

SCOTLAND / JUDGMENT

Taylor V. Cameron [2007]

ScotSC 52 (24 September 2007)

[2007] ScotSC 52

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[2007] ScotSC 52 [New search] [Help] (F964/07) JUDGMENT OF SHERIFF PRINCIPAL EDWARD F BOWEN QC in the appeal in the cause PAUL TAYLOR Pursuer and Respondent against LINDA ELIZABETH CAMERON or TAYLOR Defender and Appellant Act: Thorley, Solicitor, Thorley Stephenson Alt: Rattray, Solicitor, Edinburgh Law EDINBURGH, 24 SEPTEMBER 2007 The Sheriff Principal, having resumed consideration of the cause, refuses the defender and appellant's motion to allow an appeal to be marked late; makes no order in relation to expenses. (signed) EFB NOTE: 1. Decree of divorce was pronounced in this action on 10 August 2007 and extract was issued on 27 August. The present motion presented on behalf of the defender is to relieve her of the consequences of Ordinary Cause Rule 31.1 (which sets the 14 day time limit for the marking of appeals) and to allow her to mark an appeal late. In a Note of Appeal which accompanies the motion the defender sets out that she was unaware of the existence of these proceedings until 28 August 2007. 2. The solicitor for the defender, at the outset of her submissions, acknowledged that seeking leave to appeal out of time against an extracted decree raised an acute question of competency. *Alloa Brewery Co Ltd v Parker* 1991 SCLR 70, a decision of an Extra Division, was clear authority for the proposition that the dispensing power presently contained in Ordinary Cause Rule 2.1, could not be invoked to waive the time limit for an appeal after extract had been granted. In expressing that view, however, the Court observed that "the appeal...has not been presented on the ground that the interlocutors sought to be appealed against is invalid" (p.72C). This passage had been noted, and acted upon, by Sheriff Principal Hay of North Strathclyde in the case of *Millar v Millar* 1992 SLT (Sh Ct) 69. That was a case in which decree of divorce had been pronounced, and extract issued, due to oversights on the part of the sheriff clerk's staff. The Sheriff Principal held that as decree had not been competently granted and extracted he was able to distinguish the *Alloa Brewery* case, and could exercise the dispensing power to allow an appeal to be marked late. A similar approach had been taken in this

jurisdiction in *Gaunt v Marcos Leisure Limited* 1995 SCLR 966. 3. The pursuer's solicitor also made reference to *Anderson Brown & Co v Morris* 1987 SLT (Sh Ct) 96, in particular for Sheriff Principal O'Brien's doubts as to the competency of recalling an extract "competently issued and obtained in good faith" and to Sheriff Principal's Nicholson's willingness to consider the question of the validity of an interlocutor leading to extract in *Nortech v Aeroskip Sports Ltd* 1996 SLT (Sh Ct) 94. She then turned to the history of proceedings in this case in an endeavour to demonstrate that decree had not been obtained in good faith, and that through a defect in service it fell to be regarded as invalid. It is unnecessary to rehearse that history in detail. It is clear that there has been a long and acrimonious dispute between the parties following their separation in September 2002. There have been proceedings for interdicts, exclusion orders, disputed awards of aliment and accumulating arrears, and a minute for civil imprisonment of the pursuer. Issues over division of the matrimonial assets, which comprise the net proceeds of sale of the former matrimonial home and the pursuer's interest in a taxi business, remain unresolved. It is, I accept, inconceivable that if the defender had become aware of the existence of divorce proceedings she would have failed to have brought these to the attention of her solicitors. In the event, they first became aware of them when they were contacted by agents holding the free proceeds of sale on the matrimonial home. 5. The difficulties which face the defender and appellant, which I have with some regret concluded are insurmountable, are, however, twofold. First, it is difficult to conclude that decree was obtained by some form of subversion (which the appellant's submissions sought to imply) when the initial writ bears to have been served both by post and by sheriff officer at the defender's address, (albeit in the latter instance by depositing the document in a letterbox). On the basis of *ex facie* regular service, one could not readily conclude that the proceedings heading to decree had been conducted other than in good faith, nor is it possible to identify any irregularity such as existed in the case of *Millar*. This was a validly obtained decree and extract following upon it was properly issued. In consequence the case of *Alloa Brewery Co Ltd* cannot be distinguished. That in itself is sufficient for disposal of the appeal. 6. The matter does not however end there. In his submissions the solicitor for the pursuer and respondent drew my attention to the unreported case of *Mahmood v Mahmood* (unreported, 29 June 2007) a decision of Sheriff Principal R A Dunlop QC sitting at Dunfermline. That was an appeal against an undefended decree of divorce granted in a situation where the defender's English solicitors who did not understand the procedures of the Scottish Courts failed to take the necessary steps to see that appearance was entered. In refusing the appeal Sheriff Principal Dunlop followed the decision of Sheriff Principal Nicholson in *McFarlane v McFarlane* 1995 SCLR 794, and held that since Rule 8.1 of the Ordinary Cause Rules, which allows reponing, expressly excludes family actions from its ambit the only form of appeal against a decree of divorce was that provided for in section 27 of the Sheriff Courts (Scotland) Act 1907. Such an appeal was against the merits of the Sheriff's decision and could only proceed on recognised grounds. It was not open to the Court to invent a reponing procedure where none existed and in consequence grounds of appeal which fell

to be regarded as "reponing considerations" could not be entertained. 7. Maintaining that these cases were properly decided the pursuer's solicitor submitted that even if the extract in the present case was in some way defective the appeal could not succeed. But it was necessary to distinguish between the competency of the extract and the competency of the decree which preceded it. It was a "rogue extract" which enabled Sheriff Principal Nicholson to act in the case of *Gaunt v Marcos Leisure*. In the case of *Brown v Brown* 1996 SCLR 527 Sheriff Principal Maguire, QC felt unable to follow the decision in *Millar*. He said "it is the extract that should be looked at if one is hoping to distinguish *Alloa Brewery Co Ltd* not the interlocutor" and concluded that where there is a valid extract there can be no appeal. 8. In my judgment the solicitor for the pursuer and respondent was correct in both branches of his argument. The view as to the limited scope for an appeal against an interlocutor granting decree of divorce expressed by Sheriffs Principal Nicholson and Dunlop is in my view unassailable. The solicitor for the defender sought to argue that the appeal had not been presented "on reponing grounds" and maintained that there must have been an irregularity in service which undermined the validity of the divorce decree. That might be capable of being construed as other than "a reponing ground", but it does not constitute a ground of appeal directed against the merits of the Sheriff's decision and in consequence cannot be entertained. Identification of the appellant's argument in those precise terms also serves to emphasise the weakness of it in relation to the rule in *Alloa Brewery Co Ltd*. The argument is directed not against the extract, but against the interlocutor preceding it. There are sound policy reasons for conferring the status of finality on the issue of extract, and to open the way to an argument that an extract is invalidated by some perceived irregularity at an earlier stage of the proceedings is not a course which in my view ought to be adopted. 9. In all these circumstances the appeal must be refused. As in *Mahmood* I do that with regret, accepting that the only course open to the defender to cure what is undoubtedly an injustice will be recourse to an action of reduction. (signed) EFB BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2007/52.html>

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