

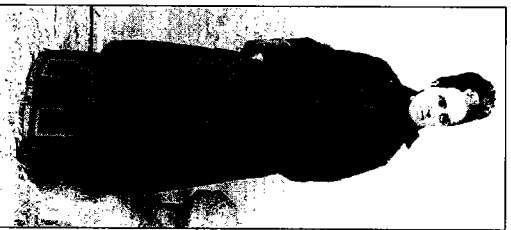
# Howell vs. Deady

*continued*

disposed of or encumbered during the period aforesaid.”

Lucy's will also provided that “in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.” She authorized her son Henderson to elect “to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life time of the widow of said Henderson Brooke Deady.”

The last clause in which the property was addressed provided that the monthly payments to her grandsons and of residue to Henderson “shall continue for a period of ten years after my death, and thereupon and thereafter, the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady.” *Howell v. Deady* was preceded by



Lucy Deady was a shy teenager when The Hon. Matthew Deady came courting, but her photographs usually show her as an unsmiling but elegant matron.

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several other disputes that foreshadowed the questions that case ultimately addressed: Within two months of Lucy's death, friction arose between Henderson and his nephew Hanover about the ownership of the property. On October 25, 1923, Wilbur, an attorney for Hanover and his brother Matthew, sent a letter to Joseph Simon, a friend of Lucy's, who with Henderson was co-executor of her will. That letter sought verification that the grandsons would be entitled to the whole of the property on Henderson's death.

The following fall, approximately one-year after Lucy's death, Marye Thompson Deady, the widow of Lucy's son Paul, filed suit claiming that Lucy had held one-third of the property in trust for Paul, to which his heirs were then entitled. Marye's claim was settled approximately one year later, on October 28, 1925, whereby her monthly income from the property was increased from \$75 to \$150.

Around the time that Marye's claim was settled, Henderson and his wife Amalie, who had long been separated, were divorced. Henderson wanted to marry Charlotte Howell but was concerned that if he did not wait for six months after his divorce decree, the validity of his marriage to Charlotte could be called into question. Henderson, however, was not well and believed that he did not have long to live. Henderson tried to get Hanover to agree that Henderson's share of the property's income would be paid to Charlotte Howell if he died before they could be married. In an effort to get Hanover's consent, on October 29, 1925, Henderson executed an affidavit that he had no children. Nonetheless, Hanover refused to consent, and a violent quarrel erupted causing Henderson to leave Portland and never return. He and Charlotte married shortly thereafter.

Henderson died May 28, 1933. His will made no specific mention of Lot 1, Block 212, but named Charlotte Howell Deady as residuary legatee and appointed her to his share of the income in his mother's estate. Hanover was immediately interested in obtaining a definite expression of the income to which Charlotte was entitled under the appointment from

Henderson. After some negotiation, in October 1934, Charlotte signed a settlement agreement. Matthew signed the agreement as well, but his brother Hanover, who had initiated the process, refused. Charlotte died July 12, 1935. Like Henderson's will, hers made no specific mention of Lot 1, Block 212. It designated her son from a previous marriage, Richard Howell, as her residuary legatee.

Probate closed on Lucy's will on March 6, 1936. Shortly before then, Joseph Simon, the remaining executor of Lucy's will, died. The First National Bank of Portland was appointed executor, and after probate closed acted as trustee for the property. Charlotte Howell Deady's son and heir, Richard Howell, sought an accounting from Hanover, Matthew, and the First National Bank of Portland and demanded payment of a share of income from the property. When his demand was refused, he filed suit on July 11, 1936, naming Hanover, Matthew, and the bank as defendants. So began the case, *Howell v. Deady*, brought in federal court because Richard Howell was a resident of Connecticut.

Richard Howell was represented by Robert F. Maguire, a prominent Portland attorney who was later to be a judge at the Nuremberg war crimes trials. He asked the court to construe the clause of Lucy's will that provided that Henderson's interest in two-thirds of the lot would vest in his nephews if he died without issue. Maguire argued that provision should be construed to apply only if Henderson predeceased Lucy; otherwise, it would violate the rule against perpetuities.

Hanover and Matthew were represented by Edgar Freed and Nicholas Jaureguy. They asserted numerous defenses including the theory that under the will, Henderson received only a defeasible fee, which was defeated upon his death without issue. They argued that Charlotte Howell Deady did not receive an estate of inheritance from Henderson, but only an appointment to income, and therefore Richard Howell was not entitled to any share in Lot 1, Block 212.

The case was tried before Judge James Alger Fee. Judge Fee had begun his judicial career in 1927 as a circuit court judge in Umatilla County.

In 1931 he was appointed to the federal bench, where he served for 23 years until he was appointed to the Ninth Circuit in 1954. Judge Fee maintained a stern atmosphere in his courtroom, which many attributed to his experience as an officer in the first world war. Judge Fee presided over *Howell v. Deady* during a period of great change in the legal landscape of the District of Oregon.

In September of 1933, just three years before Richard Howell filed his complaint, Judge Fee had moved his chambers from the Pioneer Courthouse to the then-new federal courthouse at 620 Southwest Main Street. There were two district court judges in Oregon at the time, Judge Fee and Judge John H. McNary, as well as a bankruptcy referee, Estes Sneedcor. In 1934, two years before Richard Howell filed his complaint, Congress had authorized the Supreme Court to promulgate federal rules of procedure. Those new Federal Rules of Civil Procedure went into effect on September 16, 1938—while Matthew and Edgar Deady's motion to dismiss Richard Howell's complaint was pending. The parties filed a stipulated motion to suspend application of the new rules of procedure with regard to defendants' motion to dismiss, which Judge Fee granted on October 27, 1938.

As it turns out, Judge Fee was not an advocate of the new Federal Rules of Civil Procedure. A subsequent case, *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (D. Or. 1953) and 128 F. Supp. 520 (D. Or. 1954), illustrates Judge Fee's strategy, which was to enforce the rules “up to the hilt” in order to demonstrate their flaws. The *Montgomery Ward* case was filed in 1942 and came before Judge Fee for a pre-trial conference in 1944. Judge Fee ordered the attorneys to work substantially full time on the pre-trial order until they reached agreement. For the next seven years, taking breaks for the state legislative sessions in which both attorneys had responsibilities, they worked on the pre-trial order, reaching stipulations of fact and in regard to the admissibility of evidence. In 1951, seven years after they began working on it, the pre-trial order was finalized and the trial began the next



Henderson Deady, shown ca. 1879, was Lucy Deady's only living son at the time of her death in 1923. She bequeathed him an undivided two-thirds of her property.

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day. Whether the endeavor demonstrated the new procedure's faults is debatable; the trial, which originally was estimated to take up to two years, was accomplished in nine days.

Although the new federal rules of procedure were suspended with regard to the motion to dismiss in *Howell v. Deady*, they were otherwise applied. The parties engaged in discovery, and there was a pre-trial order. Plaintiff served defendant with interrogatories, the answers to which, by today's standards, are remarkable for their forthrightness. For example, defendants gave a four-page response to plaintiff's request that they describe any evidence of which they were aware that Henderson construed Lucy's will to convey to him only a defeasible fee. The candid response is a model of professionalism, separately setting forth responsive evidence associated with various disputes and transactions, including Henderson's divorce to Amalie, his negotiations with his nephews, and the settlement with Marye Thompson Deady.

Some aspects of practice at that time were similar to law practice today, and attorneys for both sides were very busy. While the matter was pending, the parties requested more than eight extensions of time. Each was stipulated by the parties and was granted by Judge Fee. One of those motions sought to postpone the pre-trial con-

ference because Robert Maguire was in Kansas City for the first five months of 1940 for the trial of *United States v. Union Pacific Railroad Company*. So *Howell v. Deady* was tried during July of 1941 by Robert Maguire and Nicholas Jaureguy.

Judge Fee ultimately wrote three opinions in the case: 48 F. Supp. 104 (November 6, 1939), in which he denied a motion to dismiss the complaint; 48 F. Supp. 116 (May 19, 1941), in which he ruled on various evidentiary questions; and 48 F. Supp. 123 (November 17, 1941), in which he ruled on the merits of the case. Each opinion is “a good read,” particularly the opinion denying the motion to dismiss, which contains the bulk of Judge Fee's analysis of the will construction, and the opinion setting forth the evidentiary rulings, which is a model of precision and clarity.

Ultimately, Judge Fee determined the restatrix's intent, which he characterized as “the pole-star” by which to interpret the will, with resort to its four corners. He rejected evidence of the construction others gave to the will, both for purposes of its interpretation and the defense of estoppel. He found that Lucy intended to bequeath a fee simple to Henderson and that the conditional bequest to her grandsons, if Henderson were to “die without issue,” was a “substitutional gift” to take effect only if the event happened before her own death. He construed her request that the property not be sold for 25 years after her death as merely advisory and not a condition of inheritance, and therefore not an unlawful restraint on alienation.

The matter was appealed but settled while the appeal was pending, a let-down for the young lawyer who was to argue on behalf of plaintiff, for it would have been Randall Kester's first argument to the Ninth Circuit. Thus ended the dispute over Lucy Deady's bequests.

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## THE EXTERIOR IMAGERY OF THE FEDERAL COURTHOUSE

According to John Meadows, the lead architect for the Hatfield U.S. Courthouse and a principal at Portland's BOORA Architects, there were two seemingly conflicting goals with respect to the exterior imagery of the Courthouse. On the one hand, the building should convey the message of the institution of the judiciary: dignity, permanence, strength, weight, and timelessness. On the other hand, it should depict the spirit of the judges in Oregon—open and accessible to the people they serve—and be a place of comfort to the public.

BOORA Architects, a firm involved in national and local projects (including eight Nike Towns), worked closely with Kohn Pedersen Fox, a nationally recognized New York-based architectural firm that acted as a design consultant on the project. The two architectural firms formed a unique yet highly effective working relationship by integrating into one team for all the various stages of the project. People from both firms traveled as necessary to ensure that there was always one team in each location working on the Courthouse project.

The Hatfield Courthouse is plainly a contemporary building, yet it also represents a modern form of classicism. In a February 8, 1998 *Washington Post Magazine* article, the GSA's chief architect, Ed Feiner, described the Hatfield Courthouse as "contemporary architecture that is comparable to the Parthenon. But it's like abstract art. You have to look for the classical elements."

Following the pattern of a classical building, the Hatfield Courthouse has three distinct sections: the base, middle, and top. The base, a band of stone approximately one story high, connects the building to the ground. Meadows says the granite, which is heavy, hand-chiseled, and rusticated, suggests a traditional base. The front section of the base,

which forms the public entrance, further reflects "the dignity of the people."

The exterior of the middle section is limestone, as is common of American historical civic buildings. The limestone alternates with long, horizontal glass windows. Atypical of traditional buildings, however, these windows reveal the interior steel frame behind the limestone exterior.

The top piece of the Hatfield Courthouse, wrapping around the top of an elevator tower, has been nicknamed by some "the eyelash." It is, according to Meadows, "a modern interpretation of a cornice." Meadows explains that many modern buildings have been criticized because they contain no architectural feature to help the building meet the sky, resulting in a sawed off appearance at the top. The top of the Hatfield Courthouse is created by recessed glass with a canopy. Meadows describes the top as "a lacy, see-through cornice, less ornate than classical cornices, yet, significantly, still there."

The GSA wanted the Courthouse to be practical and functional says Meadows, so "form follows function." The

building is intentionally asymmetrical because symmetry is usually not functional. The law is deliberate and logical, so the Courthouse reflects these characteristics. Meadows adds, "Overall, the architectural details are about responding to what is outside and inside." William Pedersen, chief architect at Kohn Pedersen Fox and lead designer of the Hatfield Courthouse, agrees. He was quoted in the *Washington Post Magazine* article as saying, "The reality is that classicism no longer applies to our times, so we decided to let the pieces honestly explain their function and let the assemblage express a new form of courthouse."

The body of the Hatfield Courthouse has two sections: the tower containing the courtroom and chambers, and the "sidewalk" containing the administrative offices, law library, and cafe. The tower is the strongest part of the building. It is essentially a box of the strongest steel (to provide earthquake security) clad in stone and glass. Meadows says there is symbolic logic in making the tower the strongest and weightiest section of the Courthouse because "this is where justice occurs." Toppling the sidewalk on the sunny side of the building is a public roof terrace where people can enjoy an outdoor sculpture garden and spectacular views of the city.

The Hatfield Courthouse, at 343 feet high and 565,300 square feet, is a huge building on a very small block. As compared to other cities, Portland city blocks are very small, only 200 feet square, making it a challenge to fit a large building on the block. Meadows explains that the sidewalk, which is only nine stories high, mitigates the dominance of the tower, which is sixteen stories high. Yet, even with mitigating factors, the Courthouse



PHOTO BY MICHAEL

feels has become "thoroughly bipartisan") he offers a challenge: "acknowledge what cannot be sensibly denied: . . . illicit racial discriminations continue to adversely affect the administration of criminal law." To those "dedicated specifically to advancing the interests of blacks" he issues a warning: present claims of racial discrimination with care in order to avoid the kind of "racial paranoia" and "intellectual sloppiness" that led to the Tawana Brawley trials in New York City and recent assertions that American drug policy (whether effective or wise) is intentionally "genocidal."

What Kennedy is admittedly promoting—what to some he concedes "smells of Uncle Tomism"—is a racial politics of moderation. Yet beyond his calls for the ideological combatants to seek common ground in their search for community peace and civility, and beyond his moderate prescriptions for increasing equity and credibility in the administration of criminal justice, it is Kennedy's unflinching reporting of racial fact and perception that will challenge, provoke, and perhaps incite those committed as well as those opposed to promoting racial justice and harmony. For example, in Kennedy's words:

The Reagan administration attacked race-based affirmative action on color-blind grounds but supported race-based peremptory challenges as a tool of litigation. . . . This inconsistency suggests that some in the color-blindness camp tend to act opportunistically with respect to the matter of racial discrimination, complaining seriously about it only when racial distinctions hurt, or are perceived to hurt, whites.

[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws. Whereas mistreatment of suspects, defendants, and criminals has often been used as an instrument of racial oppression, more burdensome now in the day-to-day lives of African-Americans are private, violent criminals (typically black) who attack those most vulnerable without regard to racial identity.

[A] racial disparity is not necessarily indicative of a racial discrimination. . . . A disproportionate number of blacks in jail might signal that police are racially discriminating in making arrests. On the other hand, the ra-

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cial demographics of the inmate population may reflect that more blacks than whites are engaging in prohibited conduct which leads them to be arrested. If that is so, the racial disparity stems not from biased decision-making on the part of the police but from some other cause. . . . Real differences in behavior may stem, to some extent, from deprivations imposed upon individuals who live in the depressed, isolated criminogenic settings in which large numbers of blacks reside as a consequence of historic racial oppression. It is important, however, to distinguish between racial discrimination engaged in by police and real differences in behavior caused by conditions partially shaped by racial oppression. It is important to avoid wrongly stigmatizing police officers; their work is too essential to be hobbled by mistaken charges.

That relative to their percentage of the population, blacks commit more street crime than do whites is a fact and not a figment of a *Negrophobe's* imagination. Although blacks constitute only around 12 percent of the national population, in 1992, 44.8 percent of all persons arrested for violent crimes were black. Blacks made up 55.1 percent of those arrested for homicide, 42.8 percent of those arrested for rape, and 60.9 percent of those arrested for robbery. Even after one makes a reasonable discount to offset some degree of racial discrimination in law enforcement, a strikingly large disproportionality remains.

Society faces both real racism and real criminality; a long-term need to address socioeconomic inequities and a short-term need to provide for public safety now, a crisis in individual moralities and a crisis of social justice.

These are tough messages in our current environment of political correctness and a collective shame over a sordid history of racial injustice; and the messenger no doubt could only be an African-American scholar of Randall Kennedy's stature. Whether or not its observations and prescriptions are valid, *Race, Crime*

and the Law marks a major shift in perceptions and in the ongoing dialogue between the races about the administration of criminal justice in America. Communities of color are increasingly inviting the police into their midst to undertake the kind of "community policy" strategies and street encounters that gave rise to the "constitutionalization" of American criminal procedure over the past three decades. Rather than demanding that the criminal law persist in its attempts to eradicate what Professors Dan Kahan and Tracey Meares, in *The Georgetown Law Journal's* Twenty-Seventh Annual Review of Criminal Procedure, have recently called "American apartheid," people of color are increasingly calling for an end to what Professor Kennedy considers the most pernicious legacy of this country's racist history: underenforcement of the criminal law in African-American communities. Clearly, a new dialogue on crime, race, and the law is underway.

Peter Ozanne recently withdrew as a partner in Schwabe, Williamson & Wyatt and joined the U. S. Attorney's Office to direct the Department of Justice's new Strategic Approaches to Community Safety Initiative. The project is currently addressing problems of youth gun violence in Portland.

### THANKS

The following generous donations were recently made in support of our historical society's work:  
 \$1,245 in Memory of The Hon. William M. Dale  
 \$1,000 Life Membership from Randall Kester  
 \$400 from the Lane County Bar Association

