SCOTTISH LAW COMMISSION

VOL 5: Part IV – Aliment on Death of Liable Relative

Part V - Relationship between Public and Private Law

Appendices

MEMORANDUM No: 22 (cont'd.)

FAMILY LAW

ALIMENT AND FINANCIAL PROVISION

31 March 1976

PART IV

ALIMENT ON DEATH OF LIABLE RELATIVE

Introductory

4.1 In Parts II and III, we were primarily concerned with support obligations between living persons. We saw, however, that:

(a) on the death of an alimentary obligant, his obligation of aliment may in certain circumstances devolve upon a subsidiarily liable relative[1]; and

(b) on the death of an ex-spouse liable under a decree awarding financial provision to the other party to the former marriage, financial provision is, or may be, exigible from the estate of the deceased[2].

To complete our study of the private law obligations of support, we consider briefly in this Part of our Memorandum, the rights conceded to an alimentary creditor, on the death of the liable relative, to claim aliment from the estate of the deceased, or from his trustees or executors, or from the beneficiaries to whom the estate has been distributed. This has the technical name, aliment jure representationis, but for convenience we shall term it in this Memorandum simply "aliment on death", that is to say on the death of a liable relative.

---

1 Paras. 2.67. to 2.75.

2 Paras. 3.82. to 3.86.

Aliment on death and legal rights

4.2 Our approach to the law of aliment on death is affected by the fact that its reform cannot be considered separately from the "legal rights" which become exigible from the moveable estate of a parent or spouse on his or her death. As we mention below, aliment on death fulfils the function of a safety net underlying the law of legal rights. It enables provision to be made out of a deceased person's estate in a case where he (or she) has defeated his family's claims to legal rights, by investing in heritable property and leaving it to others, or by alienating the bulk of his moveable property during his life. Broadly speaking, there are three alternative approaches to reform.

(1) If it becomes clear, upon consultation, that rights to aliment on death are no longer claimed in practice, or that there is a widespread consensus that such a right should no longer be available to alimentary creditors, and that the law of legal rights provides sufficient protection for the wife or children of a deceased spouse, then rights to aliment on death could be abolished by statute.

(2) Alternatively, it would be legislatively possible (i) to abolish legal rights as a way of making provision for the family of a deceased person; and (ii) to reform the law of aliment on death on the lines of the family provision systems which obtain in England[2A] and other Common Law jurisdictions.

(3) As a further alternative, it would be possible to retain both aliment on death and legal rights, with such statutory modifications to either as are considered desirable.

We think that only the first alternative is practicable at this stage. The other two are so closely related to legal rights and family property that they can best be dealt with in the context of a full consideration of those branches of the law.

[2A] See the Inheritance (Provision for Family and Dependants) Act 1975 implementing the recommendations of the (English) Law Commission's Second Report on Family Property: Family Provision on Death (Law Com. No.61, 1974).

Scope of Part IV

4.3 If it appears from our consultations on this Memorandum that claims for aliment on the death of a liable relative no longer serve any useful purpose and that there is a consensus favouring their abolition, then a statute dealing with aliment would provide an appropriate legislative vehicle. It is for this reason that we consider below (i) the way in which the law on aliment on death developed, (ii) the uncertainties in the present law, and (iii) the question of abolition or retention. If, on the other hand, it appears that aliment on the death of a liable relative is thought worthy of preservation, we would not regard a statute on aliment and financial provision as the appropriate vehicle for a thorough overhaul and updating of this branch of the law: that would best be done in the context of family property and legal rights of succession. We do not, therefore, in the following pages discuss ways in which the law on aliment on death might be expanded into something akin to a law on family provision.

The development of the Scottish law of aliment on death

4.4 The legitimate child's claim. A typical situation in the early law was that a landowner died leaving heritable property but little or no moveable property. The eldest son succeeded to the heritable property as heir: the younger children were unprovided for. The law had no difficulty in concluding that the heir was bound to aliment the younger children in so far as he was enriched by the succession.[3] He was said to represent his father and to be liable for aliment jure representationis.

---

3 Children of Netherlie v. The Heir (1663) Mor. 415 and many other cases at Mor. 413-427; McConochy v. McConochy (1830) 8 S.604; Aitkenhead v. Aitkenhead (1852) 14 D.584; Pearson (1865) 3 M.861; 883.

The principle was soon extended to moveable property, to succession to the mother and to testate succession[4]. By the twentieth century, it was recognised that the child's claim lay against any gratuitous beneficiary of the parent's estate, to the extent of the benefit taken [5] and also against trustees holding the deceased parent's estate under a continuing trust (at least if the trustees were liable for his debts)[6] . The executors of the deceased parent might also be liable, but not in such a way as to prevent them distributing an estate which was otherwise ready for distribution; in this respect the legitimate child's claim was not like an ordinary claim of debt. The executors did not have to retain funds to provide for his future aliment: they could distribute the estate, leaving the child to make his claim for aliment against the beneficiaries[7]. The above rules were applied, and still apply, to posthumous children[8] and adopted children[9].

---

4 See Hastie & Ker v. Hastie (1671) Mor. 416; Thomson v. Wilkie (1678) Mor. 419: Scot v. Sharp (1759) Mor. 440.

5 See Davidson's Trs. v. Davidson 1907 S.C. 16 at 21; Beaton v. Beaton's Trs 1935 S.C. 187; Hutchison v. Hutchison's Trs. 1951 S.C. 108. An heir of entail was not liable to aliment his brothers or sisters, on the view that he did not "represent" his father; Marshall v. Gourlay (1836) 15 S.313.

6 Riddells v. Riddell (1802) Mor. App. voce Aliment p. 5; Ormiston v. Ormiston's Tr (1838) 11 Sc. Jur. 232; Spalding v. Spalding's Trs. (1874) 2 R.237; Baillie's Trs. Petrs (1896) 33 S.L.R. 589; Stevenson v. McDonald's Tr. 1923 S.L.T. 451.

7 See Davidson's Trs v. Davidson 1907 S.C. 16; Edinburgh Parish Council v. Couper 1924 S.C. 139; Beaton v. Beaton's Trs. 1935 S.C. 187; Hutchison v. Hutchison's Trs. 1951 S.C. 108.

8 Spalding v. Spalding's Trs. (1874) 2 R.237.

9 Hutchison v. Hutchison's Trs. 1951 S.C.108.

4.5 The illegitimate child's claim. In an early case it was held that the heir was not liable to aliment his father's illegitimate child,[10] but this case was later regarded as unsatisfactory and it was held not only that the illegitimate child could claim aliment out of the estate of his deceased parent, but also that his claim was a claim of debt which, unlike the claim of the legitimate child, had to be provided for by the executors.[11] However, this distinctive feature of the illegitimate child's claim was abolished in 1968 when illegitimate children were given the same succession rights in relation to their parents as legitimate children. Now the illegitimate child has:

> "the like right to aliment -
>
> (a) out of the deceased's estate,
>
> (b) from any person who has received property which was comprised in that estate, to the extent that that person was enriched by receiving that property, in respect of any period after the death of the deceased /parent/ as would have been available if the child had been born legitimate ....." [12]

---

10 Ker v. Tutors of Moriston (1692) Mor. 1363.

11 Clarkson v. Fleming (1858) 20 D.1224; Oncken's J. F. v. Reimers (1892) 19 R.519; A. B. v. C. D. (1900) 2 F.610; S. v. P's Trs. 1941 S.L.T. 35; Hare v. Logan's Trs. 1957 S.L.T. (Notes) 49. It is interesting to note that Roman-Dutch law and several civilian legal systems have given the illegitimate child (who was not entitled to legitim) a special claim to aliment out of the deceased parent's estate, although the legitimate child had no such claim. See Hahlo, South African Law of Husband and Wife (3rd ed.; 1969) p. 323 n. 8; French Code Civil art. 762 (pre 1972); German B.G.B. art. 1712 (pre 1970).

12 Law Reform (Miscellaneous Provisions) (Scotland Act 1968, s. 4. The section also gives the court power to vary agreements (made before the commencement of the Act) providing for aliment for an illegitimate child after the parent's death.

4.6 The widow's claim. In the late 18th and early 19th centuries, it became established that a widow had a claim for suitable aliment against her husband's heirs if, for some reason, she was not entitled to terce or if her terce was insufficient for her support.[13] As with the legitimate child's claim, it was soon recognised that the principle applied also in cases where someone other than the heir-at-law took the deceased's property, including the case where the property was held by trustees who were liable for the deceased debts.[14] The husband's executors might also be liable but, as with the legitimate child's claim, they were not required to hold up the distribution of the estate on account of the widow's claim.[15]

4.7 Even in cases where the widow was adequately provided for out of her husband's estate, there might be a gap between his death and the date when payments to her commenced. To fill this gap, she was given a claim against her husband's estate for temporary aliment after his death.[16]

---

13 Thomson v. McCulloch (1778) Mor. 434; Lowther v. McLaine (1786) Mor. 435; Ferguson v. Logan (1809) Hume 5; Smith v. Smiths 11 Mar. 1812 F.C.; McGregor v. Ballantyne (1818) Hume 8; McRostie v. McRostie (1818) Hume 9; Harvie v. Harvie (1828) 6 S. 1144; McConochy v. McConochy (1830) 8 S. 604; Hobbs v. Baird (1845) 7 D.492.

14 Cf. Fenton v. Scott (1832) 4 Sc. Jur. 457 (husband had disposed of whole property by trust deed for behoof of his daughter); Lee v. Lee's Trs. (1840) 13 Sc. Jur. 138; Howard's Exrx v. Howard's Curator Bonis (1894) 21 R.787; Anderson v. Grant (1899) 1 F.484.

15 Howard's Exrx v. Howard's Curator Bonis, supra.

16 See Clive and Wilson, op. cit. pp. 692-694. The principle was not applied to the gap between divorce and the commencement of conventional provisions: Stewart v. Stewart (1872) 10 M.472.

In the early cases, this temporary aliment continued until the next term of Whitsunday or Martinmas after the husband's death (when the widow's terce or conventional liferent would commence)[17] but in two more modern cases aliment was awarded for six months after the husband's death.[18]

4.8 The grandchild's claim. There has been a great deal of doubt as to whether a grandchild has a claim to aliment out of his deceased grandparent's estate or against those enriched by succeeding to it. In one 18th century case, the claim was rejected:[19] in two others it was apparently admitted.[20] In more recent cases, the claim has been rejected when the grandchild was born after the grandparent's death (there being no debt due by the grandparent which could transmit),[21] or when no claim for aliment was made against the grandparent during his life,[22] but has been admitted when the obligation was acknowledged by the grandparent.[23] There is one old case which raised the question of a great grandchild's claim, but the report is vague in several respects and no safe conclusions can be drawn from it.[24]

---

17 Ibid., p. 693.

18 Barlass v. Barlass' Trs. 1916 S.C. 741; MacCallum v. MacLean 1923 S.L.T. (Sh. Ct.) 117.

19 Seton v. Paterson (1761) Mor. 429.

20 Younger Children of Seaton v. Heir (1764) Mor. 431 (although there were special features in this case); Dalziel v. Dalziel (1788) Mor. 450.

21 Stuart v. Court (1848) 10 D. 1275; Gay's Tutrix v. Gay's Tr. 19 S.L.T. 278.

22 Smith v. Smith's Trs. (1882) 19 S.L.R. 552. See also Gay's Tutrix v. Gay's Tr. 1953 S.L.T. 278 at 280 (the claim against the grandparent "must have been made to and acknowledged by him during his lifetime").

23 Parish Council of Leslie v. Gibson's Trs. (1889) 1 F. 601.

24 Clerk v. Clerk (1799) Mor. App. voce Aliment p. 2.

4.9 The ascendant's claim. There appears to be only one reported case in which ascendants have claimed aliment jure representationis from those succeeding to a deceased descendant's estate. The claim was by the deceased's mother and maternal grandmother against distant collateral relatives who had succeeded to his heritable estate. "The Court were unanimously of opinion that the pursuers' claim was well-founded, and granted them an aliment out of /the/ estate."[25]

Uncertainties in the present law

4.10 Is there a general rule on aliment jure representationis? Lord Ivory formulated the following general rule in a note to his edition of Erskine's Institute:

> "It would seem that in every case the representatives of a person deceased, whether the degree of relationship be nearer or more remote, and whether the succession by which they are lucrati consist of heritage or moveables, are, out of this succession, liable in aliment to those whom the deceased himself was under a natural obligation to maintain."[26]

Fraser thought this rule too widely stated (in relation to the grandchild's claim, for example)[27] but it has been judicially approved of in several cases.[28] It is perhaps too narrow in not distinguishing between the liabilities of executors, trustees and beneficiaries.

---

[25] Buchanan v. Morrison 21 Jan. 1813 F.C. The case of Muirhead v. Muirhead (1849) 11 D.1262 and 12 D.356, which is sometimes cited in this connection, involved a claim by mother and grandmother ex jure naturae and not ex jure representationis.

[26] Note to Erskine, Institute (3rd ed; 1828) I, 6, 58.

[27] Parent and Child (3rd ed. 1906) pp 130-133).

[28] Spalding v. Spalding (1874) 2 R.237 and 298 per Lord Mure at p.254; Thomson v. Hood (1898) 6 S.L.T. 258; Anderson v. Grant (1899) 1 F.484 per Lord Ordinary. See also Smith, A Short Commentary on the law of Scotland (1962) p. 378.

4.11 Nature of the claim. It has been repeatedly stated that the claim for aliment jure representationis is an equitable claim.[29] It does not transmit against the deceased's estate like an ordinary debt.[30] Indeed on one view, it is not based on a "transmitted" obligation at all, but on a new obligation imposed on the representatives or beneficiaries.[31] Certainly, the claim should be directed primarily against the beneficiaries who are enriched by the succession, rather than against the deceased's executors.[32] Various equitable defences may be available against it. Thus, aliment may be refused if the claimant has already received a fair share of the deceased's estate and it would be inequitable to allow his claim.[33] On the other hand, claims by widows have been admitted where they have received legal rights or conventional provisions which have proved inadequate.[34] It cannot, therefore, be said that the receipt of legal rights or their equivalent necessarily bars the claim.[35] It has been suggested,

---

29 See for example Beaton v. Beaton's Trs. 1935 S.C. 187 per Lord Murray at p. 197; Gay's Tutrix v. Gay's Tr. 1953 S.L.T. 278 per Lord Blades at 280.

30 Davidson's Trs. v. Davidson 1907 S.C. 16; Beaton's Trs v Beaton 1935 S.C. 187; Hutchison v. Hutchison's Trs. 1951 S.C. 108. The peculiarity of the illegitimate child's claim, which did transmit as a debt, has now been removed by statute; see para. 4.5.

31 See Baron Hume's Lectures, Vol 1 p. 221 (representation "an artificial notion"); Beaton v. Beaton's Trs., 1935 S.C. 187 per Lord Murray at p. 197 ("The obligation which so transmits is not the father's obligation .....").

32 See cases cited in note 30.

33 Strathmore v. Strathmore's Trs. (1825) 1 W. & S. 402; Stuart v. Court (1848) 10 D.1275; Mackintosh v. Taylor (1868) 7 M.67; Howard's Exr. v. Howard's C.B. (1894) 21 R.787; Edinburgh Parish Council v. Couper. 1924 S.C. 139 at p.145.

34 Thomson v. Hood (1898) 6 S.L.T. 258 and 298; Anderson v. Grant (1899) 1 F.484.

35 Contrast Edinburgh Parish Council v. Aitchison (1919) 35 Sh. Ct. Rep. 195 (claim for aliment allowed where legitim had been received by, but exhausted on maintenance of, child) with McKenna v. Ferguson (1894), 1 S.L.T. 600 ("In cases where the child had received his legal share, such a claim had never been sustained".)

obiter, that beneficiaries who are themselves indigent may not be liable jure representationis.[36] To say that the claim is an equitable one, subject to equitable limitations, does not mean that no right to aliment emerges until the claim has been upheld by a court or that trustees cannot pay out in the absence of a judicial award. It has been held that a third party who aliments an indigent person has a right of relief against the representatives of that person's deceased father, which suggests that the right exists by operation of law independently of any judicial award.[37] And it has also been held that trustees and judicial factors may pay aliment jure representationis on their own responsibility, and should not petition the court for authority to pay.[38] In cases of doubt, of course, they may refuse to pay until the right to aliment has been established in an action by the indigent relative,[39] but this is not necessary in all cases.[40] In short, although

---

36 Davidson's Trs. v. Davidson 1907 S.C. 16 per Lord Kyllachy at p. 21.

37 Stevenson v. McDonald's Tr. 1923 S.L.T. 451. Cf. McPherson v. Walker (1869) 8 M.246 (widow's interim aliment until next term after husband's death could be set off against executor's claim on her to account for intromissions with husband's estate, even although no judicial award.)

38 Baillie's Trs. (1896) 33 S.L.R. 589. See also Aitkenhead v. Aitkenhead (1852) 14 D.584; Robertson Petr. (1853) 25 Sc. Jur. 554; Pearson (1865) 3 M.861.

39 See Aitkenhead v. Aitkenhead (1852) 14 D.584.

40 Cf. Pearson (1865) 3 M.861 where it appears that the judicial factor had been paying aliment for many years.

a claim for aliment jure representationis is not an ordinary claim for debt, it is more than a mere right to apply to the court for a discretionary award. "It is not easy to define what it is ....."[41] It is "sui generis".[42]

4.12 Can claim be renounced or discharged? In the Strathmore case, it was said that aliment jure representationis (unlike other aliment due by operation of law) could be discharged, and that the obligation had in that particular case been discharged by the father's giving his son a provision of £12,500 which he had spent.[43] It may be, however, that this is just another way of saying that a claim for aliment is subject to an "equitable defence" if the claimant has already received a fair share of the estate.[44] In the more recent case of Beaton v Beaton's Trs., the view was taken that the parent's obligation to aliment his child could not be discharged and might transmit against his estate or those enriched by the succession in spite of a purported discharge: this, however, was without prejudice to the "equitable defences" which might be available against a child who had already received his fair share.[45] These cases

---

41 Davidson's Trs. v. Davidson 1907 S.C. 16 per L. J-C Macdonald at p. 20.

42 Beaton v. Beaton's Trs. 1935 S.C. 187 per Lord Murray at p. 194.

43 Strathmore v. Strathmore's Trs. (1825) 1 W. & S. 402 at pp. 404 and 405. Cf. Stuart v. Court (1848) 10 D.1275 (grandfather had satisfied every obligation incumbent on him).

44 See cases in note 29 above.

45 1935 S.C. 187.

relate to purported discharges during the parent's life. There appears to be no direct authority on discharges or renunciations after the parent's death although it has been said that "as the obligation is not a natural one, if it has once ceased, or been satisfied or discharged, it does not again revive by the claimant's falling into destitution".[46] It would seem that the widow's claim to aliment can be renounced or discharged provided this is done clearly and specifically.[47]

4.13 Supervening indigence It is not clear whether there must be indigence, and resulting entitlement to aliment, immediately before the death if the obligation is to transmit to the representatives or beneficiaries. In two cases, the fact that the claimant had been supported for a period after the death by his or her provisions out of the estate was held not to bar a claim for aliment later when the provisions were exhausted or no longer adequate.[48] We have already noted the dicta to the effect that the grandchild's claim must have been made to, and acknowledged by, the grandparent before liability will transmit on his death.[49]

---

46 Encyclopaedia of the Laws of Scotland vol. 1 p.296, (article by Lord Wark) founding on dicta in Strathmore v. Strathmore's Trs. (1825) 1 W. & S. 402 and Stuart v. Court (1848) 10 D.1275.

47 Countess of Seafield v. The Earl Feb. 8, 1814 F.C.; McGregor v. Ballantine (1818) Hume 8 (where, however, the discharge was held to be ineffectual because apparently signed in ignorance and under pressure).

48 Anderson v. Grant (1899) 1 F.484 (where a widow was awarded aliment out of her husband's trust 24 years after his death); Edinburgh Parish Council v. Aitchison (1919) 35 Sh. Ct. Rep. 195 (where a child had received legitim but it had all been spent on his maintenance). The question of possible entitlement on the exhaustion of the claimant's share of the deceased's estate was raised, but not decided, in Howard's Exr. v. Howard's C.B. (1894) 21 R.787 and Edinburgh Parish Council v. Couper 1924 S.C. 139. Contrast Stewart's J.F. v. Law 1918, 2 S.L.T. 319 (illegitimate child could not claim aliment out of mother's estate 43 years after latter's death). Contrast also Lord Wark's view quoted in para. 4.12 above that "as the obligation is not a natural one, if it has once ceased ... it does not again revive by the claimant's falling into destitution."

49 See para. 4.11 above.

4.14 Duration of aliment. There has been a great deal of doubt as to the duration of the child's entitlement to aliment out of the parent's estate. Various ages were fixed for its termination in the early cases, much depending on the sex and rank of the claimant.[50] In the Earl of Strathmore's case in 1825 it was said that the claimant had to be in minority.[51] Lord Wark, writing in 1926, summed up the law in terms which now have a distinctly old-fashioned flavour:

> "The heir's liability to aliment his brothers ceases at their majority, or even when they become minors, if the heir's means are such as to make it unreasonable that he should support his brothers. But the obligation continues if, from bodily or mental infirmity, they cannot maintain themselves. As to sisters, if the estate is sufficient, and they are of a rank in which it is unusual for them to earn their own livelihood, the heir is liable to aliment them till their marriage. In the humbler ranks, the obligation ceases when the sisters are of an age to support themselves." [52]

However, in the later case of Beaton v Beaton's Trs.[53] the court took the view that a child of any age might have a claim for aliment against those who were enriched by succession to his parent. In that particular case the "child" was 62 years of age.

---

50 See eg Hastie & Ker v. Hastie (1671) Mor. 416 (son till 21); Don v. Don (1697) Mor. 420 (sons till 14; daughters till 12); Douglas v. Douglas (1739) Mor. 425 (sons till 21; daughters till married); Bisset v. Bisset (1748) Mor. 413 (daughters till major or married); Seaton v. Seaton (1764) Mor. 431 (till 14); Dalziel v Dalziel (1788) Mor. 450 (daughters till marriage - "family of such dignity"); McRostie v. McRostie (1818) Hume 9 (daughters till 18).

51 Earl of Strathmore v. Earl of Strathmore's Trs. (1825) 1 W. & S. 402 at 404, 406. In Aitkenhead v. Aitkenhead (1852) 14 D.584 aliment was awarded to daughters until they were 20, ceasing on marriage or on becoming able to support themselves. In Stevenson v. McDonald's Tr. 1923 S.L.T. 451, the question whether a claim for aliment jure representationis was normally limited to minority was expressly left open but it was held that it was not so limited if the child was, and always had been, incapax.

52 Encyclopaedia of the Laws of Scotland, vol. 1 pp. 295-296.

53 1935 S.C. 187.

4.15 It has never been clearly decided whether the widow's claim for continuing aliment ceases on her remarriage. In an early case in which aliment was awarded to a widow, the reporter adds that:

> "Some of the judges who carried this question, told me that they did not mean that Mrs McLaine should have any aliment, in case she married again: if so, they have shown little favour to a handsome young woman of irreproachable character." [54]

In a later case the question of restriction to widowhood was raised but the court preferred to find the widow entitled to an annuity "to continue until the same be recalled or altered by the authority of the court."[55]

4.16 Does widower have a claim? There are no reported cases in which a widower has claimed either temporary or continuing aliment out of his deceased wife's estate or from those enriched by her succession. In one old case, however, there are obiter dicta to the effect that a widower would have the same claim as a widow if he were in indigence.[56] Section 4 of the Married Women's Property (Scotland) Act 1920 (which gave the husband a right to aliment from his wife if he is unable to maintain himself) does not provide for the situation after the wife's death.

---

54 Lowther v. McLaine (1786) Hailes ii, 1012 at p.1014.

55 Hobbs v. Baird (1845) 7 D.492. It appears from this case that the report of Harvie v. Harvie (1829) 7 S.305 is wrong in indicating that aliment was restricted to widowhood.

56 Lowther v. McLaine (1786) Hailes, ii 1012.

Retention or abolition of right to claim aliment on death

4.17 From the foregoing, it will be seen that the law of aliment on the death of a liable relative is uncertain and unclear in a number of important respects and, on the assumption that it should be retained in our law, requires reform. As we explained in para.s 4.2 to 4.6 above, this is a task best undertaken along with a study of legal rights in the context of family property law. Our impression is, however, that the right of aliment on death of a liable relative is not much used in practice, and in this Memorandum we therefore consider such views on whether it can be retained or abolished.

4.18 Historically, as we have seen, aliment on death has fulfilled the function of a safety net underlying the law of legal rights and succession, remedying hardships such as those caused by the rule of primogeniture, by the technical restrictions upon the availability of the widow's right to claim terce from her deceased husband's estate, and by the fact that illegitimate and adopted children could not claim rights of intestate succession as if they were legitimate. These particular problems have been solved by recent statutes[57] but it may be assumed that other injustices can, and do arise. Under the present law, for example, a man can readily defeat his family's claims to legal rights by investing in heritable property and dying testate. Modifications to the law of legal rights might render the right to aliment on the death of a liable relative otiose, but unless or until such modifications are made, we suggest that it would be desirable to retain the existing law allowing claims for aliment out of the estate of a deceased person, or from his trustees or executors, or from the beneficiaries to whom his estate has been distributed to the extent of their enrichment. (Proposition 99).

---

[57] See for example the Succession (Scotland) Act 1964, Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

Abolition of widow's right to mournings

4.19. Although the widow's right to mournings out of her deceased husband's estate is not a right to aliment, it is so closely connected with her right to interim aliment that it is convenient to deal with it in this Memorandum. The present law is that a widow is entitled to an allowance out of her husband's estate for reasonable mournings.[58] The allowance is regarded almost as if it were part of the funeral expenses: it is deductible as a debt from the deceased's estate and accordingly reduces the estate for such purposes as estate duty[59] or capital transfer tax. It is available even if the estate is insufficient after the full payment of ordinary creditors.[60] There are few 20th century cases on this topic and it seems likely that changes in social customs have made the widow's right to an allowance for mournings something of am anachronism. Unless there is an unexpected demand for its retention, we would suggest that the widow's right to mournings out of her deceased husband's estate (and any similar rights enjoyed by other relatives) should be abolished. (Proposition 100).

---

58 See Clive and Wilson, Husband and Wife pp. 691-692.

59 I.R. v. Alexander's Trs. (1905) 7 F.367.

60 Sheddan v. Gibson (1802) Mor. 11855; Buchanan v. Ferrier (1822) 1 S.358; I.R. v. Alexander's Trs. (1905) 7 F.367 (concession by I.R.); Griffiths' Trs. v. Griffiths, 1912 S.C. 626.

Abolition of widow's right to mournings

4.19 Although the widow's right to mournings out of her deceased husband's estate is not a right to aliment, it is so closely connected with her right to interim aliment that it is convenient to deal with it in this Memorandum. The present law is that a widow is entitled to an allowance out of her husband's estate for reasonable mournings.[58] The allowance is regarded almost as if it were part of the funeral expenses: it is deductible as a debt from the deceased's estate and accordingly reduces the estate for such purposes as estate duty[59] or capital tranfer tax. It is available even if the estate is insufficient after the full payment of ordinary creditors.[60] There are few 20th century cases on this topic widow's right to an allowance for mournings something of an anachronism. Unless there is an unexpected demand for its retention, we would suggest that the widow's right to mournings out of her deceased husband's estate (and any similar rights enjoyed by other relatives) should be abolished. (Proposition 91).

---

58 See Clive & Wilson, Husband and Wife pp. 691-692.

59 Sheddan v. Gibson (1802) Mor. 11855; Buchanan v Ferrier (1822) 1 S.358; I R. v. Alexander's Trs. (1905) 7 F.367 (concession by I.R); Griffiths' Trs. v. Griffiths, 1912 S.C. 626.

PART V

Relationship between Public and Private Law

Introductory

5.1 In this final Part of our Memorandum, we examine the relationship between the law of Scotland relating to aliment and financial provision, and certain public law codes, in particular the law of supplementary benefits administered by the Department of Health and Social Security and the Supplementary Benefits Commission, and the recovery by local authorities of maintenance provided in respect of children in care. Before turning to these matters, however, two preliminary points require to be dealt with.

5.2 The Finer Committee's proposals: The relationship between the private and public law of support was examined by the Report of the Departmental Committee on One-Parent Families[1] (the Finer Report) and we have required to make certain assumptions about the implementation of its proposals. The Finer Report made two main recommendations. The first was the introduction, in England and Wales, of a single unified system of family law (including the private and public law of support) operated through a new separate system of 'family courts'.[2] The Committee believed that "the considerations of principle ..... which lead to that recommendation apply equally to Scotland."[3] We note that the Government, while accepting the desirability of providing separate courts in separate accommodation for all forms of family business, have felt compelled to reject this proposal on grounds of expense.[4]

---

[1] Cmnd. 5629 (1974).

[2] Ibid, Part 4, sections 13 and 14.

[3] Para. 4.473.

[4] Parl. Deb. Official Report (5th Series) (H.C.) October 21, 1975, col. 59.

In view of these constraints, we have restricted our provisional proposals to a proposal for making alimentary actions in the sheriff court quicker and cheaper while avoiding substantial and expensive alterations in the judicial system.

5.3 The second main proposal of the Finer Report was the introduction of a new non-contributory Guaranteed Maintenance Allowance for one-parent families.[5] This proposal has, however, been rejected by the Government, partly on the grounds of principle and partly because of the expense of administering the scheme together with the associated full scheme of "administrative orders."[6] The Government have said that there is no early prospect of being able to introduce a new special benefit for lone parents, and certainly not at a level to lift them off supplementary benefit.[7] We have therefore left out of account the relationship between our proposals and the proposed Guaranteed Maintenance Allowance.

5.4 The Finer Committee did, however, make certain proposals for the introduction of a new system of administrative orders, operated by the Supplementary Benefits Commission and not the courts. In cases where liability was not disputed, the Commission would be able to order a liable relative to pay what was due up to the level of the supplementary benefit payable to the lone mother.[8] We understand that this proposal is under active consideration by Government.[9] We revert to its implications for our proposals at paras. 5.12 to 5.16 below.

---

[5] Op. cit., Part 5.

[6] Parl. Deb., Official Report (5th Series) (H.C.) October 21, 1975, cols. 62 to 63.

[7] Ibid.

[8] Finer Report, supra., Part 4, section 12.

[9] Parl. Deb. (supra) cols. 61 and 62 where the Secretary of State for Social Services, Mrs Barbara Castle, said: ".. the new responsibilities for the assessment of the liable relative would mean a big change in the work of the Supplementary Benefits Commission and would certainly involve an increase in staff. We are still examining whether the advantages to the mother would justify this major development in the responsibilities and staff of the Supplementary Benefits Commission or whether Finer's essential objective could be achieved in other ways".

5.5 Effect of proposals on public law: The second preliminary point is that the changes in the law, which we have proposed, would have no direct effect on the many public law codes which refer to dependants. It would have been possible for the law on central and local government disbursements to, or exactions from, individuals to make use of the private law of aliment. For example, dependants' allowances for various social security purposes, and tax reliefs and credits, could be given for dependants only if they were entitled to aliment. Or it could be provided, as was provided by the old poor law, that public money paid out for the support of an indigent person could be recovered from "persons who may be legally bound to maintain him."[10] No branch of public law, however, whether British or Scottish, makes use of this technique which would in any event be inappropriate in Great Britain statutes, given the significant differences between the Scottish and English private law obligations of support. Instead, the law regulating supplementary benefit[11], social security[12], income tax[13], students' allowances[14], and other similar matters[15] have their own rules governing allowances for dependants. It follows that our proposals would not have any direct effect on these areas of the law.

5.6 Moreover, their general trend would be to diminish the gap between the rules applied in private law and the rules applied for purposes of recovery of benefit under the Ministry of Social Security Act 1966. We have suggested that the alimentary

---

[10] Poor Law (Scotland) Act 1845 s. 71. On the development of the law in this area see Appendix A, pages 340-344.

[11] Ministry of Social Security Act 1966, s. 22 (liability to maintain for purposes of the Act); Sched. 2., para. 3 (aggregation of requirements and resources of certain persons for purposes of the Act).

[12] Calvert, Social Security Law (1974) pp. 23-36.

[13] Income and Corporation Taxes Act 1970 ss. 8, 10, 11, 13, 14, 16, 17.

[14] Education (Scotland) Act 1962, s. 75; Students' Allowances (Scotland) Regulations 1971.

[15] See eg Social Work (Scotland) Act 1968 s. 78 (considered in Appendix A. para. 23); Family Allowances Act 1965; s. 3; Family Income Supplements Act 1970; Housing (Financial Provisions) (Scotland) Act 1972, Sch. 2, para 1(1) (rent rebates and allowances).

obligation between spouses should be fully reciprocal[16], that there should be no alimentary obligation between grandparent and grandchild or between more remote relatives in the direct line[17]; that the father and mother of a child should in principle be equally liable for its support[18]; and that in assessing the needs of an alimentary debtor the courts should have a discretion to take into account the requirements of members of his household who are in fact dependent on him[19]. In all these respects our proposals would bring the private law more into line with the public law.[20] The same is true in relation to the effect of conduct on the alimentary obligation, which we deal with in the next paragraph.

5.7 Recovery of supplementary benefit: effect of conduct.

There is one area in which the relationship between public and private law is unclear. The Ministry of Social Security Act 1966 provides that for the purposes of the Act:

> "(a) a man shall be liable to maintain his wife and his children, and
>
> (b) a woman shall be liable to maintain her husband and her children"[21]

"Children" means children under the age of 16 and includes a woman's illegitimate children and a man's children "his paternity of whom has been admitted or otherwise established."[22]

---

[16] Proposition 2 and para. 2.9.

[17] Proposition 8 and para. 2.36.

[18] Proposition 16 and para. 2.76.

[19] Proposition 25 and para. 2.116.

[20] The rules on "liable relatives" for supplementary benefit purposes are considered in para. 5.3 below.

[21] S. 22.

[22] S. 22(1) and (2); s. 36(1).

The purposes of the Act include inter alia recovery by the Department of Health and Social Security of the cost of benefit from liable relatives in civil proceedings brought under section 23 or 24, and to criminal proceedings under section 30 for wilful failure to maintain. It is clear that the common law hierarchy of alimentary obligants is irrelevant; proceedings under section 23 or 24 are brought only against the liable relatives referred to in section 22. It is much less clear whether the common law of aliment is irrelevant in all other respects. On a literal interpretation of the relevant provisions (sections 22 to 24), the liability to maintain imposed by the section is absolute; and the provisions make no mention of the common law defences which are available in private law actions of aliment. Nevertheless, in Scotland and England some judges have taken the view that section 22 does not deprive alimentary debtors of their common law defences and that for example, a husband could not be liable under the section if his wife's conduct gave him a good defence to a claim for aliment at common law.[23] In certain circumstances, this view would make nonsense of sections 22 and 24. A mother sued under section 23 could often say that the father was primarily liable (although Parliament deliberately rejected this common law solution).[24] A husband sued under section 23 could often say that he and his wife were separated by consent (which would be a good defence to an action for aliment under the present law).[25] Moreover,

---

[23] See National Assistance Board v. Wilksinson [1952] 2 Q.B. 648 and the obiter dicta in Corcoran v. Muir 1954 J.C. 46. Cf. also National Assistance Board v. Casey 1967 S.L.T. (Sh. Ct.) 11; Supplementary Benefits Commission v. Black, 1968 S.L.T. (Sh. Ct.) 90. The question was left open for further consideration in Brannan v. Brannan [1973] Fam. 120 at 133.

[24] See Parl. Deb., Official Reports (5th Series) vol.448cols. 697-699

[25] Bell v. Bell Feb. 22, 1812 F.C., Beveridge v. Beveridge 1963 S.C. 572.

there would be different rules on the recovery of public money in England and Scotland. In Scotland, a husband is bound to aliment an adulterous wife if she is willing to adhere or has just cause for non-adherence.[26] In England, a husband at common law was not liable to maintain an adulterous wife[27]: this is still the rule in proceedings in the magistrates' courts,[28] although the position in the High Court is now more flexible.[29] Not surprisingly, the English courts have departed from the above interpretation of the 1966 Act, taking the view that common law defences are not directly incorporated as such into the section.[30] This does not mean, however, that the Supplementary Benefits Commission can recover from the liable relative irrespective of conduct or other circumstances. The court considering applications for recovery is directed by statute to "have regard to all the circumstances".[31] It could therefore take into account, for example, a wife's adultery or desertion.

5.8 It is necessary to clarify the doubts in the present law on recovery from liable relatives of the cost of supplementary benefit. The best solution would undoubtedly be to harmonise the rules on liability under the public law and private law systems. Our proposals would go a long way in this direction.

---

[26] Donnelly v. Donnelly 1959 S.C.97; Divorce (Scotland) Act 1964 s. 6.

[27] Wright and Webb v. Annandale [1930] 2 K.B. 8.

[28] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(3)(b).

[29] Matrimonial Causes Act 1973, ss. 23-25 (adultery no more than one factor re. financial provision on judicial separation); s. 27 (adultery probably still a defence to charge of wilful neglect to maintain): see Passingham, Law and Practice in Matrimonial Causes (2nd ed. 1974) p. 154.

[30] National Assistance Board v. Parkes [1955] 2 Q.B. 506.

[31] Ministry of Social Security Act 1966, s. 23.

Thus, in addition to the suggestions summarised in paragraph 5.6 above, we have suggested that it should no longer be a condition of entitlement to aliment as between spouses that the claimant is willing to adhere or has just cause for non-adherence.[32] On the other hand, we have suggested that in quantifying the amount of aliment payable it should be relevant to take into account not only the needs and means of the parties but also their conduct in any case in which it would lead to gross injustice to leave conduct out of account.[33] If, as we have proposed, all conduct-based defences to an action for aliment are abolished, but the court is empowered to take conduct into account in a limited and flexible way when quantifying aliment, then the private law on aliment would be harmonised with the more recent interpretation of section 22 of the Act.

5.9 Criminal proceedings for persistent refusal or neglect to maintain. Section 30 of the Ministry of Social Security Act 1966 enables criminal proceedings to be taken "where a person persistently refused or neglects to maintain" a person whom he is liable, for the purposes of the Act, to maintain and where as a result of his refusal or neglect supplementary benefit or free board and lodging in a reception centre have had to be provided.[34] Professor Calvert has expressed the view that if a prosecution were to be instituted under section 30 "against a person whose spouse was living in open adultery" the earlier English view on section 22 would prevail, and it would be defence to show that there was no liability to maintain at common law.[35]

---

[32] Proposition 27 and para. 2.125.

[33] Proposition 48 and para. 2.198.

[34] Section 30.

[35] Social Security Law (1974) p. 308. Contrast Casey, "The Supplementary Benefits Act: Lawyers Law Aspects" (1968) 19 Northern Ireland Legal Quarterly 1 at p.8. Cf the Finer Committee's recommendation for the abolition of the "outmoded and unjust rule" that in the English magistrates' jurisdiction adultery bans a claim for maintenance.

There are also Scottish dicta to the effect that common law defences are available in the case of a prosecution under section 30.[36] In Scotland, of course, there is no conflict here between public and private law. Adultery does not cancel the obligation to aliment. The only conduct-based defences in the private law of aliment is the pursuer's unwillingness to adhere or just cause for non-adherance, and these defences are effectively provided for in the 1966 Act. A man cannot be said to be persistently refusing or neglecting to maintain his wife if he is offering her a home but she is unwilling to accept his offer.[37] Our proposals would open up a gap between the public and the private law, inasmuch as it would no longer be a defence in a civil action for aliment that a wife was unwilling to adhere. We do not, however, think that the resulting situation would be undesirable. The criteria for civil and criminal responsibility are not the same. Indeed there might be a case for, at the very least,[38] introducing some flexibility into the 1966 Act so as to provide a clear statutory defence for the man who objects to supporting a wife living in flagrant adultery. That however, lies beyond the scope of our present enquiry.

5.10 Other proceedings by Supplementary Benefits Commission.

If the Commission is asked for supplementary benefit it will try first to obtain an offer of a reasonable contribution from the liable relative.[39] If that fails it may "assist and encourage"

---

[36] Corcoran v Muir 1954 J.C. 46.

[37] This was the situation in Corcoran v Muir supra.

[38] The Finer Committee recommended the complete abolition of the criminal offence under section 30 of the 1966 Act. (Cmnd. 5629; 1974) para. 4.211.

[39] Supplementary Benefits Handbook, published by HMSO (revised 1974) para. 171.

the applicant to take his or her own court proceedings against the liable relative.[40] If the applicant is unwilling or unable to do so, and the evidence is sufficiently cogent, the Commission may itself take proceedings against the liable relative.[41] It has power to do this once supplementary benefit is claimed and need not wait until benefit is actually paid.[42] In Scotland, however, little use is made of the policy of "assisting and encouraging" applicants to raise their own actions for aliment and there are few civil proceedings by the Commission against liable relatives.[43] If the applicant does have a decree for aliment, the Commission may seek "diversion" of the payments to the Department of Health and Social Security.[44] The effect of the "diversion" procedure, which in Scotland is utilised only if the payments under the decree are irregular, is that the applicant for supplementary benefit receives benefit as if there were no decree. Payments under the decree are made to the Department:

> "The advantage of this arrangement is that the wife receives her full entitlement regularly, regardless of whether maintenance is paid in full or intermittently or never, and is thus relieved of the anxiety of an uncertain income."[45]

Similar arrangements for payment direct to the Department may be made in the case of voluntary contributions by the liable relative.[46] These procedures and arrangements would not be directly affected by our proposals, although we hope that our

---

[40] Ibid. para. 168

[41] Ibid. para. 168

[42] 1966 Act, ss. 23 and 24.

[43] See the Report of the Finer Committee on One-Parent Families (Cmnd. 5629, 1974) paras. 4.466 and 4.467).

[44] Ibid. paras. 4.206-4.209 (England); 4.469 (Scotland).

[45] Ibid. para. 4.469.

[46] Ibid.

suggestions will improve the background of private law against which the arrangements operate. We mention them here because they have an important bearing on the recommendations of the Finer Committee on One-Parent Families which we consider below.

5.11 Formula applied by Supplementary Benefits Commission in assessing relative's liability. In deciding whether an offer by a liable relative is reasonable, the officers of the Supplementary Benefits Commission apply certain guidelines.[47] The effect of these is to leave the liable relative with a modest margin for himself over supplementary benefit levels, after taking into account the requirements of his new household (including a woman with whom he is cohabiting as man and wife). It can easily happen that the Supplementary Benefits Commission will decide that the liable relative cannot afford to make any contribution, even although a court has already granted a decree for aliment against him.[48] We have already made recommendations which would help to enable the courts to avoid this sort of situation in the future. In Proposition 29 we have suggested that a person should be liable to provide aliment only if he has a superfluity of resources after providing for his own reasonable needs and those of any relatives having a prior claim to aliment and in Proposition 30 we have suggested that in assessing the needs of an alimentary debtor the courts should have a discretion to take into account the requirements of members of his household who are in fact dependent on him even if they have no legal right to aliment from him.

---

[47] See ibid. paras. 4.188-4.190 for a detailed account and a practical example of the formula applied.

[48] See e.g. Henry v Henry 1972 S.L.T. (Notes) 26.

5.12 The administrative order in relation to supplementary benefit. The Finer Committee proposed that the supplementary benefit procedures in relation to liable relatives should be changed in several respects.[49] Essentially the suggestions involve an extension of the diversion procedure mentioned above and the transfer of proceedings against liable relatives from the courts to the Supplementary Benefits Commission. The Committee envisages that the procedure where a lone mother applies for supplementary benefit would be as follows:

(1) Her entitlement to benefit will be assessed without reference to any claim for aliment she may have. She will not be "encouraged" to raise an action for aliment herself. If she is entitled to benefit, she will be paid it and, so far as she is concerned, that will be the end of the matter.

(2) The Commission will assess what reimbursement to them can properly be expected from the liable relative.

(3) The Commission itself will be entitled by "an administrative order" to order the liable relative to pay to it the amount assessed: it will not have to apply to a court as under the present law: the amount of the order will in no case exceed the amount of the lone mother's entitlement to supplementary benefit: the order will be legally binding on the liable relative, just like a court decree: it will be reviewed from time to time.

(4) There will be rights of appeal to a tribunal on the amount of the order.

(5) "Disputes which involve a finding on matrimonial conduct will not be dealt with by the Commission". Instead, the Commission would make a provisional

---

[49] Cmnd. 5629, paras. 4.224 to 4.227

assessment based on a means enquiry and remit the case to the courts to decide whether the conduct should extinguish or reduce liability.

This system would apply not only to "a separated but not divorced wife, with a child or children in her care" but also to the following claimants:- (a) separated wives without dependent children (b) separated husbands, with or without dependent children (c) unmarried mothers entitled to maintenance for their children (d) "wives, whether separated or divorced, who are not for whatever reason entitled to maintenance, but who have dependent children who are so entitled in their care"[50] and (e) "wives, with or without dependent children who have commenced proceedings for divorce but have not as yet obtained a decree ....."

5.13 In the above form the Finer Committee's proposals would mesh well with our proposals for the reform of the private law on aliment. A number of cases involving only quantification of aliment would be taken out of the courts. At first sight it might seem that the number would not be very large in Scotland. The Supplementary Benefits Commission does not go out of its way, in Scotland, to "encourage and assist a wife to take her own proceedings wherever possible."[51] Indeed, the Finer Committee concluded that this statement of policy was "more honoured in the breach that in the observance in Scotland", and that its relevance in Scotland seemed to be "minimal."[52] Moreover, the Commission makes very sparing use in Scotland of its power to take civil proceedings for recovery against liable relatives.[53] However, once the new system became

---

[50] Ibid. para. 4.262. Only in rare circumstances would the last category not be covered by what has gone before.

[51] Ibid. para. 4.466

[52] Ibid.

[53] Ibid. where it is pointed out that the numbers of such proceedings were 7 in 1968, 8 in 1969 and 14 in 1970.

established and well-known there might be many wives who would rely on it rather than claim aliment pendente lite or aliment for children in divorce actions. It would be in this context that the effects of the new procedure would probably be most noticeable. Indeed the Finer Committee itself thought "that the administrative order system would in time result in the near-total relief of the divorce court from the business of making orders pending suit in favour of wives on supplementary benefit."[54] To the extent that routine matters of quantification were taken out of the courts and alimentary creditors provided with a reliable source of income the Committee's proposals are welcome. Indeed there seems no reason why they should not be extended to any claim for supplementary benefit for a person whom a liable relative is bound to support. Why, for example, should a grandmother who is locking after a child after the death of its mother not have the benefit of the proposed procedure in relation to the father? That, however, is beyond the scope of our enquiry. The important point in relation to our proposals is that nothing in the administrative order procedure, as recommended by the Finer Committee, would prevent an alimentary creditor, who thought that he or she was entitled to aliment at more than supplementary benefit level, from pursuing his ordinary remedies in the courts.[55]

5.14 Possible extensions of the administrative order system. Under the present law a person is not liable to support, for supplementary benefit purposes (or indeed for any other purposes), a former spouse.[56] So a divorced husband is not a "liable relative" and, in the above form, the administrative order system would not apply to him in his capacity of divorced spouse although it might do so, of course, in his capacity of father. The Finer Committee did not actually recommend any extension of their system to this case but pointed out that it would not "be difficult to enact that if a divorced wife is entitled to be

---

[54] Ibid. para. 4.269

[55] See ibid. paras. 4.259, 4.266, 4.275.

[56] Ministry of Social Security Act 1966 s. 22.

maintained by her former husband under an order of the divorce court, the Commission would be subrogated to her rights under the order, to the extent that was necessary to reimburse themselves."[57] This seems to involve a "continuing maintenance" view of financial provision on divorce which, for reasons elaborated above, we regard as undesirable. There might also be difficulties in relation to orders for capital sums and property transfers. It may be that the administrative order system could be applied in a modified way to periodical allowance after divorce (or indeed to other rights of a claimant, such as rights under an ordinary decree for payment of a debt by instalments). We think, however, that there should be the most careful consideration of the implications before it is extended beyond the realm of alimentary relationships.

5.15 The administrative order system recommended by the Finer Committee would be limited to the recovery of supplementary benefit paid.[58] The Committee observe, however, that it would be possible to extend it beyond mere recovery. The Supplementary Benefits Commission could be authorised to make administrative orders for the whole amount of aliment due. It would reimburse itself for benefit paid and account to the alimentary creditor for the balance. If this were limited to cases where the amount of aliment due had been quantified by a court then it would "bear closer examination".[59] If, however, the Commission were to make administrative orders in other cases the question of quantification would assume a new form. Where it is merely a question of recovering supplementary benefit paid out, there is a maximum set on the amount of the administrative order.

---

[57] Cmnd. 5629 para. 4.271.

[58] Ibid. para. 4.229 - "the amount of the administrative order will in no case exceed the amount of the lone mother's entitlement to supplementary benefit."

[59] Para. 4.272.

To go beyond this would require either fixing a statutory maximum (or a statutory formula for establishing a maximum) or requiring the Commission to decide what it was reasonable for a man to pay. Again, we think that there would have to be very careful consideration of the implications before any such extension were introduced.

5.16 The Finer Committee considered the problem of conflicts between the standards of assessment applied by the courts and those applied by the Supplementary Benefits Commission. They pointed out that their proposals would take a large number of cases out of the area of conflict altogether. They also had little doubt that "publication of the Commission's general formula would strongly influence the courts when dealing with men of similar resources to those upon whom the Commission makes administrative orders."[60] They went on to say that they could "see no particular reason why the courts should not if necessary be bound, like the Commission, to apply the same formula in the general run of cases, subject to an over-riding discretion."[61] The qualification in the last eleven words suggests that the courts would in fact retain a great deal of discretion. We doubt whether it makes much sense to talk of an obligation to apply a formula "in the general run of cases, subject to an over-riding discretion" and we would prefer to see the Commission's formula used simply as a guideline for the courts.[62]

---

[60] Para. 4.276. We have already noted that our proposals would give the courts more freedom to do exactly this.

[61] Ibid.

[62] See Proposition 26 and para. 2.117 above.

APPENDIX A

THE DEVELOPMENT OF THE LAW

Contents

	Para.
Common law of aliment	
Canon law influence.	1.
Alimentary actions by and against landowners.	2.
Consolidation and development in the 17th and 18th centuries.	3.
Position at beginning of 19th century.	4.
Continued judicial development.	5.
Statutory modifications of common law rules.	8.
Changes in jurisdiction.	10.
Discretionary powers of courts.	11.
Interaction of public and private law.	
The poor law.	18.
National assistance and supplementary benefit.	20.
Children in care.	21.

APPENDIX A

THE DEVELOPMENT OF THE LAW

(The purpose of Appendix A is to trace briefly the formal development of the law with which our Memorandum is concerned. An exhaustive history would have been outside the scope of this memorandum and of our functions. But an account of the way in which the law has developed is of intrinsic interest and forms an essential backcloth to an understanding of the modern law.)

Common law of aliment

1. Canon law influence. The common law rules on aliment were made up of two main strands. One was derived from the canon law and carried forward by the Commissary Court after the Reformation. The other was derived from the case-law of the Court of Session from the sixteenth century onwards. So far as the canon law is concerned, the main influence was felt in husband and wife cases. The pre-Reformation church courts dealt with various questions relating to marriage. After the Reformation in 1560 this jurisdiction, with the addition of divorce a vinculo, was taken over by the Commissary Court, a special court (not a church court) manned by legally qualified judges and exercising exclusive jurisdiction in consistorial actions - such as actions for divorce, separation, nullity of marriage and actions for permanent aliment between husband and wife.[1] The law applied by the Commissary Court was greatly influenced by the pre-Reformation canon law.[2] Its decisions could be, and frequently were, appealed to the Court of Session[3], so that that court was accustomed from the sixteenth century to dealing with aliment between husband and wife. The pre-Reformation church courts had also dealt with the aliment of illegitimate children (but perhaps because of competition from the kirk sessions, perhaps because those concerned could not afford to or preferred not to litigate) the Commissaries were less successful in taking over this jurisdiction: they dealt only infrequently with actions of affiliation and aliment, and by the eighteenth century jurisdiction in such actions was assumed by the Justices of the Peace and the sheriff courts.[4] Canon law

---

[1] For examples, see Hermand, Consistorial Decisions, 1684-1777 (Stair Soc. Vol. 6) pp. 53-59.

[2] See Fergusson, Consistorial Law and Reports, (1829) pp. 7-12.

[3] The process of appeal was by "advocation" whereby the whole case (facts and law) was brought under review. See Ireland, chapter in Introduction to Scottish Legal History, (Stair Society Vol. 20) p.82.

[4] See Anton, chapter in Introduction to Scottish Legal History (Stair Society Vol. 20). pp. 123-124. Wilson v. Bowie (1810) Hume 426 provides, however, an example of an action for the aliment of an illegitimate child in the Commissary Court of Glasgow.

influences, however, continued to be traceable,[5] and, as the decisions of such lower courts could be appealed to the Court of Session, these influences could also be woven into the main fabric of the law.

2. Alimentary actions by and against landowners. The other main strand in the common law rules was built up in actions for aliment in the Court of Session. One striking feature about these actions is that until the nineteenth century they were concerned almost exclusively with landed proprietors - "men of rank and fortune".[6] A vague obligation to support one's impoverished kin is referred to in a source dating from around the 13th century[7] and at a later date it is clear that the aliment of ascendants and descendants was regarded as depending on the law of nature itself.[8] It would certainly not be surprising if the real origin of the law of aliment was a deeply-embedded customary kinship obligation. Yet the early law on aliment seems to be concerned with property as much as with kinship. The question is often not "who is entitled to be alimented by such-and-such a relative?" so much as "who is entitled to be alimented out of the income of such-and-such a landed estate?" Many of the early cases reported under the heading of "Aliment" are in fact argued and decided on principles derived from the feudal law and have nothing to do with family law obligations.[9] Even within the family, however, some of the earliest actions for aliment by children against their parents were brought by sons, in their capacity as heirs, against their widowed mothers, in their capacity as liferenters of the family lands.[10]

---

[5] See Anton, loc. cit.

[6] See Tait v. White (1802) Mor. Appendix voce Aliment p.4.

[7] The mediaeval Register of Brieves contains a brieve addressed to the friends and relatives of a pauper directing them to relieve him of the poverty into which he had fallen. See Stair Society, Vol. 10, Ayr, No. lxxvi (p.51), Bute, No.44. And see Anton, op. cit. pp. 121-122.

[8] See e.g. Children of Earl of Buchan v. Lady Buchan (1666) Mor. 411; Laird of Kirkland v. His Mother and Grandmother (1685) Mor. 403.

[9] See Morison's Dictionary, voce Aliment. The feudal law imposed an obligation on the feudal superior to aliment the minor heir of wardship lands. See Craig, Jus Feudale, 2.20.18; Pothier, Traité de la Garde-Noble et Bourgeoise, S.II. This obligation was extended so as to oblige the liferenter of lands to aliment the fiar if the latter were in need. See Act 1491, c.25.

[10] See Scheyle v. Sandelandis 1501, Acta Dominorum Concilii (Stair Society Vol.8) p.90; George, Earl of Huntly (1545) Mor. 454; Finnie v. Oliphant (1631) Mor. 393. And see the 1491 Act, supra. Cf. Aiton v. Colvil (1705) Mor. 390 (action against stepmother as liferentrix); Cunningham v. Ramsay (1715) Mor. 405 (child against mother and grandmother as liferenters). This last action against a mother under the semi-feudal Act of 1491 appears to have been Maule v. Maule (1825) 1 W. & S. 266.

Another common type of action in the 17th and 18th centuries was the action against the eldest son, who had succeeded to his father's lands, by his brothers and sisters left unprovided for.[11] The eldest son was liable to provide aliment, not as brother but as heir, and the function of the rule on aliment was to modify the harshness of the rule on primogeniture. Not until 1802 do we find a reported Court of Session action[12] for aliment against a man who was not a landed proprietor, and in that case it was argued strongly but unsuccessfully, that it was undesirable to impose the obligation of alimenting grandchildren "upon a poor and industrious race of men ... when their years and their labours merited a different reward."

3. Consolidation and development in the 17th and 18th centuries. These two strands of the law, the one concerned with marriage, illegitimate children and the canon law, and the other interacting with property, succession and the feudal law, were expanded by the judges and writers of the 17th and 18th centuries into a fairly systematic body of rules, justified or filled out by references to scripture, natural law, Roman law and equity. Scriptural authority - "for if any provide not for his own family, he is worse than an infidel" - was used for general reinforcement, although both Stair and Bankton were slightly troubled by the text - "children ought not to lay up for their parents, but the parents for the children" - and took pains to explain that this did not mean that children were not bound to aliment their parents.[13] Natural law was constantly invoked as the justification for the alimentary obligation between ascendants and descendants[14] - a natural obligation which, Stair said, was "written ... in the hearts of parents and children ... with capital letters" and "placed in the common nature that man hath with other animals."[15] Roman law was used by

[11] See Anton, loc. cit., p.121 and cases in Mor. 414-419.

[12] Tait v. White (1802) Mor. Appendix voce Aliment p.4. In Mirrie v. Pollocks (1731) Mor. 397 it was observed that the 1491 Act had "been extended no further than to fiars of land-estates, who are great favourites in our law; the preserving of ancient families being of great importance with us". In McCowan v. Paterson 20 May 1809 F.C., Lord Meadowbank expressed the view that the widow's claim for aliment out of her husband's estate "did not extend to persons of the description of the pursuer", who had been a servant and who might be expected to earn her bread in widowhood as she had done before marriage. See also Yuill v. Marshall 21 December 1815 F.C.

[13] See Stair I Institutions 4, 10; I, 5, 9; Bankton Institute I, 6, 13; I, 6, 20. The texts are from 1 Tim. v. 8 and 2 Cor. xii, 14 respectively.

[14] See Children of Earl of Buchan v. Lady Buchan (1666) Mor. 411; Laird of Kirkland v. His Mother and Grandmother (1685) Mor. 403; Brown of Thornydikes v. Browns (1710) Mor. 448; Moncrieff v. Moncrieff (1735) 1 Pat. 162; Douglasses v. Douglas (1739) Mor. 425, and many later cases.

[15] Institutions, I.5.1.

Erskine to provide authority for the enforceability by direct action of the father's legal obligation to support his children, for the proposition that "he who can earn his own bread, has no right or claim of maintenance from another", for the mother's obligation to support her illegitimate child, and for the reciprocity of the obligation between parent and child.[16] Roman law was also invoked, unsuccessfully, by eighteenth century pleaders in attempts to establish an alimentary obligation between brothers and sisters as such.[17] Equity, in the ordinary sense of justice and fairness, was probably regarded in some of the early cases and certainly came to be regarded later, as the true foundation of the claim for aliment by the brothers and sisters of the heir.[18] It would have been inequitable if the eldest son had been able to enjoy all the revenue from his father's lands while his brothers and sisters starved.

4. Position at beginning of 19th century. By the beginning of the nineteenth century the common law recognised the following basic rules on aliment.[19]

1. Husbands were bound to aliment their wives. It was not yet clear whether they were bound to aliment their parents-in-law and step-children.[20] And it was not yet clear whether a wife, or widow, could obtain aliment from her father-in-law if her husband, or her husband's estate, could not support her.[21]

2. Parents were bound to aliment their legitimate children and vice versa, and this obligation was extended to grandparents and grandchildren and remoter ascendants and descendants. The father was liable before the mother, and if neither parent could provide support, paternal ascendants were liable before maternal ascendants.

---

[16] Erskine, Institute I, 6, 56 and 57. The main source of texts is Justinian's Digest 25, 3, 5.

[17] See Anderson and Gibson v. Gibson (1754) Mor. 427; Malcolms v. Malcolm (1756) Mor. 439 cf. also Lauder v. Lauder (1765) Mor. 15419 (father-in-law's obligation to son's widow); De Courcy v. Agnew (1806) Mor. App. voce Aliment p.12 (father-in-law); Short v. Donald (1765) Mor. 442 (custody of children in relation to aliment).

[18] See Chiesly v. Edgar of Wadderlie (1676) Mor. 417; Don of Attenburn v. Don (1697) Mor. 420; Younger Children of Seaton of Carriston v. Heir (1764) Mor. 431. cf. Beaton v. Beaton's Trs., 1935 S.C. 187 at 197; Gay's Tutrix v. Gay's Tr., 1953 S.L.T. 278 at 280. And see Baron Hume's Lectures, Vol. I, pp. 220-223.

[19] See Stair Institutions I, 4, 9-10; I, 5, 1-10; Bankton Institute I, 5, 75; I, 5, 137; I, 6, 13-15; Erskine, Institute I, 6, 19; I, 6, 56-58; Baron Hume's Lectures, Vol.1, pp. 218-224, 231-238.

[20] See Baron Hume's Lectures Vol.1. p. 232.

[21] See Belch v. Belch (1798) Hume 1; Clive and Wilson Husband and Wife (1974) p.218.

3. Parents were bound to aliment their illegitimate children. Normally the mother would have custody of the child while it was young and would recover a financial contribution from the father, but when the child attained the age of 7 (if a boy) or 10 (if a girl) the father could relieve himself of liability by offering to take charge of the child himself.

4. A widow had a claim for aliment, (interim, or continuing, or both) out of her deceased husband's estate, if she were inadequately provided for.[22]

5. The eldest son might be liable, as heir and as representing his father, to aliment his brothers and sisters.[23]

6. Someone who had, without any intention of donation, supported a person in need, had a claim for relief against the relative or relatives liable for the indigent person's aliment.[24]

5. Continued judicial development. The nineteenth and twentieth centuries saw the continued development of the judge-made law, though now largely by reference to previous Scottish cases. It was settled that a man was liable to aliment his parents-in-law and step-children, on the ground that he was liable for his wife's ante-nuptial debts,[25] but this obligation was cut down almost to vanishing point by the Married Women's Property (Scotland) Acts of 1877 and 1881.[26] The first of these Acts provided that a man's liability for his wife's ante-nuptial debts was limited to the value of any property he received from, through or in right of his wife at, or before, or subsequent to the marriage.[27] The second abolished the rule that a wife's moveable property passed to her husband by virtue of the jus mariti[28], so that it became comparatively rare for a husband to receive property "from, through, or in right of his wife". After much hesitation, it was finally decided that neither a widow nor a wife could recover aliment from her husband's father.[29] The right of

[22] See Clive and Wilson, op. cit., pp. 692-696.

[23] It was not yet clear whether this rule could be extended to other analogous situations. See Baron Hume's Lectures, Vol. I, pp. 221-224.

[24] Cf. Laird of Ludquharn v. Laird of Gight (1665) Mor. 11425; Thomson v. Wilkie (1678) Mor. 419; Davidson v. Watson (1739) 11077; Gordon v. Sempill (1776) Mor. 446. There were various presumptions as to when an intention of donation would, or would not, be inferred.

[25] Clive and Wilson, op. cit. pp. 217-218.

[26] Ibid.

[27] S.4.

[28] S.1.

[29] Clive and Wilson, op. cit. p.218.

brothers and sisters to claim aliment from the eldest son and heir, and the widow's right to claim aliment out of her deceased husband's estate, were generalised, by at least some writers and judges, into a rule that alimentary debts transmitted against those who were enriched by the estate of the deceased alimentary debtor.[30] There continued, however, to be doubts as to the precise nature and extent of this rule[31] and a curious distinction grew up between the claim of the illegitimate child and other claims. The claim of the illegitimate child transmitted as an ordinary debt, which had to be satisfied or provided for before the father's estate could be paid out to the beneficiaries:[32] the claim of other relatives transmitted in a special way, sui generis; it did not require the distribution of the deceased's estate to be held up; and it was subject to equitable defences and exceptions.[33]

6. Difficulties arose as to the appropriate rate of aliment for children. In the case of legitimate children there was no fixed scale. Although it was accepted, after the decision of the House of Lords in Maule v. Maule,[34] that the objective was the relief of want, the Court of Session came to regard "want" as a relative term which might vary with the social position of the claimant.[35] In the case of an illegitimate child, however, the practice developed in actions of affiliation and aliment[36] of awarding aliment at low, standard rates, which varied slightly from sheriffdom to sheriffdom, but did not vary with the means

---

30 See Fraser, Parent and Child, (3rd ed. 1906) p. 129; Buchanan v. Morrison 21 Jan. 1813 F.C.

31 Fraser, Parent and Child, (3rd ed. 1906) pp. 130-133; Baron Hume's Lectures, I. 220-224.

32 Oncken's J.F. v. Reimers (1892) 19 R. 519; Hare v. Logan's Trs. 1957 S.L.T. (Notes) 49.

33 See Beaton v. Beaton's Trs. 1953 S.C., 187; Hutchison v. Hutchison's Trs. 1951 S.C. 108 and cases there reviewed.

34 (1825) 1 W. & S. 266.

35 See Thom v. Mackenzie (1864) 3 M. 177; Smith v. Smith (1885) 13 R. 126; Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649. The effect was to water down the effect of Maule v. Maule. The decision stands, unaltered by legislation, but it "has suffered considerable equitable relaxation in the case of lawful children." Mottram v. Butchart, 1939 S.C. 89 at p. 95.

36 It appears that at one time the aliment for an illegitimate child was variable in accordance with the parent's circumstances. See Oliver v. Scott (1778) Mor. 444; Paterson v. Speirs (1782) Mor. 445; Stewart v. Menzies (1832) 10 S.581; Arnott v. Thomson (1826) 4 S.503. Cf. also Houston v. Kidd (1896) 13 Sh. Ct. Rep. 19; Lamb v. Paterson (1842) 5 D. 248.

and position of the parties.[37]

7. The duration of the parental obligation also gave rise to difficulty. It was accepted that the obligation to aliment a legitimate child continued throughout the child's life, so that an indigent and childless man of over 60, for example, had a right to aliment from his father.[38] It was also accepted that an incapacitated illegitimate child, who had never been able to support himself, had a claim for aliment which might continue throughout life.[39] There was more doubt, however, about the claim of an illegitimate child who became self-supporting and then later fell into indigence.[40] It was generally thought that in the absence of special circumstances the obligation fell, at latest, on the child's attainment of the age of puberty.[41]

8. Statutory modifications of common law rules. The nineteenth and twentieth centuries have seen some limited statutory modifications of the common-law rules. The incidental effect of the Married Women's Property (Scotland) Acts 1877 and 1881 has already been mentioned. The Married Women's Property (Scotland) Act 1920 had a more direct effect, in making a Wife liable to aliment her husband.[42] This had previously been a matter of doubt.[43] The Illegitimate Children (Scotland) Act 1930 provided that the parents' obligation to provide aliment for an illegitimate child should endure until the child attained the age of sixteen (without prejudice to any further obligation attaching at common law in cases, for example, of infirmity).[44] The Act

---

[37] See Forbes v. Matthew 1919 S.C. 242 (3/- per week then standard award in actions of affiliation and aliment in Forfarshire); Fraser v. Campbell, 1927 S.C. 589 (4/6d a week then usual award). In the latter case there is some speculation as to the reason for the practice - "to discourage immorality"? - "to prevent the fastening of a charge of this kind on an innocent and wealthy man rather than on a guilty and poor man"? The most bizarre suggestion was that the illegitimate child had "no status" and took "the rank of neither parent" so that there was no room for varying the award according to his social position.

[38] Cf. Beaton v. Beaton's Trs. 1935 S.C. 187.

[39] See e.g. Pott v. Pott (1833) 12 S. 183; Oncken's J.F. v. Reimers (1892) 19 R. 519.

[40] Cf. Clarke v. Carfin Coal Co. (1891) 18 R. (H.L.) 63 at 69; Anderson v. Kirk of Session of Lauder (1848) 10 D. 960.

[41] Encyclopaedia of the Laws of Scotland, Vol. I, voce Aliment p.292-293.

[42] S.4.

[43] See Fingzies v. Fingzies (1890) 28 S.L.R.6. But cf. Montgomery-Cuninghame v. Montgomery-Beaumont (1778) Mor. 15526 (where "the Court were of opinion, that there was a natural obligation on the wife to provide the husband when in her power ..."); Ritchie v. Rennie (1840) 13 Sc. Jur. 73 (wife could use alimentary liferent for aliment of husband).

[44] S.1(1).

modified the rigid practice of awarding aliment on a fixed scale in actions of affiliation and aliment. Henceforth the court was to have regard to "the means and position of the pursuer and the defender, and the whole circumstances of the case."[45] The old rule that the father could escape liability for aliment in money by offering to take custody of his illegitimate child, or even place it with a third party, at the ages of 7 or 10 was manifestly inconsistent with twentieth century ideas on the importance of the welfare of the child, and it was swept away by the 1930 Act.[46]

9. A new alimentary obligation and a new method of extinguishing the "natural" alimentary obligation between parent and child, was introduced by the Adoption of Children (Scotland) Act 1930 which provided inter alia that, for purposes of "maintenance", the adopter and adopted child would have the same rights and duties inter se as parent and legitimate child.[47] In 1968, as a corollary of the extension of an illegitimate child's succession rights against his parents' estates, his right to aliment out of the estate or against those enriched by the succession was placed on the same footing as the right of a legitimate child.[48] In other words, the illegitimate child's claim to aliment ceased to transmit as an ordinary debt, but he acquired the same equitable claim against the parents' estate as is enjoyed by the legitimate child.

10. Changes in jurisdiction. At the beginning of the nineteenth century the Commissary Court dealt, as we have seen, with aliment in consistorial proceedings between husband and wife; the sheriff courts dealt with most actions of affiliation and aliment (although actions were sometimes brought in other lower courts[49] or in the

[45] Ss. 1(2) and 2(1). Cf. Irvine v. Dick (1933) 50 Sh. Ct. Rep. 22; Mottram v. Butchart 1939 S.C. 89; Halkett v. McSkeane 1962 S.L.T. (Sh. Ct.) 80. But see Brown v. Strachan (1947) 63 Sh. Ct. Rep. 158 where the sheriff concluded that "apart from exceptional circumstances, the usual award should, in defended cases, be £3 for inlying expenses and £15: 10: - per annum for aliment."

[46] S.2(2).

[47] S.5(1): repealed and reenacted as the Adoption Act 1958, s.13(1). These provisions expressly extinguish the natural parent's obligation, thus avoiding the difficulties which have arisen under certain United States adoption statutes. See e.g. "Liability of natural parent for support of adopted child" (1938) 36 Michigan Law Review 1028-31.

[48] Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.4. For the background, see the Report of the Committee on the Law of Succession in Relation to Illegitimate Persons (Cmnd. 3051) 1966 paras. 16 and 55.

[49] See e.g. Oliver v. Scott (1778) Mor. 444 (justices of the peace); Watson v. Keay 19 Feb. 1825 F.C. (magistrates of Dundee). And see Pollock v. Clark (1829) 8 S.1 and 7 on some of the practices of the Justices of the Peace in affiliation cases.

Court of Session[50]); and the Court of Session dealt with other actions of aliment, such as actions by parents, or against heirs.[51] However, the Court of Session, the sheriff courts, and sometimes other lower courts, also exercised a limited "emergency" jurisdiction to award interim aliment to save a wife from destitution until a proper consistorial action could be raised in the Commissary Court.[52] The Court of Session Acts 1830 and 1850 transferred the Commissary Court's jurisdiction in consistorial actions to the Court of Session,[53] so that from then on the latter court dealt at first instance with most cases involving aliment between husband and wife. The 1830 Act provided that "actions of aliment may be instituted, heard, and determined in any sheriff court of Scotland."[54] However, this was interpreted as not extending the sheriff courts' jurisdiction in husband and wife cases beyond its "emergency" jurisdiction to award interim aliment "until the rights of the parties were permanently fixed" by the Court of Session.[55] In alimentary actions other than those between husband and wife the Act had a more significant effect. The sheriff courts were given a clear statutory jurisdiction in such actions and became the normal forum for alimentary proceedings between, for example, parents and children.[56] The jurisdiction of the sheriff courts was extended again by the Sheriff Courts (Scotland) Acts 1907 and 1913 which gave them 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."[57] There remained a doubt as to what was meant by "interim aliment" in this context but it was ultimately removed when the Court of Session decided that "interim aliment" here meant any award of aliment between husband and wife

---

[50] See e.g. Glendinning v. Flint (1782) Mor. 445; Paterson v. Spiers (1782) Mor. 445; Ballantyne v. Malcolm (1803) Hume 424.

[51] In Jackson v. Jackson (1825) 3.S.610 an action by an old woman against her son, it was held that "actions for permanent aliment (being founded solely in equity) were competent before the Court of Session only".

[52] See Clive and Wilson, op. cit. 187.

[53] Ibid.

[54] S.32 repealed by the Sheriff Courts(Scotland) Act 1907).

[55] See Clive and Wilson, op. cit., p.189 and Note in 1 Scot. L. Rev. (1885) p. 196.

[56] The effect of Jackson v. Jackson supra (note 51) was thus reversed.

[57] 1907 Act s.5(2) as amended by 1913 Act. See further, Clive and Wilson, op. cit. pp. 189-190.

other than an award attached to a decree of separation or adherence.[58] The present position, therefore, is that the sheriff courts and the Court of Session have a concurrent jurisdiction in actions of aliment. In practice, the vast majority of actions for aliment are brought in the sheriff courts. Within the sheriff courts, actions for aliment between relatives other than husband and wife can be brought in the small debt court if the amount concluded for is within its pecuniary limits. In the late nineteenth century, when such actions were more common, many were brought in the small debt court.[59] There was more doubt about actions between husband and wife. It was clear that actions for separation or adherence could not be brought in the small debt court, but in some sheriff courts actions for interim aliment were dealt with there.[60] The matter was put on a statutory basis by the Sheriff Courts (Civil Jurisdiction and Procedure)(Scotland) Act 1963 which made an action for interim aliment between spouses competent in the sheriff's small debt court if the aliment claimed did not exceed £5 a week in respect of the pursuer and £1.50 a week in respect of each child (if any) of the marriage.[61]

Discretionary powers of courts

11. A series of nineteenth and twentieth century statutory provisions have given the courts discretionary powers, in certain proceedings, to award maintenance or financial provision. These statutory provisions are often merely applications to Scotland of provisions thought to be desirable for English law. It is significant that they generally use the English term "maintenance" rather than the Scottish term "aliment". They often sit uneasily on the common law rules. The earliest was the Conjugal Rights (Scotland) Amendment Act

58 Donnelly v. Donnelly 1959 S.C. 97.

59 See Palmer v. Palmer (1885) 2 Sh. Ct. Rep. 55. Cf. Russell v. Soutar (1886) 2 Sh. Ct. Rep. 236 (on the disadvantages of the lack of appeals from that court). For later examples, see Croft v. Croft (1922) 39 Sh. Ct. Rep. 80; Cowan v. Cowan (1924) 41 Sh. Ct. Rep. 11; Stewart v. Scott (1933) 50 Sh. Ct. Rep. 21 (aliment of illegitimate child). And see Lewis, Sheriff Court Practice 372 (8th ed., 1939).

60 See for example Whillans v. Whillans (1908) 24 Sh. Ct. Rep. 122; Docherty v. Docherty (1908) 24 Sh. Ct. Rep. 120; Bain v. Bain (1954) 70 Sh. Ct. Rep. 68.

61 S.3. For the background, see the Seventh Report of the Law Reform Committee for Scotland (1959) Cmnd. 907.

1861 which provided that:

> "In any action for separation a mensa et thoro or for divorce the Court may from time to time make such interim orders, and may in the final decree, make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates."[62]

The application of this provision has since been extended to actions for declarator of nullity of marriage and, in a qualified way, to actions for adherence.[63] It has been extended to children above the age of pupillarity but under 16 years of age.[64] And it has been extended to children of one spouse who have "been accepted as one of the family" by the other spouse.[65] The relationship of this discretionary power with the common law of aliment remains doubtful. To some extent the court's powers in actions for divorce, separation, nullity or adherence clearly go beyond a mere application of the common law rules. The court can, for example, order a man to pay maintenance for a stepchild whom he has accepted into his family but towards whom he has no alimentary obligation at common law. Yet the traditional view is that the statutory discretion conferred by the 1861 Act does not enable the court to vary the primary obligation of the father to aliment a legitimate child even if the mother has independent means.[66]

12. The Guardianship of Infants Act 1925 and the Children and Young Persons (Scotland) Act 1932 give the Court of Session and the sheriff courts certain powers in relation to disputes between parents or between a surviving parent and the tutor or joint tutor of his or her legitimate child. These include power to award "maintenance" for the child - the usual statutory formula being "such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable."[67]

---

62 S.9.

63 Matrimonial Proceedings (Children) Act 1958, ss.9(2) and 14(1).

64 Custody of Children (Scotland) Act 1939, s.1.

65 Matrimonial Proceedings (Children) Act 1958, s.7.

66 See Matthew v. Matthew 1926 S.L.T. 723; Dickinson v. Dickinson 1952 S.C. 27.

67 1925 Act s.5(4); 1932 Act s.73. See also the 1925 Act, s.3 as amended by Guardianship Act 1973. "Infant" in these provisions now means "child under the age of sixteen". Custody of Children (Scotland) Act 1939.

13. We have already mentioned the court's duty 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."[68] This is supplemented by another provision in the Illegitimate Children (Scotland) Act 1930 which gives the Court of Session or a sheriff court 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 or a third party) to make an order for payment by the parent or parents, 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 mother and the whole circumstances of the case the court may think reasonable."[69] These two provisions may go a long way towards enabling the court, in its discretion, to depart from the common law rule that the father and mother are equally liable (i.e. half-and-half if they both have sufficient means) for the aliment of their illegitimate child[70] but it is not clear that they cover all cases. What is the position, for example, if a third party who is not "entitled" to custody but who has had de facto custody pursues the parents for reimbursement of past aliment?[71] And does the Act have implications for the liability of parents inter se for the "sum in respect of aliment" which they may be ordered to pay to a third party who is entitled to custody?

14. It is, however, financial provision for ex-spouses on divorce which provides the most interesting example of the conferment of discretionary powers on the court. The traditional Scottish rule was that divorce had more or less the same automatic property consequences as death.[72] In the absence of an ante-nuptial or post-nuptial marriage contract, an innocent wife was entitled, on divorcing her husband, to a third or a half of his moveable property (depending on whether there were or were not children) and a liferent of a third of his heritage: a husband, on divorcing his wife, was entitled to his "courtesy" or liferent of his wife's heritage.[73] The philosophy of the law

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

69 s.1(3).

70 Cf. Mottram v. Butchart 1939 S.C.89.

71 Cf. National Assistance Board v. Casey 1967 S.L.T. (Sh. Ct.)11.

72 Scots law was not unique in this respect. For example, Article 139 of the new Portuguese Civil Code provides simply that divorce "has in general the effects of dissolution by death".

73 This is a deliberately over-simplified account. For a fuller statement dealing e.g. with the effect of divorce on marriage contract provisions and with the effect of cross actions, see Walton, Husband and Wife (3rd ed. 1951) pp.230-232.

was that divorce terminated the marriage and that there should therefore be a re-distribution of property more or less as on death. There was no continuing obligation of support. A husband was not bound to aliment his divorced wife[74] and the court had no discretionary power to award a periodical allowance after divorce.

15. This simple but unjust system (which did nothing for the wife of the unpropertied wage earner) suffered from the demolition all around it of the old matrimonial property law. As the old system whereby the spouse's moveable property merged into one fund (owned by the husband) on marriage was changed by the Married Women's Property (Scotland) Acts into a wholly separate property system,[75] the financial consequences of divorce became more isolated and less understandable. The law could no longer be seen as providing for a merging of moveable property on marriage and a division of the property on the termination of marriage. The financial consequences of divorce seemed irrational as well as unjust.[76]

16. The first inroad on the old law was consequential on the introduction of divorce for incurable insanity in 1938. This was a non-fault ground of divorce and it was doubtless felt to be hard that a man should lose a third of his moveable property as well as his wife merely because of the misfortune of insanity. The Divorce (Scotland) Act 1938 therefore did not apply the traditional rules to divorce on this ground. Instead, it gave the court power to make an order for payment by the pursuer, or his executors, of a capital sum or periodical allowance to or for behoof of the defender or any children of the marriage.[77] This power was extended in 1964 to allow the court to make an order for payment, as above, by either party to the marriage.[78]

---

[74] See Donald v. Donald (1864) 2 M. 843; Stewart v. Stewart (1872) 10 M. 472; Gatchell v. Gatchell (1898) 6 S.L.T. 224.

[75] See Clive and Wilson, pp. 285-289.

[76] See the Report of the Mackintosh Committee on the Law of Succession in Scotland (1950) Cmd. 8144, pp. 20-21.

[77] S.2(2).

[78] Divorce (Scotland) Act 1964, s.7.

17. The old system of fixed property rights was swept away entirely, and replaced by a discretionary system of awards of financial provision, by the Succession (Scotland) Act 1964.[79] Divorce now has no automatic property consequence. Instead, under section 26 of the Act, the pursuer can apply for a capital sum or a periodical allowance or both and the court on granting decree of divorce can make "with regard to the application such order, if any, as it thinks fit, having regard to the respective means of the parties to the marriage and to all circumstances of the case ... " The objective of financial provision on divorce is not mentioned in the statute, nor in any of the reported cases on it. The nature of the new system is, however, clear enough. It is a discretionary, remedy-linked system. There is still no right to aliment, and no obligation of aliment, as between divorced spouses.

Interaction of public and private law

18. The poor law. The pre-Reformation legislation on the problem of poverty in Scotland hardly went beyond the suppression of unlicensed beggars.[80] The repetition of the same repressive measures in statute after statute suggests that the legislation was highly ineffective.[81] The relief of poverty, as opposed to the suppression of beggary, was left to the church, pious foundations and private charity. The introduction of a poor law as such may be said to date from an Act of 1579[82], which contained the usual provisions for "punishment of the strong and idle beggar but which also provided, on paper at least, for the relief of the "poor and impotent". The Act ordered a "catalogue of the names of the ... poor people" to be made up for each parish and empowered the provosts and baillies in burghs and the "judges constituted by the king's commission" in the landward parishes to levy a tax on the inhabitants for the "needful sustentation" of such "aged and impotent poor persons" as were unable to work. The terms of succeeding statutes show, however, that the 1579 Act was not put into general effective operation.[83] The discretionary power to tax

---

79 Ss. 25-27. See generally Clive and Wilson, op. cit. ch. 20.

80 A.P.S. 1424, c.7 record ed., c.7 12mo.ed.; A.P.S. 1425, c.20 record ed., c.66 12mo. ed.; A.P.S. 1427 c.4 record ed., c.103 12mo.ed; A.P.S. 1449 c.9 record ed., c.22 12mo. ed; A.P.S. 1455 c.8 record ed., c.45 12mo.ed.; A.P.S. 1457 c.17 and 26 record ed., c.79 12mo. ed.; A.P.S. 1478 c.10 record ed., c.77 12mo.ed.; A.P.S.1503 c.14 record ed., c.70 12mo.ed.; A.P.S. 1535 c.29 record ed., c.22 12mo. ed.; A.P.S. 1551, c.16 record ed.; A.P.S. 1555 c.38 record ed..

81 See generally, Nicholls, History of the Scotch Poor Law pp.6-15.

82 A.P.S. 1579, c.12 record ed., c.74 12mo.ed.. There had been an interim measure in similar terms in 1574 (A.P.S. Vol.III record ed. p.86).

83 See A.P.S. 1592 c.69 record ed., c.149 12mo.ed.; A.P.S. 1593 (Vol. IV record ed. p.42); A.P.S. 1600 c.28 record ed., c.19 12mo.

was at first never used and later only rarely used, so that until 1845 the Scottish poor law was characterised by its reliance on voluntary contributions at the parish churches, supplemented in some parishes, when necessary, by irregular assessments.[84] It proved to be extraordinarily difficult to get even the simpler, more repressive parts of the 1579 Act put into effect. Various attempts were made in the sixteenth and seventeenth centuries to find suitably vigorous shoulders on which to lay the burden of administering the poor law. Different statutes gave responsibility to magistrates,[85] kirk sessions,[86] justices of the peace,[87] specially appointed commissioners,[88] heritors,[89] and kirk sessions and heritors.[90] Considerable confusion resulted. By the eighteenth century, however, the kirk sessions and heritors had emerged as those generally responsible for the relief of the poor,[91] although in parishes situated wholly within a royal burgh, the magistrates continued to be the respon-

---

84 See Nicholls, op. cit., p.105-107. There was, however, more use of assessment than Nicholls thought. See Mitchison, "The Making of the Old Scottish Poor Law", (1974) 63 Past and Present 58 at p. 63. Another source of income was a sort of primitive betting levy. Gambling or wagering gains above a certain amount had to be paid over for the benefit of the poor. This was not entirely ineffective. See Kirk of Session of Dumfries v. Kirk Sessions of Kirkcudbright and Kelton (1775) Mor. 10580.

85 A.P.S. 1579 c.12 record ed., c.74 12mo.ed..

86 A.P.S. 1597 c.39 record ed., c.272 12mo. ed.; A.P.S. 1600 c.28 record ed., c.19 12mo ed. (presbyteries to supervise kirk sessions).

87 A.P.S. 1617 c.10 record ed., c.10 12mo.ed.; A.P.S. 1661 c.338 record ed., c.38 12mo.ed. (requiring Justices to appoint "overseers").

88 A.P.S. 1696 c.29 record ed., c.29 12mo.ed.; see also A.P.S. 1592, c.69 record ed., c.149 12mo.ed..

89 A.P.S. 1663 c.52 record ed., c.16 12mo.ed..

90 A.P.S. 1672 c.42 record ed., c.18 12mo.ed..

91 See the Proclamations of 1692, 1693, 1694 and 1698, confirmed by A.P.S. 1698 c.40 record ed., c.21 12mo.ed.; Nicholls op. cit. pp. 78-88; Heritors of the Parish of Humbie v. The Minister and Kirk Session of Humbie (1751) Mor. 10555. In the Humbie case, it was held that the heritors and kirk session had a joint right of administration etc. "without prejudice to the kirk session to proceed in their ordinary acts of administration and application of their collections to their ordinary and incidental charities, though the heritors be not present nor attend." For the background see Mitchison, loc. cit. (note 84, supra) at pp. 83-85.

sible authority.[92] Until the beginning of the nineteenth century, there is little indication of any interaction between the poor law and the private law on aliment. It seems that, with the exception of aliment for illegitimate children, the two branches of the law were concerned in practice with quite different segments of society. Further, it may be supposed that kirk sessions, who would usually know the family circumstances of their paupers, would not readily have provided relief if a relative was able to provide support. From the early nineteenth century, the law reports begin to contain cases in which kirk sessions and heritors tried to obtain reimbursement from liable relatives for the cost of supporting paupers.[93] The claim of the poor law authorities was not based at this stage on any statutory provision, but it was accepted that at common law they, like anyone else providing aliment to a person in need without any intention of donation, were "entitled to relief from every party liable to aliment him."[94] As the class of those from whom the poor law authorities could claim reimbursement was identical with the class of those liable to provide aliment at common law, there was no conflict between public and private law. Indeed, actions by and against kirk sessions and heritors provided an opportunity for the development of the rules of the common law.

19. The legal situation continued to be essentially the same after the major reform of the Scottish poor law in 1845.[95] The new poor law authorities (at first parochial boards,[96] then parish councils,[97] and finally county councils and town councils of large burghs) were still entitled to have recourse

---

[92] See Guthrie Smith, A Digest of the Law of Scotland relating to the Poor, the Public Health and other matters administered by Parochial Boards (3rd ed. 1878) pp. 4-5; Lawrie v. Dreghorn (1797) Mor. 10587 Glasgow); Landward Heritors of Dunbar v. Town Council and Magistrates of Dunbar (1835) 1 S. & McL. 134.

[93] See Kirk Session of Garvald v. Forrest 14 Feb. 1817 F.C. (kirk session cannot sue father of illegitimate child for aliment unless a claim for its support has actually been made against the parish); Heritors and Kirk Session of Ettrick v. Sword (1824) 2 S.715; Wilson v. Kirk Session of Cockpen (1825) 3 S.547; Anderson v. Heritors and Kirk Session of Lauder (1848) 10 D.960. Actions were sometimes brough against the poor law authorities by relatives claiming not to be liable and asking to be relieved of their burden of support. See e.g. Nicholl v. Magistrates, Heritors and Kirk Session of Dundee (1832) 10 S. 670; Lumsden v. Heritors and Kirk Session of Leslie (1846) 8 D.1251

[94] Heritors and Kirk Session of Ettrick v. Sword (1824) 2 S.715 and 14 Feb. 1824 F.C. (a bitter report).

[95] Poor Law (Scotland) Act 1845, ss.17 and 22.

[96] Local Government (Scotland) Act 1894, ss. 21 and 22.

[97] Local Government (Scotland) Act 1929, s.1.

against relatives liable to aliment a pauper,[98] as well as the pauper's area of settlement, and against his estate.[99] Now, however, their right was recognised by statute. Section 71 of the Poor Law (Scotland) Act 1845 provided that where poor relief had been afforded to a destitute poor person, it should be:

> "lawful for the Parochial Board ... to recover the monies expended in behalf of such poor person ... from his parents or other persons who may be legally bound to maintain him ... "

The class of liable relatives for poor law purposes was still identical with the class of relatives liable at common law. Questions on the common law of aliment continued to be argued and decided in poor law cases.

20. National Assistance and supplementary benefit. The wide rights of recourse permitted by the poor law were capable of embittering family relations and leading to hard cases.[100] When the poor law was replaced by National Assistance, the class of relatives liable to provide support for purposes of the National Assistance Act (and hence the class of relatives against whom the National Assistance Board had a right of recourse[1]) was cut down in effect to the nuclear family of spouses and young children. Section 42(1) of the National Assistance Act 1948 provided that:

> "For the purposes of this Act - (a) a man shall be liable to maintain his wife and his children and (b) a woman shall be liable to maintain her husband and her children".

"Children" meant children under the age of sixteen[2] and

---

98 See Chapters V and VI of the Report of the Departmental Committee on Poor Law in Scotland (1938) Cmd. 5803; chairman, Lord Keith (subsequently Lord Keith of Avonholm).

99 See Buie v. Stiven (1863) 2 M.208; Reid v. Moir (1866) 4 M. 1060; Duncan v. Forbes (1878) 15 S.L.R. 371; Den v. Lumsden (1891) 19 R.77; Parish Council of Leslie v. Gibson's Trs. (1899) 1 F.601; Edinburgh Parish Council v. Couper, 1924 S.C. 139; Sutherland County Council v. Macdonald 1935 S.N. 58 and 70; Fife County Council v. Rodger 1937 S.L.T. 638.

100 See the debates at the Committee stage of the National Assistance Bill: Standing Committees, Official Reports, 1947-48, Vol.1 cols. 2337, 2635. For an example of a hard case under the old law, see Fife County Council v. Rodger 1937 S.L.T. 638.

1 National Assistance Act 1948, ss. 43 and 44.

2 Ibid. s.64(1).

victed of certain offences.[12] The magistrate could order "the parent, step-parent or other person for the time being legally liable to maintain" a child admitted to a certified Industrial School to contribute towards the child's maintenance such weekly sum, not exceeding 5 shillings per week, as should seem reasonable.[13] As in the poor law, the class of liable relatives was the same as the class of relatives liable to provide aliment at common law. This system was continued in the Children Act of 1908, not only in relation to children admitted to industrial or reformatory schools but also in relation to children committed to the care of a "fit person". In both cases, a contribution order could be made against "the parent or other person liable to maintain" the child or young person.[14] There was a significant limitation, however, in the Children and Young Persons (Scotland) Act 1937. Now, when a child or young person was committed to the care of a fit person or sent to an approved school, the only persons liable to make contributions to his maintenance were (a) his father or stepfather (b) his mother or stepmother and (c) any person who, at the date of the order, was cohabiting with the mother of the child or young person.[15] The Children Act 1948 further cut down the class of relatives liable to have a contribution order made against them in respect of a child in care. Now, in line with the policy of the National Assistance Act 1948, only the father and mother of a child under 16 were liable.[16] This continues to be the position under Part VI of the Social Work (Scotland) Act 1968,[17] in the case of children taken into care voluntarily under Part II of the Act, or in pursuance of compulsory measures of care (viz. supervision requirements) of a children's hearing under Part III. Part VI of the 1968 Act enables the appropriate regional council to have recourse against the child's liable relatives.[18] It should be noted, however, that a regional council does not have a right of recourse in the case of children received into its care as a result of an order made by the court in a divorce or other matrimonial action,[19] or of an order made by the court

---

12 See the Industrial Schools Act 1866, ss. 14–16, superseding the Reformatory Schools (Scotland) Acts 1854 and 1856, and the Industrial Schools (Scotland) Act 1861.

13 1866 Act, ss. 39, 40. For earlier attempts to deal with this question see the 1854 Act s.4, the 1856 Act, s. 1, and the 1861 Act ss. 18, 19.

14 Children Act 1908, ss. 22(2), 75(1), 82(1).

15 S.90(1). This is in the same terms as s.86 of the (English) Children and Young Persons Act 1933.

16 S.24.

17 S.78.

18 Ss. 80 and 81.

19 Matrimonial Proceedings (Children) Act 1958, s.10.

in independent custody proceedings.[20] Moreover, while regional councils have powers to give financial assistance in respect of children under 16 who are not in care,[21] and to make contributions for such children,[22] the councils do not have any statutory right of recourse against liable relatives in such cases.

---

20 Guardianship Act 1973, s.11.

21 Social Work (Scotland) Act 1968, s.12.

22 Children Act 1975, s.45.

APPENDIX B

Possible rules on the rights of relief of a subsidiarily liable relative against a prior relative, or of one alimenting child or parent against another child or parent

We suggest in paragraph 2.86 that these problems should be left to be dealt with by the common law as at present. If they were to be regulated by statute then one possibility would be a set of rules on the following lines.

(a) A subsidiarily liable relative who pays aliment under a court decree should have no right of relief against a prior relative if the decree is granted against him on the ground that the prior relative is unable to pay aliment because of lack of means, but should have a right of relief if the decree is granted against him on the ground that recovery of aliment from the prior relative is, for any other reason, impossible or impracticable and if the prior relative was liable to provide aliment at the time of the payment for which relief is sought.

(b) A subsidiarily liable relative who provides aliment in the absence of a court decree obliging him to do so should be presumed to provide it gratuitously and without reservation of a right of recovery against a prior relative. This presumption should, however, be rebuttable, and if it is rebutted the subsidiarily liable relative should be entitled to relief against a prior relative who was liable to provide aliment at the time when it was provided.

(c) Where one of two or more children has, under a court decree, paid more than his proper share of aliment for a parent, that child should have a right of relief to recover an appropriate contribution from any other child who was not a party to the action and who was liable to provide aliment at the time of the payment in respect of which a contribution is sought.

(d) Where one of two or more children has aliment a parent in the absence of a court decree obliging him to do so, the child should be presumed to provide aliment gratuitously and without reservation of a right of relief against other liable children. This presumption should, however, be rebuttable, and if it is rebutted the alimenting child should be entitled to recover an appropriate contribution from any other child who was, at the time of the provision, liable to provide aliment.

(e) A parent[1] who provides aliment in the absence of a court decree obliging him to do so should have a right to recover an appropriate contribution from the other parent if the other parent was liable to provide aliment at the time of the provision.

(f) A parent who pays or provides aliment when there is a court decree dealing with aliment for the child and granted in an action to which both parents were parties should have no right of relief against the other parent unless this is expressly reserved by the court.

(g) A parent who has paid aliment for a child under a court decree is an action to which the other parent was not a party should have a right to recover an appropriate contribution from the other parent if the other parent was liable to provide aliment at the time of the payment for which relief is sought.

Parent" would be defined so as to include parents of legitimate children, parents of illegitimate children, adoptive parents, and one of two de facto accepting 'parents" liable for aliment under Proposition

APPENDIX C (Para. 2.200)

FORMS OF CONCLUSIONS (OR CRAVES) FOR ALIMENT AND OF ALIMENTARY DECREES

1. As a result of historical factors,[1] conclusions or craves for aliment take a variety of different forms. The main variation lies in the terminating events which are specified in the conclusion and decree. In our Memorandum we have suggested that events not specified as terminating events in an alimentary decree should not automatically affect the decree but merely ground an application for variation or recall (Proposition 62 at paragraph 2.224). In this Appendix we consider whether forms of conclusions or craves for aliment should be prescribed by act of sederunt for the benefit of practitioners, clerks of court, judges and others.

2. In actions for aliment alone between husband and wife the pursuer sometimes seeks aliment "till the rights of the parties shall be determined by a competent court"[2] and sometimes seeks aliment "so long as [the defender] shall refuse to receive and entertain the pursuer."[3] The effect is the same: in both cases liability to pay may be terminated by a decree of a competent court or by a bona fide resumption of cohabitation.[4] Other forms have been tried, such as a conclusion for aliment "so long as the parties remain married and live apart,"[5] or a mere conclusion for aliment without mention of a terminating event.[6] In one case, following on a joint minute, aliment was awarded

---

[1] See Clive and Wilson, Husband and Wife (1974) pp 187-190 for an account of these factors in alimentary actions between husband and wife.

[2] Ibid. and see e.g. Harkness v. Harkness (1961) 77 Sh. Ct. Rep. 165.

[3] Ibid. and see e.g. Jack v. Jack 1962 S.C. 24.

[4] Donnelly v. Donnelly 1959 S.C. 97 per Lord Patrick.

[5] Jack v. Jack 1962 S.C. 24. This attempt was unsuccessful, but the case must now be read in the light of the Divorce (Scotland) Act 1964 s.6.

[6] Cf. Barr v. Barr 1968 S.L.T. (Sh. Ct.) 37 (where the wife sought (a) a declarator that she was entitled to live apart and (b) aliment).

during the joint lives of the parties and although this form of decree was criticised, it was held that there was no objection to it as other terminating events were implied by law.[7]

3. In claiming aliment for children a particular age will often have to be specified as a terminating event[8] and attainment of self-sufficiency may be specified also.[9]

4. Nevertheless, decrees very rarely if ever specify all the events which may terminate the operation of the decree. The question arises whether, in the light of the changes in substantive law proposed in our Memorandum, the forms of conclusions or craves should be prescribed by act of sederunt. It might, we think, lead to unnecessary uncertainty to specify some terminating events in conclusions and decrees but not others. Moreover, uncertainty would also result from prescribing different terminating events from the same range for mention in different actions.

5. It would be simplest to mention no terminating events, leaving the general law to apply, but this also could be misleading. It would be difficult to mention all terminating events (including e.g. the destitution of the alimentary debtor or the attainment of self-sufficiency by the alimentary creditor) with enough specification.

6. It should be possible, however, and might be helpful, to require that conclusions and decrees must specify those terminating events which are precise and clear, leaving the others to be dealt with by an application to the court for variation or recall of the decree. Thus a decree for aliment might award aliment at a specified rate until (a) the decree is varied or recalled by the court; (b) the death of either

---

[7] Christie v. Christie 1919 S.C. 576.

[8] Cf. Illegitimate Children (Scotland) Act 1930 s.3; Affiliation Orders Act 1952, s.3; Custody of Children (Scotland) Act 1939. And see para.

[9] Cf. Rules of Court, Appendix Form 2 No 20 "aliment for each child while in the custody of the pursuer and unable to earn a livlihood"; Whyte v. Whyte (1901) 9 S.L.T. 99 - son suing mother for aliment "until she should receive him back in her house, or until he is set out in his profession, and is able to support himself ...".

party; (c) divorce, dissolution or annulment of the marriage (in the case of aliment for a spouse); or (d) the attainment of a specified age (in the case of aliment for a child) or (e) the termination of the proceedings (in the case of interim aliment pending disposal of the action. Conclusions or craves for aliment could be framed accordingly although, of course, if actions of adherence and aliment are retained in our law, they would continue to be distinctive in that aliment would be payable only if the decree of adherence were not implemented.

7. In the light of the foregoing, we are requesting the Lord President of the Court of Session, representing the Court as rule-making authority for that court and the sheriff court, to consider whether acts of sederunt should be made prescribing standard forms of conclusions (or craves) for aliment specifying the events (such as death, divorce, attainment of a specified age) which will terminate the obligation to pay and which will not require to be established in an application to the court for variation or recall of the decree.

APPENDIX D

[See paragraph 3.20 of Memorandum]

The following are a few examples of cases in which the English courts have used their powers to adjust the property rights of spouses on divorce.

Example 1:

The husband, a postman earning about £21 a week, owned the matrimonial home, but had been unable to keep up the mortgage with the result that the building society foreclosed and the house was in the process of being sold. It was anticipated that a balance of about £3000 would be available after paying off the building society. The judge ordered (a) very modest maintenance for the wife and four children; (b) that the wife should have the furniture; and (c) that a half-share in the ownership of the home should be transferred to the wife. The Court of Appeal approved of this result. Scarman L.J. remarked that the case illustrated "how, even in a situation where money is scarce, the power to transfer and distribute property ... can be of great assistance."[1]

Example 2:

After the breakdown of his marriage, the husband stayed in the matrimonial home, (which was in his name) with his two sons. The wife moved to a flat some miles away, with her daughter. The judge ordered that the matrimonial home should be transferred by the husband to himself and his wife in equal shares; that it should remain unsold until the youngest child attained the age of 17 or finished his full-time education; that the husband should leave the home, so that it would be occupied by the wife, who was given care and control of the children; and that the wife should be responsible for the mortgage repayments and other outgoings on the house.[2]

Example 3:

The matrimonial home was owned by the spouses in equal shares. The husband left and the wife continued to live there with four children, paying the mortgage instalments and other outgoings. The house was valued at around £5,700 and the outstanding mortgage was £1,700. The judge ordered the husband to transfer the whole of his interest in the house to the wife, but that he should have a charge on the house for £1000, payable on the wife's death, on the sale of the property, or on the youngest child attaining the age of 16, whichever was the earliest. The Court of Appeal approved of this result.[3]

---

[1] Hunter v. Hunter [1973] 3 All E.R. 362.

[2] Allen v. Allen [1974] 3 All E.R. 385.

[3] Hector v. Hector [1973] 3 All E.R. 1070.

Example 4:

The matrimonial home was owned by the parties in equal shares. The husband agreed that the wife and child should continue to live in the house until the child was 17, but wished the house then to be sold and his share of the proceeds to be paid to him. The wife contended that the husband's share in the house, or a large part of it, should be transferred to her. The child suffered from serious kidney trouble and would not necessarily be independent after attaining the age of 17. There were no other assets. The husband earned about £25 a week. The wife was on social security, apart from spells of part-time work. The judge ordered that the whole of the husband's half share should be transferred to the wife, and that a maintenance order for £4 a week for wife and child should continue. The mortgagees were agreeable to the wife taking over the mortgage obligations if she found a guarantor, which she had done. The Court of Appeal agreed with this decision and dismissed an appeal by the husband.[4]

[4] Smith v. Smith [1975] 2 All E.R. 19; see also Jones v. Jones [1975] 2 All E.R. 12 (where the Court of Appeal reached a similar decision, observing that it would be undesirable to require the house to be sold when the youngest child ceased to be dependent, as the wife would then be over 50 and incapable of earning by reason of injuries inflicted on her by the husband).