

1. Adultery

Adultery has no statutory definition in Scotland. The term is construed in the light of cases anterior to 1938. In Scots law, adultery committed by the pursuer (petitioner) is no defence to an action of divorce for adultery; the discretionary bar raised by the petitioner's own adultery in English law is unknown. Also long delay or *mora* is no bar to the successful pursuit of an action on the ground of adultery.

2. Desertion

In Scotland desertion is a ground for divorce if the defender (defendant) "has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years." The Scottish courts have built up a considerable body of jurisprudence on the subject of desertion in the course of applying the statute of 1573. The term in the 1938 Act is, therefore, construed in the light of cases decided before 1938. The deserted party must have intimated a desire to continue or resume cohabitation, or in Scots terminology to "adhere". Cruelty, adultery or sodomy would be good grounds for refusing to adhere and thus constitute a good defence. A spouse who commits adultery during the three year period (*the triennium*) is considered to have demonstrated an unwillingness to adhere and to have given the other spouse a cause for non-adherence. Thus he or she cannot seek divorce on the ground of desertion. However, the three year period is vital; once that time has elapsed the right of action vests regardless, and adultery committed after the three year period by the pursuer does not constitute a bar to divorce.

The doctrine of "constructive desertion", whereby a party driven from the matrimonial home may petition on the ground of desertion is unknown to the law of Scotland. Conduct that falls short of a matrimonial offense may, however, be relied on as a defence to a petition based on desertion.

3. Insanity

Incurable insanity has been a ground for divorce in Scotland since 1938. The court has discretion to refuse to grant a decree on this ground if the pursuer has been guilty of such wilful neglect or misconduct as to have conduced to the insanity, although adultery *per se* is no bar. The defender to be proved incurably insane must have been under "care and treatment as an insane person" for five years preceding the action. A person is deemed to be under "care and treatment as an insane person" if he or she has been receiving treatment for mental illness as a resident of certain approved institutions, whether as a voluntary patient or otherwise. The period must be continuous for five years, although an interruption of less than twenty-eight days is disregarded.

On granting a decree for insanity, the court may make an order for the pursuer (petitioner) to pay an allowance for the maintenance of the defender and the children of the marriage.

4. Cruelty

By the 1938 Act, the courts may grant decrees of divorce where the defender has been guilty of such cruelty toward the pursuer as would justify the granting of a separation *a mensa et thoro* according to the law of Scotland at the time of the passage of the Act.