The Early Modern Englishwoman:
A Facsimile Library of Essential Works

Series III

Essential Works for the Study of Early Modern
Women: Part 1

Volume 3

Legal Treatises, 3
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PREFACE
BY THE GENERAL EDITORS

Until very recently, scholars of the early modern period have assumed that there were no Judith Shakespeares in early modern England. Much of the energy of the current generation of scholars has been devoted to constructing a history of early modern England that takes into account what women actually wrote, what women actually read, and what women actually did. In so doing, contemporary scholars have revised the traditional representation of early modern women as constructed both in their time and in ours. The study of early modern women has thus become one of the most important – indeed perhaps the most important – means for the rewriting of early modern history.

The Early Modern Englishwoman: A Facsimile Library of Essential Works is one of the developments of this energetic reappraisal of the period. As the names on our advisory board and our list of editors testify, it has been the beneficiary of scholarship in the field, and we hope it will also be an essential part of that scholarship’s continuing momentum.

The Early Modern Englishwoman is designed to make available a comprehensive and focused collection of writings in English from 1500 to 1750, both by women and for and about them. The three series of Printed Writings (1500–1640, 1641–1700, and 1701–1750) provide a comprehensive if not entirely complete collection of the separately published writings by women. In reprinting these writings we intend to remedy one of the major obstacles to the advancement of feminist criticism of the early modern period, namely the limited availability of the very texts upon which the field is based. The volumes in the facsimile library reproduce carefully chosen copies of these texts, incorporating significant variants (usually in appendices). Each text is preceded by a short introduction providing an overview of the life and work of a writer along with a survey of important scholarship. These works, we strongly believe, deserve a large readership – of historians, literary critics, feminist critics, and non-specialist readers.

The Early Modern Englishwoman also includes separate facsimile series of Essential Works for the Study of Early Modern Women and of Manuscript Writings. These facsimile series are complemented by The Early Modern Englishwoman 1500–1750: Contemporary Editions. Also under our general editorship, this series includes both old-spelling and
modernized editions of works by and about women and gender in early modern England.

New York City
2005
INTRODUCTORY NOTE

Early modern Englishwomen legally stood, in the words of *The Lawes Resolutions of Womens Rights*, “strictly tyed to mens establishments, little or nothing excused by ignorance” (2). The texts reprinted here in *Legal Treatises* in *The Early Modern Englishwoman: A Facsimile Library of Essential Works: Series III* reconstruct the legal status of the early modern Englishwoman. They have been reprinted in the hope that we will not find ourselves in a position of ignorance vis-à-vis one of the “essential” frameworks governing her life. In order to provide this framework for the years 1600–1750, the first volume of “Legal Treatises” reproduces *The Lawes Resolutions of Womens Rights* (1632), the first known treatise devoted to the legal rights of women. The second volume reproduces a significant legal treatise concerning married women, *A Treatise of Feme Coverts: Or, The Lady’s Law* (1st ed. 1732). Because “The Early Modern Englishwoman” series is devoted to the voices of women, the second volume also reproduces *Hardships of the English Laws. In Relation to Wives* (1735), the only known statement authored by a woman in the period that systematically analyzes and criticizes her legal position. The third volume reproduces the third edition of *Baron and Feme: A Treatise of Law and Equity, Concerning Husbands and Wives* (3rd ed., 1738). Together, these four texts provide an overview of the laws that directly concerned women’s lives during the sixteenth and seventeenth centuries and detail the major changes to these laws that occurred during the century that separates the treatises.

The introduction to the laws of the period that follows here provides concise overviews of the general structure of the English legal system, the legal education of practitioners of the law, the kinds of legal literature produced in the period, and the legal position of early modern Englishwomen. This introduction is meant to facilitate a reading of the treatises by broadly defining many of the laws discussed in great detail in them. Introductions to each of the reproduced works are also provided, including information about each work’s publication and authorship, intended audience, content and reception. The appended bibliography of important secondary scholarship devoted to the early modern Englishwoman’s legal position should assist the reader in obtaining more specialized knowledge.

I would like here to express my gratitude to John H. Baker and Amy Louise Erickson for their extraordinary generosity in answering my several questions concerning early modern law. I am also indebted to the late Janice Thaddeus for providing me with access to her unpublished research
and to Margaret Hunt for assisting me in my attribution of *Hurdships of the English Laws*. My special thanks as well to Eric Avram for his support, Patrick Cullen for first giving me this opportunity and to the series editors Betty S. Travitsky and Anne Lake Prescott and editor Claire Annals of Ashgate for their careful attention to this project. I also acknowledge the tremendous efforts of the many research librarians and curators who assisted me in the research of these volumes, particularly Susan Harris at the Bodleian Library, Darren Lomas at The British Library and Alan Jutzi at The Henry E. Huntington Library.

**The Structure of the Early Modern English Legal System**

English law was not centralized in a single, uniform jurisdiction during the early modern period, but rather dispersed in a complex web of exclusive jurisdictions. Functioning independently of each other, these jurisdictions developed separate bodies of law, applied and overseen by their own distinct networks of courts. Only together did these several jurisdictions produce a workable legal system in England. The rules at times overlapped, for example in the regulation of property ownership; and the rights they protected and the remedies they provided at times conflicted with each other. Sir Edward Coke recognized sixteen such jurisdictions operative during the early modern period.\(^1\) The following overview surveys the most important of these jurisdictions: the common law, equity, ecclesiastical law and local custom.\(^2\)

*Common Law*

With its origins in the customs of the king’s court, the common law emerged during the twelfth century as the reigning law of the realm.\(^3\) The common law was that law deemed customary, or common, to all of England and comprised a constantly growing body of legal principles. By the early modern period, the common-law system was embodied in case law, i.e., the courts’ reasonings, decisions and rulings in individual cases. These general principles were viewed as authoritative precedent throughout the realm. Judges, following these precedents in passing judgment in subsequent cases, commonly understood their function as applying these ancient principles to new fact patterns, rather than as making new law. Certain common-law principles, such as primogeniture and coverture, had far-reaching impact on the lives of women and will be discussed at greater length below.

The common law must be distinguished from parliamentary legislation or statutes passed by the Parliament. Statutory law was deemed superior to
the common law, and the courts were bound to uphold statutes, even if they directly conflicted with common-law precedent. Parliament had absolute power to make new laws, set aside old laws and reverse the pronouncements of the common law.

Administration of the common law was centralized by the end of Charles II’s reign in three main courts all located in Westminster: the Common Bench (or Court of Common Pleas); the Court of King’s Bench; and the Exchequer of Pleas. The local administration of common-law justice throughout England was accomplished through the systems of “assizes” and “quarter sessions.” The assizes provided for regular visits of the king’s appointed commissioners to the various counties of England to hear criminal charges, conduct trials and make judgments in criminal cases. The system of quarter sessions provided for the hearing of criminal charges four times a year in each county in England by local “justices of the peace” (knights and gentry charged to keep the peace and empowered to punish offences).4

Equity

Equitable jurisdiction originally referred to the extraordinary authority of the “chancellor” (an officer of the state and minister of the Crown) to administer justice in individual cases. By the sixteenth century, this special authority became housed in specific courts of equity authorized to hear claims equitable in nature, including the Chancery, Court of Requests and the Exchequer and in the Palatinates of Lancaster, Chester and Durham. Individuals turned to the courts of equity when the common law had somehow failed to provide them with justice. As Lord Ellesmere explained in 1615, the rationale for equity jurisdiction was that

men’s actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances. The office of the chancellor is to correct men’s consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law.5

By the early modern period, the courts of equity had developed their own body of coherent principles and, like the common-law courts, treated judicial precedents as binding. Nevertheless, equity was generally regarded as more flexible than the common law, in large part because of the equity courts’ procedures and special remedies. Equity judges were empowered to take account of the specific circumstances and facts of a given case and the particular resources, or lack thereof, available to the parties. The courts of equity were not permitted to award monetary damages to plaintiffs but did have a number of remedies unique to their jurisdiction, often of greater use to plaintiffs. For example, equity judges could grant “injunctions”
(orders to stop an activity deemed unjust by the court); “stay” (halt) the bringing of an action at common law; order a defendant specifically to perform his contractual promise; and order the discovery of documents held by a third party. The flexibility, special procedures and remedies of the courts of equity were especially helpful to female litigants, who made up a significant number of suitors in these courts.6

Ecclesiastical Law

Ecclesiastical law in the early modern period derived from three sources: the canon law of the western church (the *Corpus juris Canonici*); the code of Roman law (the *Corpus juris civilis*); and ecclesiastical common law. Ecclesiastical jurisdiction was broad, encompassing a wide range of administrative, civil and disciplinary functions. Importantly, the administrative side of ecclesiastical jurisdiction regulated the laws of marriage formation and dissolution; “probate” matters (the process of proving deceased persons’ wills and having them registered with the courts); and “intestate succession” (property inheritance in the absence of a will). The ecclesiastical courts had extensive jurisdiction in England to hear cases involving matrimonial disputes, broken marriage contracts, petitions for separations and annulments and disputed inheritances.

The ecclesiastical courts also had a significant disciplinary function. They were empowered to punish individuals for a wide range of moral and sexual offences, including drunkenness, fornication, bigamy, practicing midwifery, scolding, defamation, and religious offences (including heresy, apostasy, recusancy, absence from church and failure to receive communion).

Women appeared before the ecclesiastical courts in larger numbers than before any other jurisdiction in the early modern period. They found themselves called before these courts for moral and sexual infractions. Importantly, they took advantage of these courts to seek redress in matrimonial and inheritance disputes. So, too, large numbers of women appeared before the probate side of these courts to file and record wills.7

Custom

Unlike the common law, which represented the national custom of England, local custom represented only the traditional law of a given manor, borough or town. Manorial courts (or “court leets”) and borough courts oversaw disputes involving local, civil customs; in addition, it should be noted that the common-law and equity courts had authority to enforce manorial customs. Well into the early modern period, manorial and borough courts
handled debt issues and disputes relating to local customs of land inheritance.

Certain manorial customs still operative in the early modern period had an enormous impact on the lives of women. Some customs, such as “widow’s bench” and the acceptance of “femes sole traders,” as discussed below, provided women with more economic opportunity and freedom than common-law principles permitted. Yet, it must be emphasized that other local customs were more restrictive than the common law. Because many of the manorial rolls and borough records have not survived or have not been adequately studied, it is not possible at the present time to determine the full impact of customary law on the lives of women. One must assume that given the great variety of local customs on a wide range of issues of import to women, the locale in which a woman lived had a significant impact on her life.8

* * * * *

During the course of the early modern period, the “balance of power”9 among these competing legal systems shifted in favor of the common law. In the interests of uniformity, many conflicting ecclesiastical and manorial principles of significance to women were made to conform to common-law principles, often, as discussed below, to women’s detriment.10 These encroachments of common-law jurisdiction upon ecclesiastical, equitable and manorial jurisdiction were achieved through both statutory and judicial pronouncements. Cromwell’s regime, in particular, lessened the power of ecclesiastical and equitable jurisdiction by abolishing certain ecclesiastical and equity courts (for example, the Court of Requests) and transferring jurisdiction to the common-law courts.11

Legal Education

Education in the common law took place in the western suburbs of London at the four Inns of Court and to a lesser degree in other Inns in the area. The exclusively male Inns were places of residence that provided accommodation, entertainment and, most importantly, formal education in the common law to the students. Training was standardized: after seven years attending “readings” (lectures) and performing “moots” (oral pleading exercises), the student would be certified as a barrister. One significant problem with the educational system in this period was its failure to provide a systematic and comprehensive overview of the common law. Students had to look outside their formal instruction for such an overview, often turning to the available legal literature as a resource.12
The education of advocates of ecclesiastical law occurred in the exclusively male universities of Oxford and Cambridge. After obtaining a doctorate of law, individuals could be admitted to practice law by the ecclesiastical authorities. Henry VIII abolished the study of canon law at the universities of Oxford and Cambridge, permitting only the study of civil law. Canon law was therefore learned only through self-education and practical experience.

Legal Literature

The history of English legal literature is intimately tied to the rise of the common law. Historians have characterized the sixteenth and seventeenth centuries as a period in which medieval law was transformed into modern law. In large part, this transformation was aided by the legal literature of this period, which became more systematized throughout the era.13

Because of the centrality of precedent to the formulation of English common law, literature that recorded judges’ rulings became necessary as a means of educating apprentices and practitioners of the common law and of ensuring uniformity of decision-making. As judicial procedure became increasingly more standardized, literature that documented the proper methods for bringing actions in the common-law courts also became critical. By the early modern period, literature that accomplished these goals had become more available in the form of formularies; medieval yearbooks; reports of cases and abridgements; and legal treatises. Between 1600 and 1800, the number of legal texts published grew from 100 to 1,500 titles.

Formularies and Books of Precedent

In mastering the practice and procedures of the common-law courts, practitioners, lawyers and law clerks relied on texts that compiled sample precedents of “writs” (official statements in Latin of either the demand, or wrong, that commenced judicial actions), of pleadings before the courts and of entries in the court records. From the first quarter of the thirteenth century, writ formulae, or collections, became available, and, by the sixteenth century, books of “entries” (the pleadings that were entered on the “rolls”, or records) were in great demand.

Books of precedent (also known as conveyancing manuals) contained models of various kinds of legal forms and were widely available by the end of the sixteenth century. The kinds of legal forms frequently provided in books of precedent include examples of valid wills, bonds, debts, contracts and property deeds and conveyances. These manuals served the practical function of providing legal practitioners with technically correct
models on which to base actual legal documents. Thomas Phaer’s *Newe Boke of Presidents* (1543) is one early example of this genre. Several others were published in the period, including Sir Orlando Bridgman’s *Conveyances* (1689) and the anonymous *Precedents in Conveyancing* (1744). By the seventeenth century, simplified manuals also existed, such as the anonymous *The Country-Man’s Counsellor: or, Everyman Made his Own Lawyer* (n.d.), providing basic models together with instructions on how to complete the forms.

**Medieval Year-Books, Reports of Cases and Abridgements**

The written records of the common-law courts set out the results of individual cases and became the most important source of precedents for future cases. But these records were formulaic and incomplete. They failed to record the factual evidence, lawyers’ arguments or judges’ reasonings underlying the cases’ “holdings” (rulings). This missing information was critical to practitioners for a complete understanding of the rules of law and of pleading. Medieval year-books (circulated originally in manuscripts) and published reports of cases somewhat filled the gap. Year-books and reports of cases were written by members of the legal profession who attended court and took notes on specific cases. In the early modern period, several reports of cases were published, for example, Sir Edward Coke’s *The Reports* (1610–16, 1658, 1659), providing reasoned expositions of select case holdings along with instructions to future lawyers.

Abridgements (also known as commonplace books) supplemented the reports. These texts divided legal principles into different headings, arranged them alphabetically, and explained them by reference to judicial holdings, parliamentary records and statutes. These abridgements methodized the common law by distilling the rules of law logically from the jumble of facts and ideas found in the chronologically organized reports of cases. Abridgements are precursors of modern digests and legal encyclopedias.

**Legal Treatises**

The earliest legal treatises date from the fourteenth century. Compiled from oral readings on statutory and common law at the Inns of Court, these manuscripts cannot be characterized as law books, per se. The first English legal treatise, as we understand the term today, was Sir Thomas Littleton’s *New Tenures*, an introduction to the common law of real property, published in 1481. With the advent of printing came a proliferation of legal treatises on specific areas of the common law. The most important treatises of the seventeenth and eighteenth centuries were Sir Edward Coke’s *Institutes of the Laws of England* (1628–44), Sir Matthew Hale’s

Legal treatises, like abridgements, were intended to methodise the confused and disorderly morass of the common-law system. The best definition of the modern legal treatise (or text-book) is that of T. Plucknett:

The characteristic of the modern English text-book … is its method. It begins with a definition of the subject matter, and proceeds by logical and systematic stages to cover the whole field. The result is to present the law in a strictly deductive framework, with the implication that in the beginning there were principles, and that in the end those principles were found to cover a large multitude of cases deducible from them.14

Such treatises are generally monographs, intended to focus on a discrete, substantive (as opposed to procedural) area of the law understood as unified and coherent. The arrangement of subject matter is logically divided and presents “a single branch of the law as a systematic body of definitions, principles, and distinctions”.15 The treatises frequently cite specific cases as authority for the announced legal principles and often provide several hypotheticals that apply these principles to other fact patterns.

The Legal Position of Early Modern Englishwomen

The following overview of the public and private legal position of early modern Englishwomen introduces the important principles, statutes, court holdings and customs explored in the treatises reprinted in these volumes. The public position of women at law refers to women’s relationship to the public institutions responsible for enacting, maintaining, enforcing and punishing the transgression of the law. The private position of women at law refers to women’s place in the private sphere of society as shaped by the laws of marriage formation and dissolution, contract, property and inheritance.

The Public Position of Women at Law

Women… have nothing to do in constituting Lawes, or consenting to them, in interpreting of Lawes or in hearing them interpreted at lectures, leets or charges… \(^{16}\)

Regardless of their age or marital status, early modern Englishwomen found themselves barred from all direct involvement in the public institutions central to the legal structure of England. Denied an active role in the exercise of political authority, women could not sit in Parliament or
act as counselors or government officials. Women did have the right to petition Parliament, doing so with regularity throughout the early modern period and in great numbers during the civil war and Commonwealth.17

Women had little official role in the judicial process. They could bring suits and be sued in court, subject to the limitations imposed by common law on *femes covert* (as discussed below). They could also be required to give evidence to court officials and to act as witnesses in trials. Women could not, however, study the common law at the Inns of Court or the civil law at the universities, thus precluding them from serving as attorneys or judges. They also could not serve as jurors in court trials, except on “juries of matrons”, empanelled to examine defendants’ bodies for proof of pregnancy, virginity, physical evidence of witchcraft and the like and to testify in court as to their findings.18 Under the common law, they were not permitted to serve as “compurgators” (oath-takers in court swearing to the reputation and character of a neighbor), although they were permitted to act as compurgators in the ecclesiastical courts. Women were not permitted, in most instances, to play an active role in the policing or enforcement of the criminal law at the local level. These disabilities persisted throughout the period in question, as no law reform ameliorated any of these basic impediments to women’s legal status.

The most significant exception to women’s exclusion from public participation in government occurred at the highest level of government, in their right of succession to the throne. Early in Mary I’s reign, a parliamentary statute (1554) confirmed the “regal power” of a queen regnant, authorizing “that what or whersoever statute or law doth limit and appoint that the King of this realm may or shall… do anything as King … the same the Queen … may by the same authority and power likewise… do.”19

Technically, women could serve certain limited, local functions in government and the church. Pearl Hogreve has documented a number of instances of women serving as “churchwardens” (legal representatives of the parishioners) and “overseers of the poor” (appointed by the courts to enforce compulsory financial relief of the poor) and a handful of examples of female “constables” (charged with seeking out and reporting on breaches of the peace) and “justices of the peace” (a commission of knights and gentry charged with keeping the peace and enquiring into, hearing and determining various criminal charges or offences).20 Finally, there have been found scattered cases of women serving as “sherrifs” (responsible, among other things, for sitting on the bench of the assizes). Most female sheriffs obtained this office by right of inheritance, as did Anne Clifford, Countess of Dorset, Pembroke and Montgomery, who served as sherriff of Westmoreland from 1650–1675. Women could also hold wardships as ladies of the manor.
Women were excluded from the parliamentary franchise, although there are some examples of unmarried women voting in parliamentary elections prior to 1640. In the early modern period, some women did participate in electoral activities at the constituency and local levels. Widows, heiresses and mothers of minor sons protecting their sons’ political interests in constituencies could conduct political and electoral affairs. On the local level, women also routinely attended and voted in the parish vestry. By the eighteenth century, women could vote for and even hold the office of church sexton.

The definition of political action has received some revision by historians, its meaning broadened to encompass a wide range of activities impacting the public sphere: “dispensing patronage, influencing decisions and elections, petitioning, entertaining, haranguing, reporting seditious conduct, writing and disseminating ideas in printed form.” It is clear that women, particularly in the period from 1640 to the mid-eighteenth century, participated in such political action. So, too, women had at times great influence in the private sphere, thereby indirectly promoting public action through their relationships and kinship networks. Generally, however, women’s direct participation in government was limited.

The Private Position of Women at Law

As shown below, the author of The Lawes Resolutions delineates three important phases of a woman’s life – maidenhood, wifehood and widowhood – each resulting in markedly different consequences to her private, legal status. This introduction, in recognition of the centrality of the act of marriage to a woman’s legal position, will follow the same format and discuss each phase of her life separately.

Maidenhood

Before the age of majority, the parent or guardian retained a rigid control over minors, whether male or female, including the right of guardianship over their inherited estates. There were different ages of majority for different purposes, but generally the law set a lower age of majority for women than for men (twelve for women, fourteen for men), though in 1653 Parliament raised the legal age of women’s consent to marry and to make a contract or will from twelve to fourteen.

The age of majority differed for men and women inheriting interests in land held in “military tenure” or “knight-service” (i.e., tenancy subject to several obligations, including mandatory aids, fines and monetary relief or payments to the lord or lady of the manor). If the tenant of inheritable land held in military tenure died leaving an heir under age (and, therefore, unable to perform his or her feudal obligations), then the heir became subject to
“wardship”. Under wardship, the lord or lady of the manor became the
guardian of the ward, having custody both of the land and the body of the
ward. Such custody entitled the lord to profits of the land during the heir’s
minority and even the right to select a suitable marriage partner for the
ward. A ward who refused to consent to the marriage had to compensate the
lord financially. A woman attained her freedom from wardship at the age of
sixteen, while a man had to wait until he turned 21. Upon reaching the age
of majority, the ward could finally take control of his or her land. The
system of military tenure was not abolished until 1645.24

Upon reaching the age of majority, the *feme sole*, or single woman,
gained most of the private legal rights held by men. The laws of succession
permitted the *feme sole* to receive gifts or legacies of “personal property”.
(Personal property is defined as all forms of property, excluding real
property, including money, clothing, furniture, household goods and debts.)
The *feme sole* could also inherit “real property” (interests in land) under
certain circumstances. The system of primogeniture dictated that in the
absence of a will to the contrary, the eldest son inherited all of his deceased
father’s “freehold property” (land held for life or for uncertain duration, as
opposed to land held in leasehold, for a set number of years). If there were
no sons to inherit, then the daughter inherited such property. If there was
more than one daughter, then all the daughters would inherit the freehold
property equally. Manorial custom governed the succession of “copyhold
property” (land held at the will of the lord of the manor and according to
the manor’s customs) in the absence of a will. Customs varied in the
different boroughs of England – some boroughs followed the system of
“primogeniture” (inheritance by the first-born son), some “female
primogeniture” (inheritance by the first-born daughter in the absence of a
son), some “ultimogeniture” (inheritance by the last-born child), some
divided the land jointly among the sons and, in rare instances, some even
allowed all of the children to inherit jointly.

These forced laws of succession could be avoided simply by the creation
of a will permitting a parent to disinherit any or all of his or her children,
unless the property at issue had been “entailed” (a specification that land
must pass to a certain line of heirs) or was held in military tenure. The
freedom to draft wills contrary to the forced laws of succession could lead
to the avoidance of primogeniture in favor of a younger son, a daughter or
even all of the daughters. Yet, such freedom could also lead to the
disinheritation of daughters: in the face of only female, not male, children,
a parent could will property to a brother or nephew, for example, in order
to preserve the male line of property succession.

The rule of “reasonable parts” (or “thirds”) governed the distribution of
the deceased parent’s personal property; it provided that children receive
two-thirds of the property, if the parent died “intestate” (without a valid
will) and, in certain northern boroughs, one-third of the property, if the
parent died leaving a will prescribing less than the required two-thirds.
The ecclesiastical courts had discretion to award even higher percentages
and to divide the property between the children in any manner. A study of
the records of the ecclesiastical courts reveals that before 1670, the courts
were generous in their division of such property, often allocating even
higher percentages than required by law to children and distributing the
property equally amongst the children regardless of their sex.25

The *feme sole* could not only inherit and own real property in her own
name but could also retain the same ancillary rights over such property as
did men, including control over its disposal, maintenance, improvement
and rental. The *feme sole* could also make a will, bequeathing property and
gifts to third parties of her choosing. She stood vis-à-vis third parties in
the same legal position as a man, fully capable of entering into binding
contractual relationships with them. She could sue or be sued by third
parties in her own name, and could plead in person. The legal system
treated her as a fully capable and fully accountable subject with independent
agency. The *feme sole* retained these rights as long as she remained a maid.
Yet, her legal identity underwent radical alteration upon her marriage.

Legal pressures made it difficult for single women to support themselves,
however. The Statute of Artificers, passed in 1563, provided that single
men and women between the ages of 14 and 45 could be forced into
service.26 This statute, while theoretically gender neutral, was applied
nearly exclusively to single women. Further, municipalities often overtly
discouraged single women from establishing their own businesses or
working autonomously by denying them licenses to trade independently or
to set up alehouses,27 though they were legally required to support
themselves.

Concern with the *feme sole*’s ability to own and retain control over
property in her own name led to the passage of several abduction statutes
routinely passed throughout the medieval and early modern periods. These
statutes punished the abduction (even with her consent) of a married or
unmarried woman owning property either in goods or land or in wardship,
by levelling severe monetary damages on the abductor. These damages
were recoverable not by the woman, but by her husband, father or guardian,
as the abductor’s act was understood as the unlawful taking of the husband’s
or father’s property. If the woman was an unmarried minor, then the
abductor could also be imprisoned for two years. The more serious offence
of forcibly abducting and marrying a woman of property (in either goods
or land) or an heir apparent (“vulgarily called *stealing an heires*”28) was
treated as a felony and therefore punishable by death. The offence of rape
or ravishment, defined as the “the carnal knowledge of a woman forcibly
and against her will”,29 was likewise treated as a felony.
Marriage Formation and Dissolution

Now that I have brought up a Woman...me thinks she should long to be married.30

The legal treatises devote significant attention to the formation and dissolution of marriage, for the laws were complicated, if not inherently contradictory, and were undergoing significant change throughout the period. As previously discussed, ecclesiastical law governed marriage formation and its breakdown, and the ecclesiastical courts oversaw all suits involving marriage and divorce. From the twelfth century, canon law required evidence only of the mutual consent of the parties and did not require parental consent, physical consummation, set or prescribed words in the ceremony or even solemnization in church to uphold the legality of a marriage. Instead, canon law required that such consent be evidenced by sponsalia per verba de praesenti (spousals by words in the present tense). A couple could simply agree to take each other as husband and wife in the open air, with no witnesses, and the canon law would treat the couple as validly wed. Sponsalia per verba de futuro (spousals by words in the future tense, that is, promises to marry in the future) did not achieve legally valid marriages but only engagements that could be dissolved by the mutual consent of the parties. Such promises to marry in the future could immediately become legally binding by the subsequent recital of sponsalia per verba de praesenti or by physical consummation.

The system of spousals caused widespread irregularity in the formation of marriage and confusion and uncertainty over what words constituted present or future spousals. “Clandestine marriages” (secret marriages performed without witnesses) and “irregular marriages” (marriages that did not conform in some way to the Canons of 1604) were commonplace in the fifteenth and sixteenth centuries. Throughout the medieval and early modern periods, the English church attempted to impose more regularity upon marriage formation. The Canons of 1604 confirmed many of these efforts, requiring the publication of “banns” (public notice of the couple’s intention to marry) three times before the marriage; the issuance of a marriage license evidencing the consent of the parents of a bride or groom under 21 years of age; and a public ceremony during certain prescribed seasons and hours at the church door of the diocese in which at least one of the parties lived. Ministers who performed marriage ceremonies not in accordance with such regulations faced severe penalties, as did the offending couples, who were often excommunicated for their misconduct.31 So, too, the common law required proof of a church wedding in order to confer full property rights on married couples. Nevertheless, the Church of England continued to recognize, as valid, marriages that did not conform to the
1604 regulations. Thus, a prior clandestine or an irregular marriage would be upheld by the ecclesiastical courts over a subsequent solemnized marriage involving one of the same parties.

The Commonwealth further complicated the laws of marriage formation by radically reforming them. Parliament passed the “Act touching Marriages and the Registring hereof”, which took jurisdiction over marriage formation out of the church and into civil government. The Act required that couples be registered by the parish, prove parental consent for any party under twenty-one and submit to a civil service performed by the local justice of the peace. Upon the Restoration this statute became void, and the laws of marriage formation were returned to the ecclesiastical courts’ jurisdiction. Yet the confusion and uncertainty over marriage formation continued unabated, not systematically addressed until the passing of Lord Hardwicke’s “Act for the better preventing of clandestine Marriages” in 1753.

Because canon law perceived marriage as an indissoluble bond, the Church of England did not permit couples to divorce, that is, to dissolve the marriage and thereafter be permitted to remarry. The ecclesiastical courts permitted couples to sue only for a *divorce a vinculo* (an annulment). Annulments were granted only if the marriage was deemed to have been null at the time of its creation by reason of one of the legally recognized impediments to its creation. Such impediments turned on either the couple’s legal incapacity to marry or the lack of mutual consent to marry. The basic incapacities to marriage included “consanguinity” (a close relationship by blood between the parties); “affinity” (a relationship by marriage or carnal association); tender age (either one or both of the partners was below the age of majority); “precontract” (a previous marriage by one of the parties to a third party); permanent frigidity; or impotence. Lack of consent to marry turned on whether there had been some occurrence of fraud, duress, coercion, insanity or inadequate knowledge at the time of the marriage’s formation. A *divorce a vinculo* left the partners free to remarry, barred the woman from her “dower” (see below), and left any children of the voided marriage bastards.

If no impediment existed, then a couple could not annul their marriage and could sue only for a *divorce a menso et thoro* (a legal separation from board and bed) with no right of either party to remarry during the lifetime of the other spouse. The ecclesiastical courts had complete discretion to decide whether to grant a *divorce a menso et thoro* and would do so only upon proof of the adultery or extreme cruelty of either spouse. The courts also had the authority (again at their discretion) to bestow “maintenance” (alimony) upon an innocent wife. A wife guilty of adultery, elopement or cruelty had no legal right to maintenance. In 1670, Parliament dissolved the marriage of Lord Roos and allowed him to remarry, establishing a
precedent that, thereafter, permitted couples to separate and remarry upon such private acts of Parliament.34

One of the unintended ancillary effects of denying separating couples the right to remarry was the practice of bigamy. This problem was addressed by Parliament in the Bigamy Act of 1604 that made it a felony for previously married individuals to remarry unless the other partner had been absent for at least seven years, one of the parties had been under age at the time of the marriage’s formation or the ecclesiastical courts had granted a *divorce a vinculo*.35 In 1650, Parliament promulgated an even harsher immorality statute, the Act for “suppressing the detestable sins of Incest, Adultery and Fornication”, that made adultery a capital offence. The statute defined adultery as sexual intercourse between a married woman and a man not her husband. Intercourse between a married man and an unmarried woman, however, was not deemed adultery for purposes of the Act.36

The problem of children born out of wedlock was addressed by statutes in 1597, 1610 and again in 1624. These statutes provided for the maintenance of bastard children and established severe punishments for the parents.37 The 1624 statute criminalized only the mothers of illegitimate children, charging that they could be sent to the House of Correction for bearing children dependent upon the parish for support.38 Because a ruling of bastardy led to the individual’s disinheritance, the 1597 Act also endowed the ecclesiastical courts with expanded power to examine the circumstances of the child’s birth to determine legitimacy. The crime of infanticide was also specifically addressed by statute in 1624. The “Act to prevent the Murthering of Bastard Children”39 prosecuted any unmarried mother who concealed the birth of a child should the child die. The mother could prove her innocence only by establishing that the child had been stillborn.

*The Legal Status of the Feme Covert*

When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poore Rivolet loseth her name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soone as she is married is called covert … that is, vailed, as it were, clouded and over-shadowed … she hath host her streame … her new selfe is her superior, her companion, her master.40

The moment a marriage became legally binding, the *feme sole* found herself radically transformed by the common-law doctrine known as “coverture” (or “unity of person”). Throughout the early modern period, coverture regarded the man and wife as *una caro* (one flesh) before the common law. The eighteenth-century legal commentator William Blackstone described the practical effects of coverture as follows:

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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 everything; and is therefore called in our law French a feme covert; 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.41

Placed in the same legal category under the common law as wards, lunatics, criminals and idiots, the feme covert lost nearly all of the private rights she had enjoyed as a feme sole.42

Having lost her independent agency, the feme covert could no longer enter into a legally binding contract or sue or be sued in a common-law court. The common law did permit a feme covert to order household necessities on credit, such as food, supplies and clothing from merchants, with the proviso that her husband had either given prior authority for or later ratified this act. The common law recognized this implied agency as an extension of the husband’s duty to sustain his wife during marriage. But the separated husband had no further duty to maintain his wife. The only recourse for a separated feme covert was to sue her husband in the ecclesiastical courts for maintenance. Yet, as previously discussed, only innocent wives were eligible for maintenance; if the wife had eloped with another man or committed adultery, then the courts would not grant her maintenance. In the event of a couple’s separation, a merchant gave the separated feme covert goods on credit at his own risk. In the important case of Manby vs. Scott (1663), printed in A Treatise of Feme Coverts and discussed at length in Baron and Feme, the court held that, having received notice of the husband’s refusal to pay for necessities, the merchant could not recover payment.43

A feme covert could be named to fulfill the obligations of an executor (designated by the person making the will) or administrator (appointed by the court) to manage the property of a third party.44 Acting in this capacity, a feme covert could sue or be sued. A feme covert could not otherwise sue or be sued in the common-law courts in her own right unless her husband was joined as a party to the action. Thus, if the feme covert suffered some harm, whether bodily or economic, then she could not bring an action to recover damages without obtaining her husband’s consent and naming him as a party to the action. The husband was even entitled to file a separate cause of action in his own name against the defendant if the injury deprived him of his wife’s “help or companionship”. Any damages recovered against a third party automatically became the husband’s property. Similarly, if the wife injured a third party, then the husband found himself personally liable for any damages sustained by the third party.

The economic consequences of coverture were grave. The feme covert could no longer accept grants, even from her husband, or legacies. Generally,
she could not make a will without the express consent of her husband prior to their marriage.45 She could no longer own property in her own name. All of her real and personal property became subject to the control of her husband. Title to real and copyhold property owned by the woman did not pass to the husband outright; however, the husband could take all rents and profits from such property and had exclusive control over its maintenance during his wife’s lifetime. Because he could not permanently sell or otherwise dispose of such property, upon his death (in the event of such a transfer without his wife’s consent) the widow could sue to recover ownership. If a husband and wife wanted to sell real property in the wife’s name, then they had to obtain a “final concord” from the Common Pleas permitting them to do so. Concerned with a wife’s potential coercion by her husband, the court took special care to determine whether such a conveyance indeed represented the wife’s free will by insisting on separately examining her out of her husband’s presence before granting the request. Upon the feme covert’s death (if there were surviving issue), the husband continued “in seisin” (in possession) for life in all of her real property by the doctrine known as “curtesy”.

“Leasehold property”, also referred to as “chattels real” (land held for a fixed term of years), became the husband’s property outright during the marriage, freely disposable by the husband during his lifetime. Any personal property owned by a woman at the time of her marriage also became her husband’s property outright, as did any personal property given to a wife after her marriage, if not explicitly reserved for her “sole and separate estate” (see below). If the feme covert managed to save a little of the money allotted to her for household use, then this money immediately became her husband’s property. Even ownership of her “paraphernalia” (her clothing, jewelry, linens and plate) became her husband’s property during his lifetime.

One significant exception to coverture occurred in some boroughs, such as London, where the courts treated married female merchants as femes sole for the purpose of conducting business. These “femes sole traders,” as they were known, could enter into contracts, own property and sue or be sued in their own names. Very little is known, however, about the actual operation of feme-sole trader laws.

The leniency of the courts of equity, ecclesiastical courts and manorial courts tempered somewhat the more draconian consequences of common-law coverture, permitting femes covert to sue and be sued in their own names in a wide range of circumstances. One cannot over-emphasize the importance of this circumvention of the common-law’s disablement of the feme covert, as recent scholarship has shown that women, even femes covert, had a considerable presence in the equity and ecclesiastical courts, “waging law” to define, create and protect their rights.46 The courts of equity evaded
the *feme covert’s* lack of standing to sue by permitting the naming of a *prochein amy* (next friend) of the *feme covert* to sue on her behalf. Also, the courts of equity had jurisdiction to entertain actions by women that would have gone unrecognized in the common-law courts and to provide for a range of equitable remedies, including injunctions, the staying of actions and document recovery, that were unavailable elsewhere. The ecclesiastical courts altogether disregarded the common-law disablement of the *feme covert’s* standing to sue, permitting a *feme covert* to sue and be sued even by her husband. Certain actions brought in the ecclesiastical courts, such as slander and defamation cases, were also dominated by the presence of women, who represented the majority of plaintiffs, defendants and witnesses.47

The *feme covert* had few legal remedies against acts done to her by her husband, however, since she was unable to sue him at common law in her own name. A husband had the legal right to impose “reasonable correction” on his wife, although she was permitted to have security of the peace brought against him in cases of extreme and life-threatening violence. While a wife was not usually permitted to testify against her husband in court, the court would lift this ban in cases of spousal abuse.48

The notion of the *feme covert* as covered by her husband was taken to its logical extreme in exempting the *feme covert* from criminal liability for acts done in her husband’s presence or by his order. The law inferred that because she was so naturally dominated (or coerced) by her husband, she had no independent agency to refuse to act, even if unlawfully. The only exceptions to this principle were for particular felony crimes designated as “*male in se*”, including treason, murder and running a brothel.

The law viewed any infraction of the *feme covert’s* legally imposed subordination to her husband as particularly egregious. Thus, a *feme covert*’s verbal assault upon her husband could amount to the cognizable crime of scolding, punishable in both the ecclesiastical and manorial courts.49 A *feme covert* convicted of the murder of her spouse faced not a charge of murder and the punishment of hanging, as did a husband if he killed his wife, but the more aggravated felony of petty treason, punishable by burning at the stake.50

One area of the criminal law that progressively favored women in the seventeenth century was the extension of “benefit of clergy” to convicted female felons in 1624 for certain small felonies51 and in 1691 for all crimes in which the benefit was available to men.52 The pleading of benefit of clergy permitted a first-time convicted felon to avoid execution for specific felonies. Pregnant women convicted of a felony could also plead “benefit of the belly” (also known as “benefit of birth”) to postpone the sentence until after the birth of the child.
The Circumvention of Coverture

Women have no voice in Parliament, They make no Lawes, they consent to none, they abrogate none. All of them are understood either married or to be married and their desires… subject to their husband, I know no remedy though some women can shift it well enough.\textsuperscript{53}

Recent scholarship has begun to address the extent to which the \textit{feme covert} managed, in the words of the author of \textit{The Lawes Resolutions}, to “shift it”, or circumvent her common-law disablements. This scholarship explores the realities of living under a system of coverture, often concluding that the \textit{feme covert} had far more economic and proprietary autonomy than the letter of the common law would seem to have permitted.\textsuperscript{54} In particular, the early modern \textit{feme covert} had opportunities for mitigating coverture’s injunction against owning property by resort to a number of devices that developed in the mid- to late seventeenth century, for example separate maintenance agreements, marriage settlements and trusts.\textsuperscript{55} The early treatise, \textit{The Lawes Resolutions}, barely mentions these alternative property arrangements, for they were not common at the time of the treatise’s publication. \textit{A Treatise of Feme Coverts} and \textit{Baron and Feme} devote considerable space to exploring these opportunities, even providing sample models of conveyancing documents used to effectuate these arrangements.

The separate maintenance agreement, a development of the late seventeenth century, provided for the voluntary payment by the husband of an agreed-upon sum to his wife (or to her trustees) during their legal separation, provided that she remained “chaste”. The ecclesiastical courts could also order an innocent separated wife’s maintenance or alimony. The courts of equity became the venue for enforcing such agreements, permitting a separated \textit{feme covert} to sue or be sued by her husband as a \textit{feme sole}. The courts of equity also developed the principle known as “equity of settlement” that routinely granted separated or divorced women a share of their husbands’ estates commensurate with the portion they had brought into the marriage.

Originating at the end of the sixteenth century, marriage settlements were employed not only by the wealthiest of the population but also by ordinary people to preserve certain proprietary rights of the \textit{feme covert}. Such settlements were arranged prior to the marriage, often by the father of the bride or by the woman herself before a second marriage. Only the courts of equity enforced such marriage settlements. One historian has found that 10 percent of marrying women entered into some form of settlement with their grooms prior to the marriage and has estimated that the actual proportion may well have been much higher.\textsuperscript{56}
The settlement could take the form of a simple annuity (known as “pin money”) that paid the feme covert a specified amount of cash annually to cover her out-of-pocket expenses and personal adornment. Another simple arrangement employed by many ordinary women, and with the added advantage of being enforceable at common law, established the groom’s promise to pay a bond of a specified amount to a relation of the bride for the bride’s benefit at an agreed-upon date or to pay a certain amount to his wife upon her widowhood. The most common marriage settlements, employed regularly even by ordinary people, established the terms of a jointure (as discussed more fully below) to protect the wife in widowhood. Women marrying for the second time also employed marriage settlements to confirm the husband’s promise to pay “portions” (dowries) to his wife’s children by a previous marriage.

A marriage settlement could also establish the feme covert’s right to make a will once married, as any such consent made after the marriage would not be legally binding. Such an agreement could also stipulate that the husband had rights in only a portion of his wife’s estate (in her possession at the time of her marriage) and that she had the right to dispose of the rest of her estate by her will. Any property that she attained subsequent to the marriage, however, would not be covered by such an agreement.

Another important type of marriage settlement that developed between 1640 and 1700 was the trust for a woman’s “sole and separate estate”. The trust became the most important means of creating a separate estate for the feme covert in the form of capital in real property. The courts of equity, particularly the Court of Chancery, were instrumental in enforcing this device. One effectuated such an arrangement by conveying legal title in land to trustees and their heirs in trust for the feme covert’s “sole and separate estate”. The designated trustees oversaw the maintenance or conveyance of the property and the payment of its rents and profits to the wife. Married women’s separate property could also be achieved through a bequest after the marriage. An individual could create a trust for the benefit of the feme covert, stipulating in the will that the heir, or trustee, would oversee the estate for her sole and separate use. Throughout the course of the seventeenth century, these trust arrangements became more complex and were utilized with greater frequency to protect the feme covert herself during her lifetime (and her heirs after her death) from the husband’s curtesy right. Such arrangements could provide income for various family members over several generations.

Widowhood

But alas, when she hath lost her husband, her head is cut off, her intellectual part is gone, the verie faculties of her soule are, I will not say, cleane taken
away, but they are all benummed, dimmed and dazled … Why mourne you so, you that be widowwes? Consider how long you have beene in subjection under the predominance of parents, of your husbands, now you be free in libertie… at your owne Lawe.58

The death of a husband propelled the feme covert back to the status of a feme sole, whereby she regained all of the private legal rights and liabilities lost upon her marriage. She frequently found herself in a new position of public responsibility, often named in her husband’s will as the executrix of her husband’s estate and guardian of her children during their minority. If a man died intestate, then the widow had the legal right to administer his estate. These new responsibilities thrust her into a more public legal position, requiring her to appear before the probate side of the ecclesiastical courts to present, prove and even contest wills and to exhibit inventories and file accounts detailing her actions a year later. She also found herself paying legacies and portions, collecting and discharging debts and litigating in the courts to enforce marriage settlements or to secure her inheritance.59

The laws of inheritance and succession provided the widow with certain carefully delineated rights to her deceased husband’s personal and real property. The right known as “dower” entitled the widow to a life estate in one-third of all his freehold property held at any time during the marriage. Upon her death, the property passed to the heir named in the husband’s will or as required by the entail. Considered the female equivalent of the husband’s right of curtesy, dower provided the widow with a life interest not in all of her deceased spouse’s property, as did curtesy, but only in one-third of such property. In order to enforce her right of dower, the widow had to bring an action in the common-law courts to compel the heir of the property to assign her the land. Dower rights were absolute, superseding any will of the husband that sought to limit or deprive his widow of this right. The widow could also recover any freehold property sold by the husband at any time during the marriage without her consent. Neither adulterous nor divorced women were permitted dower rights.

A pre-arranged settlement called a “jointure” could bar the widow’s recovery of her dower rights. Medieval jointures entitled the widow to gain title to property held in joint tenancy of the husband and wife. Later jointures took the form of an annuity arising from a rent charge on specified lands. By the early sixteenth century, jointure had largely superseded dower as the common route of providing for widows. Jointures stayed in force either for the life of the widow or for the potentially more limited period of her widowhood. Experts generally considered jointure rights surer, as the land covered by jointure was specific. In 1536, the Parliament passed the Statute of Uses that effectively barred dower to widows who had agreed prior to the marriage to a jointure.60 If a jointure was settled on
a woman only after her marriage, then the widow could elect to take either the jointure or the dower. The Statute of Uses provided that jointure could limit dower only upon certain conditions, including, importantly, if the jointure gave the woman a “freehold estate” (an estate in land held for uncertain duration) at least as great as her dower right. Yet, a “theory of equitable jointure” developed which effectively evaded this requirement, permitting jointure rights to reside not simply in freehold property but even in personal property or “leasehold property” (land held for a set number of years), i.e. in property interests that were, as one historian has pointed out, often worth less over time.\textsuperscript{61} The limitation of jointure to a woman’s widowhood, rather than to her lifetime, also reduced the value of the jointure.

Local custom usually provided the widow with her right to “freebench”, also known as “widow’s bench”, in place of dower. Freebench entitled the widow to the profits of a percentage of her deceased husband’s “copyhold property” (land held at the will of the lord of the manor and according to the manor’s customs). This percentage varied according to the custom of the manor from one-third to all of the deceased husband’s copyhold property. Custom also determined whether such a right lasted for her lifetime, during her widowhood, or for an even shorter period, such as during the heir’s minority.\textsuperscript{62}

Upon her husband’s death, the widow regained her rights in and title to most of the property she had brought into the marriage. She could recover any such previously owned freehold or copyhold property. Likewise, any of the feme covert’s “leasehold property” (land held for a fixed term of years) that remained intact at the time of her husband’s death once again became the woman’s property. She permanently lost title to her personal property after the marriage and so could not recover it upon her husband’s death with the exception of her paraphernalia, which once again became her own. However, should a conflict arise between the widow and another legatee or a creditor, the law permitted her to recover only such paraphernalia deemed reasonable to her station. The rest of her jewelry and clothing would be granted to the legatee or sold to pay off the creditor.

With respect to the personal property of a deceased man, ecclesiastical law provided for fixed distributions. The “rule of reasonable parts” provided for the forced distribution of the deceased husband’s personal property even in the face of a will to the contrary. If the husband and wife had issue at the time of the husband’s death, then the widow received one-third of his personal property and the children received two-thirds of it. If they had no issue, then the wife received one-half of his personal property. This rule applied only in certain northern boroughs of England but not in the southern boroughs, where a man had complete freedom to dispose of his personal
property by will. The administration of these rules fell to the ecclesiastical
courts, which had discretion to give the widow an even greater percentage
of the husband’s personal property than the minimum percentage required
by the rule of reasonable parts. One study of the ecclesiastical courts’
administration of the rule of reasonable parts reveals that the courts acted
generously, giving at least 63% of the personal property to widows with
children.63

In 1670, however, Parliament passed the innocuously entitled “Act for
the Better Settling of Intestates’ Estates”. This Act abolished the
ecclesiastical courts’ discretion to grant higher percentages than those
spelled out by the rule of reasonable parts in the face of a will to the
contrary.64 Between 1692 and 1725, the rule of reasonable parts was
abolished altogether by successive parliamentary legislation.

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The preceding overview has mapped out the contours of the most significant
laws governing women’s personal and property rights in early modern
England. It has only hinted at the direct and indirect effects of these laws
on women’s lives, i.e. on how in fact, women actually fared individually
and as a group under this legal system. Such an overview can present only
an incomplete picture of the ways in which women directly ignored the
strictures of coverture, for example, by owning property, managing money
and forming contracts even in the face of law to the contrary, or how they
indirectly evaded such law by resort to the ecclesiastical, manorial and
equity courts and by reliance on jointures, marriage settlements, trusts and
other equitable devices. The discrepancy between the laws and actual
practice in the period suggests that women enjoyed greater privileges than
the bare letter of the law provided. Yet, one must temper any such conclusion
by an awareness that the jurisdictional, statutory and proprietary changes
of the early modern period often left ordinary women in a weakened
position with fewer venues for seeking redress and fewer customary
practices or entitlements available to them.65 More work must be
accomplished by legal and social historians so as to reconstruct the lives
of early modern Englishwomen in order to form more than speculative
opinions as to whether their situation in fact worsened or improved over
the course of the seventeenth century. Reprinting these early legal treatises,
by providing easy access to the laws of the period, will offer assistance to
scholars in their efforts.

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The Lawes Resolutions of Womens Rights; Or, the Lawes Provision for Woemen. A Collection of Such Statutes and Customs, As Doe Properly Concerne Women

Publication and Authorship

The legal treatise The Lawes Resolutions, or “The Womans Lawyer”, as its running headline and spine title read, was published anonymously in 1632. Thomas Edgar and Sir Egremont Thynne entered the work in the Stationers’ ‘Register’ on 20 April 1632. The assignees of John More, Esquire printed the text for sale by the bookseller John Grove.

The title page fails to identify the original author of the work, and its authorship remains in question today. The epistle “To the Reader”, signed by T.E., states that authorship of the text and the circumstances surrounding its composition are unknown. The “Preface to the Reader”, signed by I.L., notes that “the Author’s dead … [and the text] was long since collected” but provides no other information about the author. In the treatise, the author identifies himself as a married man, although he does not give the reader any other information about his background. Given the content and language of the treatise, its author was quite likely educated at the Inns of Court.

Authorship has sometimes been attributed to T.E., signatory of the epistle, although this conjectural attribution does not accord with T.E.’s own statement in the epistle that he merely revised the work. Early conjectures tentatively attributed the work to Sir John Doddridge, a distinguished judge of the King’s Bench, legal writer and statesman. Authorship has even been attributed to the other registrant of the work, Sir Aegremont Thynne, a serjeant at law (pleader in the Common Bench), antiquary and legal bibliophile, and to the anonymous I.L., signatory of the Preface, about whom no biographical information has been found.

The STC tentatively identifies T.E. as Thomas Edgar, who registered the book, although no extrinsic basis for making this identification seems to exist. W.R. Prest found a Thomas Edgar admitted to membership of Gray’s Inn in 1619 and has re-constructed pertinent biographical information about him in his article, “Law and Women’s Rights in Early Modern England”. He suggests that “[w]e cannot entirely exclude the possibility” that this Thomas Edgar could indeed have written the epistle and even the treatise itself.

More information is known about the work’s publisher. John More (or Moore), Esquire was a well-reputed publisher of legal texts during the period, having received the exclusive right from James I in 1618 to print all books of the English common law, statutes and abridgements for a period of forty years. It is not clear whether he was responsible for their
publication, but he did provide a stock of type for the project. In 1629, he assigned his printing rights to Miles Fletcher and his partners, John Haviland and Robert Young, those responsible for the actual printing of *The Lawes Resolutions*.\(^7^1\)

In the Epistle, T.E. emphasizes that he played a substantial role in the editing, correcting, amending, updating and revising of the anonymous manuscript. He also claims to have added many judicial opinions and case holdings to the work. It has been impossible to determine, however, which sections of the original manuscript were amended by T.E. or the extent of these revisions. It has also been impossible to date the original manuscript definitively. W.R. Prest, in an analysis of the treatise, has surmised that the author probably did not begin the treatise before the mid-1580’s and may well have completed it early in James I’s reign.\(^7^2\)

**Genre and Audience**

Publication of *The Lawes Resolutions* represents a significant moment in the history of the Englishwoman. While the legal literature of the period provides some overview of the laws affecting women, *The Lawes Resolutions* is the first known text specifically devoted to recording methodically Englishwomen’s legal rights, liabilities, immunities, advantages and interests as established by statutes and common-law rules and often contradictory case law.

The text is an early example of the legal treatise, sharing many attributes of later legal treatises, most importantly a synthesis of a discrete area of the common law and its systematic organization. The text, at 404 pages, represents a massive effort of consolidation, organizing the disparate and hitherto uncompiled aspects of the common law applicable to women into a logical framework. In the author’s words: “things…are laid plaine together, and in some orderly connexion, which heretofore were smothered, or scattered in corners of an uncouth language” (403). The author acknowledges the difficulty of “mak[ing] a perfect method of the laws of England”, yet describes his text as “an assay” at precisely this goal (2).

The text’s methodology bears resemblance to that of other early modern legal treatises as well. It explicates complicated, often theoretical points of law and even obsolete legal principles by reciting common-law case holdings, judges’ reasonings and statutes, and by providing lengthy historical discussions. The text’s technical language, including its use of antiquated legalese and untranslated Latinate expressions, is also a familiar attribute of other legal treatises of the period.

Yet, the text is different from other early modern legal treatises in its stated goal of providing a “popular kind of instruction” (2) to its readers.
As Prest has noted, the work is one of the earliest legal treatises purporting to make the law accessible to the laity, rather than simply written for legal practitioners. The treatise is not written in “law French”, still the dominant language of the legal profession, but in English. The author also relies heavily on anecdotal examples (“because women learne faster by example then by precept” [156]) and frequently intersperses his discussions with narrative frames, personal asides, subjective opinions, editorializing advice and commentary. These stylistic features of the treatise suggest that the author was writing a text for a broader audience than the legal profession.

Frequently, the author’s commentary, advice and addresses are directed at women, according with his explicit statement that he primarily intends the treatise for women: “they to whom my travels are chiefly addressed are women … I have framed this worke…[to] enable you the better to understand the reasons and arguments of Law, and to conferre and enquire what the Law is” (403–4). He claims that his treatise is meant not “so much to satisfie the deep learned or searchers for subtillity, as woman kind” (2–3). Yet, the author’s intended audience for the treatise is not only women, but also apprentices or “[s]tudents” of the law (2). As Prest has remarked, the treatise also caters to the male professionals of the Inns of Court. The treatise’s nearly exclusive focus on the common law indicates that the intended audience of the treatise must certainly have included practicing common-law lawyers.

The putative female readership of the treatise still remains in question. It is not clear how many women, if any, actually purchased or read the treatise. Nor, to the best of my knowledge, did women writers of the period quote the treatise, thereby providing direct evidence of a female readership. The frequently arcane material discussed and the use of Latinate and legal French expressions without translation or definition would have made the treatise difficult, if not inaccessible, to many women readers.

The nuances of the law of feme covert may well have been familiar to certain women, particularly propertied ones, and the treatise would have provided an invaluable resource for these women; but, nevertheless, the work would still have had greatest value to the legal profession, especially to those primarily responsible for overseeing women’s rights.

Content

The system devised by the author to organize the laws affecting women traces a woman’s life chronologically, dividing it into those stages that marked a change in her legal status. Beginning at a woman’s birth, the first “Booke” (1–50) moves through the laws governing her minority status and wardship until her coming of age, with special attention given to her property rights. The second “Booke” (51–115) details the laws of marriage...
formation and dissolution, the financial aspects of marriage and the law of curtesy. The third “Booke” (116–229) concentrates on the laws of coverture, unremittingly explicating the loss of a feme covert’s property interests. Very little sympathetic editorializing accompanies this section, for it itemizes what property the feme covert lost upon her marriage. This section also explains the law of jointure. The fourth “Booke” (230–330) recounts the legal status of widows and describes in detail how a woman could attain her dower or jointure rights. The fifth “Booke” (331–404) addresses those aspects of the criminal law that affected women, in particular the appeals available to women, including how and where to bring such actions. This section also devotes a significant section to the past and contemporary laws of rape or ravishment (376–404). The author then ends rather abruptly with a brief section imploring his readership to look kindly upon his efforts.

The introductory sections to the first Booke set up an additional, non-legal frame for the treatise so as to explain the origin of the doctrine of coverture. Relying on Genesis, the author re-tells the story of the creation of man and woman. The author emphasizes that God created woman from man, “bone of his bones, flesh of his flesh”, destined to become “one flesh” with her husband (4). This Scriptural justification for the law’s subordination of women finds further justification in the author’s account of the Fall. Eve, by helping to seduce Adam into eating the forbidden fruit, received a special punishment, “an especiall bane. In sorrow shalt thou bring forth thy children, thy desires shall bee subject to thy husband, and he shall rule over thee … The common law here shaketh hand with Divinitie …. “ (6) Yet, the author also defines his use of “woemen” in the treatise’s title and, in so doing, re-casts a misogynist expression. He insists that the creation of woman “signifieth not the woe of Man as some affirme, but with Man: For in our hasty pronouncing wee turne the preposition with to woe, or wee, oftentimes, and so shee was ordained to bee with man as a helpe, a companion, because God saw it was not good that Man should bee alone” (4).

Several passages in the treatise evidence oscillations between patriarchal and more egalitarian views of women. For example, the author’s introductory remarks to the Fourth Booke are fascinating for their embracing of the most orthodox statements on marital relations (“But alas, when she hath lost her husband, her head is cut off” [232]) and paradoxically radical statements (“Why mourne you so, you that be widowes … now you be free in libertie” [232]). The treatise, generally, is infused with sympathetic statements on women’s unfair status (“But me thinkes here wanteth equality in the Law” [146]). The author also evinces a strong sense of women’s vulnerability before the law and in their relationships with men (“But to what purpose is it for women to make vowes, when men have so many
millions of ways to make them break them? And when sweet words, faire promises, tempting, flattering, swearing, lying will not serve to beguile the poore soule: then with rough handling, violence, and plaine strength of armes …” [377]). He also emphasizes that his motive in writing the treatise is his sense of the “pitty and impiety … to hold from [women] such Customes, Lawes and Statutes, as are in a maner, proper, or principality belonging unto them” (2). Yet, the treatise fails to advocate or to encourage legal reform. Instead, the author in the final analysis instructs women to behave virtuously, to live a “modest and chast life at home” (146) and to look to God and the next life for comfort.

Reception

Resolutions must have provided an important resource to the legal profession, and legal commentators cited the treatise well into the eighteenth century.76 The Lawes Resolutions remained in print for at least 25 years, although no new editions were issued. Quotations from the text are also nearly ubiquitous in recent articles discussing the legal status of the early modern Englishwoman. The most significant analysis of the treatise is Prest’s “Law and Women’s Rights”, which investigates the authorship, subject matter and intended audience of the work in great detail. Prest’s article provided an invaluable resource in the preparation of this introduction.

The treatise has been reprinted twice since its original publication, both times in facsimile as part of Garland Publishing’s series, Classics of English Legal History in the Modern Era (1978), and Theatrum Orbis Terrarum’s series, The English Experience (1979).

This facsimile of The Lawes Resolutions takes as its photographic copy text the very fine copy at The British Library. The following libraries likewise own copies: Bodleian Library, University of Oxford; Cambridge University Library; St. John’s College Library, Oxford; Marsh’s Library, Dublin; National Library of Scotland, Edinburgh; Folger Shakespeare Library; Edinburgh University Library; Henry E. Huntington Library; Harvard University Law Library; Columbia University Library; Newberry Library; Boston Public Library; Los Angeles County Law Library; Stanford University Law Library; Library of Congress; University of California Law Library; Yale University Library; New York University Law Library; University of Pennsylvania Library; and Chapin Library, Williams College.
Publication and Authorship

*A Treatise of Feme Coverts* was originally published in 1732 by E. and R. Nutt and R. Gosling for B. Lintot and sold by H. Lintot. In 1737, it was re-issued in a second edition with no substantive changes save the reversal of the order of the title, *A Treatise of Feme Coverts*, and the subtitle, *The Lady’s Law*. The second edition was also printed by E. and R. Nutt and R. Gosling but for H. Lintot and sold by C. Corbett and E. Littleton.

The treatise appeared anonymously, and no attribution of authorship has been made. No autobiographical asides appear in the text that could provide information about the author’s gender, age, marital status, education or class. Presumably, as in the case of *The Lawes Resolutions*, the treatise was written by a man. The treatise’s methodical approach and focus on the common law also suggest that the author graduated from the Inns of Court. The author’s inclusion in the treatise of several sample legal deeds and conveyances also indicates that he likely practiced (or had at one point practiced) law.

One exciting aspect of the treatise’s publication is that the first named printer, E. Nutt, was, in fact, a woman, Elizabeth Nutt, the widow of the printer and bookseller, Joseph Nutt. She kept a pamphlet shop at the Royal Exchange and continued her deceased husband’s substantial printing business. She went into partnership with Richard Nutt, whose familial relationship to Elizabeth Nutt is unknown. An eminent printer in his own right, Richard Nutt was responsible for printing the *Daily Post* from 1726–32 and the *London Evening Post* for several years. Together, and with R. Gosling, a London printer, Elizabeth and Richard Nutt printed hundreds of legal texts, such as books of precedent, law dictionaries, abridgements, case reports, collections of statutes and treatises on a wide range of legal topics, including uses and trusts, tithes, forest and gaming laws, evidence, testaments and wills and tenures. Significantly, Elizabeth Nutt and Richard Nutt jointly published the second edition of *A Treatise of Feme Coverts*, the second edition of *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives* and, with R. Gosling, the third edition of *Baron and Feme: A Treatise of Law and Equity Concerning Husbands and Wives* (reproduced in Volume 3). Elizabeth Nutt’s involvement, then, in the printing of the two most significant eighteenth-century legal texts detailing the laws of women provides a wonderful example of the public role played by women in the legal history of England.

The eminence of the treatise’s publisher suggests the authoritative nature of the treatise. Barnaby Bernard Lintot, father of Henry Lintot, was an
important bookseller and publisher in London. George I appointed him one of only three printers of the Parliamentary votes, a capacity in which he served until 1727. He also published several important poems and plays, including those by Alexander Pope, Richard Steele, George Farquhar, John Gay and Thomas Parnell. His son, Henry, took over his father’s business around 1730 and so would probably have been primarily responsible for the publication of *A Treatise of Feme Coverts*.80

**Genre and Influence**

The text, as its title explicitly states, falls squarely within the generic category of the legal treatise. It purports to provide, as does *The Lawes Resolutions*, a logically organized overview of “[a]ll the Laws and Statutes relating to Women” (t.p.) as set out in statutes and (predominantly) common-law cases. The format of the treatise is somewhat akin to that of the early modern abridgement. After announcing a particular legal principle, the treatise chronologically discusses relevant statutes and common-law cases that apply, expand or modify this principle. The discussion of these cases is often limited to a summary of their factual backgrounds and holdings without transitional commentary or explanation. Like *The Lawes Resolutions* and other early modern legal treatises, *A Treatise of Feme Coverts* frequently provides lengthy historical discussions of the development of a particular principle, at times laboring over obsolete nuances of the law.

The treatise prints the entire case report of the “remarkable” (200) decision of Justice Robert Hyde in the case of *Manby v. Scott* in the Court of Exchequer Chamber, a somewhat unusual inclusion in a legal treatise. Usually, legal treatises elucidated and quoted judges’ decisions without printing them in their entirety. The inclusion of this decision indicates that the author of *A Treatise of Feme Coverts* thought the case seminal not only for the legal principle enunciated by the holding but also for the legal arguments and reasoning of Justice Hyde.

The treatise draws from books of precedent and conveyancing manuals of the period as well, reproducing a number of sample forms, deeds and conveyances. It is clear that the author added these sample forms to the treatise in order to supply legal practitioners with properly drafted models. The majority of these models are examples of marriage settlements that create married women’s separate property. They illustrate effectuating a jointure, providing a sum of money in lieu of a jointure, establishing a trust for the separate use of the wife and portions for younger children and arranging for the wife to have her estate entirely at her disposition after marriage. The author also provides samples of two simpler arrangements: a bond on marriage to provide money to the widow and portions for the children and a bond in the event of a divorce. The treatise contains a number
of more general sample legal documents as well: a marriage license, a petition for a writ and an order for the maintenance of a bastard child.

The treatise often directly quotes other legal commentators and judges to elucidate a legal principle. The author clearly relied extensively on *The Lawes Resolutions* for his organization, choice of subjects and discussions of cases. The treatise even opens by referring to and paraphrasing the earlier treatise: “an ancient Author has assur’d us, that all Women, in the Eyes of the Law, are either married or to be married; and their Desires are subject to their Husbands” (v). But the author is most directly indebted to the first two editions of *Baron and Feme* (discussed below). At times, his discussions of cases follow nearly word-for-word the discussions of the earlier treatise. Certain sections also follow the format and structure of *Baron and Feme* (see, for example, 31–5). It has even been suggested, by Amy Louise Erickson, that *A Treatise of Feme Coverts* was written as an “extended version”81 of *Baron and Feme*, a reasonable conjecture given the similarities and printing history of the two treatises.

The tone of the treatises is also similar, more matter-of-fact than and without the sympathetic moralizing and narrative asides of *The Lawes Resolutions*. Unlike *Baron and Feme*, however, *A Treatise of Feme Coverts* provides anecdotal examples that seem designed not only to inform but also to entertain the reader. As the author mentions in his Preface, he has included “some Things of Entertainment, being writ long ago” (vi) as well as some antiquated laws and customs relating to women (vii). For example, the author recounts the unusual custom of requiring a widow with a bastard to forfeit her estate unless she rides into the Court of the Manor on a ram, reciting: “Here I am/ Riding upon the Back of a black Ram,/ Like a Whore as I am;/ And for my Crincum Crancum,/ I have left my Binkum Bankum;/ And for my Tail’s Game/ Have done this worldly Shame;/ Therefore pray, Mr. Steward, let me have/ my Land again” (128). Anecdotal examples are employed sparingly, however, and the overall tone of the treatise is didactic and practical.

**Audience**

The author of *A Treatise of Feme Coverts* defines his readers as “all Practisers of the Law, and other curious Persons” (viii) and, like the author of *The Lawes Resolutions*, clearly intends his readership to include women. He emphasizes that he wants the treatise to provide a practical benefit to women: “The fair Sex are here inform’d, how to preserve their Lands, Goods, and most valuable Effects, from the Incroachments of any one; to defend themselves and their Reputations against all unlawful Attacks of Mankind, and to maintain Actions, and carry on Prosecutions in Cases of Violation of their Persons, to the Death of a daring Offender” (vii).
As in the case of *The Lawes Resolutions*, however, it has been impossible to prove definitively a female audience for the treatise; and it is likely that the treatise would in reality have been most useful as a reference for male practitioners of the law, to whom the sample deeds and conveyances and discussions of the fine points of case law would have been directed.

**Content**

The treatise, at 264 pages in length, like *The Lawes Resolutions* maps out the laws pertaining to every stage of a woman's life, beginning in her infancy and continuing through her marriage and widowhood, although its most detailed discussions pertain to the laws specific to the *feme covert*. The treatise is divided as follows: the first section begins with a discussion of unmarried females and their property rights (1–25); the second section (25–52) details the laws of marriage and the law of rape; the third section (52–77) delineates the proprietary consequences of marriage and the laws of dower and jointure; and the fourth section (78–109), though titled “Of the Privileges of Feme Coverts, and their Power, with Respect to their Husband, and all others”, is largely a recitation of the losses accruing to women upon their marriages. The author insists, however, that “a Feme Covert is a Favourite of the Law” (81). This section also delineates the rights of the Queen of England and the Queen Dowager of England and details when the *feme covert* could bring legal action alone and when her husband had to be joined as a party to the action. This section, interestingly, sets out in great detail the law of slander, including a list of which words spoken against a woman were actionable. The fifth section (109–28) concerns the laws of the procreation of children and descent. A significant portion of this section focuses on the laws of bastardy and the maintenance of bastards, an area of law not included in *The Lawes Resolutions*. The sixth section (129–64) recites the laws of conveyances with respect to *femes covert* as well as recoveries, leases and wills made by and for husbands and wives. The final section of the treatise articulates the laws of divorce and details how to create separate maintenance contracts. The body of the treatise ends with the enunciation of the legal principle elucidated in *Manby v. Scott*. Immediately following this restatement appears the case report of *Manby v. Scott*. The final 64 pages of the treatise print sample precedents of deeds and conveyances.

**Reception**

The treatise was re-issued five years after its initial publication, suggesting that it was considered authoritative in the period. The treatise has been reprinted twice since its original publication and re-issue, both times in

This facsimile of *A Treatise of Feme Coverts* takes as its photographic copy text the fine copy of the first edition (1732) at the Bodleian Library, University of Oxford. The following libraries likewise own copies of the original 1732 edition of the work: The British Library; Glasgow University Library; Thomas Plume’s Library, Maldon, Essex; Mills Memorial Library, McMaster University, Hamilton, Ontario; Los Angeles County Law Library; Henry E. Huntington Library; University of California Law Library, Berkeley; Folger Shakespeare Library; Free Library of Philadelphia; U.S. Library of Congress; Library Company of Philadelphia; University of Michigan Law Library; Biddle Law Library, University of Pennsylvania; Harvard Law School Library; University of Cincinnati Law Library; Virginia Historical Society.

**The Hardships of the English Laws. In Relation to Wives. With an Explanation of the Original Curse of Subjection Passed upon the Woman. In an Humble Address to the Legislature**

**Publication and Authorship**

The anonymous *Hardships of the English Laws* was first published in 1735, simultaneously in London by W. Boyler for the printer and bookseller J. Roberts and in Dublin by and for George Faulkner.

The author identifies herself as a married woman, one whose husband, unlike the majority, “lets me be alive, and gives me leave to be some Body, and to tell other People what I think they are” (51). The tract does not provide any other pertinent biographical information about the author’s age, class, education, marital status or work.

Authorship of the treatise can with some confidence be attributed to Sarah Chapone. On December 14, 1741, Anna Hopkins wrote to George Ballard that for his project on the lives of women writers, Sarah Chapone would probably lend him her copy of Mary Astells’ *A Serious Proposal to the Ladies*. Hopkins then added: “Tho’ I knew that she was the Author of *Hardships of English Laws* &c: I did not mention it to you because I thought it was a Secret”. Added confirmation of this attribution comes from a note on the title page of the British Library copy, the one reprinted in this volume. It reads: “Said to be written by Mrs Cha[??]on of Glost[ersh]ire wife to a clergyman yt [i.e. that] keeps a School”. The following note written in the same handwriting as that used on the title page also appears on page 70, the last page of the text: “NB Mr Whittern told me ye
A writer, proto-feminist and educator, Sarah Kirkham Chapone – or Capon, as she spelled it – (1699–1764), was the daughter of a clergyman. She married Reverend John Chapone, with whom she had five children. One of her sons, John, married the eminent writer, Hester Mulso. Sarah Chapone ran a school in Stanton and assisted George Ballard in his research on women writers. She seems to have been an active woman of letters, corresponding regularly with, amongst others, Ballard, John Wesley, Mary Delany and Samuel Richardson. Chapone addressed her only other published work, Remarks (1750), to the famous courtesan Teresia Constantia Phillips.

**Genre**

The work generically can be characterized, in Chapone’s words, as an “address” to “his most sacred Majesty, and the Honourable Houses of Parliament” (4). In this address, Chapone sought “an Alteration or a Repeal of some Laws” (4) that applied to married women. Whether, in fact, Chapone actually intended her work to be read by the king and Parliament, or whether her address merely set up a fictitious audience, it is impossible to know. Nor has it been possible to determine whether Chapone’s petition was actually read by the king or Parliament.

There was a well-established tradition of women petitioning Parliament in this period within which Chapone could consciously have been placing herself. Particularly during the civil-war period, women petitioned Parliament to reform a vast array of laws concerning religious, political, social and economic questions. Lois G. Schwoerer has identified 112 pamphlets and petitions to Parliament in the years 1640 to 1650 and approximately 700 petitions and tracts in the years 1640 to 1700 written by women. Individual women also petitioned Parliament throughout the early modern period to redress specific matters of personal significance. These petitions often involve property entitlement and inheritance disputes.

Chapone’s address shares many of the attributes of these female-authored petitions, including their putative audience, organization and style. In particular, the petitions often begin with general arguments justifying the right of women to petition Parliament. Chapone opens her address in a similar vein, voicing many of the arguments used in Civil War petitions to support her claim. The petitions, like *Hardships*, also emulate the style and rhetoric of formal legal argument, using common-law precedent and citations to statutory law to prove their arguments. Nevertheless, the content of *Hardships* is unique. None of the other petitions written by women in the period constitutes an elaborated protest against the legal status of.
women or an elaborated demand for the reform of any laws responsible for
women’s inferior legal status.

Chapone’s work also differs from traditional legal scholarship written
by men in the period, for example The Lawes Resolutions and A Treatise of
Feme Coverts, as it is not intended to provide an overview of the laws
relating to women or to restate systematically specific points of law for the
purposes of edification. Rather, it represents one woman’s response to the
laws of coverture, or, in her words, the “Law of Annihilation” (51).

Hardships bears some resemblance to other contemporaneous criticisms
of married women’s inferior position in society, particularly Margaret
Cavendish’s The World’s Olio (1655) and Orations of Divers Sorts
Accomodated to Divers Places (1688), Mary Astell’s Some Reflections on
Marriage (1700), Lady Mary Chudleigh’s The Female Advocate; Or, a
Plea for the Just Liberty of the Tender Sex, and Particularly of Married
Women. Being Reflections on a Late Rude and Disingenuous Discourse,
Delivered By Mr. John Sprint, in a Sermon (1700), the pseudonymous
Sophia’s Woman Not Inferior to Man (1739) and Mary More’s The Woman’s
Right (circa 1670). These works all share a vision of the married woman’s
lot as comparable to abject slavery. So, too, one of the central objects of
Hardships is demonstrating “[t]hat the Estate of Wives is more
disadvantagious than Slavery itself” (6). In particular, Mary More’s The
Woman’s Right, written as advice to her unmarried daughter, shares with
Hardships a sense of the pressing need for the feme covert to protect
herself from the laws of coverture: “for the Laws of our Country … [give]
A Man after marriage a greater Power of their Estate than ye Wife, unless
ye Wife take care before hand to prevent it (which I advice thee to doe)”.

Like the above-cited works, Hardships also emphasizes the deleterious
state of women’s formal education as responsible in large part for women’s
complacency. Unlike these other early feminist tracts, however, Chapone
provides more than just a general description of the lot of the married
woman, for she analyses those specific laws that kept women in a position
of such subordination. What is rare, then, about this text is its systematic
objection to the laws relating to women. Hardships stands as a lone protest
against not just a woman’s generally subordinate status but also those
specific legal constructions that conspired to keep her in this position.

Sources of the Text

Hardships offers proof that at least one early modern woman had a
sophisticated knowledge of her legal status. Chapone displays familiarity
with many common-law principles and with the formal style of legal
argument, confidently criticizing judicial holdings and relying on precedents
to make her claims. Her knowledge of the law extends well beyond the
common law, for she relies on points of the civil law of community property, Levitical law and Portuguese law in order to bolster her arguments.

Chapone seems to have acquired her background in the law by reading both specialized legal and more general texts. She explains that she has written the petition after having read a number of recent court cases. She refers by name to one source for her knowledge of case law, William Salkeld’s *Reports of Cases Adjudged in the Court of King’s Bench* (1721, 1724) (16), and quotes at some length directly from Thomas Wood’s legal treatise, *New Institute of the Imperial or Civil Law* (1709) (29). Yet her knowledge was not derived solely from legal texts. She admits to having learned of one of the cases from public prints, indicating the importance of popular sources, not just specialized legal treatises, to her education. Barbara Todd has shown that this case was originally reported in the *Old Bailey Session Papers* and mentioned in the *Gentleman’s Magazine*,89 suggesting two possible sources upon which Chapone could have relied.

Todd has conjectured that “the tone of the anonymous *A Treatise of Feme Coverts* (1732) and particularly the reprinting there of Justice Robert Hyde’s opinion in *Manby v. Scott* may have aroused this author to respond”.90 Todd’s connecting of these two works is, of course, of enormous interest, suggesting another explicit link between the works in this volume. Chapone does not quote the treatise or the case of *Manby v. Scott* directly; yet *Hardships* and Justice Hyde’s discussion share the same concern with identifying the limits of the *feme covert’s* economic, social and legal independence. Furthermore, the similarity of the conclusions of *Hardships* and *Manby v. Scott* as to the scriptural origin of women’s subordination to men also suggests that Chapone may have read the case itself, if not *A Treatise of Feme Coverts*.

Content

The structure of *Hardships* divides into three parts. The first section (3–6) asserts a woman’s right to petition Parliament, relying on several arguments to justify her action. First, Chapone argues that a man, as a free-born subject, has the right to approach his Sovereign, represent his grievances, and seek redress therefrom. She then asserts: “We hope that this inestimable privilege is not wholly confined to the Male Line”, because women are the most in need of protection, “being the least able to help ourselves, and most exposed to Oppression” (4). She situates women in the same category as men, as “English Subjects” (6), thereby directly challenging the law’s derogation of married women’s legal status.

The second part of *Hardships* (6–52) is devoted to proving three main grievances for which Chapone demanded redress: “I. That the Estate of Wives is more disadvantageous than Slavery itself. II. That Wives may be
made prisoners for Life at the Discretion of their Domestick Governors … III. That Wives have no Property, neither in their own Persons, Children or Fortunes” (6–7). Her arguments derive primarily from biblical exegesis, political theory and comparative legal analysis. This section offers an alternative lens by which to read the three legal treatises in this series. Whereas they assert quite matter-of-factly that women lose all property rights upon marriage, Hardships provides harrowing examples of how this law actually functioned, allowing husbands to abuse physically and mentally, starve, confine and even murder their wives and squander their estates without penalty.91 In Chapone’s words: “My Design in these Representations is to shew the Scope and Tendency of the English Laws in Relation to Wives” (32).

She also anticipates and provides counter-arguments to eleven specific “objections” to her representations. Her counter-arguments have enormous value for the legal historian in reconstructing how women actually lived under a system of coverture. She takes on the argument that a woman could find judicial relief for being beaten by her husband. Yet, Chapone insists that, even if a woman could obtain this relief, which was not always possible, sending a husband to jail could potentially leave her in a worse condition, subject to his vengeance once home or a loss of his income while in jail. Another subject addressed by Hardships that, interestingly, has been the focus of much revisionist legal history is the trust agreement and the extent to which it served to protect women’s property interests. Again, Chapone’s remarks here serve as a cautionary tale. She acknowledges that a wife could put her property into trustees’ control before marriage and so secure her use of it. Yet she reminds the reader that this could be accomplished only with the consent of her intended husband; otherwise the Court of Chancery would invalidate the trust. She insists that few actually made use of this precaution, so overswayed were they by confidence in their intended husbands (and by a lack of education). Even more discouraging, those that did make such a provision before marriage often revoked its power afterwards. Here she quotes “one of our present eminent Judges”, who unfortunately remains nameless: “That he had hardly known an Instance, where the Wife had not been kissed or kicked out of any such previous Settlement” (34).

Chapone likewise re-evaluates the efficacy of jointures in providing ample financial security to widows, concluding that they, alone, do not (34–6). Also of interest, she denies the voluntary and consensual nature of marriage, emphasizing that “in many Instances Women are commanded and directed into it, by their Parents and Guardians, and in some other Circumstances ’tis their only Way of advancing themselves and settling in the World” (43). According to Chapone, then, arranged and forced marriages still persisted well into the eighteenth century.
The third part of *Hardships* (53–68) examines the reason for married women’s inferior legal status. This section has enormous value as a reflection of and response to prevailing statements of the period that justified women’s subordination by reference to their nature. Chapone grapples here with arguments derived from familiar seventeenth- and eighteenth-century debates on political science and philosophy. She first disclaims the argument made in William Wollaston’s *The Religion of Nature Delineated* (1722) that men and women represent “exact Counter Parts to each other” (53) and because men are governed by greater reason than women, women must accordingly submit and allow men greater authority. Chapone surprisingly concludes that women in their present cultural condition, hindered by lack of education and opportunity, may “generally” lack greater reason, but that in a state of nature this would not be the case (54). She then turns to Thomas Hobbes’s *Philosophical Rudiments concerning Government and Society* (1651), agreeing with him (albeit reluctantly) that, if a state of nature prevailed, women would have original dominion and authority over their children. Yet, believing that “we never were in a State of Nature, or can be so” (57), she looks elsewhere to find an explanation for women’s subjection to men.

In an effort to comprehend women’s subordinate status, Chapone turns for clarification to biblical authority, as did so many other political and legal theorists of the period. She relies specifically on both Genesis and Revelation and on the commentary of Patrick Delany’s *Revelation Examined with Candour* (1733) to draw a distinction between prelapsarian and postlapsarian relations of the sexes. In sharp contrast to the author of *The Lawes Resolutions*, Chapone reasons that at their first creation equality of the sexes prevailed because human nature was “in a state of Perfection where Reason ruled and Perverseness had no Place, [thus] there seems to be no imaginable Reason why one Sex should be in Subjection to the other” (58). She then situates the “curse of female subjection” (59) after Eve’s transgression as divine punishment for her sin. Only with the Second Coming would women once again enjoy “the Laws of Equality” (64). This orthodox conclusion, that woman’s subordination is ultimately the will of God, divine punishment for her role in the Fall, places the work in a tradition of Christian thought, tempered only by Chapone’s ultimate statement that the laws of England go far beyond God’s decree and so require legal reform. While not seeking to place women on equal footing with men, she nevertheless advocates some bettering of women’s legal position.
Reception

It is impossible to determine whether Chapone’s work had any tangible effect on woman’s legal status or perceptions of it. Certainly it did not lead to any law reform or even to parliamentary response. While the work was excerpted that same year in the May and June issue of Gentleman’s Magazine\(^92\) as a lead essay, indicating a non-trivial early reception, it did not inspire an answering pamphlet, tract or other response and did not get printed again until this century. Nor did it set the groundwork for further criticisms of women’s relationship to property law. Indeed, it has been suggested that virtual silence followed in the wake of the text, and it would be nearly one hundred years later that a condemnation of the widow’s legal status appeared in print.\(^93\)

The most significant analysis of the work is Barbara J. Todd’s article, “‘To be some body’: married women and The Hardships of the English Laws”, an invaluable resource in the preparation of this introduction.

This facsimile of The Hardships of the English Law in Relation to Wives takes as its photographic copy text the fine copy of the original edition at The British Library. This copy text was chosen, as discussed more fully above, for its important annotations attributing the work to Sarah Chapone. The following libraries likewise own copies of the original edition: Trinity College Library; Cambridge University Library; Advocates Library, Edinburgh; Bodleian Library; Mills Library, McMaster University, Hamilton, Ontario; Folger Shakespeare Library; Lilly Library, Indiana University; University of Chicago Library; University of Minnesota Library; Boston Athenaeum Library; Harvard Law School Library; Historical Society of Pennsylvania; Library of Congress; and New York Public Library.

Baron and Feme; a treatise of law and equity, concerning husbands and wives

Publication and Authorship

In 1700, the assigns of Richard and Edward Atkyns, Esquires, for John Walthoe published Baron and Feme; A Treatise of the Common Law Concerning Husbands and Wives. In 1719, as noted earlier, E. Nutt and R. Gosling (assigns of E. Sayer), again for John Walthoe, re-issued it in a second edition, says the title page, “with large additions”. In 1738 came a third edition, entitled Baron and Feme; A Treatise of Law and Equity, Concerning Husbands and Wives, reproduced here. The title page of this edition emphasizes that it “added many cases in law and equity, from the
best books of reports.” Again, E. Nutt and R. Gosling as well as R. Nutt printed the work, this time for T. Waller.

The treatise appeared anonymously, and no attribution of authorship has been found. Given the treatise’s methodology, structure and content, one may fairly presume, as in the cases of *The Lawes Resolutions* and *A Treatise of Feme Coverts*, that the author was a man, and one who had received a formal legal education, presumably at the Inns of Court. The treatise’s focus on both equitable and common-law principles and cases, and its comprehensive inclusion of sample pleadings, also suggest that the author practiced or had at one point practiced law.

The only biographical information about the author included in the treatise comes from the note entitled “To the Reader”, printed only in the first and second editions. This note mentions that the author had previously written a work that “Methodized and Explained the Law concerning Infants” (A3), but fails to indicate either the title of this work or any further information about its publication. Considering its publication date, printing history, content and style, one can identify this work as the legal treatise entitled *The Infants Lawyer; Or, the Law (Ancient and Modern) Relating to Infants*, the only known work published in England a few years before *Baron and Feme* concerned primarily with infants. The assigns of R. and E. Atykins, Esquires, also printed this work; and, like *Baron and Feme*, it was reprinted twice, in 1712 by J. Nutt (Elizabeth Nutt’s deceased husband) and in 1726 by E. Nutt and R. Gosling as the assigns of E. Sayer. Straightforward in tone, this treatise, like *Baron and Feme*, is organized topically, addresses not only common law but also equity cases and includes sample pleadings. Unfortunately, this work too was published anonymously without accompanying autobiographical information, and no attribution of authorship or further information about the author has been found.

As discussed in connection with *A Treatise of Feme Coverts*, Elizabeth and Richard Nutt were significant printers of legal works. So, too, John Walthoe, the publisher of the first edition, was a bookseller in London and well-known for printing and dealing in law books. The publisher of the third edition, T. Waller, likewise specialized in the sale and publication of legal works, including a number of important law reports, legal treatises and abridgements. The reprinted text includes advertisements, before the title page and after the table at the end of the treatise, for many of the important legal works published and sold by Waller.

**Genre and Audience**

The first edition of *Baron and Feme* is the first known legal treatise that focuses exclusively on the laws concerning husbands and wives. As the author announces in the note “To the Reader”, “I had some reason to
conceive and hope that a Treatise of this nature (having been never hitherto designedly perused) might meet with an Entertainment agreeable” (A3). Like other legal treatises of the period, Baron and Feme provides, in the words of the note “To the Reader”, a “Methodized, Explained or Corrected” (A4) account of the laws of baron and feme as set out in statutes and common-law and equity cases. The treatise’s value lies in its clear enunciation of rules of law and legal principles. It is less interested in the obsolete details of legal history than in setting out current, established propositions and case rulings.

Its discussion of cases likewise seems designed to promote clarity. Like early modern abridgements, court holdings of significance (in particular, Manby and Scott) are abridged and reduced to propositions. In some areas of the law, rather than simply laying out the disparate holdings of a body of cases, the author provides a framework of specific rules to follow. For example, in explaining where and in what actions to join a husband and wife as parties to the suit, the author lays out eight rules so that “a Studious Mind may easily be directed how to advise in such Cases” (A5). Baron and Feme does not generally provide lengthy historical discussions of moot cases, as do The Lawes Resolutions and A Treatise of Feme Coverts. The note to the reader suggests that “[w]hoever has a mind to be curious about them, may with great Satisfaction consult the first Institutes, where they are largely and most excellently handled” (A4–A5).

Like collections of sample writs and pleadings published in the period, Baron and Feme reproduces several sample declarations and pleadings used in actions routinely brought by or against a husband and wife. These sample pleadings would have provided legal practitioners with the basic procedural mechanism needed to initiate most cases involving husbands and wives. The majority of these actions involve debts upon obligations, annuity, dower and jointure rights. These pleadings, although appearing in Latin in the first two editions of the treatise, are translated into English in the third edition. This translation was clearly made as a response to the statute passed in 1731 that substituted English for Latin as the official language of the English courts.95

The author of Baron and Feme seems to have written the treatise primarily for the edification of those in the legal profession. In the note “To the Reader”, the author identifies both students and practitioners of the law as the intended audience for the treatise. Unlike the authors of The Lawes Resolutions and A Treatise of Feme Coverts, he does not claim that he wrote the treatise for the edification of women. The treatise’s practical approach, clear rules, sample precedents and attempt to avoid moot cases also suggest that the author intended the treatise to serve as a handy reference manual to those either bringing causes of action or advising
clients. The straightforward tone of the treatise is not punctuated by any of the moralizing asides or entertaining anecdotes that characterize the other two treatises.

Content

The treatise, at 485 pages in length, differs from *The Lawes Resolutions* and *A Treatise of Feme Covert* in its scope and organization. It does not explicate the laws relating to the different stages of a woman’s life but instead seeks to summarize those concerned with the relations between husbands and wives from the solemnization of marriage through divorce and widowhood. The treatise also considers “Collateral By-blows” (A4) of relations between the sexes, such as bastardy. The treatise describes in some detail *femes covert* acting outside the strictures of coverture, notably queens, executrices, administratrices and *femes-sole* merchants. In thirty-three separate chapters, the author moves not chronologically but topically, generally dividing the treatise into chapters that detail the statutory and case law of technical legal principles, such as Dower and Copyhold. The final thirty-three pages of the treatise print the sample precedents of pleadings.

The author announces on the title page that his discussions of cases derive from “the best books of reports” (t.p.). Unlike *The Lawes Resolutions* and to a lesser extent *A Treatise of Feme Coverts, Baron and Feme* focuses on cases in equity as well as in the common law, the change of the third edition’s title (from *A Treatise of the Common Law* to *A Treatise of Law and Equity*) underscoring this focus. This previously un-compiled material would have been of enormous value to legal practitioners advising women on how to protect and enforce their property and inheritance rights in the equity courts and to law students who did not obtain systematic instruction on equitable principles at the Inns of Court.

The many cases in both law and equity added to the third edition attest to the many changes in the laws of coverture and inheritance during the course of the first half of the eighteenth century. The treatise includes several new cases involving marriage settlements, pin money, and trusts made for the sole and separate use of wives (see, in particular, 81–85) and separate maintenances settled on wives separated from their husbands (259–61). The treatise also discusses several cases brought in an effort to limit, bar or otherwise clarify widows’ claims to dower and jointures (see, in particular, 87–90, 111–14, 121–24, 159–63). The most significant expansion in the third edition involves a revising and enlarging of the discussion of what acts done or contracts made by the wife were deemed binding on the husband. This section distills the various resolutions made by the court in the case of *Manby and Scott* and subsequent cases brought
by tradesmen against husbands for money owed on goods delivered to separated wives (274–85).

Reception

The fact that the treatise was reprinted twice and both times with substantial additions in the eighteenth century strongly suggests that it was an important and authoritative reference in the period. Its influence on other legal treatises of the period, in particular *A Treatise of Feme Coverts*, likewise offers proof of its value to legal practitioners in the period. The first edition of *Baron and Feme* was reprinted in facsimile as part of Garland Publishing’s series *Classics of English Legal History in the Modern Era* (1979).

This facsimile of *Baron and Feme* takes as its photographic copy text the copy of the third edition at the Bodleian Library. This copy, while tightly bound, contains interesting marginalia. The evident work of a practicing attorney or legal scholar, the handwritten notes interspersed throughout the treatise correct case names (for example, on pages 264, 306 and 307), citations (for example, on page 301) and fact patterns (for example, on page 267). The following libraries likewise own copies of the third edition: The British Library; Advocates Library, Edinburgh, Scotland; House of Lords Library, London; Dublin Honourable Society of King’s Inn; York University Law Library, Ontario; Henry E. Huntington Library; University of Pennsylvania Library; University of Texas Law School Library; University of California, Berkeley, Library; Harvard University Law School Library; Cornell University Library; Columbia University Law Library; Folger Shakespeare Library; New York Public Library; Library of Congress; University of Florida Law Library; University of Georgia Law School Library; DePaul University Law Library; University of Chicago Library; Ohio State Law School Library; Tarlton Law Library, University of Texas; College of William and Mary Library; Southern Methodist University Library; University of Virginia Law Library; University of Wisconsin Law Library.

Notes


5. *Earl of Oxford’s Case* (1615) 1 Reports Ch. 1 at 6.


10. Tim Stretton has observed that “women’s rights were in flux in the sixteenth and seventeenth centuries largely because the jurisdictions that extended them rights were in flux”. Stretton 232.


12. For further discussion of early modern legal education, see Baker, *Introduction* ch. 10.


15. Simpson 277.


26. 5 Eliz., c. 4.


34. For further background on the history of divorce, see Powell ch. 3; and Lawrence Stone, *Road to Divorce: England 1530–1987* (Oxford: Oxford UP, 1990).

35. 1 Jac. I c. 11.


37. 18 Eliz. I c. 3; 7 Jac. I c. 4.

38. 7 Jas. I, c. 4.


41. Blackstone I: 430.

42. Only queens evaded the strictures of coverture, retaining certain proprietary rights and privileges of *femes sole*. For background on the legal status of queens, see Glanz ch. 4.


44. For a discussion of women acting as executrices and administratrices in the period, see especially Erickson, *Women and Property* chs. 9–10.

45. For a discussion of the increasing number of *femes covert* who made wills in

46. See Stretton.


51. 21 Jac. I, c. 6.

52. 3 Will. & M., c. 9.

53. The Lawes Resolutions 6.

54. See, for example, the works of Cioni, Erickson, Finn, Gowing, Meldrum, Spring, Staves and Stretton cited in the References.


56. Erickson, Women and Property 130, 143.


60. 27 Hen. VIII c. 10.


62. For further background on freebench, see J.H. Bettey, “Manorial Custom and Widow’s Estate”, *Archives* 20 (1992): 208–16; Stretton ch. 7; and Todd, “Freebench and Free Enterprise”.

63. Erickson, *Women and Property* 178.

64. 22 Ca. II c. 10; 23 Ca. II c. 10.

65. For a more comprehensive analysis of women’s changing legal position in the early modern period, see Stretton ch. 9.


69. Prest 174.

70. Prest 172–74.


72. Prest 175.

73. Prest 180.

74. Prest 181.

75. Prest 181.

76. Prest n. 62.

77. In fact, scholars have assumed male authorship. See, for example, Todd, “‘To be some body’” n.1.

78. Lance E. Dickson in his introduction to the Rothman Reprints edition of this treatise also emphasizes this fact. See *A Treatise of Feme Coverts: Or the Lady’s Law*, ed. Lance E. Dickson (South Hackensack, N.J.: Rothman Reprints, 1974) vii.


82. I am indebted to the late Janice Thaddeus for this attribution and also for providing me with the reference to Anna Hopkins’ letter. My thanks as well to Amy Louise Erickson and Margaret Hunt for putting me in contact with Janice Thaddeus. For an earlier, tentative attribution of the text to Chapone, see Virginia Blain, Patricia Clements and Isobel Grundy, eds., *The Feminist Companion to Literature in English* (New Haven: Yale UP, 1990) 196.

83. Ballard Manuscripts, Bodleian Library (43, f. 146; December 14, 1741).

84. See Blain 196. Biographical information about Chapone derives from this source.

85. Schwoerer 60–1.

86. See Schwoerer.


88. Reprinted in Ezell 192.

89. Todd, “‘To be some body’” 345, n. 7.

90. Todd, “‘To be some body’” 345.

91. For more detailed discussions of these cases and some of the sources from which the author learned of these cases, see Todd, “‘To be some body’” 344–48.

92. *Gentleman’s Magazine* (May–June, 1735) 5: 241–242, 284. This source was obtained from Todd, “‘To be some body’” 343.

93. See Erickson, “Property and Widowhood.”

94. Plomer, *A Dictionary of the Printers and Booksellers ... from 1668–1725* 300.


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B A R O N
BARON and FEME:
OR, A
TREATISE
OF THE
LAW concerning HUSBANDS
and WIVES.

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THERI is no Consideration respected in the Law so much as the Consideration of Marriage, in regard of the Establishment of Families by Alliances, and the Continuance of them by Posterity: And therefore at Common Law, if a Man had given Lands to a Man with his Daughter in Frank-marriage, a Fee-simple had passed without

1 Inst. 9, b.
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out this Word (Heirs); and at this Day it is an Estate of Inheritance in Tail; and how valuable a Consideration it is for the raising of Ufes, every Day's Practice and Experience can testify.


If one be affianced to a Woman, and then forsake her, he is to be sued in Court Christian, and not in a Court of Equity, for Breach of his Oath; Si petite ipsum canonicem inimicitia; yet she may have Remedy for the Damages she sustained for the Non-performance of the Agreement; tho' others have said, that it was her Folly to trust his Word, and therefore she had no Remedy; Quia Deus est procurator factuum. But it's much to be doubted, but a good Remedy lies upon an Assumpsit at Law, as hereafter will in several Cases appear.

One brought an Assumpsit, For that, in Consideration he had promised to marry the Defendant, she had promised to marry him; and refused: And the Plaintiff had a Verdict; and it was objected, That a Man could not have this Action, tho' a Woman might: But the Court held he might; and that a Man may maintain an Action for scandalous Words whereby he loses his Marriage, as well as a Woman. Salk. Rep. 24.

A Feme brought an Action against one ManSEL, upon a Promise of Marriage; and Proof was made of an express Promise by the Man, but none on the Woman's Part: And it was held by Hole, C.J. That if there be an express Promise by the Man, and the Woman countenance it, and by her Actions at that Time shew any Signs of Agreement to the Matter, this shall be
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be a sufficient Evidence of a Promise on her Side. 7 Mod. 172.

When the Solemnization of Marriage in the Church began.

Before the Time of Pope Innocent III. there was no Solemnization of Marriage in the Church, and then it was first ordain’d; but before the said Ordinance, Marriage was solemnized in such Form, viz. The Man came to the House where the Woman inhabits, and in the Presence of her Friends and Relations, took the Woman Home to his own House; and this was all the Ceremony; and for this Reason the Man is said ducere uxorem, and then the Wife was said nupta viro, by reason she is quasi cooperta nube (this Man) to whom she hath subjected herself by Agreement of Marriage. Now to read the several Forms of Marriage in the several Countries of the World is very delightful, but is not to the Purpose of my present Design. Moor 170.

Now by our Law, Marriage being once lawfully solemnized, and without Impediment, all the World cannot dissolve it, if it be done by one in Holy Orders, let it be at what Time and Place it will be; as the Case was in Siderfin’s Reports, the Party was married at Twelve of the Clock at Night in an Alehouse.

And in Car. 2. a Libel was brought against J. S. Parson, in the Spiritual Court, for marrying without Licence in a Church. J. S. moves for a Prohibition in the King’s Bench, suggesting that the Church is donative, and that the Donor ought ex jure to appoint Commissioners to inspect and visit this, and that the Ordinary cannot intermeddle with it. The Suggestion is good; by Twisden: But the other Justices, because
Clergyman marrying a Couple without Bans or Licence, forfeits 100 l.

The Man so married to the Clerk 5 l.

Covenant in Words of present Time true Matrimony. Vide Swinb. 7 Mod. 155.

Parties so contracted cannot marry elsewhere.

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because J. S. had another Living presentative, would not grant a Prohibition.

By the 7 & 8 W. 3. cap. 35. it was enacted, That every Parson, Vicar or Curate, who should marry any Person in any Church or Chapel, exempt or not exempt, or in any other Place whatsoever, without Publication of the Bans of Matrimony between the respective Persons, according to Law, or without Licences for the said Marriages first had, should for every such Offence forfeit the Sum of 100 l. And he that should permit any other Minister to marry Persons in his Church or Chapel, without Bans or Licence, as aforesaid, should incur the like Forfeiture of 100 l.

And that every Man so married without Licence or Bans should forfeit the Sum of 10 l. And every Sexton, Parish-Clerk, and other Person acting as such, who should knowingly aid or assist at such Marriages, should forfeit the Sum of 5 l.

It is agreed, as well by Common Lawyers as Civilians, That Persons mutually contracting Spousals in Words of present Time, are very Man and Wife before God, in what Manner ever they are performed, (for nothing but a full, free, and mutual Consent is of the Essence of Matrimony,) And where there is any Evidence of such Contract, the Parties are so far accounted Man and Wife by our Laws, that if either of them proceed to marry elsewhere, the Issue of such Marriage may be bastardized, and the Offender may be compell’d, by the Ecclesiastical Censures, to return to his or her former Spouse: The sole Question is, Whether a Marriage celebrated in a Convanticle, or before a Number of Lay Friends, shall convey the same Privileges to the married Couple and their Issue,
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fue, as a Marriage celebrated in the Face of the Church, that is, by one in Orders?

Haydon’s Case, 9 Ann. Reg. as it is reported by Mr. Salkled, may assist us in clearing up this Point: Haydon, and Rebecca his Wife, were Sabbatarians, and married by one of their Ministers in a Sabbatarian Congregation: The Form in the Common-Prayer Book was used, except the Ceremony of the Ring. They liv’d together as Man and Wife for seven Years, and then Rebecca died; whereupon Haydon took out Letters of Administration to her: But Gould, and Margaret his Wife, who was Sister to Rebecca, sued a Repeal, suggesting that Rebecca and Haydon were never married; and it appearing that the Minister who married them was a mere Layman, and not in Orders, the Letters of Administration which had been granted to Haydon, as her Husband, were repealed, and a new Administration granted to the said Margaret Gould her Sister: And this Sentence, upon an Appeal, was affirmed by the Court of Delegates at Servants-Inn in Fleet-street; for it was held, That Haydon demanding a Right due to him as Husband by the Ecclesiastical Law, he ought to prove himself a Husband according to that Law; and so the Court ruled: And a Case was cited out of Swinborn, where such a Marriage had been ruled to be void: Mr. Salkled, however, makes a Doubt, Whether the Wife, being the weaker Sex, or the Issue of such a Marriage, who are in no Fault, may not be entitled to such Marriage to a Temporal Right, altho’ the Husband himself, who was in Fault, should never in-tilte himself by the mere Reputation of a Marriage without Right?
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Mr. Salkeld observes, that an Act of Parliament was thought necessary to confirm those Marriages celebrated by Justices of Peace, &c. during Oliver's Usurpation. Vid. 12 Car. 2. cap. 35. And that the constant Form of pleading Marriage is, That it was per Presbyterum sacris Ordinibus Constitutum. Salkeld's Reports 119. Now if the Issue of a Marriage, celebrated by a dissenting Teacher, should be intitled to the same Privileges as the Issue of a lawful Marriage, only because the Fault was not theirs, but their Parents; neither ought Bastards to be excluded, for they are equally innocent; and so all the spurious Issue in the Kingdom would be upon the Level with those that are legitimate; and as to the Woman's being the weaker Sex, and therefore she ought to receive no Prejudice by the Marriage being perform'd in an undue Manner, (cho' her Husband shall) it may be difficult to instance in a Marriage where the Woman shall have an Interests in the Husband's Fortune, and the Husband none in hers; for if it be a legal Marriage on one Side, one would be inclined to think it must be so on the other: But the Act of 7 & 8 W. 3. before recited, seems to admit, that none but those in Orders can marry, so as to entitle the married Couple to the Privileges of a lawful Marriage. Or why was that Penalty laid on the Clergy only?
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