SCOTTISH LAW COMMISSION

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Sections D-H

MEMORANDUM No: 22 (cont'd.)

FAMILY LAW

ALIMENT AND FINANCIAL PROVISION

31 March 1976

Section D

The measure of support

2.135. It is not enough for the law simply to provide that an obligation exists between the parties to an alimentary relationship. It must also lay down a measure or yardstick prescribing how much has to be provided as aliment, whether in money, or in money's worth by way of support in the home. Consideration of the measure of support raises questions like the following: is the alimentary obligant fulfilling his obligation if he provides support at bare subsistence level? Or must he provide aliment at a level which is in some way "suitable" in the particular circumstances of the case? Very often, the question whether a man has an obligation of aliment and the question of what the measure of support should be will overlap. In other words, it will often make very little difference in practice whether certain circumstances (e.g. that the person claiming aliment does not need it) cut off his right to aliment or merely require aliment to be assessed at a minimal amount. There is, however, a difference in principle, and there may sometimes be practical and procedural differences. It may, for example, be to a defender's advantage to have an action dismissed as irrelevant on the ground that the pursuer's averments show that there is no liability for aliment rather than to go to proof even if there is a strong chance of a minimal award in the end of the day.

2.136. Scots law: Surprisingly, the present law is neither clear nor consistent as to the measure of support to be provided by the alimentary debtor. The problem has arisen in three main contexts:

(1) actions for aliment by or for the alimentary creditor;

(2) actions by third parties for reimbursement of aliment supplied to the alimentary creditor; and

(3) applications by tutors, judicial factors or trustees for authority to pay an allowance for the aliment of an alimentary creditor of their ward.

2.137. In the first of these contexts, direct actions for aliment, the position varies according to the relationship in question. In actions for aliment between husband and wife, the measure of aliment is generally related to the means and needs of the parties: other things being equal, the wife of a rich man will be awarded more than the wife of a man of moderate means.[1] In actions of affiliation and aliment the court is directed to "have regard to the means and position of the pursuer and the defender, and the whole circumstances of the case,"[2] but there is reason to believe that there has been more standardisation of awards in the sheriff courts than this statutory formula would suggest.[3] Similarly, the court is empowered

> "on the application of any person who is entitled to the custody of an illegitimate child, whether such child is the father or the mother of the child or is a third party, to make an order for payment to the person so entitled to the custody, by the father or the mother or by the father and the mother, as the case may be, of such sum in respect of aliment of the child as having regard to the means and position of the father and the mother and the whole circumstances of the case the court may think reasonable."[4] (emphasis added).

In awarding aliment for legitimate children under the Guardianship of Infants Act 1925, as extended, the court is empowered to award such sum "as having regard to the means of the mother or father the court may consider reasonable".[5] In awarding aliment for legitimate children on divorce the court

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[1] See Wotherspoon v. Wotherspoon (1869) 8 M.81; Alexander v. Alexander 1957 S.L.T. 298; Fyfe v. Fyfe 1970 S.L.T. (Notes) 25. And see Clive and Wilson, op. cit. p. 196.

[2] Illegitimate Children (Scotland) Act 1930, s.1(2).

[3] See the observations in Mottram v. Butchart, 1939 S.C.89 on the desirability of some standardisation, and see the explicit standardisation in Brown v. Strachan (1947) 63 Sh. Ct. Rep. 158. Note also that in undefended cases the pursuer will be awarded what she claims. Terry v. Murray 1947 S.C.10.

[4] 1930 Act, s.1(3).

[5] Guardianship of Infants Act 1925 s.5(4) and Children and Young Persons (Scotland) Act 1932, s.73. See also 1925 Act s.3(2) as amended by the Guardianship Act 1973, Sch. 4, para. 1.

takes into account the means of the father.[6] In direct actions for aliment between parent and legitimate child the position is less clear. In the leading case of:

> Maule v. Maule[7], an adult son, an ensign in the Cameron Highlanders, raised an action against his father, a wealthy landowner, concluding for an aliment of £2000 a year "or such sum as the Court should consider proper". The Court of Session, after requiring the father to make a disclosure of his free means and estate, awarded aliment of £800 a year. It was regarded as "undoubted law that, when you come to talk of aliment, it does not mean bare subsistence, but a sum proportionate to the means and situation of the parties."[8] The House of Lords reversed this decision but in such a way as to leave the law uncertain. Only two speeches were delivered. In the first, the Lord Chancellor made clear his dislike of any interference with the paternal discretion on aliment and concluded that the Court of Session had not been entitled to intervene "in this case". In the second speech, Lord Redesdale stated that the measure of aliment was "support beyond want" but made it clear that in his opinion "want" might vary with social class.[9]

Not surprisingly this decision was differently interpreted. Some judges regarded it as a warning against any interference with parental discretion.[10] Others seemed to think that it established bare support as the measure of the parental obligation.[11] In Thom v. Mackenzie[12] (an action by a mother against her son), the Court of Session finally interpreted the decision as meaning that "want" was the criterion, "want", however, being a relative term - "relative to the situation of

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[6] Dickinson v. Dickinson 1952 S.C. 27. See also Wilson v. Wilson 1957 S.L.T. (Notes) 6 on "the necessity of relating the sum concluded for as aliment [for children] to the means of the husband ..." This modern approach is distinctly at variance with the "support" approach of the House of Lords in Maule v. Maule (1825) 1 W. & S. 266.

[7] (1823) 2 S.464; 1823 July 9 F.C.; (1825) 1 W. & S. 266.

[8] July 9, 1823 F.C. per Lord President. Cf. Moncrieff v. Moncrieff (1735) 1 Pat. 162; Maidment v. Landers 1815 May 25 F.C., revd. (1818) 6 Dow 257.

[9] (1825) 1 W. & S. at 293.

[10] A.B. v. C.D. (1848) 10 D.895; Bain v. Bain (1860) 22 D. 1021 per Lord Cowan at 1023.

[11] Bain v. Bain (1860) 22 D.1021 at 1023; Smith v. Smith's Trs. (1882) 19 S.L.R. 552; Smith v. Smith (1885) 13 R 126 per Lord Fraser; A. v. B. (1904) 22 Sh. Ct. Rep. 15. Cf. the defender's argument in Ketchen v. Ketchen (1871) 9 M.690.

[12] (1864) 3 M.177.

a person who is said to be in want". "A person who has received the education of a gentleman ... would not be placed above the reach of want by getting the relief of a parish pauper."[13] This is the view which has been accepted since[14], in those cases where Maule v. Maule has not simply been ignored[15]. In the case of children undergoing education or training, the courts have also taken into account the manner in which the parent had expected or intended them to be educated[16], the suitability of the education or training proposed[17] and the extent to which the children's education could reasonably be said to be complete.[18] To sum up, in direct actions for aliment, the law has flirted with bare subsistence as the measure of support (notably in the case of illegitimate children) but has moved away from it in all cases. Aliment depends on the circumstances, but in different situations the emphasis is placed on different circumstances. One particular contrast stands out. In some cases, the courts are directed by statute to have regard to the means of the alimentary debtor: in others they have been directed by the House of Lords to have regard only to the relative want of the alimentary creditor.

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[13] Ibid. per L.J.C. Inglis at p.179.

[14] Smith v. Smith (1885) 13 R.126; Foulis v. Fairbairn (1887) 14 R.1088; Watsons v. Watson (1896) 4 S.L.T.39; A. v. B.(1904) 22 Sh. Ct. Rep. 15; Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649; Maxwell v. Maxwell (1939) 51 Sh. Ct. Rep. 56.

[15] Cf. Whyte v. Whyte (1901) 9 S.L.T. 99 (20 year old son, apprentice stockbroker, entitled to a "reasonable aliment"); Fraser v. Campbell 1927 S.C. 589 at 592 ("the case of Maule, for what it is worth"); Mottram v. Butchart 1939 S.C. 89 at 95 ("the law derived from the House of Lords case of Maule has suffered considerable equitable relaxation"); Dickinson v. Dickinson, 1952 S.C.27; Wilson v. Wilson 1957 S.L.T. (Notes) 6.

[16] Cf. Macneil v. Macneil of Taynish (1749) Mor. 426; Howe (1859) 21 D.486; Watsons v. Watson (1896) 4 S.L.T. 39 (medical students); Dickinson v. Dickinson 1952 S.C.27 (girl already attending expensive boarding school); Mizel v. Mizel 197 SLT (Sh. Ct.) 50.

[17] Cf. Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649; Mizel v. Mizel, 1970 S.L.T. (Sh. Ct.) 50.

[18] Cf. Smith v. Smith (1885)13 R.126 (son of 32, expensively educated and "well qualified to earn his own livelihood"); Whyte v. Whyte (1901) 9 S.L.T.99 (apprentice stockbroker, "only learning his business").

2.138. The second context in which the measure of alimentary support may be important is recovery by third parties from the alimentary debtor of aliment paid or provided to the alimentary creditor. A shopkeeper who has provided a destitute deserted wife with food and other provisions may try to recover payment from the husband. He will succeed only if the wife was not being properly alimented by her husband and only if the provisions are within the appropriate measure of support for the wife - that is, if they are "necessaries". Here again bare subsistence is not the criterion. The husband is bound, in Baron Hume's words, to maintain his wife at a "suitable" level and will be liable to shopkeepers who have supplied "suitable and decent furnishings".[19] Similarly, a father will be liable to tradesmen or suppliers if he fails to provide his children with "ordinary and necessary furnishings, or with the reasonable and suitable education, that which is indispensable to their welfare and is given to all of their condition"[20] Again, it is often said that the father of legitimate children will be liable for "necessaries", but the term "necessaries" is not limited to what is essential to maintain life. The traditional view is that it varies with "rank and condition in life", although it is not always made clear whose rank and condition is in question.[21] At least where the recipient is a wife, the class of "necessaries" recoverable from the husband has always been regarded as wide enough to cover the expenses of legal proceedings.[22]

2.139. Certain statutory provisions deal with claims for reimbursement by the state or public authorities in relation

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[19] Hume's Lectures Vol. I p. 94 (Stair Soc.). See also Erskine Institute I, 6, 19.

[20] Hume's Lectures Vol. I p. 218 (Stair Soc.) See also Stair, I, 5, 7, Erskine, Institute I, 6, 57.

[21] See Fraser, Parent and Child (3rd ed., 1906) p.112; Husband and Wife p.611 (2nd ed., 1876) (necessaries for wife must be "suitable to the condition and circumstances of life of the husband"). Moore, Taggart & Co v. Kerr (1897) 14 Sh. Ct. Rep. 10. For a recent discussion of this problem in English law, see Note by Treitel at 16 M.L.R. 221-5 (1953).

[22] See Sharp v. Sharp 1946 S.L.T. 116; Tait v. Tait 1955 S.C.364; Lawrie v. Lawrie 1965 S.C.49.

to the support of those in need. We consider these in more detail in Part V but we note here that they all use general formulae like "such an amount as the court thinks proper",[23] or "such sum: ... [as the sheriff] may consider appropriate" having regard "to all the circumstances and, in particular, to the [liable relative's] resources"[24] or "such ... sum towards the maintenance of the child as the court thinks reasonable."[25]

2.140. In the third context, that in which the court is asked to authorise a tutor, or judicial factor to pay aliment to a relative of the incapax, it again seems that a suitable aliment is not limited to a mere subsistence allowance but varies with the means available, and the social position of the claimant.[26] The cases, however, date from an era when there was more emphasis, generally, on social position.

2.141. Comparative survey: In England, where the approach to financial provision and maintenance is a remedy-based one, turning on the powers of the courts to make awards in particular circumstances bare support is not the criterion. A wife can, for example, apply to the High Court for an order under the Matrimonial Causes Act 1973 on the ground that the husband has wilfully neglected to provide "reasonable maintenance"[27] In relation to magistrates' courts, the Law Commission has tentatively put forward for discussion the proposition "that the principal ground upon which a court should have power to order maintenance should be failure by one of the parties to the marriage to provide such maintenance for the other party or for any children as is reasonable in all the circumstances."[28] We note too that the statutory limits on the amount of maintenance which could be awarded by magistates were removed in 1968[29]. The report of the Graham Hall Committee, which recommended this change, stressed the need for flexibility in maintenance awards. "The standard of living of the family before breakdown may have been relatively high and it would not be right to impose a substantial reduction in this."[30] (Our italics).

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[23] Social Work (Scotland) Act 1968, s.80(1).

[24] Ministry of Social Security Act 1966, s.23(2).

[25] Children Act 1975, s.16(2).

[26] Howe (1859) 21 D.486; Maconochie (1861) 23 D.740; Graham (1865) 3 M.695. Social position has also been taken into account, sometimes surprisingly, in other circumstances. See e.g. Livingstone v. Livingstone (1886) 14 R.43 (creditors arresting alimentary fund quoad excessum); Duke of Sutherland, Petr. (1901) 3 F.761 (aliment for son out of son's own funds).

[27] s.27.

[28] Law Com. Working Paper No 53, Matrimonial Proceedings in Magistrates' Courts (1973) para. 35.

[29] Maintenance Orders Act 1968.

[30] Report of the Committee on Statutory Maintenance Limits (1968) Cmnd. 3587 p.56.

2.142. In France, a right to aliment emerges only if the alimentary creditor is in need but, as in Scotland, it is recognised that need is a relative term. In family law, as opposed to social security law, there are no fixed scales. The determination of need is subjective and can take account of the social condition and accustomed standard of living of the alimentary creditor.[31]

2.143. In West Germany, the general rule as between ascendants and descendants is that the level at which aliment has to be granted depends on the station in life of the person to whom aliment is due.[32] There is, however, an exception to this rule: aliment is due only at a lower level (the level which justice requires) if the claimant has brought about his indigence through his own immorality or dissipation, or if he has seriously neglected his own alimentary obligations towards the alimentary debtor, or if he has been guilty of a serious offence against the alimentary debtor or one of his near relations.[33] This exception does not apply in the case of a parent's obligation to his minor, unmarried children.[34] In the case of an illegitimate child, aliment used to be granted "at the level of the station in life of the mother"[35] but since 1969, if paternity is established, the measure of aliment depends on the social condition of both parents.[36]

2.144. In Switzerland, the Civil Code provides that as between ascendants and descendants (and brothers and sisters if the alimentary debtor lives "dans l'aisance"), a claim can be made for an alimentary allowance "necessary for the support of the claimant and compatible with the resources of the other party".[37] Aliment for an illegitimate child is awarded according to the social position of the mother and the father.[38]

2.145. In Italy, the Civil Code recognises two main measures of support. The normal rule takes account of needs, means and social position. "Support shall be provided in proportion to the need of the person who requests it and the financial condition of the person who must give it. Nevertheless,

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[31] Pélissier, Les Obligations Alimentaires, Thèse, Lyon, 1961 pp. 157-162. Carbonnier, Droit Civil II, p.336 (9th ed. 1972). In the special case of "l'action à fins de subsides" against the potential father of an illegitimate child support is to be regulated according to the needs of the child, the resources of the potential father and the latter's "family situation". Code civil art. 342-2.

[32] B.G.B. art. 1610.

[33] B.G.B. art. 1611(1).

[34] B.G.B. art. 1611(2).

[35] Cohn, Manual of German Law Vol. 1 p. 247 (2nd ed. 1968).

[36] B.G.B. art. 1615 c (added by law of 19 August 1969).

[37] Code civil art. 329.

[38] Ibid. art. 319.

support shall not exceed that necessary for the life of the person supported having regard, however, to his social position."[39] As between brothers and sisters, however, support is due only "to the extent that it is strictly necessary",[40] and the criterion of strict necessity is also applied to a person's obligation to support the natural children of his legitimate or natural child.[41] In Greece, a dual standard is also found in the Civil Code. Normally the measure of support is determined according to the social position of the person requiring aliment but it is reduced to the bare minimum necessary to support life if that person has been guilty of conduct towards the alimentary debtor which would justify disinheritance.[42]

2.146. In the socialist states of eastern Europe, the aliment to be awarded to minor children usually varies with the needs of the child and the capacity to pay of the parent.[43] The child of A will generally get more aliment than the child of B if A earns more than B. Attempts have been made to tabulate the amount of aliment to be awarded to minor children by reference to the income of the father, and the number and ages of the children. It is claimed that the great majority of cases can be satisfactorily dealt with by simply looking up the table and making the indicated award, but the technique is still at an experimental stage.[44]

2.147. Our proposals: We are concerned at this stage with expressing the content of the alimentary obligation in general terms, which can apply to the normal case of the ordinary integrated family as well as to the pathological case of the broken family. In its simplest form, the question is whether the obligation of aliment should be to provide:

(1) a bare minimum of support (e.g. support necessary for the sustenance of life; or support at supplementary benefit level); or

(2) support at a variable level (e.g. a level varying with the means of the debtor; or a level varying with the social position of the creditor; or a level which is reasonable in the circumstances); or

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[39] Italian Civil Code arts. 438 (transl. Beltramo, Longo, Merryman, 1969).

[40] Ibid. art. 439.

[41] Ibid. art. 435.

[42] Code Civil Hellenique, arts. 1484 and 1486 (Mamopoulos fr. transl. 1956).

[43] Masilko and Vanecek, L'Objectivation du Montant de la Pension Alimentaire des Enfants Mineurs dans les Etats Socialistes d'Europe, 1969 Revue International de Droit Compare 135. See also Chloros, Yugoslav Civil Law p.109 (1970) - "the financial ability of the parents is not the only criterion; the needs of the child must also be considered."

[44] Masilko and Vanecek, loc. cit.

(3) sometimes the one and sometimes the other (as in the Italian and West German laws)?

This question raises some fundamental issues of social policy. It is arguable that private law should treat all persons equally, irrespective of their family circumstances, and thus require a single measure of support based on subsistence. Such an approach is not, however, really egalitarian in its effects since the poorer alimentary obligant has to pay as much as the wealthier alimentary obligant. It may also be argued that private law should promote or indeed require equality of treatment within 'the family', or as between legitimate and illegitimate children, or as between the standard of living of different members of the family. Technical problems also arise: first, it is necessary to decide how the relevant criterion should be expressed. A subsistence criterion might be expressed by reference to a supplementary benefit formula or by some independent test. A variable criterion could be defined by reference to the "accustomed standard of living" of the alimentary dependant; or to the resources of the liable relative; or to both. Account might require to be taken of such special factors as the ability of an eighteen-year old child to benefit from further education; the question whether the claims of third parties seeking reimbursement of aliment should be taken into account; and the question whether the same measure of support should apply to claims by parents, grandparents or adult children as apply to claims within the nuclear family of husband, wife and minor children.

2.148. In Scotland, as in other countries, the tendency has been for the private law of aliment to move away from the bare support criterion. We suspect that most people would consider that a man's legal obligation to support his family should go beyond the provision of bare subsistence and should bear some relation to the means at his disposal. If an element of variability is once accepted, there is much to be said for a very broadly-stated formula which leaves room for special circumstances and changing social views to be taken into account. We therefore put forward for consideration the proposition that the obligation to aliment should be an obligation to provide such support as is reasonable in the circumstances. (Proposition 30).

We stress again that that this proposition refers to the obligation of aliment in general, whether in the broken or unbroken family, and not only to the situation in which a court is asked to award aliment in money. We deal later, in paragraph 2.198. with the question of what, if any, further guidance should be given to the courts in quantifying aliment.

Section E

Methods of fulfilling alimentary obligations

2.149. General: It is obvious that in the vast majority of families, alimentary obligations are fulfilled by providing support in the family home, - aliment in kind rather than cash. The law of Scotland recognises this method of fulfilling the obligation, for example, by protecting an alimentary obligant who has fulfilled his alimentary obligations in this way. Thus, a third party supplying goods or services to a wife or child who is adequately supported in the home will have no claim for recompense against the husband or father[1]. Again, as mentioned at para. 2.79. above, a parent may be able to set off the cost of providing aliment in the home against a claim by the child for interest on funds belonging to the child but administered by the parent. But by and large the law is not often concerned with this situation. Questions as to the method of providing aliment usually arise when the ordinary arrangements break down and the alimentary creditor has resort to the courts. The general rule is that an alimentary creditor cannot demand support in the alimentary obligant's home,[2] but he can demand aliment in money. There is one apparent exception to the first part of this rule, in that a spouse can obtain a decree of adherence, but such decrees cannot be specifically enforced[3], and the exception is of only theoretical interest. There are more important exceptions to the second part of the rule. In certain situations, the alimentary obligant can meet a claim for aliment in money by offering support in the home.[4] The law varies according to the relationship in question.

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[1] See Fraser, Parent and Child (3rd ed.; 1906) p. 114.

[2] Cf. William Dick v. Sir Andrew Dick (1666) Mor. 409 (father decerned to receive son in house "and to entertain him in meat and cloath, as he did the rest, or else 200 merks, at Sir Andrew's option"); Bain v. Bain (1860) 22 D.1021 (father assigning daughter a separate lodging in a room adjoining his house).

[3] Clive and Wilson, op. cit. p. 425.

[4] We deal in paras. 2.179. to 2.182. below with the question whether a spouse who is cohabiting, and anxious to continue cohabitation, with the other spouse can obtain an award of aliment in money.

2.150. Husband and wife. The question whether a spouse can meet a claim for aliment by offering support in the home is closely bound up with the requirement of willingness to adhere which we have discussed at para. 2.120. above. If willingness to adhere is to continue as a general condition of entitlement to aliment, then clearly a spouse will generally be able to meet a claim for aliment by a genuine and reasonable offer of support in the home. If on the other hand, the requirement of willingness to adhere is abolished, then a separated spouse will always be able to claim aliment in money even if the reason for the breakdown in the marriage is his or her unilateral decision to live apart.

2.151. When alimentary obligant is parent. The traditional rule is that a parent can implement his obligation in the way least burdensome to himself,[5] so that an offer by the parent to take the child into his home is a good defence to an action for aliment,[6] unless there has been such maltreatment of the child by the parent,[7] or possibly by other members of the parent's household,[8] as justifies a separate aliment. In one case, this rule was applied even where the pursuer was a married woman living with her husband: her father's offer to take her into his own home was held to be a good defence to an action for aliment against him.[9] As we have seen, where an illegitimate child claims aliment, the traditional rule was formerly applied

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[5] Bell v. Bell (1890) 17 R.549; Fraser, op. cit. p. 107; Encyclopaedia of the Laws of Scotland, voce Aliment Vol. 1 pp. 19-20; Walker, Principles of Scottish Private Law, (1st ed., 1970) p. 272.

[6] Ibid.; Buchan v. Buchan (1666) Mor. 411; Couper v. Riddell (1872) 9 S.L.R. 510; Smith v. Smith (1885) 13 R.126; A. v. B. (1904) 22 Sh. Ct. Rep. 15; Ramsay v. Ramsay 1945 S.L.T. 30, where the father was ordered to pay aliment only so long as he refused to take his (legitimate) child to live in family with him.

[7] Fraser, loc. cit. supra. Cf. Cairns v. Bellamore (1687) Mor. 410; Morison v. His Father (1716) Mor. 410; Hepburn v. His Father (1734) Mor. 410.

[8] Cf. A. v. B. (1904) 22 Sh. Ct. Rep. 15 (daughter alleged that she could not live in father's house because of her brother's ill-treatment of her).

[9] Wallace v. Goldie (1848) 10 D.1510, described as "exceedingly special" in Reid v. Reid (1897) 6 F.935 at p.937.

in a special way: the father had generally to pay aliment in money until the child was 7 or 10 but thereafter could offer to take the child himself or place it with a third party.[10] This application of the rule gave rise to practical difficulties (such as the difficulty of deciding whether the father had adequately communicated a firm and reasonable offer to the mother) and to a great deal of litigation, as well as being objectionable on the grounds that it appeared to treat the interests of the child and the feelings of the mother as secondary considerations. Eventually, the Illegitimate Children (Scotland) Act 1930 gave the court power to make custody orders "in any action for aliment for an illegitimate child" and provided further that:

> "The father of an illegitimate child shall not be entitled to meet a claim for aliment by the mother of such child by an offer to assume custody of such child and his liability for aliment shall not be affected by such offer."[11]

2.152. Although the courts have sometimes suggested that the traditional rule on the method of providing aliment had nothing to do with custody[12], the two questions are in fact closely interrelated. Indeed, one of the chief defects of the traditional formulation is that it does not take custody into account. It seems to us that a parent who has been deprived of custody by a court should not be able to offer to fulfil his alimentary obligation by taking the child into his home. On the other hand, a parent who is entitled to custody normally should, we think, be able to meet a claim for aliment by making such an offer. If there is no question of custody (as, for example, in the case of a student of 19 claiming aliment), it is perhaps debateable whether a parent should be able to meet a claim for

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[10] See e.g. Corrie v. Adair (1860) 22 D.897; Moncrieff v. Langlands (1900) 2 F.1111; Macdonald v. Denoon 1929 S.C.172.

[11] S.2. Although subsection 2 of this section is limited to a father's offer in answer to a claim by the mother (and not e.g. the grandmother, as in Brown v. Ferguson 1912 S.C.22) the power in subsection 1 to deal with custody "in any action for aliment for an illegitimate child" could cover such other situations. Cf. Hepburn v. Williamson (1933) 49 Sh. Ct. Rep. 37.

[12] See Corrie v. Adair (1860) 22 D.897; Couper v. Riddell (1872) 9 S.L.R.510; Ramsay v. Ramsay 1945 S.L.T. 30.

aliment by offering support in the home. The traditional rule makes no distinction on the basis of age and the present law is that a parent can normally defeat a claim to aliment by his adult child by offering support in the home, perhaps, as we have seen (para. 2.151. above), even if the child is married and living with his or her spouse.[13] It is arguable that, at the least, this rule should be qualified by requiring the parent's offer to be genuine and reasonable in the circumstances. Reasonableness would be a matter for the court in each case. It would be open to the court to hold that an offer to take a married child into the home, thus breaking up the new family, was not reasonable, and similarly with regard to an offer which would require the child to give up his education or training, such as an offer to a student by a parent out of reach of a university town. However, many people might argue that the law should go further and should recognise that an adult has a right to an independent life.[14] On this view the parent's right to meet his obligation might be confined to minor unmarried children to whose custody he is entitled. The potential unreasonableness of this solution in the case, for example, of a parent living in a university town who objected to enabling his student son or daughter to live in a separate flat, would be mitigated by the flexibility of the rule we have suggested on the measure of support. A court would have ample power to

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[13] See Wallace v. Goldie (1848) 10 D.1510; Smith v. Smith (1885) 13 R.126; A. v. B. (1904) 22 Sh. Ct. Rep. 15.

[14] Cf. the unsuccessful argument for the unmarried sister in Maxwell v. Maxwell (1711) Mor. 423 that "She being now sui juris, cannot be confined to a particular place, but has the choice where she thinks fit to live"; the finding in Moncrieff v. Fairholm (1736) Mor. 454 that it was "not a sufficient implement of the obligation [of a stepfather, under a marriage contract] that the defender offered to aliment her in his own house with her mother as was done in bygone years;" and the decision in Barry's Trs. v. Barry (1888) 15 R.496 that a stepmother discharged her obligation under a settlement to aliment her stepdaughter by an offer to maintain her in her own home and was not bound to support her in a nunnery. Even a minor above the age of pupillarity has freedom to choose his own residence if there is no question of parental authority. See e.g. Graham v. Graham (1780) Mor. 8934 (father dead); Harvey v. Harvey (1860) 22 D.1198 (loss of patria potestas); Hardie v. Leith (1878) 6 R.115 (illegitimate minor "can live where she pleases, and her mother cannot control her movements").

ensure, if it thought fit, that the parent did not lose financially by the child's option to live apart.

2.153. Where alimentary obligant is ascendant other than parent. The traditional rule considered above applies to grandparents and other ascendants of legitimate children as it applies to their parents. Thus a grandparent can normally meet a claim for aliment by offering to take his grandchild into his home.[15] The effect of applying this rule where a mother is claiming aliment for her children from their paternal grandfather is that she may have to give up her children or forego aliment for them.[16] In proposition 8, we have already tentatively suggested the abolition of the alimentary relationship between grandparent and grandchild and between remoter relatives in the direct line: see para. 3.40. above. If this is not generally acceptable, we would suggest that the rule on offers of support in the home should be abolished except in cases where custody has actually been awarded to the grandparent or other ascendant. It seems to us to be open to the same objections as the rule which formerly enabled fathers of illegitimate children to offer to take them over when they reached 7 or 10 years of age.

2.154. Where alimentary obligant is descendant. The general rule is that a person cannot meet a claim for aliment by his parent or other ascendant by an offer to provide support in his home.[17] This is not, however, an absolute rule and such an offer may be accepted as a good defence to an action for aliment if the alimentary obligant cannot afford to pay aliment in money.[18]

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[15] See Bell v. Bell (1890) 17 R.549. Such an offer was not a defence to a claim under the Act of 1491. See Finnie v. Oliphant (1631) Mor. 406; Heir of Kirkland v. His Grandmother (1685) Mor. 403, 406.

[16] Cf. McKissock v. McKissock (1817) Hume 6; Pagan v. Pagan (1838) 16 S. 399; Bell v. Bell (1890) 17 R.549; Bell v. Bell (1895) 2 S.L.T. 598.

[17] Fraser, Parent and Child, (3rd ed. 1906) 110; Encyclopaedia of the Laws of Scotland voce Aliment Vol. ii, p. 294. In Buie v. Stiven (1863) 2 M.208 it was held that the parish had no claim against a man who had offered to support his grandmother in his home, even although she had rejected the offer!

[18] Ibid. Cf. Jackson v. Jackson (1825) 3 S.610; 4 S. 186; Whyte v. Whyte (1829) 7 S. 567.

2.155. Comparative survey. In France, the Civil Code assumes that, in case of dispute, the normal method of providing aliment will be by means of a monetary allowance but provides (a) that if the alimentary debtor cannot pay an allowance the court can allow him to provide support in the home[19], and (b) that the court may decide whether a parent who offers to support and bring up his child in his home should be excused from paying an alimentary allowance[20]. The court seems to enjoy an unfettered discretion. In West Germany, the B.G.B. provides that aliment is normally to be paid by means of a monetary allowance, but the debtor can ask to be allowed to provide support in some other form if there are particular grounds for this.[21] There is also special provision for parents. The parents of an unmarried child (of whatever age) can decide the way in which aliment is to be provided, but the guardianship court, on the application of the child, can vary the parental decision if there are particular grounds for doing so.[22] In fact the courts appear to have been hesitant in interfering: they have not been prepared, for example, to award a separate aliment, merely to enable a grown up child to escape from parental supervision.[23] It is recognised, however, that there are limits to the parents' freedom. Parental decisions on aliment cannot interfere with custody rights: so a parent deprived of custody cannot fulfil his alimentary obligation by offering to support the child in his home.[24] In West Germany, as in Scotland,[25] it is not unknown for a parent who has been awarded custody but who has been unable to obtain actual delivery of the child, to withhold aliment for the child in money and offer aliment only in the home in an attempt to bring the other parent to heel or at least to avoid providing the means for continued intransigence. The German courts have generally taken the view that such tactics are justifiable only if the child is in a position to exercise and follow its own free will: a parental decision which de facto means that aliment will not be provided in any form is otherwise unacceptable and ineffective.[26] In Italy, the Civil Code provides that an alimentary obligant can choose whether to pay an alimentary allowance in money or to provide support in his home, but this is subject to the control of the court which can "according to the circumstances, determine the manner in which support is to be furnished."[27]

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[19] Cf. art. 210.

[20] Art. 211. This does not apply to grandparents. Trib. civ. du Havre, 27 Janv. 1921, D.P. 1922. 2.28.

[21] Art. 1612 (1).

[22] Art. 1612 (2).

[23] Gernhuber, Familienrecht, p.446.

[24] Ibid. p. 445.

[25] Ibid. p. 446, Cf. the situation in Cardross v. Buchan (1842) 5 D.343.

[26] Gernhuber, op. cit., p.446.

[27] Art. 443.

2.156. Tentative conclusion: The dependant's right to choose his own residence is arguably more important than the obligant's right to choose to fulfil his alimentary obligations in the way least burdensome to himself. On this view, respect for the dependant's personal liberty, should predominate so that, in case of dispute, aliment should as a general rule be provided in money. The next problem is whether any exceptions are needed. First, if the alimentary debtor is too poor to pay an allowance, the court will simply refuse decree for aliment, so an exception is not needed here. It will then be for the alimentary debtor to decide whether to offer support in the home. We do not think that this should be forced on him. Second, should parents (or ascendants) be able to choose support in the home rather than cash? If the parents have a right to custody, then they should clearly be able to choose to offer support in the home rather than to pay aliment. If, however, the child is over 16,[27A] then as a rule he cannot be subject to a custody order[27B] and can choose the place of his residence. It may for example be reasonable that a mature apprentice almost 18 years of age should be able to live away from home and yet obtain aliment, but that an immature school pupil just turned 16 should not. Much may turn on the circumstances of particular cases. Third, there may be cases where the provision of support in the home has great advantages for the alimentary debtor (as when he has plenty of spare accommodation in his house) and no serious disadvantages for the alimentary creditor. Such an exception could hardly operate as between husband and wife; a wife's right to a separate aliment should not depend on the size of her husband's house. Whether it would impinge too much on personal liberty in other cases is open to debate. To focus discussion on this difficult subject, we suggest that in the event of dispute as to the method of fulfilling the alimentary obligation, aliment should be provided by means of a monetary allowance: an offer to provide support in the home should be a defence to an action for aliment only where (a) the aliment is being claimed for a minor unmarried child and the alimentary obligant is entitled to custody of the child; or (b) the alimentary obligant is a parent (or remoter ascendant) of the dependant and the court is satisfied that the offer is reasonable in all the circumstances of the case. (Proposition 31). This would apply both to legitimate and illegitimate children and would enable section 2(2) of the Illegitimate Children (Scotland) Act 1930 to be repealed as unnecessary.

[27A] See Custody of Children (Scotland) Act 1939.

[27B] There is, however, a statutory exception in the case of illegitimate minors (see Affiliation Orders Act 1952, s.3), and there are older cases supporting the view (but not conclusively) that parental authority extends to minors as well as pupils at common law: see Wilson and Clive, op. cit., p. 569, footnote 30; Savage v. Jardine (1893) 9 Sh. Ct. Rep. 139.

Section F

Agreements as to aliment

2.157. Husband and wife. Under Scots law, a separation agreement is not invalid, but it is revocable by either party if the revoking spouse is willing to adhere and has not given the other spouse just cause for living apart.[1] As we have seen, a spouse separated by consent has no right to aliment apart from any right conferred by the voluntary obligation of the other spouse. There is no statutory power to vary agreements as to aliment and, although there are suggestions in several cases that the courts have such power, the law is unclear and unsatisfactory.[2] In practice, if a wife seeks more aliment than she is entitled to under a separation agreement, she will either revoke the agreement and call on her husband to adhere (whereupon she can seek a decree of adherence and aliment or interim aliment) or, if he has been guilty of cruelty or adultery, raise an action of separation and aliment or interim aliment. Any provision in the agreement purporting to exclude such recourse to the courts would be contrary to public policy and ineffective.[3] A husband who wishes to have his payments of aliment varied downwards, and who has not protected himself by a suitable formula in the agreement, must revoke the agreement and call upon his wife to adhere.[4] If she refuses she will be in desertion and will lose all right to aliment. In theory, the present law favours reconciliation by enabling either party to call for a resumption of married life at any time. In practice it encourages tactical offers to adhere designed solely to vary the financial position. If the requirement of willingness to adhere were abolished, or even if a spouse separated by consent were recognised as entitled to aliment

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[1] See Clive and Wilson, op. cit., pp. 407-411.

[2] Ibid. pp. 411-414.

[3] Cf. Hyman v. Hyman [1929] A.C. 601.

[4] See Leggie v. Leggie (1949) 65 Sh. Ct. Rep. 76.) In Campbell v. Campbell 1923 S.L.T. 670 the agreement provided that the husband should "be entitled to pay a less rate of aliment should circumstances warrant such in future". The Lord Ordinary said obiter that "an application for variation under the contract could be entertained and disposed of by the court in accordance with its practice in dealing with an application for variation of a judicial award." But there is no clear authority for this expression of opinion.

by law ,[5] the situation would, in one respect, be improved. A wife seeking more aliment than she had been conceded under the separation agreement could simply raise an action for aliment without going through the charade of making offers to adhere in the hope and expectation that they would be refused. On the other hand, a husband seeking a variation downwards would be in no better position than under the present law. For this reason it is arguable that the doubts in the present law should be removed and that the courts should be given express statutory power to vary the alimentary provisions in separation agreements.

2.158. Agreements as to aliment between separated spouses often do not contain any express provision as to separation but simply regulate aliment. The same principles apply, however. One spouse, if he or she has not given the other just cause for non-adherence, can call on the other to adhere and thereby place the other in desertion. Alternatively, if grounds exist, he or she can raise an action for separation and aliment or interim aliment. In short, there is no clear-cut distinction in Scots law between "separation agreements" and "maintenance agreements".[6] It is the state of consensual separation which is important, not whether it is referred to expressly or is merely implicit in a particular document.

2.159. Comparative survey: In England, following recommendations of the Morton Commission[7], the courts were given statutory powers to vary maintenance agreements.[8] These powers were found to be unduly restrictive in certain respects and have subsequently been widened.[9] The powers were introduced and subsequently widened mainly because it was thought to be unjust that a wife should be able to apply for increased aliment notwithstanding the terms of an agreement, while the husband could not apply for the aliment to be reduced.[10] In France, the traditional view is that the spouses are bound to cohabit and any private agreement for separation,

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[5] See para. 2.125. above.

[6] Cf. the Report of the Royal Commission on Marriage and Divorce 1951-55 (Cmd. 9678) pp. 192-194 where this distinction is drawn for English law.

[7] Cmd. 9678 paras. 719-733 (1956).

[8] Maintenance Agreements Act 1957.

[9] Matrimonial Proceedings and Property Act 1970. Ss. 13-15; Matrimonial Causes Act 1973, ss. 34-36; implementing Law Com. No 25 paras. 94-96 (1969).

[10] See Cmd. 9678, para. 726; Law Com. No 25, paras. 94 and 95.

and any ancillary provisions on aliment, are invalid.[11] This view has not gone unchallenged and it has been argued that agreements as to aliment between separated spouses are valid, although either spouse can put an end to them by offering to adhere and placing the other in desertion.[12] It is agreed on all hands, however, that the courts have power to vary the aliment agreed upon.[13] In West Germany, the law distinguishes between alimentary agreements which merely regulate a legally justified separation (where at least one of the spouses has the right to live apart), and alimentary agreements dealing with a purely consensual separation which is not regarded as legally justified. The former are valid: the latter are inconsistent with the duties to adhere and to provide support in the home, and are therefore invalid.[14] Even if the agreement is valid and only regulates the legal obligation of aliment, variation can be demanded on a change of circumstances.[15] Thus, English law, French law and West German law, although differing as to the validity of alimentary agreements between spouses, all recognise that they do not fetter the courts' freedom to fix an appropriate aliment. When the agreements are invalid they can be ignored: when they are valid they are variable.

2.160. Parent and child. In Scotland, three types of agreement on aliment between parent and child have come before the courts. First, there are agreements which merely recognise, without quantifying, the pre-existing legal obligation. Early marriage contracts, for example, would often provide for the payment of suitable, but unspecified, aliment for daughters until they came into their portion at a specified age.[16] And the fathers of illegitimate children sometimes acknowledge paternity and agree in general terms to provide aliment.[17] Agreements of this first kind give rise to little difficulty. Aliment still

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[11] See Maury, La séparation de fait entre époux, 1965 R.T. 515. This approach can be found in early Scottish and English cases, but it has long been abandoned. See Clive and Wilson, op. cit., p.407; Bromley, Family Law, p.135 (4th ed. 1971).

[12] Savatier, Les conventions de séparation amiable entre époux, 1931 R.T. 535 at 544. The similarity between this solution and the Scottish solution is remarkable.

[13] Savatier, op. cit. and in Encyclopedia Dalloz voce Aliments No 212 (1951); Planiol et Ripert, Traite Pratique de Droit Civil Français, Tome II (Rouast) No 41 (2nd ed. 1952); Nouveau Repertoire Dalloz voce Aliments, Nos. 34 and 43 (1962); Sinay, Les conventions sur les pensions alimentaires, 1954 R.T. 228 at 228 and 235.

[14] Gernhuber, op. cit. pp. 185-186; Beitzke, Familienrecht, (1968) p.66.

[15] Beitzke, loc. cit.

[16] See e.g. Daughters of Balmerino (1664) 1 Stair's Decisions 225; Turnbull v. Turnbull (1724) Mor. 452; Falconer v. Creditors (1736) Mor. 454.

[17] See e.g. Lamb v. Paterson (1842) 5 D.248; F.T. v. B. (1911) 28 Sh. Ct. Rep. 199.

depends on the needs and resources of the parties, and can be quantified by a court at the appropriate level. The mere expression of the legal obligation in a contractual form gives no higher rights against creditors.[18] Second, there are agreements which quantify the legal obligation. A husband, for example, agrees in a separation agreement, or in a joint minute in a divorce action,[19] to pay aliment of so many pounds a week for the child of the marriage: or a father agrees to pay his adult son an allowance of so much a month. Such agreements do not prevent more aliment being claimed by, or for, the child.[20] On the other hand, if they are binding legal agreements at all,[21] it is not clear that the debtor could have them varied or cut down on a change of circumstances[22]. It is arguable that, in fairness to both sides, they should be variable in either direction. Third, there are agreements which attempt to discharge future claims. Such attempts are ineffectual. Sometimes, particularly in relation to aliment for an illegitimate child, the courts have reached this result by saying that an agreement to which the child is not a party cannot affect his future claims to aliment.[23] In other cases, they have reached it on the ground that agreements for the discharge of future aliment are

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[18] Falconer v. Creditors (1736) Mor. 454.

[19] Cf. Lothian v. Lothian 1965 S.L.T. 368; Rule of Court 167g

[20] Cf. Moncrieff v. Moncrieff (1735) 1 Pat. 162 (son discontented with his allowance); Caithness v. Caithness (1757) 1 Pat. 654 (wife discontented with agreed aliment). In Scott v. Scott (1894) 21 R.853 a wife had a legitimate child shortly after a separation agreement which made generous provision for her. In an application for aliment for the child it was held that this situation must have been in contemplation at the time of the agreement and that no award was called for.

[21] An agreement by a father to give his son an allowance would often not be intended to create, and hence would not create, a binding legal obligation. See Wick Harbour Trs. v. The Admiralty (1921) 2 S.L.T. 109 per Lord Sands at 110-111.

[22] Cf. Gray v. Marquis of Montrose (1688) Mor. 6398 where a sum was held to be due under an alimentary bond by the Marquis in favour of his sister even although the sister had since been given a pension by the King and was no longer in need of aliment.

[23] See Pott v. Pott (1833) 12 S.183; A.B. v. C.D. (1842) 4 D.670; A.B. v. C.D. (1900) 2 F.610; Mair v. Jackson (1939) 55 Sh. Ct. Rep.263.

imply void, because the obligation of aliment is perpetual and ndischargable.[24] The present law seems to give rise to little ifficulty or dissatisfaction. We think, however, that the ack of a clear rule as to the variability of agreements on liment for children could give rise to difficulty.[25] In articular, if provisions in separation agreements between usband and wife are to be variable so far as a spouse's aliment s concerned, we think that they should also be variable so far s aliment for the children is concerned. Moreover, agreements n the custody of children are never binding on the court. They ill often be combined with agreements on aliment, so that, for his reason too, it is desirable that the variability of the atter be placed beyond doubt.

.161. Other cases. Although there is a lack of Scottish uthority, the same principles would presumably apply to greements on aliment between other relatives, such as randparent and grandchild, as apply to agreements on aliment etween parent and child. Alimentary agreements between arties who are not linked by any alimentary relationship are, owever, in a different position. The creditor has no rights part from the agreement and cannot therefore obtain the effects f a variation upwards by simply raising an action for aliment. onversely, the debtor cannot obtain a reduction of the greement, or a variation of the aliment downwards, on a change f circumstances[26]. The position is balanced. The parties are trangers to each other so far as the law of aliment is oncerned, and they should provide in their agreement for such ontingencies as an access of wealth to the creditor.

.162. Tentative conclusion. A decree for aliment is of its ature variable.[27] We think that the same principle should

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[4]See Strathmore v. Strathmore's Trs. (1825) 1 W. & S. 402 at 405; Beaton v. Beaton's Trs. 1935 S.C. 187.

[5]Such agreements are variable in French and German law. See notes 13 and 15 above.

[6]Cf. Gray v. Marquis of Montrose (1688) Mor. 6398.

[7]See Macdonald v. Macdonald (1881) 8 R.985 per L.J.C. Inglis ("Every decree for aliment is only granted in hoc statu"); Melvin v. Melvin 1918, 2 S.L.T. 209; Donnelly v. Donnelly 1959 S.C.97 at 102.

apply, if it does not do so already, to agreements which merely regulate or quantify the alimentary obligation between the parties to a legally recognised alimentary relationship. We therefore suggest that the courts should be given express power to vary, on a material change of circumstances, provisions for aliment in separation agreements or alimentary agreements or bonds. (Proposition 32). We envisage that the term "the courts" would include both the Court of Session and the sheriff courts and that the term "alimentary agreements" would be defined so as to include any agreement purporting to regulate or quantify an existing alimentary obligation. It would thus cover agreements between parent and child, agreements between two parents, and agreements between a parent and a third party, as to the parent's obligation to aliment the child. One incidental advantage of a provision on these lines is that it would provide the courts with an easy way of resolving some of the problems which can arise under the present law as to the effect of subsequent judicial proceedings on conventional provisions for aliment.[28] If, for example, there is doubt as to whether the conventional provisions are intended to survive or be superseded by, say, an action for separation and aliment, then the court could use its power of variation to clarify the situation. Throughout the foregoing discussion we have referred to voluntary agreements but similar considerations apply to bonds or other unilateral obligations for payment of aliment and Proposition 29 takes account of this.

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[28]See Clive and Wilson, op. cit. pp. 414-418.

Section G

Remedies

Introductory

2.163. In this Section, we consider certain technical problems associated with the remedies which the courts may grant in direct actions or applications concluding for continuing aliment. These are sometimes called actions for future aliment to distinguish them from actions for reimbursement of aliment which has been provided in the past[1] and from actions to recover arrears of aliment payable under alimentary agreements.[2]

Actions by alimentary creditor for aliment for himself

Husband and wife

2.164. Three actions are available, depending on the circumstances, to a spouse who is entitled to aliment from the other party to the marriage - (1) an action for separation and aliment; (2) an action for adherence and aliment; and (3) an action for interim aliment, without any conclusion or crave for separation or adherence. The use of the term "interim" aliment to denote aliment unattached to a decree of separation or adherence is due to jurisdictional demarcations, now of only historical interest.[3] The term appears in section 5(2) of the Sheriff Courts (Scotland) Act 1907, as amended in 1913, which gives the sheriff courts jurisdiction in:

> "actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment or interim aliment ..."[4]

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[1] See paras. 2.78. to 2.87. above. Many actions of affiliation and aliment have actually been, wholly or partly, actions for recovery of past aliment. See e.g. Finlayson v. Gown 7 July 1809 F.C. - action "for aliment, in time past and future, of a bastard child."

[2] See paras. 2.157. to 2.162. above.

[3] See Clive and Wilson, op. cit. pp. 186-190.

[4] Sheriff Courts (Scotland) Act 1907, s.5(2) as amended in 1913; see, moreover, Divorce (Scotland) Act 1964, s.6 where the term "action of interim aliment" also appears.

Aliment which is attached to a decree of separation or adherence is known as "permanent aliment"[5].

2.165. Abolition of distinction between 'interim' and 'permanent' aliment: The distinction between 'interim' and 'permanent' aliment is open to two main objections, first, that it is unnecessary, and, second, that it is undesirable. As regards the first objection, all awards of aliment between husband and wife are interim in the sense that they are made "in hoc statu", that is, for so long as the existing state of affairs continues without a material change of circumstances. The marriage may end by death or divorce; the parties may resume cohabitation; the alimentary obligant may fall on hard times; the alimentary creditor may inherit a fortune: in short, the award is open to variation or termination for many different reasons.[6] Actions for interim aliment "until the rights of the parties should be fixed by a competent court", which is one of the forms of decree used in the sheriff court[7], seem at first sight to have a distinctively interim character, but in fact the aliment awarded in such an action may be just as permanent as aliment awarded in any other action. There is no time limit and there is no compulsion on the parties to raise a consistorial action in order to have their "rights fixed".[8] The interim award may last throughout their joint lives. An action for aliment "so long as the defender shall refuse to receive and entertain the pursuer", which is another form of decree for interim aliment,[9] may also result in an award which can continue indefinitely and which, in reality, is no less permanent than an award of "permanent aliment" in an action of adherence and aliment. The Divorce (Scotland) Act 1964 added a third type of action for interim aliment. It provided that it should be:

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[5]See Jack v. Jack 1962 S.C.24.

[6]Cf. Donnelly v. Donnelly 1959 S.C. 97 per Lord Patrick at p. 105.

[7]Ibid. at pp. 104-105.

[8]Clive and Wilson, op. cit. p. 189.

[9]Donnelly v. Donnelly 1959 S.C. 97.

> "competent for the court in an action of interim aliment to grant decree of aliment where it is satisfied that the pursuer is with just cause living in separation from the defender by reason of the desertion or other conduct of the defender."[10]

It is now possible, therefore, to have an action for interim aliment "on the ground that the pursuer is with just cause living apart from the defender".[11] Clearly aliment awarded in such an action is no less permanent than aliment awarded in an action of separation and aliment. To sum up, all awards of aliment between spouses are liable to variation and termination on the happening of certain events. It is unnecessary to distinguish between so-called "interim" and so-called "permanent" aliment.

2.166. The second objection to the distinction between "interim" and "permanent" aliment is that it is undesirable because (a) it is extremely confusing, and (b) it can cause injustice. Whereas the expression "interim aliment" is comprehensible when used to describe aliment pendente lite (i.e. aliment payable during the progress of an action), it is very confusing to give the expression the second and quite different meaning of a particular class of action in the sheriff court. Moreover, the distinction causes injustice because it may in certain circumstances leave an alimentary creditor without a remedy. It was held in Jack v. Jack[12] that an action for permanent aliment which did not also conclude for separation or adherence was incompetent. The case of Jack was concerned with a claim for aliment by a wife who was unwilling to adhere, who had no grounds for judicial separation, but who claimed to have just cause, falling short of such grounds, for living apart. Now, as a result of section 6 of the Divorce (Scotland) Act 1964 (quoted in the previous paragraph), a wife in this situation can raise an action for interim aliment. There are still situations, however, where the decision in

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[10] S.6, passed to counteract the effects of Jack v. Jack 1962 S.C. 24.

[11] Cf. Stirling v. Stirling 1971 S.L.T. 322.

[12] 1962 S.C. 24.

Jack continues to have unfortunate results. In one unreported case,[13] which has come to our attention, a wife obtained a decree of separation in the sheriff court but did not crave any aliment.[14] Later, she wished to claim aliment and raised an action for aliment alone, to continue during the parties' joint lives. The sheriff and sheriff-principal categorised this as an action for permanent aliment and held, following Jack, that an action for permanent aliment which did not also conclude for separation or adherence was incompetent. The wife was therefore left without a remedy, although entitled to live apart and, on the face of it, entitled to aliment. Unless all actions which are not competent actions for permanent aliment are categorised as actions for interim aliment, there is clearly a danger that pursuers will find themselves with a right, but without an effective remedy. Abolition of the distinction would remove this danger. We therefore suggest that the distinction between actions for interim aliment and actions for permanent aliment between husband and wife should be abolished: it should be competent for a spouse who is entitled to aliment to raise an action for aliment, whether the action would be characterised by the present law as an action for permanent aliment or an action for interim aliment. (Proposition 33). We deal later (in Part H) with some of the procedural corollaries of this proposition, such as the form of the conclusion and the terms of the decree. It is interesting to note, however, that the Rules of the Court of Session already make no distinction between actions for permanent aliment and actions for interim aliment but refer simply to "actions of aliment only between husband and wife."[15]

2.167. Amendment of section 5 of Sheriff Courts (Scotland) Act 1907. Section 5 of the Sheriff Courts (Scotland) Act 1907, as amended by the Sheriff Courts (Scotland) Act 1913, gives the sheriff courts jurisdiction in

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[13] McLeish v. McLeish, Edinburgh Sheriff Court (1975).

[14] This was of doubtful competence. See Docherty v. Docherty 1959 S.L.T. (Sh. Ct.) 29.

[15] R.C. 154.

> "actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment or interim aliment."

This has two unfortunate consequences. First, it means that an action between spouses for aliment alone is incompetent unless it can be characterised as an action for interim aliment.[16] If, for example, a wife had obtained a decree of separation in the Court of Session but had not concluded for aliment because her means were sufficient, she might find difficulty in raising an action for aliment later in the sheriff courts when her circumstances changed. Such an action might be characterised as an action for permanent aliment[17] and therefore as incompetent in the sheriff court. Our suggestion[18] that the distinction between permanent and interim aliment should be abolished would remedy this particular defect and would entail a consequential amendment of section 5. The second unfortunate result of section 5 in its present form is to make it incompetent to raise an action for separation or adherence alone, without a crave for aliment, in the sheriff court.[19] We can see no reason for this restriction, which can be easily avoided by the insertion of a crave for nominal aliment and which serves only as a trap for the unwary. We accordingly suggest that **if actions of separation and actions of adherence are retained in our law, then section 5 of the Sheriff Courts (Scotland) Act 1907 should be amended to allow such actions to be raised in the sheriff court even if not accompanied by a crave for aliment.** (Proposition 34).

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[16] It might even be argued that the present wording of the section made an action by a wife against her husband for aliment for a child incompetent in the sheriff court. Although the alimentary obligation founded on would be between parent and child, the actual action would be an action "between husband and wife".

[17] Cf. the unreported case of McLeish v. McLeish referred to in note 13 above.

[18] See previous paragraph.

[19] So held in Docherty v. Docherty 1959 S.L.T. (Sh. Ct.) 29.

Other relatives

2.168. Where the alimentary relationship in question is between other parties than spouses, the alimentary creditor simply raises an action for aliment. Since 1830, such actions have been competent in the sheriff courts as well as in the Court of Session.[20] It is worth noting that the action for aliment is available not only to those of full age (for example, a parent against his child, or an adult child, whether legitimate or illegitimate,[21] against his parent) but also to minors.[22] Thus a child of 16, whether legitimate or illegitimate, can raise an action for aliment against his parent, a curator ad litem being appointed if necessary.[23] Indeed, in many of the older cases pupil children feature as pursuers along with their widowed mother in actions for aliment against, for example, a grandfather or the eldest son as heir.[24] Nowadays the mother alone would sue in such circumstances, either as the child's tutrix or in her own name for aliment for the child.[25] It is still possible, however, for a pupil child to raise an action (or, more realistically, to have the raising of an action instructed for him by a well-meaning friend or relative) if he has no tutor or if his tutor has an adverse interest. The

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[20] Court of Session Act 1830, s.32, superseded by the Sheriff Courts (Scotland) Act 1907 s.5(as amended by Sheriff Courts (Scotland) Act 1913) and repealed by those Acts.

[21] Cf. Archibald v. Wilkin (1911) 27 Sh. Ct. Rep. 313 (held that illegitimate child had no claim because had been self-supporting for over 20 years).

[22] In the narrow sense of boys between 14 and 18 and girls between 12 and 18.

[23] See e.g. Couper v. Riddell (1872)9 S.L.R. 510 (legitimate girl of 14 v. mother and her second husband); A.B. v. C.D. (1900) 2 F.610 (illegitimate girl of 12 v. deceased father's executor); S. v. P's Trs. 1941 S.L.T. 35 (illegitimate boy of 17 v. deceased father's trustees); McKenzie v. Glendinning (1899) 15 Sh. Ct. Rep. 224 (illegitimate girl of 16 v. father); Mizel v. Mizel 1970 S.L.T. (Sh. Ct.) 50. Under section 10 of the Guardianship Act 1973 both parents of a legitimate child are tutors and curators, either being able to act without the other. This has opened up the possibility of e.g. an action by the minor child with consent of the mother as curatrix against the father.

[24] See e.g. De Courcy v. Agnew (1806) Mor. App. voce Aliment p.12; McKissock v. McKissock (1817) Hume 6; McConochy v. McConochy (1830) 8 S.604; Pagan v. Pagan (1838) 16 S.399.

[25] The Guardianship of Infants Act 1886, s.2 made the mother of a legitimate child its tutor on the father's death. See now the Guardianship of Infants Act 1925 s.4. For actions by the mother, as mother, for aliment for the child see para. below.

action is raised in the pupil's own name and once it is in court the court appoints a curator ad litem.[26] This procedure has been utilised in actions of aliment by both legitimate and illegitimate pupil children.[27]

Actions to obtain future aliment for a child

2.169. Actions at common law. Although, as we have just seen, actions can in certain circumstances be raised in the name of pupil children, usually a claim for aliment for a pupil child must be litigated by someone of full age and capacity. The general rule, of course, is that a pupil's tutor acts for him in litigation[28]. But many actions for aliment for children are raised in respect of illegitimate children, who have no tutors (unless a tutor-dative is appointed) so that this solution will generally involve the inconvenience and expense of a special appointment of a tutor or curator ad litem. If the mother is available in such cases and is interested in recovering aliment for the child, it is obviously more convenient to allow her to make the claim, without the need for any special appointment. This in fact is what the law has done in the case of the illegitimate child. Although there have been a few reported cases in which the child has raised an action for aliment against the father, in the overwhelming majority of the cases, it is the mother who brings an action of affiliation and aliment. Although she is not the child's tutrix, it never seems to have been doubted that she is a proper person to

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[26] See Ward v. Walker 1920 S.C.80; Carrigan v. Cleland (1907) 15 S.L.T.543. In some cases the term tutor ad litem is used in this context.

[27] Jameson v. Jameson (1845) 8 D.86 (legitimate children v. grandfather); Ketchen v. Ketchen (1871) 9 M.690 (legitimate child v. divorced father); Beattie v. McLean (1894) 10 Sh. Ct. Rep. 217 (illegitimate child v. father: mother alive); Campbell v. Money (1896) 12 Sh. Ct. Rep. 173 (illegitimate child v. father: mother dead); Waters v. Buik (1897) 14 Sh. Ct. Rep. 41 and 140 (same); Richardson v. Richardson (1932) 48 Sh. Ct. Rep. 124 (legitimate child v. father).

[28] For alimentary actions by a tutor see e.g. Couper v. Riddell (1872) 9 S.L.R. 510 (tutor dative); Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649 (widow suing as tutrix and as individual); and see the cases in the previous footnote where a tutor or curator ad litem was appointed to the child after the action was raised.

sue.[29] (We deal at para. 2.171 below with the nature of her claim.) The same result was reached by the courts in the case of actions by the mother of a legitimate child to recover aliment for it. Such actions have been raised against the father,[30] and against other alimentary debtors such as a grandfather[31]. The mother has also been allowed to claim aliment for the child in proceedings against trustees holding the child's own property.[32] Since the coming into force of section 10 of the Guardianship Act 1973, the mother of a legitimate child is "tutor and curator" (sic) along with the father either being able to act without the other. She can, therefore, raise an action for aliment for the child as tutrix. The point we wish to underline, however, is that at common law, quite apart from any statute, it was and is recognised that the mother, who is actually looking after the child, can claim aliment for it. Similarly, although examples are less common, it has been recognised that a father who has the expense of supporting his child can claim aliment, including future aliment, for the child from trustees holding the child's property, the father here claiming as father or custodier and not as tutor.[33] Again, the father of an illegitimate child who

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[29] Numerous examples could be given, but the most explicit recognition of the position is in McKenzie v. Glendinning (1899) 15 Sh. Ct. Rep. 224 per Sheriff Lees. "No doubt, while the girl is in pupillarity, the mother is, by long usage, allowed to sue in her own name on the girl's behalf, just as a tutor would do, but without describing herself as tutor. Such a custom in the case of an illegitimate child is certainly convenient, for it has no relations to look after its rights, and it is sanctioned by inveterate usage."

[30] See e.g. Arthur v. Gourlay (1769) 2 Pat. 184; Dunn v. Mathews (1842) 4 D.454 (action against divorced husband for aliment for child); Hay v. Hay (1882) 9 R.667 (action against separated husband for aliment for child); Foxwell v. Robertson (1900) 2 F.932; Ramsay v. Ramsay 1945 S.L.T.30.

[31] See e.g. Tait v. White (1802) Mor. App. voce Aliment p.4 (grandfather) Spalding v. Spalding's Trs. (1874) 2 R.237 (father's trustees); Bell v. Bell (1890) 17 R.549 (grandfather); Bell v. Bell 1895, 2 S.L.T. 598 (grandfather); Reid v. Reid (1904) 6 F.935 (grandfather).

[32] Macewan v. Munnoch (1836) 15 S.302 (action); Marshall v. Gourlay (1836) 15 S. 313; (petition) Grant v. Cameron (1838) 16 S. 652; (1840) 2 D.722 (petition).

[33] See Scott Petr. (1870) 8 S.L.R. 260 (pupil child); Duke of Sutherland Petr. (1901) 3 F.761; (1905) 13 S.L.T. 104 (minor child).

had custody of it and bore the expense of looking after it could probably at common law, in an appropriate case, claim aliment for the child from the mother.[34] In the case of non-relatives, who have supported a child but who "have no standing relation to the [child] which entitles them to assume that they will have continuing duty to aliment", past aliment can be recovered on principles of unjustified enrichment but there can be no claim for future aliment for the child.[35] The formula "no standing relation to the child" leaves open the possibility of an action by, say, a grandparent who had custody of the child but there is no satisfactory authority on this.[36]

2.170. Aliment for a child (cont'd); statutory provisions: Four sets of statutory provisions have supplemented, impliedly confirmed and extended the powers of the courts to award aliment to an adult on behalf of a child. First, one set of provisions confers powers to award "maintenance" for children in connection with actions of divorce, separation, nullity of marriage[37] or (in a special way) adherence. The court has power to make "such provision as to it shall seem just and proper".[38] Normally aliment for children will be made payable to the parent

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[34] Cf. Wilson v. McMinnin (1905) 7 F.538 (twins: father and mother each took one).

[35] See Den v. Lumsden (1891) 19 R.77 at p.78. See also Duncan v. Forbes (1878) 15 S.L.R.371.

[36] Cf. Dobbie v. Gaff (1843) 5 D.1385; Reid v. Robertson (1868) 6 S.L.R.77; Brown v. Ferguson 1912 S.C.22.

[37] Conjugal Rights (Scotland) Amendment Act 1861 s.9; Custody of Children (Scotland) Act 1939 s.1(1) (extending court's powers to children under 16) Matrimonial Proceedings (Children) Act 1958 s.7 (extending court's powers to certain children "accepted as one of the family), s.9 (extending court's powers when action dismissed or when decree of adherence not obeyed), s.14 (extending court's powers to actions for declarator of nullity of marriage). For the powers of the sheriff courts to deal with custody and aliment under the Sheriff Courts (Scotland) Acts 1907 and 1913 see O'Brien v. O'Brien (1957) 73 Sh. Ct. Rep. 129. See also Maintenance Orders Act 1950, s.6.

[38] 1861 Act s.9.

to whom custody is awarded,[39] but it is possible for aliment to be made payable directly to the child, a factor loco tutoris being appointed, if necessary, to administer the aliment and give receipts for it.[40] Second there are the provisions on aliment for illegitimate children which not only contain the implication that the mother will normally be the pursuer in an action of affiliation and aliment[41] but also give the court express power:

> "on the application of any person who is entitled to the custody of an illegitimate child, whether such person is the father or the mother of the child or is a third party, to make an order for payment to the person so entitled to custody, by the father or the mother or by the father and the mother, as the case may be, of such sum in respect of aliment of the child as having regard to the means and position of the father and the mother and the whole circumstances of the case the court may think reasonable."[42]

Third, there are the provisions in the Guardianship of Children (Scotland) Acts 1886 to 1973 which enable "any person (whether or not one of the parents)" who has been awarded custody of a child to be awarded aliment for the child payable by "the parent or either of the parents excluded from having that custody".[43] The Guardianship of Children (Scotland) Acts also contain provisions enabling the court to deal with disputes between joint tutors and, where one of them is a parent, to order the parent to pay to the other tutor a periodical sum "towards the maintenance of the infant."[44] Fourth and finally, there are provisions enabling the court to order a parent to pay contributions towards the maintenance of

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[39] See the form of conclusion in R.C. App. Form 2, No 20 - "for payment by the defender to the pursuer of (specify rate of aliment) as aliment for each child while in the custody of the pursuer and unable to earn a livelihood ...."

[40] See e.g. Mackay v. Mackay 1953 S.L.T. (Notes) 69.

[41] Illegitimate Children (Scotland) Act 1930 ss.1 and 3. Maintenance Orders Act, 1950, s.8.

[42] Illegitimate Children (Scotland) Act 1930 s.1(3).

[43] Guardianship of Infants Act 1886, s.5 as extended by the Guardianship of Infants Act 1925, s.3 and the Administration of Justice Act, 1928, s.16 and as amended by the Guardianship Act 1973, Sch. 4.

[44] Guardianship of Infants Act 1925, ss. 5 and 6 as extended by the Children and Young Persons (Scotland) Act 1932, s.73.

the child in the care of a local authority.[45] All the above statutory provisions relate primarily to children under sixteen years of age[46].

2.171. Aliment for a child (cont'd); nature of the claim: One of the uncertainties in the present law of aliment for children is whether the true creditor is the child or the person who claims aliment for it. The law appears to reflect three views. One is that where the mother claims aliment on behalf of the child she acts as tutrix (in the case of a legitimate child)[47] or as a kind of unofficial tutrix (in the case of an illegitimate child),[48] the child being the real creditor. A second view is that the mother is the creditor and claims for herself.[49] Various justifications for this theory have been put forward. The most satisfactory is, perhaps, that the action is

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[45] Social Work (Scotland) Act 1968 ss. 80 and 81; Guardianship Act 1973, s.11(3).

[46] See Illegitimate Children (Scotland) Act 1930, s.1; Custody of Children (Scotland) Act 1939, s.1(1); Social Work (Scotland) Act 1968 ss.30(1) and 78(1); Guardianship Act 1973, s.13.

[47] Barnes v. Tosh (1913) 29 Sh. Ct. Rep. 340 (mother of legitimate child could not rank as creditor for aliment for child - true beneficiary is child not mother.

[48] See Lindsay v. Thomson (1839) 1 D.434 at 436 "these actions are truly for behoof of the child"). A.B. v. C.D. (1842) 4 D.670 (discharge by mother did not prevent her claiming future aliment for child) Thomson v. Westwood (1842) 4 D.833; Clarkson v. Fleming (1858) 20 D.1224 at 1227 (illegitimate child a creditor of father for aliment); Gibson v. Brodie (1896) 13 Sh. Ct. Rep. 65 (illegitimate child - mother as guardian (sic) entitled to have aliment paid to her, even though child boarded out); McKenzie v. Glendinning (1899) 15 Sh. Ct. Rep. 224 (mother of pupil illegitimate child sues "in her own name on the girl's behalf, just as a tutor would do"). McIntosh v. Nilsson (1935) 51 Sh. Ct. Rep. 136; Mair v. Jackson (1939) 55 Sh. Ct. Rep. 263.

[49] See Hay v. Hay (1882) 9 R.667 (legitimate child); Downs v. Wilson's Tr. (1886) 13 R.1101 (mother of illegitimate child ranked as creditor of bankrupt father re. future aliment for child); Scott v. Scott (1894) 21 R.853 at 857 ("the mother is the proper claimant and proper creditor for the aliment of a child of two years" - legitimate child); Wilson v. McMinnin (1905) 7 F.538 (illegitimate child - Inner House impliedly disapproved of sheriff's view that "the debt sued for is a debt due not to the mother but to the child"); Ramsay v. Ramsay 1945 S.L.T. 30 (legitimate child - "the mother is the proper claimant in a case of this kind and not the child").

a claim for relief, or part relief, in respect of future expenditure which the mother will make on the child's aliment[50] - an exception to the rule that relief can be claimed only in respect of past expenditure[51]. It has, however, been suggested that her claim arises ex contractu in the case of a legitimate child[52] (the contract presumably being the parents' marriage) or ex delicto in the case of an illegitimate child,[53] (the delict presumably being fornication which, of course, is not in itself a delict). These last two explanations have a fictional quality about them which makes it difficult to take them seriously. A third view, which has some force in the case of a claim under some of the statutory provisions considered above, is that neither the mother nor the child is the creditor in the first instance. It is not a matter of rights but a matter of discretion. Application can be made to the court and it is then up to the court to make what order it

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[50] See e.g. Buie v. Stiven (1863) 2 M.208 at 223 (affiliation and aliment); Young v. Elliot (1904) 21 Sh. Ct. Rep. 12 (mother of illegitimate child can claim relief not only for past aliment but also "for the aliment which she may disburse in the future, and to which it is the father's legal obligation to contribute"). Cf. Duke of Sutherland (1905) 13 S.L.T. 104 (father's claim against son's trustees re. sums paid and to be paid for aliment and education).

[51] See Duncan v. Forbes (1878) 15 S.L.R. 371; Den v. Lumsden (1891) 19 R. 77. In Reid v. Moir (1866) 4 M.1060 at 1065 L.J-C. Inglis distinguished, with his accustomed lucidity, between the claim of the mother of an illegitimate child in respect of past aliment (a claim for relief) and the claim of the child for future aliment (a claim for aliment ex jure naturae).

[52] See e.g. Spalding v. Spalding's Trs (1874) 2 R.237 at 252 (father's obligation to aliment child "in a certain sense ... exists from marriage"); Cf. French Civil Code art. 203.

[53] This idea was put forward in Ker v. Tutors of Moriston (1692) Mor. 1363 and it fits in with the fact that before 1930 aliment for an illegitimate child was not variable, even if the general rate went up. See Ames v. Brown (1924) 40 Sh. Ct. Rep. 275. But it has been rejected in later cases. See e.g. Nicoll v. Heritors of Dundee (1832) 10 S.670; Clarkson v. Fleming (1858) 20 D.1224; Reid v. Moir (1866) 4 M.1060 at 1064; McCormick v. Campbell (1924) 42 Sh. Ct. Rep. 124; McIntosh v. Nilsson (1935) 51 Sh. Ct. Rep. 136. It is interesting to note that the device of awarding aliment for the child as part of the damages for seduction was used by the French courts as a way round the restrictions on proof of paternity in French law. See Pelissier, op. cit. p. 208-210.

thinks fit. The court will say who is to be the creditor. This is the view which prevails for income tax purposes in the case of aliment for children in consistorial proceedings. If the aliment is ordered to be paid to the mother it forms part of her income for tax purposes: if it is ordered to be paid to the child (through a factor loco tutoris if necessary) it forms part of the child's income for tax purposes.[54]

2.172. The mother's claim for inlying expenses, a regular feature of actions of affiliation and aliment[55] raises problems of its own. This is not part of the child's claim for aliment and we have dealt with it (at para. 2.20 et seq) in considering whether the mother of an illegitimate child should have a special right to aliment for the period just before and after the birth of the child. The mother of a legitimate child could conceivably also have a claim for inlying expenses especially if the child were born shortly after divorce or separation,[56] but that would enter into the calculation of her own needs as an alimentary creditor and does not need separate consideration.

2.173. Aliment for a child (cont'd.); simplifying the terminology: One criticism of the present statute law is its incorrect and haphazard use of commonly used Scottish legal terminology. "Aliment" is the correct term for the obligations of support between parent and child. This term is used in common law sources, in a number of statutes and in the procedural rules in the Court of Session[57] and sheriff court. The term "maintenance" is used in the other statutory provisions referred to above[58]. This departure from correct legal terminology merely complicates our law and we therefore suggest that

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[54] See Mackay v. Mackay 1953 S.L.T. (Notes) 69; Cf. Stevens v. Tirard [1940] 1 K.B. 204; Shelley v. Shelley [1952] P. 107.

[55] Cf. Illegitimate Children (Scotland) Act 1930, ss.1(2) and 3.

[56] Cf. Spalding v. Spalding (1874) 2 R.237 and the facts of Hay v. Hay (1882) 9 R.667; Scott v. Scott (1894) 21 R.853; Richardson v. Richardson (1931) 48 Sh. Ct. Rep. 124.

[57] Although the Conjugal Rights (Scotland) Amendment Act 1861, s.9 talks of "maintenance", R.C. App. Form 2, No 20 talks of "aliment for each child". "Aliment" for children is the term in daily use in divorce actions.

[58] In the Maintenance Orders (Reciprocal Enforcement) Act 1972, s.21(1), "maintenance" is defined to mean aliment as respects Scotland.

with a view to simplifying terminology, statutory provisions dealing with aliment for children should use the term "aliment" and not the term "maintenance" as some of them do at present. (Proposition 32).

2.174. Aliment for a child (cont'd); simplifying the law. As we have seen, the present law of aliment for children is based partly on common law rules, the basis of which is uncertain, and partly on various statutory provisions, some of them little known and little used. We have asked ourselves whether it would be possible to simplify the law. The key to the problem appears to be custody. The end result of the present amalgam of rules is that the person who actually has custody of the child can be awarded aliment for it. We think that the present common law rules and scattered statutory provisions on the recovery of aliment for children should be replaced by a general provision that any person entitled to, or claiming, the custody of a child, should be entitled to conclude for aliment for the child from anyone who is bound to provide such aliment.[59] (Proposition 33). This generalised rule would apply to both legitimate and illegitimate children[60], and to both independent proceedings and applications ancillary or collateral to consistorial proceedings. (We assume that the courts will have the same powers as at present, or wider powers, to deal with custody in such proceedings.) It would replace, so far as aliment is concerned, the first three sets of statutory

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[59] In West Germany the B.G.B. art. 1615 b provides that the claim of an illegitimate child to aliment from the father passes to the person who provides support (if that person is a relative bound to provide aliment or the mother's husband) with the proviso that the transfer is not to operate to the prejudice of the child. We prefer, however, to place the emphasis on custody rather than provision of support. The two will usually go together but if, for example, the mother is entitled to custody and is living with, and being supported by, her father we think the claim should be hers. Cf. Dobbie v. Gaff (1843) 5 D.1385 (mother and not grandmother proper claimant); Clarkson v. Fleming (1858) 20 D.1224 (mother and not grandfather proper claimant); Gibson v. Brodie (1896) 13 Sh. Ct. Rep. 65 (mother proper claimant even though child boarded out).

[60] Cf. F. v. F. (1944) 60 Sh. Ct. Rep. 153 (woman had illegitimate and legitimate child by same man. Held competent to claim aliment for both children in an action of separation.)

provisions referred to in paragraph 2.170. but would not affect the powers of the court to order a parent to contribute to the aliment of a child in the care of a local authority. The provision would be limited to title to sue and would not give the court discretionary powers, as the present statutory provisions do. The rules on entitlement to aliment and measure of aliment would give the necessary flexibility. We leave aside the questions of proof of paternity and the effect of findings or declarators of paternity. We do not overlook the problems which arise in this area, but we think it will be more convenient to deal with them elsewhere. Neither under the present law, nor under our proposals, is a declarator of paternity an essential feature of an action for aliment for a child, whether legitimate or illegitimate.[61] Proof of paternity is a different matter, but that involves questions such as the presumption pater est quem nuptiae demonstrant, blood tests, abnormal gestation periods, and thr burden of proof, which would take us far beyond the area of our present enquiry.

2.175. Aliment for a child (cont'd.); relationship between child's claim and custodier's claim: We consider that the child's independent right to aliment is a valuable feature of Scots law, which should be preserved. This makes it necessary to consider the relationship between the child's claim and the claim of the person who has, or is claiming, custody. It could, of course, be left unregulated, as in the present law, but this could give rise to problems,[62] particularly since the mother and father are now joint tutors of their legitimate pupil children under the Guardianship Act 1973. We think it would be undesirable to make the legal position depend, for example, upon whether a mother chose to sue as tutrix or as an individual and

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[61] See Silver v. Walker 1938 S.C.595.

[62] Cf. Hay v. Hay (1882) 9 R.667; Scott v. Scott (1894) 21 R.853 and Richardson v. Richardson (1932) 48 Sh. Ct. Rep. 124. (Should the child or the mother bring the proceedings, when child born after separation or divorce? Preference for mother's claim): Cowan v. Cowan (1925) 41 Sh. Ct. Rep. 11 (Action by mother for aliment of child. Then action by child. Held not res judicata because concerned with "new" aliment for later period.)

we suggest that in relation to future aliment the custodier's claim should be regarded as being made on behalf of the child and, should be preferred to any other claims for aliment made by or on behalf of the child. (Proposition 37). We see no reason why this should not apply for tax purposes, the aliment for the child being regarded as income of the child.[63] It is important, however, that mothers receiving aliment or maintenance for children should not be at a tax disadvantage in one part of the United Kingdom as compared with another and the position would have to be carefully watched from this point of view.[64] With regard to the second part of proposition 37, conflicts between the child's claim and the custodier's claim should be rare in practice but if, for example, a child of 15 raised an action for aliment against his father in the sheriff court (asking for a curator ad litem to be appointed) while his mother was claiming aliment for him in a divorce action pending in the Court of Session, we would envisage that the latter claim should take precedence, and that the sheriff would be given power to dismiss or sist the child's action.

Interim aliment pending disposal of an action

2.176. Subject to one possible exception, which we discuss in the next paragraph, the court hearing an action of divorce, separation, adherence, declarator of marriage, declarator of nullity of marriage,[65] or aliment (including interim aliment,[66]

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[63]The Finer Committee on One-Parent Families noted that the tax position of maintenance for children depended on the form of the court order and, in England, on the court in which the proceedings took place. The Committee recommended that "It should be established as a principle that all payers and recipients of maintenance under administrative orders or the orders of the family court are put on the same footing in respect of their tax liabilities": Cmnd. 5629, 1974, para. 4.396.

[64]So long as the child's unearned income is aggregated with that of the parent having custody (Finance Act 1974) the problem is not so serious as it once was. However, child relief will be lost or reduced if the child's income exceeds certain limits, so that in some cases it will still make a difference if the income is the child's rather than the mother's. See Income and Corporation Taxes Act 1970, s.10.

[65]On interim aliment pendente lite in these various actions see Clive and Wilson, op. cit. pp. 211-215.

[66]Ibid. p. 216.

and affiliation and aliment[67]) may award interim aliment pendente lite i.e. pending disposal of the action. Inevitably, as interim aliment pending disposal can be applied for at the earliest stage of an action on the basis of a prima facie case, the court has a wide discretion as to its award. Thus interim aliment pending disposal may be refused where the relationship allegedly giving rise to the alimentary obligation is denied.[68] A decree for interim aliment has been described as "an act of regulative administration (in circumstances where the parties' true rights are in suspense) of an underlying and permanent legal obligation."[69] We invite views on the question: is the law on interim aliment pending disposal of an action satisfactory? (Proposition 38).

2.177. The possible exception referred to above is that there may be no power to award interim aliment pending disposal in an action for interim aliment in the sheriff's small debt court.[70] It is only if the action is defended that this could give rise to hardship. If the action is undefended decree for the aliment claimed can be given immediately. Small debt actions will, however, disappear when the relevant sections of the Sheriff Courts (Scotland) Act 1971 come into force. They will be replaced by summary causes under that Act, and it is clear that there is no statutory barrier to an interim award of aliment in such actions.[71] The matter is therefore one which can be dealt

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[67] See Ballard v. Campbell (1953) 69 Sh. Ct. Rep. 127 (interim aliment awarded where defender's admissions made some liability an inevitable result).

[68] E.g. where a man is defending an action for declarator of marriage. Cf. Fleming v. Corbet (1858) 21 D.179; Petrie v. Petrie 1910 S.C.136; Murison v. Murison 1923 S.C.40. Normally the defender will be denying the relationship in an action of affiliation and aliment. Ballard v. Campbell supra was exceptional in this respect.

[69] Adair v. Adair 1924 S.L.T. 576 per L.P. Clyde at p. 577.

[70] We have been unable to find any authority showing conclusively that interim orders pendente lite can or cannot be made. They are not made in practice. It has been argued that the court, being the creation of statute, has only such powers as are conferred by statute and that these do not include power to award interim aliment pendente lite.

[71] The Sheriff Courts (Scotland) Act 1971, ss. 32-36 give the Court of Session wide powers to regulate civil procedure in the sheriff court, including procedure in summary causes.

with in the Summary Cause Rules and we understand that it has been under consideration by the Sheriff Court Rules Council. We note that the Law Commission have under consideration the question of interim orders for maintenance in the English magistrates' courts and have provisionally recommended that the courts should have power to make an interim order at any time before the final determination of an application for a matrimonial order.[72]

Miscellaneous restrictions on availability of remedies

Introductory

2.178. Even if a person is entitled to aliment and has, in principle, an action available to make his right effective, there may be restrictions which prevent the use of that remedy. Thus, a wife may be restricted by the law from raising an action for aliment against her husband while she is cohabiting with him. There may be age limits, - or time limits relating to particular proceedings for aliment for children. It may be, for example, that an action for aliment for a child cannot be raised before its birth or must be raised within a certain time after its birth. Some systems have limitations of the latter type in relation to affiliation and aliment. There may be restrictions of a more general nature on the recovery of arrears of aliment. We discuss these various restrictions in the following paragraphs.

The cohabiting spouse (or other relative)

2.179. An action of separation and aliment is inappropriate if he or she wishes to adhere (even if grounds could be established). An action of adherence and aliment is available only if the other spouse is in desertion. An action for aliment alone (interim aliment) could possibly be made available in this situation[73] but this would be breaking new ground. Until now the accepted view has been that an action for aliment in money is available only if the spouses are

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[72] Law Com. Working Paper No 53, Matrimonial Proceedings in Magistrates' Courts (1973) paragraphs 84-98.

[73] See Clive and Wilson, op. cit. p. 193.

living apart.[74] There is a statutory exception to this rule in the case of aliment for children. The court can make an order as to custody and aliment under the Guardianship of Children (Scotland) Acts even although the parents are residing together, but the order is not enforceable by one parent against the other while they are residing together and it ceases to have effect if they continue to reside together for three months after it is made.[75]

2.180. Comparative survey: In England there is a difference between applications for maintenance in the High Court and in magistrates' courts. In the High Court there is no requirement that the spouses should be separated before maintenance can be awarded on the ground of wilful neglect to maintain.[76] In the magistrates' courts a wife was originally unable to obtain a maintenance order on the ground of her husband's cruelty or wilful neglect to maintain until she had left him. This was changed in 1925 so as to allow a wife to apply for an order while living with her husband, the order, however, being unenforceable so long as she continued to reside with her husband and lapsing altogether if she continued to reside with him for more than three months after it was made.[77] The Morton Commission received suggestions to the effect that even this was too restrictive and that the law, in effect, encouraged a wife to leave home if she wished to enforce a maintenance order. The Commission considered the counter-argument that an effective order would only exacerbate relations between the spouses but thought that if relations were already "seriously strained" the obtaining of the order would not be likely to make them worse while in less serious cases the making of an order might "bring the husband to his senses". They received evidence that the law worked satisfactorily in New Zealand although there was no requirement there that the wife had to leave her husband if she wished to keep her order. They therefore recommended, by a majority of eighteen to one, that a maintenance order obtained by a wife on the ground of her husband's wilful neglect to provide reasonable maintenance for her or the child should be enforceable even although the spouses were cohabiting.[78] This

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[74] See Fraser, Husband and Wife (2nd ed.; 1876) Vol. 1 p.839. Mc Donald v. Mc Donald (1875) 2 R.705.

[75] Guardianship of Infants Act 1925 s.3, as amended by Guardianship Act 1973, Sch. 4.

[76] Matrimonial Causes Act 1973 s.27 deliberately preserving the previous law. See Law Com. Working Paper No 9 para. 32 "In our view the wife should not be forced to leave before she can obtain proper maintenance."

[77] See the Report of the Royal Commission on Marriage and Divorce 1951-55 (Cmd. 9678) paras. 1015-1016.

[78] Cmd. 9678 (1956) paras. 1042-1050. The Commission, however, felt "unable to accept" a proposal that a wife should be able to apply to the court for an order fixing the amount of housekeeping to which she was entitled.

recommendation has not been implemented. The Departmental Committee on Matrimonial Proceedings in Magistrates' Courts under the chairmanship of Mr Justice Davies in 1959 did not feel "justified" in accepting it but gave no reason whatsoever for this conclusion.[79] They did, however, suggest a rewording of the 1925 Act provision to make it clear that a wife who was not "cohabiting" with her husband, even though she might be "residing with" him under the same roof, could obtain an enforceable maintenance order.[80] In the Parliamentary debates which followed the report of the Davies Committee and which preceded the Matrimonial Proceedings (Magistrates' Courts) Act 1960 there was a great deal of discussion of this question. Many speakers were in favour of implementing the Morton Commission's original recommendation and several spoke of the hardship which in their experience was caused by the existing law. There was criticism of the fact that there was one law for the High Court and another for the magistrates' courts, and even within the latter courts one law for the wife who had space to set up a separate household under her husband's roof and another for the wife living in one room. Above all there was criticism of the fact that the law appeared to encourage and support a splitting up of the conjugal unit instead of encouraging reconciliation.[81] However, the government stood firm on the objection that it would be undesirable to give magistrates power "to intervene to this extent in the internal management of the ordinary household" and, in effect, to fix a wife's housekeeping allowance.[82] An amendment to give effect to the Morton Commission's proposal was ultimately defeated in the Commons by 203 votes to 127.[83] The Law Commission has recently re-opened the question and, while "inclined to share the views expressed by the Morton Commission", has invited views before making firm proposals.[84]

2.181. It is of interest, in view of the objections expressed in Parliament to fixing a wife's housekeeping allowance, to look at the solutions adopted by some of our continental neighbours. In West Germany, a distinction is drawn between the situation where the spouses are living together and that where they are living apart. In the former situation the emphasis is on the

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[79] Cmnd. 638 (1959) p.37.

[80] Ibid. p.36. This followed a recommendation of the Morton Commission (para. 1041) aimed at correcting the decision in Evans v. Evans [1948]1 K.B. 175. Cf. now Naylor v. Naylor [1962] P.253.

[81] See Parl. Debs. H.C. Vol. 620 cols. 515, 521, 543; Vol. 625, cols. 1415, 1425-30, 1434, 1437-40, 1441-42: H.L. Vol. 220, cols. 450, 962-64, 967.

[82] Parl. Debs. H.L. Vol. 220, col. 455. See also H.C. Vol. 620, col. 550; Vol. 625, col. 1433.

[83] Parl. Deb. H.C. Vol. 625 col. 1444. See Matrimonial Proceedings (Magistrates' Courts) Act 1960, s.7. And cf. the Guardianship Act 1973, Sch. 2 (on orders for maintenance for children while the spouses are "residing together" - in similar terms to the Scottish provisions discussed in para. 3.162).

[84] Working Paper No 53 para. 66.

support of the family rather than on individual rights and obligations of aliment.[85] The spouses are mutually bound to provide suitably for the family,[86] the support to be provided in whichever way is required by the circumstances of their married life.[87] Under the present law the husband is obliged to place at the wife's disposal a contribution towards the support of the family for a suitable period in advance[88] but there are proposals to replace this by a mutual obligation on both spouses[89]. These obligations are enforceable: a wife can therefore bring an action against her husband for a suitable housekeeping allowance.[90] In France, the position is similar. During cohabitation, the alimentary obligation between spouses is masked by the obligation imposed by article 214 of the civil code to contribute to the household expenses. The French Civil Code specifically provides that this obligation is enforceable,[91] and a wife can, if need be, have part of her husband's income arrested and paid direct to her.[92]

2.182. Our proposals: The present Scots law is an indefensible compromise. It enables a cohabiting wife to obtain a decree for aliment of her legitimate children (unenforceable during cohabitation) but leaves her own claim doubtful. One solution would be to introduce an enforceable right to a reasonable housekeeping allowance, but this would involve legal regulation of an area which has always been left to the spouses' own arrangement and which, we think, could well continue to be so. We are not convinced, for example, that it is necessary or desirable to introduce a distinction in this respect between the family based on marriage and the de facto family. We would prefer to approach the problem through the obligation of aliment. Our preliminary reaction is that there is something wrong if the obligation to aliment is meaningless in the one situation in which the claimant is perhaps most

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[85] See Gernhuber op. cit. p.178.

[86] B.G.B. § 1360.

[87] B.G.B. § 1360 a (2)

[88] Ibid.

[89] Entwurf eines Ersten Gesetzes zur Reform des Ehe-und Familienrechts (1 Ehe RG) (1973) art. 1 para. 6.

[90] Gernhuber, op. cit. pp. 180-181, 197.

[91] Art. 214. See also art. 15 of law No 75-618 of 11 July 1975 re. the official recovery of alimentary allowances, which applies to sums judicially found due under art. 214.

[92] See Carbonnier, Droit Civil, II, p.89.

deserving (because prepared to continue cohabitation for as long as possible) and most in need of assistance (because supplementary benefit is not normally available in this situation).[93] We are inclined, therefore, to endorse the principle behind the Morton Commission's recommendation and we suggest for consideration that a spouse should be able to obtain and enforce a decree for aliment for himself or herself, and any children entitled to aliment from the other spouse, notwithstanding that the spouses are cohabiting. An offer by the defender to provide support in kind in the home should not be a defence to such an action if in fact it was the lack of adequate support which rendered the action necessary. (Proposition 39). So far as the spouse's own claim is concerned, this would remove a doubt as to the present law. So far as the claim for aliment for children is concerned it would partially replace the limited provisions in the Guardianship of Children (Scotland) Acts.[94] It would have the incidental advantage of removing a minor distinction between legitimate and illegitimate children: it has never been suggested, so far as we are aware, that the mother of an illegitimate child is precluded from obtaining a decree of aliment for the child merely because she is cohabiting with the father. It might be objected that we are overlooking the interrelationship of aliment and custody but it will be remembered that we have already suggested in Proposition 33 that any person entitled to, or claiming, custody should be entitled to apply for aliment for the child. Under section 11 of the Guardianship Act 1973 both parents are entitled to the custody of a legitimate child. Under the present law the mother is entitled to the custody of her illegitimate child but the mother can bring proceedings for custody if he wishes.[95]

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[93] See Ministry of Social Security Act 1966 Sch. 2 (aggregation of resources of husband and wife living together in same household).

[94] The Guardianship of Infants Act 1925 s.3(2) and (3) as amended by the Guardianship Act 1973, Sch. 4, but only re. the spouse's claim.

[95] Illegitimate Children (Scotland) Act 1930, s.2(1).

So there would be no difficulty about title to sue. For the rest, custody should not be in issue in the sort of situation covered by our proposal.

2.183. Other relatives residing together. Similar questions can arise in the case of alimentary actions between other relatives. It is clear that aliment will not be awarded to, say, an adult child if he or she is being adequately maintained in the parental home and has no intention of leaving.[96] It is equally clear that the courts have shown a marked reluctance to inquire into the adequacy of aliment in the home, and indeed, since Maule v. Maule[97] have sometimes felt precluded from doing so.[98] A son cannot expect a sympathetic hearing if he comes to court to complain about the quality of his father's table. Our preliminary impressions are that this matter is not one of great practical importance, that there are not the same arguments for preserving cohabitation as in the case of spouses, and that the law can be left as it is.

2.184. Age limits affecting aliment for children. We have seen that both by common law and by statute, parents are enabled to claim aliment for their children, whether legitimate or illegitimate. There was some doubt as to the age limits at common law. Most actions by parents concerned pupil children but it was not unknown for aliment to be awarded to a mother for a period which could continue beyond the child's pupillarity.[99] There was also a difference of opinion as to whether a mother could bring an action for aliment of an illegitimate child above the age of pupillarity.[1] The statutory

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[96] Cf. A. v. B. (1906) 22 Sh. Ct. Rep. 15 (where, however, the daughter claimed a separate aliment).

[97] (1825) 1 W. & S. 266.

[98] See e.g. A. v. B. (1906) 22 Sh. Ct. Rep. 15 at p.20 - "all questions as to the quality or quantity of food or clothing must be left to the affection and direction of her father. These are matters with which a court of law will not interfere, and into a proof regarding which it will not enter."

[99] See e.g. Short v. Donald (1765) Mor. 442 (illegitimate child); Dunn v. Matthews (1842) 4 D.454 (legitimate children); Foxwell v. Robertson (1900) 2F.932 (legitimate child); Duke of Sutherland (1905) 13 S.L.T. 104 (legitimate child); Ramsay v. Ramsay 1945 S.L.T. 30 (legitimate child).

[1] See Hardie v. Leith (1878) 6 R.115 (no title to sue); McKenzie v. Glendinning (1899) 15 Sh. Ct. Rep. 224 (no title to sue); Young v. Elliot (1905) 21 Sh. Ct. Rep. 12 (title to sue).

position was clearer. The provisions enabling aliment for children to be awarded in certain consistorial proceedings or in proceedings under the Guardianship of Infants Acts were originally expressly limited to pupil children.[2] In the 1930s the age limit was extended to sixteen, first for actions of affiliation and aliment by the Illegitimate Children (Scotland) Act 1930[3] and then generally by the Custody of Children (Scotland) Act 1939 which provided that "The powers of any court whether at common law or under any enactment to make orders as to the custody, maintenance or education of, or access to pupil children shall extend to minor children under the age of sixteen, and accordingly in any enactment relating to any such power a reference to a pupil child shall be construed as a reference to a child under sixteen years of age."[4] Finally, the Affiliation Orders Act 1952 introduced a set of provisions enabling the liability under a decree of affiliation and aliment to be extended by periods of up to two years at a time until the child attains the age of twenty-one if "it appears to the court that the child is or will be engaged in a course of education or training after attaining the age of sixteen and that it is expedient for that purpose for there to be a liability under the decree to make payments in respect of aliment after the child attains that age."[5]

2.185. The practical effect of the present law of Scotland is that aliment for a legitimate child will normally be payable to a parent until the child is sixteen. Thereafter, if the child continues to be in need of aliment (as will often be the case when education continues) he or she must raise a

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[2]See Conjugal Rights (Scotland) Amendment Act 1861, s.9; Guardianship of Infants Act 1886, s.8.

[3]Section 1(1) of the Act extended the normal duration of the obligation to provide aliment and did not mention title to sue. It was, however, interpreted as enabling a mother to recover aliment for her illegitimate child until the child attained the age of sixteen. See e.g. Shields v. Murray (1934) 50 Sh. Ct. Rep. 323; Cape v. McLure (1935) 51 Sh. Ct. Rep. 52.

[4]S.1(1). Cf. Wilson v. Wilson (1954) 70 Sh. Ct. Rep. 262 (section applies to Maintenance Orders Act 1950, s.7); Guardianship Act 1973, s.13(1) ("child" means a child under sixteen years of age).

[5]S.3(1) and (2).

separate action.[6] Aliment for an illegitimate child will normally be payable to the parent until the child is sixteen but in certain circumstances can continue to be payable to the parent until the child is twenty-one[7]. Thereafter, if the child continues to be in need of aliment he or she must raise a separate action. It appears to us that three questions require to be considered.[8] First, should it be necessary for the child to raise a separate action after attaining the age limit on decrees in favour of a parent or custodier? Second, what should that age limit be? Third, should there continue to be different rules for legitimate and illegitimate children? On the first question, a separate action by the child seems needlessly cumbersome and expensive, quite apart from the argument that it may be desirable to keep the family's affairs so far as possible in one process in one court. We suggest therefore that where aliment has been awarded to a parent or other custodier for a child, the child should be enabled, on attaining the appropriate age, to intervene by minute in the process to claim a continuation of aliment. The second question - that of the "appropriate age" for the termination of an award of aliment to a parent or custodier for a child - is obviously linked to the determination of the age until which a custody decree should be effective, and this comes within the scope of our separate memorandum on minors and pupils. For the moment we merely suggest that where in any proceedings in any court, aliment for a child has been awarded to a parent or other person entitled to custody or awarded custody, the child should,

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[6] See e.g. Watson v. Watson (1896) 4 S.L.T. 39 and Mizel v. Mizel 1970 S.L.T. (Sh. Ct.) 50 discussed in para. 2.102. above.

[7] See Affiliation Orders Act 1952, s.3 (payments under decree of affiliation and aliment after child 16 not to be required "to be made to any person other than the father or the mother of the child or a person entitled to the custody.").

[8] Further questions would arise if the law on custody awards were changed so as to make the normal duration of such awards, say, up to the age of 18. It might be asked then whether an award of aliment for a child, who might have left school and started work, should normally continue to the same age or whether it should normally continue only until, say, the birthday following the school leaving age. Cf. the English Matrimonial Causes Act 1973, s.29: Law Com. No 25 paras. 33-41; Law Com. Working Paper No 53 paras. 141-153.

after the termination of the period for which aliment was awarded but not later than attaining a prescribed age, say majority, be able to intervene by minute in the proceedings to claim a continuation of aliment (Proposition 40). With regard to the third question - whether the same age limits should apply in relation to legitimate and illegitimate children - we can see no good reason for any difference. If Proposition 40 is acceptable, then we think it should apply also to illegitimate children. This would enable the rather detailed provisions of section 3 of the Affiliation Orders Act 1952 to be repealed. Instead of the mother being able to claim a continuation of aliment beyond the child's sixteenth birthday, the child would be able to do so. It seems to us that when the period of custody and associated aliment comes to an end the appropriate alimentary claimant is no longer the former custodier but the child, whether legitimate or illegitimate, and that it is advantageous to give the child the opportunity to claim a continuation of aliment in the proceedings in which aliment has already been fixed. We therefore suggest that there should be no difference in the age limits on awards of aliment for legitimate and illegitimate children: Proposition 40 should apply to both categories alike. (Proposition 41).

2.186. Time limits on actions of affiliation and aliment. In Scots law, unlike some other systems[9], there is no time limit after the birth of an illegitimate child within which an action of affiliation and aliment must be brought. We have already noted that there have been cases where aliment for the past has been recovered from the father twenty or thirty years after the child's birth and we have noted that the five year prescriptive period under the Prescription and Limitation (Scotland) Act 1973 may in the future cut off such claims for arrears.[10] For the

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[9] See e.g. the English Affiliation Proceedings Act 1957, ss 1, 2 (criticised in Lasok, "Time Factor in Affiliation Proceedings" 120 New Law J. 679 (1970)), the French civil code art. 340-4; the New Zealand Domestic Proceedings Act 1968. There is, however, no time limit in West German law.

[10] See para. 2.81. above.

rest we are inclined to think that any limitation period would be likely to lead to injustice. At the very least it would have to cater for the situations where the father and mother have cohabited after the child's birth, where the father has contributed to the child's aliment after its birth, and where the father has gone abroad before or just after the birth. Even then there would be a danger of injustice. It is the child's aliment which is in question and the child should not be prejudiced by delay or lethargy on the part of anyone else.[11] We invite views from those who may have had experience of practical defects in the present law. Our own preliminary view is that, as in the present law, there should be no time limits on the raising of actions of affiliation and aliment (Proposition 42).

2.187. Unborn children. Section 3 of the Illegitimate Children (Scotland) Act 1930 contains provisions enabling "any unmarried woman who is pregnant" to raise an action of affiliation and aliment before the birth of the child. However, no declarator of paternity will be pronounced, no proof will be taken and no decree for payment will be pronounced until after the birth of the child, except that "where the action is undefended, or where paternity is admitted by the defender, the court may before the birth of the child grant decree for payment of a sum to account in respect of inlying expenses, and for payment of periodical sums in respect of aliment beginning at the date of the birth of the child.[12] Such a decree can be reviewed and altered after the birth. If she wishes to raise an action under this provision the pursuer must produce "(a) a declaration sworn before a justice of the peace or magistrate that the defender is the father of the child, and (b) a certificate signed by a duly qualified medical practitioner certifying that she is pregnant and specifying the date on which delivery may normally be expected": the action cannot be

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[11] See Lindsay v. Thomson (1839) 1 D.434 at 436: "those actions are truly for behoof of the child, and it would require a great deal to satisfy me that the child should be allowed by us to be seriously injured in the prosecution of its rights .... because of a blunder or oversight which had been committed by its parent."

[12] S.3(1).

raised more than three months before this certified date of expected delivery.[13] The advantages of raising an action before the child's birth are that the pursuer may be able to establish jurisdiction against a defender who is about to decamp[14] and that she can obtain payments of inlying expenses and aliment more promptly.

2.188. In theory at least, the same problem could arise in an action for custody and aliment of a legitimate child. A wife might be deserted while pregnant. She might be in no need of aliment for herself, but might wish to raise an action for custody and aliment at once, before her husband left the jurisdiction. There are no express statutory provisions on this point. Further there appears to be no authority on whether the principle known as nasciturus pro iam nato habetur (viz. that a child in utero is to be taken as born where to do so would benefit him) might apply. The problem could also arise in divorce or in another consistorial action, especially now that a temporary resumption of cohabitation between the spouses with a view to reconciliation does not necessarily amount to condonation or interrupt the running of a period of desertion.[15] Conception during such a temporary resumption is a possibility the law should recognise. The difficulty in consistorial cases would not be in establishing jurisdiction over the defender but in knowing whether the court had power to deal with custody and aliment of an unborn child.[16]

2.189. It seems to us that section 3 of the Illegitimate Children (Scotland) Act 1930 begs certain questions. Why should it be limited to an unmarried woman? What does the

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[13] S.3(2).

[14] Auld v. Wilson (1932) 48 Sh. Ct. Rep. 257. The pursuer cannot however use arrestments on the dependence unless the defender is vergens ad inopiam or in meditatione fugae. Speedie v. Speedie (1940) 56 Sh. Ct. Rep. 133. She is entitled to her expenses in the normal way even if the defender admits paternity after the child's birth. Morton v. Duff (1942) 58 Sh. Ct. Rep. 89 (disapproving of Auld v. Wilson on this point.

[15] Divorce (Scotland) Act 1964, s.2.

[16] Cf. Hay v. Hay (1882) 9 R.667. In another case, the wife had obtained a decree of adherence and aliment and then gave birth to a legitimate child. A new action for aliment was raised in the name of the child. This was held to be competent but it was observed that it would have been preferable to apply for aliment for the child by minute in the adherence action. See Richardson v. Richardson (1932) 48 Sh. Ct. Rep. 124.

declaration before a justice of the peace add to the pursuer's averments in her initial writ or summons? Why is the procedure available only in the three months before the expected birth? Perhaps, however, it might be better to replace it by a more general provision applying to all children, legitimate or illegitimate, rather than to amend it. Perhaps what is required is a provision which would enable an action or application for aliment for a child to be brought into court before the child is born, to be dealt with only after the birth. It is only then that important evidence as to paternity will become available (gestation period, skin colour, blood test evidence and so on). Inlying expenses are a separate matter, which we have dealt with at para. 2.20 in the context of the mother's own claim. We invite views on the question whether section 3 of the Illegitimate Children (Scotland) Act 1930 should be retained in its present form, or amended, or repealed as unnecessary, or replaced by a more general provision applying to all children. To elicit views, we suggest that section 3 of the Illegitimate Children (Scotland) Act 1930 should be replaced by a more general provision, applying to all children, which would enable an action (or application) for aliment for a child to be raised or made while the child is in the womb. The action, however, should not be disposed of till after the birth. (Proposition 43).

2.190. Backdating awards of aliment: It is often said that illiquid "arrears" of aliment (viz. aliment which is due for a byegone period but which has not been constituted and quantified as a money debt by a court decree or an agreement) cannot be recovered.[17] The origins, purpose and limits of this rule are not entirely clear. In several early cases, the Court of Session refused to give decree for arrears of aliment where it appeared that the pursuer had in fact been supported by the charity of friends or relatives.[18] The reports say that such

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[17] See e.g. McMillan v. McMillan (1871) 9 M.1067; Smith v. Smith's Trs (1882) 19 S.L.R. 552 at 555 (obiter); Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649; Emmerson v. Emmerson (1939) 55 Sh. Ct. Rep. 146 (obiter); Bruce v. Bruce, 1945 S.C. 353.

[18] Sibbald v. Falconer (1679) Mor. 407; Seton v. Turnbull (1697) Mor. 404; Douglasses v. Douglas (1739) Mor. 425. But cf. Grissel Stuart v. Laird of Rosyth (1668) Mor. 415, where, although the report is confused, it seems that the pursuer was given aliment for a past time when she had been supported by her uncle.

support was presumed to be given ex pietate but this seems a reason for denying the alimenting friend's claim for relief rather than the pursuer's own claim for arrears, and the implicit reason was perhaps that the pursuer had not in fact been in need. In one case, however, considerations of hardship for the defenders seem to have played a part, for it was noted that they had bona fide consumed their whole annuities for the years in question.[19] The Commissaries too, in actions between husband and wife, seem generally to have awarded aliment from the date of citation but not before.[20] Curiously, however, for approximately a hundred years after the 1760s, the Court of Session gave decrees for "bygones" of aliment without any obvious hesitations.[21] The tide turned in 1860 when it was held that a wife who had supported herself could not claim illiquid arrears of aliment[22] and in 1871 Lord Justice-Clerk Inglis also held that a wife who had incurred alimentary debts could not recover illiquid arrears of aliment, referring to the "wholesome rule that a wife's allowance is not to be increased on account of debts for which her husband is liable."[23] Lord Fraser, however, thought that, while a wife who had supported herself through her own industry or the

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[19] Laird of Kirkland v. His Mother and Grandmother (1685) Mor. 403.

[20] See cases in Hermand, Consistorial Decisions, 1684-1777 (Stair Soc.) pp. 54-57 and especially the cases of Cassa v. Young 1749 (p.54) and Watson v. Baird 1751 (p. 56) where the pursuers unsuccessfully claimed arrears of aliment.

[21] See Arthur v. Gourlay (1769) 2 Pat. 184; De Courcy v. Agnew (1806) Mor. App. voce aliment p. 12; Bell v. Bell 22 Feb. 1812 F.C. (wife's claim rejected on other grounds); Reid v. Black 1814 Hume's Decsns. 5 at p.6; Reid v. Reid 10 July 1823 F.C. (husband argued that wife's claim for bygone aliment fell under jus mariti); Jackson v. Jackson (1825) 4 S.186 (aliment awarded from date of citation in a previous action between same parties); Thomson v. Thomson (1838) Sc.Jur.165 (aliment for wife from 1821 when husband had ceased to support her); Dunn v. Mathews (1842) 4 D.454; Macnaughton v. Macnaughton (1850) 12 D.703; Herald v. Cowper (1860) 23 D.68.

[22] Donald v. Donald (1860) 22 D.1118. But contrast Herald v. Cowper supra where decree was granted for bygone aliment.

[23] McMillan v. McMillan (1871) 9 M.1067. See also Shirrefs v. Shirrefs (1896) 23 R.807 (observed obiter that suppliers of wife should recover directly from husband). But contrast Forster v. Forster (1871) 9 M.829 where it appears that decree was granted for five years' arrears of aliment.

benefactions of others could not claim arrears of aliment, a wife who had been obliged to contract debt for necessaries in the past could recover arrears "to this extent."[24] A similar view was taken by Lord Mackay in the only 20th century case to deal at length with the question.[25] Apart from prescription, there is no rule against recovery of arrears of aliment arising under an agreement[26] or court decree[27], or against a claim for relief by a third party who has supplied aliment.[28]

2.191. Comparative survey: It is interesting to note that French law has a well-recognised rule that arrears of aliment cannot be recovered.[29] Unlike the Scottish rule, this applies even to arrears of aliment due under a court decree[30]. It has been explained as resting on a presumption that the alimentary creditor who has failed to exact aliment at the due date either impliedly renounced his right[31] or was not in need.[32] The courts have emphasised that this is merely a presumption of fact which can be rebutted by appropriate proof (e.g. that the arrears correspond to needs not yet satisfied; that the creditor in fact made repeated claims, or that his inaction was excusable).[33] As in Scots law, the rule does not apply to a

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[24] Husband and Wife (2nd ed.) p. 862.

[25] Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649 at 653. Which is, of course, directly contrary to what L.J.-C. Inglis said in McMillan v. McMillan supra.

[26] Hood v. Hood (1871) 9 M.449; McAllister v. McAllister (1907) 23 Sh. Ct. Rep. 3; Livingstone v. Livingstone (1951) 68 Sh. Ct. Rep. 47; Daniels v. Daniels (1956) 72 Sh. Ct. Rep. 259.

[27] Matthews v. Matthews' Tr. 1907, 15 S.L.T. 326; Fletcher v. Young 1936 S.L.T. 572.

[28] See paras. 2.80. to 2.83. above.

[29] Carbonnier, Droit Civil, II, p.340; 344; Mazeaud, I, No. 1218, Pélissier, op. cit. pp. 178-79.

[30] Civ.[1] 28 avril 1969, D.S. 69, 411.

[31] Pélissier loc. cit., and in note to Douai, 10 dec. 1963, D.64,458, criticises this explanation on the ground that the right to aliment cannot be renounced. Perhaps, however, renunciation of aliment which has fallen due is different from renunciation of future aliment. Certainly the courts have continued to base decisions on a presumption of renunciation. See the cases in note 33 below.

[32] Ibid, See also, Civ.[1] 28 jan. 1963; D. 63 Somm. 53; Civ.[1] 28 avril 1969; D.S. 69,411.

[33] See Trib. inst. Laval, 16 mai 1961, D. 1961, 711; Civ[1] 28 jan. 1963 D. 63, Somm. 53; Douai, 10 dec. 1963, D.64, 458; Civ.[1] 28 avril 1969, D.S. 69, 411; Civ. 31 mai 1971, D.71, Somm. 201; Rouen 8 juin 1971, D.71, 736.

claim by a third party for recovery of aliment provided.[34] In England, the practice until recently was that maintenance in matrimonial proceedings was not backdated. The Law Commission recommended (partly as a substitute for the wife's agency of necessity, now abolished) that the court should have power to award an additional lump sum in respect of any period prior to the institution of proceedings.[35] This power, it considered, "would be useful when a wife has reasonably incurred liabilities to maintain herself and the children before instituting the proceedings and needs the lump sum to discharge these liabilities."[36] The recommendation was generally approved and has now been implemented.[37]

2.192. Backdating awards of aliment; our proposals: The old argument that an alimentary creditor cannot have been in need if he has supported himself, or been supported by the benefactions of others, is no longer persuasive now that bare need is not the criterion of liability. A wife, for example, may have supported herself at a very low standard of living. Even if she has not incurred debts for necessaries, she may "owe herself", as it were, clothes, furniture, and household repairs and redecoration. The arguments against allowing recovery are (a) that there may be a double claim, on the part of (say) a wife and on the part of those to whom she has incurred alimentary debts; and (b) that it could be hard on a defender if he were faced with a massive lump sum claim representing years of past aliment. The argument for allowing recovery is that justice to the pursuer may require it. A wife should not be prejudiced by the fact that her husband manages to evade her searches for a period of months or years. As a practical matter, of course, the question will often be unimportant. It may be difficult enough to recover current aliment, far less a large amount of arrears. Nevertheless we think that some attempt should be made to balance the conflicting interests and we suggest for consideration that

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[34] Poitiers 15 avril 1969, D.S. 69, 694; Peyrefitte, "Considerations sur la règle 'Aliments n'arréragent pas'". R.T.D.C. 1968, 286 at pp. 304-306.

[35] Law Com. No 25 para. 10.

[36] Ibid.

[37] Matrimonial Causes Act 1973, s.23(3).

the courts should be given power to backdate awards of aliment i.e. to award aliment for a period which has already elapsed. (Proposition 44).

Powers of the court

2.193. Powers to award lump sums, to order security to be provided, or to counteract avoidance transactions: At present the powers of the court in an action of aliment depend on the nature of the action. In an ordinary action for aliment at common law, the position is unregulated by statute and the court's power is in practice limited to the award of aliment at so much per week or month or other period and, if appropriate, an award of interim aliment pending disposal of the action. Certain statutes dealing with aliment for children give the courts very wide powers. The court hearing an action of divorce, separation or nullity, for example, has power to make such interim orders and such provision in the final decree "as to it shall seem just and proper, with respect to the custody, maintenance, and education" of children coming within its jurisdiction.[38] But in practice the use made of these theoretically wide powers is merely to award aliment of so much per week or month or other period. The question we wish to consider in this section is whether the courts should be given express powers to award capital sums, or to order security to be provided for aliment, or to take certain anti-avoidance measures, or to order transfers of property. We also wish to consider the adequacy of the courts' powers to award aliment on granting decree of absolvitor or dismissal in divorce and other actions.[39]

2.194. Position in England. The English courts have now powers in proceedings for divorce, nullity of marriage or judicial separation to make a wide range of orders including orders for maintenance pending suit. They have power to make, on or after

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[38] Conjugal Rights (Scotland) Amendment Act 1861, s.9 as amended by the Matrimonial Proceedings (Children) Act 1958, ss. 7, 9 and 14. Cf. also Illegitimate Children (Scotland) Act 1930 s.1(3); Guardianship of Infants Act 1925 s.3 as amended by Guardianship Act 1973, Sch. 4.

[39] See Matrimonial Proceedings (Children) Act 1958 s.9 for the present powers.

granting decree,

> "(a) an order that either party to the marriage shall make to the other such periodical payments, for such terms, as may be specified in the order;
>
> (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;
>
> (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;
>
> (d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such terms, as may be so specified;
>
> (e) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;
>
> (f) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified ...."[40]

The powers relating to children (in paragraphs (d) (e) and (f) above) are exercisable even before granting decree and can be exercised on, or within a reasonable period after, the dismissal of the proceedings after the beginning of the trial.[41] The court granting an application for financial provision on the ground of neglect to maintain has the powers set out in paragraphs (a) to (f) above.[42] The court granting a decree of divorce, nullity of marriage or judicial separation has, in addition to the above powers, power to order transfers of property, to order settlements of property and to vary marriage settlements.[43] The courts also have statutory powers to restrain or set aside transactions intended to prevent or reduce financial relief under any of the above provisions,[44] and powers to order repayments of certain periodical sums paid after a change of circumstances or remarriage.[45] Under the present law the

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[40] Matrimonial Causes Act 1973 s.23(1).

[41] Ibid. s.23(2).

[42] Ibid. s.27(6)

[43] Ibid. s.24. See also s.30, giving court power (a) to direct matter to be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties and (b) to defer decree until the instrument has been executed.

[44] Ibid. s.37.

[45] Ibid. ss. 33 and 38.

magistrates' courts have much more limited powers. They can order either or both to make regular weekly payments for the maintenance of any child of the family.[46] They have no power to make lump sum awards, to order security to be provided, to order property to be transferred, to vary settlements or to counter avoidance measures. The Law Commission have expressed the view that most of these powers would be unsuitable for exercise by lay magistrates dealing with an existing, rather than a terminated, marriage, but have proposed that magistrates should be given power to order the payment of a lump sum in addition to any periodical payments ordered.[47] The circumstances in which they envisage this power being useful include the case where a deserting husband has left behind him unpaid gas or electricity bills and the case where a wife, forced to leave her husband, has a number of minor expenses to meet in establishing a new home for herself. They have suggested, however, that an upper limit should be placed on this power.

2.195. Our proposals: In Scotland, the contrast is not between the powers of legally qualified professional judges and lay magistrates but between the powers appropriate in relation to aliment, as an incident of a continuing relationship, and those appropriate on the winding up of a relationship by divorce or otherwise. In the case of aliment, the court's powers should be such as to enable it to give effect to the rights and obligations of the parties. As these vary in accordance with the parties needs and resources, and as any award of aliment is variable on a change of circumstances, we think that a periodical allowance, subject to variation from time to time, is the most appropriate form of award. Powers to order transfers of property or the payment of substantial capital sums seem inappropriate. There may be circumstances, such as those referred to in the previous paragraph, in which a power to award a small lump sum would also be useful, but the need for such a power is diminished by our earlier suggestion that the court should be able to award arrears of aliment in suitable cases. We have considered how a power to order aliment to be secured might operate in Scotland and whether the introduction of such a power would be possible or desirable. In England the normal technique involves the preparation of a trust deed.[48] The court

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[46] Matrimonial Proceedings (Magistrates' Courts) Act 1960.

[47] Working Paper No 53, paragraphs 58-59.

[48] See Jackson, Matrimonial Finance and Taxation pp. 105-115 (1st ed.); Law Com. No. 25 p.7 n.26.

has power to direct the matter to be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties.[49] If it were felt to be necessary or desirable, appropriate techniques could be easily developed in Scotland. We note that the Law Commission recommended an extension of the system of secured payments in England and that their consultations confirmed them in this view.[50] Nevertheless we hesitate to recommend the introduction of a similar system in Scotland. The interests of the alimentary creditor (whether spouse, or legitimate child, or illegitimate child, or aged parent) must be balanced against the interest of the alimentary debtor and the interests of his ordinary creditors. Until now the accepted view has been that a man's dependants follow his fortunes, and we are not satisfied that this should be changed under the guise of a simple extension of the courts' powers. Nor are we satisfied of the desirability of tying up assets in security of payments which are variable in amount, which may continue over a long period of years, and which cannot readily be converted into a lump sum. On the other hand, we recognise the force of the arguments that if the law gives a right it should provide the means of making that right effective; that the dependants are more deserving of sympathy than the alimentary debtor who is being deprived of the free use of surplus assets; and that creditors can be expected to look after their own interests so long as the security is not latent. Somewhat similar considerations apply to anti-avoidance powers. These are likely to be of most use in relation to a large capital sum, and of least use in relation to modest periodical payments of aliment. There is a danger that pursuers would attempt to use them for malicious reasons. Nevertheless, the most recent Divorce (Scotland) Bill extended anti-avoidance powers to actions for aliment between spouses.[51] We raise for consideration the question

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[49] Matrimonial Causes Act 1973, s.30.

[50] Law Com. No 25 paras. 11 and 12. [It appears that, before 1969, secured payments were "rarely, if ever, awarded unless the husband [had] free investments in addition to the home and its contents and the like". The Law Commission saw "no reason why in suitable cases the home should not be used to secure payments to the wife." Ibid. para. 11.]

[51] Divorce (Scotland)(No 2) Bill, introduced by Mr Iain MacCormick M.P. and ordered to be printed 17 December 1975, clause 6.

whether the courts dealing with claims for aliment should be given powers to award lump sums, to order security to be provided, or to counteract avoidance transactions. (Proposition 45). The question is connected with civil imprisonment for alimentary debts (which will be considered in our forthcoming Memorandum on enforcement of alimentary debt). For if that sanction is abolished, there is a stronger argument for strengthening other enforcement measures.

2.196. Powers in relation to separation and aliment: Decrees of separation and aliment present special problems. If judicial separation is viewed as a lesser divorce, which in reality marks the end of a "live" marriage, then probably the court dealing with it should have the same range of powers to adjust the financial and property consequences as is possessed by the court dealing with divorce. Such an approach would be consistent with the legislation implementing our report on jurisdiction in consistorial actions,[52] and would also be consistent with the view adopted in English law,[53] that judicial separation should be treated as a form of lesser divorce. The remedy of judicial separation, however, will be reviewed in a forthcoming Memorandum in a more radical way than is possible in this Memorandum. In the meantime, to focus debates, we suggest that if the remedy of judicial separation is to be retained in Scots law, then a court hearing an action of separation should have the same range of powers (except that the power to award aliment would take the place of the power to award

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[52] Scot. Law Com. No 25 para. 106. See now Domicile and Matrimonial Proceedings Act 1973 ss. 7 and 8.

[53] See Matrimonial Causes Act 1973, ss. 21-24. In French law judicial separation leaves the duty of support subsisting but (a) the alimentary debtor can be discharged by the court of the whole or part of his or her alimentary debt if the creditor has seriously failed to meet his or her obligations towards the debtor, (b) a capital sum can be awarded instead of a periodical alimentary allowance. Code civil art. 303, read with arts. 207 and 285 (as amended by law of 11 July 1975).

a periodical allowance) as a court hearing an action of divorce. (Proposition 46).

2.197. Another special problem concerns the power of a court to award aliment on refusing certain decrees, such as a decree of divorce, nullity of marriage or separation. Under the present law, the Court of Session has a statutory power to deal with custody, maintenance and education of children "where an action for divorce, nullity of marriage or separation is dismissed at any stage after proof on the merits of the action has been allowed or decree of absolvitor is granted therein."[54] The power can be exercised "either forthwith or within a reasonable time after" the decree of dismissal or absolvitor.[55] This same provision applies also to the sheriff court,[56] though it can there affect only actions of separation. It is based on recommendations of the Morton Commission who clearly had in mind primarily the situation where the judge had considered the circumstances of the parties and of the children.[57] The equivalent English provision confers power where the proceedings are dismissed "after the beginning of the trial."[58] It may be that the court's powers are too narrow. Perhaps it should have power (which, of course, it would not have to exercise if it were undesirable or inappropriate to do so) to deal with custody of, and aliment for, children on dismissing an action at any stage[59]. Perhaps it should have this power in any consistorial action, including actions for declarator of marriage and actions of adherence. We invite views on these questions. Curiously, the sheriff courts appear to have wider

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[54] Matrimonial Proceedings (Children) Act 1958 s.9(1). Cf. Gall v. Gall 1968 S.C. 332; Driffel v. Driffel 1971 S.L.T. (Notes) 60.

[55] 1958 Act, s.9(1).

[56] Ibid. s.15 (defining "the court").

[57] Report of the Royal Commission on Marriage and Divorce 1951-1955 (Cmd. 9678) paras. 402 and 417.

[58] Matrimonial Causes Act 1973 s.23(2).

[59] In Gall v. Gall supra Lord Justice-Clerk Grant said he would gladly have dealt with custody if he had had jurisdiction.

powers in this respect than the Outer House of the Court of Session. The Sheriff Courts (Scotland) Act 1907, as amended, gives the sheriff jurisdiction in:

> "actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment or interim aliment, and actions for regulating the custody of children."[60]

In the sheriff court, craves for custody and aliment of children in actions of separation and aliment or adherence and aliment are independent and colateral and, not, as in the Court of Session, ancillary.[61] In other words, an action for separation or adherence in the sheriff court with craves for custody and aliment of children is really a combined action, and if the sheriff refuses decree of separation or adherence (quite apart from the provisions of the 1958 Act considered above), he may nevertheless grant an order for custody and aliment.[62] So far as aliment for the pursuer is concerned, the position is more doubtful. It has been held to be competent in the sheriff court to crave decree of adherence and aliment or (as an alternative) interim aliment[63] and there would seem to be no reason, in principle, why a pursuer in an action of divorce should not have an alternative conclusion for aliment for herself in the event of divorce being refused.[64] Even under the present law, failure to establish grounds for divorce does not necessarily mean that the pursuer is disentitled to aliment. A wife may, for example, fail to establish cruelty yet prove

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[60] 1907 Act s.5(2) as amended by Sheriff Courts (Scotland) Act 1913.

[61] O'Brien v. O'Brien (1957) 73 Sh. Ct. Rep. 129.

[62] Ibid.

[63] Robertson v. Robertson (1963) 79 Sh. Ct. Rep. 88.

[64] See Clive and Wilson, op. cit. p. 657-659 (on alternative conclusions for divorce and separation or adherence). In Anderson v. Anderson; Donnelly v. Donnelly; Clark v. Clark 1970 S.L.T. (Notes) 64 it seems that interim aliment was awarded although divorce was refused. It may be doubted, however, whether a conclusion for interim aliment pendente lite is sufficient to support an award of interim aliment to continue after the action has terminated.

that she had and has reasonable cause for non-adherence. Or she might fail to establish adultery or desertion, yet prove that her husband was actually living in desertion at the time of the proof (even though it may not have continued for the three years necessary for divorce). If our suggestion in Proposition 31 (abolition of requirement of willingness to adhere or reasonable cause for non-adherence) is approved and implemented by statute, the circumstances would be multiplied in which a spouse refused divorce would nevertheless be entitled to aliment. There may also be situations in which it would be convenient for the successful defender in a divorce action to be awarded aliment. A wife defending an action of divorce for desertion may, for example, establish that she has reasonable cause for non-adherence. Again, there would seem to be no reason in principle why she should not conclude for aliment for herself. It might be argued that the court refusing divorce or separation should act on the assumption that the parties will become reconciled and should therefore not deal with aliment, but this argument strikes us, as it struck the Law Commission,[65] as unrealistic and, in any event, the conferment of a power does not mean that the power always has to be exercised. We invite views on this question also. Our preliminary view is that the law should be clarified and that it should be competent to combine conclusions for custody and aliment with conclusions for any consistorial decree so that the courts are not debarred from making orders as to custody and as to aliment (whether for children, or pursuer or defender) on refusing decree in a consistorial action. (Proposition 47).

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[65] Working Paper No 9 paras. 75-77. In the Report which followed this Working Paper the Law Commission decided, in the light of their consultations, not to recommend a power to award financial provision on refusing decree of divorce, nullity or judicial separation. They did not think this was desirable "in advance of a complete reformulation of the obligation to maintain". Law Com. No 25 para. 15. In Scots law there is a well-developed "obligation to maintain" so that this reason for inaction does not apply.

2.198. Factors to be taken into account by court in quantifying aliment. We have already considered how far the courts should have regard to the needs of the alimentary creditor and the resources of the alimentary obligant in our examination of the conditions of liability and of entitlement to aliment (paras. 2.92. to 2.119. above). We have also suggested that misconduct should not be relevant to such entitlement (paras. 2.125. and 2.134. above). We have further suggested that the content or measure of the alimentary debtor's obligation, whether court proceedings are raised or not, should be "to provide such support as is reasonable in the circumstances". (para. 2.148. above). The question which we consider in this paragraph is whether any guidance should be given to the courts as to the factors to be taken into account in quantifying aliment. If our suggestion as to the measure of support is acceptable, then it seems clear that the court s should be free to consider all the circumstances of the case. Specific guidance should be limited to points of possible doubt, such as conduct and earning capacity. For the rest, it is clear that the needs of the alimentary creditor and the resources of the alimentary obligant are relevant to the quantification of aliment as well as to entitlement to aliment. Our discussion of special problems involved in assessing needs and resources (see paras. 2.95.-2.117. above, on earning capacity, social security payments, charitable aid, recourse to capital, education of alimentary creditors, support of others, expenses of litigation, relevance of supplementary benefit formulae) is also relevant in the context of quantification. In practice, indeed, these problems are more likely to arise in relation to quantification than in relation to entitlement and we have already suggested that earning capacity is best dealt with by directing the courts to take it into account in quantifying aliment rather than by making its absence a condition of entitlement to aliment (para. 2.97. above). Our views are similar with regard to conduct. If conduct is left out of account as a test of entitlement to

aliment (between spouses[66] or between parent and child[67]) justice may require that it be allowed to play a role at the stage of quantification.[68] Is the husband who has brutally ill-treated his wife and driven her from the home to be entitled to full aliment from her if she is employed and he is not? Is the husband or wife who has abandoned his or her family entitled to come back years later and claim to be supported at the same level as if nothing had happened? Is the abandoning parent of a legitimate or illegitimate child to be able to claim a full measure of support from his children in his old age? Against arguments such as the above, it can be said that it is time-consuming and productive of bitterness to engage in investigations of past misconduct and that the parties to an alimentary action should be discouraged so far as possible from raking over the ashes of old disputes. We invite views on this question but, to focus discussion, adopt the preliminary stance that conduct should be relevant in quantifying aliment in any case in which it would clearly lead to injustice to leave it out of account. Other factors, such as the age and health of the parties,[69] could be included in the list but they would already be taken into account in assessing needs and resources. We therefore suggest for consideration that in quantifying the amount of aliment which is payable the court should have regard to the whole circumstances of the case including, subject to Propositions 22 to 25 above, the needs and resources of the parties and, in particular, their earning capacities. It is for consideration whether a party's misconduct should be regarded as a relevant factor and if so whether it should be relevant in the ordinary case or only in unusual and extreme cases (for example, if in the particular circumstances of the case it would be clearly inequitable to leave it out of account). (Proposition 48).

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[66] See para. 2.127. above.

[67] See para. 2.136. above.

[68] We refer the reader to the discussion of conduct in relation to entitlement to aliment at paras. 2.123. to 2.127. and 2.134. to 2.136. above. See also Malcolm v. Malcolm 1976 SLT (Sh. Ct.) 10 where it was held that averments relating to the pursuer's conduct before separation were irrelevant in relation to the quantification of aliment in an action of separation and aliment.

[69] Cf. the list in the English Matrimonial Causes Act 1973, s.25(1).

2.199. Should there be maximum limits? At present there are no general limitations on the amount of aliment which can be awarded, although there are financial limits on the alimentary jurisdiction of the small debt court.[70] We think that as in the present law, there should be no general maximum limits on the amount of aliment which can be awarded. (Proposition 49). We are confirmed in this conclusion by the experience in England where the upper limits on awards by a magistrates' court of maintenance for a spouse or child were abolished in 1968.[71]

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[70] See para. 2.201. below.

[71] Maintenance Orders Act 1968, implementing the recommendations of the Report of the Departmental Committee on Statutory Maintenance Limits (the Graham-Hall Committee) (1968) Cmnd. 3587.

Section H

Miscellaneous problems relating to alimentary actions

Introductory

2.200. In this, the final Section of our examination of aliment, we consider the following topics:

(a) the raising of the limits of the jurisdiction of the sheriff to entertain alimentary actions by the small debt, or new summary cause, procedure;

(b) title to sue for aliment for persons suffering from some incapacity;

(c) procedural aspects of alimentary proceedings in the Court of Session;

(d) the requirements of proof in sheriff court actions of aliment;

(e) whether the court should have power ex proprio motu to award aliment for a lesser amount than that claimed by the pursuer;

(f) the question whether the court should have power to remit arrears of aliment;

(g) the right of an alimentary creditor to claim interest on arrears of aliment;

(h) the powers of the court in applications for variation or recall of alimentary decrees, including the question of automatic revaluation of awards of aliment; and

(i) the termination and duration of decrees awarding aliment.

In addition we have submitted to the Lord President of the Court of Session, a brief memorandum suggesting, for consideration by the appropriate Rules Councils and the Court as rule-making authority, certain improvements in the procedural forms to be used in actions for aliment. This memorandum is set out as Appendix C.

Raising limits of jurisdiction in sheriff court small debt cases (or new summary cause procedure).

2.201. The Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963, section 3(1), provides that:

> "An action of interim aliment by one party to a marriage against the other may competently be brought in the sheriff's small debt court under the Small Debt Acts if the aliment claimed in the action does not exceed -
>
> (a) the sum of five pounds per week in respect of the pursuer, and
>
> (b) the sum of [one pound, 50 pence] per week in respect of each child (if any) of the marriage, ..."[72]

Even before the 1963 Act, an action of interim aliment between spouses was held competent in at least some sheriffs' small debt courts if the total amount of periodic payments craved in the action was within the normal financial limit of the small debt jurisdiction.[73] This limit is at present £50[74]. Other non-consistorial actions of aliment are also competent in the small debt court. We reviewed the development and scope of this small debt jurisdiction in our Memorandum to the Departmental Committee on One-Parent Families and summed up the present position as follows:

> "[T]he small debt court was and is intended mainly for the recovery of debts. It is accordingly competent to raise those alimentary actions which are non-consistorial actions for debt, namely actions for interim aliment between spouses,[75] actions of aliment between legitimate children and their parents or other liable relatives and vice versa,[76] and actions of affiliation and aliment.[77]

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[72] The Act followed on recommendations in the Seventh Report of the Law Reform Committee for Scotland (1959) Cmnd. 907.

[73] See Docherty v. Docherty (1908) 24 Sh. Ct. Rep. 120; Whillans v. Whillans (1908) 24 Sh. Ct. Rep. 122; Bain v. Bain 1954 S.L.T. (Sh. Ct.) 42.

[74] Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963, s.2.

[75] See Sheriff Courts (Scotland) Act 1907, sections 5(2) and 45 [and note 73 above].

[76] Jerry v. High (1877) 1 Guthrie's Select Sheriff Court Cases 417; 21 Journal of Jurisprudence 356.

[77] Campbell v. Haddow (1890) 7 Sh. Ct. Rep. 13. A declarator of paternity would probably not be competent but such a declarator is not necessary: see Silver v. Walker 1938 S.C. 595.

> Conversely it is not competent to bring an action for separation and aliment, adherence and aliment or custody and aliment since these actions are not simple debt actions.[78] The small debt court may award future payments or instalments over a period of twelve months provided that the total sum does not exceed £50.[79] It does not matter that the decree may in effect determine liability for continuing aliment for a longer period."[80]

Following on recommendations of the Grant Committee's Report on The Sheriff Court,[81] the Sheriff Courts (Scotland) Act 1971 provides for a new type of summary procedure, which on an appointed day will replace the existing small debt procedure and the existing summary cause, and which will be available when the sum sued for is not more than £250 (the limit being alterable by Order-in-Council).[82] Section 35(d) of the 1971 Act provides that the new summary cause procedure shall be used for the purposes of:

> "proceedings which, according to the law and practice existing immediately before the commencement of this Act, might competently be brought in the sheriff's small debt court ...."

Accordingly, it would seem that in due course actions for interim aliment between husband and wife will competently be brought as summary causes if the aliment claimed in the action does not exceed £5 per week for the pursuer and £1:50p for any child of the marriage, although the matter would have been clearer if section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963 had been prospectively amended so as to refer to "summary causes" instead of (as at present) "the sheriff's small debt court".

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[78] Strang v. Strang (1882) 4 Coup. 563; 19 S.L.R. 724.

[79] Small Debt Amendment Act 1889, section 9.

[80] Report of the Departmental Committee on One-Parent Families (1974) Cmd. 5629 Appendix 6, p. 227-28 (footnote numbers altered).

[81] Report of the Departmental Committee on the Sheriff Court (1967) Cmnd. 3248 para. 611 ff.

[82] 1971 Act ss. 35 and 41.

2.202. It has for some time been recognised that the financial limits on small debt actions of interim aliment between husband and wife are too low, that they should be raised, and that they should be made alterable by statutory instrument to keep pace with inflation and the up-ratings of supplementary benefit. We understand that the Government has this matter under consideration with a view to legislation when that can be sponsored.

Other actions of aliment under small debt (or new summary cause) procedure

2.203. The problem, however, is wider. There is clearly a need to abolish the 'total sum limit' upon other alimentary actions in the sheriff court and to replace it with limits upon the weekly or other periodic sum concluded for. Summary procedure, nevertheless, is not suitable if the defender denies the alimentary relationship giving rise to the claim. If there is a claim by a legitimate child against his parent, or vice versa, and the relationship of parent and child is denied, then the case should (as under the present law) be sisted to enable the question to be decided by an action of declarator in the Court of Session e.g. of legitimacy or bastardy and putting to silence. A similar course would be taken if actions of aliment between children and grandparents remain competent and are not abolished. Similarly an action of affiliation and aliment should be remitted to the sheriff's ordinary court roll if the crave for a finding or declarator of paternity [i.e. affiliation] is contested. Such a contested action often involves difficult questions of evidence and the decision is often appealed, so that a record of the evidence should be made. We therefore suggest that actions for aliment alone, or for affiliation and aliment, should be competent in the sheriff's small debt court if the amount claimed for each alimentary creditor does not exceed an appropriate prescribed weekly or other periodic sum. The

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[83] See our Memorandum to the Finer Committee Cmnd. 5629-1, para. 127. Following a resolution passed by its Annual General Meeting, the Law Society of Scotland recently made representations to the Government that the limits should be raised:

amount of the prescribed sum should be variable by statutory instrument. Where, however, the alimentary relationship in question is denied by the defender then (in a case where the sheriff has jurisdiction to entertain the declarator, e.g. a declarator of paternity in an action of affiliation and aliment) the case should be remitted to the sheriff's ordinary roll. In other contested cases where the sheriff does not have jurisdiction to determine the issue of personal status, the proceedings should be sisted to enable the appropriate action of declarator to be brought in the Court of Session. (Proposition 50). We would add that we have considered whether the limits on actions for aliment alone should be abolished, but take the view that such a course is inconsistent with the philosophy of small debt or summary procedure as a simplified form of process for small claims.

Aliment for incapacitated persons: title to sue

2.204. We have already, in Proposition 34, suggested the rationalisation of the rules on who can claim aliment for a child. There is little authority concerning the raising of actions for the aliment of adult persons who are incapable of managing their affairs. In Thomson v. Thomson[84], an insane wife raised an action of separation and aliment with the consent and concurrence of her father. Once the action was raised, a curator ad litem was appointed. The action was held to be incompetent, on the ground that only the wife herself could instruct an action of such a personal nature as separation. Lord Young, however, indicated obiter that it would have been different if aliment alone had been in issue:

> "She must of course be alimented, and an action for aliment may be brought in her name with the aid of any guardian whom the Court may assign to her, but this is not such an action".[85]

In an earlier case[86], "an imbecile and paralytic old man" raised an action for aliment against his son. A tutor ad litem

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[84](1887) 14 R.634.

[85]Ibid. at p. 636.

[86]Pringle v. Pringle (1824) 3 S.248.

was appointed and decree for aliment granted. In other cases, however, the Court has criticised and disallowed the raising of an action in the name of an insane person with a view to having a tutor or curator ad litem appointed[87] and, according to Mackay's Manual of Practice

> "the proper course is to apply by petition for a tutor-dative or a curator bonis, not a curator ad litem, at whose instance for behoof of the insane person the action proceeds."[88]

In at least two more recent cases, a curator bonis has been recognised as having a title to claim aliment for his ward.[89] A separate application for the appointment of a curator bonis must add to the expense of alimentary proceedings and it may be that there is an argument for removing any doubts there may be as to the competency of raising an action in the name of the incapacitated person with a view to the appointment of a curator ad litem thereafter. On the other hand, the problem may not be of great practical importance.[90] An action for aliment can be raised against a person suffering from incapacity[91] or his curator bonis[92], and there seems to be no need for change here. We invite views but make no suggestions in the meantime.

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[87] See Reid v. Reid (1839) 1 D.400; Mackenzie (1845) 7 D.283. But the reasoning in these cases is inconsistent with the normal practice of raising an action in the name of a child who has no tutor.

[88] (1893) p.149.

[89] Howard's Exr. v. Howard's Curator Bonis (1894) 21 R.787 (where the proceedings took the form of a special case); Edinburgh Parish Council v. Aitchison (1919) 35 Sh. Ct. Rep. 195. There have been several cases in which curators bonis have petitioned the Court of Session for authority to pay aliment out of their ward's estate but these are not relevant to the present discussion. See e.g. Hamilton Petr. (1842) 4 D.627 (aliment to wife of incapax); Myers Petr. (1845) 7 D.886 (increased allowance to incapax to allow him "the benefit of occasional carriage airings, and the use of wine when it was thought expedient.") Howe (1859) 21 D.486 (aliment for son of incapax.)

[90] There is, of course, no doubt as to the competency of an action of relief by someone who has de facto alimented the incapax without intention of donation. See e.g. Mackintosh v. Taylor (1868) 7 M.67; Sutherland County Council v. Macdonald 1935 S.N. 58 and 70.

[91] Drummond v. Stewart (1756) Mor. 412.

[92] A. v. B. (1858) 20 D.778 (Here the incapax was called as defender along with his curator bonis but, as the incapax is superseded in the management of his affairs, it would seem that he should not be called.)

Court of Session procedure in proceedings for aliment

2.205. Most claims for aliment in the Court of Session are for interim aliment pendente lite, or for aliment for children in actions of divorce. The procedure for dealing with cases where the only dispute concerns aliment or financial provision has recently been changed on an experimental basis[93] and the Rules of Court may well be amended in the light of the experience gained. It would, therefore, be inappropriate for us to deal with this matter now. The same considerations apply to actions of separation and aliment or adherence and aliment in the Court of Session: such actions are in any event rare in that court. There is, however, one point which applies to many actions concluding for aliment, undefended as well as defended, and on which anxiety has been expressed.[94] That is the difficulty faced by a pursuer in ascertaining the defender's resources. We revert to this below.[95] Actions for aliment alone proceed in the Court of Session as ordinary actions.[96] We deal later with the powers of the court in undefended actions and, as noted above, with the question of assessment of resources.

Sheriff court procedure in actions for aliment: requirement of proof

2.206. We described the procedure in the various kinds of action for aliment in the sheriff court in our Memorandum to the Committee on One-Parent Families.[97] We noted there that the procedure in actions of separation and aliment and adherence and aliment was of a consistorial nature: the crave for judicial separation or adherence is regarded as "affecting" status, so that decree will not be given, even in an undefended action,

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[93] See Practice Note of Jan. 4, 1973.

[94] See the Report of the Committee on One-Parent Families (1974) Cmnd. 5629 p. 231 note 1.

[95] Para. 2.209.

[96] Rule of Court 154.

[97] (1974) Cmnd. 5629 Appendix 6 paras. 82-127.

without proof.[98] A proof will also be held in undefended actions for custody and aliment of children: here the crave for custody takes the action out of the scope of the normal rule on decrees in absence.[99] We summarised in our Memorandum the views of the Morton Commission, the Law Reform Committee for Scotland (in its Seventh Report), and the Grant Committee on the Sheriff Court on procedure in actions for separation and aliment and adherence and aliment. The Morton Commission stressed the financial role of these actions and recommended a simpler and cheaper procedure.[1] The Law Reform Committee for Scotland laid more stress on the "consistorial" role of the actions, noting that a decree of separation could be used as proof in a later divorce action and that a decree of adherence as such was unlikely to be sought (in preference to a decree of interim aliment) unless there was some special reason for it (e.g. in order to convert a consensual separation into desertion with a view to a later divorce). They did not therefore support the proposal for a simplified small debt type of procedure, but envisaged that a proof in such actions would continue to be required.[2] The Grant Committee did not suggest any alteration in relation to separation actions but suggested that there should be no need for proof in undefended cases of adherence. "The decree in such an action", they noted "can at any time be nullified by the defender agreeing to live with the pursuer and no vital issues are involved."[3] We should be glad to receive views on this question. Our own tentative view accords with that of the Law Reform Committee for Scotland. We think that proof should continue to be required before a court grants decree of separation or adherence (both of which

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[98] See Sheriff Courts Rules, rule 23, which provides that, in an undefended cause, decree in absence may be granted at any time after the expiry of the induciae but that "this rule shall not apply to actions of separation and aliment, adherence and aliment, or to actions regulating the custody of children". See also Grant v. Grant (1908) 24 Sh. Ct. Rep. 114.

[99] See the proviso to rule 23 of the Sheriff Court Rules (note 98 above).

[1] (1956) Cmd. 9678 paras. 970 and 976 (suggesting that such actions should be competent in the small debt court).

[2] (1959) Cmnd. 907, paras. 18-19.

[3] (1967) Cmnd. 3248 para. 607.

affect the obligation to adhere, the one dissolving it, the other judicially confirming it). It may be that there is a case for abolishing the action of adherence altogether, and that this case will become stronger if the grounds of divorce are changed so as to include a period of consensual separation, but that is outwith the scope of this Memorandum.

2.207. Actions for aliment, other than those referred to in the previous paragraph and those brought in the small debt court, proceed as ordinary actions for debt.[4] The Finer Committee thought that this led to unnecessary complexity and expense and that there could

> "be no justification for saddling the legal aid scheme in Scotland with costs (sic.)in simple matrimonial disputes which result from a procedure which might be appropriate for settling financial disputes between large commercial organisations."[5]

The Committee stated that they had:

> "found in Scotland a substantial recognition of the desirability of adopting a simpler and cheaper procedure in alimentary actions in the sheriff court, both among lawyers and social workers and among organisations."[6]

The procedure in the new summary cause will be as simple and cheap as possible, consistently with justice to the defender, and if the financial limits on alimentary actions under this procedure are raised and kept properly adjusted (see paras. 2.201 to 2.203), the above criticism should be met. We invite views.

Orders ex proprio motu in undefended actions for aliment

2.208. The procedure in actions for the payment of money is adversary and, as a consequence, the general rules are that (1) the court cannot grant a decree for payment unless the payment has been requested by one of the parties to the action, and conversely (2) if the action is undefended, the court is bound to grant a decree for payment if the decree has been requested by a competent conclusion (in the Court of Session) or crave (in the sheriff court).[7] Two questions arise in relation to actions

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[4] We have described the procedure in our Memorandum to the Committee on One-Parent Families (1974) Cmnd. 5629 Appendix 6 paras. 104-123.

[5] (1974) Cmnd. 5629 para. 4.447.

[6] Ibid.

[7] R.C., 89; Sheriff Courts (Scotland) Act, 1907, Sch. 1, rule 23.

containing a conclusion or crave for aliment. First, how far are the normal rules affected by a statutory requirement that the court should have regard to certain circumstances or should make such order as it thinks fit? Second, how far is it affected by the requirement of proof in certain consistorial actions, even if undefended? Curiously, there is not a clear-cut answer to either question. The Illegitimate Children (Scotland) Act 1930 directs the court awarding aliment in an action of affiliation and aliment to "have regard to the means and position of the pursuer and the defender, and the whole circumstances of the case."[8] This looks like a mandatory requirement which not only empowers but also obliges the court to consider the circumstances for itself before awarding aliment. Yet in Terry v. Murray[9] it was held that the sheriff in an undefended action had no discretion to award a lower amount than that claimed. On the other hand, the statutory provisions giving the court a discretion in relation to financial provision on divorce have been held to imply that the court will not simply award the amount claimed if the defender does not dispute it: the court must exercise its discretion and it must have information before it to enable it to do so.[10] The cases cited in the last footnote were all divorce cases and it might be thought that the crucial point was that in consistorial cases decree will not be granted without proof:[11] in Terry v. Murray, indeed, the ratio decidendi was that actions of affiliation and aliment did not fall within the class of "consistorial" actions excepted from the normal sheriff court rule on decrees in absence. Yet the emphasis in these divorce cases is on the nature of the statutory discretion conferred on the court, not on the consistorial requirement of proof. And it has been held in the sheriff court that the requirement of proof in actions of separation and adherence relates to the substantive grounds of

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[8] S.1(2).

[9] 1947 S.C.10.

[10] Gould v. Gould 1966 S.C. 88. Cf. Seed v. Seed 1971 S.L.T. 305; Marshall v. Marshall 1965 S.L.T. (Notes) 17; Adamson v. Adamson 1939 S.L.T. 272.

[11] Court of Session Act 1830, s.33; Sheriff Court (Scotland) Act 1907 Sch. 1, rule 23, proviso quoted at note 98 to para. 2.203. above.

action only and does not apply to proof of the defender's means.[12] The underlying theory of the law is therefore in doubt, but the practical results may be summarised as follows.

(1) In relation to interim aliment pendente lite, the court has a discretion and will not necessarily give decree for the amount claimed, even if the claim is undisputed.[13]

(2) In actions of divorce the court has a discretion and will not necessarily give decree for the amount of aliment or financial provision claimed, even if the claim is undisputed.[14] Probably the same rule applies in actions of separation or adherence and other actions subject to the consistorial requirement of proof[15]: certainly the pursuer cannot simply demand a decree in absence in such cases although, as we have seen, it has been held in the sheriff court that actual proof of the defender's means is not required.[16]

(3) In actions of affiliation and aliment,[17] and actions for aliment between ascendants and descendants in the legitimate line[18] and actions of aliment alone (or interim

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[12] Gaston v. Gaston 1957 S.L.T. (Sh. Ct.) 57 (The same reasoning would apply to actions for custody.) Cf. Christie v. Christie 1919 S.C.576.

[13] Cf. Currie v. Currie (1833) 12 S.171; Murison v. Murison 1923 S.C.40; Fyffe v. Fyffe 1954 S.C.1.

[14] In Marshall v. Marshall, supra and Gould v. Gould, supra the main discussion was of financial provision for the wife, but aliment for children was also claimed and it seems that the same principles were applied.

[15] In the Court of Session these include "actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy ... and of putting to silence." Conjugal Rights (Scotland) Amendment Act 1861, s.19. In the sheriff court the only type of action, other than separation and adherence, now excluded from the usual rule on decrees in absence is an action of custody. Sheriff Courts (Scotland) Act 1907, Sch. 1, rule 23, proviso.

[16] Gaston v. Gaston supra.

[17] Terry v. Murray 1947 S.C. 10.

[18] The principle of Terry v. Murray must apply to these actions where there is not even any statutory requirement that the court should have regard to certain circumstances in awarding aliment.

aliment) between husband and wife,[19] the normal rules apply and, if the defender does not defend, decree will be given in absence for the amount claimed.

It is arguable that it is undesirable to have different rules applying, depending on the type of action in which aliment is claimed. On the one hand, it might be said that any claim for aliment is simply a petitory claim for money and that if the defender has adequate notice and is quite happy to pay the amount claimed, no purpose is served by the court's investigation of the circumstances to see if that amount is appropriate. This can only add to the expense and may well result in the pursuer obtaining less in the end of the day.[20] On the other hand, it is arguable that in dealing with aliment, which depends on means and needs and which may affect the living standards of two households, the courts should be free to exercise a discretion even if the amount claimed is not disputed. Lord Jamieson in Terry v. Murray thought that it was "unfortunate" that the sheriff had no discretion in the circumstances of that case. And the Law Commission, in recommending the introduction of a "consent order" procedure[21] in the English magistrates' courts, thought that the court should have a discretion to refuse to make a consent order if it considered that such an order would not be in the best interests of the parties and their children. The court might consider the amount to which the parties had consented to be "unrealistically high or low, bearing in mind their financial circumstances": the consenting party might be "cherishing false hopes about the

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[19] In the Court of Session these actions now proceed as ordinary actions. Rule of Court 154. They are no longer included in the proviso to Rule 23 of Sch. 1 to the Sheriff Courts (Scotland) Act 1907, so that in the sheriff courts too they now proceed as ordinary actions for debt. See Act of Sederunt of Act. 1, 1963.

[20] See the observations of the Lord Ordinary in Gould v. Gould 1966 S.C. 88.

[21] We note in passing that in Scotland there is nothing to stop the parties to an alimentary action from agreeing on the amount of aliment and asking the court by joint minute to grant decree accordingly. See Donald v. Donald (1862) 24 D.499 (action for aliment alone); Christie v. Christie 1919 S.C. 576 (adherence and aliment, but conclusion for adherence dropped); Lothian v. Lothian 1965 S.L.T. 368 (divorce); Robson v. Robson 1973 S.L.T. (Notes) 4 (divorce).

possibility of reconciliation": there might, in theory, be a danger that the consent order would be "used between conniving spouses" so as to throw the burden of support on the state.[22] It would be quite wrong to enable a court to award more aliment in an undefended action than has been claimed by the pursuer. This would cause manifest injustice to the defender, who may have failed to defend simply because the amount claimed seemed reasonable. It would be pointless to enable the court to award less than the amount claimed (unless perhaps the sum is altogether exorbitant) if the defender has notice of the claim and does not dispute it. In alimentary proceedings unnecessary inquisitions are, we think, to be avoided. We return to this question at paragraph 3.75. in considering financial provision on divorce, where the considerations are slightly different. For the moment we merely invite views on the proposition that if a claim for aliment is undisputed, the court should not have a discretion to award a lesser sum than the amount claimed (it being incontrovertible that the court should never have power to award more than the amount claimed). (Proposition 51.)

Ascertainment of defender's means

2.209. Whatever view is taken of Proposition 51, there remains a problem for the pursuer in an action for aliment. He or she obviously does not know whether the action will be defended and must, or at least should, include averments as to the defender's means.[23] Yet these may be impossible to ascertain. The Finer Committee drew attention to this problem.

> "It frequently happens that a wife who requires to take an alimentary action against her husband has no information as to his income or capital. In circumstances where the husband does not contest the amount of aliment claimed such a wife can only either seek an exorbitant amount, so as to force her husband to oppose the claim, or obtain an order of court upon the husband's employers, if she knows them, to disclose the information. The Law Society of Scotland have expressed dissatisfaction with this situation and recommended that it be made mandatory upon a husband to supply his wife with details of his capital and income

[22] Working Paper No 53 para. 77.

[23] See e.g. Lees, Sheriff Court Styles (4th ed.; 1920) pp. 78-81; Lewis, Sheriff Court Practice (8th edn. 1939) pp. 496-98; Dobie, Sheriff Court Styles (1951) pp. 10, 19-20, 26-27, 466.

> whether he seeks to oppose the conclusions of an alimentary action or not. The Law Society have further advocated a review of the procedure for enabling a husband to give details of his financial position in an alimentary action by his wife. A husband who wishes to contest only on the amount of aliment claimed now has to go through all the procedures of lodging a defence - including obtaining the services of a solicitor and applying for legal aid. The information about his means could be given simply by affidavit."[24]

There are two separate points in this passage. First, it is suggested that a defender in an alimentary action should have a duty to supply details of his means. The main difficulty we envisage here is to provide a suitable sanction to enforce the duty. Suppose the summons informs the defender that he is bound to supply details of his means, whether he intends to defend or not. What is to be the sanction if he fails to do so? If it is merely that decree may be given against him for the amount claimed, then there is no advance on the present law. If it is to be imprisonment, and if the suggestion is to apply to all actions of aliment, then a powerful weapon has been placed not only in the hands of wives but also in the hands of children, (whether legitimate or illegitimate) grandchildren, parents and grandparents. Merely by raising an action for aliment, however unnecessary or unfounded, an alimentary creditor, or indeed someone claiming to be an alimentary creditor, could compel another person to produce a statement of his means. We question whether this is wise. This objection would perhaps not be so strong if the proposal were limited to husbands and wives, but if a wife claiming aliment for a legitimate child is to have this power, why should the mother claiming aliment for an illegitimate child be placed in a weaker position? And why should a young child claiming aliment for himself or herself (e.g. because the mother is dead) be placed in a weaker position? On the whole we have grave reservations about using the sanction of imprisonment at this early stage of proceedings for aliment. There would be little point in merely inviting the defender to submit a statement of his

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[24] Cmnd. 5629 para. 4.447 note 1.

resources or to fill in and return a questionnaire, even if he did not wish to defend. If the defender thinks that the pursuer has claimed too little, why should he bother to return a statement of his means, and if he thinks she has claimed too much why should he not defend? We invite views on the question: Should the person from whom aliment is claimed be bound to supply details of his capital and income whether he intends to defend or not? (Proposition 52).

2.210. The second suggestion is that a husband should not have to go through all the procedures of lodging defences if he only wishes to contest the amount of aliment claimed. This suggestion was also made, in relation to consistorial actions, by the Grant Committee on the Sheriff Court.[25] They recommended that, as in the Court of Session procedure in consistorial actions at that time, a defender who was not contesting the substantive grounds of action should be able to lodge a minute showing that he proposed to defend only on the amount of aliment or alternatively indicate this intention in his notice of appearance. The Court of Session practice, however, has now been changed on an experimental basis: procedure by way of minute in consistorial actions defended only on aliment and financial provision has been scrapped in favour of a simplified procedure by way of defences.[26] The suggestions for change in the sheriff court procedure might merit reconsideration in the light of Court of Session experience. If extensive use is made of the new summary cause procedure in actions of aliment, the difficulties of the present system might be alleviated to some extent. We invite views on the question: Should there be a special procedure to enable a person from whom aliment is claimed to contest only the amount without the need to lodge defences? (Proposition 53).

2.211. There has been much discussion in England on the use of a means questionnaire,[27] possibly supplemented by enquiries by a means assessment officer attached to the

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[25](1967) Cmnd. 3248 para. 609.

[26]Practice note of Jan. 4, 1973.

[27]See Report of the Committee on Statutory Maintenance Limits (1968) Cmnd. 3587 paras. 214-222. Report of the Committee on the Enforcement of Judgment Debts (1969) Cmnd. 3909 para. 1273; Law Com. Working Paper No 53 (1973); Report of the Committee on One-Parent Families (1974) Cmnd 5624 para. 4.117.

courts,[28] In maintenance proceedings. A suggested form of affidavit of means, including a questionnaire, is in use in divorce proceedings, but its use is optional.[29] The Law Commission have suggested the use of means questionnaires in relation to both interim orders[30] and other maintenance proceedings[31] in magistrates' courts: the applicant, but not the respondent would, or could, be compelled to fill up such a questionnaire. To a large extent these recommendations are designed to remedy the unstructured proceedings in magistrates courts, which may well result in the parties turning up at a hearing with no clear idea of what information as to means will be expected of them and with totally inadequate evidence of means. To this extent they have little application in Scotland where the procedure is structured so that the parties and their advisers realise what is required at the proof: the pursuer who is claiming aliment will include averments of means in his or her summons[32] and the defender has an opportunity of countering with his own averments. To require this information to be embodied in a means questionnaire would be a minor change of form. Nevertheless, the idea of a standard form of means questionnaire for use in actions for aliment is an interesting one. We raise for discussion the question: Is there a useful role for means questionnaires in relation to claims for aliment? (Proposition 54).

Remission and restriction on enforcment of long-standing arrears of aliment

2.212. In Scots law, with minor exceptions,[33] the general rule is that arrears of aliment can be allowed to mount up under a decree and diligence done for the accrued total. A considerable amount of arrears can accumulate especially having regard to the fact that an alimentary decree can be pronounced in the defender's

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[28] Report of the Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and Other Sums of Money (1934) Cmd. 4649 paras. 256, 258-259; Report of the Committee on Statutory Maintenance Limits (1968) Cmnd. 3587 para. 217. The Committee on One-Parent Families envisaged that its proposed family courts would be able to assist the courts "by way of investigation or expert assessment of circumstances". Cmnd. 5629 para. 4.405.

[29] Practice Note (Family Division: Affidavit of Means) 22 December 1972 [1973] 1W.L.R. 72.

[30] Working Paper No 53 (1973) para. 101. See also paras. 87-90.

[31] Id. para. 101.

[32] See note 23 above for references to sheriff court styles. compare in the Court of Session, Rule of Court 158(a) (requiring the applicant for financial provision in divorce to set forth in the condescendence of the summons "a statement of facts in support of the application").

[33] See Maintenance Orders (Reciprocal Enforcement) Act 1972 s.20; see also Maintenance Orders Act 1950, s.20 which is now spent.

absence in contrast to England where the magistrates' courts cannot award maintenance in the defendant's absence and where there are judicial powers to remit arrears and restriction on enforcement of arrears. It will be for consideration whether an alimentary creditor should be required to apply to the court for leave to enforce, by diligence or civil imprisonment, payment of long-standing arrears. We revert to this question in our forthcoming consultative Memorandum on the collection and enforcement of alimentary debt.

Interest on arrears of aliment

2.213. The forms of crave for aliment in common use in the sheriff courts include a request for interest on each payment from the date when it falls due until payment.[34] The older styles for actions of aliment in the Court of Session also included a conclusion for interest on each instalment.[35] However, in concluding for aliment for children in divorce actions it is not now customary to ask for interest. Even in the absence of a decree awarding interest on arrears of aliment, it may be that interest is due ex lege on arrears due but unpaid.[36]

2.214. It could be argued that interest should not be allowed to run on arrears of aliment. It may make the calculation of the amount due (for the purpose of diligence, for example) unnecessarily difficult if the interest on weekly payments has to be included. Simplification of accounting procedures may become of practical importance if collection of aliment is centralised. On the other hand it is arguable that the calculation of interest may sometimes be perfectly simple (in the case of quarterly or half-yearly payments of aliment, for example); that abolition of interest on arrears of aliment would favour the tardy debtor; and that, in any event, it should be left to the pursuer, as the person mainly affected, to decide whether a simple calculation producing less is preferable to a slightly more complicated calculation producing more. To focus discussion, we suggest that interest should no longer run on arrears of aliment. (Proposition 55).

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[34] See Lees, Sheriff Court Styles (4th ed.; 1922) p.78; Lewis Sheriff Court Practice (7th ed.; 1939) pp. 496-498; Dobie, Sheriff Court Styles (1951) pp. 24-27.

[35] See Encyclopaedia of Scottish Legal Styles (1935) Vol. 1, pp. 181-182. Cf. the decrees in Dunn v. Matthews (1842) 4S.454 at p.455 and Macnaughton v. Macnaughton (1850) 12D.703.

[36] Cf. Hill v. Gilroy (1821) 1S.33; Pott v. Pott (1823) 12S.183; Moncrieff v. Waugh (1859) 21D.216; Dunnett v. Campbell (1883) 11R.280.

Variation and recall of decree for aliment

2.215. In general, a decree for aliment is variable on a change of circumstances. To a large extent this is governed by the common law:[37] but statutes conferring jurisdiction to award aliment or "maintenance" have also usually conferred power to vary or recall any order made.[38] Curiously, this was not done by section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 so that the Lord Ordinary awarding aliment for a child in a divorce action has no express statutory power to vary the award.[39] In practice this defect is surmounted readily enough by reserving leave to apply for variation in the interlocutor awarding aliment[40] but we think that the statutory position should be rationalised.

2.216. As a general provision would save much repetition in particular statutes, we suggest that with a view to simplifying the way in which the present law is expressed there should be one general statutory provision making it clear that a decree for aliment is always subject to variation or recall on a material change of circumstances. (Proposition 56).

2.217. Backdating variations of awards of aliment: A question which has connections, both with that of remission of arrears of aliment (referred to in paragraph 2.195. above) and with that of back-dating an original award of aliment (considered in paragraph 2.175 above) is whether it should be possible to backdate a variation of the amount payable. In one sheriff court case[41] a variation downwards was backdated, so as to relieve the husband retrospectively of liability for a period when the wife's needs had diminished, but the present law cannot be said to be clear. It may easily happen that an application for variation is not made until some time after a relevant change of circumstances, either because the applicant is ignorant of the true position or because he trusts the other party to comply with an informal re-adjustment of the amounts payable, and we

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[37] Macdonald v. Denoon 1929 S.C. 172; Brunt v. Brunt 1958 S.L.T. (Notes 41; Donnelly v. Donnelly 1959 S.C. 97 at 102. Notice, however, that a decree of affiliation and aliment was not regarded as variable at common law; it was regarded as an ordinary decree for debt; Ames v. Brown (1924) 40 Sh. Ct. Rep 275.

[38] Guardianship of Infants Act 1886 s.5; Guardianship of Infants Act 1925 ss. 3 and 6 as extended by the Children and Young Persons (Scotland) Act 1932 s.73 and the Guardianship Act 1973 Sch. 4; Illegitimate Children (Scotland) Act 1930, s.1(4); Matrimonial Proceedings (Children) Act 1958, s.14(3).

[39] Sanderson v. Sanderson 1921 S.C. 686; Bain v. Douglas 1936 S.L.T. 418.

[40] Rules of Court 156, 163(c), 164.

[41] A.M. v. H.M. (1955) Sh. Ct. Rep. 242.

think that an express power to backdate a variation would be useful (altnough we draw attention once again to the bankruptcy and foreign enforcement implications). A similar question is whether the court should have power to order re-imbursement of amounts overpaid. In English law, following on recommendations of the Law Commission,[42] the Matrimonial Causes Act 1973 now gives this power to the High Court and county courts in certain cases.[43] It might be thought that in Scotland an equitable result could be achieved by reliance on the law of unjustified encrichment, but the difficulty is that payments made under a court decree are not without cause or unjustified merely because the decree might have been varied had an application been made to the court in time. We think that a power to order reimbursement would be useful in the sort of situation in which a wife has continued to receive her full entitlement of aliment without disclosing that she has taken up full-time employment.[44] We invite views but tentatively suggest that the courts should be given powers to bakdate variations of aliment and to order reimbursement of excessive amounts received after a material change of circumstances. (Proposition 57).

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42 Law Com. No.25 paras. 92-93.

43 S.33(1). "Where on an application made under this section in relation to an order to which this section applies it appears to the court that by reason of -

(a) a change in the circumstances of the person entitled to, or liable to make, payments under the order since the order was made, or (b) the changed circumstances resulting from the death of the person so liable the amount received by the person entitled to payments under the order in respect of a period after those circumstances changed or after the death of the person liable to make payments under the order, as the case may be, exceeds the amount which the person so liable or his personal representatives should have been required to pay, the court may order the respondent to the application to pay to the applicant such sum, not exceeding the amount of the excess as the court thinks fit."

44 Cf. Dowswell v. Dowswell 1943 S.C.23.

2.218. Automatic revaluation and variation: In a time of rapidly changing money values, the question arises whether there should be any provision for automatic variation of awards of aliment to take account of inflation. Such provision is not unknown in other countries. In West Germany, for example, aliment for an illegitimate child is awarded in terms of a "standard aliment" (Regelunterhalt) which is the amount deemed to be necessary for support of a child living a simple mode of life in the care of its mother.[45] Most fathers will be ordered to pay the Regelunterhalt but it is possible to award a greater or lesser percentage of the Regelunterhalt to take account of special circumstances. The important point for present purposes is that the Regelunterhalt can be altered by the government (with the consent of the Bundersrat) to take account of changes in the cost of living.[46] We have already suggested that the amount of aliment should vary with the circumstances of the case and, in particular, with the needs of the creditor and means of the debtor. The difficulty with automatic revaluation is that while it may cater for an increase in the needs of the creditor it ignores the position of the debtor. Most wages may have gone up but his may not: his needs may have increased without any increase in his means. It is a question of balancing relief for one party against possible injustice to the other. There are also, in this area, broader political and economic issues involved, although it is arguable that if any payments are to be linked to the cost of living, alimentary payments should be.[47] On balance, we incline to the view that there should not be any provision for automatic variation of awards of aliment to take account of inflation. (Proposition 58).

[45] B.G.B. ss. 1615f. The amount may vary with the age of the child and with regional variations in the cost of living.

[46] B.G.B. ss. 1615f (2).

[47] It is interesting to note that alimentary debts were excluded from the French ordinances of 30 Dec. 1958 and 4 Feb. 1959 outlawing clauses varying payments with the cost of living. See Pélisser op. cit. pp. 428-430.

2.219. Whatever view is taken of automatic revaluation, it is important that the procedure for variation of aliment should be as simple, speedy, cheap and efficient as possible. The present position in ordinary actions in the sheriff court is as follows:

> "Applications for the recall or variation of any decree for payment of aliment, whether pronounced in favour of a spouse, a parent, or any other person, or pronounced in respect of a child legitimate or illegitimate ... shall be made by minute lodged in the original process in which decree was pronounced. The Court shall order the minute to be served on the opposite party or parties and appoint answers to be lodged within a specified time, and shall thereafter, without closing a record, and after such proof or other procedure as to the Court seems necessary, dispose of the application."[48]

It seems that an application by motion for interim variation would not be competent.[49] Applications for recall or variation of decrees for aliment pronounced in the sheriff's small debt court are made by summons[50] but we understand that a simplified procedure will apply in relation to variation of decrees for aliment made in a summary cause when it has been introduced. In the Court of Session, applications for variation or recall of alimentary decrees are made by minute.[51] No statutory rules apply and it is possible that interim variation would be competent.[52] Procedure by way of written minute and answers may seem unduly formal when the matter in dispute is a small weekly payment.[53] But the application for variation has to be got into court somehow,

[48] Sheriff Courts (Scotland) Act 1907, Sch. 1 Rule 171.

[49] MacMurray v. MacMurray (1953) 69 Sh. Ct. Rep. 234 read with the above Rule 171 and Stewart v. Stewart 1971 S.L.T. (Notes) 71.

[50] Sheriff Courts (Scotland) Act 1907, Sch. 1 Rule 171(a).

[51] Melvin v. Melvin 1918, 2 S.L.T. 209; Brunt v. Brunt 1958 S.L.T. (Notes) 41.

[52] A motion for interim variation of periodical allowance on divorce was held incompetent in Stewart v. Stewart 1971 S.L.T. (Notes) 71 but this was because the terms of the Rules of Court required application to be made by minute. Rule of Court 158(b) has since been amended to give power to make interim orders. Act of Sederunt of 9 February 1972. The Rules of Court do not fetter variation of aliment.

[53] Cf. the criticisms in Stewart v. Stewart 1971 S.L.T. (Notes) 71.

and it is desirable both that the parties should have notice of the evidence they will require to produce, and that there should be some record of the situation before the court. We invite views but make no suggestions at this stage beyond proposing that it should be made clear that the courts always have power to make interim orders pending the disposal of an application for the variation of aliment payable under a court decree. (Proposition 59).

2.220 The Law Reform (Miscellaneous Provisions)(Scotland) Act 1966 gave the sheriff court certain powers to vary or recall alimentary orders made in consistorial actions in the Court of Session.[54] The procedure is regulated by an Act of Sederunt of 1970 which requires applications for variation to be made by initial writ and provides that, subject to its provisions:

> "Every such application shall proceed as an ordinary action, and it shall not be competent for the sheriff to direct that it be tried as a summary cause or to shorten the induciae".[55]

There are also provisions requiring a certified copy of the initial writ to be lodged in the Court of Session process, and requiring, in defended cases, the various steps of the Court of Session process (or certified copies of those which cannot be borrowed) to be lodged in the sheriff court process.[56] These requirements, and the fact that any party to the action other than the applicant can require the application to be remitted to the Court of Session, in effect destroy the advantages of cheapness and simplicity: the applicant may have to operate in two courts instead of one. To elicit views on the working of this procedure in practice and on possible improvements to it, we suggest that a simplification is required of the procedure for variation or recall in the sheriff court of orders for aliment or periodical allowance made by the Court of Session. (Proposition 60).

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54 S.8. The section does not apply to interim orders.

55 Act of Sederunt (Variation and Recall of Orders in Consistorial Causes) 1970, paras. 1 and 2.

56 Ibid. paras. 3 and 9.

Termination of decree

2.221. A decree for aliment may be terminated by express recall. The procedure is as for variation and the two types of modification are generally lumped together in the statutory provisions. In consonance with Proposition 58 (on backdating variations of aliment) and 60 (interim orders pending disposal of application for variation), we suggest that the court should have power, on application, to recall, with retrospective effect, alimentary decrees; and to make interim orders pending the disposal of such an application (Proposition 61).

2.222. A decree for aliment may also terminate on the occurrence of some event specified in the decree, such as the attainment of a specified age by a child, or the termination of a marriage by death or divorce. We have already suggested (para. 2.208. and Proposition 46) that consideration should be given to devising standard forms of decrees for aliment specifying these readily established events which will terminate the obligation to pay and, if this were done, it would remove a possible source of uncertainty on this mode of termination.

2.223. There are certain circumstances which may not, and perhaps should not, be specified in the decree which may also suspend the obligation to pay under it. The underlying difficulty here is to decide how far a decree for aliment merely quantifies an existing obligation, leaving the general conditions of that obligation untouched, and how far it creates a new obligation, the obligation to pay under the decree. On the first view the disappearance of need on the part of the creditor would for example, suspend the obligation to pay even if no application were made for express recall of the decree. On the second, the obligation to pay under the decree would continue even although the creditor's need, and with it one of the conditions for the emergence of the alimentary obligation, had disappeared. The law on this point is not entirely clear but there is support for the view that at least some changes of circumstances suspend the obligation to pay even though the decree still stands unvaried and unrecalled. Thus a spouse who has made a genuine and reasonable offer to adhere, and who is entitled to demand adherence, can suspend any charge for payment under a decree for aliment or any warrant for imprisonment.[57]

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[57] See Macdonald v. Denoon 1929 S.C. 172 (parent and child); Brunt v. Brunt 1954 S.L.T. (Sh. Ct.) 74; Cassells v. Cassells 1955 S.L.T. Sh. Ct.) 41; Drummond v. Drummond 1960 S.L.T. (Sh. Ct.) 49.

The same applies to a parent: if he can defeat a claim for aliment for a child by offering to take the child into his own custody and if he in fact makes such an offer then his obligation is suspended notwithstanding the continuance of a decree ordering him to pay aliment.[58] Again, a genuine resumption of cohabitation by the spouses, terminates the obligation to pay aliment under a decree of separation and aliment[59] and (probably) under a decree of adherence and aliment or interim aliment[60].

2.224. It is rather unsatisfactory that decrees cease to have effect in such indeterminate ways. The clearest solution would be to provide that the mere occurrence of events not specified in the decree would not affect it, although they might ground an application for variation or recall. Under the present law, this could give rise to injustice because arrears could continue to mount up against someone who, if regard were had to the underlying facts rather than the decree, was not liable to pay. But if the court is given power to remit arrears[61] and to back-date variations and recalls,[62] this danger would disappear. Under the present law on civil imprisonment for aliment, there may be a theoretical danger of imprisonment for failure to pay under a decree after, say, cohabitation had been resumed or a genuine offer to adhere had been made. The sheriff, before granting warrant to imprison, must be satisfied that the debtor "wilfully fails to pay ... any sum or sums of aliment ... for which decree has been pronounced against him by any competent

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[58] Macdonald v. Denoon 1929 S.C. 172; Burgess v. Milton (1902) 18 Sh. Ct. Rep. 353; Kerr v. Henderson (1932) 49 Sh. Ct. Rep. 303.

[59] Winton v. Grieve (1830) 2 Sc. Jur. 370; Donachie v. Donachie 1965 S.L.T. (Sh. Ct.) 18.

[60] See the discussion in Clive and Wilson, op. cit., pp. 203-204; Drummond v. Drummond (1960) 76 Sh. Ct. Rep. 133 "Aliment in an action of adherence is ... conditional and is not really permanent. If the parties resume cohabitation the decree is spent."

[61] See para. 2.212. above.

[62] See Propositions 58 and 60 at paras. 2.218. and 2.221. above.

court."[63] It may be that an offer of, or the provision of, aliment in kind, at bed and board, would prevent there being wilful failure to pay,[64] and, in any event, the sheriff has a discretion. He "may commit to prison" but presumably would not if the reason for non-payment were the rejection of a bona fide offer to adhere or the resumption of cohabitation. We doubt, therefore, whether there is much real danger here, even if civil imprisonment is retained for alimentary debts, and suggest for consideration that events (such as offers to adhere or genuine resumptions of cohabitation) not specified as terminating events in the decree should not automatically affect the decree but should merely ground an application for variation or recall. (Proposition 62).

2.225. There have been suggestions from time to time that there should be a maximum duration for alimentary decrees or their equivalent. The Gorell Commission recommended in 1912 that separation orders by magistrates' courts in England should have a maximum duration of two years, so that the parties would be compelled to finalise their position in the High Court.[65] It is interesting to compare this argument with the views which formerly prevailed in Scotland as to the strictly interim nature of the sheriff's jurisdiction in actions for aliment between spouses. In 1956 the Morton Commission rejected "the suggestion that a specific limit should be set to the duration of all maintenance orders" on the ground that

> "the wife would then be in a position of uncertainty and would be put to the trouble of making a fresh application to the court if (as we think would happen in the majority of cases) she still required maintenance after the order had expired. The court would also be given a great deal of unnecessary work."[66]

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[63] Civil Imprisonment (Scotland) Act 1882, s.4.

[64] Cf. Macdonald v. Denoon, 1929 S.C. 172; Brunt v. Brunt (1954) 70 Sh. Ct. Rep. 264 Cassells v. Cassells (1955) 71 Sh. Ct. Rep. 113.

[65] Report of the Royal Commission on Divorce and Matrimonial Causes (Cd. 6478) 1912 para. 162.

[66] Cmd. 9678 (1956) para. 492.

More recently, the Finer Committee received suggestions that in England and Wales, matrimonial orders by the magistrates' courts should have a limited duration of, say, one year, after which the complainant would have to apply for continuation either indefinitely or for a fixed period. The Committee was tempted by the idea of limiting the duration of magistrates' orders so as to require the complainant to petition for divorce or judicial separation but:

> "upon reflection ... concluded that this would be an unacceptably draconian method of persuading a spouse to give proper consideration after a period of separation to the relative merits of divorce as against permanent separation within marriage."[67]

Instead, the Committee recommended that two years after a maintenance order had been made in a subsisting marriage, the circumstances of the parties should be examined at a conference to be held at the proposed family court. This recommendation presupposes a "court welfare service" which does not exist at the moment. Moreover, some of the objectives of the family court conference seem to be limited to the husband and wife relationship and, although the committee envisaged that "in appropriate cases, mothers with affiliation orders would be invited to the conference",[68] it is not clear that the notion would be quite so appropriate in the case of other alimentary relationships. Our view is that, for the reasons stated by the Morton Commission and the Finer Committee, it would be undesirable to provide simply for a maximum duration (or maximum initial duration) of decrees for aliment. We invite views, but suggest that as in the present law there should be no maximum duration (or maximum initial duration) of decrees for aliment. (Proposition 63).

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[67] Cmnd. 5699 (1974) paras. 4.388. and 4.389.

[68] Ibid. para. 4.393. note 2.