

# AGENCY: MARRIED WOMEN TRADERS OF NANTUCKET, 1765-1865

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## ABSTRACT

*Before the enactment of separate property and contract rights for married women, generations of married women in seaport cities and towns conducted business as merchants, traders and shopkeepers. The first part of this article shows how private law facilitated their business activities through traditional agency law, the use of powers of attorney, trade accounts and family business networks. These arrangements, largely hidden from public view in family papers, letters, and diaries, permitted married women to enter into contracts, to buy and sell property, and to appear in court. Private law, like equity, thus provided a more flexible alternative to the common law of coverture under agreements made within the family itself. On the other hand, public law proved much more restrictive for wives who were not part of a viable or harmonious marriage. In post-revolutionary Massachusetts, for example, the feme sole trader statute and various judicially adopted exceptions to the legal disabilities of married women under the common law applied only to certain wives abandoned by their husbands.*

*The second part of the article provides a case study of three generations of married women traders from Nantucket during the whaling era, the oil exploration business of its time. Their stories show how some married women, within the constraints of the law as it developed in Massachusetts without courts of equity, attained a form of autonomy in business or commercial activity at the same time that they fulfilled their family responsibilities. Their stories also uncover tensions underlying the first wave of women's rights reform efforts in the mid-nineteenth century, including the developing separation between work and home that continues to pose challenges for family law and for men and*

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women today. In a broader sense, this historical study also illuminates the interaction among private law, public law, and evolving social practice as the law both reinforced and shaped family roles during a period of increased commercialization and industrialization.

I.	INTRODUCTION . . . . .	37
II.	HISTORICAL AND LEGAL BACKGROUND . . . . .	41
	A. THE ECONOMIC AND SOCIAL CONTEXT: NANTUCKET'S WHALE FISHERY . . . . .	42
	B. COMMON LAW: MARRIED WOMEN AS "AGENTS" . . . . .	45
	C. EQUITY IN MASSACHUSETTS . . . . .	49
	D. EXCEPTIONS TO COVERTURE: SEPARATED OR ABANDONED MARRIED WOMEN . . . . .	51
	1. <i>Feme Sole</i> Trader Statute . . . . .	51
	2. Common Law Exceptions . . . . .	54
	a. <i>Influential English cases</i> . . . . .	55
	b. <i>Massachusetts cases</i> . . . . .	58
III.	THREE GENERATIONS OF WOMEN TRADERS . . . . .	60
	A. SISTERS IN TRADE: 1765-1800 . . . . .	61
	1. Kezia Folger Coffin, Merchant . . . . .	63
	2. Judith Folger Macy, Trader . . . . .	70
	B. TRADING IN TRANSITION: 1800-1865 . . . . .	73
	1. Anna Folger Coffin, Shopkeeper . . . . .	74
	2. Going Off-Island . . . . .	80
	a. <i>Mary Ellen Pleasant, San Francisco Entrepreneur</i> . . . . .	81
	b. <i>Margaret Getchell La Forge, Macy's Executive</i> . . . . .	84
IV.	CONCLUSION . . . . .	88

“Then I’ll haste to wed a sailor and send him off to sea, For a life of independence is the pleasant life for me . . . .”—*Nantucket Girl’s Song*, 1855<sup>1</sup>

## I. INTRODUCTION

When early American seafaring husbands sailed far from home, the lives of their wives on shore did not fit easily within the confines of the common law. Under the common law of coverture, married women were restricted in their capacity to enter into contracts, to own or convey property, to borrow or lend money, and to file suit in their own names.<sup>2</sup> A single woman or widow, referred to as *feme sole*, could act legally on her own behalf. By contrast, a married woman, referred to as a *feme covert*, could not. She was legally dependent on her husband.

Those legal disabilities posed practical problems for wives and families left on shore. Mariners could be away at sea for long periods under conditions of grave uncertainty concerning the success of their voyages or their safe return home. As a visitor to Nantucket observed in the late eighteenth century, “their wives, in their absence, are necessarily obliged to transact business, to settle accounts, and in short, to rule and provide for their families.”<sup>3</sup> The lines quoted above from the “Nantucket Girls Song” thus belie the tension between the law and the daily lives of married women in late eighteenth and early nineteenth century American seaport towns.<sup>4</sup>

This article traces the way the law responded to that tension, using the lives of three generations of traders and shopkeepers in an American seafaring community to examine how married women in business functioned within the legal framework of coverture. In port cities and towns along the Atlantic seaboard in both Great Britain<sup>5</sup> and America,<sup>6</sup> many women were engaged in commercial

1. The “Nantucket Girl’s Song” appears at the end of a shipboard journal kept by the wife of a Nantucket sea captain. The captain prevailed upon the ship’s owners for permission to bring along his wife and youngest child after three prior whaling voyages had taken him away from his family for three to four years at a time. Their voyage from Nantucket to the whaling grounds circumnavigated the globe. Diary of Eliza Brock, Journal of voyage in *Lexington*, Nantucket Historical Association Research Library (NHARL), MS 220/Log 136. Brock attributed the poem to Martha Ford, the wife of a whaling station’s resident physician, Feb. 1855, Bay Islands, Reefsides, New Zealand, Russell.

2. See, e.g., HENRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 93–135 (2000).

3. J. HECTOR ST. JOHN DE CRÉVECŒUR, *Letter VIII, Peculiar Customs at Nantucket*, *LETTERS FROM AN AMERICAN FARMER* 141 (1782, revised ed. 1783) (paperback ed. 1997).

4. See LISA NORLING, *CAPTAIN AHAB HAD A WIFE: NEW ENGLAND WOMEN AND THE WHALEFISHERY, 1720–1870*, at 262–70 (2000) (discussing the tension between Victorian ideals of domesticity and the reality of separations experienced by husbands and wives in whaling communities).

5. E.g., NICOLA PHILLIPS, *WOMEN IN BUSINESS, 1700–1850*, at 2–3 (2006); HANNAH BARKER, *THE BUSINESS OF WOMEN 2* (2006); see also MARGARET R. HUNT, *THE MIDDLING SORT: COMMERCE, GENDER, AND THE FAMILY IN ENGLAND, 1680–1780*, at 125–46 (1996); PAMELA SHARPE, *ADAPTING TO CAPITALISM, WORKING WOMEN IN THE ENGLISH ECONOMY, 1700–1850*, at 11–18 (St. Martin’s Press, Inc. 1996).

6. ELLEN HARTIGAN-O’CONNOR, *THE TIES THAT BUY: WOMEN AND COMMERCE IN REVOLUTIONARY AMERICA* 49–59 (2009) (focusing primarily on the women of Newport, Rhode Island and Charleston, South Carolina); Sherylllyne Haggerty, “*Ports, Petticoats, and Power?*” *Women and Work in Early-National Philadelphia*, in *WOMEN IN PORT: GENDERING COMMUNITIES, ECONOMIES, AND SOCIAL*

trading activities.<sup>7</sup> As historians have observed, America's colonial seaport towns were on the "cutting edge of economic, social, and political change,"<sup>8</sup> where the "alterations associated with advent of capitalist society" happened first, including the transition from a barter economy to a commercial one and from small-scale craft or artisanal production to factory production.<sup>9</sup> Those changes then "radiated outward to the smaller towns, villages, and farms of the hinterlands;" in that sense, the seaports "predicted the future."<sup>10</sup>

Legal and nonlegal factors, including the wider economy, the composition of the population, and the evolving legal, social and cultural context of the particular community where they lived shaped the opportunities available to women traders.<sup>11</sup> I focus here on the maritime community of Nantucket Island to show how some married women, within the constraints of the law as it evolved in Massachusetts without courts of equity,<sup>12</sup> attained a form of "independence" or autonomy in business or commercial activity at the same time that they attempted to fulfill their family responsibilities.

Although the terms "autonomy" and "independence" may provoke definitional questions as well as the more fundamental issue of whether married women could

NETWORKS IN ATLANTIC PORT CITIES, 1500-1800, at 103, 106-08 (Douglas Catterall & Jodi Campbell eds., 2012) (concentrating on the economic activities of single women); *see generally* Sheryllynne Haggerty, "Miss Fan can tun her han!" *Female traders in eighteenth-century British-American Atlantic port cities*, 6 ATLANTIC STUDIES: GLOBAL CURRENTS 29 (2009) (examining the varied nonlegal factors affecting female traders in Philadelphia, Charleston, and Kingston, Jamaica).

7. The term "trade" is used here broadly to refer to the buying, selling, and distribution of goods. Thus, included within the rubric of "traders" are merchants, dealers, wholesalers, grocers, and shopkeepers, among others. SHERYLLE HAGGERTY, *THE BRITISH-ATLANTIC TRADING COMMUNITY, 1760-1810: MEN, WOMEN, AND THE DISTRIBUTION OF GOODS* 6-7 (2006) (with a special focus on the trading communities of Philadelphia and Liverpool, England).

8. *E.g.*, GARY B. NASH, *THE URBAN CRUCIBLE: THE NORTHERN SEAPORTS AND THE ORIGINS OF THE AMERICAN REVOLUTION* ix (abr. ed. 1986) (focusing on Boston, New York, and Philadelphia); *see also* Jeanne Boydston, *The Woman Who Wasn't There: Women's Market Labor and the Transition to Capitalism in the United States*, in *WAGES OF INDEPENDENCE: CAPITALISM IN THE EARLY AMERICAN REPUBLIC* 29 (Paul A. Gilje ed. 1997).

9. NASH, *supra* note 8, at ix.

10. *Id.* *See also* GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815-1860*, at 6-14 (1951).

11. *See generally* ELAINE FORMAN CRANE, *EBB TIDE IN NEW ENGLAND: WOMEN, SEAPORTS, AND SOCIAL CHANGE, 1630-1800* (1998) (tracing the feminization of poverty in New England seaport towns).

12. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 55 (2d ed. 1985); Russell K. Osgood, *The Supreme Judicial Court, 1692-1992: An Overview*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT, 1692-1992*, at 12, 13-23 (1992). Although Massachusetts lacked a court of equity, the common law courts possessed certain limited equitable powers by statute. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* 15-17, 189 n.39 (1975); William J. Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U. L. REV. 269, 272-93 (1951). *See* discussion *infra* in Part II.C. In jurisdictions where equity courts existed, separate equitable estates could be created for married women's property, with the protections to be provided to the wife specifically stated in the document creating the estate. MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 81-140 (1986); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L. J. 1359, 1367-68 (1983).

be so described given the legal authority of husbands under coverture, women's historians have shown that the range of acceptable activity for colonial wives was quite broad.<sup>13</sup> My case study of Nantucket's married women in business begins during the colonial period after the mid-eighteenth century and ends in the mid-nineteenth century, a period of transition to capitalism and a shift in the roles of men and women.<sup>14</sup> The article is divided into two main parts.

The article begins in Part II with a brief overview of the economic and cultural context on Nantucket during this time period, including discussion of the importance of whaling to Nantucket's commercial economy, the development of whale-ships into early oil production factories at sea, and the influence of Quaker ideas on its society and culture.<sup>15</sup> The rest of Part II situates women's business activities within the overall legal environment for married women under coverture. Women in seaport towns were uniquely positioned to assume more responsibility for family business affairs due to the growing separation in both time and space between home life on shore and men's working lives at sea.<sup>16</sup> Private law responded by facilitating the marketplace transactions of women in intact marriages through powers of attorney and trade accounts. As illustrated by the lives of the individual women profiled in the next Part, married women engaged in business transactions during their husband's absences with the help of the law of agency or "representation," family commercial relationships, and community support networks.

Because much of this activity had low legal visibility and was based on the husband's explicit, implicit, or apparent assent, the role played by private law and family arrangements in facilitating married women's business activities has tended to be underestimated by those who emphasize the limitations of coverture.<sup>17</sup> The

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13. LAUREL THATCHER ULRICH, *GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND 1650–1750*, at 38 (1982) (arguing that almost any task was considered suitable for a colonial woman as "deputy husband" as long as it furthered the good of her family and was acceptable to her husband, and that this approach allowed for varied behavior "without really challenging the patriarchal order of society"); NORLING, *supra* note 4, 16–17 (arguing that "despite superficial differences from other northeastern Anglo-American towns, gender roles and the character of the women on colonial Nantucket were not in the end unusual at all").

14. JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES 193–97* (2018) (discussing the age of the machine, the rise of factories and the divergence of the lives of men and women resulting from the separation of home and work); JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* (1990) (tracing the devaluation of nonwaged household work).

15. See discussion *infra* Part II.A.

16. *E.g.*, Margaret R. Hunt, *Sailor's Wife, War Finance, and Coverture in Late Seventeenth Century London*, in *MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD* 139 (Tim Stretton & Krista J. Kesselring eds., 2013).

17. Because of the legal limitations imposed on married women by coverture, historical studies of women in business have tended to center on the activities of widows and single women. Nevertheless, some historians have focused on married women who engaged in debt collection and other business activities pursuant to powers of attorney granted by husbands to wives in families with geographically dispersed economic concerns. See, *e.g.*, LINDA L. STURTZ, *WITHIN HER POWER: PROPRIETED WOMEN IN COLONIAL VIRGINIA* 71–88 (2002) (discussing women in seventeenth and mid-eighteenth century Virginia).

case study shows how private law, like equity,<sup>18</sup> provided a more flexible alternative to coverture by permitting married women to make contracts, borrow money, and enter into other legally enforceable arrangements with third parties under agreements made within the family itself. By contrast, public law recognized married women's independent business activities only in certain broken marriages, and then, in a much more limited way.<sup>19</sup> Part II ends with a discussion of exceptions to coverture applicable in that context.<sup>20</sup>

Part III of the article tells the story of three generations of women connected by family ties to Nantucket. Each worked at least part of their married lives as merchants, traders or shopkeepers. The first section of Part III focuses on the period before and shortly after the Revolutionary War and describes the business activities of Kezia Folger Coffin<sup>21</sup> and Judith Folger Macy,<sup>22</sup> sisters who independently engaged in trading activities on Nantucket during that period. The second section of Part III focuses on two later generations of women and their business activities during a time of economic and social transformation. At the beginning of the nineteenth century, Anna Folger Coffin,<sup>23</sup> the mother of abolitionist Lucretia Mott, kept shop in her home on Nantucket and traveled to Boston to trade goods during her husband's multi-year whaling and sealing voyages. By mid-century, whaling was in decline, and the next generation includes two of the women who left the island for marriage and business opportunities elsewhere. Mary Ellen Pleasant, a young African-American girl who was brought to Nantucket by an abolitionist family with ties to the Folgers, worked in a dry goods shop, moved off island and married, and later became a very successful businesswoman and an advocate for civil rights in San Francisco.<sup>24</sup> Margaret Getchell La Forge, who was related through her mother to the first two generations of Folger women, became influential in the management of Macy's department store in New York City both before and after her marriage.<sup>25</sup>

The women traders profiled in the case study engaged in business during intact marriages. As commercial activity expanded during this period, the private law of "representation," agency, and contract, combined with their husbands'

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18. For a discussion of the relationship between coverture and separate estate jurisprudence in eighteenth-century England, and later examples from Virginia and New York, see Allison Anna Tait, *The Beginning of and End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J. L. & FEMINISM 165, 214, 216 (2014) (arguing that the separate estate served as a template for married women's property acts). *E.g.*, ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800–1861*, at 26–36 (1987) (noting that equity ameliorated some of the harsher aspects of coverture for married women but that poorer women without trust funds received no protection at all).

19. See discussion *infra* Part II.D.1.

20. See discussion *infra* Part II.D.2.

21. See discussion *infra* Part III.A.1.

22. See discussion *infra* Part III.A.2.

23. See discussion *infra* Part III.B.1.

24. See discussion *infra* Part III.B.2.a.

25. See discussion *infra* Part III.B.2.b.

acquiescence and/or support, provided the flexibility they needed as married women to enter into business arrangements with third parties.

The flexibility achieved by women in intact and harmonious marriages introduces themes regarding the state's role in enforcing certain family responsibilities versus contract and agency law's emphasis on the private ordering of choice. In a broader sense, therefore, this study examines the interaction among private law, public law, and evolving social practice as the law both reinforced and shaped social and family patterns. The study also reveals patterns and challenges later experienced by other American families and the legal system as the economy became increasingly commercialized and industrialized during the nineteenth century, resulting in greater barriers for women seeking to combine market work with their responsibilities at home. When whaling declined on Nantucket, the length of separation between husbands and their work at sea from wives and their businesses at home similarly declined. As a result, Nantucket men and women faced new economic challenges at a time when the courts were developing the distinction between market-based work and household work—an issue that continues to pose challenges for family law and in the lives of men and women of today.

## II. HISTORICAL AND LEGAL BACKGROUND

This Part provides a background summary of the island's economic, cultural, and legal environment during the time period of the case study. It begins with a brief overview of the economic and social importance of whaling to Nantucket and the influence of Quaker values on the lives of the men and women of the island. It then summarizes the legal status of wives under coverture and discusses the role played by private law agency principles as well as public law and other common law exceptions under that status-based system.

As discussed in greater detail below, a few eighteenth-century American legislatures, including Massachusetts, enacted *feme sole* trader statutes<sup>26</sup> or granted individual petitions,<sup>27</sup> permitting married women under certain circumstances to engage in business transactions independent of their husbands, including entering into contracts, lending and borrowing money, and conveying real property. In addition, during the late eighteenth and early nineteenth centuries, judges in Britain and Massachusetts expanded and then contracted the application of certain exceptions to the common law of coverture. Reforms tended to be limited or cut back, however, when they were perceived as potentially undermining the

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26. SALMON, *supra* note 12, at 44–53 (discussing *feme sole* trader statutes enacted in South Carolina in 1712, amended in 1744 and 1823, and enacted in Pennsylvania in 1718, and in Massachusetts in 1787).

27. Chused, *supra* note 12, at 1396. See also RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW 9, 56, 65–67 (1994) (describing *feme sole* protections in private legislation in partial divorces granted by the Maryland General Assembly beginning in 1816).

institution of marriage.<sup>28</sup> The individual stories of the women profiled in Part III take place within this wider economic, cultural and legal context.<sup>29</sup>

#### A. THE ECONOMIC AND SOCIAL CONTEXT: NANTUCKET'S WHALE FISHERY

In the mid-eighteenth to early nineteenth century, Nantucket, a small sandy island nearly thirty miles off the coast of Cape Cod in New England,<sup>30</sup> was in the front rank of the American whale fishery,<sup>31</sup> the oil extraction business of its time. By the mid-nineteenth century, whaling was fifth among U.S. industries<sup>32</sup> in value of output, providing raw materials for lighting and for lubricating products used in manufacturing.<sup>33</sup> The whaling fleet built by the United States was the largest in the world, comprising over eighty percent of the whaleships worldwide.<sup>34</sup> In 1855, vessels from New England hunted in fifty-one different whaling grounds, covering six of the seven oceans.<sup>35</sup> After the 1850s, the “birth of a large-scale petroleum industry signaled the death of the American whaling industry.”<sup>36</sup>

In the eighteenth century, whaling proved to be an industry on the cutting edge of the transition to capitalism. As early as the 1750s, whaling ships were transformed into an early form of an industrial assembly line or factory ship. Large cauldrons or “try works” to render the blubber into whale oil were installed on board to extract large amounts of oil; as a result of extraction and storage on board, much longer voyages became possible.<sup>37</sup> Whalers sailed the south Atlantic on nearly year-long voyages; whale products were New England's second most valuable export, after codfish, with Nantucket alone accounting for over half of

28. See discussion *infra* at Part II.D.2.

29. Women who were not in intact marriages came under somewhat different rules under modifications or exceptions to the common law of coverture discussed *infra* at Part II.D.

30. Melville wrote about Nantucket in a separate chapter of *Moby Dick*, although he did not visit the island himself until after publishing the novel: see “how it stands there, away off shore,” . . . “lonely” . . . “a mere hillock, and elbow of sand; all beach, without a background” and “What wonder, then, that these Nantucketers, born on a beach, should take to the sea for a livelihood!” HERMAN MELVILLE, *MOBY DICK*, ch. XIV (1851). See also <https://nha.org/research/nantucket-history/history-topics/herman-melville-and-nantucket>.

31. The Nantucket whaleship fleet grew from six in 1715 to sixty in 1748, and its oil production increased by twentyfold during that time. ERIC JAY DOLIN, *LEVIATHAN: THE HISTORY OF WHALING IN AMERICA* 91 (2007). By 1771 to 1775, Nantucket had a total population of about 4500 and annually sent out one hundred and fifty ships, employing more than 2000 seamen. EDWARD BYERS, *NATION OF NANTUCKET: SOCIETY AND POLITICS IN AN EARLY AMERICAN COMMERCIAL CENTER* 142, Appendix 3 at 329 tbl. 1 (population of Nantucket, 1600–1820) (1987).

32. DOLIN, *supra* note 31, at 206 (noting that whaling was the third largest industry in Massachusetts after shoes and cotton).

33. BYERS, *supra* note 31, at 298 (describing the expanding markets for whale oil).

34. DOLIN, *supra* note 31, at 206 (stating that 735 out of a total of 900 whaleships worldwide were American in 1846).

35. NORLING, *supra* note 4, at 123 (including about 466 vessels from New England).

36. LANCE E. DAVIS, ET AL., *IN PURSUIT OF LEVIATHAN: TECHNOLOGY, INSTITUTIONS, PRODUCTIVITY, AND PROFITS IN AMERICAN WHALING, 1816–1906*, at 4 (1997).

37. Previous to that time, the rendering was done on shore. DOLIN, *supra* note 31, at 108.



New England's whaling catch.<sup>38</sup> After the first whale ships sailed around Cape Horn to the Pacific in the late 1780s,<sup>39</sup> whaling voyages became even longer in duration as ships went greater distances in pursuit of the fishery, eventually lasting an average of nearly four years.<sup>40</sup> As a result, whaling wives were left onshore without their husbands for increasingly long periods of their married lives.

Because of Nantucket's location and lack of significant sustained agricultural or textile production, a large proportion of its male population were mariners,<sup>41</sup> involved in fishing, whaling, and coastal trade, or were associated with related activities such as ship building, sail making, cooperage, blacksmithing, provisioning, cordage, and candle works.<sup>42</sup> Nantucket boys typically got their start at sea at about age fifteen after learning from about age twelve some associated skills. They then worked at various tasks aboard ships and whaleboats, until they became mates or captains, sometimes as early as in their twenties. Some men retired to life on shore after several successful (or unsuccessful and harrowing) voyages; but many, especially as voyages became longer in duration, spent most of their working lives at sea.

The long separation of husbands and wives due to the duration of whaling voyages, combined with the Quaker tradition and role of women in that community, resulted in both opportunities and challenges for the island's women. Extended family and cultural cohesion provided social support for Nantucket women during the absence of their husbands but also imposed on them strong community norms and expectations.

Nantucket was purchased and settled in the mid-seventeenth century by a group of founding families who sought commercial opportunities and relief from the Puritan restrictions<sup>43</sup> of the Massachusetts Bay colony.<sup>44</sup> It had become a

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38. NORLING, *supra* note 4, at 8. After the 1820s, the front rank of the whaling industry was claimed by New Bedford, Massachusetts. DAVIS, ET AL., *supra* note 36, at 362–63.

39. The first whale ship to “round the Horn” was an English ship, with a first mate from Nantucket who in 1789 became the first westerner to harpoon a sperm whale in the Pacific. By 1791, American whaleships had followed. DOLIN, *supra* note 31, at 180–82.

40. *Id.* at 232.

41. The seasonal departure of the whaling fleets had left colonial whaling ports predominantly female. *Id.*; see also CRANE, *supra* note 11, at 102–03 (observing that “by the eighteenth century there were many more women than men in the port towns, an imbalance that was exacerbated with every boatload of mariners that left the harbor” and that “women whose husbands were off on voyages were left to fend for themselves” and thus had “strong incentive to earn an income”). By contrast, in mid-nineteenth century New Bedford, Massachusetts, only about ten percent of the city's male residents were at sea at any one time. NORLING, *supra* note 4, at 128.

42. See FRANK MORRAL & BARBARA ANN WHITE, HIDDEN HISTORY OF NANTUCKET 64 (2015) (estimating that in the mid-1840s, “over 1,100 Nantucket men were employed in the land-based industries” that supported whaling).

43. See BYERS, *supra* note 31, at 103.

44. See generally 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 49–65 (2008) (describing mid-seventeenth century Puritan law in the Bay Colony). Nantucket initially came under the jurisdiction of the colony of New York but was incorporated into Massachusetts after 1691. *Historical Sketch—Provincial Period (1692–1774)* Mass. Archives Collection, <https://www.sec.state.ma.us/arc/arccol/colmac.htm#1692> (July 12, 2019).

predominantly Quaker community<sup>45</sup> by the middle of the eighteenth century, in part as a result of the leadership of Mary Starbuck.<sup>46</sup> Starbuck was described by a visiting English Quaker in 1702 as a “great woman” who “bore some sway on the island” and showed a “soundness of judgment, clearness of understanding and an elegant way of expressing herself.”<sup>47</sup> In 1722, a visiting Congregationalist commented as follows: “Twenty years ago there was scarce one and now there are several hundreds, and all proceed from a woman (one Starbuck) turning Quaker; who being a person of note for wisdom in this place became a preacher and soon converted so many as they formed themselves into a society and built a meeting house and became the prevailing profession on the island.”<sup>48</sup> Although among Congregationalists women could sign the covenant, write, and even publish, only among the Quakers could they hold office or preach in mixed assemblies.<sup>49</sup> In addition to preaching, Mary Starbuck during her marriage kept the accounts for the island’s trading post and has been called “Nantucket’s first storekeeper.”<sup>50</sup>

According to Quaker thought, as explained by historian Edward Byers, economic activity should serve God and the good of mankind; but if one kept one’s heart fixed on God and worked diligently, God might show “his favor in material prosperity.”<sup>51</sup> Business success could be regarded as an outward sign that one was living “in the light.”<sup>52</sup> In addition, both men and women could share in the spiritual inner light and thus could participate equally in meetings for worship.<sup>53</sup> Separate men’s and women’s monthly business “meetings” served as governance

45. Quaker ministers had preached on the island since the late seventeenth century. For example, in 1698, Joanna Mott, an ancestor of James Mott the husband of the nineteenth-century Lucretia Mott, travelled without her husband from Rhode Island to Nantucket to preach to a group of two hundred or so on Nantucket. ROBERT J. LEACH & PETER GOW, *QUAKER NANTUCKET: THE RELIGIOUS COMMUNITY BEHIND THE WHALING EMPIRE* 22 (1997) (noting that by the decade ending in 1708, many other Quaker ministers had also made multiple visits to the island). In the decade prior to the Revolutionary War, despite an influx of over one thousand new settlers to the island and a growing number of Congregationalists, half of the 4500 inhabitants were still Quakers. *Id.* at 115–16.

46. Mary Coffin Starbuck, who married Nathaniel Starbuck in 1662 at age seventeen, hosted Quaker meetings in their home at the beginning of the eighteenth century when she was in her fifties. *See* BYERS, *supra* note 31, at 103–114.

47. *Id.* at 102 (quoting John Richardson, who set sail in 1702 from Newport for Nantucket “where there were but very few Friends”).

48. *Id.* at 105 (quoting from a 1722 letter by Nathan Prince).

49. ULRICH, *supra* note 13, at 9. *See* REBECCA LARSON, *DAUGHTERS OF LIGHT: QUAKER WOMEN PREACHING AND PROPHECYING IN THE COLONIES AND ABROAD, 1700–1775*, at 10, 303 (1999) (noting that between thirteen hundred to fifteen hundred women ministered in the colonies as part of the Quaker transatlantic culture).

50. *See* LEACH & GOW, *QUAKER NANTUCKET*, *supra* note 45, at 11, 22 (referring to Mary Coffin Starbuck as the island’s “first storekeeper”); NATHANIEL PHILBRICK, *AWAY OFF SHORE: NANTUCKET ISLAND AND ITS PEOPLE 1602–1890*, at 91–92 (1993) (noting that her husband Nathaniel could not read or write and that Mary kept the account books for their trading post with the island Indians); ROLAND L. WARREN, *MARY COFFIN STARBUCK AND THE EARLY HISTORY OF NANTUCKET* 109–110, 127, 133 (1987).

51. BYERS, *supra* note 31, at 107.

52. *Id.* at 108.

53. LEACH & GOW, *QUAKER NANTUCKET*, *supra* note 45, at 6.

groups for conflict resolution and marital regulation, creating a type of “surrogate government” while not superceding civil authority.<sup>54</sup> The women’s meeting collected and disbursed its own financial contributions, approved the marriages of its members, issued travel permits, disciplined members for infractions of rules of conduct, and advised the men’s meeting on finances.<sup>55</sup> The Quaker’s economic ethic,<sup>56</sup> complimented by their belief in the “simplicity of Truth,” dictated “plain dress” and “plain living,” encouraged “frugality and condemned self-indulgence and sensuality, placing severe constraints on consumption and fostering disciplined saving for the future.”<sup>57</sup> These Quaker values, combined with the practicalities imposed by the long separations of seafaring husbands from their wives, encouraged Nantucket’s wives to be industrious in household production, and like other colonial householders, they sometimes engaged in bartering or trading transactions to meet their family’s needs.

The married women traders and shopkeepers profiled in Part III largely depended on family connections and general community understandings concerning their business dealings for their families. As discussed in the next portion of this background overview, their legal authority, and thus the extent of the “autonomy” they achieved in their business activities during marriage, came from their husbands’ status-based authority as heads of households and from agency principles and express powers of attorney. Accordingly, their activities depended upon their husbands’ acquiescence, as explained below.

#### B. COMMON LAW: MARRIED WOMEN AS “AGENTS”

Under the status-based common law of coverture and the legal fiction of “marital unity,” a wife lost her separate legal identity, including the right to enter into contracts with others and with her husband. Nevertheless, under coverture a wife could serve as her husband’s agent, a kind of “deputy” husband. A husband could also expressly designate his wife as his “attorney,” under a legal instrument endowing her with various “powers.”<sup>58</sup> As Blackstone explained, her “representation” of him suggested no such separate legal identity.<sup>59</sup> Her actions as his agent or attorney were viewed as his actions.

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54. *E.g.*, J. WILLIAM FROST, *THE QUAKER FAMILY IN COLONIAL AMERICA: A PORTRAIT OF THE SOCIETY OF FRIENDS* 3–5 (1973); Jeffrey D. Kovach, “Nantucket Women,” *Public Authority and Education in the Eighteenth Century Nantucket Quaker Women’s Meeting and the Foundation for Female Activism* 8 (May 2015) (doctoral dissertation, University of Massachusetts at Amherst, available at ScholarWorks@Amherst).

55. *See* LEACH & GOW, *QUAKER NANTUCKET*, *supra* note 45, at 122–23, 147–52; Kovach, *supra* note 54, at 75–104.

56. *See, e.g.*, FREDERICK B. TOLLES, *THE MEETING HOUSE AND THE COUNTING HOUSE: THE QUAKER MERCHANTS OF COLONIAL PHILADELPHIA, 1682–1763*, at 51–62 (reprint 2011) (1948).

57. BYERS, *supra* note 31, at 108.

58. TAPPING REEVE, *BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURTS OF CHANCERY; WITH AN ESSAY ON THE TERMS, HEIR, HEIRS, HEIRS OF THE BODY* 79 (William S. Hein & Co., Inc. 1981) (1816) [hereinafter TAPPING REEVE].

59. I WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 430 (1770) (“A woman may indeed be attorney for her husband; for that implies no separation from, but is rather a

A husband also would be bound for the contracts of his wife, as explained by a leading early nineteenth century American treatise, when they were of a type “according to the usage of the country” that wives would “commonly make,”<sup>60</sup> But such a presumption would not apply to purchases which were not usually made by wives such as the purchase of “a ship or a yoke of oxen.”<sup>61</sup> Nevertheless, the presumption expanded under special circumstances:

The husband is bound, sometimes, by the contracts of his wife, when he would not be bound, if it were not for the peculiar circumstances of his family. If the husband goes to foreign parts, upon business which detains him for years, there necessarily resides in the wife more than ordinary power to bind the husband by his contracts, in providing for his family, and managing his domestic concerns.<sup>62</sup>

In addition, under the law of necessities, a merchant could recover from a husband for certain goods purchased by the wife as her husband’s apparent agent.<sup>63</sup> A husband’s duty to provide necessities was distinguished, however, from his wife’s implied or express agency to purchase goods on his account, which could be cut off.<sup>64</sup>

English mariners had long used express powers of attorney to empower agents, including wives, to handle business on their behalf on shore. As early as the beginning of seventeenth century in England, a few ships’ captains were using handwritten and customized powers of attorney before leaving on voyages, and by the end of that century in London, pre-printed power-of-attorney forms designed expressly for common sailors became available and in more widespread use.<sup>65</sup> These pre-printed forms tended to award those designated by the sailor—often wives—broad powers. They permitted wives to control chattel and other property, appear or sue on behalf of their husbands in court, and “enhanced their ability to negotiate within local credit and debt networks.”<sup>66</sup> As Margaret Hunt has shown, their use was encouraged by the Royal Navy and the East India

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representation of, her lord.”). See HARTOG, *supra* note 2, at 115; see also Angela Fernandez, *Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity*, in MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 193–94 (Tim Stretton & Krista J. Kesselring eds. 2013) (discussing Reeve and Dane’s rejection of the maxim that the wife has no separate existence during coverture, including their example of a married woman’s “naked authority” to act as an agent for the benefit of the husband).

60. TAPPING REEVE, *supra* note 58, at 79.

61. *Id.* at 79–80.

62. *Id.* at 80.

63. HARTOG, *supra* note 2, at 156–57, 353 n. 57 (citing JAMES CLANCY, A TREATISE OF THE RIGHTS, DUTIES AND LIABILITIES OF HUSBAND AND WIFE, AT LAW AND IN EQUITY 24–47 (2d ed. 1837) and TAPPING REEVE, THE LAW OF BARON AND FEMME, at 164 (Amasa J. Parker & Charles Baldwin eds., 1862)).

64. *Id.* at 353 n.57 (citing *Cromwell v. Benjamin*, 41 Barb. 558 (N.Y. Gen. Term 1863)).

65. Hunt, *supra* note 16, at 144.

66. *Id.* at 139.

Company, perhaps as a recruitment tool, and popularized by creditors to facilitate the assignment of pay tickets<sup>67</sup> by sailor's wives.

Mariners' wives often had to fend for themselves and their families until their husbands were paid following a voyage. Hunt observed that "though it is impossible to know to what degree a woman's learned habit of taking control of such matters carried over once her husband came home," by the late seventeenth century in London "we do know that some wives and widows of sailors" engaged in the following activities:

. . . setting up as 'solicitrices,' self-styled 'experts' prepared to help sailors and others manoeuvre their way through the Navy bureaucracy for a fee. Others became professional ticket discounters. Groups of women began clubbing together to pay parliamentary lobbyists to push money bills, and some were involved in sailors' demonstrations against the Navy Board and in front of the houses of parliament over alleged corruption in the Navy ticket office. Litigation by sailors' female relatives, much of it disputes about tickets, had become fairly common in the London courts by the latter seventeenth century; it is even possible to find large groups of wives and widows bringing what would today be called 'class action' suits in the Admiralty Courts against such entities as the East India Company over their husbands' wages.<sup>68</sup>

Given the trade relationships between London merchants and Nantucket ship owners and traders, as well as the settlement of a community of Nantucket whalers in Great Britain after the revolutions in the American colonies and in France,<sup>69</sup> it is likely that Nantucket mariners and merchants encountered the types of power of attorney forms and other documents in use in the maritime

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67. Sailors' pay tickets were promissory notes to sailors from the Royal Navy or from merchant ship owners as a pledge of future payment for their labor or service, usually paid off at the voyage end at an advertised time and place. *Id.* at 142–43. Often the sailors themselves would be on another voyage on the day of payment and thus needed an on-shore agent. Hunt argues that the "agents of the fiscal-military state" acquiesced in legal powers not ordinarily granted to other wives in the interest of financing its wars on credit, but that the powers of attorney also "gave wives greater ability to act independently in relation to the fiscal-military state." *Id.* at 154–56. See also, Margaret R. Hunt, *Women and the Fiscal-Imperial State in the Late Seventeenth and Early Eighteenth Centuries*, in *A NEW IMPERIAL HISTORY: CULTURE, IDENTITY AND MODERNITY IN BRITAIN AND THE EMPIRE, 1660–1840*, at 29, 38–41 (Kathleen Wilson ed. 2004).

68. Hunt, *supra* note 16, at 156–57.

69. In 1792, Timothy Folger and Samuel Starbuck, who were promised annual pensions for themselves and their wives for life, led a group of loyalist Nantucket whalers from Nova Scotia to Milford Haven, Wales, to establish a whaling settlement. In 1795, William Rotch's son Benjamin left a Nantucket whaling settlement in Dunkirk, France to establish a branch of the Rotch firm in Milford Haven. JOSEPH L. McDEVITT, *THE HOUSE OF ROTCH: MASSACHUSETTS WHALING MERCHANTS 1734–1828*, at 394–401 (1986). After negotiations in London and France, William Rotch returned to the United States. Rather than returning to Nantucket, he established a new base of operations in New Bedford in 1795, in part because of the difficulties posed for larger ships by sandbars blocking the entrance to Nantucket's harbor, which necessitated unloading first in Martha's Vineyard. *Id.* at 400–05.

neighborhoods of London and other British coastal communities. A similar pattern of customized powers issued by mariners followed by the use of pre-printed forms can be seen over a century later on Nantucket. The use of customized powers of attorney in handwritten form in town records in the eighteenth century<sup>70</sup> was followed later in the nineteenth century by increasing numbers of pre-printed power of attorney forms found among family papers.<sup>71</sup> Those forms appeared standardized, with blanks to be filled in by mariners before their voyages.<sup>72</sup>

Nevertheless, court cases over the equivalent of promissory notes or sailors' pay tickets held by wives or creditors of whalers do not appear to have been prevalent on Nantucket. This could be explained in part by the high desertion rate of whalemens due to "small pay and bad treatment"<sup>73</sup> as well as the profits-based compensation or "lay" system utilized by the whaling industry during the eighteenth and nineteenth centuries. Since crew members other than captains and officers received a comparatively tiny percentage of the profits, a significant number of those who returned on the same ship returned in debt. After deduction from their share or "lay" from a successful voyage for the advance paid when signing on plus accumulated interest, fees for unloading and loading the ship, purchases of clothes from the ship's slop chest, with high rates of interest, fees of shipping agents, a whalemens' payout at the end of a voyage was very little, if anything:

And indeed, few foremast hands shipped out on a whaleship for a second time, and those who did were usually in debt to the owner, mildly masochistic, unable to find any more satisfying line of work, or all of the above.<sup>74</sup>

Managing owners and agents of ships sometimes received requests by mariners' wives for advances against their husbands' share of profits prior to the successful conclusion of the whaling voyage.<sup>75</sup> As noted by Lisa Norling, who has studied New Bedford's whaling records, sometimes their letters noted their inability to earn money from work as in the past due to poor health of themselves or of elderly relatives, or they mentioned their husband's prior arrangement for the advance of a specified amount each year for their wives during their absence

70. See discussion *infra* of such powers of attorney in Part III.A.1 and B.1.

71. *E.g.*, Power of Attorney to Mary C. Coffin (Sept. 5, 1849) (on file at Coffin Family Papers, 1661–1962, NHARL Coll. 15, Folder 6); Power of Attorney given John's wife, Lurette Smith (Dec. 8, 1825) (on file at Smith Family Papers, 1798–1915, NHARL Coll. 163, Folder 5).

72. Power of Attorney form (n.d.) (on file at NHARL Coll. 261, Folder 3, No. 24).

73. DOLIN, *supra* note 31, at 173–74 (quoting the U.S. consul in Peru, causing them to become "disgusted, desert, and either from shame or moral corruption never return.") In 1842, for example, Herman Melville deserted a whaler after one and a half years, shipped briefly on other whalers, and finally managed to get home by signing up for a short stint in the U.S. Navy. NORLING, *supra* note 4, at 137.

74. DOLIN, *supra* note 31, at 172.

75. NORLING, *supra* note 4, at 144–45.

at sea.<sup>76</sup> Norling concluded, however, that these types of regular arrangements appear to have been negotiated on an ad hoc or individual basis with only the most trusted officers, estimating that “no more than a quarter of even the career whalemens families actually received cash or credit during a voyage.”<sup>77</sup>

Express powers of attorney from husbands to wives appear to have been especially useful to wives dealing with third parties unfamiliar with the couple’s arrangements. As discussed in the next Part, married women traders such as Anna Folger Coffin would have found it helpful to have a power of attorney from a husband in hand for dealings with merchants and wholesalers when in Boston on buying trips for her store. As commercial transactions later became less tied to family-based networks and involved more cash management, wives of officers utilized powers of attorney from their husbands to manage the family’s finances and investments while their husbands were away at sea.

Wives acting as agents for their husbands collected notes due their husbands from ship’s agents, invested funds, sold property, sued on their behalf, and paid off notes on their behalf to stop interest from running during a voyage. One wife even arranged for an employment agreement in writing for a husband with little time to arrange all his business affairs in New Bedford before going to sea again.<sup>78</sup> In the absence of a power of attorney from her husband, another New Bedford sea captain’s wife had to rely on her husband’s brothers to pay his taxes and to request that the shipowners insure the captain’s share of the cargo. Before his next voyage in 1865, the captain had a lawyer draw up a power of attorney for his wife.<sup>79</sup>

But what of married women who engaged in business during their coverture without their husbands’ acquiescence? As discussed in greater detail in the next sections below, during the period from the late eighteenth century to the mid-nineteenth century, judges in both Britain and America expanded and then contracted the application of certain exceptions to the common law of coverture.<sup>80</sup> In Massachusetts, those trends combined with limitations on the application of equitable doctrines made it increasingly difficult for married women in business who were estranged from their husbands.

### C. EQUITY IN MASSACHUSETTS

Unlike England, Massachusetts had no separate equity or chancery courts.<sup>81</sup> Although the Massachusetts legislature granted common law courts some limited equitable powers by statute, the Massachusetts legislature did not grant its courts

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76. *Id.*

77. *Id.* at 147.

78. *Id.* at 148–49 (from an 1854 letter from Henry Beetle to his wife Eliza Beetle on Martha’s Vineyard).

79. *Id.* at 154.

80. See discussion *infra* in Part II.D.2.

81. For a more detailed discussion of equity in Massachusetts, see the authorities cited in note 12. For discussion of chancery courts, coverture, and married women’s ownership of slaves in southern states,

express authority to enforce trust estates until 1818.<sup>82</sup> Prior to that time, although separate estates were possible and some couples separated their property by agreement, husbands and wives could not rely on the state's legal system for enforcement of their property arrangements.<sup>83</sup> Nevertheless, as Marylynn Salmon has pointed out, some Massachusetts judges did recognize separate estates, separate maintenances, and women's right to exercise power over settlement property prior to 1818.<sup>84</sup> Even after enactment of the statute, however, Massachusetts judges interpreted their equity jurisdiction in this area strictly.<sup>85</sup>

For example, a decision in 1824 made it impossible for women with separate estates to get credit on their trust property,<sup>86</sup> substantially limiting their usefulness for women engaged in business. In 1845, the Massachusetts legislature expressly guaranteed couples the right to use marriage settlements<sup>87</sup> but specified that none of the property held by any married woman by virtue of the provisions of the Act "shall be used or employed for the purposes of trade or commerce."<sup>88</sup>

By the mid-nineteenth century, towards the end of the period examined here, legislatures in many states had enacted married women's property acts, including New York beginning in 1848, and Massachusetts in 1855, which more generally granted property rights to married women denied to them under the common law of coverture and its various exceptions.<sup>89</sup> Under those enactments, married women slowly began to achieve certain property rights separate and apart from their husbands.

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see STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* 25–56 (2019).

82. SALMON, *supra* note 12, at 132–35. Massachusetts Session Laws, Ch. 87, Feb. 10, 1818 (granting the Justices of the Supreme Judicial Court equitable powers in cases of trust arising under deeds, wills, or in the settlement of estates, and in cases of specific performance of contracts in writing).

83. SALMON, *supra* note 12, at 120.

84. *Id.* at 139.

85. *Id.* at 132–40.

86. *Russell v. Lewis*, 2 Pickering 508, 543 (1824).

87. Act of Mar. 25, 1845, ch. 208, Mass. Sess. Laws 531 (providing also certain listing and registry requirements for such separate property). See Richard Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 BERKELEY WOMEN'S L. J. 42, 57 (1986). The married woman's separate estate was legitimized by the legislature at about the same time that Massachusetts established a system of equity jurisprudence. RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY* 62–63 n.33 (2016).

88. Act of Mar. 25, 1845, ch. 208, Mass. Sess. Laws 531, 533 (noting that a married woman may not use her property for trade or commerce).

89. Chused, *supra* note 12. *But cf.* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L. J. 1073, 1076 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L. J. 2127, 2171–80 (1995) (arguing that later statutory reforms, as subsequently interpreted by the courts, reproduced in more modern and socially acceptable form the marital status relations the common law once formally enforced through coverture).



#### D. EXCEPTIONS TO COVERTURE: SEPARATED OR ABANDONED MARRIED WOMEN

Shortly after the Revolutionary War and just prior to the expansion of whaling into the Pacific, Massachusetts enacted a *feme sole* trader statute,<sup>90</sup> which permitted married women abandoned by their husbands to engage in business transactions independent of their husbands, including entering into contracts, lending and borrowing money, and conveying real property.<sup>91</sup> Curiously, however, few reported Massachusetts cases involving married women cite or discuss the *feme sole* trader statute, but instead tend to rely for guidance on English cases dealing with married women who were abandoned by or separated from their husbands.<sup>92</sup> After briefly describing the statute and comparing it with its antecedents, this section discusses some of the key cases decided by the Massachusetts courts during the late eighteenth century to mid nineteenth century and traces the judicial expansion and contraction of certain exceptions to the common law of coverture to similar trends in Great Britain.

##### 1. *Feme Sole* Trader Statute

Massachusetts in 1787 authorized abandoned wives to apply to the Supreme Judicial Court for the right to contract, sue and be sued, sell personal property and convey real estate as if she were sole and unmarried if the husband had failed to make sufficient provision for her support during his absence.<sup>93</sup> Unlike a similar statute adopted by Pennsylvania in 1718,<sup>94</sup> the Massachusetts statute did not explicitly mention mariners and their wives. Pennsylvania's *feme sole* trader statute more specifically provided that "where any mariners or others are gone or hereafter shall go to sea, leaving their wives at shopkeeping or to work for their livelihood at any other trade in this province, all such wives shall be deemed . . . to

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90. Act of Nov. 21, 1787, ch. 32, Oct. Sess., ch. 17, Mass. Sess. Laws 597, 598. SALMON, *supra* note 12, at 45, 49–53 (discussing the *feme sole* trader statute enacted in Massachusetts in 1787).

91. Prior to enactment of the statute, abandoned wives could file individual petitions with the Massachusetts legislature for private empowering acts. SALMON, *supra* note 12, at 55–56 (noting that these acts remained rare during eighteenth century).

92. *Id.* at 52–53.

93. In relevant part, the Massachusetts statute provided "that in all such cases where any married man has heretofore, or may hereafter absent himself from this Commonwealth, abandoning his wife & not making sufficient provision for her support or maintenance, the Justices of the Supreme Judicial Court are hereby authorized, at any of the terms of the said Court, upon the application of any such wife, to empower & enable her, during the absence of her husband from this Commonwealth, & no longer, in her own name, to make and execute and any contract, either under seal or otherwise, and by deed to sell & convey any estate real or personal, of which at the time of such sale, she shall be seized or possessed in her own right, and to commence, prosecute, & defend any suit in Law or equity, to final judgment & execution, in the same manner, as fully, and to all intents & purposes, as if she was sole & unmarried; or the said Justices may grant to any such wife any or all the powers above described, according as they shall judge the circumstances of such wife shall require." Act of Nov. 21, 1787, ch. 32, Oct. Sess., ch. 17, Mass. Sess. Laws 597, 598 (quoting from the first of three paragraphs following the preamble to the enacting clause).

94. Act of Feb. 22, 1718, ch. CCXXVI, 157, 157–59 (HeinOnline, Statutes at Large of Pennsylvania from 1682 to 1801).

be *feme sole* traders.”<sup>95</sup> In addition, unlike the Pennsylvania statute, the Massachusetts statute required that the wife apply for such status and that certain public notice requirements be satisfied.<sup>96</sup>

In a Massachusetts case applying the public notice requirement, *Bachelor v. Bachelor* decided in 1804, the court held that the statutory notice requirements had been substantially satisfied.<sup>97</sup> An order of notice was published in three successive weeks in a local newspaper, which published twice weekly. Thus, the court ruled in favor of the wife, Lydia, who had sought permission from the court to sell real estate during her husband William’s absence. The court granted the wife’s petition under the authority of the 1787 *feme sole* trader statute, noting that the husband had been called but did not appear.<sup>98</sup>

Under the Massachusetts statute, an abandoned woman could act as a *feme sole* trader with regard to property possessed in her own right during the absence of her husband from the Commonwealth, but if he returned he would be responsible for any unfulfilled contracts.<sup>99</sup> Under the Pennsylvania statute, by comparison, if the seagoing husband’s family was likely to become “chargeable to the town or place where they inhabit” or if the husband refused or neglected to return for seven years without making provision for his family, the husband’s property would be liable to satisfy any sums necessary for the support and maintenance of his wife and children.<sup>100</sup>

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95. The Pennsylvania statute permitted *feme sole* traders to sue or be sued “during their husbands natural lives” without having their husbands in such suits and provided that execution on judgments for the debts of *feme sole* traders be awarded against the goods and chattels in the possession of such wives, or in the hands or possession of others in trust for them, and not against the goods and chattels of the husband unless the wife had paid the husband’s debts out of her separate stock. *Id.* at section I.

96. The Massachusetts statute not only required the wife to file an application for such powers during the absence of her husband from the Commonwealth, but also required the Justices before granting any powers to give public notice as by law they would give in the case of “any libel filed by any married woman for a Divorce.” Act of Nov. 21, 1787, ch. 32, Oct. Sess., ch. 17, Mass. Sess. Laws 597, 598 (quoting from the statute’s last paragraph).

97. *Bachelor v. Bachelor*, 1 Mass. 256, 256 (1804).

98. By contrast, in a criminal case decided the same year, the defendant was accused of two counts of bringing into the commonwealth goods acquired in another state by larceny. The first count charged the defendant, John Cullins, with larceny of 98 handkerchiefs owned by Hannah Healey, who for several years had been in trade and carried on in business as a *feme sole*. In the second count, the goods were alleged to be owned by Walter Healey, Hannah’s husband. Although the Attorney General noted in his opening that Walter had been absent six or seven years in the East Indies with the likelihood that he would never return, the court held that Hannah could not be considered *feme sole* because she was still legally the wife of Walter Healey. Thus, the court charged the jury to find the defendant guilty only of the second count if it believed the witnesses; and the jury so found. No mention was made of the 1787 statute. *Commonwealth v. Cullins*, 1 Mass. 116, 116 (1804).

99. For the statutory language, see *supra* note 93.

100. See *supra* note 94, at 158–59. See also SALMON, *supra* note 12, at 46–48 (discussing details about the South Carolina *feme sole* trader statutes, adopted in 1712 and 1744). Although South Carolina did not adopt formal registration and publication requirements for *feme sole* traders until 1823, Salmon noted that public records of early South Carolina contain copies of “agreements between husbands and wives attesting to women’s rights as *feme sole* dealers.” SALMON, *supra* note 12, at 47–48.

*Feme sole* trader status in the colonies had longstanding British antecedents but differed significantly in scope and application from British practice. The City of London and some other boroughs had recognized, by medieval custom, married women who traded independently of their husbands as *feme sole* traders.<sup>101</sup> By the mid-fifteenth century, the City of London had adopted a registration procedure and fee for such status, which was primarily utilized by *feme sole* merchants (who were wealthier businesswomen engaged in import and export activities) rather than by less well-off local traders or hucksters. If approved, the registered *feme sole* trader would be sworn to follow the usual rules regarding trading and the taking of apprentices.<sup>102</sup>

Unlike the Massachusetts and Pennsylvania statutory provisions, under customary law in certain geographic locations in Britain, *feme sole* trader status was available to married women cohabiting with their husbands as long as their husbands did not intermeddle with their trade.<sup>103</sup> As *feme sole* traders, they could own trade assets as if single and could sue and be sued in courts with regard to their dealings as a trader in those locations, and they could be imprisoned for debt.<sup>104</sup> By the mid to late eighteenth century, it was also established that customary *feme sole* traders were included in the protections afforded to traders by the bankruptcy statutes.<sup>105</sup> By contrast, under the statutory provisions enacted by both Pennsylvania and Massachusetts, married women could transact business as if *feme sole* only if they were separated from or abandoned by their husbands.<sup>106</sup>

I have been unable to unearth legislative history explaining the reasons for the enactment of the Massachusetts statute or the rationale for its provisions. However, the timing of its enactment suggests that it could have been a response, at least in part, to loyalist husbands who decamped to Great Britain or Canada during or after the Revolutionary War, leaving wives and property in Massachusetts. From 1777 to 1781, the Massachusetts legislature had adopted sequestration and confiscation procedures for certain loyalist properties, while

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101. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 484 (4th ed. 2007).

102. E.g., Marjorie K. McIntosh, *The Benefits and Drawbacks of Femme Sole Status in England, 1300-1630*, 44 J. OF BRITISH STUDIES 410, 416–17 (2005).

103. *Id.* at 410–38 (describing the custom and practice of such trading in the City of London and concluding, based on court records, that it reached its peak in the fifteenth century but remained an option in later centuries and arguing that such status was not always seen as desirable by married working women).

104. Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 L. & SOC. INQUIRY 265, 276–79 (2009) (discussing the key cases, including *Lavie v. Phillips*, 97 Eng. Rep. 1094 (KB) (1765), which reasoned that since a customary *feme sole* trader was subject to imprisonment for debt, it followed that she could be made a bankrupt).

105. *Id.*

106. South Carolina's *feme sole* trader statute followed more closely the English custom of permitting *feme sole* trader status to wives living with their husbands. See SALMON, *supra* note 12, at 48 (discussing a 1795 case in which the court treated as *feme sole* a married woman whose business was the buying and selling at a profit of “the refuse Negroes of a Cargo” without an express agreement with her husband but who had knowledge of her activities, which were separate from his own). See generally JONES-ROGERS, *supra* note 81.

making limited provision out of the property for wives and dependents.<sup>107</sup> However, not all loyalist property would have been subjected to those procedures.<sup>108</sup> In April 1787, at the request of Congress, Massachusetts like other states passed legislation that repealed its previous confiscation legislation and other acts or parts of acts repugnant to the Treaty of Paris of 1783.<sup>109</sup> Hence, it is possible that the need arose later that year for additional legislation to give wives abandoned in Massachusetts the statutory authority, under certain conditions, to manage or dispose of family property pending the return, if any, and reintegration of the absent loyalist husband.<sup>110</sup> In any event, the Massachusetts *feme sole* trader statute does not appear to have been utilized by married women in business on Nantucket.

## 2. Common Law Exceptions

In addition to customary *feme sole* traders, the courts in Great Britain recognized a number of exceptions to the common law of coverture, including exceptions for wives whose husbands had been banished, exiled, or had “abjured the realm.” They also recognized the separate use of property or maintenance by wives under equitable private separation agreements with their husbands and under certain other types of equitable agreements.<sup>111</sup> These British developments then rippled across the Atlantic to North America. As discussed in greater detail below, towards the end of the eighteenth century and beginning of the nineteenth century, exceptions to the common law of coverture were expanded and then later cut back in Great Britain in a series of contentious King’s Bench rulings.

In America, the expansion and later contraction of Kings Bench rulings influenced Massachusetts cases involving the business earnings and debts of abandoned or separated wives. Although legal historians have long recognized and discussed the significance of the English private separation cases,<sup>112</sup> the

107. See Richard D. Brown, *The Confiscation and Disposition of Loyalists’ Estates in Suffolk County, Massachusetts*, 21 THE WM. & MARY Q. 534, 535–44 (1964).

108. See *id.* at 544 n.35.

109. David E. Maas, Preface to *Divided Hearts: Massachusetts Loyalists 1765-1790*, A BIOGRAPHICAL DIRECTORY xviii-xix (David E. Mass, ed. 1980) (discussing the 1783 treaty provisions forbidding future confiscation and requiring Congress to recommend to the states restitution of estates, rights, and personal effects of the loyalists, the initial resistance by the state, the 1787 Congressional resolution that states must obey a national treaty, and legislative compliance by Massachusetts).

110. *Id.* at xxiv, xxiv n.78 (noting that prior to 1787 some exiled loyalist husbands recouped their losses by granting powers of attorney to wives or other family members who remained in Marblehead, Massachusetts). See generally, WALLACE BROWN, *THE GOOD AMERICANS: THE LOYALISTS IN THE AMERICAN REVOLUTION 172–90* (1969); THOMAS N. INGERSOLL, *THE LOYALIST PROBLEM IN REVOLUTIONARY NEW ENGLAND 247–301* (2016); Kacy Dowd Tillman, *Women Left Behind: Female Loyalists, Coverture and Grace Crowdon Gallaway’s Empire of Self*, in *WOMEN’S NARRATIVES OF THE EARLY AMERICAS AND THE FORMATION OF EMPIRE 143–45* (Mary McAleer Balkun & Susan C. Imbarrato eds., 2016).

111. Pearlston, *supra* note 104, at 279–83 (discussing equitable separate traders in the bankruptcy context); McIntosh, *supra* note 102, at 417–18.

112. E.g., SUSAN STAVES, *MARRIED WOMEN’S SEPARATE PROPERTY IN ENGLAND, 1660–1833* (1990); Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L. J. 95, 98–101 (1991).

relationship between those developments and Massachusetts law, discussed in the next section, remains relatively unexplored. Following the lead of the English cases, Massachusetts judges became increasingly disinclined to expand by judicial decision common law exceptions to coverture. Those developments in Massachusetts are discussed in the second section below.

*a. Influential English cases.* During the end of the eighteenth century, William Murray, Lord Mansfield, chief justice of the King's Bench from 1756 to 1788,<sup>113</sup> expanded the recognized exceptions to the common law of coverture in a series of controversial decisions involving married women's relations with creditors. In the 1780s, in cases involving married women who had entered into private separation agreements with their husbands, Lord Mansfield expanded existing common law exceptions to coverture. This trend culminated in a case holding that a married woman separated from her husband by agreement was responsible for her contracts at common law.<sup>114</sup> The wife's contractual responsibility was based on the idea of "representation," i.e., that the married woman represented the fund set aside for her support as a substitute for her husband who would otherwise have been responsible for his wife's debts. Nevertheless, Lord Mansfield extended the concept of "representation" to situations beyond what the common law had previously reached.

In the first two cases, *Ringsted v. Lady Lanensborough*<sup>115</sup> and *Barwell v. Brooks*<sup>116</sup> creditors sued married women for debts they entered into on the basis of their separate property. In *Ringsted*, the wife lived in England and her husband had lived in Ireland. The wife, Lady Lanensborough, had an "ample separate maintenance" under the separation agreement, and her husband was "not amenable to process" of the English courts. In Lord Mansfield's view, that situation was only a small step from the established exceptions to coverture—when a husband had abjured the realm, was exiled, was a foreigner living abroad as an alien enemy, or was transported out of the kingdom—and he allowed the creditor plaintiff to recover against the defendant wife. Under such established exceptions, the husband had experienced a type of civil death which if viewed as similar to widowhood of the wife, would require the wife to act as if *feme sole*. In *Ringsted*, by contrast, the husband and wife chose to live separately, an expansion of the established exceptions.

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113. See NORMAN S. POSER, *LORD MANSFIELD: JUSTICE IN THE AGE OF REASON* 348 (2016) (noting that his most important contribution to the law of marriage was his expansion of the situations in which a married woman could be sued for the debts she incurred, thereby directly helping creditors but indirectly lessening married women's subordination).

114. *E.g.*, *Corbett v. Poelnitz*, (1785) 99 Eng. Rep. 940 (KB). In many separation agreements, the couple agreed to live apart, the husband transferred property or an allowance for the wife's support and maintenance, and the wife's trustees agreed to indemnify the husband against the wife's future debts. *Id.*; Pearlston, *supra* note 104, at 267 n.5 (citing chapter 6 of SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660–1833* (1990)).

115. (1783) 99 Eng. Rep. 610 (KB).

116. (1784) 99 Eng. Rep. 702 (KB).

In *Barwell*, Mansfield extended *Ringsted* to an action against a *feme covert* for amounts due for necessaries even though both parties resided separately in England; the wife received a separate maintenance that was regularly paid. Mansfield stated that “modern fashions have altered the old law” and “the courts have gone gradually for public convenience to enable women in these circumstances to carry on trade for their support and to prevent their becoming common cheats.”<sup>117</sup> Mansfield held for the creditor even though the husband was not joined as a defendant.

Finally, in *Corbett v. Poelnitz*, the most controversial case in the trilogy, Mansfield held that a married woman with a private separation agreement could be held liable for her contract at common law even if her debt completely exhausted the fund from which her maintenance was drawn,<sup>118</sup> both parties lived in England, and the action was not limited to necessaries.<sup>119</sup> Mansfield observed that the trilogy was governed by “the great principle which the Court has laid down, ‘that where a woman has a separate estate, and acts and receives credit as a feme sole, she shall be liable as such.’”<sup>120</sup> The trilogy, which expanded the common law exceptions to coverture, was part of a larger reform effort by Mansfield during this period to establish and systematize commercial principles and to provide fairness to creditors.<sup>121</sup>

Lord Mansfield’s successor, Lloyd, Lord Kenyon, who became chief justice of the Kings Bench following Mansfield’s illness and death, first questioned and then expressly overruled Mansfield’s reforms. In the *Duchess of Pienne* cases, both involving creditors of a Duchess whose husband, a foreigner, had been gone for years, Lord Kenyon noted that “some modern cases had, in his opinion, gone too far.”<sup>122</sup> Nevertheless, in both cases, he allowed creditors to sue the defendant wife,<sup>123</sup> assuming that there was no hope of the Duke’s return to England.<sup>124</sup>

In *Ellah v. Leigh*,<sup>125</sup> a husband and wife had separated and alimony had been allowed the wife by the Ecclesiastical Court pending a suit there. In a case involving a debt incurred by the wife after separation, the Kings Bench held that alimony was not enough to constitute separate maintenance and thus the defendant’s plea of coverture was upheld. Lord Kenyon observed, “I do not think that

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117. James Oldham, *Creditors and the feme covert*, in *LAW AND LEGAL PROCESS: SUBSTANTIVE LAW AND PROCEDURE IN ENGLISH LEGAL HISTORY* 217, 221 n.18 (Matthew Dyson & David Ibbetson eds., 2013) (quoting from a Middle Temple Library manuscript report of *Barwell*).

118. See Pearlston, *supra* note 104, at 268.

119. *Corbett*, 99 Eng. Rep. 940 (KB).

120. See Oldham, *supra* note 117, at 222 (quoting the *Corbett* case directly).

121. See generally POSER, *supra* note 113, at 220–43 (noting Mansfield’s assimilation of mercantile custom into the common law and his articulation of principles and rules in commercial law that could be relied upon by merchants and lawyers).

122. Oldham, *supra* note 117, at 225.

123. *Walford v. Duchess of Pienne* (1797) 170 Eng. Rep. 453 (NP); *Franks v. Duchess of Pienne* (1797) 170 Eng. Rep. 464 (KB).

124. *Walford* at 453.

125. (1794) 5 T.R. 679 (KB).

the courts ought to change the law so as to adapt it to the fashion of the times,” and that if a change in the law were necessary, “recourse must be had to the Legislature for it.”<sup>126</sup> Two years later, in another suit by a creditor, claiming that the debtor had carried on the trade of a haberdasher as a *feme sole* and that the creditor knew nothing of a husband, the court held that no relief could be obtained from a court of law (as opposed to a court of equity) and that “an action cannot be brought against a *feme covert* except by the custom of London.”<sup>127</sup>

Finally, in *Marshall v Ruttan*,<sup>128</sup> which was argued in 1798 and again in 1800, Lord Kenyon’s Kings Bench expressly overruled the rationale of Lord Mansfield’s ruling in *Corbett v. Poelnitz*. Kenyon held that a wife separated by agreement could not be sued at common law even for amounts expended on necessities. The defendant and her husband had agreed to live apart and a separate maintenance of an amount had been secured by deed and paid to her each year. According to Lord Kenyon, although the separation agreement freed the husband from his support obligation, that obligation was vested in the fund created for the wife’s maintenance and not in the wife herself. Thus, although a *feme covert* could protect property to her separate use with a trust, trusts were not the province of courts of law but rather of equity.

Lord Kenyon noted that under the common law, the separation agreement was a contract supposed to be made between two parties. However, a husband and wife are in law only one person and are on that account unable to contract with each other. He concluded that “if the foundation fail, the consequence is, that the whole superstructure must also fail.”<sup>129</sup> In Lord Kenyon’s view, Mansfield’s rationale for *Corbett* undermined the very foundations of coverture, and thus, endangered the institution of marriage.<sup>130</sup> Under the doctrine of marital unity, wives could not enter into contracts with their husbands nor could they contract with third parties as if sole. He also expressed the possibility, in light of the court’s rejection in *Ruttan* of Mansfield’s rationale, of reconsideration in the future by the court of *Ringsted* and *Barwell*. However, as legal historian James Oldham has suggested, arguably the principle of *Ringsted* survived “whenever the husband was out of the country in circumstances that could be said to approximate ‘civil death,’—exile, abjuration, transportation for life, even perhaps, transportation for a term of years.”<sup>131</sup>

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126. *Id.* at 682.

127. *Clayton v. Adams* (1796) 6 T.R. 604 (KB).

128. (1800) 8 T.R. 545 (KB).

129. Oldham, *supra* note 117, at 226 (quoting from *Marshall*, 8 T.R. at 546).

130. As pointed out by Professor Oldham, Lord Kenyon also applied a much harsher rule than earlier necessities cases, providing recovery for necessities for wives not living with their husbands only when the husband behaved “in such a way as to render it unsafe and dangerous for her to reside with him.” *Id.* at 238.

131. Oldham, *supra* note 117, at 231 and 231 n.64 (citing *Carroll v. Blencow* (1801) 4 Esp 27 (holding the husband had abjured the realm after the term of transportation for seven years had expired)).

*b. Massachusetts cases.* In Massachusetts, in the case of *Gregory v. Paul*,<sup>132</sup> decided in 1818, the court cited and discussed Lord Mansfield's trilogy as well as Lord Kenyon's decision in *Marshall v. Ruttan*. Deborah Gregory was deserted by her husband James in her native England, leaving her without means of necessary provision and support. She later travelled to Massachusetts and from 1813-1818 lived in Boston and maintained herself as a single woman. She had not heard from or seen James since he abandoned her in 1803. In the meantime, Charles Wharburton made his last will and testament in 1814, and left Deborah a legacy of thousand dollars to be paid by his executor after his death. The executor, Thomas Paul, refused to pay that amount to Deborah after the death of Charles because of her coverture under James, who was still living and residing in Great Britain.

Judge Putnam, writing for the court in *Gregory v. Paul*, permitted Deborah to sue the executor as a *feme sole* despite her marriage to James. After noting that "the general rule of law is very clear" that her marriage suspended any power she may have had as a single woman to enter into contracts and that any legacy to a wife would vest in her husband, Judge Putnam observed that "the rule was anciently relaxed, from necessity, in cases where the reasons upon which it was formed, ceased to exist."<sup>133</sup> He observed as follows:

Miserable, indeed, would be the situation of those unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach him; and they could not recover for a trespass upon their persons or their property or for the labor of their hands. They would be left the wretched dependants upon charity, or driven to the commission of crimes, to obtain a precarious support.<sup>134</sup>

Judge Putnam then distinguished Deborah's situation from the voluntary separation involved in both *Ringsted* and *Ruttan*. In his view, the traditional exception to coverture in the case of husbands who had "abjured the realm" could be applied to Deborah. Although he acknowledged that James had not "abjured his

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132. *Gregory v. Paul*, 15 Mass. 31, 33 (1818).

133. *Id.* at 32. Judge Putnam also cited and discussed another *Duchess of Pienne* case, decided after Lord Kenyon's cases, in which it became clear that the husband had returned to England from France after the first two cases but had left again in 1803, as well as cases involving husbands receiving sentences of transportation, including for a term of years, but not returning to their wives at the end of term. *Id.* at 34. See *Kay v. de Pienne* (1811) 170 Eng. Rep. 1327; 3 Camp. 123, 123-24 (Lord Ellenborough, CJ noting that he did not know whether Lord Kenyon had realized the Duke was living with his wife in England before returning to France, and if so, could not subscribe to his opinion); see discussion of case in Oldham, *supra* note 117, at 232-33 (stating that the duchess had "ducked for cover yet again behind her absent husband").

134. 15 Mass. at 34.



country,” on the other hand, he had “compelled his wife to abjure it.” This “should not make the case better or worse for her,” noting that if the “husband had been a native citizen, and had deserted his wife, and become a subject of a foreign state, the law would be clear.”

About a decade later, in 1827, a Massachusetts court extended the rationale of *Gregory v. Paul* to the wife of a husband living in another state. In *Abbot v. Bayley*,<sup>135</sup> the plaintiff, Phebe Abbot, received a promissory note in 1823 from Rogers in payment for certain goods or services purchased from her. The defendant pled in abatement that Phebe could not sue as *feme sole* because both at the time of the purchase, and also when she served the writ against him, she was married to Peter Abbot of New Hampshire.

The court noted that Phebe had married Peter in 1782, but was driven by “cruelty and ill usage” from her home with him in New Hampshire in 1805 without necessary provision or support.<sup>136</sup> Since then, she had no contact with Peter and had supported herself in Massachusetts as a single woman for more than twenty years through her own labor and trading activities. After her expulsion from their home, Peter had married another woman, as was then permitted under New Hampshire law, was cohabiting with her and with whom he had several children. If the parties had both lived in Massachusetts, the court noted, under those facts Phebe could not have sued in her own name without having divorced. However, under Massachusetts law, she would have been able to obtain a divorce and a reasonable alimony or other support from Peter’s estate.

Relying on the reasoning of *Gregory v. Paul*, the court concluded that as a deserted wife, Phebe could sue as *feme sole*, her abandonment of her home “being compulsory in order to obtain a living by her industry,” and that for this purpose, New Hampshire as a separate jurisdiction would be treated like a foreign state. Thus, she was entitled to maintain the action.<sup>137</sup>

In the following year, however, the Supreme Judicial Court of Massachusetts refused to apply the rationale of those cases in *Russell v. Brooks*, a case in which the husband maintained some contact with the wife after their initial separation, but later moved and lived in another state several years before his death.<sup>138</sup> Under the facts of *Russell v. Brooks*, Joshua and Eleanor Swan had earlier in their marriage lived in Lexington, Massachusetts and for many years were engaged together in the manufacture of articles made of fur. Before their separation, Joshua entered into a different kind of business, with the fur business being carried on separately by Eleanor. After their separation in 1815, Joshua lived in Boston in adultery with another woman but visited his wife in Lexington on Sundays as often as twice a month. Joshua moved to Georgia in 1818. He became insolvent in 1819 and returned to Boston, and shortly thereafter, moved to Alabama, where he

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135. 23 Mass. 89 (1827).

136. *Id.*

137. *Id.* at 92–93.

138. *Russell v. Brooks*, 24 Mass. 65 (7 Pick. 1828).

died insolvent in 1821. Eleanor discontinued her fur business after Joshua's death and died some time later. Joshua's administrator claimed Eleanor's business earnings and certain promissory notes received by her before her death. She had lent in her trade, for which three promissory notes of \$300 were given, payable to her agent or to the bearer. Those notes were paid shortly before her death, with interest, and the funds were received by the defendant, Eleanor's administrator. In addition, in 1815, she had set aside \$1000 to be invested, and the interest had been paid to her during her life by the person who held the funds in his name, and after her death, the \$1000 was paid to Eleanor's administrator. The court held that the husband was entitled to the earnings of his wife and that Russell, the husband's administrator, was therefore entitled to recover money received and promissory notes taken by his wife in the trade carried on by her separately as well as personal property and furniture acquired by her after her separation.<sup>139</sup>

Considered together, these Massachusetts common law decisions applied exceptions to coverture in cases in which the absence of the husband could be compared to a type of "civil death" in the case of abandonment by the husband or the forced exile of the wife. Nevertheless, as in Great Britain, the Massachusetts common law courts ultimately balked in cases where the marriage relationship arguably had not completely ended when the wife's separate business activities took place. In that situation, the wife's business assets were viewed as the husband's activities and thus not the separate property of the wife.

With regard to statutory law, Massachusetts law diverged from its English customary law antecedents by recognizing *feme sole* status only in cases of abandonment by the husband. By comparison, the longstanding customary law of certain localities within England had permitted *feme sole* traders to engage in business activities while cohabiting with their husbands. Like England, where certain registration and public notice requirements were adopted for *feme sole* traders, the Massachusetts statute imposed restrictions on the property eligible for such treatment and required court supervision and public notice. Nevertheless, perhaps in part due to the registration and notice requirements in Massachusetts, the statutory *feme sole* trader statute seems to have been rarely applied, at least as evidenced by published cases.

The next Part tells the stories of three generations of married women traders on Nantucket who operated successful businesses prior to the end of coverture.

### III. THREE GENERATIONS OF WOMEN TRADERS

This Part describes the business activities of five women, divided roughly into two time periods and three generations. The first section below includes the colonial and post-colonial period up to the end of the eighteenth century and profiles two sisters engaged in different types of trading businesses. The second section focuses on the beginning to mid nineteenth century, a time when the whaling

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139. *Id.*

industry was once again bringing prosperity to the island. During this period, some married women engaged in home-based businesses, including the second-generation shopkeeper profiled here. Later, business activity shifted to more defined commercial areas and separate shops. The third generation of business women profiled for this last period spent their formative years on Nantucket but left the island during adulthood to pursue other more economically promising opportunities. This section ends with the Civil War period when Nantucket entered a long economic decline following the demise of whaling.

#### A. SISTERS IN TRADE: 1765-1800

Kezia Folger Coffin and her younger sister, Judith Folger Macy, were born on Nantucket during the 1720s.<sup>140</sup> Both Kezia and Judith engaged in business activities on Nantucket during their marriages and developed reputations as astute business women as well as capable and energetic managers of their households.<sup>141</sup> During the colonial period, Kezia became a “she-merchant” on Nantucket, and developed trade contacts in American port cities and in London.<sup>142</sup> Her trading thrived during the period before and during the Revolutionary War but suffered financial reversals following the defeat of the British. By contrast, Judith operated a more typical family household business and boarding establishment after the Revolutionary War.<sup>143</sup>

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140. Kezia Folger was born in 1723, married John Coffin in 1740, and died at age 74 in 1798. NHARL BARNEY GENEALOGICAL RECORD, <http://www.nantuckethistoricalassociation.net/bgr/BGR-o/p401.htm#i12038> (last visited Mar. 4, 2019). Judith Folger, Kezia’s younger sister, was born in 1729, and died at age ninety in 1819. Her first husband, John Gardner, died of consumption two years after she married him. In 1749, she married her second husband, Caleb Macy. He died in 1798 at the age of seventy-eight. <http://www.nantuckethistoricalassociation.net/bgr/BGR-o/p431.htm#i12953> (last visited Mar. 4, 2019).

141. Surviving documentary evidence of their business activities is sparse. Town and court records and letters provide information about Kezia’s business affairs, supplemented by the diary begun by Kezia’s daughter in 1775 and kept until shortly before the daughter’s death in 1818. In Judith’s case, an account book in her hand survives, in addition to the memories recounted later by one of her sons.

142. For a biography of another “she-merchant” who engaged in trade in Boston and England during the 1750s (both before and after her marriage in 1755), see PATRICIA CLEARY, ELIZABETH MURRAY: A WOMAN’S PURSUIT OF INDEPENDENCE IN EIGHTEENTH-CENTURY AMERICA 46, 59–60, 67 (2000) (estimating that at least ninety women kept shop in Boston between 1740 and the Revolution, most of them widows or single). See CRANE, *supra* note 11, at 103 (noting that among the 133 licensed retailers in Boston in 1737, 57 were women). See also WOODY HOLTON, ABIGAIL ADAMS: A LIFE 144–55 (2009) (describing Abigail’s trading activities during her marriage to John); Jean P. Jordan, *Women Merchants in Colonial New York*, 58 NEW YORK HISTORY 412, 417–19 (1977) (discussing Mary Alexander’s and Margaret Hardenbroeck Philipse’s activities as New York merchants during their marriages as well as less well-known married, widowed and single women traders during the seventeenth and eighteenth centuries); Claudia Goldin, *The Economic Status of Women in the Early Republic: Quantitative Evidence*, 16 J. OF INTERDISCIPLINARY HISTORY 375, 402 (1986) (estimating that in 1791, twenty-eight percent of all shopkeepers in Philadelphia were women).

143. NORLING, *supra* note 4, at 42–44 (noting that “Macy, rather than Coffin, serves as the better illustration of the kinds of activities Nantucket women typically engaged in and the relationship of these to men’s activities, within families and in the larger community”). See generally HARTIGAN-O’CONNOR, *supra* note 6, at 70–83 (concluding that after the War, women experienced a diminishment of commercial opportunities but that boarding, renting, and teaching remained).

Both sisters lived long and active lives, primarily on the island. Their parents, Folger cousins once removed,<sup>144</sup> were descendants of an early settler on the island, Peter Folger, a surveyor and Indian language interpreter.<sup>145</sup> As described in more detail below, Kezia and her sister Judith each engaged in substantial business activities with the acquiescence and apparent approval of their Nantucket husbands.<sup>146</sup> Their trading was quite different in scope, however. Judith Macy, who bore ten children compared to her sister's one, ran a large household and engaged in cloth and agricultural production, more traditional activities for women of that time.<sup>147</sup> Her trading transactions were accomplished primarily through smaller scale barter of services or goods, with amounts owed and paid recorded in her trade account book.

Kezia Coffin bought and sold goods on the island and in various other Atlantic seaports after expanding into trading activities beyond the early store and school located in her home. Her dealings with those merchants suggest that they accepted her authority to engage in business transactions with them. Documentary evidence survives on Nantucket of the issuance to Kezia of powers of attorney to act on behalf of her husband in certain matters and to appear in court on his behalf, and later also to act on behalf of her younger brother.<sup>148</sup> In her final years after her husband John's death, she relied on the common law of dower under coverture to recover property transferred to creditors in judgments against them executed after the end of the Revolutionary War.<sup>149</sup>

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144. Their parents, Daniel Folger and Abigail Folger, married in the dwelling of Abigail's father John on Nantucket in 1721. See Marriage Certificate of Daniel and Abigail Folger, NHARL Mass. Collection 51, Folder 8. Their first son, Elishai, was born six months later. See Jeffrey Kovach, *Wayward Quaker Women: Marital Regulation in the Eighteenth-century Friends Meeting*, Vol. 66 HISTORIC NANTUCKET No. 2, Fall/Winter 2016–17 at 13 (noting that the couple had to publicly acknowledge to the meeting that they had engaged in premarital sex).

145. Peter Folger settled on the island in 1663, was chosen as clerk of the court and recorder in 1673, and was described by Cotton Mather as an "Able Godley Englishman who was employed in teaching the youth in Reading, Writing and the Principles of Religion by Catechism, being well-learned likewise in the Scriptures and Capable of Help in religious matters." LYDIA S. HINCHMAN, *EARLY SETTLERS OF NANTUCKET: THEIR ASSOCIATES AND DESCENDANTS* 67–68 (1896, Tuttle ed., 1980).

146. See discussion *infra* Part III.A.1 and 2.

147. Shortly after Judith's death, a relative by marriage, Hannah Barnard of Hudson, New York, a Quaker minister who travelled to England in 1797 with Rhode Island minister Elizabeth Coggeshall, published one of the only books of its time on rural domestic economy directed entirely at women, entitled *DIALOGUES ON DOMESTIC AND RURAL ECONOMY* (1820). See JOAN M. JENSEN, *LOOSENING THE BONDS: MID-ATLANTIC FARM WOMEN, 1750-1850* at 124 (1986) (describing the book as showing "how practicality and attention to productive skills would enable women to claim their place as equals in the rural household"). Hannah's husband, Peter Barnard, Jr., shared with Judith and Kezia the same grandmother, Judith Coffin, the mother of both Daniel Folger (Kezia and Judith's father) and Peter Barnard, a son from Judith Coffin's second marriage.

148. See discussion *infra* Part III.A.1.

149. *Id.*

### 1. Kezia Folger Coffin, Merchant

Kezia kept shop in her home after her marriage at age sixteen to John Coffin, who as a young man worked as a cooper (maker of casks or barrels), and went to sea on whaling voyages.<sup>150</sup> By the time of his marriage to Kezia, John was thirty-two years old, a well-established mariner; he later became a merchant.<sup>151</sup> De Crèvecoeur, who travelled extensively in the colonies in the 1760s and 1770s, described John and Kezia Coffin as follows in *Letters from an American Farmer*, published in 1782:<sup>152</sup>

The richest person now on the island owes all his present prosperity and success to the ingenuity of his wife: this is a known fact which is well recorded; for, while he was performing his first cruises, she traded with pins and needles, and kept a school. Afterward she purchased more considerable articles, which she sold with so much judgement, that she laid the foundation of a system of business that she has ever since prosecuted with equal dexterity and success. She wrote to London, formed connections, and, in short, became the only ostensible instrument of that house, both at home and abroad. Who is he in his country, and who is a citizen of Nantucket or Boston, who does not know Aunt Kesiah? I must tell you that she is the wife of Mr. C———n, a very respectable man, who, well pleased with all her schemes, trusts to her judgement, and relies on her sagacity, with so entire a confidence, as to be altogether passive to the concerns of his family. They have the best country-seat on the island, at Quayes, where they live with hospitality, and in perfect union: He seems to be altogether the contemplative man. . . . To this dexterity, in managing the husband's business while he is absent, the Nantucket wives unite a great deal of industry. . . .

The years before the Revolutionary War were a time of prosperity and expansion on the island. Its whale fishery had reached the west coast of Africa and as far south as the Falkland Islands near the lower tip of South America. Kezia expanded beyond shopkeeping<sup>153</sup> into trading transactions with Boston, Newport, New York, and London merchants. For example, in 1772, Kezia wrote from

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150. See Copy of Record of Friends' Meeting, 1733–1760, Entries for Aug. and Sept. 1740, NHARL Ms. Collection 51, Folder 1 (recording the approval by Friends of the intention of John and Kezia to marry).

151. Nantucket court records note the grant of a license to John Coffin in 1750 to sell tea and coffee. Four years later, the sale of china was added, and in 1755, he was also authorized to sell strong spirits and to retail from his dwelling house. Nantucket Ct. Com. Pl., Record Book No. 2, pp. 176, 185, 187, 190. It is not clear from the records whether these were licenses for activities of John or Kezia, or both.

152. DE CRÈVECŒUR, *supra* note 3, at 143–44.

153. CAROLINE H. DALL, *THE COLLEGE, THE MARKET AND THE COURT; WOMAN'S RELATION TO EDUCATION, LABOR, AND LAW* 197 (1867). Kezia Coffin was described as “one of the most influential of our commercial women” as “she not only traded in dry goods and provisions but fitted vessels for the merchant service.” *Id.*

Nantucket to the Hancock merchant house in Boston about a transaction involving a cargo of hemp, inquiring of John Hancock whether a ship's captain had been supplied with the "Seven tuns of hemp," having given Hancock "my Word" to pay for it if the captain could not make payment.<sup>154</sup> She expressed her reluctance to enter into another transaction involving the use of the hemp for cordage without first knowing whether it had been acquired, and explained in her letter to Hancock that she had been unable to communicate in the meantime directly with the captain.<sup>155</sup>

Nantucket historian Nathaniel Philbrick notes that according to a traditional account, Kezia invited the first lawyer on Nantucket into her household, consulted him for his legal expertise in her various business dealings, and used him to draw up a power of attorney that gave her control over her husband's business interests.<sup>156</sup> Both traditional and later fictionalized accounts<sup>157</sup> as well as De Crevecoeur's more contemporary description suggest that Kezia was known in the community as having the authority to act in matters of business.

A power of attorney issued by John in 1746 to Kezia, six years after their marriage,<sup>158</sup> and long before the arrival on island of the lawyer, authorized her to appear for her husband in court, with a copy acknowledged by John, and witnessed and recorded in the town records much later as a deed in 1762.<sup>159</sup> It also authorized her to sell or dispose of his servant Nancy. Court records from 1748 reveal that John filed a complaint against "Nancy, a Molatta Girl, for Stealing

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154. Letter from Kezia Coffin, Nantucket, to John Hancock, Boston (Nov. 21, 1772), Hancock family papers, Box 11, Folder 23, Baker Library, Harvard Business School.

155. *See id.*

156. PHILBRICK, *supra* note 50, at 125.

157. During the following century, Kezia's life and notorious reputation served as the inspiration for a novel written by Joseph Hart entitled *MIRIAM COFFIN, OR THE WHALE-FISHERMAN: A TALE* (1835). *See* EDOUARD A. STACKPOLE, *SMUGGLER'S LUCK: BEING THE ADVENTURES OF TIMOTHY PINKHAM OF NANTUCKET ISLAND DURING THE WAR OF THE REVOLUTION 288-308* (1931) (fictionalized account describing Coffin's secret smuggler's tunnel at her country house in Quaise).

158. *See* BETSY TYLER, *SOMETIMES THINK OF ME: NOTABLE NANTUCKET WOMEN THROUGH THE CENTURIES 14* (2d ed. 2018) (noting that this was the "third such document from husband to wife recorded on the island"). There likely were additional powers of attorney in use that were not recorded in the town's registry of deeds. For example, a court record from the late 1740s notes that Hannah Harper, the wife of John Harper, sought to answer for an absent defendant in a debt collection case, based on a "letter of attorney" issued by her husband and a "power from the Defendant." The court denied her request based on the assessment that the defendant still "belonged to Nantucket" and therefore she could not appear for him despite his claiming at that time to be a resident of Dukes County (Martha's Vineyard). Nantucket Ct. of C.P., Record Book No. 2 at 175 (finding the defendant, Simon Joel, had not appeared and thus had defaulted).

159. Nantucket Town Records, Office of the Registry of Deeds, Town and Country Building, Book 6, 1759-1790, at 448. The entry states as follows: "I John Coffin of Sherborn in the County of Nantucket in the Province of the Massachusetts Bay in New England Cooper Constitute Keziah my Wife my Attorney in all Causes moved or to be moved for me or against me in my Name to appear Pleas and Pursue to final Judgment and Execution and in More Speciall Manner I hereby give unto my Said Attorney my full Power and Authority to Sell or Dispose of my Servant Nancy [illegible]; Witness my hand—and Seale this twelfth Day of July A.D. 1746," followed by an entry by a Justice of the Peace that "on the Day and yeare aforesaid the above Written Power of attorney Was acknowledged by the above named John Coffin to be his act by Deed" and recorded by the Registrar in 1762.

Sundry Goods from him. . .”<sup>160</sup> After pleading guilty, she was ordered by the court to pay threefold for goods not returned, a fine, and the cost of prosecution. She was to serve John and his heirs and assigns for five years for satisfaction of the sums due.<sup>161</sup>

No other power of attorney from John to Kezia appears to have been registered in the town’s records, although a power of attorney was issued to Kezia in 1769 by her younger brother Daniel Folger,<sup>162</sup> a mariner who later moved to a whaling community in New York. This very broad power of attorney was issued to both “John Coffin Merchant and Kezia his wife . . . Jointly and Severally to be my true, Sufficient & Lawful attorneys for me and in my Name and Stead,” and acknowledged in that year by Daniel before a Justice of the Peace; however, it was not registered as a deed in the town’s records until more than a dozen years later on August 25, 1783.<sup>163</sup>

John and Kezia’s lawyer, Phineas Fanning, was educated at Yale and sworn in as an attorney on Nantucket in 1773.<sup>164</sup> In 1777, when he was twenty-six, Fanning married John and Kezia’s only child, also named Kezia (hereinafter referred to as “young Kezia” or “Kezia’s daughter”), who was born in 1759, nineteen years after John and Kezia’s marriage.

The young Kezia’s diary, which she began keeping while still living at home in 1775 at age sixteen, provides a rich source of information about her mother’s business activities and later political, legal and financial troubles. Her early diary entries refer to her father as “Dada” and her mother as “my dear Mama” and “my ever-to-be-honored Mama.”<sup>165</sup> The daughter’s diary also provides an example of

160. Nantucket Ct. of C.P., Record Book No. 1 at 168, Court of Sessions of the peace held on March 29, 1748 (digital copy of Record Book No. 1, p. 168 at Vol. 10174).

161. *Id.* According to an island historian, the use of a single name and the word “servant” may be a euphemism for a slave; between 1659 and the late 1700s some Nantucketers, including the Coffin family owned slaves. FRANCES RULEY KARTTUNEN, *THE OTHER ISLANDERS: PEOPLE WHO PULLED NANTUCKET’S OARS* 59-64 (2005). See also FRANK MORRAL & BARBARA ANN WHITE, *HIDDEN HISTORY OF NANTUCKET* 14–22 (2015). Although the Nantucket Quaker monthly meeting communicated its view that slavery was immoral to the New England Yearly Meeting as early as 1716 and approved the publication of an antislavery tract by Elihu Coleman in 1732, monthly meetings did not begin to deal with and disown slave-owning Quakers until after the 1760s. *E.g.*, LEACH & GOW, *supra* note 45, at 39–40, 84, 117; *e.g.*, *Introduction to QUAKERS AND ABOLITION* 1–12 (Brycchan Carey & Geoffrey Plank eds., 2014).

162. Daniel Folger, who was born in 1736, thirteen years after Kezia’s birth, was only eight years old when his father, also named Daniel, died at sea.

163. Nantucket Town Records, Office of the Registry of Deeds, Town and Country Building, Book 10, at 151. Although the reason for the delay in registration is unclear, it may have been entered at that time into town records in connection with cases against John and Kezia for nonpayment of debts.

164. PHILBRICK, *supra* note 50, at 125. The earliest references I have found of Phineas Fanning’s name in the town’s registry of deeds are as a witness in two November 1772 transactions involving land on Nantucket. Nantucket Town Records, Office of the Registry of Deeds, Book 8, 179 (Nov. 16 from the widow Mehitabel Pollard to her daughter Elizabeth and Elizabeth’s husband John Killey) and 207 (Nov. 17 from Elizabeth and John Killey, residents of Yarmouth on Cape Cod, to John Coffin). The second transaction was recorded in January 1773.

165. KCF Diary, June 9–10, 1775; April 4, 1780, Oct. 19, 1782, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

the Nantucket Quaker Women's Meeting role in disciplining female members and reviewing their readiness for marriage<sup>166</sup> by mentioning a visit she received from representatives of the women's meeting in January 1777. They advised her "not to be courted by a Presbyterian & to consider well the matter before I entered into the marriage state." She noted that "Some of their advice was good but I think quite needless at this time—they advised me not to dress so fashionable."<sup>167</sup> That March, the couple's intentions to marry were published, and they married in the following month.<sup>168</sup> After marrying outside her faith, Kezia's daughter was disowned by the Quaker meeting.<sup>169</sup>

A few years earlier, in 1770, Kezia and John had built what was described as a symmetrical "regal private mansion" on the west side of Center Street between India and Hussey Streets. The mansion was positioned so that it faced the street, a departure from the town's customary spare south-facing salt box lean-to design for homes.<sup>170</sup> They kept their stores in a nearby building.

In another deviation from the Quaker community's expectations<sup>171</sup> three years later, Kezia was admonished by the Nantucket Quaker Women's Monthly Meeting for "keeping a Spinnet in Her house & Teaching her daughter . . . To Play Thereon Contrary to the advice of Friends." Kezia was not "Willing to Submit to the Judgement of Friends" and was later disowned by the meeting.<sup>172</sup> Her husband John disavowed responsibility to the Men's Meeting,<sup>173</sup> and the spinnet was subsequently moved to a neighbor's household.<sup>174</sup> Although the spinnet would have been viewed as John's property as a legal matter by civil authorities, the

166. See *supra* discussion of marital regulation and discipline by Quaker women's meetings in Part II.A.

167. KCF Diary, Jan. 13, 1777, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

168. *Id.* at March 23 and April 5, 1777.

169. See Record of Births, Deaths, Burials, Those Disowned, Received, Restored, Removed, 1711–1838, NHARL Ms. Collection 52, Book 18 (showing Kezia, daughter of John and Kezia, disowned on the 28<sup>th</sup> day of the fourth month of 1777) (on file with NHARL).

170. PHILBRICK, AWAY OFF SHORE, *supra* note 50, at 125.

171. During the latter half of the eighteenth century, the Quakers on Nantucket became increasingly strict in enforcing their discipline through disownment. See CAROL FAULKNER, LUCRETIA MOTT'S HERESY: ABOLITIONIST WOMEN'S RIGHTS IN NINETEENTH CENTURY AMERICA 15 (2011) (noting that the Nantucket Monthly Meeting disciplined only 90 members before 1770, and in the following decade the meeting disowned 227 members); LEACH & GOW, *supra* note 45, at 116.

172. Nantucket Quaker Women's Monthly Meeting Minutes, 18 Sept. 1773 ("J—C—has been treated with for keeping in his house a musical instrument called a spinnet and permitting his daughter to play thereon.") and 30 Sept. 1773 ("Ke—C—disowned for keeping a spinnet in her house and permitting her daughter to play thereon"), NHARL Ms. Collection 51, Box IV, Book V and Ms. Collection 52, Book 18 (noting that Kezia was disowned on the 25<sup>th</sup> day of the tenth month of 1773) (on file NHARL).

173. Nantucket Quaker Men's Monthly Meeting minutes, 29 Aug. 1774, NHA, Ms. Collection 52, Book 3 (reporting back to the meeting that "he declares he had no hand in bringing it there and also has forbid its ever being us'd there and also he is Sorry that ever it was brot into his house & Acknowledges he was a little Short and Rough with the Visitors") (on file with NHARL).

174. KCF Diary, Jan. 19, 1776, NHARL Ms. Collection 2, Folder 4 ("My Spinnet is at Esqr. Hussey's carried there because the friends or Quakers were displeas'd with its being at Father's.") (on file with NHARL).



Quaker women's meeting instead treated it as Kezia's infraction and disowned her for refusing to conform her conduct to Quaker rules on musical entertainment. John remained a member of the meeting after acknowledging errors in his behavior to visitors from the meeting, which Kezia declined to do.

Because Kezia was a loyalist during the Revolutionary War, she was able to trade with the British during a time when the island (which declared itself neutral during the war) was otherwise cut off from its normal source of supply. In addition, during this period, she and Fanning may have engaged in smuggling activities to supply her stores. In October and December of 1775, over a year before her marriage, Kezia's daughter refers to Fanning's provisioning trips, in which "by stealth they took more in than they were allowed." According to the young Kezia, a trip by Fanning to Shelter Island in October brought in a load of butter, cheese, cider, a cow, deerskin, apples, other fruits, and dried cherries.<sup>175</sup> In December, Fanning returned from another trip, "after going through everything but death." Three days later, she noted, "Our house has been like a tavern, people coming after provisions."<sup>176</sup>

By that summer, Kezia had a barn built on some land she and John owned at Quaise, and the following year a new country estate was built at Quaise,<sup>177</sup> several miles up the harbor from town, a location ideally suited for arriving by boat and traversing over a narrow haul-over to avoid passing by the town's main harbor.<sup>178</sup> As a result of such signs of wartime prosperity, she became a source of some resentment during a period of economic scarcity and deprivation on the island. These resentments may have contributed to her later troubles on the island after the war.

An additional source of information about Kezia's life and political loyalties comes from Benjamin Franklin and his sister Jane. Kezia's parents were cousins of Benjamin Franklin's mother, Abiah Folger, who was born on Nantucket. Abiah's children, Benjamin and his older sister Jane Franklin Mecom, considered Kezia their own "cousin."<sup>179</sup> Before the war, Kezia and her cousin Jane visited each other's homes in Nantucket and Boston as children and later as adults, and corresponded frequently. As historian Jill Lepore points out in her biography of Jane Franklin, Jane later wrote to her brother Benjamin that Kezia had been "for many years Like a Sister to me & a grat friend to my children."<sup>180</sup> Kezia sent her daughter to live with Jane for schooling in Boston and Jane sent her beloved daughter Polly to Kezia's home in Nantucket in the hope that the island would

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175. KCF Diary, October 9, 1775, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

176. KCF Diary, December 1 and 4, 1775, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

177. KCF Diary, July 7, July 19, and Sept. 17, 1777, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

178. John and Kezia's daughter Kezia and son-in-law Phineas Fanning apparently lived for a time in the Quaise house after their marriage. BETSY TYLER, *supra* note 158, at 14–15.

179. See JILL LEPORE, *BOOK OF AGES: THE LIFE AND OPINIONS OF JANE FRANKLIN* 94, 357 n.18 (2013).

180. *Id.* at 94.

aid her recovery from illness.<sup>181</sup> They remained close until the Revolutionary War,<sup>182</sup> and Jane sometimes commented on Kezia's activities in her surviving correspondence with her brother and other family members. Jane Franklin Mecom described her cousin Kezia's overextension and financial ruin following the War as follows:

She Took to the wrong side & Exerted Her Self by Every method she could devise Right or rong to Accomplish her Designs, & Favour the Britons, went in to Large Traid with them, & for them, & by mismanagement & not suckceding in her Indevours has sunk Every Farthing they were Ever Posesed of & have been in Jail both Her Husband at nantuket & her self at Halifax.<sup>183</sup>

Following the War, Kezia was accused of treason along with her cousin Timothy Folger and her husband's relations William Rotch and Samuel Starbuck, all prominent Quaker whaling merchants on Nantucket,<sup>184</sup> and Benjamin Tupper, who was a loyalist physician, for assisting the British in ransacking the warehouse of a fellow Nantucketer, Thomas Jenkins. The trial was set for the spring of 1780. In a letter to her brother Benjamin in 1789, Jane Franklin Mecom described the trial in 1780 as follows:

She was Brought up to Boston to stand trial, but I think there was no final condemnation at Court, she says they could not find Evedence. They [her prosecutors] say the Evedence was so strong that had they suffered them to come in to court it would have hanged her & so they supresd it not being willing it should Proceed so far.<sup>185</sup>

Kezia's daughter, by contrast, focused in her diary on the lack of evidence to convict, noting that "[t]he House of Representatives have . . . put a stop to the matter, as Jenkins' witnesses fail him and not one of them know anything relevant to the sundry charges."<sup>186</sup>

181. *Id.* at 148–49 (noting Polly's failure to recover and Jane's great grief over her loss).

182. *Id.* at 228.

183. *Id.* at 229 (quoting from a portion of the letter by Jane Franklin Mecom to Benjamin Franklin, Aug. 29, 1789). A transcription of the full letter can be found at <http://franklinpapers.org/framedVolumes.jsp> (last visited Oct. 26, 2018).

184. William Rotch's mother was Love Coffin Macy, a descendent of Nantucket founders, Tristram Coffin and Thomas Macy. McDEVITT, *THE HOUSE OF ROTCH*, *supra* note 69, at 4. Kezia's husband, John Coffin, could also trace his ancestry back to Tristram Coffin, as could Samuel Starbuck.

185. LEPORE, *supra* note 179, at 394 n.22.

186. KCF Diary, Apr. 4, 1780, NHARL Ms. Collection 2, Folder 4 (noting also that the "Council are not satisfied and are seeking further into the matter; but if there is anything further done it will be done here and not there.") (on file with NHARL). For a detailed discussion of the events leading up to the investigation and eventual dropping of the charges by the House of Representatives (followed by the failure of the Senate to concur, leaving the matter unresolved until "the Peace"), see McDEVITT, *HOUSE OF ROTCH*, *supra* note 69, at 245–92.

Several years later, Kezia and her husband John were charged with attempting to steal a vessel from the Continental forces and sued for money damages.<sup>187</sup> According to their daughter, it was claimed that “my Father alias Mother owned half the boat” that became property of another after it was seized by the army and that the boat was then stolen and run off to some eastern port. She then noted “my Mother being impowered has gone off to answer the case my mother positively denies having any concern in the boat.”<sup>188</sup> The case was continued, and soon thereafter, her daughter noted that the “the declaration of Peace from Congress came today to the Island. America allowed independence.”<sup>189</sup>

Along with independence from the British came the loss of Kezia’s business as well as the unravelling of their home and fortune. Later that year, Kezia’s daughter reported that two merchants from Newport<sup>190</sup> sued for 700 pounds that “my mother had taken up to carry on business for that devilish McCauly Company in New York.”<sup>191</sup> John was disowned by the Quaker meeting for failing to pay his debts.<sup>192</sup> The following November her mother returned to Nantucket from New York “unsuccessful in laws.”<sup>193</sup> John and Kezia were dispossessed of their house and goods when the judgment against them was executed in December of 1783. Her daughter describes the scene when Kezia, age sixty, refused to leave the house, the Sheriff and deputies “took her up in her chair and carried her out of the house and set her in the street.”<sup>194</sup>

During the years 1784 to 1786, Nantucket’s Court of Common Pleas records contain many claims and judgments against John and Kezia for unpaid debts, including one brought in 1786 by Charles Jenkins of New York against “John Coffin and Kezia his Wife Trader” as defendants.<sup>195</sup> Additional assets and lands

187. PHILBRICK, *supra* note 50, at 131.

188. KCF Diary at Mar. 29, 1783, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

189. *Id.* at Apr. 15, 1783.

190. For a description of credit instruments used in Newport during 1750–1820, including the growing popularity of assignable shorter-term instruments, requiring payment plus interest in a few months at the latest, allowing them to circulate as currency, see HARTIGAN-O’CONNOR, *supra* note 6, at 80–83 (noting that women, typically widows, usually appeared as the plaintiff rather than the defendant in court cases involving promissory notes).

191. KCF Diary at Dec. 27, 1783, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

192. Nantucket Men’s Monthly Meetings Minutes, Apr. 28, 1783, NHARL Collection 52, Book 3, 1772–1789, 209 (“it is the Judgment of this Meeting that he be disowned and no longer deemed a member thereof until he shall make friends satisfaction”) (on file with NHARL); NHARL Collection 52, Book 18 (noting John’s disownment on the 28<sup>th</sup> day of the fourth month of 1783) (on file with NHARL).

193. KCF Diary at Nov. 2, 1783, NHARL Ms. Collection 2, Folder 4 (on file with NHARL).

194. *Id.* at Dec. 27, 1783 (noting that after her mother was set in the street, “my father went out . . . Mr. Fanning went to my Father’s door and demanded entrance to take out his papers, goods etc. but those within refused him entrance. . . I would not wish to enjoy one sixpence of my Father’s estate if he owes money, but to have things taken hold of and torn away in the manner they are, is more than flesh and blood can or ought to bear. I am fearful that my beloved parents will lie in the Street, although I believe it is the wish of many, but Heaven grant their wishes may be abortive!”).

195. Nantucket Ct. of C.P., Mar. Term 1787, vol. 20004–20005 of digitized records, Superior Court Clerk, Nantucket Town and County Building, Nantucket, MA. *See also*, Nov. 1785, vol. 20013–20015; May 22, 1786, 20021–20022 (ordering Kezia and John to be jailed if they failed to satisfy the judgment).

were seized in execution of judgments against them. In the midst of that financial distress, Kezia fled to Halifax in an unsuccessful attempt to receive restitution from the British for the loss of their property,<sup>196</sup> and in 1787, was put into debtor's prison for failure to pay her butcher and baker in Halifax.<sup>197</sup>

While Kezia was away, her husband John died in July of 1788. After Kezia's return to Nantucket later that year, she sought her dower share in property transferred to his creditors, and was successful in some of her lawsuits.<sup>198</sup> In 1796, she settled with Walter Folger for just under two hundred dollars her dower claim in land acquired by execution from the estate of John Coffin and afterward conveyed by another to him by deed.<sup>199</sup> She prevailed in 1797 in a case against defendant Josiah Barker. Significantly, he defended against the suit by arguing that judgment on which the execution issued was founded on Notes, Debts, and Contracts made by Kezia during her coverture, and that Kezia had at the time of making the Notes, Debts, and Contracts and for "a long time before been used & accustomed to bargain sell & contract as if sole" before her widowhood.<sup>200</sup> Nevertheless, Barker lost and Kezia regained her dower right in the property at issue. She pursued other less successful litigation and died in 1798 several days after falling down a flight of stairs on returning to her rented house after an afternoon in court.<sup>201</sup>

## 2. Judith Folger Macy, Trader

Less is known about Kezia's sister Judith, although she left behind an account book listing her business and household transactions beginning at age 54, from 1783 and continuing intermittently to 1805.<sup>202</sup> Many of these transactions involved credit-based barter or exchanges, although some involved cash

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196. Kezia missed the deadline for claims filed before the Loyalist Claims Commission for restitution, and she apparently spent six weeks in debtor's prison in Halifax. See Sarah C. Chambers & Lisa Norling, *Choosing to Be a Subject: Loyalist Women in the Revolutionary Atlantic World*, 20 J. WOMEN'S HIST. 39, 46 (2008) (citing Kezia Coffin Fanning's diary).

197. KCF Diary (Apr. 28 and July 21, 1787) (on file with NHARL Ms. Collection 2, Folder 4).

198. See Nantucket Ct. of C.P., Mar. Term 1793, vol. 20091–20095 of digitized records, Superior Court Clerk, Nantucket Town and County Building, Nantucket, MA (recording a jury verdict in Kezia's favor on her plea of ejectment filed by her attorney Phineas Fanning against George Lawrence, and a favorable judgment of a full third of the premises from the Court in her claim of dower rights against George Lawrence in property formerly owned by John).

199. Nantucket Town Records, Office of the Registry of Deeds, Town and Country Building, Book 14, at 418–419.

200. Nantucket Ct. of C.P., Mar. Term 1797, vol. 20135–20137 of the digitized copy, Superior Court Clerk's Office, Nantucket Town and County Building, Nantucket, MA.

201. See also KCF Diary, (Mar. 25, 1798) (on file with NHARL Ms. Collection 2, Folder 4).

202. Judith Macy Day Book (1783–1805) (on file with NHARL Ms. Collection 10, AB 37). Her day book is one of only two pre-nineteenth century account books kept by women among more than five hundred account books in the Nantucket Historical Association collection. The other was the account book of Mary and Nathaniel Starbuck, 1662–1757. Lisa Norling, *Judith Macy and Her Daybook; or, Crevecoeur and the Wives of Sherborn*, 40 HISTORIC NANTUCKET 68 (Winter 1992). For background on Mary Starbuck, see *supra* notes 46–50 and accompanying text.

changing hands.<sup>203</sup> In addition, her son Obed Macy, a Nantucket merchant who wrote an early history of the island,<sup>204</sup> left for posterity a loving description of his mother.<sup>205</sup>

Judith was born in 1729 and lived ninety years.<sup>206</sup> Her older brother Elishai was lost at sea in 1740, the year of her older sister Kezia's marriage to John Coffin. Another brother and her father Daniel Folger met the same fate off of Cape Pogue of Chappaquidick, near Martha's Vineyard, in 1744. Judith married James Gardner in 1746,<sup>207</sup> at the age of seventeen; he died of consumption two years later.<sup>208</sup> In 1749, she married a second time, to Caleb Macy. Caleb had earlier tried several occupations: first farming and milling like his father, next shoemaking, and then he decided to go to sea. However, after several short whaling voyages and some coastal trading trips, as Obed later observed, Caleb "found his health incompetent to the hardships of a seafaring life, [and] therefore determined never to cross the ocean again."<sup>209</sup> He returned to land and became a cordwainer and shortly after he left the sea, at age thirty, he met Judith. After that, his fortunes improved, and he prospered in his shoemaking and over time made significant investments in whaleships and land on the island.<sup>210</sup>

Obed described his mother as "generally healthy and of a strong constitution & remarkably industrious."<sup>211</sup> He described his father as "a weakly man" who "often called for [Judith's] assistance, not only in administering to his comfort in sickness but frequently in counseling together respecting his business."<sup>212</sup> Between 1751 and 1771, Judith bore ten children. Of the ten, seven survived to adulthood; she lost three daughters in infancy, two of them named Kezia.<sup>213</sup> Her fifth son was developmentally delayed and required care his entire life. Judith outlived all but four of her children.

In addition to caring for the family, as Obed recounted, Judith boarded several men who worked for Caleb and lived with the family, "frequently from ten to

203. For a description of merchants, shopkeepers and artisans as financial intermediaries and the interchangeable nature of goods, cash, and work during this period, see discussion in HARTIGAN-O'CONNOR, *supra* note 6, at 136–37.

204. OBED MACY, A HISTORY OF NANTUCKET (1835).

205. OBED MACY: Family Mirror, 16 Apr. 1825, in NHARL, Ms. Collection 119, Folder 3, at 11–15. See also NORLING, *supra* note 4, at 42–44.

206. See discussion, *supra* at notes 140 and 162.

207. *Id.*

208. James Gardner, Judith's first husband, was the grandson of James Gardner and Mary Starbuck and the great-grandson of the early settlers and traders Nathaniel and Mary Coffin Starbuck. See NHARL BARNEY GENEALOGICAL RECORD, *supra* note 140 (on file with NHARL). See discussion of Mary Coffin Starbuck's role in the establishment of the Quakers on Nantucket, *supra* notes 46–50.

209. OBED MACY, *supra* note 205, at 7. See also NORLING, *supra* note 4, at 27.

210. OBED MACY, *supra* note 205, at 8–10. See also Nantucket Town Records, Office of the Registry of Deeds, Town and Country Building, Books 7, 9, 10, 11, 13, 14.

211. OBED MACY, *supra* note 205, at 12.

212. *Id.* at 13.

213. See Nantucket Friends' Records (on file with NHARL Ms. Collection 52, Book 18) (The name "Kezia" was shared by her sister and as well as a sister of her father). See NHARL BARNEY GENEALOGICAL RECORD, *supra* note 140 (on file with NHARL).

twelve workmen, besides the children & servants.” And “[n]otwithstanding this uncommon care & labour,” his mother “was never heard to repine, or frown, but was always patient, being an example of moderation through life.”<sup>214</sup> In her account book, she recorded transactions involving the production of milk and its sale to others as well as transactions with boarders.<sup>215</sup> With some boarders she exchanged room and board for their labor. For example, her records show that boarder Daniel Gifford “sawed 2 cord & 2 feet of wood.”<sup>216</sup> She also engaged in cloth production.<sup>217</sup> Her account book shows that she employed several women in spinning and weaving and sold the yarn or cloth to merchants.

Judith’s sons Sylvanus, Obed, and Brazillai operated as partners in several whale fishery businesses and her daughter Ruth worked with their mother. Judith’s account book records in 1792 that “3 Days Work by Ruth” for George Freeborn were exchanged for cloth and sewing silk. Entries for 1793 also show days of work by Ruth for Freeborn. Judith’s accounts for five or six years before show that she had earlier worked for Freeborn in exchange for cloth and thread. Judith also provided provisions for her sons’ businesses and carefully recorded the transactions: for example, in 1790–91, she listed pounds of “tallow” for her sons for brigs and schooners.<sup>218</sup>

Judith was a devout Quaker all her life, and between 1787 and 1796, served as Clerk of the Nantucket Women’s Monthly Meeting and an Overseer of the Poor. She examined the readiness of prospective brides and attended marriages and represented the Nantucket Women’s Meeting at the Quarterly Meeting at Sandwich on Cape Cod. The last fifteen years of her life, according to Obed, “was mostly spent in knitting & reading the Bible & other religious books.”<sup>219</sup>

By 1798, in her late sixties, Judith was a widow for the second time.<sup>220</sup> After nursing her husband through his last illness, Obed recalls, she “pretty much resigned up to her children the care of her business which was principally in the agricultural line.”<sup>221</sup> She died in 1819, having lived her last few years with her daughter Ruth’s family. She left a substantial estate,<sup>222</sup> to be distributed among her four children, twenty-one grandchildren and twenty-two great grandchildren.

214. OBED MACY, *supra* note 205, at 13.

215. Judith Macy Day Book, *supra* note 202.

216. Judith Macy Day Book, *supra* note 202.

217. See generally, e.g., ROLLA MILTON TRYON, *HOUSEHOLD MANUFACTURES IN THE UNITED STATES, 1640–1860*, 123–63 (first published 1917) (reprints of economic classics 1966 ed.) (describing developments in home cloth production during 1784–1809).

218. Judith Macy Day Book, *supra* note 202.

219. OBED MACY, *supra* note 205, at 15.

220. See Inventory of Judith’s share of Caleb’s estate, Estate of Caleb Macy, 1819, NHARL Ms. Collection 96, Folder 3.75 (including real estate valued at \$7455 during her widowhood, including sheeps commons, shares in a Try House, shares in wharves, land, and “With the further Compensation of Twenty Dollars per Year to be Paid by the other Heirs.”).

221. OBED MACY, *supra* note 205, at 15.

222. See Inventory of Estate of Judith Folger Gardner Macy, 1819, in NHARL Ms. Collection 96, Folder 12 (listing in addition to personal items and household goods, shares in sheep commons, fish lots,

## B. TRADING IN TRANSITION: 1800-1865

At the beginning of the nineteenth century, men in the Nantucket whale fishery and their wives on shore spent more time apart as voyages became longer in duration than during the colonial period. Captains and mates shipped out on multiple voyages and were gone for three to five years at a time in the Pacific whaling grounds. Their crews were largely unskilled, with fewer Nantucket family members among them than during the colonial period, and crew members received a much lesser share of the profits after deduction for expenses, further widening the gap between the ships' officers and the green hands.<sup>223</sup>

For wives at home, the mid-nineteenth century marked a period of transition from the common law of coverture to the statutory recognition of certain separate property rights for married women. In the midst of that transition, shops and businesses located in women's homes began to fade away in favor of separate establishments in commercial areas. An area of dry goods stores and shops in downtown Nantucket in the later part of this period became known as "Petticoat Row."<sup>224</sup> While some shops were operated by married women, many of the shops were operated by widows and single women.<sup>225</sup> As a result of increased commercialization, the capital requirements for entry into business increased and it became more difficult for married women to operate successful small-scale shops as part of their households. In addition, Nantucket had begun its economic decline as New Bedford gradually replaced Nantucket as the center of the whale fishery, a decline that accelerated following the loss of many of the town's wharves, storehouses, and shops in the "great fire" of 1846, the departure of many former

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and land from her father's estate, cash and notes on hand, a share in a mill and a Boston bank, and over two hundred sheep).

223. DOLIN, *supra* note 31, at 270–71.

224. Dianne Ucci, *Whaling Voyages & Quaker Ideals*, in NANTUCKET GUIDE 41, 43 (1991) (referring to shops lining Centre Street as the hub for women merchants, which became known as "Petticoat Row").

225. See R.G. Dun & Co. credit report volumes, Massachusetts, Nantucket Co., 1846–1890, Vol. 20, pp. 437–61, Baker Library, Harvard Business School (on file with Baker Library; research notes on file with the author) (containing early handwritten credit reporting ledgers of the Mercantile Agency). For example, the reports describe, among others, the following shop keepers: Mrs. Sarah Hiller, milliner "thriving, safe to trust," 1847–55, 1858–59. *Id.* at 437, 439. Mrs. Charlotte Riddle, "wife of Timothy Riddle, a very successful auctioneer of some ppty, Business small," 1858; "Pays promptly, gains slowly but surely," 1875. *Id.* at 450. Francis Mitchell, "A man of [stupid] habits. Age about 48 . . . has worked at boot and shoe mending for a number of shops. Wife has kept a dry Goods store for 2 or 3 yrs past and was burnt out about the 20<sup>th</sup> Sept. last. She was well insured. "M" has no business qualities, if he succeeds it must be thro the influence of this Wife," 1859. *Id.* at 452. Mrs. Chase, Worsted and Fncy Gds, 1868, "Has a husband to support age about 50, 1870; nine years later, she was reported as "a widow lady, making a living & paying bills," 1879. *Id.* at 452E. A number of the other businesses listed were run by single women: Miss Eunice Paddack, "rich and growing richer," 1856, and consistently "thriving" to 1884). *Id.* at 447. Sarah Swain, Fancy & Dry Goods store "safe to trust her for the amt. which she might ask . . . is a maiden lady, 1855; "thriving," 1866, 1871. Mrs. Susan Folger, "a poor widow, helped by her friends, is of v. gd character. If she gets credit her credit must depend on her sales and profits for payment," 1858; "cannot pay debts, out of business as a trader" 1863. *Id.* at 450.

whalers after the discovery of gold in California, and competition posed by the discovery of petroleum in Pennsylvania in the 1850s.<sup>226</sup>

The three women discussed below illustrate the beginning and end of that period of transition from the common law of coverture to the initial enactment of certain property and contract rights for married women. At the beginning of the nineteenth century, Anna Folger Coffin, Lucretia Mott's mother,<sup>227</sup> kept shop in their large home on Fair Street when her husband Thomas Coffin was away at sea.<sup>228</sup> By the middle of the nineteenth century, an increasing number of islanders left to pursue other economic prospects. Two women with early Nantucket ties who later left the island are discussed in the second section below: Mary Ellen Pleasant and Margaret Getchell LaForge. Mary Ellen, an African American indentured servant and shop girl on Nantucket, left the island to marry and became a very successful businesswoman in San Francisco.<sup>229</sup> Margaret, whose mother was a Folger, grew up on Nantucket, and taught school for a time on Nantucket and elsewhere on the mainland. She then served as a clerk and later as a buyer and executive during the early years of R.H. Macy's Department store in New York City.<sup>230</sup>

### 1. Anna Folger Coffin, Shopkeeper

In the 1780s and 1790s, after the disruption of the whale fishery and capture of vessels during the Revolutionary War,<sup>231</sup> whaling gradually regained strength<sup>232</sup> until the tensions leading up to the War of 1812 once again disrupted American shipping and whaling.<sup>233</sup> Anna Folger, who was related to Kezia Coffin and

226. DOLIN, *supra* note 31, at 211–12, 353–55.

227. Anna Folger was born in 1771, married Thomas Coffin in 1789, and died in 1844. Her second child, Lucretia, was born in 1793 and died in 1880. NHARL BARNEY GENEALOGICAL RECORD, surname index, Anna Folger, <https://www.nantuckethistoricalassociation.net/bgr/BGR-o/p412.htm#i1236> (last visited on March 4, 2019). Lucretia Coffin married James Mott after working as a teacher, and later became a Quaker minister and a prominent abolitionist and women's rights activist. *E.g.*, CAROL FAULKNER, LUCRETIA MOTT'S HERESY: ABOLITION AND WOMEN'S RIGHTS IN THE NINETEENTH CENTURY (2011); Beverly Wilson Palmer, *Introduction*, SELECTED LETTERS OF LUCRETIA COFFIN MOTT at xi-xxx (Beverly Wilson Palmer ed., 2002); MARGARET HOPE BACON, VALIANT FRIEND: THE LIFE OF LUCRETIA MOTT (1980).

228. *See infra* discussion in Part III.B.1.

229. *See infra* discussion in Part III.B.2.a.

230. *See infra* discussion in Part III.B.2.b.

231. DAVIS, ET AL., *supra* note 36, at 37. In 1775, due to the urging of Edmund Burke and others in Great Britain who opposed the punitive nature of the proposed New England Trade and Fisheries Act (referred to as the Restraining Act), Parliament excepted Nantucket from its most restrictive provisions, which otherwise prohibited fishing off the coast of Newfoundland or any other place in the North Atlantic. The Revolutionary War began before it could take hold, DOLIN, *supra* note 31, at 145–48. Since Nantucket declared neutrality during the war, it was the only colonial port that continued to send out whaling vessels during the war, but at “the end of hostilities” only a few remained. Some were lost at sea, but most were captured and destroyed, *id.* at 162–63 n. 45; DAVIS, *supra* note 36, at 37.

232. DOLIN, *supra* note 31, at 182.

233. *Id.* at 188–89.



Judith Macy through a common ancestor, was a young girl during the Revolutionary War. She married Thomas Coffin in 1789.<sup>234</sup>

Her husband Thomas voyaged away from the island for extended periods from the time he was in his teens through the first fifteen years of their marriage. Before his marriage, Thomas had gone to sea, working with his older half-brother Micajah and serving as master of the *Lucy*, which shipped out of Nantucket in 1785.<sup>235</sup> In 1788, while off the coast of French Martinique, he reported to a passing ship that “he had lost his mate and four hands, and when he left the coast, he had only one man able to keep the deck.”<sup>236</sup> Despite that experience, which made him hesitant to undergo another whaling voyage, he continued his sea career. In the 1790s, he also invested an eighth share with Micajah in the whaleship *Lydia*,<sup>237</sup> which made a number of profitable voyages, with Micajah’s son Zenas Coffin as master.<sup>238</sup>

By 1797, Thomas had made enough money to build a larger house in Nantucket for his growing family.<sup>239</sup> In 1800, Thomas invested much of the rest of their savings in the ship *Tryall* (or *Tryal* or *Trial*) with several Nantucketers who were involved in the China trade.<sup>240</sup> Before leaving later that year as captain of the ship *Tryall*<sup>241</sup> on a sealing voyage, he gave Anna his power of attorney<sup>242</sup> and Anna opened a dry goods shop in their Fair Street house to help support the family until his return.<sup>243</sup>

234. Thomas, born in 1766, was related to Kezia’s husband John through a common ancestor, Tristram Coffin, one of the original English founders and proprietors of the island. See NANTUCKET HISTORICAL ASSOCIATION: BARNEY GENEALOGICAL RECORD, <https://www.nantuckethistoricalassociation.net/bgr/BGR-o/p412.htm#i1236> (last visited Mar. 4, 2019).

235. *National Maritime Digital Library, American Offshore Whaling Voyages: A Data Base*, <https://nmdl.org/projects/aowv/aowv/> (voyage ID 108647) (last visited on Sept. 19, 2019); see also LUND, ET AL., AMERICAN OFFSHORE WHALING VOYAGES, 1667 TO 1927, VOL. II: VOYAGES BY MASTER 83, <https://whalinghistory.org/participate/download/> (revised Apr. 2019) (last visited Sept. 20, 2019).

236. FAULKNER, *supra* note 227, at 20 n.40 (citing *Pennsylvania Mercury and Universal Advertiser*, March 29, 1788).

237. Sale by Micajah Coffin of 1/8 Brig Lydia to Thomas Coffin, July 7, 1790, NHARL Micajah Coffin Papers, Collection 36, Folder 12; Letter of Thomas Coffin to Micajah Coffin, May 29, 1790, NHARL Coffin Family Papers, Collection 150, Folder 52 (on file with NHARL).

238. FAULKNER, *supra* note 227, at 17 (2011); EDOUARD A. STACKPOLE, WHALES & DESTINY: THE RIVALRY BETWEEN AMERICA, FRANCE, AND BRITAIN FOR CONTROL OF THE SOUTHERN WHALE FISHERY, 1785–1825, 317 (1972) (describing the *Lydia*’s career and noting that it lay “the foundation for one of the most successful firms in the whaling industry Micajah Coffin and Sons,” founded in 1793).

239. See CLAY LANCASTER, THE ARCHITECTURE OF HISTORIC NANTUCKET 178 (1972) (the house, which still stands, is located on the corner of Fair and School Streets, at 15 Fair Street, next to the site of their earlier Fair Street residence); see also FAULKNER, *supra* note 227, at 16–17 (explaining that their new home was located in a neighborhood in between the residences of many prominent ship owners and merchants and those of successful sea captains).

240. FAULKNER, *supra* note 227, at 20.

241. LUND, ET AL., *supra* note 235, at 83.

242. Nantucket Town Records, Office of the Registry of Deeds, Town and Country Building, Book 16, 289–90 (power of attorney from Thomas Coffin, Trader, to his Wife Anna Coffin dated Oct. 31, 1800, and recorded Dec. 6, 1800).

243. BACON, *supra* note 227, at 17–19 (noting that when Thomas departed, most of their assets had been invested in the house and in the Tryall, and that Anna “immediately reopened her shop and settled down for a long time of managing without him.”).

The power of attorney, issued by Thomas to Anna at the end of October in 1800, was recorded in the town records before the end of that year. It provided “That I Thomas Coffin, Jun’r of the Town & County of Nantucket in the Commonwealth of Massachusetts Trader, Have Constituted ordained & Made and in my Stead & place put, and by these presents, do Constitute ordain and make and in my Stead and place put, My Wife, Anna Coffin of said Nantucket, to be my true sufficient and Lawful attorney, for me and in my name & Stead and to my Use . . . .” and then listed in detail her broad authority to act on his behalf.<sup>244</sup>

Events during his voyage in the *Tryall* led to the end of his sea career and his family’s later departure from Nantucket. In 1802, about the time Thomas was expected to return, sad news reached the island that the husband of Anna’s sister Phebe, Captain Uriel Hussey, had been lost with his ship.<sup>245</sup> No word having been heard of Thomas for at least a year, he was also feared dead. He finally returned in 1803, not having been able to send word of his safety in the meantime. His ship had been seized by the Spanish authorities in the Pacific off the coast of Chile.<sup>246</sup> Fortunately, prior to seizure, he had sold his cargo of sealskins to a ship headed for China, and thus, the voyage was not altogether unprofitable.<sup>247</sup> When

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244. His power of attorney to Anna continued as follows: “to Ask, demand Levy require recover & receive of and from all and every person or persons whomsoever the same Shall or may Concern, all and Singular Sum & Sums of Money Debts Goods Wares Merchandize Effects and things whatsoever and wheresoever they shall and may be found, Due Owing payable belonging and Coming unto me the Constituent by any ways and means whatsoever Nothing reserved or Excepted, And also to give grant, Sell, Exchange, Divide, Convey, and Confirm all or any part of my Landed Interest or other Real Estate of Every kind & Nature, Notwithstanding I have not particularized or recited the same for her my said attorney to dispose of the same or any part thereof to any person or persons, and in my Name and stead to pass Good and lawful deeds & Conveyances of the same to the purchasers thereof, and also to pay all Debts and Demands that shall be due and payable from me the Constituent to any person or persons, Giving and hereby Granting unto my said attorney my full and whole Strengths power and authority in and about the premises; and to take and use all due means Causes and processes in the law for the obtaining and Recovering the same, and of Recoveries and Receipts thereof in my name to make seal & Execute due acquittance and discharge, and for the premises to appear and the person of me the Constituent to Represent before any Governour, Judges, Justices, Officers, and ministers of the Law whatsoever, in any Court or Courts of Judicature and there on my behalf to answer defend and reply unto all actions Causes Matters and things whatsoever relating to the premises, Also to submit any Matter in Dispute to Arbitration or otherwise with full power to make and Substitute one or more attornies under my said attorney and the same again at pleasure to revoke, And generally to say do act transact determine, accomplish and finish all matters and things whatsoever relating to the premises; as full amply and Effectively, to all intents and purposes as I the said Constituent; if present ought or might personally although the Matter should Require more Special Authority than is herein Comprized; I the said Constituent Ratifying allowing and holding firm and Valid all and whatsoever my said attorney or her Substitutes shall lawfully do or Cause to be done in and about the premises by virtue of these presents.” See Nantucket Town Records, *supra* note 242, at 289–90.

245. BACON, *supra* note 227, at 17–18 (referring to him as Uriah); *but see* Biographical Directory, in SELECTED LETTERS OF LUCRETIA COFFIN MOTT, *supra* note 227, at xlvi (referring to him, consistent with the Barney Genealogical Record, as “Uriel.”). His widow, Phebe Hussey, is mentioned again *infra* in Part III.B.2.

246. ALEXANDER STARBUCK, THE HISTORY OF NANTUCKET 410 (1969).

247. ANNA DAVIS HALLOWELL, JAMES AND LUCRETIA MOTT: LIFE AND LETTERS 32-33 (1884). For a description of subsequent litigation involving the 1/100 lay or share of an indentured servant sent by his

his efforts to achieve the release of the ship from impoundment finally failed, he crossed over the Andes on foot, and returned home from a port in Brazil on another ship.<sup>248</sup>

In 1804, following the decision by Thomas to seek his livelihood on land, the family moved to Boston. They sold the house on Fair Street to Anna's widowed sister Phebe Folger Hussey,<sup>249</sup> and Thomas entered into a partnership with a Boston merchant.<sup>250</sup> While in Boston, he continued his business relationship with his brother Micajah, selling his oil and candles, buying bricks to send back to Nantucket, and advancing funds to Micajah's business associates.<sup>251</sup>

Over the course of their marriage, Anna and Thomas had six children, one son and five daughters, including Lucretia, their second daughter, born on Nantucket in 1793. Lucretia was thus about ten years old when her father returned home from South America. Much of the little we know about Anna's business activities on Nantucket prior to the family's move to Boston comes from surviving descriptions by her daughter Lucretia.

For example, in replying to a letter from Elizabeth Cady Stanton regarding Stanton's plan to write a book about the woman's movement, Lucretia enthusiastically urged Stanton in 1855 to delve into history that "thou may make this a very valuable Work, and it must not be hurried" and provided her with requested information about Nantucket women, including the following:

During the absence of their husbands, Nantucket women have been compelled to transact business, often going to Boston to procure supplies of goods—exchanging for oil, candles, whalebone—&c—This has made them adept in trade—They have kept their own accounts, & indeed acted the part of men—Their education & intellectual culture have been for years equal for girls & boys—so that their women are prepared to be companions of men in every sense—and their social circles are never divided.<sup>252</sup>

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master on the *Trial's* voyage, see FAULKNER, *supra* note 227, at 22–24 (Hall v. Gardner, 1 Mass. 172 (1804)).

248. BACON, *supra* note 227, at 18–19.

249. Nantucket Town Records, Office of the Registry of Deeds, Town and Country Building, Book 18, 261–63 (deed of dwelling from Thomas and Anna Coffin to Phebe Hussey in trust for herself and her children in 1804 and recorded in 1805). *See also* Nantucket Court Records, Record Book Volume 3, 86–87 (Vol. 30138–30139 of the digitized record) (approval granted by court in March 1804 of Phebe's petition as executor of her husband's estate and guardian of their five children to sell their former dwelling house and lands to "enable her more conveniently to maintain herself and to bring up and educate and support the said Children").

250. BACON, *supra* note 227, at 19.

251. FAULKNER, *supra* note 227, at 24; Micajah Coffin Letterbooks, Congdon Family Papers, NHARL Mass. Collection 36, Folder 4, Letters to Thomas Coffin, (July 5, July 10, July 28, 1804 and Mar. 20, 29, 1805).

252. Letter to Elizabeth Cady Stanton, 1855, in SELECTED LETTERS OF LUCRETIA COFFIN MOTT, *supra* note 227, at 234, <http://www.mott.pomona.edu/letter3.htm>.

In eulogizing Lucretia Mott after her death, Stanton quoted from a diary entry by Mott who described her mother's business on Nantucket, as follows:

In those early years I was actively useful to my mother, who, in the absence of my father on his long voyages, was engaged in the mercantile business, often going to Boston to purchase goods in exchange for oils and candles, the staple of the island. The exercise of women's talents in this line, as well as the general care which developed upon them, in the absence of their husbands, tended to develop and strengthen them mentally and physically.<sup>253</sup>

Mott's granddaughter recounted Lucretia's memories of her mother's trips to Boston, when Lucretia, with her grandparents and Folger aunts nearby, would be left in charge of the household in her mother's absence:

In the room to the left of the front door Anna Coffin kept a small shop for the sale of East India goods, by this means eking out a scanty income during her husband's long and uncertain voyages to China. The shutter of the shop window, when open, projected far enough beyond the corner of the house to be visible down the side lane, the children's way from school. Lucretia often told how eagerly they used to watch for that sign of her mother being at home, and how cheery their welcome was when they ran in. Their frugal dinner was a feast when she presided. In carrying on her business, Anna Coffin was occasionally obliged to go to the 'continent,' as they called the main-land, to exchange oil, candles, and other staples of the island, for dry goods and groceries. In those days such a journey was a serious undertaking, and constituted an important event to the little family, especially to Lucretia, who was left in charge. Their mother's return was impatiently looked for, and was made a great occasion. But the prominent events were the arrival home of vessels from China or from the still longer peril of a whaling voyage.<sup>254</sup>

In response to a request for information in the 1850s about Philadelphia women in business for a woman's rights committee preparing a report on educational and business opportunities for women, Lucretia reported more current developments among women shopkeepers on Nantucket as follows:

It is true that women are employed in retail dry goods stores in this city more than in any other place that I know of—unless it be, in proportion to the number of inhabitants, on Nantucket. There, Women

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253. Elizabeth Cady Stanton, Nat'l Women's Suffrage Ass'n., Eulogy, delivered at the Memorial for Lucretia Mott, (Jan. 19, 1881), in *HISTORY OF WOMAN SUFFRAGE, 1848–61*, 407–08 (Stanton et al., eds., 1889).

254. HALLOWELL, *supra* note 247, at 27–8.

often are the principals in their business, going to Boston, & other places for their supply. Of latter years however they are in danger of being driven out of their legitimate employment, by strangers—Men, going to Island, & engaging, with perhaps greater advantages in the same business. I was on a visit to this, my native Isle, when thy last letter was recd.—one cause of the delay in answering it. . . . In the employ. of women in stores, however, as well as teachers in schools, they receive scarcely half the salary of a man for similar duties.<sup>255</sup>

Similar observations about the competition faced by women's stores were made at about the same time by Nantucketer Eliza Barney in correspondence about the role of women in business on the island in the nineteenth century. She recalled that since the time of Kezia Coffin, nearly seventy women had "successfully engaged in commerce, brought up and educated large families, and retired with a competence." Although the island had a half-century of experience with women-kept dry goods shops and groceries, "[i]t was the influence of capitalists from the Continent that drove Nantucket women out of the trade." She noted that they had only resumed it recently when emigration to California had made it necessary.<sup>256</sup>

Much later, when Lucretia was in her seventies, she recounted in a letter to her sister their mother's actions after the collapse of their father's business in Philadelphia in 1814, and his death the following year in 1815:

Ever taught to confide & trust in men in pecuniary matters, [women] risk more than they ought to where they have no exercise of judgt.—Our Mother had no faith in French Creek Works, & in our father's endorsg. thousands for John James, & used to beg him to quit before he was involved so deeply—but he went on, till they were sadly in debt . . . leavg. His fam[ily]. poor, includg. Jas. Mott whom he had taken in as a partner in the kindness of his heart—In the windg. Up there being a deficiency & Jas. Part 1/3 being \$3000—he gave his note—& one of our noble Mother's first acts, as a widow, was to destroy that note—Think of lettg. my pen run thro' all this old familiar story!<sup>257</sup>

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255. Letter to Thomas Wentworth Higginson (Apr. 6, 1854), in *SELECTED LETTERS OF LUCRETIA COFFIN MOTT*, *supra* note 227, at 231.

256. DALL, *supra* note 153, at 197–98 (quoting from an undated letter to Higginson from Barney in a lecture by Dall delivered in the late 1850s, reporting that five dry-goods and a few large groceries "are now carried on by women, as also one druggist's shop."). Barney's observations can be confirmed at least in part by reference to credit report records from Nantucket during the latter part of the 1850s and later. See R.G. Dun & Co. credit report volumes, Massachusetts, Nantucket Co., 1846–1890, Vol. 20, Baker Library, Harvard Business School (containing early handwritten credit reporting ledgers of the Mercantile Agency) (on file with Baker Library; research notes on file with author).

257. Letter to Martha Coffin Wright (Feb. 4, 1871), in *SELECTED LETTERS OF LUCRETIA COFFIN MOTT*, *supra* note 227, at 454–55.

Anna Coffin, widowed at age forty-five, with four remaining children to support, decided to open a shop and announced that she would gradually pay off her husband's full debt. Her shop was soon thriving, although Lucretia's husband's shop a few doors away from Anna's was not. As a result, James Mott gave up the shop for a salaried position, and Lucretia returned to teaching for a time.<sup>258</sup>

In the 1820s, Anna moved to Aurora, New York to run a girls' school on a nearby farm in partnership with an Englishwoman, employing a niece as head teacher and a younger sister of Lucretia's as an art teacher.<sup>259</sup> In the next decade, Anna returned to Philadelphia and Lucretia's household.<sup>260</sup> Although she enjoyed good health and a sharp mind as she aged—and travelled to Nantucket for a reunion with her remaining Folger sisters in her seventies—she died unexpectedly from a fever two years later at Lucretia's home in 1844.<sup>261</sup>

In summary, during her husband's early career at sea, Anna Folger kept a small dry goods shop in her home on Nantucket, and she travelled periodically to Boston with goods to exchange for supplies and stock for her shop. Before leaving on a multi-year voyage, Thomas provided Anna with power of attorney to give her authority to act on his behalf in all matters. This document, which was recorded in the registry of deeds in the town records soon after it was issued, provided her with the documentation she needed to deal with merchants and others who might otherwise hesitate to enter into business dealings with a married woman.

## 2. Going Off-Island

Two women in the next generation offer a glimpse of the challenges posed by declining economic conditions on the island and the changes those conditions necessitated. Neither spent their married lives on Nantucket, and thus, they provide little additional insight into the legal and social environment for married women in business on Nantucket. Nevertheless, they were both arguably influenced by the island's business women during their formative years, as described below, and brought those memories, family connections, and experience with them into other commercial environments in the mid-nineteenth century. In addition, their stories illustrate the influence of abolitionism on islanders during the period before the Civil War as well as the steady exodus from the island following the gradual decline of Nantucket's whaling industry, the discovery of gold in California, and the failure of many young soldiers from the island to return home after the Civil War.<sup>262</sup>

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258. BACON, *supra* note 227, at 33–35.

259. *Id.* at 46.

260. *Id.* at 69.

261. *Id.* at 108.

262. By 1850, the population of Nantucket had already declined by 1560 from its peak of about ten thousand in 1840. Between 1850 and 1870, the population of Nantucket declined by more than fifty percent, down to 4123 from 8452. KARTTUNEN, *supra* note 161, at 241.

a. *Mary Ellen Pleasant, San Francisco Entrepreneur.* Mary Ellen Pleasant, an African American businesswoman with early Nantucket ties traced her later success to her work in the 1820s as a young indentured servant in the Nantucket dry goods shop of “Grandma” Hussey.<sup>263</sup> Pleasant’s unpublished autobiography describes Hussey’s shop in Nantucket as follows:

“Mrs. Hussey in her shop sold everything from fish hooks to a ton of coal . . . Buying wholesale and selling retail was the way she did it and it paid. I was finally placed in the store as a clerk, and I could make change and talk to a dozen people all at once and never make a mistake, and I could remember all the accounts and at the end of the day she could put them down, and they would always be right as I remembered them.”<sup>264</sup>

After her service in the shop came to an end, Mary Ellen left Nantucket for Boston to work for a tailor where she met and married her first husband, James Smith. Mary Ellen and James, a businessman of Cuban descent who owned land near Harper’s Ferry, were active in underground railroad activities by helping slaves escape to Nova Scotia.

Whether Mary Ellen was born into slavery is not known definitively. She claimed that her father was a free black man from Philadelphia but little corroborated information about her earlier life exists. In any event, Mary Ellen arrived from a household in Cincinnati or Philadelphia to live on Nantucket with the Husseys while still a very young girl.

After her first husband’s death, which left her a well-to-do widow, she moved back to Nantucket to live for a time with Phebe Gardner. Phebe, who was the

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263. “Grandma” Hussey was likely related to Phebe Folger Hussey’s late husband Uriel Hussey; perhaps Uriel’s mother or, alternatively, the widow of Uriel’s uncle Joseph or a relative of one of the Hussey men married to two of Phebe Folger Hussey’s other sisters. Lynn Hudson refers to Grandma Hussey as “Mary” Hussey. See Lynn M. Hudson, *Mary Ellen Pleasant’s Nantucket*, in *NANTUCKET’S PEOPLE OF COLOR: ESSAYS ON HISTORY, POLITICS AND COMMUNITY* 147, 152 (Robert Johnson, Jr., ed. 2006). A woman named “Mary Hussey” advertised goods for sale in Nantucket’s local paper in the 1820s during a time when Mary Ellen was a young girl on the island. *INQUIRER AND MIRROR*, July 16, 1822, 3 (advertising tracts published by the Trustees of Boston Publishing Fund); *INQUIRER AND MIRROR*, Apr. 15 and 29, 1823, 4 (advertisements for “Staple & Fancy Goods” together with Crockery offered for “cash or candles”); *INQUIRER AND MIRROR*, Mar. 24, 1827, 4 (advertising late arrivals from Boston and New York, new goods at auction prices, “now opening at the Store lately occupied by Mrs. Mary Hussey”). I have been unable to confirm the relationship between a trader named “Mary” Hussey and Phebe Hussey Gardner, wife of Captain Edward Gardner. Given Mary Ellen’s close relationship with Phebe Gardner and her mother, Phebe Folger Hussey (Anna Folger Coffin’s sister), a family connection between Phebe and Grandma Hussey seems likely. Betsy Tyler refers to Grandma Hussey as Phebe Hussey Gardner’s grandmother. See TYLER, *supra* note 158, at 72. If that is correct, however, Mrs. Hussey’s first name would have been Deborah not Mary. NHARL BARNEY GENEALOGICAL RECORD, Surname Index, Uriel Hussey, <https://www.nantuckethistoricalassociation.net/bgr/BGR-o/p715.htm#i21484> (last visited Nov. 18, 2018). See discussion at text accompanying notes 245 and 249 for a discussion of Uriel and Phebe Folger Hussey.

264. See Hudson, *supra* note 263, at 147, 155 (quoting from Pleasant’s unpublished memoir).

daughter of Phebe Folger Hussey and Lucretia Mott's cousin, married a whaler, Captain Edward W. Gardner, in 1840. According to Mary Ellen, Captain Gardner helped her on several occasions in arranging her financial affairs after her first husband's death as well as by providing refuge and sea passage to escape detection by slavers. Members of the Gardner family were fervent abolitionists.

When she lived with the Gardners on Nantucket prior to her second marriage, Mary Ellen could have been introduced to Nantucket's Anti-Slavery Society through Edward's niece, Anna Gardner. As a girl, Anna witnessed her family's harboring of a fugitive slave and his family from southern slave hunters. In her teens, Anna Gardner subscribed to William Lloyd Garrison's *Liberator*,<sup>265</sup> served as secretary of the Society, and at age twenty-one helped organize an Anti-Slavery convention<sup>266</sup> held in August 1841 at the town's atheneum where Garrison and Frederick Douglass both spoke before the assembly.<sup>267</sup> Later, Gardner taught African American primary school children on Nantucket at what is now called the African Meeting House, and was actively involved in a hotly contested effort to integrate Nantucket's high school during the mid 1840s.<sup>268</sup> Thus, it is likely that Mary Ellen would have been familiar with and participated in New England's abolitionist community and its arguments against slavery both during and after her first marriage.<sup>269</sup>

Mary Ellen once again moved off island and after her marriage to her second husband, J.J. Pleasant,<sup>270</sup> continued her work as a "slave stealer" with J.J., financed with funds from her first husband's estate.<sup>271</sup> Increased attention from slavers concerning the couple's underground railway activities<sup>272</sup> caused them to move to New Orleans and later to San Francisco after the beginning of the California gold rush.

Passing as white and known as Mrs. Smith for her first years in San Francisco, Mary Ellen ran a successful boarding house and exclusive eating establishment.

265. Anna was the second subscriber to the *Liberator* on Nantucket; she was introduced to it by Absalom Boston, an African-American whaling captain and business leader of the African-American community on Nantucket. KARTTUNEN, *supra* note 161, at 68, 69–70.

266. Barbara White, *Anna Gardner: Teacher of Freedmen, "A Disturber of Tradition,"* in NANTUCKET'S PEOPLE OF COLOR, *supra* note 263, at 71, 72–73.

267. DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 98–101 (2018).

268. In her fifties, following the Civil War, Anna Gardner also taught for many years for the freedmen's bureau in the South, including half a decade in Charlottesville, Virginia. White, *supra* note 266, at 73–97.

269. For discussion of certain abolitionist arguments against slavery, *see infra* Part IV.

270. Mary Ellen Pleasant's second husband is also sometimes referred to as J.J. Pleasants, an anglicized version of Pleasance.

271. Although documentary evidence of their marriage has not been found, it is believed that they may have been married by Captain Gardner on board his ship. Mary Ellen testified before a California court that she was married on Nantucket in 1846. Lynn Hudson, *supra* note 263, at 158 n.18. Betsy Tyler dates the marriage to sometime after 1847. TYLER, *supra* note 158, at 73.

272. If caught, Mary Ellen and her husband could have been prosecuted, fined and imprisoned under the Fugitive Slave Act, §§ 7, 9 Stat. 462 (1850), which imposed new penalties on those who helped slaves run away.



Her husband J.J. worked as a ship's cook, and thus was often away during their thirty-year marriage. During this time, Mary Ellen established an independent career as an entrepreneur. She acquired real estate, laundries, and dairies, and made substantial investments in mining interests with information gleaned from boardinghouse customers prominent in the financial community.<sup>273</sup> In addition, she continued their antislavery activities by providing hiding places and employment for slaves who had accompanied their white masters to the goldfields but sought their freedom once in California.<sup>274</sup> After accumulating a large fortune, estimated in the millions of dollars, she built a thirty-room mansion in San Francisco.<sup>275</sup>

Following the Emancipation Proclamation, she revealed her racial identity as a person of color. She changed her racial designation in the city directory from white to black and became involved in several prominent civil rights causes and cases.<sup>276</sup> Using funds earned through her investments and extensive business enterprises, she funded litigation to support the right of African Americans to testify in court and challenged racially discriminatory public transportation practices of street car companies in San Francisco in the late 1860s.<sup>277</sup> Due to her advocacy activities for the Black community, some referred to her as the "Black City Hall," and later as the "Mother of Civil Rights in California." Twenty years after her death, W.E.B. Dubois compared her to Harriet Tubman, writing that Pleasant was "a different type of woman and yet strangely effective and influential."<sup>278</sup> He summed up her legacy as follows:

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273. Lynn M. Hudson, *Mining a Mythic Past: The History of Mary Ellen Pleasant in AFRICAN AMERICAN WOMEN CONFRONT THE WEST, 1600–2000*, 56–70 (Quintard Taylor & Shirley Ann Wilson Moore eds., 2003).

274. *Id.* at 56–70.

275. The San Francisco mansion, in the Fillmore district on Octavia Street extending between Bush and Sutter, was destroyed by fire in the 1920s. Several eucalyptus trees planted there by Mary Ellen remain, however, marked by a plaque placed by the San Francisco African American Historical and Cultural Society. Before the end of her life, she lost both her fortune and her mansion in litigation against her by the widow of her long-time investment partner (and possibly her lover), Thomas Bell. Bell, who had shared passage on the same ship to California with Mary Ellen, held the property in his name along with many of her other holdings. Mary Ellen died in relative poverty in 1904. See LYNN M. HUDSON, *THE MAKING OF "MAMMY PLEASANT," A BLACK ENTREPRENEUR IN NINETEENTH-CENTURY SAN FRANCISCO* (2003); Veronica Chambers, 1814–1907, Mary Ellen Pleasant: Born into slavery, she became a Gold Rush-era millionaire and a powerful abolitionist, *NY TIMES*, <https://www.nytimes.com/interactive/2019/obituaries/mary-ellen-pleasant-overlooked.html> (part of its "overlooked" obituary series, last visited on August 15, 2019).

276. Toward the end of her life, she claimed to have helped finance in the late 1850s John Brown's Harper's Ferry raid in West Virginia. Her biographers have uncovered some corroborating but not definitive evidence of several of the details in her narrative. Mary Ellen reported having received help from Captain Edward Gardner in cashing out bank drafts without his knowing the intended use of the funds for John Brown's planned slave revolt. See HUDSON, *supra* note 275, at 24–43.

277. See *Pleasants v. North Beach and Mission R.R. Co.*, 34 Cal. 586 (1868); see also *Turner v. North Beach and Mission R.R. Co.*, 34 Cal. 594 (1868).

278. W.E. BURGHARDT DUBOIS, *THE GIFT OF BLACK FOLK: THE NEGROES IN THE MAKING OF AMERICA* 272 (1924).

Here was a colored woman who became one of the shrewdest business minds of the State. She anticipated the development in oil; she was the trusted confidante of many of the California pioneers . . . and for years was a power in San Francisco affairs. Yet, she held her memories, her hatreds, her deep designs, and throughout a life that was perhaps more than unconventional, she treasured a bitter hatred of slavery . . .<sup>279</sup>

*b. Margaret Getchell La Forge, Macy's Executive.* Margaret Getchell, who was related to the Folger, Macy, and Coffin families through her mother, grew up on Nantucket. Although her business career centered in New York, its trajectory was intertwined with her Nantucket family history and subsequent economic changes on the island. Her mother, Phebe Ann Pinkham,<sup>280</sup> returned to the island to raise her children after the failure of her marriage to Barzillai Getchell from Maine.<sup>281</sup> Margaret attended the Fair Street School and for the next nine years led her class until she graduated from high school. In 1857, at the age of sixteen, she accepted a position to teach school on the island.<sup>282</sup>

Margaret left her teaching job on Nantucket in 1858 to teach at schools in Lansingburgh, New York, Lawrenceville, New Jersey, and possibly also in Richmond, Virginia,<sup>283</sup> and then moved to New York City in 1860 or 1861, where she began her career as a cashier at R.H. Macy.<sup>284</sup> She eventually became its first woman manager or “superintendent.” Margaret helped Macy guide the growth of Macy’s from a store selling “cheap goods” at Sixth Avenue and Fourteenth Street

279. *Id.*

280. Margaret Getchell was born in 1841. Margaret’s mother, Phebe Ann Pinkham, the daughter of George Pinkham and Phebe Swain, was related to the Folger and Coffin families through her grandmother, Deborah Coffin, whose mother was a Folger. Phebe Ann Pinkham married Barzillai Getchell with whom she had three daughters. NHARL, BARNEY GENEALOGICAL RECORD, Surname Index, Margaret Getchell, person index page 769, <http://www.nantuckethistoricalassociation.net/bgr/BGR-o/p769.htm#i23103> (last visited Aug. 9, 2018).

281. After Barzellai deserted the family, Phebe Ann divorced him and returned to the island with their children. CURTISS S. JOHNSON, *AMERICA’S FIRST LADY BOSS* 7 (1965). According to census information, Phebe Ann and her three children lived on Nantucket in a household with her mother, Phebe S. Pinkham. 1850 U.S. Federal Census, Nantucket; *see* 1855 Massachusetts State Census, Reel No. 19, Vol. 26.

282. RALPH M. HOWER, *HISTORY OF MACY’S OF NEW YORK 1858–1919* at 65 (1943). Although there are partial contemporaneous records of teacher appointments on Nantucket during the nineteenth century, Margaret’s name is not among them. NHARL Ms. Collection 88, Box 28, Books 76 and 77 (showing gaps in the records for several years prior to 1860).

283. Margaret’s children later told a business historian in interviews conducted for a history of Macy’s department store that their mother had taught for a short time in Richmond, Virginia before the outbreak of the Civil War. He noted that he was unable to confirm that based on the documentary sources available to him, including reference to the dates and places in a book of autographs kept by Margaret in the late 1850s and early 1860s. HOWER, *supra* note 282, at 432 n. 59. Getchell’s name does not appear in the 1860 census of Richmond.

284. *Id.* at 66.

into a large department store<sup>285</sup> that later grew into the present-day Macy's in Herald Square in New York City.<sup>286</sup>

Margaret's employer at Macy's, Rowland H. Macy, was a great-grandson of Judith Folger Macy,<sup>287</sup> and thus, distantly related to Margaret. Macy's father was the proprietor of a Nantucket book shop located on Fair Street,<sup>288</sup> down the street from Lucretia Mott's birthplace and childhood residence. As a young boy of fifteen, Rowland signed on a whaling voyage for the Pacific in the ship *Emily Morgan*.<sup>289</sup> Away at sea for four years, he returned to seek work on land as an apprentice printer in Boston, early training that may have opened his eyes to the possibilities posed by printed advertisements.<sup>290</sup> Two years later, he managed a needle-and-thread shop in Boston for his brother and another investor.<sup>291</sup>

Macy's departure from Nantucket followed the pattern of other young men who left the island and the whale fishery to seek their fortunes elsewhere, especially during the gold rush fever of the late 1840s. Economic opportunities on the island had begun to decline more generally as the center of the whaling industry gradually shifted to New Bedford. Following an unsuccessful two years in business, Macy and another brother left for California in 1849 to make their fortune in the gold rush.<sup>292</sup> While in California, he founded a dry goods establishment for miners, which dissolved after sixty days, and Macy returned east to rejoin his wife and child with funds from the sale of the land.<sup>293</sup> After the failure of another dry goods store in Haverhill, Massachusetts, R.H. Macy opened a store in New York City in 1858.<sup>294</sup> Thus, some years after leaving the island, Macy finally found his footing in the retail business he established in New York City. As a commercial center, New York had a much larger customer base, and offered greater opportunities than afforded by the dry goods business on the island.

Macy hired Margaret Getchell in the early 1860s, first as cashier and later as the bookkeeper at his small "strictly cash" store located at Fourteenth Street and Sixth Avenue. She had decided to seek other employment following an eye injury that made teaching more difficult for her. After he worked with her for a short

285. *Id.* at 65–66.

286. See, e.g., ISADORE BARMASH, *MACY'S FOR SALE* 23–35 (1989); ROBERT M. GRIPPO, *MACY'S: THE STORE, THE STAR, THE STORY* 1–3 (2009).

287. Roland H. Macy's grandparents on his father's side were Anna Pinkham and Sylvanus Macy, a son of Judith Folger Macy and Caleb Macy. NHARL BARNEY GENEALOGICAL RECORD, Surname Index, Roland H. Macy, 1822–1877, person index page 985, <http://www.nantuckethistoricalassociation.net/bgr/BGR-o/p985.htm#i30015> (last updated Jan. 24, 2013). For discussion of Judith Folger Macy, see *infra* Part III.A.2.

288. HOWER, *supra* note 282, at 6. Rowland's father had formerly served as the captain of a merchant ship.

289. GRIPPO, *supra* note 286, at 9 (noting that the *Emily Morgan* shipped out of New Bedford, with several Nantucketers among the crew).

290. *Id.* at 10–11; but see HOWER, *supra* note 282, at 11.

291. GRIPPO, *supra* note 286, at 11; HOWER, *supra* note 282, at 11.

292. GRIPPO, *supra* note 286, at 11–12; HOWER, *supra* note 282, at 12–15.

293. HOWER, *supra* note 282, at 12–14.

294. *Id.* at 16, 30, 37.

time, Macy recognized her facility with numbers, skill with people, and strong marketing instincts.

As the store grew in size and in the range of its merchandise, and Macy promoted her to a buyer and increasingly relied on her judgment and marketing ideas. Although it was unusual at the time for a woman to hold such a position, in 1866, Macy promoted her to superintendent of the store,<sup>295</sup> in which capacity she assisted with operations, and by the early 1870s, supervised several hundred employees. Those who knew her spoke of her “remarkable executive ability and attractive personality.”<sup>296</sup> In that role, she influenced Macy’s policy and initiated several new lines of merchandise and marketing innovations for the store. She moved into an apartment across the street from the store and later was invited to live with the Macy family.<sup>297</sup>

Margaret Getchell served as the store’s superintendent when she was single and after her marriage to Abiel La Forge in June 1869,<sup>298</sup> until after the first of their six children was born in May of 1870.<sup>299</sup> In the meantime, Abiel La Forge, who had been working for a wholesale firm, was hired as a buyer by Macy. The couple’s newborn son died in mid-December, 1870, and Margaret returned to work in the store shortly thereafter.<sup>300</sup>

She bore another son the following year and continued after then to work with the store by assisting her husband, who had become Macy’s partner, during the evenings, busy seasons, and inventory time. The La Forges lived in an apartment over the store with Margaret’s mother and a chambermaid and cook. In 1873, when carrying their third son, Margaret was left in complete charge of the store for three months when both Macy and her husband were away in Europe on a buying trip.<sup>301</sup> When she helped in the store after her marriage, however, she

295. GRIPPO, *supra* note 286, at 33.

296. HOWER, *supra* note 282, at 66. For his history of Macy’s as part of a Harvard series of studies in business history, Hower interviewed former employees of Macy’s about the Getchell/Macy years. See R. H. Macy and Co. Collection, Box 5, pp. 78–79, 98, Baker Library, Harvard Business School.

297. GRIPPO, *supra* note 286, at 34; HOWER, *supra* note 282, at 115.

298. Margaret’s husband wrote his sister that Margaret was to continue her work for Macy’s, noting that “She is the Superintendent, having full charge of the entire business; as we sell a million dollars worth of goods a year and have nearly two hundred employees, her position is a very responsible one . . .” HOWER, *supra* note 282, at 126 (citing and quoting letters from Abiel La Forge to Susan La Forge dated Aug. 29 and Oct. 24, 1869).

299. See La Forge letters, 1870–72 (from Abiel to his sister Susan, dated July 19, 1870), <http://www.alleganyhistory.org/places/towns-and-villages/a-e274/andover24/andover-related-articles/2870-laforge-letters-part-11-1870-72> (last visited Aug. 9, 2018). See also HOWER, *supra*, note 282, at 123. According to Hower, Margaret’s successor, Marie Bowyer, was promoted from floorwalker to superintendent in 1872. *Id.* at 194.

300. Abiel wrote to his sister as follows two weeks after the baby’s death of his wife’s return to work: “The physician insisted that Margie should come into the store at once and there is no doubt but that the tremendous busi-ness which we were in the constant whirl of for the whole month is a most fortunate circumstance for my wife as her mind was almost constantly occupied and thereby kept from dwelling so much on her sorrow.” Letter from Abiel to Susan La Forge (Dec. 28, 1870) *supra* note 299.

301. Letter from Abiel to Susan La Forge (Jan. 14, 1873), <http://www.alleganyhistory.org/places/towns-and-villages/a-e274/andover24/andover-related-articles/2871-laforge-letters-part-12-1873> (last

received as compensation from Macy only small gifts, even when she was left in charge of operations during the time they were abroad.<sup>302</sup>

A few years later, after suffering poor health, R.H. Macy died in his mid-fifties in 1877 while in Europe for rest and medical treatment.<sup>303</sup> A year later, in February 1878, Abiel La Forge died of tuberculosis while he and his family were in Florida to escape the New York winter. As his widow, Margaret sold La Forge's partnership interest in the business a few months later to Macy's nephew, Robert Macy Valentine, the surviving member of the firm. She bought a cottage on Nantucket for her mother, who had moved back to the island a few years previously, spent that summer in a house nearby, and then returned with her children to New York.<sup>304</sup> She died after an illness two years later at age thirty-eight, leaving her five surviving children.<sup>305</sup>

As the stories of the individual women profiled above show, the married women traders and shopkeepers did not rely on either the Massachusetts *feme sole* trader statute or common law exceptions to coverture to engage in business activities. Instead, they largely depended on family connections and general community understandings concerning their business dealings on behalf of their families. Their legal authority, and thus the extent of the autonomy they achieved in their business activities during marriage, came from their husbands under traditional agency principles, and under express powers of attorney to engage in various transactions and to pursue legal actions on their behalf in court.<sup>306</sup> Accordingly, their activities depended upon their husbands' acquiescence as well as the traditions and role of women during the absences of men in the seaport community in which they spent their formative years.

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visited Aug. 9, 2018): "We have been unable to get to the Theatre since you were here. Our Xmas trade drove us until that was over and now we are taking-stock which will keep us employed all of this month; as soon as that is over Mr Macy and I have to get ready for Europe for which we expect to start the 15th of February. Margaret takes general charge of the business in our absence and "altho I say it myself &c there is not another woman in America could do it. We want to get to the Theatre about twice before I leave . . . Margaret is jolly and just now down in the store taking my place."

302. HOWER, *supra*, note 282, at 127.

303. *Id.* at 123.

304. Letter from Margaret La Forge to "Sister" (Sept. 8, 1878), <http://www.alleganyhistory.org/places/towns-and-villages/a-e274/andover24/andover-related-articles/2872-laforge-letters-part-13-1874-80> (last visited on Aug. 9, 2018) ("Mother sends regards. I have got her comfortably settled here in a little cunning house and she will probably stay here the rest of her days. I shall leave here soon after the 25th.").

305. HOWER, *supra* note 282, at 158.

306. Margaret Getchell could enter into contracts as a single woman. During her marriage, she helped her husband and Macy but presumably without a formal employment relationship. It is not clear whether she had express authority through a power of attorney or only implied authority to act as an agent of her employer, R.H. Macy, during the time she was in charge of the store during his three-month trip to Europe.

## IV. CONCLUSION

During the period of the case study, the transition to an industrial economy brought changes in the social and economic roles of American men and women. By the end of the period, as a result of shifts in ideas about gender roles and the nature of work itself, market-based work increasingly became identified as the province of men and work in the home as the province of women.<sup>307</sup> As wage work became more acceptable for men, it became less acceptable for married women to engage in economic activity outside of the home,<sup>308</sup> especially when they both inhabited the same household.

These changes in the years leading up to the Civil War reinforced evolving social views about gender relations and reflected fiercely contested ideas that were in tension with the first wave of women's rights law reform.<sup>309</sup> The role of women in the abolitionist movement, as well as women's increased activism in support of their own legal and political rights at mid-century, exposed the underlying theoretical tension between property rights and equality of contract for married women and certain free labor arguments against slavery.

Historians of the period have traced how debates regarding free labor and domestic dependencies, fueled by struggles over slavery before the Civil War, led to a new emphasis on the distinction between home and the marketplace.<sup>310</sup> The laborer or "servant," as Locke had explained in the late seventeenth century, puts himself "into the family of his master" under the "ordinary discipline" of the master of the household;<sup>311</sup> and a husband's authority over his wife mirrors that of "a master over his servant."<sup>312</sup> During the first half of the nineteenth century, as argued by legal historian Morton Horwitz, there was a "gradual decay" of a "paternalistic and hierarchical relationship among employers and workers." With the subsequent development of a contractarian framework, according to Horwitz, "equal bargaining power inevitably became established as the inarticulate major premise of all legal and economic analysis."<sup>313</sup> Abolitionist theorists at the same

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307. LEPORE, *supra* note 14, 193–97; BOYDSTON, *supra* note 14.

308. See Jeanne Boydston, "The Woman Who Wasn't There: Women's Market Labor and the Transition to Capitalism in the United States," in *WAGES OF INDEPENDENCE*, *supra* note 8, at 23–30 (arguing that the transition to capitalism may have led to the expanded dependence on the market labor of women performed both within and without the household, and that the aggressive presence of women in the transitional economy may have fostered their disappearance from its subsequent narratives).

309. For a discussion of those themes and tensions in another context, see Mary L. Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 *YALE J. OF L. & FEMINISM* 335, 339, 363–65 (2011).

310. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 18, 175–81 (1998) (arguing that abolitionism reshaped the meaning of contract freedom by dissociating wage labor from relations of personal dependency).

311. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 47 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1975) (1690).

312. *Id.* at 4.

313. MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* at 208, 210 (noting also that as a result of that transformation, "the law had come simply to ratify those forms of inequality that the market system produced").

time developed arguments against slavery by challenging theories of contract that equated wage labor and marriage as relations of household dependency.

In making those arguments, as historian Amy Dru Stanley has pointed out, anti-slavery theorists disrupted the parallel between the legal status of hirelings and wives by distinguishing between “the formal freedom and equality of contracting parties in the marketplace [and] the benevolent dependencies of the home—an antithesis symbolized by separate spheres.”<sup>314</sup> Dependent household labor was thus distinguished from independent wage labor at a time when there were “profound changes in relationships of authority and submission—in the rights and obligations of those who own property and of the growing masses who did not” during a period of increased commercialization and industrialization.<sup>315</sup> Anti-slavery theorists also posited that by eliminating slavery, a dependency distinguished by the lack of freedom in entering the master’s service, the wage contract would sustain the marriage contract by permitting former slaves to enter into free labor contracts to maintain their own homes and families, an important element of self-ownership. The household, a place of traditional family dependencies and male mastery, would be a sphere insulated from the marketplace.<sup>316</sup> Unlike pro-slavery theorists, abolitionists thus dissociated the free labor contract from the domestic dependency of bondage and the marriage contract.<sup>317</sup>

Some female abolitionists, particularly in the black anti-slavery community, strongly challenged the distinction between free market labor and household dependencies, arguing that a married woman should also possess the right to self-ownership, rather than simply being an object of her husband’s contract rights.<sup>318</sup> In addition, women’s rights activists argued for economic equality within the marriage contract itself. The dominant view, however, sharply distinguished between freedom and equality of contract in the marketplace and the benevolent dependency of the home.

Under the status-based authority of the husband as head of household under coverture, private law facilitated the business activities of women in intact marriages through agency law, the use of powers of attorney, trade accounts, and family business networks. Thus, despite the legal disabilities imposed on married women under coverture, some married women by agreement within the family achieved a form of autonomy or independence in their trading activities. The case study in Part III illustrated how some wives in the maritime community of Nantucket assumed more responsibility for family business affairs as a result of the increasing periods of separation between their lives on shore and their

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314. STANLEY, *supra* note 310, at 166.

315. Amy Dru Stanley, *Home Life and the Morality of the Market* in *THE MARKET REVOLUTION IN AMERICA, 1800–1880* 74, 76–85 (Melvyn Stokes & Stephen Conway eds., 1996).

316. *Id.* at 74, 76–85) (arguing that “the ideology of separate spheres coalesced with the logic of antislavery to define the moral nature of market society in terms of the right to a family unscathed by market calculus”).

317. STANLEY, *supra* note 310, at 21.

318. STANLEY, *supra* note 310, at 29–35.

husbands' working lives at sea. Although largely hidden from public view, these private law arrangements permitted more flexible ordering of family responsibilities within the overall framework of coverture.

On the other hand, for wives who were not part of a viable or harmonious marriage, the law provided much more limited relief from the harshness of coverture. In Massachusetts, the application of both the *feme sole* trader statute and various common law exceptions to coverture were restricted to wives abandoned by their husbands. The courts initially expanded certain exceptions to the common law of coverture when a wife could be viewed as equivalent to a widow, with the husband viewed as exiled, banished, or otherwise the equivalent of "civilly dead." Recognition of limited rights in that context made it less likely that the public fisc would be called upon for support of the abandoned family or that creditors would be left without remedies in business dealings with women traders. Nevertheless, influenced by English common law cases decided at the beginning of the nineteenth century, Massachusetts courts ultimately balked at continued expansion when the exceptions were viewed as threatening the institution of marriage. They resisted granting more independence to the wife when the husband was arguably still in the picture, keeping women legally subordinated to their husbands if their marriage evidenced some trace of viability or proximity.

By 1855, towards the endpoint of the case study, the Massachusetts legislature had enacted a married women's property law and an early version of an earnings statute that protected certain earnings of married women from the institution of coverture.<sup>319</sup> As Reva Siegel has shown, however, the earnings statutes enacted after the mid-nineteenth century generally protected only those earnings "independent" of a wife's "marital duties."<sup>320</sup> The labor a married woman performed in the household—"a wife's work" remained her husband's by marital right long after those statutory reforms.<sup>321</sup> Separating unprotected "wife's work" in the home from protected independent work preoccupied courts after the adoption of the early earnings statute.<sup>322</sup>

As contract law and the law of husband and wife changed during the period of this study, the theoretical underpinnings of agency law also shifted. During the colonial and post-colonial period, the law of agency or "representation" continued its gradual transition from an earlier status-based system to one based on consent.<sup>323</sup> By the beginning of the twentieth century, it had shifted from its legal

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319. 1855 Mass. Acts 710.

320. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L. J. 2127, 2171-72 (1995).

321. *Id.* at 2171.

322. *Id.* at 2171-2210 (arguing that later statutory reforms, as subsequently interpreted by the courts, reproduced in more modern and socially acceptable form the marital status relations the common law once formally enforced through coverture). Those later developments are beyond the scope of my study here.

323. THOMAS A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY: THE HISTORY AND THEORY OF ENGLISH CONTRACT LAW* 431-32, 442-55 (1906); *see also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 160-210 (1977) (describing the development of



foundations based on status; nevertheless, as observed by Judge Learned Hand, because “archaic ideas” about the responsibility of a head of household for the acts of his dependents continued to serve pragmatic commercial purposes, the law of agency and of master and servant survived in more modern form:

The responsibility of a master for his servant’s act is not at bottom a matter of consent to the express act, or of an estoppel to deny that consent, but it is a survival from ideas of status, and the imputed responsibility congenial to earlier times, preserved now from motives of policy.<sup>324</sup>

Vestiges of the status-based regime can also be seen today in the reluctance of some modern courts to treat intra-family contracts like commercial contracts<sup>325</sup> and by the propensity to preserve certain traditional relationships and obligations within the family. Most jurisdictions, including Massachusetts, currently hold that the marital relationship requires some special limitations on the freedom to contract,<sup>326</sup> thereby recognizing the dual nature of marriage as a private contract and a public status that determines the rights and obligations of the parties.

On Nantucket, the expanded business role of the island’s married women continued during this gradual cultural shift to a sharper demarcation elsewhere between home and the marketplace. However, the demise of whaling eventually changed the dynamic between the island’s men and women. Fewer and fewer married women were left alone at home for years at a time to manage the family’s affairs. During the same period, better-financed men began to dominate local commercial enterprises, crowding out Nantucket’s women shopkeepers. The eventual replacement of whaling by tourism in the island’s economy also resulted

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modern contract law from a justification based on fairness of exchange to convergence of the wills of contracting parties).

324. *Kidd v. Edison*, 239 F. 405, 407–408 (S.D.N.Y. 1917).

325. See, e.g., Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 *LAW & CONTEMP. PROBS.* 221, 225–26 (1995) (noting that American courts have generally declined to enforce bargains or provide judicial resolution of disputes in an ongoing marriage). Compare *Mary Anne Case, Enforcing Bargains in an Ongoing Marriage*, 35 *WASH. U. J. L. & POL’Y* 225 (2011).

326. See *Ansin v. Craven-Ansin*, 457 Mass. 283, 288–91 (2010) (holding, in a case of first impression, that a postnuptial or marital agreement may be enforced but only if a judge determines that each party had the opportunity to obtain separate legal counsel, there was no fraud or coercion, the parties disclosed all assets before the agreement was executed, each spouse knowingly and explicitly agreed in writing to waive the right to judicial equitable division of assets and of all marital rights in the event of divorce, and the terms of the agreement were fair and reasonable at the time of execution and remained so at the time of the divorce). Compare *French v. McAnamey*, 290 Mass. 544, 546, 548 (1935) (holding an antenuptial agreement waiving alimony at divorce to be contrary to public policy and stating that “the obligations imposed by law as incident to the relation between husband and wife” cannot be “relaxed by previous agreement between the parties”) with *Osborne v. Osborne*, 384 Mass. 591, 598 (1981) (holding that an antenuptial agreement could be enforced after review to ensure that there was no fraud or coercion, a full disclosure of assets, intent to waive marital rights in the event of divorce, and fairness and reasonableness in its terms).

in more competition among men and women on the island for the remaining business opportunities on land.<sup>327</sup>

Looking ahead toward the latter part of the nineteenth century, public law responded by facilitating market transactions but by limiting the integration of home-based and marketplace work that some women achieved during an earlier period. With family household economy increasingly dependent on men's wage work outside of the home, married women became more tied to non-market production and economic dependency within the home. Although the flexibility provided by private law for business women in intact marriages remained unhindered, the changing social context and economic environment gradually reduced the opportunities for married women on island to engage in business activities as a means of fulfilling their family responsibilities.

Nevertheless, as the case study shows, the legacy of the married women traders of Nantucket lived on in their families on and off the island. The tradition and influence of the traders profiled in Part III passed through the generations on Nantucket, from mothers to daughters as well as to sons and other members of their households and community. For example, R.H. Macy, whose great-grandmother Judith Macy was a successful trader on Nantucket, recognized and encouraged the executive abilities of his cashier and bookkeeper, Margaret Getchell. He eventually promoted her to superintendent of his department store, with responsibility for over two hundred employees, at a time when there were very few women in retail management positions in New York City. The entrepreneurial legacy of women traders also passed down through other members of the women's households, including Mary Ellen Pleasant, an African American servant who learned about shop keeping and abolitionism in the Hussey and Gardner households on Nantucket. She later put both to very effective use as an entrepreneur and civil rights advocate in San Francisco.

The legacy of Nantucket's married women traders also provided the island's women and girls with a long-standing tradition of strength and independence, enabling them to pursue other types of notable careers off-island. Consider, for example, the influence and achievements of nineteenth century reformers such as Lucretia Mott, the daughter of the trader Anna Folger Coffin, who became a prominent Quaker preacher, abolitionist and woman's rights activist,<sup>328</sup> and Anna Gardner, the abolitionist, educator and woman's suffrage advocate.<sup>329</sup> Other women who spent their formative years on Nantucket also made significant contributions in careers as ministers, women's rights advocates, and as scientists. Phebe Ann Hanaford, the writer, suffrage advocate, and Universalist minister

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327. See KARTTUNEN, *supra* note 161, at 241–47 (describing the islanders' efforts before and after the Civil War to attract tourists to Nantucket in the summer months).

328. See *supra* discussion and notes in Part III.B.1.

329. See *supra* discussion and notes in Part III.B.2.a.

served congregations elsewhere in New England and New Jersey.<sup>330</sup> As a minister, she also served as the first woman chaplain of the Connecticut legislature, ordained her son, and performed her daughter's marriage ceremony.<sup>331</sup> She was a founder of the American Woman Suffrage Organization, and was later invited to preside at the funerals of both Elizabeth Cady Stanton and Susan B. Anthony.<sup>332</sup> Lydia Folger Fowler, the first American-born woman to earn a medical degree and first female professor of medicine in the United States, later practiced medicine in New York City with a focus on gynecology.<sup>333</sup> Maria Mitchell, who discovered a comet in 1847 and became a passionate advocate for science and mathematics education for women,<sup>334</sup> was the first woman elected to the American Academy of Arts and Sciences and the American Association for the Advancement of Science.<sup>335</sup> Before leaving the island in her late thirties, she taught school and served as the librarian of the Nantucket Atheneum for twenty years.<sup>336</sup> She then taught for many years at Vassar College as its first professor of astronomy,<sup>337</sup> and in the 1870s, co-founded and served as an early president of the American Association for the Advancement of Women.<sup>338</sup>

In sum, despite the economic changes that occurred on the island later in the nineteenth century as well as the social and cultural changes that increasingly confined women to the domestic sphere in America, few communities of its size could claim such a distinguished list of influential and path-breaking women, attesting to the strong early tradition and enduring legacy of the married women traders of Nantucket.

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330. For a brief summary of her life, see Lisa Tetrault, *A Paper Trail: Piecing Together the Life of Phebe Hanaford*, NANTUCKET HIST. ASS'N, <https://nha.org/research/nantucket-history/history-topics/a-paper-trail-piecing-together-the-life-of-phebe-hanaford/> (last visited on August 20, 2019).

331. *Id.*

332. *Id.*

333. Fowler gave birth to her second child two months after graduating from medical school in 1850. Jascin N. Leonardo Finger, *Lydia Folger Fowler, M.D., 1822-1879, First American-Born Woman to Receive a Medical Degree*, NANTUCKET HIST. ASS'N, <https://nha.org/research/nantucket-history/history-topics/lydia-folger-fowler-m-d-1822-1879-first-american-born-woman-to-receive-a-medical-degree/> (last visited on August 20, 2019) (noting that Elizabeth Blackwell, who graduated from medical school in 1849, was born in Great Britain).

334. See RENEE BERGLAND, *MARIA MITCHELL AND THE SEXING OF SCIENCE: AN ASTRONOMER AMONG AMERICAN ROMANTICS* 53–54 (2008).

335. MARGARET MOORE BOOKER, *AMONG THE STARS: THE LIFE OF MARIA MITCHELL* xvii, 80–82 (2007); Henry Albers, *Foreward* to *MARIA MITCHELL: A LIFE IN JOURNALS AND LETTERS* 3 (Henry Albers ed., 2001).

336. BOOKER, *supra* note 333, at 28, 132.

337. *Id.* at xvii.

338. *Id.* at 341–42, 372–74.