



Scotland Probate Records

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By definition, the term probate refers to the legal processes dealing with the financial and property of the deceased. What is Scottish probate? According to the FamilySearch Wiki "Scotland has no 'probate' records. Historically in Scotland, the equivalent term is 'confirmation.' Courts were responsible for the 'confirmation' of 'testaments'. What then is a testament and what about wills? A testament is the term for all documents relating to the confirmation (probating) of a deceased persons estate. A will is a statement by the deceased of how they wish their worldly goods distributed and may be found in a Scottish testament. Testaments were made primarily by the middle and upper classes, most of whom were nobility, gentry, merchants, or tradesmen.

Good information follows in this handout. Some of this information can be found on the FamilySearch wiki page (<http://wiki.familysearch.org>) using a search for "Scotland Probate Records". Be sure to check there for additional information. Primary Scottish resources for this information are found in the "Help and guidance" section at ScotlandsPeople.gov.uk. Click "See Guides", Record guides A-Z", "10 Wills and testaments". Also, review a research guide titled Wills and Testaments at the National Records of Scotland website (nrscotland.gov.uk).

How a deceased person's estate was handled depended on the property involved.

Property

There were two types of property in Scotland, moveable and immovable property.

Moveable property

Moveable property consisted of anything that could be moved, including household and personal effects, investments, tools, and machinery.

Immovable Property

Immoveable property, also known as heritable property, consisted primarily of land and buildings but would also include minerals, mining rights, and titles. Prior to 1868, the process for dealing with immoveable property was different than probate matters in England or the United States. It was not possible to leave immovable property (land, buildings, titles or other heritables) by means of a testament or will.

The process of inheriting property is a topic unto itself but here is a summary. Immoveable property was typically inherited by the eldest son according to the law of primogeniture. To inherit immovable property such as land, heirs had to prove to an Inquisition (essentially a jury of local people) their right to inherit. The records granting these rights are called retours of services of heirs. The process for the land transfer was as follows:

1. A chancery court issued a brieve to summon local sheriffs to hold a jury trial
2. The jury would determine who was the legal heir
3. The jury returned (“retoured”) their verdict to the chancery
4. The chancery commissioned the sheriff to grant possession of the land to the heir and collect a fee payable to the crown

Records of actual transfers of land are called sasines. You will find more information about these records in the Land and Property section of the FamilySearch Wiki (<http://wiki.familysearch.org>).

Land could also be transferred through a trust disposition which was another form of testamentary deed and recorded in the register of deeds.

Testaments

Testaments therefore dealt only with moveable property, sometimes called ‘guids’ [goods] and ‘geir’ [gear]. It was customary to divide the moveable property into a maximum of three parts: the widow’s part, the bairns part (all children, including the eldest, had a right to an equal share) and the dead’s [deid’s] part. The dead’s part could be disposed of any way the deceased wished. If there wasn’t a widow, then the two remaining parts would be divided in half.

There were two types of testaments:

- If a person died leaving a will that named an executor, the document confirming that executorship and the attached testament is called a testament testamentar (like an English probated will).
- If a person died without leaving a testament and the court appointed an executor to administer the estate, then the confirming document is called a testament dative (like an English administration).

Both also contain an inventar (inventory of moveable property). Inventories can include household furnishings, clothes, jewelry, books, papers, farm stock and crops, tools and machinery, money in cash, bank accounts and investments. Inventories can be brief overviews of heritable possessions or detailed, itemized lists.

A Scottish testament testamentar document typically included four parts. They were:

- Introductory clause
- Inventory of moveable estate
- Copy of deceased’s will and naming of executor
- Confirmation clause

A Scottish testament dative was made up of only three parts, lacking the copy of a will. Before 1823, one or more ‘eik’s may be included. These are additions to a will dealing with additional dispositions of movable property, similar to a codicil in English wills. They may result in additional inventories as well.

Finding Testamentary Records

Determining Court Jurisdictions

To find a testament for your ancestor, it is best to start with the most likely jurisdiction in which the confirmation of the estate would have taken place. Before the Scottish Reformation and the establishment of the Presbyterian Church in 1592, confirmation of testaments was the prerogative of Episcopal (bishop’s) courts. Their subordinates, called official or commissariat courts carried out the confirmation function.

After the Scottish Reformation in 1560, fifteen (eventually 22) commissariats were established by royal authority. The principal commissariat court was in Edinburgh, and it had both local and general jurisdiction. The territorial extent of the commissariat courts paid little attention to county boundaries. This system stayed in force until the end of 1823.

After 1823, beginning 1 January 1824 (although the system took a few years to fully evolve), testaments were confirmed by commissariat departments within the sheriff courts. The boundaries of these courts' jurisdictions are the same as the county boundaries, but the names of the courts are not necessarily the same as the names of the counties.

Commissariat and sheriff court jurisdictions are found easiest at the ScotlandsPeople (www.scotlandspeople.gov.uk) website. Click on the "Search our records", "Search by place", "County guides", select the county in which your ancestor lived, then find the section titled "Wills and testaments".

Finding the Documents

The original records of the commissariat and sheriff courts are housed at the National Records of Scotland in Edinburgh.

The best place to look for both an index and for digitized copies of testamentary records is www.scotlandspeople.gov.uk. The wills and testaments index contains over 611,000 index entries to Scottish wills and testaments dating from 1513 to 1925 depending on the earliest wills for the court. The index entry will list the name, title, occupation and place of residence, if given, of the deceased, along with the court and date. Click on "Search our records", "Search for people", "Legal records, then "Wills and testaments" to get to the search boxes.

ScotlandsPeople.gov.uk also has indexed about 26,000 wills of soldiers. Most are from World War I though there are quite a few from World War II and even a handful of soldiers wills before and after these conflicts. They are also in the "Legal records" section. Rather than clicking on "Wills and testaments", click on "Soldiers' and airmen's wills".

www.findmypast.com has a "Scotland, Will and Testament Index 1481-1807" that references over 165,000 deceased from the commissariat courts in Scotland.

www.ancestry.com has indexes to the wills of the Prerogative Court of Canterbury from 1384-1858 and to the Principal Probate Registry in England from 1861-1941. Ancestry calls the latter the "National Probate Calendar". Sometimes there are wills of Scottish people in these indexes. For example, a person who was living in England at the time of death but had property in Scotland could have a will in the Principal Probate Registry. Most of the Scottish people listed in this index will also be listed in Scottish testamentary indexes.

www.familysearch.org has indexes to and microfilm copies of the commissariat court records to 1823 and some sheriff court records. To find these records, use the Place Search of the FamilySearch Catalog under:

Scotland -- Probate records

Scotland, [County] -- Probate records

Many of these films have been digitized but access is restricted to those in the Family History Library or in a family history center.

For probate records for the years 1876-1936 held in the Family History Library, there are bound volumes and microfilm copies of Calendars of Confirmations and Inventories. The call numbers can be located through the FamilySearch Catalog. You can obtain information from the Confirmations such as name of deceased, where living at time of death, when and where died,

occupation, and the person or persons named as executors or administrators.

Difficulties in Finding a Testament

If you have difficulty locating a testament, keep these points in mind:

- Only a small percentage of the population of Scotland left testaments.
- A person's pre-1823 testament could have been confirmed in the Commissary Court of Edinburgh, or any other commissariat, even though he or she lived elsewhere in the country.
- A person's post-1823 testament could have been confirmed in the Sheriff Court of Edinburgh even though he or she lived elsewhere in the country.
- A person who died outside of Scotland but who owned property within Scotland would have his or her testament proved in an Edinburgh court but sometimes also in an English court, such as the Prerogative Court of Canterbury (available by searching the Discovery catalogue of The UK National Archives website and www.ancestry.com).
- Testaments for women may be under their maiden name.

Handwriting Help

The website www.scottishhandwriting.com has tutorials on how to read old Scottish handwriting. Also, www.scotlandspeople.gov.uk has a search of research tools under the "Help & Resources" tab on the home page that can help other occupations, archaic Scottish words and many other things.

Further Reading and Help to Understanding the Records

Burness, Lawrence. *A Scottish Genealogist's Glossary*. Aberdeen: Aberdeen & North East Scotland Family History Society, c1990. (FHL British Ref 941 D27bL)

Cory, Kathleen. *Tracing Your Scottish Ancestors*, Third Edition. Baltimore, MD: Genealogical Publishing Company, 2004. Appendix III provides a table listing all parishes, among other things identifying Commissariat(s) which included that parish, and date of first testament or inventory for the parish.

Encyclopedia of the Laws of Scotland. 16 vols and 2 supps. Edinburgh: W. Green & Son, Ltd., 1926. (FHL British book 941 P36e) Note: Vol. 11 is available at archive.org

Gibb, Andrew Dewar. *Student's Glossary of Scottish Legal Terms*. Edinburgh: W. Green & Son, Ltd., 1946 (FHL British book 941 P36g)

Gouldesbrough, Peter. *Formulary of Old Scots Legal Documents*. Vol. 36 Edinburgh: The Stair Society, 1985. (FHL British book 941 B4st v. 36)

Sinclair, Cecil. *Tracing Your Scottish Ancestors: A Guide to Ancestry Research in the Scottish Record Office*. Edinburgh, Scotland: Her Majesty's Stationery Office, 1990. (Family History Library book 941 D27s). Identifies court(s) by county along with ending dates for Commissariat and beginning dates for Sheriffs Court, which often overlap.

Testaments and Commissariat Records of Scotland. Salt Lake City, Utah: Genealogical Society of Utah, 1972. (Family History Library book 941 P2gs; fiche 6054479.)