Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 71

Some Miscellaneous Topics in the Law of Succession

SEPTEMBER 1986

This Consultative Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 31 January 1987. All correspondence should be addressed to:-

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Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

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PART 1 INTRODUCTION

1.1 The purpose of this consultative memorandum is to seek comments on possible reforms of various topics in the law of succession. It is the third in a series of three consultative memoranda being issued simultaneously. The first memorandum entitled "Intestate Succession and Legal Rights" (Consultative Memorandum No. 69) discusses possible reforms of the law relating to the distribution of a person's estate where no valid will is left and claims which can be made by a person in the face of a will excluding him or her. The second, entitled "The Making and Revocation of Wills" (Consultative Memorandum No. 70), looks at the validation of improperly executed wills, the rectification of errors contained in wills and the revocation of wills by operation of law (e.g. on marriage or divorce) and by testators themselves.

1.2 The series of three consultative memoranda are interrelated. Although each can be read on its own, the issues raised in one may have repercussions in areas of law discussed in the others. As the title of this consultative memorandum "Some Miscellaneous Topics in the Law of Succession" suggests, it is concerned not with general questions of principle but with more detailed and often somewhat technical issues. These are nevertheless just as important to those affected by them as are the issues of principle.

1.3 The topics contained in this consultative memorandum have been selected for inclusion for a variety of reasons. Some have been suggested to us by the Law Society of Scotland and other organisations or individuals; others

have been chosen because they have been the subject of critical comment in legal journals or elsewhere; yet others have seemed to us to be areas where the law could with advantage be reformed or simplified. We are conscious of the fact that our list of topics is incomplete and we would welcome comments from those who have experienced difficulties or problems in areas not covered by this consultative memorandum.

1.4 As a result of the Law Reform (Parent and Child) (Scotland) Act 1986 whether a person is born within or outwith marriage will make no difference to his or her succession rights (except to titles, with which we are not concerned in this memorandum). References to children and issue therefore include those born to parents not married to each other. Adopted children are already regarded as the children of the adopter rather than children of their natural parents and we are not suggesting any change in that area.

PART 2 THE CRIMINAL HEIR

2.1 Scottish succession law is based on traditional notions of family and kinship and generally speaking is not concerned with the worthiness of those who inherit. Children may have made their parents' lives a misery yet are not barred from claiming legitim, an adulterous spouse can claim his or her legal rights, and distant relatives whose very existence was unknown to the deceased may inherit under the rules of intestacy. The law also does not take into account the financial needs of successors. If a person dies without a will survived by two children, each will inherit one half of the estate even though one is living in poverty and the other is extremely rich. In this part we examine one major exception to the rule that unworthiness is no bar to inheritance: where the heir has killed the deceased or committed some other crime against the deceased. The statutory disentitlement of a husband from succeeding to his wife's intestate estate acquired after separation[1] is dealt with in the first memorandum.

Present law and comparative survey

2.2 The present Scots law on this point is an amalgam of an ancient and unsatisfactory statutory provision, a common law principle of doubtful scope and the Forfeiture Act 1982 which introduced an element of judicial discretion. The statutory provision is the Parricide Act 1594 which reads as follows:

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1 Conjugal Rights (Scotland) Amendment Act 1861, s.6.

"FOR pvnisement of parricide

OURE Souerane Lord and estatis of this present parliament Vnderstanding the abhominable and odious crueltie that hes bene at sumtymes heirtofoir vsit within this realme be children aganis thair parentis in murthering of thame and takand of thair lyves maist vnnaturally Hes thairfoir statute and Ordanit that quhatsumeuir he be that hes slayne or sall heireftir slay his father or mother guidschir or guddame and hes bene alreddie or salbe heireftir convict be ane assyise The committaris of the said cryme and his posteritie in linea recta salbe disheresit in all tyme heireftir fra thair landis heretages takis possessionis And the samyn sall apertene to the nixt collaterall and narrest of blude quha vtherwayes micht succeid falyeing of the richt lyne."

2.3 The common law principle is that a person is not allowed to invoke the aid of the law to claim a benefit from his or her crime. It is based on public policy, equity and morality and has been applied in Scotland in two recent cases. In Smith, Petitioner[1] the uncle of the deceased applied successfully to be appointed executor. He averred that the deceased's wife was excluded as she had been convicted in Northern Ireland of the manslaughter of her husband. In Burns v. Secretary of State for Social Services[2] a claim for a widow's allowance by a wife who had been convicted of culpable homicide of her husband was disallowed. A conviction for culpable homicide does not form an absolute bar. As Lord President Emslie said in Burns[3] "... not every kind of culpable homicide will necessarily result in the application of the general rule."

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1 1979 S.L.T. (Sh. Ct.) 35.

2 1985 S.L.T. 351.

3 At p. 353.

The Forfeiture Act 1982 which also allows the court to grant relief from forfeiture incurred under the common law principle is discussed later.

2.4 The Irish Succession Act 1965 disqualifies any sane person who has been guilty of the murder, attempted murder or manslaughter of another person from taking any share in that other person's estate (except a share arising under a will made after the act constituting the offence) and from applying for family provision.[1] The Act also contains a disqualification from taking any share by way of legal rights or family provision for a person who has been found guilty of any offence against the deceased or his or her spouse or child punishable by two years' imprisonment or more.[2]

2.5 The Uniform Probate Code contains a provision limited to "intentional and felonious" homicide. It provides that a person who feloniously and intentionally kills the deceased is not entitled to any benefits under the will or intestacy of the deceased. The provision also excludes the killer from taking a share of joint property under survivorship rules and from benefiting under nominations in bonds, life insurance policies or other contractual arrangements. A final conviction of felonious and intentional killing is conclusive for the purposes of the provision but is not necessary: in the absence of a conviction a court can decide on a preponderance of evidence whether a killing was felonious and intentional for the purposes of the section.[3]

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1 S.120(1).

2 S.120(4).

3 S.2-803.

2.6 In most, if not all, continental European countries there are rules disinheriting the unworthy heir.[1] The most common type of rule disqualifies the heir who has committed a crime against the deceased.[2] Sometimes conviction of the crime is required; sometimes not.[3] A less commonly recognised form of "unworthiness" is an attempt to alter or destroy the deceased's will.[4]

Proposals for reform

2.7 The Parricide Act 1594 is plainly unsatisfactory. It is archaic. It is limited to the killing of parents and grandparents and does not cover, for example, the killing of children, spouses, brothers or others from whom the killer may stand to inherit. It is not clear whether the references to possessions in the context of "landis heretages takis possessionis" covers moveable property. The common law rule the courts will not recognise benefits accruing to criminals from their crimes is in its application to succession also in need of reform and clarification. It is not clear that the rule prevails over the express provisions of the Succession (Scotland) Act 1964. The test of benefit accruing from the crime might allow someone who attempts to kill a person to inherit from him or her if that person dies naturally a few months later; it also introduces difficult questions of

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1 Regimes Matrimoniaux, Successions et Liberalites (Verwilghen, ed. 1979) Vol. 1, p.126.

2 Ibid., referring to France, Belgium, West Germany, Austria, Denmark, Greece, Spain, The Netherlands, Sweden, Norway, Switzerland, Portugal and Italy.

3 Ibid.

4 Ibid.

causation as for example where the deceased was terminally ill at the time of the crime or where he or she died as a result of some other subsequent act or circumstance. Moreover, while it is clear that murder or culpable homicide of the deceased results in forfeiture, the effect of other crimes is uncertain. In our view the 1594 Act and the common law rule should be replaced in the field of succession[1] by a reformulated rule of forfeiture.

2.8 The first question in any reformulation is what crimes should give rise to forfeiture. The Parricide Act 1594 refers to slaying and under the common law rule murder will and culpable homicide or manslaughter may result in forfeiture. Some other countries have a wider rule disqualifying an heir who commits a crime against the deceased. It might be regarded as offensive if a son who had subjected his mother to physical violence for many years or a wife who attempted to murder her husband should nevertheless remain entitled to inherit. On the other hand too wide a forfeiture rule would involve the risk of disinheriting those whom the deceased might not have wished to disinherit. A comparatively minor offence committed many years ago might well have been forgotten or forgiven or balanced out by an offence committed by the deceased against the heir. In our first memorandum we put forward proposals which would empower the court, on application by an interested person, to reduce the amount of legal rights claimable by another[2] or to award the applicant

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1 The common law rule would continue in other fields such as claims under life insurance policies or pension schemes.

2 Proposition 32 (para. 4.75).

discretionary provision out of the estate so reducing the amounts available to the existing beneficiaries[1]. These proposals, if enacted, would go some way towards dealing with persons who committed a minor offence against the deceased. But their scope is limited as there may be no applicants with sufficient interest or no grounds may exist for making the application. The Irish Succession Act's approach has many attractions[2]. It limits forfeiture to the crimes of murder, attempted murder, or manslaughter but provides that a person who commits a lesser but still serious crime against the deceased should be disentitled from claiming legal rights or applying to the court for family provision. This approach enables the deceased to make a will excluding the offender from the succession yet leaves a non-homicidal offender free to take a bequest in the deceased's will or to inherit under the rules of intestacy. Our provisional preference is for a narrow rule disinheriting an offender only in the cases of murder and culpable homicide. For these crimes there is an obvious causal link between its commission and the opening of the succession to the offender, which is lacking in other crimes.

2.9 Disinheritance under the Parricide Act 1594 requires conviction of the offender, but the position under the common law rule is less clear. Other countries have different approaches; some require a conviction, others do not. If no conviction were necessary the executors or other beneficiaries of the deceased might have to bring

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1 Proposition 43 (para. 4.101).

2 See para. 2.4 above.

civil proceedings to disinherit the offender or defend a claim by the offender to share in the estate. Such proceedings would be long, complex and expensive with the possibility that the expense would be borne by the estate or the applicants personally. If the civil standard of proof was applicable a person could be categorised as a murderer or killer on a balance of probabilities. Even if the criminal standard of proof beyond reasonable doubt was adopted the offender would be "convicted" in the absence of a jury. From a practical point of view it would be easier for executors to administer the deceased's estate if forfeiture resulted only from a conviction. Unless and until a conviction was obtained executors could distribute in accordance with the provisions of the deceased's will or the rules of intestacy. On the other hand always requiring a conviction might lead to injustice. A conviction may not be obtainable for a variety of reasons although it is fairly certain the deceased was unlawfully killed. First, the killer may die before being brought to trial. For example, he or she may commit suicide immediately after killing the deceased or die later in an unconnected road accident. Secondly, the Crown may be unable to prosecute for technical reasons, such as the killer having fled abroad or being liberated under the 110 day rule.[1] Our tentative view is that a conviction should be a necessary pre-condition for the application of any foreiture provisions.

2.10 An allied question is what effect should be given to a conviction by a non-Scottish court. A conviction by a

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1 Criminal Procedure (Scotland) Act 1975, s.101.

criminal court in another part of the United Kingdom should obviously have the same effect as a Scottish conviction as the constituent parts of the United Kingdom have very similar standards regarding criminal trials.[1] Although other countries have different standards, different procedure and different definitions of particular crimes it would be simpler and more practical if a conviction by any foreign court resulted in automatic forfeiture. The disqualified heir could, however, apply to a Scottish court for relief from forfeiture under the provisions of the Forfeiture Act 1982 or otherwise and the validity and status of the foreign conviction could be raised in such proceedings. Extension to non-Scottish convictions would necessitate the crimes of murder and culpable homicide and other crimes being expressed in a more general fashion[2], but that is a matter of drafting technique rather than principle.

2.11 Summing up the discussion so far we invite views on the following questions.

1.(a) Should the Parricide Act 1594 and the common law rule (courts not recognising benefits accruing to criminals from their crimes) in so far as it relates to succession be replaced by a modern statutory provision disqualifying from inheritance (by way of testate succession, intestate succession, legal rights, family provision, nomination

1 The conviction in Smith, Petitioner 1979 S.L.T. (Sh. Ct.) 35 was a Northern Irish conviction for manslaughter.

2 Such as "unlawful killing", Forfeiture Act 1982, S.1(1); "offence punishable under the provisions of a corresponding law", Misuse of Drugs Act 1971, ss. 20 and 36.

or special destination) any person who has committed the crime of murder or culpable homicide against the deceased?

(b) Should a person be disqualified only if convicted? If so should convictions be limited to those obtained in a court in the United Kingdom or include those obtained in a court in any country?

(c) Apart from murder or culpable homicide (and similar crimes under other systems of law) which should always result in forfeiture, should any other crime or crimes have the same effect and if so which? If a crime (other than murder, culpable homicide etc.) is to result in forfeiture, should the deceased be able, notwithstanding this rule, to confer a benefit on the offender by a will made after the crime was committed?

(d) Should there be a provision that a person convicted of a serious crime (other than murder or culpable homicide) against the deceased should forfeit any claim for legal rights or the right to apply for family provision out of the deceased's estate?

2.12 Clearly the effect of forfeiture should be to disentitle the criminal heir from succeeding to the deceased in any way, whether under the terms of the deceased's will or nomination, on intestacy, by way of legal rights or family provision, or under a gift or bequest destined to the deceased and then to the heir given

by a third party. Survivorship destinations involving the deceased and the criminal heir give rise to problems which we discuss in the next paragraph. What should happen to the forfeited provisions? The Parricide Act 1594 directs that the slayer and his or her descendants shall be disinherited and the next collateral and nearest in blood shall succeed in their place. The effect of the common law rule is not clear. We think a new statutory provision is required to regulate the devolution of forfeited provisions. A direct gift by the deceased to a descendant of the criminal heir ought not to be affected by the heir's forfeiture since the descendant's right is independent. But should descendants forfeit rights of succession which open to them as a result of the heir's disentitlement - as issue of the heir under a gift to the heir whom failing his or her issue, for example? We tend to think not. In most cases the descendants will have been entirely innocent of the crime. Where they have taken an active part in its commission they could be convicted of it art and part. In most cases of forfeiture the deceased and the offender are closely related and the deceased would probably not have wished the children or remoter descendants of the heir, who are also his or her own close relatives, to be deprived of any share of his or her (the deceased's) estate.

2.13 If, as we tentatively suggest, the criminal heir's descendants should not be barred from inheriting in place of their criminal ancestor, it would be possible to provide for the effect of forfeiture by a general provision that the criminal heir was deemed to have predeceased the victim. Thus any testamentary provision made by the deceased would normally lapse into residue or intestacy (subject to the operation of the rule conditio si

institutus sine liberis decesserit[1], a destination over or any other provision in the will), any nomination or donatio mortis causa would lapse and the fund or property would fall into the residuary estate of the deceased subject to any claim for legitim by representation[2] by the criminal heir's descendants if they happened to be issue of the deceased. Testamentary provisions by a third party in terms of which the killer takes on surviving the deceased would similarly lapse. If the deceased died intestate presuming the criminal heir to have predeceased would entitle the heir's descendants to succeed to the free estate in his or her place by representation[3]. But the rule of predecease would need to be modified in the case of property held by the deceased and criminal heir on a title to them and the survivor of them. Otherwise the deceased would be treated as succeeding to the heir's share which seems unnecessarily harsh and an extra punishment. The simplest solution would be to ignore the survivorship destination so that both the heir's share and the deceased's share would be treated as part of their separate estates.[4] Much more complex provisions would be needed if the criminal heir's issue were to be barred from the succession.

2.14 We therefore propose that:-

2. A person who forfeits by virtue of Proposition 1 his or her rights of succession in the deceased's

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1 Whereby issue of a deceased beneficiary can in certain circumstances take their ancestor's share. See paras. 4.5-4.23 below.
2 Succession (Scotland) Act 1964, s.11.
3 Succession (Scotland) Act 1964, s.2 (except where the heir was the spouse of the deceased).
4 This solution was adopted in the Ontario case of Schobelt v. Barber (1966) 60 D.L.R. (2d) 519.

estate should be treated for the purposes of succession as having predeceased the deceased, except in relation to property the title to which was held in name of that person and the deceased and the survivor of them, in which case the destination to the survivor should be ignored. Any descendants of the person should be entitled to make the same claims on their ancestor's presumed predecease by virtue of forfeiture as they could have made had their ancestor actually predeceased without having incurred the penalty of forfeiture.

Relief from forfeiture

2.15 The Forfeiture Act 1982 (a U.K. statute) empowers the courts to allow relief from forfeiture under the common law rule to unlawful killers (except murderers). This power has already served a useful function in at least one Scottish case.[1] In view of the recent date of the legislation we do not wish to question its underlying principles. There are however some criticisms of the Act from the Scottish point of view. First, the Act assumes the existence of the common law rule. While this rule is fairly well developed in England and Wales, the scope and effect of the equivalent Scottish rule is not clear. Our proposals in the preceding paragraph are intended to meet this point. Secondly, the Act does not mention the Parricide Act 1594. As a result the courts have no power to grant relief against forfeiture arising from a conviction for killing parents or grandparents. The 1594 Act reflects a society where succession to land would

1 Paterson, Petr. 1986, S.L.T. 121.

almost invariably be from parent or grandparent to child or grandchild. There seems to us nowadays no justification for treating these particular relationships differently from others. Thirdly, section 2(5) of the 1982 Act provides as follows:-

> "An order under this section may modify the effect of the forfeiture rule in respect of any interest in property to which the determination referred to in subsection (1) above relates and may do so in either or both of the following ways, that is..
>
> (a) where there is more than one such interest, by excluding the application of the rule in respect of any (but not all) of those interests; and
> (b) in the case of any such interest in property, by excluding the application of the rule in respect of part of the property."

The court is apparently only empowered to grant partial relief. Given that the power is discretionary it seems odd that the court should be prevented from granting total relief in circumstances in which it would be appropriate to do so. It is true that under the present provisions the court could give virtually total relief by granting relief from all but a miniscule part of the property, but this seems an artificial way of achieving the desired result.

2.16 Section 2(3) of the Forfeiture Act 1982 provides that any application to the court for relief under the Act must be made within 3 months of the date of the applicant's conviction for unlawful killing. It has been suggested that 3 months is too short a period and that it should be extended to 6 months.[1] Clearly some time limit is necessary to enable the executor to wind up the deceased

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1 1986 S.L.T. (News) 81 by the solicitors acting for the petitioner in Paterson, Petr. 1986 S.L.T. 121.

victim's estate. A 6 month period would fit in with the rule that executors are not obliged to pay debts or distribute the estate until 6 months from the date of death. A time limit running from the date of conviction fails to take account of those cases where the succession opens to the killer some considerable time after the deceased's death. For example the deceased's will leaving a legacy to the killer may be discovered well after the date of conviction. Again a case may be figured where the deceased leaves the liferent of his estate to his wife with the fee to his son, whom failing his son's issue, whom failing his daugher. If he were killed by his daughter she might not consider it worthwhile to apply for relief immediately after her conviction as the likelihood of her ever inheriting would appear remote.

2.17 It will be noted that the time limit proposed by the Act runs from the date of conviction of the killer. If, contrary to our present tentative view, statutory provisions were to be enacted which provide for forfeiture without the need for conviction by a criminal court, then consideration would have to be given as to what date was appropriate for the beginning of any time limit.

2.18 We invite views on the following questions.

3.(a) Should the time limit in section 2(3) of the Forfeiture Act 1982 be extended from 3 months to 6 months or some other period?

(b) In the case of an interest not vested in the criminal heir at the date of the deceased's death should the time limit run from the date when the succession opens to the heir?

PART 3 SURVIVORSHIP AND SPECIAL DESTINATIONS

3.1 In this Part we look at some areas of succession law relating to survivorship. We discuss first the introduction of a rule requiring survivance for a specified period and then the rules of survivorship that might apply when two or more people die in circumstances where it is uncertain whether one so survived the others. The next topic is special destinations - provisions contained in the title to property (usually heritable property) which regulate the succession to such property. The commonest form of special destination in current practice is the survivorship destination in which two people take the title to property to themselves and to the survivor of them. Finally, we consider whether survivorship destinations should be implied by law in the case of certain co-owned assets such as bank accounts.

Rules of survivorship

3.2 Survivance for a specified period. Most people, it may be supposed, would not wish their estate to pass to someone or into the estate of someone, who dies at or around the same time. Yet under the present law if a beneficiary is proved to have survived the deceased by the merest instant he or she will take. A beneficiary who survives for only a short period derives little or no personal benefit from any inheritance. Moreover the estate of the first person to die may, because it falls into the estate of the survivor, be distributed in a way which the first person would not have wished for. For example, suppose a married couple are involved in a car crash. The husband dies instantly but his wife dies a few hours later. The property passes to the wife to be distributed in accordance with her will or to her family if she dies intestate. It

seems doubtful that the husband would have wished his estate in the circumstances to be distributed in that way. Accidents involving families or other persons likely to leave their estates to each other often result in some members being killed instantly while others survive for a day or so. Some legal systems require a beneficiary to survive for a specified period, such as five days, before inheriting under a will or on intestacy[1]. Some Scottish wills at present do contain a condition that the legatee must survive for a stipulated period especially where the legatee is the testator's husband or wife. We understand that the period usually selected is 30 days. Another advantage in having a period of survivance is that the need for rules to deal with simultaneous or near simultaneous deaths is eliminated although a rule remains necessary to resolve the question of whether the beneficiary survives for the specified period. However, the latter rule would we think be invoked infrequently since there would normally be far less uncertainty about survival for a period such as 30 days than mere survival. We accordingly propose that:-

4. A person who fails to survive the deceased for a specified period should be treated as if he or she had predeceased the deceased for the purposes of succession to the deceased's estate. Views are invited on the duration of the specified peiod.

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1 Uniform Probate Code s.2-104 (120 hours for intestate succession); s.2-601 (120 hours for testate succession unless the will provides otherwise); proposed Canadian Uniform Intestate Succession Act, s.5 (15 days - intestate succession).

3.3 Rule of survivance. A rule requiring survivance for a specified period would we think largely remove the need for any rule about survivorship. Nevertheless where it was uncertain whether one person had survived the other for a specified period a rule would serve a useful function. Suppose, for example, two people set off on a sailing expedition and the boat was found months later with their bodies on board but no indication of their respective times of death. The present law is contained in section 31 of the Succession (Scotland) Act 1964 which provides as follows:

> "(1) Where two persons have died in circumstances indicating that they died simultaneously or rendering it uncertain which, if either, of them survived the other, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse,
>
> (a) where the persons were husband and wife, it shall be presumed that neither survived the other; and
>
> (b) in any other case, it shall be presumed that the younger person survived the elder unless the next following subsection applies.
>
> (2) If, in a case to which paragraph (b) of the foregoing subsection would (apart from this subsection) apply, the elder person has left a testamentary disposition containing a provision, however expressed, in favour of the younger if he survives the elder and, failing the younger, in favour of a third person, and the younger person has died intestate, then it shall be presumed for the purposes of that provision that the elder person survived the younger."

This would obviously require to be amended for survivance for a specified period, but the question is whether the rule that the younger survived the elder is the best general rule that can be devised. That it could produce unfortunate results is recognised in the section itself, which provides two specific exceptions to it, but even with

these exceptions the rule might distribute the estate of the predeceasing elder person in a way he or she would not have wished.

3.4 An alternative approach, which has been adopted in the United States and Canada, [1] is to replace the general rule that the younger is presumed to survive the elder by a general rule that the property of each person shall be disposed of as if he or she had survived the other. The Ontario Succession Law Reform Act 1980 provides, for example, that

> "Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others."[2]

Again this would require amendment to deal with survivance for a specified period, but it appears to us that, as a general rule, this is preferable to the arbitrary rule that the younger is presumed to survive the elder. A rule on these lines would make the exceptions in section 31 of the Succession (Scotland) Act 1964 unnecessary. In effect it would recognise the sense behind the exceptions, generalise them and make them the rule.

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1 See e.g. the U.S. Uniform Simultaneous Death Act; the Canadian Uniform Survivorship Act; the Ontario Succession Law Reform Act 1980, s.61; the Manitoba Survivorship Act 1983; Law Reform Commission of British Columbia, Report on Presumption of Survivorship (1982) pp. 15 to 23, Manitoba Law Reform Commission, Report on Intestate Succession (1985) pp. 52 to 54.

2 S.55(1).

3.5 A rule that the property of each person dying in circumstances where it was uncertain that he or she survived the other for the specified period should be disposed of as if he or she had so survived would have the following results. Any testamentary provisions (including any nomination) in favour of the other would fail to take effect and the provision would either lapse or be dealt with in accordance with the other provisions of the will. The other person would have no rights on intestacy so that those next in line would succeed in his or her place. The rule would also work perfectly well in the case of property held in the joint names of the two persons and the survivor of them. In Scots law such property is common property and each owns a half share. Each person's share would pass to his or her heirs as if he or she had survived the other. There would be no need for a special rule for joint property (such as the property of trustees as such, or the members of an unincorporated club as such) since such property does not in any event form part of anyone's estate on death but accresces by law to the remaining trustees or members.

3.6 We suggest for consideration that:-

5. Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others for the required period, the property of each person, or any property of which he or she is competent to dispose, should be disposed of as if he or she had so survived the other or others.

3.7 Property given by a third party to the survivor of two or more persons. So far we have been considering what

rules should apply to the disposal of the property of a deceased person to others who die around the same time as the deceased. We turn now to deal with a different case of a third party (A) leaving property to the survivor of B and C. Such gifts though not common are not unknown. For example, a mother might leave her estate in liferent to her two children with the fee going to the survivor of them. It seems to us that the requirement of survivance for a specified period would be inappropriate here. The position is not B's property going to C and thence after a short interval to C's heirs but A's property going to either B or C and thence to the heirs of the one that takes. A requirement of survivance would result in the gift lapsing if the requirement was not met. On the other hand a provision to regulate the devolution of the gift where B and C die simultaneously or in circumstances where it is uncertain which survived the other seems necessary. In the absence of any provision A's gift would lapse as neither B nor C could be proved to have survived the other. This would we imagine be contrary to A's intention. One option is to provide for a "tie breaker". The presumption that the younger survived the elder in section 31(1)(b) of the 1964 Act is one possible solution. Another option would be to divide the gift, with the heirs of B and the heirs of C taking one half each. This seems less arbitrary than preferring the younger. It would probably be more in line with the wishes of the donor of the gift had he or she considered the possibility of simultaneous deaths or an uncertain order of death. We invite views on the following questions:-

6. Where a third party disposes of property to the survivor of two or more persons:

(a) Should there be any requirement for a person to survive the others for a specified period before he or she is entitled to take? If so what should that period be?

(b) If the persons die in circumstances rendering it uncertain which survived the other (either for a specified period or not as the case may be) should there be a rule that the younger survived the elder or should the property be divided equally among their heirs?

3.8 To avoid interference with wills and testamentary writings drawn up on the basis of the present law, any legislation implementing our proposal should, we suggest, only affect deeds executed after its coming into force.[1] We observed in paragraph 3.2 above that some wills already contain a provision requiring a beneficiary to survive for a specified period. It is for consideration whether a similar period in post-commencement deeds should prevail over any different statutory period that might be enacted. Our provisional view is that it should.[2] We therefore propose:-

7. The proposals in propositions 4 to 6 above should only affect wills and other testamentary

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1 A similar approach was adopted by the Succession (Scotland) Act 1964, s.24(4) and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.6.

2 The Uniform Probate Code, s.2-601 contains a similar provision.

writings executed after the commencement of any implementing legislation. In the case of post-commencement deeds any provision requiring survivorship for a specified period should prevail over any statutory requirement providing for a different period.

Special Destinations

3.9 Should they continue to be competent? A destination in a title to property states to whom the property is being transferred or belongs. On the owner's death the property descends according to his or her will or the law of intestate succession. Special destinations are destinations which make different provision for devolution on death. They were extensively used prior to 1868 in order to circumvent the rule that heritable property could not be disposed of by will. The commonest example of a special destination in current practice is the so-called survivorship destination - a destination to A and B and to the survivor of them. This is often inserted in a title to residential property held by a husband and wife or other people who live together. Special destinations may also occur in documents of title to moveable property (such as shares).[1]

3.10 Since 1868[2] it has been competent to bequeath heritage by will. The co-existence of special destinations and wills results in considerable complexity and confusion

1 Connell's Trs. v. Connell's Trs. (1886) 13 R. 1175; Dennis v. Aitchison 1924 S.C. (H.L.) 122.

2 Titles to Land Consolidation (Scotland) Act 1868, s.20.

in the law. In preparing wills the existence of a prior special destination may be overlooked or its effects not fully taken into account, with the result that on death the will and the special destination conflict. Resolution of the conflict depends on whether the deceased had power to revoke the special destination by will and whether this was in fact done. To answer the former question requires knowledge of the financial arrangements made between those involved in the destination at the time when the property was acquired[1]. Answering the latter question has been simplified by section 30 of the Succession (Scotland) Act 1964. In relation to wills executed after commencement[2] of that Act a special destination is only revoked by a subsequent will if the will specifically refers to and expressly revokes the destination.[3] A destination created after the will prevails over the provisions of the will.[4] Difficulties remain for pre-1964 wills and where there is a will executed before the destination and a codicil executed afterwards.

3.11 Another area of complexity and confusion relates to the rights of creditors to attach after death the property of the debtor devolving to a third party by virtue of the destination.[5] Mistakes can also be made in evacuating a

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1 See para. 3.13 below.

2 10 September 1964.

3 Prior to commencement a later will could impliedly revoke a special destination. Destinations created by the deceased were subject to slightly different presumptions from those created by third parties.

4 Perrett's Trs. v. Perrett 1909 S.C. 522.

5 Barclays Bank Ltd v. McGreish 1983 S.L.T. 344, Robertson's Trs. v. Roberts 1982 S.L.T. 22.

special destination.[1]

3.12 The law would certainly be simplified if the creation of special destinations ceased to be competent. Since 1868 special destinations in titles to heritage have been unnecessary. It could be argued that they have outlived their purpose and should be consigned to the lumber room of legal history. On the other hand special destinations in the form of survivorship destinations in titles to heritage are widely used in current Scottish practice (and in most of the common law jurisdictions in the form of joint tenancies). This indicates that they fulfil a useful role. A survivorship destination enables a married couple or others who live together (such as two brothers or sisters) to settle the devolution of what is likely to be their most important asset without having to make wills. Another advantage is that the survivorship destination (unless revoked) automatically vests the property in the survivor or survivors thus avoiding the expense of confirming and transferring title to the property. The arguments for retention and abolition of special destinations seem finely balanced. In order to elicit views we ask:

8. Should it continue to be competent to create special destinations in titles to heritable and moveable property?

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1 On divorce a wife may convey her half share of the home subject to a survivorship destination to her ex-husband, the intention being to vest him in the whole property. Nevertheless if he dies before her his own half share transmits to her since the special destination had not been evacuated as regards that share. See 1985 S.L.T. (News) 18.

3.13 Survivorship Destinations: Disposals during life and on death. Where property is held by two or more persons on a survivorship destination, each is vested in a pro indiviso share which he or she can while alive dispose of or grant a security over.[1] There are however restrictions on disposal by way of will so as to defeat the destination. If each of the persons in the destination contributed towards the acquisition of the property subject to a survivorship destination, the destination is held to be contractual with the result that none of the owners can dispose of their shares by will.[2] But where such property has been acquired by one person alone, he or she can alter the destination as regards his or her share by will.[3] The other owner cannot do so since he or she is taken to have accepted the gift of the share of the property subject to the condition that it will revert to the giver if the giver survives.[4]

3.14 It has been argued that the above law is illogical.[5] Survivorship destinations are, we imagine, generally used in current practice to ensure that the property in question passes to the survivor. In the common case of a family home owned by a couple on such a destination, their expectations will be that the survivor will be able to carry on living there after the death of the predeceasor.

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1 Steele v. Caldwell 1979 S.L.T.228.

2 Perrett's Trs. v. Perrett 1909 S.C. 522; Shand's Trs. v. Shand's Trs. 1966 S.L.T. 306.

3 Hay's Trs. v. Hay's Trs. 1951 S.C. 329; Brown's Trs. v. Brown 1943 S.C. 488.

4 Renouf's Trs. v. Haining 1919 S.C. 497.

5 M Morton, "Special Destinations and Testamentary Instructions" 1984 S.L.T. (News) 133.

Since either can dispose of his or her share while alive the protection seemingly provided by the destination is in fact illusory[1]. Possibly more coherent positions for the law to adopt in relation to property subject to a survivorship destination would be either to prohibit all disposals during life and on death, or to allow each owner, whether or not the destination was contractual or by way of gift, to freely deal with his or her share by lifetime deed or by will.

3.15 An absolute prohibition on lifetime disposal would be too rigid. Apart from the situation where the other owner consented to the disposal, provision would have to be made allowing for disposal where such consent was not available. Otherwise the owner wishing to dispose of his or her share would be "locked in" until death or the death of the other owner. One possible solution would be to empower the court, on application by one of the owners, to order the property to be divided or sold. Another solution would be along the lines of section 7 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981. This provides that on application by an entitled spouse (who is usually the owner), the court may dispense with the consent of the other spouse so as to allow the applicant to dispose of or otherwise deal with the property. Consent can be dispensed with on the grounds that it is being unreasonably

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1 The Matrimonial Homes (Family Protection)(Scotland) Act 1981 s.9 provides that where one pro indiviso owner disposes of his or her share without the consent of the other spouse the purchaser is not entitled to take entry. The disposal does however transfer title so that on the death of the seller the purchaser could take possession or bring proceedings for division and sale.

withheld or that the consentor cannot be found or is incapable of giving consent. In the case of property held on a survivorship destination by a married couple, the court has power under the Family Law (Scotland) Act 1985 on divorce or annulment to order the property to be sold[1] or an interspousal transfer to be made.[2] Rights of third parties such as purchasers, heritable creditors and unsecured creditors would also have to be safeguarded. At present a pro indiviso share of property subject to a survivorship destination vests in the trustee for sequestration[3] and may be adjudged[4] and since the destination has only testamentary effect it does not affect the trustee's or adjudger's title. If the destination were to restrict the power of lifetime disposal, however, specific provision would have to be made in order to achieve the same effect.

3.16 If each owner in a survivorship destination were to be entitled to dispose of the property by will as well as during life, the destination would have effect only if the predeceasor died intestate or failed to dispose of the property in a different fashion by will. But this would be reasonable since the owners concerned are relying on the destination to govern the devolution of the property on the first death. Freedom to dispose of the property by will would differ from the present law in that either owner in a contractual destination would be able to revoke by will, as could an owner to whom a share had been given. This would result in a simplification of the law and would remove the oddity whereby a survivorship destination

1 S.14(2)(a).
2 S.8(1)(a).
3 Bankruptcy (Scotland) Act 1985, s.31.
4 Bell, Commentaries, (7th ed.) i 62.

confers a right of property which can be freely disposed of during life but which may not be capable of being disposed of by will. If a person wishes to share his or her property with another, subject to return of the gifted share on the other's predecease without the possibility of being defeated by testamentary disposition, then this can be done more effectively by way of a liferent.

3.17 Any change to the existing law could not in fairness be made retrospective. Persons concerned in existing survivorship destinations will have ordered their affairs and have expectations of succession based on the existing law. We do not think that these should be disturbed. That being so, we do not see it as an argument against introducing testamentary freedom in respect of future survivorship destinations that the expectations of the donor of property or those who combine to acquire property will be different from those under the present law.

3.18 We tend to think that if any change in the law is to be made its direction should be towards greater freedom of disposal. Although prohibition of lifetime disposal of property subject to a survivorship destination would protect the probable expectations of the owners, the numerous exceptions which would require to be made would complicate the law and make protection incomplete. Moreover, at the end of the day there is perhaps not a great deal of difference between freedom of disposal and a prohibition against disposal which can be overridden on various grounds. We invite comments on the following alternatives.

9.(a) The law on disposal by owners of property subject to a special destination should remain as it is; or

(b) Each owner of property subject to a survivorship destination created after the date of the relevant legislation should be prohibited from disposing of his or her share either during life without the consent of the other owner or owners or on death, subject to provisions:-

(i) empowering the court, on application by an owner wishing to dispose of his or her share, to authorise a disposal; and

(ii) protecting third parties and creditors; or

(c) Each owner of property subject to a survivorship destination created after the date of the relevant legislation should not thereby be prohibited from disposing of his or her share by will contrary to the destination.

3.19 Powers of donor and donee. If the major reforms suggested above are rejected it might nevertheless be useful to change the powers of revocation of donors and donees. Where only one of the owners of property held on a survivorship destination contributes to its acquisition the destination is not contractual and is capable of revocation by will.[1] A distinction is drawn however

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1 Hay's Trs. v. Hay's Trs. 1951 S.C. 329; Brown's Trs. v. Brown 1943 S.C. 488.

between the donor, the person who paid for or provided the property, and the donee in relation to powers of revocation. The donor can revoke by will the destination so far as his or her share is concerned. But the donee is held to have accepted the gift on the condition that he or she cannot revoke the destination relating to his or her share by will.[1] If the law continues to permit lifetime disposal without restriction by either owner, it is for consideration whether the distinction between donor and donee as regards disposal by will should be retained. Entitling both donor and donee to dispose freely by will would be consonant with their equal powers of lifetime disposal and their equal ownership of pro indiviso shares of the property. It would also simplify the law since it would no longer be necessary to investigate how the property was acquired in deciding whether or not a revocation of the destination in the donee's will was valid. If the donor wished to ensure that the share of the property gifted to the donee returned on his or her (the donee's) death a trust could be set up.

3.20 Another method of procuring equality between donor and donee would be to provide that neither could defeat by will the expectations of the other acquiring the whole property on survivance. All survivorship destinations would therefore have an implied contractual element. This would probably be justified in the vast majority of situations where survivorship destinations are used in current practice - in titles to residential property belonging to a married couple or others who live together. Although the donee may not have contributed financially to

1 Renouf's Trs. v. Haining 1919 S.C. 497.

the acquisition of the property, he or she will usually have contributed in other ways, for example, by helping with the maintenance and running costs of the property or by keeping home for the other.

3.21 We invite views on the following alternatives.

10. Where property is acquired by one person (the donor) and the title is taken in the name of the donor and another (the donee) and the survivor, then:

    (a) as under the existing law the donor should be entitled, and the donee should not be entitled, to dispose of his or her share by will so as to defeat the destination; or

    (b) both donor and donee should be entitled to so dispose of their shares by will; or

    (c) neither donor nor donee should be entitled to so dispose of his or her share by will.

    Any change in the law should apply only to destinations created after the date of the relevant legislation.

3.22 Rights of creditors. Whatever view is taken of the competence of granting special destinations in the future, special destinations will continue to be in existence for many years to come, thus justifying clarification of their legal effect. The major area requiring clarification is the liability of property passing under a destination for debts incurred by the deceased former owner.

3.23 In Barclay's Bank Ltd v. McGreish[1] Mrs McGreish acquired a house and took title to it in the name of herself, her husband and the survivor of them. He got into financial difficulties and the bank obtained a decree against him but did not put it into execution before his death. Mr McGreish died leaving no estate other than his half share of the house which passed to his widow under the survivorship destination. It was held that this half share passed free from any liability for debt in favour of the bank. The grounds of the decision were twofold. First, the predeceasing husband's share never formed part of his estate but reverted on death to his widow in terms of her original gift. Secondly, sections 36(2) and 18(2) of the Succession (Scotland) Act 1964 when read together lead to the conclusion that a predeceasor's debts are not to be satisfied out of his or her share of property held under a special destination. Section 36(2) provides that for the purposes of the Act the estate of a deceased person includes the whole estate heritable and moveable belonging to him or her at the date of death except property subject to an unevacuated special destination. Section 18(2) provides that property subject to an unevacuated destination vests in the executor on confirmation for the purpose of conveying the property to the person entitled thereto (if such conveyance is necessary) and for that purpose only. Although it was argued that the Act did not deal with the rights of creditors, so that an unevacuated special destination still formed part of the deceased's estate for the purpose of paying creditors, it was decided that the effect of section 18(2) was to vest the

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1 1983 S.L.T. 344.

estate in the executor for the purpose of transferring title and not for the purpose of paying creditors.

3.24 The correctness of the decision in Barclay's Bank Ltd v. McGreish has been challenged by a number of commentators as being at variance with principle and authority.[1] While we do not wish to express an opinion on the correctness or otherwise of the decision under the present law, the practical implications of the decision for creditors are such that the law requires to be either reformed or clarified. In principle a person's whole estate is liable for his or her debts and the rights of lifetime creditors against that estate are not affected by death. Liferents and other interests which terminate on death are limited exceptions to this principle, but it seems to us that it should not be possible by the simple expedient of inserting a special destination in the title to property to defeat one's creditors. The potential scope for evasion of liability for debt in this way is very wide, bearing in mind that moveable as well as heritable property can be made subject to a special destination, and that secured creditors would seem to be in no better a position than unsecured creditors.[2]

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1 D.J. Cusine "Of Debts and Destinations" J.L.S.S. 1984 154; M. Morton "Special Destinations and Testamentary Instructions" 1984 S.L.T. (News) 133; J.M. Halliday "Special Destinations" 1984 S.L.T. (News) 180 (Professor Halliday supported the decision on the grounds that the property did not form part of the deceased's estate but disagreed with the reasoning based on sections 36(2) and 18(2)); G.L. Gretton, "Death and Debt" 1984 S.L.T. (News) 299.

2 Barclay's Bank Ltd v. McGreish 1983 S.L.T. 344 at p.345 "... they [the husband's half share] merely reverted to the donor and they did so free from any burden or security right in favour of the pursuers".

Furthermore, the value of property passing on death by virtue of a special destination is taken into account in assessing the liability of the deceased's estate for inheritance tax.[1] It seems anomalous that this tax, but not the debts of lifetime creditors, should be a debt on the estate. We acknowledge that the passing of some other assets on death give rise to a charge to tax, yet pass without liability for the debts of the previous owner. But we do not think such anomalies should be increased. We accordingly propose that:

11. Express statutory provision should be made to the effect that property held by a person on a special destination, in terms of which it passes to some other person or persons on death, should remain liable for the deceased's secured and unsecured debts.

3.25 A related problem concerns special destinations contained in assignations of leases. Where a person holding feudal property on a title with a special destination becomes bankrupt, sequestration divests him or her of that property and the destination in the title is defeated. The result is that on the bankrupt's death the property remains vested in the trustee rather than passing under the destination.[2] In the case of a lease containing a survivorship destination "each tenant during his life is vested with a right so qualified, that were he to assign

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1 We understand that the Capital Taxes Office take the view that a special destination is not a settlement. The reversion to settler exemption under s.54(2) of the Capital Transfer/Inheritance Tax Act 1984 does not therefore apply.

2 Bankruptcy (Scotland) Act 1985 s.31(1); Bell, Commentaries, (7th ed.) i 62.

his portion the assignation would terminate with his life, when the survivor acquires the sole right..."[1] The trustee in sequestration's title to the bankrupt's portion of the lease therefore terminates on the bankrupt's death. Robertson's Trs. v. Roberts[2] dealt with the case where an assignation of a 999 year lease contained a survivorship destination. It was held, on the basis that the rule relating to destinations in leases applied, that the bankrupt's wife became the sole tenant on his death so that his trustee in sequestration had no title to pursue an action of division and sale. This decision has been criticised[3] on the ground that the rule in leases flows from a contract with the landlord involving delectus personae which is not applicable in assignations of leases. Long leasehold[4] is very similar to feudal tenure and assignations of long leases are comparable to dispositions. We propose therefore that:

12. A special destination in an assignation of a long lease should have the same effect as if it were contained in a disposition of feudal property.

3.26 Definition and construction of special destinations. In Cormack v. McIldowie's Exs.[5] a destination in a pre-1964 agricultural lease to A and B as joint tenants and the survivor of them as sole tenant, and to the heirs of

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1 Rankine on Leases (3rd ed.) 85.
2 1982 S.L.T. 22.
3 G.L. Gretton, "Destinations and Leases" 1982 S.L.T. (News) 213.
4 The definition of long lease in the Land Registration (Scotland) Act 1979 s.28(1) is a probative lease exceeding 20 years or containing an obligation to renew so that the total duration could extend for more than 20 years.
5 1975 S.C. 161.

the survivor, but excluding heirs-portioners (the eldest heir-female always succeeding without division), sub-tenants and assignees was held not to be a special destination. Section 36 of the Succession (Scotland) Act 1964 includes in a deceased tenant's estate his or her interest in the lease, but excludes heritage subject to a special destination in favour of a third party which the deceased had not validly evacuated. The result of the decision was that the tenant's interest passed on his intestacy to his executors by virtue of confirmation under section 14 of the 1964 Act.

3.27 The decision has been criticised on two fronts. First, the definition of a special destination suggested in McIldowie's Exs.[1] as one in which "the particular property in the deed is disponed to a particular person (or persons) specifically nominated by the granter, without regard to the normal operation of the law of succession on intestacy "is too narrow in that it excludes a destination to a class where the members are not named (such as "my children"). The effect is to resurrect for a class destination all the complications of the pre-1964 law relating to implied evacuation by a later will which section 30 of the 1964 Act avoids. Such an effect is in our view undesirable.

3.28 Secondly, a special destination is one that devolves the property in a different manner from the rules of intestate succession. Thus a destination to A and his or her "heirs" or "heirs and assignees" is not a special

1 L.J-C. Wheatley at p. 177.

destination[1] since on A dying intestate the property will in any event pass to A's heirs, being those persons selected by the rules of intestate succession. On this basis the destination in McIldowie's Exs. should be special, since if the tenant had been survived by heirs-portioners (3 daughters for example) the eldest would have taken the entire interest, instead of it being shared amongst all the heirs-portioners as required by the law of intestate succession. We understand that the majority of formal pre-1964 agricultural leases are in the form found in McIldowie's Exs.

3.29 Making such a destination special would bypass the machinery relting to transmissions of leases in section 16 of the 1964 Act. Instead of the executor being entitled to make over the deceased tenant's interest in such a lease to a member of the tenant's family in (part) satisfaction of his or her share of the estate, the tenant's heir-at-law would simply take over the interest as happened under the pre-1964 law in relation to any intestate heritage. We do not think reverting to the pre-1964 position would be acceptable. One way of dealing with the problem would be to provide that a McIldowie destination is not a special destination for the purposes of the 1964 Act. Anotherway, which we think achieves the same result, would be to ignore the exclusion of heirs-portioners and the preference of the eldest heir-female in such leases. The destination would then be simply to the tenant's heirs excluding sub-tenants and assignees which, as has already been noted, is not a special destination.

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1 Reid's Trs. v. Macpherson 1975 S.L.T. 101.

3.30 We propose that:

13.(a) A special destination should include a destination to a class of persons prescribed by the granter (other than "heirs" or "heirs and assignees"), even though the individual members of that class are not specifically named.

(b) A destination in a lease to a tenant's heirs excluding heirs-portioners (the eldest heir-female succeeding without division) should either:

(i) not be treated as a special destination; or

(ii) the exclusion should be ignored,

for the purposes of succession to the tenant's interest in the lease.

3.31 Special destination to count as a testamentary writing? Although special destinations have testamentary effect in that they transfer property on a person's death they are not counted as testamentary writings. A clause in a will revoking previous testamentary writings does not therefore evacuate a prior special destination[1]. In order to revoke a special destination a later will must specifically refer to and expressly revoke the destination[2]. Suggestions have been made from time to time[3] that a clause

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1 Murray's Ex. v. Geekie 1929 S.L.T. 524.

2 Succession (Scotland) Act 1964, s.30.

3 Brydon's Curator Bonis v. Brydon's Trs. (1898) 25 R. 708 per Lord McLaren at p. 713, Turnbull's Trs. v. Robertson 1911 S.C. 1288 per Lord Kinnear at p.1294, and Drysdale's Trs. v. Drysdale 1922 S.C. 741 per Lord Skerrington at p. 750.

revoking testamentary writings should have the effect of revoking prior special destinations since these have testamentary effect and the result of the present rule may produce results contrary to the wishes and expectations of testators. In our opinion however there is a need for certainty and simplicity in this area. It is better to have a single method of revoking special destinations being that provided by section 30 of the Succession (Scotland) Act 1964. Moreover, revocation of a special destination by a clause revoking "all my prior testamentary writings" would fail to achieve its objective of evacuating a special destination where the destination was contained in a deed granted by a person other than the testator. We therefore make no proposals for change.

Deemed survivorship destinations

3.32 In the course of our investigations into matrimonial property we received a suggestion that funds in a bank account in the joint names of a husband and wife should on the death of one of them pass to the survivor.[1] We did not take up the suggestion then in view of the difficulty of justifying a special rule for married couples. The question of introducing a general rule as to survivorship was we felt best considered in the context of a review of the law of succession. In this section we discuss whether there should be deemed survivorship destinations not only in relation to joint bank accounts but also in relation to other property (heritable or moveable) the title to which is held by two or more persons. We deal here only with titles to which Scottish rules of construction apply.

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1 Report on Matrimonial Property, Scot. Law Com. No. 86 (1984), para. 4.9.

How far these rules should apply to foreign property is discussed in Chapter 6 - Private International Law Aspects.[1]

3.33 Present law and comparative survey. Where the document of title to property is in the names of two or more persons they normally hold the property in common.[2] On the death of one of the owners in common his or her share passes in the absence of any express or implied survivorship clause to his or her executors. It is possible to insert in the title an express provision in terms of which the predeceasor's share of the property passes to the survivor(s); such a provision is known as a survivorship destination.[3] Where there is no express survivorship destination the terms of the title may be such as to imply accretion to the survivor. In Connell's Trs v. Connell's Trs it was held that the taking of the title to shares in English companies in joint names implied a survivorship destination since that would be the effect of such a title under English law[4].

3.34 Bank accounts and similar accounts may be opened in the names of more than one person. The precise form

1 Para. 6.17.

2 Property may also be held jointly in which case the rights of the predeceasing owner accresce automatically to the survivor(s). But this form of holding is found only amongst "persons who were interrelated by virtue of some trust, contractual or quasi-contractual bond - partnership or membership of an unincorporated association being common examples... Such an independent relationship is the indispensible basis of every joint right". Magistrates of Banff v. Ruthin Castle Ltd 1944 S.C. 36 per L.J-C. Cooper at p. 68.

3 See para. 3.13 above.

4 (1886) 13 R. 1175. See para. 6.17 below.

depends on the arrangement made with the bank. There are two main types of joint account. The first is where all the account holders require to sign a cheque or authorise a withdrawal. On the death of one of the holders the account becomes inoperable and new arrangements have to be made. The second, termed an "either or survivor" account enables either account holder to sign a cheque or withdraw funds while both are alive and on the death of one of them the survivor may continue to sign cheques or make withdrawals. The title and type of account merely regulates the entitlement of the bank to pay. It does not determine the ownership of the funds in the account. Ownership depends on how the funds were contributed and the intentions of the contributors in placing funds in the account.

3.35 Section 25 of the Family Law (Scotland) Act 1985 provides that under certain conditions each spouse is presumed to have a right to an equal share of the household goods, i.e. the goods are held in common. On the death of one spouse his or her share of such household goods passes to his or her executors rather than automatically to the surviving spouse[1].

3.36 In England and Wales and many other common law jurisdictions there are two kinds of joint holdings - joint tenancy and tenancy in common. Such holdings are not confined to land; they apply also to other categories of property to which there is a documentary title, shares for example. Both the legal and equitable interests in property may be subject to joint holdings, although in the case of

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1 The surviving spouse may of course acquire them under the deceased's will, or on intestacy in terms of s.8(3) of the Succession (Scotland) Act 1964.

land where the legal interest is held by more than one person the holding is joint[1]. Joint tenants hold in equal shares and on the death of one of them his or her share passes automatically to the surviving tenant or tenants. Tenants in common may hold in unequal shares and a deceased's tenant's share passes to his or her executors to be dealt with accoridng to the provisions of a will or the rules of intestate succession.[2] A title to property in the names of A and B, without any further qualification, makes A and B joint tenants rather than tenants in common.

3.37 If the title to a bank account is in the names of two people the legal interest in the funds is vested in them jointly and accordingly accresces to the survivor. The beneficial ownership of the funds, however, depends on how the funds were contributed and the intentions of the contributors. Where the account has been used as a common pool or where the presumption of advancement[3] applies the survivor is entitled to the balance in the account at the date of the predeceasor's death.[4]

3.38 Proposals for reform. In the absence of any independent relationship between the owners which might render the property joint[5] the effect of taking a title in

1 Law of Property Act 1925, s.36.
2 J.G. Miller, The Machinery of Succesion, p.279.
3 The presumption of advancement - that a gift was intended - may apply where there is a special relationship between the contributing joint holder and the other. Advancement may apply to contributions made by a husband (but not by a wife) to a married couple's joint account and by a father to a joint account in name of himself and his son (but not by the son).
4 J.G. Miller, p.286.
5 See para. 3.33 and footnote 3 above.

names of more than one person in Scotland is to make property common property rather than joint property. There is no deemed survivorship clause in such titles so that on the death of one co-owner his or her share forms part of his or her estate rather than passing to the survivor(s). There would be some advantages in deeming Scottish titles in favour of a plurality of persons to include a survivorship destination. First, accrual to the survivor would probably correspond to the intentions of the majority of co-owners, especially married couples. Secondly, such titles would be useful as substitutes for wills. The title would transfer the property to the survivor automatically on the death of the other owner without the need for confirmation or transfer by the executor. Thirdly, the incidence of intestacy would be lessened since the property would pass in terms of the title rather than under the rules of intestate succession where the deceased owner left no will.

3.39 Nevertheless, deemed survivorship titles would have considerable disadvantages. Many people holding property together with others would not wish their share to pass to the survivors on their death. Express provision would therefore have to be included in the title disapplying the deemed survivorship destination. This might not be done due either to forgetfulness or ignorance of the legal rule which would deem a title in favour of several persons to contain a survivorship destination. The proliferation of survivorship destinations would increase the problems associated with later inconsistent wills and the failure by married couples to revoke the destination following separation or divorce[1]. An express survivorship

1 See paras. 3.10 to 3.12 above.

destination at least alerts the owners and their advisers to the need to take the destination into account; it would be far easier to overlook the existence of a latent destination arising by operation of law. Moreover, if deemed survivorship destinations were introduced provisions would be needed to regulate in what circumstances and in what manner the deemed destination could be revoked, the right of each owner to dispose of his or her share, while alive and on death, and the rights of creditors towards the share of an owner while that owner was alive or after his or her death.

3.40 On balance we tend to think that deemed survivorship destinations should not be introduced. If people wish to transfer their share of property on their death to the survivor by means of a destination in the title then it is a simple enough matter to insert an express provision to that effect. The case of introducing deemed survivorship destinations is probably strongest where the co-owners are a married couple, but even here we think the disadvantages outweigh the advantages. Moreover, it would complicate the law to introduce a different rule for married couples; co-ownership of property is by no means confined to such people. We propose that:

14. Where Scottish rules of construction apply to a title to property held in name of two or more persons there should not be a deemed destination to the survivor or survivors. Accordingly on the death of each co-owner his or her share of the property should continue to form part of his or her estate.

PART 4 INTERPRETATION AND CONSTRUCTION OF WILLS

4.1 This Part does not attempt to survey all the rules on the interpretation and construction of wills and other testamentary deeds. We are merely concerned with some possible defects in this area. Clarification of the words "children" in relation to adopted children and "heirs" is considered, and amendments are proposed to the rule conditio si institutus sine liberis decesserit (whereby issue may be entitled to take their predeceasing parent's legacy). Abolition of the doctrine of equitable compensation is proposed and the problems created by mutual wills are discussed.

Meaning of "heirs" in private deeds

4.2 If a testator who died before the Succession (Scotland) Act 1964 came into force left heritable property to X in liferent and X's heirs in fee, do X's heirs fall to be ascertained under the pre-1964 law or under the law in force at the time of X's death? It seems probable that the latter solution is correct. A person's heirs cannot be ascertained until he or she is dead[1] and it would be most unnatural to say that they then fell to be ascertained by reference to superseded rules. A reference to a person's heirs is, unless there is evidence of a contrary intention, a reference to those who are his or her heirs rather than those who would have been his or her heirs had the law remained unchanged. Nevertheless it has been suggested to us that it would be advisable to clear up any

1 Black v. Mason (1881) 8 R. 497 at p. 500. See also Inglis v. Inglis (1869) 7 M. 435 and Ferguson v. Ferguson (1875) 2 R. 627; Grant's Trs. v. Crawford's Trs. 1949 S.L.T. 374; McLaren, Wills and Succession, Vol. II p. 757.

doubt on this point by a statutory provision providing that a reference to a person's heirs in a private deed[1] should, in the absence of any contrary indication in the deed, be taken as a reference to those who would be entitled to succeed to the person on intestacy under the law applicable at the time of his or her death. Normally a person's heirs fall to be ascertained on his or her death. In the case of a woman leaving a liferent to her second husband with the fee to the heirs of her first husband on her second husband's death the heirs would be ascertained at the date of the second husband's death - the date when the succession opened to the first husband's heirs.

15. Views are invited as to whether it would be necessary or desirable to provide by statute that a reference in a private writing to a person's heirs should, in the absence of a contrary indication in the deed, be taken as a reference to those who would be entitled to succeed to the person on intestacy under the laws applicable at the time when the succession opens to the heirs.

Problems in relation to adopted children

4.3 A testamentary reference (whether express or implied) to the children of an adopter now includes a reference to his or her adopted child[2] unless the contrary intention appears.[3] But some doubt has been expressed as to whether

1 The Succession (Scotland) Act 1964, Sched. 2 para. 2 provides that references in general terms in any enactment to the heirs of a deceased person shall include the persons entitled by virtue of the Act to succeed on intestacy to any part of his estate.
2 Succession (Scotland) Act 1964, s.23(2).
3 See Spencer's Trs. v. Ruggles 1982 S.L.T. 165 where "children" in a 1905 deed was held not to include an adopted child.

a reference in a deed or will to the "issue of X" includes X's adopted child. Those who consider that there is room for doubt on this question would also consider that there is room for doubt as to whether a reference to "the issue of X" included X's child's adopted child. It seems clear that there should be no room for any doubt on these points and that a reference to the "issue of X" should, as a matter of policy, include X's adopted child and X's child's adopted child unless the contrary intention appears. The general policy in this area of the law is that an adopted child should be treated as the child of the adopter and not as the child of any other person.[1]

4.4 The relevant statutory provision is section 23(2) of the Succession (Scotland) Act 1964 which provides as follows:

> "(2) In any deed whereby property is conveyed or under which a succession arises, being a deed executed after the making of an adoption order, unless the contrary intention appears, any reference (whether express or implied)--
>
> (a) to the child or children of the adopter shall be construed as, or as including, a reference to the adopted person;
>
> (b) to the child or children of the adopted person's natural parents or either of them shall be construed as not being, or as not including, a reference to the adopted person; and
>
> (c) to a person related to the adopted person in any particular degree shall be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter and were not the child of any other person:

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1 Succession (Scotland) Act 1964, s.23(1).

Provided that for the purposes of this subsection a deed containing a provision taking effect on the death of any person shall be deemed to have been executed on the date of death of that person."

Apart from the question whether the word "issue" by itself shows an intention to exclude adopted children there may also be a question whether the reference in paragraph (c) to persons related to the adopted person "in any particular degree" is too narrow. It would clearly result in a bequest to the brother of an adopted person being regarded as a bequest to the person who would be his brother if he had been the child of the adopter. But would a reference to, say, the "ascendants" or "collaterals" of an adopted person be a reference to anyone related to him "in any particular degree"? Ascendants and collaterals are related in a particular way, rather than in a particular degree. We suggest that:-

16. To avoid any possibility of a doubt as to the extent to which an adopted child is regarded as included in his adoptive family for the purposes of section 23(2) of the Succession (Scotland) Act 1964,
    (a) the words "or issue" should be inserted after the word "chidren" in paragraphs (a) and (b) of that subsection, and
    (b) the words "or way" should be added after the word "degree" in both places where it appears in paragraph (c) of that subsection.

The rule conditio si institutus sine liberis decesserit

4.5 Present law and comparative survey. In general a bequest lapses if the person to whom it is given predeceases the testator. Depending on its nature the bequest will fall into residue, become intestate estate or

pass to another person. However, where a testator[1] makes a bequest to his or her own children[2] or remoter descendants the issue of a predeceasing[3] beneficiary take, by virtue of the common law rule conditio si institutus sine liberis decesserit, the predecessor's share, unless the will contains an express or clearly implied contrary intention. This rule applies also to bequests to nephews and nieces if the bequests are similar to those which parents would make for their own children. It does not apply to bequests to any other relations. Since Hall v. Hall[4] it has been the policy of the courts not to widen the conditio beyond those relationships set out above.

4.6 Other jurisdictions have a similar rule, although the details vary from country to country. In British Columbia the issue of a testator's children, remoter descendants, brothers or sisters can take their ancestors' share. Also if the predeceasing beneficiary leaves a spouse but no issue, that spouse may take all or part of his late wife's or her late husband's share depending on its value[5]. In England and Wales the rule applies only to bequests in wills to the testator's children and other descendants and only

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1 The rule applies to wills and marriage contracts with testamentary provisions but not to other lifetime deeds. Thomson's Trs. Petrs. 1963 S.C. 141.

2 Step-children are not included, Sinclair v. Sinclair's Trs. 1942 S.C. 362.

3 Depending on the type of bequest the beneficiary may either predecease the testator or fail to survive until the date of vesting. McGregor's Trs. v. Gray 1969 S.L.T. 355.

4 (1888) 18 R. 690.

5 Wills Act 1979, s.29.

operates in favour of issue of predeceasors.[1] In France where a parent gives property to one or more of his or her children (whether by will or lifetime deed) under the obligation to transmit such property to their children (i.e. the donor's grandchildren) in turn, the issue of any predeceasing grandchildren take the share that would have passed to their ancestors[2]. Similar provisions apply where a person makes a disposition to his or her brothers or sisters under an obligation of transfer to their children (i.e. the donor's nephews and nieces).[3] In Germany thre is a presumption that the descendants of predeceasing children or other descendants of the testator were intended to take their predeceasing ancestor's bequest.[4] The narrowest version of the rule occurs in South Africa where only in the case of bequests to the testator's children do issue of predeceasors take.[5] The widest version occurs in the Uniform Probate Code of the United States of America.[6] This provides that if a beneficiary is a grandparent or lineal descendant of a grandparent of the testator and is dead at the time of execution of the will or fails to survive the testator, the beneficiary's surviving issue take instead. The provision extends to class gifts.

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1 Wills Act 1837, s.33 as amended by Administration of Justice Act 1982, s.19 as regards persons dying after 31 December 1982. The bequest may be a gift to a specified person or children or other descendants as a class.
2 Code Civile, Arts. 1048 and 1051.
3 Code Civile, Arts. 1049 and 1051.
4 BGB Arts. 2068 and 2069.
5 General Law Amendment Act 1952, s.24.
6 Section 2-605.

4.7 Should the conditio be retained? The conditio is an equitable doctrine which rests on the presumption that testators in making bequests for certain classes or relatives overlook the possibility of a relative predeceasing leaving issue. The law therefore reads into the will a provision entitling the issue to take their dead ancestor's share. The widespread occurrence of similar rules suggests that the above rule or something along comparable lines, represents what most testators would wish to happen if they had considered the possibility of the predecease of a closely related beneficiary. Testators who divide their estate among their children normally intend to benefit their children and through them their children's families. They would not wish to disinherit one branch simply because one of their children died beforehand. It would lead to harsh cases if one child's family was deprived of benefit due to the child's predecease of the testator by a few days, whereas the families of the other children remained beneficiaries. Another view of the conditio is that it is a rule preventing partial intestacy.

4.8 On the other hand the conditio has several drawbacks. It complicates the law, it leads to litigation as to whether or not it applies in a particular case although the proposals we put forward later in this section[1] may lead to fewer proceedings. Moreover, the effects of the conditio may be overlooked in the preparation of a will, or more likely in the execution of its provisions, since on the face of the will there is nothing to indicate that issue may be beneficiaries. It would be possible to adopt the approach that if substitution of issue was desired the testator should expressly provide for this and that in the

1 Paras. 4.16 and 4.21.

absence of express provision issue of predeceasing beneficiaries would be excluded. This seems too rigid an approach. Not all wills are drafted professionally and even those that are may not anticipate and provide for every eventuality.

4.9 On balance we think the advantages of retaining the conditio outweigh the disadvantages. We therefore propose that:

17. Subject to various modifications proposed below the rule conditio si institutus sine liberis decesserit (whereby issue of a beneficiary may be entitled to the bequest if the beneficiary predeceases the testator or fails to survive until the date of vesting of the bequest) should be retained.

4.10 Which beneficiaries should be included? At present the conditio applies to bequests by a testator to his or her direct descendants. It also applies to bequests to his or her nephews and nieces if the bequests made are similar to those which parents would make for their own children. Other blood relatives of the testator and all relatives by affinity[1] are outwith the ambit of the conditio. The present law is illogical in that it applies the conditio to nephews and nieces but not to the much closer relationship of brothers or sisters or to other equally close relatives such as uncles or aunts.

4.11 It would be possible to provide that the conditio should apply in the absence of a contrary intention in the

1 Alexander's Trs. v. Paterson 1928 S.C. 371.

will to every bequest to an individual. However, we do not think that this would correspond to most testators' wishes. Legacies to friends and others outside the family are usually made on a personal basis and are intended to confer a benefit on that beneficiary alone and not on the beneficiary's family if he or she fails to survive. If the conditio were to extend to all bequests testators would have to make express provision avoiding its operation in relation to many legacies thus complicating the drafting of wills.

4.12 Another option would be to apply the conditio to any bequest to a relative of the testator. This also seems too wide for it would include very distant relatives and relationships by affinity. Yet another option would be, as a few other jurisdictions do, to limit the operation of the rule to the testator's own direct descendants. This seems to us to be unduly restrictive in that it does not take account of the position of childless testators making provision for their close family. Such a rule would necessitate insertion of express clauses providing for the substitution of issues of predeceasors in many more cases than at present.

4.13 In our view the scope of the conditio should be confined to reasonably close blood relationships[1]. A modest extension of the present law so as to include brothers and sisters and their descendants would be one possibility. As mentioned above it seems illogical to include nephews and nieces who are the issue of brothers and sisters but not brothers and sisters themselves or

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1 See para. 4.15 below for proposals relating to step-children.

grand-nephews and grand-nieces. Another possibly more attractive approach would be to extend the conditio to the testator's grandparents and those directly descended from them.[1] Besides brothers, sisters, nephews and nieces the conditio would then apply to cousins, uncles, aunts, parents and grandparents. Although legacies to ascendants are uncommon, legacies to cousins are common enough, and in some families the testator's uncles and aunts may well be younger than him or her. The advantages of an extended list of relatives is that it caters for a wide variety of family circumstances, for example a childless testator who has no surviving collaterals or descendants of collaterals. In such cases it is not at all unreasonable to assume that bequests to somewhat distant relatives are intended to enure to the benefit of their children.

4.14 In British Columbia where a bequest is made to a descendant, brother or sister of the testator and that relative predeceases leaving a spouse who survives the testator but without issue so surviving, the spouse is entitled to all or part of the bequest in the absence of any contrary intention expressed in the will.[2] We would not be in favour of introducing a similar rule in Scotland as we doubt whether most testators would wish to benefit their in-laws in preference to their residuary legatees or heirs in intestacy.

4.15 The conditio does not apply to bequests to a testator's step-children.[3] With the increasing incidence

1 Uniform Probate Code, s.2-605.
2 Wills Act 1979, s.22(2).
3 Sinclair v. Sinclair's Trs. 1942 S.C. 362.

of divorce and second and further marriages such an exclusion seems unduly restrictive today. Many step-children will have been brought up and treated by their step-parent as a full member of his or her family. Even where this is not the case a bequest to a step-child will we imagine often be made with the intention of benefiting the child and his or her family rather than the child alone.

4.16 Summing up the discussion in the preceding paragraphs we put forward the following proposal:

18.(a) The scope of the conditio should, in relation to wills executed after the commencement of the relevant legislation, be extended. Views are invited as to whether the conditio should apply to bequests to:

(i) the testator's descendants, collaterals (whether of the full or half blood) and descendants of collaterals only; or

(ii) the testator's grandparents and any person directly descended from such grandparents.

(b) The conditio should apply to step-children of the testator. Views are invited as to whether it should be a condition that the step-child had been accepted by the testator as a member of his or her family.

(c) The effect of the conditio should be to substitute only surviving issue of a predeceasing relative. It should not have the effect of entitling a spouse of the relative to claim all or part of that relative's bequest.

4.17 Beneficiary predeceasing execution of will. In many jurisdictions the issue of a beneficiary who was dead at the date of execution of the will are entitled to take his or her bequest. The Scottish rule however is that for the conditio to apply the beneficiary must have been an institute under the will - he or she must have been alive at the date of its execution since a dead person cannot be an institute[1]. We tend to favour retention of the existing Scottish rule. Testators who wish to benefit the issue of a dead relative should be required to make a bequest to them directly. It seems somewhat artificial to make a bequest to a dead person in reliance on a rule of construction which will transfer the bequest to the children of the dead person who survive the testator. We therefore propose that:

19. It should continue to be a condition of the application of the conditio that the person to whom the bequest is made should be alive at the date of execution of the will.

4.18 Whether the conditio applies. Where a bequest is to a beneficiary whose relationship to the testator is one which falls within the scope of the conditio, it is a question of construction of the will whether the conditio applies to the bequest. The conditio is likely to be applied if the will disposes of the testator's entire estate, the bequest is of the nature of a family settlement[2] and the beneficiary is, together with others for whom

1 Barr v. Campbell 1925 S.C. 317. The conditio applies however where the beneficiary was alive at the date of the will but died before the making of a codicil confirming the will; Miller's Trs. v. Miller 1958 S.C. 125.

2 Mair's Trs. v. Mair 1936 S.C. 731; Reid's Trs. v. Drew 1960 S.C. 46.

similar provisions are made, a member of a class[1] (nephews or children, for example). The conditio may be held to apply even though the members of the class which include the beneficiary are mentioned by name[2], or they receive legacies of different amounts or other legacies in addition.[3] In the case of a bequest to nephews or nieces the conditio applies only if the testator had made such provision for them as a parent might have been expected to make. This further condition is, however, presumed so that the onus of rebutting it falls on those challenging the application of the conditio.[4]

4.19 If the relationship between testator and beneficiary and the form of the provision made is such that the conditio would apply, its application can be displaced only by an express or clearly implied contrary intention in the will or other operative testamentary writing.[5] Factors which may be adduced against the operation of the conditio include the existence elsewhere in the will of provisions for issue to take their parents' share[6], an indication that the bequest is made on the basis of personal favour[7], and that the failure to substitute the

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1 Blair's Exs. v. Taylor (1876) 3 R.362; Devlin's Trs. v. Breen 1945 S.C. (H.L.) 27.
2 Alexander's Trs. v. Paterson 1928 S.C. 371.
3 Ibid.
4 Mair's Trs. v. Mair 1936 S.C. 731 per L.J-C. Aitchison at p. 735.
5 Devlin's Trs. v. Breen 1945 S.C. (H.L.) 27 per Lord Thankerton at p.35.
6 McNab v. Brown's Trs. 1926 S.C. 387.
7 The burden of proof of this lies upon the person challenging the application of the conditio. It is a heavy burden, Knox's Exs. v. Knox 1941 S.C. 532.

issue was intentional rather than an oversight. Somewhat surprisingly, in view of the conditio being based on the testator's presumed oversight, the conditio applies even in the face of a survivorship clause in the bequest ("to my son and daughter and the survivor of them", for example[1]) or a destination over[2] (such as "to my son whom failing my niece").

4.20 As a result of all these factors the question whether the conditio applies to a particular bequest in a will is not one which can be answered with certainty. This uncertainty presents difficulties for testators and their advisers in the preparation of wills and even more so for executors and their advisers in executing the wills. Furthermore, it also promotes litigation. It would simplify the law and provide a desirable degree of certainty if the conditio were to apply automatically to any bequest to a person related to the testator within specified limits.[3] In partiuclar it would remove the need to consider, where the beneficiaries were nephews and nieces, whether the provisions made for them were similar to those which parents would make for their own children. If this approach were adopted how would the operation of the conditio be disapplied? One option, which would by and large continue the existing law, would be that the conditio should only be disapplied by an express or clearly implied contrary intention (excluding a clause of survivorship or a destination over) in the will. Another option would be that only an express

1 Devlin's Trs. v. Breen 1945 S.C. (H.L.) 27.

2 Dixon v. Dixon 2 Rob. App. 1 and authorities cited there.

3 See Proposition 16 at para. 4.16 above.

exclusion would suffice. Prior to 1964 there were complex rules relating to implied revocation of special destinations by later wills. In order to simplify the law a statutory rule[1] was introduced providing that a special destination was not revoked by a subsequent will unless it contained a specific reference to that destination and a declared intention on the part of the testator to revoke it. A similar approach might with advantage be adopted for excluding the operation of the conditio.

4.21 We invite views on the following alternatives:-

20. Where a bequest is made in a will or testamentary writing executed after the commencement of the relevant legislation to a person related to the testator within specified degrees, the conditio should apply to that bequest unless:-

(a) the will or other operative testamentary writing contains an express declaration that the conditio is not to apply to the bequest.

or alternatively that

(b) the will or other operative testamentary writing contains an express or clearly implied intention that the conditio is not to apply to the bequest.

In either case should a survivorship clause or a destination over in the bequest by themselves be regarded as disapplying the conditio?

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1 Succession (Scotland) Act 1964, s.30.

4.22 What share should the issue take? At present the issue of a predeceasing beneficiary taking by virtue of the conditio take only the beneficiary's original share, not the share he or she would have taken had he or she survived.[1] As Lord McLaren said in Neville v. Shepherd[2]

> "the right of children under the conditio is an equitable extension of the will, and cannot reasonably be extended beyond this, that what the testator thought a reasonable provision for one to whom he was in loco parentis shall pass to that person's children. The extent of what is considered a reasonable provision is fixed by the provision which the parent has actually made on the assumption that all his children survive."

4.23 We do not find the arguments for restriction compelling. If the scheme of the will is such that the bequest can be increased due to failure of other beneficiaries, most testators would probably wish the increase to accrue to issue taking under the conditio as well. We accordingly propose that:

> 21. The issue of a predeceasing beneficiary taking under the conditio should take the share that the beneficiary would have taken had he or she survived the testator or the date of vesting as the case may be.

Equitable compensation

4.24 A surviving spouse or issue of the testator may elect to claim legal rights instead of accepting provisions made for him or her in the will. Where the provision takes the form of a legacy or share of residue vesting on the

1 Young v. Robertson (1862) 4 Macq. 337; Neville v. Shepherd (1895) 23 R. 351.
2 (1895) 23 R. 351 at p. 357.

testator's death, an election to claim legal rights results in the claimant completely forfeiting his or her right to the provision. But if the provision takes the form of a liferent or an annuity the doctrine of equitable compensation may result in the claimant being reinstated in the liferent or annuity after the other beneficiaries affected have been compensated for the adverse effects of the claim for legal rights. In Macfarlane's Trs v. Oliver[1], Mrs Oliver, a daughter of the testator, was given an alimentary liferent of half the residue, the fee going to her issue. Her liferent amounted to some £300 per year. She claimed legitim which amounted to some £2,100. As there was no clause in the will declaring that any claimant should forfeit his or her provision it was held that once the accumulated instalments of liferent had repaid to the estate the amount taken out by way of legitim with interest compensation was complete and Mrs Oliver was to be reinstated in her liferent.

4.25 The will in Macfarlane's Trs. did not contain a forfeiture clause. Many wills, however, contain an express clause dealing with the effect of the beneficiary making a claim for legal rights. Normally the effect of the clause is that making a claim results in forfeiture at least as far as the claimant's provisions are concerned; whether other related provisions are also forfeited (for example those in favour of the claimant's issue) depends on the wording of the provisions and the forfeiture clause.[2]

1 (1882) 9 R. 1138.

2 See for example Campbell's Trs. v. Campbell (1889) 16 R. 1007 (claim by daughter resulted in the loss of her issue's right to the fee of her liferented share); McCartney's Tr. v. McCartney's Exs. 1951 S.C. 504 (forfeiture by children did not affect provisions for their issue).

Section 13 of the Succession (Scotland) Act 1964 implies a clause of satisfaction in all wills executed after the commencement date of the Act.[1] Unless the will contains an express provision to the contrary it has effect as if it contained a declaration that a provision in favour of a spouse or issue of the testator is "in full and final satisfaction of the right to any share in the testator's estate to which the spouse or the issue, as the case may be, is entitled by virtue of jus relicti, jus relictae or legitim..." The effect of section 13 is to prevent the revival of provisions in favour of a person claiming legal rights by virtue of equitable compensation. However, in Munro's Trs. v. Munro[2] it was held that, while the implied satisfaction clause prevented revival, it did not preclude equitable compensation in relation to other beneficiaries adversely affected by a claim for legal rights.

4.26 The Mackintosh Committee on the Law of Succession in Scotland in their report, which the 1964 Act by and large implemented, recommended abolition of the doctrine of equitable compensation[3]. Their reasons were that the doctrine is abstruse and complicated in its application and more often than not brings about a result which is very far from anything intended or contemplated by the testator. Munro's Trs[4] indicates just how complicated applying equitable compensation to beneficiaries other than the claimants can be. Mrs Munro left her husband the liferent of the residue of her estate and on his death 3/5 of the residue was to be paid to her son. The other 2/5 was to be held in liferent for her daughter and for

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1 10 September 1964.
2 1971 S.C. 280.
3 (1949) Cmd. 8144, para. 19.
4 1971 S.C. 280.

the son's son in fee. The issue of the son were to take his share if he failed to survive her husband. Vesting was postponed in all cases until the date of payment. The husband and the two children all claimed legal rights and so forfeited their provisions under the will. To provide equitable compensation for the grandson the 1/3 of the residue that remained after satisfying legal rights was to be held by the trustees and the income accumulated until the first of (a) the death of the husband, or (b) full compensation had been made[1] or (c) further accumulations became illegal.[2] If the son predeceased the husband the resulting fund should be divided with the grandson taking 2/5 and the son's issue 3/5. But if the son and grandson survived the husband the whole fund should be paid to the grandson. In order to take account of inflation the grandson's share should be the larger of 1/3 of the residue plus sufficient accumulations to make it up to 2/5 of the original estate or 2/5 of the sum of 1/3 of the residue plus accumulations (the accumulations being limited to the total amount paid as legal rights).

4.27 On the other hand the doctrine of equitable compensation, as its name implies, attempts to ensure that those beneficiaries whose interests are prejudiced by legal rights being claimed are so far as possible compensated, especially since they are not in a position to prevent a claim for legal rights being made. Furthermore, cases of equitable compensation arise infrequently so that the

1 Surplus accumulations would thereafter fall into intestacy: Ibid at p. 294.
2 Trusts (Scotland) Act 1961, s.5 as amended by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1966, s.6.

inherent complexity of the doctrine is of less moment than if cases were commonplace.

4.28 Equitable compensation only arises where liferents, annuities or similar provisions exist since in the case of straightforward gifts vesting at the date of the testator's death there is no fund available to compensate the beneficiaries prejudiced by the claim for legal rights. If equitable compensation is to be abolished what should happen to the forfeited testamentary provisions? Where the will contains express directions these would naturally be given effect to. But many wills do not. One option is for the forfeited provision to lapse into residue (if relating to a specific fund) or into intestacy (if relating to residue). This would produce unfair results in the case of a liferent of residue. Take the example of a woman who dies leaving her son the liferent of the residue of her moveable estate (worth £60,000) with the fee going to her niece on the expiry of the liferent. The son claims legitim (£20,000) and forfeits his liferent. The income on the balance of £40,000 falling into intestacy would be claimed by the son so that he would get £20,000 in cash plus an effective liferent of the remaining £40,000, while the niece's fee would be reduced to £40,000.

4.29 Another option, which we prefer, is to treat a person who claims legal rights as having predeceased the testator. Under this option the son in the example given in the preceding paragraph would get £20,000 in cash instead of a liferent of £60,000 while the niece would get £40,000 immediately instead of £60,000 when the son died. This would certainly be simpler than equitable compensation in

terms of which the trustees would hold the balance of £40,000 together with accumulated income until the son died and then pay it to the niece. Deemed predecease of the claimant produces less simple results however in the case of non-vested fees. For example, suppose a man left the liferent of his moveable estate (worth £60,000) to his widow with the fee to his daughter if she survived his widow which failing his son. A claim for legal rights by the widow would result in her being deemed to have predeceased her husband, but the vesting of the fee would not thereby be accelerated.[1] The trustees would therefore have to hold the balance of the fund together with accumulated income until the widow died in much the same way as if equtable compensation had to be made. Such problems however exist under the present law (and would continue to exist) quite apart from equitable compensation where a liferent is renounced and the will does not expressly provide for this contingency.[2] We do not think it would be fair or correct to provide for acceleration of vesting where a claim for legal rights resulted in forfeiture of a liferent, leaving the rule of non-acceleration standing in other situations (renunciation of the liferent, for example).

4.30 Deemed predecease would also produce unjustifiable results in the case of property held on a destination to the survivor of the deceased and the claimant. The whole property including the claimant's own share would pass to

1 Muirhead v. Muirhead (1890) 17 R. (H.L.) 45.
2 Ross's Trs. v. Ross (1894) 21 R. 927; Middleton's Trs. v. Middleton 1955 S.C. 51; Chrystal's Trs. v. Haldane 1960 S.C. 127.

the deceased's estate . In the first memorandum[1] we propose that a person claiming legal rights should forfeit his or her rights of succession under the deceased's will or arising from partial intestacy. We suggest that a claimant should also forfeit rights in property passing to him or her under a special destination unless the deceased could not competently have evacuated it, in which case the property should pass to the claimant. To achieve this result a claimant should not be deemed to have predeceased the deceased in the case of a destination which the deceased could not have evacuated. For others the survivorship destination should be ignored so that the claimant would retain his or her share, but forfeit any right to succeed to the deceased's share.

4.31 Our provisional view is that the disadvantages of equitable compensation outweigh its advantages. We therefore invite views on the following proposal.

22. The doctrine of equitable compensation should be abolished. Unless the will provides otherwise a person claiming legal rights should for the purposes of succession to the deceased's estate (excepting property held on a special destination) be treated as having predeceased the deceased. Where the deceased's estate includes property which would pass to the claimant under a special destination then for the purpose of succession to that property:-

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1 Proposition 28 (para. 4.63).

(a) if the deceased could not have competently evacuated the destination the claimant should be treated as having survived the deceased, and

(b) if the deceased could have competently evacuated the destination the destination should be ignored.

Mutual wills

4.32 A mutual will is a deed by two or more persons in which each disposes of all or part of his or her own estate to the survivors or survivor. The deed may also contain directions as to the disposition of the estates on the death of the survivor. Mutual wills give rise to difficulties when one of the persons concerned dies leaving a will inconsistent with the provisions of the earlier mutual will. Depending on its terms a mutual will may be regarded as either merely two wills in one deed, in which case revocation is competent, or as contractual, in which case revocation or alteration is incompetent. It is not essential for a mutual will to contain express contractual words for it to be treated as having contractual effect.[1] There is a presumption in favour of freedom of revocation[2], but it is easier to hold that a mutual will by a married couple in favour of themselves or their children is contractual[3]. Even in these cases however, the fact that a couple have provided that their estates should pass to

1 Corrance's Trs. v. Glen (1903) 5 F. 777 at p. 780.
2 Croll's Trs. v. Alexander (1895) 22 R. 677 at p. 681.
3 United Free Church of Scotland v. Black 1909 S.C.25; Lawrie's Ex. v. Haig 1913 S.C. 1159.

the survivor and on the death of the survivor to their child is not, by itself, sufficient to overcome the presumption of freedom.[1]

4.33 In England and Wales provided three conditions are satisfied the survivor in a mutual will is treated as holding the property concerned on a constructive trust for the purposes of the mutual will so that any later will is ineffective to the extent that it contains contrary provisions.[2] The three conditions are:-

(a) that the persons concerned have made an agreement as to the disposal of their property on death and made either a joint will or separate wills to this effect,

(b) it is part of the agreement that the survivor is to be bound by its terms,

(c) the survivor accepts the benefit under the predeceasor's will or alternatively the predeceasor dies with the will unrevoked and believing the agreement still stands.[3]

Each person to the agreement is under an obligation not to revoke or alter while the others are alive without notice to them.

4.34 In France mutual wills are prohibited. Article 968 of the Civil Code provides that a testament may not be made in the same instrument by two or more persons whether

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1 Hanlon's Ex. v. Baird 1945 S.L.T. 304.
2 Parry and Clark, The Law of Succession, 8th ed. pp. 11-15.
3 It is not clear which alternative represents the law as there are dicta in support of both. Ibid., p.12.

for the benefit of a third party or by way of reciprocal or mutual disposition.

4.35 In South Africa each party to a mutual will has power to revoke its provisions regarding his or her own estate while both are alive,[1] and any contract to make a will or not to revoke a will is unenforceable.[2] However, the survivor, if he or she has accepted benefits under the will on the death of the predeceasor cannot alter the dispositions made by the will in relation to the combined estates.[3]

4.36 The Uniform Probate Code of the United States of America provides that the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. A contract can be established only by express provision in the will, by reference in the will to a contract the terms of which are provable by extrinsic evidence, or by a separate written contract.[4]

4.37 Spouses, sisters, brothers or other people who live together and are economically dependent on each other may wish to pool their resources during their lives and may also wish to provide that after the death of the survivor those pooled resources or what remains of them shall go to specified beneficiaries. A mutual will provides a simple way of achieving these objectives. However, mutual wills can give rise to considerable difficulties and this has

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1 Maasdorp's Institutes, Vol 1 The Law of Persons, p.123.
2 Ibid., pp.125-127.
3 Administration of Estates Act 1965, s.37.
4 Section 2-701.

led them to be called "an unfortunate form of deed"[1] or one which it is "rarely sensible" for persons to make.[2] In view of this we turn to consider whether mutual wills should be denied contractual effect so that the survivor would always be free to dispose of his or her own estate and the estate inherited from the predeceasor notwithstanding the provisions of the mutual will. A contractual mutual will which in its terms prevents the survivor from altering its provisions acts as a lifelong veto on the survivor's powers of testamentary disposition and may so act, not only as regards the inherited property, but also as regards all present and future property of the survivor. Circumstances may change, however, and what was reasonable for a young married couple to agree to may turn out to be extremely irksome and unfortunate if one of them remarries and has a new family following on the death of their first partner. Not only circumstances but also the desires of those making mutual wills may change with the passage of time. As Lord McLaren pithily observes:-

> "... if spouses and sisters living in community discover a predilection for joint action in the matter of making a will, this tendency is not infrequently followed by a reaction in which the survivor wishes, if possible, to dispose of the property of both[3]"

Another argument against mutual wills is that as a means of protecting the succession they are ineffective and can be circumvented. The contractual provisions normally strike only at the survivor making an inconsistent will; they do

1 Gloag and Henderson, An Introduction to the Law of Scotland, 8th ed, p. 663.

2 Parry and Clark, The Law of Succession, 8th ed. p.15.

3 Wills and Succession, Vol I, p.421.

not stop him or her dissipating the property while alive so as to leave nothing for the mutual will to operate on. Denying contractual effect to provisions contained in mutual wills would still leave it open to people to enter into contracts relating to testamentary disposition separately from the wills implementing such contracts. This might be an advantage since part of the difficulty with mutual wills stems from deciding whether the terms of a particular will which does not contain express contractual terms nevertheless indicate the existence of a contract. If the contract had to be expressed in a separate deed this difficulty would by and large disappear.

4.38 On the other hand there are many arguments in favour of retaining mutual wills. We assume that it would be unacceptable to deny validity to contracts relating to testamentary dispositions. It would in our opinion be quite unjust if the survivor were entitled to accept a substantial bequest left to him or her by the predeceasor on the basis of an agreement and yet was permitted to refuse to give effect to that agreement. On the assumption that contracts relating to wills continue to be valid and enforceable it therefore seems a pointless formalism to make it a condition of such a contract that it is contained in a deed separate from the related will or wills. The fact that circumstances or the wishes of the testators may change in the future is not a good reason for denying effect to a mutual will. Testators being persons of full capacity must be taken as having considered these possibilities when entering into the contract. It would always be open to them to insert provisions permitting the survivor to alter or revoke some or all of the terms of the

will in prescribed circumstances.[1]

4.39 The latter half of the last century and the early part of the present century saw a considerable volume of litigation concerning mutual wills. Since 1930 there have only been a few such cases and we understand that in view of their well recognised difficulties mutual wills have ceased to be a feature of current practice. This lends further weight to our provisional view that:

23. No change should be made in the law relating to mutual wills

4.40 In Scotland each party to a mutual will may revoke as far as his or her estate is concerned without notice to the others while all are alive, and a clause prohibiting alteration without mutual consent during the joint lives of the parties is by itself ineffectual to achieve that result.[2] In some other jurisdictions[3] each party is under an obligation not to revoke or alter without notice to the other. The purpose of this rule is to give fair notice of withdrawal from the agreement so that the others can, if they wish, alter their testamentary dispositions. We do not think such a rule should be introduced in Scotland. It would lead to complexities since provisions

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1 For example the survivor could be allowed testamentary freedom as regards his or her own estate but be prohibited from revoking the provisions regarding the inherited estate.

2 Saxby v. Saxby's Exs. 1952 S.C. 352.

3 For example, Australia, England and Wales.

would have to be made regarding the form and manner of service of the notice, the procedure to be adopted when the others' whereabouts were unknown, and the effect of an alteration to the will without notice having been given. Furthermore we doubt whether it is necessary. Any alteration does not take effect until the death of the person concerned. The alteration will then be brought to the notice of the others who can alter or revoke their wills in the light of this knowledge.

PART 5 PROBLEMS CONNECTED WITH EXECUTORS

5.1 In this Part we examine some of the various problems which have been brought to our attention relating to the functions, rights and duties of executors.

Protection of trustees and executors

5.2 Trustees and executors have a duty to distribute the estate to those entitled to it. They are generally liable to the correct beneficiaries if they make payments to those not entitled to receive them[1]. In order to provide some protection for executors and trustees, section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides:

> "Notwithstanding anything in the foregoing provisions of this Act, a trustee or an executor may distribute any property vested in him as such trustee or executor, or may make any payment out of any such property, without having ascertained -
>
> (a) that no illegitimate person exists who is or may be entitled to an interest in that property or payment in consequence of any of the said provisions, and
>
> (b) that no illegitimate person exists or has existed, the fact of whose existence is, in consequence of any of the said provisions, relevant to the ascertainment of the persons entitled to an interest in that property or payment.
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> and such trustee or executor shall not be personally liable to any person so entitled of whose claim he has not had notice at the time of the distribution or payment; but (without prejudice to section 17 of the Act of 1964)[2] nothing in this section shall affect any

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1 Wilson and Duncan, Trusts, Trustees and Executors, p.373.

2 The Succession (Scotland) Act 1964, s.17 protects persons who have acquired title to heritable property in good faith and for value.

right of any person so entitled to recover the property, or any property representing it, or the payment, from any person who may have received that property or payment."

Section 10 and Schedule 1 of the Law Reform (Parent and Child) (Scotland) Act 1986 adds a further paragraph:

"(c) that no paternal relative of an illegitimate person exists who is or may be entitled to an interest in that property or payment."

This addition is consequential upon opening the succession to all relatives of a person whose parents were not married to each other.

5.3 Protection also exists as regards adoptions. Section 24(2) of the Succession (Scotland) Act 1964 provides:-

(2) Notwithstanding anything in the last foregoing section, a trustee or an executor may distribute any property for the distribution of which he is responsible without having ascertained that no adoption order has been made by virtue of which any person is or may be entitled to any interest therein, and shall not be liable to any such person of whose claim he has not had notice at the time of the distribution; but (without prejudice to section 17 of this Act) nothing in this subsection shall affect any right of any such person to recover the property, or any property representing it, from any person who may have received it."

5.4 Similar provisions exist in England and Wales as regards adopted[1], legitimated[2] and illegitimate[3] persons. In addition personal representatives may give notice (by way of advertisement in the London Gazette and local

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1 Children Act 1975, s.8 and Sch. 1, para. 15(1).

2 Legitimacy Act 1976, s.7.

3 Family Law Reform Act 1969, s.17.

newspapers) of their intention to distribute the estate and require any person interested to send in particulars of their claim within a prescribed period. After the period has expired the personal representatives may distribute having regard only to claims of which they then have notice and are not personally liable for claims arising later.[1]

5.5 We think that the Scottish provisions relating to protection of executors should be reformed and expressed in a general fashion. Although perhaps the majority of problems arising from lack of knowledge of a beneficiary's existence or relationship to the deceased are in connection with adopted persons and persons born outwith marriage, trustees and executors also require protection against the later emergence of other beneficiaries. At present the risk of claims by unknown beneficiaries can be covered by an indemnity policy from an insurance company, but such policies impose a monetary burden on the estate and may involve the trustees, executors and those advising them in a considerable amount of work in pursuing enquiries before a policy will be issued. Another advantage of framing the protection rules in general terms is that it would remove legal differences between persons whose parents were married to each other and those whose parents were not in yet another area of law; a policy which was overwhelmingly approved on consultation on our Consultative Memorandum on Illegitimacy[2] and by Parliament in passing the Law Reform (Parent and Child)(Scotland) Act 1986.

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1 Trustee Act 1925, s.27.

2 Scot. Law Com. No. 82 (1984).

5.6 One minor defect of the adoption provisions is that executors and trustees are not protected in relation to adoption orders by virtue of which a person ceases to be entitled to an interest in an estate.[1] The general formula we propose below would cure this defect.

5.7 If, as we suggest, the protection provisions should be generalised to cover any lack of knowledge about the existence of any person or his or her relationship with the deceased which would affect the distribution of the estate, then the present high order of duty to distribute correctly should be incorporated. Otherwise trustees or executors could distribute the estate to beneficiaries whose existence was known to them without making any effort to trace others. We think the requirement of good faith coupled with a duty to make such enquiries as are reasonably necessary in the circumstances would be sufficient. In our view this formula would represent at the most a slight change from the existing law as it is clear that the liability of trustees and executors is not absolute. As Lord Kinloch said in Lamond's Trs. v. Croom[2]:

> "Cases may undoubtedly occur in which the facts necessary to be known, in order to point out the true person entitled, may be beyond the knowledge, and fairly possible discovery of the trustees; and in such cases responsibility may be modified".

Where the enquiries do not provide an unequivocal answer the duty on an executor or trustee acting in good faith would be to seek the protection of a decree, for example by applying to the court for judicial authority to

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1 Wilson and Duncan, p.375.
2 (1871) 9 M. 662 at p. 671.

distribute on a certain basis, or by proceedings under the Presumption of Death (Scotland) Act 1977, rather than to distribute in the hope that claims would not emerge later. We tend to think that express statutory provisions relating to advertising for claims are unnecessary. Viewed as a method of pursuing enquiries we think that they are unnecessary in that advertisements may be an inappropriate method of proceeding in particular cases. Viewed as an alternative method of protection we think that they are superfluous and would merely complicate the law.

5.8 We would stress that, as under the existing law, any provision protecting executors and trustees would not affect the rights of persons entitled to recover property from the estate from those to whom it had been distributed in error. But the right of recovery is, and should continue to be, without prejudice to section 17 of the Succession (Scotland) Act 1964 in terms of which the title of a person acquiring in good faith and for value heritage[1] which had been vested in an executor by virtue of confirmation cannot be challenged on certain grounds.

5.9 We propose:-

A trustee or executor in making a distribution from the estate vested in him or her should not be personally liable for any error in distribution based on ignorance of the existence or non-existence of persons or their relationship or lack of relationship with a relevant person (including relationships by adoption or marriage) provided that

1 We discuss the extension of this to moveables below (para. 5.10).

he or she acted in good faith and made such enquiries as a reasonable and prudent trustee or executor would make in such circumstances.

Protection of acquirers of executry assets

5.10 Section 17 of the Succession (Scotland) Act 1964 protects persons purchasing heritable property from executors in whom such property is vested by virtue of confirmation. It provides:

> "Where any person has in good faith and for value acquired title to any interest in or security over heritable property which has vested in an executor as aforesaid directly or indirectly from -
>
> (a) the executor, or
>
> (b) a person deriving title directly from the executor,
>
> the title so acquired shall not be challengeable on the ground that the confirmation was reducible or has in fact been reduced, or, in a case falling under paragraph (b) above, that the title should not have been transferred to the person mentioned in that paragraph."

Protection as regards moveables is provided by the Sale of Goods Act 1979, s.23.

> "When the seller of goods has a voidable title to them, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title".

5.11 It seems to us that the above provisions are deficient in at least two aspects. First, a purchaser of executry assets such as shares or book debts has no protection under section 17 (since the items are not heritage) or section 23 (since they are not goods[1]).

1 S. 61(1) of the Sale of Goods Act 1979 defines goods as including corporeal moveables but excluding money.

Secondly, there is no statutory protection for a person who acquires moveable executry assets in good faith and for value otherwise than by purchase. We think that, without prejudice to the additional protection provided by section 23 of the 1979 Act, section 17 of the 1964 Act should extend to acquirers of all types of property. A person who deals directly with an executor ought to be able to rely on the confirmation as evidence of the executor's title and a person who deals indirectly ought not to have to enquire as to the propriety of the executor's actings. In other areas no distinction is drawn between heritage and moveables. Section 2 of the Trusts (Scotland) Act 1961 as read with section 4(1)(a) of the Trusts (Scotland) Act 1921, protects persons who purchase from trustees any part of the trust estate, heritable as well as moveable, from any challenge on the ground that the sale was at variance with the terms or purposes of the trust. Similarly section 57 of the Insolvency Act 1985 as read with section 471 of the Companies Act 1985 provides that a person purchasing in good faith and for value property from a receiver shall not be concerned to enquire whether the receiver is acting within his or her powers. Section 17 should, we think, be extended to persons acquiring for value in good faith otherwise than by way of purchase. It is not uncommon for persons with interests in an estate to acquire assets which they particularly wish to possess (such as the dwelling house or items of sentimental value) by way of exchange or by forgoing claims which they might have made. We invite views on the following question.

25. Without prejudice to section 23 of the Sale of Goods Act 1979 (protection of good faith purchasers of goods for value against seller's voidable title) should section 17 of the Succession (Scotland) Act 1964 be extended so as to protect persons acquiring (whether by way of purchase or otherwise) any type of property in good faith and for value.

Using the will as a link in title

5.12 Section 14 of the Succession (Scotland) Act 1964 vests the deceased's heritable, as well as moveable, property in the executor for the purposes of administration. Section 15 deals with the transfer of such heritage to beneficiaries or persons purchasing from the executor. As read with section 5 of the Conveyancing (Scotland) Act 1924 it provides that a confirmation in favour of an executor which includes any interest in heritable property (described in prescribed form)[1] is a valid title to the interest and forms a warrant whereby the executor can deduce title in a subsequent deed conveying the interest to a third party or complete title in his or her own name by way of a notice of title. Section 15 further provides that an executor may transfer any interest vested by virtue of confirmation to the legatee of that interest or to a person in satisfaction of rights on intestacy.

5.13 There is considerable doubt whether the above provisions have rendered incompetent the previous methods of completing title to the deceased's heritage using the

1 Ss. 14(2) and 15(1) proviso; Act of Sederunt (Confirmation of Executors Amendment) 1966.

will. In 1965 the four Professors of Conveyancing expressed the view[1] that where the will contains a general conveyance of the deceased's heritage to executors-nominate or trustees, such executors or trustees could deduce or complete title by means of the will as an alternative to so doing by means of the confirmation. Use of the will was also thought competent if the will contained a specific bequest of heritage to a legatee where the deceased was uninfeft, but opinion was divided as to the competence of using the will where the deceased was infeft in the heritage in question. In all cases it was strongly recommended that the confirmation rather than the will should be used as the link in title, and we understand that this recommendation has been generally followed.

5.14 The advantage of using the will as a link in title is that it avoids the expense and delay of obtaining confirmation where the only substantial item of estate is the deceased's house or other heritage. On the other hand, making confirmation the only valid link in title would remove the present uncertainty in the law, and by providing a single method of completing or deducing title reduce the possibility of error. Furthermore, where the will is used as a link in title any acquirer would have to be satisfied that in terms of the will the executor had a title to transfer the heritage and the acquirer's title would be open to challenge on the ground that the will was invalid or the seller lacked title. Where, however, confirmation is used as the link in title, section 17 of

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1 J.L.S.S. 1965, p.153.

the Succession (Scotland) Act 1964 protects a good faith purchaser.

5.15 In our view the advantages of making confirmation the sole link in title outweigh the disadvantages and, in line with a similar recommendation made by the Halliday Committee,[1] we propose that

26. It should cease to be competent for an executor or trustee appointed under a will or for any general disponee or legatee of heritage to use the will as a link or warrant for deducing or completing title to the deceased's heritage.

Executors and next-of-kin

5.16 At common law, the right to succeed on intestacy to moveable estate vested in the surviving members of the class of relatives nearest in degree to the intestate as next-of-kin. The intestate's spouse, mother and maternal relatives were, however, completely excluded so that the order of next-of-kin was children, grandchildren etc., full brothers and sisters, half brothers and sisters related through the father, father, collaterals of the father, father's parents etc. Those succeeding applied in their capacity as next-of-kin for appointment as executors-dative.[2] Various statutory modifications were later made

1 Report of the Committee on Conveyancing Legislation and Practice, (Chairman, Professor J M Halliday) 1966 Cmnd. 3118, para. 149.

2 We are not concerned with executors-creditor. Confirmation as executor-creditor is a species of diligence against the estate rather than a means of making up title to it.

to both the rights of succession and the right to be appointed as executor-dative.[1] These have since been repealed and replaced by the provisions of the Succession (Scotland) Act 1964.

5.17 The Succession (Scotland) Act 1964 swept away most of the previous rules of succession to moveable intestate estate and replaced them with a statutory list of those entitled to succeed to the free estate - the estate (both moveable and heritable) remaining after satisfaction of the prior and legal rights of the surviving spouse, children and other descendants (if any).[2] In terms of the 1964 Act the executor is vested in the heritable estate as well as the moveable, but this apart there was no great change made to the rights to the office of executor-dative. Section 9(4), restating earlier provisions to the same effect in the Intestate Husband's Estate (Scotland) Acts 1911 to 1959,[3] provides that where a surviving spouse's monetary right exhausts the estate, so that the spouse is entitled to the whole estate, he or she has the right to be appointed executor. Section 5(2) provides, along the lines of an earlier enactment,[4] that the right of persons succeeding as representatives of predeceasing

1 See e.g., The Intestate Moveable Succession (Scotland) Act 1855, s.1 of which introduced limited representation among next-of-kin provided that representatives of predeceasing next-of-kin could be confirmed only if surviving next-of-kin did not apply.
2 Ss. 1 to 7.
3 Intestate Husband's Estate (Scotland) Act 1919, s.3.
4 Intestate Moveable Succession (Scotland) Act 1855, s.1 repealed by the Succession (Scotland) Act 1964.

next-of-kin to the office of executor is postponed to that of the surviving next-of-kin.

5.18 The present situation relating to the right to the office of executor-dative appears to us to be unsatisfactory in two respects. First, the right to the office may be regulated by reference to next-of-kin. It is still competent to be appointed executor-dative as next-of-kin,[1] and indeed persons who succeed under the provisions of the 1964 Act and who are also next-of-kin are appointed in the latter capacity rather than in their capacity as statutory successors.[2] Furthermore, a next-of-kin with no beneficial interest in the estate can probably insist on being appointed executor-dative as next-of-kin, along with those beneficially interested.[3] It seems unnecessary to continue to use the concept of next-of-kin in relation to the right to administer an intestate estate when the concept has been abandoned for the purpose of succession to the estate itself. Moreover, by excluding the spouse, mother and maternal relatives, next-of-kin form a sexually biased class reflecting the ideas of a long-vanished society. Secondly, apart from the case of a

1 See Act of Sederunt (Confirmation of Executors) 1964, Scheds. 1 and 2.

2 Currie Confirmation of Executors, p.106. Statutory successors are not next-of-kin, which term retains its common law meaning. Young's Trs. v. Janes (1880) 8 R. 242.

3 Bones v. Morrison (1866) 5 M. 240; Meston, The Succession (Scotland) Act, (3rd ed.) p.77. But in Macpherson v. Macpherson (1855) 17 D. 357 the claim of the next-of-kin was rejected in favour of the present beneficiary interested since there was a suspicion that the appointment was designed to defeat the rights of succession.

surviving spouse who inherits the whole intestate estate[1] there is no express statutory rule that statutory successors who are not next-of-kin are entitled to share in the administration. By analogy with cases involving statutory successors under earlier legislation[2] it is, however, accepted commissary practice that statutory successors under the 1964 Act are entitled to apply to be appointed executors-dative.

5.19 It would be unduly rigid to restrict the appointment of executors-dative to those who had a beneficial interest in the estate in question, since this would entail appointing representatives to those beneficiaries unwilling or incapable of acting as executors. The appointment of a next-of-kin can avoid this problem. Thus, for example, where an elderly surviving spouse does not wish to be the executor, although entitled to the whole intestate estate, one of the children could be appointed the executor as next-of-kin provided that the surviving spouse declines the office.[3] We think such a facility should be retained but not tied to the concept of next-of-kin. It therefore becomes necessary to devise an alternative ground of appointment as persons cannot be appointed executor-dative on the ground of expediency; they must have a legal title to the office.[4] We propose that the order of succession to the free estate set out in the Succession (Scotland) Act 1964 should be used to

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1 Succession (Scotland) Act 1964, s.9(4).

2 Webster v. Shiress (1878) 6 R. 102 (Father); Muir (1876) 4 R. 74 (Mother).

3 Currie, p. 108.

4 Whiffin v. Lees (1872) 10 M. 797, per L.P. Inglis at p. 800.

select a relative who could be entrusted with the administration of the estate.

5.20 Section 1 of the Confirmation of Executors (Scotland) Act 1823 enacts that in the case of intestacy, the right of confirmation to the intestate moveable estate as next-of-kin transfers to representatives where the next-of-kin died before confirmation. The original purpose of this provision was two-fold. First, it changed the common law rule that the right to succeed vested on confirmation and replaced it with the rule that the right vested at the date of the deceased's death by survivance. This rule has been restated by the Succession (Scotland) Act 1964, Part I of which regulates succession to the free estate by survivance and which therefore supersedes the earlier enactment. Secondly, it gives representatives of next-of-kin who were vested but who died before confirmation a title to apply for appointment as executors-dative to the intestate estate. It would appear that the provision is also unnecessary for this purpose, since in modern practice the representative seeks appointment as executor to the whole estate left by the deceased's next-of-kin by virtue of any will left by him or her or by virtue of an independent right of succession to his or her intestate estate.[1]

5.21 We propose that:

27. (a) There should be a statutory rule that any person having a beneficial interest in the succession to an intestate estate has a title to apply for appointment as executor-dative on that estate.

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1 Wilson and Duncan, Trusts, Trustees and Executors, p.431.

(b) Where a person beneficially interested in an intestate estate fails to apply for appointment as executor-dative, the court should have power, with the consent of that person, to appoint a suitable relative from among those mentioned in section 2 of the Succession (Scotland) Act 1964.

(c) It should cease to be competent to appoint a person as executor-dative merely on the ground of being next-of-kin.

(d) Section 1 of the Confirmation of Executors (Scotland) Act 1823, having been superseded by later enactments and practice, should be repealed.

Power to issue confirmation where no Scottish estate

5.22 Where a person dies domiciled in Scotland without any estate situated there, it is not competent for a Scottish court to grant confirmation since the basis of the jurisdiction is the existence of estate in Scotland.[1] We understand that in practice the fiction is adopted of including some "nominal" item of Scottish estate to enable confirmation to be granted. It has been suggested to us that the Scottish courts should have jurisdiction where the deceased was domiciled in Scotland, even though no assets are situated there.

5.23 It would certainly be more principled to confer jurisdiction to grant confirmation to the estate of a person domiciled in Scotland even though there was no Scottish estate than to use the present fiction. Although

1 Anton, Private International Law, p.489.

alternative methods of proceeding would be available (such as obtaining probate or letters of administration to the estate if situated in England and Wales) Scottish executors might find it more convenient to obtain confirmation in Scotland. Thus, for example, where the whole estate was situated in a Commonwealth country which has reciprocal arrangements with the United Kingdom for resealing confirmations etc., it would be far simpler to obtain confirmation in Scotland and have it resealed abroad than to instruct local lawyers to apply to the courts of the Commonwealth country for authority to administer the estate. We therefore propose that:-

28. Jurisdiction should be conferred on Scottish courts to grant confirmation to executors of a person who died domiciled in Scotland, notwithstanding that there is no estate situated in Scotland.

A duty to notify a beneficiary?

5.24 It has been suggested to us that an executor should be placed under a statutory duty to notify beneficiaries of their interest in the estate within a prescribed time. It would be possible for a beneficiary's claim to be defeated or paid late by the executor concealing from the beneficiary that he or she was entitled to a legacy or a share of the estate.

5.25 The duty of executors is to ingather the estate and distribute it to those entitled to it by law. An executor who omitted or unreasonably delayed to pay a beneficiary whose existence and whereabouts was known would be liable to legal action by the beneficiary. The remedy of a beneficiary who fails to receive what he or

she is entitled to from an estate is to sue the executor. Such a claim is subject to the long negative prescription (20 years).[1] If the estate has already been distributed the omitted beneficiary can sue the other beneficiaries provided the executor is called as an additional defender.[2] Where a bond of caution exists a claim may be made against the cautioner. A beneficiary should be able to obtain sufficient information to make a claim. The commissary records contain copies of the wills,[3] inventories of estate confirmed to, and, in the case of intestate estates, the decrees appointing executors-dative in connection with all estates for which confirmation is granted. These records are open to public inspection.

5.26 As a matter of good administration, executors do notify beneficiaries of their interests in the estate. We do not think that turning this practice into an express statutory duty would assist beneficiaries. The present law contains adequate sanctions against executors who fail in their duty to distribute the estate, and it would be difficult to devise alternative sanctions to effectively enforce the new statutory duty to notify. We therefore make no proposals for reform.

Bonds of caution

5.27 A bond of caution is an obligation by a third party

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1 Jamieson v. Clark (1872) 10 M. 399; Prescription and Limitation (Scotland) Act 1973, s.7.

2 Armour v. Glasgow Royal Infirmary 1909 S.C. 916.

3 Wills may also be registered in the Books of Council and Session or in Sheriff Court Books which are open to public inspection.

(in modern practice normally an insurance company[1]) to indemnify any creditor or beneficiary of an estate against loss caused by maladministration, negligence or fraud on the part of the executor. Bonds of caution provide protection in those cases where suing the executor would not be an effective remedy.

5.28 At present executors-dative, but not executors-nominate, are required to find caution before they are confirmed. We first discuss whether caution should be retained or abolished for executors-dative generally.[2] The arguments for abolition of the requirement are as follows:

(a) The estate is put to extra expense in obtaining a bond of caution. The normal premium ranges from £1.20 to £2.00 per £1,000 so that for an estate having a gross value of £20,000 the cost would be between £24 and £40. We understand that insurance companies decline to act as cautioners for executors acting on their own unless the estate is small and its administration is straightforward, so that a solicitor may have to be employed simply to obtain caution.

(b) Claims under bonds of caution are relatively rare so that all intestate estates (nearly 5,000 in

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1 Personal cautioners are commoner in small estates (estates whose gross value does not exceed £13,500 - Confirmation to Small Estates (Scotland) Act 1979 as amended). Evidence of a personal cautioner's financial status is required before his or her bond is accepted.

2 A surviving spouse who inherits the whole estate by virtue of prior rights does not require to find caution before confirmation as executor-dative, Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s.5, amending Confirmation of Executors (Scotland) Act 1823, s.2.

1983[1]) are put to expense in order to protect a small number of people. Furthermore, the protection provided by a bond of caution is not complete since it may be avoided by the cautioner[2] and may not cover the whole estate administered by the executor.[3]

5.29 In England and Wales the equivalent of a bond of caution - a guarantee - is no longer generally required in connection with intestate estates. This change was made in 1971[4] implementing a recommendation to that effect contained in the Law Commission's Report on Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters[5] in which arguments similar to those in the preceding paragraph were advanced. Certain classes of administrators (those without a beneficial interest in the estate, for example) have to obtain a guarantee before letters of administration will be granted, and the court may require a guarantee in any case where it considers it desirable.[6] In Queensland an administrator appointed on an intestate estate is no longer required to furnish a bond[7]. The Uniform Probate Code provides that

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1 There were 4,709 petitions for the appointment of executors-dative presented in 1983, Civil Judicial Statistics Scotland, 1983 Table 13.

2 Harrison v. Butters 1969 S.L.T. 183.

3 See para. 5.33 below.

4 Administration of Estates Act 1971, s.8 (now Supreme Court Act 1981, s.120).

5 Law Com. No. 31 (1970).

6 Non-Contentious Probate (Amendment) Rules 1971, rule 8.

7 Succession Act 1981, s.51.

in formal proceedings a bond is not required from a personal representative unless (a) a special administrator has been appointed by the court on application by a person interested in the estate, or (b) the will contains an express requirement for a bond, or (c) a person or creditor with an interest in the estate over a prescribed value has lodged with the court a written demand that a bond should be required.[1]

5.30 But there are considerations which favour retaining a general requirement for executors-dative to find caution.

(a) Claims under bonds of caution do arise from time to time. In the absence of a bond those suffering loss might well be left without any effective remedy.

(b) Caution provides valuable protection for minor beneficiaries in that insurance company cautioners take steps where possible to ensure that the funds are securely invested on behalf of the minor until he or she comes of age.

(c) The court has power to restrict the amount of caution required where the caution for the full gross value of the estate would be excessive. The expense of an application is, however, usually more than the reduction in premium.

5.31 Caution is not required where the surviving spouse is executor-dative and inherits the whole estate by virtue of prior rights. In other cases we think that the requirement of caution serves a useful purpose. Two administrators or a

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1 Ss. 3-601 to 3-605.

trust corporation normally have to be appointed in England and Wales where one of the beneficiaries is a minor or a life interest is involved in order to provide protection.[1] In Scotland, however, one executor-dative is sufficient, the protection being provided by caution. It has been suggested to us that cautioners of Scottish executors-dative can be at risk during the minority of a child beneficiary, and that in order to avoid this, the child's property should be held by two executors-dative or a trust corporation so reducing the risk of misappropriation. But an executor-dative in Scotland does not need to retain property due to a child until majority. The father or mother of a pupil child has power to grant a discharge to the executor[2] so that, in all but exceptional circumstances,[3] the executor can in safety hand over the child's inheritance to the parents. Where the child is a minor without curators, or has a curator and acts with the curator's consent, the child can grant a discharge but cannot compel the executor to hand over the property unless security is given that it will be properly invested or applied for the child's benefit.[4] A minor with curators cannot grant a discharge without their consent. Once the executor-dative has obtained an effective discharge his or her liability and that of his or her cautioner is at an end in respect of the child's property. Moreover, we would not favour the appointment of a trust corporation on grounds

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1 The court may waive this requirement and allow a sole individual administrator, Supreme Court Act 1981, s.114(2).

2 Stevenson's Trs. v. Dumbreck (1857) 19 D. 462. Mother now has full parental rights, Law Reform (Parent and Child) (Scotland) Act 1986, s.2, replacing earlier legislation.

3 Fraser, Parent and Child, (3rd ed.) pp. 226-228.

4 Kirkman v. Pym (1782) Mor. 8977.

of expense. We invite views on the proposition that -

29. Executors-dative should, as under the present law be required to find caution before being confirmed, subject to the exceptions in Proposition 32.

5.32. Prior to 1823 executors-nominate as well as executors-dative were required to find caution for the full value of the estate confirmed. Section 2 of the Confirmation of Executors (Scotland) Act 1823 removed the requirement to find caution from executors-nominate.[1] If caution is to be retained it might be thought that it should be required from all executors, whether nominate or dative. It may be said that the need to protect creditors and beneficiaries does not and should not depend on whether the deceased appointed executors. Furthermore, executors-nominate, unlike executors-dative, frequently have no beneficial interest in the estate and so have no personal financial interest in its proper administration. On the other hand, we think that people making wills take care to select executors in whom they have confidence and usually appoint a person (or at least one person) familiar with business or financial matters in order to ensure proper administration of the estate. The Council of the Law Society of Scotland found no evidence in 1967 of any strong or widespread demand for extension of caution to executors-nominate,[2] and we are not aware of any subsequent change in the position. We therefore propose that:

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1 In exceptional cases executors-nominate may still be required to find caution, Currie, p.94.

2 J.L.S.S. 1967 pp. 258-9.

30. The present rule whereby executors-nominate are not required to find caution save in exceptional circumstances should be retained.

5.33 Section 2 of the Confirmation of Executors (Scotland) Act 1823 provides that the sum for which a bond of caution is required is not to exceed the value of the estate confirmed to. This may reduce the protection offered by the bond since there may be other items of estate which are administered by the executor, though not confirmed to. Examples of such other items include:

(a) estate situated outwith the United Kingdom;

(b) estate which the deceased was administering as a trustee or executor and to which the executor acquires title by appending a note of the trust estate to the inventory;[1] and

(c) a death gratuity payable to civil servants. The practice is to include this item, but not its value, in the inventory of estate confirmed to.

An executor is just as likely to commit embezzlement or an error of administration in respect of these items as he or she is in respect of estate confirmed to.[2] In order to fully protect creditors and beneficiaries we therefore propose that:-

31. Unless the court allows a restriction of caution the sum for which a bond of caution should be granted should be the full gross value of the estate to be administered by the executor.

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1 Executors (Scotland) Act 1900, s.6.

2 See J.L.S.S. 1967 p. 258 for an instance of an misappropriation of a civil service gratuity.

5.34 Section 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 provides that where the surviving spouse inherits the whole estate by virtue of prior rights he or she does not require to obtain a bond of caution before being confirmed as executor-dative. Where the executor is the sole beneficiary caution is not required as a protection for beneficiaries, while creditors can as easily sue the beneficiary as they can the executor. Many other situations can arise where the executors and sole beneficiaries are identical, for example, children inheriting a widow(er)'s estate. In these cases the requirement to find caution might be dispensed with, although there is always the danger of another claimant or a nearer relative emerging. This danger is absent in a case of a surviving spouse claiming prior rights. To elicit views we propose that:-

32. Caution should cease to be required if the person entitled to the whole estate seeks, or all those entitled to the whole estate seek, confirmation as executor-dative.

5.35 Another way of relieving the burden of finding caution might be to provide a less complex procedure for restricting caution in non-contentious cases. The present procedure is set out in Currie.[1] It involves a special application to the sheriff setting out the restriction sought, the value of the estate and the debts, and the names of the beneficiaries. The application has to be accompanied by written consents from the beneficiaries or their parents or guardians. On receipt of the petition an interlocutor is pronounced ordering advertisement of the petition in local newspapers. When the period for objection has passed and no objections have been made the sheriff may grant the

1 Pp. 230 to 232.

petition. If objections have been lodged the sheriff either at once, or after hearing the parties, fixes the amount of caution.

5.36. In the case of an intestate estate a petition has to be made to the sheriff for appointment of an executor-dative. This suggests the possibility (without prejudice to the special procedure for restriction of caution described above) of grafting on to the petition a simple application for restricting or dispensing with caution along the following lines with a resultant saving in court dues. It should be competent to include in the petition a crave for restricting or dispensing with caution. The crave would be supported by statements as to the value of the estate and the debts and the indentity of the beneficiaries. The beneficiaries would be able to signify their consent to the crave by signing the petition before it was lodged. Where all the beneficiaries consent the court would have power, in the absence of objections, to dispense with caution, or where only some of the beneficiaries consented, to restrict caution to the extent required to protect the interests of non-consenting beneficiaries. The drawback is that dispensing with caution altogether removes any protection for creditors. This could be met by restricting caution to the amount of unpaid debts plus a certain amount for undiscovered debts. However, restriction of caution also has drawbacks. Unless the estate is large, a restriction is not usually worth applying for. Insurance companies tend to set a minimum premium for bonds of caution while the trouble and

expense of arranging personal cautioners and lodging proof of their financial status would often be more than the cost of a bond of caution for the full amount of the estate.

33. Comments are invited as to whether there would be any advantage in a simpler procedure for restricting or dispensing with caution.

PART 6 PRIVATE INTERNATIONAL LAW ASPECTS

6.1 We turn now to examine the private international law of Scotland in relation to succession, dealing first with intestate succession and thereafter with testate succession. Although the Succession (Scotland) Act 1964 assimilated heritage and moveables for some purposes (such as succession to the free estate situated in Scotland) it did not change the private international law rules. Section 37(2) provides that nothing in the Act affects any previous rule of law relating to "the choice of the system of law governing the administration, winding up or distribution of the estate..." of any deceased person.

Intestate succession and legal rights

6.2 Intestate succession to moveables is governed by the law of the deceased's last domicile, while succession to immoveables is governed by the law of the place where they are situated[1]. These rules have the following consequences:-

(a) The prior right of a surviving spouse to the deceased's interest in a dwellinghouse, being a right to immoveables, may be claimed out of residential property situated in Scotland irrespective of the deceased's domicile, provided the other conditions are satisfied[2]. Where the dwellinghouse is part of a larger unit, or is used in connection with a business, the surviving spouse's right is a right to a cash sum equal to

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1 Anton, Private International Law, p. 504.
2 Succession (Scotland) Act 1964, s.8 (spouse must have been ordinarily resident in the dwellinghouse at the date of the deceased's death, for example).

the value of the deceased's interest in the dwellinghouse instead of the property[1]. However, it is accepted that this right remains a right to immoveables.[2] The same result probably obtains where the value of the deceased's interest in the dwellinghouse exceeds £50,000[3] so that the spouse is entitled to a cash sum of £50,000 instead.[4]

(b) The prior right of a surviving spouse to furniture and plenishings of a dwellinghouse[5] arises only where the deceased died domiciled in Scotland. The furniture and plenishings may however be situated furth of Scotland.

(c) The prior right of a surviving spouse to a cash sum[6] under section 9 of the 1964 Act is required to be "borne by, and paid out of, the parts of the intestate estate consisting of heritable and moveable property respectively in proportion to the respective amounts of those parts"[7] Where the deceased was domiciled in Scotland this right can be claimed out of moveables wherever situated and from immoveable property in Scotland only. On the other hand, where the deceased died domiciled furth of Scotland the whole right is claimable out of immoveables situated in Scotland,

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1 1964 Act, s.8(1)(a)(ii) and (2).
2 Meston, The Succession (Scotland) Act 1964, (3rd. ed.) p. 92; Anton, p.513.
3 1964 Act, s.8(1)(b).
4 Meston, p.93; Anton, p. 513.
5 S.8(3).
6 £15,000 if the deceased was survived by a child or issue of a child, £25,000 if not so survived.
7 S.9(3).

without reference to the value of any foreign estate.[1]

(d) Jus relictae, jus relicti and legitim apply only where the deceased died domiciled in Scotland, but are exigible out of moveables wherever situated.[2]

(e) The rules of succession to the free estate contained in sections 2-6 of the Succession (Scotland) Act 1964 apply to moveables wherever situated where the deceased died domiciled in Scotland and to immoveables situated in Scotland irrespective of the domicile of the deceased.

6.3 To have different rules for succession to moveables and immoveables leads to different dispositions of the estate according to the location of the immoveable assets. Consider the case of a man dying intestate and survived by his wife and mother. He leaves a house worth £75,000 containing furniture and plenishings worth £10,000 and other moveable estate worth £25,000

A. If he dies domiciled in Scotland and all the estate is situated in Scotland, his wife gets a total of £91,250 while his mother gets £18,750.

B. If he dies domiciled in Scotland but the house is situated in England, his wife takes the whole estate

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1 Meston, "Prior Rights in Scottish Heritage", J.L.S.S. 1967 401.

2 Brooks v. Brooks' Trs. (1902) 4 F. 1014 (jus relictae); Hog v. Lashley (1792) 3 Paton 247 (legitim). Where a foreign system of law treats land as moveables this does not give the surviving spouse and children of a person dying domiciled in Scotland the right to claim legal rights out of that land, Macdonald v. Macdonald 1932 S.C. (H.L.) 79.

and his mother gets nothing.[1]

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1 A.

		Wife	Balance
Section 8 rights	House £75,000	£50,000	£25,000
	Furniture and plenishings £10,000	£10,000	-
	Other moveables £25,000	-	£25,000
	Total remaining estate		£50,000

Section 9 rights — Wife entitled to £25,000 taken rateably from the net heritage and moveables after s.8 rights have been taken.

Amount from heritage £25,000 x $\frac{25,000}{50,000}$ i.e. £12,500

Balance of heritage £12,500

Amount from moveables £25,000 x $\frac{25,000}{50,000}$ i.e. £12,500

Balance of moveables £12,500

Legal rights — Wife entitled to one half of the balance of the moveables

1/2 of £12,500 comes to £6,250

Free estate — Mother takes remainder of moveables and heritage under s.2.

Wife	House	£50,000	Mother takes
	Furniture	£10,000	balance £18,750
	s.9 right	£25,000	
	Legal rights	£ 6,250	
		£91,250	

B. House situated in England inherited by wife under English law. Furniture and plenishings taken by wife under s.8. Other moveables taken by wife under s.9.

This anomaly arises between two jurisdictions which attempt to achieve much the same result in the case of intestacy but by different methods. It would persist even if Scots law adopted the methods used in England and Wales for computing the wife's share, since each jurisdiction would apply its methods to immoveables situated there and not treat the estate as a single unit. Even more divergent results might be obtained where the immoveables are situated in jurisdictions with radically different approaches to intestate succession. The existence of different rules for moveables and immoveables has been criticised both in Scotland[1] and in England and Wales.[2] Many legal systems have unity of succession whereby succession to the whole intestate estate is determined in accordance with the law of the deceased's domicile or nationality at the date of death.[3]

6.4 Secondly, if, as we suggest in our first Consultative Memorandum, Scots law ceases to make a distinction between heritage and moveables as such for the purposes of its internal law of intestate succession and legal rights, it would be anomalous to preserve a distinction for choice of law purposes.

6.5 Thirdly, the argument that the application of foreign law to land in Scotland somehow threatens the dignity or independence of the country seems lacking in force today, even if it was a relevant consideration in the days when

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1 Meston, p.92.

2 J.H.C. Morris, "Intestate Succession to Land in Conflict of Laws" (1969) 85 L.Q.R. 339.

3 E. Rabel, The Conflict of Laws, Vol. IV (Michigan 1958), pp. 257-8.

land was held by a comparatively small number of persons, when possession of land conferred status and when feudal obligations running with the land required the presence of a person in Scotland to fulfil them. In fields other than succession, land in Scotland may be affected by the laws of other countries. For example, a contract to sell a factory in Scotland may be made in Germany and subject to German law. Foreign law would however regulate only the beneficial interests; questions of title and conveyancing in relation to Scottish land would continue to be governed by Scots law.

6.6 Finally, use of the law of the deceased's last domicile to regulate the devolution of the whole intestate estate is more likely to reflect the wishes of the deceased than the present rule that succession to immoveables devolves in accordance with the law of the country in which they are situated.

6.7 For the reasons advanced above we propose that:

34. The law of a deceased person's last domicile should regulate the devolution of his or her whole intestate estates (immoveables and moveables) wherever situated.

The Crown's right as ultimus haeres

6.8 Section 7 of the Succession (Scotland) Act 1964 provides that Part I of the Act, which deals with succession to the free intestate estate, shall not "affect the right of the Crown as ultimus haeres to any estate to which no person is entitled by virtue of this Act to succeed". It therefore does not change the existing law. Despite the description of the Crown as an ultimate heir

the Crown does not succeed as an heir; rather it exercises a quasi-legal prerogative right - a jus regale - to claim ownerless property situated in Scotland[1]. The practice of the Queen's and Lord Treasurer's Remembrancer, the official who collects and administers ultimus haeres estates in Scotland on behalf of the Crown, is to claim intestate estate (whether moveable or immoveable) located in Scotland where the deceased died without heirs whether domiciled in Scotland or elsewhere. The position may be different where a foreign state succeeds in terms of its own law as an heir rather than as the claimant of ownerless property, but such a case has not yet arisen in Scotland. On the other hand estate (moveable[2] or immoveable) situated abroad is not claimed, even if the deceased died domiciled in Scotland without leaving heirs.

6.9 McLaren expresses the view[3] that the Scottish moveables of a person who dies intestate and without heirs belong to the fisc of the state in which the intestate died domiciled. This has been criticised by McMillan,[4] doubted by Anton[5], is out of line with the established practice of the Queen's and Lord Treasurer's Remembrancer and is inconsistent with case authority in England and Wales[6] where the Crown has similar rights. In the Scottish case

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1 McMillan, The Law of Bona Vacantia in Scotland, pp. 10-12.

2 In the case of shares in foreign companies where the certificates are in Scotland and the shares are dealt with on a Stock Exchange in the United Kingdom a claim is made.

3 Wills and Succession (3rd ed.) Vol. I, p.22.

4 P.14.

5 P.518.

6 Re Barnett's Trusts [1902] 1 Ch.847; Re Mursurus [1936] 2 All E.R. 1666.

of Goold Stuart's Trs. v. McPhail[1] a marriage contract fund held by a trustee in Scotland fell to be disposed of according to the Australian law of intestacy but no heirs were traced. Although the Crown in Scotland successfully claimed the fund, the case does not fully support the present practice as the Public Trustee of the State of Victoria in which the intestate died domiciled declined to claim. Lord Sorn indicated in his judgment that the position might have been different had a claim been made.[2]

6.10 The long standing practice of the Queen's and Lord Treasurer's Remembrancer claiming for the Crown moveables located in Scotland which belong to an intestate who died without known heirs domiciled in a foreign state which also claims ownerless property on the basis of a jus regale seems sensible. If there is a competition between two states each claiming on such a basis, the state within whose territory the property is located ought to be preferred.

6.11 Where a foreign estate claims property of an intestate who died domiciled there as a true successor in the absence of other heirs, rather than as a claimer of ownerless property, it has been held[3] in England that the claim of the foreign state to moveables located in England is preferable to the Crown's rights. The Crown in Scotland has however not yet been asked to concede such a claim. But the fact that the state or an institution is the heir rather than an individual or other legal person should be immaterial; the property has an owner and so should not be

1 1947 S.L.T. 221.
2 At p.223.
3 Re Maldonado's Estate [1954] P.223.

claimable by the Crown in Scotland on the basis that they are bona vacantia. If, as we proposed earlier,[1] the devolution of immoveables in Scotland should be regulated by the law of the last domicile of the deceased, the foreign state as successor to an intestate would be able to claim the whole Scottish estate.

6.12 The nature of a state's right to take the assets of an intestate leaving no known heirs has long been a matter for debate. At the beginning of the last century the prevailing view was that the right was a claim to ownerless property - jus regale - rather than a true right of succession. Since then the latter view has gained adherents. Apart from the United Kingdom and Austria all jurisdictions in Western Europe now regard the state as a genuine successor.[2] It is for consideration whether the rights of the Crown in Scotland should be expressed in a similar fashion, enabling a claim to be made to estate situated abroad which belonged to an intestate who died domiciled in Scotland without known heirs. A change in Scotland without a similar change in the rest of the United Kingdom would result in the Queen's and Lord Treasurer's Remembrancer becoming entitled to claim moveables in England and Wales. While this may pose theoretical problems, we do not think it poses practical problems as the constituent parts of the United Kingdom share a common treasury and appropriate administrative arrangements could be made.

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1 Proposition 34 (para. 6.7).

2 E.J. Cohn, "The Moral from Maldonado's Case", (1954) 17 M.L.R. p. 381.

6.13 In order to elicit views we propose that:-

35. (a) Section 7 of the Succession (Scotland) Act 1964 should be amended to the effect that the rights of the Crown in the estate of an intestate dying domiciled in Scotland leaving no other persons entitled to succeed should be that of a successor rather than as ultimus haeres.

(b) Where a person dies intestate leaving no relatives entitled to succeed domiciled in a country in which the state is a successor, the claim of such a state to the intestate's moveable and immoveable property situated in Scotland should be preferred to that of the Crown in Scotland.

Capacity to make and revoke a will

6.14 The rule in Scotland is that personal capacity to make a will of moveable property is referable to the law of the testator's domicile at that time, while capacity to make a will of immoveable property is referable to the law of the situation of the property[1]. The same rule applies to revocation of wills[2]. This ought to mean that a boy of 15 years of age domiciled in England and Wales can make a valid will in relation to his Scottish heritage but not in relation to his moveables or his real property situated in England and Wales.[3] Some doubt is thrown on this by section 28 of the Succession (Scotland) Act 1964. This

1 Anton, pp. 519-521.

2 Anton, p.537.

3 In England and Wales a minor cannot make a will unless he or she is a member of the Armed Forces; Wills (Soldiers and Sailors) Act 1918.

provides that "A minor shall have the like capacity to test on heritable property as he has on moveable property." It suggests that the law of the minor's domicile governs testamentary capacity in relation to Scottish heritage. It is not clear whether section 37(2), which saves the existing common law, saves the common law rule of testamentary capacity or whether section 28 prevails. In our view there is little merit in having separate rules for moveable and immoveable property in this field. Making a person's testamentary capacity in relation to all property depend on his or her domicile would be simpler and would remove the uncertainty mentioned above. We therefore propose:-

36. The Scottish choice of law rules relating to personal capacity to make or revoke a will should be changed to the effect that such capacity should be determined by the law of the domicile of the testator at the time of making or as the case may be of revoking the will.

Formal validity of a will

6.15 A will is formally valid if it is properly executed according to the law of the testator's domicile, habitual residence or nationality either at the date of execution or the testator's death or according to the law of the place of execution.[1] In addition a will may be formally valid if it is executed in accordance with the rules for international wills[2]. These rules apply to wills of moveable and immoveable estate, but a will of immoveable

1 Wills Act 1963, s.1.

2 Administration of Justice Act 1982, ss. 27 and 28 and Sch. 2.

property may also be valid if it is executed in accordance with the law of the situation of the immoveables.[1] These rules were the result of international conventions[2] and we propose no change in this area although the existence of a special additional rule for immoveables might be regarded as anomalous and unnecessary.

Essential validity of a will

6.16 Although a will may be properly executed and made by a person having capacity to make a will, whether the provisions are regarded as legally effective depends on the rules of essential validity. The choice of law rules applicable to determine a question of essential validity depend on the nature of the property in question. The essential validity of a disposition of heritage is governed by the law of the country where the property is situated, while that of a disposition of moveables is governed by the law of the testator's last domicile[3]. In our opinion the law would be simplified if there ceased to be a separate rule for immoveables with the result that in general[4] the question of the essential validity of any bequest (whether of immoveables or moveables) was determined by the law of the testator's last domicile. We therefore propose that:-

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1 Wills Act 1963, s.2(b).

2 Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions concluded at the Hague on 5 October 1961, Convention providing a Uniform Law on the Form of an International Will concluded at Washington on 26 Oct 1973.

3 Anton, p. 526.

4 A bequest which is invalid according to the law of the testator's last domicile may be valid by the law of another country in which it is to take effect and vice versa. See Anton, pp. 527-8.

37. The rules relating to the essential validity of bequests of moveables should apply to bequests of immoveables.

Construction of wills and titles to property

6.17 Where a will made by a person domiciled in Scotland deals with foreign (i.e. non-Scottish) property it is presumed that in the absence of any express choice of law in the will Scots law was intended to govern the construction of its terms (such as the meaning of "child" or whether the conditio si institutus applies). The presumption may be rebutted by the circumstances of the case, including the situation of the assets particularly where they are immoveable[1]. In the case of foreign property held jointly by the deceased and others the construction of the terms of the title is a matter for the foreign law. Thus in Connell's Trs. v. Connell's Trs.[2] it was held that, in the absence of any evidence as to the deceased's intentions, shares in English companies registered in names of the deceased and his wife passed to her on his death by virtue of the English rule of accretion to the survivor.[3] Lord Adam stated[4] "... when Mr Connell, in taking these shares, took them with this title, he must be taken to have known that the title would carry the shares to the survivor, and to have taken the title with that intention".

1 Smith v. Smith (1891) 18 R. 1036; McBride's Trs. 1952 S.L.T. (Notes) 59.
2 (1886) 13 R. 1175.
3 The Scots rule of construction would have passed the deceased's half share to his estate leaving his wife with the other half. In Cunningham's Trs. v. Cunningham 1924 S.C. 581 the Scots rule was held to apply to the title to British Government investments. See also Colenso's Ex. v. Davidson 1930 S.L.T. 359.
4 At p. 1185.

6.18. While the intention may be presumed for wealthy businessmen like Mr Connell, we doubt whether it is a reasonable assumption that normal people investing in foreign assets know the effect under foreign law of taking the title to them in a particular way. Investors do not normally take legal advice when purchasing bonds or shares nor can they be presumed to know foreign law. Some will of course have the requisite knowledge, but we do not think such knowledge should be imputed by law to all. A presumption that would we think be more in line with the intentions of Scots investors would be that the property devolves according to Scottish law.

6.19 A distinction might be drawn between foreign land and foreign bonds, shares and other moveable assets. Most people purchasing foreign land do so, we imagine, with the assistance of a lawyer and consequently would be advised as to the effect of taking the title to it in a particular way according to the law of the country in which the land is situated. It is perhaps more reasonable to presume that purchasers of immoveables are aware of the foreign law and by not making alternative provisions (in their wills or otherwise) intend it to govern the devolution of the property. On the other hand we have proposed the elimination of any distinction between immoveables and moveables in other areas relating to succession, so that it would be anomalous to create a distinction in this area.

6.20 The converse problem is the construction of wills and titles made by persons domiciled furth of Scotland relating to Scottish property. In the absence of any express choice of law in the will or other evidence as to intention it is presumed that the law of the testator's

domicile was intended.[1] However, the Scottish courts tend to apply Scots rules of construction where the property is Scottish heritage.[2] Our tentative preference would be to eliminate the distinction between immoveables and moveables so that the law of the testator's domicile should be presumed to apply to the construction of deeds relating to any kind of property. But the rules for foreign immoveables in deeds by Scots persons and for Scots immoveables in deeds by foreigners should be consistent; either the law of the situation or the law of the domicile should apply in both cases.

6.21 If foreign law applied to the devolution of Scottish assets held by a person domiciled furth of Scotland that law should only regulate the beneficial interests; the legal title should continue to be regulated by the law of Scotland in order to avoid complicating Scottish conveyancing and company law by the introduction of unfamiliar titles. Similarly Scots law should apply only to the devolution of the beneficial interests in foreign assets.

6.22 We invite views on the following questions.

38. (a) Where non-Scottish moveable property forms part of the estate of a person dying domiciled in Scotland, should Scottish rules of construction apply to any bequest or title to such property in the absence of

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1 Smith v. Smith (1891) 18 R. 1036; McBride's Trs. 1952 S.L.T. (Notes) 59.

2 Anton, Private International Law, p. 533.

any contrary intention in the will or otherwise? Should there be a different rule for non-Scottish immoveable property?

(b) Where Scottish moveable property forms part of the estate of a person dying domiciled in a country other than Scotland, should that country's rules of construction apply to any bequest or title to such property in the absence of any contrary indication in the will or otherwise? Should there be a different rule for Scottish heritage?

PART 7 TRANSFER OF LEASES BY EXECUTOR

7.1 In this section we look at some problems connected with transfers by executors of the deceased's interest in a lease. The difficulties that arise through lack of an identifiable person on whom the landlord can serve a notice to remove before the deceased's interest in the lease is confirmed to are being dealt with in our forthcoming Report on Recovery of Possession of Heritable Property.

Should the rule auctor in rem suam apply?

7.2 Section 16(2) of the Succession (Scotland) Act 1964 entitles the executor to transfer the deceased's interest in a lease where the interest has not been validly bequeathed or having been bequeathed, the bequest is either not accepted or is null and void under statutory provisions relating to agricultural leases. It provides:-

> "Where an interest -
>
> (a) is not the subject of a valid bequest by the deceased, or
>
> (b) is the subject of such a bequest, but the bequest is not accepted by the legatee, or
>
> (c) being an interest under an agricultural lease, is the subject of such a bequest, but the bequest is declared null and void in pursuance of section 16 of the [Crofters Holdings (Scotland) Act 1886] or section 20 of the [Agricultural Holdings (Scotland) Act 1949] or becomes null and void under section 10 of the [Crofters (Scotland) Act 1955]
>
> and there is among the conditions of the lease (whether expressly or by implication) a condition prohibiting assignation of the interest, the executor shall be entitled, notwithstanding that condition, to transfer the interest to any one of the persons entitled to succeed to the deceased's intestate estate, or to claim legal rights or the prior rights of a surviving

spouse out of the estate, in or towards satisfaction of that person's entitlement or claim; but shall not be entitled to transfer the interest to any other person without the consent -

(i) in the case of an interest under an agricultural lease, being a lease of a croft within the meaning of section 3(1) of the [Crofters (Scotland) Act 1955], of the Crofters Commission;

(ii) in any other case, of the landlord."

7.3 Prior to 1964 the interest of a tenant who died without making a valid bequest of that interest passed to the heir-at-law of the tenant, who was almost invariably[1] a single individual selected according to the rules of primogeniture and preference for males. The 1964 Act abolished the heir-at-law and the special rules of heritable succession so that the deceased's interest in a lease might, like the rest of the estate, be subject to claims by more than one person. To avoid fragmentation of the lease section 16 gives the executor power to transfer the interest to a single member of the deceased's family entitled to share in the estate by virtue of prior or legal rights or succession to the free estate. As has been pointed out[2] the enlargement of the class of possible successors may enable the executor to find a person who is genuinely interested in taking over the tenancy. This did not always happen when the interest passed to the heir-at-law.

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1 Females in the same degree of relationship to the deceased could succeed as heirs-portioners in the absence of male heirs.

2 Meston, p.88.

7.4 Section 16(2) empowers the executor to transfer the deceased's interest in a lease to a person with an interest in the estate. There is no express statutory provision preventing an executor from transferring the interest to himself or herself as an individual. In Inglis v. Inglis[1], however, it was held that where one son, with the widow as co-executor-dative, transferred the deceased's interest in a farm tenancy to himself, he acted as auctor in rem suam. Accordingly the son held the interest on a constructive trust on behalf of himself and the other son as residuary beneficiaries of the intestate estate. The argument that section 16 provided new statutory machinery which did not incorporate the notions of auctor in rem suam and constructive trust was rejected, as section 20 of the Act made executors-dative "subject to the same obligations, limitations and restrictions, which gratuitous trustees have, or are subject to, under any enactment or under common law, ..."

7.5 A transaction by a trustee acting as auctor in rem suam is voidable at the instance of a co-trustee or a beneficiary, provided action is taken within a reasonable time[2]. Furthermore a trustee who obtains a renewal of a lease which formed part of the trust estate in his or her own name holds it on a constructive trust for the beneficiaries. This rule applies even though the lease would not have been renewed to the beneficiaries.[3] The above rules apply to any person acting in a fiduciary capacity and are grounded on the need to avoid a conflict

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1 1983 S.L.T. 437.

2 Wilson and Duncan, Trusts, Trustees and Executors, p. 36

3 Wilson and Duncan, p. 365.

of interest between the person's duty to the beneficiaries and his or her own interest as an individual. When the person transacts in rem suam there is an inevitable conflict of interest and even though the transaction may have been conducted with scrupulous fairness there is always the suspicion of underhand dealing. By virtue of his or her fiduciary position the person may be in possession of facts which confer an advantage over others who might have been interested in the transaction in question.

7.6 It is for consideration whether the doctrine of auctor in rem suam should apply to the statutory provisions for transfer of an interest in a lease by the executor. As has been mentioned the purpose of the provisions is to enable the tenancy to be taken over by an individual who is both interested and willing to do so. That individual will wish to take over the tenancy as part of his or her share of the estate and not as a constructive trustee for the other beneficiaries. The rule prohibiting transactions in rem suam places an executor in an invidious position. Executors, particularly executors-dative, are often close members of the deceased's family and may well have been associated with the deceased in running the farm or business tenanted by the deceased. The executor may therefore be the only person who is interested in taking over the tenancy and who is acceptable to the landlord.[1] In these circumstances it would not be sensible for the executor to transfer to another beneficiary. A possible course of action which avoids transacting as auctor in rem suam is for the executor not to transfer the lease to

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1 In the case of agricultural leases the landlord may serve a counter-notice objecting to the transferee acquiring the deceased tenant's interest. The objection is then determined by the Land Court, Agricultural Holdings (Scotland) Act 1949, s.21.

anybody. But this results in the interest, which may be a substantial part of the value of the deceased's estate, being unavailable to any of the beneficiaries. Another possibility is for the executor to resign and for other executors to transfer the interest to him or her. However this will not avoid the transfer being avoidable on the basis of auctor in rem suam if the executor has been in negotiation with the landlord prior to resignation[1]. Moreover, such a transaction would be open to suspicion as being a mere device to circumvent the law.

7.7 We tend to think that the doctrine of auctor in rem suam is inconsistent with the statutory machinery of section 16 of the Succession (Scotland) Act 1964 providing for the transfer of the deceased's interest in a lease to a person in satisfaction of or towards his or her share of the estate. The transferee should be entitled to have the interest transferred without risk of the transfer being annulled and should not be obliged to hold the lease on a constructive trust for other beneficiaries who receive their share of the estate in assets which they are not compelled to share with the transferee. The fundamental objection to a transfer in rem suam would appear to arise out of the valuation of the transferred interest. As Lord Justice Clerk Wheatley said in Inglis[2]:

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1 Halley's Trs. v. Halley 1920 2 S.L.T. 343.

2 At p. 439.

> "As an executor it was the defender's duty to obtain the best possible price for an asset which was taken out of the executry. The value assigned to the interest under the lease had to be set against the financial interest in the executry of the person to whom the transfer was made. In his capacity as a beneficiary the defender had an interest to get the lowest possible price for the executry asset which he was receiving. The conflict of interest was manifest, ..."

We think this objection would be removed by providing for an independent valuation of the interest to be transferred. Such a valuation would remove the suspicion that the executor through private knowledge gained in that capacity acquired the interest at a less than fair price. The 1964 Act already contains provisions for valuation of the deceased's interest in a dwellinghouse and furniture and plenishings for the purposes of prior rights. Section 8(5) provides that the question of value shall be determined by arbitration by a single arbiter appointed, in default of agreement, by the sheriff of the deceased's domicile or the sheriff of Lothian and Borders at Edinburgh. These provisions could be extended to the valuation of an interest in a lease.

7.8 We therefore propose that:

39. The doctrine of auctor in rem suam should not apply to a transfer by an executor of the deceased's interest in a lease to himself or herself as an individual under section 16 of the Succession (Scotland) Act 1964. Where such a transfer occurs the value of the interest should, unless agreed by the executors and the beneficiaries of the estate, be determined by arbitration.

Transfer in satisfaction of claim

7.9 Section 16 of the Succession (Scotland) Act 1964 provides for a transfer of the deceased's interest in a lease to a person "in or towards satisfaction of that person's entitlement or claim." If the person's entitlement is say £20,000 and the value of the interest in the lease is £10,000, it is clear that the transferee's entitlement is satisfied to this extent. What is less clear is the case where the value of the interest is more, say £25,000. Is the transferee bound to pay £5,000 to the estate or is the transfer in satisfaction of the entitlement or claim without any obligation to pay the excess? We think this doubt should be removed by an express provision obliging the transferee to pay the excess value. In the preceding paragraph we have proposed machinery for an independent valuation of the interest in default of agreement between the executors and the beneficiaries where an executor is the transferee. We would extend these proposals to the present situation. We accordingly propose that:-

40. Where an executor transfers the deceased's interest in a lease under section 16 of the Succession (Scotland) Act 1964 to a person and the value of the interest (as determined by arbitration in default of agreement) exceeds the value of that person's entitlement or claim to a share of the estate, that person should be under an express statutory obligation to pay to the estate a sum being the value of the interest less the value of the entitlement or claim.

Executor's power or duty?

7.10 Section 16 entitles an executor to transfer to a beneficiary the deceased tenant's interest in a lease to which the executor has confirmed. Failure to transfer within the time limit specified in subsection (3) will result in the landlord being entitled to give notice and the interest in the lease being terminated. Failure to confirm to the deceased's interest will have the same effect if the executor has to rely on the statutory powers contained in section 16 to transfer the interest.[1] It has been represented to us that the executor should be under a statutory duty to transfer the interest under section 16, where that is the appropriate way of dealing with the interest, since failure may cause hardship to the potential transferees and to the beneficiaries of the estate. We doubt whether such a change would assist those prejudiced by the executor's inaction since an executor is under a common law duty to ingather the estate and distribute what remains after payment of debts to those entitled to it.[2] An executor who negligently failed to confirm to or ingather estate would be liable in damages[3] as would an executor who failed to distribute it. Moreover, the problem of the dilatory or negligent executor may arise in connection with matters other than leases, so that it would be anomalous to enact special provisions for leases. Accordingly we make no proposals for reform in this area.

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1 Lord Rotherwick's Trs. v. Hope and Others 1975 S.L.T. 187.
2 Wilson and Duncan, Trusts, Trustees and Executors, p. 452.
3 Donald v. Hodgart's Trs. (1893) 21 R. 246 (failure to realise goodwill of deceased's business).

PART 8 OTHER TOPICS

Mournings and temporary aliment out of estate

8.1 Mournings. The rule that the widow and family of a deceased person are entitled to an allowance out of his estate for mournings suitable to his social position[1] is, we suspect, largely in disuse. The decline in the use of special mourning clothes has made the rule anachronistic. It appears not to apply for the benefit of widowers.[2] One possibility would be to reform the rule so as to make it apply to widows and widowers alike. It would seem preferable, however, to abolish the rule altogether. We therefore invite views on the proposition that:-

41. Any rule of law entitling the widow and family of a deceased to an allowance out of his estate for mournings suitable to his social position should cease to have effect.

8.2 Temporary aliment out of estate. A widow has a right to temporary aliment out of her husband's estate after his death.[3] The deceased's children have a similar right.[4] The right is not to a mere payment to account of sums due from the estate but to a payment which is deducted before the estate is divided.[5] The prevailing view

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1 Meston, p.24; Clive, Husband and Wife (2nd. ed.) pp. 674 to 675.

2 The rule is always expressed in terms of a widow's right. There is no reported case where a widower has been held entitled to mournings out of his wife's estate.

3 Meston, p.24; Clive, pp. 675 to 677.

4 Barlass v. Barlass's Trs. 1916 S.C. 741.

5 Breadalbane's Trs. v. Breadalbane (1843) 15 Sc. Jur. 389; Baroness de Blonay v. Oswald's Reps. (1863) 1 M. 1147 at p. 1153; McIntyre v. McIntyre's Trs. (1865) 3 M. 1074.

is that temporary aliment is not a true debt of the estate and that it cannot be paid if the estate is clearly insolvent.[1] If, however, the estate is not clearly insolvent the executors are within their rights in paying temporary aliment to the widow or children before confirmation or even within the six months after the death and will not be liable to reimburse the estate should it ultimately prove to be insolvent.[2] Surprisingly, it has been held that a widow is entitled to temporary aliment out of her husband's estate even where she was in desertion and hence not entitled to aliment from him during his life.[3]

8.3 When the main provision for the widow of a wealthy man took the form of a liferent of a third of his heritable property (the widow's terce) it was natural to say that her right to temporary aliment out of the estate continued until the first term of Whitsunday or Martinmas after her husband's death. At that term she would normally begin to draw her third share of the rents from the land. Nowadays this is no longer an appropriate way of determining the duration of the right to temporary aliment and the modern approach seems to be to allow aliment for the six months following the death.[4]

8.4 We have been interested to note that the Uniform Probate Code contains a provision on this question in the following terms:

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1 Lindsay's Creditors v. His Relict (1714) Mor. 11,847; Buchanan v. Ferrier (1822) 1 S. 323. Contrary views were, however expressed in Barlass v. Barlass's Trs. 1916 S.C. 741 at pp. 748 and 749.

2 Barlass v. Barlass's Trs.

3 MacCallum v. MacLean 1923 S.L.T. (Sh. Ct.) 117.

4 Barlass v. Barlass's Trs.; MacCallum v. MacLean.

> "... if the decedent was domiciled in this state the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic instalments." .... The ... allowance is exempt from and has priority over all claims .... The ... allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share."[1]

This provision is similar in principle to the Scottish common law rules but goes further in several respects. The period of payment is longer (a year or more): payment may be in a lump sum: surviving spouse and children have preference over creditors.

8.5 We would welcome views on whether the right to temporary aliment out of the deceased's estate should be preserved in Scots law. If it were to be preserved we suggest that it should be restated in modern statutory form so as to remove doubts and anomalies. In favour of the right it can be argued

(a) that it is reasonable and humane to provide for the aliment of the deceased's spouse and children in the period between the death and the time when anything due to them from the estate can safely be paid, and

(b) that the right is particularly valuable where it is uncertain whether the estate will be insolvent and where it turns out eventually to be insolvent.

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1 S.2-403.

Against the right it can be argued

(a) that it is unnecessary in the average case either because the spouse and children will have other funds at their disposal or because the estate is clearly solvent and payments to account can safely be made out of the estate,

(b) that if a discretionary family provision system were introduced in Scotland in the case of children it would be confusing and unnecessary to provide both for interim orders under that system and for temporary aliment out of the estate,

(c) that it is contrary to principle to prefer alimentary creditors to general creditors because those entitled to aliment must follow the fortunes of the person liable to pay it, and

(d) that the right has fallen largely into disuse and could be swept away, with resulting simplification of the law, without producing ill effects in practice.

8.6 We have come to no conclusion but invite views on the following questions.

42. (a) Should the right to temporary aliment out of the deceased's estate be abolished or retained?

(b) If the right is retained should it

(i) be available to, and only to, a person entitled to aliment from the deceased at the date of his or her death

(ii) be available for the period of six months after the date of death

(iii) have preference over the claims of creditors on the estate, at least if the estate is not manifestly insolvent at the time of the payment in question?

Lack of title pending confirmation

8.7 In Scotland while the rights of legatees and beneficiaries in the deceased's estate generally vest on death[1] by virtue of their survivance, title to the various assets comprising the estate vests in the deceased's executors by virtue of confirmation[2]. Section 14(1) of the Succession (Scotland) Act 1964 provides that:

> "... on the death of any person (whether testate or intestate) every part of his estate (whether consisting of moveable property or heritable property) falling to be administered under the law of Scotland shall, by virtue of confirmation thereto, vest for the purposes of administration in the executor thereby confirmed..."

Since there is inevitably a gap between the death of the deceased and the confirmation of his or her executors, there is a hiatus in title for this period.

8.8 The gap between death and confirmation may only be a few weeks where the estate is simple; but where the estate is complex the executors may not be in a position to seek confirmation for many months or even years since a full inventory of the estate must be lodged before confirmation can be obtained. Section 38 of the Probate and Legacy Duties Act 1808 requires executors to lodge with the proper Commissary court in Scotland "a full and true inventory of all the estate and effects of the deceased already recovered or known to be existing, distinguishing what shall be situated in Scotland, and what elsewhere, ..." and section 42 prohibits the granting of any confirmation

1 The will may postpone vesting to a later date.

2 Title to certain items (such as National Savings Certificates) can be obtained without confirmation, Administration of Estates (Small Payments) Act 1965. The limit per item is now £1,500, S.I. 1975/1137.

unless an inventory has been lodged as above.[1] If further estate is subsequently discovered an additional inventory must be lodged and if appropriate an eik to the confirmation obtained.

8.9 Executors nominate have powers to deal with and realise the estate before confirmation under the common law, and the Trusts (Scotland) Acts 1921 to 1961 as amended in so far as not inconsistent with the common law. Section 4(1) of the 1921 Act empowers trustees (which term includes executors nominate) among other things to sell the trust estate or any part thereof (heritable as well as moveable)[2], to uplift, assign and discharge debts due to the trust estate[3], to concur in company reconstructions or amalgamations[4] and to take up rights issues in companies,[5] provided such acts are not at variance with the terms or purposes of the trust. Unconfirmed executors can be sued[6] and can sue[7] although in the latter case a decree in their

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1 Certain assets do not require to be confirmed to, such as foreign immoveables or property passing by virtue of a special destination or assignation (Confirmation Act 1690, Confirmation of Executors (Scotland) Act 1823, s.3) But such assets must be included in the inventory when seeking confirmation to the other assets.

2 S. 4(1)(a). Mackay v. Mackay 1914 S.C. 200 (assignation of copyright retroactively validated by confirmation).

3 S. 4(1)(h). But an unconfirmed executor cannot enforce payment or grant a discharge of a debt, Chalmer's Trs. v. Watson (1860) 22 D. 1060.

4 S.4(1)(o).

5 S.4(1)(p).

6 Emslie v. Tognarelli's Exrs. 1967 S.L.T. (Notes) 66.

7 Chalmer's Trs. v. Watson (1860) 22 D. 1060.

favour cannot be extracted nor can payment be enforced until confirmation has been obtained. Section 20 of the Succession (Scotland) Act 1964 places executors-dative in the same position as gratuitous trustees in relation to their powers and duties under any enactment or rule of law, with the exception of the power to resign or assume new trustees and the requirement to find caution.

8.10 Until confirmation, however, executors have no formal title so that problems can arise in connection with assets to which there is a documentary title. Although executors may conclude missives for the sale of the deceased's house or other heritage they are unable to grant title until confirmed. The alternative route of deducing title via the will (which in any event is only open to executors nominate) is of doubtful competence and under current practice such titles are not generally acceptable.[1] A considerable delay in granting title may cause difficulties to both the executors and the purchaser. The purchaser may decline to take entry without a title with the result that the property may be left unoccupied and subject to vandalism for a considerable period of time. If the purchaser does take entry he or she will be unable to grant a security to a heritable creditor and as a result may have to rely on bridging finance at a higher rate of interest until a title is obtained. Another area where we understand problems arise is in connection with shares. Shares comprised in the deceased's estate may be dropping in value rapidly because of the general market conditions or impending liquidation of the company concerned. In these circumstances considerable loss may be caused to the estate by

1 See para. 5.13 above.

the executor's inability to transfer title to the shares until confirmation has been obtained. Assignable options with a limited life present similar problems, as do offers made to acquire shares in connection with "take over bids".

8.11 From the executor's point of view there are risks in disposing of assets prior to confirmation. Any person who intromits with the estate of a deceased person before being confirmed may become liable to pay the whole debts of the deceased. In the case of a confirmed executor liability is limited to the value of the estate, but an intromitter's liability is unlimited. Where the intromitter is subsequently confirmed liability is restricted; in other cases the court may on application restrict liability according to the circumstances of the case and the intentions of the intromitter[1].

8.12 We do not think the scale of the problems encountered by unconfirmed executors is such as to warrant changing over to a system whereby the deceased's estate vests directly in the heirs or beneficiaries or vests in executors without confirmation. The problems arise where confirmation takes a long time to obtain due to the requirement to lodge a complete inventory of the whole estate. Where urgent action requires to be taken in respect of assets the temptation must exist to submit an inventory containing only those assets which can be readily itemised and valued leaving the other more difficult assets to be included in a subsequent supplementary inventory.

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1 Wilson and Duncan, Trusts, Trustees and Executors, p. 448.

8.13 The link between confirmation (and probate) and payment of capital transfer tax was considered by the Keith Committee on the Enforcement Powers of the Revenue Departments who recommended its retention.[1] The representations received were however confined to the need for executors to borrow at high rates of interest in order to pay the tax since assets cannot be realised until executors have title and executors cannot obtain title until they pay the tax. The Inland Revenue stated that the requirement that tax is paid before confirmation (or probate) is an effective way of collecting what is basically a self-assessed tax and an essential protection against wilful delay in payment, and this was accepted by the Committee. While we agree that the Revenue's tax gathering capacity should not be prejudiced, the problems flowing from lack of title noted in earlier paragraphs are not confined to taxable estates. Estates (however large) which pass to the surviving spouse and estates under £71,000[2] net value are not liable to tax, yet executors may have difficulty in preparing a full inventory within a reasonable time. We note that in England and Wales executors can obtain title by means of probate without submitting an account of the assets if the estate does not exceed £40,000 and certain other conditions are met. In Scotland, however, in order to obtain confirmation to an estate whatever its size a full inventory has to be submitted to the appropriate Commissary clerk, although submission to the Capital Taxes Office is dispensed with if

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1 Report, Vol. 3 (Cmnd. 9120) paras. 32.5.3 to 32.5.5.

2 1986/87 figure.

the estate is below £40,000 and certain other conditions are met.[1]

8.14 A possible solution would be to empower the court, on application by the executors, to issue confirmation in respect of either a specified item or items or the whole estate under exception of a specified item or items. An application would only be granted if the executors could show that the estate would suffer serious loss as a result of their lack of title. Application would have to be dealt with administratively because the time scale of normal court procedure would defeat the purpose of expediting acquisition of title. Commissary clerks might for example be authorised to grant partial confirmation provided certain conditions were met or undertakings given. The purpose of these conditions and undertakings would be, among other things, to guard against evasion of or delay in paying tax due on the estate. We do not think such applications would constitute a significant extra burden on Commissary departments since executors would only apply in urgent cases.

8.15 In order to elicit views on whether the problems arising from unconfirmed executors' lack of title are such as to justify special measures we propose:-

43. The court should have power on application by an executor to grant confirmation in respect of a particular item or particular items of estate or in respect of the whole estate less a particular

1 Capital Transfer Tax Delivery of Accounts Regulations 1981 (S.I. 1981/881 (Scotland), 1981/880 (England and Wales)). The limit was increased from £25,000 to £40,000 in 1983 by S.I. 1983/1040 and 1983/1039 respectively.

item or items without requiring a full inventory of the whole estate to be lodged. Such an application should only be granted on special cause shown and in order to prevent evasion of inheritance tax the court should have power to require executors to give undertakings or to attach such other conditions as it thinks fit to the granting of the application.

Legal rights and inheritance tax

8.16 The Finance Act 1975, which introduced capital transfer tax (to be transmuted into inheritance tax) contained no express provisions relating to legal rights and legitim. Subsequently amendments were made taking these rights into account.[1] Legal rights and legitim are when claimed treated as specific gifts bearing their own tax.[2] A renunciation of legal rights or legitim unless made within a specified period is treated as a transfer made by the renouncer in favour of those beneficiaries who benefit from the renunciation, and as such gives rise to liability for tax should the renouncer die within 7 years of the renunciation.[3]

8.17 Certain transfers by the deceased (such as those to his or her surviving spouse or to a charity) are exempt while others are not. Legal rights taken by either the widow(er) or children may therefore affect the amount of chargeable estate and hence the tax liability. Section 147

1 Finance Act 1976, ss. 96(7) and 123; Finance Act 1978, s.68(1). The various provisions have now been consolidated into the Capital Transfer Tax Act 1984 (to be renamed the Inheritance Tax Act 1984).
2 1984 Act, s.42(4).
3 1984 Act, s.17 as read with ss. 142 and 147.

deals with the common case where the deceased is survived by a spouse and a person under the age of 18 entitled to claim legitim, and the claim for legitim would result in a diminution of the amount inherited by the spouse. The executor can elect to have tax charged on the basis either that legitim has been taken or that it has been renounced. If, when the person entitled to legitim decides whether to take it or renounce it, the decision is not in line with the executor's election, the tax liability of the estate will be adjusted, with further tax being due or tax being repaid as the case may be.

8.18 Although section 147 departs from the theory that legal rights vest in the person entitled to them on the death of the deceased unless and until they are renounced or lost by prescription, it is convenient in practice, although it involves the Capital Taxes Office, where tax has been charged on the basis that legal rights have not been taken, enquiring of children when they attain majority what decision they have reached regarding legal rights. The main criticism is that the section deals with only one of the many situations where legal rights might affect the tax liability of the estate. For example, the deceased may leave so much of his or her estate to charity that there is insufficient to satisfy the children's legitim, or may leave insufficient to his or her surviving spouse to satisfy that spouse's legal rights. It will be in the interest of those entitled to legal rights to make the decision whether or not to claim them quickly. Problems could, however, occur when there was a lack of capacity, due to minority or otherwise, preventing a decision being reached. The executor should perhaps be able to settle the tax liability of the estate provisionally on the basis

that either legal rights have been taken or that they have been renounced. We doubt whether provisions are justified for persons who are capable of deciding whether or not to renounce legal rights but for whatever reason choose not to do so; as regards those incapable we invite views on the following questions:-

44. Should section 147 of the Capital Transfer Tax/ Inheritance Tax Act 1984 be generalised so that where legal rights would affect the tax payable from an estate, and a person entitled to legal rights is incapable of renouncing them, the executor should be entitled to elect to have the tax liability provisionally settled on the basis that legal rights either have been taken or have been renounced?

8.19 A renunciation of legal rights or legitim made within 7 years of the date of the renouncer's death is a chargeable gift. Section 17(a) as read with section 142 however provides that a renunciation made within 2 years of the death of the person from whose estate legal rights are exigible is not chargeable, while section 17(b) as read with section 147(6) provides that a renunciation by a child made within a certain period after attaining majority is not chargeable. This however leaves other situations where the renunciation is not made within 2 years due to incapacity unprovided for. For example suppose a wife leaves all her estate to a friend. A renunciation by her incapacitated husband of his legal

rights on recovery many years later[1] could give rise to a liability to tax. To elicit views we propose:

45. A renunciation of legal rights made more than 2 years after the date of death of the person from whose estate they are exigible should not count as a chargeable gift where the reason for late renunciation was incapacity to renounce earlier.

8.20 In our first Memorandum we put forward as a possible option that legal rights should, instead of vesting in those entitled to them, arise only if claimed[2]. If this option were to be adopted consequential changes would require to be made to the inheritance tax legislation. Changes would also require to be made if our proposals[3] empowering the courts to make discretionary awards out of the estate to qualified applicants were implemented.

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1 A curator bonis requires the authority of the court to renounce legal rights or to elect between them and provisions under the will; Allan's Exs. v. Allan's Trs. 1975 S.L.T. 227. Such authority is rarely given.

2 Proposition 27 (para. 4.62).

3 Proposition 34 (para. 4.94).

SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

Note. Attention is drawn to the notice at the front of the memorandum concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this memorandum may be referred to or attributed in our subsequent report.

1. (a) Should the Parricide Act 1594 and the common law rule (courts not recognising benefits accruing to criminals from their crimes) in so far as it relates to succession be replaced by a modern statutory provision disqualifying from inheritance (by way of testate succession, intestate succession, legal rights, family provision, nomination or special destination) any person who has committed the crime of murder or culpable homicide against the deceased?

(b) Should a person be disqualified only if convicted? If so should convictions be limited to those obtained in a court in the United Kingdom or include those obtained in a court in any country?

(c) Apart from murder or culpable homicide (and similar crimes under other systems of law) which should always result in forfeiture, should any other crime or crimes have the same effect and if so which? If a crime (other than murder, culpable homicide etc.) is to result in forfeiture, should the deceased be able, notwithstanding this rule, to confer a benefit on

the offender by a will made after the crime was committed?

(d) Should there be a provision that a person convicted of a serious crime (other than murder or culpable homicide) against the deceased should forfeit any claim for legal rights or the right to apply for family provision out of the deceased's estate?
(Para. 2.11)

2. A person who forfeits by virtue of Proposition 1 his or her rights of succession in the deceased's estate should be treated for the purposes of succession as having predeceased the deceased, except in relation to property the title to which was held in name of that person and the deceased and the survivor of them, in which case the destination to the survivor should be ignored. Any descendants of the person should be entitled to make the same claims on their ancestor's presumed predecease by virtue of forfeiture as they could have made had their ancestor actually predeceased without having incurred the penalty of forfeiture.
(Para. 2.14)

3. (a) Should the time limit in section 2(3) of the Forfeiture Act 1982 be extended from 3 months to 6 months or some other period?

(b) In the case of an interest not vested in the criminal heir at the date of the deceased's death should the time limit run from the date when the succession opens to the heir?
(Para. 2.18)

4. A person who fails to survive the deceased for a specified period should be treated as if he or she had predeceased the deceased for the purposes of succession to the deceased's estate. Views are invited on the duration of the specified period. (Para. 3.2)

5. Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others for the required period, the property of each person, or any property of which he or she is competent to dispose, should be disposed of as if he or she had so survived the other or others. (Para. 3.6)

6. Where a third party disposes of property to the survivor of two or more persons:
   (a) Should there be any requirement for a person to survive the others for a specified period before he or she is entitled to take? If so what should that period be?
   (b) If the persons die in circumstances rendering it uncertain which survived the other (either for a specified period or not as the case may be) should there be a rule that the younger survived the elder or should the property be divided equally among their heirs?

   (Para. 3.7)

7. The proposals in Propositions 4 to 6 above should only affect wills and other testamentary writings executed after the commencement of any implementing legislation.

In the case of post-commencement deeds any provision requiring survivorship for a specified period should prevail over any statutory requirement providing for a different period.
(Para. 3.8)

8. Should it continue to be competent to create special destinations in titles to heritable and moveable property?
(Para. 3.12)

9. (a) The law on disposal by owners of property subject to a special destination should remain as it is; or

(b) Each owner of property subject to a survivorship destination created after the date of the relevant legislation should be prohibited from disposing of his or her share either during life without the consent of the other owner or owners or on death, subject to provisions:-

(i) empowering the court, on application by an owner wishing to dispose of his or her share, to authorise a disposal; and

(ii) protecting third parties and creditors;

or

(c) Each owner of property subject to a survivorship destination created after the date of the relevant legislation should not thereby be prohibited from disposing of his or her share by will contrary to the destination.
(Para. 3.18)

10. Where property is acquired by one person (the donor) and the title is taken in the name of the donor and another (the donee) and the survivor, then:

(a) as under the existing law the donor should be entitled, and the donee should not be entitled, to dispose of his or her share by will so as to defeat the destination; or

(b) both donor and donee should be entitled to so dispose of their shares by will; or

(c) neither donor nor donee should be entitled to so dispose of his or her share by will.

Any change in the law should apply only to destinations created after the date of the relevant legislation. (Para. 3.21)

11. Express statutory provision should be made to the effect that property held by a person on a special destination, in terms of which it passes to some other person or persons on death, should remain liable for the deceased's secured and unsecured debts. (Para. 3.24)

12. A special destination in an assignation of a long lease should have the same effect as if it were contained in a disposition of feudal property. (Para. 3.25)

13. (a) A special destination should include a destination to a class of persons prescribed by the granter (other than "heirs" or "heirs and assignees"), even though the individual members of that class are not specifically named.

(b) A destination in a lease to a tenant's heirs excluding heirs-portioners (the eldest heir-female succeeding without division) should either:

(i) not be treated as a special destination; or

(ii) the exclusion should be ignored,

for the purposes of succession to the tenant's interest in the lease.
(Para. 3.30)

14. Where Scottish rules of construction apply to a title to property held in name of two or more persons there should not be a deemed destination to the survivor or survivors. Accordingly on the death of each co-owner his or her share of the property should continue to form part of his or her estate.
(Para. 3.40)

15. Views are invited as to whether it would be necessary or desirable to provide by statute that a reference in a private writing to a person's heirs should, in the absence of a contrary indication in the deed, be taken as a reference to those who would be entitled to succeed to the person on intestacy under the laws applicable at the time when the succession opens to the heirs.
(Para. 4.2)

16. To avoid any possibility of a doubt as to the extent to which an adopted child is regarded as included in his adoptive family for the purposes of section 23(2) of the Succession (Scotland) Act 1964,

(a) The words "or issue" should be inserted after the word "children" in paragraphs (a) and (b) of that subsection, and.....

(b) the words "or way" should be added after the word "degree" in both places where it appears in paragraph (c) of that subsection.

(Para. 4.4)

17. Subject to various modifications proposed below the rule conditio si institutus sine liberis decesserit (whereby issue of a beneficiary may be entitled to the bequest if the beneficiary predeceases the testator or fails to survive until the date of vesting of the bequest) should be retained.
(Para. 4.9)

18 (a) The scope of the conditio should, in relation to wills executed after the commencement of the relevant legislation, be extended. Views are invited as to whether the conditio should apply to bequests to:

(i) the testator's descendants, collaterals (whether of the full or half blood) and descendants of collaterals only; or

(ii) the testator's grandparents and any person directly descended from such grandparents.

(b) The conditio should apply to step-children of the testator. Views are invited as to whether it should be a condition that the step-child had been accepted by the testator as a member of his or her family.

(c) The effect of the conditio should be to substitute only surviving issue of a predeceasing relative. It should not have the effect of entitling a spouse of the relative to claim all or part of that relative's bequest.
(Para. 4.16)

19. It should continue to be a condition of the application of the conditio that the person to whom the bequest is made should be alive at the date of execution of the will.
(Para. 4.17)

20. Where a bequest is made in a will or testamentary writing executed after the commencement of the relevant legislation to a person related to the testator within specified degrees, the conditio should apply to that bequest unless:-
(a) the will or other operative testamentary writing contain an express declaration that the conditio is not to apply to the bequest.
or alternatively that
(b) the will or other operative testamentary writing contain an express or clearly implied intention that the conditio is not to apply to the bequest.
In either case should a survivorship clause or a destination over in the bequest by themselves be regarded as disapplying the conditio?
(Para. 4.21)

21. The issue of a predeceasing beneficiary taking under the conditio should take the share that the beneficiay

would have taken had he or she survived the testator or the date of vesting as the case may be.
(Para. 4.23)

22. The doctrine of equitable compensation should be abolished. Unless the will provides otherwise a person claiming legal rights should for the purposes of succession to the deceased's estate (excepting property held on a special destination) be treated as having predeceased the deceased. Where the deceased's estate includes property which would pass to the claimant under a special destination then for the purpose of succession to that property:-
    (a) if the deceased could not have competently evacuated the destination the claimant should be treated as having survived the deceased, and
    (b) if the deceased could have competently evacuated the destination the destination should be ignored.
    (Para. 4.31)

23. No change should be made in the law relating to mutual wills.
    (Para. 4.38)

24. A trustee or executor in making a distribution from the estate vested in him or her should not be personally liable for any error in distribution based on ignorance of the existence or non-existence of persons or their relationship or lack of relationship with a relevant person (including relationships by adoption or marriage) provided that he or she acted in good faith and made such enquiries as a reasonable

and prudent trustee or executor would make in such circumstances.
(Para. 5.9)

25. Without prejudice to section 23 of the Sale of Goods Act 1979 (protection of good faith purchasers of goods for value against seller's voidable title) should section 17 of the Succession (Scotland) Act 1964 be extended so as to protect persons acquiring (whether by way of purchase or otherwise) any type of property in good faith and for value.
(Para. 5.11)

26. It should cease to be competent for an executor or trustee appointed under a will or for any general disponee or legatee of heritage to use the will as a link or warrant for deducing or completing title to the deceased's heritage.
(Para. 5.15)

27. (a) There should be a statutory rule that any person having a beneficial interest in the succession to an intestate estate has a title to apply for appointment as executor-dative on that estate.
(b) Where a person beneficially interested in an intestate estate fails to apply for appointment as executor-dative, the court should have power, with the consent of that person, to appoint a suitable relative from among those mentioned in section 2 of the Succession (Scotland) Act 1964.
(c) It should cease to be competent to appoint a person as executor-dative merely on the ground of being next-of-kin.

(d) Section 1 of the Confirmation of Executors (Scotland) Act 1823, having been superseded by later enactments and practice, should be repealed. (Para. 5.21)

28. Jurisdiction should be conferred on Scottish courts to grant confirmation to executors of a person who died domiciled in Scotland, notwithstanding that there is no estate situated in Scotland.
(Para. 5.23)

29. Executors-dative should, as under the present law, be required to find caution before being confirmed, subject to the exceptions in Proposition 32.
(Para. 5.31)

30. The present rule whereby executors-nominate are not required to find caution save in exceptional circumstances should be retained.
(Para. 5.32)

31. Unless the court allows a restriction of caution the sum for which a bond of caution should be granted should be the full gross value of the estate to be administered by the executor.
(Para. 5.33)

32. Caution should cease to be required if the person entitled to the whole estate seeks, or all those entitled to the whole estate seek, confirmation as executor-dative.
(Para. 5.34.)

33. Comments are invited as to whether there would be any advantage in a simpler procedure for restricting or dispensing with caution.
(Para. 5.36)

34. The law of a deceased person's last domicile should regulate the devolution of his or her whole intestate estate (immoveables and moveables) wherever situated.
(Para. 6.7)

35. (a) Section 7 of the Succession (Scotland) Act 1964 should be amended to the effect that the rights of the Crown in the estate of an intestate dying domiciled in Scotland leaving no other persons entitled to succeed should be that of a successor rather than as ultimus haeres.

(b) Where a person dies intestate leaving no relatives entitled to succeed domiciled in a country in which the state is a successor, the claim of such a state to the intestate's moveable and immoveable property situated in Scotland should be preferred to that of the Crown in Scotland.
(Para. 6.13)

36. The Scottish choice of law rules relating to personal capacity to make or revoke a will should be changed to the effect that such capacity should be determined by the law of the domicile of the testator at the time of making or as the case may be of revoking the will.
(Para. 6.14)

37. The rules relating to the essential validity of of bequests of moveables should apply to bequests of immoveables.
(Para. 6.16)

38. (a) Where non-Scottish moveable property forms part of the estate of a person dying domiciled in Scotland, should Scottish rules of construction apply to any bequest or title to such property in the absence of any contrary intention in the will or otherwise? Should there be a different rule for non-Scottish immoveable property?

(b) Where Scottish moveable property forms part of the estate of a person dying domiciled in a country other than Scotland, should that country's rules of construction apply to any bequest or title to such property in the absence of any contrary indication in the will or otherwise? Should there be a different rule for Scottish heritage?
(Para. 6.22)

39. The doctrine of auctor in rem suam should not apply to a transfer by an executor of the deceased's interest in a lease to himself or herself as an individual under section 16 of the Succession (Scotland) Act 1964. Where such a transfer occurs the value of the interest should, unless agreed by the executors and the beneficiaries of the estate, be determined by arbitration.
(Para. 7.8)

40. Where an executor transfers the deceased's interest in a lease under section 16 of the Succession (Scotland) Act 1964 to a person and the value of the interest (as determined by arbitration in default of agreement) exceeds the value of that person's entitlement or claim to a share of the estate, that person should be under an express statutory obligation to pay to the estate a sum being the value of the interest less the value of the entitlement or claim.
(Para. 7.9)

41. Any rule of law entitling the widow and family of a deceased to an allowance out of his estate for mournings suitable to his social position should cease to have effect.
(Para. 8.1)

42. (a) Should the right to temporary aliment out of the deceased's estate be abolished or retained?
(b) If the right is retained should it
(i) be available to, and only to, a person entitled to aliment from the deceased at the date of his or her death
(ii) be available for the period of six months after the date of death
(iii) have preference over the claims of creditors on the estate, at least if the estate is not manifestly insolvent at the time of the payment in question?
(Para. 8.6)

43. The court should have power on application by an executor to grant confirmation in respect of a particular item or particular items of estate or in respect of the whole estate less a particular item or items without requiring a full inventory of the whole estate to be lodged. Such an application should only be granted on special cause shown and in order to prevent evasion of inheritance tax the court should have power to require executors to give undertakings or to attach such other conditions as it thinks fit to the granting of the application. (Para. 8.15)

44. Should section 147 of the Capital Transfer Tax/ Inheritance Tax Act 1984 be generalised so that where legal rights would affect the tax payable from an estate, and a person entitled to legal rights is incapable of renouncing them, the executor should be entitled to elect to have the tax liability provisionally settled on the basis that legal rights either have been taken or have been renounced? (Para. 8.18)

45. A renunciation of legal rights made more than 2 years after the date of death of the person from whose estate they are exigible should not count as a chargeable gift where the reason for late renunciation was incapacity to renounce earlier. (Para. 8.19)