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Re-evaluating Family Protection in Scots Succession Law

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Abstract

The concept of ‘family protection’ in succession law has traditionally been interpreted narrowly. The term is often qualified by ‘mandatory’, characterising such protections as constraints on testamentary freedom – namely forced heirship, compulsory portion, and family provision legislation. Consequently, family protection is typically viewed as a mechanism to prevent the disinheritance of close family members.

In Scots law, ‘legal rights’ are the primary expression of family protection. They involve dividing a deceased’s net moveable estate into three parts: one third (the ‘relict’s right’) goes to the surviving spouse, another (‘legitim’) to surviving children, and the remaining third (the ‘dead’s part’) is entirely at the testator’s disposal in their will. If only a spouse or only children survive, the moveable estate is divided in two.

This thesis re-evaluates family protection in Scotland. Adopting a lineal definition of family, focusing on descendants and legitim, it seeks to complement the existing literature by asking how else family protection might be conceived, and what insights such a reconceptualisation could yield. Three central claims are advanced.

First, family protection should not be limited to preventing disinheritance. It should be understood more broadly, encompassing both individual financial provision and the preservation of the family unit itself. A broader view is necessary because limiting family protection to disinheritance overlooks other factors that may affect descendants’ interests, such as fragmentation, exclusion, or unequal treatment.

Second, and as a consequence of this broader view, this thesis shows that, over time, several rules and doctrines have been introduced into or evolved within Scots succession law in response to such factors. As a result, legitim alone does not represent the full scope of protection for descendants; a more comprehensive view must consider this wider array of mechanisms.

Third, these mechanisms must not be viewed in isolation. Instead, their interplay should be examined to foster a holistic understanding of family protection. This holistic approach uncovers novel insights into legal rights by drawing parallels between legitim and other protective principles.

To frame its analysis, this thesis employs a conceptual framework based on two interrelated principles: continuity and integrity. This offers a structured means to group and assess various protection mechanisms.

Chapter One examines continuity of the family as a social unit, focusing on mechanisms that facilitate the downward transmission of wealth and the preservation of intergenerational bonds. It explores three mechanisms: 'tailzies', which historically restricted the ability to burden and alienate heritable estates; rules permitting descendants to inherit in place of a predeceased parent; and the *conditio si testator sine liberis decesserit*, a 'presumption' that a will is revoked if it omits an after-born child.

Chapter Two focuses on preserving the integrity of family wealth. It reviews mechanisms that safeguard against interferences affecting the validity of testamentary dispositions and related transfers, as well as the 'unworthiness' of potential successors. The chapter traces the development of Scotland's forfeiture rules for unlawful killing; the now-abolished law of deathbed, which restricted dispositions of heritable property made during a granter's final illness; and facility and circumvention, which allows a will to be challenged when a testator's weakened mental state has been exploited.

By combining doctrinal and historical analysis with cross-mechanism comparisons, this thesis demonstrates that, while these mechanisms differ in form – and some are no longer in force – all have contributed, directly or indirectly, to protecting the interests of descendants. This ultimately shows that Scots succession law has historically embodied a more coherent and interconnected system of family protection than previously acknowledged.

Lay Summary

Succession law is responsible for determining what happens to a person's property after they die. This thesis examines how Scots succession law preserves the interests of the deceased's descendants, as well as the family unit as a whole, during this process.

Traditionally, the term 'family protection' has been understood primarily as a safeguard against the complete disinheritance of close relatives. In Scotland, this protection takes the form of 'legal rights'. These rights secure a fixed share of the deceased's net moveable property – that is, tangible personal assets, like money or shares, as opposed to land and buildings – for their surviving spouse and children. This thesis focuses on the legal right of children alone, known as 'legitim'.

This thesis offers a new perspective on family protection in Scots law. Rather than focusing solely on legal rights, it draws attention to a wider set of legal rules and mechanisms working in concert to keep wealth within the family across generations. These mechanisms do not simply, or only, prevent disinheritance; they also support the family's ongoing existence.

This research is structured around two key principles: continuity and integrity. Continuity refers to how the law supports the intergenerational transfer of wealth, thereby helping to maintain family identity and connections over time. Integrity relates to mechanisms that address interferences with the administration of the deceased's estate and excluding those deemed 'unworthy' of inheriting, such as individuals who have harmed the deceased.

Through a combination of doctrinal, historical, and comparative analysis, this thesis demonstrates that family protection in Scots succession law is achieved through an interconnected system of rules and doctrines, far more complex than recognised in prior scholarship.

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Introduction

Introduction and Background

The concept of 'family protection' in succession law has traditionally been understood in a narrow sense. In legal scholarship, family protection is often qualified by 'mandatory' and used to describe the rules of forced heirship, compulsory portion, and family provision legislation across various jurisdictions.[1] This characterisation views these protections as constraints on testamentary freedom[2] – legal safeguards that, while sometimes in tension with a testator's wishes, are justified on the basis of social, moral, or familial obligations.[3] As a result, family protection is frequently treated as virtually synonymous with the prevention of disinheritance of certain close family members.[4]

In Scots succession law, 'legal rights' are viewed as the primary expression of family protection.[5] These rights, a species of compulsory portion, apply to the deceased's net moveable estate and mandate its division between a surviving spouse or civil partner[6] and any surviving children.[7] The portion of the estate subject to legal rights depends on who survives the deceased. Where only one category of claimant survives, the net moveable estate is divided equally in two. Otherwise, it is divided into three parts; a surviving spouse has a claim to one-third, known as the relict's right; another third, called legitim, is reserved for the deceased's surviving children;[8] and the final third, the 'dead's part',[9] is free for a testator to dispose of in their will.[10] These rights also operate in cases of intestacy.

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[1] Reid et al, *CSL* v3.
[2] Ibid, viii.
[3] Stair, III.8.43-44.
[4] See Report on *Succession* (Scot Law Com No 124, 1990) para 3.1; Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007) Part 3; J Watson, *A Treatise on the Law of Scotland Respecting Succession, as Depending on Deeds of Settlement* (1826) 398.
[5] Meston, "Wills and Succession", para 772; G L Gretton and A J M Steven, *Property, Trusts and Succession* 5th edn (2024) para 28.7: both use "family protection" without the qualifier 'mandatory'.
[6] Hereafter, 'spouse'.
[7] Reid, "Legal Rights", 432.
[8] Similarities were noted between legitim and Roman law's *querela inofficiosi testamenti*: Stair, III.8.10-11; Digest 5.2.2 (Marcianus). See ch 2.3.1.
[9] *Balfour's Practicks*, 217.
[10] will or testament' shortened to 'will'. Reid, "Legal Rights", 418.

Legal rights, whether in the testate or intestate context, do not offer a surviving spouse or children a claim in respect of the deceased's heritable estate.[11] This limitation, coupled with an absence of anti-avoidance measures,[12] allows legal rights to be easily undermined through lifetime transfers, the creation of trusts, of the strategic conversion of moveables into heritage.[13] Consequently, much of the discourse surrounding legal rights focuses on their deficiencies, particularly their vulnerability to circumvention and their inability to function as a comprehensive safeguard for family members.[14] However, evaluating legal rights in isolation risks distorting our assessment of their effectiveness as well as the broader protection of family members within Scots succession law.

This thesis re-evaluates family protection in Scotland, exploring how the concept can be understood beyond its traditional confines. Building on and complementing existing scholarship, this thesis asks how else might family protection be conceived, and what new insights emerge from such a reconceptualisation. To this end, the thesis advances three central claims. First, family protection should be viewed more expansively than as merely the prevention of disinheritance. Limiting it to disinheritance overlooks other factors that may affect the family's interests, such as unequal provision or the risk of fragmentation of the estate. Second, as a consequence of this broader view, legal rights alone do not capture the full scope of family protection mechanisms in Scotland; a more comprehensive set of succession rules and doctrines must be considered. Third, these mechanisms should be examined not in isolation but as interconnected components within a wider system. This approach brings fresh perspectives on the operation of legal rights themselves, as parallels between these diverse principles can be drawn.

Scope of the Enquiry

[11] However, on intestacy, prior rights entitle surviving spouses to the deceased's interest in the shared dwellinghouse up to £473,000: Succession (Scotland) Act 1964, s 8(1).
[12] Reid, "Legal Rights", 439.
[13] Ibid.
[14] Though recognised as "flawed", the Scottish Government decided not to reform legal rights in 2018: Scottish Government, *Consultation on the Law of Succession* (2015) para 3.5; Consultative Memorandum on *Intestate Succession and Legal Rights* (Scot Law Com CM No 69, 1986); Scottish Government, *Response to the Consultation on the Law of Succession* (2018) para 52.

Given the limitations of space, this thesis cannot fully explore all facets of family protection in Scotland. It therefore focuses solely on descendants. While provision for surviving spouses has gained greater legal and academic attention in recent years,[15] Scots law has historically defined the family through blood relationships.[16] This was particularly evident in the Early Modern Period, when succession law was structured such that, in cases of intestacy, the deceased's property would revert to the Crown only once all biological heirs were exhausted.[17] Moreover, an emphasis on bloodline succession was strengthened by Scotland's feudal system, under which bequest of heritable property, including land and buildings, by will was prohibited.[18] Until 1868, heritable succession followed primogeniture and favoured males within a given class.[19] Therefore, an eldest son inherited his father's entire heritage as his heir-at-law.

This legally construed line of succession reflected societal expectations of what the deceased would have wanted based upon their presumed natural affections.[20] It was regarded as expressing the presumed "will of the defunct".[21] Lord Stair observed that, in the case of remoter relatives, the "Propinquity of Blood, Natural Affection, and so the presumed Will of the Defunct is diminished".[22] Scottish legal thought often intertwined biological proximity and emotional connection, treating both as factors that rose and fell together.[23] In this way, children have come to symbolise the vital link continuing and connecting the family across generations. Even in the kin-based context of clanship, where succession was closely tied to preserving the broader

[15] Spouses' entitlements have been strengthened on intestacy: Succession (Scotland) Act 1964, ss 8-9; Trusts and Succession (Scotland) Act 2024, s 77(1)(a). See also Scot Law Com No 124, 1990, para 3.20; E Clive, "Restraints on Freedom of Testation in Scottish Succession Law" in M Anderson and E Arroyo i Amayuelas (eds), *The Law of Succession: Testamentary Freedom: European Perspectives* (2011); see generally, K G C Reid et al, "Intestate Succession in Historical and Comparative Perspective" in Reid et al, *CSL* v2.
[16] See chapters on succession, heritable and moveable property in Stair Society, *An Introduction to Scottish Legal History* (1958); S Johnson, 'blood' in *A Dictionary of the English Language* (1768) unpaginated.
[17] Stair suggested that property transferred to the Crown following exclusion of the seventh heir: Stair, III.3.47.
[18] Simpson*, Legal Theory and* History, 143–62.
[19] Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict, c.101), s 20.
[20] Watson, *Treatise,* 277.
[21] Stair, III.4.2.
[22] Ibid.
[23] K Barclay, "Emotional Lineages", 91-92.

family group, there was a significant concern to secure a legitimate heir to the clan chief, line, and estate.[24]

Over time, however, this notion of family underwent significant transformation. It evolved from a structure primarily focused on economic production to one centred on emotional and domestic bonds.[25] As capitalism and industry developed, families grew more secluded, distanced from both the broader social context and their extended kin.[26] In this new configuration, the roles of men and women became more sharply defined, with women often relegated to the home as caretakers and mothers, while men assumed the role of primary breadwinners.[27] This conceptual shift marked a transition from an agrarian, kin-based family structure to one focused more on the nuclear family, which by the early twentieth century had become "embedded as a dominant narrative in the history of the family".[28]

Thus, the family has proven remarkably protean,[29] capable of taking different forms across time and space. However, for the purposes of this thesis, 'family' is defined as the descendants, or 'issue', of the deceased. While family as understood in medieval and Early Modern Scotland has changed, children have remained a core element of its social structure. It must be noted that, as the family has evolved, so too has Scots law. Once limited to protecting legitimate biological descendants, legitim now applies to a broader class of issue. Accordingly, this thesis adopts a definition that incorporates both traditional and modern conceptions. It reflects legislative changes that now include adopted and extra-marital issue.[30] This is necessary as the study spans a wide historical scope, during which the legal recognition of who qualifies as a 'child' or 'descendant' has shifted. For clarity and brevity, this definitional flexibility is acknowledged here and not reiterated in each

[24] W D H Sellar, *Pedigrees, Power and Clanship: Essays on Medieval Scotland*, by H MacQueen (2023) 63; E Ewan and J Nugent, *Finding the Family in Medieval and Early Modern Scotland* (2016) 131; R E Ommer, "Primitive accumulation and the Scottish clan in the old world and the new" (1986) 12(2) JHistGeogr 121.
[25] E Gordon, "The Family" in L Abrams et al (eds), *Gender in Scottish History since 1700* (2006) 235.
[26] Generally, Ibid.
[27] See generally, T Hareven, "The history of the family and the complexity of social change" (1991) 96(1) AmHistRev 95.
[28] Gordon, "The Family", 244.
[29] Ibid.
[30] Succession (Scotland) Act 1964, s 23 (adopted children); Law Reform (Parent and Child) Scotland Act 1986, s 1(1), as amended by the Family Law (Scotland) Act 2006, s 21 (illegitimate children).

instance. Hereafter, ‘children’, ‘descendants’, and ‘issue’ are used without repeated qualification.

Regarding what constitutes ‘protection’, the word is commonly defined as the “fact or condition of being protected”.[31] Its etymology reveals deeper nuances such as “shelter, defence or preservation from harm” alongside “guardianship” and “care”.[32] Building on this, this thesis employs a two-fold understanding of protection operating on complementary levels. At the individual level, protection ensures that immediate descendants receive some material provision from the deceased’s estate; although preventing disinheritance can form part of this, as demonstrated below, it is not the sole way protection can be achieved. At the collective level, protection preserves the family as a social and, in some cases, economic unit, by maintaining its identity over time. It encompasses both material and immaterial wealth, such as the family name or status. These definitional clarifications lay the groundwork for the analysis that follows.

Methodology

To explore the broader concept of family protection proposed in this thesis, several mechanisms are examined through internal comparison. This demonstrates that Scots succession law, through both facilitative and restrictive means, shapes property transfer in ways that protect individual family members as well as the family unit. Protection, in this sense, is not simply reactive; it also plays a constructive role.

To facilitate this analysis, the thesis adopts a primarily doctrinal methodology, engaging closely with statutes, case law, and succession law principles. The doctrinal approach, supplemented by historical and theoretical inquiry, is used to systematically analyse these primary sources, exploring their historical development and current application. In addition, the research incorporates a comparative and functional perspective, examining how various succession mechanisms operate in practice and interact. The functional element is particularly important. It allows the thesis not only to assess the roles these mechanisms play in protecting the interests

[31] Oxford English Dictionary, s.v. “protection (*n.*)” available at https://doi.org/10.1093/OED/1016529427.
[32] Ibid.

of descendants, but also how they, alongside legitim, fit within a broader network of protective principles.

To frame its analysis, the thesis develops a conceptual framework based on two interrelated principles: continuity and integrity. This framework is not intended as a definitive or exhaustive taxonomy, but rather as a heuristic tool for identifying patterns across succession mechanisms that might otherwise appear disconnected. The first principle, continuity of the family as a social unit, or 'family continuity', is grounded in the preservation the family's identity and the fostering of intergenerational bonds. These aims are supported by mechanisms that facilitate the transfer of wealth across generations. The second principle, integrity of family wealth, concerns how the law determines the 'worthiness' or 'unworthiness' of potential successors. For the purposes of this thesis, unworthiness arises where a person, whether internal or external to the deceased's family, has interfered with the deceased's testamentary intentions or caused them harm. This broadly reflects legal the idea that no one should benefit from their own wrongdoing.[33]

This conceptual framework is used to demonstrate that, despite their diversity, various mechanisms within Scots succession law are connected by their shared contribution to what this dissertation defines as 'protecting' the deceased's 'family'. However, one must also recognise that this framework does not, and cannot, impose a rigid or comprehensive order on the law. Not every doctrine fits neatly into the categories of continuity or integrity, and many serve overlapping or multiple functions. Moreover, while the two principles are distinct, they are closely intertwined: for instance, when integrity-based mechanisms redirect wealth downward as a consequence of their operation, they indirectly support the intergenerational bonds central to continuity.

This thesis does not ignore these complexities, nor does it claim that this framework fully captures the essence or purpose of each rule. Instead, it invites us to consider how these principles illuminate shared features, even where boundaries are blurred.

[33] MacLeod & Zimmermann, "Forfeiture", 765.

The framework offers one interpretive lens – provisional and flexible – through which familiar doctrines and family protection may be read in a new light.

Structure

In line with the two aspects of its conceptual framework, the thesis is divided into two parts. Chapter One concerns how Scots succession law has achieved family continuity by maintaining family identity and connections over time. It shows that Scots succession law has historically enabled such continuity, albeit in different forms depending on the social and legal context of the period. In earlier periods, for instance, continuity could be expressed through 'tailzies', which sought to prevent the fragmentation of heritable estates, often privileging the family's landed presence through one line over several branches of descendants. The chapter also examines rules that permit descendants to inherit in place of a predeceased parent. Finally, it considers the *conditio si testator sine liberis decesserit,* which presumes that a will is revoked if it omits a child born after its execution. While continuity-based mechanisms may favour a particular heir or line of descent, they collectively reflect a consistent concern with sustaining the presence of the deceased's family – or a version of it – over time.

The second chapter on integrity begins by tracing how Scotland's forfeiture rules have evolved from a perpetual disinheritance of a perpetrator of parricide and their direct descendants towards preventing that killer's descendants from being punished for their parent's actions. It then examines the now-abolished law of deathbed,[34] which limited a granter's ability to transfer heritable property during their final illness if such transfers would prejudice their heir.[35] Finally, the chapter reviews testamentary cases involving the doctrine of facility and circumvention. It highlights that these three mechanisms and the courts have shaped, and continue to influence, who is deemed worthy or unworthy to inherit in certain circumstances. Although the principle of integrity does not determine how family wealth should be preserved, it is largely maintained in ways that result in wealth remaining within the deceased's line of descent.

[34] Act to abolish Reductions *ex capite lecti* in Scotland 1871 (34 & 35 Vict, c.81).
[35] Usually the eldest son.

Ultimately, this thesis invites a step back to appreciate a bigger picture. It expands our understanding of family protection beyond legitim to reveal a plethora of devices working together or alongside one another to protect the interests of descendants. A distinctive feature of this research is its novel contribution to existing literature by exploring under-examined doctrines[36] and case law that has received limited academic attention.[37] This, in turn, allows for new insights to be drawn by placing these mechanisms, and legitim, in context. For example, while legal rights may be vulnerable to circumvention, several doctrines examined in this thesis serve to complement and strengthen family protection in ways not always recognised in prior literature. It is therefore hoped that this re-evaluation inspires further research into how Scots succession law safeguards other family members and in what additional ways protection might be conceptualised.

[36] e.g. tailzies and deathbed; chs 1.2 and 2.3.
[37] e.g. deathbed and facility and circumvention; chs 2.3-2.4.

Chapter One: Family Continuity

1.1 Introduction

In her paper on intergenerational bonds and inheritance, Shelly Kreiczer-Levy argues that succession "is an institution that creates and maintains continuity through property".[38] She conceptualises continuity generally as operating on two interconnected levels: it enables the giver to extend their sense of self beyond death and allows the recipient to establish roots.[39] When considering continuity of the family as a social unit, property, as a personal and social symbol, is the crucial medium that binds generations.[40] This chapter argues that recognising continuity's role in succession law allows legitim to be understood not as a self-standing right, but as part of a broader system of protective mechanisms. By keeping wealth within the family, continuity mechanisms help mitigate the risk of social isolation of descendants across generations. The chapter focuses on the tension between the will of the deceased – the giver – and the interests of their descendants – the recipients – in terms of their sense of belonging to the family. Building on Kreiczer-Levy's framework, it explores how three continuity mechanisms both past and present have facilitated or restricted the giver's intentions to recognise the recipient's position.

To understand how legitim fits into this framework, one must recognise that legal rights establish a relationship between the deceased and those entitled to a share of their estate. Legitim positions children as family members whose interests in continuity are, at least in a testate context, acknowledged through limiting the giver's testamentary freedom. Furthermore, "because property holds the potential to create identity, ties, and continuity, the receiver develops expectations".[41] Disinheritance challenges these expectations. It represents the loss of property and communicates a powerful symbolic message of exclusion from the family.[42] A disinherited child's

[38] Kreiczer-Levy, "Intergenerational bonds", 498.
[39] Ibid, 502.
[40] S Kreiczer-Levy, "Property's immortality" (2016) 23(1) *Cardozo JL and Gender* 107 at 135, 144; S Kreiczer-Levy, "Big data and the modern family" (2018) 2019(2) WiscLawRev 349 at 365-367.
[41] Kreiczer-Levy, "Intergenerational bonds", 505.
[42] Ibid; Barclay, "Emotional Lineages", 88-89.

connection is thereby severed, disrupting the intergenerational bonds essential to their rootedness within the family. This disruption is especially significant given that the accepted historical foundation of legal rights rests on the deceased's "natural obligation"[43] – or moral duty – to provide for their closest relations, based on "natural affection".[44] Legitim also embodies family solidarity, underpinned by the belief that family property should descend.[45] By regulating the deceased's testamentary choices, legitim ensures continuity and the protection of descendants, both materially and symbolically, through recognising their place within the family.

There are several mechanisms within Scots succession law that relate to continuity.[46] However, to narrow its scope, this chapter examines how continuity and protection have been embodied over time through the now-abolished law of tailzies, rules allowing children to step into their deceased parent's shoes, and the *conditio si testator sine liberis decesserit*. It must be said that these mechanisms are inherently different in nature and operation, and thus their comparability may not appear self-evident. Representation, for instance, arises by operation of law, while tailzies were voluntarily created by entailers to concentrate heritable succession within a particular line. Although tailzies were not forced upon the entailer, they would nevertheless restrict the freedom of successors. These mechanisms all place some constraint on the wishes of present or future deceased persons in the interest of preserving family identity and connections. Moreover, by tracing their development we can observe how the concept of family continuity has evolved. What began as an effort to preserve estates in perpetuity has given way to a focus on each generation and their immediate successors. As such, this chapter demonstrates that Scots succession law, whether through consolidated or fragmented inheritance, has continually adapted to sustain the family as a lasting social institution.

[43] Stair, III.4.2.
[44] Watson, *Treatise*, 277.
[45] Erskine, *Institute* III.9.15; Report on *Succession* (Scot Law Com No 215, 2009) para 3.22; Reid, "Legal Rights", 443.
[46] e.g. common calamity rules redirect wealth downwards in cases involving parents: Succession (Scotland) Act 2019, s 9.

1.2 Tailzies of Heritable Property

In Scots law, 'tailzies' historically secured landed estates within a single line of descent,[47] thereby facilitating family continuity. Deriving from the Norman French word for cut, 'tailzie' shares its roots with its English equivalent, the 'entail'.[48] The medieval Latin expression *feudum talliatum* described a feu granted to a vassal with a predetermined set of heirs – effectively 'cutting off' the normal line of succession.[49] Strict tailzies enabled primarily aristocratic families to retain their name and status across generations, effectually barring succeeding heirs "from granting gratuitous deeds to the prejudice of the substitutes who are to succeed after them".[50] While primogeniture laid a foundation for lineal succession, tailzies provided a means of instituting a different series of heirs to preserve family identity and prevent fragmentation.[51] Their analysis offers a valuable historical lens through which to understand how family continuity was conceived and achieved in an earlier period, and how such approaches have shifted over time. This supports the thesis that the protection of descendants in Scots succession law has been pursued beyond legitim alone.

1.2.1 The Origins of Tailzies

The origins of tailzies can be traced to the feudal landholdings and inheritance customs that shaped property transmission throughout medieval Europe.[52] In Scotland, the use of testaments was confined to moveable property until 1868.[53] Land, or heritable property, was held on feudal tenure.[54] By primogeniture, the

[47] Barclay, *Digest*, 986-987.
[48] Craig, *Jus Feudale*, II.16.2.
[49] Ibid.
[50] Erskine, *Institute* III.8.23.
[51] McLaren, *Wills and Succession,* para 882; Hope, *Minor Practicks,* para 357; Mackenzie, "A Treatise on Tailies" in *Mackenzie's Works,* 491.
[52] See "Landlords" in K M Brown, *Noble Society in Scotland: Wealth, Family and Culture, from Reformation to Revolution* (2000); C Kidd, "Feudal law: a partially neglected theme in post-medieval political thought?" (2025) *History of European Ideas* 1.
[53] (31 & 32 Vict, c.101), s 20.
[54] For more details, see R Campbell, "On land tenure in Scotland and England" (1885) 1(2) LQR 175.

deceased's eldest son or his descendants inherited the land as the deceased's heir-at-law.[55] Fundamentally, this system served to maintain heritage within a single family line rather than partitioning it among numerous heirs. However, primogeniture alone could not guarantee absolute security against potential loss or mismanagement of these lands. For example, not only were there existential threats such as "the hazards of war [and] economic crises", but also "dissipation by spendthrift and reckless heirs."[56]

As written documents gained prominence in Scottish legal practice during the 1100s-1300s, charters provided formal channels for landholders – primarily members of the aristocracy – to express and implement their intentions for the future of family estates family estates.[57] It was within this context that tailzied succession began to emerge as a practical solution to primogeniture's limitations. As the historian Cynthia Neville observes, medieval Scottish families often measured their success by how consistently, and ideally increasingly, their estates passed down the generations.[58] Therefore, continuity of the family was not just economic, but deeply tied to identity and prestige.[59]

Though landholders could not freely dispose of land by will, charters allowed them to manage inheritance within the feudal framework by specifying conditions for succession or outlining contingency plans, for instance, should the primary heir die childless or otherwise prove hopeless.[60] The earliest tailzies, as explained by Thomas Craig, were strictly feudal arrangements.[61] They were created by agreement between the granter of the tailzie, the feudal superior, and the grantee.[62] These arrangements therefore served not only to maintain the continuity of the family by

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[55] Stair, III.4.22-23.
[56] R Poertner, "Family Fortunes", 25.
[57] P Irvine, *Considerations on the Inexpediency of the Law of Entail in Scotland* 2nd edn (1827) 32-34; D M Walker, *A Legal History of Scotland* vol 2: the later middle ages (1990) 634-637.
[58] C Neville, "Finding the Family in the Charters of Medieval Scotland, 1150-1350" in E Ewan and J Nugent (eds), *Finding the Family in Medieval and Early Modern Scotland* (2016) 12.
[59] See the later publication, J Dalrymple, *Considerations Upon the Policy of Entails in Britain; Occasioned by a Scheme to Apply for a Statute to Let the Entails of Scotland Die out, on the Demise of the Possessors and Heirs Now Existing* (1764).
[60] See the discussion in Neville, "Charters", 18-20.
[61] Ibid.
[62] In some cases, the granter was also the grantee.

preserving its identity, but also to control and direct the transfer of heritable property rather than leaving it to primogeniture alone.[63]

From a more modern perspective, keeping estates within a single line to protect the family and its descendants may appear counterintuitive. In cases where the deceased had multiple children, only one would receive the heritage, likely leaving the others with a much smaller share of the estate. This highlights the need to explore the concepts of family and identity in pre-modern Scotland, particularly before tailzies were formally integrated into succession law. In this respect, for Scottish aristocratic families, the attention they gave to preserving and calculating their social standing suggests they did not see themselves as a unified class.[64] Instead, they derived their primary identity from their family – those sharing their name and bloodline.[65] The aristocracy's actions in politics, business, and courtly life were motivated by a desire to elevate and protect their family name.[66]

In this sense, the emphasis on lineage, name, and male-preference succession was a reflection of this focus, as individual identity was often subordinated to the greater identity of the family and estate. Here we see how family continuity was achieved through tailzies in a way that primogeniture alone could not. As the next chapter shows, if the eldest son died before his landowning father, his descendants would inherit instead.[67] In fact, all his issue – no matter how distant – would "be the heir-at-law in preference to any second son or daughter of the deceased".[68] Importantly, as male-preference applied only within a particular class, if the predeceasing eldest son's issue were all female, they ranked before younger sons. In such cases, daughters inherited jointly as heirs portioners, or a "collective heir-at-law".

A distinction was also made between type inherited and acquired wealth, which informed difference views on how such property should be passed on.[69] As Samuel

[63] McLaren, *Wills and Succession,* para 882; on evading deathbed see, Bankton, *Institute* III.4.4.
[64] K Barclay, *Love, Intimacy, and Power: Marriage and Patriarchy in Scotland, 1650-1850* (2011) 17.
[65] Barclay, "Emotional Lineages", 84-85.
[66] See generally, J Taylor, *The Great Historic Families of Scotland* (1887).
[67] Ch 1.3.1.
[68] M C Meston, "Representation in succession" (1995) 1 SLPQ 83 at 87.
[69] This position was also presented in *Regiam Majestatem,* II, 18-20; Neville, "Charters", 19. See generally J Hajnal, "Two kinds of preindustrial household formation system" (1982) 8(3) *Population and Development Review* 229.

Johnson once quipped, [a]n ancient estate should always go to males," [70] dismissing the idea that it might pass to a daughter's husband – a "stranger". In contrast, newly acquired wealth was seen as less symbolically significant and could, he remarked wryly, be left "to the dog Towser." A common form of tailzie of might have involved a landowner arranging to exclude female heirs from inheriting.[71] His feudal lord would have regranted the land under a new title "to him and his heirs-male, whom failing, to his heirs whatsoever."[72] This shows how inheritance rules were manipulated to preserve male-bloodline succession and family prestige. Tailzies provided a means of addressing fears not only that family wealth might be lost by a reckless heir frittering it away, but also to another family through marriage.

Thus, across medieval Europe, especially Scotland, the central importance of landownership to the nobility was a given.[73] Careful management of estates was critical to the family's 'immaterial' wealth – that is, the identity shaped by the family's social, political, and emotional lives.[74] We have seen that maintaining both family wealth and reputation relied heavily on keeping patrimony intact over generations.[75] Such practices helped reinforce the notion that the family was a lasting, almost corporate entity.[76] In this sense, tailzies can be viewed as having constituted a mechanism of family protection, so long as 'family' and 'identity' are understood in this particular way.

At the close of the sixteenth century, however, establishing a tailzie required explicit approval from one's feudal superior.[77] Similarly, once created, a tailzie could only be dissolved with that same superior's consent, typically through resigning and receiving the land again under new terms.[78] Initially, the designated 'heir of tailzie'

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[70] J Boswell, *Boswell's Life of Johnson,* by G B N Hill (1887) 261.
[71] Kotlyar, "Succession", 187.
[72] Ibid.
[73] Neville, "Charters", 19.
[74] Ibid; This was largely true of continental Europe: R E Giesey, "Rules of inheritance and strategies of mobility in prerevolutionary France" (1977) 82(2) AmHistRev 271.
[75] Neville, "Charters", 12.
[76] R Saville, "Intellectual Capital in Pre-1707 Scotland" in *The Union of 1707: New Dimensions: Scottish Historical Review Supplementary Issue* (2008).
[77] A Borthwick and H MacQueen, "Law Tenure and Douglas Lordship: A Fifteenth-Century Case Study" in S Boardman and D Ditchburn (eds), *Kingship, Lordship and Sanctity in Medieval Britain: Essays in Honour of Alexander Grant* (2022) 178-179.
[78] Kotlyar, "Succession", 187; Sandford, *Treatise,* 33.

had no enforceable rights, only a hopeful expectation of inheritance.[79] Still, landowners often bypassed the need for the superior's approval by including a legal obligation for the granter to execute the tailzie in the grantee's favour. The grantee could then take legal action to enforce this, regardless of the superior's stance.[80]

By the middle of the following century, court decisions had evolved to favour the granter's autonomy.[81] It was accepted that granters could unilaterally cancel or change the tailzie, or even impose debts on the estate, without the feudal superior's consent.[82] However, strict tailzies provided much stronger protection for the family's land, status and name, and thus ensured continuity.[83] The following, section therefore, discusses the Entail Act 1685[84] which permitted the creation of strict tailzies protected by 'clauses irritant and resolutive.'

1.2.2 Towards the Entail Act 1685: 1662-1685

This period from 1662 to 1685 marked a decisive shift in the succession to heritable property in Scotland.[85] Both the successes and shortcomings of the feudal aristocracy's earlier practices gave way to a legal framework that further entrenched notions of continuity and family protection in the very fabric of Scots succession law. Landholders sought to create "strict or unbarrable" tailzies through the introduction of irritant and resolutive clauses.[86] These clauses prohibited an heir-in-possession and heirs of tailzie from altering the line of succession, selling, alienating, or burdening the estate with debt.[87] The irritant clause served to annul any actions that violated the terms of the tailzie, while the resolutive clause specified that such violations would result in the forfeiture of the heir's rights to the estate.[88] The enforceability of

[79] '*spes successionis'*.
[80] Kotlyar, "Succession"*,* 187.
[81] *Fairly v Heirs of Blair* (1611) Mor. 2749; *Calderwood v Pringle* (1664) Mor. 3036.
[82] Ibid.
[83] Poertner, "Family Fortunes", 39-40.
[84] Act concerning tailzies (*RPS*, 1685/4/49).
[85] Simpson, *Legal Theory and History*, 150.
[86] Sandford, *Treatise,* 33-42.
[87] See *Edinburgh magazine and literary miscellany* vol 15 (1824) 1-11.
[88] P Shaw and A Dunlop, *Cases decided in the Court of Session from 1826 to 1827* vol v (1827) 452-454.

these clauses was first tested in the 1662 *Stormont* case, which dealt with an early example of a strict tailzie.[89] The ruling set a precedent that clauses "prohibiting the contracting of debts, and irritating the contravener's rights, are effectual against creditors",[90] marking the emergence of the perpetual, unbarrable tailzie in Scots law.

In 1677, the case of *Stevenson v Stevenson and Muirhead*[91] demonstrated a clear connection between tailzies and continuity of the family as a social unit during this period. John Stevenson tailzied his estate to his daughters successive on the condition that the eldest marry a man who would assume the family name and arms. When she failed to do so, her younger sister succeeded, despite the absence of an irritant clause. The Court of Session saw the assumption of name and arms as equivalent to "preserving the family"[92] effectively fulfilling the purpose of an irritant clause. This supports the contention that, even in their earlier stages, tailzies were designed to ensure the family's continued existence, not just in an economic sense but also with regards to family identity. Thus, John Stevenson was not merely a landholder but a custodian of his lineage, having inherited land with the intention of passing it on intact to his descendants. By structuring succession in this way, the tailzie functioned as a mechanism of continuity. It bound future generations to their predecessors and maintained the power and prestige associated with the Stevenson name.[93] As A.W.B Simpson reflects, the core ideology underpinning tailzies was that:

> […] family lands, particularly inherited lands, belong ultimately to the family, not to the individuals who comprise the family at a particular time; ideally, the family ought to be as enduring an institution as the land upon which it lives. Given this notion, no individual ought, for his own selfish purposes, or through his own follies, to be able to expropriate what was not, ethically, his.[94]

[89] *Viscount of Stormont v Creditors of Earl of Annandale* (1662) Mor. 15475.
[90] Ibid; Stair, II.3.58.
[91] *Stevenson v Stevenson & Muirhead* (1677) Mor. 15475.
[92] Ibid.
[93] See also, C Agnew and G Black, "The significance of status and genetics in succession to titles, honours, dignities and coats of arms: making the case for reform" (2018) 77(2) CambLJ 321.
[94] Simpson, *Legal Theory and History*, 161. This is, of course, different from a nuclear understanding of family.

Through its formal recognition of strict tailzies, the 1685 Act reinforced the idea that estates should be safeguarded from dissipation across generations. By prohibiting the sale of the land or disponing of any part thereof, the contraction of debt, and the frustration or interruption of the succession, as established by the entailer, the 1685 Act reaffirmed the prevailing notion of property, particularly land, as a social institution essential to preserving family identity and connections.[95] For a tailzie to be valid and enforceable under the Act, its prohibitions had to be fenced by both irritant and resolutive clauses.[96] Moreover, and also for the benefit of protecting creditors and potential buyers from fraud,[97] tailzies were also subject to a duty of registration. If both conditions were satisfied, the 1685 Act solidified the position that the tailzie would be real and effectual not just against contravening heirs, but also creditors, purchasers, and other third parties.[98]

At this juncture, we can see how the practical effects of strict tailzies responded to aristocratic concerns, particularly the risk of family wealth being squandered by profligate heirs.[99] The 1685 Act effectively curtailed such financial irresponsibility as an heir-in-possession of a tailzie could be subject to several strict prohibitions. Altering the line of succession in favour of another child did not frustrate or interrupt succession but was rather a legitimate redirection. If, for instance, a father regarded his eldest son as particularly improvident,[100] he could simply execute a deed of tailzie in favour of a more responsible younger son. While many landowners were content with the default rules of primogeniture, tailzies gave them the means to formalise their preferences when choosing to alter the line of succession.[101] It was this ability to shape inheritance based on concerns about an heir's competence or financial stability that was central to the protective role tailzies played. Though they could certainly be used to divert inheritance to a different line, such as a collateral branch, tailzies appear to have primarily operated as instruments imposing strict safeguards over heritable succession and family continuity through lineal descent.[102]

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[95] *Lord Strathnaver v Duke of Douglas* (1728) Mor. 15373.
[96] Shaw & Dunlop, *Cases,* 452-454.
[97] Operating both prospectively and retrospectively: Poertner, "Family Fortunes", 25.
[98] J Rankine, *The Law of Land-ownership in Scotland* (1884) 882.
[99] Ibid.
[100] Poertner, "Family Fortunes", 26.
[101] Reid, "Legal Rights", 421.
[102] As "a natural adjunct of the feudal system": A M Bell, *Lectures on Conveyancing* 3rd edn, vol 2 (1882) 1026.

Also linked to responsibility was the ability for the entailer's family as a whole to be protected. Under the terms of the 1685 Act, consolidation of the estate in a single heir came at a cost to the material protection of other family members, namely the entailer's other children. The estate essentially became legally 'locked', meaning the heir of tailzie could make no changes, burdens, or provisions on the land unless expressly permitted in the original deed of tailzie.[103] Importantly, though, the entailer, in this case a father, could include specific clauses in the original deed, allowing the heir, his eldest son, to raise money or grant portions to younger children or widows.[104] These provisions, when included, had to be precisely defined and legally bounded within the deed, and once set, could not be modified by future heirs.[105] This structure encouraged early foresight and careful estate planning by the entailer, and arguably promoted a culture of financial prudence and responsibility, as later heirs, unable to rely on the estate to support their dependents, were incentivised to save from income rather than burden the land.[106] As such, the fault for inadequate provision to younger children would rest entirely upon their father.[107]

In addition to shaping the actions of heirs-in-possession, the 1685 Act provided statutory protection for preserving the family's heritable estate. Any deed that violated the tailzie, such as a sale or incurring debt, was automatically rendered null and void.[108] Beyond this automatic protection, the Act empowered successive heirs by allowing the next heir of tailzie to raise a declarator to have the contravention formally recognised and declared by the courts.[109] If successful, the next heir did not have to inherit through the contravening heir, instead, they could "serve themselves heir" directly to the last legitimate heir of tailzie.[110] In practice, this action was shown to apply regardless of the substitute's remoteness or likelihood of ever succeeding to the tailzied estate.[111] Thus, the 1685 Act evidently recognised that every heir of

[103] Sandford, *Treatise,* 376.
[104] *Lockhart v Lockharts* (1761) Mor. 12345.
[105] Erskine, *Institute* III.8.30; *Borthwick v Borthwick* (1730) Mor. 15556.
[106] McCulloch, *Treatise,* 73-74.
[107] Ibid, 74.
[108] (*RPS*, 1685/4/49).
[109] Sandford, *Treatise,* 442.
[110] *George Turnbull, W.S. v Richard Hay Newton,* 29th June 1836, No. 301.
[111] Sandford, *Treatise*, 244-246; reaching the 25th substitute in *Dundas v Murray* (1794) Mor. 15430.

tailzie, whether a child or great-grandchild, had a stake in family continuity. By equipping future heirs with enforcement powers, the 1685 Act ensured that they were not merely passive beneficiaries, fostering a sense of intergenerational belonging that connected aristocratic families to their ancestors and future generations.

The reciprocal assistance provided by clauses irritant and resolutive align with this chapter's broader argument that continuity is not simply an incidental feature of succession law but has always been a fundamental element of family protection. In this way, tailzies functioned not merely as instruments of control but as protective mechanisms that prevented, in respect of its name and identity, the 'family' itself from dissolving. Tailzies ensured that each generation remained linked to the one before it, and that each generation also felt responsible for preserving both the family's material and immaterial wealth over time.

2.2.3 Interaction Between Tailzies and Legitim

When the Entail Act 1685 came into effect, a child's entitlement to legitim was already a well-established feature of Scots succession law.[112] It is therefore crucial to understand how these mechanisms operated not merely in isolation, but as part of a broader framework aimed at maintaining continuity of the family. We have established that family identity during this period was closely tied to landholding and lineage; preserving heritage in a single line of descent was a way of maintaining that identity across generations. However, when tailzies are viewed alongside legitim, what emerges is a fuller picture of how identity was made meaningful by guaranteeing children beyond the heir of tailzie had a place within the family. While these mechanisms differed both in their form and the species of property to which they applied, together they reflected what it meant to preserve family identity during this period.

[112] *Balfour's Practicks*, 217; Stair, I.1.16.

At first glance, the strict application of tailzies may make it difficult to see how this preserved continuity of the family beyond one particular line of the entailer's issue.[113] However, the previous discussion showed that while tailzies privileged a single heir among the deceased's children, the entailer could take steps to ensure their eldest son provided for his siblings.[114] Nonetheless, concentrating land in one heir's hands could leave other descendants with little or nothing in terms of succession to 'family' wealth. In this respect, legitim ensured all children a share of their father's net moveable estate. While the interest in the heritage remained with one child, legitim ensured younger children received some financial provision, provided the deceased had not circumvented legal rights.[115] The important thing is that tailzies and legitim were not mutually exclusive but interacting mechanisms within a network of protective principles. This supported the overall continuity of the family beyond the preservation of the heritable estate itself.

In most cases, the value of an aristocratic family's heritage was likely to have been considerably greater than their movables.[116] However, in the rare case where the moveable funds exceeded the heritage, only the heir of tailzie to the estate would face a decision: to be excluded from a share in the moveables or to be subject to a "kind of *collatio bonorum*".[117] As set out in the 1836 case of *Anstruther v Anstruther*,[118] collation would require the heir to throw the value of his life interest in the tailzied estate into the "common stock".[119] This common stock would be equally divided amongst all the deceased's children.[120] However, it appears that this rarely occurred in practice,[121] likely because most heirs would have had to sacrifice a substantial landed estate. Even where the heritage was smaller, however, the heir in

[113] In the absence of a tailzie, the heir-at-law was often expected to support his younger siblings through aliment, assist his brothers start their careers, and improve his sisters' marriage prospects: D M Walker, *A Legal History of Scotland* vol 1: the beginning to 1286 (1988) 663-669.
[114] McCulloch, *Treatise*, 73-74
[115] Reid, "Legal Rights", 438-440.
[116] Barclay, *Digest*, 989
[117] Stair, III.8.48; *Murray v Murray* (1678) Mor. 2372.
[118] *Anstruther v Anstruther* (1836) 2 S. & M. 369.
[119] P H Cameron, *Brief Summary of the Law of Intestate Succession in Scotland* (1870), 26-27. This was borrowed from Roman law: Erskine, *Institute* III.9.24.
[120] Bell, *Principles,* §1912. Before the Intestate Moveable Succession (Scotland) Act 1855 (18 & 19 Vict, c.23), the heir had to be "next of kin" to collate.
[121] A McNeil, *Wills and Succession* (1896) 37-38; Reid, "Intestate Succession in Scotland", 373.

possession of the tailzied estate was still entitled to income, such as annual rents,[122] likely making it a more financially attractive option than claiming legitim.[123]

The combined operation of tailzies and legitim illustrates a more layered approach to family protection. At a time when social mobility was limited, preservation of the family estate was often a way to advance the family's future, overcoming personal limitations and focusing on the family line.[124] The heritable estate, by remaining concentrated in one line, prevented the family's name, status, and visibility within the social order from being put at risk – the very elements that made the family recognisable as social unit. In this context, legitim complemented tailzies, by maintaining intergenerational bonds. This ensured that the broader group of children remained connected, not to the estate, but to the family it represented. Provision through the moveable estate allowed younger children to share, in some form, in the benefits of descent from the family.

Ultimately, tailzies and legitim operated in tandem to ensure that preventing fragmentation or dissipation did not come at the expense of other descendants' ability to participate in succession. Without the family identity secured by preserving the heritable estate, there would have been little for descendants to remain connected to. However, without some ongoing provision to other children, that continuity would risk becoming disconnected from the very people the 'family', understood in this particular way, represented. This allows us to see the two mechanisms as having operated alongside one another within a system of family protection. The interdependence of tailzies and legitim historically embraced an approach to family protection which recognised both the importance of preserving identity and connections, and also the necessity that, for the family to endure as a social institution, its core estate had to be concentrated.

[122] G H Crichton, "Introduction to registration of titles to land in Scotland" (1922) 38(4) LQR 469 at 471.
[123] The heir's ability to collate may be excluded in the deceased's will: Bell, *Principles*, §1911.
[124] R A Houston and I D Whyte, "Population Mobility in Early Modern Scotland" in *Scottish Society, 1500-1800* (1989) 37-58.

2.2.4 The Decline of Scottish Tailzies

During the period of 1770-2004, the decline of tailzie law in Scotland was driven by significant legislative changes that mirrored broader shifts in society, economics, and legal thinking. For example, thinkers like T.B Goodspeed criticised tailzies as economically inefficient, arguing they prevented land from being used for its most productive purposes.[125] With the rise of economic individualism, the expansion of capital markets, and changing views on land ownership, the rigid system of tailzies became increasingly unsuitable for modern needs.[126] The erosion of strict tailzie provisions, however, should not be seen as abandoning family protection; rather, it represented a shift in how that protection was understood and achieved.[127]

The first, and rather modest, milestone in this transformation was the Montgomery Act of 1770. The law permitted heirs in possession to encumber the estate with debt for specific improvements.[128] This allowed heirs in possession to become "creditors of succeeding heirs to the extent of three-fourths of their outlay, and this [may have been] charged on the estate to the extent of four years' rent".[129] Although this weakened the traditional structure of tailzies, it also had beneficial effects. It enabled investment in agricultural improvements and infrastructure, thereby ensuring the estate remained viable and economically productive.[130] The 1770 Act, therefore, redefined the protection afforded by tailzies. Instead of freezing estates in time, it allowed heirs to adapt to new economic realities ensure the long-term viability of the estate and, as explored in more detail below, guarantee continuity in a new sense.

In eighteenth- and nineteenth-century Scotland, the shift from extended kin-based networks to a more nuclear model of family was closely tied to the decline of tailzies. As the "social legitimacy of aristocratic paternalism" eroded, so too did the broader

[125] T B Goodspeed, *Legislating Instability: Adam Smith, Free Banking, and the Financial Crisis of 1772* (2016).
[126] See generally, Poertner, "Family Fortunes".
[127] This reform would not "greatly affect the ownership of land… but [remedy] the inconveniences which they were found to occasion": L McLaren, "The decline of entail law in Scotland" (1894) 19(4) LawMag&LawRev 299 at 299.
[128] (10 Geo III, c.51), s 9.
[129] McLaren, "Decline", 302
[130] T C Smout, "A new look at the Scottish improvers" (2012) 91(1) ScotHistRev 125.

network of individuals that had once underpinned aristocratic family structures.[131] Landowners, therefore, increasingly lost both the social authority and the legal tools to bind families and tenants into long-term networks of obligation and dependence.[132] This weakening of paternalistic ties was compounded by the growing authority of the modern state, the spread of Protestant values that emphasized individual moral responsibility,[133] and the decline in the traditional mechanisms of community regulation.

Initially, the nuclear family that emerged was highly patriarchal, reinforcing the authority of the male head within a more insular household.[134] Yet over time, this structure gave way to "affective individualism" – where family ties were shaped more by personal and emotional relationships.[135] Industrialisation further accelerated these changes by disrupting the economic interdependence of the extended family. As young people gained wages and mobility, parental and elder control weakened, especially over marriage, work, and residence.[136] The shift from 'male head of household' in the earlier nuclear family model to 'male breadwinner' marked a move toward economic authority based on earning and provision. By the nineteenth century, especially among the aristocracy, this male breadwinner ideal had largely replaced the earlier emphasis on patriarchal control linked to land, lineage, and legacy.[137] This transformation, by changing the foundation of family authority, fundamentally weakened the basis on which tailzies had provided continuity and family protection.

As such, while provisions to younger children could previously be made only if expressly authorised by the entailer in the deed of entail, the Aberdeen Act of 1824 enabled heirs themselves to grant such provisions in the absence of such authority.[138] The 1824 Act allowed for payments that did not affect the entailed fee,

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[131] Barclay, *Love, Intimacy and Power,* 2.
[132] L Stone, *The Family, Sex and Marriage in England 1500—1800* (1977).
[133] T C Smout, *A History of the Scottish People, 1560-1830* (1985*).*
[134] Barclay, *Love, Intimacy, Power,* 2-3.
[135] Ibid; on individualism, see D Wahrman, *The Making of the Modern Self: Identity and Culture in Eighteenth-Century England* (2006).
[136] E Shorter, *The Making of the Modern Family* (1976) 255-269.
[137] Barclay, "Emotional Lineages".
[138] (5 Geo IV, c. 87).

that is, the capital of the estate which had to pass to the next heir, amounting to up to a maximum of three years' free rent for three or more children.[139] This broadened the scope of family protection, that being the heir in possession's nuclear family as well as the family understood across several generations. A more substantial development came with the Rutherfurd Act of 1848 which granted heirs the power to disentail.[140] This permitted heirs in possession to sell, alienate, or encumber the estate with debt, provided they obtained the necessary consents.[141] Continuity was thus reimagined not as the rigid preservation of land in perpetuity, but as the capacity of each heir in possession to manage and adapt inherited property in ways that protected their own household group.[142] The Acts of 1824 and 1848 recognised that overly restrictive tailzies could, in fact, undermine this goal, particularly when estates became economically unviable under outdated landholding practices.[143]

By the late nineteenth and early twentieth centuries, the legislative dismantling of tailzies was largely complete. The Entail (Scotland) Act of 1914 prohibited the creation of new strict tailzies, although the Act of 1685 was not repealed until 2004.[144] By then, the concept of family continuity had evolved. It shifted from preserving estates in perpetuity down one indefinite, unending lineage, to focusing each generation and their immediate successors. Accordingly, the decline of tailzie law by no means suggested that family protection was unimportant.[145] Rather, it was part of a deeper transformation of how family, property, and responsibility were understood in Modern Scotland.

1.3 Stepping into A Deceased Parent's Shoes

So far we have seen that tailzies provided individuals with a means to concentrate their heritable estate and protect it from dissipation, thus ensuring continuity of the family within a single line of descent. The analysis now turns to default provisions of

[139] McLaren, "Decline", 303-304.
[140] (11 & 12 Vict, c.36).
[141] McLaren, "Decline", 304.
[142] Barclay, *Love, Intimacy, and Power,* 9.
[143] Kidd, "Feudal Law", 8.
[144] Abolition of Feudal Tenure etc. (Scotland) Act 2000 came into force on 28/11/2004.
[145] For further details, see K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003).

similar effect. In instances where a child has predeceased their parent, Scots succession law allows that child's issue to step into their shoes and inherit from their grandparent, or remoter ascendant's, estate.[146] This section explores how continuity understood in this context has been achieved through two mechanisms. It first focuses on representation, examining the application of such rules in heritable succession and succession to the dead's part 1964, and then in respect of legitim. Next, it turns solely to the testate context, tracing the historical development and modern statutory replacement of the *conditio si institutus sine liberis decesserit.*

Working directly with or alongside legitim, both mechanisms prevent wealth from being diverted outside the deceased's lines of descent. This helps maintain intergenerational bonds that might otherwise be broken by the absence of a link in this chain.[147] In doing so, these rules align closely with this thesis' understanding of family protection, maintaining family continuity by preserving relational connections through property across generations.

1.3.1 Heritable and Moveable Succession: Pre-1964

While this thesis primarily associates family protection with mechanisms in the context of testate succession, the rules of representation in Scots law operate more broadly and, historically, find their strongest expression in intestacy. Because heritable property could not be freely bequeathed until 1868, a full understanding of representation requires close attention to how succession occurred when no will could be made. Until the reforms of the Succession (Scotland) Act 1964, intestate succession operated under two distinct regimes: one for heritable property and one for moveable property.[148] These reflected different legal and social conceptions of property and family. As previously discussed regarding tailzies, heritable property was historically tied to the continuity of aristocratic families – their identity, name, and

[146] Scot Law Com No 124, 1990, para 4.57.
[147] Kreiczer-Levy, "Intergenerational bonds", 536.
[148] Stair, III.4.23.

social standing – whereas moveable property was considered more divisible and less connected to familial permanence.[149]

Representation in Scots law first emerged in the context of heritable succession. Its durability is evident as early as the Great Cause of 1290-1292, where the maxim "the heir of the heir is the heir of the defunct"[150] provided formal recognition of the principle. By the time of the institutional writers in the seventeenth century, this had become firmly embedded in legal thought. Stair, for instance, asserted that "while there are any Descendants, there is place for no other."[151] Thus, in accordance with the principles of primogeniture, intestate heritable succession, and family protection in respect of such property, was shaped by a common law rule of infinite representation.[152]

Where there was no tailzie in place, under primogeniture, heritable property passed automatically to the deceased's eldest son – the heir-at-law – and if he predeceased his parent but left children, the deceased's grandchildren would inherit by representation, effectively stepping into their parent's place. Even daughters of a deceased eldest son could inherit equally as heirs-portioners ahead of a surviving younger son.[153] This system thus ensured the heritable estate remained within a continuous line of descent, reinforcing the primacy of the eldest son's branch. While we have seen that tailzies could effectively curtail succession to females for fear of loss of that wealth to another family and name,[154] and also redirect succession to heritage to another son, representation reflected the broader social imperative of preserving the landed estate and the identity of the family line.

In contrast, there was no 'stepping into the shoes' in terms of the dead's part or legitim until reforms were introduced in 1855 and 1964, respectively. In respect of the former, the common law position was that the dead's part passed entirely to the surviving members of the nearest class to the deceased, referred to as the "next of

[149] Barclay, "Emotional Lineages", 86-7.
[150] Kotlyar, "Succession", 171.
[151] Stair, III.4.4.
[152] Meston, "Representation", 87.
[153] Ibid, 87-88.
[154] See the discussion by Lord Lyon (Learney) in *Munro-Lucas-Tooth Petitoner* 1965 SLT (Lyon Court) 2.

kin".[155] Where, for example, a person died leaving three children, one of whom had already died leaving a child of their own, the estate would be divided only between the two surviving children. The grandchild would receive nothing. They were in the nearest class, and there was no right of representation allowing them to inherit in their parent's place. As Meston later described it, rectification of this "obvious injustice"[156] was one of the principal reasons for the enactment of the Intestate Moveable Succession (Scotland) Act 1855. The 1855 Act altered the common law position and introduced representation into the intestate succession of moveables,[157] thereby suggesting a recognition that lineal continuity should apply across all forms of property – not just heritage. Though not subject to primogeniture, the dead's part's treatment under the 1855 Act reflected a similar concern for preserving familial succession lines.

In the twentieth century, the Succession (Scotland) Act 1964 marked a turning point in intestate succession law. It abolished primogeniture and, provided for a unified scheme of distribution across heritage and moveables.[158] In respect of the dead's part, or 'free estate',[159] sections 5 and 6 enshrined the principle of representation: if a child of the deceased had already died, their issue would inherit the share that child would have taken.[160] Distribution is to follow a *per stirpes* model, where each branch of descendants receives the share attributable to their parent.[161] For instance, if a person dies intestate leaving one surviving child and another who has predeceased leaving three children, the estate is divided such that the surviving child receives half, and the three grandchildren divide the other half equally.

While representation can, in theory, be viewed as a continuity-based mechanism and a form of family protection, the extent to which it now functions in practice depends on the size of the deceased's estate. The concomitant introduction of prior rights for surviving spouses in 1964 – not least in relation to moveable property, through the

[155] Robertson, Treatise, 331.
[156] Meston, "Representation", 88.
[157] (18 & 19 Vict, c.23).
[158] Succession (Scotland) Act 1964, s 1.
[159] Pre-1964, the 'dead's part' referred only to the moveable estate of which the testator could dispose.
[160] 1964 Act, ss 2, 5 and 6.
[161] Ibid, s 6.

lump-sum provision[162] – can significantly reduce what remains for distribution.[163] In the event the estate is small or modest, there may be little or nothing left for descendants to inherit.[164] Still, where the spouse is also the parent of the deceased's children, it can be argued that the children will likely eventually inherit that property. In that sense, the estate may bypass the children or grandchildren temporarily, but not permanently, exit the family line.

Yet, this incoherence within Scots succession law's intestacy rules does not negate the rationale upon which representation was extended. The reforms introduced by the 1964 Act reflect what the Mackintosh Committee presumed to be the will of the deceased.[165] This mirrors earlier thinking by Stair, who framed succession under primogeniture as governed by a "conjectural will".[166] Within this framework, representation serves a broader purpose. It is not merely about the administration of estates, but about preserving family connections across generations beyond a single line of descent. Thus, the Committee recommended that "there should be representation in every line of succession and so far as the succession extends."[167]

Although its effectiveness under the current law may be limited by competing claims, representation to the free estate remains a means through which property, and by extension identity, can continue through the deceased's family lines in the absence of a will. The historical development of the principle illustrates an enduring concern with ensuring that property is kept within the lineage through the protection of descendants. This evolution also sets the stage for a more detailed examination of legitim, where similar concerns about family continuity continue to shape the positions of descendants in Scots succession law.

[162] £50,000 if there are children. See also, The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (S.S.I. 2011/436), art. 2, Sch.
[163] The relict's right also takes precedence over legitim on intestacy: Family Law (Scotland) Act 2006, s 29(10).
[164] See "Scooping the pool" in Reid, "Intestate Succession in Scotland", 391-393.
[165] *Law of Succession in Scotland: Report on the Committee of Inquiry* (Cmd 8144, 1951) 8.
[166] Stair, III.4.2-3.
[167] (Cmd 8144, 1951) 16.

1.3.2 Representation in Legitim

The extension of representation to legitim[168] marked a further step towards family continuity and family protection in Scots succession law. Historically, legitim was a strictly personal entitlement, as articulated by Erskine, who regarded it as a direct claim belonging exclusively to the deceased's child.[169] This meant that if a child predeceased their parent, their own offspring had no claim to legitim. The personal nature of legitim was justified on the basis that it was a direct entitlement rather than a transmissible right.[170] Consequently, when representation on intestacy was extended to moveables in 1855, a "mere slip"[171] in the drafting meant legitim remained untouched. The result was that a single surviving child could claim the entire legitim fund, completely excluding the deceased's grandchildren by predeceasing children; and if all children had predeceased, there would be no legitim fund at all.

In the historical context of high mortality rates and thus frequent breaks in the chain of descent, this lack of representation in legitim was widely regarded as a "significant limitation."[172] Moreover, as a deceased's moveable estate was likely meagre relative to his heritable estate that would pass to his eldest son, there was naturally less opportunity to protect the interests of other children outside that main line**.** Indeed, following the 1855 Act's enactment, it was reported in the *Journal of Jurisprudence* that children of a predeceasing parent should have been "entitled to the same justice" of having legitim subject to the "equitable distribution" afforded to the intestate succession of moveables.[173] In this respect, it was considered an "anomaly"[174] that representation applied only to the dead's part and not to the legitim fund, essentially undermining the protective purpose of legal rights. While the testator could have disposed of the former portion in his testament, Scots succession

[168] Succession (Scotland) Act 1964, s 11.
[169] Erskine, *Institute* III.9.17.
[170] Another rationale was that married children would likely have received advances: Bankton, *Institute* III.8.24.
[171] *Journal of Jurisprudence* (1875) 19, 379 and 381.
[172] Reid, "Legal Rights", 430.
[173] *Journal of Jurisprudence* (1858) 2*,* 131-132; *Journal of Jurisprudence* (1860) 4*,* 588.
[174] Reid, "Legal Rights", 430.

law had, at least in theory, declared the latter share to be the indefeasible inheritance of his children.[175]

This inconsistency in the law was addressed by the Succession (Scotland) Act 1964. By virtue of section 11, the issue of a predeceasing child could claim their parent's share of the legitim fund.[176] The operation of representation under section 11 mirrors the division of moveables under intestate succession introduced by the 1855 Act: where claimants belong to different generations, inheritance follows the *per stirpes* model, allowing descendants to inherit their parent's share; where all claimants belong to the same generation, distribution occurs per capita, ensuring equal division.[177] While there are questions as to whether this division could be seen as protective from an equitable perspective, the important point for this thesis is that section 11's operation does not undermine the fundamental function of representation in legitim: ensuring wealth flows down the family line rather than being curtailed when the primary recipient is no longer alive to make a claim on the deceased's net moveable estate.

Representation in legitim must therefore be understood as situated within a wider network of mechanisms in Scots succession law that embody a commitment to family protection. Legal rights already serve as a safeguard against total disinheritance, reserving certain portions of the deceased's moveable estate for children. Incorporating representation into legitim ensures a child's share does not simply fall away if they predecease their parent. Instead, the fundamental idea underpinning this development is that wealth should descend through the family, in turn achieving continuity of the family by facilitating the creation of intergenerational bonds between remoter generations.[178] In this sense, representation in legitim is not merely a form of family protection in itself, but a way of reinforcing and extending the operation of legal rights so that their underlying protective rationale is realised more fully beyond the immediate parent-child relationship.

[175] Ibid.
[176] Succession (Scotland) Act 1964, s 11.
[177] Though subject to collation: Ibid, s 11(2)-(3).
[178] Kreiczer-Levy, "Intergenerational bonds", 535-536.

When compared with other mechanisms of continuity, one of the most striking features of representation in Scots succession law is its adaptability. It is incorporated into the rules on legitim, ensuring that a deceased child's own children may claim in their stead, and it operates more broadly on intestacy, also allowing descendants to take the share of the dead's part or free estate that would have gone to their predeceasing parent. This cross-application means that representation functions as a unifying thread within the wider system of succession. It is this very continuity, across historical and modern legal developments, that underscores representation's essential role within Scots succession law. Thus, by putting its practical effects in context, representation should be conceived of as more than a mere technical rule. A grandchild does not inherit as an outsider but rather as a direct continuation of their parent.

1.3.3 *Conditio si Institutus sine Liberis Decesserit*

Having examined instances in which children can inherit in their deceased parent's stead in respect of representation, we now turn our focus to the *conditio si institutus sine liberis decesserit*.[179] In his 1901 contribution to the Juridical Review, John Wilson remarked that in every marriage-contract or trust settlement which he had observed "the principle of representation [had] almost invariably been introduced in the case of legacies to relatives".[180] However, where such a provision was omitted, Scots succession law has frequently filled this gap by way of the *conditio si institutus sine liberis decesserit*.[181] This doctrine, as well as its modern statutory replacement, represent a second branch of achieving protection for descendants by allowing them to step into their deceased parent's shoes to receive a legacy.

In its early application, the *conditio si institutus* dealt primarily with bonds.[182] Its first significant application, sufficiently testamentary to have formed the foundations of

[179] Hereafter, '*conditio si institutus*'.
[180] J D Wilson, "Legal provisions and intestate succession in Scotland" (1901) 13(1) JurRev 18 at 33.
[181] *Mowbray v Scougall* (1834) 12 S 910; *Dixon v Dixon* (1836) 14 S 938; *Grant v Brooke* (1882) 10 R 92.
[182] *Innes v Innes* (1670) Mor. 4272; *Murray v Grant* (1662) Mor. 10322; *Powrie v Dykes* (1667) Mor. 11648.

the rule,[183] can be traced to the 1738 case of *Magistrates of Montrose v Robertson*.[184] In this case, the Magistrates of Montrose borrowed 2000 merks from David Robertson. A bond was issued, binding the Magistrates to repay the sum, securing to David's wife a liferent, and to their four children the fee. If any child died, the survivors would receive their share. After David's death, James Robertson, son of one of David's three predeceasing children, brought an action to claim his parent's share. The Court of Session held that the share of a predeceasing child should pass to their own children, this being the "implied or presumed will of the father". It established that substitution in favour of surviving siblings would only occur *"si institute sine liberis decesserint".*[185]

In this regard, the Court of Session can be said to have demonstrated a preference for lineal succession and a thinking of family across multiple generations. Having based their decision on David Robertson's presumed intention, the judges essentially replaced the bond's provision with what they thought ought to have been done. Regarding the rule's later application, the *conditio si institutus* was almost exclusively limited to the testamentary instruments of wills and trusts.[186] It operated to the effect that, even if the context of a will indicated otherwise, unless the contrary is explicitly shown, where one of the deceased's issue died before the vesting of a testamentary gift, the court presumes an implied gift to that legatee's children.[187] Those children would also take priority over other potential recipients, such as conditional institutes or residuary legatees.[188]

Furthermore, the strength of the *conditio si institutus* as continuity-based intervention in favour of descendants becomes even more apparent when viewed in the wider context of will interpretation. Scots law generally interprets wills in a literal manner.[189] Moreover, the acceptance of extrinsic evidence as a basis for determining the

[183] Barr, "Conditio", 182.
[184] *Magistrates of Montrose v Robertson* (1738) Mor. 6398.
[185] "were the instituted heir to die without issue".
[186] *Spalding v Spalding's Curator ad Litem* 1963 SC 141. For a comparison with the *conditio si testator's* development, see W M Gordon, "Roman and Scots law – the conditiones si sine liberis decesserit" (1969) JurRev 109.
[187] *McGregor's Trustees v Gray* 1969 SLT 355.
[188] Barr, "Conditio", 189-190.
[189] A L Cordiner, "Interpretation of wills" (1932) 44(4) JurRev 329 at 333-336.

testator's true intentions is rare.[190] Thus, for the law to assume that a testator would want legacies to their predeceasing children to carry over to their grandchildren that forms a link between the *conditio si institutus* and broader notions of family continuity. The doctrine provided material protection for descendants through an attempt to maintain the intergenerational bonds central to the family's preservation. For this reason, Alan Barr has also described the rule as a form of "enforced family provision",[191] functionally similar to legal rights, the effects of which make up for what may, or may not,[192] have been a testator's failure to plan for the predecease of their children. Thus, the *conditio si institutus* fits within the broader system of family protection conceptualised by this thesis. Taken very literally, one could certainly argue, alongside Barr, that its effects constitute a "form of forced inheritance".[193]

It must be noted, however, that, while primarily concerned with direct descendants, the application of the *conditio si institutus* was extended to include, in certain circumstances, nieces and nephews.[194] This allowed the rule to apply in situations where an aunt or uncle had left a legacy to a nephew or niece and placed himself in *loco parentis*.[195] In such cases, the *conditio si institutus* permitted the nephew or niece's children to inherit their predeceasing parent's share, with the onus on anyone contesting it to demonstrate, based on the will's terms, that the testator had not assumed the role of a parent.[196] This extension created some uncertainty.[197] It seems that the rationale behind the rule could be stretched to accommodate relationships based on parental responsibility rather than strict lineal descent. The Scottish Law Commission in their 1990 Report on *Succession* opined that "it is very difficult to justify drawing [this] line at any point beyond the testator's own descendants".[198]

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[190] *Blair v Blair* (1849) 12D 97, at 107 per Lord Moncrieff.
[191] Barr, "Conditio", 179.
[192] As in *Magistrates of Montrose v Robertson* (1738) Mor. 6398.
[193] Barr, "Conditio", 179.
[194] *Hall v Hall* (1891) 18 R 690. Earlier cases extended the rule: *McKenzie v Holte's Legatee* (1781) Mor. 6602; *Christie v Paterson* (1822) 1 S 498.
[195] Though requiring no special interest; *Bogie's Trustees v Christie* (1882) 9 R 453.
[196] *Devlin's Trustees v Breen* 1945 SC (HL) 27; *Stewart's Trustees v Stewart* 1917 2 SLT 267.
[197] *Knox's Executors v Knox* 1941 SC 532.
[198] Scot Law Com No 124, para 4.57.

Following culmination of the Commission's review of succession law, the *conditio si institutus* was replaced by section 6 of the Succession (Scotland) Act 2016. It establishes that, so long as the will does not expressly provide otherwise, children step into the shoes of a parent who has died before a legacy vests.[199] However, the 2016 Act also demonstrates a return to thinking about family in a primarily lineal way. The statutory rule is strictly limited to children, grandchildren, and remoter lineal descendants,[200] representing a notable change in scope that leaves no room for a court's expansion. Collateral relatives, including nephews and nieces over which the testator assumed parental responsibility, are now categorically excluded.[201] Thus, the statutory rule has brought this area of Scots succession law back in line with the narrower conception of family that shaped the *conditio si institutus'* original cause.

In practical terms, the absence of statutory authority for descendants of nieces and nephews to inherit in place of their parents means those legacies will simply fail and fall into intestacy. This policy shift indirectly benefits direct descendants by reversing the *conditio si institutus'* potential effect of dissipating property across more distant branches of the deceased's family tree. In this sense, the 2016 Act reflects a principle that "the law should encourage parents to support their children… as opposed to making arrangements to take assets to a third party, whether outside the family entirely or… [outwith] the direct parental line".[202]

Ultimately, both the *conditio si institutus* and its statutory replacement can be categorised as mechanisms for maintaining family continuity in testate succession. When viewed in context, and alongside the rules of representation and legitim, these devices form part of a wider network of protections within succession law aimed at protecting descendants. By facilitating the descent of property, their mechanics communicate an enduring sense of belonging among remoter descendants and, in doing so, help sustain a broader sense of family identity.

[199] Succession (Scotland) Act 2016, s 6(2).
[200] Ibid, s 6(1)(a).
[201] The SLC adhered to its 1990 recommendations in Scot Law Com No 215, 2009, rec 54.
[202] Barr, "Conditio", 181-182.

1.4 *Conditio si Testator sine Liberis Decesserit*

Beyond allowing grandchildren to inherit from in place of a deceased parent, Scots succession law also promotes family continuity and protection when a testator's will omits provision for children born after its execution. This doctrine, the *conditio si testator sine liberis decesserit,*[203] enables an after-born child to challenge their parent's will, provided there is no clear evidence of intentional exclusion.[204] If the claim is successful, the will is revoked. The following analysis of the *conditio si testator* and key case law shows that the rule functions as a form of family protection.

1.4.1 The Rationale Underpinning the Rule

The *conditio si testator* in Scots succession law can be described as a rule of law which, if successfully advanced, emulates "an express testamentary provision linking the revocation of a will with the subsequent birth of a child."[205] While often described as a "rebuttable presumption" of revocation,[206] it is, in fact, a distinct doctrine that permits a court to treat a will as revoked[207] upon the birth of a child who was omitted from the testamentary instrument, but only if that child actively brings a claim.[208] The *conditio si testator* functions to ensure that a will is not interpreted to pass over descendants who arise after its execution without clear indication that the testator intended the will to remain operative regardless.[209] In this sense, it not only safeguards against disinheritance, but contributes to structurally prioritising the position of descendants within a wider succession framework.

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[203] Hereafter '*conditio si testator*'.
[204] Bell, *Principles*, §1782; *Ogilvie v Ogilvie* (1694) 4 BS 141.
[205] Paisley, "Conditio's Rationale", 282.
[206] R R M Paisley, "The Roman and Civilian origins of the conditio si testator sine liberis decesserit in Scots Law" (2015) 19(1) EdinLawRev 1; Meston, "Wills and Succession", para 751; H Hiram, "The conditio si testator as family policy: *Greenan v Courtney*" (2008) 11(3) EdinLawRev 431.
[207] "treated as revoked": Scot Law Com No 124, para 4.46.
[208] *The Making and Revocation of Wills* (Scot Law Com CM No 70, 1986) para 5.9.
[209] Paisley, "Conditio's Rationale", 304-8. In such cases legitim can provide an alternative: see ch 1.4.3.

This *conditio* was first received from Roman law into Scots succession law in the seventeenth century.[210] Since then, several explanations as to its underpinning policy concerns have been put forward both in the courts and in legal scholarship.[211] According to Roderick Paisley, the *conditio si testator's* roots trace back to the European *Ius Commune*,[212] where the policy underpinning the doctrine can be seen as an effort to prevent an estate from passing to strangers, on the basis that the deceased's testament was executed when the deceased had no issue.[213] In the classical Roman context, the rationale was also expressed as a preference to avoid the estate devolving to remoter relatives,[214] reflecting a broader principle of favouring descendants and the "natural" family group.

This principle echoes strongly in the institutional writings of the period. Lord Bankton, for instance, grounded the *conditio si testator* in the idea of "parental affection"[215] combined with the assumption that a testamentary settlement made prior to the birth of a child was done so on the implied condition that the testator would die childless. Similarly, Erskine reiterated this foundation, stating that the rule "arises from a presumption, founded in nature itself, that the granter would have preferred his own issue, if he had had their existence in view"[216] – an idea strikingly parallel to the rationale behind legitim, which itself protects a child's right to a portion of the estate on the basis of parent's presumed affection.[217]

Alternative explanations also emerged during this period. Lord Kames, in his *Principles of Equity,* saw the *conditio si testator* as primarily arising from "error or oversight"[218] – suggesting the testator simply failed or forgot to update their will after a child was born. For Kames, it was less about natural affection, and more about correcting a mistake or omission. However, while this view influenced some cases,[219]

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[210] *Chrystie v Chrystie* (1681) Mor. 8197.
[211] For a detailed account, see Paisley, "Conditio's Rationale"*,* 310-9.
[212] Paisley, "Conditio's Origins", 9-10.
[213] Ibid; Paisley, "Conditio's Rationale", 311; Digest 35.1.102 (Papinian).
[214] Ibid.
[215] Bankton, *Institute* vol 1 (1751) I.9.6.
[216] Erskine, *Institute* III.8.46.
[217] Stair, III.4.2.
[218] Lord Kames, *Principles of Equity* 1st edn (1760) 93.
[219] *Next in Kin of Isobel Watt v Isobel Jervie* (1760) Mor. 6401; *Speirs v Graham* 1855, 5 Fac. 222.

the literature suggests that it remained, at best, a subsidiary and peripheral theme.[220] While this suggests a clear distinction between error and presumed intention, one could argue that these concepts are not mutually exclusive: a presumption of intention might itself arise precisely because failing to provide for a child is viewed as an unintentional oversight. Nonetheless, by the close of the nineteenth century, judicial opinion had largely returned to the more traditional view that the *conditio si testator* is simply based on presumed intention.[221] Lord Stormonth-Darling, in the 1897 case of *Smith's Trustees v Grant*, identified the principle underlying the rule as the "natural obligation [of a father] to make provision for a surviving child".[222]

Building on these foundations, the *conditio si testator* arguably represents an example of 'dynamic intentionalism', a term used here to describe how the law permits a testator's presumed intention to evolve in response to supervening family developments. Rather than freezing the testator's wishes at the moment of the will's execution, the *conditio si testator* adapts testamentary interpretation to living circumstances. In this regard, Scots law would appear to a more fluid model of testamentary construction.[223] This interpretive flexibility is not neutral. The *conditio si testator's* willingness to read into the will an evolving intention rooted in the emergence of a parent-child relationship signals a concern for and a prioritisation of family continuity.

That interpretative fluidity became more explicit in the twentieth century, as the rationale for the *conditio si testator* began to be cast more overtly in terms of testamentary obsolescence.[224] For instance, the 1922 case of *Nicolson v Nicolson's Tutrix,*[225] Lord Hunter framed it as a doctrine of testamentary adjustment to changed circumstances – essentially a legal means to amend an out-of-date will, in which the

[220] Paisley, "Conditio's Rationale", 314.
[221] *Elder's Trustees v Elder* (1894) 21 R 704, at 705-6 per Lord Low.
[222] *Smith's Trustees v Grant* (1897) 35 SLR 129, at 131 per Lord Stormonth-Darling.
[223] See common law functional equivalents to rectification in Scotland in D J Carr, "Rectification of testamentary writings in Scotland, England and Wales, and Australia" (2023) 17(2) *Journal of Equity* 181 at 185-189.
[224] Paisley, "Conditio's Rationale", 318, citing "M C Meston, "The Conditiones si Sine Liberis", *JLSS* [1981] (Workshop), W 203".
[225] *Nicolson v Nicolson's Tutrix* 1922 SC 649, at 655 per Lord Ormidale.

testator had taken, as later commentators put it, “too short a view”.[226] Despite these varied formulations – affection, intention, error, and obsolescence – a common theme persists: the *conditio si testator* exists for the protection of descendants.

Viewed this way, the *conditio si testator* can be seen as a mechanism by which Scots succession law fosters family continuity. While it does not impose obligations upon a deceased testator, it nonetheless reinforces the social and moral expectation that parents provide for their descendants,[227] and for wealth to remain within those lines of descent, so long as the child brings a claim. Unless the testator clearly indicates that the will should stand notwithstanding the birth of a future child, the *conditio si testator* allows the court to set aside its apparent effect of disinheritance.

1.4.2 Giving Effect to the Testator’s ‘Intention’

The discussion so far has shown that the rationale behind the *conditio si testator* reflects a concern that wills may become outdated due to significant changes in family circumstances, in this case the birth of a child after the execution of the will. At its core, the rule embodies an idea that testamentary dispositions should reflect current realities. Moreover, the rule is already significant in demonstrating a strong emphasis on protecting descendants. For instance, marriage is also a transformative life event, yet there is no equivalent rule[228] allowing a surviving spouse to challenge an outdated will on similar grounds.[229] The rule remains firmly focused on children, and its application is shaped by how the courts assess the testator’s intention.

Thus, the *conditio si testator* rule does not automatically revoke a will simply because a child is born after its execution.[230] Neither will it apply where there is

[226] Paisley “Conditio’s Rationale”, 318, quoting “J Girvan, “Lectures on Conveyancing” (1932-33) *Lectures*, 2, 46-88 [unpublished]”.
[227] “[N]ew moral obligations” arising following the birth of one’s child was recognised in *Smith’s Trustees v Grant* (1897) 35 SLR 129, at 131 per Lord Stormonth-Darling.
[228] Contrast with England: Wills Act 1837, s 18.
[229] The legal end of this relationship is acknowledged in succession: Succession (Scotland) Act 2016, s 1.
[230] This was Bell’s understanding of the rule: Bell, *Principles,* §1779.

sufficient evidence that the testator intended the will to remain in effect despite the birth of a child.[231] However, determining what amounts to sufficient evidence of such intent is not straightforward.[232] While one might assume that believing a child would be otherwise looked after might suffice, courts demand a more explicit and deliberate indication of intent. Thus, while testator's conduct and actions can be just as telling as their words, the threshold for displacing the *conditio* remains high, typically requiring express provision of exclusion.[233]

There is only one documented instance in which the *conditio si testator* failed to take effect. In the 1899 case of *Stuart-Gordon v Stuart-Gordon*,[234] the question presented to the Court of Session was whether the defender's knowledge of her pregnancy and conduct established a contrary intention to revoking testamentary deeds that omitted her after-born daughter. Mrs Stuart-Gordon had made a trust-disposition and settlement, naming her husband as the main beneficiary and making no provision for any future children. She became pregnant and, aware of the risks of childbirth, expressed concern about her condition. Despite this, she did not revise her settlement. Instead, shortly before giving birth, she appended a docquet identifying a specific bequest of jewellery, thereby effectively reaffirming her original testamentary arrangement. Mrs Stuart-Gordon died two days after giving birth.

The child's tutor argued that the will should be presumed revoked, and the estate distributed under the laws of intestacy. However, the Court rejected this, holding that the *conditio* did not apply. The Court placed particular weight on the fact that the testatrix had been fully aware of her pregnancy, had expressed anxiety about childbirth, and had nevertheless chosen not to alter her settlement.[235] Moreover, she had taken formal action in the form of a docket shortly before her death – further evidence of her continued intention to uphold the original settlement. The Court was persuaded that her conduct amounted to a conscious affirmation of testamentary intent, even in light of the impending birth.[236] The settlement stood unaltered.

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[231] Meston, "Wills and Succession", paras 751-754.
[232] *McKie's Tutor v McKie* (1897) 24 R 526, at 528.
[233] *David Chrystie v David Chrystie* 1682 4 BS 444.
[234] *Stuart-Gordon v Stuart-Gordon* (1899) 1 F 1005.
[235] Ibid, at 1011 per Lord McLaren.
[236] Ibid, at 1021 per Lord McLaren

What this case illustrates is that, at least at that time, for the *conditio si testator* not to result in revocation of the will, the threshold was high. However, there has been a willingness to consider the testator's awareness of alternative sources of provision for the omitted child,[237] and the *conditio si testator* seeks to infer the testator's intention from their surrounding circumstances.[238] The testator's conduct must demonstrate a deliberate decision to maintain the existing testamentary scheme despite the birth, or imminent birth, of a child.[239] In other words, application of the *conditio* hinges not simply on interpreting the text of the will, but on assessing the testator's actual behaviour, particularly whether they actively chose not to alter the will in light of their changed family circumstances.

However, the extent to which surrounding circumstances can be relied upon to infer intention to exclude the child remains limited. The 1910 case of *Milligan's JF v Milligan*,[240] offers a powerful illustration of how robustly the rule can operate in practice. In this case, a daughter challenged her late father's will, which had not been amended in the ten years following her birth. The argument advanced on behalf of the deceased was that his prolonged inaction showed a desire to keep the original will unchanged. The Court, however, firmly rejected this view, as the mere passage of time was not enough to "rebut the presumption" created by the *conditio si testator*.[241] Without clear and deliberate evidence that the testator intended the will to survive the birth of the child, the rule would take effect. The will was therefore revoked.

The reasoning in *Milligan* raises an important tension at the heart of the doctrine. If the rule is designed to give effect to the testator's presumed intention, then why does a prolonged failure to amend the will not count as evidence of settled intention?[242] Might the *conditio si testator* instead be somewhat designed to protect the child, having raised a claim, regardless of the testator's intent? One might argue that sustained non-action, especially over many years, suggests a deliberate decision to

[237] *Greenan v Courtney* 2007 SLT 355, at 362 per Lady Dorrian; *Rankine v Rankine's Trustees* (1904) 6 F 581, at 596 per Lord Kinnear.
[238] R R M Paisley, "The mechanics and operation of the conditio si testator sine liberis decesserit in Scots law" (2014) 2014(3) JurRev 187 at 209-222.
[239] *Stuart-Gordon v Stuart-Gordon* (1899) 1 F 1005.
[240] *Milligan's JF v Milligan* 1910 SC 58.
[241] Ibid, at 61-62 per Lord Low.
[242] *Nicolson v Nicolson Tutrix,* 1922 SC 649, at 654 per Lord Ormidale.

let the will stand. Yet the Court's unwillingness to interpret inaction as intention demonstrates the high evidentiary bar required to support intended omission.[243] In practice, the *conditio si testator* can operate not merely as a reflection of what the testator might have wanted, but also as a legal protection for children that, when claimed, imposes what the law believes the testator *should* have wanted.

This strict evidentiary requirement was further reaffirmed in the 2007 case of *Greenan v Courtney*.[244] Richard Greenan had made a will in 1989 in favour of his then-wife Amanda Courtney. Over the following years, he separated from Amanda, had a child with her, and later married another woman, Arlene, with whom he had two additional children. Despite these major life changes, he never revised the 1989 will prior to his death in 2003. Arlene, on behalf of her children, challenged the will, arguing that it no longer reflected Richard's intentions given the births that followed its creation. Amanda, defending the will, claimed that Richard's continued attachment to it – through conversations, emotional ties, and his failure to make a new will – demonstrated his settled intention to leave his estate as originally planned. However, the Court found Amanda's evidence unconvincing and lacking the necessary weight to establish a clear, conscious intent by the testator to maintain the will in light of his changed family situation.[245] Richard's will was thus set aside, and his estate distributed under the rules of intestacy.[246]

The case of *Greenan* has shown that the *conditio si testator* does not require that the later-born child be the testator's only descendant; nor is it a strict precondition that the testator be entirely childless at the time of making the will.[247] Moreover, *Greenan* underscores the same principle evident in *Milligan*: a significant lapse of time, no matter how suggestive, does not form a sufficient circumstantial basis for the *conditio si testator* to fail. Hence, the rule reveals the law's deep commitment to ensuring that children are not left unprovided for as a result of outdated or inattentively maintained wills. While this may occasionally come at the expense of respecting actual but unexpressed testamentary wishes, it reflects a judicial preference: when in doubt,

[243] Paisley, "Mechanics", 202-203.
[244] *Greenan v Courtney* 2007 SLT 355.
[245] [2007] CSOH 58, at 63-67 per Lady Dorrian.
[246] The issue in this case would have been different after the Succession (Scotland) Act 2016, s 1.
[247] Paisley, "Conditio's Rationale", 319. For the opposite, though occasionally accepted, position, see *Rankin v Rankin's Tutor* (1902) 4F. 979, at 981 per Lord Young.

protect the child and thus provide continuity of the family as a social unit. The rule is not just protective – it is potent, and more often than not, successful.

1.4.3 Continuity Mechanisms: Functional and Conceptual Affinity

As this chapter has shown, the *conditio si testator* has developed from its Roman origins as a rule intended to prevent estates being diverted to strangers when a testator died with children born after the execution of their will.[248] Initially adopted into Scots law with this core purpose, its underpinning rationale has evolved considerably,[249] particularly through the nineteenth and twentieth centuries. Today, the significance of the rule lies not only in its potential to revoke an outdated will, but in the equalising effect it can produce, particularly where the original testamentary document fails to recognise the full composition of the testator's descendants.[250]

Indeed, Paisley notes that "one of the great merits of the *conditio si testator*"[251] is that, through mitigating against the exclusion of afterborn children, it provides them with the opportunity to inherit equally among their siblings.[252] To this, one could add that, in respect of their sense of belonging, the *conditio si testator* can facilitate an omitted child's connection with their roots.[253] Successful application of the *conditio si testator* typically results in the distribution of the estate according to Scotland's intestacy rules which, in turn, provide for equal division among the deceased's children.[254] Thus, the rule also corrects imbalanced inheritance created by outdated or incomplete wills. In this way, the *conditio si testator* lends itself to broadly preserving continuity through positioning children as intestate receivers.[255] It offers a

[248] *Knox's Trustees v Knox* (1907) 15 SLT 282, at 284 per Lord President Dunedin.
[249] *Douglas Executors (Special Case)* (1869) 7 M 504, at 508 per Lord Justice-Clerk Patton.
[250] Paisley, "Conditio's Rationale", 320.
[251] Ibid: Again, beware of prior rights. If the effect of the *conditio si testator* is intestacy, and there is a surviving spouse, there may be little benefit for the deceased's children.
[252] Including half-siblings; *Elder's Trustees v Elder* (1894) 21 R 704.
[253] Kreiczer-Levy, "Intergenerational bonds", 512.
[254] Paisley, "Conditio's Rationale", 320.
[255] Kreiczer-Levy, "Intergenerational bonds", 512.

means by which children, who would otherwise be disinherited, may assert their place within the family structure and share in its property.[256]

Furthermore, the value and complexity of the *conditio si testator* become even more apparent when examined in relation to legitim. While both mechanisms serve protective functions, they operate in different spheres: legitim guarantees a fixed share of the deceased's moveable estate to children, regardless of the will, while the *conditio si testator* allows the very validity of the will to be challenged when an afterborn child has been omitted. These mechanisms may overlap or conflict depending on the facts of a case.[257] In this regard, rather than relying on a single protective mechanism, Scots succession law provides a toolkit that enables children to pursue the most advantageous route available to them, depending on the specific circumstances of the estate and the family structure.

As a form of family protection, the *conditio si testator* is strongest where the will omits a child entirely and the intestate outcome would provide a greater share of the estate than legitim would. However, since 1964, this has been heavily dependent on whether there is a surviving spouse.[258] If no spouse survives, or the testator was unmarried, the omitted child stands to inherit the entire estate – or an equal share with their siblings – upon intestacy.[259] However, if there is a surviving spouse, their prior and legal rights may exhaust the estate, especially where the estate is modest or composed primarily of the shared marital home. In such cases, exercising the *conditio si testator* may leave the child in no better position than if they had been left out of the will altogether.

Here, legitim offers an alternative route: a guaranteed share in the moveable estate, unaffected by the existence of a will. The key insight here is that the child has a choice: to exercise the *conditio si testator* and have the will revoked, or to claim legitim. This choice, though procedurally and substantively complex, forms a critical part of recognising these rules as operating within a wider system of family protection. It allows children to make decisions in their best interests, based on the

[256] Ibid.
[257] e.g. *Isobel Jervey v John & Thomas Watt* (1762) Mor. 8170: the *conditio* was unsuccessful, yet the "Lords found, that the legitim was due…"
[258] Succession (Scotland) Act 1964, ss 8-9.
[259] Ibid, s 2(1).

size and nature of the estate, the presence of other intestate heirs, and the structure of the family. Together, the *conditio si testator* and legitim reflect a wider systemic logic, one that balances testamentary freedom with familial obligation, and which recognises that different mechanisms may serve descendants better in different contexts.

What emerges from this chapter is that continuity of the family is not a static legal ideal but a dynamic form of protection. But legitim and the *conditio si testator* are, as we saw, not the only mechanisms that ensure protection. To understand the broader picture, we must view them as they operate, or operated, alongside representation, the *conditio si institutus* and also tailzies. Though what unites these doctrines is their shared concern with continuity, they achieve it in different ways. Representation and the *conditio si institutus*, like the *conditio si testator*, operate on the basis of inclusion; the former ensuring that the descendants of a predeceasing child can step into their parent's place in the line of succession. The law thereby preserves the line of descent not through property consolidation, but by keeping alive the connection between generations. Similarly, the *conditio si testator* ensures continuity by bringing later-born children into the fold, even where a will failed to anticipate their existence.

In contrast, tailzies represented an older but equally important form of family protection – one centred on the preservation of heritable property and the family identity attached to it. Protection, in this context, was not about ensuring inclusion of every child in succession, but about ensuring that the estate remained intact, under the control of a single heir who would carry forward the name, land, and status of the family. This meant that other family members benefited indirectly, as security and prestige flowed from the survival of the estate as a whole. From this perspective, tailzies reflect a model of continuity in which protection was achieved through concentration, not distribution, through preserving the estate for one, rather than dividing it among many.

This distinction between mechanisms that preserve family identity and connections through one heir and those that uphold family continuity through more inclusive recognition is key to understanding that there are numerous ways in which family protection has been achieved Scots succession law. Over time, we see a shift in how continuity is understood: from a focus on heritable property and family name, to a

broader emphasis on relationships, inclusion, and more equitable treatment of descendants. But this is not a story of replacement. Rather, it is one of coexistence. Each mechanism reflects a different vision of what matters, or has historically mattered, in the protection of the family. In tailzies, it was the estate itself, and the identity it carried. In legitim, representation, and both *conditiones*, it is the individual descendants and their place within the family.

This chapter thus supports the broader thesis of the dissertation: that family protection in Scots succession law is not reducible to legitim alone. Rather, the legal framework reflects a deeper, systemic commitment to the dual pillars of protection: material provision for immediate descendants and the preservation of family identity and connection.

Chapter Two: Integrity of Family Wealth

2.1 Introduction

This chapter introduces integrity of family wealth as a second lens through which to re-evaluate family protection in Scots succession law. It involves ensuring that wealth is not diverted to individuals, whether family or outsiders, who have harmed the deceased or taken advantage of their infirmity to undermine the deceased's testamentary intentions. Where a successor exploits the deceased, for instance, by procuring a will in their favour through manipulation, this is treated as an 'interference with the succession process'. The chapter examines how Scotland's forfeiture rules, the law of deathbed, and facility and circumvention have developed or were incorporated into succession law to uphold this notion of integrity. A key theme throughout this chapter is that these integrity-based mechanisms are often framed as preventative or reactive protections for the testator – whether by excluding individuals who have caused them harm or by guarding against assumed manipulation.[260] Yet, the chapter argues that there is more to their operation; in some cases, they serve as much to protect the deceased as their issue. In this respect, the chapter shows that integrity also supports and facilitates continuity.

Like tailzies discussed in the previous chapter, this chapter also considers a mechanism no longer part of Scots law. The law of deathbed, abolished in 1871,[261] operated at a time when the concept of the 'heir' held primacy.[262] Its abolition, just three years after full freedom of testation over heritable property was recognised in Scotland,[263] likely reflected this broader shift. By then, deathbed had also come to be regarded as an "archaic"[264] protection, relying on artificial formalities to assess a granter's mental state. In the absence of a formal deathbed rule, the doctrine of

[260] That a victim would not want their killer to inherit was expressed in Roman law: Digest 34.9.12 (Papinian); Digest 34.9.16.2 (Papinian).
[261] (34 & 35 Vict, c.81).
[262] I Kotlyar, "Destinations in bonds in the 17th - early 18th century Scots law: between continental influences and national developments" (2020) 24(3) EdinLawRev 342.
[263] (31 & 32 Vict, c.101), s 20.
[264] J S Henderson, "Gleanings from old Scots law" (1915) 40(3) *Law Magazine and Review: A Quarterly Review of Jurisprudence* 298 at 304.

facility and circumvention gained prominence in the nineteenth-century.[265] Originally a ground for the reduction of deeds under contract law, it was soon frequently invoked by disinherited children. Although differing in form and arising at different stages in the history of Scots succession law, deathbed has been retrospectively characterised as a "kind of presumed facility and circumvention."[266] This clear conceptual connection justifies their joint analysis in this thesis. Indeed, as exemplified below, facility and circumvention has in several cases filled the gap left by the abolition of deathbed rules.

A cross-mechanism comparison of forfeiture rules, deathbed, and facility and circumvention reveals a recurring concern with 'worthiness' in Scots succession law.[267] From a functional perspective, just as forfeiture rules deem a killer unworthy of inheriting from their victim's estate, those who impose upon individuals in a weakened mental state are similarly viewed as 'undeserving' of enrichment from tainted deeds.[268] Yet, the chapter also demonstrates that case law reveals some leniency towards descendants. Scottish courts have, in a number of cases, preserved a child's entitlement in circumstances where others might be excluded.[269] While other provisions, the recent statutory disqualification of divorced spouses from inheriting,[270] also reflect concerns about worthiness, the former mechanisms engage a richer and largely untouched body of case law, facilitating a more in-depth analysis. Ultimately, the chapter argues that understanding these integrity-based mechanisms situates legitim within a larger constellation of rules and doctrines protecting descendants in Scots succession law.

2.2 Forfeiture Rules

The following section examines Scotland's forfeiture rules as they operate in the context of succession. It follows their evolution from the Parricide Act 1594 to the

[265] For earlier materials, see Stair, I.9.9.
[266] MacLeod & Zimmermann, "Forfeiture", 775.
[267] Ibid; For a similar parallel in American law, see K J Sneddon, "Should Cain's children inherit Abel's property: wading into the extended slayer rule quagmire" (2007) 76(1) UMKCLawRev 101.
[268] Ibid, 741.
[269] e.g. *Hay v Seaton* (1662) Mor. 3246; *Bertram v Weir* (1706) Mor. 3258.
[270] Also, civil partners: Succession (Scotland) Act 2016, s 1.

current framework under the Succession (Scotland) Act 2016, focusing exclusively on cases where a person has been killed by one of their issue. Integrity is a fundamental aspect of forfeiture rules, as a child who has killed their parent is deemed 'unworthy of inheriting' from that parent's estate. However, this section also shows that, although forfeiture rules have evolved over time, they have consistently preserved the integrity of family wealth in a way that allows the wealth to remain within the deceased's line of descent. This allows us to see Scotland's forfeiture rules as an integrity-based expression of family protection, operating alongside legitim within a broader system of protective devices.

2.2.1 The Parricide Act 1594 in Context

Scots succession law's approach to parricide reflects a historical tension between an integrity-based answer to unlawful killing and family protection. The Parricide Act 1594 responded to one of the most grievous breaches of natural law[271] – the killing of a parent or grandparent by one of their issue. While it clearly disinherited a killer child and all of their direct descendants, the 1594 Act did not cause the deceased's estate to fall to the Crown. Instead, it redirected heritable property to the victim's nearest collateral relative.[272] This redirection of wealth illustrates a protective function that forfeiture rules could serve during this period. While forfeiture punished the offender's descendants, it simultaneously ensured that the integrity of family wealth and thus family continuity were maintained.[273]

The 1594 Act did not emerge in a vacuum. Contemporary and near-contemporary statutes suggest it was part of a broader legal trend in which capital offences were

[271] Hume, *Commentaries*, 459-60.
[272] Despite the wording of the 1594 Act, its applicability only to heritable property is widely accepted, first stated in "The Laws and Customs of Scotland, in Matters Criminal" in *Mackenzie's Works,* 267. For later acceptance, see Bankton, *Institute* III.5.30; Scot Law Com No 215, para 7.2.
[273] K Barclay, "From Confession to Declaration: Changing Narratives of Parricide in Eighteenth-Century Scotland" in M Muravyeva and R Toivo (eds), *Parricide and Violence Against Parents throughout History. World Histories of Crime, Culture and Violence* (2018) 112.

aggravated by forfeiture.[274] Moreover, under Scots common law, for example, the crime of treason – one of the gravest offences against the state – resulted in forfeiture of both moveable and heritable property to the Crown.[275] Referred to as "corruption of the blood",[276] this penalty was rooted in the notion that a parent's actions had left a permanent stain on their family line. Set against this backdrop, the 1594 Act fit into a recognisable legal pattern where "the inheritable quality of [the offender's] blood is extinguished".[277] Yet, the 1594 Act also represented a departure. While both treason and parricide involved perceived lineal corruption that justified disinheritance, parricide was an offence against the family, not the state. The response was therefore different: rather than forfeiture to the Crown, the estate was diverted to another branch of the family uncorrupted by the crime.

Katie Barclay, writing on parricide and Scottish society after the 1594 Act, notes that parricide was "a form of rage… that drove people to overcome both natural affection and the moral and legal duty to honour parents."[278] Such violence was not seen as impulsive or the act of a dutiful child, but as the result of a prolonged breakdown in either family bonds or the offender's moral character.[279] Thus, the understanding of parricide as "the highest step of murder than can be act or imagined" [280] highlights the enduring importance of the patriarchal family unit in Scottish society, essential for the preservation of moral order and social stability.[281] If adult children struggled with the constraints of parental authority in their pursuit of independence or self-identity, their interests were seen as secondary to the fundamental expectation of deference.[282] The 1594 Act's scope was established to help legally reinforce this

[274] e.g. Act 1587 (*RPS* 1587/7/44, c.51); Act 1593 9 (*RPS,* 1593/4/41, c.177); MacLeod & Zimmermann, "Forfeiture", 754-755.
[275] Ibid; "The Laws and Customs of Scotland, in Matters Criminal" in *Mackenzie's Works,* 75-76.
[276] Hume, *Commentaries*, 15-18; N Serafin, "The corruption of blood as metaphor" (2025) 84(3) MdLawRev 597.
[277] W Blackstone, *Commentaries on the Law of England* (1871) 252.
[278] K Barclay, "Confession", 112.
[279] Ibid.
[280] National Records of Scotland, JC26/177 *Keith v. Helen Watt & William Keith*, 1766.
[281] Barclay, "Confession", 112.
[282] *The Tryal of Philip Standsfield* (1668) available at: https://quod.lib.umich.edu/e/eebo/A63189.0001.001/1:3.1.1?rgn=div3;view=fulltext; K Barclay, "Natural affection, the patriarchal family and the 'strict settlement' debate: a response from the history of emotions" (2017) 58(3) *The Eighteenth Century* 309.

hierarchal structure and thus protect parents from certain actions of their direct descendants.[283]

This view of parricide as the ultimate familial violation explains the legal response the 1594 Act prescribed. In line with this punitive and protective approach, if an eldest son killed his father, neither he nor his issue would stand to inherit his father's heritable estate under primogeniture. However, rather than passing to the Crown, the estate would pass to the victim's next surviving child – the killer's sibling. It removed heritage from only the unworthy killer's line of descent, not the victim's descendants more broadly. Only where the killer's line exhausted the deceased's issue would the estate pass to the victim's collateral line.[284] This also highlights a concern with continuity as, while 1594 Act was a statement that the killer's line had failed, the family itself had not.[285]

Thus, the rules contained within the 1594 Act represented a means for both maintaining the integrity of family wealth and a punishment for unlawful killing. While the disinheritance of the killer's children may strike us as "unjust"[286] by modern standards, when viewed in context, the 1594 Act helped to mitigate against serious disruption of familial and social order.[287] It is in this regard that we can view Scots succession law's early law on forfeiture as having operated as an integrity-based mechanism of protection, at least for a different branch of the victim's family.

2.2.2 No One Should Benefit From Their Own Wrong

We have seen that the 1594 Act legislated to condemn parricide and reaffirm the value placed on "protective and supportive rather than factitious and destructive" blood ties within a wider social context.[288] This integrity-based stance, however, was

[283] A-M Kilday, "'Sugar and spice and all things nice?': violence against parents in Scotland, 1700–1850" (2016) 41(3) *Journal of Family History* 318.
[284] One must also consider the effects of gender e.g. due to agnatic parentelic succession to heritage.
[285] See generally, Serafin, "Corruption of Blood".
[286] Scot Law Com No 124, para 7.16.
[287] Barclay, "Confession", 112.
[288] Hume, *Commentaries*, 291.

rarely tested in practice. The only recorded instance of parricide in which the 1594 Act was discussed was the 1674 case of *Oliphant v Oliphant*.[289] In this case, James Oliphant was charged with murdering his mother and with murder under trust. The Court of Session held that the latter charge required an express assurance of safety, something not satisfied by the implicit bond of confidence arising from family ties.[290] Before his trial, James fled, prompting the Crown to gift his supposed forfeited estate to his son Patrick.

This led to two disputes. First, William Yeaman, a creditor, successfully argued that James' property had never passed to the Crown and so remained subject to debts.[291] Second, James' brother George claimed succession under the 1594 Act. However, the Court took a strict view of the statute[292] and held that, in the absence of a formal conviction, the 1594 Act's disinheritance provisions could not apply.[293] This decision allowed Patrick to inherit from his grandfather, albeit burdened by his father's creditors. In this way, while James himself was effectively excluded from his father's heritage by his flight following his mother's murder, neither he nor his descendants were legally barred from succession.

While the lords' verdict in Yeaman's case – that "there was no place for the King"[294] – further emphasised that the penalty stipulated in the 1594 Act was itself distinct from "the 'counts as treason' mechanism",[295] *Oliphant* raises questions about the extent to which the 1594 Act's integrity-based aims were truly realised. One might argue that the lords' literal and narrow interpretation reflected a reluctance to impose disinheritance upon an entire lineage beyond the Act's express terms, even in the face of such strong evidence of guilt. That said, given the rarity of parricide,[296] the 1594 Act may have served as an effective social deterrent. Alternatively, the scarcity of such cases might be explained by the affective and peaceful family relationships

[289] *Oliphant v Oliphant* (1674) Mor. 3429.
[290] *Yeaman v Oliphant* (1662-3) Mor. 4773.
[291] Ibid; MacLeod & Zimmermann, "Forfeiture",
[292] (1674) Mor. 3429: "seeing the statute is *stricti juris*, it could not be extended, unless the murderer had been convict."
[293] Ibid
[294] (1662-3) Mor. 4773.
[295] MacLeod & Zimmermann, "Forfeiture", 755.
[296] Following *Oliphant v Oliphant* (1674) Mor. 3429, four convictions of parricide were identified, though the 1594 Act was libelled in none.

in which the Act sought to protect. Thus, without reading too much into one case or the absence of others, it would be unwise to draw sweeping conclusions from limited evidence.

Nonetheless, the 1594 Act remained good law in Scotland until the 21st century.[297] Yet, by the late 20th century, Scottish courts began to pivot toward a broader "principle of public policy": that no one should be able to benefit from their own wrong.[298] Although this idea appeared sporadically in Roman law,[299] it was later more fully developed by the English courts, particularly in cases where a person stood to inherit from someone who they had unlawfully killed.[300] With regards to integrity-based family protection, the key point is that this shift introduced a more discretionary and contextual approach to forfeiture than Scots succession law's existing statutory regime. Where the 1594 Act automatically excluded the killer and their descendants in the event of parricide, the public policy principle, and, in particular, the Forfeiture Act, 1982, allowed for the integrity of family wealth to be preserved in a more tailored way.[301]

In practice, this shift was exemplified in the 1987 case of *Cross, Petitioner*.[302] In that case, the petitioner had pled guilty to the culpable homicide of his father, who died intestate. The deceased was unmarried, and the petitioner was his only child. While the facts would have supported applying the 1594 Act – which would have in turn mandated disinheritance – the Court of Session made no reference to it.[303] Instead, the Court applied the public policy principle[304] through the lens of the Forfeiture Act 1982, which, unlike the 1594 Act,[305] provides that courts may modify the effect of forfeiture in cases where the killing did not amount to murder.[306] In doing so, the Court exercised a discretionary power to assess, in essence, the extent of the

[297] Succession (Scotland) Act 2016, s 53(1).
[298] For the origins of the English rule, see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB, 147.
[299] Digest 49.14.9 (Modestinus); Digest 50.17.134.1 (Ulpian).
[300] MacLeod & Zimmermann, "Forfeiture", 765.
[301] Forfeiture Act 1982, ss 2(1)-(2).
[302] *Cross, Petitioner* 1987 SLT 384.
[303] Noted in Scot Law Com No 215, para 7.2.
[304] It applied more broadly than the 1594 Act which concerned murder alone.
[305] MacLeod & Zimmermann, "Forfeiture", 766; *Estate of Crippen* [1911] P 108; W A Wilson, "The legislation of 1982" (1983) *SLT NEWS* 116.
[306] 1982 Act, s 5.

petitioner's unworthiness. It considered the broader context within which the crime occurred.

In *Cross,* the petitioner was excluded from only 1% of the moveable estate and inherited the heritable estate in full. [307] Though seemingly lenient, this illustrated a modern approach to forfeiture that recognised wrongdoing while also ensuring the estate remained within the family line. This reflected not a rejection but a refinement of forfeiture's earlier protective purpose, allowing for the integrity of family wealth to be achieved without imposing automatic or disproportionate penalties. In *Cross,* therefore, the Court's discretionary power was the embodiment of the integrity principle. It enabled a calibrated response, excluding a killer where necessary but also "having regard to the conduct of the offender and of the deceased".[308] This acknowledges that unworthiness to inherit is not a binary concept but exists on a spectrum. In cases like *Cross*, involving culpable homicide rather than murder, limited succession may still align with both integrity and justice.

In terms of its broader effects, *Cross* was silent on whether the petitioner had issue of his own.[309] As a result, it remains uncertain whether, in the absence of express statutory exclusion, the public policy principle would simply have bypassed the petitioner and allowed the estate to pass to his child. With regard to other general maxims in Scots law, particularly the principle that no one should profit from another's loss,[310] there is a view that descendants who inherit their grandparent's estate due to their parent's disqualification for unlawful killing are not good faith recipients.[311] On this point, Dot Reid has observed that this principle is generally applied only where the recipient is an *inter vivos* gratuitous recipient or was an active participant in the crime.[312] Arguably, descendants in this context are passive recipients who inherit by operation of law, rather than voluntary donees of a

[307] *Cross, Petitioner* 1987 SLT 384.
[308] Forfeiture Act 1982, s 2(2).
[309] The petitioner was simply referred to as the deceased's "only child".
[310] N R Whitty, "The 'no profit from another's fraud rule' and 'knowing receipt' muddle" (2013) 17(1) EdinLawRev 37.
[311] *Bank of Scotland v MacLeod Paxton Woolard* 1998 SLT 258, at 274-275 per Lord Coulsfield. The grandchildren would have been worse off had they not inherited.
[312] D Reid, *Fraud in Scots Law* (PhD thesis, University of Edinburgh, 2013) 243.

gratuitous transfer. Therefore, without evidence of their involvement, it is unlikely that the public policy principle would have disqualified them from inheriting.

In sum, the integration of the public policy rule and the Forfeiture Act 1982 into Scots succession law reflected an evolution in the integrity-based function of forfeiture rules.[313] It did not diminish the principle that a killer should be deemed unworthy of inheriting. Rather, it enhanced the protective function of the law by providing courts with the discretionary tools to assess culpability and to preserve the integrity of family wealth in a manner proportionate to the wrongdoing.

2.2.3 Person Forfeiting Treated as Having Failed to Survive

The Succession (Scotland) Act 2016 repealed the Parricide Act 1594 and enshrined a new statutory framework for forfeiture in Scots succession law. The current rules apply in all cases of unlawful killing where the killer would otherwise inherit from the deceased's estate.[314] As noted, however, this exploration focuses exclusively on instances where the offender is the child of the deceased. Central to this framework is section 12 of the 2016 Act, which provides that a person who forfeits their rights of succession is deemed to have "failed to survive" the deceased.[315] While the 2016 Act may be modified under the Forfeiture Act 2016, in cases of parricide, this legal fiction ensures that the offender is excluded from inheriting, maintaining the integrity of family wealth from benefiting from their wrongdoing.[316] Simultaneously, however, the 2016 Act also promotes continuity by allowing the offender's descendants to inherit in their place,[317] thereby preserving family identity and connections through the line of descent.

[313] Particularly in cases of culpable homicide.
[314] Succession (Scotland) Act 2016, s 17(2).
[315] Ibid, s 12(3).
[316] Scot Law Com No 215, paras 7.1-7.2; however, that is not to say that the 2016 Act simply puts the English rule on a statutory basis in Scotland.
[317] Ibid, para 7.3.

The significance of the 2016 Act's treatment of killers as having predeceased their victims cannot be overstated, particularly in how this legal fiction contributes to the protection of descendants by activating other mechanisms of family protection. By providing that the offender has "failed to survive", rather than being merely "excluded from the succession", the 2016 Act also enables the operation of the rules of representation and of section 6, which replaced the *conditio si institutus sine liberis decesserit*.[318] While the forfeiture rules in section 12 are not limited to cases of parricide, their effects are contingent on the nature of the family relationship;[319] the protective effects of additional mechanisms only arises in cases where the offender is a direct descendant of the deceased. Thus, the impact lies not in the generality of the forfeiture rule or the notion of "predecease" in a broader sense, but in the particular consequences that flow from this integrity-based interaction.

The weight of this legal fiction becomes clearer when contrasted with earlier case law. While not a case of parent-child parricide, the 1992 case of *Hunter's Executors, Petitioners,*[320] demonstrates how the absence of this statutory provision could generally lead to disinheritance of the killer's issue, thereby indirectly punishing them for their parent's wrongs. The Act's explicit adoption of this fiction prevents such collateral damage, reinforcing the idea that the integrity of family wealth demands not merely the exclusion of wrongdoing but also the protection of innocent successors.

In *Hunter*, the testatrix's will specified that her estate was to go to her husband, but if he predeceased her and there were no children from their second marriage, the estate was to be divided between his son from his first marriage and her sister. The Court of Session specifically dismissed an earlier conjecture from the Scottish Law Commission's 1990 Report, that a killer should be treated as if they had predeceased their victim.[321] Instead, the estate was distributed according to the rules of intestate succession and the testator's stepson was excluded. This approach recognises that a testator would likely not want their killer to benefit from their estate.

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[318] See ch 1.3.3: 2016 Act s 6(2).
[319] The SLC recognised that this would be the effect of treating killers as predeceased: Scot Law Com CM No 71, 1986, para 2.12.
[320] *Hunter's Executors, Petitioners* 1992 SC 474.
[321] Ibid; for the recommendation, see Scot Law Com No 124, para 7.15.

However, it does not necessarily imply they would also wish to exclude the killer's descendants.[322]

Suppose, for example, that a son with children kills his widowed mother.[323] Her will leaves a significant legacy to him, with the residue to her daughter. As a result of section 12, the son is deemed to have "failed to survive" her. This not only excludes him from succession but also activates the rule contained within section 6, enabling his children to inherit the legacy in his place. The property, therefore, does not fall into residue or pass to more remote relatives, but is retained within the line of descent from the victim. Alternatively, if the legacy fell into intestacy, the doctrine of representation would apply and split the estate between the killer's children and their aunt.[324] In either case, this mechanism shields the killer's descendants from total exclusion, while ensuring the offender is disqualified. Thus, provided there is no destination-over in favour of a collateral relative or non-family member, by treating the killer as predeceased, forfeiture both preserves the integrity of family wealth in a manner that implies a preference for their descendants.

A similar protective function is evident of the 2016 Act in relation to legitim. During stage two of the committee process preceding enactment, it was clarified that the forfeiture of "rights of succession" under the 2016 Act includes both prior and legal rights.[325] Accordingly, the disqualified person loses their legitim entitlement.[326] However, section 11 of the Succession (Scotland) Act 1964 ensures that representation applies to legitim just as it does in other branches of succession.[327] The effect is that the issue of a person who is treated as predeceasing the deceased – including those disqualified under section 12 – may still inherit their parent's share of the legitim fund from the grandparent's estate. This operates in much the same way as section 6 does in relation to legacies. In this specific case, just as legitim

[322] *Some Miscellaneous Topics in the Law of Succession* (Scot Law Com CM No 71, 1986), para 2.12. One could also argue that, in 1990, this would have simply constituted a literal interpretation of the will.
[323] A similar example was used in Scot Law Com No 124, 1990, para 7.17(c).
[324] Succession (Scotland) Act 1964, ss 2(a) and 5(1).
[325] Scottish Parliament, *Delegated Powers and Land Reform Committee, Official Report, 2015 (Session 4)* (Web Archive, 27 March 2024) available at https://webarchive.nrscotland.gov.uk/20240327012619/https://archive2021.parliament.scot/parliamentarybusiness/Bills/90123.aspx.
[326] Succession (Scotland) Act 2016, s 12(3)(a).
[327] 1964 Act, s 11.

itself protects children from disinheritance, treating a killer as having failed to survive the deceased safeguards a descendant's ability to step into their parent's place from being lost as a result of that parent's actions. Although no Scottish case has yet tested this interaction in practice, the 2016 Act leaves little room for ambiguity.

At each stage of their development, forfeiture rules have retained a consistent underlying concern. Although this is not generally the justification provided, their effect has been to preserve the integrity of family wealth in a manner that will likely allow it to remain within some branch of the family line. This connection between integrity and continuity reveals how forfeiture rules operate within a network of mechanisms that protect the interests of descendants in Scots succession law.

2.3 Law of Deathbed

So far we have seen that how Scots succession law responds in certain cases of unlawful killing can be aligned with a broader concern with ensuring integrity and resultingly family protection. This is also evident in the former law of deathbed, which restricted the disposal of heritable property within sixty days of death.[328] Although often justified as preventing those in their final illness from being "importuned to unreasonable deeds",[329] deathbed law was equally – if not more – concerned with protecting the granter's heir, functioning as somewhat of an anti-avoidance mechanism. Crucially, in terms of how deathbed fits within a broader understanding of family protection, case law shows that assessments of prejudice were often shaped by *who* was affected and *why*.[330] This section argues that in preserving the integrity of wealth through deathbed, there was an overarching sense that children were 'worthier' recipients of the deceased's property, even under deathbed deeds. Its practical application often resulted in wealth being kept within the line of descent.

[328] Act for regulating deeds done on death bed (*RPS,* 1696/9/56, c.4).
[329] Bankton, *Institute* III.8.15.
[330] e.g. *Bertram v Weir* (1706) Mor. 3258; *Hay v Seaton* (1662) Mor. 3246.

2.3.1 'Prejudicing' the Heir

Similar to tailzies discussed in the previous chapter, deathbed law operated at a time when wills of land and buildings were unknown to Scots law.[331] Prior to 1868, when wills could first be made to dispose of heritable property,[332] proprietors relied on *inter vivos* dispositions, often reserving themselves a liferent.[333] In the eighteenth century, the practice shifted towards the use of "*mortis causa* settlements":[334] deeds that, while framed to take immediate effect through their inclusion of a *de praesenti* conveyance, were designed to operate only upon the grantor's death.[335]

The law of deathbed applied to deeds granted by individuals not in *legitiman potestatem* or *liege poustie* - that is, those not in good health.[336] If this standard was not met, the deed could be reduced *ex capite lecti.*[337] Rooted in the *Regiam Majestatem,*[338] deathbed was largely framed as a safeguard for individuals stricken by mortal sickness when "executing deeds of importance in relation to [their] heritable estate".[339] At common law, there was a presumption that a person was in *liege poustie* if, after making the grant, they had been observed going to or returning from "kirk or market unsupported" - providing both practical and public evidence of health.[340] As George Bell articulates it in his *Principles:*

> By this law [of deathbed], if a person, while ill of the disease of which he died, has executed a deed, conveying or burdening his heritable estate, to the prejudice of his lawful heir, he is presumed to have acted

[331] Deathbed was abolished three years after heritage could first be disposed of by will: (34 & 35 Vict, c.81).
[332] (31 & 32 Vict, c.101), s 20.
[333] K G C Reid, "Testamentary Formalities in Scotland", in K G C Reid et al, *CSL* v1, 411.
[334] Ibid, 406-409. This shift can be seen in Erskine, *Institute* III.8.20.
[335] Ibid; Stair, III.4.26; I J Smith, "Succession" in Stair Society, *An Introduction to Scottish Legal History* (1958) 215-216.
[336] Erskine, *Institute* III.8.95.
[337] "On the ground of deathbed": Sellar, "Succession", 52.
[338] *Regiam Majestatem,* II.8.7.
[339] McLaren, *Wills and Succession,* para 330; Watson, *Treatise*, 104-106.
[340] Stair, III.4.26-31; Hume, *Lectures*, 26-53; H McKechnie, "Notes on death-bed and dying declarations" (1929) 41(3) JurRev 238.

> under the undue influence of importunity; and the heir may have redress.[341]

"To avoid the inconvenience of continuing the presumption of imbecility too long",[342] an Act of 1696 modified this by establishing that survival for sixty days after executing the deed was sufficient to disprove a deathbed challenge - even if the granter had not visited kirk or market during that period.[343] Nonetheless, the presumption was rather strong. While it could be displaced by evidence of sufficient survival, or the establishment of convalescence, case law shows a willingness to look beyond formal appearances when assessing whether the presumption should stand.[344] For instance, in the 1685 case of the *Laird of Luss v Carden*,[345] a bond of 20,000 merks was reduced on the grounds of deathbed despite the granter having attended church after its execution. This was based on evidence that he had taken his Lady's hand. The Court of Session viewed this as "having been used to cover weakness and subject to a suspicion, which was rational for [him] to prevent, had he been able".[346] This shows that superficial evidence of health rarely rebutted a presumption of deathbed.

The law of deathbed can be viewed as preserving the integrity of family wealth by protecting against interferences which arise while the granter is in their final illness. However, preserving against such interferences did not merely extend to protecting a granter from the "importunity of friends".[347] The law of deathbed also placed considerable emphasis on protecting the heir, becoming operative only when the granter's actions during their mortal sickness caused that heir prejudice. Prejudice was therefore a necessary condition – or perhaps the necessary interference – required for the court to determine that the grantor was not acting in *liege poustie.*[348] Deathbed law served a dual function as a mechanism of family protection: it

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[341] Bell, *Principles §*1786.
[342] Ibid, §1789.
[343] (RPS, 1696/9/56, c.4); Sellar, "Succession", 52.
[344] McLaren, *Wills and Succession,* para 345.
[345] *Laird of Luss v Carden* (1685) Mor. 3310.
[346] Ibid.
[347] Erskine, *Institute* III.8.95.
[348] McLaren, *Wills and Succession*, para 333.

protected both the grantor from exploitation, and the heir from being disadvantaged during a period of vulnerability of the granter.[349]

Like tailzies, the law of deathbed was part of a broader system designed to regulate the transmission of landed estates, vital to maintaining the social and economic standing of families.[350] Although recourse to the law of deathbed was integrity-based and not limited to aristocratic heirs, it certainly complemented primogeniture.[351] Its framework has been reported to have echoed the feudal maxim, "[n]o one could appoint his own heir, because only God, not man, can create an heir".[352] This emphasised that succession followed a natural and divinely ordained order, one not to be disturbed by individual discretion or last-minute acts potentially tainted by manipulation.

At a time when both wills and final gifts of land made *in extremis* – during "the condition of mortal infirmity"[353] – were deemed invalid, deathbed reflected a concern that a dying proprietor might deprive the heir of their inheritance simply by circumventing the rules of intestacy.[354] Accordingly, the law of deathbed operated in tandem with other legal mechanisms aimed at preserving heritable estates within the bloodline, preventing their fragmentation or alienation over time.[355] This represents an overlap between the wider principles of continuity and integrity. By preserving the integrity of family wealth through mitigating interferences to the prejudice of the heir, deathbed's resulting effect was that land, as the primary source of wealth and status, passed intact down the generations.

Across the institutional texts, the protective nature of the law of deathbed was expressed with force. Bankton, in drawing a comparison with Roman law, underscores this quality explicitly:

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[349] Watson, *Treatise*, 104-5.
[350] See ch 2.1; McLaren, *Wills and Succession*, para 330.
[351] Unless the heir-at-law was excluded by an antecedent disposition: ibid, para 356.
[352] *Regiam Majestatem,* II.20.4.
[353] Ibid, II.18.7-10
[354] "by fervour of the mind": Ibid. Deathbed also prevented feudal superiors from being deprived of their customary dues and services: Kotlyar, "Succession", 168.
[355] Bell, *Commentaries,* 92.

> The law of death-bed is a considerable privilege of heirs… introduced with us upon the same principle as the *querela inofficiosi testamenti* among the Romans… [where a testator] without cause, disinheriting his children by his testament, was supposed *non compos* by the civil law, on account of his unnatural settlement.[356]

This parallel is significant. Like Bell, Bankton's view recognises that the law protects the grantor from exploitation, but he places equal, if not greater, weight on the protection it affords to the deceased's heirs. The reference to Roman law is particularly meaningful: the *querela inofficiosi testamenti.* While the Roman Empire later recognised that it was possible for testators to disinherit their relatives for good reason,[357] the *querela* allowed close family members - primarily children[358] - to make a complaint against an "undutiful" will in which the testator had failed to show them even a minimum amount of provision.[359] Scots law, though lacking a direct Roman equivalent, embraced a similar normative framework, affirming a legal assumption that the heir should have been provided for.

Interestingly, although the Court of Session held that the deathbed applied to all legal heirs - including heirs of provision and in tailzie – legal scholarship tends to focus on the heir-at-law.[360] The concept of "prejudice" to the heir carries this normative weight: it assumes the heir's entitlement to inheritance as a default. Of course, consistent with the principles of primogeniture, there was a strong societal expectation that the eldest son would inherit their father's heritable estate.[361] However, the starting point here seems to be that the intestate heir was entitled, and that any gratuitous disposition made *in extremis* was an interference that took away from that entitlement and expectation.[362] In this sense, by preserving the integrity of

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[356] Bankton, *Institute* III.4.32.
[357] Disinheritance without sufficient cause was considered "impious": C J Reid, "The jurisprudence of the forced share in the ancient world" in O-A Rønning et al (eds), *Donations, Inheritance and Property in the Nordic and Western World from Late Antiquity until Today* (2017) 48.
[358] T B Lemann, "In defense of forced heirship" (1977-78) 52(1) TulLawRev 20.
[359] R Zimmermann, "Compulsory heirship in Roman law" in K G C Reid et al (eds), *Exploring the Law of Succession: Studies National Historical and Comparative* (2007), 36-37.
[360] e.g. McCulloch, *Treatise*, 161; *Hepburn v Hepburn* (1663) Mor. 3177.
[361] See ch 1.2.2.
[362] R Bell, *A Dictionary of the Law of Scotland* (1826) 489.

family wealth, deathbed fits within a broader understanding of family protection - not merely incidentally, but inherently.

That is not to say, however, that the protection of descendants through deathbed was not immune to circumvention. For example, granters, while still *in liege poustie*, could execute tailzies to settle the course of succession before deathbed conditions attached.[363] Not all such workarounds were successful, and that litigants continued to rely on the law of deathbed well into the nineteenth century is telling.[364] Until its abolition in 1871,[365] deathbed remained a vivid expression of integrity-based family protection in Scotland.

2.3.2 The Exercise of Reserved Faculties on Deathbed

A common method of circumventing the law of deathbed was through the use of reserved faculties or powers.[366] These allowed a granter to retain the ability to burden, alter, or even revoke lifetime dispositions of their estate, even on deathbed.[367] Yet, litigation from the mid-seventeenth century until the eventual abolition of deathbed rules shows that the Court of Session remained attuned to their protective purpose. In particular, when adjudicating reserved faculties, the following analysis shows that the Court took a more protective stance in cases where the heir at risk of prejudice was the granter's eldest son, as opposed to cases involving a stranger. This section also considers cases involving reserved faculties that burdened the estate for "natural" or "rational" causes, namely, in favour of the granter's younger children. This, in turn, reveals another practical aspect of deathbed: its role in preserving the integrity of family wealth and extending protection beyond the interests of a single descendant.

[363] Stair, III.4.26; Kotlyar, "Succession", 183-184. Also, see exclusion via antecedent dispositions: *Grant v Grant's Trustees* (1859) 22 D 53.
[364] Sellar, "Succession", 52.
[365] (34 & 35 Vict, c.81).
[366] H McKechnie, "Dying declarations", 255.
[367] Watson, *Treatise*, 131; *Forbes v Forbes* (1755) Mor 3277.

In the Court of Session, cases concerning whether a reserved faculty could be validly exercised on deathbed produced different results.[368] Nonetheless, a clear rule emerged: where a power was reserved to later modify or encumber a disposition to a stranger, it could be exercised even on deathbed, assuming always the granter was of sound mind.[369] The rationale was that, when a disposition is accepted by a stranger, they must also accept all of its conditions, including any powers reserved by the granter.[370] Thus, there was no basis for a stranger to object.

This principle was recognised in the 1685 case of *Brown v Congleton*.[371] A granter entailed his estate to a stranger, subject to the condition that the disponee would be liable for all debts owed at the granter's death - even those incurred in his final moments. Though it is unclear as to whether the granter was *of sound mind*, and although the deed lacked the explicit clause *etiam in articulo mortis*,[372] the Court held the disponee to be bound by the condition. When the granter executed a bond on his deathbed, the Lords concluded that the burden fell upon the disponee. As the reserved power was clearly stated in the original disposition, the fact that the deed had been entered into on deathbed no longer served as a ground for challenge.[373] As such, its validity was upheld, highlighting the strength of such powers in dispositions made to strangers.

While deathbed law could be seen as preserving the integrity of family wealth by preventing interferences arising either from the granter's failing health or from external importunity, its application to reserved faculties diverged depending on the identity of the heir. *Congleton* highlights an important exception. In cases involving strangers, the focus was on upholding the certainty and binding effect of the original conditions. As observed by Lord Kames in his *Principles of Equity,* what set the granter's eldest son apart from a stranger was the son's dependency on his father

[368] *Hepburn v Hepburn* (1663) Mor. 3247; *Bryson v Bryson* (1668) Mor. 3247; *Livingston v Margaret Menzies* (1705) Mor. 3261.
[369] "*sanæ mentis*": Lord Kames, *Principles of Equity* 2nd edn (1767) 333.
[370] Ibid, 333-334; Deathbed presumed the defunct *non sanæ mentis*: *Paterson v Spreul* (1745) Mor. 3334.
[371] *Brown v Congleton* (1685) Mor. 3251.
[372] The ability to exercise a reserved faculty "even at the point of death".
[373] (1685) Mor. 3251: "[T]he Lords found, that the disponee was burdened with the said quality in the disposition, and therefore that he could not reduce the bond as granted on death-bed."

for his succession.[374] Strangers could freely negotiate the conditions of such a disposition. Heirs, by contrast, risked disinheritance if they refused to accept those terms. In the event a man settled his estate upon his eldest son, with a reserved power to alter that disposition *etiam in articulo mortis*, it was to be viewed at face value as extorted consent. It is justified on the basis that "no rational man will willingly submit to be in so precarious a state."[375] In this regard, deathbed law is an example of an integrity-based mechanism aimed at protecting descendants, as restrictions on the exercise of reserved powers were applied more rigorously when the heir in question was the granter's child.

However, if the reserved power only imposed a moderate burden to provide for younger children, Kames argued that "no good man would with-hold his consent,"[376] meaning such consent could be presumed voluntary. In this way, the application of the law of deathbed distinguished between extorted and voluntary consent: heavy or unjust burdens suggested extorted consent, while reasonable and moral burdens – suggesting some form of moral obligations on the part of the disponee as well as the granter – indicated voluntary consent.[377] Accordingly, the heir-at-law's ability to challenge deathbed deeds was increasingly limited when the reserved power in question was deemed both rational and consistent with the granter's natural familial duties.[378]

Judicial recognition[379] of such moral duties can be seen in the 1662 case of *Hay v Seaton*.[380] Sir John Seaton had, by a minute of agreement, reserved the power to burden his lands with 10,000 merks. His son George consented and agreed to act as principal disponer. On his deathbed, Sir John designated this sum in favour of his wife, Dame Margaret Hay, in liferent, and his younger son Henry in fee. George, as heir, sought to reduce the deed on the ground that it was granted in *lecto ægritudinis* and thus struck at by the law of deathbed. The Court of Session rejected his

[374] Kames, *Equity* 2nd edn, 334.
[375] Ibid.
[376] Ibid.
[377] Ibid, 334-335.
[378] Stair, III.4.2; Erskine, *Institute* II.9.44 (avoiding destitution).
[379] See generally, "Reserved Faculties whether reducible upon Death-bed" in *Morison's Dictionary.*
[380] *Hay v Seaton* (1662) Mor. 3246. Similarly, though concerning adultery, *Douglas v Douglas* (1670) Mor. 329.

arguments, holding the provision was a lawful exercise of a previously reserved faculty, fulfilling a moral duty to provide for one's wife and children. The Court described it as "not a voluntary deed, but an implement of the natural obligation."[381] The burden was upheld and the reason for reduction repelled, notably resting on a natural obligation akin to that which Stair would later invoke to rationalise legitim.[382]

However, Bankton contemporaneously cautioned that natural obligations alone could not override the general rule against deathbed deeds unless supported by legal compulsions, such as a marriage contract.[383] Nonetheless, a trend towards the protection of younger children remains clear in later case law. For example, in the 1706 case of *Bertram v Weir*,[384] the Court of Session upheld a bond granted by a father to his daughter on his deathbed. James Weir of Stanebyres had already settled his estate on his eldest son, William, expressly burdening it with provisions for his younger children, both granted and to be granted. When his daughter, Mary Weir, later assigned the bond, William tried to resist payment, invoking the doctrine of deathbed. While arguments were made that such provisions fulfilled an antecedent natural obligation, the Court ultimately found that, having accepted the estate under those terms, William could not repudiate its burdens while enjoying its benefits.[385] Due to the legal effect of homologation, the provision was binding, and the bond enforceable.

These cases highlight a broader legal shift. The law of deathbed, a shield for heirs against eleventh-hour disinheritance, embodied the essence of family protection. The Court of Session drew a clear line between strangers and the granter's heir-at-law: while strangers had no grounds to object to a reserved power exercised on deathbed, an eldest son retained some ability to challenge such powers, though not when the reserved power was exercised in a "moderate" and "rational" manner, that being for the benefit of the granter's younger children. There was essentially no need to presume that the granter had been impaired by virtue of their final illness.

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[381] Answer of the charger in which the Lords sustained.
[382] Stair III.4.2.
[383] Bankton, *Institute* III.4.36.
[384] *Bertram v Weir* (1706) Mor. 3258.
[385] Reference was made to *Hay v Seaton* (1662) Mor. 3246. See also, the rules on approbate and reprobate.

While the law of deathbed effectively prevented prejudice to the eldest son's inheritance, its practical effects also placed it within a bigger picture of protective principles. In the end, it was not merely the size of the provision that mattered,[386] but whether it was reasonable, necessary, and flowed from a natural obligation - an approach that helped extend protection to more than one descendant. Thus, deathbed achieved both integrity of family wealth and family protection more broadly. In other words, integrity was maintained not by wholly extinguishing the exercise of reserved faculties but by conditioning it in light of dynastic responsibility and social expectations.

2.3.3 Parallels Between Deathbed and Legitim

Legitim, in its current form, is not supported by a direct, or even similarly reactive, institutional counterpart as it was with the law of deathbed.[387] However, despite its formal abolition, the protective principles underlying deathbed rules continue to resonate in Scots succession law, particularly through the modern development of legitim and related protections against deliberate disinheritance. Both mechanisms reflect the notion that a child, or children, of the deceased are inherently entitled to succeed, and that their exclusion, whether by deeds executed on deathbed or other pre-death arrangements, has historically invited legal scrutiny.[388] In this way, both legitim and deathbed curbed the deceased's freedom to dispose of property, whether vulnerable to or able to resist importunity, albeit through different means.[389]

The key distinction between the two mechanisms lies in the type of property they addressed. As also noted in relation to tailzies, law of deathbed principally protected heirs' rights to heritage, whereas legitim has always applied to a fixed share of the

[386] It was thought that there was "less reason for extending the law of deathbed to dispositions of moveable property." McLaren, *Wills and Succession,* para 330.
[387] See ch 2.4.2-3 for functional and conceptual affinities.
[388] McLaren, *Wills and Succession,* para 330 and fn 1.
[389] Sellar, "Succession", 52 and 59: a "significant restriction on the transmission of heritage *inter vivos* was the law of deathbed" and legal rights "are a restriction on the power of testation":

deceased's net movable estate.[390] In the early stages of the emergence of deathbed law, the moveable property subject to such dispositions typically held far less value than heritable estate.[391] Thus, a testator in Scotland has, in theory, always been able to execute a testament or disposition of moveable property while on, or to take effect on, their deathbed.[392] However, *inter vivos* deeds and transfers executed *in lecto* to the prejudice of children's legitim claims were often the subject of legal scrutiny when deathbed law was still in force.

Both institutional writers and case law affirmed that gifts or conveyances made during final a granter's final illness were ineffective if they intended to remove property from the estate in a way that circumvented legitim.[393] Hume later argued that a father could not validly convert his moveable estate into heritable property on deathbed for the purpose of avoiding legitim.[394] This included, for instance, executing on deathbed a deed of conversion for the purposes of "changing bills" or converting "promissory notes into heritable bonds".[395] Thus, legal objections based on deathbed status were upheld in a variety of contexts.[396] This demonstrates how deathbed law not only provided family protection in terms of the heritable estate, but also indirectly reinforced legitim, where such deeds threatened the integrity of family wealth by extinguishing a child's claim to a share of the movable estate.

On the other hand, ordinary lifetime transfers that bypassed legitim were not considered fraudulent nor invalid.[397] This was the case even if they were deliberately motivated by an intent to avoid the effects of legal rights.[398] Notably, a notion advanced by Erskine, that deeds executed *in fraudem* of legal rights should be considered ineffective,[399] was rejected by McLaren in his 1894 treatise, *The Law of*

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[390] See ch 1.2.3.
[391] Barclay, *Digest,* 989. This likely influenced deathbed's scope: McLaren, *Wills and Succession,* para 330.
[392] Ibid, para 325; 'in theory' as this could be subject to dispute. It may be difficult to prove donative intent.
[393] Stair, III.4.24; Bankton, *Institute* III.8.15; Erskine, *Institute* III.9.16; *Burden v Smith* (1788), reported by Cr. St. and Pat 214; *Hog v Lasley* (1792) 3 Pat 247, discussed in D J Carr, "*Lashley v Hog* (1804): Forced Heirship and Succession across Borders" in Brian Sloan (ed), *Landmark Cases in Succession Law* (2019).
[394] Hume, *Lectures,* 168-70; P Fraser, *Treatise on Husband and Wife, according to The Law of Scotland* 2nd edn, vol 2 (1878), 1008-1010.
[395] McLaren, *Wills and Succession,* para 253.
[396] *Aikman v Boyd* (1679) Mor. 3201; *Cant v Edgar* (1628) Mor. 3199; *Grant v Gunn's Trustees* (1833) 11 Sh. 484.
[397] Hume, *Lectures,* 169.
[398] *Montgomery-Agnew v Agnew* (1775) Mor. 8210.
[399] Erskine, *Institute* III.9.16.

Wills and Succession.[400] Such transfers could only be invalidated if they fell within the scope of deathbed's application. When viewed within a broader system of family protection instruments, until its abolition, the law of deathbed functioned not merely as a general anti-avoidance measure, but as a reactive mechanism, triggered where an impugned act occurred during a final illness and interfered with legitim.

Another historical method of circumventing legitim was through antenuptial contracts, particularly during the nineteenth and early twentieth centuries.[401] Wealthy parents often would discharge rights to legitim in this deed,[402] provided the children of the marriage received some alternative provision, however minimal.[403] This practice, however, was curtailed only by the enactment of the Succession (Scotland) Act 1964,[404] with section 12 marking a significant shift. The section provides that no marriage contract executed after the Act's commencement could exclude the right of any child of the marriage's legitim claim, unless that child, or remoter descendant, expressly elects to accept an alternative provision made under the contract.[405]

Although this provision does not replicate the deathbed rule in the sense of invalidating deeds made during a period of vulnerability of the granter, it nonetheless reflects the same underlying concern as legitim with the deliberate disinheritance of children by their parent. Accordingly, the 1964 Act can be seen as a contemporary effort to preserve the integrity of family wealth by thwarting a form of pre-emptive interference with legitim that was historically permitted. By disallowing parents from contracting out of their children's legitim rights through antenuptial agreements, the Act represents a conscious rejection of one of the clearest historical threats to family protection for descendants.

While the current law no longer contains the formal machinery of law of deathbed, elements of its protective core remain alive within this aspect of legitim. Just as the deathbed rules focused on the heir's entitlement and scrutinised dispositions made

[400] Noted in Reid, "Legal Rights", 439 and fn 193; McLaren, *Wills and Succession,* para 254.
[401] Predominantly to the benefit of the deceased's spouse: A E Anton, "The effect of marriage upon property in Scots law" (1956) 19(6) ModLawRev 653.
[402] Bankton, *Institute* III.8.26; Erskine, *Institute* III.9.23; Bell, *Principles, §*1587; Robertson, *Treatise,* 373-4.
[403] Ibid; *Maitland v Maitland* (1843) 6 D 244.
[404] Succession (Scotland) Act 1964, s 12.
[405] Ibid.

shortly before death, section 12 now protects children from exclusionary lifetime arrangements that would defeat their share of their parent's net movable estate. Though section 12 imposes no restriction on how a parent may dispose of their property *inter vivos* or in their will,[406] nor does it prohibit evasion through preventing increased investment in heritable assets, it nonetheless operates as a check on a deliberate interference that would otherwise extinguish children's entitlement. In this way, Scots succession law continues to safeguard the integrity by preventing at least certain direct interferences.

Ultimately, what it means to preserve the integrity of family wealth, as well as the types of wealth to which that concern applies, has changed over time. However, this section has shown that the underlying thinking about how such wealth ought to be protected has persisted. In the context of legitim, that thinking has translated, albeit in a limited way, into an emphasis on preventing active interferences with a child's entitlement. Where the prejudiced heir was the child of the granter, the practical effects of how the law of deathbed preserved the integrity of family wealth aligned with this thesis' conception of family protection.

As such, the abolition of deathbed can be rationalised on grounds akin to those that justified the decline of tailzies:[407] the rise of individualism and testamentary freedom over heritage rendered many of the older restrictions obsolete. However, the concerns that once animated deathbed law – protecting the heir by preventing interferences arising from the granter's vulnerability or susceptibility to influence – also continue to inform modern legal doctrine. In this respect, the protective function of the former law of deathbed has been said in the literature to find echoes in the rules on facility and circumvention.[408] This is examined in the next section.

[406] Gifts made in contemplation of death were (supposedly) abolished by the Succession (Scotland) Act 2016, s 25.
[407] See ch 2.2.4.
[408] McLaren, *Wills and Succession*, para 343: dispositions remain exposed to facility and circumvention beyond deathbed; *Crawford v Brichen* (1711) Mor. 3312; *Laird v Kirkwood* (1763) Mor. 3315; *Faichney v Faichney* (1776) Mor. 3316.

2.4 Facility and Circumvention

Similar to deathbed, the doctrine of facility and circumvention can preserve the integrity of family wealth by preventing both internal and external interferences with its lineal transmission. Although not unique to the law of succession, this discussion focuses on the doctrine's application when invoked by disinherited members of the deceased's issue. Thus, interferences refer to instances in which the deceased has been taken advantage of, due to their age or other infirmity.[409] This section shows that the doctrine serves as a protective purpose as its successful application is often shaped by an underlying sense that providing for one's issue is a "natural" or "rational" act. It begins with early expressions of this belief in Scots succession law, examining how it informed the later incorporation and development of facility and circumvention in testamentary cases.

2.4.1 The 'Weak and Facile' Testator

In his *Institutions*, Stair observed that "[t]he power of testing is competent to all persons who have the use of reason."[410] A state of mental weakness renders some individuals vulnerable to exploitation by cunning and deceitful parties.[411] As a result, the law has - and continues to - safeguard such persons from harming themselves due to their own mental frailty or lack of judgment. Kames echoed this sentiment, suggesting that just as the law guards against unequal bargains, it should likewise protect individuals from making "absurd settlements".[412] However, he also remarked that a "rational and laudable deed never can be lesion[413] in any proper sense."[414] But what constitutes an irrational or absurd act? For Kames, failing to provide for one's

[409] W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (1914) 542-543.
[410] Stair, III.8.37; Erskine, *Institute* I.7.33
[411] Expressed in Kames, *Equity* 2nd edn, 80; and again, in the 4th edn (1800) 75-79.
[412] Kames, *Equity* 2nd edn, 81.
[413] Generally understood as "patrimonial prejudice": MacLeod & Zimmermann, "Forfeiture", 780.
[414] Ibid.

family should fall within this category[415] - an idea reflected in the 1759 case of *Tulloch v Viscount of Arbuthnot.*[416]

While the general doctrine of facility and circumvention was in its infancy at the time, *Tulloch* offers an early indication of judicial concern with vulnerable testators, but fundamentally with preserving the integrity of family wealth and the protection of family interests. This case is not an example of the doctrine itself, but it is instructive in demonstrating that, even prior to the incorporation of the formal test for facility and circumvention in the succession context, a level of attentiveness to situations where mental frailty and the exclusion of close family members raised questions about the rationality of a testament. Situating *Tulloch* in this broader context reveals early protective reasoning that later found more structured expression in the doctrine.

In *Tulloch,* a brother sought to void a holograph testament executed by his deceased sister in favour of a stranger.[417] Evidence revealed that the testatrix had a history of mental illness and had previously been confined due to madness. Her condition reportedly deteriorated shortly after making the testament, continuing to decline until her death. Witnesses testified that her mental state fluctuated. During lucid intervals, she reportedly showed affection toward her brother, but during her episodes of illness, she harboured baseless resentment against him. The testament was made in secrecy and without consultation, with the beneficiary enjoying private, unmonitored access to the testatrix. Meanwhile, her brother lived at a distance.

Although the testatrix was considered legally capable of making a will, the Court of Session ultimately annulled the testament. The basis for the decision was that the testament reflected an irrational disposition made by a mind weakened by illness. The key principle extracted from the Court's decision was that " a testament made in favour of a stranger, by a person in a wavering and infirm state, without rational motive, will be reduced, tho- not where made in favour of a near relation."[418]

While the *Tulloch* case concerned siblings, the Court's emphasis on a "near relation" suggests that similar reasoning would likely have applied where the disinherited

[415] Ibid, 776-779.
[416] *Thomas Tulloch v Viscount of Arbuthnot* (1759) Mor. 11672.
[417] Ibid.
[418] Ibid.

party was a child of the deceased. While "next of kin" has more recently been a matter of technicality, in line with the common law in force prior to 1855, it was taken to mean those who would be first to inherit the deceased's moveable property.[419] Therefore, had the facts in *Tulloch* instead been that the testament was challenged by a child of the deceased, the key principle derived from the case would have likely been the same. Of all members of the testatrix's family, any children would have constituted the nearest class.

What *Tulloch* illustrates, therefore, is an early judicial impulse to scrutinise wills that departed from expected patterns of familial provision when made by a testator of questionable mental strength. Thus, *Tulloch's* implication for family protection is clear: a will that deviates from familial expectations requires justification, whereas a will consistent with those expectations does not. In this way, the law intervened to prevent interferences stemming from this vulnerability and also vulnerable testators from inadvertently harming their family's interests as a result. The prevention of such interferences with the succession process reflects a foundational concern with maintaining the integrity of family wealth. This concern would have been particularly significant in the case of maternal estates, as until 1881, children had no right of legitim in respect of their mother's estate.[420]

It was around this time that Scots law began to recognise such infirmity as a state of "facility".[421] Following its establishment and integration into succession law, facility and circumvention became an essential safeguard in testamentary cases in which a testator is unusually susceptible to influence due to a weakened mental state.[422] Facility need not rise to insanity or incapacity, as this would vitiate consent entirely; rather, it captures those cases where physical or mental deterioration – such as from illness or old age[423] – renders an individual easily imposed upon.[424] Having arisen from fraud in the eighteenth and nineteenth centuries, "circumvention" developed from a broader understanding of deception and coercion,[425] with the Court of

[419] Meston, "Wills and Succession", para 879.
[420] The Married Women's Property (Scotland) Act 1881, c.21, s 7.
[421] A R Barr, *Drafting Wills in Scotland* 2nd edn (2009) para 763.
[422] For the weight of circumvention against mental/moral weakness, see *M'Dougal v M'Dougal's Trustees* 1931 SC 102; *West's Trustee v West* 1980 SLT 6, OH; *Wheelans v Wheelans* 1986 SLT 164, OH.
[423] Gloag, *Law of Contract,* 542-543.
[424] Barr, *Drafting Wills*, para 763.
[425] Stair, I.9.9; MacLeod & Zimmermann, "Forfeiture", 776-777.

Session distinguishing it as involving acting on a facile or "nervously anxious" mind through "persuasion and untrue representations."[426] In terms of the affected act itself, emphasis was placed on its gratuitousness, or that it involved inadequate consideration.[427]

Establishing facility and circumvention generally requires a three-part test. The first prong is facility. The testator or granter must have been in a state of mental weakness.[428] Second, another party must have exploited this weakness to secure benefit for themselves[429] – this constitutes circumvention. The third requirement is lesion. This means that the granter, or a third party,[430] typically a close relative, must have suffered harm to their interest or a resulting loss. Although this framework sets a high evidential bar requiring convincing proof of each element,[431] proving the strength of one component could offset weaker proof of another.[432] However, the 1925 case of *Gibson's Executors v Anderson* raises questions about just how far this principle can be extended.[433] In this case, four Lords of the Court of Session demonstrated a willingness to infer both facility and circumvention from suspicious circumstances alone.

In *Gibson*, the deceased, John Gibson, had consistently expressed an intention to leave his entire estate to his son – an intention Lord Hunter described as a "natural thing [for him] to do".[434] However, shortly before his death, John executed two handwritten documents that benefited his late wife's sister, the defender. The pursuer, John's son and executor, argued that these documents were the result of the deceased's mental vulnerability and importunity by the defender.[435] A trial by jury found that the documents were genuinely authored by the deceased, however, they also found in favour of the pursuer on the issue of procurement through facility and

[426] *Clunie v Stirling* (1854) 17 D 15, at 18.
[427] Ibid, at 17.
[428] J M Thomson, "Fraud" in *Stair Memorial Encyclopaedia* vol 11 (1990) para 733; *Jackson v Pollock* (1900) 8 SLT 267 (even habitual drunkenness has sufficed!).
[429] This is the key question in such cases: *Morrison v Maclean's Trustees* (1862) 24 D 625.
[430] *Pascoe-Watson v Brock's Executor* 1998 SLT 40, at 47 per Lord Osborne.
[431] Gloag, *Law of Contract,* 543.
[432] Erskine, *Institute* IV.1.27; *Mackay v Campbell* 1967 SC (HL) 53.
[433] *Gibson's Executors v Anderson* (1925) SC 774.
[434] Ibid, at 784 per Lord Hunter.
[435] The pursuer averred impetration by "fraud and circumvention", later distinguished at 788 per Lord Blackburn, referencing Lord Kyllachy in *Parnie v MacLean*, unreported.

circumvention. Lord Justice-Clerk Alness the verdict, contending that "the establishment of a case of facility… [was] completely submerged by the weight of evidence regarding the incapacity of the deceased".[436] He maintained that, without concrete evidence of the deceased's facility or of dishonest conduct by the defender, the jury's verdict was contradictory and simply could not stand.

While Lord Justice-Clerk Alness warned that suspicion alone should not substitute for proof, the majority of the Court took a different view. In particular, Lords Blackburn and Anderson saw the suspicious events surrounding the creation of the documents as persuasively pointed toward circumvention.[437] These included the deceased's abrupt departure from his long-standing testamentary intentions, the absence of neutral witnesses, the heightened vocabulary and lack of misspellings in the will, and the defender's knowledge of the deceased's intentions. Lord Blackburn notably observed that where the deceased's mental condition straddles the boundary between facility and incapacity, the evidential threshold to infer circumvention is lowered.[438] In such cases, "solicitation, pressure, importunity, even… suggestion"[439] may suffice, without overt deception. This shows a more flexible, protective application of the doctrine beyond the strict three-part test.[440]

Within the broader context of this thesis, the incorporation of facility and circumvention into Scots succession law contributed both to protecting the weak and facile testator and to preserving the integrity of family wealth against interferences. The reasoning in *Gibson* demonstrates that the doctrine has the capacity to absorb and respond flexibly to circumstantial patterns of suspicious behaviour, particularly when vulnerable individuals alter their estate plans in ways that benefit others at the expense of their children. It is precisely this effect that allows facility and circumvention to be understood as a mechanism of family protection. While Lord Alness advocated strict adherence to evidentiary standards, the majority recognised that threats to the integrity of family wealth can arise in subtle and indirect ways. Although meeting the technical test remains important, this approach exemplifies the

[436] (1925) SC 774, at 793 per Lord Justice-Clerk Alness.
[437] The facts "proved" are set out in detail: at 779-781 per Lord Anderson.
[438] Ibid, at 786 per Lord Blackburn.
[439] Ibid, at 788.
[440] *Digest of All the Cases Decided in the Supreme Courts of Scotland and Reported in the Various Series of Reports with Alphabetical Table of Statutes July 1923 to October 1930* (1931) 107.

doctrine's role in protecting the interests of descendants when the signs of circumvention, though circumstantial, are nonetheless compelling.

2.4.2 Protection from Internal and External Interferences

The foregoing discussion demonstrates that the doctrine of facility and circumvention is capable of mitigating the effects of interferences with the succession process. While facility and circumvention is not confined to descendants, and its successful application is ultimately dependant on the specific facts of each case, it nonetheless provides a means of preventing the depletion of family wealth both in case of external and internal interference.[441] One might argue that early judicial referencing "rational" or "natural" dispositions, such as those in *Tulloch* and *Gibson*, can be interpreted as justified on the basis of ties of affection,[442] or the perceived moral obligation of parents to provide for their children.[443] Nonetheless, the continued assertion of facility and circumvention in contemporary cases confirms its relevance as a mechanism for preserving the integrity of family wealth and protecting descendants' interests.

Although distinct vices of consent,[444] facility and circumvention is often averred alongside undue influence in modern case law.[445] Similarly, undue influence is not exclusive to the purview of succession law; it arises more generally in Scots law where a party, occupying a position of trust, authority of confidence, exploits that position to extract a benefit for themselves.[446] This serves to undermine the autonomous judgement of the influenced party. To successfully challenge a will on this ground, it must be shown that, but for such influence, the testator would have

[441] *Boyle v Boyle's Executor* 1999 SC 479; *Anderson v Wilson* [2019] CSIH 4.
[442] K Barclay, "Natural Affection, Children, and Family inheritance Practices in the Long Eighteenth Century" in J Nugent and E Ewan (eds), *Children and Youth in Premodern Scotland* (2015); Barclay, "Emotional Lineages".
[443] Stair, III.4.2; Erskine, *Institute* III.9.23; Watson, *Treatise*, 49; Scot Law Com No 215, 2009, para 3.1; see *Russell's Executors v Russell's Executrix* [2025] GLA SC 19 for this idea's continued relevance and application.
[444] MacLeod & Zimmermann, "Forfeiture", 776.
[445] *Horne & Another v Whyte & Others* [2005] ScotCS CSOH 115; *Pirie v Clydesdale Bank Plc & Others* [2006] ScotCS CSOH 82.
[446] Meston, "Wills and Succession", para 764; *Ross v Gosselin's Executors* (1926) SC 325.

executed their will differently.[447] This contrasts with circumvention in that it does not necessarily require the interferer to shape the inclinations of a testator with weakened mental state to their benefit.[448] Nevertheless, commentators have argued that if the Scottish courts are prepared to infer circumvention in the absence of direct evidence, "it is difficult to see why they should not be willing to infer inappropriate pressure in cases of undue influence."[449]

This interplay was clearly outlined in the 2005 case of *Horne v Whyte*.[450] The pursuers, the deceased's son and daughter, sought a reduction of informal testamentary writings and a codicil on the grounds of both facility and circumvention and undue influence. They alleged that their father, following the death of his wife, had entered a state of physical and mental decline. Consequently, he had become increasingly dependent on his housekeeper. The pursuers contended that the housekeeper had exploited this dependence, exerting undue influence and effectively assuming total control over his financial affairs.

The pursuers' claims were supported by evidence of frequent and unexplained cash withdrawals that ceased during the housekeeper's holidays, as well as her involvement in filling out cheques. The deceased reportedly feared losing her assistance and regularly deferred to her judgement in managing his affairs. Lord Drummond Young concluded that the requisite elements for both facility and circumvention and undue influence were present,[451] and the testamentary writings were thus reduced. Although not a typical 'trust and confidence' relationship like doctor and patient or guardian and ward,[452] Lord Drummond Young was clearly swayed by the facts and treated it as sufficiently analogous to establish undue influence. From an integrity-based family protection perspective, this case underscores how the doctrines can safeguard both immediate descendants'

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[447] See generally, R J Scalise Jr., "Undue influence and the law of wills: a comparative analysis" (2008) 19(1) *Duke Journal of Comparative and International Law* 41.
[448] *Ross v Gosselin's Executors* (1926) SC 325, at 334 per Lord President Clyde.
[449] MacLeod & Zimmermann, "Forfeiture", 780.
[450] *Horne & Another v Whyte & Others* 2003 GWD 38-1044; in certain circumstances, circumvention will be presumed: *Honeyman's Exrs v Sharp* 1978 SC 223.
[451] 2003 GWD 38-1044, at paras 13-17.
[452] Gloag, *Law of Contract*, 528-529; W H D Winder, "Undue influence in English and Scots law" (1940) 56(1) LQR 97, 105; Meston, "Wills and Succession", para 764.

inheritance from external influences and help prevent wealth from being diverted outside of the family.

While there is often overlap with undue influence in case law, we can see that the focus of both doctrines is to prevent dispositions that result not from the free and informed will of the testator but from exploitation, irrespective of whether the interference comes from external or internal parties. In this regard, facility and circumvention can essentially protect the deceased's issue from each other. For instance, in *Horsburgh v Thomson,*[453] the pursuer – a granddaughter of the deceased and child of his predeceasing daughter – challenged codicils to her grandfather's will, which had allegedly been orchestrated by her aunt, Mrs Campbell. The claim was that Mrs Campbell had unjustly imposed upon her father's weakened mental state to secure changes favouring herself and her siblings, excluding the pursuer, and her predeceasing mother's, line of descent. Here, the doctrine acted as an internal check on abuses of access and opportunity, supporting the reduction of the codicils in question.

A more recent example is the 2016 case of *Matossian v Matossian*.[454] The pursuer, acting as executor-nominate under his mother's will, sought to reduce deeds that transferred his mother's heritable estate to his two brothers "for no consideration".[455] The Court of Session found that the mother had indeed executed the deeds under conditions of facility and circumvention, as well as undue influence exerted by the defenders.[456] In both *Matossian* and *Horsburgh*, the Court inferred that the actions had been procured through manipulation, with the deceased parties' mental frailty and the resulting lesion to both their estates and the pursuers' respective interests playing a central role.[457] Moreover, the mother-son relationships in *Matossian* were held to involve dominant influences of trust and confidence which had been abused to distort testamentary intentions.[458]

[453] *Horsburgh v Thomson's Executors & Others* [1911] SLR 257.
[454] *Matossian v Matossian* 2016 CSOH 21.
[455] Ibid, at para 32-33.
[456] Ibid.
[457] Ibid, at paras 7-8 and 33.
[458] Ibid.

Taken together, the cases of *Horsburgh* and *Matossian* demonstrate the dual protective function embodied by facility and circumvention and its role in preserving the integrity of family wealth. In the external context, facility and circumvention can ensure that wealth is not diverted outside the deceased's family through opportunistic exploitation of infirmity; in the internal context, it acts as a corrective where one relative manipulates another to skew the distribution in their favour. In this way, facility and circumvention offers descendants a valuable legal remedy against misconduct – whether by outsiders or other family members – that prejudice their legitimate interests. Analysis of case law affirms that the three-part test's application continues to align with fundamental principles of family protection. By preventing the exploitation of a testator's mental decline, facility and circumvention preserves the integrity of family wealth and, in doing so, has repeatedly secured inheritance for descendants.

2.4.3 Integrity Mechanisms: Functional and Conceptual Affinity

Through its internal comparison of the forfeiture rules, the law of deathbed, and facility and circumvention, this chapter has highlighted a common theme: the assessment of whether a successor is 'worthy' or 'unworthy' to inherit. Though the basis for unworthiness differs across these doctrines, a functional analysis shows that, regardless of whether one commits a grave crime or subtly exploits another's mental frailty, the law aims to prevent such individuals from being enriched through conduct that undermines, in this thesis' case, the integrity of family wealth.[459] This chapter has extended that analysis by highlighting that, in serving to ensure such integrity, these instruments can, or did, function in practice to protect the interests of the deceased's children and remoter issue against interferences with either the will of the testator or intestacy rules.

[459] See the functional links identified in ibid, 775.

In this regard, until 1871, the Scots law of deathbed can be said to have operated as a supplementary mechanism to facility and circumvention.[460] The ground of *ex capite lecti*, in allowing heirs to challenge and reduce any deed made by the deceased in a state of mortal illness,[461] was somewhat of a 'presumed' facility and circumvention. Conceptually, the law of deathbed mirrored the three-prong test. First, facility was inferred from the granter's deathbed condition. Failure to attend kirk or market unsupported or survive for sixty days from the deed's execution was indicative of mental and physical frailty. Second, the context of deathbed execution was treated as inherently suspicious, thus inferring circumvention. Finally, lesion was evident in the harm caused to the heir, whose inheritance was diminished by such deeds. Deathbed law prefigured a system of inferred interferences, functioning protectively by presuming vulnerability and thus shifting the evidentiary burden. Although now abolished, its logic persists in contemporary cases which seek to restore the integrity of family wealth where frailty and prejudice are both apparent.

However, it must be recognised that the disinheritance of children, even in what might be regarded as the most unfair circumstances, does not automatically equate to facility and circumvention. This principle was affirmed in the 2017 case of *O'Neil v O'Neil*.[462] The pursuer, David O'Neil, challenged a disposition granted by his mother in favour of his two elder brothers, Michael and John. The mother had granted a liferent in the property to herself and the fee to her first two sons, later making a will in favour of them too. David and his younger brother were thus disinherited. He argued that they had made financial contributions to the purchase and furnishing of their mother's house and were led to believe their interests would be protected. Despite these assertions and the perceived inequity, the Court upheld the deed, highlighting the limitations of facility and circumvention as a catch-all remedy.

The judgment in *O'Neil* underscores the rigour associated with successfully challenging a testamentary document based on facility and circumvention. Sheriff Miller found the pursuer's evidence failed to establish all three necessary elements: there was no sufficient indication of the mother's facility, no persuasive evidence of

[460] Ibid, 780; McLaren, *Wills and Succession,* para 333; Reid, "Testamentary Formalities", 406; for a general link between the *querela inofficiosi testamenti* and capacity, see Scalise, "Undue Influence", 82-3.
[461] See ch 4.3.
[462] *O'Neil v O'Neil* 2017 GWD 22-361.

circumvention, and only a “degree” of lesion, though not in relation to the mother or other sons who benefited.[463] It was not enough that disinheritance had occurred or that informal assurances had been made; what was lacking was compelling proof that the mother had been manipulated in a way that undermined her volition.[464] While the outcome may appear harsh, it illustrates the law’s insistence on some robust evidence before setting aside a deed on these grounds. Where a valid will exists, and facility and circumvention cannot be proven, the deed must stand.[465]

Thus, in contrast to *Tulloch*, where irrationality provided a strong foundation for reduction, or *Gibson*, which involved substantial inference of circumvention in favour of the deceased's child, *O’Neil* reminds us that not all perceived interferences warrant legal intervention. There must be a balance between protecting descendants and respecting the grantor's autonomy, not least because of the modern emphasis on testamentary freedom in Scots law.[466] While the case law has suggested that providing for one's children is both a natural and rational thing for a testator to do, facility and circumvention is a targeted basis for challenge. It is only logical to suggest that safeguarding against non-existent interferences would, in itself, undermine the very integrity-based protection these mechanisms are intended to achieve.

However, this is not to say that disinherited children are without any recourse. Herein lies a critical interaction between facility and circumvention, and legitim. By offering a statutory right to a fixed share of the deceased’s moveable estate, legitim also functions as a fallback mechanism in cases when challenges based on facility and circumvention fail or even where reductions of deeds diminish a child’s share. Although facility and circumvention can be invoked by any interested party, such as a sibling or cousin of the deceased, regarding family protection, its operation has a rather potent synergy with legitim. Thus, even where a claim is unsuccessful, legitim ensures a minimal material share for those children left disinherited, provided, as previously established, there is moveable property available to claim.

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[463] Ibid, at para 45-49.
[464] See the argument for the defenders: ibid, at para 9.
[465] Contrast with *Gibson.*
[466] Reid, “Legal Rights”, 417-418; Stair, III.4.2; Clive, “Restraints on Testamentary Freedom”, 246.

In consequence, while David and his brother failed to reduce the disposition in *O'Neil*, they would still have been entitled to claim their shares of the legitim fund. With no surviving spouse, the legitim fund would have amounted to one-half of their mother's moveable estate, divided equally among all four sons. As Michael and John had accepted their legacies under the will, they would have been barred from claiming legitim in addition.[467] Although the disinherited sons would have received no interest in their mother's heritable estate, they would not have been entirely excluded from inheriting. Subject to collation,[468] the last two sons would each have received one-eighth of the movables. This is the system of family protection in operation, albeit limited to a singular species of property.[469]

Ultimately, by shifting the focus from mere legal formalism to functional justice, facility and circumvention can be reframed as more than just a ground for reduction and instead as an integral component of a family protection continuum. The doctrine does not require a specific familial relationship between the testator and challenger; however, its operation has proven particularly effective for descendants. Moreover, while Scots law values testamentary freedom, it does not do so blindly. The presence of legitim ensures that even when interference cannot be proved, descendants are not wholly disenfranchised, and integrity of family wealth is maintained. This dynamic interaction bolsters the core thesis of this dissertation. Rather than viewing facility and circumvention and legitim in isolation, we must see them as parts of an interconnected framework aimed at family protection. Therefore, facility and circumvention may not always succeed as a legal argument and may be harder to prove in cases where the benefiting party is also one of the family, but when considered alongside legitim, it contributes to the emergence of a more nuanced and robust protective regime.

[467] Succession (Scotland) Act 1964, s 13. On the rules of approbate and reprobate.
[468] Bankton, *Institute* III.8.19.
[469] This can produce "unjust and anomalous results": Scot Law Com DP No 136, 2007, para 3.35.

Conclusion

This thesis has re-evaluated the concept of family protection in Scots succession law, traditionally understood as mechanisms to prevent disinheritance, primarily through mandatory rules such as legitim. By adopting a broader definition of protection and a lineal definition of family centred on descent, this study has shown that family protection encompasses both financial provision for individual descendants and the preservation of the family itself. This reconceptualisation formed the foundation of the thesis and underpins its first key claim: that family protection should be understood as more than simply a defence against disinheritance.

The thesis also claimed that legitim alone does not capture the full scope of protection afforded to descendants in Scotland. Through its examination of historical and contemporary mechanisms, as well as cross-mechanism comparison, the research has identified a wider array of rules and doctrines that contribute to this aim. Chapter One's focus on family continuity illustrated how the legal constructs of tailzies, the rules allowing for children to inherit in their predeceased parent's stead, and the *conditio si testator sine liberis decesserit* have consistently reflected a concern with maintaining intergenerational bonds and preserving family wealth across generations. These mechanisms have each shaped the structure of succession, not simply to guarantee financial provision, but to sustain family identity and connections, thereby mitigating risks of social isolation for descendants. Moreover, this dynamic history has demonstrated that continuity and family protection have been conceptualised and operationalised in diverse ways, reflecting shifting societal values and legal priorities over time.

Chapter Two has also developed this second claim by examining mechanisms concerned with maintaining the integrity of family wealth. It has explored how Scots law excludes those who have unlawfully killed the deceased or interfered with the succession process through forfeiture rules, the now-abolished law of deathbed, and the doctrine of facility and circumvention. Although often described as protections for the testator, this thesis has shown that, in many cases, they serve as much to protect

the issue of the deceased. The internal comparison of these mechanisms has revealed a recurring concern with the 'worthiness' of potential successors, yet the chapter has also highlighted that Scottish courts have, in some instances, preserving a child's entitlement in circumstances where others might be excluded. As such, while these integrity-based mechanisms are not formally viewed as instruments of family protection, their operation has clear protective consequences for the interests of descendants.

Third, and perhaps most significantly, this thesis has shown that the mechanisms discussed must be understood holistically rather than in isolation. By framing its analysis around the two interrelated principles of continuity and integrity, the research has revealed an interconnected system of protective principles embedded in Scots succession law. Legitim emerges within this framework as part of a larger constellation of protections that collectively secure descendants' interests in a material, symbolic, and social sense. This perspective, in turn, has encouraged a more nuanced evaluation of legitim's role and limitations, highlighting that while it has flaws, it operates alongside other evolving instruments that together sustain family protection.

Ultimately, this thesis has aimed to complement existing legal scholarship by offering a new perspective on what it means to protect the interests of descendants. It has done so by situating legitim within a broader, principle-based framework. Through an examination of mechanisms that preserve both the continuity of the family as a social unit and the integrity of family wealth, the research has demonstrated that family protection in Scots law is more comprehensive, adaptive, and coherent than has been acknowledged in the literature so far. It is hoped that this thesis has not only deepened our understanding of how Scots law protects family interests but will also inspire further reflection on fundamental questions of succession law: who it protects, what it seeks to accomplish, and why these protections matter.

Appendix 1. Abbreviations

The following abbreviations are used throughout the text. Where other editions or variations are referenced, these are identified in the footnotes.

Abbreviation	Full Description
Balfour's Practicks	J Balfour, *The Practicks of Sir James Balfour of Pittendreich*, by P G B McNeill (1962).
Bankton, *Institute*	Bankton, A MacDowall, *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between Them and the Laws of England* vol 2 (1752).
Barclay, *Digest*	H Barclay, *A Digest of the Law of Scotland: With Special Reference to the Offices and Duties of a Justice of the Peace* (1865).
Barclay, "Emotional Lineages"	K Barclay, "Emotional Lineages: Blood, property, family and affection in Early Modern Scotland" in A Marchant (ed), *Historicising Heritage: The Affective Histories of Blood, Stone and Land* (2019).
Barr, "Conditio"	A R Barr, "The conditio si institutus sine liberis decesserit in Scots and South African Law" in K G C Reid et al (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007).
Bell, *Commentaries*	G J Bell, *Commentaries on the Law of Scotland and on the Principles of*

	Mercantile Jurisprudence 7th edn, vol 1, by J McLaren (1870).
Bell, *Principles*	G J Bell, *Principles of the Law of Scotland* 6th edn, by W Guthrie (1872).
Craig, *Jus Feudale*	T Craig, *Jus Feudale, With an Appendix Containing the Books of the Feus* (translated by J A Clyde, 1934).
Erskine, *Institute*	J Erskine, *An Institute of the Law of Scotland* 1st edn (1773) reprinted by Edinburgh Legal Education Trust as *Old Studies in Scots Law* vol 5 (2014).
Hope, *Minor Practicks*	T Hope, *Minor Practicks, or, A Treatise of the Scottish Law* (1726).
Hume, *Commentaries*	D Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment for Crimes* (1797).
Hume, *Lectures*	D Hume, *Lectures 1786-1822* vol 5 (1957).
Kreiczer-Levy, “Intergenerational bonds”	S Kreiczer-Levy, “Inheritance legal systems and the intergenerational bond” (2012) 46(3) *Real Property, Probate and Trust LJ* 495.
Kotlyar, “Succession”	I Kotlyar, “The Evolution of the Scots Law and Practice of Succession: 1300-2000” in M G di Renzo Villata, *Succession Law, Practice and Society in Europe across the Centuries* (2018).
Mackenzie’s works	G Mackenzie, *The Works of that Eminent and Learned Lawyer, Sir George Mackenzie of Rosehaugh* vol 2 (1716).
MacLeod & Zimmermann, “Forfeiture”	J MacLeod and R Zimmermann, “Unworthiness to inherit, public policy,

	forfeiture: the Scottish story" (2013) 87(4) TulLawRev 741.
McCulloch, *Treatise*	J R McCulloch, *A Treatise on the Succession to Property Vacant by Death* (1848).
McLaren, *Wills and Succession*	J McLaren, *The Law of Wills and Succession as Administered in Scotland: Including Trusts, Entails, Powers, and Executry* 3rd edn, vol 1 (1894).
Meston, "Wills and Succession"	M C Meston, "Wills and Succession" in *Stair Memorial Encyclopaedia* vol 25 (1989).
Morison's Dictionary	W M Morison, *The Decisions of the Court of Session, from its First Institution to the Present Time, Digested under Proper Heads, in the Form of A Dictionary* vol 4 (1802).
Paisley, "Conditio's Rationale"	R R M Paisley, "The Rationale and Fundamental Structure of the Conditio Si Testator Sine Liberis Decesserit in Scots Law" in A R C Simpson et al (eds) *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (2016).
Poertner, "Family Fortunes"	R Poertner, "Family Fortunes: Marriage, Inheritance and Economic Challenges in Scotland, c. 1660-1800" in R Poertner et al (eds), *Family Life in Britain: 1650-1910* (2019).
Regiam Majestatem	*Regiam Majestatem and Quoniam attachiamenta: based on the text of Sir John Skene* (1947).

Reid, “Legal Rights”	K G C Reid, “Legal Rights in Scotland” in K G C Reid et al (eds), *Comparative Succession Law: Vol III: Mandatory Family Protection* (2020).
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