

**An Historical Analysis of the Voidability of Contracts in the
Long Eighteenth Century: Control vs. Protection**

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This thesis is submitted to fulfil the requirements of the degree of Doctor of Philosophy

Declaration

I declare that this thesis is my own work, and has not been submitted for the award of a higher degree at any other university.

Elements of Chapter Six have been presented at the Society for Legal Scholars Conference (York, 2015) and Chapter Four has been presented as a conference paper at the Arts & Humanities Postgraduate Research Conference (Stirling, 2018).

Kate Hunter

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Abstract

AN HISTORICAL ANALYSIS OF THE VOIDABILITY OF CONTRACTS IN THE LONG EIGHTEENTH CENTURY: CONTROL VS. PROTECTION

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The thesis has a period of focus of the 'long eighteenth century'. This phrase is coined from that in use by historians when discussing the period from 1688-1832 and has been chosen given the number of key contractual developments which took place in this era. The primary purpose of this research is to understand the basis and motivations behind the creation of important rules under which some contracts were made void. It is conceded that 'voidness' of contracts is an extremely wide area of law and as a consequence of this, three areas of contract law in particular have been chosen to be explored, these being illegality, immorality and incapacity. These three topics are linked by the way in which they concern the intervention of the law on private relationships and personal lives, which is the chosen theme throughout this thesis.

Ultimately, the thesis will arrive at a point whereby the underlying motivations behind the eighteenth century legal developments which held certain contracts concerning illegality, immorality, and incapacity to be void will be discovered. The means of doing this will be to analyse and interpret the social history and the legal history concurrently.

It will be determined whether these developments were underpinned by a law which sought to protect or control and thus the tension between control and protection interests will be explored throughout this thesis.

Table of Contents

Declaration	i
Acknowledgments	ii
Abstract	iii
Table of Cases	ix
Table of Legislation	x
Chapter One – Introduction	1
1.1 England in the Long Eighteenth Century	1
1.2 Void(able) Contracts	11
1.3 Research Question	13
1.4 Methodology	14
1.4.1 Legal Methodology	15
1.4.2 Historical Methodology	16
1.4.3 Justifications for the Interdisciplinary Method	19
1.5 Methodological Considerations	20
1.6 Scope of Thesis	21
Chapter Two – Illegality: Marriage Rights	24
2.1 Introduction	24
2.2 Formalities of Marriage	26
2.2.1 Clandestine Marriage	27
The Passage of the Marriage Bill	31
The Marriage Act 1753	38
2.3 From Financial Gain to Romantic Love	43
2.3.1 Marriage Brokerage	45
2.3.2 Restraint of Marriage	61
The Case of <i>Lowe v Peers</i>	62
The Middling Sort	68
2.4 Conclusion	72

Appendix 1 – William Hogarth, <i>Marriage a la Mode</i> (1745)	75
Chapter Three – Illegality: Marriage Rights II	78
3.1 Introduction	78
3.2 Eighteenth Century Womanhood and Masculinity	79
3.2.1 Breach of Promise	83
Female Breach of Promise Actions	85
Foote v Hayne	86
The Importance of Reputation	90
Male Breach of Promise Actions	96
3.2.2 Breach of Promise vs. Restraint of Marriage	103
3.3 Sex and Parenting	104
3.3.1 Agreements for Separation	110
3.3.2 Separation in the Long Eighteenth Century	111
Requirement 1: Immediacy	114
Requirement 2: Animosity	117
3.4 Conclusion	124
Appendix 2 – Sandro Botticelli, <i>The Birth of Venus</i> (1408)	127
Appendix 3 – Allan Ramsay, <i>Lady in a Pink Silk Dress</i> (1762)	127
Appendix 4 – Joshua Reynolds, <i>Jane Fleming</i> (1778)	128
Appendix 5 – Joshua Reynolds, <i>Richard Crofts of West Harling</i> (1785)	128
Chapter Four – Immorality	129
4.1 Introduction	129
4.2 Morality and the Establishment	131
4.2.1 The War Against Vice	131
Public Stews	135
4.2.2 The Political Agenda	140
Voting Qualification	141
The Drive for Reform	144

4.3	Morality Reconsidered	149
4.3.1	The Magdalen Hospital	150
4.3.2	Social Acceptance	155
	Kitty Fisher	159
4.3.3	Facilitation of Trade	163
4.4	A New Agenda	170
4.4.1	Vagrancy Act	176
4.5	Conclusion	179
	Appendix 6 – William Hogarth, <i>The Harlots Progress</i> (1733)	183
Chapter Five – Incapacity: Married Women and Widows		186
5.1	Introduction	186
5.2	The Eighteenth Century Woman	188
5.3	Married Women	192
5.3.1	Dowry	192
5.3.2	Coverture during Marriage	195
5.3.3	Coverture after Separation	204
5.3.4	Pin Money and Jointure	207
	Jointure	211
5.4	Widows and Unmarried Women	214
5.5	Conclusion	220
Chapter Six – Incapacity: Infants		224
6.1	Introduction	224
6.2	Position of Infants	226
6.2.1	Sale of Goods	230
6.3	Apprenticeships	239
6.3.1	Void Apprenticeship Contracts	251
	Bad Behaviour	251
	Illness and Death	253

Not Beneficial to the Infant	257
6.4 Conclusion	263
Appendix 7 – William Hogarth, <i>Industry and Idleness</i> (1747)	267
Appendix 8 – Apprenticeship Contract between James Hardy and the Lune Shipbuilding Company, 1st June 1865	273
 Chapter Seven – Conclusion	 278
7.1 Implications of this Research	282
7.2 Further Research	283
7.3 Final Remarks	285
 Bibliography	 287

Table of Cases

Appleton v Campbell (1826) 2 Car & P 347; 172 ER 157
Baddeley v Mortlock and Wife (1816) Holt 151; 171 ER 195
Bateman v Countess of Ross (1813) 1 Dow 235; 3 ER 684
Berolles v Ramsay (1815) Holt N P 77; 171 ER 168
Blackburn v Mackey (1823) 1 Car & P 1; 171 ER 1076
Bowry v Bennet (1808) 1 Camp 348; 170 ER 981
Brown v Peck (1758) 1 Eden 140; 28 ER 637
Cannan v Bryce (1819) 3 B & A 179; 106 ER 628
Cartwright v Cartwright (1853) 3 De G M & G 982; 43 ER 385
Clowes v Brooke (1738) 2 Str 1101; 93 ER 1058
Coates v Wilson (1804) 5 Esp 152; 170 ER 761
Cole v Gieson (1750) 1 Ves Sen 503; 27 ER 1169
Corbett v Poelnitz (1785) 1 TR 4; 99 ER 940
Cuff v Brown (1818) 5 Price 297; 146 ER 613
Dale v Copping (1610) 1 Bulst 39; 80 ER 743
De Francesco v Barnum (1890) 45 Ch D 430
Derby v Humber (1866) L R 2 C P 247
Duke of Hamilton v Lord Mohun (1710) 1 P Wms 118; 24 ER 319
Etherington v Parrot (1703) Salk 188; 92 ER 169
Foote v Hayne (1824) 1 Car & P 545; 171 ER 1310
Ford v Fothergill (1794) 1 Esp 211; 170 ER 331
Gawden v Draper (1690) 2 Vent 217; 86 ER 402
Girardy v Richardson (1793) 1 Esp 13; 170 ER 265
Gray v Cookson & Clayton (1812) 16 East 13; 104 ER 994
Hall and Keene v Potter (1699) 3 Lev 411; 83 ER 756
Hands v Slaney (1800) 8 Term Rep 578; 101 ER 1556
Harrison v Cage (1703) 5 Mod 411; 87 ER 736
Hartley v Rice (1808) 10 East 22; 103 ER 683

Hill v Turner (1737) 1 Atk 515; 26 ER 326
Howard v Digby (1834) 2 Cl & Fin 634; 6 ER 1293
Huggins v Wiseman (1690) Carth 110; 90 ER 669
Ive v Chester (1620) Cro Jac 56; 79 ER 840
Jennings v Throgmorton (1825) Ry & Mood 251
King v Burr (1810) 3 Mer 693; 36 ER 266
Lloyd v Johnson (1798) 1 Bos & Pul 340; 126 ER 939
Lowe v Peers (1768) 4 Burr 2225; 98 ER 160
Makarell v Bachelor (1597) Cro Eliz 583; 78 ER 826
Manby v Scott (1674) O Bridg 229; 124 ER 561
Montague v Espinasse (1824) 1 Car & P 356; 171 ER 1229
Moore v Moore (1737) 1 Atk 273
Pearce v Brooks (1866) LR 1 Ex 213
Peters v Fleming (1840) 6 H & W 42; 151 ER 314
R v Lord (1850) 12 QB 757; 116 ER 1055
Robinson v Greinold (1704) 1 Salk 119; 91 ER 112
Slade v Morley (1602) 4 Cro Rep 91; 76 ER 1072
Smith v White (1865) LR 1 Eq 626
Todd v Stokes (1699) 1 Ld Raym 444; 11 Will 3; 91 ER 1195
Westmeath v Westmeath (1830) 1 Dow 519; 6 ER 619
Whincup v Hughes (1870) LR 6 C P 78
Williamson v Watts (1808) 1 Camp 552; 170 ER 1054
Woodhouse v Shepley (1742) 2 Atk 535; 26 ER 721

Table of Legislation

Adultery Act 1650

An Act for the Better Regulation of Chimney Sweepers and their Apprentices 1788

Catholic Relief Act 1792

Chimney Sweepers Act 1834

Chimney Sweepers Act 1875

Chimney Sweepers and Chimneys Regulation Act 1840

Corporation Act 1661

Corresponding Societies Act 1799

Customs and Excise Act 1711

Marriage Act 1754

Marriage Duty Act 1695

Masters and Servants Act 1823

Papists Act 1778

Parish Apprentices Act 1792

Parish Officers Act 1793

Regulation of Servants and Apprentices Act 1747

Representation of the People Act 1832

Roman Catholic Relief Act 1829

Statute of Uses 1535

Test Act 1673

Toleration Act 1689

Vagrancy Act 1824

Chapter One - Introduction

1.1 ENGLAND IN THE LONG EIGHTEENTH CENTURY

1688 marked a significant turning point in English history. Following the Glorious Revolution, the Catholic King James II was ousted and replaced by a Protestant monarch, William III. Alongside this change in sovereign, the culture of England was also to undergo significant development. Indeed, over a period of more than one hundred years and under the reign of seven monarchs, England saw the rise of party politics, the continued growth of the Empire, and the Industrial Revolution. Culminating in the enactment of the Great Reform Act in 1832, the long eighteenth century is a particularly tumultuous period of English social history, given the degree of change that occurred at this time.

The law too was to undergo a period of development as legal doctrine sought to align itself with changing commercial and social norms. In the realm of contract law, *Slade's Case*¹ in 1602 consolidated the rules that were to persist throughout the long eighteenth century concerning assumpsit actions.² Prior to this, depending on the nature of the contract, a party could pursue a writ of covenant or a writ of debt. A covenant and a debt were distinguished as a covenant was akin to what we would today hold as a contract and thus concerned breach of a promise, whilst debts were treated as an action

¹ *Slade v Morley* (1602) 4 Co Rep 91; 76 ER 1072

² An action of assumpsit ('an undertaking'), was the primary mode of recourse for contractual breaches at this time

concerning property.³ The former was actionable in the central courts,⁴ only if evidenced by a deed, although Baker acknowledges that ‘local courts were quite competent to deal with informal agreements’⁵ not in writing. For a writ of debt, if not evidenced in a deed, a plaintiff could pursue an action of ‘debt *sur contract*’, to which the defendant could respond by waging his law⁶ that he did not owe any money. For those debts evidenced in writing, the action of ‘debt *sur obligation*’ was available, and by the long eighteenth century, this became the most common way to bring an action for the repayment of a debt.⁷ *Slade’s Case* arose from shortcomings in the law concerning the recovery of a debt on an obligation; the option for the defendant to wage his law exposed the process to abuse by deceitful oath-helpers,⁸ furthermore, executors could not wage the law of the deceased and so death resulted in the debt being unrecoverable. Assumpsit was seen as a way of avoiding these shortcomings,⁹ and so from the sixteenth century, began to be used as a means of recovering debt. The question in *Slade’s Case* concerned whether this was a permissible cause of action and it was held that it was. The outcome was that by the beginning of the long eighteenth century, claims in contract law were pursued through the action of assumpsit, which was divided between breach of covenant, ‘*special assumpsit*’ and the recovery of a debt, ‘*indebitatus assumpsit*’. This change in procedure was to become increasingly important to assist with the growing number of commercial

³ A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (Clarendon Press, Oxford: 1975) 6

⁴ The central courts refer to those of the King’s Bench and Common Pleas

⁵ J.H. Baker, *An Introduction to English Legal History*, Fourth Ed. (Oxford University Press, Oxford: 2011) 320

⁶ In a wager of law, a defendant swore on oath that he was not liable; this was then supported by a fixed number of persons who swore their belief in the truth of the defendant’s oath. It was intended that this would compensate for the lack of written evidence

⁷ Baker (n5) 324

⁸ Oath-helpers being those persons brought by the defendant to swear to their belief in his oath.

⁹ Baker (n5) 342

contracts as the long eighteenth century progressed, and England transitioned from a nation of agriculture to industry.

Prior to 1760, Britain was an agricultural nation. 90 per cent of the population of Britain was engaged in agriculture in 1688, but by 1760, this figure had fallen to under 50 per cent.¹⁰ This was the year that saw the beginning of the Industrial Revolution.¹¹ Towns such as Manchester, Leeds, Liverpool, and Birmingham grew as new industries were created in cotton, steel, coal, and shipbuilding.¹² This Revolution was assisted by improvements in transport; Turnpike trusts were created to maintain roads whilst George Stephenson tested the first steam locomotive, The Rocket, in 1829, which was the first step towards the eventual creation of the railways. Despite the sharp population increase in major cities as a consequence of greater job prospects and higher wages, industrialisation was not welcomed by everyone. The Swing Riots in 1830 saw agricultural workers destroy threshing machines over their dissatisfaction at the machines replacing manual labourers. Indeed, the transition from agriculture to industry was tumultuous, as the period from the beginning of the Industrial Revolution to the end of the long eighteenth century saw discontent in the form of food riots, notably in 1766 and 1791, as poor harvests increased wheat prices. Alongside this, rapid industrialisation meant that social welfare had yet to catch up, and so housing and sanitation in cities were poor,¹³ whilst this period also saw the evolution of workhouses; in 1783 over £2 million

¹⁰ P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Clarendon Press, Oxford: 1979) 24

¹¹ *ibid* 224

¹² R. Porter, *English Society in the Eighteenth Century*, (Penguin Books, London: 1990) 314

¹³ M. D. George, *London Life in the Eighteenth Century*, (Peregrine Books, Middlesex: 1985) 111

was paid annually for maintenance of the poor in England and Wales.¹⁴ The image of industrial Britain in the long eighteenth century, then, with historic roots in agriculture but emerging power in industry, is thus perhaps typified by William Blake in his 1804 poem, *Jerusalem*,¹⁵ in which ‘England’s pleasant pastures’¹⁶ are juxtaposed in the following stanza with the (newly established) ‘dark Satanic Mills’.¹⁷

Greater commercialisation saw a concurrent change not only in the law concerning assumpsit, but also in the formulation of new rules of contracting. The doctrine of *caveat emptor* ‘gained a foothold...[alongside] freedom of enterprise’¹⁸ during this period, whilst the promissory note arose alongside the newly emerging credit economy. Originating from a goldsmith’s note, it became necessary in the eighteenth century for merchants to have the ability to transfer the note to third parties whilst retaining its validity; in this way, the notes could be used as currency.¹⁹ Thus, the goldsmith’s note evolved to include on the receipt a promise to pay, and it is from this that the promissory note came into being. It is Lord Mansfield who has traditionally been credited with formulating much of the commercial law that evolved in this era,²⁰ driven by pressure from merchants to establish clear rules for contracting in new industries, such as railways. The speed with which industrialisation took place often meant huge sums were at stake for contracting

¹⁴ Anon, *Abstract of the Returns made by the Overseers of the Poor, in Pursuance of An Act; passed in the Twenty-Sixth Year of His Present Majesty’s Reign, intituled “An Act for obliging Overseers of the Poor to make Returns upon Oath to certain Questions specified therein, relative to the State of the Poor”*, (1787) 309

¹⁵ W. Blake, *Jerusalem*, (1804)

¹⁶ *ibid* Line 4

¹⁷ *ibid* Line 8

¹⁸ Atiyah (n10) 179

¹⁹ Atiyah (n10) 154

²⁰ Baker (n5) 351

parties seeking maximum gain from new ventures; ‘risks were concentrated and not spread’²¹ and thus clear rules were required to protect individual financial interests but also to protect against any consequent losses triggered by a failed commercial enterprise. The most notable failure in this period in which this triggering effect was apparent, was in the burst of the South Sea Bubble in 1720. Founded in 1711, the South Sea Company was created to trade with South America. The Company was formed at the height of Britain’s colonial power. Despite losing colonies in North America in the War of Independence in 1783, Britain’s Empire incorporated land across Europe, Africa, Australasia, and Asia. The initial success that the South Sea Company experienced did not last; in 1720 the Company took over the national debt, and this, in conjunction with the directors’ unscrupulous representation of company profits, saw the inflation of stock prices, followed by an inevitable collapse. A key figure in overcoming this crisis was Sir Robert Walpole,²² who was consequently given the position of First Lord of the Treasury; as a result, by 1721 Britain had its first Prime Minister.

It was not only in the creation of this new role that British politics was to change in the long eighteenth century. The party-political system too was to evolve concurrently with growing industrialisation which had created new commercial interests and new social groups with a growing desire to influence policy-making. Politically, a two-party system existed throughout the long eighteenth century, divided between the Whigs and the Tories. The origins of these two parties was founded in religion. The Whigs supported

²¹ Atiyah (n10) 229

²² See further J. H. Plumb, *England in the Eighteenth Century*, (Penguin Books, London: 1990) 59

the replacement of the Catholic King James in 1688, and protested Protestant persecution.²³ Their ideology of political power vesting in the people was supported by Lockean social contract theory, which provided that the power of a monarch derived from a contract with his people. Therefore, should a monarch abandon the protection of his people and break this contract, rebellion was justified;²⁴ the Whigs thus supported the Glorious Revolution and the ousting of the Catholic King. The Tories, on the other hand, were the traditional supporters of monarchy and the established church²⁵ and had supported the Catholic King James II. Their belief in the supremacy of monarchy aligned much more with a Hobbesian ideology of the surrendering of each man's individual will to a sovereign; only in this way could man achieve true freedom. These conflicting beliefs concerning the role of monarchy and where power ought to be vested resulted in the respective parties drawing support from differing social classes. The Whigs attracted 'new monied interests'²⁶ whilst the Tories traditionally drew support from local squires. Indeed, it was the Whigs, with their liberal notion of power deriving from the people, who pushed for the reform of the electoral system, which was to culminate in the 1832 Reform Act.²⁷

It is important at this juncture to note that the notion of 'class' in the long eighteenth century is something that has been formed retrospectively. Indeed, the notion of a

²³ F. O'Gorman, *The Long Eighteenth Century: British Political and Social History 1688-1832*, (Arnold, London: 1997) 45

²⁴ Atiyah (n10) 48

²⁵ O'Gorman (n23) 45

²⁶ *ibid* 48

²⁷ 2 & 3 Wm IV c45

distinct system, of a working, a middle, and an upper class, did not exist for those in the eighteenth century, and, as argued by E. P. Thompson, this classification only came about following the industrial revolution.²⁸ It is during this period of 'class-consciousness'²⁹ that we see the emergence of the 'middling sort' or what we would deem today to be the middle class. This group grew from the new industries which emerged as a consequence of industrialisation, as the population moved away from poorer-paid agricultural work towards towns, where greater opportunities and wealth emerged. The middling sort incorporated professions such as artisans, shop keepers, and civil servants.³⁰ The formation of these new social groups, with their own distinct interests, drove the desire for political reform in the long eighteenth century from a system in which only those with a landed interest could vote.³¹ Groups such as the Birmingham Political Union (BPU) petitioned for the widening of the franchise, and, influenced by writers such as Thomas Paine, speakers such as Robert Macaulay travelled the country postulating the view that it was not only the landed aristocracy who ought to have a say in politics. Mass political movements such as the BPU were aided in their pursuit by the very industrialisation that also created the professions from which they drew their support. The colour printing press invented in 1710 allowed for the production of pamphlets which could be distributed to educate a wider audience. Indeed, pamphlets were not only used for the promotion of political reform, but were also used to describe legal proceedings. For those pursuing breach of promise actions, it was common for pamphlets to be produced which

²⁸ E. P. Thompson, 'Eighteenth Century English Society: Class Struggle without Class?', (1978) 3:2 *Social History* 133, 134

²⁹ *ibid* 149

³⁰ M.R. Hunt, *The Middling Sort: Commerce, Gender, and the Family in England 1680-1780*, (University of California Press, London: 1996), 39

³¹ O'Gorman (n23) 360

depicted the trial as well as the background of the parties to it. From the beginning of the eighteenth century then, there thus emerged the means by which to communicate political views, moral teachings, and even legal proceedings, to the masses, cheaply.

Yet moral teachings were also promoted heavily in popular culture. The works of Defoe in novels such as *Moll Flanders*³² and *Roxana*³³ warned against the temptations of prostitution, whilst engravings by Hogarth in *The Harlots Progress*³⁴ and *Industry and Idleness*³⁵ portrayed the destructive outcome of a life of vice. As the period progressed, it is clear that this moral agenda pursued most ardently after the accession of William III to the throne, conflicted with the rise of prostitution in London, and the seeming acceptance of it in society; prostitutes were often the muse of artists at this time, and indeed, Joshua Reynolds painted the courtesan Kitty Fisher on a number of occasions. Added to this, the fact that these working women often performed on stage at Covent Garden elevated them to something of a celebrity status, and this was only cemented by publications such as *Harris's List* which promoted the women and their prices. As noted by Atiyah, during this period, 'the law of contract was being profoundly influenced by moral ideals';³⁶ the civil law concerning prostitution thus had to compete with a society that increasingly saw the profession as an incidence of everyday life. However, this social shift was not isolated to prostitution. The rise of sensibility in literature, perhaps typified

³² D. Defoe, *Moll Flanders*, (William Rufus Chetwood, London: 1722)

³³ D. Defoe, *Roxana; or A Fortunate Mistress*, (T. Warner, London: 1724)

³⁴ W. Hogarth, *The Harlots Progress*, (1733)

³⁵ W. Hogarth, *Industry and Idleness*, (1747)

³⁶ Atiyah (n10) 147

by the works of Samuel Richardson, saw a move towards a ‘emotional’³⁷ notion of marriage. This social consideration conflicted with the protections imposed by the civil law towards ensuring that wealth was maintained within the appropriate channels through marriage, and so the law thus had to strike a balance between upholding contractual principles and reflecting emerging social ideals. Alongside this, women continued to be viewed as homemakers and subservient to their husbands, and this was reflected in their legal status upon marriage, whereupon their legal rights were subsumed into those of their husband. Yet for those left widowed, the law permitted them the same rights as men. It is perhaps for this disruption of established social norms, that depictions of widows in eighteenth century literature carried negative connotations.³⁸

A further reflection of how women were viewed in the long eighteenth century is that their legal position upon marriage was akin to that of a child. Whilst an infant³⁹ was generally unable to contract, he could do so should the contract be one for necessities. ‘Necessary’ items were also the only goods for which a married woman could contract. Furthermore, an infant could enter an apprenticeship contract, provided he obtained permission from his father or guardian. Towards the end of the long eighteenth century, with industrialisation, greater apprenticeship opportunities emerged;⁴⁰ these ranged

³⁷ L. Stone, *The Family, Sex and Marriage in England 1500-1800*, (Weidenfeld and Nicolson, London: 1979) 239

³⁸ See Lady Booby in H. Fielding, *Joseph Andrews*, (A Millar, London: 1742); Clara Lennox in M. Lee, *Clara Lennox*, (J. Adlard, London: 1797); and Mrs Jervis in D. Defoe, *Moll Flanders*, (William Rufus Chetwood, London: 1722)

³⁹ At this time, the age of majority was twenty-one

⁴⁰ J. H. Plumb, *England in the Eighteenth Century*, (Penguin Books, London: 1990) 87

from the lowly climbing-boy apprentice – a profession so inherently dangerous that conversely to tradition, the master would often pay the family of the apprentice to take the child – to opportunities with apothecaries, lawyers, and bankers. Whilst children were by no means afforded the same level of rights as today, the long eighteenth century saw a move towards greater protection for those children undertaking apprenticeships.

Given this considerable social change, the period of the long eighteenth century therefore makes for an equally insightful study of legal history. As stated by Colley, the period ‘contains so much that was important and paradoxical at the same time’,⁴¹ and it is for this reason that this is the chosen period of study for this thesis. The response of the law to these changes in society is explicitly apparent in judgments concerning the voidability of contracts, which refer to the public policy factors which were taken into consideration, but what has received less attention is the general social context in which the law was operating.⁴² By taking these two strands of history simultaneously, this thesis will provide an original contribution to the law of void contracts, suggesting that a combined legal and social history methodology can assist in further understanding the rationale of the law in rendering certain contracts to be void or voidable.

⁴¹ L. Colley, ‘The Politics of Eighteenth Century British History’, (1986) 25 *Journal of British Studies* 359, 360

⁴² *ibid* 361

1.2 VOID(ABLE) CONTRACTS

When speaking of factors which ‘defeat contractual liability’⁴³ the distinction is drawn between a contract which is rendered completely void (*void ab initio*) and is thus treated by the law as if it has never existed, and one which is rendered *voidable*. The difference is that this latter classification of contract has the potential to be affirmed or invalidated by one of the parties to it. Common factors which defeat contractual liability are: the incapacity of the parties, mistake by one or both parties as to the nature or subject matter of the contract, duress or undue influence, and a contract that has at its heart an illegal purpose. Within these factors, a contract will be declared void if the operation of it is made an impossibility. This will be so where the contract is for an illegal purpose, or where the law prohibits it as being contrary to public policy. On the other hand, as mentioned, a voidable contract can be valid if it is ratified by one contracting party, but this same actor also has the potential to avoid the contract. This will be the case when the contract was entered with a minor, or a person suffering mental incapacity, or it has been entered under duress. Occasionally, as in the area of mistake, it is not possible to state generally that contracts invalidated for this reason will be void or voidable, as the ‘voidability’ is dependent upon the nature of the mistake itself. For instance, a mutual mistake has the potential to be valid if, despite the crossed purposes, the contract can still be interpreted and executed as intended. In contrast, regarding common mistake, the mistake is usually so fundamental to the nature of the contract that it will be declared void.

⁴³ J. Beatson, A. Burrows & J. Cartwright, *Anson’s Law of Contract 29th Ed.*, (Oxford University Press, Oxford: 2010) 217

These general principles being said, the policy of the law in finding contracts to be void or voidable has been said to promote one of two opposing motivations.⁴⁴ The law seeks either to protect contracting parties, as is the case concerning infants and those entering a contract under duress, or it controls persons or behaviour, such as the practice of prostitution within the area of illegality. Just as E. P. Thompson postulated an assessment of social history ‘from below’ as a means of determining exactly how the ordinary population, as distinct from the landed classes, conducted their lives and reacted to social changes, this thesis will address void(able) contracts which are deemed ‘personal’ in nature. Popular perception would perhaps categorise contract law as a purely commercial discipline, concerned with the sale of goods, or regulating the conduct of corporations, for instance. However, less attention is given to the everyday instances of contract. This thesis will attempt to give light to these contractual uses and will focus on contracts concerning marriage, prostitution, and the individual contractual actors of women and children. In this way, by placing legal principles in their social context, the thesis explores how the law impacted everyday contractual parties and challenges the extent to which the motivations of the law to protect or control held true.

Public policy is cited repeatedly by the judges as the reasoning as to why contracts were rendered void or deemed to be voidable when analysing the cases across the three substantive areas covered in this thesis. It is this which makes this area of study

⁴⁴ ‘The civil law afforded...both a set of defences...and those rules of the game’ in E. P. Thompson, ‘Eighteenth English Society: Class Struggle without Class?’, (1978) 3:2 *Social History* 133, 144

particularly necessary; in those contracts discussed above, which are rendered void for mistake, or voidable for misrepresentation, the basis of this is that these contracts undermine the will of the parties. In other words, such agreements are not upheld as they are not entered freely and with full knowledge of the facts. Conversely, in the chosen areas of study for this thesis, the voidability of these contracts cannot be explained in this way. Instead, they reflect policy choices. Consequently, a thorough analysis of this legal reasoning cannot be undertaken without an understanding of what social norms the law was reacting to in citing public policy as the rationale for rendering these contracts as void or voidable, and to this end one cannot present an exploration of the law in isolation of its social context. This is all the more necessary in order to accurately understand how ordinary people utilised contract in their everyday lives, and how the law regulated this activity. It cannot truly be said that persons and behaviour were either controlled or protected through a law that cited public policy as its rationale for rendering such contracts as void, without consideration being given to the social context – and thus the ‘public’ sphere – in which these judgments were made. For this reason, this thesis will take an original approach to address the extent of the control-protection agenda within the area of void and voidable contracts by pursuing an interdisciplinary analysis of the law that combines both law and social history.

1.3 RESEARCH QUESTION

It is taken as trite that the law seeks either to control or to protect individuals and behaviour. It is further undisputed that law is responsive to society and changing social

norms, and yet despite this, legal and social history continue to be treated as distinct disciplines. This thesis argues that one cannot fully understand the motivations of the law without also considering the social context in which these rules were operating. The research question of this thesis is to question why the law developed to render certain contracts as void or voidable. In order to fully address this, a secondary question will be posed that determines the extent to which the control-protection agenda can be seen as a rigid interpretation of the motivations of the law in this area. The originality of the thesis lies in dispelling with common misconceptions regarding the control-protection agenda of the law in the area of void and voidable contracts, by analysing the law in concurrence with social history. In this way, the law is placed in its social context and this in turn challenges the binary control-protection categorisation that a purely legal analysis of the law has produced. Ultimately, throughout this thesis it is demonstrated that greater interaction between law and social history would enhance our understanding of legal rules.

1.4 METHODOLOGY

It has been said that the methodology of a legal historian addresses either the ‘internal (essentially legal or doctrinal) developments’⁴⁵ concerning the law, or instead focuses on how the law is influenced by ‘external factors’.⁴⁶ What is also clear, however, is that short

⁴⁵ A. Musson and C. Stebbings, *Making Legal History: Approaches and Methodologies*, (Cambridge University Press, Cambridge: 2012) 1

⁴⁶ *ibid.*

of this distinction, there is no 'right' way to 'do' legal history.⁴⁷ Consequently, adopting the latter approach, this thesis employs an interdisciplinary methodology, which attempts to bridge the gap between traditional legal doctrine and social history.

1.4.1 Legal Methodology

The traditional methodology of legal doctrine is hermeneutic; cases are read and analysed with the interpretation, and fitting this into the wider sphere of the law, being the overall aim of an academic lawyer.⁴⁸ This methodology is employed within this thesis to explain the legal principles surrounding the voidability of contracts. A range of primary sources will be accessed including case law and statute, whilst academic journal articles and monographs shall consist of the secondary sources for use in this thesis. By analysing these sources, the legal rules concerning void and voidable contracts in the long eighteenth century will be stated. Only with this solid foundation of an understanding of the law can the thesis then begin to answer the research question to determine the extent to which the control-protection interests explicitly cited in the case law, held true. However, in order to do this effectively, the hermeneutic methodology is limited; it does not tell us *why* such a law is valid. The aim of this thesis is to pose this very question, in order to determine *why* certain rules concerning the voidability of contracts existed, and to this extent this thesis can be said to reflect what Van Hoecke deems an 'explanatory'⁴⁹ discipline. The explanatory methodology derives from an analysis of social history; it is

⁴⁷ J. Baker, 'Reflections on 'doing' legal history', in A. Musson and C. Stebbings, *Making Legal History: Approaches and Methodologies*, (Cambridge University Press, Cambridge: 2012) 7

⁴⁸ M. Van Hoecke, *Methodologies of Legal Research: Which kind of Method for What kind of Discipline?* (Hart Publishing, Oxford: 2011) 4

⁴⁹ *ibid* 8

evident that an effective explanatory approach must take into account other academic disciplines,⁵⁰ and it is for this reason that the question of the validity of contracts is answered alongside an exploration of socio-historical factors.

1.4.2 Historical Methodology

Historical method consists of a three-stage process of evaluation; firstly, the source must be located,⁵¹ secondly, it must be analysed,⁵² and finally, it must be interpreted.⁵³ The effectiveness of individual sources will be discussed in detail below, and so turning firstly to the effective analysis of a source, according to Howell and Prevenier, this addresses the “genealogy of the document’,⁵⁴ the “genesis” of the document’,⁵⁵ and the ‘originality’⁵⁶ of the source. In other words, it must be questioned if the source was an original (‘genealogy’), where it was produced (‘genesis’), and whether the document consisted of the first instance of such a source (‘originality’). The interpretation of the source can be understood by comparing the document to other sources; for the purpose of this thesis, this comparison will be undertaken alongside not only other historical sources but also legal principles, therein consisting of the interdisciplinary methodology to the thesis.

⁵⁰ See M. Van Hoecke, *Methodologies of Legal Research: Which kind of Method for What kind of Discipline?* (Hart Publishing, Oxford: 2011) 8 – ‘in order to simply understand law...one needs this law-in-context approach’

⁵¹ M. Howell and W. Prevenier, *From Reliable Sources: An Introduction to Historical Methods*, (Cornell University Press, New York: 2001) 2

⁵² *ibid*

⁵³ *ibid*

⁵⁴ *ibid* 61

⁵⁵ *ibid* 62

⁵⁶ *ibid* 63

Regarding locating the source, Marwick championed what he deemed ‘documents of record’⁵⁷ over and above reliance on mere ‘records’.⁵⁸ The former includes sources such as Acts of Parliament and treaties, whilst the latter refers to court transcripts and pamphlets. Both categories have been included in this thesis. Whilst ‘documents of record’ reveal the unbiased fact of how the law was, it is in the court records and the explanatory pamphlets that the subjectivity is revealed and thus we can understand *why* the law came to be. It is argued here that these ‘record’ sources are indeed written under the subjectivity of the writer, but this informs us of their ideals and thus the social norms of the time. A combination of legal fact and an understanding of social norms is integral to answering the research question of this thesis as to the motivations of the law surrounding void contracts. Beyond these legal sources, the thesis relies significantly on visual primary sources⁵⁹ as well as written sources such as literary texts and newspapers. There is a danger that historians view novels in a solely ‘illustrative way’,⁶⁰ but literature also embodies a level of subjectivity; as stated by Reinfandt, ‘language is constitutive of human dealings with reality’.⁶¹ Thus, this thesis employs the use of literary sources such as poetry, pamphlets, and novels, not only for explanatory purposes, but also in order to further understand how social norms were interpreted by those in society. This is

⁵⁷ A. Marwick, *The New Nature of History: Knowledge, Evidence, Language*, (Palgrave, Houndmills: 2001) 26-7 cited in S. Barber and C. M. Peniston-Bird, *History Beyond the Text*, (Routledge, London: 2013) 2

⁵⁸ *ibid*

⁵⁹ ‘Visual primary sources’ includes sources such as fine art, photographs and cartoons

⁶⁰ J. Reid, ‘Novels’ in M. Dobson and B. Ziemann, *Reading Primary Sources: The Interpretation of Texts from Nineteenth and Twentieth Century History*, (Routledge, London: 2009) 164

⁶¹ C. Reinfandt, ‘Reading texts after the linguistic turn: approaches from literary studies and their implications’ in M. Dobson and B. Ziemann, *Reading Primary Sources: The Interpretation of Texts from Nineteenth and Twentieth Century History*, (Routledge, London: 2009) 46

particularly evident in the moral teachings of novels by Defoe and the poetry of Rochester. Newspapers, on the other hand, much like today, inform us not only of factual events but also reveal much about the political, social, and moral stance⁶² of the journalist as well as the publication in which it is printed. It is for this reason that the thesis references newspaper articles; in this way it is possible to understand not only the effect of the law, but how it was received. Regarding artwork, Barber and Peniston-Bird postulate that ‘all media are extensions of human expression’⁶³ but it is in the delivery of these, in the circumstances surrounding their publication, that the ‘implicit elements of human expression’⁶⁴ are apparent. By using visual primary sources, the historian can greater understand not only the subject-matter of the source itself, but an examination of the timing and circumstances surrounding its release can often tell us more of the context in which it was published.⁶⁵ Thus, the importance of visual primary sources, extends far beyond the subject-matter that they depict. It is for this reason, that a range of visual primary sources have been included in this thesis; they assist not only in illustrating a specific moment in time, but can also reveal the social context of the period and they thus assist the research question of this thesis to question why the law developed as it did regarding void and voidable contracts.

⁶² S. Vella, ‘Newspapers’, in M. Dobson and B. Ziemann, *Reading Primary Sources: The Interpretation of Texts from Nineteenth and Twentieth Century History*, (Routledge, London: 2009) 192

⁶³ S. Barber and C. M. Peniston-Bird, *History Beyond the Text*, (Routledge, London: 2013) 3

⁶⁴ *ibid*

⁶⁵ *ibid*

1.4.3 Justifications for the Interdisciplinary Method

In this thesis, then, the methodology is one which combines ‘lawyers’ legal history with social history. Lawyers legal history has traditionally disregarded a layman’s experience of the law, confining this to the realm of social history, and has focused instead on a history that ‘uncritically celebrated the common law... emphasized continuity and de-emphasized change... privileged early history and “origins” over modern history and effects” [and] judged legal success in terms of narrow, self-serving technical categories’.⁶⁶ The resultant shortcomings of this legal historical approach are stated by Van Hoecke, ‘legal doctrine [is] too descriptive, too autopoeitic, without taking the context of the law sufficiently into account’.⁶⁷ It is submitted in agreement that an analysis of the law that employs only one of these traditional methodologies restricts the conclusions that one can reach, it forces the historian – and by extension the reader – to view the law through a narrow perspective; a rethinking of traditional methodologies is required. A potential alternative, as employed throughout this thesis, is that which combines social history and legal doctrine. The benefit of this ‘cross-fertilization’⁶⁸ methodology is that legal principles are opened to a much broader way of thinking and the legal historian can understand the ‘practical as well as theoretical operation of the law’.⁶⁹ Primary historical sources such as literature, artwork and pamphlets provide the ‘colour’ alongside legal judgments and statutory provisions to ultimately bring a period

⁶⁶ D. Sugarman, ‘From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship’, in L. Mulcahy and D. Sugarman, *Legal Life Writing: Marginalized Subjects and Sources*, (Wiley-Blackwell, Oxford: 2013) 11

⁶⁷ Van Hoecke (n48) 3

⁶⁸ D. Sugarman, ‘Promoting Dialogue Between History and Socio-legal Studies: the Contribution of Christopher W. Brooks and the ‘Legal Turn’ in Early Modern English History’, 2017 44 *Journal of Law and Society* 37, 41

⁶⁹ Musson and Stebbings (n45) 5

of legal history to life. The product of placing the law within this social context is that common notions regarding the motivations and subsequent impact of the law can be questioned and in some cases dispelled almost entirely; ‘what has frequently been surmised may be little more than a dusty cliché’.⁷⁰

1.5 METHODOLOGICAL CONSIDERATIONS

The use of this interdisciplinary approach is not without complication. As a legal scholar, handling historical sources correctly was a challenge and has required an understanding of historical methodology. In order to counter this, a range of literature addressing varying approaches to historical methodology have been accessed. Leading from this, most pressing was striking the correct balance between social and legal history and producing a piece which combined these two disciplines equally. In order to do this, again, a wide range of historical sources have been used; only with this breadth of knowledge could common themes be drawn between eighteenth century social norms and the judgments concerning void and voidable contracts. Redrafting chapters as further knowledge was gained greatly enhanced the ability of the present author to provide an account structured in this way, giving equal treatment to both law and history.

Within this combined methodology, a further difficulty was providing an unbiased account of social history. This has been overcome by drawing on information from a

⁷⁰ *ibid* 42

range of historians as well as relying significantly on primary sources to illustrate arguments. This has meant that areas which would perhaps lend themselves to a particular school of thought, for instance, one could easily approach the subject of married women from a feminist perspective, have not been analysed in this way. This thesis seeks a balanced interpretation of both history and the law. R. W. Ireland posited that ‘as lawyers, we often lose the people behind the law, the circumstances and personalities in the intensely personal dramas’;⁷¹ ‘cross-fertilization’ allows us to reclaim the people behind the law and gives light to the personal dramas that a purely legal historical approach has overlooked. In order to do this effectively, this thesis aims to present both disciplines in an unbiased way.

1.6 SCOPE OF THESIS

The thesis is divided into three distinct areas concerning the ‘voidability’ of contracts: illegality, immorality, and incapacity.

Following the introduction contained in Chapter One, Chapters Two and Three address illegality. Given the emphasis of this thesis on ‘personal’ contracts, the focus here will be on contracts concerning marriage rights. Chapter Two will deal with contracts for the procurement of marriage. Here, restraint of marriage and marriage brokerage will be discussed. The following chapter will present the other side of the coin; Chapter Three turns to contracts concerning the breakdown of marital relations, notably breach of

⁷¹ R. W. Ireland, ‘Sanctity, Superstition and the Death of Sarah Jacob’ in A. Musson and C. Stubbings, *Making Legal History: Approaches and Methodologies*, (Cambridge University Press, Cambridge: 2012) 300

promise actions and separation agreements. Breach of promise actions have been included in this thesis as a point of comparison to the voidability of restraint of marriage contracts in the preceding chapter. It will be questioned why breach of promise was permitted whilst restraint of marriage was not.

An analysis of contracts rendered void for immorality will then be undertaken in Chapter Four. The sale of goods to a prostitute, and the rent of premises, will be discussed alongside a demonstration of the frequency of the practice of prostitution in the long eighteenth century. An original contribution is made here as the thesis addresses prostitution from a civil law perspective, this is contrary to the issue typically being approached within the realm of criminal law.⁷²

The final substantive topic is discussed in Chapters Five and Six in which incapacity is addressed. Chapter Five focuses on married women and widows. It is demonstrated how social norms circumvented the operation of coverture. The lot of married women is then compared to that of widows, who, it is argued, disrupted the eighteenth century ideal of a male-dependent woman and thus further weakened the notion of women in the long eighteenth century lacking any legal autonomy. The contractual capacity of infants is explored in the final substantive chapter of the thesis. In Chapter Six, contracts for the

⁷² See for instance, T. Henderson, *Disorderly Women in Eighteenth Century London: Prostitution and Control in the Metropolis 1730 – 1830*, (Addison Wesley Longman, New York: 1999); H. Self, *Prostitution, Women and Misuse of the Law: The Fallen Daughters of Eve*, (Routledge, London: 2003); and J. Steinberg, 'She was "a comon night walker abusing him and being of ill behaviour": violence and prostitution in eighteenth-century London', (2015) 50 *Canadian Journal of History* 239

sale of goods, and 'necessaries' are first analysed and the balance between protecting the infant and protecting the interests of the traders with whom they contracted is determined. Apprenticeship contracts are then discussed, with an emphasis on the development of statutory protections for both apprentice and master.

Chapter Seven concludes the thesis and summarises the main arguments of each chapter. The case will be made for a rethinking of the treatment of legal principles in isolation of the social context. It will be demonstrated that addressing both the law and social history concurrently presents a different understanding of the motivations of the law, and, regarding the voidability of contracts, ultimately disrupts the rigid control-protection analysis that has been so ardently postulated.

The thesis shall now address the first substantive topic, illegality.

Chapter Two

Illegality: Marriage Rights I

‘I have made you a woman of fashion, of fortune, of rank; in short, I have made you my wife’ – Sir Peter Teazle, Act II, Scene II, *School for Scandal*

2.1 INTRODUCTION

This chapter will address contracts rendered void for illegality. Within this, the focus will be on contracts concerning marriage rights; the control and protection interests of the law are significantly apparent here and the imposition of the law on private relationships is an overarching theme of this thesis. This theme will be explored further in later chapters pertaining to immorality and incapacity. To begin, chapter one will address contracts relating to the procurement of marriage; specifically, marriage brokerage contracts and contracts in restraint of marriage.

Prior to any legal discussion, it is important for the reader to understand the significance of marriage in the long eighteenth century. Motivations to secure a desirable match stretched beyond merely possessing similar interests and a personal connection; rather instead, particularly for those from wealthier families, marriage was seen as a means for both social and economic progression, as evidenced in the above quote taken from the 1777 play, *School for Scandal*. The ability to attach your family name to one of greater social standing carried with it certain social and economic benefits, of which parents of

potential spouses were only too aware. The London Season played a key role in assisting in finding a suitably wealthy spouse for those from the upper classes, as shall be demonstrated. Yet in the contracting landscape of the long eighteenth century the notion of class was markedly different, there was little of a notable class system such as we would recognise today. Instead of the lower, middle, and upper distinctions, there was a simple separation between those of the landed class and gentry and those of the working class, or to put it more bluntly, persons who possessed wealth and assets and persons who did not. Only as we begin to move into the latter half of the long eighteenth century and into an era of greater trade and industry does what we would deem today to be the middle class emerge. The creation of the 'middling sort' arose as a consequence of greater international commerce and the concurrent population shift away from the country and into the cities as new industry was created. Just who constituted this new class of person will be discussed later in this chapter.

With this social context in mind, in this chapter an attempt will be made to determine exactly why contracts relating to the procurement of marriage were held to be void; it will be determined whether the law sought to protect individuals and their interests, or conversely, if the establishment of these legal rules sought to control these contractual actors.

2.2 FORMALITIES OF MARRIAGE

In the long eighteenth century, the formalities of marriage were grounded in consent; this had to be given in the present tense but there was no requirement of consummation or even a formal church ceremony.⁷³ People typically married in their early twenties,⁷⁴ with the marriage itself being entered into ‘at the church door’.⁷⁵ Much like today, there was an exchanging of rings, but there was the added formality of the receipt of the dowry before the wedding party entered the church to hear mass. A dowry was a sum of money given by the father of the bride to his new son-in-law; the size of this gift was relative to the wealth of the bride’s family and the payment was intended to assist the new couple as they embarked on their new life together. Given the relationship between the size of the dowry and the wealth of the family of the bride, women from families of great fortune were the most aspirational matches for young men. The provision of a dowry and what a wife received in reciprocity will be discussed further in the fifth chapter of this thesis concerning women’s contractual capacity.

As well as the requirement of a dowry, for a woman, perhaps the most significant impact of marriage was that her legal rights were subsumed into those of her husband. Again, chapter five of this thesis will explore this in greater depth, but for now, it is important to note that the notion of a husband and wife joining to become one was reflected in the marriage ceremony itself. The Book of Common Prayer in 1662 stated that, ‘for this cause

⁷³ Baker (n5 in ch 1) 480

⁷⁴ Porter (n12 in ch 1) 147

⁷⁵ Baker (n5 in ch 1) 480

shall a man leave his father and mother, and shall be joined unto his wife; and they two shall be one flesh'.⁷⁶ Thus, a husband effectively became the guardian of his wife, permitted even to inflict corporal punishment on her.⁷⁷ The words of the marriage ceremony also had to take place in public, and there was an additional requirement that banns were called in church each week for three weeks before the marriage was due to take place. However, despite these customs, marriage without these formalities continued to take place.

2.2.1 Clandestine Marriage

A clandestine marriage took place outside of the traditional practices associated with marriage, as noted above; the clandestine nature came from the fact that these ceremonies took place outside of the parish of the couple and without the traditional reading of banns. These marriages were presided over by an ordained vicar, and despite the Marriage Duty Act⁷⁸ of 1695 introducing penalties against those clergymen caught conducting such a ceremony, they continued to grow in popularity throughout the eighteenth century. To state that those who entered into clandestine marriage did so as a means of avoiding parents, or as a consequence of unwanted pregnancy, is too broad a generalisation, as such motivations are 'not borne out by the facts'.⁷⁹ There were a myriad of reasons as to why couples opted for a clandestine marriage, with ceremonies conducted in rural towns differing in their motivations from those in larger industrial

⁷⁶ Book of Common Prayer (1662), Solemnisation of Matrimony

⁷⁷ See further, Baker (n5 in ch 1) 482

⁷⁸ 7 & 8 Will 3 c35

⁷⁹ G. Newton, 'Clandestine Marriage in Early Modern London: When, Where and Why?' (2014) 29 *Continuity and Change* 151, 154

cities, and particularly in the capital. Conflicting arguments have been advanced as to the reason behind the spike in clandestine marriage in the eighteenth century, from couples wishing to avoid the public humiliation that came with a public wedding, to being unable to marry due to lack of parental consent.⁸⁰

Clandestine marriage grew in popularity throughout the eighteenth century despite the best intentions of the law in attempting to quash such practices with the introduction of the Marriage Duty Act. Short of enduring the impracticality of crossing the border and marrying in Scotland at places such as Gretna Green, the most notorious venue in England for these weddings to occur was that of the Fleet Prison in London. Ceremonies continued here even after 1695 and contributed to the continuing popularity of clandestine marriages given that as a prison, and thus private property, the Fleet did not fall under the jurisdiction of the 1695 Act, and so clergymen could operate relatively free from judicial interference. It was not until 1712⁸¹ that fines were imposed on prison keepers for permitting clandestine marriages to take place within prison grounds, but even then, the effectiveness of this legislation is dubious given that marriage conducted within and around the Fleet continued until the enactment of the Marriage Act⁸² in 1754. Despite the relatively low cost, those who married at the Fleet were not only from the lower classes of society. A combination of factors, including parental disapproval, the desire for privacy, ease and speed of the ceremony and the increase in those who did not identify with a specific religion, it is argued here, would have resulted in clandestine

⁸⁰ Baker (n5 in ch 1) 482

⁸¹ 10 Anne c19

⁸² 26 Geo II c33

marriage appealing to a cross-section of society. Indeed, Henry Fox who petitioned so ardently against the introduction of the Marriage Act in 1754 had been married clandestinely himself to Georgiana Caroline Lennox, the daughter of the Duke of Richmond, in 1744 as her parents had disapproved of the match. Further to this, whilst the ceremony itself cost very little, there was a range of facilities available at the prison and so provision of entertainment may also have been a contributing factor as to why couples opted to be married at the Fleet. Figure 1 portrays the renowned engraving by M. Cooper from 1747, depicting a caricature of a Fleet marriage, and the entertainments following the ceremony.

Figure 1



So popular were the services available at the Fleet that ceremonies quickly spread beyond the prison walls; soon, marriages were even being conducted in public houses, in designated rooms called 'the chapel'.⁸³ This is not to say that Fleet marriages were not without their difficulties, rather quite the opposite; despite the appeal of such marriages it is somewhat ironic that the very same clandestine nature which enhanced their appeal also came to be one of the greatest weaknesses of this marriage ceremony. The lack of strict guidelines surrounding maintaining a register and the ability to marry without notice resulted in clandestine marriages being open to abuse.

Perhaps the greatest abusers of these ceremonies, however, were the couples themselves. To illustrate, in the case of *Hill v Turner*,⁸⁴ the court was asked to decide upon the matter of an infant who was forced into a clandestine marriage after having been taken to the Fleet and plied with alcohol until intoxicated. The Lord Chancellor proclaimed his disdain for the case and notwithstanding his inability to reverse the decision of the ecclesiastical court in finding this to be a valid marriage, his Lordship nonetheless restrained the wife of the infant from bringing any further action for payment of alimony. It was this abuse of the marriage process that rendered parliamentary intervention necessary. This desire for reform was not sudden, however; there was a constant stream of legislation throughout the long eighteenth century, with a total of nine bills being presented to Parliament between 1689 and 1740 which aimed to prevent clandestine marriage. It was

⁸³ R.L. Brown, 'The Rise and Fall of Fleet Marriages', in R.B. Outhwaite, *Marriage and Society* (Europa, London: 1981) 127

⁸⁴ (1737) 1 Atk 515; 26 ER 326

not until 1753 however, that parliament successfully intervened in the enactment of the Marriage Act.

The Passage of the Marriage Bill

Despite earlier efforts for reform, the immediate impetus in 1753 resulted from the case of *Cochran v Campbell* in which the House of Lords were asked to decide upon the validity of a 30 year marriage which had been called into question due to the existence of a prior clandestine marriage.⁸⁵ The dominant incentive seems to have been mounting frustration that such clandestine ceremonies had the ability to disrupt family life in such a way. The need to uphold the sanctity of marriage thus appears to have been a common driver in the need to regulate against clandestine marriage in 1753. Ultimately, the greatest assistance in determining just why these contracts warranted parliamentary regulation comes from an analysis of debates from both the House of Commons and the House of Lords throughout the passage of the Marriage Bill in 1753.

The Bill introduced by Lord Hardwicke, and soon to be coined, 'Hardwicke's Act', was given its first reading in Parliament on 19th March 1753. Unfortunately, little information regarding the initial debates survive and so instead, for an insight into the motivations for the Bill and the arguments surrounding it, we are forced to rely upon later readings, notably that of the 14th May and the 4th June, for which much more documentation survives and consequently from which much more information can be gleaned. Having

⁸⁵ R.B. Outhwaite, *Clandestine Marriage in England 1500-1850* (Hambledon Press, London: 1995) 76

reviewed both reports, for those in support of the Bill, two key arguments emerge, these being that the Act would prevent abuses of marriage and also that it would prevent bigamy and legitimise children. Conversely, opponents of the Bill argued that the Act would discourage the poorer in society from marrying, and would also lead to an accumulation of wealth amongst the wealthier classes.

The second reading took place on the 14th May and we can clearly see references to the immediate impetus for introducing the Bill in 1753. Attorney General Ryder, arguing in support, stated that, ‘sometimes a clandestine marriage is set up after a man’s death which was never heard of in his lifetime, and... his whole effects are carried away from his relations by the children of a woman whom he never acknowledged to be his wife’.⁸⁶ No doubt the case of *Cochran v Campbell* was present in the mind of the Attorney General when he delivered his speech, but this case was not isolated, and indeed accounts of hidden marriages resulting in the loss of property to unknown relatives were commonplace. In fact, such was the frequency of this, that although dismissing the appeal in *Cochran*, the House of Lords directly addressed Parliament and explicitly invited them to ‘bring in a Bill, for the better preventing of Clandestine Marriages’.⁸⁷ Whilst it is easy to see this as the motivation for the introduction of the Bill in 1753, and of course, it was the instance that reignited the clamour for regulation in this area, there were numerous issues regarding clandestine marriage that had been prevalent throughout the century which accounted for the desire to legislate, and which came to the fore during the debates

⁸⁶ HC Deb 14 May 1753, vol 14, col 7

⁸⁷ Outhwaite (n85)

in the House. One such issue was that of bigamy – whether intentional or not – which had been a consequence of clandestine marriages. Questions as to whether children born into a marriage where one parent had been previously married clandestinely raised issues regarding the legitimacy of the child. Of course, financial motivations are again apparent here; the courts were not willing to burden a parish with the upkeep of a single woman and her child should the birth be deemed illegitimate as a consequence of a previous marriage. As such, it was hoped that these practical issues would be remedied by the introduction of Hardwicke’s Act and would ‘put an end to all disputes about marriage or... legitimacy’.⁸⁸

Overarching all of the arguments in support of the Bill however, was the notion that clandestine marriage in general, which did not abide by the strict formalities of a traditional marriage, led to ‘the ruin of young persons and the distress of families’⁸⁹ and was consequently an abuse of marriage. The desire to uphold the sanctity of marriage and to ensure that matches were controlled so as to be both socially and economically viable was a key consideration, and subsequently anything that could potentially disrupt this would be challenged. Some saw clandestine marriage, without the reading of banns and without an appropriate licence, as being an abuse of the formalities of a traditional ceremony also; the often quoted and colourful speech of Earl Hillsborough is perhaps best illustrative of this:

⁸⁸ HC Deb 4 June 1753, vol 14, col 33

⁸⁹ *ibid*

Does he think that the vulgar can believe that there is anything sacred in a ceremony performed in a little room of an ale house in the Fleet, and by a profligate clergyman whom they see all in rags, swearing like a trooper and haggling about what he is to have for his trouble, and half-drunk perhaps at the very time he is performing the ceremony?⁹⁰

Formalities aside, however, there was a greater concern that those from the wealthier classes may be naively seduced into a clandestine marriage and thus unintentionally forfeit their wealth, ‘we shall leave our young gentlemen of fortune, whilst underage, a prey to bawds and prostitutes, and our young ladies of fortune, whilst underage, a prey to sharpers and fortune hunters’.⁹¹ This financial loss was also alluded to by the Attorney General when he spoke of the ‘ruin of young persons’.⁹² It is interesting that there is a clear financial motivation amongst those in support of the Bill, which is perhaps not surprising given that marriage during the eighteenth century, for those of the upper classes, came with considerable financial considerations.⁹³ The advancement of the family name and successive generations depended on wealth being allocated and maintained in the correct channels; clandestine marriage was an obvious disruption to this allocation.

Nonetheless, the same argument concerning the advancement of wealth was used by opponents of the Bill as to why clandestine marriage had its advantages. This argument was advanced most fervently by Nugent, but also by others such as Henry Fox, who as we know, had married clandestinely himself, and Sir Charles Townshend. The substance

⁹⁰ HC Deb 4 June 1753, vol 14, col 63

⁹¹ HC Deb 4 June 1753, vol 14, col 41

⁹² *ibid*

⁹³ This will be discussed in greater depth later in this chapter

of their argument was that clandestine marriage gave those who, because of differences in social status and family wealth, would ordinarily not have permission or consent from their families to marry. Nugent stated the danger that ‘our quality and rich families will daily accumulate riches by marrying only one another’,⁹⁴ and as a consequence the Act would ensure that wealth remained within the same families to the detriment of social advancement. Clandestine marriage had given those from different social classes the opportunity to wed, which would have otherwise been impossible following traditional marriage arrangements given that the marriage would have undoubtedly been objected to, or refused by lack of parental consent. As noted earlier in this chapter, a marriage was accompanied by the payment of a dowry to the husband of the bride from her family. This sum varied depending on the wealth of each family, but often this payment would be relied upon to sustain the couple during their marriage, particularly during the first few years. Clandestine marriage avoided the possibility of the refusal of parents to consent, until it was too late, and it therefore came without the financial considerations that rendered marriage an exercise in family advancement and the maintenance of wealth within families.

Consequently, clandestine marriages, which involved the union of two people of unequal wealth, ‘so far from being a public evil... [were] a public benefit, because they serve[d] to disperse the wealth of the kingdom through the whole body of the people and to prevent the accumulating and monopolizing it into a few hands’.⁹⁵ With a marriage

⁹⁴ HC Deb 14 May 1753, vol 14, col 15

⁹⁵ HC Deb 4 June 1753, vol 14, col 51

between persons of unequal wealth, property did not remain within the same families and such a union ensured a distribution of wealth throughout society; to what extent this argument was true in practice is debatable, how many inter-marriages like this actually took place, and whether they did so to any meaningful extent so as to even begin to distribute wealth in such a way is also uncertain, but the theory, nonetheless, is credible.

It was not just the wealthier classes who were the subject of the debates, marriage between the poorest in society was also a common theme, particularly for those opposing the Bill. One argument advanced was that the poor would not be able to marry at all if the Bill was to become law, given the costs of a traditional marriage ceremony. Nugent argued that the Bill would ‘render marriage almost impossible’⁹⁶ for the poorest in society, whilst George Haldane expressed concern that the proposed Act would ‘render the solemnisation of that ceremony so tedious and troublesome, or so expensive’⁹⁷ that the poor would restrain from marrying. Such arguments attempted to counter that which was advanced in defence of the Bill, that it would prevent abuses of the marriage ceremony. Indeed, Fox argued conversely, that rather than preventing an abuse of the marriage system, and the bigamy and illegitimacy that seemingly coincided with it, the Marriage Act would only serve to further increase these problems, ‘if this Bill passes into law, no couple can ever be married by proclamation of banns in less than a month after they have agreed upon it, in which time it is a great chance but one of them repents, very probably the man, after having prevailed upon the credulous wench to admit him to her

⁹⁶ HC Deb 14 May 1753, vol 14, col 19

⁹⁷ HC Deb 4 June 1753, vol 14, col 39

bed'.⁹⁸ The overall concern was that in regulating marriage in such a way as proposed by the Bill, the poorer in society would not be able to afford a traditional ceremony.

Further to this, whereas prior to the Bill a couple could be married almost instantaneously, if the Bill were to pass there would be a requisite delay period whilst banns were called and the like, in the meantime, any fornication which was conducted on the promise of marriage and which could potentially lead to pregnancy and the ruin of a girl, would already take place and would give the male a chance to abscond prior to the ceremony. Thus, the girl and her child would return a burden upon the parish – something which the Bill directly sought to prevent.

What is interesting to note is that throughout both debates on clandestine marriage, and on both sides of the argument, the overriding theme is economic grounds. Whether it was to protect the single mother and her child for being a burden on the parish, to prevent abuses of marriage by socially unequal unions, or even to ensure that socially unequal marriages could continue, all of these arguments were based on the financial implications that would be consequent. Whilst opponents such as Fox and Nugent took a more humanitarian approach and framed their argument in terms of protecting the interests of the poor, their underlying rationale remained the same as those advocating the Bill, in that it was financial interests that remained at the heart of their motives. Whilst it is not disputed that opponents such as Fox and Nugent aimed to protect the

⁹⁸ HC Deb 4 June 1753, vol 14, col 70

poorest in society, it is argued further that this seeming agenda of protection was underpinned ultimately by an awareness of the financial consequences of marriage. It would seem therefore, that marriage was inexplicably tied up with economic considerations, used either as a vehicle to ensure the continuation of wealth or its suitable distribution. Thus the 1753 Marriage Bill, and the need to regulate against clandestine marriage by declaring such contracts void, was driven by economic motivations and a desire to control private relationships through such means. Property and wealth formed the key basis of the desire of the law to regulate marriage contracts, and ultimately, this regulation took the form of declaring void those which did not conform to the correct formalities and thus impeded the correct financial allocation.

The Marriage Act 1753

The Marriage Act,⁹⁹ or to give its full title, An Act for the Better Preventing of Clandestine Marriages, achieved royal assent on the 7th June 1753, the provisions of which were to come into force from 25th March 1754. Out of the nineteen provisions in the Act, most related to the formalities of the ceremony, for instance, there was now a legal requirement that banns must be called in the parish of residence three Sundays prior to the marriage,¹⁰⁰ there must be two witnesses present at the marriage,¹⁰¹ and a four week residency requirement was imposed.¹⁰² As well as this, the couple wishing to marry were required to provide full names and addresses one week prior to the reading of banns.¹⁰³

⁹⁹ 26 Geo II c32

¹⁰⁰ *ibid* article 1

¹⁰¹ *ibid* article 15

¹⁰² *ibid* article 4

¹⁰³ *ibid* article 2

It is evident that these provisions sought to prevent fraudulent and rash marriages, and returned a regulatory aspect to marriage as the reading of banns allowed for objections to be made against the union. Further regulation on the ceremony itself came with the provision that no marriage was permitted to those under 21 without parental consent.¹⁰⁴ Provisions five to seven effectively returned the monopoly on marriages to the church,¹⁰⁵ whilst article 8 rendered any clergymen who failed to be abide by the Act guilty of a felony and liable for 14 years deportation to America.¹⁰⁶ Further formalities imposed upon clergymen surrounded the upkeep of registers,¹⁰⁷ any falsification or abuse of which rendered the cleric guilty of a felony and was punishable by death.¹⁰⁸ It was also stated that the Act did not apply to the royal family,¹⁰⁹ or to Scotland, Quakers, Jews or any marriages taking place overseas.¹¹⁰ One slightly bizarre addition was the requirement in article 19 that the Act must be read aloud in Church every Sunday following Morning Prayer,¹¹¹ although it has since been noted that the fulfilment of this requirement was often accompanied by an exodus of the congregation out of the church door.¹¹² Most integral to this thesis, however, was article 11 which rendered any marriage contract that did not prescribe to the formalities as stipulated in the Act as null and void.¹¹³ These were the provisions as to be enacted from 25th March 1754.

¹⁰⁴ *ibid* article 3

¹⁰⁵ *ibid* articles 5-7

¹⁰⁶ *ibid* article 8

¹⁰⁷ *ibid* article 14

¹⁰⁸ *ibid* article 16

¹⁰⁹ *ibid* article 17

¹¹⁰ *ibid* article 18

¹¹¹ *ibid* article 19

¹¹² Outhwaite (n59) 124

¹¹³ 26 Geo II c32 (n99) article 11

Contrary to what was intended, the Act did not come to represent any seismic change. Rather, it is argued that it merely placed original formalities into statutory form and as such the extent of its impact is debatable. This is particularly shown to be the case when statistics regarding marriage are analysed. There is not the great increase in church marriages as one would expect, nor is there any significant change in the age or location of where persons chose to be married.¹¹⁴ What we do see, however, is that marriages at places such as the Fleet prison ceased almost instantaneously or dropped so dramatically so as to be of little significant value. The conclusion that we can take from this then is perhaps that whilst the Act returned the monopoly on marriage to the church, it did not do anything to attempt to increase the numbers of those marrying there. Indeed, the Act itself does not include anything to positively encourage an increase in church marriages, it merely confirmed pre-existing formalities and thus it can be said that rather than altering practices to any significant extent, the Act instead simply reinforced pre-existing social norms. Probert supports this contention in finding that, ‘the Marriage Act should be seen as part of a gradual progression towards regularity and formality rather than an abrupt shift in the regulation of marriage’.¹¹⁵ Consequently, the aim of the Act to eradicate clandestine marriage was achieved given that such marriages all but ceased in England in the years following its introduction, whilst traditional practices continued and were supported and encouraged through this legislative intervention.¹¹⁶ Thus, it is clear that

¹¹⁴ For an analysis of this, see R. Probert and L. D’arcy Brown, ‘The Impact of the Clandestine Marriages Act: Three Case Studies in Conformity’ (2008) 23 *Continuity and Change* 309

¹¹⁵ R. Probert, ‘The Impact of the Marriage Act of 1753: Was it really “A Most Cruel Law for the Fair Sex?”’ (2005) 38 *Eighteenth Century Studies* 247, 258

¹¹⁶ See further E.T. Bannet, ‘The Marriage Act of 1753: “A Most Cruel Law for the Fair Sex?”’ (1997) 30 *Eighteenth Century Studies* 233

the 1753 did little to dramatically change the marriage landscape, rather instead it sought to legitimise existing practices.

It is evident that clandestine marriage disrupted the traditional formalities associated with matrimony, and for this reason the practice was legislated against. The decision that such contracts were to be declared void not only protected the wealth of families whose children may have entered into such unions without parental approval, but the passing of Hardwicke's Act also allowed the established church to regain control of the marital process. Clive Field states that in the long eighteenth century, 'Church and State were indivisible',¹¹⁷ it is therefore not difficult to see why legislation concerning clandestine marriage – a practice which explicitly ran counter to the marriage process monopolised by the established church - was to be rendered void. Given the dominance of religion on marriage in the long eighteenth century, some understanding of religion in England at this time may be useful to the reader at this juncture.

Following the accession of William to the throne in 1688, the dominant faith in England was that of the Protestant religion, commonly referred to as the Church of England. In 1689, however, the Toleration Act¹¹⁸ was passed, which permitted non-Conformist religions to practice without restriction. It was clear that this Act was to apply only to Protestant Non-Conformists, thus Presbyterians, Baptists, and Quakers, to name but

¹¹⁷ C. D. Field, 'Counting Religion in England and Wales: The Long Eighteenth Century', (2012) 63 *Journal of Ecclesiastical History* 693, 695

¹¹⁸ 1 Will & Mary c18

three,¹¹⁹ were permitted to practice their faith free from interference, however these protections did not apply to Catholicism. Following the Revolution of 1688 and the ousting of James II, Catholicism was seen as a threat, Catholics themselves were not to be trusted, and so their active exclusion from public life was sought.¹²⁰ The extent of popular distrust of Catholics in this period is perhaps typified by the Gordon Riots in 1780, which occurred as a consequence of Parliament passing the Papists Act of 1778,¹²¹ which granted greater rights to Catholics. Thus, by the middle of the long eighteenth century, whilst legislative reform was open to the acceptance of Catholicism and to permitting greater freedoms for those practicing the faith, the change in popular opinion was slower to occur. Nevertheless, a further Catholic Relief Act¹²² was passed in 1792, this time without the popular discord caused by the Act of 1778.

Towards the end of the long eighteenth century, then, there appeared to be greater acceptance of religions outside of traditional Protestantism. This is reflected in the legislation enacted at this time, such as the Roman Catholic Relief Act¹²³ in 1829 which permitted Catholics to hold public office, something previously prohibited since the Corporation¹²⁴ and Test¹²⁵ Acts in 1661 and 1673 respectively. The 1829 Act can be seen as a significant step towards mending the tension that had existed between Protestantism

¹¹⁹ For an extensive list of the factions of Protestantism deemed to be 'Non-Conformists' see A. R. Humphreys, 'Literature and Religion in Eighteenth Century England', (1952) 3 *Journal of Ecclesiastical History* 159, 164

¹²⁰ C. Brown, 'Catholic politics and creating trust in eighteenth-century England', (2017) 33 *British Catholic History* 622, 622-3

¹²¹ 18 Geo III c60

¹²² 31 Geo III c32

¹²³ 10 Geo IV c7

¹²⁴ 13 Cha II St 2 c1

¹²⁵ 25 Car II c2

and Catholicism since the Glorious Revolution of 1688, yet it is telling that non-Conformist Protestant religions were granted the freedom to practice their faith freely in 1689, but it took much longer to lift the restrictions applied to the Catholic faith. The figures attributed to these non-conformist religions (excluding Catholicism) also reveal much about the increased tolerance of other religions which took place towards the end of the long eighteenth century. At the beginning of the period, the number of Non-Conformists in England is estimated to be 225,000,¹²⁶ but by the 1830's this figure stood at 2,750,000.¹²⁷ Population growth must of course be factored into this, but this nonetheless is a considerable increase.

The disruption that occurred as a consequence of clandestine marriage and the offence it caused to the established Church and by extension the State, was not unique. Indeed, in the long eighteenth century traditional marriage practices were at risk of manipulation not only by sons and daughters themselves, but also by families who sought a socially and financially advantageous match.

2.3 FROM FINANCIAL GAIN TO ROMANTIC LOVE

The conventions attached to marriage, such as the provision of a dowry, noted above, made financial considerations inevitable during the long eighteenth century. For the higher social classes, however, economic considerations began even before courtship.

¹²⁶ Field (n117) 700

¹²⁷ *ibid*

Money and status had always been a concern of the aristocracy when seeking a match for eligible sons and daughters, and by the middle of the long eighteenth century, with growing industrialisation, this also came to be a concern for the merchant class. Marriage was used as a tool for both social and economic advancement and the formalities of marriage, such as the provision of a dowry, assisted in this. As acknowledged by Baker, 'inheritance of property was always predicated on relationships brought about by marriage',¹²⁸ and so it was important that a financially advantageous match could be secured. This was often assured as a consequence of the guidance of parents, and their involvement in seeking a suitor. Yet, as shall be noted below in a discussion of marriage brokerage, this interest could often be at risk being deemed a manipulation of the marriage process by the courts. Furthermore, the dangers of pursuing a marriage motivated purely by financial considerations were made evident in a series of artwork, *Marriage a la Mode*, completed by Hogarth in 1745, which have been annexed to this chapter (Appendix 1). In the paintings, an economically motivated marriage causes only unhappiness, resulting in financial ruin, adultery and, eventually, death. By the middle of the period, then, perhaps as a consequence of growing dissatisfaction with parental interference as well as the influence of popular culture, social attitudes towards marriage were changing, and, as noted by Stone, 'public opinion in landed and bourgeois circles... was turning decisively against parental dictation of a marriage partner'.¹²⁹

¹²⁸ Baker (n5 in ch 1) 479

¹²⁹ Stone (n37 in ch 1) 289

The same economic concerns were not apparent for those of the lower class. Such families lacked the financial means to exercise leverage over sons and daughters with regards to the marriage process and so parental control was 'severely limited'.¹³⁰ These limitations also applied to the poorest in society; their lack of disposable income to provide a dowry meant that whilst parental consent was sometimes sought, they were not able to control the marriage process in the same way as wealthier families. Indeed, a popular tale concerning Saint Nicholas was that he dropped three bags of gold through a window of the house of a pauper, to enable him to offer a dowry for his three daughters, thus providing him with the means to present them for marriage and not become a burden on their parish.¹³¹

Whilst attitudes were slowly changing towards the end of the period, it is undeniable that in the long eighteenth century marriage was closely connected with economic gain. These financial motivations are no more apparent than in the practice of marriage brokerage.

2.3.1 Marriage Brokerage

Marriage brokerage featured often in literature and dramatics in the long eighteenth century and even prior to that; plays such as *The Marriage Broker* (1662) and *The Relapse* (1696) by Vanburgh, portrayed marriage brokerage as a deceitful exercise yet despite this, the practice was commonplace amongst the wealthier classes of society in the

¹³⁰ *ibid* 292

¹³¹ Further detail concerning this story will be discussed in chapter five of this thesis

eighteenth century. An example of a typical marriage brokerage scenario would perhaps assist here to greater inform the reader of that which this chapter will be referring:

Lord Green wishes for his niece, Sarah, to be married to the son of the Earl of Dukesbury. To affect this marriage, Lord Green, unbeknownst to the Earl of Dukesbury, approaches the sister and brother-in-law of the Earl and offers £1000 if they succeed in persuading the Earl to get his son to marry Sarah.

In the scenario above, Lord Green is deceiving the Earl as to his intentions in order to bring about a marriage that he desires. This was typically undertaken as it was felt that engineering a match in this way would allow a spouse to be chosen who would provide the family not only with the optimum social advancement, but often with financial progression also. Mingay gives an impression of the amount of wealth that was commonly earned, 'in 1790 the wealthy gentry had incomes of £3000 or £4000 a year... the lesser gentry, [had] incomes rising from near £1000 up to £3000'.¹³² Consequently, the following discussion will be with reference to those who possessed such large incomes and the wealth which they sought to protect.

Those from the wealthier classes used marriage brokerage as a means of achieving a suitable marital match and of securing all the advantages that came with it; the 'brokers' of these relationships were commonly family members and in particular, women, as their perceived compassionate nature was deemed to be advantageous in arranging a suitable match.¹³³ O'Day provides a useful account of the Duke and Duchess of Chandos, who

¹³² G.E. Mingay, *English Landed Society in the Eighteenth Century*, (Routledge, London: 1963) 21

¹³³ M. Hunt, *Women in Eighteenth Century Europe*, (Routledge, Oxford: 2014) 54

together orchestrated the marriage of several members of their family.¹³⁴ Evidently, as it was within the interests of a family to ensure the protection of their property, it seems sensible that they themselves would act as marriage broker to ensure that the potential union was suitable and prescribed to their wishes from both an economic as well as social perspective. However, such arrangements were not viewed positively by the courts who sought to uphold the sanctity of marriage; such contracts were thus declared void on grounds of public policy. This line of reasoning is apparent in the case of *Cole v Gieson*,¹³⁵ in which an annuity of £100 along with a bond of £1000 was contested. The facts of this case warrant some discussion to fully understand the rationale of the court.

In 1733, as part of a marriage agreement between Mr Bennet and Miss Hallam, it was agreed that an annuity of £100 be paid to the defendant, Ms Gieson, along with a bond for £1000. The annuity was paid to Ms Gieson even after the death of Miss Hallam, and so by 1750 an action was brought for the cancellation of the annuity. The defendant was a nursery maid in Miss Hallam's family; she was therefore employed by Miss Hallam but the court heard how the defendant 'got so absolute a power and control over her...and so entirely into her confidence, that she could put a negative upon any match, and had the government and disposal of her'.¹³⁶ An instance of the control the servant exercised over her mistress was cited by counsel for the plaintiff; it was stated that she would deliver the letters of potential suitors to her mistress and would voice her opinion over which

¹³⁴ R. O'Day, 'Matchmaking and moneymaking in a patronage society: the first Duke and Duchess of Chandos 1712-35', (2013) 66 *The Economic History Review* 273

¹³⁵ (1750) 1 Ves Sen 503; 27 ER 1169

¹³⁶ *ibid* at 1169

gentlemen would be a viable match. Given this information, it was argued that the provision of the annuity was ‘a bribe on the marriage’,¹³⁷ rendering the agreement akin to a brokerage contract. Counsel for the defendant argued in the alternative, that the annuity did not amount to a brokerage contract as no money was paid in direct procurement of the marriage. Furthermore, it was argued that the transaction was not ‘clandestine’¹³⁸ but one in which both husband and wife entered together. The privity of the husband to the contract thus dispelled with any notion of a brokerage.

In delivering judgment, Lord Hardwicke began with a general overview of the rationale of the law in finding brokerage contracts to be void. His Lordship stated that in declaring the contract to be void, this was ‘not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation’.¹³⁹ However, it was further stated that where agreements were made between a husband and wife ‘with their eyes open’¹⁴⁰ an annuity granted to a servant would not be set aside by the court as it was the lack of privity on the part of one party and the inherent deceit therein that rendered such contracts void. Yet the fact that the agreement in the current case was between husband and wife gave cause for concern for the court. Reflecting on the legal status of a wife upon marriage, Lord Hardwicke reasoned that the annuity gave rise to suspicion as the agreement was not ‘subject to power of revocation’.¹⁴¹ Given that upon marriage, a wife’s legal rights were subsumed into those of her husband, along with her estate and

¹³⁷ *ibid* 1169

¹³⁸ *ibid* 1170

¹³⁹ *ibid* 1171 (Hardwicke LJ)

¹⁴⁰ *ibid*

¹⁴¹ *ibid* 1172 (Hardwicke LJ)

property, whilst the annuity was made by both husband and wife, the proceeds were to come from her sole estate. This money was therefore ring-fenced from use by her husband and thus made for a 'precarious way of settling an estate'¹⁴² as it left part of Miss Hallam's estate in her power.

The bond of £1000 also caused concern. The defendant represented that she did not remember the consideration that she had provided for receiving payment of this upon the marriage of Miss Hallam, and the court therefore reasoned that if the annuity was granted upon the bond being delivered up, this 'would be strong evidence of this being a marriage-brocage bond'.¹⁴³ Added to the fact that there was 'strong proof of the general influence' of the defendant over her mistress, Lord Hardwicke thus ordered that further inquiry be made into the consideration of the bond. Only if the jury were to find some consideration for the bond or annuity would the payment be held valid, otherwise the agreement would be declared void, being an instance of a marriage brokerage contract.

It is clear from this case that the court gave considerable attention to the balancing of individual interests in determining what amounted to a marriage brokerage contract. The potential negative influence of a party was weighed against the legitimate delivery of a payment for services rendered and so the decision over the validity of such a contract ultimately rested on the provision of consideration. What is further evident is that the

¹⁴² *ibid*

¹⁴³ *ibid*

rationale of the courts in finding brokerage contracts to be void was that they sought to protect against the abuse of the marriage process, ensuring that ‘marriages maybe on a proper foundation’.¹⁴⁴ It is interesting that Lord Hardwicke in *Cole* further cited the legal status of a woman upon marriage, and expressed dissatisfaction with the annuity in this case interrupting the norm of her status as a *feme covert*.¹⁴⁵ Therefore, even where public policy reasoning is cited to be the rationale of the law, there is an underlying recognition of property rights and the preservation of wealth.

These public policy grounds echo that which was held in the earlier case of *Hall and Keene v Potter*¹⁴⁶ in which £1000 to be paid upon marriage was held to be void, given that ‘such contracts for procuring of marriages are of dangerous consequence, and tend to the ruin of families’.¹⁴⁷ *Hall and Keene* also tells us much of the social status of the parties who commonly entered brokerage contracts. In this case, Thomas Thinne agreed to pay £500 to Mrs Potter three months after his marriage to Lady Ogle, a widow,¹⁴⁸ and daughter to the Earl of Northumberland. She therefore possessed a sizeable fortune, but Thomas Thinne was not without social standing; although he was not nobility, Thomas maintained an estate worth £10,000 a year. The pair were never married, however, as Thomas died before the marriage could take place. The action in the case was thus brought by Thomas’s executors, Hall and Keene, who argued that the contract to provide

¹⁴⁴ *ibid* 1171 (Hardwicke LJ)

¹⁴⁵ Upon marriage, the rights of a wife were subsumed into those of her husband as a consequence of the legal doctrine of coverture, thus rendering her a *feme covert*. This concept will be discussed in greater detail in the fifth chapter of this thesis, concerning women’s contractual capacity

¹⁴⁶ (1699) 3 Lev 411; 83 ER 756

¹⁴⁷ *ibid* 756

¹⁴⁸ The legal benefits for a woman maintaining her status as a widow will also be discussed in greater detail in chapter five of this thesis

£500 to Mrs Potter was void, as it was a brokerage contract. It was cited that as Lady Ogle was ‘a person of such great honour and fortune’,¹⁴⁹ this motivated Thomas to procure the marriage.

The argument of the plaintiffs was based on two grounds. Firstly, as was paramount in *Cole*, they submitted that there was no consideration on the part of Mrs Potter for the payment. Secondly, if it were found that there was consideration, such a contract would be void regardless, as it was one of marriage brokerage, and therefore ‘of dangerous consequence and... the ruin of families’.¹⁵⁰ Counsel for Mrs Potter argued that the contract was not illegal as there was ‘no fraud, circumvention, or ill-practice’,¹⁵¹ instead all Mrs Potter had provided was advice. Furthermore, the marriage was one of equality, given the respective wealth of the two estates; as the advantage would have been to Thomas, who would have married into nobility, his executors ought not to complain. At first instance, it was held that there had been fraud on the part of Mrs Potter and so the agreement was rendered void for illegality. This decision was reversed by the Lord-Keeper in Chancery who found in favour of Mrs Potter and therefore held the contract to be valid. Hall and Keene then appealed to the House of Lords, who by a majority found the contract to void, reiterating the argument made by the plaintiffs that ‘all such contracts concerning marriages are of dangerous consequence’.¹⁵²

¹⁴⁹ *Hall and Keene* (n74) 756

¹⁵⁰ *ibid*

¹⁵¹ *ibid*

¹⁵² *ibid*

Just why these contracts were found to be void is evident; the courts were seemingly careful to avoid marriages of inequality created by unions that were open to influence. Despite the common desire to arrange a marriage that was economically beneficial for both parties, the courts were also clearly adamant that this was not to be at the expense of inducing parties into a union on the premise of dishonourable motivations, and anything that may undermine the sanctity of marriage itself, such as monetary payments in anticipation of inducing marriage, was thus discredited. There was a difference, of course, between a marriage settlement and marriage brokerage; the former being a device frequently employed with good intentions upon a marriage, whilst the latter attempted to procure the marriage itself, often by the enticement of large sums of money. A key feature of marriage brokerage was the inequality that was often inherent in the amount of money to be exchanged. This distinction is evinced in *Duke of Hamilton v Lord Mohun*,¹⁵³ where, again, the social class of persons entering into brokerage contracts is evident. In this case, a promise to discharge the debts of the parent of a future wife was held to be void.

In *Duke of Hamilton*, the Duke of Hamilton married the daughter of Lord Gerrard. As part of the agreement, it was stated that the Duke should release to his mother-in-law, Lady Gerrard, 'all accounts of the... profits of the estate'.¹⁵⁴ This was done in consideration of the provision of education of the Duke's wife by her mother, as well as the interest paid by Lady Gerrard on a mortgage for part of the estate. The Duke further

¹⁵³ (1710) 1 P Wms 118; 24 ER 319

¹⁵⁴ *ibid* 319

bound himself to pay a penalty of £10,000 to Lady Gerrard if this transaction did not go ahead. When the obligation on the part of the Duke was not fulfilled, the Duke brought an action to cancel the agreement for payment of the profits of the estate and thus release him from also having to pay the £10,000 penalty. Counsel for the executor of Lady Gerrard argued three points. Firstly, it was argued that there ‘was no surprise or misrepresentation’¹⁵⁵ to render the agreement akin to a brokerage contract. Secondly, had the agreement arisen after the marriage, there would be no legal recourse and so the court ought not to relieve against the present contract which was entered into without fraud. Finally, the ‘floodgates’ argument was advanced, that if such agreements, supported by consideration, were to be deemed invalid, no parent would enter such marriage agreements, for fear of legal action.

The Lord Chancellor, Lord Cowper,¹⁵⁶ in delivering judgment on the case, held that although there had been ‘no concealment’¹⁵⁷ such as generally required in order to render a brokerage contract void, the contract ought to be declared void regardless. This was as a consequence of the agreement effectively being ‘extorted from the Duke by one who had a power over the young lady courted by him; by one who had a power over her as her parent; which ought not to have been made use of in this manner’.¹⁵⁸ The court stated that ‘it was as if the mother should say, you shall not have my daughter, unless you will

¹⁵⁵ *ibid*

¹⁵⁶ Lord Cowper was also the first Lord Chancellor of Britain, receiving this title in 1707 following the Act of Union with Scotland

¹⁵⁷ *Duke of Hamilton* (1753) at 320 (Cowper LC)

¹⁵⁸ *ibid*

release all accounts'.¹⁵⁹ It was held that as such an agreement embodied similar motivations to that of a marriage brokerage contract, it ought to be judged in accordance with the same rationale, and was thus void. This decision was further supported by the court reasoning that as a marriage brokerage contract was rendered void by the 'giv[ing]'¹⁶⁰ of money, a contract which concerned 'a bond to *forgive* a sum of money must be ill also'.¹⁶¹ Despite the apparent consideration, his Lordship disagreed that the agreement was entered in to freely as 'the Duke might reasonably apprehend he must have lost the young lady, had he refused the covenant'.¹⁶² In this case, the court is evidently protecting the sanctity of marriage but the judgment of Lord Cowper also clearly advanced an agenda of protection towards sons and daughters whose parents, much like Lady Gerrard, sought to take advantage of a prospective union and pursued individual financial gain from the procurement of the marriage.

It is clear that marriage brokerage contracts were found to be void as a consequence of an inherent attitude of protection employed by the courts, who sought to restrict those agreements which were open to negative influence and abuse of power. However, despite this legal concern with ensuring fairness regarding the economics of a match, by the beginning of the long eighteenth century, social attitudes towards marriage were changing. Across all social classes, it is clear, as Lawrence Stone states, that, "the importance of money was far less generally accepted as a crucial factor in marriage than

¹⁵⁹ *ibid*

¹⁶⁰ *ibid*

¹⁶¹ *ibid*

¹⁶² *ibid*

it had been in the seventeenth [century]”.¹⁶³ It is argued here that this social change was bolstered by developments in popular culture, notably, the rise of sensibility in literature. Sensibility was associated with a new mode of feeling. It was a sentiment based on morality, reason, and both an acknowledgment and sensitivity to human emotion.¹⁶⁴ This concept was seized upon by literature and, given the popularity of novels addressing this concept, it is argued here that this would have had a significant effect on challenging the traditional ideal of marriage based on economic advancement. Sensibility was addressed by Samuel Richardson in *Pamela*¹⁶⁵ and *Clarissa*,¹⁶⁶ these works in particular are synonymous with a literary account of sensibility that portrayed the concept through a ‘figure of “virtue in distress”’¹⁶⁷ - a woman who is virtuous but victimised, often by a male, and who seeks her rescue from her turbulent life. This idea is also exemplified in the works of Jane Austen. Whilst the novel *Pride and Prejudice*¹⁶⁸ adopts the typically romantic notion of sensibility, Austen also advocated a more realist approach in her earlier work, *Sense and Sensibility*.¹⁶⁹ In this novel, Austen promotes the idea that whilst romantic notions must not be completely disregarded, some acknowledgement is needed of the importance of a practical approach to marriage, which addresses the wealth and status to be gained from a union. The male too was not exempt from characterisation within the culture of sensibility. Just as a woman typified virtue and subordination, equally a man was more emotionally astute, open to feeling, and ‘goodness’¹⁷⁰ - even the

¹⁶³ Stone (n37 in ch 1) 290

¹⁶⁴ M. Ellis, *The Politics of Sensibility*, (Cambridge University Press, Cambridge: 1996) 5

¹⁶⁵ S. Richardson, *Pamela*, (J Rivington, London: 1741)

¹⁶⁶ S. Richardson, *Clarissa*, (J Rivington, London: 1748)

¹⁶⁷ G.J. Barker-Benfield, *The Culture of Sensibility: Sex and Society in Eighteenth Century Britain*, (University of Chicago Press, London: 1992) xviii

¹⁶⁸ J. Austen, *Pride and Prejudice*, (T. Egerton, London: 1813)

¹⁶⁹ J. Austen, *Sense and Sensibility*, (T. Egerton, London: 1811)

¹⁷⁰ Stone (n37 in ch 1) 247

notorious Mr B in Richardson's novel *Pamela* is a reformed man upon marriage to Pamela. It is of course impossible to state to what extent sensibility alone altered popular opinion of marriage, but what can be argued is that sensibility placed these romantic notions of marriage in the consciousness of the public and by extension in the minds of families seeking suitable spouses for their sons and daughters as well as the sons and daughters themselves.

It was not only literature that provided the impetus for change in this period. The beginning of the long eighteenth century also saw the creation of events at which unmarried sons and daughters could meet free of the formalities of a traditional courtship. Whilst occasions such as balls and fairs were not created with the intention of providing this service, it is recognised that it was an unforeseen consequence; 'the development of the London Season... provided the necessary facilities for the development of acquaintances'.¹⁷¹ However, these parties simultaneously created legal issues. One such example of this is the case of *King v Burr*¹⁷² which was erroneously defended by counsel for the defendant on the grounds of being an instance of marriage brokerage. In *King*, a series of parties were held by the plaintiff at the direction of Burr to attempt to introduce the defendant to ladies 'of fortune'.¹⁷³ When an action was brought for the recovery of money expended for hosting these gatherings, the argument by the defendant that such a contract amounted to a marriage brokerage contract and was thus void, was dismissed by the court, and so Burr was liable to repay the expenses.

¹⁷¹ *ibid* 316

¹⁷² (1810) 3 Mer 693; 36 ER 266

¹⁷³ *ibid* 266

It is clear that in this instance, there was no direct exchange of money in expectation of marriage; the sums expended were done so in anticipation of hosting an event, there was no single person, or future spouse, to which the money was directly intended and as a consequence, such an agreement could not possibly be deemed to fall within the same category as those contracts relating to marriage brokerage. Further to this, to find that such a contract was indeed a marriage brokerage contract would surely extend the law beyond any sensible parameter. Such parties, as that arranged in *King v Burr*, were common place, particularly during the London Season, and although presenting an ideal opportunity to meet and court the opposite sex, cannot be said to be remotely akin to a brokerage contract.

Further, the London Season coincided with the sitting of Parliament as so began from any time after Christmas, although usually around February-April, and ran until late August.¹⁷⁴ During this time the social calendar was filled with dinners, concerts, parties, and events at which meeting a potential partner was possible. Although some of these occasions were not held with the specific aim of inducing romantic relationships, as in *King v Burr*, it was well known that, particularly for persons of a higher social class, these entertainments provided an opportunity to mingle with those from the uppermost echelons of society and so were an excellent means by which to procure social advancement, should a match be secured in this way. Some occasions, however, were very much an explicit means by which to secure a marital partner. None the more evident

¹⁷⁴ L. Gosling, *Debutantes and the London Season*, (Shire Publications, London: 2013) 6

is this than in the presentation of debutants whereby eligible daughters of landed classes were launched into society. Until this point, which involved the presentation of a girl to the monarch, she could not be considered for marriage.¹⁷⁵ It was not uncommon for eligible girls to attend numerous parties and dinners across several Seasons.¹⁷⁶ There is, no doubt, a stark difference between a party such as this and the example of marriage brokerage given in *King v Burr*. Other glamorous balls, such as that depicted in the painting, *The Dance* (1745) by Hogarth in Figure 2, were also held at the height of the Season whereby ladies dressed in the highest fashion and sumptuous banquets were held daily at various exclusive dinners.

Figure 2



¹⁷⁵ F. M. Moghaddam, *The Individual and Society: A Cultural Integration*, (Worth Publishers, New York: 2002) 229

¹⁷⁶ Gosling (n174)

These events were typified in literature and popular culture from the time; the London Season features extensively in the novels of Jane Austen,¹⁷⁷ and Oscar Wilde also pays homage to the London social scene and concurrent marriage customs in the respective relationships of Jack and Cecily in *The Importance of Being Earnest*.¹⁷⁸ Even royalty were not exempt from the allure of the Season, rather conversely, they enjoyed a key position in it; events, notably Royal Ascot and the Henley Regatta, continue to this day, and were key events in the eighteenth, and moving into the nineteenth century, social scene. Occasions such as these increased in popularity in the latter part of the long eighteenth century, as the introduction of the Marriage Act in 1754 meant that parents could allow their children to attend such occasions free of the worry that they may bind themselves in a clandestine marriage.

However, such behaviour, in the hosting of a party, was not at all in-keeping with marriage brokerage as if the reasoning of counsel for the defendant in *King* was to succeed, any party at which there was a potential to meet a partner may be deduced to be amount to a brokerage contract and thus money expended on the occasion would be irrecoverable, regardless of who paid for the event, and through what means. It is this factor also, that distinguishes *King* from traditional marriage brokerage contracts. Within marriage brokerage contracts, then, there continued to be an attachment of

¹⁷⁷ See J. Austen, *Pride and Prejudice* (T. Egerton, London: 1813); *Mansfield Park* (T. Egerton, London: 1814); *Emma* (J. Murray, London: 1815); *Northanger Abbey* (J. Murray, London: 1817)

¹⁷⁸ O. Wilde, *The Importance of Being Earnest*, (1895)

economic considerations to marriage, especially for those of the upper classes and aristocracy. Yet, there was an apparent tension between the seemingly moral motivations, found in the courts' keenness to uphold the sanctity of marriage and enforce public policy grounds, and the overall desire of law to ensure that marriages that were in-keeping with social norms regarding the allocation of wealth. Given this, it would be very easy to question why marriage brokerage was not permitted as it would seem that such an arrangement could potentially increase the likelihood of a financially desirous match, however, the answer seems to be that anything which could be open to abuse was not to be upheld by the courts. Marriage brokerage effectively involved the payment of money to induce two persons into marriage; monetary payment for something that involved personal relationships has always been discouraged by courts, as we shall see in the fourth chapter of this thesis pertaining to immorality. The idea, therefore, that a sum could be paid in relation to personal commitments was one which the courts were not willing to uphold, and which even financial considerations and the protection of wealth could not outweigh.

It is clear from the above discussion that the courts in the long eighteenth century were faced with a tension between adhering to social practices that saw marriage used as a means of furthering wealth, and the general policy of the law which sought to uphold the sanctity of marriage. With regard to marriage brokerage, the desire to prohibit such an explicit manipulation of the marriage process was a greater concern than economic motivations. The very formalities surrounding marriage, such as the provision of a dowry and the creation of the marriage settlement, allowed for the consideration of financial

gain, but the courts were also keen to protect the parties themselves from manipulation by those seeking to broker a marriage, such as that in the *Duke of Hamilton*. Ultimately, the law rendered brokerage contracts void to not only protect contractual actors, but also to control the marriage process, to ultimately prevent its abuse.

2.3.2 Restraint of Marriage

The final group of contracts to be discussed in this chapter are those concerning restraint of marriage. Whilst marriage brokerage took place unknown to one or both of the future spouses, restraint of marriage contracts were entered by the parties themselves. The considerations for the court thus differed, and so whilst there remained a need to uphold the sanctity of marriage, the economic motivations, and the consideration of these, are much more prevalent in the judgments of the court in these cases.

Contracts in restraint of marriage were created for a variety of reasons. Such contracts sought to restrict one party, or both, from marrying another, but what is helpful to an inquiry into these contracts is a brief discussion of the parties who sought to uphold them. Like clandestine marriage, the most usual of these agreements were those between couples; disapproval by parents or one party being already married, are just two of the motives behind such contracts.¹⁷⁹ Often, parents sought to restrict the marriage of a son or daughter as a means of ensuring a more desirable match with regard to financial

¹⁷⁹ R. Probert, 'Control over Marriage in England and Wales, 1753 – 1823', (2009) 27 *Law and History Review* 413, 416

considerations and the advancement of the family name. It is this reasoning which is explicitly mentioned in the cases, where reference is made to ‘the misfortune’¹⁸⁰ of families, but it is otherwise implicit when examining the facts of the case, particularly when it is clear that there is some disparity between the potential annual income of each party.

The Case of Lowe v Peers

The case of *Lowe v Peers*¹⁸¹ provides a useful illustration of the sort of circumstances which frequently surrounded contracts in restraint of marriage. The dispute centred on a deed executed in 1757 by Newsham Peers to Miss Catherine Lowe. In it, Peers stated, ‘I do hereby promise Mrs Catherine Lowe, that I will not marry with any person besides herself: If I do, I agree to pay to the said Catherine Lowe 1,000*l.* within three months next after I shall marry anybody else’.¹⁸² When Peers remarried in 1768, to a Miss Elizabeth Gardiner, Lowe sought to invoke the deed and brought an action for the recovery of the 1000*l.* under it. In order to give further detail to these facts, it is perhaps advantageous as an aside to familiarise the reader with the Peers family of Alveston, and the wealth that was at stake by way of marriage.

¹⁸⁰ In *Woodhouse v Shepley* (1742) 2 Atk 535; 26 ER 721, 724

¹⁸¹ (1768) 4 Burr 2225; 98 ER 160

¹⁸² *ibid* 2225

Alveston is a small village in Warwickshire; to give an impression of its size, there were 465 inhabitants in the census of 1801.¹⁸³ The Peers family first sought an interest in the village in 1570, when numerous properties were conveyed to Edmund Peers. These consisted of two watermills, a fishery, a farm, and a manor house, which was purchased for £576 9s 2d.¹⁸⁴ It seems that the Peers family were of some notoriety in the area, with Lieut. Colonel Newsham Peers, a descendant of Edmund, having had a monument erected in his memory in the churchyard of St James' Church in Alveston – this Newsham Peers dying in 1743 at Dettingen.¹⁸⁵ The estate and assets passed through the Peers family until Newsham Peers – the defendant in this case – inherited the estate in 1766. Leaving no male heir, upon his death, the estate was passed to his only surviving children, his daughters Amelia and Louisa. Although Louisa went on to marry a Captain Richard Adams of Wainsford in 1806, Amelia remained unmarried until her death in 1837. The estate, however, was sold under the will of Newsham in 1810 to a Henry Roberts of Stratford; by this time, it was worth £39,500.¹⁸⁶

Given the difference in price and the accumulation of wealth that had accrued since the initial purchase of the estate by Edmund Peers in 1570, it is not difficult to envisage just what Catherine Lowe sought to gain from marrying Newsham Peers. Granted, she would not have had access to deal with any property herself, given that all assets, except those

¹⁸³ W. B. Stephens, *Victoria History of the County of Warwick: Volume III* (Oxford University Press, Oxford: 1955) 283

¹⁸⁴ *ibid* 284

¹⁸⁵ *ibid* 286

¹⁸⁶ *ibid.*

expressly granted to a wife under trust, were vested in the husband upon marriage,¹⁸⁷ but she would have certainly been placed in a standard of living that was extremely comfortable for the day – as, of course, would any children to result from the union. Perhaps, then, knowing just what Lowe missed out on, the reader is now better able to understand just why she sought to obtain damages with regard to the deed, and likewise, why Peers was keen to have the very same declared void.

At the first trial, the judge gave the direction to the jury ‘to find for the plaintiff, with damages 1000*l.* if they thought the deed to be a good deed’.¹⁸⁸ Leave for a new trial was granted if this was contested, which of course, it subsequently was; counsel for Peers contended that the jury ought to be able to award less, should they see fit. Consequently, at the retrial, two questions were sought to be determined. The first of these concerned whether the original direction to the jury to award 1000*l.* was correct, and the second question was whether the deed was valid at all. Under the first ground, the court held that given that a precise sum was stated in the deed, ‘the jury are confined to it’.¹⁸⁹ This part of the judgment is clear; however, it is the judgment of the court with regard to the second ground that is of greatest interest to this thesis. In determining the validity of the deed, Lord Mansfield discussed several points, but began by stating his disapproval of such contracts, and the policy reasons behind restricting such agreements:

¹⁸⁷ Despite marriage settlements often providing a portion to the wife, given the nature of this supposed arrangement between Lowe and Peers, it is not too ambitious to assume that such a settlement was absent here, as parents were unlikely to have been informed of this arrangement

¹⁸⁸ *Lowe* (n181) 2226

¹⁸⁹ *ibid* 2229

When persons of different sexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it; as disapprobation of friends and relations, inequality of circumstances, or the like. Both sides ought to continue free: otherwise, such contracts may be greatly abused; as, by putting women's virtue in danger, by too much confidence in men; or by young men living with women without being married¹⁹⁰

Evidently, Lord Mansfield had in mind social considerations in his denouncing of contracts in restraint of marriage. It must also be remembered that social attitudes were markedly different from those of today with regard to cohabitantes. Indeed, such was the disdain for unmarried couples cohabiting together that Colquhoun even included the women of such relationships in his survey of the number of prostitutes residing in London in 1806.¹⁹¹ As will be common throughout this thesis, the reader is thus asked to view such contracts with an eighteenth-century eye.

Having remarked on this class of contracts, Lord Mansfield then turned to the construction of the deed itself. It was put to the court, by counsel for Peers, that such contracts lacked the requisite consideration, given that there was no reciprocity or mutuality. However, this was disregarded, given that the agreement was by deed, and therefore did not require the consideration element.¹⁹² Therefore, where such contracts were not made by deed, this lack of mutuality would render the contract void on technical grounds, for want of consideration. His Lordship found further that:

¹⁹⁰ *ibid* 2230 (Mansfield LJ)

¹⁹¹ T. Henderson, *Disorderly Women in Eighteenth Century London: Prostitution and Control in the Metropolis*, (Longman, New York: 1999) 179

¹⁹² *Lowe* (n181) 2227

It does not follow from her acceptance of the deed, that she either understood he meant to bind himself to marry her; or that she engaged to marry him. Possibly, he might not mean to marry her, though he bound himself not to marry anyone else. They are two quite different things; one does not follow from the other¹⁹³

This is an application of the earlier reasoning as to why such contracts may put ‘women’s virtue in danger’.¹⁹⁴ Given that in executing the deed, all Peers agreed was not to marry anyone else, this did not by implication mean that he would marry Catherine Lowe. Had there been a breach of promise, this would have been actionable,¹⁹⁵ but as it was not, the contract was clearly one of restraint and was thus held to be illegal and void.

The judgment of *Lowe v Peers* was founded upon policy reasons and social considerations. The overt reasoning of the court in this case involved the explicit application of an agenda promoting protection, specifically that contracts such as that between Lowe and Peers ought to be void to guard against negative interference with a woman’s virtue and to in turn uphold traditional marriage values. Other cases discussed in the judgment also embody similar policy reasoning, notably that of *Woodhouse v Shepley*¹⁹⁶ which will be discussed later in this chapter. *Woodhouse* provides an interesting example of the variety of contracts in restraint of marriage that were entered into; we shall see that whilst some contracts included a penalty should the marriage not take place, others did not. This distinction may be indicative of how seriously the parties

¹⁹³ *ibid* 2232 (Mansfield LJ)

¹⁹⁴ *Lowe* (n181) 2230

¹⁹⁵ Breach of promise will be discussed in greater depth in the following chapter of this thesis

¹⁹⁶ (1742) 2 Atk 535; 26 ER 721

took their commitments under the contract, but also provides a good illustration of the variation in the form of such contracts.

Policy considerations were reiterated in the later case of *Hartley v Rice*,¹⁹⁷ which concerned an action brought to recover 50 guineas which had been promised in consideration of the plaintiff remaining unmarried for a period of six years, which he consequently did. In delivering judgment, the court agreed that such a contract to restrain marriage was illegal and therefore void. Bayley J further suggested the reason as to why such a contract ought not to be valid, 'this wager is calculated to operate against marriage'.¹⁹⁸ Contracts like this, in restraint of marriage, undermined the sanctity of marriage in that they prohibited persons from being free to marry, but what is interesting is that whilst it was stated that persons ought to be free to marry who they so wished, the reality of this was frequently different. What is clear is that, as has been noted in the previous section of this chapter, for those of a higher social class, the need to maintain the correct allocation of property and to uphold such rights to property and land was a key consideration in seeking a partner, and was consequently a union in which parents often had a considerable say. The history of the Peers family, and the extent of the wealth that had accumulated coupled with their high social standing in Alveston perhaps gives some indication as to why Newsham Peers wished to ensure that the 1757 contract was declared void. Payment of the £1000 penalty is unlikely to have been the greatest concern, but rather, a family who held such high social standing would not take

¹⁹⁷ (1808) 10 East 22; 103 ER 683

¹⁹⁸ *ibid* 684 (Bayley J)

kindly to agreements such as that between Newsham and Catherine, which would not only disrupt the allocation of their wealth but could potentially have an adverse effect on their social status. With this knowledge of the social history of the Peers family, this chapter can thus offer an alternative argument to the legal reasoning for the motivations behind rendering the contract in *Lowe* to be void. It is submitted that a combination of social and financial factors was the motivation in seeking to have this contract declared void. Ensuring that such property stayed within the correct channels was paramount to safeguard future generations, with eighteenth-century marriage being used as a method of property maintenance amongst wealthier families; *Lowe v Peers* exemplifies this.

The Middling Sort

Whilst the above case concerns an upper class restraint of marriage contract, the practice was not limited to those who possessed such sizeable wealth. As noted above by Stone, financial considerations were also prevalent for those who would be deemed to be the 'middle' class in society and the case of *Woodhouse v Shepley* exemplifies such parental influence on marriage arrangements. In *Woodhouse*, the daughter of 'a person of substance'¹⁹⁹ was forbidden from continuing a relationship with a tailor to whom she had been courting, as her father disapproved of the match. Given the information presented in the judgment it is likely right to assume that Mr. Woodhouse was what would be deemed the middle class. This class of persons grew in the eighteenth century to coincide with the population boom and growth of industry; as the population moved away from

¹⁹⁹ *Woodhouse* (n196) 721

villages and into larger towns and cities, new industry was created whilst existing professions expanded considerably. The 'middling sort' possessed occupations which were very much centred on commerce and trade, examples of the occupations of those of the middling sort include artisans, journalists and civil servants.²⁰⁰ This group were above that of the working class but were not quite as affluent as those from the landed classes. It would seem inevitable, noting the phrase used to describe Mr. Woodhouse in this case, as well as the £500 fortune held by his daughter, that the family was of this class.

In an attempted compromise to her father's objections, yet unbeknown to him, Hannah Woodhouse executed a bond promising not to marry any other man 'on or before the expiration of 13 months after the decease of her father Robert Woodhouse',²⁰¹ lest she would be liable to pay her lover, Ralph Shepley, £500. A similar bond was executed on behalf of Shepley, restraining his marriage to another in the same manner, or else he would forfeit his estate to her. A further endorsement on the back of the bond executed by Shepley provided for a yearly dower to Woodhouse. In ruling upon the validity of the bonds, Lord Hardwicke gave two reasons as to why such contracts in restraint of marriage ought to be void. The first of these rested on monetary grounds:

That bonds of this sort, where parents are living, are liable to great fraud and abuse; to decree in favour of such a bond would be a great encouragement to persons to lie upon the catch to procure unequal marriages, against the consent of parents... and draw the unfortunate person into a bond

²⁰⁰ Hunt (n30 in ch 1) 8

²⁰¹ *Woodhouse* (n196) 721

to forfeit their whole fortune, as is the case here, yet it is of very dangerous consequence, and tends to bring great misfortune into families²⁰²

Here, Lord Hardwicke makes explicit reference to the financial implications of entering such agreements, which in this case had resulted in Shepley promising to surrender his property to Woodhouse. Given the concern of Mr. Woodhouse in forbidding the marriage based on what appears to be the notion that such a union would make for an unequal match, it is somewhat ironic that Hannah Woodhouse and Shepley were actually of relatively equal wealth.

When we take into account that Hannah Woodhouse had a fortune of £500, if this were to be invested in the most popular gilt treasury stock, which in 1742 had a rate of 3.5% per annum, Hannah Woodhouse would bring an average of £17/10s annually to the marriage, in comparison to Shepley's £14 a year from his land. Clearly then, financially, although Hannah's investment would have potentially brought a slightly higher sum than Shepley's income, this marriage would be founded upon somewhat equal contributions. This was not such a great instance of inequality as Mr. Woodhouse would have made out. What rather seems to be the true underlying rationale of this case, harks back to that which was stated in the introduction to this chapter, being that Mr. Woodhouse did not merely desire an equal match for his daughter but rather embodied loftier aspirations for her, which would ultimately result in the increased social advancement of his family name. The fact that his daughter had a slightly higher income than her intended match

²⁰² *ibid* 724 (Hardwicke LJ)

was no doubt used by Mr. Woodhouse to his advantage and provided the ammunition in support of his contention when the case came before the courts. The connection to a wealthier family was perhaps desired by Mr Woodhouse and knowing of the financial compatibility of Hannah and Ralph, we can thus assume that this social advancement was the true motivation behind the disapproval of Mr. Woodhouse.

This effect on families comprised the second point of reasoning advanced by Lord Hardwicke as to the motive behind finding such contracts to be void. This centred on a more personal, yet overtly financial factor, namely that contracts in restraint of marriage were ‘a fraud and imposition on the parent’.²⁰³ This was as a consequence of the ignorance of the family to such contracts who would proceed to arrange marriage and allocate wealth regardless. Subsequently, these agreements amounted to a ‘fraud of the father’s right of disposing of his fortune among his children according to their deserts’.²⁰⁴ This is a clear example of the courts ensuring an agenda of protection concerning family wealth. Upon marriage, property distributed to a daughter became vested in her husband; it was therefore important to ensure a suitable and equal match to guarantee the continuation of family wealth. Evidently, Mr Woodhouse would not have deemed a tailor to be a suitable match for his daughter, as it would not have advanced her wealth, given that Shepley would have brought no extra financial or social advancement to the marriage by comparison. Shepley would have made an adequate, but not an aspirational, match.

²⁰³ *ibid*

²⁰⁴ *ibid*

2.4 CONCLUSION

The formalities of marriage in the long eighteenth century, such as the provision of a dowry and the like, rendered financial considerations inevitable, but this did not prevent abuses of the traditional marital process monopolised by the established Church. Clandestine marriage was commonplace in England at the beginning of the period and motivations to prohibit the practice ranged from preserving the religious attachment to marriage to preventing a disruption to the allocation of wealth intended by families. It was the interference of families keen to ensure the most economically desirable match that resulted in marriage brokerage. Yet this meant that the same law that prohibited clandestine marriage as a consequence of its interference in the sanctity of marriage, when determining the validity of brokerage contracts, had to balance this public policy reasoning with social norms which encouraged the consideration of financial gains upon marriage. Cases such as *Cole v Gieson* and *Hall v Potter* confirm that greater weight was attributed to the public policy rationale, to ensure that marriages took place on a 'proper foundation'.²⁰⁵ The agenda that emerges from this is thus one of control, to ensure that the marriage process was not open to abuse.

Conversely, the case of *Woodhouse v Shepley*, similar to that of *Lowe v Peers*, suggests that there was a clear protection interest at play in the courts treatment of contracts in restraint of marriage but *Woodhouse* also demonstrates that this protection was not

²⁰⁵ *Cole* (n135) 1171

restricted solely to those of the upper class in society. Whilst the judgment in *Lowe v Peers* referred to the social considerations and the potential ruin of a young woman,²⁰⁶ placing the legal judgement alongside the social context of the Peers family reveals an alternative reasoning based on protecting the wealth at stake in the marriage. It is in *Woodhouse* that the protection of family wealth is given explicit consideration by Lord Hardwicke, who refers to the 'forfeit [of] fortune' and 'misfortune...[of] families'.²⁰⁷ Taking these judgments concurrently, and reflecting upon the social history concerning economic motivations for marriage, as discussed by Stone, this supports the contention that in rendering restraint of marriage contracts as void, a motivation for the courts in the long eighteenth century was the protection of wealth.

Ultimately, this chapter has demonstrated that an understanding of the social context in which legal judgments took place can greatly assist in recognising the true motivations of the law. The interdisciplinary analysis employed in this chapter has disrupted the belief that a purely legal interpretation of the case law has produced: that the law rendered contracts for the procurement of marriage – restraint of marriage and marriage brokerage contracts – void as being contrary to public policy and the sanctity of marriage. A combined methodology incorporating social history has revealed an alternative agenda of control and protection. Regarding marriage brokerage, the law sought to control the marriage process and thus prevent its abuse whilst with regard to restraint of marriage,

²⁰⁶ *Lowe* (n181) 2232 (Mansfield LJ)

²⁰⁷ *Woodhouse* (n202) 724 (Hardwicke LJ)

an underlying desire to protect wealth was pursued by families and ultimately supported by the courts.

The procurement of marriage having been addressed, the following chapter will now address the other side of the coin, and shall focus on contracts concerning the termination of marriage arrangements, notably breach of promise actions and separation agreements.

Appendix 1: W. Hogarth, *Marriage a la Mode* (1745)

Plate 1



Plate 2



Plate 3



Plate 4



Plate 5



Plate 6



Chapter Three

Illegality: Marriage Rights II

3.1 INTRODUCTION

This chapter will provide a continuation from the issues discussed in chapter two, but rather than a focus upon the procurement of marriage, chapter three will present issues in relation to the termination of marriage arrangements. This chapter will focus upon two areas specifically; actions relating to breach of promise will first be discussed before the chapter will move on to address the law surrounding separation agreements. Whilst the overarching purpose of this thesis continues to be discovering the motivations of the law in declaring certain contracts to be void, actions for breach of promise have been included in this chapter as they provide a direct contrast to contracts in restraint of marriage, discussed in chapter two. In exploring the disparity between these two areas of law, and in determining just why these actions were permitted whilst actions in restraint of marriage were not, this will only further reinforce arguments as to the underlying rationale of the law in finding certain contracts to be void.

As is the recurring theme throughout this thesis, this chapter will portray a rich social context alongside a discussion of the law. In this section, although touched upon in the previous chapter, greater emphasis will be upon eighteenth century notions of womanhood. In particular, the role of women will be important to a thorough exploration of actions for breach of promise, given that these actions were more commonly brought

by women against men. What shall become apparent, however, is that there have been common misconceptions surrounding these actions, particularly when it is recognised that, although not as common, a noteworthy portion of breach of promise actions were brought by men. The response of the law in these instances is particularly revealing of eighteenth century ideas of masculinity. This can be contrasted to the role of women which throughout the long eighteenth century remained very much a class of person who it was felt needed protection. Given this tension, the control-protection argument of this thesis will be particularly revealing in this section of the chapter.

With regard to contracts involving separation agreements, eighteenth century notions of sex and parenting will be discussed. Moralistic attitudes towards sex and the importance of the family unit will provide the contextual background to a legal discussion of the motivations of the law in finding that agreements for separation were void in certain circumstances. Further, an in-depth examination of individual separation cases will provide an interesting contextual aside to the legal questions posed in this chapter and will offer greater insight into eighteenth century practices regarding personal relationships.

3.2 EIGHTEENTH CENTURY WOMANHOOD AND MASCULINITY

Men in the long eighteenth century were to be strong, virile, and chivalrous, yet this did not infer brutishness; the focus in the eighteenth century was instead on 'polite and

refined masculinity'.²⁰⁸ Women, on the other hand, were to embody 'beauty, simplicity... trustfulness and affectionateness'.²⁰⁹ Such qualities were given a visual representation in portraiture from the period. Artists such as Allan Ramsay and Joshua Reynolds painted women in soft hues; their blushing cheeks and pale skin drawing immediate comparisons with Botticelli's *The Birth of Venus*²¹⁰ – womanhood personified. Portraits by these artists have been annexed to this chapter (Appendices 2-4) to allow for comparison. Men, in contrast, were painted displaying an obvious show of strength, commonly depicted with the head aloft, looking away from the artist in apparent contemplation. One hand placed on the hip physically increased the stature of the male subject and thus signified his dominance. A typical portrait of a male, painted by Joshua Reynolds, has been annexed to this chapter (Appendix 5). These opposing characteristics resulted in men and women adopting alternative roles in society. The stronger – and supposedly more intelligent – male was to obtain work, and depending on his social class, roles ranged from manual labour and farming, to professions such as lawyers and surgeons. The woman was a homemaker, whose purpose was to care for the children and maintain the household. For those women who did pursue an occupation, this most often involved more domestic disciplines, such as needlework or working as a servant in a household. The man was clearly the more dominant sex, as a poem from 1763 posited:

The gen'ral order since the whole began,

²⁰⁸ M. Cohen, "Manners" Make the Man: Politeness, Chivalry, and the Construction of Masculinity, 1750–1830', (2005) 44 *Journal of British Studies* 312, 313

²⁰⁹ S. Staves, 'British Seduced Maidens', (1980) 14 *Eighteenth Century Studies* 109, 118

²¹⁰ Incidentally, Reynolds spent time in Italy at the beginning of his career. A self-portrait hangs in the Uffizi gallery in Florence; the same which houses Botticelli's Venus

Is not in woman, but is kept in man.²¹¹

The same poem goes on to explain the conflict between the sexes, regarding their interactions with each other:

The girls uneasy and confin'd, will run

From dear mamma to us, to be undone.²¹²

Barclay develops this notion further, arguing that women 'were increasingly imagined as sexually passive and "innocent" (until corrupted by men)'.²¹³ Indeed, primary sources from the time also support this contention. The infamous publication by Martin Madan, *Thelyphthora; or, a Treatise on Female Ruin*, cited the subversion of religion as the cause of men's seduction of women, 'God's laws are laid aside... which permits men, with impunity, first to seduce, and then to betray... thousands of unhappy women'.²¹⁴ Whilst the work of Madan was heavily criticised at the time – notably as a result of his suggestion that the immorality abundant in society could be alleviated by polygamy – the notion of women falling victim to male seduction is reflected in literary depictions of sexual relationships in the eighteenth century. In *David Copperfield*,²¹⁵ Emily is seduced by David's friend Steerforth and is left ruined when he abandons her following a promise of marriage. Additionally, in *The Heart of Midlothian*,²¹⁶ Sir Walter Scott contrasts the seduction and tumultuous life of Effie Deans with that of her wholesome sister, Jeanie.

²¹¹ Anon, *An Essay on Woman, in three Epistles* (London: 1763), lines 47-8

²¹² *ibid* lines 97-8

²¹³ K. Barclay, 'Emotions, the Law and the Press in Britain: Seduction and Breach of Promise Suits, 1780-1830', (2016) 39 *Journal for Eighteenth Century Studies* 267, 267

²¹⁴ M. Madan, *Thelyphthora; or, a Treatise on Female Ruin*, (John Dodsley, London: 1781), 7-8

²¹⁵ C. Dickens, *David Copperfield* (Bradbury & Evans, London: 1850)

²¹⁶ W. Scott, *The Heart of Midlothian*, (1818)

These seduced but virtuous women are distinguished from those such as Roxana in the novel of the same name by Defoe,²¹⁷ as well as Fanny in *Fanny Hill*²¹⁸ by John Cleland. This latter group of women, being too readily complicit in their seduction, lack the innocence required of the ideal of an eighteenth century woman.

What emerges from this, as argued by Staves, is that literary depictions of women in the long eighteenth century are often thought of as falling into two categories, 'good and bad, maiden and whore'.²¹⁹ Concurrent to this categorisation, it is argued here, is confirmation of the ideal that a woman in the long eighteenth century was by nature chaste and virtuous. Indeed, it was because of her embodiment of these eighteenth century ideals, notably her trusting and affectionate nature, that she became a victim; her downfall was her association with an unscrupulous man, a man who, like Roxana and Fanny Hill regarding femininity, did not embody his eighteenth century ideal of 'refined masculinity'. Thus, it is submitted here that men could likewise be categorised into two groups: an eighteenth century man could either take advantage of a woman's naivety and innocence, as Lovelace does to Clarissa in the novel by Samuel Richardson,²²⁰ or, he could adopt the role of protector, as does Mr Knightley in Jane Austen's *Emma*,²²¹ and rescue a woman from the dangers attributed to her by way of her sex. One also cannot refrain to remark on the name 'Mr Knightley', being an obvious allusion to the symbolism of a knight in shining armour. These two categories of men were frequently juxtaposed

²¹⁷ Defoe (n33 in ch 1)

²¹⁸ J. Cleland, *Fanny Hill: Memoirs of a Woman of Pleasure*, (G Fenton, London: 1749)

²¹⁹ Staves (n209) 114

²²⁰ Richardson (n166)

²²¹ J. Austen, *Emma*, (J. Murray, London: 1815)

in the same novel, exaggerating their behaviour and thus highlighting the obvious disparity between a male seducer and a moral eighteenth century gentleman. For instance, in *David Copperfield*, Mr Peggotty assists Emily to begin a new life after her abandonment by Steerforth. Mr Peggotty's overtly chivalrous act serves to heighten the negative behaviour of Steerforth in contrast, and thus reinforces the eighteenth century masculine ideal. These literary notions naturally reflected and to some extent influenced society; as stated by Barclay, the chaste woman became integral to a morally-conscious British society, 'female virtue became the mark of British superiority' thus requiring British men to be 'the moral protectors of female virtue'.²²² Women, ultimately, were a class of person who required protection; by men, but by extension, by the law.

3.2.1 Breach of Promise

Breach of promise was very much grounded in contract law as an obligation that had not been fulfilled and was thus a broken contract; the action was accordingly economically motivated and damages were therefore recoverable. Yet as we shall see, this economic foundation also provided recourse for harm caused to a more social concept, this being the loss of reputation. A case regarding breach of promise was brought by a plaintiff who sought damages from the other party who had reneged on their promise of marriage. The humiliation surrounding a breach of promise action meant that these were usually not brought before the courts unless absolutely necessary. Proceedings were often heavily publicised, with pamphlets being distributed depicting the trial and the private

²²² Barclay (n213) at 277

lives of both parties, usually in excruciatingly minute detail. It was accordingly this importance attached to reputation that motivated a party into bringing an action,²²³ particularly if a woman had been left pregnant by her lover; pregnancy could be used to play upon the sentiments of the jury and resulted in increased damages. Commonly, a claim was brought as a consequence of a woman having lost her reputation or, perhaps of increasing importance, a number of years in which she could have been courting other potential spouses to a more successful and perhaps lucrative conclusion. This harks back to the point made in the previous chapter that marriage was used as a means of social and financial advancement, and so finding oneself jilted, and even worse, jilted whilst expecting, was ruinous from both a social as well as economic perspective; damages were therefore awarded as a reflection of this.

As mentioned, breach of promise has been included in this thesis as a direct contrast to those contracts in restraint of marriage. It would seem that breach of promise was very similar to restraint of marriage with regard to the incentive of those entering these respective contracts. Indeed, superficially, both appear to concern the notion that a party was promising themselves in marriage to another, just why one was permitted whilst the other was not will therefore provide further understanding of the motivations of the courts in declaring certain contracts to be void.

²²³ *ibid* 270

Female Breach of Promise Actions

Given what has been discussed above with regard to womanhood, it is clear why a such a breach of promise action would be deemed to be necessary for a woman left humiliated and potentially ruined by a broken promise of marriage. A woman was always under the protection – or control – of a male, whether it was her father or later, upon marriage, her husband. It was therefore almost impossible for a woman to recover from her damaged reputation in the same way as her male counterpart. Indeed, the 1827 novel *The Father and Daughter*²²⁴ portrays this very situation. The young female protagonist, Agnes, having been seduced and left ruined by her lover, returns with her child to her father only to find he has been driven insane by the shame caused by the damage to his daughter's reputation. The remainder of the story focuses on Agnes' struggle to re-establish herself in society whilst being an abandoned single mother. The reality was not dissimilar to this literary depiction; a woman could not simply move away as women lacked the financial independence to do this, and should a girl, based on a promise of future marriage, associate herself with a man in a way that was unbecoming of her virtuous eighteenth century ideal, other potential marriage prospects could be ruined if the wedding did not go ahead. As Bates explains, 'it was considered very unlikely that a woman who had been courted and then abandoned would receive another offer of marriage; unless her honour and reputation were vindicated in public'.²²⁵ With this in mind, this section shall explore female breach of promise actions, before moving on to a

²²⁴ A. Opie, *The Father and Daughter*, (1827)

²²⁵ D. Bates, *Breach of Promise to Marry: A History of How Jilted Brides Settled Scores*, (Pen & Sword Books, Barnsley: 2014) 9

discussion of the same actions brought by men; the response of the law will be analysed concurrently.

Foote v Hayne

A case of breach of promise which at the time it was heard received much publicity, is that of *Foote v Hayne*,²²⁶ which concerns a young woman raised by callous parents and twice abandoned by cruel men. The background to this case provides a detailed insight into the circumstances surrounding breach of promise actions.

The plaintiff, Maria Foote, was of some fame on the London theatre scene, performing regularly at the Covent Garden theatre. Maria had reached such a position as a consequence of the influence of her parents; her father had owned the Plymouth Theatre where Maria grew up, whilst her mother was an actress. Her family had not been received well in Plymouth as performers were viewed with distaste in the eighteenth century,²²⁷ and bad was made worse when Mr Foote married a girl who was 25 years his junior.²²⁸ In 1811, her father lost the family fortune after having bought a public house and Maria took to the stage in Covent Garden, her first performance taking place in May 1814.

²²⁶ (1824) 1 Car & P 545; 171 ER 1310

²²⁷ This is perhaps as a consequence of the fact that actresses were commonly also prostitutes in this period. We will see this connection more evidently in the following chapter discussing immorality.

²²⁸ *The Drama; or Theatrical Pocket Magazine; forming a complete critical and biographical illustration of the British stage*, (T & J Elvey, London: 1824) 186

From the descriptions of Maria, it would seem that she had inherited her mother's refined looks and was presented as beautiful and graceful on the stage,²²⁹ it was perhaps this that attracted the attention of Colonel Berkeley, by whom Maria bore two children. The relationship with Berkeley ended in June 1824, whilst Maria was pregnant with his second child. These facts are significant in that they provide the context to the circumstances surrounding how Maria found herself associated with Mr Hayne, the defendant in this breach of promise case. A year prior to the cessation of the relationship between herself and Berkeley, Maria became known to Mr Hayne, after having performed in a show at which he was present.²³⁰ Mr Hayne made his intentions known to Maria's father, who, aware of Maria's current condition, sent her away to the country until after her child was born.

Upon their return, Hayne addressed his intentions of marriage to Mrs Foote, who informed him that Maria was engaged to Berkeley and so could not accept his invitation. What passed between Maria Foote and Mr Hayne following this was a series of correspondence in which he confessed his love to her and wished to follow through with his promise of marriage. Yet Hayne repeatedly reneged on his promise, and so an action for breach of promise was brought by Maria on 21st December 1824. The facts as noted above were described extensively at trial before Abbott CJ. Pamphlets were printed depicting the circumstances leading up to the case and described the background and personal lives of both parties, and, as was common of the time, a feature was also

²²⁹ *ibid* 188

²³⁰ Barclay (n213) 277

published in the *Gentleman's Magazine*.²³¹ We must be wary when reviewing the sources surrounding breach of promise cases, as pamphlets and articles written at this time regarding such actions brought by women in particular, were especially biased in presenting the woman as ruined by the man. For instance, the case report taken from a pamphlet regarding this trial begins by describing Maria Foote as the daughter of a 'very respectable gentleman'²³² and suggests that Maria was from an up-standing family. Of course, from biographies of Maria's life,²³³ we know that this was not how the family was received in Plymouth, and so this illustrates the way in which breach of promise actions were often manipulated to appeal to the sentiments of both the jury as well as society. The rest of the pamphlet leading up to the trial is similarly pitying in its exposition of the relationship between Maria and Berkeley, portraying the image of a beautiful young girl who was seduced, a girl who was 'a victim to his artifice'²³⁴. Likewise, Maria's relationship with Mr Hayne is depicted in equally sympathetic terms.

The claim at trial is particularly telling of the reasoning of the court in permitting breach of promise actions to succeed. Indeed, it was put to the jury by counsel for Maria that

²³¹ *The Gentleman's Magazine*, Vol. 94, Part 2, (John Nichols & Son, London: 1824) 638

²³² J. Fairburn, *Fairburns Edition of the Trial between Maria Foote, the Celebrated Actress, Plaintiff, and Joseph Hayne, Esq. Defendant, for a Breach of Promise of Marriage; including Evidence, Speeches of Counsel, and the whole of the Love Letters. Tried in the Court of King's Bench*, (John Fairburn, London: 1824) 5

²³³ See further K. Barclay, 'Emotions, the Law and the Press in Britain: Seduction and Breach of Promise Suits, 1780-1830', (2016) 39 *Journal for Eighteenth Century Studies* 267, 277-279; D. Bates, *Breach of Promise to Marry: A History of How Jilted Brides Settled Scores*, (Pen & Sword Books, Barnsley: 2014) 141; and J. Fairburn, *Fairburns Edition of the Trial between Maria Foote, the Celebrated Actress, Plaintiff, and Joseph Hayne, Esq. Defendant, for a Breach of Promise of Marriage; including Evidence, Speeches of Counsel, and the whole of the Love Letters. Tried in the Court of King's Bench*, (John Fairburn, London: 1824)

²³⁴ *ibid* 6

despite her expending money in anticipation of the marriage - she had forfeited her acting career at the wishes of Mr Hayne, which had brought her £1000 a year and had also purchased various items with the expectation of marriage - all that Maria sought to claim was the non-pecuniary loss that had been endured from this breach of promise. Counsel for Maria stated this to be 'the rank and station which she would have acquired by marriage'.²³⁵ However, it must also be remembered that although the behaviour of Hayne was unreasonable, Maria had deceived him as to her condition when he made his initial proposal to her. Although Maria may have been under the influence of her parents here, indeed it was admitted at the trial that 'she knew that her father, who remained in London, wrote letters to the defendant respecting her, though it did not appear that she knew the exact contents of any of these letters',²³⁶ it must be borne in mind that such cases very often portrayed the woman as a figure of misfortune who had been taken advantage of by men.

In addition to this, at trial Abbott CJ reminded the jury that 'when a man proposed marriage to a woman, in ignorance of her having had children by another man, and afterwards discovered such a circumstance, he was not bound to perform his promise'.²³⁷ Evidently, his Lordship did not look well upon the actions of Maria at the beginning of her relations with Mr Hayne, yet fortunately for her case, this action could arise but only because of the renewed proposals of marriage. Since Mr Hayne had renewed his proposal after he became aware of Maria and her pregnancy, the action could arise, but only in

²³⁵ *ibid* 16

²³⁶ *Foote* (n226) 1311

²³⁷ *Fairburn* (n232) 44 (Abbott CJ)

relation to this later proposal. Had Mr Hayne not renewed his offer of marriage following this revelation, the action for breach of promise would not be permitted. As stated by Abbott CJ, Maria's deceitful actions in refraining to inform her suitor of her pregnancy would be sufficient to release Mr Hayne from performing any further obligations to her.

In directing the jury, eighteenth century attitudes regarding the role of women are particularly evident; indeed, Abbott CJ stated that, 'the jury were to reflect, that a woman, who had the misfortune to be seduced, and had lived with another man, could never come into a Court of Justice to ask the same compensation as a woman of unblemished reputation'.²³⁸ This was as a consequence of Maria having continued to live with Berkeley following Mr Hayne's first proposal of marriage. Clearly, we see notions of virtue and chastity here. Maria had not been entirely innocent in her conduct; it was not becoming of a woman to entertain two men in such a way. The trial itself lasted eleven hours, and the jury returned a verdict in favour of Maria. She was to be awarded £3000 in damages.

The Importance of Reputation

The trial of *Foot v Hayne* is illustrative of the motivations of the court in providing recourse to injured parties through breach of promise actions. It was not to be permitted that someone could renege on their proposal at a whim, particularly when so much was at stake not only by way of money expended but with regard to social status also. The

²³⁸ *ibid* 45

concept of reputation was referred to explicitly in the case of *Orford v Cole*.²³⁹ The highest award of damages to date was given to Miss Alice Orford in recognition of Thomas Butler Cole breaking his engagement with her. She was awarded £7000 by the court, who were directed by Bailey J to determine the sum based on ‘her conduct throughout the transaction’.²⁴⁰ As was common in such cases, the plaintiff was presented by her counsel as an upstanding woman, whilst counsel for Mr Cole portrayed her as ‘calculating’.²⁴¹ There was no evidence that Mr Cole was abusive towards Miss Orford, in fact, the engagement lasted only three months, and the couple met only three times in this period. Despite this, Alice was awarded ‘the equivalent of Cole’s annual income’.²⁴²

At trial, Mr Topping, acting for Orford, began by immediately referring to the standing of the family from which Alice heralded. He stated that, ‘a family more respectable I never knew’,²⁴³ and went on to detail how Miss Orford was the daughter of a surgeon at Warrington, and was ‘well-educated, highly accomplished, sensible and certainly not without beauty’.²⁴⁴ Mr Topping in making explicit reference to the characteristics becoming of a virtuous woman, would evidently have sought to appeal to the sympathies of the jury. The court heard how the relationship between Orford and Cole began when Miss Orford visited the home of Mrs Butler, Cole’s mother. It was not long after meeting Miss Orford that Mr Cole proposed marriage to her, following the acceptance of his

²³⁹ (1818) 2 Stark 351; 171 ER 670

²⁴⁰ S. Lettmaier, *Broken Engagements: the action for breach of promise and the feminine ideal, 1800-1940*, (Oxford University Press, Oxford: 2010) 80

²⁴¹ *ibid* 81

²⁴² Bates (n225) 95

²⁴³ Lancaster Gazette, Saturday 11th April 1818, Issue 878, 16

²⁴⁴ *ibid*

proposal, letters passed between the pair and arrangements were made for the nuptials, with clothes and other articles being ordered at the request of Mr Cole, in anticipation. However, on 14th June 1818, Cole sent Alice Orford a final letter, postponing the marriage. This was the last communication between the pair before it was announced that Mr Cole had married another woman, Miss Grimshaw, on 29th August, thus breaking his promise with Orford.

Throughout the speech of Mr Topping, it is clear that he is pandering to the sympathies of the jury on several occasions. When speaking of Cole, the language used borders on theatrical:

There was no want of intellect; but unfortunately he wanted that, without which man was the vilest reptile that crawls the earth – a heart²⁴⁵

Likewise, when calling witnesses to attest to the character of Alice Orford, the word ‘respectable’²⁴⁶ is used consistently in their testimony. Reference to the character of Miss Orford was also made by counsel for Cole. Mr Scarlett argued that lesser damages should be awarded as no loss to Miss Orford’s social standing had been sustained, ‘her character stood unimpeached and unimpeachable’.²⁴⁷ Counsel further argued that the feelings of Miss Orford could not possibly have been hurt to any great extent as the couple had only known each other for a few months. Rather incredulously, in making his final submissions to the court, Mr Scarlett stated that the behaviour of Cole throughout the

²⁴⁵ *ibid*

²⁴⁶ *ibid*

²⁴⁷ *ibid*

marriage negotiations and in abruptly ending the engagement, showed that the marriage would have been an unhappy one anyway, and so Miss Orford ought to have been happy that it was brought to an end. The jury were evidently left unconvinced by Mr Scarlett's arguments as they retired for only fifteen minutes before finding in favour of Orford and awarding her £7000 in damages.

What is clear throughout *Orford v Cole*, is that the argument presented by counsel on both sides was based on the concept of reputation. Orford was portrayed as a virtuous woman who had been wrongfully abandoned by a 'cruel, careless and dishonourable'²⁴⁸ man. Even counsel for Cole appeared to concede that his behaviour throughout the engagement was unbecoming of a gentleman. Nonetheless, in attempting to mitigate the level of damages, Mr Scarlett refers to the 'unimpeachable' character of Miss Orford even after her ordeal. *Orford v Cole* therefore demonstrates that breach of promise cases were undoubtedly seeking to protect the social standing of the parties involved and the language used throughout *Orford* reflects this clearly.

What is also clear is that in permitting these actions, the courts were not saying that two parties ought to have married regardless and were thus not effectively forcing marriage; in fact, this was the opposite of what was intended, as stated by Lord Mansfield in *Atcheson v Baker* who held that 'it would be most mischievous to compel parties to marry

²⁴⁸ *ibid*

who could never happily live together'.²⁴⁹ Instead, what the courts were attempting to do with breach of promise actions, as with any contract, was to provide a remedy for breach of an agreement in which some loss had occurred. The loss in this instance was socially as well as economically motivated. The statement by Lord Mansfield in *Atcheson* can be compared to the language used in restraint of marriage cases in the previous chapter. In cases such as *Hartley v Rice*,²⁵⁰ marriage was encouraged, and accordingly a contract which was found to be in contradiction of this policy was void as being 'calculated to operate against marriage'.²⁵¹ Breaching a promise of marriage not only countered the motivation of the law to uphold the sanctity of marriage, but furthermore, wilfully reneging on a promise of marriage undermined the institution of marriage, and equally, the law would not permit this to occur. Therefore, ultimately, the courts applied similar motivations across both restraint of marriage cases as well as actions for breach of promise; they just found different means to do this.

The agenda of protection applied by the law is particularly evident in the judgments regarding breach of promise. Eighteenth century notions that a woman ought to remain virtuous until marriage influenced this protection; any trouble in which a woman may have found herself as a consequence of a promise of marriage that was not forthcoming was taken seriously by the courts and sought to be remedied by the payment of damages. As acknowledged by Lettmaier, breach of promise actions were based upon an image of

²⁴⁹ Bates (n225) 169 (Mansfield LJ)

²⁵⁰ (1808) 10 East 22, 103 ER 683

²⁵¹ *ibid* 684

‘the dependent child woman... against whom a... plaintiff... fell to be judged’.²⁵² Loss of reputation was something an eighteenth century single woman could not afford to lose, particularly if her family had loftier social ambitions for her. Indeed, in *Foote v Hayne*, we are told of Mr Hayne that ‘he was possessed of large property in the West Indies, and that he had 46,000*l.* in the Funds’²⁵³ and thus the family had no objection to him courting their daughter. Furthermore, it is clear that counsel for Maria stated her claim in terms of the damage to her reputation that she had undertaken as a consequence of Mr Haynes refusal of marriage. As has been noted above by Barclay, protecting the virtue of women became the hallmark of a morally upright British society, this by extension required the law to employ the same protective agenda. Thus, similarly to restraint of marriage contracts as discussed in the previous chapter, the courts were seeking to ensure the protection of social status. In cases such as *Lowe v Peers*, whilst the protection of wealth was a clear motivation of the courts prohibiting a contract that restrained Catherine Lowe from marrying another man, it was also noted that implicit in this was the protection of the social standing of each party. Wealth and social status were inexplicably linked, and so whilst money expended in anticipation of marriage was sometimes claimed in breach of promise actions, it was the preservation of reputation and constituent social standing that were both sought to be protected by the courts in these cases. As with restraint of marriage, it was simply that breach of promise involved *upholding* a contract to ensure that this protection was achieved, whilst restraint of marriage involved finding a contract void to achieve this same protection.

²⁵² Lettmaier (n240) 80

²⁵³ Fairburn (n232) 12

In essence, breach of promise and restraint of marriage were merely different modes of achieving the same outcome; both were concerned with upholding the sanctity of marriage and both sought to protect social status. As has been noted, it was simply that in order to do this, one group of contracts was upheld, whilst the other was rendered void by the courts.

Male Breach of Promise Actions

Whilst it is perhaps assumed that breach of promise actions were brought by women against men, although not as common,²⁵⁴ cases involving a male plaintiff did occur.

This kind of breach of promise action is represented in literature as being rather pitiful. Jane Austen's *Sense and Sensibility*²⁵⁵ is illustrative of this, where Lucy Steele leaves Edward Ferrars to elope instead with his younger brother. This attitude is perhaps illustrative of the way in which, despite the damage to a woman's reputation, a jilted man cut a much more pathetic figure than a subdued female, who of course could not expect too much from a virile male to maintain his promise. Such was the infrequency of actions brought by men, that there was some a question of whether a man could even bring an action of breach of promise. This is what was argued in *Harrison v Cage*²⁵⁶ which involved the plaintiff bringing an action against a woman who had promised to marry him, but had instead married another. Holt CJ was sensible in his reasoning that there

²⁵⁴ Bates (n225) 49

²⁵⁵ Austen (n169 in ch 2)

²⁵⁶ (1703) 5 Mod 411; 87 ER 736

was nothing that ought to restrain a man from bringing a case when a woman could do the same. In summing up, his Lordship reasoned, ‘why should not a woman be bound by her promise as well as a man is bound by his?’²⁵⁷ The plaintiff was therefore awarded £400 which was felt to be in keeping with the fact that the woman was worth £3000 when he courted her.

Equally, in much the same way as the reputation of a jilted bride was held to be paramount, the character of the plaintiff was scrutinised in male breach of promise actions too. In *Baddeley v Mortlock and Wife*,²⁵⁸ an action was brought by Baddeley against the husband of a woman who had broken her promise of marriage to him. In the case, counsel for Mortlock scrutinised the behaviour of Baddeley and it was put to the court that the now Mrs Mortlock had rightly broken her promise of marriage to Baddeley when his negative character had become known to her. It emerged that during the marriage negotiations, Baddeley had been accused of ‘dishonesty in some pecuniary concerns, and... perjury’²⁵⁹ but he could not vindicate himself to his potential future spouse. As a consequence of this, the now Mrs Mortlock broke of her engagement to Baddeley. The court agreed with the reasoning of counsel for the defendant. Gibbs CJ stated that, ‘if a woman improvidently promise to marry a man, who turns out upon inquiry to be of bad character, she is not bound to perform her promise’.²⁶⁰ Thus, it was perfectly permissible for Mrs Mortlock to end her engagement to Baddeley, however,

²⁵⁷ *ibid* 737

²⁵⁸ (1816) Holt 151; 171 ER 195

²⁵⁹ *ibid* 196

²⁶⁰ *ibid*

Gibbs CJ followed this with the caveat that ‘she must shew that the plaintiff is a man of bad character. The accusation is not enough’.²⁶¹ Consequently, some evidence was required to be produced which confirmed the ill-character of the plaintiff. In this case, there was no proof that the charges of which Baddeley was accused were legitimate and so Mrs Mortlock was not absolved from the action for breach of promise. It was acknowledged, however, that the information concerning the behaviour of the plaintiff did affect the level of damages that could be awarded.²⁶² In delivering judgment, whilst the action for breach of promise was upheld, Baddeley was awarded a mere one shilling. Given the level of damages that have been noted in cases such as *Footte v Hayne* and *Harrison v Cage*, it is evident that this award was a nominal sum for the recognition of a breach of contract. Thus, the importance attached to reputation in breach of promise cases is clear, just as the character of a defendant could be scrutinised to pander to the sympathies of the jury to seek a higher level of damages, the same could be done to reduce the level awarded to a plaintiff for ill-behaviour. The morally upright society in which these cases were being decided is reflected in the judgments themselves, and in the subsequent protection of a much more social concept, this being the reputation of the parties.

It was this focus on protecting the social concept of reputation that meant that awards of damages for breach of promise actions were not relative to the size of the fortune of the respective parties. This was so despite the financial considerations attached to marriage

²⁶¹ *ibid*

²⁶² *ibid* 196 (Gibbs CJ)

explored in the previous chapter of this thesis. The disparity between wealth and the size of damages is evident in the case of *Foster v Mellish*²⁶³ in which Foster received only £200 in damages in comparison to the fortune of Mellish standing at approximately £13,900. As was common with all breach of promise cases, the plaintiff was presented as an upstanding member of society, who had been a victim of the cruel actions of the defendant. Indeed, Foster was described as ‘a young gentleman in a most respectable situation of life’²⁶⁴ whilst Mellish was ‘a young lady of exquisite beauty’,²⁶⁵ who had made Foster ‘a puppet to her caprice’.²⁶⁶

The report of the case reveals how Foster, a surgeon, had first met Mellish when he had taken up practice in London. After their initial meeting Foster proposed marriage which was accepted by Mellish and although her family were at first reluctant, their consent was soon obtained. Several letters passed between the couple from the 28th September 1801 when the agreement to marry took place, to the 12th December, which was the date set for the marriage. During this time, we are told that Foster spent £500 preparing his home, although it was not proved definitively that this was in anticipation of the arrival of the defendant. It was during the intermediate correspondence however that Mellish appears to become averse to the idea of the marriage, breaking off the connection and then reaffirming it on more than one occasion. This was argued by counsel for Mellish to be as a consequence of her brothers’ lack of consent to the proposal, yet in a letter dated

²⁶³ (1802) ‘Sporting for a Wife’, *Sporting Magazine*, vol 19, 309

²⁶⁴ *ibid*

²⁶⁵ *ibid*

²⁶⁶ *ibid* 310

the 27th November, Mellish ended the engagement completely at which point Foster sought recourse and brought the case to trial.

What is particularly revealing is that which was claimed by counsel for the plaintiff; it was put to the jury that the whole ordeal had taken its toll on Foster to such an extent that 'his mind was disturbed'²⁶⁷ and 'his health materially impaired'.²⁶⁸ Although Foster may have felt aggrieved as a result of his treatment - and rightly so - to say that his mind has been disturbed by the relationship is perhaps something of an exaggeration, but it is indicative of counsel in such trials attempting to pander to the sympathies of the jury by presenting clients as a severely injured victim. Clearly it was not only female plaintiffs who were presented in such a pitiable manner. Foster was depicted as a genuine man, who was motivated only by his love for the defendant, yet opposing counsel portrayed a different image, and it was argued that Foster was motivated greatly by monetary concerns. It was revealed that he had borrowed sums of money, around £1000 at a time, from various persons and marriage to Mellish and obtaining her fortune was the only way in which he could repay these debts. The jury were also shown a letter purporting to be from an anonymous source encouraging Mellish to marry Foster immediately lest her reputation be damaged from having had numerous clandestine meetings with him. Counsel for Mellish argued that this was actually forged by Foster himself.

²⁶⁷ *ibid*

²⁶⁸ *ibid*

In summing up, Le Blanc J directed that there were two points to be decided by the jury. The first of these he believed to be of little doubt, this being whether there had been a promise made in respect of marriage. The second point to be decided by the jury was of greater contention and was whether the anonymous letter had been written by the plaintiff. If the jury felt that the letter had been forged by Foster, verdict was to be for the defendant, but if they found in the alternative, verdict was to be for the plaintiff. It was noted in the report that the trial lasted a whole day but the jury took only a few moments to return a verdict for the plaintiff. The sum to be awarded was £200.

Given the behaviour of Foster, as well as Mellish, throughout their courtship in him repeatedly calling off the wedding, it is likely that damages were awarded as a reflection of this. However, it is clear that there was a significant difference between the sum awarded to Foster and the fortune of Mellish. This reinforces the notion that actions for breach of promise, although contractual and resulting in an award of monetary damages, were based on moral grounds. Thus, the level of damages was not to be awarded in proportion with the fortune lost from the prospective marriage but was instead awarded as a reflection of much more personal factors, this being the loss of reputation. This argument is only furthered when it was stated that the couple in *Foster v Mellish* were an adequate match financially, and so the same issues with regard to inequality as those that have been noted in the previous chapter as a reason for holding restraint of marriage cases to be void were not apparent here. Instead, whilst still applying a protection interest, breach of promise cases were upheld to protect that which had been lost in

anticipation of what would have been a suitable match, sometimes this was money expended, but as was more often the case, damage to reputation.

Ultimately, courts permitted an action breach of promise brought by a man for the same reason as for women - to uphold the protection of social status. This outcome was ultimately grounded firmly in typical eighteenth century ideals regarding the social position of the respective sexes. The attitude of society with respect to a man was that he ought to be strong, virile, and able to provide for a family. Women, on the other hand, were weaker both physically and with regard to their societal position. Whilst higher class women often took instruction in painting, playing music, or learning French, this was not at the expense of their traditional role which was to be in the home and to care for their husband and children. Although women became much more vocal with regard to their traditional roles towards the end of the long eighteenth century, it was not until much later that we see a substantial change in this position. As such, during the period which is the focus of this thesis, we continue to have the concept of the male 'provider' and the female 'homemaker'. With these ideals in mind, it therefore becomes easier to understand just why an action for breach of promise against a man could potentially be damaging to his reputation, but also correspondingly, why this was much more so for women who lacked the financial independence to begin a new life elsewhere, and further, why a jilted woman could take advantage of her traditionally submissive role to play the role of a naïve victim to the jury.

3.2.2 Breach of Promise vs. Restraint of Marriage

This section began by proposing to show just why breach of promise actions were permitted whilst restraint of marriage cases were not. Within breach of promise there was an agenda of protection employed by the courts and it is within this that we can draw parallels between the motivations with respect to breach of promise and restraint of marriage. At first glance, it would seem that there was little difference between a promise *to* marry a specific individual and a promise *refraining* from marrying anyone else. It has been revealed in this section that this contention proves to be partly true, in that there was little difference, as both actions involved the same motivations, this being to uphold the sanctity of marriage as well as to protect social status. The overall motive of the courts was that marriage ought to be encouraged; the language of the judgments with regard to restraint of marriage cases reaffirmed that marriage was for the public good, ‘such that marriage be made on the proper foundation’²⁶⁹ and it was therefore against public policy to uphold a contract that restrained marriage and ran counter to this ideology. Following this line of reasoning, breach of promise was actionable as breaking a promise of marriage equally did not align with this motivation of the law. Thus, in permitting breach of promise and finding the restraint of marriage contracts to be void, the courts were merely doing the same thing; they were simply employing different means to achieve this same result.

²⁶⁹ (1750) 1 Ves Sen 503; 27 ER 1169, 1171 (Hardwicke LJ)

3.3 SEX AND PARENTING

As has been mentioned, breach of promise was potentially so harmful to a woman because of the damage to her reputation that could be caused should she court a man who later abandoned her. However, this social harm was only heightened should she find herself pregnant and alone. This resulted in higher damages being awarded by the jury in breach of promise cases where a woman had been left pregnant by an absconded future husband.²⁷⁰ These damages were intended to compensate for the lack of financial aid provided by the father of the child as it was important that single mothers could be supported to ensure that they did not become a burden on the parish. Beyond these financial consequences, the social stigma of being pregnant and unmarried tells us much of attitudes to sex and parenting in the long eighteenth century. It is clear that notions of sex and marriage were informed significantly by the moral era in which these cases took place. The link between sex and morality will be addressed in greater depth in the following chapter concerning contracts which were rendered void for immorality, however some knowledge of this is helpful in this chapter to inform a discussion on marriage.

As has been noted, in the long eighteenth century, parenting was inexplicably tied to marriage. This reflected the notion that sex, too, was only to take place within the binds of matrimony; an evidently religious teaching typical of the moral Protestant era following the succession of William to the throne. Yet as shall be explored in chapter four,

²⁷⁰ Bates (n225) 8

the prevalence of prostitution demonstrated that this was not adhered to in practice. Furthermore, by the middle of the period, as recognised by Dabhoiwala, ‘consensual sex outside marriage had drifted beyond the reach of the law’.²⁷¹ This was despite Societies, such as that of the Reformation of Manners, attempting to police immoral behaviour at the beginning of long eighteenth century.²⁷² Indeed, such Reformers were viewed as objects of ridicule by the middle of the period, represented in plays such as *The Different Widows*,²⁷³ by Mary Pix as pathetic characters. Mr Drawle in Pix’s 1703 play is presented as a hypocrite, who is hated by his wife.²⁷⁴ The notion that sex ought to be confined to marriage, whilst ardently defended by such Reformation Societies, was not reflective of the reality of society. Indeed, whilst moral novelists such as Defoe warned of the dangers of sex outside of marriage in novels such as *Moll Flanders*,²⁷⁵ this can be contrasted with the writings of diarists such as Boswell, who, as well as recording the happenings in the Capital, also documented his extensive sexual exploits in his *London Journal*.²⁷⁶

Indeed, confirmation of what has been deemed ‘the rise of sexual freedom’²⁷⁷ is demonstrated in the creation of social remedies for the consequences of such free sexual relationships. As Waugh has acknowledged, ‘by the mid-eighteenth century there was... an upsurge of interest in the venereal diseases’.²⁷⁸ The London Lock Hospital was

²⁷¹ F. Dabhoiwala, *The Origins of Sex: A History of the First Sexual Revolution*, (Penguin Books, London: 2013) 77

²⁷² Once again, this notion shall be addressed in greater depth in the following chapter

²⁷³ M. Pix, *The Different Widows* (1703)

²⁷⁴ Dabhoiwala (n271) 69

²⁷⁵ Defoe (n32 in ch 1)

²⁷⁶ F. A. Pottle, *Boswell’s London Journal: 1762-1763* (William Heinemann Ltd, London: 1951)

²⁷⁷ *ibid* 79

²⁷⁸ M. W. Waugh, ‘Attitudes of Hospitals in London to Venereal Disease in the 18th and 19th Centuries’, (1971) 47 *British Journal of Venereal Disease* 146, 147

established in 1747 with the specific aim of treating venereal disease, yet only nine years previously Westminster Hospital had refused to admit patients exhibiting such symptoms – in response to public protest.²⁷⁹ Thus, whilst sex outside of marriage may have been much freer, this was not to say that it was excepted by all of society. The writings of moralists such as Defoe are illustrative of this, but equally, public disapproval of the treatment of venereal disease is an indication that whilst there may have been a rise in sexual freedom in the long eighteenth century, this was not welcomed by all. This further reflects social attitudes towards pregnancy outside of marriage, which as has been noted, still carried a social stigma.

However, in defence of St. Thomas's Hospital, another London institution which, like the Lock, treated venereal disease, Benjamin Golding stated in 1819 that 'many innocent women of irreproachable characters themselves have received infection from the profligacy of their husbands'.²⁸⁰ This statement served to reinforce the ideal of the innocent but ruined woman in the eighteenth century, as has been discussed earlier in this chapter. Golding therefore asserted that such hospitals were integral to society to redeem and protect ruined women. Perhaps in an attempt to remedy that which had caused the patients to be inflicted with disease, it was further noted that 'morality is apparent throughout the construction of this noble institution'.²⁸¹ Men and women were separated, and those most severely infected were located away from the general hospital

²⁷⁹ *ibid*

²⁸⁰ B. Golding, *An Historical Account of St. Thomas's Hospital, Southwark*, (Longman, Hurst, Rees, Orme & Browne, London: 1819), 135

²⁸¹ *ibid* 137

population. The social class of many of those admitted to St. Thomas's Hospital is evident in Golding's description of the Hospital seeking to provide a solution to the 'anguish of affliction... conjoined with poverty and pain'.²⁸² The solution that was provided at Hospitals treating venereal disease was not simply a cure to the physical illness, but the morality of the project was evident in the focus on redemption attributed to patients. Regular sermons were delivered, one such published in 1797, by Thomas Scott, Chaplain of the Lock Hospital, reminded patients of their responsibilities to God:

You should consider that affliction is not a thing which comes of course, or by chance; but springs from the wholly and righteous abhorrence with which God beholds iniquity; and is under his immediate direction and appointment²⁸³

Therefore, by the middle of the period, sexual freedom had increased and social remedies such as the Lock Hospital were established as a consequence. Yet, whilst the response of society towards those inflicted with venereal disease was one of seeming disgust, as evident in the public protest at Westminster Hospital, this did not transfer itself to the provision of a punitive solution. Rather, the focus was on redemption. Thus, the moral focus of the long eighteenth century remained dominant, and it was this same morality that maintained that sex outside of marriage was wrong.

Consequently, the correct mode of parenting was for a child to be born in wedlock. Perhaps the most famous study of the eighteenth century family is that published by Lawrence Stone. Stone's seminal argument was that the period of the long eighteenth

²⁸² *ibid* 138

²⁸³ T. Scott, *Hints for the Consideration of Patients in Hospitals*, (Jaques and Thomas, London: 1797), 5

century saw a move away from a patriarchal family, which was public, often repressive, and controlling, towards a nuclear family, which focused on the pursuit of individualistic pleasure and domesticity.²⁸⁴ This was in line with changes in the ideal of courtship too, as literary movements such as sensibility saw a shift in social attitudes towards romantic notions of love. The rise of the nuclear family resulted in women adopting a role in society, this is in contrast to their submissive position within the patriarchal family; within this new structure, women were 'homemakers'.²⁸⁵ This position therefore adhered very much to eighteenth century ideals of womanhood but did not release a woman from her legal dependence on a male guardian, as shall be discussed in chapter five.

Of course, there were social class divisions in parenting. Lawrence Stone remarks that the aristocracy were 'the negligent mode',²⁸⁶ with mother and father having political and social distractions to keep them from their children. This resulted in the use of wet nurses to breastfeed the babies of wealthier parents, although it is acknowledged that preventing a mother from breastfeeding also permitted her to retain her figure as well as have sex with her husband.²⁸⁷ The children of aristocratic families were also commonly sent to boarding school and subsequently to the armed forces or university, a practice which did not lend itself to an affectionate parental relationship. Those of the middle class were

²⁸⁴ Stone (n37 in ch 1) Part 3: The Restricted Patriarchal Nuclear Family 1550-1700 123-218 and Part 4: The Closed Domesticated Nuclear Family 1640-1800, 221-480

²⁸⁵ I. Tague, 'Aristocratic Women and Ideas of Family in Early Eighteenth Century' in H. Berry and E. Foyster, *The Family in Early Modern England*, (Cambridge University Press, Cambridge: 2017) 185

²⁸⁶ L. Stone (n37 in ch 1) 451

²⁸⁷ *ibid* 427

conversely 'child-orientated'.²⁸⁸ This was divided between those who pursued an affectionate relationship with their children and those who chose a more authoritarian approach. Regardless of the tact pursued, however, the middle class distinguished themselves from their upper class counterparts by way of their interest in their children. Finally, for the working class, children were seen as an 'economic asset',²⁸⁹ which resulted in them being sent to work at a young age, with apprenticeships often commencing when a child was seven years old.²⁹⁰ However, for those living in absolute poverty, parents were often 'indifferent [and] cruel'²⁹¹ to their children, who were a drain on already scarce resources.

What cut across the social class divide, however, was that a child ought to be born within marriage. As well as the social stigma attached to being pregnant as an unmarried woman, ensuring that pregnancy occurred only within marriage was important for society financially too. The desire to protect wealth that we have seen in the previous chapter concerning why restraint of marriage contracts were rendered void was also a significant factor in seeking to confine pregnancy to within marriage. It was important that a family was certain of the paternity of a child to ensure that the correct heir inherited the family assets. It was for this same reason that it was paramount that the correct procedures were followed upon the breakdown of a marriage to protect the correct allocation of wealth and to thus ensure the future preservation of such.

²⁸⁸ *ibid* 452

²⁸⁹ *ibid* 468

²⁹⁰ See Chapter 6 of this thesis for further discussion of apprenticeships

²⁹¹ Stone (n37 in ch 1) 470

3.3.1 Agreements for Separation

Within the law regarding agreements for separation, the social position of the respective sexes remained a pertinent concern. Upon the breakdown of marriage, although provision was made for both parties, with regard to women, this usually took the form of a fixed sum settlement or regular maintenance, and so again, an eighteenth century woman continued to be dependent upon her male counterpart. In these agreements, women were entitled to ‘necessaries’, which accounted for items necessary to her everyday life, such as food and clothing, although this notion will be discussed in greater detail in chapter five of this thesis regarding the contractual capacity of women. The trials surrounding agreements for separation provide an insight into marriages troubled by adultery, abuse, and deceit; in this section, individual cases will be discussed in detail in order to present a fuller picture of the law regarding these contracts. However, it is important to acknowledge that separation and divorce were still very much discouraged in eighteenth century England and were viewed as rather shameful; for instance, in a study for the parish of Colyton in Devon only 10% of marriages ended in separation.²⁹² Such agreements were valid provided that they were followed by an immediate separation, yet what are of interest to this thesis are those occasions in which agreements for separation were held to be void. This was usually in instances when the agreement had been prepared in anticipation of a future separation that may or may not occur and

²⁹² Hunt (n133 in ch 2) 71

where the parties had made provisions accordingly. These 'just in case' contracts were not permitted by the courts, for reasons that shall be explored.

3.3.2 Separation in the Long Eighteenth Century

Prior to any examination of the legal implications surrounding agreements for separation, eighteenth century attitudes to separation will be discussed. It must be remembered that at this time, whilst divorce and separation were discouraged, the ending of marital relations was made further difficult by the fact that divorce was only granted by way of an Act of Parliament. As a result of this, a full divorce was reserved for those who had the financial means to obtain it and so for those who could not, a separation agreement provided a means of allocating assets upon the breakdown of marriage that was relatively inexpensive, in comparison to pursuing a divorce. Whilst a separation did not permit the parties to remarry another unless explicitly provided for, it must be remembered that the average life expectancy at this time was around 40 years old and so it was likely mortality provided the option for remarriage following a separation.

Another means of separation in the long eighteenth century that has been researched extensively by historians such as E.P. Thompson is that of the wife sale. The concept of wife sales was addressed in literature, perhaps most significantly in *The Mayor of Casterbridge*²⁹³ by Thomas Hardy. Although the novel was first published in 1886, and is

²⁹³ T. Hardy, *The Mayor of Casterbridge*, (Smith, Elder & Co., London: 1886)

therefore outside of the period of focus for this thesis, it is arguably the most famous literary depiction of a custom that occurred throughout the long eighteenth century and is therefore included here as an example of how such customs were interpreted in literature, and thus informed popular culture. In the novel, Michael Henchard, a hay-trusser, decides to sell his wife Susan, following an argument. Whilst at a village fair, Henchard becomes intoxicated having consumed furrnety laced with rum and remarks that men who have become tired of their wives ought to simply sell them. This results in an auction taking place during which Susan agrees to the sale, given that Michael has shown her nothing but ill-temper throughout their marriage. She is sold for five guineas to a sailor, whose kind behaviour towards her contrasts starkly to the disrespect her lawful husband has exhibited during their time at the fair and indeed, accordingly to Susan, throughout their marriage. The first chapter of the novel ends with Henchard being presented with the money and Susan and her new husband leaving together with her child. However, this portrayal of a wife sale has been criticised by E.P Thompson who remarks that Hardy relied on newspaper sources to inform his description of the sale of Michael Henchard's wife, Susan. Thompson submits that as Hardy did not observe the practice directly, his literary depiction lacks accuracy.²⁹⁴

The most frequent method adopted for the wife sale was that which took place in a public market; a wife would be led wearing a halter, either around her neck or waist, before the rope was symbolically transferred to her new husband, the process taking place before

²⁹⁴ E.P. Thompson, *Customs in Common*, (Penguin Books, London: 1993) 405

an auctioneer. Eighteenth century ideals of womanhood are apparent in the description of the wife at auction; Thompson notes that ‘the women, being wives, [were] described by their looks, deportment or supposed moral conduct, but very rarely by their occupation’.²⁹⁵ It is clear that this, alongside the custom of a halter, presented a wife as akin to a chattel, and whilst therefore somewhat in-keeping with legal doctrine at the time which, as mentioned, reduced a woman to the property of a male, subsuming her legal rights into those of her male guardian, the practice was not well received in general society. Indeed, the wife sale was most common amongst the lower classes, and viewed with ‘moral disapproval’²⁹⁶ by the middle and upper class. Yet Thompson cautions against viewing the wife sale as something which rendered a woman a chattel; a condition of the ritual was that the wife had to agree to the sale, just as Susan did in *The Mayor of Casterbridge*, and so he argues that this consent obviated the objectification of wives at auction.²⁹⁷

The custom of a wife sale, then, was less of a ‘brutal chattel purchase’²⁹⁸ and should instead be seen as a means of separation. Further, whilst the upper classes regarded the wife sale with disdain, it should not be seen as a barbaric custom of an immoral lower class, argues Thompson, but instead as a ritual of a culture which lacked the means to readily divorce and so sought to remedy this with a process that paid ‘high regard to rituals and forms’²⁹⁹ but also to community and the maintenance of the family unit, hence

²⁹⁵ *ibid* 415

²⁹⁶ *ibid* 410

²⁹⁷ *ibid* 428

²⁹⁸ *ibid* 427

²⁹⁹ *ibid* 444

the requirement for the sale to be made public and the consent of the wife having to be obtained. These same conditions attached to the wife sale, short of creating a humiliating spectacle of a woman, ultimately rendered the custom an organised and empathetic means of pursuing a valid separation for the lower class.

For those of the middle and upper class, however, a marriage was legally terminated by divorce or a deed for separation. It is the latter of these that appealed to a greater section of society, given the relative ease of obtaining such, and was therefore more commonly employed as means of ending marital relations. The validity of these separation agreements will now be examined.

Requirement 1: Immediacy

In order to effect a valid separation agreement it was held by the courts that this must be immediate; any contract in anticipation of a future separation was void. In the early case of *Gawden v Draper*,³⁰⁰ where an agreement of a £300 yearly maintenance to be paid quarterly was agreed between the parties, this could not be revoked by a later indenture which added the requirement that the plaintiff must not cohabit with another. Indeed, when the plaintiff in this case brought the action for an unfilled payment of £75 for the previous quarter, the defendant sought to invoke this later indenture as the reason as to why the agreement was no longer valid. The court delivered its judgment based upon considerations regarding the formalities of the contract, notably that the 'later

³⁰⁰ (1690) 2 Vent 217; 86 ER 402

covenant cannot be pleaded in bar of a former'.³⁰¹ In other words, the later requirement of no cohabitation, being additional to the initial agreement, could not therefore take precedence over the original separation agreement. The action in *Gawden* involved a separation agreement which had been drafted and carried out with immediate effect, but a later case demonstrated that this immediacy was crucial to the validity of such a contract.

*Cartwright v Cartwright*³⁰² concerned a deed executed by a father, which provided that should his son and daughter-in-law separate, the rent and profits obtained from the father's freeholdings ought to be paid to his son. On the 10th July 1839, prior to the marriage of his son, Henry, Thomas Cartwright executed a settlement for the benefit of Henry and his future wife, Ellen, as well as any future children to be born from the marriage. The deed also contained a provision that should Henry and Ellen separate, the rent and profit from the freehold properties would pass solely to Henry. Henry and Ellen married and lived together until 1846, when Ellen left the home and the pair lived separately. The couple were living apart when Thomas Cartwright died in 1851 and Henry brought an action against the trustees for the payment of the rent and profits. At trial, the court was asked to determine the legality of the separation agreement contained in the deed.

³⁰¹ *ibid* 403

³⁰² (1853) 3 De G M & G 982; 43 ER 385

Knight Bruce LJ found ‘the theory of the law to be, that a man and his wife cannot live in a state of separation from each other... without some failure on the part of one or both in the performance of duties in the fulfilment of which society has an interest’,³⁰³ as such the agreement had to be void as ‘such a proviso is against public policy’.³⁰⁴ Turner LJ then went on to discuss the case law which had been relied upon in the case, notably *Brown v Peck*³⁰⁵ and *Westmeath v Westmeath*,³⁰⁶ and came to the same conclusion, that the agreement ought to be void. It is evident here that the courts found such contracts to be void as they offended against the promotion of marriage and interfered in the performance of marital duties. Clearly, the courts were relying upon the very same public policy grounds as those noted in the previous chapter in relation to restraint of marriage and marriage brokerage. Marriage was important to a civilised society and the law wished to promote this, and so a contract which anticipated the breakdown of such marital relations, and furthermore, provided for payment of a large sum should this occur, was prohibited by the courts.

Of the two cases discussed extensively in *Cartwright*, that of *Westmeath v Westmeath* will be discussed shortly in greater detail, given that the facts of this case are particularly telling of the circumstances surrounding separation in the long eighteenth century. Before that, however, it is acknowledged that the voidability of contracts based on grounds of public policy is further evidenced in a second case addressed in *Cartwright*,

³⁰³ *ibid* 387 (Knight Bruce LJ)

³⁰⁴ *ibid*

³⁰⁵ (1758) 1 Eden 140; 28 ER 637

³⁰⁶ (1830) 1 Dow & Clark 519; 6 ER 619

namely *Brown v Peck*. In *Brown*, an uncle left a devise to his niece in his will of £2 per month should she continue to live with her husband, but £5 should she live apart from him. This was on the basis that she had married him without the consent of her mother. Upon the question of the validity of this provision, it was held that the condition was 'both impossible at the time of imposing it, and contra bonos mores'³⁰⁷ and was therefore void. With the cases explored above, separation agreements which were made prior to the marriage occurring, such as in *Cartwright*, or in anticipation of the separation as in *Brown*, were held as void based upon public policy reasons. This rested on the notion that agreements made prior to marriage introduced a negative incentive on the parties to renege on their marital duties if they were aware that upon separation a sizeable sum had been settled to ensure their maintenance. Again, the law wished to uphold the sanctity of marriage, and so agreements such as these which countered this motivation were not upheld.

Requirement 2: Animosity

Immediacy was not the only condition that was required for a valid separation agreement however; alongside this there was a further caveat that the parties must be living apart and could not continue to live as husband and wife following the separation agreement. Should either one of these two requirements not be fulfilled, the contract was to be declared void. This second obligation is best illustrated by contrasting two cases, one which fulfilled this principle and was thus a valid contract, and the other which did not

³⁰⁷ *Brown* (1305) 638

and was thus void. The first of these cases that will be discussed is that which fell afoul of this rule, that being the case of *Westmeath*, which, as has been noted was one of the cases discussed in some detail in *Cartwright*. The facts of the trial of *Westmeath* are long and proceedings continued for almost a decade, but nonetheless they do demonstrate the often-seeming harshness of the law with regard to upholding a separation agreement.

Lady Emily Cecil, the daughter of the Marquess of Salisbury, married George Nugent, the Marquess of Westmeath, on the 29th May 1812. However, from the time of the marriage until 1817, the Marchioness complained of cruelty and ill treatment against her at the hand of her husband.³⁰⁸ Nugent already had one illegitimate child prior to courting Emily and relations with this mistress continued even after his marriage as during this time he fathered yet another child to her. The Marchioness was not entirely innocent in her behaviour either, however, as we are told that she neglected her husband when he was ill to attend parties and consequently accumulated significant debts to pay for which trust money had to be advanced.³⁰⁹ The outcome of these tensions resulted in a deed for separation being executed on the 17th December 1817, which stipulated the level of maintenance for the Marchioness as well as that of the couple's only daughter, Lady Rosa.

Upon the intervention of friends, however, as well as the mother of Emily who was aware of the scandalous publicity attached to a separation, both parties continued to reside

³⁰⁸ *Westmeath* (n306) 620

³⁰⁹ L. Stone, *Broken Lives: Separation and Divorce in England 1660-1857*, (Oxford University Press, New York: 1993) 288

together until 1818 when, as a consequence of her husband's fiery temper, the Marchioness ceased to cohabit with her husband and so a second separation agreement was executed on 30th May of the same year. Again, however, it would seem that Nugent was not entirely to blame, as Emily is noted to have goaded her husband and provoked his anger several times.³¹⁰ This second deed provided for £1300 per annum for the Marchioness with an additional £300 after 6 years, which was maintenance for Lady Rosa and the child with which the Marchioness was now pregnant. If one of the children should die, this was to be reduced to £250.³¹¹ The Marchioness was also permitted to dispose of her property as she so wished and was to live as if unmarried, free from interference of any sort by her husband.

After the execution of this deed, the Marchioness permitted her estranged husband to occupy apartments in the house until he could seek appointment abroad. They did not cohabit as husband and wife, they occupied different quarters in the house and slept in different beds, but it was found that they did continue to dine and visit together.³¹² This living arrangement continued in January 1819 when the pair moved into a different house - that was until the 14th June when the Marchioness left after her husband was again violent to her and the children were placed in the care of her mother. A day later, the Marquis filed a bill alleging that the information contained in the separation agreement of 1818 had been obtained by false representations and thus sought all the provisions to be declared void, but his action was dismissed. On the 3rd September 1822 the Marquis

³¹⁰ *ibid* 300

³¹¹ *Westmeath* (n306) 622-3

³¹² *Westmeath* (n306) 623

again petitioned for the deeds of 1817 and 1818 to be set aside as he alleged that both amounted to an agreement for future separation, and as the couple had continued to live together, they ought to be declared void. The Marchioness in turn pleaded for a separation on grounds of adultery and cruelty.

At the first trial, it was held that adultery and cruelty had not been proved and so such a separation was not permitted, although this judgment was reversed upon appeal on 29th January 1827. From this decision, Lord Westmeath then appealed. The result of which was a trial which lasted 5 days and culminated in the 1817 deed being declared void. Upon the question of the validity of the second deed, the court found that the cause should be retained for 12 months. Consequently, the case concerning the validity of the deed of 1818 was heard on 3rd April 1830 in House of Lords.

The court looked at the behaviour of the parties after the execution of the deed in order to determine the validity of its provisions. In returning a verdict, the Lord Chancellor, Lord Lyndhurst, found that ‘they dined together at the same table, they visited together, and travelled together; and although they might possibly not cohabit as husband and wife, they appeared to the world as living together as husband and wife’.³¹³ As a result, the provisions contained in the deed could not be realised as there had been no actual separation, given the living arrangements of the parties. Continuing to dine and visit together was in effect continuing the ‘marital duties’, as observed earlier, and

³¹³ *ibid* 628 (Lyndhurst LJ)

consequently the agreement was not immediate. A future separation agreement, such as this, was therefore void. The reasoning of the Earl of Eldon is more revealing as to the motivations of the court. Indeed, in holding that ‘the contract between husband and wife is of the most solemn and sacred nature’,³¹⁴ the court was confirming that the sanctity of marriage was not something which was to be invalidated lightly.

In *Westmeath*, the courts found that as the Marquis and Marchioness had continued to live together, effectively as husband and wife, this rendered the separation agreement akin to that of a future agreement and was thus void. With this, we again see the courts upholding the sanctity of marriage and thus protecting the fulfilment of marital duties. However, simply living together did not necessarily mean that the separation agreement was to be declared void, and as is common with these cases, each was to turn on its particular facts, and the courts would interpret this accordingly. Such was the case in *Bateman v Countess of Ross*,³¹⁵ which provides a neat contrast to the judgment of *Westmeath*.

Bateman concerned a separation agreement which had been executed in 1784 following the divorce of John Bateman and the Countess of Ross four years previously. At arbitration, maintenance was awarded to the Countess, but what is of foremost significance is the property and land which was also conveyed to her, provided that she

³¹⁴ *ibid* 629

³¹⁵ (1813) 1 Dow 235; 3 ER 684

and Bateman lived apart. In 1795 Bateman sought to have the award set aside, which was rejected, however the court did remove the attached injunction by which the Countess had obtained possession of the house and land. Upon hearing this, Bateman moved back into the property, located at Castle Gore in Ireland, at which point the Countess also returned in an attempt to protect her land. This resulted in the couple now residing in the same property, and so the Countess filed a bill in 1797 to restore the land to her, which was awarded. As a consequence, Bateman appealed, stating that as the two had been cohabiting, the prior agreement with regard to the payment of maintenance as well as the allocation of property ought to be declared void.

The matter was brought before the court on the 22nd March 1813. Lord Redesdale, in delivering his judgment, found in the alternative to the court in *Westmeath*, determining that it was not merely the form that ought to be examined but the substance of the renewed cohabitation. Accordingly, a distinction was drawn between cohabitation and reconciliation, the two not being mutual exclusive. In this case, although the parties had cohabited together, this had not been accompanied by any understanding between the two, and was in fact ‘not for the purpose of reconciliation, but to protect... property’.³¹⁶ The distinction can be drawn here between this case and that of *Westmeath*. The difference being that in the latter case, the parties had continued to live together, fulfilling all of their duties as husband and wife, and so to the outside world they appeared married, whereas here there was no apparent continuation of these martial duties, and

³¹⁶ *ibid* 687 (Eldon LJ)

as recognised by Lord Eldon, the parties instead cohabited ‘in a state of the highest animosity’.³¹⁷ As a result, the agreement for separation was upheld and Bateman was required to make an outstanding payment of £8333 11s. 9 1/2d to his ex-wife.

Lord Eldon in *Bateman* also stated just why a separation agreement accompanied by a subsequent reconciliation rendered the agreement void. His Lordship held that ‘this rested upon the ground of public policy; as it must not be permitted to parties to make agreements for themselves, to hold good whenever they chose to live separate’.³¹⁸ This is clear confirmation of that which was stated in *Westmeath*, that such contracts ought to be void on grounds of public policy. The law sought to protect marriage and uphold the sanctity of such, it was therefore not in-keeping with this notion that parties may enter into an agreement providing for their separation at some point in the future. This undermined marriage by effectively stating that the parties were prepared to accept that their marriage may not be for life; it must also be remembered that at this time the marriage ceremony which was conducted was that included in the Book of Common Prayer, which stated ‘for as long as ye both shall live’.³¹⁹ Marriage was a lifelong contract and thus making provisions for separation not only countered this belief but such an agreement also risked the couple not being as invested in their respective duties as husband and wife and thus undermining the social conditions of marriage.

³¹⁷ *ibid*

³¹⁸ *ibid*

³¹⁹ <http://justus.anglican.org/resources/bcp/1662/marriage.pdf> Accessed 25th September 2015

3.4 CONCLUSION

A key question posed at the beginning of this chapter was just why breach of promise actions were permitted whilst restraint of marriage contracts, as addressed in the previous chapter, were not. This question was particularly pertinent given that on the face of it, both of these classes of contract seemed to concern the promise of marriage to another. However, regarding restraint of marriage, as stated by Lord Mansfield in *Lowe v Peers*, refraining from marrying any other person did not necessitate that the defendant would marry the plaintiff³²⁰ and so the contract was one which purely restricted behaviour; such a restriction was accordingly contrary to public policy and therefore void. There was no actual promise of marriage to another party. On the other hand, an action for breach of promise was remedying a broken contract where a positive action – in other words, a promise of marriage – had occurred. This was the difference between these two classes of contract. Yet, it is clear that despite this difference, the motivation of the law was the same.

In both of these instances, the law was seeking to uphold the sanctity of marriage and thus invoked an agenda of protection. However, this protection extended beyond this purely legal concept, and indeed, for breach of promise, it was the damaged reputation of the jilted party that sought to be remedied by an award of damages. As has been noted, recognition of the social harm that had been caused was particularly important for women, who, as a consequence of both their legal and social status in the eighteenth

³²⁰ *Lowe* (n181 in ch 2) 2232

century, stood to lose future marriage prospects concurrently to their reputation. Likewise, in rendering restraint of marriage contracts as void, it was not simply the protection of the institution of marriage that was sought by the courts. Cases such as *Woodhouse v Shepley*³²¹ demonstrate that a contract which restrained marriage risked disrupting the correct allocation of family wealth, and so financial protection was also achieved in rendering these contracts void. Ultimately, it has been shown that whilst breach of promise actions were permitted and contracts in restraint of marriage were held to be void, the motivation of the law for both of these classes of contract was the same. It was merely that in order to invoke the protection interest for both the legal concept of the sanctity of marriage as well as for the social and financial consequences of these agreements, the nature of these respective contracts required the former to be permitted whilst the latter was declared void.

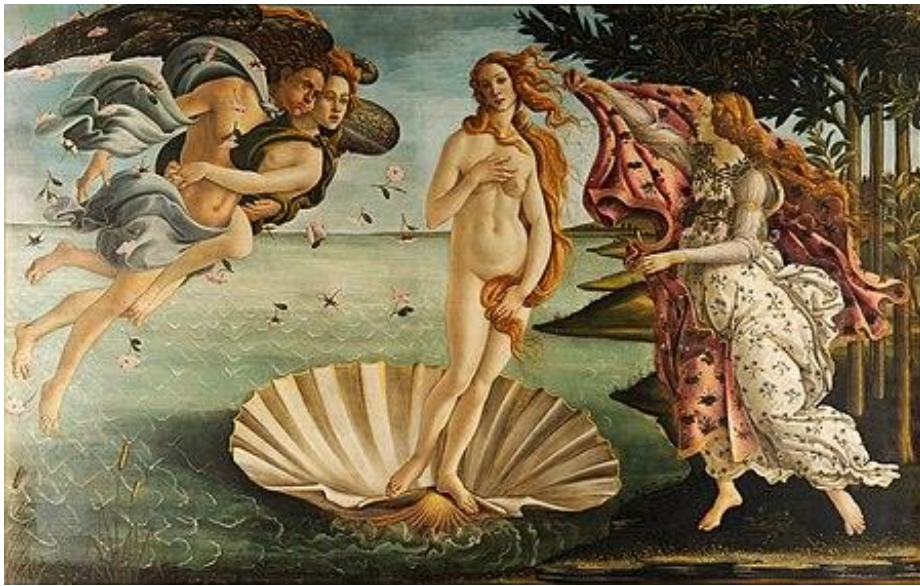
In relation to agreements for separation, it is clear that these were permitted in some circumstances; however, the agreement had to precede an immediate separation. Any contract which provided for a separation at some point in the future, such as that in *Cartwright v Cartwright*, was deemed to be void by the courts. The reasoning here was similar to that noted above regarding restraint of marriage contracts and breach of promise actions, notably that the law sought to protect marriage, but in particular with regard to separation agreements, the fulfilment of marital duties. This is further demonstrated in instances where the parties cohabited following a separation, as should

³²¹ *Woodhouse* (n196 in ch 2)

the parties live together in a state akin to husband and wife, as in *Westmeath v Westmeath*, this rendered any prior separation agreement void on the basis that the law was wary of allowing couples to effectively decide themselves when they fulfilled their marital obligations and when they did not. In finding these contracts to be void, the law was hoping to prevent couples from renegeing on their marital obligations. Consequently, it is clear that with regard to agreements for separation also, the law sought to invoke a protection interest by seeking to ensure that parties upheld their marital duties and thus subsequently the sanctity of marriage, which, as has been demonstrated, was held to be so important to an eighteenth century society which celebrated morality and the family unit.

Morality has been addressed briefly in this chapter with regard to eighteenth century notions of sex and parenting; the following chapter will examine this notion more closely by undertaking an analysis of those contracts rendered void for immorality.

Appendix 2: Sandro Botticelli, *The Birth of Venus* (1408)



Appendix 3: Allan Ramsay, *Lady in a Pink Silk Dress* (1762)



Appendix 4: Joshua Reynolds, *Jane Fleming* (1778)



Appendix 5: Joshua Reynolds, *Richard Crofts of West Harling, Norfolk* (1765)



Chapter Four

Immorality

4.1 INTRODUCTION

The frequency of the practice of prostitution in London in the long eighteenth century is particularly telling of social attitudes towards sex and personal relationships and the corresponding numerous accounts of the profession therefore make for a particularly insightful discussion of the contractual position of the women. The Oxford English Dictionary acknowledges that the concept of immorality is ‘now often used specifically of sexual impurity’.³²² This basis is only furthered when ‘prostitute’ is defined, this referring to persons ‘seeking personal gain or advantage by immoral or dishonourable means’.³²³ Evidently, it is not simply within legal terminology that we see the establishment of a link between immorality and the practice of prostitution. Yet despite institutional disapproval, during the long eighteenth century a vast section of society did not regard prostitution as a considerable problem at all, though the common phrase, ‘the most ancient profession in the world’, was in fact not coined by Rudyard Kipling until 1889.³²⁴ Rather conversely, it seems that the practice was something that was accepted as a necessary incidence, it being noted that landlords of public houses regularly permitted solicitation to occur on their premises, provided that it was not overt and did not attract the attention of the authorities.³²⁵ Clearly, there were economic gains to be made from

³²² <http://www.oed.com/view/Entry/91962> Accessed 7th October 2015

³²³ <http://www.oed.com/view/Entry/238447> Accessed 7th October 2015

³²⁴ R. Kipling, ‘On the City Wall’ in *Indian Tales*, (Lushina Publishing, Illinois: 2014)

³²⁵ G. Brewer & V. Bulloch, ‘Women, Pornography and Prostitution in Eighteenth Century Britain’, (2005) 9 *Sexuality and Culture* 14, 19

prostitution that were not simply for the women themselves. The lower class women who frequented taverns were not the only class of prostitute however and there were those, such as Kitty Fisher, who were courtesans, and who commonly accompanied upper class gentlemen and were represented in popular literature, such as Defoe's depiction of Moll Flanders. Yet despite this seeming acceptance that the practice was to occur, for those who did regard it as inherently depraved and therefore in need of some regulation, the general social consensus as the period progressed was that the women involved required assistance as opposed to harsh punishment.

Social remedies began in 1691 with the creation of the Society for the Reformation of Manners which sought, amongst other aims, to combat prostitution through religious teachings and the instigation of criminal proceedings against any person involved in the practice. The establishment of public stews and hospitals also further assisted in reforming the women involved in prostitution; these remedies will be discussed in greater depth in proceeding sections of this chapter. For now, what must be recognised is that as the long eighteenth century progressed, the social determination to solve the issues surrounding prostitution increased correspondingly with changes not only in who succeeded the throne and the religious changes therein, but also within politics. This became particularly prevalent with the growth of the 'middling class'³²⁶ and their desire to establish some sort of political recognition; solving the 'problem' of prostitution thus

³²⁶ The definition of which has been discussed extensively in the previous chapter

became a means by which to differentiate themselves politically from the debauched and immoral ruling classes,³²⁷ a concept which will be discussed shortly.

Determining exactly how, and to what extent, these social attitudes impacted upon the legal response to prostitution will be the objective of this chapter.

4.2 MORALITY AND THE ESTABLISHMENT

4.2.1 The War Against Vice

The beginning of the long eighteenth century saw William and Mary on the throne and under their rule Britain underwent a seismic shift towards becoming a moral state. The recognition of morality as something that ought to be instilled into the lifeblood of the country was not something that William ever explicitly initiated himself. Rather, it came about as a consequence of the Glorious Revolution which had seen Catholicism and all of its conceived shortcomings ousted and replaced with the more wholesome Protestantism, which William had come to represent in abundance to a country still reeling from Catholic rule under James II. The dominance of the Church of England – and the concurrent hatred of Catholicism – as discussed in greater detail in Chapter Two of this thesis, prompted this drive for the instilment of morality to be pursued by William; it was a direct juxtaposition to the ‘untrustworthy’³²⁸ Catholic state under James II. Given the actions of the previous monarch,³²⁹ the enactment of the Bill of Rights reduced the

³²⁷ N. Roberts, *Whores in History*, (Harper Collins, London: 1993) 164

³²⁸ Brown (n120 in ch 2) 623

³²⁹ The promotion of Catholicism through the appointment of Catholic officers in the army proved to be the catalyst to ignite Parliamentary dissent, James’ conversion to Catholicism was already a concern.

ability of the regent to interfere in parliamentary matters, but although the powers of the King were seemingly reduced in this way, the effect of the monarchy on social attitudes remained constant. Whilst regulating morality had been something that was also attempted years earlier under the Commonwealth, as we shall see in the enactment of the Adultery Act,³³⁰ a by-product of the religious change after 1688 was the start of the drive in popular opinion for a dramatic reform of the values and principles of England, the need to establish and justify just what it meant to 'be British.' Further extensive moral reform was one key step towards achieving this.

As early as 1690 William sought to invoke considerable reform, starting with the promotion of morality through the Church. In a letter addressed to the Lord Bishop of London, William encouraged the clergy to actively rally against acts of 'vice and sin', he stated:

We therefore require you to Order all the Clergy to Preach frequently against those particular Sins and Vices which are most prevailing in this Realm; And that on every of those Lords Days on which any such Sermon is to be Preach'd, they do also Read to their People such Statute-Law or Laws as are provided against that Vice or Sin³³¹

Invoking moral reform through the teachings of the church became emblematic to the reign of William, and this was only furthered when in the same year a Bill was drafted

This, alongside the appointment of Catholics in other senior roles, such as the judiciary, only widened the divide between the legislature and the monarch. By 1685, William was ruling without Parliament.

³³⁰ Full title: *An Act for suppressing the Detestable Sins of Incest, Adultery and Fornication*. Given the enactment of this legislation during the Commonwealth, no regnal citation is available

³³¹ W. Scott, *A Collection of Scarce and Valuable Tracts on the most Interesting and Entertaining Subjects*, (T. Cadell & W. Davies, London: 1813) 589

members of the clergy which aimed to explicitly counter immoral or sinful behaviour. Despite never actually making it into the statute book, *An Act for the More Effectual Restraining and Suppressing of Divers Notorious Sins and the Reformation of the Manners of the People* specifically addressed prostitution and provided that searches be undertaken to remove and punish as vagrants any prostitutes residing in parishes.³³² Throughout this period both the law and society reflected the notion that prostitution was best regulated by applying a particularly punitive control agenda. However, despite the punishment of prostitutes under the law as vagrants being something that was to continue, as we see the same definition evoked again more than one hundred years later under the Vagrancy Act,³³³ this was not with the same unwaveringly punitive attitude emblematic of the beginning of this period.

Although this drive for morality was symbolic of the reign of William, the means by which this was to be achieved were considerably less severe than those used by the previous Catholic monarch to prevent vice. In 1650 the Commonwealth had introduced the Adultery Act, which, although a few years before the time period for this thesis, has been included as a point of comparison to this new system of regulation under William. The Adultery Act not only made adultery a felony punishable by death, but with regard to prostitution, any person caught as a prostitute or keeping a brothel was to be 'openly whipped and set in the Pillory, and there marked with a hot Iron in the forehead with the Letter B and afterwards committed to Prison'³³⁴ for a period of three years. Despite the

³³² Dabhoiwala, (n271 in ch 3) 53

³³³ 5 Geo IV c83

³³⁴ Adultery Act (n330)

Act never being used in practice, and eventually repealed 10 years later at the restoration of the monarchy, it is illustrative of attitudes towards morality in this era which were seized upon to a greater extent following the accession of William to the throne. The failure of the Act, however, must have been something of which William was conscious in seeking new modes of regulating immorality, it would be important not to repeat the mistakes of the previous establishment.

This insistence on promoting virtue whilst punishing vice soon found its way into popular opinion. The Society for the Reformation of Manners was founded in 1691 and had at its heart a moral agenda. It sought to invoke this across London, with a key aim being the suppression of the practice of prostitution. Groups such as these were common across many industrial towns and cities in this period, but given the widespread nature of prostitution in the capital, London has been chosen as a classic example. Prosecutions were brought against women practicing as prostitutes and brothels were raided to punish all those involved in such an immoral occupation. Initially, Societies such as these garnered public support, such was popular feeling at the time in favour of the promotion of moral values; however, the fervour with which arrests were taking place soon turned popular opinion against them. This coincided with an increase in spurious claims which were a drain on the finances of the Society who themselves brought these actions. Support thus waned at the beginning of the eighteenth century, and as Dabhoiwala states, by 1730 'it had become...the general opinion that such matters were beyond the

reach of the criminal law'.³³⁵ Although the cause continued briefly in the creation of other groups later in the period, notably the Society for the Suppression of Vice, created in 1802 and headed by William Wilberforce, the popularity of the original Society never reignited; it wasn't long before it disappeared completely, subsumed instead into these new groups.

Public Stews

The concept of employing openly punitive measures to regulate prostitution was not an idea that was shared across society. Indeed, it was believed by some that controlling the practice of prostitution could be achieved through other means and with the succession of George I and the Hanoverian regime, we see a shift in attitudes, particularly towards sex and relationships. With this, social attitudes also became much more liberal than they had been under the rule of William and Mary at the beginning of the long eighteenth century, and even Anne following that. One rather radical proposal that exemplified this change was that advocated by Henry Mandeville in 1730, who, in his essay, *A Modest Defence of Publick Stews*,³³⁶ argued for the establishment of regulated houses wherein prostitution could be practiced legitimately. Mandeville's idea centred on the creation of houses across London where prostitutes could be accommodated, with a commissioner to oversee the affairs conducted there. These houses would be further divided according to class, to appeal to men from all sections of society. It must be acknowledged, however, that Mandeville himself did not support those who advocated the protection and

³³⁵ Dabhoiwala (n271 in ch 3) 54

³³⁶ B. Mandeville, *A Modest Defence of Public Stews; or, An Essay upon Whoring, as it is now practis'd in these Kingdoms*, (T. Read, London: 1730)

redemption of prostitutes, rather conversely, he saw them as a threat to civilised society, and so the creation of public stews was less about protecting the women themselves so much as controlling their movements in order to protect *society* from this immoral occupation.

The concept as envisaged by Mandeville was representative of the treatment of prostitutes by the law during this period. In seeking to rent premises, the law maintained the position throughout the long eighteenth century that should any room or building be leased to a prostitute, such a contract would be void, provided that the lessor was aware that the lessee was a prostitute, and further that prostitution was occurring there. This is illustrated in the judgment of Lord Kenyon in *Girardy v Richardson*,³³⁷ in which his Lordship held that under the circumstances of the case, the action was not maintainable, and as such the contract was void. This was based on the notion that the premises in question had been leased to a prostitute by the plaintiff, who knew of the profession of the woman, and also that she was conducting her business in the property. As a result of this knowledge of the lessor, an action to recover outstanding rent was not upheld, and verdict was returned for the defendant. Evidently, such a practice being ‘*contra bonos mores*’³³⁸ could not be upheld by the courts. Creating a regulated area in which a prostitute could reside was therefore beneficial from this legal perspective also.

³³⁷ (1793) 1 Esp. 13; 170 ER 265

³³⁸ *ibid* 265

However, the law was not as staunchly punitive towards prostitutes with regard to the leasing of premises as has perhaps been conceived. Simply leasing a room to a prostitute was not in itself sufficient to render a contract void; there was a duality to the rule which was confirmed in the later case of *Crisp v Churchill*.³³⁹ In *Crisp*, it was held that ‘those circumstances were no bar to the action’,³⁴⁰ this being where a room is simply being rented by a prostitute. What must further be shown is that ‘the lodging was let to the Defendant for the purposes of prostitution, and with a knowledge on the part of the Plaintiff of that fact’.³⁴¹ The law therefore did not embody a resolutely punitive attitude towards the women involved in prostitution, indeed, whilst the practice was in no way encouraged, it was recognised that the women ‘must have lodging’.³⁴² It would seem, therefore, that whilst the law wished to condemn the practice and to regulate against it, this was alongside some recognition that prostitution did occur, and the women involved were members of society who possessed the same needs with regard to accommodation and their sustenance. Mandeville’s concept of a public stew is in-keeping with the notion that as the practice was likely to continue regardless, the women involved in the profession should therefore have a safe and regulated environment.

Issues arose, however, when it was not known at the outset that a woman was a prostitute but these facts later came to the attention of the lessor; these were the circumstances in *Jennings v Throgmorton*³⁴³. In *Jennings*, a room was leased to Ms.

³³⁹ Quoted in *Lloyd v Johnson* (1798) 1 Bos & Pul 340; 126 ER 939

³⁴⁰ *ibid* 939

³⁴¹ *ibid* 939-40

³⁴² *ibid*

³⁴³ (1825) Ry & Mood 251

Throgmorton for her use. At the time of letting the room, the plaintiffs were not aware of Ms. Throgmorton's occupation as a prostitute, and they only came to know of this two months later. The plaintiffs continued to let the room despite this knowledge and so when an action was brought for the recovery of outstanding rent, the question was whether this could be recovered. Abbott CJ directed the jury that they were to consider two questions, the first being whether the room was originally leased for the purpose of prostitution, and the second question was that if the jury were satisfied that the plaintiff did not know of the prostitution when he began letting the premises, whether, upon being made aware of the practice occurring there, he continued to allow Ms. Throgmorton to reside regardless. If the jury were to find in the affirmative with respect to the second question, then the court held that the plaintiffs ought not to be entitled to recover the outstanding rent. Verdict was subsequently returned for Ms. Throgmorton. Evidently, mere knowledge of the prostitution occurring on the premises, regardless of when it was brought to the attention of the lessor, was sufficient to render a contract void. Simply renting a property as a prostitute was not enough; for the court to find a contract void, what must also be shown was that at some point, whether it was when the contract was entered into or sometime during its execution, this knowledge was brought to the mind of the lessor.

This attitude was affirmed in the case of *Appleton v Campbell*,³⁴⁴ in which it was held that knowing that a tenant is a prostitute is not sufficient, given that 'she may be a woman

³⁴⁴ (1826) 2 Car & P 347, 172 ER 157

of the town... [but] persons of that description must have a place to lay their heads'.³⁴⁵ Thus, a contract for the rent of premises was void but only if the lessor was aware that the premises were being rented to a prostitute and further that the prostitution was occurring there. The recognition that prostitutes ought, just like any other citizen, to have a place to rest, was endorsed from a legal perspective, however, given that the law continued to prohibit the rent of premises to a practicing prostitute, it is clear just why the concept of a public stew as evoked by Mandeville was felt to be necessary.

Mandeville went further than stating these stews would simply provide a means to regulate prostitution, however, he also explained the rather personal effect on a gentleman visiting a house, 'when a man has gained some experience by his commerce in the Stews he is able to form a pretty good comparative judgment of what he may expect from the highest gratification of love'.³⁴⁶ Mandeville suggested that by visiting a stew, this would in fact assist a gentleman in future courtships, as he would be aware of the features of a loving relationship –supposedly the opposite of what he would find in a public stew. On an even more personal level, Mandeville seemingly advocated his stews as being of benefit to the future spouses of the men also, who 'have framed themselves such high extravagant notions of the raptures they expect to possess in the marriage bed that they are mightly shocked at the disappointment'³⁴⁷ – regular visits to these houses would surely assist with that problem. Despite these perhaps exaggerated benefits of

³⁴⁵ *ibid* at 157

³⁴⁶ Mandeville (n336) 42

³⁴⁷ *ibid* 47

public stews,³⁴⁸ there was a rational basis to Mandeville's idea, that the establishment of these houses would take prostitution from the streets and give the women a regulate place in which to work. To those who argued that Mandeville was encouraging immoral behaviour, his response was that 'the public stews will not encourage men to be lewd, but they will encourage them to exercise their lewdness in a proper place, without disturbing the peace of society'.³⁴⁹ Such an idea undoubtedly had its advantages, and indeed, we see the same argument being used two hundred years later as to why prostitution should be legitimised in England, but in the eighteenth century, this idea did not appease those who wished to see prostitution eradicated completely. The solution advocated by Mandeville was never brought into effect; fortunately, however, the political landscape was soon to present a possible alternative solution.

4.2.2 The Political Agenda

The monarchy was not the only institution that underwent a transformation throughout the long eighteenth century, as the political economy of the country also shifted as increases in industry and the corresponding creation of new wealth simultaneously created a new class of citizen, the middling sort. A definition of this class of person has been stated earlier in this thesis, but it is important in relation to this chapter to recognise the role of the middling class in effecting social responses to prostitution, notably through their investment in politics and their desire to establish themselves as a reputable political force. The middling sort used the extensiveness of prostitution as grounding for

³⁴⁸ One only has to read the account of Mandeville to note the satirical theme throughout.

³⁴⁹ Mandeville (n336) 76

the promotion of their political campaign.³⁵⁰ For those who did wish to see the problem of prostitution solved once and for all, the middling sort offered a political remedy for this, and one which could also be used to promote their ascent up the political ladder.

Voting Qualification

It is no surprise that with an increase in the promotion of morality throughout this period, the emergence of the middling class, which grew alongside, would seize upon this to begin to establish themselves as a respectable political entity. Only during the reign of Queen Anne was a system of two-party politics established: the Tories, who typically received support from the landed classes, and the Whigs who represented emerging commercial interests. With a middling class who encapsulated these commercial interests, there suddenly became a means by which this class of person could have a voice in politics. One issue, however, was that the middling class did not yet have this political standing, only after 1832 did the franchise extend to the middling sort. It must be remembered that at this time, prior to the 1832 Reform Act, the voting qualification was particularly stringent. In the counties, the system was relatively straight-forward; any man³⁵¹ possessing freehold land worth 40 shillings or more secured a vote. In the boroughs, the situation was a lot more complicated as a consequence of the growth of these areas, and there were several ways in which a vote could be secured. Usually, these were reserved for those who had the requisite wealth, as there remained a qualification

³⁵⁰ Roberts (n327) 164

³⁵¹ Women, of course, did not have a vote until more than a hundred years later, in 1918

of land ownership. What must be understood is that prior to 1832 the voting qualification in the boroughs was complicated, out-dated, and undemocratic.

The consequence of this archaic system was that there existed a considerable section of society prior to the Reform Act whose voting right depended upon the classification of their resident³⁵² borough. Some boroughs were effectively in the hands of one MP and as such it is easy to see how these 'pocket boroughs' were undemocratic. In addition to this, as the voting system had not been reformed, there existed boroughs which still obtained the ability to return two MP's to Parliament, but whose population had long since dispersed. As there was no differentiation between boroughs of varying size, each still sent 2 MP's regardless. These 'rotten boroughs' presented an anomaly which somewhat reduced the efficiency of the political system. An example of this was the borough of Old Sarum, which in its final election in 1831 prior to being abolished under the reforms of the 1832 Act, had zero inhabitants but still continued to have an MP sitting in Parliament. Whilst there had been boundary changes as certain areas grew, this resulted in smaller boroughs still existing, and thus still returning the requisite number of Parliamentary members and therefore proportionally, there was an inherent unfairness. There also lacked a residency requirement attached to 'freeman boroughs' wherein all those who were freemen of the borough were entitled to vote. In a 'burgage borough' however, the right to vote was firmly dependent upon residing in a property known as a burgage plot; this was land which was owned by the king or a lord. By purchasing a burgage plot, the

³⁵² Usually, voting qualification was attached to residency, however as we shall see, in 'rotten' and 'freeman' boroughs this was not always the case

owner acquired a right to vote, however these tenements could be bought and sold easily, and therefore during elections burgage boroughs permitted the king or lord to secure a vote for whomever he so wished, simply by ensuring that his tenants voted in his favour. It is not difficult to see why these boroughs soon transformed into pocket boroughs, given the overt control exercised over the property by the landowner. Added to this, a more obscure voting qualification was given to those residing in 'potwalloper boroughs' whose right to vote depended on owning a fireplace which was large enough to be able to boil a pot of water, or 'wallop a pot'. Although it may seem that this franchise was merely a means of rendering the voting qualification dependent upon wealth and sufficient home ownership, despite common conceptions, a large number of those who we would deem to be the working class were able to secure a vote in this way.

Overall, however, the result of this haphazard system was that fewer than 4% of the population possessed voting rights in the period 1688-1832.³⁵³ Proportionality was evidently not the only shortcoming to this system as prior to 1832 the vast range of voting qualifications in the boroughs rendered the system confused and outdated, some reform to the franchise was long overdue.

³⁵³ P. Salmon, *Electoral Reform at Work*, (Boydell Press, Suffolk: 2002) 6

The Drive for Reform

The Representation of the People Act,³⁵⁴ commonly known as the Great Reform Act, achieved Royal Assent on 7th June 1832. Amongst other things, the Act removed rotten boroughs and reduced the number of MPs in some smaller towns, whilst also attempting to reinstate the balance by ensuring that larger towns returned two MPs. Its importance for this thesis, however, is that the Act also extended the franchise to include the middling class. Uniformity across all boroughs was also achieved; no longer was there a haphazard system across the boroughs, instead, one single voting qualification was installed, this being that the ability to vote rested upon a man residing in a property worth £10 a year. As Hunt has acknowledged that ‘most middling people had incomes between £50 and £2000’,³⁵⁵ it is clear that this extension would therefore incorporate this social class. Yet one perhaps unforeseen effect of the 1832 Act, and certainly one that is rarely cited by historians, is that as a consequence of the £10 property qualification a considerable number of those men who could vote prior to the Act lost this ability; according to Fisher ‘in almost two fifths of English boroughs the number of electors either fell or stayed the same’.³⁵⁶ This was especially the case in freeman boroughs, which had previously allowed those not resident in the borough to vote. One rather stark example which Fisher gives of this change is the borough of Maldon whose electorate fell dramatically after the passing of the 1832 Act, ‘by 79%’.³⁵⁷

³⁵⁴ 2 & 3 Will IV c45

³⁵⁵ Hunt (n30 in ch 1) 15

³⁵⁶ D.R. Fisher, *The History of Parliament. The House of Commons 1820-1832: Volume I*, (Cambridge University Press, Cambridge: 2009) 391

³⁵⁷ *ibid* 394

This is not to say that the reform that came about with the enactment of the 1832 Act was not also pursued by the landed classes who had their own motivations for wanting to widen the franchise to include the middling class. It was a widely held belief that the franchise ought to be extended only to those who could be trusted. It was not felt by those who already had the vote that the working class possessed sufficient intellect to determine who ought to run the country; the middling class, on the other hand, with their respectable occupations, did. 'Reform that you may preserve'³⁵⁸ was a phrase used by the Whig politician Thomas Macaulay in arguing why the 1832 Act should be enacted and is evidently based on the notion that by making small amendments to appease, those who gained a vote would be so grateful that they would not pose any further demands and the government would avoid revolution;³⁵⁹ in this way, the wealth and standing of the current landed classes would be preserved.³⁶⁰ Reaching this point, however, required the middling sort to establish themselves as a class to whom extending the franchise was necessary.

It has already been stated in previous chapters that in referring to the middling sort, this encapsulates the professions that were created as a consequence of the expansion of industry and commercialisation. These were persons such as artisans and civil servants, who were not as wealthy as the landed gentry, but not as poor as the working class³⁶¹

³⁵⁸ T. B. Macaulay, *Miscellaneous Writings and Speeches*, (Longmans, London: 1900) 26

³⁵⁹ The French Revolution of 1789 was still reeling in the minds of the ruling classes at this time

³⁶⁰ Although outside the scope of this thesis, Macaulay's reasoning actually produced the opposite effect; the franchise was widened again in 1867 as well as 1884, and further reforms to the voting procedure continued throughout the nineteenth century, notably in the enactment of the Secret Ballot Act in 1872.

³⁶¹ Hunt (n30 in ch 1) 39

and who formed the vast majority of reform groups which created the impetus for instigating political reform. The first of such groups was that of the London Corresponding Society, which was founded in 1792, but had outlets in various cities across England. The Society was created by John Frost and Thomas Hardy, both of whom were part of the middling class (Frost was a lawyer, whilst Hardy a shoemaker) and campaigned for the extension of the franchise. The Society was rather aggressive in the promotion of its cause, with the consequence that its founding members were tried for treason in 1794. Although they were found to be not guilty, with the passing of the Corresponding Societies Act in 1799,³⁶² the meeting of such groups became illegal and so the Society was forced to disband.

The fervour for reform did not desist, however, and one important group who petitioned passionately for reform leading up to the 1832 Act was the Birmingham Political Union, whose members were formed mostly of the middle class, as well as some working class men. The Union was significant in gaining popular support for political reform, with Thomas Attwood founding the movement and giving speeches rousing public opinion. To give an impression of the popularity of the cause, the first official meeting of the Union attracted between 12-15,000 people.³⁶³ The Union argued for the widening of the franchise and the removal of a property qualification, and as a consequence of its peaceful

³⁶² 39 Geo III c79

³⁶³ <http://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/chartists/case-study/the-right-to-vote/thomas-attwood-and-the-birmingham-political-union/birmingham-political-union/> Accessed 16th November 2015

methods, gained the respect of a growing number of the middle class. The Union separated after the passing of the Reform Act, only to re-emerge briefly in 1838.

Throughout this political growth, it is important to acknowledge the ideals of the middling class and consequently what their introduction into politics really meant for morality and the regulation of prostitution. By establishing themselves as a class who represented moral attributes, the middling sort were able to persuade the ruling class that they possessed sufficient standing to be able to exercise a vote correctly. By the time the 1832 Act was enacted, Wahrman acknowledges that “middle classness” ...was by now associated with domestic virtue...with social control; that is to say, with a morality which prescribed both public and private (or familial) behaviour’.³⁶⁴ The middling class had grown to embody morality and indeed, they formed a large proportion of those rallying against prostitution as far back as the Society for the Reformation of Manners. The dangers of not following this moral course of life were made all too aware to the middling classes through popular culture. Daniel Defoe was a prominent figure in the long eighteenth century who spoke out against vice, and in the novel *Roxana*, Defoe presents the downfall of a girl seduced into life as a courtesan for the aristocracy.

A considerable means by which the middling sort therefore sought to remove themselves from the ruling classes and establish themselves as a class in their own right was to distinguish their virtues from those of the nobility who had long been held as

³⁶⁴ D. Wahrman, *Imagining the Middle Class*, (Cambridge University Press, London: 1995) 378

embodiments of sin and vice. Samuel Wright, in a sermon in 1715 illustrates this concept by denoting ‘men of the highest condition and fashion in the world, supporting and encouraging...by living in the same vices’.³⁶⁵ Therefore not only were the middling class distinguished socially through their occupations and family life, as has been noted they were undoubtedly tied to commerce, but underpinning all of this was the notion of morality. Hunt recognises the ‘centrality of women and issues of sexuality to middling notions of corruption’;³⁶⁶ a corruption which, of course, was vowed to be removed by the inclusion of the middling sort within politics.

Ultimately, the effect of the 1832 Act in widening the franchise was the inclusion within politics, perhaps for the first time, of a group who embodied the concept of morality that had been so ardently promoted within society throughout this period. Although morality had achieved substantial support during the Commonwealth almost two hundred years previously, the effect of the 1832 Act was to monopolise on a resurgence in the drive for morality, which had been bolstered most considerably by the middling sort. This class now not only had a presence in influencing society through their encouragement of the establishment of social remedies to regulate prostitution, but their presence in Parliament now meant that they were to have a considerable say on it.

³⁶⁵ Hunt (n30 in ch 1) 199

³⁶⁶ *ibid* 202

4.3 MORALITY RECONSIDERED

Throughout the long eighteenth century there thus emerged considerable support for the promotion of morality not only as a social concept but one that was echoed in both politics and the law. The culmination of this was that a hallmark of the progression of this period was the increase in tolerance towards sexual relationships that accompanied the Hanoverian regime. Correspondingly with an increase in the concept of philanthropism also, attitudes towards prostitution began to change; this has been illustrated briefly in the proposal of public stews, but as this period progressed, liberal attitudes towards morality became much more widespread. This was, of course, the era of George II and his notorious extra-marital dalliances,³⁶⁷ yet whilst the proposals by Mandeville remained a little too radical even for the more progressive Georgian society; the notion that a prostitute required redemption as supposed to punishment took hold to an even greater extent. No longer was the control interest applied with the vigour that it had been at the beginning of the long eighteenth century which had seen prostitutes severely punished and instead remedies based upon their redemption took prominence. This is most greatly evidenced in the creation of hospitals which sought to assist the women affected by prostitution, most notably that of the Magdalen in London.

³⁶⁷ Most notably with Henrietta Howard, who had been appointed one of six Women of the Bedchamber to his wife, Caroline; but George had several mistresses throughout his reign. Indeed, upon the death of his wife in 1737 when she asked him to remarry, George is reported to have responded, 'no, I shall have mistresses instead'

4.3.1 The Magdalen Hospital

The Magdalen Hospital was founded in 1758 by Robert Dingley as a charitable organisation with the explicit purpose of aiding prostitutes. A key aim of the Magdalen was that it sought to redeem women who had fallen into prostitution as a consequence of destitution; entry was therefore to be determined by the position of the woman, the less time she had spent working as a prostitute, the more likely her admittance. It was felt that such women had a greater chance of redemption and therefore were given precedence over those who had spent many years working on the streets of London.

Whilst at the hospital, the main purpose was not to aid in physical recovery, in fact, this was not provided at all, and should a woman seek admittance to the Magdalen whilst pregnant or diseased, she was sent away and would only be admitted once she had given birth or was cured of her illness.³⁶⁸ A search in the Oxford English Dictionary reveals an alternative definition of 'hospital' to be a 'charitable institution for the housing and maintenance of the needy'.³⁶⁹ Given then that the Magdalen was foremost a charitable organisation, instead the women took practical training, such as needlework, and received religious teaching during their stay. Despite regimented days of work and education, this would have been preferable to most penitents than life on London's dangerous streets. The sermons conducted at the Magdalen were particularly passionate regarding the redemption of the women; one address given in 1777 recalled that, 'every

³⁶⁸ S. Nash, 'Prostitution and Charity: the Magdalen Hospital, a Case Study', (1984) 17 *Journal of Social History* 617, 618

³⁶⁹ <http://www.oed.com/view/Entry/88724> Accessed 28th October 2015

Christian grace is fled; and every Female Ornament is departed and gone, before they repair to this place of refuge'.³⁷⁰ Not only was it believed that strict religious education would ensure that the women followed a moral course of life, the sermons also clearly reinforced the benefits of the hospital; there is almost the sense in the addresses that the chaplain wished to make it known to the women that they were privileged in having been admitted. Whilst the Georgian era can be seen as more liberal, the influence of Christianity on society remained. Ultimately, it was hoped that the women would leave with a renewed virtue as a consequence of their religious training but would also be provided with the means to maintain themselves outside of the hospital by obtaining domestic work as a result of the practical skills which had been taught at the Magdalen.

This structure based on education and training seemed successful; the Magdalen moved to larger premises in 1769 and other institutions were established following the same model. However, by the end of eighteenth century, grounds for admittance to the hospital began to change as officials were more stringent with regard to the women who were permitted entry. Lloyd describes the change in policy of the Magdalen Hospital in the 1780's, which 'limited hope of recovery to those who had not yet become prostitutes and came closer to a belief that a "fallen" woman was beyond recovery',³⁷¹ this seems to conflict with the notion that such institutions sought to assist prostitutes and is very different to that which was advocated when the Hospital first opened only thirty years

³⁷⁰ S. Glasse, *A Sermon Preached in the Chapel of the Magdalen-Hospital*, (H Gardner, London: 1777) 18

³⁷¹ S. Lloyd, "'Pleasure's Golden Bait": Prostitution, Poverty and the Magdalen Hospital in Eighteenth-Century London', (1996) 41 *History Workshop Journal* 51, 64

prior. One possible reason for this change, however, could be the sheer number of prostitutes, which estimates for London in 1780 range anywhere from 3,000-40,000.³⁷²

What may be of assistance at this point is to take a slight aside to explore the background and stories of women who were successfully admitted. The fictional accounts contained in *Histories of Some of the Penitents of the Magdalen House*³⁷³ are one of the best sources we have on the sort of women who sought admittance to the Magdalen. Although fictional, these accounts were taken in 1760 and were published for a popular audience, it is therefore likely that they pandered to the sympathies of the public and informed opinion as to why the Magdalen was so valuable. Before such an exploration is undertaken, it must be acknowledged that the extent to which the novel presents an accurate depiction of the women is debatable; accounts are likely to have been exaggerated to present the women as pitiable figures, whilst the novel itself reads very much in support of the hospital, and so may have wished to ensure that it appeared indispensable. Thus a word of warning; though regardless of this, these stories do present a captivating picture of life as a working woman in eighteenth century London.

³⁷² J. White, *London in the Eighteenth Century: A Great and Monstrous Thing*, (Vintage, London:2013) 347 estimates a figure of around 3,000, whilst Colquhoun in his 1798 publication *A Treatise on the Police of the Metropolis* (Joseph Mawman, London: 1800) puts the figure at more like 40,000. Of course, Colquhoun included women that we would not typically deem to be prostitutes, such as those living with a partner unmarried.

³⁷³ Anon, *The Histories of Some of the Penitents in the Magdalen-House, as Supposed to be related by Themselves*, vol.'s 1 & 2, (P. Wilson & J. Potts, Dublin: 1760)

We are first introduced to Emily, who after the death of her father was sent to work for a landed family as domestic servant. Regrettably for Emily, the son of this family, Mr Markland, took a particular liking to her and she is soon installed in a separate house and kept as his mistress, where she gives birth to a son. This situation is not to last, however, as her lover soon finds employment overseas as a foreign ambassador and not long after his departure she is visited by bailiffs who demand payment for the rent and furniture, none of which, it transpires, has been paid for. Throughout this tale it is clear that the author does not wish to encourage such an immoral way of life, and there are constant references to the emotional state of Emily as being sad and forlorn, even whilst with her lover.³⁷⁴ The outcome of this terrible situation is that Emily is soon forced to take work in a brothel, as well as begging on the streets to attempt to sustain herself. It is during the former of these occupations that she is found and admitted to the hospital which was 'sought as a refuge from distress and misery'.³⁷⁵

A common theme throughout the accounts in *Histories* is the idea that the women have fallen into prostitution having been ruined by a man. Another story depicts a young girl who was married clandestinely at the Fleet Prison, a popular choice for those who wished to avoid the formalities of a traditional ceremony. It was this choice, however, that proved to be her downfall, as her husband, Mr Monkerton, soon claims the marriage to be void by virtue of the Marriage Act, which had made all marriages void which did not adhere to the traditional formalities. Our protagonist soon recovers from this, however, and goes

³⁷⁴ Cohabiting in such a way was, of course, something of a taboo in the eighteenth century

³⁷⁵ Anon (n373) 80

on to become engaged to another man, Mr Senwill. But this marriage does not come to pass, as we discover he has already promised to marry another. Mr Senwill agrees to send money for the maintenance of the young lady, although, in a cruel twist of fate – and perhaps too much of coincidence – this money is stolen. With nowhere to go and no employment, the girl has no choice but to admit herself into the hospital. Also common throughout these stories is the idea that the women are from upstanding families, we are told by this young lady that her father ‘was a very rich trader in a country town’,³⁷⁶ and it is only as a consequence of their bad choices and corruption by the opposite sex that they fall into prostitution. Equally, the women are all presented as being beautiful and graceful in their appearance and well-mannered – they are the epitome of an eighteenth century lady. All of this thus culminates to invoke sympathy from the reader, as well as affirming the importance of the Magdalen.

Of course, as has been mentioned, these stories are a fictionalisation, but it is likely that there is a semblance of truth to them adapted from the accounts of women who were actually admitted to the Magdalen. Whilst the accounts have been exaggerated here, they do go some way to inform of the background of the women who sought redemption in the hospital. Regardless of the truth behind these stories, they would have undoubtedly informed popular opinion as to the need for institutions such as the Magdalen and the value of redemption as a cure to the social ailment of prostitution. It is submitted that the purpose of *Histories* is potentially two-fold, that the book may have been published

³⁷⁶ *ibid* 81

as something of a fundraising initiative for the Hospital, with the stories included confirming the value of the hospital, or secondly, it may be that the stories merely wish to present a case for the women admitted so as to raise awareness of their cause.³⁷⁷ What is clear is that that the Magdalen wished to portray itself as a sanctuary for the women and *Histories* further suggests that the institution thus invoked a protection agenda to assist the women. However, despite the honourable intentions of the Magdalen in seeking to redeem the women, what has become clear is that fundamentally, such an institution only further provided for enhanced social control by seeking to keep prostitutes from the streets, as Nash argues, ‘the Magdalen was inherently a device for social control’.³⁷⁸ This contention is supported here, as it is argued that through the provision of education and training, which may on the surface appear to protect the women, the control of prostitution was achieved. Therefore, what we see is that whilst social attitudes towards prostitution could be seen as invoking an agenda based very much on protection, this was concerned more greatly with the protection of society as opposed to the women, against whom control interests remained exceedingly pertinent.

4.3.2 Social Acceptance

From the mid-eighteenth century, the concept of prostitution being something that ought to be severely punished was no longer pursued with the vigour that it had been a few decades earlier. The creation of institutions such as the Magdalen is illustrative of a

³⁷⁷ Enquiries to archives have failed to return any more definitive information regarding the purpose of *Histories*

³⁷⁸ Nash (n368) 624

Georgian era which was much more enlightened in its ideals concerning sex and intimate relationships; this is further demonstrated by the acceptance amongst society that sex was not something that was merely to be used for pro-creation. This is not to say that the Georgian's were sexually promiscuous or overly liberal, indeed, extra-marital sex remained shameful, but there was not the general feeling of prudishness towards intimate relationships that had accompanied the reign of both William and Anne. Prostitution was no longer to be confined to seedy taverns or back streets; whilst there remained a section of society who aimed to see the practice eradicated completely,³⁷⁹ it became something that was openly discussed.

An excellent example of this recognition is in the creation of *Harris' List of Covent Garden Ladies*. The pamphlet was created in the 1740's, and distributed from the Shakespeare's Head Tavern, but it was not until 1757 that the publication first reached a popular audience. The pamphlet, which can best be described as a directory of prostitutes, was sold for two shillings and sixpence, and items usually stated the physical description of the woman, as well as her location and rates. From what is stated in the pamphlet, it would seem that for a prostitute of the sort typically found in and around Covent Garden, the price could be as high as five guineas, although this could of course vary wildly depending upon the desirability of the woman, and was usually much lower. To give an impression of just what was included in *Harris' List*, the following is an excerpt taken

³⁷⁹ For instance, the Society for the Reformation of Manners was reborn under William Wilberforce, becoming the Society for the Suppression of Vice

from the 1773 edition of the publication, detailing a Miss Adams, who could be found by New Buildings, Marylebone:

This lady is really superior to the usual run of come-at-able women; her form is not only very enchanting, her countenance bewitching, and her very ringlets the toils of love; but even her understanding has a bent of a kind very different from prostitution³⁸⁰

Not all entries were positive, however, as Miss Urquhart, who could be found at the Jelly-Shops, was to discover:

This girl takes her name from a young fellow, a merchant's clerk, in the city, who thro' her extravagance was brought to the gallows; we wonder at his facination as she is a wretched piece altogether, a nasty, disagreeable... ill-made woman, without even one requisite or good quality; walks like a parrot and talks with all the cant of a Methodist preacher³⁸¹

Finally, whilst some, such as that above, were rather extravagant in their description, others were evidently more forthright – and brief; for one Polly Dixon of Brook Street, this was said:

A sturdy wench, with great breasts, good eyes, good teeth, always ready to oblige, and an extraordinary good bed-fellow³⁸²

The last pamphlet was published in 1793. This cessation in production was a consequence of the trial of John Roach and John Aitken; Mr Aitken was convicted of publishing *Harris' List* and was ordered to pay a £200 fine whilst Mr Roach was indicted under the same offence but was sentenced to one year in prison. The seriousness with which the law

³⁸⁰ J. Harris, *Harris' List of Covent Garden Ladies* (H. Ranger, London: 1773) 90

³⁸¹ *ibid* 66-7

³⁸² *ibid* 117

addressed immorality is evidenced not only in the punishments given to each of these men but also in the opinions of the presiding judges. Mr Justice Ashurst stated that ‘an offence of greater enormity could hardly be committed’,³⁸³ and in what is likely a reflection of social attitudes towards morality in this period, went on to make clear that ‘a care of the growing morals of the present generation ought to be uppermost in everyman’s heart’.³⁸⁴ Mr Justice Ashurst is referring here to the revival of moral reformers. The Proclamation Society was founded in 1787 and continued the work of the Society for the Reformation of Manners, but the immediate impetus behind the creation of the Proclamation Society at this particular time was the issuing of a Royal Proclamation by George III. The *Royal Proclamation for the Encouragement of Piety and Virtue and for the Preventing and Punishing of Vice and Profaneness and Immorality* was issued in 1787 and sought to suppress, amongst other things, the publication of obscene or immoral literature. The Proclamation Society was to merge into the Society for the Suppression of Vice under the guidance of William Wilberforce in 1802, but the drive for moral reform was clearly present in this period. It is argued that this is likely to have been as a consequence of the growth and seeming acceptance of immoral occupations such as prostitution. Whilst the law sought to suppress this, as we shall see, the weakening of traditional concepts of morality was to continue throughout the period.

One consequence of *Harris’ List*, however, was the promotion of the women included in it, to extents which even its creators could perhaps not envisage. One notable figure that

³⁸³ *The Times*, 10th February 1795

³⁸⁴ *ibid*

was included in the pamphlet and who went on to achieve considerable fame is that of Kitty Fisher, who also demonstrates perfectly the extent to which the Georgian era came to acknowledge prostitutes.

Kitty Fisher

A prostitute in the long eighteenth century could achieve fame and something of a celebrity status; this was exactly how Kitty Fisher became a well-known figure in eighteenth century London. Whilst this acceptance would seemingly indicate that the general attitude of the public towards such women was not one of particular disdain, it must be remembered that women such as Kitty were prostitutes who were well-dressed and who could hold themselves in a typically elegant Georgian way. Their exposure to an aristocratic world which had been achieved through soliciting gentlemen resulted in an ability to emulate the traits of this class, and thus their appearance reflected this. They were not seen as akin to lower class prostitutes who would beg on the streets, filthy, unkempt and lice-ridden – these women were a burden on society and were those towards whom social remedies such as public stews and the Magdalen were primarily aimed at saving. This is a very obvious class distinction which illustrates the disparity amongst those in this profession in the eighteenth century.

Kitty Fisher was one courtesan who mimicked what it was to be an aristocratic eighteenth century woman perfectly. Her elegant appearance and fashionable dress sense was achieved as a consequence of courting high class men, and subsequently earned her a

position as one of London's most famed characters, with renowned artist Joshua Reynolds painting her portrait on more than one occasion.³⁸⁵ The life of Kitty, being particularly glamorous for the age, has been recalled by several historians, with Maria Pointon producing a revealing compilation of the life of this high class courtesan as represented in art and publication.³⁸⁶ One satirical pamphlet depicted Kitty as having an entire nation fawning after her and men of all rank wishing to spend the night with her. In *The Adventures of the Celibrated Kitty Fisher*,³⁸⁷ we are told of an 'envied Kitty',³⁸⁸ who has men begging to pay to be with her. She is portrayed as having the entire city besotted with her charms, even for someone who we are reminded was not born with such wealth:

Look to her breeding, and you'll see,

Of common whores, as good as she³⁸⁹

Although reports of her early life are conflicting, some accounts recall her descending from a family of milliners, there is no certain information of her background or her life prior to being introduced to the London social scene. We do know, however, that Kitty was born Catherine Marie Fischer in 1741, and was acquainted with high society as a consequence her romantic involvement with Lieutenant General Anthony George Martin. It is commonly recalled that Kitty was carefree in her demeanour, but it is argued here that we are not to overlook the fact that behind this light-hearted persona was a girl

³⁸⁵ In fact, artists regularly used prostitutes as models during this period. Reynold's was a particular follower of this trend, painting portraits not only of Kitty but other notorious working women such as Nelly O'Brien and Mrs Abington

³⁸⁶ M. Pointon, 'The Lives of Kitty Fisher', (2004) 27 *British Journal for Eighteenth Century Studies* 77

³⁸⁷ Anon, *The Adventures of the Celibrated Miss Kitty Fisher* (London, 1760)

³⁸⁸ *ibid* 5

³⁸⁹ *ibid* 8

determined to rise. A courtesan who is able to increase her fame through associations with wealthy men is aware of the career path that she is choosing and it is submitted that Kitty was all too aware of her status, and how to make the most of her assets in order to achieve social recognition and the accompanying wealth.

This is only further evident in the ability of Kitty to manipulate the press for her own ends; after falling from a horse whilst riding through St James' Park, the popular press of course latched on to this, joking with remarks of a 'fallen woman' and the like. Yet this incident only served to increase Kitty's fame further; a print entitled *The Merry Accident* was produced, depicting the accident, with Kitty on the floor, skirts strewn in the air, whilst a poem, *On Kitty Fisher's Falling from her Horse*, also commemorated the event. Whether the accident was orchestrated is unclear; given the young courtesans ambitious nature, it would not be too unlikely to suggest this, but it is nonetheless remarkable how a prostitute could capture the attention of the public in such a way, especially when it is remembered that society at this time viewed women as innately inferior to men.

Whilst street walkers could expect little more than their fee for their services, high class courtesans such as Kitty were commonly given objects of great value in exchange for their company; a diamond ring and gold snuffbox are two items which were given to Kitty as a gift, but are indicative of what was expected by such women. The commonly recalled story is that of Kitty swallowing a banknote worth one hundred pounds in distaste at being presented with such a measly sum. Given that a banknote was not

synonymous with immediate payment during this period, and instead promised some future payment, it is easy to see why Kitty, a courtesan accustomed to receiving rather more valuable gifts, would not take this promissory note in good grace. Such a high standard of living had its shortcomings however, as it also depended upon the women maintaining themselves to this standard. Casanova, upon meeting Kitty in 1763, recalled of her that, 'she was magnificently dressed, and it is no exaggeration to say that she had on diamonds worth five hundred thousand francs',³⁹⁰ however, Casanova refused an invitation to spend the night with Kitty for ten guineas as a consequence of her only speaking English.³⁹¹ Given that the event with Kitty consuming a banknote occurred prior to this encounter, indeed, Casanova recalls being told of it,³⁹² it would thus appear that Kitty had ideas of herself that were perhaps beyond her true worth. It is submitted that the incident with the banknote is more likely to have been a demonstration of her disgust at the giver of the note or, as mentioned, as a result of her rather loftier notions of her social position, rather than the sum itself. Whilst wealthy gentleman could provide the means of achieving this high-class appearance, a quicker and more efficient way was for the women to simply contract for the items themselves. The law, however, was to provide an obstacle to the women seeking to promote their profession in this way.

The following section will discuss contracts for the facilitation of the trade of prostitution, which were void provided that certain elements could be established. Whilst control has

³⁹⁰ J. Casanova de Seingalt, *The Memoirs of Jacques Casanova de Seingalt* (Venetian Society, London: 1929) 124

³⁹¹ Casanova stated that 'I liked to have all my senses, including that of hearing, gratified'. French being the language he sought, being associated with high class and sexual pleasure.

³⁹² Casanova de Seingalt (n390)

until now been the overarching interest demonstrated in this chapter, it is within the proceeding section that the protection interest becomes more apparent; just who it was that the law *actually* succeeded in protecting, however, will be of greatest interest.

4.3.3 Facilitation of Trade

The sale of goods or the provision of services to a prostitute was not completely prohibited, but anything that was to be deemed to be facilitating trade, or in other words, anything which was likely to be used during the practicing of prostitution, was held to be void. It is therefore easy to see why courtesans such as Kitty relied so heavily upon men for their sustenance.

Similarly to contracts for the rent of premises, the courts imposed a two-part rule regarding when contracts which facilitated the trade of prostitution would be deemed to be void. This provided that such a contract would only be void on the basis that the seller knew that the buyer was a prostitute, and further, that the goods would likely to be used for that purpose. Immediately, we can see the similarity to the rule previously discussed in relation to the rent of premises, and this is no surprise, given that in formulating this rule in relation to the facilitation of trade, in *Bowry v Bennet*³⁹³ the court followed the case of *Smith v White*,³⁹⁴ which concerned a contract for the rent of premises. In *Bowry*, clothes were sold to a prostitute and when an action was brought to recover money owed

³⁹³ (1808) 1 Camp 348; 170 ER 981

³⁹⁴ (1865-66) LR 1 Eq 626 – This case was not discussed in the preceding section as it concerns the lease of premises to be used as a brothel

for the items Lord Ellenborough held that the sum was not recoverable. His Lordship stated the rule concerning these contracts, and the reason as to why the court was to deem them void, being that:

It must not only be shewn that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it³⁹⁵

The court thus reasoned that as payment was taken from the prostitute for the clothes, not only did the ability to supply this payment result from prostitution, the provision of these items indirectly supplemented the profession by allowing the woman to continue practicing her immoral trade. The outcome of this was that the entire contract was to be declared void. The case of *Williamson v Watts*³⁹⁶ also applied this rule in finding that silk stockings and 'other expensive articles of dress'³⁹⁷ were to be used for the purpose of prostitution, of which the seller was aware. The contract was in this instance also void.

There was an exception to this rule, however, as Lord Ellenborough in *Bowry* stated. His lordship added that in finding such a contract to be void, 'it was not to be considered of this description from the mere circumstance of the defendant being a prostitute'.³⁹⁸ Again, we see a similar caveat to that concerning contracts for the rent of premises; merely being a prostitute was not enough in itself to prohibit the renting of a room, nor was it sufficient to render a contract for the sale of goods as void. What must be shown

³⁹⁵ *Bowry* (n393) 981 (Ellenborough LJ)

³⁹⁶ (1808) 1 Camp 552; 170 ER 1054

³⁹⁷ *ibid*

³⁹⁸ *Bowry* (n393) 981 (Ellenborough LJ)

was that the seller was aware that the items were being sold to a prostitute, but also that they would be used for the furtherance of her trade. It is argued, however, that it is perhaps difficult to draw the line as to what would be considered by the courts to be an article of clothing used for prostitution and one purchased for everyday use. Evidently, the disparity would be much clearer should the woman be a lower class prostitute, we would expect that in these circumstances the garment would be more extravagant and expensive in comparison to her everyday wear. But with respect to a high class courtesan like Kitty, who likely possessed a great number of luxurious items for use both in her line of work as well as every day, it would surely have been of greater difficulty for the courts to determine with any certainty the ultimate purpose of the clothing.

This issue arose in the case of *Lloyd v Johnson*³⁹⁹ a decade earlier. In *Lloyd*, articles of clothing were sent by Johnson to the plaintiffs to be washed. Amongst this were 'expensive dresses' as well as 'gentlemen's night-caps'. At trial, a servant for Johnson appeared as a witness for the plaintiffs and swore that the items were worn by her mistress in public, and that the male items were from men who had spent the night with her. Despite this, Buller J refused to find this contract void on grounds of immorality. He found that 'this unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the Defendant to an improper purpose and which were not'.⁴⁰⁰ Clearly, the court was unable to determine with any certainty which items were used specifically for the facilitation of prostitution

³⁹⁹ (1798) 1 Bos & Pul 340; 126 ER 939

⁴⁰⁰ *ibid* 940

and which were merely articles for everyday use and so the contract could not be deemed to be void. But further, it was also acknowledged that prostitutes themselves must have access to the same washing facilities as other members of society and so in this judgment too we see another instance of the courts recognising that a prostitute was a citizen with the same needs as the rest of society.

Although in *Lloyd* the contract was found to be valid as it could not be determined with any great certainty which items were to be used for prostitution and which were not, in *Pearce v Brooks*,⁴⁰¹ the courts found this task much easier. In *Pearce*, Ms. Brooks hired the use of a brougham from the plaintiffs who were coach-makers. The court looked to the case of *Cannan v Bryce*⁴⁰² to address the issue of whether knowledge of the woman's trade was sufficient to render the contract void or whether this depended instead upon the coach-having been paid from the proceeds. In *Cannan*, money had been borrowed which was invested in an illegal 'stock-jobbing' venture. Abbott CJ found that the entire contract for the loan of the money to be void as a consequence of the illegal purpose and it was not necessary that the lenders were to have known of this. In applying this to *Pearce*, Pollock CB found that it was not necessary for the coach-makers to be paid from moneys earned as a result of prostitution, merely knowing of the prostitution and the purpose to which the coach was to be put was enough, the result of which would be that the contract ought to be declared void, 'if, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral

⁴⁰¹ (1866) LR 1 Ex 213

⁴⁰² (1819) 3 B & A 179; 106 ER 628

purposes, the plaintiffs can derive no cause of action from the bargain'.⁴⁰³ Pigott B agreed but further reasoned that 'if a woman, who is known to be a prostitute, wants an ornamental brougham, there can be very little doubt for what purpose she requires it'.⁴⁰⁴ The jury thus found the contract to be void, rendering Ms. Brooks free from having to pay for the hired brougham.

Cases such as *Pearce* are difficult to align with the overall incentive of the courts and their attitude towards immorality, as it is clear that the outcome of this case was more favourable to the prostitute. It is likely that the courts were attempting to dissuade persons from contracting with a prostitute, and thus further their trade, but it is submitted that the damage in *Pearce* had already been done; Ms. Brooks had obtained the benefit from the contract in that she had already had the use of it for her immoral purpose and so finding the contract to be void in this instance did little to stop prostitution from occurring. It is more likely that the courts found as they did in these cases as a warning to those who may contract with a prostitute in the future of the possible outcome of doing so. As far as this thesis is concerned, there is a clear control interest being applied against the women in the courts attempt to deter future contracts with them, yet can also be read conversely, in that the law was attempting to protect those with whom a prostitute may contract from obtaining a disbenefit from a contract that is held to be void. It is within this dual application that areas of contention arise.

⁴⁰³ *Pearce* (n401) 218

⁴⁰⁴ *ibid* 219

The issue comes when we assess just how far this protection interest extends in relation to the provision of goods to a prostitute. Evidently, in *Pearce* the law was attempting to protect the contracting party from losing out by entering into a contract which was deemed void for an immoral purpose. In *Lloyd*, however, the rationale is slightly different as the court was acknowledging that a prostitute had the same needs as other members of society but was simultaneously also holding the contract to be valid, thus rendering the woman liable to pay for the goods. In finding that such a contract was not void the court was ultimately holding the prostitute accountable by forcing her to pay for the goods. This accountability is for the benefit of the other contracting party, or if we take this wider, for the benefit of any person with whom a prostitute may contract. The protection interest is therefore evident here but this is firmly for the advantage of the public as opposed to the prostitute herself. Thus, it is submitted that for contracts for the facilitation of trade, both the protection and control interests are present but as has been shown by examining the cases, these are to be applied to the respective parties.

Ultimately, whilst women such as Kitty may have faced a slight obstacle in obtaining items of clothing and the like, the law also presented them with a possible solution.⁴⁰⁵ Only if it could be proved conclusively that the items were to be used for prostitution and that the seller was aware of this, would the contract be deemed to be void. Similarly to contracts for the rent of premises, a prostitute was not to be punished for merely seeking

⁴⁰⁵ Despite the law making it difficult for prostitutes to obtain clothing if it was likely to be used for their profession, there is no evidence to show that Kitty herself ever had any difficulty in purchasing clothes

to maintain herself in the same way as other persons in society; the law required that a substantial link be established between those things for which the woman was contracting and her profession. There thus remained some control applied by the law against these women, and this also resulted in some protection being afforded to the public to the detriment of the women, as in *Lloyd v Johnson*, but the social reality forced the judiciary to reach a compromise. The extent of prostitution did not allow for the resolutely punitive agenda invoked at the beginning of the period, and indeed it is doubtful as to whether society would have reacted kindly to such an approach, given the popularity of women such as Kitty and the disapproval shown against the methods used by groups such as the Society for the Reformation of Manners. The two-part rule therefore attempted to strike some sort of balance between regulating the practice of prostitution and adhering to social norms.

Despite the good fortune of these women as far as the law in this area was concerned, in that the courts were willing to overlook their profession to instead treat them as equal to any other person in society - provided that these items were not directly promoting their trade - the luck of these women was not to last. A common feature of the individual accounts of prostitutes is that none fared especially well in the end, which can of course be partly expected, these women had exposed themselves to all manner of diseases during their exploits, and had built a career based upon their looks, once these faded along with their health their downfall was usually imminent. This is the fate which befell Kitty. During her heyday, Kitty Fisher was one of the most well-known and famed London courtesans, however after marrying in 1766, she died only 4 months afterwards.

Whilst there is contention over the exact cause of her death – smallpox may have been a cause – poisoning caused by whitener containing lead which was used as makeup is one possible reason that has been suggested. If this is true, it would be ironic that the very thing that assisted in achieving Kitty’s success also contributed to her demise. Kitty was buried in Benenden, Bath on 23rd March 1767⁴⁰⁶ in her favourite ball gown; in what was perhaps a most fitting end for a milliner’s daughter who became one of London’s most glamorous courtesans.

4.4 A NEW AGENDA

Whilst the promotion of morality became a significant hallmark of the long eighteenth century, this was often at odds with the social reality; prostitutes such as Kitty Fisher continued to be a feature of London society, but not only this, there existed a corresponding movement of sexual liberation and freedom. As has been mentioned, no longer was prostitution confined to secrecy, and with the Hanoverian regime sexual autonomy became increasingly pertinent. This was represented in literature, notably in *120 Days of Sodom*⁴⁰⁷ which was published in 1785, which depicted, in horrific detail, sexual deviances, but also emulated an era in which traditional Christian values of sexual relationships centring on pro-creation were being eroded. This publication by the Marquis de Sade was thus something of a satirical representation; whilst the period had begun with William and the advancement of morality and adherence to sexual purity, as

⁴⁰⁶ Pointon (n386) 77

⁴⁰⁷ Marquis de Sade, *120 Days of Sodom*, translated by A Wainhouse and R. Seaver (Arrow, London: 1989)

the long eighteenth century progressed, not only do we see a move away from this, but there simultaneously emerged an opposing concept, what was perhaps the first sexual revolution.⁴⁰⁸

With the dominant religion of the country now returned to Protestantism as a consequence of the accession of William, it is no coincidence that from the eighteenth century onwards, with the growth of other branches of Protestantism, attitudes towards sex which had been promoted by orthodox Christian ideals began to collapse. This is not to say that the country underwent a dramatic shift in religious belief throughout the century but the various other facets of Christianity which emerged throughout the era went some way to weaken the traditional grasp of the Church on intimate relationships. These alternative branches of Christianity emerged as a result of one further outcome of the Glorious Revolution, the Toleration Act.⁴⁰⁹ Enacted in 1689, the Act stated that other branches of Christianity were permitted to practice free from interference provided that they swore an oath of allegiance; this applied to alternative limbs of Protestantism such as Nonconformists, but as mentioned earlier in this thesis, the legislature was careful not to extend this freedom to Catholicism. It was hoped that by extending religious freedom in this way albeit with an oath of allegiance, William could achieve a compromise and avoid the rebellion instigated against the previous monarch as a consequence of the adoption of a single-minded approach to religion.

⁴⁰⁸ Dabhoiwala provides an excellent account of this concept in *The Origins of Sex*, (Penguin Books, London: 2012)

⁴⁰⁹ 1 Will & Mary c18

Of these Nonconformists, the establishment of Quakers in the mid-seventeenth century coincided with a growth in Congregationalists, who believed that central regulation of religion was wrong, and instead spiritual autonomy was preferred. With these changes in the religious landscape there was not such a tie to the traditions of the Church as there had been earlier in the period and so social attitudes towards sexual relationships became much more progressive. Samuel Johnson encapsulated this change in 1750, by stating, 'every man should regulate his actions by his own conscience'.⁴¹⁰ There was thus a move away from a centralised notion of sexual purity and morality that had been so forcefully advocated by the Church of England, and instead the idea that sexual freedom was permissible took hold. Alongside this, social attitudes towards prostitution became much less punitive, as has been demonstrated in the social remedies which were advocated to regulate prostitution. In much the same way as was mentioned in the previous chapter, no longer were women viewed as inherently sexually deviant. After centuries of holding this belief, based on the notion that it was Eve who had seduced Adam in Eden, as the long eighteenth century progressed, the roles somewhat reversed; it was now men who were seen as being in constant pursuance of sexual gratification.

This shift was epitomised in literature by popular figures such as Casanova and the Earl of Rochester documenting their exploits not only with prostitutes but with women in general. Even the King was acknowledged to have kept a mistress and so the idea that

⁴¹⁰ S. Johnson, *The Rambler*, (J.J. Woodward, Philadelphia: 1827) 143

sex was not simply something to be saved for marriage became widespread. Perhaps one of the most notorious men was James Boswell, who recalled his associations with prostitutes in his journal. His familiarity with prostitutes is apparent in his entry of Saturday 4th December 1762, in which, during a walk through St James' park, a well-known haunt for working women, Boswell and his friend came across a young lady who offered her services. Boswell reports that 'there was one in a red cloak and a good buxom person and comely face whom I marked as a future piece, in case of exigency'.⁴¹¹ A short time after this Boswell obtains a mistress, Louisa, an actress in Covent Garden, however this romance is short-lived after he discovers her to have inflicted him with a venereal disease. The rest of the journal is sprinkled with meetings with prostitutes:

I sallied the Streets and just at the bottom of our own, I picked up a fresh agreeable young Girl called Alice Gibbs. We went down a lane to a snug place; and I took out my armour, but she begged that I might not put it on, as the sport was much pleasanter without it; and as she was quite safe. I was so rash as to trust her, and had a very agreeable congress⁴¹²

Unsurprisingly, Boswell was crippled with gonorrhoea throughout his life, and yet he garnered such a reputation from his associations with prostitutes that in a letter to a friend, it is recalled of his latest conquest, 'a whore worthy of Boswell'.⁴¹³ The attitude of Boswell was indicative of a large section of society at this time who felt that sexual relationships were resolutely personal; sex was a natural incidence of human nature and

⁴¹¹ F. A. Pottle, *Boswell's London Journal: 1762-1763*, (William Heinemann Ltd, London: 1951) 67

⁴¹² *ibid* 262

⁴¹³ F.A. Pottle, *James Boswell: The Earlier Years 1740-69*, (Heinemann, London: 1984) 335

prostitutes only aided in satisfying this innate male desire. It was thus also something in which the Church, and to an even greater extent, the law, had no right to be implicated.

It was not only in biographical literature that we see this attitude represented, whilst Defoe is most commonly cited as portraying immorality in his novels *Roxana* and *Moll Flanders*, the poetry of Rochester is most compelling in its illustration of sexual intimacy. The metaphysical poetry that dominated the previous century with its depictions of wholesome love was emulated in the poetry of Donne, but even this had allusions to eroticism. In *The Flea* Donne compares the act of a flea biting himself and his lover to the sexual intimacy that the pair has encountered:

It sucked me first, and now sucks thee,

And in this flea our two bloods mingled be⁴⁴⁴

Then in *To His Mistress Going to Bed* Donne describes his lover undressing and goes on to describe her body and their intimacy, 'license my roving hands'.⁴⁴⁵ By the long eighteenth century, these affixations with eroticism became a much more predominant theme, and we see an unequivocal recognition of extra-marital intimacy. John Wilmot, the Earl of Rochester, encapsulates this most significantly in his poem *A Ramble in St. James' Park*, in which he recalls an encounter with a prostitute in the most explicit detail. Whilst Rochester was renowned for his provocative style, his poetry is representative of

⁴⁴⁴ J. Donne, *The Flea* (1633), Lines 3-4

⁴⁴⁵ J. Donne, *To His Mistress Going to Bed* (1654), Line 25

an era in which the topic of sex, but what is more, actually openly discussing sex, became much more acceptable.

St James' Park was a common site for meeting working women, and Rochester recalls his disgust at the women soliciting there:

May your depraved appetite,

That could in whiffling fools delight,

Beget such frenzies in your mind

You may go mad for the north wind⁴¹⁶

Despite the abhorrence that Rochester displays towards these women, it is clear that the prostitutes are exceedingly popular and so we see in literature also an illustration of the way in which an acceptance of prostitution had found its way into mainstream society and simultaneously into intellectual thinking. Earlier in the period the miseries constituent upon prostitution and in pursuing an immoral course of life were made clear in literature as well as in art; Hogarth presented a pitiable chronology of a young girl seduced into a life of vice in *The Harlots Progress* – the full set of engravings have been annexed to this chapter (Appendix 6) – and Defoe's novels are explicitly critical of working women. However, what is further apparent is that by the end of the long eighteenth century no longer was the societal attitude towards sex one of upmost disgust or prudish suppression, instead sex was recognised as a natural occurrence of human nature and so it is argued that prostitution came to be seen as assisting in the fulfilment

⁴¹⁶ J. Wilmot, *A Ramble in St. James' Park* (1762), Lines 135-8

of that natural desire. Whilst this acceptance resulted in social remedies as opposed to harsh punishment being advocated by some as a means to regulate the profession, it also required the law to respond accordingly to such an extensive practice.

4.4.1 Vagrancy Act

Prostitution was wrong in the eyes of the law, but regulating this against the tide of sexual liberation and freedoms was an unenviable task. The law therefore had a choice; to control the practice with the vigour that had been attempted – and failed – earlier in the period with the harsh sentences initiated by the Society for the Reformation of Manners, or to adopt a new means of tackling the problem. The common law with regard to the rent of premises and facilitation of trade had already attempted this, with a recognition that prostitutes ought to be able to contract in the same way as any other citizen, provided that they were not doing so in an attempt to enhance their profession. It was not long before the legislature followed suit, in changing tact with regard to the statutory regulation of prostitution. This is most exemplified in the enactment of the Vagrancy Act in 1824.

The Vagrancy Act was not directed only at prostitutes; rather the Act covered a range of offences aimed at punishing those who were deemed to be a nuisance on the streets. Section 3 contained a provision relating to the punishment of a prostitute as an ‘idle and disorderly person’,⁴¹⁷ but this was only to be on the basis that she was ‘behaving in a

⁴¹⁷ Vagrancy Act (n333) section 3

riotous or indecent manner'.⁴¹⁸ Should a prostitute thus position herself in the street, without attracting any attention to herself – and remember, *Harris' List* had made the location of prostitutes much easier, and the sheer number of prostitutes working in London had made it relatively easy to spot a working woman anyway – it would thus be right to assume that she would not be considered to be doing anything unlawful under the 1824 Act. Therefore, similarly to that which was decided in *Bowry*, the law was only interested in punishing the prostitute herself should she engage in some positive act or behaviour, in this case it must be acting 'riotous' in public, or in *Bowry*, purchasing items explicitly for the promotion of her profession.

It would appear that the law was less concerned with the prostitute herself, so much as regulating the profession in general. Furthermore, it would seem that provided that the prostitute was not explicit in her intentions, the law was willing to overlook punishing her personally. This motivation based upon maintaining social order as opposed to invoking moral ideals is further evidenced when the wording of the Act is analysed. Indeed, nowhere is there any reference made to the immorality of the prostitute; instead, she is classed amongst other 'idle persons' and receives a mention which can be found between unlicensed street sellers and beggars. It would seem, therefore, that like landlords of public houses and the vast majority of society as mentioned earlier in this chapter, the law saw prostitution as a common, if unfortunate, incidence. Prostitution was to be controlled and regulated, but this was only the case where the explicit practice

⁴¹⁸ *ibid*

was occurring, and as far as punishing the woman herself was concerned, the law refrained from doing so unless it was absolutely necessary, such as had the woman drawn explicit attention to herself.

Indeed, this had been raised in a case more than a century earlier at a trial for three soldiers accused of murdering a policeman. There, Holt CJ remarked ‘must not a woman though she be lewd have the opportunity to walk quietly about the streets... a light woman hath a right of liberty as well as any other to walk about the streets’.⁴¹⁹ This earlier dictum reflects the attitude of the judiciary that although prostitution must be regulated, this was not to be with the unnecessary vigour that had begotten the downfall of those such as the Society for the Reformation of Manners. It was this less stringent attitude that was deemed the most appropriate and which ultimately made its way into the statute book in 1824 as an effective means of combatting prostitution. Only a few years prior to the long eighteenth century we saw the enactment of the Adultery Act and its incredibly punitive effect on prostitutes, the provisions included in the Vagrancy Act are indicative of a period in which prostitutes came to dominate the streets of London and sexual license became much freer. Whilst morality was brought to the fore, the ideal had to compete with the reality, and this resulted in a recognition that prostitution ought to be regulated, but the vigour with which this had been attempted earlier in the century was abandoned and replaced with a considerably less severe approach. The treatment of prostitutes within the Vagrancy Act epitomised this new agenda.

⁴¹⁹ Dabhoiwala (n271) 72

4.5 CONCLUSION

The beginning of the long eighteenth century signified a move away from Catholicism towards the re-adoption of Protestantism and with this change a moralistic agenda came to dominate social attitudes. This is most exemplified by movements such as the Society for the Reformation of Manners which sought to promote morality through harsh punishment aimed at prostitutes. With the accession of the Hanoverian regime, however, social norms regarding how best to regulate prostitution became much more progressive, as evidenced by the notion of public stews as advocated by Mandeville. It is argued that these were particularly necessary given the response of the law with regard to the rent of premises to a prostitute where such contracts were held to be void if the lessee was a practicing prostitute. Alongside this, however, was an acknowledgement that a prostitute was a citizen and should thus be treated as such as far as possible in the eyes of the law, hence the two-part rule which can also be found in cases concerning the facilitation of the trade of prostitution. This two-part rule which rendered a contract void only upon some knowledge by the other contracting party of the fact that the woman was a prostitute, as well as having to establish that the premises or the goods in question were to be specifically used for prostitution, was indicative of a change in social ideals concerning the practice. Indeed, as has been recognised, 'by the mid-century the notion of the prostitute as victim had become firmly entrenched, even in judicial circles'.⁴²⁰

⁴²⁰ *ibid* 156

However, it must also be recognised that within the facilitation of trade judgments there lay an inherent protection being afforded to the public, given that such contracts were to be void only upon satisfying both of the above criteria. Thus, was a contract to be valid or contain items some of which were to be used for prostitution and some not, the courts held the prostitute to be accountable to the agreement and the woman would be forced to pay for the goods. The same rationale is not used in the rent of premises cases given that although it could potentially have been used as a means to evict a prostitute from the premises, the cases concern the repayment of outstanding rent. Thus, rendering the contract void in these instances simply permitted the woman to withhold payment. The overlapping of the control and protection interests is significant in that it is submitted that these two agendas often do not occur in isolation and it is merely who they are applied to which differs.

The entrenchment of the idea that a prostitute could be seen as a victim was not simply apparent within the judiciary as the political landscape during this period also developed with the extension of the franchise following the Reform Act, as a result of which, the middle class were given the power to exercise a vote. It is significant that the middling sort aspired to differentiate themselves from the current ruling class by their adherence to a strict moral code, in fact, a good portion of the members of the Society for the Reformation of Manners derived from this class. As a consequence of the 1832 Act, this morally upstanding group in society were now given a say in politics and were thus given a means by which moral issues, and most specifically those pertaining to prostitution, could be brought to the fore.

The cumulative result of this change in both the monarchy and politics resulted in responses to prostitution centring more greatly on the redemption of the women. Whilst the Magdalen Hospital sought to redeem the women who had fallen victim to the profession, this was an institution that remained particularly religious in its teachings, and so it is clear that the dominant theme throughout this era has been the effect of religion on social remedies. Correspondingly with emerging redemptive social attitudes to prostitution was a partial acceptance of the women. As has been discussed, the judiciary came to view prostitution as something of an unfortunate incidence of society, and this was only echoed in popular culture with the creation of *Harris' List* and even extended so far as viewing high class courtesans such as Kitty Fisher as akin to a celebrity. This new agenda has been deemed the sexual revolution as a consequence of these liberal attitudes, and was reflected in literature, notably in the work of Rochester as well as receiving some critique by Defoe in his novels *Roxana* and *Moll Flanders*.

The influence of religion as the catalyst for this change is clear, and following the Toleration Act and the emergence of new modes of religion, the grasp of orthodox Protestantism on intimate relationships was loosened. This came to be reflected not only in society but in the response of the law, which becomes all the more evident when the provisions of the Vagrancy Act in 1824 are contrasted with those of the Adultery Act enacted in 1650. It is therefore argued that less severe modes of dealing with the problem of prostitution were borne from this change in social ideals, driven by changes in the monarchy and political landscape, but underpinned by religious belief.

Ultimately, by the end of the long eighteenth century, prostitutes came to be treated by the law in the same way as other citizens, provided that they refrained from explicitly practicing their profession. This is exemplified most significantly in the response of the law in relation to the rent of premises and the facilitation of trade cases. From putting adulterers to death at the beginning of the period, the law was now willing to overlook a prostitute in the provisions included in the Vagrancy Act, lest she should draw attention to herself, and society had even arrived at a point whereby prostitutes were positively celebrated, as evidenced by the fame of Kitty Fisher. The control interest embodied by the law towards prostitution still remained in the advent of this new legislation as well as the common law judgments; however, the social context in which this took place went some way to dilute the particularly punitive agenda invoked earlier in the period. Added to this, within the facilitation of trade cases most significantly, we see a law which, as well as controlling the practice of prostitution, also wished to protect society from such an immoral profession. Overall, the doctrine of immorality survived the social change away from viewing prostitution as resolutely sinful, but its application was hindered in practice by a judiciary who came to see prostitution as a mere incidence of society; simultaneously, the seducing harlot was replaced by the fallen woman and the control interest applied by the law was thus reduced accordingly.

Having addressed immorality, the thesis shall now turn to the legal treatment of women in the area of incapacity.

Appendix 6: W. Hogarth, *The Harlots Progress* (1733)

Plate 1



Plate 2



Plate 3



Plate 4



Plate 5



Plate 6



CHAPTER FIVE

Incapacity: Married Women and Widows

5.1 INTRODUCTION

Widow Blackacre in *The Plain Dealer* by William Wycherly observed that ‘matrimony to a woman is worse than excommunication in depriving her of the benefit of the law’.⁴²¹ It is true that in the long eighteenth century, upon marriage a woman lost her legal autonomy, and this was only regained should she outlive her husband. This chapter will explore the extent to which this contractual capacity was removed and whether the law in doing so sought to invoke control or protection interests.

The first section will form the majority of this chapter and will explore the contractual capacity of married women. A chronology of the life of a married woman will be charted and the legal issues at each stage will be presented and discussed. The section will begin by analysing the position of a woman immediately prior to marriage; the tradition of providing a dowry will be discussed here, and it will be shown that in this way, a woman maintained some leverage with regard to her future husband. Next, the chapter will explore the change in legal position of a woman upon marriage; notably her new status as a *feme covert* and what this meant for her ability to contract. The opposing argument will also be presented. It will be revealed that contrary to popular thought, the provision of pin-money, and later, jointure, allowed wives to retain an element of independence,

⁴²¹ W. Wycherly, *The Plain Dealer*, (1676) Act V Scene III

despite the legal consequences of coverture. Ultimately, this section will show that the belief that a married woman in the long eighteenth century lacked contractual capacity just does not hold true.

This theme will continue in the second section of this chapter, where common misconceptions surrounding widows and unmarried women will be dispelled. The legal position of a widow presented further issues, as these women were given contractual capacity upon the death of their husband. With regard to unmarried women, the picture is less clear. Although their legal rights were not subsumed into those of a husband, social norms dictated that these women had to remain in the family home until marriage. In this way, they did not possess the same legal independence as a widow as they continued to be financially dependent on another male, often a father or brother. A case study of Jane Austen will be presented, being a famous example of this. Ultimately, it will be shown that there was a juxtaposition between the social ideal of an eighteenth century woman and her actual legal position. Whilst legal doctrines such as coverture sought to quash any legal autonomy that a woman possessed, it is clear that in practice this was not the case. The image of a meek, subordinate female which is commonly attributed to an eighteenth century woman is an inaccurate depiction, whether she was married or not, and this chapter will aim to demonstrate that. Furthermore, the control that the law sought to exert over these women by removing their contractual capacity was limited in several ways and these will be explored throughout this chapter.

5.2 THE EIGHTEENTH CENTURY WOMAN

Although addressed in Chapter Three, before any discussion of the contractual capacity of women is undertaken, their role in eighteenth century society ought to be revisited. Conduct books from the period give us an idea of what was expected of a respectable woman at this time. Qualities such as meekness, modesty, and obedience were integral for any woman,⁴²² but advice was also given specifically, depending on the woman's status as a wife or a widow. Of a wife, it was expected that she was able to run the household, as stated in *The Lady's New Year's Gift*:

The Government of your House, Family and Children, which since it is the Province allotted to your Sex, and that the discharging it well, will for that reason be expected from you, if you either desert it out of Laziness, or manage it with want of skill, instead of a help you will be an Incumbrance to the Family where you are placed⁴²³

In *The Ladies Calling*, the author divided the position of a wife into two further roles, these being a mother and a mistress – mistress in this sense referring to the management of the home. Contractual responsibilities were also noted and it was warned that a wife must not 'waste and embezzle her husband's estate, but...confine...expences within such limits as that can easily admit'.⁴²⁴ We shall see later in this chapter how the law reinforced this social ideal through the doctrine of necessaries.

⁴²² R. Allestree, *The Ladies Calling* (1673), at [12] [14] [17]

⁴²³ G. Savile, *The Lady's New Year's Gift* (1688) 69

⁴²⁴ Allestree (n422) [18]

The social position of a wife in the long eighteenth century was supported by the legal definitions attributed to women at this time. A woman could be a *feme sole* or a *feme covert*. The nature of a *feme sole* meant that a woman was able to retain her legal autonomy, and so she was able to contract for items without reliance on a male. A *feme covert*, on the other hand, gained this position by way of marriage, upon which her legal rights became subsumed into those of her husband. The basis of this was rooted in religion and the dominance of the church on the marriage ceremony, specifically the notion that by marrying two persons became one. This is illustrated in the Book of Common Prayer from 1662, in which the Solemnisation of Matrimony contains the following words:

So ought men to love their wives as their own bodies; he that loveth his wife loveth himself: for no man ever yet hated his own flesh, but nourisheth and cherisheth it, even as the Lord the Church: for we are members of his body, of his flesh, and of his bones. For this cause shall a man leave his father and mother, and shall be joined unto his wife; and they two shall be one flesh⁴²⁵

This idea of 'one flesh'⁴²⁶ was reflected in the legal position of a woman as a *feme covert*, but the dominance of a husband over his wife is made clear in Corinthians in which it is stated, 'I want you to understand that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God'.⁴²⁷

⁴²⁵ Book of Common Prayer (1662), Solemnisation of Matrimony

⁴²⁶ *ibid*

⁴²⁷ 1 Corinthians 11:3

Despite the seeming legal disadvantage to being a wife, marriage continued to be the ultimate ambition for a woman in the long eighteenth century.⁴²⁸ This is further illustrated by the way in which unmarried women in literature at the time were usually presented as unhappy. Miss Bates in *Emma*⁴²⁹ seems always to be crying and, although slightly beyond the time period of this thesis, a literary discussion of unmarried women could not refrain from mentioning Miss Havisham, portrayed by Dickens in *Great Expectations*⁴³⁰ as perhaps the epitome of a pitiable spinster. Marriage, it seemed in the eighteenth century, was the key to happiness.

Widows did not fare any better as far as literature was concerned. At the beginning of the period, they were portrayed as lustful and sexual predators, notably the Duchess of Malfi in Webster's play of the same name⁴³¹ and Lady Booby in Henry Fielding's novel, *Joseph Andrews*⁴³² who tries to seduce the protagonist. One also cannot fail to spot the insinuation inherent in her name here. Later however – and it would not be too unlikely to suggest that as a result of the trend of sensibility in literature⁴³³ – widows are presented as more distressed and pitiable figures, examples being *Clara Lennox*⁴³⁴ in the novel by Margaret Lee and Mrs Jervis in *Moll Flanders*.⁴³⁵ This trend was also apparent in law, as by the start of the long eighteenth century, no longer was it deemed inevitable

⁴²⁸ I. H. Tague, 'Love, Honor, and Obedience: Fashionable Women and the Discourse of Marriage in the Early Eighteenth Century', (2001) 40 *Journal of British Studies* 76, 85

⁴²⁹ Austen (n221 in ch 3)

⁴³⁰ C. Dickens, *Great Expectations* (Chapman & Hill, London: 1861)

⁴³¹ J. Webster, *Duchess of Malfi* (1614)

⁴³² H. Fielding, *Joseph Andrews* (A Millar, London: 1742)

⁴³³ Addressed earlier, in Chapter Two of this thesis

⁴³⁴ M. Lee, *Clara Lennox* (J. Adlard, London: 1797)

⁴³⁵ Defoe (n32 in ch 1)

that a widow would remarry and indeed probate documents positively discouraged it, as Todd has acknowledged:

The wills of men in the mid-sixteenth century who referred to the possibility of remarriage make it clear that they viewed it calmly as a predictable, even desirable, event....after about 1570 an interesting change began to occur...rather than depending on the good offices of a future husband, these testators made certain that their wives should take none of their wealth into a new marriage by inserting a penalty withholding or reducing the wife's share of the estate if she remarried⁴³⁶

This view is echoed in *The Ladies Calling* in which a second marriage is deemed unnecessary, 'marriage is so great an adventure that once seems enough for the whole life'.⁴³⁷ A widow disrupted the natural order of things in that as a woman she maintained her contractual autonomy in a way that even an unmarried women did not. In this way she was an anomaly and so it is not surprising that she was portrayed in novels and the like as a figure of ridicule or fear. Carlton explains the propensity to depict widows in a negative light as being a consequence of this anomaly, 'men were afraid of widows because they did not fit into the age's concept of a hierarchical cosmic order. Being without a man to guide them they were, so to speak, a weak link in the great chain of being'.⁴³⁸ A widow held a different legal position, which did not accord with the social norms of a woman surrendering her independence to a male; she instead maintained this, and this difference was accentuated in the literature of the time.

⁴³⁶ B.J. Todd, 'The Remarrying Widow: A Stereotype Reconsidered', in M. Prior, *Women in English Society 1500-1800*, (Methuen, London: 1985) 72-3

⁴³⁷ Allestree (n422) [15]

⁴³⁸ C. Carlton, 'The Widow's Tale: Male Myths and Female Reality in 16th and 17th Century England', (1978) 10 *Albion* 118, 126

5.3 MARRIED WOMEN

With the social expectations of an eighteenth century woman in mind, this chapter will begin by analysing the contractual capacity of married women. The provision of a dowry will be discussed first, before the legal status of a married woman and the consequences of coverture for her ability to contract will be addressed. It is intended that by analysing the position of a woman immediately prior to marriage, this will give a fuller picture of the exchange that took place in anticipation of marriage that rendered her without contractual capacity as a wife. Finally, the section will explore the additional benefits obtained by a woman upon marriage, notably pin money and the payment of jointure upon the death of her husband. This will provide a preface for the second section of this chapter which will discuss widows and unmarried women.

5.3.1 Dowry

In the provision of a dowry the economic incentives attached to marriage are abundantly clear. A dowry was a monetary sum given to the family of the groom by that of the bride, and was intended to reflect her character and social standing. In return, the groom assigned a jointure to his wife, which provided for her upkeep upon his death – the legal significance of this will be discussed later in the chapter. There was, then, something of a trade-off. The family of a bride provided a dowry at the outset and in return the groom supported his wife financially throughout the marriage, was liable for her debts during marriage, and provided a jointure for her use upon his death. The size of the dowry was proportionate to the size of the jointure that would be available for the bride, and thus

marriage inevitably incorporated financial considerations. Historians have been quick to criticise the provision of a dowry as being degrading to women, Chan and Wright have stated that this tradition reduced a woman to ‘an “object” to be transferred’.⁴³⁹ However, when it is understood what a bride sought to gain in return for this initial financial gift, it becomes clear that she was not in such an unfortunate position, and rather conversely, the provision of a dowry gave the bride and her family an element of bargaining power.

Rather than demeaning, it is argued here that this actually gave a woman an element of leverage. In addition, what a woman sought to gain in marriage by way of financial security and the liability of her husband towards her expenditure, it is submitted, outweighed the drawback of having to provide a suitably large dowry. Thus, there were advantages to this system for both the family of the groom as well as that of the bride. The provision of a monetary sum to the estate of the groom ultimately increased its worth, whilst the jointure given to the bride provided for her future and any heirs. As well as this, in the same way as a husband could seek to advance his family through marriage, the family of a bride were also able to increase their social standing through the connection of their family name to that of a groom with sizeable wealth.

A dowry was not always a substantial sum, however, and this of course depended upon the social class of the family of the bride. Whilst those of the aristocracy could amount to

⁴³⁹ M. Chan and N. E. Wright, ‘Marriage, Identity and the pursuit of Property in Seventeenth Century England: The Cases of Anne Clifford and Elizabeth Wiseman’, in N.E. Wright, M.W. Ferguson & R.E. Buck, *Women, Property and the Letters of the Law in Early Modern England*, (University of Toronto Press, Toronto: 2004) 163

considerable sums – Lady Anne Clifford came to her marriage with a dowry of £17,000 in 1609⁴⁴⁰ – these tended to be around £1000 to £5000.⁴⁴¹ Below this, sums for daughters of the gentry ranged between £100 and £1000, whilst those of the ‘middling sort’ were typically between £100 and £500.⁴⁴² For those from the working class, it was not uncommon for a daughter from a poorer family to provide her own earnings as her portion.⁴⁴³ The importance of a dowry is noted in chapter three of this thesis, in reference to the story of St Nicholas of Myra who was said to have dropped three bags of gold through the window of a poor man to enable his daughters to marry and thus not become a burden on the parish– the same three bags used on the sign of a pawnbroker today. This tale dates back more than a thousand years, and so in the long eighteenth century, whilst romantic attraction became more popular following the rise of sensibility in the middle of the period, the predominant motivations for marriage remained financial as it was in this way that advancement could be assured.

Ultimately, a dowry assisted in this progression as it indicated the beginning of marriage and signified what a woman could bring to the union. The financial consequences which have been said to objectify the woman actually gave her the leverage to ensure her own advancement and in this way gave her and her family an element of control. When considering also what she sought to gain from marriage from her husband by way of security and the like, a dowry becomes a mere practicality on the road to achieving this.

⁴⁴⁰ A.L. Erickson, *Women and Property in Early Modern England*, (Routledge, London: 1995) 86

⁴⁴¹ *ibid*

⁴⁴² *ibid*

⁴⁴³ Erickson (n440) 85

A woman did not lose her autonomy in the traditions surrounding marriage; rather instead she was able manipulate these legal rules which on the surface appeared to constrain her contractual capacity, to her advantage. This is never more evident than during her marriage, in relation to the doctrine of coverture.

5.3.2 Coverture during Marriage

Where issues surrounding women's contractual capacity were really brought to the fore was after marriage, as it was then that the legal rights of a wife became subsumed into those of her husband. It was expected that until marriage a daughter would continue to live in the family home. In this way she did not have financial independence as she remained dependent upon her father or guardian, but the nature of being a wife and thus a *feme covert* meant that she surrendered any legal autonomy to her husband.

However, the lot of a wife was not as negative as has typically been envisaged. Although a woman lost her contractual capacity upon marriage, this did not prohibit her from contracting absolutely. To explain, although a woman could not enter into contracts in her own name, as these would be rendered void,⁴⁴⁴ she was able to pledge the credit of her husband to purchase items, as long as these were necessary for her, such as food and clothing.⁴⁴⁵ What was necessary was in accordance with the 'degree' of her husband, as

⁴⁴⁴ B. L. Oliver, *A Collection of Legal Tracts on Subjects of General Application in Business*, (Marsh, Capen & Lyon, Boston: 1831) 19

⁴⁴⁵ S. Staves, *Married Women's Separate Property in England 1600-1833*, (Harvard University Press, London: 1990) 131

stated in *Manby v Scott*,⁴⁴⁶ and so the wealthier the family, the more likely it was that extravagant items would be deemed to be necessary. In *Manby*, an action was brought by the plaintiffs, who were mercers⁴⁴⁷ in London, for the recovery of £90 owed to them by the wife of Edward Scott. Katherine Scott had contracted with the sellers for 'divers'⁴⁴⁸ wares and mercandize [*sic.*]⁴⁴⁹ on the 1st September 1658 and payment had yet to be received. In 1662, the case came before the court of the King's Bench who heard how, in 1646, Edward had issued a declaration forbidding the plaintiffs from dealing with his wife.

The question before the court was whether the outstanding sum ought to be recoverable by the plaintiffs, who contended that the items were necessary for Katherine and thus constituted a valid contract. The defendants argued that the plaintiffs were put on notice to prohibit any sale to Katherine regardless of whether it could be deemed to amount to a necessary item. Regarding whether the articles constituted necessities, Bridgman CJ was of the opinion that they most certainly were; he stated that 'silks and velvets are not unfit for a lady'.⁴⁵⁰ However, what was of greater concern to the court were the circumstances in which the sale had taken place. As the sellers had been put on adequate notice to refrain from dealing with Katherine, Bridgman CJ found that the contract was void. The voidability of this contract resulted from the lack of consent given by Edward to his wife as, 'the wife had neither a legal will, nor power to contract without her

⁴⁴⁶ (1672) O Bridg 229; 124 ER 561

⁴⁴⁷ A mercer was a seller of fabrics, usually of luxury quality, such as velvet and silk

⁴⁴⁸ 'Divers' meaning 'various types'

⁴⁴⁹ *Manby* (n446) 561

⁴⁵⁰ *ibid* 573 (Bridgman CJ)

husbands consent'.⁴⁵¹ Mr Justice Hyde agreed with this finding, he also held that 'the same wares were necessary for her, and suitable to the degree of her husband',⁴⁵² but as the husband had withdrawn his authority, the contract could not be upheld. It was reasoned that 'when the husband forbids a particular person to trust his wife, this prohibition is an absolute revocation... of the general authority which the wife had before'.⁴⁵³ As a result, the plaintiff's action for the recovery of the outstanding sum failed.

The judgment in *Manby v Scott* supports the proposition that in order for an item to be deemed necessary to a wife, this was to be judged in accordance with the state and degree of her husband. There was a presumption that any items deemed to be necessary to the wife or the household were purchased with the authority of the husband.⁴⁵⁴ However, *Manby* also demonstrates just how far the control of a wife by her husband extended, as should he withdraw his authority for any purchases, his wife was to be immediately 'disabled'⁴⁵⁵ from contracting and any subsequent contract would be declared void. It is this difference that renders the contractual capacity of a married woman different to that of an infant and it could be argued that her lot was worse. Whilst both lacked full contractual capacity, a contract with an infant for anything beyond necessities was only to be deemed voidable and not void *ab initio*. Indeed, the infant could choose to affirm the contract himself when he came of age. However, a husband could withdraw consent

⁴⁵¹ *ibid* 562 (Bridgman CJ)

⁴⁵² *The Argument of Mr Justice Hyde, in the Case of Manby v Scott* (1674) 1 Mod 124; 86 ER 781, 791 (Hyde J)

⁴⁵³ *ibid*

⁴⁵⁴ *Manby* (n446) 574

⁴⁵⁵ *ibid* 577

and order a complete prohibition on his wife's contracting, leaving her without recourse. Indeed, this distinction was addressed in *Manby* by Bridgman CJ. Although initially reducing the legal capacity of a married woman to that of a child:

A difference hath been endeavoured to be made between the necessities of a wife, and of a child...
I see no difference in reason: the man is bound by the law of God and men to maintain both wife and children⁴⁵⁶

His Lordship went on to emphasise four distinct differences.

1. The infant of the age of discretion is not a person disabled to contract as the wife is.
2. His actual contracts, if for unnecessaries, are but voidable.
3. He contracts for himself, and not for another.
4. He chargeth himself, and not another.⁴⁵⁷

In this way, in the judgment of *Manby v Scott* and indeed in all cases concerning the sale of goods to a married woman, the woman is reduced to an agent of her husband. Only with his authority could she contract and were this to be withdrawn, her contractual capacity was null. In the following chapter we shall see further explanation of how the legal status of a married woman and an infant were akin, in a discussion of the contractual capacity of an infant for necessaries.

⁴⁵⁶ *ibid* (Bridgman CJ)

⁴⁵⁷ *ibid* (Bridgman CJ)

Yet despite this lack of contractual autonomy, the lot of a wife could be used to her advantage, certainly given that her status was to be defined by the degree of her husband. Finn has recognised the possible manipulation inherent in this by wives who were ‘intent to wrestle generous maintenance settlements from husbands from whom they wished to separate’.⁴⁵⁸ As what was necessary to a wife depended on the status of her husband, the wealthier and the higher status of her husband, the more likely it was that more extravagant items would be deemed to be necessary, and thus, Finn contends, should the spouses separate, a higher maintenance payment would be awarded.

In addition to receiving beneficial maintenance payments from their husbands upon separation, the legal status of a married woman as an agent did not render her as disadvantaged as has commonly been thought and shopkeepers regularly contracted with wives beyond those items that were necessary. Despite the scorn with which such transactions by ‘haughty’⁴⁵⁹ wives were viewed by the judiciary in cases such as *Manby*, this was perfectly permissible should a husband be willing to pay for the goods, but issues arose when the outstanding debt was not paid, as shall be demonstrated in an analysis of the cases below.

Debts were able to accrue in this way as a result of the method of payment in this period. Unlike today where immediate payment is given for the purchase of goods, in the long

⁴⁵⁸ M. Finn, ‘Women, Consumption and Coverture in England 1760-1860’, (1996) 39 *The Historical Journal* 703, 710

⁴⁵⁹ *Manby* (n452) 786

eighteenth century items were commonly purchased on credit with the final bill to be settled at the end of the month or often much later, as decided by the parties themselves. Considering this, it is easy to see how a wife could accumulate large debts easily. This was the situation in *Etherington v Parrot*,⁴⁶⁰ in which Mr Parrot informed the sales boy of a pawnshop that his master ought not to trust his wife any longer and should refrain from allowing her to pawn items there. This came after his wife pawned clothes worth £7 for a mere £1 8s in order to buy alcohol. After Mr Parrot recovered his wife's items, she simply took the clothes and pawned them again and it was this that prompted the defendant in the case to seek to prohibit the shopkeeper from dealing with his wife in future. The case came about as this did not occur, and further dealings were made with Mrs Parrot, for which the shopkeeper demanded payment.

In delivering judgment, Holt CJ reminded the court of the doctrine of coverture, 'the wife has no power originally to charge her husband, but is absolutely under his power and government'.⁴⁶¹ This referred to the principle that a wife was only able to enter into such contracts with the permission of her husband, given that her legal rights were subsumed into his. Despite the husband warning only the sales boy and not the master himself, Holt CJ was of the opinion that this was sufficient notice, 'notice to the defendant's servant usually employed by him in his trade, [is] a good notice to his master the plaintiff; and he cannot charge the defendant'.⁴⁶² In applying this principle generally, his Lordship explained that 'if the husband have solemnly declared his dissent, that she shall not be

⁴⁶⁰ (1703) Salk 118; 92 ER 169

⁴⁶¹ *ibid* 169

⁴⁶² *ibid*

trusted, any person, that has notice of this dissent, trusts her at his peril after'.⁴⁶³ Consequently, Mr Parrot was not liable for the latest debts accrued by his wife as his warning to the sales boy was deemed to have put the master on sufficient notice to refrain from dealing in future with Mrs Parrot.

But what was to be done when no notice was given but the seller ought to have known that the goods could not possibly be authorised by the husband? These facts arose in the case of *Montague v Espinasse*.⁴⁶⁴ In *Montague* it was argued that items of jewellery were not necessary items for the wife of the defendant and thus he ought not to be liable for payment for them. A total debt of £83 6s was outstanding for items which included 'diamond rings, necklaces and bracelets'⁴⁶⁵ and in addition it was argued that the purchase had been made without the knowledge of the defendant. When it came to the question of whether the goods were necessary, the court reasoned that they were not, 'for if they had been so, she would have worn them',⁴⁶⁶ and furthermore Mrs Espinasse was already in possession of a number of similar pieces. Despite this, when determining whether the outstanding sum ought to be paid, Abbott CJ put it to the court that 'if tradesmen wish to run no risk on the question, whether the purchase is made by the authority of the husband or not, it is their duty, in all cases, where the order is large, to ask the husband, before the goods are supplied, whether the order was given by his

⁴⁶³ *ibid*

⁴⁶⁴ (1824) 1 Car & P 356; 171 ER 1229

⁴⁶⁵ *ibid* 1230

⁴⁶⁶ *ibid*

authority or not'.⁴⁶⁷ Although authority could be implied from the circumstances,⁴⁶⁸ to protect themselves it was suggested that explicit authority should be sought. In support of their argument the defence stated that staff of the plaintiff's shop only visited the home when Mr Espinasse was out. In addition to this, when the bill was delivered, the servant who took delivery was said to have commented, "how could Mr Montague trust my mistress so much? I am sure my master does not know it", to which the sales boy responded "we are quite aware of that".⁴⁶⁹ Despite this apparent admission, as the goods were not necessary items, the question as to whether the sale was authorised became somewhat redundant. As previously stated, a married woman could only contract for those items which were necessary or authorised by her husband, if they were not, as in this case, then the contract was void and the seller could not recover payment.

The two cases above are examples of coverture and the liabilities that a husband undertook as a consequence of the provision of a dowry from his wife prior to marriage. Thus, although a married woman lost her legal autonomy in name, she did not completely lose her contractual capacity in *practice* as she simply contracted under her husband's title. Any liability that was incurred by way of this was shouldered by her husband and so the idea that a woman was greatly disadvantaged by marriage, in the sense that she lost her ability to contract, simply does not align with the reality. The opposing side to this, however, was that the legal status of a wife rendered her

⁴⁶⁷ *ibid*

⁴⁶⁸ *ibid*

⁴⁶⁹ *ibid*

significantly reliant upon her husband, and should he fail to fulfil his obligations to her, it was notoriously difficult to prove neglect.

This is exemplified by the experience of Lady Mary Coke, who, after tiring of her husband's gambling and alcoholism, sought a separation.⁴⁷⁰ This in itself was scandalous at this time, but was further aggravated by the supposed behaviour of Lord Coke towards his wife. He was said to be controlling and to have subjected her to mistreatment. To add to these rumours, when asked to attend court, Lady Mary did so in a state of poor dress.⁴⁷¹ A divorce was sought by Lady Coke in November 1749 but this was refused and the actual divorce was not granted until her husband instigated the mediation and separation.⁴⁷² Divorce was not common in the eighteenth century and in combination with social attitudes towards women it is clear why it would be so difficult for a woman to institute proceedings. The humiliation for any petitioner was bad enough, but the practical reality of doing so as a woman made the process exceptionally difficult and near to impossible for those from the lower classes who lacked the financial support. What separation meant in terms of the continuation of coverture depended upon the circumstances. An adulterous woman who left the marital home was not able to continue to pledge her husband's credit, but could do so if she continued to reside with him.⁴⁷³ As explained by Holt CJ in *Robinson v Greinold*, 'though the wife be ever so lewd, yet while she cohabits with her husband he is bound to find her necessaries and pay for them, for he took her

⁴⁷⁰ *Letters and Journals of Lady Mary Coke*, 1 LXVIII

⁴⁷¹ *ibid*

⁴⁷² *ibid*

⁴⁷³ Finn (n458) 709

for better for worse'.⁴⁷⁴ Likewise, a wife who had been forced to leave the marital home as a result of cruelty on the part of her husband maintained the right to pledge his credit.⁴⁷⁵ It is thus evident why Lord Coke was eventually keen to seek a separation, with a stipulated payment to his wife, as opposed to being found to have caused her maltreatment with the consequence of her desertion and the possibility of her continuing to accrue debts in his name. There was a string of cases before the courts determining the operation of coverture and whether a wife maintained the right to pledge her husband's credit even after separation.

5.3.3 Coverture after Separation

One such case is *Corbett v Poelnitz*⁴⁷⁶ in which the validity of a bond was brought before the courts. Ann and Lord Percy separated and a maintenance payment of £1600 was secured on Ann for life as a consequence. After the separation, but before her divorce from Lord Percy, on the 29th November 1776 Ann entered into a bond of £1800 with Abraham Chambers. She was granted a divorce after this and went on to marry Baron Poelnitz in March 1780. On the 29th August 1780, £262 10s became payable to Abraham Chambers as a condition of the bond and an action was brought by him to recover this from Ann and her new husband. The question before the court was whether Ann was able to contract and thus bind herself in such a way having only separated from her husband. If it was found that coverture was maintained even after separation, the

⁴⁷⁴ (1704) 1 Salk 119; 91 ER 112

⁴⁷⁵ *ibid*

⁴⁷⁶ (1785) 1 Term Rep 4; 99 ER 940

contract would be void as Ann would not have been legally entitled to make such a contract in her husband's name. At court, great weight was given to the fact that a maintenance payment had been settled upon Ann and she had conducted her affairs as a single woman. Lord Mansfield alluded to this, stating that the question was

Whether a woman married, but living separate from her husband by agreement, having a large separate maintenance settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, shall be sued as a feme sole?⁴⁷⁷

He concluded that 'I think she should'.⁴⁷⁸ He further stated that 'where a woman has a separate estate, and acts and receives credit as a feme sole, she shall be liable as such'.⁴⁷⁹ Given that Ann had received a separate maintenance from her husband, which was intended to support her, and from which she entered into other contracts, it followed that this placed her in a position akin to that of a *feme sole*. Ashurst J agreed and reasoned that 'where a woman has a separate maintenance and the husband cannot be charged it follows naturally that she must'.⁴⁸⁰ Thus Ann and her new husband were liable for the payment to be made on the bond.

The question in *Todd v Stokes*⁴⁸¹ differed in that it concerned the duration of *time* that a husband could remain liable for the debts of his wife following separation. An action was brought for the recovery of a debt accrued as a result of the purchase of medicine from

⁴⁷⁷ *ibid* 943 (Mansfield LJ)

⁴⁷⁸ *ibid*

⁴⁷⁹ *ibid*

⁴⁸⁰ *ibid* (Ashurst J)

⁴⁸¹ (1699) 1 Ld Raym 44; 91 ER 1195

an apothecary. As stated earlier in this section,⁴⁸² this would amount to a necessary item and so was something for which a husband would be liable. The issue in the case, however, was that the husband and wife had been separated for five years, and maintenance had been paid to the wife during this time. As a consequence of these factors, Mr Stokes argued that he was not liable for the debts of his wife and additionally, their separation was well-known in the area and as such the apothecary ought to have known that his wife was no longer able to pledge his credit. The court agreed and explained that, 'if the wife had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessaries upon credit, the husband would have been liable'⁴⁸³ but since the separation was well known in the area 'for five years past it was enough to exempt the defendants wife from being capable to charge the defendant'.⁴⁸⁴ Mr Stokes was therefore not liable for the debt accrued by his wife.

It is thus clear that the operation of coverture continued even after separation, but this came with certain restrictions. For instance, the provision of a maintenance payment with the result that the wife was able to live effectively as a *feme sole* released both parties from the bonds of coverture. Yet a contract undertaken by a wife immediately following separation would continue to render a husband liable, until this separation became general knowledge. Instances of coverture being discharged completely include divorce (when a financial settlement would be given to the wife anyway) and upon separation

⁴⁸² Staves (n445) 131

⁴⁸³ Todd (n481) 1196

⁴⁸⁴ *ibid* 1195-6

when the wife was provided with a maintenance payment which enabled her to live effectively as a *feme sole*. So from this, it should be understood that there were benefits to a wife during marriage, such as her ability to contract but without liability on her part, as well as upon separation, where she obtained a financial settlement and was additionally able to contract as a *feme sole*. Thus, the control that the law sought to place on women, through their legal status as a *feme covert* was not strictly applied in practice. It is hoped that this section has dispelled some common misconceptions surrounding the lot of a wife in the long eighteenth century. It has been shown that there were advantages for a woman within marriage and the operation of coverture, and these should not be overlooked.

5.3.4 Pin-money and Jointure

The advantages inherent in marriage for a woman were not simply to be found in the manipulation of coverture. This section will address pin-money and jointure as a means by which married women could achieve an element of independence.

This chapter has focused upon marriage in the long eighteenth century as an economic exchange, and fundamentally, this was so. Whilst romantic love became important in the middle of the period, financial motivations remained, and securing an economically advantageous match continued to be prevalent. When speaking of the ‘trade-off’ that a woman undertook, it has been shown that the provision of a dowry and the subsequent marriage rendered a wife a *feme covert*, but this was in exchange for her husband shouldering the burden of debts that were to be accrued by her in his name. Additionally,

pin money was paid to a wife during her lifetime and a jointure payment was assigned to her upon the death of her husband.

It is in the payment of pin-money that we see a direct disruption of the control interests that were so inherent in the legal mechanisms surrounding marriage. Pin money was money paid to a wife throughout marriage, by her husband, for her own personal use. This could be for 'clothes, amusements, charities and such other out-of-pocket expenses'.⁴⁸⁵ Whilst coverture was overridden in *practice*, and did not place the woman at a considerable disadvantage, this legal mechanism was intended to control the woman as it placed assets and property into the hands of her husband. Pin money, on the other hand, ran directly counter to this control that the law had sought to place on women, as it gave them explicit autonomy outside of their husband's regulation. What is more, this payment was made by her husband, the one person for whom the control interests of the law sought to act in favour. This inconsistency explains why pin-money was deemed to be unacceptable by some commentators. A rather comical account was published in *The Spectator* in 1804 which includes the letter of a disgruntled husband and the response of a journalist to his qualms. The letter states that women were so concerned about the payment of pin-money and the financial benefits of marriage, that this superseded all other concerns, 'I could not bring her close with me before I had entered into a treaty with her longer than that of the grand alliance'.⁴⁸⁶ Upon providing his wife with £400 a year, which at this time was a considerable sum, and one which gives an idea of the class

⁴⁸⁵ Staves (n445) 132

⁴⁸⁶ J. Addison in *The Spectator*, in *Selections from the Spectator, Tatler, Guardian and Freeholder*, No. 295, vol. II (J. Johnson: London, 1804) 81

from which the author hailed, he goes on to state that 'finding me a little tardy in her last quarters payment, she threatens me every day to arrest me'.⁴⁸⁷

These primary sources provide considerable insight into how marital traditions were viewed by people at this time. Whilst we must bear in mind that the publication itself, *The Spectator*, was a great advocate of morality, it does assist in understanding what a certain section of society felt about the provision of pin-money. Given the exaggerated tone of the letter - indeed, it borders on satirical - it is the opinion of the current author that it is not a genuine account, but rather an instance of the publication trying to prove a point. Whilst the provision of pin money may have been a victory for the woman in securing some legal autonomy distinct from that of her husband, it is important to acknowledge that there were alternative perspectives to this, as advocated in the response to the letter. The publication replied, 'pin money is furnishing her with arms against himself and in a manner becoming accessory [sic.] to his own dishonour... separate purses between man and wife are in my opinion as unnatural as separate beds'.⁴⁸⁸ Not only did some see pin money as counter to the traditions of marriage, as in *The Spectator*, this point is only strengthened when it is acknowledged that pin money was paid in addition to the operation of coverture. It was thus perfectly possible for a man to shoulder the liabilities of his wife for necessaries as well as pay her an additional annuity for her own separate use. In placing this within the period, it is clear why *The Spectator* deemed pin money to be 'furnishing her with arms' as pin money

⁴⁸⁷ *ibid* 82

⁴⁸⁸ *ibid* 83-5

unintentionally risked giving the wife autonomy from her husband, and thus some contractual capacity. It also rendered a husband doubly liable to his wife; providing her with an allowance whilst also paying for debts accrued by her. This was recognised in the case law, as Lord Brougham in *Howard v Digby* noted:

It is... clear that no nobleman or person of however high and honourable degree, being in ever so wealthy circumstances, would ever dream of making an allowance to his wife for pin money, if he were at the same time to be paying all her bills year after year... over and above her pin money.⁴⁸⁹

It should be noted that pin money was not essential to marriage, but as we can see in *The Spectator* article, it was something that came to be expected. Pin money, like liabilities for debts, continued to be paid should the wife desert her husband as a consequence of his ill-treatment of her. Such was the situation in *Moore v Moore*⁴⁹⁰ in which £100 per year was given to a wife upon marriage in 1707. By 1728, the wife resided in France and an action was brought for arrears of the annuity, to which her husband responded that as she had broken her marriage rights by leaving him, she had no action. The court made it clear that pin money was not to encourage a wife to leave her husband as such an interpretation 'would destroy the very end of the marriage contract and be a public detriment'.⁴⁹¹ It went on to state that where criminal misconduct had occurred on the part of the wife, separate maintenance was irrecoverable, but such a thing had not happened here. In concluding, the court held that as the husband had continued to pay

⁴⁸⁹ (1834) 2 Cl & Fin 634; 6 ER 1293, 635

⁴⁹⁰ (1737) 1 Atk 273

⁴⁹¹ *ibid* 276

the annuity for six months following his wife's desertion, 'this is a strong presumption that he thought at least she was excusable in separating herself from him'⁴⁹² and so the arrears were payable. Clearly, pin money was another way in which a woman could benefit from marriage and this assists in countering the idea that a woman was greatly disadvantaged as a wife. The control interests that were applied by the law were circumvented by the manipulation of coverture, as has been mentioned, and this circumvention was only furthered in the payment of pin money which granted explicit autonomy to a wife.

Jointure

Jointure, on the other hand, was a payment made to a wife after the death of her husband. There were two ways that jointure could be assigned to a wife. The first was prior to marriage, where a husband settled property on his wife for her use after death, this was usually in proportion to the dowry that was provided and is a further example of the financial gains each side sought to make from the union. The second way, however, can be seen as less advantageous to a wife. It was possible to settle a jointure after marriage but a wife was not to receive both her jointure as well as any other money that was settled on her by her husband prior to the union. This was laid down by the Statute of Uses⁴⁹³. The potential to exploit this system, however, having entered marriage and secured a jointure payment, was acknowledged in the literature of the time. Writing in *Tatler* in

⁴⁹² *ibid* 277

⁴⁹³ 27 Hen 8 c10

1710, Sir Richard Steele made explicit reference to ‘jointures and settlements’,⁴⁹⁴ as being ‘the frequent causes of distrust and animosity’.⁴⁹⁵ However, given the widespread nature of the practice, securing a jointure was as commonplace as providing a dowry in relation to the traditions surrounding marriage.

The prominence of this and the familiarity of marriage settlements in society are apparent in fiction during this period. For instance, in Samuel Richardson’s *Pamela*,⁴⁹⁶ published in 1740, a great number of pages are devoted to a discussion of what financial settlement is to be made on either side, after Pamela finally succeeds in taming the ruthless Mr B. and secures her marriage to him. What is interesting is that conduct manuals⁴⁹⁷ contributed to a considerable amount of the work undertaken by Richardson both prior to and following the publication of *Pamela*. At this time, of course, the book was not published as a single entire volume but was released periodically – much to the disappointment of those eager to read the next instalment, such was the popularity of Richardson’s debut novel. To give an impression of the reception of *Pamela*, Knight recalls the following anecdote:

The blacksmith of the village had got hold of Richardson's novel of Pamela... and used to read it aloud in the long summer evenings, seated on his anvil, and never failed to have a large and attentive audience.... At length, when the happy turn of fortune arrived, which brings the hero

⁴⁹⁴ R. Steele in *Tatler*, No.223, Tuesday 12th September 1710, 239

⁴⁹⁵ *ibid*

⁴⁹⁶ Richardson (n165 in ch 2)

⁴⁹⁷ Notably *The Apprentice's Vade Mecum* (J. Rivington, London: 1734) and *Letters Written to and for Particular Friends: on the Most Important Occasions* (J. Rivington, London: 1741)

and heroine together, and sets them living long and happily... the congregation were so delighted as to raise a great shout, and procuring the church keys, actually set the parish bells ringing⁴⁹⁸

This assists an exploration of the capacity of women as it gives an idea of exactly what literature people at the time were being exposed to. Pamela and Mr. B go to great lengths to cumulatively enter into a settlement that is pleasing to both parties and this imitates something that was common practice at the time. The submissiveness but resilience of Pamela is a reflection of a novel written by an author of conduct manuals, and is certainly in keeping with what would be expected of a woman at this time.⁴⁹⁹ But whilst the outcome may have been something of a fairy-tale and out of reach for most women, as Pamela marries above her class, the practicalities and the motions followed prior to the marriage were exactly those which couples were doing in reality. What we are left with, then, is a picture that presents a much more favourable position for a married woman.

This section has sought to analyse the contractual capacity of a married woman. It has been shown that although she lost her legal autonomy under the doctrine of coverture, in practice she retained her capacity to contract. The only real issue that arose with this would be when the debt was not paid, or the husband refused to honour her purchases. Although a dowry was required to be paid to the family of the husband prior to marriage, it would seem that the trade-off that has been spoken of was particularly advantageous to a woman, especially when taking into consideration the other settlements that she

⁴⁹⁸ C. Knight, *Charles Knight's Popular History of England*, Vol. VII (Bradbury, Evans & Co., London: 1814) 87

⁴⁹⁹ See Allestree (n422) and Saville, *The Lady's New Year's Gift* (n423) regarding conduct manuals for women

could potentially receive. Pin money and jointure were given to a married woman in addition to her husband shouldering the burden of the debts that his wife may accrue. It is clear that a woman had much to gain from marriage, as did her family in securing social advancement, however, ultimately, whilst on paper a woman lost her contractual capacity upon marriage it is hoped that this section has demonstrated that this in practice was not the case, and in combination with other legal settlements that were available to her, the lot of a married woman was not as unfortunate as has been envisaged. The control that the law intended to apply to women by reducing their legal status to akin to that of an infant did not actually hinder their legal status to such a great extent as has been typically attributed by academics.⁵⁰⁰ Furthermore, should she outlive her husband, not only would she benefit from the jointure payment, but she would regain her contractual autonomy. The reasons for this, and what this meant for a woman, are discussed in the following section.

5.4 WIDOWS AND UNMARRIED WOMEN

A widow held a curious position in contract law. As a married woman, her contractual capacity had been subsumed into that of her husband, but upon his death she suddenly regained this capacity as a *feme sole*. This meant that as a widow, a woman was able to maintain ownership of land, deal with property, and contract freely. This legal status

⁵⁰⁰ See S. Staves, *Married Women's Separate Property in England 1600-1833*, (Harvard University Press, London: 1990), C. Carlton, 'The Widow's Tale: Male Myths and Female Reality in 16th and 17th Century England', (1978) 10 *Albion* 118, and M. Prior, *Women in English Society 1500-1800*, (Methuen, London: 1985)

gave her a unique position and one which saw a widow presented as a figure of ridicule and fear in literature of the time, as discussed earlier in this chapter.

The legal autonomy of a widow began soon after the death of her husband, as she was usually appointed his executrix,⁵⁰¹ and, should her husband die without leaving a will, a wife was automatically entitled to a proportion of his estate.⁵⁰² Beyond this, however, a widow was then free to contract as she wished and it is argued that in this way, she disrupted the control that the law was seeking to place on women. As Todd has recognised, 'a married woman was legally and personally subject to her husband. A widow was free from such control. Even if she was poor, she was her own woman and could run her life as she saw fit'.⁵⁰³ Throughout her life, a woman was subjected to an element of control by men, and this control was reinforced by the law, by removing her legal capacity. As a single girl, she was under the guardianship of a father or male relative who ran the household, and then as a married woman she effectively became the property of her husband. Suddenly upon widowhood, a woman was presented with complete contractual and legal autonomy often for the first time in her life. This disrupted the social norm of a submissive, obedient female, and so it is understandable why authors and playwrights presented these women in an unfavourable light.

⁵⁰¹ Erickson, (n440) 156

⁵⁰² *ibid* 170

⁵⁰³ Todd (n436) 55

Of course, these literary depictions were not entirely accurate. When Lady Mary Coke,⁵⁰⁴ although separated, outlived her husband, she was entitled to a considerable jointure, lived the rest of her life in her own estate, and never remarried. Whilst a wealthy widow was a lure for men, the women themselves were all too aware of the potential for a new husband to squander their estate and so often did not remarry at all. Katherine Austen, a widow from Abingdon, stated of her decision to remain unmarried, 'if my children should find lose [sic] in their estates, by God's blessing [I] should be able to make a supply to them... which I could never do by ingaiging [sic.] myself away from them'.⁵⁰⁵ Those who did enter into another marriage often placed their property on trust, to protect it from their future husband.

An unmarried woman, on the other hand, did not possess this contractual autonomy to the same extent. As has been demonstrated, in the long eighteenth century social norms dictated that a woman ought to marry. However, contrary to this, Erickson notes that 'the proportion of the population never marrying fluctuated between 10% and over 20%'.⁵⁰⁶ Of course this takes into account unmarried males too, but when we compare this to 1970, in which 5% remained unmarried, the difference is clear. Wrigley estimated the population of England to be 11.5 million in 1821,⁵⁰⁷ whilst the Office for National Statistics estimates that the population size in 1971 was 46,411,700.⁵⁰⁸ Thus, whilst the

⁵⁰⁴ *Letters and Journals of Lady Mary Coke*, 1 LXVIII (n470)

⁵⁰⁵ Todd (n436) 77

⁵⁰⁶ Erickson (n440) 48

⁵⁰⁷ E.A. Wrigley, 'The Growth of Population in Eighteenth Century England: A Conundrum Resolved' (1983) 98 *Past and Present* 121, 122

⁵⁰⁸ <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/enpop/pop> Accessed 14th October 2017

figure for unmarried persons was only 5% fewer in 1971, the greater population size meant that, relatively, more women remained unmarried in the eighteenth century, despite social norms dictating otherwise.

The desire to ensure that a daughter was married to a husband from a suitable family extended beyond merely securing the social advancement of her family name, as it was a concern that a woman who remained at home would be a drain on the finances of her brothers and thus their economic advancement.⁵⁰⁹ Despite this, social norms continued to dictate that until marriage a woman was to remain within the family home, essentially under the protection of her father. Whilst she was technically a *feme sole*, and thus able to contract, her finances were at the discretion of her guardian and so again we see the control that was inherent in the law's treatment of women in this period. But the idea that a single woman was to be a burden on her family, again, is a misconception as some women had their own income. A perfect example of this is Jane Austen, who lived with her father until his death after which she resided with her brother. Not only is Jane an illustration of the self-sufficiency of single women, her letters also give an impression of the sort of items that a single woman was contracting for at this time.

The actual life of Jane Austen presents a sharp contrast to many of the heroines in her novels. Jane never married, and although she was linked to a pupil barrister, Tom Lefroy, this relationship was brought to an end by his parents. Jane was the daughter of a

⁵⁰⁹ Erickson (n440) 84

Clergyman and so was unable to provide an economically advantageous match for a lawyer who was to go on to be Lord Chief Justice of Ireland.⁵¹⁰ Whilst she received a proposal when she was 27 from Harris Bigg-Wither, an old childhood friend, she declined his offer.⁵¹¹ After her father's death in 1806, Jane moved with her family to Southampton, before settling in Chawton at a cottage provided by her brother. It was during her time at Chawton that Jane published her novels;⁵¹² a discussion of which further assists our understanding of social norms in this period.

*Sense and Sensibility*⁵¹³ provides a much more realistic account of romance, in contrast to the heavily sentimental novels that had been written earlier, but there are references to the formalities surrounding marriage littered throughout her publications. *Pride and Prejudice*⁵¹⁴ is particularly helpful with regard to this. Lady Catherine alludes to the notion that a single woman ought not to live apart from her family prior to marriage, 'young women should always be properly guarded and attended',⁵¹⁵ whilst Mrs Bennet, upon learning of Elizabeth's marriage remarks, 'what pin money, what jewels, what carriages you will have'.⁵¹⁶ Again, these excerpts provide us with an insight into society at this time, and indeed these literary references provide an excellent example of the legal mechanisms which have been discussed in this chapter.

⁵¹⁰ G.E. Mitton, *Jane Austen and Her Times*, (Methuen & Co., London: 1905) 78

⁵¹¹ E. Jenkins, *Jane Austen: A Biography*, (V Gollancz, London: 1968) 88

⁵¹² *ibid* 112

⁵¹³ Austen (n169 in ch 2)

⁵¹⁴ Austen (n168 in ch 2)

⁵¹⁵ *ibid* 166

⁵¹⁶ *ibid* 301

It is within the personal correspondence of Jane, however, that the contractual capacity of an unmarried woman is apparent. The letters are unsurprising in their content, as they include the purchase of items that would be typical of an eighteenth century woman – clothes and material to fashion her own garments. On November 25 1798, Jane recalls, ‘the Overton Scotchman has been kind enough to rid me of my money, in exchange for six shifts and four pair of stockings... it cost me 3s. 6d.’⁵¹⁷ Jane speaks of the purchase of stockings on a number of occasions, as well as the purchase of ‘flannel’ (for ‘2s 3d a yard’)⁵¹⁸ and ‘bugle trimming’ (‘2/4d’).⁵¹⁹ On purchasing yet another pair of stockings in October 1800, Jane states, ‘my father... finds no fault with any part of Mrs Hancock’s bill except the charge of 3s 6d for the packing box’.⁵²⁰ Whilst it is perhaps too much to state that this was a recognition by Jane of her adherence to her father for her purchases, we can certainly view this as an example of the continued protection of an unmarried woman by her father, whether he had capacity over her affairs or was simply warning her of unscrupulous tradesmen.

It should then be clear that a single woman did not have to be a burden on her family. Jane earned a total of £684.13s from the novels that were printed in her lifetime;⁵²¹ she was an unmarried woman who was able to earn her own living and thus contract as she so wished – albeit with the slight limitation of her father’s guardianship. It has been

⁵¹⁷ R.W. Chapman, *Jane Austen’s Letters*, (Oxford University Press, London: 1964) 32

⁵¹⁸ *ibid* 23

⁵¹⁹ *ibid* 69-70

⁵²⁰ *ibid* 77

⁵²¹ J. Heldman, ‘How Wealthy was Mr Darcy – Really?’, (1990) 12 *Persuasions* 38, 43

shown that although an unmarried woman and a widow disrupted social norms as a consequence of their ability to contract, because the position of a married woman was not as restrictive as typically envisaged, the position of an unmarried woman or widow was not in *practice* so markedly different. It was merely that they had an explicit autonomy that was not given to a married woman, despite the fact that a married woman may circumvent the restriction placed on her legal rights in other ways, such as has been explored above in relation to coverture and pin money. It is submitted that this attitude came about because both a widow and an unmarried woman explicitly contradicted society's view of a weak, dependent woman, and simultaneously the control that the law had placed on women's capacity. This is what the law and society objected to – a woman stepping outside of the subordinate role that was assigned to her. Regardless of whether married women retained their contractual autonomy in other ways, a widow and an unmarried woman explicitly defied this convention and it was this that rendered them unusual and consequently open to criticism in literature, this being a mere reaction to their legal irregularity.

5.5 CONCLUSION

It has been demonstrated in this chapter that the law sought to restrict the contractual capacity of women in an effort to control, but counter to this were the women themselves who pushed against this restriction of their legal rights. Although it has commonly been said that the law was unfair towards women in that they lost their capacity upon marriage, the opposing side of this argument had yet to be explored.

When the portions allocated to women in the form of a dowry are examined, and this chapter gave an impression of what could be expected from each social class, it is clear that women contributed significantly towards marriage. In exchange for this, whilst her property and legal rights were subsumed into those of the husband, any debts accumulated by the wife were borne by her husband throughout the marriage and even upon separation, should she abscond as a consequence of his mistreatment of her. This often coincided with an additional payment of pin money, which ran counter to the control mechanisms invoked by the law as it gave a wife an element of autonomy, much to the despair of writers such as those in *The Spectator*. This was paid even following separation, as in *Moore v Moore*,⁵²² and so there was a considerable advantage to a woman securing this from her husband. A jointure was also available for a wife upon the death of her spouse, upon which she was released from this legal subordination to him and regained her contractual capacity. Thus the idea of a wife being ‘kept’ by her husband as a consequence of her inability to contract is simply not borne out on the facts, as it has been shown that tradesmen such as those in *Montague v Espinasse*⁵²³ were all too willing to trade with a married woman, even beyond those items that would be deemed to be necessities.

As a widow, a woman regained this contractual capacity and it has been show that as a consequence of this she was viewed as a figure of ridicule. Despite a widow being a prime

⁵²² *Moore* (n490)

⁵²³ *Montague* (n464)

target for men who wished to marry for wealth, women were aware of this danger and either refrained from marrying, such as Lady Mary and Katherine Austen, or placed their property on trust to protect their children and keep it away from their new husband. An unmarried woman, whilst remaining in the family home, was often not the burden that has been suggested, particularly, as in the case of Jane Austen, if she was able to retain some contractual capacity by having her own mode of income.

Ultimately, the control that the law attempted to place on women was overcome by married women who contracted anyway, such as in *Montague* and *Etherington v Parrot*,⁵²⁴ as well as other formalities surrounding marriage such as the provision of pin money. Additionally, a widow and an unmarried woman explicitly countered the social ideal of a woman being subordinate to a man, and by retaining a status as a *feme sole*, they were able to directly contradict the control element that the law was attempting to place on women. It has been argued that this is why such women were criticised so heavily in literature. This chapter has not sought to pursue a feminist discourse in the discussion of the contractual capacity of these women; rather a more balanced account has been attempted. It is clear that the law sought to control women by mechanisms such as coverture; however, it has been shown that in practice such subordination did not occur, for the variety of reasons stated above. Thus, whilst there was a control agenda applied by the law in relation to the contractual capacity of women, this was countered

⁵²⁴ *Etherington* (n460)

in practice by married women, and was not apparent at all with regard to those unmarried women and widows who were able to retain the status as a *feme sole*.

The judgment of Bridgman CJ in *Manby v Scott* regarding a woman's contractual capacity, reduced her position to that of a child. The following chapter of this thesis shall explore the contractual capacity of infants and will determine how successfully the law protected this contractual actor, in contrast to the control agenda applied to women in the long eighteenth century.

Chapter Six

Incapacity: Infants

6.1 INTRODUCTION

In the long eighteenth century, the age of majority was twenty one. This stemmed from the role of a knight in medieval England; it was felt that at this age a young man was sufficiently physically able to maintain a lance and a suit of armour whilst on horseback and it is from this historic platform that the age of twenty one as the age of majority remained.⁵²⁵ Such a high age of majority relative to educational and social developments proved problematic for the contractual capacity of infants, however, and this will be explored in this chapter.

The chapter will begin by presenting the social position of infants in the long eighteenth century. Their depiction in popular culture as well as developments in education will provide the context to an exploration of their contractual capacity. The law regarding necessities will be discussed, in relation to the sale of goods to an infant. Most challenging were those cases concerning boys under the age of twenty one who attended university or enlisted in the army; the problems associated with living apart from parents whilst lacking complete contractual autonomy will be evident. The section will seek to determine to what extent the law sought to apply a protection interest to the contractual

⁵²⁵ Latey Report on Age of Majority 1967, Cmnd. 3342, [38]

capacity of infants, and further, what this meant for the interests of the trader with whom they contracted.

The second half of the chapter will focus on apprenticeships. It will be shown that an apprenticeship contract carried alternative legal considerations and issues. Whilst a contract was entered in to by the father of the child as well as the apprentice himself, the removal of children from the family home exposed their vulnerability to harsh and cruel masters. The unfortunate cases of Susannah Archer and Mary Clifford are included as an example of the potential ill-treatment faced by apprentices at the hands of their master. Legislation aimed at protecting the infant will be analysed, and its success in employing the protection interest which was so ardently pursued by the common law will be determined. This section will conclude with a discussion of those apprenticeship contracts rendered void by way of illness or death, misbehaviour on the part of the infant, or because the contract itself was found not to be in the interests of the child.

It becomes clear that in whatever position in life of the infant, and in whatever career he or she sought to pursue, the motivation of the law to protect infants by way of the rules surrounding contractual capacity had to be balanced against the legitimate interests of those who sought to contract with them. Determining the extent to which the law succeeded in doing this will be the aim of this chapter.

6.2 POSITION OF INFANTS

A child of the long eighteenth century conformed very much to the adage of ‘seen and not heard’; a child was pure, innocent, and capable of being moulded into an upstanding member of society. Popular fiction and art of the period reinforced these social ideals. Wearing a white dress, with bare feet, and hands clasped to her chest, the young girl depicted by Joshua Reynolds in his portrait *Age of Innocence* (figure 3) encapsulates the pure nature of the child perfectly.

Figure 3



In literature also, there were a number of novels which depicted the desired traits of a child, and it was commonplace to reinforce these ideals by presenting an infant in the novel who embodied quite the opposite. The works of Daniel Defoe have been a recurrent source of research for this thesis and this chapter is no exception. As an advocate of

morality, Defoe depicts not only debauched women in his novels, but children also feature. *Colonel Jack*⁵²⁶ tells the story of a young boy who is left without a mother or guardian and who turns to criminal activity to survive. There is certainly an air of sadness to the tale, and indeed, the reader is inclined to pity the existence of the protagonist, but this only further assists Defoe in presenting his argument. By describing the child as disobedient and wayward, Defoe manages to reaffirm traditional eighteenth century ideals of the child; the reader is aware that these naughty children are condemned and viewed negatively, and thus the well-behaved, polite infant is confirmed as the desired norm. This is echoed by William Blake in *Songs of Innocence*,⁵²⁷ a book of prose published in 1789. The contrast in Blake's work between innocence and debauchery is abundantly clear and again this confirms the virtuous ideal. In *The Lamb* Blake reiterates what is expected of a child in the lines:

He is meek & he is mild,

He became a little child⁵²⁸

This can then be contrasted with darker poems such as *London* in which childhood innocence is replaced with real-world despair:

How the youthful Harlots curse

Blasts the new-born Infants tear⁵²⁹

⁵²⁶ D. Defoe, *Colonel Jack*, (William Rufus Chetwood, London: 1722)

⁵²⁷ W. Blake, *Songs of Innocence*, (1789)

⁵²⁸ W. Blake, *The Lamb* (1789) lines 15-16

⁵²⁹ W. Blake, *London* (1789) lines 14-15

The distinction between infancy and adulthood is drawn clearly in this collection of poetry; the inclusion of real-world pessimism only heightens the reader's appreciation for a childhood that is withdrawn from the anguish of growing up. Yet we shall see later in this chapter how these romantic ideals were somewhat at odds with the practical reality of life as a child apprentice, as growing industrialisation rendered work for children increasingly necessary.

The desired traits as expressed in art and literature give the reader some impression of characteristics that an infant ought to possess. Yet quite aside from the moral teachings contained in popular culture, the typical activities and lifestyle of an infant at this time tell us much of the position of children in everyday life. It is clear that a child was to be engaged in activities in-keeping with the social position of his parents; intellectual and cultural stimulation were to prepare the infant for his assent into adulthood. Plumb discusses the way in which 'children...had become luxury objects upon which their mothers and fathers were willing to spend larger and larger sums of money'.⁵³⁰ This included trips to visit new scientific discoveries, music concerts and cultural events.⁵³¹ Of course these treats were solely the reserve of a child of the middle to upper classes, those of the lower class could not afford such luxuries, nonetheless, improvements in education at the beginning of the long eighteenth century sought to narrow the educational divide between rich and poor.

⁵³⁰ J.H. Plumb, 'The New World of Children in Eighteenth Century England', (1975) 67 *Past and Present* 64, 90

⁵³¹ *ibid* 86

Whilst much historical research has been devoted to the growth of public schools,⁵³² charity and ‘dame’ schools that were established in the long eighteenth century aimed to bring a level of education to the poor. Charity schools could come about in one of two ways; either a wealthy benefactor of the parish would fund the institution, or, from 1696 onwards, the Society for Promoting Christian Knowledge⁵³³ sought to establish these schools in parishes across the country. The schools taught the ‘three R’s’, and by 1707, 41 had been established in London alone.⁵³⁴ Dame schools, on the other hand, got their name from the elderly women who taught there, usually retired teachers, and for a ‘few pence a week’⁵³⁵ children were exposed to a basic level of literacy and numeracy skills. Public schooling was reserved for those of the middle and upper classes,⁵³⁶ who could afford to send their children to the best institutions. For those of the lower classes, as Bayne-Powell has acknowledged, the lure of childhood apprenticeship drew children away from gaining an education from the free schools, ‘when wages were so low it followed, as a matter of course, that children were sent out to work as soon as possible’.⁵³⁷ The effect of these apprenticeships on children and what this meant in relation to contractual capacity will be discussed later in this chapter.

⁵³² See E.C. Mack, *Public Schools and British Opinion 1780 to 1860*, (Methuen & Co., London: 1938) and T.W. Bamford, *Rise of the Public Schools*, (Nelson, London: 1967)

⁵³³ R. Bayne-Powell, *The English Child in the Eighteenth Century*, (John Murray, London: 1939) 63

⁵³⁴ Anon, *An account of charity-schools lately erected in England, Wales, and Ireland* (Joseph Downing, London: 1707) 9-11

⁵³⁵ Bayne-Powell (n533) 57

⁵³⁶ *ibid* 69-71

⁵³⁷ *ibid* 36

6.2.1 Sale of Goods

Despite tentative steps being made to bring education to the poorest in society, a considerable legal issue concerned boys who went on to study at university. As a result of the higher age of majority, boys attended university whilst still legally an infant, and so for the purposes of contracting, they continued to be bound by the same rules regarding an infant's contractual capacity. It is here that we see the law in conflict with the social context, as clearly there was a need for the students to contract themselves for items. However, the law drew a distinction between an infant contracting in his own right, and an infant who pledged his father's credit and thus acted essentially as an agent. The protection afforded by the law to infants was much stronger should they contract themselves, as for those contracting as an agent, the core motivations of the law in this area were different, with the courts instead being much more concerned with controlling how the contractual rights of the agent were exercised. In this way, we see the law treating children in much the same way as married women; rather than protecting these parties, in this instance the law sought to control their legal rights. This in turn resulted in protection being applied instead to the father or the husband, to ensure that his wealth was safeguarded. This point is reinforced by the dictum of Abbott CJ in *Blackburn v Mackey*.⁵³⁸

This case notes that parents were not liable for the debts of their child unless the infant contracted as their agent. In *Blackburn*, Blackburn, a tailor, brought an action against

⁵³⁸ (1823) 1 Carr & P 1; 171 ER 1076

Mackey for clothes that his son, Patrick Mackey, had purchased. The transactions took place on two separate occasions, amounting to £7 8s 6d and £6 6s respectively. It was stated at trial that his father, who was a surgeon in Essex, did not provide Patrick, earning only one guinea a week as a clerk to a lawyer in London, with any clothes. A fellow lodger at the house in which Patrick stayed testified Patrick to be ‘in great want’⁵³⁹ of clothing. The court heard that the defendant sent a letter to Blackburn after his demand for payment of the second sale of goods; in this letter Mackey warned the tailor against any future dealings with his son, though he noted, “I have no great objection to paying your first bill”⁵⁴⁰. In summing up, Abbott CJ stated the case to be a ‘question [which] deeply affects society’.⁵⁴¹ His directions to the jury focused on purely financial considerations and the potential ruin of families should children be permitted to spend their fortune, whilst their parents maintained liability for these debts. He reasoned that, ‘if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man who had a family might be ruined’⁵⁴² and as such, ‘a father is not bound to pay for articles ordered by his son, unless the father gives some authority, express or implied’.⁵⁴³ Here, explicit reference is made to the protection of family wealth, and the treatment of ‘young men’ as an agent echoes very much that of married women in the previous chapter. In particular, the warning made by Holt CJ in *Etherington v Parrot*,⁵⁴⁴ that ‘if the husband have solemnly declared his dissent, that she shall not be trusted, any person that has

⁵³⁹ *ibid* 1076

⁵⁴⁰ *ibid*

⁵⁴¹ *Blackburn* (n538) 1077 (Abbott CJ)

⁵⁴² *ibid*

⁵⁴³ *ibid*

⁵⁴⁴ (1703) Salk 118; 93 ER 169

notice of this dissent trusts her at his peril after'.⁵⁴⁵ As such, express authority was required. But in this case, the jury found the letter by the defendant to amount to an admission of liability for the first receipt and so Mackey was ordered to pay £7 8s 6d. The outstanding sum for the second sale was not recoverable. It must be stressed that this finding was only because the letter constituted Mackey 'giv[ing] some authority'⁵⁴⁶ for the purchase; this case continues to be authority for the rule that a parent was not liable for the debts of his child.

Despite an infant having to contract for his own goods, the only contract that was to be valid, and for which he would be liable, was one for 'necessaries'. This concerned those items which were necessary for the maintenance of the child; articles such as food, lodging, and clothing all amounted to a valid contract. Earlier cases such as *Makarell v Bachelor*⁵⁴⁷ and *Dale v Copping*⁵⁴⁸ confirmed the rule which was to apply throughout the long eighteenth century. In *Makarell*, although it was agreed that clothing could amount to necessaries, in this case due to the extravagant nature of the articles, 'suits of sattin and velvet cannot be necessary for an infant' and as such the contract was void.⁵⁴⁹ In *Dale*, the courts extended the principle to include medicine; it was held that:

⁵⁴⁵ *ibid* (Holt CJ)

⁵⁴⁶ *ibid*

⁵⁴⁷ (1597) Cro Eliz 583; 78 ER 826

⁵⁴⁸ (1610) 1 Bulst 39; 80 ER 743

⁵⁴⁹ *Makarell* (n547) 826

For that this shall be taken as a contract, and that to be for a thing in the nature of necessity to be done for him, and the same as necessary as if it had been a promise by him made for his meat, drink, or apparel, and in all such cases his promise is good, and shall bind him⁵⁵⁰

In 1690, *Huggins v Wiseman*⁵⁵¹ similarly held that a cure for illness ‘of a distemper’⁵⁵² would also amount to a necessary article and thus a valid contract. Later in *Clowes v Brooke*,⁵⁵³ the court found that money owed for the care of horses did not amount to a contract for necessaries, and as such the infant was released from his obligations under it. It was held that, ‘the work might be necessary for the horses, yet *non constat* the horses were necessary for the infant’.⁵⁵⁴ *Clowes* also demonstrates that infancy was used as a defence to an action for the recovery of debts, ‘in assumpsit for a farrier’s bill, the defendant pleaded, that the testator was an infant’.⁵⁵⁵ In response to this, it was then up to the party seeking to recover money from an infant to show that the items were necessary and thus establish a valid contract rendering the infant liable. Yet merely proving that the items constituted necessaries was not enough; it must also be shown that the article in question was necessary for the infant in his position in life.⁵⁵⁶

Whilst students at university faced difficulties in contracting, those who chose to enlist in the army were met with similar issues and many of the cases concerning the position

⁵⁵⁰ *Dale* (n548) 743

⁵⁵¹ (1690) Cart 110; 90 ER 669

⁵⁵² *ibid* 669

⁵⁵³ (1738) 2 Str 1101; 93 ER 1058

⁵⁵⁴ *ibid* 1058

⁵⁵⁵ *ibid*

⁵⁵⁶ See also *Ive v Chester* (1620) Cro Jac 56; 79 ER 480 and *Peters v Fleming* (1840) 6 H & W 42; 151 ER

in life of the infant regard a young man who was in the armed forces. Britain was engaged in a number of conflicts in the long eighteenth century, both on the continent and in the colonies.⁵⁵⁷ It is therefore not surprising that with a total of 201,000 men enlisted in 1762,⁵⁵⁸ and the age of enlistment being sixteen,⁵⁵⁹ contractual problems for those soldiers yet to reach the age of majority would arise. The extent of the inclusion of the upper classes and gentry within the armed forces also meant that those below the age of the majority possessed the means to enter into contracts for the sale of often expensive articles. Such was the case in *Coates v Wilson*⁵⁶⁰ in which a tailor brought an action to recover debts owed for a regimental uniform. The social context is apparent here as Lord Ellenborough, in summing up, refers to the Napoleonic wars which were occurring at this time. Britain had entered the war with France a year previously, thus His Lordship stated that, in 'perilous times, when young men had enrolled themselves...for defence of the country...clothes so furnished were necessities'.⁵⁶¹

It is interesting to note that Lord Ellenborough here equates the interests of the child to those of the country at war. Yet it is argued that such items were deemed necessary based on the child's position in life; as a member of the armed forces, his station required a military uniform, to find otherwise and thus deprive the infant of this, would be absurd. Yet given the low age of enrolment relative to the age of majority, it is clear why problems

⁵⁵⁷ S. Conway, 'War, Imperial Expansion and Religious Developments in Mid-Eighteenth-Century Britain and Ireland', (2004) 11 *War in History* 125, 126

⁵⁵⁸ S. Conway, 'The mobilisation of manpower for Britain's mid-eighteenth century wars', (2004) 77 *Historical Research* 377, 382

⁵⁵⁹ D.C. Chandler & I.F.W. Beckett, *The Oxford History of the British Army*, (Oxford University Press, Oxford: 2003)

⁵⁶⁰ (1804) 5 Esp 152; 170 ER 769

⁵⁶¹ *ibid* 769 (Ellenborough LJ)

such as these arose for a young man having to maintain himself whilst living away from home, and this is also apparent in cases such as *Hands v Slaney*⁵⁶² and *Berolles v Ramsay*.⁵⁶³ Both of these cases are also illustrative of the way in which contractual problems were more pertinent for those of a higher social class; the infants in *Hands* and *Berolles* were a Captain and Lieutenant respectively – roles traditionally dominated by men of the upper class.⁵⁶⁴

Hands concerned goods which were sold to an infant who was a Captain in the army; the items consisted of livery for his servant and cockades⁵⁶⁵ for the soldiers in his company. When an action was brought for the recovery of money owed, the defendant pleaded his infancy. Lord Kenyon held that the cockades could not amount to necessaries and as such the defendant was not liable for these. For the livery, however, his Lordship found that were it necessary for ‘a gentleman in the defendant’s situation to have a servant’⁵⁶⁶ then the livery would amount to a valid contract and the infant would be bound. The jury concluded that the servant was necessary and the infant was therefore liable for the outstanding sum. In *Hands*, the rule regarding necessaries was confirmed by Lord Kenyon who stated that, ‘the general rule is clear, that infants are liable for necessaries, according to their degree and station in life’.⁵⁶⁷ But this case goes further and refers explicitly to the rationale of the law regarding necessaries, this being ‘to protect infants

⁵⁶² (1800) 8 Term Rep 578; 101 ER 1556

⁵⁶³ (1815) Holt N P 77; 171 ER 168

⁵⁶⁴ Conway (1558) 390

⁵⁶⁵ A cockade was a knot of ribbons worn on uniform to show allegiance to a particular faction of the military.

⁵⁶⁶ *Hands* (1562) 1557 (Kenyon LJ)

⁵⁶⁷ *ibid* (Kenyon LJ)

against improvident contracts'.⁵⁶⁸ The later case of *Berolles* confirms the principle that the law deduced what was necessary for an infant taking his station in life⁵⁶⁹ into account.

In *Berolles*, a chronometer was sold to the defendant who was a lieutenant in the Royal Navy. The watchmaker brought an action for the recovery of £68 that was owed to him for the goods and contended that the article was necessary for a naval lieutenant. At trial, the court stated the importance of the second part of the rule regarding necessities, being that it must be necessary to the position in life of the infant. This was because there was a difference between an article merely being necessary and one which was necessary according to station in life; Gibbs CJ stated that, 'certain things may be necessary, but not suitable to the condition of the parties'.⁵⁷⁰ In determining whether the jury ought to render an item necessary according to the situation in life of the infant, it was held that the item must be necessary for every infant possessing the same station. On the facts of the case, it was uncertain whether the lieutenant would be posted to where a chronometer would be necessary, but additionally, the court was of the opinion that 'it would be most detrimental to the service, if it were laid down as a general rule that every lieutenant of the navy might contract for the purchase of a chronometer'.⁵⁷¹ Accordingly, the item was not necessary to the infant and the contract was voidable.

⁵⁶⁸ *ibid*

⁵⁶⁹ *Berolles* (1563) 168

⁵⁷⁰ *ibid* 168 (Gibbs CJ)

⁵⁷¹ *ibid*

The cases above are illustrative of the two facets of the test required to determine whether an article was a necessary and thus whether it constituted a valid contract. A contract with an infant was valid should it be a contract for necessaries, but it must also be proven that the item was necessary for the infant in the case, in his position in life. This two-part rule, it is argued, is particularly stringent towards the trader, as it adds another element of proof on the party seeking to establish a contract with a minor. For the boy himself, the issue of whether the contract was valid or not was not of great concern, as should the contract be deemed voidable as a result of his infancy, this would release the infant from his obligations under it and he would not be required to pay for the goods. The trader who contracted with the child, however, was not so fortunate, and stood to lose out should he enter in to a contract of this sort. The law therefore could be said to be on the side of the infant, as the balance between protecting the child and protecting the interests of the trader is tipped firmly in favour of the infant.

In response to this perceived inequality, the law developed to try to ensure that a seller was put on notice to enquire as to the circumstances of the minor should he be in any doubt. *Ford v Fothergill*⁵⁷² concerned an infant who contracted with a tailor, Ford, for the provision of a military uniform. When the outstanding sum was not paid, Ford brought an action for recovery of the amount in response to which the defendant pleaded his infancy. It emerged at trial that several debts with other tailors had been accrued by the infant during this time, though these had been paid by his father; Ford was unaware of

⁵⁷² (1794) 1 Esp 211; 170 ER 331

this, however. In directing the jury, Lord Kenyon held that the onus was on the plaintiff to prove that the goods were necessary to the 'fortune and circumstances of the infant'.⁵⁷³ He warned that 'a person trusting an infant did it at his peril',⁵⁷⁴ and the trader ought to make enquiries as to the circumstances of the infant. He concluded by stating that 'if the infant had contracted other debts at the same time, for the same sort of articles for which the action was brought...such was good evidence to rebut the presumption of necessities'.⁵⁷⁵ Despite this ruling, the jury in this case found in favour of the plaintiff and thus the infant was liable for payment of the goods – such was the danger of a jury trial. The rule in *Ford* attempted to shift the power balance back towards the trader, by stating that he ought to acquaint himself with the situation of the infant before entering in to the contract with him, and thus avoiding any potential loss from a voidable contract.

This safeguard however did nothing to alter the rule in relation to the contractual capacity of infants, which remained the same. A contract with an infant was only valid in a select number of circumstances, for food, lodging and the like, and would further only be enforceable should those items be necessary for his position in life. Although the foresight requirement under the rule in *Ford* attempted to protect the trader from a losing contract, for those who found themselves pursuing an action against an infant, it is argued here that the protection of the infant by the law overrode any legitimate interest of the trader.

⁵⁷³ *ibid* 332 (Kenyon LJ)

⁵⁷⁴ *ibid*

⁵⁷⁵ *ibid*

6.3 APPRENTICESHIPS

An alternative to university, the armed forces, or the Inns of Court as a means of securing a career was for a child to be sent to complete an apprenticeship. This involved the parents of a child paying a sum of money to a tradesman in order to secure training for their son or daughter. For those children of the poorest in society without parents to provide their premium, the parish would provide this to the tradesman. We shall see later how these children were the most vulnerable to abuses at the hands of their master. In exchange for the indenture, as well as training - usually for a period of seven years - the master would agree to provide food, lodging, and all the necessary provisions for the apprentice. The extent of the premium paid was relative to the chosen career; for instance, £1,075 was paid in 1713 to a City merchant.⁵⁷⁶ This is an extraordinarily high premium however, and sums for common trades such as tailoring and shoemaking were considerably less.⁵⁷⁷ Given this monetary exchange, the contract for an apprenticeship was between the child and the master, but parental consent was required.

Typical of an eighteenth century apprenticeship contract, the agreement between James Hardy and The Lune Shipbuilding Company in Lancaster has been annexed to this chapter. The contract was entered in to by James with the consent of his father, Daniel, who is also a signatory to the agreement, and sets out the premium that has been paid. In this case 'five shillings' was deposited with the Company in return for them training James in 'the Art and Business of a joiner'. James's salary was also agreed upon, starting

⁵⁷⁶ J. Lane, *Apprenticeship in England: 1600-1914*, (University College London Press, London: 1996) 24

⁵⁷⁷ George (n13 in ch 1) 230

at 4 shillings per week in year one, before increasing by a shilling a week until year six. During the final two years of the apprenticeship James was to be paid 10 shillings and 12 shillings a week respectively. This increase in the final two years reflects the greater value of an apprentice in his last two years of service. The financial importance of year six and seven of an apprenticeship is stated by Gowing, 'the economic bases of apprenticeships was that for each year of training an apprentice was worth more to the employers, so losing the last two years of labour was economically devastating'.⁵⁷⁸ This explains the increase in the remuneration paid to James in his final two years, who it was assumed would have gained considerable skills and thus be a greater asset to the Company. The contract also outlines the behaviour that is expected of the apprentice, the rules by which he is to abide, and the procedure surrounding absence.

In reviewing this document, it is clear that although the contract was for the benefit of the apprentice, given his age, the agreement would take place with the express consent of his father. The ability of the apprentice to work, and thus be a party to the employment contract, mirrors the law discussed earlier in this chapter in relation to the sale of goods and liability of parents. Just as a contract for goods was valid should a father give explicit authority for the sale, an apprenticeship contract was binding at the consent of a father. Unlike the sale of goods, however, this consent was less about protecting the father and his wealth, so much as this consent was intended to protect an infant from entering a potentially unfavourable contract or being taken advantage of by a master. Despite this

⁵⁷⁸ L. Gowing, 'The Manner of Submission', (2013) 10 *Cultural and Social History* 25, 34

safeguard, detrimental apprenticeships did occur and later in this section the circumstances surrounding this and the consequences of such an apprenticeship will be discussed.

Whilst boys such as James were usually apprenticed to trades, it was not uncommon for a girl to undertake an apprenticeship, albeit in more domestic roles. Dunlop notes that a girl would occasionally be apprenticed to the wife of a tradesman, to learn how to fulfil more domestic tasks such as sewing and general housekeeping.⁵⁷⁹ A common means of finding an apprenticeship was through a personal connection, but for those who did not have this fortune, advertisements seeking apprentices were placed in the local paper, such as that from *The Hampshire Chronicle* in 1773,⁵⁸⁰ below:

APPRENTICES WANTED. A STOUT LUSTY LAD, about Fourteen Years of Age, as an APPRENTICE to the PRINTING BUSINESS. Likewise, an APPRENTICE to the BOOKSELLING and BINDING BRANCHES. – A moderate Premium is expected. Apply to the Publisher of this Paper.

The advert would state the physical characteristics as well as the size of the premium required. Clearly an apprenticeship was beneficial for the master who often secured a substantial premium in exchange for passing his knowledge on to a child. Beyond the premium, however, it was also expected that an apprentice would act with utmost respect and propriety towards the master. This was reinforced in pamphlets of the time.

⁵⁷⁹ O.J. Dunlop, *English Apprenticeship & Child Labour: A History*, (T. Fisher Unwin, London: 1912) 153

⁵⁸⁰ *The Hampshire Chronicle*, Monday 30 August 1773, vol. II, no. 54, 1

*A Present for an Apprentice*⁵⁸¹ amounts to a conduct manual for a bound child, in which the author advises the apprentice to ‘be careful of the secrets of the family’,⁵⁸² ‘avoid the company...of female servants’,⁵⁸³ and take care with the master’s money.⁵⁸⁴ Less explicit is *The Cheapside Apprentice*,⁵⁸⁵ which recalls a fictional account of an apprentice’s ruin after he chooses a life of drunken debauchery over a respectable career. The pamphlet serves as a warning to apprentices of the dangers of failing to follow a moral course of life, which ends in the fictional apprentice’s imprisonment and execution. This moral message was promoted half a century earlier in 1747 by Hogarth in *Industry and Idleness*, the full set of engravings of which have been annexed to this chapter (Appendix 7).

In *Industry and Idleness*, Hogarth presents a lazy apprentice, Tom Idle, who resorts to a life of debauchery which ends in his hanging. This life is contrasted with that of a dutiful apprentice who goes on to marry the master’s daughter and succeed in the business. Again, like Defoe and Blake noted at the beginning of this chapter, Hogarth depicts the ideal child by contrasting it with the very opposite. Whilst perhaps a rather severe outcome for Tom, in reality it was not uncommon for an apprentice to abscond. This could occur for a number of reasons, but maltreatment by the master has been cited frequently⁵⁸⁶ as a reason for cancelling apprenticeships. If the child did run away, or allegations of abuse arose, the case could end up before the court, and a common outcome

⁵⁸¹ J. Barnard, *A Present for an Apprentice*, (J. Reid, Edinburgh: 1769)

⁵⁸² *ibid*

⁵⁸³ *ibid* 43

⁵⁸⁴ *ibid* 25

⁵⁸⁵ S. More, *The Cheapside Apprentice*, (J. Marshall, London: 1796)

⁵⁸⁶ See M.D. George, *London Life in the Eighteenth Century*, (Penguin Books, Middlesex: 1985) and J. Lane, *Apprenticeship in England: 1600-1914*, (University College London Press, London: 1996)

was the return to the family of the remaining premium and the release of the child from the apprenticeship. This remedy serves as a reminder that, as noted by Gowing, an ‘apprenticeship was a legal contract so much as a social obligation’.⁵⁸⁷

Cases concerning the abuse of apprentices were frequent. One instance concerned girls employed as apprentices to a tambour-worker⁵⁸⁸ in Hackney. It was recalled that the girls embroidered from 4am until midnight each day, including Sunday, should there be an influx of work over the weekend.⁵⁸⁹ They were fed bread, water, and potatoes, and occasionally rice which they ate at their frames.⁵⁹⁰ The extent of their maltreatment was such that their master, Jouveaux, moved work from Hackney to Stepney Green after neighbours complained of the treatment of the girls after hearing them ‘shrieking and hunting for food in the pig trough’.⁵⁹¹ Jouveaux eventually faced trial, for ill-treating one of his apprentices, Susannah Archer, who it was noted was ‘extremely little, and emaciated, and did not look at all to be of the age she said she was – 15’.⁵⁹² At trial, Jouveaux contended that the girls had been in a state of poverty for only three months, and this was a consequence of his own destitution. However, the court heard ‘evidence of the neighbours that great wails [sic.] appeared on [the girls’] backs, and their shrieks calling out for mercy were heard in the neighbourhood’⁵⁹³ on a number of occasions. Lord Kenyon sentenced Jouveaux to twelve months imprisonment ‘kept to hard

⁵⁸⁷ Gowing (n587) 30

⁵⁸⁸ A tambour-worker was an embroiderer who worked over a circular frame

⁵⁸⁹ J. Kamm, *Hope Deferred: Girls’ Education in English History*, (Taylor & Francis Online, 2010) 65

⁵⁹⁰ *ibid*

⁵⁹¹ Kamm (n589) 220

⁵⁹² Law Report of *The King v Jouveaux* in *Universal Magazine of Knowledge and Pleasure*, (M. Brown, London: 1801) 453

⁵⁹³ *ibid* 454

labour'.⁵⁹⁴ Whilst this is retribution for Susannah, it is clear that there were a number of girls whom Jouveaux abused and for whom he was not held accountable, such was the danger of a system which did not provide easy recourse for an apprentice to report their master.

The problem concerning an apprentice's inability to report abuse until it was much too late is exemplified in a case concerning Elizabeth Brownrigg, the wife of a decorator who employed three female apprentices. The extent of Elizabeth's actions is extreme, and one cannot help but feel that Elizabeth was what we would today call a sadist. Her actions are certainly to the more extreme end of the spectrum of abuse which apprentices suffered. Thus, her actions are not typical, but they are illustrative of the potential abuses that children stood to face at the hands of their masters. Elizabeth was hanged at Tyburn on the 14th September 1767 for the murder of her apprentice, Mary Clifford. Brownrigg had beaten all three of her apprentices on numerous occasions, but had taken a particular dislike to Mary, who was 'frequently whipped...stripp[ed] naked'⁵⁹⁵ and bound by her wrists in the kitchen. The abuse inflicted upon Mary is horrific; it was noted that after these beatings, her leather bodice would be reapplied, such that when it came to remove it, 'it stuck so fast to her wounds that the poor creature cried out in the most terrible manner'.⁵⁹⁶ All three apprentices were kept in a cellar, where they were fed only bread

⁵⁹⁴ *ibid*

⁵⁹⁵ Anon, *An Appeal to Humanity in an Account of the Life and Cruel Actions of Elizabeth Brownrigg*, (Harrison & Ward, London: 1767) 7

⁵⁹⁶ J. Wingrave, *A Narrative of the Many Horrid Cruelties Inflicted by Elizabeth Brownrigg upon the Body of Mary Clifford*, (J. Wingrave, London: 1767) 15

without water and their only drink came from liquid that could be gleaned from the hog trough.

On the 31st July 1767, Elizabeth Brownrigg returned from travelling and scolded Mary for failing to do enough work; the girls were employed to grind chalk for Mr Brownrigg's decorating business. Mary was subsequently tied to a hook in the kitchen - which Mr Brownrigg has installed at the request of his wife to assist in her beatings - and whipped. This occurred a further four times that day, after which Mary was chained in the cellar. On the 4th August, a neighbour discovered Mary after hearing her moans, and took her to St. Bartholomew's Hospital, where it was said that she had 'six wounds on her head...a large wound upon each of her shoulders...a number of cuts all over her body'⁵⁹⁷ and her 'flesh seemed putrified... [her] head swelled to an enormous size'.⁵⁹⁸ Mary died 5 days later. At trial, evidence was given by another apprentice of the Brownrigg's who noted that Mary would be beaten to such an extent that her blood would pool on the floor.⁵⁹⁹ She also noted one occasion where Mary had been punished for rising in the night to get some water; Elizabeth Brownrigg had placed a chain around Mary's neck and attached the other end to a door, it was then 'drawn very tight around her neck, as hard as it could be without choking her'.⁶⁰⁰ The coroner's report was consistent with these accounts, adding that the chain was likely to be the cause of the damage to Mary's neck, which had caused her to lose her speech.

⁵⁹⁷ *ibid* 22

⁵⁹⁸ Anon (n595) 9

⁵⁹⁹ *ibid* 8

⁶⁰⁰ Anon, *Genuine and Authentic Account of the Life, Trial and Execution of Elizabeth Brownrigg*, (R. Richards, London: 1767) 17

There was considerable public outcry at the crimes of Elizabeth Brownrigg, which highlighted clear shortcomings in the apprenticeship system. Despite both parish officials and the stepmother of Mary visiting the Brownrigg's to enquire of the young girl, the abuse was able to continue for months before Mary was discovered. It is unfortunate that for children of the parish, such abuses were more likely to continue unnoticed as it was all too easy for a master to mistreat a child whose parents were not readily contactable. In an attempt to combat these issues, three pieces of legislation were enacted in a fifty year period which sought to protect infants against this ill-treatment. The first Act provided recourse to an infant to report incidents of abuse. The Regulation of Servants and Apprentices Act⁶⁰¹ in 1747 allowed an apprentice to bring his grievance before the court. However, it is submitted that the practical possibility of an apprentice being able to do this, without attracting the attention of his master and thus subjecting himself to greater mistreatment, is doubtful. Certainly, this legislation was available to Mary Clifford yet her circumstances prevented her from using it.

Additionally, the Act gave justices the power to charge the apprentice himself with misconduct, should they deem his complaint to be of little substance. As a result, and because of these caveats, the legislation was not as beneficial to an apprentice as first envisaged. The two statutes following the 1747 Act were more punitive in purpose and as such provided better means for an apprentice to seek some reprisal for ill-treatment

⁶⁰¹ 20 Geo II c19

by a master, yet it took almost fifty years for this increased protection to be enacted. In 1792, the Parish Apprentices Act⁶⁰² provided that a master could seek to remove his apprentice from his care into that of another tradesman, for a fee. The Act also set out the fine which was to be paid should the master fail to comply with an order. A year later, the Parish Officers Act,⁶⁰³ which it is argued provided perhaps the best means of punishing cruel masters, imposed a fine on those found guilty of mistreating their apprentice. Whilst these statutes aimed to assist the apprentice and to afford him greater protection, often, the nature of the work undertaken was inherently harmful, and one of the worst professions to which a child could be apprenticed was that of a chimney-sweep.

Such was the danger inherent in this profession that even after the implementation of this legislation to increase the protection of infants, in 1817 a Parliamentary Committee produced a report on the employment of climbing-boys to this occupation. The Report from the Committee on [the] Employment of Boys in Sweeping Chimnies⁶⁰⁴ was published on the 23rd June 1817. The committee heard from several chimney sweeps, as well as surgeons and designers of machinery which it was hoped would alleviate the use of young boys. It was heard that the Act of 1788, An Act for the Better Regulation of Chimney Sweepers and their Apprentices,⁶⁰⁵ provided that no child under the age of eight could be employed as a climbing boy but this was not adhered to in practice and it was found that boys as young as four had been sent up flues.⁶⁰⁶

⁶⁰² 32 Geo III c57

⁶⁰³ 33 Geo III c55

⁶⁰⁴ Report from the Committee on Employment of Boys in Sweeping Chimnies, 23rd June 1817

⁶⁰⁵ 28 Geo III c48

⁶⁰⁶ Report from the Committee on Employment of Boys in Sweeping Chimnies, 23rd June 1817 (n604) 3

Beyond the physical injury that could occur to an apprentice, such as sores on his elbows and knees, deformities of the spine, and irritations to his eyes, the Committee heard evidence from a surgeon, Mr Richard Wright, who spoke of Chimney Sweepers Cancer.⁶⁰⁷ This was cancer of the scrotum which was caused by soot irritating the area; the lack of washing facilities for a climbing boy – some went months without bathing – meant that a tumour formed which was fatal if not removed. Added to this, the boys were paid no wages, and were frequently forced up the chimney on fear of physical punishment by his master should he refuse. The Committee heard evidence of one boy who remained in the flue for two hours to avoid his master.⁶⁰⁸ After completing this gruelling apprenticeship, the boy would either continue as a chimney sweep or leave to seek work elsewhere. The nature of his work as a climbing boy, however, meant that the apprentice lacked the education and physical strength to succeed in any other trade and so many boys were left destitute or open to being taken advantage of by vagrants.⁶⁰⁹

Due to the social stigma of a chimney sweep, only the lowest class in society apprenticed their child to such work, this was usually reserved for boys but it was not unheard of for a girl to gain such employment.⁶¹⁰ A reflection of the danger inherent in the work is that contrary to the usual apprenticeship contract, the master paid a premium of two to three pounds to the parents of a child to secure the apprenticeship, though this did not counter

⁶⁰⁷ *ibid* 24

⁶⁰⁸ *ibid* 40

⁶⁰⁹ *ibid* 22

⁶¹⁰ B. Cullingford, *British Chimney Sweeps: Five Centuries of Chimney Sweeping*, (Ivan R. Dee, Amsterdam: 2000) 130

the lack of available boys, and so many were sent from the workhouse.⁶¹¹ It is unfortunate that even after this employment, it was likely that the apprentices would revert to a life of poverty, such was their physical health following years of shimmying up soot-filled flues. This harsh reality was certainly far removed from the childhood ideal promoted in popular culture and literature, noted earlier in this chapter.

The Committee on the Employment of Boys Sweeping Chimnies also heard evidence of the use of machinery to assist in cleaning chimneys, but it was stated by the manufacturers that chimney sweeps themselves were reluctant⁶¹² to supersede the work of a boy with that of a machine, and even if they were open to the possibility, the servants in the houses in which they cleaned refused them entry with the machine as it was believed that the mess would be greater than with a child.⁶¹³ Despite this, the Committee were of the opinion that such developments could enhance the work of a chimney sweep, and would not obviate the need for a boy, as the machine required two persons to operate it. Consequently, in their resolutions, the Committee stated their preference for a machine to be used to clean the chimney instead of a boy. Further resolutions concerned amending the Act of 1788 to better protect underage apprentices, but they also advocated increased regulation for chimney sweeps. The protection of infants intended by this report did not come into fruition until 1834 with the Chimney Sweepers Act,⁶¹⁴ which prohibited the employment of a child under ten as an apprentice to a chimney sweep.

⁶¹¹ *ibid* 15

⁶¹² Report from the Committee on Employment of Boys in Sweeping Chimnies, 23rd June 1817 (n604) 14

⁶¹³ *ibid* 13

⁶¹⁴ 4 & 5 Will IV c35

The Chimney Sweepers and Chimneys Regulation Act⁶¹⁵ of 1840 followed this, and raised the minimum age of employment in this profession to 21. However, without the means of direct enforcement, it was not until 1875 with the enactment of provisions requiring registration and punishment for chimney sweepers hiring climbing boys under the age of 21, that this protection was fully enforced.⁶¹⁶

Consequently, regarding apprenticeships, it has been noted that an infant was protected by the law, just as he was when contracting for the sale of goods. An additional safeguard was applied to an infant contracting for an apprenticeship however, with the requirement that the contract was entered into with the permission of the child's father. Such contractual safeguards were intended to prevent the infant from binding himself to a scrupulous master. Once bound, the law achieved over a period of fifty years further protection through a succession of Acts which gave the apprentice the means to complain to a magistrate of abusive behaviour by his master, and eventually gave courts the ability to fine a master for ill-treatment. The extent to which these provisions were successful however, is doubtful, as the cases of Susannah Archer and Mary Clifford demonstrate. Furthermore, for occupations that were inherently dangerous, such as that of a chimney sweep, specific legislative protection was slow to develop and even after its implementation, the law was often ignored in practice such as with the 1788 Act.

⁶¹⁵ 4 & 4 Vict c85

⁶¹⁶ Chimney Sweepers Act, 38 & 39 Vict c70

6.3.1 Void Apprenticeship Contracts

The treatment of apprentices such as that documented above was horrific. In the event that similar cases concerning mistreatment should reach trial, this amounted to valid cause to release the infant from the contract. However, beyond this, there were other means by which an apprenticeship indenture could be rendered void.

Bad Behaviour

One way in which the parties could be released from their obligations under an apprenticeship contract was if the apprentice absconded or behaved badly. It was common for the apprenticeship agreement to contain a clause which would put an end to the contract should the apprentice behave in a way unbecoming of his status. Indeed, in the contract between James Hardy and the Lune Shipbuilding Company, addressed above, it was stated that:

If he, as Apprentice aforesaid, shall behave in a disrespectful or unbecoming way... such conduct shall be held per se sufficient for expelling the said Apprentice from his employment and cancelling this present Indenture

In these circumstances, the contract was voidable. The case of *Gray v Cookson & Clayton*⁶¹⁷ illustrates the response of the law to an apprentice breaking his indenture agreement in this way. Gray was apprenticed to a woollen draper for a term of 3 years and 9 months. It was stated that during his period of service, Gray had 'been guilty of...

⁶¹⁷ (1812) 16 East 13; 104 ER 994

misdemeanors [*sic.*], miscarriages, and ill-behaviour'⁶¹⁸ and had eventually 'absented himself from the service...without his consent'.⁶¹⁹ As a consequence of this, Gray was sentenced to one month in a house of correction, but regarding the apprenticeship contract Lord Ellenborough held that the indenture was voidable as result of 'the act of delinquency on the part of the apprentice'.⁶²⁰ It was this same behaviour that rendered the contract voidable in the later case of *Cuff v Brown*.⁶²¹

In *Cuff*, the father of an apprentice brought an action against his son's master for the return of the indenture premium when the master refused to readmit the boy to his service after he had run away. William Cuff was apprenticed to Brown in the business of conveyancer, and after three years, he was to be an articled clerk at their firm of solicitors. One hundred pounds was paid by William's father to Brown, in the form of a promissory note payable after three years.⁶²² Much like the contract between James Hardy and the Lune Shipbuilding Company, this agreement also contained the standard clause that William would serve Brown for the whole period of the apprenticeship and would not misbehave or absent himself without leave. However, two years into the apprenticeship William ran away to enlist in the army. His father appealed to Brown to consider taking his son back, but this request was refused and when Brown sought to indorse the promissory note, Cuff brought an action against him for the return of the premium.

⁶¹⁸ *ibid* 995

⁶¹⁹ *ibid*

⁶²⁰ *ibid* 999 (Ellenborough LJ)

⁶²¹ (1818) 5 Price 297; 146 ER 613

⁶²² *ibid* 614

The courts addressed this issue by taking a common-sense approach. It was stated that 'the youth...runs away of his own accord...he may or may not come back: he chuses [sic] however to come back'⁶²³ and in these circumstances therefore 'it is not fair...that the young man should demand a return of the...money, because he chuses [sic] to run away'.⁶²⁴ As it was the apprentice who 'put an end'⁶²⁵ to the contract, Brown was entitled to keep the indenture premium and both parties were released from the contract. This conclusion is simply the courts upholding the provisions of the indenture which protected the master from losing money should an apprentice abscond, particularly if the child was to leave later in the term of apprenticeship, where he would be more valuable, having gained greater skills. Just as much as an apprenticeship contract protected the rights of an infant, this was very much balanced against the interests of the master, hence the judgment in *Cuff*, which permitted the master to retain the premium.

Illness and Death

Interpreting the provisions of the apprenticeship contract was equally important to determine whether illness or death could result in the premium being returned – or retained, depending on the inflicted party – after the contract was subsequently declared void. When deciding a case in which illness had rendered the infant incapacitated or death had brought the contract to an end, the courts looked to what was explicitly

⁶²³ *ibid* 615

⁶²⁴ *ibid*

⁶²⁵ *ibid*

stipulated in the apprenticeship indenture to determine whether the premium could be returned to the apprentice or his family. In order to understand the way in which such issues were addressed, the cases of *Derby v Humber*⁶²⁶ and *Whincup v Hughes*⁶²⁷ shall be discussed and compared below. These cases have been chosen as opposing outcomes were reached by the courts, having examined the terms of the respective apprenticeship contracts.

Derby v Humber concerned an apprenticeship indenture entered in to by James Derby and his father and Humber. James was to be apprenticed to Humber ‘in the practice and profession of a civil engineer for three years’.⁶²⁸ The contract contained a provision that should James become incapacitated by way of illness during the first 11 months of the apprenticeship, Humber would return the premium of 50 pounds to James’ father. This was on the condition, however, that the master was served with a medical certificate signed by two doctors, attesting to James’ ill-health and consequent incapacity:

And the said William Humber (the defendant) further agrees, that, in the event of the health of the said James Derby failing, so as to incapacitate him from following the said profession of a civil engineer, before the 1st of April, 1866, he the said W. Humber will refund and pay over to the said J. T. Derby (the plaintiff) the sum of 50l.; in such case the indentures to become cancelled and null and void as and between the said parties; it being understood and agreed between the parties hereto that the production by the said J. T. Derby, his executors or administrators, to the said W. Humber, at any time before the said 1st of April, 1866, of a certificate signed by two duly-qualified medical gentlemen, testifying as to the fact, shall be conclusive evidence that the health of the said

⁶²⁶ (1866) LR 2 C P 247

⁶²⁷ (1870) LR 6 C P 78

⁶²⁸ *Derby* (n626) 247

James Derby has failed, so as to incapacitate him from following the said profession of a civil engineer⁶²⁹

Only three months after entering the agreement, James' health deteriorated, as a result of a 'diseased heart and dropsy',⁶³⁰ and he died soon after.⁶³¹ Seven months after the death of James, Humber received a certificate signed by two medical professionals who confirmed that James' health had failed during the first three months of his apprenticeship, and in addition, a request for the return of the 50 pounds premium. Humber refused to pay on the basis that the certificate was provided after the death of James, and to conform to the contract term concerning the return of the premium, the certificate ought to have been served during the time that James was still alive but incapacitated. As a consequence of this refusal, James' father brought an action for the return of the premium.

Bovill CJ in deciding the case turned to the construction of the contract, and the wording of the relevant clause requiring production of a medical certificate; in particular, the words 'at any time before the said 1st of April 1866'.⁶³² Bovill understood this to mean that the deciding factor upon which the return of the premium depended was the death of James prior to 1866, and a certificate confirming the illness. As a result, it did not matter that the certificate was produced after his death, as the time frame of April 1866

⁶²⁹ *ibid* 249

⁶³⁰ *ibid* 248

⁶³¹ Dropsy was categorised by a build-up of fluid in bodily tissue and is what we know today as oedema

⁶³² *Derby* (n626) 249

was adhered to both in the death of James and the production of the certificate. As such, it was held that there had been ‘sufficient compliance with the provisions of the deed’⁶³³ and Humber was compelled to return the 50 pounds premium to James’ father.

The above case demonstrates how the courts looked to the explicit terms of an apprenticeship contract in order to determine whether there were to be further financial consequences resulting from an indenture rendered void by the incapacity of a party suffering from illness or death. However, where the contract failed to expressly provide for ill health or death, the intention of the parties was more greatly scrutinised by the courts. The judgment in *Whincup v Hughes* is an example of the courts doing this. In this case, Whincup apprenticed his son to a jeweller for a term of six years, and paid a premium of 25 pounds. The action was brought against the executrix of the jeweller’s estate for return of the apprenticeship premium when the master died only one year into the apprenticeship. In deciding the case, the court looked at what was implied in the contract. It was found that ‘the contract is subject to an implied condition that both parties should so long live’,⁶³⁴ but Montague Smith J found that the implied term did not extend to the return of the premium upon death. He reasoned that, ‘if they had so meant there would have been no difficulty in expressly providing for such a contingency’⁶³⁵ and ultimately, with explicit reference to the intention of the parties, ‘if they had intended that there should be any return of the premium, [they] would have provided for it’.⁶³⁶

⁶³³ *ibid* 250 (Bovill CJ)

⁶³⁴ *Whincup* (n627) 85

⁶³⁵ *ibid* (Montague Smith J)

⁶³⁶ *ibid*

Ultimately, it was held that Whincup's action to claim back his premium failed as there was nothing in the contract to expressly provide for such a return upon death.

Therefore, it is clear that when a contract was rendered void by way of incapacity caused by illness or death, the cases of *Derby* and *Whincup* demonstrate that the consequence of such was that a claim for a financial return, such as the premium, would only be permitted if the contract explicitly provided for it. In this way, the master did not stand to doubly lose out, by having invested in training the apprentice for the period before his death or incapacity, and then also being required to return the original premium. On the other side, the family of the apprentice were equally protected from losing the entire premium paid when only a portion of the apprenticeship was served. This protection for both parties only arose, however, when they explicitly provided for it, and so again, the law was protecting the parties by ensuring that these financial consequences were agreed when entering in to the contract.

Not Beneficial to the Infant

The final category to be addressed with regard to voidable apprenticeship contracts are those which were not beneficial to the infant. As noted, a contract for the sale of goods was binding on a child only if it was found to be in his interest,⁶³⁷ and in the same way, an apprenticeship contract was binding only if it was beneficial to the apprentice. The

⁶³⁷ See *Ive v Chester* (1620) Cro Jac 56; 79 ER 480 and *Peters v Fleming* (1840) 6 H & W 42; 151 ER 314. See also, *Coates v Wilson* (1804) 5 Esp 152; 170 ER 769

protection of the infant is abundantly clear in this rule; the law was protecting the apprentice from being taken advantage of by a master. The question of what amounted to being in the interests of the child was addressed in the case of *De Francesco v Barnum*.⁶³⁸

This case concerned an apprenticeship indenture entered into on 6th December 1886 by a 14 year old girl, Helen Maude Parnell, and her mother Elizabeth Parnell, and Giuseppe Venuto de Francesco. Helen was to be apprenticed for seven years in ‘the art of stage dancing’⁶³⁹ and her younger sister, Ada, aged 12, also entered into a contract with Mr De Francesco under the same terms. The contract provided that the apprentices were to be paid per engagement at a rate of 9d. in the first year, rising to 1s. per show thereafter. Should the company travel internationally, the girls were to receive food and lodging whilst abroad, as well as a payment of 5s. per week. However, there was nothing to stipulate that the master would maintain the girls whilst they were not employed in a show, or any guarantee of performances. As with many apprenticeship contracts, there was a clause which stated that the contract would be brought to an end should the girls behave in a way unbecoming of their status, but this provision went further than usual and provided that the master was at liberty to end the contract at any time. The action brought by De Francesco against Phineas Barnum hinged on this term.

⁶³⁸ (1890) 45 Ch D 430

⁶³⁹ *ibid* 431

Barnum had signed a contract with the apprenticed girls in August 1889, in which they agreed to perform as dancers at his Olympia show. They were to be paid 21s. a week for their services. On hearing of this, rather than exercising his supposed right under the indenture to end the contract, De Francesco sought an injunction to enforce the terms of his agreement with the girls, as well as damages for breach of contract. In response, it was contended by the defendants that the provisions of the apprenticeship contract were 'unreasonable and oppressive'⁶⁴⁰ and the contract was thus void.

In hearing the case, the judgment of Fry LJ is of particular importance, as his Lordship explained how the courts determined what was for the benefit of the infant:

It is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial.⁶⁴¹

Ultimately, there will not be an individual term which will control whether the contract is beneficial to the infant or not. Rather, the courts will look at the contract in its entirety, taking into account the circumstances of the parties in order to reach a decision. It is therefore clear that the question of what is beneficial to an infant contracting as an apprentice is determined in much the same way as the question of what is of benefit to

⁶⁴⁰ *ibid* 434

⁶⁴¹ *ibid* 439

an infant contracting for the sale of goods; the courts take into account the context of the case and the surrounding circumstances.

It was by looking at the entire contract in *De Francesco v Barnum* that the court ultimately dismissed the action brought by De Francesco. Given that the girls were only to be paid per engagement, which were not guaranteed to them, the court found that this gave De Francesco an unreasonable power over how much remuneration the girls were to receive. Additionally, it is ironic that the term on which De Francesco sought to rely in order to claim damages was one of the very same upon which the court found the contract to be unreasonably oppressive. In addition to the lack of remuneration, clause eight of the contract, which permitted De Francesco to ‘put an end’⁶⁴² to the apprenticeship ‘at any time’⁶⁴³ was held to place the infant ‘absolutely at the disposal of the teacher’.⁶⁴⁴ The terms of the contract also permitted the master to take the girls to perform at any national or international show. This, combined with the lack of remuneration and maintenance whilst unemployed, and De Francesco’s absolute power to end the contract as he so wished, led the court to find that the contract gave him an ‘inordinate power’.⁶⁴⁵ As such, the indenture could not be for the benefit of the infants and was void. The apprentices were subsequently not bound by the contract, and De Francesco’s action against Barnum failed.

⁶⁴² *ibid* 442

⁶⁴³ *ibid*

⁶⁴⁴ *ibid*

⁶⁴⁵ *ibid* 443

De Francesco v Barnum is clear authority for the proposition that finding an apprenticeship contract to be unbeneficial to an infant resulted in the contract being declared void and the parties subsequently released from their obligations under it. However, the consequences could extend much further and this is made evident in the case of *R v Lord*.⁶⁴⁶ *Lord* concerned an appeal against conviction by an apprentice who was imprisoned for absconding from his master. Although a criminal case, in his appeal, it was argued that the apprenticeship contract was void, being too onerous on the part of the infant, and thus not of benefit to him. Having therefore no valid apprenticeship, he could not be imprisoned for running away from it.

The contract was entered on the 29th July 1846 between James Lord, an infant, and John Mason, a machine-maker; Lord was to be apprenticed to Mason as an artificer.⁶⁴⁷ On the 3rd August 1846 Lord absconded from his master and like the apprentice in *Gray v Cookson & Clayton*, was subsequently imprisoned under the provisions of the Masters and Servants Act 1823.⁶⁴⁸ This Act permitted a servant to be sent to prison for up to three months for absconding.⁶⁴⁹ On appeal, the court's attention was drawn to two particular stipulations in the contract. The first was that 'should the steam engine be stopped from accident or any other cause... J.M. may retain all weekly or other wages'.⁶⁵⁰ The second notable provision stated that 'J.M. may dismiss and discharge the said James Lord from

⁶⁴⁶ (1850) 12 QB 757; 116 ER 1055

⁶⁴⁷ An artificer is what we today call a mechanic

⁶⁴⁸ (1823) 4 Geo 4 c34

⁶⁴⁹ *ibid* Section 3

⁶⁵⁰ *R v Lord* (n646) 1055

his said service at any time'.⁶⁵¹ Counsel for Lord argued that stopping the steam engine and thus withholding the wages of the apprentice was something completely within the masters control, and that this imbalance of power was only furthered with the provision that gave the master the right to end the apprenticeship as he so wished. It was therefore 'a one-sided contract'.⁶⁵² Lord Denman agreed. In quashing the infant's conviction, he stated that:

an agreement to serve for wages may be for the infant's benefit: but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant.⁶⁵³

The result was that the contract was declared void.

The above two cases demonstrate that the validity of an apprenticeship contract very much depended on balancing the respective interests of the infant apprentice against those of the master. The extent to which one party's interests prevailed over the other was to be determined by the courts taking into account all of the surrounding circumstances and the context in which the contract took place. Protection was in this way afforded to an infant who could be released from an unreasonably onerous apprenticeship contract. But it is argued that the process by which the courts determined whether a contract was to be declared void ensured that all circumstances were taken into account, and this meant addressing the interests of the master under the contract also. This was therefore not a one-sided protection aimed at protecting the infant above

⁶⁵¹ *ibid*

⁶⁵² *ibid* 1056

⁶⁵³ *ibid* 1057 (Denman LJ)

acknowledging the interests of the master, but rather a careful deliberation of the rights of each party under the contract.

6.4 CONCLUSION

Ultimately, the notion that the protection of infants was reached at the expense of the interests of those with whom they contracted, is not accurate. In relation to boys at university or those who enlisted in the army, as in *Coates v Wilson* and the cases of *Hands* and *Berolles*, it was certainly the case that the law sought to apply further safeguards to their contractual capacity, and this is evident in the application of a two-part rule. The law which stated that the goods must be necessary for the infant, but also that they must be necessary in relation to his 'station in life',⁶⁵⁴ ensured that the protection was firmly on the infant. However, cases such as *Ford v Fothergill* do attempt to redress the balance by putting the trader on notice to enquire of the potential infancy.

With regard to an infant pledging his father's credit, and the potential liability of parents for the debts of an infant, what we see in cases such as *Blackburn v Mackey* is that the law sought to protect the wealth of the father. This was done by requiring a father to give explicit consent for items purchased in his name, by his child. Thus, rather than protecting an infant, an element of control was applied to their contractual capacity.

⁶⁵⁴ *Hands* (n562) 1557

Similarly to a married woman who acted as agent for her husband, the law exerted this control mechanism in order to protect wealth and avoid the potential 'ruin'⁶⁵⁵ of families.

It is interesting that when addressing apprenticeship contracts, the interests of the respective parties were treated by the law in a much more balanced way. A level of statutory protection was intended for children undertaking apprenticeships, in the form of legislation which could cancel the apprenticeship and release the child from the indenture should mistreatment occur. A succession of Acts in the eighteenth century sought to provide the infant with recourse to report an abusive master, but as noted, the practical possibility of a child evoking the legislation and seeking recourse was uncertain, as shown in the cases of Susannah Archer and Mary Clifford. Even for those apprenticeship contracts deemed especially harsh due to the nature of the work, as were climbing boy apprenticeships, despite attempted reform of the system in the 1817 Committee Report, the age of apprenticeship – and thus increased protection for these children – was not achieved until much later. Indeed, it would take almost sixty years⁶⁵⁶ before children were completely banned from this inherently dangerous trade. It would therefore seem that despite the best efforts of the law, for apprentices, the harsh reality was that this statutory protection did little to protect them from abusive masters. The common law, however, developed in a way that sought to balance the interests of the infant against those of the master when determining the validity of an apprenticeship indenture.

⁶⁵⁵ *Blackburn* (1538) 1077

⁶⁵⁶ Chimney Sweepers Act 1875, 38 & 39 Vict c70

This equality is evident when cases such as *Cuff v Brown* are analysed. In cases concerning bad behaviour on the part of the apprentice, should the contract be declared void, as well as both parties being released from the contract, the master was also permitted to retain the premium. Thus protecting his financial interests. In death and incapacity as a result of illness too, *Derby v Humber* and *Whincup v Hughes* are authority for the proposition that the premium would only be returned if this was expressly provided by the parties in the contract. This way, the master did not stand to lose any money invested in the apprentice, and equally, the family of the child did not forfeit their premium when only part of the apprenticeship had been served. Perhaps where it could be argued that the greatest protection of the infant was applied was to those cases concerning contracts which were void for not being of benefit to the infant. Yet here also, the courts looked at the entire contract, and the surrounding context and circumstances, in order to determine whether the apprenticeship was in the best interests of the child. There was a weighing up of competing interests, which took into account those of the master also, and so it cannot be said that the law addressed these contracts from a perspective that was biased towards the infant. It is clear in cases such as *De Francesco v Barnum*, that the courts also discussed what the master sought to gain from the contract, and indeed, it is argued that the question of what was of benefit to an infant in an apprenticeship contract cannot be determined without an exploration of interests of the other party. Only by comparing and balancing the interests of each, could the courts successfully determine the validity of the contract and subsequently seek to protect the parties under it.

It is therefore argued here that ultimately, the treatment by the law of infants' contractual capacity was not purely one of protection. Regarding contracting for necessities, it was certainly the case that the two-part rule and decision in *Ford* placed more onus on the trader, but when contracting as agent of his father, the law was much more concerned with controlling the contractual rights of the child and protecting the wealth of the family than it was to protect the infant himself. Indeed, legislative protection was attempted with regard to apprenticeships and the social dangers inherent in them, but again, for cases concerning potential void apprenticeship contracts, the law protected both parties by examining their respective interests. It is therefore not as simple to suggest that the law was wholly concerned with protecting infants' contractual capacity over and above competing interests; instead, it was something that was to be achieved, but this was not to be done with a complete disregard to the contractual rights and interests of other parties.

Appendix 7: W. Hogarth, *Industry and Idleness* (1747)

Plate 1

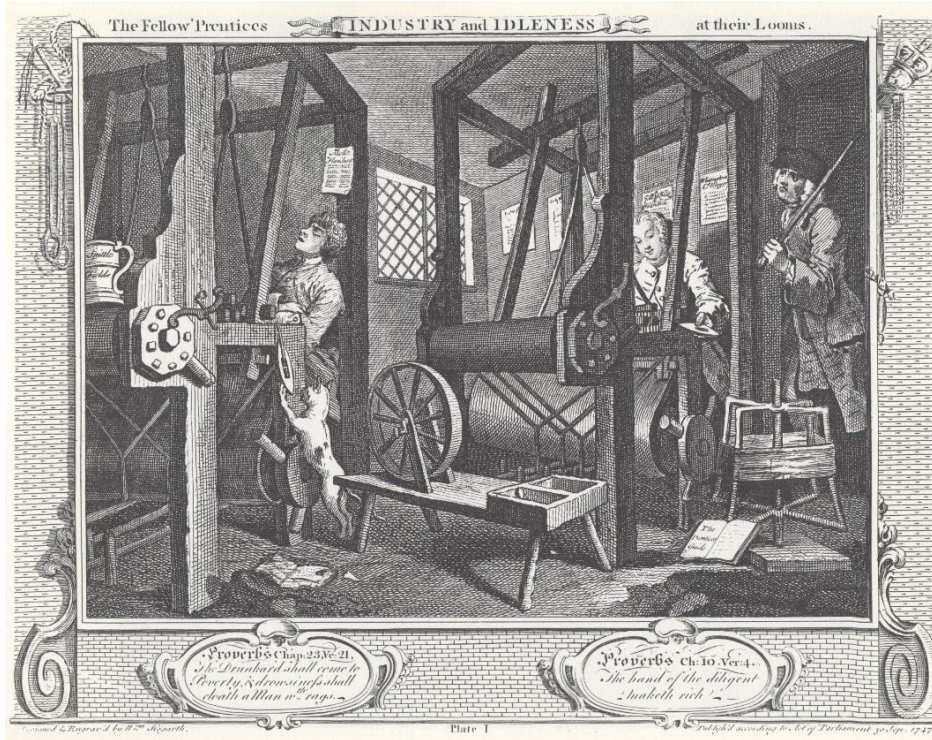


Plate 2



Plate 3



Plate 4



Plate 5



Plate 6



Plate 7



Plate 8



Plate 9

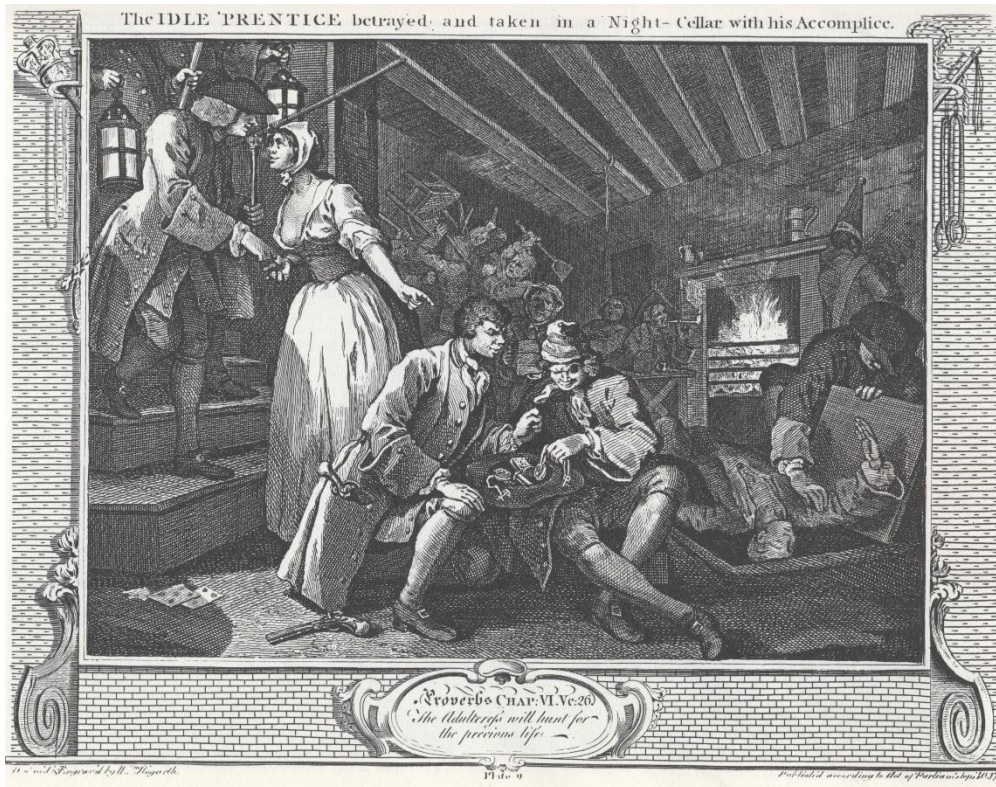


Plate 10



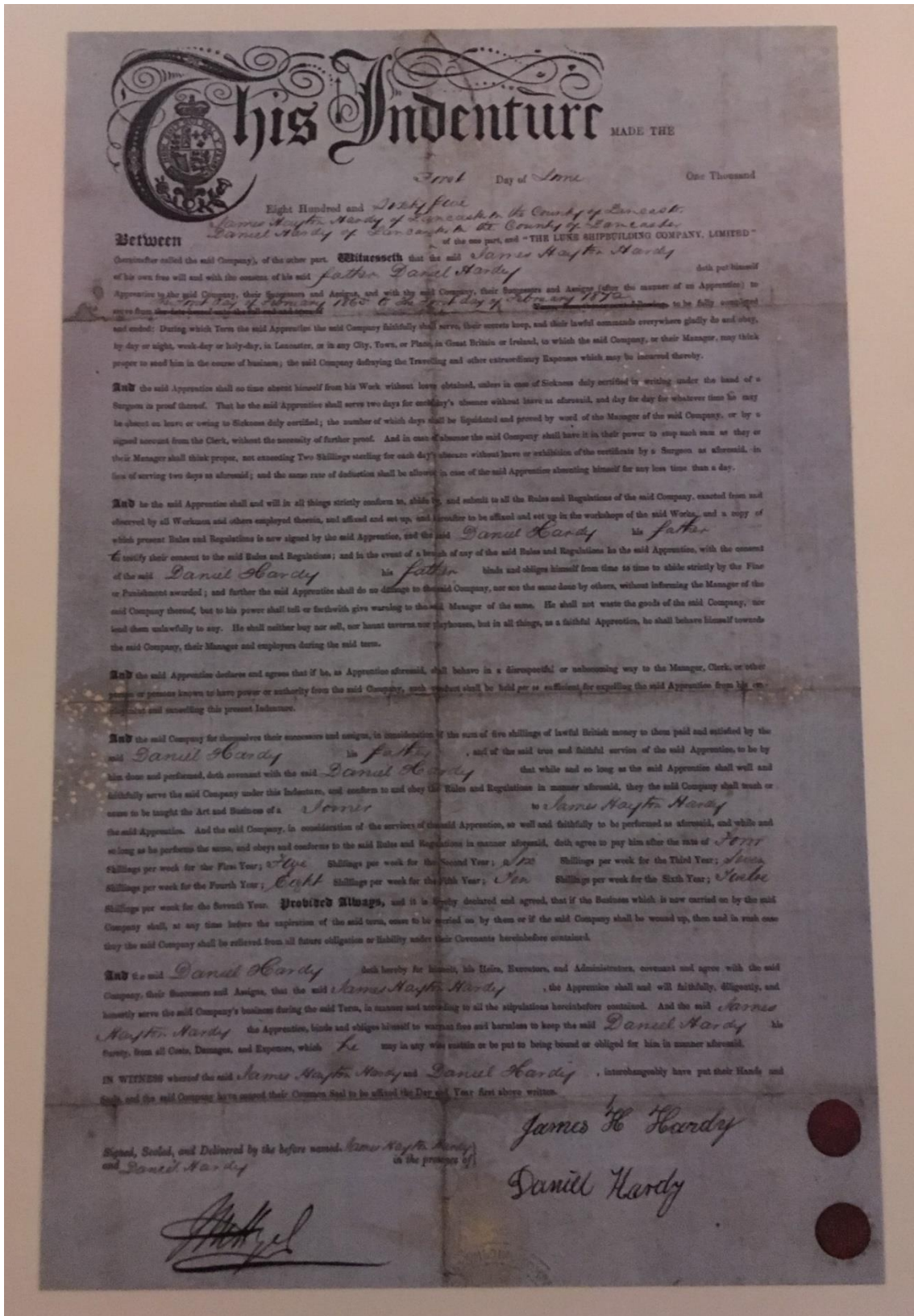
Plate 11



Plate 12



Appendix 8: Apprenticeship Contract between James Hardy and the Lune Shipbuilding Company, dated 1st June 1865



This Indenture MADE THE First Day of June One Thousand Eight Hundred and Sixty Five

Between James Hayton Hardy of Lancaster in the County of Lancaster

Daniel Hardy of Lancaster in the County of Lancaster of the one part, and THE LUNE SHIPBUILDING COMPANY LIMITED (hereinafter called the said Company) of the other part.

Witnesseth that the said James Hayton Hardy of his own free will and with the consent of his said father, Daniel Hardy doth put himself Apprentice to the said Company, their Successors and Assigns, and with the said Company, their Successors and Assigns (after the manner of an Apprentice) to ____ from the first day of February 1865 to the first day of February 1872 to be fully completed and ended. During which Term the said Apprentice the said Company faithfully shall serve, their secrets keep, and their lawful commands everywhere gladly do and obey, by day or night, week-day or holy-day, in Lancaster, or in any City, Town or Place, in Great Britain or Ireland, to which the said Company, or their Manager, may think proper to send him in the course of business, the said Company defraying the Travelling and other extraordinary Expenses which may be incurred thereby.

And the said Apprentice shall no time absent himself from his Work without leave obtained, unless in case of Sickness duly certified in writing under the hand of a Surgeon in proof thereof. That he the said Apprentice shall serve two days for each day's absence

without leave as aforesaid, and day for day for whatever time he may be absent on leave owing to Sickness duly certified; the number of which days shall be liquidated and proved by word of the Manager of the said Company, or by a signed account from the Clerk without the necessity of further proof. And in case of absence the said Company shall have it in their power to stop such sum as they or their Manager shall think proper, not exceeding Two Shillings sterling for each day's absence without leave or exhibition of the certificate by a Surgeon as aforesaid, in lieu of serving two days as aforesaid; and the same rate of deduction shall be allowed in case of the said Apprentice absenting himself for any less time than a day.

And he the said Apprentice shall and will in all things strictly conform to, abide by, and submit to all the Rules and Regulations of the said Company, exacted from and observed by all Workmen and others employed therein, and affixed and set up, and hereafter to be affixed and set up in the workshops of the said Works, and a copy of which present Rules and Regulations is now signed by the said Apprentice, and the said Daniel Hardy his father do testify their consent to the said Rules and Regulations; and in the event of a breach of any of the said Rules and Regulations he the said Apprentice, with the consent of the said Daniel Hardy his father binds and obliges himself from time to time to abide strictly by the Fine or Punishment awarded; and further the said Apprentice shall do no damage to the said Company, nor see the same done by others, without informing the Manager of the Company thereof, but to his power shall tell or forthwith give warning to the said Manager of the same. He shall not waste the goods of the said Company, nor lend them unlawfully to any. He shall neither buy nor sell, nor haunt taverns nor

playhouses, but in all things, as a faithful Apprentice, he shall behave himself towards the said Company, their Manager and employers during the said term.

And the said Apprentice declares and agrees that if he, as Apprentice aforesaid, shall behave in a disrespectful or unbecoming way to the Manager, Clerk, or other person or persons known to have power or authority from the said Company, such conduct shall be held *per se* sufficient for expelling the said Apprentice from his employment and cancelling this present Indenture.

And the said Company for themselves their successors and assigns, in consideration of the sum of five shillings of lawful British money to them paid and satisfied by the said Daniel Hardy his father, and of the said true and faithful service of the said Apprentice, to be by him done and performed, doth covenant with the said Daniel Hardy that while and so long as the said Apprentice shall well and faithfully serve the said Company under this Indenture and conform to and obey the Rules and Regulations in manner aforesaid, they the said Company shall teach or cause to be taught the Art and Business of a Joiner to James Hayton Hardy the said Apprentice. And the said Company, in consideration of the services of the said Apprentice, so well and faithfully to be performed as aforesaid, and while and so long as he performs the same, and obeys and conforms to the said Rules and Regulations in manner aforesaid, doth agree to pay him after the rate of Four Shillings per week for the First Year; Five Shillings per week for the Second Year; Six Shillings per week for the Third Year; Seven Shillings per week for the Fourth Year; Eight

Shillings per week for the Fifth Year; Ten Shillings per week for the Sixth Year; Twelve Shillings per week for the Seventh Year. **Provided always**, and it is hereby declared and agreed, that if the Business which is now carried on by the said Company shall, at any time before the expiration of the mid term, cease to be carried on by them or if the said Company shall be wound up, then and in such case they the said Company shall be relieved from all future obligations or liability under their Covenants hereinbefore contained.

And the said Daniel Hardy doth hereby for himself, his Heirs, Executors, and Administrators, covenant and agree with the said Company, their successors and Assigns, that the said James Hayton Hardy, the Apprentice shall and will faithfully, diligently, and honestly serve the said Company's business during the said Term, in manner and according to all the stipulations hereinbefore contained. And the said James Hayton Hardy the Apprentice, binds and obliges himself to warrant free and harmless to keep the said Daniel Hardy his curety, from all Costs, Damages and Expenses, which he may in any way sustain or be put to being bound or obliged for him in manner aforesaid.

IN WITNESS whereof the said James Hayton Hardy and Daniel Hardy, interchangeably have put their Hands and ___ and the said Company have ___ their Common Seal to be affixed this Day and Year first above written.

Signed, Sealed and Delivered by the before named James Hayton Hardy

and Daniel Hardy

Chapter Seven

Conclusion

This thesis began by postulating the advantages of an interdisciplinary methodology to challenge commonly held beliefs regarding the rationale of the law in relation to holding certain contracts void. It has subsequently been demonstrated that placing the law in its social context disrupts the rigid binary control-protection interest categorisation that the law sought to apply to the areas of illegality, immorality, and incapacity.

It has been argued in Chapter Two and Chapter Three that when viewed through a purely legal lens, contracts concerning marriage rights were rendered void as being contrary to public policy, as the law sought to uphold the sanctity of marriage. Yet, whilst *dicta* in the judgments supports this, in referring to the notion that marriage be made on the ‘proper foundation’,⁶⁵⁷ when analysed alongside social history, it is clear that there was an inherent desire to protect family wealth. This further protection is only revealed through an historical analysis of the background of the families in the cases, as well as knowledge of social norms such as the likely mode by which fortune would be invested at this time. The interdisciplinary methodology assisted here in that it confirmed existing notions of what the law sought to protect by rendering contracts for the restraint of marriage, marriage brokerage, and separation agreements as void, but it also revealed a further level of protection, which those conducting a solely legal analysis would overlook.

⁶⁵⁷ *Cole* (n135 in ch 2) 1171 (Hardwicke LJ)

Additionally, the interdisciplinary methodology not only provides an alternative interpretation to legal reasoning, but can also assist in further understanding the motivations of the law. For instance, eighteenth century ideals of womanhood and the presentation of women in literature support the rationale of the law regarding breach of promise actions, in that it was felt that these meek, virtuous, women required protection and this was done through permitting actions for breach of promise. This was also revealed to be the case when contracts involving infants were analysed in Chapter Six. Clearly both the law and social history sought to protect a contractual actor deemed to lack the knowledge to enter contracts, but the extent of that protection is all the more noticeable when analysing the social context. Stories of abuse assist in understanding why statutory provisions were necessary, particularly in relation to apprenticeship contracts. Yet, the protection given to the master has often been commonly overlooked; the very same statutory provisions also protected the master, and so a much more balanced agenda of the law than has previously been envisaged is revealed. The protection given to contractual actors in the areas of illegality and incapacity has always been present, but it is only when viewed through a combined lens of law and social history that alternative protections, such as that of family wealth, and the extent of the protection applied, such as that towards infants, is revealed.

Likewise, in Chapter Four it was stated that the law regarding prostitution sought to control the practice and, in order to do this, contracts for the rent of premises as well as the sale of goods were rendered void. This not only signalled that the law would not

support such an immoral practice, but also served as a warning to landlords and tradesman to prohibit them from future dealings with prostitutes and, in this way, the practice could be indirectly suppressed. Analysing the cases in isolation suggests a staunch agenda of control through the conduit of the law, yet a concurrent historical understanding displaces this view. Whilst groups such as the Society for the Reformation of Manners campaigned actively against prostitution, social remedies moved away from punitive measures towards those of redemption. This is reflected in the establishment of the Magdalen Hospital, as well as the idea advocated by Mandeville for the creation of public stews.⁶⁵⁸ It is with this knowledge that the redemptive language in the judgments takes on greater meaning; the acknowledgement in *Appleton v Campbell* that prostitutes must have a 'place to lay their heads'⁶⁵⁹ reflects the move in society away from viewing working women as requiring punishment towards, instead, seeking their redemption. From this combined methodology, not only is the notion that the law sought to control the profession weakened, but ideas of protecting the public as well as redeeming the women take greater hold.

The weakening of the control interest was also present when the contractual capacity of women was examined through the combined methodology of law and social history in Chapter Five. The operation of the legal concept of coverture sought to control women, placing them under the guardianship of a male, and subsuming their legal rights upon

⁶⁵⁸ Despite these public stews never being established, the notion of a safe place in which prostitution could occur was indicative of social acceptance of prostitution and a move away from punishing the women involved

⁶⁵⁹ *Appleton* (n344 in ch 4) 157

marriage into those of their husband. Yet in practice, cases such as *Manby v Scott*⁶⁶⁰ demonstrate that tradesman were often willing to contract anyway; such contracts would pass without issue and it was only should the bill be unpaid at the end of the month that questions concerning contractual capacity arose. Furthermore, social norms and practices developed, such as pin money and jointure, which countered their legal status as a *feme covert*. This historical context gives women in the long eighteenth century an element of independence, which legal doctrine sought to remove in the application of coverture. Once more, a solely legal analysis would result in one conclusion with respect to married women: they were controlled and lacked contractual capacity. However, a joint methodological approach counters this; the control interest is somewhat weakened and thus women take on a position of greater empowerment.

It is therefore submitted that whilst the control-protection interest of the law holds true, the extent to which this is a rigid, binary, categorisation has been disrupted. This disruption has been revealed as a consequence of the use of a combined legal and historical methodology and therefore the present author considers that those carrying out legal research could benefit from the adoption of a similar, interdisciplinary, approach.

⁶⁶⁰ (1674) 1 Mod 124; 86 ER 781

7.1 IMPLICATIONS OF THIS RESEARCH

This thesis has provided an original contribution to legal scholarship by submitting an alternative methodology for the area of void contracts. In analysing the law alongside social history, it has been determined that the motivations of the courts with regard to rendering contracts void was often misaligned with both the social reality and how these contracts operated in practice. This thesis has therefore challenged the interpretation of the law that a purely legal methodology has produced and, in the realm of void contracts, has resulted in the rigid division between the control and protection interests of the law becoming much more blurred. For instance, with regard to immorality, a purely legal analysis of the case law revealed a system which sought to control the practice of prostitution. However, placed in the social context, it revealed a level of protection aimed not only towards the public but a less punitive agenda towards prostitutes also. The implications of this research therefore extend to assisting future legal scholars and suggests a rethinking of how case law and legal theory is analysed. This supports the contention made by Sugarman in the introduction of this thesis that legal scholarship would benefit from greater ‘cross-fertilisation’.⁶⁶¹ The conclusions reached in this thesis support this argument and it is thus submitted that there is room for an alternative methodology in legal study.

⁶⁶¹ See D. Sugarman, ‘Promoting Dialogue Between History and Socio-legal Studies: the Contribution of Christopher W. Brooks and the ‘Legal Turn’ in Early Modern English History’, 2017 44 *Journal of Law and Society* 37, 41

Following from this, as mentioned briefly above, the second implication of this research has been to uncover the motivations of the law in rendering contracts as void or voidable. It is argued that the notion that the law sought to uphold the sanctity of marriage, with regard to illegality, or sought to restrict women's legal autonomy in the area of incapacity, for instance, is an overly simplistic analysis of the law. In order to determine the true rationale, this thesis has abandoned the interpretation of the law in isolation of its social context. By doing so, alternative motivations can be revealed. Following from this finding, this research has thirdly discredited the traditional view that the law adopted a staunch agenda of control or protection when rendering contracts void or voidable. An analysis of the language of the judgments, alongside the social context in which the law was operating, has revealed that the division between the control and protection interests applied by the law was not a rigid one.

7.2 FURTHER RESEARCH

This thesis' area of focus, namely voidability of contracts, was chosen in order to demonstrate the value of applying an interdisciplinary methodology to legal analysis. Yet it is acknowledged that an interdisciplinary approach to legal scholarship would benefit from application across a broader range of legal topics in order to demonstrate its ability to disrupt conclusions that the use of a singular discipline methodology has produced. The limitations of this research have been that it has been restricted to a singular area of contract law, and thus in order to fully determine the effectiveness of an interdisciplinary methodology, further application across other areas of law is required. The development

of research in other areas of civil law would complement the research conducted in this thesis. For instance, whilst this thesis has focused on those contracts which were personal in nature, the implications of commercial legislation in the long eighteenth century would be a useful research project. This is especially so given the role of Lord Mansfield in the extensive development of commercial law at that time and, indeed, throughout the industrial revolution; something touched upon in the Introduction of this thesis. Such a project would contribute to existing research by seeking to analyse the extent to which a tension existed between a law which attempted to regulate but also encourage large corporations, whilst protecting the consumers who dealt with them. Beyond this, the criminal law too would benefit from further interdisciplinary analysis. The advantages of pursuing such research lies in the comprehensiveness of historical sources relating to criminal law and the social developments, such as the creation of the Metropolitan Police, which occurred during the long eighteenth century. Whilst historical accounts of the criminal law exist, most notably in the seminal *Albion's Fatal Tree*,⁶⁶² there is a notable lack of literature *critiquing* the connection between law and social history and thus an original contribution to knowledge could be made here.

It follows that whilst the focus of this thesis has been an interdisciplinary approach between law and history, it is argued that legal scholarship could indeed benefit from further subject 'cross-fertilisation'. Subjects which may be beneficial to legal scholarship include politics, literature, and philosophy; these areas are cited as they lend themselves

⁶⁶² D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson & C. Winslow, *Albion's Fatal Tree*, (Pantheon Books, New York: 1975)

particularly well to bridging the gap between law and culture and, as this thesis has shown, this is important to aid in an understanding not only of the theory of the law, but also how it is applied, and received, in practice. Further, these disciplines have been cited by those such as Sugarman as complementing legal study.⁶⁶³ The conclusions of this thesis, in successfully discrediting beliefs that a purely legal analysis would otherwise have produced, suggests that such scholarship would indeed be beneficial to the wider academic research community.

7.3 FINAL REMARKS

Whilst it is acknowledged that further research in to the advantages of an interdisciplinary approach to other areas of law is required, this thesis has provided a baseline from which this research can be conducted, having revealed the benefit of such a methodology to contract law. Through the combined lens of law and social history, contractual actors once believed to lack legal power and status take on greater capacity and in turn, empowerment. The alternative methodology unlocks the empowerment in contractual parties once believed to have none and thus dispels with common myths such as that married women possessed no recourse from the binds of coverture, or that prostitutes were heavily controlled as being contrary to a morally upright society. More generally, the interdisciplinary approach causes a concurrent disruption in the traditional control-protection interest distinctions of the law, and has challenged the

⁶⁶³ See D. Sugarman, 'From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship', in L. Mulcahy and D. Sugarman, *Legal Life Writing: Marginalized Subjects and Sources*, (Wiley-Blackwell, Oxford: 2013) 33

extent to which these labels hold true, if at all, and to what extent such interests could be said to overlap. An alternative approach to legal scholarship is thus proposed; one which challenges commonly held conceptions regarding the motivations of the law by forcing the scholar to look beyond the purely legal principles and to acknowledge instead the cultural and social context in which the law operates.

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