

The registration of wills

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Cases cited

B's Executor v Keeper of the Registers and Records of Scotland 1935 S.C. 745; [1935] 6 WLUK 34 (IH (2 Div))

Campbell's Trustees, Petitioners 1934 S.C. 8; [1933] 10 WLUK 37 (IH (1 Div))

Leigh-Bennett, Petitioner (1893) 20 R. 787; [1893] 6 WLUK 50 (IH (1 Div))

Legislation cited

Writs Execution (Scotland) Act 1877 (c.40) s.5

Writs Registration (Scotland) Act 1868 (c.34) s.1

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Introduction

This article comments on procuring a will which has been registered in the Books of Council and Session.

Registration and extract

Registering a will in the Books of Council and Session is common. The purpose of doing so is to preserve the will. Section 5 of the Writs Execution (Scotland) Act 1877 ("the 1877 Act") provides:

"Extracts of all writs, deeds, or other documents of what nature soever, which may be registered in the Books of Council and Session, shall be equivalent to the registered writs, deeds, or other documents themselves".

Accordingly, registration under the aforementioned section mitigates the risk of a principal/original will being lost between the grantor's death (at which time it takes effect: *Clark's Executor v Clark*, 1943 S.C. 216; 1943 S.L.T. 266) and an application for confirmation. Were an unregistered will to be lost, it would normally be necessary to consider an action to prove the tenor.

Procuring the original will

However, once a will has been registered, there is only a restrictive basis for procuring the original deed. Section 1 of the Writs Registration (Scotland) Act 1868 provides:

"No writ that shall have been given in to be registered in the books of council and session shall be taken out by the party or any one employed by him, nor shall any such writ be given up by the keepers of the register for any purpose at any time, either before or after the same has been booked, excepting only when authority of the lords of council and session has been expressly given thereto, and then only under such conditions and limitations as may be expressed in such authority, anything in the said recited Act or in any other Act or any law or custom to the contrary notwithstanding."

Yet there may be circumstances where it would be helpful (or seemingly necessary) to procure the original will. This article considers two such scenarios where authority might be sought.

The first scenario: a challenge to the will itself

An obvious example of this scenario is where it is alleged that the grantor's signature has been forged/simulated. In such a case the parties may wish to submit the original will for forensic examination (as opposed to procuring a graphology report in respect of a copy of the will).

The following passage from the opinion of Lord Justice Clerk (Aitchison) in the case of *B's Executor v Keeper of the Register and Records Scotland*, 1935 S.C. 745; 1935 S.L.T. 476 supports the possibility of the original deed being procured. Explaining the purpose of s.5 of the 1877 Act, the Lord Justice Clerk commented (emphasis added in bold):

"What this section provides is that extracts shall be equivalent to the registered writs – that is, shall be of the same value in effect as the writs themselves. That is a provision as to the value and effect of an extract from the register. Extracts are to be the equivalent of the writs themselves **except where the writ offered to be in proven – that is where challenge is made of the writ in a Court of Law, in which case the writ itself, and not merely the extract, must be produced.**"

The preceding year, in *Campbell's Trustees, Petitioners*, 1934 S.C. 8; 1933 S.L.T. 612 the Inner House (First Division) granted authorisation to allow the Keeper of the Records (or his nominee) to attend a trial in the English Probate Court for the purpose of exhibiting an original trust disposition. In that case there was a dispute about probate on account of a competing testamentary document. The court's order was to allow the Keeper (or his nominee) to exhibit the document, but not to part custody of it.

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In passing it is of note that both of *B's Executor* and *Campbell's Trustees* proceeded as petitions to the court's nobile officium.

The second scenario: international private law

In this scenario, a difficulty could arise where an individual tests in Scotland and then assumes a foreign domicile. Against the risk of losing the will (whether in transit or otherwise) intuitively the sensible act would appear to be to register the will in the Books of Council and Session.

However, Scots law recognises that it is the *lex fori* which determines questions in relation to the administration of an executry estate: *Scottish National Orchestra Society Ltd v Thomson's Executor*, 1969 S.L.T. 325. Thus, registration of a will in the Books of Council and Session might have unintended consequences if foreign probate is required (whether or not in addition to confirmation) and the foreign jurisdiction seeks the original will.

There are older cases where Scottish courts authorised release of original wills, for the purpose of exhibition before *English* courts. Such authorisations were subject to conditions. In *Inglis' Executrix, Petitioner*, 1882 9 R. 761 the court granted authorisation to release a will, where it was averred to be "absolutely essential" to ongoing litigation, subject to a bond of caution and an order that the will be returned within one month. In the slightly later case of *Leigh-Bennett, Petitioner* (1893) 20 R. 787; (1893) 1 S.L.T. 72, as in *Campbell's Trustees, Petitioners*, the court granted warrant to a nominated clerk to exhibit the original will. In *Leigh-Bennett* the order was granted in response to a subpoena of the English court. Lord President (Robertson) commented:

"while I should be very slow indeed to grant any warrant which would give countenance to the idea that we shall in all circumstances place a deed which has been registered in the Books of Council and Session at the disposal of another Court, yet I think there is enough here to shew that we shall further the cause of justice, and at the same time comply with the statutory limitations of our authority, if we authorise the Keeper of the Register to take with him this writ, and exhibit it in the Probate Division of the High Court of Justice, for inspection in the suit mentioned in the petition, and go on to direct him not to part with the same, except under the order of the Probate Division of the High Court for the purposes of that suit... I close by repeating that if this is done, it will by no means relax our control over the writs in the register, but the Court will be vigilant on future occasions, as it is on this, to see that nothing is done to impair the maintenance of the register in Edinburgh in its integrity".

Commentary

Having regard to the purpose of s.5 of the 1877 Act, the preceding cases make clear that there is a restricted basis upon which an original will can be procured once it has been registered. The cases allude to exceptional circumstances; they are all predicated upon ongoing litigation (whether at home or abroad). Furthermore, in the second of the aforementioned scenarios there may be considerable practical difficulties associated with exhibiting an original deed, even if judicial authority is granted.

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