

**A Short Guide
to
DIVORCE
in the
SHERIFF COURT**

S. A. BENNETT



W. Green & Son

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in the
SHERIFF COURT**

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*To my parents
with gratitude*

FOREWORD

by

Sheriff Principal R.R. Taylor, Q.C., Ph.D.

THERE is a large field of practice and decision about divorce which is well known in the Parliament House, but with which the solicitor outside Edinburgh will be quite unfamiliar. In this practical Guide, Mr Bennett, who has experience of divorce practice in the Court of Session, passes on this accumulated lore and experience to the solicitors who will be dealing with divorce in the future. He explains how to use the amended ordinary cause rules in defended and undefended actions and how to deal with the many ancillary applications which arise in connection with financial provisions, custody of children, exclusion orders and the like. He gives examples of initial writs and affidavits in undefended actions. Of particular interest is the practical guidance which is given on how to calculate capital payments and periodical allowances.

In a few years it will all be very familiar to the practising sheriff court solicitor. At the inception of this new jurisdiction for the sheriff court, a lot of guidance is needed and it is exceedingly helpful to have the timely assistance of this book. Greens are publishing a consolidation of the ordinary cause rules with the amendments about divorce and, armed with that consolidation and the present book, the practitioner will have the basic information required for this new field.

Kirkcaldy
17 February 1984

R.R. Taylor

PREFACE

This book has had to be written without delay and I have been dependent on the goodwill of others in order to meet the deadlines. I have much pleasure in thanking the following: Mr David Williamson, W.S., Dr Alan Rodger, Advocate, and Miss Karen Bruce Lockart, W.S., all of whom read drafts of the text at short notice and made valuable suggestions for its improvement; Dr Robert Reed, Advocate, who kindly prepared the Tables of Cases and Statutes and the Index; Miss Iris Stewart of W. Green and Son Ltd, with whom it has been a pleasure to work; and, above all, my sister, Vivi Findlay, who typed endless drafts at great personal inconvenience and without whom this book would have been very much harder to write.

Edinburgh
31 January, 1984

S. A. B.

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INTRODUCTION

THE objective of this book is to provide practitioners with a convenient source of material for use in the practice of divorce in the sheriff court. Brevity has been the aim; selectivity therefore a necessity. Reference is made at appropriate points throughout this book to Dr Clive's recent fine work *The Law of Husband and Wife in Scotland* (2nd ed., 1982, W. Green & Son Ltd.), where further material may be located.

"Action of divorce on the ground of the irretrievable breakdown of the marriage as established by the defender's adultery" is abbreviated within these pages to "adultery case" (or "adultery action"). The other four "grounds" for divorce are similarly compressed. Any reference to a "rule" denotes an ordinary cause rule unless the context suggests otherwise. The convention of a female pursuer has been used throughout the book.

The reader is assumed to have a working knowledge of sheriff court practice generally.

(Note: regrettably, it has not been possible to include in this book the texts of all the Sheriffdoms' Practice Notes relating to affidavit evidence, only that issued for the Sheriffdom of Tayside, Central and Fife (see App. III) being available at the time of going to press. It should not be assumed that all six Practice Notes will be identical.)

CHAPTER 1

PROCEDURE PECULIAR TO DIVORCE¹

THERE are several ordinary cause rules which extend only to actions of divorce. Some of these rules are drawn to the attention of practitioners under the relevant subject heading (*e.g.* mental disorder). Others are mentioned in this chapter.

CITATION AND INTIMATION

Defender's whereabouts unknown^{1a}

Where the defender's whereabouts are unknown, the pursuer requires to:

- (a) provide to the sheriff clerk a certified copy of the instance and crave of the initial writ for display on the walls of court;² and
- (b) intimate the initial writ to each of the following (except where that person's whereabouts are unknown *and* there is an averment to that effect in the initial writ):³
 - (i) every child of the marriage between the parties who has reached the age of 12 years in the case of a girl and 14 years in the case of a boy;⁴ and
 - (ii) one of the defender's next-of-kin who has reached the above age.⁵

Citation by publication of an advertisement in the area of the defender's last known address is not applicable to actions of divorce.⁶

Additional spouses

In an action of divorce relating to a marriage which was entered into under a law which permits polygamy, where either party to the

¹ For the purpose of this chapter, except in relation to simplified procedure, "divorce" is taken to include, "separation and aliment."

^{1a} See also Chap. 2, n. 4; and Chap 3, n. 61 and accompanying texts.

² r. 11A(3).

³ r. 11A(2).

⁴ r. 11A(1)(i).

⁵ r. 11A(1)(ii).

⁶ r. 11(1).

marriage has any spouse additional to the other party, intimation of the action must be made to such additional spouse.⁷

PROOF

The requirement of proof

Decree in actions of divorce can only be pronounced after the ground of action has been proved, whether or not the action is defended. The reason for this has been said to be that:

"a decree in a consistorial cause may affect the status, not only of the parties to the action, but also of their children, and of other persons whom they may have purported to marry. It is the policy of the law, therefore, to prevent such a decree being obtained by agreement between the parties, on what may be improper or insufficient grounds."⁸

The effect on this policy of section 2 of the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 is considered *infra*.⁹

As a consequence of this requirement of proof, the rules make no provision for the sheriff to pronounce decree by default in a defended action of divorce (see rule 59(1)), unless, it would seem, none of the parties appears (r. 59(2)).

Affidavit procedure

Rules 23 and 72 provide for the use of affidavits¹⁰ (and medical reports¹¹) in place of parole evidence in actions of divorce. The appropriate Practice Note in relation to divorce affidavits should be consulted before affidavit evidence is presented to the court (see Introduction).

Such evidence may form the basis for the granting of decree, which may be sought (when all the relevant documentation¹² has been lodged) by endorsing a minute on the initial writ as follows:

⁷ r. 130(6).

⁸ Walker and Walker, *Law of Evidence in Scotland*, p. 166.

⁹ Chap. 3, n. 6.

¹⁰ "Affidavit" includes affirmation and statutory or other declaration; an affidavit is to be treated as admissible if it is duly emitted before a notary public or any other competent authority (r. 72(3)).

¹¹ Such a report must be in the form of a written statement bearing to be that of a duly qualified medical practitioner, which has been signed by him (r. 72(4)).

¹² Such documentation will comprise the affidavit(s), the parties' marriage certificate and the birth certificates of any children of or accepted into the marriage as well as any notice of consent or joint minute and any extract decree or conviction, photograph, medical report or other production relevant to the case. Each witness should docket the production relative to his or her evidence. The pursuer should identify the defender's signature on any document signed by him (e.g. joint minute, notice of consent).

“AB for the pursuer having considered the evidence contained in the affidavits and the other documents all as specified in the Schedule hereto and being satisfied that upon the evidence a motion for decree (in terms of the crave(s) of the initial writ) or (in such restricted terms as may be appropriate)¹³ may properly be made, moves the court accordingly.

In respect whereof

(Signed)

(designation)

SCHEDULE

(Number and specify documents considered).”

Where an action is undefended affidavit procedure is mandatory, unless the sheriff otherwise directs.¹⁴ The pursuer need not await the expiry of the period within which a notice of intention to defend or a minute under rule 34¹⁵ must be lodged before endorsing a minute for decree; the sheriff’s power to grant decree or other order in terms of the pursuer’s minute can however only be exercised after that period has expired.¹⁶ The sheriff may exercise such power or remit the cause for such other procedure, including proof by parole evidence, as he may deem appropriate, without requiring the appearance of any party before him.¹⁷

The pursuer will be able to take advantage of affidavit procedure, provided that the court so directs, if following the lodging of defences the action proceeds as undefended at a later stage.¹⁸ Affidavit procedure is also available, again provided that the court so directs, in relation to the merits alone, where the action is defended on ancillary matters only.¹⁹

The effect of mental disorder on affidavit procedure is noticed in Chapter 2.

¹³ Illustrations of “restricted terms” are as follows:

- (i) . . . for decree in terms of the first, third and fourth craves of the initial writ . . .
- (ii) . . . for decree in terms of the first and fourth craves and in terms of the joint minute no. 10 of process . . .
- (iii) . . . for decree in terms of the first and second craves, and, in relation to the third crave (for a periodical allowance) for the sum craved or for such other sum as the court thinks fit . . .

¹⁴ r. 23(2).

¹⁵ See Chap. 6, text accompanying n. 70 and Chap. 7, n. 26.

¹⁶ r. 72(5).

¹⁷ r. 23(3).

¹⁸ r. 23(1)(b).

¹⁹ r. 23(1)(c).

LATE APPEARANCE BY THE DEFENDER

It is not competent for the defender in an action of divorce to repone against decree in absence.²⁰ Provision is however made for him to appeal within 14 days against the interlocutor granting decree.²¹ Where the defender has not lodged a notice of intention to defend, he may nonetheless be allowed by the sheriff, subject to any condition deemed appropriate, to lodge defences at any time before decree is pronounced and appear and be heard at a proof.²² In the event that this power is exercised, the defender may only lead evidence with the pursuer's consent.²³

SIMPLIFIED PROCEDURE²⁴

Simplified divorce applications may only be made if it is the case that:

- (1) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the application and the other party consents to the granting of decree of divorce; or
- (2) there has been no cohabitation between the parties at any time during a continuous period of five years after the date of the marriage and immediately preceding the bringing of the application.

The application can proceed if, but only if:²⁵

- (i) in an application under head (1), the other party consents to decree of divorce being granted;
- (ii) there are no proceedings pending in any court which could have the effect of bringing the marriage to an end;

²⁰ r. 28.

²¹ r. 59A(4).

²² r. 59A(1); see also the First Division authority of *Stirton v. Stirton*, 1969 S.L.T. (Notes) 48 (very special circumstances required to justify the court in depriving a party of an opportunity to defend on a question involving status, e.g. the merits of an action of divorce); note further that if the defender is so allowed after the pursuer has led evidence, the pursuer is entitled to lead further evidence and recall witnesses whether or not her proof had by then closed — r. 59A(2).

²³ r. 59A(3).

²⁴ rr. 135-143 (and no other rules — r. 135(1)) apply to simplified procedure. Practitioners have no function to perform in the simplified procedure except insofar as they may be notaries public; it is mentioned here however for completeness.

²⁵ r. 135(2).

- (iii) there are no children of the marriage under the age of 16 years;
- (iv) neither party applies for an order for financial provision on divorce; and
- (v) neither party suffers from mental disorder within the meaning of the Mental Health (Scotland) Act 1960 (*i.e.* mental illness or mental deficiency, however caused or manifested).

If any of the above ceases to be the case, the application must be dismissed.²⁶

Applications may be opposed by way of a letter to the court giving reasons for the opposition.²⁷ Unless these reasons are frivolous, the application must be dismissed.²⁸ The defender may appeal against the granting of decree of divorce within 14 days of the date of the interlocutor by addressing a letter to the sheriff giving reasons for his appeal.²⁹

Applications subsequent to the granting of decree in respect of any matter may be made by minute in the original process in the event of a material change of circumstances of one or other or both of the parties.³⁰

²⁶ r. 135(3).

²⁷ r. 140(1).

²⁸ r. 140(2).

²⁹ r. 142.

³⁰ r. 143.

CHAPTER 2

MISCELLANEOUS TOPICS

RECONCILIATION

One of the primary aims of the Divorce (Scotland) Act 1976, according to its long title, is “to facilitate reconciliation of the parties in consistorial causes.”

Section 2 of the Act contains certain provisions for the encouragement of reconciliation between spouses. The court is empowered in appropriate cases to continue any pending action of divorce for such period as it thinks proper to enable attempts to be made to effect reconciliation (and any cohabitation during this period is disregarded for the purposes of that action).¹ This power has rarely been invoked in practice. Those provisions affecting the merits of divorce actions are discussed in Chapter 3.

Judging by the numbers of applications for divorce, this legislative policy seems to have failed. Practitioners have however been enjoined by a Court of Session Practice Note² to:

“try to identify, at as early a stage as possible, those cases in which the parties might benefit from the expert advice and guidance of a marriage counsellor, and in those cases [to] encourage the parties to seek such advice and guidance.”

PROOF OF MARRIAGE

In terms of rule 3(6)(a), a warrant for citation will not be granted unless there is produced with the initial writ an extract or certified copy of the marriage certificate.³ Where the defender's whereabouts are unknown, a recently extracted (or certified) copy certificate must be produced.⁴ The pursuer should in her evidence

¹ s. 2(1).

² March 11, 1977.

³ r. 3(6)(b) requires that an extract or certified copy of any birth certificate likewise be produced before such warrant will be granted.

identify the certificate as relating to her marriage to the defender.

In view of rule 3(6), difficulties arise where no documentation is available. The practice in the Court of Session has usually been to include in the divorce summons a conclusion for declarator of marriage and for evidence of the ceremony to be led from an appropriate source.⁵ It would seem to be desirable that this practice be followed in the sheriff court;⁶ the sheriff has however no jurisdiction to grant declarator of marriage.⁷

The complex theoretical law governing proof of marriages entered into outwith Scotland is comprehensively analysed by Clive.^{7a} Where in any Court of Session divorce action the fact of marriage is undisputed, the theoretical law has in practice been ignored, no doubt because it is appreciated that "There can be very little danger that the parties would fabricate a marriage and produce false documentation in order to have it dissolved by divorce."⁸

JURISDICTION

A sheriff court has jurisdiction by virtue of section 8(2) of the Domicile and Matrimonial Proceedings Act 1973⁹ to entertain an action for divorce if (and only if)

(a) either party to the marriage in question —

(i) is *domiciled* in Scotland at the date when the action is begun, or

⁴ This is designed to preclude the possibility of the court's entertaining an action of divorce by one spouse after a decree has already been granted in a previous divorce action by the other spouse (see 1950 S.L.T. (News) 11).

⁵ In *Lacy v. Lacy* (1869) 7 M.369, where the marriage was admitted, evidence from the clergyman who married the parties and reference by all the witnesses to the defender as "Mrs Lacy" was thought to be sufficient; more recently, evidence from the parties alone has in practice been sufficient.

⁶ r. 8(3) enables the writ to be presented to the sheriff for his consideration and signature if appropriate if for any reason the sheriff clerk refuses to sign a warrant. *Quaere* whether rule 1 (dispensing power of sheriff) entitles the sheriff to sign the warrant where rule 3(6) has not been complied with.

⁷ Sheriff Courts (Scotland) Act 1907, s. 5(1); *Quaere* whether sheriff court practice will prove sufficiently flexible not to require in the circumstances mentioned that an action of declarator of marriage be raised in the Court of Session as an essential preliminary to the sheriff court divorce action — see preceding footnote.

^{7a} pp. 486-494.

⁸ Clive, p. 486.

⁹ As amended by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983, Sched. 1, para. 18.