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### **Judging the Judges: Mansfield and Kenyon on Coverture**

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It is widely acknowledged that the common law doctrine of coverture was leavened by numerous exceptions that rendered it sufficiently flexible to enable married women to participate in economic relations notwithstanding that the law formally prohibited them from doing so. It is also well known that Lord Mansfield attempted to systematize some of those exceptions. He espoused a new rule in the final years of his long tenure as Chief Justice of the court of King's Bench (1756-88), namely that a married woman separated from her husband by private separation agreement was responsible for her own contracts at common law. The new rule created a furor among conservative jurists and Mansfield was overruled in 1800 by his successor, Lord Kenyon.<sup>1</sup>

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<sup>1</sup> See Kenyon's ruling in *Marshall against Mary Rutton* (1800), 8 T.R. 545, 101 E.R. 1538 (K.B.), discussed in sources on private separation that are cited below at note 8.

The debate over the opposing positions championed by Mansfield and Kenyon was continued in the legal literature throughout the period up to the passage of the married women's property acts and beyond. It has been noted by historians too numerous to name here. Despite this scholarly attention, the doctrinal background to Mansfield's innovations and the litigation dynamics out of which they arose have been largely unexplored. As a consequence, work to date can leave the impression that Mansfield's attempts were peculiarly emancipatory for women. Despite James Oldham's assurance that Mansfield engaged in those reforms for the benefit of creditors and not "for the purpose of loosening females from their bondage,"<sup>2</sup> the singular focus on this particular set of cases has made it difficult to displace the conventional understanding of Mansfield as the hero and Kenyon as the villain, of pre-reform married women's law.

As I have argued elsewhere, thinking of Kenyon as the "villain" in the context of private separation agreements may make sense.<sup>3</sup> My purpose, however, is to take another look at Mansfield by exploring some of the many other exceptions to coverture that were litigated at the Mansfield court, thereby placing his private separation jurisprudence in its doctrinal context and complicating his "hero" image.

In contrast with late eighteenth-century judges who objected to the existence of some of the exceptions to coverture (and to that of private separation in particular), the question at the Mansfield court was not whether such exceptions should exist, but how to best regulate them and what their consequences should be. Mansfield was interested in regularizing and systematizing the law, most especially the commercial law, and among

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<sup>2</sup> James Oldham. *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols. (Chapel Hill: University of North Carolina Press, 1992), II: 1265.

<sup>3</sup> Karen Pearlston, "At the Limits of Coverture: Judicial Imagination and Married Women's Agency in the English Common Law," Ph.D. dissertation, Osgoode Hall Law School, York University, 2007.

his concerns was to regulate debtor-creditor relations and to reduce fraudulent conduct. These were important concerns in relation to cases in which he had to consider whether a specified exception to coverture would permit a married woman to make an enforceable contract. Mansfield's general approach to this issue was to say yes, that if a married woman who had some kind of separate property made a contract in respect of that property then she should be held to it, notwithstanding her coverture. His legal technique was to systematize the various exceptions to coverture. In his view, the doctrine of coverture and the exceptions to it together formed a "system of law." As he explained in 1783:

General Rules are adapted, to the frequent and ordinary State of the Subject Matter to which they relate, at the time when they are made. But in process of Time, through the Succession of Ages, New Manners arise, New Modes of Acting diversify the Subject and beget Cases within the letter but not within the Reason of the general Rule. Inconvenience, Injustice, and many Absurditys must follow if the letter of a general rule was to govern Cases not within the Reason & therefore Exceptions are implied from Time to Time, as the Cases fit to be excepted arise, & the Exceptions form a System of Law together with the Rule.<sup>4</sup>

With the hindsight of over 200 years I think that Mansfield was absolutely correct here. Let me therefore follow him by saying that when I speak of coverture, I mean the entire system: not just the strict doctrine itself, but also the exceptions to it, and the numerous ways in which it was circumvented or exploited throughout the centuries.

Those exceptions were not identical. Each of them had the potential to resonate through the structures of the common law in a different way. Cases were litigated because a married woman was doing something that pushed the limits of the conventional understanding of coverture. When faced with the question of regularizing the practice at

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<sup>4</sup> Oldham, *Mansfield Manuscripts* 1:199, quoting Mansfield's original draft opinion in *Ringsted v. Lady Lanesborough* (1783). The case is reported at 3 Doug. 197, 99 E.R. 610 (K.B.).

issue, Mansfield would do so if he thought that it would strengthen debtor-creditor relations without threatening the integrity of the common law as a whole. But if he thought that the new exception would threaten the common law's integrity he refused to permit it, even if by doing so he might let a married woman get away with playing fast and loose with her creditors.

The next section of the paper explains the basic structures of and relationship between some of the exceptions to coverture that were important during the Mansfield era. The sections that follow first examine the judicial treatment of the other exceptions and then focus back on and re-assess the private separation agreement cases. The respective approaches of Mansfield and Kenyon are briefly evaluated in the concluding paragraphs.

### **Exceptions to coverture**

My research has focused on exceptions to coverture that permitted a married woman to have some degree of legal and economic identity in two distinct sets of circumstances. The women in the first set of circumstances lived with their husbands and operated their own businesses under a legal arrangement wherein their trade assets were held separately from their husband's property. Any non-business assets that these women brought into the marriage were subject to the rules of coverture and therefore owned by the husband. Women in the second set of circumstances were separated from their husbands, whether or not they were in business. Women in both of these groups had to be able to make enforceable contracts, which means they would have to be able to sue and be sued, most conveniently in the common law courts.

Women in these circumstances were covered by several exceptions to coverture, most of which were either developed or clarified by the Mansfield court. These exceptions can be broadly divided into four categories. The first of these, feme sole trading, was a traditional category derived from medieval borough custom. A feme sole trader was a married woman who could buy and sell, make contracts, and sue or be sued with respect to anything concerning her separate trade as long as her husband consented, and as long as she was in a different line of work from her husband and he did not ‘intermeddle’ with her trade.<sup>5</sup> Uniquely among married women, such feme sole traders were personally liable and therefore subject to imprisonment for their debts (and, later, to bankruptcy). The custom appears to have faded everywhere but London by the sixteenth century.

A second traditional category can conveniently be referred to as “husband unavailable.” A wife could be sued on her contracts if her husband was unavailable because he was exiled or had abjured the realm.<sup>6</sup> In the eighteenth century this category came to include women whose husbands were transported for life, and also, according to the Mansfield court, for only a term of years.<sup>7</sup>

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<sup>5</sup> Married women traded as feme sole in at least sixteen different medieval English towns. For Torksey, London, Worcester, Lincoln, Winchelsea, Rye, Hastings, and Fordwich, see Mary Bateson, *Borough Customs*, 2 vols., ed. Mary Bateson, Publications of the Seldon Society, vols. 18 and 21, (London: B. Quaritch, 1904), I: 227; for Chester and Southampton, see Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993); 246-7, n. 40; for Oxford, see Mary Prior, “Women and the Urban Economy: Oxford 1500-1800,” in *Women in English Society 1500-1800*, ed. Mary Prior (London: Methuen, 1985), 93-117; for Exeter, see 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: Indiana University Press, 1986), 146; for Cambridge, see Alexandra Shepard, “Manhood, Credit and Patriarchy in Early Modern England, c.1580-1640,” 167 *Past & Present* (2000): 91; and for Bristol, York, Sandwich, and Carlisle, see Marjorie J. McIntosh, “The Benefits and Drawbacks of *Femme Sole* Status in England, 1300–1630,” 44 *Journal of British Studies* (2005): 411, n. 5; 413.

<sup>6</sup> See cases cited in *Countess of Portland v Prodggers* (1689), 2 Vern. C.C. 104, 23 ER 677 (Chy.).

<sup>7</sup> During the course of argument in *Ringsted v. Lanesborough*, Mansfield is reported to have said, “that in a case at Maidstone, where the husband had been transported, he had held the woman liable, and

In addition to those traditional categories of exception to coverture, there were two newer categories which almost certainly were in use in the seventeenth century (if not earlier) but became more prominent during the eighteenth. The first of these was the private separation agreement. Private separation agreements were usually equitable instruments in which the husband and wife agreed to live apart on the understanding that he would provide for her support. The husband either settled an income producing property on his wife or promised to pay her a regular income, in consideration of which the wife's trustees would indemnify the husband against the wife's future debts. The indemnification covenant severed the economic connection of husband and wife for most purposes so that he was no longer responsible for her debts. In addition, courts consistently held that a husband who was a party to a private separation agreement had ceded his right to the companionship of and control over his wife.<sup>8</sup>

The second of the newer categories is a hybrid of customary feme sole trading and married women's equitable separate property that I classify as the equitable separate trader. In these cases, the married woman's trade assets were settled on her in an equitable agreement, giving her beneficial ownership of her trade assets and profits. These women entered into contracts in the course of their trade. However, in contrast with customary feme sole traders, equitable separate traders were not geographically

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that Mr. Justice Yates had done the same at Carlisle," 3 Doug. 199, 99 ER 611. Sir Joseph Yates was a puisne judge of King's Bench from 1764 until his promotion to chief justice of Common Pleas in 1770.

<sup>8</sup> This is a broad characterization of private separation agreements. They were in wide use by wealthy people and also people of quite modest income. Their nature as private settlements meant that the particular clauses in such agreements varied widely. Judicial attitudes toward private separation also varied, as will be briefly explored below. For more on private separation agreements, see Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge: Harvard University Press, 1990), chapter 6; Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford: Oxford University Press, 1992), chapter 7; Tammy Moore, "Common sense and common practice: custody provisions in deeds of separation: England 1705-1873," M.A. Thesis, University of New Brunswick, 2002; Pearlston (2007), chapters 5, 9 and 10.

confined to the city of London, nor were they subject to imprisonment for debt or to bankruptcy.

Finally, it is important to understand that each of these categories required some action by the husband in order for the wife to take on any kind of enforceable feme sole status. Despite his pro-woman reputation, I know of no case in which Mansfield permitted a married woman to unilaterally decide to divest herself of any of the incidents of coverture.

### **Judicial treatment of the exceptions**

Although conceptually each of these exceptions to coverture had its own rationale, over time the rationale of one began to influence the reasoning applied to the other. The next section of the paper briefly sketches out and assesses the judicial treatment of some of the exceptions in specific contexts.

#### *a. Bankruptcy*

As stated above, customary feme sole traders were subject to bankruptcy whereas equitable separate traders were not.

The husband in the 1765 case of *Lavie v. Phillips* became bankrupt.<sup>9</sup> The bankruptcy of his wife, a feme sole trader, followed a few weeks later. The litigation arose after the husband's assignees in bankruptcy seized some of the wife's trade goods. At issue was, first, whether a customary feme sole trader could be a bankrupt; and second, if so, could the bankrupt husband's assignees seize the wife's separate property to the prejudice of the wife's creditors.

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<sup>9</sup> *Lavie v. Phillips* (1765), 3 Burr. 1776, 97 E.R. 1094 (K.B.); *La Vie v. Philips* (1765), 1 Bl. W. 570, 96 E.R. 329 (K.B.).

The answer to the first question was a simple yes. As one of the judges in the case is reported to have said, bankruptcy was “a statute execution,”<sup>10</sup> an alternative to execution against goods or imprisonment. As customary feme sole traders were liable to imprisonment for their debts, the bankruptcy alternative was easily extended to them.

The answer to the second question was no. Mansfield held that the creditors of a bankrupt feme sole trader had priority over her bankrupt husband’s creditors. As he explained, although coverture governed property relations between husbands and wives, the issue here was between the wife and her creditors, not the wife and her husband. A wife could conduct a separate trade only with her husband’s consent. He was free to withdraw that consent at any time, but that withdrawal would not affect the rights of the wife’s creditors, who would have to be paid before the husband could take the residue of his wife’s assets for himself.

The reasoning in *Lavie v. Phillips* did not cause any controversy—indeed it was widely accepted. In contrast, a few years later, a case involving a bankrupt equitable separate trader was very controversial. The wife in *Ex parte Preston* had separated from her husband by an agreement in which the husband’s linen draper business was settled on the wife.<sup>11</sup> The husband emigrated. The wife’s business failed several years later. When her creditors attempted to initiate bankruptcy proceedings, the bankruptcy 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*.”<sup>12</sup> The issue went

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<sup>10</sup> *La Vie v. Phillips*, 1 Bl. W. 575, per Aston, J.

<sup>11</sup> *Ex parte Preston* (1772), reported in Edward Green, *The Spirit of the Bankrupt Laws*, 3d ed. (London, 1776), 9, and in William Cooke. *A Compendious System of the Bankrupt Laws* (London: 1785), 22.

<sup>12</sup> Green (1776), 11; Cooke (1785), 24.

to the court of Chancery where Lord Chancellor Apsley ordered the commissioners to declare that the wife, Anne Fitzgerald, was a bankrupt.

Although *Ex parte Preston* was not heard at the Mansfield court, it is included here for two reasons. First, because it is illustrative of the difference between customary feme sole trading on the one hand and equitable separate trading on the other. But more importantly, the case is included because the reaction to it was quite varied, with one leading contemporary writer on bankruptcy rejecting its reasoning completely and another accepting it wholeheartedly.

The bankruptcy commissioner Edward Green argued that the case was wrongly decided.<sup>13</sup> In Green's view, Apsley had exceeded his jurisdiction by forcing the commissioners to declare Anne Fitzgerald a bankrupt when they were not convinced that there was a legal basis for them to do so. Apsley had "no more right, as a judge, to make such an order than he had to order the commissioners to *eat and drink at the expense of a bankrupt*" and the commissioners had "were perjured" when they declared Anne a bankrupt without legal reason.<sup>14</sup>

Green's remarks were published in 1776, several years before Mansfield issued the first of his three important private separation decisions. In contrast, William Cooke wrote the first edition of his bankruptcy treatise in 1785, just after the second of Mansfield's private separation judgments was issued. Cooke accepted Apsley's 1772 reasoning, but only after explaining that it had been *subsequently* confirmed by Mansfield's separation agreement judgments, the first two of which were issued in 1783

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<sup>13</sup> It is not known if Green was himself one of the commissioners in the case.

<sup>14</sup> Green, *Spirit of the Bankrupt Laws*, 11, emphasis in original. Apsley's legal acumen was not well respected during his lifetime. See N. G. Jones, 'Bathurst, Henry, second Earl Bathurst (1714–1794)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004.

and 1784.<sup>15</sup> Even though the wives in the private separation cases were not traders, by declaring them liable for their debts Mansfield's holdings in those cases made it easier for Cooke to conclude that a married woman separate trader who was not covered by the customary feme sole trader exception could nevertheless be subject to bankruptcy. This factor appears to have influenced Cooke's understanding of *Ex parte Preston*, which he characterized as applying "where a *feme covert* lives apart from her husband, acting as a *feme sole*, he not being liable to her debts."<sup>16</sup>

As Cooke concluded:

Every reason that induces the courts of law to make a feme covert personally liable for her contracts, equally operated to make her subject to bankruptcy; and it would be the height of cruelty to determine that a woman should be taken in execution for her debts, and at the same time, preclude her from that benefit, which the legislature affords to honest and industrious traders, sinking under the pressure of undeserved misfortune.<sup>17</sup>

Cooke's approach was reiterated in a 1791 treatise,<sup>18</sup> but it was Green's attitude that prevailed.<sup>19</sup> *Ex parte Preston* was a conceptual leap that went beyond Mansfield's holding in *Lavie v Phillips* that a feme sole trader could be bankrupt. Feme sole traders were in a unique legal position because they were subject to execution against the body.

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<sup>15</sup> *Ringsted v. Lady Lanesborough* (1783), 3 Doug. 197, 99 E.R. 610(K.B.) and *Barwell v. Brooks* (1784), 3 Doug. 371, 99 E.R. 702 (K.B.). Cooke included the third case, *Corbett v. Poelnitz* (1785), 1 T.R. 5, 99 E.R. 940 (K.B.), in the subsequent editions of his treatise. There were seven subsequent editions of this work which, during Cooke's lifetime, was "the standard authority on the subject." J. M. Rigg, "Cooke, William (1757-1832)", rev. Robert Brown, [Oxford Dictionary of National Biography](#) (2004).

<sup>16</sup> Cooke (1785), 24.

<sup>17</sup> *Ibid.*, 30.

<sup>18</sup> Anon., *A Succinct Digest of the Laws Relating to Bankrupts* (Dublin: 1791), 15-16.

<sup>19</sup> Cooke's approach was repudiated in a 1787 case where he appeared as counsel for the assignees in bankruptcy of a female innkeeper who committed an act of bankruptcy and then married after the bankruptcy commission was constituted but before a declaration issued. His argument that a woman who had committed an act of bankruptcy should not be permitted to shelter under her subsequently acquired husband was strongly rejected by Lord Chancellor Thurlow, who held the wife in the case entitled to the benefits of coverture. *Ex parte Mear*, 2 Bro. C.C. 266, 29 ER 146 (1787). But see the critique of Thurlow's judgment in Edward Christian, *The Origin, Progress, and Present Practice of the Bankrupt Law: Both in England and in Ireland*, 2 vols. (London: 1812-1814), II: 29-33.

All other married women were liable for their debts, if at all, only to the extent of their separate property.

Since feme sole traders were already exceptional because they could be imprisoned, extending bankruptcy to them was merely fair and logical. Extending bankruptcy to other married woman traders had much more potential to disrupt the status quo, especially since feme sole trading was limited to London, whereas equitable separate traders could, in theory, operate anywhere.

b. *Insolvency I: (insolvent husband of) equitable separate trader*

The problem in *Ex parte Preston* was not the legitimacy of equitable separate trading in itself, but rather its consequences. Indeed we don't know which way the Mansfield court would have gone on the bankruptcy issue had the case come before it. What we do know is that in the 1784 case of *Haslington v. Gill*, Mansfield confirmed the legitimacy of equitable separate trading, and clarified some of its potential consequences in a different context.<sup>20</sup>

Anne Peach was a widow who owned a cow herd. She planned to marry John Rhodes, a stonemason. Before they were married they executed a settlement in which Anne assigned part of her property to her trustees. That property included 32 cows and a bull. John Rhodes covenanted to “permit the said Anne Peach to carry on the trade and business of a cowkeeper and milkseller according to her own will and pleasure, and at such place and places as she should from time to time think proper, for her own sole use and benefit.”<sup>21</sup>

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<sup>20</sup> *Haslington v Gill* (1784), 3 Doug. 415, 99 E.R. 725; *Haselinton v. Gill* (1784), 3 T.R. 620, 100 E.R. 766.

<sup>21</sup> 3 Doug. 415.

John was insolvent a few years later. During the execution against his goods, the sheriff seized six of Anne's cows. When her trustees sued in trover (a common law action) to get them back, the defense argued that the husband appeared to be in possession of the cows, which gave the settlement a colour of fraud, and also that marital settlements are "not common settlements amongst *common People & in Trade*."<sup>22</sup>

The Mansfield court disagreed, and opted instead to regularize the status of equitable separate trader. Up to this point, any property held separate for the use of a married woman was required to be specifically listed in a schedule to the trust agreement. This requirement was the basis for the defence argument that any cows that were not a part of Anne's original cow herd were not subject to the trust and therefore belonged to her husband. This argument was rejected. Mansfield held that the identity of the property that was subject to a trust might depend on the purposes of that trust and that when a separate estate was settled for the purpose of trade then the property would not have to be specifically identified because it was in the nature of stock-in-trade to fluctuate. In his view, the only real issue was "the general question, whether by any means a man may before marriage put his intended wife in a situation to carry on a separate trade; there is no authority that he may not. In this case the cows would have been of no use to the wife, unless she had the produce of them."<sup>23</sup>

This holding was widely accepted. In fact *Haslington v. Gill* continued to be cited with approval until it was superceded by the married women's property acts at the end of the 19<sup>th</sup> century.

c. *Insolvency II: shady dealings?*

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<sup>22</sup> Lincoln's Inn Library, Dampier Manuscripts, Buller Paper Book 329, *Haslington v. Gill*.

<sup>23</sup> *Haselinton v. Gill*, 3 T.R. 620

*Jewson v. Read* (1773),<sup>24</sup> is the only case I know of in which Mansfield refused to confirm or expand an exception to coverture. In this case, a Mrs. Jewson borrowed a very large sum from Mr. Read. She secured the debt on a bond and by a warrant of attorney. When she failed to pay the debt, Read sued Jewson as a feme sole. Judgment was entered against her for the debt and execution issued against her goods. Mrs. Jewson subsequently became insolvent. Her assignees applied to have the judgment for the debt to Read set aside because she was a married woman and she had sworn that “her husband was not privy to the proceedings, to set aside the judgment.”<sup>25</sup> If the application succeeded, then the assets that had been seized and sold for the benefit of one creditor, Read, would become available for distribution by the assignees to the rest of her creditors.

There was tremendous ambiguity in this case regarding for example whether or not Mrs. Jewson was really a customary feme sole trader, whether she was acting in that capacity when she made the agreement with Read, and whether she and her assignees were swindling Read (or were Read and Jewson trying to pull a fast one on the other creditors). After lengthy argument, the court set the judgment aside, thereby departing from Mansfield’s usual practice of holding married women to the obligations they incurred while acting as feme sole and also leaving Read without a remedy.

Although this result seems anomalous given Mansfield’s general patterns of expanding the exceptions to coverture and of policing fraud, it can be explained by the nature of the two instruments used by Mrs Jewson to secure the debt—a bond and a warrant of attorney. In Mansfield’s view, a customary feme sole trader could buy and

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<sup>24</sup> *Jewson v. Read* (1773), Lofft 134, 98 E.R. 573; 4 T.R. 362, 100 E.R. 1065 (K.B.).

<sup>25</sup> *Ibid.*, 134.

sell, and she could sue (in the London courts) and be sued upon matters that directly related to her buying and selling. But the use of a bond to secure a debt transgressed the limited privilege that the London custom conferred upon a feme sole trader. As is indicated by Mansfield's rhetorical question, "Does the custom empower her to enter into a bond to bind her heirs?"<sup>26</sup> a bond had consequences more far reaching than those of simple contract. As a contract under seal, a bond created a specialty debt. Specialty debts had priority over simple contract debts and if a specialty debt bound the debtor's heirs then that debt "had in some cases priority in payment out of the real estate of a debtor" after the debtor's death.<sup>27</sup> Mrs. Jewson's use of the instrument therefore threatened to encroach upon real property law. These facts took *Jewson v. Read* outside the realm of Mansfield systematic rationalization of commercial law which, as David Lieberman has explained, could be presented as "a newly settled body of legal principles, specifically shaped by the demands of commerce."<sup>28</sup> In contrast, the law of real property was thought to be based on so many artificial connections that it would be dangerous to remove any one of them lest the entire edifice collapse.<sup>29</sup>

Mrs. Jewson's use of a warrant of attorney may have been even more problematic. These instruments were very common, with probably thousands of them filed every year in the late eighteenth century.<sup>30</sup> Permitting a married woman to use a

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<sup>26</sup> *Ibid.*, 140.

<sup>27</sup> Earl Jowitt, *The Dictionary of English Law* (London: Sweet & Maxwell, 1959), s.v. "debt."

<sup>28</sup> David Lieberman, "Property, Commerce, and the Common Law: Attitudes to Legal Change in the Eighteenth Century," in John Brewer and Susan Staves, eds., *Early Modern Conceptions of Property* (London: Routledge, 1995), 151.

<sup>29</sup> David Lieberman, *The Province of Legislation Determined* (Cambridge: Cambridge University Press, 1989), 140.

<sup>30</sup> A warrant of attorney was a written confession of judgment in which "one party gives authority to the other to enter judgment upon terms settled," see William R. Anson, *Principles of the English Law of Contract* (Oxford: Clarendon, 1879), 37. Use of these instruments increased rapidly during the eighteenth

warrant of attorney in circumstances where her husband was not privy to the transaction also had potentially wide consequences. Under these circumstances, the overall integrity of the common law trumped Mansfield's concerns with eliminating commercial fraud despite the fact that Mansfield viewed the result as "a hard case against Read, who appears bonâ fide to have lent the money."<sup>31</sup>

### **Private separation agreements**

Thus far, as we see, Mansfield's judgments clarified and strengthened some of the exceptions to coverture, while disallowing others. Although innovative, those determinations were not controversial. It was only on the issue of private separation agreements that his married women's judgments were rejected by Kenyon and other jurists.

#### *a. Wife's agency of necessity*

The issues that arose regarding private separation agreements have to be understood in relation to the wife's agency of necessity. The agency of necessity was an underlying factor in all issues regarding married women's capacity to contract. While a couple lived together, the agency of necessity enabled a wife to pledge her husband's credit for goods appropriate to his station in life. The husband's consent was usually implied in some manner or other and if the husband failed to pay then the creditor could sue him. If the couple stopped living together, however, a creditor who advanced goods or services to the wife could collect from the husband only if the wife was the innocent

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century, see Clinton W. Francis, "Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840" *Northwestern University Law Review* 80 (1986): 829.

<sup>31</sup> *Jewson*, Lofft 140.

party—basically only if her husband had thrown her out of the house for no good reason.<sup>32</sup>

In 1776, the court of common pleas ruled that a wife who left her husband without his consent, and without a separation agreement, could not be sued at common law, and her husband could not be sued either, because he was not liable to support a wife who had left him.<sup>33</sup> In this case, the creditor was out of luck, having extended credit to a married woman “at his peril,” as the eighteenth-century courts often stated.

*b. Mansfield’s separation agreement jurisprudence: the trilogy*

Things were different where there was a private separation agreement. Because the agreement gave the wife a separate income, and because her trustees agreed to indemnify the husband against the wife’s debts, then the husband could not be sued.<sup>34</sup> The question therefore became whether and how the creditor could get paid out of the wife’s property. Strictly speaking, the creditor was required to sue the wife’s trustees in chancery, but creditors preferred to sue the wives directly using the common law action of *assumpsit*.

The next step was to see whether a woman who was separated from her husband by agreement and provided with an income could be sued. The answer from the Mansfield court was a resounding yes in three well-known cases from the 1780s.<sup>35</sup>

In each of the three cases the separated wife tried to save herself from liability for her debts by pleading her *coverture*. A plea of *coverture* was a procedural attempt to

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<sup>32</sup> A husband was no longer obliged to support his wife in circumstances where she committed an uncondoned matrimonial offense. Since desertion was one such offense, a wife could not expect to exercise her agency of necessity if she chose to leave her husband.

<sup>33</sup> *Hatchett and Another v. Baddeley* (1776), 2 Bl. W. 1079, 96 E.R. 636 (C.P.).

<sup>34</sup> see for example...

<sup>35</sup> *Ringsted v. Lady Lanesborough* (1783), 3 Doug. 197, 99 E.R. 610; *Barwell v. Brooks* (1784), 3 Doug. 371, 99 E.R. 702 (K.B.); and *Corbett v. Poelnitz* (1785), 1 T.R. 5, 99 E.R. 940 (K.B.).

non-suit the plaintiff by stating that as a married woman she could not be held responsible for the debt and therefore there was no case to be tried. In all three cases, Mansfield held that a wife who had an adequate separate maintenance pursuant to an agreement could be sued in a common law court notwithstanding her coverture. A plea of coverture in such circumstances was a “most iniquitous defence.”<sup>36</sup> As Mansfield put it, “Credit was given to her as a single woman; and shall she now be permitted to say that she was not single?”<sup>37</sup>

Mansfield made those pronouncements in the earliest of the three cases, *Ringsted v. Lady Lanesborough* (1783). In holding there that a wife with adequate separate maintenance secured by separation deed could be sued for debts she contracted during her husband’s lifetime, Mansfield emphasized the facts that the husband had lived in Ireland and that the wife was widowed before the trial took place. He added that his reasoning would “only apply to a case situated exactly like the present,”<sup>38</sup> thereby apparently limiting its reach. A year later, however, in *Barwell v. Brooks* (1784), Mansfield extended the rule to include all separated wives with an adequate maintenance that was actually paid, whether or not secured by a deed. Mansfield also declared that the husband’s place of residence was *not* relevant to whether or not he was liable.<sup>39</sup>

Although Mansfield’s strong language was novel, these two cases can be read as an incremental extension of the boundaries of coverture. Indeed they were accepted as such by some judges and lawyers at the time, in large part because the wife’s separate maintenance was conceptualized as providing her only with *necessary* goods and

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<sup>36</sup> *Ringsted*, 3 Doug. 205.

<sup>37</sup> *Ibid.*, 203.

<sup>38</sup> *Ibid.*, 203-4.

<sup>39</sup> *Barwell v. Brooks*, 3 Doug. 374. See also 3 Doug. 204, note (o), *Cooke* (1785), 28.

services. Because it was limited to necessities, the prospect that a married women with a separate maintenance agreement could be sued at common law as a sort of substitute for her husband was relatively easy to swallow.<sup>40</sup>

The greatest controversy arose around the third case, *Corbett v. Poelnitz* (1785), which went much further by making a privately separated feme covert liable for *any* contract that she might make, even if paying the debt would completely deplete her capital fund, as on the facts it did. For Mansfield, it was only logical that if the husband's financial obligation toward his wife was removed by the agreement, then the wife must be responsible for her own obligations as if she were feme sole. As Mansfield's protégé the puisne judge Francis Buller was reported to have said, "there is no colour to say, that, if the wife spends the whole of her settlement, her husband shall be liable even for necessities."<sup>41</sup> By making it possible for a wife to sink the fund, this reasoning severed the fact of the wife's separate maintenance from its protectionist rationale.

The distance between *Corbett v. Poelnitz* and the two cases that preceded it should not be under-estimated. By jettisoning the liability limiting necessities rationale, *Corbett* made the married woman potentially liable for *any* contract that she might make. It is this case that led to most of the controversy over Mansfield's private separation rulings.<sup>42</sup> It should nevertheless be remembered that even this wide contractual capacity was extended only to married women who were separated pursuant to an agreement with their husbands. Further, as I have noted above, feme sole traders and equitable separate traders achieved their contractual capacity only with the consent of their husbands.

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<sup>40</sup> See for example the note at 2 Str. 1214, 93 E.R. 1136.

<sup>41</sup> *Corbett v. Poelnitz*, 1 T.R. 10, per Buller, J.

<sup>42</sup> See, for example, John Joseph Powell, *Essay upon the law of contracts and agreements*, 2 vols. (London, 1790), I: 93-97. See also Michael Lobban, 'Powell, John Joseph (*bap.* 1753, *d.* 1801)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004.

## Conclusion

It is true that Kenyon overruled Mansfield on private separation.<sup>43</sup> But the disagreement between the two judges was less about what the married woman *herself* could do and more about what a husband could be permitted to authorize his wife to do. Mansfield thought that a husband was perfectly within his rights to confer quite a wide range of contractual capacities upon his wife. In contrast, it was Kenyon's view that Mansfield's separation agreement judgments, and *Corbett v. Poelnitz* in particular, represented an unwarranted interference with the traditional family and an affront to ecclesiastical jurisdiction over the law of marriage. For Kenyon, it was beyond the power of a *husband* to confer quite so much contractual power on his wife, and he narrowed that power as much as possible.

Although both Mansfield and Kenyon were intent on the regulation of the doctrine of coverture and the relationships to which it gave rise, Mansfield was more liberal than Kenyon about the potential consequences of a contract of private separation. Despite this fact, Mansfield did not make a *uniform* change to the doctrine of coverture. Rather, he made choices which were shaped both by the effect of potential changes on the structure of the common law, and also by the social values of his time, his class, and his

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<sup>43</sup> Kenyon's antipathy to Mansfield's separation agreement jurisprudence was evident in 1794 in *Ellah v Leigh* (1794), 5 T.R. 679, 101 E.R. 378 (K.B.), where he said with reference to *Corbett v. Poelnitz*, "I confess I do not think that the Courts ought to change the law so as to adapt it to the fashion of the times: if an alteration in the law be necessary, recourse must be had to the Legislature for it," *ibid.*, 5 T.R. 682. In 1800, Kenyon took the opportunity offered by *Marshall v. Rutton* to overrule Mansfield with his holding that a married woman could not be sued on her contracts in a common law court. See *Marshall against Mary Rutton* (1800), 8 T.R. 545, 101 E.R. 1538 (K.B.). According to Kenyon, "A wife living apart from her husband, and who has property secured to her own separate use, must apply that property to her support, as her occasions may call for it; and if those who know her condition, instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her than others who have nothing to confide in but the honour of those they trust," *ibid.*, 8 T.R. 547.

gender.<sup>44</sup> And he never seriously considered granting a married woman the right to give *herself* the option of operating as feme sole.<sup>45</sup>

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<sup>44</sup> For more on the social values and attitudes to legal change of both Mansfield and Kenyon, see Douglas Hay, "The State and the Market in 1800: Lord Kenyon and Mr. Waddington," *Past and Present*, no. 162 (1999): 101-162.

<sup>45</sup> The only judge I know of in the period who came close to granting that autonomy to a married woman was Francis Buller in *Cox v Kitchin* (1798), 1 B. & P. 338, 126 ER 938 (C.P.). This observation may strike some readers as ironic as Buller was parodied in the 1780s as "Judge Thumb," ostensibly due to an attempt to "revive the ancient doctrine that it was lawful for a husband to beat a wife provided that the stick was no thicker than his thumb," Lawrence Stone, *The Family, Sex and Marriage in England, 1500-1800* (1977), 326, quoted in Maeve Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (London: Weidenfeld & Nicolson, 1992), 7. Doggett found no evidence that Buller in fact made such a statement, *ibid.*