

## MEN, WOMEN AND PROPERTY IN SIXTEENTH-CENTURY SCOTLAND FROM THEIR TESTAMENTS

'The deidis part is....' Such is the key phrase in the settlement of worldly possessions (but not land) after a death in Scotland. Man or woman, young or old had their part in the family inheritance which could not be denied them. In Scottish custom and law marriage was a very different contract from English law. A wife in Scotland kept her name and although her tocher was merged with her husband's property her rights remained unassailable. Although after the act of the Scottish parliament, 1573 cap. 55, desertion was made a cause of divorce, and the offending party lost his or her conventional provisions this was not a common phenomenon.<sup>1</sup> So far as most property rights went women were at least the equal of younger sons. From her marriage, a woman had rights to real property — called *terce* and *courtesy* — which were legal *liferents* at common law. *Terce* became due only after a year and a day of marriage or the birth of a living child.<sup>2</sup> Ownership of real property, however, was an advantage enjoyed by only a minority and this paper is concerned with property which could be disposed of by Testament, that is moveable estate. Here too, a woman's rights were equivalent to a man's.

At common law no married person was entitled to dispose of the entirety of their personal property by Testament. Only one who had neither spouse nor child dependent had all the property they used to bestow where they would. When a marriage was ended by death goods in common were divided, normally in three (one third to survivor, one third to children, one third to the dead). If there were no children then the property was divided in half. The 'airship' was deducted before the division, and the 'legitim' which evidently required that certain household goods be set aside for the heir was not included in the inventory. As a rule therefore, the value of domicile and utensils, in country inventories are 'estimated' at a general sum, after the 'legitim' has been taken.

The 'dead' could leave their remaining share of the goods to whomsoever they chose.<sup>3</sup> In the sixteenth century the children's portion of the goods depended on their being still at home. Those that were 'forisfaitt' had effectively been paid off and had no further claims, their share having presumably already reduced the family estate. Thus Duncan Ker explicitly omits his daughter Hanet and her children from a division amongst the rest of the children because she had had her portion. Apart from this, examples of a parent favouring a male child before a female are rare. Very occasionally, a father may explicitly say that his heritable lands are for the eldest son, and his goods to the younger but the norm is for all to be named and the estate to be divided equally. Bastards too, and sometimes their mothers were provided for, usually less generously.

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1 John McLaren, *The law of wills and succession as administered in Scotland including trusts, entails powers and Executing* third ed (Edinburgh 1894) pp. 88-9.

2 *Terce* is real property which was divided (determined whether division shall start 'by the sun or the shade' by lot by sheriff or valuator); it was not claimable from *burgage* subjects; see McLaren, *The law of wills and succession*, p. 114.

3 McLaren *The law of wills and succession*, p. 116.

The formal provision for spouse and child, however, produces a personal relationship in which references to 'my dearly beloved wife' or husband are conspicuously absent, as are specific gifts. Only a handful of husbands make their wives their executrix or arrange for their goods to pass to their wives should young children not survive to inherit. When a child or children — usually the youngest — are left to the wife's care and management provision is made for their meat, drink and education as if otherwise there would be no maternal concern, or willingness to care for their child. Hardly any wives make mention of their husbands. They are more likely to turn to brothers or sisters and to remember them in their Testaments.

Before the Reformation, the law was enforced in church courts and recorded in Latin, but most of these registers are lost. In 1567 a new system of commissariots was established, authorised by parliament and keeping its records in Lalland Scots. Difficult cases, appeals, the cases of those who died overseas or who had no fixed Scottish domicile and others were heard by the Edinburgh commissioners who were probably the most legally qualified.

Most of the Testaments recorded in the sixteenth century were Testaments dative, that is, the deceased had made no disposition and the normal rules of inheritance applied. Property went to the 'nearest of kin'. Who are nearest of kin, however, can be complicated and depends on how you count 'removes'. If the 'nearest of kin' are the children but one is already dead, having produced lawful heirs, do those lawful heirs receive their parent's share or are they already one step further away and so not 'nearest'? If they have the right which had pertained to the parent the legal concept which is known as representation is involved. Later there are complications as to whether representatives are by common law in relation to moveable succession next of kin. That is a grandson may be a heritor but his uncles (his father's younger siblings) next of kin for the moveables. Next of kin share the moveables. This distinction does not appear to apply in the sixteenth century, although it may have been at issue in 1567 in a belated accounting for Sir James Sandelandis' moveables, apparently when his widow dame Marijon Forestar died. The commissioners name as heirs his four surviving children and the children of his deceased son, John.

Again, for a woman, it was her kin who benefitted where there were no direct heirs. The order of succession was first *downwards*: [1] children, grandchildren, greatgrandchildren and so on; then [2] brother or sister of full blood *of the deceased*, so in the case of a woman her sisters and brothers and their descendants; [3] brother and sister of the half blood; and if that failed *upwards* to [1] father (in the case of a woman her father); [2] collateral of father of full blood (first cousins); [3] uncles and aunts of half blood and descendants or even further *upwards* to grandfather and ditto. For a wife her share went to her children and then her relatives in collateral and ascending lines in order of law.

This happened in practice only occasionally, but perhaps under the influence of English practice it came to be seen as socially curious. In the nineteenth century, McLaren

believed that in practice the claim of the wife's next of kin was not often insisted on. When there was no family and no marriage contract ... the wife *would naturally* leave her share of the common property to the husband by will. If there was a family the claim would not be made in the father's lifetime, nor after his death if the father made an equitable will. In many cases doubtless the wife's collateral relations were prevented from making a claim through ignorance of the *strange theory of law* which gave rise to it.<sup>4</sup>

In practice, a woman with property and without obvious kin was more likely to make a will and dispose of her goods to friends and neighbours. There was still a bias in favour of the male for a mother, unlike a father, could not inherit from a child — his or her 'natural' line went to father and father's kin. When Jonet Robeson of Inche wanted her property to go to her

<sup>4</sup> McLaren *The law of wills and succession*, p. 119 (emphases added).

mother, she had to make a Testament. There were problems when husband and wife died simultaneously whether or not one or both had had time to make a Testament.

The records of the commissariots show us the whole moveable estate of the family unit being valued on the death of either husband or wife. Unlike the English Will Registers which contain only the Will and Testament, these contain inventories, Testaments (if any) and the commissioners' rulings about executors and points of law. They collected five percent of the net value of the estate presumably for the government which therefore had an interest in ensuring that estates were properly handled. The requirement for a valid Testament became stricter as the sixteenth century progressed. 1555 cap. 29 required subscription and where this was difficult, in 1579 an act required two notaries and four witnesses if not signed by the grantor. Witnesses, incidentally, are invariably male. In 1584 sealing of Testaments was no longer essential and in 1593 the name and designation of the writer must be included in the body of Testament — a practice which had been coming in for some time. The common form of the commissary's declaration in the sixteenth century follows this pattern:

we maisters Robert Maitland dene of Abirdene ane of ye senataship of ye college of iustice, Edward Henrysoun doctor in ye lawis, Clemitte Lytill and Alexandre Sym commissioners of Edinburgh specialie constitut for confirmation of Testamentis, understanding that eftir dew summoning and lauchfull warning maid be form of edict due opportunite as effewes of ye executors and intremettors with ye gudis geir of umquille Patrik Robertsoun and all uderis havand interest to compeir iudicialle before hem at ane certain day bypast to heir and se executuris dative determit to be gevin admittit and confermit be him in and to ye gudis and geir quilik iustlie pertenit to ye said umquille Patrik ye tyme of his deceis or ellis to schaw ane ressonable caus quhyrthe the said commissioners determinit thawmtill as his decret gevin yairpoun beris conforme to ye qulk we *havand power to conserve all Testamentis quhair ye deidis part excedes ye sowme of l li* inoure souverane lorddis name and auctoritie makis constitutis ordinis and confermis the said Andro Robertsoun lauchfull sone to ye said umquille Patrik as nearest of kyn to him, his executor dative with power to him to intromet uptake follow and persew as law will the gudes and geir aboute specificat and to entre dettis to Credible and do generallie alland sundrie thingis to do execute and use that to ye office of executive dative is knawin to pertene providing hat the said andro sall iustlie and laufer compt upon his intromission quair the same sal be demanded of him and the said gudis sall overnad to all parteis havand interest as law will.<sup>5</sup>

Goods were valued on oath, and 'the deidis share' was calculated as a monetary sum. How this sum was related to physical objects in cases where a Testament grants particular items to individuals is unclear. It was presumably one reason why legal decisions were needed if a testator had overvalued their likely share. What constituted moveables, if one trusts to the inventories, is narrowly defined. It included seed sown in the fields but not grass and leases are never included in the inventory although it looks as if some attempted to dispose of tacks [leaseholds] by Testaments since fathers like John Waucht endow their younger sons with land and mills when disposing of their third. The 'legitim' (which could not be excluded or diminished by the father's Will or Testament) was shared equally by children of the same parent through different marriages and including posthumous children.

By the common law of Scotland a dying person could not execute a deed of importance in relation to his/her estate and succession. A deathbed Testament which affected the dead's part only, and would not diminish the legal portions of the wife and children was common,

<sup>5</sup> Scottish Record Office, Edinburgh Commissariat, Vol. 1, p. 1 and following. All the cases cited come from this Commissariat volume which starts in 1567 although some of the cases concern much earlier deaths. The indexes to the testaments are meticulous and any individual case is best located with reference to them.

usually witnessed where the individual was a burgess or the wife of a burgess by the chief men of the town.

So Testaments concerned men and women, married or single, with or without legitimate children and also Testaments dative of children who died owning property. The exact age at which a child might make a valid Testament is unclear — but several, both boys and girls still in tutelage, made Testaments accepted as valid. Nicolas Berroun probably the youngest girl, left a small estate mainly to George Bisset her curator, which the commissioners allowed. A Testament dative resulted in the moveables being divided amongst the next heirs; a straightforward will like that of David Forestar of Wesport effectively did the same thing, in Forestar's case perhaps made only so that his wife could be named one of the executors — in a Testament dative execution was invariably given nominally to children acting through their tutor or governor — and his youngest daughter assured of a bequest which was evidently separately due to her.

It is clear that the commissioners did not invariably or even normally record the Testaments of those who died possessed of very modest property. While some estates which were apparently large ended, after debts owing by the dead had been deducted as very modest, those which were clearly small from the start were not recorded although a small percentage was taken for proving them. Were the goods fairly valued? It would seem that at least the valuation was real and not a conventional amount.

The Registers are therefore skewed towards the better off, many of whom did not bother to make Testaments, presumably because it was not necessary to ensure that the goods descended to the favoured people. When Testaments were made it was often, therefore, when it was desirable to make all crystal clear. James Calderwood's property for example was to be divided between Ninian Johnes, Adame James, Isabell, Margaret and Jonet Calderwood, William, Agnes, Catherine and [another] Margaret Calderwood, John and Christian Cuthbertson, his sisters' and brothers' bairns as 'nearest of kin'. They would presumably have inherited without a Testament, but the Testament clarified and confirmed it as the testator's wishes.

Because it was their right, women thus ended up as widows with a surprising range of property from a third of a half of a quarter of a ship (called the Hallie Geist) to a wholesale business in skins and scots plaids. Even before their widowhood, however, women clearly bought and sold, lent and borrowed on their own account.

Only approximately a quarter of all the deceased estates dealt with are women's estates, however. Were women's estates under the £50 for which the commissaries were responsible? While this may be one explanation, another may be that whatever the legal position, the family unit was not necessarily broken up on her death in order to put the children in formal possession of their share. Technically, two thirds of the property belonged to them but how was it to be managed? When a wife died and the property was divided in three, how was the child/children's portion to be handled? Was it then kept separate from the father's? If so how would this affect the father's business? And who had charge of it? Implications of this for the continuation of a business after the death of a partner or even of a family have never been explored. On the other hand, what was the position of all concerned if the spouse remarried? The new spouse would have rights, any further children would have rights and all this might disadvantage the existing children. It is possible that such situations prompted the very late declaration of inventories and the dative arrangements in some families.

In practice, clearly, the situation was both complex and messy. The businesses which can be so clearly seen at work in the inventories and lists of debts due and owing were not broken up, but a right against them which would count as a debt was created. The Testament of Marion Adamsoun who was William Littell's wife and related to the same family as the Edinburgh commissary Clement Littell illustrates this. Presumably also a professional man,

William had not yet collected from his mother, Elizabeth Saschear, £133-6-8 which was his bairn's part of geir and legacy left him by his father. Thomas Makdill at his death was still owed by his father-in-law, Thomas Stobby skinner, £70 which was part of his wife's agreed tocher. Robert Macmillan of Ayr owed to Gilbert Macmillan, his and the late Jonet Thome's son, £221-0-10 for her part. Jonet had died a year or so earlier so that the prosperous merchant's business can be seen at two moments of time. Since her death, even after this debt was deducted, the value of his goods had increased.

Because of the rule about 'legitim', Testaments are an erratic source of information about the house and its furnishing, the thing with which we could most certainly associate women. Country inventories tend to give a round sum 'estimated in airship' without giving any details. There are no descriptions of the house itself, although it is clear that the single and the elderly tended to live in a single chamber, whose furnishings are more likely to be described. Furniture when itemised appears sparse — furnished beds were items of considerable value and worth recording, chairs were uncommon, pewter pots and plates, dishes and ladles, tin spoons and knives were the usual kitchen equipment. Businesses might record other equipment not so much domestic as commercial — an iron chimney, a counterboard, fats and barrells.

The furniture most commonly mentioned is a furnished bed. Occasionally sheets, blankets and wardrobes, bolsters and cushions are specified. Adam Delkbare, though not wealthy, had a furnished bed worth three pounds, six pewter plates, six trenchers, a pot and a pan worth 52-00 a chest, a brasen basin and a chair, but his part was only £3-14-4. Elizabeth Forquhar in 'her awn dwelling hous in Dundee' had 'two brasin pottes, twelf tin plates, six tin dishes, some tin trenchers, fyve quart stoups of tin, two chandeliers of brass, six silver spoons, two damask chests and a furnished bed'. Patrick Robertson who was not otherwise wealthy had so much in the way of beds and bedding, plates and stoups and spoons and pots chairs and forms and an iron chimney that he was probably an innkeeper. Clothing is sometimes specified, generally sober in colour — a gray gown, a black doublet and black pair of hose. Occasionally grander clothes like gowns of French black with serge edgings are mentioned. Debts often include payments to artisans, tailors and shoemakers.

The nature of Scottish business and farming can be glimpsed in these Testaments. The sharp differences between the goods of townsfolk and country dwellers is compelling. The prosperous country farm was often worth more at the end than the busy business of the burghs. Even so the livestock recorded rarely reaches impressive numbers. One or two horses, or mares, cows and their followers, oxen and hogs, sheep and lambs are counted at most by the score. The usual crops are oats and bere, depending on the time of year in the stack or ground, or sown for the next crop. A single furnished plough (and some evidently have none) and a furnished pair of harrows completes the farm equipment. While there are slight signs of specialisation, especially in breeding horses, most farms were small scale, general farms, selling a few bolls here, a cow or two there and owing debts to the weaver for cloth making which suggests that the farmer's wife and daughters filled in their time spinning the wool from the sheep.

John Horne was a burghess of Edinburgh in 1567 and when his wife Alison Blak died we can see his business which appears to have been that of a wool merchant or perhaps a dyer and cloth maker buying wool for manufacture, frozen at a moment of time. His workshop was equipped with a last of flax, a poke of madder, various pans and caldrons as well as hemp, lint, wire, brissels and other smaller items. They were valued at £615. When the debts he owed had been deducted the free gear was only £205-18-8, a modest amount for a burghess but not uncommon. The clear monetary value of the burghesses' estates is surprisingly low. A complicated account of debts owing and debts due which suggests vigorous business activity boils down to a very small net balance. Total mismanagement was rare. James Hopping, burghess of Edinburgh, despite a Testament in which he blithely leaves money to various

relations, specifying that they 'mak na cumeris' to his executors, died as the commissioners dryly note — with 'the dettis exceed[ing] the guddis'. Amongst other disasters he had been in trouble 'in the commissioneris bukis of Edinburgh for four scor and sex pundis 12-4 and John Johnson writer for the mails of Dudinsoun had obtained a decree of the Lords of the Council against him and his widow for £22-00-00'.

The wills, particularly of those who died overseas, provide an insight into the scale (usually small) on which they are trading and the amount of money invested in their trade. John Ure of Stirling for instance, was primarily buying spices — pepper, nutmeg, cinnamon, aniseed and so on in small amounts (a pound or two) but also mixed goods including holland clogs, steillbonnets, pots and points and papers of pins. His clear worth, however, was only £290-4-4. Norwegian and Baltic trade looms large in the Edinburgh burgess Testaments. A man like John Vewart had a servant, presumably a factor and also kin, James Vewart who was in Norway when he died. Robert Williamson, burgess of Cowpar, who died before his father and had quite young children was another such. He left his wife a third and his unmarried children a third and with the remainder made arrangements for the children to be brought up in learning and manners. He dealt principally in lint and skins, canvas and worsted and other woollen cloth as well as finer materials like taffeta.

Professional people like the Littels had a good deal of their wealth in gold and silver made up in belts, chains and rings but valued according to weight, and also in expensive clothing valued at £100. Clerics found themselves curious side-employment from time to time. Sir John Humbill was clearly a financial agent for Athole whose finances as a result would take much sorting out by 'the universal order of the realm and judges. So preoccupied was he with this, that he made no mention of his soul.

Minor gentlemen like master John Monypenny who lived mainly on rents and was deeply involved in lawsuits over landed holdings with various lairds such as John Somervell of Cambuskenneth was not untypical of his sort. Although single he had a 'bastard barne that is callit myne' whom he entrusts to one of his executors, his sister's husband, William Sinclair, to be 'sustained in meat, drink and clothes quill scho can wyn hir leving.' Another with a bastard as well as lawful heirs was John Forestar — formally a burgess of Stirling but essentially a wealthy landholder whose 'dead's part' amounted to £692-7-00. Alex Zoule (or Yule) who was part of the clientage of Patrick Hepburn and his circle, had a legitimate son but various natural sons who were given small amounts— £20 and goods — to set up, it would seem, as small tenant farmers, while the legitimate daughters were given tochers of 800-900 marks. The wealthy and single Alexander Cochrane who was related to the laird of Bathgate left some moneys to the laird's daughters and to other lawful relatives presumably so that they would not dispute the Testament but most of his goods and gear to John Cochrane his 'son natural' — the more polite formulation of the relationship.

One significant aspect is the range of currency being used as reflected in the money recorded.

William Scott had four crowns of the sun, price £16-12-00 four crowns of the emperor £6-8-00 one old angel noble 54-00 a unicorn 22-00 a 44-00 pece of gold 46-00. James Lawrie had fifteen double ducats price £3-10-00.

Other coins referred to include pistolet crown price 26-00; croset doucates, English crowns price three pounds The circulation of foreign money at varying prices must have complicated business but burgesses who were dealing overseas probably found it convenient — Lawrie for example, whose estate amounted to a massive £3000 had died overseas and had goods in the Baltic and Elsinore. The absence of a Testament had been most awkward since Robert Fyfe had been paid to seize his writings there and another to seek for it, and his spouse Elizabeth Park had had to 'meddle with his affairs' — to prevent unfinished business going bad, presumably.

Personal and social relationships are sometimes illuminated. The uncertainties of life at the time are well exemplified in the Testament of James Gamell, a widower whose young son was being cared for by his mother. Although his will was witnessed by burgesses of Dundee, Edinburgh and Dysart and he had a steward, he was not very well provided. He was probably a factor for his brother, Thomas Gammell, to whom he owed £57 and whom he named his executor. All the goods he had, evidently Baltic sea goods from Danzig, were in a ship the *Trinyet* at Berwick which had been delayed three months for fear of the pest. Beyond that he had a quarter of a small crayer (a coastal ship) and debts which almost over balanced his resources. He left his woollen clothes to be divided between his brothers, asking brother Thomas to pay his mother four pounds a quarter for fostering his son.

Marriage for many burgesses did not mean frequent sharing of a common hearth. Jonet Muttow like Elizabeth Park, clearly rarely saw her husband David Welwod who traded to Danzig in woad, iron, lint and saffron. Families living together were not necessarily the household units we think of as 'typical'. Lawrence Creytoun was certainly sufficiently concerned about his family to endeavour to use his Testament to ensure that his own wife and eldest son Robert and his younger children

remane attogger and yiers from witsounday next and to sustene the hous of ye  
hail gudis and gier and he to be gudman yereof plesand his mother

which suggests that this was not invariably the outcome. John Waucht also sought to ensure satisfactory family living arrangements.

Illegitimacy was not yet concealed. David Arth, a Cowpar burgess and ship owner, although married, had no legal children but acknowledged three natural sons and a natural daughter for each of whom he had provided quite generously before his death apparently without any objection from his lawful wife who would thereby have seen her own lawful share diminished. Gilbert Oestler provided for his natural son by apprenticing him to Walter McAdamew, the goldsmith, with money for his support — and this was a man who displayed his religious faith, speaking knowledgeably of three Persons in one God.

The strength of family clientage and patronage is clearly delineated in some wills. George Maxwell of Garnshed is most concerned to ensure that Sir John Maxwell of Terreglis 'My tutor testimonial', and failing him his son, and other prominent Maxwells protect and promote his sons and their welfare — leaving them rewards but also asking that they defer taking them until his children are well established.

This is, however, a society in which deference is more marked than servility. People were differentiated as much by employment as by rank. Burgesses were on familiar terms with lairds. Those described as servant were not penniless or without influential relations. William Scott, servant to Cuthbert Ramsay an Edinburgh burgess, owned his own culverin and murrion and had £120-8-4. Despite substantial payments to surgeons and apothecaries for medicines and drugs, as a single man he was able to give his brothers and sisters substantial sums and leave his clothes to be disposed of amongst the servants in Cuthbert Ramsay's house.

The deathbeds of the prominent were well attended by burgh dignitaries, the local rector and family. Where the deathbed was is rarely specified although we learn that David Kippillis, mason, made his will lying in his bed in 'his awn hous in grays closis within the said burgh of Edinburgh'.

Interest in the disposition of the soul and the disposal of the body are uncommon. Robert Thomseoun, probably a fisherman, who was at sea, specified that he be buried at sea, perhaps to prevent any problems for his shipmates, but burial is usually ignored. Robert Beton 'an honorable man, steward of Fife and master of the household of the queen's majesty who died in May 1567' started very properly

sen na thing is mair certaine yan death nor na thing mair uncertane yan ye hour  
yairof yarfore I Robert Beton seik in body but hail in mynd makis my  
Testament in yis manner. In ye first I leif my saul to god almygtie and my body  
to be buryit in ye parochie kirk of Marchurch.

Such openings were the exception. Leaving money to the poor was unusual and mainly confined to the exceptionally wealthy — clerics like Sir John Castellaw or religious minded women without dependents. Most ordinary people are more down-to-earth and start directly into the distribution of their property. There is the occasional enthusiasm. Bessie Forquahr starts:

honor glorie and pryse be to the eternalle and omnipotent god and to jesus crist  
his onlie sone our lord and to the holie spreit I am perfect in spreit an mind and  
makas my Testament last will and legacie in manner following to wit I bes gif  
and ... my saull to ye greit and evirlasting god fader sone and holie gost  
beseacheing yat loving evirlasting and mercyfull god to have mercy upon me  
synner ...

Women, although they are only one in four of the cases heard, make a distinct impression. Some women, like Margaret Wod, while leaving small bequests to others gave most to their spouses. Women if widows and without children to trouble them show more clearly a circle of friends, often women, to whom small sums or clothing and keepsakes are given. There was no means of obliging a woman to leave any part of their third to the spouse. Some made judicious distribution ignoring their spouse. Jonet Mactavis left most of her third to her son, Thomas Greirson, but gave her sister Margaret eight marks and her best kirtill and best cloak, and a presumably somewhat less beloved sister, Bessie, six marks a kirtill and a cloak, six marks to her half brother and ten marks to the laird of Stanehous to be good to her son.

Occasionally Testaments reflect, darkly, a long previous history of bickering. Euphemie Bonre who had a comfortable £259-9-00 to dispose of does so with a series of caveats such as 'swearing on the holy evangel that she was neither art nor part in the away taking of the corn thomas bukles sew on the ground of harlaw'.

What is more surprising is the political light which occasionally results from these wills. The continuing support for Mary queen of Scots in 1569 is reflected in Testaments like that of George Joneston who owes teinds 'to our sovereign ladie ye queenis' and money to the abbot and convent of Cambuskenneth for wheat. The continuance of the monasteries, indeed, is surprisingly illustrated in the Testaments.

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