WRITTEN EVIDENCE

from

THE SCOTTISH LAW COMMISSION

to

THE DELEGATED POWERS AND LAW REFORM COMMITTEE

on

THE SUCCESSION (SCOTLAND) BILL

Submitted on 5 August 2015
I. Introduction

1. The Scottish Law Commission is an independent statutory body with responsibility for recommending ways of simplifying, updating and improving the law of Scotland. We want to ensure that our recommendations will result in law which is just, principled, responsive and easy to understand. In April 2009 this Commission published its Report on Succession (SLC No 215). It marked the second time in which we had undertaken work in the field of succession, following a Report on Succession (SLC No 124) published in 1990. We refer to these as the 1990 Report and the 2009 Report.

2. The main thrust of both Reports was to reform the law in two important situations: (i) how the estate should be distributed where a person dies intestate, ie where he or she does not leave a valid will; and (ii) what protections there should be where a person disinherits a close relative (including a cohabitant), ie where the relative is left little or nothing in the person’s will.

3. The law in this area is important for the obvious reason that we will all die at some point and we will therefore all trigger questions of succession. While that is trite, there is no single or simple answer to what the law should provide. At a minimum, though, it should allow for the distribution of our estates in a way which satisfies our written wishes (if we are in the minority who leave a valid will)1 or, where we die intestate, in a way which is fair and which approximates to how people in general might want their estates to devolve.

4. The current law is largely contained in the Succession (Scotland) Act 1964, although certain later statutes are also relevant, particularly in respect of cohabitants and civil partners. The rules are therefore over 50 years old in their current form, though in many cases they are based on principles which go back much further in history. One such principle, which applies on the devolution of an intestate estate, or when determining the extent to which close relatives can be disinherited, is that the estate is divided into heritable property (mainly land and buildings) and moveable property (ie goods, money and so on). In this way the rights of a surviving spouse and children will depend not only on the total value of the estate but on how it is split between heritable and moveable. In both the 1990 Report and the 2009 Report we recommend the removal of this distinction.

5. For reasons explained below, the current Bill does not deal with these broad topics. However, it is perhaps worth noting the importance of periodic review, especially in relation to succession, to ensure that the rules continue to command support and meet contemporary needs. Even in the time between the 1990 Report, which was largely unimplemented, and our work in the 2000s, there were significant changes in Scottish society which required to be taken into account in framing succession laws. Therefore, in preparation for our 2009 Report we commissioned a survey, jointly with the Scottish Government, which was carried...

---

1 Around 40% of Scots have a will; see para 2.1 of the 2009 Report and, for slightly more up to date (but similar) figures: http://www.heraldscotland.com/business/personal-finance/60-of-scots-do-not-have-up-to-date-will.19307751.
out in 2005. That empirical work, in combination with other studies of a similar nature, informed our 2009 Report.

6. The 2009 Report has been the subject of consultation by the Scottish Government. This is being done in two phases, with the first being published in August 2014 and the second in June 2015, with a closing date of 18 September 2015. Broadly speaking, the Scottish Government has decided to bring forward in the present Bill some reforms to the law of succession which may be termed “technical”. At a later date, and following the study of the responses to the second (current) consultation, a decision will be made on the more fundamental issues such as outlined in paragraph 2 above.

7. This submission aims to provide a broad picture of the context within which the Bill is primarily intended to operate, and so to supplement its Explanatory Notes and Policy Memorandum. Before doing so, it is worth making a comment on the description of the Bill as “technical”, as mentioned in the previous paragraph and as used at a number of points in the accompanying documents. This description should not in any way be seen as diminishing the importance or effect of the Bill’s provisions. Indeed, for those who find themselves in situations to which the provisions apply, they are likely to be highly important. To take an example, suppose that Tom’s will makes provision for Susan, his former wife, and he neglects to update it after beginning to cohabit with Sam, with whom he is still living at his death. Section 1 of the Bill provides that (contrary to the current law) the bequest in Susan’s favour is of no effect following the divorce. That will clearly be a major consequence, particularly if the bequest was significant in value or in sentimental terms, eg if it were of Tom’s cherished possessions.

8. What is meant by the Bill being “technical” is, partly, that its scope is comparatively limited. It stands in contrast to this Commission’s “more comprehensive recommendations which promote a fundamental overhaul of the law of succession in Scotland”, as noted in paragraph 6 of the Policy Memorandum. So, while the Bill’s provisions make important and significant changes to the Scots law of succession, they do not disturb the main principles and they are therefore unlikely to affect a large proportion of estates. Instead, their effects will be felt by a smaller proportion of estates but the impact could well be highly significant in those cases.

II. Succession law

9. As has just been explained, the Bill makes changes to some narrowly focussed areas of the Scots law of succession. We will explain the effect of the specific provisions later in this submission, but it might be useful to set them in context. We do so, in part, by way of an explanation of some of the terms used in succession, which are given in bold type.4

---

3 Much will depend on the particular words used in any given will.
4 There are also glossaries in the Policy Memorandum (at para 101) and a slightly fuller one in Annex A to the current SG consultation on succession (available via the link in note 2 above).
10. Succession law governs the way in which a person’s assets, after deduction of liabilities, (termed the **estate**) are distributed on death. It applies to situations in which he or she (the **testator/testatrix**) left a valid will (ie died **testate**) and where there was no such will (**intestate**). In addition, there can be a partial intestacy, eg where the will provides for the devolution of only some of the estate; the rest of the estate falls into intestacy.

11. The law is partly set out in statute (eg the Succession (Scotland) Act 1964, which has been amended many times; the Family Law (Scotland) Act 2006, etc) and partly in the common law. The latter is a blend of Roman law, medieval canon (or church) law and customary law. Other than what the state takes by way of any inheritance tax, the estate is distributed by the deceased’s **executor(s)**.\(^5\) Where they are named in the will they are termed **executors-nominate** and where (typically on intestacy) they are appointed by the court they are known as **executors-dative**. Executors are treated in law as trustees and therefore trusts legislation is relevant. (It is also not uncommon for a will to set up an express trust, particularly if the testator has young children. In that case there will be trustees of the will trust, who may – but need not – also be executors.) The **gross estate** is the value before tax and other expenses, and the **net estate** is what is available for distribution by the executors. Some property passes by way of **special destination**, which is nowadays most commonly found in titles to houses owned by a couple, stating that it is held by, say, “Tom and Susan and the survivor”. This means that, on the first death, the deceased’s share of the house passes automatically to the survivor, and does not form part of the estate for our purposes.

12. On intestacy, there are rules determining how the estate is to be distributed. Put very simply, the 1964 Act sets out three stages: first, a surviving spouse or civil partner has the **prior right** to the deceased’s dwelling house (or, where his or her interest exceeds £473,000,\(^6\) to that sum), and also to a certain value of the deceased’s furniture and to a financial provision.\(^7\) Secondly, any remaining estate is subject to **legal rights** in favour of the surviving spouse or civil partner and any children. These rights can only be exercised in respect of **moveable** estate, such as cash, paintings, shares, vehicles, etc (as opposed to **heritage**, such as land or buildings).\(^8\) Thirdly, any remaining estate, whether moveable or heritable, is distributed to the heirs on intestacy in accordance with a statutory

---

\(^5\) A female executor is sometimes known as an executrix.

\(^6\) This was increased from £300,000 in February 2012. The figures in the following note were also increased at that point. Although the sum is relatively large, it is only payable if the deceased owned some, or all, of the couple’s home; if that were not so (eg because it was in the survivor’s name, or they were renting their home) then the survivor takes nothing under this head.

\(^7\) The current maximum amount for furniture is £29,000. The financial provision depends on whether there are also surviving children: £50,000 if there are, or otherwise £89,000.

\(^8\) Again, the value of the legal rights will depend on whether there is a surviving spouse/civil partner, children, or both. Where there are both, the spouse/CP takes a third of the remaining moveable estate and the children share another third (with the final third going to the heirs, as explained later in the paragraph). Where there is only a spouse/CP, he or she takes half of the remaining moveable estate (with the other half going to the heirs). Finally, when there are only children they share half of the moveable estate (with the other half going to the heirs). As regards the terms “heritage” and “heritable”, these derive from the time when land could not be the subject of a will and descended in accordance with rules of inheritance such as primogeniture.
list: children first, whom failing parents and siblings, and so on. If the deceased had no surviving relatives as specified in the list, the estate falls to the Crown.

13. On testacy, the assets are ingathered and distributed by the executors in accordance with the will. The deceased’s spouse/civil partner or children may claim legal rights (as described above); if so, they renounce any bequest they would otherwise have received under the will. In this way, the spouse/civil partner and children have some protection against being disinherited. (But, as mentioned, legal rights are only exercisable against moveable estate and so that may limit their value, especially where the deceased’s wealth was mainly in the form of land or buildings.)

III. Criticisms of the current law

14. The present law is in need of review for a number of reasons. The division of the estate into moveable and heritable property, which (as just seen) affects the quantification of the value of prior rights and legal rights, is hard to justify in modern times. Also, the law is perceived as no longer dealing adequately with the way that we commonly lead our lives nowadays; for example, the survivor of a long term partnership other than marriage or civil partnership receives relatively little protection at present. Thirdly, there is a debate as to what rights children should have and whether the current rights should be protected, or restricted (eg to those under a certain age).

15. For these and other reasons, the Scottish Government is consulting on major reforms of the Scots law of succession, as already noted. Our main purpose in mentioning them is to explain the context within which the reforms in the present Bill are to be seen. While falling short of wide-scale change, they constitute important and much needed reform of particular elements within the current law of succession.

IV. The Bill

16. The Bill contains 27 sections and a schedule. The ground which is covered is varied but the substantive provisions divide up into 6 small groups:

1) Sections 1 to 8 relate to testate succession, ie where there is a valid will. Some of the provisions are, though, concerned with special destinations rather than, strictly speaking, with wills.
2) Sections 9 to 11 address questions of survivorship. These are important as it is axiomatic that C can only inherit from D if C survives D. There may be doubt as to whether C did in fact survive, and these provisions aim to provide answers.
3) Sections 12 to 17 deal with the relatively rare situations in which the “forfeiture rule” applies. This is a rule of public policy by which, in certain circumstances, a person is precluded for acquiring a benefit in consequence of a criminal act resulting in the death of another person.

---

9 The list is in s 2 of the Succession (Scotland) Act 1964.
4) Sections 18 and 19 offer protection in certain situations to executors or trustees and to third parties. With minor modifications, they restate the current law.
5) Sections 20, 21 and 24 repeal three common law rules, and (in one instance) there is a replacement in the Bill.
6) Finally, section 22 applies where there is a foreign dimension and relates to international private law.

17. In addition, there is a definitions provision (section 23), three “boilerplate” provisions (sections 25 to 27), and a short schedule of repeals.

V. Testate succession reforms (sections 1 to 8)

18. The reforms in sections 1 to 8 regulate specific situations in which a person leaves a valid will or, in some cases, where he or she holds property subject to a special destination as mentioned in paragraph 11 above.

19. Some of these provisions restate the current law, with minor modifications:

<table>
<thead>
<tr>
<th>Section</th>
<th>Current law</th>
<th>Modification in Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>The present law is in section 19 of the Family Law (Scotland) Act 2006 (for married couples) and section 124A of the Civil Partnership Act 2004 (for civil partners); both are repealed under the Bill's schedule.</td>
<td>Section 2 restates the existing provisions but extends them to all property and not just heritable property, as at present.</td>
</tr>
<tr>
<td>6</td>
<td>There is a long-standing common law presumption to similar effect to section 6, known as the <em>conditio si institutus sine libris decesserit</em> (which is repealed by section 24(1) of the Bill). See below for a description of it.</td>
<td>The common law presumption extends slightly more broadly than section 6 (eg it can apply to the testator's nephew or niece in certain circumstances). Conversely, the common law does not permit the children of the predeceasing beneficiary to benefit from the practice of <em>accretion</em>, but this is provided for under section 6(4).</td>
</tr>
<tr>
<td>8</td>
<td>Under the common law, the effect of a destination depends on whether the property in question is moveable or heritable.</td>
<td>Section 8 preserves the current law in relation to moveable property. But it changes the law on heritage, bringing it into line with that for moveables.</td>
</tr>
</tbody>
</table>

20. We now briefly discuss the provisions and give examples of how they might operate.

21. Section 1. At present, a will made by a person in a marriage or civil partnership survives intact following the formal termination of the partnership. So, if Richard
executes a will leaving his estate to his civil partner Fred, or appointing him as executor, but their partnership is later dissolved, those wishes will still stand until or unless he revokes his will. Given that the current trend in matrimonial law is for a “clean break” on the formal termination of a relationship, it may come as a surprise to many people that their will is unaffected. Section 1 provides that, unless the will says otherwise, testamentary bequests or appointments in favour of a spouse or civil partner have no effect following divorce, etc (as the spouse/CP is deemed to have failed to survive the testator, whether or not in reality they did so). The rest of the will remains effective.

22. **Section 2.** As mentioned in the table above, the Bill essentially restates the current law, which is set out in two different statutes, one dealing with married couples and one with civil partners. There is, therefore, a benefit in having a single provision, as it makes the law easier to locate and to understand. In addition, there is a minor extension to the current law: at present, only special destinations in heritable property are covered, whereas section 2 extends to moveable as well as heritable property, meaning that on divorce, etc the special destination is of no further effect. In practice, most special destinations are found in title to heritable property but they are not unknown in relation to moveables.

23. **Sections 3 and 4.** The 1990 Report set out four examples, from reported cases, of situations in which the inability to rectify a will caused difficulties which could no longer be corrected, as the testator had died:

(i) A typist, in copying a will from an approved draft, erroneously misses out some words. The effect is to deprive a residuary legatee of all benefit.  
(ii) Instead of leaving legacies of £10,000 each to the testator’s daughters, G and F, as instructed by the testator, the will, because of a clerical error, leaves two legacies of £10,000 to G and fails to mention F. The will is sent to the testator for signature along with a summary of its provisions. The testator reads the summary, which mentions legacies to G and F but does not read the whole will. He signs it without noticing the error.  
(iii) An insurance agent, asked to prepare a will relating only to an insurance policy, erroneously includes a clause revoking prior wills. He believes, in good faith, and assures the testatrix, that this has effect only in relation to the insurance money. In fact it has general effect and contrary to the testatrix’s intentions and instructions, revokes her prior will entirely.  
(iv) A solicitor, instructed by a testatrix to revoke clause 7(iv) of a will, mistakenly and carelessly revokes the whole of clause 7.

24. A recent UK Supreme Court case, *Marley v Rawlings* [2014] UKSC 51, concerned a husband and wife’s “mirror wills” being erroneously signed by the wrong testator, ie the wife signed the husband’s and vice versa. This was due to an oversight by the couple’s solicitor and was only noticed on the second death. The case was decided under English law but Lord Hodge added some interesting observations about how it might have been dealt with under Scots law, if that had applied. He described that the remedy of rectification of legal documents was put on a statutory footing in Scotland in an Act of 1985, implementing an earlier Report of the Scottish Law Commission. Deliberately, however, wills were excluded, on the basis that consideration of the appropriate remedy would be
better in a project on succession. That opportunity arose with the 1990 Report, where a statutory power of rectification was recommended (and repeated in the 2009 Report). Lord Hodge said, however, that he saw "no reason in principle why the [Scots common law] remedy of partial reduction and declarator should not be available to cure defective expression in a will" (in paragraph [91]). To that extent, therefore, sections 3 and 4 of the Bill may be an alternative to the existing common law as opposed to a departure from it. But, it should be borne in mind that Lord Hodge's comments are, strictly speaking, obiter, that is they do not form part of the reasoning of the decision in question (which, as stated, was under English law).

25. Section 5. Under the present law, if a will which revokes a previous will is itself revoked, then the previous will is generally revived automatically. This may well not be what the testator intended.

26. Suppose that Frieda writes a will (W1) soon after the death of her father, and then another (W2) some years later, following the birth of her first child. Suppose that W2 expressly revokes W1, in line with the normal drafting style. At this point, W1 is ineffective, as it has been revoked. Unfortunately, however, Frieda does not destroy W1. In the meantime, though, she has ripped up W2, with the intention of executing a revised will following her divorce. She dies before doing so, and W1 is found in her papers. Under the current law, it takes effect. It is, however, not hard to assume that, as it was written before her marriage and the birth of her child, it did not necessarily represent Frieda's final wishes. Section 5 would prevent W1 being revived (provided that it can be shown that W2 revoked W1 and that W2 was itself revoked, perhaps by being destroyed). As a final point, if it turned out that Frieda did want W1 to be revived, all she has to do is to re-execute it after destroying W2. It then becomes her new will, by dint of the re-execution.

27. Section 6. As set out in the table in paragraph 19 above, this provision largely restates the current common law presumption. It is generally known by its Latin name (which gives a reasonably reliable clue as to how old it is): conditio si institutus sine liberis decesserit. In the words of a text book whose most recent edition was published in 1894, the rationale for the law is explained in this way:

Where a legacy is given by a parent to a child or a grandchild, or to persons in whom he stands in loco parentis, without mention of the legatee's heirs, a presumption arises that the testator had overlooked the contingency of the death of the legatee leaving issue; and that, if he had contemplated that event, he would have made provision for it by substituting the children of the legatee to their parent.

28. What this means, put a bit crudely, is that where a parent leaves a legacy to his or her issue (D), the will is to be read, where D predeceases the testator, as if the legacy were in favour of D’s own issue. (Issue means children, their children (i.e.

---

10 Another example, from a reported case, is given in para 35 of the Policy Memorandum.
11 The conditio is repealed by s 24(1) of the Bill.
12 J McLaren, The Law of Wills and Succession (3rd ed, 1894), para 1288. Despite its age, this text is still authoritative. The author was a renowned Court of Session judge.
grandchildren), and so on. The Bill uses the equivalent phrase “direct descendant.”) The will can, of course, provide otherwise; the *conditio* is only a presumption. But the presumption is based on the observation that parents, who may not contemplate that their children will predecease them, will want a legacy in favour of a predeceasing child to go to the children’s issue, should any be alive when the testator dies. It is as if a bequest in a parent’s will in favour of a child contains an unwritten phrase such as “or, in the event that [my child] predeceases me, to his/her surviving issue”. (And the same for grandchildren, and remoter generations.) This is in contrast to legacies to other people, including other relatives; where the legatee predeceases, such legacies will fail unless the will expressly states that the legatee’s surviving issue are to take it.

29. Section 6 restates the common law *conditio*, but it makes two minor modifications. First, it is confined to legacies in favour of a testator’s direct descendants, ie children, grandchildren and so on. At present the *conditio* can apply to a testator’s nephew or niece, if they were treated as a child of the family. Secondly, the effect of subsection (4) is to enlarge – in certain circumstances – the share of the legacy to which the predeceasing legatee’s issue are entitled.\(^\text{13}\)

30. **Section 7.** A liferent is the term used to describe a particular individual’s entitlement to enjoy the income or use of particular property for his or her lifetime. He or she is not the owner, but has the benefit of the property. (In the context of succession, the owner will often be called the “fiar”, and the relevant property is the “fee”.) Harold could provide in his will that his estate is to be held in liferent by his wife, Margaret, and in fee by his children, John and Ann. If Margaret survives Harold, she is entitled to take the benefit of the estate (house, furniture, interest on shares, etc) but, on her death, it passes absolutely to John and Ann.

31. Problems can arise with so called “shadow liferents”. Section 7 is designed to address them. Suppose Margaret survives, but later renounces her liferent interest. If the terms of the liferent are such that the fee only passes to John and Ann on Margaret’s death, there is a question of what happens between her renunciation and her death. Who is entitled to use the property, or to take the income from the investments? The Bill provides that, unless the constituting document expressly states otherwise, John and Ann become owners no later than the date of renunciation, and all such questions are then answered.

32. **Section 8.** As set out in the table in paragraph 19 above, this provision partially restates the current law, and simplifies it. At present, a bequest “to Corrin whom failing Caitlin”\(^\text{14}\) will operate differently depending on whether the relevant property is heritable or moveable. If the bequest is of the deceased’s share in a house, it is taken by Corrin and then, if she still owns it at her death and she is survived by Dolina, it passes automatically to her. But, if the bequest is of a dining room table within the house, it passes absolutely to Corrin and Dolina’s right is extinguished.

\(^\text{13}\) This point is elaborated at para 27 of the Explanatory Notes, with an example.

\(^\text{14}\) We assume for the example that both survive the testator.
33. Section 8 takes the latter as the model and applies it to all property. It therefore changes the present law in so far as it relates to heritage. It is, of course, open to a testator to make alternative provision in his or her will.

VI. Survivorship (sections 9 to 11)

34. Questions of survivorship can be highly relevant for the simple fact that, in order to succeed to the estate of a deceased person, the beneficiary or heir on intestacy has to survive. The dead cannot inherit, even if they have only been dead for the shortest time before the testator dies.

35. The 2009 Report recommended certain changes to the current law which is set out in section 31 of the Succession (Scotland) Act 1964. This provision has been subject to considerable criticism. The two main recommendations (which were prefigured, in a slightly different way, in the 1990 Report) can be summarised as follows:

- If two people die either simultaneously or in circumstances where the order of deaths is uncertain, the estate of each should be distributed as if the other had failed to survive. So, where Anne and Bill die in these circumstances, Anne does not inherit from Bill or vice versa.
- If property within a deceased's estate is to be distributed to two or more people according to the order of their deaths and these people die either simultaneously or in circumstances where the order of deaths is uncertain (as in a car crash), then (unless the will provides otherwise) the property is to be divided equally between the estates of these people. So, if Paddy and Georgie's late mother left a liferent to her sister and the fee to the survivor of Paddy and Georgie, then – should these two siblings die in circumstances just described – the fee will be divided equally between their two estates, thereby passing to their heirs on intestacy or in accordance with their respective wills.

36. The first rule therefore regulates the situation in which one of the people who die has left a legacy to the other, or one stands to inherit from the other on intestacy. By contrast, the second rule (which can be over-ridden by the testator) concerns the situation in which two or more people are entitled to estate from a third person.

VII. Forfeiture (sections 12 to 17)

37. This part of the Bill all turns on situations in which the “forfeiture rule” applies. The statutory definition of that is: “the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing”.

---

15 The summary is a slightly simplified version, in order to illustrate the main points.
16 Or, of course, where they have left legacies to each other, or each is an heir on intestacy to the other.
17 By s 23(2), the forfeiture rule is that given in the Forfeiture Act 1982. It is set out in the text which follows.
38. These sections make some modifications to the current law. In particular:

- It is made clear that, where a person incurs forfeiture (ie where they fall within the forfeiture rule) he or she is deemed to have predeceased the testator for the purposes of succession to the testator’s estate. In other words he or she automatically loses any succession rights. That, though, is subject to the following bullet point.
- The court is given discretion to grant total relief from the consequence just mentioned (whereas at present it may only grant partial relief). Relief may be justified, for instance, where a wife kills her husband after having been subjected to prolonged mental and physical cruelty. Or where, perhaps at the end of a relationship of a very different nature, she assists him to end his life in accordance with his wishes. Any relief from forfeiture which is granted does not, of course, alter the sentence of a criminal court.
- Where a third party acquires property, for value and in good faith, from a killer who subsequently forfeits the property, the third party’s title is and remains good. Suppose a son kills his mother but this remains undetected for a period of time and inherits her home under her will. He then sells it to a person who, in good faith, pays market price. Subsequently, the court orders that the son forfeit his whole succession rights. The purchaser’s title is, however, protected from challenge.
- The court may authorise a clerk of court to sign any document to give effect to forfeiture on behalf of a person who refuses (or fails) to sign it.
- There is an extension to the time within which court action seeking relief must be raised.

VII. Protections for executors or trustees and for third parties (sections 18 and 19)

39. Both of these provisions are, in essence, a restatement of provisions currently on the statute book (and which are repealed by the Bill’s schedule).

40. Section 18 consolidates, with minor extensions, two existing provisions under which executors and trustees are protected against personal liability in certain situations. Its effect can be illustrated in this way:

Tom, as executor, distributes his late cousin John’s estate but does so without knowing that John had had a daughter as a result of a brief relationship when travelling abroad as a young man. The daughter may make a restitutionary claim against those to whom Tom has distributed the estate. But Tom himself is not personally liable for the error, provided that he acted in good faith and made reasonable enquiries before distributing the estate.

41. Section 19 broadly restates the current law. It protects those who acquire executry property in good faith and for value. Suppose Chris inherits her late mother’s house. She already has a home but needs cash so she puts the house

---

18 The difference, in practice, between the current limit of partial relief and total relief is very small. In a decision in 1987 the court granted full relief in respect of the deceased’s heritage and to the extent of 99% in respect of the moveables; the judge added that, if he had been able to do so under the law, he would have granted total relief: Cross, Petr 1987 SLT 384.
19 Evidence of bad faith might include, for instance, the purchaser knowing that the seller had killed his mother.
on the open market and sells it. Chris' inheritance could subsequently be challenged in various ways.20 Say she was left the house under her mother's will, but the will was later rectified (under section 3 of the Bill) so that it passes to Chris' brother, Jack. Can he recover the house from the purchaser? Section 19 provides the answer: no. Jack may have other remedies to try to recover his share of the estate, but the purchaser's title is immune from challenge.

VIII. Repeals of the common law (sections 20, 21 and 24)

42. These three sections remove parts of the common law. We have already discussed, in paragraphs 27 to 29, the conditio whose effect is brought to an end by section 24(1); section 6 of the Bill is, broadly, a statutory replacement.

43. The other two sections remove, respectively, the donatio causa mortis (or deathbed legacy) and the right to claim mourning expenses:

- A donatio mortis causa is a transfer of property made by a person, often not in writing,21 usually at a time when he or she is not expecting to live for much longer. The transfer is, in law, a conditional one: the donor can call for the property back at any time but if this he or she does not do so before death then the donee keeps the property.22 The common law is, however, unclear in its precise application. By section 20(2), a donor will be able to make a conditional gift of property, ie can replicate the current law, but the terms of the transfer will depend on the conditions which are specified and not on the relatively obscure donatio mortis causa.
  - Under the current (but probably little used) law, a widow (but not widower) and her family are entitled to an allowance from the deceased husband's estate for mourning expenses such as clothes. This common law right will go.

IX. International Private Law (section 22)

44. This section closes what has been recognised as a gap in the power of the Scottish courts to hear actions relating to the distribution of estates which are governed by the law of Scotland. At present, where Birgitte, who is domiciled in Denmark, is administering a Scottish estate, an action against her in her capacity as executor may need to be raised in the Danish courts. Section 22 allows the Court of Session or sheriff court to hear the action.

X. Conclusions

45. The Bill seeks to improve the lives of people living in Scotland (and elsewhere) in a number of significant ways. Rights of succession are likely to affect us all at some stage and there is an obvious benefit in the law being clear, fair and up to date. Pending the major review of the succession laws, on which the Scottish

20 As listed in subsection (3).
21 "Often" should not be read as implying that such transfers are at all frequent; the leading Scottish case is from the 1860s. There have, however, been a couple of English cases in the last few years on the equivalent practice south of the border.
22 If the donee happens to die first, then the property passes automatically back to the donor.
Government is currently consulting, the Bill takes the opportunity to make smaller scale reforms. Although the number of people likely to be affected by the present Bill is smaller than those covered by the consultation proposals, the changes are still significant and will promote greater confidence in the Scottish law of succession.