Formalism and Fairness: Matthew Deady and Federal Public Land Law in the Early West

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Security and certainty of title to real property are among the most important objects of the law in any civilized community.

Deady in *Lownsdale v. City of Portland*\(^1\)

America's vast and rich public domain contributed profoundly to the development of its nineteenth-century economy, society, and imagination. Federal policies distributing that incomparable treasure hastened settlement of communities from the Appalachians to the Pacific, rewarded three generations of military veterans, promoted internal improvements ranging from local turnpikes to transcontinental railroads, and helped finance countless public buildings, public schools, and land-grant colleges.\(^2\) At a deeper level, the heralded new Eden in a remote West represented for Americans everywhere the hope of new, more noble beginnings and served as a metaphor for their young nation's unique potential in human history.\(^3\)

* Professor of Law, University of Oregon. A faculty summer research award aided materially in the preparation of this article, as did Douglas MacCourt's able and tireless research assistance. Copyright Ralph James Mooney 1988.

1. 15 F. Cas. 1036, 1039 (D. Or. 1861) (No. 8579); see infra text accompanying note 65.


In the next generation, Henry David Thoreau and Walt Whitman continued the agrarian idealist tradition, associating it more explicitly with westward migration. E.g., The Portable
The nineteenth-century story of the American public domain also helps illuminate both the noble and the notorious in our collective past. Many enterprising, courageous Americans journeyed westward to settle new lands for God, country, and family. To their leading interpreter, those journeys in the aggregate provided much of America’s “distinctive and valuable . . . contribution to the history of the human spirit,” a frontier blend of “individualism, economic equality, freedom to rise, [and] democracy.” On the other hand, fortunes large and small often accompanied transfers of public land to private

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By midcentury, many began to herald the vacant West as a “safety valve” against industrial oppression and to invoke the agrarian pioneer as a powerful antislavery image. Horace Greeley repeatedly advised his New York Tribune reader to “Go West,” see, e.g., Van Zandt, Horace Greeley, Agrarian Exponent of American Idealism, 13 RURAL SOC. 411 (1948), and as late as 1860 the Republican campaign for a “fee-simple empire” touched the “deepest levels of American experience.” H. SMITH, supra, at 170. See generally E. FONER, FREE SOIL, FREE LABOR, FREE MEN (1970); Danhof, Farm-Making Costs and the “Safety Valve”: 1850-1860, 49 J. POL. ECON. 317 (1941).

4. By 1880, there existed nearly two million farms in the public land states. P. GATES, LANDLORDS AND TENANTS, supra note 2, at 770. On pioneer motives for journeying west, see J. UNRUH, JR., THE PLAINS ACROSS 58-82 (1979) (religious or patriotic missionary work; economic, social, or political opportunity; lure of “new and fabled lands”; escape from the law, bankruptcy, slave society, or soured romance; even “better fishing”); see also M. JACOBS, WINNING OREGON 34-65 (1938); Johansen, Antecedents of the Oregon Pioneers and the Light These Throw on Their Motives, 5 OR. HIST. Q. 38 (1904). For firsthand accounts of life on the overland trail, see, e.g., F. LOCKLEY, THE LOCKLEY FILES: CONVERSATIONS WITH PIONEER WOMEN (M. Helms ed. 1981); L. SCHLISSEL, WOMEN’S DIARIES OF THE WESTWARD JOURNEY (1982); WE’LL ALL GO HOME IN THE SPRING (R. Bennett ed. 1984). For an imaginative study of legal baggage taken on the trail, see J. REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980).

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ownership. Inevitably, therefore, the history of those transfers also featured widespread avarice, fraud, official misconduct, and lawlessness.6

Federal law dominated this important story. By 1880 Congress had passed nearly 3000 statutes granting or regulating parts of the public domain.7 Administrative and judicial case loads increased correspondingly, as many thousands of claims had to be verified and recorded and growing numbers of disputes adjudicated.8 This article recalls an early far-west chapter of the story, a remarkable series of decisions by Oregon federal district Judge Matthew P. Deady9 interpreting the cornerstone of Pacific Northwest public land law, the 1850 Oregon Donation Act.10 Although Deady decided other public land


7. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW xx (1981); P. GATES, LANDLORDS AND TENANTS, supra note 2, at xi. Early landmarks of federal public land legislation include the 1785 Land Ordinance authorizing public-domain surveys and auction sales, see DOCUMENTS OF AMERICAN HISTORY 123–24 (H. Commager ed. 1943); the Preemption Act, ch. 16, 5 Stat. 453 (1841), establishing procedures for auctionless sales of 160 acres to actual settlers; and the Homestead Act, ch. 75, 12 Stat. 392 (1862), authorizing outright grants of 160 acres to homesteaders after five years residence and cultivation. Other important, more specialized statutes include the Mining Act, ch. 152, 17 Stat. 91 (1872); the Timber Culture Act, ch 27, 17 Stat. 605 (1873); the Desert Lands Act, ch. 107, 19 Stat. 377 (1877); and the Timber and Stone Act, ch. 76, 20 Stat. 46 (1878). See generally P. GATES, LANDLORDS AND TENANTS, supra note 2; B. HIBBARD, supra note 2; R. ROBBINS, supra note 2.


law questions as well, it is his Donation Act decisions helping to determine ownership of the Portland land claim which reveal most clearly both the institutional and the biographical significance of his work in this field.

The Portland land disputes were of utmost importance to the community and exceptionally difficult to resolve. They often required Deady to reconstruct breathtakingly complex fact patterns, then interpret and apply an opaque federal statute overlaid with ancient common-law property doctrines. Worse, they forced him repeatedly to confront, under intense public scrutiny, the abiding judicial dilemma: how to reconcile the need for clear, general rules of uniform, predictable application with the equally compelling need for particular results consistent with individual and community conscience. Deady struggled with this dilemma in the Portland cases, trying simultaneously to promote certainty of land title and common-law conveyancing principles and to protect good-faith, though mistaken, purchasers who lived and worked on the disputed parcels. His choice frequently was between "legal title" and "equitable title," or, even more generally, between formalism and fairness.


11. E.g., McConnaughy v. Pennoyer, 43 F. 196, aff'd, 43 F. 339, aff'd, 140 U.S. 1 (1890) (in suit against state land board, permissible under 11th Amendment, board enjoined from declaring plaintiff's patent certificates void; see generally C. Minton, Have We Got Some Land For You: Oregon Supreme Court Interpretations of Federal and State Swampland Legislation (Dec. 21, 1985) (unpublished) (copy on file with the Washington Law Review)); United States v. Willamette Valley & Cascade Mountain Wagon Rd. Co., 42 F. 351 (D. Or. 1890), aff'd, 140 U.S. 599 (1891) (United States estopped by delay and governor's completion certificates to seek forfeiture of wagon-road grant lands from good faith purchasers; see generally C. Amundson, History of the Willamette Valley and Cascade Mountain Wagon Road Company (1928) (M.A. thesis, Univ. of Or.)); California & Or. Land Co. v. Munz, 29 F. 837 (C.C. Or. 1887) (wagon-road grantee prevailed over swampland reclamation grantee, whose grant vested only upon Interior Secretary certification; see generally Ellis, supra note 8); United States v. Reed, 28 F. 482, 487 (C.C. Or. 1886) (homestead patent upheld against claim of unpatentable mineral land: "Forty acres of this land, cleared and planted ..., furnishing a permanent home and sure support for an industrious farmer and his growing family, is worth more to the state... than all the mining or gold on the creek, twice told."); Bybee v. Oregon & Cal. R.R., 26 F. 586 (C.C. Or. 1886), aff'd, 139 U.S. 663 (1891) (railroad grantee not liable for injury to adjacent landowner's ditch; see generally Ellis, supra note 8); see also infra note 186.

Deady's favored response to this "moral-formal dilemma,"13 one common among his judicial contemporaries, was to elevate the formal stakes and declare them controlling. He repeatedly emphasized the importance to "civilized society" of secure land titles, common-law conveyancing rules undiluted by doctrines like estoppel, and literal interpretations of deed language. Although occasionally also invoking "equity" or "justice," his decisions tended repeatedly to favor holders of formal legal title rather than parties to whom the land arguably had been donated or sold years earlier.

Deady's relatively formalist stance in the Portland land cases, though especially pronounced, was not untypical of his jurisprudence generally. Throughout his career he exhibited great respect, even reverence, for the common law as a principal underpinning of western civilization and bulwark against the irrational world of party politics. To him and others of his generation, both within and outside the legal profession, constitutional and common law administered by wise and courageous judges represented the last best hope for control of political demagoguery and social disintegration.

On a more personal level, Deady's steadfast support for legal tradition served both to justify his difficult and sometimes unpopular decisions and, more generally, to dignify his own position as Oregon's most visible representative of that tradition. In these decisions, as elsewhere, Deady exhibited a tendency to parade his vast learning, a relatively severe judicial demeanor, and at times even a measure of contempt for certain contentions being urged. His abiding commitment to a strongly formalist common-law heritage helped validate his uneasy place among Portland's early elite and, ultimately, his career choice and life's work.

The Portland land decisions did not turn out well for Deady. Twice his immediate superior, circuit Judge Lorenzo Sawyer, arrived in Portland to hear pivotal test cases. Both times, once reversing Deady, Sawyer ruled for purchasers of small parcels, emphasizing an "honest and reasonable construction" of early conveyancing documents and the "intrinsic justice" of the disputes. Moreover, both times, once in a sharply worded opinion by Justice Stephen Field, the Supreme Court affirmed Sawyer's reasoning and results.


Part I to follow introduces the Donation Act, early Portland, and Deady; Parts II, III, and IV describe and analyze the principal decisions; and the Conclusion examines their significance in greater detail.

I. THE OREGON DONATION ACT, EARLY PORTLAND, AND MATTHEW DEADY

A. The Statute

In February 1838, Senator Lewis Linn of Missouri introduced the first of his several bills to promote settlement of the Oregon Country. It called for creation of the Oregon Territory north of latitude 42 degrees N. and west of the Rocky Mountains, military occupation anchored by a fort on the Columbia, and an official United States port of entry on the Pacific. Linn’s bill did not pass, but he persevered.

Beginning in 1840, all Linn’s bills called for generous land grants to settlers, usually 640 acres. Memorials encouraging such grants began arriving regularly in Washington. In February 1843 the Senate (but...
not the House) passed such a bill, prompting that year the first substantial overland migration to Oregon, about 1000 souls.17

Linn and other advocates of American manifest destiny faced a dilemma. They needed a sizable American presence in Oregon to help consolidate a claim to it, but could make no binding settler land grants without first extinguishing both Indian title and British claims.18 By the mid-1840's, however, more and more white Americans began arriving in Oregon, making clear that neither native tribes nor the British would dominate it much longer.19 In 1846 Britain and America settled their boundary at latitude 49 degrees N.,20 and throughout the next decade federal treaty officials induced the Indian tribes to relinquish their homelands.21

17. On the 1843 migration, see 29 WORKS OF BANCROFT, supra note 14, at 391-424; P. BURNETT, AN OLD CALIFORNIA PIONEER 97–138 (Cal. Centennial ed. 1946); Applegate, A Day With the Cow Column in 1843, 1 OR. HIST. Q. 371 (1900); Young, The Oregon Trail, 1 OR. HIST. Q. 339 (1900).

18. Both the Northwest Ordinance, ch. 8, 1 Stat. 52 (1787), and the Oregon Territorial Act, ch. 177, 9 Stat. 323 (1848), pledged that Indian lands would “never be taken” without Indian consent. Britain and the United States twice had agreed that territory west of the Rockies would remain open to settlement by citizens and subjects of both nations. See Convention with Great Britain, Oct. 20, 1818, United States-Great Britain, 8 Stat. 248; Convention with Great Britain, Aug. 6, 1827, United States-Great Britain, 8 Stat. 360. For two decades beginning in 1825, Hudson’s Bay Company at Fort Vancouver remained the region’s dominant non-native presence.

19. Approximate numbers of settlers arriving were 137 in 1842, 875 in 1843, 1400 in 1844, and 3000 in 1845. See 29 WORKS OF BANCROFT, supra note 14, at 395, 448, 508; W. BOWEN, THE WILLAMETTE VALLEY: MIGRATION AND SETTLEMENT ON THE OREGON FRONTIER 12–13 (1978); Young, supra note 17, at 370.

20. Soon after settling Maine’s northern boundary in the Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, both Britain and the United States became anxious to resolve the “Oregon Question.” Economic distress at home and revolt elsewhere in the Empire quickened Britain’s spirit of compromise, as did the Mexican War our own. So when Hudson’s Bay Company moved north from Fort Vancouver to Fort Victoria in 1845, the way was clear for a treaty extending the northern U.S. boundary along latitude 49 degrees N., except for the tip of Vancouver Island which went to Britain. Treaty with Great Britain, June 15, 1846, United States-Great Britain, 9 Stat. 869; M. JACOBS, WINNING OREGON: A STUDY OF AN EXPANSIONIST MOVEMENT 209–28 (1938); F. MERK, THE OREGON QUESTION (1967); Commager, England and Oregon Treaty of 1846, 28 OR. HIST. Q. 18 (1927); Van Alstyne, International Rivalries in the Pacific Northwest, 46 OR. HIST. Q. 185 (1945).

Meanwhile, early Oregonians themselves took steps toward securing their land claims. In 1843 the new provisional government authorized each male settler over 18 to claim 640 acres by occupying and improving them.\(^{22}\) Five years later, however, Congress declared all such local land laws “null and void,”\(^{23}\) thus leaving Oregon temporarily without any land law at all.

Finally, in September 1850, Congress passed the long-awaited Oregon Donation Act.\(^{24}\) Section 4 granted to every “white settler” residing in the Oregon Territory\(^{25}\) by December 1, 1850, 320 acres if a “single man” or 640 acres if a “married man” by December 1851, half to his wife “in her own right.”\(^{26}\) The undevised share of a settler who complied with the four-year residence requirement but died before...
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patent issue went to his “survivor and children or heirs . . . in equal proportions.” 27 To discourage speculation, all future contracts for sale of a claim prior to patent were declared “void.” 28

Section 5 then encouraged future emigration by granting to all “white male citizens” settling in Oregon by December 1, 1850, 160 acres if single and 320 acres if married, again half to the wife “in her own right.” 29 Other important sections granted the territory itself two townships to establish a university on each side of the Columbia, set aside once again John McLoughlin’s Oregon City claim, and required a claimant to affirm that his land was for personal use and not speculation. 30

Congress amended the Act in 1853, extending section 5 grants to settlers arriving by December 1855, authorizing patents after two rather than four years upon payment of $1.25 an acre, and granting rights to widows whose husbands died before becoming claimants. 31 The next year it granted rights to orphans, extended the 1841 Pre-exemption Act and 1844 Townsite Act to Oregon, shortened the residence requirement to one year with cash payment, authorized claim sales after four years’ residence but before patent, and granted newly-created Washington territory two townships for its own university. 32

27. Donation Act § 4. Similarly, rights of a settler who died before completing four years’ residence descended to his “heirs at law . . . , including the widow, where one is left, in equal parts. . . .” Id. § 8. Heirs of a settler who died before September 1850, however, took nothing. Fields v. Squires, 9 F. Cas. 29 (C.C. Or. 1868) (No. 4776) (see infra text accompanying notes 87–107); Ford v. Kennedy, 1 Or. 166 (1855).


29. Id. § 5. A section 5 settler had to be at least 21, and again could satisfy the citizenship requirement by declaring an intention to become naturalized. Id.


31. Amendment to Oregon Donation Act, ch. 69, §§ 1, 8, 10 Stat. 158 (1853); see also Chused, supra note 26, at 12–13; H. Head, supra note 10, at 55–58.

32. Amendment to Oregon Donation Act, ch. 84, 10 Stat. 305 (1854). The Townsite Act, ch. 17, 5 Stat. 657 (1844), provided for patent of public-land townships to local authorities, in trust
So the legislation for which Oregon settlers had hoped and petitioned for over a decade was finally in place. Its mere likelihood had encouraged thousands to journey westward, and once enacted it would bring many thousands more. It also would become the source of substantial administrative and judicial caseloads within Oregon, including that of federal district Judge Matthew Deady.

B. The City

In November 1843, William Overton and Asa Lovejoy pulled their canoe into a clearing along the west bank of the Willamette River, midway between Fort Vancouver and Oregon City, and founded Portland.  

Early the next year, Overton sold his half interest in the 640-acre claim to Oregon City merchant Francis Pettygrove for fifty dollars in supplies, departing for Texas where some said he met the wrong end of a rope.  

By early 1845 Lovejoy and Pettygrove had enlarged the clearing, built a cabin, and given their townsite a name. Later that year Lovejoy sold his half interest, plus a few cattle, for $1215 to Ben Stark, recently arrived cargomaster on a trading vessel.

33. Overton, recently arrived from Tennessee, sold half his intended site to Oregon City lawyer Lovejoy for the paperwork and 25 cents needed to file the claim. It may have been Captain John Couch, leader of an 1840 trading expedition from Massachusetts, who first recognized the clearing as "head of navigation" on the Willamette, beyond which ocean vessels could not regularly sail. See, e.g., 1 J. GASTON, PORTLAND, OREGON: ITS HISTORY AND BUILDERS 203-04, 214 (1911); H. SCOTT, HISTORY OF PORTLAND, OREGON 80 (1890); E. SNYDER, EARLY PORTLAND: STUMP-TOWN TRIUMPHANT 19-22, 29-30, 38-39 (1970). In 1845 Couch recorded his own claim just north of the clearing. See infra map at note 38.

34. Little is known about Overton. James Nesmith, early Oregon politician and humorist, described him as a "desperate, rollicking fellow" who travelled to Texas, "where, as I have heard, his career was brought to a sudden termination by a halter." H. SCOTT, supra note 33, at 81. Lovejoy's wife doubted the story, however. Id. at 82.

35. Lovejoy from Massachusetts favored "Boston," and Pettygrove from Maine favored "Portland." Reason proving ineffectual, they flipped a coin. H. SCOTT, supra note 33, at 86; E. SNYDER, supra note 33, at 32.

36. Stark, from New London, Connecticut, later engaged in a variety of merchandising, banking, and steamboating ventures, including an early effort to monopolize the Honolulu salt trade. He studied law briefly, joined the Oregon bar in 1850, and became a territorial legislator three years later. In late 1861, Governor John Whiteaker appointed Stark, recent convert from Whiggery to Democracy, to serve the one-year unexpired Senate term of Col. Edward Baker, killed on October 21 at Ball's Bluff. Newspapers denounced the appointment, calling Stark a "secessionist" and a "traitor as infamous as any that disgraces Northern soil." At least one speaker blamed the appointment on Matthew Deady, a "judicial functionary in whose hands the Executive is as clay in the hands of the potter." W. WOODWARD, THE RISE AND EARLY

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then departed, leaving the industrious Pettygrove to promote Portland to its eventual place of prominence on the Willamette.  
In 1846, the region's claims looked like this:

[Diagram of LAND CLAIMS AROUND PORTLAND 1846]

37. By the summer of 1846 Pettygrove had built a wharf, warehouse, and store, and later that year he moved his family from Oregon City to Portland's first frame house. He opened wagon roads to Oregon City and the Tualatin Valley, and began selling parcels within the claim to other settlers. Portland's population doubled in 1846 to about 100, and by August 1848 when news of California gold arrived, it was well on its way to eclipsing Oregon City as the region's leading commercial center. E. Snyder, supra note 33, at 35–47.

38. Map from E. Snyder, supra note 33, at 40 (permission to reproduce granted by Binford & Mort Publishing). On Captain Couch, see supra note 33. Daniel Lownsdale, a tanner from Kentucky, bought out Pettygrove in 1848 and eventually became the central figure in much Portland land claim litigation. James Terwilliger was a blacksmith from New York. James Stephens, naturally, operated a ferry. Elizabeth Caruthers (a.k.a. Elizabeth Thomas) was "peculiar," according to Harvey Scott, and kept to her cabin in the woods. Following her death, and that of her son, Finice, (the last Caruthers, as she had predicted), litigation clouded her land. First was the question whether she could be a Donation Act "settler." See Silver v. Ladd, 74 U.S. 219 (1869); supra note 29. Then a group of Portlanders hoping to buy the land produced one "Wrestling Joe" Thomas from St. Louis who swore he was her long-lost husband. Eventually the various claimants compromised, and the Oregon and Transcontinental Railway Company obtained the land, illustrating again how "loose property gravitates toward railways." H. Scott, supra note 33, at 138. See generally id. at 80–138; E. Snyder, supra note 33, at 36–40; Burnham, The Annual Society Address: For the Land's Sake, 53 Or. Hist. Q. 223, 230–31 (1952).
When news of California gold reached Portland in August 1848, Pettygrove sold his interest to Daniel Lownsdale for $5000 worth of leather and went south.\textsuperscript{39} Seven months later Lownsdale sold half of whatever he had bought to Stephen Coffin of Oregon City for $6000, and in December 1849 he and Coffin sold a third to Oregon City lawyer W.W. Chapman. Those three—Lownsdale, Coffin, and Chapman—became commonly known as the Portland "proprietors."

In January 1850, however, Stark met Lownsdale in San Francisco and reasserted his half interest. The two eventually agreed that Stark would receive forty-eight prime acres in the claim's northeast corner, subject to all prior conveyances. Two years later, in 1852, Lownsdale, Coffin, and Chapman partitioned their remaining jointly-owned claim, and by 1864 all four claimants—Lownsdale, Coffin, Chapman, and Stark—received federal patents to their land.

C. The Judge

Matthew Deady dominated the Oregon legal landscape for forty years. Born in Maryland in 1824, he was the eldest child of an Irish immigrant father and a mother born and raised in Baltimore. His father taught school, moving the family frequently to posts in West Virginia, Ohio, Kentucky, and Mississippi. Following his mother's death from tuberculosis in 1834, Matthew lived for two years with his maternal grandparents in Baltimore, then returned to his father's farm in southern Ohio.

In early 1841, Deady had a disagreement with his father and left home never to return. He moved to nearby Barnesville, Ohio, where he spent four years as a blacksmith apprentice and earned a teaching certificate at the Barnesville Academy. In late 1845, he moved to St. Clairsville, Ohio where he taught school for a year, then read law with a local judge. In 1847 he joined the Ohio bar, began a small practice, and two years later crossed the plains to Oregon, seeking greater opportunity.

Deady quickly became a force in Oregon Democratic politics. He was elected to the territorial Assembly in 1850, to the Council (upper house) in 1851, and Council president in 1852. He was an active member of the "Salem Clique" which, in uneasy alliance with congress-

\textsuperscript{39} Merchant Pettygrove did well in Portland, beginning in 1843 with a share in a $15,000 inventory and departing five years later with $75,000. He later helped found Port Townsend, Washington, returning to Portland in 1880 to proclaim, "It fills my heart with joy to see this great city where once I saw dense woods." E. Snyder, supra note 33, at 46; see also A. Throckmorton, Oregon Argonauts: Merchant Adventurers on the Western Frontier 34-40, 55-61, 90 (1961).
sional delegate Joe Lane, controlled Oregon politics for nearly a decade. While in the Assembly, Deady also began his work as “Oregon Justinian” by codifying the territorial laws.

In 1853 Democratic President Franklin Pierce appointed Deady to the territorial supreme court, a position he held until statehood in 1859. He was president of the 1857 state constitutional convention, and at statehood voters elected him to the new state supreme court. He chose, however, to accept President James Buchanan’s appointment as Oregon’s first federal district judge, which he remained until his death in 1893. Twice, in 1864 and 1872, he prepared monumental annotated editions of Oregon laws.

Deady revered the law, especially the common law, as foundation and guardian of a rational, orderly world. A devoted Anglophile, he read widely in English history and literature, and for him Westminster Hall was the supreme “bulwark of liberty and buttress of order.”

His most expansive statement of such views was a lecture entitled “Law and Lawyers” which he delivered first in 1866 and periodically thereafter for two decades. In it he explained how the common law pervaded virtually all American law, even that recently modified by statute. Land law, for example: “Our law of real property . . . is older than the English language. . . . The . . . forms and effect of conveyances—the terms used and necessary to create estates . . . and pass interests in real property—are all derived from the common law . . .

40. See generally R. JOHANNSEN, FRONTIER POLITICS AND THE SECTIONAL CONFLICT 3–127 (1955); W. WOODWARD, supra note 36, at 37–188 (1913); Williams, Political History of Oregon from 1853 to 1865, 2 OR. HIST. Q. 1 (1901); P. Overmeyer, supra note 9, at 40–98. For a remarkably literate 1852 satire of the Salem Clique, by Whig newspaper editor William Lysander Adams (a.k.a. "Breakspear"), see W. ADAMS, A MELODRAMA ENTITLED "TREASON, STRATAGEMS, AND SPOILS" (G. Belknap ed. 1968).
41. See Statutes of a General Nature Passed by the Legislative Assembly of the Territory of Oregon (1851); see also Beardsley, Code Making in Early Oregon, 23 OR. L. REV. 22 (1943); Peters, The “First” Oregon Code: Another Look at Deady’s Role, 82 OR. HIST. Q. 383 (1981); P. Overmeyer, supra note 9, at 111–27.
42. 1845–1864 Or. Laws; 1843–1872 Or. Laws. See generally Beardsley, supra note 41; P. Overmeyer, supra note 9, at 99–110. Deady drafted as well as codified many territorial and early state laws. E.g., 1862 Or. Laws 3–286 (Code of Civil Procedure); 1862 Or. Gen. Laws 3–13 (general incorporation law); 1845–1864 Or. Laws 441–582 (Code of Criminal Procedure and Penal Code); see also H. BANCROFT, supra note 9, at 621–23. But see Peters, supra note 41.
43. M. Deady, supra note 15.
44. M. Deady, Law and Lawyers: A Lecture Delivered Before the Portland Law Association (Dec. 6, 1866). The most notable delivery was at Georgetown University law school in January 1882 during Deady’s extended trip east. See 2 PHARISEE, supra note 9, at 386. For other occasions, see id. at 335, 444, 523, 531. Richard Chused has used the lecture for a similar point. Chused, supra note 26, at 25.
and speak its language." He45 His deeper point, though, was normative and political:

The common law people—the English race, wherever they go, establish limited governments, with Parliaments and juries; . . . [T]he common law is the source and panoply of all those features of our system, which distinguish us from the subjects of absolute governments, ancient or modern,—either by monarchs or majorities. It was made by freemen for freemen.46

Deady thus strongly associated the continued vitality of the common law, including even its “forms and effect of conveyances,” with preservation of Anglo-American ideals of limited, enlightened self-government. Generations of “profound jurists”47 had defended those ideals against the tyranny of both monarch and mob. Deady was determined to extend that tradition to the shores of the Pacific,48 and the Portland land claim litigation seemed to provide him an early opportunity.

II. PUBLIC DEDICATIONS: THE LEVEE AND THE SCHOOLHOUSE

Three clusters of Portland land claim litigation found their way to Matthew Deady’s federal court between 1861 and 1880. In the first, city officials and interested landowners alleged irrevocable public dedications by the early proprietors of a large riverfront levee area and a downtown schoolhouse site. In the second, Daniel Lownsdale’s heirs sought to reclaim land he and other proprietors had “sold” before obtaining title. And third, purchasers of lots within Ben Stark’s forty-eight acres, notably brothers Lewis and Addison Starr, sued to quiet titles. In all three, Deady inclined strongly toward holders of formal

46. Id. at 27.
47. Deady wrote in his memoir for Bancroft: “Like other profound jurists, Judge Deady attaches great importance to the study of the principles of the common law.” H. BANCROFT, supra note 9, at 629.
48. Deady made this point explicitly in his 1875 Annual Address to the Oregonian Pioneer Association:

[T]he American settler was always animated . . . with the heroic thought that he was permanently engaged in reclaiming the wilderness . . . and extending the area of liberty. . . . [H]e was here to do for this country what his ancestors had done for savage England centuries before—to plant a community . . . wherein the language of the Bible, Shakespeare and Milton should be spoken by millions then unborn, and the law of Magna Charta and Westminster Hall be the bulwark of liberty and the buttress of order for generations to come.

M. Deady, supra note 15. See generally 1 PHARISEE, supra note 9, at 192–95.
legal title and emphasized repeatedly the importance of secure land titles based on indisputable written records.

A. Lownsdale v. City of Portland (1861)

Disagreement about ownership of the Portland waterfront began as early as 1850 when Josiah Parrish,49 owner of property facing adjacent Water Street, sued Lownsdale, Coffin, Chapman, and others to enjoin construction of private buildings along the riverbank.50 Parrish alleged that between 1845 and 1850 Lovejoy, Pettygrove, and finally Lownsdale all had sold lots near the river with assurances that the fractional parcels east of Water Street would remain a public levee. Territorial Justice O.C. Pratt granted Parrish a preliminary injunction, following which the parties apparently compromised: Parrish would dismiss his suit in exchange for a firm commitment that the waterfront between Washington and Main Streets would remain open to the public. The compromise eventually failed, however, and in late 1853 the case went to trial before the full territorial court.51

Justice Olney's opinion in Parrish v. Stephens52 emphatically endorsed Parrish's position. In 1845 Pettygrove and Lovejoy had laid out Portland on a plat indicating clearly that the land between Water Street and the river would remain open to the public. That plat constituted a "prima facie dedication" of the disputed strip, one which was both "apparent" and "reasonable" in early Portland.53 Moreover, the two early proprietors had declared repeatedly to town residents that the levee would remain public. Nearly a dozen witnesses including

49. Rev. Josiah L. Parrish left New York for Oregon in 1839 with his wife and three children to labor and preach at Jason Lee's Methodist Mission. For the next 55 years "Father Parrish" pursued both wealth and grace with notable success, as farmer, sheep rancher, railroad investor, philanthropist, and university overseer. See C. DOBBS, MEN OF CHAMPOEG 71-74 (1932); H. HINES, HISTORY OF OREGON 537-40 (1893).
50. Lownsdale v. City of Portland, 15 F. Cas. 1036 (D. Or. 1861) (No. 8579).
51. Facts for the People of Portland Relating to the Levee Case, (March 1860) (anonymous pamphlet) [hereinafter Facts for the People], recounts these early events in detail. According to it, one proprietor refused to ratify the compromise, then Parrish himself repudiated it alleging he had signed when ill and "incompetent." Id. at 4. See also G. BELKNAP, OREGON IMPRINTS 1845-1870, at 129 (1968). The Oregonian attributed authorship to Alonzo Leland, H.B. Jones, and attorney W.H. Farrar, all "interested in jumping the public property of this city." Oregonian, Mar. 31, 1860, at 2, col. 5.
52. 1 Or. 59 (1853).
53. The proprietors had wished to insure that "loading and unloading of vessels, which confers upon the town its principal importance, should not be embarrassed by the caprice and avarice of private persons . . . ." They therefore adopted the "usual and proper means of guarding against this evil," by designating Water Street to adjoin the river, to "form the connecting link between all the highways of the town and the great highway of water, upon which the town is dependent . . . ." Id. at 62.
Lovejoy himself testified to such declarations, producing “unhesitating
belief in the mind of the court that the strip was thrown out to the
public.”

Finally, even without the plat or repeated declarations, the early
proprietors’ abandonment of the land to the free and apparently right-
ful use of the public itself estopped them and their purchasers from
reasserting ownership. The court invoked *turpe est fidem fallere*, a
“fundamental principle of natural justice,” and emphasized that the
evidence supported its result with a degree of certainty unusual to liti-
gated cases. Even the proprietors had recognized the public right until
developing an “itching palm for this attractive property” and yielding
to a “desire and hope of reclaiming the tempting prize.”

The “vexed Levee question” continued, however. In early 1860,
George Vaughn began building on a riverfront site purchased from
Daniel Lownsdale. City authorities arrested his workers, razed his
structures, “fanned up a flame of vengeance,” and aroused “passion
and the mobocratic spirit of our community.” Later that same year
Daniel’s son James Lownsdale began building on *his* riverfront prop-

54. *Id.* at 69; *see also* Reed, *Lovejoy’s Pioneer Narrative*, 31 OR. HIST. Q. 236, 255 (1930)
(“Lovejoy maintained that he and Pettygrove gave the river front for a public levee. Pettygrove
denied this.”).

55. The court translated, “It is base to disappoint the expectations we have authorized.” 1
Or. at 69.

56. *Id.* at 70. The court’s decree, authorizing the nonparty city to remove obstructions,
reflected an early public-trust conception. The city, though not owner, was “guardian of this
ground” with the “right and duty . . . to see that it is kept in a fit state for use, to the extent of
the public wants.” *Id.* at 72. *See generally The Public Trust Doctrine in Natural Resources Law

The following term the court denied a rehearing petition. It declared chancery “quite as
competent as a court of law” to decide the questions involved, declined to apply the “public
nuisance doctrine,” that only public authorities could sue to enjoin a widespread injury, and held
that the early Pettygrove/Lovejoy dedication did bind their successors, even though made while
title remained in the United States. “Public levies are almost as necessary . . . as public streets,”
concluded Chief Justice Williams. Parrish v. Stephens, 1 Or. 73, 74–76 (1853). Newly-appointed
Associate Justice Matthew Deady dissented without opinion.

Five years later, the United States Supreme Court dismissed a further appeal for lack of
jurisdiction. Because Congress had created no private rights in Oregon land until the September
1850 Donation Act, neither party had “any title to or interest in the land whatever” in July 1850
when Parrish had filed suit; therefore, the case involved neither a federal question nor the S2000
in dispute required for an appeal to the Supreme Court, and that Court had “no jurisdiction . . .
to examine and revise the decree of the Supreme Court of Oregon.” Lownsdale v. Parrish, 62
U.S. (21 How.) 290, 294 (1858).


58. *Id.* at 14.
Deady granted Lownsdale a temporary restraining order, then ruled on the legal merit of several city responses. Its first response, naturally, was that the territorial court already had decided the same dispute in its favor. But Deady explained that a prior decree was res judicata only if it was mutual, binding both parties. The earlier Parish decision would not have bound the city because neither it nor anyone in privity with it had been a party. Therefore, the decision also did not bind Lownsdale.

The city's second contention was that the proprietors' entire Portland land claim was invalid because the 1844 federal Townsite Act precluded private townsite claims. Deady ruled, however, that the 1848 Territorial Act had not extended the Townsite Act to Oregon so the Portland proprietors' claims were lawful. Congress had intended the Townsite Act for unsettled regions, not one like Oregon which by 1848 had extensive settlements, a provisional government, and even an established land law:

It would tax the ingenuity of man to find a provision in the land system of the United States, as it stood in 1848, less applicable to the condition of Oregon, or that would have worked greater hardship, confusion and injustice than the Act of 1844.

To the thrifty and enterprising settler it would have said: By your management and industry you have built up a town on your land claimed and thereby lost it. If you had been content to live upon it in a seven-by-nine cabin with tottering lean-to attached, and merely pastured it with a few Spanish cattle and cayuse ponies, it would have been yours.

Besides, Deady added, Congress expressly extended the Townsite Act to Oregon in 1854, which settled "beyond cavil or doubt" that it had not done so earlier.


60. Lownsdale, 15 F. Cas. at 1030, 1031-34. Deady also thought the territorial court decree "void" for lack of subject-matter jurisdiction. The Supreme Court's dismissal of Lownsdale's appeal for lack of a recognizable interest in the land necessarily meant also that the territorial court itself had had "nothing . . . to adjudicate." Id. at 1033. Cf. Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (1865).

61. On the Townsite Act, see supra note 32.

62. Lownsdale, 15 F. Cas. at 1034.

63. Id. at 1035; accord Marlin v. T'Vault, 1 Or. 66 (1854). In 1860, however, the General Land Office had concluded otherwise, issuing the city a patent for Ben Stark's 48 acres. See infra text accompanying note 160. Deady responded "respectfully" that "such decision does not
The city's third defense—recalling again the earlier Parrish decision—was that in 1845 Pettygrove and Lovejoy had dedicated the levee to public use, that Portlanders had accepted the dedication by long and continuous occupation, and that Daniel Lownsdale himself had repeatedly affirmed it even after his 1849 purchase of Pettygrove's interest. Again Deady was unreceptive, however, calling a portion of the question too plain for argument. Pettygrove and Lovejoy had owned "no interest in the soil" beyond "naked possession" and so had had "nothing to dedicate." Whether Daniel Lownsdale himself had dedicated the levee, after obtaining a Donation Act interest, was an issue for trial.

Following such a trial six months later, Deady ruled that the city failed to sustain its burden of proof. Evidence of a public dedication needed to be clear and cogent. When consisting simply of casual and disjointed conversations and remarks susceptible to various interpretations, given by witnesses tainted by prepossessions and prejudices, it had to be closely scrutinized:

Security and certainty of title to real property are among the most important objects of the law in any civilized community. Any act intended and permitted to affect the ownership or use of such property the law requires to be done or suffered with certain solemnities and formalities, so that the fact may be read and known of all men. What is shown to have once belonged to a person he is not presumed to have parted with; but the fact, if claimed, must be satisfactorily proved.

Moreover, other evidence suggested affirmatively the lack of any Lownsdale dedication. His 1850 city map depicted Water Street, by then called Front Street, as one of normal width bounded by two parallel lines, with fractional blocks on the east extending to the riverbank. In April and May 1851, Lownsdale published six notices in the weekly Oregonian that he claimed the disputed land. And, most tellingly, the Portland city council in April 1852 "deliberately recognized and adopted" his map as correct, and in 1854 and 1858 taxed the fractional blocks as private property. For all those reasons, Deady perpetually enjoined the city from asserting any right, title, or interest to conclude the Courts in a proper case... from deciding what laws were applicable to the Territory at a particular time." Lownsdale, 15 F. Cas. at 1034.

64. Id. at 1035.

65. Lownsdale v. Portland, 15 F. Cas. 1036, 1039 (D. Or. 1861) (No. 8579).

66. Even as late as 1860-1861 the council vacillated wildly on the levee issue. In August 1860 it again asserted public rights; ten months later it repealed that ordinance; then in August 1861, four months before Deady's final Lownsdale decision, it again declared the levee to be private. See Oregonian, Aug. 13, 1861, at 1, col. 1; Aug. 8, 1861, at 3, col. 1; June 18, 1861, at 2, col. 4.
a sizable portion of its waterfront. His most influential contemporaries, even those who thought the decision unfortunate, tended to assign responsibility elsewhere.

67. Lownsdale, 15 F. Cas. at 1040. A quarter century later Deady heard Coffin v. City of Portland, 27 F. 412 (C.C. Or. 1886), an effort by heirs of proprietor Stephen Coffin to reclaim the levee south of Jefferson Street, which Coffin clearly had dedicated to the city in 1850. The heirs contended that the dedication was void because contrary to public policy, and that an 1885 statute licensing a railroad to use the area renounced and abrogated the dedication, creating a resulting trust in their favor.

Deady responded sharply. Portland's charter granted it authority to hold property for public purposes, and it would be "sheer assumption" for a court to inquire into the "policy" of its doing so:

The fact that the river front is generally in the hands of private parties has no bearing on the question of the authority of Portland in the premises. ... It would be sheer assumption for the court to say that it is contrary to public policy for Portland to have a public landing on the river bank, or to improve and maintain the same, either directly or through the agency of third persons.

Id. at 418. Nor did the license to a private railroad extinguish the dedication. True, the legislature could not devote the land to a use clearly inconsistent with the dedication, but in no case would it revert to the donor. The heirs' theory that the legislature, by "passage of a void act, whereby it undertook to divert the use of this property from the public to a private corporation, has caused the right of the public therein to be forfeited," would make "one person answer for the sins of another, with a vengeance." Id. at 419. See generally West, Jefferson Street Public Levee and the Railroads, 43 Or. Hist. Q. 135 (1942).

68. Jesse Applegate, the "Sage of Yoncalla" and one of Deady's most thoughtful early correspondents, wrote to him before the decision that young Lownsdale surely would lose because "there can be no doubt the City will be able to establish the fact of the dedication." Letter from Applegate to Deady (Nov. 4, 1861) (Deady Papers, Oregon Historical Society). Later, however, Applegate saw the matter differently: "The 'City' had already decided the case against itself, by approving Short's map and survey, and you had nothing to do but to follow it..." Letter from Applegate to Deady (Feb. 5, 1862) (Deady Papers, Oregon Historical Society). On Applegate generally, see Baker, Experience, Personality and Memory: Jesse Applegate and John Minto Recall Pioneer Days, 81 Or. Hist. Q. 229 (1980); S. Frear, Jesse Applegate: An Appraisal of an Uncommon Pioneer (1961) (M.A. Thesis, Univ. of Or.).

Applegate, a nonlawyer, also offered a persuasive critique of the Supreme Court's jurisdiction denial in Parrish: "I think the decision of the Supreme Court of the U.S. in the Parrish case tho' technically correct might have been made with equal propriety to extend to the merits of the case. For though neither party owned the land, they had acquired lawfully certain rights in it of a value equal to the amount required to justify an appeal to that Court." Letter from Applegate to Deady, supra. Cf. Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (1865).

Oregonian editor Harvey Scott later expressed a similar view:

[T]he people of the city took no wise steps to secure their rights if they had anything. ... The common council of Portland acted in a manner peculiar and contradictory. ... In 1852, ... because the Brady map was most convenient they declared it to be the correct plat of Portland. By this stroke they signed away whatever right they had to the levee.

H. Scott, supra note 33, at 134; see also J. Gaston, supra note 33, at 225-26. Scott admired Deady's legal ability and generally agreed with his hierarchical world view; Deady in turn considered Scott a "protege" to whom he would "sometimes lend... a hand." Letter from Deady to William Meek (Sept. 14, 1868) (Deady Papers, Oregon Historical Society). In 1890 Deady paid $200 for a biographical notice in Scott's history, and likely helped edit at least material relating to him. 2 Pharisee, supra note 9, at 597. On Scott generally, see Nash, Scott of The Oregonian: The Editor as Historian, 70 Or. Hist. Q. 197 (1969).
B. Chapman v. School District No. 1 (1866)

Four years after Lownsdale, Deady again declined to recognize an alleged public dedication. In Chapman v. School District No. 1, plaintiff Cullen Chapman sued a school district, the city, and Ben Stark to quiet title to a one-fourth interest in a valuable downtown Portland lot. Stark, though a defendant, similarly claimed the remaining three-fourths against the district and city.

The facts, inevitably, were complex. In May 1849, a group of Portlanders met to subscribe a schoolhouse. They elected “trustees” who supervised construction of a building that autumn, and in November proprietors Lownsdale and Coffin executed a bond promising to convey the land beneath it when they received title from the United States. Early the following year, Stark agreed with the proprietors to honor such commitments within his forty-eight acres.

For the next three years, various groups used the building as a classroom, a meeting hall, even occasionally a courtroom. Then, in November 1852, the directors of newly-formed School District No. 1 leased it from the trustees, but apparently never took possession. A flurry of activity occurred in late 1857, when Lownsdale and two others, Carter and Smith, conveyed the lot to William McEwan and J.T. Holmes, and William King, purporting to act for the original subscribers, did the same. Chapman and Stark claimed through Stark's 1860 federal patent, and again the issue Deady faced was whether an early proprietor (this time Stark) had dedicated the land to public use.

As in Lownsdale, Deady ruled first on a series of legal challenges to the defendants' answer. He overruled most, reserving the issues for trial. He did, however, reaffirm his view that the Townsite Act did not apply to Oregon before 1854, and strike a defense alleging that Stark had obtained his patent fraudulently.

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69. 5 F. Cas. 483 (C.C. Or. 1865) (No. 2607); 5 Cas. 487 (C.C. Or. 1866) (No. 2608).
70. See supra text following note 39.
71. Fifteen years earlier the city had sued to quiet title to the same lot, also alleging a public dedication. The Oregon Supreme Court reversed a verdict in its favor, finding error in the trial court's admission of hearsay "reputation" evidence. See McEwan v. City of Portland, 1 Or. 300 (1860).
72. "Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it may be material or relevant, the exception will not be allowed..." Chapman, 5 F. Cas. at 483.
73. "Time and reflection have only confirmed in my mind the correctness of the conclusions arrived at in [Lownsdale]." Id. at 485; see supra text accompanying note 63.
74. In Deady's view, the fraud allegation impermissibly sought "affirmative relief." A defendant could not "become a complainant and seek affirmative relief, as a specific
A year later, Deady heard evidence and ruled on the merits. Herald- ing the importance of secure private land titles, he found no clear and satisfactory proof of a dedication to the public. He declined to presume such a dedication from long public use because with one minor exception neither the city nor the school district had ever occupied the site. Moreover, the actual evidence of an oral dedication by Stark was unsatisfactory both in fact and in law. The alleging party had a heavy burden:

Where it is claimed that a dedication has been made by parol, it ought to be shown plainly and distinctly, and not left to be inferred from facts and circumstances . . . .

A dedication by parol is an exception to the general and salutary rule of the law, which provides that no interest in lands shall pass without a writing. To allow this exception, except upon clear and satisfactory proof . . . would be subversive of the policy of the law, and dangerous to private rights. 75

The defendants’ only evidence was that occasionally, “in casual conversations with acquaintances,” Stark had expressed a willingness to convey the property to the city if it would reimburse him the money he had spent improving it. Such conversations were “no evidence of a dedication”; to the contrary, they were an “assertion of Stark’s present title to the lot.” 76

Furthermore, Deady continued, an oral dedication by Stark prior to the Donation Act, even if proved, would not bind his after-acquired estate. A warranty deed bound after-acquired title, but a quitclaim deed or oral dedication did not:

I am inclined to hold that a parol dedication to public uses, rests upon no different ground than a quitclaim deed, and if made before September 27, 1850, although by a party then in possession, who afterwards took the legal estate under the act, it would not bind the afterward acquired estate. 77

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75. Chapman v. School Dist. No. 1, 5 F. Cas. 487, 491 (1865) (No. 2608). Deady also invoked the state court ruling in McEwan, 1 Or. 300, see supra note 71, to exclude “common reputation” testimony that the city owned the land. Such testimony, besides being “very meagre and unsatisfactory,” alleged a reputation arising “subsequent to the commencement of this controversy”; if allowed, it would be “very easy (if not common) for a few active and interested persons to make a reputation on the subject.” Chapman, 5 F. Cas. at 492 (citing 1 S. Greenleaf, Law of Evidence 155–56 (1842)).

76. Chapman, 5 F. Cas. at 492.

77. Id. at 491.
Finally, what about the November 1849 bond from Lownsdale and Coffin to the trustees, together with Stark's agreement to honor such commitments? Deady answered that the bond would have failed to bind even Lownsdale and Coffin because the subscribers had not established a private school, as required, exclusive of any restrictions of any school law. Defendant School District No. 1 was instead a "public corporation of the State," governed by the "general law." Moreover, the bond ran not to the city or school district, neither of which had even existed in 1849, but to "trustees of the school and town meeting house of Portland," who represented only "private individuals—the subscribers." And third, even ignoring such matters of form, Lownsdale and Coffin's covenant could not bind Stark, a direct donee of the federal government not in privity of estate with them. As for Stark's own agreement to honor prior sales, that was between him and promisees Lownsdale and Coffin. The city and school district were not parties to it, so could not enforce it.

Near the end of his opinion, Deady expressed more simply his view of the dispute:

The truth of the matter seems to be this—sundry individuals in and about Portland, being about to build a private school and meeting house, . . . the occupant of the land claim gave the trustees of this enterprise a bond for a deed to lot 3, provided they would . . . proceed according to the conditions prescribed therein. The house was soon built by these trustees, and used from time to time for private schools, religious meeting and public meetings, but no attention was paid to the conditions of the bond or any steps taken by any one to procure the appointment of the trustees and the creation of the corporation contemplated. In other words, the project proved abortive and was abandoned. He concluded by insisting that his decision coincided with both law and justice:

So, upon every aspect of the case, it appears to me that the well settled rules of law are against the claims of the defendants, school district No. 1 or the city of Portland. Nor does it seem to me inappropriate . . . for the Court to declare, that as against these defendants . . . who seek at this late day . . . to entitle themselves to the benefit of this supposed

78. Id. at 493.
79. Id. at 492. For the incorporation of Portland, see Act of Jan. 23, 1851, 1851 Or. Local Laws 16.
80. "Lownsdale and Coffin . . . were mere occupants of the public land . . . They had no estate . . . to convey to Stark, and conveyed none . . . Stark took the land as an original settler, under the act of September 27, 1850, and derives his title directly from the United States . . . ." Chapman, 5 F. Cas. 487, at 496.
81. Id. at 495.
trust, the right of the defendant Stark coincides with the equity and justice of the case. These defendants appear to me to be not only without right, but without merit. Their claim seems to be an afterthought, put forward long after the really meritorious parties, the original subscribers, had abandoned the scheme as visionary and impracticable.\footnote{Id. at 496. This time not all Deady's readers concurred. His friend and former United States Attorney E.W. McGraw, by then practicing in San Francisco, wrote Deady that a "strict regard for truth and veracity" obliged him to state that he "dissent[ed] in toto" from the decision. Neither Stark nor his one-quarter assignee Chapman ever acquired "the shadow of a title to that lot" because neither had possessed or even exercised any control over it, as the Donation Act required. Deady's assertion that the defendants had never occupied the premises was "disingenuous" and "in all kindness and sincerity[, an] equivocation .. unworthy of you ..." continued McGraw, because their tenant's possession had been both lengthy and "notoriously, openly, undeniably and incontrovertibly adverse to Stark." Moreover, it was not the public defendants, but Stark who claimed the property as an "afterthought." Letter from McGraw to Deady (Jan. 19, 1867) (Deady Papers, Oregon Historical Society). Deady later recommended his "clear headed, honest, abrupt brusque" friend for United States district judge in San Francisco. 1 PHARISEE, supra note 9, at 138, 299.}

Thus, in both \textit{Lownsdale} and \textit{Chapman}, certainty of land title was paramount; dedications to the public were not presumed; and traditional common-law conveyancing principles governed even the rudimentary transfers and assurances by Portland's earliest proprietors. These formalistic themes, though softened occasionally by supporting fairness justifications, would recur in Deady's later Portland land claim decisions as well.

\section{III. THE LOWNSDALE HEIRS LITIGATION}

Following the 1850 allocation of forty-eight acres to Ben Stark, and the 1852 partition of the remaining Portland claim among proprietors Lownsdale, Coffin, and Chapman, the Lownsdale claim consisted of 180 acres extending west from the river.\footnote{Map from E. MACCOLL, THE SHAPING OF A CITY: BUSINESS AND POLITICS IN PORTLAND, OREGON 1885-1915, at 1 (1976) (permission to reproduce granted by the Georgian Press Co.).}
Daniel and his wife Nancy duly filed their notice of claim—east half to him, west half to her; in 1860 the General Land Office issued them a patent certificate; and five years later, after both had died, it finally issued a patent.

As early as 1850, however, the proprietors began selling smaller parcels, including many within the eventual Lownsdale claim. Nancy died intestate in 1854, leaving Daniel and four children, Isabella and William Jr. by her first husband William Gillihan, and Millard and Ruth by Daniel. Eight years later, in 1862, Daniel also died intestate, also leaving four children—James and Mary by his first wife Ruth, and Millard and Ruth by Nancy—plus two granddaughters, Ida and Emma, surviving his and Ruth’s deceased daughter Sarah.
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Then in 1864 Nancy's Gillihan children obtained a state court decree partitioning her ninety acres among Daniel and her four children. 84

More serious litigation began in 1866, however, when Daniel's heirs asserted title to parcels he and the other proprietors had sold. Stated simply, the heirs' basic contentions were that alleged promises by Daniel to convey after-acquired title did not bind them, and in any event, Daniel did not effectively convey parcels within Nancy's west half of the Lownsdale claim, which she had owned in her own right.

Matthew Deady generally relished a challenge, especially one that might bring him a measure of public acclaim for learned, principled decision making. But he could not have enjoyed deciding these cases, which easily rank among the most complex and difficult of his long career. His diary, though not beginning until 1871, contains several troubled references to them, including the weary 1883 refrain, "I have one more of the old Lownsdale cases, and then I am done after 15 years." 85

Editor Harvey Scott later recalled the "universal attention" and "multitude of opinions" lavished on the cases; the "sympathies of all kinds" excited by the prospect that "many innocent purchasers" would be evicted; and, in a Deadyesque phrase, the "confessedly very great" legal difficulties facing the purchasers. He described Deady's basic dilemma this way:

It was evident from the start that the courts must proceed in one of two ways—either to stick to the letter of the law and . . . recognize no

84. The court divided the 90 acres three-fifths to William Gillihan Jr. and Millard and Ruth Lownsdale and two-fifths to the heirs and assigns of Daniel (who in 1860 had purchased Isabella Gillihan's fifth). Because Daniel already had sold more than two-fifths, however, the court also imposed compensating liens, or "oweley," totaling $39,000 on the sold lots. See, e.g., Fields v. Squires, 9 F. Cas. 29, 30-31 (C.C. Or. 1868) (No. 4776).

85. 2 PHARISEE, supra note 9, at 409; see also 1 PHARISEE at 18, 19, 21, 69, 195.
title except that conferred by the United States Patent; or else to take a general view of the circumstances and necessities of the case and decide upon the general equities and common understanding of all parties, and to let possession count for all that it was worth.  

In general, Deady responded to the dilemma with a characteristic lean toward “letter of the law,” a position which became acutely apparent in 1871 when Circuit Judge Lorenzo Sawyer arrived in Portland with his own emphatic, opposing lean.

A. Fields v. Squires (1872)

Purchaser James Fields filed the first suit, alleging ownership of a parcel in the Nancy Lownsdale tract which the proprietors had conveyed to W.W. Chapman individually in June 1850 with a covenant to convey full legal title “if they should obtain [it] from the United States.” Deady worked his way through a maze of property and public land law issues, which were both “interesting in themselves” and “of the highest practical importance to this community.”

The heirs first asserted a series of complete defenses to the proprietors' 1850 covenant. None persuaded Deady. The rule that a joint covenant could not be enforced against one obligor alone (or the heirs

86. H. Scott, supra note 33, at 125; see also supra note 68.
87. Fields v. Squires, 9 F. Cas. 29 (C.C. Or. 1868) (No. 4776), aff'd sub nom. Davenport v. Lamb, 80 U.S. 418 (1872).
88. Id. at 30. Fields sued originally in state court. The heirs petitioned for removal, but among those served initially with process only granddaughter Ida Squires resided outside Oregon. In Field v. Lownsdale, 9 F. Cas. 20 (C.C. Or. 1867) (No. 4769), Deady remanded the case against all in-state heirs, but retained jurisdiction over defendant Squires. The 1789 Judiciary Act had authorized removal only when all defendants were citizens of another state. In 1866, however, Congress had enacted the “separable controversy” rule permitting a single out-of-state defendant to remove her portion of the case alone if the suit were “one in which there can be a final determination . . . so far as it concerns [her], without the presence of the other defendants . . . .” Act of July 27, 1866, ch. 288, 14 Stat. 306; see also the Judiciary Act, ch. 20, 1 Stat. 73, 79-80 (1789). Because the Lownsdale heirs necessarily claimed the disputed land as “tenants in common,” the interest of each was “distinct from that of the other,” and the suit “separate as to each of them.” 9 F. Cas. at 22. See generally F. Frankfurter & J. Landis, The Business of the Supreme Court 61-62 (1927); 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure 187 (2d ed. 1985).

Always an advocate of broad federal jurisdiction, Deady thought the earlier rule had created “difficulty, not to say hardship” for out-of-state defendants “debarred of this right” by being joined with a local codefendant. Field v. Lownsdale, 9 F. Cas. at 22. Moreover, even the new rule was inadequate, for there were “many reasons” why jurisdiction should extend to “the whole of a controversy, where some only of the defendants are aliens or citizens of another state.” But Congress had not yet “seen proper to provide for its exercise to that extent.” Id.; cf. Barney v. Latham, 103 U.S. 205 (1880); Act of March 3, 1875, ch. 137, 18 Stat. 470. For Fields' later unsuccessful effort to retain other out-of-state defendants in state court, see Fields v. Lamb, 9 F. Cas. 27 (C.C. Or. 1868) (No. 4775); Fields v. Lamb, 2 Or. 340 (1868).

89. Squires, 9 F. Cas. at 31.
of one alone) applied sensibly in a damages action but not a quiet title suit. The similar rule that a covenant did not bind unnamed persons applied perhaps to the "ancient feudal warranty" described in 13th century English statutes,90 but not to modern "personal covenants." And the well-known rule that, because no estate passed to Chapman in 1850, the covenant did not "run with the land" to remote purchasers, also had been "modified substantially," so that mere possession under a deed became "sufficient estate to carry the covenants to the assignee." Such newer doctrine, Deady explained, was "peculiarly adapted to the early circumstances of this country" where settler land rights were often merely possessory.91

So the proprietors' covenant to convey title did bind the Lownsdale heirs, but to what extent? What interest had Daniel acquired "from the United States"? When Nancy died intestate in 1854, Daniel and each of her four children inherited an undivided one-fifth interest in her right to ninety acres.92 When the patent issued eight years later, did Daniel take at least his one-fifth from the United States, or did he take it instead by descent from Nancy?

The heirs maintained that the legendary Rule in Shelley's Case93 applied to Daniel's one-fifth, compelling the conclusion that he took by descent rather than devise. Venturing into an "abstruse branch of the law," which had "in times past been fruitful of unprofitable subtleties," Deady concluded finally that the Rule did not apply. Nancy's Donation Act estate was merely a "qualified or determinable fee," inadequate to invoke the Rule. Her heirs, including Daniel, inherited not title but simply her right to obtain title: "[T]hey took as direct donees of the United States, by force of the grant, and not as heirs of Nancy, who left nothing for them to inherit, because her estate in the

91. Squires, 9 F. Cas. at 31–36. For authority throughout, Deady cited principally W. Rawle, Covenants for Title 354–55 (3d ed. 1860) and 2 E. Washburne, Real Property (2d ed. 1864).
92. See supra note 27 and accompanying text.
93. The Rule in Shelley's Case, 76 Eng. Rep. 206, 1 Co. Rep. 93b (1581), provided that a grant to A for life, remainder to her heirs, conveyed an "estate of inheritance," permitting A to "alien the fee and bar the heirs." If A died seized, as Deady explained, her heirs took "only as heirs, by descent." Fields v. Squires, 9 F. Cas. 29, 35 (C.C. Or. 1868) (No. 4776). See generally L. Simes, Handbook of the Law of Future Interests 43–51 (2d ed. 1966).
land terminated with her death." 94  "Justice and equity" supported this ruling as well:

With the conclusion now reached, coincides the justice and equity of this case. As to this fifth it was obtained by Daniel H. under just such circumstances as the parties to the deed contemplated when this covenant was made and accepted—by gift from the United States. The complainant, as the assignee of Chapman, is entitled under the . . . covenant to a conveyance of this fifth from the heirs or grantees of Daniel H. 95

A second fifth raised a different issue. In 1860, two years before patent, Daniel had purchased the one-fifth right inherited by Nancy's daughter Isabella. Fields naturally urged that if Daniel took the fifth he inherited from Nancy as a direct donee, he likewise took the fifth he purchased from Isabella. Deady, however, did not agree. When her mother died, Isabella became absolute owner of this interest. Therefore, Daniel "in no sense obtained it from the United States," and his heirs were not bound, "either in law or morals," to convey it to purchaser Fields. 96

Next, Fields asserted two theories under which the entire 180-acre Lownsdale claim would have gone to Daniel alone. Had either succeeded, Daniel would have taken—and his covenant would have applied to—not just the one-fifth interest he received as Nancy's heir, but the entire disputed parcel. Fields' first theory was that because Nancy once had been a potential Donation Act claimant with first husband William Gillihan, she could not also claim with Daniel. 97 But Gillihan had died in early 1850, before Congress passed the Donation Act, so Nancy could not have claimed as his wife. 98 Second, Fields contended, because the Lownsdale claim totaled less than 320 acres, the amount Daniel could have claimed alone as a single man, it all should have gone to him. However, the policy of the law was to give to husband and wife an equal quantity of land. A husband could

94. Squires, 9 F. Cas. at 36; accord Hall v. Russell, 101 U.S. 503 (1879).
95. Id. at 37.
96. Id. at 35. Deady seemed here to play Ophelia. His emphatic distinction (Nancy had only a "qualified or determinable fee," whereas Isabella was "absolute owner") is simply unpersuasive. Daniel, recall, inherited from Nancy the right to one fifth, purchased from Isabella the right to a second, and later received both by the same patent "from the United States." Moreover, Deady certainly failed to make clear why "justice and equity" favored purchaser Fields on the first fifth but not the second. See infra note 102.
97. "[N]o person shall ever receive a patent for more than one donation of land in said Territory in his or her own right." Donation Act, ch. 76, § 5, 9 Stat. 496, 498 (1850).
98. Accord Ford v. Kennedy, 1 Or. 166 (1855). Richard Chused has described an early administrative practice permitting settler widows to claim land they would have received had their husbands survived. Chused, supra note 26, at 10–12. Even so, Deady's ruling on this point was certainly correct because Nancy, in fact, did not claim as Gillihan's widow.
not “change the law and elect to take as a single man to the exclusion of his wife.”

Fields claimed next that Daniel’s declarations, together with long acquiescence in Fields’ possession and improvements, raised an “equitable estoppel in pais” barring any claim by the heirs. As in the levee and schoolhouse cases, however, Deady was unreceptive:

This is a question of title—ownership of the soil, and not a mere easement or privilege. Titles would not be worth the paper upon which they are written, if they could be called in question or destroyed in this way—by the proof of stale parol declarations inconsistent with or in opposition to them.

A more lax rule would offer a “bounty for frauds and perjuries.” Indeed, the “whole idea upon which this branch of the case rests is a novelty and without authority of law.” Oregon’s adverse possession period was twenty years, and possession even with improvements short of that would not avail.

Finally there was the 1864 state court judgment partitioning Nancy’s ninety acres, three-fifths to her children William, Millard, and Ruth, and two-fifths (Daniel’s and Isabella’s) to Daniel’s heirs and grantees. Fields contended, somehow, that he thereby had acquired “three other undivided fifths.” In Deady’s view, however, the partition decree had simply divided the ninety acres between two classes of persons; it had not further divided the two-fifths portion among Daniel’s heirs and grantees. Purchaser Fields had “yielded nothing in the partition and received nothing.” So, in an opinion again emphasizing security of land title, and a literal interpretation of the key 1850 covenant, Deady awarded purchaser Fields one-fifth of his land, the fifth which Daniel had received as Nancy’s heir from the United States.

99. Fields v. Squires, 9 F. Cas. 29, 33 (C.C. Or. 1868) (No. 4776); accord Jette v. Priard, 4 Or. 296 (1872); cf. Fitzpatrick v. Dubois, 9 F. Cas. 193 (C.C. Or. 1873) (No. 4842) (wife who left husband’s “bed and board”—and was divorced—prior to his Donation Act notification took nothing).

Nor did Nancy take her half subject to the proprietors’ deed to Chapman, regardless of whether she had notice of it. A wife took Donation Act land “in her own right,” statutory language with the “express purpose of excluding the conclusion that she took in right of or through her husband.” Squires, 9 F. Cas. at 33; accord Carter v. Chapman, 2 Or. 93 (1864).

100. Squires, 9 F. Cas. at 40, 41.

101. Id. at 41.

102. Id. at 38. Fields’ argument perhaps was that the partition decree in legal effect had placed within the oversized two-fifths sector all parcels Daniel had sold; therefore, the entire disputed parcel was within that sector; and therefore, even under Deady’s earlier conclusion regarding the sources of Daniel’s and Isabella’s fifths, Daniel had received half the disputed parcel “from the United States.”
In December 1871, the Supreme Court unanimously affirmed, *sub nom.* *Davenport v. Lamb.* Justice Stephen Field's opinion followed Deady's reasoning closely on the crucial point that the proprietors' 1850 covenant applied only to the one-fifth interest Daniel Lownsdale had received, as Nancy's heir, from the United States:

[The proprietors] expected . . . to obtain . . . the title of the United States to lands in their possession. . . . They could not have intended, in case their expectations were disappointed and the title passed from the United States to other parties, to render it impossible for them to acquire that title in all future time from those [other] parties without being under obligation to instantly transfer it to the grantee or his successors in interest.

Davenport also contended on appeal that Donation Act language granting a deceased spouse's share to her "survivor and children, or heirs" gave a half share to the surviving spouse rather than the same fraction each child received. Again, were that correct, Daniel's covenant would have applied to the larger fraction. But granting a surviving spouse only a pro rata share seemed to the court both a more natural interpretation and also one consistent with the "uniform ruling of the courts, state and federal, in Oregon."
Finally, as Deady had done, the Court peremptorily dismissed Davenport's estoppel claim:

The parol evidence offered . . . is entirely insufficient to create any estoppel . . . . If the evidence of such declarations could be received years after the death of the party who is alleged to have made them, to control the legal title which has descended to his heirs, a new source of insecurity in the tenure of property would be created, and heirs would often hold their possessions upon the uncertain testimony of interested parties . . . .

B. Lamb v. Starr (1868)

Deady himself reaffirmed his Fields ruling only months later in Lamb v. Starr, the first of several suits the nonresident heirs began filing in his court. In April 1858, Lownsdale had conveyed to his attorney Lansing Stout five entire blocks in Nancy's west half of the claim, by quitclaim deed, pursuant to a secret "trust" by which Stout was to sell the land and pay Lownsdale's debts. Eventually Lewis Starr acquired one of the blocks, later paid $1533 owelty upon it, then found himself defending a quiet title suit.

Deady first overruled Starr's preliminary challenges to the petition. He declined, for example, to apply an Oregon statute permitting only one in possession to sue for partition. Section 34 of the 1789 Judiciary Act, directing federal courts to apply state law, governed only actions at law; in equity, "general principles of equity jurisprudence" prevailed, and they did not include a possession requirement for one seeking a partition. Besides, Deady added, previewing his final decision, the heirs were in possession, as tenants in common with Starr who was entitled at most to the one-fifth interest which Daniel had power to convey in 1858. The deed to Stout had been a "simple quitclaim with-

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107. 80 U.S. at 431-32.
108. 14 F. Cas. 1024 (C.C. Or. 1868) (No. 8021); 14 F. Cas. 1030 (C.C. Or. 1868) (No. 8022).
109. 14 F. Cas. 1024.
110. Id.
out covenants," not even purporting to affect Daniel's after-acquired interest.  

A second plea by Starr contended that Isabella and William Gillihan, Jr., were not Nancy's "children" for Donation Act purposes, so Daniel had actually received (and conveyed to Stout) a third of her claim rather than a fifth. Deady acknowledged that plea as "not without plausibility," but could not so construe the Act without "doing violence to its evident purpose and plain language."  

Nancy's remarriage to Lownsdale "did not affect her identity or destroy the parental relation between herself and the children which she bore while called by the former name."  

Eight months later, Deady reached his final decision. Daniel's 1858 quitclaim deed to Stout conveyed only the one-fifth interest to which he then was entitled as Nancy's surviving husband. Deady accepted neither the heirs' contention that Starr had bought with notice of the secret Lownsdale-Stout trust, so was entitled to nothing, nor Starr's more persuasive contention that language in Daniel's deed assuring "peaceable possession of the same to have and to hold... forever" constituted a covenant estopping the heirs from any claim. "What does 'the same' refer to?" he asked. "Surely the interest conveyed... an undivided one fifth, and no more."  

To those inclined to criticize such an implausible interpretation, Deady responded again with a concluding reference to fairness:  

Nor do I think that anyone concerned, unless it be the heirs of Daniel H., has any right to complain of the result. The fifth which Starr, as an

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112. Starr, 14 F. Cas. at 1030. Recall that in Fields v. Squires, 9 F. Cas. 29 (C.C. Or. 1868) (No. 4776), it was the covenant which eventually transferred a one-fifth interest to the purchaser; here it was the 1858 deed, executed after Daniel had inherited his one-fifth share from Nancy. See supra text accompanying notes 91, 94.  
113. Starr, 14 F. Cas. at 1027.  
114. Id. Deady also overruled Starr's third plea and five grounds of demurrer. The plea was, again, that Nancy took no part of the Lownsdale claim because she had been a potential claimant with first husband Gillihan. Deady's rejoinder was, again, emphatic and convincing: Gillihan could not have claimed because he died before September 1850, and even were that otherwise, Nancy in fact had not claimed through Gillihan. Id. at 1028-29. Digressing, Deady lectured Starr's attorney, former proprietor W.W. Chapman, for violating the court rule against multiple pleas without leave of court. Id. at 1030.  
The demurrers related solely to pleading requirements. Two demurrers, for example, invoked an Oregon statute requiring any trust affecting real property to be written, but Deady, citing treatises by Gould, Chitty, Story, and Smith, permitted the trust to be alleged "according to its legal effect," requiring defendant to plead the statute. Id. at 1026.  
115. Lamb v. Starr, 14 F. Cas. 1030, 1034 (C.C. Or. 1868) (No. 8022). Deady acknowledged that his interpretation of the "peaceable possession" clause rendered it virtually meaningless. His only response was that Lownsdale and Stout "probably" had included the clause to assist Stout in a threatened dispute over the land with the school district. Id.
innocent purchaser, without notice of the trust, obtains, neither Daniel H. or his heirs received any consideration for ....

On the other hand, this block being situated to the west of Park street, there could have been no doubt, at the date of the deed from Daniel H. to Stout that the property was within the wife's half, and that Daniel H. had no other than a one-fifth interest in it.116

C. Lamb v. Carter (1870); Lamb v. Burbank (1870); Lamb v. Kamm (1870); Lamb v. Wakefield (1870)

In the summer of 1870, Deady wrote preliminary pleading decisions in four more Lownsdale heir cases117 as purchasers and their attorneys awaited the arrival of Circuit Judge Sawyer.118 Read together, the opinions seem erratic, especially in tone, as Deady began to oscillate between construing the early deeds narrowly to favor the heirs and broadly to favor purchasers.

In Lamb v. Carter, Deady uncharacteristically sustained a demurrer by purchasers of a block in Nancy's west half. Daniel had delivered a bond for a deed to the disputed block in 1861, and the heirs naturally asserted the principle of Lamb v. Starr—that purchasers Carter and Smith were entitled only to what Daniel could convey in 1861, his own fifth and the fifth he purchased from Isabella in 1860.

But Deady found an important difference. Daniel's 1861 bond recited that he "sold, released and quitclaimed" the land and that if paid the full price he would convey a "good and sufficient title to said piece of land . . ."119 Deady interpreted that language as a "contract of sale, with an agreement or covenant . . . to make title to the thing sold."120 While the sale language itself conveyed only Daniel's then

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116. Id.
117. Lamb v. Carter, 14 F. Cas. 991 (C.C. Or. 1870) (No. 8013); Lamb v. Burbank, 14 F. Cas. 989 (C.C. Or. 1870) (No. 8012); Lamb v. Kamm, 14 F. Cas. 1014 (C.C. Or. 1870) (No. 8017); Lamb v. Wakefield, 14 F. Cas. 1040 (C.C. Or. 1870) (No. 8024).
118. In late summer Deady telegraphed Sawyer that he was urgently needed in Portland to hear the important case of Lamb v. Davenport, see infra text accompanying notes 137–58. Sawyer was unavailable on the date requested, even though a "Mr. Starr" had called on him personally to urge his early participation in yet another land case, Starr v. Stark, see infra text accompanying notes 159–55. Letter from Sawyer to Deady (Sept. 12, 1870) (Deady Papers, Oregon Historical Society). Then in mid-October Sawyer wrote again, to say that "members of the Portland bar" preferred him to preside at Portland beginning October 31 even if it meant omitting the scheduled January term. He diplomatically assured Deady that they would preside jointly over all such pending cases. Letter from Sawyer to Deady (Oct. 13, 1870) (Deady Papers, Oregon Historical Society).
120. Id. (emphasis added).
two-fifths interest, the covenant language warranted a "good and sufficient title, not merely to that interest but to said piece of land." 121

The heirs urged that a boilerplate phrase "according to these presents" limited the covenant's operation to the two-fifths interest then actually conveyed. This time, however, Deady saw it differently, invoking the "plain intention of the parties": "It seems to me that this would be to disregard the plain intention of the parties, as expressed in the writing, and that, too, by giving a strained effect to a mere formal phrase which was probably inserted in the instrument as a mere matter of form." 122 Daniel had sold the "piece of land" and upon final payment was to convey "good and sufficient title." 123

So the heirs lost altogether. Whereas in Starr Deady declined to give the habendum clause meaning by applying it to the entire parcel, in Carter the words "said piece of land" persuaded him to do so. Whereas in Starr he emphasized common knowledge that Daniel had inherited the right to only a small fraction of Nancy's west half, in Carter he suggested that Daniel may have intended to acquire the entire disputed parcel in a future partition. True, the pertinent deed/bond language in the two cases differed somewhat, but, more fundamentally, in Carter Deady for the first time construed such language according to the parties' "plain intention." Perhaps he heard Judge Sawyer's footsteps.

The following month, in Lamb v. Burbank, Deady heard the first dispute over land within Daniel's own east half of the claim. As in Fields, the proprietors had conveyed the contested parcel to Chapman individually in March 1850, by quitclaim deed, covenanting to transfer any such future title obtained from the United States.

Deady reiterated his view that a pre-Donation Act deed conveyed immediately no more than "bare possession." This time, however, the proprietors' covenant for "further assurance" applied to the entire

121. Id. (emphasis added).
122. Id.
123. Id. at 994. The heirs also urged that a bond reference to "such further confirmation as the title from the United States may vest in me" indicated that Daniel neither had, nor necessarily expected to receive, title to the entire parcel. But Deady declined to engage in such "conjecture," suggesting instead that Daniel, owner of two-fifths of Nancy's entire 90 acres, perhaps had intended to "sell a small parcel thereof by metes and bounds . . . [and] in the partition with his deceased wife's children . . . arrange to have such small parcel allotted to himself in severalty." Id.
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parcel, not merely to a one-fifth interest Daniel took as Nancy’s surviving husband.124 So purchaser Burbank prevailed.

One week later, however, in Lamb v. Kamm, Deady again ruled for the heirs, on very similar facts.125 Again in early 1850 the proprietors had quitclaimed land to Chapman individually. The pertinent deed language (illustrating again the primitive state of conveyancing in early Portland) was “bargain, sell, and quitclaim . . . as well in possession as expectancy.”126 Prominent Portlander Jacob Kamm127 eventually acquired the land.

As before, Deady ruled that the phrase “bargain, sell, and quitclaim” implied no covenant, either at common law or by statute.128 Kamm contended, however, that the word “expectancy” established an intent to convey not only present possession but also any interest the proprietors might later acquire. Deady disagreed. True, Blackstone and others had described common-law “expectancy” estates, principally “remainders” and “reversions.” An essential attribute of any such estate, however, was that it be “already vested” and simply “take effect after another vested estate in the premises has been terminated.”129 The Portland proprietors in 1850 had had a “mere expectation” of acquiring a future estate, similar to that of a son who was “heir apparent to his father” but whose deed conveyed nothing.130 So, for lack of a clearer covenant, purchaser Kamm lost all, even within Daniel’s east half.

Finally, in Lamb v. Wakefield, Deady returned to the result and reasoning of Lamb v. Starr131 to award the heirs four-fifths of a parcel

124. Lamb v. Burbank, 14 F. Cas. 989, 990–91 (C.C. Or. 1870) (No. 8012); accord Bohman v. Coffin, 4 Or. 313 (1873) (proprietor Coffin bound by 1850 covenant for further assurances in sale to Lownsdale).

125. 14 F. Cas. 1014 (C.C. Or. 1870) (No. 8017).

126. Id. at 1015.


128. Kamm, 14 F. Cas. at 1015.

129. Id.

130. Id. Nor did Kamm benefit from a similarly inartful covenant against claims by “any person claiming through the grantors,” language which amounted to a mere “special covenant of non-claim,” operating only upon the “estate which Daniel then had in the premises, which was the bare possession.” Id. at 1016 (citing W. RAWLE, supra note 91, at 222).

131. See supra text accompanying notes 108–16.
in Nancy's west half. By then it was "too plain for argument" that Daniel's original 1858 quitclaim deed itself conveyed only the "then right, title and interest of said Daniel H.," an undivided one-fifth.\footnote{132. Lamb v. Wakefield, 14 F. Cas. 1040, 1042 (C.C. Or. 1870) (No. 8024).} And the exceptionally inartful "covenant," a "guarantee to warrant and defend said lands to said [purchaser], his heirs and assigns forever, against the lawful claims of all persons except the United States government or those claiming title from said government,"\footnote{133. \textit{Id.} at 1041.} did not bar the heirs' claim to the rest.\footnote{134. \textit{Id.} at 1042.} It expressly excepted any claim by or through the federal government, obviously the source of the heirs' patent, and in any event, fairly construed, it applied only to the one-fifth interest conveyed:

The covenant is to warrant and defend such lands . . . to said Hamilton, etc. But by the premises of the deed only the right, title and interest of Daniel H. is bargained and sold to Hamilton. It is a well settled rule of law that the premises or granting clause of a deed may limit and control the covenants, but the covenants can never enlarge the premises.\footnote{135. \textit{Id.} Deady's reasoning here is similar to that in \textit{Lamb v. Starr}, 14 F. Cas. 1030 (C.C. Or. 1868) (No. 8022), \textit{supra} text accompanying note 115, but contrasts sharply with that in \textit{Lamb v. Carter}, 14 F. Cas. 991 (C.C. Or. 1870) (No. 8013), \textit{supra} text accompanying note 120.}

Therefore, the covenant would not have barred Daniel himself from asserting an after-acquired interest, and it certainly did not bar his heirs from doing so.

Once again Deady acknowledged that his interpretation rendered the covenant "practically a nullity and absurdity."\footnote{136. \textit{Id.} Deady's reasoning here is similar to that in \textit{Lamb v. Starr}, 14 F. Cas. 1030 (C.C. Or. 1868) (No. 8022), \textit{supra} text accompanying note 115, but contrasts sharply with that in \textit{Lamb v. Carter}, 14 F. Cas. 991 (C.C. Or. 1870) (No. 8013), \textit{supra} text accompanying note 120.} He steadfastly refused, however, to accept the obvious inference, that the proprietors had intended to warrant both present and future ("forever") title excepting only the remote possibility that a stranger somehow would receive the initial Donation Act patent. To exempt from the covenant Lownsdale's own title acquired through the United States was, in Deady's own word, extending literalism perilously close to "absurdity."

\footnote{132. Lamb v. Wakefield, 14 F. Cas. 1040, 1042 (C.C. Or. 1870) (No. 8024).}
\footnote{133. \textit{Id.} at 1041.}
\footnote{134. \textit{Id.} at 1042.}
\footnote{135. \textit{Id.} Deady's reasoning here is similar to that in \textit{Lamb v. Starr}, 14 F. Cas. 1030 (C.C. Or. 1868) (No. 8022), \textit{supra} text accompanying note 115, but contrasts sharply with that in \textit{Lamb v. Carter}, 14 F. Cas. 991 (C.C. Or. 1870) (No. 8013), \textit{supra} text accompanying note 120.}
\footnote{136. Wakefield, 14 F. Cas. at 1042.}
D. Lamb v. Davenport (1871)

In May 1871 Circuit Judge Lorenzo Sawyer arrived in Portland to preside with Deady over a pivotal case in the Lownsdale heirs litigation. His long, pro-purchaser opinion contrasted dramatically with both the substance and the style of Deady's earlier rulings.

The original 1849 conveyance by Lownsdale and Coffin, of land eventually within Daniel's east half, had been by quitclaim deed with a covenant to “warrant and defend the same against all other persons claiming the same through or by me or my heirs whatsoever.” Had
Deady heard the case alone, he almost certainly would have ruled for the heirs. The 1849 sale conveyed only the proprietors' possessory interest, and the covenant to warrant and defend "the same" extended only to that interest.\textsuperscript{141}

Sawyer, however, saw the matter very differently. In his view, the "various contracts and conveyances" should be interpreted "in light of the condition of things existing at the time, and with reference to which they were executed."\textsuperscript{142} It was a "matter of public history" that Oregonians, well before passage of the Donation Act, had anticipated a federal land law which would recognize the "meritorious claims of the pioneers" by granting a purchase right to the "first appropriator."\textsuperscript{143} Congress had established such systems elsewhere, and the "common experience of mankind" made prior appropriation the "origin of all title . . . in organized communities."\textsuperscript{144} So even a pre-1850 Oregon settler acquired an important land right, the "right of possession, [good] against everybody but the United States," transferable like any other property right and "recognized by the law . . . in all the new states."\textsuperscript{145}

The "honest and most reasonable construction" of the various early proprietor agreements seemed evident:

\begin{quote}
[I]t was the understanding of these parties, at all times, that they were to procure title from the government to the whole tract, . . . but that they were to have no interest, in their own right, in such lots as they, from time to time, sold in pursuance of the original plan of establishing a town.\textsuperscript{146}
\end{quote}

The proprietors were to acquire title, but where lots had been sold it would be title "for the benefit of the vendees."\textsuperscript{147}

Several difficult questions remained, however. The first was, even assuming such an "understanding," what legal theory permitted its enforcement? Sawyer answered with language from the 1852 partition agreement requiring each proprietor to "fulfill . . . all [prior] contracts" relating to the Portland claim and, upon patent issue, to "make

\textsuperscript{141} The \textit{Davenport} covenant language was almost identical to its counterparts in \textit{Burbank} and \textit{Kamm}, which Deady had declared a mere "special covenant of non-claim" operating "only upon the estate which Daniel H. then had in the premises, which was the bare possession." See \textit{supra} note 130.

\textsuperscript{142} Davenport, 14 F. Cas. at 999.

\textsuperscript{143} \textit{Id.} at 999–1000.

\textsuperscript{144} \textit{Id.} at 1000.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} at 1001.

\textsuperscript{147} \textit{Id.}
good and sufficient deeds of general warranty for all lots . . . which may heretofore have been sold . . . .”148

But could a nonparty to the partition agreement, a purchaser, enforce it? American law at that time generally precluded third-party contract enforcement,149 but in Sawyer’s view once the proprietors obtained title to the land their partition agreement became a trust, whose beneficiaries did have enforcement rights.150 Besides, denial of such rights even to contract beneficiaries was among those “purely technical principles, which have no application in courts of equity.”151

Only one issue remained. Did the Donation Act itself invalidate the 1852 partition agreement as an impermissible “future contract” for sale of a claim prior to patent?152 Sawyer concluded that it did not, that the partition had been simply a “further agreement prescribing the details” of proprietor contracts predating the Donation Act.153 Certainly purchasers of small Portland parcels, being mere “vendees of portions of lands taken up by larger claimants,” were not within the prohibition’s intent.154 So, in sum, the proprietors’ 1852 mutual covenant to “make good and sufficient deeds” bound the Lownsdale heirs, and purchaser Davenport prevailed.

Deady concurred, barely, in less than three pages:

148. Id. at 999. The partition agreement bound each proprietor to these duties by a $300,000 bond.


150. Equity courts typically recognized an exception to nonparty enforcement disability for a trust beneficiary suing a trustee. 4 A. Corbin, Corbin on Contracts 779A (1951); Williston, Contracts for the Benefit of Third Persons, 46 Law Q. Rev. 12 (1930). Eventually, the exception became the rule. Corbin, supra note 149, at 1009.

151. 14 F. Cas. at 1004. Sawyer also declined to apply the “technical” common-law rule precluding a trust in unowned property. Modern decisions had modified it somewhat, and in any event “technical rules resting upon reasons that have no application to the circumstances of this case, ought not to be too rigorously applied.” Id. Moreover, by 1852 the proprietors had owned estates sufficient to support a trust, for as Deady had ruled earlier, the 1850 Donation Act was a present grant of a conditional fee. See, e.g., Chapman v. School Dist. No. 1, 5 F. Cas. 483 (C.C. Or. 1865) (No. 2607); 5 F. Cas. 487 (C.C. Or. 1865) (No. 2608); supra text accompanying notes 69–82.

152. See supra note 28 and accompanying text.

153. Lamb v. Davenport, 14 F. Cas. 996, 1006 (C.C. Or. 1871) (No. 8015).

154. Id. at 1005–06.
After careful consideration, and not without some doubt and hesitation, I have become satisfied that by force of the agreement of March 10, 1852, and the subsequent action of Lownsdale, Coffin and Chapman, under and in pursuance of it, that each of them took and obtained from the United States his separate portion of the land claim in trust for the purchasers or their vendees of any lots situated therein, and before that time sold by any or all of these parties.155

He devoted more than half his peremptory concurrence to questioning various digressions by Sawyer into what Deady considered irrelevance or even error.156

Two years later, relying heavily on Sawyer’s reasoning, the Supreme Court affirmed.157 Justice Samuel Miller casually reviewed the several early proprietor agreements, invoked the government’s well-known “disposition to protect the meritorious actual settlers,” and concluded:

We are satisfied that by the true intent and meaning of these agreements the equitable right to all the lots in controversy had been transferred by Lownsdale . . . before the passage of the Donation Act . . . .

According to well-settled principles of equity often asserted by this court, Davenport is entitled to the conveyance of this title from those heirs . . . .158

IV. IT'S NEVER OVER 'TIL IT'S OVER: STARR v. STARK

The third cluster of Portland land claim litigation involved title to portions of Ben Stark's northern forty-eight acres. Once again the fundamental issue was priority between formal legal title, represented this time by Stark's 1860 patent, and the equitable, possessory claims of Portlanders who had bought and improved small parcels. Encouraged by an early Supreme Court decision favoring Stark, Deady again sustained the legal title claim; as before, however, Circuit Judge Sawyer and the Supreme Court disagreed.

155. Id. at 1007.

156. E.g., whether individual lot holders contributed legally to acquisition of the land claim, whether the original 1849 deed was from Lownsdale or Coffin, and whether Coffin had reacquired the land briefly by redelivery of that deed to him. Id. at 1007-08.


158. Id. at 315. In early 1872 Sawyer returned to Portland to hear his final Lownsdale heir dispute, Lamb v. Vaughn, 14 F. Cas. 1034 (C.C. Or. 1872) (No. 8023). His literalist, pro-heir opinion, exhibiting even exasperation with certain of purchaser Vaughn’s contentions, must have startled his audience. Letters from Sawyer to Deady suggest, however, that Deady wrote both Sawyer’s opinion and his own concurrence in Vaughn. Letters from Sawyer to Deady (Dec. 18, 1871; Jan. 9, 1872) (Deady Papers, Oregon Historical Society). See also Mizner v. Vaughn, 17 F. Cas. 543 (C.C. Or. 1872) (No. 9678).
Recall that in January 1850, Lownsdale and Stark met in San Francisco and divided the Portland claim, allocating to Stark forty-eight valuable acres subject to certain prior conveyances. When Lownsdale returned to Portland, however, Coffin and Chapman refused to ratify that division unless Stark also confirmed three later sales, one block to each proprietor individually. Captain John Couch, who held Stark's power of attorney, eventually did so on his behalf.

Brothers Addison and Lewis Starr later bought three lots within the block thus "sold" to Chapman, using and improving them for more than a decade and, they alleged, receiving Stark's repeated assurances that he recognized their priority. Uncertainties abounded, however, and in 1860 city authorities countered Stark's patent application with one of their own under the Townsite Act. The Public Land Office responded by issuing simultaneous identical patents, excepting in each all lawful claims by the rival applicant.

Four years later, in early 1864, the Starrs sued in state court to quiet title. They alleged two theories, a legal title through the city's patent and an equitable title based on Stark's repeated assurances and long acquiescence in their possession. In a classic instance of arcane procedure frustrating inquiry into the merits, the court ordered the Starrs to elect between their two "inconsistent" theories. They chose to pursue their legal title, and prevailed. The city's patent through which they claimed was valid; Stark's was not because he had failed to reside on and cultivate the land for the required four years. The Oregon Supreme Court affirmed, in a brief opinion by Justice Boise which ignored all the hard questions and cited no authority.

Three years later, however, the U.S. Supreme Court unanimously reversed. Justice Field's opinion, perhaps even less satisfactory than Boise's, concluded that the Starrs lacked standing to challenge Stark's patent because they themselves had no adequate claim to the land. An Oregon statute permitted anyone "in possession" to sue to quiet title. However, mere "naked possession," according to Field, was inade-

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159. See supra text following note 39.

160. On the 1844 Townsite Act, see supra notes 32, 62–63 and accompanying text.

161. Again W.W. Chapman represented the purchasers. For a preview of the eventual result, see Coleman v. Stark, 1 Or. 115 (1854).

162. Starr v. Stark, 2 Or. 118 (1865), rev'd, 73 U.S. 402 (1868). One hard question ignored was how the city patent could possibly be valid following the court's own 1854 decision, and Deady's in 1861, that the Townsite Act did not even apply to Oregon when Portland was founded. See Lownsdale v. City of Portland, supra text at notes 62–63; Marlin v. T'Vault, 1 Or. 77 (1854).
quate: it had to be clothed with a "claim of right, that is, founded upon title, legal or equitable."163

The Starrs, of course, seemed to have just such a claim, recently upheld by a unanimous Oregon Supreme Court. But Field and his colleagues did not agree. As Deady had held in *Lownsdale*,164 the Townsite Act did not apply to Oregon until well after settlement of Portland. So the city's patent was invalid; the Starrs' legal title was defective, therefore not a "claim of right"; and they were not "in possession," hence unable to challenge Stark's patent. That reasoning chain made "unnecessary" any inquiry into Stark's own "original settlement and residence."165 So it seemed in 1868 that Ben Stark had won.

The Starrs declined to vacate, however, and a year later Stark sued in Deady's court for ejectment. Lewis Starr, by then sole owner of the lots, defended by alleging an "equitable title," a defense Deady ordered stricken as "immaterial and frivolous": such a title, even if established, was "no defense to an action for possession by the holder of the legal title."166 The Supreme Court already had decided the legal title issue, so Deady's only remaining task was to calculate the damages due Stark for Starr's long unlawful possession. Threading his way gracefully through much accumulated evidence, he finally determined the lost rental value, minus taxes Starr had paid and the value of Starr's permanent improvements, to be $1962.167

163. Stark v. Starr, 73 U.S. (6 Wall.) 402, 410 (1868). Recall that one month later Deady would decline to apply the same statute to the Lownsdale heir partition suit against Starr. See supra note 111 and accompanying text.

164. See supra text accompanying notes 61-62. Field quoted and praised "Mr. Justice Deady," see Stark, 73 U.S. at 415-17, and sent Deady a copy of his opinion. Letter from Field to Deady (Apr. 20, 1868) (Deady Papers, Oregon Historical Society). Regrettably, Field destroyed all Deady's letters to him so we cannot know what, if anything, Deady had written to him about the case or about the Portland land claim generally.


167. Id. at 1086-91. Whether Starr could recoup the $2000 value of his improvements was difficult. An Oregon statute authorized recovery only for improvements made while holding "under color of title adversely to the claim of the plaintiff, in good faith." Id. at 1085. Therefore, the Supreme Court decision denying Starr standing to challenge Stark's patent seemed plainly to deny his improvements counterclaim as well.

Deady chose to ignore Field's opinion, however, invoking instead other authorities holding that "[a]ny instrument having a grantor and grantee . . . gives color of title." His review of the deeds extending from Chapman to Starr convinced him that, yes, Starr had improved the land while holding "under color of title." Starr also had held adversely to Stark, and in good faith. Adverse possession was among the "vexed questions of the law," but the "just and reasonable rule" was that "every possession is presumed to be rightful and therefore adverse to the title of any other claimant." Starr's "exclusive possession . . . without any recognition of [Stark's] title"
But Starr persisted still, perhaps buoyed by references in Deady's opinion to his own good faith and to Stark's repeated assurances. Rather than leave, he sued, alleging again the equitable title theory he and his brother had involuntarily abandoned six years earlier. Once more he asked Deady to compel Stark to convey legal title.

But again Deady declined to hear the equitable theory. "After deliberate consideration, I am well satisfied that the former adjudication between these parties is a bar to this suit . . . ." The state court order to elect had been an "adjudication that one or the other of these causes of suit was insufficient, because, in the nature of things, it was impossible that both could be true in fact and law . . . ." Further, the Starrs' election had been "in the nature of a solemn admission" that the abandoned equitable title theory was "not well founded in fact or law, or both." Deady offered the usual rationale for res judicata, that a party not be permitted to "harass and weary" another with multiple suits, then applied it to Starr:

After years of litigation, the judgment of the court of last resort was given in [Stark's] favor, and now the plaintiffs seek to compel him to submit to a re-adjudication of his claim upon a fragment of the former suit, which was lost and abandoned by the plaintiffs in the progress of the former trial.

Starr answered the bell for yet another round, however, by changing attorneys and appealing to Judge Sawyer. Four years later, following a full trial, Sawyer wrote an opinion emphatically reversing not only Deady's res judicata ruling but the Starr brothers' entire series of losses extending back to the 1868 Supreme Court decision.

First, the prior state court action did not bar Starr's equitable title theory. It was "quite clear" to Sawyer that the original order compelling the Starrs to elect was "erroneous." Facts supporting the two theories were "entirely consistent with each other"; only the legal qualified for the presumption. And finally, his "actual belief" in his "apparent title" satisfied the good faith requirement. Id. at 1086-89.


169. Id. at 1115.

170. Id. The Starrs, of course, had not "lost and abandoned" their equitable-title theory voluntarily, but by a trial court order which neither appellate court bothered to review. The Oregon Supreme Court understandably did not review the order when affirming the Starrs' judgment, but why the United States Supreme Court, reversing, failed to consider it is a mystery.

conclusions to be drawn diverged. Moreover, even had the election order been correct, obviously it had precluded the Starrs from litigating their equitable claim. Sawyer asked, then answered, a compelling question:

Does it lie in Stark's mouth now, after procuring such a ruling, and forcing plaintiffs against their protest, under the order of court, to omit one cause of action, to say that plaintiffs might have litigated the claim in that action, and, because they did not, must now be precluded? I think not.  

On the merits, Sawyer brushed aside Stark's series of technical challenges to various contracts and deeds, emphasizing again "surrounding circumstances" and the parties' "true intent": "Like other contracts of that time relating to the lands in Portland, the language of these various instruments is doubtless open to much criticism. But... we must consider them in the light of the situation of the parties, and condition of things which gave them birth." No "unprejudiced mind" could examine the evidence and fail to conclude that "Stark fully acquiesced in and adopted" the January 1850 contract with Lownsdale, as modified by Coffin, Chapman, and Couch. Specifically, it was "manifest" that Stark had "held out by his acts and express declarations... to complainant and his brother... unmistakable assurances... that if he obtained his patent to the general claim he would convey to them the lots they had purchased." Sawyer directed him to do so, in "strict accordance with... intrinsic justice":

I am glad to be able to say that I am fully satisfied, as I think any reasonable mind must be, that the result in this case, and in the several others argued in conjunction with it... is in strict accordance with the

172. Starr v. Stark, 22 F. Cas. 1116, 1121 (C.C. Or. 1874) (No. 13,317), aff'd, 94 U.S. 477 (1877). See also Starr v. Stark, 22 F. Cas. 1131 (C.C. Or. 1874) (No. 13,318); Failing v. Stark, 22 F. Cas. 1130 (C.C. Or. 1874); Kamm v. Stark, 14 F. Cas. 104 (C.C. Or. 1871) (No. 7604).

173. Starr, 22 F. Cas. at 1122. Sawyer neatly turned the res judicata argument, suggesting that the state court ruling of inconsistency was itself res judicata that "the cause now relied on could not have been litigated in the former action." Id. at 1123. Presumably, however, Stark's real contention was (or should have been) that the Starrs failed to cross-appeal the election order to the United States Supreme Court. See id. at 1122–23.

174. E.g., that Captain Couch had lacked authority to modify Stark's January 1850 agreement with Lownsdale, and that the proprietors' 1850 joint deed to Chapman was ineffective. See id. at 1123–28.

175. Id. at 1124.

176. Id. at 1124–28. Sawyer also invoked, for good measure, the Supreme Court's Lamb v. Davenport dictum that even a pre-Donation Act contract or quitclaim deed could transfer equitable rights against a grantor who later acquired title. In his view, Starr's title from Stark was "in every particular, equal to that of Davenport from Lownsdale." Id. at 1130; see also supra text accompanying notes 142–44.

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intrinsic justice of the case. In my apprehension, any other result in these cases would work great hardship and gross injustice.\textsuperscript{177}

Deady dissented quietly, in six lines. He disagreed, of course, “as to the bar of the former proceedings” and equally “as to the effect of a conveyance . . . without covenants . . . by the donee under the donation act . . . prior to the passage of that act.”\textsuperscript{178} Generally, however, he chose not to answer Sawyer’s thirty-five page opinion which both reversed his ruling and admonished that no “unprejudiced mind” could fail to see its “gross injustice.” He chose instead to await word from Washington.

When that word arrived two years later, it brought no comfort. Stephen Field wrote for a unanimous Supreme Court affirming both Sawyer’s decision and his rhetoric.\textsuperscript{179} He first agreed that the state court litigation, begun twelve years earlier and decided eventually by the Supreme Court, was not res judicata precluding Starr’s equitable title claim. Undoubtedly a party had to present together “all the grounds upon which he expects a judgment in his favor,” but not “distinct causes of action . . . each of which would authorize by itself independent relief . . . ”\textsuperscript{180} Citing not a single authority, nor even helpfully analyzing the facts before him, Field simply concluded on this issue:

A decision upon one could not possibly be a bar to proceedings upon the other, from their intrinsically distinct nature. Having required the complainants to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring.\textsuperscript{181}

Field also adopted Sawyer’s view of the merits, emphasizing the need to interpret early Portland land contracts in light of the “condition on which land in Oregon was held at that time.” Because considerable settlement had preceded extension of American law to the region, early settlers had necessarily bought and sold less than full titles to their land. However, even under their own provisional land law, those settlers had “acted upon a confident expectation that their possessions and improvements would be respected by the government,

\textsuperscript{177} Starr, 22 F. Cas. at 1130.
\textsuperscript{178} Id. Privately, Deady defended his several pro-Stark rulings this way:
Sat in the [circuit court] and closed Stark cases . . . . I suppose the plaintiffs ought to have the lots, but I don’t see my way clear to make a decree in their favor and obey the law. Still I suppose most of the testimony of the Starks, Chapman and Coffin is substantially false.
\textsuperscript{179} Stark v. Starr, 94 U.S. 477 (1875).
\textsuperscript{180} Id. at 485.
\textsuperscript{181} Id. at 486.
and that ultimately they should acquire the title."\textsuperscript{182} In turn, an "unwritten conventional law" of land sales had emerged: "It was, therefore, understood by the people that, whenever the legal title was thus obtained, it should inure to the benefit of the grantees of the claimant who secured the patent of the United States."\textsuperscript{183} As the Court had concluded earlier in \textit{Lamb v. Davenport}, even a pre-Donation Act purchaser acquired "as against his vendor, an equitable right to the land . . . ."\textsuperscript{184}

Field then reviewed the record in \textit{Stark}, reiterating Sawyer's conclusions that the proprietors' 1850 conveyance to Chapman was valid, transferring an "equitable right to call for a release of the legal title"; that Stark had agreed to the modification of his January 1850 contract with Lownsdale, both through his agent Couch and later by his own conduct; and that the various deeds to Starr had transferred to him the equitable right. Noting that Starr and his brother, relying on Stark's assurances, had used and improved the land as their own for several years, Field concluded with a sentence which must have stunned Deady: "Upon every principle of law and morals, [Stark] should be forever enjoined from the commission of such injustice, and be compelled to quiet the title of the complainant by a release of all claim to the premises."\textsuperscript{185}

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\textsuperscript{182} \textit{Id.} at 487.
\textsuperscript{183} \textit{Id.} Field tried here to soften the blow to Deady by a footnote commending the "observations of Mr. Justice Deady, of the United States District Court, on this subject, quoted in \textit{Stark v. Starrs}, 6 Wall. 415 . . . ." \textit{Id.}
\textsuperscript{184} \textit{Id.} at 488.
\textsuperscript{185} \textit{Id.} at 492. Portland, of course, was not the only site of early Donation Act disputes. For a similar, though briefer and less revealing, series of decisions involving the Salem land claim of William and Chloe Willson, see Wythe v. Smith, 30 F. Cas. 771 (C.C. Or. 1876) (No. 18,122) (purchaser's estoppel plea rejected: the "seductive plea of promoting justice in particular cases [would] leave the right to real property to rest upon . . . uncertain and prejudiced testimony of ignorant and interested witnesses to . . . casual, stale and parol acts and declarations . . . ."); Wythe v. City of Salem, 30 F. Cas. 770 (C.C. Or. 1876) (No. 18,121) (pleas of public dedication and res judicata upheld); Wythe v. Palmer, 30 F. Cas. 769 (C.C. Or. 1875) (No. 18,120) (Field, with dissent by Deady: settler who was "entitled to a patent" after four years residence able to convey parcels prior to receipt of patent); Wythe v. Myers, 30 F. Cas. 766 (C.C. Or. 1876) (No. 18,119) (three purchaser defenses ordered stricken; purchaser's attorney J. Quinn Thornton lectured); Wythe v. Haskell, 30 F. Cas. 762 (C.C. Or. 1876) (No. 18,118) (patent certificate, and not patent itself, used to determine east-west line between spouses' respective halves); Nicklin v. Wythe, 18 F. Cas. 221 (C.C. Or. 1874) (No. 10,253) (Sawyer and Deady: land received by husband in exchange for land within wife's half of claim subject to resulting trust in her favor). For a critique of \textit{Smith}, see Chused, supra note 26, at 29–33. \textit{See generally J. Thornton, Salem Titles: History of the Title to Real Estate in Salem, in SALEM DIRECTORY—1874.}

At The Dalles, the issues were different. The 1848 Oregon Territorial Act granted to religious societies up to 640 acres per site then "occupied as missionary stations among the Indian Tribes." Oregon Territorial Act, ch. 177, § 1, 9 Stat. 323 (1848). In Dalles City v. Missionary Society, 6 F. 356 (D. Or. 1879), Deady ruled for the city and three private plaintiffs (including former and
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V. CONCLUSION

Matthew Deady's public land law decisions touch and concern several important themes of early far-west history. They recall for us again the importance of America's vast public domain to its nineteenth-century experience, particularly in the West. The new beginnings for hardy settlers who survived the land's adversities helped reinforce for all Americans values to which we lay special patriotic claim—freedom, opportunity, equality, democracy. Deady's decisions also illustrate once again the "central role which law played in the history of American public lands."186 The actions of Congress, federal administrators, and federal and state judges could hardly have been more prominent in shaping the settlement, ownership, and land use patterns within public land states.187 Further, the decisions reviewed here illustrate a central, abiding tension in early federal land policy, between aid to speculator claimants and protection of actual settlers.188 Although collectively the Portland proprietors were more than mere speculators, (all but Stark lived in the city and contributed materially to its development), the speculator-settler tension is plainly evident in the litigation arising from their Donation Act claims. And finally, related more closely to Deady himself, the decisions offer insight into the difficult choices, common to judges in a new land, between older, imported legal principles and newer, indigenous rules conforming more closely to local attitudes and conditions.189 Although Deady plainly favored older, established principles, the related decisions by Judge Sawyer and the Supreme Court support Paul Gates' observation that the development of American public land law was, in important part, a movement "from the common law doc-

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187. See generally works cited supra note 2.
trine of property rights . . . to . . . the rights of occupants . . . if they could prove some color of title.”

Matthew Deady's own public land law jurisprudence emphasized security of legal title, preservation of common-law conveyancing rules undiluted by parol exceptions, and literal interpretations of contract and deed language. Although sensitive at times to the claims of justice, Deady's greater allegiance was to a more jealous mistress, the law, as he understood and esteemed her. If in conflict, the equitable claims of purchaser litigants simply had to yield before society's greater need for neutral, enduring legal principles, applied without fear or favor. To state it more simply, faced with a recurring tension between formalism and fairness in early far-west public land law litigation, Deady repeatedly chose formalism.

The contrast between Deady's views and those of others who adjudicated Portland land claim disputes was often striking. In the levee litigation, the territorial supreme court heralded "natural justice" and "equity and good conscience" in deciding twice that various early proprietors had dedicated the waterfront to public use. Deady, enforcing instead the paper-title rights of private claimants, invoked traditional "solemnities and formalities" of lawful real property transfers. In virtually all the Lownsdale heir cases, Deady applied textbook common-law conveyancing doctrines, construed covenant language narrowly, and declined to recognize any alleged estoppel arising from mere conduct or "stale parol declarations." Without such protection, he warned repeatedly, land titles would not be "worth the paper upon which they are written." By contrast, Judge Sawyer and later the Supreme Court stressed the "honest and reasonable construction" of early proprietor agreements and overcame technical enforcement objections by an imaginative use of trust doctrine. Finally, in the Stark litigation, Deady ruled again for the legal title claimant, on the highly disputable ground of res judicata. Sawyer and the Supreme Court, reversing, emphasized again the parties' early conduct and understandings and the "intrinsic justice" of their respective positions.

The choices Deady faced in much of the Portland land litigation created for him what the late Robert Cover described as a moral-for-

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191. See supra text accompanying notes 49-68.
192. See supra text accompanying notes 87-158.
193. See supra text accompanying notes 163-85.
mal dilemma.\textsuperscript{194} A generation earlier, Joseph Story, Lemuel Shaw, and other antebellum judges had struggled to reconcile personal commitments to human freedom with professional fidelity to constituted authority. Deady's dilemma, though less tragic, was no less real. In "obedience to the law" he was obliged to make "hard rulings." Especially in private, he lamented repeatedly the "conflict between law and the popular interest and opinion of what is right. . . ."\textsuperscript{195}

Occasionally Deady denied facing such a dilemma, invoking as justification both "well settled rules of law" and "equity and justice."\textsuperscript{196} More commonly, however, he exhibited "dissonance-reducing behavior" virtually identical to that which Cover described. He elevated the formal stakes by claiming, for example, that "certainty of title to real property [is] . . . among the most important objects of . . . any civilized community." He retreated toward a mechanical formalism, concluding that it was a "well settled rule of law that the premises . . . may . . . limit the covenants, but the covenants can never enlarge the premises." And he ascribed responsibility elsewhere, usually to the covenant drafters whose work he described more than once as "practically a nullity and absurdity."\textsuperscript{197} Moreover, Deady's occasional, implausible denials of any moral-formal dilemma were themselves, in part, a form of dissonance-reducing behavior.

My own final judgment of Deady's public land law decisions is relatively critical. Without question, Deady's paramount professional values—legalism, respect for constituted authority, and a cautious, common-law approach to legal conflict—have been justly celebrated features of the American legal experience. Many of his public land law decisions, however, including notably those adjudicating the Portland land claim, seem to have exalted those values unnecessarily at the expense of competing fairness considerations.

In retrospect, Deady overestimated the threat to secure land titles, and to the rule of law generally, in the difficult Portland cases. Judge Sawyer saw the cases more accurately as largely \textit{sui generis}, mere growing pains of a frontier community, unlikely to recur, and best resolved by flexible, fact-oriented decisions. Traditional policies favoring relatively formalistic judging—certainty, predictability, \textit{non sub homine sed sub lege}—were, it seems, considerably less compelling in

\textsuperscript{194} R. \textsc{cover}, \textit{justice accused: antislavery and the judicial process} 226-56 (1975).
\textsuperscript{195} 1 \textsc{pharisee}, \textit{supra} note 9, at 18, 19 (emphasis in original); see also \textit{supra} note 178.
\textsuperscript{196} See, \textit{e.g.}, \textit{supra} text accompanying notes 82, 95.
\textsuperscript{197} See \textit{supra} text accompanying notes 65, 135, 136. See generally R. \textsc{cover}, \textit{supra} note 194, at 229-38.
the Portland cases than Deady believed. Indeed, one might even contend a century later that Deady's formalism undermined rather than enhanced security of land title, for certainly his decisions confounded rather than conformed to prevailing contemporary beliefs regarding entitlements to the disputed land.

How then does one account for Deady's decidedly formalist, ultimately mistaken view of the Portland land claim litigation? What deeper concerns underlay his fidelity to the law as he understood it, even at the expense of the public and purchasers who, in his own words, "ought to have the lots"?

Here and there one finds hints that personalities may have played a part. Deady clearly had little use for W.W. Chapman, proprietor, likely drafter of slovenly covenants, and eventually the attorney for many purchasers. Deady's diary references to Chapman are uniformly unfavorable, describing him as "selfish," "foolish," and an "old white haired Charon." Deady ridiculed Chapman's "old stereotyped story of the settlement and customs of this town" and his "parol history of the growth and origin of titles to property in Portland..."198 Reading Sawyer's Vaughn opinion, Deady remarked gleefully that "Old Chap[man] will howl."199

By contrast, Deady generally admired Ben Stark. Both had been pro-slavery Democrats during territorial years, and many believed that it was Deady who persuaded Governor John Whiteaker to appoint Stark to the Senate in 1861.200 In his state court litigation against the Starrs, Stark actually called Deady as a residence witness,201 and, following his return to Connecticut, he and Deady continued to correspond warmly and exchange photographs. Indeed, on the same page of Deady's 1871 diary appear these two entries: "Sent Ben Stark my photograph in exchange for his received some time since." "In Circuit Court tried Stark vs Starr and Stark vs Bacon et al, without a jury."202

198. I PHARISEE, supra note 9, at 10, 21, 200 (emphasis in original). Charon ferried souls across the river Styx.
199. Id. at 69. On Lamb v. Vaughn, 14 F. Cas. 1034 (C.C. Or. 1872) (No. 8023), see supra note 158. For a memorable altercation between Chapman and Deady's early political ally, district judge O.C. Pratt, see G. BELKNAP, supra note 51, at 50 (quoting Oregon Spectator, Nov. 11, 1851); Teiser, First Associate Justice of Oregon Territory: O.C. Pratt, 49 OR. HIST. Q. 171, 181 (1948); Letter from Pratt to Deady (Oct. 8, 1851) (Deady Papers, Oregon Historical Society).
200. See supra note 36.
202. I PHARISEE, supra note 9, at 2. Stark also took time repeatedly to praise Deady for presiding over the "one Court in Oregon that was not organized to sanctify robbery."
A second partial explanation one might infer from the opinions is that Deady was simply less careful than he needed to be in his early public land decisions, that he followed his initial formalist instincts and later felt unable to inquire more deeply into the merits of cases without confessing error. Almost certainly he did underestimate the appellate scrutiny his public land rulings would receive, relying, it seems, on his typically near-final authority on matters relating so decidedly to Oregon alone. Judge Sawyer and Justice Field made the difficult circuit journey to Portland as infrequently as possible, the Supreme Court was far away, and Deady's great ability and dedication assured him an unusual measure of deference even on appeal. In the Portland land claim cases, however, litigants repeatedly appealed beyond his court, and his strongly formalist views of those cases were sometimes simply too extreme to be sustained.

In the end, however, neither personalities nor early lack of care adequately explains Deady's public land decisions. Throughout his career, both on and off the bench, Deady's moral posture was rigidly upright and free from personal influence. Even his critics acknowledged an unusually well developed set of scruples. Moreover, many of his Lownsdale-heir rulings favored two Kentucky grandchildren wholly unknown to him, at the expense of Portland "friends" like Senator Henry Corbett and L.H. Wakefield. And finally, the lack of care/overconfidence suggestion fails even to inquire into the sources or strength of Deady's initial formalist instincts.

The most fundamental explanation—the one central to an understanding of Matthew Deady as judge and person—recalls once again Deady's unusually strong belief in law as the foundation, and judges as guardians, of moral, civilized society. Elsewhere I suggested that Deady's outspoken defenses of beleaguered Chinese immigrants drew inspiration in part from his strong commitment to reason, law, and order in a time of perceived political demagoguery and social disinte-

from Stark to Deady (Nov. 24, 1866) (Deady Papers, Oregon Historical Society); see also letter from Stark to Deady (May 25, 1885) (Deady Papers, Oregon Historical Society).

203. Former territorial court colleague George Williams, for example, eulogized Deady in this way:

"There were some things about Judge Deady that I did not particularly admire, but there was one thing about him that commanded my highest admiration; there was no sign or taint of the demagogue about him. He was independent and fearless. He was unmoved by popular prejudice or public censure. . . . He had the courage to make his judgments according to his convictions. I know of no higher praise that I can bestow upon a judge than to say of him that he administered the law without fear, favor or affection."


204. See supra note 135.
The beliefs and attitudes inspiring his public land law decisions, though less apparent, were very similar.

Both in public and in private Deady constantly contrasted the law, especially the common law, with the partisan, irrational, often corrupt world of politics. To him, the core values of enlightened civilization, including the special Anglo-American sensitivity to political and economic freedoms, depended substantially on maintaining the integrity of fundamental legal principles. Security of land titles, resting in part on immutable common-law conveyancing rules, was among the most important of those principles.

Holding such values paramount, Deady was consciously within a distinguished tradition of American thought reaching back at least to the constitutional ratification debates. Alexander Hamilton was among his principal heroes, and he undoubtedly agreed as well with many of the social and legal views of other early Federalists like Rich-

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205. Mooney, supra note 9, at 633-37.
206. To the people who speak the English tongue, the common law is . . . the wisdom of their ancestors . . . , at once a tradition and a living inheritance. Its principles, maxims, and aphorisms enter into and give tone and color to our morals, politics, and literature . . . . [It] furnishes at once the bulwark and limit of the rights of person and property, and of government and subject or citizen. M. Deady, supra note 44, at 18; see also supra notes 43-48 and accompanying text. To borrow Karl Llewellyn's memorable phrase, Deady was one who sang often "in praise of Our Lady of the Common Law." To formal style masters like Deady, it was "a good judge's business to steel himself against emotion, and against deflection by . . . sense of justice which may run counter to 'the law'. . . ." K. LLEWELLYN, supra note 12, at 38-39. See generally id. at 35-40, 64-74, 186-89.
207. As early as January 1862 Deady described how he had grown beyond the "generous but unthinking impulses" of his Democratic youth to become "more of a Federalist of the Washington and Hamilton school, than a disciple of the Sans Culotte philosophy of Jefferson." Letter from Deady to Jesse Applegate (Jan. 8, 1862) (Deady Papers, Oregon Historical Society). See generally Mooney, supra note 9, at 633. For the next two decades Deady repeatedly praised Washington and Hamilton as America's supreme patriots. Orations by Matthew P. Deady (July 4, 1877), (July 4, 1885) (Deady Papers, Oregon Historical Society). On Hamilton generally, including his commitments to federalism and rule of law, see S. KONEPSKY, JOHN MARSHALL AND ALEXANDER HAMILTON, ARCHITECTS OF THE AMERICAN CONSTITUTION 120-45 (1964) ("The Security of Property"); J. MILLER, ALEXANDER HAMILTON: PORTRAIT IN PARADOX (1959); G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 56-63 (1970) (describing Hamilton's 1784 "Phocion" essays as among the "most notable documents of American constitutionalism").
ard Peters, Samuel Chase, James Kent, and the legendary Joseph Story.

It was in Deady's own postwar era, however, that many elite lawyers and their clients began to perceive even more urgently the need for strict rule of law. The age of enterprise produced heightened class conflict in America, increasing fear among professional and business leaders of "restless majorities upsetting the social order and the rights of property." For many, the preferred legal response was rededication to a "new judicialism" to maintain an "ordered society in a world where the forces of popular democracy might become unmanageable." Relatively rigid legal categories and an activist judiciary to refine and enforce them seemed to be the nation's best potential breakwater against rising tides of political turmoil and social revolution. Matthew Deady both shared the elite concern and believed in the preferred response. He occasionally criticized Portland's business elite for its notable lack of civic virtue, but he certainly disliked and distrusted far more the ill-mannered "demagogues" and working-class "mob" gaining political power in his community.


209. Story, of course, began his career as a Republican politician, but he, like Deady, changed more than simply his profession. See, e.g., R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 37-72 (1985). Ten years of practicing both politics and law led Story to "two indelible impressions"—that politics was "inefficient, if not immoral [and] quite unable to guide the American people safely through the troubled age"; and that law, "administered by lawyers and judges, was a corrective . . . and possibly even an alternative" to party government. Id. at 38. "Over the art of politics and the artful dodging of the demagogue, Story chose the science of the law." Id. at 63.


211. Id. at 3, 5.


One particularly notable incarnation of such classical formalism, particularly later in his career, was Deady's mentor and friend Justice Stephen Field. See R. MCCLOSKEY, supra; C. MCCURDY, supra note 104; McCurdy, Justice Field and The Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897, 61 J. AM. HIST. 970 (1975).

213. In an 1883 address entitled "Towns and Cities," for example, Deady urged that the municipal franchise be limited to taxpaying property owners. Most city governments, in his
There is also a more personal dimension to this aspect of Deady's thought. Beginning in his middle years Deady became, I think, an increasingly lonely, melancholy man. Shortly after ascending the bench, he discarded the gregarious, corn-whiskey, political persona of his youth for an austere, teetotaling judicial demeanor both on and off the bench.\textsuperscript{214} His earlier close friends like Asahel Bush and James Nesmith gradually drifted away, both physically and spiritually, never to be replaced. Neither his wife, the highly proper Lucy Henderson, nor any of his three sons was a true soulmate.\textsuperscript{215}

That abiding sense of loneliness, together with the genteel poverty his inadequate judicial salary compelled, created for Deady a strong feeling that Portland society and economy were passing him by. He felt increasingly isolated from the community his friends and he had dominated politically during territorial years. Portland's postwar professional and business leaders respected him; a few even admired him; but none played Patroclus to his Achilles.

In part to compensate, to insure continued respect if not real affection, Deady developed and exhibited his unusually strong belief in the nobility of the common law, its association with the great moral and political truths extending back to Henry II, and the unique importance of judges in safeguarding it for their own and future generations. In some measure to validate his career choice and his life's work, both to himself and to his readers, Matthew Deady repeatedly chose formalism over fairness in the difficult Portland land claim cases.

\textsuperscript{214} Deady's early correspondence, especially with James Nesmith, is laced with good-humored references to corn whiskey and territorial politics. Uncle Ned, the Deady character in W. Adams, \textit{supra} note 40, carries his whiskey jug everywhere. By 1871, however, he was attending morning church services in otherwise all-female company and remarking that he had not touched hard liquor in ten years. \textit{E.g.}, \textit{1 Pharisee, supra} note 9, at 9, 13, 15, 73.

\textsuperscript{215} Deady seems to have had an unusually formal relationship with his wife. His diary entries refer to her constantly as "Mrs. Deady" and note principally her many absences and indispositions. For a sample of her own aloof literary style, see F. Lockley, \textit{Conversations With Pioneer Women} 81-101 (1981).

Deady's first two sons, Edward and Paul, became lawyers, though after Deady's death Paul mainly managed his mother's appreciated real property. Edward's recurring alcohol problem and Paul's lackluster school performance grieved Deady, who nonetheless tried to assist by appointing them both to various minor court positions like crier. His third son, Henderson, studied with C.J. Jung and became an early-day analyst, but went East to boarding school when a teenager and did not return.