

M. Scot.

THESIS.

The ORIGIN and NATURE of the LEGAL RIGHTS of SPOUSES
and CHILDREN in the SCOTTISH LAW of SUCCESSION.

by

JOHN C. GARDNER, B.L.

Degree of Ph.D. conferred on 24th March, 1927.



The Origin and Nature of the Legal Rights of Spouses
and Children in the Scottish Law of Succession.

1.

A Brief Survey of the Roman Law relating to Wills and
Succession.

No treatise dealing with the origin and nature of legal rights in Scotland, especially those of legitim and jus relictæ, can be complete without at least a brief survey of the Roman Law on this subject, for no institutions in our jurisprudence have more persistently and erroneously had their origins ascribed to the jurisprudence of Rome. Let this, therefore, suffice as an apologia for the apparent irrelevancy of commencing this treatise with a glance at the early rules governing Wills and succession in Roman Law.

It is difficult to realise that, without the help of history, we merely strive to analyse our prima facie impressions in regard to the earliest form of Will. To a person familiar with the modern testament, it would seem a sine qua non that, whatever its form, the earliest type of Will must have taken effect at death only, that its provisions would be kept secret from those taking interest thereunder, and that it would be revocable. Yet there was a time when none of these characteristics belonged to a Will. The earliest form of testament among the Romans took effect immediately on its execution; it was not secret, nor was it revocable. The reason for this may be found in the fact that intestate succession among the Romans/

Romans is more ancient than testate succession, although many legal Writers believed the contrary. Among the Scottish Jurists Lord Bankton is a notable instance in this respect. In his Institutes he propounds the doctrine that the first rule of succession was the express Will of the Proprietor, and that where no testament had been executed, the succession was regulated by the presumed Will of the Proprietor. It is obvious that Lord Bankton evolved such a theory from the ancient rule in the famous Twelve Tables of the Civil Law, which ran thus:- "Uti quisque legasset rei suae, ita jus esto". And doubtless those other Writers, who believed succession by testament to be the more ancient, owed their opinions to the influence of this dictum.

But, as more careful Students of the Civil Law have pointed out, the earliest form of succession among the Romans did not recognise such a thing as a testament. Montesquieu in his "Spirit of Laws" thus describes the transition from this stage to the introduction of a form of Will, which would not be inconsistent with the existing laws of succession. "The order of succession having been established in consequence of a political law, no citizen was allowed to break in upon it by his private Will; that is, in the first ages of Rome, he had not the power of making a testament. Yet it would have been hard to deprive him in his last moments of the friendly commerce of kind and beneficent actions. They therefore found a method of reconciling, in this respect the laws with the/

the desires of the individual. He was permitted to dispose of his substance in an assembly of the people, and thus every testament was, in some sort, an act of the legislative power. This was the earliest form of Roman testament executed in the Comitia Calata. It was only very slowly and gradually that testaments gathered round them those features which are essential to the character of the modern Will.

It would appear that, directly or indirectly, Great Britain in common with all other European countries is indebted to the Roman Law for the conception of a Will. Sir Henry Maine in his "Ancient Law" writes - 'The barbarians were confessedly strangers to any such conception as that of a Will. The best authorities agree that there is no trace of it in those parts of their codes which comprise the customs practised by them in their original seats, and in their subsequent settlements on the edge of the Roman Empire. But, soon after they became mixed with the population of the Roman provinces, they appropriated from the Imperial jurisprudence the conception of a Will, at first in part, and afterwards in all its integrity. The influence of the Church had much to do with this rapid assimilation. The ecclesiastical power had very early succeeded to those privileges of custody and registration of Testaments which several of the heathen temples had enjoyed; and even thus early it was almost exclusively to private bequests that the religious foundations owed their temporal possessions. Hence it is that the decrees of the earliest Provincial Councils/

Councils perpetually contain anathemas against those who deny the sanctity of Wills. Here, in England, Church influence was certainly chief among the causes which, by universal acknowledgment, have prevented that discontinuity in the history of testamentary law, which is sometimes believed to exist in the history of other provinces of jurisprudence. The jurisdiction over one class of Wills was delegated to the Ecclesiastical Courts, which applied to them, though not always intelligently, the principles of Roman jurisprudence; and, though neither the Courts of Common Law nor the Court of Chancery owned any positive obligation to follow the Ecclesiastical tribunals, they could not escape the potent influence of a system of settled rules in course of application by their side. The English Law of testamentary succession to personality has become a modified form of the dispensations under which the inheritances of Roman citizens were administered".

It was not, however, the type of Will executed before the Roman Comitia Curiata that gave the then primitive tribes of the various European countries their first conception of a testament. Every Student of Civil Law is familiar with the various stages through which the Roman Will passed before reaching maturity - the early unwritten testament of the Comitia Calata, gradually displaced by the Plebeian form of mancipatory testament per aes et libram, also consisting originally simply of a ceremony involving no written documents, and finally the gradual alteration/

-ation and amelioration of this form of testament into the Praetorian Will. This Praetorian Will was based on the jus honorarium or equity of Rome, but the mancipatory testament in spite of its many defects, was never entirely superseded by this new form of Will, and the ingenuity of the Roman juriconsults probably effected in this testament the very improvements which the Praetors may have concurrently carried out by equity on the Praetorian Will. The latter, which came to be the one generally known as the Roman Will, was, however, the Will of the Eastern Empire only; and Savigny has shown that the old Mancipatory Testament with all its apparatus of conveyance, copper, and scales continued to be the form in use in Western Europe down to the middle ages.

Probably the most interesting aspect of the early testament is the question as to whether a testator should be permitted to exercise an unrestricted power in the disposal of his estate, or whether equity and the state should, in certain circumstances, retain restrictions on complete freedom of testing. We have already seen that the earliest laws of succession among the Romans did not permit of the disposal of property by Will. This was doubtless due to the strong position which the familia occupied in Roman civilization as a Social unit. Individual ownership of property was at that time scarcely known, and it was considered to be the only possible rule of succession that, on the death of the pater familias, the common property of the familia, which had been managed by/

by him, should remain with its other members who might be said to occupy a dual role as heirs and co-owners. It does not seem probable that the Romans ever intended that a testator should have an unrestricted power of disposal of his property by Will, and the "uti legasset" of the Twelve Tables might quite well be taken as being nothing more than a somewhat unfortunately expressed provision intended merely to establish a Will as a deed to be specially favoured in the eyes of the law. In view of the nature of the Roman social organisation at that time, it seems quite as reasonable to suppose that the compilers of the Twelve Tables had simply never contemplated the possibility of a testator overlooking his natural heirs, as to believe that they specially intended to give him the power to do this.

Be that as it may, it soon became evident that proprietors of property were nothing loth to avail themselves of the letter of this provision, and the bonds of the familia proved inadequate to restrain testators from overlooking their natural heirs. The first reaction against this freedom of testing was instituted by the centumviral Court in the challenge it allowed to children of the testament of a parent who had causelessly disinherited them, or left them only a mere trifle in his testament; a challenge, however, which, as it took the form of a reflection of the parent's sanity was not available if any other remedy, civil or praetorian, could be resorted to. It is interesting to observe that, at this stage, the law/

law had not found it necessary to give children any right of succession in a parents' estate which could be upheld against the provisions of his testament. The obligations and ties of the familia were even then considered to be so strong as to render the action of a pater familias who violated them in his testament sufficiently unnatural to savour of mental aberration.

e/ A remedy which found greater favour than the querula inofficiosi testamenti was that of bonorum possessio contra tabulas, by which the Praetors allowed sui heredes, who had been disinherited, to participate in the estate, in spite of the terms of the Will. In the case of a Son, however, who was one of the testator's sui heredes, the latter had either to institute or expressly disinherit him, otherwise the testament was a nullity and the child passed over had no need of the Praetorian remedy.

It was apparently the influence of the querula^e rather than that of the Praetorian edict, which led to the establishment of the rule that every child was entitled, notwithstanding the terms of his Father's testament, to at least a fourth of what would have come to him had his parent died intestate, unless it appeared that the parent had had adequate grounds for excluding him or limiting him to a smaller share. This fourth share was called the portio Legitima - statutory share, because, as Professor Muirhead explains in his 'Roman Law', the fourth was borrowed from the Lex Falcidia, which declared that every testamentary heir should be entitled to have that proportion of the succession free from bequests to legatees. A parent was entitled to the same share of his child's estate, notwithstanding the terms of any testament which the latter might have made/

made. It is interesting here to note that, unlike the legitim of Scotland, the portio legitima was exigible from the Deceased's heritable as well as his moveable property. Justinian by his 18th Novel raised this portio legitima to one third at least, and one half where there were five or more children to participate. He also enacted that the challenge of a Will should not be excluded, as in the earlier querula inofficiosi testamenti, where the testator had made advances to his child during his life or left him a legacy, which equalled in amount the portio legitima. Such a measure was apparently prompted by the theory that a child was entitled to recognition by his parent as one of his heirs, and that the law should not permit such recognition to be causelessly denied.

Notwithstanding that so many Scottish lawyers have ascribed the origin of our rights of legitim and jus relictæ to the Civil Law, apparently on no more substantial reasoning than that of the similarity between legitim and the Roman portio legitima, it is a fact that the conception of jus relictæ, as understood in Scots Law, was quite unknown to the Romans. The early form of confarreate marriage, which was rigidly adhered to by the patrician Romans till after the enacting of the Canuleian Law in 308 U.C., involved the passing of the Wife into her Husband's manus or power, assuming that he himself was a pater familias. Any property she had of her own, which was a possible state of matters, only if she had been independent before marriage - passed to him as a result/

result of the marriage; if she had none, her pater familias provided her with a dowry, which shared the same fate. Whatever she acquired while the marriage lasted, whether by her industry or otherwise, also fell to her Husband. Indeed so far as her patrimonial interests were concerned, she was in practically the same position as her children; and on her husband's death, according to Gaius, she had a share with them in his inheritance, not as his Widow, but as if she had been one of his Daughters. Later, in the time of Justinian, Husband and Wife had each their separate estate, which, on their death, descended to their respective heirs, without any share falling to the surviving spouse. The dowry of the wife and the donatio propter nuptias of the Husband were treated merely as forming a fund for the maintenance of the home, but did not in any way constitute a communio bonorum, and on the death of either, the dowry or the donatio, as the case might be, became again a separate entity, and went to the heirs of the predeceasing spouse. According to Sir Henry Maine it was apparently left to the Roman Church of the late empire to inculcate the principle that a Husband was morally bound to make some provision for his Wife in the event of her outliving him, so that she might not be dependent solely on what he might see fit to leave her by his Will.

It is plain therefore that although, from the time when the jus honorarium first began to be recognised, the Romans were confronted with restraints on complete freedom of testation, these were not nearly so rigid as the/

the restrictions which resulted from the legal rights of Scotland. For even in Justinian's time, in spite of the rule of the portio legitima, a testator might entirely exclude his heir from the succession, if he could give a sufficiently good reason for doing so; nor was his estate liable to any claim on behalf of the surviving spouse.

II.The Origin of Jus Relictae and Legitim in Scotland.

Most, if not all, of the early laws of Scotland are involved in obscurity. Various causes have been suggested as accounting for this fact. From the earliest times Scotland was a country of perpetual warfare and strife, successively subjected in different parts, to the jurisdiction of whichever tribe happened to be in the ascendent at the moment. The Battle of Carham in 1018, which established the final supremacy of the Scots, and brought Scotland under the rule of one people, did not provide any permanent state of peace. Unity within led merely to strife without, and the constant state of warfare, which existed for several centuries between Scotland and England was not conducive to fostering the study of jurisprudence. Printing was not introduced into Scotland until the Reformation; and until that time the Roman Clergy were the judges in the consistorial Courts, and practically all their judicial records were either destroyed or carried abroad during the violent commotions which preceded the final subversion of Roman Catholicism in this country. The Lords of Session were "mutable and ambulatory" until the College of Justice was perfected in 1540 by James V, and, like their confrères the Clergy, they conducted their proceedings with closed doors and in secret.

It will therefore be seen that the Scottish juridical writers had great difficulties to contend with in the lack of anything in the nature of a jus scriptum to work upon. Nevertheless there can be little doubt that they did not make the most/

most of such information as lay to their hands, and the fact that, almost without exception, none of the Scottish institutional writers attempted to avail himself of such assistance, meagre though it might have been, as history could offer, was almost inevitably bound to lead to the many mistakes, which have been the frequent subject of comment by more recent jurists. Riddell in his "Peerage and Consistorial Law" has thus characterised the failings of the early expositors of our Law:- "From the time of Lord Monboddo downwards, and indeed even in that of Craig it would appear to have been too much the fashion among Scottish lawyers to indulge in a parade of foreign authorities, and in vague metaphysical speculation in the illustration of legal topics; and thus often catching at nubes et inania, instead of humbly condescending to burrow within their own soil, and excavating from thence the solid ore that is still to be found there, of far greater malleability and service". And, as Chalmers remarks in his 'Caledonia', "Without the certainty of facts, metaphysics may darken, and system may distract, but law cannot be cultivated as a science, either for the agreeable illustration of theory, or for the more useful purposes of practice". Robertson, in his "Law of Personal Succession" is of the opinion that "nothing has tended more to render the ancient law of Scotland obscure and uncertain than the opposite statements made upon this subject by the two eminent Writers Skene and Craig". The latter appears to have held the *Regiam Majestatem*, which so many of our legal Writers have unhesitatingly founded on, almost in horror. Treating it merely as a transcript from Glanville's work on the law of England, he utterly refuses/

refuses to regard it as in any way exhibiting the ancient and authentic law of Scotland. Skene on the other hand, prejudiced by his endeavour to support a hypothesis bearing on the much agitated question of the independence of the Scottish Monarchy, attempts to ascribe the authorship of the *Regiam Majestatem* to the reign of David I, and thus to attribute to it an antiquity more remote than that of the works of Glanville. The cumulative effect of these numerous adverse factors is to render a research into the origin of any of our ancient legal customs an undertaking hedged about on every hand by difficulties and beset by innumerable perplexities.

It has been said, that, before the Roman invasion of Britain, the customs, which had the place of laws, were the same in Scotland and in England, because the tribes which inhabited both were the same Celtic people. Such laws as were imposed by the Romans during their occupation are generally considered to have had no permanent duration. The conquest of the Saxons, however, made great changes in South Britain, but, as they made no conquests North of the two firths, the immemorial customs of Scotland remained there unchanged. Cosmo-Innes expresses the opinion that "Scotland at the different eras of her history used the laws of the people cognate to her then dominant race". But such a theory does not appear to coincide with historical facts, as at one period Scotland had four different peoples ruling at the same time in different districts. It appears probable that when the Scots, Picts, and Britons finally became united, these combined peoples adopted as/

as a positive body of laws, the Scots-Irish usages known as the Brehon laws. The evidence of the existence in Scotland for a considerable period of those rules of succession, recognised in Ireland ^{as} ~~at~~ the Law of Tanistry, seems to lend support to such a theory. It is true that there has never been discovered in Scotland any great formal record of Celtic custom like the Brehon laws in Ireland, and other similar laws in Wales. But the remnants which have survived of a set of laws known as the Leges inter Brettos et Scotos seem to indicate the broad lines of a similar system.

The South-East of Scotland, however, did not escape from the Anglo Saxon conquest, and it would appear reasonable to suppose that the earliest laws in that part of the country consisted of the same stock of Teutonic customs as were then used in England. "One must indeed be ignorant of the history of our law", wrote Lord Kames, "who does not know that the laws of Scotland and England were originally the same almost in every particular". It is doubtful if this axiom was intended to apply to such an early period in the history of the laws of the two countries, and indeed Chalmers considers that this position only began to be true at the commencement of the 12th century, when the Sons of Malcolm Canmore, the children of a Saxon Princess, came in successively, by the aid of a Saxon power, from the North of England, and brought with them the customs and laws of England, as they were then understood and practised. But there does not seem any reason to disbelieve that the laws of the South-East of Scotland and the laws of England, as the customs of a cognate people, were/

were very similar from the time of the Anglo Saxon conquest; for several of our legal rules in use today appear to owe their origin to Teutonic customs.

The introduction into both countries of Norman Law would further any such similarity. Moreover, Norman Law had many points in common with Anglo Saxon Law, and it is now exceedingly difficult to tell what belonged to the original foundation and what to the Scoto-Norman superstructure. Certain it is that the Celtic Law gradually died out, and the Scoto-Norman Law came to affect every branch of our jurisprudence. Ultimately the Scoto-Norman Law in Scotland must have come to be almost identical with the Anglo-Norman Law in England. For both laws were composed chiefly of Norman law grafted on Anglo-Saxon law, and both agreed in neglecting the Celtic law.

The early history of testate succession in Scotland shares the obscurity which shrouds all our ancient laws. We have no clear record of the inception and development of a Last Will in this country. It is impossible to trace its progress and different phases, as has been done in the history of Roman jurisprudence. In England, Blackstone informs us, the power of bequeathing by testament was co-eval with the first rudiments of the law, for there are no records of a time when this was not known. In Scotland, it is more difficult to determine whether the conception of a Will has been recognised in some form since the first rudiments of law. If the Anglo-Saxons in England were familiar with a Last Will, it seems probable/

probable that it would also be known in the South-East of Scotland. North of the Firth of Forth, however, in what might be called Celtic Scotland, there is room for more doubt as to whether the power of bequeathing by testament was always recognised. Sir Henry Maine, in his "Early History of Institutions", says that the conception of a Will is present in the tracts of the Brehons and attributes its introduction into their laws to the influence of the Civil Law diffused by the Roman Church. But there does not seem to be any evidence in the "Ancient Laws of Ireland" of directing a succession by Will, and practically the only mention that is made of it in the Senchus Mor is in connection with giving effect to directions contained therein respecting the testator's burial.

In spite of the difficulty in arriving at any definite and authentic information about the early rules of testation in Scotland, there seem little doubt that our Country has never known a period when an unrestrained power of disposal by Will of the whole of the Testator's estate was permitted, assuming him to have a Wife and family. Indeed it follows rationally that, as probably all the peoples of Northern Europe, like the Romans, had some principles of succession or division of property on a death before they understood the conception of a Will, the earliest Wills would not be allowed to dispose with absolute freedom of a dead man's assets. The question of what a testator could dispose of by Will was doubtless originally regulated not by the fact that he possessed or did not possess a Wife and children, but by the early/

early laws of property. The testator would almost certainly have a greater power of disposal of property acquired by his own efforts than of property allotted to him as a member of the tribe, and it might quite well be contended that the conception of a Will could not be recognised until the people adopting it had become familiar with the doctrine of private ownership of property. The Church has been credited with introducing both these conceptions to most of the communities beyond the Roman Empire, held together by the primitive tie of consanguinity. It appears, however, from the "Ancient Laws of Ireland" that in certain circumstances a tribesman might even grant, contract or bequest a certain quantity of the tribe land, allotted to him. The circumstances in which he might do this are not clear, owing to the obscurity and contradictory nature of the rules laid down, but there seems little doubt that the grantee primarily contemplated was the Church. For, as Sir Henry Maine points out, "The Will, the contract, and the separate ownership were, in fact, indispensable to the Church as the donee of pious gifts; and they were also essential and characteristic elements in the civilization amid which the Church had been reared to maturity".

There does not appear to be any evidence in the early Celtic Laws, (which seem at one time to have been prevalent in most of Scotland), of a Widow and children having any claims on a Deceased's estate, which would act as restraints on his freedom of testing; and indeed the law of Tanistry, which, if it was not the only form of succession known to the Celts, was the most usual practice, did not recognise them as successors.

The first authentic evidence of the existence in Scotland of any law giving the Widow and children in-
-feasible rights in a deceased's estate is to be found in the Regiam Mejestatem and the Leges Quatuor Burgorum. Although both these works have been ascribed to the reign of David 1, it is by no means certain that they are of an equal antiquity. The Regiam Majestatem seems to be now generally accepted as being merely a copy of Glanville's work on the law of England, though for centuries the question of its superior antiquity has been the subject of a controversy, which divided the opinions of our greatest Writers. Even at the present day there is still considerable room for doubt as to whether it is an original work, and as to when it was written. The Leges Quatuor Burgorum, on the other hand, seem to afford more cause for believing that they had been sanctioned as a code of laws in Scotland by the authority of David 1. There is, of course, no ground for believing that this code was a creation of King David. He was a wise law giver, rather than a law maker; and there appears to be sufficient similarity between these laws and the privileges and customs, which obtained in some of the English Burghs from the time of Henry 1, to warrant the conclusion that they were framed in accordance with usages already known and established. Chalmers considers that these Burgh Laws bear upon the face of them, a much more modern air than the early age in Scotland of David 1 could properly exhibit. Indeed it has been suggested that the privileges and customs in the Leges Burgorum were borrowed from rules obtaining in many Burghs on the Continent. A strong similarity has also been observed between/

between these laws and the usages of Newcastle-on-Tyne, as contained in "The Laws and customs which the burgesses of Newcastle-on-Tyne had in the time of Henry (1) King of England, and which they ought to have" - a document, of which two ancient transcripts are still preserved, one among the Tower records of Henry II, and the other in the Cartulary of the Monastery of Tynemouth. John Hodson Hinde, the author of a paper on the Early ^uMunicipal History of Newcastle, expresses the opinion that this document was the result of an inquiry into these customs instituted by King David of Scotland, and to have been the foundation of his Leges Burgorum. This hypothesis has a certain air of probability and seems to be not inconsistent with the known vestiges of these ancient institutions. It also seems likely that King David, if he did adopt such a procedure in forming a code of laws for his favourite Burghs in Scotland, would have revised and extended these already existing privileges of the Burgh of Newcastle by comparing them with those of other similar communities.

Dr. David Baird Smith, however, writing in the Scottish Historical Review of April 1924 on the Retrait Lignager in Scotland, arrives at the conclusion that the early date sometimes assigned to the Leges Quatuor Burgorum cannot be accepted without some further consideration. He quotes Dr. Maitland Thomson's view on this matter as follows:- "But, putting it at the lowest, the code of laws of the Four Burghs, as we have it, is not later than the time of the Alexanders, and represents a body of custom, which had been growing up in Scotland since/

since the days of David I; much of it having grown up long before in other countries and brought here by immigrants. For, that the influx of foreigners is responsible to some extent for the rapid growth of the Scottish burgh system, that it was they who inoculated the infant community with the corporate spirit, which so soon made them a power in the land, may be taken as certain". Dr. Smith himself considers that, "Evidence of external influences at a formative period may be found, e.g., in the fact that a Fleming was the first baillie of St. Andrews and that the Chartulary of St. Andrews' Priory contains references to a number of Flemings as residents. The main influence however", he says, "was probably derived from the eleventh and twelfth century Norman immigrants".

Professor Dove Wilson, on the other hand, in an article on the "Historical Development of Scots Law", which appeared in 1896 in Volume VIII of the Juridical Review, regards the laws in this code as almost purely Anglo Saxon in their origin and nature. He considers that the four Burghs were originally Anglo Saxon Settlements and that the Leges Quattuor Burgorum give some conception of what law prevailed before the Normans made their way into the country. In support of this contention he points out that the vernacular version of these laws contains many Anglo Saxon words, that the whole system of land tenure described therein is allodial, and that they show no trace of the Norman system of brieves. He admits that there are many additions and insertions which are plainly due to Norman or Feudal influences. "When it is remembered", he writes, "that the earliest date, at which any kind of manuscript of these laws could have/

have been made out, was at least a century after Norman ideas were in fashion: and that these ideas had worked for at least another century before the existing manuscripts were written down, it is plain that we must expect to have difficulty in unearthing the original Anglo Saxon element".

In Chapter 115 of this code, the principle of our law of succession in moveables, whereby a portion is reserved as the right of children, is enunciated, and, so far as it goes, accurately describes the right known as legitim, at the present day. This law, which is remarkable for its statement of the antiquity already assigned to the custom is as follows:- "Consuetudo est in omnibus burgis Scocie a tempore de quo non extat memoria in contrarium quod si aliquis burgensis liberos procreaverit de uxore sua legitima et ipse decedat tertia pars omnium bonorum debetur filiis et filiabus ipsorum. Legitimus autem filius primogenitus et heres ejusdem viri et uxoris habebit eandem porcionem bonorum quam et filii alii videlicet equalem cum aliis liberis nisi ipse primogenitus fuerit foris-familiatus". The law does not say what becomes of the other thirds, but, in view of the corresponding statement on this subject in the Regiam Majestatem, it may be presumed the disposal of them was the same as that obtaining in the present day. It is, however, not so clear as to what was done when only the wife or the children survived and not both of them.

Robertson is of the opinion that this law indicates that there had been a custom in the Burghs of Scotland relative to the law of succession different from/

from the general law, as there was in various parts of England. But he adds: "For a long period no trace of such custom has been known in Scotland, and there has been but one rule of law in that country in regard to the succession in personal estate". Such a hypothesis has at first sight, a certain air of probability. For a distinction of a similar nature seems to have been made in the burghs of Normandy in regard to a wife's share in burgage property. In this latter case, however, the distinction was of a rather different nature, consisting in the custom of recognising a wife as having a community right with her husband in burgage property acquired jointly. According to Brissaud she was debarred by the law of Normandy from any share during the marriage in joint acquests of other property. In the case of the Leges Burgorum, however, the more probable theory is that the wording of the law in question was partly copied from some set of laws in use in other burghs, and did not therefore imply any difference between the law of succession as to personal estate in burghs and personal estate in other parts of the country.

In the Regiam Majestatem the division of a deceased's estate is declared to be tripartite - one third to the children, one third to the Wife, and one third as the dead's part. This law deals with the wife's share as well as that of the children, and appears to be the first authentic evidence of the existence in Scotland of the legal right now known as jus relictæ. In this case the claims of the wife and children seem to operate together, and this tends to substantiate the belief that, though the children's claim only is mentioned in the Leges/

Leges Burgorum the wife also would be entitled to her third from the estate.

These rights of the wife and children in a dead man's estate do not appear to be indigenous to our law, for there is no trace of them in the early Celtic Laws, which have come down to us. The Brehon Laws give an indication of the Celtic practices in this matter, and the Cain Lanan^mhna, or Cain-Law of Social connexions, set forth therein shows that the Celtic Law demanded for the Mother a position equal to that of the father, and that they had each their separate estates. On the dissolution of the marriage each party regained his or her own estate intact, having restitution made for any part thereof which had been consumed by the other party and taking any increase that had accrued during the marriage. How then, and from what source did legitim and jus relictæ come to be adopted into Scots Law?

The most prevalent theory on this subject is that these rights, or at any rate the right of legitim was directly borrowed from the Corpus Juris. Legitim has been stated to be just a modified form of the testamentum inofficiosum and portio legitima, originally introduced into the law of Rome, as we have seen, by the praetors as an equitable modification of the absolute right of testing permitted by the strict law, and to have come into Scotland at some time prior to the Reformation, either through the Canon Law, or the Droit Coutumier of Northern France. In the reported Cases of the 17th and 18th centuries this doctrine appears to be most generally ascribed to a Roman origin.

Most/

Most of our earlier institutional Writers seem to have unhesitatingly taken this view, probably because of the great similarity between legitim and the portio legitima of the Romans (indeed the name legitim is derived from the name given to the Roman share) and the extensive adoption in our law of so many of the principles of Roman jurisprudence. Even Fraser, in his book on the "Law of the Personal and Domestic Relations", after starting a much more probable line of research in a detailed examination of the system of communion of goods between husband and wife, which obtained on the continent and its introduction into this country, and drawing a somewhat unwarrantable conclusion from his researches, announces that "there is high authority for the doctrine that the immediate origin of the Scotch law of legitim was the jurisprudence of Rome". Unfortunately he omits to state what constitutes this high authority.

At the same time, it is rather extraordinary in view of the almost insurmountable obstacles to this theory, which will be subsequently dealt with, that the idea of a Roman origin of legitim should have taken such deep root among our jurists. We find Hope, for instance, in his Minor Practicks, explaining that the reason there is no legitim from the mother's estate is because she does not have the children in potestate as the father does! A significant example of the belief in this theory at the present day is to be found in a communication made on 16th February 1924 to the General Assembly of the Society of Comparative Legislation in Paris by the Professor of Comparative Civil Law there, Professor Henri Lévy-Ullmann, a translation of which appeared/

appeared in the Juridical Review of December 1925. Dealing with the influence of Roman law on Scots law, Professor Lévy-Ullmann remarks:- "Lastly the law of succession, in so far as it has not been modified by feudal principles presents to us institutions, the names of which we have abandoned, while the Scots have preserved them, such as the legitime, our reserve héréditaire, still called in Scotland legitim". It seems obvious that Professor Lévy-Ullmann thinks that the French legitime, which was adopted from the Roman law, and the Scottish legitim, have the same origin. But Brissaud in his History of French Private law tells us that Legitime, which he states to be a Roman institution, was introduced on the Continent into the countries of Customs towards the middle of the 13th century. Yet there seems to be irrefutable evidence of the existence of a children's share in Scotland in the 12th century, and the Leges Burgorum, possibly as early as the reign of David I, state it to have been a custom in this country beyond the memory of man. It appears, moreover, to be most generally accepted that the modification of the Roman law of succession, which forms the foundation of our present system of succession in mobilibus, had a continental source, which was not extensively drawn upon till the 15th or 16th centuries. It therefore seems extremely improbable that the Roman institution of legitim could have been introduced into Scotland before it had been accepted in those countries on the continent, which adopted it.

It/

It is true that there were few branches of our law which were not affected by Roman legal principles, but there seems to be a universal tendency to over-estimate the extent to which those came to prevail. In many instances, their effect was a mere veneer on the surface, and in the law of succession we appear to have adopted the Roman names, but not ^{always} the Roman principles. Blindness to this fact seems to account largely for the so prevalent tendency to trace the origin of legitim and ius relictae to the Roman law.

Present day research has raised some doubts as to whether Roman law was not drawn upon in this country at a much earlier date than that at which it is usually supposed to have become the determining influence of our jurisprudence. As yet, however, there is not sufficient evidence to overthrow the older theory. Robertson in his Law of Personal Succession offers the hypothesis that Roman law was first extensively introduced in Scotland during the centuries of intimate political relationship which obtained between our country and France. "In 1532", he says, "Legislature had instituted the college of Justice on the model of the Parliament of Paris; and soon after the marriage of Mary to the Dauphin in 1558, Frenchmen and Scotchmen were mutually maturalised in the two countries". Henry II of France seems to have regarded this marriage as inseparably uniting Scotland and France. In his ordonnance granting the privileges of naturalization to Scotsmen in France, which is printed in our statute book in an act of 1558 c. 66, he says "Au moyen de quoy estans les Subjects des deux royaumes/

royaumes (qui ont jusques icy & des long temps ordinairement communiqué ensemble veseu en mutuelle amitié & intelligence, favorisé & secouru les uns les autres) par L'approche des maisons de France & d'Escosse, tellement unis ensemble, que nous les estimons comme une mesme chose". Robertson concludes by adding that, as we find in France at that period several of those modifications of the civil law which are in full force in Scotland to this day, it is not unreasonable to believe that we have derived them from that country.

In his recent book on the Parochial Law of Tithes, however, the Reverend Thomas Miller, states a discovery, made in the course of his researches, which seems to establish the fact that a considerable body of Roman law and Canon law was adopted as authoritative law in Scotland by David I. Mr. Miller discovered in the archives of the Abbey of St. Andrews a deed by which Robert, Bishop of St. Andrews in the reign of David I, and by that King's authority, directs those Churchmen and Judges who were subject to his orders to conform to a book which he names the Exceptiones Ecclesiasticarum Regularum.

Mr. Miller has identified this book, (which consisted partly of Canon law and partly of Roman law, and comprised texts from the Theodosian Code, from all the compilations of Justinian - the Institutes, Code, Pandects and Novels, and included in these the praetors edict, nautae, caupones, stabularii), with the Decretum or the Panormie, (or both combined) of Yves de Chartres, the greatest Canon lawyer of that period. Mr. Miller supports his contention by proving that relations existed between David/

David I, who had travelled in France, and Yves de Chartres, who had at that time achieved considerable fame throughout Christendom by his writings, and on account of the monks whom he sent as missionaries, and the convents and Churches he established in many countries including Scotland. He further adduces in support of this theory the self interest of David on the grounds that, by recommending the book of Yves de Chartres in Scotland, the King could rest his royal prerogative upon the authority of the most celebrated text of the middle ages. This was the passage of the Institutes usually cited as De constitutionibus principum which runs thus "Sed et quod principi placuit legis habet vigorem". It seems to have been the practice of almost every King in the middle ages both in the East and in the West, to rely for support on this text.

It is interesting to note that Dr. David Patrick in his "Statutes of the Scottish Church", had previously pointed out that, through this book, we had a compendium of Roman Canon law in Scotland in the 12th century, although he considered the "Exceptiones Ecclesiasticarum Regularum to be the Excerptiones Egberhti Eburacensis - the famous selection of church canons attributed to Egbert of York. Dr. Patrick, however, seems to have formed this theory as a result of speculation only and without any knowledge of the contents of the book. In advancing it, he says, "If this be so, we have in use in 12th century Scotland a compendium of Roman Canon law, redacted in England, hundreds of years before Scotland, under French guidance, had begun to look to the Roman Civil law as the groundwork of its national jurisprudence.

Mr. Miller's contention, however, which has been favourably commented on by Professor Lévy-Ullmann in the communication already referred to, does not of course prove that Roman legal principles were adopted to any appreciable extent in our country at so early a date, though his discovery certainly opens up a new vista of research in connection with this question. It would seem rather that, if the Exceptiones did exercise any influence in Scotland in the reign of David I, this would be confined to ecclesiastical matters. Moreover, the use of the words "a tempore de quo non extat memoria in contrarium" to describe the antiquity of the custom in the Leges Burgorum, which allowed children a one third share in their father's estate, would surely preclude the possibility of this rule having been adopted from King David's newly imported Roman Law.

It does not seem ever to have been contemplated that the conception of legitim could have been introduced into Scotland by the Romans, at the time of their invasion of this country, and have survived the conflicting influences of the various laws to which Scotland was subsequently subjected. And indeed such a theory would appear in the highest degree improbable. For though the excellence of the Roman laws would assist their compulsory acceptance by a vanquished people, the Romans never achieved in Scotland anything resembling such a permanent subjugation of the inhabitants as would ensure of their legislation having any lasting effect. Nor is it likely that the comparatively primitive tribes, who inhabited our country at that time, and who were strangers to anything/

anything resembling an established system of jurisprudence, would be capable of assimilating the Roman law to an extent sufficient for its influence to attain any measure of permanency. It is also evident that the numerous systems of laws and customs which were imposed on Scotland after the departure of the Romans, would seriously militate against the survivance of any of the Roman institutions.

What is perhaps the most formidable argument of all, however, against the theory of a Roman origin for our right of legitim has been advanced by Professor Goudy in a lecture delivered at Oxford in 1894 on the "Fate of the Roman Law North and South of the Tweed". He points out that in addition to the dissimilarities between the Scottish legitim and the Roman portio legitima, the notion of the jus relictæ, which is bound up with that of legitim, was, as we have already seen, wholly unknown to the Romans. It is true that the Leges Burgorum speak only of the children's share and say nothing of a portion for the widow, but at the same time, the wording of the law, which deals with this matter, gives no reason to believe that this was because the widow's share was not recognised at that time. The Regiam Majestatem, which has never been satisfactorily disproved to be a contemporary of the Leges Burgorum mentions the widow's share as well as that of the children, and in England, at the time when these rights were also in force there, they are invariably mentioned together. Throughout the whole range of Scottish jurisprudence the Leges Burgorum seem to be the only instance of a complete statement regarding the division of/

of a dead man's estate, which mentions the children's right therein and omits that of the widow, and, as has already been pointed out, there does not seem any room for the view that such an omission was occasioned by the fact that at that date the widow was not recognised as having any such claim. It is also significant to note that several writers, amongst whom is Professor Dove Wilson, refer to the passage in the Leges Burgorum as being evidence of the existence of a tripartite division in Scotland at that date.

It has also been suggested that legitim and jus relictæ may have been introduced into Scotland by means of the Canon law, but there is little to support such a view. There does not seem to have been any extensive adoption of the Canon law in Scotland before the time of David I, during whose reign Bishops and Episcopal Courts were introduced into our country, and, as has already been pointed out, the reference to legitim in the Leges Burgorum undoubtedly conveys the impression that it was a rule which had obtained in Scotland long prior to that date. There is also the same objection that has been advanced against the theory of the introduction of legitim and jus relictæ by the Roman law, namely that the latter would be unknown to the Canon lawyers also, for they merely adapted the Roman law to the needs of the Church. Further, as Pollock and Maitland, dealing with this question in connection with the introduction of these rights into England, have pointed out, "The Canonist was not interested in the maintenance of the old restraints. His training in Roman law might indeed teach him that the claims of children should set limits to/

to a father's testamentary power, but 'Wife's part', 'bairns part', and 'dead's part' cannot be found in the Institutes; besides, the Church had legacies to gain by ignoring the old limits".

Had the Canonists introduced these rights into Scotland, it would only be reasonable to expect to find some trace of them in the early Statutes of our Church, but no such trace exists. There is indeed a General Statute of 1420 passed in a Provincial Synod and General Council, held in Perth, to enact a declaration in respect of the canonical portion due on account of the Confirmation of testaments, which decided that it was the practice to divide the personal effects of a deceased into three equal portions, which constituted the wife's share, the childrens share and the dead's part. But there is nothing in any of these Statutes to support the view that legitim and jus relictæ had been introduced by the Canonists, or were specially enforced by them.

Before considering any further theories as to the origin of legitim and jus relictæ in Scotland, it is probably advisable to determine first what significance is to be attached to the use of the words "a tempore de quo non extat memoria in contrarium", in the Leges Burgorum, to describe the antiquity of legitim. Were these words deliberately used by the compiler of these laws, or were they merely copied from the phraseology of other Burgh laws on which our Leges Quattuor Burgorum were based? If they were a mere adoption of an expression used elsewhere, it would be difficult to say whether/

whether the custom of legitim had obtained in Scotland before the time of David I or not. Such a view would further raise the question as to whether this custom had been introduced by David direct into this country from France, as a result of his travels there, or borrowed from England. Robertson is of opinion that this expression furnishes a strong reason to conclude that the custom of legitim had been adopted from England, for, he says:- "This is precisely the mode in which their writers describe the legal memory of the English law". Unfortunately, however, he does not state whether there is a probability that this custom was taken from Burgh laws, which obtained in England, or whether it had more likely been adopted from that country at a time sufficiently early to justify the use of such an expression, at that date, as to its antiquity. As will be shown subsequently, there appears to be sufficient evidence that legitim and jus relictæ, (if they were borrowed from England) were adopted at an earlier age than that of David I, to make it appear as if the compiler of the Leges Burgorum had really been desirous of calling attention to the antiquity of legitim in Scotland. Nor is there apparently any evidence which would point to the expression in the Leges Burgorum as being nothing but a slavish copying of a phrase used elsewhere.

We now come to the most probable theory which has yet been suggested, to account for the origin in Scotland of legitim and jus relictæ, namely that they were introduced into our country from England. It is well known that these rights existed in England in the 13th century, and fairly certain that they were known in the twelfth, but there is considerable doubt as to how/

how much further back they can be traced. Bede tells a story of a Northumbrian who rose from the dead and divided his property into three shares, reserving one for himself, while one was made over to his wife and another to his children. Such an anecdote, however, can not be regarded as evidence that these rights existed in England as early as the time of Bede, who wrote in the 8th century. Glanville states that by the common law as it stood in the reign of Henry II a dead man's goods were to be divided into three equal parts, of which one went to his children, another to his wife and the third was at his own disposal. The shares of the wife and children were called their 'reasonable parts'.

This continued to be the law at the time of the Magna Carta, which, in regulating the disposal of a tenant-in-chief's estate, declared that the King's debts should first be paid and that if nothing be owing to the Crown, "omnia catalla cedunt defuncto salvis uxori ipsius et pueris suis rationabilibus partibus suis". Blackstone tells us that this right of the wife and children was still held to be the universal or common law in the reign of Edward III, though it was frequently pleaded as the local custom of Berks, Devon and other counties. 'Sir Henry Finch', he says, "lays it down expressly in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by Will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed Sir Edward Coke is of opinion that this never was the general law, but only/

only obtained in particular places by special custom; and to establish that doctrine he relies on a passage in Bracton, which in truth, when compared with the context makes directly against his opinion. For Bracton lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanville, Magna Carta, Fleta, the Year-books, Fitzherbert, and Finch do all agree with Bracton that this right to the pars rationabilis was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland". It is interesting to note that this custom obtained in the province of York, the principality of Wales, and the City of London, until a comparatively late date and had finally to be abolished in these places by Statute, in order to bring them into conformity with the rest of the Kingdom.

How then did this doctrine of the reasonable parts, which is precisely the same as our doctrine of legitim and jus relictæ, come into England? We have already seen that such vestiges of the Ancient Celtic laws, as have come down to us, show no trace of having recognised this rule. It may therefore be assumed with comparative safety that it was not in existence in England before the Anglo Saxon conquest. It was therefore not indigenous to England any more than it was to Scotland, and on that account must have been adopted from some foreign source.

We have already disposed of the theory of a Roman origin of this custom in Scotland, and the arguments/

arguments used in that connection are equally applicable to England. It is true, of course, that the Romans made a much more effectual occupation of England than they did in Scotland. Blackstone, who seems to suggest that there is a possibility of this doctrine having had a Roman origin in England, says that, if it was derived from the Roman law of succession, it had been drawn from that source much earlier than the time of Justinian, from whose constitutions in many points it very considerably differs. He offers the hypothesis that it may have emerged from the Roman usages introduced into England in the time of Claudius Caesar, who established a colony in that country to instruct the natives in legal knowledge; which usages were inculcated and diffused by Papinian, who presided at York as praefectus praetorio under the emperors Severus and Caracalla, and were continued by his successors till the final departure of the Romans from Britain.

Pollock and Maitland, however, state that there is no real evidence that the Roman Institutions survived in England for any time after the Romans departed. They point out that it is difficult to believe that civil institutions remained continuous in a country where the discontinuity of ecclesiastical affairs is so pointedly marked, and in an age when the Church was far more stable and compact than any civil institutions whatever: nor does there appear to be any trace of the jurisprudence of Rome, as distinct from the precepts and traditions of the Roman Church, in the earliest Anglo-Saxon documents. It has also to be kept in mind that, at a later age when the influence of the Roman law was spreading/

spreading over the whole of Europe, it did not meet with any ready acceptance in England, which country had by then a very complete body of common law. And, in any case, as has previously been pointed out, a Roman origin cannot be accepted as accounting for the Widow's share; nor is there any evidence to give rise to a belief that the children's share may have had a separate origin, and that this is to be found in the jurisprudence of Rome.

The two theories still remaining to be examined are (first) that the division by reasonable parts was a Teutonic institution introduced by the Anglo-Saxons and (second) that it was a custom of early French law brought into England through Norman influences.

In an article on the "Historical Development of Scots Law", which appeared in 1896 in Volume VIII of the Juridical Review, Professor Dove Wilson has, as we venture to think, rather unhesitatingly and emphatically accepted the former theory. Although the passage dealing with this matter is fairly long, it might be well for its proper consideration that so much of it as is relevant should be quoted here.

"In moveable succession", he says, speaking of the Leges Burgorum, "we find one of the most interesting provisions. There is distinct mention of the tripartite division (still existing in Scotland) whereby, when a father died leaving widow and children, one third of the goods went to the widow, one third was divided among the children, whether sons or daughters, and/

and one third might be bequeathed by Will - the dead's part. This division, however, was much older in Anglo-Saxon Scotland than the oldest date to which we have any right to assign the earliest part of the written Burgh Laws, and it existed widely in other Germanic races. Possibly it applied at an early date with us, as it did in other places, both to immoveables and moveables. The earliest authentic trace of it with us is in the often quoted passage of Bede, written about the end of the 8th century. Speaking of the customs of Northumbria (which it will be remembered then included Scotland to the Firth of Forth) Bede mentions a case of succession in the following terms:- "Omnem quam possederat substantiam in tres divisit portiones e quibus unam conjugui, alteram filius tradidit, tertiam sibi ipse retentans statim pauperibus distribuit". The Saxon version has in place of the words 'sibi ipse retentans'; words signifying 'which belonged to him'. Somner, who quotes this passage, remarks on it: 'The third part is there said to belong to him, plainly insinuating that the other two as rightly appertained to his wife and children, each of them a third. But withal observe that this is the act of an housekeeper in the province or region of Northumberland and such a testimony indeed it is as makes much (I confesse) for the antiquity of that custom yet (A.D. 1660) surviving and current in these northern quarters of the Kingdom'. As is well known, the custom of the province of York recognised the tripartite division of moveables down to a somewhat later date than that at which Somner wrote, namely till 1692. Alongside of the tripartite division, we have evidence of the dual division, according as either widow or children were wanting.

The passage of Bede leaves points unsettled.

'Substantia' would include more naturally than exclude land; and 'fili', though sometimes used for descendants, more naturally means sons. Possibly the law which was subsequently elaborated into the doctrine of 'communio honorum', at one time regulated in Anglian Britain, as it certainly did in many places elsewhere, both land and goods, and possibly the preference of sons to daughters, which was unquestionably made at a late stage in land, was once universal. But, be these things as they may, this much is certain that in Anglo-Saxon Scotland the division of the succession into widow's part, bairns part, and dead's part existed from the earliest historic times, and that it has survived with us, though it has died out in England".

It is exceedingly unfortunate that Professor Dove Wilson has mentioned no other authority than Bede in support of his contention. For this omission forces us to conclude that this theory, which he puts forward with such confidence, is based only on these words of Bede, and an assumption that, because he is of the opinion that the Leges Burgorum are in the main Anglo-Saxon customs, the rule of tripartite division mentioned therein must also be Anglo-Saxon in its origin.

It is indeed difficult to understand why Professor Dove Wilson should so unhesitatingly accept these words of Bede as proof positive that the rule of a tripartite division of a deceased's property was in force at that early date. In so doing, he appears to be at variance with almost every authority. Moreover, the/

the passage, in which Bede speaks of such a division, occurs in a fable of a Northumbrian who rose from the dead, and so disposed of his property. Surely a very flimsy piece of evidence on which to base a reliable theory! No English writer appears to have dared to ascribe to their rule of division by reasonable parts an antiquity so remote as that of the time of Bede. Why then should Professor Dove Wilson go, what might almost be said to be, a step further, and connect the Scottish custom of tripartite division with ^{this} similar rule said to be in force in England in the 8th century? Holdsworth, in his History of English Law, while admitting the possibility of the rule of tripartite division having been in existence at so early a date, says that there is no definite connecting link in the Anglo-Saxon laws between Bede's date and the 12th century (when there is clear evidence of the tripartite division being in force). And he regards Bede's fable as evidence only of the vagueness of the limits of testamentary power at that early period.

If the scheme of tripartite division was an Anglo-Saxon rule of inheritance, it would be only rational to expect to find some traces of this custom in the early law of England, which was, in the main Anglo-Saxon in its nature. But there does not appear to be any evidence of such a custom having been recognised at that time. It is true that such vestiges of the laws of inheritance as have come down to us from that period are vague and incomplete, yet they seem to show quite clearly that the rules/

rules which then regulated the disposal of a deceased husband's property were quite different from the tripartite division.

In Attenborough's 'Laws of the Earliest English Kings', we find the wife's share of her husband's property in the time of Ethelbert of Kent (600 A.D.) stated thus:- "if she bears a living child she shall have half the goods left by her husband, if he dies first. If she wishes to depart with her children, she shall have half the goods. If the husband wishes to keep (the children) she shall have a share of the goods equal to a child's. If she does not bear a child (her) father's relatives shall have her goods and the 'morning gift'.

Thorpe in his 'Ancient Laws and Institutions of England' has the following passage in connection with the ceremony of betrothal in the time of Edmund:-
'Then after that let the bridegroom declare what he will grant her, in case she choose his will, and what he will grant her, if she live longer than he. If it be so agreed, then it is right that she be entitled to half the property, and to all if they have children in common, except she again choose a husband'.

In the time of Cnut (1016-1035), we find the deceased's near kinsmen coming in for a share along with the wife and children, though it is not stated what proportions of the property fell to these respective parties. The doom enacting this scheme of division runs thus:- 'If a man departs from this life intestate/

intestate his lord shall take no more from his property than his legal heriot. But, according to his direction, the property shall be very strictly divided among his wife and children and near kinsmen, each according to the share which belongs to him!

This rule has certainly, on the face of it, some resemblance to the tripartite division, but at the same time, there is nothing to indicate that the shares which belonged to the wife and children were thirds of the property.

In none of these early English laws of inheritance therefore, does there appear to be any evidence of the custom of tripartite division having been recognised.

Professor Dove Wilson admits in his Article that the text of the Leges Burgorum has been so subjected to additions and insertions owing to Norman or Feudal influences that there is considerable difficulty in unearthing the original Anglo-Saxon element. How then can he state with such certainty that the evidence in the Leges Burgorum of a rule of tripartite division in Scotland is a law of Anglo-Saxon origin?

He states further that this custom existed widely in other Germanic Nations. Brissaud, certainly, in his *Histoire du Droit Privé*, says that in pagan Germany there seems to have existed the custom of dividing the moveables of the deceased into three parts, one third for the widow, one third for the children, and one third for the dead. The objects which went to make up this last third/

third were burned or entombed with the body so as to be of use to the deceased in the life beyond the grave. After the conversion of the Germans to Christianity, the division into thirds persisted for a long time in many places, but the disposal of the share of the dead changed. It was employed in pious works, "pro remedio animae", and in time became the share of the Church.

If it could be accepted as an authentic fact that this custom of tripartite division had really been in force among the Germans, such evidence would form a strong argument for an Anglo-Saxon origin of this custom in England and Scotland. But Brissaud apparently makes this assertion solely on the authority of Brunner on "Der Totenteil in Germanischen Rechten", Zeitschrift für Rechtsgeschichte XIX 107 et seq., which article seems to be sufficiently refuted by Rietschel on "Der Totenteil in Germanischen Rechten", Zeitschrift für Rechtsgeschichte XXXII 297-309. And Liebermann, in "Die Gesetze der Anglesachsen", probably the most complete record of Anglo Saxon laws and customs, makes no mention of a division by thirds. Brunner's view moreover seems to be discredited by most authoritative writers.

The Professor of Dutch Civil Law and Private International Law at Leyden University, Professor E. M. Meyers, (who has kindly given the Writer permission to quote his views on this subject) is emphatically of the opinion that the scheme of tripartite division of a deceased's estate is not a custom of Germanic origin

"The/

"The German writers", he says, "- and Brissaud is a follower of the Germans - name all laws, which are not of Roman origin, Germanic laws, but this is the greatest mistake of the contemporary history of Law". He further states that this mode of division occurs in the most scattered parts of Europe, as for instance, in Sicily and Bohemia, but that there is no trace of it in the real Germanic law, which comprises Skandinavian, Saxon, Frisian, and Anglo Saxon law, and that to pretend that the Sicilian law, which knows this tripartite division, is a Germanic law, is an error already refuted by many writers.*

The theory that the English and Scotch systems of tripartite division were derived from early French law, however, has no lack of reliable evidence to support it. It seems to be unquestionable that complete conformity existed between the old Normandian customs and the ancient customs in English and Scots law on this matter. It is true that Pollock and Maitland say they have seen no proof that the rule of tripartite division ever prevailed in Normandy. But it seems hardly conceivable that any importance can be attached to a statement which has such an overwhelming weight of evidence against it.

This theory of a Normandian origin is emphatically contended by Professor Meyers, and strongly supported by Dr. F. P. Walton, sometime Professor of Roman Law at McGill University, Montreal. In a paper on "the Relationship of the law of France to the Law of/

of Scotland" read before the International Law Association at a Conference held in Glasgow in August 1901 (which paper was published in the Juridical Review of 1902 Vol. XLV) the latter says that the jus relictæ of Scots Law is precisely analogous to the right of a French Wife, commune en biens, to her share of the community when the division takes place.

Le très Ancien coutumier de Normandie, the Summa de Legibus Normannie, Lefeburés - "le Droit des Gens Mariés Aux Pays de Droit Écrit et de Normandie" Viollet's - "Précis de l'Histoire du Droit Français" and Brissaud's - "l'Histoire de Droit Privé" are among a few of the works that furnish evidence that the division by thirds was the ancient Norman law. Brissaud informs us that a surviving Wife received not only her dower, but one third or one half of the moveables left by the husband at his death - one third if he had children born during the marriage, one half if there were no children alive. Such a mode of division is exactly analogous to the division by reasonable parts in England, and the tripartite division in Scotland.

It therefore seems that, of all the conflicting and vague theories which have been advanced to account for legitim and jus relictæ in Scotland, the theory that they were introduced first of all into England from Normandy, and subsequently into Scotland is the only one which, in view of the scanty evidence available on this subject, can stand with any degree of assurance.

It/

It is not suggested that, at the time of the Conquest, this rule of tripartite division was imported as a piece of Norman legislature and enforced on the vanquished English. While it cannot be pretended that the Norman Conquest had no effect on the laws of England, there seems little doubt that this effect was gradual and, indeed, at first almost imperceptible. There was no sweeping away of English law and rigid substitution and enforcement of Norman law. Freeman, in his "History of the Norman Conquest", thus describes the Norman influence on English law:- "Norman ideas, Norman principles, if not actual Norman institutions, crept in alongside of earlier English ideas, sometimes modifying the English institutions, sometimes merely changing their names Our institutions are in no sense of Norman origin, but they bear about them the trace of deep and abiding Norman influences. The laws of England were never abolished to make room for any laws of Normandy: but the laws of England were largely modified both in form and spirit by their administration at the hands of men, all whose ideas were naturally Norman. The change was silent and gradual".

We have seen that, before the Norman Conquest English law recognised the wife of a deceased as having a share in his estate, and, in the case of Cnut's doom the children were apparently at that time also entitled to some share. The lack of any uniform custom of dividing a deceased's estate, the fact that the wife seems generally to have been allowed a half of the property, and/

and at some time a share given also to the children, would afford a very receptive field for modification into the Norman system of the tripartite division. Such modification and alteration would, of course, be a very gradual process, and there is no definite evidence to show when it would reach its completion.

It is equally uncertain at what time this tripartite division was introduced into Scotland. Professor Goudy, in the lecture already referred to propounds the theory that it was introduced at the time of the compilation of the *Regiam Majestatem*, being copied into that work from Glanville. Disagreeing with the view that *legitim* had a Roman origin, he says:- "It seems to me much more probable that the doctrine of *legitim* was introduced into Scotland from the law of England. For it is a fact that by the old customary law of England, (whether derived from the Normans about the time of the Conquest or handed down from Saxon times is doubtful) a testator, who was survived by wife and children, had his powers of bequest restricted to one-third of his personality. His widow had a right to one-third of his estate, and the children to another third - such share being called in each case the rationabilis pars. So the law is stated IN Glanville, and so it existed in the time of Littleton From Glanville this rule of rationabilis pars was copied into the *Regiam Majestatem*. It is said in both works, "Cum quis in infirmitate positus testamentum facere voluerit omnes/

omnes res ejus mobiles in tres partes dividuntur
aequales, Quarum una debetur haeredi, secunda uxori,
tertia reservetur testatori. Accordingly, you see,
the Scottish doctrine on the subject was virtually
the same as that of England down to the time of the
Reformation".

But there are objections to this proposition of
Professor Goudy. For its acceptance we must be entirely
satisfied that Glanville's book is the original work
and the *Regiam Majestatem*, in parts, at any rate, a
mere slavish copy of it. Although possibly the weight
of the best informed opinion is in favour of the
originality of Glanville, we understand that some of
the most recent researches leave this matter in a state
of considerable doubt, and that the possibility of the
Regiam Majestatem being the original work is by no
means conclusively disposed of.

Furthermore the fact that the rule of the
tripartite division is postulated in the *Regiam
Majestatem* does not prove that it was not in use in
Scotland before the compilation of that work. The
Leges Burgorum, which there is every reason to believe
were compiled at an earlier date than the *Regiam
Majestatem*, mention the doctrine of legitim (which
seems inseparably bound up with the rules of the
rationabilis pars) and declare that it has existed in
Scotland beyond the memory of man. Surely such incon-
-sistencies do not lend much support to Professor
Goudy's view.

It seems much more probable that, if this rule
did/

did not find its way into Southern Scotland by means of the English sympathies of the sons of Malcolm Canmore (particularly those of Edgar, who owned a species of allegiance to William Rufus during the whole of his reign) it must almost certainly have crept in not later than the time of David 1, and very possibly during his reign. For David, having spent his youth at the court of the Norman King of England, was thoroughly Norman in his sympathies and principles. Indeed the Norman influence in Scotland was probably at its height during his kingship, and, in view of the lack of any positive evidence on the question, the theory that the custom of the tripartite division of a deceased's estate had found its way into Scotland from England not later than David's time seems as worthy of consideration as any that has yet been offered.

Various reasons have been advanced to account for the survivance in Scotland to the present day of the rights of jus relictæ and legitim, and their desuetude in England.

Some Writers have offered the explanation that in England these rights were regarded as inequitable restrictions on a married man's power of testing. They argued that they would destroy the incentive to save, because a man with undutiful children would be desirous of disinheriting them, and, if this was prevented by the law, he would make no effort to acquire wealth, knowing that it would eventually go to those whom he did not wish to benefit. There is, however, probably only a modicum of fact in this statement. It seems more/

more probable that, in England, it was merely the natural trend of jurisprudence and the lack of any supportful influence, that accounted for the dying out of the rights of jus relictæ and legitim in that Country.

Professor Dove Wilson explains the survivance of these rights in Scotland as being due to the care which the Canon and the Civil Law ever had for the rights of women and children. This explanation seems to be substantially correct, but Professor Goudy, while giving a similar view, expresses it more accurately in accordance with the known facts. The reason for this survivance in Scotland, he says, in his lecture on the "Fate of the Roman Law North and South of the Tweed", is due to the preponderating influence of the Civil Law in that country subsequent to the Reformation. "The Scottish lawyers of the sixteenth and seventeenth centuries", he points out, "finding that the rationabilis pars, as regards children, harmonized with the portio legitima of the Roman law, forthwith attributed to it a Roman parentage, and supported it by the authority of the Pandects and Code".

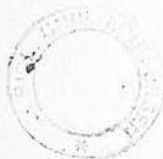
III.

The Origin of Terce and Courtesy in Scotland.

Fewer conflicting theories have been advanced to explain the origin in our country of the legal liferents of Terce and Courtesy, than in the case of legitim and jus relictæ. Indeed it is almost universally agreed that a Norman origin must be attributed to courtesy, but there is not such unanimity of opinion as to the origin of Terce. For authorities differ in ascribing to this right a Germanic as well as a Norman origin.

Terce (from tierce partie - third part) must be looked for in Scotland first under the name of dower, by which name this institution was known in England. There is no conclusive evidence to show at what period terce was first known in Scotland. Celtic law does not appear to have recognised this doctrine, yet there seems little doubt that it was observed in this country from an age of sufficient antiquity to justify Lord Stair's assertion that it was one of those ancient immemorial customs, which were the precursors of our legal system.

The first authentic evidence of the existence of dower in Scotland appears to be furnished by the Regiam Mejestatem. It is also expressly recognised at a somewhat later date in a Statute of Alexander II in 1244. There is no mention of it in the Leges Burgorum, though evidence is afforded there of the existence of courtesy at that period. This, however, does not seem to imply that dower was not known in Scotland as early as courtesy, for/



for there seems little doubt that, in England, at any rate, dower was the older right. The omission may most probably be explained by the fact that terce was not due from burgage property, though the widow of a burghess had, so long as she remained a widow, a somewhat analogous right to the use of the "inwarde parte" of the house.

In spite of the propensity of most of the Scottish jurists to ascribe a Roman origin civil or ecclesiastical to almost every institution in Scots Law, they do not appear to have fallen into this error in the case of terce. Curiously enough, however, this mistake has been made by one of the greatest English Jurists. Sir Henry Maine in his "Ancient Law writes:-
 "The provision for the widow was attributable to the exertions of the Church", (i.e. the Roman Church),
 "which never relaxed its solicitude for the interest of wives surviving their husbands -- winning, perhaps, one of the most arduous of its triumphs when, after exacting for two or three centuries an express promise from the husband at marriage to endow his wife, it at length succeeded in engrafting the principle of dower on the customary law of all Western Europe". But, as we shall see, when we look into the origin of dower on the Continent, it seems to have originally been a civil institution, which developed more or less independently among the Teutonic races, who settled upon the ruins of the Western Empire, and in no way evolved from the influence of the Roman Church, nor from any analogous doctrine of Roman law.

As/

As there is evidence of the existence in England, at a very much earlier period than the date of the Regiam Majestatem, of a right, which, though not called dower, was undoubtedly an early form of it, it might be contended that dower or terce found its way into Scotland via England, although Basnage appears to think that, because the Scottish terce was at first called dower, it was derived directly from the Norman customs. But if the former view is to be considered, from what source was it introduced into England, and at what time?

Those who favour a Norman origin for dower point to the analogous right of the French douaire, which was almost exactly similar in every respect to its English counterpart. This argument may be substantiated by contending that the English word "dower" is derived from the French douaire.

Such a view of the origin of dower places the date of its introduction into England at some period subsequent to the Norman Conquest. Fraser, who admits the great antiquity of this right among the Teutonic nations, states that "there is every reason to believe that in this country it is coeval with the feudal system". It is not clear whether by, "this country", he includes England or not, but it would appear as if he considered the feudal system had some influence on the introduction of Terce. Not only is it difficult, however, to find any evidence in support of such a view, but the contention that dower was introduced into England by the Normans, or direct by them into Scotland, appears to be quite erroneous. For there is ample evidence to show that a right which was certainly the earlier/

earlier form of dower existed in England at a date considerably prior to the Norman Conquest.

The Lex Saxonum, indeed, actually states that the custom as to the destination of a wife's dower on her death varied with the customs of different districts. In one of the laws, which obtained in the reign of King Ethelbert, as these are set forth in Attenborough's "Laws of the Earliest English Kings", it is enacted that if a wife does not bear a child her father's relatives shall have her goods and the "morning gift" (the earlier name for dower). A law in the reign of Canute, which provided that every widow must not remarry within twelve months of her husband's death, stated that, if she chose a husband within that time, she would lose her morning gift and all the property which she had from her first husband, and his nearest relations would take the land and the property which she had held. One of the laws of Henry I also provides that a wife who survives her husband shall have her dower given to her by written instruments. Such evidence as this seems to prove clearly that dower was in existence in England in some form prior to the Norman influence, and that it must therefore have its origin in early Anglo Saxon law.

It is true that Blackstone says that dower out of lands seems to have been unknown in the early part of our Saxon constitution, for, in the laws of King Edmond, the wife is directed to be supported wholly out of the personal estate. He suggests that it is possible that dower, in England, may be a relic of a Danish custom, since, according to the historians of that country, dower was/

was introduced into Denmark by Swein, the father of Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. This contention, however, does not seem to have much to support it, as there appears to be no doubt that dower was recognised in the early Saxon law, and the explanation of the origin of dower among the Danes savours more of an ancient legend than of an authentic fact.

Glanville held that every man was bound both by ecclesiastical and by temporal law to endow his spouse at the time of the espousals. He distinguishes between two different ways of giving dower. If the husband endowed his wife with certain specific lands this was known as a dos nominata and must not exceed one third of his lands, but if he named no particular lands, he was understood to endow his wife with one third of the lands of which he was seised at the time of the espousals, and this was known as a dos rationabilis. Pollock and Maitland hold that even this dos rationabilis can easily be represented as the result of the bridegroom's bounty, and not as a compulsory provision. They state that the origin of dower is attributed by the lawyers to a gift made by the bridegroom to the bride at the Church door, but they have not discovered any sufficient reason for supposing, as Glanville does, that the right is of ecclesiastical origin.

Investigation into the origin of dower on the Continent demonstrates quite clearly that this right was evolved in the development of the old Germanic law. It/

It is even possible there to trace each step of its development. In the most primitive system of law which first obtained among the Germanic tribes there was scarcely any question of the possessions of the wife. It was a system not yet recognising the doctrine of a community of goods, in which there existed only one inheritance, namely that in the hands of the husband. There were, however, three classes of possessions over which the wife had claims: the Germanic marriage portion, the "Morgengabe", or gift of the morning, and the marriage portion in the Roman sense, or share brought by the wife.

It appears that among the primitive Germanic tribes, the family organization was similar to that which obtained at one time among the Romans. Just as under the old Roman law, the wife passed in manu mariti at her marriage, so in the old Germanic law she found herself and her possessions under the mundium of her husband. In his book, "Das Recht der Eheschliessung in seiner geschichtlichen Entwicklung", Dr Von Emil Friédberg traces the growth of this mundium of the old Germanic tribes into the law of dower, the price originally paid by the husband to the relations of the wife for her mundium (i.e. the privileges arising to him out of the legal guardianship or tutela which he acquired over her.) This payment was, in course of time, secured to the wife as a provision in case of widowhood.

But the law of dower was not evolved solely from/

from the payment made by the husband for the mundium of the wife. In the primitive law the wife received none of this payment. It belonged absolutely to her relatives. In this connection it is interesting to observe that a very similar marriage law prevailed in Babylonia as early as 2285 - 2242 B.C. The Code of laws, promulgated by Hammurabi, King of Babylon at that period, and said to be the oldest code of laws in the world, shows that the husband was required to pay a bride price to his father-in-law, the latter giving his daughter a marriage portion, which descended to the children of the marriage. But, if the wife died without children, the husband had to return the marriage portion to the father-in-law, first deducting from it the bride price, unless this had been repaid. With the primitive Germanic tribes the wife received from her husband the gift of the morning, and from her relatives only a few articles of clothing or ornament.

The gift of the morning or "morgengabe" consisted originally in merely a few simple gifts which it was customary for the husband to give to the wife the day after the marriage. It was in the nature of a ratification by him of the marriage, and a renunciation of the right to repudiate his wife in cases where, according to the biblical expression, she did not find favour before him.

The share brought by the wife also originally consisted only in clothing and ornaments exclusively used by women - a mere trousseau in fact. Later, this developed into a substantial portion. Sometimes her parents gave her her share of the inheritance in advance/

advance. Sometimes she had already received this owing to the previous death of her father and mother. This share, which corresponded to the Roman dos, was the maritagium of the Anglo Saxons.

A passage from the Laws of Wessex, attributed to Henry 1 of England, shows the wife as being entitled on the death of the husband to these three rights, which were then quite separate and distinct. It runs thus:- "If the wife survive her husband let her have permanently her dower and her maritagium given to her by written instruments or production of witnesses, and her "morgengift" and a third part of all joint acquisition besides clothes and her bed, and let her receive nothing in respect of what has been consumed in charity or common necessity".

The purchase price paid by the husband to the relatives of the wife came, in time, to be paid to the wife herself. There was an intermediate stage in which the relatives still received a portion of it, the rest going to the wife, but ultimately she got the whole price as a marriage portion. This providing of a marriage portion came to be a requisite condition for the validity of a marriage. Certain barbarian laws even established a legal marriage portion if none were given by agreement. This custom may be explained thus:- On the death of the husband, the marriage portion assured better treatment for the widow than she might otherwise receive and ^{helped} ~~help~~ to provide for her maintenance. It also served as an equitable compensation for the benefit gained by the husband under a system where the wife's possessions became/

became merged in a community of property under the husband's administration. The husband appropriated for his wife a portion of his estate in return for what he gained over her possessions, or with their assistance. The obligation to pay a marriage portion would become stronger as the wife's rights of inheritance assumed importance, and a portion of the acquests had also to be given to her. It is probable that originally the marriage portion consisted in only moveable objects, but later it came to include heritage also.

The gift of the morning underwent a similar development. In the christian reaction against the earlier facility of divorce, it lost its original reason for existing, and was changed into something which corresponded to the Germanic marriage portion. Like the latter it came to include both moveables and immoveables, and not mere objects for the use of women. It is not difficult to understand that it eventually became merged with the marriage portion, and together with it developed into the later institution of dower.

It seems clear that the component parts of dower were brought to both Scotland and England by the Anglo Saxon tribes, as there is ample evidence of their existence in England before the Norman influences were felt, and that they underwent a similar fusion here to what took place on the Continent. The morning gift, however, appears to have retained its separate entity to a comparatively late date in this^s country, and to have been given at the door of the Church along with the dower. With the advent of Christianity dower at once/

once assumed a religious significance, and it became the universal practice to endow the wife at the Church door. This came to be looked upon almost as part of the religious ceremony necessary to constitute a marriage, and doubtless gave rise to the view held by some that dower had an ecclesiastical origin. Fraser is of opinion that only a wife married in Church was entitled to dower, but this is not clear. A Statute of Alexander II enacts that, "for her dowrie sche shall have the third of all the lands quhilk pertained to hir husband in his lifetime, gif sche received na dowrie at the kirk dure quhen sche was married". While this Statute apparently does not contemplate the wife being married other than in Church, it is probably going rather far to say that a wife not so married cannot get dower, as this Statute expressly provides dower for a wife who has not previously received it.

While it is possible to trace the gradual growth of dower on the Continent, it is most difficult to discover how it came to apply exclusively to heritable property, there being no doubt that it once comprehended moveables also. It is possible that when more modern jurisprudence began to classify property into moveables and immoveables, and the widow's jus relictae came to be restricted to the former, dower was made to apply only to the latter. It might also be suggested that, as dower developed into a life interest, it would have been difficult to allow it from moveables without the constitution of some kind of trust to safeguard the capital of the fund so appropriated.

Although some writers maintain that COURTESY obtained among the Germanic tribes as well as with the Normans and other peoples of France, there does not seem to be any trace of it having been recognised in this country, or in England at a date prior to the Norman Conquest. This naturally leads to the inference that it was introduced into Britain by the Normans, and there seems to be no reason to cast any doubts on this theory.

The first evidence of the existence of courtesy in Scotland, though it is not called such, seems to be furnished by the Leges Burgorum L.41, which runs thus:-
"De burgagio collato in liberum maritagium - Si aliquis acceperit burgagium cum aliqua in liberum maritagium et cum ea genuerit masculum vel feminam et casu contingente moriatur uxor viri illius et post mortem matris si filius vel filia vivat vel moriatur vir illo burgagio omnibus diebus vite sue gaudebit sed illud ultra nec vendere nec impignorare potest. Et si illa nocte qua nascitur filius vel filia simul moriatur mater et filius vel filia adhuc vir gaudebit bonis illius terre in vita sua ita tamen quod vir ille habeat testimonium duorum legalium virorum vel mulierum vicinarum qui audierunt infantem clamantem vel plorantem vel braiantem. Et sic si plures terras acceperit in maritagium cum uxore sua. Si vero prolem non genuerit dicta terra revertetur ad proximos heredes uxoris sue".

Skene and Stair were apparently under the misapprehension that courtesy was a right which was known only in Scotland. Littleton on the other hand displayed equal/

equal ignorance in stating that it was peculiar to England. Fraser recognises that it was borrowed from the Continent, where it was early matured, and indeed formed one of the rules of the continental jurisprudence. He appears to be less correct, however, when he states that the language of the coutume of Normandy is the same as that of Scotland. For the Norman custom allows courtesy to the husband only so long as he shall remain a widower. Hale, in his History of the Common Law of England, notices this distinction in regard to courtesy in his own country. He says:- "Also in some things tho' both the law of Normandy and the law of England agreed in the fact and in the manner of proceeding, yet there was an apparent discrimination in their law from ours: as for instance the husband seized in right of the wife, having issue by her, and she dying, by the custom of Normandy he held but only during his widowhood, Coutume cap.119. But in England, he held during his life by the courtesy of England".

Stair and Bankton were of the opinion that the origin of courtesy in our law was to be found in the constitution of the Emperor Constantine, which enacted that property descending from the mother, whether by her testament, or by law, should devolve to the sons, but that the father should use and enjoy it all the days of his life; the property, however, still pertaining to the children. Lord Pitfour was also of this opinion. Craig, while he refers to this constitution as being, perhaps the ground-work of the law in those continental states which were subjected to/

to the Roman power, claims no higher antiquity for this institution in Scots law than the Norman customs which were adopted both in England and in this country. But, as Fraser points out, the general enactment of the Roman law does not even allude to the many peculiar rules governing courtesy. Most of these, however, are to be found in the laws of various States on the Continent, which recognised courtesy long before any settled law on the subject can be claimed for this country. It would therefore rather appear that this endeavour to trace the origin of courtesy to the law of Rome is simply another example of the too exclusive references to Roman law which were almost invariably made by our earlier jurists when seeking to discover the origin of our legal doctrines.

Basnage states the language of the coutume of Normandy in regard to courtesy thus:- "Homme aiant un enfant né vif de sa femme jouit par usufruit, tant qu'il se tient en viduité de tout le revenu appartenant à sa dite femme lors de son décès, encors que l'enfant soit mort avant la dissolution du mariage". With the exception that in Normandy the husband was entitled to courtesy only so long as he remained a widower, this statement of the law on this subject is the same as it was in both Scotland and England. This writer, however, goes on to account for this right in Normandy by saying "Cet usufruit lui étant donné comme une récompense d'avoir donné des sujets à la République en procréant des enfans". Brissaud, on the other hand, says that, following the example of the Barbarian law, the usages of/

of certain provinces, such as Normandy, Anjou and Maine, made an exception to the common law and allowed the widower the marriage portion of the wife; and that this same custom existed across the channel under the name of "curtesy of England". A similar institution, he says prevailed in the countries of written law under the name of the "counter-increase".

If Brissaud be correct, it would appear that courtesy is not of such great antiquity as dower, and that it originated on the continent as a set-off against dower, which came to be allowed to the husband. Such an explanation of the origin of courtesy takes no cognisance of the condition that a live child must be born of the marriage in order to entitle the husband to this right, but it is quite possible that this requirement did not adhere to courtesy in its original form, and simply became grafted to it by force of custom.

According to Brissaud, it would appear that this right had existed in some form among the primitive barbarian tribes on the continent and been copied from them by certain of the French provinces. This would accord with the views of those writers who contend that it existed among the early Germanic tribes. There does not, however, seem to be any evidence of it having been introduced into Britain by any of these tribes even in an incomplete state of its development, as dower was. The first evidence of the existence of courtesy both in England and in Scotland shows us that this right appeared in a form almost as complete and fully developed/

developed as that in which it exists today. The fact that its existence cannot be traced in Britain before the Norman Conquest, and the fact that it existed in Normandy from the earliest times, in an almost exactly similar form to that in which it first appeared in this country, seem to point fairly conclusively to our having adopted it from that country. It is difficult to say whether courtesy was introduced direct into Scotland through the Norman influence on the Leges Burgorum, or whether it came into this country via England, but, as it appears to have been in existence in Scotland at as early a date as it was in England, it seems probable that the former theory is the correct one.

It seems most likely that originally courtesy was exigible both from heritage and moveables. If it owes its origin to the husband being allowed the marriage portion of the wife, this would certainly be the case, as the marriage portion often consisted of both. As in the case of dower, it is difficult to discover when this right was restricted to heritage only. Possibly this change occurred about the same time as it did with dower, and for similar reasons.

IV.

The Nature of Jus Relictae and Legitim.

The exact nature of jus relictæ and legitim appears to have aroused as much controversy as the question of their origin. Doubtless this is to a great extent due to the very obscurity surrounding the latter question, but the alterations made by various statutes in certain important particulars of these rights must bear some share of the responsibility. Three distinct theories have been advanced to explain the nature of these rights. They have been described as rights of succession, as debts against the husband's and father's executry, and as rights of division of a common stock of property held in partnership by the husband, wife, and children of the marriage.

The theory that jus relictæ and legitim are rights of succession does not appear to have much constructive evidence to support it. It appears to have been evolved as the result of diligent searches after every possible objection which could be made against the other two theories. Bell, in his Principles, Sec. 1582, says, "Legitim, which is generally stated as a share of the goods in communion belonging to the children on dissolution of the marriage, is more correctly a right of succession to a share of the father's moveable estate --", but he does not, unfortunately, explain why it is more correct to regard legitim as a right of succession than as a right of division of common property.

In the Journal of Jurisprudence for 1859, Volume

Ill there appears on page 72 an article on the nature of Legitim and jus relictæ, in which the theory of their being rights of succession is supported. But here again the only arguments, which seem to be advanced in support of this contention, are the objections to the theories that legitim and jus relictæ are debts, or rights of division.

The Writer of this article cites the case of Shearer V Christie 1842, 5 D 132 as repudiating the latter theory. In this case, Lord Mackenzie, in expressing the opinion of the majority of the Court, said, "The wife's original property in it" (her moveable estate before marriage) "had been extinguished by the marriage, by which it became the property of the husband, just as much as his own moveable property was. Both, no doubt, fell under the name of communio bonorum. But we cannot regard that as giving to the wife any right of property during the subsistence of the marriage. The absolute power of use and disposal being in the husband, we must consider the goods nominally in communion as truly his, not at all the wife's property. In this view, we do not think that a mere renunciation of the jus mariti made by the husband, in relation to the whole or any part of these goods, could vest the property of them in the wife".

He then refers to the case of Fisher V Dixon 1843, 2 Bell's Ap. 63, which he considers decides conclusively that legitim and jus relictæ are not rights of division of common property. Apparently he also believes that this case supports his theory that they/

they are rights of succession, for he declares Fraser's interpretation of this case, as holding that legitim and jus relictæ are debts against the executry, to be erroneous.

Against the theory that these rights are debts, he points out that all the authorities speak of them as shares of the deceased's property and that in the most recent cases the Judges speak of the right of the children during the father's life as a spes successionis. But, strongest argument of all, the theory that these rights are mere debts to be deducted from the executry is quite inconsistent with the acknowledged principle that a general settlement is incompatible with a claim for legitim, so that a child cannot both take under the former and claim the latter.

The Writer then refers to the passage in Bell's Principles already quoted, and that concludes his case for the theory that legitim and jus relictæ are rights of succession. He offers no constructive evidence in support of this theory, but apparently arrives at it simply by endeavouring to dispose of the other two theories as being impracticable.

In the second last paragraph of the article, it is observed that, "Though jus relictæ and legitim are rights of succession, they do not come under the terms of Mr. Dunlop's Act (18 Vict. C. 23) which introduces the doctrine of representation in cases of intestate moveable succession". The Writer explains this by saying that no person can die intestate quoad jus relictæ and legitim. It would not be very difficult/

difficult to find in the exception of these rights from this Act an argument against the theory that they are rights of succession.

In this connection it is interesting to notice Bankton's theory as to why there is no representation in regard to legitim. He says that, as it was a frequent custom for fathers to advance their children sums of money towards satisfaction of their legitim, it was necessary that there should be some way of proving this when the claim was made. In the case of children, such payments could be proved by putting the children on oath, but, if grandchildren were to be allowed to claim legitim, there would be no way of proving whether their parents had received sums in satisfaction of it or not.

Although rather in the nature of another digression it is also of interest to note that Dunlop's Act removed the restriction which denied a widow her jus relictæ, unless the marriage had subsisted for a year and day, or a living child had been born of it. For this restriction can trace its origin to a very ancient custom which seems to have prevailed at one time among the early Germanic tribes. It appears that spouses were not considered to be properly married until the marriage had subsisted for a year and day, or a living child been born of it. If there was no child, presumably either party could dissolve the marriage within the period mentioned without any of the usual consequences of such an event, as the then existing marriage seems to have/

have been recognised, only as a sort of trial marriage or probe - ehe, as the German Writers call it. Might not our present divorce law find in this ancient custom an inspiration for its amelioration?

Apart, however, from the fact that the theory that jus relictæ and legitim are rights of succession has no constructive evidence to support it, there are such serious objections to it that it can obviously be proved to be untenable. Two of these objections it seems appropriate to bring forward now. The third may be more fitly considered when the theory that jus relictæ and legitim are rights of division is dealt with.

Professor Walton, in the address referred to earlier in this treatise, points out that jus relictæ and legitim are not rights of succession because, in the first place, they are indefeasible and override any contrary disposition by Will, and, in the second place, jus relictæ could at one time be claimed by the wife's representatives if she predeceased her husband. Now, no man can be called on to divide his succession during his lifetime, so it is obvious that if jus relictæ is a mere right of succession, the wife's representatives could have had no claim so long as the husband was alive, nor, if this were the case, could a wife claim jus relictæ on divorce. There is no getting round this fact, which, of itself, would seem sufficient to prove that jus relictæ, at any rate, is something more than a right of succession.

The theory that jus relictæ and legitim are debts against the executry has been vigorously pro-pounded/

-pounded by Fraser in his book on the "Law of the Personal and Domestic Relations", and the more recent cases dealing with these rights seem disposed to regard them in that light, if they do not actually enunciate this doctrine.

In volume 1 of this book pages 528-531, Fraser deals shortly with the conflicting views as to the nature of *jus relictæ* and *legitim*, which have been put forward by different writers and expressed in various cases. He then interprets the case of Fisher V. Dixon as holding that these rights are nothing more than debts against the executry, and seems to consider that the dictum, which he attributes to this case, has settled this long disputed question once and for all. Referring to it, he says:- "The view which the Court took of jus relictæ and of *legitim* sanctioned neither of the prevailing opinions that they were rights of division or rights of succession; but, adopting a different principle, a conclusion was arrived at, which seems incompatible with either of these doctrines. They held that the father, during his life, had entire power over the whole moveable property to be divided; that he could convey all this property to a trustee, and that the rights of the widow and the children were nothing different from those of ordinary creditors against their debtor; that the jus relictæ and *legitim* were debts against the executry funds like ordinary debts, and, in short, were nothing more than mere claims, competent to the parties in right of them, against the husband's executor. The recognition/

recognition of such a principle fixes the law upon this subject upon a basis at once clear and definite".

It cannot be disputed that, on the husband's death, jus relictæ and legitim are claims for sums of money which must be satisfied by the executor. But they are not debts against the executry in the ordinary sense, for they cannot compete with the claims of ordinary creditors: nor do the Judges in this case appear to have said so. The view taken by Fraser appears to be little short of amazing in a man of such eminence. In the first place he undoubtedly seems to have infused a meaning into the views expressed by the Judges in Fisher V Dixon which was not intended. In the second place, as a legal writer and historian, he ought to have realised that the nature of rights, which are fundamental principles of our law, cannot be laid down beyond further argument and investigation simply by a judicial decision. The origin and antiquity in Scots law of legitim and jus relictæ had, at that time, never been fully investigated. Without a better knowledge of their origin, it was obviously foolish to lay down hard and fast rules as to their nature. And, in the third place, this theory, even supposing it to be partially correct, is obviously incomplete. For, if jus relictæ and legitim are mere debts and nothing more, what is the ground of debt? And if, as Fraser also states, the husband is absolute owner of the property during the marriage, how can his wife and children have claims on it at his death? Without a satisfactory explanation/

explanation of these points Fraser's theory does not merit serious consideration.

There is thus left the theory that jus relictæ and legitim are rights of division of a common fund and careful research seems to demonstrate that, in spite of the many objections which have been made against it, this theory is the true explanation of the nature of these rights. The great weight of opinion which has arisen against this theory seems to be accounted for by a lack of information in regard to the origin of these rights, the effect on them of Statutes and decisions, and an inability to properly comprehend the doctrine of communio bonorum, with which this theory is bound up. The first and third of these factors seem, in their turn, to have been occasioned by a lack of research into the principles of ancient law.

There seems little doubt that the apparent unsatisfactoriness of the doctrine of a communion of goods between spouses in Scotland has proved the main stumbling block to the acceptance of the theory that jus relictæ and legitim are rights of division. Fraser goes very fully into this subject in Volume 1 of his book on the personal and domestic relations. He argues that the theory of a communio bonorum, as our older writers call it, was of late introduction into our law, and that the name was borrowed by our lawyers from France in the 17th century. He maintains that it is inconsistent to speak of a fund as common/

common property and yet admit that one partner - the husband can do as he likes with it. But, as Professor Walton points out, the chapter on communio bonorum is most unconvincing. For, not only does Fraser fail to prove that in Stair's time, any change was made in the substance, as opposed to the terminology of our law on this question, but he has obviously failed to understand how this doctrine of a community of goods operated in its earliest stages. Had he understood it, he would have found no insuperable inconsistency in the husband's extensive powers over the common fund.

But, even if we were to accept Fraser's contention that the doctrine of communio bonorum formed no part of our ancient law, and was not introduced into Scotland till the 17th century, such a state of affairs would be no proof that jus relictæ and legitim are not rights of division. If Fraser had been able to show that they had no place in our ancient law, but had come into being as a result of the introduction of this community doctrine his contention might be less absurd. Jus Relictæ and Legitim, however, were recognised in our earliest law and are most obviously not the result of the perhaps comparatively modern Scottish doctrine of community of goods, but of a far older community, which had its birth on the Continent.

It is really astonishing that at the present day Fraser's views on this question of a community of goods in Scotland have been regarded as of such authority. His statement in regard to the existence of

a community in England is, though brief, equally inaccurate. He says, without any qualification, that the law of England recognises no communio bonorum, even in name. With this rather sweeping assertion, it is interesting to compare Pollock and Maitland's more carefully considered and more accurate statement. "We are not contending", they say, "that the law of England ever did definitely recognise a community of goods between husband and wife. We have, however, seen many rules as to what takes place on the dissolution of marriage, which might easily have been explained as the outcome of such a community, had our temporal lawyers been free to consider and administer them. Unfortunately about the year 1200 they suffered the ecclesiastical courts to drive a wedge into the law of husband and wife, which split it in twain. The lay lawyer had thenceforth no immediate concern with what would happen on the dissolution of the marriage. He had merely to look at the state of things that existed during the marriage. Looking at this, he saw only the husband's absolute power to deal with the chattels inter vivos. Had he been compelled to meditate upon the fate which would befall this mass of goods as soon as one of the spouses died, he might have come to a conclusion which his foreign brethren accepted, namely, that the existence of a community is by no means disproved by the absolute power of the husband who is, so long as the marriage endures, the head of the community. As it was, he saw only the present, not the future, the present unity of the mass, not its future divisions into shares. And so he concluded holdly that the whole mass belonged to the husband".

These Writers conclude this passage by saying that they consider that Fraser's views on the question of a community of goods in Scotland are quite erroneous.

Dealing with the system of the tripartite division of a man's estate, which at one time obtained also in England, Pollock and Maitland say, "It^{is} intimately connected with a law of husband and wife which is apt to issue in the doctrine that husband and wife have their goods in common. All Europe over the new power of testation had to come to terms with the ancient rights of the wife, the children, and the other kins-folk".

In England, as in Scotland, however, even proof positive of the non existence of a community of goods between husband and wife, does not establish the fact that those rights, which today we call jus relictæ and legitim, were not rights of division of some common fund. It is necessary to look to the countries where these rights had their origin, in order to discover reliable information as to their nature. Although there is no evidence of the prevalence of the tripartite division of a husband's estate in the old German laws, the wife and children undoubtedly had rights on his death similar to those under the system of the tripartite division, which obtained in Normandy, and other parts of France. Thus in order to establish the theory that jus relictæ and legitim are rights of division of a common fund, it is necessary to demonstrate the existence of a community of goods between husband and wife on the Continent.

Fraser, who goes into this matter also, seems again to have fallen into the error of making sweeping and rather inaccurate statements. He says that there was a proper communion of goods among the Germans, under which each of the spouses had equal rights in the common fund, that this was borrowed by the French customs towards the end of the 9th and the beginning of the 10th centuries, but that these customs and all the laws which followed them (as our own) were based on principles essentially different. The husband had absolute ownership and control of the property during marriage, and the French customs simply copied the name, but not the substance, of a communion of goods from the Germans. The Wife was only the creditor of her husband for a share of the goods acquired during the marriage. Her right was just a share given gratuitously by the tacit consent of the husband and this, Fraser holds, is the true explanation of our jus relictæ!

Now this statement about the German community appears to be far from correct. A community in which both spouses had equal rights is not only inconsistent with the known principles of ancient law, but is quite incompatible the doctrine of the German mundium. It is quite true that the German community of goods eventually justified its name to a great extent, although the right of administration was always in the husband. But Brissaud and other continental writers show that, in its first stages, the German community afforded no rights to the wife during her lifetime. This doubtless was partly due to her being able to contribute very little property of her own.

Fraser goes on to say that there was unquestionably never any communion of goods between spouses in Normandy. In support of this contention he cites the 389th article of the Coutume de Normandie: "Les personnes conjointes par mariage ne sont communs en biens, soient meubles ou conquets immeubles; ains les femmes n'y ont rien qu' après la mort du mari". In this passage, we get a glimpse of the same argument that community cannot exist because the wife had no rights during her husband's lifetime.

Brissaud also holds the view that there was no community in Normandy. Not only did the custom of Normandy not admit of any community, he says, but it forbade community to be stipulated for. The wife had no rights even in the acquests of the marriage during her husband's lifetime.

But neither Fraser nor Brissaud appears to have gone very deeply into this matter. The former adduces old charters as evidence of the German community, but he has obviously overlooked the old Norman charters. The latter offers no evidence in support of his contention except the passage in the custom refusing to recognise any community.

Now, it has by no means been proved that a community of goods between spouses did not exist at one time in Normandy. In fact, the weight of reliable evidence seems rather to support the existence of such a community.

In 1770 the contention that a community did at one/

one time obtain in Normandy was well argued by Du Castel in a small book entitled "Dissertation sur la Communauté Normande". His assertions, however, were followed by an official contradiction from the whole bar of the Parliament of Normandy, which reads as follows:-

Arrête

De L'ordre de Messieurs les Avocats au Parlement de Normandie

du 11 d'Aout 1770

Sur le rapport qui a été fait à la compagnie d'un livre intitulé: 'Dissertation sur la Communauté Normande, imprimé à Rouen chez Pierre Seyer, contenant 149 pages, il a été arrêté unanimement que c'est s'élever directement contre les dispositions de la Coutume, que de prétendre qu'il y ait, ou qu'il doive y avoir entre mari & femme une communauté en cette Province; qu'au contraire il est de principe que l'article 389 de la coutume est exclusif de communauté: comme aussi qu'il est de notoriété qu'il y a une distinction certaine à faire entre les statuts personnels & les statuts réels, & que celui qui règle la majorité en cette Province est pur personnel & suit la personne dans quelques lieux que les biens soient situés. Arrêté en outre que le present sera imprimé & envoyé aux Batonniers de l'ordre des Avocats de Paris & de Rennes & aux Syndics des Collèges de la Province.

(Signé), Mc Jansse Syndic.

Mc Lalouette, Secrétaire".

Here again the same article of the custom is by itself held to provide conclusive proof that no community of goods between husband and wife ever prevailed in Normandy. But it must be observed that this arrête is only ^{authority} ~~evidence~~ that since the compilation of the Grand coutumier de Normandie in 1583 no community of goods prevailed. It has no authority whatever in regard to the early law of Normandy.

Lefebure, in "Le Droit des Gens Mariés aux Pays de Droit Écrit et de Normandie", also argues against the contention of a Norman community, but he recognises that some of the old Norman Charters furnish evidence in support of a community. Unfortunately he does not consider these very fully.

Professor Meyers, however, presents a very strong case in support of a community having at one time prevailed in Normandy. Le très Ancien Coutumier de Normandie, he says, speaks in C. 5 de communi catallo. The old Style de Procédure, printed in the editions of the ancient custom of Normandy of 1534, and other Gothic editions, says, in the chapter dealing with testaments, that if a father has emancipated his children, he can bequeath a half of the goods. This would appear to furnish evidence that the emancipation of children in Normandy, as in many other countries, was a separation of the children from the family property, so that after this the husband and wife remained as the only owners for a half each. The gloss on the Summa de Legibus C. 21 says that if a husband forfeits all his goods, there remains to the wife and children their one third portions, such an enactment cannot be

a/

a consequence of the law of inheritance. The Établissement de Pont de l'Arche of 1219 allowed a wife to make a will ad pias causas for her part in the community.

The Ancient Charters of Normandy, Professor Meyers contends, furnish a considerable amount of evidence to show that husband and wife were joint owners of acquests, and that a community existed between them. The Cartulaire de l'Église de la Sainte - Trinité de Beaumont - Le - Roger of 1268 in narrating a gift between husband and wife, contains the following passage:- "Dedimus eciam eidem prioratui omnia bona nostra mobilia post decessum nostrum, de quibus non licebit nobis aliter disponere vel testari. Ex altero nostrum decedente prior, qui pro tempore fuerit, portionem mobilium decedentis sine contradictione supervenientis (Sic) percipiet et habebit." In the 'Atirements et Jugies d'Eschequiers' also, the word "Communanté" is used in connection with conjugal property.

Professor Walton, in his address to the International Law Association in 1901, in speaking of the coutumes of France, says that they were not separate bodies of law, that the central doctrine common to all was that of la communanté. Certainly each custom varied as to what property fell into this communion, as to what were the shares of the partners at its dissolution, and as to what proportion of the communion the husband could dispose of by Will.. This doctrine of a community of goods between spouses was recognised not only all over France and Germany, but in such scattered/

scattered parts of Europe as Sicily and Bohemia. It is very doubtful if, as Fraser asserts, the French community was borrowed from Germany, its antiquity being probably as great as the community of the latter country. There is certainly evidence in the matrimonial system of the Gauls of a species of community between husband and wife having prevailed, though the common fund went to the survivor in its entirety and was not divided on the husband's death. Most of the French customs unquestioningly accept the doctrine of a community, as, for instance, those of Brittany and Amiens, and it seems most improbable that Normandy could have escaped this prevailing and fundamental doctrine, especially in view of the evidence to the contrary. It would rather appear that the compilers of the 389th article of the Coutume Normandie had fallen into the same short-sighted error as Pollock and Maitland attribute to the civil lawyers of England after the 13th century, namely, that they had become so obsessed with the husband's powers over the conjugal property in his lifetime, that they lost sight of the rules governing its division on his death, and concluded that there was no community, and that the husband was the sole owner.

The most recent researches into ancient law shows that among all the early Aryan nations there was no such thing as individual ownership of property. It was owned in the first place by the tribe or village community, and the individuals who composed these groups were simply joint owners of the whole. In some cases they were scarcely even that, for the common/

common property was sometimes practically under the ownership of a smaller group consisting of the most influential men of the tribe or the community, so that the other members were almost in the position of tenants rather than joint owners. Later the family became a legal unit in which ownership of property was recognised. In this case, however, probably owing to the rudeness of the age, the wife and children were not permitted to share in the control of the joint property. The father, or, where all lived together, the grandfather in some cases, acquired the property for his household, and, as head of the house, possessed it as the manager of an implied partnership. As distinct from the patria potestas, the basis of the French system of family law was not the rights of the father but the interests of the wife and children. Moreover unlike the Roman system there was no religious significance attached to the father's supremacy. His authority was purely a civil institution. Originally it was devised for the direction and support of the wife and children as the weaker members of the family. Later it was justified by the theory that, if the wife had equal powers in the partnership with the husband, this would lead to endless quarrels, and that in a conjugal partnership one partner must be empowered to enforce his will, and so put an end ^{to} ~~of~~ disputes. It can thus be seen that there is no real inconsistency between the conception of a partnership, between spouses and children, and the husband's complete power over the joint property.

It/

It further appears to be indubitable that the origin of all succession among most of the peoples of Northern Europe is not descent, but co-ownership. This fact, which entirely overthrows the theory that jus relictæ and legitim are rights of succession, seems to have been frequently lost sight of owing to too frequent and exclusive references to Roman law, and a lack of investigation into any other earlier jurisprudence than that which prevailed in feudal times. The Roman haeres and the feudal heir seem to have blinded jurists to the fact that in countries in which the technical unity of the family was not continued after the father's death, the succession was manifestly equivalent to survivorship among joint tenants. The idea of a succession opening does not appear to have occurred to the Northern mind in the more primitive stages of its jurisprudence. Widow, children, and executors took possession of a deceased's property as owners, not as representatives of the deceased. It is easy to see how the later doctrine of communio bonorum was evolved from this system.

This conjugal partnership did not always begin at marriage. In our old law it began at the end of a year and a day after the marriage, or on the birth of a live child, whichever event happened first. This rule obtained also in some of the French customs and generally among the Germanic tribes. The children of the marriage were admitted at birth into the partnership, so that each new birth diminished the shares of the others pro tanto, just as each child which became forisfamiated increased the shares of those who still remained in the partnership.

Misled by what happened in the development of the Roman law, many writers appear to think that the indefeasible portions of the wife and children were introduced by legislation, or the growth of custom, to safeguard them against an unrestricted power of testing acquired by the father as pater familias. They appear to believe that, as in Rome, there was an intermediate stage between the primitive period in which members of the family took the property of the deceased by virtue of survivorship and the period in which the creation of the rights of the widow and children took place - a stage where the father had a complete power of testing in regard to the whole property. But such a view is clearly erroneous. The indefeasible portions of the wife and children are obviously the result of a period when testation was unknown. They were not created as restrictions on a complete power of testing.

It seems clear that, among the Northern nations, testation was an innovation of the Church to benefit the deceased beyond the grave and itself on this side of it. For the earliest Wills almost invariably bequeathed property to none but the Church. Indeed it seems likely that the Church was also responsible for the origination of private ownership of property, as obviously such a preliminary step was necessary before a man could have any power of testation. At the same time, there seems little doubt that this new power of testing was not extended beyond the dead's part, as being the husband's share of the common property and, whatever his powers during his lifetime, the only portion he could dispose of/

of mortis causa. This is doubtless the explanation why a wife and children cannot both take under the husband's and father's Will and claim their legal rights. The husband is supposed to have the power of testing only in regard to the dead's part - his own share of the common property, but, if he tests with the whole property, he is supposed to be taking into account the indefeasible portions of the wife and children and adding to these a share of the dead's part when he fixes the bequests to them in his Will.

These indefeasible shares of the common property would necessarily originally be composed of both heritage and moveables. It seems most probable that the influence of the feudal system on heritage was responsible for restricting them to moveable property only. Kames argues that legitim became altered from a right in property into a mere personal right, a contention which would apply also to jus relictæ, and seem to be substantially accurate.

It is, of course, obviously absurd to contend that today legitim and jus relictæ are rights of division of common property held in partnership by the husband, wife, and children, since there is no longer any conjugal communion of goods in Scotland. But, at the same time, it is equally incorrect to describe these rights either as mere debts or as rights of succession. The truth is that the trend of legislation, actuated no doubt to some extent by the misconceptions of our jurists, has put these rights in a peculiarly anomalous position, so that they are now really almost a blend of the three different/

different theories which have been formed as to their original nature. In their essence, however, it appears to be quite clear that, from a species of right by survivorship, they soon became, and for a long time remained rights of division of a conjugal community of goods.

It is also incorrect to regard legitim and jus relictæ as restrictions on freedom of testation in Scotland, for, if they did not exist in this country before testation was known, their introduction must have been practically coeval with it, and consequently prevented it having ever extended to a man's whole estate. The more correct view is to realise that in Scotland the power of testing has, from its introduction, never been extended to more than one third of a man's whole estate, where he had both a wife and children, and not to regard the indefeasible portions of the wife and children as having been created to limit the power of testing.

With regard to the statutory rights of jus relictæ and legitim from the Mother's estate, it is almost impossible to form any theory as to their nature. It is doubtful if even their creators had any theory as to whether they were inventing new rights of succession, additional debts against a deceased's executry, or adding to the then scheme of division of deceaseds' estates. It seems more probable that they thought only of creating counterparts of jus relictæ and the older legitim. The Married Women's Property (Scotland) Act 1881, which created these new rights, declares that they shall be the same as the older/

older rights, "according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge or satisfaction thereof, as the case may be." It would therefore seem that these later rights have, since their creation, occupied the same anomalous position which is held today by jus relictæ and the older legitim.

In connection with the right of legitim from the Mother's estate, it is interesting to note Bankton's contention that, in his day, the Mother's estate really contributed to the legitim, since it was immixed with the father's property, and the children took one third or one half of the joint estate.

There is, however, this difference between the newer and the older rights, namely, that, whereas the latter existed before testation was recognised, the former are undoubtedly restrictions on freedom of testation in Scotland.

V.

The Nature of Terce and Courtesy.

There does not appear to have been so much diversity of opinion among Scottish Jurists as to the nature of terce and courtesy. These rights have always been regarded in this country simply as legal liferents, but, on the Continent, Jurists are at variance as to whether dower (to give terce its more widely known name) and courtesy are to be attributed to the doctrine of a conjugal community, or are, as the French lawyers generally style them, gains de survie - rights by survivorship.

There certainly appears to be some ground for describing dower as an offshoot of the community doctrine, for although, from a very early time, there appears to have been present the idea of making some provision for the wife after her husband's death, dower was originally the price paid by the husband for the privileges which marriage would give him over her estate. At the same time, the wife had the counter benefit of one third or one half of the joint property on the husband's death, so that dower would really appear to have been an additional provision for widowhood, and also to serve as a resource in the event of the husband disposing, or being deprived of the whole conjugal estate in his lifetime, so as to leave nothing for the widow on his death. This seems to have been the view taken of dower by the Church, and to have accounted for the support it received from the latter, and for its later/

later attribution to an ecclesiastical origin. It is difficult, however, to see how this right could be regarded as a right by survivorship, since originally it was given to the wife in her lifetime, unless this view did not mature until dower arose only on the death of the husband.

The nature of courtesy is almost more difficult still to determine. Some writers are of the opinion that it is an alimentary provision to the husband corresponding to the wife's dower, but such a view has little to support it, although the fact that, in Normandy, courtesy was allowed only so long as the husband remained a widower, would seem to lend some credence to this contention. It would, however, seem out of proportion to allow the husband the life interest of the whole of the wife's inherited heritable estate, when a life interest of only one third is allowed in dower. Moreover it would be inconsistent that such an alimentary provision should be dependent on the birth of a live child. Others hold that it is a reward for presenting the state with a child, and the Mother with an heir. Certainly, at first sight, courtesy appears to be allowed on account of fatherhood, rather than as the privilege of a husband. Those who attribute it to the community doctrine say that it is a result of the predominance of the husband in regard to the management of the family property. A similar view is taken by Erskine, who holds that courtesy is simply an extension, after the wife's death, of the husband's jus mariti. But, if this is so, how is the insuperable condition that a live child must be born of the marriage to be explained?

Were it not for the fact that the child does not require to live, but merely to have been born alive, it seems possible that this theory might be explained thus:- If no child was born, the conjugal partnership would be dissolved at the wife's death and there would be no further interests for the husband to look after. The birth of a child, however, who is the Mother's heir, would continue the partnership after her death, and necessitate the administration of the child's share. The Father, having fulfilled this function in the wife's lifetime, it would be but right that he should continue to do so after her death. As a reward for his trouble, and possibly also in order that he may not abuse the wife's estate, he is allowed the life interest of her heritage. Such an explanation, however, will scarcely stand in view of the fact that courtesy is allowed though the child dies in infancy, and does not survive the Mother. There is also the additional objection that, if the child survived the Mother but became forisfamiliated, there would be no further excuse for the Father's administration of this part of the conjugal estate, nor consequently for his enjoyment of the life interest of it..

As has already been mentioned, Brissaud's explanation of courtesy in Normandy, (from which country we undoubtedly derived it) Angou, and Maine is that it was the marriage portion of the wife, which was allowed to the husband on her death. The reason for this may be better comprehended by regarding the "Counter-Increase" -- the courtesy of the countries of written law. This was allowed to the widower as a set-off against the "Increase" or dower, which was given by/

by him to the widow and added to and increased her marriage portion. If Brissaud's view is correct, courtesy was simply a set-off against dower. The reason for it being a more extensive provision than dower is probably to be explained by the husband's predominance. This theory, however, does not account for the requirement that a live child should be born of the marriage. It is possible, however, as has already been suggested, that this condition did not originally govern courtesy, but came into being later through the mere force of some custom. Professor Walton thinks that the proof of live birth which was required, namely that the child must be heard to cry, is justified by immemorial custom rather than reason. May not this also be the explanation of the condition that the live birth of a child was necessary to entitle the husband to courtesy?

Although it is difficult to say with any certainty which of these theories is the correct one, there seems little doubt that courtesy was a right by survivorship, though it can probably be linked to some extent with the system of family law which revolved round the doctrine of a conjugal community.