



# Confirmation of Executors (Scotland) Act 1858

1858 CHAPTER 56 21 and 22 Vict

**S**

An Act to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration. [23rd July 1858]

## Modifications etc. (not altering text)

- C1 Short title “The Confirmation of Executors (Scotland) Act 1858” given by [Short Titles Act 1896 \(c. 14\)](#) but this Act may also be cited as Confirmation and Probate Act 1858
- C2 Act amended by [Confirmation and Probate Amendment Act 1859 \(22 Vict. c. 30\)](#)
- C3 Functions of Keeper of the Record of Edictal Citations now exercisable by such clerks and officers of the Court of Session as may be appointed from time to time: [Reorganisation of Offices \(Scotland\) Act 1928 \(c. 34\), s. 8](#), S.R. & O. 1929/588 (Rev. XIX, p. 785: 1929, p. 1305) and [Public Records \(Scotland\) Act 1937 \(c. 43\), s. 13](#)
- C4 Functions of Commissary Courts and Commissary Clerks in Scotland (except Commissary Clerk of Edinburgh) now exercisable by Sheriffs and Sheriff Clerks: [Sheriff Courts \(Scotland\) Act 1876 \(c. 70\), ss. 35-39, 54](#), [Sheriff Courts and Legal Officers \(Scotland\) Act 1927 \(c. 35\), ss. 10, 11\(1\)](#) and S.R. & O. 1933/1089 (1933, p. 520)
- C5 Preamble omitted under authority of [Statute Law Revision Act 1892 \(c. 19\)](#)
- C6 Words of enactment and certain other words repealed by [Statute Law Revision Act 1892 \(c. 19\)](#)
- C7 Acts cited or referred to by their short titles under authority of [Statute Law Revision Act 1893 \(c. 14\), s. 3](#)
- C8 A dagger appended to a marginal note means that it is no longer accurate

**Changes to legislation:** Confirmation of Executors (Scotland) Act 1858 is up to date with all changes known to be in force on or before 30 December 2023. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

#### Textual Amendments

- F1 S. 1 repealed by Statute Law Revision Act 1892 (c. 19)

## 2 Petition to Commissary to be substituted. †Form of petition as in Schedule A. U.K.

Every person desirous of being decerned executor of a deceased person as disponee, next of kin, creditor, or in any other character whatsoever now competent, or of having some other person, possessed of such character, decerned executor to a deceased person, shall . . . . .<sup>F2</sup> present a petition to the commissary for the appointment of an executor; which petition . . . . .<sup>F3</sup> shall be subscribed by the petitioner or by his agent [<sup>F4</sup> or by an executry practitioner [<sup>F5</sup> or a recognised financial institution providing executry services] within the meaning of section 23 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990].

#### Textual Amendments

- F2 Words repealed by Statute Law Revision Act 1892 (c. 19)  
 F3 Word repealed by S. I. 1964/1143  
 F4 Words added (1.3.1997 except in relation to a recognised financial institution, as to which *prosp.*) by Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c. 40, SIF 76:2), s. 74(1), Sch. 8 para. 22(1); S.I. 1996/2894, art. 3, Sch. (as amended by S.I. 1996/2966, art. 2)  
 F5 Words in s. 2 repealed (S.) (15.8.2003) by Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), s. 21(2), Sch. 4 para. 1; S.S.I. 2003/384, art. 2(d)

#### Modifications etc. (not altering text)

- C9 A dagger appended to a marginal note means that it is no longer accurate

## 3 To whom petition to be presented. U.K.

Such petition shall be presented to the commissary of the county wherein the deceased died domiciled, and, in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having . . . . .<sup>F6</sup> property in Scotland, to the commissary of Edinburgh.

#### Textual Amendments

- F6 Word repealed by S. I. 1964/1143

## 4 Mode of intimating petition. U.K.

Every such petition . . . . .<sup>F7</sup> shall be intimated by the commissary clerk affixing on the door of the Commissary Court House, or in some conspicuous place of the court and of the office of the commissary clerk, in such manner as the commissary may direct, a full copy of the petition, and by the keeper of the record of edictal citations at Edinburgh inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which

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particulars the keeper of the record of edictal citations shall cause to be printed and published weekly, . . . .<sup>F8</sup> in the form of schedule (B.) hereunto annexed; Provided always, that, to enable the keeper of the record of edictal citations to make such publication, the commissary clerk shall transmit to him the said particulars, and to enable the commissary clerk to grant the certificate after mentioned, the keeper of the record of edictal citations shall transmit to the commissary clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner and on payment of such fees as the Court of Session by act of sederunt may direct.

**Textual Amendments**

- F7** Words repealed by [Statute Law Revision Act 1892 \(c. 19\)](#)
- F8** Words repealed with saving by [Succession \(Scotland\) Act 1964 \(c. 41\)](#), ss. 34(2), 37, [Sch. 3](#)

**5 Certificate of intimation of petition. Additional intimation of petition in certain cases. [U.K.](#)**

The commissary clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify on the petition that the same has been intimated and published, . . . .<sup>F9</sup>. Provided always, that where a second petition for confirmation is presented in reference to the same . . . .<sup>F10</sup> estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition.

**Textual Amendments**

- F9** Words repealed by [Statute Law Revision Act 1892 \(c. 19\)](#)
- F10** Word repealed by [S. I. 1964/1143](#)

**6 Procedure on petition. [U.K.](#)**

On the expiration of nine days after the commissary clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in court, and an executor decerned, or other procedure may take place, according to the forms now in use in case of edicts of executry, and with the like force and effect; and decree dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the law as to executors finding caution; and that bonds of caution for executors may be partly printed and partly written.

**7 Not to affect present procedure. [U.K.](#)**

Provided always, that nothing herein-before contained shall alter or affect the course of procedure now in use before the commissaries in confirmations of executors nominate.

**8 Where inventories, &c. may be recorded. Confirmations may be granted. [U.K.](#)**

Inventories of . . . .<sup>F11</sup> estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary court to which it is competent to apply in virtue of the provisions of this Act for the appointment of an executor dative to the deceased.

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**Textual Amendments**

**F11** Word repealed by [S. I. 1964/1143](#)

**9 Inventory may include personal estate in any part of United Kingdom. U.K.**

It shall be competent to include in the inventory of the . . . .<sup>F12</sup> estate and effects of any person who shall have died domiciled in Scotland any . . . .<sup>F12</sup> estate or effects of the deceased situated in England, or in Ireland, or both . . . .<sup>F13</sup> Provided . . . .<sup>F13</sup> that the value of such . . . .<sup>F12</sup> estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, [<sup>F14</sup>and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.]

**Textual Amendments**

**F12** Word repealed by [Administration of Estates Act 1971 \(c. 25\), s. 6\(1\), Sch. 2 Pt. I](#)

**F13** Words repealed by [Statute Law Revision Act 1892 \(c. 19\)](#)

**F14** Words repealed in relation to deaths occurring after 13. 4. 1975 and, so far as regards certain duties in relation to any death, by [Finance Act 1975 \(c. 7, SIF 99:3\), ss. 52\(2\), 59, Sch. 13 Pt. I](#), note (with a saving in s. 52(3) in relation to repayment or allowance in respect of certain sums paid before 13. 3. 1975 on account)

**10 Form and effect of confirmations. U.K.**

Confirmations shall be in the form, or as nearly as may be in the form, of schedules (D.) and (E.) hereunto annexed; and such confirmations shall have the same force and effect with the like writs framed in terms of the Acts of Sederunt passed on the twentieth December, one thousand eight hundred and twenty-three and the twenty-fifth February, one thousand eight hundred and twenty-four, or at present in use.

<sup>F15</sup>**11** . . . . . **U.K.**

**Textual Amendments**

**F15** [S. 11](#) repealed (1.3.1997) by [Law Reform \(Miscellaneous Provisions\)\(Scotland\) Act 1990 \(c. 40, SIF 76:2\), s. 74\(2\), Sch. 9; S.I. 1996/2894, art. 3, Sch.](#) (as amended by [S.I. 1996/2966, art. 2](#))

**12** . . . . .<sup>F16</sup> **U.K.**

**Textual Amendments**

**F16** [S. 12](#) repealed by [Supreme Court of Judicature \(Consolidation\) Act 1925 \(c. 49\), s. 226, Sch. 6](#)

**13, 14.** . . . . .<sup>F17</sup> **U.K.**

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#### Textual Amendments

F17 Ss. 13, 14 repealed by Administration of Estates Act 1971 (c. 25), Sch. 2 Pt. I

### [<sup>F18</sup>15 For securing the stamp duties, probates, &c. to be deemed granted for all the property in the United Kingdom. U.K.]

In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the <sup>M1</sup> Stamp Act, 1815, and of all other Acts of Parliament granting or relating to stamp duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the commissary shall in manner aforesaid find that the deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper Commissary Court in Scotland before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland.]

#### Textual Amendments

F18 Ss. 15, 16 repealed in relation to deaths occurring after 13. 4. 1975 and, so far as regards certain duties in relation to any death, by Finance Act 1975 (c. 7, SIF 99:3), ss. 52(2), 59, Sch. 13 Pt. I, note (with a saving in s. 52(3) in relation to repayment or allowance in respect of certain sums paid before 13. 3. 1975 on account)

#### Marginal Citations

M1 1815 c.184

### 16 Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act. U.K.]

For the purpose aforesaid, and also for granting relief where too high a stamp duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the <sup>M2</sup>Stamp Act, 1815, relating to probates and letters of administration granted in England, and the like provisions in the <sup>M3</sup>Probate Duty (Ireland) Act 1816 relating to probates and letters of administration granted in Ireland, and the provisions contained

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in the <sup>M4</sup>Probate and Legacy Duties Act 1808 relating to inventories in Scotland, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

#### Marginal Citations

- M2** [1815 c. 184.](#)  
**M3** [1816 c. 56.](#)  
**M4** [1808 c. 149.](#)

### 17 Affidavit as to domicile to be made on applying for probate or administration. **U.K.**

[<sup>F19</sup>Provided, that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorize the same to be so stated in or upon the probate or letters of administration: Provided also, that any such statement, and]the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this Act only.

#### Textual Amendments

- F19** Words repealed in relation to deaths occurring after 13. 4. 1975 and, so far as regards certain duties in relation to any death, by [Finance Act 1975 \(c. 7, SIF 99:3\)](#), ss. 52(2), 59, [Sch. 13 Pt. I](#), note (with a saving in s. 52(3) in relation to repayment or allowance in respect of certain sums paid before 13. 3. 1975 on account)

### 18 Acts of sederunt to be passed for following out the purposes of this Act. **U.K.**

It shall be competent to the Court of Session, and they are hereby authorized and required, from time to time, to pass such acts of sederunt as shall be necessary and proper for regulating in all respects the proceedings under this Act before the commissary of Edinburgh and other commissaries in Scotland, and following out the purposes of this Act, and also the fees to be paid to agents before the said courts, and to the commissary clerks and other officers of court, and the expense of publication of petitions.

#### Modifications etc. (not altering text)

- C10** [S. 18](#) extended by [Succession \(Scotland\) Act 1964 \(c. 41\)](#), ss. 14(2), 22(1)

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**19 Former Acts of Sederunt repealed if inconsistent with this Act. U.K.**

... <sup>F20</sup> this Act ... <sup>F20</sup> may be cited as the Confirmation and Probate Act, 1858.

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**Textual Amendments**

**F20** Words repealed by [Statute Law Revision Act 1875 \(c. 66\)](#)

**20 Interpretation of terms. U.K.**

... <sup>F21</sup> the term “commissary clerk” shall include commissary clerk depute.

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**Textual Amendments**

**F21** Words repealed by [Statute Law Revision Act 1892 \(c. 19\)](#)

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## SCHEDULES TO WHICH THE FOREGOING ACT REFERS

### F22F22 SCHEDULE (A.) U.K.

#### Textual Amendments

F22 Sch. (A.) repealed by S.I. 1964/1163

F22

### SCHEDULE (B.) U.K.

#### *Roll of Petitions for the Appointment of Executors in Commissary Courts in Scotland*

County.	Name and designation of petitioner.	Title of petitioner.	Name and designation of defunct.	Place and date of death.
Edinburgh.	A.B., writer in Edinburgh.	Next of kin.	C.D., merchant in Edinburgh.	No. George St., Edinburgh, 1st January 1857.

### F23F23 SCHEDULE (C.) U.K.

#### Textual Amendments

F23 Sch. (C.) repealed by Sheriff Courts (Scotland) Act 1876 (c. 70), s. 44

F23

### SCHEDULE (D.) U.K.

#### Modifications etc. (not altering text)

C11 Sch. (D.) amended by Executors (Scotland) Act 1900 (c. 55), s. 5

C12 Forms prescribed by S.I. 1967/789 are to be used by Sheriff Clerks and may be used with modifications by Commissary Clerk of Edinburgh in lieu of form prescribed by Sch. (D.)



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*Form of a Testament Dative or Confirmation of the  
Executor of a Person who has died without naming one.*

I, *A.B.*, commissary of the county of [*specify county*], considering that by my decree, dated [*specify date*], I decerned *C.D.* executor dative qua next of kin [*or other character, as the case may be,*] of the late *E.F.*, who died at [*specify place*], on [*specify date*], and seeing that the said *C.D.* has since given up on [<sup>F24</sup>declaration] an inventory of the personal estate and effects of the said *E.F.* at the time of his death situated in Scotland, [*orsituated in Scotland and England, orin Scotland and Ireland, orin Scotland, England, and Ireland, as the case may be,*] amounting in value to pounds, which inventory has been recorded in my court books, of date [*specify date*], and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in Her Majesty's name and authority, make, constitute, ordain, and confirm the said *C.D.* executor dative qua [*specify character*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor dative qua [*specify character*] is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

**Textual Amendments**

**F24** Word substituted (1.3.1997) by Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c. 40, SIF 76:2), s. 74(1), Sch. 8 para. 22(2); S.I. 1996/2894, art. 3, Sch. (as amended by S.I. 1996/2966, art. 2)

Given under the seal of office of the commissariot [*specify county*],  
and signed by the clerk of court at [*specify place*], the [*specify date*].

*To be signed by the commissary clerk or his depute, and sealed with the  
seal of office.*

SCHEDULE (E.) U.K.

**Modifications etc. (not altering text)**

**C13** Sch. (E.) amended by Executors (Scotland) Act 1900 (c. 55), s. 5

**C14** Forms prescribed by S.I. 1967/789 are to be used by Sheriff Clerks and may be used with modifications by Commissary Clerk of Edinburgh in lieu of form prescribed by Sch. (E.)

*Form of a Testament Testamentar or Confirmation of an Executor Nominate.*

I, *A.B.*, commissary of the county of [*specify county*], considering that the late *C.D.* died at [*specify place*], upon [*specify date*], and that by his last will [*or other writing containing the nomination of executor*], dated [*specify date*], and recorded in my court books upon [*specify date*], the said *C.D.* nominated and appointed *E.F.* to be his executor, and that the said *E.F.*, has given up on [<sup>F25</sup>declaration] an inventory of the personal estate and effects of the said *C.D.* at the time of his death situated in Scotland, [*orsituated in Scotland and England, orsituated in Scotland and Ireland, orsituated in Scotland, England and Ireland, as the case may be,*] amounting in value to pounds, which inventory has likewise been recorded in my court

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books of date [*specify date*]: Therefore I, in Her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foresaid last will [*or other writing containing the nomination of executor*]; and I give and commit to the said *E.F.* full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor nominate is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

#### Textual Amendments

**F25** Word substituted (1.3.1997) by Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c. 40, SIF 76:2), s. 74(1), Sch. 8 para. 22(2); S.I. 1996/2894, art.3, Sch. (as amended by S.I. 1996/2966, art. 2)

Given under the seal of office of the commissariat of [*specify county*],

and signed by the clerk of court at [*specify place*], the [*specify date*].

*To be signed by the commissary clerk or his depute, and sealed with the seal of office.*

<sup>F26</sup>F26 SCHEDULE (F.) U.K.

#### Textual Amendments

**F26** Sch. (F.) repealed by Administration of Estates Act 1971 (c. 25), Sch. 2 Pt. I

F26

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**Changes and effects yet to be applied to :**

- s. 2 words inserted by [2010 asp 16 s. 118\(1\)](#)