



SHERIFF APPEAL COURT

**[2026] SAC (Civ) 50
DUN-SD177-25**

Sheriff Principal Gillian A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN A WADE KC

in the appeal in the cause

DAVID SCOTT CHALMERS

executor-nominate of the late Mr Morgan John Chalmers by will and confirmation

Pursuer and Respondent

against

DAVID GOODFELLOW MELVILLE

Defender and Appellant

Pursuer and Respondent: Anderson, advocate

Defender and Appellant: Party

18 May 2026

[1] The appellant seeks to bring under review a decision of the sheriff at Dundee dated 12 December 2025 in terms of which he granted decree against the appellant for recovery of possession of a room at the Marine Hotel, Crail, Fife.

[2] The primary point at issue is whether a notice to quit served by an executor before confirmation can be retrospectively validated by the subsequent grant of confirmation.

Procedural background

[3] The respondent raised a summary cause action for recovery of possession against the appellant, which he duly defended. Chapter 8 of the Summary Cause Rules 2002 ("SCR") sets out the procedure which the sheriff must follow in order to secure expeditious disposal of defended cases. In accordance with SCR 8.3(2)(a) the sheriff is obliged to ascertain the factual and legal basis of the action and any defence. His case management role requires that he takes steps to facilitate resolution of the dispute. In terms of SCR 8.3(3)(c), where it appears that the claim or any defence stated is not soundly based in law in whole or in part, the sheriff is obliged to hear parties on the matter, and having done so may grant decree in favour of any party.

[4] In this case there were two hearings assigned in terms of SCR 8.3(2); one on 15 August 2025 (at which the presiding sheriff noted that the issues in dispute were a) jurisdiction; b) the validity of the lease; and c) competency of the summary cause procedure) and one on 19 September 2025 at which a different sheriff noted the following:

- "1. The defender accepts:-
 - a. this court, not the Housing Tribunal, has jurisdiction;
 - b. he entered into the House Share Agreement lodged by the pursuer;
 - c. the pursuer is the Executor of the late Mr Chalmers;
 - d. he received the Notice to Quit dated 23 December 2024;
 - e. the pursuer was confirmed as Mr Chalmers' Executor after the Notice to Quit was issued.
2. The only issues are whether the pursuer had title to issue the notice to quit and, if not, whether he had title to raise proceedings.
3. As discussed with the defender:-
 - (a) the case can be finally decided without hearing evidence and (b) he should both seek legal advice and consider the following legal points, which may have a bearing on his defence:-
 - a. the Trusts (Scotland) Act 1921;
 - b. the Succession (Scotland) Act 1964;
 - c. the decision in the case of *Bentley v Macfarlane* 1964 Session Cases 76 at page 79."

The sheriff thereafter assigned what was described as a “final hearing” which proceeded on 12 December 2025.

[5] Accordingly by the time of the final hearing the material facts had been agreed. The sheriff narrates the agreed facts at paras [3] to [9] of the stated case which has been prepared for this court. Unfortunately a typing error has crept in at para [5]. However there was and remains no dispute about the factual basis upon which the sheriff proceeded at first instance.

[6] In the stated case the sheriff describes the hearing of 12 December 2025 as a proof. It was not. No evidence required to be led. The hearing was more in the nature of a debate proceeding on an agreed factual scenario and utilising the extensive case management tools open to sheriffs in summary cause proceedings.

[7] Following legal argument the sheriff accepted as a matter of law that while the respondent had no formal title to the Marine Hotel or power to administer the estate when the notice to quit was served on 23 December 2024 those issues were retrospectively validated by the subsequent grant of confirmation. From that conclusion it followed that no relevant defence was stated and that decree should be granted as craved.

[8] In the stated case the sheriff distilled the various grounds in the appellant’s Form 31 (application for stated case) into two succinct questions for this court.

1. Was service of the notice to quit by the pursuer retrospectively validated by the subsequent grant of confirmation ?
2. Did I err by holding that the defender had no defence to the claim ?

Factual background

[9] In summary the appellant's brother, the late Morgan Chalmers was the heritable proprietor of the Marine Hotel in Crail. On 1 July 2024 he leased a room to the appellant for a period of 1 year. This was a common law lease. It is accepted that it is not a private residential tenancy in terms of paragraph 9 of Schedule 1 of the Private Housing (Tenancies)(Scotland) Act 2016. No question of jurisdiction remained live before the sheriff at first instance. Mr Chalmers died on 4 August 2024. In the stated case this is erroneously noted as "4 August 2025".

[10] On 23 December 2024 the respondent instructed sheriff officers to serve a notice to quit on the appellant. Due notice of these proceedings was provided to Fife Council on 2 July 2025 pursuant to the respondent's obligations in terms of section 11(1) of the Homelessness etc (Scotland) Act 2003 and the Notice to local Authorities (Scotland) Regulations 2008.

[11] The respondent was confirmed as Mr Chalmers' executor-nominate on 2 May 2025.

[12] Notwithstanding these steps the appellant refuses to remove from the property.

The appellant's position

[13] The appellant lodged an application for a stated case which specified six discrete points. He proposed adjustments to the stated case which reflected these arguments rather than focussing on the questions posed in the stated case. He also lodged written submissions in advance of the appeal hearing. In short, he asserts that the service of the notice to quit was not valid. The sheriff was incorrect to categorise it as an antecedent or preparatory step in the process as it was a substantive act which produced immediate legal

consequences. As such, an unconfirmed executor was not entitled to serve such a notice and it could not be retrospectively validated by the subsequent grant of confirmation.

[14] In his note of argument the appellant sought to rely on the typographical error in the stated case in that the date of Mr Chalmers' death is recorded as having been the 4 August 2025 when it ought to have read "2024". It was conceded that the sheriff at first instance proceeded on the correct chronology but the appellant suggested that this court is bound by the facts as stated in the stated case and the questions posed by the sheriff at the end of the stated case cannot be safely answered without remit to the sheriff, presumably to correct his mistake.

[15] It is submitted that the authorities to which the sheriff referred concern acts done in circumstances where there was an "imperfect" title and that the sheriff has misapplied *Bentley v Macfarlane* 1964 SC 76 to extend retrospective validation beyond its recognised limits. The respondent had provided no authority to support their proposition and those authorities that were cited concerned administrative defects rather than acts which affect substantive possessory rights. The additional authorities referred to by the respondent could be distinguished on their facts and did not establish the principle contended for.

[16] The appellant further argues that the respondent's approach would create uncertainty in tenancies because at the time of service the validity of the notice to quit would be contingent on confirmation subsequently being granted.

[17] The appellant also sought to argue that in any event tacit relocation had operated to renew the lease at ish. The appellant had emailed the respondent on 29 June 2025 to intimate that tacit relocation had occurred.

[18] Accordingly it was submitted that there was a statable defence to the action and the sheriff had erred both in his approach to the notice to quite and in granting decree.

The respondent's position

[19] The respondent began by observing that the hearing was in effect a debate at which resolution of the matter would take place in terms of SCR 8.8(3)(c) without the need for evidence to be led. It was observed that the appellant now sought to introduce new matters such as the operation of tacit relocation and the effective date of the notice to quit: neither of which had been canvassed before the sheriff at first instance. These issues were not within the scope of the interlocutor of 19 September 2025. They had not been included by the appellant in the Form 31 which was the application for the stated case. Therefore they had not been addressed in the stated case. Accordingly they were not matters which were competently before this court.

[20] The only defence to the claim which had been maintained by the appellant by the time of the hearing on 12 December 2025 was in relation to the service of the notice to quit by the respondent as an unconfirmed executor. If that defence was without merit, as it was submitted, then the sheriff was correct to grant decree in the terms that he did.

[21] Section 14(1) of the Succession (Scotland) Act 1964 brought the position in relation to heritable property into line with the position as regards moveable property so far as the effect of confirmation was concerned. Following the authorities, executors-nominate have a fundamentally good underlying title which confirmation renders absolute (*Symington v Campbell* (1894) 21 R 434, per Lord Adam at 437; *Bentley v Macfarlane* 1964 SC 76, per Lord President (Clyde) at 79).

[22] Under reference to *Garvie's Trustees v Garvie's Tutors* 1975 SLT 94, and *Pattinson v Matheson* 2023 SC 280, per Lord President (Carloway) at [22], it was submitted that the

distinction which the appellant sought to draw between retrospective validation of administrative and substantive acts did not exist.

[23] Addressing briefly the appellant's arguments on tacit relocation the respondent's primary position was that this issue was not live before the sheriff at first instance. The scope of the hearing on 12 December 2025 having been correctly narrowed, in terms of the rules, to the questions specified in the interlocutor of 19 September 2025, it was not and could not now form a ground of appeal. Insofar as the appellant sought to invoke an argument that tacit relocation was still open as a statable defence in order to address the sheriff's second question in the stated case, the respondent submitted that even informal notice that the lease is not to continue will suffice to exclude an inference of consent and defeat any such defence (*Rockford Trilogy Ltd v NCR Ltd* 2022 SC 90, per Lord Clark at [7]). In sum, the law favoured pragmatism over legal concept as could be seen from the cases on accretion.

Decision

[24] I shall deal firstly with the appellant's contention that this court is bound by the typographical error in the date of death of the late Morgan Chalmers and that the case should be remitted to the sheriff for correction. It appears to me that this is a delaying tactic which serves no useful purpose. Both parties were in agreement about the date of death at first instance. The confirmation was lodged and incorporated into the pleadings. The date of death was clearly specified in the confirmation and the appellant agreed that the respondent had been confirmed as executor which was recorded in the interlocutor of 19 September 2025.

[25] The reference in the stated case to the death being in 2025 is clearly a typographical error. The date of death of the late Morgan Chalmers was not and is not in dispute. The stated case must be read as a whole and would make no sense if the date of death post-dated the date of confirmation. The proposition that this somehow vitiates the sheriff's decision in its entirety because the factual basis upon which this court must proceed is unsound is rejected.

[26] Turning then to the substance of the appeal, although there is authority in relation to the effect of confirmation on antecedent acts of an unconfirmed executor neither party was able to bring to the court's attention any authority directly in point in relation to the service of a notice to quit. The question as to whether subsequent confirmation of an executor retrospectively validates service of a notice to quit by an unconfirmed executor requires to be answered by analogy.

[27] An executor-nominate has all the powers, privileges and immunities conferred on a trustee by the Trusts (Scotland) Act 1921. Section 4 of the 1921 Act details a variety of powers which an executor-nominate has in relation to heritable property. In particular it is provided:

"4.— General powers of trustees.

- (1) In all trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust deed, viz.:—
 - (a) To sell the trust estate or any part thereof, heritable as well as moveable.
 - (c) To grant leases of any duration (including mineral leases) of the heritable estate or any part thereof and to remove tenants."

[28] After confirmation the position is governed by section 14(1) of the Succession (Scotland) Act 1964 which provides *inter alia*:

“14. Assimilation for purposes of administration, etc., of heritage to moveables.

(1) Subject to subsection (3) of this section the enactments and rules of law in force immediately before the commencement of this Act with respect to the administration and winding up of the estate of a deceased person so far as consisting of moveable property shall have effect (as modified by the provisions of this Act) in relation to the whole of the estate without distinction between moveable property and heritable property; and accordingly on the death of any person (whether testate or intestate) every part of his estate (whether consisting of moveable property or heritable property) falling to be administered under the law of Scotland shall, by virtue of confirmation thereto, vest for the purposes of administration in the executor thereby confirmed and shall be administered and disposed of according to law by such executor.”

[29] Confirmation operates to vest the title to the deceased’s estate in the executor for the purposes of its administration and disposal thereof. The effect of confirmation on acts of the executor prior to confirmation is expressly dealt with in *Currie on Confirmation of Executors* (9th Edition) at 14.03:

“Validation by subsequent confirmation

14-03

If the executors purport to deal with or transfer the deceased’s estate before they are confirmed, confirmation granted subsequently will validate the purported dealing or transfer retrospectively :- *Mackay v Mackay*, 1914 S.C. 200 per Lord Strathclyde at 203 (assignment of copyright); *Garvie’s Trs. v Garvie’s Tutors*, 1975 S.L.T. 94 (transfer of lease); *Chalmers’ Trs. v Watson* (1860) 22 D. 1060 (unconfirmed trustee voted at a meeting regarding a composition offer in a sequestration).

No doubt confirmation was required in order that [the trustees] might secure an active title to intromit with and administer the estate, but it seems to me to be perfectly clear that if they subsequently obtained confirmation the defect in their title could be effectively cured, and the cure could draw back to the date of the assignment.”

[30] Even before confirmation is obtained, an executor is entitled to sue for the estate, but he must confirm to the debt before extract. See obiter dicta of Lord Adam in *Symington v Campbell* (1894) 21 R 434 at 437; and Lord President Clyde in *Bentley v Macfarlane* 1964 SC 76 at 79.

[31] There is therefore no doubt that it is long established that actings of an executor before confirmation are retrospectively vindicated thereafter on the basis that the executor has an underlying good title which is simply ratified by the granting of confirmation.

[32] No question of title to sue arises in this case because confirmation was granted before the action was raised. However the appellant seeks to distinguish the authorities to which the respondent refers on the basis that they are exceptional cases and that the principles laid down in *Bentley (supra)* are restricted to administrative acts rather than intromissions which can substantially affect the rights of third parties such as tenants.

[33] This argument is somewhat undermined when an analogy is drawn with the circumstances of *Garvie (supra)* in which unconfirmed executors served a notice of transfer of a deceased tenant's interest in a lease on the landlord. The notice was held to be retrospectively validated by the subsequent obtaining of confirmation and was therefore a "good notice" to effect the transfer. Under reference to section 14(1) of the Succession (Scotland) Act 1964, Lord Thomson stated at paragraph 79:

"In my opinion both these submissions on the part of the pursuers are unsound. I think it is plain that the overriding general intention of the legislature was to put the executor quoad heritage into the same position as he is quoad moveables. There must, of course, be some technical or mechanical variations, but these are not material here. I cannot see that the purpose of the statute would in any way be defeated by construing ss. 14 and 16 as desiderated by the defenders, and I do not think such a construction involves any great straining of the language used. On the other hand, in my opinion, the construction of s. 14 contended for by the pursuers seems to me to run counter to the broad intention of the statute and is not, in my view, required by the language used. Furthermore, if the grant of confirmation of 19th February 1969 operates retroactively to validate the transfer of the interest in the lease of 13th January 1969, it seems to me necessarily to follow that the notice ... was a good notice for there must be deemed to have been a transfer and an acquisition at that date."

[34] In my opinion, standing that authority, which is binding on this court, a notice to quit, which had the effect of intimating to the appellant that formal steps were in train to

terminate his lease is a good notice proceeding as it did on an underlying sound title and is capable of retrospective validation by the subsequent grant of confirmation.

[35] The matter was considered more recently in *Pattinson v Matheson* 2023 SC 280, per Lord President (Carloway) at [22]. That case was more closely analogous in terms of fact as it related to the service of a notice of intimation of a transfer of interest in two crofts. The issue had been referred to the Court of Session by the Land Court and concerned the interaction of the section 11(1) of the Crofters (Scotland) Act 1993 and section 16(2) of the Succession (Scotland) Act 1964. Although the decision ultimately turned on other considerations, the question of the validity of the notice served by an unconfirmed executor was specifically addressed. It was held that a subsequent grant of confirmation retrospectively validated the transfer. Even had the notice been deficient, the respondent's actions in completing and intimating the further documentation and endorsing a docket on the confirmation were sufficient to effect the transfer.

[36] Although the comments of Lord Carloway were strictly *obiter* they directly meet the issue which arises before this court. There was no contrary authority cited to support the proposition advanced by the appellant that only administrative acts could be retrospectively validated and for those reasons it is my opinion that the sheriff was correct in both his reasoning and his conclusions at para [16] of the stated case.

[37] On the basis that the notice to quit was retrospectively validated the answer to the first question must be in the affirmative.

[38] By the time of the hearing on 12 December 2025 there was no other defence before the court. The appellant has sought to introduce new matters by way of adjustment to the stated case and despite those adjustments and further questions having been rejected by the

sheriff, the appellant persisted in including them in his written and oral submissions before this court.

[39] For the avoidance of doubt the arguments which the appellant sought to advance and which he maintained constituted a stateable defence to the action are fundamentally flawed. He suggests that tacit relocation had operated to renew the lease on the same terms and conditions for a further year because he had served notice on the respondent to that effect on 29 June 2025.

[40] The operation of tacit relocation is dependent on a failure of the parties to give notice of termination and silence or at least a lack of agreement as to the position at ish. In this case there was a valid notice to quit. That is the generally accepted means by which notice is given. Even if the notice had been flawed in some way, which it was not, it was clear in its terms and would have been sufficient to exclude the operation of tacit relocation following *Rockford Trilogy Ltd v NCR Ltd* 2022 SC 90, per Lord Justice Clerk (Dorrian) at [7]:

“Although service of a notice to quit is the classic means of showing that there has not been silence, informal notice that the lease is not to continue will suffice as long as it constitutes sufficient intimation of the party’s intention not to prolong the lease on the existing terms. This will be sufficient to prevent the inference of consent being drawn. (*Signet Group plc v C & J Clark Retail Properties Ltd*, pp 446B–447D; *Gilchrist v Westren*, per Lord Justice Clerk (Macdonald), p 366, Lord Young, p 367). There must be ‘overt intimation by either party that he did not consent to the prolongation of the lease’ (*McDonald v O’Donnell*, per Lord Justice Clerk (Gill), para 32, under reference to *Signet Group*).”

[41] The other points which the appellant made in his submissions regarding the date in the notice were not canvassed at first instance or addressed in the stated case. They do not fall to be considered now. That being so the second question posed by the sheriff (namely whether he erred in law by holding that the appellant had no defence to the claim) falls to be answered in the negative. The appeal falls to be refused.

[42] Finally the court considered the question of expenses. The respondent has been wholly successful in resisting the appeal and following the usual rule expenses will follow success. The respondent also sought sanction for the instruction of junior counsel for the appeal procedure including the preparation of the written submissions. Sanction had been refused at first instance. However given the number and nature of authorities which required to be considered, the fact that there was no authority directly in point, and the importance of the matter to the respondent, who has not been able to market the hotel and ingather the estate for the benefit of the beneficiaries until such times as the appellant removes, I consider sanction to be justified in all the circumstances.

Disposal

[43] I shall therefore answer the first question posed in the stated case in the affirmative, answer the second question posed in the stated case in the negative, refuse the appeal, and thereafter find the appellant liable to the respondent in the expenses of the appeal, and sanction the appeal as suitable for the employment of junior counsel.