Women in Business, 1700–1850

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Introduction

The business of life or a life in business

> We go on talking as if it were still true that every woman is, or ought to be supported by her father, brother, or husband. . . . We are (probably to a man) unaware of the amount of the business of life in England done by women; and if we do not attend to the fact in time, the knowledge will be forced on us in some disadvantageous or disagreeable way.
>
> Harriet Martineau (1859)[1]

> Business is just life, and we had life long before we had business.
>
> Edith Mae Cummings (1929)[2]

For women today, the distinction between the business of daily life and business as an economic activity is probably as relevant a question – particularly with the advent of 'home-working' and 'the virtual office' – as it was in the eighteenth and early nineteenth centuries. For Harriet Martineau and Edith Mae Cummings the two appear to have been inextricably linked. For most historians of women's work in this period, however, the idea that the business of life and the business of making a profit could be seen as interlinked activities for women is rare. Even though, in economic terms, all business depends on the generation of profit, the pursuit of which is a common goal for men and women regardless of gender, racial or class differences, it is these very differences that are most often highlighted at the expense of other considerations. Business has been located primarily within an economic public sphere and gendered as masculine. By contrast women's daily lives have been described primarily in terms of a private domestic sphere, which is gendered as feminine. The success of 'domestic' enterprises run by women from home tends not to be calculated in the same terms as those of burgeoning corporate ventures, although the modern emphasis on achieving a better work/life balance may force a reassessment of the ways it is measured. Since women have remained largely invisible in histories of economic enterprise, narratives that seek to redress this gender-blind approach focus chiefly on hierarchies of difference,

[1] Harriet Martineau, 'Female Industry', *The Edinburgh Review*, 109 (1859), p. 298.
[2] Edith Mae Cummings, *Pots, Pans and Millions: A Study of Woman's Right to be in Business* (Washington, 1929), p. 100.

particularly along the lines of gender and class. Yet, while it remains paramount to consider the inequalities of power implicit within social categories of difference, it is also important to examine areas of co-operation and common interaction between men and women, families and friends, and notions of public and private.[3] This book aims to retain this broader focus while analysing the role of women in business from 1700 to 1850 and the impact of changing perceptions of gender on that role.

The term 'business' can have many meanings, and those meanings have also shifted subtly over time. Originally stemming from 'busy', the word still incorporates notions of industrious employment in a 'multiplicity of affairs' not necessarily connected with trade. Daniel Defoe seems to have been one of the first to use the word in terms of 'trade, commercial transactions or engagements' in his famous advice book, *The Complete English Tradesman* (1727). In 1768, however, Dr Johnson listed 'business' and 'employment' as synonymous, but only 'trade' was solely connected with commerce and monetary exchange.[4] Perhaps this was one reason why it was possible for a woman seeking a partnership in a chandlery shop to advertise in 1765 that 'A Sober Woman would be glad to be in business', while another could emphasise that investing in a girls' boarding-school would be far safer 'than to risk it in trade'.[5] In the eighteenth century at least, to be in business suggested a broader and less vulgar enterprise than to be in trade. In this book, the term 'business' has been chosen precisely because it could include the economic enterprises of women from a wide range of social backgrounds. It might equally be applied to the activities of women of very limited means struggling to make ends meet, of middling-sort women aspiring to gentility, and to those of the higher orders who would have disdained to see themselves 'in trade'. Today, entering business is seen chiefly as a means of upward mobility but for many in the earlier period, while money remained a key motivation, it was a final resort intended to prevent a further decline in their social or economic status.

Tracing women in business in the past is a difficult task; they tend to be obscured from the record by law and custom, which gave primacy to the identities of their male relatives, and by the often informal organisation of their enterprises. Defining women in business is equally difficult. The *OED* only quotes usage of the term 'business woman' from 1844. Although this suggests a degree of acceptance of their role rather earlier than might be expected, it does mean that, strictly speaking, reference to businesswomen in

3 Mary A. Yeager, 'Review of Angel Kwolek-Folland, *Incorporating Women: A History of Women and Business in the United States*', H-Business, H-Net Reviews, April, 1999. URL: http://www.h-net.msu.edu/reviews/showrev.cgi?path=30313927576847, pp. 14–16, presses for a greater focus on the interaction between men and women in business.

4 *OED* sub: 'Business'; *Samuel Johnson, Dictionary of the English Language* (3rd edn, 1768), sub: 'Business', 'Employment', 'Trade'.

5 *LDA*, 8 November 1765; 5 August 1765. For an extended discussion of these and other advertisements placed by women in business see below, pp. 203–29.

the eighteenth century could be considered anachronistic, even if the activities they engaged in conform to our expectations of independent economic enterprise. Mary Yeager has pointed out that, 'as an activity business confounds with multiple meanings and definitions': it includes production, trade, agriculture, manufacturing, service and retail; it also encompasses producers, professionals, entrepreneurs, workers, administrators and managers.[6] In this book the definition of business is narrowed somewhat because it does not include those entering it as a form of paid employment. Women in business are thus defined here as any females, whether in partnership or alone, who owned any independent unit of production or service. This definition includes those who were independently self-employed and those who were involved in, sometimes multiple, partnerships with men or other women. The notion of 'ownership' did not necessarily include proof of hands-on daily activity in the business and there was no restriction on size or profitability. Nor did the business need to be the sole, or even the main, source of income. Indeed, in some cases, it included a projected income that may never have materialised. The focus here then is solely upon women running businesses rather than upon the rather different issues relating to women's waged labour; it is, none the less, overwhelmingly towards the latter that debates about changes in women's economic role have focused.

Continuity vs. change: women's economic position, 1700–1850

In an attempt to provide a historical basis for women's current inequality in the workplace the historiography of women's work has ploughed some deep and well-worn theoretical furrows.[7] Most accounts focus chiefly around long-term models of linear change. However, within the commonly argued case for women's declining economic opportunities and an increasing separation of the public sphere of work from the private sphere of home, there are a number of complex and overlapping debates. One issue is the question of whether the advent of capitalistic or industrial modes of production restricted or improved women's position in society. Yet for those who see the persistence of patriarchal power as the chief factor in restricting women's economic opportunities, there is little question of any change at all.[8] Then there are debates over the change in the dominant mode of production from a family-based economy at home

6 Yeager, 'Review of Angel Kwolek-Folland', p. 2.

7 Amanda Vickery, 'Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History', *Historical Journal*, 36 (1993), pp. 383–414, critiques the two main historical narratives of women's work.

8 For the uncertainties of definition and chronology of organising categories such as 'capitalism' and 'patriarchy', see below, pp. 6–8.

to more mechanised production outside the home and how far the separation of work and home created specifically gendered separate spheres of activity for men and women. There is also considerable argument over the concepts and chronologies used to link narratives of industrial change and rapid economic growth to a story of class formation. Often, the rise of a powerful middle class with its own distinctive cultural identity is seen as crucial in narratives of how new perceptions of sexual difference were mapped on to the public/private division to create a domestic ideology that confined women to the home.

The two seminal works that still serve as a starting point for many studies are Alice Clark's *Working Life of Women in the Seventeenth Century*,[9] and Ivy Pinchbeck's *Women Workers and the Industrial Revolution*.[10] Both books are chiefly concerned with the effects of capitalism/industrialisation on the lives of working women and consequently the changing position of women in society, but they locate that change in different centuries. Clark argued that women's economic power declined during the seventeenth century with the advent of increasingly capitalistic forms of industry, which removed production from the home. Pinchbeck found that increasing industrial change in the eighteenth century robbed women of economic opportunities but argued that it had beneficial effects in the very long term. More recently historians have divided into those who, like Peter Earle, believe that Clark's model of decline was 'more or less right',[11] and those who, like Bridget Hill and Tilly and Scott, favour Pinchbeck.[12] In the latter case, a U-shaped model is implied, with initial decline followed later by improvement in the twentieth century.

Nevertheless, the central concern of much recent scholarship, divided by Janet Thomas[13] into 'optimists' versus 'pessimists', remains the view that capitalism and/or industrialisation[14] was a watershed for women's experience of work. This approach relies implicitly or explicitly on an assumption about

[9] Alice Clark, *Working Life of Women in the Seventeenth Century* (1919; reprinted London, 1992).

[10] Ivy Pinchbeck, *Women Workers and the Industrial Revolution, 1750–1850* (1930; reprinted London, 1981).

[11] Peter Earle, *The Making of the English Middle Class: Business, Society and Family Life in London, 1660–1730* (London, 1989), p. 166.

[12] Bridget Hill, *Women, Work and Sexual Politics in Eighteenth-century England* (1989; reprinted London, 1994); Louise A. Tilly and Joan W. Scott, *Women, Work and Family* (1978; reprinted London, 1987); Eric Richards, 'Women in the British Economy Since about 1700: An Interpretation', *History*, 59 (1974), pp. 337–57.

[13] Janet Thomas, 'Women and Capitalism: Oppression or Emancipation? A Review Article', *Comparative Studies in Society and History*, 30 (1990), pp. 535–49.

[14] As Thomas points out there is some confusion regarding the use of the terms 'industrialism', 'capitalism', 'modernisation', and 'urbanisation' which requires clarifying, as do the chronologies attached to these concepts which also vary considerably. Amy Erickson also criticises Clark's conflation of 'industrial' and 'capital' in her Introduction to the third edition of Clark, *Working Life* (1992), pp. vii–x.

a medieval 'golden age' of economic opportunity for women which has proved notoriously difficult to locate.[15] It also corresponds with traditional narratives of 'the industrial revolution' as a period of dramatic transformation, although this view too has been seriously undermined by recent scholarship stressing the more gradual nature of change.[16] Yet this 'revisionism' in turn is also coming under attack; and there are now calls to study both the continuities and discontinuities of industrialisation on a regional basis along with the social and cultural impact of such changes.[17] Although this indicates a general lack of consensus, it nevertheless suggests that histories of women's work should no longer be tied to overarching narratives of a nation-wide transformation in methods of manufacturing and production.

One of the most commonly highlighted features of industrial change for women is the belief that there was a transition from a pre- or proto-industrial family or household economy to a waged economy, making home and work increasingly separate.[18] According to this view, women could no longer work with their husbands at home but became increasingly dependent on the male breadwinner's wage.[19] There has, however, been a growing criticism of models based on the conception of an idyllic pre-industrial family unit of production.[20] The notion of universally harmonious family relations of shared domestic

[15] There is a fierce debate between those like Caroline Barron, 'The "Golden Age" of Women in Medieval London', *Reading Medieval Studies*, 15 (1989), pp. 35–58, who argue that women were economically active in the medieval period, and others like Maryanne Kowaleski, 'Women's Work in a Market Town: Exeter in the Late Fourteenth Century', in *Women and Work in Preindustrial Europe*, ed. Barbara Hanawalt (Bloomington, 1986), pp. 145–64, who argue that women's work was always restricted. Others like Martha C. Howell, 'Women, the Family Economy, and the Structures of Market Production in Cities of Northern Europe during the Late Middle Ages', in ibid., pp. 198–222, see a decline beginning in the sixteenth century.

[16] For the view that 'less happened, less dramatically than was once thought', see David Cannadine, 'British History: Past, Present and Future?', *Past and Present*, 116 (1987), pp. 131–72.

[17] For an overview of the changing historiography on the speed and extent of industrial change but arguing for the concept to be retained, see Pat Hudson, *The Industrial Revolution* (London, 1992); and Maxine Berg and Pat Hudson, 'Rehabilitating the Industrial Revolution', *Economic History Review*, 45 (1992), pp. 24–50. See also Katrina Honeyman, *Women, Gender and Industrialisation in England, 1700–1870* (Basingstoke and London, 2000), pp. 9–14.

[18] For a discussion of how the idea of a family economy underpins most writing on women's work and a European-wide perspective, see Deborah Simonton, *A History of European Women's Work, 1700 to the Present* (London, 1998), pp. 17–18, 37–47.

[19] Sara Howell and Jane Humphries, 'Women's Labour Force Participation and the Transition to the Male Breadwinner Family, 1790–1865', *Economic History Review*, 48 (1995), pp. 89–117.

[20] Maxine Berg, 'Women's Work, Mechanisation and the Early Phases of Industrialisation in England', in *The Historical Meanings of Work*, ed. Patrick Joyce (London, 1987), pp. 64–98, argues that the concept of the household economy is a 'myth'.

production has also been revised to allow for a greater degree of family conflict over economic matters.[21] Domestic industry is now thought to have been far more diversely organised than these models allow and not to have followed any one route towards industrial production.[22] Studies have also shown that wives, particularly in towns, frequently worked at separate trades from their husbands, although as Joanne Bailey has shown, there is no clear correlation between spouses' work patterns and the quality of their marital relationship.[23] Nevertheless, the separation of work and home remains the dominant paradigm for analysing women's experience of industrialisation. In socialist feminist accounts, class issues are linked to explanations of how the separation of work and home contributed to an increasingly gendered division of labour outside the home. Women's childbearing activities are held to have formed the 'natural' basis for such a division of labour,[24] and capitalism ensured women's economic dependence on their husbands. This meant that with the ending of an idyllic 'handicraft era' women working outside the home became increasingly marginalised in occupations designated as 'feminine', which were deemed unskilled, and so became low-paid and overcrowded.[25]

If narratives of universal dramatic change are problematic, those which deny any change are equally so. For radical feminists, who argue that society has always been organised around institutions of patriarchal power, women's work has constantly been seen as lower paid, less skilled and of lower status than

[21] Margaret Hunt, *The Middling Sort: Commerce, Gender and the Family in England, 1680–1780* (Berkeley and London, 1996), pp. 134–42. Tilly and Scott, *Women, Work and Family* (revised edn London, 1987), p. 9, also conceded that their earlier model did not allow for conflict between family members.

[22] Hill, *Women, Work and Sexual Politics*, p. 22, has critiqued the separation of work and home by problematising terms like 'household' or 'family economy' but nevertheless retains the basic framework.

[23] Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660–1800* (Cambridge, 2003), pp. 93, 96–7, 197–8, found that twenty-three out of forty-three couples in ecclesiastical records of marital difficulties worked in separate trades. Peter Earle, 'The Female Labour Market in London in the Late Seventeenth and Early Eighteenth Centuries', *Economic History Review*, 2 ser., 42 (1989), pp. 328–53, found that of 256 wives who listed their employment in church court depositions only twenty-six were engaged in the same trade as their husbands. Dorothy George, *London Life in the Eighteenth Century* (1925; reprinted 1966), pp. 425–8, found that of eighty-six married couples whose occupations were listed in Old Bailey sessions papers, only two shared the same trade.

[24] Hunt, *Middling Sort*, p. 134, challenges functional biological arguments for gender-segregated work outside the home, and argues that eighteenth-century women were most likely to work outside the home during their childbearing years because low fertility rates meant few children, and these were usually cared for by servants or female relatives.

[25] Sally Alexander, *Women's Work in Nineteenth Century London: A Study of the Years 1820–50* (London, 1983). For a non-Marxist variant, see also Mary Prior, 'Women and the Urban Economy: Oxford, 1500–1800', *Women in English Society 1500–1800*, ed. M. Prior (London, 1985), p. 113, arguing that the concentration of women in millinery and mantua-making led to their exploitation in the nineteenth century.

men's.[26] They seek to avoid the charge of denying historical change by emphasising the protean nature of patriarchy, arguing that the social and institutional arrangements which reinforce male hegemony can remain dormant for long periods, only to reappear in times of gender conflict.[27] This has given rise to fierce debates over the issues of continuity and change in women's work, which are broadly aligned to whether capitalism (change) or patriarchy (continuity) is considered the dominant factor.[28] Attempts by socialist feminists to consider the effects of both capitalism and patriarchy have resulted in either a dual systems analysis, or an attempt to combine the two as 'patriarchal capitalism'.[29] Another 'solution' has been to envisage the competing interests of capitalism and patriarchy resolved through a concept of paternalism, which also serves to link systems of gender and class.[30] Yet, more recently, models describing the working of patriarchal power in early modern households have been significantly revised. Alexandra Shepard has argued that although patriarchal status theoretically rested on men's economic independence in providing for their families, many men were unable to realise this ideal.[31] The economic survival of households therefore 'required adaptability and the best possible use of resources, rather than adherence to a patriarchal blueprint'. In practice, this meant the engagement of many married women in commercial pursuits. Similarly, Bailey has argued that both spouses' labour and earnings helped to forge a greater interdependence, and although this cannot be said to have necessarily improved the quality of their emotional relationship it did foster a model of marriage based on co-dependency rather than hierarchical patriarchal power.[32] What remains to be seen is whether the practical subversion

[26] See, controversially, Judith Bennett, '"History that Stands Still": Women's Work in the European Past', *Feminist Studies*, 14 (1988), pp. 269–83, and idem, 'Medieval Women, Modern Women: Across the Great Divide', in *Culture and History, 1350–1600: Essays on English Communities, Identities and Writing*, ed. David Aers (London, 1992), pp. 145–75.

[27] Katrina Honeyman and Jordan Goodman, 'Women's Work, Gender Conflict, and Labour Markets in Europe, 1500–1900', *Economic History Review*, 44 (1991), pp. 608–28.

[28] See esp. the debate in which Bridget Hill accuses Judith Bennett of undermining the project of women's history and isolating it from mainstream history. Bridget Hill, 'Women's History: A Study in Change, Continuity or Standing Still', *Women's History Review*, 1 (1993), pp. 5–19; and Judith Bennett, 'Women's History: A Study in Continuity and Change', *Women's History Review*, 2 (1993), pp. 173–84.

[29] See e.g. Sylvia Walby, *Patriarchy at Work: Patriarchal and Capitalist Relations in Employment* (Minneapolis, 1986).

[30] For a comprehensive study based on this approach, see Judy Lown, *Women and Industrialization: Gender at Work in Nineteenth-century England* (Oxford, 1990). By envisaging several interlinking sets of social relations Lown seeks to dissolve the concept of two separate spheres.

[31] Alexandra Shepard, 'Manhood, Credit and Patriarchy in early modern England c. 1580–1640', *Past & Present*, 167 (2000), pp. 75–106.

[32] Bailey, *Unquiet Lives*, esp. pp. 96–7, 193–4, but she remains pessimistic about the extent to which co-dependency meant that wives were able to derive any wider 'institutional, political or legal power'.

of patriarchy in the household could have wider implications for institutionalised patriarchy.

Nevertheless, the preponderance of literature based on feminist categories of analysis linked either to the transformations wrought by capitalism or the persistence of patriarchy has resulted in the widespread assumption that there are only two ways to discuss women's economic opportunities; that is, that they were always limited, or that they became more so after the Industrial Revolution. This was how Leonard Schwarz framed the question when researching women's employment in London by comparing eighteenth-century insurance records with the 1851 census. His findings, which were chiefly for waged employment, showed that women were employed in broadly the same occupations in both periods.[33] By contrast Catherine Hall has argued that women's economic activities narrowed in the nineteenth century. Using trade directories, she found that, although the percentage of women engaged in business rose, the types of business run by women declined in the early nineteenth century.[34] Although the trade directories suggest an increasing concentration of women in 'feminine' trades (as opposed to an outright decline), the assumption is that marginalisation rather than specialisation lies behind the change. In other words these narratives of women's work have been largely determined by the old analytical categories, but while the analytical categories themselves have now been questioned, the boundaries to debates about women's economic opportunities have shifted very little.

In a review of the literature on women's economic roles, Pamela Sharpe has argued convincingly that 'neither change nor continuity is satisfactory as an explanatory or descriptive scheme'.[35] She points out not only the 'nebulous character of the benchmarks' used for making quantitative comparisons but also that uneven economic development could affect groups of women differently, so that specialisation could benefit some but reduce opportunities for others.[36] Retailing, for example, used to be seen as another area in which the advent of new commercial practices in the nineteenth century drove women out of business.[37] Yet recent research suggests that in some areas women

33 Leonard Schwarz, *London in the Age of Industrialisation: Entrepreneurs, Labour Force and Living Conditions, 1700–1850* (Cambridge, 1992), pp. 14–22. Peter Earle, 'The Female Labour Market', pp. 328–53, also stressed broad continuities.

34 Catherine Hall, 'Gender Divisions and Class Formation in the Birmingham Middle Class, 1780–1850', in idem (ed.), *White, Male and Middle Class: Explorations in Feminism and History* (Cambridge, 1992; reprinted 1995), p. 99.

35 Pamela Sharpe, 'Continuity and Change: Women's History and Economic History in Britain', *Economic History Review*, 48 (1995), pp. 353–69.

36 Ibid., pp. 358–9.

37 Older narratives describing women's increasing marginalisation within retailing were linked to notions of both the industrial revolution and/or a mid-nineteenth-century retailing revolution. See e.g. David Alexander, *Retailing in England During the Industrial Revolution* (Edinburgh, 1970); Catherine Hall, 'The Butcher, the Baker, the Candlestick-maker: The

could benefit from increasing consumer demand for new and luxury goods.[38] Sharpe's study of labouring women in Essex between 1700 and 1850 showed that 'adapting to capitalism was not a unilinear process'.[39] While there was an increasing disparity between male and female wages in trades such as spinning, opportunities for women increased in the Essex fashion trades and in some areas of agriculture.[40]

Throughout all these debates there has been a marked bifurcation of studies, which focus either on working-class women at work or upon the idleness of middle-class women and the growth of domestic ideology.[41] Within this view, an ever-increasing amount of literature prescribed how the ideal wife and mother should best exercise her superior moral influence from within the home where she could provide the necessary support for her husband to run his business. In addition to the assumption that the majority of middle-class women were at home, one of the reasons why so little work has been done on their economic activities is the lack of conceptual space available when class is used as the primary paradigm for relations of power. Most accounts have focused on labouring women as the victims, or at least employees, of middle-class male capitalists. Middle-class women in business do not fit comfortably into either the Marxist category of exploited workers or the feminist category of exploited women. Even more problematic is the need to conceptualise successful businesswomen both as female capitalists and, sometimes in ethical terms, as the oppressors of other women whose labour they exploited. Accounts of poor exploited seamstresses, for example, are numerous,[42] but references to their female employers are negligible.

Shop and the Family in the Industrial Revolution', in idem, *White Male and Middle Class*, pp. 108–123.

38 For the diversity of eighteenth-century shopkeeping practices see Neil McKendrick, John Brewer and J.H. Plumb (eds), *The Birth of a Consumer Society: The Commercialisation of Eighteenth-century England* (London, 1982) and H.C. and L.H. Mui, *Shops and Shopkeeping in Eighteenth-century England* (London, 1989). For women's trading opportunities, see also Hunt, *Middling Sort*, pp. 132–4; Pamela Sharpe, *Adapting to Capitalism: Working Women in the English Economy, 1700–1850* (London, 1996), pp. 17–18.

39 Ibid., p. 149.

40 Ibid., pp. 149–53.

41 Jane Rendall's synthesis of women's work, *Women in an Industrialising Society: England, 1750–1880* (Oxford, 1990), clearly associates working-class women and work and middle-class women with the growth of domestic ideology.

42 For work on the image of the poor seamstress, see Beth Harris, '"The Works of Women are Symbolical": The Victorian Seamstress in the 1840s' (Ph.D., City University of New York, 1997), pp. 11–15; for studies of milliners which focus only on the apprentices, see Alexander, *Women's Work*, pp. 34–6; Wanda Fraiken Neff, *Victorian Working Women: An Historical and Literary Study of Women in British Industries and Professions, 1832–50* (1929; reprinted London, 1966), pp. 115–50.

The chronology for the decline of middle-class women from 'stirring activity' to 'the triumph of the useless woman'[43] is vague and contested. One of the reasons for this is the lack of agreement about which period the middle class may actually be said to have 'emerged'.[44] Another is the existence of research that questions just how separate commercial middle-class culture was from that of other landed gentry families.[45] For Peter Earle, 1660 to 1730 are the seminal dates for the making of the middle class, which also witnessed a growth of literature complaining that wives refused to become involved with business.[46] Margaret Hunt follows a similar chronology, placing the middling sort as a distinct section of society between 1680 and 1730.[47] Many literary historians' narratives about eighteenth-century women of the middling sort focus upon the creation of the 'proper lady' in print culture and particularly upon the explosion of didactic literature on the subject.[48] Yet John Tosh has argued that, while women have long been associated with the home, the heyday of the Victorian cult of domesticity, which was equally aimed at men, was dominant for only two generations from 1830 to the 1870s.[49] Wahrman's analysis supports this chronology, by locating a shift in middle-class identity from representing a masculine public opinion to a focus on domestic virtue after 1832.[50] However, for Leonore Davidoff and Catherine Hall, the formation of the middle class and its adoption of a specific oppositional culture, commensurate with its new-found wealth and power, took place between 1780 and 1850.[51]

[43] Ibid., p. 186; Neff follows Alice Clark in seeing the process as completed by the eighteenth century.
[44] See Dror Wahrman, *Imagining the Middle Class: The Political Representation of Class in Britain, c.1780–1840* (Cambridge, 1995), pp. 1–10; David Cannadine, *Class in Britain* (1998; reprinted London, 2000), pp. 8–15.
[45] Amanda Vickery, *The Gentleman's Daughter: Women's Lives in Georgian England* (New Haven and London, 1998), pp. 3, 13–37, critiques the ever-emerging middle class and argues for the existence of greater social interaction between the commercial and landed classes.
[46] Earle, *Making of the English Middle Class*.
[47] Hunt, *Middling Sort*.
[48] Kathryn Shevelow, *Women and Print Culture: The Construction of Femininity in the Early Periodical* (London, 1989); Mary Poovey, *The Proper Lady and the Woman Writer: Ideology as Style in the Works of Mary Wollstonecraft, Mary Shelley and Jane Austen* (London, 1984). Nancy Armstong, in *Desire and Domestic Fiction: A Political History of the Novel* (Oxford, 1987), pp. 16–17, offers a more balanced view, arguing that idealised representations of women co-existed with misogynous and even proto-feminist writings. See also Ingrid Tague, *Women of Quality: Accepting and Contesting Ideals of Feminity in England, 1690–1760* (Woodbridge, 2002), p. 21, on how conduct books did not represent the only discourse of feminity.
[49] John Tosh, *A Man's Place: Masculinity and the Middle-class Home in Victorian England* (London, 1999), pp. 5–6.
[50] Wahrman, *Imagining the Middle Class*, pp. 377–408.
[51] Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780–1850* (London, 1987).

Davidoff and Hall's *Family Fortunes* has arguably become the most classic articulation of the formation of a doctrine of gendered separate spheres based on a Marxist conception of class. Although some distinction is made between the higher and lower middle classes, Evangelicalism and domestic ideology form the central pillars of a unifying and specifically middle-class culture. Within this schema, the majority of middle-class women became the archetypal 'angels in the house' and their only access to the world of economic enterprise was by making a 'hidden investment' in the family business.[52] The legal restrictions on women regarding property are seen as a major impediment to their economic activities, causing women to be considered 'poor credit risks', and preventing them from raising finances through institutional sources as men did. The lack of property as capital is theoretically the chief element in 'social closure'; that is, their 'exclusion from control over one's own life chances'.[53] However, there were a few exceptions. Widows are allowed to have been independent but only 'temporary incumbents' of their husbands' enterprises. Moreover, these women are represented as an extreme case of lack of male support. Women in 'active occupations' are assumed to be widows or spinsters, partly because some sources recorded occupations only for these groups. For Davidoff and Hall, the few women in 'trade' were generally characterised by their confinement to less capitalised, less formal enterprises with quick turnovers and short credit runs, in low-status occupations such as retailing. It is argued that, although married women could start their own small businesses, the loss of status and the enticements of domesticity, coupled with the increased scale and technical advances in manufacturing enterprises, meant that fewer and fewer did so. In sum, for Davidoff and Hall women were increasingly marginalised in the economy from the late eighteenth century onwards.[54]

Some localised case studies have in fact shown that 'genteel' women were in business, although primarily in the 'feminine' trades of millinery and mantua-making, but the most common conclusion is that even this limited form of economic enterprise decreased in the nineteenth century.[55] In a broader study, Margaret Hunt has shown women operating as a matter of course in the eighteenth-century marketplace, but there is an all-too-brief examination

[52] See also Catherine Hall, 'Strains in the "Firm of Wife, Children and Friends": Middle-class Women and Employment in Early Nineteenth-century England', in idem, *White, Male and Middle Class*, pp. 172–202.
[53] Davidoff and Hall, *Family Fortunes*, p. 278ff., for women and property; p. 315 for social closure.
[54] Ibid., pp. 301–15.
[55] Shani D'Cruz, '"To Acquaint the Ladies": Women Traders in Colchester, c.1750–c.1800', *Local Historian*, 17, (1986), pp. 158–61; Elizabeth Sanderson, 'The Edinburgh Milliners, 1720–1820', *Costume*, 20 (1986), pp. 18–28, and idem, *Women and Work in Eighteenth-century Edinburgh* (New York, 1996).

of their actual trading activities and greater emphasis on the prescriptive literature aimed at limiting the aspirations of daughters. Hunt's terminal date of 1780 prevents any speculation about nineteenth-century developments.[56] In Deborah Valenze's study of changing representations of working women, eighteenth-century praise of women's productivity vanishes in the nineteenth century, which in her view entirely lacked a vocabulary of praise.[57] Middle-class women are portrayed only as proselytising to the poor, and women in business are not discussed at all. Yet other historians have challenged the very existence of a nineteenth-century idle, middle-class 'angel in the house'. Jeanne Peterson argues that only upper-middle-class women had enough privacy, prosperity and leisure to fulfil the role, and her micro-study of the Paget family shows that these women had too many choices and opportunities to want to join movements for suffrage. For Paget, the 'angel' was an aspirational ideal for lower-middle-class wives rather than a reality.[58]

The whole question of separate spheres has generated extensive debate among academics attempting to dissolve or to reformulate the boundaries, of the public and private.[59] There have, for example, been attempts to end the polarities implicit within such a framework by theorising the existence of a third sphere of public activity or the existence of a grey area between the two.[60] Leonore Davidoff has posited the existence of several public spheres, but argues that these are nevertheless explicitly gendered as masculine. This had material effects upon women, which reached an apogee in the nineteenth century.[61] Jane Rendall also posits the existence of multiple public and private spheres, but does not view gender as the single overriding factor in determining

[56] Hunt, *Middling Sort*, pp 125–6, 145–46, remains on the whole agnostic over the question of women's retreat from trade, identifying factors that could have both encouraged and inhibited their participation.
[57] Deborah Valenze, *The First Industrial Woman* (Oxford, 1995).
[58] M. Jeanne Peterson, 'No Angels in the House: The Victorian Myth and the Paget Women', *American Historical Review*, 89 (1984), pp. 677–708.
[59] Linda Kerber, 'Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History', *Journal of American History*, 75 (1988), pp. 9–39, and idem *et al.*, 'Beyond Roles, Beyond Spheres: Thinking about Gender in the Early Republic', *William and Mary Quarterly*, 46 (1989), pp. 565–85. For a comprehensive discussion of the literature, see Hannah Barker and Elaine Chalus' 'Introduction' to *Gender in Eighteenth Century England: Roles, Representations and Responsibilities*, ed. H. Barker and E. Chalus (London, 1997), esp. pp. 18–24.
[60] Dena Goodman, 'Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime', *History and Theory*, 31 (1992), pp. 1–20; John Brewer, 'This, That and the Other: Public, Social and Private in the Seventeenth and Eighteenth Centuries', in *Shifting the Boundaries: The Transformation of the Languages of Public and Private in the Eighteenth Century*, ed. D. Castiglione and L. Sharpe (Exeter, 1995), pp. 1–21.
[61] Leonore Davidoff, 'Regarding Some "Old Husband's Tales": Public and Private in Feminist History', in idem, *Worlds Between: Historical Perspectives on Gender and Class* (London, 1995), pp. 227–76.

these oppositions.[62] Many historians no longer consider the boundaries of public and private to be impervious, or fixed to any specific physical location, and accept that their meanings are relative and historically contingent.[63] Amanda Vickery's critique has perhaps done more than any other to undermine the analytic purchase of this ubiquitous metaphor to account for social and political developments in any particular century or for Victorian class formation. To establish a more credible chronology, she has called for a more integrated approach to studying a range of debates about women's role in society, found in a wide variety of sources, rather than the narrow focus on domestic ideology.[64] More recent syntheses of research in women's history have also come to question the usefulness of the separate spheres model and to call for new conceptual approaches that acknowledge a far wider diversity of experience.[65] Although the right to work is seen as important today, it is also important to acknowledge that the acquisition of greater leisure would have been welcomed by many women. Perhaps even more significantly, some studies are now beginning to revise the sad story of decline and separation, opening the door for a revised assessment of women's economic roles during the period.[66]

To summarise, then, the main picture that emerges from the majority of accounts is one of women in business being increasingly marginalised into low-status, unprofitable feminine trades, or removed from the scene altogether by the impact of domestic ideology. Those few women who could have been left in trade after centuries of marginalisation were severely hampered by a legal system that prevented married women from owning property or making contracts. Some women could claim *feme sole* status, which enabled them to trade as if single, under local borough customs. Yet these customs are also believed to have become increasingly rare so that by the nineteenth century only women in the City of London could claim the privilege.[67] The combination of legal and ideological restraints made it difficult for women to raise credit and capital for their businesses, which therefore relied on short credit runs and were generally under-capitalised. For the majority of women, forays

[62] Jane Rendall, 'Women and the Public Sphere', *Gender and History*, 2 (1999), pp. 475–88.
[63] Robert Shoemaker, *Gender in English Society, 1650–1850: The Emergence of Separate Spheres?* (London, 1998), p. 318, concludes that the period witnessed an 'accentuation' rather than emergence of separate spheres that never became watertight. Michele Cohen, *Fashioning Masculinity: National Identity and Language in the Eighteenth-Century* (London, 1996), pp. 66–7, emphasises the shifting meanings of 'public' and 'private'.
[64] Vickery, 'Golden Age to Separate Spheres?', pp. 412–13.
[65] Barker and Chalus, 'Introduction', in idem (eds), *Gender*, p. 24.
[66] Hannah Barker, 'Women, Work and the Industrial Revolution: Female Involvement in the English Printing Trades, c. 1700–1840', and Susan Skedd, 'Women Teachers and the Expansion of Girls' Schooling in England, c. 1760–1820', in *Gender in Eighteenth-century England*, ed. Barker and Chalus. See also Sharpe, *Adapting to Capitalism*, pp. 149–53.
[67] Prior, 'Women and the Urban Economy', p. 103.

into the world of business are therefore generally thought to have been of short duration and limited by marriage and their life cycles to spinsters or widows. Middle-class women in particular apparently avoided business wherever possible by raising enough income from rentals to support their aspirations to leisured gentility, or by ensuring that their husbands earned enough to maintain their social pretensions.[68] One of the key aims of this study is to re-evaluate the rather limited picture painted above in the light of recent research, which has cast so much doubt on the old categories of analysis such as class, industrial revolution, separate spheres and the usefulness of linear narratives to explain complex social and economic change.

Concepts and categories

Class is a notoriously difficult concept to define. Having stressed the broad social range of women who found themselves in business, it is important to note that the vast majority of women featured in this book could nevertheless be broadly defined as the 'middling sort'. In one way this exemplifies one of the major criticisms levelled at the notion of a 'middle class': that it is so vague that it includes anyone below the rank of aristocrat but above the labouring poor. However, the existence of women from a broad range of social backgrounds with widely varying incomes is not a problem in itself, rather it is the mode of representing them that needs examining. The emergence of specifically 'middle-class' women has come to assume great importance because of feminist arguments about the impact of domestic ideology. Yet Nancy Armstrong argues that eighteenth-century conduct books were aimed at readers from all social levels, so that it was the books themselves that gave the impression of a unified middle class when 'other representations of the social world suggest that no such class yet existed'.[69] However, as Dror Wahrman has stressed, many historians have ignored 'the degree of freedom which actually exists in the space between social reality and its representation'.[70] In her polemical article of 1859, Harriet Martineau linked the *increasing* 'need and supply of female industry' to 'the uprising of a middle class', the roots of which she located in an imagined and unspecified late medieval period.[71] Language can thus be both an inadequate and frequently politically determined guide to the many gradations of social status shaped by birth and/or income. Indeed, Penelope Corfield has shown that there were multiple terminologies

[68] See Peter Earle, *A City Full of People: Men and Women of London, 1650–1750* (London, 1994), p. 150, and idem, *Making of the English Middle Class*, pp. 163–6, for middle-class wives' foolish pretensions to idle gentility.
[69] Armstrong, *Desire and Domestic Fiction*, p. 63.
[70] Wahrman, *Imagining the Middle Class*, p. 6.
[71] Martineau, 'Female Industry', p. 298.

of social status or position circulating in the eighteenth century.[72] While 'class' as a socio-economic label was in common usage by 1750, the older categories of 'rank' and 'order' were still preferred as descriptions of social status conferred by birth. Moreover, even where 'class' was the descriptive category employed it was not confined to a tripartite model, but could include five or more classes of society.[73] Conversely, there were occasions when the 'middle' could disappear entirely from social representation, leaving only the picture of a nation divided between rich and poor.[74] Since the gap between social reality and class representation is not only wide but contingent, it is no longer possible to link the grand narratives of industrial revolution with those of class formation on to which gender has so often been grafted in order to explain changes in women's economic activities.

The 'middle-class' woman in business is an elusive figure, one whose appearance or (more commonly) disappearance should not be tied to a preponderance of one kind of representational literature over another. The term 'middle class' also conveys an impression of an essentially stable social group, particularly if it is viewed as sharing common cultural values. This could be equally misleading because economic misfortune could strike at any level and the attitudes and reactions of those born into 'gentility', but who were forced to support themselves through necessity, cannot be understood in the same terms as those of women who viewed themselves as 'bred' into trade. Of course, social mobility could work both ways, so the values and beliefs of those whose social and economic status was improved by the acquisition of profit were also not necessarily uniform. As we shall see, women's attainment of wealth through business (as opposed to through the more traditional route of marriage) could earn them huge public opprobrium. While it is often necessary to refer to a middling sort/class throughout this book for the sake of broad description, this should not be confused with any attempt to elide differences of rank and income, or to link the representation of middle-class women with any precise social referent. It is therefore more useful to refer to the 'middle classes' or 'middling sort' when dealing with social groups and 'middle class' only when this description is used in contemporary literature. Removing *the* middle class as a driving force in the historical process means it is also possible to abandon linear narratives of *its* development, in the same way that the unilinear approach has been dropped from narratives of industrial and economic developments during the period.

The language of 'public' and 'private' conveys an equally elusive range of concepts. Since the language was present in both eighteenth- and nineteenth-

[72] Penelope J. Corfield, 'Class by Name and Number in Eighteenth-century Britain', in idem (ed.) *Language, History and Class* (Oxford, 1991), pp. 101–30.
[73] Ibid., pp. 101, 112–17.
[74] Cannadine, *Class in Britain*, pp. 19–20, argues that there have been three major models of social description: the hierarchical view of ranks and orders, the tripartite model, and the dichotomous picture of patricians and plebeians.

century discourses, its importance cannot be discounted even if the metaphor of separate spheres has lost its analytical power within overarching narratives of women's history. But it can no longer be used to explain 'the rise of the domestic woman', 'the separation of work from home' and 'the sexual division of labour' in several different centuries. For the purposes of this study the categories of public and private are assumed to be always relative and the boundaries highly flexible and entirely historically contingent. Since one term necessarily constructs the other, it is important to consider what is inscribed within each category at any given time or place and how these terms are articulated in terms of one another. This formulation allows for the possibility of issues moving from the private to the public domain and back,[75] as well as for much eighteenth-century usage, which was not at all consistent. It is in the fields of women's and gender history, perhaps above all, that it is essential to pay attention to subtle nuances of language and how these change over time. Given the ubiquitous stress on issues such as the essential nature of women and their association with domesticity, reproduction and motherhood in contemporary debates across most historical periods, it is only by studying how these ideas are articulated, when and why they change partners and in the service of what interests that gives them their historical specificity.

An integrated methodology

This project was conceived with the idea of answering calls for a more integrated approach to studying women's economic activities alongside ideological representations of those activities,[76] using a wide range of quantitative and qualitative sources. The time-span from 1700 to 1850 allows for the analysis of the *longue durée*; but the structure of the book has been designed to avoid the pitfalls of simple linear narratives whether of decline, progress or continuity. As a result the book is constructed via a series of case studies in which common themes recur but with different emphases in each period. Although there are obvious disadvantages in terms of continuity with this methodology, cumulatively, it does allow for an analysis of diachronic change. The structure was also determined by the availability or, more accurately, the dearth of sources available to study women's business activities. Two major problems needed to be overcome. First, the difficulty of obtaining commensurable quantitative sources for both the eighteenth and nineteenth centuries and,

[75] For the indeterminacy of the boundary between public and private, see Daniella Gobetti, *Private and Public: Individuals, Households and Body Politic in Locke and Hutcheson* (London, 1991), p. 152.

[76] Sharpe, *Adapting to Capitalism*, p. 10, argues that the impact of ideological factors needs to be considered in conjunction with and not in isolation from women's economic activities. See also Sonya Rose, *Limited Livelihoods: Gender and Class in Nineteenth-century England* (Berkeley, CA, 1992), p. 10, for similar comment.

second, the complexity of reconstructing women's experiences of being in business when so few traces of their voices remain.

The need for a directly comparable source covering both the eighteenth and nineteenth centuries was met by using the information found in the insurance policy registers of the Sun Fire Insurance Company in the years 1735 to 1850. This has meant that the sample was restricted to those women who were not only in business of a sufficient size to be able to afford insurance but who also believed in the very idea of protecting their property in an age when the culture of insurance was in its infancy. However, the policy registers are uniquely suited as a source for providing information about women in business rather than merely about female employment. Each policy recorded not only the name, address and occupation of the policy holder (or holders in partnerships), but also the types of buildings insured, plus their locations and contents, as well as the name and occupation of any tenants if the buildings were let, and their insured value. The policies also recorded the type and value of household goods and stock or merchandise. These records have been profitably used before for counting the numbers and types of female occupations but here they also lend themselves to a more in-depth analysis.[77] As the format of each policy in the registers remained the same over the entire period, it was possible to construct a relational database and all the policies taken out by women in business were recorded for five sample years, at roughly equidistant intervals throughout the period. The resulting database of 1490 policies, predominantly from the London area, forms the quantitative core of this study. This information was further supplemented by the addition of material from 600 advertisements placed by businesswomen in the London *Daily Advertiser* (1731–75). In order to provide a regional contrast the metropolitan economy of London was then compared with a micro-study of businesswomen's networks in the county town of Durham. It was possible to study a network of fifty-six women over a thirty-year period from 1755 to 1784 to discover to what extent women were supplied by female traders, by using the accounts and bundles of receipts belonging to Judith Baker, a wealthy member of the local gentry. Baker's papers not only provided material to reconstruct business dealings between women but they also contained letters from some of the suppliers that provide a rare glimpse of women writing about their business activities.

Further important insights into women's own experience of business were provided by the personal testimonies of litigants in equity cases. This material

[77] Earle, *Making of the Middle Class*, pp. 168–71, counted occupations and marital status from 1726 to 1729; Hunt, *Middling Sort*, pp. 132–4, counted women in each trade from 1775 to 1787; Schwarz, *London in the Age of Industrialisation*, pp. 14–22, counted occupations and compared them with census records; Beverley Lemire, *Culture and Commerce: The English Clothing Trade before the Factory, 1660–1800* (Basingstoke, 1997), pp. 104–12, calculated the number of female pawnbrokers and clothes sellers as a percentage of men from 1777 to 1796. The exception is David Barnett, *London, Hub of the Industrial Revolution: A Revisionary History, 1775–1825* (London, 1998), pp. 208–18.

has only very recently come to light as a result of the Public Record Office's indexing project of Chancery pleadings. The project is the first of its kind and has therefore so far only covered the period *c.* 1660 to 1714, but it nevertheless made it possible to study in great detail thirty cases concerning women in business. The personal nature of the testimonies in the equity cases provides a contrast to the prescriptive literature that purports to describe the workings of the common law and the borough custom of *feme sole* trading. In addition, legal treatises from 1632 to 1884 have been used to assess changing interpretations of the apparently fixed legal fiction of 'coverture', which effectively construed a husband and wife as one person by collapsing the legal personality of the wife into that of her husband. It was possible to make an almost direct comparison with the legal treatises by studying law reports of cases concerning *feme sole* traders in the years 1627 to 1852. The resulting sample of fourteen cases was analysed in detail to examine how and when judges decided to impose common law doctrine over that of borough custom, but also to see how married women used the plurality of the English legal system to defend themselves in cases of debt.

One further category of evidence has been employed. In order to study changing representations of women in business in both eighteenth- and nineteenth-century discourses, two different sets of sources were used. For the eighteenth century, the net was cast very wide to analyse the interaction of several competing discourses surrounding women in trade. The sources studied included contemporary fiction, autobiographies, journals, plays, poems and satirical prints, pamphlets and other writings on trade disputes, trade cards, and the database of newspaper advertisements. Particular attention has been given to the proceedings of the patriotic Society for the Encouragement of Arts, Manufactures and Commerce in the Strand, because it was one of the few eighteenth-century institutions that could be shown to be active in encouraging women in the field of manufactures. For the nineteenth century, the focus has been more selective. One major debate on the condition of milliners and dressmakers in mid-nineteenth-century London has been examined in detail. However, by using a wide range of sources including contemporary art, novels, newspapers, magazines, and the evidence of the 1842 Children's Employment Commission, some wider themes can be analysed to show the range of competing discourses around women and business.

Arguably there are three major factors that are commonly believed either to have always severely limited women's economic enterprise or to have increasingly done so during the eighteenth and nineteenth centuries. These are: the legal system; the difficulty of gaining access to property and capital; and the impact of a restrictive domestic ideology.[78] In broad terms, the three sections of the book address each of these issues in turn and indicate ways in

[78] Adapted here for women in business from factors identified by Sharpe, *Adapting to Capitalism*, p. 9.

which the impact of these factors may have been less universal than has been previously thought. The book is therefore divided into three parts: the first examines the legal position of women in business, the second forms a predominantly quantitative study of women's business practices and networks, and the third focuses on representations of women and trade.

Part I addresses legal issues that affected women in business. Chapter 2 examines how far the common law doctrine of coverture affected married women in business and what means there were available for avoiding its consequences. Chapter 3 focuses specifically on the borough custom of *feme sole* trading, which allowed a married woman to trade as if she were single. This chapter considers how women could manipulate the pluralistic legal system and questions to what extent the custom could be seen as a 'privilege' for women. Chapter 4 examines Chancery cases of debt and bankruptcy, as well as disputes over estates and contractual obligations in which businesswomen were involved. It reconstructs the complex de facto trading arrangements between men and women, which often left litigants of *both* sexes remedyless under the universal rigidity of the common law, and highlights the importance of credit networks and extended family relations.

In Part II, trading networks between family and friends is also the central concern of Chapter 5, which examines the relationships between a Durham gentlewoman and her female suppliers. Switching the focus back from a regional to a metropolitan economy, chapters 6 and 7 centre on the database of insurance policies. Chapter 6 looks at the culture of insurance and the women who bought and sold it. It examines the wide variety of businesses in which women were involved and questions whether increasing marginalisation is an adequate description of changes in women's trading practices. Chapter 7 continues to examine women's diverse business practices and insurance strategies. In particular, it addresses questions about what constituted business capital for women, and how property was divided between men and women in marital, mixed and same-sex business partnerships.

Part III deals with representations of women in business. Chapter 8 discusses what 'other languages', apart from that of separate spheres, were available for discussing the activities of women in business in the eighteenth century. The focus here is chiefly on how debates around the nature of profit, luxury trades and patriotism impacted on representations of businesswomen. The discussion of different uses of public and private in the eighteenth century is extended in Chapter 9, which considers the language and strategies employed by business-women advertising in a London daily newspaper. Chapter 10 focuses on nineteenth-century debates about the appalling working conditions of milliners' and dressmakers' apprentices in London. It discusses how the often wealthy female proprietors of these businesses were represented according to whether protective legislation, political economy or moral reform was thought to be the solution to the problem. These three chapters are linked to material already discussed in the previous sections, showing that there was no simple relationship between women's actual economic activity and public representations of them.

Overall, this book provides evidence of women in business operating as fully integrated members of local trading networks, exchanging money, credit, property and goods with male traders on a regular basis throughout the period. In addition, a study of a range of debates about women in trade shows that, while the discourse of domesticity was a powerful one, it was by no means the only one within which businesswomen were discussed or could themselves negotiate. There is thus a need to reassess the extent to which patriarchal power, operating through marriage or the common law doctrine of coverture, may be seen to have actually curtailed women's economic enterprises. While patriarchy could disadvantage women in business, its effects were greatly modified by economic imperatives. Finally, while gender remains an important analytical tool for examining the experience of women in business, there were numerous other factors that impacted on the opportunities for and success of women's economic enterprises.

Part I

Law

2

Legal fictions vs. legal facts

Common law, coverture and married women in business[1]

> Fiction of use to justice? Exactly as swindling is to trade.
>
> Jeremy Bentham (1748–1832)[2]

> Among other disadvantages legal fictions are the greatest obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell.
>
> Sir Henry Maine (1822–88)[3]

Perhaps the most powerful and commonly cited impediment to women's economic opportunities is the common law doctrine of coverture based on the legal fiction that a husband and wife were one person, and that person is usually understood to have been the husband.[4] Most accounts detail how, for a married woman in trade, the legal disabilities that proceeded from coverture meant that she could not keep anything she earned from her business, that her husband could shut it down whenever he pleased, that she could not contract on her own account and that she could not sue or be sued alone. Although the borough custom of *feme sole* trading did allow married women to trade as if single in some towns, this medieval privilege is widely believed to have died out as the common law became more powerful and centralised. It was also possible for a wife to retain control of her separate property and to preserve the proceeds of her economic enterprise through the creation of a trust in equity, but this has been seen as an expensive and time-consuming legal procedure of use only to the wealthier ranks. The dominant impression of women's legal position during the period 1700 to 1850 remains one of the disabling effects of coverture produced by the overarching power of the common law

[1] This chapter and the one that follows have benefited greatly from discussions with Karen Pearlston, for whose advice and guidance I am deeply indebted.

[2] Jeremy Bentham, 'The Theory of Fictions', Appendix A, in C.K. Ogden, *Bentham's Theory of Fictions* (London, 1932), p. 141.

[3] Henry Maine, *Ancient Law* (London, n.d.), pp. 16–17.

[4] For this version of Blackstone's 'famous dictum' see e.g. Hall, 'Gender Divisions and Class Formation', p. 97.

– and the patriarchal values underlying it – which, in turn, mirrors narratives of women's declining economic position. As this chapter will demonstrate, however, the legal position of women in business was both less restrictive and considerably more complex than most accounts allow.

Coverture was just one of many legal fictions in eighteenth- and nineteenth-century English law, defined by Jeremy Bentham as 'an assumed fact notoriously false, upon which one reasons as if it were true'.[5] Yet the legal fiction of marital unity of person is also one of the longest surviving. It has been in existence at least since the Norman Conquest[6] and has still 'never been abolished outright by legislation', although most of its consequences have now been removed.[7] Its effects were obviously alleviated by the Married Women's Property Acts from 1870, but this longevity and the fact that wives did continue to trade throughout a period of enormous social and economic change still raises questions as to what extent the legal disabilities proceeding from the doctrine of coverture actually impacted upon their ability to trade.

This chapter therefore, examines how far the legal fiction of marital unity of person could theoretically affect married women in trade by studying the changing definitions of coverture given in legal treatises published between 1632 and 1884 and identifying the means suggested for avoiding it. In doing so it suggests new ways of considering long-term linear narratives of women's changing legal position and the nature of the relationship between law, culture and social change. In order to do this it is necessary to separate narratives of women's legal rights from those detailing their ability to trade under the legal system. The question of rights is not an inevitable pre-condition for the practice of trade, despite the desirability of such legal rights in terms of social justice. In terms of the latter criteria of ability to trade, it will be argued that although coverture could be a great disability for married women, for those in trade it was an entirely historically contingent doctrine, the definition, use and means of avoidance of which has varied over time. Moreover, the 'privilege' of *feme sole* status also conferred considerable liabilities against which the 'disability' of coverture was an effective protection.

Narratives of women's legal position

Jeremy Bentham's antipathy to the logical inconsistencies of English jurisprudence was early fuelled by his attendance at lectures given by the Vinerian

[5] Bentham, 'Theory of Legislation', cited in Pierre J.J. Olivier, *Legal Fictions in Practice and Legal Science* (Rotterdam, 1975), p. 32.

[6] Maeve E. Doggett, *Marriage, Wife-beating and the Law in Victorian England* (London, 1992), p. 70, traces the earliest references to legal literature produced after 1066 and found in every leading work on English common law since the twelfth century.

[7] J.H. Baker, *An Introduction to English Legal History*, 3rd edn (London, 1990), p. 551, bases his observations on arguments from the 1981case of *Midland Bank Trust Co vs. Green.*

Professor of Law at Oxford, Sir William Blackstone,[8] whose *Commentaries on The Laws of England* (1765) were widely acknowledged to have been the first, most complete and systematic compilation of English law.[9] It is Blackstone's powerful articulation of the legal fiction of marital unity of person that is most often cited in narratives describing women's legal position during the long eighteenth century, particularly those which stress the legal disabilities under which women suffered.[10] Blackstone's famous passage graphically described how:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert, foemina viro co-operata*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.[11]

This 'suspension' of a wife's legal identity and the consequent erasure of her rights to individual citizenship has outraged generations of feminists.[12] The 'protection' that coverture offered a wife, which meant *inter alia* that she could not be sued and imprisoned for debt, led some treatise writers, most notably

[8] Ogden, *Bentham's Theory of Fictions*, p. xvii.

[9] William Holdsworth, *Sources and Literature of English Law* (Oxford, 1925), p. 158, comments on Blackstone's accurate translations and contemporary acknowledgement of his achievement in an era when belief in systematisation and certainty was paramount, but describes how his reputation declined under Bentham's influence in the early nineteenth century. For an extensive discussion of Blackstone's classic work and his contemporary critics see David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge, 1989).

[10] Hill, *Women, Work and Sexual Politics*, p. 196; Earle, *Making of the English Middle Class*, p. 159; Doggett, *Marriage, Wife-beating and the Law*, p. 35; Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-century England* (Oxford, 1983), p. 18.

[11] William Blackstone, *Commentaries on the Laws of England*, 15th edn (London, 1809), pp. 441–2.

[12] Anon., *The Hardships of the English Laws in Relation to Wives* (1735), rep. in Vivien Jones, *Women in the Eighteenth Century* (London, 1990), pp. 217–25. Barbara Todd, '"To be Some Body": Married Women and *The Hardship's of the English Laws*', *Women Writers and the Early Modern British Political Tradition*, ed. Hilda L. Smith (London, 1998), pp. 343–61, argues, in sympathy with the *Hardships*' author, that 'the rights of married women to "existence" were only achieved in the twentieth century'. Leonore Davidoff, 'Regarding Some "old husbands' tales"', p. 234 also argues that 'upon marriage, women died a kind of civil death, losing legal personality along with potential capacity for active agency in either civil or commercial life'.

Blackstone, to see wives as favoured by the law.[13] But this 'myth' of male protection has also angered those who view it as an abrogation of a wife's right to individual agency and responsibility for her own actions, reducing her to little better than the status of a child. For those who see the law as a reflection of social attitudes, coverture mirrored a patriarchal society's negative perception of women.[14] The law is thus held responsible both for causing women's subordination and being a reflection of the patriarchal attitudes that lay behind it. Hence coverture and its effects have long been a major focus for feminist attacks, not least because of the perceived relationship between women's legal status and their social and economic roles. For many feminists the metaphor of coverture became a highly politicised synecdoche for 'the law', highlighting its worst inequities and providing a basis for calls for social equality and female suffrage. Histories of women's legal 'position' in society, like those of their economic position, frequently replicate a very similar pattern of loosely dated decline, followed by a struggle towards greater freedoms.

As early as 1735, the anonymous female author of *The Hardships of the English Laws in Relation to Wives* appealed to 'the Laws of our Country' as the best way to promote moral equality between husbands and wives.[15] She argued that the law reduced wives to a state 'more disadvantageous than *Slavery* itself', leaving them with no property 'neither in their *own Persons*, Children, or Fortunes'.[16] The claim that the common law reduces women to mere objects of property is, as Greenberg notes, still a common one among modern feminists, despite the fact that in 'no period of English history . . . since the Norman Conquest, have women been given the legal status of chattels'.[17] More recently, Tim Stretton has argued that this tendency to cast the common law as 'the villain of the piece' is misleading.[18] As we shall see, many legal treatises throughout the eighteenth and nineteenth centuries were at pains to explain both the many common law exceptions to coverture and the additional relief provided by equity and borough customs.

Histories of women's allegedly declining legal and civil liberties may be traced back to the suffrage-inspired narratives at the turn of the twentieth

[13] For a discussion of how favoured wives were at law see Joanne Bailey, 'Favoured or Oppressed? Married Women, Property and Coverture in England, 1650–1800', *Continuity and Change*, 17 (2002), pp. 351–72.

[14] Janelle Greenberg, 'The Legal Status of the English Woman in Early Eighteenth-century Common Law and Equity', *Studies in Eighteenth-Century Culture*, 4 (1975), pp. 171–81, argues that 'the treatment that the law accords women reflects society's perception of women and of what it means to be a woman'.

[15] Anon., *Hardships of the English Laws*, pp. 217–18.

[16] Ibid., p. 218.

[17] See Greenberg, *Legal Status*, p. 172, esp. footnotes 1–2, for examples of modern feminist arguments based on the proposal that 'women were regarded as chattels' under English common law.

[18] Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge, 1998), p. 31.

century by authors such as Charlotte Stopes, and Mary and Beatrice Wallis Chapman. Stopes charted the many 'privileges' held by women, until the 'errors of Sir Edward Coke'[19] signalled the beginning of the 'long ebb', which lasted until 1868 when support for the Married Women's Property Acts signalled a sea change. The Chapmans traced a long slow decline from 1066 until 1832 when the 'tide of events . . . made for liberty'.[20] The pace of decline was deemed to have increased from 1485 with the change in relative importance of local and central government, particularly concerning the erosion of borough privileges and their local courts. Alice Clark was equally convinced that 'abrogating customs in favour of common law' effectively deprived married women of their property rights.[21] Quite apart from the questions raised by the common assumption of a pre-conquest legal golden age for women, which is still hotly debated,[22] two legal issues from these early works remain of central concern to historians of women in trade: namely the relative importance of local borough customs in allowing women to trade as *feme sole* merchants on the same terms as men, and the effect of increasing centralisation of the law or the growth of common law jurisdiction.[23] In addition, the ideological work of the law and narratives of increasing patriarchal legal restrictions on women's activities, particularly from *c.* 1800, remain prominent in modern historiography.[24]

Susan Staves has considered how the different frameworks commonly used to explain legal change might be applied to changes in married women's property law between 1660 and 1830. She rejected both a liberal-progressive narrative of increasing 'improvements' to the law, and a sociological story

[19] Charlotte Carmichael Stopes, *British Freewomen* (London, 1907), p. 121, referring to Sir Edward Coke's *First Part of the Institutes of the Lawes of England* (London, 1628) which like Blackstone's *Commentaries* also became a target for feminist critics.

[20] Beatrice and Mary Wallis Chapman, *The Status of Women under the English Law* (London, 1909), p. 40.

[21] Clark, *Working Life of Women*, p. 237.

[22] Doggett, *Marriage, Wife-beating and the Law*, p. 72, begins her analysis with the assumption that 'After 1066 things changed'. But see Pauline Stafford, 'Women and the Norman Conquest', *Transactions of the Royal Historical Society*, 6 ser. 4 (1994), pp. 221–49, for a strong critique of the 'Golden Age for women pre 1066' and p. 234, positing a somewhat 'flexible legal situation' afterwards.

[23] Amy Louise Erickson, *Women and Property in Early Modern England* (London, 1993, rep. 1995), pp. 6, 28–30, argues that this 'rationalisation' of the law occurred between 1300 and 1800 and resulted in a deterioration of women's legal and economic position.

[24] Susan Staves, *Married Women's Separate Property in England, 1660–1833* (London, 1990) and Todd, 'To Be Some Body', both trace a decline from 1800. Davidoff and Hall, *Family Fortunes*, p. 276, note that 'in legal and practical terms' women's position had deteriorated from about the seventeenth century but base their analysis primarily on the ending of customary rights of dower and a wife's testamentary incapacity in the nineteenth century.

of 'functional adaptation' to economic and social change,[25] in favour of a radical feminist explanation. Her study of the political choices made by judges in individual cases argued that their decisions were based on patriarchal ideology, which, she admits, is 'the story you might get . . . from Blackstone's sister'.[26] For Staves, this 'patriarchal history is a nightmare' which is not yet over. In a similar vein, Maeve Doggett argues that the patriarchal 'power principle' of women's subordination to men lay behind the fiction of coverture in cases of wife beating.[27] For Doggett, the legal fiction of unity was an ideological structure designed to obscure unequal relations of power within marriage rather than a legal principle per se.[28] Yet the use of patriarchal ideology as an analytical device has been critiqued by legal feminists as a rather blunt instrument.[29] As Shelley Gavigan has argued, feminists need to use sharper analytical tools and to consider how the law could reflect more than one single interest.[30] As in narratives of women's economic position, the radical feminist approach can result in a denial of historical differences and in the reaffirmation of a story of the way things always are.[31]

Instead, historians need to navigate between the pitfalls of a gender-blind versus a gender-specific narrative of legal change, and to avoid a simple linear narrative of decline or liberation. The resulting interpretation is less one of the functional adaptation of the law to social change or to women's rights, but of an extremely imperfect interaction between law, society and economy which cannot be said to have taken any form of linear trajectory. This in effect could leave spaces for married women to continue trading while not actually conferring upon them the same rights as men to do so. Indeed, the argument that coverture was neither so monolithic nor so effective at preventing married women from economic bargaining has recently been endorsed by the work of Margot Finn and Joanne Bailey. Their research highlights the ways wives as consumers evaded the strictures of coverture to contract for far more than the 'necessaries' the common law allowed them as legitimate agents of their husbands.[32]

[25] Staves, *Married Women's Separate Property*, pp. 199–230.
[26] Ibid., p. 230.
[27] Doggett, *Marriage, Wife-beating and the Law*, p. 61.
[28] Ibid., p. 99.
[29] Shelley A. M. Gavigan, 'Law, Gender, and Ideology' in *Legal Theory Meets Legal Practice*, ed. Anne F. Bayefsky, (Edmonton, 1988), pp. 283–95, esp. pp. 292–4.
[30] Ibid., p. 294.
[31] Diane Purkiss, *The Witch in History* (London, 1996), p. 11, argues that the radical feminist approach results in a 'refusal of historicity'; for another critique of 'history that stands still' see Hill, 'Women's History', pp. 5–19.
[32] Margot Finn, 'Women, Consumption and Coverture in England, c. 1760–1860', *The Historical Journal*, 3 (1996), pp. 703–22; Bailey, 'Favoured or Oppressed?', pp. 351–72.

Legal fictions in legal treatises

In addition to Bentham's objections to scientific untruthfulness, legal fictions have been critiqued on numerous grounds. Two of these are of particular concern here. One criticism was that legal fictions created uncertainty, which raised problems of application in individual cases. The second was that their use concealed the fact that judges were effectively able to change the law, when legal theory suggested that they should act only as interpreters of law. Conversely, therefore, it was argued that fictions helped the law evolve in a peaceful and conservative way by enabling new interpretations to be based upon old principles.[33] Studying a legal fiction can therefore prove a useful way of considering the relationship between law and social change. Furthermore, one way of examining the paradox of the 'changeless yet ever changing'[34] common law and the role of legal fictions such as coverture within it is to study legal treatises and commentaries on the subject over a long period of time. In consequence, this section is based on a study of the changing explanations of coverture and married women's separate trading found in legal treatises between 1632 and 1884.

There are several reasons for studying legal treatises separately from the law reports of individual case decisions considered in Chapter 3. First, they provide a glimpse of some of the circuitous routes by which different sections of the law allowed married women to trade in certain circumstances, while the principle of coverture remained unchanged. To do this, treatises had to take account of borough customs but also of equity as a separate but co-existent system of law that did recognise married women's separate property. Although treatises cannot reveal the extent to which equity was actually used, they can give a good indication of when and how equitable principles were both incorporated into the common law and accepted as a necessary alternative.[35] Second, as we shall see below, narratives of legal history based on different sources can appear to proceed in entirely different directions, so that treating them independently can provide a more balanced picture.

Third, treatises provide a distilled version of the law as it stood at any moment in time. The common law was an unwritten set of maxims or principles

[33] See Olivier, *Legal Fictions*, pp. 88–92, for an assessment of the advantages and disadvantages of the use of legal fictions. In the nineteenth century, Maine, *Ancient Law*, p. 16, asserted that the expression 'legal fiction' signified 'any assumption which conceals, or effects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified'.
[34] Roger Cotterell, *The Politics of Jurisprudence* (London, 1989), p. 28.
[35] In England equity and common law had developed as two separate systems but in the classical formulation 'equity represented an essential though distinguishable feature of any judge's authority' and there was considerable debate as to what extent if any this should occur in eighteenth-century common law courts; for an illuminating discussion see Lieberman, *Province of Legislation*, pp. 71–87.

based on ancient customs and the accumulated wisdom of judges, which was both always pre-existent yet also developing, 'with the accumulation, reinterpretation and restatement of precedents and the adjustment of legal doctrine to new circumstances'.[36] Legal treatises therefore are, in effect, historically contingent interpretations of the law based on judges' decisions in important cases and the issue of new statutes. This is particularly important because juridicial change could be made only incrementally, founded on existing legal principles, but legislative change could effectively change the principle itself. Only the latter is now acceptable to feminists rightly seeking 'true equality' in the eyes of the law, but this view tends to leave the impression that legal change in the long eighteenth century was moribund compared to that produced by the zeal for reform in the later nineteenth century. Yet legal historians have shown that, not only was there a great deal of debate over whether legal remedies for new problems were best developed by the courts or by Parliament, but also that the courts did carry out a great deal of reform in a number of areas, including property, contract and commercial law, without resorting to parliamentary statute.[37] As Atiyah points out, however, while a number of eighteenth-century lawyers were 'willing to modify the law to bring it up to date with social and economic changes from time to time . . . they certainly never contemplated the idea of using the law so as to *create* social and economic change'.[38]

Finally, it is important to stress not only the interpretative nature of these treatises but also that many were not written solely for legal scholars. Some were a commercial attempt to bring the law to a wider audience and, as such, served as the version of the law available to literate women,[39] including those who were in business, as well as to men from whom women may have sought legal advice. In the Preface to *The Lawes Resolutions of Women's Rights* (1632), the anonymous author expressly dedicated this collection of 'Statutes and Customes, with the Cases, Opinions, Arguments and points of Learning in the Law as do properly concerne Women' to women themselves. In the Conclusion, he explained that he had attempted to set out useful information:

> in some orderly connexion, which heretofore were smothered, or scattered in corners of an uncouth language, cleane abstruded from their sex. Which

[36] Cotterell, *Politics of Jurisprudence*, p. 26.
[37] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), pp. 91–7; Lieberman, *Province of Legislation, passim,* also notes that while the increase in statutes was vast their reforming impact was minimal: pp. 13–28.
[38] Atiyah, *Rise and Fall*, p. 97; emphasis added.
[39] Beth Swan, *Fictions of the Law: An Investigation of the Law in Eighteenth-century English Fiction* (Frankfurt, 1997), p. 11, argues that contemporaries displayed a detailed knowledge of the law, aspects of which were frequently included even in 'women's' fiction. Erickson, *Women and Property*, pp. 21–3, also shows that 'relatively well-off' women were familiar with legal texts.

> concealement, because it seemed to me neither iust, nor conscionable, I have framed this worke.[40]

In this work the author bases his explanation for coverture on the biblical story of Adam and Eve as 'but one flesh' and women's subjection to their husbands on Eve's original sin, because the 'common law here shaketh hands with Divinitie'. Two sections are commonly cited from this work. The first declared that all women are 'understood either married or to be married and their desire be subject to their husband'.[41] The second was the graphic metaphor of how, for women, marriage is like a little stream being carried away by a major river; following the Latin definition of coverture as 'nupra', meaning that she was 'vailed, as it were, clouded, overshadowed &c. she hath lost her streame, she is continually *sub potestate viri*'.[42] It is this image of a woman's personal and legal identity being totally subsumed by male power that has most angered feminists; yet, if it is placed in context, a rather less literal reading of women's lack of agency is possible or, as the author put it, 'some women can shift it well enough'.[43] A passage cited less frequently explains that, although man and wife 'bee by intent and wise fiction of law, one person, yet in nature & in some other cases by the Law of God and man, they remaine divers . . . so in other speciall causes our Law argues them severall persons'.[44] Indeed, this interpretation is supported by Shepard's study of working wives involved in debt litigation in the Cambridge University courts between 1580 and 1640.[45] Most importantly, the author of the *Resolutions* concludes by warning his readers:

> not to take it for so strong and substantiall a peece as London bridge is, whereon you set up great building; but I will say to you. . . . There bee some things in these Bookes which are not Law, yet even those may enable you the better to understand the reasons and argument of Law, and to conferre and enquire what the Law is amongst the sage matters therof.[46]

In other words, the treatise's graphic representations of coverture should not be read as exact statements of the common law *per se*, which, as the book suggests, was by no means consistent on the subject. The *Lawes Resolutions* was one of the earliest attempts to present a systematic summary of the common law and was still cited in the eighteenth century. It was written in English rather than in legal French, and although its complex expositions made it

[40] Anon., *The Lawes Resolutions of Womens Rights Or, The Lawes Provisions for Woemen* (London, 1632), p. 403.
[41] Ibid., p. 6.
[42] Ibid., pp. 124–5.
[43] Ibid., p. 6.
[44] Ibid., p. 4.
[45] Shepard, 'Manhood, Credit and Patriarchy', pp. 90–5.
[46] Anon., *Lawes Resolutions*, pp. 403–4.

suitable for law students, it was not only addressed to, but specifically dealt with, women's legal issues in a generally sympathetic and enlightened fashion for public consumption.[47]

The anonymous author of *Baron and Feme* (1700) was equally aware of the difficulty of interpreting contract law for married women. He found that 'the Resolutions of our [law] Books have not been very consistent' and in real actions concerning *femmes coverts* 'the law had been much abridged and altered'.[48] This author's previous book had focused on the law concerning children, which may partially account for an infamous passage in which the position of married women was compared to that of children.[49] Hence a woman's lack of contractual capacity was explained in terms of a coverture in which she was represented as being under her husband's power and lacking in free will, in the same way as a child lacks judgement. After the 1882 Married Women's Property Act, legal commentators were anxious to distance themselves from this analogy when explaining coverture. They emphasised that it was lack of a 'disposing *power*' rather than 'want of a disposing *mind*' that explained a wife's lack of contractual capacity.[50] Nevertheless, *Baron and Feme* did highlight exceptions to coverture 'for Necessity-sake of Commerce, and the like'. Two of these anomalies were important for women in trade.

First, the earlier *Lawes Resolutions* (1632) had explained that 'if sisters make a joint purchase they are jointnants, and not partners', which meant that unlike partners their property could not be divided between them.[51] In *Baron and Feme* this principle was extended to include leases, and it was made explicit that, if one of the sisters married, 'the wife continued sole possessed',[52] even if the other sister died. The married sister's title would also hold good against her husband's executors should he die. In other words, sisters purchasing property or a lease were treated as one person, and this fiction of unity could supersede that of marital unity by virtue of being the 'elder title'. As will be shown below,[53] this could have been of great importance to many women, particularly those in 'feminine' trades such as millinery and dressmaking, a

[47] W.R. Prest, 'Law and Women's Rights in Early Modern England', *The Seventeenth Century*, 6 (1991), pp. 169–87.

[48] Anon., *Baron and Feme. A Treatise of the Common Law Concerning Husbands and Wives* (London, 1700; rep. 1719), p. A3.

[49] Ibid., p. 7. That women were reduced to the status of children, idiots and outlaws is another legal 'fact' much lamented by modern historians: see e.g. Hill, *Women, Work and Sexual Politics*, p. 196.

[50] Montague Lush, *The Law of Husband and Wife within the Jurisdiction of the Queen's Bench and Chancery Divisions* (London, 1884), p. 263.

[51] Anon., *Lawes Resolutions*, pp. 24–5, explained in which circumstances sisters were considered jointnants and in which as partners. For example, if inheriting land from a common ancestor, they would have been regarded as partners.

[52] With thanks to Margaret Hunt for pointing out this reference in Anon., *Baron and Feme*, p. 231.

[53] See below, p. 135.

significant proportion of whom were in business partnerships with their sisters and other female relatives.

Second, *Baron and Feme* included an entire section on the borough custom of *feme sole* trader in the city of London. The custom is listed as one of several instances when a wife could sue without her husband, although the action had to be brought in the city courts. However, the author explained that 'every feme which trades in London is not a *Feme sole* Merchant',[54] because the custom stated that it must be proved that the husband had not 'intermeddled' with his wife's trade in any way. If the couple lived together outside London 'and the wife deals separately, her Contracts shall charge the husband'. In other words, wives could trade separately outside London but, as the custom was limited to the city, they could not be held solely liable for their debts. There was therefore no suggestion that coverture prevented married women from trading separately. The point was that, if they did so, their husbands would be liable for any debts they incurred. Other towns did have similar borough customs but this treatise focused solely on London, almost certainly because the law reports on which it was based were confined to London cases.[55]

The cases in *Baron and Feme*, which were chiefly taken from the seventeenth century, are poorly explained, and it is difficult to establish firm principles of law. None the less, they give an indication of what constituted a *feme sole* merchant and of the procedural difficulties that could arise in such cases. This was because, although a woman had to be openly trading separately from her husband to qualify as a *feme sole* merchant, her husband still had to be named in any legal action for the sake of conformity to the doctrine of coverture, even though sentence would only be passed on the wife alone. The first case, *Langham vs. Bluet* (1627), focused on whether Mrs Bluet, who had traded as a vintner while her husband was serving in the army abroad, was liable for her own debts. The author drew the extremely broad conclusion that 'if the Husband be beyond Sea, or becomes bankrupt, or leaves his Trade, and the Wife exercise the same Trade or they both exercise the same trade distinctly by themselves',[56] then she could be described as a *feme sole* merchant. Other cases showed that a husband was not liable for his dead wife's debts if she had been a *feme sole* trader, even if he had previously promised to pay, and that a man sued by a married *feme sole* merchant, who pleaded in bar, could not later reverse this as an error of judgement by citing her coverture. The treatise therefore provided evidence of several cases in which the custom had been upheld over common law and emphasised that liability for payment of debts was of prime concern, even though some confusion remained about its exact terms.[57]

[54] Anon., *Baron and Feme*, p. 301.

[55] For borough customs, see below, p. 57.

[56] Anon., *Baron and Feme*, p. 301.

[57] One reason for this was probably because as the Law Report of the Bluet case (*ER*,

In direct contrast, however, the 1732 edition, while mentioning the custom of London and noting that not all trading women fell under it, gave no examples of cases at all. The work had been updated, extended and renamed *A Treatise of Feme Coverts: Or, The Lady's Law*, a guise in which it was blatantly aimed at an almost certainly propertied, female audience and/or their legal advisers. The Preface explained that 'the fair Sex are here inform'd how to preserve their Lands, Goods, and most valuable Effects, from the Incroachments of any one'.[58] The emphasis had changed dramatically from the disabilities of coverture to the 'Privileges of Feme Coverts, and their Power with respect to their Husbands'.[59] There was no graphic description of coverture. Instead, the treatise contained information about how women could protect their separate property and a selection of 'precedents of conveyances', or prewritten settlements and bonds. Amy Erickson has shown that far from being confined to the upper ranks of society, even women of the middling orders could protect their separate property after marriage by using simple bonds;[60] but the sample settlements found in this treatise provided examples involving large sums of money. Nevertheless, a legal treatise, originally based solely on the common law, had now begun to include equitable principles of married women's separate property. Since married women could also trade sole on the basis of their equitable separate property, these sample conveyances provided for establishing separate property may have been equally useful to women in business. The creation of separate property was not linked to any specific locality and thus had a wider appeal, which may be another reason why detailed information about the borough custom of *feme sole* traders was omitted from this edition. This did not signify the end of the borough custom, however, which reappeared in later treatises and was still being cited in law reports as late as 1852.

William Blackstone's section on married women in the *Commentaries*, first published in 1765, contained no mention of the borough custom or equity's provisions for wives. As a paean to the common law inspired by Enlightenment enthusiasm for rationalism, Blackstone's attempt to gloss over the 'little contrarities' of English Law,[61] for the sake of a systematic treatise on the subject, effectively obscured the loopholes that continued to allow women to trade. Much later, Blackstone was savagely attacked in 1946 by the American feminist Mary Beard for his omissions,[62] particularly over women's legal rights

Langham vs. Bewett, Croke Car 68, 79, pp. 661–2) shows the judges were divided over the verdict and the case was eventually settled out of court. See below, p. 57, but note variant spellings.

58 Anon., *A Treatise of Feme Coverts: Or, The Lady's Law* (London, 1732), p. vi.

59 Ibid., p. 78.

60 Erickson, *Women and Property*, pp. 129–51, 104–6.

61 For Blackstone's Enlightenment project, see Staves, *Married Women's Separate Property*, pp. 15–16; Holdsworth, *Sources and Literature*, pp. 158–9.

62 Mary Beard, *Woman as Force in History: A Study in Traditions and Realities* (New York, 1946), pp. 75–107, saw Blackstone as the most influential proponent of the mistaken idea

in equity; but his work represented the beginning of a new form of authoritative legal treatise which clearly stated the general principles of law. Blackstone himself admitted in his 1765 Preface that he may be 'still mistaken' on some points and in a later edition that he had encountered fierce opposition. By 1809, his editor Edward Christian had added substantial footnotes 'apologising' for Blackstone's position on many facets of married women's law, and in particular for his assertion that women were 'a favourite of the law', because of the many exemptions provided by the 'protection' of coverture. The 1809 edition shows that the legal profession was already well aware of the inequity of the common law's doctrine on women. Christian added two pages of notes disputing Blackstone's position and – most importantly – a further note on a wife's ability to sue as if *feme sole* in equity.[63]

Yet other treatises, somewhat less authoritative than Blackstone's, were available to women in the eighteenth century, which did provide a more comprehensive assessment of coverture and the exceptions to it. Blackstone's work was written 'to give educated gentlemen an introduction to the legal system'.[64] In contrast, *The Laws Respecting Women* (1777) was written to address legal issues concerning women – it consisted of 449 pages compared to the meagre nine Blackstone devoted to the law concerning husband and wife. It seems more plausible that middling-sort women wishing to discover where they stood at law would turn to this type of work rather than to Blackstone. Conversely, those wishing to attack the inequities of the common law could find no better target than Blackstone's compelling and succinct description of coverture.

The author of *The Laws Respecting Women* also wrote within the spirit of the Enlightenment and acknowledged his debt to Blackstone, whose 'elegant pen' had done for English law what Newton did for the laws of nature and Locke for those of human intelligence. The treatise declared that the law had now been 'rescued from perplexity and intricacy' and 'proved to be uniform'. For women in trade, however, the most important rationale behind *The Laws* was its economic imperative and its recognition that a nation:

> whose commerce is extended over the whole circumference of the globe . . . must necessarily furnish continual occasion for the creation of new laws; to ascertain the rights of individuals who were before unattended to, because such situations were unknown; to adjust the nice distinctions with regard to property, occasioned by . . . families . . . the concerns of commerce, the interests of those who compose the legislative part of government, and of those of the body of the people.[65]

that the law 'extinguished the married woman's personality', based on the erroneous assumption that the common law took no account of equity.

63 Blackstone, *Commentaries*, ed. E. Christian (London, 1809), pp. 441–5, esp. Christian's notes, 15 and 21.

64 Staves, *Married Women's Separate Property*, p. 14.

65 Anon., *The Laws Respecting Women, As they Regard their Natural Rights, or their Connections and Conduct* (London, 1777), pp. iii–iv.

Hence the law was acknowledged to be adaptable to social change and particularly to the interests of commerce. Moreover, the treatise was addressed to women in all situations of life and had dropped the married/to be married dichotomy present in earlier treatises.[66] Even more importantly, it expressly covered principles of common law, statute law, equity and ecclesiastical law, and thus encompassed legal principles applicable to women in all branches of the tangled legal system. It therefore not only covered the category of *feme sole* trader in great detail but also included examples of women resorting to law as a matter of course during other kinds of commercial transactions.

Several of the cases concerning both married and single women in business, as cited in *The Laws*, had been tried before Lord Mansfield, Chief Justice of the common law court of King's Bench.[67] Mansfield was known for his attempts to import equitable principles into the operation of the common law, particularly in the interests of commerce.[68] His influence during thirty-two years as Chief Justice (1756–88) was considerable and contemporaries regarded his judgeship as a unique period for legal innovation and creativity. Mansfield appealed to principles of natural justice and equity rather than strictly adhering to precedent; he also insisted on the superiority of the common law over legislation as the best means to develop new legal rules in response to altered social conditions.[69] He was a firm believer in the principles of free trade[70] and the justice of equitable separate property for married women. Indeed, Lieberman has argued that Mansfield's series of rulings on a *feme covert*'s powers to contract best demonstrate his belief that, 'as the usages of society alter, the law must adapt itself to the various situations of mankind'.[71] He repeatedly upheld the contractual obligations of married women, particularly when those contracts concerned dealings with merchants.[72] His decisions therefore frequently benefited women in trade. It is unlikely that he intended to contribute to women's emancipation in general, but this should not detract from the effect

[66] The frontispiece to *The Laws Respecting Women* listed women's roles as 'daughters, wards, heiresses, spinsters, sisters, wives, widows, mothers, legatees and executrixes &c'.

[67] See ibid., pp. 134–5, *Morisset vs. King*; and pp. 173–7, *Lavie vs. Phillips* (1776).

[68] See William Holdsworth, *Some Makers of the English Law* (Cambridge,1938), pp. 172–4 on Lord Mansfield who, before his appointment as Chief Justice of Kings Bench, had been a leading lawyer in Chancery, and his attempts to fuse the principles of equity and common law.

[69] See Lieberman, *Province of Legislation*, pp. 87, 88–143, for a discussion of Mansfield's reform of the commercial code, and his attitude towards equity and common law principles, precedents and reform.

[70] James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* II (North Carolina, 1992), p. 685, Mansfield's 'ultra-free-trade principles' were criticised by some, and it was argued that he could even furnish a defence for a besieged city to sell gunpowder to its invading army.

[71] Mansfield on *Barwell vs. Brooks* (1784), cited in Lieberman, *Province of Legislation*, pp. 126–7.

[72] Oldham, *Mansfield Manuscripts*, pp. 1245–51.

of his decisions, which were widely reported in legal treatises as evidence of women's legal position long after his retirement from the Bench.

In *The Laws Respecting Women* (1777) the distinction between a *feme covert* and a *feme sole* merchant chiefly revolved around the latter's liability to be declared a bankrupt. The treatise explained that a '*Feme-covert* is warranted by law to sell goods in open market, and her husband cannot reclaim any goods so sold, provided such woman is usually accustomed to trade for herself'.[73] Hence married women traders were again presented as a normal occurrence. Moreover, the evidence in Chancery cases shows that wives 'usually accustomed' to trading did indeed continue to do so, even through remarriages.[74] The chief distinction made in this treatise was that a '*feme-covert* in London, being a sole trader, is liable according to the custom to a commission of bankrupt'.[75] This was, of course, unlike the situation outside the London custom where a wife's coverture prevented her from being held personally liable for her contracted debts. The 1776 case cited at great length to illustrate this concerned the assignees of Jane Cox, a bankrupt milliner in London, and the assignees of her husband John, who had also been made bankrupt in spring 1764.[76] The dispute concerned Jane Cox's stock of fans, which were seized by her husband's assignees on the grounds that, as she was a married woman, the stock constituted part of his estate by right. The court had to decide whether a commission of bankruptcy could lie against a married woman and, if a wife was a sole trader, whether her goods could be taken to satisfy her husband's debts before those of her own creditors. The defence argued that a husband's rights took precedence and that a married woman was within the letter of the bankruptcy laws but not the spirit. Mansfield, however, judged that the London custom did not impinge on a husband's marital rights, except those subject to the custom's terms. Hence, as a sole trader, the wife was subject to a bankruptcy commission as far as her separate business assets were concerned. Thus the principle of a married woman's ability to contract and be sued separately under London custom was upheld. But this meant that she could also be declared bankrupt. Mansfield had actually acted 'for the benefit of the creditors, who cannot by reason of this custom come at the husband',[77] but who could now claim directly from the bankrupted wife's estate.

[73] Anon., *Laws Respecting Women*, p. 172.

[74] See below, pp. 74–81.

[75] Anon., *Laws Respecting Women*, p. 173. It is not clear whether the author meant just the City of London or a wider definition of the capital; later treatises specified the City but cases reveal that there was still some dispute over whether the defendant had to reside in the city or just be trading there. See *Buckland vs. Burges* (1703) discussed below, pp. 84–5.

[76] Ibid., pp. 174–6, *Lavie vs. Phillips*, 3. Bur. Manf. (1776).

[77] Ibid., p. 176. Mansfield also believed that if a *feme sole* trader had not been subject to a bankruptcy commission she would have been 'liable to perpetual imprisonment' for the unsettled debt, which was worse.

Lack of contractual ability has been seen as a major disability for married women; but the ability to make legal contracts also made them liable for the consequences and unable to claim 'male protection' by using coverture as a defence, which in fact many tried to do.[78] In William Cooke's *The Bankrupt Laws* (1785), *feme sole* traders remained the only women in business definitely liable for bankruptcy. Cooke believed that this implication also had a bearing on the status of women trading on the basis of equitable separate property, but they remained an 'exception of a more doubtful nature'.[79] The case Cooke cited to prove that a married woman who lived apart from her husband and traded as a *feme sole* could be liable to bankruptcy was that of Mrs Ann Fitzgerald, which came before the Lord Chancellor in 1772. Mrs Fitzgerald's husband was a linen draper but, when the couple decided to separate, he assigned all his stock-in-trade, household goods and debts owing to two male trustees for her separate use, keeping £600 for himself. It was also agreed that she would trade 'without any interruption from her husband', pay all the trading debts he then owed, and maintain their children at her own expense. He left for the East Indies and she continued to trade as a linen draper for four years in her own name. In December 1771, a commission of bankruptcy was taken out against Mrs Fitzgerald but the commissioners 'refused to find her a Bankrupt, because she was a *feme covert*, residing in the county of *Middlesex*, and not a *feme sole* merchant trading in the city of London'.[80] However, the Lord Chancellor ordered the commission to proceed immediately and Mrs Fitzgerald was declared bankrupt. The authority for this decision, Cooke argued, was later supported by the case of *Ringstead vs. Lanesborough* (1783), in which Mansfield had found that a married woman with a separate maintenance agreement, living apart from her husband, was liable for her own debts. In that case Mansfield had explained that 'the general principle of law' was that a married woman could not be sued for debt on her own contract, 'but as the times change, you must alter the law to them; and therefore, gradually, exceptions have been allowed to prevent injustice'.[81]

This argument was still being cited in the 1823 edition of Cooke, and Mansfield's decisions were also still being recited in R.S. Donnison Roper's authoritative *Treatise on the Law of Property Arising from the Relation between Husband and Wife* (1820). Mansfield had recognised the growing number of exceptions to the unity of persons doctrine, created chiefly to aid those dealing commercially with married women, and he had therefore attempted

[78] See the discussion of *feme sole* trader cases below, pp. 48–68.

[79] William Cooke, *The Bankrupt Laws* (London, 1785), pp. 39–41, lists *feme sole* traders and equitable sole traders under 'Person's who, engaging in Trade, can or cannot be made Bankrupts'.

[80] Ibid., p. 41.

[81] Ibid., p. 45.

to reduce these cases to a single commercial principle.[82] He not only held married women, whether traders or just separated from their husbands, liable for their debts but he also upheld female traders' rights to stock and profits, where these had been held in trust, as separate estate by equity. Thus in *Haslington vs. Gill* (1784), Mansfield protected the original herd of cows that had been assigned to a wife as separate trade stock from her husband's creditors, and also the additional cows she had since bred and the profits she had gained from doing so. He reasoned that, although the common law denied a wife separate property, 'in equity women have for ages been protected from the extravagance of their husbands'[83] by means of a trust. Even more importantly, Mansfield declared that 'wherever such a trust could be supported in equity, the trustee would be intitled in a court of law'.[84]

Thus equitable title to separate property could be upheld in a common law court, which would in effect substantially negate the disabilities of coverture for married women in trade. What this arrangement did not do was give wives legal title to their property, since it could only be claimed, on their behalf and for their sole use, by the trustees of that property. This is one of the feminist objections to the use of equity,[85] as it only conferred upon wives the ability to act *as if* they were individual agents. It did not confer the same legal rights as those held by men and single women. It has also been argued that married women of the middling sort would not have been able to afford the lengthy and expensive process of Chancery proceedings,[86] but, as will be shown below, expenses need not have been very high.[87] Nevertheless, as long as equitable title was recognised in a common law court, and sample agreements to create separate property were available in printed legal treatises, then married women's ability to trade on the basis of equitable separate property was far wider than has previously been thought.

It should be noted, however, that there is a significant problem to be considered when writing any narrative of legal change because that change could be achieved by judge-made decisions or by legislative enactments and, as Douglas Hay has shown, judicial politics could proceed in opposition to both legislative intent and various economic interests.[88] Furthermore, legal treatises

[82] Oldham, *Mansfield Manuscripts*, p. 1246.

[83] Cited in ibid., p. 1250.

[84] Cited in R.S. Donnison Roper, *A Treatise of the Law of Property Arising from the Relation between Husband and Wife* (London, 1820), p. 170.

[85] Holcombe, *Wives and Property*, p. 47, argues that 'equity failed to meet the feminist criterion of excellence – that all women should have rights and responsibilities equal to those of men'.

[86] Holcombe, *Wives and Property*, p. 46, and Doggett, *Marriage Wife-beating and the Law*, p. 38.

[87] See below, p. 72.

[88] Douglas Hay, 'The State and the Market in 1800: Lord Kenyon and Mr Waddington', *Past and Present*, 162 (1999), pp. 101–63, esp. p. 103.

did not necessarily keep abreast of these developments, whether by intent or by default.[89] Although early nineteenth-century treatises still cited Mansfield's decisions as proof that women could claim equitable title under the common law, his own attempts to fuse equitable and common law principles were largely rejected by his successors. These men were not only more traditionally conservative in their moral principles and their attitudes towards new commercial practices, but wanted the common law and equity to work as separate tribunals run on separate principles.[90] One of the supporters of the two distinct systems was Mansfield's successor Lord Kenyon, a paternalistic, evangelical Tory landowner, whose decisions effectively reversed Mansfield's attempts to make married women with separate maintenance contracts, liable for their own debts. In particular, Kenyon's decision in *Marshall vs. Rutton* (1800) has been seen as critical[91] in restoring the 'old established law founded generally upon the relation of husband and wife, by which, with certain known exceptions, no married woman was capable of contracting or acting as a *feme sole*, or of suing or being sued as such'.[92] However, although recent research has provided much evidence for a conservative moral backlash against married women's independent action in cases of separate maintenance,[93] the evidence of legal commentaries suggests that commercial imperatives remained important even after 1800 and that for women in trade the 'certain known exceptions' were crucial. In 1820 Roper pointed out the implications of the *Marshall vs. Rutton* case, but was concerned to show in what instances the law did permit the wife 'to contract, to sue, and to be impleaded',[94] and how 'a court of law by circuity changes the character of wife into that of a single woman'.[95]

[89] Ibid., p. 110: for example, legal treatises still classified forestalling, regrating and engrossing as market offences as late as 1810 despite the fact that these offences had been repealed in 1772. This conservatism was partly because those judges, who were opponents of *laissez-faire* economics, continued to find ways legally to prosecute offenders. See also Atiyah, *Rise and Fall of Freedom of Contract*, pp. 361–9, who suggests one reason for the conservatism shown by judges c. 1793 to 1830 was that many belonged to an older generation and reflected the opinions of an earlier time, but by the 1830s most had been replaced by men more in favour of political economy and commercial enterprise.

[90] Holdsworth, *Makers of English Law*, pp. 174, 200–10.

[91] Staves, *Married Women's Separate Property*, pp. 180ff.; and Todd, 'To Be Some Body', pp. 358–9.

[92] Roper, *Treatise of the Law of Property*, p. 120.

[93] Staves, *Married Women's Separate Property*, pp. 162–95, focuses on separate maintenance contracts of wealthy couples, and Todd, 'To Be Some Body', pp. 351–61, explores the impact of these cases on the separate legal identity of poor married women.

[94] Roper, *Treatise of the Law of Property*, p. 122.

[95] Ibid., p. 171.

Marriage and legal trading in the nineteenth century

According to Roper's treatise, it seems there were four main ways a married woman could continue to trade and contract with others by 1820. Namely, when coverture was suspended because of the husband's absence; as a *feme sole* trader by the custom of London; with her husband's agreement before marriage, or his permission afterwards; or on the basis of possessing equitable separate property. In the first instance coverture was effectively suspended, leaving a wife free to act as a single woman if her husband had been exiled, transported or had left the country for life, and it was reactivated only if he was pardoned and had physically returned to this country. However, if the husband was a foreigner who had never resided in England or who chose to leave the country, coverture continued. But if he was an 'alien enemy' and thus prevented from living in England, the wife would be acknowledged as a *feme sole*. As will be seen below,[96] hostility towards 'aliens' and confusion about different legal doctrines on the Continent made this one of the more contested categories of separate trading for women. Similarly, although divorce completely negated coverture, women trading under separate maintenance agreements, while living apart from their husbands, remained the most vulnerable category of *feme sole* trader and moral imperatives constantly challenged economic considerations in such cases. While advocates of free trade like Mansfield had insisted that such women were effectively single, the evangelical Lord Kenyon and the deeply conservative Lord Eldon[97] were not prepared to sanction any such challenge to the institution of marriage.

The second way in which married women could trade as if single was by the custom of London, but by 1820 its interpretation had become much stricter. The wife must be trading within the City and be able to prove that her husband had never 'intermeddled' in her business at any time. As the custom was now strictly construed as 'regarding only trade and commerce',[98] the husband could do nothing to injure his wife's creditors but he could possess himself of any 'surplus'. A *feme sole* trader could only sue or be impleaded within the City courts, although she could cite the custom in her defence in the superior courts at Westminster, but on all occasions her husband must be named in the action for the sake of conformity. Thus far, then, the custom had been interpreted as far as possible so as not to conflict with the common law and to give the appearance of a single doctrine on the matter. Nevertheless, in two instances where a stricter interpretation was indicated, Roper immediately provided examples of equitable relief available. While a husband could close down his wife's business and appropriate what remained of her business assets after her

[96] See pp. 64–7.

[97] On the 'extreme' conservatism of Kenyon and Eldon, see Atiyah, *Rise and Fall of Freedom of Contract*, pp. 361–7.

[98] Roper, *Treatise on the Law of Property*, p. 127.

creditors had been paid, a court of equity might still consider these assets to be her own separate property, 'she having procured it by her own industry, and with the permission of her husband, and without any risk incurred by him'.[99] Roper also pointed out that, although technically a wife could not enter into a bond (because it might have bound her heirs if she had any real property), again equity would have considered a bond to have good security if it had been made on her separate property.[100]

The situation was clearly intricate. Yet, according to Roper, under the common law a wife did not need either borough custom or equity to be able to trade separately, although the means by which this could be achieved sometimes followed a tortuous logic. In theory, a wife could 'trade on her own separate account, apart from and without the interference of her husband',[101] if this had been expressly agreed before the marriage or if during the marriage he subsequently gave his 'permission'. Roper explained that:

> When the agreement is made *previously* to the marriage since the consideration is valuable, the transaction will not only be obligatory upon the husband, but also binding upon his creditors. When the agreement originates *during* marriage, it will be void against his creditors, but good against himself.[102]

To make this possible, the common law had to accommodate equitable principles without sacrificing its own integrity. As the wife had no separate legal identity under common law, she had to be construed as acting as an *agent* either of her husband or the trustees of her separate estate.

The strongest protection for married women traders was a written premarital agreement that she could trade separately using her own property. Verbal agreements were possible but liable to be construed as fraudulent if used as a defence against creditors.[103] In either case, marriage itself served to validate separate trade agreements and hence it was known as being based on a 'valuable consideration'[104] and would be recognised as such even by the common law. Since the wife's separate property was technically owned by her trustees (for her sole and separate use), it could not then be taken away if her husband

[99] Ibid.
[100] Ibid., p. 128. The inability of a wife to make a bond was based on *Jewson vs. Read* (1773) which is discussed in detail below, pp. 59–60.
[101] Roper, *Treatise on the Law of Property*, p. 167.
[102] Ibid.
[103] Ibid., p. 305. The Statute of Frauds stated that nobody could be charged with any agreement contracted before marriage unless it was made in writing.
[104] Atiyah, *Rise and Fall of Freedom of Contract*, pp. 139–42, defines 'consideration' in eighteenth-century contract law as meaning the reason or motive for giving a promise (e.g. some expected benefit), which was stronger if there was some pre-existing moral obligation or duty arising from a transaction, or relationship (including e.g. parenthood or marriage) at the time the promise or contract was made.

became bankrupt, as it was no longer regarded as part of his property. That was because the wife was deemed only an agent of her trustees and not the legal owner. However, this meant that the wife could not use her own name when negotiating contracts or taking securities. Roper explained that this was because the common law vested all her personal estates in her husband and 'the mode by which it is evaded by modern legal decision inconsistent with the rule is by considering the wife as the agent of the trustee. But that construction cannot be made against actual expression to the contrary.'[105] Thus, if a wife signed contracts in her own name, they would be void regardless of any premarital settlement, but the law could support contracts signed in her husband's name because then it was presumed that any transactions were conducted with his explicit or implied permission.[106] Roper cited the case of *Barlow vs. Bishop* (date not stated) to illustrate this convoluted reasoning.[107] A wife trading with her husband's consent had received a promissory note of payment made out to her for business purposes; but Lord Kenyon ruled that she could not recover the money because it technically belonged to her husband. Kenyon added that if the note had been endorsed in her husband's name it would have been valid because then she would have been seen to be acting under her husband's authority. However, under the common law, if the wife traded as a *feme sole* with only her husband's permission after marriage, the agreement was considered good against himself but not against creditors. All her contracts would therefore bind him too, but he was entitled to her profits as there were no trustees to prevent him from acquiring them.[108]

Yet even securities in the wife's name could be held good in equity, if they were in respect of a contract based on her separate property, because equity had the power to offer relief against mistakes and 'mere forms', and therefore greater freedom to dispense with the strict legal forms necessary to establish proceedings in a court of law. A wife with even an informal premarital agreement[109] was therefore effectively able to control her business assets and her

[105] Ibid., p. 171.
[106] Ibid., p. 172. Roper supported this reasoning (ibid., p. 110) because a wife could act as 'her husband's agent or attorney. If, therefore, he authorises her to receive and pay money, or if she be *accustomed* so to do with his permission (which is an implied authority), he will be bound by such her acts.'
[107] Ibid., p. 172. The case was listed as 1 East. 432.
[108] Ibid., pp. 305–7. Agreements made after marriage were less authoritative, being based only on a 'voluntary consideration', as opposed to a 'valuable consideration', which was stronger because it was made on the expectation of some benefit from the other party, i.e. usually the financial/property agreements made between both parties and their families to seal the marriage arrangement. See e.g. *Bower vs. Holtrop* (1711) below, pp. 77–8. On portions and other benefits accruing from marriage agreements in trading families see Hunt, *Middling Sort*, pp. 151–2.
[109] Ibid., p. 168, states that such an agreement did not even require a detailed schedule of goods/stock to be kept separately.

profits, which were protected both from her husband and his creditors. In equity, the same principles applied in that a premarital agreement remained stronger than one made during marriage. However, if no trustees had been appointed for the wife, equity could make the husband a trustee of her separate business property for her own use. In addition, if a husband could be shown to have deserted his wife, and friends or family had given her the means to carry on a trade to support herself, he could not reclaim this on his return. Merely living separately, however, was not considered sufficient proof that the husband did not have an interest in the trade. More importantly, equity only held a woman liable for her own debts to the full extent of her separate property or business assets, so she could not personally become bankrupt. Wives trading on the basis of equitable separate property therefore effectively incurred only limited liability, an option that was not available to male traders until the Limited Liability Acts of 1861. However, equity did give a husband greater protection from his wife's debts, even where he was considered liable at law, because he could not be held liable for any contracts his wife made on her separate property. Hence the creditor trusted to her credit only, not his. If the separate property was officially vested in trustees by agreement, the husband was totally absolved from all responsibility even at law because the wife was the trustee's agent, not his. The trustee as the legal owner was responsible for both the wife's profits and her debts; but she was the sole beneficiary of the profits. Equity would therefore limit the debts to those payable out of the separate property, thus ensuring that the trustee would not personally suffer a loss.

Thus equity provided a means for women to trade that also limited their husband's liability for their debts even if he was created a trustee of her separate property. Once created, however, it is less clear how separate a wife's property really remained from her husband even if they were both in trade, and, as Chapter 3 shows, other family members may have been even less keen to formally recognise such property. Hunt has shown that some middling-sort wives made quite formal arrangements with their spouses to loan them the separate property with interest, but others were coerced or bullied into using it to pay off their husband's debts.[110] Restraint on anticipation, which was introduced in the late 1780s, was a legal instrument designed specifically to prevent husbands from 'kissing or kicking' their wives out of their separate property and was in common use by the nineteenth century.[111] It has been

[110] Hunt, *Middling Sort*, pp. 159–62, but all these cases were prior to 1780 and none concerned women with separate trades.

[111] Restraint on anticipation was a legal device originally conceived by Lord Chancellor Thurlow after he had been unable to prevent a husband (who had persuaded his wife to pledge her separate property to secure his debts) from taking all that property to pay off his creditors in 1785. This means of protecting a wife's separate property nevertheless effectively removed her power to alienate it during marriage. See Walter G. Hart, 'The Origin of Restraint upon Anticipation', *Law Quarterly Review*, 40 (1924), pp. 221–6.

viewed as yet another restriction on the agency of married women, even though its original intention was protective. However, this measure was unlikely to have been adopted so eagerly by those of the middling orders, who had far less to gain by it, than the relatives of wealthy heiresses attempting to prevent the dissipation of inherited family property. This was particularly so since marriage portions in trading families were frequently intended to be used for business purposes; but in families in which both spouses traded separately, the question was whose business.[112]

Roper's 1820 treatise presented a broader, more balanced picture of the whole English legal system than the earlier works had done and appeared to show how equity and common law could work in partnership without compromising each other. On occasions this may have been achieved by a degree of synthesis beyond what may have been suggested by disparate case results, but probably no more so than in Blackstone's *Commentaries*, which also sacrificed diversity for the sake of elegant clarity. Given the number of exceptions to coverture that Roper highlighted, it is perhaps not surprising that his definition of it was also less disabling to women than that provided by Blackstone. For Roper, coverture was merely a 'policy of law', created to prevent a husband from stripping his wife of all her property during marriage, and to prevent a wife from binding her husband by acts which 'might prove ruinous to both them and their family'.[113] This interpretation still assumed the wife to be the weaker partner, but did not entirely deny her a separate identity. Hence coverture was still under construction, and the legal fiction was concealing the fact that the laws had effectively changed.

Nevertheless, it would be a mistake to view legal treatises on the subject of married women's separate trading as evidence of a slow progress towards the more equitable provisions of the Married Women's Property Act in 1870, which gave every wife the right to the earnings of her own separate business. As the jurist Dicey pointed out, the most obvious way to reform the law would have been to give married women the same rights as single women. Instead, the Act merely gave married women in common law equitable rights to their separate property, leaving the fiction of *coverture* unchanged and conservatives unalarmed.[114] This imperfect fusion, however, confused many lawyers and common law judges who were unfamiliar with equity's principles.[115] It thus led to 'many curious legal rules, many doubtful problems and some injustice'.[116] One such injustice was that wives could still not be sued easily for their debts,

[112] See Hunt, *Middling Sort*, p. 152, on the different attitudes of elite and trading families towards marriage portions.

[113] Roper, *Treatise of the Law of Property*, pp. 97–8.

[114] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in the Nineteenth Century* (London, 1905; rep. 1917), pp. 387–9.

[115] Ibid., p. 388.

[116] W.S. Holdsworth, *A History of the English Law* III (London, 1903; rep. 1923), p. 533.

which as one businesswoman pointed out, meant that suppliers were less keen to provide trade goods since their chances of legally recovering any money owing were minimal.[117] Even after the 1882 Act, which did make wives liable for their debts to the extent of their separate property and made those in trade subject to the bankruptcy laws,[118] legal commentators were still trying to explain the balance between the rights and liabilities of each spouse. In order to retain her earnings a woman in business still had to prove that her trade was indeed separate. Hence the 'line between actual interference by the husband, so as to take the case out of the Statute: and the "reasonable assistance" which he may be expected to render to her: is often a very fine one.'[119] A wife was still technically only able to contract on the basis of her separate property and restraint on anticipation could still be applied.[120] The implicit assumption behind both the 1870 move towards creating separate property for wives and the earlier common law accommodations of wives' separate trading based on equitable principles was a model of family unity and a household economy which defined the liabilities of both parties so as to protect the whole. Yet the law could only imagine and define the family in one form with a nominal male head and with a common economic goal.

Conclusion

It seems clear that graphic descriptions of married women's disabilities under coverture should be treated with caution. Legal commentaries should not be taken as literal statements of women's legal status because such studies only distilled the relevant case law at any given moment in time. Moreover, the constant reinterpretation of coverture and its exceptions provides an insight into processes of legal change which cannot be said to have followed any clear linear trajectory. Adaptation to shifting social and economic conditions could only take place within the very limited possibilities defined by judicial or legislative reform, neither of which necessarily proceeded in the same direction. Nevertheless, for women in business, incremental judicial changes had a greater effect than the lack of legislative reform prior to 1870 suggests. Hence the paradox of the changeless but ever-changing law remains the defining paradigm for this narrative of imperfect adaptation, of incremental change and of constant reinterpretation. The treatises also show that wives could defend their separate business property, even in a court of common law, more than a century before the Married Women's Property Acts enshrined equitable principles in law. Married women did not acquire the same trading rights as men or single women; but the creation of numerous exceptions and the reinterpretation of existing law left – theoretically – plenty of space for them to continue to trade throughout the period 1700 to 1850.

[117] Holcombe, *Wives and Property*, pp. 182–3.
[118] Ibid., p. 203.
[119] Lush, *Law of Husband and Wife* (1884), p. 152, provided an entire chapter, on the continuing difficulties encountered when married women traded separately, pp. 149–63.
[120] Dicey, *Lectures*, p. 389, argued that the Married Women's Property Act adopted the conservative tactic of making married women's property separate by equitable means partly because Parliament did not wish to alienate the wealthy who relied on restraint upon anticipation to protect their daughters' property.

3

A customary privilege?

Common law, borough custom and the *feme sole* trader

> There is a difference between acts done by a *feme covert* and an infant: the one is incapable for want of natural judgement. . . . A *Feme covert* is only incapable for want of liberty, being sub potestate viri; but where the custom expressly enables her to act, in matters concerning her trade independent of her husband, she is exempted from that incapacity, and is under no other. If she can manage her trade she may surely borrow money.
>
> *Jewson vs. Read* (1773)[1]

One method by which married women in business could avoid the effects of coverture was by invoking the borough custom of *feme sole* merchant. In theory, the custom restored the economic 'liberty' that coverture denied women on marriage, although, as already noted, that denial was neither absolute nor clear-cut. Nevertheless, the existence of the custom has been seen as a bastion against the encroachment of patriarchal values embodied in the common law. According to this view, the custom was a valuable privilege for women in trade and the growth of common law jurisdiction is seen as a blow to women's economic autonomy.[2] The first part of this chapter therefore discusses women's access to local courts and customary law. It considers to what extent the existence of a pluralistic legal system could be beneficial to women in business and whether legal doctrine relating to women in trade may be shown to follow more than just a single, patriarchal imperative, as Gavigan has argued.[3] Instead, court judgments may, as Finn has argued, have been more informed by 'multiple layers of legal, social and economic reasoning'.[4] At the same time, however, the custom was the only legal way that a woman could be made fully *personally* liable for all her trading debts and therefore subject to a commission of bankruptcy.[5] From this perspective, the custom offered little protection to married

[1] PRO, *The English Reports, 1220–1867*, CD-Rom (subsequently *ER*), Lofft 134, 98, p. 574.
[2] Prior, 'Women and the Urban Economy', p. 103; Erickson, *Women and Property*, p. 6.
[3] Gavigan, 'Law, Gender and Ideology', p. 294; and see above, p. 28.
[4] Margot Finn, 'Debt and Credit in Bath's Court of Requests, 1829–39', *Urban History*, 21 (1994), p. 219.
[5] As discussed above, equitable traders could also be made bankrupt but they remained a

women whose husbands could instead hide behind their wives' liability.[6] The second consideration is therefore to examine to what extent the custom of *feme sole* trader could really be seen as a privilege for women in business.

The main sources for this study are the law reports of cases concerning *feme sole* traders in London. Although this means a very narrow focus on a (relatively) small group of women in trade, based on an even smaller number of legal reports, it does highlight a number of key issues. Only cases that dealt specifically with *feme sole* trader merchants have been analysed,[7] which excluded those cases cited as supporting case law (most of which may be found in the treatises) and resulted in a selection of fourteen cases between 1627 and 1852. In studying a different but directly comparable source to the legal commentaries a different narrative and chronology emerges which further highlights the drawbacks of retaining a single linear narrative in histories of women's legal and/or economic 'position' in society. A comparison of the verdicts in *feme sole* trader cases from 1627 to 1852, which, if taken at face value, appear to show an increasing number of cases in which the common law doctrine of coverture was upheld at the expense of the custom. Of the seven identified cases directly concerning feme sole trading between 1627 and 1776, only one returned a verdict that upheld *coverture*, and even that ruling was given with strict reservations.[8] The end of the Mansfield era and the accession of Kenyon in 1788 could be seen to herald a new era of conservatism or of a return to traditional patriarchal values. In only one of the seven cases reported between 1791 and 1852 was the borough custom upheld. At first glance, then, it would seem that the *feme sole* trader cases show women losing economic agency during the period in direct contrast to the evidence provided by the legal treatises. Yet this type of simple linear analysis not only obscures other aspects of legal, social and economic change but implicitly assumes that the custom was both a privilege and a necessity to enable married women to trade at all.

One of the reasons why the law reports apparently tell a different story from the legal treatises, despite the fact that the treatises were largely based on them, is because the reports were specifically written by lawyers for use by other lawyers.[9] As such, they concentrated on cases that turned on a specific point

more doubtful category, probably because their liability was more likely to have been limited to the extent of their separate property, the difficulties of establishing how this had been created (that could effect which creditors it would be held good against) and what exactly it comprised.
[6] Hunt, *Middling Sort*, p. 139; Bennett, 'Medieval Women, Modern Women', pp. 154–5.
[7] From *ER*, a searchable CD-Rom database of the English Law Reports.
[8] See below, p. 59, for discussion of *Jewson vs. Read* (1773), and p. 57 for one further case, *Langham vs. Bewett* (1627) in which the judges could not agree on a verdict.
[9] See Holdsworth, *Sources and Literature of English Law*, pp. 74–5, on how judicial decisions based on precedent necessitated the compilation of law reports from which lawyers could learn the principles of the common law.

of law or procedural question. The broad overview of women's position at law, in equity and in ecclesiastical jurisdiction which was found in some treatises was largely missing from the law reports. Reported cases were also heavily biased towards the untypical. None the less, they represented what were considered to be 'turning points' in judicial decision-making and as such may be used to trace a history of such points. As Staves argues, law reports are also useful for histories of 'legal ideology, or . . . what the profession publicly represented its rules and their rationales to be'.[10] However, historians face a number of problems when using these reports. The early reports, in particular, were privately published collections with no set style and they were often inaccurate. From around 1736, there was a greater degree of standardisation, which emphasised reporting of the judge's decision and the reasons for it rather than the lawyers' arguments; but standards still varied considerably. In the eighteenth and nineteenth centuries, reporters also increasingly stressed the rules of pleading because courts became ever stricter over the presentation and formulation of cases, which made it 'more possible for a skilful pleader to snatch a decision, in spite of a total absence of any substantial merit'.[11] Conversely, a lawyer unaware of proper procedure could lose even the strongest case, a point which was of particular importance for married female traders whose coverture necessitated the presence or naming of her husband for conformity's sake. Law reports are therefore particularly useful for the discussion here, because they highlight both issues of legal doctrine and procedure.

One thing the law reports cannot do is to give any indication of how many women in trade had access to legal systems outside the centralised uniformity of the common law. Nor do they allow historians to assess the probably far greater number of women who never resorted to official adjudication to settle commercial disputes. As H.W. Arthurs has argued, the 'rules' for:

> buying and selling, lending and borrowing, shipping and carrying are generated primarily by regimes of private ordering – the contract, the course of dealing, the ritual of exchange. It is extremely doubtful that more than the tiniest fraction of these transactions is made with conscious reference to formal rules and common or statute law. Nor does such law suddenly take over when disputes arise.[12]

Quite apart from private renegotiation or family intervention to settle disputes, which must have happened very frequently, lawyers could also settle cases out of court. As a result, only a small minority of cases would be likely ever to reach a courtroom, and of those that did many were not concluded there.[13] An even

[10] Staves, *Married Women's Separate Property*, p. 13.
[11] Holdsworth, *Sources and Literature*, pp. 97–8.
[12] H.W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-century England* (London, 1985), p. 51.
[13] See below, p. 71, esp. n. 12 on the high number of Chancery cases that did not continue beyond the pleading stage; see also Finn, 'Debt and Credit', p. 218 and n. 27, on how roughly

smaller minority would have been recorded, perhaps even fewer where women were involved. In a case in 1765, the prosecution pointed out that there was only one record of a bankruptcy commission ever having been taken out against a wife, arguing this to support the view that a married woman was not within the spirit of the bankrupt laws. Lord Mansfield, however, ruled that just because this was the only instance found, it did not 'follow that there was certainly none before it'.[14] The law reports in particular cannot be taken as any indication of the number of women involved in *feme sole* trader cases, because the reports were only intended to be examples of current case law.

Local vs. superior courts

Within the pluralist legal system tradeswomen had access to a number of courts, including many that operated outside the common law, although more research is needed to determine the extent of such access. As late as 1830, the superior courts of Westminster – Common Pleas, King's Bench, Equity and Exchequer – were handling some 90,000 lawsuits. Yet more than 300,000 claims were still being processed in over 300 local and special courts,[15] most of which operated on the basis of local customary law or according to equitable principles.[16] Both of these were principles that could operate to the advantage of female traders. Of particular interest were the local Courts of Requests, which grew increasingly prevalent from the mid-eighteenth century and were processing in the region of 400,000 claims annually by 1840. They were designed to facilitate debt collection, and operated on principles of local communal justice and commercial fairness. These were courts for small claims, often with a limit of just 40 shillings (although this was not an inconsiderable amount even in 1800), used predominantly by the lower-middle orders, and particularly by shopkeepers, a trade in which women were numerous.[17] However, Christine Wiskin's brief exploration of Birmingham businesswomen's use of local courts shows that those seeking legal advice from a local attorney were on a higher

half of all cases in the Bath Court of Requests in 1829 and 1839 were settled out of court. Earle, *Making of the English Middle Class*, p. 124, notes that the main object of issuing a writ was to call the debtors' bluff; less than one-tenth of those issued writs for debt in London in 1791 actually went to prison because the majority paid up or settled out of court; and see Craig Muldrew, 'Credit and the Courts: Debt Litigation in a Seventeenth Century Urban Community', *Economic History Review*, 2nd ser., 46 (1993), p. 27 on how just 4 per cent of cases in the borough court of King's Lynn reached judgment.
[14] *Lavie vs. Phillips* (1765), cited in *The Laws Respecting Women*, pp. 174, 175.
[15] Arthurs, *Without the Law*, p. 17.
[16] W.R. Cornish and G. de N. Clark, *Law and Society in England, 1750–1950* (London, 1989), pp. 30–1.
[17] For a description of the Courts of Requests, their limited jurisdiction, type of litigants and commitment to local communal justice, see Arthurs, *Without the Law*, pp. 26–34.

economic level than that of female suitors described by William Hutton in 1787 as using the Birmingham Court of Request. Since, unlike in London, she also found that businesswomen formed a very small proportion of those appearing in Coventry's Town Court, she suggests that they were reluctant to use court proceedings unless the sums involved were large enough to warrant litigation.[18] This is an area that would greatly repay further research, not only into the extent of tradeswomen's use of local courts, but also to throw light upon regional variations and the role played by the threat of litigation.

The borough custom of *feme sole* trading, however, relied on the existence of borough courts. From the medieval period, certain towns possessed one or more borough courts, usually granted under their original charters, which, *inter alia*, regulated disputes between traders before a court presided over by the Mayor and other officials according to a customary law which varied in different towns. In Lincoln, a trading wife could be imprisoned and her husband was not liable for her debts, and she could plead coverture only if she followed the same trade as her husband. In Fordwich, a plaintiff could implead even a woman with a separate business as a wife (presumably therefore making her husband still liable), and a wife could not bring an action without her husband.[19] In Cambridge, a woman could be charged as sole for anything concerning her craft, as long as her husband had not 'medeleth' in it.[20] Bateson noted long ago that while the common law took 'a short cut to clear doctrine', customs regulating relations between husbands and wives were never systematic. Instead, such customs provide evidence of the long persistence of the 'old family organisation of the household', and the difficulty burgesses had in fitting this into borough arrangements for freedom of trade and division of property.[21]

For historians attempting to assess the impact of the *feme sole* custom on women in trade, the question is: How long did these courts survive and how far could their local customary law resist the efforts to achieve legal unity or centralisation that resulted finally in the Judicature Acts (1873–75)? The Courts of Requests were replaced by county courts in 1846 but there is little consensus over the fate of borough courts. Cornish and Clark argue that, as long as a town itself continued to flourish, so would many of its tribunals, and note that borough courts in Bristol, Liverpool, Salford and Norwich survived until 1971, as did the Mayor's and City of London Court.[22] Many

18 Wiskin, 'Women, Finance and Credit', pp. 172–3. Finn, 'Debt and Credit', p. 22, found that female litigants from a wide social spectrum used the early nineteenth-century Bath Court of Requests, but there is little discussion of their occupational status apart from servants.

19 Mary Bateson (ed.), *Borough Customs* I (1904), pp. cxii–xiii.

20 Shephard, 'Manhood, Credit and Patriarchy', p. 91.

21 Ibid., pp. xix, c–ci.

22 Cornish and Clark, *Law and Society*, p. 30, and n. 51. Baker, *Introduction to English Legal History* p. 25, n. 32, notes that all these courts were abolished by the 1971 Courts Act, so

more local tribunals had, however, probably become moribund by the mid-eighteenth century when they were largely supplanted by Courts of Requests.[23] The survival of the *feme sole* trader custom is even harder to ascertain. There were at least thirteen boroughs in which the custom was known to exist in the medieval or early modern period,[24] and Erickson suggests that others remain unidentified. Prior, however, argues that by the nineteenth century only the London custom remained.[25] It is therefore not possible to provide a definitive answer to the question of how long the custom might have survived without further detailed research, but it would be equally mistaken to assume that it had vanished. The law reports were still citing the London custom in 1852 and the editor of the 1861 edition of the *Liber Albus* noted that it still held good in the City, which suggests that it may not have fallen completely into abeyance until after the Married Women's Property Acts rendered the distinction unnecessary. Although the law reports cannot show exactly when the custom ended or how widely it spread, they can give an insight into how far the superior courts could overrule the decisions of these inferior courts and to what extent the common law could allow the operation of a custom that clearly operated in opposition to its own principles.

William Bohun, author of *Privilegia Londini* (1702), was convinced that local rights and customs, and London's in particular, were a necessary bulwark against the operation of arbitrary power wielded by monarch and ministers. Whether he regarded the common law per se as an instrument of that power, however, is not so clear.[26] Under the City of London customs, wives could be considered as single women in a number of instances, such as if they were accused of trespass or had been battered. The custom of London, cited in cases concerning wives trading alone, was usually that recorded in the *Liber Albus* (1419), which stated that:

> where a woman *coverte de baron* follows any craft within the said city by herself apart, with which the husband in no way intermeddles, such a woman shall be bound as a single woman as to all that concerns her said craft. And if the husband and wife are impleaded, in such case the wife shall plead as a single woman in a

that ironically they survived longer than the superior common law courts of King's Bench and Common Pleas which were abolished in 1876.

23 Finn, 'Debt and Credit', pp. 212–13.

24 Cambridge, Chester, Exeter, Fordwich, Hastings, London, Lincoln, Oxford, Rye, Southampton, Torksey, Winchelsea, Worcester.

25 See Bateson, *Borough Customs*, pp. 227–8; Erickson, *Women and Property*, pp. 30, 246–7, and n. 40; Prior, 'Women and the Urban Economy', p. 103; Kowaleski, 'Women's Work in a Market Town', p. 146.

26 William Bohun, *Privilegia Londini: Or, The Rights, Liberties, Privileges, Laws and Customs of the City of London* (London, 1702; rep. 1723), p. 5, argued that if the fundamental rights of London were overturned, 'the whole Nation would soon be overspread' by a plague of arbitrary power.

> Court of Record, and shall have her law and other advantages by way of plea just as a single woman. And if she is condemned she shall be committed to prison until she shall have made satisfaction; and neither the husband nor his goods shall in such case be charged or interfered with.[27]

The *Liber Albus* thus made it perfectly clear that the custom was a double-edged sword. In the 1861 edition the editor noted that '*coverte de baron*' was 'an old legal term' which simply meant 'protected by a husband'.[28] Thus, just as in the legal commentaries, the fiction had been reinterpreted.

Perhaps just as importantly for women in business the *Liber Albus* also stated that if any wife:

> as though a single woman rents any house *or shop* within the said city, she shall be bound to pay the rent of the said house or shop, and shall be impleaded and sued as a single woman, by way of debt if necessary, notwithstanding that she was coverte de baron at the time of such letting, supposing that the lessor did not know thereof.[29]

Under London custom, married women acting as if single were therefore also personally liable for the rent on their premises, regardless of whether they were for commercial or domestic purposes. The important factor, which was also commonly cited in Chancery cases, was that the wife was *known* to have been acting for herself regardless of her marital status.[30] In the Mayor's Court case of *Fabian vs. Plant* (1691), Hannah Plant was described by the defence as living and trading as a lace-maker in a house, apart from her husband, on which she paid the rent. Fabian had sold trade goods to Mrs Plant for which she still owed £57 at the time of her death. Despite the prosecution's assertion that Mrs Plant was trading in a house rather than a shop and that her husband had retired from the Company of Hatbandmakers to preach as a dissenting minister, the custom was upheld. Fabian was held to have known 'her and her trade' and to have therefore traded with a *feme sole* merchant at his own peril, so her husband was not liable to pay her debts after her death.[31]

City wives could therefore trade alone and rent out the premises necessary to do so, but in both cases had to make it clear to other people that they were acting as if single. The consequence of this agency, should they fall into debt, was imprisonment. In the medieval period, trading wives had had to register

[27] Henry Thomas Riley (trans.), *Liber Albus: The White Book of the City of London* compiled in 1419 by John Carpenter and Richard Whittington (London, 1861), p. 181. For trespass and battery see p. 182; in addition, a husband could claim 'the aid of his wife' and take an extra day to consult with her if he was accused of debt over a contract that she had signed for him.

[28] Ibid.

[29] Ibid., pp. 181–2; emphasis added.

[30] See below, pp. 79–81.

[31] *ER, Fabian vs. Plant* (1691), 1 Shower KB 183, 89, p. 525.

their right to trade with the local authorities or at least publicly declare their intention to trade sole.[32] This seems to have died out, because even the seventeenth-century case reports state only that a wife's sole trading status should be commonly known. It seems likely that the main reason for reliance upon public reputation was the importance of credit as a facilitator of trade. Other traders had to know with whom they were dealing, and what recourse they would have in case of debt. In 1798, counsel in *De Gaillon vs. L'Aigle* argued that it was 'for the benefit of the *feme covert* that she should be liable to an action . . . otherwise she could obtain no credit, and would have no means of gaining her livelihood'.[33] In other words, it was thought that unless a woman could be held personally liable, other traders would be reluctant to extend her the necessary credit on which so many business transactions relied. This was an argument which, as we have already seen, was still being used in the nineteenth century when the first Married Women's Property Act failed to make wives easily accountable for their debts at law. The evidence thus suggests that the label of *feme sole* trader was far more relevant in law as a category of debt recovery than as a means of conveying the right to trade. However, since *feme sole* trading did confer full liability for debts owing, in order to reclaim the 'protection' of coverture, indebted trading wives sued under the borough custom in a local court had to appeal to the common law in a superior court. In more than half of the cases studied this is precisely what *feme sole* trader wives appear to have been doing, often with their husbands' assistance.

London had at least ten city courts, including numerous Courts of Requests, which by the early nineteenth century were handling an enormous case-load.[34] The court in which *feme sole* trader cases were initially tried was the Lord Mayor's Court held in the Guildhall. It was a court of record, which could try any matter arising within the liberty of the City of London including debt to any value. The Recorder of the City of London was the official judge but the Lord Mayor and aldermen could sit with him and trial was by jury. Moreover, like the Exchequer, it was a court of both common law and equity. It was also relatively simple, quick and cheap to bring an action before this court. A plaintiff had to go to one of the four court attorneys who would empower a sergeant to arrest the defendant, who had to find bail immediately or be imprisoned in one of the compters. Bohun noted in his 1723 edition that it would cost 30 shillings to bring an action to trial within fourteen days and,

[32] Bateson, *Borough Customs*, p. cxii; Kay E. Lacey, 'Women and Work in Fourteenth- and Fifteenth-century London', in *Women and Work in Pre-Industrial England*, ed. L. Charles and L. Duffin (1985), p. 44.

[33] *ER, De Gaillon vs. L'Aigle* (1798), 1 Bosanquet & Puller 359, 126, p. 951.

[34] Bohun, *Privilegia Londini*, pp. 290–472, gives detailed accounts of ten City courts and their proceedings. Arthurs, *Without the Law*, p. 26, found that by 1830 a single Court of Requests in Tower Hamlets was handling almost 30,000 claims a year.

if a defendant took more than six weeks between finding bail and entering a plea, he would be unable to remove the case to another court. The equity division was usually held before the Mayor and Alderman but again the Recorder sat as judge and an action was brought by bill of complaint, costing approximately 10 shillings.[35] A defendant in a common law case could issue a bill of complaint in the equity section to act as an injunction to stop the case at law. As will be shown subsequently,[36] this was not an uncommon procedure in Chancery, and there is nothing to suggest that women did not take advantage of it in the City Court. If there was no action pending at law a defendant had only eight days to answer the bill in equity. In theory, therefore, businesswomen in London could have relatively fast and inexpensive access to both customary and equitable law, which gave them the ability to sue and be sued.

Craig Muldrew has argued that local courts were very accessible institutions, and his research on the Palace Court of Westminster supports the view that women were frequent litigants there.[37] Muldrew found that by 1686 the Palace Court was handling some 20,000 cases per annum, and had effectively become a borough court for urban areas of London west of the city. Of 413 cases Muldrew sampled for June 1686, 36 per cent involved women, and in 15 per cent of the total sample the plaintiffs were women. For Muldrew, this constitutes 'evidence that women played a crucial role in the business of the capital'.[38] Combined with the evidence of the accessibility of the Mayor's Court discussed above, it also provides a possible explanation for the fact that all of the reported *feme sole* trader cases were tried in the superior courts but only one law report dealt with a case of a wife suing to recover debts rather than being sued. It would appear, in other words, that women wanting to sue as *feme sole* traders may have done so in a local court of record, while those seeking a defence against being sued would try to have the case removed to a superior common law court in order to plead coverture in their defence.

In the single case where a wife did attempt to sue in a superior court, *Caudell vs. Shaw* (1791), she had been widowed before the case came to court. The widow sued for goods sold and delivered by her while she had been married but trading separately from her husband in Cheapside, although they had lived in the same house. She had obtained a verdict in her favour but the defence managed to obtain a retrial at Westminster. Despite being widowed, she was

[35] Bohun, *Privilegia Londini*, pp. 250–3. A bill of complaint had to be signed by one of four city councillors which cost 6s 8d, 4d a sheet to draw, 6d a sheet to engross, 2s to enter in court and 3s 4d to pay the attorneys.
[36] See below, pp. 73, 75, 85–6.
[37] Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Basingstoke, 1998), p. 271, also argues that legal accessibility was very 'necessary in a society where credit relations were so intertwined'.
[38] Ibid., pp. 233–4. However, Muldrew could not find enough surviving records for the Mayor's Court and other London courts to assess women's participation further.

claiming her prior right to have traded as a married woman on the basis of the *feme sole* custom of London. The court insisted that she should either have sued the case as a *feme sole* in the city courts or have sued at common law through representatives of her dead husband, because she had still been a *feme covert* while she was trading.[39] The case was tried before the conservative Kenyon, and was only the second report in which coverture was upheld at the expense of the custom. It is quite possible that these procedural abnormalities were used to support both Kenyon's belief in the dominance of the common law and the morality of coverture. As Cornish and Clark point out, law reports give a useful impression of the 'technical objections and procedural stratagems', fostered by the adversarial nature of the eighteenth-century legal system.[40] However, far more frequently the law reports show that *feme sole* traders used procedural stratagems to their own advantage. Eight of the selected fourteen reported cases show evidence of some form of legal manipulation, most commonly in the form of appeals to a 'higher' court to review an inferior court's decision by a prerogative writ.

A *feme covert* sole trader who had been imprisoned by the city court under the custom of London could apply for relief on a writ of habeas corpus, which could remove a defendant imprisoned for debt by an inferior court to the court above. It had been a common remedy against the 'misuse' of borough jurisdiction since the fourteenth century.[41] In a report dated 1627, Mrs Bewett, whose case was cited in both *Baron and Feme* (1719) and *The Laws Respecting Women* (1777)[42] as evidence of the principles of *feme sole* trading, had used this method to attempt to obtain her release. Her defence argued that she should be discharged because she followed the same trade as her husband and was 'but servant to her husband, and the wares coming to his use, he, by intendment, is to be sued: and this case is out of the custom'.[43] Her husband, John Bewett, had been serving in the army overseas while she was trading, and he had since returned 'bare and needy'. As Mrs Bewett would have had to cite him in order to bring the case at all, he was in all probability supporting this attempt to regain his wife's economic assistance. Three of the five judges upheld the principle of the *feme sole* trader and declared that they ought 'not to meddle' in the business of the City Court, 'for in London they are judges of their own customs, and not otherwise; and therefore we ought not to take away their privileges'.[44] Here the common law judges seem to have viewed the borough custom as a local authority 'privilege' above that of a wife but

[39] *ER*, *Caudell vs. Shaw*, 4 Term Reports 364, 100, p. 1066.
[40] Cornish and Clark, *Law and Society*, p. 25. Lord Mansfield had tried to 'free the main branches of process but under his successors, the parasitic growths crept back'.
[41] Baker, *Introduction to Legal History*, pp. 126–8.
[42] Anon., *Baron and Feme*, p. 301; Anon., *Lawes Respecting Women*, p. 177, but note variant spellings. See also above, p. 33.
[43] *ER*, *Langham vs. Bewett* (1627), Croke Car 68, 79, p. 661.
[44] Ibid., p. 662.

this would have left her liable for the debt. The other two judges thought that because Mrs Bewett had followed the same trade as her husband she was acting as his servant so that the goods were provided for his use and he should be sued, thus discharging her. In the event, neither side prevailed and no action was taken because Mrs Bewett came to an agreement with her creditor, so the case was settled out of court.

In *Moreton vs. Packman* (1669),[45] which was also cited in *Baron and Feme* (1719), another attempt at using habeas corpus was blocked by the superior court even though there was some doubt about whether the trade of victualler fell within the custom. Again the superior court held that the case and the decision over whether victualling could be warranted by the custom could only be decided by the City Court. In *Pope vs. Vaux* (1776),[46] the superior court again decided that there were insufficient grounds to remove the case from the Mayor's Court. After this date there are no more reports of attempts to remove cases from the City courts in this manner, so it seems probable that defence lawyers abandoned this method of directly challenging the jurisdiction of the borough courts, relying instead on challenges to substantive points of law.

Custom vs. common law

Although later cases still show strong evidence of procedural stratagems, the grounds for argument shifted more towards the relative power and morality of the principle of coverture over custom and an attempt to balance the 'rights' of debtors and creditors. The boundaries of economic and moral imperatives thus became highly contested areas, particularly as judicial decisions seem to have partly reflected swings between 'progressive' and conservative attitudes. Atiyah has divided the period into three phases. The first, a period of modest reform and increasing acceptance of economic liberalism, was dominated by Mansfield and continued through to around 1793. The second, which ran from 1793 to 1830, Atiyah has characterised as a 'disastrous period for the law and legal institutions'. It was dominated by the conservative Chief Justices Kenyon and Ellenborough and the Lord Chancellor Lord Eldon, who between them opposed 'practically all legal reform for nearly thirty years'.[47] From 1830 to 1870, judges more in sympathy with political economy, Benthamite legal reform and commercial enterprise rose to prominence.[48] It is a necessarily sweeping generalisation but nevertheless provides a broad framework within which to discuss the role of gender in relation to other issues in *feme sole* trader cases. Discourses around gender did not exist in isolation but always within a

45 *ER*, *Moreton vs. Packman* (1669), 1 Modern 26, 86, p. 705.
46 *ER*, *Pope vs. Vaux* (1776), 2 Blackstone W 1060, 96, p. 624.
47 Atiyah, *Rise and Fall of Freedom of Contract*, pp. 360–9.
48 Ibid., pp. 369–74.

dynamic relationship with debates about other related legal, social and economic concerns. On the legal and social front one of these issues was separate maintenance contracts, cases concerning which could involve wives in trade.[49] But more importantly the judicial decisions and moral concerns involved in separate maintenance cases could, as discussed earlier, also impact on decisions in *feme sole* trader cases. Staves describes the period 1675 to 1778 as one in which equity courts were increasingly favourable towards separate maintenance contracts and contract logic, but from 1778 to 1800 there was a struggle over whether common-law courts would accept equitable principles and fears that the application of contract logic to marriage produced socially disruptive consequences. After 1800 the courts reaffirmed the legitimacy of separate maintenance contracts but imposed stricter controls over contracting parties, which Staves interprets as a revival of deeper patriarchal structures.[50] However, although in later reports of *feme sole* cases, coverture and the patriarchal values it embodied does seem to have become the dominant doctrinal position, in most of these cases there were other points to be considered, and fact-based exceptions did not disappear.

As early as 1765, the extent to which the custom could challenge the common law doctrine of coverture in the interests of trade was questioned. In *Lavie vs. Phillips* (1765), the defence argued that it was 'convenient to trade that the wife should sue and be sued; but no reason, that (subject to this control) the husband should not have the ultimate property'.[51] In this case, cited in *The Laws Respecting Women* (1777), Lord Mansfield held that the custom 'as a good one, use may be made of it in any Court in the kingdom',[52] particularly as a defence by the husband. Hence, as discussed earlier, Mansfield supported the use of the custom as an aid to free trade.[53] However, in 1773 even Mansfield was effectively forced to reverse his decision in a blatant case of legal manipulation. *Jewson vs. Read* is one of the least clear reports but the facts of the case appear to have been as follows.[54] Mrs Jewson was a wealthy milliner, 'dealing on paper-currency' up to £70,000. She borrowed £9,000 on a bond from Mr Read, an apothecary, and entered into a warrant of attorney to confess a judgment[55] on her own account without her husband's apparent knowledge. She subsequently went bankrupt and was

49 See e.g. *Cecil vs. Juxon* (1737), an equity case often noted as supporting case law in legal treatises, in which the judge upheld the wife's right to her stock in trade as a milliner, when her husband had returned after fourteen years' absence and tried to claim it as his own. See Staves, *Married Women's Separate Property*, p. 176.
50 Ibid., pp. 175–95.
51 *ER*, *Lavie vs. Phillips*, 1 Blackstone W 570, 96, p. 330. See also above, p. 37.
52 Ibid.
53 See above, p. 36.
54 *ER*, *Jewson vs. Read* (1773), Lofft 134, 98, p. 573. See also a summary of the case in *ER*, *Caudell vs. Shaw*, 4 Term Reports 364, 100, p. 1066.
55 A way of acknowledging or registering the existence of a loan or bond.

represented in court by her assignees. Read wanted to be included among her creditors but she applied to have the judgment set aside on the grounds of irregularity; this was because she had been declared a *feme sole* whereas now she claimed to be a *feme covert* in joint trade with her husband. There was a strong suspicion of fraud in the case, particularly since Mr Jewson had used part of the money borrowed for his wife's business to build a house and, if Mrs Jewson was declared a *feme covert*, she could evade repaying Read.

The court had to decide whether the bond was void because it had been taken out by a married woman on her own and therefore the confession of judgment on it was an error, or whether the custom could be extended from simple contracts to include bonds. It was also questioned whether the custom was valid at all in a superior court. Lord Mansfield wanted to 'give the creditor a chance' to recover his money and to acknowledge the custom, but he was not prepared to allow that a married woman could give a bond, which was void under common law and could serve to bind her heirs and was an action not covered specifically by the custom. This is one of very few cases in which Mansfield was not willing to hold a *feme sole* trader liable for her debts in the interests of commerce. Perhaps the sums of money involved, and particularly the £70,000, which he felt 'would have startled the City at the time of making the custom',[56] seem to have convinced him that the custom was not meant to cover such eventualities. However, despite the verdict supporting coverture, Mrs Jewson's agency is paramount in this case. She seems to have dealt regularly in huge sums of money, and managed to borrow a large sum and get it officially sanctioned with no apparent difficulty, all on her own behalf. It was only when she went bankrupt that she attempted to reverse this by successfully pleading her coverture.

During the trial, Mr Jewson had been urged to bring a writ of error, a method of questioning substantive points of law. In 1776, during *Hatchett vs. Baddeley*, a case frequently cited in later *feme sole* trader cases, defence counsel had argued that the 'very admission of the fact of *coverture* destroys the action. If a *feme covert* appears as a *feme sole* and has judgement against her, she and her husband may set it aside by writ of error, alleging the *coverture*.'[57] In summing up, the judge argued that to allow a wife to contract or be sued alone would overturn 'the first principles of the English law' and the consequences would result in numerous 'legal absurdities.'[58] This was thus a restatement of the necessity of maintaining the principle behind the legal fiction of marital unity of persons upon which so much law relating to marriage rested. It could indeed be seen as evidence of a resurgence in the subordination of women to the bonds of coverture but the moral (as opposed to economic) considerations in the case were considerable. The woman in question had eloped from her husband and

[56] ER, *Jewson vs. Read* (1773), Lofft 144, 98, p. 578.
[57] ER, *Hatchett vs. Baddeley* (1776), 2 Blackstone W 1079, 96, p. 363.
[58] Ibid., p. 367.

was not living separately with his permission. Even though the decision was later cited in *feme sole* cases to support stricter readings of coverture it did not necessarily adversely affect *feme sole* traders because, as in the case of Mrs Jewson, coverture was precisely the verdict many women hoped for.

One such similar case was that of *Beard vs. Webb* (1800), in which the Tory Lord Eldon upheld coverture, but again there are a number of considerations that prevent the case from being read as simply another reassertion of patriarchy. Arabella Beard, a married upholsterer, was sued for debt as a *feme sole* trader by the custom of London in the court of King's Bench and appeared in court on her own account with her attorney. She lost the case and brought a writ of error with her husband Henry, on the grounds that under common law she could not have used an attorney in the court without her husband who should also have been named in the suit for conformity's sake. Lord Eldon made it clear that the custom of London should be seen as executory only; that is, it attached only to the City courts and could not support an action in the superior courts. He argued that even in the City Court the husband should have been named for conformity. Hence his first objection on procedural grounds was upholding the centrality and dominance of the common law. Furthermore, Lord Eldon pointed out that there were a number of difficult cases concerning a married woman's separate property currently undecided, which questioned her position in equity and the ecclesiastical courts, and how far the common law should provide remedies beyond these. He was equally resistant to any suggestion that the common law should bend to commercial necessity. He declared that:

> if the law has decided that a feme-sole trader in London cannot be sued elsewhere than in the city courts, those who deal with her must take their remedy as the law has given it to them. Whatever may be the effect of the prevailing fashions of the times, I do not think that the argument of inconvenience, arising out of those fashions, can at any time be relied upon against a current of decisions: and I am ready to say, that if the policy of the law has withheld from married women certain powers and faculties, the courts of law must continue to treat them as deprived of those powers and faculties, until the legislature directs those courts to do otherwise.[59]

Hence Eldon was greatly concerned with maintaining the status quo between the plurality of legal systems and of upholding the authority of the common law against prevailing commercial 'fashions'.[60] Unlike Mansfield, Eldon was therefore unwilling to import equitable principles into the common law, or to accept that it could be changed except by statutory legislation, even

[59] ER, *Beard vs. Webb* (1800), 2 Bosanquet & Puller 108, 126, pp. 1183–4.
[60] At this point Eldon was still a common law judge but he became Lord Chancellor from 1801 to 1827 and in Chancery his conservatism was evident in attempts to reverse earlier decisions on the legality of separate maintenance contracts. Staves, *Married Women's Separate Property*, pp. 184–6, 189, notes that Eldon was anti any form of marital separation

if some legal treatises still suggested that a more flexible situation existed. However, Eldon's argument also made it clear that married women were *de facto* acting as traders, if at some potential risk to all concerned. He upheld coverture in the common-law court, but stressed that there were other 'remedies' against married women available in other courts. Eldon was also concerned to maintain the relationship between the law and 'private families, constituting together that great family called the public'.[61] It has been argued earlier that legal doctrine as reproduced in treatises became increasingly concerned with balancing family members' liability and, under London borough custom, even children could be held liable for debt if they kept a shop or traded goods.[62] Although the family model implicit within contemporary legal doctrine always figures a male head suggesting the persistence of patriarchal ideology, Gavigan has argued that feminists need to study how legal procedures reproduce 'familial' ideology rather 'male' ideology per se.[63] Using this reading, Mrs Beard appears not to have been a victim of patriarchal ideology but acting with her husband to manipulate the legal concept of family within which an appeal to coverture could result in restoring her contribution to the family economy.

In some cases, upholding the doctrine of coverture prevented husbands from evading debts by claiming that their wives were *feme sole* traders. In 1825 Mr Anderson, a baker and confectioner, was sued for debts owing by two grocers, who had gone to his premises to demand payment where they found him 'in working dress'.[64] Anderson told them to speak to his wife, who said she could not pay; but the couple later sent their son with some money. In court, Anderson claimed that his wife employed him but that he received no wages and that they lived in the same house but did not cohabit. As he had told the grocers that they would get no more than 4 shillings in the pound if they sued him, the court was of the opinion that he was well aware of the extent of his liability by maintaining such an arrangement. Witnesses agreed that Mrs Anderson paid the rent and rates, so her name was on the rate books, and that she was employed by the parish to make bread and had been given credit in her own right by other tradesmen. It was revealed that Mr Anderson had been a baker in the same house but had been sent to prison, during which time his goods had been sold under a distress but were bought back by a friend for Mrs Anderson, who carried on in business. After Mr Anderson's discharge

except for cruelty and determined to leave any matters concerning it to the ecclesiastical courts. With regard to new commercial enterprise, Atiyah, *Rise and Fall of Freedom of Contract*, pp. 366–7 notes that Eldon made 'a thorough nuisance of himself' on the subject of new companies which he treated as illegal monopolies.

61 Ibid., p. 1182.

62 Riley, *Liber Albus*, p. 193; Lacey, *Women and Work*, p. 45: girls from age 15 and boys from age 14 were liable for any debts concerning their craft or trade.

63 Gavigan, 'Law, Gender and Ideology', pp. 293–4.

64 ER, *Petty & Another vs. Anderson* (1825), 2 Carrington and Payne 38, 172, p. 18.

under the Insolvency Act, he returned to live with his family again. The court found for the plaintiffs on the grounds that, even if Mrs Anderson was running the business, she must have been acting as her husband's agent and with his knowledge and consent, and therefore under coverture he was still liable for 'her' debts. At a retrial, the review judges refused to change the verdict and commented that 'the granting of new trials, of late, has been too much a matter of course'.[65] Hence husbands were equally able and willing to manipulate both the concept of coverture and the legal system itself, in the interests of maintaining a viable household economy.

The problem with the household economy, as Margaret Hunt has pointed out, is that it presumes a model of family harmony that was far from present in all households.[66] The *feme sole* trader custom could function to protect a husband from his wife's debts, which was definitely to his advantage. But it also protected trading families, probably in much the same way as transferring property into a wife's name today can help to protect a bankrupt husband's assets from his business creditors. This would have been especially valuable prior to the advent of limited liability for families that were not sites of marital discord, because to assume that most were inharmonious would be as erroneous as assuming a state of universal marital harmony. Even J.S. Mill's polemical work *The Subjection of Women* (1869) argued that 'men do not inflict, nor women suffer, all the misery which could be inflicted and suffered if the full power of tyranny with which the man is legally invested were acted on'.[67] Cases like those of Mrs Anderson and Mrs Bewett also suggest that it was not only widowhood that propelled wives into taking over family businesses. Women whose husbands had gone bankrupt, been imprisoned, or who suffered some other financial or physical misfortune had to operate as *feme sole* traders. Margaret Hunt found numerous instances of wives and even sisters or daughters running the businesses of male relatives gaoled for their involvement in radical or illegal publishing.[68] As Defoe put it when commenting on the many disasters that could befall trading families, women 'are not so helpless and shiftless creatures as some would make them appear in the world; and we see whole families in trade frequently recover'd by their industry'.[69] Indeed, it seems that legal problems arose more often when the husbands returned but did not take back the business than when their wives were operating alone.

65 Ibid., p. 19.

66 Hunt, *Middling Sort*, pp. 134–42.

67 J.S. Mill, *The Subjection of Women* (London, 1869; rep. 1974), p. 34.

68 Margaret Hunt, 'Hawkers, Bawlers, and Mercuries: Women and the London Press in the Early Enlightenment', in *Women and the Enlightenment*, ed. M. Hunt (New York, 1984), pp. 53–4.

69 Daniel Defoe, *The Complete English Tradesman*, I and II (London, 1738), p. 296, also urged wives either to save their husbands from ruin or to take over completely 'if he is forced to fail and fly', p. 288.

Privilege vs. liability

The question of how far the custom of *feme sole* trading could be considered an advantage or a hindrance to married women in trade is therefore a complex issue in which the liabilities of other family members also have to be considered. The advantages or disadvantages the custom could actually confer also need to be separated from the courts' views of this ancient custom. It is possible to consider the latter question from a different angle by looking at cases in which the 'rights' of English women in trade were compared to those of women from European countries whose laws recognised a form of community of ownership between married couples. In parts of France, Germany and Spain, and in areas of European North America, legal systems recognised a co-ownership of acquisitions and/or movables between husband and wife.[70] English law had remained undecided about the position of married women under systems of community of property until the end of the thirteenth century. Once the common law had lost its jurisdiction over testamentary matters to the ecclesiastical courts, it ceased to consider the ownership of property after death and vested the wife's chattels in her husband during their lifetime.[71] Holdsworth argues that the common law thus effectively made the law of the nobles applicable to all classes. Among the lower orders, a system of community of ownership had prevailed because most owned only movables and distinguishing who owned what was difficult. In England, this 'law of the smaller folk' effectively disappeared *except* in some of the borough customs.[72] It is possible to compare how the common lawcourts viewed the concept of the borough custom and the common law doctrine of coverture against European models of community of property in three cases covered by the law reports.

In 1792 a Frenchwoman and her husband emigrated to England, but in 1795 he gave her power of attorney to transact his business while he went to Hamburg. Once alone however, Victoire Harel L'Aigle cohabited with a M. Montelun 'while carrying on trade with him' and bore his child. A client, M. De Gaillon, asked Madame L'Aigle to procure £700 of merchandise for which he paid her £300 on account and sent £600 of goods to her husband in Hamburg for which the client expected brandy or Hollands to that value in return. Madame L'Aigle gave De Gaillon a receipt for the £300 in her own name but no goods arrived from Hamburg, so she gave him £100-worth of

[70] For Europe, see Holdsworth, *History of English Law*, pp. 521–2; for America, see Angel Kwolek Folland, *Incorporating Women: A History of Women and Business in the United States* (New York, 1998), pp. 22–4.

[71] Holdsworth, *History of English Law*, p. 524, notes that if, as with property, the common law had been obliged to consider a husband and wife's rights to each other's chattels after death then it may not have given the wife's chattels absolutely to her husband during marriage. Although a husband retained control over real property during marriage the land returned to her or her heirs after his death.

[72] Ibid., pp. 524–5.

goods and four bills for £50 each in her husband's name. However, although John Harel L'Aigle accepted the bills, he refused to pay them when they became due, so De Gaillon had Madame L'Aigle arrested. The case was tried in 1797 and Madame L'Aigle pleaded coverture in her defence, to which De Gaillon replied that her conduct (with Montelun) had been such that he no longer believed her to be married. This was a blatant attempt to get the court to focus on Madame L'Aigle's immorality because in the letter requesting her to set up the deal he had told her that he wanted to trade with 'your husband'.

The court did not want to decide whether her marriage was valid, only whether Madam L'Aigle had used the £300 advance herself for her own separate trade. However, in deciding to allow Madame L'Aigle's coverture to be put on record, Justice Buller noted that the question of the parties' nationality was of great importance. He argued that:

> In France married women have many rights, which are allowed to none but single women in this country. If she received the £300 on her own account, she is entitled to no favour. A discharge is a favour; and the question now is, whether we are to grant a favour or not?[73]

This clearly illustrates the paradox of the *feme sole* trader custom. Buller believed that French law conferred 'rights' that English married women could not claim, but in order to grant the 'favour' of a discharge she would have to claim the protection of the English system of coverture. Madame L'Aigle was discharged on common bail but the case was presented again in 1798,[74] by which time John L'Aigle had returned and was living in Westminster, although it is unclear whether he and Victoire had resolved their marital difficulties enough to cohabit. Madame L'Aigle's defence argued that she was a married woman and could only be sued as a *feme sole* under the custom of London, in which case her husband should have been named for conformity, but that had not happened. Buller stated that in cases where a husband was abroad, 'the disability of the wife was suspended' and the other review judges concurred with him. Justice Heath added that it was 'for the benefit of the *feme covert* that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of obtaining her livelihood'. In the reviewed case, then, the judges appeared to view coverture as a 'disability' and the custom as a favour, not because it conferred contractual rights but because a woman's personal liability facilitated the acquisition of credit. However, although the court upheld the right of the *feme sole* trader, it meant that Madam L'Aigle was not granted the 'favour' of a discharge and so lost her case.

By contrast, in *Williamson vs. Dawes* (1832), the English wife of a bankrupt husband (who had absconded abroad) had traded as a *feme sole* but successfully

[73] *ER, De Gaillon vs. L'Aigle* (1797), 1 Bosanquet & Puller 8, 126, p. 749.

[74] *ER, De Gaillon vs. L'Aigle* (1798), 1 Bosanquet & Puller 357, 126, p. 950.

pleaded coverture to avoid paying her debts. Again, given the later date, this could be seen as evidence of an increasingly strict application of coverture, but there were other considerations. It was established in both cases that the women in question had traded openly as *femmes soles* and had been recognised as such by other traders for a substantial period of time. However, in Mrs Dawes' case there was no hint of sexual impropriety on her part and she was clearly the victim of a man who had escaped to France after being served with a bankruptcy commission. As this case appeared after Kenyon's famous *Marshall vs. Rutton* (1800) decision, it was held that nothing short of the husband's civil death could leave a married woman 'subject to the liabilities of a *feme sole*'. And because Mr Dawes' absence was voluntary, it could not confer to 'the wife the privileges or affect her with the liabilities of a *feme sole*'.[75] Mrs Dawes was therefore 'protected' from her creditors. Perhaps even more pertinently, the judges' decision also reflected a degree of hostility towards the French engendered by long years of military and commercial conflict. Justice Bosanquet stated that, in the earlier case of *De Gaillon vs. L'Aigle*, 'the husband was a foreigner, which makes an essential difference in the case'.[76] Some legal treatises point out that the law could be applied differently if one of the parties was an alien enemy,[77] but it is possible that there was also a degree of rivalry between the two legal systems.

A similar conflict between English common law and European systems of community ownership was also visible in the 1824 case of *Cosio and Pineyro vs. De Bernales*. A husband and wife who traded as partners in Spain attempted to sue De Bernales in the Court of Common Pleas for *assumpsit*, which in this case was probably a breach of contract, since it appears that the defendant had already received the money. The defence objected that under English law the wife should not have 'joined in the action, as she, as a *feme covert*, could have no property'.[78] The judge held that the plaintiffs must provide proof that a *feme covert* in Spain could engage in trade on her own account so that they could 'put a proper plaintiff on the record', before he would even consider whether under Spanish law a husband and wife who traded as partners could sue jointly in an English court. Furthermore, if the wife chose to sue as a *feme sole*, she could do so only by the custom in the City courts and not in the superior courts. Thus, even if Mrs Pineyro could have proved her right to trade as a married woman in Spain, the judge implied that her case could be heard only in the City courts where a similar customary right existed for English women and not under the auspices of the common law. The defence could not provide such proof at that time and the case was effectively lost over a

[75] *ER, Williamson vs. Dawes* (1832), 9 Bingham 292, 131, p. 624.

[76] Ibid., p. 626.

[77] For a particularly partisan approach see Anon., *A Treatise of Feme Coverts* (1732), p. 104. See also above, p. 41.

[78] *ER, Cosio and Pineyro vs. De Bernales* (1824), 1 Carrington and Payne 266, 171, p. 1189.

technicality of pleading. A note on the text adds that in all probability the plaintiffs' attorney was unaware that they were husband and wife, one called Cosio and the other Pineyro, because it was common on the Continent for a wife to continue to use her first surname or simply to add the husband's surname after both of hers. Whatever the reason, at this time the common-law court seems to have been extremely reluctant to accommodate foreign customs, the 'privileges' conferred by which, perhaps not surprisingly, were viewed as even more alien to the system of English common law than were local borough customs.

Fifty years earlier, Lord Mansfield had also compared the use of borough custom within a common lawcourt with that of foreign laws. In *Jewson vs. Read* (1773), on the question of whether an action on the custom of London could be maintained in a common lawcourt, it was argued that the customs of London were not the only ones to have been proceeded upon. Mansfield declared that 'when a right is established by the law of France and the party comes here, the debt must be recovered here, according to the law of France; of which the court will take notice on information upon evidence'.[79] The degree to which common lawcourts were willing to recognise 'foreign' systems of law therefore varied over time. This is a topic that will repay further examination by legal historians. Nevertheless, it seems that the problems around delineating the appropriate jurisdictions in separate courts with different systems of law, whether local or foreign, was an important factor in deciding the legitimacy or otherwise of *feme sole* traders. Therefore the question of the rights and privileges of *feme sole* trading was also inextricably bound up within the administration of a pluralistic legal system. What seems to have been under consideration was not only the rights or privileges conferred to married women in trade by customary law, but also the extent to which local customs per se should be recognised by the common law, both as a privilege which challenged the internal logic of its own system and as the product of an external jurisdiction.

Conclusion

The paradox of the custom of *feme sole* trading meant that, while it did confer a right theoretically denied to married women by the common law, it also left those in trade far more vulnerable to actions for debt, for which the protection of coverture was the best remedy. In practical terms, the custom seems to have been concerned primarily with debt recovery and personal liability rather than conferring the 'right' to trade in itself, but that still made borough custom relevant to the practice of trade. This was because contemporaries believed that a clear supposition of liability was necessary for the acquisition of credit

[79] *ER, Jewson vs. Read* (1773), Lofft 138, 98, p. 575.

on which so much trade was based. Judges had to constantly weigh up the competing demands of creditors against those of married women and their families. The commercial interests of a custom designed to facilitate trade in the City were juxtaposed against the traditional concern of the common law to maintain a particular form of the family with a male head. Moreover, common law judges sought to maintain the integrity and dominance of their own system of law while being forced to recognise the limits of their own jurisdiction and the need for litigants to seek 'remedies' for its often outdated harshness in the legal systems of other courts. There is still much research that needs to be done on this topic, but on this evidence, legal doctrine and judicial decisions appear to have been concerned with upholding far more than a single patriarchal interest in cases concerning women in business.

Married female litigants, and their husbands, seem to have been well aware of the pluralistic nature of the legal system and to have manipulated the relevant systems of law in their own interests whenever possible. For example, the infamous married coffee-woman, Moll King's, increasingly drunken behaviour resulted in frequent court appearances. She displayed an admirable knowledge of how to manipulate the legal system by getting her case removed 'into the Court of Kings bench by Certiorari, thinking . . . that her Prosecutor would not follow her, on account of the great expence'.[80] The existence of jurisdictional competition and an adversarial legal system seems to have greatly facilitated this. The evidence suggests that married women in business were most likely to sue and be sued in local courts where they could gain fast and inexpensive access to customary and equitable law. The superior common-law courts were most often appealed to when a case had been lost and it became necessary to plead coverture as a defence. If the law reports appear to show an increase in the number of decisions which upheld the common law in the later period, this could indeed be seen as evidence of the common law's attempts to impose uniformity, but it did not necessarily mean that this was wholly detrimental to wives in trade because, in most of the cases reported, that was precisely the result desired by the female defendants (and often also by their husbands) in order for the wife's trade to continue to contribute to the household economy. There was still plenty of scope for husbands to exercise an abuse of power within unhappy marriages but in such cases married women could turn to equity as 'the guardian of the weak and unprotected'.[81]

[80] Anon., *The Life and Character of Moll King, Late Mistress of King's Coffee House in Covent Garden* (London, 1747), p. 15; and see below, p. 192.
[81] Holcombe, *Wives and Property*, p. 37.

4

Trading 'according to equity and good conscience'

Businesswomen in Chancery

> Having the profitt & benefitt of her trade to her selfe & having greater parte of yr orator's goods by her in her shop at the time of her husband's decease, she . . . ought in Equity and good Conscience . . . to answer and pay to yr orator the said debt contracted during the coverture out of her own estate.
>
> Bill of complaint by John Benney, haberdasher, against Jane Long, milliner (1700)[1]

Courts of equity can perhaps best be described as a means of adjudicating disputes according to conscience. In practice this often meant abandoning the application of strict legal rules and resorting to concepts of natural justice by 'introducing an exception from consideration of what is equitable in particular circumstances, to avoid the hardship which would otherwise fall upon individuals'.[2] Chancery has thus long been viewed as providing the necessary correction to the universal strictness of the common law, particularly in the case of married women. In 1905 the legal scholar Dicey even went so far as to argue that equity lawyers viewed husbands as 'the "enemy" against whose exorbitant common-law rights the Court of Chancery waged constant war'.[3] As Chapters 2 and 3 have shown, this opposition is too stark, but echoes of Dicey's comment may be found in narratives of women's legal and economic position that focus on the operation of patriarchy and power relations between husband and wife, which tend to obscure wider family relationships. Yet both male and female plaintiffs in Chancery often justified their appeal to this court by claiming that they had been left 'remidiless by the strictness of the common law',[4] and it was not uncommon for women to sue each other. Furthermore, as we have seen, both the common law and borough custom did, even if some-

[1] PRO, C6/380/51, and see below, p. 80.
[2] John Millar, *An Historical View of English Government* (1803), cited in Lieberman, *Province of Legislation*, p. 75, and for a discussion of the development of concepts of equity see ibid., pp 73–87.
[3] Dicey, *Lectures*, p. 376.
[4] See e.g. PRO, C6/399/23, *Collins vs. Allen* (1684).

what imperfectly, attempt to balance the rights and liabilities of members of trading families and, where it could not do so, judges and legal treatises were often quick to point out that alternative remedies were available in other courts. This chapter therefore adopts a broader approach towards analysing relationships between women in business, their families and community networks during disputes over who in 'good conscience' should keep the 'profitt and benefitt' of their trade.

Equitable justice was not only an important recourse for married women. The growth of equitable jurisdiction to cover new forms of property and increasingly complex forms of trusts and contracts[5] meant that its remedial and protective functions were relevant to many women in business regardless of their marital status. By the eighteenth century there were a number of established principles for equitable intervention in cases concerning, for example, mortgages, contracts, trusts, partnerships, disclosure of accounts, debt, bankruptcy and leases on commercial property, as well as cases of fraud, forgery or duress. Litigants were attracted to Chancery precisely because it could facilitate their particular aims in a dispute. While the common law could only provide retributive damages after the event, equity could provide specific immediate relief, compel performance of contracts, and issue injunctions to prevent a future injustice from being committed. As in other courts, many cases were brought merely to put pressure on an opponent to settle a dispute rather than face expensive costs and delays, or to compel a rival to disclose his or her financial position. It could also be used to block an opponent's action in another court, or as a collusive procedure to gain formal legal recognition of an action upon which both parties were already agreed.[6] Something of this nature was probably occurring in 1710 when Blanch Pope, a widow and bankrupt mercer, was sued by her son who wished to gain a portion of his father's estate before Mrs Pope's other creditors took all the family's assets. The same lawyer acted for both mother and son, which strongly suggests a collusive suit, and the hapless lawyer later sued both Popes for non-payment of fees.[7]

Chancery was thus important for women, whose legal status under the common law was limited, but also central to the regulation of many business practices. The highly detailed accounts of each dispute in Chancery bills and answers, written from several different perspectives, provide an extraordinarily rich source for studying how women in business conducted their trade on a daily basis, for examining complex relations of credit, and for tracing how breakdowns in these relations affected both their families and neighbours. As Craig Muldrew has shown, concepts of equity and equality were very important to the social practice of economic bargaining and making contracts in early

[5] Holdsworth, *History of English Law*, pp. 446–69.

[6] Henry Horwitz, *Chancery Equity Records and Proceedings, 1600–1800* (London, 1995; rep. 1998), p. 8.

[7] PRO, C6/362/42, *Pope vs. Pope* (1710), and C6/400/61, *Dottin vs. Pope* (1713).

modern society. Moreover, he argues that 'contracting parties, whatever their position on the social scale in other spheres of activity, became morally equal in their responsibility to honour their bargains because everyone in the community had a stake in obliging others to pay their debts'.[8] Litigants in Chancery often appealed to 'equity and good conscience' which, despite its formulaic usage, also seems to have embodied an ideal of fair trading that clearly included holding tradeswomen morally accountable for their debts, an accountability that was all too frequently missing from common law. Since feminists have long argued that contract ideology masks the social and economic inequalities of contracting parties, particularly in the case of women, one of the aims of this chapter is to examine how far the process of economic bargaining within a culture of credit could mitigate this gendered inequality; although the overall focus remains on women's relationships within family and community networks.

Procedure and access

The flexibility of legal action possible in equity was achieved largely through procedural differences. In common law, an action could only be started by a particular type of writ in Latin, but in Chancery the suitor would submit a bill of complaint written in English detailing all her grievances against the other party and praying for suitable relief. The defendant(s) would then have to submit a written answer, which unlike the bill had to be made under oath. The complainant could in theory reply to this answer (replication) and the defendants could also reply again (rejoinder).[9] Occasionally this could continue for some time. In 1691 Mary Richardson and her son Peter Thorn refused to write any more answers when the bills of complaint brought by Isabella Firmin and her husband had reached forty-four pages.[10] Defendants could also file a cross-bill in order to make the complainant a defendant in a second but related case,[11] and both strategies no doubt contributed to Chancery's reputation for lengthy delays. However, the majority of cases never proceeded past the pleading stage, and a substantial minority of bills never even received an answer.[12] Many cases were settled out of court, the threat of litigation being enough to prompt both parties to resolve their differences and some

[8] Muldrew, *Economy of Obligation*, p. 318.

[9] For a comprehensive summary of procedure, see Horwitz, *Chancery Equity Records*, pp. 12–24.

[10] PRO, C6/411/58, *Firmin vs. Carter* (1691), and see below, pp. 75–7.

[11] PRO, C6/375/44, *Bower vs. Holtrop* (1711) and C33/317, p. 276, for the judge's decree which details the cross-bill. See also below, pp. 77–8.

[12] Horwitz, *Chancery Equity Records*, p. 26, estimates that as many as one in five bills were not answered and, in a sample of 146 suits in 1685, 75.3 per cent proceeded no further. In a sample of 140 suits in 1785, 65.7 per cent did not proceed beyond the pleading stage.

complainants may have run out of energy or funds before they had managed to compel the defendant to answer. The original bill of complaint and the answer(s), which could be written as a joint statement or as individual replies if there was more than one defendant, plus any schedules of accounts accompanying the answers, are known as Chancery pleadings. This chapter is based on a detailed study of the pleadings for thirty cases in which women in business were involved between 1684 and 1714.[13] The comments made here can therefore only apply to the early eighteenth century, because much needed research on cases in the later period, when the processes of Chancery had become infamously slow and tortuous, has yet to be conducted.[14]

There have been a number of objections as to why women would not have had wide access to Chancery or might have been put off from using it; either because of the expense, the delays or due to ideological pressures.[15] It is not possible to give definitive answers to all these objections, but there are a number of considerations that should be noted which suggest that women's use of the court may not have been so narrowly circumscribed. First, although nineteenth-century feminists argued that equity was only available to wealthy married women,[16] it was, as Margaret Hunt has shown, possible for impoverished litigants in Chancery to plead *in forma pauperis*, which exempted them from most court costs.[17] Even issuing a bill of complaint cost very little, and heavy expenses only began to be incurred once the case had proceeded to the point of going to court and filing continuations which happened in only a minority of cases,[18] especially given the efficacy of merely threatening to sue. Horwitz's research into Chancery litigants shows that in the period 1627 to 1819 the numbers of those ranked gentlemen or above actually fell, and by contrast, commercial and artisanal plaintiffs rose slightly over the same

[13] These cases have only come to light because of a recent indexing project carried out by the Public Record Office, and further research on later cases is hampered because the project ended at 1714. I am greatly indebted to Mary Clayton for alerting me to the existence of these cases and passing on references to those concerning women in business during her work on the project.

[14] The huge volume of cases and the lack of comprehensive indexing have so far proved effective deterrents to historians working in this field.

[15] Greenberg, 'Legal Status of the English Woman', pp. 178–9, argues that women's internalisation of patriarchal ideology would have prevented them from being aware that a wrong had been done, and hence from seeking redress. Dicey, *Lectures*, p. 383, argues that the creation of separate property only benefited wealthy women, so equity effectively created one rule for the rich and another for the poor.

[16] Holcombe, *Wives and Property*, p. 47; but note: Dicey and Holcombe are both writing from the perspective of late nineteenth-century reform.

[17] Margaret Hunt, 'Women and Money: Female Litigants in Equity in Eighteenth-century England' (unpub. paper given at the PRO, 1999), p. 12. In order to gain exemption a petitioner had to swear before a court clerk that she had no more than £5 in total assets.

[18] Ibid., pp. 11–12.

period.[19] Furthermore, because the bills and answers were written, litigants did not have to live in the capital to pursue their cases. In a separate survey, Horwitz found that more than 70 per cent of first-named parties lived outside London, and although this figure had fallen to just over half by 1785, it still shows that a substantial proportion of litigants lived in the provinces.[20]

Perhaps more importantly, Horwitz's survey of Chancery bills shows that the proportion of female plaintiffs among his survey of several hundred cases rose from around 14 per cent in 1627 to just over 21 per cent in 1819. Indeed, Horwitz argues that if minors and men who do not fit an occupational/status category (e.g. cases brought by corporate bodies) were removed from the sample, by 1818 to 1819 women formed 'no less than 30.6 per cent of all-named plaintiffs'.[21] It is not possible to estimate how many of these women may have been in business because they are only categorised by marital status. Horwitz suggests that most married women would have been involved in estate or land suits but cases are often very difficult to categorise and disputes over estate did not exclude the possibility that they involved women in business. In the thirty cases analysed here for information about women in business, 46 per cent involved disputes over estates.[22] Furthermore, Horwitz only counted plaintiffs, whereas just over half of the women in this study were defendants,[23] which would suggest an even higher level of participation of women in Chancery proceedings. Since Chancery could be used to block an opponent's action in another court, a woman suing a common law case could become a defendant in a separate but related case in Chancery in order to stop her proceeding at law. Hence, in Chancery, the distinction between plaintiff and defendant did not necessarily imply a distinction of agency between the parties that could be mapped on to gender inequalities. Finally, it has also been well documented that the process of Chancery cases was notoriously slow and that this put many people off, but not only was the delay considerably less in the early eighteenth century than in the nineteenth,[24] but the threat of potentially expensive delays was often an effective way of forcing a settlement.

[19] Horwitz, *Chancery Equity Records*, p. 42. A comparison of 446 plaintiffs in 1627 with 269 plaintiffs in 1818–19 showed that those ranked gentleman or above fell from just over 30 per cent to just over 18 per cent.

[20] Ibid., p. 46. In 1685 71.3 per cent of 237 first-named parties lived outside London; this proportion had fallen to 47.1 per cent among 240 cases in 1785.

[21] Ibid.

[22] It is difficult to categorise cases into single subject issues, since many plaintiffs had multiple grievances, but fourteen chiefly concerned disputes over estate, seven were about debt, three were about bankruptcy and six concerned disagreements over contractual issues.

[23] Of thirty cases studied six had female plaintiffs, one had a female plaintiff and defendant, seventeen had female defendants, and six concerned the estates of women in business who had died.

[24] Ibid., p. 28. In Horwitz's 1685 data, 77 per cent of cases were resolved in under one year but by 1818 just 45 per cent were resolved.

The remainder of this chapter is divided into three sections. The first examines cases concerning disputes over estate; the second considers cases of debt and bankruptcy, and the last looks at issues of contractual obligation in partnership and property agreements. The very nature of court documents always produces an undue emphasis on conflict, and each testimony would have been carefully framed to support each litigant's case but there are common themes which constantly recur in the discourses used to describe women's trading activities. First, the penetration of market relations into family life was very evident, particularly in the case of remarriages complicated by the presence of children from an earlier union. Second, married women's status as separate traders seems to have varied more according to the trading relationship established with their creditors and debtors than according to their legal marital status. Third, extended networks of credit feature in many cases, and complex monetary agreements reveal women to have been deeply enmeshed in these networks in which community relations played an important role. In some cases communities seem to have provided their own sanctions against suspect or dishonest behaviour, again regardless of marital or legal status.

Estate

Perhaps one of the most obvious areas for potential family conflicts was a dispute over the estate of a dead parent, particularly if that parent had remarried. Of fourteen cases categorised as disputes chiefly about the division of a deceased's estate, four involved daughters suing to gain a better portion of their father's estate, including one who was suing her paternal grandmother, and four involved second families or other issues around remarriage. The division and paying out of legacies was not only complicated by remarriages but by the deaths of other married children and the claims of their executors/trixes. The formation and dissolution of business partnerships between family members such as sisters, or mothers and sons-in-law, served only to exacerbate family tensions. In fact, the issue of separate trading was not necessarily a gendered one, confined only to disputes between husbands and wives. A dispute in 1713 over the estate of two dead sisters who had traded together showed that even in same-sex partnerships the issue of separate trading, when it came to a division of assets, was just as contentious.[25] Equally contentious was the settlement of debts owed and owing to the estate from other family members, who may have had goods 'in kind' or taken out 'loans' from parents in the expectation that ties of blood would prove strong enough to ensure their eventual cancellation. These expectations were heavily jeopardised should the

[25] PRO, C6/364/69, *Alsopp vs. Kelson* (1713): a grandfather sued the relatives of the deceased unmarried sister in the partnership to gain his granddaughter's share of her dead mother's assets in their millinery business.

parent remarry and the surviving spouse be left to call in the 'debt' to the estate. If the myth of the callous stepmother had gained considerable cultural purchase, it could only be heightened further if that stepmother had succeeded in a business of her own.

One example serves to illustrate the complexity of inter-family conflicts when women in business remarried. In 1691 Mary Carter, tallow chandler and widow of John Carter from Colchester, was sued by his daughter Isabella Firmin and her husband Josiah, a linen draper.[26] Mary had previously been married to Thomas Thorne, a tallow chandler with whom she had five children, including Peter Thorne, who helped her run the business, and Mary Richardson who was a baker. Thomas Thorne had left his wife the tallow business and all the household goods. The case hinged chiefly on whether the tallow business remained Mary Carter's separate property on her remarriage to John Carter in 1668. However, the existence of children from previous marriages who were involved in the same or allied trades complicated matters further.

John Carter's daughter from his first marriage, Isabella Firmin, argued that under the common-law doctrine of coverture the business technically became her father's, and in return for this he had paid each of the Thorne children £100. To prove Carter's ownership of the business his daughter argued that he took up the trade of tallow chandler but left Mary Carter to 'manage' it on a daily basis with the help of her son Peter, because John Carter was too busy running several farms. To emphasise the point Firmin insisted that her father had paid for all the tallow stock, utensils and servants' wages. Yet the reciprocal trading relations between the two families while they were reconstituted as one caused further tensions. The Firmins had accused Mary Carter and her son Peter of delivering too much stock on credit, which had remained unpaid for when Carter died in 1690. This alleged mismanagement was compounded by the accusation that Mrs Carter's daughter Mary Richardson (née Thorne) had failed to pay for wheat which she had bought from her stepfather, John Carter, to use in her bakery. Mrs Carter's son, Peter Thorne, was accused of misappropriating money from the business because the Firmins believed that as an apprentice he should not have been able to afford good-quality furniture. Furthermore, he had borrowed £200 from his stepfather and failed to repay it before Carter's death. This was a typically complex saga of inter-family borrowing and trading, of the sort that came before Chancery.

All the Firmins' accusations actually formed part of an attempt to stop Mary Carter suing them at common law for the return of her first husband's goods.

[26] PRO, C6/411/58, *Firmin vs. Carter* (1691): Josiah Firmin was the first-named plaintiff but, as discussed in Chapter 3, all married women had to sue with their husbands for form's sake. The testimony was from both Isabella and Josiah but the claim on the Will was primarily Isabella's. All bills and answers are tied together in one bundle and not all have page numbers to aid reference.

As a widow, Mrs Carter had therefore taken the initiative to sue her step-daughter first and this action in equity was a defensive measure by the Firmins. Part of the problem seems to have been caused by the fact that John Carter had made his second wife and his daughter by his first marriage joint executrixes of his estate, perhaps in an effort to promote goodwill between them. The result was that both women were therefore technically liable for his debts before they could claim their share. Mary Carter's loyalties however seem to have lain with her first family and she resolutely refused to allow the Firmins any of her first husband's goods, saying that even 'if she had any she would not give the sd complts any account of such'. She argued that John Carter had agreed not 'to have any interest or any waies to intermeddle with the trade of tallow chandler or in the profit or loss of the sd trade or of the goods belonging to the sd trade'. She refused to present any accounts from the business and argued that the Firmins could not 'in equity have any colour thereunto or unto any greater part of the estate of the sd Thomas than according to the marriage agreement' between Carter and herself.[27] However, Mary Carter also wanted to retain her right as a widow to one-third of John Carter's lands in Colchester, which had been left to her stepdaughter Isabella Firmin, on the condition that she paid her stepmother £20 per annum from the rents and profits. Firmin insisted that her stepmother should give up the claim entirely; Mrs Carter would only agree to a reduction. Not surprisingly, Peter Thorne supported his mother's version of events, claiming that he had only ever worked for her benefit and that neither of them had ever charged anything concerning the trade to Carter. Thorne also claimed to have bought the furniture with his own money, but he admitted having borrowed money from Carter on a bond. However, his mother testified that the bond had been surrendered to her before her second husband's death.

Although the case was ostensibly about the ownership of separate property under a premarital agreement, informal borrowing and trading between members had strained relations in the reconstituted family. On John Carter's death, old loyalties reasserted themselves. Mrs Carter had done everything in her power to retain her separate business for herself and her son. She had insisted on the validity of the premarital agreement, suing the Firmins at law to recover her goods and only agreeing to negotiate over her widow's third share of her second husband's estate. Mrs Carter was therefore not only aware of but actively insisting on all that could be considered legally her property. However, at no point did she claim that the property was directly hers; her 'right' to it was held only by virtue of her first husband and on the strength of a premarital agreement. As was discussed above,[28] women could legally retain their separate property but the tortuous legal technicalities necessary to do so

[27] The reasons for this and the terms of the marriage agreement were apparently set out in one of Mary Carter's earlier answers, which is missing.
[28] See above, pp. 41–6.

meant they could never claim the right to own it personally. Mrs Carter's testimony seems to have been carefully framed to fit this situation. Isabella Firmin, on the other hand, was assuming that her 'right' to a larger portion of her father's estate rested on proving her stepmother's coverture on marriage to her father was total and superseded all previous arrangements. Hence Firmin tried to prove that Mrs Carter had merely managed the business after she was married.[29]

There is only one case, dating from 1711, which gives an indication of how equity upheld the status of wives as sole traders based on separate property while recognising the competing claims of other family members.[30] In this case, a fair division of assets rather than clarification of sole trader status seems to have been the main issue. Lydia Bower (née Lillie)[31] had kept the Log Tavern in St Olave for some years before she met London citizen and carpenter Jeremiah Bower, who was a widower with three children. Widowed herself and concerned that his children might have too great a claim on her estate, Lydia Bower persuaded her brother to draw up a premarital agreement, guaranteeing her £500 if Jeremiah died before her and the ability to make her own Will if he did not. In consideration of this Jeremiah Bower promised to pay £800 on a penalty bond and she paid £400 as a marriage portion.[32] Lydia claimed that, after the marriage, she discovered that Jeremiah was deeply in debt. However, she continued to manage The Log 'as though she was single' and persuaded her husband to buy another, The Kings Head in Southwark, which she also ran and profited by so much that she managed to clear his debts and increase his personal wealth to £2,000. When Jeremiah died in March 1710 he left one-third of his estate to his wife according to London custom, one-third to his only surviving daughter Ruth Wine, and one-third to his friend and executor John Holtrop. He also left £500 to his grandchildren by Ruth, but stipulated that they could not claim that money until they reached 18 years of age. In the meantime Lydia was to have full use of it for five years after his death, provided that she gave Holtrop sufficient security for it.

Jeremiah Bower's daughter and his second wife could not agree on any detail of the settlement which, as in the case of Mary Carter, was complicated by trading relations and inter-family loans. Even Bower's executor, Holtrop, was personally indebted to his estate. Holtrop broadly supported Ruth Wine and her family, and sued Lydia Bower at law over the valuation of the tavern, from

[29] In trying to prove coverture the claim that a married woman had merely 'managed' the business was a common one; see e.g. PRO, C6/418/48, *Gwynne vs. Sheppard* (1706).
[30] In addition to the large numbers of cases that did not reach the decree stage, the lack of indexing and the method of filing each stage of every case separately means that tracing the outcome of any one case is extremely difficult.
[31] PRO, C6/375/44, /47, *Bower vs. Holtrop* (1711).
[32] This meant that the agreement was the strongest that could be made, as it was written before the marriage and thus based on a 'valuable consideration', which rendered it a legally binding contract. For a discussion of this, see above, p. 42, and n. 104.

which he was trying to evict her. Part of Mrs Bower's bill was a request for an injunction to stop his action, yet much of the argument was over Jeremiah Bower's attempts to set up his daughter and son-in-law in business as part of Ruth's marriage settlement. The Wines had tried unsuccessfully to run an inn and when that had failed turned to retailing, at which they were also largely unsuccessful. They borrowed money from Jeremiah on bonds and he paid at least part of their shop rent. The Wines, however, blamed their misfortunes on Ruth's stepmother. They claimed it was Lydia Bower's 'declared intention to ruin both' of them. Ruth's father, they said, had 'freely given' them financial help when needed, and he had 'often in his lifetime promised' to release his son-in-law from his debts.[33] If the Wines did not pay back their debts, Lydia Bowers' share of the estate would be considerably reduced, so she argued that Holtrop had tried to trick her husband into signing a general release of all the Wine family's debts on his deathbed. She also claimed that John Wine had written to his father-in-law apologising for being such a burden on him.

The Wines tried to indict Lydia Bower by filing a cross-bill against her. They accused Lydia of trying to claim her share of the estate on three separate grounds: through the terms of the premarital agreement, from the one-third she was allowed by London custom, and under the terms of the Will. It seems likely that the estate was not actually large enough to support all three. The judge's decree went largely in Lydia Bower's favour, while still trying to accommodate the other claimants. She was ordered to make a claim under one of the three grounds, but allowed to wait to decide which until the debts to the estate had been settled. The Wines were ordered to 'clarify' exactly what they had borrowed and all accounts relating to the estate were to be submitted to the court to determine its exact value. Lydia Bower was also granted an injunction to prevent Holtrop from proceeding against her at law, which meant that she could continue to live and trade in her tavern.[34] Thus in providing equitable justice the court seems to have been far more concerned with ensuring a practical remedy for all than determining Lydia Bower's status as a separate trader.

Both Mary Carter and Lydia Bower had to deal with money and relationship problems exacerbated by remarriages. Indeed, even without the added tensions caused by inter-family trading and borrowing, hostility towards stepmothers could be inexplicably strong. Mary Saxby, a silkweaver's daughter born in 1738, admitted that her father's new wife was very fond of her but explained that the 'very name of stepmother gave me such disgust, that I could not endure it; and therefore I was not very careful to please her'.[35] Yet 'natural' mothers were also not immune from the consequences of children made resentful by

[33] The schedule of accounts attached to the bill suggests that Jeremiah Bower frequently paid trade and household bills for the Wines.

[34] PRO, C33/317, pp. 276–7.

[35] Mary Saxby, *Memoirs of a Female Vagrant* (London, 1806), pp. 4–5.

the accumulation of profit from trade. Ann Symonds[36] was widowed in 1699 and took over her husband's wine business. As executrix of his estate, however, she was sued by the executors of two of her late husband's creditors in 1710. Of her six children, three had died as young adults, but two of her surviving daughters testified against her. Mary Meakins explained that she did not want to suffer for her mother's 'mismanagement'. Her husband, Edward Meakins, had joined his mother-in-law in a business partnership two years after her father's death. Meakins testified that Ann had 'made great profit' from the business before he joined it, but the partnership had been dissolved in May 1708, so possibly there was some residual bitterness over its termination. Mrs Symond's other daughter, Elizabeth Honblon, had sued her mother in Chancery many years earlier because she had not been paid her legacy. There is no surviving answer from Mrs Symonds herself to explain her version of events.

The ideal widow of didactic literature was only supposed to act as caretaker of the family business in order to maximise the benefits for her children before happily passing it on, preferably to her son.[37] In this case Mrs Symonds had apparently tried to benefit at least one daughter by going into trade with her husband, but the partnership had failed, causing resentment all round. This resentment was exacerbated because Mrs Symonds appears to have continued to enjoy the profits from her business, while her daughters felt that they had not received a fair share of their father's legacy over which she had control. It is not really surprising that the prospect of large legacies could cause great tensions within families, but even relatively poor families exhibited a high degree of mercenary behaviour. Eighteenth-century Exchequer court cases show women repeatedly put monetary values on personal and domestic services to other family members. Moreover, the courts were willing to uphold payments between close family members for lodging, interest on loans and medical expenses.[38] Thus financial and emotional exchange within families seems to have been as closely related as social and economic exchange was in the wider trading community.

If widowhood and remarriage caused inter-generational conflict within trading families, the changing legal status of these women could also prove problematic for creditors. This was particularly true for those who had traded with a woman over long periods during which her marital status may have altered more than once. In 1705, Cornelia Bateman's executor[39] had trouble defending her estate against creditors claiming against both her and her husband, who had died before her. Henry Wood had dealt with the Batemans only as a supplier of beer for domestic use but Thomas Cooper had done

[36] PRO, C6/362/9, *Johnson vs. Symonds* (1710).

[37] See Hunt, *Middling Sort*, p. 137, for the role of the idealised widow in trade.

[38] Hunt, 'Women and Money', p. 27.

[39] PRO, C6/393/29, *Crawley vs. Cooper* (1705).

business with Cornelia before she married Bateman. She was then the widow of Harris Vanacker, a wealthy property owner in one of whose houses Cooper had lived and traded as a grocer for twenty years. He claimed that Cornelia had traded with him frequently on her own and had paid in full until 1695 when she remarried.[40] During her second marriage, she began trading with Cooper again, and continued to do so after Bateman's death in 1698. The trading relationship only ended when Cornelia Bateman died in 1702. Cooper claimed that William Bateman had never contracted or paid for any goods during the marriage and that Cornelia had personally acknowledged her debts to him. Cooper had traded with Cornelia for at least seven years, through two widowhoods and definitely one if not two marriages. To Cooper, therefore, she had been a sole trader, but Wood believed she was covert, presumably because to him she was merely a domestic consumer.

In a similar case for debt in 1700, John Benney,[41] a London haberdasher, appealed to 'equity & good conscience' to make Jane Long, a milliner, pay her debts either as a married woman from her dead husband's estate or as a sole trader because she had 'the profitt & benefitt of her trade to herself'. Like Cornelia Bateman, Jane Long's case was complicated because she had traded with Benney both before, during and after her marriage to Reuben Long, a mariner. Benney explained that he had brought the case before equity because Mrs Long would simply claim coverture under the common law and he would be nonsuited. In fact Jane Long used precisely that defence, claiming she was not a milliner but had only made stockings together with her husband 'in his name and to his sole use'. Benney was therefore less concerned with Jane Long's actual status as a *feme sole* or covert trader; instead he was appealing to both principles in the hope of gaining an equitable settlement of the debt. Given the court's decision in Lydia Bower's case, it seems likely that Benney could have received at least some of his money by appealing to equity or at the very least pushed Jane Long towards making some sort of out-of-court settlement. Hence equity may have protected married women but it also provided one of the few ways of making them responsible for their debts.

In the context of an appeal to equity, all these testimonies were framed within a particular legal discourse in which a concept of 'fair' trading would have been paramount and the considerations of the common law minimised. Both Mrs Bateman's creditors would have argued for the status that they considered most likely to guarantee repayment and John Benney argued for both at once. But these cases do show that a married woman could have more than one identity and that this depended largely on the relationship she had with those she dealt with. Indeed, Hunt has argued that 'for some women *coverture* was less *the* normative state than a hiatus in a larger pattern of

[40] There is no record of what Mrs Bateman dealt in; Cooper claimed only that she 'had diverse dealings in the way of trade' with him.

[41] PRO, C6/380/51, *Benney vs. Long* (1700), and above, p. 69.

monetary exchange transactions'.[42] England's high mortality rate in the late seventeenth and early eighteenth centuries meant that widowhood could repeatedly end periods of legal coverture; but neither widowhood nor remarriage necessarily disrupted long-standing trading relations.[43] In the following section, an examination of wider monetary exchanges within local trading communities reveals similar patterns of continued exchange with married women until credit relations broke down beyond repair, when the need to use harsher legal sanctions overrode personal relationships.

Debt and bankruptcy

While disputes over the settling of estates chiefly concerned women in the latter stages of the life cycle, problems of debt or bankruptcy could strike at any age and were also likely to involve a wider section of the community. Nevertheless, of the seven cases which were concerned with debt collection, one-third still involved problems caused by remarriage. There were only three cases of bankruptcy, two of which concerned the same family,[44] but there are a number of possible reasons why there were comparatively few female bankrupts.[45] First, particularly before the law of 1706 mitigated its harshness, creditors were reluctant to bring such drastic charges.[46] Second, a charge of bankruptcy could only be brought against a trader owing £100 or more to a single creditor, which would have excluded many women in smaller businesses. Third, the 'trading distinction' meant certain trades were exempt from the bankruptcy laws and these included victualling and innkeeping, both trades

[42] Hunt, 'Women and Money', p. 27.

[43] On high mortality rates see Alex Mercer, *Disease, Mortality and Population in Transition* (London, 1990), pp. 28–45, and fig. 3.8, p. 64, but from the mid-eighteenth century the death rate declined. On remarriage see Vivian Brodsky, 'Widows in Late Elizabethan London: Remarriage, Economic Opportunity and Family Orientations', in *The World We Have Gained: Histories of Population and Social Structure*, ed. Lloyd Bonfield, Richard M. Smith and Keith Wrightson (Oxford, 1986), p. 123, who points to a particularly active remarriage market for widows of London craftsmen; but as the eighteenth century progressed overall rates of remarriage for widows fell; see Olwen Hufton, 'Women without Men: Widows and Spinsters in Britain and France in the Eighteenth Century', *Journal of Family History* (1984), pp. 356–7. For a discussion of class, age and regional effects on widows' rates of remarriage see Hill, *Women, Work and Sexual Politics*, pp. 240–2.

[44] *Pope vs. Pope* and *Dottin vs. Pope* (discussed above, p. 70).

[45] Earle, *Making of the English Middle Class*, pp. 167–8, found that between 1711 and 1714 only 2.8 per cent of metropolitan bankrupts were women, and they were more than twice as likely to be creditors as bankrupts.

[46] Julian Hoppit, *Risk and Failure in English Business, 1700–1850* (Cambridge, 1987), p. 23; see also pp. 29–34 for alternative ways of dealing with indebtedness and insolvency outside the law.

in which women were numerous.[47] Finally, as we have seen, the legal difficulty of ascertaining a married woman's liability in such cases probably put many creditors off laying out a £200 bond to bring such charges. Bankruptcy records are therefore a highly unreliable guide to the numbers of women in business.[48]

Central to all economic transactions, whether involving money or goods in kind, was the existence of credit based on mutual trust, and usually guaranteed by local knowledge of the parties involved. Muldrew has defined these relationships as a 'culture of credit', which was 'generated through a process whereby the nature of the community was redefined as a conglomeration of competing but interdependent households which had to trust one another'.[49] Because each household or 'unit of creditworthiness' was serially linked with others in complicated networks of credit and obligation, defaulting on debts owed by one household could cause a domino effect involving the collapse of several others. Moreover, the lack of formal accounting procedures, and high levels of illiteracy among poorer traders, meant that neighbours often acted as witnesses to oral agreements. As such it seems likely that it was in their and the community's interests to police these agreements effectively. For example, John Holtrop had insisted that Lydia Bower should name ten neighbours to agree the valuation of the lease on her inn, but he refused to accept any of her fellow vintners as witnesses.[50] Muldrew has also stressed that the nature of trust required in economic transactions meant that a form of 'equality in exchange was necessary for contracts to be just' but that this was an equality of 'potential to be trusted and certainly not an equality of opportunity or wealth'.[51] The Chancery bills show that on these grounds even married women could *de facto* participate in economic exchanges and contracts, and that their legal or marital status was of less importance than whether they could be *trusted* to be trading 'as if sole'. In fact the degree of trust required to trade with a married woman was probably far higher than any other category of trader, but as the case of *Grey vs. Hawks* (1711)[52] shows, the community could act to regulate the disabilities incurred by a 'bad' marriage, which in this case was very much a May and December union.

In November 1710 John Grey, who described himself as a 'linen-draper', married the widowed shopkeeper Thomasin Moor in Milbrook, a small village two miles from Southampton. Grey claimed that he took over her thriving chandlery and grocery business worth £50 per annum which he became 'lawfully possessed of & intitled to' by virtue of their marriage. Thomasin's

[47] For a discussion of the trading distinction, see ibid., pp. 24–5. For exempt trades, see Cooke, *Bankrupt Laws*, pp. 67–70.

[48] Mui and Mui, *Shops and Shopkeeping*, p. 58, found that female milliners formed a 'very insignificant proportion' of retail clothiers on the basis of bankruptcy records.

[49] Muldrew, *Economy of Obligation*, p. 4.

[50] PRO, C6/375/47, *Bower vs. Holtrop* (1711), and above, pp. 77–8.

[51] Muldrew, *Economy of Obligation*, p. 146.

[52] PRO, C6/415/4, *Grey vs. Hawks* (1711).

daughter, Elizabeth Hawks, and her husband William, a tanner, lived next door to her mother, whose remarriage immediately caused tensions between the two families. Grey felt that the Hawks resented his presence because it would lessen their inheritance. Elizabeth Hawks discovered that Grey had lied about his past and was really a 'common soldier'. She feared Grey would sell off her elderly mother's stock and desert her to serve overseas.

In December 1710, Grey claimed that he ordered £19-worth of goods from Thomasin's regular supplier, John Bradburne in Winchester, but as Bradburne was away he made an agreement with Bradburne's servant to pay for the goods over six months. Bradburne claimed that Grey had ordered £80-worth of goods, but that he had received a letter from Thomasin changing the order to £20-worth of goods just a few days later. Bradburne had only received 40 shillings in payment when he heard a rumour that Grey had been trying to sell up. Fearing Grey was about to default, Bradburne had him arrested for debt in February 1711 and held in gaol for several days. At this point, Bradburne went to see Thomasin personally and he also seems to have consulted with her daughter and son-in-law about how best to manage the situation. The Hawks offered to lend Thomasin money to pay off the debt but she refused and returned all Bradburne's unsold goods to him plus other goods as security for the rest. The Hawks loaned Bradburne a cart to carry away the disputed shop stock and then stored it in their own home until May, when the debt was settled and Thomasin's household goods were returned to her. John Grey had disappeared for months after his release from jail but on his return he found the shop shut. The Hawks believed that the locals had been unwilling to trade with Grey, but that, if he was called away on service, Thomasin would soon have just as many customers as before. John Bradburne also testified that Thomasin had 'lost a great deal of trade' by marrying Grey.

Thomasin Moor's unsuitable marriage seems to have raised concerns among her family who were willing to collaborate in removing her household goods, a large section of the village community who stopped buying from her shop, and her supplier from Winchester who was willing to co-operate with the family to settle the debt fairly.[53] All seem to have co-operated to prevent a more serious failure. The rumour that Grey was selling up, which had travelled from near Southampton to Winchester, was enough to start the domino effect by precipitating Bradburne into taking action to reclaim his debt. Despite the fact that he should by law have dealt with Grey, because there is no suggestion that Thomasin had any separate trade agreement with her husband, Bradburne chose to obey Thomasin's instructions to cancel her husband's order and to deal with her and her family as he had always done. This may have been

[53] Similarly, Margaret Hunt, 'Wife Beating, Domesticity and Women's Independence in Eighteenth-Century London', *Gender and History*, 4 (1992), pp. 10–33, found that a wife's 'embeddedness in a community of friends, neighbours, relatives and work-mates' was the best way to escape male abuse.

the best way to regain his money if Grey could really dispute liability for the debt, but it also ensured that Bradburne retained his reputation for fair dealing with debtors.[54] Hence the joint actions of himself and the Hawks prevented a more severe break in the chains of credit stretching from Millbrook to Winchester.

Once a credit relationship based on trust had broken down, creditors had a number of legal options for retrieving their money, the most severe of which was to institute a commission of bankruptcy.[55] In the case of *Buckland vs. Burges* (1703),[56] the creditor hedged his bets by causing two bankruptcy commissions to be issued separately against husband and wife. Thomas Burges was a London druggist who was being jointly sued by John and Elizabeth Buckland to stop him taking their household goods in payment of debts, but Burges had already instigated bankruptcy proceedings against both of them. Burges had traded with Elizabeth Buckland, a pork butcher, for two years and he believed her to be a sole trader, as her husband was a ropemaker and she had always paid for goods personally and signed notes in her own name. Apparently she had often declared that her husband's 'weakness and infirmity of understanding' meant that he was incapable of supporting his family. Burges had also heard that her friends and relations had given her the money to set up in business. From May 1701 until January 1702, Burges kept a record of all his dealings with Mrs Buckland. They met occasionally to reckon up the state of the account, and by October 1701 she owed him £80 which, during a meeting at the Bucklands' house in Camberwell, she promised to settle by note. In December 1701, they met again and she gave him two more notes for another £33.

In January 1702, Burges heard that the Bucklands were intending to defraud their creditors by making a fraudulent bill of sale of all their goods to their friends. He therefore caused a commission of bankruptcy to be issued against Mrs Buckland because by this time she owed him £113. The commission found her bankrupt,[57] and issued a warrant to seize her goods from the Camberwell house. A group of the Bucklands' friends tried to prevent the goods from being removed but a constable and watchmen dispersed the crowd. Burges

[54] Muldrew, *Economy of Obligation*, p. 181, argues that a creditor's decision of when to press for payment had to be based on careful consideration of the debtor's situation, because should the creditor find himself in the same situation, leniency might be denied if he had a reputation for hardness.

[55] A creditor could pursue small debts through the Courts of Requests, or have the debtor arrested, or regulate the debtor's business via a deed of inspection, and in event of failure close it down, sell off the proceeds and divide them among all creditors informally, which was known as a composition.

[56] PRO, C6/381/24, *Buckland vs. Burges* (1703), answer of Thomas Burges only.

[57] See Hoppit, *Risk and Failure*, p. 36, for the legal definition of a bankrupt. In addition to debts over £100, Mrs Buckland would have had to have committed an act of bankruptcy, which in this case was probably fraudulent conveyance.

was not satisfied, because Mrs Buckland only paid him a further £3, so he caused another commission of bankruptcy to be issued, this time against John Buckland. Burges continued to insist that Mrs Buckland was a sole trader, but he testified that John Buckland was found bankrupt because, 'tho he did not intermeddle with his said wife's dealings', he nevertheless 'permitted her to trade separately'. Thus Mrs Buckland was construed as having acted as his agent with his knowledge and consent, so when the bankruptcy commission was sued Mr Buckland 'became lyable to pay'. In February 1702 the Bucklands formally assigned all their goods over to Burges to relieve both him and their other creditors, but then issued a bill against Burges in Chancery to try to prevent their household goods from being taken.

Thomas Burges seems to have been content to trade with Mrs Buckland in the normal fashion of exchanging goods and money for long periods and then settling the difference of the account every few months. He knew that she lived in Camberwell but hinted that she could have been taken for a *feme sole* trader by the custom of London, because most of the sales of pigs took place in Leadenhall Market. The rumour of the Bucklands' defaulting on their other creditors was enough to persuade Burges to start proceedings, yet the Bucklands obviously had loyal friends and family willing both to collude in the deception and to try to prevent their goods from being taken. Burges was happy to treat Elizabeth as a sole trader until his action against her failed to settle the debt, when a legal technicality allowed him to sue her husband as well. It seems the Bucklands did not have a premarital agreement based on a valuable consideration. They may have had a voluntary agreement between themselves which, while it would be seen as good between each other in law, was not strong enough to withstand the claims of creditors.[58] If there had been no agreement at all, then in equity a husband had only to acquiesce to his wife treating some property as her own for it to be considered as hers; but he remained liable because he was thereby constituted as the trustee of that property.[59]

In cases of debt, legal action was both an effective threat to prompt the debtor to settle, but also, if seen through to its final end, a last resort to regain money when credit relations had broken down. Both men and women seem to have resorted to legal action or the threat of it as part of 'normative business practice',[60] and misunderstandings over the often complicated but informal reckoning of accounts could not but exacerbate the problem. In 1693 Isabel Lambert,[61] a linen draper in Leeds, sued Robert Browne, a dealer in Scotch

[58] See above, p. 43, on how trading with a husband's permission meant that the agreement was good against the husband but not against creditors.

[59] Holcombe, *Wives and Property*, p. 40.

[60] Muldrew, *Economy of Obligation*, p. 275. See also Earle, *Making of the English Middle Class*, p. 124, on the efficacy of initiating legal proceedings to force a debtor to settle and the high proportion of litigants who settled out of court.

[61] PRO, C6/367/37, *Browne vs. Lambert* (1693).

linen cloth, over a deficit in a reckoned account amounting to less than £10. For some years she had got her Scotch cloth from Browne and paid him in kind with linen goods as was 'customary', but they disagreed over the value of cloth exchanged in one transaction, so she had him arrested and started an action for debt in Kings Bench. When he refused to pay the £9 7s 1d, Lambert instructed her attorney to press for the full value of the cloth, some £136. Browne failed to appear, so Lambert pressed for judgement by default, but she must have failed, because at a special inquiry in York she agreed to accept the smaller sum. Lambert explained that, because Browne had not shown her 'just and equitable dealings', when she first had him arrested and he had tried to delay her by issuing this suit in Chancery, she was determined to pursue her case in King's Bench.

Initiating litigation by instructing a lawyer to write a letter was normal practice at this time, and even an attachment of person or goods was not too damaging. Making an arrest, however, was a sign that the creditor considered the debtor to be seriously unreliable and could lead to a potentially fatal loss of credit. These cases reveal that there was a very fine line between acceptable pressure, in which even other members of the community would collude, and escalation into adversarial tactics invoking the full spectrum of legal sanctions. Moreover, the power of rumour could be enough to tip the balance from negotiated credit arrangements to legal prosecution. However, it seems clear that women in trade were equally involved in both processes, and also that they could generally rely on the support of family and friends, and even other members of the community while trading.

Contracts

There has been heated debate among feminists over the degree of disadvantage suffered by women despite the ideal of equality between contracting parties.[62] Married women were the most obviously disadvantaged category because of their theoretical inability to contract under the common law. Yet, as we have seen, coverture was by no means a universal block to married women's trading activities and within equity married women could contract on the basis of their separate property. Indeed, as the cases of Thomasin Moor and Elizabeth Buckland show, contracts were sometimes made on the most informal basis but this could leave both spouses and the other party vulnerable. The question that naturally follows from this is whether the situation was any different for single women, or the extent to which gender inequality affected the ability of unmarried women to contract. As a *feme sole* trader an unmarried woman

[62] For a radical feminist analysis, see Carol Pateman, *The Sexual Contract* (Oxford, 1988; rep. 1989); for a critique of Pateman, see Susan Moller Okin, 'Feminism, the Individual and Contract Theory', *Ethics*, 100 (1990), pp. 658–99.

was held to be just as fully personally liable for her debts and contracts as was a male trader which, in contemporary thought, meant that other traders should have been more willing to make contracts since they had every chance of recovering the debt should the need arise. If, as Muldrew has argued, all that was required for a fair exchange of contracts was an equality of 'potential to be trusted', then the gender inequalities in operation in most other social situations had the potential to be suspended or ignored in economic transactions concerning single women.

This final section refers to a set of cases that have been categorised as chiefly contractual in nature, concerning disputes over specific non-performance of contracts, either to supply goods or to fulfil the terms of a partnership agreement, or involving property disputes over the terms of leasehold agreements. Of the six cases in this category, half concerned non-performance of an agreement and half were property disputes. None of the women in these cases were married (or at least not at the time the dispute occurred), so the issue of separate trading does not arise here. However, complex arrangements over exchanges of money and credit were still critical,[63] and the role of other members of the community also remained vital to the regulation of many of these agreements. Just two cases will serve to illustrate the extent of single women's contractual abilities and their embeddedness in local networks.

The first was an action for ejectment, which could be served against tenants in commercial properties who had failed to pay the rent.[64] An appeal to Chancery for an injunction could halt proceedings at law and also gave tenants some chance to claim that they had been unfairly treated. Abigail Barber,[65] a chapwoman in Westminster, had to appeal to equity for just that reason when her landlord tried to evict her from her shop. She had sublet a house and shop from Elizabeth Brockhurst, who in turn held the property from William Davis. Mrs Brockhurst proposed that Abigail should pay £12 for one year's occupancy and buy a door, a bed, paper hangings, a counter and shelving from her for £11. They both consulted Davis who agreed to the arrangement. A year later Davis offered Barber the chance to extend her lease for another three years, which is when his own lease would expire. Abigail claimed that she had traded profitably and earned herself a good reputation in the neighbourhood. However, she became ill and went to convalesce in the country, leaving a male friend to look after the business for her. During her absence Davis and his wife seized the property, evicted her friend and took away all her belongings.

[63] In PRO, C6/410/73, *Farncourt vs. Lee* (1706), for example, an eviction case, revealed a web of interconnected personal and business borrowing between four people, which had collapsed when the businesswoman in question had remarried and left the locality.

[64] This was an action, based on a legal fiction, by which a leaseholder could recover possession of a property, and it had become a common way of trying titles to land. See Staves, *Married Women's Separate Property*, p. 235.

[65] PRO, C6/379/78, *Barber vs. Davis* (1712).

From his reply, it seems Davis was angry with Barber for not paying her rent on time but he was also concerned about the affect Barber's reputation would have on renewing his own lease, which he held from another widow. He claimed that Barber's neighbours had complained about 'frequent disorders' for which the Middlesex JPs had issued more than one warrant. Barber, he said, had absconded and then threatened to return with friends to seize the property, so Davis and his wife had gone there to lock her out. Both sides were therefore relying on local opinion to support their case. Although there is no indication of the outcome, it is clear that Abigail Barber was nevertheless sufficiently established in trade to be able to call on friends of both sexes to provide physical assistance in the same way that the Bucklands had, before resorting to law to settle the dispute. It is also evident that loss of credit through loss of reputation was a major factor in prompting Davis to take action, in case the domino effect should cause his own landlady in the chain of subletting to refuse to renew his lease.

Abigail Barber may have been held fully accountable for her rent and reputation as well as being able to call on friends to support her dispute, but she could hardly be classified as a successful businesswoman. Mary Jevon, on the other hand, was. Her case provides perhaps the clearest insight into how issues of gender may have affected women's contractual capacity. The case was a dispute in 1711 between Jevon and her previous partners in a mercery business, Edward Bee and Thomas Bond, whom she was suing at law for non-payment of debt.[66] Bee and Bond had issued a bill in Chancery to stop Mary Jevon proceeding at law, on the grounds that she had broken the terms of their partnership agreement. Although Jevon had started out as the weaker partner in the business, the balance of power gradually shifted over the six years they traded together, and she seems to have held the upper hand in contractual terms once the relationship between the three began to deteriorate.

In 1704 Mary Jevon had joined Bee and Bond at their mercer's shop in London. They claimed that she was taken on as a journeywoman; but she said that she had known Edward Bee previously and that, as she already had a knowledge of the trade, he had asked her to join them in a partnership. She brought £300 of stock into the business and, after many meetings, Bee and Bond agreed to pay her £45 per annum plus dinner. After two years Jevon threatened to leave because she was unhappy with the terms of the first agreement. She further stated that she had heard rumours that they referred to her as their 'journeywoman' to others. Bee asked her to stay and offered to pay her another £15 per annum, and to have her name printed as a partner on their shop billheads. This new agreement lasted for another two years, after which Bee and Bond asked her to become an equal partner with them. A partnership agreement was drawn up on 4 December 1707 stating that all three agreed to trade as equal partners for a term of seven years. Each partner

[66] PRO, C6/374/38, *Bee vs. Jevon* (1711).

had to provide £1,000 stock and to give six months' notice of any intention to quit, if this was before the seven years had expired. In this new agreement then, Jevon became the financial equal of her male partners. Then Jevon claimed that Edward Bee came to see her privately on 15 December 1707 and asked her to make a separate agreement with him because he feared Thomas Bond was behaving irresponsibly and was running short of money. Jevon agreed with Bee that, if the first partnership dissolved, the two of them would immediately form a new partnership with a joint stock of £2,000 and would continue to trade together for the rest of the seven-year period.

In 1709, Bee gave Mary Jevon written notice that the partnership was going to be dissolved and on 15 July 1709 an account of all their joint stock was taken on the understanding that if any errors were discovered they should be rectified at a later date. Jevon's share was estimated at £1,010 6s 6d for which sum Bond and Bee entered into a penalty bond of £2,000 plus interest at 5 per cent, which was due by 25 January 1710. However, there was a dispute over debts still owed by the partnership. Bee and Bond claimed that Jevon had refused to pay her share of these debts despite the agreement to adjust the account. Jevon counter-claimed that she had asked her partners simply to deduct her share from the bond. Finally, Jevon left the partnership and began an action at law to recover the money due on the bond. Edward Bee refused to go into partnership with her, so she then began an action for non-performance against him. Meanwhile, she had moved to a shop in Ludgate Hill and had begun trading there, an action which Bee and Bond interpreted as a deliberate attempt to steal their customers.

Mary Jevon seems to have been at some contractual disadvantage when she first joined the partnership and had to negotiate hard for a position in the business. She felt initially that her position was undermined by her male partners' references to her as a 'journeywoman'. Gender may well have played a determining role in her initially disadvantaged position, but it seems likely that, as Thomas Bond's fortunes apparently declined, the need for Jevon's money in the partnership had overcome this. After four years' trading she had also sufficiently proved her ability within the business to make Bee prefer to be in partnership with her, rather than with his male colleague. Contractually, then, by 1707 she was in an equal position with the two men and once Bee had approached her privately she had begun to gain the upper hand. Moreover, after the partnership had broken down, it was she who first began legal proceedings, and she who had gone on to set up another business alone of sufficient size to make her previous partners feel threatened. They felt that 'in equity and good conscience' she should not be allowed to take their customers with her and that she should surrender the private articles of agreement to Edward Bee, and agree to be bound only by the first two. They also argued that she should cease her legal actions and pay her share of the debts discovered after the partnership had ceased. Since the common law would have been unable to provide any of these remedies, Mary Jevon clearly had the upper hand, and a suit in equity was Bee and Bond's only hope of gaining a 'fairer' settlement from her. Although the outcome of this case is unknown, it demonstrates that gender did not necessarily leave businesswomen in a contractually disadvantaged position with their male colleagues, and that the possession of capital and commercial ability could do much to level the field.

Conclusion

The cases studied here in detail provide an intricate 'snapshot' of trading relations for women in the early eighteenth century, albeit one tightly framed within a legalistic discourse of dispute. It is more difficult to speculate for how long and in what ways these conditions continued for women once an increasing number of banks and paper money, better communications and expanding markets made the culture of credit less central to business transactions. Muldrew's study of credit relations only covered the period to 1720 when changes in the volume of litigation and the structure of credit networks began to alter conceptions about the nature of trust, even though the amount of credit and its importance remained high throughout the eighteenth century. Nevertheless, these cases collectively suggest some more general conclusions about tradeswomen's relationships with their families and other members of their immediate community, and about how practical arrangements may have circumvented legal restrictions on married women's business activities.

First, the model of a household economy based on a nuclear family needs to be expanded to take account of the needs and actions of adult children, and to incorporate the tensions caused by second families. The impact of divorce may have been minimal in early eighteenth-century society, but the incidence of remarriage through death meant that second families and their attendant problems must have been a reality for many women in business. Indeed, even 'natural' children could prove problematic when a division of profits was at stake. A wife's patriarchal subordination to her husband, therefore, was not necessarily the chief cause of family conflict for women. Cases of husbands defrauding their wives certainly did exist,[67] but, in this survey, six cases involved remarriage, whereas only one concerned a hostile husband. In that one case, which was also a second marriage, family and friends mitigated the effects of the husband's potentially damaging actions.

The issue of married women's separate trading also needs to be re-examined because of the impact of multiple marriages on trading relationships. For many women in trade, coverture may have been merely an interruption to their usual long-standing credit arrangements with other traders. As long as credit relations between both parties remained mutually beneficial, that interruption may have been barely noticed. The impact of coverture seems to have been

[67] Hunt, *Middling Sort*, pp. 138–42.

greatest when credit relationships broke down. Then it became a convenient defence for married women, or a means for children to sue their stepmothers (and their own widowed mothers) to gain a greater share of their fathers' estates. Creditors chose to argue for either coverture or *feme sole* status depending on which was most likely to result in the retrieval of their money. Some even appealed to both principles in the same case. Thus, despite the common law definition of married women's legal status, both *feme covert* and *feme sole* traders were highly contingent categories rather than concrete determinants of women's trading status.

Married women's contractual capacity may have been theoretically constricted but, in equity, the existence of separate property seems to have rested on even the most informal of agreements. Such agreements, however, left both husband and wife vulnerable to creditors. For single women, gender disabilities could also be overcome by economic considerations in contractual negotiations. Whatever the respective social positions of borrower and lender, once in debt to another the borrower became 'servant to the lender',[68] even if that lender was female. Thus this research supports Muldrew's findings, in that equitable concepts of trading could do much to level the playing field in economic transactions concerning both married and single women in this period. Just as importantly, women in business were deeply embedded within highly complex networks of credit, and they were also able to call on other members of the trading community for assistance in maintaining those networks. As Chapter 5 shows, women remained active participants in mixed-gender business networks throughout the eighteenth century. Wiskin's research has demonstrated that this remained the case for the first three decades of the nineteenth century and, as the mixed-sex partnerships and property sharing discussed in chapters 6 and 7 will show, networking remained important for businesswomen at least until 1845.[69]

[68] A common seventeenth-century phrase, cited in Muldrew, *Economy of Obligation*, p. 98.

[69] Wiskin, 'Women, Finance and Credit', pp. 147–91.