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“Husbands without wives, and wives without  
husbands”: Divorce and Separation in Scotland, c.  
1830-1890

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May 2014

## **Abstract**

This thesis explores divorce and judicial separation as it occurred in nineteenth-century Scotland, between the years 1830 and 1890, predating the phenomenon it came to be in the twentieth and twenty-first centuries. As Scotland's history has frequently been incorporated within a general history of Great Britain, this thesis separates it from the widely researched accounts of marriage and marital breakdown in England to highlight the different approach to regulating marriage, divorce and separation under Scots law. Applying Scotland's distinctive legal, demographic and economic context has provided a social and gender history of marriage breakdown unique to the country, and filled a historiographical gap for the nineteenth century. This research will be presented through separate analyses of divorce for adultery, desertion—both official and unofficial, and marital cruelty in the civil and criminal courts. To present individual experiences inside the courtroom, Court of Session divorce and separation cases are used and supplemented with newspaper accounts of Court of Session trials. To provide context to the related discourses, Parliamentary papers and newspaper articles are used. Lastly, to address the unofficial instances of marital breakdown, criminal court trials of wifebeating and poor relief applications from deserted wives are also analysed. This thesis argues that despite comparably liberal divorce and separation laws established in the sixteenth century, legal, economic, social and cultural factors and discourses imposed on the accessibility of these legal forms of marital breakdown.

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## Acknowledgments

I would first and foremost like to thank my supervisors. To Annmarie Hughes, since my first year at Glasgow, you inspired me to learn and love social and gender history. To Eleanor Gordon, it has been a privilege to study under your supervision. Thank you both for your expertise, encouragement and patience. I would also like to thank Malcolm Nicolson, who has been an enormous support and been there to sign many forms over the years.

This work was achieved through the help of several archivists and librarians from the General Register House, National Archives of Scotland, Paisley Central Library, Angus Archives and the Glasgow University Library and Special Collections Department. Thank you especially to David Weir of PCL and Kay Munro of GUL. I am also immensely grateful for the postgraduate and collegiate community of Economic and Social History.

There are several people I would like to thank for their friendship, company and many kind words. In particular, the social history girls, Eilidh Macrae, Linsey Robb and Catriona Macdonald: from the beginning of our Masters to the end of our PhDs, you have been fabulous friends. Secondly, this last year has been bettered by the friendships of Andrea Thomson, Emily Rootham, Sadiâ Zulfiqar, and Gavin Purdie.

A special thank you to my friends and family who filled these last few years with love and laughs, and kept me grounded. I would especially like to thank those who read my chapters and provided the helpful comments that got me to the end. To Jean, thank you for all the kind messages and breaks from working. Darron, thank you, without you I would not be living half as well or be half as happy.

I am most grateful to my family. To my mom, our chats everyday lifted my spirits and kept me going, thank you for always being reachable. To my dad, your love of knowledge and open-mindedness made me the person I am today. To my brother, although you were born after me, I have always looked up to you as a role model; you constantly impress and motivate me. The love and support from you all, especially as I have been living across the ocean, makes my world go round, thank you.

## **Author's Declaration**

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature \_\_\_\_\_

Printed name \_\_\_\_\_



## Abbreviations

|     |                          |
|-----|--------------------------|
| CS  | Court of Session         |
| GRH | General Register House   |
| MPs | Members of Parliament    |
| PP  | Parliamentary papers     |
| PRA | Poor Relief Applications |

## Introduction

Reading Linda Gordon's *Heroes of Their Own Lives*, illustrated the darker side of marriage;<sup>1</sup> the reality that while marriage on its most superficial level symbolises loves and happiness, there also exists a broader spectrum, where marital conflict can be found. In the twenty-first century, divorce and separation are commonplace.<sup>2</sup> Gordon's work inspired my research into the history of marital breakdown before this was so.<sup>3</sup> Though she focuses on abuse in the family, this investigation was expanded to incorporate other forms of marital breakdown. As this thesis will show, domestic abuse was not considered justification for a full divorce, only a separation. This raised the question of what the legal grounds for divorce were, and how they matched the real experiences of marital breakdown? What were the ways that couples handled their failed marriages within the context of the law? This thesis addresses how husbands and wives utilised the law to their benefit when the core of marriage and legal rights were unequal and indifferent to women and the impoverished, essentially restricting couples from recourse to the law.

The focus of this thesis is on divorce and judicial separation covering the decades 1830 to 1890 with a concentration on Scotland. This is a history of marital breakdown in Scotland through the lens of nineteenth-century civil and criminal law. From the perspective of social and gender history, this topic is first approached by establishing the legal and statistical context of divorce and separation. The legal, economic, social and cultural discourses related to marital breakdown, are then compared to individual experiences found in the civil and criminal courts to determine how much of an influence these discourses had on how couples dealt with failed marriages.

As this thesis revolves around legal remedies in the civil court, the three most common grounds used for filing an action of divorce or separation were chosen for in-depth studies: adultery, desertion and cruelty. The first and second most common grounds for divorce make up two thirds of this thesis: adultery and desertion (respectively). Marital abuse composes the remaining one-third, as it was the most recurrently charged ground for judicial separation in the form of maltreatment and cruelty. The incorporation of adultery,

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<sup>1</sup> Specifically Chapter 8: "'The Powers of the Weak': Wife-Beating and Battered Women's Resistance' in Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960*, (London, 1989), pp. 250-288.

<sup>2</sup> Registrar General for Scotland (Duncan Macniven), *Annual Report of the Registrar General of Births, Deaths and Marriages for Scotland 2010*, 156<sup>th</sup> Edition, (National Statistics, 5 August 2011), < <http://www.gro-scotland.gov.uk/files2/stats/annual-review-2010/rgar2010.pdf> > [accessed 31 July 2013], p. 61.

<sup>3</sup> B.R. Mitchell, *British Historical Statistics*, (Cambridge, 1988), pp. 75-76.

desertion and marital abuse have allowed for an encompassing look at marital breakdown, as it existed inside and outside the civil court.

This thesis also works from the perspective that cruelty in the nineteenth century existed in many forms. It incorporates a definition of abuse that is wider than physical violence. This was not the working legal definition of the 1800s; what is today considered marital abuse, was in fact tolerated on certain levels. At the standard level of acceptance the use of physical violence was often condoned if justified as a means of correction or chastisement. The discourses of the Scottish judiciary and media differentiated between correction and cruelty. Non-physical violence, although often complained of as more frequent, was invariably overlooked by its categorisation as less likely to cause injury.

Gender and class are key elements for this study as each social construct directly shaped an individual's experience of marriage. There are times in this analysis when stereotypes might unintentionally appear; however, this is a result of contemporary discourses that made certain issues an idiosyncrasy of gender or class. For instance, although adultery is committed by husbands and wives, and anecdotally thought to be committed by more husbands, the majority of divorce actions on the charge of adultery were filed by husbands against their wives. This is arguably the result of the double standard, as well as men's economic independence.<sup>4</sup> Likewise, twenty-first century scholars are raising awareness of husbands as victims of domestic abuse, and evidence shows that some wives were also violent and abusive, yet every summons of judicial separation filed on the ground of maltreatment and cruelty was initiated by the wife.<sup>5</sup> This suggests that judicial separation for cruelty was not a practical remedy for a husband, and therefore an abused husband may have preferred an alternative way to deal with a violent wife.

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<sup>4</sup> The double standard will be discussed in detail in Chapter Three. For articles on the double standard, see Keith Thomas, 'The Double Standard,' *Journal of the History of Ideas*, Vol. 20, No. 2 (April, 1959), pp. 195-216; Ursula Vogel, 'Whose Property?: The double standard of adultery in nineteenth-century law', in Carol Smart (ed.), *Regulating Womanhood: historical essays on marriage, motherhood and sexuality*, (London, 1992), pp.147-165; Ann Sumner Holmes, 'The Double Standard in English Divorce Laws, 1857-1923', *Law & Social Inquiry*, Vol. 20, No. 2 (Spring, 1995), pp. 601-620; Lesley Hall, 'Hauling Down the Double Standard: Feminism, Social Purity and Sexual Science in Late Nineteenth-Century Britain', *Gender & History*, Vol. 16, No. 1 (April, 2004), pp. 35-56.

<sup>5</sup> For instance see Ronald E. Hall, 'The surreptitious feminization of domestic violence: An empirical expose', *Social Work & Social Sciences Review*, Vol. 16, No. 1 (2012), pp. 34-47. Joanne Bailey addresses the issue of violent wives in Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800*, (Cambridge, 2003), pp. 119, 128-132.

## Historical Gaps: Expanding on the Scottish Experience

As a history of marital breakdown, this thesis draws on previous studies of marriage to reach a historical understanding of marital expectations.<sup>6</sup> The transition from family-based economics in the early-modern period of western civilization, to industrialisation in the modern, is argued as a factor that contributed to changing marital relationships over the recent centuries.<sup>7</sup> For instance, Edward Shorter, in *The Making of the Modern Family*, argued that the modern family—where affection, love and sentiment are priorities for its members—was a product of industrialisation and capitalism restructuring societal values, while Lawrence Stone, in *Family, Sex and Marriage*, similarly argued that romantic love caused couples to place the individual before the community, eventually cutting the possessive links between families and wider society that defined the traditional family. Though several historians' theories ultimately illustrate a similar pattern of development of the western family, the debate has become more complex because historians disagree over when these developments took place, and how simply the shift occurred. Thus, the notion of romantic love as a primary foundation for companionate marriage has been widely debated, as well as the original proposal that it was a modern development.

Older histories of marriage argued that marriage had two forms: patriarchal, and then romantic love or companionate.<sup>8</sup> More recent works argue that married couples experienced a combination of the two, rather than one at a time. For instance, A. J. Hammerton's *Cruelty and Companionship* examines marital cruelty in both working-class and middle-class marriages to show that cruelty existed within a society that promoted love and submission regardless of socioeconomic status.<sup>9</sup> Eleanor Gordon and Gwyneth Nair's

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<sup>6</sup> Key works on the history of the family: Edward Shorter, *The Making of the Modern Family*, (London, 1976); Rosemary O'Day, *The Family and Relationships, 1500-1900: England, France and the United States of America*, (Hampshire, 1994); Leonore Davidoff, Megan Doolittle, Janet Fink and Katherine Holden, *The Family Story: Blood, Contract and Intimacy, 1830-1960*, (London, 1999). For the ideology of separate spheres and patriarchy in England see Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class 1780-1850*, Revised Edition, (London, 2002), and Catherine Hall, *White, Male and Middle Class: Explorations in Feminism and History*, (Cambridge, 1995). For Scotland, see Eleanor Gordon and Gwyneth Nair, *Public Lives: Women, Family and Society in Victorian Britain*, (New Haven and London, 2003). Key works on the history of marriage: Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, (London, 1977); Joan Perkin, *Women and Marriage in Nineteenth-Century England*, (London, 1989); John Gillis, *For Better For Worse: British Marriages 1600 to the Present*, (New York and Oxford, 1985).

<sup>7</sup> Edward Shorter, *The Making of the Modern Family*, (London, 1976); Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, (London, 1977).

<sup>8</sup> Accordingly Shorter claimed romantic love was a product of the nineteenth century in *The Making of the Modern Family*, p. 7, while Stone claimed it was already an established practice by 1800, in *The Family, Sex and Marriage*, pp. 8-9. Rosemary O'Day argues the nuclear family already existed before industrialisation took effect in the nineteenth century, in Rosemary O'Day, *The Family and Relationships, 1500-1900: England, France and the United States of America*, (Hampshire, 1994), pp. 9-10.

<sup>9</sup> A. J. Hammerton, *Cruelty and Companionship: Conflict in Nineteenth-Century Married Life*, (London, 1992), pp. 1-5.

*Public Lives* debunks the applications of separate spheres as the best analytical tool for examining Victorian middle-class women's lives in Scotland, as does Elizabeth Foyster's *Marital Violence*, focusing on early-modern England, because, as both books argue, women had much more movement across the 'spheres' and therefore more of a presence and contribution to private and public life within their marriage, which contrasts with the idea of an overt patriarchal relationship.<sup>10</sup> Importantly, these works also establish that wives had more agency than previously believed, particularly in daily interactions with their husbands.<sup>11</sup>

Similarly, Katie Barclay argues that rather than assuming theory did not meet expectations in practice, patriarchy, obedience and love were seen and experienced as compatible and complimentary.<sup>12</sup> Her book *Love, Intimacy and Power*, stresses that the intimacy between elite husbands and wives afforded women much more agency and room for negotiation over everyday familial and domestic matters.<sup>13</sup> Joanne Bailey, in *Unquiet Lives*, argues from the perspective that marriage was an interdependent relationship for the majority of the population; she takes a more moderate approach than the extreme optimistic or pessimistic outlooks used by historians when discussing marriage in the pre-modern era.<sup>14</sup>

Following the progressive understandings of the complex nature of marriage in the past put forward by Barclay and Bailey, my own work approaches marriage in the decades of mid-nineteenth century Scotland as companionships based within a patriarchal society. Wives were property of their husbands, but also their husbands' moral responsibility. Marital expectations put forward in the court records, as well as through public discourses, demonstrate that while wives were subordinate to their husbands in terms of legal and economic rights, happy and successful marriages were partnerships founded on love, kindness and support for all socioeconomic groups. Interdependency played a larger role in couples' everyday lives and their decisions on how to handle marital issues and potential breakdown; for instance, desertion, or remaining in abusive relationships. When a spouse

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<sup>10</sup> Gordon and Nair, *Public Lives*, pp. 1-7; Elizabeth Foyster, *Marital Violence: An English Family History, 1660-1857*, (Cambridge, 2005), pp. 9-11.

<sup>11</sup> Hammerton, *Cruelty and Companionship*, pp. 5-6; Gordon and Nair, *Public Lives*, pp. 1-7; Foyster, *Marital Violence*, pp. 9-11. For further examples of female agency in gender history, see, Maud L. Eduards, 'Women's Agency and Collective Action', *Women's Studies International Forum*, Vol. 17, Nos. 2/3 (1994), pp. 181-186; Jane Lewis, 'Gender, the family and women's agency in the building of "welfare states": the British case', *Social History*, Vol. 19, No. 1 (1994), pp. 37-55; or Mounira M. Charrad, 'Women's agency across cultures: Conceptualizing strengths and boundaries', *Women's Studies International Forum*, Vol. 33 (2010), pp. 517-522.

<sup>12</sup> Katie Barclay, *Love, Intimacy and Power: marriage and Patriarchy in Scotland, 1650-1850*, (Manchester, 2011), pp. 3-5.

<sup>13</sup> Barclay, *Love, Intimacy and Power*, pp. 198-204.

<sup>14</sup> Bailey, *Unquiet Lives*, pp. 8-11.

did seek a divorce or separation these issues were at the heart of the pursuer's complaint. Furthermore, with the influence of historical studies, such as Gordon and Nair's that seek to empower women of the nineteenth century, this thesis highlights the resourceful agency of disadvantaged wives. Although many of these cases demonstrate the embedded gender inequality of the nineteenth century, it is clear that few of the wives represented in this study lived as submissively and dependently as encouraged by middle-class ideology.

The other historiographical framework essential to this study is the history of marital breakdown. There is notable and extensive historical research on the subject. The literature has been growing since the second wave feminism emergence of gender history, with scholars addressing the modern phenomenon of divorce by looking at how it existed and developed from marital breakdown in the past.<sup>15</sup> Marital breakdown has existed alongside matrimony long before divorce became commonplace, hence the two are not synonymous; divorce is a form of marital breakdown, but marital breakdown does not mean divorce.

Furthermore, each country (and in America, each State) established unique civil laws for the dissolution of marriage. Overall, the reasons a spouse sought a divorce or separation were common in most western countries. For example, adultery was commonly viewed as a worse offence if committed by the wife than the husband.<sup>16</sup> Desertion was associated with poverty, and potentially a more problematic form of marital breakdown for most countries as a deserted family often became a burden for the local government, requiring extra legislation to tackle the issue.<sup>17</sup> Marital cruelty remained a complicated matter for most countries in the nineteenth century, as the legal definitions took time to accept that abuse existed in various forms besides physical assault.<sup>18</sup> Additionally, the development of intolerance to marital violence has become the subject of historical debate. Specifically,

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<sup>15</sup> Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*, (Cambridge, 1988), p. xii; Lawrence Stone, *Road to Divorce: England 1530-1987*, (Oxford, 1990), p. 2; Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America*, (Chicago, 1980), p. 2.

<sup>16</sup> Phillips, *Putting Asunder*, pp. 344-354; Bailey, *Unquiet Lives*, pp. 140-167; Stone, *Road to Divorce*, pp. 179-180, 193, 243-244; Colin S. Gibson, *Dissolving Wedlock*, (London, 1994), pp. 33-35, 41-42.

<sup>17</sup> Gibson, *Dissolving Wedlock*, pp. 73-74, 98; Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separation, 1684-1830*, (Edinburgh, 1998), p. 21, 329; Bailey, *Unquiet Lives*, pp. 170-178.

<sup>18</sup> Hammerton, *Cruelty and Companionship*; Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy against Family Violence from Colonial Times to the Present*, (New York, 1987); Foyster, *Marital Violence*; Anna Clark, 'Humanity or Justice? Wifebeating and the law in the eighteenth and nineteenth centuries', in Carol Smart (ed.) *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*, (London, 1992).

scholars question when wifebeating became socially unacceptable as a means of correction by husbands.<sup>19</sup>

Nevertheless, it was accessibility that caused the greatest differences. For instance, divorce was not accessible for the common public in England until the 1857 Matrimonial Causes Act. Accounts of marital breakdown in England, therefore, emphasise the before and after impact of the 1857 Act.<sup>20</sup> Moreover, because the Act established a double standard by legalising divorce for husbands on the ground of adultery, while wives had to prove aggravated adultery with a secondary charge of desertion, cruelty, incest, bigamy, or sodomy, historians have produced extensive research on the double standard in England.<sup>21</sup>

This thesis has been shaped to cover this overlooked aspect of Scotland, and subsequently Great Britain's, social history. It presents Scotland's distinctive account of divorce and separation in the nineteenth century. Despite the rich vein of research into marriage breakdown, there is very little published on the Scottish experience.<sup>22</sup>

Whereas England, France and parts of the United States underwent divorce reform in the nineteenth century, Scotland experienced divorce reform first in the sixteenth century and then not again until the twentieth.<sup>23</sup> Furthermore, the divorce and judicial separation laws of the sixteenth century established egalitarian legislation, including a single standard for

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<sup>19</sup>See Nancy Tomes, 'A "Torrent of Abuse": Crimes of Violence between Working-Class Men and Women in London, 1840-1875', *Journal of Social History*, Vol. 11, No. 3 (Spring, 1978), pp. 328-345; Hammerton, *Cruelty and Companionship*, p. 14; Foyster, *Marital Violence*, p. 251; Annmarie Hughes, 'The "Non-Criminal" Class: Wife-beating in Scotland (c. 1800-1949)', *Crime, Histoire & Sociétés/Crime, History & Societies*, Vol. 14, No. 2 (2010), pp. 31-54; Shani D'Cruze (ed.) *Everyday Violence in Britain, 1850-1950*, (Harlow, 2000); Shani D'Cruze, *Crimes of Outrage: Sex, Violence and Victorian Working Women*, (London, 1998); Ellen Ross, "'Fierce Questions and Taunts": Married Life in Working-Class London, 1870-1914', *Feminist Studies*, Vol. 8, No. 3 (Autumn, 1982), pp. 575-602.

<sup>20</sup>For early modern accounts of marriage and marital breakdown in England see Stone, *The Family, Sex and Marriage*; Bailey, *Unquiet Lives*; Foyster, *Marital Violence*; Frances Dolan, *Marriage and Violence: The Early Modern Legacy*, (Philadelphia, 2008). For histories that cover a longer time span see Gillis, *For Better For Worse*; Lawrence Stone, *Road to Divorce*; L. Stone, *Broken Lives: Separation and Divorce in England 1660-1857*, (Oxford, 1993); Gibson, *Dissolving Wedlock*. For nineteenth-century histories see Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895*, (Princeton, 1989); Hammerton, *Cruelty and Companionship*; Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England*, (Columbia, 1993).

<sup>21</sup>Gibson, *Dissolving Wedlock*, pp. 56-63; Stone, *Road to Divorce*, pp. 368-382; Phillips, *Putting Asunder*, pp. 412-422. See 'Chapter I. What Kind of Contract is Marriage?: Married Women's Property, the Sexual Double Standard, and the Divorce Act of 1857', in Shanley, *Feminism, Marriage, and the Law*, pp. 22-48.

<sup>22</sup>Rosalind Marshall, *Virgins and Viragos: A History of Women in Scotland from 1080 to 1980*, (London, 1983); Gordon and Nair, *Public Lives*; Annmarie Hughes, *Gender and Political Identities in Scotland, 1919-1939*, (Edinburgh, 2010); Barclay, *Love, Intimacy and Power*.

<sup>23</sup>Eric M. Clive, *The Law of Husband and Wife in Scotland*, Second Edition, (Edinburgh, 1982), pp. 1-17.

both sexes.<sup>24</sup> Accordingly, the history of marital breakdown in Scotland from the early modern to modern period was uniquely shaped by Scots law.

Only a small minority of the Scottish married population filed for divorce or judicial separation per year between 1830 and 1890, but those who did left a record revealing a hidden history of marital discord. These experiences of marital breakdown are viewed through the lens of legal remedies. However, as court records only reveal a minor proportion of couples whose marriages failed, marital breakdown is further investigated through other historical sources outwith the civil court. The patterns addressed illustrate alternative methods used to escape unhappy marriages. This thesis specifically examines married heterosexual couples who were considered legal residents of Scotland, and therefore subject to Scots law.

Leah Leneman set the example in her study, *Alienated Affections* covering 1684 to 1830, providing a detailed account of Scots divorce and separation law, court processes and procedures, the roles played by all parties involved, and the various scenarios couples presented to the judges.<sup>25</sup> It has been criticised, nevertheless, for its descriptive overtones; a greater part of the book is the retelling of divorce and separation trials as examples of individual experiences. Furthermore, Leneman stopped at 1830— the same year consistorial actions were transferred from the Commissary Courts to the Court of Session (CS)<sup>26</sup> — meaning the divorce and separation cases she discusses were all brought to the Commissary Courts and judged based on moderately unchanged legislations from the seventeenth to the nineteenth century. Leneman's account of Scottish marital breakdown established the distinctiveness of Scotland's divorce and separation history, especially apart from England and Wales, and paved the way for future research, but is essentially restricted to the time period chosen and therefore emphasises the importance of another study from 1830 onwards.<sup>27</sup>

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<sup>24</sup> These divorce and separation laws will be discussed fully in Chapter One. The single standard is discussed in Chapter Three.

<sup>25</sup> Leneman, *Alienated Affections*, (1998).

<sup>26</sup> Any action related to divorce or separation, including declarator of marriage and legitimising illegitimate children, was considered a consistorial action in this early period; Clive, *The Law of Husband and Wife*, pp. 4-5.

<sup>27</sup> There has been one Masters dissertation on Scottish divorce and separation, focusing on the legal, religious and social influences' affects on rising rates in the nineteenth century; Fiona M. Dobbie, 'Divorce in Scotland, 1830-1890', unpublished Final Year Dissertation 1997/98, Department of Economic and Social History, University of Glasgow. As of 2013 Dr. Annmarie Hughes, Professor Eleanor Gordon, Dr. Rosemary Elliot, and Dr. Jeffrey Meek began a research project at the University of Glasgow exploring working-class marriage from 1855 to 1976. For more information see <http://www.gla.ac.uk/schools/socialpolitical/research/economicsocialhistory/projects/historyofworking-classmarriage/>



1830 serves well as the beginning for this study as it marks a turning point for Scots civil law. Indeed, Eric Clive states this in his own work: ‘The period since 1830 has been one of legislative activity.’<sup>28</sup> This started with the transfer of civil cases to the CS, whereafter, suing parties were restricted to this single court located in Edinburgh.<sup>29</sup> The second half of the nineteenth century, in particular, saw many important legislative changes, which arguably led to the gradual increase in divorce and separations that then burgeoned in the twentieth century.

There have been historical demographic studies of marriage and marriage breakdown written for Scotland, but they do not take into account the individual stories, gender and class differences so central to social history.<sup>30</sup> Moreover, this research has found that marital desertion in Scotland is especially wanting in the historiography. This facet of marital breakdown is discussed under the context of poverty, unemployment, emigration, marriage, and divorce, but has not featured in a study for Scotland before this thesis.<sup>31</sup>

As for specific historical accounts of violence and marital breakdown in Scotland, none use CS cases as sources. The High Court records of domestic homicides in late nineteenth-century Scotland have been examined and in a separate work compared with Great Britain and Ireland for patterns of murder and conviction by Carolyn Conley.<sup>32</sup> Her work provides insight into how the judiciary dealt with husbands and wives who murdered their spouses, however, she does not go into the contextual side of the marital breakdown. Annmarie Hughes has contributed several articles, and most recently in her book, challenging the arguments of Martin Wiener who claimed male violence decreased by the turn of the

<sup>28</sup> Clive, *The Law of Husband and Wife*, p. 7.

<sup>29</sup> For an overview of the history of the Court of Session, see David M. Walker, *The Legal History of Scotland, Volume VI: The Nineteenth Century*, (Edinburgh, 2001), pp. 320-335.

<sup>30</sup> For instance, T.C. Smout, ‘Scottish Marriage, Regular and Irregular 1500-1940’, in R. B. Outhwaite (ed.), *Marriage and Society: Studies in the Social History of Marriage*, (London, 1981), pp. 204-236; Robert Woods, *The Population of Britain in the Nineteenth Century*, (Hampshire, 1992), pp. 39-45; M. Flinn, J. Gillespie, N. Hill, A. Maxwell, R. Mitchison and C. Smout (eds.), *Scottish Population History, from the Seventeenth Century to the 1930s*, (Cambridge, 1977), pp. 90, 271-274; Andrew Blaikie, ‘Rituals, Transitions and Life Courses in an Era of Social Transformation’, in Trevor Griffiths and Graeme Morton (eds.), *A History of Everyday Life in Scotland 1800-1900*, (Edinburgh, 2010), pp. 89-115; R. A. Houston, ‘Marriage Formation and Domestic Industry: Occupational Endogamy in Kilmarnock, Ayrshire, 1697-1764’, *Journal of Family History*, Vol. 8 (Fall, 1983), pp. 215-229.

<sup>31</sup> For studies specific to marital desertion in the nineteenth century, see Olive Anderson, ‘Emigration and Marriage Break-up in Mid-Victorian England’, *The Economic History Review*, New Series, Vol. 50, No.1 (February, 1997), pp. 104-109; Christina Twomey, “‘Without Natural Protectors’: Responses to wife desertion in gold-rush Victoria”, *Australian Historical Studies*, Vol. 27, No. 108 (1997), pp. 22-46; Beverly Schwartzberg, “‘Lots of them did that’: Desertion, Bigamy, and Marital Fluidity in Late-Nineteenth Century America”, *Journal of Social History*, Vol. 37, No. 3 (Spring 2004), pp. 573-600; Marjorie Levine-Clark, ‘From “Relief” to “Justice and Protection”: The Maintenance of Deserted Wives, British Masculinity and Imperial Citizenship, 1870-1920’, *Gender & History*, Vol. 22, No. 2 (August 2010), pp. 302-321.

<sup>32</sup> Carolyn Conley, ‘Atonement and domestic homicide’, in Richard Mc Mahon (ed.), *Crime, Law and Popular Culture in Europe, 1500-1900*, (Cullumpton, 2008); and ‘Homicide in Late-Victorian Ireland and Scotland’, *New Hibernia Review/Iris Éireannach Nua*, Vol. 5, No. 3 (Autumn/Fómhar, 2001), pp. 66-86.

century due to aggressive masculinity becoming socially and judicially unacceptable.<sup>33</sup> In contrast, Hughes argues that tolerance of wifebeating and gender violence was still evident through criminal courts' penal sentencing of convicted wifebeaters and the continued use of provocation as an excuse for violence.<sup>34</sup> Hughes' main period of study is the interwar era, but she has traced the criminal legislation, the convictions rates and sentencing of wifebeaters by criminal courts since the mid 1800s. Hughes' work provides a seminal account of the history of wifebeating, reinforcing that Scotland has a unique and independent history that requires separate investigations before concurring with any found patterns put forward by scholars of English history. Hughes' work, however, does not look at divorce or separation. She uses criminal court records, newspaper accounts, and oral histories to analyse experiences and prosecution of wifebeating.

Class also features predominantly in Hughes' research, but her demographics are restricted by the nature of prisoners persecuted in criminal court. Other key historical accounts of Scotland that discuss marriage focus on specific classes of Scottish society, too, such as Gordon and Nair's exploration of Victorian and Edwardian middle-class women in *Public Lives*, and more recently Barclay's account of marriage within sixteenth to eighteenth-century elite society in *Love, Intimacy and Power*.<sup>35</sup> Rosalind Marshall's *Virgins and Viragos* covers a long history of Scottish women, touching upon marriage and marriage breakdown and the advances for women in the modern era without specifying their economic status.<sup>36</sup> This study does not claim to reveal the history of a particular socioeconomic class; however, using CS cases inadvertently unveils the ambiguous classes that fell between the middle and working class definitions. Likewise, the use of criminal court cases and poor relief applications single out families that would fall into the lower classes.<sup>37</sup>

## Sources and Methodology

Part of the original contribution of this thesis is the use of Court of Session (CS) records. These, along with other primary sources, reveal the unique Scottish experiences and representations of marital breakdown. This is further achieved through the incorporation

<sup>33</sup> Hughes' book deals with gender and identity in the interwar period, including two chapters on marriage and marital conflicts; Hughes, *Gender and Political Identities*. See also Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*, (New York, 2004).

<sup>34</sup> Hughes, 'The "Non-Criminal" Class', pp. 32-33.

<sup>35</sup> Gordon and Nair, *Public Lives*; Barclay, *Love, Intimacy and Power*. See also Eleanor Gordon and Gwyneth Nair, *Murder and Morality in Victorian Britain: The Story of Madeline Smith*, (Manchester, 2009).

<sup>36</sup> Marshall, *Virgins and Viragos*.

<sup>37</sup> It is important to note that not all women who applied for poor relief due to desertion lived as paupers prior to their husbands leaving them. Some may have lived in a more stable economic situation, but fell into poverty upon abandonment.

of sources from different social levels in Scottish society; specifically the use of Parliamentary papers, newspapers, poor relief applications, civil court cases and criminal court cases.

This thesis begins where Leneman's *Alienated Affections* ended, in 1830. The stopping point of 1890 was chosen to include some of the key dates for legislative changes associated with marriage and marriage dissolution in Scotland. The first year of each decade represents the benchmark years of this study, as the data collected was from the years 1830, 1840, 1850, 1860, 1870 and 1880.

The majority of the evidence comes from CS cases. The CS, located in Edinburgh, served as the Supreme Civil Court that presided over any matrimonial, inheritance, trustee, property or financial dispute by thirteen Lord Ordinaries. Held in the National Archives of Scotland in Edinburgh, the CS records are catalogued as extracted and unextracted processes. Extracted records are decrees that were formally copied in order to act as a warrant and enforce the final judgment of the CS.<sup>38</sup> In the National Archives the extracted cases were registered in index books organised by year, and displayed the name of the parties involved and the decree awarded.<sup>39</sup> For this study I recorded all the extracted divorce and separation cases found in the benchmark years and compiled the data into two sets. The first set of data lists all the decrees found in the index books for the benchmark years (see Table I.1, Benchmark Data). These decrees provide the names of the litigants, who initiated the suit, the status and final ruling of the case, and the addresses and occupations of the pursuer and defender (if known). The second set of data, which is smaller but contributes more detail, is a sample of the benchmark cases from the first list; these cases were viewed in their original legal documents, photographed and analysed as case studies (see Table I.1, Case Studies Data). The legal documents that make up a CS action are: the summons; the condescendence (the complaint); the defenders' answers and plea (if given by defender); the proof (the testimonies of witnesses); the interlocutor sheet (the Lord Ordinary's rulings on the case from start to finish); the account of expenses; and an inventory of the documents assembled for the case.

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<sup>38</sup> Leneman found that the majority of cases were extracted because it was more convenient for the parties involved, although it did cost money to have a case extracted; Leneman, *Alienated Affections*, p. 10.

<sup>39</sup> The unextracted cases were listed in a filing cabinet in alphabetical order, without the type of action or decree specified. For these more managerial reasons, only the extracted cases were collected for this research. Every decree related to divorce or separation was written down and requested from the archive, however, not every case was available. Some had been recalled, and were therefore unavailable.

Table I.1 Court of Session Source Data Sets

| Year  | Benchmark Data |         |            |         |           |           | Case Studies Data |         |                 |                 |            |         |           |           |
|-------|----------------|---------|------------|---------|-----------|-----------|-------------------|---------|-----------------|-----------------|------------|---------|-----------|-----------|
|       | Total per Year | Divorce | Separation | Aliment | Adherence | Dismissed | Total per Year    | Divorce | Adultery        | Desertion       | Separation | Aliment | Adherence | Dismissed |
| 1830  | 5              | 1       | 1          | 3       |           |           | 3                 | 1       |                 | 1               | 1          | 1       |           |           |
| 1840  | 27             | 20      |            | 2       | 3         | 2         | 15                | 13      | 9               | 4               |            |         | 2         |           |
| 1850  | 32             | 25      | 4          |         | 1         | 2         | 12                | 11      | 9               | 2               | 1          |         |           |           |
| 1860  | 28             | 21      | 3          | 1       | 2         | 1         | 24                | 20      | 15              | 5               | 3          |         | 1         |           |
| 1870  | 55             | 46      | 6          | 2       |           | 1         | 33                | 30      | 18              | 12              | 3          |         |           |           |
| 1880  | 107            | 90      | 15         | 1       |           | 1         | 40                | 34      | 14              | 20              | 6          |         |           | 1         |
| Total | 254            | 203     | 29         | 9       | 6         | 7         | 128               | 109     | 65 <sup>a</sup> | 44 <sup>a</sup> | 14         | 1       | 3         | 1         |

<sup>a</sup> The totals of the Adultery column and Desertion column are a breakdown of the grounds found for Divorce cases, and therefore equal the total for the Divorce column

Source: GRH, General Minute-Book of The Court of Session, Vols. 49, 50, 59, 60, 69,70, 79, 80, 89, 90, 99, 100

One advantage of using CS records as the main source for this thesis is that they provide the historian with the judicial discourses of the time, in particular the marital expectations as defined by the law. Another is that, the parties involved in the actions comprise a wide class spectrum, from the landowning to the impoverished. Furthermore, the court documents provide detailed accounts of peoples' everyday lives and are an invaluable source for the social historian. By recording the complaints and defences of the litigants, as well as third party witness testimonies, these documents have simultaneously preserved the stories of nineteenth-century Scottish men and women that may have otherwise been lost. There are also the occasional private letters, correspondence between solicitors and clients, and even a photograph (known in court as a 'likeness').

There are some important disadvantages to note, too. Most significantly, divorce and separation trials centred on the portrayal of the defender (and the pursuer in the defences) in a negative light in order to get a successful decree. It is likely, therefore, that some stories presented in court were self serving, exaggerated or manipulated in favour of the storyteller. It is also significant that the case documents were written by a clerk, altering the first person account to third person, and inadvertently distorting the source. Moreover, these cases reveal the worst aspects of the relationship or only one end of the spectrum;

happy memories are excluded in order to establish the failure of the marriage. In terms of what is available in the sources, not all of the required documents are available with the extracted cases; for instance, some cases only had the summons, the complaint and the interlocutor sheet, as these were the only documents required for extracted processes to prove the divorce or separation trial had occurred.<sup>40</sup> Lastly, as the first half of Chapter Two will show, couples that filed for divorce or separation were only a small minority of the married population, and therefore not representative of all married couples.

Another primary source used is Parliamentary papers. Though Parliamentary papers are available for the whole of the nineteenth century, census reports are restricted to 1855 and after. In 1854 the Registration Act was passed in Scotland requiring all births, deaths and marriages to be officially registered.<sup>41</sup> From 1855 onwards there is a census report available for each decade. Divorce and separation figures, however, were not recorded with the census. Instead that information can only be found in disparate reports written for Parliamentary enquiries. Therefore, data on the number of marriages and the number of divorces before 1855 are incomplete. Furthermore, where data are available, the figures are not always specified. For example, the report might say the number of divorces without defining the grounds, or only provide the number of decrees (final ruling of the Lord Ordinary) granted rather than the total number of summonses (petition for the action) applied for and the number dismissed (cases thrown out by the Lord Ordinary without a decree). Information on the number of separation summons and decrees are even harder to come by, therefore the quantitative analysis of this data in Chapter Two focuses on divorce. Overall, the executive findings printed in the Parliamentary papers were crucial to establish the general trends of marital breakdown as viewed and publicised by the government.

In order to write an in-depth study of marital desertion in Scotland, beyond the limited numbers of official desertion cases found in the CS, an additional source was used: poor relief applications. It is well accepted amongst historians and contemporaries that the majority of marital desertions took place outside the courtroom. In order to address the gap between official and unofficial desertion, Poor Law applications were collected from

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<sup>40</sup> For more detailed discussions of court records as sources for historians, see Joanne Bailey, 'Voices in court: lawyers' or litigants?', *Historical Research*, Vol. 47, No. 186 (Nov., 2001), pp. 392-408; Stephen Robertson, 'What's Law Got to Do with It? Legal Records and Sexual Histories', *Journal of the History of Sexuality*, Vol. 14, No. ½, Special Issue: Studying the History of Sexuality: Theory, Methods, Praxis (Jan.-Apr., 2005), pp. 161-185.

<sup>41</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1854; Clive, *The Law of Husband and Wife*, p. 8.

three different parishes in Scotland: Paisley in the west, and Montrose and Forfar in the east. Poor relief was available to women and their children who could prove they did not have the financial support of their husband or father. These documents are another excellent source for studying social history, or history from below. They provide demographic details, such as education, religion, age, place of birth, residence, and number of children. Forfar's applications, for instance, follow the life of the pauper until they are off the Poors' Roll or deceased. The applications reveal the discursive prejudices held against impoverished peoples, but also the humanity that was displayed by Inspectors of the Poor who granted destitute and desperate women aid. For these reasons, poor relief applications are a valuable source for studying the impact of desertion on wives. The disadvantage of using poor relief applications, however, is that this source restricts the records of unofficial desertion to abandoned wives, which only reinforces the stereotype of desertion as the poor man's divorce. These documents are also written by clerks, again removing the first person voice of the female applicants.

The fourth major sources used are nineteenth-century newspapers from across Scotland. They enhance the findings from the CS records and the Parliamentary papers, as well as provide the media and public discourses on marital breakdown. *The Scotsman*, a national paper based in Edinburgh, reported on CS divorce and separation cases—thus providing extra case studies, though outside the benchmark years,—as well as on the debates relating to legislation on marriage, divorce, separation and wifebeating held in the House of Commons and House of Lords of Parliament.

Several local newspapers were also examined for my research: *Glasgow Herald*; *Caledonian Mercury*; *Aberdeen Journal*; and the *Dundee Courier & Argus & Northern Warder*. The main source the newspapers contributed to this study are the trials and sentencing of wifebeaters tried in the Scottish criminal courts. Criminal courts in Scotland are divided into a three layered hierarchy: at the bottom is the Justice of the Peace Court that deals with summary (judge only) criminal proceedings; second are the Sheriff Courts, which hold both solemn (judge and jury) trials and summary trials; and at the top is the High Court of Justiciary, the Supreme Criminal Court. This hierarchy is important for understanding prosecution of wifebeaters, for instance, if a husband's abuse was seen as a minor assault to be punished by a fine or short prison sentence then he would be tried summarily in the Justice of the Peace Court, whereas a brutal assault, often defined by the use of a weapon or severity of injury, would be tried in Sheriff Court or High Court in

order to deliver a more substantial penalty. This will be discussed in detail in Chapter Five.

These cases do not qualify as examples of separation, as there is no indication of what happened to the couple after they left the criminal courtroom. Still, the database of wifebeating cases compiled through this study allows another perspective for examining marital abuse in Scotland. The newspapers also provide articles, editorials and letters that give further glimpses into public perceptions of this issue. The disadvantage of using newspapers as a source is that the authors were most likely of the middle class and portraying class biases. Furthermore, a desire to attract readership may have determined what was written. Lastly, as with judiciary opinions, journalists' attitudes towards an topic such as marital breakdown, divorce and separation may not reflect the more common perceptions.

## **Thesis Structure**

The main questions for this thesis are how Scotland's legislation affected the Scottish experiences of marital breakdown? Why, when divorce and separation were legal on equal grounds for husband and wife, were there so few actions tried by the CS? And who did break out from the majority to initiate a summons, and why?

Chapter One serves as a foundation for understanding the legal context of this thesis. It outlines the history of Scots law through discussions of marriage legislation and its regular and irregular forms, the establishment of divorce on two grounds: adultery and desertion, and the law as it related to judicial separation and marital cruelty. The final section of the chapter discusses the important civil and criminal legislation reform in the second half of the nineteenth century that related to divorce, separation and marital abuse as the century came to a close. This chapter further provides the context through a comparison of Scot's law to English common law (and America briefly), outlining the differences and similarities of post-1850 law reform. Using primary and secondary accounts of Scots law texts and acts passed by Parliament, Chapter One argues that Scotland entered the nineteenth century as the more liberal country regarding marriage and divorce law, but was overshadowed by several pivotal changes to English marriage and divorce law within the second half of the 1800s. When compared side by side, however, Scot's law was equally active in improving married women's rights, though both legal systems managed to do so without altering the traditional views of marriage as a sanctified institution. Despite the liberal nature of Scottish legislation, conservative ideologies regarding married women's

rights and marital expectations deterred couples from using divorce and separation as a common remedy.

Chapter Two is also a background account before the main analyses in Chapters Three, Four and Five. It firstly provides a general demographic context of the married population for Scotland in the nineteenth century. This is followed by a discussion of the attitudes and discourses on specifically Scottish types of marriage and divorce. Divorce and separation rates are presented in a quantitative analysis of findings from the CS records, Parliamentary papers and census records. Again, the information available on Scotland is compared to England and Wales to demonstrate distinct patterns and trends. The quantitative research conducted establishes that there was a low number of divorce and separations throughout the mid-nineteenth century. The low figures persisted, despite the legislative changes in the second half of the century; higher figures are not recorded until after World War One. Nevertheless, official marital breakdown remained a concern for authorities, principally due to a fear that divorce was too accessible for the poorer classes. Thus this chapter argues that although egalitarian legislation made divorce and separation accessible in theory, it was still unused by the majority of the population due to other economic, social and cultural factors. The second section of Chapter Two presents the data collected from the CS specifically for this thesis. Using the CS benchmark data set further substantiates the general trends established in the first section, and shows that there were gendered differences regarding which spouse filed a suit and on what ground. More husbands filed for divorce on the ground of adultery than wives, while wives were more likely to seek divorce on the ground of desertion. Even more evident was that wives were the dominant instigators for suits of judicial separation, and the most used ground complained of was cruelty and maltreatment.

Chapter Three begins the qualitative analysis of the CS records. This chapter focuses on the most frequently filed ground for divorce: adultery. Following the historiographical debates related to sexuality within marriage, the extracted cases are analysed and compared with popular discourses to demonstrate the impact on husbands' and wives' sexual behaviour, conjugal and extramarital. The double standard and its visibility in Scots law and societal attitudes is a central discussion as the most pervasive and ultimately invasive discourse. Patterns found in the cases collected are also presented and discussed. This chapter argues that even though husbands and wives had equal access to divorce on this ground in theory, outside social and cultural factors caused more men to instigate actions than women. Wives were not absent as pursuers, but the CS sample suggests they were



more likely to file for divorce on the ground of adultery if their husbands had also deserted or maltreated them.

Chapter Four focuses on desertion categorised in two forms: official and unofficial. Actions of divorce on the ground of desertion brought to the CS represent the official cases. Instances of unofficial desertion or ‘self-divorce’ found through poor law applications by deserted wives represent the hidden layer of this form of marital breakdown. This chapter’s analytical framework establishes the breadwinner ideal and its impact on marriages, married women and work. As the second ground established for divorce in Scotland, desertion had a much more complicated process than filing for adultery. The legal documents that accompanied a divorce for desertion included a summons of adherence, and letters of horning before the summons for divorce could be filed (a summons of adherence was a suit requesting a spouse to return to their conjugal home, letters of horning were the required letters sent out to a person absconding from debt to request their return and if unanswered were followed by the symbolic act of declaring the absconder a rebel with three blasts to the horn).<sup>42</sup> Therefore, this chapter argues that filing for divorce on the ground of separation was a less practical remedy for abandoned spouses. In 1861 the law was changed to no longer require those preliminary steps, whereafter an increase in desertion divorces is noticeable.<sup>43</sup>

The fourth chapter has a different outline than the others and incorporates the second vital source for understanding this form of marital breakdown besides the CS cases, the poor relief applications. More instances of desertion are recorded through poor relief applications than CS trials. Due to economic restraints, specifically limited opportunities for married women and the dominance of the breadwinner wage, many abandoned wives were forced to apply for poor relief. However, this study found that it was because of desertion that women became impoverished, rather than desertion being a custom of marital breakdown specific to poor couples. Merged together, this chapter presents marital desertion in its official and unofficial forms.

The fifth and final chapter focuses on separation and cruelty in two parts. Part One discusses the analytical framework and discursive context related to marital abuse, while Part Two applies those discussions to the sources and findings. Although judicial separation was available on the ground of adultery and cruelty to both sexes, of the CS cases collected for this study, every case was initiated on the ground of maltreatment and

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<sup>42</sup> Walker, *A Legal History of Scotland*, p. 546.

<sup>43</sup> Conjugal Rights (Scotland) Act, 1861 [24 & 25 Vict. Cap. 86.]

cruelty, and by the wife. However, these only amounted to fourteen summonses of separation. This number is too small for a representative analysis of marital abuse, and therefore the secondary source of Scottish newspapers was collected and analysed alongside the civil court cases. This follows the work done by Hughes, though on a smaller scale, in assessing the attitudes towards wifebeaters and abused wives, as well as public and judicial discourses that may have been influential in determining how acceptable marital violence was in nineteenth-century Scotland. To try to capture a fuller story of marital abuse CS records and newspaper accounts are analysed in conjunction. This chapter argues that although legislation may have changed implying less tolerance of marital abuse within the judicial system, this notion was not always applied when in practice. Moreover, the nature of the legislation on marital cruelty, and the court procedures, limited judicial and public understanding of marital abuse as more than physical confrontations; as the case studies will show, abuse could be found in physical, verbal, sexual, and mental forms. As a result, marital abuse continued into the twentieth century in Scotland, and has persisted as an issue that cannot be narrowed to a class problem.

## Chapter One: Legal Context of Scots Marriage, Divorce and Judicial Separation Law in the Nineteenth Century

This chapter provides the background to Scotland's civil legislations as a foundation for this thesis' discussions of adultery, desertion and cruelty. First addressing Scots marriage law and history leading into the nineteenth century, this chapter will then provide an account of divorce and separation law, its history, and the processes of adultery, desertion, and cruelty. This chapter then addresses the changes in the law and the social consequences. The nineteenth century was a pivotal time in Scots law for marriage and its dissolution as, particularly from 1830 to 1890, several acts were passed that directly influenced the availability of marital dissolution for the married population. These legislative reforms and amendments also highlight the progression (or lack of) related to matrimonial law, and more specifically the rights of married women. Throughout this overview Scots law will also be juxtaposed with the marriage, divorce and separation legislations of other Western countries, in particular England.

The contrasts between Scotland and England are important features of nineteenth-century marriage, divorce and separation laws. Up to the mid-1800s Scotland was the more liberal of the two: lenient marriage regulations, the option of divorce and separation for multiple grounds, and, significantly, egalitarian access to divorce and separation legislations were only features of Scots civil law. After 1850 Parliamentary enquiries into marriage and divorce laws, campaigns by women's rights advocates, and increasingly defined Victorian values resulted in several progressive reforms pertaining to matrimonial rights in England. However, as this chapter will argue, Scotland's reforms were not far behind, if behind at all.<sup>1</sup>

Scottish law subjected the three grounds central to this study—adultery, desertion and cruelty—to separate requirements and processes. The terminology for these forms of marital breakdown was specific to the nineteenth-century legal lexicon. Adultery was the carnal connection between a married person and someone who was not their spouse (the guilty party's lover was labelled the paramour). In cases of desertion, abandonment of a spouse for a long period of time was non-adherence. Once four years of non-adherence had passed it could be legally recognised as desertion. Cruelty, most commonly known in the twentieth century as domestic violence, was legally defined in nineteenth-century

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<sup>1</sup> Craig Young, 'Middle-Class "Culture", Law and Gender Identity: Married Women's Property Legislation in Scotland, c. 1850-1920', in Alan Kidd and David Nicholls (eds.), *Gender, Civic Culture and Consumerism: Middle-Class Identity in Britain 1800-1940*, (Manchester, 1999), pp. 136-137.

Scotland as maltreatment, inhumane treatment, or gross cruelty. Chastisement or moderate correction was the acceptable use of physical violence by a husband to discipline a misbehaving wife. Outside of the civil courtroom marital violence was publicly and socially branded as wifebeating, despite the narrowness of the term.

## Overview of Scottish Marriage Law

The relatively permissive marriage law of Scotland differed significantly from the marriage laws in other countries.<sup>2</sup> Indeed, one of the stipulations upon the Act of Union of 1707 preserved a separate judicial system for Scotland from the rest of Great Britain. Although the Acts of Union secured this division, 147 years earlier Scotland had already distinguished itself from its neighbours when the Reformation of the sixteenth century brought changes throughout Europe.<sup>3</sup> The Commissary Court was established in 1563 to handle civil matters of marriage, divorce and separation (in 1830 this jurisdiction was transferred to the Court of Session based in Edinburgh).<sup>4</sup> Following the Reformation Canon Law temporarily remained the authority relied upon for judging matters related to matrimony. By the seventeenth and eighteenth centuries, however, a native Scottish idea of marriage had developed.<sup>5</sup>

This idea of marriage stood in stark contrast to England's. Lord Hardwicke's Act solidified England as the conservative country and Scotland as the comparably liberal neighbour when Parliament tightened English marriage laws in 1753. The Act limited valid marriages to only those performed by an Anglican Minister in a Church of England, following three calls of banns or the purchase of a license, requiring residence of at least three weeks in the parish where the union was held, and raising the age of consent to twenty-one, preventing anyone younger from marrying without parental consent.<sup>6</sup>

<sup>2</sup> "Marriage", Scottish Way of Birth and Death,

<<http://www.gla.ac.uk/departments/scottishwayofbirthanddeath/marriage/>>, [accessed 20 January 2010].

<sup>3</sup> Kidd argues that the centuries following the Union Act demonstrate more of an effort by Scotland to be progressive and unionist rather than using the legal system to maintain a national identity. He does not, however, discuss Scots marriage laws and their antagonistic relationship to English marriage laws; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000*, (Cambridge, 2008), <<http://www.myilibrary.com?ID=198281>>, [accessed 19 August 2013], pp. 173-174.

<sup>4</sup> Initially the Court of Session took over judgement on religious matters, including marriage, divorce and separation. Ronald D. Ireland, 'Husband and Wife: (a) Post-Reformation Canon Law of Marriage of the Commissaries' Courts, and (b) Modern Common Statute Law', in Various Authors, *An Introduction to Scottish Legal History*, (Edinburgh, 1958), pp. 82-83.

<sup>5</sup> Ireland, 'Husband and Wife: (a) Post-Reformation', p. 83

<sup>6</sup> As of 1831 the age of consent in Scotland was fourteen for males and twelve for females; W. C. Boyd, 'A Review of the Marriage Laws of Scotland and England, showing how they might be assimilated with the advantage to both countries; also, remarks on the ancient Roman jurisprudence on the same subject, &c. &c.', *Hume Tracts*, (1831), p. 13.

Furthermore, if a couple (or dissenting clergyman) attempted to marry out with these regulations it was considered a crime with the penalty of transportation.<sup>7</sup> The consequences of these strict regulations were voiced by the Act's opponents who cited the vulnerability of women promised marriage through betrothal, the expenses being too much for poor families, and the residency restrictions displacing migrant workers, sailors and soldiers.<sup>8</sup>

The other impact of Lord Hardwicke's Act was the new dichotomy created between England and Scotland; when marriage became less accessible in England couples began crossing the border into Gretna Green (the closest town in Scotland) to take advantage of the lower age of consent, no requirement of residency, and Scotland's multiple forms of irregular marriage (discussed below).<sup>9</sup> Throughout the nineteenth century Members of Parliament repeatedly attempted to assimilate the marriage laws between the countries, but with little success.<sup>10</sup>

### *The Nature of the Marriage Contract*

Coming into the nineteenth century, marriage under Scottish law was a civil contract that united a man and woman under terms where the woman lost her independent legal status and effectively became subsumed in her husband's identity. This contract was different from any other, in that it changed the legal status of the participating woman. According to Patrick Fraser, Scottish advocate, it was a unique contract only existent in this unique form through the union of a man and a woman.<sup>11</sup> It was by necessity a consensual civil contract delegating status to the parties involved, for example the status of legitimate

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<sup>7</sup> The only exceptions were for Quakers and Jews; John Gillis, *For Better, For Worse: British Marriages, 1600 to the Present*, (New York and Oxford, 1985), pp. 140-141.

<sup>8</sup> Ibid, pp. 141-142.

<sup>9</sup> The popularity of runaway and clandestine marriages in Gretna Green was addressed in 1856 in the Marriage (Scotland) Act, also known as Lord Brougham's Act, that stipulated a period of residency to be married in Scotland, although Clive argues this law was ineffective overall; Eric M. Clive, *The Law of Husband and Wife in Scotland*, Second Edition, (Edinburgh, 1982), pp. 8-9.

<sup>10</sup> In particular, see PP 1849 (310) *Report from the Select Committee on Marriage (Scotland); together with the minutes of evidence*; PP 1852-53 [1604] *First report of the commissioners appointed by Her Majesty to enquire into the law of divorce, and more particularly into the mode of obtaining divorces a vinculo matrimonii*; PP 1912-13 [Cd. 6478] *Royal Commission on Divorce and Matrimonial Causes. Report of the Royal Commission on Divorce and Matrimonial Causes*.

<sup>11</sup> Fraser attributed the explanation to Lord Robertson, a Scotch judge; Patrick Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, Second Edition, Vol. 1, (Edinburgh, 1876), p. 170. Bishop also quotes the same judge and references Fraser's use of the definition. Though Bishop wrote on marriage law he included the opinion of a Scotch Judge as a universal definition of the marriage contract; J. P. Bishop, *Commentaries on The Law of Marriage and Divorce, and Evidence in Matrimonial Suits*, (Boston, 1859), pp. 30-31.

children.<sup>12</sup> Unlike any other contract, marriage cannot be dissolved on the parties' own volition, but only by a judicial authority based on matters determined under Scots Law.<sup>13</sup> Another Scottish advocate, Frederick Walton, noted the consequences writing in 1893 that, 'it [is] not merely a civil contract, but is rather a status, the gate of which is a contract. The contract once validly made, the parties must accept the incidents and consequences attached by the law of the man's domicile to the status of marriage.'<sup>14</sup>

Such consequences were deemed the legal effects of marriage. As husband and wife, the spouses agreed to life-long adherence and chastity.<sup>15</sup> Yet, for the woman the effects were more extreme:

the husband's legal supremacy was undoubted. The wife's moveable property became his property: the children of the marriage were, for purposes of guardianship, custody and access, his children: the wife's domicile followed that of her husband automatically: she had hardly any contractual capacity: she was 'in a manner, in a state of wardship or minority under her husband'—a 'peculiar and inferior condition.'<sup>16</sup>

Throughout the nineteenth century a wife was continuously viewed as a subject rather than an equal under Scots law. Still, as argued by Gordon and Nair, '[i]t was expected... that the relations between husband and wife would be based on love and mutual respect, and that the authority of the husband would be tempered by affection and consideration.'<sup>17</sup> This expectation had not changed significantly by the end of the nineteenth century.

The impact of the marriage contract was injurious to the woman. For Western countries, marriage represented the spiritual and legal bond of matrimony: a unity between a man and a woman. This unity, however, did not mean equality, and in effect removed a woman from her individual identity placing her under the control of her husband. This condition was legally known as coverture: 'a married woman, who at common law was a

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<sup>12</sup> Under Scots law children born out of wedlock became legitimate once their parents married. In England, however, even if the parents of children were married and went on to have legitimate children, the children from before the marriage remained illegitimate. Boyd claimed that this important difference between Scotch and English law signified Scotland's humanity, 'dictated in the purest spirit of philanthropy and goodness'; Boyd, 'A Review of the Marriage Laws', p. 30.

<sup>13</sup> Fraser, *Treatise on Husband and Wife*, p. 170.

<sup>14</sup> Frederick Parker Walton, *A Handbook of Husband and Wife According to the Law of Scotland*, (Edinburgh, 1893), p. 1. Despite marriage being associated with a religious ceremony, it was regarded as 'purely a civil contract' in both Scotland and England, although arguably England enforced the union under a religious context more so than Scotland; Boyd, 'A Review of the Marriage Laws', pp. 13, 15-16.

<sup>15</sup> William Murray Gloag, and Robert Candlish Henderson, *Introduction to the Law of Scotland*, (Edinburgh, 1927), p. 519.

<sup>16</sup> Clive, *The Law of Husband and Wife*, p.11.

<sup>17</sup> Eleanor Gordon and Gwyneth Nair, *Public Lives: Women, Family and Society in Victorian Britain*, (New Haven, 2003), p. 73. See also Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class*, (Berkeley, 1997), p. 63.

“feme covert,” a woman covered over by her husband’, legally, politically, and economically.<sup>18</sup> In effect, this legal condition was most detrimental to the wife because she lost her identity upon marriage.<sup>19</sup> This remained an issue despite the efforts by reformers during the nineteenth century to give married women legal standing separate from their husbands.<sup>20</sup>

### *The Forms and Processes of Marriage Law*

The Scottish marriage union could become legally valid through multiple processes: either a regular or an irregular marriage. A regular marriage included a religious ceremony.<sup>21</sup> This process required the parties to first make a proclamation of banns and then to be united through a religious ceremony officiated by a minister of religion with two witnesses present during the ceremony.<sup>22</sup> The proclamation of banns was a necessary precursory-step meant to determine the legality of joining the involved parties.<sup>23</sup> The purpose of the banns, ‘was to prevent marriages between persons under incapacity’.<sup>24</sup> Before 1834, penalties were inflicted on those married by a minister not of the established Scottish Church.<sup>25</sup> The Marriage (Scotland) Act of 1834 decreed a removal of those restrictions making it lawful for a couple to be wed by a clergyman not in the established Church, as long as a proclamation of banns was still presented before the solemnisation.<sup>26</sup>

<sup>18</sup> Hendrik Hartog, *Man and Wife in America: A History*, (London, 2000), p. 115.

<sup>19</sup> David Stewart, writing in 1885, referred to coverture sceptically stating that there was a ‘fiction of unity’ assumed with marriage; David Stewart, *The Law of Husband and Wife as Established in England and the United States*, (San Francisco, 1885), p. 45.

<sup>20</sup> The most relevant reform was the Married Women’s Property Act. This will be discussed in a later section of this chapter. For a full discussion of feminist campaigns and debates on marriage see Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885-1914*, (London, 1995), pp. 124-150.

<sup>21</sup> Clive, *The Law of Husband and Wife*, p. 35.

<sup>22</sup> Walton, *A Handbook*, p. 14; see also Ireland, ‘Husband and Wife: (a) Post-Reformation’, p. 84.

<sup>23</sup> The process was the presentation of a certificate, produced by the Session-Clerk that stated an authorisation for marriage via a proclamation of marriage with names and titles to the acting minister before the ceremony. After the solemnisation the minister, wedded couple and witnesses signed the proclamation and sent it to the Registrar of the parish where they were wed; Walton, *A Handbook*, pp. 14-15.

<sup>24</sup> The incapacities laid out by Scots Law included the same impediments that enacted a nullity of marriage. There were a number of reasons a marriage could be nullified in post-Reformation Scotland: if there was a previous and valid marriage; if the couple were married under age; or if the marrying parties had an impeding relationship between them, such as being closely related by blood or marrying into a deceased partner’s family; Ireland, ‘Husband and Wife: (a) Post-Reformation’, p. 84; Ireland, ‘Husband and Wife: Divorce’, pp. 92-93.

<sup>25</sup> Clive, *The Law of Husband and Wife*, pp. 7-8.

<sup>26</sup> Ireland, ‘Husband and Wife: (a) Post-Reformation’, pp. 85-86. See also Walton, *A Handbook*, p. 16. Further information on the Marriage (Scotland) Act 1834: ‘The law on regular marriages was reformed by statutes of 1834 (allowing priests or ministers not of the established church to celebrate marriages), 1878 (introducing a civil alternative to banns in the form of notice to a registrar)’; ‘This Act was one of a series of early nineteenth century Acts removing religious disabilities’; Clive, *The Law of Husband and Wife*, p. 8. See also An Act to Amend the Laws relative to Marriages celebrated by Roman Catholic Priests and Ministers not of the Established Church, in Scotland, 1834, [4 & 5 Gul. IV. Cap. 28.]

Irregular marriage in nineteenth-century Scotland was recognised in three different forms: marriage by declaration *de praesenti*, marriage by promise *subsequente copula*, or marriage by cohabitation with habit and repute. The declaration *de praesenti* required a mutual, genuine, verbal consent of marriage between a man and woman that in effect stated they acknowledged themselves as husband and wife.<sup>27</sup> This declaration could also be made in written form.<sup>28</sup>

The second form of irregular marriage, promise *subsequente copula*, existed when a promise of marriage was made between a man and woman, and the woman accepted the promise with consensual intercourse.<sup>29</sup> This sexual union, '[was] regarded by them as the fulfilment of the promise.'<sup>30</sup> It was also required that the promise be stated either as a writ or an oath.<sup>31</sup>

The third form of irregular marriage was cohabitation with habit and repute. This class of irregular marriage came with the least requirements and therefore may have been the easiest form of marriage to prove. Marriage by habit and repute was sanctioned following that the couple openly and continuously lived together as husband and wife, to the effect that the neighbours, family and friends were under 'a general belief that they are married persons.'<sup>32</sup> Cohabitation had to be verified with evidence of their matrimonial habits and reputation; it could not be proven solely by word of mouth.<sup>33</sup> Reputation included the parties' social and moral standing; 'A woman of the same social class as the man and of respectable character was much more likely to succeed in establishing a marriage by cohabitation with habit and repute than was a woman of a lower social class or easy virtue.'<sup>34</sup>

Both marriage by declaration *de praesenti* and marriage by promise *subsequente copula* were banned by the Marriage (Scotland) Act, 1939, while marriage through cohabitation with habit and repute was maintained in section 5.<sup>35</sup> It was not until 2006 that marriage

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<sup>27</sup> Walton, *A Handbook*, pp. 16-19; see also Ireland, 'Husband and Wife: (a) Post-Reformation', pp. 86-87; and Clive, *The Law of Husband and Wife*, pp. 50-54.

<sup>28</sup> Walton, *A Handbook*, p. 17.

<sup>29</sup> Walton, *A Handbook*, pp. 25-32; see also Ireland, 'Husband and Wife: (a) Post-Reformation', pp. 87-88; and Clive, *The Law of Husband and Wife*, pp. 54-59.

<sup>30</sup> Walton, *A Handbook*, p. 25.

<sup>31</sup> Ireland, 'Husband and Wife: (a) Post-Reformation', p. 87.

<sup>32</sup> Walton, *A Handbook*, p. 20.

<sup>33</sup> Ibid, pp. 21-22.

<sup>34</sup> Clive, *The Law of Husband and Wife*, p. 63.

<sup>35</sup> Marriage (Scotland) Act, 1939, [2 & 3 Geo. 6. Ch. 34.], section 5; Clive, *The Law of Husband and Wife*, p. 50.



by cohabitation was abolished.<sup>36</sup> From the 1830s to the turn of the century the four different forms of marriage discussed above remained unchanged. While some of these types of marriage were more common than others, all were deemed as valid, and therefore as indissoluble, as the other.<sup>37</sup>

## Divorce Law in Scotland

In nineteenth-century Scotland, two routes could legally end or alter a marriage: divorce or separation. The action for complete divorce was available on two grounds: adultery or desertion. Adultery, the older of the two, was established the year of the Reformation in 1560 and had been in use since.<sup>38</sup> More specifically adultery became grounds for a divorce *a vinculo*—from the bond (of marriage).<sup>39</sup> The eligibility for a complete dissolution as a consequence of adultery has been attributed to religious influences. With the growth of the ecclesiastical courts dealing with marital issues, sentiments relating to the Roman Catholic Church tradition of marriage being indissoluble conflicted with reality of marital breakdown as presented by the public. In particular, the courts recognised that without a complete divorce separated couples may engage in more adultery or the crime of bigamy.<sup>40</sup> As a result it was thought that divorce *a vinculo* would preserve the sanctity of marriage by allowing failed marriages to end and new, and ideally healthier ones, to begin.<sup>41</sup>

## Adultery as a Ground for Divorce

Scots law was distinct from common law in that it allowed the husband and the wife the right to a divorce solely on the charge of adultery.<sup>42</sup> This was not a right given to women in England or in parts of the United States. Despite set legislations, the issue was still

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<sup>36</sup> Eleanor Gordon, 'Irregular Marriage in Scotland,' unpublished paper from 'Marriage: A Meaningful Relationship?', School of Law, University of Glasgow, 21-22 May 2012, pp. 1-2. Forthcoming paper: Gordon, 'Irregular Marriage: Myth and Reality' *Journal of Social History*, Winter Volume, 2013.

<sup>37</sup> Ireland, 'Husband and Wife: (a) Post-Reformation', p. 87.

<sup>38</sup> Walton, *A Handbook*, p. 41; see also Clive, *The Law of Husband and Wife*, p. 437.

<sup>39</sup> Ireland, 'Husband and Wife: Divorce', pp 94-95. See also Shelford for his general definition: 'Divorce, according to the canon law, is twofold: the first being only a separation from bed and board *a mensa et thoro*; the other, an entire dissolution of the marriage *a vinculo matrimonii*'; Leonard Shelford, *A Practical Treatise of the Law of Marriage and Divorce*, (Philadelphia, 1841), p. 192,

<sup>40</sup> David M. Walker, *The Legal History of Scotland, Volume VI: The Nineteenth Century*, (Edinburgh, 2001), p. 409.

<sup>41</sup> 'By the Roman Catholic Church marriage has always been regarded as a sacrament, and therefore indissoluble. The ecclesiastical courts were entitled upon certain grounds to pronounce decrees of divorce *a mensa et thoro*, but though this relieved the innocent spouse from the necessity of further conjugal cohabitation, the marital bond was not severed, and it would have been bigamy for one of the spouses to contract a second marriage during the lifetime of the other'; Walton, *A Handbook*, p. 41.

<sup>42</sup> Hyacinthe Ringrose, *Marriage and Divorce Laws of the World*, (London, 1911), p. 34.

debated in western society claiming a wife's adultery was worse, 'since the [husband] does not impose on the marriage a spurious issue while the [wife] may.'<sup>43</sup> Hence, because a married woman's affair may result in the wife becoming pregnant, while a married man's affair would not have the same consequences,<sup>44</sup> some argued only men should be able to receive a divorce on the grounds of adultery.<sup>45</sup>

Another difference between Scotland and England was the debate over remarriage after divorce. A complete divorce from the Edinburgh Court of Session (CS) decreed the pursuer and defender the privilege of remarriage, as if the marriage had ended naturally by death of a spouse.<sup>46</sup> There was, however, prohibition of the adulterer or adulteress marrying the paramour if he or she was named in court, and if they did marry, the union would be declared null.<sup>47</sup> In England, on the other hand, it was feared that a husband or wife would use infidelity as a tool for collusive divorce if allowed to remarry, and with that allowance the number of divorces would increase.<sup>48</sup> Hence, remarriage was not allowed until the Matrimonial Causes Act of 1857. Previous to 1857, remarriage was only available to elite men capable of obtaining a Parliamentary Divorce.<sup>49</sup>

### *Desertion as a Ground for Divorce*

The second claim for divorce was desertion. This ground was established after the Reformation, in the Act of 1573,<sup>50</sup> but required a series of complicated steps:

if either spouse 'diverts from the other's company, without a reasonable cause alleged or reduced before a judge, and remains in their malicious obstinacy by the space of four years,' and refuses to obey privy admonitions to adhere, that the deserted spouse shall raise an action of

<sup>43</sup> Bishop, *Commentaries on the Law*, p. 416.

<sup>44</sup> Excluding the possibility of incurring a venereal disease transferred from the husband to the wife after extramarital sex.

<sup>45</sup> Stone assessed that this fear over inheritance was a repercussion of the patrilineal system established in the early modern era, where any offspring of the marriage was eligible to inherit part of the family estate, wealth or fortune. This replaced the previous system where only the eldest inherited upon the death of the head of the family; Lawrence Stone, *Road to Divorce: England 1530-1987*, (Oxford, 1990), pp. 242-243; Gibson likewise claimed this change in inheritance meant a 'wife's adultery became an unforgivable sin'; Colin Gibson, *Dissolving Wedlock*, (London, 1994), p. 40.

<sup>46</sup> CS46/1850/3/16 Fleming v Currie or Fleming.

<sup>47</sup> Shelford, *A Practical Treatise*, p. 448.

<sup>48</sup> For instance, the lenient, but temporary, reform of divorce law in France following the French Revolution led to a substantial increase in divorces, which was identified by the English government as evidence of the detrimental effects of legalising divorce on social stability. Stone argues that it led officials to, first, try to reign in the granting of Parliamentary divorces, and second, to persecute female adultery specifically; Stone, *Road to Divorce*, pp. 332-333, 335-339.

<sup>49</sup> Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*, (Cambridge, 1988), pp. 413-420.

<sup>50</sup> Ireland, 'Husband and Wife: Divorce', pp. 95-96. Walker writes that divorce for desertion had been allowed since 1560 along with adultery, but it was made official in the 1573 statute; David M. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law*, (Edinburgh, 1969), p. 149.

adherence, and, if necessary, thereafter shall apply to the minister to publicly admonish the deserter to adhere, and if he shall fail to comply he shall then be guilty of 'malicious and obstinate defectioun,' and divorce may be obtained.<sup>51</sup>

In other words, the deserted spouse was required to first file a summons of adherence and aliment.<sup>52</sup> If the spouse did not return or respond with payment, then the pursuer was expected to denounce the defender as a rebel, get letters of horning and request that the Church 'excommunicate the deserter'.<sup>53</sup> Only after these actions was the pursuer able to apply for divorce.

In the second half of the nineteenth century, the claim for a divorce based on desertion became easier with the 1861 Conjugal Rights (Scotland) Act.<sup>54</sup> The Act updated the provisions of 1573 by dismissing the preliminary proceedings.<sup>55</sup> One of the preliminaries abolished was the need to 'prove beyond doubt that the defender remained in 'malicious obstinance'.<sup>56</sup> Still, the form of desertion that would allow a divorce was very specific. It required that the desertion had to include within the four years a 'non-adherence' from the deserting party, but efforts for reconciliation by the pursuing party.<sup>57</sup> Courts were aware of the possibility that if a couple mutually desired a divorce they may consent to desertion in order to precede, therefore a divorce for desertion would be withheld if the court did not feel there had been sufficient attempts at a reconnection by the pursuer and complete refusal by the deserter.

### **Judicial Separation and Marital Cruelty in Scots Law**

In the nineteenth century the only legal remedy granted by the CS for cruelty and maltreatment was a judicial separation. It did not qualify as a means for divorce in

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<sup>51</sup> Walton, *A Handbook*, p.33

<sup>52</sup> Though the summons was for adherence and aliment, the defender was required to either adhere to the pursuer or provide an aliment; Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separations, 1684-1830*, (Edinburgh, 1998), p. 22.

<sup>53</sup> Letters of horning were the required letters sent out to a person absconding from debt to request their return and if unanswered were followed by the symbolic act of declaring the absconder a rebel with three blasts to the horn; Walker, *A Legal History of Scotland*, p. 546. Lenemen found that the Church was expected to refuse the request to excommunicate the defender, which has been conferred with the findings from the Court of Session in this study; Leneman, *Alienated Affections*, p. 233.

<sup>54</sup> The Conjugal Rights (Scotland) Act, 1861 [24 & 25 Vict. Cap. 86.], section 11.

<sup>55</sup> Walton, *A Handbook*, p.33.

<sup>56</sup> Clive, *The Law of Husband and Wife*, p. 454.

<sup>57</sup> Walton, *A Handbook*, pp. 34-35; see also Ringrose, *Marriage and Divorce*, pp. 34-35.

Scotland until the Divorce Act of 1938.<sup>58</sup> The reasoning behind this distinction between adultery, desertion and cruelty, related to the judicial and social perception that maltreatment was not a breach of the marriage contract:

Adultery and desertion appear to have been regarded as fundamental violations of the marriage relationship, which had so destructive an effect upon it as to make divorce *a vinculo* an appropriate remedy. Cruelty, on the other hand, was thought rather to be only an abuse of the ordinary difficulties inherent in the state of marriage, and so there was no place for divorce in respect of acts of this kind.<sup>59</sup>

Scottish Courts acted under the influence of social concerns; their main goal was to keep together as many married couples as possible and preserve the sanctity of the marriage contract. Though the courts would not allow a complete divorce, they did recognise that in cases of proven abuse the complaining party needed legal protection: ‘Public policy is strong against increasing the number of persons living as if single, and yet not free to marry— husbands without wives, and wives without husbands. It is only grave and weighty causes, therefore, that the Court will find sufficient to justify the spouses in living apart.’<sup>60</sup>

### *Legal Standards and the Unacceptability of Cruelty*

Thus cruelty was grounds for divorce *a mensa et thoro*, (from bed and board).<sup>61</sup> Divorce *a mensa et thoro* signified a judicial order to remove the condition of adherence, allowing separate living spaces and economic maintenance through alimony paid by the husband to the wife. Furthermore, neither party could remarry as their marriage was still intact, preserving the marriage union.<sup>62</sup> A judicial separation was available for either husband or wife.<sup>63</sup>

To prove cruelty the CS required that the alleged acts displayed certain characteristics. One of these was the potential of future risk for the pursuer: ‘The ground of interference is

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<sup>58</sup> Ireland, ‘Husband and Wife: Divorce’, p. 98. The Divorce (Scotland) Act of 1938, ‘provided the remedy of divorce for cruelty of the quality previously required for judicial separation’; see also Clive, *The Law of Husband and Wife*, p. 437. The Act of 1938 also included ‘incurable insanity, sodomy and bestiality.’

<sup>59</sup> Ireland, ‘Husband and Wife: Divorce’, p. 97.

<sup>60</sup> Walton, *A Handbook*, p. 57.

<sup>61</sup> It was also sometimes referred to as a limited divorce. The other ground for divorce *a mensa et thoro* in Scotland was adultery; Fraser, *Treatise on Husband and Wife*, pp. 904-905.

<sup>62</sup> Clive, *The Law of Husband and Wife*, p. 427.

<sup>63</sup> Walton, *A Handbook*, p. 68. The same applied in England in the mid-nineteenth century; Shelford, *A Practical Treatise*, p. 234.

not to punish the husband for the past, it is to protect the wife for the future.’<sup>64</sup> There was also a need to prove the maltreatment was cumulative: ‘It has been said that it must be sustained, and indicate a continued want of self-control, and must be referable to permanent causes so as to endanger the future safety of the wife’s person or health.’<sup>65</sup> If the Court deemed the cruelty a continuing occurrence without reasonable cause, either as terrifying threats or physical maltreatment, then a judicial separation would be granted.

Scots law also acknowledged other forms of cruelty within marriages. As of 1893 spitting in the face of your wife was deemed a form of ‘legal cruelty’.<sup>66</sup> Spitting alone, however, would not warrant a judicial separation, but was mostly used as supportive evidence of a husband’s cruel behaviour. Other forms of abuse were also recognised as oppressive and harmful to a wife’s wellbeing. For example, the tyrannical actions of a husband towards his wife, even if not physical, were seen as attempts to break the wife’s spirit, resulting in ill-health, body and mind.<sup>67</sup> Courts also recognised constructive cruelty, which was an act of violence inflicted on a third party explicitly to torment the wife. A third party could be a child or a family member, such as the wife’s sister or mother.<sup>68</sup>

A remaining form of cruelty identified by Scots law was the communication of disease from one spouse to another. The disease, whether infectious or venereal, if present in one spouse as a result of an adulterous affair, served as evidence of the adultery, but was also considered an act of legal cruelty if the infected party forced his or her spouse to have sex during the infection. Cruelty was also decreed if the infected party did knowingly have sex with his or her spouse with the disease, but without informing the spouse. The reason for deeming these actions as cruel was not because the disease was communicated, but rather, because such actions demonstrated neglect and misconduct towards one’s husband or wife. If the infected party had sought professional medical treatment, it was no longer seen as cruelty.<sup>69</sup>

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<sup>64</sup> Walton, *A Handbook*, p. 58.

<sup>65</sup> Ibid, p. 59.

<sup>66</sup> Ibid, p. 60. In England, spitting was also included as a form of cruelty if directed at one’s wife; Shelford, *A Practical Treatise*, p. 238.

<sup>67</sup> Walton, *A Handbook*, pp. 61-62. For England, Foyster found that English courts were also recognising non-physical acts of cruelty used by husbands against their wives, which sometimes served as enough evidence to warrant a separation; Elizabeth Foyster, *Marital Violence: An English Family History, 1660-1857*, (Cambridge, 2005), pp. 42-43. A discussion of mental cruelty in Court of Session cases is included in Chapter Five.

<sup>68</sup> Walton, *A Handbook*, p. 67. See Foyster for examples of husbands who forced their children to physically and verbally abuse their mothers as a strategy of violence; Foyster, *Marital Violence*, pp. 152-153.

<sup>69</sup> Walton, *A Handbook*, pp. 64-65.

### *Legal Standards and the Acceptability of Chastisement*

Unlike cruelty, the allegedly lesser physical force of chastisement was not sufficient grounds for judicial separation. Although this may appear contradictory, the use of violence on a wife was tolerated up to a point; evidence of intervention suggests that the motivation and severity of the abuse was what was called into question, not that violence was being used.<sup>70</sup>

The law on chastisement was complex and appeared to contradict the law on cruelty and maltreatment. As discussed above, under the *femme covert* notion, the legal status of a woman once married was bound with her husband, making her no longer an independent person according to the law. Chastisement stems from an understanding that by entering a marriage contract she had agreed to a life-long partnership of living with and obeying her husband. If a wife did not submit to his requests and perform her marital duties, the husband did have the authority to enforce her compliance.<sup>71</sup> But the degree of acceptable violence lessened over time. In 1831, for example, Boyd observed:

The husband by the old law might give his wife moderate correction; and the civil law gave him the same or larger authority; but this is, or should now be, put a stop to, as the wife may have the security of the peace against her husband, and he against the wife: indeed, among respectable people, when it proceeds to lifting hands, a separation is probably the best plan which can be adopted.<sup>72</sup>

Later, in 1876 Fraser wrote:

Where the wife violated any of her conjugal obligations, the husband is not entitled to use personal chastisement to compel obedience, but, at the same time, he has remedies equally effectual, for he may thrust her out of doors; and her only remedy is separate aliment and judicial separation, and, at the end of four years, divorce on account of desertion.<sup>73</sup>

On the other hand, even more severe physical correction or chastisement was sometimes condoned (or at least presented as acceptable) if justified through claims of the wife's wrong doing, legally known as provocation, by the defender.<sup>74</sup> Therefore, despite the

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<sup>70</sup> Phillips, *Putting Asunder*, pp. 326-338.

<sup>71</sup> Phillips claims that the right of a husband to chastise his wife was partially due to the legal responsibility of a husband for his wife's 'misdeeds'; Ibid, pp. 324-325.

<sup>72</sup> Boyd, 'A Review of the Marriage Laws of Scotland and England', pp. 22-23.

<sup>73</sup> Fraser, *Treatise on Husband and Wife*, p. 511.

<sup>74</sup> When a husband alleged his wife's misbehaviour had caused him to use violence, this was deemed provocation on the part of the wife, and in turn made her the irresponsible party; Fraser, *Treatise on Husband*

legal view presented in the above quote, criminal court records and civil court records provide evidence of provocation being used as a defence and qualifying the defender for a lesser penalty, or a dismissal of the case.<sup>75</sup> Writing about western society in general, Phillips concludes ‘that violence was to be used only as a response to a wrong committed by the wife, and there was also the expectation on the part of the law that it would be a last resort, not a first reaction.’<sup>76</sup>

The incorporation of chastisement within the law in Western society is most commonly associated with the infamous contemporary trope of the ‘rule of thumb’. The ‘rule of thumb’ alleged that a man could beat his wife as long as the instrument he used was no bigger than the width of his thumb. It has been argued that this legal precedent allowed wifebeating to be excused as suitable in most western countries, inside and outside of the courtroom. Historians, however, debate whether the rule had legal validity.<sup>77</sup> Whether or not the ‘rule of thumb’ was a myth or legally sound, the persistence of the phrase as a defences for abusive husbands demonstrated that some people accepted it as a legal precedent. This belief presented an even bigger problem in Scotland as Scots law is based on precedent.<sup>78</sup>

### *Cruelty in England and America*

In England, by comparison, cruelty was a ground for separation under the jurisdiction of the church court diocese until the terms of the 1857 Matrimonial Causes Act. The stipulations of this Act stated that wives could only seek judicial separation for cruelty on the charge of aggravated adultery and cruelty, despite a similar judicial attitude towards wifebeating as Scotland.<sup>79</sup> Though divorce was not granted, several acts were passed in the second half of the nineteenth century that allowed abused wives more protection in England without dissolving the marriage. These will be discussed in a later section.

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*and Wife*, pp. 898-899. See also Foyster for a discussion of provocation in the early modern period, especially ‘Chapter 1: Rethinking the histories of violence’; Foyster, *Marital Violence*, pp. 30-83, 115-122.

<sup>75</sup> See Annmarie Hughes, ‘The “Non-Criminal” Class: Wife-beating in Scotland, c.1800-1949’, *Crime, Histoire & Sociétés/ Crime, History & Societies*, Vol. 14, No. 2 (2012), pp. 33-39; and Carolyn A. Conley, ‘Atonement and domestic homicide in late Victorian Scotland’, in Richard McMahon (ed.), *Crime, Law and Popular Culture in Europe, 1500-1900*, (Portland, 2008), pp. 219-238. Chapter Five on Separation and Cruelty explores the condemnation and categorisation of cruelty using Edinburgh Court of Session separation case records and criminal court cases reported in local newspapers.

<sup>76</sup> Phillips, *Putting Asunder*, p. 325.

<sup>77</sup> For discussions of the ‘rule of thumb’ see Neil Websdale, ‘Female Suffrage, male violence, and law enforcement in Lane County, Oregon, 1853 to 1960: an ascending analysis of power’, *Social Justice*, Vol. 19, No. 3 (Fall 1992), p. 2, 7; Henry Ansgar Kelly, ‘Rule of Thumb and the Folklaw of the Husband’s Stick’, *Journal of Legal Education*, Vol. 44, No. 3 (September 1994), pp. 343-347; Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England*, (Columbia, 1993), pp. 7-8. Stewart, *The Law of Husband and Wife*, pp. 86-87; Hughes, ‘The “Non-Criminal” Class’, p. 39.

<sup>78</sup> Walker, *A Legal History of Scotland*, pp. 10-12.

<sup>79</sup> Walton, *A Handbook*, p. 58; Foyster, *Marital Violence*, pp. 15-16, 40.

In America, some states granted separation for cruelty, while none included cruelty as a ground for divorce. Only separation or arrest were available as a means for abused spouses to escape their partners. A general legal definition of cruelty in America, provided by Bishop, reflected a similar concern over the upkeep of the marriage contract as voiced by Scottish authorities:

Such conduct in one of the married parties, as renders further cohabitation dangerous to the physical safety of the other, or create in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duty.<sup>80</sup>

This definition suggests that if the abusive behaviour of the spouse did not interfere with the other's capabilities then the marriage should remain intact. This emphasis reinforced the courts' requirement that only 'grave and weighty' maltreatment excused a spouse from the marriage contract.<sup>81</sup>

For all three countries, the converse of establishing laws prohibiting 'grave and weighty' violence against wives was the suggestion that minor acts of violence were tolerated. As Phillips argued, 'It was about the appropriateness of the violence, rather than the violence per se.'<sup>82</sup> The result of requiring such evidence in order to grant a separation was in effect a backhanded permission for some husbands to be abusive. Thus, while some couples were able to legally separate by charging cruelty in the nineteenth century, the majority, and undoubtedly greater, number of abuses never made it to the courtroom.

### *Disadvantages of Judicial Separations*

Despite a law in place for separation on the ground of cruelty and maltreatment, it was still a difficult charge to prove, especially for women. Looking at early modern to mid-nineteenth century England, Foyster argued that the continued trust in clergymen, the professionalisation of doctors, and the establishment of a police force at the beginning of the 1800s, were the beginnings of professional intervention against marital violence.<sup>83</sup> Nevertheless, Foyster explains, wives remained at a disadvantage as they could not always rely on clergymen, doctors and police officers corroborating their claims of abuse; in situations where the husband controlled and held the money, it was not uncommon for them to bribe or threaten these professionals to keep silent. In addition, some

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<sup>80</sup> Bishop, *Commentaries on the Law*, p. 422.

<sup>81</sup> Ibid, p. 427.

<sup>82</sup> Phillips, *Putting Asunder*, p. 336.

<sup>83</sup> Foyster, *Marital Violence*, p. 205.



professionals opted to withdraw themselves from the situation and allow the matter to be settled within the family, as they did not want to break up the marriage.<sup>84</sup>

Reconciliation or marriage mending was the preference of governing authorities. For instance, Foyster explained that ‘it became financially prudent for the parish to ensure that couples remained together.’<sup>85</sup> In the judiciary realm, Hammerton found that ‘local magistrates’ courts increasingly took on a more paternalistic role, eager to intervene in an attempt to make the wife forgive, the husband reform and the family reunite.’<sup>86</sup> He argued that the presumed decline in domestic assaults recorded in late nineteenth-century English courts was actually a reflection of court officials encouraging reconciliation instead of convicting and separating tumultuous couples.<sup>87</sup>

In the CS a husband present during his separation trial had the opportunity to defend and deny the allegations to get an absolvitor.<sup>88</sup> In her study of the Commissary Courts in seventeenth to early nineteenth-century Scotland, Leneman found that some of the more common defences from husbands were: ‘that he did not abuse her, that the incidents complained of were exaggerated or were part of the normal rough-and-smooth of married life; and besides no witnesses saw it.’<sup>89</sup> These defences suggest some husbands expected their familial authority to protect them from legal punishment.<sup>90</sup> The level of tolerance given to violent husbands, however, is debated, in particular by Wiener who argued that starting with Lord Ellenborough’s Act of 1803, English legislators and judiciary encouraged a shifting discourse condemning the use of violence by men (and women).<sup>91</sup>

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<sup>84</sup> Foyster, *Marital Violence*, pp. 208-209, 218-219, 225. Leneman briefly discussed the role of police and doctors and similarly found that many chose not to get involved in marital conflicts; Leneman, *Alienated Affections*, p. 295-297.

<sup>85</sup> Foyster, *Marital Violence*, p. 211.

<sup>86</sup> A. J. Hammerton, ‘The Targets of “Rough Music”: Respectability and Domestic Violence in Victorian England’, *Gender & History*, Vol. 3, No. 1 (Spring, 1991), p. 39. Leneman’s study of Scottish divorce and separation cases also found that judges preferred reconciliation over granting separations; Leneman, *Alienated Affections*, p. 290. Hughes argued the same issue persisted by the twentieth century; Hughes, ‘The “Non-Criminal” Class’, pp. 48-52.

<sup>87</sup> Hammerton makes this same argument in his book and cites J. H. Potter, *Inasmuch: The Story of the Police Court Mission, 1876-1926*, (London; Williams & Norgate, 1927), pp. 67-80; Hammerton, ‘The Targets of “Rough Music”’, p. 39; A. J. Hammerton, *Cruelty and Companionship; Conflict in nineteenth-century married life*, (London, 1992), p. 39. Shanley gives examples of magistrates refusing to ‘[split] up the home’ in England after the 1878 Matrimonial Causes Act; Shanley, *Feminism, Marriage and the Law in Victorian England, 1850-1895*, (Princeton, 1989), pp. 172-173.

<sup>88</sup> When the court decided in favour of the defendant that party was assolized, and that official judgment was an absolvitor.

<sup>89</sup> Leneman, *Alienated Affections*, p. 309.

<sup>90</sup> *Ibid*, p. 313.

<sup>91</sup> Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*, (Cambridge, 2004), pp. 22-29.

For women in abusive marriages, the best escape was to charge the husband with adultery or abandonment to gain a complete divorce, which would allow them the right to remarry. If this was not an option, abused wives were left with few legal alternatives: seek a court order for alimony, or for a bed and board separation. Even though these avenues were available there were further difficulties. One complication was proving maltreatment with evidence; often the only useful evidence was testimony from a third party, because before the 1870s husbands and wives were unable to testify at their own trial.<sup>92</sup> Combined, these legal limitations and loopholes suggest that the lawmakers and judiciary were more interested in maintaining marriages for the greater good of society than assisting people out of unhappy ones.

### **Legislative Change in the Second Half of the Nineteenth Century**

Marriage and divorce law in Scotland underwent little change from the sixteenth century up to the first half of the nineteenth. In the second half of the 1800s, however, new civil and criminal legislation addressed the legal relationship between husband and wife. Gradually, the codified inequality between spouses was tempered with a series of reforms advancing the rights of married women.

Most of the law reforms that advanced women's rights are attributed to acts passed in England, and rightly so, as will be discussed below. Yet Scotland also passed several legislations that addressed married women's rights, if not at the same time as England, then often immediately afterwards. Comparing the two countries shows that although Scotland was arguably more liberal (within the space of three decades) before the 1850s, it seemed to be less so afterwards because England rapidly advanced from a nation that did not allow divorce to a nation that protected married women's rights.

#### *Property Reform in Civil Law*

The first notable legislation for Scottish married women was the Conjugal Rights (Scotland) Amendment Act of 1861. This Act sought to improve the financial predicament of a deserted or maltreated wife, by allowing a wife who was deserted 'without reasonable cause' the right to apply for an order of protection of her property.<sup>93</sup> If the order was granted by the CS or a sheriff, the woman was essentially given a decree

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<sup>92</sup> Clive, *The Law of Husband and Wife*, p. 11.

<sup>93</sup> Walton, *A Handbook*, pp. 270-272.

of separation, as well as some financial and legal independence, though still married. Section 1 of the Act stipulated that:

A Wife deserted by her Husband may, at any Time after such Desertion, apply by Petition...for an Order to protect Property which she has acquired or may acquire by her own Industry after such Desertion, and Property which she has succeeded to or may succeed to or acquire Right to after such Desertion...<sup>94</sup>

Clive suggested that a further result of this Act—besides granting a woman her rightful assets—was preventing deserting and abusive husbands from taking advantage of the contractual bonds of their wives, particularly keeping their money and property.<sup>95</sup> This statute also changed the requirements for seeking divorce on the ground of desertion by stipulating that it was no longer necessary for a spouse to submit an action for adherence before seeking divorce for desertion, and allowed custody of children to be decided by the court rather than automatically giving custody rights to the father.<sup>96</sup> The Conjugal Rights Act offered more protection from husbands than previous civil legislations, almost allowing wives the economic freedom of an unmarried woman.<sup>97</sup>

In the two decades following the Conjugal Rights Act, further statutes were passed that specifically addressed the rights of married women in Scotland.<sup>98</sup> The first was the Married Women's Property (Scotland) Act, passed in 1877, that stated a husband was no longer entitled under *jus mariti*<sup>99</sup> to the independent earnings acquired by any wife married after the passing of this law.<sup>100</sup> In 1881, only four years later, an important amendment to the 1877 Act added that a wife's estate was also no longer subject to *jus mariti*, thereafter remaining under the wife's name upon marriage, and that any woman married before the passing of the 1877 or 1881 Acts could reclaim her personal estate and property if properly done through the CS or the sheriff court.<sup>101</sup> In addition, between the two Married

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<sup>94</sup> The Conjugal Rights (Scotland) Act, 1861, [24 & 25 Vict. Cap. 86.], section 1. See Section 4 and 5 on the effect of an Interlocutor of Protection.

<sup>95</sup> Clive, *The Law of Husband and Wife*, pp. 297-298.

<sup>96</sup> The Conjugal Rights (Scotland) Act, 1861, [24 & 25 Vict. Cap. 86.], section 11 and section 9.

<sup>97</sup> Walker, *The Legal History of Scotland*, p. 656. A later amendment to the 1861 Act declared: 'The sheriffs of counties in Scotland shall have all jurisdictions, powers, and authorities necessary for hearing, trying, and determining applications by wives deserted by their husbands for orders to protect property', Conjugal Rights (Scotland) Amendment Act, 1874, [37 & 38 Vict. Ch. 31.]

<sup>98</sup> For the debates and controversy surrounding these bills see Young, 'Middle-Class "Culture", Law and Gender Identity', pp. 137-139.

<sup>99</sup> *Jus mariti* is the right of a husband to his wife's entire personal estate transferred to him upon and maintained throughout the marriage, Walton, *A Handbook*, p. 144.

<sup>100</sup> The Married Women's Property (Scotland) Act, 1877, [40 & 41 Vict. Ch. 29.] Shanley comments that the 1877 Act was described as 'hopelessly limited' because it only protected the wife's wages, not her inheritance or savings; Shanley, *Feminism, Marriage and the Law*, p. 121 fn. 50.

<sup>101</sup> The Married Women's Property (Scotland) Act, 1881, [44 & 45 Vict. Ch. 21.]

Women's Property (Scotland) Acts, a similar statute was passed entitled the Married Women's Policies of Assurance (Scotland) Act. Enacted in 1880, it allowed wives, 'to take out a policy of life insurance on her own life or that of her husband, for her separate use, and provided that such a policy would vest in her to the exclusion of the *jus mariti*.'<sup>102</sup> Thus, *jus mariti* was essentially abolished by 1881.<sup>103</sup>

England, likewise, passed several acts in relatively quick succession starting with the pivotal 1857 Matrimonial Causes Act.<sup>104</sup> Before 1857 in England separations could be petitioned for in an ecclesiastical court on the ground of adultery and gross cruelty. These separations were available for the husband and wife. Still, if a wife sought a separation she was at a significant disadvantage due to her economic dependence on her husband. Being married, a woman had no property, political or parental rights under existing marriage law. Moreover, judicial separations required that a wife prove 'life-threatening cruelty' and adultery, whereas a husband need only give sufficient evidence of adultery to separate from his wife and cease financial support.<sup>105</sup> Elite English men had an alternative known as Parliamentary divorce. The exorbitant price of asking Parliament to pass a private bill that would grant a divorce with the ability to remarry, restricted this form of marriage dissolution to only the wealthiest of male elites and few of them.<sup>106</sup> With the enactment of the 1857 Matrimonial Causes Act divorce was legalised in England, yet equality between the sexes was not offered as the grounds were maintained from the ecclesiastical courts: a wife had to prove aggravated adultery (infidelity coupled with a secondary charge), to obtain a complete divorce, while a husband could divorce his wife for a single instance of adultery.<sup>107</sup> Equal grounds for the wife on the charge of adultery only became available for English divorce in 1923, and other grounds like desertion and cruelty were not added until 1937.<sup>108</sup>

Taken on its own, the 1857 Act suggests minimal headway for married women. However, despite the obvious double standard related to divorce and separation laws, historians argue that England showed signs of progressive legislation to protect women from harm

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<sup>102</sup> Clive, *The Law of Husband and Wife*, p. 298; Rosalind Marshall, *Virgins and Viragos: A History of Women in Scotland from 1080 to 1980*, (London, 1983), p. 279.

<sup>103</sup> Clive, *The Law of Husband and Wife*, p. 298.

<sup>104</sup> These acts include civil and criminal laws. The civil laws are discussed here, and the criminal laws will be discussed in the following section.

<sup>105</sup> Lawrence Stone, *Broken Lives: Separation and Divorce in England 1660-1857*, (Oxford, 1993), pp. 18-22.

<sup>106</sup> *Ibid*, p. 25.

<sup>107</sup> Such as desertion, cruelty, bigamy, sodomy, incest, or another crime; Ringrose, *Marriage and Divorce Laws*, pp. 16-17, 23.

<sup>108</sup> Clive, *The Law of Husband and Wife*, pp. 438-439.

since the beginning of the nineteenth century. Wiener applies this to his analysis of penalising male violence (as mentioned above), but Phillips' work suggests that legislators were torn between preserving marriage indissolubility or keeping women safe: 'Rather than reduce the costs of divorce to make it more widely accessible, Parliament introduced cheaper alternative measures to help women who were deserted or brutally treated by their husbands.'<sup>109</sup> The alternative measures Phillips is referring to were not passed in Scotland. Instead, reforms in Scots law addressed the financial and custodial inequalities defined in the marriage contract.

English Members of Parliament saw attempts to reform married women's property rights since before the Divorce Act of 1857, although the first statute was not passed until 1870.<sup>110</sup> The Married Women's Property Act of 1870, once passed however, 'departed so substantially from the measure originally sought by its proponents that [the committee and feminists] were reluctant to accept it.'<sup>111</sup> The law of 1870 kept married women dependent on their husbands as it only granted the rights to some of her property, allowing the husband to keep the rest in his name. Undeclared, campaigns continued resulting first in the Married Women's Property Act (1870) Amendment Act of 1874, which required a husband to pay any prenuptial debts he had covered through his wife's assets.<sup>112</sup> Within a decade, England passed the crucial Married Women's Property Act of 1882, which gave married women legal and economic autonomy, thus rescinding the expectation that upon marriage a woman became one with her husband.<sup>113</sup> Mary Lyndon Shanley argued that this was, 'the single most important change in the legal status of women in the nineteenth century.'<sup>114</sup>

Another example of the progression of married women's rights apart from divorce reform was in the United States. In America a woman's property also became available to her husband through the marriage contract; however, reforms began even earlier than in England and Scotland.<sup>115</sup> By the 1850s many states across the nation had already adopted a version of the Married Women's Property Act, which first protected a married woman's

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<sup>109</sup> In terms of numbers, Phillips found that a much higher rate of women were getting separation and maintenance orders than divorces per year by the first decade of the twentieth century; Phillips, *Putting Asunder*, pp. 606-607.

<sup>110</sup> The first rejected bill for the Married Women's Property Act was in 1856; Shanley, *Feminism, Marriage and the Law*, p. 49.

<sup>111</sup> *Ibid.*, p. 68.

<sup>112</sup> *Ibid.*, pp. 107-108.

<sup>113</sup> *Ibid.*, p. 103.

<sup>114</sup> *Ibid.*

<sup>115</sup> Richard H. Chused, 'Married Women's Property Law: 1800-1850', *Georgetown Law Journal*, No. 71 (1983), pp. 1359-1426, p. 1361.

property from being used to pay off her husband's debts, then allowed her to maintain her own property as a separate estate, and finally enabled her to protect her independent earnings from coverture.<sup>116</sup>

Progress for women's rights in marriage, however, was not sweeping across the populace. Despite the property reform provided by these acts, expectations of the marriage contract kept women 'subordinate and dependent' legally, politically and otherwise.<sup>117</sup> Independent wealth did not release married women from their marital duties. Furthermore, the allowance of married women to maintain ownership of property and finances in actuality only affected married women who had either inherited or acquired property and wealth (wages were also protected). An entire populace of women without any financial means besides the income of their husbands was therefore excluded from this legal reform. Though some wives had more economic constancy following the Married Women's Property Acts, there were still significant barriers to women being able to earn an independent income, as acquiring a job with a sustainable income was still difficult for married women at the end of the nineteenth century.<sup>118</sup>

Within the historiography, Sara Zeigler argues that the reform of property laws in the United States did not bring about major changes to the marriage contract, particularly coverture, and therefore did not greatly alter the subordinate position of married women in America.<sup>119</sup> Likewise, Lucy Bland argues that even after the Married Women's Property Acts of 1870 and 1882 English feminists recognised the continued disadvantages of coverture maintaining wives as property of their husbands, and consequently pressed on with their campaigns.<sup>120</sup> In Scotland the Property Acts had a similar impact on Scottish married women. Eleanor Gordon and Gwyneth Nair argued that before the Property Acts Scottish women already benefited over English from more complicated, yet more communal, property laws. Still, feminists in Scotland fought for the legal establishment of separate property. Though these acts eventually passed, they were advantageous to

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<sup>116</sup> The Act was dispersed in three waves that consequently overlapped beginning in the 1840s until the third wave ended after the Civil War; Chused, 'Married Women's Property Law', p. 1398.

<sup>117</sup> The wifely duties of childbearing and childrearing, coupled with domestic maintenance dominated many women's lives even within a companionate marriage; Sara Zeigler, 'Wifely Duties: Marriage, Labor, and the Common Law in Nineteenth-Century America', *Social Science History*, Vol. 20, No. 1 (Spring, 1996), pp. 67-69. For a discussion of gender identity as constructed by the marriage contract particularly in relation to property rights of married women, see Young, 'Middle-Class "Culture", Law and Gender Identity', pp. 133-145.

<sup>118</sup> Gordon and Nair, *Public Lives*, p. 75. See also, Marshall, *Virgins and Viragos*, pp. 274-278.

<sup>119</sup> Zeigler, 'Wifely Duties', pp. 79-85, 86-87.

<sup>120</sup> Bland, *Banishing the Beast*, pp. 124-125. Shanley also identified the continued use of the 'language of coverture', meaning that married women did not gain any political equity; Shanley, *Feminism, Marriage and the Law*, p. 130.

women more in theory than in practice. In reality divorce and judicial separation were still out of reach for the majority of wives unless they had financial or familial support.<sup>121</sup> Overall, Stone's argument that the threat of granting married men and women equal property and divorce laws led to 'prolonged and fierce debate', and resulted in Parliament passing acts that did little to alter the established marriage laws, seems to have been applicable not only to England, but Scotland and the United States, too.<sup>122</sup>

### *Criminal Law Reform Relating to Married Women's Rights*

The second half of the nineteenth century also saw criminal law reform in Scotland and England. Though these changes were not directly related to marriage laws, they reflected some effort to address the deeper problems of gender inequality within the judicial system.<sup>123</sup> In particular, Scotland changed the requirements for evidence, which directly altered the ability for husbands' and wives' to win cases. As of 1830 Scottish wives were at a further legal disadvantage in the courtroom because women were not deemed credible witnesses—along with young children, the insane, the poor, the infamous or those seeking to profit.<sup>124</sup> Husbands were also unable to testify against their spouse. Nevertheless, this was a greater hindrance for wives hoping to prove cruelty on the part of the husband. The first Evidence (Scotland) Act, passed in 1853, began this wave of reform by declaring it lawful for a husband or wife of any party to be a competent or compellable witness in civil proceedings in Scotland. Crucially, however, that permission did not include a case related to divorce or separation.<sup>125</sup> The exclusion was recognised and finally addressed by the 1874 Evidence (Scotland) Act, which amended the 1853 Act to allow husbands and wives to testify in matrimonial actions.<sup>126</sup>

Twenty-four years later the Criminal Evidence Act 1898 allowed wives and husbands to be competent (though not compellable) witnesses in the criminal courts:

The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness

<sup>121</sup> Gordon and Nair, *Public Lives*, pp. 161-164.

<sup>122</sup> Stone, *Road to Divorce*, pp. 375-376;

<sup>123</sup> Anna Clark, 'Humanity or Justice? Wifebeating and the law in the eighteenth and nineteenth centuries', in Carol Smart (ed.), *Regulating Womanhood: Historical essays on marriage, motherhood and sexuality*, (London, 1992), p. 187.

<sup>124</sup> Clive, *The Law of Husband and Wife*, p. 11; Walker, *The Legal History of Scotland*, p. 499.

<sup>125</sup> 'Nothing herein contained shall apply to any Action, Suit, or Proceeding instituted in Scotland in consequence of Adultery, or for dissolving any Marriage, or for Breach of Promise of Marriage, or in any Action of Declarator of Marriage, Nullity of Marriage, putting to Silence, Legitimacy, or Bastardy, or in any Action of Adherence or Separation'; Law of Evidence (Scotland) Act, 1853, [16 Vict. Cap. 20.]

<sup>126</sup> Fraser, *Treatise on Husband and Wife*, p. 903; Clive, *The Law of Husband and Wife*, p. 11.

either for the prosecution or defence and without the consent of the person charged.<sup>127</sup>

Annmarie Hughes argues that the Criminal Evidence Act was important in allowing wives to be competent witnesses, and that previous to the Act of 1898, the requirement of more than one witness to convict a person deterred abused wives from successfully prosecuting their abusive husbands. Despite this progress, Hughes found its impact minimal as wives could ‘bear witness against their husbands [but] they were not compelled to do so.’<sup>128</sup>

Another reform of the criminal courts was the Police and Improvement (Scotland) Act of 1862. This statute attempted to reform the whole of the Scottish police system as well as the infrastructure of the country. Deep within the clauses, in part VI, section VI—*Jurisdiction, and Recovery of Penalties*, number 413, the Act lists a number of offences declared crimes to be dealt with after imprisonment.<sup>129</sup> Hughes argues that this section of the Police and Improvement Act was an effort at reform that seemingly aimed to criminalise wifebeating and enforce harsher penalties by prosecuting violent offenders in higher up criminal courts:

assault charges were codified. [The Act] stipulated that magistrates could not prosecute an assault charge where the assault was to the danger of life; or where a limb had been fractured; or where a knife or lethal weapon was used to the effusion of blood; or where the assault was aggravated by three previous convictions for this crime. Moreover, ‘if it appeared during the investigation or in the opinion of the magistrate that the crime merited a greater punishment at any stage of the trial, the prosecutor fiscal was to be informed and the defendant committed to prison until disposed according to law.’<sup>130</sup>

This Act also demonstrated the attempt to reform punishment legislations in Scots law. Though it ostensibly addressed wifebeating by typifying violence used against wives, it targeted more severe instances of brutality. Moreover, Hughes found evidence that after the passing of the Act little change was visible in the sentencing by sheriffs and magistrates.<sup>131</sup> A smaller study of criminal court cases discussed in full in Chapter Five similarly found unsystematic use of this Act after 1862. As a result, the Police and

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<sup>127</sup> Criminal Evidence Act, 1898, [61 & 62 Vict., Ch. 36.], section 4.

<sup>128</sup> Hughes, ‘The “Non-Criminal” Class’, pp. 35-36.

<sup>129</sup> Police and Improvement (Scotland) Act, 1862, [25 & 26 Vict. Cap. 101.]

<sup>130</sup> Quoted from Parliamentary Papers, Vol. IV. 199, Police and Improvement Scotland Bill [1862] in Hughes, ‘The “Non-Criminal” Class’, p. 37.

<sup>131</sup> Hughes, ‘The “Non-Criminal” Class’, p. 37.



Improvement (Scotland) Act may have only contributed minor relief to severely abused women seeking intervention.<sup>132</sup>

Legal remedies against wifebeaters under criminal law were an important aspect of nineteenth-century law reform in relation to the rights of husbands and wives. Although criminal legislation reform did not modify marriage and divorce law, it suggested a growing intolerance of violence against women. This historical debate is the argument, discussed earlier, that violence became less acceptable in the latter half of the nineteenth century due to the growth of the new domestic ideal of a 'softer patriarchy'.<sup>133</sup> Hughes disputes the conjecture that the decline in criminal convictions for wifebeating in England at the end of the nineteenth century was equalled in Scotland.<sup>134</sup> England—though conservative in its divorce legislation—had passed laws intended for the protection of single and married women, few of which were enacted in Scotland. These were the alternative measures suggested by Phillips. The Aggravated Assaults Act, for instance, passed in 1853 in England, was regarded as a progressive action against abusive husbands and fathers and a public statement that violence was not a respectable attribute or behaviour in Victorian England.<sup>135</sup> The Act stipulated that any person convicted of an assault on a female or boy under fourteen years of age would be sentenced to up to six months imprisonment or a fine not to exceed £20. Clark argues the Act 'had limited effect because wives could not fully prosecute their husbands if they were financially dependent on them. When they appeared before the magistrates' courts, sometimes mangled and bloody, they still testified reluctantly.'<sup>136</sup>

In 1878 English wives were addressed again under the amendment to the Matrimonial Causes Act. Widely attributed to the campaigns of English feminist Frances Power Cobbe, this new provision stated:<sup>137</sup>

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<sup>132</sup> For the purpose of this paper legislations and discussion of wife-murder is excluded in order to focus on the less sensationalised acts of wife abuse.

<sup>133</sup> Hughes, 'The "Non-Criminal" Class', p. 31; Annmarie Hughes, *Gender and Political Identities in Scotland, 1919-1939*, (Edinburgh, 2010), p. 136. This debate will be discussed in full in Chapter Five.

<sup>134</sup> The most prominent works on the theory of male violence declining in England are Nancy Tomes, 'A "Torrent of Abuse": Crimes of Violence between Working-Class Men and Women in London, 1840-1875,' *Journal of Social History*, Vol. 11, No. 3 (Spring, 1978), pp. 328-345, and Wiener, *Men of Blood*, (2004); Hughes, 'The "Non-Criminal" Class', pp. 33-39.

<sup>135</sup> Aggravated Assaults Act, 1853, [16 Vict. Cap. 30.], section X. Anna Clark, 'Domesticity and the problem of wifebeating in nineteenth-century Britain: working-class culture, law and politics', in Shani D'Cruze (ed.), *Everyday Violence in Britain, 1850-1950*, (Harlow, 2000), p. 30; see also Clark, 'Humanity or Justice?', p. 187.

<sup>136</sup> Clark, 'Domesticity and the problem of wifebeating', p. 33; see also Clark, 'Humanity or Justice', p. 203.

<sup>137</sup> Susan Hamilton, *Frances Power Cobbe and Victorian Feminism*, (Hampshire, 2006), p. 16.

If a husband shall be convicted summarily or otherwise of an aggravated assault... upon his wife, the Court or magistrate... may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty<sup>138</sup>

As well as allowing for the separation of bed, board was to be provided for the wife through a weekly payment determined by the court or magistrate based on the husband's earnings. Under this English Act, if there were young children from the marriage legal custody went to the wife based on the discretion of the court or magistrate. An exception was made if the wife was guilty of adultery, then, despite charges against the husband, her case was examined by the High Court of Justice to determine custody and aliment.<sup>139</sup> A further amendment to the Matrimonial Causes Act in 1884 ordered that a wife had the right to alimony and her own property under court decree once she filed for restitution of conjugal rights. Furthermore, if the husband did not comply the wife was then allowed to file for separation on the charge of desertion, or divorce if he had committed adultery.<sup>140</sup> This amendment offered the financial protection many English women lacked when trying to separate from an abusive husband.<sup>141</sup>

These acts exemplify the progressive steps of the Victorian era as more legislators and feminist groups pushed for women's rights, but also reiterate the discrepancies between English and Scots law, despite the similar societal values. As will be discussed in full detail in Chapter Five, this study of cruelty using CS records and reports of criminal court trials, revealed an increased awareness and reporting of marital abuse in the second half of the nineteenth century. However, the low numbers of wives filing for separation on the ground of cruelty and the continued acceptance of provocation as cause for a more lenient sentencing in criminal courts suggests that the progressive legislations passed were not being enforced and therefore did not encourage a rejection of male violence en masse. Furthermore, the defences provided by husbands in this study use provocation and justify the mistreatment of their wives (including actions of adultery and desertion) by claiming

<sup>138</sup> Matrimonial Causes Act, 1878, [41 Vict., Ch. 19.], section 4.

<sup>139</sup> Matrimonial Causes Act, 1878, [41 Vict., Ch. 19.]

<sup>140</sup> Matrimonial Causes Act, 1884, [47 & 48 Vict., Ch. 68.]

<sup>141</sup> Shanley questioned the impact of the 1878 amendment after explaining that the evidence was 'ambiguous'; Shanley, *Feminism, Marriage and the Law*, p. 172. The Act was amended with the Summary Jurisdiction (Married Women) Act of 1895 by allowing wives who had already left their abusive husbands without a separation order to apply for the decree, custody, aliment and expenses, and a special stipulation was added to give women guilty of adultery a chance to prove it was due to their husbands' maltreatment, however this may have been a way to reduce the number of wives on poor relief; Shanley, *Feminism, Marriage and the Law*, pp. 174-175.

their wives had failed to meet their marital expectations. These expectations were more often than not beyond achievability. Married women were given the overwhelming responsibilities of wife, mother, housekeeper and household representative. It therefore becomes apparent that despite new legislative reforms and emerging discourses aimed to protect women, these discourses were still laden with the belief that women should be the ‘angel in the house’.<sup>142</sup> If she did not match this ideal then she was not worth the same amount of protection or provision.

## Conclusion

Throughout the nineteenth century marriage was an accessible recourse for Scottish couples. They had the option of a regular or irregular marriage until the Marriage (Scotland) Act of 1939. Dissolution of a marriage was also comparably attainable under Scots law. Still, to end a marriage in Scotland was difficult due to costly and lengthy legal processes, requirements of evidence, and severity of circumstances in certain cases. Even with the legislative option to divorce or separate, the judiciary preferred to keep couples together whenever possible. Legislative reforms in the second half of the nineteenth century offered important improvements to married women’s rights through civil and criminal statutes, yet, these changes were arguably taken in small steps that sought to maintain the traditional marital relationship.

In particular, the legislations related to wife abuse reflected the problematic nature of an embedded patriarchal society—where wives were legally regarded as property bound by the marriage contract—by leaving the gender inequality of the conjugal union intact. Maintenance of this hegemony was portrayed as a priority for the judicial and governing authorities. It can be argued that the difficulties found in divorce and separation suits for women complainants, and defendants, represent the legal and social attitudes that marriage was not a union of equals in the nineteenth century, but rather a means of supporting the traditional view of male supremacy over women, even under the pretext of love and companionship.

This outline of Scotland’s marriage and divorce legal history provides the context for an in-depth study of Scots’ experiences of official and unofficial marital breakdown. The laws governing marriage—its entry and dissolution—imply a society’s value of the individual versus the social contract, and even sanctity of marriage. Thus, despite the

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<sup>142</sup> Joan Perkin, *Women and Marriage in Nineteenth-Century England*, (London, 1989), p. 7; Marshall, *Virgins and Viragos*, p. 247.

comparatively liberal legislations of Scots law in theory, the reality of married women's legal and economic restrictions suggests that marriage was considered more valuable than the felicity of the individual.

## Chapter Two: General Trends of Scottish Divorce and Judicial Separation

This chapter discusses the general trends in divorce and judicial separation in nineteenth-century Scotland, with a focus on the decades from 1830 to 1890. Following the history of Scots law in Chapter One, this chapter is a secondary foundation for understanding the divorce and separation cases analysed in Chapters Three, Four and Five. It charts and explains the low rate of divorce and separation in relation to the rising population and the normal rate of marriage through a quantitative analysis of available figures. Based on the available data nineteenth-century trends are established and compared to similar information on England. In the final section, the findings from the Court of Session (CS) extracted cases used for this study are examined for similar trends on a smaller scale, as well as any other information that was unavailable in the Parliamentary papers and census reports.

As discussed in Chapter One, Scots law was comparably liberal in its marriage and divorce legislations. The second half of the nineteenth century underwent several important legislative changes that directly altered the legal and economic privileges of husband and wife. The legislative reforms addressed previously will now be analysed with the available figures to see if they indeed made a difference to accessibility. From the second half of the 1800s through the turn of the century there was a gradual increase in the number of divorce and separation actions. The reasons for this gradual increase were arguably the effect of the legislative changes discussed previously, which granted greater access for more women and men towards the end of the century. Other influences, specifically economic limitations, are also analysed as contributing factors to the low rates found.

### Population and Marriage in Scotland

Between 1750 and the early 1800s Scotland experienced an ‘unprecedented growth’ in population.<sup>1</sup> From 1831 to 1914 the Scottish population doubled from 2.4 million to 4.8.<sup>2</sup> This increase has not been attributed to a rise in marriage and subsequent birth rates, but

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<sup>1</sup> R. A. Houston, ‘The Demographic Regime’, in T. M. Devine and Rosalind Mitchison (eds.), *People and Society in Scotland, Vol. I, 1760-1830*, (Edinburgh, 2004), p. 12.

<sup>2</sup> R. J. Morris, ‘Scotland, 1830-1914; The Making of a Nation Within a Nation’, in W. Hamish Fraser and R. J. Morris (eds.), *People and Society in Scotland, Vol. II, 1830-1914*, (Edinburgh, 1990), p. 1.

rather, a high rate of immigration.<sup>3</sup> However, even with the noteworthy growth over the nineteenth century, Scotland's population rate remained significantly lower than that of England.<sup>4</sup> Indeed, the population of England more than tripled from 8.9 million in 1801 to 29 million in 1891.<sup>5</sup>

The history of marriage statistics in Scotland should be divided into two periods: before the Registration Act of 1854 and after.<sup>6</sup> There was no systematic gathering of demographic statistics until the Registration Act, making it difficult to say anything precise about Scottish marriage patterns in the first half of the century.<sup>7</sup> Following the Act all couples were required to register their marriage, whether regular or irregular.<sup>8</sup> Once registration

<sup>3</sup> Although an increased flux of immigration was a defining event in nineteenth-century Scotland, particularly of Irish immigrants, this thesis does not look at the Roman Catholic Irish married population. The Catholic position since before the sixteenth century was that marriage was indissoluble. As this had not changed by the nineteenth century, there are no Catholic couples in the Court of Session case records collected.

<sup>4</sup> See M. Anderson and D. J. Morse, 'The People', in W. Hamish Fraser and R. J. Morris (eds.), *People and Society in Scotland, Vol. II, 1830-1914*, (Edinburgh, 1990), pp. 8 12-13. Anderson and Morse argue Scotland saw a decline in crude death rates (pp.22-30), and also a decline in birth rates, which was not unique to Scotland, but a trend throughout Europe (p.32).

<sup>5</sup> PP 1893-94 [C.7222] Vol. IV, *Census of England and Wales, 1891. General report, with summary tables and appendices*, p. 4.

<sup>6</sup> Eric M Clive, *The Law of Husband and Wife in Scotland*, (Edinburgh, 1982), p. 77; the Marriage Registration Act of 1854 required all marriages, births and deaths to be registered after 1855.

<sup>7</sup> J. Stark, 'Contribution to the Vital Statistics of Scotland', *Journal of the Statistical Society of London*, Vol. 14, No. 1 (Mar., 1851), p. 69. Also see T. C. Smout; 'Because of poor quality of church records and the complexity introduced by irregular marriage, it is virtually impossible to attempt a quantitative study of Scottish marriage before 1855, whether regular or irregular'; T. C. Smout, 'Scottish Marriage, Regular and Irregular, 1500-1940' in R. B. Outhwaite (ed.), *Marriage and Society: Studies in the Social History of Marriage*, (London, 1981), pp. 220-221.

<sup>8</sup> Both the Registration Act of 1854 and the Marriage (Scotland) Act 1856 convicted irregularly married couples in order to officially register the marriage, however, it was never illegal to have a clandestine or irregular marriage; Clive, *The Law of Husband and Wife*, p. 9, fn. 90. For the history of irregular marriage in Scotland see Smout, 'Scottish Marriage'; Leah Leneman and Rosalind Mitchison, 'Clandestine Marriage in the Scottish Cities, 1660-1780', *Journal of Social History*, Vol. 26, No. 4 (Summer, 1993), pp. 845-861; Leah Leneman, *Promises, Promises: Marriage Litigation in Scotland 1698-1830*, (Edinburgh, 2003). For a history of regular marriage and marriage patterns in Scotland that argues economic independence in urban areas allowed for people to marry younger, while lack of high-income jobs in rural areas meant people waited until they were financially stable before marrying, see M. Flinn (ed.) *Scottish Population History, from the Seventeenth century to the 1930s*, (Cambridge, 1977), p. 274-276. Houston analyses the Kilmarnock Kirk session records focusing on the impact of proto-industrialisation on marriage choice. Also Houston's work on the eighteenth century contests the generalised notion that women in the pre-modern era married earlier than women of the later twentieth century; he found that age of marriage depended on economic status and region of the country (influenced by the main economic staple); R. A. Houston, 'Marriage Formation and Domestic Industry: Occupational Endogamy in Kilmarnock, Ayrshire, 1697-1764', *Journal of Family History*, Vol. 8, (1983), pp. 215- 229. When compared to England, the mean age of marriage for Scottish women was 26-27 from the end of the eighteenth century to mid-nineteenth century, a later age than women in England during the same period (23-27 years old); R. A. Houston, 'The Population History of Britain and Ireland 1500-1750', in M. Anderson (ed.), *British Population History; From the Black Death to the Present Day*, (Cambridge, 1996), pp. 125-128. Anderson and Morse examine death rates, birth rates, changes in the marriage pattern, immigration and emigration in an analysis of Scotland's population growth in the nineteenth century; Anderson and Morse, 'The People', pp. 8-45; See Woods for marriage rates in specific regions of Scotland, England and Wales; R. I. Woods, 'The Population of Britain in the Nineteenth Century', in M. Anderson (ed.), *British Population History; From the Black Death to the Present Day*, (Cambridge, 1996), pp. 315-316.

became compulsory, standardised statistics became available.<sup>9</sup> In 1861 the *First Detailed Annual Report of the Registrar-General of Births, Deaths and Marriages in Scotland* explained that, ‘19,680 Marriages were contracted and registered in Scotland during 1855, which gives the proportion of 654 marriages in every hundred thousand of the population.’ The report compared these rates with England stating that, ‘[t]his is a proportion far below the marriage rate of England, which, on a ten years’ average, shows that 864 Marriages were contracted annually in every hundred thousand persons of the population.’<sup>10</sup> Later census reports show that the rate of registered marriages did not drastically change from 1851 to 1881, averaging at 693 marriages per 100,000 people (see Table 2.1).

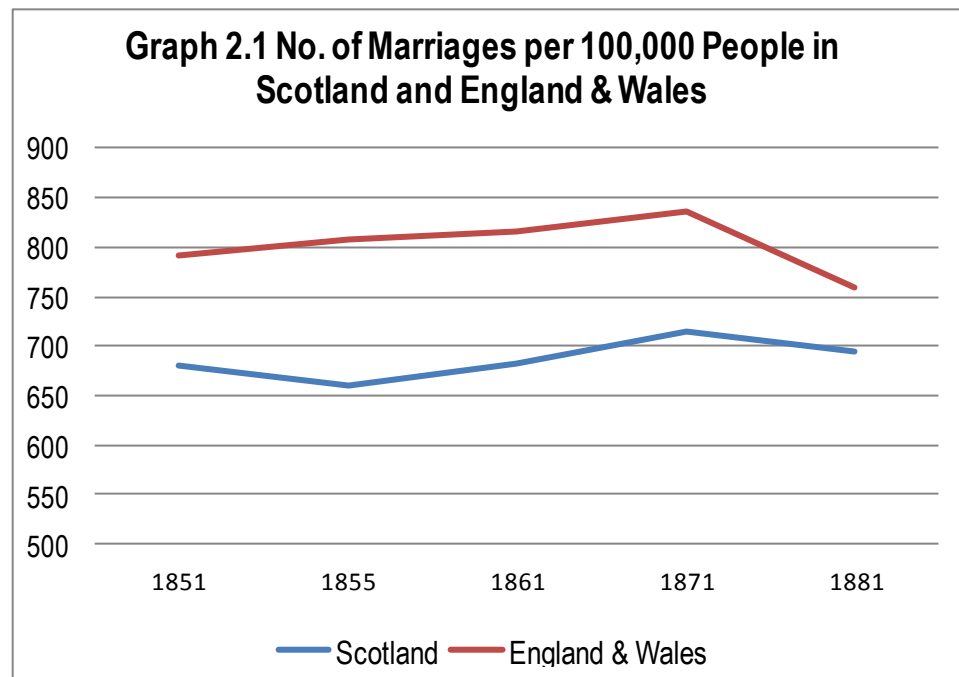
**Table 2.1 Scottish Marriages per Year in Comparison with Population in Scotland**

| Year | Total Population of Scotland | Population Married per Year |                                  | No. of Marriages per 100,000 People |
|------|------------------------------|-----------------------------|----------------------------------|-------------------------------------|
|      |                              | No. of Marriages per Year   | % of Population Married per Year |                                     |
| 1851 | 2,888,742                    | 19,639                      | 0.660                            | 680                                 |
| 1861 | 3,062,294                    | 20,896                      | 0.681                            | 682                                 |
| 1871 | 3,360,018                    | 24,019                      | 0.7102                           | 715                                 |
| 1881 | 3,745,485                    | 26,004                      | 0.6943                           | 694                                 |

Source: Marriage percentages from PP 1884-85 [C.4218] *Twenty-seventh detailed annual report of the Registrar-General of Births, Deaths, and Marriages in Scotland*. [Abstracts of 1881.], p. xvii.

<sup>9</sup> Though the Registrar Act created a national system of registration, it did not necessitate registration as a part of the marriage process; Clive, *The Law of Husband and Wife*, p. 77. For a description of civil registration and available census data see Flinn, *Scottish Population History*, pp. 87-91.

<sup>10</sup> PP 1861 [2814] *First detailed annual report of the Registrar-General of Births, Deaths, and Marriages in Scotland*, pp. xx-xxi.



Sources: PP 1890 [C.6170] *Fifty-second annual report of the Registrar-General of births, deaths, and marriage in England. (1889.)*, pp. lxvi-lxvii; PP 1884-85 [C.4218] *Twenty-seventh detailed annual report of the Registrar-General of Births, Deaths and Marriages in Scotland. [Abstracts of 1881.]*, p. xvii.

Graph 2.1 illustrates the difference in rate of marriage between Scotland and England and Wales in a population of 100,000 people. Although there were more people marrying in England and Wales, both lines show similar patterns. The graph also shows a trend of slow growth as a feature of Scottish, English and Welsh marriage rates over this thirty year period. Still, the rate of marriage in England and Wales decreased more markedly after 1871. This decline in marriage rates has been noted as a feature of the Victorian era.<sup>11</sup> The Registrar Generals discussed the decline in the mid-1880s, though at the time they predicted numbers to have already started ascending again: ‘The number of marriages registered throughout Scotland during 1881 was 26004, an increase of 1499 [*sic*] [from] the previous year, and representing a marriage rate of 69.43 for every ten thousand of estimated population, a higher rate than it has been since 1877, though below the average for the ten years ending with 1880, which was 72 per ten thousand.’<sup>12</sup>

<sup>11</sup> Based on the proportion of females married, Woods’ ‘Table 5: *Index of Proportion Married, Im*’ shows England and Wales in 1861 to 1891 decreasing from 0.502 to 0.477, and Scotland decreasing over the same years from 0.422 to 0.420; Robert Woods, *The Population of Britain in the Nineteenth Century*, (Hampshire, 1992), pp. 41-42.

<sup>12</sup> Marriage rates in the 1860s-70s were increasing, but dropped in 1877, only to rise slightly by 1881; PP 1884-85 [C.4218] *Twenty-Seventh Detailed Report*, pp. xvi-xvii.



## Perceptions and Accessibility of Divorce and Separation

Divorce and judicial separation have been legal in Scotland since the Reformation. Notwithstanding their legal availability, Chapter One demonstrated that divorce and separation were not feasible options for married women until the second half of the nineteenth century when reform legislations, such as the Conjugal Rights (Scotland) Act of 1861 and the Married Women's Property (Scotland) Acts of 1877 and 1881, provided economic and legal autonomy to married women. This chapter puts forward the argument that access was also restricted for the majority of husbands and wives due to economic restraints, such as court fees and travel. Most couples remained legally married until death, but, there was a small percentage who sought judicial means to end their marriage. The sixty year period of 1830 to 1890, however, shows how uncommon divorce and separation were, as well as the beginning of the increase in rates that were to swell by the late twentieth century.

Although there was a concern that divorce was commonplace, divorce and judicial separations were rare. Parliamentary papers written throughout the 1800s reported an increase in the number of divorce actions instigated (cases filed by a pursuer, but not necessarily awarded a decree due to dismissal or never being heard in court), yet the reality was a gradual rise from as low as 17 actions in 1823 to a peak of 140 in 1885. The number of divorce actions given successful decrees was even less, for instance in 1823, 14 of the 17 were successful and only 76 of the 140 in 1885. Nevertheless, throughout the nineteenth century, marriage, divorce and separation were issues of worry and reform.

Newspaper reports of Parliamentary debates demonstrate that the concerns over accessibility were ever present. In 1830 the complicated nature of the Scottish courts was addressed with the proposal of a bill for trial by jury to be instituted in the CS.<sup>13</sup> The bill sought to establish juries in civil cases tried in the CS as well as to pass the former duties of the Commissary Court onto the CS. This debate in the House of Commons about Scottish court system reform simultaneously flagged the issue of divorce. The Lord Advocate was reported by *The Scotsman* as stating:

The duties of that court, with respect to marriage and legitimacy, were of so important a character as called, in his opinion, for an alteration in its construction... He feared that the system gave rise to much collusion between parties who wished to be separated... it appeared, that, in the three last years, the number of divorces obtained was 48; in these cases

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<sup>13</sup> The bill was an amendment to earlier acts passed under George III and George IV, all related to restructuring the Scottish Courts.

appearances were entered for only nine of the defendants; so that in 39 cases of divorce the suit was carried on by only one of the parties... Now, when he removed this jurisdiction to the CS, he would, in a great measure, put an end to this facility of obtaining divorces. By taking this course he thought that many of these cases would be stopped—that they would not be heard of—and thus the marriage tie would be placed in a more secure state... The only objection he had heard to the alteration was, that it would put poor people to a heavy expense in procuring divorce. He was anxious that justice should be administered as strictly and as cheaply as possible; yet, when he came to look at the numerous actions of divorce that came before these commissaries, he was inclined to think that some benefit might arise from the increase of expense.<sup>14</sup>

The Lord Advocate asserted that the comparably lax Scots law may explain ‘great’ numbers of divorce. He did not suggest abolishing the divorce and separation laws, rather he identified them as well established and recommended making the process more costly in order to reduce the number of actions. What was evident was the expectation that a reform of the legal courts would curtail the applications. Though the Lord Advocate expressed concern that poor people should be able to afford a divorce, the underlying message implied his belief that the people guilty of colluding to get a divorce were the same people who would be excluded by a rise in price, specifically working-class couples. The recommendation to increase costs suggests that the Lord Advocate believed only poorer couples took advantage of and undermined the system through fraud and collusion.<sup>15</sup>

Over forty years later, in 1872 *The Scotsman* reported a debate in the House of Lords, on the ‘Marriage Law of Scotland’, started by Lord Chelmsford who referenced the following question posed by an ‘hon. gentleman’: ‘The Government were asked in 1865 whether they intended to do anything towards making the Marriage Law in Scotland more in accordance with those of *civilised nations* [italics added].’<sup>16</sup> According to Lord Chelmsford, this inquiry prompted ‘the appointment of a Commission to inquire into the subject’, which as of March 1872 remained ‘untouched’. The Lord Chancellor replied:

The Marriage Law was certainly one of great importance, but it was surrounded with many difficulties...Then there was the question of divorce. In Scotland persons might be divorced without any proof of

<sup>14</sup> ‘House of Commons.- April 1. Trial by Jury in Scotland’, *The Scotsman*, 7 April 1830, p.2

<sup>15</sup> The separate Court of Session Act of 1830 not only changed the location for divorce and separation proceedings, it also altered the practice of the court, particularly evidentiary support. With the transfer to the Court of Session from the Commissary Courts, evidence that had originally been presented to a Commissary and then to the Court went instead from a Commissary (eventually a sheriff) to the Lord Ordinary. Criticism over this change appeared to come from the indirectness of collecting evidence. Whether the court reforms had the intended effect on the rate of divorce as mentioned by the Lord Advocate is debatable; Clive, *Husband and Wife*, pp. 12-13.

<sup>16</sup> ‘Article 12—No Title. [Imperial Parliament. House of Lords—Tuesday, March 19.]’, *The Scotsman*, 20 March 1872, pg. 7.

adultery. The Committee had consequently to be cautious in expressing any opinion as to what the law should be with regard to divorce. These were the reasons why the Government had not dealt with the matter as yet.<sup>17</sup>

The Lord Chancellor then suggested Lord Chelmsford should propose a bill to reform the Scottish marriage law. To which Lord Chelmsford answered: 'a private member would have no chance in carrying a marriage bill this Parliament, and declined the responsibilities, which he thought the Government ought to undertake. [sic]'<sup>18</sup>

Similar discourses on increasing divorce rates and the role of the lower classes in this trend prevailed. In 1880 The National Association for the Promotion of Social Science held their twenty-fourth annual congress, where anxiety over rising divorce rates was addressed in a paper given by a writer signet of Edinburgh. The paper, 'The Increase of Divorce in Scotland', explained that in the last ten years the number of divorces had risen from 35 cases per annum to 59, and already 63 cases had been counted for 1880.<sup>19</sup> Coldstream conducted a comparative study of 55 cases before 1874 and 55 after to find patterns that might explain the increase:

One other contributing cause to the increase suggested itself, and that was the ready and wide circulation of the reports of such cases by a cheap press, thus rendering the public mind accustomed to and prepared for what should be regarded as a scandal and disgrace in a family's history...The result of the inquiry went to show that increased drunkenness, specially among women, had increased divorce in Scotland, while the Legislature had also contributed to the increase by the passing of the Act which enabled parties to be witnesses in the cause.<sup>20</sup>

In the debate that followed, Mr. Campbell Smith, advocate from Edinburgh, attempted to refute the observations of the paper, particularly that there was a cause for alarm. *The Scotsman* reported:

He attributed the increase in divorce not to any increase in immorality among the people, but to the greater faculty now afforded for taking advantage of the existing means of divorce... He concluded by repeating that in the increase of divorce cases, there was nothing to alarm us.<sup>21</sup>

<sup>17</sup> 'Article 12', *The Scotsman*, 20 March 1872, pg. 7.

<sup>18</sup> Ibid.

<sup>19</sup> The paper was written and presented by Mr. John P. Coldstream, W. S., Edinburgh, at the Municipal Law Section of the conference, and reported on in *The Scotsman*; 'Article 15—No Title [The National Association for the Promotion of Social Science, Twenty-Fourth Annual Congress]', *The Scotsman*, 13 October 1880, pp. 7-8.

<sup>20</sup> Coldstream was referencing the Evidence Law Amendment (Scotland) Act of 1874; 'Article 15', *The Scotsman*, 13 October 1880, pp. 7-8.

<sup>21</sup> 'Article 15', *The Scotsman*, 13 October 1880, pp. 7-8.

As the official figures remained low, it seems that the matter at heart was whether Scots law made divorce and separation too accessible for the lower classes. Accessibility was arguably the biggest variant between Scotland and England. The two countries had distinct marriage and divorce legislations. Husbands and wives residing in Scotland had equal access to suits of divorce on the grounds of adultery, desertion, and judicial separation for cruelty and maltreatment, but in England before 1857 only elite men could obtain a private divorce through Parliament, or a separation from bed and board. After the 1857 Matrimonial Causes Act, divorce in England for simple adultery was only available to the husband, while a wife had to prove aggravated adultery to qualify or apply for a separation. As part of the investigation into reforming English divorce law, the Select Committee of the House of Lords interviewed the Lord Advocate and an esquire of Scotland in 1844 to record Scottish legal practices.<sup>22</sup> It was apparent from this interview that the MPs correlated divorce with immorality; the line of questioning seemed to be searching for evidence of failure within the Scottish system. The Lord Advocate, Right Hon. Duncan M'Neill, answered questions that focused on the impact of allowing wives the same rights as husbands as well as overall accessibility of divorce:

125. You do not consider that the number of Divorces *à vinculo* has increased in a greater proportion than the population?—No.

126. Is your Lordship of opinion that the great facility of obtaining divorces in Scotland gives rise to a greater number of Divorce suits being instituted than otherwise would be instituted? – I should think that where a remedy is within reach it would be resorted to more frequently than where it is not within reach.

...133. Is it your opinion that the possibility of obtaining a Divorce at no very great expense, and with no great delay by way of judicial proceedings, increases the effectual demand for the remedy by increasing the number of adulteries committed in Scotland?—That would be mere speculation. I have no reason to suppose that it does. I would certainly say not, with reference to the adultery of the wife.

...137. Is it conceived generally that in proportion to the number of people in Scotland there exists a greater degree of immorality than in other countries?—I really cannot answer that question; my experience does not enable me to do so. In the first place, I cannot speak to the degree of immorality, of the nature referred to, in Scotland; in the second place, still less can I do so in regard to other countries.

...165. Do not you think that the facility of Divorce at the suit of the wife may have a tendency to produce collusive Divorces; meaning by that,

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<sup>22</sup> The Lord Advocate of Scotland, Right Hon. Duncan M'Neill, now Lord Justice of Scotland, being questioned for the PP 1852-53 [1604] *First Report of the Commissioners appointed by Her Majesty to enquire into the law of divorce*, p. 65.

adultery committed by the husband for the sake of founding such a proceeding? – It may have. I am not aware that it has.<sup>23</sup>

J.A. Maconochie, esquire in Scotland, was also interviewed with related questions levelled at him by the Committee, to which he gave similar answers as the Lord Advocate.<sup>24</sup>

Though the purpose of the Committee's investigation was to determine the best divorce law for England, there was an embedded derision of Scottish divorce law in these questions. Speculation about access to divorce and separation leading to immorality was not only reserved for Scotland. In 1846 the *Morning Herald* published the following blurb titled 'Morality in France': 'If statistical returns speak truth, morality in France is becoming every year less and less regarded. The number of condemnations for adultery is increasing every month; of separations between husbands and wives the number has risen from 643 in 1837 to 1108 in 1844.'<sup>25</sup>

Accessibility was regulated in Scotland and England through gender imbalances, but also through costs of legal fees. This was another disparity between the two countries, as well as a source of contention. Contemporaries frequently cited expenses as an issue; for instance an editorial on English divorce law written in 1830 angrily stated: '[b]ut the truth is, it exactly suits John Bull's taste in legislation, first to lay down a rule which has every appearance of being absolute, and then either to nullify it *in toto*,...or to leave it as a trap for the poor, while a loophole is opened for the rich to make their escape through it.'<sup>26</sup> The *Daily News* published an article in September 1853 reporting on the Select Committee's findings (discussed above):

From that report we learn, first, that it is proposed to refuse divorce to women (in England) altogether, except in cases of such rare atrocity as to constitute, practically, no exception at all; and next, that in Scotland, there were ninety-five cases of successful suit for a divorce in five years—the parties being almost all of the labouring classes, under favour of the smallness of the cost; one-third of these divorces were at the suit of the wife. Such is the state of the law beyond the Tweed, while, on this side of it, the expense of a divorce rises from £500 to several thousands, and as we said, the wife is, practically speaking, excluded from release altogether.<sup>27</sup>

<sup>23</sup> The Lord Advocate of Scotland, Right Hon. Duncan M'Neill, now Lord Justice of Scotland, being questioned for the PP 1852-53 [1604] *First Report of the Commissioners*, p. 67.

<sup>24</sup> J. A. Maconochie, Esq., questioned for the PP 1852-53 [1604] *First Report of the Commissioners*, p. 69.

<sup>25</sup> This blurb was re-printed in *The Scotsman* and reported under the English news section; 'England. [Morality in France.]', *The Scotsman*, 21 October 1846, pg. 4.

<sup>26</sup> 'Editorial Article1—No Title', *The Scotsman*, 7 April 1830, pg. 6.

<sup>27</sup> 'Brutal Husbands—The Divorce Laws. (From the *Daily News*.)', *The Scotsman*, 10 September 1853, pg. 4.

In Scotland an uncontested action at the CS in 1853 was reportedly between £20 and £30, compared to an estimated average of £700 to £800 for a Parliamentary Divorce in England.<sup>28</sup> After 1857 divorce proceedings were still considered expensive for the average English person though an uncontested case could cost from £30 to £40.<sup>29</sup> The difference after 1857 between Scotland and England was drastically reduced, but it was still more than a working-class couple could afford.

Although the expenses for a trial were low compared to England, in Scotland the final sum was dependent on the length of the trial, the number of witnesses,<sup>30</sup> and whether the defender answered the summons with a defence. The cost would vary further based on the action and charge made by the pursuer as a divorce and a separation had different outcomes. If awarded a divorce, the marriage was fully dissolved leaving the parties free to remarry, the innocent wife was given her terce (if the wife was the guilty party she lost this claim),<sup>31</sup> and any further economic dependency was severed. The only stipulation being that if a co-defender was named and charged as the paramour, the defender and co-defender were not legally allowed to marry after the divorce. In the event of a judicial separation the parties remained legally married, although allowed to live separately, and the husband was required to pay the wife aliment for as long as they lived apart. As a result, it was in the interest of the defender to contest a suit of separation in order to avoid alimony, while suits of divorce were more often left uncontested (no appearance or defence provided by the defender), even when the parties had not colluded. Accordingly, the study of CS cases, discussed in full below, found that out of 65 divorce cases on the ground of adultery, 38 actions (58 per cent) were uncontested. In actions of divorce on the ground of desertion, only one defender out of 48 cases made an appearance, however, she did not contest the plea for divorce, but rather appeared as a witness to testify that she had left her husband due to his 'unkindness'.<sup>32</sup> Out of the 14 cases of judicial separation on the ground of cruelty and maltreatment, eight were contested and six were uncontested, although two of those six defenders were imprisoned at the time of the trial. Leneman found in her study

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<sup>28</sup> Clive, *The Law of Husband and Wife*, pp. 438-439. Stone cites a contested separation suit from 1846 that cost £1,700 in England; Lawrence Stone, *Road to Divorce: England 1530-1987*, (Oxford, 1990), p. 355.

<sup>29</sup> Hyacinthe Ringrose, *Marriage and Divorce Laws of the World*, (London, 1911), p. 23.

<sup>30</sup> Parties sometimes had to pay to bring witnesses to Edinburgh for their trial; Leah Leneman, *Alienated Affection: The Scottish Experience of Divorce and Separation, 1684-1830*, (Edinburgh, 1998), p. 15.

<sup>31</sup> Terce was the 'life-rent enjoyed by a widow, or a wife who has divorced her husband, to one-third of the income of the heritable estate in Scotland'. In the event that the wife was the guilty party (for adultery or desertion) she was no longer entitled to terce; Frederick Parker Walton, *A Handbook of Husband and Wife According to the Law of Scotland*, (Edinburgh, 1893), p. 199, 200, 214.

<sup>32</sup> CS46/1880/1/81 *Brown v Guthrie or Brown*.

of pre-1830 separation cases that 69 per cent were contested, versus 42 per cent of adultery cases.<sup>33</sup>

Out of the CS cases, the most expensive action was an 1870 divorce for adultery. The suit was instigated by the husband, contested by the wife, and lasted one year and two months; the expenses declared in the final ruling were £335.9s.9d. In contrast, the lowest cost for a case was £12.16s.0d. This case was also filed by the husband on the ground of adultery, contested by the wife, but lasted only two months. From the information available, the average cost of the CS cases shows that actions of desertion and actions of maltreatment were more similar in price than the average for an adultery divorce.<sup>34</sup> This information, along with the highest and lowest fees, the cost of an action for aliment, and an action of adherence and aliment, are listed in Table 2.2.

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<sup>33</sup> Leneman, *Alienated Affections*, pp. 13-14.

<sup>34</sup> The separate account of expenses reported by an auditor was only available in a few of the divorce and separation records. Instead, the expenses total was also sometimes listed as a final decree by the Lord Ordinary in the interlocutor sheet, which stated that the auditor's report had been approved, the amount found by the auditor, and who was responsible for paying it. The majority of cases where this information was available were in actions where the wife was the pursuer and the husband the defender. In cases where the husband filed the action payments of *ad interim* aliment, money granted by the Lord Ordinary to the wife from the husband in order to cover her debts, are usually recorded in the interlocutor sheet, although a final tally of expenses is not always available, presumably because the husband had been paying all the legal fees directly since the start of the action.

**Table 2.2 Cost of Trials, Court of Session Cases, 1830-1880**

| Action                | Charge       |             | Cost        | Year | Length of Action | Contested   | Liable for Expenses | Pursuer |
|-----------------------|--------------|-------------|-------------|------|------------------|-------------|---------------------|---------|
| Divorce               | Desertion    | Highest     | £79.6d.     | 1880 | 5 ms             | Uncontested | Defender            | Wife    |
|                       |              | Lowest      | £33.18s.4d. | 1880 | <2 ms            | Uncontested | Defender            | Wife    |
|                       |              | Average     | £43         |      |                  |             |                     |         |
| Aliment               | Desertion    |             | £15.9s.4d   | 1830 | 1 yr             | Uncontested | Defender            | Wife    |
| Adherence and Aliment | Desertion    | (Adherence) | £25.0s.9d.  | 1840 | 1 ms             | Uncontested | Defender            | Wife    |
|                       |              | (Divorce)   | £13.2s.5d   | 1840 | 3 ms             | Uncontested | Defender            | Wife    |
|                       |              | Total       | £38.3s.2d.  | 1840 | 4 ms             | Uncontested | Defender            | Wife    |
| Divorce               | Adultery     | Highest     | £335.9s.9d. | 1870 | 1 yr 2 ms        | Contested   | Pursuer             | Husband |
|                       |              | Lowest      | £12.16s.0d. | 1880 | 4 ms             | Contested   | Pursuer             | Husband |
|                       |              | Average     | £88         |      |                  |             |                     |         |
| Separation            | Maltreatment | Highest     | £99.17s.7d. | 1830 | 2 yrs 8 ms       | Contested   | Defender            | Wife    |
|                       |              | Lowest      | £17.1s.7d.  | 1860 | 2 ms             | Uncontested | Defender            | Wife    |
|                       |              | Average     | £46         |      |                  |             |                     |         |

As shown in Table 2.2, the husband was liable for the expenses in all of the cases, even as the complainer who was successfully granted a divorce. This was a repercussion of coverture; a husband was required to pay all and any of his wife's debts, including legal fees. Fraser in 1876 wrote that this was a condition of the marriage contract, however, Clive argues that this system was more complicated than Fraser outlined.<sup>35</sup> What is evident from the CS cases, nonetheless, is that in every trial the husband was responsible for any fee incurred. This condition, though beneficial for a wife without a separate estate, was damaging for a husband, and sometimes disputed in court.<sup>36</sup> In one case Lord

<sup>35</sup> According to Fraser, 'The theory of the law is, that a wife has no means; and therefore, as a general rule, any justifiable litigation carried on by her must be paid for by the husband, as a *necessary*.' [sic]; Patrick Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, Second Edition, Vol. 1, (Edinburgh, 1876), p. 1230, for the full discussion see pp. 1230-1238. Clive refutes Fraser's assessment, instead saying that, 'the basis of the traditional rule on expense is the husband's liability, based on his obligation to provide support, to reimburse those who provide his wife with necessities or give her credit for necessities'; Clive, *Law of Husband and Wife*, p. 589, for the full discussion see pp. 588-593.

<sup>36</sup> For example, an article in 1862 began, 'A somewhat novel and important point in practice was decided by Lord Jerviswoode in this case to-day', when Jerviswoode ruled the husband was liable for the wife's legal fees after she consulted an agent, but decided not to contest her husband's suit against her; 'Outer House.



Ardmillan revealed an aversion to this system when the wife was clearly guilty of adultery. He included a note following an interim order to the pursuer (the husband) to pay an additional £5 to his wife (the defender) for her legal fees: 'It is not without hesitation and difficulty that the Lord Ordinary has awarded even this small sum to the Defender in name of Expenses. He has read the Defense; and the Proof; and is satisfied that, at all events, the sum awarded is the largest which can with justice be allowed. [sic]<sup>37</sup>

Also worth noting is that in Scotland poor relief had been available for paupers to cover legal expenses since the fifteenth century.<sup>38</sup> This legal right enabled men and women of the lower working class equal access to legal procedures.<sup>39</sup> In this study of CS cases, only eleven pursuers, or 4 per cent, used the Poors' Roll to fund their suit of divorce, separation, aliment, and adherence. Still, this was an important resource considering the state of employment in nineteenth-century Scotland. It has been estimated by historians of the early nineteenth century that working-class wage in Glasgow ranged from 18 shillings (s.) per week for the skilled worker to 9s. per week for the unskilled labourer.<sup>40</sup> James Treble's study of Glasgow's working class from 1890 to 1914 shows wages for unskilled labourers between 17s. and 23s. per week, however, even workers with seemingly better wages only had a tenuous hold on economic stability as many industries revolved around seasonal demands, and unemployment was high and improperly regulated. Thus, Treble wrote: 'it is impossible to dispute that the majority of the families of unskilled workers must have lived at or below the poverty line if they solely depended upon the income of the head of the household.'<sup>41</sup> Women's wages in comparison were significantly less than a man's. This was a result of the Victorian ideal that encouraged families to divide marital

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(Before Lord Jerviswoode.) Saturday, January 25. Divorce—Agnew v Agnew and Co-Respondent.' *The Scotsman*, 27 January 1862, pg. 4. The Conjugal Rights (Scotland) Act 1861 allowed a pursuer to request the co-defender pay expenses of the action. A case from 1873 demonstrated this law being used to recover the fees spent by a husband filing for divorce on the ground of adultery against his wife and her lover; the Lord Ordinary ruled the co-defender was liable for the full expenses; 'Second Division. The Double Action for Divorce. Andrews v Andrews and Another', *The Scotsman*, 8 February 1873, pg. 9.

<sup>37</sup> CS46/1860/3/98 Scott v Millar or Scott.

<sup>38</sup> Lord Guthrie, 'The History of Divorce', *Scottish Historical Review*, 8 (1910/1911), p. 40; Clive, *Law of Husband and Wife*, p. 14; Leneman, *Alienated Affections*, p. 15.

<sup>39</sup> In this study of Court of Session cases, eleven pursuers used the Poors' Roll to fund their suit of divorce, separation, aliment, and adherence. The importance of the Poors' Roll will be discussed in detail in Chapter Four.

<sup>40</sup> T.R. Gourvish, 'The Cost of Living in Glasgow in the Early Nineteenth Century', *The Economic History Review*, New Series, Vol. 25, No. 1 (Feb., 1972), pp.65-80. Cage concluded that by 1850 wages improved for skilled labourers, but decreased for unskilled workers, who were the 'majority of the labour force' in Glasgow; R. A. Cage, 'The Standard of Living Debate: Glasgow, 1800-1850', *The Journal of Economic History*, Vol. 43, No. 1 The Tasks of Economic History (Mar., 1983), p. 182.

<sup>41</sup> James A. Treble, 'The Market for Unskilled Male Labour in Glasgow, 1891-1914', in Ian MacDougall (ed.), *Essays in Scottish Labour History: A Tribute to W. H. Marwick*, (Edinburgh, 1978), p. 129. See also Treble, 'Unemployment and Unemployment Policies in Glasgow, 1890-1905', in Pat Thane (ed.), *The Origins of British Social Policy*, (London, 1978), pp. 147-172; and Treble, 'The Seasonal Demand for Adult Labour in Glasgow, 1890-1914', *Social History*, Vol. 3, No. 1 (Jan., 1978), pp. 43-60.

expectations by gender: husbands were considered the breadwinner, and wives were meant to run the household and raise the children. Therefore, if women did work, their wages were inadequate to support a family without a male head of the household.<sup>42</sup> A national average of women's wages showed women earned 42 per cent of men's wages. In 1893 the lowest female wage was 4s. to 8s. per week, while in 1886 the highest female wage recorded was 20s. per week.<sup>43</sup>

In the 1852 Divorce Commission for the Queen, it was reported that out of 95 decrees for divorce between 1836 and 1841, the parties involved in the cases were 'almost all of the humbler classes'.<sup>44</sup> Coldstream's paper of 1880 also noted the economic status of divorce litigants: 'As to the trade or profession of the parties, it was found that nearly all classes of the community—from the man of noble birth to the humblest subject—took advantage of the Divorce Court.'<sup>45</sup> Likewise, historian Marshall wrote in her analysis of divorce in Scotland that it was the 'humbler classes' that most frequently sought a divorce action before the twentieth century.<sup>46</sup>

Yet, what constituted 'humbler'? This description vaguely specifies the socioeconomic status of the divorcing parties. Moreover, it suggests that the legal remedy of divorce or judicial separation was more accessible than it seems based on legal fees and average wage earnings. To investigate this claim, the listed occupations of litigating parties from the CS benchmark cases were analysed. Out of the 254 cases collected for the benchmark years, there are a total of 508 litigants. Of the 508 people, fifty per cent had an occupation listed. 221 of the 254 occupied litigants were husbands, or 43.5 per cent of the 508, while only 33, or 6.5 per cent, were wives. These numbers can be broken down further to look specifically at pursuers and defenders (see Table 2.3).

Examining husbands first, the number of pursuers who listed an occupation was 105 out of a total of 119 male pursuers. The largest group of occupations, or 80 per cent, fell into the working class. Of the remaining pursuers, 16 per cent were of the middle class, and 4 per cent upper class. From the list of occupations for male defenders, 116 out of 135, again the highest percentage was from the working class; 71 per cent, then 25 per cent middle class and 3.5 per cent upper class. As pointed out by W. A. Armstrong and Matthew Woollard,

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<sup>42</sup> Eleanor Gordon, *Women and The Labour Movement in Scotland, 1850-1914*, (Oxford, 1991), p. 21.

<sup>43</sup> Ibid, pp. 30-31.

<sup>44</sup> PP 1852-53 [1604] *First report of the Commissioners*, p. 73.

<sup>45</sup> 'Article 15—No Title [The National Association for the Promotion of Social Science, Twenty-Fourth Annual Congress]', *The Scotsman*, 13 October 1880, pp. 7-8.

<sup>46</sup> Rosalind Marshall, *Virgins and Viragos: A History of Women in Scotland from 1080 to 1980*, (London, 1983), p. 301.

the system of classification used in the nineteenth century was heavily flawed because they distinguished men and women based solely on occupation rather than individual wealth or earnings.<sup>47</sup> It is apparent, nevertheless, that while working-class men filed the majority of divorce suits, a high number of them would have fallen into the upper-working class. For instance, there were a high number of artisans, such as shoemakers, and small business owners, such as grocers, while the most common occupation listed for both male pursuers and defenders was engineer. Table 2.3 shows that there is not a great discrepancy between the percentages of male pursuers and male defenders. This suggests that of the male litigants, husbands who filed suits and husbands who were summoned overall belonged to the same socioeconomic classes.

Of the occupations listed by wives, eighteen were female pursuers and fourteen were female defenders. Despite the fact that the husband was required to cover his wife's legal fees, a woman whose marriage broke down was often forced to earn a living. Although it is obvious that there were at least four upper-class wives in the 254 cases sample, none listed an indicator of their status. On the other hand, three female pursuers identified as middle class by listing themselves as the daughter of a merchant. The rest of the eighteen female pursuers were upper and lower-working class. Overall, the majority of wives with occupations fell into the working-class status. It is also noticeable, however, that of the female pursuers, seven ran or owned small businesses. Presumably, the husband had also been an owner or manager at some point, but by the time of the suit the wife had often taken over the business due to the marital breakdown. In contrast, the most common occupation for a female defender was servant or employed in domestic services, such as washer, mender of clothes or wet nurse (eight of the fourteen). As these women had been charged with adultery or desertion, it would make sense that they had taken up work to

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<sup>47</sup> For this investigation the 1861 Census Report Vol. II, W.A. Armstrong's work on nineteenth-century occupations, and Matthew Woollard's paper on the 1861 census were used, yet the classifications of the nineteenth century are problematic as it divides the population into five classes based on the occupations listed in the census returns, but does not differentiate based on income, level of employee, wives or widows. To most accurately identify the class of the litigants from the Court of Session sample, the listed occupations were divided into the three broadly defined classes; 1864 [3275] Census of Scotland, 1861. Population tables and report. Ages, civil or conjugal condition, occupations, and birth places of the people in Scotland: with the number and ages of the blind, the deaf-dumb, and the inmates of poorhouses, prisons, lunatic asylums, and hospitals. Vol. II, pp. xl-lvi, lxviii- lxix; W.A. Armstrong, 'The use of information about occupation,' in E.A. Wrigley, *Nineteenth-century Society; Essays in the use of quantitative methods for the study of social data*, (Cambridge, 1972), pp. 191-223; Matthew Woollard, 'Occupational Classification in the Nineteenth-Century Census of Scotland', unpublished paper, University of Glasgow, <[http://www.gla.ac.uk/media/media\\_147205\\_en.pdf](http://www.gla.ac.uk/media/media_147205_en.pdf)>, [accessed 13 November 2013].

support themselves independently. Undoubtedly, a larger number of wives did indeed work, but did not list an occupation.<sup>48</sup>

Overall, this study's findings support the notion that it was the 'humbler classes' who filed for divorce and separation. Yet, what does this say about economic accessibility? There are two possible explanations. Firstly, though these litigants fall into the vaguely defined working class, many were skilled labourers, and small business owners. Therefore, rather than simply working class, these men and women would be upper-working class. Secondly, that working-class husbands and wives were willing to spend a large amount of money for a divorce and judicial separation suggests that it was not a decision taken lightly, and that perhaps it was out of desperation and lack of alternatives. Thus, the contemporary concern over working-class couples abusing the divorce legislation was only partially legitimate, as many litigants were indeed from the lower class, yet the numbers, which will be discussed below, never indicated a threat to society.

**Table 2. 3 Socioeconomic Status of Litigants with Listed Occupations, Court of Session**

| <b>Class</b>             | <b>Male Pursuer w/Occ.</b> | <b>%</b>    | <b>Male Defender w/Occ.</b> | <b>%</b>    | <b>Female Pursuer w/Occ.</b> | <b>%</b>    | <b>Female Defender w/Occ.</b> | <b>%</b>    |
|--------------------------|----------------------------|-------------|-----------------------------|-------------|------------------------------|-------------|-------------------------------|-------------|
| Upper                    | 4                          | 4%          | 4                           | 3.5%        | 0                            | -           | 0                             | -           |
| Middle                   | 17                         | 16%         | 29                          | 25%         | 3                            | 17%         | 0                             | -           |
| Working                  | 84                         | 80%         | 82                          | 71%         | 15                           | 83%         | 13                            | 93%         |
| <b>Total<sup>a</sup></b> | <b>105</b>                 | <b>100%</b> | <b>116<sup>b</sup></b>      | <b>100%</b> | <b>18</b>                    | <b>100%</b> | <b>14<sup>b</sup></b>         | <b>100%</b> |

<sup>a</sup> The total number of male pursuers is 119, with 119 female defenders. The total number of male defenders is 135, with 135 female pursuers. There are 508 litigants in total.

<sup>b</sup> One male and one female defender were imprisoned at the time of the suit.

Source: *General Minute-Book of The Court of Session*, Vols. 49, 50, 59, 60, 69, 70, 79, 80, 89, 90, 99, 100.

<sup>48</sup> Ellen Ross found in her study that seasonal and irregular employment for husbands caused wives and children to become secondary earners for an impoverished family. In census records only 13 per cent of wives were employed, however, she argues in reality married women's work was excluded from records as it was viewed as 'insignificant'; Ellen Ross, *Love and Toil: Motherhood in Outcast London, 1870-1918*, (Oxford, 1993), pp. 44-48.

Lastly, accessibility was impacted by the singular location of the CS in Edinburgh. This was the only court with the jurisdiction to oversee actions of divorce and judicial separation. Although railways had been built connecting central and southern Scotland to Edinburgh by the 1840s, this was a costly way to travel mid century.<sup>49</sup> Treble's work on geographical mobility found that while workers with wages of 30-40s. per week could afford to commute for work, unskilled labourers were made immobile by costs of transportation.<sup>50</sup> Presumably, a husband or wife in the working class could not afford travel to Edinburgh, let alone the unknown amount of days off work, and accommodation costs. Historians of England have argued that the establishment of the only divorce court in London following the 1857 Act limited access for the lower classes; the same impact was most likely true for the CS.<sup>51</sup> Furthermore, out of the CS cases, 34 per cent were instigated by residents of Edinburgh (Leith included), a higher percentage than any other town.<sup>52</sup> Glasgow was the second most common town of residence, followed by Dundee and Aberdeen. All five are urban areas with the largest concentration of populations in nineteenth-century Scotland.<sup>53</sup>

## Discovering Trends with Parliamentary Papers and Census Reports

### *Tracking Divorce and Separation Trends*

For the period before 1830 Leah Leneman's research on divorce in Scotland reveals low rates with a very distinct increase by the end of the eighteenth century, however, this rise was relatively minor with figures remaining small. From 1684 to 1830 she found 904 cases, 'of which 757 were successful and 147 unsuccessful (either abandoned or dismissed); 803 were for adultery and 101 for desertion'. Significantly, the majority took place at the end of the eighteenth and beginning of the nineteenth century.<sup>54</sup> Parliamentary findings on the number of Scottish divorce actions for adultery filed in the 1820s also reported low figures ranging from 17 to 25 actions per year over a seven year period.<sup>55</sup>

<sup>49</sup> S. G. E. Lythe and J. Butt, *An Economic History of Scotland*, (London, 1975), pp. 195-198.

<sup>50</sup> Treble, 'The Market for Unskilled', pp. 130-131.

<sup>51</sup> Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England, 1850-1895*, (Princeton, 1989), pp. 41-42; Stone, *Road to Divorce*, p. 383.

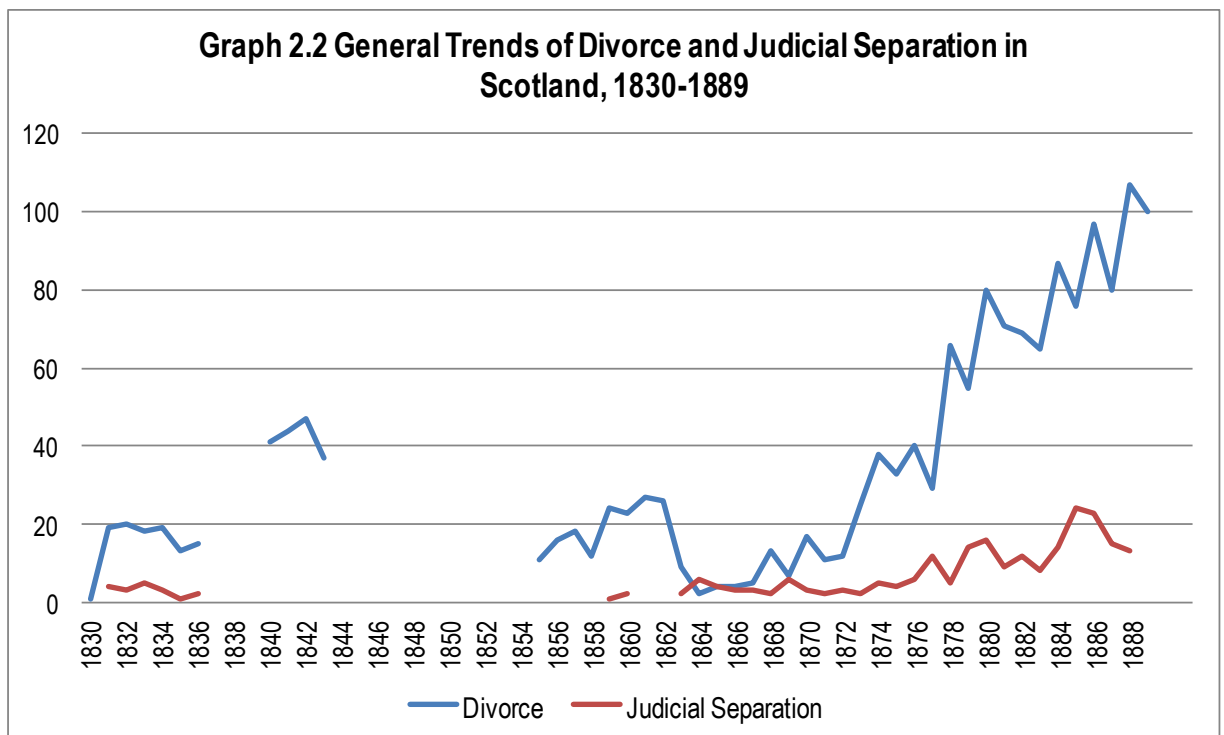
<sup>52</sup> *General Minute-Book of The Court of Session*, Vols. 49, 50, 59, 60, 69, 70, 79, 80, 89, 90, 99, 100

<sup>53</sup> PP 1882 [C.3320] Vol. 1, *Ninth Decennial Census of the Population of Scotland taken 4th April 1881, with report*. Also see Anderson and Morse, 'The People', pp. 8-45.

<sup>54</sup> Leneman, *Alienated Affections*, p. 13.

<sup>55</sup> PP 1830 (577) *Divorce, Scotland. Statement of the number of actions concluding for divorce on the head of adultery, raised in the Consistorial Court of Edinburgh, in each year from 1822 to 1829 inclusive; and of the result of every such action*.

Graph 2.2 provides an overview of the general trends of divorce and separation from 1830 to 1890. Decrees of divorce in Scotland, although showing repeated fluctuations, gradually increased over these decades, but numbers never exceeded 107 decrees per year (the peak in 1888). For judicial separation, the general trend shows a much smaller incline, with numbers remaining below 25 decrees per year (the peak was 24 in 1885). Visible in the graph are breaks in the data on divorce and separation. This is due to a lack of comparable official data. Although, the data are not capable of comparison for Graph 2.2, they are used in a deconstructed analysis of these trends, which follows.



Notes: The gaps in the lines indicate where comparable information was not available.

From 1830-1836 the figures are decrees for divorce on the ground of adultery, and separation on the ground of maltreatment; PP 1852-53 [1604] *First report of the commissioners appointed by Her Majesty to enquire into the law of divorce, and more particularly into the mode of obtaining divorces a vinculo matrimonii*.

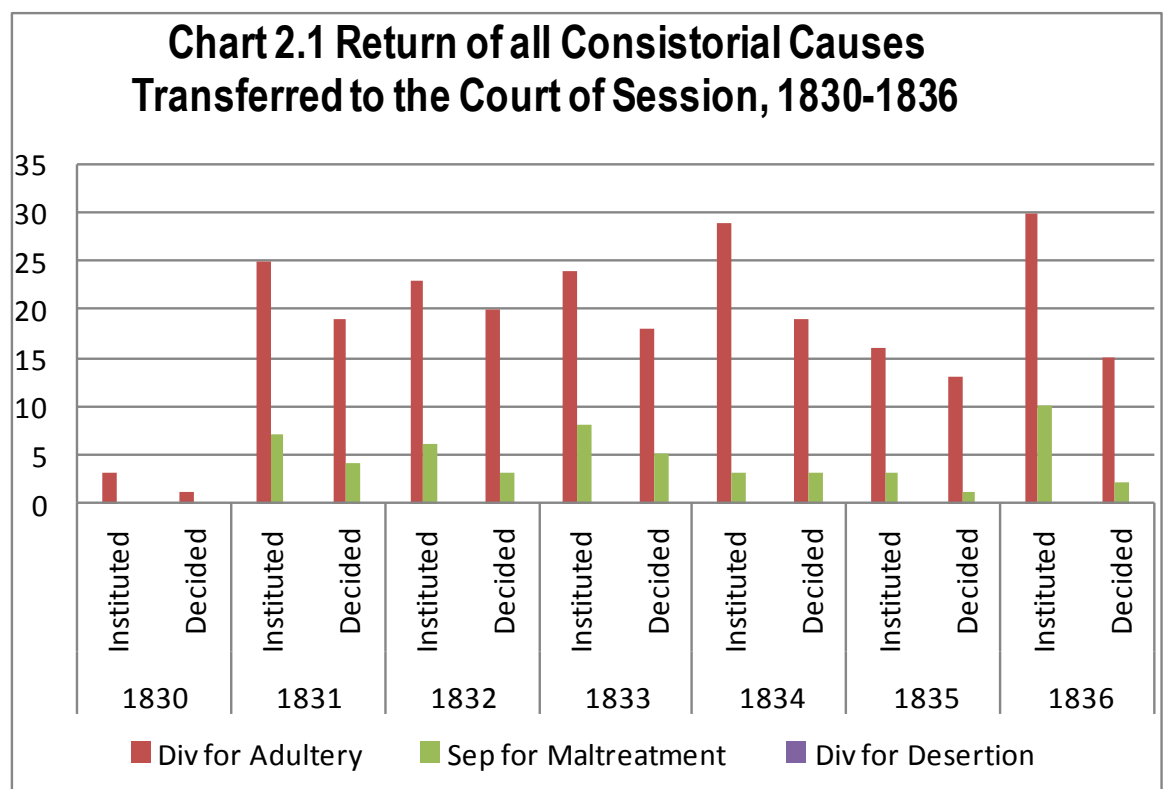
From 1841-1843 the figures are 'returns of matrimonial suits', not specified as divorce or separation decrees; PP 1844 (354) *Matrimonial Suits. Abstract of returns of matrimonial suits in 1840, 1841, 1842, 1843*.

From 1855-1889 the figures are decrees of nullity and divorce; PP 1890 (162) *Divorces (Scotland). Return of the number of suits instituted year by year in Scotland*.

From 1857-1888 the figures are decrees of judicial separation; PP 1890 (162) *Divorces (Scotland). Return of the number of suits instituted year by year in Scotland*.

Firstly, the transfer of matrimonial suits to the CS caused some discrepancies in the number of cases recorded in the 1830s. The *1837 Consistorial Courts, Scotland* report shows the number of cases seen in the Commissary Court in the 1820s and then transferred

to the CS after 1830. The report on ‘All Consistorial Causes Transferred to, and Instituted and Decided in the CS, from 1830 to 1836’, showed 18 divorce causes transferred in 1830, three of which were instituted (filed) for adultery and only one of those three decided (given a decree). By 1836 the number had increased to 30 cases instituted, with 15 decided. Over the seven years the number of adultery cases filed averaged 21.4 charges per year, and an average of 15 awarded a decree (see Chart 2.1).<sup>56</sup> The low figure in 1830 may be a result of cases only being counted after the Act was implemented, possibly as late as October. Accordingly, the fact that there were no separation cases listed might mean no actions were processed until 1831. From 1831 to 1836, the number of separation for maltreatment cases instigated ranged from 7 to 10 cases per year, with only 2.6 on average receiving a decree; an insignificant number in relation to the married population. Additionally, there are no returns for divorces on the ground of desertion (labelled non-adherence or wilful desertion) listed in the report.<sup>57</sup>



Source: Return by James Fergusson, Esq, Senior Principal Clerk of Session, of all Consistorial Causes Transferred to the Court of Session, 1830-1836; PP 1837 (459) *Consistorial courts, Scotland. Return of the number of causes transferred from the consistorial courts to the Court of Session in 1830.*<sup>58</sup>

<sup>56</sup> PP 1837 (459) *Consistorial courts, Scotland. Return of the number of causes transferred from the consistorial courts to the Court of Session in 1830.*

<sup>57</sup> There are some figures for Consistorial causes on the ground of adherence, but only from 1832 to 1836, with an average of 6.4 instituted and 3 decided upon per year.

<sup>58</sup> The record of the Consistorial Court from 1830-1836 shows no desertion cases, therefore desertion is not included in Chart 2.1.

But does this trend continue? Information on separation for maltreatment is not available again until mid-1850. Data on matrimonial cases brought to the CS for a decree of divorce are found through various Parliamentary papers as discussed earlier, yet, these data are inconsistent. For instance, according to a listing of divorce decrees (grounds not specified) from November 1836 to November 1841 the number of decrees ranged from 10 to 23, with an average of 19 cases for divorce per year.<sup>59</sup> A return of matrimonial suits in Scotland (grounds not specified) from 1840 to 1843, had a range of 37 to 47 actions, with an average of 42.25 suits per year.<sup>60</sup> Though these data are consecutive they present very different figures. As noted earlier, the type of data represented are different between the two reports, and may explain the difference in numbers. The 1836-1841 report shows only decrees of divorce, while the 1840-1843 shows every matrimonial suit instituted to the CS. The higher numbers given between 1840 and 1843 are fitting as the suits are all divorce, separation, aliment, and declarators of marriage actions combined. The data from these two reports, therefore, are not sufficiently comparable to determine an exact trend. They do, nevertheless, suggest a continuation of low numbers of couples seeking legal assistance to divorce or separate over the first four decades of the nineteenth century.

After 1855 consistent data exist for Scottish divorce figures, making it possible to illustrate the divorce and separation trends for the second half of the century. Table 2.4 compares the data available after 1855 on annual marriage figures to the number of divorce and nullity decrees reported. However, as the marriage figures and the divorce figures indicate the number of people who were married or divorced per year, not the total number of married or divorced people, the overall population was included as a neutral figure for comparison. Table 2.4 shows that the number of divorces per year was notably disproportionate to the number of marriages per year.

The overall trend in divorce rates was a gradual, fluctuating increase. This is apparent in Graph 2.3 that shows divorce and nullity decrees at continuously low numbers until the mid-1870s, whereafter, the number of divorces began to rise, albeit, unsteadily. When charted the increase seems significant. Yet, even by 1889 the peak number was 107 decreed divorces (see Graph 2.3).<sup>61</sup>

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<sup>59</sup> PP 1852-53 [1604] *First report of the Commissioners*, pp. 75-76.

<sup>60</sup> PP 1844 (354) *Matrimonial Suits. Abstract of returns of matrimonial suits in 1840, 1841, 1842, 1843*.

<sup>61</sup> B.R. Mitchell, *British Historical Statistics*, (Cambridge, 1988), pp. 75-76.



**Table 2.4 Scottish Marriage, Divorce and Population Trends**

| Figures                           | 1855      | 1861      | 1871      | 1881      |
|-----------------------------------|-----------|-----------|-----------|-----------|
| No. of Marriages                  | 19,680    | 20,896    | 24,019    | 26,004    |
| No. of Divorces                   | 11        | 26        | 19        | 60        |
| Total Population                  | 2,978,065 | 3,062,294 | 3,360,018 | 3,745,485 |
| No. People per Every 1 Marriage   | 151       | 147       | 140       | 144       |
| No. People per Every 1 Divorce    | 270,733   | 117,781   | 176,843   | 62,425    |
| No. Marriages per Every 1 Divorce | 1,789     | 804       | 1,264     | 433       |

Source: Marriage data from PP 1884-85 [C.4218] *Twenty-seventh detailed annual report of the Registrar-General of Births, Deaths, and Marriages in Scotland*. [Abstracts of 1881.]; Divorce data calculated from B.R. Mitchell, *British Historical Statistics*, (Cambridge, 1988) and PP 1890 (162) *Divorces (Scotland). Return of the number of suits instituted year by year in Scotland*.

Just how low the rates of divorce in Scotland were are further evident when compared with England and Wales. As stated earlier, England (with Wales combined from this point on) had a greater and increasing population in the nineteenth century, which directly translated to higher number of marriages and divorces. For instance, in 1875 England had a population of 23,944,459, while Scotland only totalled to 3, 495,214, or fifteen per cent of its southern neighbours' populace. That year there were 201,212 marriages registered in England, and 25,921 in Scotland,<sup>62</sup> or one in 119 people married in England compared to one in 135 people in Scotland.<sup>63</sup> Once the Matrimonial Causes Act 1857 passed and divorce became available to the general public of England, the low rates of private divorces and judicial separations were dwarfed by the new divorce figures reported by the Registrar General.<sup>64</sup> England witnessed significantly higher rates of divorces than Scotland (see Graph 2.4). Looking again at 1875, the number of marriage dissolutions recorded in England was 304, compared to 33 divorce and nullity decrees in Scotland; therefore, in England there was one divorce for every 662 marriages, and one divorce for every 785 marriages in Scotland.<sup>65</sup> The larger population in England, and subsequently

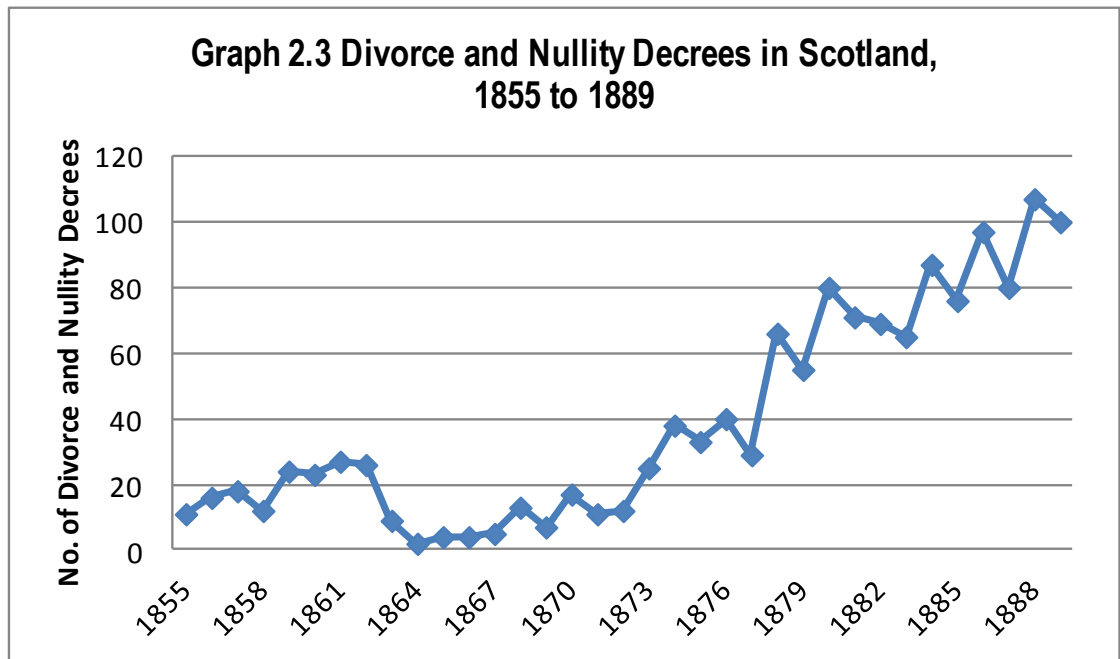
<sup>62</sup> PP 1878-79 [C.2332] (Part X), *Miscellaneous Statistics of the United Kingdom*, p. 1.

<sup>63</sup> Ibid, p. 2 & 12

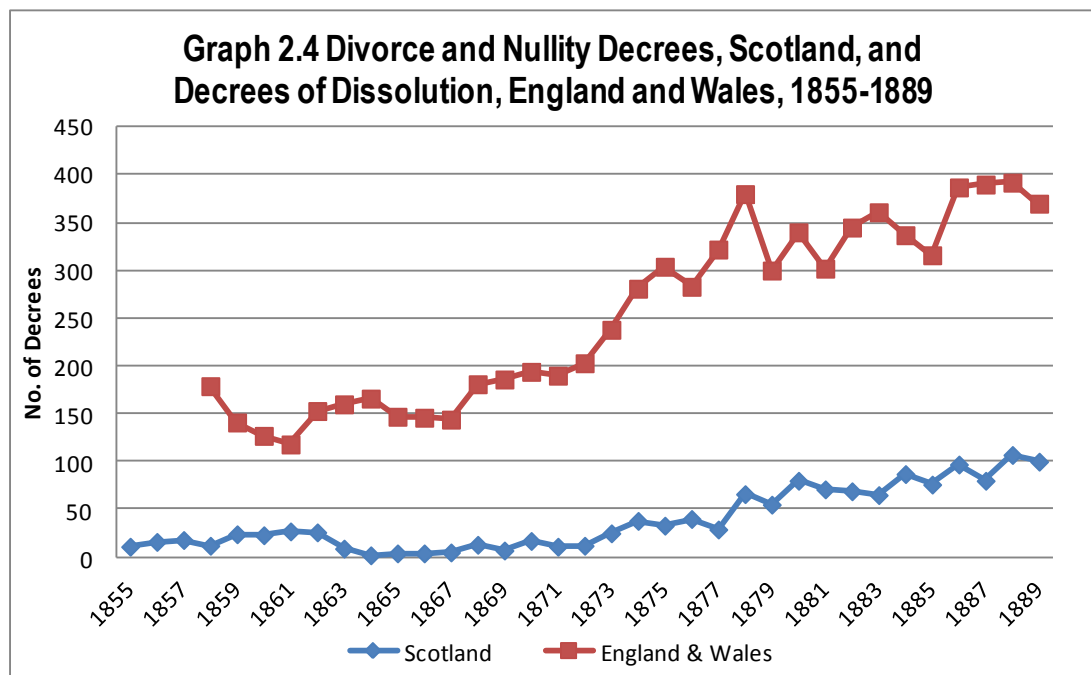
<sup>64</sup> Stone, *Road to Divorce*, pp. 387-388.

<sup>65</sup> Mitchell, *British Historical Statistics*, pp. 75-76.

larger married population, caused the number of decrees of dissolution to start off higher than the Scottish figure in 1858 and continued to rise at a higher rate. Hence, when compared side by side, Scotland's divorce figures no longer appear to have been increasing as drastically, but instead show the trend of upward but gradual increase.



Source: Mitchell used the Annual Reports of the Registrar General for Scotland; Mitchell, *British Historical Statistics*, pp. 75-76.



Source: Mitchell used 'England and Wales Decrees for Dissolution, 1858-1909—Appendix III to Report of the Royal Commission on Divorce (S.P. 1912/13 xx); other figures for England & Wales—Registrar General's Statistical Review of England & Wales and its successors' and Annual Reports of the Registrar General for Scotland; Mitchell, *British Historical Statistics*, pp. 75-76.

While the low rates arguably reflect problems with accessibility, as mentioned earlier, the legislative reforms of the nineteenth century, discussed in Chapter One, also impacted the divorce and separation rates in Scotland. As a result, changes in trends are visible in Graphs 2.3 and 2.4. For example, in Graph 2.3 there is a decrease after 1861, followed by a steady incline through the 1870s and 1880s, suggesting influence from the changes in law. 1861 was the year the Conjugal Rights (Scotland) Act passed, which granted spouses an easier process for divorce suits for both desertion and adultery.<sup>66</sup> In the CS sample, thirteen pursuers in divorce cases cited the 1861 Act. Three of the thirteen were actions for adultery (all from 1870); the remaining ten were on the ground of desertion (two from 1870 and eight from 1880).

One of the most significant increases in Graph 2.3 between 1877 and 1878 corresponds to the passing of the first Married Women's Property (Scotland) Act 1877. Moreover, even with fluctuation in the number of divorce and nullity decrees after 1877, there is a rate of growth that continued into the 1890s. The Conjugal Rights (Scotland) Act and the Married Women's Property (Scotland) Act (and its later amendments) are cited as having the most evident effect in rising divorce rates, particularly for women—nine of the thirteen actions citing the Conjugal Rights Act were instigated by the wife.<sup>67</sup> Contemporaries also highlighted the 1874 Evidence Law Amendment (Scotland) Act as a direct factor in the increasing divorce figures, as the Act allowed parties to testify as witnesses in their own action.<sup>68</sup>

This thesis found that law reform of married women's rights, including these Acts, did lead to better accessibility for women in the second half of the nineteenth century. Once more wives could file for divorce, then the rates would naturally increase as a new portion of the married population finally had the opportunity and, for some, the means.<sup>69</sup> It is important,

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<sup>66</sup> A few of the more important stipulations were: it abolished the preceding requirement of an action of adherence; addressed the issue of the defender no longer residing in Scotland by serving summons to the next of kin (the most common use found in the Court of Session cases); created an order of protection of a wife's property from a deserting husband and his creditors; this order of protection also had the effect of a separation *a mensa et thoro*, and allowed custody of children to be decided by the court rather than automatically giving custody rights to the father; Conjugal Rights (Scotland) Act, 1861 [24 & 25 Vict. Cap. 86.]

<sup>67</sup> Fiona M. Dobbie, 'Divorce in Scotland, 1830-1890', undergraduate dissertation, Department of Economic and Social History, University of Glasgow, 1998, pp. 12-22. Also in 'Article 15', *The Scotsman*, 13 October 1880, pp. 7-8.

<sup>68</sup> Coldstream asserted that the rise in numbers after 1874 was an immediate consequence of the Act going into effect; 'Article 15', *The Scotsman*, 13 October 1880, pp. 7-8.

<sup>69</sup> Marshall found that more women raised an action of divorce than men in the twentieth century; Marshall, *Virgins and Viragos*, p. 301. Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America*, (Chicago, 1980), p. 7.

however, to distinguish between the campaigns of the women's rights movement and increasing divorce rates.

At the turn of the century (and after), conservative parties blamed the feminist movement (along with other groups considered radical) for the seemingly rising divorce rates.<sup>70</sup> Later studies by historians, such as Roderick Phillips and Elaine Tyler May, point out that it was incorrect and oversimplified to label divorce reform as a central issue for feminists, as it was a topic of tension and disagreement for many involved in the women's rights movement.<sup>71</sup> Mainstream feminists primarily campaigned for women's suffrage, not to liberalise the divorce law.<sup>72</sup> They promoted marriage and the maintenance of traditional family norms;<sup>73</sup> this is clear from their efforts to better the marriage contract.<sup>74</sup> Scholars have shown instead, that the impact of the feminist movement was more indirectly responsible for increasing divorce rates.<sup>75</sup>

Thus, the more accurate impact of the feminist movement was law reform of married women's rights, or as Gibson wrote: 'It has been...social transformations that have helped create the patterns and numbers of divorce rather than reform of divorce grounds.'<sup>76</sup> Moreover, this indirect impact of the women's rights movement became most visible after this period of study, as divorce rates did not increase substantially until after World War One. In 1919 the Registrar General recorded 829 divorces, a jump from 250 in 1913.<sup>77</sup>

### *Analysis of the Result of Actions: Successful, Dismissed or Never Tried*

The figures recorded in Graphs 2.3 and 2.4 are the number of divorce and nullity decrees successfully awarded by the CS; these figures, however, exclude the full number of actions filed with the CS that were either dismissed or never tried in court.<sup>78</sup> The 1890 *Divorces*

<sup>70</sup> William L. O'Neill, *Divorce in the Progressive Era*, (New Haven, 1967), pp. 72-78.

May, *Great Expectations*, pp. 3-7; Colin Gibson, *Dissolving Wedlock*, (London, 1994), pp. 122-124; Jane Lewis, *Women and Social Action in Victorian and Edwardian England*, (Hants, 1991), pp. 246-247.

<sup>71</sup> Phillips, *Putting Asunder*, pp. 500-505, 514-515; May, *Great Expectations*, pp. 6-7.

<sup>72</sup> Phillips, *Putting Asunder*, pp. 500-505.

<sup>73</sup> Shanley, *Feminism, Marriage and the Law*, pp. 189-193.

<sup>74</sup> Lewis, *Women and Social Action*, p. 19.

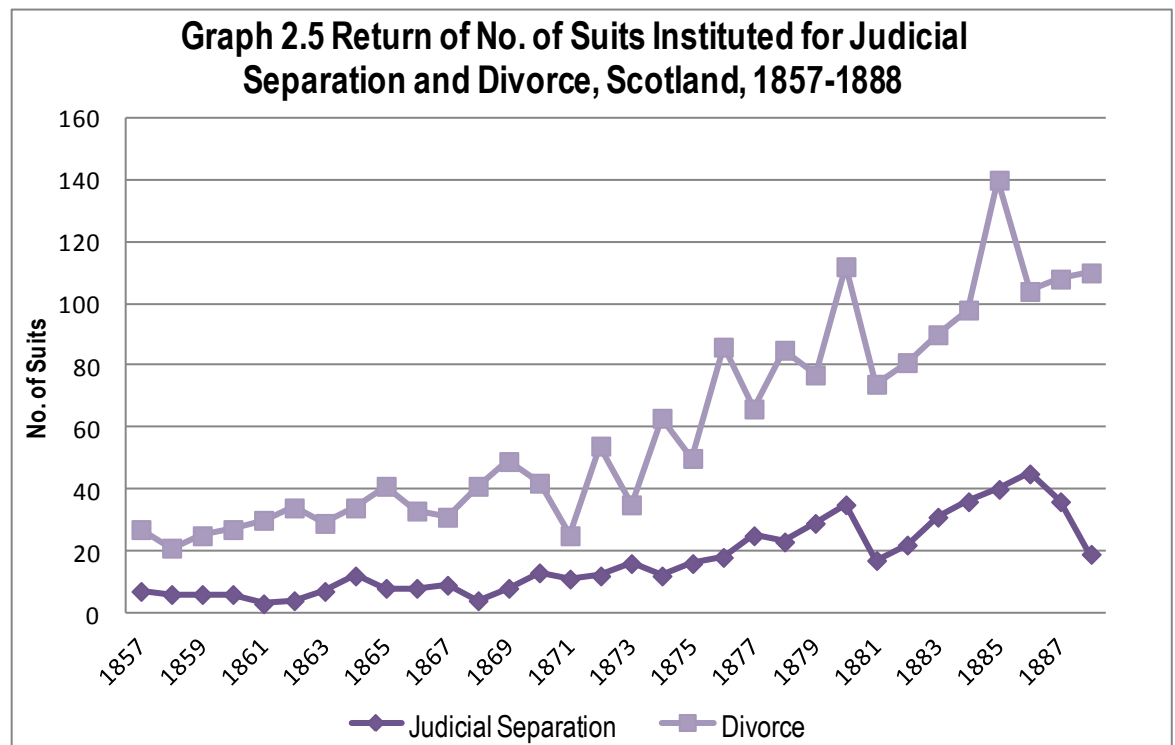
<sup>75</sup> For Progressive America, O'Neill argues that as women's social and economic statuses advanced, women were more likely to end unhappy marriages than tolerate them; O'Neill, *Divorce in the Progressive Era*, pp. 23-26. Shorter's work criticises the theory that women's independence led to 'the breakdown of the family; Edward Shorter, *The Making of the Modern Family*, (London, 1976), pp. 6-7. Marshall, writing about Scotland, found that the long-term effects of the women's rights movement did impact divorce rates because ultimately women's situations were bettered as a result, but that this cannot be seen until the twentieth century; Marshall, *Virgins and Viragos*, pp. 300-301.

<sup>76</sup> Gibson, *Dissolving Wedlock*, p. 173.

<sup>77</sup> Mitchell, *British Historical Statistics*, p. 75.

<sup>78</sup> Mitchell used divorce and nullity decrees, but does not distinguish exact numbers, therefore the inclusion of nullity decrees also alters the figures; *Ibid*, pp. 75-76.

(Scotland) report listed a return of divorce and judicial separation suits disclosing how many were instituted, successful, dismissed or never heard, as well as how many were filed at the instance of the husband or the wife. As with earlier Parliamentary papers on divorce and separation figures, the numbers from the 1890 report do not correspond precisely with the numbers Mitchell found from the Registrar General's annual reports. Nevertheless, this report provides valuable data for determining more specific trends relating to divorce and separation in the second half of nineteenth-century Scotland. For instance, when the 1890 data of divorce suits are charted alongside the number of judicial separations filed from 1857 to 1888, it is evident that there was a higher rate of divorce actions than separation. This difference grew considerably towards the end of the 1800s as the number of separations began to decrease (see Graph 2.5), perhaps because divorces became more accessible for wives.



Source: PP 1890 (162) *Divorces (Scotland)*. Return of the number of suits instituted year by year in Scotland.

Actions for divorce also increased at a much faster rate than those for separation. This graph shows that there were very few separation suits between the 1857 and 1888 with an average of 17 cases per year. This figure illustrates that the trend of separation cases had changed little since Leneman's period. She highlights that, 'the first separation case did

not appear until 1714, and the total number by 1830 was only 175.<sup>79</sup> Furthermore, 83 cases were tried unsuccessfully, and ‘of the 92 successful cases 64 (69 per cent) were contested.’<sup>80</sup> As discussed under accessibility, the benefits of fully dissolving a marriage greatly outweighed a legal separation, for both the husband and the wife. A separation upheld the marital bond though allowing the couple to live separately for as long as they chose. This separation of bed and board stipulated that the husband provide aliment to his wife. Still, it was not possible for the courts to enforce this payment, which left wives vulnerable to uncooperative husbands. Thus, a husband or wife would have more reasons to contest a suit for separation than a suit of divorce.<sup>81</sup> Moreover, as the majority of separation suits were filed on the ground of cruelty and maltreatment, it was likely that some wives dropped the charges from fear of their husbands’ retaliation.<sup>82</sup> Chart 2.3 illustrates this point as it shows a high average of cases never heard in court compared to the number instituted.

The 1890 *Divorces (Scotland)* report provides another opportunity to examine the discrepancies between actions filed and decrees awarded. When charted the data show two very distinct patterns for divorce and judicial separation: Charts 2.2 and 2.3 compare the averages of suits instituted, successful, dismissed or never heard in court over four year periods between 1857 to 1888. Chart 2.2 illustrates that the majority of divorce suits brought to the CS were successful. It also shows that more actions of divorce were never heard than dismissed; although the number of divorce cases instigated steadily increased, the number of successful, dismissed and cases never heard remained relatively constant in proportion suggesting a steady trend. Chart 2.3 showing judicial separations, suggests less consistency over the thirty year period. One of the most apparent differences is the low average of successful suits compared to the number filed. It also suggests that on average more cases were never heard in court, until 1885-88. The average number of successful separations was 7.5, while the average number of cases never heard was 9. Moreover, more judicial separation suits over this time period were dismissed than divorce suits.

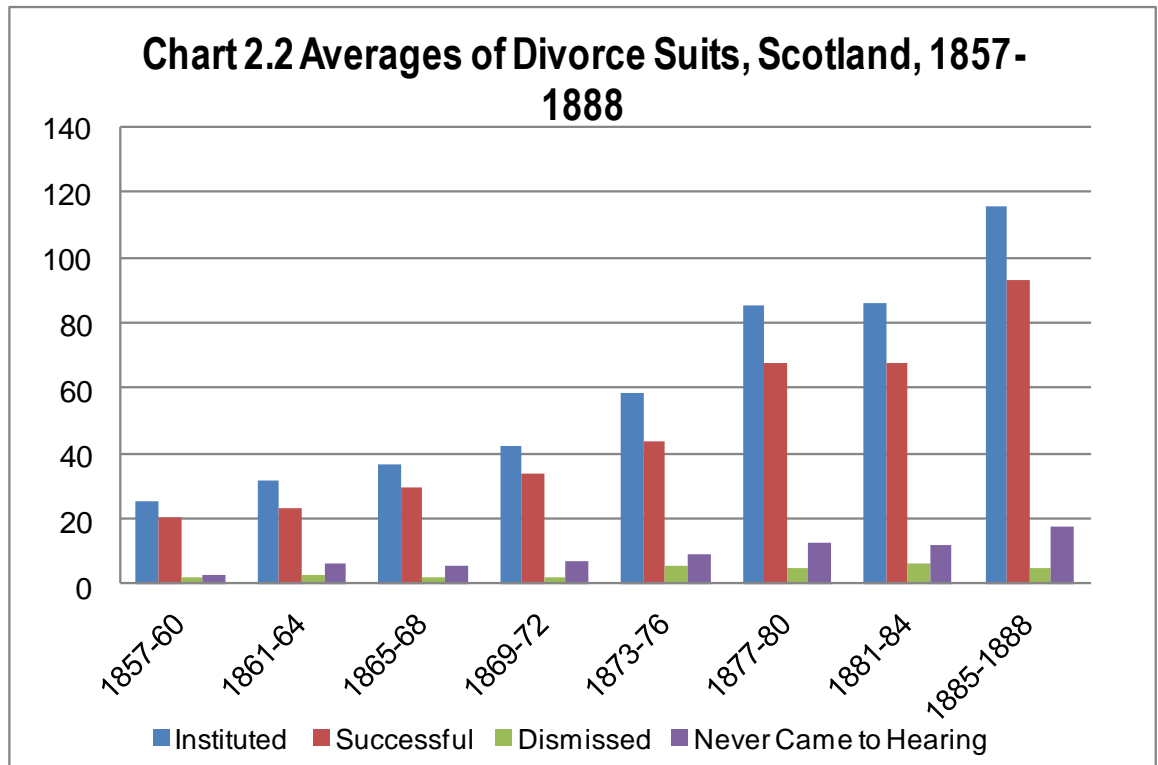
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<sup>79</sup> Leah Leneman, “‘A tyrant and tormentor’: violence against wives in eighteenth and early nineteenth-century Scotland”, *Continuity and Change*, Vol. 12, No. 1 (1997), p. 33.

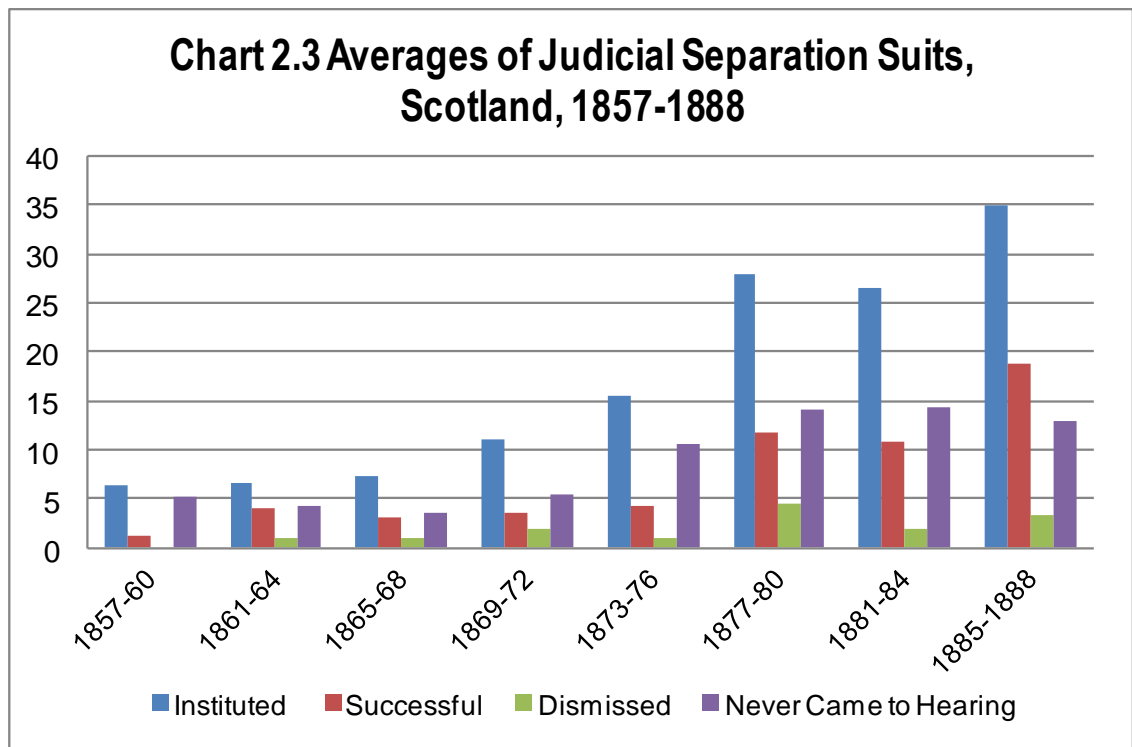
<sup>80</sup> Leneman, *Alienated Affections*, p. 14.

<sup>81</sup> *Ibid*, pp. 13-14.

<sup>82</sup> It was common in the criminal courts for a wife to drop charges of assault against her husband. This will be discussed in detail in Chapter Five.



Source: PP 1890 (162) *Divorces (Scotland)*. Return of the number of suits instituted year by year in Scotland.



Source: PP 1890 (162) *Divorces (Scotland)*. Return of the number of suits instituted year by year in Scotland.

### *Gender Breakdown Analysis of Data*

Trends also differed as a result of the legal inequalities between the sexes. Scots law had always permitted equal opportunity for a husband or a wife to divorce or separate. However, the type of action (divorce or judicial separation) and charge filed (adultery, desertion or cruelty) show a division when broken down by gender.<sup>83</sup> The first pattern to note is that in the first half of the century husbands were more likely to file for divorce.<sup>84</sup> This pattern is identifiable in the ten year period from 1846/47 to 1856/57 where, according to the 1857 *Divorce (Scotland)* report, there were 174 decrees of divorce in Scotland. Of the 174 actions, 99 were instigated by the husband against the wife, and 75 were instigated by the wife against the husband (the specific causes were not stated).<sup>85</sup> This can be simplified to a ratio of 33:25 (husband: wife). This also shows that, although more pursuers were likely to be husbands, there was not a large discrepancy in the number of female pursuers, suggesting that accessibility was not as impaired for wives as thought.

Data from the 1890 *Divorces (Scotland)* report provide the number of husbands and wives who filed a suit for a divorce or judicial separation between 1857 and 1888. Looking first at divorce suits, it is apparent that, again, while more husbands filed for divorce, the number of wives remained proportionate. Graph 2.6 illustrates the small gap between the number of actions of divorce filed by a wife and by a husband. For most of the period the figures are close, though the number of suits sought by wives shows more of a steady increase than those sought by husbands. However, from 1883 there is a reversal where the number of husbands filing for divorce decreased as the number of wives increased at a mirrored rate: 1883 and 1887 are nearly equivalent figures (47 husbands to 43 wives, and 53 to 55, respectively).

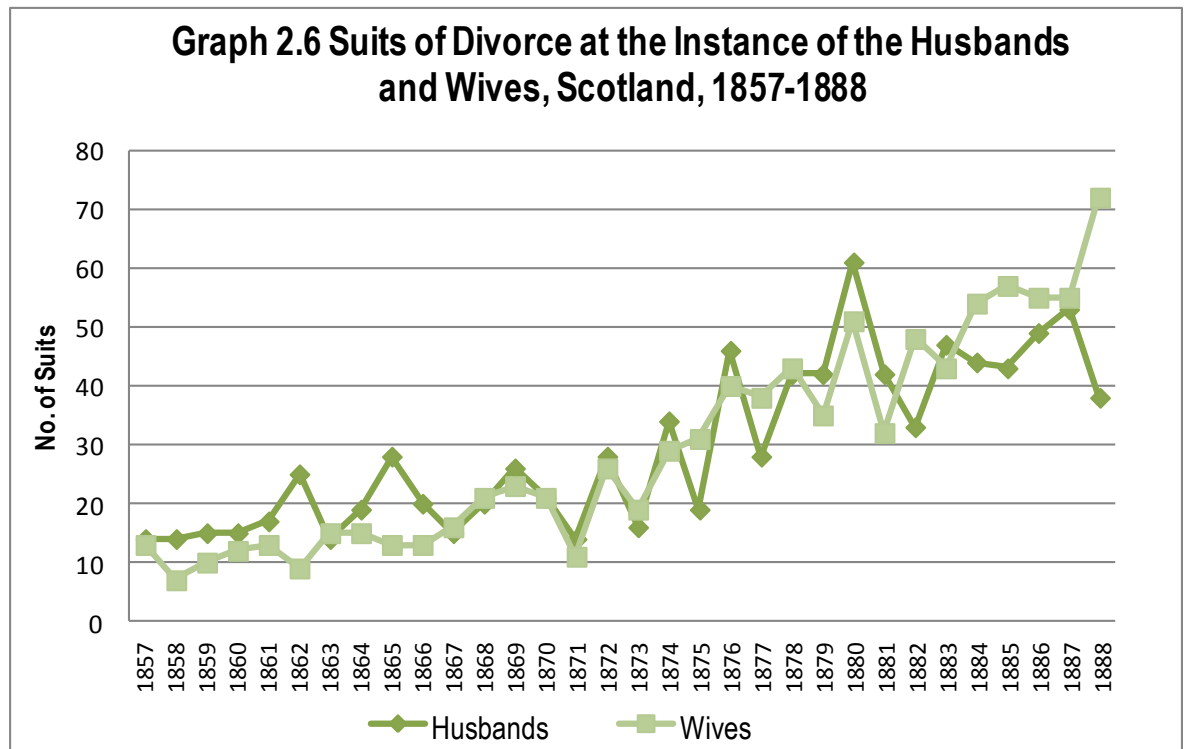
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<sup>83</sup> This information is not available for the breakdown of suits discussed in Chart 2.2 and 2.3.

<sup>84</sup> Dobbie, 'Divorce in Scotland', pp.18-22.

<sup>85</sup> PP 1857 Session 2 (123) *Divorce Acts.—Divorce (Scotland). Abstract of return of the number of acts of Parliament since the reformation to the present time, for dissolving marriage and enabling the parties to marry again; distinguishing the years in which such acts passed; also, a return of the number of decrees of divorce a vinculo matrimonii in Scotland for the last ten years.*





Source: PP 1890 (162) *Divorces (Scotland)*. Return of the number of suits instituted year by year in Scotland.

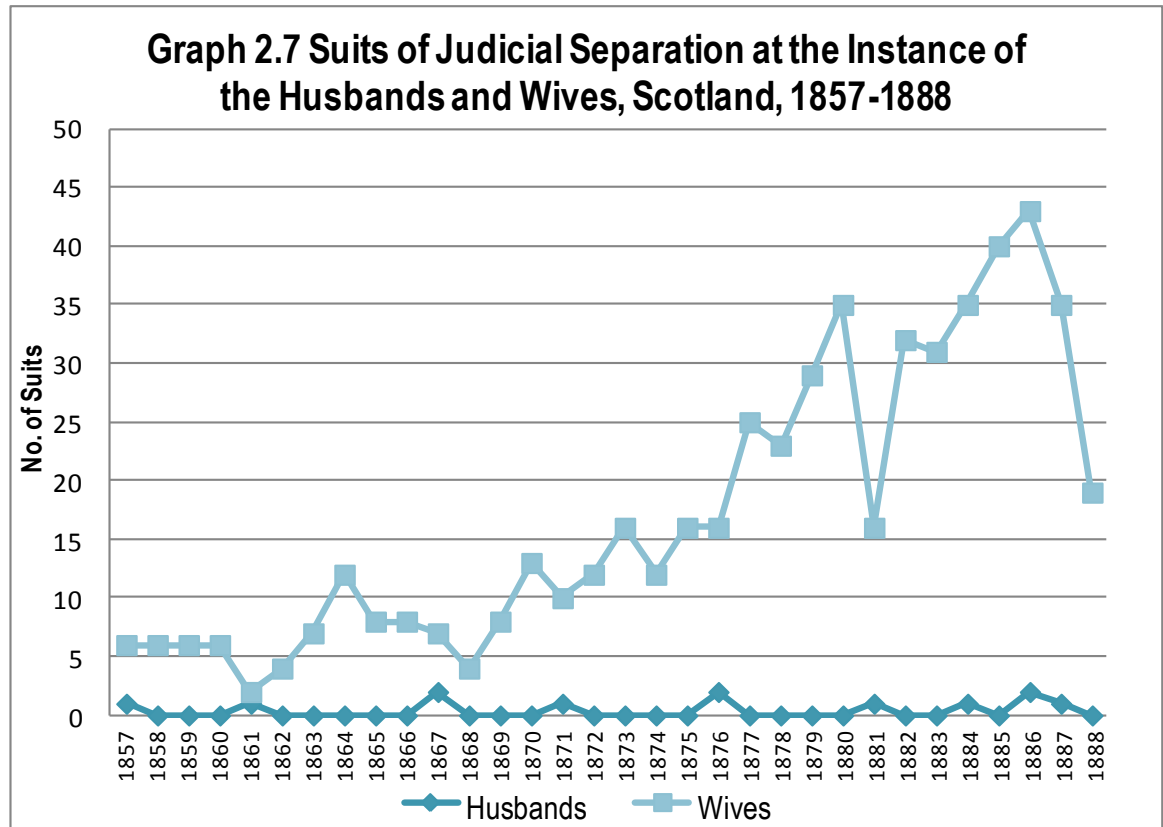
These findings correspond to Leneman's analysis of the early modern period; her gender breakdown revealed 'the sexes to be fairly evenly matched.'<sup>86</sup> Where specific grounds for the divorce are unavailable in the above data, Leneman's evidence shows that this finding was true for adultery charges, yet desertion divorce suits show a higher percentage of wives than husbands instigating the action. As adultery cases made up almost 90 per cent of the total number of divorce suits, this skewed the gender breakdown to show that more men filed for divorce than women.<sup>87</sup> The data collected from the CS records confirms this disparity between charges, and will be discussed in the next section. In the 1880s there was evidence of an increase in divorces sought by wives against husbands, further supporting the argument that the progressive legislations in Scotland from the 1860s, 70s and 80s brought wives greater access to legal remedies for failed marriages.

Gender breakdown of judicial separation cases reveals a different trend according to the data from 1890. As shown below in Graph 2.7, a suit for separation was almost entirely brought at the instance of the wife from the period 1857 to 1888. The number of suits for separation filed by a husband remained consistently lower than 5 cases per year, while

<sup>86</sup> Leneman, *Alienated Affections*, p. 16.

<sup>87</sup> Ibid.

separation suits instigated by wives continued to increase, though unsteadily, until the late 1880s. Again this data does not specify the grounds for the separation.



Source: PP 1890 (162) *Divorces (Scotland)*. Return of the number of suits instituted year by year in Scotland.

Despite the lack of complete data for the 1830 to 1880 divorce and separation figures, where information is available, it is evident that these rates were low throughout the nineteenth century. A trend of gradual increase is also evident, yet it was not until after 1880 that numbers began rising at greater rates. To further trace patterns of divorce and separation the following section will analyse findings from a sampling of the CS minutes books.

### Trends and Patterns in the Court of Session Records

While complete data is not available for matrimonial suits in the nineteenth century, there are CS minute books of the extracted decrees. Extracted decrees were decrees ‘written out

and bound into the volume' for 16s. or 17s. after 1824.<sup>88</sup> They were not required to prove the final judgment, and therefore, as they added an extra expense, they are only a portion of the decrees awarded by the CS. In the following section, data collected from the CS records for the years 1830, 1840, 1850, 1860, 1870, and 1880 are analysed and compared to the nineteenth-century Parliamentary papers and census reports used in the first section of this chapter.<sup>89</sup>

The six years listed above serve as benchmark years for this study, allowing further divorce and separation trends to surface. From those six years, a total of 254 extracted decrees of divorce, separation, adherence, aliment and dismissal were collected.<sup>90</sup> The 254 decrees found in the minute books listed the parties involved, addresses of residence and occupations (when available). These records created the database that was the basis for this section on trends and patterns. As illustrated in the first section, the general rates of divorce and judicial separation over the sixty year period represented a low percentage of the population, until the 1870s when the number of suits began to increase at a slow rate through the turn of the century. Overall, the cases found in the CS minute books complement the trends found through Parliamentary papers and census reports.

1830 proved to be a year of few matrimonial decrees in the CS; the only cases found were three decrees of aliment and an action of separation and aliment (four in total).<sup>91</sup> This issue mirrored the findings from the Consistorial Court records from 1837 (see Chart 2.4). Though no divorces were found in the 1830 General Minute-Books, it is likely that there were some divorce actions. They were perhaps unlisted because couples were either continuing to appeal to local Commissary Courts while the newly reformed CS was establishing itself, or did not pay to have their cases extracted. One case of divorce for

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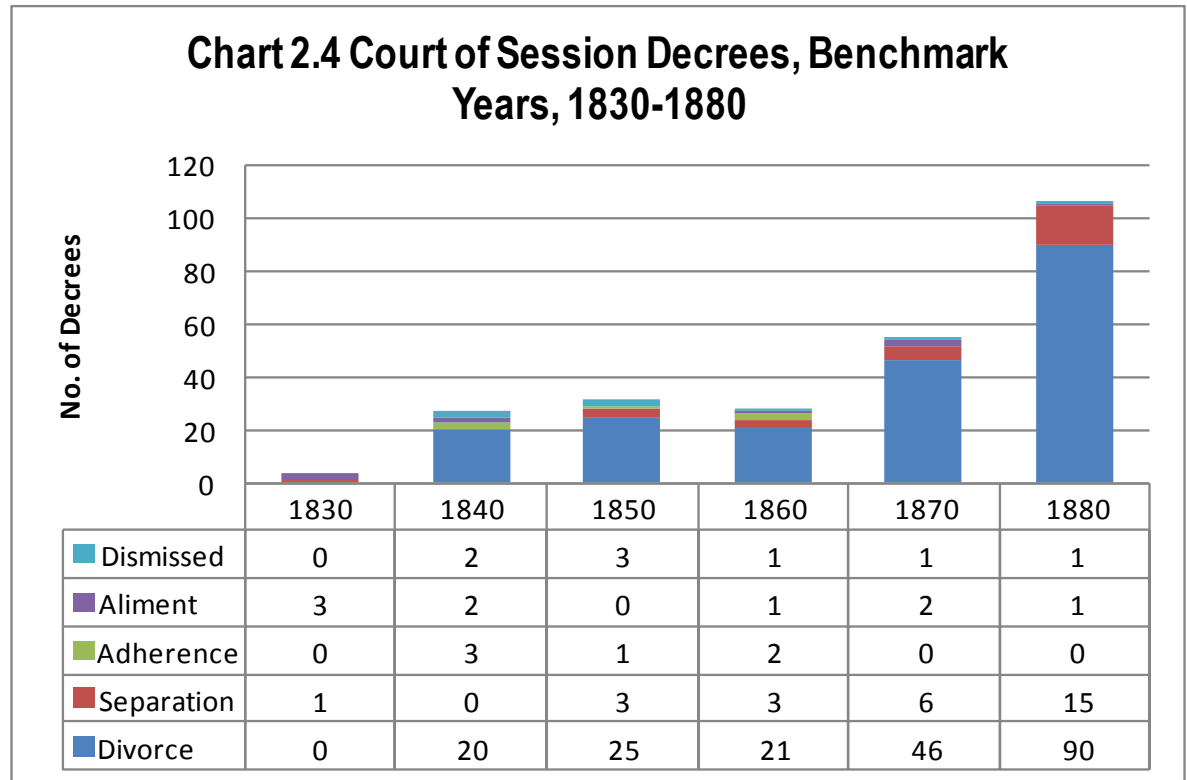
<sup>88</sup> Leneman, *Alienated Affections*, p. 16.

<sup>89</sup> The Court of Session records used are the General Minute Books which listed every action brought to the Court during the year. Every decree for divorce, separation, adherence and aliment was counted to compile a list of consistorial suits at these benchmark years. This research was then put into a database and entered into tables and graphs.

<sup>90</sup> Leneman found that 'over a hundred litigants in divorce cases and 29 in separation cases' did not have their decrees extracted; Leneman, *Alienated Affections*, pp. 15-16. Extracted decrees were used for this study due to the National Archive of Scotland holding separate catalogues for the extracted decrees and unextracted decrees. The extracted decrees were more accessible as they are recorded in minute books by year, whereas the unextracted decrees are filed on index cards by pursuer with very little information given.

<sup>91</sup> Sources for 1830 are, General Minute-Book of the Court of Session, First and Second Divisions, for the year from 12<sup>th</sup> November 1829 to 12<sup>th</sup> November 1830, Vol. XLIX, and General Minute-Book of the Court of Session, First and Second Divisions, for the year from 12<sup>th</sup> November 1830 to 12<sup>th</sup> November 1831, Vol. L, General Register House, National Archives Scotland, CS17/1/49, CS17/1/50. The action of separation and aliment in the case CS46/1832/3/185 Grieve or Winton v Winton, covered the span of ten years. Due to the multiple actions put forward by the parties starting in 1821, there was a decree recorded in 1830, but the case did not completely close until 1832. This case will be examined in detail in Chapter Five.

desertion from 1831, tried in 1830, was found and used as a case study and therefore included in the total benchmark data set.



Source: General Minute-Book of The Court of Session, Vols. 49, 50, 59, 60, 69, 70, 79, 80, 89, 90, 99, 100.<sup>92</sup>

Ten years later in 1840 the number of divorce decrees found had risen to twenty cases, the same average number reported in the 1852 return.<sup>93</sup> In total there were 27 decrees found in the CS records: 20 for divorce, three decrees for adherence, two aliment, and two dismissed cases (one for divorce, and one for separation and aliment). There were no decrees for judicial separation.<sup>94</sup>

From the Parliamentary papers and census reports cited in the first section there were no matrimonial case figures available for 1850. The CS minute-books, however, revealed some of the lost activity of this year. From 1840 to 1850, there was a slight increase in the number of divorce cases, as well as a few separation cases. A total of 32 matrimonial suits were found: 25 were for divorce, three for judicial separation, one for adherence and three

<sup>92</sup> GRH, NAS, CS17/1/49, CS17/1/50, CS17/1/59, CS17/1/60, CS17/1/69, CS17/1/70, CS17/1/79, CS17/1/80, CS17/1/89, CS17/1/90, CS17/1/99, CS17/1/100.

<sup>93</sup> PP 1852-53 [1604] *First report of the Commissioners*.

<sup>94</sup> Sources for 1840 are GRH, NAS, CS17/1/59, CS17/1/60 and General Minute-Book of the Court of Session, from 1<sup>st</sup> November 1839 to 1<sup>st</sup> November 1840, Vol. LIX, and General Minute-Book of the Court of Session, from 3d November 1840, to 1<sup>st</sup> November 1841, Vol. LX.

dismissed cases.<sup>95</sup> Though there are no figures for a comparative analysis, the number of cases found in the minute-books supports the overall low rates.<sup>96</sup>

1860 proved to be a year of few actions for divorce and separation. In the minute books covering all CS cases from November 1860 to November 1861 there were fewer cases listed than previous years. In total only 28 matrimonial decrees were collected. The 1890 *Divorces (Scotland)* report lists six suits for separation instituted, all by the wife. Of the six only two were successful, with four never being heard in court. The CS books record two successful suits for separation and one dismissed.<sup>97</sup> Even with the slight discrepancies, these figures are consistent with the decline in divorce and separation rates in the early 1860s shown in Graph 2.3 and Charts 2.2 and 2.3.<sup>98</sup>

Congruent with the overall trend of the 1870s and the 1880s, the CS minute-books also reflect the beginning of the increase in divorce and separation rates even though the numbers found are not as high (see Graph 2.3 and Charts 2.2 and 2.3). The total number of decrees found in 1870 was 55: 46 divorces, six separations, two aliment and one dismissed case. The findings for 1880 were greater, totaling 107 decrees: 90 for divorce, 15 for separation, one for aliment, and one dismissed. What is most evident is the increase in decrees for divorce: rising from 21 decrees in 1860, to 46 in 1870, and 90 in 1880. These numbers show a compound annual growth rate of 7.5 per cent (see Chart 2.4).<sup>99</sup>

Though the numbers reported from the CS minute-books are lower than the figures represented in the first section of this chapter, the overall trend has not changed. It is clear from both sources that the trend of divorce and separation in nineteenth-century Scotland was consistently low, even though a higher rate is evident after 1870. It is also notable that from 1830 to 1880 the number of decrees for adherence and aliment remained almost

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<sup>95</sup> Of the three dismissed cases one was an action for separation and aliment (CS46/1850/2/16 McMichael or Smith v Smith) instigated by the wife on the charge of maltreatment. This action was actually assoilized in favour of the husband due to a lack of evidence proving gross cruelty.

<sup>96</sup> Sources for 1850 are GRH, NAS, CS17/1/69, CS17/1/70 and General Minute-Book of the Court of Session, from 1<sup>st</sup> November 1849 to 1<sup>st</sup> November 1850, Vol. LXXIX, and General Minute-Book of the Court of Session, from 1<sup>st</sup> November 1850, to 1<sup>st</sup> November 1851, Vol. LXX.

<sup>97</sup> PP 1890 (162) *Divorces (Scotland)*. *Return of the number of suits*.

<sup>98</sup> Sources for 1860 are GHR, NAS, CS17/1/79, CS17/1/80 and General Minute-Book of the Court of Session, from 12<sup>th</sup> November 1859 to 12<sup>th</sup> November 1860, Vol. LXXIX, and General Minute-Book of the Court of Session, from 12<sup>th</sup> November 1860, to 12<sup>th</sup> November 1861, Vol. LXXX.

<sup>99</sup> Sources for 1870 are GRH, NAS, CS17/1/89, CS17/1/90 and General Minute-Book of the Court of Session, from 15<sup>th</sup> October 1869 to 14<sup>th</sup> October 1870, Vol. LXXXIX, and General Minute-Book of the Court of Session, from 15<sup>th</sup> October 1870 to 14<sup>th</sup> October 1871, Vol. XC. Sources for 1880 are GRH, NAS, CS17/1/99, CS17/1/100, and General Minute-Book of the Court of Session, from 16<sup>th</sup> October 1879 to 15<sup>th</sup> October 1880, Vol. XCIX, General Minute-Book of the Court of Session, from 16<sup>th</sup> October 1880 to 15<sup>th</sup> October 1881, Vol. C

nonexistent, fluctuating between zero to three.<sup>100</sup> The decline in actions for adherence is explained by the change in legislation; the 1861 Conjugal Rights Act negated the need to file a suit for adherence. The low number of aliment cases cannot be as easily explained as there are no comparable statistics for the nineteenth century.

### *Gender Breakdown in Court of Session Cases*

The CS general minute-books can also be used to determine changes in the gender division of charges for matrimonial suits. In these records it is immediately noticeable that all aliment, adherence, and separation decrees granted were brought at the instigation of the wife against the husband.<sup>101</sup> Conversely, in the decrees for divorce, the majority of cases were brought at the instance of the husband against the wife; still the difference was not substantial. Out of the 202 decrees for divorce found over the six years, 114 were instigated by the husband and 88 by the wife (see Table 2.5). This suggests that despite fewer resources for wives, there was still some accessibility to legal remedies. As 1900 approached it is also evident that the number of wives filing an action was rising. This same trend was shown in Graphs 2.6 and 2.7.

Though it is evident that more husbands filed for divorce than wives, and more wives filed for judicial separation than husbands, this can be deconstructed further to show patterns in the grounds for the action. As this study works with a small sample, it would be inaccurate to presume these represent the bigger picture. However, an analysis of this sample presents some relevant patterns. Most noticeably, more husbands filed for divorce, yet the majority of male pursuers charged adultery: 70 cases compared to 16 desertion divorces. Divorces filed on the ground of desertion were primarily filed by the wife (31 versus 16 husbands). Of the female pursuers there was less discrepancy between charges: 33 filed a suit of divorce on the ground of adultery, 31 for desertion, and 24 unknown. Although judicial separation was available on the ground of cruelty or adultery for either spouse, this study only found charges of cruelty. There were, however, fifteen separation cases where the ground was unlisted. A suit of adherence charged the defender with desertion, which more female pursuers filed for. An action for aliment could be claimed on any ground where the defender had ceased to financially support the pursuer, but again, only women

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<sup>100</sup> An action of adherence was filed against a deserting spouse to order their return to the conjugal home, or to provide an aliment to the pursuer. An action of aliment requested a yearly payment from the defender in order to support the pursuer and their children if applicable.

<sup>101</sup> Except in the instance of the 1840 case on the ground of adherence filed by the husband against his wife; CS46/1840/2/17 Gray v White or Gray.

were found as complainants. Finally, there were only eight dismissed cases found, but most were actions of divorce, and the majority was filed by the wife (See Table 2.6).

**Table 2.5 Court of Session Decrees, Benchmark Years, 1830-1880**

| Year         | Divorce        |             | Separation     |             | Aliment <sup>1</sup> | Adherence <sup>1</sup> | Dismissed      |                | Total |
|--------------|----------------|-------------|----------------|-------------|----------------------|------------------------|----------------|----------------|-------|
|              | <u>Husband</u> | <u>Wife</u> | <u>Husband</u> | <u>Wife</u> |                      |                        | <u>Husband</u> | <u>Wife</u>    |       |
| <b>1830</b>  | 0              | 0           | 0              | 1           | 3                    | 0                      | 0              | 0              | 4     |
| <b>1840</b>  | 11             | 9           | 0              | 0           | 2                    | 3 <sup>2</sup>         | 1              | 1              | 27    |
| <b>1850</b>  | 16             | 9           | 0              | 3           | 0                    | 1                      | 1              | 2 <sup>3</sup> | 32    |
| <b>1860</b>  | 13             | 8           | 0              | 3           | 1                    | 2                      | 1              | 0              | 28    |
| <b>1870</b>  | 22             | 24          | 0              | 6           | 2                    | 0                      | 0              | 1              | 55    |
| <b>1880</b>  | 52             | 38          | 0              | 15          | 1                    | 0                      | 0              | 1              | 107   |
| <b>Total</b> | 114            | 88          | 0              | 28          | 9                    | 6                      | 3              | 5              | 253   |

<sup>1</sup> All aliment and adherence cases were at the instance of the wife against the husband, and therefore left unlabeled on the table.

<sup>2</sup> One Pursuer in an 1840 Adherence case was male; see footnote 84.

<sup>3</sup> One case was assoilized in favour of the husband rather than dismissed.

Source: General Minute-Book of The Court of Session, Vols. 49, 50, 59, 60, 69, 70, 79, 80, 89, 90, 99, 100.<sup>102</sup>

<sup>102</sup> GRH, NAS, CS17/1/49, CS17/1/50, CS17/1/59, CS17/1/60, CS17/1/69, CS17/1/70, CS17/1/79, CS17/1/80, CS17/1/89, CS17/1/90, CS17/1/99, CS17/1/100.

**Table 2.6 Gender Comparison by Decree and Cause, Court of Session, Benchmark years, 1830-1880**

| Sex              | Divorce  |           |         | Separation   |          |         | Adherence | Aliment   |           |         | Dismissed |             | Total |
|------------------|----------|-----------|---------|--------------|----------|---------|-----------|-----------|-----------|---------|-----------|-------------|-------|
|                  | Adultery | Desertion | Unknown | Maltreatment | Adultery | Unknown | Desertion | Desertion | Adherence | Unknown | Divorce   | Sep & Alimt |       |
| M                | 70       | 16        | 28      | 0            | 0        | 0       | 1         | 0         | 0         | 0       | 3         | 0           | 118   |
| F                | 33       | 31        | 24      | 13           | 0        | 15      | 5         | 1         | 1         | 7       | 3         | 2           | 135   |
| Total for Cause  | 103      | 47        | 52      | 13           | 0        | 15      | 6         | 1         | 1         | 7       | 6         | 2           | 253   |
| Total for Decree | 202      |           |         | 28           |          |         | 6         | 9         |           |         | 8         |             | 253   |

Source: General Minute-Book of The Court of Session, Vols. 49, 50, 59, 60, 69, 70, 79, 80, 89, 90, 99, 100.<sup>103</sup>

## Conclusion

To conclude, this analyses of divorce and separation records in Scotland reveals that although there was a general trend of increase after the 1870s, the statistics prove that the incidence of legalised divorce and separation was insignificant and, contrary to the pronouncements of some judges and politicians, did not signal the breakdown of the Scottish family. As the population was growing, marriage rates did not show any drastic changes and were even seen to decline at some points, possibly contributing to the fear of rising divorce figures. Though marriage rates were low in comparison to the population rates, divorce and judicial separation rates were not greatly increasing, and were disproportionate to the marrying population. The reason for concern, therefore, appears to have been apprehension over the ease of accessibility for working-class families and for wives.

<sup>103</sup> GRH, NAS, CS17/1/49, CS17/1/50, CS17/1/59, CS17/1/60, CS17/1/69, CS17/1/70, CS17/1/79, CS17/1/80, CS17/1/89, CS17/1/90, CS17/1/99, CS17/1/100.



As this chapter has shown, the majority of litigants were from the working class. Yet, on closer examination, many were skilled labourers or small business owners who would have constituted the upper-working class rather than the poorer population. Moreover, many working-class families would have struggled to afford the overall costs of a legal petition, as well as the transportation to the CS in Edinburgh. Thus, although the listed occupations suggest working-class couples filed the most suits, the number of actions remained diminutive.

The low divorce and separation rates can also be explained by the gender inequality within marriage law. Before the reform of married women's rights in the second half of the century, more husbands filed for divorce than wives. This was due to the marriage contract cancelling out the egalitarian rules of Scots divorce law. After the improved legislations were passed the number of divorces began to increase, which corresponds to wives gaining independent finances, custody of their children, and changes to the evidence laws. The quantitative evidence discussed above shows that the number of divorce and separation suits increased as wives gained better access.

This chapter has illustrated the general patterns and trends of divorce and judicial separation in the sixty year period from 1830 to 1890. Although the figures are official, they are far from absolute. In reality there is a dark, unofficial picture of marital breakdown that remains elusive. Central for this study is the fact that divorce and separation did exist in the nineteenth century of which a small portion of the Scottish married population used as legal intervention. The remainder of this thesis will investigate the most common grounds for divorce and separation found in the CS: adultery, desertion and maltreatment. For each ground, case studies from the benchmark years will be used to further analyse the history of marital breakdown in Scotland.

## Chapter Three: Divorce and Adultery

### Introduction

This chapter explores the event of adultery as the most common grounds for a Scots divorce in the nineteenth century, through a study of the Court of Session (CS) cases. First, the chapter discusses the era's expectations on sexuality and the related discourses. Then it considers the patterns that the cases on adultery suggest, including common adultery scenarios, gendered choices of paramour, and excuses for infidelity. Reviewing the individual experiences extracted from the legal records provides an opportunity for insights into the failure of marriages and broader themes of Scotland's social history of the nineteenth century. Overall, this analysis of adultery divorce trials also links back to the theme of accessibility from Chapters One and Two, to determine how present the double standard was in Scotland and if it had an influence on the rates of divorce for adultery, or whether marriage law and marital expectations had a greater impact. It argues that social factors, particularly the double standard, further contributed to the low divorce rates.

Adultery was the most common ground for divorce, likely because it was relatively easier to prove (as it, at least, always involved a third person) and a more straightforward legal process.<sup>1</sup> Unfortunately, complete figures are not available for the first half of the nineteenth century. Graph 2.5 (in Chapter Two) of unspecified divorce cases (grounds unlisted), shows that more husbands than wives filed suits from 1857 to the 1880s.<sup>2</sup> Although it is also obvious that the number of female pursuers was comparable, this was likely due to the fact that these cases included adultery and desertion divorces, and desertion was a charge filed more often by wives. In the second half of the 1880s the number of wives filing for divorce surpassed the number of husbands.<sup>3</sup>

The main source for this study is CS extracted divorce cases filed on the ground of adultery from the period 1830 to 1880. A total of 254 extracted divorce and separation decrees were found from the benchmark years of the study. 103 of the 254 decrees were suits of divorce on the ground of adultery. Out of the 254 decrees, 128 cases were collected for

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<sup>1</sup> To prove adultery the pursuer only needed one witness for each alleged extramarital sexual act, and one proven act was enough to qualify for a divorce; Patrick Fraser, *The Treatise on Husband and Wife according to the Law of Scotland*, Vol. 2, (Edinburgh, 1876), pp. 1160-1161.

<sup>2</sup> PP 1890 (162) *Divorces (Scotland). Return of the number of suits instituted year by year in Scotland*.

<sup>3</sup> This emerging trend corresponds to the passing of the 1881 Married Women's Property (Scotland) Act; Katie Barclay, *Love, Intimacy and Power; Marriage and Patriarchy in Scotland, 1650-1850*, (Manchester, 2011), p.48.

qualitative analysis. From the 128 cases, a sample of 65 adultery cases was used for analysis and discussion in this chapter.<sup>4</sup> As the year 1830 did not have any adultery cases available, this sample only contains cases from the years 1840, 1850, 1860, 1870 and 1880 (see Table 3.1).

**Table 3.1 Sample Set of Court of Session Divorce for Adultery Cases**

| Year         | Total No. CS Decrees Found for Each Year (1) | Total No. of Adultery Divorce Decrees (2) | No. of Male Pursuers from (2) | No. of Female Pursuers from (2) | Used No. of Adultery Cases (3) | No. of Male Pursuers from (3) | No. of Female Pursuers from (3) |
|--------------|--|---|-------------------------------|---------------------------------|--------------------------------|-------------------------------|---------------------------------|
| 1830         | 5  | 0   | -                             | -                               | -                              | -                             | -                               |
| 1840         | 27   | 12  | 9                             | 3                               | 9                              | 7                             | 2                               |
| 1850         | 32   | 14  | 10                            | 4                               | 9                              | 7                             | 2                               |
| 1860         | 28   | 15  | 11                            | 4                               | 15                             | 11                            | 4                               |
| 1870         | 55   | 21  | 13                            | 8                               | 18                             | 11                            | 7                               |
| 1880         | 107  | 41  | 27                            | 14                              | 14                             | 13                            | 1                               |
| <b>Total</b> | <b>254</b>                                   | <b>103</b>                                | <b>70</b>                     | <b>33</b>                       | <b>65</b>                      | <b>49</b>                     | <b>16</b>                       |

Based on the low number of female pursuers from the CS sample it seems that there was a disconnect between the judiciary and government's expectations of marriage and chastity and that of society's.<sup>5</sup> From the larger sample collected 70 decrees, or 68 per cent, were filed by male pursuers, and 33, or 32 per cent, female. In the smaller CS sample study, 16 of the 65 adultery divorce cases were instigated by wives. Of those 16, eight also cited a secondary charge of maltreatment, and two claimed their husbands had deserted them and committed bigamy.

Due to data limitations and social influences, it is fair to assume that adultery occurred more often than reflected in the sample collected. No figures show the true number of spouses who had an extramarital affair. Additionally, adultery did not necessarily lead to marital breakdown. Studies of marriage and marital breakdown suggest that families

<sup>4</sup> The cases used for this sample were chosen based on the wealth of information available, such as the defender's answers and pleas, the pursuer's (and sometimes defender's) proof, or other material evidence. Extracted decrees only required the summons and interlocutor sheet documents to prove the action took place. Therefore, some of the records, especially from 1880, only had these two documents, and were excluded from the case studies.

<sup>5</sup> An extra-marital affair threatened the carefully constructed norm of monogamous and conjugal sexuality; Leonore Davidoff, Megan Doolittle, Janet Fink and Katherine Holden, *The Family Story: Blood, Contract and Intimacy, 1830-1960*, (London, 1999), p. 247.

covered up scandals such as infidelity to avoid shame.<sup>6</sup> Even when separation or divorce was an option, spouses sometimes decided to keep the affair a secret rather than publicise their marital problems. Wives especially are thought to have not uncommonly chosen to overlook a husband's adultery as long as he continued to provide for her and her family.<sup>7</sup> Considering the vulnerable position of a married woman—who was legally bound to her husband—it was sometimes a greater risk to file for divorce or separation than a benefit.<sup>8</sup> Husbands, on the other hand, were in a more advantageous position if they decided to file for divorce as they were legally entitled to custody of the children and to keep their wealth or earnings if the wife was found guilty. Moreover, to stay married to an adulterous wife meant the risk of an illegitimate child gaining the legal protections of the marriage was much higher. The law presumed a woman's child to be her husband's and thus entitled to part of the family inheritance as well as basic protection and provision, unless the child was proven to be illegitimate.<sup>9</sup>

Thus, before the 1860s in Scotland, although the law stipulated egalitarian grounds for adultery, the rest of the marriage law did not provide sufficient support for a married woman to get a divorce (except the ability to remarry). With the divorce a wife would receive a terce as if her husband was dead (this amount was dependent on his wealth),<sup>10</sup> but she would not be entitled to monetary support besides having her legal fees covered, or a right to custody of her children. Legislation reform in the second half of the 1800s bettered the rights of wives, but in waves. Specifically, the Conjugal Rights Act of 1861, allowed a wife to request custody of her children during a divorce or separation trial, as well as protect her earnings from her husband if he deserted her. The Married Women's Property (Scotland) Acts of 1878 and 1881 gave full protection of a wife's wages and her property from her husband by abolishing *jus mariti*.<sup>11</sup> Notably, however, this greater protection for women's rights did not immediately lead to a clear increase in wife-initiated

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<sup>6</sup> Ibid, pp. 245-246.

<sup>7</sup> Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800*, (Cambridge, 2003), pp. 144-145; Colin S. Gibson, *Dissolving Wedlock*, (London, 1994), pp. 76-77.

<sup>8</sup> Schultz's argument supports this idea, finding that, 'the court records indicate that economic independence was not an important factor in encouraging divorce'; instead wives were more likely to file for divorce in order to protect their children and themselves when their husbands had already abandoned them; Martin Schultz, 'Divorce Patterns in Nineteenth-Century New England', *Journal of Family History*, Vol. 15, No. 1 (1990), pp. 105-115, p. 109.

<sup>9</sup> Frederick Parker Walton, *A Handbook of Husband and Wife According to the Law of Scotland*, (Edinburgh, 1893), p. 73; Eric M. Clive, *The Law of Husband and Wife in Scotland*, Second Edition, (Edinburgh, 1982), p. 564; David M. Walker, *A Legal History of Scotland, Volume VI; The Nineteenth Century*, (Edinburgh, 2001), pp. 670-676.

<sup>10</sup> Walton, *A Handbook*, pp. 199-200.

<sup>11</sup> The Married Women's Property (Scotland) Acts of 1877 and 1881 were significant as they granted married women protection of their wages and property from their husbands in the event of a problematic marriage, and subsequently a chance to be monetarily independent and stable after a divorce.

divorce proceedings on grounds of adultery or otherwise. Thus, this chapter argues that outside factors, such as the double standard, contributed to the low number of wives divorcing their husbands on the ground of adultery. Husbands, in turn, were more likely to divorce an adulterous wife, as legislation, financial arrangements, and societal expectations made it beneficial for them to do so.

### Marital Expectations, the Double Standard and Competing Discourses of Sexuality

According to Scots divorce law, extramarital sex was the definitive grounds for dissolving a marriage. Historians think that this resulted from the belief that conjugality was the foundation of social morality and stability.<sup>12</sup> Ideas of morality and immorality revolved around sex. Before marriage, chastity was encouraged and sex outside of marriage, or fornication, was deemed immoral. Within marriage, however, sex was acceptable (and expected) as it was then an act of intimacy between a husband and wife that resulted in the procreation of a family.<sup>13</sup>

Although the perception of sexuality within nineteenth-century society is tied to the notion of the Victorian era being an age of restraint, piety, and morality, the reality of sexuality and sexual behaviour of the day to day person was much more complex.<sup>14</sup> The importance of upholding an image meant that sex was a taboo subject amongst the respectable classes, resulting in little documented public discourse.<sup>15</sup> What historians have found instead are competing discourses from authoritative and political groups. Official ideas of acceptable or unacceptable sexual behaviour were created by legal, religious and medical discourses. These were then met, in the second half of the nineteenth century, with reformed and

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<sup>12</sup> Gibson, *Dissolving Wedlock*, p. 58; Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*, (Cambridge, 1988), p. xi.

<sup>13</sup> This was also evident through other aspects of marriage law. For instance, impotence qualified as a ground for nullification of a marriage, while at the other end of the spectrum, according to Hume, a husband could not be guilty of raping his wife unless he helped another person commit the rape; Frederick Parker Walton, *A Handbook of Husband and Wife According to the Law of Scotland*, (Edinburgh, 1893), pp. 2-7, 283; Joan Perkin, *Women and Marriage in Nineteenth-Century England*, (London, 1989), p. 236.

<sup>14</sup> Jeffrey Weeks, *Sex Politics and Society: The regulations of sexuality since 1800*, (London, 1981), p. 19. For a discussion of alternative and hidden sexuality in history, see Anna Clark, 'Twilight Moments', *Journal of the History of Sexuality*, Vol. 14, No. 1/2, Special Issue: Studying the History of Sexuality: Theory, Methods, Praxis (Jan. – Apr., 2005), pp. 139-160.

<sup>15</sup> Davidoff et al, *The Family Story*, p. 127; Clark, 'Twilight Moments', p. 152.

sometimes radical reinterpretations. Amongst these competing discourses, however, marriage remained the archetype for acceptable sexual activity.<sup>16</sup>

The confining of sexual activity within marriage is visible in the terminology used to describe it. Legally marriage unites a man and woman 'as husband and wife'. Furthermore, when the couple was pregnant it was referred to as being 'in the family way', or having children was living 'in family'. In actions of divorce for adultery these phrases served as euphemisms for sex; a standard summons stated that in consequence of their marriage the pursuer and defender had 'openly cohabited together as husband and wife, owned and acknowledged each other as husband and wife were holden and reputed as married persons.'<sup>17</sup> Thus, when the defender had committed adultery, particularly if cohabitating with the paramour at the time of the action, he or she was described as forming that same bond with the paramour; for instance, Jane Scott was accused of 'living openly with [the co-defender] as his wife',<sup>18</sup> and Margaret McAllister or Mitchell 'openly cohabited with the said James Orr, and lived with him at bed and board, the same as if she had been his lawfully married wife.'<sup>19</sup>

One of the mainstream discourses that complicates ideas of appropriate sexual behaviour is the notion of the double standard. According to Keith Thomas, the double standard, 'is the view that unchastity, in the sense of sexual relations before marriage or outside marriage, is for a man, if an offense, none the less a mild and pardonable one but for a woman a matter of the utmost gravity.'<sup>20</sup> Although not mentioned in this definition, the double standard also existed within marriage. The most obvious example of this can be seen in English divorce law. Unlike Scots law, English common law easily lent itself to examples of the double standard enshrined in legislation, particularly the Matrimonial Causes Act of 1857 and the Contagious Diseases Acts of the 1860s.<sup>21</sup> While most scholars of English divorce law agree the double standard was a dominant feature of the civil law, there tends to be a

<sup>16</sup> Lynn Abrams, 'Whores, Whore-Chasers, and Swine: The Regulation of Sexuality and the Restoration of Order in the Nineteenth Century German Divorce Court', *Journal of Family History*, Vol. 21, No. 3 (July 1996), p. 268.

<sup>17</sup> CS46/1870/12/3 McQueen or Morrison v McQueen.

<sup>18</sup> CS46/1860/7/36 Caldwell v Scott or Caldwell.

<sup>19</sup> CS46/1840/3/161 Mitchell v His Wife [McAllister or Mitchell].

<sup>20</sup> Keith Thomas, 'The Double Standard,' *Journal of the History of Ideas*, Vol. 20, No. 2 (April, 1959), pp. 195-216, p. 195.

<sup>21</sup> Gibson, *Dissolving Wedlock*, pp. 76-77; Ann Sumner Holmes, 'The Double Standard in English Divorce Laws, 1857-1923,' *Law & Social Inquiry*, Vol. 20, No. 2 (Spring, 1995), pp. 601-620; Ursula Vogel, 'Whose Property?: The double standard of adultery in nineteenth-century law', in Carol Smart (ed.), *Regulating Womanhood: historical essays on marriage, motherhood and sexuality*, (London, 1992), pp.146-165. Joanne Bailey's discussion of adultery questions the influence of the double standard as asserted by historians by examining the stereotypes associated with this discourse; Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800*, (Cambridge, 2003), pp. 140-167.

debate over the extent that it existed in society and practice. Colin Gibson and Laura Gowing argue the double standard had a significant impact on societal expectations as the law defined acceptable marital behaviour differently for husbands and wives.<sup>22</sup> Rosemary O'Day and Joanne Bailey, on the other hand, propose that the double standard did not impact practice as rigidly as supposed, as evidence of a single standard was found in each of their studies.<sup>23</sup> Indeed, Christianity promoted a single standard, and labelled infidelity as a sin for both the husband and the wife.<sup>24</sup>

But how present was the double standard in Scotland, and did it exist to the same degree?<sup>25</sup> This study found that the double standard did indeed exist within the social, cultural and legal discourses of nineteenth-century Scotland, despite its absence within divorce law.

Unlike other jurisdictions, the Scottish legal system viewed infidelity as equally unacceptable for husband or wife. This alienation of affections was eligible for a full dissolution of the marriage through divorce, or a separation of bed and board. In other jurisdictions where the divorce law was not as liberal, adultery was usually the first, and sometimes only, ground for divorce; Connecticut, for instance, allowed divorce for adultery (and desertion for three years) since 1667, while Washington D.C. and New York in the nineteenth century only allowed divorce on the ground of adultery.<sup>26</sup> Germany followed the French civil code from 1814 to 1900 that allowed divorce on four grounds including infidelity, but 'was notorious for its unequal stance on adultery.'<sup>27</sup>

Scotland's single standard rule for adultery was not without opposition. MPs in particular struggled with this legal laxity, as discussed in Chapter Two under issues of accessibility.

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<sup>22</sup> Gibson, *Dissolving Wedlock*, pp. 58-59, 63, 76-77; Laura Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London*, (Oxford Scholarship Online: October 2011), [accessed 02 December 13], pp. 3-4, 180, 194.

<sup>23</sup> Rosemary O'Day, *The Family and Relationships, 1500-1900: England, France and the United States of America*, (Hampshire, 1994), p. 157; Bailey, *Unquiet Lives*, pp. 140-145.

<sup>24</sup> Bailey, *Unquiet Lives*, p. 143.

<sup>25</sup> The fact that the Contagious Diseases Acts were not passed in Scotland can be misleading in regards to the discourse on prostitution in Scotland. Mahood and Littlewood argue that it was not a lack of concern for prostitution or fallen women that kept the Contagious Diseases Acts out of Scotland, rather it was the Scottish preference for localised authorities' regulations instead of policies from their southern neighbours. Glasgow in particular formed their own system of institutional reform for these women, referred to as the Glasgow system: police arrests, Lock Hospital and the Magdalene Institution. It was in this system of regulating women's behaviour through the use of gendered institutions that the double standard existed in Glasgow. Again women were the target of punishment and reform rather than the male clients who used them; Barbara Littlewood and Linda Mahood, 'Prostitutes, Magdalenes and Wayward Girls: Dangerous Sexualities of Working Class Women in Victorian Scotland,' *Gender & History*, Vol. 3, No. 2, (Summer 1991), pp. 160-164.

<sup>26</sup> Schultz, 'Divorce Patterns in Nineteenth-Century New England', pp. 101-115, p. 104; Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America*, (Chicago, 1980), p. 4.

<sup>27</sup> Lynn Abrams, 'Whores, Whore-Chasers, and Swine', pp. 268-269. For a full discussion of the French civil code as well as English divorce law, see Vogel, 'Whose Property?', pp. 147-165.

For instance, it was a point of interest in the 1853 Commissioners report to the Queen on divorce law. This was evident through series of questions put to the Lord Advocate of Scotland by the Select Committee, such as:

138. Has any inconvenience been found to result from giving the wife an equal remedy with the husband in obtaining a Divorce *à vinculo*?—I am not aware of any inconvenience.

139. Can you state what proportion of instances there are of Divorces *à vinculo*, at the suit of the wife?—No, I cannot state the proportion.

140. Are they frequent?—I would say they are about as numerous as the others. I am merely guessing. Those that have been most litigated on the merits have been suits at the instance of the husband.<sup>28</sup>

Despite the Lord Advocate's dismissal of the suggestion that allowing wives to divorce was an 'inconvenience', the Committee recommended restricted access for English wives. In fact, English MPs were never persuaded to enforce a single standard until 1923.<sup>29</sup> The pivotal 1857 Matrimonial Causes Act captured the essence of the double standard in English legislation by limiting simple adultery as a charge only available to husbands against their wives, whereas the wife had to prove adultery plus an aggravation such as cruelty, desertion, impotence, incest or sodomy.<sup>30</sup>

Statutes other than the divorce law impacted on married people's rights in Scotland and reflect this double standard. The most relevant example to this discussion of adultery is the entitlement of a husband to claim damages. The civil action of damages in general could be instigated by any person, male or female, to seek pecuniary compensation for a loss or personal injuries caused by the defender.<sup>31</sup> This could, and often was, applied by a husband against a man for the seduction of his wife. The summons for this charge read as follows: 'the defender wrongfully alienated the affections of the said --- ---- from the pursuer, and wrongfully seduced her from her marriage vows and engagements'.<sup>32</sup> This action could be filed with a summons for divorce on the ground of adultery against the wife with the paramour named as the co-defender. It could also be filed separately,

<sup>28</sup> The Lord Advocate of Scotland, Right Hon. Duncan M'Neill, later Lord Justice of Scotland; PP 1852-53 [1604] *First report of the commissioners appointed by Her Majesty to enquire into the law of divorce, and more particularly into the mode of obtaining divorces a vinculo matrimonii*, p. 65.

<sup>29</sup> Holmes, 'The Double Standard', pp. 601-603

<sup>30</sup> Holmes, 'The Double Standard', p. 602, fn. 2.

<sup>31</sup> David M. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law*, third edition, revised, (Edinburgh, 1969), p. 393.

<sup>32</sup> Harvard University—Harvard law School Library/ Bell, Alexander, plaintiff. Report of train in the action of damages for Crim. Con: poor Alexander Bell, teacher, Dundee, versus William Murray. [Edinburgh?:s.n.], 1834, p. 1.



without any action against her, whereby the husband chose to uphold the marital union, but filed a suit against the other man to prove he was the paramour and request monetary compensation.<sup>33</sup> This legal option was not available to wives whose husbands had committed the same breach. In fact this pecuniary remedy was never introduced for wives, and was only abolished for husbands recently in the Divorce (Scotland) Act of 1976.<sup>34</sup>

Suits for criminal conversation, which first appear in the early nineteenth century, also reflect the double standard for men and women engaging in adultery.<sup>35</sup> The husband of a wife who committed adultery could file a suit of criminal conversation (also written as crim. con.) against his wife's paramour, if his identity was known, for the loss of his wife's affections and society.<sup>36</sup> In January 1818 *The Scotsman* reported the Scottish jury's first criminal conversation case, which 'created a good deal of interest,' as it told the story of a poor private soldier whose wife took a position in the service of a wealthy writer in Edinburgh while her husband was away with his regiment. Her employer allegedly seduced the private's wife and:

not satisfied with thus deeply hurting [the husband] in the nicest feelings, [the employer] added another injury; the [soldier's] wife having been denied to him, he went one day to the [employer's] house to demand access to her, when the [employer] came out, and, after knocking [the husband] down the stairs, added still a third injury, by writing a most false and calumnious letter to the [husband's] commanding officer.

After a fifteen hour trial the jury awarded a successful verdict for the pursuer and damages of £30.<sup>37</sup> Public attention was again cited in the March 1818 article of the second criminal conversation case to be tried in front of a Scottish jury. This case was kept private due to the nature of the evidence, only revealing that the requested damages were for £10,000 against a surgeon of Hamilton for the seduction and 'adulterous connection' with the wife of the pursuer, General of Carnbroe, Lanark County. The charge was denied and the jury ruled not proven: 'The verdict of the Jury was hailed by a crowded Court with the greatest

<sup>33</sup> Walker, *A Legal History of Scotland*, . 661; Fraser, *Treatise of Husband and Wife*, Vol. 2, p. 1204.

<sup>34</sup> Clive, *The Law of Husband and Wife*, p. 289.

<sup>35</sup> Leneman claims that crim. con. did not exist in Scotland before then, although it was an option in England; Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separation, 1684-1830*, (Edinburgh, 1998), p. 43.

<sup>36</sup> Fraser, *The Treatise on Husband and Wife*, Vol. 2, p.1142, fn. (a). Thank you to Katie Barclay for allowing me to read her soon to be published chapter where she discusses the charge of criminal conversation in Scotland and England in much greater detail; Katie Barclay, 'Shame, Pity and the Voyeur: Matrimonial Causes', in David Lemmings and Claire Walker (eds.), *Governing Emotion: the Affective Family, the Press and the Law in Early Modern Britain*, forthcoming.

<sup>37</sup> 'Jury Court, Dec 15. Kirk v Guthrie.' *The Scotsman*, 3 Jan 1818, pg. 5. Barclay also cites this case in her forthcoming chapter, 'Shame, Pity and the Voyeur'.

applause. There were no less than 150 witnesses in attendance for the defense [*sic*].<sup>38</sup> Although a suit of divorce by a husband against his wife suggests an element of pride, a suit of damages for criminal conversation suggests a desire to restore a husband's reputation amongst men.

Outside of the law, the double standard influenced the more pervasive discourses from medical, conservative, feminist and radical groups. This notion that gender should determine whether sexual activity was appropriate was not without opposition. Indeed, it was the double standard that angered and inspired reformers. Weeks argues that, 'it was during the nineteenth century that the debate about sexuality exploded... Sexuality became a major social issue in Victorian social and political practice.'<sup>39</sup>

Christianity, one of the oldest and most established discourses, labelled adultery as a sin for both the husband and the wife.<sup>40</sup> In earlier centuries this sin was considered a capital offense in Scotland, meaning an adulterous spouse could be punished by death, although very few if any executions took place.<sup>41</sup> Remnants of this notion exist in the conditions of a divorce that stated the pursuing party was allowed to remarry as though their spouse were 'naturally dead'.<sup>42</sup> In the sixteenth and seventeenth centuries Scottish Reformers pushed to equalise the disgrace of infidelity for both husbands and wives by encouraging a 'single standard'.<sup>43</sup> This was put into practice in Kirk sessions that publicly denounced men and women for fornication, the birth of illegitimate children, infidelity, and other immoral behaviour.<sup>44</sup> This system of regulation was thought to be most effective in pre-industrial Scotland, although historians debate the reasons for the Church's loss of dominance in the 1800s.<sup>45</sup> Despite the decline in Church attendance, in Scotland religion remained an

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<sup>38</sup> 'Article 6—No Title [Jury Court, Ballie v Bryson]', *The Scotsman*, 21 Mar 1818, pg. 93.

<sup>39</sup> Weeks, *Sex Politics and Society*, p. 19.

<sup>40</sup> Bailey, *Unquiet Lives*, p. 143.

<sup>41</sup> Walker, *A Legal History of Scotland*, p. 409; Kenneth M. Boyd, *Scottish Church Attitudes to Sex, Marriage and the Family 1850-1914*, (Edinburgh, 1980).

<sup>42</sup> CS46/1860/7/145 Brown v Brown.

<sup>43</sup> Boyd, *Scottish Church Attitudes*, pp.5-7.

<sup>44</sup> Leneman, *Alienated Affections*, p.3; T.C. Smout, 'Aspects of Sexual Behaviour in Nineteenth-Century Scotland', in A. Allen MacLaren (ed.), *Social Class in Scotland: Past and Present*, (Edinburgh, 1976), p. 55.

<sup>45</sup> Leneman argues it was a combination of urbanisation and the impact of the cult of 'sensibility' on changing ideas of sexuality in the early modern period; Leneman, *Alienated Affections*, pp. 3-4. Weeks cites 'changing forms of "social regulation" as a precursor to modern sexuality; Weeks, *Sex, Politics and Society*, pp. 13-14; see also T.C. Smout, *A Century of the Scottish People*, pp. 203-204. From the approach of religious history the apparent declining influence of the Church in nineteenth-century Scotland has also been attributed to the division of society into defined and conscious classes and regional differences as well as urbanisation; see Douglas A. Reid, 'Playing and Praying', in Dauton, *The Cambridge Urban History of Britain*, Vol. III (Cambridge, 2000), pp. 788-793; Smout, *A Century of the Scottish People, 1830-1950*, pp. 202-208.

important facet of peoples' lives.<sup>46</sup> The upkeep of religious teachings about sex was particularly evident in middle-class ideas of courtship and marriage, and especially amongst women.<sup>47</sup> Influential religious values rejected the societal leniency given to sexually promiscuous men and preferred for sex to be restricted to the marital union as a conjugal right.<sup>48</sup> Often associated with middle-class ideals and centred on the teachings of Evangelical Christianity, this discourse on sexuality in marriage was also found in some working-class families' marital expectations.<sup>49</sup> In brief, the official stance of morally conservative groups rejected the double standard, as they believed sex was an expectation of marriage to be kept between husbands and wives.<sup>50</sup>

Increasingly, historians have debated that sexuality in the Victorian era was repressed and ruled by the double standard.<sup>51</sup> Early scholarship argued that male sexuality was linked to theories of biological instincts. Medical texts used terms such as natural, biological and habitual to describe men's relationship with sex. The ideal man would marry and contain his natural sexual desires within the marriage bed.<sup>52</sup> In contrast, women were viewed as frigid when it came to sex: it was perceived that women did not enjoy it and even feared it.<sup>53</sup> Some medical texts encouraged this notion claiming that women were uninterested and sometimes apprehensive of sex, only participating in order to fulfil their maternal

<sup>46</sup> Callum Brown, 'Religion, Class and Church Growth', in W. Hamish Fraser and R. J. Morris (eds.), *People and Society in Scotland, Vol. II, 1830-1914*, (Edinburgh, 1990), pp. 310-335; Callum Brown, *Death of Christian Britain*, (Great Britain, 2009), pp. 165-166; Trevor Griffiths and Graeme Morton, 'Structures of Everyday Life in Scotland, 1800 to 1900', in T. Griffiths and G. Morton (eds.), *A History of Everyday Life in Scotland, 1800 to 1900*, (Edinburgh, 2010), pp. 12-13.

<sup>47</sup> Smout, 'Aspects of Sexual Behaviour', pp. 56-62; Brown, *Death of Christian Britain*, p. 166; Reid, 'Playing and Praying', p. 780; Callum G. Brown and Jayne D. Stephenson, "'Sprouting Wings?": Women and Religion in Scotland c. 1890-1950', in Esther Breitenbach and Eleanor Gordon (eds.), *Out of Bounds: Women in Scottish Society, 1800-1945*, (Edinburgh, 1992), pp. 95-120.

<sup>48</sup> Weeks, *Sex Politics and Society*, p. 30; Bailey, *Unquiet Lives*, p. 143.

<sup>49</sup> For a discussion of the influence of religion on middle-class ideals of family see Davidoff et al, *The Family Story*, pp. 136-143; Lesley Orr MacDonald, *A Unique and Glorious Mission: Women and Presbyterianism in Scotland, 1830-1930*, (Edinburgh, 2000), pp. 23-34. Roberts found that sex, 'was regarded as necessary for the procreation of children or as an activity indulged in by men for their own pleasure, but it was never discussed in the evidence as something which could give mutual happiness. No hint was ever made that women might have enjoyed sex'; Elizabeth Roberts, *A Woman's Place: An Oral History of Working-Class Women 1890-1940*, (Oxford, 1984), p. 84.

<sup>50</sup> Lesley Hall, 'Hauling Down the Double Standard: Feminism, Social Purity and Sexual Science in Late Nineteenth-Century Britain', *Gender & History*, Vol. 16, No. 1 (April, 2004), pp. 36-56, pp. 36-37; Gail Savage, 'The Wilful Communication of a Loathsome Disease': Marital Conflict and Venereal Disease in Victorian England', *Victorian Studies*, Vol. 34, No. 1 (Autumn, 1990), pp. 35-54, p. 35; Joanna Bourke, 'Sexual Violence, Marital Guidance, and Victorian Bodies: An Aesthesiology', *Victorian Studies*, Vol. 50, No. 3, (Spring, 2008), pp. 421-422.

<sup>51</sup> Weeks, *Sex, Politics and Society*, p. 19; Carl Degler, 'What Ought to Be and What Was: Women's Sexuality in the Nineteenth Century', *The American Historical Review*, Vol. 79, No. 5 (Dec., 1974), pp. 1467-1468; Anna Clark, 'Twilight Moments', pp. 139-160; Morse Peckham, 'Victorian Counterculture', *Victorian Studies*, Vol. 18, No. 3 (Mar., 1975), pp. 257-276.

<sup>52</sup> Davidoff et al, *The Family Story*, p. 66.

<sup>53</sup> Bourke, 'Sexual Violence', pp. 426-429; Sheila Jeffreys, 'Women and Sexuality', in June Purvis (ed.), *Women's History: Britain 1850-1945, An Introduction*, (London, 2004), pp. 202-203.

needs to procreate—this followed another medical discourse that believed women were ‘subject to their reproductive organs’.<sup>54</sup> This discourse was also present in contemporary prescriptive literature.<sup>55</sup>

The pervasiveness of the double standard was also evident in the campaigns against it in the second half of the century. First, the rise of feminist discourses attempted to challenge the double standard by confronting the issues and repercussions regarding male sexuality as innate and uncontrollable.<sup>56</sup> Feminists took a more radical stance campaigning that in reality the marriage contract did not encourage mutual affection and respect of sex. Instead, they argued, it effectively turned a wife into a prostitute as she was legally the property of her husband and subject to his sexual desires.<sup>57</sup> Furthermore, the ownership of a wife’s body by her husband meant rape did not legally exist within the institution of marriage.<sup>58</sup> Wives also suffered from unwanted pregnancies when duty bound to have sex with their husbands, putting their lives at risk with each pregnancy and childbirth.<sup>59</sup> The use of prostitutes as substitutes for ‘respecting’ wives’ dignity and status was also a product of the double standard and furthered the divide between respectable married women and sex.<sup>60</sup> Despite the radical aspects of their campaign, mainstream feminist groups rejected more extreme feminists who promoted free love outside of marriage, and marriage was still considered the ideal relationship.<sup>61</sup>

Second, Social Purity was a reform movement that attempted to restore morality by returning sex to the marriage bed.<sup>62</sup> It coincided with feminism and in many ways their

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<sup>54</sup> Degler, ‘What Ought to Be and What Was’, pp. 1467-1468; Carroll Smith-Rosenberg and Charles Rosenberg, ‘The Female Animal: Medical and Biological Views of Women and Her Role in Nineteenth-Century America’, *The Journal of American History*, Vol. 60, No. 2 (Sep., 1973), pp. 332-356.

<sup>55</sup> Prescriptive literature furthered the divide between women and sexuality, as noted by Lucy Bland, by advising its readers that a woman’s sexual role was to be, “pure”: the “sexless” spinster was assumed to know nothing of sex, and the “angel in the home” entered marriage sexually ignorant and remained sexually passive; Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885-1914*, (London, 1986), pp. 124-125; Davidoff et al, *The Family Story*, p. 66; Degler, ‘What Ought to Be and What Was’, pp. 1467-1469.

<sup>56</sup> The main issues feminists brought to light were child sex abuse, use of prostitutes, the double standard, and morality; Bland, *Banishing the Beast*, pp. 124-125.

<sup>57</sup> Lucy Bland, ‘Marriage Laid Bare: Middle-Class Women and Marital Sex c.1880-1914’, in Jane Lewis (ed.), *Labour and Love: Women’s Experience of Home and Family, 1850-1940*, (Oxford, 1986), p. 142; Sandra Stanley Holton, ‘Free Love and Victorian Feminism: The Divers Matrimonials of Elizabeth Wolstenholme and Ben Elmy’, *Victorian Studies*, Vol. 37, No. 2 (Winter, 1994), p. 215.

<sup>58</sup> Bourke, ‘Sexual Violence’, pp. 421-422.

<sup>59</sup> Bland, *Banishing the Beast*, p. 128.

<sup>60</sup> Bland, *Banishing the Beast*, p. 142. See also Rachel Mesch, ‘Housewife or Harlot? Sex and the Married Woman in Nineteenth-Century France’, *Journal of the History of Sexuality*, Vol. 18, No. 1 (Jan., 2009), pp. 65-83.

<sup>61</sup> See Holton, ‘Free Love and Victorian Feminism’ p. 215.

<sup>62</sup> This group simultaneously drew attention to the issues of sexual inequality and the double standard: prostitution and child sex abuse; Weeks, *Sex Politics and Society*, p. 87. Though their campaigns were important Weeks, Gordon and Dubois point out that their efforts divided society by othering unmarried

campaigns overlapped.<sup>63</sup> Social Purists were particularly concerned with respectability and took an interventionist approach towards working-class women, who they believed were more likely to engage in sex and lose their femininity by letting go of modesty.<sup>64</sup>

The last movement to mention was Sexology. Sexology arguably began as a radical alternative to the limited sexual liberty given to women and even men by promoting women's equal passion for sex and natural sexuality.<sup>65</sup> Medical theories of sexuality have also been found to have influenced this movement.<sup>66</sup> Sexologists (like medical authorities) asserted that men had dominant sexual urges that could not be controlled because they were biological.<sup>67</sup> These ideas placed men in power during the act of sex and relegated women as the submissive partner. This, in consequence, reinforced the traditional gender roles of sexuality that feminists were attempting to break.<sup>68</sup>

The double standard was present in legislation, such as actions for damages or criminal conversation, Parliamentary debates in the House of Commons, the writings of medical men, and the campaigns of the feminists, social purists and sexologists, whether it was being supported or disputed.<sup>69</sup> Seemingly, these social and political discourses could have appeared in a divorce trial as a reflection of popular beliefs, even if the CS in theory enforced a single standard. As the remaining sections will show, evidence of the double standard is available through the higher number of male pursuers in the collected sample of CS cases. To put this into context, out of the three grounds for divorce and separation, adultery was the only ground where more husbands than wives instigated the action—suits charging desertion and cruelty had a higher number of female pursuers. However, the individual trials themselves suggest that this legal theory of a single standard was upheld in practice once in the courtroom, as the overwhelming majority of the sample was successful suits.

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women, women in prostitution, and working-class women, as well as homosexuals, claiming they were immoral and needed regulating; Weeks, *Sex Politics and Society*, pp. 87-88; Ellen Carol Dubois and Linda Gordon, 'Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought', *Feminist Studies*, Vol. 9, No. 1 (Spring, 1982), p. 16.

<sup>63</sup> For instance Josephine Butler's campaigns against the Contagious Diseases Acts.

<sup>64</sup> Bland, *Banishing the Beast*, pp. 115-118.

<sup>65</sup> Jeffreys, 'Women and Sexuality', p. 202.

<sup>66</sup> Degler, 'What Ought to Be and What Was', pp. 1467-1490. For a further discussion of medical theories on female sexuality see Bland, *Banishing the Beast*, pp. 52-70.

<sup>67</sup> One of the most cited sexologists Henry Havelock Ellis believed sex should be deconstructed to mirror sex between animals: the man should be dominant and the woman should be submissive; Jeffreys, 'Women and Sexuality', pp. 199-204.

<sup>68</sup> Jeffreys, 'Women and Sexuality', p. 202, 212; Bourke, 'Sexual Violence', p. 424.

<sup>69</sup> Hall argues that these three movements had 'common roots'; Hall, 'Hauling Down the Double Standard', pp. 36-56, p. 37.

## Found Patterns of Adultery in Court of Session Sample Study

Using the 65 divorce case sample filed on the ground of adultery, as well as divorce trials reported in Scottish newspapers, patterns specific to nineteenth-century experiences of adultery have emerged. They reflect that the double standard persisted, despite the legal equality. This section will discuss the patterns of adultery through three different subsections: the most common scenarios, the paramour, and the excuses for infidelity.

A few caveats on the substance of the cases: as the law required just one proven act of extramarital sex between the defender and the paramour for a divorce decree, the instances cited in the complaint likely represent those that could be successfully proven, rather than the full sexual history of the defender. Additionally, only one dismissed case was found in this sample, meaning that this study is based on successful decrees of divorce for adultery.<sup>70</sup> Likewise, the 1890 *Divorces (Scotland)* report, discussed in Chapter Two, showed a low percentage of divorce actions dismissed.<sup>71</sup>

The fact that over half of the wives who did file an adultery divorce suit cited a secondary fault on the part of the husband (desertion or cruelty), suggests that, for a wife, adultery on its own was not as much of a push factor to break up a marriage. Cohabiting adultery, on the other hand, was a more common complaint from female pursuers, as it often meant the husband had ceased to financially support his wife leaving no reason for her to uphold the marriage (12 out of the 16 male defenders were accused of living in an adulterous cohabiting relationship). That more husbands filed for divorce suggests they were less tolerant of extramarital affairs. Furthermore, more husbands filed for divorce when their wife had a short-term affair or one-night encounter. Some husbands also accused their wives of becoming prostitutes; this could indicate a general attitude towards women who had left their husband and had sex with other men, although it was possible that these women had turned to prostitution after separating from their husbands.<sup>72</sup> The rise in

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<sup>70</sup> Only one adultery case collected in this sample resulted in a dismissal by the Lord Ordinary. In 1880 Thomas Wilson charged his wife Elizabeth Dick or Wilson with committing adultery after deserting him to live in London. The co-defender named was a lodger who resided at the lodging house kept by Elizabeth. She answered his complaint, admitting to leaving her husband but explained it was due to his 'grossly abusing and maltreating' her since their marriage; she furthermore denied the adultery charge. The only other document available for this case is the interlocutor sheet, which simply states that on the 26<sup>th</sup> October 1880, 'In respect of the Minute for the Pursuer, No. 11 of process, and of the Receipt for the Defenders Account of Expenses No. 10 of process, Dismisses the action, and Decerns.' Signed James Adam [Lord Adam]. There is no further information on the reason why the case was dismissed, although presumably the pursuer was unable to prove infidelity on the part of the wife, as a defence of cruelty was not sufficient to dismiss a charge of adultery (see Fraser, *Treatise on Husband and Wife*, Vol. 2, pp. 1190-1191, 1201-1202); CS46/1880/12/102 Wilson v Dick or Wilson.

<sup>71</sup> PP 1890 (162) *Divorces (Scotland)*. *Return of the number of suits instituted year by year in Scotland*.

<sup>72</sup> Bailey found in her study of adultery that the description of an adulterous wife as a whore in matrimonial suits was often backed up with proof, such as a venereal disease or the wife's association with brothels,

female pursuers in the later 1880s (after the sample), further supports this argument, as married women were obtaining more economic and legal rights by the turn of the century, and therefore less dependent on their husbands.

### *Patterns of Adultery: 'Standard' Adultery*

The most 'standard' form of adultery, where a married person has extramarital sex while still living with their spouse, was one of the less frequently cited forms. Out of the 65 cases studied, 27 pursuers complained of a spouse's affair while still residing under the same roof as husband and wife. Six of the pursuers were wives, and 21 were husbands. Only eight defenders from the 27 cases, however, had affairs that did not develop into a long-term relationship. Although one-time encounters were seemingly uncommon within the CS divorce cases, this was not necessarily representative. Rather, this may indicate acceptable and unacceptable infidelity.

Wives less commonly pursued divorce for a one-time or short-term affair unless the husband's financial support was already lost. Female pursuers therefore appear under-represented likely because a one-time affair was not reason enough to divorce. Even though religious and legal discourses enforced a single standard, society encouraged wives to be more tolerant of their husbands' indiscretions, if not directly, then through the dependency and subordination of wives. Thus, of the 16 female pursuers, twelve charged their husbands with living in an adulterous cohabiting relationship. Even in the four cases claiming a husband had one-time (or short-term) affairs, the wife was no longer living with or supported by him. This most likely prompted the action as maintaining the marriage would not have benefited her, whereas dissolution of the marriage would have allowed her the freedom to sever all ties with her husband and remarry.

In contrast, husbands often accused wives of brief sexual affairs, which corresponds to the idea that adultery was less acceptable if committed by the wife. This may have been true for a few reasons. First, the competing discourses about sexuality, discussed above, arguably impacted upon private family decisions about marital breakdown. Besides monetary concerns, an openly sexual wife may have been a cause of anxiety for some husbands.<sup>73</sup> More conservative discourses expected married women to be uninterested in

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rather than used as a general insult for a woman who had committed adultery; Bailey, *Unquiet Lives*, pp. 160-161.

<sup>73</sup> Abrams states this was true for husbands and wives in Germany in the nineteenth century, where honour was judged for a married woman 'on her sexual comportment; a husbands' position in the community, on the other hand, was determined less by his sexual behaviour and more by that of his wife'; Abrams, 'Whores, Whore-Chasers, and Swine', p. 270. Mesch, 'Housewife or Harlot?', pp. 70-71.

sex beyond procreation and the conjugal duties of a wife. Hence, a sexually aggressive or promiscuous wife brought shame on a family concerned with upholding a respectable reputation.<sup>74</sup> Secondly, some husbands may have also been concerned with being a cuckold, as it insinuated they failed as a husband. According to Gillis, '[i]n the sixteenth century, "cuckold" was the worst a man could be called and the cause of most of the defamation suits brought by men to the Church courts.'<sup>75</sup> Bailey suggests otherwise, arguing that in the early modern era, 'it was becoming less common for husbands in this situation to be seen as failing sexually' and blame was shifted to the third party.<sup>76</sup> The double standard and the insult of being cuckolded are not unrelated as they both appear to reflect insecurity over masculinity.

This connection is illustrated in an 1880 case of divorce and damages, where the husband laid full blame on the wife yet attempted to maintain his friendship with the paramour, a former friend. The pursuer William Ramsay filed the suit against his wife Ann Armit or Ramsay and John Weir, accusing them of having carnal connection on multiple occasions. As this case was brought to court in 1880, the husband and wife were both able to testify. John Weir and William Ramsay were friends who would get together with their wives and visit one another's homes. One night, suspicious of John's relationship with Ann, William returned home early to find John and Ann in the dark and pressed up against the bed. William broke into the locked house and threw the pair out. From William's responses to his wife's affair, it was evident that he directed his anger towards her more so than John. For instance, the next day he went to John's home to tell John's wife what he had seen and prevented. Mrs. Weir testified that, '[Ramsay] then set his teeth, and called his wife a whore. He turned to my husband and said, "Johnny, you and I have always been friendly, and I hope we will remain so. Mind you, Johnny, I have no ill-will to you."' <sup>77</sup> Ann admitted to forming an adulterous relationship with John, although John continued to deny it throughout the trial. William's testimony demonstrated evidence of the double standard, as well as concern over male honour and reputation.

In two other instances, William alludes to the importance of reputation as a cause for divorcing his wife. The first example is from William's testimony. He had been asked about a time when Ann and John were seen walking alone together:

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<sup>74</sup> Mesch, 'Housewife or Harlot?', pp. 70-71; Weeks, *Sex Politics and Society*, p. 30.

<sup>75</sup> John Gillis, *For Better, For Worse: British Marriages, 1600 to the Present*, (Oxford, 1985), p. 79.

<sup>76</sup> Bailey, *Unquiet Lives*, p. 164, 165-166.

<sup>77</sup> William Ramsay was sent to jail in consequence of shooting John Weir; CS46/1880/10/47 Ramsay v Armit or Ramsay and Weir.



(Q) Did you ever ask your wife about this walk?

(A) Yes. I asked why she went along with Weir. At last she 'owned' that she had never gone away to set the girl home a bit, but that at the door Weir asked her to go a walk, and that is why she had gone. I told her I had a good mind to leave her, as I would not live with any woman who would leave a ball-room with a man in such a suspicious way. [*sic*]<sup>78</sup>

The second example reveals William's reaction to Ann's betrayal, which was to immediately separate and then divorce her. In his testimony he insinuates that this was not an easy decision; 'I had to break up my business after I put her away. She had conducted it for me. It was increasing and paying very well. I was always kind to my wife.'<sup>79</sup> It seems that William voiced a choice of male honour over the wealth and comfort he had with his wife, yet, likely felt more betrayal and hurt than he expressed in court.

The relationship between William, Ann and John illustrates adultery as the direct cause of marital breakdown. It also shows the double standard affecting the attitude of a husband towards his wife as reflected in William calling Ann a whore while offering friendship to John despite the fact that both were caught. The Lord Ordinary, however, declared both defenders guilty by awarding William a divorce, but a payment of £100 in damages from John rather than the £500 requested in the summons.

Thirdly, the case studies also show that a wife's infidelity would be less tolerated, or subject to the double standard, for the fear of illegitimate children. Of the 65 cases examined, 23 pursuers complained their spouse had at least one illegitimate child. Fifteen of the 23 were female defenders, and eight of the 23 were male. Though there were more adulterous wives with illegitimate children, only five of those fifteen women ended up in a cohabiting relationship with their paramour. All of these women were separated from their husbands, but they did not end up (at least according to the case documents) living with the father of their child—it was possible that the paramour withdrew his affections and deserted her. In contrast, the number of adulterous husbands who ended up in cohabiting relationships with their paramour after having an illegitimate child was seven out of eight. Again this may reflect the vulnerable position of mothers with illegitimate children; if a man was willing to live in family with a woman and her children she would have most likely accepted this arrangement.

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<sup>78</sup> CS46/1880/10/47 Ramsay v Armit or Ramsay and Weir.

<sup>79</sup> After William caught Ann with John, Ann went to live in Inverkeithing with her family; CS46/1880/10/47 Ramsay v Armit or Ramsay and Weir.

Male anxiety over adulterous wives is attributed to the issue of inheritance.<sup>80</sup> From the mid-eighteenth to mid-nineteenth century the shift from wealth in the form of land to capital meant that, '[a]dultery by the wife now created a potentially wider and more threatening horizon of both legitimate and spurious family claimants.'<sup>81</sup> However, examples of illegitimacy from the nineteenth century outline inheritance as an issue for families with wealth to pass on.<sup>82</sup> For the working-class or impoverished family illegitimacy was seen as an extra mouth to feed or a potential burden on the local parish.<sup>83</sup> Furthermore, illegitimacy was perceived as 'a sign of social and moral disintegration' by 'moralizers'.<sup>84</sup>

### *Patterns of Adultery: Separation for Work*

The absence of a spouse and subsequent infidelity was a common pattern found in this study. In the CS sample 49 of the 65 cases were instigated by the husband. 18 per cent of the 49 husbands alleged that their wives slept with other men while they were working away from home. As seasonal occupations and migrating work was not uncommon for working-class men, it was not unusual to find a husband away from home for long periods of time. Suits against husbands for adultery committed while working away from home were rarer as, among other things, there was no one keeping tabs on their behaviour. Wives, on the other hand, were not given the same privacy. It was more difficult to hide an adulterous affair committed by a wife as she was often under the watchful eye of neighbours and family.<sup>85</sup> If the woman became pregnant the community would immediately suspect adultery aware of the husband's absence.

Such was the case for Margaret Paterson or Macallan, who was subject to local gossip and disapproval in the absence of her husband. Margaret, a domestic servant before her marriage, and her husband William, an engineer, moved from Campsie where they married in July 1863 to Dumbarton. They lived in Dumbarton together as man and wife with two children until May 1866 when William's employers Messers Denny and Company sent

<sup>80</sup> Vogel, 'Whose Property?', pp. 161-163; Holmes, 'The Double Standard', pp. 604-605.

<sup>81</sup> Gibson, *Dissolving Wedlock*, p. 38.

<sup>82</sup> Ginger Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England*, (Manchester, 2008), pp. 23-26.

<sup>83</sup> Lynn Abrams' study of orphans in Scotland distinguishes illegitimate children as one of the most vulnerable groups in poor communities stating that their support systems were unstable and varied, but single mothers of illegitimate children often fell back onto poor relief. This dependency came to be seen as an extra expense by a resentful community; Lynn Abrams, *The Orphan Country: Children of Scotland's Broken Homes from 1845 to the Present*, (Edinburgh, 1998), pp. 11-12. See also Phillips, *Putting Asunder*, p. 351.

<sup>84</sup> Gillis, *For Better, For Worse*, p. 128; Weeks, *Sex, Politics, and Society*, p. 22.

<sup>85</sup> Abrams, 'Whores, Whore-Chaser, and Swine', p. 274; Bailey, *Unquiet Lives*, pp. 156-157.

him to work for the Peninsular and Oriental Steam Navigator Company's steam ship 'Avoca' as an engineer on a voyage to Bombay, India for three years. While William was away Margaret took in two male lodgers. In the summer of 1868 she became noticeably pregnant and gave birth to an illegitimate child in October 1868, the father being one of the lodgers, a married man named Thomas McLean. Most of the proof against her came from neighbours and members of the Dumbarton community. Mrs. Mary Vallance, a mid-wife and a neighbour also living on High Street, Dumbarton stated: '[i]n the summer of 1868, I observed that she was in the family way; it was quite visible to be seen. I thought it was not nice to see her in that way, when her husband was absent. I knew that he had been away from home for more than a year; and that drew my attention to her condition more than it would otherwise have been. I did not speak about it to the neighbours at the time; but I mentioned to a party that I thought there was something wrong with her, and I was not pleased about it.'<sup>86</sup> Another neighbour Mrs. Baxter or Fleming included in her testimony that the pregnancy of Margaret Macallan was well known and attributed to bad behaviour: '[t]hat was very much spoken about among the neighbours, because it was known that her husband was away. I heard Mrs. McPhail speak about it. During the pursuer's absence, I have seen Mrs. Macallan carrying articles to the pawn. She became of dissipated habits.'<sup>87</sup> Mrs. Ann Barry, a woman who lived below Margaret on High Street, stated: '[w]hile I was living there, Mrs. Macalan was delivered of child. That was quite well known among the neighbours. I had previously noticed that she was in the family way. The fact of her having a child caused a good deal of talk, in consequence of her husband being abroad.' And Mrs. McPhail or Lavery ended her deposition by stating, '[i]t was the talk among the neighbours.'<sup>88</sup> A local doctor in Dumbarton also testified on behalf of the husband, stating in his deposition that he saw Margaret in the summer of 1868 and observed she was 'in the family way'. He then told Mrs. Vallance to keep a watch on Mrs. Macallan, and in the beginning of November, after the child was born, 'mentioned the matter' to Mr. Mackay the Superintendent of the Burgh Police of Dumbarton. Mr. Mackay (another witness), following a report that Mrs. Macallan might have 'made away with the child', went to Mrs. Macallan's home looking for the child, but instead found her across the street in the home of Thomas McLean with his wife who had since moved to Dumbarton. For an unexplained reason, Mrs. Macallan had moved into the McLean's home and had given birth there, assisted by the unaware Mrs. McLean. The child

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<sup>86</sup> CS46/1870/12/54 1870 Macallan v Paterson or Macallan.

<sup>87</sup> CS46/1870/12/54 1870 Macallan v Paterson or Macallan.

<sup>88</sup> CS46/1870/12/54 1870 Macallan v Paterson or Macallan.

remained in the McLean's home after Mrs. Macallan moved back across the street, and died aged six months.

There were notable similarities between the nine cases of adultery during separation for work. Firstly, all the couples were working class. Secondly, all the couples had only been married a short time before the husband went away, and in most instances the length of time apart was longer than the length of time they cohabitated. For instance, Archibald White and his wife Helen McLean married in July 1847 and lived together until May 1848 where after her husband left for thirteen months to work as a ship steward.<sup>89</sup> Thomas Needham and his wife Agnes Reid were only married two and a half months before Thomas was called away to join a ship in the Royal Navy as an engineer in December 1877, he remained away for two years.<sup>90</sup> Thirdly, in all the marriages where the husband left within two years of their marital union the couple had no legitimate children. Only two couples who lived together for three years before their separation had children. Lastly, in all the cases but two, the defender had given birth to at least one illegitimate child. It was the pregnancy and birth that proved the adultery and led to an immediate separation once the husband returned from his employment. Matthew Marshall wrote in his complaint against his wife Margaret Patterson, that upon discovering his wife had given birth to an illegitimate child while he was working in Argentina, 'the present action has been rendered necessary.'<sup>91</sup>

This form of adultery was also more likely to be a one-time encounter or a brief affair rather than develop into a cohabiting relationship. For example, Elizabeth Cairncross, wife of James Webster, gave birth to an illegitimate son while her husband was away at sea. Witnesses for the pursuer, neighbours in Broughty Ferry, stated they thought the father of the child was a tide waiter or preventive man, and one stated that Elizabeth, 'often said she was sorry for having fallen into the mistake.'<sup>92</sup> There was one case where an affair did develop into a cohabiting relationship. Annie Inglis or Brewster had an affair with a man while her husband was in British Burma. The Brewsters lived in Madras for three years stationed with Colonel Brewster's regiment, until he and the regiment were ordered to Burma. Annie returned to Scotland alone out of concern for her health. Within six months she moved to London, all the while keeping correspondence with Brewster until September 1868. In October Annie secretly returned to Madras to live with John Dawson Mayne, a

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<sup>89</sup> CS46/1850/3/43 White v McLean or White.

<sup>90</sup> CS46/1880/1/99 Needham v Reid or Needham.

<sup>91</sup> CS46/1880/12/108 Marshall v Patterson or Marshall.

<sup>92</sup> CS46/1870/12/38 Webster v Cairncross or Webster.

barrister she met in Madras after her husband left for Burma and before she returned to Scotland.<sup>93</sup>

Nineteenth-century occupations and economic situations created numerous circumstances that physically separated husband and wife for prolonged periods of time and left both parties vulnerable to extramarital exploits. Maritime occupations put a particularly heavy strain on married couples: firstly, husbands who worked on board ships were repeatedly called away from home for extended periods (sometimes over a year), and secondly, it was a potentially dangerous business where the ship and men could be lost at sea. In one maritime community Lisa Norling found that, '[t]o sustain their relationships over such long separates both [mariners and their wives] were forced to rely on the prescribed ideals of what a wife and husband were supposed to be.'<sup>94</sup> The application of these ideals, however, only worked to sooth the anguish of separation whilst living apart; rarely could the reality of married life measure up. Mariners in general were more likely to be unfaithful as seaman had a 'collective reputation for infidelity.'<sup>95</sup> This sexually promiscuous behaviour of sailors when docked was also evident in Scottish cases. For instance, Leneman and Mitchison found that soldiers and sailors made up a high percentage of illegitimate children's fathers.<sup>96</sup> Sailors seduced married women as well, as was reported in three cases from the CS records, one from 1840 and two from 1880.<sup>97</sup> Another case printed in *The Scotsman* reported a wife had run away with a sailor who bought her presents, 'and [reportedly] said it was a good thing that somebody thought something of her.'<sup>98</sup>

### *Patterns of Adultery: Prostitution*

Another pattern of adultery, and an example of one-night encounters, was prostitution. Only three of the sixteen cases instigated by the wife claimed their husbands committed infidelity with a prostitute. On the other hand, seven out of 49 cases filed by the husband, or fourteen per cent, alleged their wives had committed adultery in the form of prostitution.

<sup>93</sup> CS46/1870/11/37 Brewster v Inglis or Brewster.

<sup>94</sup> Lisa Norling, "'How Frought with Sorrow and Heartpangs': Mariner's Wives and the Ideology of Domesticity in New England, 1790-1880', *The New England Quarterly*, Vo. 63, No. 3 (Sep., 1992), p.435

<sup>95</sup> Norling, "How Frought", p. 436.

<sup>96</sup> Soldiers and sailors made up a high percentage of illegitimate fathers; Leah Leneman and Rosalind Mitchison, *Sin and the City: Sexuality and Social Control in Urban Scotland 1660-1780*, (Edinburgh, 1998), p.89.

<sup>97</sup> CS46/1840/7/64 Nicol v McBeth; CS/46/1880/12/61 Littlejohn v Brown or Littlejohn; CS46/1880/3/118 Dempsey Jr. v Innes or Dempsey.

<sup>98</sup> 'Outer House. Divorce—Robert Arnott v Margaret Balfour or Arnott', *The Scotsman*, Dec 2, 1878, p. 3.

Prostitution, perhaps more obviously than the other scenarios of adultery, reflects how the double standard existed in practice.<sup>99</sup> In particular, more husbands visited prostitutes than the number reported to the CS.<sup>100</sup> Nevertheless, because the majority of adultery divorce cases were filed by husbands against their wives, there are more examples of wives accused of prostitution than husbands using prostitutes. Furthermore, as mentioned earlier, women who had sex outside of marriage faced greater criticism and stigmatisation than men. This applied to the labelling of women as prostitutes. Littlewood and Mahood found that ‘the manner in which reformers used the term “prostitute” was highly variable and vague’.<sup>101</sup> A surgeon from the Lock Hospital is quoted by them as saying that the women at the hospital ‘were all “prostitutes of one kind or another, that is to say they were women consorting with more than one man.”’<sup>102</sup>

According to Judith Walkowitz’s in-depth studies of prostitution,<sup>103</sup> only a minority of prostitutes fell into the stereotype of abandoned or widowed women seeking to support their children.<sup>104</sup> While there are some similarities between Walkowitz’s findings on prostitutes in London, the wives accused of prostitution from the CS cases do not fit the overall trend. Most notably, the wives were not young, single girls who lacked other options. If a married woman did in fact turn to prostitution it would have been for different reasons than her ‘fallen’ sisters, although, the underlying cause was the lack of opportunities for any women to earn a self-supporting and sustainable income. One reason according to the CS cases was alcohol. Four husbands claimed their wives infidelity followed her taking up intemperate and dissipated habits. In consequence of that disreputable behaviour the couple separated, and after the separation the wife began her adulterous escapades. Daniel Nicol, shoemaker in Kirkgate Leith, stated in his complaint that his wife Christian McBeth or Nicol:

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<sup>99</sup> For instance, those who opposed the Contagious Diseases Acts of the 1860s highlighted the application of the double standard in punishing the women accused of being prostitutes but not the male clients who paid for them; Littlewood and Mahood, ‘Prostitutes, Magdalenes and Wayward Girls’, p. 163.

<sup>100</sup> Clark, ‘Twilight Moments’, p. 159.

<sup>101</sup> Mahood and Littlewood, ‘Prostitutes, Magdalenes and Wayward Girls’, p. 162. See also, Clark, ‘Twilight Moments’, p. 157.

<sup>102</sup> Mahood and Littlewood, ‘Prostitutes, Magdalenes and Wayward Girls’, p. 162.

<sup>103</sup> See Judith R. Walkowitz, *Prostitution and Victorian Society: Women, class and the state*, (Cambridge, 1980); and Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London*, (Chicago, 1992).

<sup>104</sup> The majority of women who became prostitutes were girls in their late teens, local to the area they worked in, orphaned, single, possibly trained as casual maids, and already sexually experienced with a man from their same social class. She also argues most of the clientele for prostitutes were men of the working class, which caused some prostitutes and clients to form long-term relationships; Walkowitz, *Prostitution and Victorian Society*, p. 18-19.

estranged herself from his house and society, and has deserted her infant children and has addicted herself to vicious and dissolute habits... frequently absent from the Complainers House in Kirkgate Leith during the whole night, and was sometimes so absent for four or five nights in one week; and when thus absent walked the street at untimeous hours under night as a common prostitute, and had adulterous intercourse with other men, and returned to the Complainers House in the morning, generally in a state of beastly intoxication.<sup>105</sup>

Some wives may have been pushed towards this lifestyle due to drink, an unhappy marriage, separation from their husband and a need to self-support.<sup>106</sup> Mary Innes or Dempsey, who answered her husband's summons of divorce charging her with living in a brothel as a prostitute and then entering the workhouse pregnant with an illegitimate child and syphilis, denied infidelity claiming that she left him due to 'illusage and misconduct'. She denied that she lived in a brothel, and claimed that she had feigned pregnancy in order to get admittance to Glasgow's workhouse, Town's Hospital. Once admitted she was found to have contracted syphilis—more proof of her immorality according to her husband and his lawyers—however Mary stated she had contracted the venereal disease from her husband while they still were still living together. Although the Lord Ordinary granted the divorce in favour of her husband, Mary's story of pretending to be pregnant to enter Town's Hospital evokes images of desperation.<sup>107</sup>

The case of Henry Seton, a riding master in Edinburgh, and his wife Ann Elliot also suggests a more complicated marital breakdown than put forward in Henry's complaint. He accused his wife Ann of committing adultery with at least three men only three months after their wedding. Witnesses testifying on his behalf labelled her a prostitute, working in brothels and socialising with other prostitutes. However, it was revealed by Mrs. Mary Bell, a reputed brothel owner, that Henry had met Ann at Mrs. Bell's house:

I know Mr. Seton very well. I would scarcely ever let him into my house. The girls used to go up to Mr. Seton's School every day. I remember of him visiting Mrs. Seton in my house before her marriage to him. The first time she saw him was at the school. He never stayed all night with her in my house that I remember of. I cannot remember of their ever being in bed together in my house before their marriage, as he never had any money. I do not think that he was more than twice or thrice in my house asking for her before the marriage.<sup>108</sup>

<sup>105</sup> CS46/1840/7/64 Nicol v McBeth.

<sup>106</sup> Walkowitz argues, however, that it is not possible to narrow down the reasons for going into prostitution, let alone the effect the lifestyle had on women: 'prostitutes were still not free of male domination, but neither were they simply passive victims of male sexual abuse'; Walkowitz, *Prostitution and Victorian Society*, p. 31.

<sup>107</sup> CS46/1880/3/118 Dempsey Jr. v Innes or Dempsey.

<sup>108</sup> CS46/1870/3/113 Seton v Elliot or Seton.

Even though Seton attempted to remove Elliot from a life of prostitution by marrying her, she quickly returned. But, another witness disclosed that Ann may have gone back to prostitution because Henry had deserted her: she stated, '[Ann] told me that [Henry] had left her, and that as soon as he came back she was going to be divorced from him.'<sup>109</sup>

Yet, other wives, appeared less innocent. Such as Clementina Currie, wife of James Fleming, who deserted him after less than a month of marriage. She was caught months later having sex with a local man named Bowman for money in a public field of Brechin. Clementina provided no defences, leaving witness testimonies to explain the charges. For instance, one witness stated:

[Witness] took [Bowman] by the privy parts and said it was a shame for him to have connection with any mans wife who had a wife of his own, Some of the rest of them asked [Bowman] for money calling it Bull Money... [Clementina] damned Bowman for some money which she said he had promised her.<sup>110</sup>

### *Patterns of Adultery: Adulterous Cohabiting Relationships*

While the scenarios listed above probably occurred more frequently than reflected in the CS sample, undoubtedly, the most common pattern of adultery found in the CS cases was cohabiting relationships. Of the 65 cases filed by husbands and wives, 33 of the defenders ended up in a cohabiting relationship with their paramour. In some cases they were short term relationships, but the majority were long term. Sixteen cases were filed by the wife on the ground of adultery, eleven of which claimed their husbands were living in a cohabiting relationship. 22 of the 49 cases where the husband was the pursuer claimed the wife was living in a cohabiting relationship.

The number of adulterous couples who ended up living together demonstrates an overall interdependency of men and women, and particularly husbands and wives. Phillips points out in relation to eighteenth-century western civilization that, '[t]he economic interdependence or dependence of husbands and wives, the difficulties involved with making a living outside marriage, the presence of children—these and other variables could effectively lock husbands and wives into marriage.'<sup>111</sup> Using remarriage rates of widows and widowers Phillips argues, '[t]he need to restore the family economy quickly

<sup>109</sup> CS46/1870/3/113 Seton v Elliot or Seton.

<sup>110</sup> CS46/1850/3/16 Fleming v Currie or Fleming.

<sup>111</sup> Phillips, *Putting Asunder*, p. 362.



can be discerned in the hasty remarriages that were characteristic of traditional western society.’<sup>112</sup> Although Phillips is not writing about adulterous cohabitation, seemingly a husband or wife separated from their spouse would seek another partner to restore that interdependent relationship, whether for love or economic stability.

Under this context then, what appeared to be an episode of adultery may have in reality been a case of a deserted spouse needing to re-establish a home with economic benefits in order to avoid destitution, the workhouse or even prostitution. For instance, David Scott, a grocer in Dundee, claimed his wife was intemperate causing him to separate from her. Scott moved to France leaving his wife with his brother and an aliment to support her. Even after he left, David claims his wife continued her bad habits, left the home of his brother and began an adulterous cohabiting relationship with a man named John Anderson. Mary Ann Miller or Scott denied the charges of adultery stating in her defences that her husband deserted her when he moved to France and only sent aliment at the beginning of his absence. When the money stopped she took a job with Anderson, a wright and widower in Stobwell, as a washer and mender of clothes for Anderson and his son.<sup>113</sup> The pattern of Maria Merritt or Davis also serves as an example of a separated wife’s reliance on adulterous cohabitation. Her husband William Davis, weaver in Hawick, claimed that his English wife left their home in Dumfries, Scotland, voicing her desire to return to England. Since leaving, she had supposedly lived in three adulterous cohabiting relationships with unknown men. A witness for the pursuer, testified Maria had returned to Trowbridge and had a child with a John Taylor who then died. After his death she moved in with a man named James Eve posing as his wife until his death around 1873. At the time of the trial she was reportedly living with another man named Watts, and her fourteen year old son from Taylor, again posing as his wife. Another witness from Trowbridge claimed he had only learned a fortnight before his testimony at the trial that Maria and Watts were not married.<sup>114</sup>

Husbands also demonstrated a dependence on conjugal unions for daily survival. In England, Frost found that, ‘working-class men without wives had to either break up the home, sending their children away, or take on a housekeeper, who frequently became a de facto wife.’<sup>115</sup> A blatant example of this dependency can be seen in the letter to the Lord Ordinary written by Hugh Crawford Gunning, defender in a divorce case. His defence for

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<sup>112</sup> Phillips, *Putting Asunder*, p. 367, 369.

<sup>113</sup> CS46/1860/3/98 Scott v Miller or Scott.

<sup>114</sup> CS46/1880/12/103 Davis v Merritt or Davis.

<sup>115</sup> Frost, *Living in Sin*, p. 112.

leaving his wife and living with another woman as stated in the letter was his need for a 'partner capable of conducting whatever little means and support I required'.<sup>116</sup> Mary Paterson or Coutts' husband John replaced her, after Mary left him due to maltreatment, with a woman who posed as his 'housekeeper or companion' while living in an adulterous cohabiting relationship with him in Aberdeen.<sup>117</sup> James Littlejohn blamed his wife's bad habits as the cause of their separation and her subsequent adultery, and that in consequence he was 'obliged to break up his household, and go into lodgings, his children being boarded out by him.'<sup>118</sup>

Though the interdependence discussed by Phillips may have originated with the family economy of the eighteenth century, men and women continuously relied on cohabiting relationships despite the nineteenth-century's economic shifts that separated work from home, especially for men. John Gillis argues that this need for a female partner was still an issue after the turn of the century.<sup>119</sup> Working-class wages, seasonal demands and lack of full time work for married women meant working-class men and women were more reliant on one another for survival. If a marriage failed a second, and safer option than bigamy, was adulterous cohabitation.<sup>120</sup> The testimony of neighbours in the divorce case of William Mitchell against his wife Margaret revealed that Margaret had since her separation from her husband been living together with a married man whose wife had left him eight or nine years prior. He was a shoemaker and Margaret unemployed. Without a husband to support her Margaret created an affinal union with a man who also needed the domestic support.<sup>121</sup>

Adulterous cohabiting relationships were also a product of affection and companionship. It would be wrong to assume adulterous couples did not build homes together out of love. However, based on the CS divorce cases there does appear to be a class difference between those who cohabited out of love and those who cohabited out of necessity. While the cases discussed above were mostly working-class men and women, examples of adulterous cohabiting couples who ran away together involve parties with more wealth. For instance, Henry Douglas McMurdo an esquire and collector of customs in Glasgow charged his wife with adultery and desertion claiming she ran away with a stranger she met when they moved to Toronto, Canada. McMurdo's wife Jane, the daughter of an esquire

<sup>116</sup> CS46/1840/6/70 Lindsay or Gunning v Gunning.

<sup>117</sup> CS46/1870/7/107 Coutts v Coutts.

<sup>118</sup> CS46/1880/12/61 Littlejohn v Brown or Littlejohn.

<sup>119</sup> Gillis, *For Better, For Worse*, pp. 303-304.

<sup>120</sup> Lynn Abrams, 'Concubinage, Cohabitation and the Law: Class and Gender Relations in Nineteenth-Century Germany', *Gender & History*, Vol. 5, No. 1 (Spring, 1993), pp. 81-100, pp. 88, 92-93.

<sup>121</sup> CS46/1840/3/161 Mitchell v Mitchell.

and writer to the signet in Edinburgh, used the opportunity of her husband being away on business to abandon him and runaway with an Englishman she met at the British Lodging and Coffee House where she and McMurdo were staying. During the absences of her husband for work Jane, according to witnesses, had developed ‘a great intimacy’ with Francis Walker. Though no occupation was given for Walker, the adulterous couple ran away together in 1833 and over four years later witnesses in Canada testified they were still living together as husband and wife.<sup>122</sup> Thomas Edward Gordon, Captain in Her Majesty’s 14<sup>th</sup> Regiment of Dragoons also lost his wife to another man as the result of a hidden affair. While attending a ball in Bridge of Allan, Stirlingshire, Agnes Hunter or Gordon disappeared from the sight of her husband, mother and friends. It was discovered by morning that Agnes had fled with her lover, a Captain in Her Majesty’s 71<sup>st</sup> Regiment of the Line (Highlanders), from the ball to begin a life of adulterous cohabitation. After hiding out in guest houses in Scotland, they supposedly moved to Hanover Square in London taking an apartment with ‘two drawing rooms, on the first floor, and bedroom and dressing room on the second floor.’<sup>123</sup>

### *Bigamy*

Bigamy does not fit as neatly in this context as it was in fact a criminal offense and grounds for declaring the second marriage null.<sup>124</sup> Yet, for the spouse from the first marriage it was grounds for divorce as proof of bigamy implied adultery and desertion. Bigamy is the act of entering into a second marriage contract when a first and valid marriage had already taken place and the first spouse was still living.<sup>125</sup> Police statistics on criminal offenses illustrate that it was not a commonly reported crime in nineteenth-century Scotland: from 1874 to 1876 the average number of bigamy offenses known to the police was 11, and by 1910 that number had only risen to 27.<sup>126</sup> In the CS cases only four charged the defender with entering into a bigamous marriage, one from 1840 and three from 1850.

Like the majority of the cases, the four couples that mentioned bigamy in their complaint were all part of the working class.<sup>127</sup> From the four, two pursuers were female and two

<sup>122</sup> CS46/1840/11/58 McMurdo v Lockhart.

<sup>123</sup> CS46/1860/2/40 Gordon v Hunter or Gordon.

<sup>124</sup> Walton, *A Handbook of Husband and Wife*, p. 11.

<sup>125</sup> Clive, *Law of Husband and Wife*, pp. 374-375.

<sup>126</sup> PP 1878-79 [C. 2332] (Part X), *Miscellaneous Statistics of The United Kingdom*, p. 86; PP 1911 [Cd. 5981] *Report on the Judicial Statistics of Scotland for the Year 1910. Statistics relating to police apprehensions—criminal proceedings—prisons—reformatory and industrial schools—criminal lunatics, etc. Also to business done in the courts of civil jurisdiction, and in judicial and other public offenses*, p. 30.

<sup>127</sup> Bigamy was seen as more common amongst the working class; Frost, *Living in Sin*, p. 77.

were male. Only one defender, a wife, had given birth to an illegitimate child as a result of her adultery.<sup>128</sup> All four couples had been separated before the adultery and subsequent bigamy took place. Three of the four cases were uncontested. Of the defenders who did not answer to their summons: one husband was thought to be living outside of Scotland; the wife who had an illegitimate child and married her paramour the same month gave no response; and the third husband, William Crerar, was imprisoned in Perth. He was arrested two years after his bigamous marriage, absconded when out on bail, apprehended after two years of hiding, and as of 1849 was sitting in prison during the divorce proceedings.<sup>129</sup>

The Lord Ordinary granted a divorce for all four complainers. Though it is not completely clear, it seems likely that all four pursuers found out about their spouses' second life through the bigamous marriage union. As the couples were all living separately the pursuers may have remained unaware of the adultery if they had not been notified of the second marriage. For instance, Margaret Moodie or Crerar's complaint suggests she learned about William remarrying through his arrest on the charge of bigamy.<sup>130</sup> John Dickson may have been informed that his wife remarried by their daughter who was forced to participate in her mother's wedding ceremony.<sup>131</sup>

Bigamy was one of the only criminal offenses directly tied to marriage, and thus was an arrestable offense. Concerning Scotland, Boyd argues there were fewer cases of bigamy (along with seduction and divorce for adultery) in Scottish courts than English due to the 'absence of irregular marriage in English law.'<sup>132</sup> Equally criminal in England, Ginger Frost found that though underreported the number of bigamous marriages recorded were substantial considering the law. For example, in the 1850s she found an average of 85 bigamous marriages per year, and 103 in the 1890s.<sup>133</sup> It was possible that the fluidity of Scottish marriage also lent itself to avoiding charges of bigamous relationships as people could argue over the definition of marriage, although it could also be argued that irregular marriage made bigamy more likely in Scotland.<sup>134</sup>

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<sup>128</sup> CS46/1850/3/44 Wallace v Watt or Wallace.

<sup>129</sup> CS46/1850/3/99 Moodie or Crerar v Crerar.

<sup>130</sup> CS46/1850/3/99 Moodie or Crerar v Crerar.

<sup>131</sup> CS46/1840/11/17 Dickson v Scott or Dickson.

<sup>132</sup> As argued in the previous chapters, there were several reasons for a lower divorce rate in Scotland than England; specifically, the larger population in England directly affected the disparate numbers; Boyd, *Scottish Churches*, p. 60.

<sup>133</sup> Frost, *Living in Sin*, pp. 72-73.

<sup>134</sup> For a discussion of irregular marriage and its popularity in the nineteenth century, see, T. C. Smout, 'Scottish Marriage, Regular and Irregular, 1500-1940' in R. B. Outhwaite (ed.), *Marriage and Society: Studies in the Social History of Marriage*, (London, 1981), pp. 204-236. See also the forthcoming article, Eleanor Gordon, 'Irregular Marriage: Myth and Reality' *Journal of Social History*, Winter Volume, 2013.

Studies of bigamy, in particular Frost's *Living in Sin*, found some patterns that are unavailable through the CS analysis. Using bigamy criminal cases Frost found there was a high rate of conviction; however the juries were more likely to convict male defendants (though men were over-represented), and convicted women received lighter sentences. Still, the punishments in general were 'mild' according to Frost, and they were getting more so towards the end of the century.<sup>135</sup> A look through nineteenth-century Scottish newspapers revealed more reports of English bigamy trials than native. The few cases found tried in Scottish criminal courts show a range of imprisonment terms, from a one year sentence in 1844, to a husband and wife both being charged in 1872, where the husband received a three month term and the wife was given six months.<sup>136</sup> The longest sentence was eighteen months given to a repeat offender.<sup>137</sup> It appears that the judges did not have a set length of imprisonment for bigamists; when it was seen fit they offered leniency, such as in an 1880 trial where the husband charged with bigamy pled guilty but stated for his defence that he and his first wife had been living separately for five years. He was sentenced to four months imprisonment.<sup>138</sup>

### **The Adulterous Spouse and the Paramour**

Another pattern discernible through the adultery cases is the nature of the relationship between the adulterous spouse and the lover, legally called the paramour. Other studies of adultery suggest that wives were more likely to take a lover of the same social class, whereas husbands would often have an affair with a social inferior. This was not a set rule, however, and there were many variations.<sup>139</sup> In this study the majority of paramours were social equals, although the men and women chosen as lovers ranged from stranger to employee to servant to neighbour.

### ***The Prostitute***

As shown in the discussion on prostitution, one potential partner to a husband's extra-marital affairs were prostitutes. Presumably these women were of the same or lower status

<sup>135</sup> Frost, *Living in Sin*, pp. 73-74.

<sup>136</sup> 'Bigamy', *Dundee Courier*, 9 January 1844; 'Husband and Wife Both Convicted of Bigamy', *Dundee Courier and Argus*, 27 December 1872.

<sup>137</sup> 'Extraordinary Case of Bigamy at Hamilton', *Dundee Courier and Argus and Northern Warder*, 6 Jun 1878.

<sup>138</sup> 'Glasgow Bigamy Case', *Dundee Courier and Argus and Northern Warder*, 29 June 1880.

<sup>139</sup> See Leneman, *Alienated Affections*, pp. 18-19, 157-173;

as the husband. Of the sixteen cases filed by wives, three charged their husbands with hiring prostitutes. Only one of these three men, however, committed adultery with prostitutes and no other women according to the evidence: Robert Shrivall waited until his wife was away in London to visit the house of Mrs. Melville in Edinburgh commonly known as a house of bad fame.<sup>140</sup> The other two husbands slept with several women, some of whom were prostitutes. Due to the need to only prove one incident of adultery to request a divorce, it is impossible to know how many times these men visited brothels. Furthermore, the low number of husbands accused of hiring prostitutes is unrepresentative of the true number, but more likely reflects the tolerance of society (and wives) to men and husbands engaging in extramarital sex.

### *The Stranger*

Female defenders were most commonly accused of having an adulterous relationship with men who would appear to have been strangers to the pursuer. These were men the wives met through separate activities from their husbands. Though not much information is available on how the defender and paramour met, one pattern cited by several husbands was that the wife met her paramour due to her ‘dissipated’ or ‘intemperate’ habits. For example William Brodie, a searcher of public records in Edinburgh, complained of his wife that, ‘after [their] separation the defender’s habits of dissipation continued, and she had carnal and adulterous connection, intercourse and dealings with several men other than the pursuer’.<sup>141</sup> These wives, labelled as drunkards and neglectful of their marital duties, were damaging their reputation, and their families’. On the other hand, wives who may have considered themselves more respectable were more likely to begin adulterous relationships with someone known to the family.

### *The Friend*

Thus the second most common paramour for the wife (though not as frequent as strangers) was a friend of the family. This person also tended to be a social equal. John Weir and Ramsay, for instance, were friends who dined at each other’s homes with their wives.<sup>142</sup> William Wilson claimed the man his wife ran away with had been an intimate friend of

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<sup>140</sup> CS46/1840/2/90 Lindsay or Shrivall v Shrivall.

<sup>141</sup> CS46/1870/7/99 Brodie v Alexander or Brodie.

<sup>142</sup> CS46/1880/10/47 Ramsay v Armit or Ramsay and Weir.

hers for years.<sup>143</sup> Alexander Macalister, Esquire of Torrisdale, was a friend of Keith and Mary Macalister, Esquire of Glenbarr, and may have even been a cousin of Keith.<sup>144</sup> This closeness allowed Alexander and Mary to sleep in each other's homes without suspicion until Mary left Glenbarr and moved into Torrisdale to live in 'open and notour adultery'.<sup>145</sup>

### *The Servant*

The next most common paramour was a servant to the family, and most markedly a social inferior. Both husbands and wives were accused of committing adultery with a servant: four husbands and three wives. Historical assessments of female servants placed them as one of the most at risk groups for sexual exploitation, as they were predominantly single girls deprived of parental or communal supervision.<sup>146</sup> Their minimal wages and lack of trade or skill increased their vulnerability if impregnated and dismissed from service.<sup>147</sup> Studies of illegitimacy show high numbers of servants as mothers in England and Scotland.<sup>148</sup> However, the majority of the fornication that resulted in pregnancy for these girls was with a male servant or with men of the same social class.<sup>149</sup> The records indicate that it was far rarer for a servant to develop a sexual relationship with their master or mistress than presumed.<sup>150</sup> Still, this did not diminish the susceptible position servants were in if employed by a sexually aggressive master or mistress.

As found in the CS records, masters did sometimes engage sexually with their female servants. This was a particularly problematic situation as the master was in a position of power and authority; it was probable that some female servants were forced into having sexual relations.<sup>151</sup> The testimony of other domestic servants in the home of the Davidsons, for instance, painted a picture of an abusive husband whose wife was scared of him, and who forced inappropriate intimacy with one of his young female servants.<sup>152</sup>

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<sup>143</sup> CS46/1850/3/108 Wilson v Love or Wilson.

<sup>144</sup> This was the only example of a paramour being a family member in the Court of Session cases; CS46/1850/3/152 Macalister v Campbell or Macalister.

<sup>145</sup> CS46/1850/3/152 Macalister v Campbell or Macalister.

<sup>146</sup> Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, (London, 1977), p. 642, 646.

<sup>147</sup> Stone, *Family, Sex and Marriage*, p. 646; Gillis, *For Better, For Worse*, p. 175.

<sup>148</sup> In his article Gillis cited a survey from 1883, 'of ten thousand unwed mothers in Scotland [that] found forty-seven percent to be servants'; John Gillis, 'Servants, Sexual Relations and the Risks of Illegitimacy in London, 1801-1900', in Newton, Ryan and Walkowitz (eds.), *Sex and Class in Women's History*, (London, 1983), p.116. In eighteenth-century England and France high rates of illegitimacy were attributed to unmarried women in positions such as domestic service; Stone, *Family, Sex and Marriage*, pp. 642-643.

<sup>149</sup> Stone, *Family, Sex and Marriage*, p. 642; Gillis, *For Better, For Worse*, pp. 174-175.

<sup>150</sup> Gillis, 'Illegitimacy in London', p. 132; Walkowitz, *Prostitution and Victorian Society*, p. 18.

<sup>151</sup> Leonore Davidoff, 'Class and Gender in Victorian England', in Newton, Ryan and Walkowitz (eds.), *Sex and Class in Women's History*, (London, 1983), pp. 27-28.

<sup>152</sup> CS46/1860/7/8 Davidson v Davidson.

Then again, as Bailey points out, not all servants ‘were victims.’<sup>153</sup> There was the possibility of mutual affection developing between master and servant. Stone and Gillis’ argue that servants mostly formed intimate relationships with men of their own class.<sup>154</sup> Frost likewise asserts that there was an issue for masters who attempted affectionate relationships with poor servant girls; whether that was disapproval from the man’s family, or the chance that the girl was using the man as a means to better her own situation.<sup>155</sup> Whether or not a servant willingly participated in adulterous connections with a married master or mistress, the chances of being placed in such a predicament would have been increased by any marital problems between the master and mistress, particularly troubles with conjugal relations.<sup>156</sup> This appears to have been the case for Agnes Callander and her husband William Boyd. Her suit for divorce complained, ‘the defender treated the pursuer with great indignity and cruelty. He frequently struck her and ordered her to leave his house’, which she eventually did. After Agnes left William began a cohabiting relationship with his servant Alison McBryde. From 1854 to the trial in 1869 William and Alison had lived together and had three illegitimate children.<sup>157</sup>

In contrast to masters who impregnated their servants, Stone suggested it was slightly easier for a manservant to have relations with his mistress because she could ‘presumably’ pass an illegitimate child off as legitimate.<sup>158</sup> Except that would have required the master and mistress to have an active married sex life, which the cases found did not exhibit. Of the wives who allegedly became intimate with male servants, their relationships appeared to have grown into a companionship if not love. Thomas Cassels, a farmer and contractor in Galahill, stated in his complaint that his wife Jane Boreland had been impregnated by Robert Templeton, one time a servant to the Cassels, and that ‘she has admitted and declared to various persons at sundry times and places that the said Robert Templeton and no other is the father of said child, and that she is resolved to live with and follow the fortunes of the said Robert Templeton wherever he may go.’<sup>159</sup> William Hardie’s wife Mary Scott also left the home of her husband, only to be quickly followed by their manservant William Martin. Mary was already pregnant by Martin, and at the time of the trial she had had two children with him and was living in family ‘furth of Scotland’.<sup>160</sup>

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<sup>153</sup> Bailey, *Unquiet Lives*, p. 146.

<sup>154</sup> Stone, *Family, Sex and Marriage*, p. 642; Gillis, *For Better, For Worse*, p. 174.

<sup>155</sup> Frost, *Living in Sin*, pp. 154-155.

<sup>156</sup> Stone, *Family, Sex and Marriage*, p. 642.

<sup>157</sup> CS46/1870/2/34 Callander or Boyd v Boyd.

<sup>158</sup> Stone, *Family, Sex and Marriage*, p. 642.

<sup>159</sup> CS46/1860/10/19 Cassels v Cassels.

<sup>160</sup> CS46/1850/7/67 Hardie v Scott or Hardie.



## *The Employee*

For upper-working class or middle-class couples, their homes were also gathering points for employees of the pursuer or defender. Apprentices and employees were also sometimes members of the household, and therefore regularly in the company of their employer's family.<sup>161</sup> Apprentices, or employees, living with their employer were more common in the early modern centuries in Britain.<sup>162</sup> By the nineteenth century live-in employment was mainly present in rural areas, particularly farms. Stone argues that the newly developing desire for privacy was evident in the division of employers and employees in the eighteenth century.<sup>163</sup> One contributing factor to this separation may have indeed been the potential for infidelity living in such close quarters.<sup>164</sup>

Of the 65 cases, three wives and one husband allegedly had sexual relations with people in their employment other than servants. Mary Rice, wife of Robert Hamilton, shoemaker in Catrine, after seventeen years of marriage ran away with James Nimms, also a shoemaker, to Glasgow where they began a cohabiting relationship in 1840. James had for about three and a half years prior been living in Robert's shop, which was in the Hamiltons' house, as one of his apprentices. Statements from witnesses, another apprentice who stayed with Robert and residents of Catrine, testified that Mary and James had been 'on too familiar a footing with each other' for two years prior to moving to Glasgow.<sup>165</sup> James moved to Glasgow first to become a shoemaker there and Mary followed him shortly afterwards. Robert, upon learning of his wife's cohabitation with James, went to Glasgow to see for himself, taking the other apprentice Robert McClure with him. They found James and Mary living together in a one room, one bed apartment on Ladywell Street. There Robert asked and established in front of witnesses that James and Mary were living together in adultery to which they willingly admitted.<sup>166</sup>

However, the division of work and home was not always enough to prevent infidelity. Margaret Bell or Hunter took advantage of Adam Dickson, a porter or servant to her husband's merchant business in Leith, who would go to the Hunters' family home on business. When her husband was away from the house Margaret used the chance to

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<sup>161</sup> Eleanor Gordon and Gwyneth Nair, *Public Lives; Women, Family and Society in Victorian Britain*, (New Haven, 2003), pp.44-46

<sup>162</sup> Stone, *Family, Sex and Marriage*, pp. 27-29.

<sup>163</sup> Stone, *Family, Sex and Marriage*, p. 255.

<sup>164</sup> Davidoff et al explain this shift was also due to the increasing use of waged day labour; Davidoff et al, *The Family Story*, pp. 103-104.

<sup>165</sup> CS46/1840/6/123 Hamilton v Rice.

<sup>166</sup> CS46/1840/6/123 Hamilton v Rice.

become intimate with Adam.<sup>167</sup> In another case, Mrs. Walker was able to prove that her husband developed a sexual relationship with his shop girl Mary White while working together.<sup>168</sup>

### *The Lodger and Co-Worker*

Lodgers were often part of the nineteenth-century household make-up, and another potential source of an adulterous relationship. Davidoff et al argued that the landlord/lady and lodger relationship was one of a few archetypes of the nineteenth century in England and due to that reality marriages suffered; '[t]he "legitimate" household head might be provoked into jealousy, and a saying of the period claimed that three evils most commonly broke up marriages: selfishness, greed and lodgers.'<sup>169</sup> Such was the case for William McAllan's marriage to Margaret Paterson. It ended when Margaret became pregnant with an illegitimate child while William was away at sea. The father was allegedly one of the men who lodged with Margaret after her husband left for his work.<sup>170</sup> Thomas M'Queen and his wife let rooms to lodgers in Greenock for fifteen years, until 1877 when his wife and one of their lodgers ran off to Grimsby.<sup>171</sup>

Lodgers and servants continued to live in a large proportion of nineteenth-century households. Taking lodgers was a form of employment acceptable for married women as it allowed them to stay at home and keep the house and children.<sup>172</sup> It was difficult for women, let alone wives, to find adequate employment, but unemployment could be devastating for working-class families.<sup>173</sup> Some wives needed to earn a second income.<sup>174</sup> Those wives who were employed out of the home sometimes developed an adulterous relationship with a co-worker. James Forrest, a labourer who worked away from home from Monday to Saturday evenings, stated in his complaint that his wife Elizabeth Alexander, 'having in consequence no sufficient household duties to engage herself in, the

<sup>167</sup> CS46/1840/7/84 Hunter v Hunter.

<sup>168</sup> CS46/1870/6/79 Cornwall or Walker v Walker.

<sup>169</sup> Davidoff et al, *The Family Story*, pp. 180-181.

<sup>170</sup> CS46/1870/12/54 McAllan v Paterson or McAllan.

<sup>171</sup> 'Outer House. (Before Lord Craighill.) Divorce—Thomas M'Queen v. Elizabeth M'Crea or M'Crae or M'Queen', *The Scotsman*, 23 December 1878, p. 6.

<sup>172</sup> Horrell and Humphries identified keeping lodgers as a way for wives to supplement their husbands' income, especially for outworking families; Sara Horrell and Jane Humphries, 'The Origins and Expansion of the Male Breadwinner Family: The Case of Nineteenth-Century Britain', *International Review of Social History*, Vol. 42 (1997), p. 36. See also Jane Humphries, 'Female-headed Households in Early Industrial Britain: the vanguard of the proletariat?', *Labour History Review*, Vol. 63, No. 1, (Spring, 1998), p. 39, where she discusses the importance of lodgers for female-headed households and husband and wife-run households.

<sup>173</sup> Humphries, 'Female-headed Households in Early Industrial Britain', p. 38.

<sup>174</sup> Davidoff et al, *The Family Story*, p. 119.

defender worked during the said period at out door work.’<sup>175</sup> It was at her work that she met and bonded with Patrick Donnelly, a miner or sinker in the same employment. Lodgers’ presence in family homes undoubtedly contributed to the breakdown of some marriages.<sup>176</sup>

### *The Neighbour*

Lastly, another potential paramour for both husbands and wives, but more likely amongst working-class couples, was the neighbour. This relationship was also more likely to develop in a town or city than in rural or agricultural areas. Close living conditions, tight communities, and supportive neighbours allowed intimacies to occur.<sup>177</sup> For instance, Walter Reid suspected his wife of ‘carrying on a criminal intercourse’ with an artist lithographer who lived on the same street in Paris as Walter and his wife. Walter forbade his wife from seeing Jules Cremer, but this resulted in her abandonment and moving in with Jules.<sup>178</sup>

### **Excuses for Adultery: Insight into Scottish lives**

Just as adulterous relationships are complicated and difficult to explain for twenty-first century couples, men and women in the nineteenth century had various excuses for having affairs. From the CS adultery divorce sample a few patterns emerge. Of the 65 cases, only twenty (five of whom were male defenders) provided defences, and sixteen of those twenty defenders denied the charges.<sup>179</sup> Overall, divorce cases were less likely to be contested, presumably because neither party wished to remain in the relationship.<sup>180</sup> On the other hand, if a male co-defender was named in the suit he would usually deny the charges in order to avoid paying damages and expenses. For instance, David Croley, fancy stationer and dressing-case maker of Glasgow, filed for divorce charging his wife Catherine Roberts, governess in Glasgow, and William Geddes Borron, a glass and bottle

<sup>175</sup> CS46/1860/2/63 Forrest v Alexander or Forrest.

<sup>176</sup> In Germany lodgers were viewed as ‘a corrupt and destabilising influence on family life’; Abrams, *Concubinage, Cohabitation and the Law*, p. 86.

<sup>177</sup> See the section ‘The Conditions in which the Urban Poor Lived’ for a discussion of living arrangements in Britain, the United States and France; O’Day, *The Family and Family Relationships*, pp. 226-234.

<sup>178</sup> CS46/1860/6/10 Reid v Reid.

<sup>179</sup> Two of the remaining 16 gave defences for their behaviour claiming maltreatment and failed expectations: one wife admitted in court she had an affair, though her co-defender denied it, and the other case only had defences provided by the co-defender who denied the infidelity and then died before the trial concluded leaving the Lord Ordinary to assoilize the defenders.

<sup>180</sup> Other possible reasons for defenders not contesting a divorce suit may have been that they no longer lived in Scotland; that they could not afford the legal fees of hiring an advocate and responding to the summons; or perhaps they were hiding from the pursuer. For a discussion of contested cases and legal defences used by defenders see Leneman, *Alienated Affections*, pp. 73-86.

manufacturer in Ardrossan, with having an affair, and asked for damages of £2000, and expenses of £300. Catherine did not answer his summons and made no appearance. William did reply, however, and he admitted to carnal connection with Catherine, but claimed David was not entitled to damages because he had shown indifference and cruelty to Catherine, driving her to unofficially separate from him in March 1865, whereafter William and Catherine met through her work as a governess. The Lord Ordinary ruled in favour of David, ordering William to pay £100 in damages and cover the expenses of £115.6s.8d. for all parties in the suit.<sup>181</sup>

The excuses presented in court for adultery, while not capable of justifying their infidelity, provide a unique insight into the home life of nineteenth-century Scotland. Insights come from not only the parties to the action but also from third party witnesses testifying for the pursuer, which were sometimes biased. Still, the testimony from friends, family, officials (such as police and reverends who performed the marriage ceremony), and the landlords and landladies who let out rooms, illuminated the small details that contributed to the marital breakdown. The defence testimony of the defender, though helpful for the accused, was more often than not absent from the case records.

Three general excuses have emerged as factors in the formation of the adulterous relationships: separation of husband and wife; love; and failed expectations.<sup>182</sup> Physical separation occurred for two reasons: either due to migration for employment or an unofficial separation owing to ill treatment or bad habits. It was the leading reason attributed to infidelity. Husbands and wives claimed that while living apart their spouse ‘alienated his/her affections’. Dissipated habits, such as intemperance, led to unofficial, but sometimes mutual, separations. As discussed earlier, the formation of an adulterous cohabiting relationship by separated spouses was sometimes a necessity in consequence of losing their spouses financial support. Agnes Johnstone or Dickson was accused of ‘carnal adulterous conversation intercourse and dealings’ with William Mason, a baker in Duke Street Glasgow, whom she lived with at the time of the trial. In her defences she claimed her husband John Dickson, a wright in Cousland, Midlothian, had treated her ‘with great barbarity’, was addicted to drink, and would abuse her to the point that she left their home. She did not deny living with William, but explained that she worked for him: ‘in order to

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<sup>181</sup> CS46/1880/7/122 Croley v Roberts or Croley and Borron.

<sup>182</sup> Bailey similarly proposed four reasons for adultery in her study of eighteenth-century adultery in England: 1) unofficial separation of house; 2) separation due to employment; 3) difference in age; 4) childlessness. This study, independently of Bailey’s work, has also found separation to be a primary reason for adultery, though the two remaining reasons did not emerge for the Court of Session cases; Bailey, *Unquiet Lives*, pp. 154-156.

be removed from the scene where she had endured so much suffering, [Agnes] removed to Glasgow. She was offered a situation and accepted it.’<sup>183</sup>

The second most commonly cited reason for adultery was love. Though this was difficult to determine and not provable for all the cases, there were clear examples of affairs that grew out of a desire for a companionate relationship or an uncontrollable love. For instance, a witness for Robert Hamilton against his wife Mary Rice testified that once after being caught in a room alone with James Nimms, Rice told the witness that ‘they were doing no harm that day, but were merely leaning upon each other as persons who had a regard or affection towards one another; that she said she had been in Nimms’ company a hundred times and never would deny that she loved him dearly.’<sup>184</sup> In the trial against Agnes M’Gee Sinclair or Mackay and John Stewart, hostler (horse keeper), a love letter written by John was presented as proof of their adulterous relationship. Roderick Mackay, hotelkeeper of the Commercial Hotel in Biggar, Lanark County, and husband of Agnes had discovered their relationship after finding the letter in February 1880. In the letter John repeatedly declared his love for Agnes and his plan to steal her away: ‘If I hadent’ loved you, I would not run after you... As soon as I can get work and some money to take us from this part of the country, I will let you see wither I am making a fool of you or not, But you might see that I love you my dear [*sic*].’<sup>185</sup> John had worked at the Commercial Hotel for Roderick and his wife. Although Roderick had fired John in November 1879, Agnes continued to secretly meet him and eventually left Biggar in February 1880 to be closer to John in Edinburgh. Roderick filed for divorce a few months after.<sup>186</sup>

Love was not always the goal; sometimes mere companionship led to an affair. Witnesses in the trial of James Webster against his wife Elizabeth Cairncross or Webster explained Elizabeth did not like being on her own. Two female friends took turns staying with her while her husband was away, though after eight months of separation she became pregnant with an illegitimate child.<sup>187</sup> A friend of Jane Boreland or Cassels who testified at the divorce trial instituted by Thomas Cassels against Jane, stated that Jane spoke to her of her marriage and affair: ‘She said that her own husband was often out at night, and that

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<sup>183</sup> CS46/1840/11/17 Dickson v Scott or Dickson.

<sup>184</sup> CS46/1840/6/123 Hamilton v Rice.

<sup>185</sup> CS46/1880/10/39 Mackay v Sinclair or Mackay and Stewart.

<sup>186</sup> CS46/1880/10/39 Mackay v Sinclair or Mackay and Stewart.

<sup>187</sup> CS46/1870/12/18 Webster v Cairncross or Webster.

Templeton used to keep her company by the fire, and that she then commenced keeping company with Templeton in his own bedroom.’<sup>188</sup>

The third most apparent reason for the affair was failed expectations of the marriage. This is a very general categorisation, but covers the large number of issues that caused a marriage to be unhappy. The legal expectations for a husband and wife were chastity and adherence. The more pervasive social expectations—mostly associated with the middle class, but also found in working-class discourses—was the division of familial roles by gender. Wives were the carers, domestic managers, educators, and representative model for the family. Husbands were providers, protectors, and legal and political representative for the family.<sup>189</sup> As husbands and wives had different expectations, how they met these often served to define their masculinity and femininity. Statements from adultery cases demonstrate that these expectations were present within common marriages. For instance, Barbara Grant Orrock or Grierson stated that she ‘has been kept by [her husband] in a state of discomfort and penury from the date of said marriage’, and that they had separated due to his abuse towards her. Her husband William Grierson charged her with adultery after their separation, which he stated was due to her conduct being ‘loose, irregular and unbecoming that of a wife’.<sup>190</sup> Both parties cited failure to meet the basic marital expectations of provision from the husband and obedience and morality from the wife. In another case, the pursuer Matthew Marshall, an engine fitter from Parkhead, Glasgow, described what he believed to be the expectations of a husband. As a witness in his own trial Matthew explained: ‘I cannot say why she left me. She got discontented in her home. I had done nothing to make her discontented so far as I am aware. I was never a day away from my work, and I always brought home my wages. I made about 26/ a week.’<sup>191</sup> Matthew accused his wife Margaret of violently lashing out at him one night, then leaving their home. After their separation Margaret had given birth to an illegitimate child while Matthew was working overseas.

The parties involved in these divorce trials did not always say that they were unhappy in their marriage, but described the bad behaviour of their spouse, which often led to an unofficial separation. Descriptions of intemperance, neglect, dissipated habits indicated a bad wife or husband. Intemperance in particular was frequently mentioned.<sup>192</sup> For

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<sup>188</sup> CS46/1860/10/19 Cassels v Cassels.

<sup>189</sup> Davidoff and Hall, *Family Fortunes*, pp. 322-323

<sup>190</sup> CS46/1880/4/72 Grierson v Grant Orrock or Grierson.

<sup>191</sup> CS46/1880/12/108 Marshall v Patterson or Marshall.

<sup>192</sup> The affects of drink on marriage relations and expectations will be discussed in detail in Chapter Five.

instance, in his defence John Gordon Davidson, esquire of Hebbaty, Aberdeenshire, claimed his wife was at fault for ruining their marriage:

The defender treated the pursuer with kindness and affection; but explained, that for many years the defender has suffered great annoyance and discomfort at the hands of the pursuer, who had become addicted to habits of intemperance. More particularly after going to [H]ebbaty she was frequently in the habit of drinking to such excess as to become intoxicated; she became most slovenly in her habits; she associated much with her servants; and was almost constantly in the kitchen. She further indulged in most foul, offensive, and insulting language towards the defender and the servants. She also neglected and abused her children, and kept them in a state of filth; she also on several occasions surreptitiously carried off the children from their home and concealed their whereabouts from the defender.<sup>193</sup>

Margaret McGibbon or Davidson had filed for divorce on the ground of adultery and secondary charge of maltreatment, which she explains was the reason she had left Hebbaty to ‘take refuge’ with her father. Though Davidson was answering the summons sent by Margaret, his defence and proof only hurt his case. The Lord Ordinary found Davidson guilty of infidelity and granted Margaret the divorce. In another case a friend of Reid, whose wife left him in Paris for the lithographer Cremer, testified on his behalf that:

a little box arrived for the pursuer from the defender—the pursuer opened the little box and it contained a broken ring which the pursuer said proved to him the defender his wife had left him for ever, as she had said to him when they had had differences, that when she returned that ring to him broken he might know every thing was finished between them—the difference I allude to had arisen out of the defender dispositions to be too extravagant in her expenditure for dress, but the particulars of their differences I heard only from the pursuer shortly after the defender leaving him [*sic*].<sup>194</sup>

Sometimes failed marital expectations turned into a general dislike or disrespect for their spouse. Margaret Hunter, for instance, was once overheard by a servant telling her husband, ‘that she did not care for him, and that she liked Miller better than him.’<sup>195</sup> Julia Grant or Ketchen filed for divorce for adultery and a secondary charge of cruelty against her husband James Ketchen. In his answer he claimed his wife abused him, ‘calling him offensive names, and using insulting language, stating that she loathed and detested him, and repeatedly suggested to him to consort with other women, as she would never be satisfied until she obtained herself divorced, in order that she might marry another [*sic*].’<sup>196</sup>

<sup>193</sup> CS46/1860/7/8 Davidson v Davidson.

<sup>194</sup> CS46/1860/6/10 Reid v Reid.

<sup>195</sup> CS46/1840/7/84 Hunter v Hunter.

<sup>196</sup> CS46/1870/10/30 Grant or Ketchen v Ketchen.

James tried to use his wife's condonation of his adultery as collusion and therefore reason to dismiss the charges. Julia was awarded the divorce. Another example was found in the divorce trial of William Hardie against his wife Mary Scott. Witnesses testified that Mary had so much dislike for her husband that she did not even sleep in the same house as him, preferring to stay in the farm house of Barelaw Mill with the children and the servants rather than the Barelaw Castle where William stayed. In the farm house Mary began an adulterous relationship with a male servant, William Martin. When she left her husband, Mary explained to a neighbour and friend that 'she could not get on with the pursuer at all and she thought it better to leave him.'<sup>197</sup> It was also revealed in the testimony that there was a substantial age difference of over forty years between William Hardie and Mary.<sup>198</sup> The age difference, issues with money, scolding from William Hardie, and a desire to work by Mary caused the two to disagree and seemingly the marital breakdown had begun long before Mary moved away.<sup>199</sup>

## Conclusion

Divorcing couples represent a minority of the Scottish married population, yet the detailed narratives of divorce court records capture some of the individual experiences of adultery that led to marital breakdown. Although divorce was legally available on equal grounds for husbands and wives and religious discourse faulted both men and women for licentious behaviour, society at large viewed adultery by the wife as a greater and often unforgivable offence. The 65 cases studied support this finding: adultery divorces instigated by the wife were only sixteen of the 65 cases (24 per cent). Moreover, half of the sixteen wives who charged adultery also cited maltreatment and desertion, suggesting wives withheld from filing for divorce on the ground of adultery when this was the only offence committed. Husbands, on the other hand, were more likely to file for divorce if they had an adulterous wife, in this sample. The reasons are attributable to the double standard and better access to economic resources: anxiety over pride and honour, fear of passing their wealth down to an illegitimate child, and the means to pay the legal fees. Similarly, the double standard notion that accepted men as incapable of controlling their sexual desires could exonerate men's role as paramour as well as allow extra-marital sex to be frequently overlooked by families.

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<sup>197</sup> CS46/1850/7/67 Hardie v Scott or Hardie.

<sup>198</sup> Bailey found that wives commonly used age difference as a reason for adultery in her time period; Bailey, *Unquiet Lives*, p. 155.

<sup>199</sup> CS46/1850/7/67 Hardie v Scott or Hardie.



These adultery cases also revealed patterns about the paramour and the excuses given for infidelity. Given that men and women had different daily activities, the paramour for husbands and wives differed as the people they interacted with would differ, for example husbands were more likely to have extramarital sex with a stranger, whereas a wife was more likely to commit adultery with a lodger. As for excuses for infidelity, the most frequent explanation given was the fact that the couple lived apart, often for work, as well as due to unofficial separations initiated by the spouses.

In short, adultery, though the most common cause for divorce, did not always end a marriage. Although this cannot be misconstrued as acceptance of extramarital affairs, there was the possibility that wives would tolerate their husbands' indiscretions as long as he continued to provide for her and their children. If a husband adhered to and supported his family, but was guilty of infidelity, a divorce would sometimes mean a change for the worse for a married woman.

## Chapter Four: Divorce and Desertion

‘An able-bodied, but somewhat improvident person, having deserted his wife and family, they were left in circumstances of such helplessness and destitution, as to require aid from the poors’ funds of the burgh.’<sup>1</sup>

Desertion without divorce was perhaps the most common way to end a marriage, but it was also the most hidden form of marital breakdown. The majority of wives and husbands abandoned by a spouse did not file for divorce, despite it being one of the two grounds for full dissolution of a marriage since 1573. The extent of desertion (particularly of wives), therefore, was most evident in applications for poor relief, which, as illustrated in the above quote, was often a necessity. The sources analysed in this chapter show two sides to the nature of desertion; the Court of Session (CS) records serve as the official cases, and Poor Law records reveal the unofficial instances. Both sides are analysed to demonstrate this complex form of marital breakdown and the impact desertion had on abandoned spouses. This study of official and unofficial desertion reveals that more female pursuers filed for divorce on this ground than male, yet, these litigants were a minority compared to the amount of deserted wives who applied for poor relief. As desertion often led to poverty for wives, especially mothers, going on the Poors’ Roll was logistically a better remedy as it provided immediate financial aid without needing to wait the required four years to file for divorce.

This chapter begins with a discussion of the historiographical debates related to marital desertion. The rest of the chapter is divided into two sections: official desertion, and unofficial desertion. In the first section desertion is examined using divorce actions filed on the ground of desertion. The sample taken from the CS is presented in tables and broken into subsections discussing prominent patterns. The second section on unofficial desertion uses poor relief applications as the primary source. The section begins with an overview of Scottish Poor Law and then examines case studies of three Scottish parishes. These records are also tabulated and discussed to show similarities and differences between the official and unofficial cases.

There are relatively few historical studies of marital desertion in Scotland.<sup>2</sup> This may be due to the elusiveness of deserting spouses. Most instances of desertion were not reported,

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<sup>1</sup> ‘Desertion of Families’, *Caledonian Mercury*, 3 December 1838.

and if they were, often little was known of the deserting spouse's whereabouts. Still, micro-studies have provided evidence of marital desertion through a few different sources. For Scotland, Leah Leneman used consistorial actions from 1684 to 1830. Out of 904 cases she collected, 101 were filed on the ground of desertion; 26 or 26.3 per cent were filed by the husband, 74 or 73.7 per cent were filed by the wife. Her main findings conclude, first, that more wives filed for a divorce for desertion than husbands; second, that the increase in divorce suits for adultery was 'matched' by actions on the ground of desertion; third, that most desertions took place after less than one year of marriage; and fourth, that most pursuers filed after four to ten years of being abandoned. Her last finding in particular reflects the impact of judicial regulations on family circumstances, as it was required to prove at least four years of wilful and malicious desertion by a spouse in order to file for a divorce.<sup>3</sup>

To explain the higher rate of desertion certain economic and societal circumstances have been proposed as influential factors. Poverty in particular has been linked to the high rates of desertion in the nineteenth century. Lawrence Stone's extensive work on marriage, divorce and the family in England only briefly addressed desertion, but associated it with the poorest families as they could not afford a legal divorce.<sup>4</sup> He also linked it as the easiest solution for poor husbands; 'for the poor, the simplest was just to abandon his family, to walk out of the house one day and never come back. Desertion was one of three alternatives to divorce for the poor in the eighteenth and early nineteenth centuries; bigamy and wife-sale as the other two.'<sup>5</sup> Roderick Phillips discusses the correlation between desertion and poverty as a means as well as a reason for abandonment. He argues that a man in complete destitution had 'an absence of material constraints' that enabled him to leave the human relationships he might have had.<sup>6</sup> This has been supported by evidence showing that desertion rates fluctuated with seasonal employment.<sup>7</sup> Still, husbands of the

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<sup>2</sup> For Scotland see Leah Leneman, *Alienated Affections: the Scottish experience of divorce and separation, 1684-1830*, (Edinburgh, 1998). For England, America and Australia see Roderick Phillips, *Putting Asunder: a history of divorce in western society*, (Cambridge, 1988); Olive Anderson, 'Emigration and Marriage Break-up in Mid-Victorian England', *The Economic History Review*, New Series, Vol. 50, No.1 (February, 1997), pp. 104-109; Beverly Schwartzberg, "'Lots of them did that": Desertion, Bigamy, and Marital Fluidity in Late-Nineteenth Century America', *Journal of Social History*, Vol. 37, No. 3 (Spring 2004), pp. 573-600; Christina Twomey, "'Without Natural Protectors": Responses to wife desertion in gold-rush Victoria', *Australian Historical Studies*, Vol. 27, No. 108, (1997), pp. 22-46.

<sup>3</sup> Leah Leneman, *Alienated Affections*, pp. 13, 16, 21-24.

<sup>4</sup> This was seemingly due to the English Common Law not allowing divorce for desertion until the 1857 Act where after wives could only use desertion as an aggravated ground for divorce along with adultery.

<sup>5</sup> Lawrence Stone, *Broken Lives: Separation and Divorce in England 1660-1857*, (Oxford, 1993), p. 18; and Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, (London, 1977), pp. 141-143.

<sup>6</sup> Phillips, *Putting Asunder*, p. 371.

<sup>7</sup> Phillips references D.D. M. Snell, *Annals of the Labouring Poor* (Cambridge, 1985), p. 361; Phillips, *Putting Asunder*, p. 371, footnote 26. Bailey also discusses the connection between economic downturns and

middling rank found to have deserted their wives were vulnerable to seasonal unemployment, underemployment, and many other uncontrollable issues that may prevent a man from working.<sup>8</sup> Joanne Bailey, although also finding evidence of poverty contributing to desertion, wrote that her study, 'shows that abandonment was not just a habit of the lowest social ranks. We need to adjust our preconceptions that it was only men without property who deserted their families because they were less encumbered by property and financial obligations.'<sup>9</sup>

Employment also had a large impact on marital breakdown as many men (and women) travelled or lived away from home for work. As a result some married couples spent long periods apart. The 1871 census report showed an awareness of this situation:

In a commercial country like Scotland, it was to be expected that, on the night when the census was taken, a very considerable number of the husbands would be absent from their wives... Many of the husbands are in the Army, Navy, Merchant Shipping or fisheries, or are engaged in commerce and trades which necessitate their frequent absence from home and Scotland.<sup>10</sup>

Absence did not indicate desertion. What this report illustrated was the extent of husbands and wives who were forced to live separately due to employment opportunities. Thus, on the night of April 3<sup>rd</sup> 1871, the Census record showed that 6.3 per cent of husbands were absent from their wives, or 8.5 per cent of wives reported their husbands absent.<sup>11</sup> There was, however, a direct link between husbands leaving in search of employment and families being abandoned. Husbands could (and did) use the opportunity to migrate or emigrate for employment to desert their family. For instance the application for poor relief from Robert Calderwood's wife stated her husband was an 84 year old travelling salesman, who for the past several years had rarely lived at their home and only supported her occasionally by paying rent.<sup>12</sup> If this case illustrates anything, it is that desertion could be complicated; although Robert may have paid rent sometimes, he had reneged on all other responsibilities of a husband.

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rising desertion rates at the end of the eighteenth century in England; Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800*, (Cambridge, 2003), pp. 174-178.

<sup>8</sup> Bailey, *Unquiet Lives*, pp. 173-174.

<sup>9</sup> Bailey, *Unquiet Lives*, p. 173.

<sup>10</sup> PP 1873 [C.841] Vol. II, *Eighth Decennial Census of the Population of Scotland taken 3d April 1871, with report*, p. xxvi.

<sup>11</sup> PP 1873 [C.841] Vol. II, *Eighth Decennial Census*, p. xxvi.

<sup>12</sup> Paisley Poor Relief Records, 1840, Vol. 11/1, Statement 304.

This aspect of nineteenth-century marriage reflects the ideology of the husband as the breadwinner and the wife as the dependent.<sup>13</sup> The notion that men should be the main provider for families was prevalent in the nineteenth century following the new economic trends of the industrial revolution. Historians from the twentieth century have identified the inadequacy of this economic structure and the damage it caused to working-class families.<sup>14</sup> They have also determined that this notion was mainly present within wealthy middle-class culture rather than the majority of the population.<sup>15</sup> Yet it still seemed to impact the general population when it came to public images. For instance Anna Clark argues that this ideal was applied by trade unionists in order to gain the respectable working-class vote in the 1830s and 40s:

Instead, trade unionists cleverly exploited the contradictions between bourgeois morality and theories of political economy. They drew upon domesticity to demand the breadwinner wage for themselves, claiming that they needed higher wages and the legislative exclusion of women and children in order to protect their families from the immorality of factories and workshops.<sup>16</sup>

This societal and economic pressure placed on men was particularly detrimental to an unskilled labourer, men employed seasonally, and men whose occupations were depleting with new technology and women entering the workforce.

Men deserting their families on the premise of seeking employment was an issue around the world as well as for Scotland. A study of Victoria, the Australian colony, for example, highlighted that contemporaries recognised the correlation between desertion and migration.<sup>17</sup> A lack of jobs meant men struggled to provide for their families and consequently migrated. And, like men who emigrated, some husbands never returned. Twomey argued that the rhetoric surrounding this social observation reflected the middle-

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<sup>13</sup> Leonore Davidoff, Megan Doolittle, Janet Fink and Katherine Holden, *The Family Story: Blood, Contract and Intimacy, 1830-1960*, (London, 1999), pp. 20-21.

<sup>14</sup> Sara Horrell and Jane Humphries, 'The Origins and Expansion of the Male Breadwinner Family: The Case of Nineteenth-Century Britain', *International Review of Social History*, Vol. 42 (1997), pp. 25-64; Ian Levitt and Christopher Smout, *The State of the Scottish Working-Class in 1843: A statistical and spatial enquiry based on the data from the Poor Law Commission Report of 1844*, (Edinburgh, 1979), pp. 100-113.

<sup>15</sup> Eleanor Gordon, 'Women's Spheres', in W. Hamish Fraser and R. J. Morris (eds.) *People and Society in Scotland, Vol. II 1830-1914*, (Edinburgh, 2000), pp. 206-235, p. 206.

<sup>16</sup> Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class*, (Berkeley, 1997), pp.218-219.

<sup>17</sup> Twomey, "'Without Natural Protectors'", p.46. For a history of wife desertion in the British Empire from the end of the Victorian period to the end of WWI see Marjorie Levine-Clark, 'From "Relief" to "Justice and Protection": The Maintenance of Deserted Wives, British Masculinity and Imperial Citizenship, 1870-1920', *Gender & History*, Vol. 22, No. 2 (August 2010), pp. 302-321.

class notion of domesticity and the societal pressure on men to be breadwinners cultivated in western societies.<sup>18</sup>

Thus the connection between emigration and desertion has also been argued as having a correlation to marital breakdown. This was outlined by Olive Anderson through her evaluation of deserted wives in England, and also highlighted by Alan Horstman in his study of Victorian Divorce.<sup>19</sup> The literature on other western countries suggests that some men who emigrated in search of employment were also the same men who deserted their families. In some instances the initial plan to move may have involved the family following once work was obtained, but often the family was never sent the funds needed to travel. Scotland had a high rate of emigration: in the 1850s and 1860s 300,000 Scots emigrated.<sup>20</sup> As a result it is likely that of the large numbers of men (and some women) who emigrated a proportion were abandoning their families.

Enlistment in the services has been analysed in some studies of desertion as another means of abandoning a family.<sup>21</sup> It allowed a man to relocate, often in far off countries, with pay and board. Besides relocation, enlistment also gave men an opportunity to fake their death, and with that feigned independence some men married again and started a new family. For France, Phillips wrote that, ‘the connection between absence or desertion and military service is, in fact, a strong one, and we should expect it to be so particularly in times of war’, finding that enlistment was used as a means ‘of escaping an unsatisfactory marriage.’<sup>22</sup>

This form of desertion existed in Scotland as well. As indicated previously by the 1871 census, enlistment in the army was a means of employment for husbands who may have been idle, or looking for adventure and change. Charles M’Gregor enlisted in August of

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<sup>18</sup> Twomey, ‘Without Natural Protectors’, p. 25.

<sup>19</sup> Olive Anderson, ‘Emigration and marriage break-up’, pp. 104-105; ‘Desertion occurred regularly... Divorce records in the late 1850s suggest that the huge emigrations to the United States and Australia in the late 1840s contained large numbers of fleeing husbands, as well as the occasional eloping wife’; Alan Horstman, *Victorian Divorce*, (London, 1985), p. 41

<sup>20</sup> For a history of emigration and migration in Britain see Dudley Baines, *Migration in a Mature Economy: Emigration and Internal Migration in England and Wales 1861-1900* (Cambridge Books Online). Scotland is mentioned on pages 58, 65, 67-68. For patterns of emigration from 1840s Scotland see Levitt and Smout, *The State of the Scottish Working-Class*, pp. 236-258.

<sup>21</sup> Schwartzberg’s study of Civil War pension applications for veterans or their widows illuminated the reality of marriage, desertion and remarriage. Widows hoping to receive their husbands’ pension would find their application contested by another woman claiming to be the same man’s widow. Schwartzberg found men used enlistment in the services as well as the ease of creating a new identity in the newly developing United States to leave one family behind and start another; Beverly Schwartzberg, “‘Lots of them did that’”, pp. 573, 577.

<sup>22</sup> Phillips, *Putting Asunder*, p. 287; further discussion of married couples using active service during wartime to break from their marriage on pp. 264-265.

1840 after being out of work since February due to his ‘bad habits’, leaving behind his wife of four years and two children.<sup>23</sup> Enlistment however did not always mean abandonment. Ann Carr travelled to Canada with her enlisted husband while he served time in the army, and even returned with him to Scotland. It was not enlistment that ended their marriage, but his intemperance and abuse.<sup>24</sup>

Discourses in the Scottish media suggest that the major concerns about desertion centred on men failing to fulfil their role as family breadwinner and provider. This related to the wider public issue of parishes supporting deserted women and children when there was no one else to do this (this will be discussed in the unofficial desertion section). These expectations for husbands and fathers were evident in newspaper reports of desertion. For example, the *Caledonian Mercury* article ‘Desertion of Families’ included a note stating that the maintenance of family was the natural obligation of a husband and father. It was believed that prosecution of deserters would be a ‘great measure’ to ‘relieve the community from an oppressive burden, and prevent worthless individuals from acting in violation of an imperious natural obligation.’<sup>25</sup>

The history of deserting wives has received even less attention. Bailey explains that the discourse related to deserting spouses tended to be gender specific. Moreover, desertion did not always amount to marital breakdown. In Bailey’s study this was evident from parishes’ efforts to reunite abandoned spouses without punishment, advertisements in local newspapers, warrants for arrest and summons of adherence.<sup>26</sup> In Scotland the preference for reconciling married couples was also visible through similar methods of tracking. Husbands used local newspapers to report to the public that their wife had absconded, and to alert store owners that if she attempted to use his name for store credit it was without permission. By cutting of her access to money a deserting wife may have been forced to return, or find another source of monetary support.<sup>27</sup> Deserting wives may have equally received less attention from contemporary authorities, as her absence from a family home would not necessarily create the same vacuum of poverty as would a husband’s; <sup>28</sup> a deserted husband could only apply for poor relief in Scotland if he was ill, aged or

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<sup>23</sup> Paisley Poor Relief Records, Vol. 11/1, Statement 457, 29 October 1840

<sup>24</sup> Paisley Poor Relief Records, Vol. 11/12, Statement 10684, 12 September 1860

<sup>25</sup> ‘Desertion of Families’, *Caledonian Mercury*, 3 December 1838.

<sup>26</sup> Bailey, *Unquiet Lives*, pp. 30-31.

<sup>27</sup> For instance, one husband put out a notice in *The Greenock Intelligencer*, and *Clyde Political, Commercial, and Literary Journal*, on August 7, 1833 stating, ‘Notice is hereby Given, That Joseph Potts, Mariner in Port-Glasgow, will not be responsible for any Debts contracted by his wife, Eliza Kennedy, formerly residing in Port-Glasgow, presently in Greenock’; CS46/1840/7/168 Potts v Kennedy or Potts.

<sup>28</sup> Bailey, *Unquiet Lives*, pp. 36-37.

disabled, where as a deserted wife, especially if a mother, could use her desertion and children as a disablement.<sup>29</sup>

### Official Desertion in Court of Session Divorce Records

In this section official dissolutions of marriage will be examined through CS divorce for desertion cases. Of the 253 extracted decrees collected, 121 cases were used for qualitative analysis. 48 cases of the 121 were filed on the ground of desertion or non-adherence and examined for this study. 32 of the 48 cases, or 67 per cent, were filed by the wife against her husband, leaving sixteen cases instigated by a deserted husband, or 33 per cent. Desertion cases were relatively few but increased between 1870 and 1880. There were two cases from 1830, four in 1840, two again in 1850, five in 1860, twelve in 1870 and twenty by 1880.

Below, the evidence from these case records is divided by instigator to determine, firstly, the length of the marriage before desertion; secondly, the interval between when the pursuer was deserted and when they filed the action; and thirdly, the length of time the action took from start to finish.<sup>30</sup>

**Table 4.1 Length of Marriage Up to Desertion, Court of Session Cases**

| Husband as Instigator | 16* [100%]  | Wife as Instigator | 32 [100%]  |
|-----------------------|-------------|--------------------|------------|
| Under 1 yr            | 7 [43.75 %] | Under 1 yr         | 7 [21.8%]  |
| 1-5 yrs               | 3 [18.75%]  | 1-5 yrs            | 14 [40%]   |
| 6-10 yrs              | 3 [18.75%]  | 6-10 yrs           | 6 [18.75%] |
| Over 10 yrs           | 1 [6.25%]   | Over 10 yrs        | 5 [15.6%]  |

\*Two cases did not have this information available

<sup>29</sup> This will be discussed in detail in the latter section on Unofficial Desertion.

<sup>30</sup> This same division can be found in Leneman's study of early modern divorce cases; Leneman, *Alienated Affections*, pp. 13, 16, 21-24.



**Table 4.2 Interval between Desertion and Action, Court of Session Cases**

|                              |                  |                           |                  |
|------------------------------|------------------|---------------------------|------------------|
| <u>Husband as Instigator</u> | <u>16 [100%]</u> | <u>Wife as Instigator</u> | <u>32 [100%]</u> |
| Less than 4 yrs*             | 1 [6.25%]        | 4+ yrs                    | 3 [9%]           |
| 4+ years                     | 5 [31.25%]       | 5-10 yrs                  | 20 [62.5%]       |
| 5-10 yrs                     | 5 [31.25%]       | 11-15 yrs                 | 5 [15.6%]        |
| 11-15 yrs                    | 4 [25%]          | Over 16 yrs               | 4 [12.5%]        |
| Over 16 yrs                  | 1 [6.25%]        |                           |                  |

\*Action of Adherence

**Table 4.3 Length of Action, Court of Session Cases**

|                                       |                  |
|---------------------------------------|------------------|
| <u>Husband and Wife as Instigator</u> | <u>48 [100%]</u> |
| <1 month                              | 15               |
| 1 month                               | 11               |
| <2 months                             | 4                |
| 2 months                              | 3                |
| < 3 months                            | 2                |
| 3 months                              | 4                |
| 4-9 months                            | 8                |
| Over 10 months                        | 1                |

The data compiled in Table 4.1 shows that the majority of marriages where the husband was the instigator of the divorce, or where the wife deserted, were less than one year in length before the desertion. In the cases where the wife was the instigator, or the husband deserted, the majority of marriages were between one and five years long. The information provided in Table 4.2 reiterates the divorce legislation that required the desertion to have been maintained for a minimum of four years before a divorce was allowed. Furthermore, the fact that many couples took longer than the required four years to file for divorce was likely caused by the need to raise and save money to pay for the action fees, time needed to find the deserting spouse in order to send a summons,<sup>31</sup> or years of waiting in hopes that the spouse would return or get in contact. Thus, the findings for Table 4.3 showing a majority of cases were processed and decerned<sup>32</sup> in less than a month or one month would have been a benefit to many couples, as the shorter the length of the action, the less expensive the fees.

<sup>31</sup> The Conjugal Rights (Scotland) 1861 Act, section 10, allowed a pursuer to include their spouse's next of kin as another defendant in their action, in the event that the spouse was living abroad or hiding somewhere unknown to the pursuer.

<sup>32</sup> Meaning to give a final decree or judgement.

### *Desertion and Children*

Another feature of desertion provided by CS cases is the prominence of children. In cases instigated by the wife, 22 out of 32 had at least one child alive. Of the actions filed by husbands, on the other hand, the majority of the couples did not have children from their marriage. Only three of the sixteen wives who left their husbands also abandoned children.

**Table 4.4 Presence of Children in Court of Session Divorce Cases**

| <u>Cases Where Wife Deserted</u> | <u>16</u> | <u>Cases Where Husband Deserted</u> | <u>32</u> |
|----------------------------------|-----------|-------------------------------------|-----------|
| No Children of Marriage          | 11        | No Children of Marriage             | 8         |
| No Children Alive                | 2         | No Children Alive                   | 2         |
| 1 Child                          | 0         | 1 Child                             | 9         |
| 2 Children                       | 2         | 2 Children                          | 9         |
| More than 2 Children             | 1         | More than 2 Children                | 4*        |

\*One wife had 5 children from a previous marriage but no children from current

These findings support the notion that women were more likely to remain in an unhappy marriage when children were present.<sup>33</sup> Without children unhappy wives had less of a commitment to upholding the marriage. Of the three cases where the husband was the pursuer and had children, two are instances of the wife absconding with her children. Both cases have a few other similarities: divorce decrees were awarded in 1880 for each case; both had two children from the marriage; and both cases hint at maltreatment by the husband. Most significantly, the catalyst of the desertion, based on the pursuers' summonses, appears to have been due to the wife's family intervening and bringing their daughter back home. According to both husbands' complaints it was the interference of the wife's family that caused the breakdown of the marriage. Arguably the support of the wife's family was a contributing factor in the wife's ability to leave and take her children with her. Neither wife was described as employed. Ann Guthrie had been married to James Brown for only three years before she feigned a brief visit to her parents, in reality deserting her husband and taking their children to her parents' home in Abernethy, Perthshire.<sup>34</sup> Ann Calder's marriage to Thomas Brown had lasted eight years until she abandoned his home selling off his furniture and moving back to her father's home in

<sup>33</sup> Phillips, *Putting Asunder*, pp.371-372.

<sup>34</sup> CS46/1880/1/81 Brown v Guthrie or Brown.

Upper Seater, Caithness.<sup>35</sup> Calder was able to keep her children at her parents' home with her, but Guthrie was forced to return with her children to her husband after he filed for a custody warrant. Guthrie only remained one night with James Brown after returning the children, running back to her parents' home the next day.

The third instance of a wife leaving her husband when they had children together is one where she left her children behind. John Boax, an engineer, was married to Elizabeth Johnstone for 26 years, she having borne six children, five who survived childhood. This case from 1870 had little detail besides the complaint stating that the wife left her husband and for four years refused to return to him. The lack of details in *Boax v Johnstone* or *Boax* is not uncommon within the CS extracted divorce records.<sup>36</sup> According to Scottish Law in order to obtain a divorce on the ground of desertion the desertion had to be 'wilful and malicious', and unwarranted and unjust without cause or reason. More often, however, the documents only reveal the type and means of desertion perpetrated by the defender. For example the summons submitted by Susan O'Rourke in 1850 was commonly found in other desertion cases, both male and female. Edward O'Rourke, who deserted his family, was accused of,

shaking off all fear of God, and forgetting his matrimonial vows and engagements, upon or about the fifteenth day of July in the said year 1843, fled from the Kingdom and unnaturally and undutifully deserted the Pursuer, his spouse, her company and society, and has withheld and withdrawn himself from her from that time. That the Pursuer was not apprised of the intentions of the Defender, as he had no cause of complaint against her, and not only left her in a state of complete destitution, but never in any way contributed towards her support, leaving her a burden upon her own relations...<sup>37</sup>

### *The Reasons for Desertion as Found in Court of Session Cases*

Earlier in this chapter poverty, employment, and enlistment were discussed as commonly attributed causes of desertion by historians and contemporaries. This study has demonstrated further reasons, as well as the above three. Where it is available in the CS cases, the cause of the desertion falls neatly into categories: adultery or bigamy; maltreatment; alcohol usage and other 'bad habits'; money problems; and family intervention or interference. Of the 48 cases only two showed the desertion to have been

<sup>35</sup> CS46/1880/3/74 *Brown v Calder* or *Brown*.

<sup>36</sup> Extracted decrees only required the summons, complaint and interlocutor sheet to prove a divorce action and decree had taken place.

<sup>37</sup> CS46/1850/7/103 *O'Rourke v O'Rourke*.

caused by an adulterous relationship. If the defender had left the pursuer for an adulterous partner, the pursuer more often than not filed for divorce on the ground of adultery (as discussed in Chapter Three). In the cases of *Smith or Simpson v Simpson*, and *Reid v Gibson or Reid*, however, both pursuers pled for a divorce on the ground of desertion even though they could have charged adultery. It is unclear why these parties opted to do so, however, it illustrates further the complexity of marital breakdown when forced to fit within the confines of the judicial system.<sup>38</sup> In 1870 Christina Smith filed for divorce against her husband James Simpson claiming he had left for work on the Monday and never returned to her parents' home in Gifford where they were living. James' brother filled in the story of James' disappearance when he testified. He claimed that before James and Christina were married in 1863, James had been in a cohabitating relationship in New York with a woman named Emma Weymouth, whom he had four children with. Eighteen months before marrying Christina, James had returned to Scotland leaving Emma and the children in New York, allegedly avoiding prosecution for deserting the Army. At the time of James' disappearance from Christina's home, Emma had returned from New York in search of James. Emma persuaded James to return to New York with her and they quickly arranged a plan to run away. With the help of his brother, James and Emma stayed in Edinburgh for two weeks before sailing to America. The pursuer's parents also testified, describing the non-adherence of their son-in-law as 'wilful and improper desertion.'<sup>39</sup> It was possible that Christina and her agents could not prove James had committed adultery after leaving with Emma, and therefore charged desertion in order to win the divorce suit.

The desertion of James Reid by his wife Helen Gibson according to James followed, 'in consequence of some words which we had about a letter which I found she had received from a soldier named J. Troup Murray, 2<sup>nd</sup> Dragoons, Hamilton. I did not consent to her leaving me.'<sup>40</sup> James also stated that Helen, when she left his home, went to live with Murray, and he had never seen or heard from her since. They had only been married five months, but he had waited nine years to file for divorce.<sup>41</sup>

In 1870 John Watt filed for divorce against his wife, who had deserted him 'without any cause or reason'. John, however, had since Harriet Fitten or Watt left, entered into a bigamous marriage. His complaint stated that, 'seven years after [Harriet's] wilful desertion [John] during the whole of this period never having heard from her and being

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<sup>38</sup> In these cases it may have been easier for the pursuer to prove their spouse had abandoned them than it would be to prove they had committed adultery.

<sup>39</sup> CS46/1870/1/35 *Smith or Simpson v Simpson*.

<sup>40</sup> CS46/1880/12/93 *Reid v Gibson or Reid*.

<sup>41</sup> CS46/1880/12/93 *Reid v Gibson or Reid*.

ignorant of his responsibilities, contracted a second marriage.<sup>42</sup> Two years after his second marriage he was arrested for bigamy and sentenced to eighteen months imprisonment. At his trial his first wife, Harriet, appeared against him as a witness for the Crown. On that encounter Harriet reportedly told him she wanted nothing more to do with him. Though Harriet made an appearance in 1859 at his bigamy trial, she did not respond to the summons of divorce against herself in 1870. John's plea of ignorance to civil law, though possibly a lie, could equally be an indicator of what was common knowledge. After being abandoned by his wife for at least five years, he believed he was entitled to remarry. This is also illustrative of a man who respected the institution of marriage enough to enter into it a second time. As discussed earlier, remarriage rates could signify the value attached to the ceremony and state of matrimony even after leaving a failed marriage.<sup>43</sup>

The most frequently cited reason for desertion was maltreatment and alcohol abuse coupled with 'bad habits.' Often, more than one of these behaviours was mentioned in the same complaint. Cruelty in marriage is the subject of a separate chapter; therefore this section will only briefly discuss maltreatment in context of desertion. Nine cases specifically cited maltreatment, alcohol abuse or bad habits. Seven of those cases were instigated by the wife, while the remaining two were instigated by the husband. In these two remaining cases the maltreatment was revealed in the testimony of witnesses. In the case of James Brown against his wife Ann Guthrie, James admitted to losing about £300 his wife brought to the marriage when his cattle-dealer business failed, but claimed '[d]own to that time I had always been on perfectly good terms with my wife, and even after that, there was no difference between us to my knowledge.' Ann, who provided a defence, admitted that she had left her husband because they often quarrelled. When asked 'What about?', she replied, '[h]is unkindness to me. The loss of my money also led to disputes between us. When I went away on the visit to Abernethy..., I did not say whether I would return or not, but I told pursuer often before that, and shortly before that, that I would go.'<sup>44</sup>

Where available, letters between the husband and wife serve as material evidence of wives' defiance and determination to leave an abusive marriage, even if it meant desertion. As it has already been established, these parties who filed for divorce were the minority, yet they reveal a portion of the female population who empowered themselves by taking action to

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<sup>42</sup> CS46/1870/10/45 Watt v Fitten or Watt.

<sup>43</sup> See forthcoming article, Eleanor Gordon, 'Irregular Marriage: Myth and Reality', *Journal of Social History*, Winter 2013 Volume.

<sup>44</sup> CS46/1880/1/81 Brown v Guthrie or Brown.

better their situation. Ann White went to a solicitor for professional advice in 1839 after two years in her abusive marriage, though she had already taken the initiative to leave her husband over a year earlier. Writer to the Signet, Henry John Burn of Edinburgh testified:

that the Deponent [Henry] first knew the said parties in the spring or summer of 1839 and he so knew them from his having been applied for professionally by the Defender Mrs. Gray, to advise her as to how she would act as to her pecuniary interests, she Mrs. Gray having, in consequence of a quarrel with her husband, separated herself from him. Depones that the Deponent, on several occasions, advised the Defender Mrs. Gray to endeavor to get matters made up between herself and her husband, and to return to her husband's house and live with him. Depones that, on all these occasions, the Defender Mrs. Gray always stated that it was her decided determination never again to live with the pursuer, and said repeatedly that from the usage she received from him she never would enter his house again. [*sic*]<sup>45</sup>

Ann White faced repeated recommendations to reconcile, even from her own friends, suggesting the social pressures and popular perception of failed marriages. Ann Calder and Marion Walton discussed earlier, demonstrated similar resolution as Ann White. In these cases the two women were represented through letters they wrote to their husbands, which were presented as evidence against them in Court. After already living with her parents for almost three years and repeated requests by her husband to return, Calder wrote to him in 1875 to say, 'As for a house for me you need not put yourself to any trouble for I will not come.'<sup>46</sup> Walton left her husband under the pretence of a visit to her parents. The day after she left she wrote a letter to her husband saying that she would not be returning. The letter was used in the pursuer's complaint as evidence of her desertion:

A visit from you will be quite unavailing as you will not be permitted to enter the house. You may perhaps think fit to take some action in order to compel me to return. But I have to inform you that I will never return except at an order from the Law Courts of England in which your conduct as well as mine will be thoroughly ventilated. Any communication you choose to make after this must be made to J. G. Millican Esq. Solicitor, Alston. Should you attempt to annoy me I will at once apply for an injunction from the magistrate to restrain you.<sup>47</sup>

The major difference between White, Calder and Walton was the familial support Calder and Walton received. White, possibly with no family to rely on, went to a childhood friend's home and remained with her and her husband as long as she was able to before

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<sup>45</sup> CS46/1840/2/17 Gray v White or Gray.

<sup>46</sup> CS46/1880/3/74 Brown v Calder or Brown.

<sup>47</sup> CS46/1880/3/156 Burns v Walton or Burns.

finding employment as a domestic servant and then became untraceable. Her determination to escape her marriage comes across powerfully in the case documents.

Another reason for desertion cited by wives was economic failure. The cult of domesticity existed as an ideal, but in practice it was difficult for wives to achieve. A major reason for this disparity was the challenge for husbands to successfully serve as the breadwinner, which was the foundation needed to allow wives to stay at home. Horrell and Humphries found that, 'In only a few occupations were men earning enough to buy their families' sustenance and to provide the roof over their heads; for most households the earnings of women and children were essential and not becoming noticeably less so over time'<sup>48</sup> Without the stability of a regular wage from husbands, wives could not afford to perform as a middle-class housewife. Some wives from the CS cases demonstrate that this failure to provide was indeed a breach of marital expectations, and a catalyst for their desertion. For instance, when Ann Guthrie's husband started and failed in a business as a cattle-dealer and dairyman with the £300 she brought into their marriage, their relationship began to fall apart.<sup>49</sup> Jane Soutar's marriage allegedly broke down when her husband, a baker, opened his own bakery in the same building as their home. The business failed and the combination of living in the same premises led Jane to give birth to their only son prematurely. Shortly after that creditors took possession of their home, furniture and everything else. Jane was forced to move with her child back into her parents' home, but her husband did not move with her. She had limited communication with him and mostly heard of his movements from contacts. By 1876 the last information she heard of him was he had set sail on the 'Scottish Knight' to Townswell Queensland, and whilst on board the ship he had entered into a second and bigamous marriage with another woman. The Soutars had been married ten months before he deserted her, yet she waited twelve years to file an action against him.<sup>50</sup>

Janet Thomson married James Straiton in March of 1860. He was a grocer and merchant in Glasgow. Janet followed James when he moved shop and house and lived in ignorance of James financial troubles. It was not until James disappeared on August 25<sup>th</sup> 1861 leaving only a note behind for Janet that she learned he was badly in debt, having worsened it through gambling. James let Janet know he was sailing to Australia and even sent her money, promising to return home as soon as he raised some more. That was the last she heard of him. In 1868 she found out he had changed his name and was constantly

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<sup>48</sup> Horrell and Humphries, 'The Origins and Expansion of the Male Breadwinner Family', p. 42.

<sup>49</sup> CS46/1880/1/81 Brown v Guthrie or Brown.

<sup>50</sup> CS46/1880/3/89 Soutar v Soutar.

moving.<sup>51</sup> Of these marriages each wife suffered from their husbands' failure at business, which in turn left them impoverished. While Ann Guthrie took the initiative to leave her husband, Jane Soutar and Janet Thomson were deserted; their husbands' fled overseas to escape debt and to restart their lives, as well as families. Running away from debt also meant absconding from the burden of supporting a wife and children.

In the case of wives who deserted their husbands, family pressures appear to have played a part in prompting them to leave. This pattern seems to have been predominantly a feature of cases where the wife deserted her husband. Several husbands who filed for divorce on the charge of desertion blamed their wives' family for her abandonment. The most striking example of this was in the case of Marion Walton (discussed earlier) who had shown strength and defiance against her husband in her letter to him. This defiance may have only been possible with the help of family intervention. Her husband William Burns had argued that it was the fault of her family that she left him after only five months of marriage:

A few days after [Marion's] departure [William] accidentally found a document titled on the outside "Instructions when required but only available for any Friday"... From this document... it appears that [Marion's] departure from [William's] house had been carefully planned for her by her father and was to be studiously concealed from her husband.<sup>52</sup>

William Wallace and Agnes Tait of the Isle of Cumbrae had an even shorter union. The two married in secret without the consent of Agnes' father. She then returned to her father's home right after the ceremony intending to keep their marriage secret and reveal it at the right time. Their plan was ruined by the Reverend that married them who, unaware of the secrecy involved, announced their wedding in the newspaper. Agnes' father immediately forbade her from returning to William. Shortly after William received a letter from Agnes saying she would not live with him. After repeated efforts by William to contact Agnes he received a firm letter of discouragement: 'As I understand you have been in Edinburgh several times lately... I must have a written promise from you that this time you will cease trying to find me.'<sup>53</sup> Though it is unclear if Agnes truly desired the separation, it is clear that her father had a great influence over her relationship.

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<sup>51</sup> CS46/1880/10/26 Straiton v Straiton.

<sup>52</sup> CS46/1880/3/156 Burns v Walton or Burns.

<sup>53</sup> CS46/1880/11/139 Wallace v Tait or Wallace.



### *Means of Desertion*

Once a spouse had resolved to leave the marriage, there were five common means to do so: move back with one's parents or family; emigration; employment; enlistment; or cohabit with a new partner. Gender differences were evident when determining the means of desertion used. In the case of deserting wives, family support was more than just a form of influence; it enabled a wife to leave her unhappy marriage. The majority of the available desertion divorce cases reveal that when a wife left her husband she went directly to her parents' home. Equally, when a wife was deserted she would, if possible, go back to her family. Fathers who testified on behalf of their daughters did not hesitate to state they had become the sole provider for her and her children. John Willcott, father of Isabella Willcott or Whyte who moved in with him after her husband deserted her, testified: 'She has continued to live with me ever since... There has been no letters come to her from him, and he has contributed nothing towards her support or that of her children. I have supported them entirely, and educated them, and everything.'<sup>54</sup>

Desertion patterns of husbands further reflect a gender divide showing some male specific patterns. First, as discussed earlier, husbands were more likely to desert their families through emigration overseas. This study of Scottish divorce cases has demonstrated that among deserting husbands a large proportion of them used emigration as a means to leave their family behind in Scotland. There were some wives who emigrated, but the indisputable majority were male. This can be seen in Poor Relief statements as well, which will be discussed in the next section. The divorce case records highlight in great detail the stories of desertion through travel. 24 out of the 48 CS cases stated that the deserting spouse had gone overseas. Often these cases were not straight forward instances of abandonment. For example, some husbands left to look for work and did continue communication with their spouse in Scotland sometimes for several years, others with just one letter. Some wives received money for their maintenance, though only for a short time. Mary Meek, for instance, received occasional sums of money from her husband for up to two years after he had gone to work as an engineer on board a steamship to Monte Video, Uruguay.<sup>55</sup> Jane Dryborough's husband sent her and their three children £230 in total and kept in correspondence over the first few years after he left for Australia before breaking contact.<sup>56</sup> Others claimed they had no contribution directly or indirectly from their husbands, such as Mary Ann Thomson whose husband wrote to her in April 1875

<sup>54</sup> CS46/1870/12/36 Willcott or Whyte v Whyte.

<sup>55</sup> CS46/1880/8/64 Meek or Allan v Allan.

<sup>56</sup> CS46/1870/7/74 Dryborough or Binnie v Binnie.

from London to say he intended to go to Cape of Good Hope, South Africa. By the time of the trial in 1880, Mary Ann had received nothing for herself or her children for over four years.<sup>57</sup>

As discussed earlier, employment was not only a reason but also a means of desertion for husbands. When unhappy with their current situation some husbands left claiming they were going to look for work and then ceased all communication with their family while away.<sup>58</sup> Isabella Willcott, daughter of John Willcott and wife of Lawrence Whyte, filed for divorce in 1870 complaining her husband had deserted her after he was unemployed for four months. They had one child together and she was pregnant with her second child when he sold all their belongings, brought the family to Isabella's parents' home and went off in search of work. Isabella stated in her complaint it was believed he went abroad, yet no one could confirm his whereabouts. She had not heard from him since March 1858.<sup>59</sup> Mary Steven, wife of John Mill, experienced abandonment twice when John first deserted her and their two sons in May 1873. He left hoping to find better employment in London, leaving behind a job working for the North British Railway Company in Edinburgh. He then returned in August 1873 for his mother's funeral where he met with Mary but quickly left again. A month later he sent her a message asking for their eldest son to be sent to him, which she believed to be preparation for the whole family joining him in London. Instead she never heard from John again. In March 1874 she was informed by her bother-in-law's wife that John and her oldest son had gone to New Zealand. Mary had by 1880 still found no trace of her son or her husband.<sup>60</sup>

Another commonly associated trope of husband desertion was enlistment. In the CS sample, however, only three cases emerged where the wife claimed her husband deserted after enlisting with a regiment. It is also noticeable that the action of enlisting appears more of a means to escape the marriage rather than a cause. Alexander White, a baker, left his family in Edinburgh on the pretence of looking for work, and found employment as a baker for the Commissariat Bakeries at Kadikoi in the Crimea. Though he had not enlisted (his wife believed he did), he was employed by this branch of the army. White took advantage of the overseas opportunity provided by the army's presence in Crimea to abandon his family in Scotland.<sup>61</sup>

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<sup>57</sup> CS46/1880/3/100 Thomson or Dick v Dick.

<sup>58</sup> Phillips, *Putting Asunder*, p. 371.

<sup>59</sup> CS46/1870/12/36 Willcott or Whyte v Whyte.

<sup>60</sup> CS46/1880/11/29 Mill v Mill.

<sup>61</sup> CS46/1860/8/20 Lamb or White v White.

The last means for desertion, cohabiting with another person, allowed the deserter to form a new relationship, which may have been the cause of the desertion in the first place. As mentioned earlier, only a few cases charged adultery along with desertion, however, it was likely that many absconding husbands and wives formed cohabiting relationships out of necessity.<sup>62</sup>

### *The Characters of Husbands and Wives and Working to Support the Family*

The CS divorce cases can provide insights into the kind of behaviour that was deemed to be appropriate for husbands and wife. It should be remembered that it was in the pursuer's best interest to omit any bad behaviour on their part. Though it is impossible to determine how much of the descriptions were accurate or exaggerated, they are useful examples of acceptable and unacceptable behaviour as expected by the Scottish judicial system. Thus, even though the husband was undoubtedly expected to be the financial provider according to social norms, the value of a hardworking woman is also evident. In defence of an abandoned wife, the woman was sometimes described as industrious or of good habits. Alternatively, if the wife was reputed to be of bad habits, neglectful, or a drunk, this was stated as a way to discredit her character in court, or refuse her relief from the Poors' Roll. Still this was not accepted as an excuse for desertion.

Conversely, witness statements (where available) illustrate working wives being described as having positive characteristics in contrast to their feckless husbands. In the case of Helen Boyd against her husband James Thomas Cockburn two witnesses for the pursuer made such a contrast when the first stated, 'I cannot say whether or not the defender was a good workman; but I know that he was not industrious—he was rather lazy. I knew that pursuer had to work for her own maintenance after her marriage'. The second testified that, '[t]he pursuer was a well behaved, industrious person during the time I knew her; I never saw anyone more so. I had a very high opinion of her conduct.'<sup>63</sup> The pursuer's credibility was reinforced by the fact that neither witness was a family member.

There was, however, a distinction made between an industrious woman working to support her family and the wife who left her husband and family for employment. The former was acceptable in a circumstance such as Mrs Cockburn, the latter was not. Working women became more common during industrialisation, although as explained by Eleanor Gordon, of the women who worked in factories (for instance), '43 per cent of the female labour

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<sup>62</sup> Phillips, *Putting Asunder*, pp. 388-389.

<sup>63</sup> CS46/1870/10/51 Boyd or Cockburn v Cockburn.

force were under eighteen, and the largest single category of worker was young girls between thirteen and fourteen years of age.<sup>64</sup> Though there were an increasing number of women working in factories, few were married. Besides factories women largely worked in domestic service, agriculture and clothing.<sup>65</sup> Of the 48 desertion cases found in the CS extracted cases eight cases mentioned the wife as employed in a separate trade from her husband. Five of those eight were filed by the wife. The remaining three cases demonstrate wives using employment as a means to escape their marriage. For example, Robert Liddle caught his wife packing up her belongings and attempting to catch a train when he returned home early from work:

The pursuer asked the defender for an explanation of her conduct when she informed him that she had taken a situation as a wet nurse. This was the first intimation the pursuer had of any intention on her part to leave him or take a situation and he believes that she intended to keep him in ignorance until she got away. The pursuer objected to her leaving him and urged her to remain at home but she left in defiance of his remonstrances taking her child along with her.<sup>66</sup>

Robert Lawson Peebles of Colinsburgh, Fife, gave a similar account of his wife's desertion, claiming that he had no idea she intended to leave him, but returned home to find all of her belongings gone. He afterwards learned she had moved to Glasgow to become a domestic servant.<sup>67</sup> Robina Bell McKenzie or Borthwick, wife of James Robert Borthwick, left her husband's home in Madras to join her sister in her milliner business also in Madras, then moved on to Calcutta to work as a milliner for Messieurs Francis Harrison Hathaway and Company Drapers and Outfitters. She eventually completely disappeared, even her family did not know where she was. Allegedly she travelled to Australia with a man she met in Calcutta.<sup>68</sup> Each husband claimed that their wives deceptively found employment as a means of escaping their marriage, and ignorance of their wife's dissatisfaction.

Women who found their marriage had broken down due to desertion were put in dire circumstances compared to deserted husbands.<sup>69</sup> Though women acting as the breadwinner were more common than the ideal of the male breadwinner would suggest, in most situations women's work was under-paid compared to men's wages, sometimes less

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<sup>64</sup> Gordon, 'Women's Spheres,' p. 207.

<sup>65</sup> Gordon, 'Women's Spheres,' p. 209.

<sup>66</sup> CS46/1870/2/62 Liddle v Moffat or Liddle.

<sup>67</sup> CS46/1880/11/135 Peebles v Gibson or Peebles.

<sup>68</sup> CS46/1880/11/115 Borthwick v McKenzie or Borthwick.

<sup>69</sup> Horrell and Humphries, 'The Origins and Expansion of the Male Breadwinner Family', p. 60.

than half the earnings.<sup>70</sup> Furthermore, married women were in some industries paid less than single woman due to the shorter hours they worked.<sup>71</sup> Thus a deserted woman, who often had dependents, would struggle even with employment to support a family solely on her income.<sup>72</sup> Some women were able to manage, at least temporarily. Dolina MacKay, deserted wife of Angus Campbell, claimed after her husband absconded in 1862 she spent the next eight years moving about Edinburgh parish supporting herself and child entirely through needlework, sewing and service before filing for divorce in 1870.<sup>73</sup> Both Janet Thomson or Straiton of Duke Street, Glasgow and Catherine Reid Aitken or Scott of Dumbarton Road, Glasgow, began dairy businesses after their husbands deserted them.<sup>74</sup> Though these women were able to become breadwinners, the fact that they filed for divorce, even after several years of desertion, implies their need to become fully separated from their husbands in order to establish complete independence and comfort, as well as to legally remarry.

Many women, however, were forced to apply for poor relief in order to supplement their wages or due to an inability to work. In an action for aliment against her husband Alexander Smart who had deserted her, Ann Arnot's application for poor relief to the parish of Brechin was included with the case documents. It detailed that she was employed as a weaver but only earned three shillings per week, far too little to support herself, two children and an elderly mother whom she cared for. She was further assisted by two shillings per week from her eleven year old son's job as a mill-spinner and one shilling per week from the Kirk Session of Brechin to support her mother. Still, Ann's family of four struggled on six shillings per week.<sup>75</sup> As her husband had deserted her over four years ago she had no other means of support besides applying to poor relief, and it was only with the poor relief that she was able to instigate a legal suit against her husband. In the next section the prevalence of deserted wives in the applications for poor relief will attest to the dependence of women on men as a result of the breadwinner ideology and further exemplify the prominence of desertion outwith the courtroom.

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<sup>70</sup> Humphries found that 'at any one time between ten and twenty per cent of families were headed by women, and over their lifetimes over one fifth of women could expect to experience lone motherhood'; Humphries, 'Female-Headed households in early industrial Britain', p. 34; Gordon, 'Women's Spheres,' p. 212; For a full history of women and work in Scotland see Eleanor Gordon, *Women and The Labour Movement in Scotland, 1850-1914*, (Oxford, 1991), especially 'Chapter 1. Women's Employment in Scotland, 1850-1914', pp. 15-54.

<sup>71</sup> A Clark, *The Struggle for the Breeches*, p. 127.

<sup>72</sup> Gordon, 'Women's Spheres,' p. 213.

<sup>73</sup> CS46/1870/4/18 MacKay or Campbell v Campbell.

<sup>74</sup> Janet's husband left her in 1861, CS46/1880/10/26 Straiton v Straiton; Catherine's husband left her in 1874, CS46/1880/3/180 Aitken or Scott v Scott.

<sup>75</sup> CS46/1830/7/278 Arnot or Smart v Smart

## Unofficial Desertion in Poor Relief Records

The official records of desertion found in the CS provide greater insight into examining one of the more over-looked forms of marital breakdown. Yet, in reality, very few deserted spouses went through the judicial process to fully dissolve their marriage. The cases found in the CS mask the high level of ‘unofficial’ separation or self-divorce. Thus this section will present and analyse the more common form of marital breakdown: desertion without divorce.

Poor relief applications are an important source that highlights marital breakdown due to desertion. Wendy Gordon’s study of poor relief in Paisley found that, ‘women were disproportionately vulnerable to poverty, and poor women were disproportionately without spouses, whether because unmarried, widowed, or abandoned.’<sup>76</sup> Each parish kept record books of every pauper who applied for poor relief, which included deserted wives. Samples of applications from three parishes, Paisley, Forfar and Montrose, were collected and compiled into databases for analysis and a comparison with the CS desertion cases.

### *The Old and New Poor Relief Legislation in Regards to Deserted Wives*

The old Scottish Poor Law until 1845 had relied on the generosity of local wealth (landowners especially) and charitable donations to fund the resources for each parish to support their poor and infirm.<sup>77</sup> Following the Disruption of 1843—where members of the Established Church of Scotland split away to form the Free Church—the rapid increase in population and employment changes due to industrialisation, the old system of donations proved incapable of supporting Scotland’s paupers.<sup>78</sup> In 1845 the New Scottish Poor Law was passed following the demands for reform in the 1840s, one of the biggest changes

<sup>76</sup> Wendy M Gordon, ‘The Demographics of Scottish Poverty: Paisley’s Applicants for Relief, 1861 and 1871,’ *Journal of Scottish Historical Studies*, Vol. 30, No. 1 (2012), p. 33.

<sup>77</sup> Rosalind Mitchison, ‘The Poor Law’, in T. M. Devine and Rosalind Mitchison (eds.), *People and Society in Scotland, Vol. 1, 1760-1830*, (Edinburgh, 1988-90), pp. 252-254.

<sup>78</sup> George King, ‘Modern Pauperism and the Scottish Poor Laws: including hints for the amendment of the Poor Law Act of 1845: with some suggestions for the amelioration and social elevation of the people’, *Bristol Selected Pamphlets*, (1871), pp. 20-21; Mitchison, ‘The Poor Law’, p. 626; James Smyth, “‘Seems decent’: Respectability and poor relief in Glasgow, c. 1861-1911’, in Andreas Gestrich, Steven King and Lutz Raphael (eds.), *Being Poor in Modern Europe: Historical Perspectives 1800-1940*, (Oxford, 2006), pp. 253-254. For an overview of the history of the Disruption of 1843 see, David M. Walker, *A Legal History of Scotland*, (Edinburgh, 2001), pp. 223-227.

being the shift from charitable donations as the main source of funds to compulsory assessments of property.<sup>79</sup>

The paupers that most concerned Poor Law officials were the aged, the young, the infirm, the impotent and the disabled. However, officials were well aware how easily people could fall into destitution even if healthy and able. Over the centuries since the Scottish Poor Law was established in the sixteenth century, applicants presented various predicaments that pushed them into poverty. Applicants claiming poverty did not always fit the qualifications listed above, and instead were classed as able-bodied. Technically, able-bodied paupers had always been excluded from Scottish Poor Law.<sup>80</sup> The 1845 Act made sure to officially sanction it; in the New Poor Law under section 68 it stated that Poor Law officials had the right to refuse relief to able-bodied applicants. It did not prohibit able-bodied persons from applying, but stipulated that such paupers could not demand relief when unemployed.<sup>81</sup>

The problem of responsibility for paupers was reoccurring for policy makers. There was an underlying principle that ran through the old and new Scotch Poor Law that legally bound family relations with the maintenance of one another. In the instance of a person becoming impoverished, their first resource for relief would be their family.<sup>82</sup> In the event

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<sup>79</sup> The New Scottish Poor Law of 1845 included the establishment of 1) local Parochial Boards in every parish; 2) a Board of Supervision; 3) appointed an Inspector of Poor chosen by local Parochial Board; 4) authorised the Parochial Board to levy an assessment for relief of the poor; 5) required insane people to go to asylums if poor and in need; 6) power to build and maintain local Poorhouses; 7) medical attendance and better diet for the poor; 8) required Parochial Boards to relieve destitute people; 9) the ability to appeal to the Board of Supervision if relief was denied or insufficient; 10) settlement could be established after living somewhere for five years; 11) authorised the re-patriation of English and Irish paupers who were destitute in Scotland; 12) allowed a parish that relieves a pauper from another settlement to request compensation from the settlement parish; 13) authorised the prosecutions of persons who deserted or failed to maintain their wives and family; 14) authorised the Board of Supervision to bring Parochial Boards to Court of Session if they are not taking care of their local poor; George Mackay, *Practice of the Scottish Poor Law*, (Edinburgh, 1907), pp. 4-5.

<sup>80</sup> Rosalind Mitchison, 'The Making of the Old Scottish Poor Law', *Past & Present*, No. 63 (May, 1974), pp. 58-59.

<sup>81</sup> 'LXVIII. And be it enacted, That from and after the passing of this Act all Assessments imposed and levied for the Relief of the Poor shall extend and be applicable to the Relief of occasional as well as permanent Poor: Provided always, that nothing herein contained shall be held to confer a Right to demand Relief on able-bodied Persons out of Employment'; An Act for the Amendment and better Administration of the Laws relating to the Relief of the Poor in *Scotland*. [4th August 1845] Regni VICTORI, Britanniarum Regin. CAP. LXXXIII.

<<http://www.workhouses.org.uk/poorlaws/1845act.shtml>>, [accessed 24 November 2013].

<sup>82</sup> 'LXXI. And be it enacted, That where in any Case Relief shall be afforded to a poor Person found destitute in a Parish or Combination, it shall be lawful for the Parochial Board of such Parish or Combination to recover the Monies expended in behalf of such poor Person from any Parish or Combination within *Scotland* to which he may ultimately be found to belong, or from his Parents or other Persons who may be legally bound to maintain him: Provided always, that in all Cases in which Relief shall be afforded by One Parish or Combination to a poor Person having a Settlement in another Parish or Combination, written Notice of such poor Person having become chargeable shall be given to the Inspector of the Poor of the Parish or Combination to which such poor Person belongs; and the Parish or Combination affording Relief

that a pauper had no relations to support them, poor relief was substituted. This expectation that relations would take care of their own applied expressly to the maintenance of women, who were the responsibility of their parents or husband. Hence, widows with young children were recognised since the sixteenth century as predisposed to poverty, and their eligibility for relief continued after the 1845 changes.<sup>83</sup>

Married women whose husbands were still alive but absent, however, were another matter. Because it was assumed that husbands could (and would) provide for their families if a woman was deserted she remained the legal responsibility of her husband as they were still legally married. Moreover, if there were children they were seen as a priority. In an attempt to tackle this problem the proportion of abandoned women and children was specifically addressed in the 1845 New Poor Law. Section 80 of the law first restated that neglecting or deserting husbands and fathers were to be branded as vagabonds, and secondly, authorised penalisation by the local court in the form of a fine or imprisonment.<sup>84</sup>

One of the largest impacts of the 1845 legislation was the regulation of procedures for Poor Law officials. This was done through the organisation of a central Board of Supervisors at the highest level, then local parochial boards for each parish and an Inspector of Poor assigned by the local board to meet with each applicant. Any person seeking relief would go to their local Inspector of Poor and provide all relevant details for the Inspector to determine if they qualify (such as residence, place of birth, marital status, dependent children, occupation, earnings, disablement, living relations, and so on). Their need for relief was further assessed by a visit from the Inspector to his or her listed residence within twenty-four hours of the application. The recommendation decided upon by the Inspector was then considered and finalised by the Parochial Board. Until their approval or refusal the applicant was given temporary relief as the decision of the Inspector was only provisional.<sup>85</sup>

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shall not be entitled to recover for any Charges or Expences incurred in respect of such poor Person, except from and after the Date of such Notice'; Poor Law (Scotland) Act 1845.

<sup>83</sup> Mackay, *Practice of Scottish Poor Law*, p 47.

<sup>84</sup> 'LXXX. And be it enacted, That every Husband or Father who shall desert or neglect to maintain his Wife or Children, being able so to do, and every Mother and every putative Father of an illegitimate Child, after the Paternity has been admitted or otherwise established, who shall refuse or neglect to maintain such Child, being able so to do, whereby such Wife or Children or Child shall become chargeable to any Parish or Combination, shall be deemed to be a Vagabond under the Provisions of the aforesaid Act of the *Scottish Parliament* passed in the Year One thousand five hundred and seventy-nine, and may be prosecuted criminally before the Sheriff of the County in which such Parish or Combination or any Portion thereof is situate, at the Instance of the Inspector of the Poor of such Parish or Combination, and shall upon Conviction be punishable by Fine or Imprisonment, with or without hard Labour, at the Discretion of the said Sheriff'; Poor Law (Scotland) Act 1845. See also Mackay, *Practice of Scottish Poor Law*, pp. 4-5.

<sup>85</sup> Mackay, *Practice of Scottish Poor Law*, p. 47.



There were effectively two types of relief available: indoor or outdoor. Indoor relief was the placement of the pauper in the poorhouse, which according to section 60 of the 1845 Act was for ‘the aged and other friendless impotent poor, and also...for those poor persons who, from weakness, or facility of mind, or by reason of dissipated and improvident habits, are unable to take charge of their own affairs.’<sup>86</sup> The second option of outdoor relief allowed paupers to remain in their own homes and receive small funds for their survival. This could range from rent payments to clothes for children to money for funeral provisions.

Finally, section one of the new Act explicitly states that any reference to a male person throughout ‘shall extend to a Female as well as a Male.’ Still, married women were not considered the same as single women. For instance, section 76 stipulates the applicant must prove residence of five years in the parish where applying. Section 77 stated that any applicant born outside of Scotland, specifically England, Ireland or the Isle of Man, and unsettled in Scotland, could be removed to their native country through the funds of the poor relief.<sup>87</sup> If married, however, the woman must give her husbands’ parish of settlement or place of birth.<sup>88</sup>

### *Concerns about Distribution of Funds and the Impact on Deserted Wives*

Although the first half of the nineteenth century saw reforms of the Poor Law intended to better regulate distribution of poor relief to paupers, there is room to debate the effectiveness of these changes. Historians, and some contemporaries, have found evidence that in practice distribution of poor relief did not match up to the written legislations. Moreover, in the nineteenth century conservative discourses developed about ‘deserving’ and ‘undeserving’ poor and respectability. These distrustful attitudes towards paupers arguably had a greater impact on who received relief than the actual law. It is also important to highlight that the Poor Law legislation was devised under the impression that paupers would be male.<sup>89</sup> Several studies, nevertheless, have shown that a majority of applicants to poor relief were women.<sup>90</sup>

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<sup>86</sup> Quoted in Mackay, *Practice of the Scottish Poor Law*, p. 56. This section enacted the erecting of poorhouses in any town with a population over 5,000 inhabitants; See Poor Law (Scotland) Act 1845, section LX.

<sup>87</sup> See Poor Law (Scotland) Act 1845, section LXXVII.

<sup>88</sup> The old Poor Law required three years of residence in order to qualify for relief in a parish; see Poor Law (Scotland) Act 1845, section LXXVI.

<sup>89</sup> Gordon, ‘The Demographics’, p. 28.

<sup>90</sup> Gordon used census data and poor relief applications from 1861 and 1871 and found that there was a higher percentage of women in the applications but this was also balanced by the higher percentage of women in the Paisley Population; Gordon, ‘The Demographics of Scottish Poverty’, pp. 28-29; Mitchison, ‘The Poor Law’,

Contemporaries and historians describe the Scottish Poor Law as austere, yet with the benefit of hindsight, evaluate the legislations as more complex as a result of the non-regulated system before 1845. According to William Forbes, an advocate in 1845, Scotland was stricter compared to England for two reasons: first, it legally bound relations of a pauper, if capable, with the responsibility of keeping them from becoming destitute, and second, because it did not aid the unemployed. Nevertheless, these rules were not always abided as Forbes wrote:

The Scotch system, limiting its responsibilities to the impotent to the absolute exclusion of the able-bodied, professes to provide for the former alone; but the practice is better than the theory, for it has been the custom to relieve the able-bodied, during temporary distress, from the Church collections, and by private subscriptions, but not only by legal assessment, which would involved a right to relief, which has been carefully guarded against.<sup>91</sup>

Rosalind Mitchison, in 1974, also found that the old Poor Law was more severe than England's, yet, it was 'more practical and less doctrinaire than credited in the past by nineteenth-century commentators.'<sup>92</sup> Room for allowances continued despite the provisions for a Board of Supervisors and local Parochial boards in the 1845 Act. For instance, studies of Glasgow found that although the new Poor Law presented more liberal ideas on a national scale, by the 1850s the local board in Glasgow became more conservative in their opinion on the best way to help paupers.<sup>93</sup>

Conservative discourses on how to treat the poor existed since before the nineteenth century in Scotland, yet Smyth argues they were given more credence in the late 1800s.<sup>94</sup> This conservative discourse was the 'notion that poverty was the consequence of personal immorality'.<sup>95</sup> This idea followed the principles that believed aid to the poor did more harm than good as it encouraged dependency on relief.<sup>96</sup> Therefore, charity should only be given to the 'deserving' and respectable paupers, who would independently support themselves when capable, but if unable, would not abuse the system by remaining on the Poors' Roll long term. While the 1845 Act seemingly brought fewer restrictions on

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p. 256; R. A. Cage, 'The Nature and Extent of Poor Relief', in R. A. Cage (ed.), *The Working Class in Glasgow 1750-1914*, (London, 1987), p. 89. For England in the eighteenth century see Bailey, *Unquiet Lives*, pp. 187-188.

<sup>91</sup> W. Forbes, 'Some Considerations on the Scottish poor-law question: in a letter to a friend', *LSE Selected Pamphlets*, (1845), p. 6 of 61.

<sup>92</sup> Mitchison, 'The Making of the Old Scottish Poor Law', pp. 73.

<sup>93</sup> Cage, 'The Nature and Extent of Poor Relief', p. 87.

<sup>94</sup> Smyth, "'Seems decent'", pp. 251, 256-57; Cage, 'The Nature and Extent', pp. 86-87;

<sup>95</sup> Smyth, "'Seems decent'", pp. 257, 268.

<sup>96</sup> This was argued by Malthus in the eighteenth century and Chalmers in the nineteenth; Mitchison, 'The Poor Law', pp. 263-264.

Scotland's impoverished, Smyth argues that in practice those who applied for poor relief were being judged on the preconceived notion that impropriety and poverty were directly linked. Thus, to the detriment, or benefit, of any applicants Poor Law Inspectors based their judgments on who was deserving of poor relief by how respectable the applicant appeared.<sup>97</sup>

In consequence female applicants were at a disadvantage; a single woman was judged on her character (which was further marred if she was an unmarried mother), or, if she was married she was viewed as legally one with her husband (making his place of birth or residence her own) and his dependent and responsibility. Pat Thane found the same situation existed under the English Poor Law, reformed in 1834. She claimed, '[t]he policy-makers ignored or underestimated severe problems of poverty among adult able-bodied women.'<sup>98</sup> As a result English women did not benefit from the New Poor Law of 1834 as much as English men, because policy makers 'assumed that women [who worked] simply supplemented the earnings of the male breadwinner'.<sup>99</sup>

The combination of conservative discourses and an increasing number of applicants caused Poor Law officials to question who was receiving support from poor relief. One group targeted was deserted wives. There were several reasons policy makers gave deserted wives special attention. Firstly, husbands who deserted their families were seen as disgraceful, yet a guilty by association notion transferred to the women and children left behind. Deserted wives and children were labelled as burdens; this attached a stigma to women and children tied to neglectful and irresponsible men. They were viewed critically by policy makers and not offered the emotional or social support needed to revoke those negative discourses that influenced the way policy makers wanted to deal with them. According to Marjorie Levine-Clark, abandoned women were not officially portrayed as victims until 1920.<sup>100</sup>

Secondly, it was thought that struggling couples colluded to defraud the Poor Law Inspector by claiming the wife was deserted, while her husband would temporarily remove himself from the family home.<sup>101</sup> The suspicion that deserted women were colluding with husbands for supplemental funds remained a concern in Britain even into the twentieth

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<sup>97</sup> Smyth, 'Seems decent', pp. 251-259.

<sup>98</sup> Pat Thane, 'Women and the Poor Law in Victorian and Edwardian England', *History Workshop*, No. 6 (Autumn, 1878), pp. 30-31.

<sup>99</sup> Thane, 'Women and the Poor Law', p. 48.

<sup>100</sup> Marjorie Levine-Clark, 'From "Relief" to "Justice and Protection"', pp. 313-315.

<sup>101</sup> Gordon, 'The Demographics of Scottish Poverty', p. 33.

century, although evidence suggests it was much more of an infrequent occurrence than assumed.<sup>102</sup>

Thirdly, Poor Law Officials, as well as those supplying the funds for poor relief, viewed deserted wives and children as a financial burden on the parish. The *Glasgow Herald* article from March 1852, 'Disgraceful Case of Desertion' told the tale of a deserting husband who sent his pregnant wife and two year old child from Wick to Glasgow where he promised to meet them. He instead left them in Glasgow alone and destitute. The wife was eventually forced to apply for poor relief, which brought her case to the attention of Glasgow's Poor Law Inspector, Mr Kirkwood:

The inspector at once relieved her immediate wants, and with the assistance which she obtained from the [distant] relative... the poor woman's situation was rendered as comfortable as the distressing circumstances would admit of. Of course, Mr. Kirkwood lost no time in communicating to the husband at Wick the position of matters at Glasgow, and requested to be relieved of the maintenance of his wife and children... This failing to produce any satisfactory reply, the Inspector, finding that he was likely to make nothing of the husband by mere correspondence, despatched a messenger-at-arms to Wick, from whence, to the no small astonishment of the natives, Mr. Malcolm was conveyed *en route* for Glasgow... [the husband was] brought before Sheriff Bell the following morning, and the fact of refusing to maintain his wife and children having been distinctly proved, both by the reluctant admissions of his unfortunate partner and the documents in the possession of the Inspector, the Sheriff adjudged the defendant to pay a fine of £5, in addition to refunding the expense which the parish had been put to in supporting his wife and sending for him to Wick. The alternative was 60 days' imprisonment; and, as the bill of costs is rather heavy, Mr. Malcolm, we believe, must consent to remain in durance vile till he obtains a remittance from Wick, where he carries on business to some extent.<sup>103</sup>

The concern for parish funds can be seen in such efforts by parish officials to track down a deserting husband, bring him to court, and force him to repay the sum of the funds given by poor relief. If a husband was found, he was furthermore strongly urged to return to his family. However, these efforts only increased the financial burden of deserted families as the means to cover such expenses for travel and litigation costs against the deserting husband were also covered by the parish funds.<sup>104</sup>

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<sup>102</sup> Gordon argues there was little evidence of this being a frequent occurrence; Gordon, 'The Demographics of Scottish Poverty', p. 33; Thane found even by 1914 'deserted mothers were still to be treated with the utmost caution for fear of "collusion" and every effort was to be taken to find the husband and make him support his family'; Thane, 'Women and the Poor Law', p. 46.

<sup>103</sup> 'Disgraceful case of Desertion', *Glasgow Herald*, 19 March 1852.

<sup>104</sup> Unknown, 'The Poor Law of Scotland: An Essay', in 'Prize Essays on the Practical Working of the Poor Law of Scotland...: with a preface and appendix by an eminent Scottish lawyer', *Bristol Selected Pamphlets*, (1871), p. 26.

When a deserting husband was reported the parish took over the financial responsibilities for the family whilst the absenting husband was searched for and, if found, brought before the Court for punishment. As stated in the 1845 Act, this could range from a fine to imprisonment with hard labour. For instance, John Cameron of St. Cuthbert's Parish was sentenced to sixty days imprisonment with hard labour for deserting his wife and five children.<sup>105</sup> Arguably, however, penalising a deserting husband with a fine or imprisonment did not provide the reconciliation desired between husband and wife. Even if a husband was found, he could not be made to resume providing for his family. Some husbands refused to support their wives and children and accepted imprisonment instead. Such as George Crow, who deserted his wife and three children and moved to the Highlands to become a preacher with another woman. From May 1874 until March 1875 Mrs. Crow had been living on out-door relief of 3s. According to the witness who brought Crow to the Sheriff Court Crow, 'distinctly refused to support his wife, and stated that he would rather go to prison than do anything for her...[He] says that it was the minister that married him to his first wife, but Jesus married him to the other one.' The Sheriff sent him to jail for 60 days with hard labour and no option of a fine.<sup>106</sup>

Growing concern over husbands and wives taking advantage of outdoor poor relief led policy makers to propose methods of dissuasion. They believed that if wives and children no longer had poor relief to fall back on husbands and fathers would not be so quick to abandon them. R. A. Cage found that in 1852 Glasgow's local parochial Board 'ordered that a list of deserted wives and children be published as a means of reducing their numbers', and offered a monetary reward to those willing to provide information on deserting husbands.<sup>107</sup> Seemingly, the shame of publicising this disgraceful behaviour was intended to discourage desertion; nonetheless Cage concludes it only increased costs for the Board.<sup>108</sup>

By the 1880s officials labelled deserted wives as subjects of special circumstances—along with mothers of illegitimate children, wives of men imprisoned long-term, and persons considered to be of bad habits—who were recommended for indoor relief. The poorhouse seemed to originally be intended as a multifunction space for paupers that provided lodging, labour to prevent idleness, medical care, education for children, and a reformatory for prostitutes or paupers addicted to drink. In the second half of the nineteenth century

<sup>105</sup> 'Desertion of a Wife and Family', *Dundee Courier & Argus*, 9 October 1874.

<sup>106</sup> 'Revivalist Preacher sent to Prison for Desertion of Wife and Family', *Glasgow Herald*, 29 March 1875.

<sup>107</sup> Cage, 'The Nature and Extent', p. 88.

<sup>108</sup> Ibid.

the poorhouse was used as a means test to determine which applicants truly were in want.<sup>109</sup> C. S. Loch wrote in 1898 that if an Inspector of Poor doubted the claims of an applicant a second option instead of refusal was to offer the poorhouse. It was believed that if persons were indeed destitute then they would accept the indoor relief out of desperation. If they refused or withdrew their application then it proved they had other options available. Hence, Loch described the poorhouse as divided between two classes of paupers: the test class, who received ‘strict discipline and deterrent administration...to make the test effective, and to secure order and decent conduct’; and the deserving poor—the aged, sick and infirm—who used the house as a refuge and ‘should received liberal sympathetic treatment.’<sup>110</sup>

Still, the consideration of deserving and undeserving factored in to the logic of the Scottish Poor Law. This is exemplified in the following quote discussing female applicants and the type of aid they should receive:

The recommendation that only indoor relief should be offered to deserted wives admits also of qualification. Because a woman has had the misfortune to be deserted by her husband, it does not necessarily follow that she is bad, or merits that her home should be broken up. If a woman, through no fault of her own, has fallen on evil days, the true function of the Poor Law is to raise, rather than further degrade her. All such cases should be considered on their merits. A point specially to be kept in view is the position of the children. It is very undesirable that children should be brought up in a poorhouse. If a mother with children be received into a poorhouse, the children should, as soon as possible, be boarded with respectable guardians. But the mother of the children is the natural, and, as a rule, the best guardian. *If, therefore, the deserted wife is a person to whom the upbringing of her children can safely be entrusted, the Parish Council should certainly grant outdoor relief*, taking measures at the same time, under section 80 of the Poor Law Act, to compel the deserting husband to do his duty. Clearly the Board’s recommendation will apply only to women of bad character [*italics original to the text*].<sup>111</sup>

Outdoor relief above all was viewed as an encouragement for potential collusion as wives claiming to be deserted would be given money to continue living at home.<sup>112</sup>

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<sup>109</sup> Ibid, p. 92; Smyth, ““Seems decent””, p. 255; Clark interprets the workhouse (English name for the poorhouse) test as indicative of the breadwinner wage being a privilege and responsibility rather than a right; if a man could not earn breadwinner status but still married and produced children then his punishment was the separation from his family and loss of independence in the workhouse; Anna Clark, ‘The New Poor Law and the Breadwinner Wage: Contrasting Assumptions’, *Journal of Social History*, Vol. 34, No. 2 (Winter, 2000), pp. 261-281, p. 261.

<sup>110</sup> C.S. Loch, ‘Poor Relief in Scotland: Its Statistics and Development, 1791 to 1891’, *Journal of the Royal Statistical Society*, Vol. 61, No. 2 (Jun., 1898), pp. 271-370, pp. 234-235.

<sup>111</sup> Mackay, *Practice of Scottish Poor Law*, pp. 62-63.

<sup>112</sup> Thane, ‘Women and the Poor Law’, p. 37.

In 1877, Mr. Adamson, the Inspector of Glasgow City Parish, was quoted as saying: '[t]he rule as to deserted wives seems harsh; but experience shows that facility of getting parish support for the children is a great encouragement to desertion, and also that many desertions are collusive, with the very object of burdening the rates.'<sup>113</sup> Clearly, the designation of poor relief was very much subject to the perceived character of the applicant, except that married women were not judged as individuals but as wives and mothers.

One reason the practice differed from the theory was the heightened concern over 'deserving' and 'undeserving' poor. Importantly, the Scottish poor relief system was individualised as each parish had their own Inspector of the Poor and Parochial Board. In effect every parish had different conditions to be met in order to receive poor relief, and therefore no study of one parish can serve as an example for Scotland as a whole. Still, studies of parishes do reveal important patterns. For instance, Gordon's demographic study of Paisley Parish identified migrants and 'widowed, abandoned or single parents' as the predominant category of applicant. However, Gordon acknowledged that the majority of those groups were female, but so too was the majority of Paisley's population.<sup>114</sup> Mitchison's studies of poor relief before 1845, found examples of able-bodied applicants receiving funds even though not officially entitled to them.<sup>115</sup> Cage's study of Glasgow likewise found relief given to able-bodied paupers before and after the New Poor Law, but argues that Glasgow officials disagreed with the liberal changes taking place centrally with the Board of Supervisors, and became 'reluctant followers.'<sup>116</sup> Although they repeatedly attempted to finalise an end to the practice of funding the unemployed, times of crisis in the nineteenth century required rules to be bent.<sup>117</sup>

This study of Paisley, Forfar and Montrose parish has similarly discovered that the different economic conditions of each parish influenced the types of applicants found in the records and the subsequent attitudes from the local board and inspector. Deserted wives are more complicated applicants, as they were the legal responsibility of their husband, and his 'natural obligation'.<sup>118</sup> Moreover, some deserted wives may have been

<sup>113</sup> Alex. M'Neel Caird, 'Specials Evils of the Scottish Poor-Law', (Edinburgh, 1877), Appendix p. 29.

<sup>114</sup> Gordon used census data and poor relief applications from 1861 and 1871 and found that there was a higher percentage of women in the applications but this was also balanced by the higher percentage of women in the Paisley Population; Gordon, 'The Demographics of Scottish Poverty', pp. 28-29.

<sup>115</sup> Mitchison, 'The Making of the Old Scottish Poor Law', pp. 63; Mitchison, 'The Poor Law', p. 260.

<sup>116</sup> Cage argues that the centralisation of the Poor Law lessened local uniqueness after 1845; Cage, 'The Nature and Extent', pp. 89, 96.

<sup>117</sup> Cage, 'The Nature and Extent', pp. 90-91.

<sup>118</sup> Levine-Clark, 'From "Relief" to "Justice and Protection"', p. 314.

able-bodied, whereby they would not qualify for relief.<sup>119</sup> Yet, even if able-bodied, as described by Gordon and emphasised in Thane's article, women were predisposed to poverty.<sup>120</sup> The prevalence of the breadwinner ideology meant women were paid less than men as it was assumed that they were dependents. Therefore, even with employment, married women struggled to earn enough to support a family on their own.<sup>121</sup> Young children, as well, prevented healthy women from working, and as mentioned earlier, the health and welfare of children was given priority over the parents. Hence, in this study the majority of deserted wives applying for relief in these parishes listed themselves as partially disabled, possibly because they were, and possibly because it would help them receive relief. Furthermore, one of the parishes shows evidence that suggests the means test was being used with deserted wives in the later decades.

Thus, we find deserted wives as applicants in Poor Law Parish Registers. The presence of deserted wives in Poor Relief applications is an indicator of two aspects of marital breakdown in nineteenth-century Scotland: the legal and social attitude towards deserted wives and the men who deserted them; and a glimpse of the wives and husband who ended their marriage outside of the legal process.

### *Case Studies of Three Parishes: Paisley, Forfar and Montrose*

The Poor Law Registers of Paisley parish, Montrose parish, and Forfar parish were collected and analysed in search of applications from deserted wives between the period 1830 and 1880. The first consideration was to find parishes in the east coast and west coast. These three parishes were chosen as case studies based on the availability of sources for comparison. Paisley Central Library has a wealth of well-kept Poor Law Records for this west coast parish, while the Angus Archive in Forfar holds the records of fifty local parishes on the east coast of Scotland. The Paisley records (which include Abbey Parish) were extensive and great in number. There were much fewer applications from Forfar, hence the inclusion of Montrose as another east coast example. Montrose, a town more similar to Paisley in regards to industrial centres, had a sizeable number of applications available, though still fewer than Paisley. Menmuir parish Poor Law records were also examined, but had far fewer applications from the same time period, and no applicants who listed themselves as a deserted wife. Overall, Paisley had more applications from deserted

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<sup>119</sup> Smyth, "Seems decent", p. 263.

<sup>120</sup> Thane, 'Women and the Poor Law', pp. 33-35.

<sup>121</sup> Gordon, 'The Demographics of Scottish Poverty', p. 33; Thane, 'Women and the Poor Law', pp. 33-35.



wives in the five years collected for this study than the total number of applications collected from Forfar and Montrose combined.

The discrepancy in number of applicants between the three parishes chosen was due to the variation in population size. Paisley, the largest of the three, already had a population of 57,466 by 1831.<sup>122</sup> Fifty years later in 1881 the population had actually decreased slightly to 55,638.<sup>123</sup> Montrose in 1831 had 12,055 residents, which by 1881 had only risen to 16,303.<sup>124</sup> Lastly, Forfar in 1831 had a population of 7,549 that almost doubled to 14,470 by 1881.<sup>125</sup>

The main industry of these parishes was textiles. Paisley is an example of a Scottish town that reached its industrial peak in the first half of the nineteenth century. In 1839 there was an established network of forty cotton mill factories with almost 5,000 employees around Paisley.<sup>126</sup> This was due to the reliance on water power making Renfrewshire, especially Paisley, an attractive region to build factories. This only lasted until the use of water power was replaced by steam power as the century wore on, causing Glasgow to become the new centre of industry.<sup>127</sup> In time the strength of the cotton industry in Scotland faded away leaving Paisley to suffer from a loss of employment and enter into economic decline as manufacturing flourished elsewhere in Britain.<sup>128</sup>

Montrose and Forfar, both in Forfarshire, though also heavily involved in the textile industry managed to avoid Paisley's downturn. Montrose's main manufactories were flax-spinning and weaving, and had several other manufactories such as soap, starch, and a ship-building industry as Montrose was a port town.<sup>129</sup> Forfar's main industry was linen, specifically heavy linens.<sup>130</sup> By 1843, 3,000 people were employed in weaving.<sup>131</sup> The

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<sup>122</sup> *The New Statistical Account of Scotland*. By The ministers of the Respective Parishes, Under the Superintendence of a Committee of the Society for the Benefit of the Sons and Daughters of the Clergy. Vol. VII. Paisley, County of Renfrew. Edinburgh and London. MDCCCXLV., p. 249.

<sup>123</sup> PP 1884-85 [C.4218] *Twenty-seventh detailed annual report* [Abstracts of 1881.], p. 15.

<sup>124</sup> *The New Statistical Account of Scotland*. By The ministers of the Respective Parishes, Under the Superintendence of a Committee of the Society for the Benefit of the Sons and Daughters of the Clergy. Vol. XI. Forfar-Kincardine. Edinburgh and London. MDCCCXLV., p. 278; and PP 1884-85 [C.4218] *Twenty-seventh detailed annual report* [Abstracts of 1881.], p. 9.

<sup>125</sup> *The New Statistical Account of Scotland*. Vol. XI. Forfar-Kincardine, p.697; and PP 1884-85 [C.4218] *Twenty-seventh detailed annual report* [Abstracts of 1881.], p. 9.

<sup>126</sup> T. M. Devine, *The Scottish Nation 1700-2007*, (London, 2000), p. 158.

<sup>127</sup> S. G. E. Lythe and J. Butt, *An Economic History of Scotland 1100-1939*, (Glasgow, 1975), pp. 186-187.

<sup>128</sup> An article written in 1845 suggested that the dire poverty of Paisley in the 1840s directly led to the reform of the Scottish Poor Law in 1845; William Forbes, 'Some Considerations on the Scottish Poor-Law Question: in a letter to a friend', *LSE Selected Pamphlets* (1845), p. 20. See also Lythe and Butt, *An Economic History of Scotland*, p. 188; and *The New Statistical Account*. Paisley, p. 306.

<sup>129</sup> *The New Statistical Account of Scotland*. Montrose, pp. 280-281.

<sup>130</sup> Devine, *The Scottish Nation*, p. 158.

<sup>131</sup> *The New Statistical Account of Scotland*. Forfar, p. 697.

region of Angus as of 1836 had one of the highest concentrations of flax-spinning mills numbering at eighty-two of the 170 in Scotland. Angus also had 26 of the 48 jute factories, and was one of the three predominating counties for linen.<sup>132</sup> Even by 1901, Forfar remained an important town for the linen industry.<sup>133</sup> It was possible that the dominating presence of textile factories meant more employment opportunities for women, including married women. As shown later on in this section, many deserted wives did state occupations, of which the majority worked in textiles.

### *Patterns Found in the Poor Law Applications of Deserted Wives*

In total the collected number of Poor Law applications made by deserted wives was 335.<sup>134</sup> 252 of the 335 are applications made to the Paisley Parochial Board, 42 are from Forfar, and 41 are from Montrose. The records available for Paisley parish began in 1839, allowing the study to start in the year 1840 and continue decennially until 1880.<sup>135</sup> Forfar parish's *Record for Applications for Parochial Relief* began in 1855, for that reason the applications collected cover every five years from 1855 to 1880. This quinquennial system was used for Montrose parish as well. The earliest Poor Law record available for Montrose was June 1846. Due to the low number of applications per year, any woman who applied as a deserted wife between 1846 and 1868 (the first General Register of Poor volume) was included. After 1868, applications from deserted wives every five years were collected up to 1880. The number of applications collected per year from each parish is shown in Table 4.5.

Due to the differences in application formats, not all the same information is available for each applicant over the three parishes. Paisley had the most detailed application form. Forfar's application form was the briefest, with the bare minimum written down by the clerk. The form for Montrose was more similar to Paisley's, but placed a greater emphasis on recording the exact amount, type and length of relief given to the applicant and her family members, whereas Paisley's form suggested a greater concern with proving the applicant's settlement and relations.<sup>136</sup> From the Paisley applications there is an

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<sup>132</sup> Lythe and Butt, *An Economic History*, p. 183.

<sup>133</sup> Devine, *The Scottish Nation*, p. 329.

<sup>134</sup> As this study focuses on marital breakdown only women who listed themselves as deserted were included. Any wife who applied to Poor Relief claiming her husband was in the hospital or in prison was excluded as they did not represent women who had been wilfully deserted by their husbands.

<sup>135</sup> This also allowed the Poor Law applications collected to coincide with the same years as the Court of Session cases.

<sup>136</sup> Settlement was an important factor for Poor Law Officials to determine which parish was responsible for supporting that pauper. Married women were required to provide their husband's residence or place of birth

opportunity to determine the length of the marriage before desertion, and the interval between the desertion and application (as is available from the CS cases). Those numbers are listed in Tables 4.6 and 4.7.

**Table 4.5 Number of Poor Relief Applications of Deserted Wives Collected**

| <u>Year</u> | <u>Paisley</u><br>Total No. of<br>Applications | <u>Paisley</u><br>No. of<br>Deserted<br>Wives | <u>Forfar</u><br>Total No. of<br>Applications | <u>Forfar</u><br>No. of<br>Deserted<br>Wives | <u>Montrose</u><br>Total No. of<br>Applications | <u>Montrose</u><br>No. of<br>Deserted<br>Wives | <u>Total</u><br>Deserted<br>Wives Per<br>Year |
|-------------|--|---|---|--|---|--|---|
| 1840        | 281  | 38  | --  | --   | --  | --   | 38  |
| 1850        | 319  | 62  | --  | --   | 6   | 0  | 62  |
| 1855        | --   | --  | 54  | 6  | 21  | 0  | 6   |
| 1860        | 435  | 75  | 119   | 8  | 22  | 1  | 84  |
| 1865        | --   | --  | 151   | 8  | 87  | 4  | 12  |
| 1870        | 421  | 47  | 148   | 3  | 78  | 4  | 54  |
| 1875        | --   | --  | 92  | 2  | 63  | 4  | 6   |
| 1880        | 303  | 30  | 218   | 15   | 63  | 0  | 45  |
| Total       | 1759   | 252   | 782   | 42   | 340   | 41 <sup>a</sup>                                |   |

a. From 1846-1868 there were 33 relevant applications collected out of 701 total

Table 4.6 demonstrates that the highest percentage of wives claim to have been married 1-5 years before their husband absconded; this length of time between marriage and desertion for Poor Law applicants was similar to that shown in Table 4.1 for the CS. One of the biggest differences between the Poor Law applications and the CS cases was the ability for a deserted wife to apply immediately after she realised her husband had left her. Unlike the divorce legislation forcing a deserted spouse to wait at least four years before they could file for a divorce, poor relief was available as long as the Inspector of Poor believed the applicant was truly destitute and in need of Parochial Board funds. Therefore, Table 4.7 shows a high percentage of applications within one year of their desertion.

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as their own settlement. If a pauper applied for relief in a parish that was not their settlement, the officials would then request the true parish of settlement to compensate the funds given to that pauper.

**Table 4.6 Length between Marriage and Desertion, PRA Paisley**

| Deserted Wife as Applicant | 1840 | 1850 | 1860 | 1870 | 1880 | 252 [100%] |
|----------------------------|------|------|------|------|------|------------|
| Under 1 yr                 | 1    | 5    | 6    | 4    | 0    | 16 [6.34%] |
| 1-5 yrs                    | 10   | 11   | 20   | 13   | 5    | 59 [23.4%] |
| 6-10 yrs                   | 11   | 12   | 15   | 11   | 4    | 53 [21%]   |
| 11-15 yrs                  | 3    | 8    | 13   | 4    | 4    | 32 [12.7%] |
| Over 16 yrs                | 6    | 11   | 9    | 3    | 2    | 31 [12.3%] |
| N/A                        | 7    | 15   | 12   | 12   | 15   | 61 [24.2%] |
| Total No. of Applications  | 38   | 62   | 75   | 47   | 30   | 252        |

**Table 4.7 Interval between Desertion and Action, PRA Paisley**

| Deserted Wife as Applicant | 1840 | 1850 | 1860 | 1870 | 1880 | 252 [100%]  |
|----------------------------|------|------|------|------|------|-------------|
| Under 10 days              | 1    | 6    | 13   | 16   | 3    | 39 [15.5%]  |
| Under 1-1 mo               | 5    | 13   | 19   | 6    | 2    | 45 [17.8%]  |
| 2-12 mos                   | 17   | 19   | 27   | 9    | 5    | 77 [30.5%]  |
| 1-2 yrs                    | 7    | 2    | 4    | 4    | 1    | 18 [7.14%]  |
| 3-5 yrs                    | 5    | 6    | 1    | 2    | 1    | 15 [5.9%]   |
| 6-10 yrs                   | 1    | 1    | 2    | 4    | 1    | 9 [3.57%]   |
| Over 10 yrs                | 0    | 1    | 0    | 3    | 2    | 6 [2.3%]    |
| N/A                        | 2    | 14   | 9    | 3    | 15   | 43 [17.06%] |
| Total No. of Applications  | 38   | 62   | 75   | 47   | 30   | 252         |

**Table 4.8 Ages of Applicants Listed as Deserted Wives, Poor Relief**

| Paisley PRA        |     | Forfar PRA— (37 Applicants) |    | Montrose PRA       |    |
|--------------------|-----|-----------------------------|----|--------------------|----|
| 14-20              | 2   | 14-19                       | 0  | 14-19              | 0  |
| 21-30              | 87  | 20-29                       | 12 | 20-29              | 7  |
| 31-40              | 88  | 30-39                       | 19 | 30-39              | 22 |
| 41-50              | 45  | 40-49                       | 4  | 40-49              | 6  |
| 51-70              | 15  | 50-70                       | 2  | 50-70              | 5  |
| N/A                | 15  | N/A                         | 0  | N/A                | 1  |
| Total no. of Apps. | 252 | Total no. of Apps.          | 37 | Total no. of Apps. | 41 |

The age of the applicant was one piece of information available from all three parish forms. This information is also beneficial because it is not available in the CS divorce documents. From the data given in Table 4.8 it can be seen that most wives in each parish were between 30-40 years of age when they applied.

The age of the applicant's husband was not required in the Forfar or Montrose forms, and therefore was only included erratically. From those chance ages gathered—twelve applicants listed the age of their husbands in the Montrose records, but only one from Forfar—the most common age group was 30-39; the same as that of a deserted wife. The Paisley records have 177 of the 252 applications with the age of the deserting husband listed, from which most husbands fell into the age group 21-30; younger than the age found most common for the wives. When the three parishes are combined the most common age group for deserting husbands was 20-30.

A study of Poor Relief applications from three parishes in Scotland reveals that even with employment and working children, families without a male wage earner struggled with poverty. This was a consequence of the breadwinner wage associated with male employment, and the lower wages distributed to women and children, who if employed, were considered dependents and therefore only deserved a supplemental wage.<sup>137</sup> Therefore a deserted wife, even if a wage earner, still required extra assistance and this became the charge of the Parochial Boards. In the parish of Paisley, out of 252 applications for poor relief, 163 of these deserted wives had a listed occupation. The most common employment of these 163 women was in the textile industry, followed by women employed as a domestic servant or housekeeper (including cleaners and washers).<sup>138</sup> In the Forfar Poor Law applications out of 37 applicants, 34 had listed occupations, the majority of whom worked in the textile industry as a sewer, cotton spinner, millworker, winder or weaver.<sup>139</sup> The third parish of Montrose had 41 applicants, 26 of whom listed an occupation. The most common form of employment found was domestic services, followed by mill or factory work.<sup>140</sup> That a high proportion of deserted wives worked outside of the home reflects the discrepancy between male and female employment and wages; 'latterly rising real wages of the husband, if employed, enhanced emphasis on family life and the emulation of middle-class child-rearing attitudes, and diminished prospects for re-entry into a domestic sector which had stabilised or was even contracting slightly maintained married women's employment at very low levels.'<sup>141</sup> Women were expected to marry and receive support from an employed husband, but when the marriage failed, deserted wives were compelled to re-enter the workforce to earn what they could from low wages and limited employment.

<sup>137</sup> Phillips, *Putting Asunder*, pp. 370-372; see also Horrell and Humphries, 'The Origin and Expansion of the Breadwinner Family', pp. 25-64.

<sup>138</sup> Paisley Parochial Board, Poor Law Records.

<sup>139</sup> Angus Archive, Forfar Poor Law Register of Applications, 1855-1880.

<sup>140</sup> Angus Archive, Montrose Parish Poor Relief Records, 1846-1880.

<sup>141</sup> Rodger, 'Employment, Wages and Poverty', pp. 33-34.

Number and age of children was another category present on all three forms. It was more common for a deserted wife to have children when she applied for Poor Relief. The maintenance of dependent children was a determining factor for the Inspector of Poor and Parochial Board in determining whether the applicant was eligible for relief and if so, how much. Of the 252 Paisley applications, 210 had dependent children, or 83 per cent. In Forfar, 30 of the 37 applicants had dependent children, or 81 per cent. And from the Montrose applications, 30 of the 41 applicants had children, or 73 per cent. From all three parishes, the majority of women had two or three dependent children. According to Cage, 'children were continued on the roll until the age of ten and were provided with school fees from the age of six until the age of ten.'<sup>142</sup> The term dependent excluded any adult children, children who were living apart from the applicant, or children who were employed.

Previous case studies of Poor Law applications in Scotland conducted by Smyth for Coffin Close in Glasgow, and Gordon who looked at the Paisley Poor Law records from 1861 and 1871, also found that most female applicants had young children.<sup>143</sup> Gordon even argues that '[i]t is a mark of the humanity (or realism) of the system, in fact, that "having a young child" was considered sufficient grounds for a woman's inability to work.'<sup>144</sup> The extent of the Parochial Board's humanity, however, was tested when the child or children were determined to be illegitimate. Smyth found that, '[w]here the pregnant woman was single, the relief given was invariably the Poorhouse. One married woman who was pregnant was initially refused aid, but this may have been because the child was not her husband's.'<sup>145</sup> Two applicants from Montrose, Mary Striven and Margaret Peebles, applied for relief claiming to have been deserted by their husbands, but their disablement was young children. Mary Striven was confined due to child birth, and Margaret Peebles was destitute with an eight year old and a two and a half year old child. Both women were noted as having illegitimate children. Unlike Smyth's applicant, however, Striven was given temporary relief for a month, and when she applied a year later after having another illegitimate child, she was again given temporary outdoor relief. Margaret Peebles was also given outdoor relief of 10s. in order to buy her sons shoes.<sup>146</sup>

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<sup>142</sup> Cage, 'The Nature and Extent of Poor Relief', p. 86.

<sup>143</sup> Smyth, "'Seems decent'", p. 263; Gordon, 'The Demographics of Poverty', p. 33.

<sup>144</sup> Gordon, 'The Demographics of Scottish Poverty', p. 33.

<sup>145</sup> Smyth, "'Seems decent'", p.263.

<sup>146</sup> Angus Archive, Montrose Parish, ACC9/41/2/23- General Register. Vol. 1. Commencing 1<sup>st</sup> June, 1846, Ending 13<sup>th</sup> August, 1868, Both days inclusive. Statement 553, Mary Striven or Findlay; and Statement 660, Margaret Peebles.

‘Maintenance of children’ was even a phrase used by the Paisley Clerk when listing the applicant’s disablement. In 1840, 28 of the 38 applications listed the disablement as ‘maintenance of children’.<sup>147</sup> Whether wholly disabled, partially disabled, or able (along with a column for details), was a third category of information available on each Poor Relief form. As discussed earlier, able-bodied applicants risked refusal or only indoor relief. Women, nevertheless, could be fit and healthy, but still unable to escape poverty, whether due to low wages, lack of employment, or dependent children. In Paisley, Forfar and Montrose, the majority of the deserted wives stated they were partially disabled (after those who did not list anything or N/A). In Paisley and Forfar, the second most common answer given was ‘able’. In the Montrose applications, no woman described herself as able, possibly indicating a stricter local parochial board. The smallest percentage of deserted wives stated they were wholly disabled in each parish (see Table 4.9).

**Table 4.9 Wholly or Partially Disabled, Poor Relief**

| <u>Paisley PRA—</u> |            | <u>Forfar PRA—</u> |                           | <u>Montrose PRA—</u> |                 |
|---------------------|------------|--------------------|---------------------------|----------------------|-----------------|
| Wholly Disabled     | 46 [18%]   | Wholly Disabled    | 3 (4 <sup>a</sup> ) [8%]  | Wholly Disabled      | 3 [7%]          |
| Partially Disabled  | 53 [21%]   | Partially Disabled | 11 [30%]                  | Partially Disabled   | 36 [88%]        |
| Able                | 56 [22%]   | Able               | 8 (9 <sup>a</sup> ) [22%] | N/A                  | 1 [2%]          |
| Not Available       | 97 [38.5%] | Neither            | 6 [16%]                   | Total                | 41 <sup>c</sup> |
| Total               | 252        | N/A                | 9 (10 <sup>b</sup> )      |                      |                 |
|                     |            | [24%]              |                           |                      |                 |
|                     |            | Total              | 37 (40 <sup>ab</sup> )    |                      |                 |

c. One woman was listed as ‘taken badly’

a. One woman applied three times in one year; the earliest date lists her as N/A, second as wholly, and the third as able

b. One woman applied twice, the first application stating she was wholly disabled due to an injury to her rib, the second application had nothing listed

The descriptions of these women’s disablements are significant for the historian to determine what caused them to apply for poor relief. Forfar only asked for the type of disablement (wholly or partially), though some applicants volunteered extra information. For example, one woman stated she was wholly disabled in child bed, while another woman said she was only partially disabled as she was in the last month of pregnancy, presumably preparing for child birth when she would be unable to work. One woman

<sup>147</sup> Paisley Public Library, Paisley Poor Law Records, 1840, Vol. 11/1, Statement of Cases, 1-1067.

stated she was wholly disabled due to asthma and bronchitis, and another one said it was an injury to her rib that put her out of work. Another woman listed herself as able, but her disablement was starvation.<sup>148</sup> In Montrose most of the wives described themselves as partially disabled due to young children. The second most common description was illness or disease. Five women complained of general weakness and one of exhaustion. Only three women stated that their disablement was desertion.<sup>149</sup> If these disablements are analysed alongside the discourse of deserted wives as burdens on the community it appears that having young children was indeed a predisposition to poverty if a single parent. Pregnancy and childbirth impaired the mother's ability to work and support herself and children, leaving limited options to avoid poverty. The description of an injury or disease suggests these deserted wives were capable of managing on their own until hurt or ill. Weakness and exhaustion are telling as well, as they imply these women were working themselves to the point that they became incapable of carrying on as the sole provider for their family.<sup>150</sup>

The most common description of disablement in the Paisley applications varied by year, but often contained more detail than 'wholly', 'partially' or 'able'. As already mentioned, in 1840 the majority of deserted wives stated their disablement was young children. The second highest disablement listed was abandonment by their husbands. In 1850 the most cited disability was desertion, followed by childbirth, and then destitution. 1860 the most common disability was again desertion, but the second most common reason for applying to the Poor Law was to fund the wife's search for her absconding husband. Twelve women, of the 75, stated they were travelling to locate their husband and had arrived in Paisley in the hope of finding him there, or as a stopover as they continued their search. One woman was listed as, 'worn out travelling from Kilbirnie and applies for a night's lodgings'; another said, 'has been travelling in search of husband but is exhausted and unable to proceed any further'; and another explained, 'husband deserted her in Derry 2 months ago and she came here 2 weeks ago in search of him but finds he has left Paisley and she wishes means to convey her home to Carluke.'<sup>151</sup> The fact that these wives opted to search for their deserting husbands rather than stay at home in the hope that he would return is a part of the hidden nature of desertion. There is no way to know how often this

<sup>148</sup> Angus Archive, Forfar Parish, ACC9/18/1/29B- Record of Applications for Parochial Relief, with Index.

<sup>149</sup> Angus Archive, Montrose Parish, ACC9/41/2/23- General Register. Vol. 1. Commencing 1<sup>st</sup> June, 1846, Ending 13<sup>th</sup>.

<sup>150</sup> Bailey argues in her study that deserted wives should not be labelled as victims; Bailey, *Unquiet Lives*, p. 190.

<sup>151</sup> Paisley Public Library, Paisley Poor Law Records. 1860, Vol. 11/11, Statement of Cases, 9657-10456; 1860, Vol. 11/12, Statement of Cases 10457-11260½, 1860.



occurred (in 1880 two applicants from Forfar said they were in search of their husbands, one asking for fare to Aberdeen to be paid by the Parochial Board as it was the next step in her search<sup>152</sup>), or how often wives were able to catch up to their husbands. It is apparent from the persistence of these women that deserted wives would not react passively to their abandonment, but would risk destitution and homelessness to track their husband down and demand his return. What is also evident is the support deserted wives expected from the Poor Law Officials, despite the condemnation of deserted wives receiving outdoor relief.

In 1870, the most common disablement was also desertion, but the second most common complaint was illness or injury, followed by pregnancy. There is also evidence of women who did their best to avoid going on the Poors' Roll: one woman stated she was, 'disabled by sore leg, but that does not hinder her from winding—was supported by son James, but he died ten weeks ago—was four or five months off work before he died- was Clerk on Railway'; she had been capable of surviving without poor relief as she had the earnings of her son and herself, but once he died her earnings as a winder were not enough even for her own support.<sup>153</sup> Lastly, in 1880 most applicants complained of having young children and pregnancy, followed by desertion, and the third most common disablement was injury or illness.

While the reason for the application was the most important issue for the Inspector of Poor and Parochial Board, it meant that the reason for the desertion itself was often an excluded aspect of information. Similar to the CS case details, the Poor Law applications usually only supply the reader with the type of desertion experienced by the applicant, rather than the reason which led to it. The most common means of desertion was emigration. An article published in the *Glasgow Herald* in September 1867 reported an awareness of this as a contemporary issue in Scottish society. In response to an article on cotton spinners deserting their families to emigrate, the Secretary to the Cotton Spinners wrote a letter to the editor of the *Glasgow Herald*. He explained that the loss of employment had left close to 400 spinners out of work and displaced. In order to help their fellow tradesmen, a solution was devised to send spinners to America, of which 30 men were chosen to go. In defence of these thirty men's decision to emigrate for employment, the author went through all thirty men's families to clear their names as deserters. The main argument of

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<sup>152</sup> Forfar Poor Law, ACC9/18/1/29B- Record of Applications for Parochial Relief, with Index, 1880, Statement 794 and 888/78.

<sup>153</sup> Paisley Public Library, Paisley Poor Law Records. 1870, Vol. 11/16, Statement of Cases, 14865-16064, Statement 15718.

his letter was to state that four hundred idle men were starving, and in an attempt to better their situation, emigration was the only viable solution:

With thanks to you, Mr Editor, I am done; and I think that from this statement the public can calculate how many paupers the spinners have made by emigration, likewise, to estimate at its true value, the rubbish that is sometimes spouted by public men before public bodies, in despite of one of "God's laws," which says—"Thou shalt not bear false witness against thy neighbour".<sup>154</sup>

Enlistment, though argued by Phillips and Schwartzberg to be a common feature of familial desertion, was only found in ten of the Paisley applications, and one from Forfar. More husbands were listed as seamen than soldiers. Montrose had nine of the 27 husbands listed as seaman. Working at sea had risks for families (death or lost at sea), but advantages for unhappy husbands who found working on ships a means of employment and an opportunity to travel abroad leaving behind dependents and starting over in a new country.<sup>155</sup> Overall the most frequently cited statements as to the whereabouts of the husband were: overseas, somewhere else in the country, or unknown.<sup>156</sup>

An application where the reason for the desertion was listed gives some insight into the problems that led to marital breakdown. Of the examples available the most cited reason for the desertion was related to money and employment. For instance, the wife of John Wright claimed her husband left her and their children to sail to America with his brother, who also left behind a family. Before he left he told his wife of his plans saying that he was want of employment.<sup>157</sup> Andrew Elvine, a weaver, with his wife's consent left his family and job six weeks before to sail to America in hopes of 'bettering his condition, meaning to send for his wife and family should he succeed'.<sup>158</sup> Though both husbands emigrated for work neither sent money nor returned to Scotland, thus abandoning their families.

Though Paisley Poor Law records have greater detail available on the applicant's life, only the applications from Forfar and Montrose include the relief given to the applicant. Table 4.10 shows the results of the applications collected.

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<sup>154</sup> 'Emigration of Cotton Spinners, and desertion of their wives and families. To the Editor of the Glasgow Herald', *Glasgow Herald*, 6 September 1867.

<sup>155</sup> Prices for travelling overseas varied by country, but were costly and required capital; Levitt and Smout, *The State of the Scottish Working-Class*, pp. 244-246. See also Phillips, *Putting Asunder*, p. 286.

<sup>156</sup> These answers were to be expected from most wives, however some wives did have a vague idea of where their husbands were, but were still unable to get support from them.

<sup>157</sup> Paisley Poor Law, 1840, Vol. 11/1, Statement 314.

<sup>158</sup> Paisley Poor Law, 1840, Vol. 11/1, Statement 466.

**Table 4.10 Result of Application, Poor Relief**

| <u>Forfar PRA—</u>    |                 | <u>Montrose PRA—</u> |    |
|-----------------------|-----------------|----------------------|----|
| Inspector:            |                 | Outdoor:             |    |
| Relieved              | 23              | Money:               |    |
| Poorhouse             | 18 <sup>a</sup> | Less than 2s.pwk     | 5  |
| Infirmery             | 1               | 2-3s.pwk             | 9  |
| Total:                | 42              | 3-4s.pwk             | 9  |
|                       |                 | 4-5s.pwk             | 4  |
|                       |                 | 6s.pwth              | 2  |
| Parochial Board:      |                 | Board & Lodging      | 3  |
| Admitted              | 16              | Maintenance          | 1  |
| Withdrawn             | 2               | Indoor/Poorhouse     | 5  |
| Allocated Aliment     | 3               | N/A                  | 3  |
| Sanctioned            | 11              | Total:               | 41 |
| Refused               | 2 <sup>b</sup>  |                      |    |
| Taken off b/c Husband |                 |                      |    |
| Returned              | 3               |                      |    |
| N/A                   | 5               |                      |    |
| Total:                | 42              |                      |    |

<sup>a</sup> Two women did not go to the Poorhouse when it was offered

<sup>b</sup> Reason for refusal by Parochial Board:

- 1) Woman refused to live with her husband;
- 2) Applicant was able-bodied

The amount and type of relief was determined by the number of dependents the applicant had, the earnings or lack of earnings contributed by herself or her children, and the character of the applicant. Jane Simpson, for example, was given 3s. per week in cash in relief to support herself and four dependent children. She had six children in total, but Janet aged 14 lived with her grandmother, and John aged 16 had an apprenticeship as a carpenter earning 4s.6d. per week.<sup>159</sup> Those who received relief in the form of board, lodging, or the poorhouse were all listed as injured and without children (except for one woman who had a 3  $\frac{3}{4}$  year old child), and presumably deemed unable to take care of themselves. An important reality of the Scottish Poor Law, however, was the fact that it was not capable of providing funds to pull a person out of poverty. It was only available to keep a person and families from being completely destitute.<sup>160</sup> This discretion in funds was meant to ensure paupers did not resolve themselves to poor relief rather than work to pull themselves out of poverty.

What do these findings suggest about these parishes? Each study highlights different aspects of the lives of deserted wives due to the differences in the applications. Although Paisley parish did not record the relief given to the applicants, it did ask whether or not the

<sup>159</sup> Montrose General Register, 1865, ACC9/41/2/23, Statement 404.

<sup>160</sup> Mitchison, 'The Poor Law', p. 263.

applicant had been chargeable before. From the statements collected an average of 38 per cent of the 252 applicants had been on the Poors' Roll at some point in their life; this suggests the difficulty of escaping poverty, and how easily women could fall into it. Paisley was also unique in that 30 per cent of the 252 applicants were born outside of Scotland, 28 per cent listed Ireland as their place of birth, and the remaining four applicants were from England.<sup>161</sup> All applicants from Montrose and Forfar by comparison were born in Scotland, except for one Irish and one English woman who applied to Forfar. These examples could indicate the increasing severity of Poor Law officials towards paupers. The woman from Ireland, who was listed as a vagrant and able-bodied, applied for her three children in 1865 and was given temporary relief by the Inspector, but was then withdrawn from the Roll by the Parochial Board. Presumably, this was because she was not a resident of Forfar parish and had described herself as neither wholly nor partially disabled.<sup>162</sup> The English woman listed her residence as Blairgowrie and occupation as an outdoor worker. Her application stated that she was able-bodied, but with a three month old child. Her husband had deserted her, and she was on her way to Aberdeen to search for him. The Inspector offered her the poorhouse as relief, but the application states that she did not go.<sup>163</sup>

Forfar shows use of the means test to determine deserving and undeserving paupers. For instance, from 1855 to 1875 most women were offered outdoor relief, except in 1880 when it was offered to only one woman, and this may have been due to the notation '[husband] is said to be a bad character.'<sup>164</sup> Indoor relief, or the poorhouse, was offered from 1855 to 1875 to six deserted wives, although five of these women, out of the thirty applicants with children, were 'relieved' by having their children sent to the poorhouse, and three of those mothers were also offered admittance. This seemingly contradicts the official position on indoor relief and children quoted earlier; however, it could be that although four out of five of these women had jobs, four out of the five women had 'no home' listed as their residence, and were therefore considered unable to maintain their children. Moreover, perhaps these mothers recognised if not welcomed the opportunity to ensure a roof and meals for their children; none of their applications state that the offer was refused.

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<sup>161</sup> Gordon's study of Paisley goes into detail about the frequency of migrant applicants to the Poors' Roll. She found that although Irish immigrants made up 16.8 and 12.9 per cent of Paisley's population in 1861 and 1871 respectively, 27.8 and 23.3 per cent of poor relief applicants were Irish in those years; Gordon, 'The Demographics of Scottish Poverty', pp. 34-35.

<sup>162</sup> Forfar Poor Law, 1865, ACC9/18/1/29, Statement 1221.

<sup>163</sup> Forfar Poor Law, 1880, ACC9/18/1/29, Statement 888.

<sup>164</sup> Forfar Poor Law, 1880, ACC9/18/1/29, Statement 765.

Seemingly the means test was in full force by 1880 as, out of eleven applicants, ten were offered indoor relief. Five of the ten were either partially or wholly disabled, three were able (two with young children and one claimed starvation), and two did not list a disablement, but one applicant stated her husband was a bad character, while the other stated she did not know where her husband was and she was out of work. Of the ten offered the poorhouse, three women refused: two were the women listed as able-bodied and the third was the woman claiming 'no regular work for six weeks', although she had a daughter who worked as a weaver and another who was illegitimate. As this sample is small, no generalisations can be made, however, these findings could support the argument that deserted wives were subject to tougher judgements by Poor Law officials in the latter decades of the nineteenth century.

Montrose, also a small sample of deserted wives and poor relief, gave full accounts of the pauper until their removal from the Poors' Roll or their death. Similar to Forfar before 1880, the Montrose sample shows more outdoor relief being given. As listed in Table 4.10, thirty out of 41 applicants were given outdoor relief in the form of money or board. Five out of the 41 were offered the poorhouse; all of those applicants required medical care and had no earnings otherwise, and accordingly only stayed in the poorhouse for a short amount of time. Only one woman is described as being struck off the roll because she 'declined' the offer of the poorhouse, but was given 13s.6d.<sup>165</sup> Unlike Forfar or Paisley, however, no deserted wives who applied to Montrose parish were able-bodied. Most were listed as partially disabled, which may have entitled them to outdoor relief instead of the poorhouse. Based on the relief authorised, it is arguable that Montrose may have been a more liberal parish: 18 out of the 41 applicants listed some form of income, either from their own labour or a family member, yet were still given outdoor relief of small amounts of cash per week or month. Perhaps this could be explained by the fact that the majority of these women listed their disablement as children or an illness (only one stated it was her husband's desertion), which were only temporary problems, not indicators of the woman being undeserving. Furthermore, three women who were living in lodging houses and had no residence otherwise were given money to pay their board rather than sent to the poorhouse.

The Montrose poor relief statements also provide some long-term insight into the lives of deserted wives. Of the 41 applications, 39 recorded the woman's movements after she first applied. 27 of those 39 were eventually struck off the Poors' Roll. Five women were on

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<sup>165</sup> Montrose Poor Law, 1868, ACC9/41/2/24, Statement 668.

the Roll for less than one year, however, the average number of years was 19, and the longest time recorded was Christina McLeod Cameron, who applied in 1875 and remained on the Roll until 1916 when she died at the age of 89. Fourteen of the 39 died while still chargeable, and although some were much older, like Christina, the average age at death was 59. This suggests that although many of these women may have applied due to children or an injury or illness, most stayed on the role for many years afterwards. Seemingly, this contradicted the purpose of the Poores' Roll as envisioned by officials; however, it is unsurprising considering the relief given was never intended to pull a person out of poverty, but just enough to keep them and their family alive.<sup>166</sup>

## Conclusion

What is evident from these poor relief applications and the CS cases was the complicated and hidden nature of desertion in nineteenth-century Scotland. The act of desertion in itself was an act of deceit and trickery. It required the deserter to disappear without a trace, remove themselves as far away as possible, and sever all communication. Yet, there are also examples of husbands who deserted their families through neglect, or by committing themselves to a job away from home. These forms of desertion were not unique to Scotland or the nineteenth century, as shown through the work of Leneman, Phillips, Stone, Bailey, Schwartzberg and Twomey. Nevertheless, the history of desertion as a ground for divorce in Scotland is limited to the work of Leneman. Unofficial instances of desertion have been noted, but not focused on, in the case studies of poor relief by Mitchison, Cage, Smyth and Wendy Gordon. This chapter contributes to the historiographical gap by examining desertion as it was recorded officially in the CS through divorce cases, and unofficially in the Poor Law records.

It has been repeatedly quoted as the poor man's divorce, and as the Poor Law records show, desertion and poverty were linked. Nevertheless, using poor relief applications to study desertion skews the argument by only exploring impoverished women. The more accurate analysis of desertion's connection to poverty would be to assert that whether or not the couple were financially stable, once deserted the wife was more likely to fall into destitution due to the restraints placed on married women's employment. Some women were able to support themselves through independent employment, however, the large

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<sup>166</sup> Mitchison, 'The Poor Law', p. 263.

amount of women who applied to poor relief proves many women struggled to manage a female-headed household.

The extent of applications for poor relief from wives claiming to be deserted, separated, or neglected, also shows that a larger portion of separation took place outside of the CS. An exact number is unavailable, yet, for example, this study has found 55 divorce cases in the year 1870 at the CS (the only place to apply for a divorce or separation), while in parishes of Paisley, Forfar and Montrose there were 54 deserted wives applying for poor relief in 1870. The three parishes alone show an equal number of unofficial desertions to the number of divorces, and presumably this number of deserted wives in 1870 was much higher as every parish in Scotland had a Parochial Board to administer poor funds, not including the number of wives and husbands who did not report their desertion. In conclusion, although the divorce law allowed for dissolution of the marriage on this ground, the complicated legal process (particularly the requirement of four years of non-adherence) and economic factors, made this legal remedy inaccessible and impractical for many deserted husbands and wives. Poor relief, on the other hand, was more obtainable, provided financial assistance the day of the application, and included services to track down the deserting husband and force him to return or be punished. Still, even with these sources, desertion has proven to be as elusive to historians as it was to the authorities, and arguably the most common form of marital breakdown.

## Chapter Five: Separation and Cruelty, Part I

### Introduction

In nineteenth-century Scotland there were two legal forms of intervention available to a spouse in an abusive marriage. The largest number of reported incidents came through the criminal courts which provided temporary forms of relief for an abused spouse. The more substantial gesture was a summons for separation and aliment. However, only a small minority of wives (and even fewer husbands) sought a judicial separation.<sup>1</sup> As discussed in Chapter Two, the number of divorce and separations were rising and continued to do so into the twentieth century, but the increase in numbers of actions mentioning cruelty is no indicator of levels of marital violence. Overall, it is widely agreed that the majority of marital violence was not officially reported, thus eliminating any chance of determining accurate figures beyond trends.

Aiming to analyse marital violence whilst continuing to be aware of the quantitative limitations, this study uses examples of marital violence as found in Court of Session (CS) judicial separation cases and criminal trials of wifebeating. Although the samples are small, the rich detail is not lacking. Accordingly, this chapter has been divided into two parts; the first part discusses the discursive contexts around marital violence in Scotland, and the second presents the sources and findings.

Historians of English history suggest legislative and discursive changes showed a hardening of attitudes towards violence by the turn of the century. In Scotland divorce and separation laws, which may have seemed progressive in the beginning of the 1800s due to their egalitarian principles, were impacted by the judiciary discourses and prejudices of the criminal law. As a result, they did not take the same steps towards protecting wives from abusive husbands. Evidence of discursive changes is complicated and differs between the civil and criminal courts. Nevertheless, the tales of marital strife, violence, and cruelty throughout the sources show cohesion in the types of abuse used, sources of conflict, and use of provocation.

Separation *a mensa et thoro* (otherwise referred to as judicial separation) was available in the nineteenth century on the grounds of adultery or cruelty to both the husband and the

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<sup>1</sup> Patrick Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, Second Edition, Vol. II, (Edinburgh, 1878), p.911.



wife.<sup>2</sup> Though these two legal grounds existed, this study only found judicial separation actions filed on the charge of cruelty in the CS extracted cases, suggesting that separation for adultery was not as commonly sought as divorce for adultery.<sup>3</sup> This was perhaps due to the restricting stipulations of a separation. The terms for a judicial separation were the granting of the spouses to live apart (essentially permission for non-adherence), whilst maintaining the other marital expectations of chastity and financial provision; the couple remained legally married, and the husband was required to monetarily support his wife in her separate residence through aliment payments until they reconciled.

It is necessary to briefly establish that the contemporary terms used in the nineteenth century were cruelty or maltreatment. Both cruelty and maltreatment could embody physical and non-physical abuse. Cruelty was the term used when listing the grounds available for judicial separation; however, maltreatment was the term more often used within the CS's required legal documents. For instance, a summons for an action of separation and aliment would state: '[t]herefore the Lords of our Council and Session Ought and Should Find it proven that the Defender has been guilty of grossly abusing and maltreating the pursuer his wife'.<sup>4</sup> Outside of the civil courtroom the term used by the media and the public was wifebeating. This connotes a very specific type of gendered violence between a married couple, where the husband was the abuser and the wife was the victim. There does not appear to be a significant difference between the legal and popular definition, except that the legal terms were more encompassing of wives and husbands, and physical and non-physical abuse. Lastly, the official terms for tolerable violence that did not legally constitute cruelty, due to its use as a form of discipline, were chastisement or correction. Previous to the nineteenth century it was widely accepted, both in the law and the general population, that a husband was entitled to use moderate corporal punishment on his wife if she 'deserved' it. By the late nineteenth century, officials revised this sanction, although, as this chapter will go on to show, not enough. As a result in 1878 Fraser wrote, 'Where, however, the cruelty, said to be used towards the wife, does not amount to gross personal violence, it is a valid defence to the husband that the wife's conduct was improper

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<sup>2</sup> Fraser, *Treatise of Husband and Wife*, Vol. II, p.904-906. In 1903 under the Licensing (Scotland) Act, a third ground for separation was added, habitual drunkenness; William Murray Gloag and Robert Candlish Henderson, *Introduction to the Law of Scotland*, (Edinburgh, 1927), p.524.

<sup>3</sup> A random collection of the Court of Session Outer House cases reported in *The Scotsman* produced one suit for separation and aliment on the ground of adultery; 'Court of Session. Outer House. (Before Lord Rutherford Clark.) S. & A.—Mrs Dowie v. Andrew Linmore Dowie.' *The Scotsman*, 13 December 1880, pg. 6.

<sup>4</sup> CS46/1860/5/21 1860 Kyd or Peters v Peters.

and deserving of punishment'.<sup>5</sup> For this chapter the terms cruelty, maltreatment, marital violence and abuse will be used, as they cover the widest range of physical and non-physical violence.<sup>6</sup>

The main historical debate related to marital violence in the nineteenth century is the issue of continuity and change: was there a shift in attitudes towards violence? And if so, did this shift influence the level of marital violence committed by Victorians as the nineteenth century drew to a close? Nancy Tomes arguably began the debate in 1978 when she identified that English society had become less tolerant of violent offences in the second half of the nineteenth century. She concluded that this rejection of violence resulted in fewer men assaulting women by 1900.<sup>7</sup> Her evidence for this decline, however, was based on the discourse of middle-class authorities, and she provides no evidence of changes among working-class attitudes.<sup>8</sup>

Martin Wiener agreed with and expanded Tomes argument in 2004 concluding that the end of the nineteenth and beginning of the twentieth century in England witnessed the emergence of a new ideal of masculinity encapsulated in the notion of a 'new "reasonable man"'. His evidence centres on homicide and 'felonious and malicious wounding' rates that he found declined by the turn of the century. He argues that it was the development of new Victorian values related to masculinity that contributed to a decrease in violence committed by men, especially towards women, and that working-class women benefitted most of all.<sup>9</sup> His conclusions, however, are problematic as he does not fully take into account the impact of manslaughter charges on the decrease in homicide rates. Wiener acknowledges that by the latter half of the 1800s society was less comfortable with capital punishment, which was the sentence for homicide; as a result there was an increase in charges of manslaughter.<sup>10</sup> Furthermore, though Wiener states the benefits of using homicide as evidence of intolerance towards male violence, by focusing on murder he is only looking at extraordinary instances of violence whilst overlooking more commonly

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<sup>5</sup> Fraser, *Treatise of Husband and Wife*, Vol. II, pp. 898-900, quote on p. 298; Eric M. Clive, *The Law of Husband and Wife in Scotland*, Second Edition, (Edinburgh, 1982), pp. 175-176; Anna Clark, 'Domesticity and the problem of wifebeating in nineteenth-century Britain: working-class culture, law and politics', in Shani D'Cruze (ed.), *Everyday Violence in Britain, 1850-1950*, (Harlow, 2000), pp. 27, 30.

<sup>6</sup> The most common term for the twenty-first century, domestic violence, will not be used because it encompasses couples married and unmarried, men and women, and physical abuse. The case studies for this chapter are all married couples where the husband was the alleged abuser.

<sup>7</sup> Nancy Tomes, 'A "Torrent of Abuse": Crimes of Violence between Working-Class Men and Women in London, 1840-1875', *Journal of Social History*, Vol. 11, No. 3 (Spring, 1978), pp. 328-345, p. 330, 342.

<sup>8</sup> Tomes, 'A "Torrent of Abuse"', p. 338.

<sup>9</sup> M. Wiener, *Men of Blood; Violence, Manliness and Criminal Justice in Victorian England*, (New York, 2004), p. 239.

<sup>10</sup> Wiener, *Men of Blood*, pp. 25-27.

used forms. For wives in abusive marriages it was daily acts of cruelty that defined their relationship. His research offers no proof that this type of daily abuse was declining at the turn of the century.<sup>11</sup>

Another aspect of this debate to address is the exclusion of non-physical cruelty. The argument that violence against wives was decreasing by the turn of the century, as asserted by Tones and Wiener, used reports of violent assaults to determine the decline. Due to the perceived difficulty in policing non-physical cruelty penal law did not fully recognise this form of marital abuse.

There now appears to be a consensus that there was a shift in public attitudes that made violent behaviour less acceptable in England.<sup>12</sup> However, since Tones' article a number of historians have argued against her assessment of a decline in the incidence of wifebeating and violence against women. Ellen Ross, A. J. Hammerton and Roderick Phillips concluded in their separate studies of marital violence that while the number of reported assaults did decline by the turn of the century, it was impossible to prove that the number of wifebeating assaults also decreased.<sup>13</sup>

More recently historians have questioned the reality of discursive shifts and when they took place in the nineteenth century. Anna Clark, in her article 'Humanity or Justice?' for instance, found that the English legislation, often cited by historians as evidence of the change in attitude towards violence in reality merely limited violence against women rather than making any full attempt to prohibit it.<sup>14</sup> Furthermore, legislations of the nineteenth century turned wifebeating into a class issue instead of a gender issue. Clark purposefully, however, avoided a quantitative discussion of levels of marital violence focusing instead on the issue of changing attitudes.<sup>15</sup>

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<sup>11</sup> Shani D'Cruze wrote in the introduction of *Everyday Violence in Britain*, 'The key continuity seems to have been that everyday violence kept happening, despite statistics showing a decline in recorded crime'; Shani D'Cruze (ed.) *Everyday Violence in Britain, 1850-1950*, (Harlow, 2000), p. 18.

<sup>12</sup> Anna Clark, 'Humanity or Justice? Wifebeating and the law in the eighteenth and nineteenth centuries', in Carol Smart (ed.) *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*, (London, 1992); Elizabeth Foyster, *Marital Violence: An English Family History, 1660-1857*, (Cambridge, 2005); Lawrence Stone, *Road to Divorce: England 1530-1987*, (Oxford, 1990).

<sup>13</sup> Ellen Ross, "'Fierce Questions and Taunts": Married Life in Working-Class London, 1870-1914', *Feminist Studies*, Vol. 8, No. 3 (Autumn, 1982), p. 591; A. J. Hammerton, *Cruelty and Companionship; Conflict in nineteenth-century married life*, (London, 1992) p. 39; R. Phillips, *Putting Asunder: A history of divorce in Western society*, (Cambridge, 1988), p. 324, 326-8, 340-3.

<sup>14</sup> Anna Clark, 'Humanity or Justice?', p. 191.

<sup>15</sup> Clark, 'Humanity or Justice?', p. 188. Clark does provide a quantitative study of criminal cases in her book, Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class*, (Berkeley, 1997).

Elizabeth Foyster challenged both aspects of the debate. She argues there was a redefinition of marital violence during the two hundred year period she studied, which was earlier than the 1860s identified by Hammerton as the decade when English judges began accepting wider definitions.<sup>16</sup> She further argues that even with the expanded notion of cruelty, the middle-class magistrates and judges' attitudes did not impact on the general public's views of wifebeating. Foyster argues that the perception of marital violence as a working-class issue meant legislation did little in reality to address the bigger issues and instead focused on physical violence committed by working-class men against 'provoking' working-class wives.<sup>17</sup> Hence she concludes that wives by the turn of the century still experienced the same types of violence and in no less quantity than the women at the start of her period.<sup>18</sup>

Thus far, this debate centres on case studies of marital violence in nineteenth-century England. As Annmarie Hughes stresses, the theory of 'softer patriarchy', identified by English historians as a factor in decreased male violence towards women, excludes Scotland because it 'ignore[s] the distinctiveness of Scotland's legal, religious and cultural environment which mediated condemnation of violent men in the nineteenth and early twentieth centuries.'<sup>19</sup> A few historians, most notably Leah Leneman, Carolyn Conley and Annmarie Hughes, have applied the same questions to Scotland and found significant differences. Leneman argued that a more intolerant view towards wifebeating had developed by the early nineteenth century within the court system of Scotland. Based on the judicial attitudes towards wives seeking separation on the ground of cruelty she argued there was a shift away from accepting wifebeating as a means of correction.<sup>20</sup> Her evidence, however, was based on cases of judicial separation filed with the Commissary Courts, which were replaced in 1830 by the CS. She did not include the attitudes of judges in the criminal courts, which in the nineteenth century were where more abused wives turned for protection.<sup>21</sup>

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<sup>16</sup> Foyster, *Marital Violence*, p. 251.

<sup>17</sup> *Ibid*, p. 254.

<sup>18</sup> *Ibid*, p. 235.

<sup>19</sup> Annmarie Hughes, *Gender and Political Identities in Scotland*, (Edinburgh, 2011), p. 136.

<sup>20</sup> Leah Leneman, "'A tyrant and tormentor': violence against wives in eighteenth- and early nineteenth-century Scotland", *Continuity and Change*, Vol. 12, No. 1 (1997), p. 49.

<sup>21</sup> See Jennifer Davis, 'A Poor Man's System of Justice: The London Police Courts in the Second Half of the Nineteenth Century', *The Historical Journal*, Vol. 27, No. 2 (Jun., 1984), pp. 309-335, pp. 320-323; George Behlmer, 'Summary Justice and Working-Class Marriage in England, 1870-1940', *Law and History Review*, Vol. 12, No. 2 (Autumn, 1994), pp. 229-275, pp. 238-239. In the eighteenth and early nineteenth century, assault was considered a less serious offence and would have been dealt with in sheriffs court or burgh courts. Once police courts were established in the nineteenth century they dealt primarily with working-class offenders and complainers, which included battered wives; David G. Barrie and Susan Broomhall, 'Public

Carolyn Conley's work on domestic homicide in Scotland in the late nineteenth century was predicated on distinguishing the country from neighbouring England and Ireland. When compared with Ireland, and following the notion that Scotland was less violent (as supported by the judicial record),<sup>22</sup> her analysis of domestic homicides found instead that convictions for spousal homicide were 'slightly higher in Scotland than in Ireland', and that, '[m]en accused of killing their wives were more likely to be convicted than the average defendant. Eighty-one percent of the Scottish men tried for killing their wives were convicted, as were 60 percent of the Irishmen.'<sup>23</sup> Of the men convicted of murder, however, more than half had their sentences reduced and avoided the death penalty (in both Scotland and Ireland), except in the instance of husbands who used weapons. She also noted that while Irish judges spoke of wife murder as rare, Scottish judges lamented that it was all too frequent.<sup>24</sup> In regards to the defence of intoxication, Conley found that Scottish criminal judges were less likely to accept drunkenness as a defence for homicide than Irish judges.<sup>25</sup> Still, this defence was used in 'over 75 per cent of Scottish spousal homicides.'<sup>26</sup>

Conley's research follows the discursive notion of the Scottish as a respectable 'orderly, well-behaved people' that she argues existed as a national identity in the nineteenth century.<sup>27</sup> Therefore, her findings represent the perspectives of the middle and upper classes who 'othered'<sup>28</sup> the working classes and immigrants in the High Court in order to maintain that reputation. Her conclusions based on records of homicide trials, however, conflict with the work of Hughes, whose research uses Scottish criminal court trials from the nineteenth century to the end of World War One. Conley and Hughes' work shows a difference in judicial attitudes regarding murder and domestic violence.

Hughes argues that the new male of Victorian English society did not exist to the same degree in Scotland. Instead male violence towards women was legitimised by the light sentences repeatedly given to wifebeaters. 'Minimal risk' sentences and 'marriage mending' as used by Scottish criminal courts allowed the practice of wifebeating to

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men, private interests: the origins, structure and practice of police courts in Scotland, c. 1800-1833', *Continuity and Change*, Vol. 27, No. 1 (May, 2012), pp. 83-123, pp. 86, 104-111.

<sup>22</sup> Carolyn A. Conley, 'Homicide in Late-Victorian Ireland and Scotland', *New Hibernia Review/Iris Éireannach Nua*, Vol. 5, No. 3 (Autumn/Fómhar, 2001), p. 66.

<sup>23</sup> Ibid, p. 84.

<sup>24</sup> Ibid, pp. 84-85; Also in Conley, 'Atonement and domestic homicide', in Richard Mc Mahon (ed.), *Crime, Law and Popular Culture in Europe, 1500-1900*, (Cullumpton, 2008), p. 226.

<sup>25</sup> Conley, 'Homicide in Late-Victorian Ireland and Scotland', p. 86.

<sup>26</sup> Conley, 'Atonement and domestic homicide', pp. 227-228.

<sup>27</sup> Conley, 'Homicide in Late-Victorian Ireland and Scotland', pp. 66-67.

<sup>28</sup> To 'other' someone or a group is to claim they are different for inferior reasons.

continue as an acceptable form of male behaviour.<sup>29</sup> Hughes also criticises the impact of middle-class discourse explaining that, '[n]ot only did it absolve middle-class men from complicity and condemnation, but it also helped to silence middle-class victims because wife-beating was associated with the "animality" of the poor and the shame of inadequate feminine skills.'<sup>30</sup> Ultimately, Hughes argues that the legislation passed implied a change in attitude, yet these views only existed in theory. In practice there was little done to condemn the use of violence against wives.<sup>31</sup>

To contribute to this debate, this chapter picks up where Leneman's work on Scotland ended. As highlighted by the historiography, certain sources are associated with specific types of violence. This study looks at the legal representations of marital abuse as provided by judicial separation records and newspaper reports. The use of CS cases provide a window into marriages plagued by abuse and cruelty where the couple was able to afford the legal process, thereby representing the more indefinable group of men and women who fell between the working class and middle class. However, due to the limited number of separation cases available, and in order to address the representations of marital violence as predominantly a working-class issue in this period, newspaper reports have been included. This discussion seeks to answer the questions of how the legal definition of cruelty related and compared to the reality of marital conflict and violence; and whether tolerance of marital abuse was declining in Scotland in the last decades of the nineteenth century. To begin, it answers the contemporary discourse used to identify wifebeating as a societal issue related predominantly to working-class men, although there was some discussion of broader issues, particularly the inequality between men and women.

### **Contemporary Discourse on Wife Beating in Scotland**

In 1856 the *Aberdeen Journal* reprinted an article originally published in the *Manchester Guardian* titled 'Wife Beating Advocated as Scriptural.' It told the story of a man who upon being charged with beating his wife claimed a Reverend George Bird, at Whitehaven, had preached that husbands were entitled to use violence against their wives. The Reverend spoke out in defence of the prisoner saying that, 'it is a man's duty to rule his own household; and that, if his wife refuse to obey his orders, he is justified, according to the law of God, in beating her, in order to enforce obedience.'<sup>32</sup> The prisoner was

<sup>29</sup> Annmarie Hughes, 'The "Non-Criminal" Class: Wife-beating in Scotland (c. 1800-1949)', *Crime, Histoire & Sociétés/Crime, History & Society*, Vol. 14, No. 2 (2010), pp. 32-33.

<sup>30</sup> Ibid, p. 42.

<sup>31</sup> Ibid, pp. 33-39, 52.

<sup>32</sup> 'Domestic Intelligence. England.—Wife Beating Advocated as Scriptural.' *Aberdeen Journal*, 15 October 1856.

sentenced to one month imprisonment with hard labour, and the Reverend appears to have continued preaching physical chastisement. The purpose of the article for contemporaries is questionable, as it seemingly merely reported the story, but in reality, the lack of condemnation of the Reverend, and the meagre one month punishment for the wifebeater furthers the public perception of wifebeating as acceptable when justified by someone clearly of the middle class and authority.

Mention of wifebeating in contemporary sources reveals the discourses and attitudes towards marital violence. If there was a change in society's tolerance of male violence in Scotland, it would be captured in these sources. Though much evidence of nineteenth-century perceptions on this form of violence comes from legal sources, popular culture also demonstrated how the issue infiltrated into everyday life.<sup>33</sup> Some examples represent wifebeating very differently from the legal documents. In broadside ballads, for instance, marital violence was often portrayed humourously for entertainment value.<sup>34</sup> Wives were depicted as aggressive, argumentative and disobedient in humour ballads, while their husbands either tried to stand their ground non-violently or through threats and fighting back. Though the verbal fight may have begun due to the husband's complaints, the physical fighting was more often than not instigated by the wife. In 'The Comforts of Man', the husband as the victim is exemplified:

We'd scarce been married more than a week/  
When I found her tongue  
began to speak/  
She broke my head with a large brown pan/  
And I soon  
found out the comforts of man.

Betty, says I, you and I must now part/  
You've cut my head and broken my  
heart/  
I was ready to faint I began for to cry/  
When a roll of fresh butter  
came dab in my eye.<sup>35</sup>

'The Week's Matrimony' also illustrates the aggravating wife and her husband who responded in kind:

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<sup>33</sup> For the history of the ballad in popular culture see, L. Shepard, *The Broadside Ballad: A Study in Origins and Meaning*, (London, 1962); C. Elkins, 'The Voice of the Poor: The Broadside as a Medium of Popular Culture and Dissent in Victorian England', *Journal of Popular Culture*, Vol. XIV, No. 2, (1980), pp. 262-274; N. Buchan, 'Folk and Protest', in E. J. Cowan (ed.), *The People's Past: Scottish Folk, Scottish History*, (Edinburgh, 1980), pp. 165-190; F. Anderson, 'From Tradition to Print: Ballads as Broadside', in Flemming G. Andersen, Otto Hozapfel, and Thomas Pettitt (eds.), *The Ballad as Narrative: Studies in The Ballad Traditions of England, Scotland, Germany and Denmark*, (Gylling, 1982), pp. 40-57; A. Bennett, 'Sources of popular song in early nineteenth-century Britain: problems and methods of research', *Popular Music*, Vol. 2, Theory and Method (1982), pp. 69-89; K. Stavreva, "'Scaffolds unto Prints': Executing the Insubordinate Wife in the Ballad Trade of Early Modern England', *Journal of Popular Culture*, Vol. 31, (1997), pp. 177-188.

<sup>34</sup> Clark, *The Struggle for the Breeches*, pp. 67-71.

<sup>35</sup> (MC) Mu23-y:3:009, 'The Comforts of Man.'

On Wednesday morning I looked blue/ My wife was cross and snappish too/ I soon found out she had a tongue/ And we went at it both ding-dong/ Vexation on vexation rose—/ First came abuse and then came blows/ She tore my hair and scratch'd my face/ And in return I smash'd the place/ She'd quickly conquer me she said/ Then with the tongs she broke my head/ So I went at her left and right/ And we mill'd each other by Wednesday night.<sup>36</sup>

These representations of wives provoking their husbands, though not to be taken literally, highlight one of the more damaging discourses related to marital violence. In nineteenth-century Scottish society wives were questioned and judged in the judicial process to see if their husbands' abuse was justified, which if proven, could reduce the degree of violence from cruelty to chastisement. If the judges found any evidence of the wife behaving poorly, the husband could either be exonerated or given a lighter punishment as the assault was deemed defensible. Hughes argues this was a product of class typecasting; the working-class stereotype allowed excuses for bad behaviour.<sup>37</sup>

In Glasgow's *Caledonian Mercury* an article titled 'An Afflicted Husband' illustrates this discourse existing in the criminal court. The presiding sheriff in a case of wife assault in Leith—reminiscent of the above ballad except the husband used tongs to attack his wife—was reported as saying:

He would frankly state that it was rarely that a case so painful and melancholy came before him; and he should be very glad if he could believe the prisoner's statement, that the injuries received by his wife were the result of a fall... He thought that he had been as sorely tried as a man could be, and likewise that he had always been an honest, respectable person, but he must also believe, on the strength of evidence, that, excited by his wife's misconduct, he had so far forgot himself as to use his wife with unmanly violence... He went on to say that he would give what effect he could to the mitigating circumstances of the case; but his public duty demanded him that such an offence should be severely punished.<sup>38</sup>

The severe punishment awarded was a fine of £5 or fifteen days imprisonment.<sup>39</sup> In 1875 the *Dundee Courier & Argus & Northern Warder* published a report on two cases of wifebeating tried in the Police Court titled 'Wife Beating Under Provocation.' One of the husbands, a riveter, listed the disobedient, neglectful and drunken behaviour of his wife in defence of his assault, seemingly with effect since even with testimony from his wife and witnesses claiming she did not provoke him, the magistrate was reported as saying:

<sup>36</sup> (MC) Mu23-y:1:088, 'The Week's Matrimony.'

<sup>37</sup> Hughes, 'The "Non-Criminal" Class', p. 39. The same level of judgment was found in the High Court; Conley, 'Atonement and domestic homicide', pp. 226-227.

<sup>38</sup> 'An Afflicted Husband', *Caledonian Mercury*, 27 April 1858.

<sup>39</sup> £5 was a considerable fine for a working-class person at this time, nevertheless, this penalty was not the maximum that could be given by a sheriff; 'An Afflicted Husband', *Caledonian Mercury*, 27 April 1858.



‘looking at the whole case, he would make the penalty as lenient as possible, which would be a fine of 10s 6d or seven days in prison.’<sup>40</sup> Even Frances Power Cobbe noted that the concept of the deserving, disobedient wife was the rule rather than the exception.<sup>41</sup>

Another discourse directly related to the notion of wife blaming was the influence of drink. Alcohol was viewed as the cause of most common violence, and thus an excuse for belligerent behaviour. Men were not personally blamed for using cruelty against their families; instead violence was attributed to the effects of alcohol combined with working-class brutality.<sup>42</sup> Hence, temperance advocates believed if drink was removed from the situation the violence would stop.<sup>43</sup> They too used discursive means. For example, a broadside ballad tilted ‘The Drunkard Reclaimed’ told the tale of a man who came across a frantic woman and child fleeing from her abusive drunkard husband: ‘While conversing with this woman, I told her of a plan/ That would keep her husband sober, and make him a steady man/ He must go sign teetotal, and then you’ll be reconciled/ And he will love his darling wife and beautiful child.’ The man then went and found the husband and told him of his idea: ‘He had some strong objections, but at last he did consent/ And ever since that moment they have been happy and content/ She went back to her husband, and both were reconciled/ And now they live in harmony, and he loves his wife and child.’<sup>44</sup>

Magistrates were also reported as advocates of teetotalism when faced with a man convicted of assault while drunk. The *Dundee Courier* published the article ‘Bailie Taylor as a Temperance Reformer. Whisky and Wife Beating’ recounting two husbands brought to police court for assaulting their wives, both released after agreeing to sign the pledge. For the first husband the magistrate was reported as saying: “‘Would he promise to join the “Blue Ribbon” if he allowed him to go this time?’” The accused said he had joined that before. Bailie Taylor—Join it again. The accused promised to take the Magistrate’s advice, and he was then dismissed.’ Bailie Taylor’s interaction with the second husband was equally forgiving:

The Bailie—Will you stop striking your wife if I let you away? Accused—  
Yes, sir. The Bailie—Do you promise if I let you away that you will go  
with Mr. Scrymgeour and join the Good Templars, and work regularly?

<sup>40</sup> ‘Wife Beating Under Provocation’, *Dundee Courier & Argus & Northern Warder*, 28 September 1875.

<sup>41</sup> Frances Power Cobbe, ‘Wife-Torture in England’, *Contemporary Review*, Vol. 32 (Apr./July, 1878), pp. 55-87, pp. 67-68.

<sup>42</sup> Judith Rowbotham, “‘Only when drunk’: the stereotyping of violence in England, c. 1850-1900”, in S. D’Cruze (ed.) *Everyday Violence in Britain, 1850-1950*, (Essex, 2000), pp. 155-169, pp. 164-165.

<sup>43</sup> Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy against Family Violence from Colonial Times to Present*, (Chicago, 2004), p. 50.

<sup>44</sup> (MC) Mu23-y:1:024, ‘The Drunkard Reclaimed.’

Accused promised that he would take the pledge, and he was then dismissed from the bar.<sup>45</sup>

In Scotland the temperance movement's most active members were middle-class women who argued that men who drink were the leading cause of unhappy marriages and families. Megan Smitley found that there was a pattern of middle-class women engaging in philanthropy and then becoming temperance reformers. She argued it was the conditions they witnessed in local impoverished areas of Scotland that led many philanthropists to link poverty (especially of women and children) to the presence of alcohol in the family.<sup>46</sup> However, the use of drink was also viewed as a feature of working-class behaviour and culture, and therefore expected. Consequently, when an intoxicated man beat his wife society accepted it as an aspect of working-class life; this was furthermore supported by the rulings of the judiciary.<sup>47</sup>

Women who drank, by contrast, were demonised as bad wives, bad mothers, unwomanly, and associated with the lowest class of people incapable of redemption.<sup>48</sup> In 1870 when an elderly watchmaker and green grocer from Jersey was arrested for 'having cruelly ill-treated his wife by having, among other things, fastened her head in an iron mask', the story was dramatically reported in the *Dundee Courier*. The iron mask was descriptively captured by the reporter as being a heavy item of three pounds, with iron bars and rings an inch wide and inches apart, a hinge in the front and padlock on the back which went over her head and sat on her shoulders. However, the article went on to say that the wife was a drunkard, 'who had a half-stupid appearance.' In an attempt to force sobriety the husband had locked her in a large box with iron bars and then tried the mask. Despite acknowledging the cruelty of locking up the wife the magistrate only sentenced the husband to a fine of 10s. and had the wife (who admitted her addiction to drink in court) agree to a separation of bed and board.<sup>49</sup> Furthermore, the fact that the magistrate encouraged a separation due to the wife's alcoholism reaffirms the inequality placed on women who did not meet marital expectations. In 1875 a magistrate at the Eastern Police Court of Glasgow, Bailie Torrens, told a woman found lying drunk on Orr Street with a

<sup>45</sup> 'Bailie Taylor As A Temperance Reformer. Whisky and Wife Beating', *Dundee Courier & Argus*, 17 October 1883.

<sup>46</sup> Megan Smitley, *The Feminine Public Sphere: Middle-class Women in Civic Life in Scotland, c. 1870-1914*, (Manchester, 2009), pp.62-66.

<sup>47</sup> Hughes, 'The "Non-Criminal" Class', p. 39; Rowbotham, "'Only when drunk'", pp. 158-161.

<sup>48</sup> Rowbotham, "'Only when drunk'", pp. 165-166.

<sup>49</sup> 'An Iron Mask for a Drunken Wife', *Dundee Courier*, 4 February 1870. Nash and Kildare discuss this case as evidence of shaming used by the media to report this sensational case in the Chapter 7: 'The Woman in the iron mask': From Low Life Picaresque to Bourgeois Tragedy – Matrimonial Violence and the Audiences for Shame', in David Nash and Anne-Marie Kildare, *Cultures of shame: Exploring crime and morality in Britain 1600-1900*, (Basingstoke, 2010), pp. 134-152.

baby in her arms, 'I think no wonder that such women as you get a beating from your husbands. I think you deserve it sometimes.'<sup>50</sup>

New discourses are evident in the latter decades of the nineteenth century following the emergence of women's rights campaigns, though they did not displace the old discourses. The historiographical debate over the development of intolerance towards wifebeating and the subsequent impact of these shifting attitudes, centres on the increasing attention given to male violence by the media, judiciary and politicians. This attention was generated by the burgeoning feminist discourses calling for an end to violence against women. However, while some historians have interpreted this as indicative of a decrease in such violence, others argue there was not a change, just a newly found awareness. Elspeth King identified two female Scottish poets to demonstrate the growing feminist agenda, who also addressed the issue of wifebeating in their writings.<sup>51</sup> Marion Bernstein, a music teacher, poet, and single woman from Glasgow, depicted wifebeating and society's tolerance of it (through the lack of effective legislation), as an effect of gender inequality. In her poem 'Women's Rights and Wrongs' she wrote:

You'd give the lash to wife beaters  
But surely you should know  
If women legislated, they'd  
Have had it long ago.<sup>52</sup>

And in her poem 'A Dream' she illustrated how the law should be through the reversal of gender roles:

Now no man could venture to beat his wife  
For the women had settled by law  
That whoever did so should lose his life  
Then he'd never do so any more.<sup>53</sup>

'A Dream' resembles the contemporary ballad 'Scotch Bloomers' that also described a world where men and women's roles were reversed: 'Their husbands they will wop and squander all their riches/ Make them nurse the kids & wash their shirts & breeches/ If the men should say a word they'll be such jolly rows, sirs/ Their wives will make them sweat

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<sup>50</sup> 'A Glasgow Magistrate on Drunken Wives and Wife Beating', *Dundee Courier & Argus & Northern Warder*, 23 March 1875.

<sup>51</sup> Elspeth King, *The Hidden History of Glasgow's Women: The Thenew Factor*, (Edinburgh, 1993), pp. 83-92.

<sup>52</sup> King, *The Hidden History*, p. 87; Tom Leonard (ed.), *Radical Renfrew: Poetry from The French Revolution to The First World War*, (Edinburgh, 1990), p. 297.

<sup>53</sup> King, *The Hidden History*, pp. 83-84; Leonard (ed.), *Radical Renfrew*, pp. 301-302.

and beat them with the trousers.’<sup>54</sup> Though ‘A Dream’ was not meant to be comedic, ‘Scotch Bloomers’ shows that writers employed imagery of an upside-down world to express humour as well as inadequacies of society.

Jessie Russell, inspired by Bernstein, likewise questioned the penal legislations in her poem ‘Women’s Rights Versus Women’s Wrongs’. In her stanzas she points out that patriarchal hegemony resulted in the lack of severe punishments for male criminals: ‘But a life for a life, and the murderer’s hung, and we think not the law inhuman/ Then why not the lash for the man who kicks or strikes a defenceless woman?’<sup>55</sup>

Their poetry also reflects the 1870s Parliamentary debate over instituting flogging as a penalty for convicted violent offenders in Great Britain.<sup>56</sup> In 1874 Disraeli initiated an enquiry into brutal assaults.<sup>57</sup> The report questioned the effectiveness of the existing punishments for brutal assaults, possible changes to certain crimes and punishments, and whether flogging should be considered as a new form of punishment, particularly in the event of crimes against women and children.<sup>58</sup>

Though assaults on women and children are mentioned specifically, wifebeaters were not the main focus. However, the responses from some Scottish sheriffs and sheriff substitutes revealed judicial opinions on the issue of wifebeating. Forty-six separate letters of reply were included in the report, representing forty-two counties of Scotland. In response to the question on the sufficiency of the penal law, it was found that a sheriff without a jury (also known as summary procedure) was capable of sentencing a maximum punishment of sixty days imprisonment or a fine of 10s.<sup>59</sup> Out of the 46 responses, 54 per cent (25) stated that

<sup>54</sup> (MC) Mu23-y:1:029, Mu23-y:1:054, ‘Scottish Bloomers’; Both ballads printed by James Lindsay on two separate broadsides, suggesting multiple productions of the same ballad at different times.

<sup>55</sup> King, *The Hidden History*, p. 87; Leonard (ed.), *Radical Renfrew*, pp. 306-307.

<sup>56</sup> A proposed bill entitled ‘To Authorize the Punishment of Whipping for Certain Offense against Women and Children’ was taken to Parliament in 1872, but was never brought forward for discussion; Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England, 1850-1895*, (Princeton, 1989), pp. 161-162.

<sup>57</sup> The full title is ‘Reports to the Secretary of State for the Home Department on the State of the Law Relating to Brutal Assaults, &c’ and was published in 1875; PP 1875 [C. 1138] *Brutal Assaults, &c. Reports to the Secretary of State for the Home Department on the State of the law relating to brutal assaults, &c.*

<sup>58</sup> The enquiry was sent as a circular to Her Majesty’s judges; Chairman of Quarter Sessions; Recorders of Boroughs having Quarter Sessions; Stipendary Magistrates; Magistrates of Metropolitan Police Courts; and Sheriffs and Sheriffs Substitutes of Counties (Scotland). A second circular was sent specifically to the Commissioner of Police of the Metropolis, the Commissioner of Police of City of London, and the Chief Constable of Counties (England and Wales) enquiring about brutal assault figures, breakdown in nature of the offense and if flogging, or possibly another punishment, would be more effective; PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 4.

<sup>59</sup> Paul T. Riggs, ‘Prosecutors, Juries, Judges and Punishments in Early Nineteenth-Century Scotland’, *Journal of Scottish Historical Studies*, Vol. 32, No. 2 (2012), p. 169; PP 1875 [C. 1138] *Brutal Assaults, &c.*, pp. 122-123.

they found the penal law ‘sufficiently stringent’ as a means of deterring violent assaults; 30 per cent said no. For the question, ‘should flogging be authorized...especially in cases of assaults on women and children?’, 74 per cent (34) said yes and 22 per cent said no. A large proportion of those who said yes to flogging insisted it should only be decided in court with a jury and used in an instance of extreme brutality.

Some letters also included a quick sentence on the frequency or infrequency of violent assaults. Two representatives of Forfar and two of Renfrew stated that wife beating was ‘a crime on the increase.’<sup>60</sup> The first letter of the report, signed by twelve sheriffs and sheriff substitutes speaking on behalf of 23 locations, stated: ‘since 1831, and more particularly of late years, and in large towns, crimes of violence and of aggravated violence have increased, and we believe that increase is more than is due simply to increased population.’<sup>61</sup> Sheriffs from Fife, Lanark, Renfrew and Bute stated wifebeating was a problem in their districts, while individual letters from Inverness, Shetland, Argyll and Inverness, Tobermory (Mull), Aberdeen and Kincardine and Fife all stated violent crimes were not a problem or of rare occurrence. Only D. Macleod Smith, sheriff substitute of Elgin, reported, ‘I am glad to be able to add that, within the last few years, assaults of all kinds within this county have been undergoing considerable and increasing diminution.’<sup>62</sup>

The first circular of the *Brutal Assaults Report* begins, ‘Sir, Mr. Secretary Cross having at present under his consideration the measures to be adopted for the more effectual repression of the crimes of violence, now unhappily so common among certain classes of the population...’<sup>63</sup> The notion of working-class men being the main and therefore most likely perpetrators of violent crimes was ever present in nineteenth-century discourse. This attitude could also be seen in the responses, for instance Sheriff Substitute James Campbell wrote:

Assaults on women and children, as a rule, are in no way premeditated, but result from sudden paroxysms of passion, arising frequently out of the miserable conditions of the social life of the lowest classes, and the offender is usually more or less under the influence of drink.<sup>64</sup>

Drink was frequently mentioned as the universal feature of violent crimes. The sheriff substitute who responded for both Tobermory and Nairn claimed excess drinking led to

<sup>60</sup> PP 1875 [C. 1138] *Brutal Assaults, &c.*, pp. 124-125, 143, 144.

<sup>61</sup> The letter covers ‘Linlithgow, Clakmannan, and Kinross; Roxburgh, Berwick, and Selkirk; Fife; Perth; Stirling and Dumbarton; Argyll; Aberdeen and Kincardine; Renfrew and Bute; Caithness, Orkney, and Shetland; Peebles; Banff; Elgin, and Nairn; Inverness’; PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 115.

<sup>62</sup> PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 121.

<sup>63</sup> PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 4.

<sup>64</sup> PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 139.

violence. And Alex Falconar of Nairnshire wrote: 'it is my full conviction that, with few exceptions, all the cases of assault that occur in Scotland, arise from drink got in the public-houses under which the country groans.'<sup>65</sup>

In the newspapers, numerous letters and opinion pieces were published on the use of the lash for wifebeaters. While there were some supporters, such as Bernstein and Russell, who felt the only just punishment for an abusive husband was the lash, there were seemingly more opponents, although the reasons for protesting the lash differed. Hughes found that officials rejected the implementation of the lash on wifebeaters because they felt that in many instances of husbands using violence it qualified as chastisement, as the wife had provoked him and therefore deserved discipline.<sup>66</sup> In 1874 the *Dundee Courier & Argus* published a letter printed in the *Times* written by 'A Scotch Employer' that began, 'Before statesmen are asked to empower magistrates to inflict the lash for wife beating it would be well to look at both sides of the question.' He then told the story of meeting a boy named Alec who had to carry his 'sawbath breeks' (Sabbath trousers) out of his house every Monday morning to hide so his mother would not pawn them for drink, despite the fact that his father was, 'a steady man; that had high wages'. The author used this example to argue that it was the miserable condition of some working-class people that led to marital violence, but these wives were not free of blame: '[w]hat justice is there in punishing a man who even resorts to drink or to violence when he has a wife like Alec's mother to deal with? Let us pause and try and get deeper down and try and reach the source of the sorrow.'<sup>67</sup> Another letter anonymously written to the *Dundee Courier & Argus* in November 1874 stated: 'And there are few who will not admit that men who have become so brutalised as to repeatedly beat the woman whom they have sworn to protect and cherish, deserve the same kind of treatment they extend to their wives', but then went on to discuss the use of the lash on thieves as a more appropriate criminal for such a detrimental punishment:

Hence there might be less mischief or wrong done in applying the lash to a degraded habitual thief than to a man who, in passionate moods, has been known to lift his hand to his wife. Of course, this involved the very difficult question of provocatives, a question that, if ever the lash becomes legally applicable to the backs of wife-beaters, will have to be duly considered by the Sheriffs'<sup>68</sup>

<sup>65</sup> PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 141.

<sup>66</sup> Hughes, 'The "Non-Criminal" Class', p. 44.

<sup>67</sup> 'A Scotch Employer on Wife Beating', *Dundee Courier & Argus*, 02 December 1874.

<sup>68</sup> 'Wife Beating and Its Punishment', *Dundee Courier & Argus*, 14 November 1874.

The other side who opposed the lash for wifebeaters argued on behalf of the wife. There was recognition evident in public discourse that using the lash on violent husbands would put the wives of these men in even more danger. A report on ‘an exemplary sentence’ of twelve months with hard labour by Sheriff Cheyne of Dundee to a ‘brutal fellow of a husband’, who repeatedly abused his wife and child (listed as the only one ‘alive’), was used as an example of effectively punishing a wifebeater without flogging:

Although the cowardly blackguards who ill-use women—especially those whom they have sworn to love and protect—rightly deserve to have meted out to them the kind of punishment they inflict, there was to be kept in view the effect that such chastisement inflicted by order of a Judge would have upon the offender considered as a husband.... men living under the same roof with a woman by whose evidence they were flogged would be simply out of the question. And we opine that those who have displayed the most enthusiasm for the Corporeal Punishment Bill, have failed to realise this sufficiently.<sup>69</sup>

Cobbe also made this point in her 1878 article, arguing that the lash as a possible penalty would not only put more wives at risk, but also deter wives from reporting their husbands’ assaults, which she added was already a problem in England.<sup>70</sup> Her solution was a bill that would empower judges in criminal courts to grant an order of separation, aliment, and custody of the children to abused wives who requested protection from their husbands.<sup>71</sup> Her proposal was discussed in an anonymous letter published by the *Dundee Courier & Argus & Northern Warder* in April of 1878. Applying her arguments to Scotland, the author agreed with Cobbe that flogging as a punishment for wife abuse would be dangerous, and so called for a consideration of Cobbe’s Bill. The author, however, did not fully endorse the bill, citing the potential difficulty magistrates and judges might face in granting separations to wives. Although some complaints may be genuine, the author wrote that others may not be; such as instances of ‘justified’ assaults or provocation, as well as the possibility that unhappy wives would charge cruelty without grounds in order to ‘get away from her husband’s control, and yet live off him’, or the extreme scenario of wives tempting their husbands to violence in order to have them arrested. Accordingly, the author concludes that the Flogging Bill is not the answer, but Cobbe’s bill still requires some thought: ‘In the meantime, it is no easy matter for wives in Scotland who

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<sup>69</sup> ‘Wife-Beating—Exemplary Sentence’, *Dundee Courier & Argus*, 16 December 1876.

<sup>70</sup> Cobbe, ‘Wife-Torture in England’, pp. 80-81.

<sup>71</sup> *Ibid*, pp. 82-85.

undoubtedly ought to have it, getting a separation, owing to the trouble and expense of a suit in the Court of Session.’<sup>72</sup>

This observation about the Court of Session offers unique insight into public perception of the civil law and court system. The Court of Session was only available to parties involved in a civil action, an expensive and potentially lengthy process. In contrast to the criminal courts, the CS was used less often for charges of violence. In London for instance, Jennifer Davis identified that poor women regularly used the police courts to speak of violent husbands, though they were sometimes only seeking intervention rather than an arrest.<sup>73</sup>

However, police intervention was not always wanted by an abused wife, as there were potentially more negative consequences than positive. For instance, in Scotland, the police could make an arrest and charge without a citizen’s request; meaning a police officer could charge a violent husband with assault or breach of the peace without the wife’s consent.<sup>74</sup> There was also a concern for the wife’s safety if her husband was arrested and punished. The issue of husbands responding to their arrest with more violence or abuse was addressed earlier in the discussion on flogging, but that scenario was hypothetical. In reality wives whose husbands were arrested, temporarily restrained, put in prison, or convicted faced a backlash once their husbands were released from police custody.<sup>75</sup> In Airdrie, for instance, the wife of George Smith had boiling tea thrown at her after she called the police to protect her from her husband’s abuse.<sup>76</sup> In Dundee Police Court it was reported that, ‘As the prisoner was leaving the dock he scowled at his wife, who was sitting in court, and said “Wait or I come out!” The wife—“Do you hear that now.”’ The husband had been convicted of wifebeating and imprisoned for thirty days.<sup>77</sup>

As pointed out by contemporaries, penalties related to violent offenders especially wifebeaters were ineffective forms of prevention or deterrence. Punishments were restricted to a certain amount of days in jail or money depending on the court in which the

<sup>72</sup> ‘Wife-Beating’, *Dundee Courier & Argus & Northern Warder*, 19 April 1878.

<sup>73</sup> Davis, ‘A Poor Man’s System of Justice’, pp. 320-323. She outlined the alternative uses, besides prosecution, of police courts by London’s impoverished female communities, arguing that poor women in particular were apt to rely on the courts for relief or support. Ellen Ross also illustrates the regularity of abused wives going into Police Courts; Ellen Ross, *Love and Toil: Motherhood in Outcast London, 1870-1918*, (Oxford, 1993), pp. 84-85.

<sup>74</sup> Lindsey Farmer, *Criminal Law, Tradition and Legal Order: Crime and the genius of Scots law, 1747 to the present*, (Cambridge, 1997), pp. 85-86.

<sup>75</sup> Hughes gives an example of this: ‘On hearing the sentence this man turned to his wife and smiled before exclaiming, “Three months, Elsie.” The threat was clear from his wife’s response. The woman fainted and had to be carried from the court’; Hughes, *Gender and Political Identities*, p. 138.

<sup>76</sup> ‘Airdrie—Wife-Beating’, *Glasgow Herald*, 8 April 1871.

<sup>77</sup> ‘Wifebeating’, *Glasgow Herald*, 30 October 1876.



offender was tried, and that was dependent on the precognition decided by a procurator fiscal.<sup>78</sup> Most cases of assault, if considered minor offences, were tried in police court (established in the early nineteenth century) and presided over summarily by a bailie or magistrate with jurisdiction to sentence a maximum of £5 or sixty days' imprisonment.<sup>79</sup> For slightly more serious assaults, a prisoner was sent to sheriff court, which was given jurisdiction in 1828 to try cases without a jury provided the maximum sentence was £10 or sixty days imprisonment.<sup>80</sup> Farmer argues that by the end of the nineteenth century most minor offences were tried summarily due to their 'cheapness and speed', allowing more convictions of lesser sentences.<sup>81</sup>

The increase in summary procedures reflected the growing demand for policing public spaces, evident through the higher rate of crimes being reported and tried.<sup>82</sup> However Donnachie distinguishes this increase as reflecting more reports of crimes against property, whereas crimes against the person were declining in early nineteenth-century Scotland.<sup>83</sup> Hughes asserts that there was a shift in priorities to a greater concern for property than people, as implied by judiciary penalties.<sup>84</sup> Riggs also argues that the early nineteenth century showed a trend towards more lenient sentencing than those found in the early modern period; the forms of harsh punishment so readily used in the eighteenth century were gradually replaced by the mid-nineteenth century with comparatively lighter ones, specifically, transportation was converted to penal servitude.<sup>85</sup>

By the beginning of the twentieth century convictions for assaults against wives were regularly tried in summary courts. Significantly, Hughes found that, 'around two-thirds of all men convicted' under these circumstances were not given prison sentences.<sup>86</sup> Those convicted were given alternative penalties such as fines, cautions or admonishment. If sent to prison the average sentence was less than six months, and sometimes one month or less.

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<sup>78</sup> For a detailed discussion of precognitions and the process of determining where to try prisoners, see Farmer, *Criminal Law*; Ian Donnachie, "'The Darker Side': A Speculative Survey of Scottish Crime During the First Half of the Nineteenth Century", *Scottish Economic and Social History*, Vol. 15 (May 1995), pp. 6-7; and Riggs, 'Prosecutors, Juries, Judges and Punishment', pp. 168-170.

<sup>79</sup> Farmer, *Criminal Law*, p. 77; Walker, *A Legal History*, pp. 369-370.

<sup>80</sup> Walker, *A Legal History*, p. 366.

<sup>81</sup> Farmer, *Criminal Law*, pp. 73-74. Hughes also agrees with Farmer and applies this to her work; Hughes, 'The "Non-Criminal" Class', p. 36.

<sup>82</sup> Farmer, *Criminal Law*, pp. 73-74; Donnachie, "The Darker Side", pp. 7-8; Riggs, 'Prosecutors, Juries, Judges and Punishment', p. 173; Hughes, 'The "Non-Criminal" Class', p. 46.

<sup>83</sup> He bases this study on precognitions rather than convictions; Donnachie, "The Darker Side", pp. 9-17.

<sup>84</sup> Hughes, 'The "Non-Criminal" Class', p. 34.

<sup>85</sup> Riggs, 'Prosecutors, Juries, Judges and Punishment', pp. 169, 174-188.

<sup>86</sup> Hughes, 'The "Non-Criminal" Class', p. 47.

She argues that this leniency was further encouraged in the early twentieth century by marriage mending, probation and instalment plans for paying fines.<sup>87</sup>

As shown in the *Brutal Assaults Report*, the majority of the sheriffs and sheriff substitutes said they found the legislation sufficient.<sup>88</sup> Still it was apparent that many felt harsher penalties could be more effective to discourage violent assaults, hence the high number who supported flogging. The weakest aspect of the penal code, according to those respondents who found the laws inefficient, was the option of a fine. Walter J. Spens, sheriff substitute in Hamilton, who provided a response to Secretary Cross, had also written a letter to the *Glasgow Herald* less than a month earlier, arguing against the reinstitution of the lash. In this letter he voiced the inefficiency of fines: ‘Cases of wife-beating occurring in my district are not now frequent, and I believe this to be due to a declared and inflexible rule, that wife-beaters, when proved guilty, receive sentence of imprisonment without the option of a fine.’ He explained that in his experience the option allowed violent offenders to escape punishment, as often a support system from other men formed to bail one another out of prison: ‘I believe in many cases [money is] raised by a man’s friends (sometimes by a subscription in court); or, if colliers, by their brother workers in the same pit—very much with the idea, “it’s you to-day, it may be me tomorrow.”’<sup>89</sup> Duncan White was able to avoid ten days’ imprisonment because he was given the option of a 21s. fine, which his employer paid for him.<sup>90</sup> Sheriff Substitute J. M. Lees of Lanarkshire also declared, ‘the maximum penalty of 5/. [as] a perfect mockery. In frequent cases I have seen the money paid by the prisoner, or collected for him, as soon as the clerk of the court had read the sentence.’<sup>91</sup> Those who supported a harsher penalty for violent offenders were not necessarily advocating prison or flogging; some merely suggested an increase in the maximum amount of money. Several sheriffs and sheriff substitutes proposed the raising of the fine to between 20s. and 50s., even after saying the penal law was sufficient.

The other effect of sentencing fines on wifebeaters was the impact on the family’s finances. An editorial in *The Scotsman* written by an anonymous woman illustrates this issue as part of the public discourse on how to penalise violent husbands:

<sup>87</sup> Hughes, ‘The “Non-Criminal” Class’, pp. 47-49.

<sup>88</sup> PP 1875 [C. 1138] *Brutal Assaults, &c.*, pp. 118, 123, 124.

<sup>89</sup> A Sheriff-Substitute, *Letters to the Editor*, ‘The Lash and Punishments of Police Magistrates,’ *Glasgow Herald*, 27 October 1874. Walter J. Spens signed it anonymously as ‘A Sheriff-Substitute’, but included the letter with his response to Secretary Cross declaring himself the author.

<sup>90</sup> ‘Paisley—Wife Beating’, *Glasgow Herald*, 29 May 1865.

<sup>91</sup> 5/. is 5 shillings; Written by J. M. Lees, Sheriff Substitute of Lanarkshire; PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 134.

Day after day I read in your papers accounts of wife-beating, in which conviction is followed by sentences so lenient that it is a mockery to say they either avenge the wrongs or protect the future of the poor bruised victims; while, with regard to the offenders, they only irritate them, and in no way deter them from a repetition of the offence when incited thereto by wrath or whisky.<sup>92</sup>

A postscript was included asking, 'I should like to know who earns the fines paid in these cases? I suspect it is the wife.'<sup>93</sup> The *Glasgow Herald* reported a case where a husband failed to appear in court and thus forfeited three guineas. Instead his wife arrived and, 'Although the poor woman was severely bruised on the body and face, she set about raising money, and succeeded in gathering the amount of the pledge, through which her cowardly husband was liberated.'<sup>94</sup>

The inefficiency of the Scottish penal code regarding assaults on wives was most problematic for the wife. Not only were husbands able to redirect the blame onto their wives through the discourse of female provocation, they were also able to retaliate for any judicial punishment they received by further threats, beatings or terrorisation. Thus, another fault in the penal law flagged up by the sheriff substitutes was the gap between an arrest and a trial. Two sheriff substitutes from Fife included this complaint, one writing:

In cases of assault on wives, it is of the greatest importance that the trial shall take place as soon as possible. The delays which are inseparably from securing a trial by jury when imprisonment for 60 days is thought an inadequate punishment, are very apt to lead to the escape of the criminal. If he is admitted to bail (which it is his right to get) he very often has succeeded in softening his wife's feelings towards him, and the tale which she then tells in the witness box is scarcely recognisable as a narrative of the same event which she described soon after its occurrence.<sup>95</sup>

The second concurred, explaining that 'witnesses are tampered with or threatened, and it is with difficulty the prosecutor can present to the jury evidence sufficient to justify a conviction.'<sup>96</sup> A sheriff substitute of Lanarkshire wrote that even when trying cases of assault on women and children summarily, 'I have found it next to impossible to get the parties assaulted to depone in support of the charge.'<sup>97</sup> Evidence of this can also be found in newspaper accounts. The wife of Timothy Garty was knocked down and hit with a hatchet, nevertheless when she appeared in court it was publicised that, '[i]n the course of

<sup>92</sup> W. W., 'Wife-Beating,' *The Scotsman*, 6 February 1872, pg. 6.

<sup>93</sup> W. W., 'Wife-Beating,' *The Scotsman*, 6 February 1872, pg. 6.

<sup>94</sup> 'Wife-Beating', *Glasgow Herald*, 8 July 1862.

<sup>95</sup> Written by A. Beatson Bell, Sheriff Substitute of Fife; PP 1875 [C. 1138] *Brutal Assaults, &c.*, pp. 122-123.

<sup>96</sup> Written by W. Lamond, Sheriff Substitute of Fife; 1875, PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 123.

<sup>97</sup> Written by J. Neil Dyce, Advocate and Sheriff Substitute of Lanarkshire of Lanark; PP 1875 [C. 1138] *Brutal Assaults, &c.*, p. 134.

her examination, the woman, who seemed anxious to screen her husband, stated that the blows were not painful, and that he was not in the habit of lifting his hand against her.<sup>98</sup> Garty was sentenced to sixty days with hard labour. Similarly, the wife of John Mailly plead, ‘that the accused should be leniently dealt with, the wife said she was not much hurt, although her face was cut, discoloured, and swollen; in fact, she was struck “in the gentlest manner possible.”’ Sheriff Hamilton, the same man who sentenced Garty to imprisonment, gave Mailly a caution of 26s. or ten days imprisonment.<sup>99</sup> Lastly, Scotland’s restrictions on evidence excluded wives as competent witnesses, but required at least two witnesses for proof.<sup>100</sup> Hughes argues this was verification of the Scottish judiciary’s preference for domestic disputes to be handled within the family.<sup>101</sup>

Still, wifebeaters made regular appearances in Scottish criminal courts. In 1831 *The Scotsman* reported, ‘Wednesday, no fewer than six low drunken fellows were placed at the bar of the Police Court, on charges of beating and maltreating their unfortunate wives.’<sup>102</sup> Forty years later the *Glasgow Herald* printed a blurb on some of the latest sentences for convicted wifebeaters and referenced the public perception of wifebeating:

A notion exists that Paisley is noted for wife beating cases, but although that notion is not well founded, and has arisen in all likelihood from the fact that there is a singular absence of other offences in this town, and that wife beating only bulks large in proportion, the records of the Police Court this week are calculated to confirm the imputation that the brutal practice is a very common one.<sup>103</sup>

Reports of husbands tried for assaulting their wives are present throughout the nineteenth-century Scottish newspapers, but an increase in cases reported is evident from the 1860s, which arguably corresponds with the rise of the first wave feminist movement.<sup>104</sup> Again, this rise in reports of marital violence should not be interpreted as evidence of the real number of incidents. Newspapers only reported cases of marital violence that were prosecuted, sensational or topical.

What is evident from the contemporary sources is a continued discourse of blame and provocation into the 1880s: working-class women were judged on their ability to keep a

<sup>98</sup> ‘Aggravated Wife-Beating Cases’, *The Scotsman*, 18 November 1873.

<sup>99</sup> ‘Wife-Beating’, *The Scotsman*, 24 September 1873.

<sup>100</sup> Wives became competent, but not compellable witnesses with the 1898 Criminal Evidence [Scotland] Act; Hughes, ‘The “Non-Criminal” Class’, p. 35.

<sup>101</sup> *Ibid.*, pp. 34–35. For a discussion of reconciliation in English summary courts see Behlmer, ‘Summary Justice and Working-Class Marriage’, pp. 254–258, 270–271.

<sup>102</sup> ‘Horrid Brutality’, *The Scotsman*, 26 November 1831, p. 3.

<sup>103</sup> ‘Wife-Beating’, *Glasgow Herald*, 9 March 1871.

<sup>104</sup> This finding is based on a collection of wifebeating reports in *The Scotsman* Archive available online and the Scottish newspapers available on the Nineteenth-Century British Newspapers database.

happy husband and home, while working-class men were deemed more like animals than men. Drink was seen as an excuse for bad behaviour, but also a justification for chastising a drunken wife. Newspaper articles labelled husbands accused of beating their wives as ‘brutal’, ‘unmanly’, ‘cowardly’, ‘scoundrel’, ‘disgraceful’, and even ‘monsters’, but still, no severe legislation was enacted as punishment. Even the consideration of flogging, never implemented for violent criminals in Scotland, indicated the view that such criminals were confined to the working class, for as Foyster pointed out, ‘[t]here is no way that this would have been a topic for debate if MPs imagined that members of their own social class could have been subject to this penalty.’<sup>105</sup>

Furthermore, though physical violence was frequently mentioned in detail in criminal trial reports, there is very little mention of non-physical abuse. Letters and editorials on marital violence usually only addressed wifebeating as the big issue, but as the CS judicial separation cases will demonstrate, abusive marriages involved a much more complex type of cruelty than strikes and blows.

In the second part of this chapter the sources and findings of the CS separation cases and sample of criminal court wifebeating cases will be discussed in detail. The discourses explained above will be applied to these cases to determine how the judicial authorities coped with the reality of martial violence when presented in their courtrooms. As shown through the trajectory of ideas in the nineteenth century, the general notion that violence within marriage was a working-class concern put working-class wives at a disadvantage as their characters were often put on trial alongside their husbands. Within the civil court, however, wives were given a greater opportunity to present and plead their cases.

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<sup>105</sup> Foyster, *Marital Violence*, p. 239.

## Chapter Five: Separation and Cruelty, Part II

### Introduction: Sources and Findings in Court of Session Judicial Separation and Criminal Court Cases

The Edinburgh Court of Session (CS) case records illuminate the reality of cruelty within abusive marriages. This reality was often hidden by predominating public perceptions that marital violence was a class issue, as outlined by D'Cruze: 'Working-class violence was constructed as a social problem, highly visible to contemporaries and well documented. Middle and upper-class offenders were certainly tried and punished, but by and large this occurred only when their offence proved impossible to ignore or redefine.'<sup>1</sup> Wifebeating was not considered an issue of the middle and upper classes, and if it was brought to the attention of the public, it was due to the extremity of the offence. In actuality, the true extent of marital abuse can never be stated in a numerical amount. It exists as a dark figure, both historically and today. From this study's sampling of divorce and separation records available from the decennial years of 1830, 1840, 1850, 1860, 1870 and 1880, there is some light shed on individual experiences of marital abuse, and further attestation of the complexity of defining and proving cruelty within the courtroom.

As the small number of cases found prohibits any generalising they will be supplemented by wifebeating trials reported in the newspapers. The trial reports collected were printed in Scottish newspapers from across the country: *The Scotsman*, *Glasgow Herald*, *Aberdeen Journal*, and *Dundee Courier & Argus & Northern Warder*. In total 102 cases were found, ranging from 1831 to 1896. The highest numbers of trials were reported between the 1860s and 1870s.

Of the 254 decrees found from the benchmark year study of the CS, 128 cases of divorce and separation were collected, fourteen of which were actions for separation and aliment, or 11 per cent of the 128. Out of the fourteen summons sent to the CS, thirteen were given decrees of judicial separation, and one was declared assoilized (dismissed). The ground on which the action was filed was cruelty and maltreatment for each case. In every case the pursuer was the wife.

As cruelty was not grounds for divorce, this chapter's focus is on judicial separation. It should be noted, nevertheless, that cruelty was also an issue cited in divorce cases where the official grounds were adultery or desertion. For example, of the 65 adultery divorce

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<sup>1</sup> Shani D'Cruze (ed.), *Everyday Violence in Britain, 1850-1950; Gender and Class*, (Essex, 2000), pp. 3-4.

cases, seventeen mentioned maltreatment of the wife by the husband. Of the 48 desertion divorce cases, five mentioned maltreatment as well. These cases will not be discussed in this chapter, however, as any mention of maltreatment was usually brief and unspecific.

To draw conclusions based solely on these small numbers would be inaccurate. Though the rate of divorce and separation in Scotland was increasing towards the turn of the century, these findings do not add any definitive quantitative data to the debate of marital violence increasing or decreasing.<sup>2</sup> It may be that more women were reporting their husbands' cruelty, which caused the number of cases reported to rise (in both criminal and civil court). This would be reflected in the rising number of cases where maltreatment was reported.<sup>3</sup>

### **Cruelty as Defined by Scots Law and Forms of Violence and Abuse Found in Cases**

Hammerton proposes that in England more abused wives were reporting their maltreatment in the second half of the century due to a shift in judges' attitudes regarding the legal definition of cruelty. He demonstrates that as middle and upper-class husbands sometimes used more verbal, mental and economic cruelty against their wives, these women struggled to prove maltreatment until a more encompassing definition was accepted.<sup>4</sup> The increase in England, however, was a direct result of the new English legislations after 1850, such as the 1857 and 1878 Matrimonial Causes Acts. Scotland, on the other hand, did not have the same legislative restructuring of divorce law in the mid-nineteenth century as England.<sup>5</sup>

The legal definition of cruelty, according to nineteenth-century Scots law, had six forms of abuse that qualified for a separation *a mensa et thoro*: physical, verbal, economic, constructive, wilful communication of venereal disease and tyrannical cruelty.<sup>6</sup> Although all of these forms have been cited as warranting a judicial separation, the judges repeatedly emphasised that for a ruling of cruelty, 'the grounds of action must be grave and weighty,

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<sup>2</sup> Please see Chapter Two for discussion of divorce and separation rates.

<sup>3</sup> As discussed in Chapter Two, this is often attributed to the 1861 Conjugal Rights Act and Married Women's Property Acts of 1877 and 1881.

<sup>4</sup> A. J. Hammerton, 'Victorian Marriage and the Law of Matrimonial Cruelty', *Victorian Studies*, Vol. 33, No. 2 (Winter, 1990), p. 283.

<sup>5</sup> In fact, Hughes, Riggs, and Donnachie suggest the criminal laws in the first half of the century were more draconian than the second half. This will be discussed in the section on police intervention.

<sup>6</sup> Essentially it was, 'any conduct towards the wife which leads to any injury, either creating danger to her life or danger to her health'; Patrick Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, Second Edition, Vol. II, (Edinburgh, 1878), p. 880.

and such as established an impossibility that the duties of the married life can be discharged.’<sup>7</sup>

Thus the definition of cruelty in Scotland did not solely rest on physical violence, but did hinge on proving the wife’s life was at risk if she continued to live with her husband. Though the legal definition did not change from 1830 to 1890, Scots law followed the system of precedent, meaning if one Lord Ordinary ruled in favour of judicial separation on the grounds of non-physical cruelty another Lord Ordinary could cite this decree as justification for a similar interlocutor.<sup>8</sup> This was illustrated in the 1870 action initiated by Mrs. Elizabeth Gordon or Steuart against her husband Mr. Andrew Steuart. Lord Gifford found Mr. Steuart ‘guilty of abusing and maltreating’ his wife and granted a separation of bed and board. Lord Gifford included a note with the interlocutor detailing the precedents applicable to the pursuer’s summons and the defender’s answers. Though the defender and his lawyer cited a case from 1850 claiming ‘a single isolated case of violence, producing no permanent injury to health, was not enough’, the Lord Ordinary countered that there was indeed violence committed by the defender and:

also abundant threats of violence, sufficient, the Lord thinks, to justify reasonable apprehension, which the event shewed [*sic*] was well founded, and such reasonable apprehension, even without actual blows, seems enough.—See *Milford v Milford*, 18<sup>th</sup> December 1866, Law Reports, 1 Prob. and Div., 295. See also *Harris v Harris*, 2 Hagart’s Reports, 148, in which very slight violence coupled with threats was held enough.<sup>9</sup>

The fourteen separation cases discussed in this chapter offer detailed accounts of discontented marriages. Significantly, it was found that the economic status of each couple does vary. Some couples were wealthy, the Steuarts for instance, while others would fit into the upper-working class and the lower-middle class. Significantly, the majority of these couples did not fit into one economic profile, though there are several occupations shared by two of the defenders. Still, it is important to state that of these cases, the average expense for the Court action was £42.<sup>10</sup> While this was considered a cheaper price than in England, it was unaffordable for many lower working-class couples. An overview of the couples’ backgrounds is provided in Tables 5.1 and 5.2 below.

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<sup>7</sup> Fraser, *Treatise*, Vol. II, p. 878.

<sup>8</sup> David M. Walker, *A Legal History of Scotland, Volume VI: The Nineteenth Century*, (Edinburgh, 2001), pp. 271-273.

<sup>9</sup> CS46/1870/8/20 Gordon or Steuart v Steuart.

<sup>10</sup> The overall expenses for these actions ranged from £10 to £99.17s.7d.



**Table 5.1 Residences and Occupations of Separation and Aliment Case Couples**

| Year | Name                          | Residence     | Hus Occupation                  | Armstrong's Class <sup>1</sup> | Wife Occupation                      |
|------|-------------------------------|---------------|---------------------------------|--------------------------------|--------------------------------------|
| 1830 | Grieve or Winton              | Edinburgh     | Builder                         | II                             | Daughter of Coal Merchant            |
| 1850 | McMichael or Smith            | Kirkintilloch | Iron Founder                    | III                            | Daughter of Manufacturer             |
| 1860 | Kyd or Peters                 | Arbroath      | Bleacher (Manager) & Proprietor | II                             |                                      |
| 1860 | Ronaldsome or McCorquodale    | Edinburgh     | Grocer (Owner)                  | II                             | Runs Grocery (Widow of Grocer)       |
| 1860 | Chesterfield Aimer or Russell | Dundee        | File-cutter                     | III                            |                                      |
| 1870 | Graham Gordon or Steuart      | Auchlunkart   | Esquire of Auchlunkart          | I                              | Daughter of Esquire of Park in Banff |
| 1870 | Nicol or Pringle              | Edinburgh     | Iron-dresser                    | III                            | Daughter of Shoemaker                |
| 1870 | Wilson or Johnstone           | Leith         | Engineer                        | II                             | Runs Temperance Hotel                |
| 1870 | Fernie or Taws                | Dundee        | Engineer                        | II                             |                                      |
| 1880 | Lawrenson or Findlay          | Edinburgh     | Grocer                          | II                             | Keeps Lodgers                        |
| 1880 | M'Call or Cairns              | Edinburgh     | Polisher                        | III                            | Washer                               |
| 1880 | Morrison or Cook              | Dunfermline   | Innkeeper                       | II                             | Works at Inn                         |
| 1880 | Myles or Souter               | Edinburgh     | Dairyman                        | II                             | Runs Dairy Business                  |
| 1880 | Perry or Mein                 | Dumfries      | Master Joiner                   | II                             |                                      |

<sup>1</sup> Based on W.A. Armstrong's classification of nineteenth-century occupations from census records: I is the equivalent of upper class; II is the equivalent of middle class; III is the equivalent of working class.<sup>11</sup>

<sup>11</sup> W.A. Armstrong, 'The use of information about occupation,' in E.A. Wrigley, *Nineteenth-century Society; Essays in the use of quantitative methods for the study of social data*, (Cambridge, 1972), pp. 191-225.

**Table 5.2 Marriage and Cruelty, Court of Session Cases**

|  |                  |
|--|------------------|
| <b>Length of Marriage</b>                  | <b>Total: 14</b> |
| Less than 1 yr                             | 1                |
| 1-10 yrs                                   | 4                |
| 10-15 yrs                                  | 3                |
| 15-20 yrs                                  | 1                |
| 20-30 yrs                                  | 5                |
| <b>When Cruelty Began</b>                  | <b>Total: 14</b> |
| Shortly after marriage                     | 6                |
| 2-5 yrs                                    | 2                |
| 10 years + after marriage                  | 3                |
| Not Available                              | 3                |
| <b>Time btw First Cruelty &amp; Action</b> | <b>Total: 14</b> |
| Less than 1 yr                             | 3                |
| 1-2 yrs                                    | 1                |
| 2-15 yrs                                   | 4                |
| 5-10 yrs                                   | 4                |
| Over 10 yrs                                | 2                |

### *Physical Violence*

Within the separation cases gathered from the CS, the most predominant forms of cruelty found were physical, verbal and economic. In every case there was at least one instance of physical abuse reported to the judge. Verbal abuse was the most prevalent complaint, as it featured in every case as the most frequently employed form of cruelty. Economic abuse was the third most common form and was found in five of the fourteen cases.<sup>12</sup> There was one wife who mentioned mental abuse as part of her husband's maltreatment, one wife who complained her husband communicated a venereal disease to her, and one woman who stated her husband spat in her face.

The type of physical cruelty described to the CS (legally referred to as personal violence) ranged from forceful removal from a room to throwing nearby objects to stabbing with a penknife.<sup>13</sup> Catherine Pringle of Edinburgh was 'totally blind and [was] thus rendered very helpless and defenceless' against her abusive husband Robert Pringle, an Iron Dresser. In three out of the four assaults described by Catherine to the Court, her husband 'seized her by the throat' to choke her. The fourth time, he 'violently struck her on the face with a

<sup>12</sup> This form of cruelty will be discussed at length below.

<sup>13</sup> Alexander Peters stabbed his wife Elizabeth with a penknife; this couple will be discussed in more detail later on in the chapter; CS46/1860/5/21 Kyd or Peters v Peters.

pass key and chased her out of the house.’<sup>14</sup> According to the cases, most daily incidences of violence were committed with bare hands; however, the extreme episodes, and the claims most likely to prove maltreatment, often included the use of a weapon. Nine out of the fourteen cases mention the use of a weapon to harm or threaten the wife. It is also apparent that weapons were a means to terrorise, such as James Souter, a dairyman in Edinburgh, inflicted on his wife Christina. She stated that, ‘he purchased a butcher’s knife, with which, in the presence of the children, he repeatedly threatened to stab [her], and which he carried about on his person during the day, and kept concealed about his bed at night.’<sup>15</sup> Similarly, John Mein, a joiner in Dumfries, would frequently strike his wife with the ‘stout cane with a bone handle’ he used as a walking stick; he even tried to choke her to death with it.<sup>16</sup>

Likewise, every case of wifebeating or wife assault tried in the criminal courts described a physically violent attack by a husband against his wife. In the trial reports collected, all 102 cases reported physical abuse. Where details of the episode were available, the most common assault was a blow or a strike, then kicking after being knocked down. Thomas Alexander, a shoemaker in Glasgow with previous convictions, exemplified this combination of violence when he struck his wife, knocked her to the ground and then kicked her.<sup>17</sup> 79 of the 102 prisoners were accused of using their bare hands to assault their wife. The majority, or 61 per cent, of these husbands were sentenced to imprisonment, half of whom served 30 to 60 days. The second most commonly sentenced length of imprisonment was less than one month. Only ten of the prisoners were also sentenced to hard labour. 33 per cent of the 79 husbands convicted of beating their wives bare-handed were fined; the expense of the fine varied, although most men received fines of £1 to £2, followed by fines of less than a guinea (21 shillings), and fines of £2 to £3. The majority of men fined were given the alternative of prison if unable to pay (see Table 5.4).

23 per cent of the 102 reports stated that the husband had used a weapon in his attack (see Table 5.3). The most frequently used weapon was often a household item: wooden objects, metal objects, boiling water, knives, hatchets, even shoes. The frequency of physical assaults, often with dangerous weapons, reaffirms that marital cruelty could be, and often was, life threatening. As mentioned earlier, life-threatening cruelty qualified a

<sup>14</sup> CS46/1870/10/47 Pringle v Pringle.

<sup>15</sup> CS46/1880/12/113 Myles or Souter v Souter.

<sup>16</sup> CS46/1880/7/94 Perry or Mein v Mein.

<sup>17</sup> ‘Wife Beating’, *Glasgow Herald*, 5 March 1861.

spouse for a judicial separation, yet, when similar episodes were presented to a criminal court abusive husbands received comparably light sentences for violence often described as brutal. Hughes argues that the 1862 Police and Improvement (Scotland) Act had the potential to toughen the punishments for such offenders—the Act specifically addressed assaults where life was threatened, limbs were broken, lethal weapons were used to the effusion of blood, or the accused had three previous convictions—by sending their cases to the High Court or to be tried by a jury, which could result in more severe penalties, such as longer prison sentences. However, her investigation of criminal court rulings shows that sheriffs and magistrates continued to work within their own jurisdiction applying lenient sentences rather than utilise the 1862 Act.<sup>18</sup>

**Table 5.3 Criminal Courts Where Sample of Wifebeating Cases Were Tried, 1831-1896**

| <b>Court</b>             | <b>All cases</b> | <b>Wifebeating without Weapon</b> | <b>Wifebeating with Weapon</b> |
|--------------------------|------------------|-----------------------------------|--------------------------------|
| Police/Burgh Court       | 78               | 65                                | 13                             |
| Sheriff Court            | 15               | 10                                | 5                              |
| <i>Summary Trial</i>     | 6                | 4                                 | 2                              |
| High Court of Justiciary | 3                | 0                                 | 3                              |
| Unlisted                 | 6                | 4                                 | 2                              |
| <b>Total</b>             | <b>102</b>       | <b>79</b>                         | <b>23</b>                      |

Equally, my own sampling of wifebeating cases suggests that the Police and Improvement Act was not used efficiently (see Table 5.3 and 5.4). Out of the 102 cases found, 78 were tried in police court (or burgh court in the 1830s), fifteen in sheriff court, and three in the High Court of Justiciary, suggesting that many violent husbands were kept in the lower courts and subsequently given lighter sentences.<sup>19</sup> There is some evidence of the 1862 Act being utilised; specifically, the two cases tried in the High Court after 1862 did involve the

<sup>18</sup> The 1862 Police and Improvement Act stated that when presented with a case of assault where any of the listed forms of violence were evident the magistrate could recommend the accused to be considered for a harsher punishment than the magistrate was able to sentence to the prosecutor fiscal, and returned to prison to await a decision and potential transfer; Annmarie Hughes, 'The "Non-Criminal" Class: Wife-beating in Scotland, c.1800-1949', *Crime, Histoire & Sociétés/ Crime, History & Societies*, Vol. 14, No. 2 (2012), p. 37. For the twentieth century Hughes found that abusive husbands 'were rarely convicted for a first offence'; Annmarie Hughes, *Gender and Political Identities in Scotland, 1919-1939*, (Edinburgh, 2010), p. 137.

<sup>19</sup> Six cases did not provide detail on where the prisoner was tried.

use of a weapon, the effusion of blood, and previous convictions.<sup>20</sup> John Hughes, a seventy year old man charged with assaulting his wife with a piece of wood or hammer about the head, face, breast and hands, to the effusion of blood, pled guilty stating, ‘that he had lately been very eccentric in his habits and weak in mind, almost imbelice [*sic*]; and that he scarcely knew the nature of the offence committed’, and was sentenced to twelve months imprisonment by the Lord Justice-Clerk in 1876.<sup>21</sup> When Thomas Morrison, who had already been convicted four times for assaulting his wife, stood in front of the Lord Justice-Clerk in April 1865 he was given a sentence of eighteen months after the jury unanimously found him guilty of his fifth attack. Although eighteen months was the lengthiest penalty found in this sample, it was not the maximum sentence Morrison could have received; his sentence was explained by the Lord Justice-Clerk and reported in the article:

considering the previous convictions of the prisoner, and the last sentence of twelve months’ imprisonment he had received for beating his wife, the natural course for the Court would be to give a sentence of penal servitude, which could not according to law be less than seven years. But taking into consideration that the injury inflicted upon Mrs Morrison was not of a permanent character—no thanks to him for that, however—and unwilling to give such a long term of punishment, the Court would try again the effect of imprisonment, but as sure as ever he lifted his hand to his wife again, he would be sentenced to a long term of penal servitude.<sup>22</sup>

Of the 23 cases where a weapon was used, thirteen were tried in police (or burgh) court, and five in sheriff court (see Table 5.3).<sup>23</sup> The majority of the 23 prisoners were sentenced to imprisonment of 30 to 60 days, although just two were also sentenced to hard labour. Fines were only given to three men and ranged from less than 21s. to £2, with prison sentences if unable to pay (see Table 5.4). Only six of the 23 received punishments of five months or more (two from the High Court of Justiciary and four from the sheriff court). Of the five husbands accused of harming their wives to the effusion of blood, three were sentenced to twelve or more months imprisonment, while the other two received ten days and eight days in prison. Thus, it seems that even with legislation encouraging harsher penalisation of violent assaults enforcement by the judiciary was not guaranteed. For instance, in 1872, ten years after the Act was passed, Alexander Ross of Edinburgh struck, stamped on, kicked, and beat his wife with the heel of a nailed shoe and with a shoemaker's knife. He also injured her ten year old son who attempted to defend his mother. Despite

<sup>20</sup> The third case was tried in the High Court in 1831, thirty years before the Police and Improvement (Scotland) Act was passed.

<sup>21</sup> ‘Glasgow Spring Circuit-Court’, *Glasgow Herald*, 10 May 1876.

<sup>22</sup> ‘Assault on a Wife’, *Aberdeen Journal*, 26 April 1865.

<sup>23</sup> Two cases did not list where the trial was held, or who was the presiding judge.

the brutal nature of the attack, the use of a lethal weapon, and Ross' three previous convictions, he was tried in the burgh court by a baillie and sentenced to six days imprisonment with a £1 caution or another six days if unable to pay.<sup>24</sup>

**Table 5.4 Sample of Wifebeating Cases Tried in Criminal Courts and Reported by Local Newspapers, 1831-1896**

|                                      | Wifebeating<br>without<br>Weapon | Wifebeating<br>with Weapon | Total      |
|--------------------------------------|----------------------------------|----------------------------|------------|
| <b>Type of Sentence</b>              |                                  |                            |            |
| Dismissed                            | 3                                |                            | 3          |
| Transported                          |                                  | 1                          | 1          |
| Cautioned                            |                                  | 1                          | 1          |
| Sent to Higher Court                 | 1 <sup>a</sup>                   |                            | 1          |
| Failed to Appear                     | 1                                |                            | 1          |
| Fined                                | 26                               | 3                          | 29         |
| <21s.                                | 6                                | 1                          | 7          |
| £1-2                                 | 8                                | 2                          | 10         |
| £2-3                                 | 6                                |                            | 6          |
| £3-4                                 | 4                                |                            | 4          |
| £4-5                                 |                                  |                            |            |
| >£5                                  | 2                                |                            | 2          |
| with alt. of prison                  | 23                               | 3                          | 26         |
| cautioned                            | 5                                |                            | 5          |
| <b>Imprisonment</b>                  | <b>48</b>                        | <b>18</b>                  | <b>66</b>  |
| <i>Length of Sentence:</i>           |                                  |                            |            |
| <1 month                             | 14                               | 4                          | 18         |
| 1-2 months                           | 30                               | 8                          | 38         |
| 3-6 months                           | 2                                | 2                          | 4          |
| >6 months                            | 3                                | 4                          | 7          |
| with alt. of fine                    | 2                                |                            | 2          |
| with caution/security                | 3                                | 1                          | 4          |
| with hard labour                     | 10                               | 2                          | 12         |
| <b>Total No. Cases<br/>Collected</b> | <b>79</b>                        | <b>23</b>                  | <b>102</b> |

<sup>a</sup> This case from 1832 did not provide much detail besides the name and occupation of the prisoner; it stated that due to his three previous convictions his case was remitted to the Council Chamber as the past punishments had been ineffective.<sup>25</sup>

<sup>24</sup> Ross was described as having 'been a Good Templar for 9 months, but had broken his pledge on Friday'; 'Wife-Beating', *The Scotsman*, 31 January 1872.

<sup>25</sup> 'Police Court', *The Scotsman*, 20 March 1832.

### *Verbal Abuse as Legal Cruelty*

Although physical violence was the predominant form of abuse cited in criminal courts and most separation cases, verbal abuse could constitute cruelty when it demonstrated harassment, menace, and threats of physical violence. Furthermore, the unrelenting use of unkind words towards a wife would be considered cruelty when they disrupted her from performing her marital duties.<sup>26</sup> This line appeared to be blurry, however; for example, when discussing ‘Words of Abuse and Habits of Drinking’, Fraser wrote that, ‘Words of abuse and reproach, however irritating, blasphemous language, however disgusting, and habits of intoxication, however annoying to the wife, without bodily ill-treatment or threats of it, are not cruelty.’<sup>27</sup> Thus, many wives suffered years of maltreatment in the form of verbal abuse as words alone were often not enough to warrant a separation.<sup>28</sup> Andrew Steuart, an esquire of Auchlunkart and at one time a Member of Parliament, called his wife ‘a blackguard, liar, fool’ and told her to ‘go to the devil’.<sup>29</sup> Christina Winton, daughter of a coal merchant, complained her husband would ‘vilify her with the most degrading of names and epithets’.<sup>30</sup> Both Mrs. Russell and Sarah Mein were called whores by their husbands along with other ‘vile names’.<sup>31</sup> The use of verbal cruelty was hurtful and degrading for wives, but it was even more humiliating and effective when used publicly, especially for women who considered themselves respectable. Hence, Mrs. Russell complained that Mr. Russell, ‘[used] most disgusting language to [her] and using very obscene language—this was heard by a great many people.’<sup>32</sup> John Smith would degrade his wife, daughter of a Glasgow manufacturer, by calling her names to his servants, particularly ‘poor silly, stupid body’.<sup>33</sup>

The line between chastisement and cruelty was crossed, though, when a husband began to make threats of physical violence or murder. According to Scots law, the threats once said out loud, even if the wife was not present to hear them, indicated a predisposition to harm and a future risk for the wife.<sup>34</sup> The wife of John Johnstone, previously a coal merchant in Edinburgh but lately an engineer in West Calder, was able to benefit from this aspect of the

<sup>26</sup> Fraser, *Treatise*, Vol. II, pp. 879-882.

<sup>27</sup> Fraser, *Treatise*, Vol. II, p. 897.

<sup>28</sup> Verbal abuse was also regarded in criminal courts as less of an offence, for instance a baker was sentenced to thirty days’ imprisonment for striking his wife in the face, although Sheriff Hallard commented that argument was mostly words, ‘and not characterised by the brutality usually incident to cases of wife-beating’; ‘A Couple of Cruel Husbands’, *The Scotsman*, 5 July 1873.

<sup>29</sup> CS46/1870/8/20 Gordon or Steuart v Steuart.

<sup>30</sup> CS46/1832/3/185 Grieve or Winton v Winton.

<sup>31</sup> CS46/1880/7/94 Perry or Mein v Mein; CS46/1860/2/101 Russell v Russell.

<sup>32</sup> CS46/1860/2/101 Russell v Russell.

<sup>33</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>34</sup> Fraser, *Treatise*, Vol. II, p. 887.

law; though she could not prove he had physically assaulted her, his verbal abuse and violent threats were deemed enough for a decree of separation.<sup>35</sup> John had told his daughter ‘that he would blacken [his wife’s] body if he could catch her,’ and when he could not find his wife he said, ‘he wished she were drowned,’ and that ‘it would be the happiest day he would see when he saw her carried off in a stretcher.’<sup>36</sup>

Most cases of alleged cruelty illustrated that verbal abuse was more regularly used, but was also usually present during physical abuse. For instance, Elizabeth Morrison, wife of James Dick Cook an innkeeper of the Park Tavern in Dunfermline and characterised in the court room as a drunkard, stated that he repeatedly threatened to shoot her with a loaded gun he kept in the house, both in front of people as well as privately.<sup>37</sup> John Mein, a joiner in Dumfries, who called his wife a whore, threatened various ways he wanted to kill her: ‘to throw her out of the window, or over the stair, or into the fire.’ In December 1879 he ‘seized the pursuer by the neck of her jacket, forced her down on the floor and tried to push her face into the fire, at the same time swearing and calling her obscene names.’ She was able to free herself before she was burned.<sup>38</sup> Verbal abuse often preceded physical assault, sometimes by years. Robina Findlay, wife of Robert Findlay a grocer in Canongate Edinburgh, claimed, ‘[w]e lived very comfortably together till about seven years ago, when he began to treat me badly. He used violent language. He began to threaten me with personal violence between two and three years ago.’ After that she claims he frequently told her he would ‘do for her’ and would ‘rim a knife into her.’<sup>39</sup>

Though the legal definition of cruelty did not fully recognise the harm caused by verbal abuse in the nineteenth century, it was clearly a cause of distress.<sup>40</sup> Equally so, many husbands who claimed provocation when accused of wifebeating, such as that found in the ballads, described what was ostensibly verbal abuse by their wives.<sup>41</sup> Moreover, the use of vulgar words was associated with low-class characters. John Archer found in his study of men and violence that working-class men used verbal abuse to initiate violent confrontations, and that this aspect of working-class masculinity was culturally accepted.<sup>42</sup>

<sup>35</sup> CS46/1870/4/54 Wilson or Johnstone v Johnstone.

<sup>36</sup> CS46/1870/4/54 Wilson or Johnstone v Johnstone.

<sup>37</sup> CS46/1880/12/42 Morrison or Cook v Cook.

<sup>38</sup> CS46/1880/7/94 Perry or Mein v Mein.

<sup>39</sup> CS46/1880/12/11 Lawrenson or Findlay v Findlay.

<sup>40</sup> Ross cites one woman from the early twentieth century who told a police court missionary, ‘I would forgive anything... but the filthy names he called me’; Ellen Ross, *Love and Toil: Motherhood in Outcast London, 1870-1918*, (Oxford, 1993), p. 86.

<sup>41</sup> Hughes, ‘The “Non-Criminal” Class’, pp. 44-45.

<sup>42</sup> John E. Archer, ‘“Men behaving badly?”: masculinity and the uses of violence, 1850-1900’, in D’Cruze (ed.), *Everyday Violence in Britain, 1850-1950*, (Essex, 2000), pp. 43-44, 48.



In contrast, Judith Rowbotham found that women who used foul language detracted from their femininity, and were also associated with the lowest classes.<sup>43</sup> Therefore, insults, opprobrious epithets and vile words used by a respectable man towards a respectable woman (or vice versa), were considered even more damaging as such language was not expected or tolerated.

### *Economic Abuse as Legal Cruelty*

Economic abuse has been a constant in the history of marital cruelty.<sup>44</sup> It was less straightforward than personal violence, yet the Scottish Court recognised that part of the marital contract was the provision of basic needs for a wife and children by the husband. A 'good husband' was idealised by the middle classes as a caring, companionate partner whose masculinity was tied to his ability to command respect, obedience, and maintain domestic order. This reverence to his authority, however, was dependent on his ability to provide and protect for his family and any other dependents.<sup>45</sup> Within working-class families the idea of a 'good husband' catered to more achievable goals. Though the respectable working class also promoted the ideals of breadwinning, protecting and educating, the conflicts and tensions that escalated from these pressures meant that deviations were tolerated and excused.<sup>46</sup> Ultimately, husbands, whether wealthy or impoverished, were expected to keep their families alive and comfortable.

Complete neglect and abandonment constituted desertion and grounds for a full divorce. However, for a man who was still living with the family, Fraser wrote, 'there can be no plainer case of cruelty than the refusal of the necessities of life to the wife. But this must

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<sup>43</sup> Judith Rowbotham, "Only when drunk": the stereotyping of violence in England, c. 1850-1900', in D'Cruze (ed.), *Everyday Violence in Britain, 1850-1950*, (Essex, 2000), p. 164

<sup>44</sup> Leah Leneman, "A tyrant and tormentor": violence against wives in eighteenth and early nineteenth-century Scotland', *Continuity and Change*, Vol. 12, No. 1 (1997), pp. 31-54, pp. 36-37; Nancy Tomes, 'A "Torrent of Abuse": Crimes of Violence between Working-Class Men and Women in London, 1840-1875,' *Journal of Social History*, Vol. 11, No. 3 (Spring, 1978), pp. 331-332; Ayers and Lambertz, 'Marriage Relations, Money, and Domestic Violence in Working-Class Liverpool, 1919-39,' in Jane Lewis (ed.), *Labour and Love; Women's Experience of Home and Family, 1850-1940*, (Oxford, 1986), pp. 195-219; Annmarie Hughes, 'Working Class Culture, Family Life and Domestic Violence on Clydeside, c. 1918-1939: A View From Below,' *Scottish Tradition*, Vol. 27 (2002), pp.70-73. Linda Gordon found that the economic non-support of a husband was '[b]y far the most striking and consistent women's complaint' in 1930s Boston; Linda Gordon, *Heroes of Their Own Lives; The Politics and History of Family Violence, Boston 1880-1960*, (London, 1988), p. 258.

<sup>45</sup> John Tosh, *A Man's Place: Masculinity and the Middle-Class Home in Victorian England*, (London, 1999), pp. 60-62; Leonore Davidoff, Megan Doolittle, Janet Fink and Katherine Holden, *The Family Story: Blood, Contract and Intimacy, 1830-1960*, (London, 1999), pp. 147-151; Hughes, 'Working Class Culture', p. 64.

<sup>46</sup> Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class*, (Berkeley, 1997), pp. 248-263.

always be taken with the qualification that the husband is able to give them.’<sup>47</sup> The complaint of financial want was measured against the station and condition the complainer was accustomed to. Out of the fourteen cases, six husbands were accused of economic cruelty. Each husband, failed to act as a provider and protector. Three of the husbands earned a wage yet contributed very little or nothing to the support of their wives and family; only one step from committing wilful and malicious desertion.<sup>48</sup> Janet Taws, for instance, claimed her husband, an engineer in Dundee, abused her verbally and physically when she asked for some of his wage.<sup>49</sup>

The three other husbands refused to work, thus not contributing financially: two were drunkards and hindered their wives from earning a separate wage, while the third, a polisher named John Cairns, lay in bed for three months, though perfectly well, and refused to work, forcing his wife ‘to seek work for her own maintenance and [get] some work at washing.’<sup>50</sup> Elizabeth McCorquodale’s second husband depleted the customer base of her grocery store in Edinburgh that she inherited after her first husband died. John McCorquodale, a butler when they married, became the grocer of the shop, yet refused to support Elizabeth and her children (the parties involved had no children between them): ‘on the contrary by his violent and outrageous conduct he has driven away almost the whole custom of the shop and nearly ruined the business.’ One witness for the pursuer stated that she, a spirit merchant’s wife, had been a customer at the shop for four years, but since Elizabeth’s marriage to John, ‘I have not frequented the shop much since the month of December last, but have rather avoided it in consequence of what I saw then. I did not like the conduct of the defender, because he abused the pursuer and was violent and outrageous in my presence.’<sup>51</sup> Twenty years later, Mary Cook similarly struggled with a husband who not only violently assaulted her, threatened her life, and slept with a servant, but who also squandered away the £1,200 she brought with her to the marriage and sabotaged any additional income to the family ‘by his idle and dissolute habits.’<sup>52</sup>

Some historians of marital violence argue that in relationships where the wife became the breadwinner (or at the least the more stable wage earner), the chances of violence

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<sup>47</sup> Fraser, *Treatise*, Vol. II, p.886.

<sup>48</sup> CS46/1870/4/54 Wilson or Johnstone v Johnstone; CS46/1880/6/107 Fernie or Taws v Taws; CS46/1880/12/11 Lawrenson or Findlay v Findlay.

<sup>49</sup> CS46/1880/6/107 Fernie or Taws v Taws.

<sup>50</sup> CS46/1860/7/113 McCorquodale v McCorquodale; CS46/1880/3/116 McCall or Cairns v Cairns; CS46/1880/12/42 Morrison or Cook v Cook.

<sup>51</sup> CS46/1860/7/113 McCorquodale v McCorquodale.

<sup>52</sup> CS46/1880/12/42 Morrison or Cook v Cook.

increased.<sup>53</sup> In 1865 John Glumie was arrested for wifebeating reportedly because, 'his wife, who had been in the habit of earning as much by her hands, making men's clothing, was now unable to do so, having a child to nurse.'<sup>54</sup> Conversely, that same economic independence enabled some abused wives to seek protection or the strength to challenge their husbands.<sup>55</sup> The assaults listed above, though not directly mentioned as provocation in the court documents, are arguably a reflection of 'the struggle for the breeches' as discussed by Clark.<sup>56</sup> But equally, these conflicts reflect the difficulty wives faced when forced to compensate for a failed breadwinner husband.

### *Other Legal Forms of Cruelty*

Other forms of non-physical cruelty acknowledged by the Scottish Court were the wilful communication of venereal disease, spitting in the face, and constructive cruelty.<sup>57</sup> Janet Taws described several types of maltreatment inflicted on her by her husband, including the passing on of a venereal disease.<sup>58</sup> Elizabeth Peters described episodes of brutal violence perpetrated by her husband, a managerial bleacher and proprietor in Arbroath, one of which, 'the defender being in a state of intoxication put the pursuer into a corner of the kitchen and spat in her face till he exhausted himself, and assaulted the pursuer and bruised her arms.'<sup>59</sup> The two types of cruelty not found in the fourteen cases, but qualified as grounds for a separation were if a husband was guilty of committing criminal acts (which would make her an accomplice if she did not separate from him), and constructive cruelty, which was the abuse of a third party in front of the wife purposefully done to upset her.<sup>60</sup> For instance, a witness in a case of child cruelty charging a labourer from Old Assembly Close, Edinburgh, with neglecting his three children, claimed the father drank and would not work as a way of punishing his wife.<sup>61</sup>

Significantly, sexual violence is not mentioned in Fraser's *Treatise on Husband and Wife*. Sexual activity is only mentioned in a brief paragraph stating that the refusal of sexual

<sup>53</sup> For instance, Margaret Hunt, 'Wife Beating, Domesticity and Women's Independence in Eighteenth-Century London', *Gender & History*, Vol. 4, No. 1 (Spring, 1992), pp. 16-17.

<sup>54</sup> 'Wife Beating', *Glasgow Herald*, 21 June 1865.

<sup>55</sup> A. J. Hammerton, *Cruelty and Companionship; Conflict in nineteenth-century married life*, (London, 1992), p. 114; Clark, *The Struggle for the Breeches*, pp. 77-79.

<sup>56</sup> Clark, *The Struggle for the Breeches*, pp. 67-84.

<sup>57</sup> Fraser, *Treatise*, Vol. II, p. 887, 890-91.

<sup>58</sup> CS46/1880/6/107 Fernie or Taws v Taws. For a full discussion of venereal disease as cruelty in England, see Gail Savage, "'The Wilful Communication of a Loathsome Disease": Marital Conflict and Venereal Disease in Victorian England', *Victorian Studies*, Vol. 34, No. 1 (Autumn, 1990), pp. 35-54.

<sup>59</sup> CS46/1860/5/21 Kyd or Peters v Peters.

<sup>60</sup> Fraser, *Treatise*, Vol. II, p. 890.

<sup>61</sup> 'Cruelty to Children in Edinburgh', *Glasgow Herald*, 25 August 1896.

intercourse by a husband or a wife to their spouse was not grounds for a separation.<sup>62</sup> Baron David Hume had established the legal opinion on marital rape by the early nineteenth century: a wife gave her implied consent upon the marriage union, therefore a husband could not rape his wife.<sup>63</sup> This exemption did not legally change until the 1980s when two cases (1982 and 1984) of wives charging their separated husbands with rape forced the Scottish Courts to re-examine Hume's judgment. Though these husbands were acquitted, it led to a ruling in 1989 in the CS that 'abolished the marital rape exemption in a case involving a cohabiting couple'.<sup>64</sup> Historians who have attempted to examine sexual violence in centuries past have found the task thwarted by the fact that marital rape did not legally exist and therefore was no ground for divorce or separation.<sup>65</sup> Bourke and Hammerton argue that where sexual assault offenses seem absent, they may in fact be found between the lines. Both historians cite the location of attacks or mention of a lack of clothing as telling more than the wife may be able to.<sup>66</sup> Thus, in the CS separation case, when Isabella Johnstone stated the following in her complaint it was likely her husband had intended a sexual assault upon his sleeping wife:

upon the morning of the 1<sup>st</sup> of January 1870, the pursuer while in bed was attacked by the defender who was perfectly sober. The pursuer's screams for help brought her daughter Jessie to her assistance when it was found that the gas was out and that the defender was in bed with his clothes on in a menacing position towards the pursuer. The defender was using foul opprobrious and threatening language to her.<sup>67</sup>

He furthermore chased her about the house swearing to find her, until she was able to escape with her daughter to her sister's neighbouring home. D'Cruze similarly found that accounts of violence described in a court case between husband and wife may suggest more sexual violence than appears:

the location of violence (in the bedroom) or its patterning (kicking the belly or genitals) can infer the totality of the control an abusive husband was seeking to impose. In a culture where female sexuality had such symbolic potency and was also such a key determinant of a woman's reputation,

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<sup>62</sup> It could constitute grounds for a divorce on the charge of desertion; Fraser, *Treatise*, Vol. II, p. 897.

<sup>63</sup> Clive, *The Law of Husband and Wife*, pp. 378-379; D. Kelly and R.S. Shiels, 'Marital Rape in Scots Law', *Journal of the Forensic Science Society*, Vol. 28 (1988), pp. 253-258; Kate Painter, 'Wife Rape in the United Kingdom', presented at the American Society of Criminology 50<sup>th</sup> Anniversary meeting, November 20-23, 1991, pp. 3-4.

<sup>64</sup> Painter, 'Wife Rape', p. 4. Three years later in 1991 marital rape was made illegal in English Law; Painter, 'Wife Rape', p. 3.

<sup>65</sup> Leneman, "'A tyrant and tormentor'", p. 39.

<sup>66</sup> Joanna Bourke, *Rape: Sex, Violence, History*, (Berkeley, 2007), p. 308; Hammerton, *Cruelty and Companionship*, p. 108. Hammerton also argues that the communication of venereal disease by a husband to his wife implies sexual violence, pp. 109-110.

<sup>67</sup> CS46/1870/4/54 Wilson or Johnstone v Johnstone.

almost any kind of male violence could draw upon some kind of sexual metaphor to express rage or exert dominance.<sup>68</sup>

Following this line of thought, in 1880 Sarah Mein may have been subjected to sexualised violence when her husband kicked her in the stomach the day before his removal to the Crichton Lunatic Asylum in Dumfries for alcoholism.<sup>69</sup> However, neither she nor her lawyers presented it as sexual assault.

### The Evolution of Mental Abuse as Cruelty

Mental abuse was not deemed a form of cruelty in nineteenth-century Scottish law. Even in the twenty-first century mental abuse, recently labelled as coercive control by scholars and legal authorities,<sup>70</sup> was only legally recognised and added to an expanding definition of domestic violence in the United Kingdom as of March 2013.<sup>71</sup> This admission of psychological abuse exists to the benefit of men and women today, yet in the nineteenth century it was not an issue the courts wanted to deal with. Listed under the section ‘cases where there is much discomfort and much misery but where the law...refuses to recognize the conduct of the offender as legal cruelty,’ Fraser wrote, ‘mere mental distress no ground for separation [*sic*].’ With the admission that mental cruelty could cause as much injury as personal violence, the courts nevertheless refused to recognise it as a form of cruelty on the issue of practicality.<sup>72</sup>

The problematic nature of mental cruelty is illustrated in the case of Mrs. Catherine Smith who filed for a judicial separation and aliment against her husband John Smith on the ground of maltreatment, but after a nearly three year long suit, John Smith was assoilized of the charges. The interlocutor was followed by a note from the Lord Ordinary that stated he was unable to grant a separation to Catherine as the evidence she provided did not meet the Court’s expectations of what constituted cruel ‘conduct’.<sup>73</sup> Catherine’s complaint stated that three years after their marriage her husband ‘deprived her of, and took the elder

<sup>68</sup> D’Cruze, *Everyday Violence*, p. 17.

<sup>69</sup> CS46/1880/7/94 Perry or Mein v Mein.

<sup>70</sup> Evan Stark, *Coercive Control*, (NY, 2007); Emma Williamson, ‘Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control’, *Violence against Women*, Vol. 16, No. 12 (2012), pp. 1412-1423.

<sup>71</sup> Alan Travis, ‘Teenage Victims of Domestic Violence Targeted as Definition is Extended,’ *The Guardian*, Wednesday 19 September 2012, [www.guardian.co.uk/society/2012/sep/19/teenage-victims-domestic-violence-definition](http://www.guardian.co.uk/society/2012/sep/19/teenage-victims-domestic-violence-definition) [accessed 8 October 2012]. In Scotland, however, mental and emotional abuse were already part of the National Strategy definition of domestic violence used in a 2003 campaign organized by the Scottish Executive; Scottish Executive, ‘Preventing Domestic Abuse; A National Strategy,’ 2003, p. 3.

<sup>72</sup> Fraser, *Treatise*, Vol. II, pp. 893-894.

<sup>73</sup> CS46/1850/2/16 McMichael or Smith v Smith.

of her two boys... then a child of two years of age, and sent him to live with [John's] sister in Glasgow, where he was kept entirely away from the Pursuer.' Following this,

[John] took the entire charge of the household affairs out of her hands, and committed it to a servant; and by this and other such like expedients, he systematically persecuted the Pursuer, lacerated her feelings—most seriously affected her peace of mind—endangered her health, and degraded her in the eyes of her acquaintances, servants and neighbours.<sup>74</sup>

A little over a year later he 'took her younger and then only other child away from her', also sending him to the Aunt's in Glasgow. After this second assault on her status as a mother Catherine left and went to her father's. While at her father's, Catherine gave birth to her third son. Upon learning of this and 'after a good deal of negotiation between the parties and their friends and advisors, and after the two eldest children had been taken home from Glasgow, a reconciliation was brought about' whereby Catherine returned to her husband's home in Kirkintilloch with her newborn son in July 1845. In October 1846 John again resumed his psychological maltreatment of his wife by hiring a housekeeper, an Englishwoman named Miss Grant. He gave Miss Grant full responsibility of the house and the children, giving her the keys and authority over Catherine: '[t]he Pursuer was thus constantly and systematically wounded in her feelings, exposed to insult at the hands of her husband and Miss Grant, and degraded in the eyes not only of her servants, but also of her friends and neighbours.'<sup>75</sup>

Reading Catherine's complaint in the twenty-first century conjures up images of mental cruelty or coercive control; John did not physically assault his wife (beyond pulling her from rooms forcefully), 'but', as Williamson points out, 'these small, and sometimes insignificant incidents, represent the way in which, by creating an unreality that undermines the self-identity of the victim, the perpetrator is guilty of a crime against identity and liberty, one which, as Stark rightly theorizes, is based on gender roles.'<sup>76</sup> The anguish caused by her displacement from mistress of the household and particularly as the carer for her children is evident. This was the same husband who called his wife 'poor silly, stupid body' when speaking of her to his servants. It is also important to note that Catherine was the daughter of a manufacturer in Glasgow, raised in the middle class, making her treatment even more demeaning as she considered herself a woman of status.

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<sup>74</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>75</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>76</sup> Williamson, 'Living,' p. 1422.

In Catherine's complaint she describes herself through the gender roles associated with the middle-class married woman: 'being degraded from her natural position as mistress of her own domestic establishment'; 'he continued to deprive her of her proper place, and of all authority as mistress in the house'; 'he continued to keep her in the degraded and slavish position; turned the pursuer out of the room, regardless alike of her remonstrances and tears, and thus prevented her from paying a mother's attention to her sick offspring.'<sup>77</sup> Catherine identified herself as the domestic keeper of her husband's home and the devoted mother to her children; these were her rightful roles and duties, and what was expected of her as a wife. And yet, her husband had taken these responsibilities away from her and reduced her to a 'slavish position' where servants were a level above her in the chain of command and she had to ask permission to hold her sons. As historians have argued, the development of the domestic ideal, particularly in the middle-class household, relegated this space as the woman's sphere.<sup>78</sup> Nevertheless, the hegemonic relationship of man and woman was even more reinforced due to the husband's ability to give and take away her authority. For this reason cases similar to *McMichael or Smith v Smith* were not rare or isolated.<sup>79</sup> Moreover, under the defining of legal cruelty it is written that a 'husband taking management of household from the wife' was not a form of cruelty.<sup>80</sup> For his own defence John Smith stated that:

Shortly after the marriage of the parties in July 1840, the defender discovered that the pursuer was ill qualified for the duties of a wife, or of the mistress of a family. She was not only ignorant of household affairs, but seemed from weakness of purpose and want of apprehension, neither capable nor desirous of becoming acquainted with them. When she became a mother her deficiencies were still more lamentably apparent, and her neglect or mismanagement of her children occasioned to the defender the greatest pain and anxiety.

He went on to say that it was at the expense of his own feelings, too, that he sent his children away, indicating the affection he felt for them. He opted to send them to live in

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<sup>77</sup> CS46/1850/2/16 *McMichael or Smith v Smith*.

<sup>78</sup> Though the theory of separate spheres has been recognised as problematic by gender historians, the term 'woman's sphere' is being used simply to signify that many women did act as manager within their household, not that historically women could only be found within the domestic setting; for a full discussion of women and the theory of separate spheres, see Eleanor Gordon and Gwyneth Nair, *Public Lives: Women, Family and Society in Victorian Britain*, (New Haven, 2003). Bailey integrates the business and public activities of women in her study, yet also explains that it was a '[w]omen's right to govern the household'; Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800*, (Cambridge, 2003), p. 78. See also, Katie Barclay, *Love, Intimacy and Power: Marriage and Patriarchy in Scotland, 1650-1850*, (Manchester, 2011), pp. 143-144, 186-191.

<sup>79</sup> Hammerton, *Cruelty and Companionship*, pp. 114-115. Bailey found this occurred in the eighteenth century as well; Bailey, *Unquiet Lives*, pp. 76-77.

<sup>80</sup> Fraser, *Treatise*, Vol. II, pp. 893-894.

what he considered to be a better environment, which in the nineteenth century was his right as a father.<sup>81</sup>

Another ruling where the defender was assoilized by the CS suggests that mental cruelty continued to be out of the jurisdiction of the judiciary. In 1877 Edith Eliza Finlay or Macculloch filed for separation and aliment (for her and her infant son) against her husband George Wallace Macculloch, of Foxwood House Dumfriesshire, on the ground of cruelty. She alleged he had a passionate temper, was violent, drank to excess, kept bad company (which he brought into their home), was verbally abusive and repeatedly threatened her bodily harm. In one of her complaints there is an indication of George's mental health:

once, when she was ill and was unable to leave her room [pregnant], he rushed upon her in a frantic and excited state, and put her into a state of terror by attempting to cut his throat with a razor, which he brandished before her and drew across his throat. On another occasions he threatened to take his life, and he insisted always on having a loaded revolver suspended overhead in the bedroom at night, much to her alarm for her own safety, and anxiety lest he should commit some desperate act when infuriated.<sup>82</sup>

In his defence George stated the allegations were false and only came from the negative influences of Edith's family whom she was currently residing with, upon his consent, and where he had visited for their child's baptism. Lord Adam ruled in favour of George stating that Edith failed to prove her case, only granting her expenses to be paid.<sup>83</sup> As this case was found in *The Scotsman* details of the trial are unavailable. However, of all the other CS cases found for this study, the only two with a decree of innocent for the defender were examples of mental cruelty being the dominant form of abuse rather than physical, despite the pursuers' descriptions of some physical abuse.

Hammerton argues that the 1869 and 1870 English case *Kelly v Kelly* represents a turning point for judiciary attitudes towards mental cruelty.<sup>84</sup> In Scotland it was not until 1895, during the *Mackenzie v Mackenzie* case, that a wife was awarded a right to non-adherence due to her husband's attempts to re-engage her obedience and conjugal duties by taking away her children and threats to 'put her under lock and key.'<sup>85</sup> The successful suit of

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<sup>81</sup> Davidoff et al, *The Family Story*, pp. 137-141.

<sup>82</sup> 'Separation and Aliment—Mrs Edith Eliza Finlay or Macculloch v. George Wallace Macculloch.' *The Scotsman*, 12 November 1877.

<sup>83</sup> '(Before Lord Adam.) Sepn. and Alimt.—Mrs. E. E. Finlay or Macculloch v. George W. Macculloch.' *The Scotsman*, 14 December 1877.

<sup>84</sup> Hammerton, *Cruelty and Companionship*, p. 94.

<sup>85</sup> Clive, *Law of Husband and Wife*, p. 176.



Mackenzie against her husband perhaps demonstrates the shift in attitude of judges towards intolerance of tyrannical yet non-violent behaviour of a husband to his wife. The earlier case examples, however, suggest this change was late in coming.

## Marital Cruelty and Children

Children can have two conflicting effects on an unhappily married couple. They can exacerbate already existing problems, such as creating economic pressure or struggles for attention.<sup>86</sup> But, contrastingly, they are often the reason why couples remain together even in an abusive marriage.<sup>87</sup> As discussed above, fathers were considered to have natural and sacred rights over their children. Studies of England have found that nineteenth-century judiciary based their judgments for custody on the rights of the father, not on what would be best for the children.<sup>88</sup> Arguably, though there were differences in legislation, the same want in consideration is evident in the Scottish courts. Mothers married to an abusive man were in very precarious positions, as there were several concerns if they wanted to leave their husbands. Firstly, before the Conjugal Rights Act of 1861—which allowed parents to ask for custody—custody was not decided in the divorce or separation action, but in a separate petition to the Inner House.<sup>89</sup> Secondly, fathers had the common law right to their children as property. Thirdly, if a wife did want to leave she had to consider how to support herself and her children without her husband's income. Further adding to the pressures placed on wives to stay in unhappy marriages was the notion that a mother should be self-sacrificing for her children; it was considered appalling if a mother did not put her children before herself.<sup>90</sup> In consequence, unhappy mothers often continued living with their husbands in order to stay with their children.<sup>91</sup> The main advantage of filing for a separation, though an expensive and sometimes lengthy process, was the provision of alimony. A successful action for the wife meant her husband was legally ordered by the CS to support her and her children (if awarded custody) in a separate dwelling.

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<sup>86</sup> Dobash and Dobash believe children cause 'a dramatic shift in a marriage potentially changing the relationship for the worse'; Dobash and Dobash, *Violence Against Wives: A Case Against The Patriarchy*, (London, 1980), p. 91.

<sup>87</sup> Elizabeth Foyster, *Marital Violence: An English Family History, 1660-1857*, (Cambridge, 2005), p. 137.

<sup>88</sup> *Ibid.*, pp. 153, 161-162.

<sup>89</sup> Clive, *Law of Husband and Wife*, pp. 14-15. In England Caroline Norton, an unhappily married and abused upper-middle-class wife of a lawyer, successfully petitioned for improved rights for mothers and helped pass the 1839 Custody of Infants Act, which allowed mothers to request custody of children up to the age of seven. Norton spearheaded this Act as a result of her husband removing their children from her care and her inability to win custody through her own legal actions; Foyster, *Marital Violence*, pp. 156-157.

<sup>90</sup> Foyster, *Marital Violence*, pp. 154-155.

<sup>91</sup> This happened historically and is found to equally be a problem for women in the twentieth and twenty-first century; Dobash and Dobash, *Violence Against Wives*, p. 148; Foyster, *Marital Violence*, p. 151.

In the separation and aliment cases, twelve out of the fourteen couples had children. The average number of children from these couples was 3.6. Two couples had no children at all, and one woman had three children from a previous marriage, but none with her second husband, the defender. Out of the twelve couples with children, three wives complained of direct violence towards their children; two husbands threatened their children, three husbands were violent to the mother in front of their children, and two husbands threw their children out of the house with their mother (see Table 5.5 below). Linda Gordon found in her study of nineteenth-century Boston that wife beating ‘was often correlated with child neglect...Only 13 percent of wife-beating victims were child abusers, but 41 percent of wife-beaters were also child abusers.’<sup>92</sup> Considering the small sample and nature of sources being examined for this study, the same figures are not available, however, it can be said that the majority of these cases of cruelty involved violence in some form (either threats, abuse of the mother in front of them, thrown out of the house or physical assault) towards children. Catherine Pringle’s daughter testified that her father threatened their family the last night they saw him: ‘before he left he warned us to get out of his way, as he would be sure to take some person’s life that night. My mother and the children took refuge in a neighbour’s house.’<sup>93</sup>

In the criminal court cases of wifebeating, only six of the 102 collected cases mentioned a husband assaulting a child as well as his wife. The punishments, however, varied. In 1831, George Loughton was sentenced by the High Court of Justiciary to seven years transportation for coming home drunk and beating his sleeping wife and twenty month old child with a bottle and stick.<sup>94</sup> In 1876 a man convicted of ‘knocking [his wife and daughter] to the ground, and when lying there seizing them by the throats and otherwise conducting himself in a disorderly manner’, was given sixty days imprisonment with no alternative of a fine.<sup>95</sup> But twenty years later, a man taken to Paisley Police Court for assaulting his wife and stepdaughter by pulling them by the hair and striking them with his fists, was only given seven days imprisonment, perhaps because he used his bare hands.<sup>96</sup>

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<sup>92</sup> Gordon, *Heroes of their Own Lives*, p. 261. Foyster argues the same; Foyster, *Marital Violence*, p. 137.

<sup>93</sup> CS46/1870/10/47 Pringle v Pringle.

<sup>94</sup> ‘High Court of Justiciary’, *The Scotsman*, 16 March 1831.

<sup>95</sup> The ‘disorderly manner’ suggests possibly sexual assault, which may have contributed to the ‘harsh’ penalty; ‘Port Glasgow—Wife-Beating’, *Glasgow Herald*, 11 December 1876.

<sup>96</sup> ‘Paisley—Wife-Beaters Punished’, *Glasgow Herald*, 26 January 1896.

**Table 5.5 Children and Cruelty, Court of Session Cases**

| No. | Year | Pursuer Surname               | No. of Children    | Defender Abusive towards Children | Location of Children | Plea for Custody by Pursuer | Awarded Custody                    |
|-----|------|-------------------------------|--------------------|-----------------------------------|----------------------|-----------------------------|------------------------------------|
| 1   | 1830 | Grieve or Winton              | 3                  | Yes                               | Mother               | Yes                         | Custody of eldest only to Mother   |
| 2   | 1850 | McMichael or Smith            | 3                  | No                                | Father               | Yes                         | Father (Assoilized)                |
| 3   | 1860 | Kyd or Peters                 | 2                  | In front of                       | Mother               | No                          | -                                  |
| 4   | 1860 | Ronaldsome or McCorquodale    | 3 (prev. marriage) | In front of/Threatened            | Mother               | No                          | -                                  |
| 5   | 1860 | Chesterfield Aimer or Russell | 3                  | Put outdoors w/Mother             | Mother               | No                          | -                                  |
| 6   | 1870 | Graham Gordon or Steuart      | 5                  | In front of                       | Mother               | Yes                         | Custody of youngest only to Mother |
| 7   | 1870 | Nicol or Pringle              | 6                  | Threatened                        | Mother               | No                          | -                                  |
| 8   | 1870 | Wilson or Johnstone           | 2 (3b)             | No                                | Adults               | No (Adult Children)         | -                                  |
| 9   | 1880 | Fernie or Taws                | 2 (6b & preg.)     | Yes/Put outdoors w/Mother         | Mother               | Yes                         | Father                             |
| 10  | 1880 | Lawrenson or Findlay          | 3 (4b)             | No                                | Adults               | No (Adult Children)         | -                                  |
| 11  | 1880 | M'Call or Cairns              | 0                  | -                                 | -                    | -                           | -                                  |
| 12  | 1880 | Morrison or Cook              | 2                  | No                                | Mother               | Yes                         | Mother                             |
| 13  | 1880 | Myles or Souter               | 8/9 (12b)          | Yes                               | Adults               | No (Adult Children)         | -                                  |
| 14  | 1880 | Perry or Mein                 | 0                  | -                                 | -                    | -                           | -                                  |

(b): born

Out of the twelve wives with children who filed for separation and aliment, five asked for custody. Four husbands fought this request, but eight mothers took or kept their children with them after the final separation. Out of the remaining four families, three had adult children, and one wife was forced to leave her children in her husband's home (see Table 5.5).<sup>97</sup>

It was not until the 1861 Conjugal Rights (Scotland) Act that judges in the CS were given the power to grant custody of the children, rather than custody automatically going to the father; yet, there is evidence of wives seeking custody with their plea for separation before

<sup>97</sup> This was Mrs. Smith, the only woman to lose her case due to her claims of non-physical maltreatment failing to meet the legal definition of cruelty.

the Act passed.<sup>98</sup> The earliest case, *Grieve or Winton v Winton*, details the complexity of separation and custody. Christina Winton began the action against her husband Campbell Winton, a builder, in 1820, but under enormous pressure from him reconciled in spite of being granted a plea of separation by 1823. She stayed with him until 1827 then petitioned to reawaken her separation and aliment action as Campbell had resumed his maltreatment shortly after her return. She was one of the few women to cite direct violence to her children, claiming ‘he kicked her off a chair and upon the floor, while holding an infant in her arms’ and ‘in a fit of fury he broke to pieces the bedstead upon which she and her new born child were laid. He also locked [Christina] and her infants out of their bedrooms and house when sick, leaving them exposed in the streets.’<sup>99</sup> She was awarded a decree of separation and aliment in 1829, but her plea for custody was denied despite her numerous attempts to appeal the ruling, causing the court case to last until 1832. Due to Christina’s first action being filed in 1820, only three years after her marriage, her original plea asked for custody of her then only child. During their reconciliation from 1823 to 1827 they had two more children. When she reawakened her case she again asked for custody. However, the Lord Ordinary only granted the custody of her first child with the decree of separation. Campbell had also asked for custody of the children claiming, ‘[he] is plainly entitled to the custody of them’, and later stated, ‘he is materially interested, that none of [their children] shall remain with the pursuer and her relations’ (the cause of their marital unhappiness according to Campbell).<sup>100</sup> He was awarded custody of the two youngest.

It is unclear why the Lord Ordinary allowed Christina custody of only the oldest child, as it is unexplained in the Court documents, particularly when compared to the following judge’s note from the *Gordon or Steuart v Steuart* case, where the wife and husband also fought for custody. Elizabeth Steuart was only granted custody of her youngest child, a four year old, as she was too young to remove from her mother’s care:

Under the Conjugal Rights Act, however (24 and 25 Vict., 86), section 9, the Lord Ordinary in the present decree is entitled to provide for the custody of the pupil children. The youngest child of the marriage, a girl, is only four years old. It seems right that the pursuer, who is not to blame for the present separation, should have the custody of this child, but the Lord Ordinary does not feel warranted in going further. The next child is a boy, aged eleven, the others are above puberty, the eldest being major. No

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<sup>98</sup> Conjugal Rights (Scotland) Act, 1861 [24 & 25 Vict. Cap. 86.]

<sup>99</sup> CS46/1832/3/185 *Grieve or Winton v Winton*.

<sup>100</sup> CS46/1832/3/185 *Grieve or Winton v Winton*.

sufficient grounds have been established for interfering with the custody and education of these children.<sup>101</sup>

In the Steuart case, it was the youngest child who was determined to need her mother's care, while the older children would stay with their father. This ruling was common practice in England according to Foyster, who found that children between infancy and seven years of age were deemed to require their mother's care, but it was believed that children over seven would be best placed with their fathers.<sup>102</sup> Similar attitudes are evident in Scottish cases. Overall, the custody disputes in the separation cases show five wives pleading for custody, four out of those five were contested and fought by the husband (only one husband gave no answer to the summons against him, and the wife was granted custody). For the four other women, two were only given custody of one child, while the husband was allowed to maintain the rest; one husband was assoilized (John Smith), and one husband, Robert Taws, was awarded custody while his wife was given visitation rights.

What is also evident is that judges did not characterise the maltreatment of a wife by her husband as a feature of his abilities as a parent.<sup>103</sup> Thus, a husband could be abusive to his wife but deemed a fit father, as illustrated in the Lord Ordinary's decision for Janet Taws who was awarded a separation and aliment from her husband Robert Taws without custody of her children. Underneath the ruling for a separation, Lord Adam wrote:

The Lord Ordinary does not think that there is anything in the defenders conduct which makes it necessary that he should be deprived of the custody of his children. Neither their health nor morals will be injured by their residing with him and under his control. The pursuer will be entitled to have access to them at such times as may be arranged.<sup>104</sup>

Although cruelty was proven by Janet, the Lord Ordinary stated that based on her behaviour in court, it seemed likely that Janet was responsible for some of the 'quarrels' between her and Robert. Despite her quarrelsome nature, the Lord Ordinary declared that Janet did not deserve to be maltreated and therefore granted the separation. Even so, while her character did not prevent her from obtaining a separation, it did influence her claim for custody. This case was filed in 1880 and perhaps does support a change in judges' attitudes towards chastisement, though with the limited sample it is difficult to say positively. Still, Fraser's *Treatise* written as late as 1878, suggests that the official legal

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<sup>101</sup> CS46/1870/8/20 Gordon or Steuart v Steuart.

<sup>102</sup> Foyster, *Marital Violence*, pp. 157-158, 164-165.

<sup>103</sup> Ibid, pp. 161-162. A father had the moral right to chastise his children; see, Tosh, *A Man's Place*, p. 92; Shani D'Cruze, *Crimes of Outrage, Violence and Victorian Working Women*, (London, 1998), pp. 77-78.

<sup>104</sup> CS46/1880/6/107 Fernie or Taws v Taws.

position allowed for some tolerance of physical violence if in the form of correction or chastisement: ‘where however, the cruelty, said to be used towards the wife, does not amount to gross personal violence, it is a valid defence to the husband that the wife’s conduct was improper and deserving of punishment.’<sup>105</sup> It is discernible that there was a divide between legislations and judiciary rulings in the second half of the nineteenth century; the discourse of provocation and wife blaming was still used in legal texts, but some judges were setting their own precedents discouraging this notion, at least in the CS.

### **Sources of Conflict and Provocation in Separation Cases and Criminal Court Cases**

Analysing the aggravating factors surrounding episodes of violence is rarely straightforward, yet scholars of marital violence in Scotland have agreed on three main issues as the sources of conflict for marital abuse: sexual jealousy, money, and marital expectations of domesticity.<sup>106</sup> Though these categories are very general, most disagreements that led to abuse stem from one or more of these matters. In the nineteenth century these three sources of conflict are equally applicable to the CS separation and aliment cases and are also evident in wifebeating cases tried in the criminal courts.

According to the wives’ complaints and testimonies, seven wives claimed they had not done anything wrong to warrant maltreatment. Christina Winton stated she ‘did everything in her power to please him.’<sup>107</sup> Elizabeth Peters included in her complaint that, ‘a day or two after the death of [her] father...and before his funeral...[her husband], without the slightest provocation on [her] part, struck her on the face and breast to such an extent that she was quite disfigured in which state she had to appear at her father’s funeral.’<sup>108</sup>

Whereas Leneman and the Dobashes found jealousy and possessiveness as the most common source of conflict, only two wives indicated this as the cause for their husbands’ abuse: Catherine Cairns and Sarah Mein were called ‘whore’—an insult that implied suspected adultery and sexual violence—and Sarah found herself locked out of her home when she returned from a trip and was subsequently attacked when she tried to get in,

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<sup>105</sup> Fraser, *Treatise*, Vol. II, p. 898.

<sup>106</sup> Dobash and Dobash, *Violence Against Wives*, p. 98. Leneman found the same issues in her research of early modern Scotland; Leneman, “‘A tyrant and tormentor’”, p. 39; Barclay, *Love, Intimacy and Power*, pp. 187-193.

<sup>107</sup> CS46/1832/3/185 Grieve or Winton v Winton.

<sup>108</sup> CS46/1860/5/21 Kyd or Peters v Peters.

despite having asked for and received permission from her husband to travel.<sup>109</sup> Still, as shown in other historical studies, the mistrust demonstrated by abusive husbands reflects, as Barclay explains, ‘their frustration with their wives’ “active” behaviour, regardless of the form it took.’<sup>110</sup>

Money, the second source, was cited by three of the seven wives. An assault could follow after the wife either asked for money or refused to give her husband any to support his ‘dissipated habits’. In Leith’s Summary Court, for example, a wife claimed her husband beat her because she would not allow him to spend any more money on liquor.<sup>111</sup> Relationships were also complicated by a shared business. For instance, Christina Souter, who ran a dairy business with her husband, went out after him to stop him selling some of their cows: ‘He poked me out of the door with a stick, and then followed me to Mayfield Terrace and knocked me down. He struck me on the mouth and knocked one of my teeth out and cut all my lip.’<sup>112</sup> By the time of Christina’s action, she and her husband had sold off most of their cows and closed their business. James Souter was reportedly unemployed, but Christina’s middle son had opened a dairy business of his own across the street from his father’s and she had moved in with him.

The third source of conflict, marital expectations, is the most general category, and therefore covers a wide range of domestic related issues that led to cruelty. Christina Smith, for instance, admitted conflict arose when she disobeyed her husband’s orders to stay away from her children, and to not interfere with the servants.<sup>113</sup> Elizabeth Peters’ husband threw dishes at her when he did not like the dinner put in front of him.<sup>114</sup> In the criminal court, a husband from Bolton was convicted of ‘grossly maltreating his wife because...[her] neglecting to mend a hole in his trousers pocket had been the cause of his losing 14s.’<sup>115</sup> These episodes were precipitated by the wife disobeying orders, her domestic failures, and her reprimands, all related to her role as mother and mistress of the home. The use of violence to remedy a wife’s conjugal failings, as Barclay wrote, was ‘a demonstration of power.’<sup>116</sup> Any disobedience of a wife disrupted the patriarchal hierarchy, and threatened the husband’s power over his dependents. To reaffirm his

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<sup>109</sup> CS46/1880/3/116 McCall or Cairns v Cairns; CS46/1880/7/94 Perry or Mein v Mein.

<sup>110</sup> Barclay, *Love, Intimacy and Power*, p. 191.

<sup>111</sup> ‘Domestic Disagreements’, *The Scotsman*, 12 August 1874.

<sup>112</sup> CS46/1880/12/113 Myles or Souter v Souter.

<sup>113</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>114</sup> CS46/1860/5/21 Kyd or Peters v Peters.

<sup>115</sup> ‘Wife-Beating in Bolton’, *The Scotsman*, 5 September 1873.

<sup>116</sup> Barclay, *Love, Intimacy and Power*, p. 186.

position as the head of the household and restore familial order it was socially acceptable in the nineteenth century to discipline a wife.<sup>117</sup>

Sources of conflict, however, are not the same as provocation. As Foyster explained, ‘cruel violence was unprovoked violence’; meaning provocation implied validation.<sup>118</sup> For the twentieth century, the Dobashes found that, ‘[t]he idea of provocation is a very powerful tool used in justifying the husband’s dominance and control and removing moral indignation about his resort to force in securing, maintaining, and punishing challenges to his authority.’<sup>119</sup> The allowance of provocation to be heard as a defence was in effect accepting that there may be a justifiable reason for abuse. It implicated the woman as the one at fault. Foyster argues that provocation was less acceptable as a defence in nineteenth-century English criminal courts, nevertheless, she continues, this did not necessarily dissuade the general public from tolerating marital violence as a form of chastisement and enforcing authority.<sup>120</sup> Hughes’ work on wifebeating in nineteenth and twentieth-century Scotland found that, ‘Scottish courts and the press continued to identify wives as the source of provocation’.<sup>121</sup>

Following Hughes findings, this analysis of reported wifebeating trials and CS cases shows the language of provocation was still being used from 1830 to 1880 and onward. Table 5.6 outlines the number of times provocation or drink was used as a defence for wife assault in the sample of 102 cases. Of the 102, eighteen reports cite a form of provocation. Over half of these husbands were sentenced to imprisonment, all sixty days or less. If fined, the cost was less than £2, and all with the alternative of prison. Drink was mentioned slightly more; 23 times out of the 102. Again, the majority of offenders were given prison sentences for thirty to sixty days, although only five men were sentenced to hard labour. Fines were also used relatively sparingly, and ranged from 20 shillings to £3 with the alternative of prison. For instance the article reporting on a labourer from Edinburgh given forty days imprisonment in summary court for assaulting his wife by striking her in the face, knocking her down, kicking and trampling her, stated, ‘the prisoner, in his defence, said he had received much provocation.’<sup>122</sup> According to the *Dundee Courier & Dundee Argus*, Bailie Macdonald was swayed by a defence of provocation in 1880: ‘[three fellow weavers] had known Patrick for many years as a sober hard working man, but he was sadly

<sup>117</sup> Barclay, *Love, Intimacy and Power*, pp. 187-190.

<sup>118</sup> Foyster, *Marital Violence*, p. 115.

<sup>119</sup> Dobash and Dobash, *Violence Against Wives*, p. 136.

<sup>120</sup> Foyster, *Marital Violence*, pp. 116-122.

<sup>121</sup> Hughes, ‘The “Non-Criminal” Class’, p. 32.

<sup>122</sup> ‘More Wife-Beating’, *The Scotsman*, 22 March 1872.



tried with a drunken wife. After hearing the evidence, the Bailie found the charge proven, but as he believed Patrick had been sorely tried, he dismissed him without inflicting penalty.’<sup>123</sup> In the CS cases, seven out of fourteen cited specific instances of provocation that allegedly instigated the abuse.

The examples used by husbands to justify their maltreatment are interchangeable with the sources of conflict. As Hughes, Ayers and Lambertz argue, the maintenance of this domestic ideal was rarely accessible for working-class couples, therefore, ‘money problems had enormous potential for creating tensions between husbands and wives.’<sup>124</sup> That money was indeed an issue was evident in the coverage in 1899 of James Hardie from Possilpark, Glasgow, who attempted to murder his wife and then take his own life. Mrs. Hardie explained that up to the night he stabbed her:

Hardie had been out of work for about two years, in consequence of ill-health. Latterly he had been eccentric and peculiar in his behaviour. They had, however, lived amicably together. Lately his inability to work seemed to prey upon his mind, but he never displayed a tendency to violence, either towards her or himself.<sup>125</sup>

Pawning, in particular, was a unique feature of working-class life in the nineteenth and early-twentieth centuries, and a regular source of conflict. While many wives used pawn shops effectively to temporarily supplement a lack of wages from their husbands, these businesses were also used to get money quickly for supporting destructive habits.<sup>126</sup> Some husbands and wives would pawn furniture, clothing, and other household items to buy drink when out of money. For instance, the wife of an elderly weaver was beaten for hiding the blankets when she feared that her husband, who had been drinking all week, would pawn them. When he asked for the blankets and she refused he struck her in the face, tore her clothes, and took the children’s blankets instead. He was sentenced to ten days imprisonment by Bailie Morton.<sup>127</sup> Another husband assaulted his wife with a walking stick but was only punished with a fine of £1.1s. or fourteen days imprisonment because his wife was a drunkard and had been ‘pawning everything in the house to obtain drink.’<sup>128</sup>

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<sup>123</sup> ‘A Sorely Tried Husband. A Drunken Wife and A Wretched Home.’ *Dundee Courier & Dundee Argus*, 29 April 1880.

<sup>124</sup> Ayers and Lambertz, ‘Marriage Relations,’ p. 195.

<sup>125</sup> ‘Murderous Wife Assault At Glasgow. Husband Attempts Suicide.’ *The Scotsman*, 17 January 1899, pg. 5.

<sup>126</sup> Ayers and Lambertz, ‘Marriage Relations, Money and Domestic Violence’, pp. 195-219.

<sup>127</sup> ‘Paisley Wife-Beating’, *Glasgow Herald*, 27 October 1865.

<sup>128</sup> ‘A Plea for Wife-Beating’, *The Scotsman*, 2 April 1873.

**Table 5.6 Provocation and Drink Defences Found in Wifebeating Cases Tried in Criminal Courts and Reported by Local Newspapers, 1831-1896<sup>a</sup>**

|                                  | Provocation | Drink      | Total      |
|----------------------------------|-------------|------------|------------|
| <b>Type of Sentence</b>          |             |            |            |
| Dismissed                        | 2           | 1          | 3          |
| Transported                      |             | 1          | 1          |
| Cautioned                        |             |            |            |
| Sent to Higher Court             |             |            |            |
| Failed to Appear                 |             |            |            |
| Fined                            | 5           | 5          | 10         |
| <21s.                            | 2           | 2          | 4          |
| £1-2                             | 2           | 2          | 4          |
| £2-3                             |             |            |            |
| £3-4                             | 1           | 1          | 2          |
| £4-5                             |             |            |            |
| >£5                              |             |            |            |
| with alt. of Prison              | 5           | 5          | 10         |
| cautioned                        | 1           |            | 1          |
| <b>Imprisonment</b>              | <b>11</b>   | <b>16</b>  | <b>27</b>  |
| <i>Length of Sentence:</i>       |             |            |            |
| <1 month                         | 5           | 4          | 9          |
| 1-2 months                       | 4           | 10         | 14         |
| 3-6 months                       | 1           | 1          | 2          |
| >6 months                        | 1           | 1          | 2          |
| with alt. of fine                |             |            |            |
| with caution/security            | 1           | 1          | 2          |
| with hard labour                 | 3           | 5          | 8          |
| <b>Total</b>                     | <b>18</b>   | <b>23</b>  | <b>41</b>  |
| <b>Total No. Cases Collected</b> | <b>102</b>  | <b>102</b> | <b>102</b> |

<sup>a</sup> Although divided into two categories, cases where provocation or drink are mentioned do overlap. Ten of the provocation cases mention drink, while eight of the drink cases mention provocation.

Money was a recognised source of conflict for working-class families, but it was also a provocation frequently cited by middle-and upper-class husbands.<sup>129</sup> Four CS cases, all middle and upper-middle class couples, said their wives' extravagance led to their marital

<sup>129</sup> Hammerton, *Cruelty and Companionship*, p. 113; Elaine Tyler May, 'The Pressure to Provide: Class, Consumerism, and Divorce in Urban America, 1880-1920', *Journal of Social History*, Vol. 12, No. 2 (Winter, 1978), pp. 180-193, pp. 183-184.

unhappiness. Two of those four men also complained that their wives' frivolous spending put them into debt.<sup>130</sup> Alexander Peters stated that his wife:

is a person of a stubborn and unyielding disposition and also very extravagant in her expenditure, and he was also rendered uncomfortable and unhappy by the wasteful extravagance of the pursuer, both in the management of her household affairs and in her personal expenses and tastes. She in these respects very far exceeded the income of the defender, and notwithstanding his remonstrances she persisted in this course of extravagance which the defender clearly saw was exhausting his means and running him rapidly into debt.

He furthermore claimed this debt caused him to lose his co-partnership with Messrs. Webster Salmond & Co. and move down to a managerial position in the Ward Mill Bleachfield. Money was such a concern to him that he admitted they lived unhappily together—though denying the 'special charges against him'—and stated he would not fight the action for a separation from bed and board, but would argue against the requested alimony of £100 per annum. The Lord Ordinary decreed a separation and an alimony of £40 per annum.<sup>131</sup>

Another provocation described by husbands was domestic failure. Ross found in her study of London from 1870 to 1914, that 'the failure of wives to provide such services even for very good reason—such as a husband's refusal or inability to provide money needed for meals—was looked on by men as a major breach of their marital claims.'<sup>132</sup> Again Ross' study focused on the working-class couple; however, this issue was not restricted to the lower classes. Even in families with servants, husbands were equally intolerant of their wives' domestic shortcomings. Unsurprisingly, these were the same husbands who criticised their wives' extravagance in this study.

Provocation not only implied bad behaviour and the need for discipline, but also legitimised the use of violence as a means of correction.<sup>133</sup> Nancy Tomes found the phrase 'she was very quarrelsome and used aggravating words' as a typical defence used by working-class husbands in London.<sup>134</sup> This study of CS and criminal court cases of wifebeating identifies that this form of provocation existed in a wider context than working-class marriages. John Smith stated his wife had a 'temper, which was always

<sup>130</sup> Bailey found in her study that a husband's credit was dependent on his wife's credit, which explains why husbands commonly complained of their wives' extravagance, as well as exaggerated their complaints for their benefit in court; Bailey, *Unquiet Lives*, pp. 73-75.

<sup>131</sup> CS46/1860/5/21 Kyd or Peters v Peters.

<sup>132</sup> This also included sex; Ellen Ross, "'Fierce Questions and Taunts': Married Life in Working-Class London, 1870-1914,' *Feminist Studies*, Vol. 8, No. 3 (Autumn, 1982), pp. 575-602, p. 580.

<sup>133</sup> Dobash and Dobash, *Violence Against Wives*, p. 133.

<sup>134</sup> Tomes, "'Torrent of Abuse'", p. 332.

discontented, [and] had become more violent and acrimonious.’<sup>135</sup> In his defence against specific allegations of physical abuse, John answered:

The story as to the pursuer being forcibly thrust out of the kitchen amounts to nothing, even as it is told. Its only foundation is, that, upon the defender’s checking the pursuer for interfering injudiciously with a new servant, she addressed to him some vituperative epithets, upon which he led her with him out of the room. Another allegation of the defender having struck the pursuer in present of Mr Blackwood, misrepresents the actual occurrence, which was of this nature—that in the presence of the gentleman mentioned, the pursuer, while at the tea-table, had done all she could to irritate the defender by accusations against him, and by intimations of what she and her friends would do, by involving him in a litigation in this Court, upon which the defender put his hand to her mouth to terminate a discourse so improper and unbecoming. Nothing further took place, and the evening passed off as if nothing had happened.<sup>136</sup>

One of the more telling examples of provocation was verbal and physical assault by the wife. It demonstrates that women were indeed violent, too.<sup>137</sup> In fact, Ross’ quotation used in the title of her 1982 article, ‘fierce questions and taunts’, describes the behaviour of wives when their husbands withheld money or spent it on themselves.<sup>138</sup> Barclay argues that, ‘[i]n the eighteenth century, female violence, like female sexuality, was a threat to the discourse that labelled women as passive and men as strong. Women’s violence towards men was generally believed to undermine masculinity, while female defiance was a challenge to male authority.’<sup>139</sup> John Mein explained in his defence to the CS, ‘that for some years there have been bickering and quarrels between the pursuer and defender, and mutual recriminations. These quarrels were generally begun by the pursuer.’<sup>140</sup> Similarly, Mr. Souter claimed his wife was very violent; for instance, she threw dishes at his head cutting him severely. When accused of being arrested for assaulting his wife and their adult son, he admitted to being fined £3.3s. and a caution of £5, but said, ‘the true parties to blame were the pursuer and her son, for they, without cause, attacked and assaulted the defender and his son-in-law...In trying to protect himself the defender may have hurt the pursuer, but he had no intention of doing so.’<sup>141</sup> In an 1872 sheriff court case a wife claimed her husband had come home ‘the worse for liquor, and, without provocation’ beat

<sup>135</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>136</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>137</sup> Despite this truism, it is important to note that men were still the predominant sex of violent offenders; Martin Wiener, *Men of Blood; Violence, Manliness and Criminal Justice in Victorian England*, (New York, 2004), pp. 1-2.

<sup>138</sup> Ross, “‘Fierce questions and taunts’”, p. 582. See also, Bailey, *Unquiet Lives*, pp. 110-111.

<sup>139</sup> Barclay, *Love, Intimacy and Power*, p. 193.

<sup>140</sup> CS46/1880/7/94 Perry or Mein v Mein.

<sup>141</sup> CS46/1880/12/113 Myles or Souter v Souter.

her with a broom. In his defence, however, the husband claimed she had struck him first with a poker.<sup>142</sup>

Defences were provided in order to dispute charges and to be exonerated. Still, attitudes of entitlement and privilege were evident from some husbands. In particular the 1870 case of *Gordon or Steuart v Steuart* illustrates cruelty in an upper-class household. In 1847, Elizabeth Georgina Graham Gordon, daughter of Thomas Gordon, Esquire of Park in the county of Banff, married Andrew Steuart, Esquire of Auchlunkart, and proprietor of other estates in Banff County. Elizabeth and Andrew were also ‘cousins-german’.<sup>143</sup> Together they had five children living, though eight were born. Elizabeth described her husband as having always ‘displayed a most irritable, capricious, and ungovernable temper. And his language and conduct towards the pursuer gradually became so cruel and violent’ that they almost separated in 1862, but reconciled until July 1869 when Elizabeth left Auchlunkart permanently. Andrew’s abuse began in the form of verbal cruelty, followed by threats of physical violence and threats to throw her out of the house. His words eventually escalated into a physical assault in July 1869, twenty-two years after their marriage:

in the presence of ... two of their children, and of Jane Millar, the pursuer’s maid, the defender used the most violent and abusive language towards the pursuer, threatened to kick her and every servant with her out of the house, and finally struck and beat the pursuer repeatedly about the head, until she was completely stunned and fell to the ground, where she lay for some time without the defender making any attempt to assist or relieve her, or in fact taking any notice of her whatever.<sup>144</sup>

Elizabeth left the next day, taking their children with her and contacting both her solicitor and her brother, a Major and curator *bonis* of Mr. Steuart’s estate. Her determination to never return to her husband’s home is evident from her complaint; nevertheless, she could not force him to provide an aliment for living separately. The purpose of the action therefore was to obtain financial support for herself and her children: she asked for £500 per annum plus £50 per annum per child claiming that Andrew earned £3,000 per annum through his estates.

To deny and dispute his wife’s claims, Andrew provided an unusually detailed background of his life, starting from childhood. The most important contributing factor to the defence was his development of mental health issues. Even as a young boy Andrew admitted to having ‘a warm and somewhat vehement temper.’ Educated all over the United Kingdom,

<sup>142</sup> ‘Wife-Beating’, *The Scotsman*, 2 March 1872.

<sup>143</sup> ‘The pursuer’s father and the defender’s mother having been brother and sister’; CS46/1870/8/20 *Gordon or Steuart v Steuart*.

<sup>144</sup> CS46/1870/8/20 *Gordon or Steuart v Steuart*.

he inherited his property in 1844, while still attending the University of Cambridge. He claimed the combination of intense studying and his inheritance responsibilities ‘told most seriously on his health, both mental and bodily.’ In 1852 he ‘had repeated attacks of illness, and these last culminated...in temporary deprivations of reason, requiring curative treatment in the Royal Asylum at Perth, where he resided for about eighteen months.’ After his time at the Royal Asylum he decided to begin a career in politics, becoming a member for the Borough of Cambridge in 1857 and again in 1859. By 1862 this public life and his role as proprietor had retriggered his earlier health issues;

he unfortunately contracted an impassioned mode of language, which he admits he ought not to have carried, at least into private life. Owing to circumstances the defender often used violent language without attaching to it their significance which in the mouth of most men would have borne. For this, in his case, great allowance ought to be made, and the defender regrets exceedingly that this appears not to have been sufficiently kept in view by his family.<sup>145</sup>

Andrew maintained this line of defence. He stated he had ended his political career and on doctor’s orders was staying in his room alone and in bed to avoid any aggravations. It is apparent that Andrew expected this story to serve as a foundation for his defence.

The principal conflict between the Steuarts was household expenditure—Andrew claimed he inherited debt with his property, and had much more limited means than expected of him, but Elizabeth would spend money on luxuries against his wishes. The tensions and disagreements escalated into the first and only physical assault between the couple in July. Andrew was reprimanding his wife for hiring another female servant while she ‘asserted her right to keep as many servants as she pleased, when the defender asserted his right to turn out any he thought in excess.’ Elizabeth further infuriated her husband by calling for the servants to come ‘witness what ought to have been private.’ Andrew’s denial of cruelty, his defence that he was provoked, and his plea for an absolutor and custody of the children illustrates his belief in his authority and expected privileges as a husband and man of status. The Lord Ordinary commented substantially on this case stating in the Reclaiming Note:

This is a very painful case, *especially looking to the social position of the parties...* The Lord Ordinary thinks that it is sufficiently proved that...the defender committed a violent assault...and inflicted serious injury by repeated blows with his clenched fist. The defender himself does not dispute the assault, but alleges that the blows were given with his open hand, and he pleads provocation. The provocation has not been proved,

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<sup>145</sup> CS46/1870/8/20 Gordon or Steuart v Steuart.

and the whole evidence goes to shew that the blows were given, not with the open hand, but with the clenched fist.

The Lord Ordinary is disposed to hold that no other actual assault resulting in personal injury has been proved, and *he gives the defender the benefit of this*...The Lord Ordinary thinks that the actual and violent assault of 26<sup>th</sup> July 1869, taken in connection with the oft-repeated threats, and the use of violent and unjustifiable language, entitled the pursuer to decree of separation. *Especially is this the case in the rank of life to which the pursuer and defender belong* [italics added].<sup>146</sup>

Andrew Steuart argued a defence of deficient health and provocation expecting leniency afforded by his position as an esquire and politician. Despite his protests the Lord Ordinary found the sum of Andrew's past behaviour warranting of a separation with aliment.

### Perceptions of Marital Violence

As discussed previously, the point at which judicial opinion on wifebeating shifted from tolerated to unacceptable is at the centre of the historiographical debate on marital violence. Leneman, whose study ended in 1830, asserted that it was in the first half of the nineteenth century that Scottish judges showed this change in attitudes.<sup>147</sup> Conversely, Conley concluded that in the late Victorian period diminished responsibility and provocation still excused men accused of wife murder from homicide convictions, although men who murdered their wives were more likely to be convicted of culpable homicide and given harsher sentences.<sup>148</sup> Hughes also argues Scottish judges continued to sanction provocation and diminished responsibility as legitimate defences into the twentieth century.<sup>149</sup> Evidence from this study suggests provocation was indeed still used in both civil and criminal courts as a mitigating factor in wife assault. However, judiciary rulings show both the persistence of those attitudes as well as evidence of less tolerance of wifebeating. For instance, the ruling in *Gordon or Steuart v Steuart* demonstrates that by 1870 the Lord Ordinary showed intolerance of 'respectable' husbands using violence against 'respectable' wives. However, his inclusion of the couple's status indicates this may have influenced his decision.<sup>150</sup> Comparatively, also in the early 1870s, *The Dundee*

<sup>146</sup> CS46/1870/8/20 *Gordon or Steuart v Steuart*.

<sup>147</sup> Leneman, "A tyrant and tormentor", p. 49.

<sup>148</sup> Carolyn A. Conley, 'Atonement and domestic homicide in late Victorian Scotland', in Richard McMahon (ed.), *Crime, Law and Popular Culture in Europe, 1500-1900*, (Portland, 2008), pp. 230-231.

<sup>149</sup> Hughes, 'The "Non-Criminal" Class', pp. 37-41.

<sup>150</sup> Conley similarly found that 'respectable' husbands accused of murdering their wives were more likely to be judged on their character rather than the evidence against them, often resulting in convictions of 'not

*Courier, Argus, and Northern Warder* printed the following report for a case of wifebeating heard in Police Court by Bailie Johnson:

The Magistrate, after hearing the evidence, said he had no doubt but the accused was guilty of the charge of assault. He and his wife seemed to live very disagreeably, and there was no doubt but that there was provocation on the part of the wife; but no man, whatever provocation he may receive, could be justified in striking his wife.<sup>151</sup>

Though the magistrate was clearly stating he did not accept this as a defence, the husband had been convicted of beating his wife with a metal weight, yet was given the rather light sentence of a 20s. fine or ten days in prison. A similar sentiment was expressed in the report of another wife assault case in 1874:

Bailie Muirhead remarked that he was reported to have said that the Magistrates were determined to put down wife beating. He had said no such thing; what he did say was that the Magistrates were determined to punish wife beaters with the utmost rigour. As to the putting down of it, unless they had the power of flogging he believed they would continue to have wife beating in Edinburgh.<sup>152</sup>

The wife beater in this case, an Andrew M'Manus (with a previous conviction), was sentenced to sixty days' imprisonment with hard labour, as well as a new caution. However, Muirhead's comment that he only expects to punish men brought to court suggests an awareness of the ineffectiveness of judicial penalties, and ultimately the impact they have on dissuading the general population from this behaviour. This concern was not limited to Edinburgh. An anonymously written article attempted to cast light on this issue of ineffective sentences claiming that the:

scandalously slight sentences given by Bailie Ross [of Aberdeen] to the two cowardly fellows who beat their helpless wives in the brutal manner detailed, can only be considered as giving very large encouragement to them and like reprobates to go on in their brutal course, and may be said to lead indirectly to such more serious cases...<sup>153</sup>

There is suggestion of changing discourse amongst the judiciary encouraging less tolerance, but what is also evident is that the earlier acceptance of wifebeating and provocation was still a competing discourse.<sup>154</sup> Thus, David Niddrie in 1872 was sentenced to fifteen months imprisonment for his fourth conviction of wife assault, but

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proven'; Conley, 'Atonement and domestic homicide', pp. 226-227. CS46/1870/8/20 Gordon or Steuart v Steuart.

<sup>151</sup> 'Grocer Beating His Wife With a Pound Weight. A Jealous Couple', *Dundee Courier, Argus, and Northern Warder*, 18 June 1875.

<sup>152</sup> 'Bailie Muirhead on Wife-Beating', *The Scotsman*, 12 August 1874, pg. 4.

<sup>153</sup> 'The Luxury of Wife-Beating', *Dundee Courier & Argus & Northern Warder*, 3 October 1873.

<sup>154</sup> Hughes, 'The "Non-Criminal" Class', p. 42.



Sheriff Cheyne blamed drink as the cause as his wife was hiding furniture from him to prevent him pawning it.<sup>155</sup> The combination of this wife-blaming discourse and futile penalties indicates that any changing attitudes were culminating in words rather than action. Moreover, it does not provide any evidence of a decline in wife abuse.

## Intervention and Relationships

In mid-nineteenth-century Scotland homes were not the havens of privacy associated with modern living. In the towns people lived in intimate settings with little privacy between the thin walls and echoing closes. Large families commonly lived in one or two room homes, many with lodgers or boarders, possibly a single servant, sharing the already limited space.<sup>156</sup> In rural areas homes were also small and part of close knit communities, where neighbours knew one another and windows served as boxes of entertainment. Wealthier families lived in homes more separate from the community, sometimes out in the country or what became suburbs with few neighbours at all, but this did not mean privacy.<sup>157</sup> To be in the middle or upper class required symbols of status, one of which was the employment of servants.<sup>158</sup>

Marital violence, taken in the context of these living conditions, was often more of a public affair.<sup>159</sup> Hughes argued, in her work on Clydeside in the interwar period, that it was not only an increase in private living conditions that led to less intervention, but the discourses of ‘respectability’ versus ‘animality’ that working-class families struggled against. In order to maintain respectability for their family, abused wives sacrificed their own wellbeing. Moreover, the notion of marriage-mending encouraged by authorities permeated public discourse and, Hughes believes, then became ‘internalized’ by working-

<sup>155</sup> ‘Lengthened Imprisonment for Wife-Beating’, *Glasgow Herald*, 30 July 1872.

<sup>156</sup> Susie L. Steinbach, *Understanding the Victorians; Politics, Culture and Society in Nineteenth-Century Britain*, (London, 2012), pp. 11-30; Butt outlines that in early nineteenth-century Glasgow, ‘[t]here were 8,065 lodgers, with males outnumbering females by a proportion of roughly three to two. For every two householders there was one lodger. Since the distribution of lodgers was not even throughout the social structure, an overcrowding problem and a houseless group almost certainly strained the seams of the city’s social fabric’; John Butt, ‘Housing’, in R. A. Cage (ed.), *The Working Class in Glasgow, 1750-1914*, (London, 1987), p. 41, 42-43; Hughes argues housing conditions in Glasgow in the interwar period, specifically Clydeside, created further tensions within marriages; Hughes, ‘Working Class Culture’, p. 61.

<sup>157</sup> See Jane Hamlett’s article on middle-class homes for discussion of the division of spaces based on the family hierarchy, the lack of conventional family units, and middle-class ideals; Jane Hamlett, ‘“Tiresome Trip Downstairs”: Middle-Class Domestic Space and Family Relationships in England, 1850-1910’, in Delap, Griffin, and Wills (eds.), *The Politics of Domestic Authority in Britain since 1800*, pp. 111-131.

<sup>158</sup> B.S. Rowntree, *Poverty: a study of town life* (London, 1902), p. 14.

<sup>159</sup> Foyster argues against the notion that marital violence became increasingly private in her chapter ‘Beyond conjugal ties and spaces’; Foyster, *Marital Violence*, pp. 168-204.

class women.<sup>160</sup> The public nature of marital violence is illustrated in both Leneman's and Barclay's studies, which found neighbours, family and servants were more willing to intervene in the eighteenth century and early nineteenth.<sup>161</sup>

This study of Scottish marital violence, though a much smaller sample, similarly found that family, neighbours, servants and even strangers were known to physically intervene to stop a husband from brutally beating his wife. Newspaper reports of wifebeating cases likewise indicate that third party intervention was not uncommon. Hammerton and the Dobashes have written on the use of 'rough music' or charivari as a form of community justice against violent husbands, but agree the practice died out by the twentieth century.<sup>162</sup> Though there is no report of a similar communal response in the CS cases, the *Dundee Courier* reported in 1863 that, '[a]n inhabitant of Buckler Brewer, notorious for his wife-beating propensities, was lately shaken in a floursack by the women of the village, until he promised amendment.'<sup>163</sup> Of the 102 criminal court cases collected from the papers, only seven individuals were noted as interfering when wives were being assaulted.<sup>164</sup> The fear of stepping in between a belligerent husband and his wife was indeed reasonable.<sup>165</sup> In one instance a husband beating his wife with his fists, tearing her hair and threatening their child was confronted by their lodger. The husband's response was to bite the lodger on the nose to the effusion of blood.<sup>166</sup> In another trial a labourer named O'Donnell attempted to stop a husband from beating his wife, but was instead attacked by both the husband and wife, indicating that couples may have resented a stranger's intrusion on their connubial dispute.<sup>167</sup>

The most common party to intervene from the CS cases was a family member.<sup>168</sup> Ten out of the fourteen cases featured at least one instance of family intervention during an

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<sup>160</sup> Hughes, 'Representations and Counter-Representations of Domestic Violence on Clydeside Between the Wars', *Labour History Review*, Vol. 69, No. 2, (August, 2004), pp. 172, 179-180.

<sup>161</sup> Leneman, "'A tyrant and tormentor'", pp. 43-45; Barclay, *Love, Intimacy and Power*, p. 181.

<sup>162</sup> Hammerton, 'The Targets of "Rough Music": Respectability and Domestic Violence in Victorian England', *Gender & History*, Vol. 3, No. 1 (Spring, 1991), pp. 23-44; Dobash and Dobash, 'Community Response to Violence Against Wives: Charivari, Abstract Justice and Patriarchy', *Social Problems*, Vol. 28, No. 5 (June, 1981), pp. 563-581.

<sup>163</sup> *Dundee Courier*, 25 March 1865, Issue 3002.

<sup>164</sup> Three of those seven people were mother-in-laws who were cited as also hurt by the prisoner, it seems likely that they attempted to stop the attack, but it is not made clear.

<sup>165</sup> The Dobashes found that neighbours were less reliable as their proximity to the troubled couple made their involvement potentially permanent, substantial or even dangerous. Again, the idea that problems between a husband and wife should remain within the family also kept unrelated neighbours at a distance; Dobash and Dobash, *Violence Against Wives*, pp. 175-178.

<sup>166</sup> 'A Brutal Husband and Father', *Glasgow Herald*, 29 August 1864.

<sup>167</sup> 'Paisley—Monday's Police Court', *Glasgow Herald*, 22 August 1866.

<sup>168</sup> Twentieth and twenty-first century concepts of domestic violence describe it as a hidden assault, private in its location but also private in its nature as personal or the business between a husband and wife. Shelter, especially, was usually given by family, but in the twentieth century poor housing as well as continued

assault.<sup>169</sup> Children were often the only witnesses present to stop an attack. Younger children would run for help, while older ones would intervene physically to help their mother.<sup>170</sup> Elizabeth McCorquodale's ten year old daughter would bang on the connecting wall to their neighbour to cry for help as the neighbour would often intervene.<sup>171</sup> Isabella Johnstone had two adult, unmarried daughters living with her. They would protect their mother by pulling their father away, hiding her, or escaping with her to a neighbouring house. Isabella never sustained an injury from her husband thanks to her daughters and the intervention of others.<sup>172</sup>

Many women would go to their parents' home after they left their husbands. Every wife who left her husband and who went to her parents' home appeared to be welcomed and sheltered there. Catherine Smith's father, for example, sent her to hide in their country home when he heard John Smith was coming to take Catherine and her new born son away.<sup>173</sup> There were also reports of other relatives helping to physically prevent an attack. Catherine Pringle was being choked by her husband when his brother and his brother's wife entered the room and pulled him off of her. Elizabeth McCorquodale's nephew saved her from being struck by stepping between her and her husband, and when John McCorquodale still had not calmed down and attempted to strike her with a poker, the nephew stopped him again by taking away the poker. Elizabeth's sister testified that she went to visit in Edinburgh and during that time John was constantly abusive. She claimed that he was civil at first, 'but when I began to remonstrate about his appearance, he was very saucy and impertinent to me—so much so that he struck me on the eye.' He did not attack that night, but threatened he would 'do them both.' The next night when he began to strangle Elizabeth because she would not give him money, her sister did what she could to pull him off. After that incident he did not physically abuse Elizabeth again while her sister was in town.<sup>174</sup>

There were some indications of poor treatment of the wife by her husband's family. Janet Taws was arrested when her mother-in-law called the police for breach of peace, despite

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notions of family 'privacy and the sanctity of marriage' meant accommodation was often temporary. Furthermore, refuges and shelters for abused women and children were not available until the 1970s; Dobash and Dobash, *Violence Against Wives*, pp. 169-174, 223-234.

<sup>169</sup> The Dobashes also found family, particularly parents, were usually the first people contacted by a battered wife, that they would often provide temporary relief, but not get involved otherwise; Dobash and Dobash, *Violence Against Wives*, pp. 169-170.

<sup>170</sup> Leneman, "A tyrant and tormentor", p. 45.

<sup>171</sup> CS46/1860/7/113 McCorquodale v McCorquodale.

<sup>172</sup> CS46/1870/4/54 Wilson or Johnstone v Johnstone.

<sup>173</sup> CS46/1850/2/16 McMichael or Smith v Smith.

<sup>174</sup> CS46/1860/7/113 McCorquodale v McCorquodale.

the claim that it was Robert Taws who was drunk. Elizabeth Peters was saved on one occasion from her husband pulling her hair till she bled, when a servant went for his uncle and upon the uncle's arrival being announced Alexander Peters stopped, despite servants attempting to pull him away in the interim. After that attack Elizabeth went to her parents' home, but one week later was brought back to her husband's by the same uncle. Another example is Robina Findlay. She was struck in the face by her step-daughter after asking her to leave their home for being too loud. The Findlay's home was full of witnesses, including Robina's sons and their friends. Still, after the step-daughter hit her, Robert Findlay also struck his wife.

It seems in the nineteenth century that assaults were more common in the presence of witnesses than in private spaces. Again this may be due to the intimate settings many families lived in. Testimonies from neighbours describe close range spaces making fights, screams or other sounds of violence impossible to ignore. Evidence of intervention from the early modern era differed greatly from the modern, as Leneman found when she contrasted her study to the Dobashes statement, 'most neighbours are not thought of as sympathetic'.<sup>175</sup> Likewise, the abused wives from the fourteen separation cases tell stories of neighbours saving them on several occasions. It appears common that a wife would run away to a neighbour's home and spend the night (sometimes neighbours were family members, such as sisters or adult children). Furthermore, if a third party was present and witnessing an assault they were more likely to intervene in some way than not at all. Mrs. Russell and her husband were the centre of attention when fighting outside their home in the summer of 1859. She was heard 'crying shame on her husband for he had been beating her. She had blood on her face.' He then grabbed and shook her violently when she tried to get back into their house. Workmen from a neighbouring business cried out 'shame—shame to strike a woman', causing Robert to turn his attention towards them. The boss sent a worker to find a police man, but none could be found. Soon afterwards Mrs. Russell stuck her head out of her window and shouted 'murder', as her husband was beating her again. Neighbours tried to get in the front door, but found Robert had blocked it from the inside. A stranger then climbed into the building through a window and found Robert

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<sup>175</sup> Leneman, "A tyrant and tormentor", p. 44 and Dobash and Dobash, *Violence Against Wives*, p. 175. See also Bailey's article on violence against wives in eighteenth-century England; Joanne Bailey, "I dye [sic] by Inches": locating wife beating in the concept of a privatization of marriage and violence in eighteenth-century England', *Social History*, Vol. 31, No. 3 (August, 2006), pp. 273-294.

lying in front of the door holding it shut with his feet. The stranger assisted a policeman through the same window and Robert was arrested.<sup>176</sup>

This was far from the first time Robert roused the neighbours by beating his wife. A couple from across the street testified on behalf of Mrs. Russell; the wife claimed she could see into the Russells' home through the window and had seen Robert chasing his wife with something in his hand, which she suspected was a poker. Mrs. Russell had shown up at her door in just a shift after midnight with 'marks of violence' on her body. When they would try to intervene they would find the door blocked from the inside. The husband of this woman was the only neighbour who appeared unsympathetic, testifying that 'her coming annoyed me, and I discouraged her coming before this,' though she was always taken in at least for a short time. If anything is evident from Robert Russell's behaviour, particularly his blocking of the door, it was that the neighbours' intervention was a common occurrence.<sup>177</sup>

A third party that frequently intervened against an abusive husband was servants.<sup>178</sup> In the fourteen cases, six mention having servants. Only Elizabeth Cook was maltreated by a servant who she once found in bed with her husband.<sup>179</sup> Otherwise, most wives that called for assistance were aided. This aid predominantly came in the form of physical intervention—seemingly as a result of the isolation of the household from neighbours—as servants had to act quickly but perhaps were also aware of the fact that they were the only people available to help. Sometimes this was at a risk to themselves, for instance Elizabeth Peters' servants were put in danger several times when they interfered between the Peters. On one occasion Alexander Peters chased a servant with a carving knife when she tried to rescue Elizabeth from the bedroom she had been locked in. He had also threatened to shoot them during a separate attack. The last assault before the separation suit, Elizabeth was hidden in the servants' bedroom off of the kitchen. When the servants tried to block Alexander from entering he began to kick them. They were able to overpower him and push him away, but they left his service the same night (Elizabeth left the next day).<sup>180</sup> John Mein struck his servant as she attempted to rescue her mistress, the two then escaped

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<sup>176</sup> CS46/1860/2/121 Russell v Russell.

<sup>177</sup> CS46/1860/2/121 Russell v Russell.

<sup>178</sup> This group of workers did not exist to the same extent by the time of the Dobashes study in the 1970s, but in Leneman's period servants were commonly found in most homes, even those 'low down the social scale,' and these servants 'did what they could'; Leneman, "'A tyrant and tormentor'", p. 43.

<sup>179</sup> CS46/1880/12/42 Morrison or Cook v Cook; no further details were given however, and it is impossible to know the circumstances that led the servant to sleep with her employer.

<sup>180</sup> This was also the same man who attempted to break down the door of the nursery with an axe while his wife, children, and servants were inside it; CS46/1860/5/21 Kyd or Peters v Peters

by running out into the street together.<sup>181</sup> It is also evident from these cases that servants did not remain in households where the husband was cruel and violent;<sup>182</sup> many witnesses at the trials were ex-servants who had left the couples' home as a result of the cruelty. These same witnesses, predominantly young girls, expressed concern and fear for the mistress of the house, and felt their own safety was at risk if they stayed.

The only group who had official power to stop a husband from assaulting his wife was the police. The call for a police officer in the nineteenth century by an abused wife was seemingly used as an immediate relief from an attack rather than a desire for police punishment. An arrest would physically remove the husband creating distance between the couple and an opportunity for him to calm down, or in some instances, sober up. Leneman identified that if a neighbour called for the police they were often calling for selfish reasons, hoping the police would end the noise caused by the dispute.<sup>183</sup> In this study, six out of the fourteen wives had some form of police intervention to protect against their husband's violence. Two of the five husbands had been arrested twice each for violent crimes against their family. In the case of *Myles or Souter v Souter*, the inadequacy of fines is illustrated: James Souter was arrested for breach of the peace and paid a fine of £3.3s. Not long after that charge he was arrested again for assaulting his daughter. Likewise, Robert Pringle was arrested twice for the same crime of assaulting his wife, receiving a punishment of ten days imprisonment.<sup>184</sup>

Wives also feared the repercussions of following through with charges against their husbands. They logically dreaded that imprisonment might enrage him even more so, endangering their lives upon his release. This is apparent in Mrs. Russell's plea for a separation, which she filed while her husband was in jail for wifebeating. It stated, 'the pursuer is afraid for her life, and has removed from the house of the defender, it being manifest that she cannot safely cohabit with him; and she raised the present action for separation from her said husband and for aliment.'<sup>185</sup> Sarah Mein, the woman who was choked and beaten with her husband's walking stick, was so fearful of her husband when he drank that she petitioned to the sheriff to have him incarcerated in the Crichton Lunatic Asylum in Dumfries. Her application was granted, though she was beaten for it the night before he left. In her complaint she stated:

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<sup>181</sup> CS46/1880/7/94 *Perry or Mein v Mein*.

<sup>182</sup> Lawrence Stone, *Road to Divorce; England 1530-1987*, (Oxford, 1990), p. 220.

<sup>183</sup> Leneman, "'A tyrant and tormentor'", p. 47.

<sup>184</sup> Mr. Pringle ran away to Glasgow when his wife threatened to go to the police a third time due to his continued violence; CS46/1870/10/47 *Pringle v Pringle*.

<sup>185</sup> CS46/1860/2/121 *Russell v Russell*.

The defender was in the asylum for a fortnight, when he was liberated on his own application. The pursuer left his house before his return, as after what she had suffered from him it is impossible and would be dangerous for her to continue to live with him. She is convinced from experience that he will again take to drink<sup>186</sup>

Even though John Mein provided defences stating Sarah had no cause to leave his home, the separation was granted.

Lawburrows was another form of legal intervention available to a wife or husband afraid of their spouse, but unwilling to ask for a legal separation.<sup>187</sup> It existed in Scots law as a 'caution or security' granted by both the high and low courts, and was available to anyone who felt under threat for themselves or their property by another person.<sup>188</sup> Only one wife from the separation cases took advantage of this legislation. Elizabeth McCorquodale petitioned for law-burrows from the Justices of the Peace in the County of Edinburgh May 17<sup>th</sup> 1860, who ordained the defender to find caution for 'one hundred merks scots failing which a warrant of incarceration would be granted till the same was found.'<sup>189</sup> Despite this order of protection, Elizabeth still filed for a separation and aliment shortly after. The CS cases examined in this chapter suggest that a decree of separation and aliment was the most effective form of protection (out of a limited range of options) against an abusive husband, yet, it was the most difficult to obtain for wives.

## Conclusion

The pressures of marital expectations worked both ways to instigate disappointment, tension and conflict for husbands and wives. The ideal husband was first and foremost a provider for his family, a caring companion to his wife, and an educator and moral guide for his children. The ideal wife took care of the home, ensuring comfort and stability for her husband and children, obeyed her husband with loyalty and submissiveness, and also set an example for her children. But, as discussed, these expectations were often unachievable due to economic restraints and marital discord.

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<sup>186</sup> CS46/1880/7/94 Perry or Mein v Mein.

<sup>187</sup> Fraser, *Treatise*, Vol. II, p. 910.

<sup>188</sup> A person could request a lawburrows from the Court of Session, the High Court of Justiciary, or the lower courts presided by sheriffs and magistrates. Walker comments that lawburrows was 'outmoded in the later nineteenth century', due to the development of a police infrastructure in Scotland; Walker, *A Legal History*, pp. 548-549.

<sup>189</sup> CS46/1860/7/113 McCorquodale v McCorquodale.

When made public through the criminal and (less often) civil courts, marital violence was presented as a narrowly defined experience, both in its definition and as an occurrence relegated to lower working-class families. In the criminal courts, marital violence was labelled as wifebeating, which evoked specific imagery of drunken or brutal husbands physically assaulting their wives sometimes for no justifiable reason, but more often than not, under an alleged provocation by the wife. Non-physical forms of abuse were rarely discussed in criminal courts and if they were, they were judged less cruel as it did not result in an injury or disablement. The portrayal of marital abuse in the CS following a summons of separation and aliment allowed for a more encompassing definition. However, the interpretations of what constituted maltreatment and cruelty were subjective depending on the judiciary overseeing the action; hence, the cases where wives could prove physical assault or valid threats of future violence were awarded separations. The only cases found where no physical harm was proven and the complaints revolved around mental terrorisation and cruelty were the only cases dismissed in favour of the defender (husband).

This narrow view of marital violence as physical assault against a wife greatly impacted judiciary and public perceptions. If a wife was found to have provoked her husband the assault against her was deemed justified and the husband was given a light punishment. Or, if he did not use physical violence, then the court did not find it life-threatening and therefore no reason to intervene in the marriage. Provocation in particular remained a valid defence for many judiciaries in the Scottish criminal courts, as seen through its continual use during the mid-nineteenth century, and into the twentieth. In the CS abuse continued to require proof of extreme violence in order to be cruelty until the turn of the century, when, there was a precedent set citing mental abuse as grounds for a separation.

Overall, though English studies suggest a shift in attitudes towards intolerance of male violence, in Scotland it seems this shift took longer to establish. Despite more progressive civil legislation by the nineteenth century, regarding the rights of wives, the criminal penal code did not compliment these laws, and the few advances enacted after 1850, culminated in little more than words written on paper. Thus, the discourse of ending wifebeating, in the media and in the criminal courts, through harsher punishments was not often the reality. Most importantly, however, the increase in reports to the criminal courts and CS demonstrate that marital violence was not a declining occurrence. No accurate figures are available for instances of marital violence, and moreover, it is understood that this is a form of recurrent violence where the majority of incidents went unreported. Increased



reports suggest a rising level of awareness, but not necessarily an increase or decrease in marriages where abuse was used.

When placed between the work of Leneman and Hughes, this study confirms an undeniable pattern: marital violence was and is a continuing issue for families, no matter the class, background or location. The misunderstanding and lack of awareness perpetuates public and judicial discourses that often render penalties and legislations ineffective. Thus, the combination of these social and cultural beliefs contributed to the low number of separation suits brought to the CS, while criminal courts remained the more commonly used legal remedy for marital violence.

## Conclusion: Continuity and Change in Nineteenth-Century Scottish Divorce and Separation

As Frederick P. Walton, Scottish advocate, wrote in 1883, ‘husbands without wives, and wives without husbands’ was seen as a threat to social stability.<sup>1</sup> Thus, he stated, only the gravest circumstances should warrant a separation, (and presumably a divorce). Yet, there was another idea present in nineteenth-century Scottish legal texts and that was the idea that in order to preserve the sanctity of marriage husbands and wives guilty of adultery and desertion should forfeit the rights from their conjugal union. The understanding of divorce as upholding the marital institution also allowed an unhappy couple the opportunity to end their union and form a new one, where they could be happy in their conjugal bond and more likely to respect it through chastity and adherence. Rather than forcing people to remain unhappily married, causing emotional, economic or physical harm, divorce and separation provided an escape for the truly irreparable causes. What this study has shown, however, is that despite the divorce and separation law being relatively liberal for the early modern period, in the nineteenth century this legislation was not commonly used. There were outside factors beyond rules and regulations that seemingly kept divorce and separation rates in Scotland low. These additional factors were economic, social and cultural.

This thesis researches and reports on Scotland’s unique experience of divorce and separation, and as the only previous work on the same subject covered the dates 1684 to 1830, it is essentially a study of continuity and change within the nineteenth century.<sup>2</sup> Moreover, related work on the twentieth century provides a chance to highlight when changes did begin to occur within this earlier period.

Chapter One considered the legal state in Scotland regarding marriage, divorce and separation law. Scots law was significantly influenced by the country’s conversion to Protestantism in the sixteenth century, and consequently its divorce law rejected the Catholic belief that marriage was indissoluble. The ability to file for divorce on the two grounds of adultery and desertion for husband and wife before the modern era was unique to Scotland.<sup>3</sup> The civil law in Scotland that granted validity to regular and irregular marriages was also unique to the country, and frequently subject of discussion between

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<sup>1</sup> Frederick Parker Walton, *A Handbook of Husband and Wife According to the Law of Scotland*, (Edinburgh, 1893), p. 57.

<sup>2</sup> Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separations, 1684-1830*, (Edinburgh, 1998).

<sup>3</sup> Particularly when compared to England, Wales, Ireland, Catholic countries and some States of America.

English and Scottish MPs.<sup>4</sup> All of this was well established before the nineteenth century, but in the second half of the 1800s, significant legislative changes took place that bettered the rights of married women.

The most straightforward changes over this study were found in the legal system. Importantly, divorce law was not drastically modified throughout the nineteenth century. It was not until 1938 that additions were made to grounds for divorce.<sup>5</sup> Yet, the rights of married women (and consequently husbands) were subject to several rounds of reforms between the 1860s to the 1880s in Scotland. Subsequently, it appears that the reforms were more significant at the turn of the century, decades after their enactment. Individually the statutes were small steps forward. Although reform may have been born from good intentions, the legal changes were not always put into practice.

More specifically, gender inequality within marriage continued throughout the nineteenth century. Even with reforms, wives remained invisible citizens under their husbands, and this invariably contributed to their reliance on their marriage, even if it was an unhappy one. For instance, the property rights statutes specific to married women passed in waves from the 1861 Conjugal Rights Act to the Married Women's Property Act of 1881 gradually abolishing *jus mariti*. Still, legal and economic restraints remained. Married women were given the right to keep their own property; however, this was only an advantage for a woman who entered marriage with some personal wealth. The Acts also gave married women the right to protect their personal earnings from their husband. Yet, again, many married women who worked earned insignificant wages and most likely still struggled to be self supporting.<sup>6</sup> The legislative reform advanced women's rights, but day-to-day struggles between husband and wife continued.

This does not contradict Walton's comment on husbands and wives, nonetheless, as both observations suggest marriage was indeed the most important family institution, and its preservation was pre-eminent in Scots law. This is also evident in the feminist campaigns of the first wave women's movement.<sup>7</sup> Though the feminist movement championed

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<sup>4</sup> Lawrence Stone, *Road to Divorce: England 1530-1987*, (Oxford, 1990), pp. 349-351. For a primary example, see John Fraser MacQueen, Esq., *The Rights and Liabilities of Husband and Wife, at Law and in Equity; As Affected by Modern Statutes and Decisions*, Part I, (Philadelphia, 1848), p. 20, fn. (1).

<sup>5</sup> 'The Divorce (Scotland) Act 1938 added three new ground for divorce (cruelty, sodomy and bestiality)'; Eric Clive, *The Law of Husband and Wife in Scotland*, Second Edition, (Edinburgh, 1982), pp. 11-12.

<sup>6</sup> See Chapter Two: General Trends of Scottish Divorce and Judicial Separation.

<sup>7</sup> For work on Scottish women in the feminist movement see Rosalind Marshall, *Virgins and Viragos: A History of Women in Scotland from 1080 to 1980*, (London, 1983), pp. 278-292; Leah Leneman, *A Guid Cause: The Woman's Suffrage Movement in Scotland*, (Aberdeen, 1991); Elspeth King, 'The Scottish Women's Suffrage Movement', in Esther Breitenbach and Eleanor Gordon (eds.), *Out of Bounds: Women in*

married women's rights, it did not call for reform specific to the divorce law. Historians have found that mainstream campaigners were against reform of the divorce laws and marginalised radical feminists who promoted alternatives to marriage. Most feminists believed in marriage as the standard family unit, but emphasised the need for legal equality between husband and wife.<sup>8</sup> Accordingly, the wives who brought their husbands to court for divorce or judicial separation were not necessarily feminists, but did so for personal reasons.

Nevertheless, marital expectations throughout this time period are difficult to chart. The legal expectations of chastity and adherence did not change from the beginning to the end of the nineteenth century. Historians, however, debate the development of companionship values between husband and wife. Joanne Bailey, Elizabeth Foyster, Eleanor Gordon, Gwyneth Nair, and Katie Barclay demonstrate love, partnership and kindness did exist within the confines of a patriarchal relationship in the early modern period.<sup>9</sup> While the works of Edward Shorter, Lawrence Stone, John Gillis, and Colin Gibson do not deny love existed in the earlier period, they argue that it developed into a commonly held marital expectation in the modern period.<sup>10</sup>

This study analyses marital breakdown from the perspective of marriage in the nineteenth century as existing within a patriarchal framework that still allowed for companionate partnerships. The narratives presented to the Court of Session (CS) reflect the marital expectations of the judiciary; demonstrating kindness, affection and accord were key components for a pursuer to establish the validity of the marriage and how it began to break down. Marriage, regular or irregular, was based on mutual consent and not to be taken lightly. Moreover, the institution of marriage remained just as important to the

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*Scottish Society, 1800-1945*, (Edinburgh, 1992), pp. 212-150; Megan Smitley, *The Feminine Public Sphere: Middle-class Women in Civic Life in Scotland, c. 1870-1914*, (Manchester: Manchester University Press, 2009).

<sup>8</sup> Jane Lewis, *Women and Social Action in Victorian and Edwardian England*, (Hants, 1991), pp. 16-19, 135; Bland, Lucy, *Banishing the Beast: English Feminism and Sexual Morality 1885-1914*, (London, 1995), pp. 126-130, 133-134; Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England, 1850-1895*, (Princeton, 1989), p. 189.

<sup>9</sup> Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800*, (Cambridge, 2003), pp. 22-29; Elizabeth Foyster, *Marital Violence: An English Family History, 1660-1857*, (Cambridge, 2005), p. 6, 11; Eleanor Gordon and Gwyneth Nair, *Public Lives: Women, Family and Society in Victorian Britain*, (New Haven and London, 2003); Katie Barclay, *Love, Intimacy and Power; Marriage and Patriarchy in Scotland, 1650-1850*, (Manchester, 2011), p. 201.

<sup>10</sup> Edward Shorter, *The Making of the Modern Family*, (London, 1976), p. 6; John Gillis, *For Better For Worse: British Marriages 1600 to the Present*, (New York and Oxford, 1985), pp. 307-308; Colin S. Gibson, *Dissolving Wedlock*, (London, 1994), pp. 215-216. Shanley and Bland agree that companionate marriage was not the norm by the first wave feminist movement; Bland, *Banishing the Beast*, p. 130; Shanley, *Feminism, Marriage and the Law*, pp. 7-8.

Scottish contemporaries from the beginning to the end of the nineteenth century.<sup>11</sup> This was evident through the continuing emphasis on preventing divorces based on collusion, and the efforts of local authorities to reconcile separated couples, particularly deserting husbands with their families, at the expense of the Parochial Board.

Overall, in Scotland, reforming married women's rights rather than the divorce law bettered accessibility for wives to legally end their marriage. This in turn led to an increase in the number of divorces. However, it is important to note that this was not the intention of the mainstream feminist movement, or those involved in legal changes including MPs and Scots law lords, and thus to say the one directly led to the other would be inaccurate.<sup>12</sup>

Chapter Two established the general trends of divorce and separation through a quantitative discussion. Using a combination of sources it shows that only a small minority of married persons either divorced or legally separated from 1830 to 1890. The reasons for the low numbers are attributed to the factors discussed earlier: legal, economic, social and cultural. Chapter One explained how legislation caused divorce and separation figures to remain insignificant, including marriage law and evidence law. Chapter Two highlights how accessibility was another influence on the divorce and separation rates.

Even with equal access for husbands and wives, economic factors prevented some couples from filing legal suits. The fee of a legal proceeding was estimated to cost from £20 to £30 if uncontested by the accused spouse. If it was contested however, that amount would increase based on the length of the trial and the number of witnesses called. The average cost found in the CS sample was closer to £60, the equivalent of 66.7 weeks wages for a skilled worker who earned 18s. per week. Moreover, the CS was located in the city of Edinburgh. It can only be speculated that this would have deterred couples from filing a suit, as there is no evidence in the CS stories. Nevertheless, the fact that the majority of pursuers were from Edinburgh and Leith suggests physical accessibility was a factor. Similarly, historians who studied London's Divorce Court argue the same for English couples.<sup>13</sup> There is also the consideration that a man or woman would have to take time

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<sup>11</sup> See Rosalind Marshall, Eleanor Gordon, Gwyneth Nair, and Annmarie Hughes who all discuss the normality and dependency of women on marriage in the wider context of their studies; Marshall, *Virgins and Viragos*, pp. 247-292; Gordon and Nair, *Public Lives*, pp. 71-106; Annmarie Hughes, *Gender and Political Identities in Scotland, 1919-1939*, (Edinburgh, 2010), pp. 128-129, 156-157.

<sup>12</sup> Elaine Tyler May argues against this theory, which she states was widely held by contemporaries at the end of the nineteenth and beginning of the twentieth centuries; Elaine Tyler May *Great Expectations: Marriage and Divorce in Post-Victorian America*, (Chicago, 1980), pp. 6-7.

<sup>13</sup> Shanley, *Feminism, Marriage and the Law*, p. 42; Lawrence Stone, *Road to Divorce: England 1530-1987*, (Oxford, 1990), p. 383.

off of work or family responsibilities to travel to Edinburgh and follow through with a suit, and that amount of time would also be dependent on the defender's response.

On the other hand, impoverished Scottish individuals had access to support from Parish Councils to fund separation and divorce suits, the equivalent of legal aid, since the sixteenth century. The Scottish Poor Law would cover all legal expenses for pauper litigants if they could prove genuine hardship.<sup>14</sup> This study of divorce and separation cases found a few examples of pursuers applying to the Roll in order to fund their suit, though this amounted to less than five percent of the database sample.

From the CS database the predominant socioeconomic status of the litigants appeared to be upper-working class and middle-working class. This finding was not surprising for Scotland. Leneman's assessment of the preceding period divided the social rankings of her study into three classifications—aristocracy, gentry and common—and found that from 1771 to 1830 the majority of pursuers were from the common class.<sup>15</sup>

Discrepancies between the number of wives and the number of husbands who filed for divorce and separation further identifies greater influences at work besides the law. Chapter Two demonstrated that more husbands filed for divorce on the ground of adultery during this time period. Wives on the other hand were more likely to file for divorce on the ground of desertion or for judicial separation on the ground of cruelty. Again, this suggests diverse factors were influential.

While Chapters One and Two discuss legal and economic factors, Chapters Three, Four and Five evaluated the social and cultural aspects of marital breakdown. Chapter Three, which focused on divorce for adultery, showed that societal expectations on behaviour seemingly impacted on the number of wives who divorced their husbands for infidelity. Known commonly as the double standard, more leniencies regarding sexual indiscretions were granted to men than women. Women were instead branded by their 'deviant' sexual behaviour, and received more condemnation for it. Thus, despite the practice of a single standard promoted by the Scottish legal system and religious teachings, the double standard prevailed as a discourse, and in practice.<sup>16</sup>

This is not to say that wives quietly overlooked their husbands' affairs, and some wives did successfully win a divorce on the charge of infidelity, however, it does seem that a wife

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<sup>14</sup> Leneman, *Alienated Affections*, p. 15.

<sup>15</sup> Ibid, pp. 17-18.

<sup>16</sup> See Chapter Three: Divorce and Adultery.

was more likely to end the marriage if her husband had also broken the marital vows of adherence, support and protection, as she had nothing left to lose. Husbands, on the other hand, were more likely to file for divorce if their wives had an affair, especially if she had an illegitimate child. This reflected the general concern that if a woman had an extra-marital affair it would likely lead to pregnancy and that the child could potentially be passed off as a child of the marriage and future heir of the family's estate. The degree to which married couples tolerated adultery was arguably reflected in the fact that most cases of adultery collected demonstrated cohabitating adultery rather than the more standard affair where spouses cheated while living together. Once both elements of marital expectations had been broken, it seems couples were willing to deal with the expenses and legal process to end their irreparable marriage. This suggests that adultery did not always lead to marital breakdown. Finally, Parliamentary accounts of divorce showed that after the 1880s more wives began to file for divorce, which coincides with the enactments of legislative reform for married women's property and evidence.<sup>17</sup> Better protection of a wife's economic independence, as well as the fact that a husband or wife could testify in a matrimonial suit, meant more wives filed suits.

The second social, and undoubtedly economic, factor explored in this thesis is the issue of gender inequality within employment and wages. The decades from 1830 to 1890 saw the establishment of the breadwinner wage.<sup>18</sup> The notion that husbands, fathers, and men overall, should earn a higher wage under the assumption that they are the main provider for the family, shaped the earning capabilities of women in the nineteenth century. This was especially evident through this study of divorce and separation in Scotland.

Although all women who divorced or separated at this time most likely struggled financially, women who were abandoned by their husbands perhaps experienced more prolonged economic deprivation. If deserted, a wife no longer had the physical presence of her husband, but his financial support was also withdrawn. Based on the testimonies of deserted wives in the CS, as well as the applications for poor relief by deserted wives, Chapter Four illustrated how many of these women did their best to either track down their husband or to find a new source of financial support. Nevertheless, the ability to sustain a female headed-household on low wages and limited employment resulted in many deserted women becoming destitute. Although desertion is often attributed to poverty, this study

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<sup>17</sup> See Chapter Two: General Trends of Scottish Divorce and Judicial Separation.

<sup>18</sup> See Sara Horrell and Jane Humphries, 'The Origins and Expansion of the Male Breadwinner Family: The Case of Nineteenth-Century Britain', *International Review of Social History*, Vol. 42 (1997), pp. 25-64; Anna Clark, 'The New Poor Law and the Breadwinner Wage: Contrasting Assumptions', *Journal of Social History*, Vol. 34, No. 2 (Winter, 2000), pp. 261-281.

found that it was the cause of poverty, particularly for women. Thus more wives filed a suit of divorce on the ground of desertion than husbands. Additionally, however, more wives used the Poors' Roll to deal with desertion than the CS. Poor relief offered immediate financial aid as well as the resources to track down the deserting husband.

This chapter also found that a comparison of official desertion cases presented to the CS and unofficial desertion documented through the Poors' Roll illustrates desertion as potentially the most common, yet largely hidden, form of marital breakdown. A divorce for desertion, on the other hand before the 1861 Conjugal Rights (Scotland) Act was the most complicated process of the three as it required repeated efforts by the pursuer to prove that he or she had unsuccessfully attempted to reconcile with their spouse for at least four years. This most likely contributed to the low number of desertion divorce actions, because a spouse would have been immediately disadvantaged by their desertion, but forced to wait years before they could file for divorce.

The third social influence was the idea of chastisement or correction as acceptable for a husband to use on his wife. This line, precisely because it was so fine, allowed some husbands to abuse their wives and go unpunished. Physical violence could be excused through the defence of provocation. This construction of provocation as it related to wives disseminated a discourse on certain female behaviour warranting punishment, in particular, drinking, nagging, pawning, and neglecting household duties. Consequently, separation suits on the ground of cruelty were the least commonly filed suit found in this study. Instead, as shown through the examination of criminal court reports and historiography, more wives used criminal courts than the CS if seeking legal intervention, even though effective protection was often wanting.

Although English historians have proposed that the treatment of women shifted at the end of the nineteenth century towards more protection of the 'fairer' sex,<sup>19</sup> this chapter argues that in Scotland this new discourse existed more in theory than practice. It furthermore differentiated between 'respectable' and 'unrespectable' women. Combined with a belief in provocation, unrespectable women were given less protection from violent husbands as it was thought poor people were of a different nature than those in the middle and upper

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<sup>19</sup> See Nancy Tomes, 'A "Torrent of Abuse": Crimes of Violence between Working-Class Men and Women in London, 1840-1875', *Journal of Social History*, Vol. 11, No. 3 (Spring, 1978), pp. 328-345; Martin Wiener, *Men of Blood; Violence, Manliness and Criminal Justice in Victorian England*, (New York, 2004); A. J. Hammerton, *Cruelty and Companionship; Conflict in nineteenth-century married life*, (London, 1992), pp. 166-167. Stone argues that non-physical cruelty was accepted in English legislation as early as 1850, however, class biases meant middle and upper-class wives benefited from this rather than working-class women; Stone, *Road to Divorce*, pp. 205-206.



classes. Working-class husbands accused of wifebeating were also given chances to excuse their behaviour because they blamed provocation or drink for their use of violence.<sup>20</sup> This study found evidence of magistrates and judges using tougher penalties to punish men accused of assaulting their wives, however, this practice was inconsistent. Moreover husbands in the courtroom through the turn of the century were still using the defences of provocation and alcohol.<sup>21</sup>

The first part of Chapter Five discussed the discursive context for cruelty and wifebeating in the nineteenth century, concluding that because violence was attributed to working-class men and sometimes women, there was lack of understanding within criminal and civil policies. However, wives had a better chance to demonstrate how their husbands abused them in civil court than in the criminal courts.

Part One was followed by a comparison of charges of cruelty in the CS to those in the criminal courts revealing less tolerance of husbands' brutality in the former than the latter. However, wives seeking a separation did have to present evidence of 'grave and weighty' cruelty in their complaint as well as evidence of long-term abuse and the potential for future violence. Whereas, for a husband to end up in criminal court he had to have been charged with a violent assault by his wife or a police officer at the time of the attack. A previous conviction was not needed for a husband to be charged in criminal court, although he would possibly qualify for a harsher punishment if he had previously been convicted of wifebeating or violent assault.

Patterns of abuse within the sources were also analysed and highlight how non-physical cruelty barely featured in the cases presented in criminal courts. Scottish judges and policy makers overall struggled with the concept of non-physical abuse. In the CS non-physical cruelty was frequently cited by petitioning wives, yet it was a difficult offense to prove and subsequently not as likely to warrant a separation. Some forms of non-physical abuse were more understandable for courts, such as economic cruelty and verbal threats. Mental abuse, however, was not given a precedent until 1895.<sup>22</sup> Moreover, certain forms of cruelty were associated with specific classes, such as tyrannical abuse from middle-class

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<sup>20</sup> See Hughes for these arguments regarding Scotland; Annmarie Hughes, 'The 'Non-Criminal' Class: Wife-beating in Scotland (c. 1800-1949), *Crime, Histoire & Sociétés/Crime, History & Society*, Vol. 14, No. 2 (2010), pp. 32-33.

<sup>21</sup> See Chapter Five: Separation and Cruelty, Part II.

<sup>22</sup> 1895 Mackenzie v Mackenzie; Clive, *The Law of Husband and Wife*, p. 176. See Chapter Five, Part II, Section: 'The Evolution of Mental Abuse as Cruelty', pp. 212-216.

husbands.<sup>23</sup> In addition, it seems that more working-class couples appeared in the criminal court attesting to an incidence of assault, whereas couples with money were more likely to end up in the CS where they could elaborate on the various physical and non-physical maltreatment they had received over the years. A lack of quantitative data on marital violence besides incidences reported to the authorities means it is problematic to assume an increase or decrease in spousal abuse. However, it is justifiable to argue that the overarching patterns of marital abuse found in this study were present in the centuries before and after.<sup>24</sup>

While this thesis argues that there were several limitations that dissuaded and impeded couples from filing for divorce or separation, it also contributes to the bigger picture of female agency; and certainly, the varied experiences of men. Rather than concluding that marriage was a negative relationship for husbands and wives, or as Joanne Bailey would say, a pessimistic history,<sup>25</sup> what was captured within these sources were the efforts to improve difficult situations, whether that meant staying together or leaving the marriage. Furthermore, the fact that only a minority of the Scottish population filed for divorce or separation suggests more couples handled marital conflict without the aid of lawyers and court officials. This gives greater weight to understanding everyday methods of coping employed within an unhappy or, indeed, an abusive marriage. Abuse, as this thesis aims to highlight, ranges from emotional cruelty through adultery, to financial cruelty through desertion or neglect, and maltreatment through physical, verbal and mental violence. As a gender history of marital breakdown, this study suggests more than how some marriages ended, but also the self-made autonomy of wives in nineteenth-century Scotland.

Combined, these findings suggest that social and cultural factors contributed to the low divorce rates of Scottish couples in the nineteenth century. These, along with legal restrictions on the rights of wives and economic deterrents, were all arguably influences on the fact that divorce and judicial separation were not common in nineteenth-century Scotland. Marital breakdown, on the other hand, was more common, but largely

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<sup>23</sup> Hammerton's work on cruelty within marriage is divided into two parts illustrating this finding in his own research. The first part examines the working class and the second focuses on the middle class; Hammerton, *Cruelty and Companionship*, pp. 13-67, 71-163.

<sup>24</sup> See the work of Hughes and the Dobashes for twentieth century accounts of marital violence; Hughes, *Gender and Political Identities in Scotland*, especially Chapters Six and Seven; Hughes, 'The "Non-Criminal" Class', pp. 31-54; Hughes, 'Working Class Culture, Family Life and Domestic Violence on Clydeside, c. 1918-1939: A View From Below', *Scottish Tradition*, Vol. 27 (2002), pp. 60-94; Hughes, 'Representations and Counter-Representations of Domestic Violence on Clydeside Between the Wars', *Labour History Review*, Vo. 69, No. 2 (August, 2004), pp. 169-184; Dobash and Dobash, *Violence Against Wives: A Case Against The Patriarchy*, (London, 1980).

<sup>25</sup> Bailey, *Unquiet Lives*, p. 10.

immeasurable. Therefore, it seems likely that divorce and judicial separation were last resorts for couples whose marriages broke down. Contrary to the fears of the politicians and judiciary in the nineteenth century, legalising and liberalising divorce did not open up a flood of colluding and immoral behaviour and lead to an increase in formal separations and divorce. Instead, a minority of Scottish husbands and wives demonstrated their personal intolerance and a break from social norms and constraints by resorting to the CS. But most marriage breakdown remained invisible statistically as this thesis highlights. Taken as a whole, divorce and separation did not threaten the nineteenth-century Scottish fabric or the institution of marriage.

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