SHERIFF APPEAL COURT

[2026] SAC (Civ) 71
KIR-A18-26

Temporary Sheriff Principal B Mohan

OPINION OF THE COURT

ON COMPETENCY

delivered by TEMPORARY SHERIFF PRINCIPAL B MOHAN

in the appeal in the cause

by

JULIE ANDREW

Pursuer and Appellant

against

DONALD STEWART OMAND

Defender and Respondent

Pursuer and Appellant: Party
Defender and Respondent: Anderson KC; BBM Solicitors Limited

28 October 2026

[1] At a hearing on 18 September 2026 I dealt with two motions by the respondent, one on competency, the other seeking sanction for counsel.

[2] The motion challenging the competency of the appeal had two parts. The first was that the appeal had been lodged outwith the 28-day time limit required by the rules. The second was that the appeal itself sought to challenge a decision it was not competent to appeal.

[3] The case concerned an objection to confirmation lodged by the appellant, the partner of the deceased Donald Shepherd Peace who died on 4 March 2023. The appellant lodged a caveat in January 2026 at Kirkwall Sheriff Court craving that no warrant for confirmation should be granted in the estate of the deceased without intimation to her. When an application for confirmation was lodged on behalf of three executors-nominate the appellant was notified and lodged a notice of objection.

[4] The appellant's objection is that, in terms of the will of the deceased, she was due a liferent of the property known as "Samsonlane". The dispute between the parties was that the executors considered the liferent was for a farmhouse of that name whereas the appellant was of the view that the liferent was for the whole farm, including the business.

[5] Following a hearing before the sheriff, he refused to appoint further procedure in respect of the appellant's objections. The sheriff noted that there was a difference of opinion as to the extent of the liferent but decided that an objection to confirmation was not the route by which that could be challenged. A passage in *Currie on Confirmation of Executors* (*Currie*) at paragraphs 19-80 had been referred to and suggested further court procedure in the event of an objection; however, the sheriff noted that was not based on any authority. The appellant appealed against that decision of the sheriff.

Is the appeal late?

[6] The appeal was lodged by the appellant, a party litigant, within 28 days of the sheriff's decision. It was not in the correct form. In keeping with standard procedure, the SAC clerks noted the date of receipt and informed the appellant that the appeal required to be re-submitted in the correct form. The appellant re-submitted the appeal on the correct form. It was accepted by the clerks and a procedural appeal sheriff confirmed that the

appeal should be registered. In those circumstances I consider that the appeal was lodged timeously.

Competency of the appeal

[7] The respondent objected to the competency of the appeal on the following bases:

1. A grant of confirmation is an administrative decision.
2. The objection lodged by the appellant would make no difference to the actual extent of the estate. Confirmation is confirmation and if the appellant's real complaint was the extent of the liferent, an objection to confirmation would not determine that problem. There were other routes she could take such as an interdict or an action of reduction of the will: none of those steps had been taken.
3. The passage in *Currie* which suggests a procedure for objections to confirmation lacked reference to any authority.
4. The case of *Ahmed's Executor* v *Ahmed's Executor* 2026 CSOH 30 was a decision by Lord Colbeck where he noted that an appeal is available in civil court proceedings, but not in commissary proceedings (at para [33]).

[8] The appellant's position was that the appeal was competent for the following reasons:

1. The sheriff held a hearing in respect of this matter; it was wrong to say that she had no *prima facie* case. She averred bad faith on the part of the named respondent (one of the three executors). The sheriff made a judicial decision at a hearing. It should therefore be appealable.

2. The decision in *Roy* v *McGregor* 1935 SLT (Sh Ct) 6 supported the appellant's position.

Decision on competency

[9] I consider that this appeal is competent. The matter should proceed before a bench of three appeal sheriffs under chapter 7.

[10] The reasons for my decision are as follows:

1. In her application to the sheriff court objecting to the confirmation the appellant avers a conflict of interest. She avers that the named respondent Donald Omand owns land adjoining the deceased's estate and makes certain averments about his actions in disposing of parts of the estate prior to confirmation. She avers in para [2] of her notice of objection that the respondent:

> "is in a material position of personal and financial conflict of interest. The Applicant [respondent] owns residential property immediately adjacent to the eastern boundary of Samsonlane Farm and stands to benefit personally by utilizing and expanding his private holding into the estate's farmland, to the severe and permanent prejudice of the Objector's interests."

This appears to be the situation in which an objection to confirmation may be allowed. In the case of *Roy* v *McGregor* 1935 SLT (Sh Ct) 6 the court noted that confirmation may be refused:

> "where an applicant for the office has already committed himself to an expression of his view as to conflicting claims, more especially if the expression has been in favour of the claims with which his own personal interest is identified".

2. The passage in *Currie* referred to by the sheriff was relied on in submissions. Paragraphs 19-80 indicates a procedure where there is an objection to

confirmation; the passage indicates that the matter should proceed as an ordinary action in the sheriff court. This was criticised as lacking an authoritative basis. Nevertheless *Currie* is an accepted text of some repute (the extract referred to comes from the 9th Edition). Furthermore, the same page of *Currie* at paragraphs 19-81 states the following:

> "Where it is averred that there is a serious risk that the estate might be dissipated or lost if left in the hands of an executor-nominate, the court may sist the process, and instead of confirming the executor-nominate, appoint a judicial factor."

Hamilton v *Hardy* (1888) 16 R 192 is cited as authority for that proposition. Accordingly, I did not accept the implication that the court procedure proposed in *Currie* at paragraphs 19-80 was without any foundation.

3. The decision by Lord Colbeck in *Ahmed's Executor* v *Ahmed's Executor* 2026 CSOH 30 involved an action of reduction of a will. It was a decision by an Outer House judge. While the respondent cited the case as authority for the view that commissary proceedings are not appealable, I noted a further passage in Lord Colbeck's decision which lends some support to the appellant. At para [16] his Lordship notes:

> "The basis for opposing confirmation is limited, but it exists as a protection if the estate is in danger. Both the conduct and the intentions of an executor are relevant, see *Campbell* v *Barber* (1896) 23 R 90 at 92. The basis of opposition is that an applicant's conduct demonstrates that he has committed to a position of conflict, see *Roy* v *McGregor* 1935 SLT (Sh Ct) 6."

This is the position which the appellant has averred in her notice of objection.

Decision

[11] In all these circumstances I consider that the objection to confirmation does fall within the parameters of those anticipated in *Currie*, and is supported to some extent by the authority of *Roy* v *McGregor* and the observations of Lord Colbeck in *Ahmed's Executor* (both *supra*).

[12] The sheriff in this case heard objections at a hearing. He made a judicial decision. It is therefore subject to appeal before the Sheriff Appeal Court. This matter should therefore be appointed to call before three appeal sheriffs under chapter 7 in order that a more authoritative decision can be provided on the issues raised in this appeal.

Motion for sanction for counsel

[13] The appellant is unrepresented. The respondent sought sanction of the appeal as suitable for counsel. I have granted that motion in light of the complications and limited prior authority.