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Equity Law Consequences upon the Mississippi Married Women’s Property Act of 1839

by Cameron L. Fields

Pass the bill, and what will be the result? Where there should be union, there will be division. Confidence will be impaired – jealousy will arise – matrimonial quarrels will occur – domestic happiness will be lost. . .¹

State Representative Robert Josselyn
Lafayette County

In 1839, Mississippi state senator Thomas B. J. Hadley introduced a bill entitled “An Act for the Protection and Preservation of the Rights and Property of Married Women.”² The bill passed, becoming the first legislation in the nation allowing a woman under common law, to own property separate from that of her husband.³ However, women in Mississippi were already allowed to own property under a separate system of equity law adjudicated by chancery courts. Hadley’s bill actually set forth no new clauses that could not have been completed under equity law through wills, marriage contracts, or trusts. In analyzing the origins of the passage of the act, most historians have focused on social or economic interests. The only legal recognition they attribute to its

¹ “Rights of Women,” *Mississippian*, April 26, 1839, Mississippi Department of History and Archives, microfilm; Dunbar Rowland, *The Official and Statistical Register of the State of Mississippi Centennial Edition* (Madison, Wisconsin: Democrat Printing Company, 1917), 242; *Journal of the House of Representatives of the State of Mississippi* (Jackson: B. D. Howard, 1838), 4.

² *Journal of the Senate of the State of Mississippi* (January 21, 1839), 99-100. Mississippi Department of History and Archives, microfilm.

³ Alexander S. Gould, *A Digest of the Laws of Mississippi: Comprising all the Laws of a General Nature, Including the Acts of the Session of 1839* (1839), Chapter XXVI, 920-921. Mississippi State University, Mitchell Memorial Library, Special Collections.

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passage was the *Fisher v. Allen* court case of 1837. To fully understand the reasons behind the passage of the Married Women's Property Act, I will examine legal history and equity law in Mississippi and provide evidence through various court cases to verify that married women participated in property ownership before 1839. As Norma Basch has stated, women's legal history emphasizes "the relation between law and the social process."⁴ Some of these cases granted decisions favorable to the woman, while others did not. All, however, show that women had owned property in some form through marriage contracts, trusts, or wills. The importance of equity law in Mississippi has been overlooked with relation to the Married Women's Property Act of 1839. Equity law dispensed through both equity and common law jurisprudence sometimes gave women property rights before the passage of the Act.⁵ However, equity and common law systems had conflicting and varied opinions on married women's property rights. Where equity law could be a relief to married women; common law could be an obstruction to this relief. This divergence in the law ultimately helped facilitate an act bringing

⁴ Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution," *Signs* 12, no. 1 (1986), 97.

⁵ *D. Kenley v. P. Kenley*, 2 Howard 751 (Miss. Ct. App. 1838); *Hall v. Harriet Browder's Administrators*, 4 Howard 224 (Miss. Ct. App. 1839); *Whitehead v. Middleton*, 2 Howard 692 (Miss. Ct. App. 1838); *Lowry v. Houston*, 3 Howard 394 (Miss. Ct. App. 1839); *M. Kimball v. T. Kimball*, Howard 532 (Miss. Ct. App. 1837); *Magruder and Nichols v. Stewart's Administrators*, 4 Howard 204 (Miss. Ct. App. 1839), State Law Library, Jackson, MS. (I found these cases by looking at index words in the *Mississippi Digest* records such as "equity" (Volume 6b). The *Mississippi Digest* records cover cases from state and federal courts. I then searched cases between the years 1835 and 1839, which is around the time of *Fisher v. Allen* (1837) and before the 1839 Act (they are not in chronological order.) The cases that I found indexed in the *Mississippi Digest* were listed in Howard's *Mississippi Reports*, which gives decisions from the Mississippi High Court of Errors and Appeals. Other cases were found by searching index words in Howard's *Reports* such as "equity," "marriage contract," "feme covert," "trusts," or "wills." From there, I searched through cases involving these words and limited them to cases in which women and property were the focus. Since cases appealed to the Mississippi Court of Errors and Appeals are indexed in a more accessible and straightforward way to find particular types of cases than are chancery court records, the cases I will be analyzing were all appealed cases. Further study of court cases previous to 1832 when Mississippi adopted a separate court of chancery and even afterwards in the chancery records would be beneficial for a longer time period since the chancery records of the 18th and 19th century are not indexed according to subject. But, for the purpose of this study which is to add evidence of women and property ownership through a sample of court cases, these appealed cases served to be beneficial in that they provided both chancery court cases and circuit court cases which enhances the viewpoint that equity law was overflowing into common law courts.

consistency into the field of married women's property rights.

Elizabeth Gaspar Brown, Robert Gilmer, and Sandra Moncrief are the leading historians on the Mississippi Married Women's Property Act of 1839. All of these historians analyze either the social or economic motivations for the origins of the Act. The only legal aspect they attributed to the Act was the *Fisher v. Allen* case which directly gave a woman property ownership. Moncrief recognized Betsy Allen, the woman involved in the court case *Fisher v. Allen*, and Piety Smith Hadley, wife of Senator Thomas B. J. Hadley, as being monumental influences in helping pass the bill.⁶ Robert Gilmer focused on the Chickasaw tribal law that was the basis for the *Fisher v. Allen* decision and linked the Hadleys to the court case by suggesting ulterior motives for the passage of the bill. He also suggested it would have been easier for tribal lands to be sold to white settlers if not only Chickasaw and Choctaw men but also the women could sell property.⁷ Brown acknowledged that Mrs. Hadley may have had some influence over the passage of the bill, but she also recognized the *Fisher v. Allen* court case and Louisiana's civil law influence on Mississippi.⁸ Unlike other historians of the Mississippi Act, Donna Sedevie, however, accounted for the legal antecedents of the Mississippi Married Women's Property Act of 1839. She recognized that an analysis of "women's legal status in Mississippi before 1839" was missing in other historiography on the act.⁹ She stated, "in order to distinguish law from custom and practice, judges' actions in specific cases must be examined." Sedevie however, focused mostly on divorce cases and their relationship to women's liberalization of property ownership. Megan Benson largely discussed the role of the *Fisher v. Allen* court case upon the passage of the Woman's Law, but she also proposed that the importance of the case lay in the fact that common law court saw this case, whereas chancery courts normally considered cases involving women and property. There are a few historians who have recognized

⁶ Sandra Moncrief, "The Mississippi Married Women's Property Act of 1839," *Journal of Mississippi History* 47 (1985), 110-125.

⁷ Robert Gilmer, "Chickasaws, Tribal Laws, and the Mississippi Married Women's Property Act of 1839," *Journal of Mississippi History* 68 (2006), 131-148.

⁸ Elizabeth Gaspar Brown, "Husband and Wife: Memorandum on the Mississippi Woman's Law of 1839," *Michigan Law Review* 42 (1944), 1110-1121.

⁹ Donna Sedevie, "Women and the Law of Property in the Old Southwest: The Antecedents of the Mississippi Married Woman's Law, 1798-1839" (master's thesis, University of Southern Mississippi, 1996), 1-119.

the role that equity law played in helping facilitate other states' married women's property acts including Marilyn Salmon, Carole Shammass, Richard Chused, and Susan D. Lebsock. None of these historians, however, have specifically analyzed the role it played in the Mississippi Married Women's Property Act of 1839.¹⁰

Mississippi became a territory in 1798 and a state in 1817. During this time, the law of the land derived from the common law system of England.¹¹ Alongside the common law system in England stood the equity law system, which developed as a need grew for remedies other than the exact ones prescribed by common law. The common law system was rigid, which enabled predictability in the application of decisions. The strictness of common law did not allow for much leeway with regards to certain cases not covered under its scope. Equity, on the other hand, provided more flexibility and applied remedies on a case-by-case basis. If a particular case had no remedy under common law, it fell under the jurisdiction of equity law. This legal practice is why certain court cases involving areas that were not readily covered by the narrow scope of common law, such as trusts, generally fell under the jurisdiction of equity law. Whereas common law generally relied upon precedent, or previous court decisions by judges, equity law depended on the discretion of a chancellor (equity court judge) who was more able to give a flexible decision based on moral issues as well. One of the downfalls of equity law was that due to this flexibility, it grew to include "larger cases—and consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with

¹⁰ Megan Benson, "Fisher v. Allen: The Southern Origins of the Married Women's Property Acts," *Journal of Southern Legal History* 97, (1998), 97-122. Two other cases I will examine involving women and property were also tried in common law courts: *Hall v. Harriet Browder's Administrators and Magruder and Nichols v. Stewart's Administrators*; and Suzanne D. Lebsock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43, no. 2 (1977), 195-216; and Carole Shammass, "Re-Assessing the Married Women's Property Acts," *Journal of Women's History* 6 (1994), 9-30; Richard Chused, "Married Women's Property Law 1800-1850," *Georgetown Law Journal* 71, no. 5 (1983), 1359-1425; and Marylynn Salmon, "Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730-1830," *William and Mary Quarterly* 39 (1982), 655-685; and Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 1-261; and Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution," *Signs* 12, no. 1 (1986), 97.

¹¹ V. A. Griffith, *Mississippi Chancery Practice* (Indianapolis: Bobbs-Merrill Company, Inc., 1950), 2:12, Mississippi State University, Mitchell Memorial Library, Reference.

common law practice.”¹² Even equity law in Mississippi included a vast array of types of cases that fell under its jurisprudence.¹³ This may be part of the reason that the married women’s property act developed—it was becoming too troublesome and expansive to keep seeing such varied cases on an individual basis.

In February 1821, Governor George Poindexter, acting on authority granted by the General Assembly, undertook a “general revision and consolidation” of the laws of the state. His work resulted in the creation of the renowned Poindexter Code that was completed after his term as governor had ended. Poindexter’s Code, which was adopted by the General Assembly at a special session in June 1822, included provisions for a separate court of chancery.¹⁴ Reaffirming the provisions of Poindexter’s Code, the Mississippi Constitution of 1832 established the chancery court with full jurisdiction “in all matters of equity.” The circuit courts would have common law jurisdiction as well as equity jurisdiction where the equity matter did not amount to more than five hundred dollars. This provision made clear the separate chancery courts administering equity law and circuit courts administering common law (and sometimes equity law.)¹⁵ Because chancery courts were not as abundant as circuit courts, this provision also helped ease the burden of traveling long distances to have a case heard in chancery court by allowing circuit court to hear some equitable matters.¹⁶

This particular section of the constitution explained why from the beginning, chancery courts as well as circuit courts could administer decisions involving some types of equity cases. The range of cases that fell under equity law included matters of trusts, contracts, deeds, fraud, and bills of sale as well as many other subjects. Equity jurisdiction would provide a remedy in all matters of equity “. . . if there be no plain, ade-

¹² Stephen N. Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,” *University of Pennsylvania Law Review* 135 (1987), 4-6.

¹³ V. A. Griffith, *Mississippi Chancery Practice* (Indianapolis: Bobbs-Merrill Company, Inc., 1950), 2:26, Mississippi State University, Mitchell Memorial Library, Reference.

¹⁴ *Ibid.*, 2:12; Porter L. Fortune, Jr., “The Formative Period,” Richard Aubrey McLemore (ed.), *A History of Mississippi* (University & College Press of Mississippi: Hattiesburg, 1973), 1:254; Dunbar Rowland, ed., *Mississippi Comprising Sketches of Counties, Towns, Events, Institutions, and Persons, Arranged in Encyclopedic Form* (Atlanta: Southern Historical Publishing Association, 1907), II, 441; Rowland, *Mississippi*, I, 394.

¹⁵ *Ibid.*, 2:14.

¹⁶ *Ibid.*, 2:14-15.

quate, and complete remedy at law. . .”¹⁷ Since cases involving women and property generally fell under equity jurisprudence, this provision shows why some of these cases fell under the jurisdiction of circuit court and thus common law. A particular maxim of the equity procedure noted, “Equity follows the law.” This statement meant that if the common law explicitly offered a solution to a case, the equity court must follow that solution. But, if “some countervailing, dominant, and equally well established equitable principle intervenes” then the court of equity can do away with the common law solution and offer its own remedy.¹⁸ The chancery courts apparently saw women’s property ownership in some cases as an equity principle that could defy the common law in place at the time. A rule of court procedure stated that if a court did not have jurisdiction of a particular “subject matter” it could not hear that case.¹⁹ But, both the circuit courts and the equity courts saw cases involving the equitable matter of married women’s property rights. Therefore, both had jurisdiction over this matter, at least in practice. The common law offered a legal remedy for the property rights of married women through coverture (the legal status of a married woman); equity law at the same time offered different remedies that common law courts accepted.

Decisions in circuit court or in chancery court could be appealed to the High Court of Errors and Appeals, which was established by the Constitution of 1832, if one was unsatisfied with the justice rendered by the judge or chancellor. The appellate court only saw cases that had a “material error of law.” It would not review any cases upon error of fact unless the error of fact was so great that it became an error of law.²⁰

Common law defined a woman’s status through *coverture* as a *feme covert* when she became married, which meant that everything she had previously owned now became the property of her husband. Her husband would now own, manage, and receive earnings from anything that had once been hers.²¹ Common law, however, did recognize a difference regarding “ownership” of certain properties. “Real property” consisted of land and things attached to land, such as houses. “Personal property” consisted of money, stock, clothing, jewelry, and notably—slaves. Once

¹⁷ Ibid., 2:26.

¹⁸ Ibid., 2:42.

¹⁹ Ibid., 2:21.

²⁰ Ibid., 2:741.

²¹ Marylynn Salmon, “Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730-1830,” *William and Mary Quarterly* 39 (1982), 655-656.

married, the husband held all ownership rights to the wife's personal property including the ability to sell her personal property. The husband could not, however, sell any of her real property. He only held managerial rights to it and controlled the rent and profit.²² Salmon explained that this legal principle might be the reason why most marriage settlements included slave property rather than land, since the husband could not sell his wife's land or real property without her consent, but he could sell her personal property. Salmon also stated, "Such a pattern may indicate that fathers gave land to their sons, while daughters received slaves or money."²³

Under common law, the *feme covert* could not execute contracts, sell or own property, or write a will. The woman's property, upon marriage, could even fall prey to her husband's creditors, since, once married, it was technically his property.²⁴ Under equity law, women owned property through marriage settlements (marriage contracts), wills, or trusts.²⁵ Sometimes these contracts allowed for married women to own and control property under "separate estates," or write wills, or basically do most things that she could not do under the common law. As Carole Shammas has noted, marriage contracts allowing for separate estates were a way for the woman to keep her property away from her husband and his creditors.²⁶

The problem with equity law was not what women could *theoretically* do, but rather what the courts allowed them to *actually* do. Any legal document that involved the transfer of property to a woman, especially a married woman, had to be precisely worded as to cause no doubt to the extent of the ownership.²⁷ A downfall of equity law was that the means by which women owned property had to be so well defined and explicitly stated that the court could find no fault with the document or interpret it in a way that would be unfavorable to the woman and in conflict with the original intent of the legal document. In the following

²² Ibid., 655.

²³ Ibid., 665.

²⁴ Megan Benson, "Fisher v. Allen: The Southern Origins of the Married Women's Property Acts," *Journal of Southern Legal History* 97, (1998), 98.

²⁵ Suzanne D. Lebock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43, no.2 (1977), 199.

²⁶ Carole Shammas, "Re-Assessing the Married Women's Property Acts," *Journal of Women's History* 6 (1994), 10.

²⁷ Suzanne D. Lebock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43, no.2 (1977), 199.

three cases, *Kenley v. Kenley*, *Whitehead v. Middleton*, and *Kimball v. Kimball*, Justices William L. Sharkey or Cotesworth Pinckney Smith of the High Court of Errors and Appeals rendered each decision. Each case imposed a different type of judgment involving women and property ownership, thus showing the variations in the sphere of equity law.

For example, in *Kenley v. Kenley*, which was appealed from chancery court, the ruling of the judge decided in favor of the husband. In 1832, Phoebe Sims had entered a marriage contract with her fiancé Mr. Kenley. Phoebe, recently widowed, possessed property that she may have acquired through her deceased husband, thus the need of a marriage contract to keep safe her property from her new husband. The provisions of the contract included Mr. Kenley's promising "to relinquish all right. . . after marriage, of the liability of said property being taken for any debt which I now owe; neither do I wish or pretend to hold any claim to said property. . ."

The new Mrs. Kenley had marriage trouble with her husband. She asserted that he became "cross and ill natured" and used "ill treatment and abusive language." She left their house and tried in chancery court to remove her husband's name from the marriage contract and to have her property placed in her name alone. Why would she need to remove his name from a contract that basically stated that he had no claim to her property? At this time, if husband and wife entered a marriage contract without an official administrator, then the husband became the trustee of the property.

The court stated that the only justification of a woman to leave her husband would be that he caused her bodily harm, and that it was the duty of the wife "to disarm such a disposition in the husband by the weapon of kindness." Thus the court decided that she could not remove her husband as trustee stating, "We take it to be settled law that when no trustee is named in a marriage contract, the husband is by operation of law constituted the trustee, and as such is entitled to the possession of the trust property."²⁸ Thus, the marriage contract in this case did not serve to fully protect the woman's property from her husband, since the court would not accept his removal as a trustee. Even though in the marriage contract Kinley had explicitly surrendered his rights to Phoebe Sims's property after marriage, as Salmon noted, "What powers

²⁸ *D. Kenley v. P. Kenley*, 2 Howard 751 (Miss. Ct. App. 1838), State Law Library, Jackson, MS.

a woman held over her separate estate and what rights her husband or trustee retained needed clear delineation.”²⁹

On the other hand, in the case of *Whitehead v. Middleton*, appealed from probate court (another type of equity court), the judge ruled favorably for the widow and overturned the decision of the lower court. This case predominantly shows inconsistency between the lower court and the High Court of Errors and Appeals. Lydia, widow of William Whitehead, filed a petition for a right to dower in one-half of the personal and real property of her deceased husband. Under common law, dower was the widow’s right to at least one-third of the husband’s estate.³⁰ Sometimes a marriage settlement before marriage or similar contract during marriage could specifically give the wife title to more than a one-third share. In such a case it would be in the wife’s best interest to accept whichever devise afforded her the most property, which in this case would be the contract right as opposed to the dower right.³¹

The probate court tried to use a marriage contract devised between Lydia Whitehead and her husband to Lydia’s disadvantage. The marriage contract made no specific statutes and made vague statements with the only mention of property being “. . . that it is our desire to enjoy our property together, until death. . .” The probate court claimed the marriage contract was a “bar to the claim of dower.” This meant that since Lydia entered a marriage contract concerning property, she “barred” or refused her right to dower. Chief Justice Sharkey of the High Court of Errors and Appeals delivered the answer that “there can be no just ground for refusing her claim. . .” The court also questioned if the widow had right to dower in a mortgaged tract of land. The court ruled favorably again, stating “the widow must be entitled to dower.” Justice Sharkey therefore reversed and remanded the decision of the

²⁹ Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 101.

³⁰ Donna Sedevie, “Women and the Law of Property in the Old Southwest: The Antecedents of the Mississippi Married Woman’s Law, 1798-1839” (master’s thesis, University of Southern Mississippi, 1996), 22-23; and Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 16.

³¹ Donna Sedevie, “Women and the Law of Property in the Old Southwest: The Antecedents of the Mississippi Married Woman’s Law, 1798-1839” (master’s thesis, University of Southern Mississippi, 1996), 22; and Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 143-144.

lower court.³²

In the case of *M. Kimball v. T. Kimball*, appealed from chancery court, yet another different decision was rendered involving the extensiveness of opinions on marriage contracts. M. Kimball entered a marriage contract with her husband, T. Kimball, which said that he could not have any “access” to her property, meaning it could not be taken for his debts, and he could not sell it. Furthermore, M. Kimball had the right to distribute the property as she wanted. Margaret filed a suit against her husband to “recover possession of two slaves, and the proceeds of a note for six hundred dollars, which she claimed in right of a marriage contract.” Before the finish of the legal proceedings, Margaret died. The question now came into play regarding who would now own the property described in the contract.³³

Alfred King, the administrator of the marriage contract, claimed the property in the name of the deceased wife stating that the marriage contract she had made secured that property to “Mrs. Kimball and her heirs.” Heirs could mean children, maybe even by a previous marriage, or family members. Under common law, if the husband died, the woman was only guaranteed one-third of the property and the rest would cover debts or descend to his heirs only. On the other hand, if the wife died, and they had children, then the husband would receive a “life estate” in all the widow’s property. The only benefit he could not enjoy in a life estate would be selling the property, but he could receive all the profits from the land or rent for his lifetime. The court would give the life estate to the husband, claiming his right as “tenant by the curtesy” or guardians of the children. If the woman died, and there were no children, then the husband did not receive her property, but rather the property went to the heirs of the wife, such as her family or children.³⁴ As administrator of the marriage contract, King, therefore, defended the property of Mrs. Kimball on behalf of her heirs. The fact that the court gave the husband his deceased wife’s property, but did not name him “tenant of the curtesy” suggested that the couple had no children. Thus the husband had no real claim to the wife’s property,

³² *Whitehead v. Middleton*, 2 Howard 692 (Miss. Ct. App. 1838), State Law Library, Jackson, MS.

³³ *M. Kimball v. T. Kimball*, Howard 532 (Miss. Ct. App. 1837), State Law Library, Jackson, MS.

³⁴ Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 142-144.

and the court should have awarded the property to the “heirs of Mrs. Kimball” according to common law.

Chief Justice Sharkey studied the wording of the contract and commented on the phrase “no access to the said Margaret Ragan’s property either personal or real” stating that “if these terms could even be construed as vesting the property in her alone, the subsequent explanation is abundantly sufficient to show the true interpretation.” The only “true interpretation” this marriage contract accomplished, according to Sharkey, was “a suspension of the marital right of the husband over the property during coverture.” He said that since the woman died and the contract did not stipulate to whom the property would belong in case of her death that the property would belong to her husband. Sharkey noted that there was no clause in the contract that stipulated transference of the property in case she died, and “she did not exercise the power of appointment.” Therefore, the property belonged solely to her husband now.³⁵

This case showed that marriage contracts had to be extremely precise in order for the woman’s reasons and purpose for making the contract in the first place to be fulfilled. The words of the original contract in this case made it absolutely clear that Margaret Kimball did not want her husband to own her separate property. She took him to court and sued him for possession of her slaves and a six hundred dollar note “which she claimed in right of a marriage contract.” Also, she owned the property *before* she married. All of which made it evident that Margaret did not want her property in the hands of her husband. The ruling ultimately favored the husband simply because it ruled in favor of coverture which made all the woman’s property become the husband’s property, even though a contract had been explicitly made which granted absolute ownership to the wife. In other words, this decision ignored the contract that had previously been made and enforced coverture. Justice Sharkey also noted that even if Margaret had intended to provide for her children, because they were not specifically named in the contract, “they could not claim that property.”

The previous cases were all appealed from the courts of equity. In each case, the application of law depended upon the judge’s opinion. Such opinions inconsistently brought justice. The definitions and pre-

³⁵ *M. Kimball v. T. Kimball*, Howard 532 (Miss. Ct. App. 1837), State Law Library, Jackson, MS.

cision of devices such as marriage contracts and the legal implications attached to them show how judges' and chancellors' rulings had more discretion in a system of equity as opposed to common law, which offered a standardization for decisions. The following cases involve women and marriage contracts, but they were appealed to the High Court of Errors and Appeals from the circuit courts. The circuit court in these cases still accepted these marriage contracts as facts and evidence. Even though the circuit courts represented the common law that prohibited women from owning property, they still accepted marriage contracts, wills, and trusts. These matters were under jurisdiction of equity law that did allow women to own property, and the circuit court had to recognize the jurisdiction of equity law.

In *Magruder and Nichols v. Stewart's Administrators*, appealed from the circuit court, the entire court case referenced equitable matters and accepted them as fact to render a decision. A father made a will in which he bequeathed to his daughter, Ann, leaving her a life estate in certain slaves. Ann died; her descendants were the wives of Magruder and Nichols. The husbands officially went to court to sue in the name of their wives for the slaves that had been passed down to their wives. The court granted the husbands these slaves in right of their wives. Although the women could not officially go to court to sue for the slaves themselves, the whole basis of the court's decision rested upon the premise that it was indeed the wife's property first, which in turn gave the husband his right to it through coverture.³⁶

In *Hall v. Harriet Browder's Administrators*, appealed from the circuit court in 1835, the court clearly shows evidence of a marriage contract between husband and wife throughout the decision. Both the husband (Mr. Browder) and wife (Harriet Browder) died before the decision reached the High Court of Errors and Appeals, but the ownership rights were disputed for their administrators. The entire case is flooded with terminology deciding the intent and allowance of the contract. Although the original decision of the circuit court ruled that the marriage contract was sufficient to deny the husband's right to the property, the decision by the appellate court under Justice Smith ruled in favor of the husband's right to the property, despite the marriage contract.

Justice Smith ultimately ruled in favor of the husband's right to the

³⁶ *Magruder and Nichols v. Stewart's Administrators*, 4 Howard 204 (Miss. Ct. App. 1839), State Law Library, Jackson, MS.

property based on the marriage contract proviso of the husband's entitlement to "annual income or profits" of the land. But, Smith expressly stated throughout the decision that the marriage contract did in fact make the husband's "marital rights" or coverture rights null due to the wording of the contract. Therefore, at the same time he ruled in favor of the husband, Justice Smith upheld a small portion of the property ownership of the wife by acknowledging that the "marriage agreement prevented the marital rights of Browder from attaching to his wife's property. . ."³⁷

The case that historians talk about most when discussing the origins of the Woman's Law of 1839 is *Fisher v. Allen*. The noteworthy aspect of the decision ruled that a slave was the separate property of the wife. This decision directly gave property ownership to the wife. This, along with the case being tried in 1837, close to the time of the passage of the Married Women's Property Act, have made it convenient to link the two events together. Other cases as I have shown did in fact give women property or at least acknowledge their property ownership, just not as explicitly as *Fisher v. Allen*. The circuit court, not the chancery court tried this case, just as it did with *Magruder and Nichols v. Stewart's Administrators* and *Hall v. Harriet Browder's Administrators*. Evidentially, such matters of equity were overflowing into the common law sphere of circuit courts.

The *Fisher v. Allen* court case began in the Monroe County Circuit Court in 1830. A quick summary behind this case is that a Chickasaw woman, Elizabeth Allen, had deeded a slave to her daughter Susan around 1829. Elizabeth's husband, James Allen had become indebted to a man named John Fisher. Fisher took Allen to court, and the judge granted authority to John Fisher, along with the Monroe County sheriff, to collect James Allen's property in payment for his debt. Among the property taken was the slave, Toney, whom Elizabeth Allen had deeded to her daughter. Next, "James's son George Allen filed suit against Fisher on behalf of his minor sister Susan Allen, claiming that the slave Toney was in fact her property and not that of her father." The judge at the Monroe County Court ruled in favor of Susan Allen in *John Fisher v. Inter Susan Allen*, stating that ". . . the defendant go hence and recover of the plaintiff the cost in this cause expended. . ." Therefore this

³⁷ *Hall v. Harriet Browder's Administrators*, 4 Howard 224 (Miss. Ct. App. 1839), State Law Library, Jackson, MS.

case actually began in the circuit court, and the judge granted property ownership to the woman. Fisher then appealed to the Mississippi High Court of Errors and Appeals.³⁸

Justices Sharkey and Smith affirmed the decision of the Monroe Circuit Court. They accepted that Susan had a rightful claim to the property “under donation by deed, executed on the 14th day of November 1829. . . by Betsy Love, who was the mother of the donor. . .” The court asked whether or not Allen was subject to common law. Under coverture the slave would belong to Allen, making Fisher eligible to collect the slave to pay for Allen’s debt. As shown through an analysis of other court cases, the ruling of this case could be based off the deed. As with marriage contracts giving women separate property ownership, Allen contractually deeded to her daughter a slave named Toney. Therefore, like these other cases, the circuit court had reason to uphold the deed and separate right to the slave in accordance with equity law.

The High Court of Errors and Appeals decided that Chickasaw tribal custom granted the husband no right to the property of the wife. “It remained to her separate use and subject alone to her disposition and constraint.” According to Chickasaw tribal law, the wife “had a right to own separate property, to dispose of it at pleasure, to create debts and in most things act as a feme sole.”³⁹

This difference allowed the slave Toney not to be confiscated for James Allen’s debts. Betsy Allen was not married under common law, which would have given her the name “feme covert,” (which would have given her property to her husband upon marriage.) The court gave preference to tribal law over common law (in this particular case) just as it had been giving preference to equity law in some cases.

Henry Ingersoll, writing in the *Yale Law Journal*, in 1911, noted in states such as Mississippi that have a chancery court separate from common law court, that the “powers and jurisdictions” of both the chancery court and the common law court have been extended, “with the result that there is a broader zone of concurrent jurisdiction . . . and the lines of jurisdiction are not so sharply drawn. . .”⁴⁰ With the jurisdiction of

³⁸ Robert Gilmer, “Chickasaws, Tribal Laws, and the Mississippi Married Women’s Property Act of 1839,” *Journal of Mississippi History* 68 (2006), 131-148.

³⁹ *Fisher v. Allen*, 2 Howard (Miss.) 611 (1837), State Law Library, Jackson, MS.

⁴⁰ Henry H. Ingersoll, “Confusion of Law and Equity,” *Yale Law Journal* 21, no. 1 (1911), 63.

these separate courts sometimes overlapping, naturally these courts would have seen cases that involved the same subject matters—such as women and property rights.

As seen in the cases discussed above, the various interpretations of equity law allowed judges to render particular decisions for each case. While sometimes this practice proved to be beneficial to the married woman, other times it did not. Judges used their own discretion in cases involving women and property ownership, since a uniform standard under common law – with one statute to refer – did not exist. Common law at first allowed married women no separate property rights. Equity law eased this disadvantage by providing loopholes. These loopholes proved to make the interpretation of law convoluted and dense to the point that it was simply easier for common law to allow married women separate property rights. As Salmon explains, while equity represented variation and diversity in the law, the Mississippi Married Women's Property Act served as a standardization of the law.⁴¹

While the *Fisher v. Allen* case, which occurred in 1837, can be seen as a decision that partially led to the passage of the Married Women's Property Act of 1839, it cannot be identified as a sole factor. Some historians have looked conveniently at the *Fisher v. Allen* case, because it occurred before the Woman's Law, and its decision gave a married woman separate property under Chickasaw tribal law. But, they have failed to realize this court case's prominence among a larger composition of equity cases. It belonged to a whole movement of court cases that slowly gave women ownership of property and represented a gradual change in giving women more property rights. Griffith's *Chancery Practice* also hinted that the chancery courts heard cases each with the "same state of facts." Such cases required a consistent remedy, ". . . the law courts later began to include some of the same features as remediable at law."⁴² Cases dealing with property rights of women became frequent to the point of needing a new law or statute to provide adequate justice. As Salmon noted, ". . . legal discussions of the contracts that did make their way into court forced jurists to confront the contradictions in the

⁴¹ Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 1-13.

⁴² V. A. Griffith, *Mississippi Chancery Practice* (Indianapolis: Bobbs-Merrill Company, Inc., 1950), 2:24.

laws on women and property.”⁴³

The inconsistencies in the previous court cases mentioned can also be attributed to the social hierarchy in place during the early nineteenth century. Equity law simply made it easier for the judge to use his discretion to keep those traditions in place. Patriarchal authority ensured that the social hierarchy would be upheld.⁴⁴ White males held power over their female counterparts, their heirs, and, of course, their slaves. If a woman did not overstep her marital boundaries, then the courts sometimes granted her property ownership, (more liberally if it was slave property.) Tradition and social structure among females represented a sort of hierarchy as well. Married women, widows, and divorcees each held a different status in the eyes of the nineteenth century patriarchal society.

Modern history has sometimes recognized the Mississippi Married Women’s Property Act of 1839 as a revolutionary act purposefully giving women more freedom. Some have misleadingly suggested that Betsy Allen led the fight for women’s property rights.⁴⁵ The bill did not greatly enhance women’s rights with regards to owning property in a manner that could not have been handled under equity law, but the act standardized into statute that a married woman could own her own property. Therefore, later bills such as the Mississippi Act of 1846 and Mississippi Act of 1857 could build upon this act to in fact grant women more rights with concern to property such as the ability to control and manage their property and to receive earnings from that property.⁴⁶ This act was in no way a progressive move for feminine equality, but it would help diminish the social structure in place, for white women at least. The bill granted women property ownership despite their individual

⁴³ Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 83-84.

⁴⁴ Christopher Morris, *Becoming Southern: The Evolution of a Way of Life, Warren County and Vicksburg, Mississippi, 1770-1860* (New York, Oxford: Oxford University Press, 1995), 91-96.

⁴⁵ “Love Local History,” *Commercial Appeal*, November 12, 1933; and “Mississippi Women Owe Debt to Property Fight in 1800s,” *Clarion Ledger*, November 5, 1989; and Thompson, Ray M. “Another Mississippi First-The Protected Rights of Married Women,” *Daily Herald*, Biloxi and Gulfport, November 6, 1961; Mississippi State University, Mitchell Memorial Library, Special Collections; and “Mississippi Legislature Adjourned Session: Speech of Mr. Boyd,” *Tri-Weekly Mississippian*, February 16, 1839; Mississippi State University, Mitchell Memorial Library, microfilm.

⁴⁶ *Biographical and Historical Memoirs of Mississippi*, Vol. 1 (Chicago: The Goodspeed Publishing Company, 1891), 123.

status with their husband, signifying more freedom from coverture.⁴⁷

⁴⁷ Alexander S. Gould, *A Digest of the Laws of Mississippi: Comprising all the Laws of a General Nature, Including the Acts of the Session of 1839* (1839): Chapter XXVI, 920-921. Mississippi State University, Mitchell Memorial Library, Special Collections.

