SHERIFF APPEAL COURT

[2026] SAC (Civ) 29
GLW-A1114-24

Sheriff Principal A Y Anwar KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the cause

JOHN BERNARD CURRAN

Pursuer and Respondent

against

CAROLINE THERESA CURRAN (ASSISTED PERSON)

Defender and Appellant

Pursuer and Respondent: F. MacShane, advocate; Oraclelaw Ltd
Defender and Appellant: M. Thompson, solicitor; Thompson Family Law

21 April 2026

Introduction

[1] This appeal concerns an action of division and sale. The parties to the action, although still married, have been separated for 14 years. The issue in this appeal is a narrow and focussed one: does a defender require to have relevant averments and a plea-in-law, in order to rely upon section 19 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 ("the 1981 Act")?

Legislation

[2] Section 19 of the 1981 Act provides as follows:

> "**19. Rights of occupancy in relation to division and sale**.
>
> Where a spouse brings an action for the division and sale of a matrimonial home which the spouses own in common, the court, after having regard to all the circumstances of the case including—
>
> (a) the matters specified in paragraphs (a) to (d) of section 3(3) of this Act; and
> (b) whether the spouse bringing the action offers or has offered to make available to the other spouse any suitable alternative accommodation,
>
> may refuse to grant decree in that action or may postpone the granting of decree for such period as it may consider reasonable in the circumstances or may grant decree subject to such conditions as it may prescribe."

[3] The matters set out in paragraphs (a) to (d) of section 3(3) are as follows:

> "(a) the conduct of the spouses in relation to each other and otherwise;
> (b) the respective needs and financial resources of the spouses;
> (c) the needs of any child of the family;
> (d) the extent (if any) to which—
> (i) the matrimonial home; and
> (ii) in relation only to an order under subsection (2) above, any item of furniture and plenishings referred to in that subsection,
> is used in connection with a trade, business or profession of either spouse . . ."

Background

[4] In June 1994, the parties purchased the subjects at Davidston Place, Lenzie ("the property"). Each party holds a one-half *pro indiviso* share of the property. The parties remained in a relationship until they separated in January 2012. Since separation, the respondent has paid his half-share of the mortgage over the matrimonial home.

[5] The respondent warranted the present action of division and sale in September 2024. Neither party had raised divorce proceedings. This action was served upon the appellant in October 2024. The respondent sought declarator that he is entitled to insist upon division

and sale of the property, a declarator that the property should be sold and the net sale proceeds divided equally between the parties together with a number of ancillary orders.

[6] The following matters are admitted in the pleadings; that the parties are *pro indiviso* proprietors of the property; that it is incapable of division; that the appellant continues to reside there; that the respondent has not resided there since they separated in January 2012; that the respondent has paid one half of the mortgage payments since separation; that there are "a number of matrimonial assets"; that the property is a matrimonial home and that the appellant had occupancy rights in respect of it.

[7] The respondent avers that the appellant has failed to engage with him in relation to the sale of the property; that he is financially strained and requires the property to be sold to release the equity. The appellant avers that she is "agreeable to the sale of the property" and "consents to the sale" but does not agree to the net free proceeds being divided equally; that the respondent ought to seek remedies under the Family Law (Scotland) Act 1985 by raising divorce proceedings; that she is currently employed as a retail assistant and earns around £1,000 net per month; that she will not be in a financial position to seek alternative accommodation without a division of all matrimonial property; that the respondent has suggested that the appellant reside with her elderly mother but she is unable to do so; that the parties' marriage broke down as a result of the respondent's affair and that it would be unjust for the respondent's conduct to "force the sale of the property"; and that the sale and division of the property may prejudice the appellant from achieving a fair share of the net value of the matrimonial property.

[8] Both parties lodged a note of basis of preliminary pleas. The appellant's only plea-in-law was that the respondent's averments were irrelevant and should not be admitted to

probation. Her note of basis of preliminary plea, however, referred to section 19 of the 1981 Act. There was no reference in her averments to that provision.

[9] The respondent's first and second pleas-in-law challenged the relevancy and lack of specification of the appellant's averments. On the same date as lodging his note of basis of preliminary pleas, the respondent lodged a motion for summary decree on the basis that no relevant defence was averred.

The sheriff's judgment

[10] Following a debate, the sheriff repelled the appellant's plea-in-law, sustained the respondent's first and second pleas-in-law and granted the respondent's motion for summary decree in part.

[11] Before the sheriff, there was no dispute that, at common law, a *pro indiviso* co-proprietor has an absolute right to insist on the sale of the property (*Upper Crathes Fishings Ltd* v *Bailey's Executors* 1991 SLT 747). However, the appellant submitted that this was "not a case at common law". Instead, the action was governed by the 1981 Act and the onus rested on the respondent to make averments of "circumstances" (in terms of section 19(a) and (b) of the 1981 Act) to justify the court in granting decree. The respondent had failed to do so. Even if there was no such onus, the appellant submitted that she had pled a relevant defence in terms of section 19 of the 1981 Act. The respondent submitted that the onus rested upon the appellant to plead a defence in terms of section 19 of the 1981 Act (*B* v *B; Berry* v *Berry* 1988 SLT 650).

[12] The sheriff noted that there were conflicting decisions (*B* v *B*, unreported, 8 June 2010 and *Hall* v *Hall* 1987 SLT (Sh Ct) 15). However, he considered *B* v *B* was correct and that the onus lay with the appellant to make relevant averments and to prove her defence. He noted

that it was an established legal principle that a party who seeks to rely upon an exception, defence or discretionary power, must make averments to put that exception, defence or discretionary power, "in issue".

[13] The sheriff noted that the appellant had made no reference to section 19 of the 1981 Act in her averments, nor was there any plea-in-law for the appellant to support such a defence. Even if that issue were overlooked, there were no averments setting out why it was necessary for the appellant to remain in occupation of the property. Such averments required to be made before the defence in section 19 could be engaged: *Berry* v *Berry* 1988 SLT 650. The alleged extra-marital affair of the respondent was irrelevant to whether a section 19 defence was established. The remaining averments were so lacking in essential specification that they also fell to be excluded from probation.

[14] Thereafter, there being no real prospect that the appellant's defence would succeed, the sheriff considered it appropriate to grant summary decree, in part.

[15] The appellant sought leave from the sheriff to appeal his interlocutor and judgment to this court. That was granted on 1 April 2025.

Grounds of appeal

[16] Two grounds of appeal were advanced by the appellant in her note of appeal, namely first, that the sheriff had erred in his analysis of the question of onus and second, that he had erred in making orders *ex proprio motu* in terms of chapter 47 of the Ordinary Cause Rules in the absence of specific craves. During the appeal hearing, the solicitor for the appellant advised that the second ground of appeal was no longer insisted upon.

Submissions for the appellant

[17] Mr Thompson, solicitor for the appellant, submitted that the sheriff erred in his categorisation of section 19 as an exception (or defence) to the rule at common law. The 1981 Act had superseded the common law. It was for the respondent to plead averments such that section 19 was not engaged. An analogy was drawn between section 4 and section 19 of the 1981 Act. Section 4 made provision for the granting of an exclusion order. If the onus of proof in relation to an exclusion order fell upon the pursuer, the same onus of proof must apply to section 19, as both sections required a court to consider the factors in section 3. Accordingly, there was no burden of proof upon the appellant: *Hall*; and *Milne* v *Milne* 1994 SLT (Sh Ct) 57. The respondent had failed to aver why the factors identified in section 3(3) of the 1981 Act were satisfied. The sheriff had wrongly described section 19 as creating a defence; it is not a defence, but rather a protected right of occupancy. The sheriff ought to have upheld the appellant's preliminary plea, refused the appellant's motion for summary decree and dismissed the action.

[18] Mr Thompson conceded that if he was wrong on the question of onus, the appellant's averments were insufficient to advance a reliance upon section 19 and in those circumstances, the sheriff was correct to grant summary decree.

Submissions for the respondent

[19] Counsel for the respondent limited his submissions to the issue of onus. The sheriff was correct to hold that the proprietors of common property have an absolute right to seek division and sale of the property, subject to any contract between them: *Upper Crathes* at 36 – 37. Section 19 of the 1981 Act presented a basis for a defence to an action of division and sale. Where a statutory provision provides a defence the party relying on it bears a

persuasive and evidential burden to bring themselves within the scope of that provision (*Clyde Navigation Trustees* v *Barclay Curle & Co* (1876) 3 R (HL) 44 at 48 – 52; Walker & Walker, *The Law of Evidence in Scotland*, (5th edition, Bloomsbury Professional, Edinburgh, 2020), paragraph 2.2.4). The sheriff was correct to follow *B* v *B* and *Milne* was wrongly decided.

[20] Counsel drew the court's attention to the terms of section 3 of the 1981 Act, noting that a pursuer in an action could aver their own circumstances, but would not be in a position to aver the circumstances of a spouse from whom they had separated.

[21] The application of section 19 of the 1981 Act is not a matter which has been identified as *pars judicis*: Macphail, *Sheriff Court Practice*, (4th edition, W. Green, Edinburgh, 2022), paragraphs 2.12 – 2.14. The appellant required to plead averments and a plea-in-law to substantiate a defence under section 19 of the 1981 Act. In the absence of such averments, the sheriff was correct to grant summary decree.

Decision

[22] At common law, *pro indiviso* proprietors enjoy an absolute right to insist upon an action of division and sale, lost only by contract or personal bar (per Lord President (Hope), *Upper Crathes).* The court has no discretion to refuse to grant decree. Prior to the commencement of the 1981 Act, the common law position applied, without qualification, to *pro indiviso* proprietors who were husband and wife (*Dickson* v *Dickson* 1982 SLT 128).

[23] The 1981 Act altered the common law position as it applied to married couples. Section 19 of the 1981 Act confers upon the court a broad discretion to refuse to grant decree in an action of division and sale or to postpone the granting of decree for such period as it may consider reasonable in the circumstances, or to grant decree subject to such conditions

as it may prescribe, after having regard to all the circumstances of the case, including the matters specified in subsections (a) to (d) of section 3(3) and having regard to whether the spouse bringing the action has offered to make available to the other spouse, any suitable alternative accommodation.

[24] The issue in this appeal came to be a narrow and focussed one. The appellant has, however, somewhat conflated the question of which party requires to aver the relevant circumstances in reliance upon section 19, with the question of where the onus of proof lay in terms of the orders sought from the court. These are separate and distinct issues. The matter came before the sheriff at a diet of debate. He was dealing with the former and not the latter issue. Strictly then, the issue before this court relates to adequacy of averments rather than questions of onus, however as I was addressed on both matters, I shall deal with both.

[25] Three Sheriffs Principal have determined that it falls upon the pursuer in an action of division and sale, to bear the onus of proving the matters set out in section 19 of the 1981 Act (*Hall*, *Milne* and *Mannox* v *Mannox* 1997 Fam LR 127). A Lord Ordinary and a sheriff have reached the opposite conclusion (*Berry* and *B* v *B*). It is important thus to consider these conflicting authorities.

[26] As explained by Lord Wylie in *Crow* v *Crow* 1986 SLT 270, section 19 of the 1981 Act made a very material inroad into the rights of *pro indiviso* proprietors where they happen to be husband and wife. In that case, the pursuer sought postponement of decree by reference to section 19; an action for divorce was pending. Dealing with the matter at debate, Lord Wylie noted that if an action of division and sale is raised during the subsistence of the marriage "it can be met, as in the present case, by a plea under the section". By implication,

in one of the earliest reported decisions on section 19, Lord Wylie envisaged that it was for the defender in such an action to plead reliance upon section 19.

[27] In *Hall*, neither party had raised, nor had plans to raise, an action of divorce. The husband sought division and sale of the matrimonial home. Decree was refused on the basis that the pursuer had failed to establish that he had offered his wife suitable accommodation in terms of section 19(b). It is important to note that the decision was made following proof and thus the question of the relevancy of the defender's averments did not arise. Sheriff Principal Caplan (as he then was) adhered to the sheriff's decision on the question of onus, determining that the burden rested with the pursuer. The Sheriff Principal considered that section 7 provided some guidance as to the correct approach to section 19. Put shortly, section 7 provides that an entitled spouse may apply to the court for an order dispensing with the consent of a non-entitled spouse to the sale of the matrimonial home if such consent is unreasonably withheld. The Sheriff Principal noted at page 17, E-F:

> "In the first place, the Act could not have intended that an entitled spouse with a joint interest in the matrimonial home should have less protection for occupancy rights than a non-entitled spouse. Accordingly, the reasonableness of displacing the defending spouse should properly be taken into account in deciding a s19 case. Secondly, in relation to a s7 application the onus must clearly be on the applicant spouse to show that consent is being unreasonably withheld. Thus if in an application aimed against a non-entitled spouse the onus rests on the pursuer to show that the protection of occupancy should be lifted, it would be curiously inconsistent if the same did not apply in relation to s19. The pattern imposed by the legislation is that prima facie a spouse has a right to continue to occupy the matrimonial home and that it is for the spouse seeking to disturb such right so show that it is reasonable to do so."

[28] The following year, Lord Sutherland considered section 19 in *Berry*. In that case, a husband defending an action of division and sale sought to have decree refused or postponed pending the outcome of cross actions of divorce. It appears from the report that the defender made express reference to section 19 in his averments. The court was not

referred to Sheriff Principal Caplan's opinion in *Hall*. Dealing with the matter on the procedure roll on the pursuer's plea to the relevancy of the defences, Lord Sutherland was clearly mindful of the common law right to insist upon an action of division and sale when he noted the absence of averments directed at section 19 (at page 651L-652C):

> "There is no doubt that the pursuer would be entitled in normal circumstances to the declarator which she seeks and the only reason for preventing such declarator being granted would be if there were circumstances averred which showed that it was necessary for the defender to have continued occupancy of the matrimonial home at least until the time of divorce. . . there are no circumstances averred which would indicate that the defender has any need whatsoever to continue to live in the present matrimonial home, and apart from the inconvenience which no doubt it will cause him to move, there are no circumstances averred which would indicate that he will be prejudiced in any way by the sale of that house."

[29] The Extra Division of the Inner House had cause to consider *Berry* in *Rae* v *Rae* 1991 SLT 454. The Inner House was primarily concerned with whether the action of division and sale ought to have been sisted, the defender having raised divorce proceedings seeking a transfer of the matrimonial home. *Berry* had been relied upon by the sheriff to refuse a motion to sist. Delivering the opinion of the court, Lord Clyde noted that the question in *Berry* was whether the defender had made relevant averments to enable him to invoke section 19 of the 1981 Act. While *Berry* was distinguished on its facts on the issue of whether the action should be sisted, there is no suggestion in the reasoning of the Extra Division that Lord Sutherland had erred in his approach to the question of relevancy nor in his conclusion that it fell upon the defender to invoke the protection offered by section 19.

[30] In *Milne,* Sheriff Principal Risk again considered section 19 following a diet of proof. The parties did not reside together, there were no divorce proceedings pending and the wife continued to occupy the matrimonial home with two younger children of the marriage. The Sheriff Principal provided a helpful analysis of the authorities and noted that *Hall* had not been referred to in *Berry* or *Rae*. While he found the reasoning in *Hall* on the question of

onus persuasive and the approach in that case "sound and practical", he did not do so without some qualification (at page 60 H-I):

> "So far as the onus of proof is concerned, the question will not often arise after evidence has been led, but the actual words of s19 seem to me to be quite neutral; the section does not say either that the court shall only grant decree if it considers it reasonable to do so, or that it shall be a defence for the defender to establish that it would not be reasonable to grant decree; it merely says that the court shall take account of certain circumstances and exercise a discretion."

[31] Indeed, in setting out a number of propositions, the Sheriff Principal's conclusion on the question of onus was, with the greatest of respect, somewhat ambiguous:

> "once proof has taken place the court must take account of such facts as have been established and are relevant in terms of s 19 and apply its discretion thereto. There *may* [emphasis added] be an onus on the pursuer but there is no onus on the defender".

[32] What was not ambiguous however was Sheriff Principal Risk's conclusion on which party bore the responsibility of raising the protection afforded by section 19. Citing the opinion in *Berry*, Sheriff Principal Risk explained (at page 60 J):

> "where an action of division and sale is raised it is for the defender to put s 19 in issue by averring circumstances upon which a reasonable court would be entitled to exercise its discretion by refusing or postponing decree".

[33] In *Mannox,* on an appeal following a diet of proof, Sheriff Principal Maguire adopted the reasoning of the Sheriffs Principal in *Hall* and *Milne* without further analysis and noted (page 129 at 23-15):

> "once s 19 of the Act has been brought into play it is for the person seeking decree of division and sale to establish that in all of the circumstances it is reasonable that decree should be pronounced in his or her favour".

[34] In *Hall,* Sheriff Principal Caplan had drawn support for his reasoning from the terms of section 7 of the 1981 Act. Section 7 provides that the court may:

> "on the application of an entitled spouse or any other person having an interest, make an order dispensing with the consent of a non-entitled spouse to a dealing which has taken place or a proposed dealing, if

(a) such consent is unreasonably withheld;
(b) such consent cannot be given by reason of physical or mental disability;
(c) the non-entitled spouse cannot be found after reasonable steps have been taken to trace him or her; or
(d) the non-entitled spouse is [under legal disability by reason of nonage]".

In considering whether to make an order, section 7(3) provides that the court shall have regard to all of the circumstances including the matters specified in paragraphs (a) to (e) of section 3(3) of the 1981 Act. Section 7(3A) allows the court, if refusing an application, to require the non-entitled spouse who is or becomes the occupier of the matrimonial home to make payments to the owner or to comply with such other conditions as the court specifies.

[35] Sheriff Principal Risk was correct to observe that the language used in section 19 is "neutral" on the question of onus. That is true of many of the provisions on the 1981 Act which refer to the circumstances set out at section 3(3). In my respectful opinion, section 7 does not assist the court in its approach to section 19 and thus the premise upon which the reasoning in *Hall* relies, is flawed. Sections 7 and 19 deal with two distinct situations. Where property is owned in common, the 1981 Act, protects one spouse's occupancy rights ("the non-entitled spouse") from a dealing between the other spouse ("the entitled spouse") and a third party, relating to the entitled spouse's *pro indiviso* interest; a third party is not, by reason only of such a dealing entitled to occupy the matrimonial home (section 6(1)(a)). The legislature has provided a statutory framework for the disturbance of the occupancy rights of a non-entitled spouse in such circumstances; the entitled spouse (or third party) requires to raise proceedings to dispense with the consent of the non-entitled spouse. An application under section 7 is the means by which to do so. A pursuer in such an action requires to aver and establish that one of the four conditions set out in section 7(1)(a) to (d) applies. He bears the onus of proof, as the applicant under section 7. However, the legislature has, presumably with knowledge of the common law rights of co-proprietors to

insist on division and sale, provided a separate and distinct means by which the occupancy rights of a co-proprietor can be protected. The co-proprietor who wishes to sell the matrimonial home does not require to do so by way of any application under the 1981 Act; they do so by way of an action of division and sale and bear the onus of proof ordinarily borne by a pursuer in such proceedings. Thus, both in an application under section 7 and in an action of division and sale, the pursuer bears the onus of proof; the "curious inconsistency" referred to by Sheriff Principal Caplan does not arise.

[36] Section 19 provides, in effect, a statutory defence to an action of division and sale. As the authorities to which I have referred have clearly established, is it for the defender to invoke the protection afforded by section 19 and "put it in issue".

[37] I agree with the submissions advanced by counsel for the respondent. It is a well established legal principle that where a statutory provision provides a defence, the party relying on it bears a persuasive and evidential burden to bring themselves within the scope of that provision. As explained by Lord Hatherley in *Clyde Navigation Trustees* v *Barclay Curle & Co* (1876) 3R (HL) 44 (at page 48); "you who desire the exemption must bring yourself within the provisions of the statute, and burden is therefor thrown upon you . .". The general maxim applies: on he who asserts, not he who denies, lies the obligation to prove (*ei qui affirmat, non ei qui negat, incumbit probatio).*

[38] That this well-established legal principle embodies the correct approach to section 19 is clear when one considers the circumstances to which the court is to have regard in terms of section 19(a) and section 3(3). In most cases, the parties will have separated and the spouse raising the action of division and sale will no longer be residing in the matrimonial home and is unlikely to have current or comprehensive information on the other spouse's needs and financial resources nor on the extent to which the matrimonial home is used in

connection with a trade, business or profession. The spouse bringing the action may have offered alternative accommodation (section 19(b)); the defending spouse is best placed to explain why any such offer is unsuitable. These observations are apt in the present case: the respondent has not resided in the matrimonial home for 14 years.

[39] That other statutory provisions, such as section 4, upon which Mr Thompson relied, also require the court to have regard to the circumstance specified in paragraphs (a) to (d) of section 3(3) of the 1981 Act, is a tenuous basis upon which to draw parallels in the court's approach to the question of onus.

[40] In an action of division and sale, provided the pursuer can prove title, that the property cannot be divided, and that they are not barred by contract or personal bar from insisting on their right to division and sale (all matters in relation to which the pursuer ordinarily bears the onus of proof), they are ordinarily entitled to decree. Section 19 affords the court a discretion; the court may refuse to grant decree, postpone the granting of decree or grant decree subject to conditions. It is for the defending spouse to persuade the court to exercise that discretion. It follows that the onus then shifts to the defending spouse.

[41] While Sheriff Principal Caplan was concerned that a non-entitled spouse had greater protection under section 7 than that afforded to a spouse who sought to invoke section 19, that analysis is predicated upon the proposition that what provides protection is the onus of proof. For the reasons I set out at para [43] below, onus is rarely likely to be determinative and thus it is an unsound basis upon which to draw parallels between sections 7 and 19. It is the occupancy rights created by the 1981 Act which provide protection both under section 7 and section 19.

[42] In *B* v *B*, Sheriff Horsburgh, in obiter comments, doubted the reasoning provided by Sheriff Principal Caplan in *Hall*. I consider him to have been correct to do so.

[43] Having considered the authorities, it follows, in my judgment, that the propositions set out by Sheriff Principal Risk in *Milne* (at page 60J-K) can be re-stated as follows:

(a) in an action of division and sale, it is for the defender to put section 19 of the 1981 Act in issue by averring circumstances upon which the court may exercise its discretion to refuse or postpone decree or grant decree subject to conditions. The defender should have a plea in law directed at section 19;

(b) the pursuer bears the onus of proof in an action of division and sale, however, if the defender seeks to invoke section 19, the defender will bear the burden of proving their averments and will require to satisfy the court to exercise its discretion in their favour by refusing or postponing decree.

[44] Finally, it is important to bear in mind that the cases in which section 19 is invoked and in which, following proof, onus is likely to be determinative of the outcome are likely to be rare. The pursuer will likely make averments which are relevant to the exercise of the court's discretion, in answer to those made by the defender. The court will assess the evidence, weigh the interests of both parties having regard to the matters set out in section 19 and exercise its discretion based on the facts and circumstances established. In most cases therefor, the question of who bears the onus is likely to be a question of form, rather than of substance.

[45] Turning to the present appeal, the sheriff was correct to conclude that the appellant had failed to make relevant averments to invoke section 19 of the 1981 Act. The defences made no reference at all to that provision and there was no plea in law founding upon it. The defender had failed to make sufficient averments to support any reliance upon section 19. The sheriff correctly observed that there were no averments addressing the defender's need to continue to occupy the matrimonial home. She had sought to rely upon

the respondent's alleged extra-marital affair, however if this averment was intended to be directed towards the appellant's "conduct" it was irrelevant for the purposes of section 19; "conduct" in section 3(3)(a) of the 1981 Act was "not directed towards the general conduct of the spouses towards each other during the course of the marriage" but was directed to the conduct of the spouses in relation to the matter of occupancy of the matrimonial home (*Berry* at page 65). Her averment that she earned £1000 net per month and would not be in a financial position to seek alternative accommodation without the full division of the matrimonial assets, was lacking in specification; she had failed to specify what those assets were, their value or how her position might be materially different or improved by an action of divorce rather than an equal division of the sale proceeds of the matrimonial home.

[46] The appellant's brief pleadings can be described, at best, as confused. She expressly consents to the sale of the property. Yet she invites the court to refuse decree. She does not aver why. She does not seek postponement of decree nor invite the court to grant decree subject to conditions, such as by consigning the funds with a solicitor pending the outcome of divorce proceedings. Put shortly, she agrees the house should be sold, but wishes to remain in occupancy, without explaining the circumstances which would entitle her to do so.

[47] Neither during debate, nor in the course of the appeal, did the appellant offer to amend her pleadings or seek to have a minute of amendment received. That course of action was available to her. During the course of the appeal, Mr Thompson advised that divorce proceedings had been raised by the appellant recently (after the debate before the sheriff), however, he did not provide any details of those proceedings, of the nature of the orders sought and he did not seek to have the appeal sisted pending the outcome of the divorce proceedings. In any event, I agree with the comments made by Lord Sutherland in

*Berry (*at page 65C); while it may be administratively convenient to deal with the issues arising in this action at the same time as the divorce, there is no apparent reason (and none was advanced on behalf of the appellant before this court) why the respondent should be deprived of his right to insist on division and sale. It was not, for example, suggested that the appellant sought an order for the transfer of the property in the action of divorce (*Rae)*.

Disposal

[48] Accordingly, I shall refuse the appeal and adhere to the sheriff's interlocutor.

[49] The respondent sought sanction for the employment of junior counsel. That motion was not opposed. The appellant sought to have the expenses modified to nil, the appellant being in receipt of legal aid. That motion was formally opposed by the respondent.

[50] I shall certify the cause as suitable for the employment of junior counsel and make an award of expenses in favour of the respondent, modified to nil.