CHAPTER FIFTEEN

Wife and Widow: The Evidence of Testaments and Marriage Contracts c. 1600

Winifred Coutts

THE LEGAL POSITION of married women in late-sixteenth and early-seventeenth century Scotland was inferior to that of men, although the mutual obligations and moral responsibilities of marriage were virtually the same for both sexes. Non-fulfilment, adherence and divorce law bore equally on both.¹ A woman on marriage kept her maiden name, but this may simply imply that marriage was a link between two kin-groups.² A wife had fewer legal rights than her husband, an unmarried woman over twenty-one, or a widow. All women were inferior in law in that, apart from as a mother or nurse proving someone's age, they could not be witnesses in civil cases heard in the supreme court.³ Although women could be executors, none was appointed in a testament to act as an overseer to supervise the fulfilment of the testator's wishes. Many wives and widows, however, were not as legally constrained as theory might suggest; this can be shown by an examination of surviving testaments, marriage contracts, and the court cases in which such documents featured.

Information about the legal position of women around 1600 can be gleaned from several extant legal sources. Principal among these is Balfour's Practicks (1579–83), a digest of contemporary laws based on Balfour's own judicial experience, old laws, decisions from a register now lost, and statutes.⁴ Ius Feudale by Thomas Craig, a practising advocate, discusses conjunct infeftment, liferent, terce and courtesy, all of which affected wives and widows.⁵ Hope's Practicks, the personal notebook of a busy legal practitioner, covers the entire range of contemporary practice between 1608 and 1633.⁶ The most important sources for this study, however, are the manuscript sources in the Scottish Record Office. The seventeenth-century Registers of Testaments for Edinburgh and Dumfries⁷ and the Registers of Acts and Decrees of the Lords of Council and Session for 1600⁸ have been studied in detail along with the unindexed processes, Warrants and Decreets.⁹ What can these sources tell us about wives and widows and the law?

On marriage a woman ceased to have an independent legal persona; she could not act without her husband's consent or contract personal obligations, although as head of the household she could pledge her
husband's credit. He had to approve her pursuit or defence of any civil action. Some cases before the Lords of Council and Session were raised by or against single women or widows but those involving wives bear the words 'A, relict,' (or daughter) 'of B and C her spouse for his interest'.

On marriage all the wife's moveables, including rents from her heritable property, passed to her husband. Her paraphernalia (jewels and clothes) were her own to gift, but not heirlooms or household furniture. A widow or single woman could make a testament, but a wife needed the approval of her husband as *dominus omnium bonorum*. As Balfour puts it,

> ane woman that is fre and not under subiection to ane husband may mak ane testament of hir guids and geir . . . bot ane woman beand cled with ane husband and thairby in his powar and subsection, may dispone and give na thing in hir latter will without his consent . . . nevertheless the husband dois ane honest and godlie thing gif he permittis and grantis to his wife licence and powar to mak testament of that part of the gudis and geir quhilk sould have pertenit to hir, gif scho had happinit to live efter him.

A wife who could make a testament seems to have been completely free to test as she wished. Although Balfour implies that a wife, like a husband, was legally compelled to give a third of the moveable estate to the spouse if there were children or a half if there were none, later jurists such as Stair and Hume clearly state that *legitim*, or bairn's part, affected the father only. Actual testaments show how often mothers provided for their children. Euphemia Broomrig, whose husband and children were alive, left a will in three parts. In each case the husband's prior consent is implied, although never specifically mentioned. Such consent may have been given because the wife had brought goods from a previous marriage; her current husband may have felt such goods were hers by right.

Husbands frequently tried to protect their wives through testaments. Time and again male overseers were appointed 'to see that nane do wrang to my wife and bairns'. Some who could afford to do so reinforced this responsibility with a gift. Thus £10 was left to the Laird of Cowhill 'desiring him for Godis cause to be good to my wife' and a farmer left the Laird of Lag as 'protector, maintainer and defender of my wife and bairns . . . to suffer no man to do thame wrang, fortie punds or ane of my horses', whichever he pleased best.

Husbands often appointed wives as executors. 'Jon Kirkpatrik nominat and constitute Isobell Kirkpatrik his dochter and Agnes Mcgowne his spous his onlie exe[cut]rs and intro[mitte]rs wt his guids geir and dettis'. A widowed mother could be appointed 'tutrix testamentary' by her husband, or 'tutrix dative' by the king or court, to a son until he
Winifred Coutts was fourteen and to a daughter until she was twelve, although she forfeited the office if she remarried; after these ages the pupil became a minor and could choose the mother as curatrix until the minor reached twenty-one. This choice had to be ratified by the Court of Session. If the girl married before the age of twenty-one (she could marry at twelve years) she came under the power of her husband instead of under her curator.  

Although a widow was entitled to a third of her husband’s moveable goods, and his children, apart from his heir, to a further third, the remaining third, or ‘deid’s pairt’ was the husband’s to dispose of as he wished. Legacies from the ‘deid’s part’ were made in money and kind. The Commissary of Dumfries left his wife ‘1,200 merkis in the coffer’, while a farmer left five merks to each sister. Most bequests provided the wife with something specific beyond her legal rights. One was given a house, a yard and a peat house to be a barn; their son was to furnish the house and labour the ground. Friction between the family and widow was anticipated in a spouse being given £40 yearly ‘if sche can nocht agrie in familie with hir son’.  

Some thought a contract more binding than a testament. Sir John Edmiston made a contract that his son Andrew should pay Christian Ker, his widow, and if she died, their daughter Isobel, the sum of 2000 merks. Andrew was to ‘receive thame in houshald with himself and to interteine thame during the space that Cristiane sould happin to remane wedow allanerlie’. The sum was not paid to her, Andrew claiming that it was meant to be used to purchase lands or annualrents for Christian in liferent and Isobel heritably. He was content to do so. It was the other stipulation which caused problems, because

said Cristiane hes removit hirself furth of the saidis Androis hous and is relaps in fornicatioun and hes borne twa bairns . . . and swa hes defylit hirself in respect quhairof the said Andro can not be haldin to interteine ane fornacatrix in his hous, and he hes ever sen the deceis of his said umquhile father intertenit the said Issobell hir dochter in houshald with himself, lyk as he intends to intereine hir in tyme cuming.

He protested that if he was compelled to give the whole 2000 merks ‘sche will not fail schortlie to consume the samen, being ane woman, as is knawin to the lords, quha dois not behaive hirself honestlie’. The Lords ordered him to pay the 2000 merks to Christian and her to find caution that the said sum would be made forthcoming to Isobel after her decease.

In the law of succession, based on the principle of male primogeniture, although a male always excluded females of equal degree, a woman could
succeed in default of a male. In such an eventuality, the heritage was divided equally among the daughters. The preference for a male was over-ridden by the rule that descendants were represented by their descendants. A grand-daughter by a dead eldest son excluded a younger son. Such a wife’s heritable estate differed from her moveable goods. Her husband administered it but never owned it. With his consent she could dispose of it \textit{inter vivos} and on her death it passed to her heir. Until he died, even if he remarried, the husband enjoyed the courtesy, the legal right, to the liferent of his wife’s patrimony, provided she had borne a living child who would have been his heir, even if the child died.

That there were advantages for women in marriage is indisputable. Marriage contracts refer to the husband ‘takand the burdene upon him’ for his future spouse. He was responsible for her misdemeanours and debts and he had to provide clothes and sustenance. He could make a voluntary provision for her widowhood by assigning to her debts owed to him. In being compelled by law to give her a third of his moveable goods after the debts had been paid if there were children, half if there were none, a Scottish husband differed from his English counterpart. An English husband could make a will that left nothing to his wife or children if he chose. The widow’s only recourse was to challenge the fairness of the will in a Court of Equity. It was only when an English husband died intestate that a widow was descerned by the ecclesiastical courts to be entitled to one third of his moveables, with the remaining two thirds divided equally among his children. A Scottish widow was also entitled to terce, the liferent of a third of his heritable estate as it stood at the time of the marriage. Although this land did not belong to her, since she could not sell it, its purpose was to give her a source of food or income in widowhood or ‘gif it happin hir husband to deceis befor hir scho may the mair easilie be maryit with ane uther man’.

Increasingly by 1600, terce was replaced by assignations by the husband or husband’s family of lands in conjunct fee. In such an arrangement, husband and wife received investiture in a feu at the same time. On the death of one partner, the survivor enjoyed the liferent and the feu passed to the heir after the survivor’s death. Craig pointed out that those who could, bargained with their daughter’s future spouse or his parents for the setting apart of some cultivable land as a unit in lieu of terce. They provided a tocher but stipulated that they required for their daughter something more than the rights which the law accorded to a widow. They insisted on half or even more of the husband’s lands being set aside for their daughter’s lifetime, should her husband predecease her. Thus conjunct fee arrangements provided greater security for life for their daughter. Although meant to be instead of terce, this was a provision, not a legal requirement. Unless specifically renounced, the widow could
still claim terce. All the widow’s rights ceased, however, if the husband
died within a year and a day, ‘no bairns being gotten or born betwixt
thame’. If the couple were divorced on the grounds of adultery, the guilty
party forfeited his or her rights.35

As in England, although married women lost their persona on mar-
riage, all their disabilities could be altered by provisions laid down in
marriage contracts. The purpose of these contracts was to protect
property from creditors, spouses or children by counteracting legal
rights.36 Most contracts were straightforward provisions for the marriage
but some were far-sighted legal documents. They appear as evidence in
court mainly because they had not been honoured or because a pursuer
sought to impose what would have been his legal right if there had been
no contract.

In a simple marriage contract in Dumfries in 1571, Thomas Newell
optimistically promised ‘to infeft Marioun Fergusson in hir virginitie in
the lands of Dalbatholme and to provide her with thrie hunredth punds’,
still unpaid in 1600.37 The contract in 1598 for the marriage between
Mark Ker, son of Sir John Ker of Hirsel, and Jean Hamilton, second
daughter of Alexander Hamilton of Innerwick, was a more complicated
legal document.38 Sir John promised to infeft Mark and Jean, and ‘the
larger levar (liver) of thame twa, in conjunct sie and the airis lauchfullie to
be gotten betuix thame . . . in the lands and maynis of Spylaw and mylne
thairof . . . and the landis of Littildeane and Maxtoun’. Financial details
of the worth and yields of these and other lands followed and a further
promise of 1000 merks was made. A house was to be built in three years;
projected plans were outlined. Complicated renunciations of specific
lands and reservations of liferents were set down. The contract tried
to foresee every eventuality.

Gif it sail happin thair be na airis maill (as God forbid) bot airis
femell procreat betuix the saidis Mark and his future spouse . . . ;
gif there be bot ane air femell the sowme of ten thousands
punds . . . ; gif there be twa airis femell the sowme of auchtene
thowsand merkis to be equallie distribuit betuix thame . . . ; gif
there be ma airis femell nor twa, the sowme of tuentiefour
thowsand merkis to be equallie devydit and distribuit amangis all
the saidis airs femell . . .

These sums were to be provided by any male heirs succeeding to the lands,
in default of a direct male heir, for ‘providing of thame to honorabill
pairteis in marriage agreabill to thair estaitis and conditionis’. Such sums
were not to be paid until the daughter or daughters were past the age of
sixteen years complete ‘as gif thai war of pirftyte aige’ (twenty-one years).
In return they were to surrender all documents relating to the lands. Here
The aim was to prevent the equal division of the lands among the daughters as heiresses as the law required, by compensating them with money for tochers. Any daughter giving her body ‘to any persone unmareit . . . sall forfalt, tyne and amit the tocher’. Alexander Hamilton, for his part, obliged himself to pay to Sir John Ker and heirs, in two instalments, 11,000 merks in tocher.

Although usual, tochers were not an essential feature of a marriage. This is shown by a testament in which Janet Glover declared that ‘for the love and respect I have to my husband Thomas Kirkpatrick who received no patrimony with me, I appoint him to be my executor and legator unto the whole guides and geir pertening to me’. Tochers were normally paid to a man by the father of his bride-to-be, but 500 merks Scots money was paid by Sir John Dalziel in name of tocher good with Barbara Cheslie together with the sum of 60 merks money foresaid ‘in caice of failyie’. Here the master of a ‘servitrix’ may have been marrying off a reluctant illegitimate daughter or a discarded mistress. Brothers too were sometimes helpful. In a responsible provision for his niece, James Beaton became

bundin to pay to Cristiane Betoun my sister dochter . . . 6000 merkis to the help and supplement of hir marriage quhen it sal happen and in sa far as I presentlie mynd, God willing, and am agaitward to France, for sundrie guid respectis moving me and that thairby it lykis better Cristiane to remane and be company with the said Luceis hir mother and Andro Wischart of Mylnden hir father in law nor in houshald with my familie . . . to pay and deliver to Cristiane Betoun fortie punds betuix the present and 10 November for hir sustentatioun this present yeir 1600 and yeirlie ay and quhile my returning in Scotland.

Inability to afford the amounts so optimistically promised in marriage contracts was a fertile seed of grievance in marriage. Many such actions came before the Lords of Council and Session; for instance, 1000 merks were ‘to be wairit upoun land [of Aberlady] to the utilitie of him and his spous and the airs to be gottin’ but they were never paid.

Most women who wrote testaments or litigated had been or were married. Single women were entitled to bring actions but relatively few who had never been married did so. This may have been because women did not feel confident about litigating without the support of a husband, father or brother. Remarriage was exceedingly common. There were sound economic reasons for remarriage, particularly if a widow had children. Although she lost the freedom to act in her own affairs, she hoped to gain for herself and her children the financial security provided by a husband. He gained
control of her property unless a clause in a marriage contract restricted his
power and he provided his children, if he had any, with a surrogate
mother.

That remarriage was often hasty is suggested by the example of a
widow who was left with large debts marrying the cautioner before the
confirmation of the will less than a year later.\textsuperscript{45} The evidence of testa-
ments shows how one husband had two wives within two years.\textsuperscript{46} The
prevalence of brothers or sisters ‘germane’ may be indications of a man’s
remarriage; court actions by a woman, relict of one man and spouse of
another, indicate a woman’s remarriage.

Without a man to protect them, relicts and spinsters were open to
oppression. There are many examples of widows not being paid ‘fermes
and dewties’.\textsuperscript{47} Margaret Home, relict and tackswoman of the teind
(tithe) sheaves of lands in the regality of Melrose had not been paid since
1594.\textsuperscript{48}

Single women and widow tenants were frequently removed from
someone’s heritable property if the tack had expired. If she did not
comply with the decree of removing, the landlord could obtain letters or a
precept of ejection in order to authorise her ejection from the holding.\textsuperscript{49}
Sympathy for a widow’s plight probably explains why the relict of
Richard Fiddes was to have removed herself from the town and lands
of Gilmerton by Whitsunday, 1598, but no action followed until Adam
Tait entered to the property and was charged as succeeding in the vice and
violent occupation thereof.\textsuperscript{50} Mr David Ogle, minister at Barry, however,
successfully ejected a widow from land designated to him ‘in gleib’. Some
women fought back. Two women tenant farmers protested against their
ejection from lands in Lauder.\textsuperscript{51}

Goods were often taken from a widow, perhaps justifiably by an
inheritor or legatee. Thus ‘twelf brod geis, ane gaunder and ane skeip
of bees’ were removed from Elizabeth Mure and ‘horses, meirs with foils,
bedding and fyre veschels’ were forcibly removed from Helen Hal, relict
in Banffshire.\textsuperscript{52} Dame Jean Campbell, Duchess of Lennox, widow of the
Master of Eglinton, brought an action for the

spoliatioun of corns, the samen pertening to her . . . and in the
wrangous outputting furth of the foirsaidis landis, rowme and
steding, the uplifting of the profeits sche micht have had, and in the
wrangeous demolisching of the houses and biggings, away taking of
the tymmer wark, stanes, joynit wark and uther materials.\textsuperscript{53}

Actions were raised against women who, either through apathy or
poverty, allowed property to become dilapidated. Isobel Hamilton, relict
of John Whitelaw, had let two tenements of land in Haddington become
‘ruinous and utterlie decayit’.\textsuperscript{54} Her son was dead and she may have seen
no reason why she should maintain property for a remote heir. Margaret Auchinleck ‘being fallin in povertie and be hir debotchit lyfe and unhonest conversatioun, hes ... sustenit the mylne houses and biggings of Ballumbie to come to rwyin, fall and decay’.55

Some women renounced their legal rights in return for some perceived benefit. Thus, Dame Jean Johnston, Lady Salton, renounced her ‘third and terce of all and sundrie lands, lordschippis, barronies and possessiounis quhilks pertenit to hir said umquhile spous and to the leving of Saltoun’; for his part, George Lord Salton bound him, his heirs, executors and assignees
to content and pay to the said Dame Jean Johnston yeirlie during hir lyftyme ten chalders cheritit victual, and in cais of not payment thirof, the sowme of ten merkis for ilk boll thairof, as the contract contening uther heids beirs.56

Dame Alice Ross, wife of Sir John Melville of Carnbie, renounced her liferent by giving consent to her husband to ‘infeft William Moncreiff heritable but [without] reversioun in all and haill the lands and maynes of Carnbie’. It had been agreed that she should be recompensed, but ‘trew it is that the said William Moncreiff nevir as yit maid satisfactioun’.57 In this way the anticipated benefit had not materialised but had provided a loophole for escaping from the contract.

A few women were determined to circumvent the law. Elizabeth Drummond used a contract to prevent certain family members inheriting her goods. For £300 she sold to Robert Drummond, her brother ‘germane’ ‘the haill guids and geir, abuliament [clothes], insicht and plenishing in his possessioun in the place of Elphinstoun according to the particular inventar ... reservand to hir use thairof during all the days of hir lyftyme’. He was to intromit with her goods if she died without heirs. She died childless and intestate. She had acquired further goods since the transaction and the intromitters with these goods refused to hand them over to the brother. The Court, however, found that her brother ‘had guid ryt to the guids and geir pertening to umquhile Elizabeth Drummond’.58 Margaret Winton sought, unsuccessfully, to defeat the course of law by passing on goods to her daughter on the view that these ‘wald justlie befall and pertene to her as relict’. The son as executor dative claimed them because her dead husband’s debts greatly exceeded his free gear and ‘quhile the dettis be first payit, it cannot be ... knawn quhat hir thrid part may extend to’.59

Margaret Dalgleish assigned her half of a liferent of a tenement in Edinburgh to her son after banns of marriage to her next husband had been called. She took the precaution of writing a backband, or a writing qualifying the assignation, to the effect that should her new husband die,
her son must restore the liferent to her. One can understand her motive; the liferent must have come to her through her son’s father and she may well have felt that by remarrying she was defrauding him. An advocate voiced her future husband’s fury.

In cais sic kynd of blokes (bargains) and dispositionis be sustenit, the samen sall be ane grit defraude to all men quha maries wedows or heretrices or other frie wemen quha onlie contractis thameselfis in mereage without onie concernis or assistance of ony responsall persone quha binds for thame.

The Lords annulled the disposition as ‘being given contra bonos mores without the consent of her husband quhomto sche was oblist and contractit in matrimony’ and they ‘restorit the said Margaret to hir awin ryt’.

The married woman or widow of the late sixteenth and early seventeenth century, as she appears in legal textbooks, was downtrodden and in many ways ‘widows, pupils and other poor and miserable persons’ needed protection. A healthy married woman could expect to have many children. She needed support and gender roles were clearly defined in the late sixteenth and seventeenth centuries. The fundamental difficulty for a wife lay in her requiring her husband’s consent to all her actions. This meant that she was utterly dependent on her husband’s sense of fairness. The principle governing the law was equity and reason but it was not necessarily the principle governing a marriage relationship.

Nevertheless the evidence of testaments and court records suggests that many wives were in fact well protected and had legal freedom in practice, whether it derived from the consent to write a testament given by a fair-minded and understanding husband or from conditions written into a marriage contract by a far-sighted father.

NOTES

7. Scottish Record Office [SRO], CS5/8 and CS5/6.
8. SRO, CS7/185-193.
9. SRO, CS7/15/77-79.
11. For example, SRO, CS7/192 fo 223r; CS 7/189 fo 65v.
12. Paton, 100, 103; Balfour, *Practicks*, 93.
16. SRO, CC8/8/34. 25 February, 1600.
17. For example, SRO, CC8/8/41. January 1602.
18. SRO, CC8/8/35. 8 May 1600; CC8/8/45. 20 May 1608.
19. SRO, CC8/8/35. 8 November 1600.
20. SRO, CC5/6/1 fo 181r.
22. SRO, CC5/6/1 fo 39v; CC8/8 fo 39. 5 August 1600.
23. SRO, CC8/8 fo 45. April 1608.
24. SRO, CC5/6/4 fo 1r.
25. SRO, CS7/192 fo 133v. Ker v Edmestoun.
27. Paton, 100–104.
29. SRO, CS7/186 fo 131v.
37. SRO, CS7/186 fo 131v. Newall v Fergusson.
38. SRO, CS15/78, 2. Hammilton v. Ker.
40. SRO, CC5/6/6 fo 439.
41. SRO, CC5/6 fo 666.
42. SRO, CS7/186 fo 252r. Campbell v. Betoun.
44. Cf. John Finlay's paper in this volume.
45. SRO, CC5/6/4 fo 42v; CC5/6 fo 70v.
46. SRO, CC5/6/1 fo 119v.
47. SRO, CS 7/190 fo 121r.
50. SRO, CS7/186 fo 246. Lord Edmoston v Tait.
54. SRO, CS7/190 fo 311r. Quhitlaw v. Hammiltoun.
55. SRO, CS7/190 fo 254v. L. Secretar v. Auchinlek.
56. SRO, CS7/185 fo 285r. Ker v. L. Saltoun.
57. SRO, CS7/185 fo 234v. L. Carnbie v. Moncreiff.
59. SRO, CS7/186 fo 221r. Meldrum v. Forret.
60. SRO, CS7/187 fo 344r. Hereot v. Crystie.