



SCOTTISH LAW COMMISSION

MEMORANDUM No: 18

**LIABILITY OF A PARAMOUR IN DAMAGES
FOR
ADULTERY AND ENTICEMENT OF A SPOUSE**

24 September 1974

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PART I

INTRODUCTION

1.1 The Scottish Law Commission considers in this Memorandum the liability of a paramour for damages for adultery, his associated liability for the expenses of an action of divorce on the ground of adultery under section 7 of the Conjugal Rights (Scotland) Amendment Act 1861,¹ and also the separate question of liability for the enticement of a spouse. We do not propose to consider at present the possible liability under Scots law for the enticement of a child. Such enticement raises different issues which are more appropriately considered in the context of the law relating to the custody of children. This Memorandum has been prepared as part of the Commission's family law programme, in accordance with Item 14 of our Second Programme of Law Reform.²

1.2 The matters with which this Memorandum is concerned have already been the subject of official investigation both in Scotland and in England. The law of England was examined by the Royal Commission on Divorce and Matrimonial Causes (the Gorell Commission) in 1912³ and later by the Royal Commission on Marriage and Divorce (the Morton Commission) in 1956⁴. The relevant recommendations, however,

¹ 24 & 25 Vict., c.86.

² Scot. Law Com. No.8 (1968).

³ Report of the Royal Commission on Divorce and Matrimonial Causes, 1912, Cmd. 6478.

⁴ Report of the Royal Commission on Marriage and Divorce, 1956, Cmd. 9678.

of the two Commissions were not implemented. The Law Commission invited views on these questions in 1967 when they circulated their Working Paper No.9¹. In their subsequent Report,² they recommended the abolition of actions of damages for adultery and actions for the enticement, seduction and harbouring of a spouse and child³. These recommendations were implemented by the Law Reform (Miscellaneous Provisions) Act 1970⁴.

1.3 The Morton Commission also considered the Scottish aspects of the matters with which this Memorandum is presently concerned⁵. The view was taken that the existing remedies open to a husband should be extended to a wife, and that other minor alterations should be made to the law. These recommendations, like the corresponding recommendations for England, were not implemented. The subsequent abolition, however, in England of actions of damages for adultery and enticement makes it appropriate to consider the question whether such actions should remain competent in Scotland. We have reached no concluded views on that question though we believe that, if those actions are to remain competent, a number of changes in the existing law would be desirable. The purpose of this Memorandum is to set out the reasons

¹ See paragraphs 108, and 128 to 142.

² Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, at paragraphs 99 to 107.

³ Paragraph 102.

⁴ 1970, c.33. For the Parliamentary consideration of these issues, see 799 H.C. Deb. (Fifth Series) cols. 891 to 912 and 930 to 934; and 309 H.L. Deb. (Fifth Series) cols. 1001 to 1009.

⁵ Report of the Royal Commission on Marriage and Divorce, 1956, Cmd. 9678, paragraphs 436, 437, 448 to 452, 463 and 464.

which led us to these tentative conclusions. The Commission would welcome comments, which should be submitted before 1st January, 1975 to Mr D E Fisher, Scottish Law Commission, Old College, South Bridge, Edinburgh EH8 9BD.

PART II

DAMAGES FOR ADULTERY AND ASSOCIATED LIABILITY FOR EXPENSES

1. Background to the present law.

2.1 The history of the development in Scots law of actions of damages for adultery and for the enticement of a spouse has not to our knowledge been the subject of detailed investigation. While it would not be appropriate to enter into great historical detail in this Memorandum, it seems desirable to place the present law in perspective by referring to certain features of that history.

2.2 It is important, in the first place, to recall that from 1563 until 1830 jurisdiction in consistorial actions, including actions of divorce and separation, was exercised by the Commissary Courts. There was some hesitation, however, on the part of all concerned to name the paramour since adultery was a crime, in theory attracting the death penalty and in practice leading to the escheat of the guilty person's estate to the crown. There was a gradual departure, therefore, noticed by Lord Hermand¹, from the practice of naming the paramour and the Commissary Court rejected the contention that a libel was incompetent where the paramour was unnamed². In this situation claims for damages for adultery were likely to have been settled

¹ Consistorial Decisions, 1684-1777, (Stair Society, Vol.VI), pp.46-47.

² Ibid., pp.47-48.

extra-judicially. Whether the Commissary Court would have been a competent court to entertain such a claim is doubtful. A passage in Lothian suggests that such a claim may have been competent when presented along with a conclusion for divorce on the ground of adultery¹, but there is no evidence of this in the reported cases.

2.3 The first recorded action of damages by a husband against his wife's paramour for adultery is the case of Steedman v. Coupar², raised in the Court of Session in 1743. Though such an action was said by the defender to be "quite new and unprecedented", the pursuer, whose authorities related to iniuria, claimed that such actions, though not frequent, were well-founded. The Court found the libel proved and, though the basis of the judgment is not clear, the Court remitted to the Lord Ordinary to report on the expenses of the process of divorce and the pursuer to condescend upon the loss sustained to his trade and business. In two subsequent cases the Court of Session admitted to proof claims for damages for adultery in the absence of a divorce, but the grounds for these decisions do not appear from the reports³. When trial by jury in civil causes was instituted in Scotland in 1815⁴ actions of damages "on

¹ The Laws, Practice and Styles peculiar to the Consistorial Actions transferred to the Court of Session (1830), p.91.

² (1743) M.7337; Kilkerran, 484; Elchies, tit. Adultery, No.1; also sub nom. Stedman v. Stedman (1743) M.13909.

³ Maxwell v. Montgomery (1787) M.13919 and Paterson v. Bone (1803) M.13920.

⁴ Jury Trials (Scotland) Act 1815.

account of breach of the promise of marriage, seduction or adultery" were remitted to the Jury Court. This was tantamount to a statutory confirmation of the existence of these rights of action, and they soon began to be heard by that Court¹. Its decisions make it clear that the expenses of the action of divorce were awarded but suggest that wider claims for pecuniary loss were also competent. Baron Hume contemporaneously expressed the view that "damages have, however, been given purely in solatium".² The Jury Court was abolished in 1830 and its jurisdiction transferred to the Court of Session where causes formerly appropriated to the Jury Court were henceforth tried by jury before the Lords Ordinary³. In the period which followed up to 1861 only one further case is reported of an action of damages for adultery⁴. That case throws little light on the basis of the action but the damages laid were considerably higher than any conceivable expenses of the action of divorce. All these actions were actions by a husband against his wife's paramour. There are no reported cases of a married woman claiming damages from her husband's paramour. She could hardly have done so during the course of the marriage since, until the passing of the Married Women's Property (Scotland)

¹ Kirk v. Guthrie (1817) 1 Murray 271; Baillie v. Bryson (1818) 1 Murray 317.

² Lectures, 1786-1822, Vol.III, (Stair Society, Vol.XV), pp.130 and 131, citing Ker v. Renton, 24 May 1972.

³ Court of Session Act 1830, s.2.

⁴ Glover v. Samson (1856) 18 D.609.

Act 1881, the damages would have passed automatically to the husband, who would then have profited from his own wrong.

2.4 The next relevant development was the introduction of divorce into English law by the Divorce and Matrimonial Causes Act 1857 and the simultaneous abolition by that Act of the action for criminal conversation.¹ The 1857 Act enabled the husband in an action for divorce or judicial separation to "claim damages from any person on the ground of his having committed adultery with the wife of such petitioner"² and permitted the court to order the adulterer to pay the whole or any part of the costs of the proceedings³. Provisions of a similar kind were enacted for Scotland by the Conjugal Rights (Scotland) Amendment Act 1861. Section 7 provides:

"In every action of divorce for adultery at the instance of the husband it shall be competent to cite, either at the commencement or during the dependence thereof, as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it should be lawful for the court in such action to decern against the person with whom the wife is proved to have committed adultery for the payment of the whole

¹ s.59.

² s.33.

³ s.34.

or any part of the expenses of process, provided he has been cited as aforesaid, and the same shall be taxed as between agent and client: provided always, that it shall be competent to examine the person with whom the wife is said to have committed adultery as a witness in the cause, notwithstanding he is called as a co-defender in the action, and in the power of the court, on cause shown, to dismiss such action as regards such co-defender, if in their opinion such a course is conducive to the justice of the case".

2.5 The Parliamentary proceedings concerning the Act do not disclose the policy informing this provision¹. In Fraser v. Fraser and Hibbert², however, Lord President Inglis and the other members of his court took the view that the object of the Conjugal Rights Act was not to create a jurisdiction which had not previously existed but merely to enable the pursuer to call and cite the alleged paramour as a co-defender in the divorce proceedings. This view is confirmed by the extra-judicial remarks of Lord Fraser³: "To be able to call the co-defender was a new and valuable privilege given to a wronged husband, who could in this

¹ See 159 Parl. Deb. (Third Series) col.2020 (H.L.); 160 Parl. Deb. (Third Series) col.179 (H.L.); 164 Parl. Deb. (Third Series) cols.292, 792 and 1520 (H.C.) and cols. 1452, 1783 and 1835 (H.L.).

² (1870) 8 M.400.

³ Husband and Wife, (2nd. ed., 1878), Vol.2, p.1147.

easy way, and without the trouble and risk of a second action against the particeps criminis, make him liable for the costs of the divorce." Lord Fraser is understood to have been the promoter and draftsman of the Act of 1861. It is suggested, therefore, that the purpose of section 7 of the 1861 Act was similar to that of the corresponding provisions of the English Act of 1857, namely to render it competent to claim expenses against the paramour in the action of divorce rather than in a separate action.¹

2.6 Section 7 of the 1861 Act presents a number of problems. Although the 1861 Act refers to "expenses" it is clear that the basis on which the expenses are paid by the paramour differs from the ordinary basis of liability for expenses. They are not due, as in the ordinary case, because the co-defender has intervened of his own volition and impeded the pursuer in the vindication of his rights. On the contrary, the co-defender may have been cited by the pursuer and may have entered no defences. The expenses are due in terms of the statute, but not on the principles of law usually applicable to expenses. It can only be supposed that the legislature intended them to be paid as a species of compensation to the pursuer for one of the losses which he suffered directly in consequence of the co-defender's act. Lord Anderson has spoken of the co-defender being "penalised

¹ Thomson v. Thomson and Another, 1907, 14 SLT 643, per Lord Salvesen at p.646; Murray v. Murray and Tattersall 1944 SLT 46 per Lord Keith at p.47.

either in damages or expenses - the latter being really a form of damages"¹ - a view which has been assumed to be correct in subsequent cases². In entire conformity with this view the expenses are required to be paid on an agent and client basis and, as is explained in detail later in this Memorandum, they are payable even when the co-defender has not by his conduct in his divorce action increased the pursuer's costs by defending or by the nature of his defence³. Equally, the factors regarded by the court as relevant to exclude or reduce liability for expenses are those relevant to exclude or reduce liability for damages⁴.

2.7 Although the 1861 Act refers only to the expenses of process, by a course of development whose details are not clear the Court of Session became accustomed in actions of divorce for adultery to entertain conclusions not merely for the expenses of the action of divorce but for general damages and solatium⁵. Separate actions of damages, therefore, became rare but not unknown.

¹ Heggie v. Heggie 1917, 2 SLT 246 at p.247.

² Sleigh v. Sleigh and Allison 1951 SLT (Notes) 57 per Lord Guthrie at p.58; Forrester v. Forrester and Exton 1963 SC 662 per Lord Johnston at p.663.

³ Fairgrieve v. Chalmers 1912 SC 745; A v. B and C 1922 SLT 392; Hutchison v. Hutchison and Another 1962 SLT (Notes) 11.

⁴ See below pp.14-15, and pp.24-25.

⁵ Forms of Process in the Court of Session, 1886.

2. The action of damages for adultery.

(a) Basis of action.

2.8 The modern action of damages for adultery is founded not upon the seduction of the wife, but the fact of sexual intercourse with her. It has been put thus:

"It is plain that the real injury done to the husband was not that his wife had been subjected to seductive arts, but that the seducer attained his purpose".¹

The action is competent whether or not the wife is a consenting party.²

2.9 To agree that the factual basis of the action is the act of adultery does not greatly assist in determining the legal foundation of the husband's claim for damages. According to Fraser³ the basis of the action was a "matter of some controversy":

"It is contended, on the one hand, that the damages are granted to the wife for the loss of the society of his wife, and, on the other, that the claim is for the loss of the wife's services, not her society. Perhaps the law is based on a combination of different reasons. The injury to the husband in the dishonour of his bed, the

¹ Black v. Duncan 1924 S.C. 738 at p.747.

² A v. B and C 1922 SLT 392; Hutchison v. Hutchison and Another 1962 SLT (Notes) 11.

³ Husband and Wife, Vol.2, p.1203.

alienation of his wife's affections, the destruction of his domestic comfort and the suspicion cast upon the legitimacy of her offspring, are wrongs for which redress should be given. It is a trite observation, that such a loss does not admit of any pecuniary estimate or compensation; but if damages be not an adequate retribution, they constitute the only one which the law can award; and the impossibility of giving full redress is a bad reason for giving none, and for depriving morality of one of its safeguards."

Fraser concluded that the elements in the claim for damages were "the expenses of a process of divorce, and the patrimonial damages he has sustained by the loss of his wife, as in managing his business, together with a sum for solatium".¹ Damages, however, are allowable where the husband has not obtained and does not propose to obtain a decree of divorce². In such cases, clearly, the central element in the claim for damages is simply a claim for solatium.

(b) Causal connection.

2.10 The delictual basis of the law makes relevant questions of causation and foresight. The court considers

¹ Ibid. p.1204.

² Maxwell v. Montgomery (1787) Mor. 13919; Paterson v. Bone (1803) Mor. 13920; Macdonald v. Macdonald (1885) 12 R. 1327.

where the responsibility for the husband's loss really lies.

Lord Anderson remarked:

"It seems to me as a point of law that if damages are claimed against a co-defender on the ground that he had seduced a wife from her husband and deprived the husband of the wife's society, it would be a complete answer to such a claim if it could be shown that it was the husband's conduct which compelled the wife to leave her home and cease associating with him."¹

He also pointed out that, where the husband was partially to blame, a reduced award of damages would be appropriate.

(c) Knowledge.

2.11 It follows from the delictual basis of the action that the paramour is held liable in damages to the pursuer only where he knew, or had reasonable cause to know, that the woman with whom he had sexual intercourse was a married woman.² This rule is well-established in relation to liability for expenses³ and, in the context of such liability,

Lord Anderson has remarked:

"... it is essential that before a co-defender can be penalised either in damages or in expenses - the latter being really a form of damages - it

¹ A v. B and C 1922 SLT 392 at p.393.

² See Walker, Delict, Vol.II, p.717.

³ Miller v. Simpson (1863) 2 M.225; Laurie v. Laurie 1913, 1 SLT 117; Heggie v. Heggie 1917, 2 SLT 246; Forrester v. Forrester and Exton 1963 S.C. 662.

must be established that he was aware when he was misconducting himself with the woman that she was a married woman. The underlying principle whereby the court penalises a co-defender either in damages or expenses is just this - that he knew when he was having connection with the woman that he was probably wronging a husband and it is just because of the wrong which the court holds that a husband suffers when his wife is seduced by a co-defender that a penalty is imposed by the court on the co-defender for that wrong."¹

The onus, however, of establishing that the paramour knew, or had reasonable cause to know, that the woman was married is thought to rest on the husband.²

(d) Defences.

2.12 There is probably no necessary connection between the bars to an action of divorce and the defences to an action of damages for adultery. The fact that the husband has condoned the adultery is not by itself a bar to a claim for damages, though it may diminish or exclude the claim for damages for loss of society.³ The rather special defence of lenocinium in the action of divorce would itself appear irrelevant, though in cases where it was

¹ Heggie v. Heggie, *supra*, at p.247 approved by Lord Johnston (Ordinary) in Forrester v. Forrester and Exton, *supra* at p.663.

² Forrester v. Forrester and Exton, *supra*.

³ Collins v. Collins (1882) 10 R.250 at p.258; Macdonald v. Macdonald (1885) 12 R.1327.

justified in the consistorial conclusion the defence of volenti non fit injuria is likely to be relevant to the conclusion for damages.¹

(e) Quantum of damages.

2.13 In calculating the amount of the damages, the relative blameworthiness of the parties is material.

Lord Anderson has remarked:

"I have reached the conclusion, as a matter of law, that the proper effect which the conduct of a husband who is partially to blame for his wife's fall has upon this question of damages is that it must be taken into account by way of diminishing or mitigating the damages which the co-defender has to pay. In other words, the pursuer must himself bear some portion of blame, and it affects him in the shape of a reduced award of damages."²

Damages may be reduced where it is clear that the husband's feelings are unlikely to have been injured by the conduct of the paramour.³ While the fact of seduction is not the basis of the action, damages may be increased where the co-defender has practised seductive arts, in particular the abuse of a position of authority.⁴ Damages may also be

¹ See Macdonald v. Macdonald (1885) 12 R.1327, per Lord Young at p.1329.

² A v. B and C 1922 SLT 392 at p.394.

³ Cf. Thain v. Thain 1948 SLT (Notes) 89, where the spouses had lived apart for some sixteen years.

⁴ Baillie v. Bryson (1818) 1 Murray 317; Fraser, Husband and Wife, Vol.2, p.1204.

increased where the conduct of the co-defender amounts to or verges upon rape.¹ On the other hand, though the consent of the wife is not a bar to the action, damages may be reduced by reason of the disposition or character of the wife or by reason of the husband's lack of affection for her or his misconduct with other women.²

(f) Procedure.

2.14 In current practice the claim for damages is usually made by a conclusion in the summons of divorce, because in this case one proof suffices both for the consistorial and for the delictual claim.³ It is equally competent to raise a substantive action of damages. This will be necessary where the husband condones his wife's adultery and does not propose to seek a divorce.⁴ Before 1861, actions of damages were necessarily separate and were usually initiated after the decrees of divorce. This procedure is thought to remain competent and may be necessary in cases where at the time of the divorce proceedings the Court of Session lacked jurisdiction over the paramour.

2.15 Actions of damages for adultery are "enumerated causes" in terms of section 28 of the Court of Session Act

¹ Black v. Duncan 1924 S.C. 738.

² Sievwright v. Sievwright (1949) CLY. 4514; Hutchison v. Hutchison and Another 1962 SLT. (Notes) 11; Miller v. Simpson (1863) 2 M.225.

³ See, for example, Fairgrieve v. Chalmers 1912 S.C. 745; A v. B and C 1922 SLT. 392; Hutchison v. Hutchison and Another 1962 SLT. (Notes) 11.

⁴ Macdonald v. Macdonald (1885) 12 R.1327.

1825 as read with section 49 of the Court of Session Act 1850. They are, therefore, appropriate for jury trial, though subject to the power of the court in terms of section 4 of the Evidence (Scotland) Act 1866, if both parties consent or if special cause is shown, to order a proof. Where damages are sought by way of a separate conclusion in the divorce action, their amount is in practice determined by proof before the Lord Ordinary: jury trial is a live issue only where a separate action of damages is raised. The Strachan Committee in their Report on Civil Jury Trial in Scotland¹ did not make special reference to actions of damages for adultery. The effect, however, of their recommendations would be to remove such actions from the list of "enumerated causes".

(g) Jurisdiction.

2.16 There are no reported cases in which the jurisdiction of the Scottish courts to make an award of damages for adultery was directly at issue. Before liability to pay damages for adultery was abolished in England², the weight of authority in that country favoured the view that a judgment for damages against a co-respondent was not ancillary to a decree of divorce and that the appropriate grounds of jurisdiction were those in personal actions.³

¹ Cmnd. 851 (1959).

² Law Reform (Miscellaneous Provisions) Act 1970, s.4.

³ Dicey and Morris, The Conflict of Laws, 9th.edn., p.330; Rayment v. Rayment and Stuart [1910] P.271; Rush v. Rush, Bailey and Pimenta [1920] P.242; Jacobs v. Jacobs and Green [1950] P.146.

It seems reasonably clear that the Scottish Courts would adopt the same approach and apply the ordinary grounds of jurisdiction in personal actions.¹ In Pollock v. Pollock² the provisions of the Law Reform (Jurisdiction in Delict) (Scotland) Act 1973 were applied to a conclusion for expenses under section 7 of the Conjugal Rights (Scotland) Act 1861 in an action of divorce. These provisions would seem to apply a fortiori to an independent action of damages.

¹ There is only indirect authority for this proposition. In Jacobs v. Jacobs and Green [1950] P.146 Pilcher J. referred to the unreported English case of Bell v. Bell and Cooke. (The Times, June 10, 1932) as follows: "Lord Merrivale, P., granted to a petitioner with a Scottish domicile an award of damages against a co-respondent. The petitioner had obtained a decree nisi (sic) on the ground of his wife's adultery in Scotland; he claimed damages against the co-respondent, an Englishman domiciled in England. The co-respondent in the Scottish court pleaded that the Scottish court had no jurisdiction to entertain a claim for damages against any person not domiciled in Scotland, and the Scottish court dismissed the claim for damages for lack of jurisdiction. The husband accordingly brought his claim in this country".

² 1973 SLT. (Notes) 66.

3. The pursuer's claim for expenses against the co-defender.

(a) Basis of award.

2.17 We have seen that the 1861 Act conferred no new substantive right upon the pursuer in an action of divorce: it merely enabled him to obtain decree against the co-defender for the expenses of the action of divorce in that action. This, as Lord Fraser pointed out, saved him the trouble and risk of a second action.¹ In practice the Court of Session in considering claims for expenses applied similar principles to those which it evolved in the context of the general claim for damages. This is understandable since, notwithstanding the fact that the 1861 Act is limited to claim for expenses, the Court henceforth entertained claims for damages and solatium as well as for expenses in the course of the divorce action.²

2.18 The conceptual basis of the award of expenses is similar, therefore, to that of the award of damages, namely, the fact that the co-defender by committing adultery with the pursuer's wife has caused loss to the pursuer, in this

¹ Husband and Wife, Vol.2, p.1147.

² In the Forms of Process in the Court of Session, 1886, the following entry appears:

Summons of Divorce for Adultery at instance of husband, with conclusion for damages against the Co-Defender

"... And the said C ought and should be decerned and ordained, by decree of our said Lords, to make payment to the pursuer of £ in name of damages and solatium. And the said C (and if his wife have a separate estate the said B and C) ought and should be decerned and ordained conjunctly and severally to make payment to the pursuer of the sum of £ as expenses of the process, to follow hereon, conform to the laws and daily practice of Scotland."

case the expenses of the action of divorce. Lord Guthrie has explained: "The reason is that the adultery of the co-defender has caused damage to the pursuer, whose loss includes the expenses for the action of divorce caused by the co-defender's adultery."¹ The basis of liability, therefore, is quite different from that of an ordinary award of expenses: they may be awarded even where the co-defender has not by his conduct in the course of the action increased or affected in any way the expenses incurred by the pursuer. Expenses, as we have explained, may be awarded where the co-defender lodges defences but makes no further appearance and even where he does not enter appearance or lodge defences.²

(b) Factors excluding liability.

2.19 The foundation of the award being the commission of a delict, principles similar to those evolved in the general action of damages for adultery apply. The conduct either of the pursuer or of the defender is relevant on general principles, but these principles are re-inforced by the power conferred on the Court by section 7 of the 1861 Act "on cause shown, to dismiss such actions as regards such co-defender, if in their opinion such a course is conducive to the justice of the case". This power was exercised in

¹ Sleigh v. Sleigh and Allison 1951 SLT (Notes) at p.58. Cf. Morrison v. Morrison and Another 1970 SLT 116. Pollock v. Pollock 1973 SLT (Notes) 66, discussed below, clearly proceeds on the same assumption.

² Kirk v. Kirk (1875) 3 R.128; Sleigh v. Sleigh and Allison 1951 SLT (Notes) 57.

Miller v. Simpson¹, where the status of the marriage between the pursuer and defender was not clear and where there were averments that the defender had "given herself up to habits of intemperance and dissipation". In McVey v. McVey² the pursuer brought an action of divorce for adultery against his wife, with a conclusion against the co-defender for expenses but not for damages. The Lord Ordinary refused to make an award of expenses since it appeared that the pursuer had no interest in the matter other than a desire to obtain a divorce so as to emigrate as a single man from Scotland, that he had taken no interest in his wife or the children of the marriage for the past 14 years, and that he had delayed raising the action of divorce for over eight years: "For a man to stand by for so long a period as this pursuer stood by is, I think, tantamount to his admission that he really felt that he had not suffered any great injury at the hands of the co-defender."

2.20 In conformity with the delictual basis of the claim, it must normally be established that at the time of the intercourse the co-defender knew or had reasonable cause to know that the woman in question was married. In Laurie v. Laurie³, where no evidence was led to show that at the time

¹ (1863) 2 M.225. In Kelly v. Kelly 1953 SLT 284 (discussed below at p.25) Lord Guthrie stated that he would have been prepared, if it had been necessary, to utilise this power to dismiss the action against the co-defender's executors.

² 1914, 1 SLT 370.

³ 1913, 1 SLT 117.

of the adultery the co-defender was aware that the defender was a married woman, a motion for expenses by the pursuer was refused. In Kydd v. Kydd¹, decided shortly after the 1861 Act, the Lord Ordinary held that, though it was for the pursuer to establish such knowledge, no special averment of knowledge was required. A different view, however, was taken in the English case of Teagle v. Teagle², approved, following extra-judicial remarks of Lord Fraser³, in Scottish cases⁴ and incorporated in a former Rule of Court⁵. Teagle v. Teagle, however, was disapproved by Sir Henry Duke in Butterworth v. Butterworth⁶, and the current Rules of the Court of Session contain no such requirement, although it is understood that in practice it is usual to make such an averment when expenses are concluded for against a co-defender. In any event it is thought that the pursuer must undertake the onus of proving that the co-defender knew or had reasonable cause to know that the defender was a married woman⁷. In Forrester v. Forrester and Exton⁸ Lord Johnston refused the pursuer's motion for expenses on the

¹ (1864) 2 M.1074.

² (1858) 1 Sw. and Tr. 188.

³ Husband and Wife, Vol.2, p.1234.

⁴ Laurie v. Laurie 1913, 1 SLT, 117; Heggie v. Heggie 1917, 2 SLT, 246.

⁵ Rule 172(b).

⁶ [1920] P.126; Jackson v. Jackson and Parry [1960] 3 All. ER. 621.

⁷ Forrester v. Forrester and Exton 1963 SC. 662 per Lord Johnston at pp.663-664.

⁸ Supra.

ground that it was not proved that the co-defender knew that the defender was a married woman. He added the rider that "there may be cases where it would be proper to award expenses against a co-defender, even though it was not proved that he knew that the defender was a married woman. For example, it might, in a defended case, be proper to award expenses against a co-defender because of the manner in which he conducted his case". In this situation, however, the expenses are clearly awarded on the ordinary principles governing expenses in Scots law and practice and not upon the special grounds applicable under the 1861 Act.

(c) Nature of expenses.

2.21 Under section 7 of the 1861 Act the Court is empowered "to decern against the person with whom the wife is proved to have committed adultery for the payment of the whole or any part of the expenses of the process". The "expenses of process" include not only the expenses incurred by the pursuer, but also the expenses of the defender which, on the ordinary principles governing expenses in consistorial actions, the pursuer may be liable.¹ In cases where the wife has separate estate, expenses may be awarded jointly and severally against the defender and co-defender.² The fact that the co-defender has already been

¹ Andrews v. Andrews (1873) 11 M.401.

² Froebel v. Froebel (1884) 22 SLR. 22.

found liable to the pursuer in damages is not a bar to an award of expenses against him.¹ The "expenses of process" include reasonable expenditure prior to the action including expenditure on preliminary investigations². Where, on the other hand, a paramour is not cited as a co-defender in terms of section 7 of the 1861 Act, but sists himself as a party-minuter in the action he is liable only for the expenses occasioned to the pursuer by his own unsuccessful appearance in the process³. Ordinary expenses of process may be awarded even against a successful co-defender, as where a co-defender, by refusing to deliver up certain letters from the defender, caused the action to be raised.⁴

(d) Discretion to reduce award.

2.22 The court has a discretion to award "the whole or any part of the expenses of process". While this is a discretion appropriate to ordinary awards of expenses, it is somewhat anomalous in respect of expenses which are essentially a species of damages. It may be for this reason that, although there are a number of cases, discussed above, in which the claim against the co-defender has been dismissed by reason of the conduct of the pursuer or his wife under the power conferred upon the court "when such a course is conducive to the justice of the case",

¹ Fairgrieve v. Chalmers 1912 S.C. 745.

² Stair v. Stair 1905, 13 SLT. 446.

³ Murray v. Murray and Another 1944 SLT. 46.

⁴ Collins v. Collins and Eayres (1882) 10 R.250.

there are no reported cases stating the principles upon which only a part of the expenses of process are awarded. In practice, where the action is competent the whole expenses are awarded. These, in terms of section 7, are taxed on an agent and client basis.

(e) Liability of representatives of deceased co-defender.

2.23 In Kelly v. Kelly¹, when the cause was enrolled for an allowance of proof before answer, the summons was amended by the deletion of a conclusion for expenses against the co-defender. Subsequently the co-defender died and the pursuer sought leave to add a new conclusion "for expenses against the co-defender", and craved warrant to serve the summons upon the deceased co-defender's executrix and to transfer the cause against her in terms of section 96 of the Court of Session Act 1868. Lord Guthrie, as Lord Ordinary, refused these motions on the grounds (1) that section 7 of the (Scotland) 1861 Act did not authorise the citation of, or a decree for expenses against, the representatives of a deceased adulterer; and (2) that there was no process before the Court to which the deceased was a party at the time of his death and therefore no action capable of transference. It is thought, however, that nothing in this decision would have precluded the pursuer

¹ 1953 SLT. 284.

from raising a fresh action of damages (excluding any element of solatium) against the executors of the deceased co-defender, in accordance with the general rule that the liability of a wrongdoer may transmit against his executors from his estate.

(f) Jurisdiction.

2.24 The question has arisen whether section 7 of the 1861 Act confers upon the Court of Session jurisdiction to make an award of expenses against a co-defender not otherwise subject to the jurisdiction. In Fraser v. Fraser and Hibbert the pursuer argued that this section, by empowering the Court to decern against the co-defender for expenses by implication subjected him to the jurisdiction. This argument was rejected, for reasons most fully stated by Lord Ardmillan²:

"I am of opinion that the Conjugal Rights Act does not create any jurisdiction in this court. It merely empowers a party suing in this court to call as a co-defender one who is alleged to have committed adultery with the wife of the pursuer, with the view of having him found liable in expenses. But this is merely the conferring of a power of citation, and not the

¹ (1870) 8 M.400.

² At p.405.

creation or extension of jurisdiction. In the second place it must be kept in mind that the action as against the co-defender is not an action affecting his status, but an action to enforce a liability in expenses arising out of his delict. He is not concerned with the conclusions of this action except as regards his liability for expenses arising from the alleged delict committed in Scotland."

It was held, however, that the co-defender, though resident in England, was subject to the jurisdiction by virtue of his tenancy of shootings in Scotland. This decision was followed in Thomson v. Thomson¹ where though the adultery took place in Scotland, Lord Moncrieff held that he had no jurisdiction, following a decree of divorce on the ground of adultery, to find the wife and the co-defender liable in expenses, since they both then resided in New Zealand. The question of jurisdiction was recently discussed in Pollock v. Pollock² where the co-defender was neither resident in Scotland nor otherwise subject to the jurisdiction in personal actions. The adultery founded upon, however, had been committed in Scotland and Lord Macraig held that he had jurisdiction to find the co-defender liable for the expenses of the action on the view

1935 SLT 24.

1973 SLT (Notes) 66.

that the adultery amounted to the commission of a delict, and that section 1(1) of the Law Reform (Jurisdiction in Delict) Act 1973, in consequence, applied.

(g) Legal aid.

2.25 Where the co-defender in an action of divorce for adultery with a conclusion for expenses is a person entitled to legal aid, special problems arise. Section 2(6)(e) of the Legal Aid (Scotland) Act 1967¹ provides that the liability of a person receiving legal aid by virtue of an award of expenses against him with respect to the proceedings shall not exceed the amount which in the opinion of the Court making the award is a reasonable one for him to pay having regard to all the circumstances including the means and conduct in connection with the dispute of all parties. In the context of awards of expenses against a co-defender it has hitherto been assumed that the provision applies, and with its usual effect, to awards of expenses against a co-defender in terms of section 7 of the 1861 Act. In consonance with this view Lord Thomson in the case of Vacha v. Vacha and Another² found the co-defender liable in the whole expenses of process but restricted his liability to £50. In the earlier case, on the other hand, of Todd v. Todd and Hutchison³ Lord Hunter, applying the discretion, modified a legally-

¹ Replacing s.2(3)(e) of the Legal Aid and Solicitors (Scotland) Act 1949.

² 1968 SLT (Notes) 101.

³ 1966 SLT 50.

assisted co-defender's liability to £1500. The Inner House refused a reclaiming motion on the view that the jurisdiction conferred by section 2(6)(e) was one conferred only upon the Court making the award. Lord Hunter, however, in giving his Opinion remarked: "Neither did counsel for the pursuer argue that an award of expenses against a co-defender stood in any different position from other awards of expenses, though I note that in Heggie v. Heggie¹, which was not cited to me, Lord Anderson, at p.247, referred to such expenses 'being really a form of damages'. It may be that this is a consideration which ought to be taken into account when the Court is exercising its discretion under section 2(3)(e) of the Act, but in the present case it was not suggested that I should do so". It would seem to be at least arguable that the legislature did not contemplate the application of section 2(6)(e) of the 1967 Act to expenses which are essentially a species of award of damages.

¹ 1917, 2 SLT. 246.

4. Possible reforms.

(a) Action of damages.

(i) General:

2.26 In paragraphs 2.8 to 2.16 of this Memorandum the present law relating to the action of damages for adultery was described in detail. Before considering whether this right of action should subsist, it seems appropriate to consider whether, accepting its continued subsistence, changes might be introduced to clarify, rationalise or improve it. A number of questions arise, such as the question whether it should be made clear that a wife has a right of action analogous to that of her husband, the question whether it should be for the pursuer to establish knowledge on the part of the co-defender, and the question whether damages (including solatium), other than the expenses of the action of divorce, should be recoverable.

(ii) Extension of right of action to wife:

2.27 As we have indicated, one important question - assuming the subsistence of the right of action - is whether the law can continue to concede a right of action to a husband against the paramour of his wife but leave it unclear whether a wife has a similar right of action against the paramour of her husband. Since the passing of the Married Women's Property (Scotland) Act 1881, we can think of no reason of principle why such a claim, if competent to a husband, should not also be competent in similar circumstances to the wife. An obstacle does exist in cases where a conclusion for damages is inserted in an action

for divorce since section 7 of the 1861 Act envisages only actions of divorce for adultery at the instance of the husband; but this procedural obstacle would not exist in the case of a separate action for damages. The Royal Commission on Marriage and Divorce (the Morton Commission) recommended that the wife should be expressly conceded a right of action for damages for adultery similar to that of her husband.¹ It has been objected that this might increase the number of cases coming before the courts² but, if the principle on which the husband's right of action is based is accepted, we consider that any such increase ought also to be accepted. The present tendency of legislation is to treat spouses, as far as possible, upon an equal footing and there would appear to be a strong case for removing from our law this remnant of discrimination between husband and wife. We endorse, therefore, the conclusion of the Morton Commission.

(iii) Extension of right of action to children:

2.28 It would be possible, however, to go further than this and argue that the liability of the paramour should be extended to the children of the marriage. We might be more disposed to accept this if the basis of liability were or were made to be responsibility for the breakdown of the

¹ Cmd. 9678 (1956), para.463.

² See Mr Julius Silverman in 799 H.C. Debs. (Fifth Series), col.902.

marriage, since that may have serious financial repercussions upon the children. We doubt, however, whether such an extension of liability could be seriously contemplated, since if such a right were conceded to the children of the marriage it would presumably be the duty of their tutors to initiate proceedings in every case. That would clearly be undesirable. It has been suggested that children should not be exposed to the risk of learning in the future that their education had been facilitated by their parent's adultery¹. Our tentative conclusion, therefore, is that it would be inappropriate to extend the right of action beyond the spouses themselves, but we would nevertheless welcome views on the matter.

(iv) Knowledge:

2.29 Another relevant question arises from the requirement of knowledge on the part of the paramour that he is having sexual intercourse with a married woman. Proof that the co-defender knew, or might reasonably be expected to have known, that the defender was married is sometimes difficult, and would probably present difficulty even more frequently if the right of action were extended to wives. The Morton Commission recommended² that "when the adultery alleged has been established, it should be presumed that the co-defender committed that adultery with the defender in the knowledge

¹ See 799 H.C. Debs. (Fifth Series) Col.900.

² In paragraph 437.

that she was a married woman until the contrary has been proved. The same presumption should arise when a claim for damages is made by a wife". If this right of action is to subsist, we consider that there is a reasonably strong argument on practical grounds for the legislative implementation of this proposal. The fact, however, that it may be necessary to reverse the ordinary principles of onus of proof is a factor which requires to be taken into account in considering whether the right of action itself should subsist. A further point is whether this presumption should apply where the conduct of the co-defender amounts to a criminal offence, particularly rape. An offender takes his victim as he finds her. The question upon which we would appreciate views is whether knowledge of the type described in this paragraph on the part of the co-defender is relevant where he has committed rape upon the defender so that the evidence of rape should be sufficient to hold him liable in damages to the husband of the defender.

(v) Claim in actions of separation:

2.30 It has been suggested that a claim for damages for adultery should be competent in actions of separation founded upon adultery, as well as in actions of divorce. There would appear to be no justification for making a distinction in this respect between actions of divorce and actions of separation and we invite views as to whether - assuming the continuation of the right of action - a claim for damages for adultery should be competent in actions of judicial separation.

(vi) Possible discretion to reduce damages:

2.31 Another possible change in the law may merit consideration. If actions of damages for adultery are to remain competent, there may be argument for conceding to the court a general power at its discretion to reduce the damages (including expenses) payable by a co-defender. The Court in effect enjoys that power at present when reaching a decision in the divorce action upon subsidiary claims for expenses under section 7 of the 1861 Act. It may be thought to be anomalous that such a power exists where the claim for expenses is submitted in the course of divorce proceedings, but not where a separate action of damages is raised. The possible change in the law suggested in this paragraph would be designed to allow the court to take into account inter alia the conduct of the pursuer and the means and circumstances of the co-defender both in cases where he is legally assisted and in cases where he is not. Such a proposal will require careful consideration as it introduces a new principle. We would welcome views upon this suggestion.

(vii) Clarification of heads of damages:

2.32 A further question is whether it should remain competent to recover a solatium and patrimonial losses other than the expenses of the action of divorce. To declare that a third party should be liable in damages for adultery is usually in effect to declare that that third party should be liable in damages for having caused or materially contributed to the breakdown of the marriage. This

may in fact often be the case, but in other cases the adultery may be a symptom of the breakdown of the marriage rather than its cause. Conduct other than adultery may have been responsible for or contributed to the breakdown of the marriage; for example, behaviour amounting to cruelty or intolerable conduct. Enticement may, of course, have resulted in desertion. If that approach were to be adopted, there would seem to be little justification, at least in principle, for confining liability to the co-defender; the defender may also be shown to have been to some extent responsible in this sense for the breakdown of the marriage. In many cases the other spouse will have been a consenting party. If damages are to be awarded, it might be contended for these various reasons that the responsibility should be shared between the defender and co-defender. On the assumption that expenses are a form of damages in this context, similar reasoning would in principle seem to apply to the liability in expenses of the co-defender. The difficulties are also similar, particularly that the attribution of causal responsibility for the breakdown of a marriage often presents the court with an extremely difficult task. It would seem, however, to be out of line with current notions of responsibility to affix upon a person who has committed adultery with a spouse responsibility for the whole consequences of the breakdown of that spouse's marriage. These arguments, however, are matters upon which we would welcome an expression of opinion. It is possible that the appropriate solution (which we consider in subsequent paragraphs) may be that the right of action for

damages should be totally abolished. An intermediate solution, on which we would appreciate views, is that the liability of the paramour should be limited to the expenses of the action of divorce.

(viii) Restriction to actions of divorce:

2.33 It has also been suggested that, if a claim for damages for adultery is to subsist, it should be competent only in actions of divorce and not in independent actions of damages. The Law Commission, when examining the problem in the context of English law said that "... it appears to be generally accepted that it should not be possible to petition for damages alone; the claim should be permissible only if coupled with one for divorce or judicial separation".¹ The Commission, therefore, recommended that, if their recommendation that the action should be abolished were not implemented, the right to claim should be available only in proceedings for divorce or judicial separation. We concede that it is unfortunate that, after the conclusion of an action of divorce or of judicial separation, responsibility for the breakdown of a marriage may have to be re-examined. We consider, however, that if the right to claim damages is to subsist, any procedural limitations affecting the type of process in which they may be claimed would be inappropriate. If, as we think for reasons

¹ Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25 (1969), para.100.

developed elsewhere in this Memorandum, jurisdiction in respect of conclusions for damages or expenses should follow the normal rules for personal actions, the limitation of the right to claim damages or expenses to a subsidiary conclusion in an action of divorce or separation would present co-defenders with the temptation to place themselves temporarily outwith the jurisdiction of the court. There would also be a contrast between the liability in practice of a co-defender subject to the jurisdiction of the Scottish courts in personal actions and a co-defender not subject to that jurisdiction. We do not consider that there would be any real danger of many pursuers deliberately choosing to raise a separate action for damages with a view to adding to the co-defender's account for expenses, particularly if the court, as has been suggested, were given a discretion to reduce the amount of the damages awarded having regard inter alia to the conduct of the pursuer. Our conclusion, therefore, is that a claim for damages for adultery should not be confined to actions of divorce but, if it is to remain available, should remain competent in independent actions of damages. The same principle should apply if damages are to be available in an action of separation.

(ix) Jurisdiction:

2.34 We have seen that in actions of damages for adultery, whether or not heard along with the action of divorce, the Scottish courts are likely to, and, in relation to conclusions for expenses under section 7 of the 1861 Act, do apply the ordinary grounds of jurisdiction in delictual

actions including the provisions of the Law Reform (Jurisdiction in Delict) Act 1973. We have considered whether it would be advantageous to discard this approach in favour of the principle that jurisdiction in an action of divorce or separation necessarily clothes the court with jurisdiction in concurrent claims for damages and expenses. Our tentative conclusion is that it should not, on the ground that the claims in question are essentially of a delictual nature and should follow the usual heads of jurisdiction in delictual actions. If the European Judgments Convention comes into force in relation to Scotland in its present form, the only grounds of jurisdiction available for such claims in relation to EEC "domiciliaries"¹ will be those appropriate to delictual claims.

(x) Possible abolition of the right of action:

2.35 Whatever justifications have been offered in the past for the husband's right to claim damages from the person who has committed adultery with his wife, the question remains whether this right of action should be retained in our law. It might be said, on the one hand, that a conjectural historical basis of the action, namely the recognition of a species of right of property enjoyed by the husband in his wife's body, is out of accord with current social attitudes. It might also be asked whether there is

¹ This expression is utilised as a compendious reference to the natural and legal persons covered by Article 3, paragraph 1, and by Article 53 of that Convention.

any evidence to suggest that the existence of such a right of action is at the present time a deterrent to the commission of acts of adultery and whether any social ends of value would be lost by the abolition of the action. On the other hand, it might be said that in addition to its moral basis the right of action does have a practical justification, that of recouping for a wronged husband the expenses he has incurred in the action of divorce and, perhaps more importantly, that of providing a solatium to him for the injury which he has sustained. It is arguable that, while in the ordinary case the wronged spouse would not wish to seek such a remedy, there are cases where the conduct of the paramour has been so blatantly offensive, or so cruel, or so underhand that the injured person should be entitled to damages. One example is where the paramour has abused a position of authority. In such cases, it may be argued, the absence of a legal remedy might lead to anti-social acts of revenge. There are also situations, illustrated by the case of Black v. Duncan¹, where the conduct of the person who has had sexual intercourse with the pursuer's wife, verges upon the commission of indecent assault or even rape. If the defender is worthwhile suing, should he not pay damages to the husband and a solatium for the injury to his feelings? It is arguable, however, that in cases verging

¹ 1924 SC. 738.

on indecent assault or rape the real injury is suffered by the woman, to whom a right of action for solatium would clearly be open, and that it should be for her alone to decide whether to claim damages. It is also undeniable that there are some cases where actions of damages for adultery are brought for inappropriate reasons, out of spite or hatred, or where the action is brought or threatened to put pressure on the co-defender to make a financial settlement. In England, following a Report by the Law Commission¹, the corresponding right of action was abolished by section 4 of the Law Reform (Miscellaneous Provisions) Act 1970. To enable us to decide whether this right of action should remain or be abolished in Scotland, the views of readers of this Memorandum on these and other relevant arguments would be welcomed.

(b) Liability for expenses.

(i) General:

2.36 The present law relating to the liability of a co-defender for the expenses of an action of divorce for adultery was described in paragraphs 2.17 to 2.25 of this Memorandum. Before examining the arguments for the retention or exclusion of this liability, it seems desirable to consider whether, assuming its retention, the law relating to this liability is in need of reform.

¹ Report on Financial Provision in Matrimonial Proceedings (1969) Law Com. No.25, para.102 and Appendix II, paras. 128-142.

(ii) Extension of liability to female co-defender:

2.37 Two important reforms were advocated by the Morton Commission¹ but, so far, have not been implemented. The first is that it should be competent for the court to ordain the co-defender to pay the pursuer's expenses in actions for divorce at the instance of the wife. Like the Morton Commission, we see no reason why the court's powers should at the present day be restricted to actions at the instance of a husband and we consider that, assuming the retention of the existing law, the law should be amended to empower a wife-pursuer to cite as a co-defender a woman with whom the husband has committed adultery and the court to ordain such co-defender to pay the whole or any part of the expenses of process.

(iii) Knowledge:

2.38 The second reform advocated by the Morton Commission is based on the practice of the courts, both in England and Scotland, not to award expenses unless the pursuer can show that the co-defender knew or had reasonable cause to know that the defender was a married woman. The Commission considered that it was unfair to place this burden of proof, which in many cases cannot easily be met, upon the husband and that, since the adultery had been proved, it should be

¹ Cmd. 9678, paras.463 and 464.

for the co-defender to show cause why he should not be liable for expenses. The Commission, therefore, recommended that it should be presumed, until the contrary is proved, that the co-defender committed adultery with the defender in the knowledge that the latter was married. Assuming that the power of the court to ordain the co-defender to pay the expenses of process is to remain, we advocate the acceptance of this Recommendation.¹

(iv) Extension of remedy to actions of separation:

2.39 A third change in the law would seem to be desirable. The power of the court to award expenses is confined to actions of divorce founded upon adultery and does not extend to actions of separation. We can see no reason for this distinction and, in consonance with our views relating to the comparable distinction in actions of damages for adultery, suggest that, if the court's power to ordain the co-defender to pay expenses in actions of divorce for adultery is to subsist, a corresponding power should be conferred upon the court in actions for judicial separation on the ground of adultery.

(v) Restriction to action of divorce:

2.40 Another problem requires attention if the existing liability of the co-defender for the expenses of an action

¹ For the position where rape has been committed, see para. 2.29 at pp. 32 and 33.

of divorce for adultery is to be retained. This is whether it should remain open for the successful pursuer in such an action to claim the expenses in an action of damages subsequent to the divorce proceedings. Essentially the same problem was discussed above in the context of the general action of damages for adultery. The same considerations apply and we think that it should remain possible for a pursuer to raise a separate action of damages concluding inter alia for payment by the co-defender of the expenses of the action of divorce. This conclusion, however, is a tentative one on which we should welcome views.

(vi) Legal aid:

2.41 Another problem which must be faced if the existing liability of a co-defender for expenses is to persist, with or without the amendments canvassed in the immediately preceding paragraphs, is the role of the legal aid scheme in this branch of the law. The existing practice of the court may possibly lead to anomalies which it is not easy to justify. If the pursuer chooses to raise a subsequent action of damages against a paramour in an action of divorce, and includes as one head of damage the expenses of his action of divorce, the party sued would presumably be entitled to receive legal aid in respect of the expenses of the action of damages but would receive no assistance in respect of the principal sum (the stated damages including the expenses of the divorce action) decerned for in the action of damages. On the other hand, if the court decerns against the co-defender for payment of any part of the expenses of process

in the course of a divorce action, that co-defender would be protected by the discretion of the courts, as it is understood at present, to assess under section 2(6)(e) of the Legal Aid (Scotland) Act 1967 the maximum liability of an assisted person when an award of expenses is made against him. If, as we think, the co-defender's liability for the pursuer's expenses in an action of divorce is properly to be regarded - except in so far as they are attributable to the co-defender's own conduct of the case - as a species of damages payable by the co-defender in respect of a wrong he has committed, it would seem inappropriate that he should be afforded by a state legal aid scheme any higher protection from liability for those expenses than he would possess in a separate action of damages. The present practice may result in serious injustice to a pursuer who is not legally aided when confronted by a co-defender who is an assisted person. Moreover, to assimilate, as the Court does at present, the expenses awarded against the co-defender in an action of divorce for adultery with the expenses in an ordinary action leads in practice, in cases, where both the pursuer and the co-defender are legally aided persons, to the position that the state pays the greater part of the successful pursuer's award of damages for adultery. This, arguably, is not the function of the legal aid scheme. We suggest that one way of meeting the problem might be by excepting actions of damages for adultery and conclusions for damages and expenses against a co-defender in actions of divorce for adultery from legal aid under the 1967 Act. In relation to the pursuer this proposal would find its

justification in the general desirability of discouraging such actions. A co-defender, for his part, would be protected against the more catastrophic effects of a decree for damages or expenses if our proposal for giving the court a discretion to reduce the award were implemented. This would not protect a co-defender from requiring to meet the irrecoverable expenses of a valid defence, but that situation is likely to be rare.

(vii) Possible abolition of the liability of the co-defender for expenses:

2.42 The question remains whether it is right in principle to hold a co-defender liable in the expenses of an action of divorce. We do not, of course, mean to question the rule whereby a paramour who is sisted as a party-minuter may be liable for the expenses resulting from his intervention in the action. Such liability arises upon the ordinary principles governing liability for expenses in non-consistorial, as well as in consistorial, causes.

2.43 The argument for the retention of the liability of a co-defender who has committed adultery for the whole expenses of process depends on the view that, by his action, the co-defender was at least partially responsible for the divorce and, therefore, apart from other and more indirect damage suffered by the pursuer as a consequence of the breakdown of his marriage, is at least partially responsible for the expense of the divorce action. This argument is a strong one because - setting aside the possibility of legal aid - the expense even of an undefended divorce action is not

inconsiderable and that of a defended action frequently high. This liability for expenses is, as we have explained, in essence a form of damages. While it might be suggested, as has been argued above, that, because of the difficulties of ascertaining the parties' share of responsibility and of fixing the quantum of damages, it is inappropriate to make the co-defender potentially liable for all the financial consequences of the breakdown of a marriage, the problem of quantification is less difficult when confined to the expenses of process. There is, therefore, a stronger case for retaining the co-defender's liability for expenses.

2.44 On the other hand, it is apparent that co-defenders may be cited for inappropriate reasons, for example, because the pursuer is seeking a species of retribution for the wrong done to him. More important, though the corresponding liability of a co-respondent in English law was not removed by the Divorce Reform Act 1969¹, it is arguable that, in systems which are moving away from a system of divorce based upon the commission of a matrimonial offence towards a system based on the breakdown of the marriage which recognises the complexity of the causes of the failure of many marriages, it may be inappropriate to retain a provision firmly based upon the concept of a matrimonial offence.

¹ See Schedule 1, para.2 which amends s.4(1) and (2) of the Matrimonial Causes Act 1965.

2.45 The Commission seek the comments of readers of this Memorandum upon the question whether the co-defender's liability for the expenses of an action of divorce, other than those resulting from his own intervention in the process, should be abolished.

PART III

ACTIONS OF ENTICEMENT

(a) Background to the law.

3.1 Until it was recently abolished by statute,¹ the common law of England conceded a right of action to a husband against a person who, without justification, enticed or persuaded his wife to leave him.² A corresponding right of action, after a period of doubt, was conceded to a wife.³ The ground of the action was not adultery, which did not require to be established, but simply the inducement of the spouse to leave his marriage partner. Textbook authorities in Scotland recognise the competency of a similar right of action,⁴ but there are few reported decisions in this field. The first is Duncan v. Cumming⁵ where a husband sought to recover damages in an action styled an action injuriarum against his wife's father "on account of his instigating and enticing and encouraging his daughter to desert and abandon the pursuer her husband and harbouring her in his house after she had deserted him". The Court stopped the procedure, however, in the action pending the determination by the Commissary Court of a question of adherence, and the concluded view of the Court does not appear.

¹ Law Reform (Miscellaneous Provisions) Act 1970.

² Winsmore v. Greenbank (1745) Willes 577; Place v. Searle [1932] 2 KB 497.

³ Gray v. Gee (1923) 39 TLR 429; Newton v. Hardy (1933) 149 LT 165; Elliott v. Albert [1934] 1 KB 650.

⁴ Fraser, Husband and Wife, Vol.2, p.1203; Walton on Husband and Wife, 3rd.edn., p.282.

⁵ (1714) 5 Brown's Supplement 104.

3.2 The second reported decision is Adamson v. Gillibrand¹ where a husband brought an action of damages against his mother-in-law alleging that she had by illegal and improper acts and practices caused his wife to desert him and remain in desertion without good cause. The Lord Ordinary (Ashmore) dismissed the action on the ground that the pursuer's averments were irrelevant. However, he took the opportunity to set out what he believed to be the relevant law in a series of propositions which appear to have been derived mainly from the English authority cited in the action. A subsequent case in the Sheriff Court, McGeever v. McFarlane,² concerned the right of a wife to seek damages for the enticement of her husband. Relying on English authority, both the Sheriff-substitute and the Sheriff accepted that a wife was entitled to damages from a woman who by artifices induced her husband to leave home and give up his wife³. While both judges accepted the competency of the claim, they held that it was irrelevant in the circumstances.

3.3 The position, accordingly, is that there is no recorded instance of damages being in fact awarded for enticement and no wholly satisfactory authority for the existence of this right of action. In England, as we explained, the corresponding right of action was abolished

1923 SLT 328.

(1951) 67 Sh.Ct.Rep.48.

³ Cf. Walton on Husband and Wife, 3rd. ed., p.282.

by the Law Reform (Miscellaneous Provisions) Act 1970. For some time before that the court showed a distinct tendency to narrow its scope by saying that it involved "the deliberate break-up of marriage"¹, that it did not lie against parents-in-law², and that such actions were "no more than legal fossil incapable of further growth beyond the point which binding precedent compels us to acknowledge that they had already reached"³. They were declared by statute not to survive for the benefit of, or against, the estate of either party. Their abolition was recommended successively by the Law Reform Committee⁴ and by the Law Commission⁵.

(b) Proposals.

3.4 It is, therefore, for consideration whether this right of action, if indeed competent, should continue to subsist in Scots law. Actions of damages for the enticement of a spouse, it is thought, are an anachronism in the present social climate and fulfil no useful purpose. They are anachronistic because they imply that one spouse has a species of proprietary right to the society of the other. They fulfil no useful purpose both because the remote chance that they may be instituted is not a serious deterrent to

¹ Winchester v. Fleming [1958] 1 QB. 259 per Devlin J. at p.266.

² Gottlieb v. Glaiser [1958] 1 QB. 267 n.

³ Pritchard v. Pritchard and Sims [1967] P.195 per Diplock L.J. at p.209.

⁴ Eleventh Report, Cmnd.2017.

⁵ Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25 (1969) para.101 and App.II, paras.132 and 133.

a third party who wishes to persuade one spouse to leave the other and because success in the action is more likely to persuade the enticed spouse to remain apart than to rejoin the other. The effect of such actions is likely to be an increase in the bitterness between those involved. They are objectionable on that account and subsidiarily because there is a danger of such actions being initiated for reasons of mere spite. In our view, therefore, it should be made clear by legislation that actions of damages for the enticement of a spouse are incompetent in Scotland.

SUMMARY OF PROVISIONAL CONCLUSIONS AND OTHER
MATTERS ON WHICH VIEWS ARE SOUGHT

Action of damages for adultery:

General.

<u>Subject Matter</u>	<u>Paragraph</u>
1. Views are invited on the arguments set out in this Memorandum and on any other relevant arguments to enable the Commission to resolve the question whether the action of damages for adultery should be retained or abolished.	2.35
<u>On the assumption that the actions of damages for adultery are to remain competent.</u>	
2. The conclusion of the Morton Commission should be implemented, namely that a wife should have an action of damages against the paramour of her husband in the same circumstances as a husband presently has an action of damages against the paramour of his wife.	2.27
3. Comments are invited on the question whether and in what circumstances a paramour should be liable in damages not only to the wronged spouse but also to the children of the marriage.	2.28

Subject Matter

Paragraph

4. A further recommendation of the Morton Commission should be implemented, namely that when the alleged adultery has been established, it should be presumed until the contrary has been proved that the co-defender committed that adultery with the defender in the knowledge that she was a married woman. The same presumption should arise when a claim for damages is made by a wife. Views are also invited on the relevance of knowledge where the co-defender has committed rape upon the defender. 2.29
5. Comments are invited on the question whether a claim for damages for adultery should be competent in actions of judicial separation. 2.30
6. Comments are invited on the question whether the court should be invested with a general discretionary power to reduce the damages (including expenses) payable by a co-defender. 2.31

Subject Matter

Paragraph

7. Comments are invited on the question whether in an action of damages for adultery it should remain competent to recover a solatium and patrimonial losses other than the expenses of the action of divorce, or whether the liability of the paramour should be limited to the expenses of the action of divorce. 2.32
8. It is suggested that a claim for damages for adultery should not be confined to actions of divorce but should remain competent in independent actions of damages. The same principle should apply if damages are to be available in an action of separation. 2.33
9. It is provisionally concluded that the jurisdiction of the court in actions of damages for adultery should follow the usual heads of jurisdiction in delictual actions, and that the existence of jurisdiction in an action of divorce or separation should not necessarily invest the court with jurisdiction in concurrent claims for damages and expenses. 2.34

Expenses in actions of divorce:

General.

Subject Matter

Paragraph

10. Views are invited on the question whether it is right in principle to hold a co-defender liable in the expenses of an action of divorce, other than those arising from his own intervention in the process. 2.45

On the assumption that the liability of a co-defender for the expenses of an action of divorce is to subsist.

11. A further recommendation of the Morton Commission should be accepted, namely that it should be competent for the pursuer in actions of divorce at the instance of a wife to cite as a co-defender a woman with whom the husband has committed adultery and for the court to ordain such co-defender to pay the whole or any part of the expenses of process. 2.37
12. In accordance with the recommendation of the Morton Commission it should be presumed, until the contrary is proved, that the co-defender committed adultery with the defender in the knowledge that the latter was married. 2.38

Subject Matter

Paragraph

13. The power of the court to award expenses should not be confined to actions of divorce for adultery and should be extended to actions for judicial separation on the ground of adultery. 2.39
14. It is thought that it should remain open for a successful pursuer in an action of divorce for adultery to claim the expenses of that action in an action of damages subsequent to the divorce proceedings. 2.40
15. Views are invited on the question whether a co-defender who has been found liable in expenses should be afforded greater protection by a scheme of legal aid from liability for those expenses than he would receive in relation to a separate action of damages. The suggestion is put forward for consideration that actions of damages for adultery and conclusions for damages and expenses against a co-defender in an action of divorce for adultery should be excepted actions in terms of the Legal Aid (Scotland) Act 1967. 2.41

Actions of damages for enticement:

16. It should be made clear by legislation that actions of damages for the enticement of a spouse are incompetent. 3.4

