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# The Succession Rights of the Unborn Child

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## A. INTRODUCTION

If, as at the date of vesting of the entitlement to a share in a deceased person's estate, a child in the womb were to have no legal existence, then that child would inherit nothing. This possibility has been judicially described as "an embarrassment to the logic of the law",<sup>1</sup> and to avoid it the unborn child is given special treatment in the laws of succession. In Scotland there are specific statutory provisions applicable to unborn children with regard to matters such as conveyances in fee to persons unborn,<sup>2</sup> accumulations<sup>3</sup> and restrictions on the existence and duration of liferents.<sup>4</sup> However, these are details on the fringe of rarely-encountered technical rules. By far and away the most important rule in Scotland relative to the unborn child is a common law rule. This is to the effect that for the purposes of the law of succession the unborn child is treated as if he were already born.<sup>5</sup>

### (1) The Civilian inheritance

The classical statement of the privileged position of the unborn child in the context of the law of succession is found in the words of Paulus: "*Qui in utero est, perinde, ac si in rebus humanis esset, custoditur, quotiens de commodis ipsius partus quaeritur: quamquam alii, antequam nascatur nequaquam prosit.*"<sup>6</sup> Similarly Julian wrote: "*Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse. Nam et legitimae hereditas his restituntur.*"<sup>7</sup>

Other passages in the *Digest*<sup>8</sup> and the *Institutes of Justinian*<sup>9</sup> confirm the same approach which was further developed by writers of the European *Ius Commune*.<sup>10</sup>

1 *Elliot v Joicey* 1935 SC (HL) 57 at 70 per Lord Macmillan.

2 Trusts (Scotland) Act 1921, s 8.

3 Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s 6(1)(b); Trusts (Scotland) Act 1961, s 5(2)(c). For the equivalent rule of public policy under English law see *Long v Blackhall* (1797) 30 Eng Rep 1119.

4 Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 18(1).

5 For limitations on a wider application of the notion see D M Yorke, "The legal personality of the unborn child" 1979 SLT (News) 158; E J Russell, "Abortion law in Scotland and the Kelly foetus" 1997 SLT (News) 187; E Robertson, "Consider the foetus" 1997 SLT (News) 319.

6 D 1.5.7. In the translation of Mommsen, Krueger and Watson (vol 1, 1985) this reads (at 16): "The fetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born, even though before birth his existence is never assumed in favour of anyone else." The original Roman passage with a different translation (that of Monro, 1904) was quoted in *Elliot*, note 1 above, at 70 per Lord Macmillan.

7 D 1.5.26. In the translation of Mommsen, Krueger and Watson (vol 1) this reads (at 18): "For almost all purposes of the civil law, children *in utero* are considered as existent beings. Even *hereditas legitimae* revert to them."

8 D 1.5.96 and D 50.16.231.

9 J Inst 2.14.2.

10 E.g. G Heineccius, *Elementa Juris Civilis Secundum Ordinem Pandectarum*, 1.5.124 and 125: *de Statu Hominum*; Pothier, *Pandectes de Justinien*, (1819), Tome II, *Pars Prima*, pages 310-311, 1, I, v.6.

At an early date Scots law adopted this Roman heritage. Consequently the favourable treatment for the posthumous child in Scots law has a long history. Drawing on the classic Roman law statement of Paulus, Craig wrote in the sixteenth century:<sup>11</sup>

*Posthumi autem sunt, qui post humatum patrem nati sunt, & eadem est de eis ratio, quae de iam natis, .... Nam cur ex patris insperato obito posthumi calamitas augetur? Aut in quo peccasse censerī poterat, qui nondum natus patrem amisit.*

The rule was later restated in similar terms by the Institutional writers, Stair,<sup>12</sup> Erskine,<sup>13</sup> Bankton<sup>14</sup> and Bell,<sup>15</sup> with both Erskine and Bankton referring to the passage of Paulus in the *Digest*, and it was also recognised in Scottish reported cases before the end of the seventeenth century.<sup>16</sup> By the latter half of the nineteenth century Lord McLaren could justifiably claim that the rule “has long been received in our system of jurisprudence”.<sup>17</sup> Since then it has received a modest amount of academic comment.<sup>18</sup>

## (2) The maxims

The Scottish rule may be expressed in various maxims, all with broadly the same meaning. They include: *qui in utero est, pro iam nato habetur* (a child in the womb is held as already born in any question which arises concerning its rights or interest, abbreviated henceforth to “*pro iam nato*”); *foetus in utero habetur pro iam nato ubi agitur de eius commodo*; and *nasciturus pro iam nato habetur*.

11 Craig, *Ius Feudale*, 2.13.15. The translation of Lord Clyde in Craig, *Ius Feudale* (1934), vol 2, at 643 is: “[p]osthumous sons are those born after their father’s decease. The same principles apply to sons born during their father’s lifetime. ... There is indeed no reason in the case of a posthumous child to aggravate the calamity it suffers by the premature death of the father, nor to make that event a ground for diminishing its rights”.

12 Stair, *Institutions*, 3.5.50.

13 Erskine, *Institute*, 3.8.76.

14 Bankton, *Institute*, 1.2.7, at 47 and 1.2.1, at 72.

15 Bell, *Principles*, § 1642.

16 *Bruce v Melville*, 22 Feb and 24 July 1677; (1677) Mor 14880; *Mountstewart v Mackenzie* (1707) Mor 14903.

17 J McLaren, *The Law of Wills and Succession*, 3rd edn (1894), para 1259; 2nd edn (1868), para 1235. There is no such statement in the first edition, entitled *Trusts and Trust Settlements* (1863).

18 McLaren, *Wills and Succession*, note 17 above, para 1259; T B Smith, *A Short Commentary on the Law of Scotland* (1962), at 245-246; M C Meston, *Succession (Scotland) Act 1964*, 5th edn (2002), at 25-26; A B Wilkinson and K McK Norrie, *Parent and Child*, 2nd edn (1999), paras 2.18-2.22; *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 25 (1989), paras 660-662; H Hiram, *The Scots Law of Succession* (2002), at 32-33; D R Macdonald, *Succession*, 3rd edn (2001), paras 1.33-1.35; M C Meston, “Succession rights of posthumous children” (1970) 15 JLSS 33; Anonymous, “Succession—posthumous child” (1937) 49 JR 76.

Plucking a word from the last variant one finds the name by which the rule is sometimes known: “the *nasciturus* principle”<sup>19</sup> or “*nasciturus* rule”.<sup>20</sup> That name is apt to cause confusion in Scotland as the term *nascaturus* (meaning “about to be born”) is more commonly encountered in the context of a recognition that children yet to be born can be beneficiaries of obligations,<sup>21</sup> legacies and trust provisions.<sup>22</sup> The maxims quoted above traditionally apply to a more limited class of *nascaturi*: those who as at the date of vesting of succession rights are, in the phrase familiar to lawyers from Common Law jurisdictions, *en ventre sa mère*. Oddly perhaps, this phrase is not used in any reported Scottish case except in quotations from English cases on posthumous children<sup>23</sup> or in relation to the application of the Thelluson Act, a statute that was applied to perpetuities throughout Scotland and England.<sup>24</sup> However, the Common Law phrase is well understood in Scotland<sup>25</sup> and indicates accurately the traditional limitations of the application of the Scottish rule on posthumous or uterine children. As regards the maxims themselves, only the last of the variants noted in the first sentence of this section does not expressly link the unborn with the womb. This last variant may offer some encouragement to those who advocate the extension of the Scottish rule to children conceived by artificial techniques of reproduction.<sup>26</sup> However, this may go too far as all the variants were clearly coined in an era when the only place in which a viable posthumous child could rest was in the mother’s womb.

### (3) The rationale

The rule which deems an unborn child to be born already is clearly a legal fiction<sup>27</sup> — pejoratively it could be termed an “artificial rule”.<sup>28</sup> However, it may be

19 D Johnston, “The renewal of the old” (1997) 56 CLJ 80 at 85.

20 M M Corbett, G Hofmeyr, E Kahn, *The Law of Succession in South Africa*, 2nd edn (2001), at 516.

21 Erskine, *Institute*, 3.1.8; W W McBryde, *The Law of Contract in Scotland*, 2nd edn (2001), para 10.16. See also the obligation to aliment an unborn child noticed in Family Law (Scotland) Act 1985, s 2(5).

22 This is recognised in Trusts (Scotland) Act 1921, s 8; Trusts (Scotland) Act 1961, s 1(1)(c); Lands Clauses Consolidation (Scotland) Act 1845, s 7.

23 *Johnstone’s Trs v Johnstone* 1936 SC 766 at 774 per Lord President Normand quoting *Trower v Butts* (1823) 1 Sim & St 181; 57 Eng Rep 72.

24 39 & 40 Geo III, s 1.

25 See its use in P Fraser, *Parent and Child*, 3rd edn (1906), 220; 2nd edn (1866), 162; P Fraser, *Personal and Domestic Relations* (1846), vol 2, 70.

26 See, however, the Human Fertilisation and Embryology Act 1990 and Human Fertilisation and Embryology (Deceased Fathers) Act 2003, discussed in text at notes 216-233 below.

27 *Elliot*, note 1 above, at 70 per Lord Macmillan; *Cox’s Trs v Cox* 1950 SC 117 at 121 and 122 per Lord Carmont; Voet, *Pandects*, 1.5.5.

28 *Johnstone’s Trs v Johnstone* 1937 SLT 2 at 3 per counsel for the second party. This is not repeated in the report *Johnstone’s Trs v Johnstone*, note 23 above, at 771.

justified as a pragmatic solution which both the deceased<sup>29</sup> and society in general are likely to have wished. The traditional Scottish justification, however, has been phrased more narrowly. The rule arises, it is said, out of a desire to favour, or at least not further to prejudice, the unborn child. This is evident in the writing of Craig quoted above and also in the observation of Stair who summarised the rationale of the rule as “in all things tending in favours of those unborn, they are accounted as born”.<sup>30</sup> A more modern commentator couched his observation as to the operation of the rule in words sufficiently general as to be capable of encompassing all of the various rationales: “It is clear that it has an equitable effect ... it concedes a benefit to which in strict law the child is not entitled.”<sup>31</sup>

The “equitable” effect of the maxim has been judicially confirmed as a canon of construction in testate succession.<sup>32</sup>

#### (4) Other jurisdictions

Similar rules are found in Civilian systems such as Germany,<sup>33</sup> France<sup>34</sup> and Greece.<sup>35</sup> The Scots law position broadly reflects that of other mixed jurisdictions such as South Africa<sup>36</sup> and Sri Lanka<sup>37</sup> both of which, in turn, follow the position in Roman-Dutch law.<sup>38</sup> Common Law jurisdictions such as England,<sup>39</sup> Australia,<sup>40</sup>

29 See the remarks in *Trower*, note 23 above, at 74 per Sir John Leach, Vice-Chancellor, to the effect that “the potential existence of such a child places it plainly within the reason and motive of the gift”, quoted in *Elliot*, note 1 above, at 62 per Lord Russell of Killowen.

30 Stair, *Institutions*, 3.5.50.

31 D Johnston, “The renewal of the old”, note 19 above, at 86.

32 *Cox's Trs*, note 27 above, at 122 per Lord Carmont.

33 § 1923 II BGB: “Wer zur Zeit des Erbfalls noch nicht lebte, aber bereits gezeugt war, gilt als vor dem Erbfall geboren”. This means: “where, at the time of the succession opening, a person is not yet alive but is already conceived, that person is treated as if he were born before the succession opening”.

34 *Code civil*, Art 725: “Pour succéder, il faut exister à l'instant de l'ouverture de la succession ou, ayant déjà été conçu, naître viable”. In translation: “In order to inherit, one must exist at the time of the opening of the succession or, having been conceived, be born viable”.

35 Greek Civil Code, Art 36. The translation provided in C Taliadoros, *Greek Civil Code* (2000), at 11 is: “[w]ith regard to the rights accruing to it a child *en ventre sa mère* shall be deemed born if it is born alive”.

36 *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O) in which De Villiers, R at 957 made use of the Scottish authorities *Burns' Trs v Burns* 1917 SC 117 and *Elliot*, note 1 above, (the latter being cited as an English case) and commented: “Ek is bereid om die *ratio decidendi* van die Engelse en Skotse gewysdes te aanvaar want op die keper beskou sluit dit aan die reëls van vertolking wat in ons reg toegepas word”. In translation this means: “I am prepared to follow the *ratio decidendi* of the English and Scottish cases because on close inspection they correspond to the rules and interpretation applied in our law”.

37 *M M Mohamed v Sitti Cadija* (1959) 61 NLR 412.

38 Voet, *Pandects*, 1.5.5: “*fictione tamen juris pro jam natis habentur, quoties de ipsorum commodo agitur*”. Gane's translation (vol 1, 1955, at 127): “Still by a fiction of law they [persons *in ventre matris*] are regarded already born whenever it is a question of their advantage”. See also Grotius, *Inleidinge*, 1.3.4; 2.16.2; Schorer, *Ad Grotium*, notes 115 and 167.

39 *Trower*, note 23 above; *Blasson v Blasson* (1864) 46 Eng Rep 534; *Villar v Gilbey* [1907] AC 139; *Re Stern's Will's Trusts* [1962] Ch 732.

New Zealand<sup>41</sup> and India<sup>42</sup> adopt a comparable approach, having grounded their own domestic rule in the very same Roman sources followed by Scots law.<sup>43</sup> In some instances English courts also found support for their approach in Roman-Dutch law.<sup>44</sup> In a few jurisdictions the rule has taken statutory form<sup>45</sup> but in Scotland it remains a common law rule.

This remarkable consonance of approach across legal traditions within the United Kingdom has been judicially noticed in the House of Lords, where it was observed by Lord Macmillan:<sup>46</sup>

... the law of England in this matter is to all intents and purposes the same as the law of Scotland. The same fiction, derived from the same source in the Civil Law and qualified by the same condition, is common to both systems.

Lord Russell of Killowen agreed with Lord Macmillan and, in a less comprehensive statement of the consonance of the legal systems, opined that the law of Scotland was "certainly not more favourable to the claims of a child *en ventre sa mère* than the English law."<sup>47</sup>

The similarities across legal traditions and jurisdictions have their benefits for Scots law. In developing its own approach to the unborn child, Scots law may more easily have regard to the decisions of the English courts. This is facilitated to some extent by the fact that the leading modern case on the matter, *Elliot v Joicey*,<sup>48</sup> is a case decided by the House of Lords on an English appeal by reference to Scots law.<sup>49</sup> By good fortune for scholars of Scots law, but perhaps not for the parties to the case, it was not noticed until the matter was appealed through the English courts to the House of Lords that the deceased was domiciled in Scotland and confirmation to her estate had been granted in Scotland.<sup>50</sup> The applicable law was

40 *Re Bruce: Tasmanian Permanent Executors & Trustees Association v MacFarlane* [1979] Tas R 110 at 123 per Cosgrove J; *Wesley v Wesley* (1998) 71 SASC 6560 (Supreme Court of South Australia, 23 Feb 1998, available at [www.austlii.edu.au](http://www.austlii.edu.au)) per Debelle J. See also P H Winfield, "The unborn child" (1942) 4 *University of Toronto Law Journal* 278 at 279 reprinted in (1942) 8 CLJ 76 at 77.

41 *Re Brown* [1933] NZLR 114.

42 *Okhoymoney v Nilmony* 15 Cal 282.

43 *Gibson v Gibson* (1698) 2 Eng Rep 1173; *Wallis v Hodson* (1740) 26 Eng Rep 472; *Trower*, note 23 above, at 73 per counsel for the Defendant; *Elliot v Joicey* [1935] AC 209 at 238 per Lord Macmillan. See also Blackstone, *Commentaries on the Laws of England* (1765), Book 1, Chapter 1, at 129-130.

44 *Blasson*, note 39 above, at 536 per Lord Chancellor Westbury.

45 E.g. the Irish Republic: Succession Act 1965, s 3(2) which applies for the purposes of the Act.

46 *Elliot*, note 1 above, at 71.

47 *Elliot*, note 1 above, at 71.

48 See note 1 above.

49 Smith, *Short Commentary*, note 18 above, at 246 comments that the House of Lords gave a "decision not itself binding on the Scottish courts but accurately summarising the Scottish doctrine".

50 In the earlier proceedings the application of Scots law had not been noticed: [1934] Ch 140; [1933] Ch 778.

therefore Scots law although this made little difference to the outcome, given the virtual identity of the relevant rule in both legal systems. The interest for Scots lawyers is further increased by the fact that the leading judgement in the case was given by a Scottish judge, Lord Macmillan. The Scottish courts have adopted a different approach from English authority only once,<sup>51</sup> and this approach is unlikely to be followed today.<sup>52</sup>

A wider congruence of approach may be observed outside the traditional sources of the Civilian and Common Law traditions. A rule to similar effect has been employed by the European Court of Human Rights in considering the right of a child to succeed on the intestacy of his father where the father was not married to the mother. The Court had previously considered issues of succession where the child had been born during the life of the father but in this case the child was born after the death of the father. In this context the Court observed: "The fact that [the father's] death occurred before [his child] was born is no reason for the Court to adopt a different approach in the present case."<sup>53</sup>

This position has been affirmed in subsequent cases,<sup>54</sup> but this does not signify that all legal systems into which the European Convention on Human Rights and Freedoms has been incorporated should adopt a rule similar to the *pro iam nato* rule. Nonetheless, the quotation above indicates that those legal systems which do operate such a rule are likely to be regarded as complying with the requirements of the Convention insofar as they secure the interest of the unborn child from discrimination in relation to Convention rights, such as the right to respect for private and family life.<sup>55</sup> The ancient rule, it would appear, has stood the test of time and the enormous shift in societal and family values through the centuries. It seems likely to be with us for some time to come.

## B. DEVELOPMENTS

The rule enshrined in the various maxims remains Scots law to this day albeit there have been some developments in its application.<sup>56</sup> These developments may be examined in relation to three issues: (1) the types of entitlements to which the rule applied; (2) the property affected by the rule; and (3) the parties benefited by the rule.

51 *Burns' Trs*, note 36 above, at 122 per Lord Salveson commenting on *Villar*, note 39 above.

52 *Burns' Trs*, note 36 above; doubted in *Elliot*, note 1 above, at 71 per Lord Macmillan.

53 App No 28369/95, *Camp and Bourimi v Netherlands* (2002) 34 EHRR 59, 1446 at 1460, para 35.

54 App No 69498/01, *Pla and Puncernau v Andorra*, [2004] 2 FCR 630, para 26. See also App No 42326/98, *Odièvre v France* (2004) 38 EHRR 43; [2003] 1 FCR 621.

55 Article 8 as read with Article 14.

56 For a summary of developments in a Common Law jurisdiction see *Burton v Islington Health Authority* [1993] QB 204 per Dillon LJ at 226-227.

### (1) Types of entitlements

The *pro iam nato* rule applies to benefits arising on intestate and testate succession. The specific authority for the former may at first appear to be surprisingly scant because, of all the Institutional writers, only Bell expressly refers to intestacy.<sup>57</sup> However, this silence is immediately explicable given that at the time of the earlier Institutional writers it was incompetent to leave heritage in Scotland by means of a will.<sup>58</sup> All their comments relative to the application of the *pro iam nato* rule concerning heritable property are therefore directly referable to intestate succession, at least insofar as those rules arise at common law.

There is ample authority to the effect that the *pro iam nato* rule extends to an entitlement to legitim,<sup>59</sup> the *legitima portio* or forced share payable to a child out of the moveable property of the deceased, whether he dies testate or intestate. On the same basis, posthumous children also have a claim against their father's estate as creditors for aliment *iure representationis*.<sup>60</sup> This has been extended to a claim for aliment from an *inter vivos* trust set up by their father where one of the purposes of the trust was to provide aliment for the truster's other three named children.<sup>61</sup> Aliment is regarded as a debt payable out of both the moveable and heritable estate. In Scotland the title to sue for such discretionary provision on the part of the posthumous child arises at common law,<sup>62</sup> paralleling to some extent the statutory entitlement in English law of a child *en ventre sa mère* to apply for a discretionary provision for the purposes of family provision.<sup>63</sup> No such general statutory scheme of family provision exists as yet in Scotland. Despite this, in 1990 the Scottish Law Commission recommended the abolition of *aliment iure representationis* and favoured the extension of a fixed share scheme to protect the position of children.<sup>64</sup> Whether this recommendation will remain the position of the Scottish Law Commission if it comes to revisit the matter is open to question.<sup>65</sup>

57 Bell, *Principles*, § 1642.

58 Craig, *Ius Feudale*, 2.13.15; Stair, *Institutions*, 3.5.50; Erskine, *Institute*, 3.8.76; Bankton, *Institute*, 1.2.7, at 47 and 1.2.1, at 72.

59 *Jervey v Watt* (1762) Mor 8170.

60 *Hastie and Kerr v Hastie* (1671) Mor 416 and 5922 where the version of the maxim applied was *nam in beneficiis qui in utero est pro iam nato habetur*; *Muirhead v Muirhead* (1706) Mor 5927 and 16322.

61 *Spalding v Spalding's Trs* (1874) 2 R 237. See Discussion Paper on Trustees and Trust Administration (Scot Law Com DP No 126, 2004), para 6.28.

62 It appears to remain unaffected by the Succession (Scotland) Act 1964 despite the fact there is an express saving in that Act, s 37(1)(c), only for a right to aliment on the part of a surviving spouse.

63 See the expanded definition of "child" found in Inheritance (Provision for Family and Dependents) Act 1975, s 25(1). For earlier legislation see Inheritance (Family Provision) Act 1938, s 5.

64 Report on Succession (Scot Law Com No 124, 1990), paras 9.4-9.5.

65 See Discussion Paper on Trustees and Trust Administration, note 61 above, para 6.30, in which the Commission deliberately made no proposals as to aliment *iure representationis*. However, it commented

## (2) Property affected

Discrete systems of succession applicable to moveable and immoveable property were unknown to Roman law. By contrast, the distinction between succession to heritage and moveables was well-established in Scots law from earliest times and has only recently been abolished.<sup>66</sup> The earliest decisions of the Scottish courts in relation to the *pro iam nato* rule relate only to heritable property.<sup>67</sup> The writings of earlier Institutional writers Craig,<sup>68</sup> Stair<sup>69</sup> and Erskine<sup>70</sup> exhibit a similar focus. Bankton's comments do not expressly limit the operation of the rule to heritable property but deal with the *pro iam nato* rule in the context of the law of persons and leave unstated the issue of the classification of the property to which it relates.<sup>71</sup> Bell, the most recent of the Institutional writers, appears at first blush to include both heritable and moveable property in his application of the *pro iam nato* rule because his comments are contained in a Chapter in his *Principles* entitled "Of Succession In General" denoting both heritable and moveable estate.<sup>72</sup> However, this comprehensive application is not confirmed by the comments themselves:<sup>73</sup>

In intestate succession, the person who is in the right to succeed at the time of the opening of the succession is the heir. But the right of the child already conceived, though not yet born, is admitted in this question, provided there is life after birth; and, on birth, he will exclude one who may have entered as heir, and may compel him to denude. ... In succession by deed, the person entitled to succeed, the person entitled to succeed according to a particular destination will not be deprived of it, though not born or conceived at the opening of the succession.

The mention of the "heir" in this quotation is exclusively referable to succession to heritable property. All cases cited by Bell in support of the propositions in the quotation relate to heritable property. On the other hand, there is no Institutional comment that the *pro iam nato* rule did not apply to moveables.

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that if an aliment scheme as originally recommended in 1990 were implemented then aliment *ture representationis* "could safely be abolished". Despite this comment, the aliment scheme was not in the 1990 Report but appears to have been an unpublished recommendation to Ministers made some time later.

66 For intestate succession see Succession (Scotland) Act 1964, s 1. For testate succession see Titles to Land Consolidation (Scotland) Act 1868, s 20, relating to testators who are alive as at and after 31 Dec 1868; Conveyancing (Scotland) Act 1874, s 27.

67 *Livingston v Fullerton* (1627) Mor 6870; *Bruce*, note 16 above; *Mountstewart*, note 16 above. See also *Grant v Grant's Trs* (1859) 22 D 53.

68 Craig, *Ius Feudale*, 2.13.15.

69 Stair, *Institutions*, 3.5.50.

70 Erskine, *Institute*, 3.8.76.

71 Bankton, *Institute*, 1.2.7, at 47 and 1.2.1, at 72.

72 *Principles*, Book Third, Part II, Chapter I.

73 Bell, *Principles*, § 1642.

By 1762<sup>74</sup> the courts had already confirmed that the *pro iam nato* rule applied to legitim – payable only out of moveables, but it was not until a decision of the Court of Session in 1781 that it became established by native Scottish authority that a posthumous child could benefit from a class gift to “children” in respect of a legacy of moveable property.<sup>75</sup> This was soon followed by a similar case.<sup>76</sup> The two case reports, however, are brief<sup>77</sup> and in neither is the *pro iam nato* rule expressly employed.<sup>78</sup> Despite the absence of a reference to a maxim, the two decisions conform to the substance of the *pro iam nato* rule. What is particularly notable about the two cases is the lack of any real dispute as to the applicability of such a rule to moveable property. This may have been because the decisions reflected an existing and widespread practice and the issue may have been largely uncontroversial. It may have been that the Roman origins of the *pro iam nato* rule indicated that its application to moveables would be wholly compatible with the Civilian property principles that were otherwise largely predominant in relation to Scottish moveable property.<sup>79</sup> In this regard the way forward may have been signalled by the English courts. By the mid-eighteenth century,<sup>80</sup> several English cases had already been decided in which the *pro iam nato* rule was applied to moveable property with a clear acknowledgement of its Roman origins. It seems reasonable to assume that Scottish lawyers would have been aware of these cases, especially since Bankton had compared English and Scottish law on the point as early as 1751.<sup>81</sup> By the early nineteenth century there can be little doubt as to the knowledge of the English position in Scotland. At that date a case involving the entitlement of a posthumous child to succeed under the will made under the law of Grenada was decided by the Court of Session according to the law of England after receiving opinions from English barristers.<sup>82</sup>

Whatever the influences on Scots law one may conclude that no-one has ever seriously questioned the application of the *pro iam nato* rule in relation to testate succession to moveable property. Beyond the general comments of the Institutional writers there appears to be no direct authority for intestate succession to moveable property. However, it is inconceivable that such an objection would be raised today.

74 *Jervey*, note 59 above.

75 *McKenzie v Holte's Legatees*, 2 Feb 1781 FC; (1781) Mor 6602.

76 *Grant v Fyffe*, 22 May 1810 FC.

77 In both cases there are no Session Papers remaining in the Advocates' Library and no extant related material in National Archives.

78 The first express reference to the maxim in a case involving moveable succession appears to be *Burns' Trs*, note 36 above.

79 Bell, *Principles*, § 1283.

80 *Gibson*, note 43 above; *Wallis*, note 43 above.

81 Bankton, *Institute*, 1.2.7, at 47 and 1.2.1, at 72.

82 *Hardman v Guthrie* (1826) 6 S 920. For background papers see National Archives *sub nom Henry A Hardman & Co v Guthrie* (1819) CS228/H 13/61.

### (3) The parties benefited

Children are natural persons. The rule to benefit the unborn has always applied only to such natural persons. There has never been any impetus to develop the rule to benefit juristic bodies which are in the course of creation but which have not yet been constituted when the testator dies leaving them a bequest.<sup>83</sup> Where the testator clearly was aware that the juristic body would not be in existence as at the date of his death it seems possible for the courts to regard the bequest as one which is suspensively conditional upon the creation of the relevant juristic body.<sup>84</sup> The date of vesting will then be delayed until the coming into being of the relevant beneficiary.<sup>85</sup> However, such an approach is less easy to justify if the testator was not aware that the beneficiary was not yet in existence. For such juristic bodies it may be that the *cy-près* jurisdiction of the courts could supply a functional substitute. Consider the case of a charitable bequest made to a juristic body that was non-existent at the time of vesting. The bequest may fail for want of a beneficiary. It seems possible that, where a general charitable intention may be discerned, in the exercise of the *cy-près* jurisdiction the court could redirect the charitable bequest to an institution which was in the course of creation at the time of vesting, particularly if there is evidence that it is one which the testator actually had in mind.<sup>86</sup> This novel application of the *cy-près* doctrine would require the exercise of judicial discretion and is far from the application of the *pro iam nato* rule which is designed to apply automatically without judicial intervention. As we shall see, however, the *pro iam nato* rule has been developed as a canon of construction of wills and settlements.<sup>87</sup> Of course in that context there may be cases where the courts will have to decide if the testator's intention was to dis-apply the *pro iam nato* rule but that is judicial intervention of an entirely different character.

At its simplest the *pro iam nato habetur* rule applies where the deceased leaves a child who is conceived but not yet born. It enables that child to be treated as having been born at the date of the death and as having survived the deceased.<sup>88</sup>

83 The issue of juristic bodies as beneficiaries could not arise in the context of intestate succession as all beneficiaries, apart from the Crown as *ultimus haeres* in relation to *bona vacantia*, are connected to the deceased by a relationship of blood, adoption or marriage.

84 Scots law did not receive the Roman rule excluding juristic bodies from being a beneficiary on the basis that they were *uncertae*: W W Buckland, *Text-book of Roman Law*, 3rd edn (1963), at 290-291.

85 Cf the position with the enforcement after death of an *inter vivos* promise: *Morton's Trs v The Aged Christian Friend Society of Scotland* (1899) 2 F 82.

86 For the operation of the doctrine generally, see W A Wilson and A C M Duncan, *Trusts, Trustees and Executors*, 2nd edn (1995), paras 15.16-15.24. Cf *Davidson's Trs v Arnott* 1951 SC 42 at 48 per Lord Justice Clark Thomson; *Cuthbert's Trs v Cuthbert and others* 1958 SC 629.

87 Text at note 114 below.

88 E.g. *Johnstone's Trs*, note 23 above.

However, the rule can be applied in more sophisticated cases. Although Craig restricted his formulation of the rule to the unborn child of the deceased,<sup>89</sup> the modern Scottish rule applies where the unborn child is the issue of someone else.<sup>90</sup> For example, it applies to a nephew<sup>91</sup> or grandchild<sup>92</sup> of the testator or even to an unrelated child.<sup>93</sup> Thus it may include a child born after the death of the deceased where both parents of that child may be still alive. It is therefore possible that the child suffers none of the hardship originally envisaged by Craig.<sup>94</sup> The rationale for the rule in such a case must be grounded in concepts of presumed intention or equity amongst members of a described class rather than the aggravation of the child's already distressed position. The *pro iam nato* rule may also be applied where the date of vesting is not the date of death but later. The modern Scottish rule applies to identify not only a single beneficiary but also those who fall within a class of beneficiaries at a particular date.<sup>95</sup>

The present rule in Scots law, following the Roman position, benefits posthumous children of both sexes. However, feudal concepts caused an indigenous Scottish quirk in relation to heritable property. In the period prior to 1964 when the rules of primogeniture in Scots law were applied to succession to heritage the *pro iam nato* rule also operated to presume that the unborn child was male, because that would be the outcome most beneficial to it.<sup>96</sup> On the birth, this fiction was either superseded or confirmed. With the abandonment of primogeniture, this aspect of the maxim has largely disappeared. Except in the context of succession to titles of honour,<sup>97</sup> the simplicity of the original Roman rule has been restored.

#### (a) *Personality and capacity*

Within certain limitations a testator may chose the identity of his beneficiaries and "contract out of" the law of intestate succession. This is the essence of the qualified

89 Craig, *Ius Feudale*, 2.3.15.

90 E.g. McKenzie, note 75 above. This is also the rule in South Africa: G Steyn, *The Law of Wills in South Africa*, 2nd edn (1948), 61.

91 Grant, note 76 above; Cox's Trs, note 27 above.

92 Allan's Trs v Allan 1949 SLT (Notes) 3.

93 McKenzie, note 75 above. No relationship is specified in this case report.

94 See text above at note 11.

95 Allan's Trs, note 92 above; Cox's Trs, note 27 above; *sub nom Cox's Trs v Pegg and others* 1950 SLT 127. This is also the position in English law: Villar, note 39 above, at 149-150 per Lord Atkinson, and in Australia: *Tasmanian Permanent Executors and Trustees Association Ltd*, note 40 above. See also *Permanent Trustee Co of New South Wales Ltd v Ralfe and others* (1940) 57 WN (NSW) 183 discussed in note in (1941) 14 ALJ 316.

96 Stair, *Institutions*, 3.5.50.

97 The law in this regard remains unaffected by the Succession (Scotland) Act 1964. See 1964 Act, s 37(1)(a). See *obiter* remarks in *Dunbar of Kilconzie, Petitioner* 1986 SLT 463 at 465 reported *sub nom Dunbar of Kilconzie v Lord Advocate*; 1986 SC (HL) 1 at 29 per Lord Keith of Kinkell.

freedom of testation permitted by Scots law. However, the entitlement of a beneficiary involves much more than the establishment of identity. In addition, it requires consideration of personality and capacity on the part of the beneficiary. Scots law follows the Roman rule to the effect that issues of capacity and personality are determined by the general law and are not within the gift of a testator.<sup>98</sup> This also applies to the capacity and personality required to be a beneficiary.

One important aspect of the modern rule that an unborn child is treated as already born is that the child in the womb is regarded as having personality and capacity in a measure sufficient to benefit from an entitlement under the laws of succession. In this regard Scots law is consonant with Roman,<sup>99</sup> Roman-Dutch<sup>100</sup> and South African law.<sup>101</sup> A similar position is clearly implicit in the authorities from Common Law jurisdictions.<sup>102</sup> This creates difficulties when one attempts to extrapolate beyond the law of succession into fields such as the law of delict and abortion. However, within the law of succession it is largely immaterial whether one classifies the personality of the foetus according to more modern concepts of "anticipated personality"<sup>103</sup> or one adopts the more ancient view of *testamenti factio passiva*.<sup>104</sup> All that matters is that there is sufficient recognition of personality and capacity to enable the unborn child to benefit from an entitlement.

Satisfaction of the requirements of personality, capacity and identity will not always enable an unborn child to inherit. In some cases a third party may be given a right to challenge a bequest if the beneficiary has insufficient skills to use the subject of the bequest. This is commonly afforded to landlords in relation to farming leases<sup>105</sup> and it would be relatively easy to demonstrate that a child in the womb has insufficient skill to farm a croft. Some particular bequests may expressly require an additional qualification on the part of the beneficiary. For example, a

98 D 28.1.3 (Papinian); Buckland, *Roman Law*, note 84 above, at 288.

99 J Inst 2.20.28.

100 Grotius, *Inleidinge*, 2.16.2; Voet, *Pandects*, 1.5.5.

101 Corbett, Hofmeyr, Kahn, *Law of Succession in South Africa*, note 20 above, at 79; M J de Waal and M C Schoeman-Malan, *The Law of Succession*, 3rd edn (2003), para 6.2.1.

102 See the cases cited at notes 39-42 above.

103 M Planiol, *Traité Élémentaire de Droit Civil*, 12th edn (1939), vol 1, nos 366-367 (English translation by the Louisiana State Law Institute (1959)).

104 This is a form of passive capacity enabling the receipt of property, as contrasted to a form of active capacity enabling the management of property received or the capacity required to enable the disposition or conveyance away of property: Voet, *Pandects*, 28.5.1 and 12; Buckland, *Roman Law*, note 84 above, at 290.

105 The provisions for agricultural holdings apply to testate and intestate succession: Agricultural Holdings (Scotland) Act 1991, ss 11(4) and (6) and 12(2) and (3); B Gill, *The Law of Agricultural Holdings in Scotland*, 3rd edn (1997), para 33.11; I Connell, *Agricultural Holdings (Scotland) Acts*, 7th edn (1996), at 19. The provisions relative to crofts relate only to testate succession: Crofters (Scotland) Act 1993, s 10. See D J MacCuish and D Flyn, *Crofting Law* (1990), para 7.03.

testator may impose a condition that his children will inherit only if at the date of vesting they are pupils at a particular school or are married or reside in a particular place. In respect of such additional pre-conditions, the *pro iam nato* rule will not confer the requisite qualification on the beneficiary and the preconditions may be seen as an indication that the testator did not wish a child in the womb to be included in the benefited class. It is difficult to see how most of the modern legally implied disqualifications known to Scots law, such as the exclusion of a beneficiary who murdered the deceased, could apply to a posthumous child, but it is clear that some, such as illegitimacy, have so applied in the past.<sup>106</sup> As we shall see, however, a relevant and applicable disqualification may arise from statutory provision relative to modern techniques of reproduction<sup>107</sup> and the *pro iam nato* rule will not elide its application.

### (b) Survivorship

Survival by a beneficiary is a pre-condition of entitlement to benefits arising under the law of succession, whether in terms of a will or under the rules of intestate succession. It is generally accepted that the *pro iam nato* rule operates to satisfy the requirement that the beneficiary survive the date of vesting of the benefit.<sup>108</sup> This proposition is not beyond comment as regards entitlements under (i) wills and settlements (testate succession), and (ii) statute (largely intestate succession).

#### (i) Testate succession

Occasionally the precondition of survivorship is made express in wills in terms such as the following: "... in the event of AB surviving me he shall be entitled to ..." <sup>109</sup> or "I hereby leave and bequeath AB, in case he shall survive me..." <sup>110</sup> With most beneficiaries such wording is otiose. However, with the child in the womb the matter may be otherwise.

It used to be said that it was a strange set of circumstances where a father of a child did not know the extent of his own family.<sup>111</sup> In modern times this probably understates the frequency of the times when a man is surprised when someone comes forward claiming to be his child. However, the statement still holds good for

106 *Purves' Tr v Purves* (1895) 22 R 513; (1894) 1 SLT 631; (1895) 2 SLT 284 and 627. In this regard Scots law took the approach of Roman law: J Inst 2.20.28; Gaius, *Institutes*, II, ss 241 and 242; D 28.2.9. See also the English case of *Occleston v Fullalove* (1873) 9 Ch App 147.

107 See text below at notes 216-233.

108 In the vast majority of cases this is the requirement that the child survives the date of death because most gifts vest *a morte*.

109 E.g. the terms of the trust-disposition examined in *Craig's Trs, Ptrs* 1933 SC 34.

110 E.g. the codicil in *Arnot's JF v Gardiner* (1865) 4 M 66.

111 *Dixon v Dixon* (1841) 2 Rob App 1 at 20 per Lord Chancellor Cottenham.

the posthumous child. Despite exhortations from legal writers in some American jurisdictions,<sup>112</sup> in many cases the birth of such a child is overlooked in a will. It may be that testators rely on the general terms of the maxim. It is a very rare case indeed in which a testator or testatrix prepares for death by arranging for gametes to be stored with a view to use *post mortem* and also deliberately seeks to provide for any afterborn children in his or her will.<sup>113</sup> In any event, the circumstances of the birth ensure that in the will the child is never referred to by name and its right to inherit in terms of a will invariably depends on a construction of general words such as “children” or “issue”. In the context of testate succession the *pro iam nato* maxim is used as a principle of construction of testamentary documents based upon the presumed intention of the testator.<sup>114</sup> The principle has been described alternatively as a “fictional construction”<sup>115</sup> or a “benevolent construction” presumably depending upon whether one regards its application with favour or disfavour.<sup>116</sup> It has also been extended to *inter vivos* deeds with direct testamentary effect, such as ante-nuptial marriage contracts.<sup>117</sup> In Scots law there is no legislative provision confirming that the term “child” is presumed to include a child *in utero*, but other mixed legal systems such as South African law have chosen a different approach. In South Africa, for example, in the interpretation of a will, unless the context indicates otherwise:<sup>118</sup>

any benefit allocated to the children of a person, or to the members of a class of persons, mentioned in the will shall vest in the children of that person or those members of the class of persons who are alive at the time of the devolution of the benefit, or who have already been conceived at that time and who are later born alive.

Whatever the present form of the rule, in both Scotland and South Africa the testator may insert a clause in his will expressly including or excluding a child as yet unborn from the benefit of a legacy. In such a case everything depends on the

112 E.g. J F Farr and J W Wright, Jr (of the Massachusetts Bar), *An Estate Planner's Handbook*, 4th edn (1979), at 144 and 431 where the comments are extended generally to children born after the date of the will.

113 Such a case is encountered in M C Meston, *Succession Opinions* (2000), Opinion 78, at 246-248.

114 The rule is similar in Sri Lanka: *M M Mohamed*, note 37 above, where Basnayake CJ at 420 in construing a will opined: “There being no indication in the will that the testator intended to disinherit the child who was born after he made the will, it appears to have been rightly construed so as to include him”. Authority cited in the case included both English and Roman-Dutch sources: T Jarman, *A Treatise on Wills*, 8th edn (1951), vol 3, at 1698, and Voet, *Pandects*, 1.5.5; 27.9.1 and the entirety of 28.2.

115 *Elliot*, note 1 above, at 67 per Lord Russell of Killowen.

116 See the English case *Re Stern's Will's Trusts*, note 39 above, at 735 per Russel J.

117 *Johnstone's Trs*, note 23 above.

118 Wills Act 7 of 1953, s 2D(1)(c) inserted by Law of Succession Amendment Act 1992, s 4 (Act 43 of 1992).

construction of the relevant clause. However, even where professionally drafted, most wills and settlements do not specifically address the issue of posthumous children<sup>119</sup> except where the vesting of the entitlement is expressly delayed to a later date in the context of a continuing trust.<sup>120</sup> This deliberate or inadvertent omission was the practice observed in the early twentieth century<sup>121</sup> and it remains so to this day.<sup>122</sup> Experience shows that a child *in utero* is usually not in contemplation at the time of making a will. Legal practice has not changed largely because the principle in the *qui in utero* maxim adequately deals with the situation. The question facing the courts in such a situation has been put as follows:<sup>123</sup> "...is there any express exclusion of the fiction or any exclusion of it by fair implications to be found in the terms of the testator's will?" Clearly, where the will refers to a child and links the child to concepts of "living", "birth" or "survivorship" there will be difficult cases as the courts attempt to apply the general wording used to the specific facts.

The starting position for Scots law is *Elliot v Joicey*<sup>124</sup> where A left his property to be held in trust for B absolutely in the event of B leaving any "surviving" issue. The House of Lords held that the word "surviving" would not normally mean "posthumous". Lord Russell of Killowen indicated: "The word 'surviving' ... according to its ordinary meaning requires that the person who is to survive shall be living both at and after a particular point of time."<sup>125</sup>

Arguably, a foetus is not alive as at the date of vesting even if it becomes alive at some subsequent date. So a restatement in a will of the legally implied survivorship requirement may tend to indicate an intention to exclude a posthumous child. However, in *Elliot v Joicey* Lord Russell of Killowen indicated that the ordinary meaning of the word "surviving" can be displaced where the reason and motive of

119 For a very early exception to the rule in which a father expressly provided in his will for the appointment of a tutor to his unborn child see *Murray v Mershall* (1555) Mor 16226. Roman law also permitted this: J Inst 2.13.4. See also Craig, *Ius Feudale*, 2.20.7.

120 E.g. *Howden's Trs v MacPherson* 1911 2 SLT 308.

121 *Johnstone's Trs*, note 23 above, at 777 per Lord Morison.

122 See the comments per the Honourable Justice DeBelle in *Wesley*, note 40 above. One may contrast this with the perspicacity or excessive caution of the English draftsman who made express provision for children *en ventre sa mère* at the death of the testator, as noticed in *Locke v Dunlop* [1888] LR 39 Ch D 387. See also the precedent for an entail provided in C Davidson et al, *Davidson's Precedents and Forms in Conveyancing*, 3rd edn (1880), vol 4, at 392. Similarly in the Indian case *Okhoymoney v Nilmony*, note 42 above, the testator left a will narrating "my wife is supposed to be in the family way; should she bring forth a child male, in that case he will be the sole heir of my property and effects on his attaining proper age. If, on the other hand, she is delivered of a female child, all the expenses of her marriage or maintenance till that period should be defrayed from my estate."

123 *Cox's Trs*, note 27 above, at 121 per Lord Carmont.

124 See note 1 above.

125 See note 1 above, at 61-62.

the gift indicate otherwise.<sup>126</sup> This was exactly why the First Division of the Inner House of the Court of Session, in a case decided only sixteen months after *Elliot v Joicey*,<sup>127</sup> felt able to construe an antenuptial deed of trust using the words children “who shall ... survive me” as including a posthumous child. The court gathered from the deed that the truster intended that all children were to be treated alike.

And what of the remaining case-law? It is almost inevitable that the reported cases show a pattern that is not entirely uniform.<sup>128</sup> Where a testator left a will leaving property to “the descendants alive at the time of my death of ... [my brothers and sister] ...” it was held that this class included posthumous descendants *in utero* as at the date of death of the testator.<sup>129</sup> A legacy to “the children (or the survivors of them at the time of my decease) of my sister AB” was held to include a child of the sister born after the death of the testator.<sup>130</sup> An instruction to trustees to pay and divide a bequest of a quarter share of residue “to the lawful child or equally among the lawful children if more than one of my said son” was held to include a child in the womb as at the date at which the members of the class were determined.<sup>131</sup> Similarly, a bequest to be divided among “the children of Janet McKenzie, and the children of Anne McKenzie, and the children of Anne Monro” included children of each of these parties born after the death of the testatrix.<sup>132</sup> However, a bequest of residue to the “children of my said son ... AB ... born prior to the date of my death” excluded a child *in utero* as at the date of death.<sup>133</sup> It may be one can justify the decision in the last case in that the meaning of the word “born” is very different from that of “alive”. However, this last decision has been doubted,<sup>134</sup> albeit never formally over-ruled. Many wills contain clauses rendering the vesting of a bequest suspensively conditional upon a beneficiary surviving a few days after death. This is intended to assist in situations where the deceased and the beneficiary die simultaneously, but it is possible that it could unintentionally cause added difficulty with a posthumous child. Whilst there is no

126 See note 1 above, at 67.

127 *Johnstone's Trs*, note 23 above, decided on 2 July 1936. *Elliot v Joicey* was decided by the House of Lords on 14 Feb 1935.

128 *Elliot*, note 1 above, at 62 per Lord Russell of Killowen commenting on the English authorities.

129 *Cox's Trs*, note 27 above. For a similar position in England see *In Re Allsop, Cardinal v Warr* [1968] Ch 39. Cf the Canadian case *Bull v Sloan* [1938] 4 DLR 79 (BCCA).

130 *Grant*, note 76 above.

131 *Allan's Trs*, note 92 above. The note is inadequately reported but the full details of the case including a transcript of the relevant trust deed are found in the National Archives: *Douglas Strathearn Allan and others, Trustees of the late John Strathearn Allan and others, Special Case*, 7 Dec 1948, ref: CS258/20583. The relevant deed of trust is Trust Disposition and Settlement by John Strathearn Allan dated 12 June 1930 and registered in the Books of Council and Session 17 June 1936.

132 *McKenzie*, note 75 above.

133 *Burns' Trs*, note 36 above.

134 *Burns' Trs*, note 36 above, doubted in *Elliot*, note 1 above, at 71 per Lord Macmillan.

Scottish case on the matter, the decisions from other jurisdictions indicate that a posthumous child in the womb as at this date of vesting will be regarded as having survived.<sup>135</sup>

From this brief overview, it is clear that the jurisprudence readily has a tendency to degenerate into a digest of prior cases with no clear determining principle apart from the desire not to prejudice the child *in utero* except where that is manifestly the will of the testator. However, that is perhaps all we can expect because that is all the guidance the Institutional writers give. Some jurisdictions, such as the Irish Republic, have attempted to solve the problem by adopting a statutory provision deeming a posthumous child born alive not only to have been born in the lifetime of the *de cuius* but also to have survived him.<sup>136</sup> That is not yet the approach of Scots law.

However, neither science nor jurisprudence is static. The approach in *Elliot v Joicey* is based on the view that in the normal use of language a foetus is not “alive” at the date of vesting. One may argue that this has become controversial in the light of recent scientific advances. In addition, values have greatly altered over the course of the seventy years since the decision. In the light of the provisions of the ECHR it remains open to question whether the *Elliot v Joicey* approach would be taken today.<sup>137</sup>

#### (ii) Statutory provision

The precondition of survivorship is sometimes expressly restated in statute. So too are terms like “born”, “in life” and “child”. In determining whether such terms may be construed with the help of the *qui in utero* maxim regard may be had to the judicial observations in *Reid's Trs v Dashwood*.<sup>138</sup> Lord President Clyde observed:<sup>139</sup>

... I do not think it is legitimate to give the word “born”, when used in an Act of Parliament, any meaning but that which belongs to it in ordinary language, unless the subject-matter or the context requires it.

It was contended that the subject-matter of the section does require it, because it deals with the rights of succession of, *inter alios*, children, and because the legal fiction which regards a posthumous child as “born” at the date of the father’s death is not only deeply embedded in those rights, but is the foundation of the claim of the posthumous

135 *Wesley*, note 40 above, per DeBelle J.

136 Succession Act 1965, s 3(2) which applies for the purposes of the Act. The Explanatory Memorandum with the Succession Act, at 1, makes it clear that this is intended to exclude the effect of *Elliot v Joicey*. See J Brady, *Succession Law in Ireland*, 2nd edn (1995), para 6.17.

137 *Pla and Puncernau*, note 54 above, paras 25 and 26. (Extension of benefit of a bequest to a “child” to illegitimate child.)

138 *Reid's Trs v Dashwood* 1929 SC 748 relative to Trusts (Scotland) Act 1921, s 9.

139 At 754.

child in the present case. It is certainly true that she can only claim the benefits of the section, *qua* liferenter under her father's testamentary deed, and her qualification as such liferenter rests solely on the legal fiction. But I do not think this will do. The fiction, however properly appealed to in the sphere of testamentary succession, is altogether out of place in the construction of an Act of Parliament.

Similarly Lord Sands opined:<sup>140</sup>

It is quite true that a benignant construction has been given to testamentary provisions in the case of children *in utero* when the succession opens, but I do not think it follows from that that we are to attach an elastic or artificial meaning to the word "born" in all cases where it occurs in deeds or statutes. I think that we must construe the expression "born after a certain date" in accordance with the general use of language and the general understanding of language. I mean thereby the use and understanding of an unimaginative person of ordinary intelligence, and the Legislature is an unimaginative person and has a very ordinary intelligence. Now, I think that such a person would use and construe the expression "born" as equivalent to "having been given birth to". Finding this expression in the statute, I am unable to avoid the conclusion that we must give that meaning to it and that "born" is just equivalent to "having emerged from the womb".

Consequently the court held that the phrases "a person in life" and "a person ... born" where they were used in Trusts (Scotland) Act 1921, section 9, must be given their ordinary significance. The former phrase was susceptible of including a reference to children *in utero* but the latter referred to a child alive on the separation of its person from that of its mother.<sup>141</sup> The effect of the decision is that the posthumous child in such a situation acquires a fee, in other words a right of property, rather than a mere liferent. This outcome is clearly more favourable for the unborn child and it may be that the result influenced the decision.

Certain provisions in the Succession (Scotland) Act 1964 confer a benefit on a child "where an intestate is survived by children"<sup>142</sup> or allow representation by issue where the deceased "dies predeceased by a child who has left issue who survive the deceased".<sup>143</sup> There is no definition of the word "child" in the Act. The application of the Act in practice indicates that posthumous children have always been regarded as benefiting under these provisions<sup>144</sup> although there is no decision directly in point. In another provision of the same Act the value of the financial provision as a prior right to a surviving spouse in cases of intestacy is lessened where the deceased is "survived by issue".<sup>145</sup> The definition of the term "issue" in

140 At 755-756.

141 At 754 and 756.

142 Succession (Scotland) Act 1964, s 2(1)(a).

143 Succession (Scotland) Act 1964, s 11(1).

144 Meston, "Succession rights of posthumous children", note 18 above, at 34.

145 Succession (Scotland) Act 1964, s 9(1)(a).

the 1964 Act<sup>146</sup> does not expressly include the posthumous child. In practice this provision is universally interpreted as applying where a posthumous child is subsequently born. Again, no reported case has determined the point. The fiction enshrined in the *pro iam nato* rule is nowhere referred to expressly in the 1964 Act<sup>147</sup> but it is clear that it is used by practitioners as a gloss to interpret the meaning of the word “survived” and its cognates in the 1964 Act. Some writers take the view that as regards the succession to the free estate the effect of the maxim is preserved by a general saving of the prior law in the 1964 Act.<sup>148</sup> A similar argument is that Parliament legislated against the background of the common law and did not seek to change such a fundamental rule.<sup>149</sup> As regards the prior right of the surviving spouse, the same writers take the view that it would be contrary to the policy of the 1964 Act that the maxim is recognised in one part of the Act and not another. However, all these observations have overlooked the existence of the decision in *Reid’s Trs v Dashwood*, part of the common law forming the background to the 1964 Act. Nonetheless, the general interpretation of the 1964 Act placed thereon by practitioners is undoubtedly correct despite the observations in *Reid’s Trs v Dashwood*, although the legal basis remains obscure.<sup>150</sup>

### C. THE MAXIM *PRO IAM NATO* IN THE MODERN LAW

It has been observed by one commentator that: “The maxim *foetus in utero* is so closely hedged about with restrictions that it is as well that the law does not depend on it primarily.”<sup>151</sup> This is hardly a fair criticism because there are remarkably few

146 Succession (Scotland) Act 1964, s 36(1).

147 Cf the express statutory provision in jurisdictions such as the Northern Ireland Administration of Estates Act (NI) 1955, s 13 and the Canadian Province of New Brunswick: Devolution of Estates Act, RSNB 1973, s 30.

148 To the effect that a person’s intestate succession will devolve according to the rules in that Act and to “any enactment or rule of law in force immediately before the commencement of this Act which is not inconsistent with those provisions”, Succession (Scotland) Act 1964, s 1(1)(b). See also Wilkinson and Norrie, *Parent and Child*, note 18 above, para 2.22; Meston, “Succession rights of posthumous children”, note 18 above, at 34.

149 The same, it can be argued, is true for the rule excluding killers as unworthy beneficiaries. However, there is no comparable decision such as *Reid’s Trs v Dashwood* indicating that this unworthiness principle is not a canon of construction applicable to statutes.

150 Cf the English case in which the Wills Act 1837, s 33 referring to “issue ... living” was interpreted as including an unborn child: *Re Griffiths’ Settlement: Griffiths v Waghorne* [1911] 1 Ch 246. No direct use was made of the maxim and, in any event, the decision was disapproved in *Elliot*, note 1 above, at 65 and 67 per Lord Russell of Killowen. The full reasons for the disapproval are omitted in the Session Case report and are found in [1935] AC 209 at 228-230. They do not include the approach that the maxim is an inappropriate canon of construction for statutes. The 1837 Act, s 33 was amended in both England and Northern Ireland expressly to include children *en ventre sa mère*: Administration of Justice Act 1982, s 19 (inserting a new s 33(4)(b)) and Wills and Administration Proceedings (NI) Order 1994, Art 22.

151 Anonymous, “Succession—posthumous child”, note 18 above, at 77.

qualifications in the application of the maxim. In modern Scots law the rule to the effect that an unborn child is treated as already born applies provided two conditions are satisfied. These are: (a) the child is benefited by the application of the rule; and (b) the child is born alive.

### (1) Third parties

The *pro iam nato* rule cannot be invoked in the interests of a third party unless the child benefits from its application. Following the original view of Paulus,<sup>152</sup> this was recognised at an early stage by Bankton who observed: “A child in the mother’s womb is esteemed as already born, in all things that concern its own interest, but is not reckoned among children, in relation to questions to the advantage of parents from a certain number of children.”<sup>153</sup> Thus the application of the rule was refused in *Elliot v Joicey*,<sup>154</sup> where A left his property to be held in trust for B absolutely in the event of B leaving any “surviving” issue. The House of Lords held that even if the word “surviving” did comprise a “posthumous” child this would in this case result in a benefit to B and not to B’s unborn child.<sup>155</sup> The enrichment of a parent’s estate is not a benefit to the child within the meaning of this rule.<sup>156</sup> B’s unborn child would have benefited only indirectly (were B to leave a will in the child’s favour or to die intestate in suitable circumstances) or not at all if B were insolvent.<sup>157</sup> A similar situation arises where a legacy given to B is subject to a suspensive condition that it will vest upon the “birth” of a child within a certain time. The legacy will not vest unless the child is actually born within the stated time.<sup>158</sup>

### (2) Live birth

The child must be born alive,<sup>159</sup> even if it survives only briefly<sup>160</sup> provided vesting is not delayed to a date after its death. If vesting is delayed and the posthumous child predeceases the date of vesting, the child will inherit nothing because it has failed

152 D 1.5.7.

153 Bankton, *Institute*, 1.2.7, at 47 and 1.2.1, at 72.

154 See note 1 above.

155 See also the English case *Re Burrows, Cleghorn v Burrows* [1895] 2 Ch 497.

156 *Elliot*, note 1 above, at 60-61 per Lord Tomlin; *Cox’s Trs*, note 27 above, at 121 per Lord Carmont.

157 Macdonald, *Succession*, note 18 above, para 1.35.

158 McLaren, *Wills and Succession*, note 17 above, para 1259 citing the English case *Blasson*, note 39 above, at 536 per Lord Chancellor Westbury, founded upon D 1.5.7 and 26. See also D 50.16.231 and Voet, *Pandects*, 1.5.5. In comparison with the then existing Scottish authorities McLaren’s statement was quoted as a “more recent and fuller statement of the Scots law on the subject” in *Elliot*, note 1 above, at 70 per Lord Macmillan.

159 Bell, *Principles*, § 1642.

160 E.g. less than two months’ survival: *Robson v Robson* (1897) 5 SLT 351 at 353 per Sheriff Vary-Campbell. For survival of “only a few months” in an aliment case see *Jervey v Watt*, 7 Jan 1762 FC 164.

to survive the relevant date.<sup>161</sup> A stillborn child or a child who perishes at an earlier stage is regarded as never having existed for these purposes.<sup>162</sup> Bankton states the matter starkly: "A child born dead is considered as if it had not been conceived."<sup>163</sup> This reflects the position in jurisdictions such as France,<sup>164</sup> Quebec<sup>165</sup> and Louisiana<sup>166</sup> and is based squarely on the Roman rule stated by Paulus: "*Qui mortui nascuntur, neque nati neque procreati uidentur, quia numquam liberi appellari potuerunt.*"<sup>167</sup>

As a consequence, some interesting and unanswered questions arise in relation to vesting. To regard the right obtained by the unborn child as an "inchoate right" which "ripens into a full right on birth"<sup>168</sup> does little to explain the underlying property issues. If the rule is indeed that a stillborn child is treated as never having existed it is possible that no vesting in that child ever takes place because the vesting of rights is suspended until the *nasciturus* is actually born. This appears to be the approach in mixed jurisdictions such as South Africa,<sup>169</sup> Louisiana<sup>170</sup> and Quebec.<sup>171</sup> However this does not sit well with the part of the maxim to the effect that the child in the womb is regarded as already born. A possible reconciliation of the two aspects of the maxim is that vesting does take place whilst the child is in the womb but that such vesting is subject to an implied resolutive condition leading to defeasance.<sup>172</sup> The resolutive condition would apply in the event of a still birth but with the effect of the defeasance being backdated so that vesting in the stillborn child is deemed never to have occurred at all. This is a problem with which some American courts have grappled but the resulting jurisprudence is mixed. In some states a posthumous child takes directly from the parent at birth suggesting vesting

161 E.g. *Melrose v Melrose's Trs* (1869) 7 M 1050.

162 J Walker, *Intestate Succession in Scotland* (1927), at 10; Meston, *Succession (Scotland) Act 1964*, note 18 above, at 26.

163 Bankton, *Institute*, 1.2.8, at 47.

164 *Code civil*, Art 725; Planiol, *Droit Civil*, note 103 above, vol 1, no 368; English translation by the Louisiana State Law Institute (1959).

165 Quebec Civil Code, Art 617.

166 Louisiana Civil Code, Art 26.

167 D 50.16.129. The translation provided by Mommsen, Krueger and Watson, vol 4, at 945 is: "Those who are stillborn, seem neither born nor begotten, since they could never be called children".

168 See the observation in passing in F F Stone, "Common problems and uncommon solutions in the law of tort: a comparative study" (1967-1968) 2 *Georgia Law Review* 145 at 147.

169 *Pinchin v Southern Insurance Co Ltd* 1963 (2) SA 254 (W) at 255 per Hiemstra J. See also the *obiter* remarks in an English case to the effect that as regards the right to take on a will or intestacy a claim "crystallises upon the birth": *C v S* [1988] QB 135 at 140 per Heilbron J.

170 Louisiana Civil Code, Art 26; *Rosen v The Louisiana State Board of Medical Examiners*, 318 F Supp 1217 at 1226 n 6; 1970 US Dist LEXIS 10629. See also J Montjoy, "Abortion and the law: a proposal for reform in Louisiana" (1969) 43 Tul L Rev 834 at 850-851.

171 Quebec Civil Code, Art 617; *Tremblay v Datgle* [1989] 2 SCR 530; (1989) 62 DLR (4th) 634.

172 This is suggested by D 5.4.3 and 4; Voet, *Pandects*, 1.5.5.

only as at birth.<sup>173</sup> In other states the inheritance vests immediately in the child whilst *en ventre sa mère*.<sup>174</sup>

Whatever the legal niceties, there are two unavoidable realities for the administration of estates. These are (a) interim protection and (b) practical problems.

#### (a) *Interim protection*

The issue of entitlement may come into sharp focus if there is litigation about the inheritance whilst the child is in the womb, or if another party proposes to act to the child's prejudice. In either case legal systems worldwide, including Scots law,<sup>175</sup> appear to avoid the underlying legal conundrum and offer interim protection to the interests of the child,<sup>176</sup> possibly including the appointment of an appropriate representative.<sup>177</sup> Consequently, whatever the approach taken to vesting, a posthumous child cannot be divested of its inheritance unless by due process of law to which the child is made a party.

#### (b) *Practical problems*

In any case in which a posthumous child is a possibility, there will be a delay after the death of the relative during which the exact distribution of the estate is not known. Until recently, this has been limited to a period of nine months but it is arguable that modern techniques of assisted reproduction may lead to this period being extended. A further difficulty is how to find out whether the possibility is a fact and whether a child was actually *in utero* as at the date of death. These were noticed by Bell,<sup>178</sup> but were dismissed by Lord Carmont<sup>179</sup> as "administrative rather than legal difficulties".<sup>180</sup> The advance of science may require a less dismissive

173 Illinois: *McConnel v Smith* 23 Ill 611, 1860 WL 6315 (1860); Kentucky: *Sansberry's Executor v McElroy* 69 Ky 440, 6 Bush 440, 1870 WL 4962 (1870); Alabama: *Gillespie v Nabors*, 59 Ala 441, 31 AmRep 20 (Ala 1877).

174 North Carolina: *Byerly v Tolbert*, 250 NC 27, 108 SE 2d 29 (1959); Tennessee: *Hogan v McDaniel*, 204 Tenn 235, 319 SW 2d 221.

175 A child in the womb might have a tutor appointed to him: *Murray*, note 119 above.

176 *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524 (Supreme Court of Victoria, 15 Dec 1999, available at [www.austlii.edu.au](http://www.austlii.edu.au)). For subsequent proceedings see *Yunghanns v Candoora No 19 Pty Ltd (No 2)* [2000] 35 ACSR 34.

177 North Carolina: *Deal v Sexton*, 144 NC 157, 56 SE 691 (1907).

178 Bell, *Principles*, § 1642: "Many difficult questions in evidence respecting conception, birth, parentage, identity and legitimation by subsequent marriage of parents, occur on such occasions".

179 *Cox's Trs*, note 27 above, at 122.

180 History indicates otherwise. In 1286 the succession to Crown land had to be suspended for several months in case the widow of Alexander III was pregnant. In the event it turned out she was not. See *Obligation by the Barons of Scotland to receive Margaret, daughter of Margaret and Eric, King of Norway, as their Queen on death of Alexander III without issue*, dated at Scone 5 Feb 1283; APS vol 1, at 424.

approach. One solution might be suitable legislative intervention in the form of a limitation period for claims.<sup>181</sup> A simpler solution would simply be for the common law to refuse to extend the application of the *qui in utero* maxim to situations which would require it to be read as *qui in vitro*. This is the approach in Louisiana where it is provided that the child will not inherit except where the child is *in utero* at the date of death of the testator<sup>182</sup> and, as we shall see, it is the implied effect of the modern current legislative approach in the United Kingdom.<sup>183</sup> Despite the sympathetic approach of Scots law to the unborn, the policy requirements of distribution of estates without undue delay may outweigh the individual requirements of a beneficiary who might be born some time in the future. It is submitted that there is a sufficient parallel with those cases involving the ascertainment of the members of a class of beneficiaries as at a particular date where the courts have excluded *post nati* from the class where they are born after the date at which the members of the class are ascertained.<sup>184</sup>

#### D. THE OMITTED CHILD

In Scotland this possibility of a posthumous child being overlooked when a will is prepared is addressed by the application of the *conditio si testator sine liberis decesserit*, which allows an afterborn child to revoke a will in certain circumstances. The *conditio* applies in relation to a will that fails to make any provision for a child, whether male or female,<sup>185</sup> born after the will is made—it does not operate where a provision is merely inadequate<sup>186</sup> or one less favourable to the unborn child than to other children.<sup>187</sup> Where such a child is born and the will remains unaltered the child is given a right to have the will revoked. The benefit of this *conditio* has been extended to a child who was *in utero* as at the date of the father's death.<sup>188</sup>

Traditionally the *conditio* has been examined separately from the application of the *pro iam nato* rule. However, this is not the only way to look at this issue. As the

181 This is suggested in Meston, *Succession (Scotland) Act 1964*, note 18 above, at 26. Time periods do exist in some legal systems, e.g. in Hungary a 300-day period after the death of the relative: Hungarian Civil Code, s 646.

182 E.g. Louisiana Civil Code, Art 1474.

183 Human Fertilisation and Embryology Act 1990 and Human Fertilisation and Embryology (Deceased Fathers) Act 2003, discussed in text at notes 216-233 below.

184 E.g. *Davidson's Trs v Davidson* 1952 SLT 52.

185 E.g. *Colquhoun v Campbell* (1829) 7 S 709.

186 *Stuart-Gordon v Stuart Gordon* (1899) 1 F 1005 at 1011 per Lord McLaren.

187 *Findlay's Trs v Findlay* (1886) 14 R 167.

188 *Smith's Trs v Smith* (1897) 5 SLT 190 at 192 per Lord Stormonth Darling; Bell, *Principles*, 9th edn (W Guthrie) (1889), § 1779. See also *Blair's Executors v Mitchell* (1915) 2 SLT 97.

right arising from the *conditio* effiers to an afterborn child and is implied into the terms of a will it is to be regarded as one of the succession rights of the unborn child. It therefore falls within the scope of this article.

In one early case the *conditio* was used not to revoke a will but to justify the entitlement of a posthumous child to a one third share of the benefits of a bond of provision made in favour of two named children.<sup>189</sup> This goes much further than the *pro iam nato* rule in that it forces an interpretation on words that was manifestly not the intent of the testator: it includes C in two separate bequests to A and B as if the two bequests were a single class gift to “my children”. However, this evident extension of the *conditio* in that case has been doubted<sup>190</sup> and is not likely to be followed.

Although claims have been made for a Civilian pedigree<sup>191</sup> the derivation of the *conditio* from Roman law is more indirect than in relation to the *pro iam nato* rule.<sup>192</sup> A similar rule in English law, possibly with the same Civilian foundations,<sup>193</sup> was abolished in 1837.<sup>194</sup> Scots law developed the *conditio* by reference to both the Civilian roots and the developments in English law.<sup>195</sup> The Scottish Law Commission has recommended the abolition of this *conditio* but this has not been acted upon as yet.<sup>196</sup>

### (1) Similarities between the *conditio si testator sine liberis decesserit* and the *pro iam nato* rule

There are three ways in which the application of the *conditio* mirrors that of the *pro iam nato habetur* rule:

#### (a) Presumed intent of the testator

First, unlike the Roman precursors which struck down wills failing to mention a posthumous child, and unlike the “omitted” or “pretermitted” child rules in other

189 *Oliphants v Oliphant* 19 June 1793, (1793) Mor 6603; 10 Dec 1794, Bell's Folio Cases 125; 5 BS 648; FC 327, case no 143.

190 *Spalding*, note 61 above, at 246-247 per Lord President Inglis.

191 McLaren, *Wills and Succession*, note 17 above, para 732.

192 An indirect precursor is nullity of a will resulting from failure to mention a child, even posthumous: J Inst 2.13.1 and 2.18.2. See the reference to the Roman rule in Stair, *Institutions*, 3.8.10, but in this original form the rule was not adopted in Scotland: *Stevenson's Trs v Stevenson* 1932 SC 657 at 672 per Lord Hunter.

193 *Doe on the Demise of Lancashire v Lancashire* (1792) 101 Eng Rep 28 at 29 per arguments for the plaintiff referring to J Inst 2.13.1.

194 Wills Act 1837, ss 18 and 19. For the former law which appeared to require marriage and the birth of a child see *Doe on the Demise of Lancashire*, note 193 above; *Johnston v Johnston* (1817) 161 Eng Rep 1039.

195 *Elder's Trs v Elder* (1894) 21 R 704 at 708 per Lord (Ordinary) Low and at 708 per Lord Adam.

196 Scottish Law Commission, Report on Succession, note 64 above, paras 4.46-4.49.

jurisdictions,<sup>197</sup> the *conditio* in Scots law is not a device to restrict testamentary freedom: rather the operation of the *conditio* is based on the presumed intent of the testator. It is therefore subject to the actual intent of the testator and may be excluded if a suitable intent is discernible.<sup>198</sup> Put another way, it is regarded as the intention of the testator that the child has the option to revoke the will. This option could have been expressly created<sup>199</sup> (although such a clause is never found in modern wills) but, in terms of the *conditio*, it is created by legal implication. As the option to revoke arises from the terms of the will, express or implied, it can be excluded by the terms of the will. So if the will contains a bequest to "children", and this is held to include the posthumous child, that child logically must be regarded as being within the contemplation of the testator and the operation of the *conditio* is thus excluded.<sup>200</sup> Occasionally one encounters in practice wills that confirm that they are to remain in full force and effect notwithstanding the birth of a child to the testator.<sup>201</sup> Such a declaration will probably exclude the operation of the *conditio* even in respect of posthumous children.<sup>202</sup> There is possibly greater latitude shown in excluding the *conditio* as a canon of construction than in excluding the *pro iam nato* rule. In relation to the *pro iam nato* rule the case-law suggests that the courts will confine their attentions to intrinsic evidence: what the testator has said within the will. However, as regards the *conditio si testator*, the presumption that the testator wished the *conditio* to operate may be overturned by extrinsic evidence that the testator considered the birth of the child and regarded it as well provided for, although it is rare for this to occur.<sup>203</sup>

(b) *The option to revoke is personal to the child*

Second, the doctrine of the *conditio* operates to relieve the hardship created for a *post-natus*.<sup>204</sup> The option to revoke is therefore personal to the child and is not

197 See, e.g., Arizona: *De Coste v Superior Court* 106 Ariz 50, 470 P 2d 457 (1970), and North West Territories in Canada: Wills Act, RSNWT 1988, s 22. The sanction in both those jurisdictions is not to revoke the will entirely but to afford the child the portion he would have obtained if the testator had died intestate.

198 Erskine, *Institute*, 3.8.46; McLaren, *Wills and Succession*, note 17 above, para 735.

199 And even expressly extended beyond the operation of the *conditio*, e.g. to a situation in which a provision is made for the child but the child is given the right to assess whether the provision is adequate.

200 *Viz Kentucky* where a bequest to "children" comprised a posthumous child who was therefore excluded from the benefit of the protection of the "pretermitted child": *Lamar v Crosby* 162 Ky 320, 172 SW 693 (1915).

201 E.g. the will considered in *Couper's JF v Valentine and others* 1976 SC 63 at 65 per Lord Stott.

202 Cf the jurisdiction of New York where the approach is that the contemplation of the subsequent birth of a child is not necessarily the contemplation of the subsequent birth of a posthumous child: *Stachelberg v Stachelberg*, 124 AD 232, 108 NYS 645 (1st Dep't 1908) aff'd 192 NY 576, 85 NE 1116 (1908).

203 E.g. *Stuart-Gordon*, note 186 above.

204 *Stevenson's Trs*, note 192 above, at 665 per Lord Justice Clerk Alness.

available to a third party.<sup>205</sup> Whilst the option to revoke is part of the child's estate, it terminates on its death. If the child dies without making a claim, no right to make it passes to its executor.<sup>206</sup> In the unlikely event of the child being rendered insolvent the right probably does not pass to the trustee in bankruptcy.

(c) *The child must be born alive*

Third, the child must be born alive. There is no direct Scottish authority on the point, but, subject to one qualification, it is likely that Scots law would follow the authority of Roman-Dutch law in relation to a similar rule.<sup>207</sup> After setting out the basic rule that the child was deemed to be already born only if the child was born alive, Voet observed: "*qua de causa nec posthumi praeteriti a patre, dum sunt in utero, testamentum rumpunt, sed demum agnatione sua; testamento manente rato, si abortus fiat, aut monstrum producat.*"<sup>208</sup>

Scots law may have been prepared to accept the comments concerning monstrous births as late as the eighteenth century,<sup>209</sup> but modern conceptions of the rights of disabled persons require that no child born alive should be excluded from inheriting or from operating the *conditio si testator* just because the child was born significantly disabled. Today it may be that the term "monster" might be equated with a wholly unviable birth.<sup>210</sup> Whatever the case, Scots law would not today adopt uncritically the last three words of the quotation above.

**(2) Differences between the *conditio si testator sine liberis decesserit* and the *pro iam nato* rule**

The operation of the *conditio* as a canon of construction of a will differs from the *pro iam nato* rule in three important respects. First, the *conditio* is not a resolute condition<sup>211</sup> and it does not operate automatically to revoke the relevant will.<sup>212</sup> The benefit of the *conditio* must actively be sought by the child. Secondly, the

205 *Stevenson's Trs*, note 192 above, at 665-667 per Lord Justice Clerk Alness.

206 *Smith's Trs v Grant* (1897) 35 SLR 129. *Stevenson's Trs*, note 192 above, at 669 per Lord Ormisdale.

207 Voet, *Pandects*, 1.5.5 and 5.2.17 (not translated by Gane); Schorer, *Ad Grotiam*, note 167; Van der Keessel, *Theses Selectae*, 2.18.9, para 306.

208 Voet, *Pandects*, 1.5.5: The translation provided by Gane (at 128) reads: "The passing over, therefore, by a father of posthumous children while still in the womb does not break a last will until the moment of their subsequent birth, the will remaining sound if abortion takes place or a monster is brought forth", citing Code 6.29.2 and 3. See also Grotius, *Inleidinge*, 1.3.5 citing D 1.5.14.

209 Craig, *Ius Feudale*, 2.13.18; Bankton, *Institute*, 1.2.10, at 47.

210 See Planiol, *Droit Civil*, note 103 above, vol 1, no 368.

211 See the contrary assertion in Bell, *Principles*, § 1779, disapproved in *Stevenson's Trs*, note 192 above, at 669 per Lord Ormisdale.

212 Cf the different operation of similar rules in some other jurisdictions: B Titcher, "The right of testamentary disposition in favor of a posthumous child" (1917) 2 *Southern Law Quarterly* 210.

operation of the *conditio* is not limited to children born after the death of the testator but is also extended to children born after the date of the relevant will even if they are born before the death of the testator.<sup>213</sup> It is instructive to note that the term "*posthumi*" was used in this wider sense in the Roman law sources.<sup>214</sup> Thirdly, as a direct consequence of the recognition by Scots law of the second difference, it has already been confirmed that the *conditio* applies as regard the succession not just of predeceasing fathers but also of predeceasing mothers.<sup>215</sup> In this regard the existence of the *conditio* has provided a pointer for the further development of the *pro iam nato* rule.

### E. MODERN TECHNOLOGY

Modern technology poses certain challenges for the application of the rules of succession relative to posthumous children.<sup>216</sup> A few situations may serve to illustrate the point.

All the reported cases and the comments of the Institutional writers deal with the situation of a child born after the death of the father. However, it is now possible that the predeceasing parent could be the mother—a possibility increased because of medical techniques for ventilating dead patients.<sup>217</sup> The policy originally identified by Craig—not to aggravate the calamity suffered by the child because of the death of a parent<sup>218</sup>—and the example of the *conditio*, both show that there is no good reason why the rule could not be applied to benefit such a child.

Until recently the state of scientific advances meant that one almost invariably had to contemplate the application of the maxim only to children conceived before the death of the relative, which was usually also the date of vesting of benefits in succession.<sup>219</sup> Children conceived later could not benefit. However, in an

213 Erskine, *Institute*, 3.8.46; McLaren, *Wills and Succession*, note 17 above, para 732. E.g. *Stuart-Gordon*, note 186 above.

214 This coincides with the wider meaning afforded to the term *posthumi* in the relevant Roman sources: J Inst 2.13.1 and 2; D 28.2.10 and D 28.3.3 as noticed in McLaren, *Wills and Succession*, note 17 above, vol 1, at 405, para 736, note 5.

215 E.g. *Stuart-Gordon*, note 186 above.

216 R Atherton, "*En ventre sa frigidaire*: posthumous children in the succession context" (1999) 19 LS 139; Anonymous, "Recent cases: inheritance rights and artificial conception" (1996) 70 ALJ 972; Anonymous, "Frozen embryos: rights of inheritance. In Re the Estate of the Late K" (1997) 5 Med L Rev 121; S Sutton, "The real sexual revolution: posthumously conceived children" (1999) 73 St John's L Rev 857.

217 Hiram, *Scots Law of Succession*, note 18 above, para 3.3. For an example see J Cush, "Tragedy birth medics' heroics," *Evening Chronicle* (Newcastle, UK), 4 Mar 2003, at 11. In some cases the doctors delay carrying out the tests to determine death of the mother until after delivering the child: I Smith and P Wright, "Comatose woman's baby girl has a fair chance of life," *The Times*, 21 Oct 1986.

218 Craig, *Ius Feudale*, 2.13.15. See note 11 above.

219 Planiol, *Droit Civil*, note 103 above, vol 3, part 1, no 1707; G Marty and P Raynaud, *Droit Civil, Les Personnes*, 3rd edn (1976) 14, para 13. See also § 1923 II BGB.

intriguing and puzzling passage Van der Keessel wrote: “*Nondum nati pro iam natis habentur, quoties de eorum commodo agitur: adeoque et ab intestato possunt succedere, licet eo tempore, quo mortuus est ille, de cuius successione quaeritur, concepti non fuerint, ut in casu § 7. I., de her. quae ab int. def.*”<sup>220</sup> The application of this passage is obscure and it is not supported by the passage cited from the *Institutes* of Justinian.<sup>221</sup> It may be explicable if Roman-Dutch law accepted that entitlement to the right in succession vested in a conceived child some time after the death of the relative, provided that the date of vesting occurred after conception. However, the comment from Van der Keessel deals with intestate succession, where this is not the case. In the absence of clarity on the application of the passage, we are left with a mystery. At common law in Scotland it is an unanswered question whether the *pro iam nato* rule would apply to children born after the death of the relative (usually one of their parents) if at the date of death the children were frozen embryos or even unconceived in the form of frozen sperm or ova. Given the uncertainty arising from the passage in the writing of Van der Keessel it would be unwise to seek to develop the law solely on that foundation and one should look elsewhere for assistance.

This possibility of a child unconceived as at the date of death being entitled to succeed was addressed in Tasmania in *Re Estate of the late K.*<sup>222</sup> It was held that a child, being the product of his or her father's semen and mother's ovum, implanted in the mother's womb subsequent to the death of the father, is, upon birth, entitled to a right of inheritance afforded by law. Whilst this approach has not found universal favour in other jurisdictions,<sup>223</sup> such a decision clearly has the potential to cause problems for the administration of estates. A legislative solution was sought

220 See Van der Keessel, *Theses Selectae*, 1.3.4, para 45. The translation provided in Van der Keessel, *Select Theses*, 2nd edn (1901), at 12, para 45 reads: “children yet unborn are considered as already born, whenever their advantage is in question, and they may therefore succeed *ab intestato*, though they may not have been conceived at the time when the person, whose succession is in question, died [as in the case in § 7. *Inst* iii,1]”.

221 It also seems at odds with the very next passage, J Inst 3.1.8: “*Plane, si et conceptus et natus fuerit post mortem avi, mortuo patre suo desertoque postea avi testamento, suus heres non existit, quia nullo jure cognationis patrem sui patris tetigit*”. In translation this means: “But a child both conceived and born after the death of his grandfather, could not become the *suius heres*, although his father should die and the testament of his grandfather be abandoned; because he was never allied to his grandfather by any tie of relationship”; Sandars, *Justinian's Institutes*, 4th edn (1869), at 356.

222 (1996) 131 FLR 374; (1996) 5 Tas R 365.

223 A contrary position was taken in the Californian case *Re Estates of Elsa and Mario Rios* (1985) (Los Angeles City P680682 and P680683) (Cal Supreme Ct) discussed in G P Smith, “Australia's frozen orphan embryos: a medical, legal and ethical dilemma” (1985) 24 *Journal of Family Law* 27. For contradictory American cases see *Gillett-Netting v Barnhart*, 371 F 3d 593; 2004 US App LEXIS 11320; *Woodward v Commissioner of Social Security*, 435 Mass 536, 760 NE 2d 257 (2002); *In re Estate of Kolacy*, 332 NJ Super 593, 753 A 2d 1257 (2000).

in the United Kingdom. Following earlier recommendations,<sup>224</sup> statute provided that where the sperm of a man or any embryo the creation of which was brought about with his sperm was used for artificial insemination or certain other similar treatments after his death the man is not to be treated as the father of the child for any purposes.<sup>225</sup> The statute presumes that a woman will carry the child in the womb and be alive as at the date of that placing. Such a woman is generally regarded as the mother even if she dies prior to the birth of the child.<sup>226</sup> There is no provision for a method of reproduction not involving a woman carrying the child in her womb and such a method does not in any event exist.

The effect of these provisions is to exclude a child produced by the relevant treatments from the benefit of rights on intestacy or legal rights or aliment where inheritance is solely dependent upon the establishment of the relevant legal relationship.<sup>227</sup> The statute also precludes a child produced by such treatments from inheriting where the father's will indicated his estate was to pass to his "child", "grandchild", "niece" etc, or was to be distributed among his "children", "grandchildren", "nephews" or any other class defined by relationship.<sup>228</sup> Clarity has been secured and has received the comment:<sup>229</sup>

English law has, consequently, achieved the certainty it sought and does not follow the approach in *Estate of the Late K*. In doing so, of course, it might well defeat the intention or frustrate the desire of a testator. The 1990 Act, however, creates a rule of law, not construction, and so is not subject to a contrary intention on the part of the testator.

As the statute is a UK statute this comment also applies to Scotland. The comment, however, is a little too broad. The 1990 Act would not preclude inheritance by the child where the biological father had provided, expressly or impliedly, that a bequest should be given to any child born as a product of his sperm. A will can make provision for a complete stranger and a testator can choose such a person to be his beneficiary whether or not the law deems the person to be his child.

Out of certainty springs uncertainty. The effect of the 1990 Act was to leave the child produced by the relevant treatments as a *filius nullius* with regard to the

224 Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd 9314: 1984), paras 10.9 and 10.15; *Human Fertilisation and Embryology: A Framework for Legislation* (Cm 259: 1987), para 60.

225 Human Fertilisation and Embryology Act 1990, ss 28(6)(b) and 29(2) and (3).

226 Human Fertilisation and Embryology Act 1990, s 27.

227 *Mrs U v Centre for Reproductive Medicine* [2002] Lloyd's Rep Med 259 per Lady Justice Hale at 262, para 13; Wilkinson and Norrie, *Parent and Child*, note 18 above, paras 2.23-2.24.

228 This is the result of 1990 Act, s 29(3). See Anonymous, "Frozen embryos: rights of inheritance. In *Re the Estate of the Late K*" (1997) 5 Med L Rev 121. Cf Wilkinson and Norrie, *Parent and Child*, note 18 above, paras 2.23-2.25, who foresee a difficulty with "grandchildren".

229 Anonymous, "Frozen embryos: rights of inheritance. In *Re the Estate of the Late K*", at 124.

father and the father's relations. This negation of relationship applied for all purposes. It was accepted in England that this statutory provision was contrary to the ECHR at least where the man left some indication that he consented to the use of the sperm after his death.<sup>230</sup> New legislation was enacted which allows the deceased man to be treated as the father of the child where, prior to his death, the father had consented to the use of his sperm or an embryo conceived with use of his sperm.<sup>231</sup> However, this treatment is for the very limited purpose of allowing the man to be registered as the father of a child conceived after his death. Consequently, even if registered as the child of the deceased, the child acquires no rights as regards that man or his estate in relation to succession, aliment or legal rights.<sup>232</sup>

Again this achieves a degree of certainty. The effect is that the child will not inherit unless the child is *in utero* at the date of death of the biological father, except where that father has died testate making a provision, express or implied, for a bequest to any child born as a product of his sperm.<sup>233</sup> In such an exceptional case it is irrelevant whether the biological father is registered as the father of the child or the child is a complete stranger. This is a compromise solution, grounded in the provision seen in the oldest forms of the original Roman rule, but updated slightly to deal with the complexity of modern science.

## F. CONCLUSION

The ancient rules inherited from the Civilian tradition have served Scots law well. They continue to do so despite modern human rights concerns. There are, however, a number of difficulties which need to be resolved in any future amendment of Scottish succession law, not least of which is how the rules should apply when an entitlement derives from statute. Other reform will be needed in some areas such

230 Concession by Alan Millburn, Secretary of State for Health in an action in the English High Court, on 28 Feb 2003 noted in J Rozenberg, "Diane Blood wins fight over husband's name," *The Daily Telegraph*, 1 Mar 2003. Of consent the court issued a declaration of incompatibility with ECHR, Article 8. This case involved Mrs Diane Blood who previously had been a party to other related litigation: *R v Human Fertilisation and Embryology Authority ex parte DB* [1997] 2 All ER 687, [1999] Fam 151. The consequence was an amending statute: C Brown, "Diane Blood wins her long battle," *The Daily Telegraph*, 18 Dec 2002.

231 Human Fertilisation and Embryology (Deceased Fathers) Act 2003, inserting a new s 28(5A)-(5I) into the 1990 Act. This is applied to Scotland by the 2003 Act, s 4(5) with some variation as to detail e.g. s 28(5E).

232 1990 Act, s 29(3B) as inserted by 2003 Act, s 1(2).

233 Other solutions are possible: e.g. California Probate Code, s 249.5 allowing succession (testate or intestate) where the deceased has confirmed in writing that he consents to the posthumous use of his genetic material for the conception of a child and the child is *in utero* within two years of death.

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as in relation to children born by artificial techniques of reproduction. Nonetheless, the law in this area largely works well and provides a good example of how a fundamentally sound idea has spread throughout the various types of legal systems whether they be Civilian, Common Law or mixed jurisdictions.