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Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 22 September 2015

Session 4

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CONTENTS

Col.

DECISION ON TAKING BUSINESS IN PRIVATE 1
SUCCESSION (SCOTLAND) BILL: STAGE 1 2
INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE 42
International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [Draft] 42
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE 43
Sea Fishing (EU Control Measures) (Scotland) Order 2015 (SSI 2015/320) 43
Land and Buildings Transaction Tax (Open-ended Investment Companies) (Scotland) Regulations 2015 (SSI 2015/322) 43
Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Amendment Order 2015 (SSI 2015/323) 43
Police Pension Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/325) 44
Scheduled Monuments and Listed Buildings (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/328) 44
INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE 45
Private Rented Housing (Scotland) Act 2011 (Commencement No 7) Order 2015 (SSI 2015/326) 45
Procurement Reform (Scotland) Act 2014 (Commencement No 1) Order 2015 (SSI 2015/331) 45
ALCOHOL (LICENSING, PUBLIC HEALTH AND CRIMINAL JUSTICE) (SCOTLAND) BILL: STAGE 1 46

DELEGATED POWERS AND LAW REFORM COMMITTEE
26th Meeting 2015, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Bartos
Professor Janeen Carruthers (University of Glasgow)
Professor Elizabeth Crawford (University of Glasgow)
Nick Holroyd (TrustBar)
Professor Roderick Paisley (University of Aberdeen)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 22 September 2015

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning, everybody, and welcome to the Delegated Powers and Law Reform Committee's 26th meeting in 2015. As always, I ask members to turn off their mobile phones, please.

Agenda item 1 is a decision on taking business in private. It is proposed that the committee takes items 7 to 11 in private. Item 7 is further consideration of the delegated powers contained within the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill. Item 8 is consideration of correspondence from the convener of the Standards, Procedures and Public Appointments Committee on Scottish Law Commission bills. Item 9 is a report on the committee's work during the parliamentary year 2014-15. Item 10 is consideration of a draft report on the delegated powers provisions in the Succession (Scotland) Bill. Item 11 is consideration of evidence received on the Succession (Scotland) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Succession (Scotland) Bill: Stage 1

10:02

The Convener: Agenda item 2 is oral evidence on the aforementioned Succession (Scotland) Bill. We have two panels: first, a panel of legal academics and secondly, witnesses from TrustBar, which is a group of Scottish advocates who specialise in the areas of trusts, executries, partnership, directors' duties and agency and other relationships of good faith. We look forward to hearing from them.

I welcome Professor Janeen Carruthers, who is professor of private law at the University of Glasgow; Professor Elizabeth Crawford, who is an honorary research fellow at the University of Glasgow; and Professor Roderick Paisley, who is chair of Scots law at the University of Aberdeen. Thank you very much for joining us.

I have a sneaking suspicion that we will start with questions from me, on the structure of what we are doing with the bill. How desirable—or undesirable—is it that we will have two succession bills, not one, especially given that it will be possible to amend the first one by way of secondary legislation, by virtue of section 25? As some have suggested, should we seek to consolidate the bills at a later stage?

Professor Janeen Carruthers (University of Glasgow): In terms of seeing action and movement, two bills is the sensible way forward. Once two bills become two acts, it might be sensible to consolidate them, so that there is not a gap or, worse, some inconsistency between them. In practice it is easier to work from one consolidated act. However, to get the legislation into statute, moving forward in two instalments is a sensible approach.

The Convener: When that consolidation occurs—assuming that it does—would it be practicable to try to consolidate absolutely everything in statute at that point or would that be too big a task?

Professor Carruthers: That gives rise to the question whether it is necessary to put into legislative form a rule that already operates effectively at common law. Personally, I do not see the need to do that, but views will differ on that point. In my personal view, we do not need a succession (Scotland) act to cover every element of the Scots law of succession.

The Convener: I am not a succession lawyer, but there will be previous statutes that still interact—I rather imagine that there will be several, given the way that law is scattered across

the statute book. If we consolidate the two bills that we are talking about, of which the current bill is the first, will we have reached the point at which we really ought to ensure that everything is picked up from all the other statutes?

Professor Carruthers: My view is that it is better to have fewer pieces of the jigsaw that have to be put together. It is simpler to work from a smaller number of statutes than from a vast number. Other people might want to express a view on this, but we will be doing well if we get the Succession (Scotland) Bill and the next succession (Scotland) bill consolidated. It might take a third tranche to mop up what has gone before.

Professor Elizabeth Crawford (University of Glasgow): Perhaps it would be too big a task to try to put absolutely everything into some compendious act in the future. After all, the formal validity of wills is nicely situated and succinctly put in the Wills Act 1963 and one would not want to disturb that. Equally, there are in family law statutes provisions to do with succession—for example, the rights of cohabitants on intestacy, which might come into part 2 of your consideration. If the Parliament wishes, it would be sufficient to have something to take the place of the Succession (Scotland) Act 1964, which was a watershed, and not to be more ambitious than that.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Forgive me, Professor Carruthers, but I want to be clear. You used the phrase "In my personal view". Do you have another hat that you might wear with which you might have another opinion, or was the use of that phrase simply a conversational lubricant?

Professor Carruthers: It was exactly the latter. I simply did not want to suggest that I was giving the panel's view.

Stewart Stevenson: That is fine. Thank you.

Professor Roderick Paisley (University of Aberdeen): It would be possible to consolidate the existing statutory material on the law of succession into one act after the two bills are enacted. However, it would be a step too far, as regards getting it done in any timescale, to try to consolidate the entirety of the law of succession because that would bring in a vast amount of the law of trusts and executory administration, much of which works pretty well at common law in any event. That would be unnecessary.

The Convener: I am grateful for those general comments. We will, of course, get into the details of the bill but I will pursue one more general question. Do any of you have any general comments on things that we might have missed or anything in the bill that causes you a general concern? I am not referring to the detail of specific phrases, to which we shall come shortly.

Professor Crawford: It is an excellent idea to separate the technical from the more policy-driven or controversial issues, but the difficulty lies in drawing the dividing line at times. Certain topics have been put off until the later discussion. For example, the provisions in section 9 on people who die in a common calamity have a more fundamental aspect to them and perhaps should not be regarded as an entirely technical matter.

The Convener: I appreciate that. Section 9 is one that we will undoubtedly come to.

Professor Paisley: I would like to make a point about the Forfeiture Act 1982, which is being amended in the Succession (Scotland) Bill. I am quite surprised at that; I think that it should have been dumped altogether. The 1982 act is one of the worst pieces of legislation ever passed by the Westminster Parliament.

The 1982 act is one of the few pieces of legislation to do with the law of succession that is United Kingdom based; most legislation is Scottish based. That piece of legislation treated Scotland as Scotlandshire—as if Scotland did not exist—until about the second reading. It was a private member's bill and it was remedied in large measure by amendments that came very late in the day. Section 15 of the Succession (Scotland) Bill attempts to remedy it again. That is a bit like trying to build a building on a pile of rubble. I think that it should have gone completely.

The reform that is proposed in section 15 misses out entirely the Scottish tradition of what is known as personal unworthiness. That, not public policy forfeiture, is our tradition. Public policy forfeiture was foisted on us by the English. Really, if section 15 of the bill is going to amend the 1982 act, we need to expand it to deal with personal unworthiness, but my preference would be to get rid of the Forfeiture Act 1982 altogether. It is, to use a technical term, terrible. [*Laughter*.]

The Convener: Thank you for that comment, which is much appreciated. Stewart Stevenson will look at section 1 and the effect of divorce.

Stewart Stevenson: I want to probe the provisions in section 1 in relation to guardians of a child, to see whether they cover instances in which a will has appointed a former spouse or partner as a guardian. In light of the increasing role of step-parents and indeed the costs and timescale of going to law, is the bill as drafted to your satisfaction?

Professor Carruthers: I think that the Law Society of Scotland drew particular attention in its written evidence to the inclusion of the word "guardian" in section 1(1)(a)(ii). I agree with the

Law Society's observation, but although I accept that as an objection I would not hold up the section because of the inclusion of the guardianship issue. It is quite a small issue in the bigger scheme of what section 1 is endeavouring to do.

Stewart Stevenson: Right. No one else wishes to contribute, so I will move on. TrustBar has raised the issue of whether section 1 should take effect at the point at which the marriage or civil partnership ended, if the person was domiciled in Scotland. We heard mixed views last week about the point in time and the domicile or residency that should be used.

Professor Crawford: I have given some thought to this and I tend to favour the characterisation and the manner of drafting that are laid down at present. It is always difficult to decide whether something of this matter pertains to the law of succession or to the law of marriage. In the bill it has been drafted as a categorisation in the law of succession, which seems to work rather well. If one regards the rule of the effect of divorce upon a will as a rule of the succession law of Scotland, it would apply when the deceased died domiciled in Scotland. I am glad to see that section 1(5) provides that the divorce must be recognised by the law of Scotland. That seems to me to be quite neat; both bases are covered. I have tried to think how it could be drafted the other way, as if it were a matrimonial matter, and I find it difficult to see how one would do that.

10:15

Professor Carruthers: The written evidence from the Faculty of Advocates suggests that section 1(1)(d) could be drafted according to the testator's domicile at the date of the divorce, and the possible criticism is mounted that, if the test is domicile at death, an individual is not able to know the effect of the divorce or dissolution at that point, so the question of certainty is in suspense until death happens. However, as Professor Crawford said, the point is that it is a rule of succession and that, in a sense, everything is in suspense until the point of death. Everything is inchoate until that point and, as a rule of succession, the connecting factor is correctly at the point of death.

Professor Crawford: It is really a nice point. There is a rule, supported by precedent, that the question whether a will is revoked by a marriage is a matter of matrimonial law, to be decided by the domicile of the testator immediately after marriage, but I would be inclined to draw a distinction between that and the situation that we are looking at now, which is presumably the case where a will is discovered many years after a divorce and nobody has thought to alter it. I suggest that the effect of the divorce is more clearly put as a matter of succession and, as drafted, the connecting factor would be the domicile at death of the testator.

Stewart Stevenson: Is there a practical issue as well? First, as Professor Crawford said, it would be a divorce recognised under Scots law, which is immediately restricting, so there would be categories of divorce that would not be recognised. Secondly, inquiries would have to be made, and they might be inconclusive and create uncertainty, whereas death—notwithstanding the other parts of the bill that we will discuss—is substantially more certain and will certainly happen at some point.

Professor Crawford: Yes, there is a practical issue.

Professor Carruthers: Section 1 is about applicability. It starts with the words, "This section applies where", so tying it to the testator's domicile at death is sensible in so far as Scots law begins to have any relevance only if the testator is domiciled in Scotland at death. It could become quite uncertain if the testator was domiciled in Scotland at the point of the divorce and was domiciled somewhere else at the point of death, as the question of which country's law was applicable could give rise to more ambiguity. Simply to anchor it to the point of death is the clearer approach as a choice of law rule.

The Convener: Professor Paisley, do you have anything to add?

Professor Paisley: Yes, I would like to comment on the way that section 1 is designed. It is a provision of the law of succession, and the real intention, in the guts of the bill, is to reflect what the testator would have wished to happen when they died. The last person they would want to inherit is their ex-spouse, and the bill's purpose is to reflect the testator's intention. It goes about it in a slightly odd way, because it indicates that, if the four circumstances in section 1(1) are complied with, the ex-spouse will

"be treated as having failed to survive the testator."

In other words, it is a bit like saying that the testator has got his wish and it is as if his ex-spouse was dead.

Rather than say, "I wish she were dead," there is probably a better way to phrase it in the law of succession. A better way to do it would be to say that every will interpreted by the law of Scotland will be deemed to include an implied term, that the spouse in question will not receive that particular benefit. A testator could make an express contradictor to that, should he or she wish to do so.

That approach would get over the minor flaw in section 1(2), which says that

"For the purposes of the will"—

please note that it says "the will", rather than "the provision"—

"P is to be treated as having failed to survive the testator."

That phrase would mean that for the whole will—not just for this provision—the ex-spouse would be treated as having failed to survive. For example, I might leave a bequest to my son, on the basis that he would get £100 if my wife were alive, with a secondary provision that he would get £200 if she were dead. If I then divorce my wife, section 1(2) would kick in, even though the provision would be in favour of my son. The drafting of section 1(2) means that the provision makes a change for the "purposes of the will", so it has a wider effect than is intended.

If the bill is about succession, it should be about what a testator wants in their will. In that case there should be a simple provision of a deemed implied term—we have that in contracts and every other type of voluntary arrangement, so I think that testators would understand exactly what it meant.

Stewart Stevenson: I want to open up some of the terminological difficulties that I have had as we have looked at this. There are two other places in the bill where a person is deemed to have died when they have not necessarily done so. First, where there is simultaneous or uncertain sequence of death, each person is held to have died before the other, which makes some sort of sense, because at least the people are dead. However, in relation to parricide and other provisions in respect of inheriting when one has committed a crime against the person who has died, affecting whether one can inherit, the provision again is that one is deemed to have died before the testator.

Is there a general difficulty around the way in which we describe and deal with such things? We create the fiction that someone is dead for one legal purpose, whereas, physically, they continue to live.

Professor Paisley: The fewer legal fictions that we have, the better. You should try to move the law so that it is as consonant as possible with the actual intentions of the testator, if you are dealing with testamentary succession. Simultaneous death has some technical benefits, in treating someone as though they are already dead, and there are some technical provisions where that approach is appropriate. However, I am not sure that it is appropriate for section 1. Different sections require different treatment.

Professor Crawford: In relation to what Professor Paisley said about section 1(2), to save a lot of redrafting, it might be possible to say, "For the purposes of the benefits or powers of appointment referred to in section 1, P is treated as having failed to survive," rather than

"For the purposes of the will",

which, as he pointed out, is very general. In that case you could take out the bit about the guardian, if practitioners think that it is likely to be problematic.

The Convener: That is very helpful evidence. It moved from the very general to the most particular, and it is all appreciated. Perhaps we can leave that point and move on to the topic of rectification.

Richard Baker (North East Scotland) (Lab): Several people who have given evidence to the committee have suggested that the scope of sections 3 and 4, on rectification of wills, should be broadened to include wills that have been drafted by the testator, such as handwritten wills or wills created using templates that have been found online. What are your views and opinions on that proposal?

Professor Paisley: I would prefer that section's scope was not widened to deal with wills written only by the testator rather than prepared by a third party. In fact, I would prefer the word "prepared" to be used in section 3(1)(b), rather than the word "drafted".

Rectification is important to reflect what the testator would have wanted and avoid negligence actions. When a solicitor prepares a will for a client, the solicitor can be sued for negligence if he writes down the will wrongly. A testator can never be sued for writing his or her own will wrongly or leaving somebody out. There is a big difference in law between a will that a client prepared on his or her own and one that a solicitor prepared. I would not be minded to broaden the section's scope for those reasons.

More pragmatically, it is incredibly difficult to find evidence outside a solicitor's file or a will writer's file about what a testator actually wanted. I have been in many houses and found dozens and dozens of lists, receipts and half-baked wills or whatever. You would open up an extraordinary hunt if you looked for what the testator actually wanted in those lists or undated receipts.

I have a good estimation of the character of the average Scot, except when it comes to succession. People become incredibly avaricious when they are getting something for nothing. It is absolutely extraordinary to see what turns up in solicitors offices as being a note written by the testator. It might not be signed, but we are told, "This is really what mum wanted." Broadening the section's scope would be disastrous.

Richard Baker: I take your point that it could result in an increased number of challenges to

wills. The Law Society said that wills that were drafted by the testator can reflect what the testator wanted. If someone has gone to the effort of preparing a will, whether it be online or not, surely that reflects what they wanted and the legislation should reflect that, so that their wishes can be fulfilled.

Professor Paisley: You will find that the canons of interpretation of wills are extraordinarily malleable. Words can mean almost the exact opposite of what they say when it comes to wills. It is very unlike a contract. The courts go out of their way in extraordinary measure to treat a will as the unique document of the testator or testatrix because that is what it is, but black can mean white and red can mean blue when it comes to a will.

The courts tend to investigate background circumstances, so I would not go so far as to say that there is an overwhelming need for rectification of home-made wills. The courts do that quite openly via an open back door.

Professor Carruthers: I agree with Professor Paisley that in section 3(1)(b), "the will was prepared" would be preferable to "the will was drafted".

You mentioned online templates and suchlike. That is a bit of a red herring, because if an individual accesses a template and downloads it for his or her own purposes, the important point is whether he or she has taken professional advice on it. If no advice has been taken, the template might as well have been written by the individual personally.

Richard Baker: I have another question.

The Convener: Does Stewart Stevenson have a question?

Stewart Stevenson: I want to be clear what "prepared" might mean. If someone makes a traditional visit to their lawyer to draw up their will, there are two aspects to it. There is the discussion and advice that might be provided, which will be specific to the individual and their circumstances. There is then the expression of what is wanted in the draft that the lawyer provides.

Does what I have just heard suggest that the drafting is much less important than the advice, or do they have to stand together? If one part is absent, even if the other is present, is it entirely the responsibility of the person—the amateur—who has written their own will?

Professor Carruthers: One would hope that if the act of consulting a solicitor has taken place, advice will have been given and implemented in the drafting. If there is a mismatch between what is drafted by the agent and signed and the instructions that the client gave, there might not be a case for rectification of a will, but an intended beneficiary might well take legal action by way of proceedings in negligence against a solicitor.

That is different from rectifying the will, but there is a fairly substantial body of case law on negligence against solicitors for the failure to implement instructions accurately. The provision of advice certainly makes a difference.

10:30

Stewart Stevenson: Just to be clear, then, you believe that if the bill were enacted as presently written, but used the word "prepared", the provision would be restricted to circumstances in which the lawyer had provided advice and had undertaken drafting. Other circumstances would not be caught.

Professor Carruthers: I would prefer the phrase "prepared not by the testator" to

"drafted not by the testator",

because the word "prepared" encompasses the situation where a testator downloads some sort of pro forma or template. The word "drafted" might not include that. "Prepared" suggests a separate entity in which the testator might have, for example, filled in blanks, which is different from drafting a deed in his or her own words.

Richard Baker: In his evidence to the committee last week, Alan Barr of Brodies LLP raised a specific point about whether wills that are created using pro formas from the internet actually fall within the scope of section 1. In Mr Barr's opinion, the fact that the testator is interacting with software might constitute the drafting of a will by a third party, or it might not. Given your comments to Mr Stevenson, what are your views on Mr Barr's opinion?

Professor Carruthers: It all depends on the caveats and the terms and conditions of the website from which one downloads the document. I cannot give a definitive view on that.

Richard Baker: Fair enough.

Professor Carruthers: However, I expect that the website from which an individual downloads such things or the pad of document paper that someone might have bought from a newsagent will carry a caveat exempting the producer thereof of any liability or responsibility for the testamentary consequences.

Richard Baker: That was helpful.

The Convener: Indeed. I cannot help but feel that this area is going to prove complicated, simply because this is the internet generation and people will believe that they can just download something or think that they have received advice from

somewhere because they have put questions into a website and got the right answer. I am not seeking to disagree with the answers that have just been provided, but I cannot see the problem going away, and we really must do our level best to ensure that what is in statute is as good as it can be.

John Scott has some questions on the timing of an application for rectification.

John Scott (Ayr) (Con): Good morning. With regard to section 4, which relates to time limits, a number of those who have given evidence to the committee have suggested that it would be better if the relevant time limit for applying to the court for rectification ran from the date of death, given that a grant of confirmation can take many years. Last week, however, Eilidh Scobbie reminded the committee that until confirmation is granted the will is not a public document, and she suggested that if the period ran from the date of death executors could delay the grant of confirmation when it was in their personal interest to do so. Do you have any views on that topic?

Professor Paisley: When someone in Scotland dies, one of the first things that a solicitor will do if the will is in the office is register it in the sheriff court books. At that point, it immediately becomes a public document. Confirmation follows later, but the will becomes a matter of public record when it is registered, which means that anyone can go and look at it. Registering a will is a voluntary act, and it is registered only to ensure that if the original gets lost, a certified copy that is treated as the original can be obtained.

I suspect that there is a possibility, which you rightly bring out, that, in the personal interests of someone who is stated to be the executor, or even of someone who is just a relative, a will could be hidden or there could be a delay in bringing it to the attention of the beneficiaries for ages and ages. My personal view is that a long, fixed deadline is needed—one that cannot be exceeded except in cause shown. However, that situation would be a high-ranking candidate for cause shown for extending a deadline. Apart from that, someone who hides or destroys a will is themselves open to an action on the part of disappointed parties, possibly for some sort of delict.

There is another form of unworthiness, whereby any provision in respect of which that person would have received something under the will could be struck out as unworthy. Such things are possible. I would regard section 4(2) as providing a way of dealing with that. However, I would definitely prefer a deadline running from death, not from the obtaining of confirmation.

John Scott: From death—I see. Thank you. I invite views from the other witnesses.

Professor Crawford: Not on that, but, with the convener's permission, I would like to say—

The Convener: Please do.

Professor Crawford: I will revert to a conflict-of-laws point. Section 3 makes it clear that, before rectification can happen, the testator must have died "domiciled in Scotland". That is clear. Later, the section allocates jurisdiction to the Court of Session or to the sheriff to consider the possibility of rectifying the will according to the habitual residence of the testator at death. That seems quite clear.

I notice that, in section 2, unlike in sections 1 and 3, there is no reference to the testator having died "domiciled in Scotland" before the provision would apply. Section 6 is also silent about the applicability of Scots law. That is possibly quite all right, because Scots law applies if it applies in the view of the court hearing the case—it does not always need to be stated. However, perhaps at the end of this process, one ought to consider all those conflict-of-laws provisions to check that they are consistent with one another.

The Convener: That was not a question that we were going to ask, so I am grateful to you for bringing it up.

Professor Carruthers: I will add to that. You mentioned potential omissions from the bill. At the early stage of consultation, reference was made to the fact that the UK has decided not to opt into the European Union regulation on succession and wills and the question was asked whether it would be prudent to adopt any of the provisions of that EU regulation in the bill. The analysis of consultation responses indicated that the current legislative programme would not seek to deal with the cross-border elements.

Following up on the points that Professor Crawford has made, I note that section 2(1) begins:

"This section applies where ... property is held in the name of"

and lists various parties.

Section 23(1) makes it clear that

"'property' includes any interest in property"—

either movable or immovable, one imagines. However, that subsection does not specify whether the property is restricted to property in Scotland or whether it is property situated anywhere. That should possibly be clarified.

Specifically on sections 3 and 4, which we have just considered, perhaps section 4(1) should be clarified, such that paragraph (a) should read, "in a

case where confirmation in Scotland is obtained". Is it really intended that a Scots court could be asked to rectify a foreign-drawn deed? That could be a complicating factor, if that is what is intended. Should it be specified that that provision is restricted to deeds drawn in Scotland, or not? I am not sure that we should give a definitive answer to that question today, but the point should at least be considered.

The Convener: I am very grateful. All those things need to be considered.

John Scott will ask the next questions.

John Scott: I move on to sections 9 and 11, on survivorship.

My question is for Professors Carruthers and Crawford. You suggested in your written response to the Scottish Government's consultation that the law of survivorship should not be included in a technical bill. Indeed, you have already hinted at that this morning. Do you wish to expand on that view? Do you have further opinions to offer?

Professor Crawford: Legal systems vary a great deal on the rule on deaths in a common calamity. I believe that I am right in saying that the EU regulation on succession and wills is comparable to what is in the bill. Perhaps attention ought to be paid to the consequences of that. I do not see it as an entirely technical matter.

In the Succession (Scotland) Act 1964, we had the rule that the younger survive the elder, preserving what is possibly the natural order of succession. I merely suggest that, in my view, greater consideration could be given to that in the second bill.

Professor Carruthers: I agree with that. I do not have any objection to the formulation of the rule per se, but if one is a beneficiary who is affected by the operation of the rule, it is far from technical.

The point is the characterisation of the provision as technical and therefore as one that is being dealt with in the current bill, as opposed to seeing it as having policy consequences and therefore more appropriately placed in the second tranche of legislation.

There are policy implications as a result of the change to the survivorship rules that is proposed in the bill.

John Scott: Forgive me for being so dumb, but what might those policy implications be, beyond how beneficiaries are treated?

Professor Carruthers: The manner of the treatment of beneficiaries according to the order of death is indeed the policy implication. There is policy in that.

John Scott: I see.

Professor Crawford: Let me give a very classic exposition, involving the law of Germany. A mother and daughter died in the blitz on London. A difference arose between how English law would treat that common calamity and how German law would treat it. German law was applied, with the result that the daughter was not deemed to survive in order to take the inheritance from her mother. There are implications.

The Convener: If I might come back to the point, the question of what is in the bill that is before us is not strictly whether the provision has policy implications; it is whether those policy implications appear contentious. There are often policy implications, but where everyone is agreed on the policy implications, the provision would seem to be appropriate for the bill that is before us. I accept that there will be views as to whether that decision is correct.

John Scott: Does Professor Paisley have anything to say?

Professor Paisley: I am content for the provision to be in the bill. It is pretty well drafted.

I would prefer something that TrustBar originally suggested, which was some form of exception—a forfeiture provision—in relation to the Crown Estate, or the rule of ultimus haeres, which is the inheritor of last resort if it is not possible to find anyone else. I would like to see a provision whereby deeming people not to survive does not apply where there is a choice between such inheritors. The dice are loaded against an individual. The Crown never dies.

The Convener: If I have understood correctly, what you are saying is that the provisions seem to be fine as long as some human ultimately inherits, but if the estate goes to the Crown under intestacy, or effectively by default—let us not fight about the legal terms—plainly that would never have been the testator's intention—

Professor Paisley: Yes, that is correct.

The Convener: —and therefore the courts should find some default, which would have a human consequence.

10:45

Professor Crawford: It is a very interesting point. The policy intrudes because, if there is a rule of simultaneous death in which neither individual survives the other, there will be fewer humans to succeed and therefore it is more likely that the estate will go to the Crown as the ultimate heir.

Professor Paisley: As far as logic is concerned, it is absolutely impossible for the

Crown to inherit anything in Scotland, because everyone in this room is related—it is just a matter of proof. You are descended either from Adam and Eve—and that view was written down as long ago as Maimonides in Spain—or from someone who came out of Africa, which you can prove with your genes. There is a probability that everyone in here is more closely related than we are to the institution of the Crown. As I have said, it is just a matter of proof. Acceptance that the state should not inherit seems to me what almost everyone would want in the law of succession.

The Convener: The point is very well made, but precisely what the default should be is an issue for others to worry about on another occasion.

Does that complete John Scott's questions?

John Scott: No.

The Convener: Okay—on you go.

John Scott: If that was not uncertain enough, I now want to take you to the area of uncertainty itself. Sections 9 and 11 refer to the situation in which people die simultaneously and it is uncertain who survived whom. What do you make of TrustBar's point, which was supported last week by the Law Society, that the use of the word "uncertain" is likely to lead to unnecessary litigation? Given what you have just said, do you concur with that view?

Professor Paisley: I agree with it. Does the word "uncertain" mean that it is not certain? If not, is it only 99 per cent clear or something? Certainty means 100 per cent, so I agree with the Law Society and TrustBar on this.

Professor Carruthers: As far as the semantics of the drafting are concerned, what is intended and what is meant by not certain could be more clearly stated.

John Scott: In light of the help that you gave us earlier, do you have any proposals for more elegant drafting? Of course, a form of words might occur to you subsequently—and if it does so, please let us know.

That is all I need to say just now, convener.

The Convener: That brings us to Stewart Stevenson and questions on private international law.

Stewart Stevenson: I simply observe that I am 38 generations and two marriages away from Malcolm Canmore. I will now look more closely for the DNA connection, which is presently not in my family tree.

I note that, under section 22, an executor who has been confirmed in Scotland will be caught by Scots law if, for example, they are sued. Is that satisfactory to the panel?

Professor Crawford: It is a useful provision that I think closes a gap. I believe that Professor Carruthers has suggested that, if one is going to be detailed about this, one would remove the brackets around the phrase

"where confirmation has been obtained in Scotland".

Professor Carruthers: Indeed. I do not think that the brackets add anything helpful to the provision.

Professor Crawford: The phrase is of course very important, because it is the link that justifies the court in Scotland taking jurisdiction. In theory, jurisdiction should be taken on submission, residence or close connection, and in this case, confirmation provides that justification. As a result, the phrase should be set out plain and simple and without the brackets.

Stewart Stevenson: But is punctuation not, as a matter of general principle, disregarded in interpretation, just as headings are?

Professor Crawford: Right.

Stewart Stevenson: That is all, convener.

The Convener: Is there anything else that our witnesses are worried about?

Professor Carruthers: I should add that section 22(2) is only a partial implementation of what had been proposed. It provides for a helpful additional ground of jurisdiction, but the earlier recommendation set out additional grounds, and it is not altogether clear to us why those grounds have not been implemented in the bill. In our initial response, we said that we were happy with the additional link based on the situation of immovable property. We are content with the wording of section 22(2), subject to the removal of the parentheses, but we would have supported a more expansive jurisdiction rule than the one it provides for.

The Convener: Given that you are here and that you have raised the point, could you put on the record why that is the case in the context?

Professor Carruthers: The initial provision—

The Convener: I am conscious that you have written it down. It is not necessary to reread the words of a previous submission, but it would be helpful to the committee to hear it in relatively short terms that we and listeners can understand.

Professor Carruthers: We were referring to recommendation 50 of the Scottish Law Commission's 2009 report on succession, which provided that:

"The Court of Session should also have jurisdiction in relation to relevant proceedings"

not only

"where the deceased died domiciled in Scotland"

but—and this is the particular provision—

"where the deceased died domiciled outwith Scotland and the estate includes immoveable property situated in Scotland."

According to the current terms of schedule 8 of the Civil Jurisdiction and Judgments Act 1982, which contains the relevant rules of jurisdiction applicable to Scots law and the Scottish courts, there is no particular rule on immoveable property in the case of suing an executor who is domiciled outside Scotland that would provide what recommendation 50(1)(b) provides. We would have supported such a provision in principle; what the bill has in section 22(2) is narrower.

The Convener: Have you any understanding of why that recommendation has not been followed up?

Professor Carruthers: No.

The Convener: So there is no reasoning that you can comment on.

Professor Carruthers: We have not seen any reasoning. That is not to say that it is not somewhere in the documentation, but we looked for it and did not see anything.

The Convener: Thank you. That is appreciated.

John Scott: Are there any other cross-border issues that you would like to raise?

Professor Carruthers: The UK decided not to opt in to council regulation (EU) 650/2012 on wills and successions, colloquially known as Rome IV. The fact that the UK as a member state decided not to opt in to that instrument does not mean that UK citizens are unaffected by it. There are various cross-border succession issues that will present for Scottish residents or domiciliaries. As far as the EU regulation is concerned, we think that it would be desirable for Scotland to act along with the UK, rather than implement specific provisions of the regulation within our own Succession (Scotland) Bill. It would only add to the uncertainty in cross-border cases between Scotland and the rest of the UK if we had bespoke provisions akin to Rome IV that are not matched by English law.

The Convener: There are benefits to consistency even if it is not always what you would have preferred.

Professor Carruthers: Yes.

The Convener: Does Professor Paisley want to add anything to that?

Professor Paisley: I have a brief comment on other matters, if that is possible.

The Convener: Yes, please do.

Professor Paisley: I will take you back very briefly to something that is unique to Scotland. Several months ago the First Minister indicated that it was highly desirable that all land should be registered in Scotland within 10 years. There is something that is directly relevant to that in section 2(3) of the bill, to do with special destinations. It reads:

"Subsection (2) does not apply if the document under which the property is held"

makes express provision otherwise.

All land that is registered is not held under any document; it is held under a title. If the bill refers to a document in subsection 2(3), that will affect nothing as regards property. The word "document" should be deleted and replaced with "registered title" or "title deeds". After land is registered, it is not going to be the case that there are bundles of deeds—there will be an electronic title. It is very important that the word "document" is not used, but instead there is reference to an electronic title.

The Convener: Thank you.

Professor Paisley: On an entirely different matter, section 6(1)(a) reads:

"This section applies where a will names as a beneficiary a person who is a direct descendant".

I could name my son as Robert Paisley and say that he is getting such and such, but if I just say that I am giving something to my son and do not name him, the provision will not apply. The wording should be "where a will identifies as a beneficiary by any means at all". I am not naming a person if I simply say that I am giving something to my son or my grandson—they are not named at all. There is a very great difference between naming somebody in a will and identifying them in a will, and yet I think that the provision is intended to apply in every case.

The Convener: In particular, it might also cause a complication where people's normal names are not their given names. I would normally refer to my son by a different name from the one that is actually on his birth certificate; that is not uncommon.

Professor Paisley: Indeed, and grandparents, in my experience, tend to get names wrong or forget them, so it is important to sort that provision out.

The rule in section 12 headed

"Person forfeiting to be treated as having failed to survive victim"

is, I repeat, an English rule that was imported into Scotland as a public policy rule. There is a direct parallel in Scotland known as personal unworthiness, which is a continental rule that we have from the European legal systems. It is part of

our law, and case law confirms that our law is based on one or the other. It does not say that it is just going to be based on public policy.

If all we do is to amend the 1982 act as regards the forfeiture rule, as defined in the Forfeiture Act 1982, we will not have amended the unworthiness rule in Scotland but will have left it intact. I think that that section of the bill should be expanded to deal both with the English version that we have imported—via Northern Ireland, I hasten to add—and also with the personal unworthiness rule, which is basically a rule in Scotland under which it is said that someone should not inherit because the testator would not have wanted them to inherit because they have done something so unworthy.

Finally, I agree with everything that has been said in the submissions about section 20(2), on

"Gifts made in contemplation of death".

The phrase "in contemplation of death" is absolutely meaningless and should be taken out.

The Convener: Thank you. I seem to recall once seeing a finals jurisprudence paper that read, "Take this out. Discuss."

John Scott: For someone like me, who is a completely lay observer, could you say why "in contemplation of death" should be taken out?

Professor Paisley: Donatio mortis causa means a donation in contemplation of death. It is a direct Latin translation. A gift in contemplation of death other than a donation mortis causa means a gift mortis causa other than a donation mortis causa. It is just complete nonsense. You are saying that it has to be this but it cannot be that at the same time; it is logically incoherent.

The Convener: Fine. We shall let the draftsmen and women worry about that.

John Scott: Since we have such eminent people in front of us, I wonder whether that is a view shared by others. The concept of contemplation of death has been around for quite some time. Do the other witnesses agree with Professor Paisley or, being lawyers, might you disagree?

Professor Carruthers: I am not quite as concerned about it as Professor Paisley is, but on that particular point I am happy to defer to his view. He is more expert in donations mortis causa than I am—unless, of course, it is a cross-border one.

Professor Paisley: Whatever it is, the gift that we are trying to allow is a gift made during life. People contemplate their death occasionally—I might do it this afternoon—but it does not mean that such gift happens only if they die. Most people, if they are really sensible, empty the bucket and give everything away before they die so that there is nothing left. The richest person in the world is the person who dies with nothing.

The Convener: Indeed, and one could easily argue that anybody who is writing a will is contemplating their death, because there is no other purpose for which one would write a will.

On that esoteric point, I am looking at my colleagues and I think that we may have covered everything that we need to cover. If there is nothing else that the panel would like to raise with us, all that remains is for me to thank them for an informative and enjoyable discussion. Thank you for your efforts, ladies and gentlemen.

10:59

Meeting suspended.

11:03

On resuming—

The Convener: It is my pleasure to welcome to the meeting David Bartos and Nick Holroyd, who are here from TrustBar. Our first question comes from Stewart Stevenson.

Stewart Stevenson: Should the provisions of a will appointing an ex-spouse as a guardian fall within the scope of section 1?

Nick Holroyd (TrustBar): The first difficulty, which I do not wish to dwell on, although I must flag it up in any case, is that the term "guardian" is often used in wills in a multiplicity of ways that do not always chime perfectly with the way in which the term is used in a family law context. So far as TrustBar can see—and we welcome correction—there is no express definition of guardian in the 2015 bill. On the assumption that we are dealing with a guardian in the family law sense—that is to say, in terms of section 7 of the Children (Scotland) Act 1995—it would contemplate a situation in which someone has parental responsibilities, rights and duties, but is not a parent. That is an issue for clarification.

When one considers family law and, in particular, section 7 of the Children's Scotland Act 1995, one does not find that it contemplates death or divorce prompting revocation. Section 7 refers to documents, so it is capable of including a will. It would be slightly at odds with that if divorce or annulment in a succession context were to prompt the extinguishing of the provision.

It is not something that we feel very strongly about, but it is something worth thinking through. I know that it is a matter that David Bartos has also given considerable attention to.

David Bartos: I will elaborate on that. Section 7 of the Children (Scotland) Act 1995 allows a

person to make a document appointing another person to be guardian of their children upon their death. Section 7 does not say that that has to be in a will; the appointment of a guardian could be in any document. There is no provision in section 7 that the document is to become ineffective if the guardian-to-be becomes divorced from the granter of the document. There is no provision in section 7 for such an appointment to be revoked.

The effect of section 1 of the bill would be to create an anomalous situation in the sense that if one made an appointment of a guardian in a document that was not a will and the grantee became divorced from the granter, that document—and so the appointment—would remain valid, but if the appointment happened to be made in a will, the appointment would cease to be valid. That is anomalous and in principle undesirable. However, that would be the effect if section 1 were to include the words "or guardian".

My second point relates to how we have got to the point where the words "or guardian" are in the bill. The suggestion that appointments as guardian might be revoked by divorce or annulment goes back to a Scottish Law Commission discussion paper from the mid-1980s, which predates the Children (Scotland) Act 1995. That paper was put out for discussion and the majority of people who responded to the consultation paper indicated that they would have no objection. The words "or guardian" were then incorporated in the 1990 SLC report and repeated in its 2009 report.

With all due respect to the Scottish Law Commission, it seems that the matter has not been given full consideration. In any event it would create an anomaly, as I have just described: if the appointment is made in a document that is not a will and there is a divorce, the divorce has no effect, but if it happens to be in a will, it is revoked according to section 1. That is inconsistent.

Stewart Stevenson: Just to be absolutely clear, when a guardianship is created under family law, does it take effect at that point?

David Bartos: It depends on how the guardianship is created. It can be created by an application to the court, in which case it takes effect upon the court decree, or it can be done in a document, which takes effect upon death.

Stewart Stevenson: So it is a contingent provision.

David Bartos: It is a contingent provision. As I said, section 7 of the 1995 act simply says that it can be put into a document—it does not have to be a will.

Stewart Stevenson: When there is a contingent provision, you suggest that, logically, the effect in law should be the same in the two contexts. Of course, section 1 of the bill appears to be trying to catch those circumstances where no other provision has been made. Is that how you read it?

David Bartos: I read it as being restricted to wills. If the appointment of the guardian is made in a will and, subsequent to that will, the person who was appointed as guardian is divorced from the granter, that appointment ceases to have effect. Section 1 does not relate to non-will appointments, but the Children (Scotland) Act 1995 clearly contemplates that there can be non-will appointments—just a document and nothing else can make the appointment. No other legacy is required. It is not testamentary, so it is not a will on any normal understanding of that word. In that case, the divorce would have no effect.

We are really going into an area of family law in a piece of succession legislation.

The Convener: If there were two documents, in the way that you have just described—one testamentary and one non-testamentary—which would trump which and would it matter in which order they were created?

David Bartos: I have not thought about that, but I would have thought that, as a matter of general principle, the latter would trump the former, in whatever form it happened to be. However, that is just a—

The Convener: It sounds like a good principle, anyway.

David Bartos: That is a tentative view based on general principle. A latter will generally revokes a former one. A latter contract that covers the same material as a previous one supersedes the previous one.

John Scott: At the very least, there needs to be a harmonisation of the two pieces of legislation. The point is well made and I hope that we will take note of it.

Stewart Stevenson: Section 1 also has issues related to domicile. Do you have any comments on that?

Nick Holroyd: I preface my answer by saying that it is on the hypothesis that we are going to deal with guardians in the way they are currently dealt with in section 1(1) and, of course, we slightly query that.

On the question of whether domicile at death or domicile at divorce should be used, we favour the divorce approach. One might analyse it as a species of partial revocation of the will, arising by operation of a statutory provision. Our understanding of the general law in the area is that, when considering whether an alleged act of revocation has been effective, one should look at

the domicile of the person allegedly revoking at the time of the act of the alleged revocation.

We draw some support for that view by analogy with what happens where there is an international context and, under the law of one country, marriage subsequent to the will gives rise to revocation. In those circumstances, there could be a valid will that has nothing wrong with it in terms of purely domestic Scots law, and there is no incapacity or anything like that, and a marriage that was purely domestic to Scotland would not lead to a revocation of the will or a partial revocation of it, thereby extinguishing somebody else's rights.

If there is an international context, one would look at the law of the domicile of the testator immediately after marriage. Support for that view can be found in standard textbooks in relation to that marriage point. For example, Professors Crawford and Carruthers touch on the issue at paragraph 18-34 in the third edition of their book. I am very obliged to Professor Crawford, because I was allowed a glimpse of the fourth edition, and I found that it is now paragraph 18-39. The views that I am expressing are TrustBar's—Professors Crawford and Carruthers have a different view on this particular issue. However, by analogy, one could say that one is dealing with a partial revocation arising from statute. My suggestion is that, in looking at that, we should look at the law of the domicile of the alleged partial revoker at the time they do the act.

11:15

Stewart Stevenson: Just so that I can be clear before we move on to further complexities, is there a distinction in this respect between heritable and moveable assets? The answer might be no.

David Bartos: I do not understand there to be a distinction. The leading Scots common-law case on revocation, Westerman v Schwab, involved the marriage of a lady who was in England and who later died domiciled in Scotland. At the time of the marriage, she was in England and the court held that the question of whether that marriage revoked her will was to be decided by English law, as that was the law of her domicile at the time of the revocation. Therefore the common law already says that revocation of a will is to be assessed by the law of the domicile of the person at the time of the alleged revocation.

If the suggestion in section 1 were to be adopted, in effect two tiers would again be created. There would be one law relating to revocation generally and a separate law relating to revocation by divorce or annulment. From a user-friendly point of view, it seems inherently not a good idea to have too many different laws applicable for different types of revocation.

Another point is that the idea that one looks to the applicable law at the act of revocation is internationally recognised. We see that in the EU regulation that has been referred to, in which the general law governing succession is the one of habitual residence of the deceased at death. That is the general rule, but there are exceptions to that stated in the regulation, one of which is the assessment of whether a will has been revoked.

The regulation says that it is the law of the habitual residence at the time of the alleged revocation that is to apply. Although we are not adopting habitual residence and we are not adopting the EU regulation, I simply mention that as an indicator of how such things are considered internationally. There is a good reason why things are done in that way, which is that it allows for estate planning. People need to know where they stand, and tying things to the date of the alleged revocation allows people to know with some certainty—and to receive clear advice about—whether the will has been revoked. Otherwise, one might have a floating situation.

In a nutshell, the common law already directs us to the act of revocation. That is in line with practice internationally, and there is a good planning reason behind it.

Stewart Stevenson: I hope that I will not regret asking this but, if you are tying things to the date of revocation, that clearly precedes the reallocation of assets to the now separated partners, whatever jurisdiction the revocation took place in. Does that, in effect, draw that separation of assets back into the revocation as part of the consideration of the executry? To a layperson, it sounds as if there might be something in that.

David Bartos: I am sorry—no doubt the fault is mine—but I have slight difficulty in following that scenario.

Stewart Stevenson: Let me explain my layman's difficulty. If a will is overturned, at the point when it is overturned there will be assets, but something in law happens to those assets before death occurs, in that the assets are now distributed to different parties. If we return to a point where it is as if the will had never been written, is there any interaction with that? The simple answer might be no.

Nick Holroyd: You have raised an extremely important point, which has ramifications in various areas of divorce and succession law. In assessing who owns what, one would need to consider the law of divorce and the general law. In Scots law, there are various presumptions where couples are married or cohabiting—they are slightly different in

each case. You are absolutely right: it would be very important to know who owns what.

Where the will is extinguished in favour of a particular person or is not effective in relation to a particular person, that removes, as it were, their opportunity to benefit under the will, but it would be silent as to the question of what the husband or wife owned prior to the divorce or annulment. In a Scottish domestic context, there is some guidance on the presumptions as to who owns certain assets. That relates to household goods although, crudely speaking, there might be a presumption of equality.

David Bartos: The scenario that you laid out, Mr Stevenson, can easily be imagined. When the divorce or annulment took effect, one would effectively see that the will had been revoked. At that point, one would expect to know whether the person had been domiciled in Scotland at that time. As far as the distribution of the estate is concerned, one would, prima facie, be in a situation of intestacy unless a fresh will was made.

It would seem that, ultimately, intestacy is the preferred fallback rather than the spouse inheriting, but with one reservation, as I am rightly reminded, which is that if the will provides that, failing the now-divorced wife or husband, somebody else is to inherit, or if there is a residue clause, the persons entitled to inherit under those provisions or residue cause will inherit and will take the spouse's share.

I hope that that has clarified the point.

Stewart Stevenson: I think that I am getting there, although I might have to read the *Official Report* to know for sure.

Nick Holroyd: For example, if the couple who sadly get divorced have children, that might raise issues depending on how precisely one construes section 1. The children might take either under the residue clause or, in certain scenarios, in place of the parent.

Stewart Stevenson: Professor Crawford made the point—and I interacted with her—that it is where a divorce is recognised under Scots law that is relevant. So, for clarification, where a divorce is not recognised by Scots law, it has not happened from our law's point of view.

The Convener: That takes us on to Richard Baker's question on rectification.

Richard Baker: In TrustBar's written evidence you suggest—as others have done—that the scope of sections 3 and 4 of the bill should be broadened to include wills drafted by the testator, such as handwritten wills or wills that have been created using templates found online. I want to probe that further. There is not unanimity on the issue. You will have heard the views of the earlier panel. Could you expand on the reasons for your suggestion and perhaps reply to the counter-arguments that were made earlier on?

Nick Holroyd: I will just outline our position, which is based on issues of both principle and practicality—there is an overlap between the two.

In principle, it seems to us that if someone makes a clerical or other type of error in a DIY will, their intentions are being defeated if there is no opportunity for rectification. There is an English case called Williams 1985, as reported on pages 911-12 of "Weekly Law Reports 905", in which the English judge makes the point—and it is not a binding comment, but an aside—that you do not need to have a clerk to make a clerical error. One can easily imagine someone who is perfectly capable, in the sense that they have capacity and are not being unduly influenced by anyone, deciding to make their own will, making a rough draft with annotations and then, particularly if they are obsessive compulsive—if I can use that phrase in a loose and non-politically correct way—deciding that they wish to make a fair copy. As one can imagine, it would be very easy to miss something out in the process of making the fair copy of the will. For example, they may have identified their children or grandchildren by name or otherwise and then, for no good reason other than that they have made a clerical-type error, one of them does not appear in the version that they sign. I appreciate that there could be evidential issues, but TrustBar does not consider that the evidential tail should wag the dog in this case.

11:30

There are also, I would suggest, practical reasons for favouring a wider approach. The first of those is that there could easily be difficulties in discerning whether one is dealing with a purely DIY will or one that has been either prepared or drafted—depending on the terminology that one favours. At the moment, one tends to think of people either getting a will form from the post office and filling it in and signing it, or using a comparable online version. It seems to me that there could be different sorts of errors. With an online will system where one is asked questions and the answers to the questions lead to a will being drafted, there could be problems with the software or, as we have all done when asked to fill in our email address on an online form—one is asked to enter information and then enter it again—a testator might just copy and paste and thereby complete the answer imperfectly. Therefore, it seems to me that there could be grey areas. Our view is that the provision should extend to DIY wills, but if one is going to go down the route of excluding DIY wills, one would need to

say something along the lines of "wholly drafted" or "wholly prepared".

There is an even more mundane example of a mixed situation. A solicitor could draft the will and, because he or she is a sophisticated will drafter, use defined terms. The testator could then skim through the will and see a reference to a particular defined term, say, "No, that is not what I meant," and change it, and that could have knock-on effects.

If we are against statutory rectification for DIY wills, I think that the word "wholly" should be in the bill. However, we would favour the broader approach.

The final point is a practical one as well. If DIY wills were to be excluded from the statutory rectification regime, and if the committee favoured TrustBar's position that the statutory rectification regime should not prejudice the existing common law, whatever that may be, someone who is faced with a DIY will might well attempt, particularly in light of Lord Hodge's comments in an English appeal to the UK Supreme Court—although in that case, called Marley, it was not a DIY will—to go down the common-law route rather than the statutory route. It seems to me better on the whole if people's first port of call is the statutory regime and they go down the common-law route only if the statutory regime does not accommodate them.

For those reasons, which are a combination of matters of principle and of practical matters, we favour an approach that would allow rectification. We should bear it in mind that, in civil matters, there may be evidential difficulties, but one is nearly always dealing with a balance of probabilities, and that is something that advisers and the courts have to face up to. No doubt there will be the odd duff claim, but equally there may be some well-grounded ones. It would be for the person seeking rectification to make their case on the balance of probabilities.

I would like to pick up a point from Professor Paisley's evidence. There was a suggestion that the court could use great imagination, great skill and breadth in interpreting wills, and that is true. However, it seems much better if one can separate off interpretation of a document from rectification. One might say, "Properly interpreted, the will means this and Johnny should benefit," and that if the will does not bear that interpretation, it should be rectified to bear that interpretation. Although there is merit in what Professor Paisley said, it is desirable to keep clear in one's own mind the distinction between interpretation and rectification.

One of the very fashionable things that has come from south of the border, and which I am not wildly enthusiastic about, is the idea of trying to treat the interpretation of wills in exactly the same way as the interpretation of contracts. One of the differences that I would suggest should exist in relation to the interpretation of wills is that there should be a general reluctance to try to have all sorts of evidence from outside the will brought in. Yes, one can put oneself on the arm of the testator's chair when he made the will, but what you cannot do, generally speaking, is to have a trawl over all the evidence to see what the person meant.

We should keep interpretation separate from rectification. That adds weight to the idea that we would be more likely to produce a fair outcome if there were rectification for DIY wills.

Richard Baker: I appreciate that point and the points that you have made about the matter of principle.

Earlier in your response, you mentioned grey areas that might arise in cases. Is there not a danger of introducing a very wide range of legal complexity by including handwritten wills and internet template wills in the provisions?

Also, there is a practical issue in that the broader the provisions are, the higher the risk is that every disappointed beneficiary will use the powers in question. How would you address those points?

Nick Holroyd: Undoubtedly there would be difficult cases, but I come back to the point that one would normally consider what the evidence is to support a position and then establish one's case on a balance of probabilities. TrustBar fully accepts that there would be difficult cases.

Richard Baker: And do you think that there would be more cases or challenges if the provision were broadened?

Nick Holroyd: I am really into the realms of speculation and guesswork, but I suspect that the answer is yes. It would be very hard to quantify.

Richard Baker: Finally on this point, in oral evidence to the committee last week, Alan Barr of Brodies raised a specific point about whether wills created using proforma from the internet currently fall within the scope of section 1. He argued that the testator is interacting with software, which, in Mr Barr's opinion, may constitute a will being drafted by a third party. You will have heard the question being put to the previous panel as well. What is your view on that point?

Nick Holroyd: Again, the point that the committee has raised and which Alan Barr addressed is a very valuable one. It is one of the practical difficulties that I touched upon. In some cases, it would be very difficult to know whether such a will falls outwith the regime by reason of it not having been drafted or prepared by someone

else. If one were to go down that route, which I do not favour and TrustBar does not favour, one would have to amend the provision to say "wholly" prepared.

Richard Baker: Professor—sorry—

David Bartos: If I could add to that, at the moment, the provision says:

"This section applies where ... the will was drafted not by the testator but on the testator's instructions".

A court would understand that as excluding the situation where someone has gone on the internet.

Richard Baker: So such a will would not currently fall within the provisions of section 1?

David Bartos: An internet will would not currently fall within section 1. A court would view that section as covering only where one person instructs another person to carry out the drafting. That is the background on which the proposals have been created. It owes its origin and spirit to English provisions which predate the internet. The internet situation is not covered under the existing provisions, which adds force to the argument for expanding the existing provisions.

There is one other point that I wish to raise in relation to section 3, but do you have further questions?

Richard Baker: I have no further questions.

The Convener: If you want to raise your point, please do.

David Bartos: The point relates to third parties and the effect that rectification of a will may have on third parties who have arranged their affairs on the basis of the will in its unrectified form.

I will give an example. A person leaves a property to their son, B, and that is the basis on which son B expects to take the property. Son B obtains a loan, which he expects to repay from the value of that property. Thereupon, somebody else comes in and says that the will should be rectified so the property does not go to B but goes to them instead. Yet, son B has already acted on the basis of the unrectified will.

As the legislation stands at the moment, it gives the court no guidance as to how it is to treat the prejudice being caused to son B. That, it seems, is a clear hole in the statutory provisions. The hole is emphasised by the fact that there are already rectification provisions on the statute book—this problem is not new. Those rectification provisions are contained in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, sections 8 and 9.

As enacted in the mid-1980s, those sections omitted wills because it was thought that there should be further consultation on whether wills should be included. That was meant to be only a temporary thing. The provisions cover, for example, the granting of trust deeds that take effect during lifetime. Other than their taking effect during life, such trust deeds are extremely analogous to wills. Indeed, many wills contain trust provisions. The only difference between a will that contains a trust provision and a lifetime trust deed is that the will with the trust provision takes effect on death whereas the lifetime one takes effect during life. Ultimately, they fulfil the same role.

Section 9 of the 1985 act provides protection for third parties such as the son B that I have mentioned—we put it in the back of our written evidence. Section 9 provides that the rectification is to take place only if the court

"is satisfied that the interests of a person to whom this section applies would not be adversely affected to a material extent by the rectification; or that that person has consented to the proposed rectification."

Simply put, the person in question is the son B that I mentioned in my example. We can see no reason why the provisions of section 9 should not apply to wills, as they do to lifetime trust deeds.

The Convener: Did you want to pursue that, Stewart?

Stewart Stevenson: I wanted to go back to the internet briefly.

David Bartos: I think that the rectification issue is important, which is why I wish to emphasise it. It will arise in practice—there will be third parties affected by the rectification of wills, without question.

The Convener: I will pursue that before I let Stewart Stevenson go back to something else.

I am not sure whether son B acted during the testator's lifetime or after death and therefore on the expectation of the will being carried forward. If B acted before his father died, all sorts of simple commercial caveat emptor things apply. If the person who loaned money to B does not have some protection against an asset, that is their fault, to be frank. That is what commercial law will say. If, however, B acted after death and on the expectation, section 19 might well apply, particularly if something had already been conveyed to B. Does that section not apply in the circumstances that you outlined?

11:45

David Bartos: Section 19 relates to the protection of persons acquiring property

"in good faith and for value"

—the key words are "for value"—

"whether by purchase or otherwise".

In the example that I gave, B, as the son who was to inherit under the unrectified will, simply acquires the inheritance without value, so he does not receive any protection under section 19.

The Convener: Not even under section 19(2)(b), which refers to the property being "distributed"?

David Bartos: That relates to persons who have acquired from B.

The Convener: Okay—I just wanted to check that.

David Bartos: In my scenario, B is still left having to meet the loan without having the property.

The Convener: I just wanted to explore that a little.

Stewart Stevenson: I am thinking about what I will call the internet exclusion. I want to test what it means, and I will do so by starting with a situation in which the interaction between the person writing the will and the legal adviser has taken place by telephone. I presume that that is okay.

David Bartos: That would be covered.

Stewart Stevenson: When the telephone service is provided by technology that is available on the internet—Skype is one example—I presume that the internet exclusion to which you refer is not intended to exclude that interaction.

David Bartos: If the instructions were given to the will drafter over Skype, the existing provisions would cover that.

Nick Holroyd: There is a slight nuance in opinion—only a cigarette paper—between me and David Bartos on that point. I am at one with him in taking the view that, as the provision is currently worded, a will that is made over the internet by the testator—a program-type will or a downloaded pro forma—would in most cases not be covered. Section 3(1)(b) states that the section applies when

"the will was drafted not by the testator but on the testator's instructions".

In most cases, the testator would have had a hand in the drafting, which would seem to take the will out of the rectification regime.

Things become more difficult in the situation that I postulated, in which someone is asked a series of questions over the internet and gives answers to those questions, and perhaps also inadvertently copies and pastes something slightly wrongly. In a sense, that person is giving instructions to the computer and, in turn, the company behind the computer. They print a will at the end of the process and then sign it. It is difficult to say, but that might be a situation in which the will is drafted not by the testator but on the testator's instructions.

Stewart Stevenson: I just want to be clear. We have hung this point on the internet, which seems to be unhelpful, given that I am now hearing that the test is whether a human being interacts with the person who gives the instructions.

Nick Holroyd: It would not have to be—

Stewart Stevenson: The point is about the presence or absence of a human being, rather than the mechanism of communication and the presence of computer systems in helping with and assisting in the drafting of the final document. Am I capturing correctly what I have been hearing?

Nick Holroyd: You have raised a tremendously good point. If one answers questions that are posed by a robot, so to speak—I use that example in a glib sense—and the will is produced at the end of the process and someone signs it, there has been a non-human Q and A. The answers come from the testator—the human—but the questions are posed by the robot. Behind the robot, there is the programmer and the company that provides the service. In that scenario, there seems to be scope for arguing that the bill as introduced would allow for statutory rectification. The will has not been drafted by the testator; the testator has provided answers, but the will has been drafted on their instructions, as they have instructed the robot and the company behind the robot.

The bigger point that you might be alluding to, which is something that troubles me, is on a much more mundane situation—the solicitor prepares the will and, rightly or wrongly, the testator thinks that the will drafter has not got it quite right, tweaks it a bit on paper and duly authenticates the tweakings. A question then arises. There might have been an error by the solicitor, but that might not have been the thing that the testator altered in his tweaking. As the bill is worded, there could not be statutory rectification under section 3. It could not be said that the will was not by the testator because, in part, the testator had done something to the will, albeit that the offending parts—the error—had been made by the solicitor.

There are grey areas, most obviously when one is dealing with a robot, but also, less obviously, when one is dealing with someone who has tried to improve the solicitor's drafting, although the error is not what they have tried to improve and they have overlooked the solicitor's big error while focusing on something trivial.

Stewart Stevenson: Does that also touch on informal writings?

Nick Holroyd: Informal writings are—

Stewart Stevenson: They are often provided for in wills.

Nick Holroyd: They are. In the past two years I have tutored at the University of Glasgow, and the standard-style wills that students are taught to use include informal writings clauses. They tend to say that effect will be given to informal writings, and there is usually a provision that says that that applies provided that they are signed. That style tends to be recommended for use.

Those clauses raise horrifically difficult questions in their own right, which have not been addressed in the consultation exercise. I will outline some of the difficulties. On formalities of execution of wills, one would normally want each sheet to be signed, as well as the will being signed at the end. It is said that the will is self-proving, so it can be relied on, and it can be taken along to the sheriff court to get confirmation. When a normal will has been signed not on every sheet but only at the end, it has to be established that it is the testator's will. It is usually fairly easy to jump through the various hoops, although it can sometimes be a little more difficult. That relates to section 4 of the Requirements of Writing (Scotland) Act 1995. When there are informal writings, there are all sorts of collateral issues.

Stewart Stevenson: We are travelling into things that are not in the bill that is before us—such things are perhaps for another day for the committee.

The Convener: I point out that, unless this is relevant, we have strayed. Interesting as this might be, can we get back to the bill that is before us, please?

Nick Holroyd: I shall describe a situation that relates purely to rectification. Let us assume that the informal writing is effective and that there is nothing wrong with it. The error that exists is by the solicitor and lies in the parent will. On one view, given that we consider the informal writing and the will as one document, we would seem to be excluded from relying on rectification in that context.

David Bartos: One thing is perhaps worth mentioning, which underlines my view—I think that this is where Nick Holroyd and I differ. I take the view that there have to be instructions to a person—a human being, as Mr Stevenson said—whereas I think that Nick Holroyd's view is that instructions to a robot, or instructions into the internet, might suffice.

The reason why I take the view that a court would view instructions as being instructions to a person is tied in with the reason for that specific definition. It is a practical reason. It is contemplated that it may be easier to satisfy the requirements for rectification if one can lead as a witness the person who was instructed to draft the will, who can say what their instructions were and what they were asked to do but that—oops—there was a slip. They put their hands up about that slip, but it is clear that the testator intended the will to be as per the instructions that were given.

That illustrates a practical reason why section 3 has been drafted in the way that it has. One can understand that. We happen not to agree with the provisions, because they are too restrictive, but one can understand the reasoning.

John Scott: On the previous point, Mr Holroyd suggested that there is a gap in executry regarding informal writings—that is not part of the bill, and the bill is the reason for our consultation with you, but it is for you to tell us of gaps in provision. Notwithstanding the convener's remarks about needing to stick to what we are here to do today, would you consider writing to us about the gap in provision that you see?

Nick Holroyd: I should mention that that area is attended with considerable controversy.

John Scott: I ask the convener whether that is the reason why the matter is not included in the bill.

The Convener: That might be why it is not in the bill. My point is simply that we should use our time to address things that can reasonably be altered in the bill. I recognise that there is overlap with other issues, and I would not for one moment wish to disagree with John Scott. If the witnesses feel that anything needs to be added in written evidence, please do that, while recognising that some of it may be appropriate for discussion in relation to other proposed legislation and that it might not be acted on at all. I certainly do not wish to be restrictive.

I am just about to bring in John Scott on time limits, but I cannot help thinking that we have heard enough today for us to recognise that the interaction between me, as a general citizen, and advice that I might get from the internet is now an issue that the law will have to address. We will not answer those questions today, but it is plain that the courts will have to address that issue pretty soon. It might be fairly sensible if we as legislators—I am talking as much to the Government via the *Official Report* as I am to us—thought about how we will interact with that issue, because that is bound to happen.

David Bartos: You have raised an extremely important and valuable point. The focus is on the words "on the testator's instructions" in section 3(1). In the past, instructions have always been seen as being to individuals, but now they might be viewed as being to other things, to use an entirely neutral word.

The Convener: Robots are only programmed, and the programmer is a human being. It does not matter how far back we have to go with who writes the programs—there is a human back there somewhere. I suspect that that is for another day and another place.

I invite John Scott rapidly to take us on to time limits before we run out of time.

John Scott: Indeed. I return to section 4(1) and a question that was put to the previous panel. Stakeholders who have given evidence to the committee, including TrustBar, have said that it would be better if the relevant time limit for applying to the court for rectification ran from the date of death. However, Eilidh Scobbie reminded the committee last week that, as you know, until confirmation is granted, a will is not a public record, notwithstanding what Professor Paisley said. Eilidh Scobbie suggested that, if the period ran from the date of death, executors could delay the grant of confirmation when it was in their personal interest to do so. Do you agree with that point? Do you have any points to make about that?

12:00

David Bartos: If an executor delayed in order to prevent rectification, that would clearly be a breach of duty by them. If that could be established, it would be likely to amount to cause shown for waiving the time limit. I think that a number of people who have given evidence have expressed that view, which is our view, too.

It is extremely important that the time limit be firmly anchored in the first place. As the provision is drafted, the time limit begins either from death or from the granting of confirmation—it is really not clear which it is. One has to go one way or the other. One could go the English way, which Eilidh Scobbie seems to prefer and which involves anchoring the time limit to the confirmation. In that case, as confirmations might not be obtained for a number of years, de facto, the time limit might be a long time. Alternatively, as we prefer, the time limit could be tied to death, to try to give a measure of certainty, subject to the provision of cause shown to waive the time limit.

It has to be borne in mind that, as a matter of general law, creditors have six months in which to come forward to an executor to recover their debts from the deceased's estate. The executor has to settle those debts. After six months, once the debts are settled or there is reasonable estate to settle them, the beneficiaries begin to be entitled to be paid. Beneficiaries will be aware of that and therefore one could reasonably expect that a will would come to light, on any view, within one year of the death. There will be exceptions, but one could reasonably expect that.

It is not uncommon for individuals to seek to rearrange the inheritance in order to avoid inheritance tax. That is done by documents that are known as instruments of variation. If those are executed within two years of the death, the succession is taken from the point of view of HM Revenue and Customs to be as stated in the instrument of variation. Those instruments have to be done within two years of death. That anticipates that everyone will be aware of the will well before that time, so that they have time to arrange the instrument of variation.

The first point is that, for certainty, the period should be tied to death. Secondly, on the timescale, if we bear in mind the distress in the initial months and what have you, six months is too little, and two years seems to us to be appropriate.

The Convener: Thank you—that deals with question 5, and I think that question 6 has been exhausted, so we will move on to John Mason.

John Mason (Glasgow Shettleston) (SNP): TrustBar's written submission mentions the retrospective effect that sections 5 and 8 might have. We raised that with the Government, and its clarification is that section 5 is intended to apply only in respect of wills that are revoked after commencement and that it intends section 8 to apply to documents executed on or after commencement. Are you satisfied with that, or do you still have reservations about that?

David Bartos: That would satisfy our concerns.

Nick Holroyd: I suggest that that should be made explicit in the legislation. There is a tension in Scots law between, on the one hand, putting oneself in the armchair of the testator and thinking about what he meant when he wrote the will and, on the other hand, the principle that the will speaks from the date of death—that second principle is associated with a case called Callander's trustees.

It is critical that a retrospective effect is not intended. Although David Bartos and I have gone over the *Official Reports* of the committee, the likelihood is that those will not be available to the average practitioner, and it is very important that the legislation is explicit and user friendly.

John Mason: Do you think that the bill as it stands could be interpreted in different ways?

Nick Holroyd: It would be sensible to make it crystal clear that the provisions apply only in such and such a situation. Such things are often dealt with through transitional provisions or a raft of regulations. TrustBar suggests that the intention should be made clear in the primary legislation.

John Scott: I will take you to section 6(2) of the bill, which allows a testator to state in his or her will that section 6 should not apply. TrustBar has made a specific point relating to section 6(2), suggesting that it needs to be revised to give greater clarity about the effect of a legacy of the residue in certain circumstances.

In oral evidence to the committee, the SLC said that it was happy with the drafting of section 6(2) as it stands. Accordingly, for the benefit of the record, can you explain what your proposed changes are and why you think that they are necessary and important in practice?

David Bartos: Our proposed changes can be found on pages 8 and 9 of our submission, and they would be to insert a new subsection (3A) that states:

"Without prejudice to the generality of subsection (2), it is not to be regarded as clear from the terms of the will that the testator intended otherwise if the testator provides for a legacy of the residue of the estate to a person other than the issue of A."

The point that we were concerned with is a situation that commonly occurs in which a legacy is left to person A—this can occur with a homemade will, for example—and there is a residuary provision to person D. In that situation, a layperson might think that they want to leave a particular property to son A, but if they are not leaving it to son A, they want to leave it to "all my children", because they are leaving the residue—the whole balance—to their children.

In other words, the legacy is specific to son A; otherwise—if he pre-deceases or something—it goes to all of the children. There might be an argument that the testator has made his position clear: if son A does not get the property, everyone else does. However, it seemed to us that that argument should be eliminated.

The overall intention of section 6(2)—as I understand the policy—is that, notwithstanding the legacy to residue, there is to be inheritance by A's children, in preference to, say, A's other siblings. That is the policy, but it seems that there could be an argument over the word "clear". Our proposed amendment aims to put that argument to bed and to make it plain to any reader that a legacy of residue will not prevail over the issue of the specific legatee.

Nick Holroyd: It is worth remembering that the provision is confined to issue of the testator. If the testator leaves a legacy to his son, and there is no residue clause to complicate matters or it is left out of account, and the son died, the legacy would go to the son's child—let us say he only had one.

What concerns us is that, if the testator gives no express contemplation as to what should happen if their son A dies but there is a residue clause, that could spoil the good intentions of the bill's drafters and create a doubt whether A's children should get the money.

There is another twist, which we bring out on page 5 of our memorandum, as distinct from our submission. Although this is not a very common way of looking at things, it happens: if a testator wishes to leave as much as he can to a child, up to the point where inheritance tax would come into play, and he wants to leave the balance to someone who could benefit from reliefs, such as the spouse or a charity, that will be dealt with in the residue clause. In the situation in which the testator's son has died, it is very unlikely that the testator would have wanted everything to go into the residue clause because, ex hypothesi, the residue clause was used in a tax-relief planning context because he wanted to benefit from reliefs for the balance in favour of either the spouse or a charity.

What we are really saying is that the residue clause should be neutral and should not weigh against the testator's deceased son or daughter, so that what was destined for them can go to the grandchildren.

It is perhaps not the most exciting thing, but it could create problems. Let us imagine a solicitor reading the will and the legislation in such a case. They might think, "Ah, there is a provision that what should happen is this legacy should go to residue". We want to make it clear so that the residue clause does not displace the good intentions of the draftsmen but allows the legacy to go to the grandchildren of the testator if the child has died.

David Bartos: It is fair to say that, as advocates in practice, we are very conscious of arguments appearing on the back of certain words, where at first glance people might not have thought that such arguments would be available. We are also aware that such arguments can gain traction with courts and different views can arise. At the cost of cutting off a small line of work for us, we suggest that matters be clarified.

The Convener: We will always endorse the view that ensures that things do not finish up in courts. I have great respect for lawyers, but the less work that we as legislators can give you, the better our legislation undoubtedly will be.

I will take us on to the difficult issue of uncertainty—not in any mathematical sense. You will have heard the earlier discussion and you also raised the issue in your submission. A general point has been accepted that, where legislation talks about certainty or its absence, that may itself constitute an uncertainty. As practitioners, can you lead us to a good answer on that?

David Bartos: The word "uncertainty" is already included in the current legislation in relation to common calamity and has already given rise to litigation, most notably in the shape of a case in the mid-1970s, Lamb v the Lord Advocate. In that particular case, the judge at first instance analysed the English authorities on the use of the word "uncertainty" and found that, in the leading case in England, several different judges had expressed conflicting views as to what was or was not uncertain.

The judge of first instance then reached a particular view and the case was appealed up to the inner house of the Court of Session—the appeal court. In a nutshell, the appeal court held that uncertainty simply means that it cannot be established, on a balance of probabilities, that one person survived the other.

It seemed to us that, in the light of that case and what was observed about the word "uncertainty", the wording "established on a balance of probabilities" should be used in this new statutory provision. One should not have to go back to Lamb v the Lord Advocate in order to understand what uncertainty means.

On page 10 of our written evidence, we suggest that the provision should refer to

"circumstances where it cannot be established who survived whom".

Under that, the phrase "established" would be understood as being on the balance of probabilities. We would not have any difficulty with the words "balance of probabilities" being used, but if one "establishes" something in any civil law matter, one does so on a balance of probabilities.

That was ultimately the outcome of the Lamb case, but one had to go to the case to find it. Why should we use a word that causes issues? The point that Professor Paisley made earlier was extremely well put.

12:15

The Convener: I would like to take you back to last week's evidence from Alan Barr, who—I think in this context—said that sometimes it almost does not matter what the answer is in those common calamity situations as long as one is certain what the law is saying.

I read into his comments the idea that nobody contemplates such things and therefore what is needed is the ability to sort out the horrible mess rather than to work out what was intended. The situation was never in contemplation and nothing was therefore ever intended.

Nick Holroyd: While I am sure that there are exceptions to people's attitudes, it is probable in most cases that there is no desire that the estate should go to the Crown, hence the suggestion that TrustBar made, which has met with quite a lot of approval from some quarters.

The Convener: Perhaps the bottom line comes back to the point made earlier this morning that we should be sure that there is a human beneficiary rather than the Crown.

Would TrustBar endorse Alan Barr's comment that it really does not matter who the estate goes to because the common calamity situation was never in contemplation anyway?

David Bartos: I would, as long as the estate goes to a human.

The definition of "uncertain" is a drafting point, but what is important here are the consequences of the new rule. What we drew attention to was the difficulty with the old common law, which led to the 1964 reform that is now to be changed. The difficulty was highlighted in the Clydebank blitz case that we mentioned in our written submission.

In 1941, a husband, wife and two children died when their house was bombed, and it could not be established who survived whom. The wife owned national savings. She did not have any other blood relatives and did not leave a will. Claims to the national savings were put forward by her brothers-in-law, the husband's siblings, on the basis that they were the uncles of the children and by others, I think, on the basis that they were the sisters-in-law of the wife.

Neither of those arguments was successful before the court. The common law, which was essentially the law that is being sought to be re-established now, was that, because it could not be proved who survived whom, the property was intestate and, as no other blood relative could be identified, the property went to the Crown. The Crown actually fought the case quite hard.

It seemed to us that, although the argument for moving away from doing everything by age is a good one, we should not have to be revisited with the Clydebank blitz outcome.

John Scott: Forgive me if I have this completely wrong—I am not certain that I am even referring to the right thing—but in evidence last week was it not mentioned that Lord Wheatley had made a more recent judgment on the matter long after the Clydebank judgment?

David Bartos: Lord Wheatley was involved in the Lamb case in the mid-1970s, which looked at the principles of uncertainty. Ultimately, his opinion in the inner house was that all that has to be established for uncertainty is that it cannot be proved on a balance of probabilities that one person survived the other. That was his role.

John Scott: That would be a view that you would presumably share.

David Bartos: That would be a view that we would share, but Lord Wheatley's view should be put into statute, so that we move away from the word "uncertainty".

John Scott: Excellent—thank you.

The Convener: After a very interesting morning, we have finished the evidence session. I thank Mr Bartos, Mr Holroyd and the gathered company. If anything more occurs to any of you, possibly in the small hours of the night, you should feel free to write to us. I hope that anything that you would submit would not be too extensive, because I think that we have pretty much received all the evidence that we will be able to cope with.

David Bartos: Thank you very much for inviting us to give evidence.

Nick Holroyd: TrustBar has appreciated the opportunity to give evidence. It is committed to assisting the committee in promoting the ideas of legislation in a clear and user-friendly manner. In providing that assistance, we have tried to promote the idea of the legislation in the area of succession chiming with other areas of the law so far as that is possible.

David Bartos: I will just add a footnote. Professor Paisley mentioned donatio mortis causa; we would entirely associate ourselves with those comments.

The Convener: Thank you very much. I briefly suspend the meeting to allow the witnesses to leave us.

12:22

Meeting suspended.

12:27

On resuming—

Instruments subject to Affirmative Procedure

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Members may want to be aware that the instrument was withdrawn and subsequently relaid following correspondence with our legal adviser. Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Sea Fishing (EU Control Measures) (Scotland) Order 2015 (SSI 2015/320)

12:28

The Convener: The instrument contains an unclear provision. Article 23(1)(a) could more clearly provide that a court is not enabled to order the detention of a boat, its gear and catch for a period after the date when a fine is paid, the purpose of the detention being the recovery of the fine.

The instrument also contains a drafting error. In part 1 of the schedule, at inserted entry 1(da), column 3 of the table specifies a requirement in relation to EU fishing boats with an overall length of 10m or more, the contravention of which requirement constitutes an offence. The requirement at (b) is to submit the "landing obligation" as soon as possible, but that should refer to a "landing declaration".

Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (h), as the meaning of article 23(1)(a) could be clearer, and on the general reporting ground, as it contains a drafting error?

Members *indicated agreement.*

The Convener: Does the committee also agree to call on the Scottish Government to lay an amendment to correct those matters in due course?

Members *indicated agreement.*

Land and Buildings Transaction Tax (Open-ended Investment Companies) (Scotland) Regulations 2015 (SSI 2015/322)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Amendment Order 2015 (SSI 2015/323)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Police Pension Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/325)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Scheduled Monuments and Listed Buildings (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/328)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Private Rented Housing (Scotland) Act 2011 (Commencement No 7) Order 2015 (SSI 2015/326)

12:29

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Procurement Reform (Scotland) Act 2014 (Commencement No 1) Order 2015 (SSI 2015/331)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill: Stage 1

12:30

The Convener: Agenda item 6 is for the committee to consider the delegated powers provisions in the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill at stage 1. The committee is invited to agree the questions on the delegated powers that it wishes to raise with the member proposing the bill in written correspondence. The committee will have the opportunity to consider the responses at a meeting before the draft report is considered.

Section 2 imposes new mandatory conditions that would prohibit, in licensed premises or as part of an occasional licence, the sale of alcoholic drinks with a caffeine content in excess of such amount as may be prescribed by regulations. The bill would insert new paragraphs into the Licensing (Scotland) Act 2005 that would require the Scottish ministers to prescribe a maximum amount of caffeine in caffeinated alcoholic drinks no later than 12 months after royal assent.

The delegated powers memorandum does not explain the reasoning behind requiring the Scottish ministers to prescribe a maximum amount no later than 12 months after royal assent. Equally, the member's intentions regarding levels of caffeine, in relation to premises licences and occasional licences, are not outlined.

Does the committee agree to ask the member in charge of the bill for an explanation in relation to the powers in sections 2(3) and (4), which would insert paragraph 8A(1) of schedule 3 and paragraph 7A(1) of schedule 4 to the 2005 act? Specifically, the Scottish ministers must prescribe a maximum level of caffeine in caffeinated alcoholic drinks under those powers no later than 12 months after the date of royal assent. Do members agree to ask why that timing has been chosen as suitable? Furthermore, it appears that the powers would enable ministers to prescribe either the same or different maximum amounts for the purposes of premises licences and occasional licences under the 2005 act. Do members agree to ask why that is considered to be appropriate?

Members *indicated agreement.*

The Convener: The commencement powers provide for certain provisions listed in section 34(1) to come into force on the day after royal assent. Under section 34(2), other provisions are proposed to automatically commence 12 months after royal assent, unless ministers bring any of them into force earlier by regulation.

The commencement powers are relatively unusual as they set out when certain provisions will come into force, unless regulations are made to commence the provisions earlier. Such powers take into account that this is a member's bill rather than a Government bill.

Does the committee agree to ask the member in charge of the bill for an explanation in relation to the commencement powers in section 34? More specifically, section 34(1) lists various provisions that would come into force on the day after royal assent, and section 34(2) provides that the other provisions come into force at the end of 12 months from the day of royal assent, or on such earlier day as the Scottish ministers may by regulations appoint.

Is the committee content to seek clarification of why the various provisions listed in section 34(1) have been selected as suitable for commencement on the day after royal assent, with the other provisions coming into force by regulations; and why a timing of 12 months from royal assent has been selected as a suitable long-stop date by which the Scottish ministers must have commenced the remaining provisions?

Members *indicated agreement.*

The Convener: At this point, I will move the meeting into private.

12:33

Meeting continued in private until 13:12.

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