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NOTE

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Yvette Joy Liebesman*

“It was all Mrs. Bumble. She WOULD do it,” urged Mr. Bumble; first looking round to ascertain that his partner had left the room.

“That is no excuse,” replied Mr. Brownlow. “You were present on the occasion of the destruction of these trinkets, and, indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction.”

“If the law supposes that,” said Mr. Bumble, squeezing his hat emphatically in both hands, “the law is a ass—a idiot. If that’s the eye of the law, the law’s a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience.”

Laying great stress on the repetition of these two words, Mr. Bumble fixed his hat on very tight, and, putting his hands in his pockets, followed his helpmate downstairs.

—Charles Dickens, Oliver Twist

I. INTRODUCTION

With our contemporary, Western eyes, we tend to view the social constraints placed on Arab and third-world women as something long left behind in our own enlightened society. Yet we are only a few generations removed from circumstances in which our own freedom was sharply curtailed. Property, suffrage, and liberty rights of women are not guaranteed to last forever. It is not just places such as Iran and Afghanistan where women’s rights are threatened. While our own history demonstrates long-term forward progress and expansion of women’s rights, it is also marked with periods of back-treading, and there is no abso-

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2. The most well-known example of this is Utah’s granting women’s suffrage in 1870, and then revoking it in 1887. Kris W. Kobach, Note, Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, 103 Yale L.J. 1971, 1981 n.46 (1994). However, New Jersey performed the feat almost one century earlier. The 1776 New Jersey Consti-
lute assurance that the rights women in the United States enjoy today will be present in the future.

Abiding by English law, married women in colonial America were legally considered as nonentities. The eastern colonial legal system originally developed under the strong influence of English law, which greatly limited women's freedoms. Colonial American jurisprudence did not allow married women to buy or sell property, run or manage a business, sue or be sued, or have ownership of even the clothes they wore. As the frontier shifted westwards, newer settlements, influenced by the shortage of women, their impact on settling beyond the borders, and the independent nature of those attracted to exploring and settling the expanding territories, adopted fewer restrictions on women's rights. Wyoming was the first territory to permanently grant suffrage to women in 1870.3 More than four years before the enactment of the 19th Amendment granting suffrage to all women in the United States, the first United States Congresswoman, Jeanette Rankin,3 was elected in Montana in 1916. The evolution of women's rights was more difficult in states founded during America's colonial era, where European traditions were firmly ingrained in the fabric of society from the time of the settlements' founding. The lack of political traditions in the newly settled western regions allowed women to solidify their significance to the community and thus have greater rights than those married women who remained back east, where the legal system remained firmly based on English common law.

The beginnings of codified married women's property rights in Pennsylvania, initially established under the 1718 Pennsylvania Femme Sole Trader Act, may be contributed to three sources: (1) the influence of the Quakers; (2) the foundation set by William Penn, Pennsylvania's founder, who sought to establish a colony that granted more expansive rights than elsewhere in the English colonies of the New World; and (3) the control of Hannah Penn over her husband's estate and business affairs during his final years of incapacity prior to his death. The realities of an economy based on trade required an adaptation of the laws that governed the land-based economy of England.6 The abandonment by their husbands and absent merchant husbands made it necessary for married women in the colonies to have greater legal rights to conduct business, conclude contracts, and own property. The enactment of the Femme Sole Trader Act could have been a groundbreaking step in the expansion of women's rights, or merely the formal acceptance, in part, of a common practice. It may have been either a necessary step to protect abandoned women and their children, or a measure to protect the rights of those who had business interactions with married women, who were not merely acting as agents of their husbands, but independently engaged in trade. While it may not be possible to definitively answer these questions, by examining some of the legal instruments of the period, we may call into question a common belief that married women at the time were merely the chattel of their husbands, with no legal standing and no ability to act as independent vessels in the stream of commerce.

While the English and Dutch common law influenced the legal system of the New York

3. See Kobach, supra note 2, at 1981.
colony, their similarities did not necessarily result in comparable property rights, or the impetus for legislative action to establish or acknowledge these rights. This is due in part to the different foundation on which the colony was based and the governing influences of the day on the particular colony. The body of this article is divided into three sections. Part II explores the differences between the status and rights of married and unmarried women during the seventeenth and eighteenth centuries under English law. It begins with a discussion of the difference between a *femme sole* and *femme covert* under English law, and continues with the development of English common law regarding *femme coverts* and the 'custom of London,' which was a deviation from the *femme covert* role of married women. Part III addresses the divergence in the evolution of women's property rights in colonial Pennsylvania and New York, and the influence of Dutch, Quaker, and English ideologies on these developments. Specifically, Part III discusses (1) the common law of *femme coverts* as transferred to the colonies, including legal maneuverings around the common law through mechanisms such as trusts and the Doctrine of Necessaries; (2) the influence of William Penn and the Quaker tradition and an analysis of the Femme Sole Trader Act, which was the first legislation in the colonies granting married women some rights to conduct business as *femme soles*; and (3) the concurrent regression of married women's rights in the New York colony during this period.

Part IV presents the further evolution of the laws of England, Pennsylvania, and New York from the time of the Femme Sole Trader Act until the point at which married women in these three regions attained property rights equal to those of men and single women. This note then concludes with a discussion of whether a regression towards the unity doctrine and *femme covert* status of married women is possible in contemporary society.

II. THE FOUNDATIONS OF THE FEMME SOLE TRADER IN ENGLISH LAW

A. Femme Sole Versus Femme Covert

Eighteenth century English law provided different rights for unmarried (*femme soles*) and married (*femme coverts*) women. The history of England demonstrates occasions where *femme* (or *feme*) *soles*, which included spinsters as well as divorced and widowed women, had most of the rights of men, including the right to enter into contracts, own and convey property, hold their own manorial courts, and sue in the Royal courts. Under English common law in the eighteenth century, the property qualifications for suffrage were the same for men and women. Prior to 1832, no English law absolutely excluded women from voting, and “unmarried women who were ‘freeholders’ (real property owners) might claim the vote in a particular jurisdiction, if they fought for it in court.” In *Coates v. Lyle* (ca. 1619), it was noted “that a *femme sole*, if a freeholder, could vote . . . with the addition that on marriage the right to vote is conveyed to the husband.”

The rights granted to unmarried women were seemingly lost once she wed and became a *femme covert*, through the doctrine of “couverte,” or the “unity principle,” as stated by William Blackstone in his *Commentaries*:

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

7. Also referred to as the “Doctrine of Necessities.” See Elizabeth A. Heaney, *Pennsylvania’s Doctrine of Necessities: An AnachronismDemanding Abolishment*, 101 Dick. L. Rev. 233 (1996) (citing Gessler v. Gessler, 124 A.2d 502, 505 (Pa. Super. Ct. 1956) (stating that, under Pennsylvania common law of the Doctrine of Necessities, “[a] husband is under a legal duty to support his wife and children, and where he neglects this duty, one who supplies necessaries for their support may recover their cost in an action under the common law, which raises an implied promise, on the part of the husband, to pay.”)). See infra Part IV. A.


9. Id.
10. Id.
11. Id.
under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture . . . . 12

In essence, once married, through a legal fiction a woman and a man were consolidated into a single being; yet one being could only have a single head guiding it, and that one head was that of the man. 13

With regards to her rights in the courts at law, the unity doctrine provided that a married woman could not sue or be sued; rather, all legal actions were taken through her husband. While most of the tenets of the Unity Doctrine are no longer present in modern jurisprudence, spousal privilege remains:

If the wife be injured in her person or her property, she can bring no action for redress without her husband’s concurrence, and in his name, as well her own; neither can she be sued . . . . But in trials of any sort they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person. . . . 13

Sir Edward Coke wrote in 1628 that “it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband.” 15 Justice Burger, writing in Trammel v. United States, elaborated that,

[This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now

long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife. 16

Thus, if a defendant had the right against self-incrimination, and the Unity Doctrine dictated that a husband and wife were one being, then for either to testify against the other would constitute a breach of this right, as it would be viewed as identical to compelling testimony against oneself.

Blackstone’s Commentaries on the Unity Doctrine recognize that because the wife did not have a separate legal existence, she could not execute agreements or devise her property, because she did not have the right to legally bind her husband to contracts or convey what was rightfully his.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void. . . . She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. . . . These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England. 17

Blackstone believed that, for her own protection, a married woman was under the complete dominance of her husband. 18 As he alone controlled the property for both of them, only he had the power to relinquish it or to enter

12. Zaher, supra note 6, at 459-60 (quoting 1 William Blackstone, Commentaries *442).
13. See id. at 460.
14. Id. (quoting 1 William Blackstone, Commentaries *442).
16. Id. at 44. Justice Burger further wrote that, “despite its medieval origins, this rule of spousal disqualification remained intact in most common-law jurisdictions well into the 19th Century . . . . The modern justification for this privilege against adverse spousal testimony is its perceived role in fos-
into binding agreements.\textsuperscript{19} Blackstone viewed women as weak, therefore such control was necessary for their own protection.\textsuperscript{20} A wife could not make testamentary disposition of property to her husband because he was already in possession of her property through her coverture.\textsuperscript{21} Blackstone reasoned that, since any gift or grant to a man’s wife was in fact a gift to himself, and any contract with her was merely a contract with himself, it was impossible for a man to enter into a contract with his wife or convey any property to her.\textsuperscript{22} However, a husband was obligated to pay his wife’s debts, as they were the same as if they were his own.\textsuperscript{23} He was bound by law to financially support her through the Doctrine of Necessaries.

For this reason, a man cannot grant anything to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence; and to covenant with her, would only be to covenant with himself. . . . The husband is bound to provide his wife with the necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them. . . .\textsuperscript{24}

The doctrine of necessaries dictated that, although she lost her legal existence, her husband was responsible for providing the necessities (food, shelter, clothing) for her and their offspring.\textsuperscript{25} It “originated from the feudal-medieval concept that, as the head of the family, the husband was responsible for the needs of those dependant on him to provide life’s necessities.”\textsuperscript{26} The English courts recognized the doctrine more than three centuries ago “as a means of enforcing a husband’s duty to support his wife during an ongoing marriage.”\textsuperscript{27} Early cases in the seventeenth and eighteenth centuries declared that “the husband has a duty to support his wife, that she has a duty to render services in the home, and that these duties are reciprocal.”\textsuperscript{28} Twila L. Perry’s study reconsiders the duty of support and services under the doctrine of necessaries.\textsuperscript{29} She details this historical division of labor as “a combination of moral precepts based on religious teaching, stereotypes about the natural proclivities of men and women, and practical realities,”\textsuperscript{30} which operated to reinforce the belief that a woman’s proper role was maintaining the home and the needs of her family.\textsuperscript{31} A femme covert had no right to her wages—any income earned by her labor belonged to her husband. In addition to her inability to contract on her own, this deprivation removed the economic means by which she could purchase necessaries.\textsuperscript{32} The doctrine of necessaries was the safety net for women whose husbands refused to provide support when able to do so.

Under the doctrine of necessaries, if a husband neglected his duty to provide his wife with the necessities of life, he was liable, under principles of restitution, to pay a merchant who supplied the necessary goods to her. The doctrine of necessaries was extremely important because at common law, a woman basically forfeited her legal existence upon marriage. As a result, a wife could not contract on her own for food, clothing, or medical needs. Like the duty of support, the necessaries doctrine was gender based. Husbands were obligated to pay for the necessaries of their wives, but wives did not have a corresponding

\textsuperscript{19} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Zaher, supra note 6, at 460 (quoting 1 William Blackstone, Commentaries *442).
\textsuperscript{25} See Heaney, supra note 7, at 235-37. See infra, Part III.
\textsuperscript{26} A. for further discussion on the transfer of this doctrine to the colonies.
\textsuperscript{27} Heaney, supra note 7, at 237.
\textsuperscript{29} Clrk, supra note 27, at 181 (citations omitted).
\textsuperscript{31} Id.
obligation to pay for the necessities of their husbands.\textsuperscript{33}

Thus, a married woman, a \textit{femme covert} under English law, and by extension, the colonial American system of the early eighteenth century, had no legal existence and became "civilly dead."\textsuperscript{34} Yet, as noted throughout the following sections, other legal instruments for coping with the realities of daily living were often at odds with this relegation. Those with the means and wherewithal maneuvered around these legal impositions, turning the \textit{femme covert} status into more of a legal fiction than a total impediment towards the ability of married women to retain some of the rights of a \textit{femme sole}.

B. The Intricacies and Maneuverings of the English Common Law Regarding Femme Coverts

In the seventeenth and eighteenth centuries, English wealth, and its preservation, was rooted in land; the ability to retain it was of paramount importance. Inheritance laws worked to maintain land within the family lineage; if a wife or daughter were to inherit more than a limited portion of an estate, then the original family's position could be diminished by a subsequent marriage.\textsuperscript{35} Claims to it by a widow's family upon her death would be relatively weak, although the rights of dower would have protected the widow during her lifetime.\textsuperscript{36}

English legal essayist Tapping Reeve noted that, by marriage, a husband acquired absolute title to all personal property of his wife, and, until his death, the property could never again belong to his wife.\textsuperscript{37} There were narrow exceptions, as in the case where a married woman was a trustee for another person; she had control of those lands independent of her husband.\textsuperscript{38}

Under practical terms, however, this general rule was often not the case. \textit{Femme sole} merchants, by custom of London, granted that "if a \textit{fem[m]e covert}, the wife of a freeman, trades by herself in a trade, with which her husband does not intermeddle, she may sue and be sued as a \textit{fem[m]e sole}, and the husband shall be named only for conformity; and if judgment be given against them, she only shall be taken in execution."\textsuperscript{39} English courts continuously up-

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\item \textsuperscript{33} Perry, supra note 29, at 11-12.
\item \textsuperscript{34} Zaher, supra note 6, at 460 (citing the 1848 Seneca Falls Declaration of Sentiments, reprinted in Joan Huff, Law, Gender & Injustice: A Legal History of U.S. Women 383 app. 2 (1991)). It should be noted, however, that in England, a Queen (regent, consort or dowager) was always considered a \textit{femme sole}. See A TREATISE OF FEMME COVERTS: OR THE LADY'S LAW 82-83 (Garland Publishing Inc. 1978) (1732).
\item \textsuperscript{36} Id. at 149.
\item \textsuperscript{37} TAPPING REEVE, THE LAW OF BARON AND FEMME; OF PARENT AND CHILD; OF GUARDIAN AND WARD; OF MASTER AND SERVANT; AND OF THE POWERS OF THE COURTS OF CHANCERY, WITH AN ESSAY ON THE TERMS, HEIR, HEIRS, AND HEIRS OF THE BODY 120-22 (New Haven, Oliver Steele, 1816).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} THE LAWS AND CUSTOMS, RIGHTS, LIBERTIES AND PRIVILEGES OF THE CITY OF LONDON 111 (Cornhill, R. Withy 1765) [hereinafter LAW AND CUSTOMS]. As early as 1231, it was established that a wife who lived apart from her husband could be sued for her debts, and that by the custom of some towns, such as London, could be sued "if she were carrying on a trade apart from her husband. . . . These borough customs, which treated the woman who carried on a trade apart from her husband as, in some respects independent" was a remnant of the theory of community ownership between husband and wife. See 3 WILLIAM HOLDsworth, A HISTORY OF ENGLISH LAw 523-25 (1966). Holdsworth states that historians recognize that, in Western Europe during the Middle Ages, there were two main systems regarding the relationship between a husband and wife. The first recognized, to varying degrees, community ownership of property, either movable or through acquisition. The second system developed nonrecognition of community ownership; the husband and wife were one, with the husband having dominion over the wife. While the Roman legal concept of \textit{dos} or dowry safeguarded a married woman's property, canon doctrine followed that marriage was "a sacrament which makes the husband and wife one flesh, and gives the husband dominion over the wife." Id. at 521. For a thorough discussion of Roman \textit{dos}, see WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 437-38 (Longwood Press 1977) (1870).
\item The unity doctrine gradually became the dominant law in England. "English law of the twelfth and the beginning of the thirteenth centuries is the law of a period which has not yet made up its mind as to the position of the married woman." 3 HOLDsworth at 522. However, through the course of the thirteenth century, England rejected the community property theory in favor of the unity doctrine. The abolition of community began in the common law for the nobility, while safeguarding the inheritance of land within a family was of paramount importance and the unity doctrine served as a means to accomplish this. The merchant class held onto the community property laws (where few owned land—moveable property was their chief concern), but eventually "the common law made the law of the nobles the law for all," and resulted in a significant erosion of married women's property rights. Id. at 524. The custom of the \textit{femme sole} trader is one of the last vestiges of the common law of the
\end{itemize}
held the legitimacy of *femme sole* merchant status embodied in the custom of London.\(^{40}\)

Prior to the Married Women's Property Act of 1870, other creative legal manipulations were also used to circumvent the lack of common law property rights for *femme coverts*, such as the use of trusts.\(^{41}\) "[A] married woman could at law have no personal property, but in order to secure to her the equitable interest in property, it was vested in trustees for her, and then at law the property was not hers but that of the trustees."\(^{42}\) If money were bequeathed to a married woman without the intervention of trustees, it went to her husband.\(^{43}\) However, English contract law allowed for marriage settlements, from the court of chancery (court of equity) to protect “a wife’s equitable separate estate.”\(^{44}\) This provided for the equivalent of today’s prenuptial agreement, a contract between the betrothed couple which allowed the woman, once married, to control some or all of the property she brought into the marriage.\(^{45}\) This was performed through a legal work of art, where the future wife's property was placed in a trust.

An example illustrating how this was accomplished can be seen through the legal maneuverings prior to the marriage of Elizabeth Wright, Lady of the Manor of Cranham Hall. She sought to preserve her claim on Cranham Hall, which she had inherited in 1741, prior to her marriage to James Oglethorpe (who had founded the American colony of Georgia).\(^{46}\) In 1744, Elizabeth Wright negotiated a pre-marital agreement with her betrothed; in this contract, Elizabeth's lands were placed in trust to her lawyers, but it gave Oglethorpe a life estate in the Manor at Cranham Hall, which reverted to Elizabeth upon his death.\(^{47}\) Thus, while Oglethorpe had the use of the Manor and the income derived from it, he was unable to sell or mortgage it, thus preserving Elizabeth's interest in it through the trust. These adaptations of English jurisprudence regarding *femme coverts* were transferred to the legal and social system established in the English colonies in America.

III. THE DIVERGENCE IN THE EVOLUTION OF WOMEN’S PROPERTY RIGHTS IN PENNSYLVANIA AND NEW YORK

This section discusses the *femme covert* doctrine’s transfer to the English colonies in America, and then its transition through legal maneuverings towards granting married women some of the rights of *femme soles*.

A. Transferring the Common Law Regarding Femme Coverts to the English Colonies in America

While married women were also held as *femme coverts* in the colonies in America, the legal maneuverings in equity continued there as

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40. See Langham v. Bewett, (1625) 79 Eng. Rep. 661-62 (K.B.) (declaring that a wife may carry on her husband's business as a *femme sole* trader if he does not meddle in her business); see also Royston v. Ivory, (1674) 84 Eng. Rep. 733 (K.B.) (affirming the rights of *femme sole* merchants, with certain restrictions—the *femme sole* merchant could only conduct her business in London; also, if her husband meddled in her trade or was in the same trade, she was not considered a *femme sole* merchant. However, if her husband conducting the same trade abandons her, goes bankrupt, or they exercise the trade distinctly apart from each other, she is considered a *femme sole* merchant.) See David Hughson, An Epitome of the Privileges of London, Including Southwark, as Granted by Royal Charters, Confirmed by Acts of Parliament and Established by Ancient Custom 225-26 (Sherwood, Neely, & Jones, eds., 1816) (1813).

41. Ramsay v. Margrett, [1894] 2 Q.B. 18, 25. See also Amy Erickson, Women and Property in Early Modern England 106-113 (1993) (stating that “[t]he first explicit statement of a woman's right to a trust for her separate use was not made until 1673, in the case of Doily v. Perfull: a woman might assign 'her term in trust for her self before marriage.'”)

42. Id.

43. Ramsay, 2 Q.B. at 25. While the enactment of the Married Women's Property Act of 1870 granted some rights to married women, the Act of 1882 provided full proprietary rights. A married woman's money and other personal property were her own and did not pass to her husband. The designation as a *femme covert* disappeared and, as Lord Esher, M.R. stated in his opinion, "a married woman and her husband are no longer in law one person; they are two persons, just as if they were two men." Id.


46. Tony Fox, The Life and Times of Two Georgian Gentlemen 14, 30-31 (EBD Group 2002).

47. Id. at 30-31.
well. Trusts such as those of Elizabeth Wright made their way to those women in colonial America with possessions worth holding onto after marriage. Other legal resources expanded in the colonies, such as the power of attorney, by which a husband who expected to be away would grant his wife the power to act on his behalf in writing.

The colonial American courts also adopted the doctrine of necessities (also referred to as the doctrine of necessities). Since a husband in a colony, just as in Mother England, controlled all of his wife’s possessions, here too equity demanded that he be responsible for providing her and their children with the necessities of food, shelter, and clothing. “The husband’s duty to support his wife, and the wife’s duty to render services to her husband, are two of the most ancient concepts of common law.” When transferred to Pennsylvania and New York, under common law “a husband is under a legal duty to support his wife and children, and where he neglects this duty, one who supplies necessaries for their support may recover their cost in action under the common law, which raises an implied promise, on the part of the husband, to pay.” It was “a recognition by the courts of the limited economic potential that a married woman once possessed.” However, when the husband refused to support his wife, there was little recourse for her even with the doctrine of necessities. A merchant in the colonies, as in England, was under no obligation to accept a wife’s credit under the doctrine of necessities, and she may find herself at the mercy of relatives and charity for her needs, as was the case of Mary Jones Penn, the daughter-in-law of Pennsylvania’s founder, William Penn.

Not all wives whose husbands went to sea were abandoned or left without a visible means of support. A practice in some colonies was for a husband to grant power of attorney to his wife, “allowing her to do all of [his] business whatsoever relating to [him], as though [he himself were] present.” In this way, “even as a married woman whom the law defined as a femme covert, [a wife] gained the authority to manage property and legal matters as she deemed proper.” Power of attorney allowed a husband to designate that his wife had the legal responsibility to act on his behalf by recording his grant to her. Usually men granted power of attorney to their wives in anticipation of travel out of the county, especially if they ventured out of the colony. In granting these powers, the men [especially those in prosperous, commercially active families] believed their interests were best served when their wives had

At the common law the legal existence of the wife was, for most purposes, merged in that of the husband. She was not allowed to hold property to her separate use; and in harmony with the same idea, she was denied the capacity to contract. The common law was consistent with itself. Having destroyed the power to hold and control her property, the power to contract, which is incident to the other, was destroyed along with it. But this rule, though consistent, was narrow and restricted, and did not meet the wishes or the interests of society. The court of equity, therefore, early found means to evade it, through the intervention of trusts for the separate use of married women. Id. (citation omitted).
49. See infra notes 50-54 and accompanying text.
51. Id. at 857.
55. Id. at 303.
56. See infra notes 65-66 and accompanying text.
57. Linda L. Sturitz, “As Though I My Self Was Pr[e]sent”: Virginia Women with Power of Attorney, in The Many Legalities of Early America 250, 250 (Christopher L. Tomlins & Bruce H. Mann, eds., 2001). Sturitz illustrates this arrangement’s use through the example of William West of Essex County in 1716. As he planned to leave the colony, he granted power of attorney to his wife, Elizabeth, allowing her to conduct all matters related to his business during his absence. By examining the court documents of the time, Sturitz determined that this was not an isolated incident, but rather a common practice, and that colonial Virginians of the tidewater region did not believe that being female precluded aptitude in business. In this manner, married women, who by law were femme covert, obtained the “authority to manage property and legal manners as she deemed proper.” Id. 58. Id.
the legal authority to pursue the family's business in the local courts [and in conducting business transactions related to his local economic concerns].59

This legal maneuvering sidestepped the limitations of married women under the unity doctrine, as necessitated by the realities of life in a commerce-based society.

By 1718, the colonies had already diverged from their mother country in the development of the economic basis of their society.60 With the exception of large cities such as Bristol, London, or Norwich, most of England was rooted in an agrarian economy, concerned mainly with local spheres of commerce and trade.61 The English Parliament was dominated by the landed gentry, and the conservation of estates was paramount; the interests of the merchant and peasant class were viewed as subordinate.62 The dominant source of capital in sixteenth and seventeenth century England was in the land, and the income generated from such property (comprised of both rent and agriculture production), though a strong merchant class was beginning to emerge. In the colonies, it was the opposite. Trade predominated over land value, and extensive travel by merchants away from home, in pursuit of these commercial interests was commonplace. By leaving his wife with a power of attorney, a traveling merchant could thus be secure in the knowledge that his business concerns at home were well-cared for by someone with an economic stake in their success while he was away.63


William Penn sought to establish a colony in the New World based on the principles of his Quaker faith, one providing religious freedom for all of those who professed a belief in God. He theorized that a settlement grounded this way would create a utopian society.

For my country, I eyed the Lord, in obtaining it; and more was I drawn inward to look to him, and to owe it to his hand an power, than to any other way; I have so obtained it, and desire to keep it; that I may not be unworthy of his love; but do that, which may answer his kind Providence, and serve his truth and people: that an example may be set up to the nations: there may be room there, though not here, for such an holy experiment.64

William Penn came of age during the reign of Charles II, who regained the monarchy after the failure of Oliver Cromwell’s experiment with representative government. Penn’s father had attained the rank of Admiral in the Royal Navy, and had been granted several estates in England and Ireland in recognition of his service to the crown. During his early schooling, while his family resided on a recently acquired estate in Ireland, William was exposed to the “ugly manifestations of religious intolerance and hypocrisy” in the form of religious persecutions of sects such as the Quakers.65 To his father’s dismay, William left the Royalist Church of England to become a member of the Society of Friends; for this he was jailed on several occasions.66 The experience of his trials in En-

59. Id. at 251.
61. See generally LAWS AND CUSTOMS, supra note 39, at 111.
62. See generally 3 Holdsworth, supra note 39, at 523-25.
63. Sturtz, supra note 57. For a detailed discussion on the variety of uses of the power of attorney to provide a range of rights for married women, including limited grants of authority, protection of children of previous marriages, and its ability to circumvent the femme covert status of married women, see Sturtz, supra notes 58-59.
66. Id.
gland ingrained in William the importance of judicial process for the accused.67

Upon Admiral Penn's death in 1670, William Penn inherited the bulk of his father's estate. In 1681 he accepted a proprietary charter for the colony of Pennsylvania from Charles II, in lieu of a debt owed by the Crown to his late father.68 He sought to establish a province in which there was tolerance and freedom of conscience, following the Quaker tenet that "every liberty demanded for oneself should also be extended to others."69 William Penn wrote about this "liberty of conscience," which was grounded in his Quaker faith:

Conscience is God's throne in man, and the power of it his prerogative.

Liberty of conscience is every man's natural right, and he who is deprived of it is a slave in the midst of the greatest liberty.

There is no reason to persecute any man in this world about anything that belongs to the next.

No man is so accountable to his fellow creatures as to be imposed upon, restrained or persecuted for any matter of conscience whatever.

For the matters of liberty and privilege, I propose...to leave myself and successors no power of doing mischief, that the will of one man may not hinder the good of the whole country.70

William Penn believed that there were three secular liberties, which expressed the Quaker principle of reciprocal liberty: (1) that men were entitled to their own lives, liberties, and estates; (2) that men should be governed through a representative government and that taxes could only be imposed by consent of the governed; and (3) that all free-born Englishmen, when brought up on charges, had a right to a trial by a jury of their peers.71 His ideals resonated strongly with contemporary notions of liberty, and were stronger than those rights in other colonies, as well as those rights granted in England.72 The laws enacted by Pennsylvania granting these liberties are similar to many rights granted in the U.S. Constitution's Bill of Rights.

For the next three decades, Penn worked to develop the legal foundations and the economic basis of his colony. This included the appointment of successive colonial governors who professed Penn's beliefs, as well as the establishment of a like-minded legislature to enact laws and develop a constitution that utilized the Quaker foundations of liberty. For its economic basis, Penn desired that men should be able to prosper based on their industry.73 While none of the rights he sought to establish seemed to extend to women, Quaker theology would dictate that it was logical in the developing colony to institute equitable compensation for a married woman who, due to abandonment, could not benefit from the industry of her husband—the expression of the ultimate goal of the colony.

In December of 1712, William Penn suffered a debilitating stroke, leaving his second wife, Hannah, as the de facto head of household. She managed his business affairs and worked in collaboration with agents in England and Pennsylvania to supervise his holdings and the governance of Pennsylvania.74 She handled all correspondence, from family issues to the appointment of a new governor of Pennsylvania, William Keith, in 1716.75

Based on letters from Hannah Penn to her stepson William Penn, Jr., (William Penn's surviving son from his first marriage), William Junior apparently abandoned his wife Mary Jones Penn and their three children and refused to support them. From 1713 to 1718, Hannah provided money to Mary for rent, clothing, food, and schooling.76 Hannah corresponded with William Junior in an effort to convince him to support his family.77 This type of abandonment was listed as the major reason for enacting the Female Sole Trader Act. It would be an unusual coincidence to believe that William Junior's abandonment of his family, his refusal to sup-

67. Id. at 17, 20.
68. Id. at 20.
69. Id. See also Fischer, supra note 60, at 603.
70. Fischer, supra note 60, at 598.
71. Id. at 599-600.
72. Id. at 600.
73. Bronner, supra note 64.
75. Id.
76. Id. at 752 n.3.
77. Id. at 744 n.6.
port them, and Hannah’s influence over the Pennsylvania colony, were not factors influencing the implementation of the Femme Sole Trader Act. Mary Jones Penn could have been the poster girl for the necessity of a law providing femme sole trader status to married women in such a predicament. If the son of the founder, hero, and proprietor of the colony was capable of such a misfeasance, then any man could be capable of abandoning his wife and family, leaving them destitute. It was the duty of the Provincial Council to come to the aid of these women.78

Pennsylvania was not founded based on the English establishment; rather, it was created in part as a haven for liberties not permitted in the motherland. After suffering persecution based on English law, the Quakers may have been more skeptical of the need to follow English legal precedent than other colonies, such as New York, where the controlling English governors embraced the notions of English common law with little reservation. In addition, Hannah Penn’s influence may have had a strong bearing on the decision to pass the Femme Sole Trader Act.

C. An Analysis of the Text and Rationale of the Enactment of the Pennsylvania Femme Sole Trader Act of 171879

The Pennsylvania Femme Sole Trader Act of 1718 was one of the first codified laws in the colonies that allowed married women, albeit only a subset of femme coverts, the rights of femme soles. The Minutes of the Provincial Council of Pennsylvania provide little evidence of any discussion regarding the Act, and there are no newspapers from that period in which debate and discussion may have been published.80 The sole entry in the minutes for the Council meeting in Philadelphia on February 21, 1717 states “[a]n act Concerning femme sole Traders were read at the Board, and several amendments proposed; then the Council adjourned till to-morrow morning.”81 This was in addition to the reading of acts, among others, for encouraging trade, imposing duties upon various forms of alcohol and other goods imported into Pennsylvania, and a duty on slaves brought into the province.82 There was no record of a vote, and no other mention of the Act in the provincial council’s minutes other than a general acknowledgement in a ‘post meridiem’ where the Lieutenant Governor, William Keith, “read each title by itself, and so past them into Law. . . .”83 The Act was passed February 22, 1717. According to the colonial records, it was never submitted to the consideration of the Crown, but allowed to become a law by lapse of time, in accordance with the proprietary charter.84 The original Act contained four sections: (1) laying the foundation and the reasoning for its enactment; (2) the rights afforded married women declared to be femme sole traders; (3) an exception for men involuntarily away from their families; and (4) situations in which men abandoned their families and later returned.85

Section I of the Act declared that:

Some of those husbands, having so far lost sight of their duty to their wives and tender children, that their affections are turned to those, who, in all probability, will put them upon measures, not only to waste what they may get abroad, but misapply such effects as they leave in this province.86 The estates of the wayward husband could be secured by the wife for her support and the support of any children, and the married woman could be deemed a femme sole trader. She had the right to sue and be sued, enter into contracts, own property in her own

78. Id.
79. See infra Appendix A for the complete text of the Pennsylvania Femme Sole Trader Act of 1718.
80. The American Weekly Mercury, the first newspaper in Pennsylvania, was first published on December 22, 1719. See Early Philadelphia Newspapers. http://www.sims.berkeley. edu/academics/courses/is182ACf05/second12.html.
82. Id. at 38.
83. Id. at 39.
84. 3 Statutes at Large of Pennsylvania from 1682 to 1801, 159 (James T. Mitchell, et al. eds., State Printer of Pa. 1896).
85. Two sections were added in 1855. The first described when a woman could become a femme sole trader status. It expanded the original grounds to whenever a husband refused to provide for his wife or deserted her. The second explained how a married woman became a femme sole trader through a petition to the courts. See “An act relating to certain duties and rights of Husband and Wife, and Parents and Children,” P.L.430, No.456 § 2 (May 4, 1855).
86. Id.
right, and have control of her husband’s property.87

The purpose was to help women maintain themselves and their children when their husbands were absent for a prolonged period of time or had abandoned them. The preference was that these women take care of themselves rather than rely on charity. The legislators went to great lengths to define which women received relief under this law and under what circumstances. It only allowed those women without a male breadwinner to be characterized as femme sole traders and afforded these rights. Unlike the custom of London, women who regularly lived with their husbands did not qualify as femme sole traders.88

Case law confirmed femme sole trader status only for those married women covered by the Femme Sole Trader Act, and enumerated the rights granted to femme sole traders. In Jacobs v. Featherstone, the court declared that “there is no fem[m/e] sole trading in Pennsylvania, but such as falls within the Act of 1718.”89 The court went on to state that the Femme Sole Trader Act was meant to protect a woman who was left to fend for herself when her husband had gone to sea, and “[i]t is her being left to contract debts for which his person cannot be reached by process, that gives her the credit, and subjects her to the responsibility of a fem[m/e] sole.”90 The husband, Michael Featherstone, was a resident of the same city as his wife, Hannah, who contracted debts for her business then refused to pay them.91 He was named with her in a suit, that read “Michael Featherstone and Hanna his wife, (which said Hanna doth merchandise and trade with merchandise in the art of a dry-goods shopkeeper, according to the custom of fem[m/e] sole trading”).92

The court ruled that Hannah did not meet the statutory definition as a femme sole trader under the Femme Sole Trader Act, and as a femme covert could not contract or be sued on her own accord.93 The court also decided that her husband, who lived apart from her, could not be sued for her debts, as there was no evidence that he consented to her carrying on a trade as his agent.94 The court stated that if a husband lived with his wife and knew that she carried on a trade, then it was presumed that she conducted the business as his agent and with his consent, and he was liable for her contracts and debts and could thus be sued.95 However, if they were still married but did not reside together, there was no presumption of his assent.96

The court also distinguished the husband’s liability for debts incurred during the conduct of a business by his wife from those incurred as necessaries purchased for consumption, for which he would solely be liable under the doctrine of necessaries.97 In addition, the court affirmed that the statute did not grant femme sole trader status to any married woman wanting it.98 Only the specific situations that the Pennsylvania colony saw as a serious issue were covered, including men abandoning their families, leaving their wives no means to support themselves therefore becoming dependant on public assistance for their very basic survival.99 It was better to make these women independent femme soles than to have them on the colonial version of welfare.

The Femme Sole Trader Act did not address powers of attorney, though it did not preclude their existence. However, it did seek to redress the situation where the husband had not granted such power to his wife, who then found herself in the unfortunate situation as to have no means of support due to abandonment.100

Section II of the Act created an avenue to prevent a man from leaving his family destitute and using the monies gained for his own personal use rather than his dependents’ welfare.

87. Id. § 6.
89. Jacobs v. Featherstone, 6 Watts & Serg. 346, 346 (Pa. 1843).
90. Id. at 349.
91. Id.
92. Id. at 347.
93. Id. at 349.
94. Id.
95. Jacobs, 6 Watts & Serg. at 349.
96. Id.
97. Id. See also discussion supra, Part III.A.
98. Id. at 348-49.
99. Id. at 349.
100. Id.
That if any of the said absent husbands, being owners of lands, tenements, or other estate in this province, have aliened, or hereafter shall give, grant, mortgage or alienate, from his wife and children, any of his said lands, tenements or estate, without making an equivalent provision for their maintenance in lieu thereof, every such gift, grant, mortgage or alienation, shall be deemed, adjudged and taken to be null and void.\textsuperscript{101}

A husband who abandoned his wife and left her no means of support was prohibited from selling or mortgaging his property out from under her and their children.\textsuperscript{102} If he did so, the transaction was void. The authors of the Femme Sole Trader Act seemed to believe that men who abandon their wives would turn their affections to those, who, in all probability, will put them upon measures, not only to waste what they may get abroad, but misapply such effects as they leave in this province, and to the end that the estates belonging to such absent husbands may be secured for the maintenance of their wives and children.\textsuperscript{103}

While nothing could be done to prevent husbands from spending the funds they earned while away, this section prevented them from disposing of property in Pennsylvania that could be used to support his family.

Section III of the Act provided an exception to the law granting total \textit{femme sole} trader status to a married woman.\textsuperscript{104} Husbands who were away for a prolonged period of time due to shipwreck or illness were not considered to have abandoned their wives, but still could only dispose of property to the extent that allowed them to get home.\textsuperscript{105} One may safely speculate that shipwrecks, piracy, and the welfare of seagoing merchants were of great concern to the colonial merchant class. Colonial merchants feared the possibility of being pressed into involuntary service in the Royal Navy while in a foreign port. During the same legislative session when the Femme Sole Trader Act was brought before the Provincial Council, several pirates pleaded for the King’s pardon which was recorded at length in the Council’s minutes.\textsuperscript{106} It is straightforward to reason that the Provincial Council did not want such men to be the “victims” twice, once to shipwreck/piracy or illness, and a second time by the declaration of \textit{femme sole} trader status on their wives due to their unforeseen and undesired absence, depriving them of their rights over their estate and over their wives’ conduct.

Section IV of the Act addressed the situation in which a husband abandoned his wife and children, did not provide for their support, and caused them to become dependent on public assistance for a considerable period of time.\textsuperscript{107} Upon his return, his property could be seized for repayment of that which was expended by others for the financial support of his family during his absence.\textsuperscript{108} The Provincial Council seemed to be concerned with men abandoning their families and not being held responsible for their upkeep during his absence. Without this section, his estate could have remained untouched while his family was destitute or his wife forced into the role of \textit{femme sole} trader. Through this section, his estate could be attached for the support of his family.

In summary, the Provincial Council of Pennsylvania did not think it important enough to record their deliberations concerning the Femme Sole Trader Act, or to record the discussion of proposed amendments to it.\textsuperscript{109} However, based on the available records, while the colony was concerned with both the welfare of wives and children and the avoidance of burden to the charity of their community, they were also concerned that \textit{femme sole} trader status be conferred only on a very small class of women. This class was limited to those whose husbands had abandoned them and could become a bur-

\textsuperscript{101} 3 Statutes at Large of Pennsylvania, supra note 84, at 158.
\textsuperscript{102} Id. at 159.
\textsuperscript{103} Ellen Skinner, Women and the National Experience: Primary Sources in American History 10 (Bruce Borland ed., Addison-Wesley Educational Publishers Inc. 1996).
\textsuperscript{104} Id.
\textsuperscript{105} See infra Appendix A.
\textsuperscript{106} Minutes of the Provincial Council of Pennsylvania, supra note 81, at 28, 32.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} See infra Appendix A.
den on the colony, mostly in the context of maritime trading.

In conclusion, the Quakers had been persecuted and denied liberties under English law, and the concept of the \textit{femme covert} could be considered another attempt by the Crown to retain control, with unintended consequences in a society with a different economic base. There was a danger in not allowing abandoned women, in a merchant-driven society, to establish a trade and support herself and her children.\footnote{110} It was a departure from constrictions of a landed society which saw a danger in allowing for separate property rights or a community property system for married people. It instead sought a legal fiction that melded the husband and wife into one being, with the power and property in control of the male half of the equation. Blackstone’s “unity doctrine” was not entirely pragmatic in the colonies, and the status of married women had to be adapted to varying degrees to reflect this.

The Pennsylvania Femme Sole Trader Act of 1718 could be considered either a groundbreaking expansion of women’s rights in the colonies, a natural expansion of the Quaker ideal of liberty, a codification of the true form of a married women’s place in society, or adaptation of the custom of London. The influence of William Penn through his philosophies regarding the way to build a utopian society and his desire to implement his plan in Pennsylvania strongly influenced the laws enacted there. Hannah Penn’s control of the affairs of her husband after his infirmity and her desire to aid her stepson’s abandoned wife may have led to the enactment of a law in the colonies to help women in her position. While the abandoned Englishwoman, Mary Penn, received no assistance from its enactment, her colonial counterparts became the fortunate beneficiaries of one of the first laws granting property rights to married women. Through the Femne Sole Trader Act, the legal status of being ‘civilly dead’ was put aside through its acknowledgement that life often necessitated that married women be merchants and have other rights necessary to conduct business independently of their husbands.

D. New York Married Women’s Rights as Shaped by the Transition from Dutch to English Controlling Law

In Linda Riggs Biemer’s study of women’s property rights in colonial New York, she explores in detail how, when New York was originally settled by the Dutch West India Company, a married woman’s property rights, her ability to sue and be sued in a court of law, and her ability to enter into contracts in the New York colony were based on Dutch law.\footnote{111} Under Dutch law, an unmarried woman was treated in law as a man was treated.\footnote{112} Regarding marriage, Dutch women, following the tradition of Roman Law, had a choice of a marriage by \textit{manus}, whereby she became a minor under the guardianship of her husband, or \textit{usus}, (which was created either through a prenuptial agreement or by renouncing her marriage by \textit{manus}) in which she retained her property rights, as well as all of the freedoms of a Dutch single woman.\footnote{113} The more restrictive marriage by \textit{manus} parallels the English ‘unity doctrine’ and the concept of \textit{femme covert}:

\footnotetext{110}{Under the Pennsylvania Femme Sole Trader Act of 1718, \textit{femme sole} merchant status under the custom of London was statutorily extended to the colonies and even expanded. See generally Baxter against Smith and Wife, 6 Binn. 427, 429 (Penn. 1814) (holding that a married woman may take by purchase unless her husband expressly dissents; “a deed made to a married woman may take effect, provided her husband assents thereto, or even in [the] case he does not dissent”). See also Burke against Winkle, 2 Serg. & Rawle 189, 191 (Penn. 1816) (indicating that the Pennsylvania Femne Sole Trader Act of 1718 creates more rights than those enjoyed by \textit{femme sole} traders under the custom of London). The Pennsylvania law gives a \textit{femme sole} trader a capacity of contracting debts [and unlike the custom of London, the Pennsylvania Act places no restrictions or limitations on the nature of the debts], and being sued for them, not only touching matters of her trade, but for the maintenance of herself and children. She is placed on a different footing from a \textit{femme sole} trader in London, and a much better one. \ldots Thus it appears, that married women stand in a different situation among us from any known to the law of England, and of course the law of England is not applicable.}

\footnotetext{111}{See generally \textit{Linda Riggs Biemer, Women and Property in Colonial New York: The Transition from Dutch to English Law 1643-1727} (UMI Research Press, 1979).}

\footnotetext{112}{\textit{Id.} at 1}

\footnotetext{113}{\textit{Id.} at 1-4.}
If she chose the restrictive marriage, the legal consequences were as follows: (1) she would acquire the rank of her husband and his family; (2) she would henceforth be known as a minor, under the guardianship of her husband; (3) she would have no standing in court—she could not institute or defend any action in her own name (her husband had to appear for or with her in any suit in which she was charged as a defendant); (4) she could make no contract without her husband’s authority, and even with that authority there were only certain types of contracts that were considered legal for a woman to be party to. A woman under manus could also make business contracts if her husband permitted her to be a public trader, but the husband could revoke his permission at any time.\textsuperscript{114}

However, under manus, a married Dutch woman’s property rights differed from those of her English counterpart, the *femme covert.*\textsuperscript{115} Dutch law had a primitive version of community property; while the separate properties that the bride and groom brought to the marriage became part of the marriage community, their properties continued to belong to each party separately, even while the husband was the administrator of his wife’s property.\textsuperscript{116}

A woman who chose a marriage by *usus* through an ante-nuptial agreement retained all the rights and control over property which she had enjoyed as a single woman, which were “all the freedoms of a Dutch man.”\textsuperscript{117} A major advantage of this arrangement was “that a wife would never be responsible for any debts the husband accrued.”\textsuperscript{118} Pre-marital contracts providing women with marriage by *usus* were common during the period of Dutch authority, as were women in court, “either suing or being sued on their own accounts.”\textsuperscript{119} In addition, the option to marry under manus and later renounce it was also available in New Netherland.\textsuperscript{120} A Dutch woman in the colony could also inherit property, own land outright, and will her property separately from her husband’s property upon her death.\textsuperscript{121} As noted earlier, no such rights were available to English *femme coverts.*

The English took permanent control of New Netherland in 1674, and the colony began its conversion to the English legal system. Following the doctrine of Calvin’s Case, if an English king conquered a Christian country, he had the right to change the laws of that land, but until he specifically did, the laws of the subdued territory would remain in effect. The English chose to see their capture of New Amsterdam as the conquest of a Christian land, and, therefore, they did not change the Dutch laws immediately. Instead, the Articles of Capitulation provided that (1) “[a]ll differences of contracts and bargains made before this day shall be determined according to the manner of the Dutch”; (2) “[n]o judgments that hath passed any judicature here shall be called in question”; (3) “the Dutch ‘inferior civil officers and magistrates shall continue... till customary time of the new election’”; and (4) “[t]he Dutch here shall enjoy their own customs concerning their inheritances.”\textsuperscript{122}

However, within a year of the conquest, James, Duke of York, began to replace the Dutch legal traditions with laws based on the English legal code.\textsuperscript{123} The imposition of English law resulted in a gradual, yet significant loss of rights for women.\textsuperscript{124} It resulted in a curtailment of economic rights and the ability of women of the New York colony to make a legitimate living. As a consequence, women resorted to illegitimate means of earning a living.\textsuperscript{125} “Both statutes and judgments demonstrate that the English law that was gradually imposed on New York colony after 1664 [the time of the first conquest] was much more stringent and confining to women than the immediately preceding Dutch law had been and much

\begin{itemize}
\item \textsuperscript{114} Id. at 1-2.
\item \textsuperscript{115} See generally id. at 5 (describing legal liabilities of New York women under tightening English control).
\item \textsuperscript{116} Id. at 2.
\item \textsuperscript{117} See Biemer, supra note 111, at 2.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 3.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 4-5.
\item \textsuperscript{122} Id. at 6.
\item \textsuperscript{123} See Biemer, supra note 111, at 6.
\item \textsuperscript{124} Id. at Preface xiii.
\item \textsuperscript{125} Id.
\end{itemize}
more rigid than the early Roman law.” 126 Very little of the effect of the earlier Dutch colonization carried over in the transition to English law regarding the rights of married women. This effect is illustrated in an examination of court cases in Albany and New Amsterdam from 1664 to 1700, during the transitional period from Dutch to English law.

The cases indicate quite clearly that within the 36 years after English rule became settled in both Albany and New York City, the numbers of women engaging in the trade or as proprietors or in service jobs declined severely, the frequency of women in court as either as plaintiff or as defendant decreased, the numbers of women making wills jointly with their husbands dropped, and the numbers of women inheriting real property plunged. 127

In addition to her rights to conduct herself as a single woman, a married woman living during this period saw her inheritance rights dissolve, the discontinuation of using her own family surname after marriage (a common practice in Dutch society), and eventually her classification in 1710 in the same category as minors and the feeble. 128 At a time when femme sole trader status was granted to a specific class of married women in Pennsylvania, expanding their rights, the legal privileges of married women in New York appeared to be undergoing a reversal of fortune.

IV. THE SUBSEQUENT ATTAINMENT OF PROPERTY RIGHTS BY MARRIED WOMEN IN ENGLAND, PENNSYLVANIA, AND NEW YORK

The subsequent legal history of married women’s property rights demonstrates an expansion of those rights until the inevitable conclusion of femme sole status for all married women. Those rights included the ability to be treated the same as men with regards to their right to contract, claim wages earned as their own, the ability to own, sell and convey property, and to sue or be sued in a court of law. The expansion can be seen as a natural consequence of the industrial revolution beginning in the 1850s, when factory workers were increasingly necessary in greater numbers than previous generations. To control one’s own wages was a strong incentive to provide the manual labor for the growing industrial complex of the nineteenth century.

A. The United Kingdom

While the Victorian Era (1837-1901) in the United Kingdom has been viewed by many as oppressing women, the opposite was true—this was in fact a period of expanding rights for women. Just prior to Victoria’s reign, in 1833 with the passage of the Fines and Recoveries Act, English law began to expand the rights of married women. 129 This act granted several rights to married women including the right, with her husband’s concurrence, to sell lands, and purchase lands and any estate therein, as fully and effectually as she could do if she were a femme sole. 130 The Matrimonial Causes Act of 1857 provided femme sole designation to married women who were parties to a judicial mari-

126. Id.
127. Id. at 7-8. Some of the figures illustrating this decline include:

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<thead>
<tr>
<th>Number of Female Traders</th>
<th>Cases involving Females as</th>
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<tr>
<td></td>
<td>Plaintiff or Defendant</td>
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<tr>
<td>Albany</td>
<td>Amsterdam</td>
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<tr>
<td>1654-64</td>
<td>46</td>
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<td>1665-74</td>
<td>10</td>
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<td>1675-84</td>
<td>13</td>
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<td>1685-94</td>
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<td>1695-1700</td>
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*Records were destroyed in the 1911 Albany Fire
† Most of the 1657 records are missing

128. Id. at 8-9. (noting the erosion of rights from women under English governance).

129. Fines and Recoveries Act, 1833, 3 & 4 Will. 4, c. 74 (Eng.).
130. Id. at s. 45. While prior case law regarding married women’s property rights is no longer indexed by the Digest, in Pettit, Lord Morris of Borth-Y-Gest provides a historical reflection of the evolution of married women’s property rights in England. He begins by acknowledging that “at common law a wife’s proprietary capacities were very limited. Although the Court of Chancery protected a wife’s equitable separate estate it was by statutory enactment that the rights of a wife concerning property were established.” Pettit, 2 All E.R. at 392.
tal separation from their husbands, giving her ownership of any property she might acquire subsequent to the separation.131

England's first Married Women's Property Act was passed in 1870. It deemed that certain property, such as wages from employment which she carried on separately from her husband, and certain property acquired, was considered to be her separate property.132 A married woman could bring a legal action, in her own name, with respect to her separate property.133 Under Victoria, the designation of 

femme covert was abolished. When it was amended in 1882, the Act eliminated the concept of the unity doctrine as so eloquently described by Blackstone, provided full property rights to married women, and forevermore established that men and women were separate entities after marriage.134 It allowed for her to sue and be sued, enter into contracts, carry on a trade separately from her husband, and treated her in all regards as a femme sole.135 A married woman was no longer considered so fragile as to be in need of the protection and benefit under the coverture of her husband under English law, which two centuries earlier Blackstone felt was so desired by women.

B. Pennsylvania

Pennsylvania property rights of married women expanded slowly after the passage of the 1718 Femme Sole Trader Act, not achieving the pace of the reforms achieved in Victorian England or New York. Between 1848 and 1947, the Married Women's Property Act (“the Act”) was amended several times, yet none granted a married woman total control over her property.136 It was not until the Act of 1957137 that married woman during coverture by will, descent, deed of conveyance or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property . . . " Hack v. Hack, 433 A.2d 859, 862 (Pa. 1981) (citing the Act of April 11, 1848 P.L. 536, § 6). The Act was amended in 1855 to extend the right to apply in situations where a husband refuses to provide for his wife, such as neglect. Act of May 4, 1855 § 2, P.L. 430 (1855). “The Act of 1872 . . . expressly secured to the wife her earnings free from any legal claim of her husband.” Miller, 34 Pa. D. & C.3d at 87 n.2. (citing The Act of 1872, P.L. 35, 48 P.S. § 34). In 1887, another amendment to the Act declared that “property of every kind owned, acquired or earned by a woman before or during her marriage shall belong to her and not to her husband.” Lewis’s Estate, 27 A. 35, 35 (Pa. 1893) (citing the Act of June 3, 1887 P.L. 332, §1). It was amended again in 1893, [giving a married woman the same power that a femme sole trader has to sell her real estate, except that she may not make a valid conveyance unless her husband joins in the deed . . . it gives her the right to contract for its sale in the same manner, and to the same extent as an unmarried person; but when she comes to convey, she may do so only by her husband joining the deed.

all married women, not just those who were neglected or abandoned by their husbands, were to have the same property rights, contract rights, and the ability to sue and be sued; they were to have the same rights as married men.\textsuperscript{138} Ninety-seven years after New York (1860) and seventy-five years after England (1882), Pennsylvania finally passed a statute which abolished the distinction between married men and married women's (and unmarried women’s) property and contract rights.\textsuperscript{139}

C. New York

Eighteenth century New York, while observing the unity doctrine, allowed a married woman to prevent her husband from controlling her property through premarital contracts and trusts.\textsuperscript{140} Gradually, the necessity of the use of trusts was questioned, as they appeared to be nothing more than a legal fiction by which a married woman could retain full control over her pre-marital property. By 1815, New York Chancellor James Kent held that “premarital agreements creating passive trusts—that is, trusts that created . . . nominal trustees but allowed married women beneficiaries to manage the trust assets actively—were valid and would be enforced according to their terms.”\textsuperscript{141} By 1818, no trust was necessary and married women could, through a premarital agreement, retain control of their property.\textsuperscript{142} This evolution was most likely due to the growing merchant society in New York, as it allowed married couples to shield assets from creditors through the separate estate of his wife, and to prevent a wife’s assets from being used to satisfy her husband’s pre-marital business debts.\textsuperscript{143} In 1848, New York passed legislation which granted that the real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.\textsuperscript{144}

A married woman’s right to contract and to control her earnings became law in 1860.\textsuperscript{145} While the judiciary sought to constrain this right through a series of decisions that narrowly defined the scope of these laws, the legislature continued to pass laws expanding rights.\textsuperscript{146} “New York . . . courts did not strike down the

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138. It is interesting that a colony which enacted one of the first statutes granting married women the ability to act as \textit{femme sole} traders took so long to eliminate any distinction between the abilities of married and unmarried women to conduct property transactions, enter into contracts, and have those contracts enforced in a court of law.

139. It is interesting that a colony which enacted one of the first statutes granting married women the ability to act as \textit{femme sole} traders took so long to eliminate any distinction between the abilities of married and unmarried women to conduct property transactions, enter into contracts, and have those contracts enforced in a court of law.


141. \textit{Id.} at 507 (citing Methodist Episcopal Church v. Jacques, 1 Johns. Ch. 450 (N.Y. Ch. 1815)).

142. \textit{Id.} (citing Bradish v. Gibbs, 3 Johns. Ch. 523 (N.Y. Ch. 1818)).

143. \textit{Id.} at 527. The courts tended to interpret the laws as a method for protecting family assets against claims of the husband creditors, not as a vehicle for the advancement of women’s rights. See \textit{id}.

144. \textit{Id.} at 509-10 n.146 (citing 1848 N.Y. Law 200, § 1).

145. \textit{Id.} at 510 n.149 (citing 1860 N.Y. Law 90).

146. Ranney \textit{supra} note 140, at 557-58 (stating “New York was the first state to adopt a broad married women’s property act, and it was one of the most important battleground for the subsequent struggle between lawmakers and judges over how fast the rights conferred by those acts would be expanded.”).
women's rights laws, but they consistently give the laws a narrow interpretation and tried to preserve much of the old order of common law property rights.147

Two hundred years after the English rule began to erode their rights, and 150 years after their relegation to the same category as children and imbeciles,148 married women of New York were back where they started under the Dutch. With a few exceptions,149 they had rights over their proprietary interests, the ability to contract, to sue and be sued, and control over their destinies. Despite its initial backward movement, New York expanded women's rights at a faster pace than Pennsylvania.

The story of the loss of women's rights in colonial New York should not be ignored or treated as a footnote of history; it is a painful illustration that rights granted may also be lost, one that should be prominently and repeatedly recounted. It should serve as a reminder that, without vigilance, women could again be deprived of their rights in this country.

V. CONCLUSION

The restrictive gender roles and traditional social order of Blackstone's unity doctrine no longer exist in this country. However, the strength of the matrimonial bond it espouses continues to have "limited application under current law; in particular, it still applies to create relationships by affinity. It is the foundation for the form of property ownership known as tenancy by the entireties, and has also been cited in support of laws immunizing spouses from civil liability for torts against one another.150

As noted earlier, the doctrine of spousal privilege also owes its existence to the "spiritual and emotional unity which is recognized by virtue of marital vows."151 It is not a foregone conclusion that the mechanisms which created the femme covert will not reemerge and erode the rights women have gained over the last two centuries. It is possible that we could again risk losing our rights, as the women of Colonial New York did.

This possibility is not so farfetched. As our social order changes, so do our laws.152 In 1998, Southern Baptist convention amended its official statement of beliefs, based on biblical interpretations, and sounding like a modern version of the husband's duty to support and the wife's duty to render services.153 Section XVIII of the Baptist Faith and Message states that the husband

has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.154

One must question how can the wife be the equal of her husband, yet be his helper and submit to his leadership? The Baptist Faith and Message shrouds of inequality, and subtly reminds one of the unity doctrine's concept that, at common law, a husband and wife are one person, and that person is the husband.155 It

147. Id. at 554. "[D]uring the century following the wave of married women's property acts, women's rights evolved slowly and fitfully out of a tug of war between state legislatures and court. In most states the legislature took the lead in expanding property rights; but courts took the lead in accommodating increased social pressures for divorce." Id. at 557-58.
148. BIEMER, supra note 111, at 9.
149. Earnings and wages legislation lagged behind the expansion of property rights; but from 1860 to 1902, these rights were expanded. See Ranney, supra note 140, at 529.
151. Id.
152. President Bush's second presidential campaign focused on "traditional values" of marriage, and the fear of its erosion as a focal point, a concept that aided in his victory. If we are not vigilant, can this be translated into a future loss in women's empowerment in society?
154. Id.
155. See BLACKSTONE supra note 14.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a femme-covert...under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture... .
even falls in line with the unity doctrine concept that only the wife is commanded to respect her husband, and no such duty is placed upon him.\textsuperscript{156}

On a more personal level, not long ago, I spoke with a friend whom I had not had recent contact. As our conversation progressed towards politics, she commented to me that she saw nothing wrong with submitting to her husband’s leadership, and that she would have no problem with women losing their right to vote. She felt that suffrage was wasted on women, and such decisions should be in the hands of their husbands. She believed most women were irrational in their voting behavior, and were bought off by charm and good looks, and therefore made unreliable voters. She used as evidence for this the high percentage of women who voted for Al Gore in 2000, stating that, had they been rational, they would have surely voted for George W. Bush. In another instance, during a friend’s wedding in 2000, the pastor stated that if they want to have a happy marriage, the bride should submit to her husband’s will. He was the head, and she must be willing to graciously accept his leadership—and she said ‘obey’ in her vows (a phrase not repeated in his).\textsuperscript{157} Both were willing to take this step backwards, to give up rights and freedoms so hard-fought on their behalf and relinquish control to their husbands, and were on the verge of becoming \textit{femme coverts}.

We must continually visit our history, present our successes and our failures, and steadily move forward towards the goal of social equality for all women and men. The late Susan Sontag wrote that, “the past itself, as historical change continues to accelerate, has become the most surreal of subjects—making it possible . . . to see a new beauty in what is vanishing.”\textsuperscript{158} While it may not be possible to see a new beauty in the vanishing of the limitations on women’s rights, by exploring the past, we may see a new beauty in the rights that women have achieved, and will continue to do so as we move through the twenty-first century.

\textsuperscript{156} At the 1998 Southern Baptist Convention, other amendments were overwhelmingly defeated. One of these “called upon husbands and wives to submit to each other.” Austin Cline, \textit{Southern Baptists and the Role of Women, About}, http://atheism.about.com/od/baptistssouthernbaptists/a/baptistwomen_p.htm (last visited Apr. 1, 2004).

\textsuperscript{157} One humorous situation comes to mind, in addition to the two rather serious ones described above. In an episode of Comedy Central’s television program, “The Man Show,” the two hosts set up a booth at a shopping center, and asked passersby to sign a petition in support of ending women’s suffrage. Many signed the petition, not realizing that ‘suffrage’ was not the same as ‘suffering.’

APPENDIX A

An Act Concerning Femme Sole Traders, 1718 [Pennsylvania]159

Whereas it often happens that mariners and others, whose circumstances as well as vocations oblige them to go to sea, leave their wives in a way of shopkeeping: and some of them as are industrious, and take due care to pay the merchants they gain so much credit with, as to be well supplied with shop-goods from time to time, whereby they get a competent maintenance for themselves and children, and have been enabled to discharge considerable debts, left unpaid by their husbands at their going away; but some of those husbands, having so far lost sight of their duty to their wives and tender children, that their affections are turned to those, who, in all probability, will put them upon measures, not only to waste what they may get abroad, but misapply such effects as they leave in this province: for preventing whereof, and to the end that the estates belonging to such absent husbands may be secured for the maintenance of their wives and children, and that the goods and effects which such wives acquire, or are entrusted to sell in their husband’s absence, may be preserved for satisfying of those who so entrust them, be it enacted, that where any mariners or others are gone, or hereafter shall go, to sea, leaving their wives at shop-keeping, or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and hereby declared to be, as femme-sole traders, and shall have ability and are by this act enabled, to sue and be sued, pleased and be impugned at law, in any court or courts in this province, during their husbands’ natural lives, without naming their husbands in such suits, pleas or actions: and when judgments are given against such wives for any debts contracted, or sums of money due from them, since their husbands left them, executions shall be awarded against the goods and chattels in the possession of such wives, or in the hands or possession of others in trust for them, and not against the goods and chattels of their husbands; unless it may appear to the court where those executions are returnable, that such wives have, out of their separate stock or profit of their trade, paid debts which were contracted by their husbands, or laid out money for the necessary support and maintenance of themselves and children; then, and in such case, executions shall be levied on the estate, real and personal, of such husbands, to the value so paid or laid out, and no more.

And it be further enacted, That if any of the said absent husbands, being owners of lands, tenements, or other estate in this province, have aliened, or hereafter shall give, grant, mortgage or alienate, from his wife and children, any of his said lands, tenements or estate, without making an equivalent provision for their maintenance, in lieu thereof, every such gift, grant, mortgage or alienation, shall be deemed, adjudged and taken to be null and void.

Provided nevertheless, That if such absent husband shall happen to suffer shipwreck, or be by sickness or other casualty disabled to maintain himself, then, and in such case, and not otherwise, it shall be lawful for such distressed husband to sell or mortgage so much of his said estate, as shall be necessary to relieve him, and bring him home again to his family, and any thing herein contained to the contrary notwithstanding.

But if such absent husband, having his health and liberty, stays away so long from his wife and children, without making such provision for their maintenance before or after his going away, till they are like to become chargeable to the town or place where they inhabit, or in case such husband doth live or shall live in adultery, or cohabit unlawfully with another woman, and refuses or neglects, within seven years next after his going to sea, or departing this province, to return to his wife, and cohabit with her again; then, and in every such case, the lands, tenements and estate, belonging to such husbands, shall be and are hereby made liable and subject to be seized and taken in execution, to satisfy any sum or sums of money, which the wives of such husbands, or guardians of their children, shall necessarily expend or lay out for their support and maintenance; which execution shall be founded upon process of attachment.

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159. 3 Statutes at Large of Pennsylvania from 1682 to 1801, supra note 84.
against such estate, wherein the absent husband shall be made defendant; any law or usage to the contrary in any wise notwithstanding.