

Workshop five

Family

Members of the Scottish Parliament were not only men (women never attending other than in a few occasions as wives of elite nobles when they observed the opening ceremony or if the Queen was head of state) but also fathers, sons and husbands and so naturally they were concerned for the welfare of the medieval and early modern family in Scotland. For example, before and after the Protestant Reformation in 1560 Parliament legislated to maintained the principles that marriage was forbidden before the age of puberty (14 years for men and 12 years for women) though in reality marriages occurred much later, and in the case of the nobility nearly two thirds in the period 1560 to 1637 married between 18 and 25 years. Inheritance depended on the legitimacy of marriage and parenthood and was seen as vital but other matters such as adultery, divorce and the relationship between parent and child were also reviewed by parliament members who were, along with their church, just as anxious as modern counterparts to preserve social institutions.

[A widow's right to enjoy the terce on her husband's death (her right for as long as she lives thereafter for a third of the husband's heritable estate) was confirmed in 1504, unless subsequently they were found not to be lawfully married]
{Act to confirm the rights of widows, 1504}

It is decreed and ordained as regards the exception proposed against widows pursuing and following their brieves* of terce or the profits of their terces, when it is often proposed against those widows that they were not lawful wives of the persons, their husbands, through whom they pursue their said terce, that therefore where the matrimony was not challenged during their lifetimes, that the woman seeking this terce being of good standing and held as his lawful wife during his lifetime shall be terced and use her terce without any impediment or exception to be proposed against her forever and until it is clearly determined and sentence given that she was not his lawful wife and that she should not have a lawful terce for that reason.

[RPS, 1504/3/122]

[The 1552 session of parliament was the first to show a partial interest in updating the law of marriage. Both bigamists and adulterers were the targets, the former to be punished as perjurors as their crime was a violation of the marriage oath, and the latter as open and incorrigible individuals to be put to the horn, that is declared outlaws]

{Concerning those who marry two wives or husbands, 1552}

It is statute and ordained that whatsoever person marries two sundry wives or a woman marries two sundry husbands, living together, not being lawfully divorced, in opposition to the oath and promise made at the solemnization and contracting of the matrimony, and so of the law are perjurious and infamous, therefore, that the pains of perjury be executed upon

them with all rigour; that is to say, confiscation of all their moveable goods, warding of their person for a year and a day and longer enduring the queen's will, and as infamous persons are never able to possess offices, honours, dignity or benefices* in time to come.

[RPS, A1552/2/11]

[**Restrictions on marriage caused by consanguinity (blood relationship) and affinity (relationships transferred from spouse to spouse on marriage) were a particular concern with reference to the Bible. The Papal Lateran Council of 1215 standardised the forbidden degrees to those within four degrees of consanguinity and affinity, but the addition of 'spiritual degrees' to bar those closely related to witnesses and godparents at baptisms and the possibility of papal dispensations led to some level of disreputable activity. Although it took a little time for parliament to respond to pressure from the church following the Reformation, and from the policies of the First Book of Discipline (1560-1), in 1567 a more rigorous but more practical code was enacted where persons of second degree (or more distant) of consanguinity or affinity could marry provided this did not conflict with God's law as contained in the Book of Leviticus. In fact two interrelated acts were passed simultaneously, the one declaring lawful such marriages (see below) and the other to introduce the capital crime of incest.]**

{Concerning lawful marriage of the own blood in degrees not forbidden by God's word, 1567}

Our sovereign lord, with advice and consent of *James Stewart, earl of Moray*, my lord regent, and three estates of this present parliament, has statute and ordained that the holy bond of marriage made by all estates and sorts of man and woman to be as lawful and as free as the law of God has permitted the same to be done, without exception of person or persons; and has declared and declares that seconds in degrees of consanguinity and affinity, and all degrees outwith the same contained in the word of the eternal God and that are not repugnant to the said word, might and may lawfully marry at all times since 8 March 1558 [1559], notwithstanding any law, statute or constitutions made in the contrary; and ratifies and approves all the said marriages done since the said day and the bairns procreated, or to be procreated, in such marriage to be as lawful, as well toward their succession to lands, heritages or any other liberties as any bairns procreated in marriage, and to be reputed and esteemed in all time to come lawfully procreated in lawful marriage, notwithstanding any laws, statutes, constitutions or acts made, or to be made, in the contrary.

[RPS, A1567/12/1]

[**Preventing clandestine marriages was yet another common objective of Presbyterians and Episcopalians from the mid-seventeenth century onwards when church party politics demanded officiation by an authorised minister. Penal laws were first introduced in 1649 to stop clandestine marriages, though some continued anyway]**

{Act against clandestine marriages, 1649}

The estates of parliament etc., considering how necessary it is that no marriage be celebrated but according to the laudable order and constitution of this kirk and by such persons as are by authority of this kirk warranted to celebrate the same, and that, notwithstanding hereof, sundry, either out of disaffection to the religion presently professed in this kingdom, or being desirous to eschew the censures of this kirk, or to falsify their promise of marriage formerly

made to others, or to decline the concurrence and consent of their parents or others having interest, or out of some other unlawful pretext, do procure themselves to be married and are married either in a clandestine way, contrary to the established order of the kirk, or by Jesuit priests, deposed or suspended ministers, or any other not authorised by this kirk, do therefore statute and ordain that whatsoever person or persons shall hereafter marry, or procure themselves to be married in a clandestine and unorderly way, or by Jesuit priests or any other not authorised by this kirk, that they shall be imprisoned for three months, and besides their said imprisonment shall pay each nobleman £5,000, each baron and landed gentleman 5,000 merks, each gentleman and burgess £1,000, each other person 500 merks, and that they shall remain in prison until they make payment of their said respective penalties above-mentioned, which are hereby ordained to be uplifted to pious uses within the several parishes where the said persons dwell; and that the celebrator of such marriages be banished from the kingdom, never to return therein under the pain of death. And ordain the procurator for the kirk to pursue before the civil judge the fulfilling of this act and ordinance for the corporal and pecuniary pains above-mentioned without prejudice always to the kirk to proceed with their censures against such offences. Likewise the estates of parliament ratify the eighth act of the parliament 1641 against those persons who go to England or Ireland and marry without proclamation of banns in this country and against the order and constitution of this kirk, with this addition: that the contraveners shall be liable to the respective pecuniary and corporal pains mentioned in this present act, and that the pecuniary pains shall be applied to pious uses.

[RPS, 1649/1/127]

[Marital breakdown was also a matter of concern for the Scottish parliament, not least because of the implications for inheritance. The first statute regarding adultery arose in 1552 and through this open adulterers who would not ‘desist and ceis thairfra for feir of ony spirituall jurisdiccioun or censuris of halie kirk’ were to be put to the horn and lose their property. ‘Notour’ or notorious adulterers were distinguished from simple adulterers who when censured mended their ways. After the Reformation in an act of 1563 notorious and manifest adulterers were to be punished by death if they would not head the censures of the church but it was not until after a commission was formed that new explanatory act came in 1581].

{The explanation of the act touching the notorious and manifest committers of adultery, 1581}

Concerning the supplication made to the king's majesty and his three estates of this present parliament, craving an explanation of the act of parliament made in the reign of *Mary*, the queen, his highness's dearest mother, concerning adultery, that is what shall be esteemed and judged in law to be notorious and manifest adultery, worthy of the pain of death mentioned in the said act; it is therefore declared by his highness, with advice of his three estates in this present parliament, that it shall be judged in law notorious and manifest adultery, worthy of the said pain of death, where there are bairns, one or more, procreated between the persons, adulterers, or when they keep company and bed together well known, or when they are suspected of adultery and thereby give slander to the kirk, whereupon, being duly admonished, to abstain and satisfy the kirk by repentance or purgation, and yet contemptuously refusing, are excommunicated for their obstinacy; all these three degrees of adulterers, and every one of them, being lawfully called and convicted before the justice and his deputes, shall incur and suffer the said pain of death.

[RPS, 1581/10/26]

[The same 1563 act that introduced the death sentence for adultery (see RPS A1563/6/10) also stipulated that it should not prejudice the right of the injured party over divorce. The position of the church and state is summarised in the Confession of Faith, a manifesto of church policy, that was first approved by Parliament after the Reformation but again in 1690 after the revolution against James VII and II in 1688-89, following which religious and moral priorities were re-affirmed]

{Chapter 24 of the ‘Confession of Faith’ approved by Parliament in 1690}

Adultery or fornication committed after a contract, being detected during marriage, giveth just occasion to the innocent party to dissolve that contract. In the case of adultery after marriage, it is lawful for the innocent party to sue out a divorce, and after the divorce to marry another, as if the offending party were dead

[RPS, 1690/4/33]

[Parliament took a view on the relationship between parent and children and that the former were responsible for the behaviour of their sons and daughters. Here an act of 1504 made it clear that fathers were responsible for the misconduct of their children and of 1685 made more specific reference to the punishment code in order to protect essential crops]

{Parents to punish children who steal produce or deliver them for corporal punishment, 1504}

Regarding those who steal rabbits, pikes out of ponds, [those who] break dovecotes or orchards, or [those who] steal bee-hives and destroy them, and also for those who kill enclosed deer or roes or roebucks from the lord's own woods, that that be a point of dittay* in the future, and that the fine for that be £10 along with compensation for the party according to the injury; and if any children within age commit any of these aforesaid things, because they cannot be punished as they are not of legal age, their fathers or masters will pay 13s and 4d for each one of them each time [they] commit any [of] the aforesaid trespasses or else deliver the said child to the judge to be lashed, scourged and flogged according to his faults.

[RPS, 1504/3/30]

{Act for sowing peas and beans, and inhibiting the casting up of ground within the shire of Aberdeen, 1685}

Our sovereign lord, considering how much the sowing of peas and beans does contribute for improving and fattening of the ground and for entertainment of people that labour at it and the labouring beasts, and that by the 81st act of the fifth parliament, King James I, and 82nd act of the fourteenth parliament, King James II, the sowing of peas and beans was enjoined, but the quantities too little, and yet, nevertheless, in many places of the kingdom, as in Aberdeenshire, these laudable laws have gone totally in desuetude, and in place thereof the ground labourers have introduced a custom of delving, tilling and casting up great quantities of corn ground, meadow ground and swarded ground, which they lay in heaps to rot, for making dung or manure for their land, which custom has in a great part destroyed the land in diverse parts of the kingdom, and if not prevented will utterly destroy the same, and render it altogether useless for many years thereafter, and seeing that the sowing of peas and beans will be a good remedy to prevent these evils, and will be otherwise useful; therefore his

majesty, with advice and consent of his estates of parliament, statutes and ordains that all persons within the said shire of Aberdeen, who shall hereafter labour ground for corn, shall sow yearly the twentieth part of their infield or croft land with peas and beans, or peas alone, and the thirtieth part of their said infield or croft land, if the room be a muirland room, and that under the pain and penalty of £10 for every boll of the said peas and beans that shall not be sown, and so proportionally for lesser quantities, to be applied to the use of the master of the ground who sustains the prejudice by the not sowing, allowing always lesser quantities to be sown for the first three years, until the tenants be sufficiently provided of seed; and ordains the master of the ground to provide the tenant with the first seed, upon payment of just and reasonable prices. And for the better encouragement of those who shall sow these peas and beans, it is further statute and ordained that if any person or persons shall be found stealing, pulling or taking away the said peas and beans in the fields, or from the corn yards or any manner of way destroying the same, without the will and consent of the owner, he shall likewise be fined in the sum of £10 on each occasion for the use of the owner who sustains the prejudice, and the master shall be liable for the fault of the servant in so far as the servant's fee will extend to, and shall have retention against his servant who shall be legally convicted, and the parent for the fault of the children, being within fourteen years of age, or otherwise shall be held to give up his children to be corrected; and discharges and inhibits all ground labourers to cast or delve up corn ground, meadow ground or sward ground for making manure or dung for their lands in any time coming, under the pain of a £100 each time to be applied to the use of the master, who is thereby injured, and recommends to the sheriffs or justices of the peace to see this present act put in execution in case the masters of the ground be negligent.

[RPS, 1685/4/84]

[In the modern period social policy and statute are designed to protect children but the Scottish Parliament also sought to protect parents from the violence of their children, such as in this act of 1649]

{Act against beaters and cursers of their parents, 1649}

The estates of parliament etc., considering how great and atrocious a crime it is for children to beat or curse their parents and how the law of God has pronounced just sentence of death against such as shall by either of these ways injure either of their parents, do therefore statute and ordain that whatsoever son or daughter above the age of 16 years, not being deranged, shall either beat or curse either their father or their mother shall be put to death without mercy, and such as are within the age of 16 years to be punished at the arbitrament of the judge according to their deservings, that others may hear and fear and not do the like.

[RPS, 1649/1/211]

[Members of parliament could be general or quite specific in the help they gave to families, in this case how to deal with the children of a father who intermittently suffered from incapacity due to illness. It was common to set up a committee of tutors to manage the estate in favour of children. This was especially the case for 'pupils' or 'minors' too young to do so (pupils, under 14 years for males and 12 years for females, respectively the legal age of marriage or, in modern terms the age of puberty, and minors, under 21 years for males and 14 years for females). The 1685 case below is typical in the sense that tutors were sought but more unusual in that the father was alive and not insane or completely incapable. Remember to check the glossary for legal terms that are unfamiliar]

{Act in favour of the children of Sir William Primrose, 1685}

Anent the petition given in to his majesty's high commissioner and estates of parliament by the children of Sir William Primrose of Carrington, mentioning that where the petitioner's father, being afflicted with a palsy which affects his memory and judgement, and renders him altogether unfit and incapable of business and of management of his affairs and estate, whereby they not only run in confusion with great loss and prejudice, but likewise there is hazard from such persons who might take advantage of his weakness, to procure warrant from him to notaries to subscribe papers for him, which may ruin both himself and us, and seeing that he neither being idiot nor furious, a tutory dative* cannot be obtained, and there is no remedy in law provided applicable to his case and condition, and that it was most just and proper to the lords of the articles, upon this exigence, to provide a remedy; therefore, humbly craving that the lord commissioner his grace and lords of the articles might nominate, authorise and appoint John Hay, earl of Tweeddale, John Keith, earl of Kintore, John Hay, lord Hay of Yester, Walter *Sandilands*, lord Torphichen, Sir John Foulis of Ravelston, Sir James Hay of Linplum, Sir Francis Scott of Thirlestane, Sir Alexander Bannerman of Elsick, Sir Patrick Murray of [...], Sir John Young of Leny, Mr Robert Lauder, one of the clerks of exchequer, and James Hay, writer to his majesty's signet,* in whom the said Sir William had entire trust and confidence, and whom he nominated to be tutors to them after his decease, and then whom there is none more fit and the quorum appointed in the said nomination of tutors, to manage the said Sir William Primrose's affairs and estate, personal, real and casual, and to uplift his rents, profits, duties and annualrents* thereof, of all years and terms bygone resting, owing and in time coming, during his weakness from his tenants, debtors, chamberlains, coal-grieves and other intromitters,* and to call them to account, and to grant discharges thereof, and to disburse what shall be necessary for his present condition and recovery of his health, and the said children their education and maintenance, and their father's family, and for payment of his debts and annualrents, with power likewise to the said persons, from time to time during the said Sir William's weakness as said is, to nominate and appoint factors and chamberlains under them to the effectforesaid, and to allow to the said factors and chamberlains competent fees, and to nominate and appoint bailies and officers in his lands and baronies, ... and to cause set down sinks and eyes for the coal-works, and to do everything necessary therein, by the advice of the grieves and overseers of the said work and other skilled men; as also, with power to them to uplift and use all necessary diligence for securing and uplifting of such sums of money as are owing to the said Sir William, as they shall think fit and necessary, and generally with power to the said persons to do everything needful for the management of the said Sir William, his affairs and estate personal, real and casual, that he might do himself if he were in perfect health of body and perfect in memory and judgement. Which petition, being first read, voted and passed by the lords of the articles, was afterward reported, read and considered in plain parliament, and found to be reasonable and just and, therefore, our said sovereign lord, with advice and consent of the estates of parliament, nominates, authorises and appoints the persons above-named and their said quorum designed in the said Sir William's nomination, to manage the said Sir William Primrose's affairs, and to do everything else that is craved and desired in the foresaid petition during the continuance of the said Sir William's sickness and infirmity, for doing whereof this shall be to them and all that shall act by their commission a sufficient warrant.

[RPS, 1685/4/85]
