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BENCHMARKS

FORMALISM AND FAIRNESS: MATTHEW DEADY
AND EARLY PORTLAND LAND-TITLE DISPUTES

by Ralph James Mooney

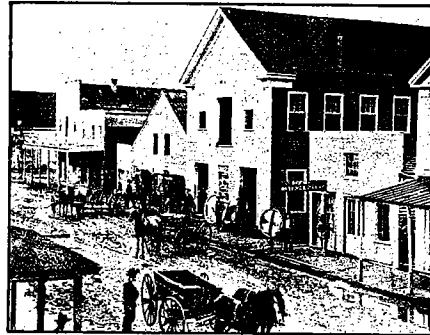
Professor Mooney teaches American legal history at the University of Oregon Law School and currently is writing a biography of Oregon's first federal judge, Matthew P. Deady. This article is excerpted from "Formalism and Fairness: Matthew Deady and Federal Public Land Law in the Early West," 63 WASH. L. REV. 317 (1988)

No legal issue touched the lives of more early Oregonians than land title uncertainty. The promise of free land in this remote Eden brought to Oregon many of its first settlers. Yet, as commonly occurs in new communities, uncertainty and disputes over property titles abounded.

The most dramatic and prolonged series of disputes occurred in Portland between 1861 and 1880, when Federal District Judge Matthew Deady, Circuit Judge Lorenzo Sawyer, and ultimately the U.S. Supreme Court struggled repeatedly to give meaning to opaque federal statutes overlaid with centuries of English and American common-law real property doctrine. A look back at that extensive litigation, featuring the contrasting judicial styles of two remarkably able pioneer judges, recalls again the importance of land — and of federal law — to America's early west.

The Oregon Donation Act

The centerpiece of nineteenth-century Oregon land law was the Oregon Donation Act, which Congress passed on September 27, 1850. Largely the work of Missouri Senators Lewis Linn and Thomas Hart Benton, it granted to every "white settler" residing in Oregon by December 1, 1850, 320 acres if single or 640 acres if married, half to his wife "in her own right." To encourage future emigration, it also provided for somewhat smaller grants to settlers arriving by December 1853. Eventually, Oregonians patented



*Portland's first house was the "Overton cabin," built in 1844 at Front and Washington Streets. A decade later, the waterfront town was bustling with activity and the seeds of many land disputes were being sown.
(Photo courtesy Oregon Historical Society)*

more than 7,000 claims under that Act, nearly all in the Willamette Valley.

Early Portland Settlement

In November 1843, William Overton, recently arrived from Tennessee, and Asa Lovejoy, Oregon City lawyer originally from Massachusetts, pulled their canoe into a clearing along the west bank of the Willamette River and founded Portland. A few months later, the restless Overton sold his half-interest in the 640-acre claim to Oregon City merchant Francis Pettygrove for \$50 in supplies and departed for parts unknown. By early 1845 Lovejoy and Pettygrove had enlarged the clearing, built a cabin, and — by a coin flip — named their town for its

leading counterpart in Pettygrove's home state of Maine. (Lovejoy, naturally, favored Boston.) Later that year, Lovejoy sold his half-interest for \$1,200 to Ben Stark, recently arrived cargo-master on a trading vessel. Stark then departed, leaving the industrious Pettygrove to promote Portland to a place of prominence in the Northwest.

In August 1848 news of California gold reached Portland, and Pettygrove sold out to Daniel Lowndale, a tanner from Kentucky, for \$5,000 and departed. Lowndale then sold one-third shares to two Oregon City entrepreneurs, Stephen Coffin and William W. Chapman.

Finally, in January 1850, Stark met Lowndale in San Francisco and reasserted his half-interest. The two eventually agreed that Stark would receive 48 prime acres in the claim's northeast corner, bounded today roughly by Stark Street, Burnside Street, and the river, subject to any conveyances already made to others. Two years later, Lowndale, Coffin, and Chapman partitioned their remaining claim into thirds, and by 1864 all four men had received federal patents to their land.

Lowndale Heirs Litigation

Early Portland land-title disputes were many and varied. In 1854, for example, the territorial supreme court held that Congress did not extend the 1844 Townsite Act to Oregon when granting it territorial status, making private claims within townsites permissible. In 1861 Federal Judge Matthew Deady ruled that Pettygrove, Lovejoy, and later Lowndale had not made a binding public dedication of the Portland levee area east of Front Street; four years later the Supreme Court affirmed. And in 1868, the

(Continued on p. 2)

Matthew Deady (continued)

Supreme Court, reversing the Oregon Supreme Court, held that a woman qualified as a Donation Act "settler," despite repeated statutory references to "single man" and "married man."

Much of the Portland litigation, however, involved disputes between early proprietors or their heirs and those who bought and improved individual parcels. Often, when the proprietors finally obtained federal patents to the land, they and their heirs began questioning the validity of many of their own early sales. Although certain

BRIEFS



C. E. S. Wood holding his son, Erskine B. Wood
(Photo courtesy Oregon Historical Society)

The CES Wood Roundtable is holding a special meeting at the Oregon Historical Center's Madison Assembly Room Wednesday, August 16, from 11 a.m. to 1:30 p.m. A distinguished panel, headed by University of Oregon Professor Edwin Bingham, will give short, informal talks before opening the meeting to audience participation. Anyone interested in learning more about Wood is invited to attend.



Charles S. Crookham, retired judge of the Fourth Judicial District in Multnomah County, has received the American Judicature Society's Herbert Harley Award for his contributions to improving the Oregon judicial system.

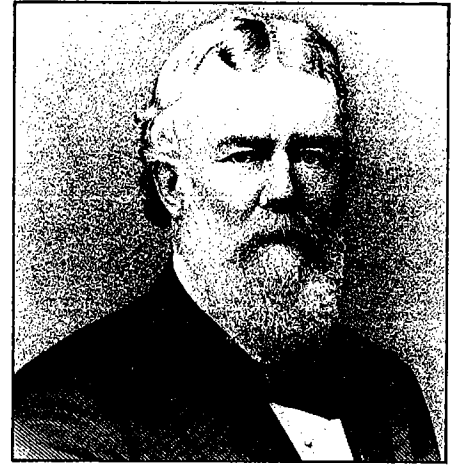


of the legal issues were technical and complex, the dilemma facing the courts was essentially between (1) upholding traditional common-law conveyancing principles, which would favor the proprietors, and (2) invoking more general principles of equity and "common understanding," which would favor the purchasers. In other words, the cases often required decisions between legal title and equitable title or, even more simply, between law and justice.

One series of such proprietor-purchaser disputes involved the heirs of Daniel Lownsdale, who died in 1862. Matthew Deady generally relished a challenge, especially one that might bring him public acclaim for learned, principled decision-making. But he could not have enjoyed deciding these cases, which easily rank among the most difficult of his career. His diary contains several troubled references to them, including the weary refrain as late as 1883, "I have one more of the old Lownsdale cases, and then I am done after fifteen years."

Purchaser James Fields filed the first suit, alleging ownership of a parcel in the west half of the Lownsdale tract, which the surveyor general had allocated to Lownsdale's wife Nancy "in her own right." In June 1850, before Congress even passed the Donation Act, proprietors Lownsdale, Coffin, and Chapman had conveyed the parcel to Chapman individually, with a covenant to convey full legal title to Chapman or his vendee if they obtained it "from the United States." Fields, Chapman's vendee, invoked the covenant; the Lownsdale heirs defended, relying on their federal patent.

To reach his decision, Judge Deady worked through a maze of public-land and property-law issues, which were both "interesting in themselves" and of "highest practical importance to this community." In the end, the case turned principally on Deady's interpretation of the proprietors' covenant to convey title if they obtained it "from the United States." Because the disputed land lay within Nancy's half of the Lownsdale claim, Daniel had obtained only one-fifth of it "from the United States." When Nancy died without a will in 1854, Daniel and four children each inherited a right to one-fifth of her 90 acres from the federal government. Daniel (and therefore his heirs)



Federal District Judge Matthew Deady
(Photo courtesy Oregon Historical Society)

had obtained the remainder not "from the United States" but in earlier state-court litigation partitioning the 90 acres among himself and the children.

Purchaser Fields also contended that oral assurances by Daniel during his lifetime, together with the Lownsdales' long acquiescence in his possession, raised an "equitable estoppel" against the heirs. But Deady was unresponsive to such a claim, answering that land 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 proof of stale parol declarations inconsistent with or in opposition to them."

Deady's *Fields* decision was an important example of his general jurisprudence. Throughout his 34 years on the federal bench, from statehood in 1859 until his death in 1893, Deady leaned emphatically toward enforcing the "letter of the law." He revered the law, especially the common law, as foundation and guardian of a rational, orderly world. For him Westminster Hall was the supreme "bulwark of liberty and buttress of order," and he constantly associated the continued vitality even of common-law conveyancing principles with preservation of Anglo-American ideals of limited, enlightened self-government. It was this association, so central to Deady's concept of judging, which largely determined his response to much of the Portland land claim litigation.

In 1871, the United States Supreme Court unanimously affirmed Deady's *Fields* decision, following closely Deady's reasoning on the crucial point that the proprietors' 1850 covenant applied only to the one-fifth interest



Circuit Judge Lorenzo Sawyer
(Photo courtesy Oregon Historical Society)

which Daniel Lownsdale received from the U.S. as Nancy's heir. It also peremptorily dismissed, as Deady had, Field's evidence regarding estoppel.

During the next two years, Deady decided several other Lownsdale heir disputes — principally, though not exclusively, favoring the heirs. In May 1871, however, Federal Circuit Judge Lorenzo Sawyer arrived from San Francisco to preside with Deady over *Lamb v. Davenport*, a test case for many such disputes still pending. Sawyer's long pro-purchaser opinion, although concurred in by Deady, contrasted dramatically with earlier Deady opinions, both in reasoning and in result.

The original proprietor conveyance, of land eventually within Daniel's own eastern half of the Lownsdale claim, had been in 1849 by quitclaim deed. The deed's only covenant, poorly drafted, seemed on its face not even to require transfer of full title when later obtained. Sawyer, however, ruled for the purchaser Davenport and against the heirs. Regardless of what various early contracts and deeds actually said, the "honest and most reasonable construction" of them was evident. The proprietors were to obtain title under the Donation Act, but as to lots they or their predecessors had sold, it was to be title "for the benefit of the vendees." Sawyer declined to apply several "technical" common-law rules relied on by their heirs, reasoning that "technical rules resting upon reasons that have no application to the circumstances of this case, ought not to be too rigorously applied." Deady concurred, briefly and without enthusiasm.

Two years later, the Supreme Court affirmed. It invoked Congress's commendable "disposition to protect the meritorious actual settlers" and concluded that "well settled principles of equity" entitled purchaser Davenport to a conveyance of legal title from the heirs.

Starr v. Stark

A third case, which eventually made two trips to the Supreme Court, set precedent for land within Ben Stark's northern 48 acres. Again the central issue was priority between formal legal title, represented this time by Stark's 1860 patent, and the equitable, possessory claims of parties who had purchased and improved a small parcel. Matthew Deady ruled for the legal title holder, Stark, but once again circuit judge Sawyer and then the Supreme Court saw the matter differently.

One prior conveyance to which Stark allegedly agreed in his 1850 compromise with Lownsdale was of an entire block the proprietors again had conveyed to W. W. Chapman individually. Brothers Addison and Lewis Starr eventually bought the block, using and improving it for more than a decade and, they alleged, receiving Stark's repeated assurances that he recognized their priority.

But Stark refused to tender a deed to the Starrs, so in 1864 they sued in state court to quiet title. They alleged two theories: a legal title through a patent issued to the City of Portland and an equitable title based on Stark's repeated assurances and long acquiescence. When the court ordered the Starrs to elect between their two "inconsistent" theories, they chose their legal title, and prevailed. The Oregon Supreme Court affirmed, but in 1867 the U. S. Supreme Court unanimously reversed. The city's entire patent was invalid because the 1844 Townsite Act upon which it was based did not apply to Oregon until 1854, well after Portland was settled. So Stark apparently had priority.

The Starrs declined to leave, however, and in 1870 they sued in Deady's federal court, alleging the equitable title which the state court had ordered them earlier to abandon. Deady, however, held that that ruling was *res judicata*, barring reassertion of the equitable theory. A party should not be permitted to "harass and weary" another

with multiple suits, he explained.

On appeal, however, Judge Sawyer emphatically reversed Deady's *res judicata* ruling and granted the land to the Starrs. In his view, no "unprejudiced mind" could fail to conclude that Stark had "held out by his acts and express declaration... unmistakable assurances... that if he obtained his patent to the general claim he would convey to [the Starrs] the lots they had purchased."

Two years later, the Supreme Court affirmed Sawyer's rather than Deady's view of the case. Justice Stephen Field, writing again for a unanimous Court, declared that the earlier decree was not *res judicata*, then invoked the "unwritten conventional law" of early Oregon land sales to rule for the Starrs on the merits. According to "conventional law," legal title finally obtained by federal patent would "inure to the benefit of the grantees of the claimant who secured the patent." Field concluded emphatically, with a sentence which likely stunned Deady: "Upon every principle of law and morals (Stark) should be for ever enjoined from the commission of such injustice, and be compelled to quiet the (Starrs') title by a release of all claim to the premises."

So it was that most early Portland land purchasers finally prevailed in litigation against an original proprietor or his heirs holding a federal patent to disputed parcels. Judge Matthew Deady's view of the cases, emphasizing security of formal legal title, preservation of commonlaw conveying principles, and literal reading of early deed language, generally did not prevail; instead it was Judge Lorenzo Sawyer's view, affirmed twice

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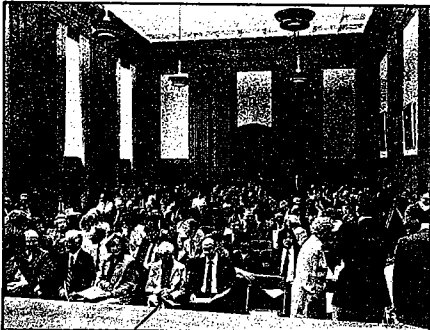


Daniel Lownsdale
(Photo courtesy Oregon Historical Society)

COURTHOUSE RENAMING CEREMONY DRAWS MANY DIGNITARIES

Friday, April 28, was a time when family, friends, and distinguished guests met at the U. S. Courthouse in Portland to mark a rare occasion — the renaming of a federal courthouse for one of the judges who presided there. That judge was Gus Solomon.

Officiating at the ceremony, which drew a packed courtroom, were the Hon. Owen M. Panner, chief judge of the U. S. District Court for Oregon, and the Hon. Alfred T. Goodwin, chief judge of the Ninth Circuit. Other honored guests and speakers included Governor Neil Goldschmidt; Senator Mark Hatfield; Congressman Les AuCoin; Chief Judge Emeritus of the Ninth Circuit Richard Chambers; Chief Justice Ed Peterson from the Oregon Supreme Court; Chief Justice Robert Jones from the Oregon Supreme Court; Chief Justice George Joseph from the



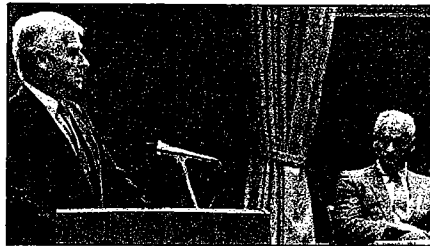
A standing-room-only crowd attended the historic courthouse renaming ceremony.



Members of Gus Solomon's family who attended the Courthouse dedication included Phillip, Libby, and Richard Solomon.

Oregon Court of Appeals; Judge Londer, presiding circuit judge in Multnomah County; Patrick Gilroy, Clackamas County presiding circuit judge; Dan O'Leary, president of the state bar; Marc Blackman, representing the Multnomah County Bar Association; Tom Vaughn, director of the Oregon Historical Society; Gerald Bollis, director of the Portland Art Museum; and Wayne Hilliard, president of the U. S. District Court of Oregon Historical Society.

The ceremony was followed by the viewing of a plaque renaming the building and the unveiling of a sculpture on the Madison Street side of the courthouse.



Senator Mark Hatfield and Governor Neil Goldschmidt are only two of the many speakers who paid tribute to Judge Solomon.

Matthew Deady (continued)

by the U. S. Supreme Court, favoring more fact-oriented, equitable decisions even at the expense of greater legal certainty, which typically was decisive. Even today, lawyers and judges continue even today to debate these contrasting views of the judicial process. In retrospect, however, it seems clear that in early Portland land-claim litigation, the latter view was preferable.

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