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Common Law Female Property Rights from Early Modern England to Colonial Virginia

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Abstract

According to English common law during the early modern period, women were not granted the legal privilege of exercising property rights. The British institutions of primogeniture, dowry, coverture, and widowhood governed this suppression of women's rights. Aristocratic women found ways around these restrictions in the form of separate estate and jointure agreements, among other methods. With the settlement of the British colony of Virginia, it was expected that the patriarchal common law would rule colonial society. Despite this, several factors present in Virginia combined to increase the legal agency and property rights of Virginian women across the economic and social boundaries. These women enjoyed rights above and beyond those exercised by their British predecessors and counterparts.

Rights Most Precious

Common Law Female Property Rights from Early Modern England to Colonial Virginia

Sir William Blackstone, in his *Commentaries on the Laws of England*, wrote that there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises of the external things of the world, in total exclusion of the right of any other individual in the universe.¹

For Blackstone, writing in eighteenth-century England, property was the defining quality of gentlemen. Elite status was characterized by property ownership. Women were deprived of this significant right to property. British common law barred women from holding property or possessing their own legal identity apart from their husbands or fathers. According to the common law, men were able to hold, buy, sell, and exchange their property as they pleased. On the other hand, women were heavily restricted not only in the types of property they were allowed to own but also when they were allowed to own property and how they were to handle it. Despite these legal restrictions, British women found some ways to carve out property rights.

The English expansion into North America in the early seventeenth century also saw the exportation of English social, legal, and cultural institutions. Virginian women should have had no legal rights to property or separate legal identity from men. The few exceptions women experienced in early modern England should have been the only freedoms experienced by the elite few of Virginia. On the contrary, upon close study one sees that women in Virginia actually enjoyed far more property rights than even their

1. *Commentary on the Laws of England*, Book II, Chapter I, 1765–1769. Lonang Institute, 2005. <http://www.lonang.com/exlibris/blackstone/>.

British female counterparts. Furthermore, these property rights were not experienced by only the elite women, as in England; women in all levels of Virginia society, from the gentlewoman to the tavern owner's wife, could enjoy these rights. Conditions in colonial Virginia allowed women to assert and exercise far more extensive rights than their British counterparts.

To best illuminate the changes in women's property rights from early modern England to colonial Virginia, the state of female property rights in early modern England is examined first. Each legal institution affecting these rights is discussed separately, with an explanation of the common law mandates and the reality of practices in relation to property. The discussion then moves to Virginia, with emphasis on the rights women exercised to illustrate the increased legal recognition they enjoyed in contrast to that of their British counterparts. The references to women in the discussion of early modern England refer strictly to the elite females of society. In the context of Virginia, the term "women" refers to women in all classes of society.² This contrast is important, as it serves as the greatest distinction between the two societies in relation to women's rights. The discussion of England is organized around the stages of a woman's life cycle, while the Virginia discussion is not as neatly organized. The reason for this difference lies in the fact that English women experienced a fairly consistent pattern of life events, while Virginian women lived in an environment that produced unpredictable life stages. Thus, an exact comparison between the progressions of the life cycle of women and these institutions from the two periods is not entirely possible.

2. While this paper specifically discusses the property rights of white women, the legal status of both male and female slaves in Virginia changed as well. However, that topic is outside the scope of this paper.

The restrictions placed on women were based in the underlying philosophies and attitudes of societal traditions. These attitudes were inherited from a variety of sources, but all combined to produce the notion that women were weak, incompetent, and corrupt. Judeo-Christian traditions contributed to these attitudes about women. Church teachings pointed to the Genesis account of the fall of man and Eve's particular role. They viewed Eve as the source of sin and evil, and extended that to all women. Biblical stories such as Delilah, Rebekah, and Lot's wife were further proof that women were deceitful, disobedient, and sexually depraved.³ Throughout the Renaissance and Reformation, the picture of an ideal wife became one of a submissive woman, who cheerfully bore children and served her husband without question. The Scientific Revolution saw debates about the female body, ultimately concluded that women were physically inferior to men in every way, and confirmed that women were irrational, prone to hysteria, and in need of men to contain their passions.⁴ With these ideas that women were physically, spiritually, and emotionally inferior to men, English common law developed as a system that restricted women's opportunity to corrupt society with their passions. These attitudes also resulted in women's identity being defined by their roles as wife and mother, rather than as a legal entity. It was through these roles that women could prove their virtuous character under the watchful eye of a male.

The first common law practice affecting early modern British women's property rights was primogeniture.

3. Merry E. Weisner, *Women and Gender in Early Modern Europe* (Cambridge: Cambridge University Press, 1993), 10–11.

4. *Ibid.*, 12–29.

These laws affected women primarily during maidenhood.⁵ Primogeniture demanded that the full inheritance be passed to the eldest son in a family and often left female family members with little to no inheritance. The reasoning behind this made sense for a country with limited land resources like England: to keep the estate from splintering into smaller parts through marriages and multiple inheritances, the eldest son simply inherited it. If daughters were given land as dowry or inheritance, upon marriage that land would leave the family estate, severely reducing its value. If younger sons were to gain land through their inheritance, the estate would quickly be reduced as it was divided up with each new generation. Other items were passed down to all children, like moveable goods such as furniture and clothes, or sums of money; however, land determined wealth and power in England, and that was to be protected at all costs. Primogeniture maintained the aristocracy by keeping land and titles among the elites, as well as preserving family fortunes for posterity.

In reality, women were increasingly granted inheritances which sometimes included land. Women commonly received moveable property inheritances, as that was more acceptable under common law; however, the law provided a condition under which a daughter could receive a landed inheritance. If her father had no sons but desired the land to stay in his immediate family rather than being passed to a distant male relative, his daughters could inherit it. Additionally, if a man had several daughters and no sons,

5. The terms “maid,” “maiden,” or “single” refer to never-married women. The term “widow” refers to an unmarried woman whose husband died. The term “single” will not be applied to a widow, though the property rights of a maid and of a widow were at times similar.

the land could be split equally among them.⁶ It is estimated that about 33% of women received real property inheritances under the common law regulations.⁷ Landed inheritance for women also varied by area. For example, records from Yorkshire indicate that around 26% of men who had both sons and daughters granted a landed inheritance to children of both sexes, while in Sussex the rate was as low as 5%.⁸ This idea of passing estate on to women over distant male relatives held true even within the nuclear family. For example, in the case of Sir John Shelton, he made arrangements for his estate to pass to his three daughters in the event that their only brother, the sole male heir, died before Sir Shelton.⁹ While the common law's ideal was for the eldest son to inherit the landed estate, the reality of early modern English inheritance practices allowed maidens to receive landed estates, though it was less frequent.

The second practice limiting women's property rights was the dowry. In return for promise of jointure for the bride, the dowry was the bride's half of the marriage contract and often consisted of sums of money paid in either a lump sum or installments over time.¹⁰ A family granted as large a dowry as they could afford, as marriage was a

6. Amy Louise Erickson, *Women and Property in Early Modern England*, (New York: Routledge, 1993), 26–27.

7. Eileen Spring, *Law, Land, and Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill: University of North Carolina Press, 1993) 10–11.

8. Erickson, 61.

9. Barbara J. Harris, *British Aristocratic Women, 1450–1550: Marriage and Family, Property and Careers* (Oxford: Oxford University Press, 2002), 21.

10. *Ibid.*, 45. Jointure was an agreed-upon amount of property, either moveable or real, that the groom's family agreed to grant the newlywed couple for use during their marriage. This property supported the bride after the death of her husband.

primary path to increasing socio-economic status.¹¹ Dowries could range from small to large amounts of money in addition to other property, and these amounts were negotiated by the parents or guardians of the bride and groom. In some cases, mothers were the key negotiators in these transactions, such as in the case of Margaret Green in 1635.¹² In 1536, the first earl of Huntington agreed to pay a dowry of 2,000 marks to his daughter's husband in return for a jointure of 200 marks.¹³ Dowry negotiations could last for months. Mabel Parr, negotiating a settlement between her daughter and the heir of Lord Scrope in 1524, actually cut off negotiations after eight months when the potential groom's party would not grant a reasonable jointure.¹⁴ Often, the dowry was a woman's share of the family inheritance, and amounts could vary even among sisters if their father determined that one daughter's match may be more valuable than another. The larger the dowry, the more attractive a lady was as a potential marriage partner.¹⁵ Although a woman's dowry constituted her portion of the family inheritance, some men chose to grant further inheritances to married daughters. In 1478, Sir Ralph Verney gave his two married daughters small inheritances, while equally dividing the rest of his estate between his two sons. His reasoning was that "for as much as my daughters...have had their preferment at their marriages of their portions...and my sons...have not have their

11. Ibid., 43–44.

12. Erickson, 93.

13. Ibid., 45.

14. Ibid., 46.

15. For a case study of marriage motivated by property acquirement, see Mary Chan and Nancy E. Wright, "Marriage, Identity, and the Pursuit of Property in Seventeenth-Century England: The Cases of Anne Clifford and Elizabeth Wiseman," in Wright, Ferguson, and Buck, 162–182.

such preferment.”¹⁶ Under a common law dowry negotiation, all property granted to the bride transferred immediately to her husband’s control, as payment for the promise of a small jointure which the bride could not own until widowhood.

The third common law practice restricting women’s property rights was coverture. According to coverture, “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....”¹⁷ Under coverture, women lost not only their rights to their dowry property, but also any form of legal identity they may have had. It was under this common law that women were prevented from functioning legally without their husband’s consent. For example, women could neither sue nor be sued as individuals. It was their husbands who sued or were sued on their wives’ behalf.¹⁸ According to the common law standard, not only did a woman lose all property rights upon her marriage, but the strictest of settlements guaranteed that all property would proceed to the eldest son in accordance with the law of primogeniture.¹⁹ She lost all moveable property, and the real property she may have brought into the contract might come back to her or it might be entailed away, depending on whether her husband sold it or left it to her in his will. This strict marriage settlement was only one

16. Harris, 47.

17. Blackstone, Book I, Chapter XV.

18. Erickson, 24.

19. *Ibid.*, 102.

type of marriage contract. While it was the most restrictive form of contract, women found two ways around strict marriage settlements.

The first way was jointure. If the marriage contract was not carried out completely or if the marriage failed to fulfill ecclesiastical law,²⁰ jointure guaranteed at least the partial return of the dowry to the bride's family. Not only was jointure a way of securing wealth for the bride's family, but by common law it was meant to serve as a protection for the wife upon the end of her marriage, either by death or divorce.²¹ There were two conditions under which this ecclesiastical law applied. The first included circumstances in which the bride was younger than twelve years of age and the groom under fourteen years of age, and applied when the couple was old enough to decide that they did not wish to be married. This was valid grounds for ending the marriage and returning the dowry to the bride. The second condition was if either the bride or the groom died before consummating the marriage or before reaching the age of sixteen.²² Jointure allowed for cases such as these, and served as a security measure for the woman involved. This also illustrates where a departure from common law could take place, as the jointure in these circumstances relied heavily on ecclesiastical law.

The second way around the restrictions of coverture was a form of marriage contract called separate estate. This allowed for a woman's "sole and separate estate" during marriage. This meant that the bride reserved complete rights over her property

20. Ecclesiastical law governed the exchange of personal property. This included items such as money, furniture, clothes, and jewelry. Because ecclesiastical law borrowed heavily from Roman law, it tended to support the ideas of common property in marriage and equal distribution of inheritance among children.

21. Spring, 25–26.

22. Harris, 45.

during her marriage. The idea is similar to modern pre-nuptial agreements. Upon the end of the marriage by either death or divorce, the woman would retain specified dowry property and jointure. Generally, this form of marriage contract was used by only the wealthiest members of society in order to protect the family wealth. Separate estate was also the most difficult to defend legally because it was valid only according to the law of equity.²³

Equity was a form of law that seemed to favor women's property rights. Equity courts, unlike common law courts, looked not only at items such as deeds and documents for legal evidence in a case, but also looked at the circumstances and resources surrounding an individual's actions. Under equity, a woman could sue her son, other males, and even her own husband.²⁴ For example, if a widow sought to sue her son for a landed portion of his inheritance, the common law court would look at her original marriage contract to ensure that she had fulfilled her part of the agreement. The court would then look at any documents relevant to the land, such as the woman's father's will or the deed to the land. Based on these documents, the court would make its decision. As it was difficult for a woman to prove legal rights to land through wills and documents, the common law courts seemed to favor men's property rights over that of women. Equity courts, on the other hand, looked not only at these documents but also at the individual's circumstances. The equity courts would listen to a woman's explanation of why she did not have a deed or other document, as well as her arguments for why she should receive

23. Erickson, 103.

24. Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge: Cambridge University Press, 1998), 28.

the land in question. Equity law accepted the validity of separate estate agreements, and thus women took advantage of this allowance. Equity law was generally utilized by widows to secure their jointure, separate estate, or other property to which they felt legally entitled.²⁵

An excellent example of separate estate is Margaret, Countess of Bath. A wealthy widow, she required her third husband to sign a marriage contract which allowed her full control of her moveable property. The contract included an inventory of her property and stated that she was allowed to dispose, gain, or trade her property as she saw fit, in addition to containing a clause that said her husband would compensate her for any damages or diminishment he caused her property. Upon his death, all of her property remained hers, and should she precede her husband in death, she had the power to bequeath her property as she desired. To provide legal leverage under common law, Lady Bath had her two sons-in-law sign the document, which gave them the power to sue on her behalf.²⁶ Lady Bath serves as an excellent example of women's ability to work around the common law, via separate estate under equity, to protect their property rights. Her case also illustrates that marriage was not necessarily as restrictive as the common law prescribed.

25. A fascinating historical debate has emerged over the importance of equity law in relation to women's property rights. Mary Beard, in her book *Woman as Force in History: A Study in Traditions and Realities* (New York: The Macmillan Company, 1946), and Maria Cioni, in "The Elizabethan Chancery and Women's Rights," in *Tudor Rule and Revolution* eds. D. Guth and J.W. McKenna (Cambridge: Cambridge University Press, 1982), claim that equity was essentially the legal savior of women's property rights. Amy Louise Erickson and Tim Stretton both agree upon a tempered view of the balance between common law and equity. However, an in-depth discussion of equity law is outside the scope of this paper.

26. Harris, 71.

The most common forms of marriage contract²⁷ seem to have been created in the interest of protecting the wife's property rights. Conveyancing manuals, which served as guidelines for marriage settlements, contain samples of marriage settlements that served the wife's best interest. One such manual, the *Newe Boke of Presidents* [sic], written in 1543 by Thomas Phayer, gave an example stating that

“An indenture of maryage” contracted between the groom and the bride's mother, a widow, including the provision that the bride, herself also a widow, might marry her own daughter to whomever she pleased, with whatever portion she pleased....²⁸

Not only did this settlement protect the bride's property, but it reserved her right to make decisions regarding her daughter's dowry and marriage portions. Under common law, this was not allowed. After all, a woman had no right whatsoever to make legal decisions without her husband. The conveyancer manuals provide a picture of the reality of marriage settlements. Women clearly had several options to protect their property rights, and the reality of marriage settlements existed in sharp contrast to the common law ideal of the husband having full property rights and legal identity.

Many aristocratic men trusted their wives not only to run their household accounts but also to manage their property. These men were so confident in their wives' abilities to manage the estate that many of them named their wives as the principal executor of their

27. The terms “contract” and “settlement” are synonymous when referring to coverture.

28. As quoted in Erickson, 104. Original spelling retained.

wills.²⁹ They often limited the powers of co-executors to providing financial advice to the widow. Several examples of this are found in the wills of Sir Thomas Arundell, Sir John Danvers, and Sir Phillip Champernon. Arundell gave his wife the ability to “add and diminish [his] will at all times as it can by her best be thought.” Danvers and Champernon both ordered the co-executors to abstain from interfering with the administration of their estates unless their wives died before the will was carried out.³⁰ These trusted widows, who by common law should not administer or have any control over their deceased husband’s property, not only received their jointure, but had complete control over the estates. In addition to inheriting control of their late husbands’ estates, many women became increasingly wealthy as each husband died and left them large estates. In the case of Lady Bath, she had married three times, and each time was named sole executor of her husband’s will. Thus, with the charge of three estates, Lady Bath was an appealing marriage partner.³¹

Upon the death of her husband, a woman found herself in an unusual position in society. Given that women were viewed as innately evil and in need of male headship, widows posed an interesting case. They were wives and had been under male leadership for the duration of their coverture, but no longer had a male head. If the widow was older, then her father was most likely deceased. Common law provided that either at least one-third of her husband’s estate or her jointure should be passed to her in order to provide

29. Harris, 128.

30. *Ibid.*, 129.

31. Harris, 71–72.

for her needs; beyond that, women were not supposed to retain property.³² A book addressing common law treatment of women titled *The Lawes Resolutions of Women's Rights* stated that “when she hath lost her husband, her head is cut off, her intellectual part is gone, the verie faculties of her soule are...cleane taken away....”³³ Under strict common law coverture, the attitude portrayed in *The Lawes Resolutions of Women's Rights* was true. If a woman's husband died, her identity was gone and she was reduced to the low state of widowhood. A widow's case was confusing and often a legal mess, particularly if she remarried.

Widows marrying for the second or third time were usually wary of coverture, and often settled separate estate, such as Lady Bath's agreement, before entering back into marriage. In this way, widows retained their rights to the property and estates left to them by their former husbands. They could go to court to defend their property or to sue those who dared infringe upon their material domain, including sons and new husbands.³⁴ This was often frustrating to the men who married these widows, who had expected to receive these estates as a result of the marriage settlement. If these marriages failed, they often went to court, as in the case of William Culliford and Elizabeth Mitchell. Elizabeth had married previously and inherited a handsome estate from her deceased first husband. In court, William argued that Elizabeth had promised the estate at their marriage, but had never produced it for him. In reality, the estate belonged to Elizabeth, on the authority of

32. Erickson, 25.

33. As quoted in Erickson, 153. Original spelling retained.

34. Harris, 134–135.

her previous husband's will, and she had protected it in her settlement. Thus, William did not receive any of the estate.³⁵

Stepchildren also complicated remarriages. Wealthy widows were often in a position to write their own wills and bequeath their estates as they wished. This often caused legal issues when the inheritances were being divided up, as widows wanted their children to be provided for but were also obligated to provide for their stepchildren. The complexity of wills from several husbands who left inheritances for their children was often left to the widow to untangle and carry out, thus granting her even greater control over her late husbands' wills.³⁶

Given the potential outcomes for multiple remarriages, sets of stepchildren, and the power granted widows over their husband's estates, the reality of the practice of inheritances and what the common law ideal prescribed were often in sharp contrast to one another. Common law made a small allowance for widows from their husband's estate, but nowhere near the amounts of wealth that the widows often inherited. In addition, the power over the accumulated estates that widows exerted with each new marriage contract was in clear opposition to ideal common law coverture. Widows claimed and exercised far more property rights than the common law allowed or than they were allowed to have while a maiden or first married.

The advent of Elizabeth I's reign challenged the existing notions about women. Prior to her reign, men viewed women as innately evil, unstable creatures who could not control their passions without a man to restrain them. As evidenced by the lack of legal

35. Erickson, 115–116.

36. Harris 167–174.

recognition the law gave women, they were not to be trusted with their own identities, much less with property. The ascension of Elizabeth I challenged these notions in a public manner. Despite the efforts of Parliament and her advisors, who were male, to control her, Elizabeth appeared to exist outside the realm of patriarchy. After all, she held property as queen of England and ruled over it and its populace. In spite of retaining male property rights, Elizabeth presented herself as possessing the virtues of chastity, stability, and, despite her celibacy, the maternal virtues associated with motherhood.³⁷ This conflicting image of England's sovereign as both masculine and feminine sparked controversy over women's roles in society. Despite this challenge to traditional ideas about women, the patriarchal system in Britain was still restrictive, preventing women from living truly independent and autonomous lives. This challenge to the views of women's potential served as a catalyst for change of female status, and was manifested in some ways through Britain's royal colony Virginia for the first time.

The experience of women in Virginia sheds light on the migration of British culture across the Atlantic and how it was amended under new conditions. As the first British royal colony in North America, Virginia naturally retained close ties to English common law and tradition. The established system in Britain intended to implement a society ruled by common law in Virginia. The key to a patriarchy is the presence of men to institute it. Virginia's high mortality rate, particularly among men, left a void in the

37. Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996), 21.

system that needed to be filled.³⁸ Businesses suddenly had no proprietors, land had no owners, and women were left without men to hold property. In some regions of Virginia, men's average life expectancy was mid-to-late-forties, and for women, it was their mid-to-late thirties. Two-thirds of children in these same regions had, by age thirteen, experienced the death of at least one parent.³⁹ For Virginians, death was certain and early, thus creating a problem with practicing common law inheritance standards. Thus, Virginia's situation created conditions for the development of female property rights in a unique way that did not exist in any other part of the British world. Additionally, the institutions found in England, like that of jointure, separate estate, primogeniture, and widowhood, took on different forms in Virginia.⁴⁰

Three primary factors account for these changes in female property rights. First, the women of colonial Virginia enjoyed the benefit of the change brought about by Elizabeth's reign. Elite women in Britain experienced the change in status in the sense that they were no longer necessarily viewed as innately immoral but as having potential for virtue and legal agency. Women in Virginia were given a unique opportunity to prove that this potential was more than just an impression, but that they could actually achieve

38. Edmund Sears Morgan, *American Slavery, American Freedom: the Ordeal of Colonial Virginia* (New York: W.W. Norton & Company, Inc., 1975), 161.

39. Linda L. Sturtz, *Within Her Power: Propertied Women in Colonial Virginia* (New York: Routledge, 2002), 19.

40. In her book *Women's Life and Work in the Southern Colonies* (New York: W.W. Norton & Company, 1972), Julia Cherry Spruill asserts that this was not the case. She argues that women in the colonies faced the same restrictions as women in England. While her work is foundational to the study of women in the British colonies, scholarship since Spruill's book indicates that Virginian women did in fact enjoy more extensive property rights than their British counterparts.

this potential. Elizabeth's shadow—that of a strong yet virtuous woman who could hold her own—prevailed in Virginia.⁴¹

The second factor is the inclusion of all women, regardless of socio-economic status, in the ability to exercise property rights in Virginia. Although social strata did evolve in colonial Virginia, that did not restrict lower-class women from enjoying these legal exceptions. British aristocratic women enjoyed many rights despite the common law restrictions, but these were limited exceptions when compared to Virginia. The ability of Virginians to elevate their social position, as opposed to the more stationary social positions of British aristocrats, encouraged this availability of legal rights to women of all classes. The participation of all women in these practices increased the legitimacy and influence of these rights within the colony.⁴² Had fewer women claimed these rights, perhaps they would not have become such an important factor in increasing women's property rights.

The third and perhaps most significant factor is the conditions in Virginia that contributed to the changes in common law institutions. First and foremost, Virginia settlements experienced a high mortality rate among its male inhabitants. This created a power vacuum in a society based on patriarchy, leaving women in a predicament.⁴³ If the common law was to be strictly observed, then Virginian women would have been left in a pitifully destitute state. Without men, the legal system would have broken down as no one could go to court or perform legal business transactions; the economic system would

41. Brown, 22.

42. Sturtz, 89–90.

43. See Morgan, pp. 158–179 for a fuller description of the mortality rate situation in Virginia.

have broken down as there were no men to conduct businesses, whether farmers or merchants; the social system would have broken down as there were no men to head the basic social unit of the family. Therefore, by the simple fact that men's deaths left crucial positions in society vacant, women were forced in some ways to step up and fill those roles. This required an increase in their legal and property rights. Secondly, the geographic features of Virginia allowed for institutions like inheritance and separate estate to develop beyond British traditions. With more land available, primogeniture was no longer necessary as it was in England. This enabled women to inherit property from their fathers or deceased husbands, which for maidens served as their dowry and for widows served as their motivation for strong separate estate contracts. Both the high male mortality rate and the increased inheritance availability contributed to the development of widowhood as a powerful position, even more so than it was in Britain.⁴⁴

Although common in England among aristocratic women, the practices of jointure and separate estate became a primary means for common colonial women to retain property rights during marriage. Because widowhood, particularly at younger ages, was common in Virginia, remarriage was also common.⁴⁵ To protect any property obtained through previous marriages, women often negotiated agreements with their prospective husband that outlined what estate transferred to the man's control and what the woman retained under her own agency. Jointure, as practiced in England, meant that the bride received an agreed-upon amount in full upon the end of her marriage. In Virginia, jointure meant that the lady would bypass her claim to dower for control over her own

44. Morgan, 158–179.

45. Sturtz, 19.

property after the end of their marriage.⁴⁶ This property went beyond the amount of a dowry to anything she may have brought into the marriage, including the estate inherited from previous marriages. Much like in England, the husband had control over the property during the marriage, and could buy, sell, or trade without concern over his wife's consent in these transactions, as she had no legal right to control any of the family property. Upon her husband's death, a widow gained the property agreed to in the jointure contract, and from that point on—or at least until her remarriage—she exercised rights over the property, including the right to buy, sell or trade.⁴⁷ Jointure thus secured for a woman legal agency upon her husband's death, which was a far higher status than the common law would allow her.

Separate estate was the stronger form of pre-nuptial contract that granted a woman even greater legal agency over property than jointure. Separate estate in England was an institution reserved primarily for aristocratic women, but the social situation in Virginia developed this institution into a common practice among all women. As in England, under separate estate a woman entering into coverture, particularly if remarrying, could hold an entirely separate estate from her husband. In Virginia, a woman's land, money, and business transactions listed under the separate estate fell under her sole authority before, during, and after her marriage. As such, she could buy, sell and trade, make a profit, and dictate what happened to her property without the consent of her husband. She could also write her own will and divide her estate between

46. Dower was the entitlement of one-third of the husband's property that went towards the care and benefit of his widow. Jointure meant bypassing the dower in return for stated property, even if that property was less than whatever dower the lady may have claimed upon her husband's death. *Ibid.*, 21.

47. *Ibid.*, 21.

her children in any manner she wished.⁴⁸ Essentially, separate estate granted women the power to act as though they were men, which suggests increased agency of women in Virginia beyond the agency enjoyed by British women through separate estate. Most often, these agreements were reached in the interest of protecting children from greedy stepfathers who wished to take advantage of their wife's wealth, even at the expense of the children's inheritance. Again, as in England, women could establish separate estates and sue for their legal rights to property under the law of equity.⁴⁹

Temperance Yeardley West is a revealing example of the changing status of women in colonial Virginia. Temperance had married George Yeardley, who was governor of Virginia from 1616 to 1627. After her husband's death in 1627, Temperance married Francis West. Prior to this marriage, Temperance established a separate estate contract that allowed her control over the property from her first husband's estate and over her tobacco exporting business. Records indicated that Temperance had a fruitful business of which she kept meticulous records separate from West's estate. Although West took Temperance's children from her first marriage to court over his share of the estate after his wife's death, the pre-nuptial agreement was strong enough to withstand the trial and pass on the lady's estate to her children, save for the one thousand pounds allotted to her husband in the separate estate contract.⁵⁰ Common women also exercised this separate estate ability. For example, Mary Stark, who remarried five times, established separate estate contracts with her last four husbands. Her first husband, who

48. *Ibid.*, 21–23.

49. *Ibid.*, 21.

50. *Ibid.*, 23.

died in 1692, declared in his will that if she remarried, all the personal estate she inherited from him was to be divided up between her and her children. After her first marriage, Mary took steps to ensure that subsequent inheritances from her husbands would stay in her control.⁵¹

Primogeniture was different in Virginia. England practiced primogeniture due to limited land resources. However, there was plenty of New World land for the settlers to acquire and pass on to their children.⁵² In fact, land was almost worthless in and of itself—its value consisted in the amounts of cash crops that could be produced on it.⁵³ Moveable estate thus comprised most of the value of an individual's inheritance, though land was a part of most estates. Children who, in England, would have received only moveable estate now received real estate, consisting not only of land but also of slaves. Men who died intestate had their estates subjected to the defaults of partial primogeniture and dower.⁵⁴ In these cases the eldest son received all the real estate— which encompassed land but excluded slaves—but not personal property. He was obligated to divide personal property between his other siblings equitably.⁵⁵ The widow could claim the one-third dower entitled to her, but no more. Thus, in colonial Virginia, if a man

51. *Ibid.*, 25.

52. Carr, 157.

53. Morgan, 172–173.

54. That is, without a will to dictate the division of their property among children, wives, or other relatives. Linda E. Speth, “More than Her Thirds: Wives and Widows in Colonial Virginia,” in *Women, Family, and Community in Colonial America: Two Perspectives* by Linda E. Speth and Alison Duncan Hirsch (New York: The Haworth Press, Inc., 1983), 15.

55. Ray Keim, “Primogeniture and Entail in Colonial Virginia,” *William and Mary Quarterly* 25 (1968): 551.

wanted his eldest son to inherit the entire estate, a will was necessary to ensure that happened. An examination of wills from colonial Virginia indicates that primogeniture was unusual, if not rare. Although there existed a wide variety of inheritance divisions, men often left their daughters land in their wills, and granted their widows more than the required one-third dower as well as land.⁵⁶ One Virginia landowner, Christopher Robinson, gave 1200 acres to his son Benjamin and split the remaining land between four daughters. Another gentleman by the name of Henry Ashton granted one daughter 2200 acres, to another 1000 acres, and to two granddaughters he gave 1250 acres.⁵⁷

Under common law, these women should not have been granted land, if they were to be granted any inheritance at all. The New World afforded women the opportunity to acquire land because there was so much of it. The finite land of England limited this potential for women to inherit. Because separate estate was widespread, it was not assumed in Virginia that a woman's property would immediately transfer to her husband in every case. British women saw their estate transferred to their husband's sole control far more often than Virginian women.

Land was not the only inheritance women could receive. Fathers entailed upon their daughters property such as livestock and slaves, as well as other household items. This was strategic on the father's part. It was not uncommon for most of the land holdings to go to sons, but those sons would not inherit the required number of slaves to operate the land. Thus, women who were granted large numbers of slaves had a great

56. Carr, 158–160.

57. Keim, 552.

chance of marrying men with land wealth.⁵⁸ In England, a woman's dowry served as her portion of the family inheritance; in Virginia, a woman's inheritance served as her dowry.⁵⁹ While in England such extensive inheritance was not available to women, in Virginia they were able to obtain property rights through inheritance, thereby enhancing their legal status. This inheritance also increased the need for separate estate contracts prior to marriage, as the property gained through inheritance could be lost upon marriage if not protected.

In addition to inheriting property, Virginian women could pass property on to their children. Women who asserted their property rights could bequeath to their children through two different avenues. First, while married women had no legal rights to create a will, widows were not bound to their deceased husband's legal identity and thus could make their own wills, as Susannah Reynolds, the widow of a merchant, did upon the death of her husband in 1768.⁶⁰ They could entail property directly to their children, but more often than not the safest way to ensure the property falling into the child's hands, particularly if bequeathing to a daughter, was to entail it to the daughter's children. The daughter could be granted use of the property until her children came of age. Thus, female lines became the agent of property inheritance for women. With each marriage,

58. Carr, 169.

59. The dowry did not exist as a specific institution in Virginia as it did in England; thus, the closest idea to the dowry that can be found in Virginia is the inheritance.

60. Sturtz, 35.

women would include this property in the separate estate contract and have the prospective husband sign the contract to ensure that he could not touch the property.⁶¹

The second method of passing property on to children, particularly daughters, was to grant gifts prior to a woman's re-entrance into coverture. These gifts were carefully worded in deeds that women had their new husbands sign, thus guarding the property from infringement by either the new husband or by any successive children seeking to claim a larger share of inherited property. Children did not receive the gifts until after the death of both the woman and her new husband, so these gifts functioned as a sort of will.⁶² An example is that of Sarah Anderson, who remarried in 1702. Sarah sought to protect the inheritance of her four children from a previous marriage by giving them each gifts of property consisting of livestock, horses, and other household items. Sarah's intended husband also signed the deeds.⁶³ It is interesting to note that widowers with children from previous marriages also granted these types of gifts to their children prior to remarriage, presumably to protect them against any potential lawsuits from their stepmother for more than her dower share.⁶⁴ This fact stands in strong testament to the increased legal rights and standing women held in colonial Virginia.

The developing legal empowerment of Virginian women also allowed them greater legal identity apart from their husbands, a right that even most British aristocratic women did not enjoy. According to common law, women had no legal identity of their

61. *Ibid.*, 34–35.

62. *Ibid.*, 26–27.

63. *Ibid.*, 27.

64. *Ibid.*, 27.

own. Upon their marriage, their only legal identity was that of their husband, and thus they could not sue or be sued except through their husbands. The empowerment of women in colonial Virginia was a dramatic departure from English common law. Not only did they retain property and establish legal contracts and wills protecting these legal rights, but women in Virginia gained legal identity and thus were able to bring lawsuits in non-equity courts and to be sued themselves. For example, women could take their deceased husband's will to court and seek to obtain their full thirds of dower if less had been provided for them in the will.⁶⁵

Virginian men went so far as to grant their wives power of attorney during absences. While British women could serve as executors of their husbands' estate, they were rarely, if ever, entrusted with this power of attorney. Virginian women trusted with this power could act as attorneys in court without male oversight, pursue business transactions on behalf of their husbands, and execute a will.⁶⁶ In particular, if minors were involved in the family, a man would assign his wife as executor to ensure his estate went to the children when they came of age. Evidence suggests that colonial women were also called upon to present valid legal testimony in trials; they were not treated as minors but as having testimony equal to adult males. One case in 1658 had several women testify in a case of alleged infanticide.⁶⁷ Numerous examples of female legal agency in Virginia

65. Lois Green Carr, "Inheritance in the Colonial Chesapeake," in *Women in the Age of the American Revolution*, eds. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1989), 160–161.

66. Sturtz, 71–75.

67. Julie Richter, "The Free Women of Charles Parish, York County, Virginia, 1630–1740" in *Women and Freedom in Early America*, ed. Larry D. Eldridge (New York: New York University Press, 1997), 291–292.

exist. In a 1721 case, a couple requested the administration of an estate. The court granted this request, and while both the husband and wife were listed as administrators of the estate, only the wife signed the necessary documents, and thus she served as the legal representation of the estate. A different case granted administration of an estate by a woman for a relative who died intestate, as well as being granted the executorship of her father's will. It was recorded that this woman was married, but it was she and not her husband who acted out the legal responsibilities of the estate.⁶⁸ While not all women exercised such strong legal rights, clearly enough women did so as to provide a number of records of women's legal capabilities in Virginia. This is yet another illustration of how women were able to act as men in the face of a declining male presence in colonial Virginia.

English common law created certain institutions and traditions that restricted women's property rights in Great Britain. Among these institutions were the practice of primogeniture, the dowry, coverture, and limited rights for widows. Women's legal identity rested with the men in their lives, first with their father and then with their husbands. Despite these restrictions, elite women found ways to retain certain property rights, particularly through the use of equity law. In fact, elite British women managed to establish separate estate contracts and strong jointure agreements to ensure that they would receive large property rights after their husband died. In the male-dominated society in which they lived, British aristocratic women found ways to reclaim parts of their legal identity. Elizabeth I's reign challenged some of the underlying attitudes of the

68. Both stories are recounted in Sturtz, 30.

common law, and the slight changes in attitude that she inspired contributed to changes in women's legal agency, most notably in Virginia.

Virginia illustrates the progression of women's legal and property rights, despite the patriarchal common law, from the early modern era to the colonial era. The amount of legal power they did possess far surpasses that of their counterparts in England. While the common law demanded that women submit their identities first to their father and then to their husband, and that all property they may have obtained be transferred to the sole control and ownership of their husband, the property practices in Virginia granted many of these controls to women. These rights had their roots in the practices of early modern British female aristocrats, but conditions in Virginia allowed for the exceptions enjoyed by the elites to be expanded not only to more powerful levels but to more women living the patriarchal society of British common law. These rights most precious were made more precious to the women of colonial Virginia. Despite the differences between the two groups, both the women of Britain and the women of Virginia managed to overcome the restrictions placed upon their legal agency, carving out property rights and legal identity for themselves.

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