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Women and the Transmission of Property:

Inheritance in the British Isles in the 17th Century

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The effect of the law and practice relating to the ownership by and transmission of property by and to women in the British Isles, was to favour men. However, by a variety of means, not least the multiple jurisdictions in the three kingdoms which made up the British Isles, it was possible for women to circumvent some of these restrictions, or at least to vary them. While it is true that the mechanisms by which they were able to do so often derived from ancient jurisdictions, it is generally not the case, as has often been suggested, that there was some earlier golden age for women in which they had much more economic freedom.¹

It was not until the eighteenth century that the study of the distant past in the different parts of the British Isles was taken up seriously and peoples such as the Anglo-Saxons, Picts, Druids and Celts regarded as anything more than barbaric. Enthusiasts portrayed these ancient peoples in a variety of guises often claiming the existence of freedoms that had been lost with the laws and materialism of later ages.² Frequently observations were made about the status of women. An anonymous book on the laws of England relating to women, published in 1777, claimed that

In the Saxon times, the rank and consequence of women appear to have been considerable....The Norman invasion was fatal to the rights of women.³

It was asserted that under the Brehon (Celtic) laws in Ireland

women were not mere chattels but had a framework in which they could carve out much freedom for themselves, if they wished.⁴

Recent scholarship has not shown Anglo-Saxon society to be notably free, and it has demonstrated that early Irish society was inegalitarian and offered women few rights.⁵ These myths, however, prove remarkably persistent. They perform a rhetorical function in affording a basis for looking at very long term changes in society. But another possible reason for their survival is that traces of ancient societies endured in legal systems which provided women the possibilities of circumventing some of the restrictions placed on their capacity to own and transfer property. In reality, it was not that these legal systems allowed special freedoms to women, but rather that it was possible for lawyers to exploit the contradictions between these co-existing jurisdictions.

This article is concerned with the legal position of women in the British Isles and their capacity to own and transfer property at marriage and at death. In many respects the principal legal systems of the British Isles restricted women's capacity for independent action in similar ways. Primogeniture governed the transmission of land (real property) in all but the Highlands of Scotland and the north and west of Ireland (the Gaelic-speaking regions) but, unlike many other European countries, there was no equivalent to the Salic law: if there were no sons to inherit land, the descent passed to daughters rather than to more distant male relatives. The greatest discretion attached to what is known as moveable property: goods, money, debts, livestock and so on; by the seventeenth century many valuable estates consisted primarily of moveable property. So the substance of this discussion concerns the transmission of moveable property to and from women within the many jurisdictions that existed in the British Isles in the early modern period and the extent to which contradictions between the different legal codes that co-existed provided opportunities for women to circumvent restrictions placed on their powers over property.

The three kingdoms and the law

France, Spain and the Habsburg lands were all monarchies, each being made up of an accumulation of territories, assembled over the centuries, with a wide variety of jurisdictions and customs. The British Isles from 1603 was no different. The territory consisted of 'Britain' (England, Scotland and Wales);

Ireland; and a multitude of smaller islands such as the Isles of Wight, Man and Lundy; and small archipelagos such as the Hebrides to the west of Scotland, the Orkney and Shetland Islands to the north-east of Scotland, the Aran Islands to the west of Ireland, the Scilly Islands to the south-west of England and so on. The peoples who inhabited these islands also varied greatly, speaking a variety of languages as well as different dialects of English and divided amongst several different Christian denominations.

Until 1603 there were two monarchs in the British Isles. Scotland and the islands round it were ruled by the house of Stuart, closely connected with the French house of Guise. England, Wales and Ireland were ruled by the house of Tudor until 1603 when Queen Elizabeth died childless, and the crown passed to the nearest heir, who happened to be King James VI of Scotland. Wales had been formally united with England in 1536 and Ireland had been declared subject to the crown of England in 1541. So, from 1603, the whole of the British Isles shared a single monarch but, although England was the most wealthy and powerful of the nations, Scotland and Ireland were not technically subject nations. A comparable instance was that of Henri IV who ruled Navarre as king of Navarre not as king of France. However, one very important difference between the kingdoms of England, Scotland and Ireland on the one hand, and France on the other, was that the primary instrument of law-making was parliamentary acts (statute law) rather than royal decrees. The three parliaments—of England, Scotland and Ireland—were each equivalent to the *états général* rather than to *états provinciaux*. In practice they combined the functions of the French estates, which advised the king and voted subsidies, with those of the *parlements* which registered royal edicts. The monarch's real power lay in his or her freedom to call or to dissolve parliaments at will rather than in being able to impose edicts.

But much more significant for the rights of women and men over property and their power to transfer it to one another, was the mass of overlapping jurisdictions which were to be found in each nation and between different regions within them. There were three fundamentally different systems of law in operation. First, dating back to pre-Christian times, was Celtic law which had prevailed in Wales, Ireland and much of Scotland. This was not a single system of law, though its practice shared many

features in common between the different territories, in particular the traditional laws of clans in Scotland and Ireland were very similar. In Scotland by the seventeenth century Celtic law had been merged with the other law systems but it remained significant in inheritance and succession in the Highlands.⁶ In 1609 the Statutes of Iona were intended to bring Highland custom into conformity with the rest of Scotland, they were renewed in 1616 but older ways continued particularly in relation to marriage.⁷ In Ireland, by contrast, traces of Celtic law (there known as Brehon law) survived much later despite concerted efforts by the administration in Dublin to eliminate it by such measures as the attempt in 1605 to abolish Celtic land tenures.⁸

Second, there was Germanic law which had arrived with the Normans in the eleventh century. This provided the basis for feudal law in most of the British Isles and was the origin of much of the customary law found in England, Wales and Scotland. Feudal law excluded women from the ownership of land because land was granted by the king as overlord in return for his subjects' military service; subsequently this was modified in recognition of the possibility of performing military service by proxy or commuting the obligation into a money payment. Germanic law was also the ancestor of English common law, which uses precedent rather than a law code, and was used in England, Wales and in Ireland in areas settled by Anglo-Normans in the twelfth century and, later, in areas settled by the English.⁹ Traces of Norse law were to be found in the Orkney and Shetland Islands which had been part of the kingdom of Norway until 1472. The use of Norse law was officially abandoned in 1611, though local custom there continued to diverge from Scottish legal practice.¹⁰

Third, there was Roman (civil) law. Scottish law had taken much from the law brought by the Normans, but developed in a different direction from English common law from the thirteenth century as Scots lawyers were educated on the continent and were influenced by the Roman law they learnt in Paris.¹¹ So Scots law used Roman law texts rather than precedent. Civil law was also the basis for canon law. The Protestant church in England and Wales ceased to recognise any instructions from the papacy in Rome after 1535; in Ireland this took place after 1540, and in Scotland after 1560. The Churches of England, Wales and Ireland had much in common in their theology and episcopal

organisation; their disciplinary functions were exercised through ecclesiastical courts which derived from pre-Reformation courts and were regulated by canon law. These churches shared a Calvinist theology with the Church of Scotland, but otherwise the Church of Scotland's organisation and liturgy were completely distinct. Its discipline was exercised through the kirk sessions, meetings of minister and laity in each parish, with a series of higher assemblies to which difficult cases could be referred.¹² Protestant reform had only a limited effect on Ireland, and the majority of the population, especially those who spoke Gaelic rather than English, remained Catholic but the Catholic ecclesiastical hierarchy and church courts were proscribed.

The most significant feature of Protestant canon law concerning relations between men and women, that distinguished it from the canon law practised in Catholic countries, related to marriage. At the Reformation, Protestant churches reduced the number of sacraments from the seven of the Catholic church, to two: baptism and communion/mass. One reason why reformers wanted to displace marriage from the list of sacraments was the frequent abuse of Catholic marriage law. Once marriage ceased to be a sacrament, there was no reason why it should be indissoluble. So Protestant churches in Scotland, Germany, the Netherlands, and Scandinavia introduced divorce but often restricted the right to remarriage. The one Protestant church which forbade divorce and remarriage was the Church of England, an irony since it was formed out of Henry VIII's wish to dissolve his marriage with Katherine of Aragon and marry Anne Boleyn.¹³

In Scotland both men and women might bring cases of divorce on account of the adultery or desertion of the other partner.¹⁴ Divorces were administered by a secular court (the Commissary Court) and followed Calvin's precept that the right to divorce should be equal for both sexes.¹⁵ In the case of divorce for adultery, the innocent person could remarry, while the guilty party could not marry the person named in the decree; there were no restrictions on remarriage for someone divorced on the grounds of desertion.¹⁶

During the 1640s and 1650s—the period of the Civil War—there emerged in England a number of radical Protestant sects. The lapsing of press censorship meant that many of them openly advocated

abandoning traditional moral standards in favour of free love, divorce and so on. Those that survived to become fully-developed churches in the later seventeenth century did not deviate from the regulation of marriage imposed by the Church of England. The most radical consequences of the period of the revolution were the legislative union of all the nations of the British Isles as a republic, the abolition of church courts (apart from the Prerogative Court of Canterbury which proved wills), and the introduction of civil marriage. At the restoration of the monarchy in 1660, church courts were restored, though with nothing like the vigour of the period before the Civil War, and civil marriage was abolished, not to be reinstated until the nineteenth century in England and Wales and the twentieth century in Scotland.

Marriage patterns

Since the publication of J. Hajnal's work in 1965, it has been widely accepted that in most of western Europe from the sixteenth century the characteristic pattern was of late marriage for both men and women and a high degree of celibacy. The most significant criticisms of Hajnal's work have been to note that this pattern was confined to north-west Europe and may well have been well developed in parts of England long before the sixteenth century.¹⁷

The work of Wrigley and Schofield and the Cambridge Population Group has established that in England and Wales the usual age of marriage for both men and women was in the mid-twenties, with men marrying a year or two later than women.¹⁸ Royal and aristocratic marriages were sometimes concluded between very young people to secure dynastic unions, such as that between the 14-year-old James Duke of Monmouth, illegitimate son of King Charles II, and the 12-year-old heiress of the house of Buccleuch in 1663. (They were married at the minimum age for boys and girls.) In addition, detailed local studies show some variation from Hajnal's model. In England there were significant differences between town and country. In towns the age of marriage was lower than in the countryside and urban widows and widowers were more likely to remarry than their rural counterparts. England was a very much more urbanised country than anywhere else in the British Isles and its towns were

growing fast in the seventeenth century, even so, by far the majority of the population lived in the countryside as Table 1 shows.

Table 1: Percentages of population living in towns of over 10,000 inhabitants c.1650¹⁹

England	8.8
Wales (no town with more than 10,000 inhabitants)	0
Scotland (5 towns with more than 10,000 inhabitants)	3.5
Ireland (2 towns with more than 10,000 inhabitants)	1.1

Outside England, there was considerably more variation. Hajnal's model probably prevailed in Wales. The problems of lack of archives there, especially the lack of parish registers providing records of baptisms, marriages and burials, are compounded by the small number of surnames found in many Welsh communities which makes family reconstitution difficult. Hajnal's model seems to have predominated in the central region of Scotland and the Lowlands, with an average age of first marriage for women of 26 to 27 years. As in England, Scottish townswomen seem to have married younger than countrywomen.²⁰ Scotland seems to have had a more high pressure demographic regime than England, with higher birth rates, higher infant mortality and a higher overall death rate.²¹

The two places where there was significant deviation from Hajnal's model were the Highlands of Scotland and much of Ireland. However, there are very few indigenous written records for these regions, in either the English or the Gaelic language. Historians are very dependent for knowledge of these societies on the highly impressionistic accounts of visitors, which often reveal more about the prejudices and preconceptions of the writers than about the societies they describe.²² Mr Martin, a Scot travelling in 1697 to the island of St Kilda, off the north-west coast of Scotland, commented on how the women there were only 13 or 14 years old when they married.²³ In Highland areas dependent on fishing where lairds (landlords) could call on unmarried men for naval service (a relic of feudal

responsibilities to provide fighting men) the age of marriage was about 18-24 years for men and about 18-22 years for women.²⁴ Clan marriages were often between people related to one another, albeit fairly distantly, of young girls (as young as fifteen years) and with a considerable age difference between husband and wife.²⁵ These marriages resembled noble marriages in that they often formed part of a series of political alliances. Scottish ministers' wives, the subject of another study, married in their mid-twenties.²⁶ The age of marriage of both Catholics and Protestants in Ireland in the seventeenth century was lower than that of in England.²⁷ However, it was on average only lower by two or three years, it did not approach the pattern of teenage brides found in southern and eastern Europe.

The validity of a marriage was important for the transfer of property. While church marriages were usual, there existed in all parts of the British Isles forms of secular marriage, usually depending on a public pronouncement of an intention to marry. For the most part, such marriages were concluded by poorer people so even if there were contests about property they did not take place in the law courts. However, there were two situations in which the validity of a marriage was of more concern: Scottish divorce and the Celtic marriage customs.

Under Scots law, provision for men and women after divorce was not equal. In divorce for desertion, the innocent party received whatever they would have received if the other spouse were dead: so a deserted wife received a third of the estate but a deserted husband received everything his wife had brought to the marriage. Where a wife was divorced for adultery, she surrendered not only her dowry, but also any rights to moveable property or dower; where a husband was divorced for adultery, the wife received what she would have got as a widow.²⁸ The public nature of remarriage and the close involvement of the local church, probably prevented there being doubt as to the parentage of any children.²⁹

Celtic custom and law, practised on both sides of the Irish Sea, diverged significantly from Scottish civil law and from English common law. Divorce and remarriage (pre-Christian survivals) were recognised despite frequent objections from Rome, though by the sixteenth century the custom was

declining. It raised questions both of the redistribution of property and of the legitimacy of heirs. John Macgillechallum of Raasay (an island off the north-west coast of Scotland) carried off the wife of his chief, Ruari Macleod of Lewis, in 1569 and married her after her divorce.³⁰ In 1585 the Bishop of Ossory in Ireland was murdered by a man whom the bishop had threatened with gaol for his adultery in keeping an harlot and setting aside his wife.³¹ In 1619 in County Leitrim in Ireland, Sir Teig O'Rork's sons were disqualified from inheriting the lands he had received there by royal grant because the sons were declared illegitimate, their mother having been previously married to an Irish lord from whom she was divorced.³²

Another important characteristic of the marriage pattern identified by Hajnal was a relatively high incidence of non-marriage. At any one time about 60 per cent of the population was unmarried (that is to say, not yet married, widowed or never married). It is estimated that in seventeenth century England about 5 to 18 per cent of people never married, though this proportion fluctuated, reaching peaks of around 25 per cent in the 1620s, 1670s and 1690s.³³ The figures do not discriminate between men and women, but unmarried women often outnumbered unmarried men. In the late seventeenth and early eighteenth century between 11 and 25 per cent of the female population of Scotland did not marry. This figure resembles that for England, but whereas in England in the eighteenth century an increasing proportion of people married and the average age at first marriage fell, the proportion of unmarried people in Scotland remained high.³⁴ In Ireland there was both a lower age at first marriage and a very high incidence of marriage. The pattern of late marriage and a high incidence of bachelors described in so much Irish literature is a feature of the mid nineteenth century onwards. As with the age at marriage, the aristocracy showed a completely different pattern of behaviour: it was unusual for members of the aristocracy not to marry, though the proportion remaining unmarried rose sharply during the seventeenth century. In many respects, as Amy Erickson has shown, unmarried women under English common law were regarded as independent legal personalities like men, and much the same was true of Scots civil law.³⁵ There was no formal legal provision for the protection of an

unmarried woman over the age of 21 by a male relative, but in practice such women, especially young women, were often regarded as under the advice of a father, brother, uncle or other male relative.

Feme sole, feme covert: women, property and marriage

These statistics are important for understanding the disposition of property at marriage. For plebeian women, the late age of marriage provided a period when they could leave home and earn a living, in such occupations as domestic or farm service, which provided them with a dowry to take to a marriage. Wealthier women, whose age of marriage was lower, had dowries provided by their families.

In most of Britain and Ireland a women's family of birth handed over the dowry to the married couple whereupon the husband could dispose of it as he wished under the common law doctrine of *feme covert* which governed the rights of wives. Wives could hold no freehold land (real property) except through their husbands, nor could they alter or dispose of property without their husbands' consent even if it was their own inheritance. Women could not make wills or appoint executors without their husbands' agreement. All wives' moveable property at the time of the marriage, or acquired subsequently, became their husbands' (though, by custom, household goods were usually regarded as the woman's own). In Scotland the wife could not give away moveable property during her lifetime without her husband's consent, at her death she could bequeath it. Moveable property normally included rents and the income from leases and annuities and, from the early eighteenth century, income from stock in chartered companies.³⁶ The husband was not normally entitled to dispose of the land or capital that provided the income which, at his death, reverted to the wife as widow who could now own such property in her own right. These provisions were substantially the same in Scotland. Both countries recognised 'paraphernalia', personal jewellery and clothing which was treated as the wife's own property. She might not be able to dispose of it without her husband's consent, but she could bequeath it freely.

The theoretical basis for the doctrine of *feme covert* in England was not that the wife surrendered herself to her husband, but that the two people became one. In Scotland, however, the theory that underpinned the law of matrimonial property was far from certain. In the seventeenth and eighteenth centuries Scots lawyers started to assert that matrimonial property was held in common, an idea that was probably brought from France by Scottish law students studying there. In practice, the husband had an absolute right over all property because his wife was personally subject to him. He could treat his wife's property as his own but he could not do anything that injured his wife's interest without benefiting him or which took effect against her at his death.³⁷

The idea of merging a woman's identity with her husband's for economic purposes was varied in a number of ways which allowed married women to own and dispose of property in their own right and even to appear as litigants. The most commonly used was the marriage settlement, though various forms of trust became increasingly popular in the seventeenth century.³⁸ The enforcement of such contracts in England, Wales and Ireland took place in the equitable Court of Chancery which did not recognise the doctrine of *feme covert*, so a married woman whose marriage contract had been breached could sue in that court. Canon law also did not recognise the doctrine of *feme covert*, but cases that appeared in the church courts normally concerned the validity of marriages rather than matrimonial property. In England, common law did not recognise the kinds of trust that were used to establish jointures and in Scotland there was, until 1730, some doubt as to the validity in civil law of contracts which set aside the husband's rights over his wife's property.³⁹

In England, Wales and lowland and central Scotland, the family who provided a dowry for a bride gave up any right to the property unless a marriage contract made some specific exception as, for example, the marriage being childless. There was also no relationship between the dowry and the dower (what a woman was entitled to as a widow), though it was understood that a condition of the dowry was provision for widowhood.⁴⁰

Under the Celtic law that governed many marriages in the Highlands of Scotland and in Ireland amongst the Gaelic-speaking Irish inhabitants (as opposed to the Anglo-Normans or later English and

Scots settlers) arrangements were rather different. Women could not own land because, under Celtic law, land was held by clans or kin groups, rather than by individuals, and was periodically redistributed between the male members of the clan.⁴¹ Land was primarily used for grazing cattle not for cultivation, so cattle were the primary form of wealth. Irish women brought cattle, sheep, horses, household equipment (often implements to do with dairying) as dowry.⁴² Such dowries were the means of supplying the farming stock for the newly-married couple. Thomas Dineley, writing in 1681, commented upon how, before a woman was to be married, for a year beforehand, she would go round with relatives and servants 'mumping' or begging a portion. A prospective bride of some standing might get seven or eight head of cattle by this means, a woman of lesser standing sheep, pigs, geese and poultry. He noted that 'a marriage is never completed until they have an iron pot, gridiron, ... a Irish chest...and... a rug or blanket'.⁴³ Irish noblewomen brought others form of moveable property: Gráinne O'Malley brought a fleet of ships, Agnes Campbell a troop of mercenary soldiers, and Marion Macleod 200 cows and a galley [ship] of 24 oars and three sails.⁴⁴ A further difference was that in theory under Brehon law wives retained considerable control over their portions, creating a tradition of women warriors like Gráinne O'Malley.⁴⁵ At the time that the marriage took place, however, the husand's family was expected to provide for the wife either the use of land or rental income for life.⁴⁶

Women, property and inheritance

In England and Wales there was no relationship between dowry (the property a women brought to a marriage) and dower (her entitlement as a widow). The right to dower had been established by custom but it was asymmetrical: a widower was entitled under common law to the whole of his late wife's property, provided she had borne a living child, while a widow was entitled to only a third of her late husband's property regardless of whether she had had any children.⁴⁷ Dowry and dower were not just material provision for married or widowed women, they also represented the formation of a new set of alliances forged by the marriage, the nature of which depended much on the social status, the wealth and the location of the families.

During the seventeenth century an increasing high proportion of the population made wills. Their content was frequently influenced by the custom that applied in cases of intestacy: at a husband's death, the normal disposition was a third of the moveable estate to his widow, a third to his children, and a third to dispose of as he wished. If there were no children half the estate went to the widow. If there was no wife, half the estate went to the children, the other half in each case being the testator's to dispose of as he wished. The courts which were responsible for proving wills and ensuring that their provisions were carried out did so in accordance with this formula. But from 1692 a legal precedent was established that a testator might dispose of the whole of his estate as he wished, removing at a stroke widows' protection. However, in practice many safeguards continued as, for example, the custom of allowing widows to assume their late husband's tenancy of land. The majority of the female tenants of the Bishop of Durham's great estates in the north of England held their land by 'widowright'.⁴⁸

The right to dower could be set aside at the outset of the marriage by a marriage contract. An increasingly widely used device was a contract known as a jointure which made provision for the possible widowhood of the new wife by purchasing land in which she received a life interest. In the hands of a generous husband it could provide his widow with more than she might otherwise have been entitled to.

In Ireland, the survival of Brehon custom can be seen when it came into conflict with English common law and where resolution was sought in the the Dublin Court of Chancery. The difference in principal that gave rise to the need for a law suit was that Brehon law saw land as the property of a kin-group, while common law sees land as the property of an individual. In common law, land (real property) normally descended to the eldest son, then to any other sons, then, in the absence of a son, to the daughters not to a more distant male relative. Chancery was the forum for a number of contests between the two legal systems. Mary O'Dowd has shown how, in the interests of securing the primacy of common law and the property rights of English settlers in Ireland, Chancery consistently decided in favour of women inheriting land which they were prevented from doing under Brehon law.⁴⁹

Conclusion

It is clear that in the British Isles in the seventeenth century there was a mass of overlapping jurisdictions which treated women's ownership of property and its transmission in a variety of different ways. People had a choice about which courts or legal system to use to resolve disputes, however it is not clear that women knew enough to use the differences between the various jurisdictions strategically to protect their own interests. It is more likely that cases were brought by families trying to protect some common interest.

This paper has largely been concerned with moveable property, which certainly became much more important during the seventeenth century as merchants and financiers built up large fortunes that were not based on the ownership or occupation of land. However, land remained an extremely important source of wealth and England had a fluid land market with rising land prices for the first half of the seventeenth century, though the return from rent was less than that from other forms of investment.⁵⁰ England did not acquire a land registry until 1862, so we cannot quantify women's ownership of land in the seventeenth century, but it is possible to do this for both Scotland and Ireland.

In 1617 a General Register of Saisines, to record all land transfers in Scotland, was established.⁵¹ In the early seventeenth century women formed just over 40 per cent of all the principals whose transactions were recorded in the General Register; in the majority of these they were joint principals with a man, usually a husband or son. By the 1690s the proportion of women joint principals had fallen slightly to 37 per cent with around a similar volume of transactions. In around 25 per cent of cases the women seems to have been a sole principal. There was an increase, over the period, in the number of transactions involving women as joint principals with other women, though the sample may be too small for this to be statistically significant.⁵²

Table 2: Women involved in land transactions in Scotland, seventeenth century

Year	All Principals (men & women)	Women joint and sole principals
1610s	381	157 (41%)
1690s	396	136 (37%)

The Irish land registry was established in 1707 to monitor compliance with the penal laws restricting the ownership and transfer of land (by sale gift or inheritance) by Catholics, enacted after the victory of the Protestant King William III in 1692.⁵³ Of the first 100 transactions in the register women were sole principals in 8 transactions and joint principals in 19. Most of the sole principals were widows. Where a wife was a joint principal the transaction often involved land which she brought to the marriage; a number of the other female joint principals were executors or beneficiaries of wills.⁵⁴

The evidence for both Scotland and Ireland shows that although married women could not control land without special legal provisions, nevertheless, a high proportion of transactions involved women as whole or part owners. In England, although we have no records comparable to those of Scotland and Ireland, short life expectancies and the 40 per cent of marriages that had no son aged 21 years or over at the time of a father's death meant that women, as a matter of fact, frequently had the disposition of matrimonial property, even if they were treated primarily as agents of its transmission between males.⁵⁵ The real extent of women's control over property contradicts some of the more fanciful ideas about how women in the distant past had greater power than those in the sixteenth and seventeenth centuries.

Making comparisons between the ways in which women in different parts of the British Isles could hold or dispose of property provides us with the opportunity not only to track change in women's lives, but also to understand that apparently similar affects may be obtained by quite different legal provisions, social systems and economic relationships.

References

- ¹ Amanda Vickery, 'Golden age to separate spheres? A review of the categories and chronology of English women's history', *The Historical Journal* 36 (1993), pp.383-414.
- ² William Ferguson, *The Identity of the Scottish Nation: An Historic Quest*, Edinburgh: Edinburgh University Press, 1998, p.205
- ³ Anon., *The Laws Respecting Women...in 4 Books*, London, 1777, p.x.
- ⁴ Patrick C. Power, *Sex and Marriage in Ancient Ireland*, Cork: Mercier Press, 1986, p.77.
- ⁵ Fergus Kelly, *A Guide to Early Irish Law*, Dublin: Dublin Institute of Advanced Studies, Early Irish Law Series III, 1988, p.3.
- ⁶ Derick S. Thomson (ed.), *The Companion to Gaelic Scotland*, Oxford: Blackwell, 1987, p.147. Virtually no early Scottish law texts survive so much of our understanding of early Scots law has been extrapolated from Irish texts. John Cameron, 'Celtic law', in *An Introductory Survey of the Sources and Literature of Scots Law*, Edinburgh: Stair Society 1 (1936), pp.335-6.
- ⁷ John Cameron, 'Celtic law', p.352; R.A. Dodgshon, *From Chiefs to Landlords: Social and Economic Change in the Western Highlands c.1493-1820*, Edinburgh: Edinburgh University Press, p.40.
- ⁸ Brehon law derived from law texts of the 7th-8th centuries preserved, often in corrupted form, in manuscripts of the 14th-16th centuries. It was designed to regulate a society that was tribal, rural, hierarchical and based on the family rather than the individual. Every person had an 'honour price', there were free and unfree individuals, and wives, sons and daughters were valued at half the honour-price of husbands and fathers. Fergus Kelly, *A Guide to Early Irish Law*, Dublin: Dublin Institute for Advanced Studies, 1988, pp.1, 3, 11; Mary O'Dowd, 'Gaelic economy and society', in Ciaran Brady and Raymond Gillespie (eds), *Natives and Newcomers: the Makings of Colonial Society 1534-1641*, Dublin: Irish Academic Press, 1986, p.141.
- ⁹ Brian P. Levack, *The Formation of the British State: England, Scotland and the Union 1603-1707*, Oxford: Clarendon Press, 1987, pp.18-19.
- ¹⁰ Gordon Donaldson, *Scotland James V-James VII*, Edinburgh History of Scotland, vol.3, Edinburgh: Oliver and Boyd, 1978, p.233.

¹¹ Lord Cooper of Culross, 'From David I to Bruce 1124-1329', in *An Introduction to Scottish Legal History*, Edinburgh: Stair Society 20 (1958), p.15.

¹² Margot Todd, *The Culture of Protestantism in Early Modern Scotland*, New Haven & London: Yale University Press, 2002, pp.9-13.

¹³ The term divorce was often used in England for separation from 'bed and board' (*a mensa et thoro*), a continuation of the pre-Reformation form of legal separation without the right to remarry. It was possible to get a private Act of Parliament to permit remarriage (though this did not actually dissolve the marriage), but the process was expensive and complicated and in the period 1670-1857, 325 were granted. See Roderick Phillips, *Putting Asunder*, New York: Cambridge University Press, 1988, p.230; Lawrence Stone, *The Road to Divorce*, Oxford: Oxford University Press, 1990, pp.309-11.

¹⁴ Ronald D. Ireland, 'Husband and wife', in *An Introduction to Scottish Legal History*, Edinburgh: Stair Society 20 (1958), p.95.

¹⁵ The incomplete survival of the Commissary Court records prevents us from knowing how many divorces took place before 1684. In the period 1684-1830 there were 904 divorces, most of which took place after 1770. Leah Leneman, *Alienated Affections: the Scottish Experience of Divorce and Separation 1684-1830*, Edinburgh: Edinburgh University Press, 1998, p.13.

¹⁶ Rosalind Mitchison & Leah Leneman, *Sexuality and Social Control*, Oxford: Blackwell, 1989, pp.85-6; Leneman, *Alienated Affections*, p.6.

¹⁷ J. Hajnal, 'European marriage patterns in perspective', in D.V. Glass & D.E.C. Eversley (eds), *Population in History*, London: Edward Arnold, 1965, pp.101-46; Jack Goody, *The Development of the Family and Marriage in Europe*, Cambridge: Cambridge University Press, 1983, pp.8-9; Zvi Razi, 'The myth of the immutable English family', *Past and Present* 140 (1993), p.42.

¹⁸ E.A. Wrigley & R.S. Schofield, *The Population History of England 1541-1871: A Reconstruction*, 1981, reprinted Cambridge: Cambridge University Press, 1989; E.A. Wrigley, R.S. Davies, J.E. Oeppen, & R.S. Schofield, *English Population History from Family Reconstitution 1580-1837*, Cambridge: Cambridge University Press, 1997.

¹⁹ R.A. Houston, *The Population History of Britain and Ireland 1500-1750*, Studies in Economic and Social History, London: Macmillan, 1992, p.32. French towns displayed Hajnal's characteristics more clearly. Katherine A. Lynch, 'The European marriage pattern in the cities: variations on a theme by Hajnal', *Journal of Family History* 16 (1991), p.86; E.A. Wrigley, 'Marriage, fertility and population growth in eighteenth-century England', in R. Outhwaite (ed.), *Marriage and Society: Studies in the Social History of Marriage*, London: Europa, 1981.

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- ²⁰ Houston, *The Population History of Britain and Ireland*, p.37.
- ²¹ Ian D. Whyte, 'Scottish population and social structure in the seventeenth and eighteenth centuries: new sources and perspectives', *Archives* 89 (1993), p.31.
- ²² Anne Laurence, 'Cradle to the grave: English observations of Irish social customs in the seventeenth century', *The Seventeenth Century* 3 (1988), pp.63-84.
- ²³ M.Martin, 'A voyage to St Kilda', in *Miscellanea Scotica: A Collection of Tracts Relating to the History, Antiquities, Topography and Literature of Scotland*, Glasgow, 1818, vol. II, p.37.
- ²⁴ M. Flinn (ed.), *Scottish Population History from the Seventeenth Century to the 1930s*, Cambridge: Cambridge University Press, 1977, p.273.
- ²⁵ Allan Macinnes, *Clanship, Commerce and the House of Stuart 1603-1788*, East Linton: Tuckwell Press, 1996, p. 9.
- ²⁶ Flinn, *Scottish Population History*, p.275.
- ²⁷ George O'Brien (ed.), *Advertisements for Ireland*, Dublin: Royal Society of Antiquaries of Ireland, 1923, p.43.; David Dickson, 'No Scythians here: women and marriage in seventeenth century Ireland', in Margaret MacCurtain & Mary O'Dowd (eds), *Women in Early Modern Ireland*, Dublin: Wolfhound Press, 1992, pp.230-232.
- ²⁸ G. Campbell H. Paton, 'Husband and wife: property rights and relationships', in *An Introduction to Scottish Legal History*, Edinburgh: Stair Society 20 (1958), p.110.
- ²⁹ Todd, *Culture of Protestantism*, p.290. The provincial assembly of the kirk in Argyll insisted in the 1650s on proof of the husband's death or that a divorce really had been effected before allowing a woman to remarry. Duncan C. Mactavish (ed.), *Minutes of the Synod of Argyll 1652-1661*, Scottish History Society 3rd series 38 (1944), p.29.
- ³⁰ D. Gregory, *History of the Western Highlands and Isles of Scotland from AD 1493 to AD 1625*, Edinburgh: William Tait, 1836, p.266.
- ³¹ 'Letter Book of Lord Deputy Sir John Perrot 1584-6: Perrot Papers', *Analecta Hibernica* 12 (1943), p. 35.
- ³² Dublin: Trinity College, Molyneux MS 883/1, f.139.
- ³³ Wrigley & Schofield, *Population History of England*, p.263.
- ³⁴ Whyte, 'Scottish population', p.31.
- ³⁵ Amy Louise Erickson, 'Coverture and capitalism', *History Workshop Journal* 59 (2005), pp.1-16.

³⁶ *The Lawes Resolutions of Womens Rights*, London, 1632. Under statutes of 1697 and 1719 stock in the Bank of England and the South Sea Company were declared to be personal estate (8 & 9 Will III, c.20, s.33; 6 Geo II, c.4). Paton, 'Husband and wife', pp.103, 100.

³⁷ Paton, 'Husband and wife', p.100.

³⁸ Amy Louise Erickson, *Women and Property in Early Modern England*, London: Routledge, 1993 and Susan Staves, *Married Women's Separate Property in England 1660-1833*, Cambridge, Mass.: Harvard University Press, 1990. Erickson (pp. 102-3) identifies two main types of contract: the 'strict settlement' used by propertied families to keep an estate intact by passing it through the male line; and the 'separate estate' which provided a married woman with property which was outside her coverture, and thus outside the husband's control.

³⁹ Erickson, *Women and Property*, p.26.;Paton, 'Husband and wife', p.101.

⁴⁰ Eric M. Clive, *The Law of Husband and Wife in Scotland*, 3rd end, Edinburgh: W. Green/Sweet and Maxwell, 1992, p.2.

⁴¹ See particularly on Welsh law, R.R. Davies, 'Property interests in the classical Welsh law of women', in Dafydd Jenkins and Morfydd E. Owen (eds), *The Welsh Law of Women: Studies Presented to Professor Daniel A. Binchy on his 80th Birthday*, Cardiff: University of Wales Press, 1980, p.98; K.W. Nicholls, 'Some documents on Irish law and custom in the sixteenth century', *Analecta Hibernica* 26 (1970), pp.105-6.

⁴² Mary O'Dowd, 'Women and paid work in rural Ireland, c.1500-1800', in Bernadette Whelan (ed.), *Women and Paid Work in Ireland 1500-1930*, Dublin: Four Courts Press, 2000, p.14.

⁴³ Thomas Dineley, *Observations in A Voyage through the Kingdom of Ireland*, Dublin: Dublin University Press, 1870, pp.20-1.

⁴⁴ Aidan Clarke, 'The Irish economy, 1600-60', in T.W. Moodie, F.X. Martin & F.J. Byrne (eds), *A New History of Ireland vol.III: Early Modern Ireland 1534-1691*, Oxford: Clarendon Press, 1978, p.172; Macinnes, *Clanship and Commerce*, p.9.

⁴⁵ Katherine Simms, 'Women in Gaelic Society during the age of transition', in Margaret MacCurtain & Mary O'Dowd (eds), *Women in Early Modern Ireland*, Dublin: Wolfhound Press, 1991, p.38.

⁴⁶ Dodgshon, *From Chiefs to Landlords*, p91.

⁴⁷ P. Brand, "'Deserving" and "undeserving" wives: earning and forfeiting dower in medieval England', *Legal History* 22 (2001), pp.1-20.

⁴⁸ D.A. Kirby (ed.), *Parliamentary Surveys of the Bishopric of Durham* vol.2, Surtees Society 185 (1972), pp.24-33. Women held land in Hampshire manors by manorial custom despite disqualification in common law and made up to 20 per cent of tenants on most manors at any time before 1850. Sylvia Seeliger, 'Hampshire women as landholders: common law mediated by manorial custom', *Rural History* 7 (1996), pp.1-14.

⁴⁹ Mary O'Dowd, 'Women and the Irish chancery court in the late sixteenth and early seventeenth centuries', *Irish Historical Studies* 31 (1999), pp.470-87.

⁵⁰ Lawrence Stone & Jeanne C. Fawtier Stone, *An Open Elite? England 1540-1880*, Abridged Edition, Oxford: Oxford University Press, 1986, p.11.

⁵¹ The indexes for these provide a summary of transactions and women are easy to trace because, in Scottish custom, they did not take their husband's surname.

⁵² The figure may be lower as in some cases women will have been acting jointly with someone to whom she was not related and cannot therefore be identified by name from the index.

⁵³ The 'popery act' of 1704 prohibited Roman Catholics from buying land or from leasing it for more than 31 years and placed restrictions on who could inherit the land. At a man's death his estate had to be 'gavelled' (divided between all his sons) unless the eldest turned Protestant, in which case he took everything. The Catholic father of a Protestant heir was reduced to the status of life tenant. J.G. Simms, 'The establishment of Protestant ascendancy 1691-1714' in T.W. Moody and W.E. Vaughan (eds.), *A New History of Ireland: vol. IV: Eighteenth Century Ireland*, Oxford: Clarendon Press, 1986, pp.19-20.

⁵⁴ The references are to the first volume of the Register of Deeds kept at the Registry of Deeds, King's Inns, Dublin.

⁵⁵ Erickson, *Women and Property*, p.5.