
EXPLORING THE LAW OF SUCCESSION

Studies National, Historical and Comparative

Edited by

Kenneth G C Reid, Marius J de Waal and Reinhard Zimmermann



EDINBURGH STUDIES IN LAW

EDINBURGH STUDIES IN LAW
VOLUME 5

Exploring the Law of Succession

Studies National, Historical and Comparative

Edited by Kenneth G C Reid
Marius J de Waal
and Reinhard Zimmermann

EDINBURGH UNIVERSITY PRESS

© The Edinburgh Law Review Trust and the Contributors, 2007

Edinburgh University Press Ltd
22 George Square, Edinburgh

Typeset in New Caledonia by
Koinonia, Manchester, and
printed and bound in Great Britain by
Antony Rowe Ltd, Chippenham, Wilts

A CIP record for this book is available from the British Library

ISBN 978 0 7486 3290 9 (hardback)

The right of the contributors
to be identified as authors of this work
has been asserted in accordance with
the Copyright, Designs and Patents Act 1988.

Preface

By comparison with other areas of private law, the law of succession has fallen into neglect. Academic literature is surprisingly sparse even in relation to national systems of law, while such comparative treatments as exist are often little more than country-by-country summaries. Yet succession law is on the move. Some causes are discussed in the first chapter of this volume. The relationship between family law and the law of succession has become more apparent and better understood, and the impact on the latter of changes in the former can be seen, for example, in the shift of focus from the “nuclear” family to a more inclusive concept which extends to partners outside of formal marriage. In another important development, human rights instruments have led to restrictions on freedom of testation, to the removal of succession rules which discriminate against, for instance, the extra-marital child, and to a reconsideration of aspects of customary succession systems. Above all, social and economic change has had, and will continue to have, a marked influence on the law’s development. As these trends are not confined to any one country, they present a challenge to the view, hitherto widely held, that succession law is a matter of local concern and local practice, and that little is to be gained from comparative research. One result has been a new interest in the possibility of harmonisation of succession law, especially in the European context. Another has been to open out the vista for more focused comparative research.

These reflections were the stimulus for a working conference on the law of succession which was held at the University of Stellenbosch in March 2005. The book’s origins lie in this conference and in the papers read on that occasion. The chapters that follow review selected topics in the law of succession from a variety of perspectives: national, historical and comparative. The jurisdictions most prominently featured are the mixed jurisdictions of Scotland and South Africa, and in that sense the book can be regarded as an extension into the law of succession of work which has previously been

carried out in the fields of property and obligations: see *Southern Cross: Civil Law and Common Law in South Africa* (eds R Zimmermann and D Visser, 1996); *A History of Private Law in Scotland* (eds K Reid and R Zimmermann, 2000), and *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (eds R Zimmermann, D Visser and K Reid, 2004). But the book is by no means confined to Scotland and South Africa. One chapter, for example, considers the rules in Roman law on freedom of testation and compulsory heirship. Another is devoted to the country which has most recently re-written its law of succession: the Netherlands. And throughout the book there are frequent comparative references to the law of other countries.

Much important work is waiting to be done in the law of succession. The present book is a contribution to that work as well as, it is hoped, a stimulus to further writing and research.

Kenneth Reid, Edinburgh
Marius de Waal, Stellenbosch
Reinhard Zimmermann, Hamburg
March 2007

List of Contributors

ALAN R BARR is Director of the Legal Practice Unit in the University of Edinburgh and a practising solicitor.

ALEXANDRA BRAUN is a Junior Research Fellow of St John's College, Oxford.

JAMES CHALMERS is a Senior Lecturer in Law in the University of Edinburgh.

MARIUS J DE WAAL is Professor of Private Law and Roman Law in the University of Stellenbosch.

FRANÇOIS DU TOIT is an Associate Professor of Law in the University of the Western Cape.

GEORGE L GRETTON is Lord President Reid Professor of Law in the University of Edinburgh.

DALE HUTCHISON is Professor of Private Law in the University of Cape Town.

RODERICK R M PAISLEY is Professor of Commercial Property Law in the University of Aberdeen.

KENNETH G C REID is Professor of Property Law in the University of Edinburgh.

M C SCHOEMAN-MALAN is Professor of Private Law in the University of Pretoria.

W DAVID H SELLAR is an Honorary Fellow in Law in the University of Edinburgh.

J C SONNEKUS is Professor of Private Law in the University of Johannesburg.

SJEF VAN ERP is Professor of Civil Law and European Private Law in the University of Maastricht.

REINHARD ZIMMERMANN is Director of the Max Planck Institute for Comparative and International Private Law, Hamburg.

List of Abbreviations

Information about cases and statutes in Scotland and South Africa, including law reports, is given in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) lxxiii ff.

PART I: BOOKS

Bankton, *Inst*

Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (1751–1753), reprinted by the Stair Society, vols 41–43 (1993–1995)

Bell, *Comm*

George Joseph Bell, *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence*, 7th edn, by J McLaren (1870; reprinted 1990)

Bell, *Prin*

George Joseph Bell, *Principles of the Law of Scotland*, 10th edn, by W Guthrie (1899, reprinted 1989)

Corbett et al, *Succession*

M M Corbett, G Hofmeyr and E Kahn, *The Law of Succession in South Africa*, 2nd edn (2001)

Craig, *Jus Feudale*

Thomas Craig of Riccarton, *Jus Feudale*, 3rd edn, by J Baillie (1732); transl Lord Clyde (1934)

De Waal & Schoeman-Malan, *Succession*

M J de Waal and M C Schoeman-Malan, *Introduction to the Law of Succession*, 3rd edn (2003)

Erskine, *Inst*

John Erskine of Carnock, *An Institute of the Law of Scotland*, 8th edn, by J B Nicholson (1871, reprinted 1989)

Grotius

Hugo de Groot, *Inleidinge tot de Hollandsche Rechts-geleerdheid* (eds F Dovring, H F W D Fischer, E M Meijers), 2nd edn (1965)

Hume, *Lectures*

Baron David Hume, *Lectures 1786–1822* (ed G C H Paton), Stair Society vols 5, 13, 15–19 (1939–1958)

Macdonald, *Succession*

D R Macdonald, *Succession*, 3rd edn (2001)

McLaren, *Wills & Succession*

J McLaren, *The Law of Wills and Succession as administered in Scotland*, 3rd edn (1894), with a supplementary volume by D Oswald Dykes (1934)

Parry & Clark, *Succession*

Parry and Clark, *The Law of Succession*, 15th edn, by R Kerridge assisted by A H R Brierley (2002)

Reid & Zimmermann, *History*

K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* vols 1 (Introduction and Property) and 2 (Obligations) (2000)

Scottish Law Commission, *Succession*

Scottish Law Commission, Report on *Succession* (Scot Law Com No 124, 1990)

South African Law Commission, *Succession*

South African Law Commission, *Review of the Law of Succession* (Report 22, 1991)

Stair

James Dalrymple, 1st Viscount Stair, *Institutions of the Law of Scotland*, 6th edn, by D M Walker (1981)

Voet

Johannes Voet, *Commentarius ad Pandectas* (Hagae-Comitum, 1707)

Wilson & Duncan, *Trusts*

W A Wilson and A G M Duncan, *Trusts, Trustees and Executors*, 2nd edn (1995)

Zimmermann, Visser & Reid, *Mixed Legal Systems*

R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004)

PART II: OTHER ABBREVIATIONS

A	Appellate Division
A	Atlantic Reporter
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
AC	UK Law Reports, Appeal Cases
ACJ	Acting Chief Justice
AD	South African Law Reports, Appellate Division
Add	Addams' Reports (England and Wales)
Ad & El	Adolphus & Ellis's Reports (England and Wales)
AJ	Acting Judge
AJA	Acting Judge of Appeal
AJCL	American Journal of Comparative Law
AJP	Acting Judge President
All ER	All England Reports
All SA	All South African Law Reports
App Cas	UK Law Reports, Appeal Cases, House of Lords
APS	Act of the Parliament of Scotland (until 1707)
ASP	Act of the Scottish Parliament (from 1999)
Bell App	S S Bell's Scotch Appeals, House of Lords
BGB	Bürgerliches Gesetzbuch (German Civil Code)
Bpk	beperk (= limited)
BS	Brown's Supplement, Court of Session reports
Buch	Buchanan's Reports, Cape Supreme Court
Buch AC	Buchanan's Appeal Cases, Cape Appeal Court
BW	Burgerlijk Wetboek (Civil Code of the Netherlands)
C	Cape Provincial Division
c(c)	chapter(s) (legislation)
C	Codex Iustiniani
CA	Court of Appeal
CC	Constitutional Court, South Africa
Ch	English Law Reports, Chancery Division
Ch D	English Law Reports, Chancery Division
CJ	Chief Justice
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports (Australia)
Co	Company
CPD	Law Reports, Common Pleas Division; South African Law Reports, Cape Provincial Division

CSIH	Court of Session Inner House
CSOH	Court of Session Outer House
D	Justinian's <i>Digest</i> ; Dunlop's Session Cases (Scotland)
D (HL)	House of Lords Cases in Dunlop's Session Cases
Dick	Dickens' Reports (England and Wales)
DP	Discussion Paper
E	Eastern Cape Local Division
EDC	Eastern District Court Reports, Cape of Good Hope
EdinLR	Edinburgh Law Review
EDL	Eastern District Local Division Reports, Cape of Good Hope
EDLD	Eastern District Local Division
Edms	eiendoms (= proprietary)
EHRR	European Human Rights Reports
ER	English Reports
EWCA	Court of Appeal, Civil Division (England and Wales)
EWHC	High Court (England and Wales)
Ex	English Law Reports, Exchequer
Ex D	English Law Reports, Exchequer Division
F	Fraser's Session Cases (Scotland)
F (HL)	House of Lords Cases in Fraser's Session Cases
FC	Faculty Collection, Court of Session
Foord	Foord's Reports, Cape Supreme Court
Gai Inst	Gaius's <i>Institutes</i>
GWD	Green's Weekly Digest (Scotland)
Harvard LR	Harvard Law Review
HC	House of Commons
HL	House of Lords
HLC	Clark's House of Lords Cases
HR	Hoge Raad (Supreme Court of the Netherlands)
Hume	Hume's Decisions, Court of Session
ICLQ	International and Comparative Law Quarterly
Inc	Incorporated
J	Judge
JA	Judge of Appeal
JLSS	Journal of the Law Society of Scotland
JP	Judge President
JR	Juridical Review
J Inst	Justinian's <i>Institutes</i>

KB	English Law Reports, King's Bench Division
LA	Lord Advocate
La LR	Louisiana Law Review
Law Com	Law Commission (England and Wales)
LC	Lord Chancellor
LCJ	Lord Chief Justice
LJ	Lord Justice
LJC	Lord Justice Clerk
LJCP	Law Journal Reports, New Series, Common Pleas (England and Wales)
LJEx	Law Journal Reports, Exchequer (England and Wales)
LQR	Law Quarterly Review
LR CP	English Law Reports, Common Pleas
LR QB	English Law Reports, Queen's Bench
LT	Law Times Reports
M	Macpherson's Session Cases (Scotland)
Macq	Macqueen's House of Lords Reports (Scotland)
McGill LJ	McGill Law Journal
Menz	Menzies Reports, Cape Supreme Court
MichLR	Michigan Law Review
MLR	Modern Law Review
Mo	Missouri Reports
Mor	Morison's Dictionary of Decisions, Court of Session
MR	Master of the Rolls
N	Natal Provincial Division
NC	Northern Cape Division
NE	North Eastern Reporter (USA)
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
NLR	Natal Law Reports
NO	nomine officii
NPD	South African Law Reports, Natal Provincial Division
NZLR	New Zealand Law Reports
O	Orange Free State Provincial Division
OAG	Oberappellationsgericht (Regional Supreme Court of Appeal, Germany, 19th century)
OH	Outer House, Court of Session
OLG	Oberlandesgericht (Regional Appeal Court, Germany)
OJ	Official Journal of the European Communities

OPD	South African Law Reports, Orange Free State Provincial Division
Pa	Pennsylvania State Reports (USA)
plc	public limited company
pr	principium
Pty	Proprietary
Pvt	Private (Company)
QBD	Queen's Bench Division
R	Rettie's Session Cases (Scotland)
R (HL)	House of Lords cases in Rettie's Session Cases
Rob	Robinson's Scotch Appeal Cases
S	Shaw's Session Cases (NE indicates New Edition) (Scotland)
s	section
SA	South African Law Reports
SALJ	South African Law Journal
SALR	Butterworth's South African Law Review
SAR	Reports of the High Court of the South African Republic
SC	Reports of the Cape Supreme Court
SC	Session Cases (Scotland)
SC (HL)	House of Lords cases in Session Cases
SCA	Supreme Court of Appeal (South Africa)
SCLR	Scottish Civil Law Reports
Scot Law Com	Scottish Law Commission
SE/SEC/SECLD	South Eastern Cape Local Division
Searle	Searle's Reports, Cape Supreme Court
Sh Ct Rep	Sheriff Court Reports (Scotland)
SI	Statutory Instrument
SLPQ	Scottish Law & Practice Quarterly
SLR	Scottish Law Reporter
SLT	Scots Law Times
SLT (News)	News Section in Scots Law Times
SLT (Notes)	Notes of Recent Decisions in Scots Law Times
SLT (Sh Ct)	Sheriff Court Reports in Scots Law Times
So	Southern Reporter (USA)
SR	High Court of Southern Rhodesia
SSI	Scottish Statutory Instrument
Stellenbosch LR	Stellenbosch Law Review
sv	sub voce

SW	South Western Reporter (USA)
SWA	South African Law Reports, South West Africa Division
T	Transvaal Provincial Division
TH	Reports of the Witwatersrand High Court
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Tk	South African Law Reports, Transkei High Court
TPD	South African Law Reports, Transvaal Provincial Division
TS	Reports of the Transvaal Supreme Court
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tulane LR	Tulane Law Review
UKHL	United Kingdom, House of Lords
US	United States Supreme Court Reports
Va	Virginia State Reports (USA)
Ves	Vesey's Reports (England and Wales)
Ves Jun	Vesey Junior's Reports (England and Wales)
W	Witwatersrand Local Division
W& S	Wilson and Shaw's House of Lords Cases (Scotland)
WisLRev	Wisconsin Law Review
WLD	South African Law Reports, Witwatersrand Local Division
WLR	Weekly Law Reports (England and Wales)
WPNR	Weekblad voor Privaatrecht Notariaat en Registratie
Yale LJ	Yale Law Journal
ZEuP	Zeitschrift für Europäisches Privatrecht

Table of Cases

A v B [2003] QB 195	104
Adam's Exx v Maxwell 1921 SC 418	58
Aird v Aird's Exrs 1949 SLT (Notes) 3	123
Allan v Callender (1762) Mor 8,208	137
Allan v Thomson's Trs (1893) 20 R 733	188
Allan's Testamentary Trs v Allan's Marriage Contract Trs (1907) 15 SLT 73	126
Allen v McCombie's Trs 1909 SC 710	117
Anderson v Miller (1799) Hume 282	137
Annand and Colhoun v Chessels (1774) Mor 5,844	122
Anstruther v Anstruther (1836) 14 S 272	54, 56
Argo v Pauline (1905) 12 SLT 784, (1905) 13 SLT 480	122
Arkley v Paterson (1893) 1 SLT 336	127
Aronson v Estate Hart 1950 (1) SA 539	109, 111, 113
Baiky v Baiky (1693) 4 BS 68	139
Balfour's Trs v Johnston 1936 SC 137	112, 131, 139
Ballantyne's Trs v Ballantyne 1952 SC 458	140
Banks v Goodfellow (1869-70) LR 5 QB 549	86
Bannerman v Macqueen (1896) 4 SLT 71	130
Barker v Watson's Trs 1919 SC 109	123, 139
Battan Singh v Amirchand 1948 AC 161	87
Beaton's JF v Beaton 1950 SLT (Notes) 63	132
Bedwells and Yates v Tod 2 Dec 1819 FC	125
Beguman v Saroo 1964 Pakistan Legal Decisions (WP) Lahore 451	140
Bekker v Naude 2002 (1) SA 264 (W), affd 2003 (5) SA 173 (SCA)	154
Bell's Trs v Bell 1916 2 SLT 250	131
Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC)	8
Birch v Curtis [2002] EWHC 1158, [2002] Fam Law 815	220

Blair v Blair (1849) 12D 97	179
Blathwayt v Baron Cawley [1976] AC 397	104, 111
Bogie's Trs v Christie (1882) 9 R 453	190
Booths v Black (1831) 9 S 406	122
Borman en De Vos NNO en 'n Ander v Potgietersrusse Tabak- korporasie Bpk en 'n Ander 1976 (3) SA 488 (A)	226, 227, 228, 230, 231, 232, 233, 236
Braun v Blann and Botha 1984 (2) SA 850 (A)	76, 160
Brits v Brits's Executors (1868) 1 Buch 312	223
Brogan v Rennie 1991 GWD 31-1885	93
Brown v Coventry (1792) Mor 14,863	170
Brown's Trs (1882) 10 R 441	188
Bruce v Bruce's Trs (1898) 5 SLT 359	130
Bruce's Trs v Hamilton (1858) 20 D 473	130
Burgers v Burgers' Exrs 1911 CPD 936	224
Bydawell v Chapman 1953 (3) SA 514 (A)	69
Cairney v Macgregor's Trs 1916 SLT 357	243
Calder v Millars (1890) 28 SLR 231	119
Cameron v MacIntyre's Exr 2006 SC 283	121
Campbell v Campbell (1740) Mor 14,855	170
Campbell v Levingstoun	164
Carelse v Estate De Vries (1906) 23 SC 532	71, 72
Champaign County Bank & Trust Co v Jutkins 29 Ill 2d 253, 193 NE 2d 779 Ill (1963)	124
Chaplin's Trs v Hoile (1890) 18 R 27	133
Christie v Christie (1681) Mor 8,197, 14,849	169
Christie v Paterson (1822) 1 S 498	190
Christie's Trs Ptrs (1894) 1 SLT 550	126
Church Property Trustees v Ebbeck (1960) 104 CLR 394	109
Clavering v Ellison (1859) 7 HLC 707, 11 ER 282	110
Clayton v Ramsden [1943] AC 320	110, 111
Clinton v Trefusis (1869) 8 M 370	56
Cochrane's Exr v Cochrane 1947 SC 134	174
Colville's JF v Nicoll 1914 SC 62	58
Commonwealth v Stauffer 10 Pa 350 (1849)	108
Corrance's Trustees v Glen (1903) 5 F 777	222
Costain and Partners v Godden NO 1960 (4) SA 456 (SR)	228, 230
Couper's JF v Valentine 1976 SLT 83	123

Crampton's JF v Barnardo's Homes 1917 SC 713	178
Creditors of the Earl of Annandale v Viscount Stormont (1662) Mor 13,994	166, 167
Croll's Trustees v Alexander (1895) 22 R 677	222
Cross Ptr 1987 SLT 384	136, 139
Cuninghame v Cuninghame (1770) Mor 14,875	56
Cuningham v Montgomerie (1879) 6 R 1333	117
Curdy v Boyd (1775) Mor 15, 946	243
Cuthbertson v Thomson and Young (1781) Mor 4,279	183
 D & D of Buccleugh v M of Tweeddale (1677) Mor 2,369	65
D'Angelo v Bona 1976 (1) SA 463 (O)	229, 230
Daniels v Campbell (2004) 7 BCLR 735 (CC)	73
De Kock v Estate De Kock 1922 CPD 110	224
De Wayer v SPCA Johannesburg 1963 (1) SA 71 (T)	106
Denysen v Mostert [1872] 8 Moore NS 502, 17 ER 400, (1873) 3 Buch 31	223
Devlin's Trs v Breen 1945 SC (HL) 27	189
Dishington v Hamilton (1558) Mor 8,913	135
Dixon v Dixon (1836) 14 S 938, (1841) 2 Rob 1	181, 183, 191
Dougall's Trs v Dougall (1789) Mor 15,949	221
Douglas v Douglas's Trs (1792) Mor 2,985	106
D'Oyly-John v Lousada 1957 (1) SA 368 (N)	224
Drummond's JF v HM Advocate 1944 SC 298	65
Du Plessis NO v Strauss 1988 (2) SA 105 (A)	187
Dufour v Pereira (1769) 1 Dick 419, 21 ER 332	215, 217, 219
Duguid v Caddell's Trs (1831) 9 S 844	243
Dunbar v Scott's Trs (1872) 10 M 982	135
Dundee General Hospitals v Bell's Trs 1952 SC (HL) 78	122, 123
 Earl of Rothes v Lord Melville (1677) BS 168	165
Erasmus v Havenga 1979 (3) SA 1253 (T)	229, 230
Estate Cato v Estate Cato 1915 AD 290	187
Estate Claassen v Estate Claassen 1913 CPD 269	224
Estate Coaton v The Master 1915 AD 527	224
Estate Kemp v McDonald's Trustee 1915 AD 491	76
Estate Smith v Smith 1940 CPD 625	224
Estate Warren v Hulett and Others 1949 (3) SA 229 (N)	189
Estate Watkins-Pitchford v CIR 1955 (2) SA 437 (A)	76, 85

Ex parte Calderwood NO: In re Estate Wixley 1981 (3) SA 727 (Z)	230, 234
Ex parte Gitelson 1949 (2) SA 881 (O)	107
Ex parte Higgs NO: in re Estate Rangasami 1969 (1) SA 56 (D)	107
Ex parte Jackson NO 1941 TPD 222	224
Ex parte Steyl 1951 (1) SA 275 (O)	238
Executors of Cerfonteyn v O'Haire 1873 Buch 47	89
 Falconar Stewart v Wilkie (1892) 19 R 630	132, 134
First National Bank of SA Ltd v Lynn NO and Others 1996 (2) SA 339 (A)	233
Fleming's Tr v Fleming 2000 SC 206	168
Fogo's JF v Fogo's Trs 1929 SC 546	117
Forster v Campbell (1866) 2 SLR 98	131
Fowlis v Gilmours (1672) Mor 2,965, 2 Brown's Supp 160	107
Fraser v Rose (1849) 11 D 1466	112, 132
Fulton v Fulton (1864) 2 M 893	117
 Galliers v Rycroft [1901] AC 130	184, 185, 186, 187, 189
Garvie's Trs v Still 1972 SLT 29	140
Gay Association HR 7 June 1991, 1992 NJ 262	200
Gibson v MacBain (1786) Mor 620	122
Gilchrist, Ptr 1990 SLT 494	139
Gillespie v Mercer (1876) 3 R 561	188
Glazer v Glazer NO 1963 (4) SA 694	46, 71, 72
Globe Insurance Co v McKenzie (1850) 7 Bell's App 296	117
Gordon v Gordon 124 NE 2d 228 (Mass 1955), 349 US 947 (1955)	103
Core-Browne-Henderson's Trs v Grenfell 1968 SC 73	116
Gow's Trs v Gow 1912 2 SLT 256	135
Grant v Brooke (1882) 10 R 92	190
Grant v Cowe (1887) 15 R 81	118
Grant v Grant (1679) Mor 3,596	243
Grant's Trs v Grant (1898) 25 R 929	112, 132
Gray v Perpetual Trustee Co Ltd [1928] AC 391	220
Green v Harrison, 7 Dec 1983 CSOH	116
Greenberg v Estate Greenberg 1955 (3) SA 361 (A)	76, 77
Grusd NO v Grusd 1946 AD 465	111, 112
 Hall v Hall (1891) 18 R 690	190