

**PLEASE NOTE: THIS OPINION SUPERSEDES THE OPINION
ISSUED ON 24 MARCH 2026
[2026] CSOH 26**



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 30

A256/23

OPINION OF LORD COLBECK

In the cause

SADDIQ AHMED, in his capacity as executor of the late Bashir Ahmed

Pursuer

against

KAMALL AHMED, in his capacity as executor of the late Bashir Ahmed

Defender

Pursuer: R MacLeod, advocate; BTO Solicitors LLP

Defender: Party

25 March 2026

Introduction

[1] Bashir Ahmed died intestate on 1 July 1996, survived by nine children. The pursuer and defender are two of his sons. Following contested proceedings, they were appointed as the deceased's executors dative by the sheriff at Wick on 3 July 1998.

[2] In the present action, the pursuer seeks (i) production and reduction of the grant of confirmation EXE/37/23 issued at Wick Sheriff Court on 12 May 2023; (ii) suspension of the said grant of confirmation, and for suspension ad interim; and (iii) interdict of the defender,

or any person acting on his behalf or on his instructions or authority, from taking any step in reliance upon the said grant of confirmation, including without prejudice to the foregoing generality from taking or attempting to take any step to sell, burden or otherwise deal with any of the nine properties listed in the inventory of the said confirmation. In essence, the pursuer wishes to be put back into the position of being able to oppose the grant of confirmation in favour of the defender.

[3] On 4 August 2023, on the motion of the pursuer made before calling, no caveat having been lodged, the Lord Ordinary granted interim suspension of the grant of confirmation and interim interdict.

[4] The background to the present action is set out in the opinion of the Extra Division of 13 August 2024 ([2024] CSIH 25). In disposing of the reclaiming motion (appeal) then before it, the Extra Division recalled the interlocutor of the Lord Ordinary allowing proof before answer, and the ancillary orders associated with the allowance of proof, and appointed the cause to the procedure roll.

Submissions for defender

[5] The defender appeared on his own behalf, adopted the note of argument lodged by him and made brief further submissions in support of it. The defender argued that many of the pursuer's averments were irrelevant and should not be admitted to probation. He argued that the pursuer has not averred any miscarriage of justice supporting reduction, nor has he averred circumstances in which any miscarriage of justice cannot be remedied without reduction.

[6] The defender further argued that the pursuer has not averred that no other remedy is open to him. There are mistakes in the inventory, but the defender has been trying to

correct them. The pursuer has prevented those corrections by the use of interim interdict and interim suspension. The pursuer refuses to correct any error by way of eik to the confirmation. The pursuer admits that one property (34 Argyle Square, Wick) is properly within the inventory and therefor total reduction is not competent or necessary.

[7] The defender argued that it has long been settled that reduction is not competent unless there is no other remedy available. Here there are at least two other shorter, quicker and cheaper remedies available, namely, by way of an eik to the confirmation; or an appeal to the Sheriff Appeal Court, although late (the defender having confirmed that he will consent to any appeal being heard late). In addition, there must also be a miscarriage of justice which is incapable of being corrected without reduction; and in the whole circumstances it is just and necessary to achieve substantial justice to grant reduction.

The defender referred to *Malcolm v Park Lane Motors Ltd* 1998 SLT 1252 at 1256.

[8] In his note of argument, the defender sets out (over three pages) criticisms of the pursuer's averments that the defender maintains are those which support the conclusion for reduction. A party who challenges the sufficiency of his opponent's case must, for the purposes of a procedure roll debate, accept as true the opponent's averments of fact. In a number of respects, the defender's argument does not proceed on this basis.

[9] The defender argues that interdict and/or suspension are incompetent. He maintains that there was no threatened wrong in performing the duties of executor; and that as the action "does not seek real or personal diligence" suspension is not available to the pursuer (by reference to rule 53.1). The defender also maintains that what the pursuer seeks to do is to interdict him from access to the courts, which is not competent. The defender also argues that the pursuer's principal agent is acting in a conflict of interest and contends that it is for the court, in the exercise of its supervisory jurisdiction, to address this. Lastly, in his note

of argument, the defender sets out (over four pages) a number of averments which the defender maintains are irrelevant and ought not to be admitted to probation.

Submissions for pursuer

[10] Counsel for the pursuer adopted the note of argument lodged by him and made further submissions in support of it. Counsel invited the court to repel the defender's first, second and eighth pleas-in-law, and to remit the cause to proof in respect of all of the pursuer's averments.

[11] By way of general background, in addition to that set out above, the defender had applied for confirmation by application in Form C1, dated 4 April 2023. Confirmation was subsequently granted on 12 May 2023 in the names of the pursuer and the defender. The grant of confirmation, which is in the usual form, is incorporated into the pursuer's pleadings. For the purposes of the debate, the central averments of the pursuer are to be found in Articles 10; 16; and 18 of condescendence. Those averments can be summarised thus.

[12] The defender applied for confirmation qua executor-dative of Bashir Ahmed ("the deceased") without telling the pursuer. The application for confirmation proceeded on the basis that the deceased's estate included assets which are not within his estate which the defender knew or ought reasonably to have known having regard to his prior knowledge of the deceased's indebtedness to Habib Bank (Article 10).

[13] The defender did not discuss an application for confirmation with his co-executor, the pursuer. As at the date of submission of the confirmation form to Wick Sheriff Court there was no basis in fact for the defender's representation to the sheriff that the named executors intended to enter upon possession and management of the deceased's estate.

The property at 25 - 29 Grant Street, Wick did not belong to the deceased at the date of his death and should not have been included in the confirmation. Various other heritable properties which had formerly belonged to the deceased had been sold - which the defender knew or ought reasonably to have known. In his application for confirmation, the defender also signed a certificate that the information given to the court in the application for confirmation was "correct and complete". The application was not correct and complete. The deceased's estate consists solely of the heritable property at 34 Argyle Square, Wick. The sales of several properties were not brought to the court's attention. Confirmation was granted in the face of three material errors or omissions. Had the pursuer been given notice that the defender sought to expedite confirmation, the pursuer would have had a basis to oppose the application predicated on the defender's unsuitability to act in the office of executor. The defender's unsuitability to act as executor is evidenced by: (i) the defender's prior financial status; (ii) the consequential risk to the estate of the deceased on account of the defender's avowed intention to investigate matters in respect of which he is personally barred and which have prescribed, and given the limited means of the estate; and (iii) the defender unilaterally seeking to expedite confirmation based upon an erroneous inventory of estate (Article 16).

[14] As an executor, the defender would ordinarily be entitled to indemnification out of the funds of the estate for the costs of litigation brought in the name of the executry. The pursuer is reasonably apprehensive that the defender intends to embark qua executor upon litigation against family members and Habib Bank, directed towards challenging the dispositions of the properties which took place in the period 1998-2001. An email from the defender dated 22 May 2023 infers that he also intends to embark upon a course of conduct prejudicial to the security rights of a third party. The defender has also indicated

that his understanding is that certain heritable properties have been disposed of, become encumbered with certain securities and some have been rented out to third parties and that he intends to investigate each and every such transaction in order to secure the maximum return for the estate (Article 18).

[15] The process of confirmation is one of administration, see McLaren, “The Law of Wills and Succession” (3rd Edition, paragraph 1602). The effect of confirmation is to give executors a valid title to intromit with a deceased’s estate, see section 14(1) of the Succession (Scotland) Act 1964. A grant of confirmation is not automatic. An applicant requires to lodge the requisite form and make the appropriate declarations. The process allows an interested party to lodge a caveat, in order that they could oppose the grant of confirmation by lodging a note of objections.

[16] 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 MacGregor* 1935 SLT (Sh Ct) 6.

[17] Reduction is an equitable remedy. It is a remedy which can apply to a decree (which is the effect of confirmation), “in exceptional circumstances if reduction is necessary to produce substantial justice”, see *Bain v Hugh L S McConnell Ltd* 1991 SLT 691 per Lord Justice Clerk (Ross) at 695. Being an equitable remedy, the pursuer submitted that the court ought to hear evidence to consider all the relevant circumstances; and that the court ought not to refuse reduction without proof. The pursuer placed reliance upon the (albeit obiter) remarks of Lord McCluskey in *Cameron v Lighthouse* 1995 SC 341 at 351.

[18] The pursuer argued that there was an “intelligible purpose” to the current action (cf *Cameron v Lightheart*) as set out in the pursuer’s pleadings. Put shortly, the pursuer maintains that the defender acted unilaterally and made incorrect statements for which there was no basis; that the grant of confirmation contains material errors; that the defender has committed to a position which risks the executry estate; and the pursuer would wish to be put back into the position where he could oppose the grant of confirmation in favour of the defender. As there are matters in dispute between the parties, a proof would be required. The pursuer also made submissions in response to the arguments advanced by the defender. I consider these below.

Decision

Introduction

[19] In considering the arguments advanced by the defender, it is first necessary to stress the basis upon which a judge hearing a procedure roll debate must proceed. A party who challenges the sufficiency of his opponent’s case must, for the purposes of a procedure roll debate, accept as true the opponent’s averments of fact. Certain of the arguments advanced by the defender fail to recognise this. I proceed on the basis that the averments of the pursuer are true. The judge who hears the proof I will allow in this matter will determine whether or not those averments (and, indeed, the defender’s averments) are, in fact, true.

All parties not called

[20] The defender’s second plea-in-law is one of all parties not called. Neither the defender’s note of argument nor his oral submission at the procedure roll debate addressed

this, however, as the issue of all parties not called is one which is *pars judicis* (see *Connell v Ferguson* (1857) 19 D 482, per Lord Deas at 486 - 487) I require to address it.

[21] The plea of all parties not called can only be sustained if all parties have not been called whose appearance or failure to appear is necessary to have the question at issue effectively disposed of (see *Wilson v Independent Broadcasting Authority* 1979 SC 351, per Lord Ross at 356). The question at issue in the present proceedings is whether or not the confirmation applied for by one executor (ie the defender) without the knowledge of the other (ie the pursuer) and subsequently granted should be reduced. The defender's assertion, at answer 2, that all nine family members ought to be called is misconceived.

[22] As the pursuer rightly submitted, it was only the parties who have right to be confirmed. The heirs on intestacy have no title in respect of the subject matter of the current action.

[23] The second plea-in-law for the defender will be repelled.

Reduction of confirmation

[24] The defender presented a number of arguments in relation to reduction. Those can conveniently be considered under two headings. Firstly, whether reduction of confirmation is competent and, assuming it is, what legal requirements must be satisfied to do so. Secondly, has the pursuer pleaded a relevant case to support reduction.

[25] That the confirmation of an executor may be reduced is stated in Currie, "Confirmation of Executors" (9th Edition) at 19-96 and 19-97. The latter paragraph states in terms, but without reference to authority, that the ground on which confirmation of an executor may be reduced is that an averment in the inventory was false, before going on to provide three possible examples of such a challenge, none of which is relevant to the

circumstances of the present case. Authority is, however, cited in support of one example, that where there has been an error in the stated domicile of the deceased.

[26] In *Dowie v Barclay* (1871) 9 M 726, the error was in relation to the sheriffdom within which the deceased was domiciled. William Dowie died at Edinburgh, unmarried and intestate. Mrs Barclay, a niece of the deceased, presented a petition to the Commissary of Kinross-shire, stating *inter alia* that the deceased had, at the time of his death, his ordinary or principal domicile in the county of Kinross. No appearance being made or objections lodged, decree was pronounced in favour of the petitioner, and confirmation followed.

[27] Less than a month later, Alexander Dowie, the sole surviving brother of the deceased William Dowie, raised an action of reduction of the decree and confirmation, alleging that he was sole next of kin of the deceased at the time of his death; that the deceased had his domicile in the county of Edinburgh at the time of his death; that he, the pursuer, was not aware of the defender's proceedings in the Commissary Court of Kinross; and that he had presented a petition in the Commissary Court of Edinburgh, craving to be decerned executor-dative *qua* next of kin of the deceased.

[28] Following a proof in the Court of Session, the Lord Ordinary found that the title in favour of Mrs Barclay, which the petitioner sought to be reduced, was competently and validly expedite by her before the Commissary Court of Kinross. The ground of reduction alleged by the pursuer that the deceased was not domiciled in Kinross at the time of his death was a matter of fact depending on the evidence. The Lord Ordinary was satisfied that the domicile of the deceased was in Kinross. Two other grounds of reduction were advanced and failed. The first that the date of decree was written on an erasure and the second that Mrs Barclay was not one of the next of kin of the deceased. The petitioner reclaimed (appealed) unsuccessfully.

[29] In *Baines's Executor v Clark* 1957 SC 342, the error was in relation to the country the deceased was domiciled in. A testator, whose domicile was understood to be English, owned shares in certain Scottish companies. Accordingly his executor, after obtaining a grant of probate in England which bore that the testator had died domiciled in England, presented the probate for certification by the commissary clerk in Edinburgh under section 14 of the Confirmation of Executors (Scotland) Act 1858, and thereafter exhibited it to the companies concerned.

[30] Procedural difficulties subsequently arose when it was discovered that the testator had, in fact, died domiciled in Northern Ireland. The executor brought an action for the reduction and cancellation of the commissary clerk's certificate. Without issuing an opinion, the Lord Ordinary (Strachan) reduced the certificate and authorised the commissary clerk to cancel it.

[31] It will be observed that in neither *Dowie* nor *Baines's Executor* did the court reduce a grant of confirmation on grounds of domicile, although the decision in the latter might fairly be considered analogous to that. Whilst one of the unsuccessful challenges in *Dowie* was on the basis of an allegedly false averment as to domicile, the observations of the Lord President on this ground (at 727) are such that it might reasonably be inferred that had the Lord Ordinary found that the late Mr Dowie was domiciled in Edinburgh, the challenge would have been upheld and the decree and confirmation reduced.

[32] It may be that the absence of authority on this issue is unsurprising to executry practitioners. Nevertheless, it is clear that proceedings for reduction of confirmation have been raised before this court previously, and that no authority suggesting such proceedings were incompetent has been cited. What is clear, beyond peradventure, is that proceedings

for the reduction of decrees of inferior court may be competently brought in the Court of Session (see, for example, *Bain v Hugh L S McConnell Ltd* 1991 SLT 691).

[33] The availability of the remedy of reduction is essential in executry proceedings, the circumstances of the present case are a good example of why that is so. The position advanced by the defender is without merit. No other remedy is open to the pursuer. An appeal to the Sheriff Appeal Court is available in civil proceedings, not commissary proceedings.

[34] I turn then to consider whether the pursuer has pleaded a relevant case to support reduction. Firstly, there is no requirement to aver a miscarriage of justice (as argued by the defender). The requirement is to aver facts and circumstances which, if established, would entitle the court to grant the remedy sought.

[35] The facts and circumstances that are principally relied on by the pursuer are those set out in Articles 10; 16 and 18 of condescendence, as summarised above in paras [12] - [14]. If established, I am satisfied that the pursuer's averments are relevant to support reduction. Before doing so the court will require to make a judgment as to the equitable considerations that apply, however, that assessment is for another day. It must be stressed that the potential for alternative remedies (such as the removal of erroneously included estate by way of eik to the confirmation) will form part of such considerations.

Competency of interdict/suspension

[36] The defender's arguments in relation to the competency of both interdict and suspension are misconceived. The purpose of suspension is to stop unlawful conduct.

Rule 53.1 has no application to the present proceedings. The relevant chapter of the Rules of the Court of Session is chapter 60. Suspension is, in this case, the prelude to reduction

and it goes hand in hand with interdict. The anticipated wrong identified by the pursuer is the taking of steps in reliance of the confirmation which the pursuer seeks to reduce.

[37] As the fourth plea-in-law for the defender, in part, addresses the conclusions for suspension and interdict it is not appropriate to repel it, however, for the reasons set out above it is, in part, misconceived.

[38] The pursuer does not seek to exclude the defender from the courts by way of interdict. That argument is equally misconceived. The seventh and eighth pleas-in-law for the defender will be repelled.

Conflict of interest

[39] The defender avers (in answer 1) that

“the agents for the pursuer act for the pursuer as executor, whose job it is to ingather and distribute the estate but also act for two other beneficiaries who it is averred hold assets of the estate which they wish to keep and prevent being gathered in or who assert that they are entitled to keep such assets from the estate. Therefore the pursuer’s present solicitors and solicitor advocate cannot continue to act for any of the three persons they presently act for.”

The defender’s tenth plea-in-law is directed towards this argument.

[40] There are two points that require to be made in relation to this issue. First, for the reasons set out in para [19] above, at this stage the court must proceed on the basis that the pursuer’s averments are true. Albeit only by way of a general denial, the pursuer denies the averments set out in the preceding paragraph. On that basis alone, the court cannot deal with this matter at a procedure roll debate. Second, it is for a solicitor, not the court, to determine whether there is a conflict of interest. There may or not be a conflict between the interests of beneficiaries in due course, however, the remaining beneficiaries (outwith the parties) have no interest in the present proceedings.

[41] The argument advanced by the defender in support of his tenth plea-in-law is without merit and the plea is accordingly repelled.

Matters of relevancy

Introduction

[42] In his note of argument, the defender sets out a considerable number of averments which he maintains are irrelevant and ought not to be admitted to probation. In response to these assertions, the position of the pursuer was that all of his averments are relevant and suitable for inquiry, as they bear upon the necessity of the remedies sought. I consider each disputed averment in turn.

Article 3

[43] The defender argues that the averments of the pursuer relating to an appeal by Khazir Ahmed and Naceer Ahmed to the sheriff principal anent a purported will are irrelevant to the question of reduction and should not be admitted to probation.

[44] Other than by way of general background, these averments (some of which are a matter of admission) are of no import to the remedies sought by the pursuer. They do not bear upon the necessity of the remedies sought by the pursuer. I will refuse to admit them to probation.

Article 4

[45] The defender argues that the averments of the pursuer in this article “anent possible recovery procedure of the security holder have no bearing on the issue of reduction and should not be admitted to probation”.

[46] I do not accept that these averments are irrelevant. This article requires to be read in conjunction with Article 5 (in respect of which no challenge is made by the defender). The properties set out in the latter are those within the confirmation. I will allow probation in respect of these averments.

Article 6

[47] The defender argues that the averments of the pursuer in this article “anent the defender buying or not buying properties have no bearing on any reduction and should not be admitted to probation”.

[48] I do not accept that these averments are irrelevant. The defender’s alleged knowledge and participation in the sales of the properties is relevant. I will allow probation in respect of these averments.

Article 7

[49] The defender argues that the averments of the pursuer in this article are irrelevant. The pursuer avers that,

“Since the transactions between 1998 and 2001 referred to in the two preceding Articles, several of the properties which formed part of the deceased’s estate at his date of death and which were subsequently conveyed with the consent and concurrence of Habib Bank Limited, have been subsequently sold. Other properties have been used as heritable security”.

[50] Leaving aside a notable lack of specification (which the defender did not take issue with), other than by way of general background, these averments are of no import to the remedies sought by the pursuer. They do not bear upon the necessity of the remedies sought by the pursuer. I will refuse to admit them to probation.

Article 8

[51] The defender argues that the averments of the pursuer in this article are irrelevant.

The pursuer avers that,

“In or about May 2022 the Defender began communicating with the Pursuer. The Defender was at that stage seeking a payment based upon his share of Bashir Ahmed’s house at 34 Argyle Square.”

[52] I do not accept that these averments are irrelevant. The defender’s alleged request for funds prior to him allegedly applying for confirmation without the pursuer’s knowledge is relevant. I will allow probation in respect of these averments.

Article 9

[53] The defender argues that the averments of the pursuer in this article “anent the defender seeking to ingather papers have no bearing on any reduction and should not be admitted to probation”. There are no such averments in this article. I will allow probation in respect of this article.

Article 10

[54] The defender argues that the averments of the pursuer in this article are irrelevant.

The averments made in this article are summarised above at para [12].

[55] I do not accept that these averments are irrelevant. The defender’s answer to them suggests an acceptance of applying for confirmation without the pursuer’s knowledge. That is a central plank of the pursuer’s case and is relevant. I will allow probation in respect of these averments.

Articles 11 and 12

[56] The defender argues that the averments of the pursuer in these articles are irrelevant. In Article 11, the pursuer sets out the terms of an email sent by the pursuer to the defender shortly after the grant of confirmation. The email is referred to for its terms by the defender. Article 12 sets out the terms of an email the defender is said to have sent in reply.

[57] I do not accept that these averments are irrelevant. Whilst they may be said to plead evidence, the pursuer's response to learning that confirmation had been granted bears, as the pursuer argues, on the remedies sought (particularly interdict and interim interdict). The defender's response to that email is equally relevant. I will allow probation in respect of these averments.

Articles 13, 14 and 15

[58] The defender argues that the averments of the pursuer in these articles are irrelevant. In them, the pursuer makes averments in relation to an email sent by the defender to the pursuer (Article 13); a letter by the solicitors for the pursuer and two other family members to the defender (Article 14); and the response by solicitors for the defender (Article 15).

[59] These communications, in effect, are a continuation of the exchanges that are set out in Articles 11 and 12. Having admitted those earlier averments to probation, it is appropriate to admit these averments also.

Article 16

[60] The defender argues that a number of averments made by the pursuer in this article are irrelevant. They are not. The averments made in this article are summarised above at para [13].

[61] I do not accept that these averments are irrelevant. I refer to para [35] above. I will allow probation in respect of these averments.

Article 17

[62] The defender argues that a number of averments made by the pursuer in this article are irrelevant. They are not. They set out the basis upon which the pursuer seeks suspension. I will allow probation in respect of these averments.

Article 18

[63] The defender argues that a number of averments made by the pursuer in this article are irrelevant. The averments made in this article are summarised above at para [14].

[64] I do not accept that these averments are irrelevant. I refer to para [35] above. I will allow probation in respect of these averments.

Articles 19, 20 and 21

[65] The defender argues that the averments of the pursuer in these articles are irrelevant. They are not. They set out the basis upon which interim interdict and interim suspension ought to be granted. As set out above (see para [3]), interim orders have been granted in this case. I will allow probation in respect of these averments.

Disposal

[66] I will sustain the first plea-in-law for the defender to the extent of refusing to admit to probation Articles 3 and 7 of condescendence. I will repel the second, seventh, eighth and tenth pleas-in-law for the defender and allow parties a proof of their respective averments.

As they are not insisted upon, I will also repel the pursuer's fifth, sixth, seventh and eighth pleas-in-law. I will also repel the pursuer's second plea-in-law.

[67] The pursuer has been successful in all but two, minor, respects. The defender will be found liable to the pursuer in the expenses of the debate.