

MEMORANDUM NO 1

**PROBATES OR LETTERS OF ADMINISTRATION
AS LINKS IN TITLE TO HERITABLE
PROPERTY UNDER THE
SUCCESSION (SCOTLAND) ACT 1964**

Memorandum No. 1
SCOTTISH LAW COMMISSION

MEMORANDUM

on

Probate or Letters of Administration as Links
in Title to Heritable Property under
the Succession (Scotland) Act 1964

[This Memorandum is circulated for comment and criticism and does not represent the concluded views of the Scottish Law Commission.]

1. We were asked by the Lord Advocate to advise on a Memorandum originating from the Law Society of Scotland in the form of a Note by the Convener of the Society's Succession Act Committee on the above subject. A copy of the Note and references to an Opinion and various articles in the Journal of the Law Society of Scotland are contained in Appendix I.
2. The question at issue is whether probate or letters of administration or other grant of representation issued by a court in England or Northern Ireland or in any part of Her Majesty's dominions, colonies, protected states or mandated territories, duly certified or sealed in Scotland, is a valid midcouple or link in title to a deceased person's heritable property in Scotland. The question arises from the terms of section 15(1) of the Succession (Scotland) Act 1964 and may be stated shortly as follows:-
 - (i) Section 15(1) provides that section 5(2) of the Conveyancing (Scotland) Act 1924 shall have effect as if any reference therein to a heritable security included a reference to any interest in heritable property which has vested in the executor by virtue of a confirmation.
 - (ii) Section 5(2) of the 1924 Act, as thus amended, provides with regard to heritable property that:-
 - (a) When the holder of any interest in heritable property has died any confirmation in favour of his executor shall be a valid title to it and a warrant for completing title to it.

(b) "Confirmation" shall include a probate or letters of administration to moveable or personal estate of the deceased issued by any court in England or Northern Ireland or any part of Her Majesty's dominions, when duly certified or sealed in Scotland, and the confirmation so implied shall operate in favour of the person to whom it is granted, and "executor" shall include such person, and such implied confirmation shall be deemed to include all interests in heritable property which belonged to the deceased.

(iii) The proviso to section 15(1) of the 1964 Act states that confirmation shall not be deemed for the purposes of section 5(2) to include an interest in heritable property which has vested in the executor unless a description of the property in a form specified by Act of Sederunt is included or referred to in the confirmation.

(iv) The proviso to section 15(1) of the 1964 Act therefore denies the deemed inclusion of the property in section 5(2)(b) of the 1924 Act unless a description of the property in the required form is included in the confirmation or in the probate or letters of administration which are included in the term "confirmation". Since probate and letters of administration do not normally include such a description, they are not valid as links in title to the property.

3. One view is that such a conclusion is not the proper construction of the sub-section. The principal arguments in support of this view are:-

(i) In previous statutes relating to confirmation of executors, e.g. the Confirmation of Executors (Scotland) Act 1858, the Executors (Scotland) Act 1900 and the Confirmation of Executors (War Service)(Scotland) Act 1940, the term "confirmation" has normally been used as signifying a Scottish

confirmation. The sections of these statutes in which the term "confirmation" is used with that meaning are listed in Appendix II. In sections 14 and 15 of the Succession (Scotland) Act 1964 the term is similarly used with that meaning. The extension of the application of the term to probates and letters of administration in sub-section (1) of section 14 is derived from the provisions of section 14 of the 1858 Act which enacts that probate or letters of administration when certified in Scotland shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted: this extends the effect of confirmation to probate or letters of administration which have been duly certified, but does not enlarge the meaning of the term "confirmation", and it is plain that in sub-section (2) of section 14 confirmation is used in the sense of a Scottish confirmation only. Similarly, in the leading provision of sub-section (1) of section 15 of the 1964 Act the extension of the application of confirmation to probate or letters of administration is effected by referring to and amending section 5(2) of the 1924 Act, which renders probate or letters of administration, duly certified or sealed in Scotland, valid links in title to Scottish heritable property but refers to such probate or letters of administration as "implied confirmation". Again, the effect of confirmation is extended, but not the meaning of the term "confirmation". Accordingly, there is nothing inconsistent in construing the term "confirmation" in the proviso to sub-section (1) of section 15 as applicable to a Scottish confirmation only.

(ii) If, in the proviso to section 15(1) of the 1964 Act, "confirmation" is construed as applicable to probate or letters of administration, then, since such grants do not usually contain a description of the Scottish heritable property of the deceased, the effect is to negative the application of the leading part of section 15(1) in the case of such grants, a

result which cannot have been intended.

(iii) In the case of testate succession the use of probate or letters of administration, which did not contain a description of Scottish heritable property, as effective links in title to it, is authorised specifically by section 51 of the Conveyancing (Scotland) Act 1874, section 5 of the Conveyancing Amendment (Scotland) Act 1887 and section 5(1) of the Conveyancing (Scotland) Act 1924. These sections have not been repealed or amended by the 1964 Act. If, in the proviso to section 15(1) of the 1964 Act "confirmation" is construed as applicable to probate or letters of administration, then, in cases of testate succession, its provisions are inconsistent with the earlier conveyancing statutes.

(iv) A statute should be construed so as to avoid an absurd result. If, in the proviso to section 15(1) of the 1964 Act, "confirmation" is construed as applicable also to probate and letters of administration, the result is contrary to the evident intention of Parliament and inconsistent with existing conveyancing statutes. The alternative construction that it is applicable only to a Scottish confirmation is intelligible for the reasons given in sub-paragraph (i) above and is consistent with the earlier statutes relating to confirmation of executors and the existing conveyancing statutes.

4. The alternative view is based on the well established principle of statutory interpretation that a word is intended to bear the same meaning in different sections of a statute and a fortiori in the same section. If, in the proviso to section 15(i) of the 1964 Act, "confirmation" is construed as applicable only to a Scottish confirmation, the word must bear the same meaning where it occurs at the end of the leading provision of the sub-section and so, however startling it may appear,

section 5(2) of the 1924 Act does not extend to interests in Scottish heritable property carried by a probate or letters of administration.

5. It is the function of the courts to determine such questions, but we think the matter is sufficiently doubtful and of such practical importance that it should be clarified by amending legislation. We understand that there are other provisions of the 1964 Act which may require amendment and a statute for that purpose may be required. We suggest that the opportunity should be taken of clarifying the question of whether the terms "confirmation" and "executor", as used in various sections contained in Part III of the 1964 Act, should extend to or be equivalent to probate or letters of administration duly certified or sealed in Scotland and the person or persons to whom such grants have been made, and that certain other minor amendments should be incorporated.

6. We advise that the amending legislation should make clear that in Part III of the 1964 Act "confirmation" means a Scottish confirmation and "executor" means the person thereby appointed, but

(a) the provisions of section 14(1) of the Act shall extend to probate or letters of administration or other grant of representation to moveable or personal estate of a deceased person issued by any court in England or Northern Ireland or in any part of Her Majesty's dominions, colonies, protected states and mandated territories which have been or shall have been produced in the Commissary Court of the County of Edinburgh and certified by the Commissary Clerk of that Court under or in terms of the Confirmation of Executors (Scotland)

Act 1858 or sealed with the seal of office of that court under and in terms of the Colonial Probates Act 1892 or of the Colonial Probates (Protected States and Mandated Territories) Act 1927 or so certified or sealed under and in terms of any future statutory provisions to that effect, and any reference to "executor" in that sub-section shall be deemed to include the persons to whom such probates, letters of administration or grants of representation have been or shall be issued and the survivors and the survivor of them,

(b) the provisions of the first paragraph of section 15(1) (but not the proviso thereto) shall be amended by adding the words "or implied confirmation" at the end of the paragraph, and section 5(2) of the 1924 Act shall have effect as stated in section 15(1) with the extension that "implied confirmation" and "executor" shall include the grants and the persons to whom they were issued specified in sub-paragraph (a) above, and

(c) in sections 16, 17 and 18 the terms "confirmation" and "executor" shall extend to the grants and the persons to whom they were issued specified in sub-paragraph (a) above.

APPENDIX I
SUCCESSION ACT COMMITTEE

CONVENER'S NOTE

on

Probate or Letters of Administration as
Links in Title to Heritage under the 1964 Act.

The question at issue in this connection is whether an English grant of Probate or Letters of Administration duly resealed in Scotland, can function as a midcouple or link in title in relation to the deceased person's Scottish heritage in the same way as the Scottish grant of Confirmation does.

In their joint opinion (published in the Journal for 1965 at p. 153) the four Professors of Conveyancing said "Yes", although indeed Professor McDonald was already committed to this view (see his Article in March 1965 issue of Journal p.74).

In an article published in the Journal for December 1965 (p.325) Dr. Keston gave reasons for disagreeing with the Professors and took the opposite view, holding that the proviso in subsec. (1) of sec. 15 of the 1964 Act, making it necessary for a confirmation to include a description of the heritable property in accordance with the Act of Sederunt before it could be used in completing the heritable title, applied also to Probate and Letters of Administration.

And now Professor McDonald has replied to Dr. Keston's argument in an article published in the Journal for March 1966 (p.68) and reasserts his opinion that Probates and Letters of Administration (duly resealed in Scotland) do not require to contain a description of Scottish heritage, and are available for use in the heritable title without any such description.

It is not proposed to examine the arguments on either side nor to adopt one view as against the other. The reasoning of the respective protagonists can be followed by

studying their articles above referred to. It would seem unlikely that the special provision in section 15 for the inclusion of a proper description of heritage in a confirmation would not have been intended to apply also to something which "confirmation" is said (1924 Act s. 5(2)) to include. But as against this, Probate or Letters of Administration, without any details of the items of estate, have since 1924 been "deemed to include all heritable securities which belonged to the deceased." (s. 5(2)(b) of 1924 Act). And now s. 15(1) of the 1964 Act provides that this 1924 Act subsection (s. 5(2)) shall have effect as if heritable security included heritable property.

And then again on the other side - it is this same subsection (s. 15(1) of the 1964 Act) which runs on into the proviso that a confirmation, to function titlewise, must include a proper description of the heritage. At this point the argument develops into an exercise in semantics, as to whether "confirmation" is to include "implied confirmation," and it is not proposed to follow it further.

Sufficient has been said to show that, whatever may have been the intention in this regard in drafting the Bill, what has been included in the Act is far from clear or satisfactory.

Two matters must be considered.

1. What should be done in the present circumstances?
2. What should be done for the future?

Dr. Keston pointed out in his article that English executors could still apply direct to the Scottish Commissary department for a Scottish grant of confirmation, and in this way obtain a confirmation which would have a proper description of the heritage, thus avoiding the danger or doubt which seems to be inherent in using a certified (i.e. resealed) probate in a heritable title.

It is understood that in the present confused state of expert opinion on this matter, some solicitors have been adopting Dr. Meston's suggestion and taking out separate grants of Scottish confirmation where Scots heritage is involved.

Provided the English grant has not been already resealed or certified in Scotland the procedure is quite straight forward. If the English grant is of probate, then a Scottish Inland Revenue Inventory must be sworn to showing all the Scottish Estate, heritable and moveable, in detail in the usual way, and the English estate merely as a lump sum. Confirmation must be craved to all the estate in Scotland. The grant of Probate is described in the oath to the inventory and the grant is docquetted and signed as relative thereto. Confirmation to the Scottish estate will then be issued on payment of the confirmation fee, which will be calculated on the Scottish estate alone.

Where the English grant has been a dative one (Letters of Administration) it might be necessary in the first instance to present a petition to have the executor-dative decerned before deponing to the inventory, and, of course, caution might require to be found for the Scottish estate.

In some cases the English grant may already have been resealed before the question of title to heritage had emerged, and this presents a problem. Under the 1858 Act a resealed grant "shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted." This induces some doubt as to whether, if the Scots heritage had been included in the resealed English grant, it would be competent, in following through the procedure for a separate Scottish grant, to issue another confirmation to the same estate.

In such circumstances it is suggested that the separate Scottish confirmation (to include the heritage by description) should be a grant of confirmation ad omissa. This type of confirmation, while primarily to provide for the situation where some estate has been omitted or not sufficiently described in the confirmation to which a title is required, is used also to cover other contingencies, some of which are mentioned in Currie, 6th edn., at pp. 195 and 196. It would be necessary to aver that the heritage had been omitted from the English grant in order to give the appropriate basis for the application for an ad omissa confirmation. While this expedient is thought to be available in order to get a confirmation containing a heritable description where the English grant has already been resealed, no such court application is known to have been lodged so far.

There is always, of course, the alternative in testate cases of using the Will should this contain a general conveyance to trustees or executors, and thus bypassing the Confirmation so far as heritable title is concerned. Sec. 51 of the 1874 Act provides in this regard that production of probate of the Will shall be equivalent to production of the will itself or of an extract thereof from the Books of Council and Session.

With regard to the future, it is felt that the Society should without delay press for amending legislation to have it declared that resealed probates and letters of administration are sufficient for heritable title purposes without any description of the heritage. In earlier notes the suggestion was made that it might be fit and proper to have it provided that a confirmation should operate qua heritage in the same way as a decree of general service did prior to the 1964 Act, and perhaps this could be done at the same time. One section in a miscellaneous conveyancing or

succession statute would do, simply providing that a confirmation nominate or dative, a resealed probate or letters of administration would have the same effect as regards giving the deceased's executors the right to complete or pass on a title to his heritage as formerly a general service did in relation to his heir at law. Further in view of the confusion in regard to probates etc. this provision might be given retroactive effect to obviate any possible objections to titles where in the meanwhile a course had been followed relative to probates or letters of administration which might be thought to be of doubtful validity.

16/5/1966

THE LAW SOCIETY OF SCOTLAND

COMMITTEE ON THE SUCCESSION ACT 1964

Draft of Proposed Statutory Provision sought to be included in the Law Reform (Miscellaneous Provisions)(Scotland) Bill meantime before Parliament.

Notwithstanding anything in any Act passed before this Act, for the purposes of sections three and four of the Conveyancing (Scotland) Act 1924 (14 and 15 Geo. V. c.27) an executor administering the estate of a deceased person which includes any land or other heritable property or any interest in any land or other heritable property or any heritable security or part of any heritable security or any lease or any interest in or security over a lease, shall be deemed as from and after 10th September, 1964, to be and to have been a person having a right within the meaning of the said sections to such land or other heritable property or interest therein or such heritable security or part thereof or such lease or interest therein or security thereon respectively, and shall with respect to any lease or security over a lease comprised in the said estate be entitled to the benefit of all enabling powers and rights under section twenty-four of said Act of 1924; and any confirmation of such executor granted in Scotland on or after 10th September, 1964, and any probate, letters of administration or other grant of representation issued outwith Scotland and certified in Scotland under section fourteen of the Confirmation of Executors (Scotland) Act 1858 (21 & 22 Vict. c.56) or sealed in Scotland under section two of the Colonial Probates Act 1892 (55 & 56 Vict. c.6) or so certified or sealed under and in terms of any future statutory provisions to that effect, on or after 10th September, 1964, shall, whether it contains an entry

relative to or a description of such land or other heritable property or interest therein or such heritable security or part thereof or such lease or interest therein or security thereon respectively, or not, be and be deemed to have been a valid midcouple or link of title.

APPENDIX II

1. Confirmation of Executors (Scotland) Act 1858
Sections 5, 7, 8, 9, 10, 12, 13 and 14.
2. Executors (Scotland) Act 1900
Sections 3, 4, 5, 6, 7 and 9.
3. Confirmation of Executors (War Service) (Scotland)
Act 1940
Section 1.