

"if the evil ever occurs":
The 1873 Married Women's Property Act:
Law, Property and Gender Relations
in 19th Century British Columbia.

By

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Abstract

This study will examine the circumstances surrounding the passage of the British Columbia Married Women's Property Act, 1873 and the judicial response to it. The statute was an attempt on the part of legislators to clarify and facilitate married women's actions in the marketplace, while accomodating new ideas about women's place in society. But despite the rhetoric about women's rights and the bill's more egalitarian potential, it precipitated no domestic revolution. The courts, in turn, ignored the legislation's more liberal provisions and interpreted it solely as a protective measure. Notwithstanding their different views on gender relations and marital property reform, legislators and judges shared common beliefs about the importance of family life. Consequently, the law defended women's legal rights as family members more than as individuals. Overall, the bill represented a compromise. Although it was meant to alleviate some of a wife's legal disabilities so that she could participate more freely in the economic life of the community, it was also grounded in the Victorian paternalism of the legislators who enacted it and the judges who enforced it. As a result, despite the challenge presented by the provisions of the Married Women's Property Act, the doctrine of marital unity proved remarkably resilient.

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THE COMET.

V

"Whatever is morally wrong ought never to be constitutionally right."

Vol. 1.

VICTORIA, B. C., FEBRUARY 2ND. 1873.

No. 5



The effects of Mr. Beaver's Woman's Rights Bill on Robert Smalley, Junr.

WOMAN'S RIGHTS BILL.

We give above an illustration showing what may result from the passing of the Women's rights Bill should it become law. The reader will imagine the mother looking after her rents. We also publish a copy of the bill for the benefit of our subscribers:

1. After the passing of this Act the woman shall be the man and the man shall be the woman.

2. That the woman shall, with or without the consent of her husband, be at liberty to earn wages on the outside, either by artistic skill or otherwise: and that in the event of her earnings exceeding her husband's, she can, if she choose, declare her marriage null and void.

3. A married woman may, in her own name, insure the life of her husband,

and immediately afterwards procure a bottle of strychnine, without laying herself liable to suspicion.

4. Any policy of insurance effected by a married man on his own life without the knowledge of his wife, shall be void.

5. After the passing of this Act, any married woman may engage in all kinds of athletic sports, such as horse-racing, foot-racing, standing high jump, and tossing the caber, and, also, own interests in dry dock and dyking companies, without lowering her standing in society.

6. Any married woman "going through" on any of the games enumerated above, shall be at liberty to draw on her husband, and the husband refusing her demands, shall be guilty of a misdemeanor.

7. Any married woman shall be at liberty to carry a night-key, and attend

Introduction

On January 30, 1873, British Columbia legislators, with a certain degree of trepidation on the part of some, passed the Married Women's Property Act. The bill was designed to ensure that the married women of the province, like their counterparts in England and Ontario, would enjoy certain limited property rights which had been previously denied them. The proposed legislation was neither radical nor innovative, yet it sparked considerable controversy as legislators and ordinary citizens alike argued the relative merits of what the local press called the "Women's Rights Bill". The impetus for the statute came from male legislators who enacted a law which, at least theoretically, gave women more autonomy. That these men did so, seemingly against male interests and in the absence of a visible feminist movement reveals much about nineteenth century English Canadian ideas about law, family and gender relations.

This study will examine the circumstances surrounding the passage of the Married Women's Property Act and the judicial response to it. The statute was an attempt on the part of legislators to clarify and facilitate married women's actions in the marketplace, while accomodating new ideas about women's place in society. But despite the rhetoric about women's rights and the bill's more egalitarian potential, it precipitated no domestic

revolution. The courts, in turn, ignored the legislation's more liberal provisions and interpreted it solely as a protective measure. Notwithstanding their different views on gender relations and marital property reform, legislators and judges shared common beliefs about the importance of family life. Consequently, the law defended women's legal rights as family members more than as individuals. Overall, the bill represented a compromise. Although it was meant to alleviate some of a wife's legal disabilities so that she could participate more freely in the economic life of the community, it was also grounded in the Victorian paternalism¹ of the legislators who enacted it and the judges who enforced it. As a result, despite the challenge presented by the provisions of the Married Women's Property Act, the doctrine of marital unity proved remarkably resilient. For this reason the study will explore the ways in which economic, social and ideological forces shaped the laws that defined, and were defined by, women's role and status in the Victorian family of British North America.

Other scholars have examined the subject of women, property and the law, and their work provides a theoretical

1. According to Webster's Dictionary, 3rd. ed., 1976 paternalism is defined as "the care of control of subordinates (as by a government or employer) in a fatherly manner. A system under which an authority undertakes to supply needs or regulate conduct of those under its control in matters affecting them as individuals as well as in their relations to authority and to each other." I would emphasize the benevolent nature of this paternalism as it affected women in the Victorian period.

framework from which to start. Considering the fundamental importance of property in determining status and power, it is not surprising that historians have been interested in how the law has defined women's property rights. In establishing the law as a key to understanding women's place in society, American women's legal historian Marylynn Salmon pointed out that:

Although a woman's legal rights constitute only one of several strands necessary for defining her status, control over property is an important baseline for learning how men and women share power in the family.²

In their efforts to understand law, gender relations, and the distribution of power within the family, historians have made women's status a major theme in the literature. In doing so they have laid the groundwork for debate over the central question of why and under what circumstances, the rules governing women's property changed. To date, Canadians have touched upon, but far from exhausted the major issues presented in the far more extensive body of work written by British and American scholars.³

2. Marylynn Salmon, Women and the Law of Property in Early America, (Chapel Hill: The University of North Carolina Press 1986), xii.

3. Very little work has been done in Canada specifically on women and the civil law and property. See for example, Constance B. Backhouse, "Married Women's Property Law in Nineteenth Century Canada", Law and History Review 6, no.2 (Fall 1988) 211-57; Backhouse, "'Pure Patriarchy': Nineteenth Century Canadian Marriage," McGill Law Journal 31 (March 1986) 264-312; and Peter Ward, Courtship, Love and Marriage in Nineteenth Century English

The question of women's status is the central theme in the literature on women's property law. But although there is a consensus amongst historians that, by the nineteenth century, ideas about the family were markedly different from earlier times, and that these changes affected women's status, historians of women and those of the family have approached the topic from very different angles. Each has studied the law as an external measure of internal change within the family. However, in the context of legal rights, family historians considered these rights primarily in relation to the family as a whole, whereas feminist historians focussed on the rights of women as individuals. Thus, differing initial assumptions have determined the kinds of questions which have been asked, and the conclusions which have been drawn.

Many family historians argue that nineteenth century family relationships were transformed by the rise of what

Canada (Montreal: McGill-Queen's University Press 1990), 32-49. Although Backhouse refers briefly to British Columbia, these works focus primarily on eastern Canada. On British Columbia specifically, no comprehensive study exists aside from two very early treatises on women and the law. See Helen Gregory MacGill, Daughters, Wives and Mothers in British Columbia: Some Laws Regarding Them, 2nd ed., (Vancouver: The Moore Printing Co. Ltd., 1913) and C.B. Townley, Points in the Laws of British Columbia regarding the Legal Status of Women, (Vancouver: British Columbia Political Equality League, c.1911). For an overview of MacGill's involvement in law and legal reform see Elsie MacGill, My Mother the Judge, (Toronto: Ryerson Press 1955).

Lawrence Stone defines as "affective individualism".⁴ Marriages, previously arranged according to economic and family considerations, were essentially calculative, emotionally distant arrangements in which family needs came before those of the individual. However, a growing emphasis on individual rights coupled with a increasing tendency to choose partners on the basis of emotion and affection, meant that marriage became an affair of the heart, not the head. The family, hitherto subject to community scrutiny, became a refuge from the outside world, in which women's role was that of nurturer in a separate but equal domestic sphere. Women's status in this new egalitarian marriage rose accordingly.⁵ Having established the companionate marriage as the basis for Victorian family relationships, historians of the family then looked at changing property rights as one measure of women's higher status.

In terms of the law, family historians examined how property was transmitted through pre-mortem and inheritance patterns. To this end, they were interested in how these practices affected the family's structural, economic and demographic characteristics. Women's dowry, pre-nuptial

4. Lawrence Stone, The Family, Sex and Marriage in England 1500-1800, (New York: Penguin Books Ltd. Abridged Ed. 1984), 22.

5. For an overview of the "sentiments approach" in family history, see Michael Anderson, Approaches to the History of the Western Family 1500-1914, (London: MacMillan Press, Ltd., 1980), 39-64.

agreements, dower rights and wills, provided a basis for discussing women's changing legal status.⁶ In his influential work on the English family, Lawrence Stone maintained that before the age of sentiment, women were subject to the "near absolute authority of the husband."⁷ In the Canadian context, Peter Ward found that "feminine autonomy grew substantially from at least the 1850's onward."⁸ The crucial point for such family historians as these was that legal changes affecting women reflected new perceptions of the family, specifically the idea of the companionate marriage. In their view, the laws did not fail to achieve women's equality because they were never designed for this purpose. Rather, legal reform was undertaken to make women's position as family members more equitable, thereby reflecting their improved status in the family.

Although women's historians agree that by the end of the nineteenth century women's property rights had improved substantially, they regard family historians conclusions about women's status as overly optimistic. In a critique of family history, Rayna Rapp, Ellen Ross and Renate Bridenthal noted that because family historians view the family as a

6. Anderson, Approaches to the History of the Western Family, 48-49; Anderson describes the Household Economics approach which emphasizes these practices, 65-84.

7. Stone, The Family, Sex and Marriage in England 1500-1800, 221.

8. Peter Ward, Courtship, Love and Marriage in Nineteenth-Century English Canada, 175.

homogeneous unit, they fail to address the conflicting interests that sometimes exist between family members. In fact, according to them:

There are four assumptions which obscure the historical experience of women in families: that the family is a natural unit...that it is the only one in which significant emotional contact takes place, that sexes and generations experience families in the same way and that their needs and interests are identical...and that the best way to conceptualize relations among family members is under the rubric of role with its implications of harmony and of a process of simple "training" in how to fill them.⁹

Consequently, women's historians have looked beyond the ideal of the companionate marriage to explore how the concept of separate but equal spheres both oppressed and empowered women. From a feminist historical perspective, women's economic, social and legal disabilities were perpetuated by their exclusion from public life. Nevertheless, women used their position as "angels of the house" to justify their social reform activities, including demands for legal change.¹⁰

⁹. Rayne Rapp, Ellen Ross, and Renate Bridenthal, "Examining Family History", Judith Newton, M. Ryan and J. Walkowitz, eds., Sex and Class in Women's History, (London: Routledge and Kegan Paul 1983), 241.

¹⁰. In the Canadian literature, see for example, Carol Lee Bacchi, Liberation Deferred? The Ideas of the English-Canadian Suffragists 1877-1918, (Toronto: University of Toronto Press 1983) and Linda Kealey, ed., A Not Unreasonable Claim: Women and Reform in Canada, 1880s-1920s, (Toronto: The Women's Press 1979).

In the growing field of women's legal history, three inter-related lines of inquiry regarding women's status and property law have emerged: statutory reforms initiated by legislators and legal professionals within the legal system itself, structural economic changes, and the role of nineteenth century feminists in legal reform. By the 1850's, in England, the United States, and Canada, many legislators and legal professionals urged reform of married women's property laws. Peggy Rabkin's study of the American codification movement indicates the extent to which legal reform in several areas of the law was thought to be necessary.¹¹ Similarly, Constance Backhouse's work in Canada documents legislative efforts to reform marital property law and judicial interpretations of those laws.¹² Structural economic changes also made it necessary to change property laws affecting women, particularly in North America where commercial markets and debtor-creditor relations

11. Peggy A. Rabkin, "The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Women's Property Acts." Buffalo Law Review 24 (1974-75), 683-760.

12. Constance B. Backhouse, "Married Women's Property Law in Nineteenth Century Canada", 211-57. See also Backhouse, Petticoats and Prejudice: Women andd Law in Nineteenth Century Canada, (Toronto: The Osgoode Society, 1991), 177-80 in which property laws are discussed briefly.

rendered existing legislation inadequate.¹³ The third issue - that of women's role in legal reform - is central to a feminist historical perspective.¹⁴ By placing women at the center of historical inquiry, scholars have analyzed the ways in which women actively sought and influenced legal change. However, in certain instances, this approach presents difficulties.

Nineteenth century feminists worked to change the laws regarding married women's property, using a variety of strategies including petitions, letter writing campaigns and public speaking engagements.¹⁵ Yet, statutes were also

13. See for example, Norma Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York, (Ithaca: Cornell University Press, 1982); Marylynn Salmon, Women and the Law of Property; Richard H. Chused, "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Property Acts by Courts and Legislators", American Journal of Legal History, 29, No.1, (January 1985), 3-35.

14. See Basch, In the Eyes of the Law; Lee Holcombe, Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England, (Toronto: University of Toronto Press 1983); Dorothy Stetson, A Woman's Issue: The Politics of Family Law Reform in England, (Westport: Greenwood Press 1982); Mary Lyndon Shanley, Feminism, Marriage and the Law in Victorian England, 1850-1895, (Princeton: Princeton University Press 1989); For an overview of women's legal history see, Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce and the Constitution", Signs: Journal of Women and Culture in Society, 1986, Vol. 12, No.1, 97-117; and Mary Lyndon Shanley, "Suffrage, Protective Labor Legislation, and Married Women's Property Laws in England", Signs: Journal of Women and Culture in Society, 1986, Vol. 12, No. 1, 62-77.

15. For earliest feminist efforts in Canada, see Backhouse, "Married Women's Property Law", 222-223; also cited in Ward, Courtship, Love and Marriage, 40.

passed without the influence of such campaigns. Norma Basch argues that legislators' willingness to enact such laws under these conditions presents a major challenge for scholars of women's legal history, arguing that:

From a feminist historical perspective, one central and troubling question is why male legislators gave women legal rights that had been denied them for centuries.¹⁶

From Basch's observation, we can begin to grasp the complex and ambiguous nature of law and gender relations. It is not enough to document gender bias in the law based on the knowledge that men did, in fact, make the laws, and women were, indeed, restricted by them. Basch's question about male legislators requires scholars to move beyond this obvious fact to examine legal continuity as well as change. Basch argues, for instance, that despite the enormous social and economic changes that occurred in nineteenth century New York, the legal doctrine of marital unity, which subsumed women's legal identity under that of their husbands, endured.¹⁷ Both Basch and Marylynn Salmon point out the importance of considering ideological and social factors as well as economic forces to explain the passage of marital property legislation. Salmon's American study revealed that, on its own

16. Basch, "The Emerging Legal History of Women", 103.

17. Basch, In the Eyes of the Law, 225-226.

...economic change could foster legal rules that both benefitted and harmed married women. There was no direct correlation between economic change and an expansion of women's rights. The nature of a specific legal reform, whether it improved the position of women or not, depended on forces other than economic ones. The most important determining forces were ideological and social.¹⁸

In terms of Basch's question about male legislators, then, we must be aware of contemporary feminist influences but, at the same time, recognize that legislators and the judiciary were not concerned primarily with women's equality, but with their membership in the family. This is a crucial distinction to keep in mind, and one that benefits from drawing upon both feminist and family historical perspectives.

The work of two family historians suggests ways in which we might approach the question Basch posed. In his study of love, courtship and marriage in nineteenth century English Canada, Peter Ward touches upon the issue of married women and their property, and in doing so, offers a broader interpretation of the meaning of these laws. He acknowledges the law's patriarchal nature, but argues that scholars have defined patriarchy too narrowly by assuming it to mean simply "men's supremacy over women". But patriarchy was a system of social organization in which all family members, husbands, wives and children, placed the interests

18. Salmon, Women and the Law of Property, 190.

of the family first rather than their own. The law also placed the interests of the family before those of the individual. In doing so, Ward observes that the law

...defended the family as a social institution...It strengthened the family as the primary unit in community life. The law gave no consideration to equality within the family. Instead it lent its support to the solidarity of family life.¹⁹

Ward's observations provide a useful starting point from which to explore Basch's question. If we begin with the premise that male legislators and the judiciary acted in what they perceived to be the interests of the family, then we must take into account their ideas about both male and female roles and responsibilities.

In this context, Michael Grossberg discusses the judicial response to domestic relations laws. Judges, too, were influenced by Victorian ideas about gender roles, and they translated

...the era's gender assumptions into binding rules. It is in views towards gender that a portion of the distinctive fabric of issues in domestic relations law becomes clear, particularly the role that ideal images of family members have played in legal change.²⁰

Neither Ward nor Grossberg deny that women's legal capacity was limited but the family historians' perspective reminds

19. Ward, Courtship, Love and Marriage, 49.

20. Michael Grossberg, "Crossing Boundaries: Nineteenth Century Domestic Relations Law and the Merger of Family and Legal History", American Bar Foundation Research Journal, (Fall, No. 4, 1985), 808.

us that, for Victorians, the family was central, and both men and women were socialized in particular ways to meet familial goals. It is with these points in mind that this study addresses the question of why male legislators in British Columbia enacted a married women's property act and why the courts responded to it as they did.

Chapter I:

Women, Family, and Property Law
in 19th Century British Columbia
"...laws, customs and usages of a bygone age,..."

On January 15, 1873, an editorial in the Victoria Daily Standard discussed the proposed Married Women's Property Act then being considered in the legislature. In doing so, the writer proclaimed:

We are assuredly living in a progressive period of the world's history. Many laws, customs and usages (sic) of a bygone age, that may have answered their purpose very well when first introduced, have outgrown their day of usefulness and are now ill adapted to the purpose for which they were originally instituted or to meet the requirements of the present more enlightened generation. Among these is the law which gives the husband absolute proprietary rights to the property of his wife...¹

Just what was the law, and how had it outgrown its usefulness? To understand the implications of the 1873 statute, we must first know something about how the law previously dealt with married women's property. At the outset it is important to note that legislation was only one aspect of the law and that statutes functioned in association with common law and the law of equity to constitute the body of laws that affected married women's property. It is legislation, however, that best reflects contemporary concerns as lawmakers formulated public policies based on their community's needs, and their own ideas about family life.

1. Victoria Daily Standard. 15 January 1873.

In the early nineteenth century, two bodies of British law defined married women's property rights. Under common law, married women had no separate property rights apart from their husbands. But the law of equity enabled families to draw up marriage settlements or establish other trusts that would provide separate estates for their wives and daughters. When colonial settlers came to the new world, they brought these same laws with them. But in British North America, access to equitable devices was even more limited than in Britain. In addition, colonial legislators sometimes found it necessary to draft new legislation to meet local economic and social conditions. Such was the case in Eastern Canada and in the colony of Vancouver Island where legislators introduced the earliest statutes reforming the common and equity law traditions of marital property.

These first British North American statutes were designed only to protect deserted wives property and earnings in cases of marriage breakdown. Legislators were not concerned with women's legal or economic equality, but with safeguarding women in their capacity as wives and mothers when men neglected their familial duties. On Vancouver Island, with its predominantly male population, legislators, community leaders and government officials tried to encourage a solid family presence. The bill introduced by legislators in 1862 was intended to protect existing families when husbands did not. But in order to

understand why this early legislation was necessary, we must first examine British law regarding marital property because it provided the basic framework for Canadian law.

The law in British Columbia as in all Canadian provinces except Quebec, stems from British common law,² which was originally derived from feudal law and Christian doctrine. In time, judicial decisions were embodied in case law or a body of jurisprudence that was based on past decisions of the court. Under British common law a married woman came under the legal protection of her husband. The legal fiction or doctrine of marital unity, or coverture, had profound implications for women. The situation was summed up in 1856 in The Upper Canada Law Journal:

The natural rights of man and woman are, it must be admitted, equal; entering the married state, the woman surrenders most of them; in the possession of civil rights before, they merge in her husband; in the eye of the law she may be said to cease to exist.³

In practical terms, this meant that a married woman could not sue or be sued in her own name, make a will, or contract with either her husband or a third party. All her real and personal property was controlled by her spouse. She could not collect rents or profits from her real property, nor

2. Law in Quebec is based on a civil law tradition and will not be dealt with here. For an overview of the British legal tradition in Canada see Gerald L. Gall, The Canadian Legal System, 2nd ed. (Toronto: Carswell Legal Publications, 1983), chap. 4.

3. The Upper Canada Law Journal, 2 (1856): 217.

could she engage in business or trade without his consent. Furthermore, he was entitled to all her earnings or wages. Although the law required a wife's written consent before her husband could sell her real property, he could dispose of her personal property as he wished.

In effect, a married woman's legal capacity was limited severely under common law, as was her ability to act in her own economic interests. In the event of separation or desertion by the husband, a wife, under common law, had little recourse. She could not sue her spouse for maintenance because the law did not recognize her as a separate legal entity. If she supported herself, her husband could still claim all of her earnings and income. She could attempt to obtain credit from merchants for the necessities of life, but creditors were often reluctant to take such risks. In short, wives who lived apart from their spouses were dependent upon their husband's goodwill to provide for them. If such goodwill was not forthcoming, these women were extremely vulnerable.

But common law was only one branch of the law that determined women's property rights. Under the law of equity, women's position was improved substantially. In the British legal system, the law of equity evolved as a corrective to common law. In equity, a woman could have a separate estate and she enjoyed special protection because of her married status. The usual device for protecting a woman's real or

personal property was to settle it on her as a trust. A pre- or post-nuptial agreement was drawn up and often a trustee was appointed to manage her assets. Depending upon the terms of the agreement, a woman might exercise considerable control over her estate. In some instances, she could carry on business, make contracts, and sue or be sued in relation to her separate property. She could also make a will to dispose of her estate. In cases of separation, a deed of separation could be drawn up to provide maintenance for the wife. A husband who deserted his wife could be ordered by the court to provide support for her. Under the law of equity, married women could enjoy many of the benefits of property ownership, while suffering few of the liabilities. Overall, their husbands were still legally responsible for them.

But although women's legal status in equity was far better than under common law, these advantages were available only to those who could afford to engage in the legal proceedings necessary to establish such trusts. In Britain, the common law/equity system created sharp differences in the legal status of rich and poor women. For the fortunate few, equity provided varying degrees of legal and financial autonomy. For the poor, it had little meaning. Such legal forms could not defend the interests of the poor, most of whom could not afford recourse in civil courts, and who therefore lived material lives bounded more

by popular custom than by any set of formal rules. Nevertheless, by the 1850's, British feminists and legal reformers alike were calling for new legislation that would bridge the gap between common law and equity, improving all women's legal status, regardless of their station in life.⁴ This same body of law, with all of its flaws, was inherited by colonial women for whom it created even greater difficulties.

In some ways, Canadian women's legal status was even more precarious than was that of their English counterparts. Property law fell under provincial jurisdiction and it varied from province to province. Furthermore, according to Constance Backhouse, courts of equity developed sporadically, sometimes were non-existent, and were inaccessible to many. One of the consequences of this circumstance may have been that marriage settlements were far less common in Canada than in Britain. Certainly, Peter Ward's findings for Ontario seem to confirm this.⁵ Although we do not know the extent to which this traditional device for protecting women's property was used in British

4. For this summary of common law and equity, I draw on Norma Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York, chapters 1-3. Lee Holcombe, Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England, chapters 2-3.

5. Constance B. Backhouse, "Married Women's Property Law in Nineteenth Century Canada", 211. Peter Ward, Courtship, Love, and Marriage in Nineteenth-Century English Canada, 42-47.

Columbia, for example, evidence indicates that some prominent families did take advantage of it.⁶ Backhouse notes that British Columbia courts had always been capable of equitable jurisdiction so theoretically, at least, colonists who had settlements drawn up in England could have had them enforced in British Columbia and new marriage settlements could also have been properly drawn up and processed.⁷ Settlements, as British critics had already argued, were not without their drawbacks, because, unlike legislation, they were established on an individual basis. Furthermore, their terms could be changed, sometimes to a woman's disadvantage. The post-nuptial agreement drawn up by Colonel Richard C. Moody (Chief Commissioner of Lands and Works, and Commander of the Royal Engineers) is a case in point.

Although marriage settlements were usually drawn up as a way to ensure married women's separate economic interests were protected, this was not always the only motive for establishing trusts. They could also be used to safeguard family assets that might otherwise be subject to seizure, or in the case of government officials, public censure. Such may have been the case for Col. Moody, when, on April 11,

6. While I have not done an extensive or comprehensive search for settlements, I did find reference to such agreements for two prominent families. See Crease Family Papers, British Columbia Archives and Records Services, (hereafter BCARS). MS. Moody Family Papers, BCARS. MS.

7. Backhouse, "Married Women's Property Law", 215.

1860, he instructed his lawyer, Henry P. Crease, to draw up a post-nuptial settlement for his wife, Mary Susannah Moody. In it, he gave her title to all his property holdings in British Columbia. Moody explained that he was doing so because Mrs. Moody's father had given her a very small, inadequate settlement when she married. Moody said that he wanted his wife to have more security and he set out the terms of the agreement in which he stated:

I do not settle it on her in a trust nor do I appoint trustees nor do I desire to have the slightest atom of power over it or benefit in it myself. I wish it to be an entirely free gift for her to do what she pleases with. She may sell it tomorrow and buy sugarplums with it. I wish it to be hers as solely and entirely as it is possible for the law to make it. God knows what may happen in this world of change and uncertainty and I hope it may prove of some service to her. I have other reasons besides the above all good and sufficient but I need not allude to them.⁸

Although Moody no doubt was motivated by a genuine desire to look after his wife, the "other reasons" he alluded to may have influenced his actions more strongly than he suggests to Crease.

In 1860 and 1861, Moody was embroiled in a scandal, reported in the newspapers, that involved his land holdings. The implication was that he had used knowledge acquired in his official position to take advantage of certain land

⁸. R.C. Moody to H.P. Crease, 11 April, 1860. Moody Family Papers. BCARS. Add MSS 60.

purchases. In February of 1861, The British Columbian went so far as to publish an anonymous letter accusing Moody of "land-grabbing."⁹ Under these circumstances, he may well have decided it would be best to transfer his property to his wife. By 1863, however, Moody had drawn up a new Deed of Agreement essentially re-registering at least some of the property in his own name. This agreement, according to court records, was subsequently not recognized by the Registrar "on the grounds that this property was settled on Mary Susannah Moody his wife by Moody by a post-nuptial settlement made in British Columbia."¹⁰ Subsequently, in 1874, Moody applied to the Supreme Court to re-register the title. According to Justice John Hamilton Gray, the Registrar rejected Moody's deed because when it was drawn up in 1863, the record did not show that Mrs. Moody had been questioned apart from her husband as to whether she wanted to transfer the land. This was a requirement under the Land Registry Act, 1861. Gray reserved decision on the matter pending more information on how similar cases had been decided.¹¹

⁹ Margaret Ormsby, "Richard Clement Moody" Dictionary of Canadian Biography, 1881-1890, 2 (Toronto: University of Toronto Press 1982) 606.

¹⁰ B.C. Supreme Court. (Victoria) Gray Bench Book. 1872-1875. BCARS, GR 1727 Vol. 453.

¹¹ Ibid.

The legal complications that resulted in Moody's case illustrate that the protective mechanism of separate examination was effective in protecting his wife's interests. Not ensuring that his deed was properly registered with all documentation caused Moody considerable inconvenience. More significantly, however - and this is the larger point - such agreements were not necessarily permanent. They could be reversed by a husband whose economic circumstances had changed, and we do not know, in fact, how many wives would object to such transfers even under separate questioning. In these situations the limitations of individual marriage settlements become obvious. Only legislation had the potential to protect married women's separate property in a way that was not subject to the whims or changing fortunes of their spouses. In the colonies, where more traditional means of dealing with married women's property were not widely used, statutory law took on an added importance.

In a survey of Canadian Married Women's Property Acts, Constance Backhouse notes that Canadians actually passed such statutes before Britain. New Brunswick was the first to do so in 1851, followed by other Maritime colonies in the 1860's. In 1859, the Ontario legislature also passed a bill, influenced by New York laws and reformers' demands. Of the western colonies only Vancouver Island enacted an early law in 1862, regarding deserted wives. These first statutes, for

the most part, were supposed to protect a woman's property and earnings in cases of marriage breakdown. The wording of the statutes was often ambiguous and judges tended to interpret them conservatively when they had occasion to refer to them.¹² These early laws were not concerned with women's equality, but with the preservation of families in the absence of husbands and fathers. Therefore, legislators emphasized the unique nature of bills that were meant to deal with a very specific set of circumstances.

In British Columbia, Backhouse suggests that "An Act to Protect the Property of a Wife deserted by her Husband" was passed on Vancouver Island in 1862, in response to the economic conditions in the colonies, a reasonable assumption given the nature of the colony's boom and bust economy. The bill introduced in the legislature by D. Babington Ring would secure a woman's property and earnings to her "as if she were a feme sole and...(would) place her in the like position with regard to property and contracts as she should be supposing her to have obtained a Judicial Separation."¹³ The bill was an emergency measure meant to enable a woman who had been abandoned to support herself and her children without interference from her recalcitrant husband or his

12. For a summary of legislation passed, see Constance Backhouse, "Married Women's Property Law", 217-219.

13. Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia. 2, James Henrickson, ed. (Victoria: Provincial Archives of British Columbia 1980), 340.

creditors. Its provisions stated that if a wife could show that her husband had deserted her "without reasonable cause," she could apply to a court officer, the Chief Justice, a Police Magistrate, or a Justice, for an "order of protection" to safeguard her earnings and property. The order was to be effective from the date of the order, not the desertion. It had to be duly registered with the Registrar of the Supreme Court within ten days to be considered valid.¹⁴ Just what constituted reasonable cause is unclear, but certainly the onus was on the wife to prove that such was the case. In fact, the order of protection clause was potentially confusing and the entire procedure was fraught with difficulties, as we shall later see.

From all appearances, the bill proceeded smoothly through the legislative process, and it was given Royal Assent on July 11, 1863. No doubt, those who supported the bill shared the sentiments of The British Colonist's editor who declared that "Mr. Ring deserves the thanks of the colony for his exertions in behalf of distressed females."¹⁵ Yet the bill was not without its critics, one of whom recognized the potential problems that the order of protection could entail. When the legislature passed the statute, the Colonial Secretary's office in London was duly

14. An Act to Protect the Property of a Wife Deserted by her Husband, 1862. Public General Statutes of the Colony of Vancouver Island 1859-1863, C.51 at 20.

15. The British Colonist, 27 May 1862.

informed, as was customary. In his reply, the Duke of Newcastle expressed misgivings about the law.

The alteration made by the Act in the Imperial Law for protecting the property of deserted wives seems an alteration for the worse, as it appears that a poor woman, deserted by her husband, who by honest industry has collected a little property, will not be able, under the present Act, without troubling herself about questions of law, to obtain any protection for the property so acquired but will remain liable (notwithstanding any order she may subsequently obtain) to have the whole of that property swept away by the husband or creditors of the husband who has deserted her.¹⁶

The Imperial Law he referred to may have been the Matrimonial Causes Act or Divorce Act of 1857, which did make provisions for deserted wives' property. However, why he would do so is unclear, because the Divorce Act also required that an Order of Protection be issued, and in fact, the Vancouver Island statute appears to be closely modelled on the 1857 British law.¹⁷ Nevertheless, the Colonial Secretary's observation about the order of protection was astute and his criticism well founded, as will become apparent when we later look at court records.

¹⁶. Colonial Secretary. Vancouver Island. 1862. Colonial Correspondence. BCARS. GR 1372, Reel B-1314, File 319.

¹⁷. See Great Britain. Statutes. The Matrimonial Causes Act, 1857. 20 & 21 Vict., c.85 and also 1858, 20 & 21 Vict. c.108.

The 1862 act dealt only with cases of family breakdown, and as such, did not extend women's separate property rights within marriage. The limited scope of the bill's provisions was very much in keeping with more conservative beliefs about family and the respective roles and responsibilities of individual family members. Clearly, Vancouver Island legislators thought that the colony required additional legislation over and above that provided by British law which took effect when the colony was established in 1858. Their concerns were twofold: economic conditions and the general well being of families. Legislators, along with community leaders and government officials attempted to encourage and strengthen family life as the foundation of a healthy settler society. The 1862 statute was designed to safeguard family stability when it was threatened by a husband's absence.

By the early 1860's, the two colonies of Vancouver Island and the mainland were in an economic slump. As gold rush fever waned, the predominately male population was once again on the move as miners and other disappointed venturers left the upcountry and converged on Victoria and New Westminster, seeking employment or on their way to more promising prospects elsewhere.¹⁸ The colonies, burdened by

18. For an overview of B.C. political history, see Margaret Ormsby, British Columbia: A History (Toronto: The MacMillan Co. 1958). For a social history, see Jean Barman, The West Beyond the West: A History of British Columbia (Toronto: University of Toronto Press. 1991)

huge debts, had few resources to cope with the inevitable problems associated with economic hard times. In August of 1862, an editorial in The British Columbian went so far as to suggest levying a municipal tax to assist those in need, observing that:

The amount at the command of the Municipal Council is but small when compared with the number of the unemployed who are daily arriving from the upper country.¹⁹

Given these conditions, the financially strapped government was understandably anxious to take whatever steps necessary to promote economic self-sufficiency. Although benevolent societies and church charities no doubt provided a small safety net for some of the unemployed or destitute, their resources were probably quite limited. Moreover, if the precarious financial circumstances of transient men was worrisome, the plight of deserted wives and children was doubly so, coupled as it was with Victorian concerns about morality.

Under these circumstances, it seems reasonable that legislators would introduce a bill to protect deserted wives' earnings and property. Such legislation would safeguard a woman who was supporting herself and her family "by her own lawful industry," as the wording of the statute stipulated. If women could earn a "respectable" living, safe in the knowledge that the law would protect them, they might

19. The British Columbian 23 August, 1862.

be less likely to fall into illegal occupations or become completely dependent on the community. The colonies could only benefit by alleviating some of the social problems associated with women's poverty. Although there were very few women in the colonies at this point, this did not make concerns about home and family life any less important to those who addressed such issues.²⁰

If anything, the scarcity of women may have made the situation seem all the more compelling to community moral leaders such as the Rev. Matthew MacFie, who noted the "civilizing" influence of the right sort of woman. Writing in 1865, he discussed his solution to the moral, social and physical ills that plagued single men.

Frequently have I been delighted to see the beneficial change affected by marriage, in arresting the progress of dissipation. It is only to be regretted that the paucity of respectable females in Vancouver Island and British Columbia limits so much the opportunity of single men who desire to cultivate domestic virtues, and lead sober lives.²¹

In keeping with Victorian ideas about women and morality, MacFie distinguished carefully between the colonies' "bad"

20. Barman, The West beyond the West, 89-90. Barman points out that even by the 1870's, the number of non-native women was relatively small. While she notes that precise census data for the Pre-Confederation period is based only on estimates, the ratio of women to men was approximately 1:3, in the interior it was as high as 1:10. Only in Victoria was the ratio approximately even.

21. Matthew MacFie, Vancouver Island and British Columbia, Their History, Resources, and Prospects, (London: Longman, Green, 1865), 408.

women and its' "good." Of the former, which included prostitutes, schemers, and "widows" of questionable background, he said "...there are too many females in both colonies, as everywhere else, that reflect as little credit upon the land of their adoption as they did on the land of their birth."²²

F.W. Howay, describing social conditions in the Cariboo in the 1860's, observed:

Cariboo drew to itself not only miners, but all the classes that naturally congregate where money is plentiful and easily obtained. Gamblers flocked like vultures to the spot. The authorities resolutely set their faces against this evil, but the vice was too deeply rooted to be completely eradicated. It merely went under cover and continued to flourish in private. An anomalous class of females, known as the hurdy-gurdy girls, made their appearance in Cariboo...They frequented the saloons and drinking places and, for a money consideration, danced with all applicants. But, at the same time, their morals were above reproach.²³

No doubt, Howay was more generous in his assessment of the hurdy-gurdy girls' moral character than Rev. MacFie might have been. But his description points out the kinds of social problems associated with the boom and bust gold economy that community leaders wanted to deter. One way to do this was to encourage families and family life. But

22. Ibid.

23. F.W. Howay, British Columbia. From the Earliest Times to the Present, 2 (Vancouver: S.J. Clarke Publishing Co. 1914), 112.

"good" families required "good" women who were willing to emigrate.

In 1862, the Columbian Emigration Society arranged for the first of two "bride" ships to bring women from London to the colonies. Upon their arrival, some of the women went into domestic service, but most of them married. The Society was formed under the auspices of Sir E. B. Lytton and the Duke of Newcastle (Colonial Secretary) in London, and assisted in the colonies by the Baroness Burdett-Coutts, a prominent church worker. The organization's mandate was to encourage marriageable young women to come to the colonies to settle, and in the process, strengthen family life in the settler society.²⁴ Rev. MacFie, in a book obviously intended for the London market, emphasized the ample work opportunities available for female emigrants, but also noted that marriage prospects were even better and that "the presence of this sex is as urgently required on social and moral grounds."²⁵ Other religious leaders shared MacFie's concerns. In a letter to the Bishop of Oxford in London, Rev. Brown also spoke of the need for a solid family life to build a good community with a strong church.

24. Jackie Lay, "To Columbia on the Tynemouth: The Emigration of Single Women and Girls in 1862", Barbara Latham and Cathy Kess, eds. In Her Own Right: Selected Essays on Women's History in B.C. (Victoria: Camosun College 1980), 19-41. See also Barman, The West Beyond the West, 79-80; Howay, British Columbia, 113-114.

25. MacFie, Vancouver Island and British Columbia, 497.

Churches may and must be built, a faithful witness must be borne for holiness and virtue, but where there is no wedded life churchgoing must be difficult because morality is almost impossible.²⁶

At the London meeting of the Columbian Emigration Society, the Bishop agreed wholeheartedly with Rev. Brown. He acknowledged the need to balance the proportion of men to women so that colonial society could maintain British morals, values and tastes. He also touched upon the "problem" of native women in British Columbia - a growing concern for many in the colonies as well as in London.

The Columbian Emigration Society's efforts to bring British women to settle in the colonies reflected a growing bias against intermarriage and common law relationships with native women. This opinion was expressed not only by religious leaders like Rev. Brown, writing to his superiors, but also in the more public forum of the local newspapers. A letter to the editor of The British Columbian voiced concern about native women and wondered about the consequences of family breakdown for the children involved.

One of the most painful reflections arising from the state of things is the probable future awaiting the unhappy offspring of these connections after the fathers have made their "piles" and deserted both mothers and children.²⁷

26. The British Columbian, 21 June 1862. Also quoted in Lay, "To Columbia on the Tynemouth", 20-21.

27. The British Columbian, 4 June 1862.

So, mixed marriages and common law relationships were, in the eyes of some, undesirable on two counts; the first was racist, ethnocentric, and religious, the second, although not expressed outright, was economic.

It is interesting to note that legislators did not include a provision to exclude native women from using the provisions of the 1862 bill. Theoretically, at least, native wives, legally married, would have been entitled to the same protection as their white counterparts. In practice, of course, we do not know if native women took advantage of these legal rights. However, it seems likely that, given the transient nature of frontier society in B.C., common law arrangements as well as more casual liaisons involving all women would have occurred quite regularly. Consequently, the legal status of these women was precarious, to say the least.

Although commentators usually focussed their observations on women and women's behaviour, we should not forget that men, too, were assigned a very specific role in Victorian society, as protectors and providers for their wives and children. Men who neglected their family obligations did not avoid criticism. The underlying assumption of the 1862 statute was that it protected women whose men had failed to do so. The editor of The British Colonist explained that the bill was not a divorce bill as such and that:

Neither has the bill been introduced to offer rewards for the apprehension of any heathen husband who may cruelly desert his better half; but it tacitly recognizes the right of a husband to "emigrate." If a husband be too lazy to provide for his wife, the bill don't give the latter the right to summarily turn him adrift. There is nothing even in the Stamp Act to reach such a Scamp.²⁸

By referring to the bill's capacity to "bring about a quasi dissolution of matrimonial unions," ²⁹ the editor underlined the exceptional nature of the legislation. "Good" men, much the same as "good" women, were expected to behave appropriately. When they did not, it was a matter of good public policy to ensure that any legal barriers were removed that would prevent deserted wives from maintaining economic self-sufficiency.

Even though the "Act to Protect the Property of a Wife deserted by her Husband" was passed with little fanfare in 1862, its passage did not go entirely unnoticed, and discussion about the bill anticipated some of the same concerns that would be expressed eleven years later, in relation to the 1873 statute. One of the few public responses to the 1862 bill was written by a rather perplexed correspondent to The British Colonist, who enquired of the editor:

28. The British Colonist, 27 May 1862.

29. Ibid.

Would you be so good as to give some information respecting the Bill before the House of Assembly, introduced by Mr. Ring, to protect wives deserted by their husbands. The constituents of Mr. Ring at this place are quite puzzled about the bill, and are inclined to believe that it is introduced to effect some special case in Victoria, as there is no need for it at Nanaimo. You, Mr. Editor, who have never failed to ventilate any measure, good or bad, will, I am sure, let the public know something of such an uncalled for bill- uncalled for in this country, where women are so scarce, and a bill so foreign to the wants of Nanaimo and the country generally, and so different from the measures Mr. Ring promised on his election to introduce. 30

The writer, in this instance, perceived no need for such legislation, but the editor, in a lengthy reply, supported the bill and explained its' basic provisions. It would, he said, "prove a terror to husbands who are disposed to emigrate." Nevertheless, despite his overall approval, the editor was a little uneasy about the long term implications of a law which he thought could unsettle the marital relationship. He envisioned a situation that he found disturbing, in which:

She can have her end of the table groaning under the good things of this world, whilst the man, whom she has vowed to cherish and obey, cannot get a mouthful of food without her consent. If she owns the blankets, the runaway will have to sleep upon the floor, except he has talent enough to re-construct the union. 31

30. Ibid.

31. Ibid.

The editor's ambivalence towards the bill which he described as "a kind of Women's Rights affair," was typical of the mixed reactions towards this kind of legislation. In this instance, both the editor and the legislators who passed the law recognized it as a necessary step. On the other hand, they were unsure about giving women control of their own pursestrings. Yet the requirements of the bill made it rather unlikely that it would be widely used by women in any case.

The Colonial Secretary, who had expressed his misgivings about the bill, doubted that it would be allowed to remain on the books as it stood. However, it did so, and in 1866, when the two colonies united to become British Columbia, the statute was incorporated into the laws of British Columbia. It was not repealed until 1873, when the Married Women's Property Act was introduced. But in 1873, egalitarian issues would play a more prominent role in the debate over women's property law.

Chapter II:

The British Columbia Married Women's Property Act, 1873:
"The Woman's Rights Bill"

Whereas the 1862 Vancouver Island statute caused little controversy, the Married Women's Property Act proposed by the Hon. Mr. Robert Beaven on January 7, 1873, was the subject of lively debate in the legislature and the local press. It represented a significant legislative attack on the doctrine of marital unity. Legislators were aware that new laws governing married women's property had been introduced in England, the United States, and eastern Canada in response to the economic and social change that characterized the nineteenth century Anglo-North American world. They also wanted to outline more clearly the relationship between the married couple and the mercantile community, and to address concerns about women's status raised by public debate during the period. Discussion of the bill revealed the underlying paternalism which influenced men's attitudes towards gender relations and the law. Two major concerns were evident in this discourse. The first of these focussed on the bill's legal and economic impact, and the second upon the bill's implications for the relationship between husband and wife. The advocates of reform envisioned a statute that went considerably beyond the scope of the 1862 Vancouver Island law, and they drafted the bill accordingly.

The provisions of the 1873 bill were far more comprehensive than the limited and purely protective nature of the 1862 statute. On one level, as Constance Backhouse observes, the 1873 Married Women's Property Act was "copycat" legislation. The British Columbia statute was essentially the same as those passed in England and Ontario.¹ It entitled all married women, not just deserted wives, to own and administer their own property, to control their earnings and wages and to contract in relation to their own property as if they were single women. A husband was not liable for his wife's debts prior to marriage or in relation to her separate property. A wife could also open her own bank account, be an active stockholder and insure her own life, or with his consent, that of her husband. Two aspects of the statute were particularly important because of their implications for separating the legal identity of a wife from that of her husband; the removal of the order of protection clause, and the section which dealt with spousal liability.

¹. See Backhouse, "Married Women's Property Law," 212. She also describes the section in the 1873 bill which stipulated that only real property came under the provisions of the act. Personal property was not included until an amendment was passed in 1877. *ft.*85, 250. In addition see B.C. Attorney General's Letterbook. Official Letters of the Attorney-General's Dept. 1870-1874. BCARS C4B 30.4J4, 412-413 in which Atty. Gen. Walkem informs the Lieut. Gov. that the Bill has been passed. In it he cites the precedents of the Bill as having been based on the Ontario Act and legislation in England.

The 1862 bill required a woman to obtain a court order of protection to safeguard her property. This order, which could be issued by a magistrate of the lower courts, was to be registered in the Supreme Court within ten days, a cumbersome process and one that was seldom used. In fact, the Supreme Court Register of Orders lists only four such orders prior to 1873, and one in 1873.² In part this may reflect the province's demographic imbalance but it also indicates problems with the process itself. A woman first had to be aware that such an order was necessary. Then the order had to be registered within a specific, and fairly short period of time. Given the geographic realities of the province, and the fact that court officials travelled a circuit, many women may have had difficulty meeting the necessary requirements. In addition, when disputes did arise, litigants and court officials alike could be confused about the procedure. The case of Balden vs. Strong, which will be discussed further in a subsequent chapter, illustrates the far reaching consequences of such orders. Suffice to say at this point that the existence or non existence of a protection order was a major point of contention in the case.³ Although neither legislators nor the general public discussed this particular stipulation,

2. B.C. Supreme Court Register of Orders. BCARS C/AB 30.3D. Only 14 orders were issued between 1868-1889.

3. B.C. Supreme Court (Victoria). Begbie Bench Book. 1873-1877. BCARS GR 1727 Vol. 729.

clearly it was an unsatisfactory requirement that was best removed as part of the effort to simplify and reform married women's property law.

The section which gave a married woman the right to contract or maintain a legal action on her own behalf - that is, sue or be sued - was a distinct departure from the common law tradition of coverture, which required that a husband act as co-litigant. Potentially this was an important clause for women who, as part of the province's service sector, operated small businesses. While there are no precise statistics on the numbers of such women, the Victoria City Directories during this period list numerous women engaged in occupations such as boarding house and hotel keeping, laundry, dressmaking and millinery, as well as teaching.⁴ Of these, we cannot determine how many were married but, as Matthew MacFie observed, descriptions of marital status in frontier communities were not necessarily accurate in any case.⁵ Although theoretically, under common law, a married woman could not be represented in court separately from her husband, in practice, the courts sometimes recognized a woman's right to run a business and enter into contractual agreements regarding it with the

4. Victoria City Directories. 1863-1875.

5. MacFie, Vancouver Island and British Columbia, 407-409.

consent of her husband. But because the law was not consistent on this point, it inevitably caused confusion.

The case of Toy vs. Barnard in 1868 illustrates the difficulties associated with coverture and the married businesswoman. In this instance, Mrs. Malvina Toy sued a Mr. Barnard in Lillooet County Court for debt. In response, Barnard pleaded coverture as his defense because Toy was a married woman. The details of the case need not concern us, but what is interesting was the Justice's reasons for disallowing Barnard's coverture plea. Justice E.M. Sanders explained:

I deemed that when a married woman has transacted business in her own name for many years and on a large scale, too, that she did so with her husband's sanction...That if a wife trades by herself in a business in which her husband does not meddle she may sue and be sued on her own account and that she is enabled if injured in person or property to bring an action for redress without the concurrence of her husband and be sued without the husband being made a defendant.⁶

The Attorney General, asked to report on the case, upheld Sanders ruling. The larger point to be made about this particular case is that although in this instance, the justice ruled in Toy's favour, he could easily have done otherwise because legal precedent was loosely defined and subject to an individual's interpretation. By embedding in

⁶. B.C. Attorney General, Documents. BCARS GR 419 Box 7 File 13.

statutory law married women's property rights regarding their business or wages earned, supporters of reform wanted to establish a standard from which courts could rule, rather than relying on a judge's own, often idiosyncratic, interpretation of common law precedent. Consequently, they were determined to push the bill through, despite the objections of their opponents.

The statute's supporters argued that the Married Women's Property Act was a progressive and necessary reform, one that was in keeping with Victorian ideas about companionate marriage. Moreover, they argued that the legislation would clarify the legal standing of husbands and wives, and protect their individual financial interests as well as those of merchants. The bill's opponents, however, thought that the measure would threaten family stability and encourage fraud. The growth of commercial capitalism in British Columbia established an increasingly complex economy in which credit played a significant role. In frontier communities like British Columbia, with a boom and bust resource based economy and a largely transient population, credit was particularly important. Merchants on the mining frontier established their own businesses using credit, not capital, and, in turn, extended credit to those who required outfitting. In addition, a significant credit-based service sector was established, particularly in Victoria and the Cariboo, to meet the needs of those requiring board, food,

laundry and so on, as well as various forms of entertainment. In many instances, it was women who provided such services. The extensive use of credit was reflected in the courts as civil litigation for bankruptcy and debt occupied a large portion of the courts' time.⁷ Given these economic conditions, legislators thought it important to clarify spousal liability in relation to debt.

In economies where credit flourished, coverture was a cumbersome and often inappropriate response to the needs of the community. Those who supported the 1873 bill stressed the economic protection it would offer both husbands and wives. British Columbians were aware of the problems associated with the use of credit. One supporter of the bill, B. Humphreys, went so far as to argue that the mercantile habit of extending credit should be curtailed at any rate because it encouraged too much litigation.

He did not believe in the unlimited credit that tradesmen were in the habit of giving families, for it was only placing a tax upon this country and others who were obliged to be employed to settle the debts of the various parties in question.⁸

Another member of the legislature and the editor of the Daily British Colonist, John Robson, took exception to Humphrey's suggestion, noting that the credit system "be it

7. Tina Loo, "Law and Authority in British Columbia, 1821-1871." University of British Columbia, Ph.D. (History), 1990, 113-118.

8. The Victoria Daily Standard, 15 January 1873.

good or bad," was used widely and would continue to be, regardless of the difficulties it presented.⁹ The real dispute, of course, was not over whether or not to abolish the credit system, but rather how to deal with married women in it.

Those who spoke against the statute argued that, if anything, such legislation would encourage families to go into debt and they agreed with Henry Holbrook who warned that

...the Bill was fraught with danger to tradesmen and others, and it opened up many an opportunity for families to run into debt, knowing their property could be, and probably would be placed exclusively in the name of the wife.¹⁰

It is clear from the response of the bill's advocates that they considered the fear of potential fraud to be somewhat of a red herring. The Hon. Mr. William Armstrong argued that the opportunities for fraud would be no greater than before, while a correspondent to The Daily Standard observed that no statute could prevent people from defrauding their creditors if they wanted to.¹¹ Having thus discounted their opponents' fears, they stressed the economic protection the bill would bring husbands and wives, and ultimately, to the merchants who dealt with them.

9. Daily British Colonist, 24 January 1873.

10. The Daily Standard, 15 January 1873.

11. Ibid., 16 January 1873; 30 January 1873.

Supporters of the 1873 bill were aware of the confusion concerning spousal liability for debt, and it was on this concern that they focussed their attention. These legislators anticipated that, if the legal accountability of each party was laid out clearly in statutory law, everyone would benefit. Therefore, they emphasized the protection that the bill would afford both parties, making each more fiscally responsible. An editorial in The Daily Standard said in defense of the statute:

It is not by any means a one-sided measure, extending protection only to wives; but it aims as well to protect the interests of husbands, where the law now exposes them to loss and inconvenience by legal process for the recovery of debts contracted by wives...¹²

In the end, the bill's supporters concluded that merchants and others who had occasion to deal with married women would be much better off as they would know who was responsible for paying a debt. But at the same time, the bill's advocates seem not to have recognized the statute's possible detrimental effects on women's ability to obtain credit, a factor of considerable importance to deserted wives or those engaged in business. Without the possibility of being able to pursue a husband for such debt, it is likely that many merchants would simply have declined to extend credit to

¹². Ibid., 15 January 1873.

women.¹³ Apart from this rather crucial oversight, however, legislators introduced legal reforms that would eliminate the need for an order of protection and alleviate confusion about spousal liability.

In attempting to give married women more legal and economic autonomy, advocates of the measure challenged a concept of marital unity that was grounded in religious doctrine and supported by law. It was this challenge that most disturbed the bill's opponents. Certainly, one of the arguments against the bill focussed on its effect on the commercial interests of the community, but the debate over the statute's economic impact had just as much to do with who controlled the family pursestrings. Potentially, the provisions of the 1873 statute could have had considerable impact on the private world of the family. It was this issue that dominated the debate over the Married Women's Property Act in British Columbia.

In grappling with the problem of married women's property, both legislators and the general public touched upon the larger issues raised by the ongoing controversy in England and North America concerning women's rights and legal status. In doing so, they recognized the law's potential to alter family relationships in fundamental ways.

¹³. Constance Backhouse, "Married Women's Property Law", 214. She discusses this point in relation to deserted wives, but it would be equally applicable to married business women.

The law, as a powerful institution, gave public and formal expression to the distinct and rigid gender roles assigned to Victorian husbands and wives alike. Each, in their own way, was constrained by society's definitions of their responsibilities in the home and the community. And, whatever their individual beliefs about the Married Women's Property Act, British Columbians sensed that family life, the cornerstone of Victorian English-Canadian society, held a tenuous grip on the west coast frontier. The main point of contention in the ensuing debate lay in whether the 1873 statute would strengthen that grip or help to dislodge it.

Although British Columbia seemed far removed from England and the eastern United States where agitation for women's rights was strongest, in fact, it was not. British Columbians, on the whole, were quite well informed about the questions being raised about women's place in society.¹⁴ Certainly, they had been exposed to the ideas of American feminism, as Susan B. Anthony's lecture tour to Victoria in 1871 indicates.¹⁵ The challenge to coverture presented by married women's property legislation was troubling to those who associated it with feminist demands. So it was not surprising that opponents of the 1873 statute referred to it

14. Barman and Ormsby both discuss the strong cultural links with Britain in particular. Barman, J. The West beyond the West, 89. Ormsby, M. "Canada and the New British Columbia", 39.

15. For coverage of Anthony's visit see The Daily Standard, 24 October 1871; 25 October 1871; 27 October 1871.

as the "Women's Rights Bill", thereby suggesting that it was a radical measure. Advocates, on the other hand, emphasized the bill's links to nineteenth century liberal reform, a seemingly more moderate approach. In fact, the two were already connected in the public mind, as British and American feminists used the concepts of liberal individualism to argue their case for equal rights.¹⁶ Basch suggests, for example, that male legislators who supported married women's property laws in the nineteenth century, actually, and perhaps, unknowingly, "adopted selected strands of liberal feminist thought" in their arguments and that both supporters and opponents made gender central to their arguments.¹⁷ The debate in British Columbia was, therefore, indicative of a much larger Anglo-American discourse on family, gender relations, and the law, that in conjunction with more local concerns, was instrumental in the passage of the 1873 statute. Consequently, the ways in which British Columbians framed their arguments either for or against the bill demonstrate the same underlying assumptions and conflicting ideas held by their British and American contemporaries about what constituted women's proper sphere.

16. Shanley, Feminism, Marriage and the Law, 3, 67, 189. In the case of American feminists Basch and Salmon link emphasis on individualism to Jacksonian democracy and republicanism. Basch, In the Eyes of the Law, 39. Salmon, Married Women's Property, 193.

17. Basch, The Emerging History, 103-105.

One of the leading characteristics of the nineteenth century debate over women's issues was the inconsistency of the views presented by various individuals and groups. In fact, according to the authors of one study, the diverse and conflicting range of ideas, arguments and conclusions expressed

makes any strict definition of feminist or anti-feminist positions very difficult. We can speak more accurately not of positions but of a set of competing, though not mutually exclusive, myths or models for women's place in society. Controversialists used these myths to argue for opposing solutions to contemporary problems.¹⁸

In terms of the debate over married women's property law, these conflicting ideas about women often enabled men to take a stance seemingly at odds with their wider political beliefs. Thus, it was that two prominent British Columbian liberal reformers, the then Premier, Amor De Cosmos, and the later premier, John Robson, found themselves on opposite sides of the political fence in relation to the Married Women's Property Act.

Despite their broad reform sympathies, they held strikingly different opinions about women's place in the world and what their legal rights should be in a society governed by the liberal principles of progress and reform. The Married Women's Property Act was one of several pieces

¹⁸. Helsinger, Elizabeth K. et al., The Woman Question XIV.

of reform legislation introduced under the De Cosmos government. His ideas about marital property reform were progressive in that sense. Robson, in contrast, had more conservative ideas about marriage and family. Although he was concerned about protecting men's rights as British subjects, he believed that those same men would protect and represent their wives and children in the community. Whereas De Cosmos had an individualistic view about the role of each family member, Robson envisioned a more conservative, corporate family structure.

Although in the past De Cosmos and Robson had agreed on certain political issues, most particularly on Confederation, it is not surprising that, given their very different personal circumstances, they disagreed about the 1873 statute. De Cosmos, a bachelor and a free thinker, had little reason to fear any personal repercussions from the bill. In this sense, he viewed it somewhat dispassionately. Robson, on the other hand, was married, a devout Methodist and a very active member of his church. Therefore, it is conceivable that his religious background also coloured his opinions about the legislation. Aside from their personal circumstances De Cosmos and Robson were also journalists and editors. They voiced their views in rival newspapers, The Daily Standard, of which De Cosmos was part owner and sometime editor, and The Daily British Colonist, for whom

Robson was editor.¹⁹ No doubt, the controversial issue of women's rights made lively copy. Yet both considered themselves staunch liberals and friends of reform, and presented their arguments in the legislature and the press accordingly.

Premier Amor De Cosmos considered the 1873 statute a progressive bill, one quite in keeping with the reform mandate of his government. Not only had similar legislation been passed in other jurisdictions, but the bill reflected changing attitudes towards women that called for new legislation. These new attitudes found expression in liberalism's emphasis on equality and the rights of the individual. For these reasons, the Premier argued that

no liberal government could justly oppose this Bill, and he thought that the change of society required a new law. He was of the opinion that the Bill was almost the same as one recently brought before the House in Ontario; bills of this nature had been found to work most happily: the great and well known Stewart (sic) Mill had advocated the cause in England and it brought the women for whom the bill was intended as a safeguard, into a freer atmosphere, and prevented the worthless husband from concentrating his thoughts on the sole object of money making from the resources of his better half.²⁰

19. Patricia Roy, "John Robson", Dictionary of Canadian Biography, Vol. XII 1891-1900. (Toronto: University of Toronto Press, 1990). Keith Ralston and R.A.J. McDonald, "Amor De Cosmos", Ibid.

20. The Daily Standard, 15 January 1873.

Clearly, De Cosmos, influenced by Mill's ideas on the subject, considered existing laws regarding married women's property to be outmoded. He recognized "the change of society" and although he certainly was not a feminist to the extent that Mill was, he was nevertheless sympathetic to some aspects of the equal rights argument.²¹ On these grounds, and also as a protective measure for women, De Cosmos perceived a need for the bill. When Robson, as a married man, asked him if his ideas were based on personal experience, De Cosmos replied that they came "from observation,"²² making his personal marital status irrelevant. The Premier believed simply that the statute was a necessary and good reform.

Those who opposed the 1873 statute, however, were convinced that it was a radical, potentially dangerous and quite unnecessary piece of legislation. Their more conservative views were grounded in the traditional concept of coverture, whereby the man, as head of the household, represented the family's interests in the public world. To allow women separate economic interests represented nothing less than a direct attack on family unity. Robson, the bill's most outspoken critic, claimed that the De Cosmos government

21. Ibid.

22. Ibid.

proposed by the Bill to establish two authorities in the same household. It held up a sort of premium to the wife to commit acts of insubordination. It might properly be entitled an act to promote and protect bachelordom. He admitted there were instances where a wife required protection. It looked too much and savoured of "Women's Rights." This was calculated to revolutionize the whole household system, when a much simpler remedy might be found.²³

Robson's ideas about husband-wife relations were based on a more hierarchical and corporate vision of family life, in which a wife's economic interests were normally looked after by her husband.

Although Robson supported other measures introduced to protect women, in particular an assurance bill introduced by J.F. McCreight and a dower bill put forward by Arthur Bunster,²⁴ the Married Women's Property Act, he argued, went too far. In an editorial in The Daily Colonist, he voiced his concerns, but also emphasized his firm belief in the principles of liberalism:

We would not be understood as objecting to the legislation of the present session as of too liberal a tendency; for we regard liberal institutions as essential to the development of a prosperous, contented, and self-reliant people...It is, therefore, with peculiar

23. Ibid.

24. The Daily British Colonist, 24 January 1873. In fact, in addition to the section in the Married Women's Property Act related to insurance the Married Women's Assurance Act was passed in conjunction with the 1873 Married Women's Property Act. Statutes. Province of British Columbia. 36 Vict. Ch. 117, 36 Vict. Ch. 118.

gratification that we observe the liberal tendency of present legislation in British Columbia. Any objections we may have felt it to be our duty to raise in regard to the Women's Rights Bill, were directed against the dangerous and revolutionary character, rather than against the liberality of its provisions.²⁵

For Robson, the idea of married women having separate legal and economic interests represented a direct threat to the concept of marital unity. De Cosmos's position held no appeal for Robson, who noted that his opinions had led some to accuse him of being "illiberal and ungallant,"²⁶ an accusation he thought was decidedly unfair.

Along with their conflicting views on family and the law, De Cosmos and Robson, as men of their time, were also influenced by the more subtle, yet equally powerful ideas that Victorians held about men, women and gender relations. In attempting to determine why male legislators would extend women's legal rights without any popular pressure to do so, and despite the reduction in male authority and power which this step implied, we must consider Victorian paternalism as it related to women and the law.

In stating an obvious but sometimes forgotten point, the authors of a recent study on gender and public policy observe that nineteenth century laws affecting women were based on contemporary notions about women's dependence and

25. Ibid. 24 January 1873.

26. Ibid., 29 January 1873.

frailty and men's responsibility to protect them. In this context, men who enacted and enforced the law were neither oppressors nor acting solely in their own self interest. Instead the authors argue that

the dominant reason for sex-differentiating rules was neither self-interest nor animus towards women, but something altogether more laudable: concern and affection. Rules governing the conduct of women were adopted in what was honestly seen as women's best interest, obliging women to behave just as they would have if they had been fully able to appreciate what was best for them.²⁷

In retrospect, we are able to see the limitations of such reforms, but, despite their differences, Victorian men like Amor De Cosmos and John Robson believed they were protecting women who had no political voice themselves. They may have disagreed about the degree of independence women should have, but they both thought women deserved and were entitled to the law's protection.

Their beliefs, no doubt, were shaped by the ways in which they were socialized. Just as Victorian women were socialized as "Angels of the House" to be passive but capable wives and mothers, so too Victorian men were expected to behave in particular ways. If women were to concern themselves with matters of home and hearth, then men were expected to provide for and protect that home and its

²⁷. David L. Kirp, Mark G. Yudof, and Marlene Strong Franks, Gender Justice, (Chicago: University of Chicago Press 1986), 30.

inhabitants. Women's historians have described in considerable detail the contrasting ideals of womanhood that characterized the Victorian age.²⁸ Yet both sexes were subject to conflicting images and ideas about their behaviour and what comprised their proper place in the world.

Recently a few scholars have turned their attention to the cultural myths that defined Victorian manhood. Anthony Rotundo, for example, isolates three gender ideals of masculinity that were encouraged by society, in general, and by families in particular. Fathers, he argues, concentrated on imbuing their sons with the values of the Masculine Achiever. The ideal Victorian man was to be progressive, dynamic, and entrepreneurial, traits well suited to the demands of commercial capitalism. Therefore, self-reliance and a degree of emotional aloofness was fostered. The ideal middle class Victorian man was also a gentleman, whose chivalrous and compassionate qualities were instilled in him most often by mothers who emphasized these values. The Christian Gentleman was a devout man committed to religious principles, community and family.

28. See for example Elizabeth Helsinger et al., The Woman Question, who define the four cultural myths which dominated discussion about women. "The Angel in the House", "The Angel Out of the House", "The Equal Woman" and "The Female Saviour", XIV-XV. In the Canadian context, see Ramsay Cook and Wendy Mitchinson, eds., The Proper Sphere: Woman's Place in Canadian Society, (Toronto: Oxford University Press 1976).

The third ideal, man as Primitive, was not necessarily encouraged by families, but was popular nonetheless. It romanticized the adventurer, the frontiersman who was independent, physically strong, and unencumbered by family. The qualities associated with this ideal were especially strong in frontier societies where male culture predominated. The emphasis on male camaraderie and desire for autonomy was sometimes manifested as an unexpressed hostility towards or fear of women.²⁹ Thus, men were imbued with complementary, but also conflicting myths about themselves and their relationships with women. And while one cannot claim a direct relation between these cultural myths and the actions of men and women, neither can we deny the importance of their influence.

In relation to the law, Michael Grossberg points out that these very attitudes account for the protective and

29. E. Anthony Rotundo, "Learning about Manhood: Gender ideals and the Middle-class family in nineteenth-century America", J.A.Mangan and James Walvin, eds., Manliness and Morality: Middle-class Masculinity in Britain and North America 1800-1940. (Manchester: Manchester University Press 1987), 35-51. Rotundo's definition of a gender ideal is useful. "A cluster of traits, behaviour and values that the members of society believe a person should have as a woman or man. Seen in a wider perspective, the gender ideal is closely related to the broader values of the culture in which it develops - it represents a series of cultural choices out of the vast range of qualities possible for a man or a woman." 35. For an overview of masculinity in frontier New Zealand see, Jock Phillips, A Man's Country? The Image of Pakeha Male - A History, (Auckland: Penguin Press 1987). David G. Pugh, Sons of Liberty: The Masculine Mind in Nineteenth-Century America, (Westport: Greenwood Press 1983).

paternalistic nature of domestic law, as men, acting in accordance with the values they were taught, made the state responsible for protecting women whose real husbands or fathers failed to do so.³⁰ In British Columbia, discussion about the 1873 bill also reveals the strength of gender-related cultural myths and the tensions they sometimes reinforced between men and women.

The attitudes and ideas expressed by De Cosmos and Robson were echoed by the public in a more general discussion in the local newspapers. Editorially, of course, The Daily Standard, De Cosmos's paper, supported the bill, while Robson in The Daily British Colonist, opposed it. The issue also inspired numerous letters to the editor as it struck a chord in the public mind. These letters reflect many of the prevailing currents of thought and conflicting ideas about women and men, and what their relationship should be. On one hand, women were considered either admirable and trustworthy partners or flighty, irresponsible, even sinister, adversaries ready to take advantage of their new found freedoms at the expense of their families. Men were either noble victims of such actions or despicable scoundrels, who failed to provide for their families. Correspondents presented their arguments with a decided flair for the dramatic, expressing outrage or

30. Michael Grossberg, "Crossing the Boundaries: the Merging of Family and Legal History", 809-815.

astonishment at the naivete of their fellow writers, as they predicted what the bill's effect would be.

Several of the bill's supporters stated their case by referring to the ideals associated with the concept of the companionate marriage. One such writer to the Daily

Standard "A Married Man," criticized John Robson and his followers for their antiquated views on what the relationship between husband and wife should be. In doing so, he alluded to the ways in which control of money and property within the family affected gender relations in the home.

Now I will ask any right minded married man whether if the only tie between man and wife is the fact that the law has placed the woman and her earnings completely in the power of the man, and he abuses that power, if it is not right that the Legislature should provide a remedy against such oppression; it is only to such persons as are unfortunately in that position, that this Act has any application. No household whose heads actuated by the only true principles upon which matrimony is based and can be successful, will dread the application of this Act...all this nonsense about "sapping the foundations of well ordered domestic life," is pure buncombe. It is no doubt a terror to those who rule their households with a rod of iron and oppression, but to the husband and wife, in heart as well as in name, it has no dread.³¹

Here, then, were the sentiments of the ideal Victorian marriage: a relationship based on equality, shared

31. The Daily Standard, 30 January 1873.

responsibility, mutual respect, and most importantly, love. The writer emphasized the protective nature of the bill, thereby appealing to the chivalrous nature of gentlemen, whose duty it was to protect the most vulnerable members of society. For this correspondent, giving married women more control over their property and earnings posed no threat because women naturally wanted what was best for their families as well as themselves.

One of the few female correspondents also adopted this theme and her letter indicated the underlying tensions and hostility between the sexes that sometimes existed. In part, Sarah Jane wrote:

I have carefully read all that has been urged in Parliament or written in the papers against the passage of such a law, and in every instance the writer or speaker seemed to proceed upon the assumption that women are not naturally as good or honest as men - that they are inferior, and should be subordinate - and that all that is necessary to excite in them the manifestation of the worse qualities, is opportunity. They seem to take for granted that men naturally love their families, and will labor for their well being and happiness; but that women have little or no love for their husbands and families, and should they be entrusted with power or property, that they would necessarily use it to the injury of both....³²

She went on to point out that some men had even expressed fears about their personal safety should this bill become law because of a provision in it enabling women to insure

32. Ibid., 3 February 1873.

their husbands lives. She reassured these "timid gentlemen" that similar laws had been passed elsewhere without such effect, and that allowing women such powers would not, as she explained succinctly

develop every woman in the Province into a Madame Duplessis or Lucretia Borgia,...that no man would dare marry, with risk staring him in the face that his life might be insured by his better half, and as a sequel he might be poisoned, or have hot lead poured into his ear.³³

Overall, the supporters of the statute emphasized positive aspects of married life such as mutual trust and shared economic power, at the same time, addressing the negative attitudes and distrust between men and women that was also evident. Sarah Jane addressed those fears squarely, and by using gentle ridicule, challenged the masculinity of men who vented such fears about women.

In contrast, those who opposed the bill were concerned less with the sentiments of the egalitarian marriage and more with the implications of separating the interests of husbands and wives. They stressed the dire consequences of shifting the balance of power between man and wife by giving women greater economic control over family resources. Several correspondents expressed the fear and mistrust of women that Sarah Jane alluded to, while others voiced

33. Ibid., 3 February 1873.

religious objections to the legislation.³⁴ One outraged writer predicted rather ominously that husbands would find themselves "dressed in threadbare coat and well worn pants" while their wives would be able to "indulge in all the extravagances of fashion."³⁵ He warned that

by creating two separate and distinct purses, two powers are created where only one should exist...it tends in every way to create coldness, bad feeling, jealousy and dissension in the family, where naught but love and trust should exist, and will ultimately result in the destruction of the family compact...It would eventually divide scores of what otherwise would be united families, and prepare the way for the passage of a cheap and easy divorce law with all its attendant evils...³⁶

According to this correspondent, love and trust would only endure in the family if there were no arguments over the family pursestrings.

Nor were men the only ones who objected to the bill. In a response to Sarah Jane, Pauline took exception to the whole idea of women's rights, expressing the opinion that Sarah Jane must be an unhappily married woman.

34. See for example, The Daily British Colonist, 2 February 1873 in which the writer makes reference to the religious grounds for marital unity, citing concepts found in the Scriptures.

35. The Daily Standard, 1 February 1873.

36. Ibid.

Now, Sir, "Sarah Jane" may give publicity to her brilliant ideas, but she cannot force me or any other respectable, morally disposed woman to believe them. She may advocate the Extremities of Women's Rights with a will, she may try to corrupt our at present good state of society, but she will not succeed - for I and others will wage war against all of her stamp until she and they are effectually silenced. Women's Rights indeed! It is all foolery, for we have plenty of rights now, and unlike "Sarah Jane" are quite contented. All good women in the city look upon the Bill as extremely pernicious (sic) and I can assure you, Mr. Editor, that it is as much as I can attend to properly to look after my home and family.³⁷

In this instance, the supporter of the Married Women's Property Act was viewed as morally suspect because she advocated women's rights. Pauline assured readers that good women did not want or need legal or financial autonomy and were content to remain protected in the confines of the home.

As these letters reveal, the cultural myths about men and women's proper spheres created conflicting ideas and attitudes about Victorian men and women, and strong feelings about the issue evoked a powerful response from a public which thought that the bill, for better or worse, would change family life. The lines of debate were clearly drawn in both parliamentary and public discussion between those who favoured the measure that would divide the economic

37. The Daily British Colonist, 5 February 1873.

interests of husbands and wives as an appropriate response to changing economic and social conditions, and those who preferred women to remain under coverture. Their respective positions depended upon their view of gender relations. But both men and women were influenced by the idea that men should protect women's interests for them.

Despite the controversy surrounding the Married Women's Property Act, it passed through the legislative process with little difficulty. Nor was there any apparent division over the bill along predictable political lines. John McCreight, for example, who was not overly sympathetic to many of the liberal reforms undertaken by the De Cosmos government, supported the bill.³⁸ Others, as well, seemed to vote according to their personal views on the matter. No official parties existed in British Columbia at the time, and voting was based on loose and somewhat eclectic political alliances.³⁹ Upon its third reading, on January 24, 1873, William Smithe attempted to have the bill sent back to committee for further consideration. There is some uncertainty as to the actual vote on Smithe's amendment. John Robson was later to report in The Daily British Colonist, that the motion for recommittal was carried,

38. S.W. Jackman, Portraits of the Premiers: An Informal History of British Columbia, (Sydney: Gray's Publishing Co. Ltd., 1969) 7-9.

39. J. Barman. The West beyond the West, 102-103. Ormsby, British Columbia: A History, 241.

sixteen to five, and that despite this, the third reading was put forward "amidst considerable confusion," and carried.⁴⁰ The legislative record shows only that the amendment was "put and Resolved in the negative." The original motion was then put forward and carried by a vote of sixteen to five, with Robson, Smithe, Holbrook, Bunster and Robinson, opposing.⁴¹ The Married Women's Property Act, despite Robson's best efforts, had only to receive royal assent to be placed on the statute books. Meanwhile, outside the legislature, its opponents employed one last strategy to stop the bill.

On January 29, 1873, a small notice in The Daily British Colonist announced that a petition against the Married Women's Property Act, "this Communistic measure," was to be sent to the Lieutenant-Governor.⁴² On February 23, 1873, Lt. Gov. Trutch received two petitions with a combined total of approximately 450 names, denouncing the measure. The petitions presented many of the same objections voiced earlier. The statute was not necessary, they said, because the existing law already provided for the protection of deserted wives. Furthermore, they were concerned about the bill's impact on family life and

40. The Daily British Colonist, 29 January 1873.

41. B.C. Journals of the Legislative Assembly. Vol 11, 1872-73. 24 January 1873.

42. The Daily British Colonist, 29 January 1873.

commercial interests in the province. On these grounds, they argued

that the tendency of the proposed Act by interfering in the sacred relationship existing between husband and wife will be to produce "domestic infelicity," That the Act discourages marriage, That the Act opens up new avenues for fraud, and will thereby detrimentally affect commercial interest.⁴³

Shortly after the petition was circulated, supporters of the bill claimed that it contained fraudulent signatures.

One correspondent to The Daily Standard wrote to express his surprise at seeing his name on the list of petitioners and denied having signed the document. Furthermore, he hoped that the ladies of Victoria would take note of those who did sign so that they would know "who are against women being allowed equal rights with themselves."⁴⁴ Robson launched an attack on Robert Beaven for questioning the legitimacy of the petition as he remarked caustically:

His (Beaven's) insulting allusion to the signers of the petition... proved how position and "dignity" have converted a popular tailor into a political goose. The hon. gentleman professes to have analyzed the petition and found names of only about 60 voters, while we are prepared to show that the signers of who vote in Victoria number nearly 200...The truth is Mr. Beaven's unexpected and ill deserved elevation has turned his head. Time was that when the brains were out the man would die; and there was an end

43. B.C. Provincial Secretary's Correspondence Inward. BCARS GR 526 Files 387,401.

44. The Daily Standard, 12 February 1873.

of him. The fact that Mr. Beaven still lives is proof positive that times have changed.⁴⁵

We do not know if Beaven's allegations were correct as neither side produced any proof to justify their claims. Despite the furor over the petition, it was, in fact, too late. The bill had already been given royal assent on February 21, 1873.⁴⁶ For better or worse, "the Act to promote Bachelorhood" - the Married Women's Property Act - became the law in British Columbia. It remained to the courts to interpret the statute as they saw fit.

45. The Daily British Colonist, 12 February 1873.

46. B.C. Journals of the Legislative Assembly. Vol.11 1872-73. Feb. 21, 1873.

Chapter III:

Women, Property and the Courts in British Columbia:
"to shield her where she has been wronged"

Those who objected to the Married Women's Property Act because they feared a domestic revolution would have been reassured by what they saw in court. Once the legislation was in place judges seldom had occasion to refer to it. Before 1880 only Justice John Hamilton Gray referred to the statute at length, and he expressed some of the same concerns as had the legislators who had fought it so vigorously. The statute's provisions would, in theory, enable women to assume a separate legal identity from that of their husbands, thereby weakening coverture, and giving women legal responsibility for their own contracts. But the paternalism of the law was evident in judicial views of the subject which remained essentially protective.

Nineteenth century British Columbia court records reveal several things about women and property-related litigation. They provide insight into judges ideas and attitudes towards women, marriage and family life. They highlight the limitations of statutory law in that some of the litigation, particularly involving native common law wives, fell outside the sharply defined scope of the statute. The records also confirm that orders of protection were problematic, and that women in association with their husbands did engage in suits involving commercial transactions. Finally, despite legislative intent to extend

women's legal autonomy, the court's narrow interpretation of the statute ensured that it would remain a protective measure because, in the judicial mind, separating the economic interests of husband and wife was linked inevitably to marital breakdown and divorce.

Provincial court records, specifically some twenty-five volumes of judges' bench books for both Supreme and County civil courts from 1867 to 1879, offer us a window on the law as women experienced it. Although they do not constitute an official legal transcript, these records prove extremely useful to the historian. In them, judges recorded the particulars of a case and its outcome. In addition, they often wrote their own observations and reasons for judgement, providing insight into their personal beliefs and legal interpretations. Equally important, bench books allow us to hear women's voices, for those who appeared in these pages were not always silent. Many of them addressed the judge and their testimony was duly recorded. Consequently, these volumes inform us not only about judicial perceptions of women and the law, but also about a little known aspect of women's lives in Victorian British Columbia, their presence in civil court.

Women appeared with some regularity before the court in matters related to property, both before and after the statute was passed. It is clear from the records that law on the books and law as people experienced it were often

very different. For some of the women who came to court, the Married Women's Property Act may have had little meaning because their marital status and property concerns lay outside its legal parameters. In British Columbia, Tina Loo argues, the law functioned as an arbitrator in a society which lacked the social cohesion of more established communities.¹ This was certainly true of commercial litigation, but it was equally applicable in matters related to the home. As seen through the judicial eyes, domestic life on the west coast frontier was anything but stable. It is apparent from the records that the most disadvantaged members of society occasionally did seek redress through the legal system.² Not surprisingly, women involved in litigation who had neither social standing nor family support, turned to the courts, having little to lose in the process but court costs.³ Although judges did not record

1. Loo, "Law and Authority in British Columbia", 109.

2. See for example the 1871 case of Johns vs Munser and Barker involving two prostitutes. Clara Johns sued Ellen Munser and her boyfriend Stephen Barker in a dispute over the plaintiff's clothing and jewelry. B.C. County Court (Victoria) Pemberton Bench Book 1870-71, BCARS GR1727 Vol. 57.

3. Loo, "Law and Authority in British Columbia", 121-125. Loo notes, for example, that in the period from 1858-1871, the average cost of county court actions where most such cases were heard ranged from \$4.50 in the lower country to \$5.00 in the upper country. Moreover, most of the county courts actions involved sums of less than \$50. She concludes that costs were not particularly prohibitive and that particularly in the lower country where courts were more accessible, people engaged in litigation over relatively small sums.

ethnic origin with any consistency, we find native and Chinese women as well as one black woman in the bench books. In cases involving disputes over domestic property, native women, for example, were doubly disadvantaged, both by their ethnicity and the legal vulnerability of common law wives. In frontier communities like British Columbia, where native-white common law marriage was not unusual, the question of marital status was not always easily determined. Certainly the issue was one that concerned British Columbians, as discussions about native wives in the 1860's, when church officials were trying to encourage white women to emigrate, indicated. Jean Barman notes that, despite these efforts, the non-native female population in the province remained relatively small, and in 1871, natives, roughly half of whom were women, still made up approximately 70 percent of the total population.⁴ Faced with this demographic reality and given the fact that the issue of mixed marriages engaged the Canadian judiciary's attention during these years,⁵ it is

4. Barman, The West beyond the West, 130, 363. She notes that even by the 1890's, there was only one non-native female for every three males.

5. See Backhouse, Petticoats and Prejudice, 7-20 in which she discusses the Connolly case extensively. Briefly, it involved the common law marriage of a native woman and a white fur trader who subsequently married a white woman. The native woman's son sued for inheritance rights from his father's estate. At issue was whether or not the native-white common law marriage was valid. The courts eventually ruled that it was and ruled in the son's favour. Backhouse notes that the case received wide public attention and was no doubt of interest in B.C. because James Douglas' mixed blood wife, Amelia, was one of the Connolly daughters.

noteworthy that British Columbia legislators included no provisions for common law native wives in the 1873 statute. Thus the issue of what constituted a common law wife's separate real or personal property might become a particularly contentious issue.

Although the bench books do not discuss native women in direct relation to the Married Women's Property Act, they do appear as common law wives in property related actions. Their concerns lay outside the framework of the 1873 act, but are important nonetheless because they illustrate that the property concerns of women in frontier British Columbia ranged far beyond the narrowly defined provisions of the Married Women's Property Act.

In asserting their property claims, native women sometimes employed arguments that ran counter to Victorian notions of respectability by renouncing their status as wives. In responding to one such claim, a prominent British Columbian judge, Matthew B. Begbie revealed his ideas about native-white common law marriages and the nature of marital property relations more generally. For European Victorian women, the designation of "Mrs." denoted a certain respectability, and was probably used by many women who were neither married nor widowed. Matthew MacFie, an observer of society in Victoria in the 1860's, noted that in frontier communities, it was not at all unusual for both men and women to misrepresent their social or marital status, for a

variety of reasons.⁶ We do not know that married status meant the same for native women as it did for their white counterparts, or if their willingness to renounce it merely reflects the level of their desperation. But, certainly, Margaret Neill, a mixed blood woman, rejected the title of "Mrs." when, in 1871, she sued S. Burt to recover her property from him. In her testimony, she claimed that her belongings were given to Burt by her common-law husband, Mr. Blee, following a domestic dispute, and she said, in part

I know a man named Blee, I lived with him for six years. I was not married to him. I am a half breed...A clock, a stove, and some spoons were taken away and they were my property...I did not give Blee permission to remove anything from my house. I never told you I was married.⁷

In his defense, Burt argued that he took the goods in payment of Blee's debt to him, adding that he had known the plaintiff for two years and that she "represented herself as Mrs. Blee." This being the case, he no doubt assumed that Neill was Blee's wife and that Blee could dispose of family property as he wished. The suit was later withdrawn so we have no way of knowing if Margaret Neill regained her property, but the case suggests the legal complications that could result from common-law relationships regarding women's

6. MacFie, Vancouver Island and British Columbia, 395-400.

7. B.C. County Court. (Victoria) Pemberton Bench Book, 1870-71. BCARS GR 1727 Vol. 57.

property. For native concubines, recognition as a wife did not always work to their advantage.

Whereas Neill tried to reclaim her possessions by renouncing her status as wife, another native woman, Mary, also challenged the very concept of Victorian wifely duties when she sued her deceased common law husband's estate for the domestic services she had provided for him. Judges were not unaware of the ethnic and cultural differences of some of the litigants who appeared before them. In rendering his decision, Judge Matthew Baillie Begbie revealed his views on native-white common law marriage:

Now it is of common knowledge that these arrangements for concubinage with Indian women are considered by them not as immoral at all, but as constituting free marriages: and all they expect to receive is the ordinary treatment of a wife: they get food, shelter, protection, clothing, and any pocket money they can coax from their protector. They do not stipulate for wages, and if they did, the stipulation of course would not be enforced...Here, the more you insist on the purity of the plttf's conduct, according to Indian notions - the more nearly you approximate her position to that of a legitimate wife, the more you explode the notion of there being any claim for wages, for which she can sue.⁸

In this instance, Begbie acknowledged the validity of Mary's common law marriage to Seater, but his discussion worked against the plaintiff who obviously was trying to

8. B.C. Supreme Court. Victoria. Begbie Bench Book, 1877-78. BCARS GR 1727 Vol. 730.

claim monetary compensation from her common law husband's estate. Mary's and Neill's willingness to come to court indicates that some native women were not reluctant to engage in a civil action to fight for what they thought legally and rightfully belonged to them. Furthermore, the argument for compensation for wages was novel and Begbie felt compelled to explain the difference between labour and marital contracts and the domestic responsibilities of wives, generally.

According to Begbie, recognizing Mary's position as wife meant that she could not sue for wages as if she had been a servant. A contract for wages could only exist between master and servant, not husband and wife. In this context, Begbie pondered "did she go to the deceased as a concubine who also acted as a cook, or go as a cook, and afterwards submit to be a concubine?"⁹ The point was crucial; as the former, she would only be fulfilling what was normally considered to be her wifely duties. The idea of compensating wives for their domestic labour was not possible, nor even desirable, Begbie argued:

In the position of a wife, a woman naturally makes herself useful in a household, for the benefit of the establishment generally, not for the benefit of the husband alone. She does the work, or superintends the work as part of the functions of the mistress of the household. Among the labouring part of the population, the wife it is true

9. Ibid.

may be regarded as the servant, and the only servant in the establishment, it is a common remark, that a poor man, not being able to offer wages, married in order to get a servant. But the wife is not the husbands' servant, so as to entitle her to sue for wages.¹⁰

Begbie's remarks underscored Victorian ideas about marriage and women's role and responsibility as wives. Domestic labour was not work but a labour of love.

As women's historians observe, society's refusal to acknowledge household labour as work placed women who performed such tasks in an economically vulnerable position when marriages, for whatever reasons, dissolved.¹¹ Women like Mary paid a heavy price for the sentimentality attached to female labour in the home which placed no monetary value on such services. Not legally entitled to the same claims upon a man's estate as a legitimate wife or widow, Mary attempted one last strategy. In this instance, she may have been successful to some degree. Begbie, noting there was no next of kin, reserved decision, so that he could speak to

10. Ibid.

11. See for example, Basch, In the Eyes of the Law, 222, in which she points out the financial vulnerability of widows or deserted wives "who brought no separate estate to marriage and created none during coverture, and whose lifelong services to husband and family continued to be regarded by the law as part of the husband's marital rights. The value of those services constituted the only conceivable assets they could have owned. Only some kind of property system that made the wife a full legal and financial partner in the assets of the marriage could have benefitted them. The dominant culture, however, never viewed all of the wife's vital services as work, and neither did the law."

the Attorney-General about her case.¹² Mary's efforts to be paid for her work emphasized the difficulties common-law wives sometimes experienced in trying to provide for themselves when husbands died or abandoned them. But legally married women who technically came under the provision of statutory law sometimes suffered no less under similar circumstances.

In their capacity as arbitrators of disputes involving women and their property, judges saw little evidence of family stability. Instead, they often witnessed the legal complications arising from women's life circumstances. Theoretically, married women whose husbands deserted them could separate their economic interests from those of their spouses, but in reality this was not always possible. Prior to 1873, women who lived apart from their husbands could obtain an order of protection to secure their belongings. But few of these orders ever were registered in British Columbia. Legislators removed this requirement in the 1873 statute and if the case of *Balden vs. Strong* is any indicator of the confusion and resulting litigation that such orders provoked, it is not surprising that they did so. *Balden vs. Strong* is instructive on this point because it

12. In his biography of Begbie, David Williams suggests that the Intestate Estates Act, 1877 was later amended to include provisions for "concubines and illegitimate children" as a result of Begbie's influence. David R. Williams, The Man for a New Country: Sir Matthew Baillie Begbie, (Vancouver: Gray's Publishing Co. 1977), 107.

illustrates the weakness of the legal procedure that required women to get orders of protection upon separation.

For Catherine Balden and her husband, residents of Victoria's black community, property became the focal point of domestic strife and violence. From 1865 to 1878, a series of suits and countersuits involving the Baldens and, eventually, their neighbours and friends, centred upon the issue of what belonged to whom. In 1870, Mr. Balden, a storekeeper, was convicted of attempted arson for trying to burn down his wife's house while she was sleeping in it. At his trial she testified that Balden had physically assaulted her on several occasions, saying however that "I have nothing against him though he has treated me pretty hard." She further stated that "we have had many disputes about the possession of the house. I was determined not to give up the house."¹³ In 1872, while Balden was in prison, Catherine became ill and later died. During her illness, she was cared for by her friends, the Stronges. Before her death, Mrs. Balden left them her few belongings - a gold watch and chain, a few pieces of furniture, and two trunks of clothes as repayment for their kindness.

The Stronges took the goods and, in 1874, successfully sued Balden for expenses incurred in caring for and burying his wife. Balden later appealed the decision, claiming that

13. B.C. Supreme Court, Notes of Proceedings 1870-71, BCARS C/AB/30 N6. 30-54.

because his wife had obtained an order of protection when they first parted in 1865, he was not responsible for her debts. According to Begbie, the crucial point of law upon which the case revolved was whether or not such an order had been issued and properly registered in the Supreme Court.¹⁴ Balden and the Stronges then became embroiled in a lengthy legal battle over Catherine's property and over compensation for debts paid on her behalf. The details of the various suits need not concern us here, but the case exposed the weakness of a cumbersome legal procedure and highlights the gulf between statute law and its implementation. Although there is no direct evidence that legislators were aware of the Balden case, it is probable that they would have known about the circumstances of what was generally considered a notorious case. Legislators recognized the advantage of avoiding the kind of extensive litigation that Balden vs. Strong entailed. Removing the requirement for an order of protection seemed an appropriate legal reform.

Although the records of commercial cases are not as rich in detail as those concerned with more personal situations, they are instructive nonetheless because they verify that prior to 1873, women were active in the commercial life of the province. Either as small business

14. B.C. Supreme Court (Victoria) Begbie Bench Book, 1873. BCARS GR 1727 Vol. 729. See also B.C. County Court (Victoria) Pemberton Bench Book, 1871-74. BCARS GR 1727 Vol. 58.

operators or as consumers, women sued and were sued in civil court. Their presence in civil court prior to the passage of the Married Women's Property Act suggests that women did not hesitate to engage in litigation and that legislators were justifiably anxious to delineate their legal responsibilities in statutory law. A brief survey of plaintiff and procedures books for the Cariboo district from 1862-1871, reveals many actions involving board, wages, and goods. Some women appear to have used the litigation process quite regularly as a means to collect debt. For example, Malvina Toy, the Clinton innkeeper mentioned in the previous chapter, often took others to court. From 1866 to 1869 she appeared eight times as a plaintiff and twice as a defendant. Between 1863 and 1865 Catherine Lawless, another Cariboo innkeeper, sued seven times and was sued twice. Various other women were also involved in similar litigation, appearing two or three times.¹⁵ Women who ran their own businesses, then, were willing to go to court to settle disputes. We do not know how independent most of these women were financially, but according to Justice E.M. Sanders, Toy ran a substantial business. Evidently, such women felt entitled to approach the courts for redress. Although they may have had limited legal capacity, they utilized that which they had. In Toy's case, for example, a

15. B.C. County Court. Plaintiff and Procedures Books (Cariboo District) 1860-1871, BCARS GR Vols. 568, 569, 572, 584.

challenge to her right to independent legal action did not prevent her from pursuing the same course again.

The records also indicate that legislators' concerns about spousal liability were well founded, as women who were sued as consumers of goods or services, especially prior to 1873, often were co-litigants with their husbands and sometimes were not named at all in the action. Although women appeared on their own in some instances, husbands were often brought to court in relation to a debt owed by their wives prior to marriage. For instance, in 1872, Sam Chong sued Mr. Woodhaus and his wife, the former Lucy Smith, for the \$5.50 she owed him for laundry services he provided for her prior to her marriage. In *Spencer vs. Snow and wife*, the plaintiff claimed Mrs. Snow had borrowed five dollars from him before she married. Mansell & Holroyd, furniture store owners, took the former Emily Morris and her husband, Mr. Farr, to court over furniture Mrs. Farr had bought when she was single.¹⁶ In each of these cases, the plaintiffs won their case and husbands had to pay the costs involved.

It is significant that, after 1873, co-litigant cases disappeared from the bench books. This is not to say that they no longer occurred, but the Married Women's Property Act seems to have diminished husbands' liability under certain circumstances. Legislators who supported the bill had argued

¹⁶. B.C. County Court (Victoria), Pemberton Bench Books, 1871-76. BCARS GR 1727 Vol. 58.

that the bill's provisions would clarify spousal liability and that it would benefit husbands by making them no longer responsible for debts contracted by their wives before marriage. The bench books suggest that this provision may have been an effective deterrent to launching such suits after the bill was introduced. But the issue of married businesswomen remained problematic and for Justice Gray, at least, the act of separating a husband and wife's economic interests was the first step towards divorce. It was this link between separate property and marriage breakdown that most concerned Gray when a case touching upon the Married Women's Property Act was heard before him in 1877.

After the 1873 bill was passed in the legislature, its' impact was minimal. The bench books record only three instances in which it was considered. In two of these cases, Justice Gray presided, and he carefully recorded all of his deliberations, because he was aware that he was the first court official to invoke the statute.¹⁷ His comments on the statute reflect his concerns about its' legal ramifications, but they also reveal his ideas and attitudes about domestic relations, women, the doctrine of marital unity and divorce. The cases which drew Gray's attention

17. One case appears in Crease's Bench Book, but he does not provide much detail. B.C. Supreme Court (Victoria) Crease Bench Book, 1877-78. GR 1727 Vol. 695. For Gray's discussion see B.C. Supreme Court (Victoria) Gray Bench Book, 1875. GR 1727 Vol. 769.

regarding the Married Women's Property Act involved women running small businesses.

The first litigants, both Chinese, appeared before him in 1877, prompting Gray to ponder briefly the meaning of marriage in Chinese culture. He determined that regardless of what that status implied in China, the woman resided in Canada and so came under the provisions of provincial law as it applied to married women. In *Wah Fung vs. Loy You*, the plaintiff claimed that the defendant, who ran a laundry in Victoria, owed him money for rent. The legal point then to be decided was whether Loy You made the contract in relation to her own separate business or as a wife acting as her husband's representative for the benefit of both. According to Gray:

The mere fact of her carrying on a separate business in a particular line does not prevent a woman from making a contract that would render her husband liable - and for which she herself would not be liable. It is not to be assumed that everything she does is for her separate business. To bring the case within the Statute - that fact must be distinctly alleged or *prima facie* proved. Looseness in affidavits or legal proceedings affords facilities for fraud.¹⁸

18. B.C. Supreme Court (Victoria) Gray Bench Book, 1875. GR 1727, Vol. 769. Gray was not alone in focussing upon the legal point of whether or not a woman engaged in a contract as part of her separate business or as a wife. Constance Backhouse notes that in Ontario, judges did the same. Backhouse, "Married Women's Property Law", 238.

In the second case, in 1878, Cranoelli vs. Snow, the plaintiff sued Snow, a married woman, who ran a business at Naas River and whose husband purchased goods from Cranoelli on her behalf. Because the plaintiff had previously sued the husband, Gray ruled that this implied that the plaintiff acknowledged that the husband, not the wife, was liable for the debt. Although in both instances, Gray's decisions benefitted the women involved, such rulings, in the long run, were detrimental to women engaged in business.¹⁹ Few merchants would be willing to contract with married women if it meant having to determine first whether the woman was legally entitled to do so.

Gray chose to understand and apply the statute solely as a protective measure, and in doing so ignored any potential it had to give women more autonomous property rights. In his view, even if legislators meant the bill to achieve this end, it should not. Gray was particularly disturbed by the bill's potential to erode marital unity. On the one hand, he was aware of the bill's provisions that would enable married women to act in their own economic interests. But he argued that these egalitarian elements of the statute would encourage women to behave irresponsibly and yet remain financially unaccountable. Gray complained that under the Married Women's Property Act:

19. Backhouse, "Married Women's Property Law", 226-227.

There is hardly anything the wife cannot do - She may carry on business separately from her husband - perhaps with his rival in trade - or greatest enemy - join incorporated Companies or Associations - speculate - gamble in stocks - run up debts - sue and be sued civilly and criminally - become the Manager of a Bank or a Livery Stable - spend her money in profligacy and folly - and when it is all gone - require her husband to support her.²⁰

Furthermore, Gray, like John Robson and his followers, thought that the legislation would encourage fraud, and he was therefore determined to apply the statute in its narrowest terms, not to encourage women's independent business transactions, but only to protect them from liability under certain circumstances. Citing common law, Gray reasoned that under coverture, a married woman could not contract, and that the Statute "must not be so construed as to encourage divergent interests between man and wife- It steps in to shield her where she has been wronged or to aid her when it would be for her benefit."²¹ For Gray, any separation of the economic interests of husband and wife was incomprehensible except in cases of marriage breakdown, and he framed his opinion accordingly.

Scholars of women's legal history have emphasized the strength of the doctrine of marital unity despite the efforts of some legislators to challenge it.²² For most

20. B.C. Supreme Court. (Victoria) Gray Bench Book, 1875. GR 1727 Vol. 769.

21. Ibid.

22. Salmon, Women and the Law of Property in Early America, 193. Backhouse, "Married Women's Property Law",

nineteenth century Canadians, British Columbians included, the concept of married women's separate property would remain linked with the troubling issues of separation and divorce. Both men and women, acculturated to view the rigid gender roles assigned to them as the norm, simply could not imagine such divergent interests between husband and wife. Gray could only envision the statute being useful when husbands were derelict in their duties as providers and protectors for their families. He reiterated that the 1873 statute was "remedial and intended to protect the woman - where the duties and objects of the marriage have been departed from and disregarded by the Husband."²³

Similarly, women who stepped outside the realm of wifely duties to act as independent economic agents were also suspect. The common law, according to Gray was quite adequate to protect the property rights of the married woman "whose Purity and virtue will always command respect - and ensure to their possessor the esteem and position to which refinement, Civilization and Christianity have elevated her."²⁴ A woman who engaged in commerce solely for her own economic gain clearly transgressed the boundaries of behaviour thought appropriate for those whose marriages were intact. Thus both husbands and wives were to set individual

²³. B.C. Supreme Court. (Victoria) Gray Bench Book, 1875. GR 1727, Vol. 769.

²⁴. Ibid.

interests aside to work for the benefit of the family. The law, having encoded prescriptive behaviour for both sexes by defining patterns of ownership, reinforced idealized gender roles that, as we have seen, did not always accord with reality.

In Gray's mind the Married Women's Property Act, unless interpreted narrowly as a protective measure, was no less than a precursor to divorce. If women were allowed to exercise the rights given them under the statute, husbands should be entitled to some legal remedy. In one sense, Gray was perhaps more progressive than some of his colleagues for he believed that divorce, though undesirable, was sometimes necessary. Despite the rhetoric that extolled married life and idealized the relationship between husband and wife, often marriages did go wrong - its partners trapped legally in what Justice Gray called "the charnel House of Buried affections - of buried hopes - of buried Honor."²⁵ He expressed his opinion on the matter in a discussion of the Divorce and Matrimonial Causes Act of 1857 in relation to a divorce case before the Supreme Court in 1877. The question arose as to whether provincial courts had jurisdiction over divorce. Matthew Begbie had argued that only British courts had such powers.²⁶

25. B.C. Supreme Court. (Victoria) Gray's Bench Book, 1875. BCARS GR 1727 Vol. 769.

26. Ibid. For full details of the case see the erroneously named case Sharpe vs. Sharpe (1877), B.C. Review, 25, 247-273.

Gray disagreed and in doing so referred at length to the potential impact of the Married Women's Property Act. The passage of the statute represented the beginning of a new phase of domestic law. Marriage was now considered to be a contract and had to be viewed "not in the light of sentiment - but in the light of modern legislation."²⁷ Gray believed that both wives and husbands should have equal access to divorce. If, under the provisions of the 1873 statute, a woman acted in her own economic interests to the detriment of her husband, then he was entitled to a divorce. In discussing the question of local jurisdiction over divorce, Gray ruled that:

When England passed the Act of 1857 it intended that both man and woman should henceforth hold their matrimonial status by law - not by the favor or accident of a Parliamentary majority. British Columbia in adopting the English law intended the same - and I cannot see that it is justice to the inhabitants of this Country to apply to them the worse part of the law - and deprive them of the best - I know of nothing - that would be more ruinous to the peace of families - or tend more to social degradation - than the belief that...there is in this Country no remedy...²⁸

Obviously, in Gray's opinion the Married Women's Property Act represented the 'worst part of the law.'; a legislative travesty that should never have been passed. While he

27. Ibid.

28. Ibid.

believed that married women were entitled to the court's protection, he did not wish to encourage female autonomy.

Consequently, Gray's rulings based on the 1873 statute represented a judicial compromise. Instead of fulfilling its potential, the act became another extension of the protective domestic legislation affecting women and the family that was characteristic of the nineteenth century. By linking the two pieces of domestic legislation: the Divorce and Matrimonial Causes Act and the Married Women's Property Act, Gray demonstrated the court's reluctance to acknowledge women's separate rights, and its tendency to cling to the doctrine of marital unity.

Conclusion

Women in colonial British Columbia inherited the British legal tradition of marital property based on two bodies of jurisprudence, common law and equity. But the law of equity was not readily available to most women and the limitations of common law were even more apparent in the new world than the old. Marriage settlements, a traditional device for settling separate property upon women were not common, nor were they irreversible. As British and American feminists pointed out, such agreements were only available to the wealthy and did little to protect the average woman. Legislation was a means to protect all women's separate property and earnings and as a result, during the mid and late nineteenth century, property acts were adopted throughout the Anglo-North American world.

Both feminist and family historians have examined the issue of these married women's property laws, although they have done so from very different perspectives. Women's historians have emphasized the active role that nineteenth century feminists played in bringing about legal change, whereas family historians have focused on women's increased status within the family to explain their expanded legal rights. A major problem for women's legal historians has been to explain the passage of such laws in areas where no feminist presence existed.

The 1873 Married Women's Property Act in British Columbia was passed under such circumstances and has served as a case study to explore this question from a family historical perspective. Although the influence of feminist thought was apparent in the parliamentary and public debate over the bill, meeting a feminist agenda was never the legislators' goal. Instead, their motives were twofold: to clarify women's legal responsibilities in the commercial world, and to grant them a higher legal status in accordance with their family position in the companionate Victorian marriage. In doing so, reform-minded legislators challenged the common law doctrine of marital unity. Unlike the earlier 1862 law which dealt only with deserted wives, the 1873 statute had the potential to grant married women greater legal and economic autonomy. But it did so only in a limited way because judges interpreted it conservatively. Consequently, property law affecting married women remained distinctly paternal, grounded in Victorian ideas about law, gender relations, family, and men's role as protectors and providers.

The 1873 statute represented an attack on the legal doctrine of coverture, and discussion focused on the bill's potential impact in the marketplace and in the home. The lines of debate were clearly drawn. Those who supported the legislation thought the bill would clarify spousal liability and raise women's legal status to a level more appropriate

with their position as wives and mothers. Its opponents, however, argued that the statute would encourage fraud, destroy marital and family unity, and lead to marital breakdown. Two aspects of the proposed legislation were central: the removal of the order of protection clause which simplified legal procedures and the elimination of confusion about spousal liability involving commercial transactions. But the concerns about the economic implications of the bill also extended to its impact on domestic relationships and control over the family pursestrings.

The 1873 statute was one of several reforms introduced by Amor De Cosmos's liberal reform government. Yet not all those who believed in the importance of liberal institutions and reform supported the measure, as John Robson's opposition indicated. The differences between De Cosmos's and Robson's positions on the bill no doubt stemmed, in part, from their personal circumstances and religious convictions. But it also revealed their conflicting perceptions of gender relations and their views on the "woman question" of the period. De Cosmos, although no feminist, was sympathetic to the egalitarian ideal of marriage whereas Robson believed in a more traditional, hierarchical sense of family. Their respective positions were echoed in the public debate as men, and occasionally women, discussed the relative merits of the bill. Much of

the discussion focused upon women's rights, and the potential impact on marriage and family life of dividing the family's economic interests. But although the statute's supporters and opponents disagreed as to how much legal and economic autonomy women should have, no one disputed women's entitlement to the law's protection.

Contemporary ideas about the respective gender roles and responsibilities of both sexes underlay discussion of the statute. Victorian men, as well as women, were socialized in ways that reinforced gender ideals. Women were regarded as dependent, fragile creatures, uncomfortable in the world outside the home. Men, on the other hand, were expected to be more worldly and were deemed to bear a moral obligation to provide for and protect their families. When husbands failed to protect their wives this moral obligation extended to the law. This all-encompassing paternalism was temporarily threatened by the provisions of the Married Women's Property Act which might have allowed married women more control over their own economic resources. But through judicial decisions, the courts reinforced the law's traditional paternalism.

Nineteenth century British Columbia court records reveal that, despite their smaller numbers, women were active in the commercial life of the province and did not hesitate to engage in litigation regarding their property concerns. Some of the cases indicate the limitations of

statutory law in dealing with those who fell outside its' scope. This was particularly true for native common law wives whose property rights were ill-defined or non-existent. It is significant that legislators included no provisions for these women in a province where such liaisons were not unusual, and native women represented most of the female population. The Balden case illustrates the problems that could arise from embedding complicated legal requirements in a statute. The sources also suggest that, while spousal liability regarding wives debts prior to marriage diminished after 1873, the issue of married businesswomen remained problematic. The cases that came before Justice Gray indicated the courts' reluctance to acknowledge either the separate economic interests of husbands and wives or a wife's liability.

Justice Gray's decisions involving married women who operated small businesses revealed judicial concerns about the relationship between female independence in property-holding and the possible dissolution of marriage. By focussing on the issue of what constituted a married women's 'separate' property, Gray effectively nullified the more egalitarian aspects of the 1873 statute. Instead, he interpreted the bill solely as a protective measure. To do otherwise, he reasoned, would be to encourage divergent economic interests between husband and wife. Allowing women to be responsible for their own economic resources would

enable them to behave irresponsibly, and husbands would suffer the legal consequences. Gray viewed the Married Women's Property Act in direct relation to the Divorce and Matrimonial Causes Act, and argued that local access to divorce must exist if the provincial legislature was going to enact statutes like the 1873 bill.

Given the relatively small number of women in nineteenth century British Columbia who would have fallen within the scope of the Married Women's Property Act, it is not surprising that it was seldom used. But this made it no less important to the legislators who enacted it, nor Judge Gray who interpreted it. In discussing the importance of statutory law, Gray observed

The application or non-application of a statute or any particular part of it - does not rest upon the view or opinion of any one person - but upon the wants and necessities of the community - nor does it depend upon the frequency or common nature of the subject legislated upon - It is sufficient if the evil ever occurs - the moment it does - the statute applies.¹

And it was meeting the community's needs that engaged both legislators and the judiciary. They shared an overriding concern for family stability over individual rights and it was this objective that remained foremost in their minds.

Thus, in the end the Married Women's Property Act represented a compromise. It had the potential to allow

¹. B.C. Supreme Court. (Victoria) 1875. Gray Bench Book. BCARS GR 1727 Vol. 769.

married women greater legal and economic autonomy, but this also implied greater responsibility. Clearly, in the minds of many, such an outcome was not desirable. For most Victorian British Columbians, feminist thought may have sparked debate over women's role and status in society, but they could not conceive of a world in which husbands and wives acted as independent legal and economic entities. The doctrine of marital unity which joined husband and wife economically and legally, as well as emotionally, survived this first legislative assault. It remained for British Columbian suffragists at the turn of the century to mount the next attack.

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