

SHERIFFDOM OF LoTHIAN AND BORDERS

[2024] SC EDIN 16

NOTE OF SHERIFF JULIUS KOMOROWSKI

in

an application for confirmation as executor to the estate of the late Kenneth Muir

Applicant

Applicant: R MacLeod, Advocate; Wright, Johnston & Mackenzie

EDINBURGH, 27 March 2024

[1] The applicant seeks confirmation as executor nominate to the estate of a man said to have been last domiciled in Scotland, but without property in Scotland or elsewhere in the United Kingdom, who died in Singapore. The clerk rejected the application on the basis of this lack of property. The applicant has requested the sheriff to grant authority to the clerk to confirm the applicant as executor. I received written and oral submissions from counsel for the applicant on 7 December 2023, further to the clerk's decision to reject her application.

Decision

[2] Having heard counsel, I informed him I would direct the commissary clerk to adhere to the decision rejecting the application for confirmation.

[3] I concluded that whilst a sheriff in Scotland may have power to confirm the applicant as executor, the appropriate clerk to whom the application should be made was not the commissary clerk at Edinburgh.

Analysis

[4] I was asked at the hearing to write a Note.

[5] In considering the materials provided further, I have also had cause to reflect on additional authorities that amplify matters. The additional material has not caused me to alter my decision or the essential bases for it.

The role of executor

[6] As I explained at the hearing, I do not consider a lack of property in Scotland to preclude the competency of confirmation being granted here, where the deceased was domiciled here at the time of death. However, as, on the applicant's contentions, he died domiciled in a part of Scotland outside of this county, the Edinburgh commissary is not the appropriate commissary to grant confirmation. An application ought to be made to the sheriff clerk appropriate for the place of the deceased's domicile which, I was informed by counsel, is understood to be the clerk at Ayr, but in any event is not the commissary clerk at Edinburgh.

[7] In my view, confirmation as executor is, in the first place, as the phrase implies, confirmation to the office of executor. Whilst often one refers also to confirmation to the estate, the grant of confirmation is not simply the confirmation of title to the estate.

[8] This is also clear from the styles of confirmation. Counsel referred me to the old style for confirmation as executor nominate, but I have also, subsequent to the hearing, reviewed the current style, as well as the styles (past and present) for executor nominate. The current style of confirmation for an executor-nominate:

“APPROVES OF AND CONFIRMS as ... Executor(s) nominate of the said deceased ...’ and *then* gives certain powers to intronit, &c. with the estate, ‘and generally every other thing concerning the same to that to the office of ... [executor] is known

to belong.” (Act of Sederunt (Confirmation of Executors) 1967), Article 1(a), Schedule).

The older style was substantially the same, perhaps a little more emphatic, the nomination of executor in the will not being merely approved and confirmed but also ratified (Confirmation of Executors (Scotland) Act 1858, section 10: Schedule E).

[9] For executors-dative, the relevant style of confirmation “MAKES, CONSTITUTES, ORDAINS and CONFIRMS” the status of executor (1967 Act of Sederunt, *ibid*), the confirmation in this instance being the formal grant of the entitlement of the applicant to that office, such an entitlement existing as a matter of law rather than discretion. One is confirming the selection made by the law, rather than the deceased, but it is still confirmation of a sort. The old style was similar (1858 Act, *ibid*, Schedule D).

[10] This is also consistent with the understanding of the office of executor articulated by Erskine. A person who sought appointment as executor *ad omissa vel male appetiata* was required to call the originally confirmed executor, as the latter “has an obvious interest to oppose the nomination of another executor who is to deprive him of part of that administration” (Erskine III.ix.37). Thus, to appoint another executor to estate omitted from the inventory was a deprivation of the original executor's right of administration.

Confirmation conferred title on the executor to sue for debts not included in the inventory (*Bothwell v Trotter*, M. 16, 103 cited in Erskine III.ix.39). *Currie on Confirmation of Executors* (9th Ed.: Ed. E. Scobbie) notes both these historic consequences of confirmation without any suggestion that there has been a material change in modern executory law or practice (paragraphs 17-25, 17-32). The implication, in my view, is that confirmation of executor is confirmation to an office with general powers and responsibilities in connection with the deceased.

[11] It follows, in my view, that appointment as executor to a nil inventory of Scottish estate is competent and not academic. It confirms the executor's exclusive entitlement to sue on behalf of the estate. It establishes that person's entitlement to the office unless and until displaced by the appointment of another, and no other person can be appointed to administer any Scottish estate without the original executor being heard in opposition to that.

[12] In any event, under modern arrangements, as noted in the Scottish Law Commission in a passage provided by counsel, there are certain reciprocal arrangements with Commonwealth countries "for resealing confirmations &c." (Consultative Memorandum (1986) No. 72, paragraph 5.23). The deceased in this matter has estate in India and Singapore. Also, whilst by the law of Scotland, the law as to whom may administer the estate follows the law of where the estate is situated, I see no reason in principle why the law of Scotland would not accept a reference back (*renvoi*) if the *lex loci situs* determined the relevant law of administration to be that of the domicile of the deceased. In *Preston v Melville* (1841) 8 ER 1, cited by counsel, the Lord Chancellor (Earl of Cottenham) observed that "the courts in Scotland are bound to take notice" of the appointment by an administrator of a foreign (in that case, English) court (p. 6); but equally it seems if the foreign court refused to appoint an administrator or the like on the basis that its system of law required the estate there to be administered by the mechanisms provided by the law of Scotland, we should equally take notice of that.

Contrary views about appointment

[13] As counsel noted, the Scottish Law Commission was of the view that confirmation in respect of a deceased who had no estate in Scotland was not competent (*ibid*), citing Anton,

Private International Law, (1967), p. 489, stating that “notwithstanding that the deceased was domiciled in Scotland, confirmation may not be granted ... if he left no property in Scotland”. Anton cites no authority for that particular assertion. However, after the passage just cited, Anton states that the basis of jurisdiction is property in Scotland, citing the Executors (Scotland) Act 1900, section 6. But that enactment is concerned with transmission of funds from an executor or trustee who dies in office. That is to say, it is concerned with the appointment of executors or the like to late executors. It is not concerned with the appointment of the original executor. Thus, the understanding that property here is a prerequisite to confirmation appears to proceed from the Scottish Law Commission’s reliance on Anton, who in turn relies on (if anything) an irrelevant enactment. There is no warrant for this in enactment or judicial decision.

Applicable statute

[14] As I explained at the hearing, in my view jurisdiction is determined by a plain reading of the 1858 Act, section 3, which states:

"3. To whom petition to be presented.

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 property in Scotland, to the commissary of Edinburgh."

[15] I analyse this as providing the following rules:

- a) Where a person was known to be domiciled in a particular county in Scotland, the petition should be presented in the county of his domicile.

b) Where a person died domiciled outwith Scotland, or the person's domicile is not ascertainable, the petition shall be presented in Edinburgh provided that the deceased had property in Scotland.

[16] That is to say, the condition of "having property in Scotland" applies only in cases of "dying furth of Scotland, or without any fixed or known domicile".

Case law

[17] Counsel suggested there was some similarity to the predicament of the applicant and that of the petitioner in *Dunbar* (1900) Sh Ct Rep 232. There, the sheriff refused to confirm the petitioner as executor due to a lack of jurisdiction. The sheriff said the deceased could not tenably be said to have a "residential domicile" in Scotland given that he "carried on no business, ... had no property, and ... [only] occasionally visited" (p.234). In my view, the *ratio* of *Dunbar* is not that the lack of property here precluded jurisdiction; rather the lack of "residential domicile" evidenced by, *inter alia*, the lack of property here. Were it just about the lack of property, his lack of business or more frequent visits here would have been immaterial.

Conclusion

[18] Accordingly, I directed the clerk to adhere to the original decision rejecting the application, but on the basis only that the deceased is said to have a known domicile elsewhere in Scotland.