

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT STIRLING

[2026] SC STI 82

STI-F10-26

JUDGMENT OF SHERIFF E GOSNEY

in the cause

JULIAN DAVID FRANCIS VEREL

Pursuer

against

DAVINA MAREE KENNEDY or VEREL

Defender

STIRLING, 28 May 2026

Introduction

[1] This matter called before me on 12 May 2026 as a hearing on the defender's motion seeking to recall the decree of divorce which was granted on 26 March 2026.

[2] I have considered the written pleadings, the submissions and the relevant authorities upon which parties relied.

Background

[3] The pursuer raised an action of divorce. The action proceeded as undefended. Decree was pronounced on 26 March 2026 and extract issued on 10 April 2026.

[4] The defender subsequently lodged an application in terms of rule 33.33A of the Ordinary Cause Rules, moving the court to grant an order recalling the decree. The application by the defender was lodged on 23 April 2026 and therefore outwith the 14-day

time limit prescribed in rule 33.33A(3). The defender sought to rely on the general dispensing power contained in rule 2.1(1) of the Ordinary Cause Rules, to excuse the late lodging of the application and moved the court to grant the application for recall although late.

[5] Two questions arise as a result of this application. Firstly, whether I can competently exercise the dispensing power provided in rule 2.1(1) in order to allow late an application for recall of a decree in terms of rule 33.33A after extract has been issued and secondly, if I can competently exercise this dispensing power, whether the application in terms of rule 33.33A(5) sufficiently sets out the proposed defence and explains the defenders failure to appear. The application is opposed by the pursuer on both counts.

Legal framework

[6] The starting point is rule 33.33A of the Ordinary Cause Rules. This rule came into force on 1 July 2008 and provides *inter alia* a mechanism by which a defender in a family action who has not lodged a notice of intention to defend may seek recall of a decree granted against him. Rule 33.33A(3) creates a similar right to that prescribed in rule 8.1, which provides for reponing in any undefended cause other than certain excluded causes that do not bear upon this decision.

[7] Rule 33.33A provides that:

“(3) Where no order under paragraph (1) has been sought by a defender who has not lodged a notice of intention to defend and decree is granted against him, the sheriff may, on an application made within 14 days of the date of decree, and with such conditions, if any, as he thinks fit, make an order recalling the decree.

...

(5) An application under paragraph (1) or (3) shall be made by note setting out the proposed defence and explaining the defender’s failure to appear.”

[8] Rule 2.1(1) of the Ordinary Cause Rules provides that:

“The sheriff may relieve a party from the consequences of failure to comply with a provision in these Rules which is shown to be due to mistake, oversight or other excusable cause, on such conditions as he thinks fit.”

[9] During the course of submissions, I was referred to some authorities. In *Taylor v Taylor* 2007 Fam LR 139, the pursuer raised an action for divorce. The action proceeded as undefended, decree was pronounced and extract issued. The applicant, who had not defended the action sought leave to appeal out of time against the extract decree and sought to rely upon the dispensing power contained in rule 2.1 of the Ordinary Cause Rules. The court, applying the case of *Alloa Brewery Co Ltd v Parker* 1991 SCLR 70, refused the application and held that the dispensing power contained in rule 2.1 could not be invoked to waive the time limit for an appeal after extract had been granted, unless the interlocutor had been invalid or not made in good faith.

[10] In *B v B* 2008 WL 4820332, the defender against whom decree of divorce had been granted, requested that the court to exercise its dispensing power under rule 2.1 to allow late receipt of a Note of Appeal. The circumstances of this case were unusual. The pursuer made an application for divorce under simplified procedure. The first application did not proceed following interventions by the defender who submitted *inter alia* that she was suffering from a mental disorder. The pursuer thereafter submitted a second application in which he declared that his spouse did not have a mental disorder and lodged an affidavit to that effect. The application was intimated to the defender by the sheriff clerk and from the court’s perspective thereafter there was no response by the defender to this second application. Decree of divorce was therefore pronounced. After the extract decree was issued the pursuer remarried. The defender submitted that although the court would not

ordinarily exercise its dispensing power to allow an appeal against an extracted decree, the position was different when an extract had been obtained in bad faith or was otherwise incompetent. In refusing the defender's motion the court was satisfied that the decree had not been obtained in bad faith. In such circumstances, the court declined to further address the competency of recalling an extracted decree of divorce where one of the parties had since remarried, the answer to this question having been well established in the case of *Ali v Ali* 2003 SLT 641.

[11] In *Jandoo v Jandoo* [2018] CSOH 14 the pursuer sought reduction of a decree of divorce on the grounds that decree had been obtained by the defender under the simplified procedure and that the procedure was not appropriate where there was a dispute as to financial provision. The court held that it was appropriate to grant decree of reduction, the relevant criteria having been met. That simplified procedure was not available when there was a financial dispute between the parties and that by proceeding in this fashion the defender had denied the pursuer the opportunity to seek an order of financial provision.

Submissions

[12] The defender acknowledged that the initial writ was served upon the defender personally by sheriff officer. I understood that the defender did not challenge the competency of service. The issue arises because the defender did not thereafter pass the initial writ to her solicitors or make them aware of proceedings. The defender mistakenly assumed that her solicitor was aware of the proceedings and that papers had also been served on them by the pursuer. By way of explanation, there had been ongoing discussions and communications between the pursuer's solicitor and the defender's solicitor regarding settlement of the divorce, prior to the raising of proceedings. Various proposals had been

made to the pursuer's solicitors regarding extra-judicial settlement of the matrimonial assets. It was submitted by the defender's solicitor that, against that background, the defender's assumption that her solicitors would be aware of the raising of the action was not an unreasonable one.

[13] The action proceeded as an undefended divorce. The defender was therefore unaware that decree had been granted. The first the defender became aware of the decree was when the extract was issued. By this stage, the time limit prescribed in rule 33.33A(3) had already expired.

[14] The defender did not - as I had understood the submissions - suggest that the pursuer's solicitor had acted improperly or in bad faith. However, I was told that there had been ongoing discussions during which the defender's solicitor had indicated that they had instructions to accept service of any initial writ in due course. It was submitted that from those discussions that had taken place, the pursuer ought to have expected the action to be defended. Subsequent to the raising of the action, the defender's solicitors had not received any intimation of the proceedings from the pursuer's solicitors.

[15] The defender submitted that any prejudice to the pursuer by recalling the decree was minimal and amounted to little more than delay and inconvenience. On the other hand, the prejudice to the defender in refusing the application was significant. It was submitted that the matrimonial assets and liabilities in existence as at the date of separation and the parties respective financial resources are such that, applying the principles in section 9 of the Family Law (Scotland) Act 1985, the defender is likely to be entitled to a significant capital sum and an agreement in relation to her continued occupation of the former matrimonial home.

[16] On behalf of the pursuer, the opposition to the application was straightforward. It was submitted that the application was time barred and therefore incompetent. The

decree was validly obtained based on a properly served action and affidavit evidence. The extract following decree was properly issued. There was therefore nothing irregular in the proceedings and the interests of justice required finality in litigation.

[17] The pursuer's *esto* position was that, if the application was competent, it should nevertheless be refused due to it failing to properly conform to the specifications required by rule 33.33A(5). The pursuer submitted that the application failed to set out a proposed defence to the action in that it contained only vague references to matrimonial assets and liabilities and a bald assertion that the defender was likely to be entitled to a significant capital sum. Moreover, the pursuer submitted that the explanation for the defender's failure to appear in the action was insufficient such as to allow the application to be granted.

Decision

[18] It is a well-established principle, following *Alloa Brewery Co Ltd v Parker* that where a decree has been extracted it is generally not competent to exercise the dispensing power so as to allow an appeal to be marked late. The court's decision in the cases of *Taylor* and *B* applied that principle in the context of family proceedings.

[19] Although the decisions in *Alloa Brewery Co*, *Taylor* and *B* all predate the introduction of a reponing power in family actions including actions of divorce, I am not persuaded that this is significant. I am satisfied that the principle equally applies in applications for recall by defenders in terms of rule 33.33A(3) in situations where an extract decree of divorce has been produced for the following reasons.

[20] Firstly, unlike in reponing applications under rule 8.1, in which the defender may apply to be reponed at any time before implement in full of the decree in absence, applications for recall under rule 33.33A require to be made within a strictly prescribed time

period, namely 14 days of the date of decree. Rule 33.33A does not provide any right of relief for applications for recall made outwith this period.

[21] Secondly, as Sheriff Principal Bowen QC stated in *Taylor*, “there are sound policy decisions for conferring the status of finality on the issue of the extract”. In divorce proceedings the extraction of decree does more than end litigation, it alters the legal status of the parties. Irreversible consequences may occur following extract of decree. For example, remarriage may occur. A person must know definitively whether they are married or divorced.

[22] Notwithstanding the defender’s references to discussions between the parties’ solicitors at an early stage, it is not suggested that the decree obtained in this case was obtained either in bad faith or is otherwise incompetent. The initial writ was properly served on the defender at her home address by sheriff officers. The defender mistakenly assumed that her solicitors had also received a copy of the initial writ. However, there appears to be little in the way of communication from the defender to her solicitors after service of the initial writ to have the matter actioned. No notice of intention to defend was lodged.

[23] In these circumstances I have no alternative but to refuse the application for recall.

Postscript

[24] I was satisfied that *prima facie* the application sets out a proposed defence and there is an explanation provided as to why the defender failed to timeously lodge a notice of intention to defend. Having come to the decision that the application is time-barred and therefore not competent, I do not consider it necessary to determine these matters further.