SCOTTISH LAW COMMISSION

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MEMORANDUM No: 22 (cont'd.)

FAMILY LAW

ALIMENT AND FINANCIAL PROVISION

31 March 1976

This consultative Memorandum is in two volumes, of which this is Volume 2. (Volume 1 contains a survey and summary of the Commission's provisional proposals). The Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 October 1976.

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MEMORANDUM NO. 22 (cont'd.)

ALIMENT AND FINANCIAL PROVISION

(Volume 2)

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PART II

ALIMENT

Section A: General

Nature and purpose of alimentary obligation

2.1. A legal obligation to provide aliment may be seen in four different ways.

(1) It can be seen as a method of providing support within the family, the emphasis being on family solidarity. This "family support" approach regards it as normal and acceptable that the law should intervene to compel a man to fulfil his family obligations. Aliment is part of family law.[1] As a variant or extension of this approach, the legal obligation of aliment may be seen as the outward expression of what is, or ought to be, a deeply felt sense of family obligation. Even if it were shown that the private law obligation of aliment is to some extent inefficient as a method of compelling the provision of support which is not being provided voluntarily, it might still be argued that the law should recognise and express an obligation which is widely felt to be binding and which is voluntarily fulfilled in the overwhelming majority of families. On this view, the law may even have a hortatory role to play.

(2) The obligation of aliment can be seen as a way of providing support for the indigent, the emphasis being on relief of the ratepayer or taxpayer. This may be called the "poor law" approach since the point of departure is the poor law or its equivalent. This approach regards it as abnormal or undesirable to interfere with a man's freedom to do as he likes with his own property or income, and believes that such interference should be confined to the bare minimum necessary to protect the public purse. In such a system, the obligation of aliment will tend to be regarded as part of the poor law.[2]

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[1] See e.g. the civil codes of France, Germany, Italy, Switzerland and many other countries.

[2] See e.g. the (English) Poor Law Act 1930, s.14. Similar "family responsibility statutes" were enacted in many states of the U.S.A. See Annotation on "Nature of care contemplated by statute imposing general duty to care for indigent relatives." 92 American Law Reports Annotated; 2nd series, p. 348.

(3) The obligation may be seen as a way of re-allocating resources and redressing injustices on the breakdown of a marriage. This approach will often involve the conferring of discretionary powers on courts dealing with marital breakdown. The obligation of support, as such, may play a background or subsidiary role. There may well be dispute as to whether, in exercising their discretionary powers, the courts are, or ought to be, giving effect to an alimentary obligation, or awarding a substitute for an alimentary obligation, or awarding compensation for loss of an alimentary obligation or simply trying to achieve an equitable adjustment of a situation often complicated by the de facto economic dependence of many married women and the presence of minor children, and sometimes complicated also by questions of matrimonial property[3].

(4) The obligation may be seen as supplemental to, or a part of, succession law. In Appendix A, we show how the harshness of a succession law based on primogeniture was modified in Scotland by requiring the heir to aliment his brothers and sisters.[4] The "family provision" legislation of New Zealand, England and other Commonwealth countries can likewise be seen as a derogation from the principle of complete testamentary freedom.[5] It would be legislatively possible for a legal system to recognise no alimentary obligations between living relatives but to make aliment a major plank of its succession law. Support of dependants could be seen as one of the main purposes of succession law; and aliment could be seen as relating primarily to support out of a deceased relative's estate.

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[3] An interesting conspectus of this aspect of the law is to be found in the symposium on "Alimony" in 6 Law and Contemporary Problems (1939) 183-321.

[4] Appendix A, para. 2.

[5] See Laskin, "Dependants' Relief Legislation," (1939) 17 Can. Bar Rev. 181 for a comparison of the English legislation of 1938 with earlier New Zealand and Canadian legislation to like effect. See now the (English) Inheritance (Provision for Family and Dependants) Act 1975.

2.2. Most of the legal systems which we have examined seem to contain a mixture of these approaches. Broadly speaking, however, it can be said that the first approach, often with an admixture of the third, predominates in civilian legal systems, whereas a mixture of the second, third and fourth, usually involving discretionary powers on the part of the courts, predominates in English law and systems derived from it. In this respect, Scotland is in the civilian camp.[6]

2.3. This Memorandum is not directly concerned with rights of recourse by the state, public agencies or local authorities against liable relatives. We deal, however, in Part V with some of the questions raised by the relationship between public and private law in this sphere. For the moment, we leave out of account the second, or poor law, view of aliment.

2.4. We think it leads to confusion to lump together the first and third views - aliment between the parties to a subsisting relationship and financial provision on divorce. We therefore leave for later consideration, in Part III, the problems of financial provision in divorce and similar situations of marital breakdown. We also leave for later consideration, in Part IV, aliment payable on the death of a liable relative.

2.5. That leaves the first approach to aliment - the family support approach. We consider that at the present time the legal obligation of aliment may properly be regarded as designed to provide support within the family and perhaps also to recognise and express a widely felt sense of obligation to support members of the family. It is obvious that this approach must lean heavily on prevailing notions of the family and of family obligations.

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[6] The case of Maule v. Maule (1825) 1 W. & S. 266 (see para. 2.137 below) provides a very fine example of the clash between the first and the second views of aliment.

2.6. It can be argued that the relief of need has become very largely a public law task, that the indigent person will in most cases look to the state rather than to his relatives for support, that the state's rights of recovery from liable relatives are limited in law and in many cases worthless in fact, and that in this situation it would be better to recognise these realities and to abolish the relative's obligation of aliment altogether. There are, however, cases where this obligation is valuable and readily enforceable. The number of actions for aliment in the sheriff courts each year is not negligible as the following table shows:

TABLE

ACTIONS OF ALIMENT DISPOSED OF BY FINAL JUDGMENT IN THE SHERIFF COURT: 1969-1974

Type of action	1969	1970	1971	1972	1973	1974
Actions of separation and aliment	181	155	164	206	169	190
Actions of adherence and aliment	114	105	99	110	78	74
Actions of affiliation and aliment	312	302	263	237	194	223
Other actions for aliment	241	273	297	295	295	299
Total	848	835	823	848	736	786

Source: Civil Judicial Statistics for Scotland for the years 1969 to 1974 Table 10; unpublished annual returns of business by the sheriff courts to the Scottish Home and Health Department or Scottish Courts Administration for the years 1969-1974.

In addition, aliment for children, and interim aliment for wives, is awarded in several thousand divorce actions each year and a few decrees for aliment are granted in the sheriff's small debt court. There are no published statistics on these types of action. Nor do we know how many decrees are actually complied with or enforced, but such statistics as have been published suggest at least that there is a continuing demand for decrees for aliment. There is no way of knowing how many people who at present pay aliment reluctantly but voluntarily would cease to pay at all if the legal obligation no longer existed in the background. The cost to the taxpayer of abolishing the obligation to aliment might be substantial.

2.7. We note that the Finer Committee on One Parent Families, which was sharply critical of many aspects of the private law on aliment, nevertheless did not suggest its complete abolition.[7] In relation to one-parent families (which alone came within its terms of reference) the Committee suggested a radical change in the method of providing support, involving a shift from private law to public law techniques, but it did not suggest the abolition of the absent parent's liability. We discuss the Committee's proposals in Part V under the heading of the "Relationship between Public and Private Law". For the moment it is sufficient to note that the Finer Committee proposals presuppose a system whereby relatives, and not only the state, are liable to provide aliment, whether it be provided directly, or indirectly through reimbursement of an administrative authority. The Committee's proposals do not make any less necessary a consideration of which relatives should be liable, on what conditions, to provide what support.

2.8. We think, moreover, that the argument for abolition concentrates too much on the pathological situation - the broken family, the defaulting husband, the abandoning parent - and ignores the normal situation. Most men and women <u>do</u> support their families. Doubtless they would continue to do so if the legal obligation were removed, but as we have suggested in

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[7] Cmnd. 5629, 1974.

paragraph 2.1. above, there is perhaps some force in the argument that the law has an expressive function to fulfil. People recognise an obligation to support certain relatives and, by and large, fulfil it. It is the sort of obligation which they would expect to find recognised and expressed in the law.

2.9. We invite views, but our present view is that the private law obligations of aliment should continue. (Proposition 1).

Section B: The parties to the alimentary relationship

Parties liable

2.10. General considerations. The tendency in the law relating to the right of recourse of public agencies against liable relatives has been to restrict the classes of relatives bound to provide support. Under the Ministry of Social Security Act 1966, recovery is possible only from a person's husband or wife, or from the parents of a child under sixteen.[1] There is no recourse against the children of indigent old people, or against grandparents, or against step-parents or relations through marriage. Similarly, under the Social Work (Scotland) Act 1968, only parents (not step-parents or grand-parents) can be obliged to contribute towards the maintenance of a child in care.[2] This tendency has not been reflected in the private law on aliment. Grand-parents and grand-children in the legitimate line, for example, are bound by a reciprocal obligation of aliment. It is difficult to know whether a more restrictive approach would be in accordance with public opinion. We hope that comments on our Memorandum will throw some light on this. As the question is whether a potentially onerous obligation should be imposed by law on particular individuals, we think that there should be a certain presumption against the imposition of a liability to aliment. It should be confined to those cases where there would be general recognition that it is justified.

2.11. It would probably be generally accepted that an alimentary obligation is justified only if there is a tie of family or blood relationship or some similar link between the alimentary debtor and alimentary creditor. We doubt whether the mere existence of a blood link alone would be widely regarded today as justifying the imposition of an alimentary obligation, and our general approach will be to look for some other justification - for instance, that the person in question has himself assumed the liability (by marriage, for example, or by bringing a child into the world, or by adopting a child) or may

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[1] Ss. 22, 23, 24, 36(1).

[2] S.80(1).

be equitably bound to aliment someone (such as an aged parent) who has supported him at an earlier stage in life. On many points our conclusions must be tentative. We can merely set out the arguments, point to the legal position in other jurisdictions, express a preliminary view, and invite comments.

2.12. Husband and wife: reciprocity of obligation. Under the present law of Scotland, a husband is bound to aliment his wife. This depends on the common law. The wife's obligation to support her husband was never clearly recognised in the common law.[3] A statutory obligation is now imposed by section 4 of the Married Women's Property (Scotland) Act 1920. This may not be exactly the same as the husband's obligation. The section provides that:

> "In the event of a husband being unable to maintain himself his wife, if she shall have a separate estate or have a separate income more than reasonably sufficient for her own maintenance, shall be bound out of such separate estate to provide her husband with such maintenance as he would in similar circumstances be bound to provide for her, or out of such income to contribute such sum or sums towards such maintenance as her husband would in similar circumstances be bound to contribute towards her maintenance."

The doubt whether the spouses' obligations are identical arises because of the words "unable to maintain himself". Does this mean that the wife's obligation does not arise if the husband can maintain himself at subsistence level? If so, there is a difference between the wife's obligation and the husband's, because a husband may be bound to pay a suitable aliment to his wife even though she has the means of bare subsistence.

2.13. On a certain view of marriage, it is arguable that there should be no alimentary obligation between spouses.[4] Marriage would be seen as a free relationship between independent and equal citizens, no more bound to support each other than, say, two students sharing a flat. We doubt whether this view would command wide acceptance in Scotland. Our own view is that, if private law obligations of aliment are to exist at all, the obligation between spouses should continue. We have no doubt that it should be fully reciprocal. It is reciprocal for

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[3] See note 43 to para. 8 in Appendix A below.

[4] This view has been urged in Denmark. See Pedersen, "Recent Trends in Danish Family Law" (1971) 20 I.C.L.Q. 332 at 339.

purposes of the supplementary benefit law.[5] The Law Commission for England and Wales has suggested that "the time has come ... when the law should recognise the duty of each spouse to support the other".[6] In French law the reciprocity of the obligation has been recognised for centuries.[7] We therefore suggest that there should be fully reciprocal obligations of aliment between husband and wife. (Proposition 2).

2.14. Polygamous marriages: The position of a party to a polygamous marriage requires separate consideration. Two points are clear. First, if supplementary benefit is provided to a wife of such a marriage, the state can recover from the husband: the liability to maintain a "wife" for purposes of supplementary benefit extends to the wife of a polygamous marriage.[8] Second, the Scottish courts are not precluded from entertaining proceedings for, or from granting, certain decrees by reason only that the marriage to which the proceedings relate was entered into under a law which permits polygamy.[9] The decrees in question include decrees of separation and aliment, adherence and aliment, or interim aliment.[10] There is, however, no provision which gives the spouse of a polygamous marriage a right to aliment. This question remains undecided. It may be that a Scottish court would hold that a husband was bound at common law to aliment his wife or wives even though the marriage was polygamous, and that the words

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[5]Ministry of Social Security Act 1966, s.22. Notice however, the husband-oriented rules in Sch. 2 on aggregation of the resources of cohabiting spouses.

[6]Working Paper No. 53, Matrimonial Proceedings in Magistrates' Courts (1973) para. 34.

[7]It seems to have been recognised as early as the 16th or 17th centuries: see Braye, De L'Obligation Alimentaire: Étude Historique et de Legislation Comparée (Thèse, Nancy, 1903) p.85: see now Code Civil art. 212.

[8]Imam Din v. National Assistance Board [1967] 2 W.L.R.257.

[9]Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.2.

[10]Ibid.

"husband" and "wife" in section 4 of the Married Women's Property (Scotland) Act 1920 include the parties to a polygamous marriage. It is possibly implicit in the 1972 Act that there should be such a right. But there remains an element of doubt. For the removal of this doubt, we recommend that it should be provided by statute that the reciprocal obligations of aliment between husband and wife exist between the parties to a polygamous marriage (Proposition 3.) We have in mind here the obligation between a husband or husbands on the one hand and a wife or wives on the other. We have not thought it necessary to consider whether a man's wife should be bound to aliment the man's other wives, still less whether one husband should be bound to aliment another.

2.15. We considered whether marriage for purposes of aliment ought to include a putative marriage - that is, a void marriage which has been contracted in good faith by one or both of the parties - to the effect of conferring a right of aliment on the innocent spouse.[11] This question, however, is best dealt with in relation to the court's discretionary powers on marriage breakdown, and we revert to it in Part III.[12]

2.16. Parent and legitimate child. Scottish private law recognises a reciprocal obligation of aliment between parent and legitimate child.[13] At one time, actions for aliment by parents against their children were fairly common.[14] They are now rare[15] and it may be that abolition of the legal obligation to support parents would make little practical difference, while bringing

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[11] Berthiaume v. Dastous [1930] A.C.79.

[12] See para. 3.121.

[13] See e.g. Thom v. Mackenzie (1864) 3 M.177; Hamilton v. Hamilton (1877) 4R. 688; Duncan v. Duncan (1882) 19 S.L.R. 696; Fife County Council v. Rodger 1937 S.L.T. 638; Dickinson v. Dickinson 1952 S.C. 27.

[14] In Palmer v. Palmer (1885) 2 Sh. Ct. Rep. 55, Sheriff Lees said that "hundreds of actions of this kind are disposed of ... in the Small Debt Forum ....".

[15] The most recent reported example appears to be Jack v. Jack (1953) 69 Sh. Ct. Rep. 34. In the Civil Judicial Statistics for Scotland, alimentary actions between parents and children are not shown as separate units.

about a slight simplification of the law. On the other hand, the present law may well express a widely felt obligation. Legitimate children are bound to support their parents in French,[16] German,[17] and Italian law[18], among many others[19] but not in English law. If the obligation continues to be recognised in Scots law, it does not follow that a parent need be entitled to aliment in all cases. It may be, for example, that a parent should be denied aliment if he has abandoned his child in infancy. But we deal with such questions below[20] where we consider the effect of conduct on alimentary obligations. We also deal below[21] with the question of an age-limit cutting off the child's right to aliment. For the moment we are concerned with the p r i n c i p l e. Should a parent, in principle rule, be entitled to aliment from his legitimate children? As a starting point for discussion, we put forward the proposition that reciprocal obligations of aliment between a parent and his or her legitimate child should continue to be recognised. (Proposition 4.)

2.17. Parent and adopted child. Under section 8 of, and Schedule 2 to, the Children Act 1975, adoption extinguishes the alimentary obligation between the biological parents and the child and creates a new reciprocal obligation between the adopter (or adopters) and the child. So far as aliment is concerned, the adopted child is in the same position as a legitimate child.[22] We think that this should continue to be the case and suggest that, for the purposes of aliment, an adopter and his or her adopted child should (as under the existing law) stand to each other exclusively in the position of parent and legitimate child. (Proposition 5.)

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[16] Code civil art. 205.

[17] B.G.B. art. 1601.

[18] Civil Code art. 433.

[19] See e.g. Greek Civil Code art. 1476; Code civil Belge, art. 205; Chloros, Yugoslav Civil Law p. 108 (1970).

[20] See paras. 2.132.-2.134.

[21] See para. 2.131.

[22] It is no longer the case that an adoption by an unmarried mother of her own illegitimate child does not extinguish the natural father's alimentary liability. See the Report of the Departmental Committee on the Adoption of Children Cmnd. 5107, 1972 paras. 102 and 115.

2.18. Parent and illegitimate child. Under the present law of Scotland, a parent is bound to support his or her illegitimate child. An illegitimate child, however, is not reciprocally bound to support the parent,[23] and the question arises whether this latter rule should be changed? The tendency of the law has been to place the illegitimate child in the same position as the legitimate child. Illegitimate children have the same rights as legitimate children to recover damages for the death of either parent[24] and vice versa.[25] They have full rights of intestate succession in relation to both parents and vice versa.[26] One of the few remaining distinctive features of the legal position of the illegitimate child is the one-sided nature of his alimentary relationship with his parents and it is arguable that it too should be removed. The case for abolition of this distinction is, of course, strongest in relation to a child of a stable non-marital union who has been brought up by his parents just as a legitimate child would be. On the other hand it may seem unfair and undesirable to make an illegitimate child liable to aliment a father who has never acknowledged or supported him. The father of a legitimate child, however, may also abandon him in infancy and we are not satisfied that there is any important difference between the legitimate child, born just after a divorce, who never sees his father, and the illegitimate child who never sees his father. The blood

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[23] Clarke v. Carfin Coal Co (1891) 18 R.(H.L.) 63. At one time it was thought that an illegitimate child was bound to aliment his or her mother. See Wilson v. Todds (1867) 3 S.L.R.192; Mays v. Keir (1888) 5 Sh. Ct. Rep. 71 (where the sheriff referred to the "natural obligation" to maintain parents, whether the child was legitimate or illegitimate.)

[24] Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s.2(2).

[25] Law Reform (Damages and Solatium) Act 1962, s.2.

[26] Succession (Scotland) Act 1964 as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, ss.1-3. See also s.5 which has the effect that an illegitimate child is covered by the term "child" in a will or other deed made after 25 November 1968 unless the contrary intention appears.

relationship is the same in both cases. We suggest that the alimentary relationship should also be the same, the deserting or abandoning parent being dealt with by taking conduct into account.[27] We therefore suggest that the alimentary obligation between parent and illegitimate child should be the same as that between parent and legitimate child

(Proposition 6.)

2.19. In France, a similar recommendation was made by the Commission on the Reform of the French Civil Code in 1952,[28] and that the law of 3 January 1972 has now given the illegitimate child whose filiation is established the same rights and the same duties as a legitimate child in relation to his father and his mother.[29] In West Germany, the alimentary obligation between parent and illegitimate child is now reciprocal and (if the child is recognised by the father or if paternity is declared) exactly the same as the obligation between parent and legitimate child.[30] The Italian Civil Code also provides for a reciprocal obligation of support between parent and natural child.[31] Article 6 of the Council of Europe Convention on the Legal Status of Children Born out of Wedlock, provides as follows:-

> "1. The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock.
>
> 2. Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock."

It will be noted that this provision applies only to obligations to aliment the child and not to the child's obligation to aliment his parents or other relatives. It represents, nevertheless, yet another important step towards the assimilation of the legal status of illegitimate children to that of legitimate children.

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[27] See paras. 2.132-2.134. below.

[28] Travaux de la Commission de Réforme du Code Civil (1952) pp. 101-102. See also arts. 1 and 2 of the Project adopted by the Commission. In Sweden there has been no difference since 1949 between the illegitimate and the legitimate child with regard to aliment. See Sundberg, "Marriage or No Marriage in Swedish Law" 20 I.C.L.Q. 223 at 226 (1971).

[29] Code civil art. 334 (new).

[30] Pedamon, La loi allemande du 19 août 1969 sur la condition juridique de l'enfant illegitime. D.1970 Chron.153.

[31] Art. 435. It should be noted, however, that there are limitations on the circumstances in which natural paternity can be judicially declared. See arts. 269-271.

Father's liability to mother of illegitimate child

2.20. The Finer Committee on One-Parent Families drew attention to the question whether, in English law, the father of an illegitimate child should be liable to support not only the child but also, during the child's dependency, the mother of the child. They pointed out that:

> "the distinction between the obligation to support the mother and the obligation to support the child is to some extent artificial. The child requires the presence of the mother, and much of the cost of maintaining her, especially in the necessities of rent, heating and the like, may quite reasonably be regarded as part of the cost of maintaining the child .... The father is a partner in the conception and, especially when the means of preventing it are easily available, ought to share in the real economic costs of the results. These include the value of the services which the mother renders in taking responsibility for caring for the child - a responsibility which, given what we know of the lives of unmarried mothers, changes her life dramatically and, on the evidence we had, almost always for the worse.
>
> Factors of the kind last mentioned may argue for a reconsideration of the law of affiliation in general, although we are well aware of the existence of strong countervailing arguments against the extension of the private law obligation to maintain to the unmarried mother as such. We have decided not to trespass on this ground."[32]

A similar problem arises in Scots law.

2.21. Under the present law, the father of an illegitimate child is not liable for aliment, as such, for the child's mother. He is, however, liable for a sum in respect of inlying expenses, in the award of which the court in an action of affiliation and aliment is directed to "have regard to the means and position of the pursuer and the defender, and the whole circumstances of the case".[33] If the child dies under the age of 16, the father is also liable for reasonable funeral expenses jointly with the mother "or in such proportions as the sheriff on summary application may determine".[34] In these limited respects, the law already recognises that the father "ought to share in the

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[32] Cmnd. 5629, (1974) paras. 5.195-5.196.

[33] Cf. Illegitimate Children (Scotland) Act 1930, s.1(2); see also Social Security Act 1975, s.23(2)(b) (court must disregard maternity benefit in awarding inlying expenses to the mother of an illegitimate child.

[34] 1930 Act, s.5.

economic costs of the results" of the conception, otherwise than by merely paying aliment for the child. In certain cases, an action for damages for seduction could be raised by the mother,[35] but this remedy, even when theoretically available, is nowadays little used.

2.22. Comparative survey: It is interesting to note that West German law specifically regulates the claim to aliment of the mother of an illegitimate child against the father. First, the father has to provide the mother with aliment for the period from six weeks before until eight weeks after the birth.[36] Second, this period can be extended, but not beyond four months before or one year after the birth, if (a) the mother cannot work because of the pregnancy or because of illness resulting from the pregnancy or the birth or (b) the mother cannot work, or can undertake only limited work, because the child could not otherwise be cared for[37]. The mother's claim ranks after the claim of the man's wife and minor unmarried children but before that of his other relatives.[38] It prescribes in four years.[39]

2.23. The French civil code provides that, if a paternity action is successful, the court can order the father to reimburse the mother the whole or part of her inlying expenses and cost of support during the three months before and the three months after the birth,[40] without prejudice to any action for damages she may have under the general principles of the law of reparation.[41]

2.24. Our proposals. The difficulties of proof in actions of affiliation are such that the results are bound to be somewhat arbitrary. Some fathers escape liability because paternity cannot be proved against them, while a few may have paternity unjustly fastened on them. Our enquiries suggest that, of those who admit paternity or have it proved against them, many can ill afford to pay aliment for the child, far less the mother. An extension of the law might therefore increase the element of arbitrariness without benefiting a large number of mothers. On the other hand, there is force in the argument that the real cost of bringing up the child may often

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[35] Walker, Civil Remedies (1975) p. 988.

[36] B.G.B. art. 1615 l(1) (added by law of 19 August 1969).

[37] Id. art. 1615 l(2).

[38] Id. art. 1615 l(3).

[39] Id. art. 1615 l(4).

[40] Code civil art. 340-5.

[41] I.e. under code civil, arts. 1382 and 1383.

include the cost of maintaining someone to look after the child. We suggest later, however, that this element might in appropriate cases, be included in assessing the needs of the child. For the rest, we think that some extension of the idea of inlying expenses, on the lines of the German provision considered above might be a useful compromise between two opposing points of view. We suggest for consideration that the liability of the father of an illegitimate child for the mother's inlying expenses should extend to liability for the support of the mother for a period of, say, six weeks before and eight weeks after the birth, with the possibility of an extension of this period (but not beyond say, four months before or one year after the birth) if the mother cannot work as a result of the pregnancy, the birth, or the need to care for the child. (Proposition 7).

Grandparent and grandchild (and remoter ascendants and descendants)

2.25. Scots law: Under the present law there is a reciprocal obligation of support between grandparent and grandchild in the legitimate line, but this arises only if the intermediate generation is unable to provide support.[42] Thus, young children, whose parents are dead or unable to provide support, can claim aliment from their grandparents.[43] And grandparents, whose children are dead or destitute, are entitled to aliment from their grandchildren.[44]

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[42] See Smith v. Smith's Trs. (1882) 19 S.L.R. 552.

[43] See Wilson v. Kirk Session of Cockpen (1825) 3 S.547; Pagan v. Pagan (1838) 16 S.399; Jameson v. Jameson (1845) 8 D.86; Smith v. Smith's Trs. (1882) 19 S.L.R.552; Bell v. Bell (1890) 17 R.549; Bell v. Bell (1895) 2 S.L.T. 598; Parish Council of Leslie v. Gibson's Trs. (1899) 1 F.601; Garden v. Garden (1899) 15 Sh. Ct. Rep. 274; Mackenzie's Tutrix v. Mackenzie 1928 S.L.T.649; Perth, Parish Council v. Tavendale (1929) 46 Sh. Ct. Rep. 46.

[44] The grandchild's reciprocal obligation is stated by all the authorities. See Fraser, Parent and Child (3rd ed. 1906) p. 136 and authorities there cited. But its actual emergence would be fairly unusual. For one reported example see Muirhead v. Muirhead (1849) 12 D.356.

2.26. A person is not bound to aliment his child's illegitimate child.[45] It seems never to have been expressly decided whether a person is bound to aliment his illegitimate child's legitimate child, but probably there is no such obligation.[46] It is clear that an illegitimate child, as he is not bound to support his parent, is not bound to aliment that parent's parent. And it seems equally obvious that the legitimate child of an illegitimate child is not bound to aliment the latter's parents.

2.27. Under the Adoption Act 1958 adoption did not terminate the alimentary obligation between the child and his natural grandparent.[47] Nor did it give rise to any obligation between the child and his adoptive parents' parents. This situation has now been remedied by the Children Act 1975[48] which places the adopted child in the same legal position for most purposes, including aliment, as a legitimate child of the adopter or adopters.

2.28. Comparative survey of other laws: In English law there is no obligation of support between grandparent and grandchild (although under the old poor law the parish authorities had a right of recourse against grandparents)[49]. As we have seen, grandparents and grandchildren were not "liable relatives" for the purposes of nationalassistance and are not "liable relatives" for the purposes of supplementary benefit. Scots law therefore differs from English law on this point. In many foreign countries, however, an alimentary relationship between grandparent and grandchild is recognised, sometimes to a greater extent than in Scots law.

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45 Nicoll v. Magistrates, Heritors and Kirk Session of Dundee (1832) 10 S.670.

46 Cf. the dicta in Corrie v. Adair (1860) 22 D.897 and Clarke v. Carfin Coal Co. (1891) 18 R.(H.L.) 63. Note also that the prevailing view is that the parent's obligation to the illegitimate child itself flies off when the child is "launched in the world" and does not revive on supervening indigence. See Archibald v. Millan (1911) 27 Sh. Ct. Rep. 313. This makes it extremely unlikely that there would be any obligation to aliment the child of the illegitimate child if the latter had once become self-supporting.

47 S.13 of the Adoption Act 1958 was limited to the parent/child relationship.

48 Section 8 and Sch. 2: the Act has not yet come into force.

49 See Nicholls, History of the English Poor Law p.190 (1898 ed.) Blackstone, Bk. I, chap. 16, p.448 (10th edn. 1787).

2.29. In France, there is a reciprocal obligation of aliment between grandparent and grandchild in the legitimate line.[50] Formerly illegitimacy introduced an element of doubt[51] but the law of 3 January 1972 provides that an illegitimate child whose filiation is established enters into the family of his parent,[52] so that he now has the same alimentary relationship with his grandparents as has a legitimate child.[53]

2.30. Similarly, in West German law there is a reciprocal alimentary obligation between grandparent and grandchild, and since 1969 this applies equally in the case of an illegitimate child whose paternity is established.[54]

2.31. Under the Italian Civil Code, grandparents and grandchildren in the legitimate line are required to provide support, failing the intermediate generation.[55] A person is bound to aliment the legitimate descendants of his natural child and to provide "such support as is strictly necessary" to the natural children of his legitimate or natural child.[56]

2.32. South African law, too, goes beyond Scots law in one respect in that it recognises an alimentary obligation on the maternal grandparents to aliment their illegitimate grandchildren if the parents are unable to do so.[57]

2.33. Our proposals: The present Scots law seems to represent an uneasy compromise: an alimentary relationship between grandparent and grandchild is recognised in the legitimate line but not if illegitimacy intervenes. There appear to be three main possibilities:

1. The law could be left as it is.
2. The obligation could be extended to cases where illegitimacy intervenes.

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[50] Code civil arts. 205 and 207.

[51] The ancien droit hesitated about the alimentary relationship in this situation and the Code Civil did not deal expressly with the problem. Some authors thought there was an obligation between a person (P) and the legitimate children of his illegitimate child but not between P and the illegitimate children of his legitimate child. See Braye, op. cit. supra note 7, at pp. 54-60 and Pélissier, Les Obligations Alimentaires, Thèse, Lyon, 1961, at pp. 108-114.

[52] Code civil art. 334 (new).

[53] This was recommended by the Commission on the Reform of the Civil Code in 1952. See their Travaux 1951-52 pp. 101-103 and art. 1 of the project adopted by them.

[54] Law of 19 August 1969. Before 1969 a reciprocal obligation existed between the illegitimate child and his or her maternal grandparents.

[55] Art. 433.

[56] Art. 435. These rules must, however, be read in the light of the provisions on illegitimate filiation in arts. 250-279, which limit the availability of judicial declarations of paternity.

[57] Maasdorp, Institutes of South African Law, Vol. 1 p.208 (9th ed. by C.G. Hall, 1968).

3. The obligation could be abolished.

2.34. We do not favour the first possibility. We can see no good reason for distinguishing between the legitimate child (who may have had only the slightest contacts with his grandparents) and the illegitimate child (who may have been brought up by his grandparents). It is impossible to generalise about the factual nature of the relationship between grandparent and grandchild, whether or not illegitimacy is in question, and the blood relationship is the same in both cases. Again we refer to the provision of the Council of Europe Convention quoted in paragraph 2.19. above.

2.35. Of the two remaining possibilities, we tend to favour the abolition of the alimentary obligation between grandparent and grandchild. The following considerations have weighed with us. First, cases where the legal obligation is important are rare (given the fact that the intermediate generation is primarily liable) so that abolition would simplify the law without causing hardship to many individuals. Second, while a parent's liability may be justified on the ground that he brought his children into the world, it is less convincing to apply the same argument to grandparents. A person has very little control over the number of his grandchildren. Third, the factual relationship between grandparent and grandchild is likely, in most cases, to be less close than that between parent and child, so that the alimentary obligation must rest to a much greater extent on the simple fact of blood relationship. Fourth, it is less easy to regulate specifically the effect which the conduct of a grandparent or grandchild should have on their legal obligations of aliment. A court could, for example, be given power to deny aliment to a parent who has abandoned his child in infancy. (We discuss this at para. 2.132. below.) But concepts like abandonment are difficult to apply to the grandparent-grandchild relationship.

2.36. In the present law, great-grandparents and great-grandchildren and remoter ascendants and descendants may in theory be liable for aliment.[58] The likelihood of such a legal obligation materialising in practice is, however, remote and the arguments against continued recognition are even stronger than in the case of grandparents and grandchildren. We suggest that alimentary obligations at this level should no longer be recognised. To focus discussion, and without commitment to the to the proposal, we suggest tentatively that <u>there should be no alimentary obligation between (i) a grandparent and his or her grandchild or (ii) between more remote relatives in the direct line</u>. (Proposition 8.)

2.37. <u>Step-children and step-parents</u>. Before 1877, a man who married a woman who already had children (whether illegitimate or by a previous marriage) was bound to aliment those children, supposedly on the ground that he was liable for her ante-nuptial debts.[59] A woman was not, however, liable to aliment her step-children.[60] The Married Women's Property (Scotland) Act of 1877 restricted the husband's liability for his wife's ante-nuptial debts "to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage ...."[61] The present position is, therefore, that a man is liable to aliment his step-children if they were in existence (or <u>in utero</u>)[62] at the date of the marriage and if, and only to the extent that, he receives property "from, through, or in right of his wife" (for example, a payment by her towards a house the title to

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[58] See <u>Mackenzie's Tutrix</u> v. <u>Mackenzie</u> 1928 S.L.T. 649 at 650 - "there is now no doubt that for the aliment of pupil children ... ascendants are liable according to classes in this order - first, the father ... then the mother ... then the paternal grandfather and ascendants on that side, and, fourthly, - only after these - maternal grandparents ..."

[59] <u>Aitken</u> v. <u>Anderson</u> (1815) Hume 217; <u>Couper</u> v. <u>Riddell</u> (1872) 9 S.L.R.510. The earlier case of <u>Aiton</u> v. <u>Colvil</u> (1705) Mor. 390 was concerned with the liability of a step-mother <u>as liferentrix</u>.

[60] <u>Macdonald</u> v. <u>Macdonald</u> (1846) 8 D.830.

[61] Section 4.

[62] Cf. <u>Spalding</u> v. <u>Spalding's Trs</u>. (1874) 2 R.237.

which was taken in his name).[63] If these conditions are fulfilled the step-child's right to aliment can be enforced by an independent action for aliment. It does not depend on any test of de facto acceptance into the family. On the other hand, if the father of the step-children is able to provide support, his is the primary obligation and the step-father will not be liable.[64]

2.38. On to this remnant of a more general rule has been engrafted a discretionary power on the part of a court in an action of divorce, nullity of marriage or separation to make orders providing for the custody, maintenance, and education of any child who

> "(a) is the illegitimate child of both parties to the marriage, or
>
> (b) is the child of one party to the marriage (including an illegitimate or adopted child) and has been accepted as one of the family by the other party ..."[65]

In considering whether and to what extent to order any party to make any payment towards the maintenance or education of a child who is not his own, the court is directed to have regard

> "to the extent, if any, to which that party had, on or after the acceptance of the child as one of his family, assumed responsibility for the child's maintenance and to the liability of any person other than a party to the marriage to maintain the child."[66]

Under these provisions the court granting a decree of divorce could, for example, order a husband to make payments for the aliment of his wife's children by a former marriage.

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[63] Cf. Robb v. Robb (1948) 64 Sh. Ct. Rep. 172, where it was held that the husband was lucratus because he had got income tax allowances for his step-children. This seems questionable and, in any event, the question under the 1877 Act is not, strictly, whether the husband is lucratus by his marriage but whether he receives property in certain ways.

[64] The step-father is liable only if his wife is liable and, under the present law, the mother's liability arises only if the father is unable to provide support. See Matthew v. Matthew 1926 S.L.T. 723.

[65] Matrimonial Proceedings (Children) Act, 1958 s.7(1) read with the Conjugal Rights (Scotland) Amendment Act 1861, s.9. The courts have similar powers in connection with an action of adherence but they arise only if the decree is not obtempered. 1958 Act s.9(2).

[66] 1958 Act s.7(2).

2.39. We discuss below (para. 2.52. et seq.) the extent to which de facto family membership should confer a right to aliment. For the moment we are concerned only with the step relationship. Should a person be bound to aliment his or her step-children? The present law is unsatisfactory. It distinguishes between step-mothers and step-fathers. It uses a test (receipt of property) which has little relevance to modern matrimonial property law or social realities. And it makes a step-child's entitlement to aliment depend on whether its parent's marriage breaks up and on whether certain consistorial proceedings are brought. Let us consider a fairly common type of situation. A man marries a woman who has an illegitimate daughter a year or so old. The father of the child is untraceable. The child is accepted into the family, without any formal adoption, and is brought up along with two later-born children of the marriage. A few years later the husband deserts his family. Why should the step-child's right to aliment depend on (a) whether consistorial proceedings can be taken by the wife and (b) whether the husband acquired property from his wife? Suppose the wife dies before she has raised any action against her husband and her mother takes charge of all three children. Why should that affect the child's entitlement to aliment from its step-father? It is with anomalies and injustices such as these in mind that we reject the remedy-based approach of the present law and turn to the general question of liability for the aliment of a step-child.

2.40. Comparative survey: A comparative survey on this topic is complicated by the fact that, in a legal system which makes use of community of property regimes between spouses, the aliment of a child of one spouse may be a burden on the community funds, even though not a direct burden on the step-parent as such.[67] Subject to this, we note that there is no direct obligation to aliment a step-child in France, West Germany Switzerland, Italy or Greece. In Yugoslavia, however, step-parents are under an obligation to maintain their step-children if there are no other relatives liable and able to do so.[68]

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[67] Cf. French Code Civil arts. 1409, 1414.

[68] Fundamental Law on the Relationship between Parents and Children art. 34 (in Chloros, Yugoslav Civil Law at pp. 237-238 (1970)).

2.41. In England, under the old poor law statutes, a man who married a woman having a child at the time of the marriage was liable to maintain that child as part of his family.[69] This, however, was deliberately changed in the National Assistance Act 1948, the Scottish solution being preferred to the English.[70] It was argued unsuccessfully in the House of Commons that a man who marries a woman with children must surely accept liability for their support. Against this, it was pointed out that he might not know of the existence of the children, or might marry on the understanding that the children would continue to be looked after elsewhere. There was no suggestion that a woman should ever be liable to support her step-children[71].

2.42. Our proposals: The considerations applying to the private law obligation of aliment are slightly different from those applying to the right of recourse by public agencies. There is not the same pressure to keep the claim to public assistance free and uncluttered by anything resembling a family means test. Nevertheless, we think that the step-relationship as such does not justify the imposition of an alimentary obligation. This seems reasonably clear in the case of the support of a step-parent. We doubt if many people would seriously argue that a man should be liable for the aliment of a second husband whom his mother has chosen to marry late in life. With regard to step-children, the case where a person is ignorant of the existence of children of his or her spouse is doubtless unusual but it illustrates the tenuousness of the "step" link by itself. We suspect that in all cases in which it might be felt that the step-relative has a reasonable claim to aliment, the justification for the claim will be found to be linked to de facto family membership[72], and this we consider at para. 2.52. We therefore suggest that there should be no alimentary obligation between step-parents and step-children as such. (Proposition 9.)

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[69] See Poor Law Act 1930, s.14(3); Hill v. Hill [1902] P.140. Similar provisions were enacted in several states of the U.S.A. See "Stepchildren and in loco parentis relationships" (1939) 52 Harv. L. Rev. 515-21 at 516.

[70] See 448 H.C. Deb. 698 and Standing Committees, Official Reports, 1947-48, Vol. I, cols. 2337 and 2625-35.

[71] See the Standing Committee debates referred to in the preceding note.

[72] In Yugoslav law step-children are bound to aliment their step-parents but only "if the latter have maintained and cared for them over a considerable period of time." Chloros, loc. cit. p.238.

2.43. Other relations through marriage. Scots law hesitated for a long time over the question whether a man should be liable to aliment his son's wife if the son himself was unable to provide support, but by the beginning of the twentieth century it was settled that there was no such liability.[73] At one time a man was generally liable for the support of his wife's parents, but this liability was based on the theory that he was liable for his wife's ante-nuptial debts,[74] with the result that it was strictly limited by the

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[73] See Adam v. Lauder (1762) Mor. 398 (father bound to aliment son's wife) and (1764) Mor. 400 (father not bound to aliment son's widow); Belch v. Belch (1798) Hume 1 (father not liable to aliment son's wife, son having gone off to America leaving her unprovided for); Chrystie v. Macmillan (1802) Mor. App. voce Aliment p.7 (father not bound to aliment son's wife while son - in America - alive and able to maintain her). De Courcy v. Agnew (1806) Mor. App. voce Aliment p.12 (father liable to aliment son's widow - "as there existed a child of the marriage, the connection was not altogether dissolved by the death of the husband"); Ferguson v. Logan (1809) Hume 5 (question left open); Duncan v. Hill 28 Feb. 1809 F.C., 17 Feb. 1810 F.C. (father liable to aliment son's wife, when son alive but unable to provide support - doubts about obligation to son's widow); Yuill v. Marshall 21 Dec. 1815 F.C. (father not liable to aliment son's widow, although daughter of marriage survived); Brown v. Brown (1824) 3 S.247 (father not held liable for aliment of son's wife when son in East Indies - no opinions given - possibly decided on ground that wife had refused to join husband); Lady Cardross v. Earl of Buchan (1842) 5 D.343 (apparently decided on basis of widow's conduct); Hoseason v. Hoseason (1870) 9 M.37 (father under no obligation to aliment son's widow, even when children of marriage survive); Reid v. Reid (1897) 4 S.L.T. 282 (also reported later in note at 6 F.935) (father not bound to aliment son's wife, even when he is alive and unable to provide support) Mackay v. Mackay's Trs. (1904) 6 F.936 (father not bound to support son's wife). Cf. also Inspector of Barony Parish v. Garvie (1885) 2 Sh. Ct. Rep. 58.

[74] See Laidlaw v. Laidlaw (1832) 10 S.745; Reid v. Moir (1866) 4 M.1060; Wilson v. Todds (1867) 3 S.L.R. 192; Foulis v. Fairbairn (1887) 14 R.1088.

Married Women's Property (Scotland) Act 1877[75]. It now arises only if the husband receives property "from, through, or in right of his wife" and only to the value of that property.

2.44. Comparative survey of other laws: In French law a person is bound to aliment the husband or wife of his child or the father or mother of his spouse,[76] but the obligation ceases when the "linking" spouse and the children of the marriage are dead,[77] or when the marriage is dissolved by divorce.[78] The Italian Civil Code adopts a similar rule. Sons-in-law and daughters-in-law, and fathers-in-law and mothers-in-law, are bound to provide aliment but their obligation ceases (1) when the person who is entitled to support has remarried and (2) when the spouse from whom the affinity originates, and the children born of the marriage and their descendants, have died.[79] The French code and those based on it are unusual in imposing an obligation to maintain relatives by marriage.[80] There is no such obligation in English law, German law[81] or Swiss law.[82]

2.45. Our proposals: In favour of an obligation to support parents-in-law, it can be argued that, if a marriage is to be a balanced partnership, then the parents of one spouse should not have a stronger legal claim on the resources of the partnership than the parents of the other. If, for example, the husband alone is earning, it might seem undesirable to place his mother in a stronger legal position than his wife's mother. The same argument could, of course, be made in relation to children if both husband and wife have children by a previous union. We suspect that if the marriage is a healthy one, such problems will be worked out in an acceptable manner. If it has broken up (even if only in fact), an

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[75] McAllan v. Alexander (1888) 15 R.863; Dear v. Duncan (1896) 3 S.L.T.241. Before 1888 there were many conflicting decisions in the sheriff courts on the effect of the 1877 Act. See e.g. Mitchell v. Crockatt (1886) 2 Sh. Ct. Rep. 232; Russell v. Soutar (1886) 2 Sh. Ct. Rep. 236.

[76] Code civil art. 206.

[77] Ibid. See also Pelissier, op. cit. p.117-122 (where it is suggested that the survivance of grandchildren also keeps the obligation alive). The French solution is remarkably similar to that which the Court of Session toyed with in the early 19th century, only to reject. See Appendix A, paras. 4 and 5.

[78] Pelissier op. cit. p.121; Cass. Civi., 13 juillet 1891, D.P. 1893, I,353; S.1891, I,311.

[79] Arts. 433 and 434.

[80] See Pelissier, op. cit. p.11.

[81] B.G.B. arts. 1601-1615; Cohn, Manual of German Law, p.242 (2nd ed. 1968).

[82] Civil Code, art. 28.

obligation to aliment a mother-in-law would often give rise to great resentment. On balance, we conclude that an obligation to aliment parents-in-law should not be introduced.

2.46. In the case of a son-in-law or daughter-in-law, the argument is not dissimilar to the above. On the one hand, the husband and wife should enjoy the same standard of living. A husband should not be supported while his wife is left to starve. On the other hand, if they are living together as a married couple, they will share whatever support is forthcoming from either family, falling back on supplementary benefit if need be. If they have parted, the relationship between one of them and the parents of the other becomes thin and may well be strained.

2.47. In the light of these considerations, we suggest that there should be no alimentary obligation between a person and the relatives (other than children) of his or her spouse. (Proposition 10.)

2.48. Collaterals. Scots law does not recognise any alimentary obligation between brothers and sisters as such.[83] Neither does English law, French law[84] or German law[85]. Italian law does, however, recognise an obligation to support brothers and sisters "to the extent that it is strictly necessary"[86]; and Swiss law makes brothers and sisters liable for aliment but only if they are themselves comfortably off.[87] In a mobile society brothers

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[83] However, a person enriched by the succession to his parent's estate may be bound ex jure representationis to aliment his brothers and sisters. This is considered in Part IV.

[84] The omission from the French civil code of an alimentary obligation between siblings has been criticised. See e.g. Braye, op. cit. p.51. However the Commission on the Reform of the French Civil Code rejected the idea partly on the ground that brothers and sisters often led separate lives and partly on the ground that the obligation could place a heavy burden on the eldest son of a large family at a time when his other responsibilities were heavy. See Travaux de la Commission (1952) p.105.

[85] The obligation was recognised in some German provinces before 1900 and was reluctantly endorsed in the avant projet of the BGB so as to avoid placing an extra burden on the poor law authorities in those provinces. The legislature, however, rejected the obligation, partly because it was thought that it merely gave rise to litigation. See Braye, op. cit. 52-53.

[86] Italian Civil Code art. 439 (transl. Beltramo, Longo, Merryman 1969).

[87] Code Civil Suisse (10th ed. Rossel) arts. 328, 329.

and sisters very often grow apart, establish independent lives, and acquire obligations to their own new families. They may indeed be separated, through the misfortune of a family breakup, very early in childhood. We do not recommend any change in the present Scots law on this point and therefore suggest that there should be no alimentary obligation between brothers and sisters or between other collateral relatives. (Proposition 11).

2.49. Possible fathers of illegitimate children. In Scots law a man is not liable for the aliment of an illegitimate child merely because he could have been the father. Liability depends on paternity, not on possible paternity. This means that if several men have had sexual intercourse with the mother within the time of possible conception, if all deny paternity, and if any one of them could be the father, aliment can be recovered from none.[88] The defence that the mother has slept with several men around the relevant time is known in several legal systems as the exceptio plurium concubentium.

2.50. Comparative survey: This problem is dealt with in different ways in different legal systems. In England, as so often in this field, the solution is remedy-based, linked with the old poor law, and hedged about with procedural restrictions. The illegitimate child has no independent right to maintenance, but subject to various qualifications, the mother may be able to obtain maintenance in respect of the child by means of an affiliation order against the father.[89] Establishment of paternity is a pre-requisite for the recovery of maintenance and to this extent the solution is similar to the Scottish. In West German law too the existence of the alimentary obligation between a man and an illegitimate child depends on paternity and not merely possible paternity.[90] In French law, on the other hand, aliment for an illegitimate child is not necessarily linked with the establishment of paternity. An illegitimate child whose paternity is not legally established (for example, because of the limitations placed on actions to prove paternity

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[88] See e.g. Robertson v. Hutchison 1935 S.C.708; Hannan v. Anderson (1935) 51 Sh. Ct. Rep. 300.

[89] Bromley, Family Law (4th edn. 1971) 479-87.

[90] B.G.B. arts. 1600a-1600o and 1615a-1615k, added by the law of 19 August 1969. Under art. 1600o the man who has cohabited with the mother during the (legally determined) period of possible conception is presumed to be the father, but this is only a presumption and flies off if there is in all the circumstances serious doubt as to the man's paternity of the child.

outside marriage[91]) can nevertheless claim an allowance of an alimentary nature from any man who had sexual relations with the mother during the (legally determined) period of possible conception.[92] The defender can, however, escape liability by proving (e.g. by blood tests) that it is impossible for him to be the father or by establishing that the mother gave herself over to debauchery ("se livrait à la débauche").[93] The French provisions can be properly assessed only in their context, but they do involve the explicit recognition that possible paternity justifies the imposition of an alimentary obligation.[94] The exceptio plurium concubentium is not as such a defence to this alimentary claim,[95] though it remains to be seen what scope will be given to the debauchery exception. Several other legal systems have also rejected the exceptio as a defence to a claim for aliment for the child.[96] In South Africa, although there may be room for doubt on the matter, it has been held that the exceptio is not a defence.[97] The Norwegian experience is particularly instructive.[98] At one time Norwegian law did allow aliment to be recovered from all the possible fathers and this was widely regarded as a progressive solution. But as time went by, the rule was subjected to criticism on the grounds that it resulted in a special depressed class of children who could not prove full paternity, and hence enter into a full legal relationship with their fathers. Moreover an award of support without paternity

> "involved an assumption of the sexual promiscuity of the mother during the period of conception, and the scheme of support served to remind the child of this very fact during the whole of its adolescence. This means placing a severe psychological strain on the child. Experienced social workers affirm that children settle down more easily where no duty of support is imposed at all ..... Against the scheme of imposing on several men the duty of supporting the same child particularly sharp criticism

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[91] Code civil art. 340 (1972).

[92] Ibid arts. 342-342-8 (De l'action à fins de subsides).

[93] Art. 342-4 (3 Jan. 1972).

[94] In Scots law there may of course, be cases where a man who has had intercourse with the mother is wrongly found to be the father in an action of affiliation and aliment. But there is no explicit recognition that possible paternity is sufficient.

[95] Contrast art. 340-1 which preserves the exceptio as a bar to the establishment of paternity for general purposes, such as succession.

[96] Arminjon, Nolde and Wolff, Traité de Droit Comparé, Vol. 2, p.367 (1950).

[97] Scholtens, "Maintenance of Illegitimate Children and the Exceptio Plurium Concubentium" (1955) 72 South African Law Journal 144.

[98] Arnholm, "The New Norwegian Legislation relating to Parents and Children" (1956) 3 Scand. Studies in Law, 11.

was forthcoming. From an economic point of view, of course, it might be advantageous to hold several persons jointly liable. But the advantage was dearly bought. It involved a particularly brutal reminder of the mother's lapse."[99]

For these reasons, the solution of imposing a duty of support on possible fathers, without creating any other family law link between them and the child, was abandoned in 1956. It is necessary, however, to see this change in the context of two other related changes in Norwegian law. First, the establishment of full paternity for all legal purposes is not excluded by the exceptio plurium concubentium if the paternity of one man is "substantially more likely" than that of anyone else. Second, a fatherless child's allowance from the state was made available in 1957 to (among others) children born out of wedlock whose paternity could not be established.

2.51. Our proposals: Given the absence of restrictions on proof of paternity in Scots law, we consider that it would not be desirable to create a special class of reluctant "alimentary fathers" and a special corresponding class of children. We therefore suggest that, as under the existing law, the fact that a man has had intercourse with the mother of an illegitimate child within the period of possible conception should not render him liable to aliment the child. (Proposition 12).

2.52. De facto family membership. At present, the court hearing an action of divorce, nullity of marriage, separation or (in a special way) adherence has powers to make orders providing for the maintenance of a child who "is the child of one party to the marriage (including an illegitimate or an adopted child) and has been accepted as one of the family by the other party."[1] The statutory provisions conferring this power clearly envisage that it may be used to make an order against the step-parent (who has no alimentary obligation at common law) for they go on to provide that:

> "In considering whether any and what provision should be made by virtue of the foregoing subsection for requiring any party to make any payment towards the maintenance or education of a child who is not his own, the court shall

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[99] Ibid., pp. 16-17.

[1] Matrimonial Proceedings (Children) Act 1958, s.7(1).

have regard to the extent, if any, to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance and to the liability of any person other than a party to the marriage to maintain the child."[2]

2.53. There have been no reported Scottish cases on the meaning of "accepted as one of the family by the other party"[3]. In England it has been held that a child in utero can be accepted into the family[4] and that the mere fact that a man marries a woman with children is not of itself acceptance into the family.[5] A family normally comes into existence on marriage[6] but once the spouses have separated there may no longer be a family into which the children can be accepted.[7] It has also, and more questionably, been held that acceptance requires an element of mutuality[8], and full knowledge of all the relevant facts, so that a man was held not to have accepted a child whom he thought was his but who was in fact illegitimate.[9] It is not clear how far the Scottish courts would follow these views, which could well be regarded as adding requirements (mutuality and full knowledge) which are not in the statute. As noted at para. 2.60. below, the English law has now been changed, so far as the divorce jurisdiction is concerned, and no longer involves the question of "acceptance".

2.54. It has been held in Scotland that, in considering the extent to which a party has assumed responsibility for a step-child's maintenance, it is relevant to consider duration

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[2] Ibid., s.7(2).

[3] Lothian v. Lothian 1965 S.L.T.368 but the case was decided on the footing that it turned on the legal effect of a joint minute between the parties.

[4] Caller v. Caller [1968] P.39.

[5] Bowlas v. Bowlas [1965] P.450.

[6] Ibid.

[7] B. v. B & F [1969] P.37.

[8] Holmes v. Holmes [1966] 1 W.L.R.187; Dixon v. Dixon [1968] 1 W.L.R.167; Snow v. Snow [1972] Fam. 74 (in which, however, the excessively contractual approach of some of the earlier cases is criticised).

[9] R. v. R. [1968] P.414. But cf. Kirkwood v. Kirkwood [1970] 1 W.L.R.1042 (husband's belief that wife's children were her legitimate children by another man, whereas they were illegitimate, did not prevent acceptance).

as well as amount.[10] A different view has been taken in England.[11] It was argued in one English case that the "accepting" step-father should never be liable at all if there was any other party (apart from the other spouse) who was liable to maintain the child, but this argument was roundly rejected.[12]

2.55. The background to these provisions on "accepted" children is instructive. The Royal Commission on Marriage and Divorce (the Morton Commission) was concerned about the position of children in matrimonial proceedings. It dealt first with custody of children, and recommended that the court's jurisdiction should extend to:

> "(1) illegitimate children of the two spouses; (2) children of either spouse (including a child adopted by either spouse) if living in family at the time when the home broke up; (3) illegitimate children of either spouse, if living in family at the time when the home broke up; (4) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up."[13]

Later in its Report, the Morton Commission dealt with maintenance for children and recommended that the power to award maintenance in matrimonial proceedings should extend to the same four categories of children, adding that it contemplated that in relation to children in class (4) "the court would ascertain whether there was a natural parent living who could support the child and that the court would also take into consideration how long the child had been a part of the family."[14] It is clear from the Parliamentary debates

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[10] Hart v. Hart 1961 S.L.T.14.

[11] See Roberts v. Roberts [1962] P.212, referred to in Smith v. Smith and Brown [1962] 1 W.L.R. 1218 and Kirkwood v. Kirkwood [1970] 1 W.L.R.1042. Snow v. Snow [1972] Fam.74 reveals the dangers of the English approach. See now Matrimonial Causes Act 1973 s.25(3) (Court to have regard inter alia to "the length of time during which "responsibility for maintenance was assumed).

[12] See Snow v. Snow [1972] Fam. 74. But cf. Bowlas v. Bowlas [1965] P.450. (It is natural father's "liability" to maintain and not the amount he actually pays to which the court is to have regard.)

[13] Cmd. 9678 (1956) para. 393.

[14] Ibid. para. 576.

on the Matrimonial Proceedings (Children) Bill that there was a strong body of opinion in favour of implementing the Morton Commission's recommendations in full.[15]

2.56. Criticism of present law: Several criticisms can be made of section 7 of the 1958 Act. First, it does not take account of the significant differences between a judicial power to award custody to a de facto parent, and a judicial power to award aliment against such a parent. In custody questions, the welfare of the child is the first and paramount consideration and accordingly Scots law does not define exhaustively the class of persons who may apply for and be awarded custody. There is nothing in Scots law to prevent a de facto parent as such from applying for custody in separate custody proceedings.[15A] Section 7 of the 1958 Act merely enables the application for custody to be made in a divorce action. Further, the ordinary rules of pleading suggest that the court cannot (and in any event would not) foist custody on an unwilling person. By contrast, the welfare of the child is not, and cannot be, the first and paramount consideration in determining liability to pay aliment, and the general law defines exhaustively the class of persons who may be alimentary debtors. There must be some acceptable link between the child and the alimentary debtor because in aliment cases the court is not, as in custody cases, conferring a right or authority on a willing applicant but imposing an obligation on an unwilling defender.

2.57. A second criticism of the present law is that it is remedy-based. The courts' powers in relation to aliment for

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[15] That the fourth class of children was left out, was due to the technical legal difficulty of correlating the recommendations with the then powers of the English magistrates courts to award maintenance: see Standing Committees, Official Report 1957-58, Vol. II cols. 47-50.

[15A] Cf. Cochrane v. Keys 1968 SLT (Notes) 64; Klein 1969 SLT (Notes) 53; Cheetham v. Glasgow Corporation 1972 SLT (Notes) 50 esp. at p.51; Samson v. Samson 1922 SLT (Sh. Ct) 34; Matrimonial Proceedings (Children) Act 1958, s.14(2); Children Act 1975, s.47(1)(a).

an "accepted" child arise only in the four types of consistorial proceedings mentioned at para. 2.52. above. This gives rise to anomalous situations. Suppose, for example, that a woman obtains a divorce, an award of aliment for her son by that marriage, and an award of aliment for her son by a former marriage who was accepted by her husband into the family. Both boys attain the age of sixteen and both continue their education. The first can recover alimentfrom his father in an independent action for aliment. The second cannot. His claim is linked to the divorce action and the court's powers in such an action terminate when the child attains the age of sixteen. This particular defect could be cured by altering the age limits, but others are not so easily cured. Suppose the mother dies before she can raise her divorce action. Under the present law, the stepson has no claim for aliment against his stepfather. Or suppose that the mother leaves both boys with a relative and vanishes without making any claim for aliment against her husband. One child has a claim for aliment against him: the other has not.

2.58. A third criticism is that the law leaves too much to the subjective discretion of the court. What is a judge to do after "having regard" to the factors mentioned in section 7(2), such as "the liability of any person other than a party to the marriage to maintain the child"? Can he decide that the stepfather's liability should be subsidiary to the natural father's, or that it should arise only if the children had formed part of the stepfather's family for some years? It might well be thought that he cannot. On the other hand, English cases suggest that he can go to the opposite extreme and make the stepfather liable along with the father, on the basis of a very short period of assumption of responsibility for maintenance.[16] There is perhaps too much room here for variation according to the personal views of the judge. The amounts of money involved over the years may be substantial and even if they are not, the emotional stakes may be high.[17] The nature of the link between two people which justifies the imposition of an alimentary obligation raises questions of principle which, arguably, should not be left so largely to judicial discretion.

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[16] Snow v. Snow [1972] Fam.74.

[17] It is clear, for example, that in the case cited in the previous footnote, the ex-husband, who had been ordered to pay maintenance, felt a deep, and understandable, sense of grievance.

2.59. There is a fourth criticism of the present law which we do not endorse. It is said that it is "illogical" to use a mixture of blood tie and acceptance into the family, and that once one goes beyond a man's own relatives by blood or adoption "there is no logical or just stopping place short of acceptance into the family. It makes no sense to couple that with a relationship by blood or adoption to the other party to the marriage."[18] We cannot, however, see any lack of logic in saying that neither the step-relationship nor the de facto relationship is sufficient by itself to justify imposing an alimentary obligation but that both together may be. What is at issue seems to us to be a question of expediency and values. What roles should be given to the blood link and the de facto link respectively in family law? This is not merely, or even primarily, a matter of logic, and it begs a lot of questions to assert that it is a simple question of sense or justice.

2.60. The Matrimonial Proceedings (Children) Act 1958 applied to Scotland and England in very similar terms. However, following on recommendations of the Law Commission, English law has now been changed.[19] At present the changes are confined to matrimonial causes (in the High Court and county courts) but the Law Commission has provisionally recommended similar changes for the magistrates' courts[20]. In matrimonial causes the English courts are now empowered to make orders for the maintenance of (a) a child of both parties to the marriage and (b) "any other child, not being a child who has been boarded-out with those parties by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family."[21] In deciding whether to exercise its

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[18] See Law Com., Published Working Paper No 9 - Matrimonial and Related Proceedings - Financial Relief, (1967) para. 168.

[19] Law Com. No 25, Report on Financial Provision in Matrimonial Proceedings (1969). See now the Matrimonial Causes Act 1973, s.52(1).

[20] Working Paper No 53, Matrimonial Proceedings in Magistrates' Courts (1973) paras. 122-123.

[21] Matrimonial Causes Act 1973, s.52(1).

powers against a party to a marriage in favour of a child who is not his child and, if so, in what manner, the court must have regard (among the circumstances of the case):

> "(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
>
> (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
>
> (c) to the liability of any other person to maintain the child."[22]

2.61. There are various possible solutions to the problem under consideration.

1. We could keep the present law (paras. 2.52. to 2.59. above).
2. We could adopt the changes made in, and recommended for, English law (para. 2.60. above).
3. We could return to the pre-1958 system, (under which a child accepted into the family could not obtain aliment).
4. We could introduce a right to aliment based on a de facto relationship.

2.62. The first possibility - keeping the present law, so far as aliment is concerned - would be safe and simple. The Scottish courts have already interpreted the 1958 provisions slightly differently from the English courts (in holding that it is relevant to consider the length of time for which responsibility for a child's maintenance has been assumed) and would not necessarily get into the same difficulties as did the English courts over the phrase "accepted as one of the family." In any event, it is certainly arguable that "acceptable" is a better criterion than mere "treatment" as a member of the family so far as aliment is concerned. The disadvantages of the present law have been set out at paras. 2.52. to 2.59. above.

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[22] Ibid. s.25(3).

2.63. The second possibility - adopting the English changes - would bring the laws of Scotland and England back into harmony on this question. It would involve a solution which has already, and recently, found approval by Parliament in relation to English law. It would give the courts a wide enough discretion to enable them to avoid hard cases and further the interests of children in consistorial proceedings. Perhaps, however, it gives the court too much discretion. And it is restricted to marriage breakdown. It does not cover all the cases in which a child might be thought to have a reasonable claim to aliment on the basis of a de facto relationship. It does not cover, for example, the case in which a man sets up a household with a married woman and her child but, because she cannot or does not get a divorce, never regularises the position. It does not cover the child taken over by a single person, such as the mother's sister. It does not cover the case in which there is a marriage between the two adults concerned but in which, because of death or disinclination or some other factor, consistorial proceedings are never raised.

2.64. The third solution - a return to the pre-1958 law - would, we think, be rightly regarded as retrogressive. It could lead to unjustifiable distinctions between children in an essentially similar position. At the moment, a child who has been accepted into a family and treated as a member of it for many years has at least a chance of an award of aliment against a step-parent in certain circumstances. The courts have powers to reach results which would be widely regarded as reasonable. We doubt whether it would be an advance to take away those powers without putting anything in their place.

2.65. The fourth solution - the creation of an independent right to aliment based on some acceptable de facto link - is in many ways the most attractive. The right would be the child's. It could be made to depend on the child's relationship with the alimentary debtor and not on the accidental features of the relationship between two adults and the proceedings they can bring, or choose to bring, against each other. It fits in better with the rest of the Scottish law of aliment and is more consistent with the Scottish approach to this question which has

traditionally been based on rights rather than discretionary remedies. On the other hand, there are difficulties in spelling out the nature of the relevant relationship. Perhaps the two essential elements should be

(1) an acceptance into the family (which need not be a married family); and

(2) de facto support as a member of the family for a substantial period - say, five years.

In creating a new alimentary obligation it would be desirable to proceed cautiously and to leave a measure of flexibility to enable reasonable results to be reached in unforeseen cases. It might therefore be made a defence to a claim for aliment under the new rules that it would be unreasonable in all the circumstances to impose an obligation to aliment. This would be wide enough to cover the case where it would be unreasonable to expect a man to aliment a child foisted on him as his own. An escape clause of such a wide nature would, of course, introduce the element of discretion which we have criticised above but this may be the price of advance in this area. We deal below (paras. 2.126. to 2.131.) with the question of age limits on aliment for children, but we envisage that the same limits would apply in this case as in the general case. We also deal below (paras. 2.67. to 2.77.) with the question of the hierarchy of alimentary obligations. It would be perfectly possible to provide that the obligation of the de facto parent should be subsidiary to that of the natural parents if that were thought desirable. Considerations of caution and difficulty of delimitation might suggest that the obligation should not, at least to begin with, be reciprocal, although it is not difficult to imagine cases in which de facto parents might have a strong moral claim to aliment in their old age.

2.66. We invite views as to which of the above four solutions should be adopted. The first three involve well-charted ground. The fourth involves dangers and difficulties as well as advantages. In order that it may be properly assessed, and without any commitment to it, we are prepared to put forward

for consideration the proposition that unless an obligation to aliment would be unreasonable in the circumstances of the case, a person should be liable to aliment a child, other than a child boarded out with him by a local authority, whom (a) he has accepted into his family, and (b) he has supported as a member of his family for a period of not less than five years. The obligation should be reciprocal. (Proposition 13.)

Hierarchy of liability

2.67. Under the present law, persons liable to provide aliment to a relative are liable in a certain order. Only when aliment cannot be recovered from relatives further up the hierarchy is a lower relative bound.[23] The alimentary creditor's own funds are liable in the first place, but this is not a matter of order of liability among debtors and we deal with it later when considering the conditions for the emergence of an alimentary obligation.

2.68. The hierarchy is usually said to be as follows:- (1) descendants; (2) father; (3) mother; (4) paternal grandfather; (5) paternal grandmother; (6) paternal great-grandfather, and so on until paternal ascendants are "exhausted"; and (7) maternal grandfather and so on, in the same order.[24] This traditional formulation has to be expanded and qualified, however, if it is to take account of a spouse and of illegitimate and adoptive relationships. The spouse comes first in the

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[23] For early recognitions of this principle see Hamilton, Younger of Blair v. His Grandfather (1629) Mor. 329; Ramornay v. Law (1636) Mor. 388; Frazer v. Frazer (1663) Mor. 415; Laird of Ludquharn v. Laird of Gight (1665) Mor. 11425. Cf., however, Macdonald v. Macdonald (1846) 8 D.830 (an action for aliment against the pursuer's mother, stepmother, son, daughters and sons-in-law).

[24] See Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649; Lord Wark in Encyclopaedia of Scots Law voce Aliment vol. 1 para. 710; Fraser, Parent and Child (3rd ed.) p. 102; Smith, Short Commentary, 378; Gloag & Henderson, Introduction to the Law of Scotland (7th ed.) p. 685; Walker, Principles of Scottish Private Law (1st. ed.; 1970) p. 273.

hierarchy: a wife is expected to look to her husband for support before her own children,[25] or her own father.[26] The illegitimate child has a claim to aliment against (1) his legitimate descendants and (2) his father and mother, but not other ascendants. He is not bound to aliment his father or mother or other ascendants.[27] The adopted child stands to his adoptive relatives, for purposes of aliment, in the same position as a legitimate child and his alimentary relationship with his natural relatives is extinguished.[28] The step-parent has no obligation of aliment (although the court in certain consistorial proceedings may, in certain circumstances, make an order against him) and does not appear in the hierarchy. The same applies to the divorced spouse, even if a periodical allowance after divorce is equiparated to aliment. It is sometimes said that the representatives of a deceased person come in his place so far as liability to provide aliment ex jure representationis is concerned, so that they will be liable before relatives further down the list.[29] However, as liability ex jure representationis is of a peculiar nature and subject to discretionary and equitable considerations, it is arguable that it should be left out of the list, like the liability of the accepting stepfather or divorced husband.

2.69. In principle, all legitimate children are equally liable to their indigent parent,[30] but the nature of their

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[25] See Inspector of Barony Parish v. Macfarlanes (1886) 2 Sh. Ct. Rep. 152; Macdonald v. Macdonald (1956) 72 Sh. Ct. Rep. 171.

[26] This question was raised, but not clearly decided, in Maxwell v. Maxwell (1711) Mor. 423 Wallace v. Goldie (1848) 10 D.1510; Fingzies v. Fingzies (1890) 28 S.L.R.6; Reid v. Reid (1904) 6 F. 935; Mackay v. Mackay's Trs. (1904) 6 F.936; Stewart's J.F. v. Law 1918, 2 S.L.T.319.

[27] Clarke v. Carfin Coal Co. (1891) 18 R. (H.L.) 63.

[28] Children Act 1975, s.8 and Sch. 2.

[29] Douglasses v. Douglas (1739) Mor. 425; Bisset v. Bisset (1748) Mor. 413 (Heir could not afford full support. So mother had to make up difference.) Fraser, Parent & Child (3rd ed.) pp. 128 and 113. It should be noted, however, that some of the cases cited by Fraser related to claims under the 1491 Act, where the same principles did not necessarily apply (see Appendix A).

[30] See Laidlaw v. Laidlaw (1832) 10 S.745; Foulis v. Fairbairn (1887) 14 R.1088.

liability appears to be sui generis[31]. It is not just a separate liability for an aliquot share fixed by the number of children: the inability to pay of one child relieves him of liability and throws an increased burden on the rest,[32] and, even in the absence of absolute inability to pay, the children's shares may be apportioned according to their means.[33] Moreover, a parent can sue one child for his whole aliment.[34] Nor is the obligation joint and indivisible: it clearly can be divided up. Nor is it joint and several. Joint and several debtors must normally all be called as defenders, but, as we have just seen, a parent can sue one child alone if he so wishes and cannot be met by a plea of "all parties not called."[35] Moreover, inability to pay on the part of one child (even though not amounting to insolvency) will relieve him from liability while payment by one child of all that he is liable to pay will not necessarily free the others: he may not be liable, because of his own lack of means, to pay the whole aliment required for the parent's needs. In fact, the key to the uniqueness of the obligation lies simply in this - that the liability of each child depends partly on his own circumstances. Although traditionally the obligation of the parents of an illegitimate child has been regarded as joint and several,[36] it appears that, since the Illegitimate Children (Scotland) Act 1930, the above arguments apply also to that obligation and that it too should be regarded as an obligation sui generis.

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[31] Cf. the discussion in Smiths v. Macdonald (1919) 35 Sh. Ct. Rep. 233.

[32] Hamilton v. Hamilton (1877) 4 R.688; Palmer v. Palmer (1885) 2 Sh. Ct. Rep. 55; Dear v. Duncan 1896, 3 S.L.T. 241; Reid v. Reid (1897) 6 F.435.

[33] See Brown of Thornydikes v. Browns (1710) Mor. 448; Jack v. Jack (1953) 69 Sh. Ct. Rep. 34.

[34] Dear v. Duncan 1896, 3 S.L.T.241; Reid v. Reid (1897) 4 S.L.T. 282 (also reported at 6 F.935); Rutherglen Parish Council v. Dick (1917) 34 Sh. Ct. Rep. 249. There was some hesitation on this point in the earlier cases of Laidlaw v. Laidlaw (1832) 10 S.745; Hamilton v. Hamilton (1877) 4 R.688; and Duncan v. Duncan (1882) 19 S.L.R.696. Cf. also Robertson v. Robertson (1902) 18 Sh. Ct. Rep. 272.

[35] Ibid.

[36] See Walker, Principles, (1st ed.; 1970) p. 279; National Assistance Board v. Casey 1967 S.L.T. (Sh. Ct.) 11.

2.70. It could easily happen that a person claiming aliment had both children and grandchildren able to provide support. The grandchildren might be the issue of a child alive and able to pay aliment, or of a child unable to pay aliment, or of a predeceasing child. Scots law appears to be undeveloped in this area, although Lord Wark ventures the opinion that descendants are liable "in order: first, children, then grandchildren, etc."[37]

2.71. Preconditions for passing on liability down the hierarchy: It is clear that indigence on the part of a prior debtor will suffice to bring into play the liability of a relative further down the hierarchy. But what if it is just difficult to recover aliment from the prior debtor? In one early case it seems to have been accepted that a relative's absence abroad was sufficient to activate the liability of those further down the list, though with a right of relief against the prior debtor.[38] In more recent cases, varying views have been taken. Usually a relative's absence in a distant country has been regarded as sufficient to activate the liability of a posterior relative.[39] Sometimes it has not.[40] It is not always clear from the cases whether the whereabouts of the absent relative were known or unknown. In the latter case aliment would seem to be recoverable from a relative lower down the hierarchy.[41]

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[37] Encyclopaedia of the Laws of Scotland voce Aliment vol. 1 para. 710. Other solutions are possible: e.g. the grandchildren might step into the place of their parent. Cf. Gernhuber, Familienrecht p.430.

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

[39] Belch v. Belch (1798) Hume 1 (father in America, grandfather liable); Inspector of Barony Parish v. Macfarlanes (1886) 2 Sh. Ct. Rep. 152 (husband in South America and earning good wages, sons liable while husband "cannot be reached by the law"); Bell v. Bell (1890) 17 R.549 (father in South Africa, grandfather liable, but could offer to maintain grandchildren in his home).

[40] Brown v. Brown (1824) 3 S.247 (ratio doubtful); Perth Parish Council v. Tavendale (1930) 46 Sh. Ct. Rep. 46 (father in New Zealand; grandfather not liable; recovery from father more difficult but not impossible).

[41] Bell v. Bell 1895, 2 S.L.T. 598 (father had deserted family and disappeared; grandfather liable).

2.72. Comparative survey of other laws: Hierarchies of liability for aliment are found in many European legal systems. As in Scotland, the order is generally (1) spouse; (2) descendants; and (3) ascendants, but without the Scottish postponement of the mother to the father, and maternal ascendants to paternal ascendants. The Italian Civil Code provides, for example, that

> "The following persons are required to give support in the order shown:
>
> (1) the spouse;
>
> (2) legitimate or legitimated children and, if there are none, the nearest descendants;
>
> (3) parents and, if there are none, the nearest ascendants;
>
> (4) sons-in-law and daughters-in-law;
>
> (5) the father-in-law and the mother-in-law;
>
> (6) brothers and sisters of the whole blood or of the half blood, with precedence to those of the whole blood over those of the half blood."[42]

In West Germany, the order of liability is (1) the spouse; (2) descendants; in the order of their succession to the indigent; (3) ascendants, the nearer before the more remote.[43] In Switzerland, as in the traditional Scottish formulation, the aliment of spouses is dealt with separately from the aliment of other relatives. So far as the latter are concerned, aliment can be claimed from them in the order of their rights of succession, which means that the order is (1) descendants; (2) father and mother; (3) grandparents; and (4) great-grandparents.[44] Essentially similar hierarchies are found in various other civil codes.[45] A few systems make express provision for the case where the debtor relative is in a country where he cannot be effectively pursued for aliment, or where he can be so only with considerable difficulty. In West German law, the alimentary obligation falls, in such a case, on the next liable relative who has, however, a full right of recourse against the prior debtor.[46] The Greek civil code has adopted the same solution.[47]

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[42] Art. 433 (Beltramo, Longo, Merryman transl. 1969).

[43] Gernhuber, Familienrecht pp. 430-431.

[44] Civil code, arts. 329, 457-60.

[45] See e.g. - Greek Civil Code, arts. 1479 - 1482; Spanish Civil Code, art. 144.

[46] See Gernhuber, Familienrecht p.431.

[47] Art. 1481.

2.73. French law is unusual in not having any general hierarchy of liability.[48] It appears, however, to be recognised that the spouse is liable before other relatives, and that parents are liable before remoter relatives to provide for the needs of minor children.[49] And in the case of "simple adoption" the civil code expressly provides that the alimentary obligation of the natural father and mother (which is not extinguished by this type of adoption, in contrast to "full adoption") arises only if aliment cannot be obtained from the adopter.[50] The avant-projet submitted to the Commission on the Reform of the Civil Code included a proposal for a hierarchy with the qualification that any alimentary debtor pursued for aliment could escape liability only on establishing that a prior debtor was in a position to provide support: as between debtors in the same rank of the hierarchy each was to be bound in proportion to his resources.[51] After discussion, this proposal was rejected,[52] and a solution adopted which allowed the alimentary claimant to raise an action against one or more of the alimentary debtors, the defender or defenders being allowed to bring into the cause other liable relatives, and the judge being given a discretion to fix the aliment due by each, having regard to his resources and nearness of relationship.[53] There is no hierarchy of liability for maintenance in English law, probably because of the absence of any general system of maintenance rights and obligations, as opposed to discretionary remedies.

2.74. Our proposals: The argument for some hierarchy of liability is that it reflects the differing strengths of different family obligations and protects remoter relatives from unnecessary involvement in litigation. The argument against a hierarchy is that it may leave the alimentary claimant without a remedy, or place the burden of pursuing prior relatives on the person who is perhaps least likely to be able to sustain it. It seems to us that a modified hierarchy is desirable together with a clarification of principles which may be implicit in the present law. If our suggestions (in Propositions 2 to 13 above) as to the parties liable are accepted, the actual drawing up of the hierarchy becomes a fairly straightforward matter.
We suggest that the members of a person's family should continue to be liable to aliment him, and, subject to the

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[48] See Ripert et Boulanger Traité de Droit Civil I, no. 2048. This has not always been the case. See Pélissier, loc. cit. p.255; Pothier, Traité du contrat de mariage nos. 387, 393, 395.

[49] Pelissier, loc, cit. p. 258; Ripert et Boulanger op. cit. I, no. 2048.

[50] Art. 367.

[51] Travaux de la Commission de Reforme du Code Civil 1951-52 p.98.

[52] Ibid. p.112.

[53] Ibid. p.130.

effects of an adoption order, the liability should attach to them in the following order:- (1) his spouse; (2) his children (including any step-children whom he has accepted into his family and who are liable under Proposition 13 above); (3) his father and mother; (4) a step-parent who has accepted him into the family and is liable under Proposition 13 above. (Proposition 14). It will be noted that the father and mother are placed on the same rank. This is the present law with regard to illegitimate children. It is now recognised that the parents of legitimate children have equal parental rights[54] and we think they should have equal parental duties. It will be noted too that our proposal would postpone the liability of de facto parents to that of the natural parents. This is a more rigid solution than that of the present law (which gives the court, in certain circumstances a discretion to find a step-parent liable along with or before a natural parent) and we invite comments on it.

2.75. In order to clarify principles which may be implicit in the existing law we suggest that the alimentary obligation of a remoter relative should arise not only if the prior relative is unable, through lack of means, to provide support but also if, and for so long as, the alimentary creditor finds it impossible or impracticable for any other reason, to obtain aliment from the prior relative. (Proposition 15). We deal later with the question of rights of relief in this and other situations.

2.76. Liability of relatives in same rank of hierarchy: The liability of those in the same rank of the hierarchy must continue to be sui generis because of the distinctive features of the alimentary obligation and we do not recommend any fundamental change in the law here. For the sake of clarity, it would be desirable to set out the governing rule in statutory form and we suggest that the liability of alimentary obligants in the same rank of the hierarchy of liable relatives should in principle be equal, but subject to modification in the light of their resources. (Proposition 16). It should continue to be

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[54] Guardianship Act 1973 s.10.

possible for the alimentary claimant to raise an action against any one or more of those who are in the same rank of the hierarchy of liability. We deal later with the question of rights of relief.

2.77. We have not included in the above list the representatives of a deceased relative against whom an equitable claim may be raised for what is regarded in the present law as aliment ex jure representationis. Nor have we included the divorced spouse who may be liable under a court decree to pay a periodical allowance. The list consists of those who are liable to pay or provide aliment, and, in theory, should not include anyone else. We have considered whether these exclusions might give rise to practical difficulty. Suppose, for example, that a divorced woman claims aliment from her father, having concluded that it will be easier to recover from him than to obtain an enforceable award of a periodical allowance from her former husband. Should the father not be allowed to argue that she should try to obtain and enforce such an award against her husband? Or suppose that a man has died leaving only heritable property (which is not subject to legal rights), and that he has left it to some non-relative. Should his widow be allowed to claim aliment from her son without first seeking to recover from her deceased husband's estate? This problem is not very different from that which arises when the alimentary creditor has any legal claim against a third party (for breach of contract for example) and we think it could be dealt with in the same way. The court dealing with the action for aliment will have to consider among other things the means of the claimant. In so doing, or in assessing the amount of aliment to be awarded, it could take into account legal claims against third parties.

Reimbursement of aliment paid or provided

2.78. The next problem which concerns us arises when a person ("the first party"), who has alimented somebody ("the second party"), later attempts to obtain reimbursement of the amount paid, either from the second party or from someone else ("the third party"). The problem arises in various forms. The first party may be someone who is under no obligation to aliment the

second party (a shopkeeper providing food and clothing on credit, for example) or may be a relative who has a subsidiary liability (a father supporting his married daughter, for example, when her husband has the primary liability) or may be a relative who is liable equally along with others (one son supporting an aged parent, for example, when two other sons are equally liable). Reimbursement may be sought from the second party on the ground that he had sufficient means for his support at the time when aliment was provided or on the ground that he has since acquired means. The third party from whom reimbursement is sought may be the representative of the deceased second party, or may be a relative with a prior liability or a relative with the same liability.

2.79. Reimbursement from alimented person. Attempts to obtain reimbursement of aliment from the alimented person may be based on an agreement to repay. The courts, however, have not gone out of their way to imply such agreements[55] and it may be that, as between a liable relative and an indigent person, even an express agreement would not always be immune from challenge.[56] More usually, attempts to obtain reimbursement will be based on recompense or repetition. The claimant will be able to recover only if he was not liable to pay aliment and if he was not making a donation. If he was liable to pay, then he has merely fulfilled a legal obligation and there is no basis for a claim based on unjust enrichment. Thus a parent who aliments a child who has no means of his own cannot recover from the child when the latter acquires property or becomes self-supporting.[57]

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[55] See Hyslop v. Hyslop 18 Jan. 1811 F.C. (advances to son by father); Ferguson v. McGachen (1831) 3 Sc. Jur. 293; Gilbert v. Hannah (1924) 40 Sh. Ct. Rep. 262 (aliment of non-relative); Kemp v. Robertson (1948) 64 Sh. Ct. Rep. 190 (aliment of wife's uncle).

[56] Guthrie Smith mentions that some poor law authorities used to exact from paupers dispositions omnium bonorum in order to preserve relief against subsequently acquired wealth, but expresses the opinion that "No Court of law or equity would support a deed, so entirely without consideration, taken from a starving man." Op. cit. p.271.

[57] See Guthrie v. Mackerston (1672) Mor. 10137 (based, however, on presumed donation); Drummond v. Stewart (1756) Mor. 412; Home v. Wedderburn (1757) Mor. 412 (mother had no claim against daughter's supervenient fortune). Stair I, 8, 2; Ersk., Institute III, 3, 92.

If the person claiming aliment was not liable to pay (and it must be remembered that no-one is liable to aliment a person who has ample means for his own support), then the question is simply whether the payment was a gift. At one time this problem was solved by applying various presumptions. A benefactor alimenting a person of full age and capacity was presumed to donate, as he could easily have entered into an express agreement for repayment,[58] but there was no such presumption where the recipient of the aliment was a mentally incapable person or pupil child without a tutor.[59] In more recent cases, however, the courts have preferred not to proceed on the basis of legal presumptions but to look at the facts and ask whether they are more consistent with donation or with the intention to constitute a debt.[60] On the whole, the courts have not looked favourably on claims for reimbursement of aliment and have tended to conclude that support must have been donated ex pietate,[61] that is, was a gift motivated by natural affection and a sense of duty. One type of situation has, however, arisen fairly frequently and has been dealt with in a slightly different way. This is the situation which arises when a parent who has been holding funds belonging to a child is met by a claim by the child for the payment of those funds with the interest on them. Very often the parent will have used the funds, or the interest, or both, on general family expenses and

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[58] Stair I, 3, 3; Guthrie v. Mackerston (1672) Mor. 10137.

[59] See e.g. Drummond v. Stewart (1756) Mor. 412 (mother recovered aliment from idiot son whom she had supported even after he succeeded to property).

[60] See Wilson v. Paterson (1826) 4 S.817 (uncle could not recover from alimented niece when facts suggested donation); Drummond v. Swayne (1834) 12 S.342 (brother could not recover from alimented brother when facts suggested donation); Turnbull v. Brien 1908 S.C.313 at 315 (no recovery from alimented brother-in-law); McVeigh v. Bonnar (1948) 64 Sh. Ct. Rep. 102.

[61] Guthrie v. Mackerston (1672) Mor. 10137; McCulloch v. McCulloch (1727) Roberts 611; Home v. Wedderburn (1757) Mor. 412; Hamilton v. Hamilton (1807) Hume 3; Ferguson v. McGachen (1831) 3 Sc. Jur. 293. And see cases in last footnote. For a case in which the circumstances were held to be inconsistent with donation ex pietate see McGaws v. Galloway (1882) 10 R.157.

the question is whether he can set off the amount spent on the child's aliment. In effect, the parent is making a counter claim for reimbursement of past aliment. At one time, it was thought that a father was bound to support his child even if the child had means of its own, so that he had no claim for reimbursement. He was merely fulfilling his obligation.[62] It is now accepted, however, that a child's own resources are primarily liable for its support and that a parent can use the child's income, and even if need be his capital, for the child's proper support.[63] On this view the parent, in the type of situation we are considering, is in the position of someone who is not bound to provide aliment and his claim depends simply on whether or not he has donated the aliment ex pietate. This will depend on the facts. In some cases the courts have concluded that the parent did provide aliment ex pietate and had no intention of using the child's money for its support or of reserving a claim against the child.[64] In most cases, however, particularly where the parent is of modest means and has apparently used the funds or the interest in good faith for family expenditure, the courts have been very willing to allow set off, without insisting on anything in the nature of a strict accounting.[65] Parents have also been allowed to recover reimbursement of past aliment from trustees holding funds for their children, where the facts suggested that the aliment was given, not ex pietate but on the understanding or assumption that

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[62] See Galt v. Boyd (1830) 8 S.332. The mother's obligation was not regarded as so absolute, see Fairgrieves v. Hendersons (1885) 13 R.98.

[63] See Hutcheson v. Hoggan's Trs. (1904) 6 F.594; Gray v. Caledonian Ry Co. 1912 S.C.339 per Lord President Dunedin obiter at p.342.

[64] See e.g. McCulloch v. McCulloch (1727) Robert. 611 (not a very clear case); Galt v. Boyd (1830) 8 S.332 (probably decided, however, on the now discredited ground that the father was bound to provide aliment even though his children had resources).

[65] In the following cases parents were allowed to set off aliment against the interest on the child's funds: Aitken v. Goodlet (1706) Mor. 2562. Steele's Trs. v. Cooper (1830) 8 S. 926; Dudgeon v. Arnot (1830) 9 S. 36; Hamilton v. Hamilton (1834) 12 S. 924; Bell v. Baillie (1868) 6 S.L.R. 191; Fairgrieves v. Hendersons (1885) 13 R. 98. The possibility of set-off is not now confined to interest but may extend to capital, Polland v. Sturrock's Exrs. 1952 S.C.535.

it would be recovered.[66]

2.80. Reimbursement from relative with primary or prior liability. Someone who has alimented an indigent person may have a claim to reimbursement against a relative who has a primary or prior liability to provide support. The claim may be based on agreement,[67] or possibly negotiorum gestio[68] but more usually will be based on recompense. Where the person claiming reimbursement is not under any obligation, not even a subsidiary obligation, to provide aliment, his claim will be readily recognised.[69] Thus, third parties who have alimented an illegitimate child have frequently been held entitled to recover from the father,[70] and someone who has supplied a wife with necessaries has a well-recognised claim for relief against the husband if the latter was bound to aliment his wife but was failing to do so.[71] Someone who has supplied a legitimate child with necessaries has a similar claim against the parent who should have been, but was not, providing aliment.[72] If, however, the person claiming reimbursement is a

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[66] See Duke of Sutherland Petr. (1901) 3 F.761 and cases there referred to; Duke of Sutherland Petr. (1905) 13 S.L.T. 104; Hutcheson v. Hoggan's Trs. (1904) 6 F.594.

[67] See e.g. Ligertwood v. Brown (1872) 10 M.832.

[68] Cf. Thom v. Jardine (1836) 14 S. 1004 (obiter); Ligertwood v. Brown, supra (obiter); Gilbert v. Hannah (1924) 40 Sh. Ct. Rep. 262 (obiter).

[69] See e.g. Thomson v. Wilkie (1678) Mor. 419 (claim by brother-in-law); Stevenson v. McDonald's Tr. 1923 S.L.T. 451 (claim by sister); Macpherson v. Williamson (1903) 19 Sh. Ct. Rep. 25 (claim by brother-in-law who had, however, given notice that he held the prior relative liable). Contrast McVeigh v. Bonnar (1948) 64 Sh. Ct. Rep. 102 (claim by uncle unsuccessful - aliment furnished ex pietate).

[70] See e.g. Aitken v. Anderson (1815) Hume 217; Butchart v. Scott (1839) 1 D.1128; Gairdner v. Monro (1848) 10 D.650 at 653; Reid v. Robertson (1868) 6 S.L.R.77.

[71] See Clive and Wilson, Husband and Wife (1974) pp. 263-265; Conjugal Rights (Scotland) Amendment Act 1861, s.6 (applying only to a wife holding a decree of separation a mensa et thoro). It has been held in England that compliance by the husband with a maintenance order made by justices did not preclude liability for his wife's necessaries, but much turned on the limited nature of the justices' jurisdiction. See Sandilands v. Carus [1945] 1 K.B. 270.

[72] Stair I, 5, 7; Fraser, Parent and Child, (3rd ed., 1906) 111.

relative with a subsidiary liability, the courts have been more ready to hold that aliment was furnished ex pietate and that there is no claim for relief.[73] Thus, a grandfather alimenting his grandchild (in the legitimate line) has been held not to be entitled to reimbursement from the father in the absence of any requisition on him.[74] Conflicting decisions have been pronounced in cases involving a claim by a legitimate child's mother (who has only subsidiary liability under the present law) against his father. In some cases she has been allowed to recover reimbursement of aliment furnished to the child,[75] but in one sheriff court case it was held by the sheriff-substitute that, being herself subsidiarily liable, she must be presumed to have alimented the children ex pietate.[76] It should be noted that the claim by a provider of aliment against a liable relative is not a claim for arrears of aliment and cannot be affected by any rule that such arrears cannot be recovered.[77] Indeed the very reason for the rule that a wife cannot recover arrears of aliment has been said to be that the husband is directly liable to those who have supplied her with necessaries: "a wife's allowance is not to be increased on account of debts for which her husband is liable".[78] Where a decree for aliment is granted against a person with a subsidiary liability, on the ground that the person with the primary liability is abroad and so beyond

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[73] See Laird of Ludquharn v. Laird of Gight (1665) Mor. 11425 (grandfather failed to recover from father); Fingzies v. Fingzies (1890) 28 S.L.R.6 (father could not recover from son's wife, even on assumption that she was primarily liable).

[74] See Laird of Ludquharn, supra; Kennedy v. Macpherson (1900) 16 Sh. Ct. Rep. 344.

[75] See Dunn v. Matthews (1842) 4 D.454; Foxwell v. Robertson (1900) 2F.932; Emmerson v. Emmerson (1939) 55 Sh. Ct. Rep. 146. In none of these cases is there any mention of a presumption of donation ex pietate.

[76] Kennedy v. Kennedy (1911) 27 Sh. Ct. Rep. 183. (The sheriff preferred to decide the case on the ground that the mother could not recover arrears of aliment: sed quaere?) In Reid v. Moir (1866) 4 M.1060 at 1067 Lord Benholme expresses the view obiter that the mother of a legitimate child who has furnished aliment would have no claim for relief against the father. He gives no reason for this view.

[77] Cf. Mackenzie's Tutrix v. Mackenzie 1928 S.L.T. 649 at 653; Emmerson v. Emmerson (1939) 55 Sh. Ct. Rep. 146. But see Kennedy v. Kennedy, supra.

[78] McMillan v. McMillan (1871) 9 M.1067.

the reach of an alimentary action, it is probable that the defender has a right of relief against the primary debtor, but the law on this point is not well developed.[79] If the relative with the subsidiary liability has to pay aliment because the relative with the prior liability is unable, through lack of means, to provide support, then, in principle, the former can have no claim against the latter. In fact, it is misleading to say that the former has only a subsidiary liability in this situation. His liability becomes the primary liability for so long as the other party is unable to provide support.

2.81. Reimbursement from relative with equal liability. The law on this topic has developed mainly in relation to the claim of the mother of an illegitimate child against the father. Both are prima facie equally liable for the child's aliment and it is clearly established that if the mother meets the whole obligation herself, she has a claim against the father to recover his share.[80] Her claim is regarded as the claim of one co-debtor for relief against another.[81] After early hesitations, it was decided that it was not subject to the triennial prescription[82] and that interest is payable on the amounts falling due by the father from time to time.[83] As a

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[79] Tait v. White (1802) Mor. Appendix, voce Aliment p.4. In this case a grandfather was found liable, the father being abroad. By the time of the appeal the father had returned but it was not thought that this could alter the judgment, as the grandfather had only been found liable subsidiarie, leaving him to apply for relief if the father could support the child.

[80] See e.g. Finlayson v. Gown 7 July 1809 F.C.; Thom v. Jardine (1836) 14 S.1004; Thomson v. Westwood (1842) 4 D.833; Stewart v. Scott (1934) 50 Sh. Ct. Rep. 21. Cf. Wilson v. McMinnin (1905) 7 F.538 in which the parents of illegitimate twins took one each and it was held that the mother had no further claim against the father.

[81] See Thom v. Jardine (1836) 14 S.1004 per the Lord Ordinary; Reid v. Moir (1866) 4 M.1060 at 1065; Ligertwood v. Brown (1872) 10 M.832 at 836; Stewart v. Scott (1934) 50 Sh. Ct. Rep. 21.

[82] Thomson v. Westwood (1842) 4 D.833; Moncrieff v. Waugh (1859) 21 D.216 (action raised almost 40 years after birth of child); Doig v. Buchan (1885) 22 S.L.R. 630 (action raised 33 years after birth of child); McPhail v. Manarie (1897) 14 Sh. Ct. Rep. 176 (action raised 26 years after child's birth).

[83] Hill v. Gilroy (1821) 1 S.33; Pott v. Pott (1833) 12 S.183; Moncrieff v. Waugh (1859) 21 D.216; Dunnet v. Campbell (1883) 11 R.280.

result, there have been several cases in which fathers of illegitimate children have been found liable for accumulated aliment and interest twenty years or more after the birth of the child.[84] In so far as the mother's claim is "based on redress of unjustified enrichment" (as it would seem to be in the usual case) or arises from negotiorum gestio (possible but much less likely), it will, under the Prescription and Limitation (Scotland) Act 1973, prescribe in five years.[85] It does not seem to have been decided whether, if an illegitimate child (with the aid of a tutor or curator ad litem if need be[86]) pursues his father or mother directly for aliment, the defender can claim to be liable only for his or her share or can require the other party to be called as a defender also. In principle, and on the analogy of the liability of children to a parent, either could be pursued for the whole aliment due, but would have a right of relief against the other for his or her share.

2.82. It has been assumed obiter in several cases that if one child pays, under a court decree, the whole aliment of an indigent parent he or she has a claim for relief against his brothers and sisters.[87] There appear, however, to be only three reported cases, all in the sheriff courts, in which a claim for relief has been made by an alimenting child. In the first, recovery was denied on the ground that aliment must be presumed to have been given ex pietate.[88] In the second, recovery from sisters was denied on the ground that no claim had been intimated to them.[89] And in the third, a case in which the appropriate share of the alimentary debt had actually been

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[84] See cases in last two footnotes. Cf. Westlands v. Pirie (1887) 14 R.763.

[85] Section 6 and Sch. 1 para. 1.

[86] Cf. McKenzie v. Glendinning (1899) 15 Sh. Ct. Rep. 224.

[87] Reid v. Moir (1866) 4 M.1060. Hamilton v. Hamilton (1877) 4 R.688 at 691; Duncan v. Duncan (1882) 19 S.L.R. 696 at 697; Rutherglen Parish Council v. Dick (1917) 34 Sh. Ct. Rep. 249.

[88] McKillop v. Stewarts (1889) 5 Sh. Ct. Rep. 96.

[89] Milne v. Milne (1904) 20 Sh. Ct. Rep. 266.

constituted by decree against an absconding brother, recovery was allowed, there being no room in such a case for any presumption that the aliment had been provided ex pietate.[90] It appears that a distinction is drawn between the case in which one child has been ordered to pay the whole aliment by a court decree (in which event there can be little room for any argument that aliment was donated ex pietate) and the case in which a child pays more than his share in the absence of a decree (in which case the argument for donation ex pietate is more plausible).

2.83. Comparative survey. In France, there have been differing views on the rights of relief of a debtor who has paid more than his share. Because of the absence of an expressly recognised general hierarchy of alimentary debtors the question has presented itself as one relating to the rights of relief of a co-obligant. There is general agreement that, if the debt has already been apportioned among the debtors, one who pays more than his share has a right of relief.[91] If the debt has not already been divided, many authorities think that there is still a right of relief,[92] although there has been much difference of opinion on this issue among courts and writers and much discussion as to the basis of the claim - negotiorum gestio, unjustified enrichment or a right which is sui generis.[93] The Commission on the Reform of the Civil Code thought that, if one alimentary debtor was sued, he should be able to bring one or more of the others into the cause. The judge would then be able to apportion the liability between or among them as he thought appropriate or decide that they should be jointly bound. Debtors ordered to pay aliment would have a right of relief against those not brought into the cause; the judge being able to order the latter to reimburse the whole or part of the alimentary allowance, after taking into account their resources and the degree of relationship to the creditor.[94]

2.84. In West Germany, a subsidiarily liable relative who has to pay aliment because of the indigence of a prior relative, has no right of relief against the latter.[95] In effect the

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[90] Smiths v. Macdonald (1919) 35 Sh. Ct. Rep. 233.

[91] Pélissier, op. cit. 274-275. Cf. Smiths v. Macdonald, supra where the same result was reached.

[92] Pélissier, op. cit., 273-280; Marty et Raynaud, Droit Civil, Tome I(2) p.47. And see the decision of the Cour de Cassation of 27 Nov. 1935, D.P.1936, I. 27.

[93] See Frossard, "Le recours du débiteur alimentaire condamné contre les codebiteurs" D.S. 1967, Chronique 23; Pélissier, op. cit. 277-279.

[94] Travaux 1951-52 p.130 art. 5.

[95] Gernhuber, Familienrecht p.431.

normally subsidiary liability becomes for the time being the primary liability. However, if the subsidiarily liable relative has to pay because the prior relative is abroad and it is impossible or extremely difficult to pursue him effectively than there is a right of relief, by means of a cessio legis, against the prior relative.[96] Third parties or non-liable relatives who provide aliment may have a right of relief based on negotiorum gestio or unjustified enrichment.[97]

2.85. In England the problem of reimbursement has been of extremely limited scope because of the virtual non-existence of alimentary rights and obligations as opposed to discretionary remedies. At common law a trader or other third party who supplied a wife with necessaries would often have a claim for reimbursement against the husband based on the wife's "agency of necessity".[98] Following on recommendations of the Law Commission, who viewed the doctrine as an anachronism, the wife's agency of necessity was abolished by the Matrimonial Proceedings and Property Act 1970.[99] We observe, however, that the Law Commission emphasised the uselessness of the doctrine from the wife's point of view. It conceded that it could work justice from the point of view of a relation or friend who had supported the wife.[1]

2.86. Tentative conclusions. The problem of reimbursement of aliment paid or provided is not often of practical importance, and there are few reported cases. None of the foreign systems we have studied contains an elaborate statutory regulation of this matter. We therefore suggest that the rights of relief of an alimentary obligant, who has paid or provided aliment, against other obligants with the same or a higher rank in the hierarchy of liability, should be left (as at present) to depend on the common law. (Proposition 17). If, however, reimbursement were to be regulated by statute, the provisions would be unduly complex, as can be seen from the possible rules set out in Appendix B.

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[96] Ibid. p.431-432. So long as the cessio legis operates there is no room for claims based on negotiorum gestio or unjustified enrichment.

[97] Ibid. p.432.

[98] Bromley, Family Law, pp. 401-402 (4th ed. 1971).

[99] S.41. See Law Com. No 25 paras. 108-110 and Appendix II paras. 41-52 and 108.

[1] Law Com. No 25 Appendix II paras. 46-48. See e.g. Sandilands v. Carus [1945] 1K.B. 270 (charitable boarding house keeper); Weingarten v. Engel [1947] 1 All E.R. 425 (deserted wife supported by her brother); Biberfeld v. Berens [1952] 2 Q.B. 770 (wife supported by her brother, but he failed to recover from husband because wife had means of her own).

These would have to be refined, and probably further expanded, before they could be embodied in legislative language and they would become much more elaborate if, contrary to our tentative suggestion, grandparents and grandchildren were to be included in the list of alimentary debtors and creditors. The rules in Appendix B relate only to reimbursement among alimentary debtors inter se. Even if they were thought worth adopting, we would not suggest any major alteration in the law relating to rights of reimbursement from the alimented person or by third parties (including non-liable relatives). This would involve questions which would be more appropriately dealt with, if at all, in the context of a reappraisal of the whole law of unjustified enrichment. In particular we do not recommend the abolition of the right corresponding to that of the third party founding on the now-abolished wife's agency of necessity in English law. It would be anomalous to exclude one particular application of the law of unjustified enrichment but not others, and undesirable to do so unless the particular application gave rise to inconvenience or injustice. We are not satisfied that it does in any field except expenses of consistorial litigation. Indeed, we agree with the Law Commission that the present rule can work justice in those rare cases where it is invoked by an alimenting third party.[2] We would point out too that in Scots law, unlike the pre-1970 English law, the rule involves no sex-discrimination: exactly the same right arises, founded on exactly the same principles, against a wife who was liable to aliment, but was not in fact alimenting, her husband. In relation to the expenses of consistorial litigation, the present law does fetter the courts' discretion in certain situations[3], but we suggest later[4] a way of dealing directly with this problem.

2.87. There is, however, one minor change which we suggest in relation to the husband's liability for his wife's necessaries. Section 6 of the Conjugal Rights (Scotland) Amendment Act 1861

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[2] Ibid.

[3] See Clive and Wilson, op. cit., pp. 598-611; Campbell v. Campbell 1975 S.L.T. (Notes) 47.

[4] Para. 2.110 below.

provides that if a wife obtains a decree of separation, certain property consequences shall follow:

> "and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs (sic) she may incur as pursuer or defender of any action, after the date of such decree of separation and after the subsistence thereof; provided, that where upon any such separation aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use."

This provision applies only to a wife, (and not to a husband) who has obtained a decree of separation (not a decree of adherence and aliment or interim aliment). It adds nothing to the common law rule that the husband (or any other alimentary debtor) is liable for necessaries supplied by a third party only if his obligation of aliment is not being fulfilled. This provision is anomalous (because it infringes the principle of sex equality) and otiose (because it adds nothing to the common law). The common law principles should govern the situation. No doubt it would generally be held that a husband who was duly paying the aliment awarded by a competent court was fulfilling his obligation to aliment and therefore was not liable to a third party for necessaries,[5] but there could be exceptional cases where this was not so.[6] The common law principle is flexible enough to deal with such cases. We therefore suggest that the provisions of section 6 of the Conjugal Rights (Scotland) Amendment Act 1861 (i.e. the passage quoted above) rendering a judicially separated husband liable only for necessaries provided to his wife should be repealed as anomalous and otiose, the situation being better regulated by the general common law rule under which an alimentary debtor is bound to reimburse a third party for necessaries paid or provided to the alimentary creditor unless the alimentary debtor has been fulfilling his alimentary obligation. (Proposition 18).

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[5] Cf. Willson v. Smyth (1831) 1 B. & Ad. 801; 109 Eng. Rep. 984; Supplementary Benefits Commission v. Black 1968 S.L.T. (Sh. Ct.) 91. In para. 2.110. below we suggest that in any event a separated spouse's expenses of litigation should not be treated as necessaries in assessing his or her needs.

[6] The award might, for example, have been made by a foreign court with a very limited power to award only minimal amounts. Cf. Sandilands v. Carus [1945] 1 K.B.270.

Hierarchy of rights as between alimentary creditors

2.88. Just as the law prescribes a hierarchy of liability as between alimentary obligants, so it may require to regulate the competing rights of alimentary creditors by ranking them in a prescribed order of priority. Suppose that a man of limited means has a separated wife, children by her, and aged parents. He cohabits with a widow and has accepted into his family, and supported for the past six years, her children by her previous marriage. All these people are in need of support and all claim aliment from him. Is there any order of priority between them? The question is most likely to arise in an action by one of the supposedly "remoter" alimentary creditors, in which the obligant argues that, taking into account his obligations to prior claimants, he has not enough resources to pay aliment. With the exception of one brief reference in Stair[7] (dealing with the priority of children's claims inter se), none of the Scottish Institutional writers or text books explicitly recognises the existence of any hierarchy of claimants. Nevertheless, some such hierarchy seems to be implicit in the law. It is clear, first of all, that a wife comes before a mistress: a man cannot escape from his obligation to support his wife by arguing that he requires his income for the support of "the other woman" with whom he is living.[8] This, of course, is not a question of competition between two people entitled to aliment but we mention it because there is an important contrast here between private law and public law. For supplementary benefit purposes, a man's requirements are treated as including those of a woman with whom he is cohabiting as man and wife.[9] It is also implicit

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[7] Institutions I, 5, 9, ("parents must first aliment their children in the family; and amongst those that are emancipate, the males are preferable to the females, who pass by marriage into other families".)

[8] Hope v. Hope (1956) 72 Sh. Ct. Rep. 244; McCarrol v. McCarrol 1966 S.L.T. (Sh. Ct.) 45; Hawthorne v. Hawthorne 1966 S.L.T. (Sh. Ct.) 47; McAuley v. McAuley 1968 S.L.T. (Sh. Ct.) 81; Henry v. Henry 1972 S.L.T. (Notes) 26.

[9] Ministry of Social Security Act 1966, Sch. 2, para. 3(1).

in the law that a person's obligations to his spouse and children under the age of sixteen take priority over his other alimentary obligations. There are obiter dicta, not of a very authoritative or carefully thought out nature, to this effect[10] and, more important, obligations to a spouse and children are backed up by criminal law sanctions which do not apply to other alimentary obligations.[11]

2.89. Comparative survey of other laws: There is no expressly recognised hierarchy of alimentary creditors in French law.[12] In West Germany, however, a hierarchy is recognised. A person's first obligation is to his minor unmarried children and his spouse (or divorced spouse). Among other relatives, descendants, in the order of succession to the alimentary debtor, come before ascendants.[13] The Italian Civil Code adopts a flexible solution and provides that

> "When more than one person is entitled to support from the same person, and that person is not in a position to provide for the needs of each of them, the court shall make appropriate provision, taking into account the degree of relationship and the respective needs, as well as the possibility that some of the persons entitled to support can obtain it from other persons whose obligation is of a lower degree."[14]

2.90. Our proposals: We think that the implicit preference for spouses and children should be made explicit and we suggest that if an alimentary obligant is unable to support all those who are entitled to aliment from him, then, as between those entitled to aliment, his spouse and children (including his adopted children, illegitimate children, and "accepted step-children) should have a preferable claim to that of his parents and, within the class of the spouse and children, those members living in family with the alimentary obligant should have a preferable claim to the claim of those members not living in family with him. (Proposition 19). The first part of this proposition

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[10] See Hamilton v. Hamilton (1877) 4 R.688 at 690 (children's liability to support father arises only if they "have a superfluity after providing for the maintenance of themselves and their own families"); Palmer v. Palmer (1886) 2 Sh. Ct. Rep. 55 (in awarding aliment to mother against son, account taken of his wife and six children); Jack v. Jack (1953) 69 Sh. Ct. Rep. 34 (man's responsibility to wife and children "must take precedence over his responsibility to his father").

[11] Cf. Ministry of Social Security Act 1966, s.30(1).

[12] Pélissier, loc. cit. p.170. Pélissier suggests, however, that spouse and children should come first.

[13] Gernhuber, Familienrecht, pp. 285, 286, 433-435. The same hierarchy is adopted in the Greek Civil Code. See art. 1483.

[14] Art. 442.

should be read in the light of our later suggestion on the restriction of the rights of adult children to aliment. The second part is based on the consideration that a man cannot reasonably be expected to deprive his actual existing household of wife and children of support in order to contribute to the support of children, such as the children of an ex-wife or illegitimate children, not living in family with him. Any award of aliment against him in such circumstances is likely to be ineffective and our proposal is an attempt to go some way towards recognising the realities of the situation and dealing with the problems adverted to in Henry v. Henry[15]. We are aware that, being confined to the ranking of alimentary creditors inter se, it does not deal with the questions of priority as between wife and cohabitee or between new wife and divorced wife. We revert to these problems under other headings.

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[15] 1972 S.L.T. (Notes) 26. Cf. the excerpt from Stair Institutions I, 5, 9 in note 7 above.

Section C

Conditions of liability

2.91. The mere fact of relationship is not of itself sufficient to give rise to an obligation to aliment. In addition, certain other conditions have to be fulfilled. Of these, the most important are need on the part of the person claiming aliment (the alimentary creditor) and a superfluity of resources on the part of the person from whom aliment is claimed (the alimentary debtor or alimentary obligant). In certain cases, other conditions may have to be fulfilled. In certain circumstances, for example, a wife must be willing to adhere to, or live with, her husband before she can claim aliment from him. It is for consideration whether this and other conduct of the alimentary creditor should cut off his or her entitlement to aliment, and also whether there should be age limits on a child's entitlement to aliment. We consider these and related questions in this Section of our Memorandum.

Need of alimentary creditor

2.92. General: As a general rule, no obligation to aliment arises unless the alimentary creditor is in need: a person who can support himself at the appropriate level has no right to aliment from a relative. "The appropriate level" is not fixed by reference to bare subsistence but, under the present law, varies slightly according to the type of alimentary relationship which is in question.[16] Similarly, the emphasis placed on the general rule that no aliment is due unless there is need has been slightly different in different situations. As between parent and child (or remoter relatives in the direct line), the rule has been accepted at face value.[17] Again, a

[16] See paras. 2.135.-2.148. below.

[17] See Woolley v. Maidment (1818) 6 Dow 257 (son v. mother); Drysdales v. Drysdale (1831) 10 S.98 (sons v. mother); Landers v. Landers (1859) 21 D.706 (mother v. son); Reid v. Moir (1866) 4 M.1060 at 1063, 1066; Hamilton v. Hamilton (1877) 4 R.688 at 690 (father v. son); Smith v. Smith's Trs (1882) 19 S.L.R.552 (grandchild v. grandfather's representatives); Smith v. Smith (1885) 13 R.126 (son v. father); Stevenson v. McDonald's Tr. 1923 S.L.T.451 at 452 (child's claim v. father's estate); Ker's Trs. v. Ker 1927 S.C.52 (father entitled to relief out of child's separate estate); Maxwell v. Maxwell (1940) 56 Sh. Ct. Rep. 56.

husband's statutory right to aliment from his wife arises only if he is "unable to maintain himself".[18] In relation to a wife's right to aliment, however, there has been less emphasis on need. Admittedly, a third party will have no claim against the husband for "necessaries" supplied to the wife if she has sufficient means of her own at her disposal,[19] and even in direct actions for aliment there are some clear cut cases (for example, where the wife's resources are equal or superior to the husband's) in which the husband could successfully maintain that he had no liability for aliment.[20] But in direct actions for aliment by wives against husbands, the courts have generally taken such a very flexible view of need that it is doubtful whether it has been regarded as a condition of liability at all. It may be more realistic to say that the wife's need or lack of it has been taken into account as a factor relevant to the quantification of aliment. Certainly there have been many cases in which wives have obtained awards of aliment although an objective bystander would not have said they were in "need", in any ordinary sense of the word.[21]

2.93. Comparative survey: The need of the alimentary creditor is a condition of the right to aliment in most legal systems which we have examined, although the case of the wife is sometimes dealt with separately (and not expressly linked to need) and there are sometimes special provisions relating to the preservation of the capital of minor unmarried children.[22]

2.94. Our proposals: Consistently with our views on the purpose of aliment, we suggest that the need of the alimentary creditor should be, or should continue to be, a condition of his right to aliment but that the condition should be expressed in a way which is flexible enough to enable the courts to reach

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[18] Married Women's Property (Scotland) Act 1920, s.4.

[19] See Clive and Wilson, op. cit. pp. 264, 600. The traditional formula is that the husband is not liable if the wife has "separate estate", but that term now includes earnings as well as other resources. See Lawrie v. Lawrie 1965 S.C.49.

[20] See e.g. Thacker v. Thacker 1928 S.L.T.248.

[21] See e.g. Fyfe v. Fyfe, 1970 S.L.T. (Notes) 25. Cf. the observations in Murray v. Murray (1935) 51 Sh. Ct. Rep. 47 at p.49.

[22] See, for French law, Pélissier, op. cit. pp 152-170; for West German law, Gernhuber, op, cit. pp 424-425, 441; Italian Civil Code, art. 438; Swiss Civil Code arts. 159-161 (husband and wife), 272, 300 (use of child's capital), 328 (general alimentary obligation); Chloros, Yugoslav Civil Law pp 215, 238 (1970).

results which they regard as reasonable, particularly in actions between husband and wife. Accordingly we suggest that a person should be entitled to aliment only if he is unable to provide himself with such support as is reasonable in the circumstances. (Proposition 20). Some of the problems which can arise in ascertaining whether a person is unable to maintain himself require special consideration. We deal in paragraphs 2.95. to 2.110. below with - earning capacity; social security payments; charitable aid; recourse to capital; education; support of others; the relevance of the supplementary benefit rules; and the expenses of litigation. Although these problems are dealt with here because they affect, or may affect, entitlement to aliment, they are also relevant to the question of the quantification of aliment which we deal with later in paras. 2.198. and 2.199.

2.95. Alimentary creditor's earning capacity. There is nothing new in the argument that a person should not be entitled to aliment if he is able to earn enough for his own support - it is referred to in Justinian's Digest[23] and crops up in the Scottish cases from the 17th century onwards[24] - but it has assumed a new significance in the present century in view of the increased opportunities of paid employment for women. In the present law, the courts take the alimentary creditor's earning capacity into account in awarding aliment. An adult son, for example, who has completed his education or training, will not be awarded aliment if, taking into account his fitness for work and the availability of employment, he could support himself.[25] Aliment for a daughter, where not affected by a statutory time limit, may be awarded until

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[23] D25, 3, 5(7) "Where a son can support himself, the court should decide not to compel aliment to be furnished to him."

[24] See e.g. Ogilvie v. Gordon (1699) Mor. 408 (reporter's comments); McRostie v. McRostie (1818) Hume 9.

[25] See Aiton v. Colvil (1705) Mor. 390 and 451 Hunter's Trs. v. Macan (1839) 1 D.817 at 823; A.B. v. C.D. (1848) 10 D.895; Smith v. Smith (1885) 13 R.126; Watsons v. Watson (1896) 4 S.L.T. 39; Whyte v. Whyte (1901) 9 S.L.T.99; Fife County Council v. Rodger 1937 S.L.T. 638 (father liable to support unemployed son); S v. P's Trs. 1941 S.L.T.35 (need to complete education - obiter).

marriage or such time as she can support herself.[26] In the case of aliment for a wife, the courts have taken earning capacity into account but only in the light of all the relevant circumstances including the wife's "age and state of health, the age of any children in her care, the extent to which she worked before or during marriage, and the extent to which her career or employment prospects have been affected by marriage."[27] There is certainly no rule that a wife who can earn is never entitled to aliment. The Morton Commission received a good deal of evidence to the effect that the law should not "encourage a wife to live in idleness for the rest of her life on the maintenance paid by her husband."[28] The Commission agreed that "in principle it is undesirable nowadays that a woman should receive maintenance if she is well able to support herself" and that "the court should ... have regard in every case to what may be termed the wife's earning capacity ...."[29] but diluted these statements of principle by accepting that factors such as age, health, children, employment during marriage, and standard of living during marriage should be taken into account and that "a wife should not be expected to seek work which is quite unsuited to her age or to the position which she has occupied in the community."[30]

2.96. Comparative survey of other laws: Under the present English law, the courts dealing with maintenance in matrimonial causes are directed to have regard to inter alia "the earning capacity"[31] of the spouse or child for whom financial provision is claimed, and it has been suggested that magistrates courts

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[26] See Aitkenhead v. Aitkenhead (1852) 14 D.584. Cf. A. v. B. (1858) 20 D.778 (daughter aged 29 but in bad health and unable to enter into any permanent employment).

[27] Clive and Wilson op. cit. pp. 197 and 552. See also Smith and Smith, "Aliment of Spouses in Scots Law" in British Institute of International and Comparative Law, Comparative Law Series 13 (1966) at p.191.

[28] See (1956) Cmd. 9678 para. 485.

[29] Ibid. para. 493.

[30] Ibid. paras. 494-495.

[31] Matrimonial Causes Act 1973, s.25.

should similarly be directed to have regard, in making maintenance orders, to inter alia "the income, earning capacity, property and other financial resources of each of the parties."[32] In French law, the principle is accepted that he who can supply his needs by his work is not entitled to aliment but a considerable discretion is enjoyed by the courts in deciding what work can reasonably be expected of the alimentary creditor.[33] Exactly the same observation applies to aliment between ascendants and descendants in West German law.[34] The law, however, attempts to prescribe the circumstances in which a separated wife is not expected to work - viz. if the husband is wholly or mainly responsible for the separation, and the wife has not worked during the cohabitation, and it would not be grossly unfair to make the husband pay aliment (as it might be if the wife had worked before marriage and cohabitation had lasted only a very short time).[35] This formulation is part of a group of provisions which are currently under review. It has been suggested that it should be amended so as to provide that a non-working spouse should be required to earn his own living only when this can be expected of him in the light of his personal circumstances (in particular, his previous employment or career pattern, bearing in mind the duration of the marriage) and in the light of the financial circumstances of both spouses.[36] The proposed formulation treats husband and wife alike and abandons the emphasis on fault in the present law. Although it leaves a great deal to the discretion of the courts, it clearly recognises that there may be situations in which a spouse who has not worked during the period of cohabitation should not be expected to work after its termination. There has been a much more rigorous emphasis on ability to work in Soviet law. "[W]here husband and wife are living apart and both are capable of working, Soviet society sees no reason why either should be expected to support the other."[37]

2.97. Our proposals: We find ourselves, on this issue, confronted by a dilemma. On the one hand, it is tempting to

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[32] Law Com. Working Paper No 53, Matrimonial Proceedings in Magistrates' Courts (1973) para. 56.

[33] See Marty et Raynaud, Droit Civil I(2) p.43 ("Le juge appréciera le genre de travail qu'il est raisonnable d'attendre du creancier eventuel d'aliments, en tenant compte de sa formation professionnelle et, dans une certaine mesure, de sa situation sociale." Pélissier, op. cit. pp 163-166 accepts that the courts enjoy a great discretion in this field but criticises as old-fashioned the view that an alimentary creditor cannot be obliged to do work which his education and social position make unsuitable.

[34] Gernhuber, Familienrecht, p.425.

[35] Ibid. pp 181-183. B.G.B. s. 1361 (2).

[36] Entwurf eines ersten Gesetzes zur Reform des Ehe-und Familienrechts (1. Ehe R.G.) BT - Drucks VI/2577 (1971), p.3. This project ran out of time and was reintroduced in amended form in June 1973. See BT - Drucks 7/650.

[37] E.L. Johnson, "Matrimonial Maintenance in Soviet Law" in B.I.I.C.L. Series 13 (1966) at p.234.

argue that anyone who can work should have no entitlement to aliment, and that unemployment, inadequate training facilities, inadequate nursery facilities and so on should be regarded as exclusively the state's responsibility. On the other, it is realistic to recognise that work is not always available and that there may be cases where many people would still regard it as unreasonable to require it to be obtained, even when available. We suggest that public opinion will come in time to accept the view that a person who is capable of taking up gainful employment should not be entitled to aliment, but we doubt whether that stage has been reached. We suggest therefore that lack of earning capacity should not be expressly laid down as a condition of a person's entitlement to aliment and it is sufficient for the law to provide (a) that a person's entitlement to aliment depends on his inability to provide himself with such support as is reasonable in the circumstances (see Proposition 30 in para. 2.148. below); and (b) that the courts can take earning capacity into account in quantifying aliment (as in Proposition 48 at para. 2.198. below). (Proposition 21).

2.98. Social security payments to alimentary creditor. Here "social security" includes not only payments such as unemployment benefit, retirement pension or family allowances, which are not simply a provision for general need, but also supplementary benefit, which is. With regard to the first type of social security payments, there is no problem. Such payments are just as much part of a person's resources as a private pension, or the proceeds of a private insurance policy.[38] Supplementary benefit is in a different position. It is directly related to need and, under the present law, is left out of account in determining an alimentary creditor's resources. A husband cannot argue that his wife is not in need because she can live on supplementary benefit.[39] On the other hand, the knowledge

[38] Cf. Maxwell v. Maxwell (1940) 56 Sh. Ct. Rep. 56 (re old age pension); Thomson v. Thomson (1951) 67 Sh. Ct. Rep. 150 (family allowances); Fyffe v. Fyffe 1954 S.C.1 (re family allowance).

[39] See McCarrol v. McCarrol 1966 S.L.T. (Sh. Ct.) 45; McAuley v. McAuley 1968 S.L.T. (Sh. Ct.) 81; Henry v. Henry 1972 S.L.T. (Notes) 26. Cf. Maxwell v. Maxwell (1940) 56 Sh. Ct. Rep. 56 per sheriff-substitute (father v. son). Notice too the Supplementary Benefits Commission's statutory rights of recovery against spouses and parents. Ministry of Social Security Act 1966, s.23. The same view has been taken in the sheriff court in relation to Family Income Supplement: Freer v. Taggart 1975 S.L.T. (Sh. Ct.) 13. Under the Social Security Act 1975, s.23(2)(b) the court must disregard maternity benefit in awarding inlying expenses to the mother of an illegitimate child.

that supplementary benefit is available in the background may affect indirectly a court's approach to aliment. If a husband is working and a wife is not, an award of aliment may reduce him to a condition of hardship without improving the wife's position, as any aliment will simply reduce her supplementary benefit.[40] In such a situation, the availability of supplementary benefit may reduce subconscious pressure to exact the greatest possible amount of aliment from the husband. This question is linked to the question of what amounts to a superfluity of resources on the part of the alimentary debtor, which we discuss at paras. 2.111. to 2.117. below. So far as the creditor's position is concerned we do not, as at present advised, consider that there is any need for change but we would be grateful for information about any difficulties or hardships which may have emerged in practice.

2.99. Charitable aid. The possibility, or even probability, that the alimentary creditor will receive charitable assistance from others is not taken into account in assessing his needs.[41] Such charity may have met want in the past, and if given ex pietate without thought of recovery may have relieved the alimentary debtor in the past, but it cannot relieve him of future liability.[42] We see no reason for any change in this rule.

2.100. Recourse to alimentary creditor's capital. There is no reason to exclude consideration of capital resources in assessing the need of the alimentary creditor and there is no rule that he is not expected to encroach on capital for his support.[43] Thus, a person with a vested right to the fee of

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[40] Cf. Thoms v. Thoms (1957) 73 Sh. Ct. Rep. 124; Ashley v. Ashley [1968] P. 582; Barnes v. Barnes [1972]1 W.L.R. 1381.

[41] Borthwick v. Borthwick (1848) 10 D. 1312; Macdonald v. Macdonald (1956) 72 Sh. Ct. Rep. 171.

[42] It is the same in Germany. See Gernhuber, Familienrecht, pp. 424-425.

[43] There was such a rule in French law but Pélissier argues that it rested on old cases and on old ideas of conserving family capital, and that it is no longer the law. Pélissier, op. cit. p. 162-163. Douai, 28 juillet 1953, D. 1954, 477. But see Cour Cass. 17 dec. 1965, D.S.1966, 465 and note thereto by R. Savatier, where it is argued that although capital must be used to produce a revenue if possible, it need not always be sold or exchanged for a liferent: in the end of the day the court of first instance has a large discretion.

property liferented by another is not in need of aliment if he can use his vested right as a source of credit.[44] So long as the alimentary creditor's capital is substantial, there is little difficulty in requiring it to be applied for his aliment, but if it is modest the question arises whether it must be exhausted before he or she becomes entitled to aliment. The courts have given different answers to this question. In some cases they have required the capital to be exhausted,[45] but these have been cases concerning liability for aliment ex jure representationis where special considerations apply.[46] In husband and wife cases, the courts have been more lenient and have not necessarily regarded the possession of a small amount of capital as precluding entitlement to aliment.[47] Certainly, it has been recognised that a wife is entitled to hold a small reserve against emergencies.[48] It is our view that the courts have to be left a certain discretion in applying the principle of need to cases where there is a modest capital. Any rule precluding recourse to capital would be unjustifiable and unrealistic, given the ease with which capital can be turned into revenue and vice versa in modern financial conditions. Equally, however, a rule requiring the last penny of capital to be exhausted before aliment could be claimed would be liable to lead to harsh and unreasonable results in certain cases.

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[44] Woolley v. Maidment (1818) 6 Dow 257; Drysdales v. Drysdale (1831) 10 S. 98. Contrast this with the earlier rule, dating from a period before there were life insurance companies and similar institutions, that the liferenter was bound to aliment the heir. See Appendix A, para.2.

[45] See Blake v. Bates (1840) 3 D.317 (What annuity could widow buy with the capital received as jus relictae?); Howard's Exr. v. Howard's Curator Bonis (1894) 21 R.787; Edinburgh Parish Council v. Couper 1924 S.C.139.

[46] See Part IV below.

[47] See Macfarlane v. Macfarlane (1848) 10 D.962; Dowswell v. Dowswell 1943 S.C.23 at 26; Nelson v. Nelson 1969 S.L.T. 323 (wife's flat not "separate estate" for purposes of expenses). But cf. Henderson v. Henderson (1888) 16 R.84 (wife's savings of £500 "separate estate" for expenses). Cf. Biberfeld v. Berens [1952] 2 Q.B.770 (wife's capital of about £7,450 precluded husband's liability for necessaries).

[48] Dowswell v. Dowswell 1943 S.C.23 at 26. (To say that wife must exhaust savings of £70 "an extreme and unjustifiable view, for it denies to the appellant the right to hold any reserve, however small, against emergencies.") Similarly, in German law, a modest provision for emergencies can be kept. Gernhuber, Familienrecht p.424.

2.101. We have considered whether any special provision should be made regarding recourse to the capital of children. At one time it was thought that a father, as administrator-at-law of his pupil children's property, could not encroach on their capital for their aliment and education[49], but this is not now regarded as an absolute rule.[50] In West Germany, the law expressly provides that a minor unmarried child is entitled to aliment from his parents when the income of his property and the produce of his labour do not provide for his support.[51] The same rule is found in the Greek Civil Code.[52] So far as the question of principle is concerned, we see no reason why a child's capital should be any less liable for his support than anyone else's. The questions of tutorial administration which may be involved - should the parent be required to seek authority to use the child's capital? from whom?[53] always, or only in certain circumstances? - belong to the law on minors and pupils. On the whole, we think that the question of recourse to capital should be left to the discretion of the courts in the light of the general principle set out in Proposition 30 (at paragraph 2.148 below).

2.102. Education of alimentary creditor: The present law recognises that a person who is pursuing an appropriate education or training may be unable to provide himself with

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[49] See Steele's Trs. v. Cooper (1830) 8 S. 926. In Fairgrieves v. Hendersons (1885) 13 R.98 it was held that a mother could not, in the circumstances, encroach on the child's capital but Lord Shand said, at p.100, that he was "very far from saying that where a widow is left without the means of maintaining her children otherwise, she is not entitled to encroach on the capital of any means or fortune, large or small, belonging to them."

[50] Polland v. Sturrock's Exrs. 1952 S.C.535. Cf. Ker's Trs. v. Ker 1927 S.C.52 at 57. French law appears to be similar. See Pélissier, op. cit. p.154 (parent can use revenue or even capital of child for its aliment).

[51] B.G.B. art. 1602, II. See Gernhuber, op. cit. p.441.

[52] Art. 1477 para. 2.

[53] Cf. Swiss Civil Code, art. 272 "If they are in need or if the child should occasion extraordinary expenses, or for other exceptional causes, the guardianship authority (l'autorité tutélaire) may permit the father and mother to take from the goods of the child such contribution as it shall determine towards the child's support and education."

support and may therefore be entitled to aliment.[54] It also recognises that the reasonable expenses of an appropriate education may form a legitimate addition to the needs of a person requiring aliment.[55] Three cases may be taken as illustrations of these principles. In Mizel v. Mizel[56] a girl of sixteen was held entitled to aliment from her father at a level which would enable her to continue her education at a fee-paying school. The sheriff noted that the father had paid the school fees in the past and that a change in schools would almost certainly have an adverse effect on the girl's education. He noted that the general criterion was "the need of the child, the necessity of his situation, his inability to aliment himself" but that it might be necessary to consider elements "such as the capacity of the child to benefit from further education and his or her reasonable diligence in its pursuit" and expressed the general view that "a child, reasonably and appropriately engaged in full-time education, who has no private means is ... in need of support". In Watson v. Watson[57] a father was ordered to aliment his two sons, aged 19 and 20, who were starting their curriculum as medical students. Because of the father's limited means, aliment was awarded only for four years in the first place. It was observed that the father's obligation did not cease on the child's majority (now 18), but ended only when the child was able to support itself. In Whyte v. Whyte[58] an apprentice stockbroker, aged 20, was held entitled to aliment from his widowed mother "until she

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[54] See Smith v. Smith (1885) 13 R.126; Watsons v. Watson (1896) 4 S.L.T.39; Whyte v. Whyte (1901) 9 S.L.T.99; S. v. P's Trs. 1941 S.L.T.35; Mizel v. Mizel 1970 S.L.T. (Sh. Ct.) 50. Cf. Affiliation Orders Act 1952, s.3 (extending duration of aliment for illegitimate child "engaged in a course of education or training".)

[55] Lamb v. Paterson (1842) 5 D.248 ("in special circumstances", sum allowed to cover school fees and school books etc. of illegitimate child); Scott Petr. (1870) 8 S.L.R. 260; Watsons v. Watson (1896) 4 S.L.T. 39; Duke of Sutherland Petr. (1901) 3 F.761; Dickinson v. Dickinson 1952 S.C.27; Mizel v. Mizel 1970 S.L.T. (Sh. Ct.) 50. The phrase "maintenance and education" is often used as a compound one. Cf. Conjugal Rights (Scotland) Amendment Act 1861, s.6; Children and Young Persons (Scotland) Act 1932 s.73(3) ("the expression 'maintenance' shall include education"); Marshall v. Gourlay (1836) 15 S.313; Ker's Trs. v. Ker 1927 S.C.52.

[56] 1970 S.L.T. (Sh. Ct.) 50.

[57] (1896) 4 S.L.T. 39.

[58] (1901) 9 S.L.T. 99.

should receive him back in her house, or until he is set out in his profession, and is able to support himself without the assistance of his mother." It was observed that the son was "only learning his business" and that it would have been different if his education had been completed. All three of these actions were direct actions for aliment by the child against the parent. All three make it clear that there is no upper age limit on awards of aliment to enable a youth or young man or woman to benefit from education or training. Indeed, with the increase in adult education and vocational retraining, there is no reason why the same questions of principle should not arise in actions other than those brought by children against parents.

2.103. Comparative survey: In England, it is a feature of the remedy-based approach to maintenance that disputes as to maintenance to cover a child's education can be dealt with only in proceedings between parents or spouses. A child, youth or young adult has no right to maintenance for this purpose which he can enforce by proceedings at his own instance. Although it seems naive to suppose that the relationship between parent and child necessarily remains harmonious so long as the parents can keep their own disputes out of the courts,[59] nevertheless a person's chances of an enforceable order for maintenance to enable him to continue his education depend on whether one of his parents chooses to take proceedings against the other and, under the present law, on the court which the parent selects.[60] Subject to this, the law does take account of the "need" for education. The courts of the divorce jurisdiction are empowered to award maintenance for a child to continue beyond the age of 18 if inter alia the child is "receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also in gainful employment".[61] In the United States, the question has also arisen mainly in the context of matrimonial litigation between parents. There has been a diversity of approach. The original view was against any liability on the part of a father to pay for more than an elementary education for his children[62] but in the present

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[59] There is, for example, growing concern at the failure by parents to pay the parental contribution required under the student grants scheme. See e.g. The Scotsman, September 22, 1975 p. 5 col. 3.

[60] The magistrates courts have no power to award maintenance for a child over 21. See Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(h). The High Court does. Matrimonial Causes Act 1973, s.29(3).

[61] Matrimonial Causes Act 1973, s.29(3). Cf. the Matrimonial Proceedings (Magistrates Courts) Act 1960, s.2(1)(h) which is in more restrictive terms.

[62] Middlebury College v. Chander 16 Vt. 683, 42 Am. Dec. 537 (1844).

century the courts in a large number of states have been increasingly ready to require a father, if he has the means and his child has sufficient ability, to contribute to the child's college education.[63] Many courts refuse, however, to extend this obligation beyond the child's majority (sometimes because of statutory limits on their jurisdiction) and the opinion has been expressed that liability is unlikely to be extended to cover a second degree.[64] In France, difficulty has been caused by the apparent overlapping of several provisions of the civil code[65] and by a doubt as to the respective roles of the obligation to aliment and the spouses' obligation to bring up and educate their children.[66] In recent years, however, the courts have recognised that a parent[67] may be liable to aliment a child, even if over the age of twenty-one, who is reasonably pursuing appropriate further education at a university or similar institution.[68]

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[63] There have been many cases and many articles on this subject. For a general survey see Inker and McGrath, "College education of minors" (1966) 6 Journal of Family Law 230.

[64] Ibid. at 243, 252. See also "Higher education - nicety or necessity" (1961) 1 Journal of Family Law 146.

[65] Art. 203 (spouses' obligation to support and bring up their children); arts. 205-211 (aliment in general); art. 213 (spouses provide for education of their children); art. 303 (on divorce parents remain bound to contribute to support and education of their children in proportion to their means).

[66] See Carbonnier, Droit Civil, II, p.382; Pélissier op. cit. pp. 52-53; Robert in note at D.S. 1966, 130.

[67] Not a grandparent. See Aix, 20 mai 1970, D. 1971, Somm. 109. Pelissier op. cit. p.158 criticises this restriction.

[68] See Paris 17 juin 1965, D.S. 1966, 130 (divorced father could be ordered to aliment law student aged 22); Civ.2 18 mai 1967, D.S.1967, 633 (parents bound, even after child's majority, to give children the means to pursue studies for their chosen profession); Blois 18 jan. 1968, D.S. 1968, Somm. 49 (no aliment to adult medical student who had married against father's wishes); Paris 9 dec. 1968, D.S. 1969, 210 (parental obligation can continue beyond majority if aliment corresponds to needs of child, having regard to studies already undertaken while a minor, future chances, social milieu and means of father and mother); Civ.2 19 mai 1969, D.S. 1970 Somm. 42 (major child's claim is distinct from divorced mother's); Civ. 26 nov. 1970, D.1971 Somm. 104 (son with diploma in engineering could not ask father to support him in a new course of study); St. Brieuc, 16 nov. 1971, D.S.1971 Somm. 227 (aliment allowed to 22 year old medical student pursuing normal course of studies but refused to 23½ year old secretarial student with record of academic failure); Civ.1 18 mai 1972, DS 1972, 672 (father bound to provide for cost of study of son aged 20).

2.104. The present Scots law is flexible enough to allow the courts to apply the principle of need to changing educational conditions, and to decide in the circumstances of each case when a particular course of education is reasonable and appropriate. Nothing would be gained, in our view, by attempting to fetter this discretion. We deal at paragraph 2.184. below with the associated problem of an age-limit on aliment for children.

2.105. Support of others. In a loose sense, a person's needs are obviously increased if he has to provide for the support of others. The requirements of a man with a wife and young children to support are greater than those of a bachelor living alone.[69] For the law of aliment, the questions arise of whether or to what extent these requirements for the support of others can form a charge against the alimentary debtor. It seems clear that a person's needs are not regarded as including the support of someone whom he has no obligation to support.[70] So a student claiming aliment from his father could not argue, with any hope of success, that the amount should be increased because he was living with and supporting a woman and her child by a previous marriage. It might be thought that a person cannot claim aliment, or an increase in aliment, on the ground that he is bound to support someone who has no claim against the alimentary debtor. To allow such a claim would be to require the debtor to support indirectly someone whom he had no obligation to support. In Muirhead v. Muirhead,[71] a mother claimed aliment from her eldest child, pleading that "as she was bound to support her younger daughter, she should be allowed a larger sum than was necessary for her individual support." The court rejected this argument. Lord Kincairney, however, took a different view in the later case of

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[69] This, of course, is explicitly recognised for the purposes of supplementary benefit and many social security benefits. See e.g. Ministry of Social Security Act 1966, Sch. 2; Social Security Act 1973, ss. 31, 32, 34.

[70] Cf. Henry v. Henry 1972 S.L.T. (Notes) 26 (alimentary debtor's needs do not include support of those whom he has no obligation to support).

[71] (1849) 11 D.1262 ("we cannot give any weight to the plea founded on the mother's obligation to support the younger child.") Cf. Marshall v. Gourlay (1836) 15 S.313 (where the same question was raised).

Reid v. Reid,[72] in which he held that a woman had no right to aliment from her father-in-law but indicated that she might benefit from him indirectly:

> "If a wife lives with her husband, that circumstance may affect her husband's claim and she may benefit from that claim. The husband's obligation to support his wife may perhaps reduce him to such penury as to entitle him to claim aliment from his father, or it may be taken into account in considering the amount of aliment to be awarded."

Yet another aspect of the problem is presented if the alimentary creditor is supporting someone whom the alimentary debtor is liable to support. A wife, for example, seeks custody of the children of the marriage and claims an increase in her aliment because she will have the burden of supporting the children. It has been said that in this situation the proper course is not to increase the wife's aliment but to award a separate aliment for the children.[73] Normally, however, the decree will be for payment to the wife of £x per week or month as aliment for each child[74] and, when the decree is in this form, it is accepted for tax purposes that the aliment forms part of the wife's income.[75] So, even if the amount of each child's aliment is separately expressed, the effect is to increase the wife's income to take account of her need to support the children.

2.106. We have already considered, in the context of the possible liability of the father of an illegitimate child to support the child's mother, the difficulty which can arise if too rigid a line is drawn between the needs of a parent and the needs of children in his or her care. The same problem arises in the case of legitimate children. A mother, for

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[72](1897) 4 S.L.T. 282, also reported at 6 F.935. See also Mackay v. Mackay's Trs. (1904) 6 F.936 per Lord Trayner ("the fact that the son is married and has a family to maintain may be a consideration in determining the amount of the aliment which the father is bound to pay him. But that gives no right to the wife to claim directly against her father-in-law".)

[73]Lang v. Lang (1868) 7M.24; 445.

[74]See Rules of Court, Appendix, Form 2, No. 20.

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

example, may not be entitled to aliment, but may be unable to work because she has the care of children who are entitled to aliment from her husband and their father. In fact she and the children will probably share the same standard of living so that depriving her of aliment will simply reduce the amount available for the support of the children.

> "[T]he needs of the child may require that its mother, despite her own conduct,[76] be fully maintained. The assessment of separate amounts for the wife and each individual child must in any case involve a certain arbitrary element, since the cost of some of the basic needs of the household, such as rent, rates and heating, are only marginally affected by its size."[77]

This problem could assume greater importance if, as we suggest later (para. 2.198), conduct can be taken into account in quantifying aliment in any case in which it would clearly lead to injustice to leave conduct out of account. There are various ways of dealing with the difficulty within the confines of private law.[78] The simplest, and one we favour,[79] is to say that there is no injustice in leaving conduct out of account in so far as aliment for the mother represents recompense for looking after the child. Another, which could also be adopted, is to say that in assessing the child's needs, account may be taken, so far as it is reasonable to do so, of the needs of a person who is looking after the child and living with him in the same household. The second approach could cover cases not covered by the first, such as the case of a child being cared for by an aunt or other relative.

2.107. In French law, a person's needs can include his need to support members of his family if, but only if, those members have a claim against the alimentary debtor.[80] Thus, the indigent son of a rich father can claim from his father aliment for himself, his wife and his children (a man being bound to aliment his

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[76] This is a reference to the fact that in the English magistrates' courts a wife's conduct (e.g. adultery) may cut off her right to obtain maintenance.

[77] Report of the Finer Committee on One-Parent Families Cmnd. 5629, 1974 para. 4.107. taking up a point made by the Graham Hall Committee on Statutory Maintenance Limits, Cmnd. 3587, 1968 paras. 94-96.

[78] The Finer Committee suggested solutions from the point of view of public law. See Cmnd. 5629 paras. 5.195. and 5.199.

[79] See para. 2.198. below.

[80] Pélissier, op. cit., p. 160; Rep. Civ. Dalloz (2nd ed. 1970) voce Aliments p.223.

daughter-in-law in French law as well as his grandchildren) but a mother with a rich eldest son and several young children still on her hands cannot claim from the eldest son aliment for the younger children (there being no alimentary collaterals in French law).[81]

2.108. The problem of title to sue for aliment for or on behalf of children is best regarded as a procedural problem and we deal with it below (see para. 2.169.). Subject to that, and subject to the special problems of young children who require someone to look after them, we think that in principle each person's entitlement to aliment should be distinct and should relate to his own individual needs. A man should not be liable to support his daughter-in-law indirectly if he is not liable to support her directly. We therefore suggest for consideration the proposition that in assessing the needs of an alimentary claimant, regard should be had only to his own individual needs, but where the alimentary claimant is a child, then in assessing the child's needs, account may be taken, so far as it is reasonable to do so, of the needs of a person who is looking after the child and living with him in the same household. (Proposition 22)

2.109. Relevance of supplementary benefit formula. A person over 16 is entitled to supplementary benefit if his requirements exceed his resources.[82] There is a set of statutory rules for calculating requirements and resources,[83] and it may be worth considering whether the same formula should be applied for private law purposes.[84] To apply it for all purposes would mean establishing a maximum amount of aliment which corresponded to support at supplementary benefit level. This is a solution which we consider, and reject, later.[85] It would, however, be possible up to a point to apply the supplementary benefit formula in assessing minimum need. This would be possible only

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[81] Ibid. Bordeaux, 22 mars 1893, D.P. 1893, II, 342.

[82] Ministry of Social Security Act 1966 s.1.

[83] Id. Sch. 2.

[84] Cf. The Report of the Finer Committee on One-Parent Families Cmnd. 5629, 1974, para. 4.276. where a similar suggestion is made in relation to assessing the requirements and resources of a liable relative.

[85] Paras. 2.147-2.148. and 2.199 below.

"up to a point" because the supplementary benefit rules take account of the requirements of a man's actual household, including any woman with whom he is cohabiting as man and wife. We have just suggested that for private law purposes a person's needs should, in general, include only his own needs.[86] It is one thing for the state to support a man's cohabitee and her children as part of his de facto family but quite another to expect his separated wife to do so. Subject to this, however, there is nothing in the present law to prevent legal advisers and the courts from taking the supplementary benefit rules into account in assessing an alimentary creditor's need and our inquiries suggest that this is done to a considerable extent. We see no need for any change in the law here.

2.110. Expenses of litigation. Under the present law, the expenses incurred by a wife in conducting or contesting consistorial litigation (such as an action of divorce) are regarded as "necessaries" for which her husband is liable if the wife has no separate estate, if she is entitled to aliment from her husband, and if the action was not frivolous or vexatious.[87] This view has affected (although it does not entirely explain) the traditional practice whereby the husband generally pays the expenses of divorce, win or lose: it has affected the scale of taxation in consistorial causes; and it means that a wife's solicitor has a direct action against the husband just like any other supplier of necessaries.[88] In certain cases it limits the discretion which the court usually enjoys as to an award of expenses: there may be little point in awarding the expenses of consistorial litigation to the husband, or in finding no expenses due to or by either party, or in modifying the husband's liability for expenses, if the only result will be an independent action against the husband by the wife's solicitor for the whole amount, or the balance of, her

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[86] Para. 2.108 above.

[87] See Clive & Wilson, op. cit. pp. 598-601, 604, 610-611.

[88] Ibid.

expenses.[89] The advent of legal aid has meant that the compelling social reasons for making the husband generally liable have disappeared: wives do not now need to rely on their husbands' credit in order to obtain consistorial remedies.[90] The Morton Commission concluded "after very careful consideration" that with regard to expenses "husband and wife should now be treated on exactly the same footing" and recommended "That in England and Scotland the wife's costs [scil. or expenses] of bringing or defending matrimonial proceedings should no longer be regarded as necessaries for the provision of which her husband is liable."[91] More recently the Law Commission vigorously endorsed this recommendation[92] but went further and recommended the complete abolition of the wife's agency of necessity.[93] This has now been done.[94] We think that the recommendation of the Royal Commission should now be implemented for Scotland and that, accordingly, the wife's expenses of bringing or defending consistorial proceedings should no longer be regarded as necessaries for the provision of which her husband is liable. That, however, is not the end of the problem. In Scotland, the husband's liability to third parties for necessaries supplied to his wife is based not on any narrow doctrine of a wife's agency of necessity but on broad principles of recompense. In principle, a husband may be liable for his wife's expenses in non-consistorial litigation (against third parties, for example)[95]; a wife may be liable for her husband's expenses if she is liable to, but failing to, aliment him[96]; and similarly a father may be

[89] Id. 603-604, 608. Cf. Nabarrow & Sons v. Kennedy [1955] 1 Q.B.575.

[90] See Wilson v. Wilson 1969 S.L.T.100; Nelson v. Nelson 1969 S.L.T. 323; Dawson v. Dawson 1975 S.L.T. (Notes) 37; Campbell v. Campbell 1975 S.L.T. (Notes) 47. Cf. Gooday v. Gooday [1969] P.1.

[91] Cmd. 9678 (1956) p.126.

[92] Law Com. No 25 (1969) p.132-133 ("we have no hesitation in recommending that the doctrine [of the wife's agency of necessity] should be abolished in respect of costs in matrimonial proceedings .... The doctrine is, in this field at any rate, an unnecessary and embarrassing anachronism.")

[93] Ibid. p.52.

[94] Matrimonial Proceedings and Property Act 1970, s.41.

[95] Clive & Wilson op. cit. p.366.

[96] As a result of the Married Women's Property (Scotland) Act 1920 s.4.

liable for his son's expenses if these are regarded as necessaries. It may be that a distinction should be drawn between the case of a spouse and other cases. While there might be widespread acceptance of the view that in general the expense of litigation by a poor person should be met by the Legal Aid (Scotland) Fund rather than by his relatives, we suspect that there would be less support for the view that the taxpayers rather than a wealthy husband should pay for the expenses of litigation by a wife against third parties, at least where the husband and wife are living together amicably and sharing the same standard of living. Under the present law, in assessing disposable income and disposable capital for purposes of legal aid, any resources of a person's spouse are treated as that person's resources unless (a) the spouse has a contrary interest in the dispute or (b) the spouses are living separate and apart.[97] A third exception for the case where "it would in the circumstances of the case be either inequitable or impracticable to make the resources of one spouse available to the other spouse" was deleted in 1972.[98] We invite views on this question but tentatively suggest a solution based on the legal aid model viz:- Where a person entitled to aliment incurs expenses in raising or defending consistorial or other litigation, the expenses should not be treated as necessaries for the provision of which the alimentary obligant is liable. But the expenses of a spouse entitled to aliment from the other spouse should (as under the present law) be treated as necessaries if the spouses are living together and have no contrary interest in the subject matter of the litigation. (Proposition 23).

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[97] Legal Aid (Scotland) Act 1967, s.4(4); Legal Aid (Scotland) (Assessment of Resources) Regulations 1960, reg. 4.

[98] Legal Aid (Scotland) (Assessment of Resources) Amendment Regulations 1972. This exception still operates, however, for the purposes of the Legal Advice and Assistance Scheme. See the Legal Advice and Assistance (Scotland) Regulations 1973, Schedule para. 6(b)(iii) and, for illustrations of its operation, Journal of the Law Society of Scotland (1975) p.303.

Resources of alimentary obligant

2.111. The second condition for the emergence of a right to aliment is that the alimentary obligant from whom it is claimed must have "a superfluity" (or surplus) of resources after providing for his or her own needs and those of any relatives having a prior claim to aliment.[99] "No one is bound to ruin himself, even to support another."[100] There are, however, suggestions in some of the cases that this condition does not apply in the case of a claim by an illegitimate child against its parent. Such a claim, it has sometimes been said, is a claim of debt which does not depend on the parent's means.[1] This view seems out-of-date.[2] We can see no reason for any special rule for the illegitimate child's claim and suggest 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. There should be no difference in this respect between the obligation to aliment an illegitimate child and other alimentary obligations. (Proposition 24). We proceed in the following paragraphs to discuss some of the questions which arise in assessing an alimentary obligant's resources. The discussion

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[99] Wilson v. Kirk Session of Cockpen (1825) 3 S. 547 (poor grandfather not liable); Reid v. Moir (1866) 4 M.1060 at 1063, 1066 (parent and legitimate child); Hamilton v. Hamilton (1877) 4 R.688 at 690 (parent v. child); Duncan v. Forbes (1878) 15 S.L.R.371 (husband, a poor crofter, held to have superfluity); Smith v. Smith's Trs. (1882) 19 S.L.R. 552 (grandchild's claim). See also Married Women's Property (Scotland) Act 1920, s.4 (wife's obligation).

[100] Macdonald v. Macdonald (1846) 8 D.830. Cf. Stair I,5,7 "Though the children be necessitous, yet there must first be reserved for the parents that which is necessary for their subsistence; so that, when they are not able to entertain their children, they may lawfully expose them to the mercy and charity of others."

[1] Clarkson v. Fleming (1858) 20 D.1224; Barnes v. Tosh (1913) 29 Sh. Ct. Rep. 340; Mottram v. Butchart 1939 S.C.89 per Lord Wark at p.101 ("I cannot conceive of circumstances in which the court would be justified in making no award at all where paternity is admitted or proved.") But see Marjoribanks v. Amos (1831) 10 S.79.

[2] Cf. Illegitimate Children (Scotland) Act 1930, s.1(2); National Assistance Board v. Casey 1967 S.L.T. (Sh. Ct.)11 (mother had no means: father therefore wholly liable); see also art. 6 of the Council of Europe Convention on the Legal Status of Children Born out of Wedlock, quoted in para. 2.19. above.

is relevant also to quantification of aliment, which is dealt with later in para. 2.198.

2.112. Alimentary obligant's earning capacity. In assessing the means of an alimentary obligant it may sometimes be desirable to take into account potential resources including, in particular, what he could earn if he was employed. The danger, however, in taking earning capacity into account is that it may simply result in an unrealistic and unenforceable award. This is a matter on which the courts must enjoy a considerable discretion and we make no recommendations.

2.113. Social security payments received by alimentary obligant. There is no reason why national insurance benefits should not be taken into account in assessing the resources of the alimentary debtor.[3] Similarly, when supplementary benefit is paid to a man to cover his own requirements and those of his wife and children under sixteen years of age living with him, it is clear that he has means for the support of his wife and those children. Probably, given that supplementary benefit is carefully geared to requirements, a man in such a position will not have means for the support of any other relatives, such as his parents[4], but, since there is no statutory provision to this effect, the courts retain a discretion and, in dealing with the private law obligation of aliment, are not necessarily bound by the calculation of requirements and resources for supplementary benefit purposes.[5] We see no need to change the law in this respect.

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[3] Cf. Thoms v. Thoms (1957) 73 Sh. Ct. Rep. 124 (unemployment benefit).

[4] Cf. National Assistance Board v. Casey, 1967 S.L.T. (Sh. Ct.) 11 (national assistance left out of account in calculating resources of mother of illegitimate child). Cf. Casey, "The Supplementary Benefits Act: Lawyer's Law Aspects" 19 Northern Ireland Legal Quarterly (1968) 1 at 27-28.

[5] Cf. Ivory v. Ivory [1954] 1W.L.R. 604 (husband ordered to pay small amount of maintenance to deserted wife, although his only income was national assistance for himself, his cohabitee and his child).

2.114. Unenforceable advantages. In calculating the resources of the person from whom maintenance is claimed, the English courts have sometimes taken into account unenforceable advantages such as a regular allowance received by a man from his parents or mistress.[6] The danger, of course, is that the benefactor will simply stop paying, in which case the award becomes unrealistic. There is a lack of reported Scottish cases on this point.[7] We think it is a matter which can be left to the discretion of the courts.

2.115. Recourse to capital. Under the present law, the alimentary obligant's capital may be taken into account in assessing his resources.[8] On the other hand, an alimentary obligant need not exhaust his capital and his savings before he can plead lack of superfluity.[9] Much depends on the obligant's circumstances: it may be more reasonable to expect a wealthy person living on an index-linked pension and having no long-term commitments to convert some capital into income[10] than to expect a young person about to marry to do the same. Much also depends on the relationship in question: it is arguable, for example, that a man must share

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[6] Cf. Moss v. Moss and Bush (1867) 15 W.R.532 (voluntary allowance from father); Bonsor v. Bonsor [1897] P.77 at p.81; Nott v. Nott [1901] P.241; Donaldson v. Donaldson [1958] 1 W.L.R. 827. Jackson, Matrimonial Finance and Taxation 36-37, 73-76.

[7] In Syme v. Syme (1833) 11 S.305 the court took into account a voluntary allowance received by a husband from his mother but the Lord President observed that she was "under a legal obligation to support her son". See also Alexander v. Alexander 1957 S.L.T. 298 at 303 (obliter).

[8] Alexander v. Alexander 1957 S.L.T. 298; Watsons v. Watson (1896) 4 S.L.T. 39.

[9] Carr v. Taylor (1884) 1 Sh. Ct. Rep. 118; Inspector of Monifieth v. Swan (1886) 2 Sh. Ct. Rep. 180; Sutherland County Council v. Macdonald 1935 S.N.70. Inspector of Poor for Barry v. Ferrier (1882) 27 Journal of Jurisprudence 52 at 54 ("I know of no authority for saying that he is to dispossess himself of the little capital he has ... To take away his capital now by such demands would very soon bring him as a burden on the rates.")

[10] Samson v. Lowden's Trs. (1886) 2 Sh. Ct. Rep. 353.

his last crust and his last pound of savings with his wife and minor children living with him. It would be possible to devise statutory rules on at least some of these points, as is done in German law,[11] but we think that they are better left to the discretion of the courts.

2.116. Support of others. The general rule enunciated in proposition 24 caters for the obligation to support relatives having a prior claim to aliment. A man will not be bound to aliment his mother if he has only just enough for the support of himself and his wife and children. There is, however, a further problem. Should a man, pursued for aliment, be able to argue that his needs include the support of de facto dependants living in his household, even though they have no legal right to aliment from him? For supplementary benefit purposes, a man's requirements include those of a woman with whom he is cohabiting as man and wife and those of children under the age of sixteen who are in his household.[12] Scottish private law, however, takes into account only a man's legal obligations, not his factual responsibilities.[13] The difficulties caused by the interaction of the two rules are illustrated by the case of Henry v. Henry.[14] A divorced man was living with a married woman, her child by him, and her child by another man. His wage was just sufficient to support this household, and he applied for a decrease in the amounts of periodical allowance and aliment which he had been ordered to

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[11] B.G.B. §1603 II (on availability of parental means for aliment of children); Gernhuber, Familienrecht, p.441.

[12] Ministry of Social Security Act 1966, Sch. 2.

[13] Hope v. Hope (1956) 72 Sh. Ct. Rep. 244; McCarrol v. McCarrol 1966 S.L.T. (Sh. Ct.) 45; Hawthorne v. Hawthorne 1966 S.L.T. (Sh. Ct.) 47; McAuley v. McAuley 1968 S.L.T. (Sh. Ct.) 81; Henry v. Henry 1972 S.L.T. (Notes) 26. A more flexible approach is taken in England. See Roberts v. Roberts [1970] P.1. See also the Report of the Committee on One-Parent Families, (the Finer Report) Cmnd. 5629, 1974, paras. 4.48. and 4.203.-4.205.

[14] 1972 S.L.T. (Notes) 26. Although this was a divorce case it involved, inter alia, aliment for children and the problems raised could also be raised in a straightforward action for aliment.

pay for his former wife and legitimate children. For supplementary benefit purposes, he had virtually no superfluity of resources and so, although he had been failing to support his old family and they had been living on supplementary benefit, the Supplementary Benefits Commission had made no attempt to recover from him.[15] The position, therefore, was that the old family was supported by the state and the new family was supported by Mr Henry. Lord Fraser, although recognising that the social security rule was convenient and sensible, felt obliged by the existing law to disregard the cost of maintaining the paramour and her child by another man and refused to vary the amounts of periodical allowance and aliment payable. He reached this result with some misgivings as he had little doubt that the amounts due would not be paid: Mr Henry would continue to support his new family: Mrs Henry and her children would continue to be supported by the state: the Supplementary Benefits Commission would not take action against Mr Henry who, on their rules, had no surplus resources: Mrs Henry, who was receiving regular payments of supplementary benefit, would have no incentive to enforce the decree in her favour. It is unsatisfactory that courts are compelled to pronounce decrees which they know are unrealistic and will not be enforced and we invite views on whether it would be desirable to provide that in assessing the needs of an alimentary obligant, 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. (Proposition 25). We envisage that this discretion would be exercised in the light of the supplementary benefit rules or any rules which may supersede them.

2.117. Relevance of supplementary benefit formula: The Finer Committee on One-Parent Families disclosed the formula used by the Supplementary Benefits Commission in deciding whether a "liable relative" such as a separated husband has any

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[15] The formula applied by the Commission for this purpose is described in the Finer Report at paras. 4.188. to 4.190.

superfluity of resources out of which to reimburse the Commission for supplementary benefit paid to his dependants. They described the formula as follows:-

> "The requirements of the liable relative are normally taken to be the supplementary benefit scale rates for himself and any dependants with whom he is living, plus an allowance to meet the rent in full (or, in the case of boarders, the appropriate supplementary benefit rate) plus the sum of £5, or a quarter of his net earnings (his take-home pay after deduction of national insurance contributions and income tax) whichever is the higher. Any income in excess of this will be regarded as being available to meet the liable relative's obligation ..."[16]

The Finer Committee expressed the view that publication of this formula would in itself "strongly influence the courts" when dealing with men of similar resources to those dealt with by the Supplementary Benefits Commission.[17] If our suggestion in the previous paragraph is accepted, there is no reason why it should not do so. No other change in the law would be necessary to enable the courts to have full regard to the formula in appropriate cases. The Finer Committee went on to say, however, 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."[18]

The qualification in the last eleven words rather negates the idea of an obligation. Our tentative opinion is that, <u>as in the present law, the courts should have a power but not a duty to follow the supplementary benefit formula in deciding whether an alimentary debtor has a superfluity of resources.</u> (Proposition 26).

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[16] Cmnd. 5629, 1974, para. 4.188.

[17] Para. 4.276.

[18] Para. 4.276.

2.118. Competition between alimentary creditor and other creditors: bankruptcy. In ascertaining whether a person has a superfluity of resources out of which to pay aliment it is necessary to take into account his ordinary debts.[19] If he is solvent there is no particular difficulty. He cannot argue that all his debts (including, for example, his building society loan) must be completely paid off before he can afford to pay aliment: it is a matter of deciding how much, if anything, is available when obligations to creditors are taken into account. If he is insolvent, then it is clear that in principle his alimentary creditors must be postponed to his ordinary creditors. A right to aliment arises only if there is:

> "indigence on the one side, and superfluity on the other .... That being the nature of the claim, it follows that such claims never can be made effectual against a bankrupt estate, because there is no concurrence of these two requisites. There may be indigence on the one side, but of necessity there is no superfluity on the other, superfluity and insolvency being incompatible."[20]

In some early cases it was apparently thought that a decree for aliment altered the position and that a person holding such a decree could rank as an ordinary creditor in bankruptcy[21] but, if the decree merely quantifies an alimentary obligation and if it is variable on changes in the debtor's financial position, then this view seems unsound. In more recent cases, it has been held that a person holding a decree for aliment cannot rank as a creditor for future payments, although he can for arrears.[22] This view has been justified on the ground that the claim for future payments is incapable of valuation[23] but

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[19] See e.g. Maule v. Maule (1825) 1W. & S. 266 at 283 (where the Lord Chancellor suggests that the Court of Session had underestimated the father's debts); Robb v. Robb's Creditors (1794) Mor. 5900; Dunlop's Tr. v. Dunlop (1865) 3 M.758 at 762.

[20] Reid v. Moir (1866) 4 M.1060 per L.P. Inglis at p.1063.

[21] Cf. Macdonald & Elder v. Macleod Jan. 15, 1811 F.C.; Macgregor's Tr. v. Macgregor, Jan. 22, 1820 F.C. Thomson v. Sharp (1828) 7 S.1; Webster v. Tait (1886) 24 S.L.R.67. Fraser, Husband and Wife, (2nd ed.; 1878) pp. 864-865.

[22] Matthews v. Matthews' Tr. 1907, 15 S.L.T. 326; Barnes v. Tosh (1913) 29 Sh. Ct. Rep. 340. Cf. McNaught v. McNaught's Tr., 1916 2 S.L.T. 291.

[23] Matthews v. Matthews' Tr., supra.

perhaps the better view is that of its nature the claim cannot compete with the claims of ordinary creditors.[24] A countervailing advantage is enjoyed by the alimentary creditor in that the bankrupt's discharge does not affect his liability for future aliment.[25] It was at one time thought that the claim of an illegitimate child was different in this respect and that it could be ranked as an ordinary debt[26], but this view has become suspect in view of the changes made by the Illegitimate Children (Scotland) Act 1930[27]. We have suggested above that there should be no difference in the illegitimate child's claim so far as the resources of the alimentary creditor are concerned. If this is accepted, there will be no ground for any distinction in relation to bankruptcy. For the rest, there is an unsatisfactory element of uncertainty about the law on alimentary claims in bankruptcy although the more recent cases seem to conform to principle and commonsense. We think that, if clarification is required here, it should be dealt with in the context of the law of bankruptcy rather than the law of aliment.

2.119. Conclusion: We have not dealt with all the problems which can arise in assessing the needs of the alimentary creditor and the resources of the alimentary debtor. Our general approach has been that, except where it is necessary to correct anomalies (such as the suggestion that the illegitimate child is in a special position) or to remedy defects (such as the pernicious effects of the "necessaries rule" on the expenses of consistorial actions) or to give the courts freedom to avoid unrealistic results (as in the Henry v. Henry situation), the assessment of needs and resources should be left to the discretion of the courts, whether they are dealing with a direct action for aliment or with a claim for reimbursement by a third party.

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[24] Cf. Barnes v. Tosh (1913) 29 Sh. Ct. Rep. 340.

[25] Marjoribanks v. Amos (1831)10 S.79.

[26] See Downs v. Wilson's Tr. (1886)13 R.1101; Barnes v. Tosh, supra.

[27] S.1 (aliment variable with parents' means and position); s.2 (father may apply for custody). See also Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.4 (changing nature of illegitimate child's claim against estate of deceased parent - no longer a claim of debt).

Non-patrimonial conditions of liability

2.120. Husband and wife: willingness to adhere: effect of conduct. Under the present law entitlement to aliment as between husband and wife is associated with willingness to adhere to, or live with, the other spouse. A spouse who is willing to adhere is generally entitled to aliment, whatever his or her conduct may have been: a spouse who is unwilling, without just cause, to adhere, is not entitled to aliment.[28] The meaning of "just cause" in this context has given rise to difficulty. It clearly covers adultery or cruelty, which are grounds for judicial separation. Until 1964, however, it went no further. A wife who had left her husband because of intolerable conduct falling short of adultery or cruelty had no right to aliment.[29] This was altered by section 6 of the Divorce (Scotland) Act 1964 which provided that:

> "without prejudice to its other powers to award aliment it shall be competent for the court in an action of interim aliment to grant decree of aliment where it is satisfied that the pursuer is with just cause living in separation from the defender by reason of the desertion or other conduct of the defender."

It will be noted that this section is confined to an action for interim aliment. It does not apply to the entitlement to aliment in general. Thus it does not apply in relation to a spouse's right to interim aliment pendente lite in a divorce action and it does not apply to proceedings by a third party for reimbursement of aliment provided to a spouse. Under the section, a husband's desertion gives the wife just cause for living in separation even if she has become unwilling to adhere.[30] "Other conduct" covers such conduct as would provide reasonable cause for non-adherence in an action of divorce for desertion.[31] It does not cover consent to separation. The

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[28] Donnelly v. Donnelly 1959 S.C.97; Jack v. Jack 1962 S.C.24; Beveridge v. Beveridge 1963 S.C.572, Divorce (Scotland) Act 1964, s.6.

[29] Jack v. Jack 1962 S.C.24.

[30] Stirling v. Stirling 1971 S.L.T. 322.

[31] Barr v. Barr 1968 S.L.T. (Sh. Ct.) 37.

traditional view is that a consensually separated spouse will not be helped by the court to recover aliment. If he or she has not stipulated for aliment in a separation agreement, the remedy is to call on the other spouse to adhere.[32] This view does not appear to have been affected by section 6 of the Divorce (Scotland) Act 1964.[33] We should like to draw attention to the following results of the present law:

(1) Adultery is not a bar to the recovery of aliment. An adulterous spouse can recover aliment if willing to adhere.[34] Moreover, a spouse who has obtained a decree of separation on the ground of adultery may be ordered to aliment the adulterous spouse.[35] The principles are the same with regard to a cruel spouse. This rule has been criticised.[36] One justification which is sometimes put forward for it is that if the innocent spouse objects to paying aliment he has his remedy in divorce.

(2) A deserting spouse is not entitled to aliment so long as desertion, without reasonable cause, continues. He or she is not willing to adhere and has no just cause for living apart. One way of explaining the harsher treatment meted out to the deserter than to the adulterer is to say that the deserting spouse is in fact being offered aliment in the matrimonial home but is deliberately rejecting it. He or she is not entitled to claim a separate alimentary allowance in money while rejecting the support which is offered in kind in the matrimonial home.[37]

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

[33] It would be straining language to say that the consensually separated spouse was living in separation "by reason of the desertion or other conduct of the defender".

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

[35] Cf. Nisbet v. Nisbet (1896) 4 S.L.T. 142; Milne v. Milne (1901) 8 S.L.T. 375; Beveridge v. Beveridge 1963 S.C. 572 at 582. The decree of separation, of course, absolves the adulterous spouse of the duty to adhere.

[36] The Report of the Departmental Committee on the Sheriff Court (the Grant Report), Cmnd. 3248, 1967 mentions in para. 118. a suggestion that "there should be available in the sheriff court a decree of separation with an order setting aside the husband's duty to maintain his wife."

[37] Clive & Wilson, op. cit. pp. 191-192.

(3) A spouse separated by consent is not entitled to aliment.[38] He or she is unwilling, without just cause, to adhere and it does not matter that the other spouse is also unwilling to adhere. The traditional justification for this rule is that it favours reconciliation. The law tolerates, but does not encourage, consensual separations. If the parties wish to make their own arrangements as to aliment they may do so but if they fail to do so the law will not intervene to order one to aliment the other.[39] We doubt whether the notion that a spouse can be starved into adherence really favours reconciliation and we note that under the present English divorce law, and under the Bills on Scottish divorce law reform which have been introduced, unsuccessfully, in Parliament since 1969, consensual separation if continued for two or five years is a sufficient indication of marital breakdown to warrant decree of divorce or judicial separation. In so far as the philosophy behind the new divorce law is that the courts should be available in order to regulate and regularise de facto marital breakdowns, it may be held to justify the intervention of the court to deal with aliment for the spouse separated by consent. It may be unreasonable to expect a spouse who is on the point of separating to exact a suitable undertaking as to aliment: indeed it could be argued that the present law discriminates in favour of the legally aware or legally advised spouse. It may be undesirable to preclude judicial intervention on aliment during the run up to divorce or separation on a separation ground (if this is introduced). It may be unjustifiable to deny to the consensually separated spouse rights and remedies which are allowed to the cruel or adulterous spouse. The more recent Bills on reform of the Scottish divorce law have, doubtless for reasons like the above, included provisions designed to

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[38] Bell v. Bell, Feb. 22, 1812 F.C.; Beveridge v. Beveridge, 1963 S.C. 572. Cf. Fraser, Husband and Wife, p. 636 (husband bound where parties have separated by mutual consent) p.637 (husband not bound if consents to separation only on condition that wife supports herself) (2nd ed.).

[39] Bell, Principles §1541 (" .... it is now settled that a separation may be affected by mutual consent. But courts of law, though they wink at the practice, will not interfere to aid or complete such contracts by awarding aliment, if not settled by the parties.")

remove in certain cases the requirement of willingness to adhere. We discuss these provisions in para. 2.124. below.

2.121. Comparative survey: In England the Law Commission has recently discussed the role of conduct in relation to the award of maintenance in English magistrates' courts. They have suggested that "adultery should not of itself be regarded as an absolute bar to financial relief, but should be treated in the same way as other forms of misconduct."[40] As we have seen, adultery does not disentitle a spouse to aliment under the present Scots law, so that, so far as it goes, this suggestion is in the direction of harmonisation of the laws of England and Scotland. The Law Commission do not give particular attention to the problems posed by the spouse who is in desertion without just cause or the consensually separated spouse who has no maintenance agreement: in the present law neither can recover maintenance in the magistrates' courts.[41] They set out four possible approaches to the problem of conduct:-[42]

> "(i) the obligation to maintain should be regarded as absolute and reciprocal and, thus, matrimonial conduct should not be taken into account in determining liability or quantum:
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> (ii) conduct should be relevant in every case as regards liability, but should not be taken into account in determining the amount of the order;
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> (iii) conduct should be relevant, both as regards liability and quantum; and
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> (iv) conduct should be relevant in every case, both as regards liability and quantum, but if the court decides to make an order, it should not reduce the amount it would have ordered below a sum sufficient to provide the applicant with the basic necessities of life."

The first possibility is closest to the existing Scots law and the Commission have this to say about it:

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[40] Law Com. Working Paper No 53 (1973) para. 45.

[41] See Lilley v. Lilley [1960] P.158 (desertion); Stringer v. Stringer [1952] P.171 (separation without any agreement as to maintenance); Starkie v. Starkie (No 2) [1954] 1W.L.R. 98 (consensual separation without agreement to maintain).

[42] Ibid. para. 48, "Liability" must here be read as meaning "whether an order should be made." Thus, to say that conduct should be relevant to liability means merely that a court should be able to take conduct into account in deciding whether or not to make an order. See ibid. paras. 49-54.

> "Such a principle has the obvious advantage that it would remove the discussion of conduct wholly from the magistrates. But we doubt whether it would be acceptable to public opinion to require a husband to maintain a wife who had abandoned him for a penniless lover without allowing the husband to oppose the enforcement of the obligation against him on the ground of the wife's conduct."[43]

In Scotland, of course, the husband in this situation would have the defence that his wife was unwilling to adhere. The Law Commission discuss the other approaches in turn and, without recommending one rather than the other, conclude by inviting views. We shall await the results of this invitation with interest.

2.122. In French law, as in Scots law, the basic principle is that the obligation of aliment between spouses persists throughout marriage and is not cancelled by the culpability of a spouse.[44] This has recently been modified slightly in the case of judicial separation: the law of 11 July 1975 provides that the alimentary allowance in such a case is to be granted without regard to fault (thus affirming the general principle), but that the judge can nevertheless discharge the alimentary debtor of the whole or part of his liability if the other party has seriously failed in his or her obligations towards the debtor.[45] Moreover, a deserting spouse cannot, in the absence of a judicial separation, claim aliment in money, having rejected it in kind.[46] Here the similarity with Scots law is striking. French law differs from Scots law, however, in that a spouse who is separated by mutual consent can claim aliment unless he rejects an offer to adhere.[47]

2.123. We have already noted the special provisions on the separated wife's earning capacity in West German law, and the special provisions reducing aliment to the level of bare support if the alimentary creditor has brought about his need through his own immorality or has been guilty of an offence such as would justify the alimentary debtor in depriving him of his legal rights (Pflichtteil).[48] Apart from this, the present law adopts a fairly flexible approach to the aliment of separated spouses but nevertheless places considerable emphasis on conduct. A separated spouse can claim aliment in so far as is

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[43] Ibid. para. 49.

[44] Pélissier op. cit. pp. 29-31.

[45] Code civil, art. 303 (as replaced by law of 11 July 1975). For previous law, see Carbonnier, Droit Civil II pp. 172, 178 (duality of approach - most courts used art. 212 and regarded conduct as irrelevant - some used art. 301, on the analogy of divorce, in order to refuse aliment to guilty spouse).

[46] Pélissier, op. cit. pp. 29-30; Colmar 1 dec. 1952, D.53-46 and note at 47.

[47] Ibid. And see generally, Maury, "La Séparation de Fait entre Époux", 63 Revue Trimestrielle de Droit Civil (1965) p.515 at 515.

[48] Paras. 2.12. and 2.96 above. B.G.B. arts. 1361(2); 1611.

just or equitable, consideration being paid to the grounds of the separation and to the needs, means and employment situation of the spouses.[49] There is an explicit provision that a spouse who refuses to adhere, against the wish of the other spouse, and without just cause, is not entitled to aliment.[50] Again, it is explained that a spouse who unjustifiably rejects aliment in kind, in the home, has no claim to aliment in money.[51] The family law reform project presently under consideration has as one of its main principles a departure from the emphasis placed on fault by the present law.[52] A rewording of the above provisions has therefore been suggested, which would eliminate all reference to responsibility for the separation and which would also eliminate the express provision as to the spouse who refuses to adhere, but which would specify certain situations (e.g. commission of serious criminal offence by claimant against other spouse; claimant maliciously bringing about his own indigence; long and gross neglect by claimant of his obligation to help to support the family) in which aliment could be denied as grossly inequitable.[53] The suggested provision has been strongly criticised on the grounds that the exceptional cases in which aliment can be denied are too limited, too specific and too inflexible: they involve a reference to fault in some cases but preclude reference even to gross fault in others: they are one-sided in that they operate to deny aliment to the alimentary creditor on the basis of his conduct but make no provision for taking into account the conduct of the alimentary debtor.[54] The criticisms made of the proposal would seem to suggest that it is difficult to begin with the general principle that fault is irrelevant to aliment between spouses and then to provide <u>specifically</u> for cases where it would be grossly inequitable to allow aliment.[55]

2.124. <u>Solutions proposed in recent Bills</u>. Several of the Bills on Scottish divorce law reform presented in recent years have contained provisions on willingness to adhere in relation to aliment. The Divorce (Scotland) (No. 2) Bill (1976) presented by

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[49] B.G.B. art. 1361(1).

[50] B.G.B. art. 1361(3).

[51] Gernhuber, <u>op. cit.</u> p.181.

[52] Entwurf eines ersten Gesetzes zur Reform des Ehe - und Familienrechts (1. Ehe R.G.) BT - Drucks V1/2577 (1971) pp. 43-44.

[53] <u>Ibid.</u> and new version at BT - Drucks 7/650 (1973).

[54] See Magnus, "Zur unterhaltsrechtlichen Harteklausel im geplanten Scheidungsfolgenrecht", Fam RZ 1974, 5-8.

[55] See <u>ibid.</u> and articles there cited; Lange, "Zum Entwurf eines Ersten Gesetzes zur Reform des Ehe - und Familienrechts vom 1.6.1973", Fam RZ 1973, 580-583; Bürgle, "Die Stellungnahme des Bundesrats zum Entwurf 1973 eines Ersten Gesetzes zur Reform des Ehe - und Familienrechts" Fam RZ 1973, 508.

Mr Iain MacCormick, M.P.[56] has a remedy-based provision which preserves the right of a spouse under existing law to claim aliment in an action of interim aliment where that spouse has reasonable cause for living apart by reason of the other spouse's adultery, unreasonable behaviour or desertion, and which extends that right to a spouse living apart without such reasonable cause provided the other spouse is unwilling to resume cohabitation[57]. The effect is that where spouses live apart by agreement, for example in order to obtain a consent divorce after 2 years' separation under the provisions of the Bill, a wife can raise a summons for aliment without stating in the summons that she is either willing to adhere or has reasonable cause for non-adherence. The husband can defend the action if he changes his mind and is prepared to take his wife back. If he does so, the husband's defence will be repelled and the wife will obtain aliment only if she has reasonable cause for living apart because of the husband's adultery, unreasonable behaviour, or desertion. The clause is really consequential on the proposed introduction by the Bill of divorce by consent after two years' separation. During the two years, a wife must be allowed aliment even though she is not willing to adhere and does not have reasonable cause for living apart. A husband who has not given his wife reasonable cause for living apart must be given the option of offering to resume cohabitation in lieu of paying aliment.

2.125. Our proposals: The main possibilities for reform of the present Scots law on the conditions (other than those relating to means and need) for entitlement to aliment from a spouse would seem to be as follows.

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[56] [Bill 23], 1975-6, ordered by the House of Commons to be printed on 17 December 1975: see clause 7. An identical provision appeared in earlier recent Divorce Bills.

[57] See clause 1(2)(d).

1. The requirement of willingness to adhere could be retained as a general rule but (a) the "just cause" exception in section 6 of the Divorce (Scotland) Act 1964 could be generalised (i.e. not limited to actions for interim aliment) and (b) a spouse separated by consent could be given a right to aliment and to seek the intervention of the courts to obtain it.[58] This would involve only minor changes in the present law. It would, however, mean picking out one form of conduct - desertion without just cause - as a bar to aliment while ignoring others which many people might regard as equally reprehensible. It also has the practical disadvantage that it can be very difficult to draw the dividing lines between desertion without just cause, desertion with just cause and separation by consent; or between genuine willingness to adhere and sham willingness to adhere. Not only may the situation be difficult to ascertain at any one point in time but different situations may merge almost imperceptibly into each other. A wife, for example, leaves her husband against his wishes although she does not legally have just cause for separation. At this stage she is in desertion. After some time she enters into an adulterous association with another man. In the course of time, the husband ceases to urge her to come back and accepts the situation, which thus develops into a separation by consent. Thereafter the husband sets up house with another woman. It is not obvious that the present law, or any suggested modification of it, achieves the best possible result in this sort of situation. It frees the husband from liability for aliment at the initial stage when, although the wife is in desertion, there may still be a hope of reconciliation since he has not completely broken, psychologically, with her. It imposes an obligation

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[58] An alternative way of achieving much the same result would be to abolish the requirement of willingness to adhere but to provide that a spouse would not be entitled to aliment if he or she was rejecting, without just cause, a genuine and reasonable offer to adhere.

obligation on him at the final stage when he has finally broken with the old situation, is establishing a new life and has assumed new responsibilities. The imposition of liability at that late stage looks suspiciously like a punishment of the husband's adultery.

2. The requirement of willingness to adhere could simply be abolished. This would make entitlement to aliment as between spouses independent of considerations of conduct and would avoid the disadvantages of the last solution. It would, however, involve recognising that the following spouses were entitled to aliment if the conditions as to need and resources were fulfilled (whatever view may be taken as to quantification).

(a) The spouse who leaves the matrimonial home for a penniless lover[59].

(b) The spouse who has tricked the other into marriage by, for example, pretending to be pregnant.

(c) The spouse who has tried to murder the other spouse or, a less extreme case, has been guilty of such cruelty that the other has been forced to leave the home.

(d) The husband who has abandoned his family for many years, leaving his wife and children in penury while he has lived in comfort abroad, but who has now returned poor, to claim aliment from the wife who has just begun to enjoy a good income from the small business she has built up single-handed over the years.

Some of these results are accepted by the present law and have been accepted for many years. All of them might be acceptable on the view that the innocent spouse has, or will have after reform of the divorce law, his remedy in divorce. We think, however, that the implications of a non-fault approach to aliment should be squarely faced.

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[59] The Law Commission give the example of the wife who does this: Working Paper No 53, (1973), para. 49. The West German Bundesrat give the example of the older, unemployed man who leaves his family for a younger woman and claims aliment from his working wife. Burgle, loc. cit. supra note 63 at p.514.

3. An attempt could be made to list particular circumstances in which a spouse would be disentitled to aliment. The German experience, however, demonstrates the dangers of this approach.

4. There could be a general provision that a spouse was disentitled to aliment if in the light of his conduct it would be unjust (or grossly unjust) to hold him entitled. This would cater flexibly for all hard cases but would have disadvantages. It would leave the law vague and uncertain, dependent on the subjective discretion of individual judges. It would invite time-wasting and embittering investigations of the matrimonial history and the dredging up of old grievances which could well impede reconciliation.

We invite views on the effect which conduct should have on entitlement to aliment and on the requirement of willingness to adhere in particular. Our own tentative preference, at this stage, would be for the first or second of the above solutions. As the second solution is most distinct from the present law and brings the central problem into sharper focus, we venture it as a proposition for consideration, and therefore suggest that it should no longer be a condition of entitlement to aliment as between spouses that the claimant is willing to adhere or has reasonable cause for non-adherence. (Proposition 27).

2.126. Parent and child: age limits. There is no age limit on the entitlement of a legitimate child to aliment from his parents. If the two conditions of need on the part of the child and superfluity of resources on the part of the parent are fulfilled, the right to aliment emerges no matter what age the child[60]: one of the leading cases concerned a "child" of 62.[61]

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[60] Erskine, Institute I, 6, 56; Maule v. Maule (1825) 1 W. & S. 266; Strathmore v. Strathmore's Trs. (1825) 1 W. & S. 402 at 405 ("It is perpetual and reciprocal".); Beaton v. Beaton's Trs 1935 S.C. 187.

[61] Beaton v. Beaton's Trs, supra (a claim against the father's representatives).

It does not matter that the child may have been self-supporting at some stage in his life. In the case of an illegitimate child the obligation can likewise be lifelong if the child is, through physical or mental incapacity, never capable of self-support.[62] It has, however, been held in the sheriff courts, following a dictum of Lord Watson in the House of Lords, that if the child once becomes self-supporting and then later falls into indigence, no right to aliment emerges.[63] To this extent there is, or may be, a difference in the rights of the legitimate and of the illegitimate child.

2.127. Although there is no age limit on entitlement at common law to aliment from a parent, there are age limits on the statutory powers of the courts to make decrees for aliment for children in particular types of proceedings. Thus, the Lord Ordinary's power to make an award of "maintenance" for children in or in connection with an action of divorce, nullity of marriage, separation or adherence is limited to children under 16 years of age.[64] This applies also to orders for "maintenance" of children under the Guardianship of Infants Act 1925.[65] The Illegitimate Children (Scotland) Act 1930 provides that:

> "The obligation of the mother and father of an illegitimate child to provide aliment for such child shall (without prejudice to any obligation attaching at common law) endure until the child attains the age of sixteen years."[66]

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[62] Marjoribanks v. Amos (1831) 10 S.79; Pott v. Pott (1833) 12 S.183; Oncken's J.F. v. Reimers (1892) 19 R.519; A.B. v. C.D. (1900) 2 F.610.

[63] Clarke v. Carfin Coal Co (1891) 18 R.(H.L.) 63 per Lord Watson at p.69; Anderson v. Fraser (1909) 26 Sh. Ct. Rep. 130; Archibald v. Wilkin (1911) 27 Sh. Ct. Rep. 313.

[64] Conjugal Rights (Scotland) Amendment Act 1861, s.9; Custody of Children (Scotland) Act 1939, s.1(1); Matrimonial Proceedings (Children) Act 1958, ss. 9 and 14.

[65] 1925 Act s.5(4) read with definition of "infant" in Guardianship of Infants Act 1886 s.8; Children and Young Persons (Scotland) Act 1932 s.73; Custody of Children (Scotland) Act 1939, s.1(1).

[66] s.1(1).

Although this expressly saves the potentially lifelong common law liability, its practical effect was to make sixteen the normal terminating age of an award in an action of affiliation and aliment.[67] The Affiliation Orders Act 1952, section 3, enables an award made in an action of affiliation and aliment to be extended beyond the age of 16 on the application of any person entitled to the custody of the child if it appears to the court:

> "that the child is or will be engaged in a course of education or training after attaining the age of sixteen and that it is expedient for that purpose for there to be a liability under the decree to make payments in respect of aliment after the child attains that age."

The extension may be for such period not exceeding two years from the date of the order as may be specified by the court. The period may be further extended by periods of up to two years at a time "but shall not in any case extend beyond the date when the child attains the age of twenty-one." Payments can be ordered to be made only to "the father or the mother of the child or a person [but not a local authority] entitled to the custody of the child."

2.128. It is perhaps worth noting in passing that for supplementary benefit purposes the obligation to maintain children is limited to children under the age of 16.[68] Orders requiring parents to contribute to the maintenance of children in local authority care can be made only in respect of children under 16 years of age.[69]

2.129. Comparative survey of other laws: In English law the powers of the divorce courts to make orders for the maintenance of children in matrimonial proceedings were amended in 1970 on the recommendation of the Law Commission.[70] The effect of the new provisions is that orders will normally be in such terms as to cease on the child's first birthday after the attainment of

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[67] Previously it had been common to make an award terminating at 7 (for boys) or 10 (for girls) with the possibility of extension. See Encyclopaedia of the Laws of Scotland, voce Aliment vol. 1, p.292.

[68] Ministry of Social Security Act 1966, ss. 22 and 36(1).

[69] Social Work (Scotland) Act 1968, s.78.

[70] Law Com. No 25 paras. 33-41, 43; Matrimonial Proceedings and Property Act 1970, s.8. See now the consolidating Matrimonial Causes Act 1973, s.29(3).

the school leaving age (i.e. at present maintenance will cease at 17) but may be made so as to continue up to the age of 18. Further, they may continue even beyond the age of 18 if it appears to the court that the child is, or will be, or would be if continuance is allowed, "receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also ... in gainful employment" or that "there are special circumstances which justify the making of an order ..."[71]. The Law Commission gave as the most obvious example of special circumstances the case where the child's earning capacity was impaired through illness or disability, but did not wish to limit the exception to this case. "If, for example, a wealthy father has promised his son an allowance until he attains 25 and the son has planned his career accordingly, we see no reason why, on a divorce, the court should not make an order which recognises the father's moral obligation ... On the other hand, we do not suggest that the court should in future, any more than it does at present, make an order which would compel the parents of, say, a permanently disabled child, to maintain him for life. To avoid hardship we think that there is a strong case for enabling the court on the break-up of the marriage to give effect to moral obligations which, but for the break-up, would have been fulfilled for a temporary period beyond the age of majority; but maintenance obligations of parents should normally end at the age of majority at latest."[72] In English law, there is no independent right to aliment on the part of the child so that the greater the avoidance of hardship in broken marriages, the greater the gulf between the legal position of the children of such marriages and the children of unbroken marriages.[73] This problem does not arise where, as in Scots law, the child has a right to aliment which is independent of his parents' matrimonial difficulties. More recently, the Law Commission have considered the duration of orders for child maintenance in the English magistrates' courts, taking the view that, in principle, the magistrates' courts should have the same powers in this respect as the divorce courts but making no firm proposals and inviting views.[74]

2.130. In France, as we have seen, there is no age limit on the parent's obligation to aliment his child,[75] although some authors argue that the obligation to nourish and raise the child imposed by article 203 of the civil code (as opposed to the general reciprocal obligation of aliment between ascendants and

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[71]Matrimonial Causes Act 1973, s.29(3).

[72]Law Com. No 25 paras. 39 and 40.

[73]See ibid. App. II para. 179 at p.144.

[74]Law Com. Working Paper No 53 paras. 141-153 (matrimonial jurisdiction) para. 160 (guardianship jurisdiction) para. 163 (affiliation proceedings). The present age limits are summarised at p.120 of the working paper.

[75]See para. 2.103. above.

descendants imposed by article 205) is impliedly limited to minor children[76]. In West Germany the minor unmarried child has an alimentary right which is privileged in certain respects,[77] but there is no age limit on the general obligation of aliment between ascendants and descendants.[78]

2.131. Our proposals: In discussing possible changes in age limits in relation to aliment for a child, there are two problems which must be kept distinct. The first is the age at which a child ceases to be entitled to aliment from his parent: if the child is in need and the parent in superfluity, should there be any age beyond which the child has no claim? The second is the normal duration of a decree for future aliment made by a court. Up to what age should a court in the ordinary case order a parent to pay aliment for a child? Should it be possible to extend the normal limits? The second problem relates to procedure rather than substantive rights. It does not involve any extra condition for the emergence of an alimentary right, but merely questions of the person to whom, and the mechanics by which, aliment should be ordered to be paid. We deal with this problem at paras. 2.184. and 2.185. below in the context of procedural matters. So far as the right to aliment is concerned, it is difficult to see how any age limit can reasonably be placed on the child's right so long as the parent is recognised as having a right to aliment if he is in need. Suppose, for example, that a man of 40 supports his widowed mother of 60, either voluntarily or because of a court order. A few years later she receives an inheritance and he falls into unemployment. He might feel a justifiable sense of grievance if told that, while he is bound to support his parents throughout their lives, they are bound to support him only up to, say, the age of 18. Justice may be thought to

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[76] See e.g. Carbonnier, Droit Civil, II pp.377, 382. Art. 203 is not expressly limited to minor children. See Civ. 12 dec. 1971, D. 1971, 689, Civ. 18 mai 1972, D.1972, 672 and see Nerson, R.T.C. 1973 p.115-119.

[77] See e.g. B.G.B. arts. 1602(2) (child not normally expected to resort to capital); 1603(2) (parent to share last resources with child); 1609(2) (first place in hierarchy of alimentary creditors).

[78] B.G.B. art. 1601.

require reciprocity in this sort of situation. In view, however, of the opinion of the English Law Commission that "maintenance obligations of parents should normally end at the age of majority at latest", we invite views on this important question. Whatever conclusion is reached we can see no justification for any distinction between legitimate and illegitimate children. We put forward for consideration the proposition that as under existing law, there should be no prescribed age on the attainment of which a child ceases to be entitled to claim aliment from a parent with a superfluity of means. The same rule should apply to legitimate or illegitimate children. (Proposition 28).

2.132. Parent and child: conduct. In the present Scots law, conduct does not affect the existence of the alimentary obligation between parent and child. Thus, a son has a claim against his father even although he has married against his father's wishes,[79] or brought about his own need by squandering his means in a life of dissipation.[80] This does not exempt the parent from his alimentary obligation any more than "the parent's vices would exempt the children from that duty".[81] No doubt, however, a child's conduct could have an indirect effect in determining the reasonableness and appropriateness of further education.[82]

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[79] Cf. Moncrieff v. Moncrieff (1735) 1 Pat. 162 (son "by his marriage and conduct in other respects offended his father").

[80] See Fraser, Parent and Child (3rd ed.) 107; Strathmore v. Strathmore (1825) 1 W. & S. 402 at 404, 405. In A.B. v. C.D. (1848) 10D. 895 the father founded on the son's dissipation intemperance and threatening conduct, the son pleading on his part that "whatever the pursuer's conduct might have been, the question now was whether he was to be allowed to starve". The court refused aliment following Maule v. Maule (1825)1W. & S. 266 in saying that it was not a case "for interference". The importance of the son's past conduct, as opposed to his future earning capacity, is not therefore clear.

[81] Elchies, Annot. p.31. Cf. Mays v. Keir (1889) 5 Sh. Ct. Rep. 71 at 73 ("even ... where a mother deserts her child, should such child gain more than it needs of this world's goods, a contribution to keep her alive, or at least off the parish, may fairly be deemed a legal as it is a natural debt".)

[82] See para. 2.102. above.

2.133. Comparative survey: Until 1972, French law was essentially similar to Scots law on the above points.[83] The alimentary obligation between ascendants and descendants depended on the concurrence of need on the one side and resources on the other. Fault was in general irrelevant.[84] One result was that a person who had been neglected by his parents in his childhood might find himself called upon to support them in their old age, the proceedings against him being initiated very often by the social services.[85] A new factor was added to the situation when it was proposed to give the parents of illegitimate children a reciprocal right to aliment. Here parental abandonment or non-recognition was a distinct probability and not merely a possibility. In its discussion of this question, the Commission on the Reform of the Civil Code at first toyed with the idea of making the right of the natural parent contingent on recognition or care of the illegitimate child while young. Then it was pointed out that the parents of legitimate children might also have abandoned their children. Finally, the Commission adopted a solution whereby both legitimate and illegitimate children could be excused from alimenting their parents or other ascendants if the latter had been guilty of various kinds of ill-treatment or neglect to the prejudice of the children's health, security, morality or education.[86] When the law on filiation was reformed by the law of 3 January 1972, a still more general solution was adopted. Article 207 of the civil code, which until then had simply provided that the alimentary obligation between ascendants and descendants was reciprocal, was amended by providing that when the alimentary creditor had himself seriously failed in his duties towards the alimentary obligant, the judge could discharge the latter of the whole or part of his alimentary debt.[87] This applies to both legitimate relationships and illegitimate relationships where filiation is established.[88] Although designed primarily to deal with the problem of the abandoning or neglectful parent, it is not limited to this situation and could apply to the child who had seriously failed in his obligations. As we have seen, the reform of 1972 enabled aliment for an illegitimate child to be recovered from a possible father, even though actual paternity could not be legally established. In this case, conduct is also relevant but in a different way. It is provided that the alimentary allowance payable by the alleged father may be due even after the child's majority if he is still in need, unless

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[83] See Pélissier, op. cit. pp. 133-145.

[84] However, a parent who was deprived of parental power lost his right to aliment (Code civil, art. 379) and so did the parent who abandoned his child to the Service de l'aide sociale (Code de la famille, art. 84).

[85] See Journal Official, debats, Ass. Nat. 1971-72 p.4337.

[86] See Travaux de la Commission de Réforme du Code Civil 1952 pp. 101-102 and 104 and art. 2 of the project adopted.

[87] Art. 207, as amended by law of 3 January 1972.

[88] Art. 334.

his need is imputable to his own fault.[89] In West Germany, aliment is due only at a lower level (the level which justice demands) if the claimant has brought about his indigence through his own immorality or if he has seriously neglected his own alimentary obligations towards the alimentary obligant or if he has been guilty of a serious offence against the alimentary obligant or one of his near relations: the alimentary obligation falls away altogether if it would be grossly unjust to make the obligant liable.[90] This rule does not, however, apply to the obligation of parents towards their minor unmarried children.[91] A similar provision is found in the Greek civil code.[92]

2.134. Our conclusions: In one respect, conduct is more important in relation to the alimentary obligation between parent and child than in relation to the obligation between husband and wife. A parent or a child cannot terminate his obligation by divorce.[93] Moreover, the proposal to give equal rights and liabilities to the illegitimate child raises in a more acute form the problem of the abandoning parent. Actions for aliment by adult children against their parents or by parents against their children are infrequent so that the possible delays and expense involved in investigating conduct would not clog the system. In this respect too the position is different from that between husband and wife where there is a practical argument for a clean and clear-cut solution. We invite views on this question. Our tentative view is that, if it is accepted that there should be a flexible measure of support ("such support as is reasonable in the circumstances")[94] and if the courts can take conduct into account in quantifying aliment,[95] then the conduct of the parties should not be taken into account in ascertaining entitlement to aliment. (Proposition 29). On the other hand, it is arguable that a child who has been abandoned by his parent should be able to argue that he has no obligation at all, not even an empty or merely theoretical obligation, to aliment that parent.

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[89] Art. 334-2.

[90] B.G.B., art. 1611(1).

[91] B.G.B., art. 1611(2).

[92] Art. 1486.

[93] We do not overlook the effects of adoption or of assumption of parental rights by a local authority, but these are very limited exceptions to the general rule.

[94] See Proposition 30 in paragraph 2.148.

[95] See Proposition 48 in paragraph 2.198.