


THE LAW and PRACTICE of LEGAL AID  
in SCOTLAND

by

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A thesis presented for the degree of  
Doctor of Philosophy (Ph.D.)  
University of Edinburgh  
1978



## P R E F A C E

It is well known that there is a long tradition in Scotland of the provision of free legal services to those who cannot afford to pay for professional assistance. The system can be traced back at least as far as 1424 when the organised practice of law in Scotland was in its infancy. Now, there is a comprehensive statutory system of legal aid and advice which covers most (but not yet all) aspects of legal business in Scotland.

What is missing however is an up-to-date exposition of the present law and practice set in its historical context. This work is an attempt to fill this "unmet need", rather than to explore those gaps in the system of legal services usually so labelled. As will be apparent, the task of writing this thesis, particularly the latter parts thereof, has not been made easy by the turgid nature of the statutory materials which comprise the bulk of the subject matter. Perhaps legal aid legislation is not as bad in this regard as some of the more esoteric aspects of Social Security law, but the Parliamentary draftsman receives no plaudits from this writer for rendering immediately intelligible much information vital to the law practitioners. That Parliament has so conspicuously failed in its task of making the law easy to understand is the raison d'etre for this work.

However, I have been extremely fortunate in receiving much valuable assistance from many colleagues, both in the Solicitors' profession and in the University, in unravelling the mysteries of the topic. In mentioning three by name, I do not wish to belittle in any respect the contribution made by the others. Firstly, Professor E.M. Clive, Professor of Scots Law at Edinburgh University, who acted as

my research supervisor throughout, has read and commented upon each Chapter as it was written. But for his painstaking care in this task, there would be many more errors of content and style herein than undoubtedly remain. Mr. James R. Dandie, S.S.C., Chairman of the Legal Aid Central Committee, has likewise seen the whole work in draft form. His assistance has been particularly valuable on the many points of practice of which an author not daily connected with legal aid is inevitably unaware. Through his good offices I have also had access to Central Committee minutes, which have proved most useful. Thirdly, Dr. G. Campbell H. Paton, LL.D. has brought to bear on Part I of the work his many years of experience in researching and teaching legal history. I am happy to acknowledge the many helpful suggestions which he has made for improving my treatment of an unfamiliar subject. To these and all the many disparate sources of encouragement, I am pleased to extend my warmest thanks.

Parts II and III of the work, dealing broadly with civil legal aid, follow to a great extent both in content and division of subject-matter the approach adopted in England by Messrs. Matthews and Oulton in their book entitled Legal Aid and Advice. The statutory materials on this aspect of legal aid are very similar in Scotland and England. What is different is of course the practice on a number of important points and, to a lesser extent, the interpretation of the statutory provisions by the Courts and the Law Society. But the general treatment of the problems inherent in similar technical legislation used by Matthews and Oulton has proved so useful that I have frequently followed their scheme of analysis. To this extent, the originality of this work is lessened, but I hope there is adequate compensation in Parts I, IV and V.

The typescript is largely the work of Mrs. Jeanette McNeill. She has devoted much of her spare time in the past months to a daunting task, and kept her head while many round her were losing theirs. I am most grateful for her patience and care.

The law is stated as at 1st March 1978.

Charles N. Stoddart

Edinburgh,  
24th April 1978

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A B S T R A C T

This thesis is an attempt to conduct for the first time in Scotland a comprehensive analysis of the history and practice of legal aid and advice. There is a long tradition of legal aid being provided gratuitously for poor persons by Scots lawyers, but there is no single work dealing with the development of the subject from its roots in the 15th century to the present day.

The work is divided into five parts. Part I is purely historical and traces legal aid in Scotland from 1424 to present times. Parts II to V deal in detail with legal aid and advice as presently available under the Legal Aid and Advice (Scotland) Acts 1967 and 1972, and are intended primarily for the practising lawyer. Part II deals generally with legal aid administration, Part III deals with civil legal aid under s.1 of the Legal Aid (Scotland) Act 1967, Part IV deals with criminal legal aid, and Part V deals with legal advice and assistance.

Thus, the emphasis of the work is practical, against an historical background. For example, there is no attempt to deal with the "unmet need" for legal services in Scotland, nor to probe the question of whether legal services of all types should be nationalised. Rather, the purpose of the author has been to try to satisfy another type of "unmet need": the need for an up-to-date, properly vouched and reasoned exposition of present-day law and practice - as required by the law practitioner. The case law in Scotland is fully dealt with and the policy of the legal aid authorities in Scotland in relation to various matters is also indicated in the text.

PART I

HISTORICAL SURVEY

## CHAPTER I

### THE EARLY HISTORY TO 1800

#### Prior to 1532

Like many aspects of Scots law, legal aid was made the subject of legislation in the fifteenth century. While it is popularly thought that the credit for this belongs to James I, it may well be that the origins of the system are to be found not in Scotland, but in France. From 1329 to 1460 the Auld Alliance produced considerable changes in Scottish society and the mechanics of government, with the importation into Scotland of some of the practices of the French political and social system. The French Parliament had made provisions for counsel for the poor in 1400 and 1414; it may therefore be no coincidence that legislation followed in Scotland when James I, who is generally regarded as the father of the statute law of Scotland, came to the throne in 1424.<sup>1</sup>

One of the tasks which he took upon himself was to improve the machinery of justice which (unlike the situation in England) had been in disarray and disrepute, mainly as a result of the absence of effective executive authority, the lack of a supreme Court and an organised legal profession. In 1424 an Act "Anent complaintes to be decided before the Judge ordinar" was passed, the purpose of which appears primarily to have been to order judges to deal with all bills of complaint which had formerly come before the King, and generally to do justice to all and sundry.<sup>2</sup> The reason for the enactment was

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1. See Introduction to Acta Dominorum Concilii Vol.II, (Stair Society) Edited by Neilson & Paton (1918) at p.lxiii. See also The Sources and Literature of Scots Law (Stair Society Vol.1) p.229.

2. Act 1424 c.45 (12 mo Edition); A.P.S. 1424 c.24.

the gross laxity in performance by the judges of the time, an evil which seemed to pervade all manner of causes, for the Act went on to provide:

" .... And gif there bee onie pure creature, for faulte of cunning, or expenses, that cannot, nor may not follow his cause, the King for the love of GOD, sall ordain the judge, before quhom the cause suld be determined, to purwey and get a laill and a wise Advocate, to follow sik pure creatures causes: And gif sik causes be obtained, the wranger sal assyith baith the partie skaithed, and the Advocatis coastes and travel ...."

This legislation remained on the statute book for over five centuries,<sup>3</sup> but its terms, if looked at literally, are open to misconstruction. In the fifteenth century the judges and Advocates referred to were not members of any centralised body; many judges had only a localised jurisdiction whether temporal or spiritual, while the term "Advocate" meant nothing more than a person knowledgeable in law. Advocates in this broad sense had emerged as a professional class by the middle of the fifteenth century, but their practice was to a great extent only before the ecclesiastical courts or Parliament itself, where the most privileged causes were dealt with.<sup>4</sup> None of these practitioners were licensed by any public authority<sup>5</sup> and it was only with the establishment of the College of Justice in 1532 that the profession began to figure more prominently in the records.

Little appears to be known about the sort of Poores' causes to which the statute applied in early times, although there appears to

3. It was repealed by the Legal Aid and Solicitors (Scotland) Act 1949, Schedule 8, Part I.
4. For the later position see Donaldson The Legal Profession in Scottish Society in the Sixteenth and Seventeenth Centuries 1976 J.R. 1.
5. Bankton, Institute of the Laws of Scotland iv.3 (1752, Vol.II, p.485).

be no restriction as to the type of cause in which the judge was compelled to obtain legal assistance for a party. It is likely that assistance was available for all the common actions of the time: actions of spuilzie, lawburrows, assythment and debt seemed to be predominant.<sup>6</sup> Matrimonial causes were generally the province of the Church courts which had their own forms of procedure, while in criminal causes legal assistance was not available until 1587.<sup>7</sup> Nor does it appear that a party had to undergo any form of means test, although presumably he had to satisfy the court of his poverty. Another matter on which the Act is silent is on the question of free legal advice in matters not involving litigation; it appears to apply only to Court proceedings.

#### 1532-1686

Information on the system is inevitably sparse prior to 1532, the written records being fragmentary or simply non-existent. Information becomes more available after the setting up of a centralised court with power to regulate its own procedure. The establishment of such a court brought with it the beginnings of an organised legal profession and it was provided in 1532 "that there be ane number of advocates and procuratoures chosen, and to be chosen to the number of ten persons, that shall be called general procuratoures of the Council".<sup>8</sup> Although eight such persons were selected, it appears that poor persons causes were not being dealt with, for in a letter to the Court of James V in 1535 the King complained

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6. See generally Introduction to Scottish Legal History (Stair Society) Chapters II and XXIII.

7. See infra., p.5 et seq.

8. Act 1537 cap.36-41 (12 mo edition); A.P.S. 1532 c.2.

"we ar daily infestit be the complant of divers our pur legis perservand for justice, quhilke ar postponit tharfra in default of advocatis to procur for thame, and thai have na expenssis to do the samin,"

and ordered that, for the honour of God and the help of such person

"ane man of gud conscience to that effect be choisin be you quhilk sall be callit advocatus pauperum, quhem ye sall cause sweir that he sall administer to all our liegis cumand to him for help that will mak faith thai have nocht to persew justice withall of that awn."

It was further provided that this advocate was to be paid the sum of £10 annually from the Treasury and could be deprived of his right to plead before the Court if he failed to discharge his duty.<sup>9</sup>

Two persons were appointed in consequence of this direction and by Act of Sederunt made on 27 April 1535, Friday of each week was assigned

"for calling of all summondis and actionis concerning the pure folkis quen opportunitie may be had for the kingis materis, and als to be sene and considerit be the lordis quha are pur folkis be inspectioun and be the aith of the procuratouris declarand that they tak no profit for procuratioun for sic pur folkis."<sup>10</sup>

It is in these provisions that the rudiments of what came to be known as the Poor's Roll are found: the applicant's legal representative was appointed for him by the profession, but the Court itself had to be satisfied of the applicant's poverty before admitting him. In a sense, all that occurred in the history of the Poor's Roll in civil cases thereafter was simply refinement and adaption of these fundamental rules.

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9. Acta Dominorum Concilii in Public Affairs 1501-1554, pp.434-435. For a selection of cases in which poor litigants were involved at this time, see Acta Dominorum Concilii et Sessionis 1532-1533 (Stair Society 1951) Nos.19, 52, 58, 67. For the evident anxiety regarding the delay and expense in Poor's cases see Ballingal v Badisone, ibid., No.75 and George and Blackwod v Wallace of Cragy and Others, ibid., No.105.
10. Ibid., 439. This provision seems to be the basis for the practice which arose of a report being given to the Court as to poverty and probabilis causa litigandi, a practice which does not appear to have become formalised until 1784.

On the criminal side, legal assistance was not so readily available. The criminal law and administration of sixteenth century Scotland was characterised by many of the abuses already apparent in civil cases; no central court existed, trials being taken either by the Justice-General, a justice-depute, a special Commissioner of Justiciary or Courts of Barony or Regality; little uniformity of practice was evident; and the accused did not enjoy many of the rights considered today as basic to a fair system of trial.<sup>11</sup> In addition, the general lawlessness of the time encouraged the most summary of proceedings when the accused was apprehended, with all the resulting injustices.

In an attempt to remedy some of these, on 29th July 1587 the Scots Parliament passed a number of important measures. By the Act 1587 c.38 (A.P.S. 1587 c.16) it was provided:

"That na Advocate, nor Praeloquitor, be nawaies stopped, to compeir, defend and reason for onie person accused in Parliament for treason, or utherwaies: Bot that quhatsumever partie accused sall have full libertie to provide himselfe of Advocates and Praeloquitores, in competent number to defend his life, honour and land, against quhatsumever accusation; Seing the intending thereof, suld not prejudge the partie of all lauchfull defences: as gif it were pro confesso, that the accusation were trew .... "

Further, the Criminal Justice Act 1587 provided inter alia that justice-ayres were to be held twice a year in every shire; the whole case against an accused was to be heard in his presence (not a common occurrence at the time); juries were not to be tampered with after they had been enclosed; and the representation of the accused was confirmed thus:

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11. See generally, Introduction to Scottish Legal History (Stair Society) pp.37-43.

"And that all and quhatsumever Lieges of this Realme, accused of treason, or for quhatsumever crime, sall have their Advocates and Procuratoures, to use all the lauchfull defences quhem the Judge sall compell to procure for thame, in the case of their refuse, that the sute of the accuser be not tane pro confesso .... "12

That these provisions were a great advance in the criminal procedure of the time is not open to doubt. What was apparently open to doubt was the effect of these provisions from the point of view of any right of an accused to legal representation. For over three centuries the profession certainly accepted as a duty the defence of poor persons on criminal charges, but in Graham v Cuthbert 1951 J.C. 25, Lord Cooper refused to uphold an argument that the Act of 1587 c.91 granted every accused person, rich or poor, a statutory right to be provided by the Court with gratuitous legal assistance for the conduct of his defence. He doubted<sup>13</sup> " .... whether the Act of 1587 had anything whatever to do with the provision by the Court of counsel for the defence, either to poor or to rich. The problem in 1587 was an entirely different one, viz. to remove some of the scandale which then diegraced the criminal administration of the time, and habitually led to the accused being condemned (and often executed) unheard ("tane pro confesso"), .... " According to Lord Cooper, all that the Act of 1587 c.91 did was to authorise the presentation of the defence case by an advocate whom the accused had himself retained under the Act of 1587 c.38. The practice which later grew up after the establishment of the High Court in 1672 of requiring the presence of counsel to

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12. Act 1587 c.91 (12 mo edition); A.P.S. 1587 c.57. It appears that the other reforms contained in the Act were largely ineffectual for at least another century until the founding of the High Court of Justiciary in 1672.

13. At p.29.

defend "poor" prisoners was not so much forced upon the legal profession by the Court as accepted by the profession as a munus publicum.<sup>14</sup>

Whether or not Lord Cooper was correct in his view, there is no doubt that a criminal bar emerged after 1587, lay representation becoming an exception. In some cases the accused was undoubtedly of little or no means, but might have more than one advocate appointed to act for him.<sup>15</sup>

There appears to be no evidence that the practice of the civil courts regarding legal aid was regulated by any other legislative provision until the latter years of the seventeenth century. This absence may be explained by two factors: firstly, the political turmoil of the time left little time for what is now called "social welfare" legislation; and secondly, the Books of Sederunt for the years 1608-1626 went astray in the later seventeenth century.<sup>16</sup> The profession of 'lawyer' was still basically unified until about 1650 and it must be concluded that the annual appointment of Advocates for the Poor continued throughout the whole period, those appointed appearing in such cases as the applicant's poverty justified. Nor does the establishment of the Court of Session seem to have brought with it any comprehensive collection of the Rules of Court; although the Lords had power to make "rules and statutes for ordering of the Court",<sup>17</sup> these were generally made ad hoc to cure whatever abuses were rife at any particular time.

14. Ibid., p.30. For a fuller discussion of the effect of this case on contemporary criminal practice, see Chapter IV, infra.
15. See generally on the question of representation in criminal cases, the Introduction by Sheriff J. Irvine Smith to Selected Judiciary Cases 1624-50, Vol.2 (Stair Society) pp.xxii to xxvi.
16. On this disappearance, see Hannay The College of Justice (1933) p.148.
17. Ratified by the Act 1540 c.93 (12 mo edition); A.P.S. 1540 c.10.

The practice of appointing Writers to the Signet as Writers for the Poor seems to have originated at some time before 1663, although it is not clear exactly when and how this became a regular feature. The Minutes of the W.S. Society for 8th June 1663 illustrate that even then the system was not formalised. On that day,

"It was complained that some of the brethern were appointed Writers for the Poor too frequently, and therefore the commissioners and brethern ordain that the lord secretary be spoken to, and the he be desired to speak to the Lords of Session, that they nominate none to Writer for the Poor until a list be given in by the Keeper of the Signet and the commissioners of such of the brethern as they shall judge fit to be nominated each year for the poor, so that there may be an equal burden."<sup>18</sup>

In 1664 an unsuccessful application was made to the Lords to exempt commissioners for the writers from being appointed as Writers for the Poor, and the Minutes record the appointment of writers for that year.<sup>19</sup>

Such appointments were again made on 6th November 1694, 9th November 1696 and 7th November 1698.<sup>20</sup>

#### 1686-1800

Throughout the century from 1686 to 1784 it appears that generally the Poor's Roll was subjected to misuse by lawyer and litigant alike. This is evidenced by a number of Acts of Sederunt, the first of which is dated 20th November, 1686 when it was ordained:

"That any petitiones which shall be given in hereafter by persons craving the benefite of the Poor's Roll shall condescend upon the processees wherein they are pursuers or defenders, upon account whereof they desire that benefite and that the warrand for enrolling them amongst the poor shall be restricted to these processees allennary, and the warrand to continue only for three years, unless the same be renewed."

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18. See History of the Society of Writers to the Signet: Edinburgh, (1890) pp.292/3.
19. Ibid., pp.295/6.
20. Ibid., pp.339, 344, 350.

These provisions are in contrast to the earlier practice of admitting those who appeared "pur be inspectioun" and whose representatives swore to act gratuitously;<sup>21</sup> also significant is the three year period for which admission initially persisted, for one of the oldest abuses of process was for poor persons' litigation to come last in the judicial calendar, which in any event included causes long delayed.<sup>22</sup>

Another common feature of poor's litigation appeared to be the passing on of cases from one counsel to another, probably because the original counsel had found more gainful employment. In 1710 the Lords were forced to ordain ".... that the advocates first employed for the poor in any cause, continue advocates therein, until the cause be finally decided"<sup>23</sup> and in 1742 they attempted to formalise procedure again by recommending to the Dean and Faculty of Advocates, and the keeper (of the sederunt book) and Writers to the Signet that lists of advocates and writers for the poor to be given to the clerk of Court, to be presented to the Lords and marked in the sederunt book, presumably so that both Bench and Bar would know who was appointed for that year.<sup>24</sup>

The late seventeenth and early eighteenth centuries saw the emergence of separate persons acting as agents in Court, even although they were not legally qualified nor indeed admitted as Writers to the Signet, and the rudiments of the divided profession are to be found in

21. cf. A.S. 27 April 1535, supra., p.4.

22. It appeared that the Court sittings themselves were seriously inconvenient to poor litigants, even from the 16th century: see Hannay The College of Justice p.138. This Act of Sederunt itself does not appear to have been wholly successful: on 16 July 1708 the Lords refused a gratis warrant in respect that report of the Advocates for the Poor bore not that the petitioner had probabilem litigandi causam, but only that he deserved the benefit of the Poor's Roll: see Brown's Supplement V.52.

23. A.S. 9th June, 1710.

24. A.S. 16th June, 1742.

this period.<sup>25</sup> That such agents were in any event accustomed to practise before the lower courts is beyond dispute<sup>26</sup> and it is reasonable to suppose that since the procedures of such courts were modelled on Court of Session practice,<sup>27</sup> the habit of appearing gratuitously for poor persons may well have become established, even although it does not appear to have been regulated by legislation other than the Acts of 1424 and 1587.<sup>28</sup> Nor were there any regulations for admission as an agent in the inferior courts until 1825 and the records of those courts themselves can by no stretch of the imagination be described as complete.<sup>29</sup>

The oldest of these inferior courts was of course the Sheriff Court which had both criminal and civil jurisdiction, even before heritable jurisdiction was abolished in 1748. Its main pre-occupation in civil matters appears to have been with spuilzie, tenancy causes, violent occupation of land, lawburrows and the like. The standard of the bench does not appear to have been particularly high<sup>30</sup> until after

25. For the general history of how this occurred, see the Introduction to Begg, Treatise on the Law of Scotland relating to Law Agents, Edinburgh, 1873.
26. Ibid., p.313, where Bankton is quoted as describing them as "advocates of lower rank".
27. Act 1540 c.72 (12 mo. edition); A.P.S. 1540 c.7.
28. In Graham v Cuthbert 1951 J.C. 25 L. Cooper doubted (at p.31) whether the Act of 1587 ever applied to the Sheriff Court, but it may have applied to other inferior courts.
29. For an account of what records are available, see e.g. Thomson, The Public Records of Scotland (1922).
30. A litigant in Perth Sheriff Court in 1551 protested against the Sheriff and his deutes being judges in his action which was "greit and wechty" requiring "men of witt, knowledge and understanding quhilkie can nocht be had in the Sheriff Courts of Perth, the Sheriff and his deutes (being) of ower small knowledge and understanding": Acta Dominorum Concilii in Public Affairs, p.610. In 1549 the Sheriff of Bute was apparently unable to write: see The Sheriff Court Book of Fife (ed. Dickinson, 1928) Introduction p.ciii.

the Heritable Jurisdictions (Scotland) Act 1747, when new rules of Procedure were made, again largely based on Court of Session models.<sup>31</sup> Again it seems a reasonable supposition that the abuses inherent in the Poor's Roll System in the Court of Session spilled over into the inferior courts, for the whole issue of admission to the Poor's Roll seems to have come to a head in 1784.

This is evidenced by the preamble to the Act of Sederunt of 10th August 1784. It narrates:

" .... and whereas the Acts of Sederunt of 20th November, 1686, 19th June 1710 and 16th June 1742 are inadequate for the good purposes thereby intended, or have fallen into disuse; and whereas the present form of admitting such poor persons as aforesaid, to the benefit of the Poor's Roll, and of conducting their causes after such admission, is attended with many inconveniences, as well as to themselves as to others, in so far as such poor persons are often at a loss to whom they should apply for assistance, and that for want of proper information being given to the advocates and writers for the poor, many are admitted to the benefit of said Roll, who are not entitled thereto, some who have good causes meet with undue delays, and others are continued upon the said Roll, when, from the alteration of their circumstances, they ought not to be so continued, or when by the production or proof of the adverse party, it may appear their claims are without any just foundation, and, in general, that for want of proper agents, the causes of such persons are neglected or misconducted, to the great detriment of the poor suitors, to the oppression of the adverse party, and to the great trouble of this Court .... "

and prefaces what is really the first comprehensive code relating to admission to the Poor's Roll.

The Act specified that six Advocates for the Poor should be appointed annually instead of four and that both the Writers to the Signet and agents<sup>32</sup> should each nominate four of their number to be

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31. These appear to have been made by the Sheriffs themselves: see Introduction to Scottish Legal History (Stair Society) p.421.

32. This appears to mean all the agents practising in the Court of Session who were not Writers to the Signet. See Begg, Treatise on the Law of Scotland relating to Law Agents, pp.10-11.

writers and agents for the poor. The names of these persons were to be entered in the Books of Sederunt. No person was to be admitted to the Poor's Roll unless he produced a certificate from the minister and two elders of the parish in which he resided, certifying that of their own knowledge, the party was in indigent circumstances and unable to prosecute his or her claim in a court of law. Provision was further made for petitions for admission to the Poor's Roll to be intimated by entry in the minute book and on the walls of court ten days before being remitted to the advocates and writers for the poor,

".... to the end that the adverse party may have an opportunity of laying a state of the case before the said advocates and writers, for the better enabling them to make their report to the lords, concerning the petitioner's having a just title to be admitted to the benefit of the Poor's Roll, and a probable cause of litigation."

The Act went on to provide that the duty of acting as Poor's agents should rest alternately on the Writers to the Signet and other agents and that when the Lords remitted the petition of a poor litigant to the advocates and writers the remit was to name the advocates and writers or agents who were to act for the applicant. It was the duty of the writer or agent to draw up a full memorial and state the petitioner's case, and to lay this before the advocates and writers named in the remit, so that they could make their report. If their report was favourable to the petitioner, the Lords were enjoined to appoint the same advocates and writer or agent to act for the petitioner

"and continue their services and assistance, as herein directed, until the final issue of the petitioner's cause, even although such advocates, writer or agent should during its dependence, cease to be in the respective list of advocates, writers, or agents for the poor."

It was lastly provided that warrants then existing for the benefit of the Poor's Roll were not to continue in force for longer than a year, and warrants subsequently granted were to last for two years only, unless renewed by petition to the Lords.

The features of this code which were to persist were that the report on poverty was to be taken from the hands of the legal profession and placed with the Church; the opponent was to be given an opportunity of objecting to the applicant's admission, which of course meant that probabilis causa litigandi had now to be considered more carefully; the reporters to the court on this question were to be provided with proper written information; and the provision as to continued representation throughout the case were confirmed.<sup>33</sup>

Such regulations were symptomatic of the revival and reconstruction of Scots law which featured at the time. Law had become systematised; the Institutional writers, in particular Stair, had introduced a whole new era in legal development. Although abuses still existed, the more settled political state of Scotland was conducive to law-making and the provision of remedies. Although the 19th century was to see a drastic re-organisation of the Courts, law became more accessible to the population and the legal system gained a certain amount of respect, not least of all from the law makers themselves. It is significant that at no time since 1424 does it appear that poor litigations were not carried on by the Scottish legal profession; the service provided, although sometimes not of the best, appears to have been continuous.

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33. Case law of the 18th century indicates that admission to the Poor's Roll exempted a poor litigant from being found liable in expenses: see Crinzean v Gibb (1749) M.10555 and Paton v Adamson (1722) M.7669.

## CHAPTER II

### THE PERIOD FROM 1800-1937

#### Introduction

The period from 1800-1937 saw a great expansion both in the numbers of lawyers admitted to practise and in litigation itself.<sup>1</sup> Inevitably, work on the Poor's Roll expanded along with the tide, necessitating further regulation by the Courts. These Courts themselves were subjected to considerable re-organisation, the main feature being that the Sheriff Court emerged as a much stronger institution. This Chapter deals with the legislative framework of the Poor's Roll as it developed at each level.

#### The Sheriff Court

The establishment of a Poor's Roll in the Sheriff Court was recommended by the Commissioners on the Courts of Justice in Scotland in 1822.<sup>2</sup> In some counties at this time arrangements existed among local agents for considering applications, but such arrangements were informal. While the Commissioners also recommended that the Court should have power to deprive a litigant of the benefit of the Roll at any stage of the proceedings when his case no longer warranted it, these recommendations were not immediately carried out. The first detailed provisions dealing with the Poor's Roll in the Sheriff Court appeared on 12th November 1825 as an inclusion in a general "Act of Sederunt Relative to the Form of Process in Civil Causes before the Sheriff Courts", passed as a result of the Court of Session Act 1825.<sup>3</sup>

1. To instance only one professional society, in 1625 there were over 60 members of the W.S. Society; in 1840 there were over 600.
2. 12th Report, Charges of Agents or Law Practitioners before the Inferior Courts 1822 (595) VIII 293 at p.70. (Parliamentary Papers)
3. The rather misleading short title of this Statute does not reveal the fact that the Act gave the judges of the Court of Session power to regulate procedure in the inferior Courts. The full title of the Act is "An Act for the better regulating of the Forms of Process in the courts of law in Scotland".

Chapter XXI of the Act of Sederunt is as follows:

"Section 1: As parties, from poverty, are sometimes unable to pursue or defend any civil or criminal action, the Procurators of the court shall annually appoint one or more of their number to act as Procurators for the Poor gratis, such appointment to be approved of by the Sheriff.

Section 2: Application for the Benefit of the Poor's Roll shall be made by petition, along with which there shall be produced a certificate, signed by the minister of the parish, or by the heritor on whose lands the pauper resides, or by two elders, bearing, that it consists with their personal knowledge, that the person prosecuted, or who means to bring the action, is not possessed of funds for paying the expense thereof. This petition shall be remitted to the Procurators for the Poor, who shall intimate the petition to the other party; and after hearing both parties, or inquiring into the case, report their opinion specially to the Sheriff, whether the petitioner has a probabilis causa litigandi. On considering which report, the Sheriff shall either refuse the petition, or remit to one or more of the Procurators for the Poor, who shall attend to and conduct the cause to its final issue; and the pauper shall not be liable in payment of any of the dues of court, or fees to the Procurator, or to the officer, except actual outlay, unless expenses shall be awarded to him in process."

The broad similarities between these provisions and those already applicable in the Court of Session will be immediately apparent, but it will be noted that they also purport to apply to criminal cases as well as civil.<sup>4</sup>

In 1839 this Act was replaced by a more detailed set of provisions regulating Sheriff Court procedure.<sup>5</sup> The rules regarding the Poor's Roll contained in Section 134-136 of that Act remained substantially the same, although it was now provided that the Agent for the Poor originally conducting the case was to see it through to its

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4. This point does not appear to have been confirmed in law until 1962, when the Law Society of Scotland sought Counsel's Opinion on whether the equivalent Rules in Schedule I to the Sheriff Courts (Scotland) Act 1907 applied to criminal cases, albeit their civil "flavour" had been removed by the Legal Aid (Scotland) Act 1949. Counsel's Opinion confirmed that criminal cases in the Sheriff Court had still to be conducted by Agents for the Poor. See infra Chapter IV, pp.65-67.

5. A.S. 10th July 1839.

final issue, even if he had in the meantime ceased to be an Agent for the Poor; no persons, except these Agents, were to conduct any such case; and the Sheriff was given power to deprive a party of the benefit of the Poor's Roll.<sup>6</sup> The Sheriff was also given power to relieve the Agent for the Poor from paying the expenses of witnesses.<sup>7</sup>

In 1877 the rules for appointment of Poor's Agents were altered to give the Sheriff further powers of regulation. By the "Act of Sederunt anent Procurators for the Poor in the Sheriff Court"<sup>8</sup> the Sheriff was enjoined to order an annual meeting of all the Agents practising in his court for the purpose of nominating one or more of their number to act as Poor's Agents for a period of a year in each of the counties or districts within his jurisdiction. At the meeting, the Agents were to be elected by a majority and the names of those nominated were to be reported to the Sheriff who had power to confirm these nominations in whole or in part, or to decline to do so. If the Agents failed to meet or report their nomination or if the Sheriff declined to confirm the nomination, the Sheriff might himself appoint an Agent to act for the Poor, or alternatively appoint another meeting of the Agents to try and nominate someone to act for the Poor; if this failed, then the Sheriff might appoint someone himself. The Sheriff Clerk was to give formal notification of the appointments. The Agents appointed were given the specific duty of acting for poor persons on criminal charges before the circuit Court and to forward to the Agent for the Poor at the circuit town any recognitions or other information available. Agents were also bound to co-operate with their colleagues Poor Agents in other districts.<sup>9</sup> It was subsequently provided that an Agent

6. Ibid., s.135.

7. Ibid., s.136.

8. A.S. 16th January, 1877.

9. Ibid., ss.2-7.

for the Poor was not liable to pay the expenses of witnesses nor the fees of Sheriff Clerks, Shorthand writers, Sheriff Officers or Bar Officers.<sup>10</sup>

Another important change in procedure was made by the Act of Sederunt of 4th February 1903, whereby the certificate of poverty might henceforth be granted not only by the minister or elders of the applicant's parish of residence or the heritor on whose lands he resided, but by the local Inspector or Assistant Inspector of Poor (subsequently a Public Assistance Officer) being a person more likely to be aware of the applicant's circumstances.

All of these rules were substantially repealed and re-enacted in the Sheriff Courts (Scotland) Act 1907.<sup>11</sup> Section 51 of that Act gave the Sheriff power to admit parties to the Roll if the report of the Agents for the Poor was favourable. Rules 152-169 of Schedule I of the Act provided the machinery. One alteration worthy of note was that the Certificate of Poverty no longer required to bear that it accorded with the granter's own knowledge, but only that the applicant was, through poverty, unable to pay for the conduct of legal proceedings.<sup>12</sup> Nor was there any procedure by which an Inspector could be compelled to grant a certificate, whereas under the previous procedure the minister was obliged to set forth the applicant's circumstances to the best of his knowledge and belief.<sup>13</sup> Rule 166 confirmed that the service to be provided was to be gratuitous: unless expenses were awarded against and

10. A.S. 4th December, 1878, s.13.

11. Under the 1907 Act, the Certificate of Poverty could only be granted by the Inspector of the Poor.

12. See Rule 162 and Wallace, Practice of the Sheriff Court in Scotland (1909) p.337.

13. Ibid.

recovered from the opponent, the Agent had no claim for fees, but the litigant would be liable to the Agent for outlays incurred with his sanction. Likewise Court dues were only exigible if recovered from the opposing party.<sup>14</sup>

#### The Court of Session

As already indicated, the first real code relating to the Poor's Roll in this Court was contained in A.S. 10th August 1784.<sup>15</sup> The nineteenth century saw a number of improvements to this code, all of which appear to indicate that abuses were still prevalent. These related mainly to the process of admission and the conduct of the case thereafter.

The preamble to A.S. 11th July 1800 indicated that the previous regulations had in general proved salutary and useful, but required additions. Art.1 required that the whole of the regulations passed in 1784 should in future be strictly enforced, which indicates that in 1800 the reverse was true. In particular more information was to be given about the applicant's personal circumstances and whether he was involved in any other litigation at the time.<sup>16</sup> An additional certificate of intimation was to be lodged, stating that the adverse party had been appraised of the nature of the case; and when the petition was remitted to the Advocates and Writers for the Poor, they were to delay making their report for fifteen days in order that there might be an opportunity of receiving full information from both parties on the subject.<sup>17</sup> The names of the lawyers acting were to be marked on the papers and no-one

14. Sheriff Courts (Scotland) Act 1907, Sch.1, Rule 168: see also A.S. 7th March 1908, s.5.

15. See supra Chapter I, pp. 11-13.

16. A.S. 11th July 1800, s.2.

17. Ibid., s.3.

else was to act unless his employment was sanctioned by the Lord Ordinary; the penalty for non-observance of these rules was that if the adverse party objected to the person(s) acting, the whole proceedings were liable to be opened up and set aside, or the Court might apply such other remedy as the circumstances required.<sup>18</sup> Finally, a record was to be kept of the applications made for the benefit of the Poor's Roll, in order that there might be no improper renewals or concealment of former applications.<sup>19</sup>

In 1819 abuses were still prevalent, for the preamble to A.S. 16th June 1819 states:

" .... And whereas the Poor's Roll has of late years increased in number in a proportion greater than the circumstances of the times seems to warrant; whereby there is reason to believe, that many persons have got upon the Poor's Roll who are not proper objects for it, and have thereby obtained a great advantage over their adversaries, some of whom are in circumstances little better than themselves; And whereas it is therefore expedient that provisions should be made, which, while they secure the benefit of the Poor's Roll to those who really deserve it, may, at the same time exclude those who are not proper objects .... "

The Act extended greatly the provisions of the earlier law. Among the additions was a requirement that the applicant was to appear personally before the minister and elders to be examined as to the facts relating to his circumstances. The minister and elders were to certify how far the statement given by the party consisted with their own proper knowledge or whether the basis of the certificate depended solely on the applicant's statement, in which case they were to certify whether he was of good character and worthy of credit.<sup>20</sup> If an application for continuance on the Poor's Roll after the two year period was

18. Ibid., s.6.

19. Ibid., s.7.

20. A.S. 16th June 1819, s.3.

made, it was to be made to the Lord President of the Division,<sup>21</sup> accompanied by a report from the Counsel in the cause stating whether the applicant still had a probabilis causa litigandi and detailing the steps which had been taken for bringing the process to a conclusion and the cause which appeared to have prevented a final determination.<sup>22</sup> An annual report was to be made to the Lord President of each Division as to the state of the Roll for the time being.<sup>23</sup>

The formalism of these rules apparently still failed to prevent improvident admissions, for in 1842 yet another A.S. was passed, again stating that:

"there is reason to believe that many persons have been admitted to the benefit of the Poor's Roll who are not proper objects for it and who have otherwise obtained undue advantage over their adversaries; and it is therefore expedient that provisions should be made to correct these and other abuses which are believed to exist ..."<sup>24</sup>

The main change was that the legal bodies were not only to appoint persons to act for poor litigants, but also to select persons to act exclusively as Reporters on probabilis causa.<sup>25</sup> The Reporters were enjoined to make their report on the basis of the information before them within three months, otherwise the application was held to be abandoned.<sup>26</sup>

The lawyers appointed to act were to be selected in regular rotation

21. The term "Lord President of the Division" appears to mean the presiding judge in each division; the Inner House had been divided into divisions in 1808, the Second Division being presided over by the Lord Justice-Clerk.

22. A.S. 16th June 1819, s.8.

23. Ibid., s.9. See also note 21, supra.

24. A.S. 21st December 1842.

25. Ibid., s.1. Cf. Sheriff Court procedure, where reporters acted also as Agents for the Poor, although not in cases on which they had reported. See also Harrison v McKean (1913) 1 S.L.T.144.

26. Ibid., s.5.

from the lists of Counsel and Agents for the Poor for the time being: the clerks were prohibited from deviating on any account whatever from the regular course prescribed, except with the express authority of the Court and upon cause shown.<sup>27</sup> If it emerged either from judicial statements, please or productions of parties which in the opinion of the Lord Ordinary showed that the pauper had no probabilis causa, the Lord Ordinary might report verbally to the Court or remit the cause to the Reporters for their opinion; if there was no probabilis causa, then the party forfeited all right of exemption from professional charges and dues.<sup>28</sup> By Art.13 it was provided inter alia that if any Agent appointed to conduct any Poor's Roll cause neglected or refused to do so, or Agents acted without the authority of the Court or Lord Ordinary, or otherwise infringed the regulations,

" .... they shall not only forfeit all claims for expenses against the parties, but shall moreover be liable to public censure from the Court."<sup>29</sup>

Another innovation was that the pauper was required to pay the Agent's outlays, but the expenses of admission to the Roll were not to be part of the expenses of process due against an unsuccessful adverse party, unless the Inner House decided that the opposition was vexatious.<sup>30</sup>

The 1842 provisions remained in force until 1913 when all existing subordinate legislation was embodied in the Codifying Act of Sederunt of that year; but besides codification, certain amendments were also effected. While on a strict reading of the 1842 Act the applicant's case might be remitted to the Reporters probabilis causa for a decision

27. Ibid., s.6.

28. Ibid., s.9.

29. Ibid., s.13

30. Ibid., s.15.

on probable cause and on the question whether the applicant merited the benefit of the Poor's Roll, the latter determination was in fact not made in practice. By section 6 of Chapter X of the Codifying Act of Sederunt, the door to abuse was left open by requiring the Reporters to consider whether the applicant merited admission "should the remit so require". So without a special remit the Reporters could hear no objections apart from those relating to the applicant's probable cause.<sup>31</sup> A further defect in both the 1842 and 1913 provisions was the absence of any prohibition on the adverse party borrowing the applicant's precognitions from the Reporters. He might therefore learn the whole case before any action was raised, which of course was quite unjust.<sup>32</sup>

These matters were clarified in 1914 when an amending Act of Sederunt required the Reporters on a remit specifically to consider whether the applicant merited the Poor's Roll as well as his probable cause, and prohibited the adverse party from borrowing precognitions or productions without the written consent of the applicant or his agent, or by order of the Reporters in the exercise of their discretion.<sup>33</sup>

All of these rules were subsequently embodied in the Court of Session Rules of Court.<sup>34</sup> From 1934 a Government official, on the nomination of the Principal Clerk of Session, acted part-time as Clerk in charge of the Poor's Roll and Clerk to the Reporters probabilis causa, the first state contribution to the Poor's Roll since 1535.<sup>35</sup>

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31. For example, if there was no special remit, the applicant might gain admission to the Poor's Roll without enquiry into the reasonableness of his proposed action: cf. s.1(6) of the Legal Aid (Scotland) Act 1967.

32. See Young, The Present Position of the Poor's Roll 1914 S.L.T. (News) 15. See also Cant v Pirnie's Trustees (1906) 8 F. 1120.

33. A.S. 15th July 1914.

34. Book 1, Section 11, paras.73-92 (1936).

35. See supra Chapter I, p.4.

### The House of Lords

It was held in Urquhart (1865) 3 M.882 that the Court of Session had no power to grant leave to appeal in forma pauperis to the House of Lords. Appeals were governed latterly by the Appeal (Forma Pauperis) Act 1893 whereby if in an appeal to the House of Lords a petition was presented for leave to sue in forma pauperis, and the House on the report of its Appeal Committee determined that there was no prima facie case for the appeal, the House might refuse the prayer of the petition.<sup>36</sup> The documents to be lodged before the Appeal Committee were a certificate of poverty and a copy of the proceedings in the court below, along with the Petition itself.

The increasing formality of these rules in civil cases clearly confirms that both applicant and lawyer alike would be quite prepared to circumvent the spirit if not the letter of the law in order to proceed with their litigation. The whole of the 19th century case law on the application of the rules shows the efforts made by the Court to stop abuses, with only partial success. Space does not permit a detailed anthology of this case law<sup>37</sup> but three cases may be given as illustrations of the general policy of the Courts. In Christie v A.B. (1830) 9 S.169 the keeper of a lock-up house sought admission to the Poor's Roll. So far as his means were concerned he alleged that while he himself had rent-free accommodation, "on the occasion of any capital

36. Section 1.

37. It can be found in e.g. The Scots Digest 1800-1873 and The Faculty Digest 1868-1922 sub. nom. The Poor's Roll. See also the commentary in McLaurin Forms of Process in Civil Causes before the Sheriff Courts of Scotland (1836) Ch. XXVIII; McGlashan Practical Notes on the Jurisdiction and Forms of Process in Civil Causes of the Sheriff Courts of Scotland, in all four editions 1831-1868; Wilson Practice of the Sheriff Courts in Scotland in three editions 1869-1883; Mackay Court of Session Practice in two editions 1879-1893.

execution, he was obliged to provide a night's lodging for himself and his child". His application was refused, Lord Gillies observing that "It is of the greatest moment to prevent an abuse of the Poor's Roll. It is not enough that it should be inconvenient, or even highly inconvenient, for a party to bear the expense of litigation; he must make out a case of necessity, or we cannot listen to his petition." That lawyers were not above abusing the Poor's Roll is shown by Colquhoun v Paterson (1850) 12 D.851 in which the Procurators at Dumbarton Sheriff Court appointed as an Agent for the Poor in that Court a Procurator who resided in Glasgow and had no place of business in Dunbartonshire. The Sheriff refused to confirm the nomination and called upon the Agents to make a new appointment, which they refused to do. The Sheriff then petitioned the Court of Session to order the local agents to nominate one of their own number to act as Agent for the Poor. The Court held that the petition was competent and that the agents were bound to act on the Sheriff's order to make a new nomination in order to avoid inconvenience not only to parties on the Poor's Roll but also to the Court in disposing of criminal trials of poor persons. Another case illustrates that even obtaining a favourable report on probabilis causa litigandi did not necessarily mean that the applicant would be admitted to the Roll. In Buchanan v Ballantine 1911 S.C. 1368 the pursuer in an action of damages for slander was refused admission to the Roll by the Second Division on the ground that the cause was not suitable for trial in the Court of Session.<sup>38</sup>

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38. Such actions are still not within the ambit of modern-day legal aid: Legal Aid (Scotland) Act 1967, Sched.1. There is no indication in Buchanan as to whether the action would have been suitable for a trial in another court, nor on the "reasonableness" of the proposed action: cf. 1967 Act, s.1(6).

### Criminal Courts

If representation in civil cases on the Poor's Roll was characterised by formality, criminal cases were conducted under appalling disabilities. The striking feature of the period is the lack of organisation, uniformity and professional competence. In the inferior summary courts,<sup>39</sup> where most cases were tried, the Agents for the Poor appointed under the relevant Act of Sederunt frequently did not consider it was their duty to attend, with the unfortunate result that the accused had to represent himself as best he could.<sup>40</sup> In such cases the accused might be tempted to plead guilty to dispose of the case whether or not this was justified on the facts; or he might misunderstand the charge itself. In summary cases before the Sheriff, the Agents for the Poor were usually available to advise and act for an accused person at his first appearance from custody before the Court. A duty rota was in operation, but no assessment of financial eligibility was carried out and in particular the applicant was not required to produce an affidavit as to means.

In solemn cases, representation was available in the Sheriff Court and the High Court; in the latter, an Advocate for the Poor appointed at the anniversary meeting of the Faculty of Advocates acted both in Edinburgh and on circuit. It was on circuit that most difficulty arose: there was little pre-trial consultation between Counsel and the local Agent for the Poor who was supposed to instruct him. Much has been made of the not infrequent practice whereby the Agent

39. The Burgh, Police and J.P. Courts.

40. In Edinburgh and Dundee the local corporations did make a token payment to a Public Defensor and the Agents respectively, which had the effect of ensuring some representation. The position also appears to have been slightly better in the rural areas where the volume of criminal business in those courts was never very high.

considered he had instructed Counsel adequately by handing him the service copy indictment outside the Court, but it was merely a product of the times, not yet departed, when criminal work in the cities was shunned by most of the profession.<sup>41</sup> One could hardly expect much in the preparation of a defence when the most experienced city lawyers did not deal with crime and when those who did were hampered by the inaccessibility of their clients, the inroads on their time and the most obvious of all, the absence of remuneration. The result was that criminal cases were prepared poorly or not at all, even although the cost of the defence in those days would not have been high. As one writer put it,<sup>42</sup>

"At present about 225 persons are acquitted by juries annually. A sum equal to the salary of one Advocate-Depute would pay for their defence; but while the state provides a Lord Advocate, a Solicitor-General, four ordinary and one or two extra Advocates-Depute, and an army of Procurators-Fiscal at the public expense for their prosecution, and appoints Agents for the defence and Counsel also in the High Court, it leaves the poor agents to bear the whole expenses, except those of the witnesses. In other words, the cost of punishing the guilty is borne by the nation; that of defending the innocent poor by about a hundred young men."<sup>43</sup>

The necessity of payment in all cases was stressed by another writer in 1894, who stated that the duties of Agents for the Poor in large cities were considerable and often not the pleasantest. He also pointed to the fact that in 1535 at least it had been recognised that payment was to be made.<sup>44</sup>

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41. For a description of 19th century criminal pleading for poor prisoners, see The Present System of Conducting Poor's Causes in the Court of Justiciary (1883) 27 Jour. Jur.1; and The Sad Case of James Dickson: a plea for poor prisoners (1886) 30 Jour. Jur.309.
42. J.M. Lees The Defence of the Poor (1891) 7. Scottish Law Review 209 at 212-213.
43. The reference to "young men" indicates that the poor's agency, at least in the cities, was generally the province of the newly-admitted (and inexperienced) practitioner.
44. J.A.F.M. The Poor's Roll (1894) 10 Scottish Law Review 11 at 14. See also supra. Chapter I, p.4.

Many of these complaints about the Poor's Roll were made in the evidence to the Scott-Dickson Committee on Sheriff Court Procedure. One witness claimed that suing in forma pauperis was ".... a good deal of fraud".<sup>45</sup> Certificates of poverty were granted often as a matter of course and both the Sheriff and Agent for the Poor were left at the mercy of the granter of the certificate. Another witness stated the common objection that since many Poor's litigations had alimentary conclusions, local Parochial Boards were being relieved of the necessity of paying poor relief by the successful actions taken by Agents for the Poor, which actions were nonetheless pursued gratuitously.<sup>46</sup> Yet another witness called for a proper definition of the Agent's duties in criminal cases, for the practice had arisen of the police intimating the arrest of an accused to the Agent for the Poor automatically, without inquiry as to whether the accused was "poor". At judicial examination it would then transpire that the accused could pay for his defence, thus placing the agent in an awkward position.<sup>47</sup>

The Scott-Dickson Report appeared in 1904 and was the basis of the Sheriff Court (Scotland) Act 1907, to which reference has already been made. The Rules contained in that Act of course did nothing to alleviate the burden caused by non-payment, but merely perpetuated in the Sheriff Court a system which was already starting to break down. That it never did break down completely was entirely due to the lawyers themselves; the tradition of gratuitous legal services had become firmly rooted.

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45. Report of the Departmental Committee on Sheriff Court Procedure (The Scott-Dickson Report) 1904, Cmnd.2287 H.C. Reports lxiv. 451, Evidence of Sheriff Fyfe Qus. 100-104.

46. Ibid., Evidence of P.L. Millan Qus. 677-681.

47. Ibid., Evidence of W.J. Lewis, Qus. 808-813.

CHAPTER III  
THE MOVEMENT FOR REFORM

Introduction

The early years of the twentieth century appear to have been characterised by some complacency as to the working of the Poor's Roll, in spite of the comments made by the Scott-Dickson Committee. The evidence given to the Gorell Commission on Divorce and Matrimonial Causes seems to indicate that the system worked smoothly in consistorial causes and was well known to the Scottish public.<sup>1</sup> But such complacency did not survive the First World War, which had a disrupting effect on the institution of marriage and led to a great increase in business on the Poor's Roll in divorce and separation cases. By the mid-1930s it was clear that the delay and inconvenience involved in such litigation was becoming intolerable. This led to the setting up in 1936 of a Committee on Poor Persons Representation in Scotland, under the chairmanship of Sheriff Morton K.C.

The Morton Committee

The terms of reference of this committee were:

"To inquire into and report upon the existing law and practice regulating the facilities available to poor persons as parties before the Civil Courts and as accused persons before the Criminal Courts of Scotland, and the provision at present made thereunder for the representation of such persons by Counsel and Agents; and to recommend what changes, if any, in the present system are desirable and practicable."

When its Report appeared in 1937,<sup>2</sup> the Committee agreed that it was -

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1. See Report of the Royal Commission on Divorce and Matrimonial Causes (1912) Cmnd.6478, para.415; Minutes of Evidence, Vol.1, p.278 et seq.
  2. Report of the Poor Persons' Representation (Scotland) Committee (1937) Cmnd.5435 (the Morton Report).

" .... beyond doubt that the great majority of Solicitors practising in Scotland have discharged the duties laid upon them by the country's ancient laws with praiseworthy skill and often in circumstances of hardship and difficulty. Not only have services been given without charge, but outlays and expenses have been defrayed by the Solicitor. No profession has, in recent times, given greater gratuitous service to the poor than that given by those who practise the law. Evidence is not wanting, however, that the burden has become too heavy, and that if some radical changes are much longer delayed the system may break down."<sup>3</sup>

In its general resumé of the position in Scotland the Committee confirmed that it was the practice for the profession to give gratuitous legal advice to the poor, as well as assistance in Court, and that it was this burden which the profession found harder to bear. Before the need for Court proceedings arose, there was always a great deal of preliminary investigation which might lead to settlement of the client's case, but which required to be done anyway if proper professional advice was to be given. While there appears to have been no legal obligation on the profession to render such services, the view of the Committee was that the system was so firmly established that " .... its abolition now would result in such hardships to poor persons that limitation of the service to representation in Court cannot be contemplated".<sup>4</sup>

The rise in the numbers of actions by and against persons admitted to the Poor's Roll led to many complaints. From poor litigants one such complaint was that some Agents in Glasgow, when consulted about divorce proceedings which had to be taken in Edinburgh, were charging sums from £10 to £20 either before taking action, or while the case was proceeding. This appeared to have been done on the view

3. Ibid., para.2.

4. Ibid., para.10.

that Agents for the Poor in Glasgow Sheriff Court were not Agents for the Poor in the Court of Session, and that until a person was admitted to the Poor's Roll in the Court of Session, he was in the position of an ordinary litigant. The Committee deprecated this practice which, although possibly competent in law, was " . . . an abuse of the spirit of the rules applicable to litigation on the Poor's Roll".<sup>5</sup> Such abuses were to a very great extent due to the almost total absence of control over the activities of the Agents for the Poor.<sup>6</sup>

From the point of view of the Agents themselves, the Committee found four areas of difficulty: Solicitors often had to bear outlays out of their own pockets, especially in appeals; they suffered great inroads into their time; their clients were sometimes difficult and truculent; and their professional pride was hurt in that their clients often thought such lawyers were in fact paid from local funds. Furthermore, especially in country areas there were many veteran solicitors serving on the Poor's Roll who had on many previous occasions done similar duty, and this repeated burden had become too heavy.<sup>7</sup>

The Committee went on to comment on the work of the existing Legal Dispensaries in Edinburgh and Glasgow, where much useful advice was given to poor persons with legal problems, although the services given by these bodies did not include litigation. But the evidence before the Committee led it to conclude that the Dispensaries were not universally approved by the profession and that it was unlikely that they would be established throughout Scotland; even if they were, the Committee thought that they could not possibly undertake the legal

5. Ibid., para.16.

6. It appears that the only control was theoretically in the hands of the Sheriff.

7. Morton Report, para.18-23.

work, apart from litigation, which was then discharged by the Agents for the Poor.<sup>8</sup>

The Committee considered in detail the prevailing practice in civil cases in both the Sheriff Court and the Court of Session. In the Sheriff Court it found two undesirable features of the present system:

- (i) the appointment year after year, or at frequent intervals, of the same Solicitors as Agents for the Poor, and
- (ii) the discharge of the duties of Reporters probabilis causa by the same Solicitors who conducted the actions on the Poor's Roll.<sup>9</sup>

In the Court of Session, the main difficulties arose in divorce cases where the parties lived outwith Edinburgh, or in appeals to the Court of Session, in both of which cases the applicant had to be admitted to the Poor's Roll in the Court through the medium of an Edinburgh Agent for the Poor. According to the Committee,

"The great defect in the present system is that the poor person in the provinces wishing to sue on the Poor's Roll in the Court of Session has no direct route along which he can travel with the distinguishing label "poor" applied to him throughout, and with the protection thereby available."<sup>10</sup>

Further difficulties arose in relation to the costs of appeals from the Sheriff to the Court of Session, particularly in relation to printing notes of evidence, and in all cases involving outlays by Sheriff officers and Shorthand Writers.<sup>11</sup>

8. Legal dispensaries are however still with us: the Edinburgh Legal dispensary (the oldest in Scotland) still operates regularly.

9. Morton Report, paras.27-31.

10. Ibid., para.37.

11. Ibid., paras.38-39.

The solution to these difficulties which was proposed was that responsibility for legal aid generally should be vested in the General Council of Solicitors established under the Solicitors (Scotland) Act 1933 and that a grant be made by the State to cover administrative costs and outlays. Organisation at grass roots level was to be devolved to the local legal societies. In the Sheriff Courts a Panel of Reporters would be appointed from the local faculty to act for lengthy periods, but annual appointments should be made of other Solicitors to act as Agents for the Poor. The Panel of Reporters would have a full or part-time Clerk to investigate the grievances of each applicant who desired admission to the Poor's Roll and to process the application prior to putting it before the Panel. The applicant would swear an affidavit as to his circumstances but would still require to obtain a certificate of means from the Public Assistance Department. The Panel would require to have regard both to the income and capital of the applicant and to levy a small contribution to the cost of the advice or assistance he sought.

It was envisaged by the Committee that the Clerk would initially give the applicant free legal advice if the Panel admitted him to the Poor's Roll<sup>12</sup> but that if litigation were necessary, the case would be re-submitted to the Panel acting as Reporters probabilis causa. If probable cause was established then the case would be remitted to an Agent for the Poor to conduct the case to the final judgment. Any Agent who accepted money from a poor person would be guilty of contempt of Court in which the action was raised or contemplated and the Panel would be responsible for discipline of the Agents in their jurisdiction.

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12.. The formal admission was no longer to be made by the Court.

At the end of the litigation, the Agent would be paid his outlays by the Clerk from the central fund, subject to any contribution by the assisted party. Similar payment would be made to any Sheriff Officers and Shorthand Writers necessarily employed. Any sums recovered from the opposite party in the litigation would be paid to the Panel, who would determine its distribution, having regard to the Agent's fees.<sup>13</sup>

So far as litigation in the Court of Session was concerned, the local Clerk to the Panel of Reporters would have the duty of initial investigation and precognition. The papers would be forwarded to the Clerk to the Reporters probabilis causa in the Court of Session for allocation to an Agent for the Poor there. Means, however, would be determined by the local panel of Reporters, who would be empowered to fix a scale of outlays appropriate to Court of Session litigation, all before probabilis causa were determined. If the Reporters probabilis causa decided that there was probable cause, the Edinburgh Agent for the Poor would have outlays incurred in the litigation paid by the local Panel. If an appeal was contemplated the Court of Session Panel would continue to determine probabilis causa.<sup>14</sup>

On the question of financing these changes, the Committee pointed out that the admission dues to the profession of Solicitors were at a high level and it was not therefore unreasonable that the State should bear the major part of outlays involved in Poor's Roll litigation.<sup>15</sup>

The Committee also considered the position of poor persons charged in the criminal courts. The Committee commented on the heavy burden

13. Ibid., paras.40-50.

14. Ibid., paras.51-54.

15. Ibid., para.55.

which was borne by the Agents for the Poor, particularly in busy Sheriff Courts and compared the gratuitous assistance given by these Agents to service rendered on a fee paying basis in England under the Poor Prisoners' Defence Act 1930 and later statutes. After reviewing some of the defects in the existing system, the Committee recommended that in the Police Courts in large towns (in which there was a huge volume of criminal work) it should be the duty of the Local Authority to provide out of local funds for a Public Defensor whose services would be available for all poor persons accused before the Police Courts; in the Sheriff Court provision should be made for the granting by the Sheriff of legal aid to poor persons in cases where a sentence of imprisonment might be imposed and for payment of outlays and modified fees on certification by the Sheriff; and that similar power should be conferred on Judges of the High Court, whether sitting as a trial Court or on appeals taken under solemn procedure.

So far as trials were concerned, the presumption of innocence provided the probabilis causa. In view of the short period which elapsed between service of an indictment and the trial diet in High Court cases, the Committee recommended that the Agent for the Poor acting for an accused person should be sent an intimation copy of the indictment at the same time as it was served on his client so that preparation for the defence might begin immediately.<sup>16</sup>

The Government indicated that it would study this Report but gave no guarantees as to its implementation, due to the complexity of the problems raised. Quite apart from its pre-occupation with the worsening political situation, it did not fail to observe the misgivings which emerged from the profession which the recommendations

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16. Ibid., paras.76-85.

would affect.<sup>17</sup> The pages of the professional journals after 1937 are littered with comments and criticisms of the proposals of the Morton Committee. One Edinburgh writer found it almost amusing to read in the Report that no complaints were lodged against Counsel and Agents for the Poor in the Court of Session, but went on:

"The agents, I am afraid, could not pay a similar compliment regarding their poor clients. Of all clients there is no doubt that the worst offenders in the way of ignoring letters, failing to keep appointments, and general carelessness and lack of consideration for their agents' interests or appreciation of his efforts on their behalf are the clients on the Poor's Roll. Not only so, but it is a fact that one cannot help remarking that a small payment towards outlays can very often be obtained by mere suggestion before decree; but after decree - never."<sup>18</sup>

The same writer compared the minimal hardship suffered by Advocates for the Poor with the ever-increasing burden on the Agents and suggested that the number of Agents be increased or made to include every practising solicitor in Edinburgh on the Poor's Roll.<sup>19</sup>

Other writers foresaw complications in the creation of a fund from which Agents would be paid;<sup>20</sup> another complained of his difficulties in criminal cases;<sup>21</sup> and one reviewer of the Report pointed out that no recommendation was made regarding a poor litigant resident in Scotland who wished to ascertain his rights in any problems he might

17. A succession of parliamentary questions were asked between 1937 and 1939 as to when the recommendations would be implemented. The Government indicated that it would not proceed until there was substantial agreement among all interested parties. See Hansard: H.C. Vol.349, cols.2027-8.

18. Poor Persons' Representation: Some Observations and a Suggestion 1937 S.L.T. (News) 213 at 214.

19. Ibid., p.215.

20. 1937 S.L.T. (News) 223.

21. 1937 S.L.T. (News) 232.

have relating to private international law, spotlighting the number of marriages between Scots and non-Scots.<sup>22</sup>

Looking at the whole matter in hindsight it is submitted that far from suggesting the "radical changes" apparently necessary, the Committee had been content with the then-prevailing philosophy and tradition of free legal services, especially when it came to litigation. The proposals represented nothing more than tinkering with the existing system, and had they found their way into law, four main areas of difficulty would still have remained.

Firstly, as the Committee pointed out, the problems of securing adequate legal services for the Poor in the town and in the country were quite different. But they were not so different as to necessitate the perpetuation of a system whereby local panels would apply their own guidelines as to the grant of legal aid, without any guidance by regulation or otherwise from any centralised body and without any form of procedure other than that which had proved so unsatisfactory in the past. The poor litigant would still be unaware whether he would qualify on means, since no definite rules as to means were to be laid down.

Secondly, the Agents who acted for long periods on the Poor's Roll would presumably still have to do so in areas where no other Agents were available or willing to take on the work. In some areas there would be extreme difficulty in fulfilling the recommendation that Reporters probabilis causa should not act as Agents for the Poor. In the cities there would still be the ingrained opposition of a large part of the profession to Poor's Roll work, which would still rest on the young and inexperienced.<sup>23</sup>

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22. 1937 S.L.R. 245. The whole of this review of the Report is contained in 1937 S.L.R. 173, 213, 243.

23. A suggestion that the Dean of the Royal Faculty of Procurators in Glasgow be appointed as an Agent for the Poor was not received with much enthusiasm: see 1937 S.L.T. (News) 236, 240, 255.

Thirdly, there was still to be no payment for the Solicitor's involvement in civil litigation, apart from outlays. Irrespective of the length or complexity of the case, the Agent would still be obliged to carry the case through without fee and often without hope of recovering expenses from the opponent, even if an award was made in favour of the poor litigant. No reason appears to have been advanced for the absence of a proposal to pay a Solicitor's fees in such cases, even on a modified scale.

Lastly, the system would still be open to abuse by both Agent and client. Some Agents would still regard their pauper clients as a race apart and the standard of service to them would drop, while some clients would still be at the mercy of ignorance, fear and distrust, all well-recognised attitudes to law and lawyers.<sup>24</sup>

#### The war experience

Before anything could be done to implement the Morten scheme, the Second World War intervened. During the war many Solicitors left their practices to undertake war service and the burden on those who remained became especially hard. As the war progressed the necessity arose for creating machinery to deal with the legal problems, especially matrimonial, of members of the forces. Arrangements were made by the War Office for the establishment in the various Commands at home of Command Legal Aid Sections and Legal Advice Bureaux, and later similar schemes were set up overseas together in 1942 with a Services Divorce Department.<sup>25</sup> In Scottish Command, the first officer in charge was

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24. Such attitudes still persist: see generally Public Attitudes to the Legal Profession in Scotland, Report published by the Law Society of Scotland 1973.

25. For a fuller description of these services, see Report of the Committee on Legal Aid and Legal Advice in England and Wales (the Rushcliffe Report) (1945) Cmnd.6641, paras.23-32 and 71-81.

Edinburgh Solicitor the late Thomas Young W.S.,<sup>26</sup> who had plenty of experience as an Agent for the Poor and Reporter probabilis causa. Briefly the procedure was for the serving soldier to complete a form of application which was submitted to the Legal Aid Section, where the case was prepared, precognitions being obtained as necessary and a memorandum completed. This was then submitted to the Reporters probabilis causa for the Court in which the action was to be raised, and the Reporters decided whether to admit the applicant to the Poor's Roll. From the point of view of financial eligibility service pay and allowances were disregarded, a "rank test" being substituted for a "means test".<sup>27</sup>

The applicant's case, if for divorce, was conducted by a member of the Services Divorce Department, the applicant being required to deposit £5 for outlays. The scheme was very successful and in Scotland there was tremendous co-operation from the various local faculties.

The experience gained during the war throughout the U.K. prompted a strong feeling that the structure set up should not be dismantled immediately on conclusion of hostilities. In particular, the method of processing applications through a central institution was found satisfactory, whatever practical difficulties there were in obtaining evidence. When it became clear that the Allies were to be victorious, the first moves were made to ensure that particularly the soldier who would be demobbed after the war would not be in any worse position with his legal problems than he would have been while serving in the Forces. In a sense, legal aid as it operates in Scotland today is based largely on wartime experiences; how this came about must now be examined.

26. Subsequently Mr. Young became first Chairman of the Legal Aid Central Committee and was appointed a Sheriff in 1955.

27. Rushcliffe Report, para.79.

### The Rushcliffe Committee

In May 1944 the Rushcliffe Committee was appointed

"to enquire what facilities at present exist in England and Wales for giving legal advice and assistance to Poor Persons, and to make such recommendations as appear to be desirable for the purpose of securing that Poor Persons in need of legal advice may have such facilities at their disposal, and for modifying and improving, so far as seems expedient, the existing system whereby legal aid is available to Poor Persons, in the conduct of litigation in which they are concerned, whether in civil or criminal courts".

Its Report appeared a year later<sup>28</sup> and contained detailed recommendations for the setting up of a comprehensive legal aid scheme in civil matters and for improvements in the system of legal aid in criminal courts in England. For the Scottish reader, the most striking features of the report are firstly that the history of legal aid south of the Border is completely different from that in Scotland, and secondly that in England a large amount of gratuitous advice appears to have been given other than directly in Solicitors' offices, for example through voluntary organisations such as Poor Man's Lawyer centres.<sup>29</sup> These two features are understandable in the context of a completely different legal system with its own traditions, but in 1945 the problem in England was basically the same as in Scotland: the total of all the existing free facilities was inadequate to meet the demand.<sup>30</sup> This led to an acceptance by the Committee of the principle that generally in criminal cases legal aid should be granted in all cases where it appeared desirable in the interests of justice and in civil cases to persons with net incomes of not more than £420 per annum. In the latter

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28. Report of the Committee on Legal Aid and Legal Advice in England and Wales (1945) Cmnd.6641.

29. Ibid., paras.99-113.

30. Ibid., para.125.

the assisted person might be required to pay a contribution to the cost of proceedings, and the State would bear the burden of remunerating Barristers and Solicitors. The Law Society would run the scheme through Area and local committees under the general supervision of the Lord Chancellor's Advisory Committee; legal advice in matters not involving litigation would also be available.<sup>31</sup>

The Government accepted these proposals<sup>32</sup> and the details were worked out by The Law Society. In February 1946 a full report was submitted to the Lord Chancellor and consultation followed with the profession. Very little opposition was evident and the resulting Bill passed through its parliamentary stages with ease. It received the Royal Assent as the Legal Aid and Advice Act 1949 on 30 July 1949.

#### The Cameron Committee

Meanwhile, in Scotland matters took a very different turn. Rushcliffe had reported in May 1945; in November of that year legal aid in Scotland came under the review of the Cameron Committee,<sup>33</sup> whose terms of reference were limited to considering

" .... the detailed recommendations providing for the establishment of Legal Aid Centres contained in the (Rushcliffe) Report .... and to frame a corresponding scheme for Scotland, with the necessary modifications; and to include a statement of the estimated cost of the scheme".

These terms of reference were to cause problems later, but the evidence before the Committee disclosed general agreement as to the structure of the organisation necessary to implement Rushcliffe, provided of course that the Scottish experience might be used in the furtherance of the Scheme.<sup>34</sup>

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31. Ibid. Summary of Recommendations pages 40-44.

32. With slight variations: see the White Paper on the Legal Aid and Advice Bill 1948, (1948) Cmnd.7563.

33. See Report of the Committee on Legal Aid and Legal Advice in Scotland (the Cameron Report)(1946) Cmnd.6925.

34. Ibid., para.1.

The Committee recommended that Ministerial responsibility for the Scheme should rest with the Lord Advocate, there being no official in Scotland comparable to the Lord Chancellor. While there might be some anomaly in the Lord Advocate, who as head of the criminal administration of Scotland was responsible for the initiation of criminal proceedings, having at the same time a direct supervisory responsibility for the organisation which would be used to combat those proceedings, the Committee considered that it was " .... an anomaly which may be accepted and one which is unlikely to cause difficulty or embarrassment in practice".<sup>35</sup>

Two further divergences from Rushcliffe may be noted. The Cameron Committee did not agree that in criminal proceedings, the grant of legal aid should depend on a discretionary determination by the judge; and in civil cases means should be determined before and not after probable cause.<sup>36</sup>

The proposals of the Rushcliffe Committee were followed as regards the setting up of Area and local committees to run the Scheme; the General Council of Solicitors would be responsible for administration, under the joint supervision of the Lord President and the Lord Advocate.<sup>37</sup> Panels of Solicitors willing to act would be set up in each locality, from which a prospective litigant might make his choice, and Counsel would also be entitled to go on a list for different types of cases.<sup>38</sup>

35. Ibid., para.1.

36. Ibid., paras.7-8.

37. Ibid., paras.10-18.

38. Ibid., para.22.

As regards the giving of legal advice, the General Council would have power to make whole-time appointments of Solicitors in each area to carry out this duty, but a wide discretion was to be left to Area Committees on how this was to be arranged.<sup>39</sup>

In civil cases, the Committee recommended that the method of application should follow as closely as possible the existing Scottish practice in making applications for the benefit of the Poor's Roll. A Certificate of Means would be provided by the applicant by way of Statutory declaration before any Solicitor. This would be submitted to the Local Committee who would be empowered to check the declaration through the Public Assistance Authority. The applicant would be entitled to object on the grounds of adequate means.<sup>40</sup> On the assessment of contributions, the Committee recorded an

".... uneasy impression that the financial recommendations of the Rushcliffe Committee's Report may well bear hardly on that section of the community which we feel stands most in need of legal aid and assistance - persons with small businesses, or on modest or moderate pay or salaries".

Nevertheless it felt constrained to accept the framework of the financial recommendations of the Rushcliffe report on the fixing of a lower limit below which no contribution would be required; the computation of the contribution; the safeguarding of essential capital such as the applicant's dwellinghouse and furniture; and the assessment of the applicant's actual as opposed to maximum contribution.<sup>41</sup>

The Committee went on to make a number of other ancillary recommendations as to recovery of contributions, renewal of certificates and the provision of counsel and expert witnesses.<sup>42</sup> Modification of

39. Ibid., para.23.

40. Ibid., para.24.

41. Ibid., para.25.

42. Ibid., paras.26-30.

expenses awarded against an unsuccessful assisted litigant would also be introduced, and accounts of expenses would be taxed by the appropriate Auditor of Court.<sup>43</sup>

As already noted, in criminal matters there was a departure from the recommendations of the Rushcliffe report. The Cameron Committee went so far as to recommend that the right to receive assistance should be applicable to any person accused in any criminal court and at any stage. Provided he made a declaration of means indicating that his financial position brought him within the ambit of the Scheme, he would receive a certificate of assistance entitling him to legal aid without contribution. The Committee would thus have been willing to sanction legal aid in the inferior summary courts, a proposal not realised until thirty years later with the passing of the District Courts (Scotland) Act 1975.<sup>44</sup> The applicant would select his Solicitor from the appropriate panel: if no selection was made the accused would be allotted the panel Solicitor in attendance at the Court, according to a rota prepared by the local Committee, on the same principle as the system of attendance provided by Solicitors for the Peer. Counsel and expert witnesses would be available with Committee sanction.<sup>45</sup>

As regards criminal appeals, the Committee recommended that in summary cases the local Committee should be empowered to grant a certificate after considering the draft Stated Case or Bill of Suspension and a note by the Solicitor or Counsel conducting the defence that in his opinion the case was suitable for appeal. Another

43. Ibid., paras.32-36.

44. Legal aid in the District Court was introduced under the Criminal Legal Aid Scheme 1975 and s.21 of the District Courts (Scotland) Act 1975.

45. Cameron Report, para.38.

interesting recommendation (never subsequently carried out) was that the Local Committee should be obliged to assess the applicant's contribution towards expenses, having regard to his means and earning capacity, and the probable expense to be incurred, in the same manner as for a civil cause. Appeals under solemn procedure would similarly be dealt with, and in all cases the right to apply for a certificate should be open at all times, provision being made for application to the Court to postpone a hearing, or extending the time for lodging appeals as might be considered necessary in the circumstances.<sup>46</sup>

On the question of contributions to the cost of an appeal, the Committee appear to have overlooked the obvious difficulty in collecting any money from any person involved in criminal proceedings, especially on appeal. There is not a word in the Report of how one was supposed to collect a contribution to the cost of an appeal from e.g. an accused who was in custody pending his appearance in the appeal court. Such a person is rarely granted bail or interim liberation and has thus no means of earning a regular income; further, one could hardly apply to his relatives or friends, the case being nothing legally to do with them. Even if the accused was released pending his appeal, the likelihood of his keeping up contributions was likely to be slight.<sup>47</sup>

Nor do the Committee appear to have appreciated the possibilities of unscrupulous accused persons (and lawyers) manipulating the scheme, especially if an application for legal aid could be made at any time.

46. Ibid., para.39.

47. The proposal that an accused person should pay a contribution towards the cost of proceedings, whether by trial or appeal, was not followed when the Guthrie Committee reported on Legal Aid in Criminal Proceedings in 1960: see infra Chapter IV, p. 63.

It would thus have been open for an accused to apply for legal aid on the day of his trial, thus necessitating an adjournment of the proceedings with all the concomitant inconvenience to witnesses, jurors and like, merely as a device to postpone the evil day of judgment. Such practical matters do not appear to have been examined at all.

The Committee did recommend that a Table of Fees should be prepared for all criminal cases and that taxation of accounts should be made by the Auditor of either the Sheriff Court <sup>or</sup> the Court of Session. Fees for criminal business had never been laid down but the Committee did not recommend any statutory maxima for different types of cases.<sup>48</sup>

All in all, the Cameron Committee was clearly in difficulty because of its restricted terms of reference. No cognizance seems to have been taken of the fact that the Rushcliffe proposals might not have been entirely suitable for Scotland, but the presumption was that they were, subject to modification.

Meantime, difficulties were still being encountered by some of the Agents for the Poor, especially in criminal cases. In Turnbull v H.M. Advocate 1948 S.L.T. (Notes) 12 the facts were that three days before his trial before Sheriff and a jury for assault, an accused wrote to the Agent for the Poor who had been provided for him dispensing with that Agent's services. The accused subsequently conducted his own defence and was convicted. He appealed on the ground that there had been a miscarriage of justice inasmuch as his case had not been properly presented. In refusing the appeal, the High Court held that where an accused was provided with the gratuitous services of a Solicitor, who was simply discharging a duty to his profession, those services should

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48. Cameron Report, para.40.

be regarded as a privilege for which the accused should be grateful, and not as a right which the accused was entitled to assert. Lord Justice-General Cooper commented "If it were thought that any such accused person could delay proceedings by picking and choosing at the last moment between the Solicitors who act for the poor .... the whole system of our criminal administration would be reduced to a farce."

In McCarroll v H.M. Advocate 1948 S.L.T. (Notes) 89 a convicted poor person appealed against his conviction on the ground that the Poor Person's Solicitor acting for him had lacked diligence and competency in the handling of the case. The Court held that no question of miscarriage of justice could arise on such a ground and that it was impossible to draw a distinction between Counsel and Agents employed in the ordinary way and those called upon to defend a poor person according to the accepted practice.

#### The Legal Aid (Scotland) Bill

Discussion followed the Cameron Report, but no parliamentary action was taken until November 1948 when the Legal Aid and Solicitors (Scotland) Bill was given a first reading in the House of Commons.<sup>49</sup>

Its purposes were inter alia

"to make legal aid and advice in Scotland more readily available for persons of small or moderate means and to enable the cost of legal aid or advice for such persons to be defrayed wholly or partly out of moneys provided by Parliament".

The Bill, preceded by a White Paper,<sup>50</sup> proposed to give legislative effect to the Cameron proposals but a bizarre groundswell of adverse opinion began to form in part of the Scottish Solicitors profession.

49. First reading, 22nd November 1948.

50. White Paper on the Legal Aid and Solicitors (Scotland) Bill: (1948) Cmnd.7562.

The most vociferous opposition came from the Scottish Law Agents Society. The main ground of complaint was that the Bill was being rushed through without sufficient time for consultation, and that machinery devised by English practitioners was being foisted on Scottish solicitors.<sup>51</sup> More extreme was the view that the Bill amounted to State control of the profession, a position as ludicrous as it was unfounded.<sup>52</sup> A leading opponent of the Bill, Mr. John J. Campbell, stated a personal view that the provisions were "virtually the liquidation of the profession in Scotland" and spoke of the supposed similarities between the Soviet Legal System and the Bill.<sup>53</sup> In May 1949 another of his statements was quoted in Parliament. In what was really an open letter to the Lord Advocate (John Wheatley K.C.) he stated that the profession's conviction was

".... that Scotland's ancient legal system is in danger of being swamped by Asiatic ideas, that her constitutional rights and historical traditions are being trampled in the mire of materialistic politics and that coercion is a weapon of Socialist planners which will be used ruthlessly to bludgeon truth and justice".

The letter concluded

"It is a matter of profound regret for many of us to find you, as Lord Advocate, leading against your own brethren, the forces of aggression. It may be that you have not fully realised the sinister implications of the Bill and that you are unaware of the revolutionary lengths to which the Socialist movement is committed. In the light of this letter I do hope you will find it possible to reconsider your own position. Naturally you have the right to make your own decision. The choice is clear, Marx or Christ."<sup>54</sup>

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51. On this opposition see (1948) 16 Scot. Law Gazette, pp.86-89; (1949) 17 Scot. Law Gazette 110-111, 126 and the Minutes of the 1949 A.G.M. of the Scottish Law Agents Society, printed as an Appendix to 17 Scot. Law Gazette.
52. See 1948 S.L.T. (News) 153; 1949 S.L.T. (News) 56 - which contains a parody of "Scots Wha Hae"; 1949 S.L.T. (News) 88, 96, 125; see also correspondence in 1949 S.L.T. (News).
53. 1949 S.L.T. (News) 30, 39, 71.
54. 31 May 1949 quoted at H.C. Vol.465, Cols.2001-2.

With the hindsight of history, such vitriolic abuse is laughable, but the truth is that a sizeable number of solicitors did subscribe to such views. What they failed to realise was that the time for objecting was not when the Bill was published but when the Cameron Committee's terms of reference were laid down. Curiously, no such extreme criticism seems to have occurred in England when the Rushcliffe proposals appeared. Even more curiously, the opposition to the Morton Committee's report ten years previously was far more muted, although its main proposal was that the State would finance a legal aid scheme.<sup>55</sup>

These criticisms ensured a stormy passage for the Bill which was contested with a vigour markedly different from the equivalent English Bill. The Bill received the Royal Assent in July 1949, very little changed from what had been originally proposed, except that the Secretary of State and not the Lord Advocate was to have ministerial responsibility. Its details are considered in Parts II and III of this work.

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55. See supra., pp.32-34.

CHAPTER IV

THE 1949 ACT AND AFTER

I. Legal Aid in the civil courts

Although the Legal Aid and Solicitors (Scotland) Act 1949 had received the Royal Assent on 30th July 1949, its provisions were not all brought into force at the same time. On 24th October 1949 the Prime Minister announced that due to the economic situation, the introduction of certain parts of the Legal Aid Schemes would be deferred meantime;<sup>1</sup> it later transpired that s.5 (legal aid in matters not involving litigation), s.7 (legal advice) and provision for legal aid in the House of Lords, Lands Valuation Appeal Court and Land Court were not to be brought in until the economy improved. Another major part of the Scheme to be postponed was that relating to criminal legal aid, again due to the probable expense. But the intention was to proceed immediately with legal aid under s.1 of the Act in the Court of Session and Sheriff Court; to this end the newly-founded Law Society of Scotland was required to set up the requisite machinery under ss.8-11 of the Act.

The first step was the constitution of the first Scheme-Making Committee under s.8(3) of the Act. This Committee<sup>2</sup> met between February and June 1950 to frame the Legal Aid (Scotland) Scheme 1950 which, along with the necessary regulations and rules<sup>3</sup> was brought into force in the

1. The parts deferred were to be the same in Scotland and England.
2. Chairman, Thomas Young W.S. This Committee was able to use much of the experience gained in administering Legal Aid to the forces during the war years, which perhaps explains the speed with which its deliberations were completed.
3. Legal Aid (Scotland) Act (Commencement)(No.2) Order 1950; Legal Aid (Scotland)(General) Regulations 1950; Legal Aid (Scotland)(Assessment of Resources) Regulations 1950 and Act of Sederunt (Legal Aid Rules) 1950.

Court of Session and Sheriff Court as from 2nd October, 1950. A tremendous amount of preparatory work went into these provisions: the hierarchy of committees required to be set up, staff hired, lists of Solicitors and Counsel prepared and financial arrangements made. Indeed, the 1949 Act itself provided only the barest outlines of the principles of legal aid; the details were (and still are) a matter of regulation by the Law Society, the Secretary of State and the Court.

The 1950 Scheme, although replaced in 1958<sup>4</sup> remains substantially unchanged in its basic rules. The details are contained in Parts II and III of this work but it seems appropriate to consider what was in outline the procedure in the ordinary civil cases at the Scheme's inception.<sup>5</sup> The applicant initially consulted a Solicitor on the appropriate list who completed the application form along with a memorandum explaining the nature of the case. These papers along with precognitions and productions were sent to the Secretary of the appropriate Committee, with intimation to the opponent of the application only. The Committee determined probabilis causa and, if satisfied, remitted the financial statements as to means made by the applicant to the National Assistance Board for the determination of the applicant's disposable income and disposable capital, along with the maximum contribution to the cost of proceedings for which the applicant might be liable.<sup>6</sup> After this was computed in accordance with the detailed formulae in the relevant regulations the Committee then decided (a) whether the applicant was entitled to legal aid and (b) the applicant's

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4. It was replaced by the Legal Aid (Scotland) Scheme 1958, itself varied in 1961.
  5. For fuller details see Young, Legal Aid Scheme 1950 S.L.T. (News) 177.
  - 5A. On the Committee structure, see infra pp. 86-91
  6. This function is now exercised by the Supplementary Benefits Commission set up under the Ministry of Social Security Act 1966.

actual contribution (which was not more than the maximum contribution fixed by the N.A.B.).

The applicant would then be offered legal aid on these terms, but would be free to reject the offer or appeal to the Central Committee against a refusal of legal aid or the amount of his actual contribution.<sup>7</sup> If he accepted, then his Solicitor began acting for him immediately he received intimation that the assisted person had paid his contribution or the first instalment thereof. The case would then be conducted as any other litigation. On its conclusion, if successful for the applicant, any sums recovered including expenses were paid initially into the Legal Aid (Scotland) Fund; the Law Society was obliged to clear any debit balance on the assisted person's account before paying any principal sum over to the applicant,<sup>8</sup> while the Solicitor (and Counsel, if any) received his fees less 15% of the taxed or agreed amount <sup>thereof</sup> ~~of expenses~~.<sup>9</sup> If, however, the applicant was unsuccessful in the litigation then he would be personally liable for any expenses awarded against him, subject to their modification under s.2(3)(e) of the 1949 Act.

This basic procedure is still followed today, but at its inception in 1950 there were of course some teething troubles which resulted in a number of criticisms of the Act and the Scheme.<sup>10</sup> By far the most

7. If he accepted legal aid, the applicant could also appeal to the Central Committee if his certificate was later discharged or suspended: 1950 Scheme, para.16(1).
8. Act of Sederunt (Legal Aid Rules) 1950, s.6.
9. This 15% deduction (now 10%) can be traced back to para.171(24) of the Rushcliffe Report in 1945 (Cmd.6641). The original rationale appeared to be that the 15% deducted represented 50% of the profit normally remaining to the Solicitor after meeting his overheads. That there should be any deduction at all is widely disputed by Solicitors.
10. See First and Second Reports of the Law Society of Scotland on the Legal Aid Scheme (1950-51 and 1951-52).

widely-felt objection to the provisions was that they provided only partial service to the client. The non-introduction of ss.5 and 7 of the Act meant that the client did not receive the benefit of legal aid until his case was prepared to a stage where an action could be commenced, and the Solicitor received no payment for this essentially preparatory work (which would normally include at least interviewing witnesses and taking precognitions) unless he rendered a fee-note in the normal way.<sup>11</sup> The other major criticism was of the non-introduction of criminal legal aid: firstly, the repeal of s.51 and Rules 152-169 of Schedule 1 of the Sheriff Courts (Scotland) Act 1907 by the 1949 Act threw into doubt the statutory authority for appointing Agents for the Poor in the Sheriff Court; and secondly, the decision in Graham v Cuthbert 1951 J.C. 25 was to the effect that only the "poor" were entitled to representation, without any guidance being given as to how to determine poverty.<sup>12</sup> In the result the standard of service in criminal cases, without its statutory underpins, continued to deteriorate.

Happily, there was no shortage of volunteers to go on the appropriate lists of Counsel and Solicitors <sup>under the new scheme.</sup> Only in places where there were few Solicitors in practice did any difficulty arise, not from the fact that they were unwilling to act, but from the fact that they were the only persons available to be appointed to Local Committees or as Local Representatives under Art.6 of the 1950 Scheme,<sup>13</sup> thus opening a potential conflict of interest situation.

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11. Which was frequently not done.
  12. There was in fact never any clear guidance from anyone on this point: in criminal cases, the Agents for the Poor seem to have operated a rough and ready system: see paras.23-25 of the Guthrie Report on Legal Aid in Criminal Proceedings (1960) Cmnd.1015.
  13. Originally there were 21 Local Committees; this has now been reduced.

Another matter which became immediately apparent once legal aid cases were completed was that where expenses were awarded to an assisted pursuer against a non-institutional defender, particularly in an action seeking aliment, the collection of expenses (if pressed) would often stop payment of any aliment or other sum awarded. Thus before pressing for expenses, it was necessary to consider the financial circumstances of every unsuccessful opponent in order to decide whether action (including diligence) was desirable. The expense to the Legal Aid Fund of paying Solicitors to do diligence on a decree for expenses would often be out of all proportion to the value of any monies recovered for the Fund. This became a recurring problem, resulting in the writing-off as irrecoverable increasing sums of money.<sup>14</sup>

The Scheme, like the Poor's Roll, has been used primarily in consistorial actions. In the first period for which statistics are available,<sup>15</sup> 68% of all applications granted related to actions between husband and wife; only a surprisingly small 9% related to actions for reparation. These proportions have generally been maintained since 1959<sup>16</sup> so far as applications under section 1 of the Act are concerned.

As the early years passed, it became clear that, in addition to the criticisms mentioned above, there was a general feeling that the financial limits of eligibility were too low. One particular hardship was caused to applicants such as pensioners who had little or no disposable income but a small nest-egg of capital in excess of the £75 limit, which thus disentitled them to entirely free legal aid but

14. By 1953 the total sum written off since 1950 as irrecoverable was £18,542; in 1974-75 it was over £190,000, but of course legal aid is now more widely available than in 1950.

15. 2nd October 1950 - 31st March 1951.

16. For detailed statistics see generally the Annual Reports of the Law Society of Scotland on the Legal Aid Scheme.

necessitated payment of a contribution. Likewise the limit of £156 per annum disposable income for free legal aid laid down in 1949 became increasingly inappropriate as the value of the pound dropped.<sup>17</sup>

Happily, such matters have been subjected to regular review over the years by raising the income and capital limits for Section 1 Legal Aid. Apart from these changes another major improvement on the 1949 Act was made by s.1 of the Legal Aid Act 1964, which gave the Court power to award expenses out of the Legal Aid Fund to an unassisted party who successfully defended an action against him at the instance of an assisted party, if the Court was satisfied that it was just and equitable to do so and that the unassisted party would suffer hardship if such an order were not made.<sup>18</sup>

The Courts and Tribunals in which civil legal aid is available now include the House of Lords (introduced in 1960), the Lands Valuation Appeal Court (1961), the Scottish Land Court (1971), the Lands Tribunal for Scotland (1971), the Restrictive Practices Court (1973), and the Employment Appeal Tribunal (1976).<sup>19</sup> It is also available in proceedings before the Sheriff or on appeal to the Court of Session relating to the decision of a children's hearing or an application to the Sheriff for a finding under s.42 of the Social Work (Scotland) Act 1968.<sup>20</sup>

The governing statute is now the Legal Aid (Scotland) Act 1967, which consolidated all earlier legislation.

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17. The payment of contributions by e.g. pensioners is still a problem under the Legal Advice and Assistance (Scotland) Scheme 1973.

18. For details see infra., Chapter XV.

19. The Legal Aid (Scotland)(N.I.R.C.) Scheme 1971 lapsed with the passing of the Court.

20. See infra., Chapter XVII.

## II. Criminal Legal Aid

By section 2(2) of the 1949 Act it was provided that legal aid would be available in criminal cases without enquiry into the resources of the accused, both in solemn cases until the stage of bail or full committal and in summary cases until the conclusion of the first diet at which he was called upon to plead. The Act also provided for legal aid being available for criminal proceedings in the High Court, the Sheriff Court and the inferior courts of summary jurisdiction,<sup>21</sup> for appeals in all cases provided that the accused showed he had a probabilis causa litigandi, unless in such appeal proceedings it appeared unreasonable that he should receive legal aid;<sup>22</sup> and for the making of a Scheme, regulations and an Act of Adjournal to implement these statutory provisions. This was not done until 1964, and from 1950 until that time, the provisions of the Act of 1587 c.91 (A.P.S. 1587 c.57) remained in force, poor persons facing criminal charges continuing to be represented by Agents and Counsel for the Poor.<sup>23</sup>

The initial reason why criminal legal aid was not immediately introduced appears to have been apprehension as to the cost, not only of paying fees to Solicitors and Counsel, but also of administering any such scheme. Coupled with these factors, the increase in crime after the Second World War meant that legal services would be required in a larger number of cases than previously envisaged and the Government of the day was understandingly reluctant to sanction such expense in a time of economic stringency.

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21. S.1(2) and Sch.I, part I.

22. S.1(6). For criminal trials, it was envisaged that the presumption of innocence would supply the probable cause, but in appeals against conviction or sentence this obviously did not apply, hence the specific wording of s.1(6).

23. The practice continued of appointing such Agents and Counsel under the Poor's Roll provisions, even although their duties were limited to criminal cases.

The Law Society of Scotland made regular representations to the Government about the non-implementation of these provisions, but with no success.<sup>24</sup> Instead, a temporary expedient was agreed in 1953 whereby the sum of £8,000 annually was paid by the Exchequer to the Law Society for division among Agents for the Poor in criminal cases throughout Scotland.<sup>25</sup> The scheme of division eventually adopted was based on the volume of criminal business in particular courts as shown by the Criminal Statistics. Twice a year the local societies were asked how the sum allocated for the court or courts in their area should be divided among the local agents, and payment was thus made. The Law Society itself retained only a small sum each year for distribution to agents involved in particularly complex cases.<sup>26</sup> Administrative costs were thus cut to a minimum, but legal difficulties were still apparent in the continued "limbo" existence of Agents for the Poor in criminal cases, in the absence of a clear statutory basis for their existence.

The main legal difficulty was in regard to appointment of "poor" agents. Until 1951 it had been assumed that the Act of 1587 c.91 (A.P.S. 1587 c.57) required the Court to provide legal assistance for any persons on a criminal charge of whatever gravity, an assumption which seems to have been fortified by a passage to that effect in Alison.<sup>27</sup> But in Graham v Cuthbert 1951 J.C. 25 this simplistic interpretation was torpedoed by Lord Justice-General Cooper.

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24. See the first six of the Annual Reports of the Law Society of Scotland on the Legal Aid Scheme (1951-1956).

25. There was initially some disagreements on whether this paltry sum should be accepted, but the view prevailed that it was better than nothing.

26. No part of the £8,000 payment was distributed to Advocates for the Poor, but from 1953 they received travelling expenses and subsistence from the Exchequer. A complex case might mean an extra payment of e.g. £25.

27. Alison, Criminal Law of Scotland, Vol.ii, p.370.

The case concerned five men who were charged on summary complaint before the Sheriff Court at Fort William. At their first appearance in Court they were represented by a local Solicitor who was prepared to act for them on a fee-paying basis. No fee was forthcoming from the accused, who approached the poor's agent in Dumbarton for assistance. The agent took some precognitions and sent them to Fort William to be dealt with by the poor's agent there. The only poor's agent in Fort William was the same Solicitor who had originally appeared. At the trial diet he asked for and was granted leave to withdraw from the case. The accused then elected to conduct their own defences, were convicted and appealed against their convictions on the ground that the Sheriff had failed to appoint a Solicitor to act for them, as it was allegedly his duty to do in terms of the Act of 1587 c.91, and that his failure to do so had resulted in a miscarriage of justice. Their appeal was rejected by the High Court on three grounds.

Firstly, the Court did not uphold the argument that the Act of 1587 c.91 granted every accused person, rich or poor a statutory right to be provided by the Court with gratuitous legal assistance for the conduct of his defence. Lord Justice-General Cooper doubted

" .... whether the Act of 1587 had anything whatever to do with the provision by the Court of counsel for the defence, either to poor or to rich. The problem in 1587 was an entirely different one, viz: to remove some of the scandals which then disgraced the criminal administration of the time, and habitually led to the accused being condemned (and often executed) unheard ("tunc pro confesso") ; .... "28

By the Act of 1587 c.38 it was provided that

"quhatsumever partie accused, sall have full libertie to provide himselfe of Advocates, and Praeloquutores, in competent number to defend his life, honour and land, against quhatsumever accusation."

According to Lord Cooper, all that the Act of 1587 c.91 did was to authorise the presentation of the defence case by an advocate whom the accused had himself already retained under the Act of 1587 c.38. The accepted practice of the High Court in requiring the presence of Counsel to defend "poor" prisoners, said Lord Cooper, was not so much forced upon the legal profession by the Court as accepted by the profession as a munus publicum and had nothing at all to do with the Act of 1587 c.91.

"But it was only long afterwards, when distance had lent enchantment to the view of sixteenth century criminal 'justice' that Alison by a patriotic anachronism ascribed the .... practice .... to the Act 1587 c.91, and for the first time invested that statute with something of the glamour which once attached in England (and with no greater justification) to Magna Carta."

The second ground for the rejection of the appeal was the much simpler one that none of the accused claimed to be even prima facie poor persons. Whatever may have been the statutory justification (if any) for the practice of providing of gratuitous legal services, those services were owed by the Act of 1587 c.91 only to poor persons.

Finally, Lord Cooper startled the twentieth century legal profession by saying that in his view the Act of 1587 c.91 did not and never had applied to the Sheriff Court. Since the criminal jurisdiction of that Court was extremely limited in the sixteenth century and long after, there was very little opportunity for legal assistance, most criminal trials at that time being taken by the Justice-General or by one of the many holders of special Commissions of Justiciary, or by Barony, Regality or burgh Courts.<sup>29</sup>

With this added burden, the profession began to call in question the munus publicum referred to by Lord Cooper. In the early years of

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29. At p.31.

civil legal aid it was confidently expected that the provisions of the 1949 Act relating to criminal legal aid would be introduced quickly. But by the mid-1950s it was clear that this was not to be so. Firstly, the prospective cost was spiralling. Based on the number of criminal cases for 1952, 1953 and 1954, one estimate put the annual cost at £429,000, taking into account both fees payable to the profession and administrative costs.<sup>30</sup> Secondly, the experience of the working of civil legal aid cast doubt on whether the 1949 Act provisions were apt to deal with criminal cases, particularly in relation to checking financial eligibility if a case went to trial. The solution to these difficulties was inevitably the reference of the whole matter to a new inquiry.

In December 1957 a Committee under the Chairmanship of the late Lord Guthrie was appointed with the following terms of reference:

"To review the provisions of the Legal Aid (Scotland) Act 1949 so far as they relate to criminal proceedings and to consider whether, and if so to what extent, they should be varied in the light of the experience gained of the operation of that Act in relation to civil proceedings and any other relevant circumstances."

Its report appeared in May 1960<sup>31</sup> and, after a review of the historical background to date, contained a detailed survey of the then-existing arrangements for the legal assistance of poor persons facing criminal charges.<sup>32</sup>

As far as the Sheriff Court was concerned, the Committee noted the informality of the practice whereby the Agents for the Poor appointed

30. This was the figure quoted by the Law Society of Scotland to the Scottish Home Department in 1955.

31. Report of the Guthrie Committee, Legal Aid in Criminal Proceedings (1960) Cmnd.1015.

32. Ibid., paras.16 to 43. For the Memoranda of Evidence submitted to the Committee by the Law Society of Scotland see (1958) 3 J. Law Soc. of Sc. 185, 260.

under Rules 152-158 of Schedule 1 of the Sheriff Courts (Scotland) Act 1907 acted for accused persons and the fact that the arrangements varied from area to area. Whereas in Glasgow each Agent for the Poor did a "duty week" once every six months, in Dumfries the duty period was for three months at a time. Variations were also noted in different parts of Scotland regarding the point at which legal assistance for the accused was provided before the accused's production to the court, the financial eligibility for representation as a poor person and the type of case which representation was afforded. Apparently the only matter in which the practice throughout Scotland was consistent was that once an accused person had been accepted as a client by an Agent for the Poor, the Agent carried out for him all the functions carried out by a Solicitor on behalf of a client in criminal proceedings, whether the trial was summary or on indictment. The Committee noted that in the High Court of Justiciary formal arrangements existed for Counsel to appear on behalf of poor persons in sittings of the Court in Edinburgh and on the Glasgow circuit, but that at circuit sittings in other towns no such formality existed, local agents often drawing upon the services of Counsel eligible for the Glasgow circuit. The services of a Solicitor in High Court cases were always available: either the local Agent for the Poor or a member of the W.S. or S.S.C. Society if the trial was in Edinburgh High Court. Appeals to the High Court under the Criminal Appeal (Scotland) Act 1926 were similarly covered, but representation of poor persons in Justiciary Appeals seems not to have been common.

The Committee then went on to consider the main criticisms of the existing arrangements in the High Court and the Sheriff Court.<sup>33</sup> It was

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33. Guthrie Report, paras.44-65.

satisfied that it was no longer reasonable for the legal profession to continue to act for accused persons without remuneration: in particular the annual payment of £8,000 from state funds was totally inadequate. Nor was the quality of the service all that it might be, due to the absence in some cases of a satisfactory relationship between Solicitor and client based on mutual trust and understanding. The absence of any uniform standard of financial eligibility was a further source of abuse: the assessment of the accused person's means was all too often rough and ready. In the inferior summary courts, the absence of legal assistance for the accused, especially where the court was presided over by lay magistrates, meant that there were risks of miscarriages of justice.<sup>34</sup>

The future form of criminal legal aid was then discussed in detail against the background of the skeletal provisions of the 1949 Act and the experience gained in civil cases.<sup>35</sup> In particular it was noted that the same financial conditions were to be applied in criminal cases as in civil if legal aid was required for a trial or appeal<sup>36</sup> and in particular that an accused person might be required to make a contribution to the cost of the proceedings.<sup>37</sup>

A number of criticisms were expressed to the Committee by witnesses concerned with possible abuses by accused persons and Solicitors, and the high demands which would be placed on the legal profession if criminal legal aid were introduced in a similar form as

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34. Ibid., paras.63-64.

35. Ibid., paras.66-67.

36. Legal Aid (Scotland) Act 1949, s.2(1).

37. Ibid., s.2(3)

for civil cases under the 1949 Act.<sup>38</sup> Some of these criticisms had more validity than others, but it was on the question of financial eligibility and its determination that most witnesses agreed that the civil provisions were impracticable. For instance, how could one accurately project an applicant's income for the next twelve months if he were to be found guilty and sent to jail? The "irregular lives"<sup>39</sup> of criminals would in any event make it difficult to ascertain their resources; if they were obligated to make contributions to the cost of their defence, those contributions would be difficult to collect.

These criticisms led the Committee to review what it considered were the only two alternative methods of providing legal aid in criminal cases.<sup>40</sup> The first, supported by the majority of the professional bodies, was that the 1949 Act provisions should be introduced, although with modifications. The second alternative, also with its supporters, was that the existing system should continue, again with some improvements, on the view that to introduce the 1949 Act provisions would be costly and inconvenient.<sup>41</sup> When comparing these proposals the Committee emphasised its conclusion that it was unreasonable to expect the legal profession to continue to carry the financial burden of representation. Since the State would have to assume this, it would be inappropriate for the sum distributable to

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38. Guthrie Report, paras.88-95.

39. Ibid., para.93.

40. Ibid., paras.103-112.

41. One particular inconvenience stressed was that proceedings would be protracted by an increase in pleas of not guilty. Statistics since criminal legal aid was introduced in 1964 have laid this red herring to rest.

the profession to be simply increased without the introduction of proper accounting for work done.<sup>42</sup> The administrative cost would thus be incurred in any event and it was perhaps this consideration above all which impelled the Committee to conclude that the State should take over the financial burden which rested on the profession and that proper payments should be made from State funds to the profession based on records of work done. The balance of advantage thus lay with the discontinuance of the existing system.<sup>43</sup>

The main recommendations of the Committee were generally that legal aid should be available as a right in all cases before courts of solemn jurisdiction; in sheriff summary proceedings where the offence was punishable with imprisonment without the option of a fine; and in all other sheriff court and other summary court proceedings only where a legal aid certificate had been granted in the discretion of the Court.<sup>44</sup> Financial eligibility was to be determined by the Court on the basis of a written declaration by the applicant; no contribution would be payable by a successful applicant.<sup>45</sup> Prior to the determination of financial eligibility, any arrested accused irrespective of his means would be entitled to legal aid in solemn proceedings until admitted to bail or fully committed; and in summary proceedings until the conclusion of the first diet at which he was called upon to plead and for proceedings relating to any application for bail following that diet.<sup>46</sup> Legal aid for the purposes of an

42. Guthrie Report, para.107.

43. Ibid., para.109.

44. Ibid., paras.118, 120.

45. Ibid., paras.152, 155 and 164.

46. Ibid., paras.162 and 163.

of an appeal would be granted only if there were substantial grounds for the appeal and financial eligibility would be determined by the Court.<sup>47</sup> Recommendations were also made as to the extent of the service to be provided by the profession, in particular regarding the employment of Counsel and the setting up of local duty rotas.<sup>48</sup> The Law Society of Scotland itself would lay down the services which a legal aid Solicitor conducting a trial was authorised to provide without specific sanction.

Although the Committee recommended total implementation of their proposals, as opposed to partial introduction of legal aid in criminal cases in the High Court and Sheriff Court, there was in fact further delay. The Law Society formed a list of observations on the Guthrie Report and in general found themselves in agreement with the Report's proposals. The Society was however opposed to the extension of criminal legal aid to the inferior summary courts, mainly on the ground of economy; it also had some reservations on the proposal that the "certifying authority" in first instance cases was to be the Court, due to the lack of uniformity in decision making which it foresaw. Reservations were also expressed on the absence of statutory guidelines on financial eligibility and in appeal cases on the dual determination on eligibility proposed by the Guthrie Report. The Society also regretted the rejection<sup>49</sup> of their proposal that payment of fees should be on the principle of "fair remuneration according to work actually and reasonably done".<sup>50</sup>

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47. Ibid., paras.170, 174, 178, 184.

48. Ibid., paras.194-199.

49. Ibid., para.208.

50. Minutes of Legal Aid in Criminal Causes Committee of Law Society of Scotland, 30th June 1960.

A year later, a parliamentary question in June 1961 produced the response that the Government was still considering the Report,<sup>51</sup> but it was clear that the existing system was reaching breaking point. In July 1961 the Law Society for Scotland presented a Memorial for the Opinion of Counsel<sup>52</sup> in which it expressed its concern at the increasing burden which was being borne by the profession in representing without adequate remuneration accused persons in the High Court and the Sheriff Court and commenting on the absence of legislation to follow the recommendations of the Guthrie Committee. The Memorial drew attention to proposals which had been made in May 1961 by the Ayr Faculty of Solicitors to restrict their services to the genuine poor,<sup>53</sup> and sought Counsel's Opinion as to the extent of the service which it was by law incumbent upon Solicitors to provide in criminal causes. The five particular questions for his Opinion were:

- (1) Was a Solicitor for the Poor in the Sheriff Court under obligation to act gratuitously for any accused who requested his services no matter what might be the means of the accused person? or
- (2) Was he under obligation to act only for accused who were "poor persons"?
- (3) If the answer to Question Two was in the affirmative, how did the question whether or not an accused was a "poor person" fall to be determined?
- (4) If the answer to Question One or Two was in the affirmative
  - (a) Did the duty extend to summary proceedings?

51. H.C. Vol.642, cols.186/87.

52. W.I.R. Fraser Q.C. (as he then was), at that time Dean of Faculty.

53. The Dean of the Ayr Faculty considered that only Pensioners and those in receipt of State Benefits qualified under the 1907 Act.

(b) How far did the duty of the Solicitor originally instructed extend (1) in the Sheriff Court and (2) in the High Court?

(5) Was there a legal duty on Solicitors to appear in the High Court; and if so what was its extent?

In his Opinion of 28 July 1961, Counsel confirmed the view taken by Lord Cooper in Graham v Cuthbert 1951 J.C. 25 that Alison<sup>54</sup> was wrong in construing the Act of 1587 c.91 (A.P.S. 1587 c.57) to the effect that any accused was entitled to the services of the Solicitor for the Poor, and Question One was thus answered in the negative. Counsel did however take the view that whatever was Lord Cooper's opinion as to the non-applicability of the Act 1587 c.91 to the Sheriff Court, Rule 159 of the Rules in Schedule 1 to the Sheriff Courts (Scotland) Act 1907 was sufficient statutory authority for the proposition that a Solicitor for the Poor in the Sheriff Court was obliged to act gratuitously as procurator for accused persons who were "poor", so Question Two was answered affirmatively. As regards Question Three, Counsel's opinion was that the "poor" persons for whom a Solicitor for the Poor was bound to act were persons who had been admitted to the benefit of the Poor's Roll. Rules 152-169<sup>55</sup> provided the machinery for admission which, although not operated in practice in criminal cases, was strictly speaking appropriate. Counsel went on to confirm that the duty to act extended to summary cases. In the Sheriff Court it covered the conduct of all proceedings except where Counsel was instructed; in the High Court when on circuit, the Solicitor was obliged to attend personally on behalf of his "poor"

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54. Alison, Criminal Law of Scotland, Vol.ii, p.370.

55. See Sheriff Courts (Scotland) Act 1907, Sch.1.

client or arrange for another Solicitor in the circuit town to attend on his behalf. There was, said Counsel, no obligation imposed by Rule 159 on the Solicitor to act for his "poor" client in an appeal to High Court in Edinburgh, but it would be contrary to established practice for him to decline to act. This was the limit of a Solicitor's legal duty and there was no legal obligation on the W.S. and S.S.C. societies to appoint agents for persons tried in the High Court in Edinburgh.<sup>56</sup> Finally, Counsel's opinion was that the custom of acting for poor persons on criminal charges could not be transformed into a legal duty merely because of its longevity.

Meanwhile, the Poor's Roll Solicitors in Glasgow and Dunbartonshire were becoming impatient and, before the Opinion was issued, decided to work-to-rule by requiring applicants to produce Affidavits setting forth their circumstances, as was required in civil cases.<sup>57</sup> So far as Glasgow was concerned, the insistence on the Affidavit was to be confined in the first instance to court appearances after the first diet, but the agents subsequently intimated that from 4 September 1961 they would require Affidavits for all appearances. The Law Society deprecated such action due to the potential hardship and dislocation which would be inevitable,<sup>58</sup> and the Solicitors reconsidered their position in the light of the Dean's Opinion which was then available. In the result the date for operating the full affidavit procedure was postponed to 31 December 1961. Two weeks before this deadline, the Secretary of State for Scotland announced that the

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56. This had been the long-established practice.

57. In 1948 Affidavits as to means had replaced the appearance before the Minister and Elders.

58. See Minutes of Law Society Legal Aid Committee 13 July 1961, Item 241.

Government accepted in principle the Guthrie Committee's recommendation that there should be statutory legal aid in criminal cases on the lines of the 1949 Act. That Act would however require amendment and the details remained to be finalised.<sup>59</sup>

The Glasgow agents were not totally assuaged by this statement and from 1st March 1962 commenced their work-to-rule. Further parliamentary questions were asked; it appeared that during the first week of the new system, 157 persons appearing from custody at Glasgow Sheriff Court were not legally represented.<sup>60</sup> On 12th March, the Lord Advocate refused to direct Procurators-Fiscal at Glasgow Sheriff Court to advise accused persons on completing the Affidavits of Means supplied by the agents.<sup>61</sup>

Eventually after an assurance that the Government was considering legal aid legislation for 1962/63, the agents in Glasgow called off their action. In October 1962 the Criminal Justice (Scotland) Bill was introduced; included in its clauses was one amending the 1949 Act.<sup>62</sup> The main effect of this proposed amendment was fourfold:

- (a) the provisions of the 1949 Act relating to the ascertainment of means in civil cases would not apply to criminal cases. Under s.2(2) of the Act, as amended, there would be no means

59. H.C. Vol.651 Written Answers Col.145.

60. H.C. Vol.655 Written Answers Col.96

61. Ibid., Col.126. At the commencement of the work-to-rule, the Agents announced they would make available to Sheriff Clerks sufficient Affidavit forms for a few weeks, but the Clerks did not immediately distribute them or arrange for their completion. See The Scotsman 28th February 1962 and 5th March 1962.

62. It eventually became law as section 48 of the Criminal Justice (Scotland) Act 1963. Meantime as another expedient, the annual payment to Solicitors of £8,000 was doubled.

test initially in either solemn or summary proceedings where the accused was in custody. In all other cases, means would be considered in summary fashion by the Court, the criterion being whether the accused was unable without undue hardship to himself or his dependants to meet the expenses of the case;

- (b) legal aid would be granted or refused (except in Appeals) by order of the Court and not by Local Committees or the Supreme Court Committee;
- (c) in summary cases, except where the proceedings were being concluded by a plea of guilty tendered at the first diet, the Court would also have to consider whether it was in the interests of justice that legal aid should be given; and
- (d) the assisted person would not be required to pay any contribution if he was admitted to legal aid, and the reference to probabilis causa in section 1(6) of the 1949 Act, which was in appropriate to criminal cases, was deleted.

The differences in these provisions from what was proposed in the Guthrie report will be evident: summary cases were to be included whether or not the offence was punishable with imprisonment without the option of a fine. It also became clear that legal aid was not to be available in the inferior courts of summary jurisdiction; the relevant commencement order on this matter was not made until 1975 with the passing of the District Courts (Scotland) Act.<sup>63</sup> The reason for this non-introduction was probably the feeling that initially there was no widespread public demand for such an

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63. Section 10 of this Act paved the way for legal aid in the District Court.

extension and the Law Society's view that it would involve an unwarrantable expenditure of public money.<sup>64</sup>

Criticism of these provisions was confined really to two matters: firstly, the Sheriffs did not approve of the system whereby they would determine applications for legal aid for criminal trials. They were given little guidance on what constituted "undue hardship"<sup>65</sup> or what constituted "the interests of justice" in summary cases.<sup>66</sup> Their fears appear to have been justified, for the practice which has subsequently arisen has varied widely from Sheriff to Sheriff and Court to Court.<sup>67</sup>

Secondly, the departure from the Guthrie recommendation regarding legal aid in summary proceedings caused many to believe that the number of persons pleading not guilty and going to trial would increase dramatically. In fact, no such dramatic increase has occurred, although of course there has been a dramatic increase in the number of criminal cases.<sup>68</sup>

Even after the 1963 Act was passed, criminal legal aid was not brought into force until October 1964, because of the necessity of preparing the relative Scheme, Regulations and Acts of Adjournal

64. See Memorandum of Evidence to Guthrie Committee (1959) 3 J. Law Soc. of Sc. 185 at 195.

65. In November 1975 a Sheriff was criticised for granting legal aid to a person earning £14,000 p.a.

66. Some Sheriffs consider that it is always in the interests of justice to grant legal aid.

67. And now from J.P. to J.P. in the District Court.

68. There were 186,828 summary cases in 1964; 237,989 in 1974.

providing Rules of Procedure and fees.<sup>69</sup> Since October 1964, these have been revised from time to time, in particular with the substitution of a completely new scheme in 1975.<sup>70</sup> Of all the provisions introduced in 1964, the one which has given most difficulty is the notorious s.13(2) of the Act of Adjournal (Criminal Legal Aid Fees) 1964. This broadly now provides for an application at the end of a trial for a certificate from the trial judge that the case has necessarily been one of exceptional length, complexity or difficulty, and thereby allowing the solicitor fees greater than the statutory maxima. As this continues to be a bone of contention in the solicitors' profession, consideration of the detailed history of this provision is reserved for Part IV of this work.

### III. Legal Aid in matters not involving litigation

#### (a) Section 7 of the 1949 Act

Of the various provisions of the 1949 Act which dealt with legal aid outside the courtroom, the first to be introduced in Scotland was Section 7. In March 1959 almost ten years after legal aid was brought in to cover litigation in civil courts, the Government finally acceded to the Law Society's repeated requests for making legal advice available, albeit that court action was not contemplated. The relative instruments were the Legal Advice (Scotland) Scheme 1959 and the Legal Advice (Scotland) Regulations 1959.<sup>71</sup>

69. The Law Society constituted an informal Scheme-Making Committee to frame a scheme in advance of the setting up of the Statutory Committee under s.8(3) of the 1949 Act.

70. See Legal Aid (Scotland)(Criminal Proceedings) Scheme 1975, which also provided for legal aid in the District Court.

71. S.I. 1959/174. It was introduced simultaneously in England, the Government <sup>having</sup> ~~have~~ decided that the Section 7 Scheme would be more satisfactory than the employment of salaried solicitors to give advice as proposed in the Rushcliffe Report, para.178.

All that was covered was oral advice given by a Solicitor on legal questions, including help in preparing an application for legal aid and in supplying information required in connection therewith for determining disposable income and capital. Such oral advice might be confirmed in writing. The advice was limited only to Scots law; although subsections (4) and (7) of Section 7 dealt with advice to members of the forces on the laws of any part of the U.K. or another country and generally to the public on the laws of England and Northern Ireland if provisions corresponding to Section 7 were made for these countries, these subsections were never in fact brought into force.

As with Section 1 Scheme, Solicitors had no obligation to go on the lists kept by local secretaries of persons willing to give advice. Many Solicitors did so volunteer, but they found from the start that the Scheme did not live up to expectations. The advantages inherent in the facts that the application form was easily completed, that the Solicitor himself determined financial eligibility and that there was no obligation on the Solicitor to check the accuracy of any statements made by the applicant were together outweighed by two main drawbacks.

Firstly, the financial limitations were such that only the poorest members of the community qualified for advice. Originally the applicant was eligible if his capital (excluding his house, furniture, clothing and tools) did not exceed £75 and either he was in receipt of National Assistance (in which case he qualified on income) or his income for the previous week did not exceed £4.10.0. after tax, national insurance and statutory deductions for spouse and dependants. The capital and income of the applicant's spouse were reckoned as his own, unless the spouses were living apart, had a contrary interest in

the matter on which advice was sought or it was inequitable or impracticable so to reckon them. Although these capital and income limits (and deductions) were subsequently adjusted over the years,<sup>72</sup> they never brought advice under the Scheme within the range of a large number of persons whose problems went unanswered.

Secondly, as indicated the scope of the advice was limited. Very few legal questions could be answered by oral advice alone; the regulations did not permit even the writing of letters on behalf of a client. The advice could not be given for more than ninety minutes in all (unless Committee sanction was given) on any one legal question;<sup>73</sup> it had to be given in the office of a Solicitor in private practice in Scotland and could not be given on any matter on which the applicant was already receiving legal aid under the provisions of Part I of the Act (i.e. litigation under s.1) or on any matter in connection with any criminal proceedings in which the applicant was an accused person. These severe limitations perhaps above all contributed to the unpopularity of the scheme and many practitioners simply ignored it and continued their old practice of giving advice gratuitously or under the non-statutory legal advice scheme set up simultaneously with the introduction of section 7.<sup>74</sup>

A subsidiary reason for the scheme's failure is perhaps to be found in the rate of payment for the Solicitors concerned. The applicant was obliged to pay a fee of 2s.6d. unless he or his spouse was in

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72. See S.I. 1960/757; 1970/1064 and 1972/1755. When section 7 was repealed by the Legal Advice and Assistance Act 1972, the capital and income limits were £250 and £9.10.0. respectively.

73. For an amusing comment on this provision see "So do our minutes hasten to their end" (1959) 4 J. Law Soc. of Sc. 169.

74. See infra p. 77.

receipt of National Assistance and this was retained by the Solicitor, who collected the balance of his account from the legal aid fund. But the rate of payment was derisory: initially in 1959 it was £1 for each half-hour, with a margin of ten minutes at the end of the first half-hour which had to be exceeded if a second fee of £1 was to be earned; it was not raised to £2 per half-hour until 1970. In the meantime the ever-present problem of office overheads had become acute; it became financially disadvantageous to many practitioners to operate the scheme and their efforts became geared to the more lucrative business brought in by the fee-paying client.

The statistics confirm the unpopularity of the Scheme. In its first full year 1959-60 a total of 4,309 applications were made. This rose to a peak of 8,071 in 1963-64 and then dipped to only 4,494 in 1973.

Section 7 was repealed by the Legal Advice and Assistance Act 1972.

(b) Legal Aid under Section 5

Although introduction of Section 5 had been under contemplation since 1956,<sup>75</sup> no steps to introduce it were taken until 1960 with the making of the relative Scheme and regulations.<sup>76</sup>

Section 5 of the 1949 Act provided broadly for pre-litigation legal aid. It covered legal aid in taking steps to assert or dispute a claim where

- (a) the question of taking, defending or being a party to proceedings before a court or tribunal does not

75. See (1956) 1 J. Law Soc. of Sc. 158

76. Legal Aid (Scotland)(Section 5) Scheme 1960; Legal Aid (Scotland)(Section 5) Regulations 1960 (S.I. 1960/497) and the Act of Sederunt (Legal Aid Rules) 1960 (S.I. 1960/692).

arise or has not yet arisen; but

- (b) if it did arise, the proceedings would, or might properly, be such that legal aid could be given in connection therewith under section 1 of the Act.

A person did not receive legal aid under s.5 unless he showed that he had reasonable grounds for taking steps to assert or dispute a claim, and might also be refused such aid if it appeared unreasonable that he should receive it in the particular circumstances of the case.<sup>77</sup>

The procedure briefly was that the applicant consulted a Solicitor on the appropriate list and completed an application giving details of his means and a statement explaining the nature of the claim and his interest therein. This was then forwarded to the Local Committee who itself determined the applicant's disposable income and capital and his maximum contribution, without reference to the National Assistance Board. The application did not require to be supported by an accompanying Memorandum or precognitions as in a Section 1 case, nor did the Solicitor require to intimate the application to the opponent, although if a certificate was granted, the Local Committee intimated the issue of the certificate to the opponent unless it considered intimation unnecessary. Provision was made for Appeals to the Central Committee against the refusal of a certificate or in relation to matters relating to the applicant's contribution.

Originally the applicant was debarred from legal aid under s.5 if his disposable capital exceeded £75 or if he was not in receipt of National Assistance or had disposable income of more than £234, such figures being computed in accordance with the relative Regulations,<sup>78</sup>

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77. S.5(3).

78. S.5(5).

but these provisions were later amended to exclude applicants whose disposable income or capital was enough to permit of his making a contribution under s.3(1) of the Act.<sup>79</sup>

Section 5 was limited to matters under which legal aid might be given under s.1 if litigation was required, which meant of course that initially section 5 did not apply to asserting or disputing claims in courts and tribunals other than the Sheriff Court or Court of Session.<sup>80</sup> Further, once investigation under s.5 revealed that resort to litigation was inevitable a full section 1 application was required.

Initially this Scheme was popular among the profession but its defects became slowly apparent. The terms of Section 5 itself precluded the obtaining of Counsel's Opinion, which might be of considerable benefit in deciding whether to pursue or defend an action.<sup>81</sup> The Local Committee was entitled to put a limit on the amount of expenditure which might be incurred by the assisted person or his Solicitor, who might thus be required to obtain Committee sanction before pursuing particular lines of inquiry.<sup>82</sup> Most important of all, there was a disparity between the financial requirements under Section 5 as compared with those under Section 1. For example, an applicant who would be assessed in a nil contribution under Section 1 might be faced with a considerable contribution under Section 5, while those in receipt of supplementary benefit might even be involved in a

79. See Legal Aid Act 1960, s.1(2).

80. As Section 1 legal aid was extended to other Courts and tribunals, then Section 5 applied to investigating cases relating thereto.

81. s.5(2): "Legal Aid under this section shall consist of the assistance of a solicitor ...."

82. Legal Aid (Scotland)(Section 5) Regulations 1960, para.5.

higher Section 5 contribution than other applicants who were not on supplementary benefit. Such difficulties were due entirely to the fact that various deductions from income were, while competent in a Section 1 application, quite irrelevant under Section 5.

These anomalies were never solved, apparently because the Government was unwilling to alter Section 5 limits for Scotland alone. Section 5 was not nearly so popular in England, and so the desire to have comparable legal aid legislation in both countries thwarted reform.<sup>83</sup> Furthermore, in England Legal Aid Committees had power to issue a Section 1 certificate limited to making enquiries, including taking the Opinion of Counsel, whereas in Scotland a person could not obtain Section 1 Legal Aid until he could establish a full probabilis causa litigandi.<sup>84</sup>

Like Section 7, Section 5 was repealed by the Legal Advice and Assistance Act 1972.

(c) The Non-Statutory Legal Advice Scheme

Along with the introduction of Section 7 in March 1959 there was introduced by the Law Society of Scotland a non-statutory legal advice scheme which, in the words of the then President was ".... intended to bridge a gap to prevent any embarrassment which may arise when ... an applicant does not qualify under the Statutory Scheme".<sup>85</sup> Once again, the Solicitor had to be on a list of volunteers kept by the local committee and was permitted to give oral advice for up to thirty minutes for a fee of £1. The advice might be confirmed in

83. But this does not of course apply when there is pressure in England for reform, while none exists in Scotland; see section (e) of this Chapter on the Legal Advice and Assistance Act 1972.

84. See infra p. 140.

85. See (1959) 4 J. Law Soc. of Sc. 42.

writing but if the matter could not be finalised in thirty minutes then the Solicitor was required to give the applicant an estimate of the approximate cost of any further advice or steps which might be necessary.

The limitations in this Scheme were very similar to those described in relation to Section 7, although of course more people qualified on means. It was wound up with the repeal of Section 7; in its last year 1971-72 only in three areas did the legal advice lists include Solicitors willing to give advice thereunder.

(d) "Limited" Certificates under Section 1

As already indicated, the disparity between the financial conditions of eligibility for Section 5 certificates and Section 1 certificates meant that many persons who would qualify for legal aid under s.1 would still not qualify at the preliminary stage of investigation. This problem had been alleviated in England in the early years of legal aid by allowing committees to issue Section 1 certificates limited generally to investigation, with the result that Section 5 was not used nearly so widely in England as in Scotland.<sup>86</sup>

Not until 1970 did the Scottish Home and Health Department indicate that it had no objection to the issue of such certificates in Scotland and they were introduced in 1971, for three purposes only. Firstly, the certificate might be limited to the making of further enquiries, in which case the certificate would specify the total amount beyond which an account for enquiries might not be paid. Secondly, the certificate might be limited to the obtaining

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86. This appears to have originated in the extended interpretation given by Local Committees in England to the word "proceedings" in s.1(5) of the Legal Aid and Advice Act 1949, an interpretation confirmed by the Courts. See e.g. Law Society v Elder [1956] 2 Q.B. 93 at 97, in which case it was held that "proceedings" included "contemplated proceedings".

of Counsel's Opinion on a particular legal question, such certificates being granted only where the appropriate Committee considered it reasonable. Lastly, the certificate might be limited to representing the assisted person at a Fatal Accident Inquiry and to obtaining the relative notes of evidence.<sup>87</sup>

In all cases, the application was made in the normal method for Section 1 cases with the Section 1 financial limits and with intimation to the opponent. It was never the intention that limited Section 1 certificates would supersede Section 5 certificates; in particular Section 5 still remained attractive because of the more expeditious way in which certificates were granted by Local Committees, while a limited Section 1 certificate might take three months to process.<sup>88</sup>

It is still competent to apply for a limited Section 1 certificate, although enquiries and the taking of Counsel's opinion can now be done under the Legal Advice and Assistance Scheme. A fuller description of the procedure is contained in Part III of this work.

(e) The Legal Advice and Assistance Act 1972

The Legal Advice and Assistance Act 1972 is a United Kingdom statute which, although it applies to Scotland, is not based on any proposals or recommendations of any Scottish body. It was enacted mainly as a result of the Report of the Lord Chancellor's Advisory Committee on the better provision of Legal Advice and Assistance which appeared early in 1970, a Report which was concerned only with the deficiencies in the provision of legal services in England and Wales.<sup>89</sup>

87. Neither of the latter two steps could be taken under a Section 5 certificate.

88. The DHSS would still require to assess the applicant's means in accordance with normal Section 1 procedure.

89. (1970) Cmnd.4249.

Although some of those deficiencies were equally apparent in Scotland, the Report has to be viewed against a background of separate legal aid legislation and a different tradition of professional practice.

In order to remedy what it saw as the faults in the English system, the Advisory Committee had before it three schemes: a set of proposals by the Society of Labour Lawyers embodied in their document "Justice for All"; another set by a Committee of Conservative Lawyers contained in a pamphlet "Rough Justice" and the recommendations of the Law Society (of England) for the setting up of what had become known as the £25 Scheme".<sup>90</sup> All these bodies agreed that many people failed to get the legal help they needed, either because of faults in the legislation, lack of publicity, lack of Solicitors in their area, reluctance to consult a Solicitor, or just plain failure to recognise that legal remedies might be available. Each body however suggested a different solution: the Law Society's original scheme was basically that anyone whose means were below a certain limit would be entitled to the services of a Solicitor simply by going to him, filling in a simple form and in some cases paying a small contribution to the cost of the work done. The services to be provided would include the whole range of a Solicitor's business, short of litigation, up to an initial level of work costing £25. Further work might be done if the Law Society granted sanction. In addition, the Society proposed that lawyers might be employed to act in conjunction with the Citizens Advice Bureaux where the latter had clients with legal problems. The Labour Lawyers broadly advocated the setting up of "local legal centres" in areas where no Solicitors were in practice. Such centres were to be staffed by Solicitors

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90. Ibid., paras.9-15.

employed by the State, free from restraints as to advertising and soliciting business, but restricted as to the type of work they could undertake (particularly in regard to litigation), leaving the existing scheme, amended as the Law Society proposed, to cope with "city centre" business. Finally, the Conservative Lawyers' proposal was for the attraction of Solicitors to new localities by inter alia the payment of capital grants, provision of premises and a higher rate of payment for legal aid work for Solicitors practising in designated areas.

The Law Society subsequently came round to the view that local legal advice centres should be set up, but under its control rather than that of the State, and that this should be done by expanding the work of the proposed liaison service between the profession and the Citizens Advice Bureaux. Full-time legal staff would be provided by the Society, rather than by voluntary means, and there would be constant liaison with the social services. The Advisory Committee accepted both the original idea for the "£25 Scheme" and the proposed amendments regarding local services, although the cost of introducing the scheme was impossible to predict. This uncertainty as to cost precluded the Committee from recommending the immediate introduction of a full system of liaison officers and legal centres, but the basic scheme was to go ahead. The Committee also suggested a full-scale publicity campaign to bring home to the public the full range of legal facilities which would be available.<sup>91</sup>

The publication of the Legal Advice and Assistance Bill in February 1972 brought forth perhaps more protest in Scotland than in England. In the latter country the criticisms centred mainly on Part II of the Bill (dealing with employment of solicitors by the Law

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91. For a trenchant critique of the whole report see [1970] M.L.R. 432.

Society) which was not to be introduced until the effects of the "£25 Scheme" embodied in Part I became apparent.<sup>92</sup> In Scotland the opposition was directed towards the method of introduction.

When the Report of the Advisory Committee was first introduced, a Scheme Varying Committee of the Law Society of Scotland was considering afresh legal advice and Section 5 legal aid in the light of the tailing-off of applications due to the low financial limits of eligibility and the restrictions on the type of work which might be done. The Society indicated at that time its general approval of the extension of the £25 Scheme to Scotland, considering that anything which did away with the ".... artificial hiatus between legal advice, Section 5 legal aid and Section 1 legal aid was to be commended".<sup>93</sup> But on the publication of the Bill, it was discovered that there were no separate sections for Scotland and that the proposed legislation for England was merely given a Scottish flavour by reference in its clauses to equivalent Scottish bodies and Scottish provisions. In its 22nd Report of the Legal Aid Scheme, the Law Society of Scotland recorded:

"We made urgent representations against this procedure and against certain of the provisions in the Bill but our representations were unsuccessful. We pointed out that the legal aid codes in the two countries have always been quite separate and that the lumping of the legislation for Scotland with that of England will make it more difficult for Scottish solicitors to interpret and apply. We must record our considerable regret at the failure of the authorities to take effective account of our views."<sup>94</sup>

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92. This criticism came from various bodies including established neighbourhood law centres, the Child Poverty Action Group and the National Council for Civil Liberties. See e.g. [1972] New L.J. 231, 384; cf. Pollock Legal Advice and Assistance [1972] 69 L.S.G. No.9, p.8.
93. 20th Rep. of the Law Society of Scotland on the Legal Aid Scheme, p.5.
94. pp. 6-7.

The views of which the authorities failed to take note included a strong feeling that, although Section 5 legal aid was not widely used in England it was popular in Scotland and ought not to be abolished here, as proposed by the Bill; furthermore the collection of contributions was something which should remain with the Law Society and should not be transferred to the Solicitor concerned. In particular, the Council of the Law Society felt that a separate Bill should be introduced dealing with Scotland only and providing similar benefits in accordance always with Scottish law, practice and procedure.<sup>95</sup>

It must be noted in passing that this plaintive cry by the Council is depressingly familiar to all of those concerned with Scots law reform. What had happened with the Legal Advice and Assistance Bill has happened on countless previous occasions when Westminster has tried in one Bill to legislate for the United Kingdom on a matter where the laws and practice of the legal systems of Scotland and England have enjoyed separate development and interpretation. It is simply no use saying that because the State provides legal services to all its needy citizens, then the legislation enabling this to be done should be uniform, even although there may exist different solutions to a client's difficulties in each legal system of the U.K. The failure of the legislature to appreciate this is shown by the following example: when the Bill was at the Second Reading stage in the House of Commons the (English) Solicitor-General of the day explained to the House the import of Clause 2(4) which contained a proposal to make it possible for a court, when confronted with a person coming before it, to suggest that he should seek and receive advice and assistance from a

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95. Cf. the original statutes dealing with legal aid in England and Scotland in 1949: they were separate.

lawyer then present in the Court precincts: something of a "dock brief" system, although it is fair to say that the proposal was not limited to criminal cases. In replying for the Opposition, Mr. Ronald King Murray Q.C. emphasised that in Scotland there existed a duty solicitor system under the provisions of a Scots scheme relating to criminal legal aid and that even before that there was a long tradition of voluntary legal aid in such cases in Scotland. Clause 2(4) might therefore be of no application in a criminal case, at least before the Sheriff Court.<sup>96</sup>

It is patently obvious that had there been a separate Bill for Scotland this point and others like it would have been dealt with at the initial drafting stage, rather than for the first time in debate. Countless Scottish M.P.s have been disheartened through the years by having to make such interventions during debate on U.K. Bills adapted or intended for use in Scotland.

The Council of the Law Society pressed its objections when the Bill reached its Second Reading in the House of Lords, suggesting through the medium of Lord Hoy that Section 5 legal aid should be expanded in scope to cover all aspects of legal advice, not only those concerned with pre-litigation matters. The Government's reply was that the new Bill would cover all of the work possible under Section 5 and that its retention was unnecessary. The only difference between the old and new provisions would be that the Solicitor would require to collect the contribution.<sup>97</sup> The Society thereafter received an

96. See Hansard H.C. Vol.830 cols.1592, 3 and 1604-1606. But it must be said that the duty solicitor scheme did not at that time extend to the other summary criminal courts and that Clause 2(4) might have been expected to be of some use there, always assuming that there were Solicitors present in court.

97. Hansard: H.L. Vol.332 cols.520-522 and 529-531.

undertaking from the Lord Advocate and Secretary of State that they would consider whether Section 5 legal aid should be left to run concurrently with the new scheme in Scotland and in the light of that undertaking withdrew its objection to the Bill. The merits and demerits of the new scheme were then considered against the retention of Section 5; what tipped the balance in favour of the "£25 Scheme" seemed to be the generous financial limits compared to Section 5, the fact the new system would be simple to operate and instantaneous in commencement and the wide scope of services available.

It is interesting to note that the provisions of Part II of the Bill concerning employment of solicitors by the Society did not seem to cause any notable opposition; the hostility of the profession to the new Act was concentrated on the disappearance of a familiar procedure under Section 5. Experience has shown that such fears as to the content of the new legislation have been groundless.

PART II

HOW LEGAL AID IS AVAILABLE TODAY

CHAPTER VADMINISTRATION AND FINANCE

Main provisions: 1967 Act, ss.8-16; 1958 Scheme, Arts.5-11

Introduction

The Law Society of Scotland has the ultimate responsibility for securing that legal aid and legal advice are available as required by both the Legal Aid (Scotland) Act 1967 and the Legal Advice and Assistance Act 1972, and for the general administration of the system.<sup>1</sup> The striking feature of both statutes is that they lay down only the broad principles of legal aid and legal advice, leaving the details to be filled in by subsidiary instruments made either by the Law Society, the Secretary of State or the Courts. In the result the existing provisions resemble a morass of fragmentary information, difficult to assimilate and frustrating to construe.<sup>2</sup> Each time legal aid is extended to cover a new area, at least a new Scheme and set of Regulations is added to the morass.<sup>3</sup>

What follows is an attempt to sketch out generally the areas of responsibility, to indicate which bodies are concerned with the grant of legal aid and to outline the financing of the Schemes.

(A) Functions of the Law Society of Scotland(1) Administering legal aid and advice

The Society exercises its statutory functions in this regard

1. 1967 Act, s.8(1); 1972 Act, s.6(1).
2. When legal aid was first introduced in 1949 the enactments were considered so confusing that the Opinion of Counsel had to be taken on the division of functions between the Law Society's Council and the Legal Aid Central Committee. This was repeated in 1974.
3. The Law Society of Scotland is apparently not unaware of the need to streamline the whole body of legal aid provisions and has been trying for some time to convince the Scottish Office of this. The problem appears to be the usual lack of parliamentary time for Scottish legislation.

through its Council and a hierarchy of Committees. In addition to the non-statutory Legal Aid Committee of the Law Society's Council, which is a general supervisory Committee, the Society is obliged by the statutes to make Schemes for securing that legal aid and advice are available thereunder.

The Scheme-Making Committee is responsible for this function and consists of members of the Law Society and persons nominated by the Faculty of Advocates.<sup>4</sup> Every Scheme requires the approval of the Secretary of State and the concurrence of the Treasury, and any such Scheme may be varied or revoked by a subsequent Scheme.<sup>5</sup> Any member of the Scheme-Making Committee who was present when a Scheme or any provision thereof was considered by the Committee and who then objected to the Scheme or to that provision may state his objection to the Secretary of State, who in turn must not approve the Scheme without first giving the members of the Committee an opportunity to make representations about the matter in dispute.<sup>6</sup>

The Central Committee is a statutory body situated in Edinburgh. It consists of members of both branches of the legal profession, together with two laymen appointed by the Secretary of State. Its total membership does not exceed sixteen, with Solicitors in the majority. Members hold office for a five year term and the Committee is chaired by a Solicitor.<sup>7</sup> Its functions are generally to administer the various Schemes and to act in a supervisory capacity over the

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4. 1967 Act, s.8(3). This is not a standing Committee and is constituted as and when the need arises.

5. Ibid., ss.8(1) and (2).

6. 1967 Act, s.8(7). This does not appear to have ever occurred.

7. Legal Aid (Scotland) Scheme 1958, Articles 5(1), (2) and (4). All the other Schemes adopt the administration provisions of the 1958 Scheme.

Supreme Court Committee and the Local Committees.<sup>8</sup> It also submits to the Law Society estimates, statements of accounts and other necessary information, together with an annual report (later included as part of the statutory report on legal aid made by the Law Society of Scotland to the Secretary of State) containing inter alia a statistical breakdown of the types of cases considered and certificates issued, lists of new enactments and the audited accounts of receipts and payments relating to the Legal Aid (Scotland) Fund. Among its more particular functions are included:

- (1) publicising information concerning legal aid both to the profession and persons wishing to apply for legal aid;
- (2) the determination of appeals from the Supreme Court Committee or a Local Committee,<sup>9</sup> particularly in relation to refusal of certificates and in relation to the refusal of a Local Committee to authorise additional expenditure under the Legal Advice and Assistance (Scotland) Scheme;
- (3) the granting or refusing of authority to a Solicitor not to enforce the priority right of payment of fees out of property preserved or recovered under legal advice or assistance; and
- (4) the agreeing and paying of Solicitors' accounts of expenses.<sup>10</sup>

The Supreme Court Committee is established and maintained in Edinburgh. It consists of an equal number of Solicitors appointed by

8. Ibid., Art.5(3). See infra, pp.89.

9. See infra, p.153.

10. See infra, p.255.

the Law Society and Counsel appointed by the Faculty of Advocates, up to a maximum composition of sixteen members. The Chairman is usually a Queen's Counsel. Members hold office for three years and their function is generally the administration of such Schemes as affect proceedings in

- (1) the Court of Session;
- (2) the High Court of Justiciary, when sitting as a court of appeal;
- (3) the Lands Valuation Appeal Court;<sup>11</sup> and
- (4) the Restrictive Practices Court.

In addition, the Committee is obliged to supply the Central Committee with such estimates, accounts and other information as may be required.<sup>12</sup>

The Local Committees are appointed to run the Schemes throughout Scotland. Sixteen such Committees are distributed on a territorial basis and their members are Solicitors practising in the Sheriff Court or Courts in their own area. Members hold office for three years.<sup>13</sup>

The area of jurisdiction of each local Committee is now delineated according to Sheriff Court Districts,<sup>14</sup> as shown in the following table:

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11. This Court sits only in Edinburgh.

12. 1958 Scheme, Art.6.

13. Ibid., Art.7(1).

14. As presently constituted under the Sheriffdoms Reorganisation Order 1974 and the Sheriff Court Districts Reorganisation Order 1975.

<u>Location of Committee</u>	<u>Area by Sheriff Court District</u>
Aberdeen	Sheriff Court Districts of Aberdeen, Banff, Kirkwall, Lerwick, Peterhead and Stonehaven.
Airdrie	Airdrie
Ayr	Ayr
Dumbarton	Dumbarton
Dumfries	Dumfries, Kirkcudbright, Stranraer
Dundee	Arbroath, Dundee, Forfar
Edinburgh	Duns, Edinburgh, Haddington, Jedburgh, Linlithgow, Peebles, Selkirk
Glasgow	Glasgow, Oban, Strathkelvin
Greenock	Campbeltown, Dunoon, Greenock, Rothesay
Hamilton	Hamilton, Lanark
Inverness	Dingwall, Dornoch, Elgin, Fort William, Inverness, Lochmaddy, Portree, Stornoway, Tain, Wick
Kilmarnock	Kilmarnock
Kirkcaldy	Cupar, Dunfermline, Kirkcaldy
Paisley	Paisley
Perth	Perth
Stirling	Alloa, Falkirk, Stirling

Each Local Committee administers the various Schemes within its area and has power, with the approval of the Law Society, to appoint Solicitors as local representatives for parts of its area to act on its behalf.<sup>15</sup>

The main duties of the Local Committees are of course the determination of applications for civil legal aid in all the Sheriff

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15. 1958 Scheme, At.7(4). Local representatives have been appointed particularly in towns where there are few Solicitors in practice.

Courts in its area and the organisation of legal aid in criminal causes. It also deals in certain circumstances with the sanctioning of Counsel or Expert Witnesses<sup>16</sup> and the processing (but not the paying) of accounts in Sheriff Court proceedings and under the Legal Advice and Assistance Scheme.<sup>17</sup>

The Complaints Committee is constituted under Article 20 of the 1958 Scheme and the equivalent provisions of the other Schemes. It is a Committee of the Law Society and deals only with complaints against Solicitors with respect to their services under the Legal Aid and Advice (Scotland) Acts 1967 and 1972 and Schemes made thereunder.<sup>18</sup> Complaints against Counsel are not dealt with by this Committee but by the Faculty of Advocates itself.<sup>19</sup>

Complaints against Solicitors are referred by the Law Society to the Complaints Committee after they have been considered initially by the Local or Supreme Court Committee. The Society has power to regulate the Committee procedure.<sup>20</sup>

#### General Provisions as to Committees

A number of general provisions relate to the Committees set up under the 1958 Scheme. These are as follows:

##### (a) Appointment of Sub-Committees

Every Committee may appoint Sub-Committees for dealing with any

16. See infra, p. 189.

17. See infra, p. 408.

18. These are quite separate from complaints against solicitors regarding other aspects of professional conduct, which are now dealt with ultimately by The Scottish Solicitors Discipline Tribunal set up under the Solicitors (Scotland) Act 1976.

19. 1958 Scheme, Art.19.

20. On complaints procedure and the sanctions available, see infra pp.118-121.

matter within the appointing Committee's terms of reference.<sup>21</sup> A typical example is that set up by the Central Committee to deal with Accounts in Criminal Causes. Such Sub-Committees may, except in the case of one dealing with finance, include Solicitors who are not members of the appointing Committee, but in practice Sub-Committees include only members of the latter. The quorum of such a Sub-Committee must include at least one member of the appointing Committee.<sup>22</sup>

(b) Power to regulate Committee procedure

The Supreme Court Committee and each Local Committee may frame rules subject to the approval of the Central Committee for the conduct of their business in accordance with the provisions of the 1967 Act and its subsidiary legislation.<sup>23</sup> The Central Committee has power to determine its own procedure by virtue of s.8(6) of the 1967 Act.

(c) Disqualification, Resignation and Removal from Membership

There appears to be no prohibition against a member of one Committee being simultaneously a member of another, and in practice the Solicitor members of the Central Committee have also been members of Local Committees at the same time. A person becomes disqualified from Committee membership:

- (i) on an order or warrant being granted for his detention as a lunatic or on a curator bonis being appointed on his estate;
- (ii) on his estate being sequestrated or on his granting a trust deed for behoof of his creditors;

21. 1958 Scheme, Art.8(2).

22. Ibid.

23. Ibid., Art.8(3).

- (iii) on his being disbarred or struck off (as the case may be), or in the event of his having been suspended from practice, or excluded from giving legal advice or assistance, or from acting for a person receiving legal aid;
- (iv) in the case of a member of the Supreme Court Committee or of a Local Committee, on his ceasing to practise in the Court of Session, the High Court of Justiciary, or the Sheriff Court or Courts within the area of the Committee, as the case may be; or
- (v) on his resignation.<sup>24</sup>

A person retiring from membership of a Committee on the expiry of his term of office is eligible for re-appointment if qualified to serve.<sup>25</sup>

A member of a Committee may resign office by giving one month's written notice to the Law Society and the resignation takes effect on the expiry of the notice.<sup>26</sup>

The Law Society, the Faculty of Advocates or the Secretary of State respectively may, after such inquiry as they think fit, remove from membership of any of the Committees a person appointed by them or him to be a member of the Committee by giving him written notice. Notice must also be given to the Law Society in the case of members appointed by the Faculty of Advocates or the Secretary of State. The removal takes effect from the day after the date of the notice to the member.<sup>27</sup>

24. 1958 Scheme, Art.9(1).

25. Ibid., Art.9(2).

26. Ibid., Art.9(3).

27. Ibid., Art.9(4).

(d) Power to fill vacancies

If a vacancy occurs in a Committee by reason of death, resignation or otherwise, the person or body by whom the member was appointed may appoint another person having the necessary qualifications to be a member in his place and to hold office until the expiration of his predecessor's term.<sup>28</sup> The acts and proceedings of a Committee or Sub-Committee are not invalidated by reason of any vacancy in the membership of the Committee or Sub-Committee or any want of qualifications on the part of any member thereof.<sup>29</sup>

(e) Matters in which a Committee member has an interest

A member of a Committee or Sub-Committee may not take any part as such member in the hearing or discussion of any matter in which he or any partner of his is personally or professionally interested.<sup>30</sup> This prohibition does not extend to matters in which employees (e.g. qualified assistants) of a member are concerned, even although such an employee may be entitled to give legal aid, but common sense would seem to necessitate a de facto extension of the prohibition.

(f) Payment of Committee Members

The Legal Aid (Scotland) Fund bears the cost of travelling and other expenses of members and secretaries of the Central Committee and its Sub-Committees, the Complaints Committee, the Supreme Court Committee and its Sub-Committees and the Local Committee and its Sub-Committees and local representatives and ad hoc members.<sup>31</sup> The annual remuneration of any local representatives is also borne by the Fund.

28. Ibid., Art.9(5).

29. Ibid., Art.9(6).

30. Ibid., Art.9(7).

31. Ibid., Art.10(1)

The amounts to be paid are determined by the Society and are subject to the approval of the Secretary of State.<sup>32</sup>

To allow the increasing burden of administration to be carried out smoothly, the Society is empowered to provide office accommodation and staff for the Central Committee, the Supreme Court Committee and Local Committees.<sup>33</sup> Much of the day-to-day burden falls on the Secretary of each body who may be full-time or part-time.<sup>34</sup> The Society is responsible for making pension arrangements for its full-time staff.<sup>35</sup>

A computer system has now been adopted for Central Committee accounting and records.

(2) Administering the Fund

The Law Society of Scotland has a statutory duty under s.9(1) of the 1967 Act to administer the Legal Aid (Scotland) Fund and all receipts and expenses of the Society attributable to legal aid are paid into and out of the Fund.<sup>36</sup> The general funds of the Law Society must be indemnified thereout against any liability in respect of those expenses.

Sums required to meet payments out of the Fund e.g. as fees to Solicitors, are paid into the Fund by the Secretary of State from moneys provided by Parliament. Such sums come as a grant from the Vote for the Scottish Home and Health Department. In addition, the

32. Ibid., Art.10(2)

33. Ibid., Art.11.

34. The Central Committee, the Supreme Court Committee, the Glasgow and N. Argyll Local Committee and the Lothians and Borders Local Committee all have full-time Secretaries. The remainder act on a part-time basis.

35. 1967 Act, s.12 and 1972 Act, s.8(4).

36. See generally, 1967 Act, s.9.

receipts of the Fund will include contributions by Assisted Persons and damages and monies recovered on their behalf, which must initially be paid into the Fund so that a complete accounting may be made.<sup>37</sup> The expenses for which the Fund will be liable include primarily payments to Solicitors and Counsel and costs of administration. Estimates of such sums are provided annually by the Society to the Secretary of State.<sup>38</sup>

The Law Society must keep such accounts with respect to the Fund and must prepare in respect of each financial year a statement of accounts in such form as may be directed by the Secretary of State with the approval of the Treasury.<sup>39</sup> These annual accounts are audited by persons appointed by the Secretary of State<sup>40</sup> and in accordance with a scheme of audit approved by him.<sup>41</sup> As soon as this is completed, the auditors send to the Secretary of State copies of the accounts and their report, and he sends a copy of each to the Comptroller and Auditor General.<sup>42</sup> The Comptroller must examine every statement and report thus sent to him and may inspect the accounts kept with respect to the Fund and any records relating thereto. He must then certify every such statement of accounts and lay a copy of it together with his report thereon before Parliament.<sup>43</sup>

37. See infra, Chapter XVI.

38. 1967 Act, s.9(7).

39. 1967 Act, s.11(1). The Accounts are published with the Law Society's Annual Report on the Legal Aid Schemes.

40. Only members of the Institute of Chartered Accountants of Scotland, the Institute of Chartered Accounts in England and Wales, the Association of Certified and Corporate Accountants and the Institute of Chartered Accountants in Ireland are qualified to be appointed as auditors: 1967 Act, s.11(3).

41. 1967 Act, s.11(2). Legal aid administration is also subject to audit by the Exchequer and Audit Department of the Treasury.

42. Ibid., s.11(4).

43. Ibid., s.11(5).

(B) Functions of the Secretary of State for Scotland

The main power of the Secretary of State in relation to legal aid and legal advice is in relation to the making of regulations by statutory instrument.<sup>44</sup> Those regulations which deal with

- (a) the proceedings in connection with which legal aid may be given;
- (b) the upper limits of a person's disposable income and capital which make him eligible for legal aid or legal advice;
- (c) the financial limit on the prospective cost of legal advice; and
- (d) the contribution (if any) exigible from the applicant

do not come into force until approved by both Houses of Parliament.<sup>45</sup>

All other regulations do not require such approval, but are subject to annulment in pursuance of a resolution of either House of Parliament.<sup>46</sup> In addition the Secretary of State has general authority to make such regulations "as appear to him necessary or desirable for preventing abuses" by persons seeking or receiving legal aid and legal advice;<sup>47</sup> as to the information to be furnished by applicants;<sup>48</sup> to modify any provision of the Acts to meet the special circumstances in relation to a number of matters;<sup>49</sup> and to make provision as to cases in which a person is to be taken to be (directly

44. 1967 Act, s.15(6).

45. Ibid., s.15(8); 1972 Act, s.11(2).

46. 1967 Act, s.15(7).

47. Ibid., s.15(1); 1972 Act, ss.6(1) and (3).

48. Ibid., s.15(2); 1972 Act, ss.6(1) and (3).

49. Ibid., s.15(3); 1972 Act, ss.6(1) and (3).

or indirectly) in receipt of supplementary benefit or family income supplement for the purposes of the Legal Advice and Assistance Act 1972.<sup>50</sup>

Among his other executive functions, the Secretary of State has the duty of laying before Parliament the annual report of the Law Society of Scotland on the legal aid schemes<sup>51</sup> and of approving any new schemes.<sup>52</sup>

There is no body in Scotland comparable to the Lord Chancellor's Advisory Committee in England to advise a Government Minister on the working of the Acts; the Secretary of State receives merely the Law Society's report adopting the Report of the Legal Aid Central Committee.

(C) Functions of the Court

The Court of Session has power to regulate a number of important matters relating to legal aid and advice generally. It may by Act of Sederunt inter alia determine which proceedings are to be treated as "distinct proceedings" for the purposes of legal aid; regulate the procedure of any court or tribunal in relation to legal aid; provide for the situation in which a person may be treated as having disintituled himself to a continuance of legal aid and advice; make provision for the recovery of sums due to the legal aid fund; fix fees in civil courts and tribunals other than itself and the Sheriff Court; and provide for the taxation of accounts of expenses in connection with legal aid and advice.<sup>53</sup>

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50. 1972 Act, s.6(3).

51. 1967 Act, s.8(11).

52. 1967 Act, s.8(1).

53. 1967 Act, s.16(1); 1972 Act, s.6(1).

The High Court of Justiciary exercises similar powers by Act of Adjournal and in particular may fix fees in all criminal courts.<sup>54</sup>

Before either Court regulates the procedure of any court or tribunal it must so far as practicable consult any rules council or similar body by whom or on whose advice rules of court may be made apart from the Legal Aid and Advice (Scotland) Acts 1967 and 1972, or whose consent or concurrence is required to any such rules so made.<sup>55</sup>

(D) Prohibition on Disclosure of Information

By s.18(2) of the 1967 Act, no information furnished for the purposes of the Act to the Law Society or to any committee or person on their behalf may be disclosed

- (a) in the case of such information furnished by, or by any person acting for, a person seeking or receiving legal aid, without the consent of the person seeking or receiving legal aid; or
- (b) in the case of such information furnished otherwise than as aforesaid, without the consent of the person who furnished it.

To disclose such information is made a criminal offence<sup>56</sup> but disclosure is permitted

- (i) for the purpose of facilitating the proper performance by any person or body of functions under the Act; or

54. 1967 Act, s.16(2).

55. 1967 Act, s.16(5); 1972 Act, s.6(1).

56. 1967 Act, s.18(2).

- (ii) for the purpose of any criminal proceedings for an offence thereunder or of any report of any such proceedings.<sup>57</sup>

It is specifically provided that information furnished to Counsel or to a Solicitor as such by or on behalf of a person seeking or receiving legal aid is not information furnished to the Law Society or a person on their behalf.<sup>58</sup>

These provisions also apply to information furnished for the purposes of obtaining legal advice and assistance under the 1972 Act.<sup>59</sup>

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57. Ibid.

58. Ibid., s.18(4).

59. 1972 Act, s.6(1).

CHAPTER VI

THE COURTS AND PROCEEDINGS FOR WHICH LEGAL AID  
IS AVAILABLE UNDER THE 1967 ACT

Main provisions: 1967 Act, s.1(1)-(4) and Sched.1

Introduction

As mentioned earlier, legal aid was introduced piecemeal after the passing of the Legal Aid (Scotland) Act 1949 and is still not universally available for proceedings in all Scottish Courts and Tribunals. However, it does apply in the major courts, both civil and criminal, with the result that most common court proceedings can now be litigated under legal aid. As regards tribunals and proceedings before other inquiries and administrative bodies the position is not nearly so satisfactory and gaps which the Legal Advice and Assistance Act 1972 has only partially filled remain a source of disadvantage to litigants before such bodies.

The Scheme of the 1967 Act is to allow legal aid to be extended to Courts and Tribunals as necessary,<sup>1</sup> and this has been done regularly in recent years. Certain proceedings are however excepted from the ambit of legal aid and in addition the Act allows rules of Court to be made declaring certain proceedings as "distinct" for legal aid purposes.

Courts and Tribunals in which legal aid is available

Schedule 1 of the 1967 Act lists the proceedings for which legal aid may be given and Part I of that Schedule describes them by reference to the Courts in which they are taken. Legal aid has also been extended by Regulation to proceedings in certain Tribunals.

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1. 1967 Act, s.1(1)-(4).

At present legal aid is available for civil proceedings in

- (a) the House of Lords in the exercise of its jurisdiction in relation to appeals from the Court of Session;<sup>2</sup>
- (b) the Court of Session;<sup>3</sup>
- (c) the Lands Valuation Appeal Court;<sup>4</sup>
- (d) the Scottish Land Court;<sup>5</sup>
- (e) the Sheriff Court<sup>3</sup>

and proceedings before any person to whom a case is referred in whole or in part by any of the said Courts. In addition, it has been extended by Regulation to proceedings in

- (a) the Lands Tribunal for Scotland<sup>6</sup>
- (b) the Employment Appeal Tribunal<sup>7</sup>

By s.43 of the Fair Trading Act 1973 legal aid is now available for proceedings in the Restrictive Practices Court under Part III of that Act, and any proceedings in that Court in consequence of an order made, or undertaking given to the Court, under that Part of that Act.

In criminal proceedings legal aid is available in

- (a) the High Court of Justiciary;<sup>8</sup>
- (b) the Sheriff Court;<sup>8</sup> and
- (c) the District Court.<sup>9</sup>

- 2. Introduced 1 December 1960.
- 3. Introduced 2 October 1950.
- 4. Introduced 15 August 1961.
- 5. Introduced 1 March 1971.
- 6. S.I. 1971/317, in operation 1 March 1971.
- 7. S.I. 1976/512, in operation 30 March 1976.
- 8. Introduced 19 October 1964.
- 9. Introduced as from 16th May 1975 when the District Courts (Scotland) Act 1975 came into force. Legal aid under the 1967 Act was not previously available in the inferior courts of summary criminal jurisdiction which were replaced by the District Courts.

Proceedings in respect of children, being either before the Sheriff or on appeal to the Court of Session, being proceedings in respect of a decision of a children's hearing or of an application to the Sheriff for a finding under Part III of the Social Work (Scotland) Act 1968 may be legally aided under ss.1(6) and (6A) of the 1967 Act.<sup>10</sup>

Some proceedings in the European Court may, for legal aid purposes, be treated as simply steps in the proceedings before the courts of Scotland. The point ~~is~~<sup>has</sup> yet to arise in Scotland, but when a Scottish Court, whether civil or criminal, refers a case to the European Court under Article 177 of the Treaty of Rome, the language of the relative rules of court suggests that such a reference would merely be incidental to those domestic proceedings.<sup>11</sup> This is the approach taken in England where the whole question was recently canvassed before the Queen's Bench Division. In R. v Marlborough Street Stipendiary Magistrate ex parte Bouchereau [1977] 1 W.L.R.414 a French national working in England was granted legal aid for proceedings in the magistrates court. During those proceedings the magistrate decided to make a reference under Article 177 of the Treaty to the European Court on the question of whether the accused could be deported. He refused to grant legal aid to cover the reference on the ground that he had no jurisdiction. The accused then applied for

10. Introduced 15 April 1971. See infra, Chapter XVII.

11. See e.g. Court of Session Rules of Court, Rule 296 A-E; Act of Adjournal (References to the European Court) 1973; Act of Sederunt (Sheriff Court Procedure)(Amendment No.2) 1973. This would not appear to be the case where eg. a decision of the Council of Ministers or European Commission is challenged direct in the European Court by an individual under Article 173. In such cases there appears to be no provision for legal aid under the 1967 Act.

an order of mandamus directed to the magistrate to entertain the application for legal aid to cover the reference. It was held that a reference to the European Court was a step in the proceedings before the magistrates' court and, since the latter were covered by the legal aid order, that order included the reference to the European Court. The vital question for the Court was whether the wording of s.28 of the (English) Legal Aid Act 1974 authorised the magistrate to make an order for legal aid in the European Court. Since proceedings instituted under Article 177 are in effect non-contentious and are in the nature of a step in the action pending before a national Court, and since all questions of costs are still dealt with domestically and nationally, there was no difficulty for the Court in holding that legal aid was automatically available under the existing legal aid order.

It is submitted that this reasoning would be applied in Scotland, even although a literal construction of s.1(1) of the 1967 Act might preclude such a conclusion. By that subsection legal aid is available only before ".... courts and tribunals in Scotland", but any such proceedings in which a reference is made would be commenced and concluded here.

It should also be noted that European Community Judgments are enforceable in Scotland on registration here.<sup>12</sup> Procedure is by Petition to the Outer House and there would appear to be no reason why a normal section 1 application for legal aid should not be granted for such proceedings.

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12. See Court of Session Rule of Court, Rules 296 F-K.

Proceedings before the Courts-Martial Appeal Court, if sitting in Scotland, may be legally aided if the Court so orders under s.73(6) of the Criminal Justice Act 1967 and, by s.73(7) thereof, if either party appeals to the House of Lords against the decision of this Court, the person to whose conviction or sentence <sup>the appeal</sup> relates may be given legal aid.<sup>13</sup>

Courts and Tribunals in which legal aid is not available

Although it is competent to extend the ambit of legal aid to proceedings before other Courts and Tribunals, this is subject to the qualification that legal aid cannot be given in proceedings before such bodies before which persons have no right, and are not normally allowed, to be heard by Counsel or a Solicitor.<sup>14</sup> Although legal representation is normally allowed before a variety of other Courts and Tribunals in Scotland, legal aid is not available for proceedings taken before the following:

(a) Courts

- (1) The Court of the Lord Lyon
- (2) The Court of Teinds<sup>15</sup>
- (3) The Registration of Voters Appeal Court
- (4) The Election Petition Court<sup>16</sup>
- (5) The Courts of the Church of Scotland

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13. If such an order is made it appears from S.I.1967/1289 that the technical provisions of ss.73-84 of the Criminal Justice Act 1967 would apply. The Legal Aid Act 1974 consolidates these provisions with other legal aid legislation in England, but they are still in force quoad Scotland. They relate to the grant of legal aid in criminal proceedings in England and have no application in Scottish (civilian) criminal cases.

14. 1967 Act, s.1(4).

15. As the business of this Court is almost entirely formal and conducted on paper, s.1(4) of the 1967 Act would appear to exclude legal aid.

16. 1967 Act, Schedule 1, Part II.

(b) Tribunals

The proliferation of administrative tribunals in recent years and the importance to parties of the causes they determine has rendered legal representation before such bodies an increasingly frequent occurrence. So many bodies now exist that formulating a complete list would be almost impossible,<sup>17</sup> but, apart from those already mentioned, legal aid is not available for proceedings before them, although it could competently be made available by Regulation. In particular, a great deal of contentious business is now disposed of before Industrial Tribunals, Supplementary Benefit Appeal Tribunals and local Valuation Appeal Committees.

However, legal advice under the Legal Advice and Assistance Act 1972 is available for all steps leading up to the hearing before such a body and to that extent the gap is partially filled.<sup>18</sup> The Law Society of Scotland have since 1974 held the view that the Legal Advice and Assistance Scheme should be available for representation before such bodies,<sup>19</sup> but the present somewhat ludicrous situation is that legally-aided representation under the 1972 Act is still not permitted in proceedings before e.g. the Criminal Injuries Compensation Board (a non-statutory body), an Industrial Tribunal set up under the Employment Protection Act 1975, or a Fatal Accident Inquiry under the Fatal Accidents and Sudden Deaths (Inquiry)(Scotland) Act 1976.<sup>20</sup>

17. For a comprehensive attempt, see Walker, Scottish Legal System 4th ed. (1976) pp.226-236.
18. S.2(3) of the 1972 Act prohibits advice or assistance being given for any step in the institution of conduct of any proceedings before a tribunal. See infra, Chapter XXIII.
19. See 24th and 25th Annual Reports of the Law Society of Scotland on the Legal Aid Scheme.
20. A "limited" certificate under s.1 of the 1967 Act may be granted as respects the latter, and other similar inquiries e.g. under the Merchant Shipping Act, the Mines and Quarries Act and the Aircraft Act. On the effect of a limited certificate see infra, p. 183.

(c) Arbitrations

In the 1967 Act, the term "tribunal" is defined as including an arbiter or oversman, however appointed, and whether the arbitration takes place under a reference by consent or otherwise.<sup>21</sup>

In the absence of any general statutory provision allowing legal aid to be granted for proceedings before Tribunals, it thus appears that proceedings before an arbiter cannot be litigated on legal aid.

The excepted proceedings(a) Defamation or verbal injury

Proceedings wholly or partly in respect of these civil wrongs cannot be brought or defended under legal aid. It appears that the reason such cases were excluded was the fear that there would be a flood of unmeritorious applications,<sup>22</sup> but in any event actions for defamation have always been rare in Scotland.<sup>23</sup>

But if in an action for which legal aid is granted the defender makes a counter-claim for defamation or verbal injury, the pursuer in the original action (i.e. the defender to the counter-claim) is not barred from applying for and may be granted legal aid to enable him to defend such a counter-claim.<sup>24</sup>

21. 1967 Act, s.20(1).

22. See Matthews and Oulton, Legal Aid and Advice (1971) p.48, note 14.

23. The Faulks Committee on Defamation (1975 Cmnd.5909) heard evidence to the effect that not more than one such action per year was heard in the Court of Session over the past 15 years, with perhaps rather more in the Sheriff Court (para.54). At para. 582 the Committee recommended that legal aid should be extended generally to actions for defamation, convicium and malicious or injurious falsehood. The Committee indicated that such actions were so rare that no significant extra burden was likely to be placed on public funds.

24. Legal Aid (Extension of Proceedings)(Scotland) Regulations 1969 (S.I. 1969/955) para.2.

(b) Breach of promise of marriage

Like actions for defamation, actions for breach of promise of marriage are a rarity in Scotland<sup>25</sup> and legal aid is not available for proceedings wholly or partly in respect of such cases. Such a rule is in contrast to the other procedural rules favouring a pursuer in such cases.<sup>26</sup>

(c) Proceedings wholly or partly in respect of the inducement of one spouse to leave or remain apart from the other

Actions for damages for enticement of a spouse are still competent in Scotland but are highly exceptional in practice.<sup>27</sup> Legal aid is not available for such actions.

(d) Election Petitions

Legal aid is not available either for a parliamentary or local election petition.<sup>28</sup>

(e) Summary cases

The summary cause provided for under s.35 of the Sheriff Courts (Scotland) Act 1971 was introduced as from 1st September 1976<sup>29</sup> and replaced inter alia cases which were formerly taken in the Sheriff's Small Debt Court. Under Part II of Schedule 1 of the Legal Aid (Scotland) Act 1967 legal aid was not available for proceedings in the Small Debt Court in which liability for the debt and the amount thereof were admitted. Although no consequential amendment of Schedule 1 was made by the Sheriff Courts (Scotland) Act 1971, it may be that legal aid is not available where the same situation occurs in a summary cause. While s.35(1)(d) of the 1971 Act directs the use of

25. They have already been abolished in England.

26. See Clive and Wilson Husband and Wife (1974) pp.27/28

27. Ibid., pp.280-281.

28. 1967 Act, Sch.I, part II.

29. S.I. 1976/236.

the summary cause for "proceedings which, according to the law and practice existing immediately before the commencement of this Act, might competently be brought in the Sheriff's Small Debt Court ...", this provision does not affect the question of the grant or refusal of legal aid in such causes. It is submitted that if liability for the debt or the amount thereof is disputed, legal aid would be available, unless the appropriate Committee felt it was unreasonable to grant legal aid. Presumably this would not become apparent until the first calling, and it might be necessary for the party who desires legal aid to apply for a sist so that an application might be made.<sup>30</sup>

The Summary Causes Rules permit the representation of a party by a person other than an Advocate or Solicitor at the first calling of the cause and, unless the Court at that calling otherwise directs, at any subsequent diet where the cause is not defended on the merits or on the amount of the sum due.<sup>31</sup> From the point of view of legal aid, this simply means that if a party wishes legal aid to pursue or defend a summary cause which is disputed on the merits or on quantum, he must have a Solicitor to act for him.<sup>32</sup>

(f) Summary removing

According to the 1967 Act, legal aid is not available for proceedings in the Sheriff Court for summary removing in which liability for the debt and the amount thereof are admitted.<sup>33</sup> By s.35(1) of the Sheriff Courts (Scotland) Act 1971, such a summary cause comes within

30. The competency of sisting a summary cause may be in doubt, but it is arguable that a motion to sist is an "Incidental Application" within the terms of Rule 93 of the schedule to the Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976.

31. Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976 Sch. rule 17.

32. This is in line with the recommendations of the Grant Committee on the Sheriff Court (1967) Cmnd.3248, para.626-627.

33. 1967 Act, Sch.I, part II.

the Summary Cause Rules 1976 and the considerations discussed above would seem to apply.

### Distinct Proceedings

By s.16(1)(a) of the 1967 Act the Court may make provision as to the proceedings which are or are not treated as distinct proceedings for the purposes of legal aid. The provisions made thereunder for civil cases are contained in para.2(1) of the Act of Sederunt (Legal Aid Rules) 1958 as amended.<sup>34</sup> The significance of distinguishing certain types of civil proceedings is simply that each kind of "distinct" proceedings requires a separate legal aid application.

The following proceedings are "distinct":

- (a) proceedings in the Sheriff Court, whether before the Sheriff Principal or the Sheriff, in so far as they are proceedings in a Court of first instance;
- (b) proceedings in the Sheriff Court before the Sheriff Principal on appeal from the Sheriff;<sup>35</sup>
- (c) proceedings in the Court of Session, whether in the Inner House or before a Lord Ordinary, in so far as they are proceedings in a Court of first instance;
- (d) proceedings in the Court of Session in so far as they are proceedings in an appellate court and including proceedings by way of motion for a new trial;<sup>35</sup>
- (e) proceedings in the House of Lords on appeal from the Court of Session;<sup>35</sup>
- (f) proceedings in the Lands Valuation Appeal Court;
- (g) proceedings in the Scottish Land Court;

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34. S.I. 1958/1872 amended 1960/2269; 1961/1549; 1971/174; 1973/1774; 1976/373.

35. Thus, a fresh certificate is necessary whether the person seeking legal aid is appellant or respondent.

- (h) proceedings before the Lands Tribunal for Scotland;
- (i) proceedings before the Employment Appeal Tribunal;
- (j) proceedings in the Restrictive Practices Court under Part III of the Fair Trading Act 1973 and any proceedings in that Court in consequence of an Order made, or undertaking given to the Court, under that Part of that Act.

Where proceedings are initiated in the Sheriff Court and are thereafter remitted to the Court of Session under s.5 or s.30 of the Sheriff Courts (Scotland) Act 1907, or under any other enactment authorising or requiring proceedings to be remitted to the Court of Session the ensuing proceedings in that Court (other than any subsequent proceedings by way of appeal) are not treated for the purposes of legal aid as "distinct" from the initial proceedings in the Sheriff Court.<sup>36</sup> A separate application for legal aid is thus not required in this situation.

For criminal cases, the relevant rules are contained in para.2 of the Act of Adjournment (Rules for Legal Aid in Criminal Proceedings) 1964 as amended.<sup>37</sup> As they are somewhat differently expressed, they are discussed in detail later in the section on criminal legal aid.<sup>38</sup>

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36. Ibid., para.2(2).

37. S.I. 1964/1409 amended 1975/835.

38. See infra., pp.295-296.

CHAPTER VII

REPRESENTATION OF THE ASSISTED PERSON

Main provisions: 1967 Act, s.6; 1958 Scheme, Articles 12 and 13

Introduction

All legal aid, advice and assistance must be rendered by practising Solicitors and Counsel (where appropriate).<sup>1</sup> Although the remuneration payable to the legal profession comes from State funds, the fact that the services of Counsel or a Solicitor are given by way of legal aid or advice and assistance does not affect the relationship between or the rights of Counsel, Solicitor and client, save as expressly provided by or under the 1967 or 1972 Act.<sup>2</sup>

When legal aid was originally introduced in 1949 the legislation provided for the maintenance of lists of Solicitors and Advocates willing to act for persons receiving legal aid, and there might be separate lists for different purposes, for different courts and for different districts.<sup>3</sup> Any practising Solicitor or Advocate was entitled to have his name on the appropriate lists or any of them, unless he was excluded because of his conduct.<sup>4</sup> On this statutory basis the Law Society of Scotland made detailed provisions in the various legal aid schemes for the maintenance of separate lists of lawyers to act for particular types of cases.<sup>5</sup>

1. 1967 Act, s.1(5). Representation includes all such assistance as is usually given by Solicitor or Counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a settlement to prevent or bring to an end any proceedings: ibid.
2. Ibid., s.1(8); 1972 Act, s.6(1). So e.g. a Solicitor may still be sued for professional negligence even although his services were given under the legal aid Schemes.
3. Legal Aid (Scotland) Act 1949, s.6, consolidated in s.6 of the 1967 Act.
4. Ibid.
5. See e.g. 1958 Scheme, Article 12.

But in 1973 when legal advice and assistance was introduced it was considered desirable that a Solicitor who was requested to give such advice should be able to start work immediately without requiring to put his name on any list, and so any practising Solicitor with a current practising certificate who was not disqualified from being on a legal aid list could act in appropriate cases.<sup>6</sup> In 1974 this reasoning was applied to civil cases in the Court of Session, Lands Valuation Appeal Court and the Sheriff Court with the result that Legal Aid Committees no longer maintained separate civil lists.<sup>7</sup> In 1977 the position as regards lists of Solicitors prepared to act in criminal proceedings was brought broadly into line.

Section 6 of the 1967 Act, which was the foundation provision for the listing of Solicitors and Counsel, was itself amended by s.1(2) of the Administration of Justice Act 1977, with effect from 29 August 1977, which had the effect of removing the statutory authority for the previous system. But none of the legal aid Schemes has yet been amended to take account of this statutory change, with the result that outdated references to legal aid lists persist throughout, as if there were still separate lists for separate purposes or separate Courts.

Although the Law Society has been relieved of its statutory obligation to maintain lists, it does prepare from time to time selective Referral lists for issue to local legal aid Secretaries, Citizen's Advice Bureaux, Advice Centres and other organisations or agencies which have occasion to refer enquiries to a Solicitor. These lists are prepared on a country-wide basis and indicate the type of work each Solicitor is prepared to undertake. The current Referral

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6. The Solicitor must also contribute to the Guarantee Fund and be entitled to practise on his own account.

7. See (1974) 19 J.L. Soc. Sc. 93.

lists were prepared in early 1977. Informal lists of Solicitors who are prepared to act in criminal cases are also maintained by local Secretaries for use by Sheriff Clerks, duty Solicitors and prison authorities.

This Chapter deals with the present position regarding representation: the question of who may give legal aid. The question of complaints against Solicitors and Counsel is also covered.

#### Freedom of Choice

An applicant for legal aid or advice and assistance has a completely free choice as to who may act for him. By s.6(1) of the 1967 Act,<sup>8</sup> a person entitled to receive advice or assistance or legal aid may select

(a) the Solicitor to advise or act for him, and

(b) if the case requires Counsel, his Counsel,

and he shall be entitled to make the selection himself. All the Schemes make provision for the circumstances in which Counsel may be instructed<sup>9</sup> and of course Counsel can only be instructed through a Solicitor. It will be noted that s.6(1) permits but does not oblige the applicant to make the choice of Counsel; normally therefore the Solicitor selected will advise his client on the choice of Counsel available. By s.6(2) of the Act it is provided that s.6(1) does not prejudice the right of a Solicitor or Advocate to refuse or give up a case or entrust it to another Solicitor or Advocate where he has good reason to do so.<sup>10</sup>

8. As substituted by s.1(2) and Part II of Schedule 1 of the Administration of Justice Act 1977.

9. On the instruction of Counsel, see infra, pp.189-190.

10. This has always been the position since 1949.

Normally an applicant for civil legal aid resident in Scotland selects the Solicitor whom he first consults, provided the latter is prepared to act for him; if this is not the case he will be referred by that Solicitor or by the appropriate Committee to a Solicitor who is prepared to act.<sup>11</sup> If the application comes from a person resident outwith Scotland it goes initially to the Central Committee, which passes it to the Secretary of the Supreme Court Committee or the Local Committee as appropriate.<sup>12</sup>

An applicant for criminal legal aid must make application to the Court for legal aid for a trial, and to the Law Society for appeal proceedings. In both cases the Court decides whether the applicant qualifies on means. There is also a comprehensive system of Duty Solicitors who appear for persons appearing from custody. All of these detailed provisions are dealt with separately,<sup>13</sup> as are those involving legal aid for proceedings involving children<sup>14</sup> and those relating to legal advice and assistance.<sup>15</sup>

11. See 1958 Scheme, Art.14(2), followed in all the other civil Schemes. The Solicitor need not have a place of business near the Court in which any proceedings are contemplated.
12. Ibid. A person who desires legal aid in the House of Lords applies to the Solicitor who acted for him in the Court of Session, whom failing any other Solicitor: see House of Lords Scheme, Art.6(2). English barristers and Solicitors may act in Scottish cases in the House of Lords provided they observe the provisions of the House of Lords Scheme: see House of Lords Scheme, Art.5. Under the Employment Appeal Tribunal Scheme, Art.7(3) where it appears to the Local Committee that the application relates to proceedings which are likely to be conducted in England and Wales, they transmit the application to the Secretary of the Law Society in England; if it is doubtful where the proceedings will be conducted, the Registrar of the Tribunal determines that question.
13. See infra, Chapters XIX-XXI.
14. See infra, Chapter XVII.
15. See infra, Chapter XXIII.

Although the system of legal aid lists has been abandoned, certain provisions of the Schemes relating thereto apparently still apply. Any Solicitor who is selected by an applicant is bound to act for him in connection with the case specified in any legal aid certificate issued to the assisted person, unless he satisfies the Supreme Court Committee or the Local Committee, as the case may be, that he has good reason to refuse or to give up the case or to entrust it to another Solicitor.<sup>16</sup> There is a general duty on any Solicitor giving legal aid to comply with all the legal aid provisions.<sup>17</sup>

#### Delegation by Solicitor

Assisted persons sometimes complain that the Solicitor or Advocate who actually represents them at e.g. a Trial is not the same person whom they originally instructed. Delegation of functions by the original Solicitor or Advocate is clearly in order in view of s.6(2) of the 1967 Act; the right of entrusting a case to another Solicitor or Advocate is there preserved. However, the Central Committee have deprecated the practice of Solicitors in taking on too many criminal cases and then having to delegate extensively.<sup>18</sup>

#### Withdrawal from giving legal aid

All the Schemes give a Solicitor or Advocate the right to withdraw from the list of persons giving legal aid, or to refuse to give it,<sup>19</sup> but the question now arises as to whether this is now possible in view of the abolition of separate lists.

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16. See e.g. 1958 Scheme, Art.13(3), followed in all the other Schemes.

17. Ibid., Art.13(5).

18. See 16th Report of the Law Society of Scotland on the Legal Aid Schemes (1965-66) p.59.

19. See e.g. 1958 Scheme, Art.13(2).

It is submitted that it would be possible for any Solicitor or Advocate to give notice to the appropriate legal aid Committee or the Faculty of Advocates, as the case may be, that he does not intend to act for persons seeking legal aid, advice or assistance and simply to intimate that fact to any seeking such help; even without giving notice any Solicitor or Counsel could refuse to do legal aid work in general, or refuse to do it in a particular case. It is further suggested that notwithstanding the giving of such notice, the Solicitor or Advocate would still be bound to carry through to its conclusion every case in which ~~has~~<sup>he</sup> was at that time acting for an assisted person, unless he had a good reason to give up the case: the abolition of listing would not seem to affect this basic term of service, which is included in all the Schemes.<sup>20</sup>

Exclusion from giving legal aid, advice and assistance

The original provisions of the 1967 Act have been slightly re-written to take account of the fact that legal aid lists have been abolished. Now, by s.6(3) of the 1967 Act,<sup>21</sup> the Law Society in the case of a Solicitor, or the Faculty of Advocates in the case of an Advocate, may exclude him (whether permanently or temporarily) either from being selected to give legal aid, advice or assistance, or from giving it, on the ground that there is good reason for excluding him arising out of

- (i) his conduct when acting or selected to act for persons receiving advice or assistance or legal aid,
- (ii) his professional conduct generally, or
- (iii)/-

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20. Ibid.

21. As amended by s.1(2) of the Administration of Justice Act 1977.

- (iii) in the case of a member of a firm of Solicitors, such conduct on the part of any person who is for the time being a member of the firm.

Where a Solicitor or Advocate is aggrieved by any decision so excluding him, he may appeal against his exclusion to the Court of Session, and the Court in determining such an appeal may make such order as it thinks fit.

Such exclusion is likely to be made on the basis of a complaint concerning the Solicitor concerned.

#### Complaints against Counsel and Solicitors

All the Schemes contain provisions dealing with complaints made against the legal representatives of an assisted person.

##### (1) Complaints against Counsel

The provisions of the Schemes are identical with respect to these complaints.<sup>22</sup> An aggrieved person (or body) who wishes to complain about the conduct of an Advocate with respect to his services under the 1967 Act or any of the Schemes thereunder must intimate his complaint direct to the Faculty of Advocates. The Faculty has a discretion to investigate the complaint to <sup>such</sup> ~~whatever~~ extent "as seems proper". It has power to exclude an offending Counsel from giving legal aid;<sup>23</sup> if it does so, that fact must be intimated to the Central

22. 1958 Scheme, Art.19; House of Lords Scheme, Art.10; Scottish Land Court Scheme, Art.12; Lands Tribunal for Scotland Scheme, Art.12; Children Scheme, Art.17; Restrictive Practices Court Scheme, Art.12; Employment Appeal Tribunal Scheme, Art.12; Criminal Scheme, Art.27. Although Legal Advice and Assistance may be given by Counsel where necessary, there is no provision in the relative Scheme for complaints against Counsel.
23. The Schemes all refer to exclusion from legal aid lists. But quite apart from the provisions of the Schemes, the power to exclude Counsel is clear from s.6(3)(a) of the 1967 Act, as amended by Sch.1, Part II of the Administration of Justice Act 1977.

Committee. Both the fact that a complaint has been made and the decision of the Faculty thereon are intimated to the Counsel concerned.<sup>24</sup>

The lack of formality in these provisions is presumably an expression of the traditional approach adopted by the Faculty that matters of discipline are for the Dean and his Council. The formalistic approach with regard to Solicitors (outlined below) is in stark contrast.

It is interesting to note that the provisions of all the Schemes refer to "any complaint" against a Counsel.<sup>25</sup> While this presumably means in the normal case a complaint made by an aggrieved litigant, there would seem to be no reason why an aggrieved Court Solicitor, or Legal Aid Committee (and perhaps even an aggrieved fellow-Counsel) should not complain to the Faculty about the conduct of an Advocate. These points have yet to be decided.

(2) Complaints against Solicitors

The provisions are more complex and formal and the Schemes are not identical on a number of points.<sup>26</sup>

(a) Who may complain

All the Schemes provide that the assisted person or any person or body having an interest arising out of proceedings in which legal aid is given may complain with respect to the Solicitor's services. The Legal Advice and Assistance Scheme refers to "any complaint by

24. 1958 Scheme, Art.19, followed in all the other Schemes.

25. See e.g. 1958 Scheme, Art.19.

26. They are to be found in the 1958 Scheme, Art.20; House of Lords Scheme, Art.11; Scottish Land Court Scheme, Art.13; Lands Tribunal for Scotland Scheme, Art.13; Children Scheme, Art.18; Restrictive Practices Court Scheme, Art.13; Employment Appeal Tribunal Scheme, Art.13; Criminal Scheme, Art.28.

a client .... or any person or body having a reasonable interest to complain".<sup>27</sup>

The Central Committee itself may lodge a complaint against a Solicitor with respect to the latter's services under all the Schemes except the House of Lords Scheme.

The Supreme Court Committee may lodge a complaint against a Solicitor under the 1958 Scheme,<sup>28</sup> the Children Scheme,<sup>29</sup> the Restrictive Practices Court Scheme<sup>30</sup> and the Criminal Scheme.<sup>31</sup>

The Local Committee may lodge a complaint under all the Schemes except the Legal Advice and Assistance Scheme, the House of Lords Scheme and the Restrictive Practices Court Scheme.

Under the Scottish Land Court Scheme,<sup>32</sup> the Lands Tribunal for Scotland Scheme,<sup>33</sup> and the Children Scheme,<sup>34</sup> the Restrictive Practices Court Scheme,<sup>35</sup> the Employment Appeal Tribunal Scheme,<sup>36</sup> and the Criminal Scheme,<sup>37</sup> the Court or Tribunal itself may lodge a complaint against a Solicitor.

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27. Legal Advice and Assistance Scheme, Art.11.

28. 1958 Scheme, Art.20(1)(a).

29. Children Scheme, Art.18.

30. Restrictive Practices Court Scheme, Art.13(1).

31. Criminal Scheme, Art.28.

32. Art.13.

33. Art.13.

34. Art.18.

35. Art.13.

36. Art.13.

37. Art.28.

(b) To whom must the complaint be directed?

Initially complaints, whether they be by the assisted person, other interested party, the Central Committee or the Court or Tribunal itself, arising out of the conduct of a Solicitor in the Court of Session, High Court of Justiciary, Lands Valuation Appeal Court and Restrictive Practices Court are directed to the Supreme Court Committee; those relating to conduct in the Sheriff Court, Scottish Land Court, Lands Tribunal for Scotland and Employment Appeal Tribunal are directed to the Local Committee. Under the Criminal Scheme it appears that complaints relating to conduct in the District Court or Sheriff Court go to the Local Committee, as do complaints under the Legal Aid and Assistance Scheme. Complaints relating to conduct in the House of Lords go to the Central Committee.

Complaints by the Supreme Court Committee to the Local Committee, in cases where such complaints are competent, go to the Central Committee.

(c) Investigation of complaint

If the Central Committee receives any complaints it may, after such inquiry as it thinks fit, report the complaint to the Law Society. If the Supreme Court Committee or Local Committee receives a complaint, it must report it to the Society, unless it considers the complaint to be frivolous.<sup>38</sup>

The 1958 Scheme provides that the Supreme Court Committee must investigate every complaint against a Solicitor arising out of proceedings in which legal aid is given in the Court of Session, the High Court of Justiciary or in the Lands Valuation Appeal Court notwithstanding that the Solicitor may not be on the appropriate list of

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38. This is also the position when the Central Committee receives a complaint relating to a Solicitor's conduct in the House of Lords.

Solicitors undertaking legal aid cases in these Courts;<sup>39</sup> since the abolition of legal aid lists this provision presumably means that all such complaints must be so investigated, wherever in Scotland the Solicitor has his principal place of business.

On receiving a complaint the Law Society refers it to the Legal Aid (Scotland) Complaints Committee and that Committee makes such investigation with respect to the complaint as seems proper to them, and makes recommendations to the Society accordingly.<sup>40</sup> The procedure to be followed by the Complaints Committee is contained in the Legal Aid (Scotland) Complaints Committee Rules 1973, details of which are to be found in the Parliament House Book.<sup>41</sup>

The report and recommendations of the Complaints Committee <sup>are</sup> ~~is~~ laid before the Law Society. If the recommendation is that the Solicitor should be excluded from giving legal aid, advice or assistance, the Solicitor shall be so excluded by the Society without further inquiry.<sup>42</sup> Such exclusion appears to be the only sanction possible under the legal aid provisions, but there would presumably be the other over-riding sanction of a reference to the Scottish Solicitors Discipline Tribunal set up under the Solicitors (Scotland) Act 1976. The Council of the Law Society has also had occasion to reprimand Solicitors for their conduct in relation to legal aid cases.

All complaints and the decision of the Society thereon are intimated by the Law Society to the Solicitor concerned.

39. Art.20.

40. Relatively few complaints actually come before this Committee and many are resolved between the Society and complainer. There is no limitation on what sort of complaints may be made: dilatoriness would appear to be the general catch-all.

41. They are self-explanatory and it has not been thought necessary to repeat them here.

42. See e.g. 1958 Scheme, Art.20(3), followed in all the other Schemes.

PART III

CIVIL LEGAL AID UNDER THE 1967 ACT

CHAPTER VIII

HOW TO APPLY FOR SECTION 1 LEGAL AID

Main provisions: 1967 Act, s.1; 1958 Scheme  
Art.14-16; General Regulations 5 and 6

Introduction

Legal aid for civil proceedings under Section 1 of the 1967 Act is granted or refused by the Law Society of Scotland, to which body all applications should be directed. The detailed provisions relating to the method of application are to be found in Articles 14-16 of the Legal Aid (Scotland) Scheme 1958 (the "1958 Scheme"), which provisions have been adopted with suitable modifications in all the other Schemes relating to civil cases,<sup>1</sup> with the exception of cases involving children's referrals and appeals therefrom, which are the subject of an entirely separate Scheme.<sup>2</sup>

The Law Society of Scotland deals with Section 1 applications through Local Committees and the Supreme Court Committee; the Central Committee is not generally involved with applications under Section 1 (except in House of Lords cases) unless there is an appeal against the refusal of a certificate or against some other decision of another Committee. It should also be observed that the Court in which the proceedings are to be taken has no locus regarding the grant of legal aid for cases in civil courts, as opposed to criminal trials; the whole matter is dealt with by the Law Society itself.

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1. See Legal Aid (Scotland)(House of Lords) Scheme 1960, Arts.6-8; Legal Aid (Scottish Land Court) Scheme 1971, Arts.7-9; Legal Aid (Lands Tribunal for Scotland) Scheme 1971, Art.7-9; Legal Aid (Scotland)(Restrictive Practices Court) Scheme 1973, Arts.7-9; Legal Aid (Scotland)(Employment Appeal Tribunal) Scheme 1976, Arts.7-9.
  2. For details of the Legal Aid (Scotland)(Children) Scheme 1971 see infra, Chapter XVII.

Before putting in an application under s.1, the Solicitor must of course satisfy himself that prima facie the applicant is eligible, both financially and on the grounds that he has a probabilis causa litigandi and that it is reasonable for him to be granted legal aid. But, as explained, the final decision on these matters is not made by him and in this work they are discussed separately.<sup>3</sup> This Chapter deals simply with the mechanics of making the application.

#### Meaning of "person"

Only a "person" is eligible for legal aid. This term is defined in s.20(1) of the 1967 Act in negative terms: it does not include a body of persons, corporate or unincorporate, so as to authorise legal aid (or legal advice or assistance) to be given to such a body. Within that limitation, it would appear that any natural person, irrespective of residence or personal status, may apply for legal aid to allow him to become a party to proceedings in a Scottish Court or Tribunal.

#### No legal aid without a certificate

All the civil Schemes provide that a person is not entitled to legal aid until he has obtained a legal aid certificate.<sup>4</sup> The certificate may have limitations on it<sup>5</sup> or may take the form of an emergency certificate,<sup>6</sup> but in all cases the principle is the same: any work done by the Solicitor before a legal aid certificate (of whatever type) is

3. See infra, Chapters IX and X.

4. 1958 Scheme, Art.14(1); House of Lords Scheme, Art.6(1); Scottish Land Court Scheme, Art.7(1); Lands Tribunal for Scotland Scheme, Art.7(1); Restrictive Practices Court Scheme, Art.7(1); Employment Appeal Tribunal Scheme, Art.7(1).

5. On Limited Certificates, see infra, pp. 183-185.

6. On Emergency Certificates, see infra, Chapter XII.

granted is generally not work done under legal aid and the client is in the same position as any other ordinary litigant. This general principle is however subject to the following qualifications:

- (a) if the applicant is in receipt of legal advice and assistance, all the preparatory work necessary for amassing the information needed to support and complete a Section 1 application may be done under the Legal Advice and Assistance Scheme;<sup>7</sup> but even if the applicant is not so assisted, the cost of obtaining precognitions to establish a probabilis causa litigandi, provided they are used subsequently in the proceedings, and the cost of submitting the application will be borne by the Fund if legal aid is granted;
- (b) if the applicant is the defender in an action raised against him, obviously some steps have to be taken to protect his interests immediately. The fact that the applicant is the defender does not of itself entitle him to an emergency certificate; if the defender wishes to apply for legal aid, the action should be sisted to allow him to do this and the cost of entering or lodging a notice of appearance and the appropriate motion will be subsequently met from the Fund if legal aid is granted;
- (c) in all cases, the Law Society, if it decides to issue a certificate, has power to determine the date from which it has effect; this date is either the date of receipt of the application for legal aid by the Committee

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7. See infra, Chapter XXIII.

concerned, or such later date as the Committee shall think fit having regard to all the circumstances of the application.<sup>8</sup> There is thus some risk to the Solicitor that he will not be paid for work done while the application is pending and in practice actions are usually not raised until the legal aid position has become clear.

- (d) if the application is successful and the applicant is offered a certificate but does not take it up, the Solicitor who has acted for the applicant in preparing and submitting the application is deemed, when so acting, to have been acting for a person receiving legal aid, notwithstanding that a legal aid certificate is not issued and accepted.<sup>9</sup>

APPLICATIONS: COURT OF SESSION; SHERIFF COURT;  
LANDS VALUATION APPEAL COURT

Form of Application

All applications are made in writing, almost invariably on the Law Society's official form, although a written application in some other form may be accepted as sufficient in exceptional circumstances.<sup>10</sup> By General Regulation 5, every applicant must furnish the particulars required by the form and such further particulars with respect to his case and to his resources as may be required by the Society or any Committee or person acting on their behalf or by the Supplementary

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8. 1958 Scheme, Art.16(2)(a); see also House of Lords Scheme, Art.8(2); Scottish Land Court Scheme, Art.9(2)(a); Lands Tribunal for Scotland Scheme, Art.9(2)(a); Restrictive Practices Court Scheme, Art.9(2)(a); Employment Appeal Tribunal Scheme, Art.9(2)(a).
9. 1967 Act, s.6(5). The Solicitor will thus be paid also for preparing the Memorandum necessary.
10. General Regulation 4(1).

Benefits Commission for the purpose of considering whether a legal aid certificate should be issued to the applicant and of assessing his disposable income and capital and the amount of the contribution (if any) to be made by him to the Fund.

The normal Form used for all Section 1 applications irrespective of the Court or Tribunal in which the proceedings are being taken or defended, and irrespective of whether the applicant is pursuer or defender, is Form SLA 3 (blue-grey). Part I thereof deals with the applicant's personal circumstances and his general eligibility for legal aid; Part II is the statement of the applicant's financial circumstances. Contained in Form SLA 3 is a Certificate of Intimation to the opponent which should also be completed, since Part I of the application requires to be intimated to the opponent. Some practical points require attention in relation to the completion of Form SLA 3 and supporting documentation, as the Law Society has frequently found that the forms are incomplete or incorrectly filled up.

(a) Completion of Form SLA 3, Part I

No particular difficulty arises here. All the particulars requested relating to general eligibility should be given. If the applicant has been in receipt of Legal Aid or Legal Advice and Assistance, the Local Committee's reference number and details should be given. The applicant should sign and date the form.

(b) Completion of Form SLA 3, Part II

The statement of financial circumstances should be completed with care as it will be checked when the applicant subsequently attends for interview before the Supplementary Benefits Commission. References in the form to "annual rent" or "annual income" normally means rent or income during the twelve months starting from the date of the

application, but the Commission may consider that the previous twelve month period is appropriate.<sup>11</sup> Computation of income and capital is dealt with separately.<sup>12</sup> Again, Part II should be signed and dated by the applicant. The Solicitor's full name, firm and postal address (and those of his instructing Local Agent, if any) should also be added to the backing of Form SLA 3.

(c) Certificate of Intimation

Solicitors often forget to sign and date this. Only Part I of Form SLA 3 and the accompanying Memorandum require to be intimated to the opponent. An intimation copy of Part I is prepared (Form SLA 3) and sent to the opponent, having been signed and dated by the applicant. If the opponent's whereabouts are unknown, no intimation need be made and the Certificate of Intimation should be completed accordingly.

(d) The Memorandum

A supporting Memorandum must be prepared by the Solicitor for the applicant explaining the nature of the case and the interest of the applicant therein.<sup>13</sup> It often takes the form of articulated paragraphs containing averments framed in similar fashion to those found in the Condescence of a Summons or Initial Writ. It does not of course require to contain the same amount of detail as nor to satisfy the technical requirements of such documents, since it is accompanied by whatever precognitions and productions as it has been practicable to obtain at the stage of making the application for legal aid.<sup>14</sup>

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11. Resources Regulations, Reg.1(2), defining "the period of computation". See also infra, Chapter X.

12. See infra, Chapter X.

13. 1958 Scheme, Art.14(3).

14. 1958 Scheme, Art.14(3).

It is however essential that the Memorandum should contain an accurate statement of the nature of the case. The application Form SLA 3 contains a statement which is signed by the applicant to the effect that the facts set out both in the application and the Memorandum are correct to the best of his knowledge and belief and if this is not so, unforeseen complications can arise. In Healy v A. Massey and Son Ltd. 1961 S.C.198, which was an action of damages in respect of injury sustained in cleaning a ham-slicing machine in a grocer's shop, the defenders averred that the averments on record of the pursuer as to how the accident happened differed materially from the statements relating thereto contained in the Memorandum accompanying the pursuer's legal aid application. The pursuer pleaded that the said averments were irrelevant and should be excluded from probation. In repelling the pursuer's plea to the relevancy of the averments, Lord Cameron stated that a Memorandum certified by an applicant as correct and authenticated by him was in effect on all fours with a statement of complaint made by a party reporting on, or complaining of, the receipt of an injury. Since it would be competent under the Evidence Act for the defender to cross-examine the pursuer to the effect that he had made a statement on a previous occasion, contrary to the testimony he was giving on oath, it would be perfectly relevant and competent for the defenders to cross-examine the pursuer as to the contents of the Memorandum, the correctness of which had been certified by him, and, in the event of his denial of its terms, to prove them by competent evidence. For that reason, the defenders were entitled to give the pursuer fair notice on record of their intention to prove the statement certified by him to be correct in the initial stages of his application for legal aid.

The Memorandum is signed both by the applicant and by the Solicitor (the Edinburgh Solicitor if the case is in the Court of Session or Lands Valuation Appeal Court), lodged with the appropriate Committee along with the other documents and and also intimated to the applicant's opponent along with the intimation copy of the application for legal aid (Form SLA 3A).<sup>15</sup>

(e) Supporting documentation

The appropriate Committee cannot begin to consider the application unless some supporting documentation is also submitted. The Scheme specifies that the Solicitor must lodge "such precognitions and and productions as it has been practicable to obtain" at the stage of making the application.<sup>16</sup> This normally includes at least a dated precognition of the applicant together with any supporting dated precognitions, medical or technical reports and the like. If Counsel's opinion has been obtained, a copy of this should be forwarded. If the applicant is the defender, the Committee must see a copy of the Summons, Minute or Initial Writ sought to be contested; if it is sought to contest an alimentary claim or vary an existing award, an employer's Statement of Earnings or Certificate of State Benefits must be included. For appeals in the Court of Session or Lands Valuation Appeal Court, the lower court's Interlocutor, Opinion and other relevant Court documents should be included.

It should be noted that the supporting documentation is not intimated to the opponent.

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15. Ibid.; see also Art.15(1).

16. Ibid.

Applications by persons resident outside Great Britain

Where a person is resident outside Great Britain and is unable to be present in Great Britain while his application is being considered, the application must be in English and must be sworn before an appropriate official; namely, a J.P., Magistrate or other person authorised to administer oaths, for persons resident in the Commonwealth or Irish Republic; if the person is resident elsewhere, the application must be sworn before a U.K. Consular Officer or other person authorised to administer oaths. The application must also be accompanied by a statement in writing, signed by some responsible person who has knowledge of the facts, certifying that part of the application which relates to the applicant's income and capital.<sup>17</sup>

To whom are the papers sent

For proceedings (whether by way of appeal or otherwise) in the Court of Session or the Lands Valuation Appeal Court, the papers go to the Secretary of the Supreme Court Committee.<sup>18</sup>

For proceedings in the Sheriff Court, the papers go to the Secretary of the Local Committee.<sup>19</sup>

Where the application is made by a mental defective or insane person, the Supreme Court Committee or Local Committee may accept as sufficient the application and memorandum signed on behalf of the mental defective or insane person by his legal representative, or a relative or friend.<sup>20</sup>

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17. General Regulation 4(2). "Responsible person" is not defined, but professional people are usually acceptable. The formalities may all be dispensed with by the Society if compliance would cause serious difficulty, inconvenience or delay.

18. 1958 Scheme, Art.14(3).

19. Ibid.

20. Ibid.

APPLICATIONS: OTHER COURTS AND TRIBUNALS

In a number of other civil proceedings, applications may be made for Section 1 legal aid. The other Schemes presently in force to which this relates are:

- (a) the Legal Aid (Scotland)(House of Lords) Scheme 1960,
- (b) the Legal Aid (Scottish Land Court) Scheme 1971,
- (c) the Legal Aid (Land Tribunal for Scotland) Scheme 1971,
- (d) the Legal Aid (Scotland)(Restrictive Practices Court) Scheme 1973;
- (e) the Legal Aid (Scotland)(Employment Appeal Tribunal) Scheme 1976.

All these Schemes contain broadly the same details and are laid out in very similar form to the basic 1958 civil Scheme, and only the specialities are discussed here.

(1) House of Lords

In applications for legal aid to pursue or defend an appeal from the Court of Session to the House of Lords, the application Form SLA 3 is completed in the normal way and must contain a statement of the grounds for the appeal. Such a statement is frequently on an attached sheet. The intimation Form SLA 3A is also completed; intimation requires to be made to the opponent and the Clerk of the Parliaments and the Certificate of Intimation on Form SLA 3 should be completed. There is no accompanying Memorandum in House of Lords applications. The application is signed by the applicant and sent by the Solicitor along with a copy of the Closed Record and all Interlocutors and Opinions to the Secretary of the Central Committee.<sup>21</sup>

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21. House of Lords Scheme, Art.6(3). The Standing Orders of the House of Lords deal inter alia with the time limits for appealing: see particular Standing Order X relating to the extension of time limits where the decision of the Central Committee is not available. Appellants who have been granted legal aid do not have to find security for costs: ibid., Order VI, 4.

(2) Scottish Land Court

All that is required here is Form SLA 3 and either an accompanying Memorandum or statement setting out the nature of the case and the true facts. The application need not be made through the medium of a Solicitor; if it is so made, the Solicitor must intimate the application (but not the accompanying Memorandum or statement) to the opponent. The application is sent to the Local Committee, who intimate the application to the opponent if they receive the application direct from the applicant.<sup>22</sup>

(3) Lands Tribunal for Scotland

The procedure for applying for legal aid for proceedings in the Lands Tribunal resembles that which applies to proceedings in the Sheriff Court. Applications are directed to the Local Committee.<sup>23</sup>

(4) Restrictive Practices Court

The procedure here resembles that which applies to applications for legal aid in the Court of Session. Applications are directed to the Supreme Court Committee.<sup>24</sup>

(5) Employment Appeal Tribunal

In applications for legal aid before this Tribunal, procedure resembles that which applies to applications for legal aid in the Scottish Land Court. Applications go to the Local Committee.<sup>25</sup>

22. Scottish Land Court Scheme, Art.7(3) and (4). The less stringent conditions regarding the formal mechanics of Land Court applications no doubt stems from the fact that parties are not necessarily legally represented in their initial communications with the Court. Obviously if legal aid is granted, legal representation becomes automatic.

23. Lands Tribunal Scheme, Art.7(3).

24. Restrictive Practices Court Scheme, Art.7(3).

25. Employment Appeal Tribunal Scheme, Art.7(2), (4) and (5).

Procedure for applying is less formal here as parties may well not have been legally represented before the body, e.g. an Industrial Tribunal, whose decision is being appealed.

#### OBJECTIONS BY OPPONENT

As explained, intimation of the application and the accompanying Memorandum is made to the opponent of the applicant or, when the proceedings are already in court, to the Solicitor of the opponent. The Intimation Copy of the application (Form SLA 3) informs the applicant's opponent of his right to lodge written objections to the granting of legal aid with the Secretary of the appropriate Committee. Such objections must be lodged within fourteen days if the opponent is resident in the United Kingdom or Eire and within twenty-eight days if the opponent is resident outwith these countries, or within such longer time as the Committee may allow.<sup>26</sup>

There is no particular form which the objections should take, but they must be in writing. The opponent is entitled to submit any documents other than precognitions in relation to the objections. Normally the opponent cannot appear before the Committee either personally or by his legal representative and does not have access to the precognitions or productions of the applicant or to any papers containing particulars of the applicant's means; but if the Committee deem it desirable so to do, they may permit the applicant and the opponent or either of them to appear personally or by their respective legal representatives and to submit their cases orally.<sup>27</sup> This very rarely happens in practice.

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26. 1958 Scheme, Art.15(1). By Art.8(1) of the Scottish Land Court Scheme, objections must be lodged within at least twenty-eight days, but under all the other civil schemes the period is fourteen days.

27. Ibid.

There is no limit to the sort of objections which may be lodged: they may relate to the applicant's means, or want of probabilis causa litigandi, or the alleged unreasonableness of any grant of legal aid.

In House of Lords applications, the opponent is limited to making "written representations", but the Central Committee may permit him and the applicant or their legal representatives to make oral submissions.<sup>28</sup>

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28. House of Lords Scheme, Art.7(1).

CHAPTER IXHOW THE APPLICATION IS DEALT WITH

Main provisions: 1967 Act, s.1(6); 1958 Scheme, Art.15

Introduction

Once a full Section 1 application has been lodged with the appropriate Committee, four matters require to be determined:

- (a) whether the applicant is financially eligible for legal aid;
- (b) whether he has a probabilis causa litigandi;
- (c) whether it is reasonable that he should receive legal aid in the particular circumstances of the case; and
- (d) if all these tests are satisfied, what contribution (if any) the applicant should be called upon to pay towards the cost of the proceedings.

The decision on financial eligibility rests with the Supplementary Benefits Commission, before which applicants are usually called for interview; the decision on probabilis causa litigandi, "reasonableness" and actual contribution rests with the appropriate Committee.

If the applicant meets all four requirements he will be offered a certificate, which will be issued once his contribution (if any) or the first instalment thereof is paid.

If legal aid is refused, the applicant will be told the reason(s) and of his right to appeal to the Central Committee.

This chapter deals with the processing of Section 1 applications and the investigations carried out by the various bodies before a

certificate is issued. The procedure is the same under all the civil schemes.<sup>1</sup>

#### Initial Steps

On receipt of a Section 1 application the appropriate Committee may (and usually do) send Part II of Form SLA 3 (Statement of Financial Circumstances) to the Supplementary Benefits Commission, along with any objections relevant thereto submitted by the opponent.<sup>2</sup> This is done before the merits of the application are considered, so that the Commission may determine the disposable income and disposable capital of the applicant and the maximum amount of his contribution to the Legal Aid (Scotland) Fund.<sup>3</sup>

But the Committee need not do this; if they consider that prima facie it does not appear that the applicant has a probabilis causa litigandi or that it is unreasonable that he should be granted legal aid, or for any other cause, they may, before sending to the Commission the financial particulars, decide the merits and reasonableness of the application.<sup>4</sup> Thus the obviously worthless application can be dealt with immediately without involving an outside body.

One speciality arises in relation to applications for legal aid in the Employment Appeal Tribunal and Restrictive Practices Court by virtue of the fact that it may not be immediately apparent in which part of the United Kingdom the proceedings are likely to be taken. In cases before the Employment Appeal Tribunal applications in Scotland

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1. See 1958 Scheme, Art.15; House of Lords Scheme, Art.7; Scottish Land Court Scheme, Art.8; Lands Tribunal for Scotland Scheme, Art.8; Restrictive Practices Court Scheme, Art.8; Employment Appeal Tribunal Scheme, Art.8.
  2. The Committee do not send any other papers to the Commission.
  3. 1958 Scheme, Art.15(2), followed in all the other Schemes.
  4. Ibid.

are directed initially to Local Committees;<sup>5</sup> in cases before the Restrictive Practice Court, the application initially goes to the Supreme Court Committee.<sup>6</sup>

It is now provided that where it appears to the appropriate Committee that an application for legal aid relates to proceedings which are likely to be conducted before the Employment Appeal Tribunal in England and Wales, or before the Restrictive Practices Court in these countries or Northern Ireland, the Committee must transmit the application forthwith to the Law Society in England and Wales, or to the Incorporated Law Society of Northern Ireland as the case may be, and must notify the applicant and his Solicitor that they have done so.<sup>7</sup> Where it appears to the Committee doubtful whether the proceedings will be conducted in Scotland, or elsewhere, that question will be determined by either the Registrar of the Employment Appeal Tribunal or the proper officer of the Restrictive Practices Court, and his determination is binding on the Committee.<sup>8</sup>

#### Consideration of means by the Commission

By s.4(6) of the 1967 Act the Supplementary Benefits Commission determines a person's disposable income, disposable capital and the maximum amount of his contribution to the Legal Aid (Scotland) Fund. They may also call attention to any special circumstances affecting the maximum amount of the lump sum and periodical payments which the applicant could reasonably make on account of any contribution.

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5. Employment Appeal Tribunal Scheme, Art.7(2).
  6. Restrictive Practices Court Scheme, Art.7(2).
  7. Gen. Regulations 4A(3)(a); 4B(3)(a).
  8. Ibid. 4A(3)(b); 4B(3)(b). For the definitions of "Registrar" and "proper officer", see Gen. Regulations 4A(1) and 4B(1).

In arriving at the figures for disposable capital, disposable income and maximum contribution, the Commission apply the provisions of the Legal Aid (Scotland)(Assessment of Resources) Regulations 1960, the details of which are dealt with separately.<sup>9</sup> The Commission also applies its own policy decisions and provision is made for redetermination of the assessments on a change of circumstances.<sup>10</sup>

The applicant is usually called for interview before the Commission where his financial details will be checked. Applicants not infrequently fail to attend for interview when asked, and the result may be that the application will be treated as abandoned.<sup>11</sup> Much of the delay in processing applications stems from the fact that the interviewing process is time-consuming; determination of resources by post has been advocated.<sup>12</sup>

The Central Committee has repeatedly warned the profession of the risks involved in trying to indicate to a client what his contribution to the cost of the proposed litigation will be.<sup>13</sup> The maximum contribution fixed by the Commission is the maximum amount which the client can ever be called upon to pay, but the actual contribution is not fixed by the Commission but by the Committee. Any Solicitor who tries to compute either of these two figures will require to have a detailed

9. See infra, Chapter X.
10. Ibid., p. 164.
11. 1958 Scheme, Art.15(4). The Local or Supreme Court Committee usually advise the Solicitor for the applicant of the fact that his client is not co-operating and the Solicitor should then endeavour to contact his client.
12. A Scheme has been drawn up to permit this, but it is not yet in force.
13. See Notes printed in the Parliament House Book on Legal Aid for civil proceedings. The Law Society of Scotland also produces a pamphlet from time to time giving guidance on financial conditions.

knowledge of the Resources Regulations, the policy of the Commission and the exact costs of litigation; most Solicitors are therefore content to leave these matters to people who deal with them every day.<sup>14</sup>

On completion of its enquiries, the Commission reports in writing to the appropriate legal aid Committee its determination of disposable income, disposable capital and maximum contribution.<sup>15</sup> The latter figure is not computed if the applicant's means debar him from receiving legal aid.<sup>16</sup> The Commission also sends any report which it wishes to make as to special circumstances under s.4(6) of the Act.<sup>17</sup>

Consideration by the Committee: (1) the merits

Once the Commission has reported on means and after the time limit within which the opponent may lodge objections has expired, the Committee consider the merits of the application.<sup>18</sup> The papers are normally circulated by the Secretary and discussed at a meeting, but the Committee may make such inquiry as it sees fit.

Initially what the Committee must decide is whether the statutory test embodied in s.1(6) of the 1967 Act is satisfied: there must be a probabilis causa litigandi and it must be reasonable that the applicant should receive legal aid.<sup>19</sup>

(a) What constitutes a probabilis causa litigandi?

No guidance is given in the Act or any subsidiary instrument as

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14. Specimen determinations are printed from time to time in the Journal of the Law Society of Scotland.
15. Resources Regulations, reg.8.
16. 1958 Scheme, Art.15(3)(a).
17. Ibid., Art.15(3)(b).
18. Ibid., Art.15(4).
19. Ibid.

to what standard should be applied in assessing this. As a matter of history, it was thought that when legal aid in civil causes was introduced in 1950, the experience of the profession in assessing probabilis causa under the old Poor's Roll system would carry through under statutory legal aid. It was never the duty of the Reporters probabilis causa under the Poor's Roll to try the applicant's case for him, and it is not the present policy of legal aid committees to do so.<sup>20</sup> Whether there is probabilis causa litigandi thus depends on an assessment by experienced lawyers of what the case looks like on paper; the Committee do not hear or see the witnesses and decide this matter through discussion and assessment of the applicant's legal position.

In the early years of statutory legal aid, some criticism was levelled at legal aid committees for the allegedly high standard of probabilis causa which they applied in considering applications; this criticism has continued intermittently ever since.<sup>21</sup> The standard answer given by the Central Committee has always been that the criterion is not whether the committee feels the proposed action will be successful, but whether he has probabilis causa. This explains why legal aid is often granted to both parties, particularly in a consistorial cause. In such a case legal aid may be granted to a pursuer who seeks a capital sum and to a defender who wishes to dispute the amount thereof. Only one can be successful, but both may have a probabilis causa.

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20. See e.g. 2nd Report of the Law Society of Scotland on the Legal Aid Scheme (1951-51) pp.6-7. See also supra., pp.23-24.

21. See e.g. 2nd Report, op. cit.; also 18th Rep., pp.4-5.

One of the requirements frequently stressed is that the applicant should produce corroboration of his case. Corroboration of evidence is the general rule in Scots civil proceedings, unless by statute it is not required. But a Committee will be reluctant to grant an application which rests on the unsupported statement of the applicant, even in those cases where corroboration is not required; the Court may subsequently hold that where corroboration of a pursuer's account was available but not produced, the pursuer's account should be treated with caution.<sup>22</sup>

Cynical observers of Scots consistorial procedure often feel that the most minimal corroboration of a pursuer's account of e.g. the defender's intolerable behaviour is required in the Court; but the legal aid committee still require at least a supporting precognition or other corroboration in such cases. In personal injuries actions where corroboration is not necessary by statute, if corroboration is not available, this should be made clear in the accompanying Memorandum.

It should always be remembered that preliminary investigation work necessary to establish probabilis causa can be done under the Legal Advice and Assistance Scheme, assuming the client qualifies on means; much of the former difficulty in doing work for which there might be no payment has been removed.<sup>23</sup>

It is clear from the wording of s.1(6) of the 1967 Act that the onus of showing a probabilis causa rests on the applicant, but where

22. On the difficulties with s.9 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 which purports to dispense with corroboration in personal injury cases, see Morrison v J. Kelly & Sons Ltd. 1970 S.L.T. 198, McGowan v Lord Advocate 1972 S.L.T.188 and McLaren v Caldwell's Paper Mill Co. Ltd. 1973 S.L.T.158.

23. See e.g. 2nd Report op. cit.

there is a reasonable doubt, the Committee gives the applicant for legal aid the benefit of the doubt.<sup>24</sup>

It appears to be the policy in England not to grant legal aid for test cases;<sup>25</sup> in Scotland the policy of the Central Committee appears to be that legal aid will be refused where a novel point of law is in issue but where the applicant can gain no advantage from having that point of law decided in his favour.<sup>26</sup> However legal aid was granted for an action for damages arising from the Ibrox disaster;<sup>27</sup> when the defenders were found liable all the other pending actions by relatives of persons killed were settled. The position seems to be that each application will be assessed on its own individual merits.

(b) Is it reasonable that legal aid be granted?

The assessment of "reasonableness" is an objective matter and no onus of showing this rests on the applicant.<sup>28</sup> The provision is designed to stop frivolous or worthless actions being pursued at the public expense and generally to prevent abuses of the system. It should be observed that very few applications are refused on this ground; the reason is almost certainly that Solicitors in practice do not risk their professional reputations by putting forward worthless cases for

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24. See 4th Report of the Law Society of Scotland on the Legal Aid Schemes (1953-54) p.8. The Committee may also issue a certificate limited to making further inquiries, although this is now uncommon. On Limited Certificates, see pp.183-185 infra.
25. See Matthews and Dulton op. cit., p.128.
26. See 12th Report of Law Society on Legal Aid Schemes (1961-62) p.42.
27. Dougan v Rangers Football Club Ltd., reported on another point at 1974 S.L.T.(Sh. Ct.) 34.
28. See 1967 Act, s.1(6).

consideration by Committees, but normally advise the client that he has little chance of success.<sup>29</sup>

Matthews and Oulton argue that the applicant's character is of no importance in assessing "reasonableness" unless it impinges on the merits of his case, but if his attitude to the legal aid scheme, for example by making persistent worthless applications, is such as to satisfy the Committee that he is prepared to abuse it, they will take his conduct into account.<sup>30</sup>

#### Persons having joint interest with other persons

This is dealt with by General Regulation 6 which deals with two separate types of joint interest: firstly, joint interest or concern in the subject matter e.g. in a representative action; and secondly, joint interest by virtue of the capacity of the applicant.

##### (i) Joint interest in subject matter

Where it appears to the appropriate Committee that a person making application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Committee shall not grant legal aid if they are satisfied that:

- (a) the person making the application would not be seriously prejudiced in his own right if legal aid were not granted; or
- (b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of

29. But it should be noted that to put forward an application which the Solicitor knows will be refused gives him some protection against a complaint by his client.

30. Matthews and Oulton, op. cit., p.124.

the expenses as would be payable from the Legal Aid (Scotland) Fund in respect of the proceedings if legal aid were granted.<sup>31</sup>

(ii) Joint interest by virtue of capacity

Where a person applies for legal aid in connection with any proceedings in which he is concerned in a representative, fiduciary or official capacity and it appears to the appropriate Committee that the applicant is entitled, whether by an order of the Court or otherwise, to be indemnified in respect of his expenses in connection with the proceedings out of a fund or by a third party, they shall not grant legal aid unless they are satisfied that the fund cannot reasonably be expected to bear the expense of the proceedings or, as the case may be, that the third party would himself, if he were a party to the proceedings, be entitled to legal aid.<sup>32</sup>

In such cases it is clear that the Committee will require to have information regarding the extent of any fund from which indemnity may be sought, or the resources of any third party; information on these matters is required in computing the applicant's contribution.<sup>33</sup>

Persons with other rights or facilities

By General Regulation 7(1) it is provided that:

"Where it appears to the appropriate Committee that an applicant has available rights or facilities making it unnecessary for him to obtain legal aid or has a reasonable expectation of obtaining financial or other help from a body of which he is a member, they shall not approve the application unless the applicant has not succeeded in enforcing or obtaining such rights, facilities or help, after having, in the opinion of the Committee, taken all reasonable steps to enforce or obtain them or having permitted the Committee to take those steps on his behalf.

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31. Gen. Regulation 6(1).

32. Gen. Regulation 6(2).

33. Gen. Regulation 6(3) and infra, pp. 147-150.

Provided that where it appears that the applicant has a right to assistance in the conduct of the proceedings in question, he shall not, for the purpose of this Regulation, be deemed to have failed to take all reasonable steps by reason only that he has not taken proceedings by way of declarator or otherwise to enforce that right."

The wording of this Regulation is of course somewhat different to that which applies in criminal cases;<sup>34</sup> in civil cases the question which immediately arises is how far is the applicant required to go ~~in~~ in search of other facilities in relation to litigation.

The provision is obviously designed for those whose litigation would normally be supported by a trade union or by virtue of an insurance policy which provides legal representation, or where some other right of indemnity exists. Form SLA 3 merely asks the applicant to state (a) whether he has any rights or facilities for assistance in litigation; (b) is he a member of a trade union or other body the rules of which provide for assistance in litigation to members; and (c) whether the applicant has tried to obtain assistance in terms of either of the two immediately preceding statements. If a positive answer is given, the matter should be further explained in the accompanying Memorandum.

Sachs<sup>35</sup> and Matthews and Dulton<sup>36</sup> both state that the onus is on the applicant to satisfy the Committee that he has done all he reasonably can, short of taking proceedings, to enforce a right to indemnity. The practice in Scotland appears to be that the Committee do not follow up negative answers to these questions on Form SLA 3; if

34. See infra, Chapter XX.

35. Legal Aid, p.83.

36. Op. cit., p.132. The Legal Aid Central Committee take the view that the punctum temporis to be considered in relation to the application of Regulation 7 is the date on which the applicant makes his application: See 16th Report of the Law Society on the Legal Aid Schemes (1965-66) p.56.

it subsequently transpires that a false answer has been given, the matter will be passed to the Procurator Fiscal for a possible prosecution under s.18 of the 1967 Act.

If the applicant does have other rights or facilities in relation to litigation the question then arises as to the extent of these facilities: it may still be necessary for the applicant to receive legal aid. Matthews and Oulton take the view<sup>37</sup> that the alternative facilities must be reasonably equivalent to those available under the 1967 Act before legal aid should be refused; in particular the alternative facilities should not place unreasonable restrictions on the choice of Solicitor or conduct of the case, or provide no protection against liability for an opponent's expenses akin to s.2(6)(e) of the 1967 Act.

By General Regulation 7(2) where the appropriate Committee approve an application by a person who is a member of a body which might reasonably have been expected to give him financial help towards the expenses of the proceedings, they shall require him to sign an undertaking to pay to the Society, in addition to his contribution (if any) any sum received from that body on account of the expenses of the proceedings. So the applicant's contribution is unaffected; indeed, if the total contribution including the payment received is more than the net liability of the Fund on his account, the applicant may be refunded the excess.<sup>38</sup>

Consideration by the Committee: (2) the contribution

In all cases where the Committee decide that there is a probabilis causa and that it is reasonable that legal aid be granted,

37. Ibid.

38. 1967 Act, s.3(3)

they then decide the probable cost of the proceedings.<sup>39</sup> This figure must be computed because it is the amount which it appears that the Fund will have to pay the assisted person's Solicitor at the end of the case and is thus the "base figure" for computing the actual contribution to be levied on the assisted person. Estimating the cost of litigation is not as difficult as may first appear, as the vast majority of s.1 legal aid applications relate to consistorial proceedings where block fees are frequently accepted by Solicitors in preference to sums payable on detailed accounts.

The Committee fix the contribution (if any) payable by the applicant to the Fund.<sup>40</sup> In computing this actual contribution payable by the assisted person, the Committee firstly have regard to the maximum contribution fixed by the Supplementary Benefits Commission. The latter figure is statutory: by s.3(1) of the 1967 Act it includes an amount

- (a) not greater than one-third of the amount (if any) by which the applicant's disposable income exceeds £760; plus
- (b) not greater than the whole amount, if any, by which the applicant's disposable capital exceeds £340.<sup>41</sup>

The maximum contribution fixed by the Commission is the maximum amount which the applicant can be called upon to pay in any circumstances; it cannot be varied by any legal aid Committee although it can be re-<sup>42</sup> determined by the Commission itself.

39. 1958 Scheme, Art.15(4)(i), repeated in all the other civil Schemes.

40. Ibid., Art.15(4)(ii), repeated in all the other civil Schemes.

41. These are the figures fixed by the Legal Aid (Scotland) (Financial Conditions) Regulations 1977 S.I.1977/1981 which vary the provisions of s.3(1) of the 1967 Act. This varying process is an annual occurrence due to inflation.

42. On re-determination of resources, see infra, p. 164.

But the maximum contribution fixed by the Commission is not necessarily the actual amount which will be levied on the assisted person. The Committee will fix the actual contribution at the estimated cost of the proceedings, or at the maximum contribution, whichever is the less, unless there are special circumstances brought to its attention by the Commission.<sup>43</sup>

It will thus be apparent that even if the Committee are wrong in their estimation of the costs of the proceedings, the applicant can never be called to pay more than his maximum contribution; but his actual contribution can be varied upwards or downwards dependent on a change of circumstances. There is a duty on the Committee to vary the certificate as respects the amount of the contribution, the instalments thereof or the dates of payment, where it is found that the actual contribution specified in the certificate is not sufficient to meet the liability of the Fund on behalf of the assisted person, but this must be done within the limits of the maximum contribution fixed by the Commission.<sup>44</sup>

In any event the assisted person suffers no loss if the actual contribution in fact exceeds the cost of the proceedings to the Fund; by s.3(3) of the 1967 Act, the excess is repaid to the assisted person.

Where an applicant is granted legal aid and is concerned in the proceedings only in a representative, fiduciary or official capacity, then his personal resources are left out of account in determining

43. See 1967 Act, s.4(6).

44. 1958 Scheme, Art.16(7), repeated in all the other civil Schemes. Matthews and Dulton op cit., p.139 suggest that if an assisted person's actual contribution is less than his maximum contribution, his Solicitor should inform the Committee immediately if, during the course of proceedings, it becomes apparent that the costs are likely to exceed the actual contribution.

the contribution to be made by him to the Fund, but regard is had to the amount of any fund out of which he is entitled to be indemnified and to the resources of the persons, if any, who are beneficiaries of the fund, or as the case may be, to the resources of any third party to whom the applicant looks for indemnity in respect of his expenses.<sup>45</sup>

#### Paying the contribution

If the Committee decide that the applicant is liable to pay a contribution, it then decides the method of payment. Although there is nothing to prevent a Committee requiring payment in a lump sum,<sup>46</sup> the contribution is frequently paid by instalments, usually spread out over twelve months. The dates of payment and the amounts are intimated to the applicant and his Solicitor; as indicated, they can be varied by the Committee.<sup>47</sup>

The Committee, if they decide to offer legal aid to the applicant, do not issue the certificate until he accepts the offer and the contribution (or first instalment thereof) has been paid. The applicant must also sign a Letter of Undertaking to comply with the conditions in the certificate. The sanction for non-payment of an instalment is suspension or discharge of the certificate; and if two or more instalments are in arrear, the Committee may require the assisted person forthwith to pay the whole balance due by him of the contribution, and the Law Society has the right to recover from him any sum not paid in pursuance of such requirement.<sup>48</sup>

45. General Regulation 6(3).

46. 1967 Act, s.3(2).

47. 1958 Scheme, Art.15(4)(iii), repeated in all the other civil Schemes.

48. General Regulation 8(1).

Failure to co-operate with Commission or Committee

Applicants for legal aid not infrequently fail to take the necessary steps on their own behalf to allow progress to be made with their applications. Some applicants simply disappear after the initial visit to the Solicitor's office when the application is signed and do not appreciate the necessity of staying in touch with the Solicitor, the Law Society and the Commission. At the stage of signing the application, the Solicitor would thus be well advised to warn his client of the consequences of non-co-operation.

It is provided in all the civil Schemes that where

- (a) an application is continued by a Committee with a request for further information and the applicant fails without explanation to furnish the desired information; or
- (b) an applicant is invited to attend for interview with the Commission and without explanation fails to attend for such interview; or
- (c) intimation has been given to an applicant that an application has been granted and the applicant fails to sign a Letter of Undertaking to comply with the conditions laid down in his certificate and to pay his contribution (if any) or the first instalment thereof, as the case may be,

the Committee shall be entitled to intimate to the applicant that if the appropriate action is not taken within fifteen days of such intimation the application will be treated as having been abandoned, and if the applicant does not proceed in terms of such intimation, the Committee may on the expiry of the notice contained in the said

intimation treat the application as abandoned.<sup>49</sup> Intimation of any such abandonment is given by the Committee to the opponent.<sup>50</sup>

Abandonment of a legal aid application does not prejudice a further application at a later date, but the whole process must be gone through from the beginning, with a fresh application and a fresh determination of resources. An applicant whose original application has been held as abandoned also runs the risk of having any fresh application refused on the grounds that it is unreasonable that he should receive legal aid, in that he previously failed to co-operate, unless he has a reasonable excuse.

#### Intimation of Committee decision

If the Committee decide to offer legal aid to the applicant, they send him and his Solicitor intimation of this fact, the contribution (if any) exigible and the Letter of Undertaking for him to sign and send to the Law Society with the first payment of contribution.

If the application is refused either on means, lack of probabilis causa, or, although there is probabilis causa, because it is unreasonable that legal aid be granted, this is also intimated to the applicant and the opponent.<sup>51</sup> The applicant is advised of his

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49. 1958 Scheme, Art.15(4)(iii), proviso, is the basic provision.

50. Ibid. In the House of Lords applications, intimation of the abandonment is also given to the Clerk of the Parliaments. In Lands Tribunal, Restrictive Practices Court and Employment Appeal Tribunal Cases, intimation is also made to the Tribunal or Court and all other parties to the proceedings, but only where an emergency certificate has been granted. See Lands Tribunal for Scotland Scheme, Art.8(5), Restrictive Practices Court Scheme, Art.8(5) and Employment Appeal Tribunal Scheme, Art.8(5).

51. 1958 Scheme, Art.15(5). Again, intimation of refusal is made, as the case may be, to the Clerk of the Parliaments in House of Lords Applications and, where an emergency certificate has been granted, to all other parties and the Tribunal or Court in cases before the Lands Tribunal for Scotland, Restrictive Practices Court or Employment Appeal Tribunal. See the respective Schemes, Art.7(6); Art.8(6); Art.8(6) and Art.8(6).

right of appeal to the Central Committee, except in House of Lords applications where no such right exists.<sup>52</sup> As a matter of practice, the Solicitor is also so advised.

Provision is made for the transfer of papers from one Local Committee to another in cases where the former considers that the proceedings should be taken in a Sheriff Court within the area of the latter.<sup>53</sup>

#### Right of Appeal to the Central Committee

All the Schemes (with the exception of the House of Lords Scheme) allow a right of appeal to the Central Committee in certain circumstances.<sup>54</sup> These are:

(i) Where a certificate is refused

If the Supreme Court Committee or a Local Committee refuse to grant a Section 1 certificate the applicant may appeal. This may be taken against the Committee's decision that there is no probabilis causa litigandi or its decision that it is unreasonable that legal aid be granted. There is no right of appeal against a determination of the Supplementary Benefits Commission as to disposable capital, disposable income and maximum contribution, although the Commission may be asked to re-determine the applicant's resources.<sup>55</sup>

It should be noted in passing that the opponent of the assisted person has no right of appeal against the granting of a certificate.<sup>56</sup>

52. Notice of this right is given in the intimation of refusal of legal aid: 1958 Scheme, Art.17(2).

53. 1958 Scheme, Art.15(6). The latter Committee may then grant or refuse the certificate, or endorse any certificate already granted to cover proceedings in its own area.

54. The basic provision is Art.17 of the 1958 Scheme.

55. 1958 Scheme, Art.17(1). See infra, p.164.

56. 1958 Scheme, Art.17(1).

(ii) In relation to the applicant's contribution

Any applicant or any assisted person who is dissatisfied with a decision of a Committee with regard to any matter relating to his actual contribution to the Legal Aid (Scotland) Fund may appeal, for example if the applicant feels aggrieved at the amount of the actual contribution fixed by the Committee, or at the amount of instalments thereof. Also appealable would be a decision of the Committee to vary the amount of the contribution after a redetermination by the Commission of the applicant's means.<sup>57</sup>

(iii) Where the certificate has been varied, suspended or discharged

An appeal is open to the assisted person in such cases.<sup>58</sup>

(iv) Where a limited or emergency certificate is refused, or where a limited certificate is issued when a full certificate was applied for, or against the nature of the limitation imposed

Such appeals are competent,<sup>59</sup> but limited Section 1 certificates are rarely issued now since the advent of Legal Advice and Assistance. But they are sometimes still issued to permit representations at a Fatal Accident or similar inquiry. An appeal against the refusal of an emergency certificate is competent<sup>60</sup> but rarely taken, firstly because emergency certificates are rarely refused and secondly because the appeal is not usually heard in time to be of much value.

Procedure for appealing

The appellant must appeal to the Central Committee within fifteen days from the date on which notification of the decision was sent to

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57. 1958 Scheme, Art.17(1).

58. Ibid.

59. See (1971) 16 J.L. Soc. Sc. 194. On Limited Certificates generally, see infra, p.183.

60. Art.17(1) of the 1958 Scheme refers to "a legal aid certificate" which, it is submitted, includes an emergency certificate.

him or within such longer period as the Central Committee may allow.<sup>61</sup>  
 The appeal is made on Form SLA 11 signed either by the applicant or his Solicitor, stating the ground of appeal. The Central Committee inform the opponent that an appeal has been lodged and give him a further opportunity to lodge objections, normally within seven days,<sup>62</sup> but many Solicitors themselves advise the opponent of the applicant's appeal.

All the relevant papers should be forwarded to the Central Committee such as precognitions, reports and the like. The Central Committee obtain direct from the Committee of first instance the SLA 3 and relative Memorandum, the objections (if any) by the opponent and any other papers, and the reasons for refusal.

#### Hearing of the Appeal

The appeal is disposed of by consideration through a Sub-Committee which reports to the full Central Committee. The members of the Central Committee do not normally look outside their own number for expert assistance on the point under discussion, but under the legal aid Schemes applicable to proceedings in the Scottish Land Court, Restrictive Practices Court and Employment Appeal Tribunal, if the originating Committee has made a decision adverse to an applicant or assisted person, it is competent for the Central Committee in considering the appeal to co-opt ad hoc any member of the Faculty of Advocates and/or any member of the Law Society of Scotland.<sup>63</sup>

61. 1958 Scheme, Art.17(1). Some latitude may be allowed in cases of difficulty, but intimation of this should be made immediately to the Central Committee.
62. Ibid.
63. See Scottish Land Court Scheme, Art.10(4); Restrictive Practices Court Scheme, Art.10(4); Employment Appeal Tribunal Scheme, Art.10(4).

But although Art.17(1) of the 1958 Scheme does not give any person a right to appear before the Central Committee, it appears that a formal hearing is sometimes held where both applicant and opponent may be heard either in person or by Solicitor or Counsel.<sup>64</sup>

The Central Committee may, after such investigation as they think fit, either allow the appeal, vary the lower Committee's decision, dismiss the appeal, or with or without allowing or dismissing the appeal in whole or in part, remit the application back to the appropriate Committee with directions for further procedure, e.g. to issue a certificate or remove a limitation or whatever.<sup>65</sup>

The decision of the Central Committee on the appeal is final and must be intimated to the appellant, the opponent and the Committee concerned.<sup>66</sup>

#### Fresh applications

If legal aid is refused, there is nothing to stop the applicant submitting a further application if he subsequently finds he comes within the ambit of the Scheme, whether by change in his financial circumstances or because new evidence comes to light. There is no provision in the Scottish legal aid legislation, as there is in the English, for making a "prohibitory direction" that an applicant be barred from making further applications;<sup>67</sup> the position of the vexatious litigant is dealt with in Scotland under the Vexatious Actions (Scotland) Act 1898. In any event multiple legal aid applications by a disgruntled applicant are likely to be refused on the grounds of unreasonableness. It should also be observed that Form SLA 3 requires

64. This rarely happens and the cost may be irrecoverable from the Fund.

65. 1958 Scheme, Art.17(1).

66. Ibid., Art.17(3).

67. See Legal Aid (General Regulations) 1971 Reg.8.

an applicant to state whether he has previously consulted another Solicitor as to the subject matter of the application; if a false answer is given, the applicant may be liable to prosecution for an offence under s.18 of the 1967 Act.

CHAPTER XTHE FINANCIAL LIMITS FOR LEGAL AID

Main provisions: 1967 Act, ss.3 and 4;  
Resources Regulations, Schedules 1 and 2

Introduction

Legal aid in civil proceedings (other than proceedings under the Social Work (Scotland) Act 1968) can only be given to an applicant if, in addition to satisfying the Law Society of Scotland that he has a probabilis causa litigandi and that it is reasonable for him to receive legal aid, he falls within the financial limits of eligibility. The original statutory financial conditions laid down in 1949 have been raised frequently since then and are now fixed by regulation.<sup>1</sup>

Financial eligibility is based on an assessment of the applicant's income and capital, subject to a number of deductions from both, in respect of the other commitments of the applicant and in respect of sums fixed as a matter of policy. The computation of the applicant's resources is made by the Supplementary Benefits Commission (not the Law Society of Scotland) with a view to fixing his disposable income and disposable capital. On the basis of these figures the Commission also compute the maximum amount which the applicant can be called upon to pay towards his legal expenses, known as his maximum contribution. On reporting these figures to the appropriate legal aid Committee, the Commission thereafter has no responsibility for fixing the actual contribution payable by the applicant; this is done by the Committee.

The assessment by the Commission of the applicant's disposable income and disposable capital is carried out on the basis of the

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1. 1967 Act, s.2(1).

financial declarations made by the applicant in his application form and in accordance with the Resources Regulations for the time being in force.<sup>2</sup> The Commission usually interview the applicant in person and have power to call for further information from him.

In addition to applying the Resources Regulations, the Commission also has regard to certain policy decisions taken in the past when dealing with applications. It is perhaps this factor above all which makes it somewhat dangerous for a Solicitor to try and compute an applicant's disposable income and capital with a view to advising his client how much an action may cost him. Nor are many Solicitors likely to keep pace with the detailed Regulations on this matter which emanate from the Secretary of State, preferring to leave the assimilation of such information to those who use it every day. The best course would seem to be to assist the client to complete the declaration of means on the application form, advise him that he will almost certainly be called for interview by the Commission, that he must attend such interview, and further advise him that if he is offered legal aid, there may be a contribution which he will have to pay. Only when the application has been determined will this figure be settled, and the financial implications of continuing with the case can be explained.

The main features of the Resources Regulations (which are discussed in detail in this Chapter) are:

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2. The Legal Aid (Scotland)(Assessment of Resources) Regulations 1960 (S.I. 1960/1395, amended by S.I. 1960/2194; 1971/275; 1972/1756; 1975/1372 and 1977/1761). Reg.1(4) provides that any reference in the Regulations to any payment received or made or any debt due or owed or any other resource possessed or obligations due by the person concerned under Scots law shall include references to any such resource or obligation under any corresponding provision in the law of any other country.

- (a) the whole of the applicant's income and capital are included in the assessment of his resources;
- (b) the resources of an applicant include those of his spouse, unless, for example, they are living apart or have opposing interests in the proceedings;
- (c) the period of computation with regard to income is normally the twelve months following the application;
- (d) deductions are made from the applicant's income and capital to cover many of his daily expenses such as tax, rent, maintenance of dependants, debts and the like.

It must be stressed that even if the applicant qualifies on financial grounds, he may still be refused legal aid if it is unreasonable to grant it or if he has no probabilis causa litigandi.

#### The Financial Limits

The financial limits for legal aid for civil proceedings (other than those under the Social Work (Scotland) Act 1968<sup>3</sup>) are laid out in s.3(1) of the Legal Aid (Scotland) Act 1967. It is currently available<sup>4</sup> for any person whose disposable income does not exceed £2,400.00 a year or such larger yearly figure as may be prescribed, provided that a person may be refused legal aid in respect of such proceedings if he has a disposable capital of more than £1,600.00 or such larger figure as may be prescribed and it appears that he can afford to proceed without legal aid. Income limits are thus fixed by regulation, but some discretion is permitted with regard to capital.

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3. See 1967 Act, s.2(1) and s.1(6A).

4. Under s.3(1) of the 1967 Act amended by the Legal Aid (Scotland) Financial Conditions) Regulations 1977 (S.I. 1977/1981).

By s.4(1) of the 1967 Act references to a person's disposable income or disposable capital shall be taken as referring to the rate of his income or the amount of his capital after making

- (a) such deductions as may be prescribed in respect of the maintenance of dependants, interest on loans, income tax, rates, rent or other matters for which the person in question must or reasonably may provide; and
- (b) such further allowances as may be prescribed to take account of the nature of his resources.

#### Assessment by the Commission

##### (1) Duty to Assess

This is contained in s.4(6) of the 1967 Act which, as well as imposing on the Supplementary Benefits Commission the duties of determining disposable income, disposable capital and the maximum contribution, empowers the Commission ".... to call attention to any special circumstances affecting the maximum amount of the lump sum and periodical payments which he could reasonably make on account of any contribution". One example of a "special circumstance" would be that the applicant has e.g. no prospect of employment during the period of computation.

##### (2) Machinery for Assessment

The applicant for legal aid will have completed the Statement of Financial Circumstances on the application Form SLA 3 which is lodged along with the other papers with the Secretary of the appropriate legal aid Committee. This Statement (but none of the other papers submitted) is sent to the Commission, who normally require the applicant to attend for interview. At the interview the Statement is

checked with the applicant, who will often be asked to provide documentary evidence of his declarations. If he fails to attend for interview or fails to co-operate fully with the Commission, his application may be treated as abandoned.<sup>5</sup>

Persons resident outside Scotland and applicants who are Members of H.M. Forces are not interviewed.<sup>6</sup>

### (3) The Determination Itself

On receipt of all the necessary information the Commission compute disposable income, disposable capital and, from these figures, the maximum contribution which the applicant must make to the cost of the proceedings. By s.3(1) of the 1967 Act this may include:

- (a) a contribution in respect of income not greater than the amount (if any) by which his disposable income exceeds £760.00 a year or such larger yearly figure as may be prescribed; and
- (b) a contribution in respect of capital not greater than the amount (if any) by which his disposable capital exceeds £340.00 or such larger figure as may be prescribed.

Specimen determinations are printed from time to time in the Journal of the Law Society of Scotland.

### (4) Deprivation or Conversion of Resources

This is the situation whereby an applicant tries to arrange his financial affairs so as to give a misleading account of his

5. See e.g. 1958 Scheme, Art.15(4), proviso, followed in all the other civil Schemes.

6. In England, there have been suggestions that Solicitors should check the applicant's financial circumstances and a similar pilot Scheme has been mooted in Scotland.

resources. By Resources Regulation 6:

"If it appears to the Commission that the person concerned, with intent to reduce the amount of his disposable income or disposable capital, has directly or indirectly deprived himself of any resources or has converted any part of his resources into resources which under these Regulations are to be wholly or partly disregarded or in respect of which nothing is to be included, the resources of which he has so deprived himself or which he has so converted shall be treated as part of his resources or as not so converted as the case may be."

Common situations envisaged hereunder are where the applicant disposes of assets e.g. to a relative shortly before applying for legal aid and cannot account for so doing.

(5) Information to be given to the Committee

The determination of the Commission as to disposable income, disposable capital and maximum contribution are communicated in writing to the appropriate legal aid Committee.<sup>7</sup> The Commission may call attention to any special circumstances which affect the amount that the applicant could reasonably contribute, either out of capital or income.<sup>8</sup>

If the applicant is offered a certificate, it will show these figures, along with the actual contribution assessed by the Committee. If the application is refused on means, the Commission's determination is not disclosed to the applicant.

(6) Alteration of a determination

There is no appeal against the Commission's determination of resources, but a determination may be altered in two ways.

(i) Cases of error or mistake

By Resources Regulation 10:

7. Resources Regulations, Reg.8.

8. 1967 Act, s.4(6).

"Where it appears to the Commission that there has been some error or mistake in the determination of a person's disposable income, disposable capital or maximum contribution or in any computation or estimate upon which such determination is based and that it would be just and equitable to correct the determination, the Commission may, with the consent of the Committee by whom the certificate would be issued, suspended or discharged, correct such error or mistake and make an amended determination; and such amended determination shall for all purposes be substituted for the original determination and shall have effect in all respects as if it were the original determination."

As will be observed, this regulation refers to "any computation or estimate" and would thus cover changes in circumstances which render the determination mistaken.

(ii) Redetermination on a change of means

This is covered by the General Regulation 11(2). If since the last determination by the Commission of the applicant's disposable income and disposable capital, his circumstances have altered, a Committee may require the Commission to redetermine these figures. This is only done if there has been an increase in the amount of his disposable income by an amount greater than £156 or decrease therein by an amount greater <sup>than</sup> £78, or if there has been an increase in his disposable capital by an amount greater than £120.<sup>9</sup>

The Commission may also be asked to carry out a redetermination if it appears to the Committee that the assisted person's circumstances have altered to such an extent that his certificate should be varied or discharged.<sup>10</sup>

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9. Legal Aid (Scotland)(Assessment of Resources) Amendment Regulations 1977, reg.2. It will be noted from General Regulation 11 that the assisted person must report changes in his circumstances to his Solicitor, who must in turn report them to the Committee. A decrease in disposable capital can lead to an amended determination in terms of Resources Regulation 10.

10. Resources Regulation 9.

(7) Appellate Proceedings

If a certificate is granted for appeal proceedings (other than interlocutory proceedings) and the applicant was an assisted person in the court below, the Commission generally do not have to re-determine disposable capital and income, but assess the maximum contribution (if any) at an amount not greater than the maximum contribution in relation to the earlier proceedings, less any amount assessed by them or another Committee to be paid in respect of those proceedings.<sup>11</sup>

Subject Matter of Dispute

By Resources Regulation 3, it is provided that in computing the disposable income or disposable capital of the person concerned there shall be excluded the value of the subject matter of the dispute in respect of which application has been made for a certificate.

This provision has never been subjected to judicial interpretation in Scotland, although the equivalent provision in England came before the House of Lords in Taylor v National Assistance Board [1958] A.C. 532.<sup>12</sup> The broad test suggested<sup>13</sup> there was whether the ownership of the resource in question depends wholly or in part on the result of the proceedings. Taylor was a case in which the applicant had obtained alimony pendente lite and applied for legal aid inter alia to defend divorce proceedings. The Probate Division held that at the date of her application for legal aid, her application for alimony was the subject matter in dispute and should have been excluded

11. Resources Regulation 11, of which the proviso deals with the limited situation in which a redetermination must be made.

12. Discussed by Matthews & Oulton, op. cit., pp.76-78.

13. [1958] A.C. at p.543.

in assessing her disposable income. The Court of Appeal and the House of Lords reversed this, holding that once the order for alimony had been made there was no longer merely a claim for alimony, but the amount of the alimony was the income of the applicant and did not form the subject matter of the dispute. It therefore formed part of the applicant's disposable income.

This decision is followed in practice in Scotland in relation to actions involving aliment, periodical allowance and similar sums. So if the ownership of the subject matter of the dispute, like such sums, cannot be determined until the conclusion of the case, they are excluded from the resources of the applicant.<sup>14</sup> Examples given by Matthews & Dulton<sup>15</sup> include sums held in trust and damages sought by Court action. An obvious Scottish example would be a fund in medio, the ownership of which is disputed by multiplepinding.

#### Aggregation of Resources

##### (a) Spouses

Resources Regulation 4 provides that in computing the income and capital of the person concerned the resources of his or her spouse shall be treated as his or her resources except

- (1) where the spouse has a contrary interest in the dispute in respect of which application for a certificate is made, or
- (2) the person concerned and the spouse are living separate and apart.

14. It should be observed that in Taylor's case there was an existing order for alimony; such alimony thus becomes one of the applicant's resources. Where there is no existing order, a claim for e.g. periodical allowance or aliment can only be regarded as the subject matter of the dispute; it cannot be said to be a resource.

15. Op. cit. at pp.78-80.

"Contrary interest" is not defined but obviously covers situations where spouses sue each other as in a consistorial cause or other action.

(b) Juveniles

Where an application is made by or on behalf of a juvenile,<sup>16</sup> there shall, save in exceptional circumstances, in addition to the resources of the juvenile, be taken into account the resources of any person liable to maintain him under s.17 of the Supplementary Benefits Act 1976 (formerly s.22 of the Ministry of Social Security Act 1966) and of any person having care and control of the juvenile, not being a person having such care and control by reason of any contract or for some temporary purpose.<sup>17</sup> Where such an application is made, the juvenile's resources shall include any sum payable under the order of a court or under any instrument to any person for the purposes of the maintenance of the juvenile.<sup>18</sup>

Calculating Disposable Income

Although the Solicitor for the applicant must obtain the information required on the application form regarding the income of his client, that information will be subjected to checking by the Supplementary Benefits Commission in order to arrive at the applicant's disposable income. As already indicated,<sup>19</sup> the Solicitor should rarely attempt to calculate this figure himself. The Commission apply<sup>20</sup> the rules contained in Schedule 1 of the Legal Aid (Scotland)(Assessment

16. A person under 16.

17. Resources Regulation 5(1).

18. Ibid., Reg.5(2).

19. Supra., p. 159.

20. Resources Regulation 7.

of Resources) Regulations 1960, together with their own policy decisions and the discretion on various matters which they are allowed by the Regulations themselves.

(a) What is included in income

The term "income" is defined in the Regulations as including benefits and privileges and the income of the person concerned includes any sum payable for the maintenance of a child, including any sum payable to him under the order of a court or under any instrument for that purpose.<sup>21</sup> This definition gives no clue as to how income is computed: this is provided by rule 1 of Schedule 1:

"The income of the person concerned from any source shall be taken to be the income which that person may reasonably expect to receive in cash or in kind during the period of computation,<sup>22</sup> that income in the absence of other means of ascertaining it being taken to be the income received during the preceding twelve months."

Income obviously includes wages, salaries, interest, dividends, rents from property, pensions and annuities, which are all readily quantifiable. With regard to emoluments, benefits or privileges receivable otherwise than in cash, their value is estimated at such a sum as in all the circumstances is just and equitable.<sup>23</sup>

The income from a trade, business or gainful occupation, other than employment at a wage or salary, is deemed to be the profits therefrom which have accrued or will accrue to the person concerned in respect of the period of computation, and in computing such profits the Commission may have regard to the profits of the last accounting period of such trade, business or gainful occupation for which accounts have been made up.<sup>24</sup> Sums expended to earn those profits are ~~disregarded~~ <sup>deducted</sup>,

21. Ibid., reg.1(2). See also R. v Supplementary Benefits Commission, Ex parte Singer [1973] 1 All E.R.931, where it was held that ad hoc receipts could never be income.

22. As defined in Resources Regulation 1(2).

23. Resources Regulations, Sch.1, rule 2.

24. Ibid., rule 3(1).

but no deduction is made for the living expenses of the person concerned or any member of his family or household except in so far as such member of his family or household is wholly or mainly employed in such trade or business and such living expenses form part of his remuneration.<sup>25</sup>

It will be observed from Form SLA 3 that it is the rate of annual income which must be included, the applicant also being asked to indicate the amount of any potential increase or decrease. This is because the "period of computation" referred to in the Regulations means the period of twelve months from the date of the application or such other period of twelve months as in the particular circumstances of any case the Commission may consider appropriate.<sup>26</sup> As indicated, the income receivable during that year is normally taken as the income received during the preceding year.<sup>27</sup> One situation<sup>28</sup> in which a different period of computation may be adopted is where cross-actions of divorce are taken: the pursuer in one action may find that he has to defend a cross-action. For that purpose it appears that if he was legally aided in his own case, the period of computation adopted for determining his disposable income in it will be used for the determination relating to the cross-action, even although that cross-action is not raised until perhaps the pleadings in the original case are at adjustment.

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25. Ibid., rule 3(2).

26. Resources Regulations, Reg.1(2).

27. Ibid., Sch.1, Rule 1.

28. Mentioned by Matthews & Dutton, op. cit., p.85. It is submitted that this example would be followed in Scotland.

(b) What deductions are made(i) Income tax

The Commission use the formula contained in Rule 4 of Schedule 1 of the Regulations to compute the appropriate deduction.

(ii) Expenses of employment

There is deducted from the income from employment at a wage or salary a sum representing the reasonable expenses, if any, incurred by the person concerned in connection with that employment.<sup>29</sup> This will certainly include travelling expenses to and from work.

(iii) National Insurance Contributions

There is a deduction in respect of contributions payable by the person concerned (whether by deduction or otherwise) under the National Insurance Acts 1965-1973 of the amount estimated to be so payable in the twelve months following the application for a certificate.<sup>30</sup>

(iv) Rent

In the case of a householder there is a deduction in respect of the rent of his main or only dwellinghouse of the amount of the net rent payable, or such a part thereof as is reasonable in the circumstances. The Commission must decide which is the main dwellinghouse where the person concerned resides in more than one dwellinghouse in which he has an interest.<sup>31</sup> The Rules contain definitions of "rent" and "net rent" respectively; "rent" includes inter alia yearly outgoings such as rates and any annual instalment payable in respect of a heritable security.<sup>32</sup> Where any amount of the rent as so defined is

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29. Resources Regulations. Sch.1, Rule 6.

30. Ibid., Rule 7.

31. Ibid., Rule 8(1).

32. Ibid., Rules 8(2) and (3).

met by a rebate or allowance under Part II of the Housing (Financial Provisions)(Scotland) Act 1972, or by any rate rebate, the amount so met is to be deducted from the rent considered by the Commission.<sup>33</sup>

(v) Cost of living accommodation

If the person concerned is not a householder, there is a deduction in respect of the cost of his living accommodation of such amount as is reasonable in the circumstances.<sup>34</sup>

(vi) Dependants

Rule 10(1) provides that there shall be deduction in respect of the maintenance of

- (a) the spouse of the person concerned if the spouses are living together and
- (b) any dependent child or other dependent relative being, in either case, a member of the household of the person concerned.

Rule 10(3) contains the complex formula applied by the Commission in computing the deductions.

(vii) Maintenance payments

Where the person concerned is making and throughout such period as the Commission may consider adequate has regularly made bona fide payment for the maintenance of

- (a) a spouse or former spouse who is living separate or apart;
  - (b) a child or relative who is not a member of his household
- there is a deduction amounting to a reasonable sum up to but not exceeding the rate of such payments.<sup>35</sup>

33. Ibid., Rule 8(4).

34. Ibid., Rule 9.

35. Ibid., Rule 11.

(viii) Discretionary deductions

The Commission have an overall discretion to deduct from the total income of the person concerned an amount to cover outgoings in excess of the sum of £104.<sup>36</sup> It appears that the Commission operate this provision by totalling sums payable for items such as hire purchase, T.V. rentals and perhaps also supporting a person co-habiting with the applicant, and then deducting the sum of £104.<sup>37</sup>

(c) What is disregarded(i) Fixed sum

There is a fixed deduction of £104, irrespective of other deductions which may be made.<sup>38</sup>

(ii) Other statutory sums

Rule 5 of Schedule 1 provides for a large number of detailed statutory sums to be disregarded. Of all the provisions of the Resources Regulations it is the least comprehensible to those unfamiliar with the law on social security; and, as disregarding such sums is entirely the task of the Commission, it seems pointless (and unoriginal) to reproduce the rule in full. The only part of rule 5 which does not appear to require a detailed knowledge of the social security system is sub-para (11):

"Any sums payable to any person as holder of the Victoria Cross or of the George Cross shall be wholly disregarded."

(iii) Discretionary amounts

In computing the income from any source there shall be disregarded such amount, if any, as the Commission consider to be reasonable having

36. Ibid, Rule 12, which provides for an allowance of such further amount as is just and equitable.

37. See Matthews & Oulton, op. cit., pp.91-92.

38. Resources Regulations, Sch.1, Rule 4A.

regard to the nature of the income or to any other circumstances of the case.<sup>39</sup> Hardship in borderline cases is thus provided for and the policy of the Commission is flexible on this matter.

#### Calculating Disposable Capital

Once again, this is not a task carried out by the Solicitor for the applicant, who merely ensures that the appropriate sections of the application form are completed. The calculation is carried out by the Supplementary Benefits Commission in accordance with the rules set out in Schedule 2 of the Legal Aid (Scotland)(Assessment of Resources) Regulations 1960. As with income, these rules bestow considerable discretion on the Commission in relation to allowances and the disregard of assets.

#### (a) What is included in capital

The term "capital" is nowhere defined but it includes the amount or value of every resource of a capital nature ascertained as on the date of the application for legal aid.<sup>40</sup> The rules recognise however that capital assets fluctuate in value and that they can be changed easily: if it is brought to the notice of the Commission that between the date of the application and the Commission's determination there has been a substantial fluctuation in the value of a resource or there has been a substantial variation in the nature of a resource affecting the basis of computation of its value, or any resource has ceased to exist or a new resource has come into the possession of the person concerned, the computation of capital must be made in the light of such facts.<sup>41</sup> It will be observed that the Commission have a wide

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39. Ibid., Rule 13.

40. Ibid., Sch.2, Rule 1.

41. Ibid., proviso.

discretion in assessing whether such fluctuation or variation has been substantial; all that the applicant (or his Solicitor) can do is to bring the change to the notice of the Commission.

The following capital assets are of relevance in the computation of total capital.

(i) Savings

This will be the commonest item encountered in practice and their amount should be stated in full.

(ii) Resources other than money

The value of such a resource is taken to be the amount which that resource would realise if sold in the open market, or, if there is only a restricted market for that resource, the amount which it would realise in that market.<sup>42</sup> But the Commission may alternatively assess its value in such manner as appears to it to be just and equitable.<sup>43</sup> It appears that as a rule of practice the Commission will deduct from the value of the asset the cost of realising it.

(iii) Dwellings and other heritable property

Until recently, owners of heritage were likely to find that they were outwith the financial limits of eligibility for legal aid, unless the value of the heritage was very small. By virtue of the Legal Aid (Scotland)(Assessment of Resources) Amendment Regulations 1977 the whole value of the applicant's main or only dwellinghouse is excluded from the assessment. But where the person concerned resides in more than one dwellinghouse in which he has an interest, there is taken into account in respect of the value to him of any interest in any dwelling-

42. Ibid., Rule 2.

43. Ibid.

house which is not the main dwellinghouse any sum which might be obtained by borrowing money on the security thereof.<sup>44</sup>

(iv) Debts

Where money is due to the person concerned, whether immediately payable or otherwise, and whether its payment is secured or not, its value is taken as its present value.<sup>45</sup> No indication is given on how to compute the present value of a debt due on a future date.

(v) Interests in a company or business

The Commission apply two rules in determining an amount for such an interest. Firstly, if the person concerned stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, the Commission may in lieu of ascertaining the value of his stocks, shares, bonds or debentures in that company, treat that person as if he were such sole owner or partner.<sup>46</sup> Secondly, if he is or is to be treated as the sole owner or a partner in any business, the value to him of such business or his share therein is taken to be either

- (a) such sum, or his share of such sum as the case may be, as could be withdrawn from the assets of such business without substantially impairing the profits of such business or the normal development thereof; or
- (b) such sum as that person could borrow on the security of his interest in such business without injuring the commercial credit of that business;

whichever is the greater.<sup>47</sup>

44. Ibid., Rule 9(3).

45. Ibid., Rule 3.

46. Ibid., Rule 4.

47. Ibid., Rule 5.

A description of the principles applied by the Commission in interpreting these rules is given by Matthews & Oulton.<sup>48</sup>

(vi) Interest in trusts

No detailed rules apply in computing the value of such an interest. The Regulations merely provide that the value of any interest, whether vested or contingent, of the person concerned in the fee of any heritable or moveable property forming the whole or part of any trust or other estate is to be computed by the Commission in such manner as appears to them to be both equitable and practicable.<sup>49</sup>

(vii) Life and endowment policies

The value of any life assurance or endowment policy is taken to be the amount which the person concerned could readily borrow on the security thereof.<sup>50</sup>

(b) What allowances are made against capital

The Regulations provide that a number of allowances may be made against capital:

(i) Contingent liabilities

Where under any statute, bond, agreement, indemnity or other instrument the person concerned is under a contingent liability to pay any sum or liability to pay a sum not yet ascertained, an allowance is made of such an amount as is reasonably likely to become payable within the twelve months immediately following the date of application for legal aid.<sup>51</sup>

48. Op. cit., at pp.97-98.

49. Resources Regulations, Sch.2, Rule 6. It appears that in such cases the D.H.S.S. avail themselves of the services of the Government Actuary's Department, but a dissatisfied applicant may be given an opportunity to produce his own valuation. See the note at (1977) 22 J.L. Soc. Sc., p.350.

50. Ibid., Rule 11.

51. Ibid., Rule 12.

(ii) Existing debts

An allowance may be made in respect of any debt owed by the person concerned (other than a debt secured on the dwellinghouse or dwellinghouses in which he resides) to the extent to which the Commission consider reasonable, provided that the person concerned produces evidence to the satisfaction of the Commission that the debt or part of the debt will be discharged within the twelve months immediately following the date of application for a certificate.<sup>52</sup>

(iii) Dependants

Where the person concerned has living with him one or more of the following persons, namely:

(a) a spouse whose resources are required to be treated as his for the purpose of the Regulations;

(b) a dependent child;

(c) a dependent relative wholly or partly maintained by him;

an allowance is made of £125 in respect of the first person, £80 in respect of the second person and £40 in respect of each further person. In ascertaining whether a child is a dependent child or whether a person is a dependent relative, regard is taken of his income and other resources.<sup>53</sup>

(iv) Small disposable income

Where the disposable income of the person concerned is less than £1,200 an allowance is made in computing his disposable capital of a sum equal to the difference between the amount of the disposable income and £1,200.<sup>54</sup>

52. Ibid., Rule 13, as amended by S.I. 1977/1761, reg.4(b).

53. Ibid., Rule 14.

54. Ibid., Rule 15, as amended by S.I. 1977/1761, reg.4(c).

(c) What capital is disregarded completely

Certain types of capital are disregarded:

- (i) Death grant
- (ii) Maternity grant<sup>55</sup>
- (iii) Personal property

Save in exceptional circumstances, the person concerned's household furniture and effects of the dwellinghouse occupied by him, his personal clothing and the personal tools and equipment of his trade, not being part of the plant or equipment of a business in which he is or is treated as sole owner or partner,<sup>56</sup> are left out of account.<sup>56</sup>

(iv) Financial assistance from other bodies

Where the person concerned has received or is entitled to receive from a body of which he is a member a sum of money by way of financial assistance towards the cost of the proceedings in respect of which a certificate is applied for, such sum is disregarded.<sup>57</sup> So assistance from e.g. a trade union is irrelevant in computing disposable capital.

(v) Discretionary amounts

A general discretion is bestowed on the Commission in computing the amount of capital to disregard such an amount (if any) as they may in the circumstances of the case decide.<sup>58</sup>

55. Ibid., Rule 7.

56. Ibid., Rule 8. A car is usually regarded as a normal personal possession and its value is disregarded unless it is exceptionally high.

57. Ibid., Rule 10.

58. Ibid., Rule 16.

CHAPTER XIPRACTICAL EFFECTS OF A CERTIFICATEMain provision: 1958 Scheme, Art.16Introduction

If a Committee decide to offer an applicant a Section 1 certificate and the offer is accepted,<sup>1</sup> the applicant becomes an assisted person. Although s.1(8) of the 1967 Act provides that the fact that the services of Counsel or a Solicitor are given by way of legal aid shall not affect the relationship between or the rights of Counsel, Solicitor and client, the fact that a Section 1 certificate is issued places certain additional duties on the assisted person and his legal representatives, who also acquire certain rights, such as that to payment from the Fund, by virtue of the grant of legal aid. The fact that one or more parties to the litigation is legally aided also has some practical effects in relation to any non-assisted party and the Court itself.

This Chapter deals with the above matters from a practical standpoint.

Commencement of Legal Aid

The date from which an applicant becomes legally aided is of supreme importance, particularly to the Solicitor for the assisted person. The latter will not be paid from the Fund for work done prior to the grant of legal aid except for the following work:

(a)/-

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1. That is, by payment of the contribution (if any) or the first instalment thereof.

- (a) obtaining precognitions to establish a probabilis causa litigandi, provided they are used subsequently in the proceedings, and work done in preparing and lodging the application;
- (b) entering appearance for a defender and moving for a sist to apply for legal aid, and dealing with immediate matters such as interim custody and interim aliment. In addition in many Sheriff Courts the Sheriff will not grant a sist until an order for defences has been made and these are lodged. This also will be covered if legal aid is granted.
- (c) reporting to the court that his client's certificate has been suspended or discharged and that his client is no longer an assisted person;
- (d) obtaining a Note from Counsel to support an application for legal aid in connection with an appeal to the Inner House from the Outer House;
- (e) work done while the client was in receipt of Legal Advice and Assistance.

After the date from which legal aid was granted the Solicitor can look to the Fund for payment, provided he also has regard to the various legal aid provisions which relate to the scope of the certificate, and provided the certificate is lodged timeously in process.<sup>2</sup>

The Committee which issues the certificate must determine the date as from which the certificate shall have effect,<sup>3</sup> but all the Schemes provide that this date is the date of receipt of the

2. On lodging, see infra, pp.186-188.

3. 1958 Scheme, Art.16(2)(a), followed in all the other civil Schemes.

application by the Committee concerned, or such later date as the Committee shall think fit having regard to all the circumstances of the case.<sup>4</sup> In practice the Committee normally fix the date of the certificate as the date of receipt of the application, which would seem to suggest that if a Solicitor is confident that legal aid will be granted, he may be justified in taking steps to represent the assisted person during the period when the application is being determined. However, the risks inherent in such a practice are obvious: although a certificate may be offered by a Committee, the offer may not be taken up and the work done after the application is lodged does not become work done under legal aid. If proceedings are urgent e.g. actions of interdict, an Emergency Certificate may be applied for.<sup>5</sup> Normally therefore, while the application is pending, the Solicitor takes no action on the applicant's behalf.

#### Scope of the Certificate

Every Section 1 certificate specifies the name, address and occupation of the assisted person,<sup>6</sup> the Court and the proceedings in or in connection with which the legal aid is given;<sup>7</sup> whether the legal aid certificate is granted for the purpose of defended or undefended (except in the House of Lords and Employment Appeal Tribunal) and, in the case of an assisted pursuer, against a specified defender or defenders.<sup>8</sup> In all cases generally a certificate has effect only for the purposes of the proceedings mentioned in the certificate.<sup>9</sup>

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4. Ibid., Art.16(2)(a). Under the House of Lords Scheme, Art.8(2) the Central Committee merely determine the date on which the certificate takes effect: there is no indication as to when this is to be, as in all the other civil Schemes.
  5. For Emergency Certificates, see infra, Chapter XII.
  6. 1958 Scheme, Art.16(3)(a), followed in all the other civil Schemes.
  7. Ibid., Art.16(3)(b).
  8. Ibid.
  9. Ibid., Art.16(8). There is no such provision in the House of Lords Scheme.

It is thus of the utmost importance when applying for a certificate to specify the proceedings for which legal aid is sought. The Courts and proceedings for which legal aid is available have already been dealt with;<sup>10</sup> separate Section 1 applications are required for each species of "distinct proceedings" enumerated in Rule 2(1) of the Act of Sederunt (Legal Aid Rules) 1958 (as amended). But within each classification so provided, a certificate may be granted to cover e.g. all the remedies sought in one summons or initial writ, or all the defences pleaded, or all the grounds of appeal. But the necessity of stating these accurately in the accompanying Memorandum cannot be over-stressed.<sup>11</sup>

Thus, if there should be included in Form SLA 3 a statement that legal aid is sought for proceedings for e.g. "divorce, custody, aliment and periodical allowance", the details of these remedies would have to be included in the Memorandum. It would be quite improper to proceed for divorce on e.g. grounds of adultery, having previously been granted legal aid for an action based on desertion, and the Solicitor would not be paid for work so done. The proper course would be to make a fresh application.<sup>12</sup>

It should also be observed that certain steps can only be taken with the sanction of the appropriate Committee: these are dealt with separately.<sup>13</sup>

10. See supra, Chapter VI.

11. On the accompanying Memorandum and the case of Healy v A. Massey & Son Ltd. 1961 S.C.198, see supra, pp.128-129.

12. Probabilis causa would require to be re-established and any existing certificate would be discharged.

13. See infra, pp.189-192.

### Limited Certificates

These were introduced in 1971 in order to cover the gap between the old Section 5 scheme which covered pre-trial enquiries and the Section 1 scheme which covered Court proceedings.<sup>14</sup> Certain steps, such as the obtaining of Counsel's opinion, could not be done under the former scheme; another purpose behind the introduction of limited certificates was to make legal aid under Section 1 available on less stringent financial conditions than obtained under the Section 5 scheme.<sup>15</sup>

Originally, three types of limitation were authorised: firstly, the making of further enquiries; secondly, the obtaining of Counsel's opinion; and thirdly, representation at a Fatal Accident Inquiry and the obtaining of the notes of such an inquiry.<sup>16</sup> But with the advent of Legal Advice and Assistance under the 1972 Act, the rationale for issuing Section 1 certificates with the first two types of limitation mentioned was cut away; further enquiries can be made and Counsel's opinion sought under the Legal Advice and Assistance Scheme.<sup>17</sup> Thus Limited Certificates are now granted for only four types of proceeding:

- (a) representation at a Fatal Accident Inquiry under the Fatal Accidents and Sudden Deaths (Inquiry)(Scotland) Act 1976 and to obtaining the relative notes;

(b)/-

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14. Limited certificates had been issued in England at least since the decision in Law Society v Elder [1956] 2 Q.B.93.
15. The disparity between the financial conditions applicable to these two schemes became particularly acute at this time.
16. See 21st Report of the Law Society of Scotland on the Legal Aid Schemes (1970-71) p.5.
17. See infra, Chapter XXIII.

- (b) inquiries analogous to Fatal Accident Inquiries  
e.g. under the Merchant Shipping Act;
- (c) inquiries under the provisions of s.108 of the  
Mental Health (Scotland) Act 1960;<sup>18</sup> and
- (d) for the inspection, production and recovery etc. of  
documents before an action is raised, in terms of  
s.1 of the Administration of Justice (Scotland)  
Act 1972.<sup>19</sup>

Application for a Limited Certificate is made in the usual way on Form SLA 3 with intimation to the party who would be the opponent if a litigation was to ensue. The accompanying Memorandum and accompanying documents should indicate the nature of the work which it is intended to do under the Limited Certificate and where possible, an estimate of the cost.<sup>20</sup>

The normal provisions as to assessment of means apply; if a Limited Certificate is offered it is endorsed with the appropriate limitation. It remains valid for three months from the date of the certificate, subject to extension by the appropriate Committee.

In the vast majority of cases where a Limited Certificate is now appropriate, it will probably be necessary to apply first for an Emergency Certificate, as the potential applicant is unlikely to have more than a few weeks' warning that an Inquiry is to be held; and thus rarely sufficient warning to allow for the complete processing of a Limited Section 1 application. The normal Emergency Certificate

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18. See (1977) 22 J.L. Soc. Sc. 215. Section 108 allows the Secretary of State to order an inquiry in connection with any matters under the Act.

19. See (1973) 18 J.L. Soc. Sc. 374.

20. See (1971) 16 J.L. Soc. Sc. 193.

provisions apply; the application for an Emergency Certificate should immediately be followed up with application for a Limited  
21  
Certificate.

If the Inquiry covered by the Limited Certificate reveals that litigation should be pursued, the Committee may be asked to remove the limitations on the Certificate. There should be returned to the Committee the whole papers submitted with the application, a Supplementary Memorandum signed by the applicant and his Solicitor setting forth the changed circumstances and all other information available to the applicant and his Solicitor at that time. The Supplementary Memorandum will require to be intimated to the opponent who should be advised that he has the right to lodge objections with the appropriate Committee within fourteen days and should have an appropriate certificate of intimation endorsed on it by the applicant's Solicitor. It will be noted that the request is for removal of a limitation on a certificate already issued; it is not treated as a fresh application for a legal aid certificate.

Where the Committee are satisfied that the limitation should be removed they will endorse the certificate accordingly and return it to the applicant's Solicitor. Where the limitation is removed the endorsement removing the limitation will also extend the time for lodging in Court the Summons, defences or other writ and the legal aid certificate, for a period of three months from the date of the removal of the limitation or such longer period as the Committee may determine under Art.16(2)(b) of the 1958 Scheme. The withdrawal of a limitation on a certificate will not necessitate a re-assessment of means.

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21. On Emergency Certificate, see infra, Chapter XII.

If the matter covered by the Limited Certificate does not reveal that litigation should be pursued, the Solicitor simply makes up his account and submits it in the normal way.<sup>22</sup> Appeals against the refusal of a Limited Certificate are made in the usual way to the Central Committee.

In fixing the actual contribution payable by the assisted person, the Committee will assess the actual cost of the work authorised by the Limited Certificate in the normal way. Where this exceeds the amount of the maximum contribution, the actual contribution will, of course, be the maximum contribution. Where, however, the estimated cost is less than the maximum contribution, the actual contribution will be the estimated cost of the work. In such cases where there is a subsequent application to the Committee for the removal of the limitation, the actual contribution will fall to be reviewed. The revised actual contribution will be the maximum contribution or the total estimated cost of the work authorised by the Limited Certificate and the work to be authorised by the removal of the limitation, whichever is the lower.

#### Lodging and Intimating the Certificate

##### Lodging

Once a Section<sup>1</sup> certificate, Limited Certificate or Emergency Certificate has been granted it must be lodged in Court.<sup>23</sup> Under Article 16(2)(b) of the 1958 Scheme, a full certificate (or Limited Certificate) ceases to have effect unless the summons, defences or other writ relating to the applicant's initial interest in the proceedings and the certificate are lodged in Court within three months,

22. See infra, Chapter XVI.

23. Act of Sederunt (Legal Aid Rules) 1958, para.3(2).

or in cases in which the induciae is eighty-four days, five months or such longer period as the Committee may determine from the date of the certificate. If an extension of the time for lodging the certificate is sought, it must be made to the Committee concerned not less than fourteen days prior to the date on which the certificate would otherwise expire.<sup>24</sup> No such formal rule applies under the House of Lords Scheme, but the provisions are broadly similar under all the other civil Schemes.<sup>25</sup>

Normally the certificate is lodged along with whatever document is first lodged in process or in the Tribunal office as the case may be, whether the applicant is pursuer, defender, applicant, appellant or respondent. In the case of proceedings in the Court of Session as an appellate court, the certificate must be lodged before the appeal, reclaiming motion or motion for new trial is heard.<sup>26</sup> If any person who is a party to any proceedings becomes during the dependence of those proceedings an assisted person, he must forthwith lodge in process (or with the Tribunal) the legal aid certificate or emergency certificate issued to him, and intimate the lodging thereof to all other parties to the proceedings.<sup>27</sup>

But this lodging of the certificate may not always have the effect of bringing to the Court's attention that legal aid has been

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24. 1958 Scheme, Art.16(2)(c). But Committees have a discretion to issue Certificates with an initial period of validity of six months as a matter of course. See (1974) 19 J.L. Soc. Sc. 374.

25. See Scottish Land Court Scheme, Art.9(2); Lands Tribunal for Scotland Scheme, Art.9(2); Restrictive Practices Court Scheme, Art.9(2); Employment Appeal Tribunal Scheme, Art.9(2).

26. Act of Sederunt (Legal Aid Rules) para.3(2).

27. Ibid., para.3(3).

granted; it is also provided that the words "Assisted Person" must follow the name of the assisted person on every step of process in the proceedings to which he is a party.<sup>28</sup>

Once the legal aid certificate or emergency certificate has been lodged it cannot be borrowed by any party to the proceedings except for the purpose of having the same amended, suspended or discharged by the Committee; but if the certificate is varied or discharged, the Committee by whom the certificate was issued is entitled to borrow the lodged copy for the purpose of varying it or of marking it as having been discharged.<sup>29</sup>

#### Intimating the Grant

When issuing a s.1 certificate, the appropriate Committee intimate this to the applicant, his Solicitor and the opponent.<sup>30</sup> The certificate sets out details of who is to act for the assisted person,<sup>31</sup> the latter's disposable income and capital, his maximum and actual contributions and details of any instalments fixed.<sup>32</sup> The acceptance of the offer of legal aid is deemed to imply an undertaking by him to pay on the due dates as fixed or subsequently varied by the Committee the instalments of his contribution to the Fund and that if two or more instalments are in arrear the Society is entitled to

28. Ibid., para.3(1). See James Sim Ltd. v Haynes 1968 S.L.T. (Sh. Ct.) 76 where one of the consequences of not marking the papers "Assisted Person" was that an award of expenses against the assisted person could not be modified in terms of s.2(6)(e) of the 1967 Act.
29. Ibid., para.3(4).
30. 1958 Scheme, Art.16(1) and (4), followed in all the other civil Schemes.
31. Ibid., Art.16(3)(g). This is normally the Solicitor who prepared the application. In the Court of Session and Lands Valuation Appeal Court, an Edinburgh Solicitor is also named; in the House of Lords, a London Solicitor is also appointed.
32. Ibid., Art.16(3)(c) and (d).

recover immediately the whole balance of contributions due by him.<sup>33</sup>  
 The certificate also contains statements relating to the obligation to disclose a change in circumstances; the expiry of the certificate if it and the other initiating court document are not lodged <sup>timeously;</sup> the fact that the assisted person is not relieved of personal liability by virtue of an award of expenses against him; the fact that his actual contribution may be increased up to the level of his maximum contribution; and any other particulars which the Society may consider appropriate.<sup>34</sup> The certificate is signed by the Secretary or one of the members of the issuing Committee.<sup>35</sup>

Matters for which sanction must be obtained

It should always be borne in mind that the grant of a full Section 1 certificate does not give the assisted person or his Solicitor carte blanche to run up unnecessary expense or to take steps which would not normally be taken if the assisted person were not legally aided. The Solicitor's legal aid account is subject to taxation in the same way as an ordinary account, but in addition the Schemes provide that certain steps may not be taken without the sanction of the appropriate Committee. If such steps are taken without sanction, the Solicitor risks non-payment from the Fund for these steps.

(1) Instructing Counsel

The instruction of Counsel sometimes needs the prior sanction of the appropriate Committee, depending on the Court or Tribunal before which the proceedings are pending. The position may be summarised as follows:

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33. Ibid., Art.16(3)(d).

34. Ibid., Arts.16(3)(e)(f)(h)(i) and (j).

35. Ibid.

(a) House of Lords

Normally at least Senior and Junior Counsel are instructed to act for the assisted person and this does not require the prior sanction of the Central Committee. But the consent of the Central Committee is required for the employment of a member or members of the Bar of England and Wales.<sup>36</sup>

(b) Court of Session, Lands Valuation Appeal Court and Restrictive Practices Court

No sanction is required for the employment of Counsel in these courts, and the question of whether Senior Counsel or an extra Junior are required is unaffected by the legal aid provisions.<sup>37</sup>

(c) Sheriff Court, Scottish Land Court, Lands Tribunal for Scotland and Employment Appeal Tribunal

In these Courts and Tribunals the assisted person is not entitled to the services of Counsel, except with the prior consent of the Local Committee.<sup>38</sup>

Where it is necessary, sanction is usually sought by letter to the Secretary of the appropriate Committee setting out the reasons why Counsel (or an extra Counsel) should be instructed. Sanction is likely to be given where the issues are serious or where there is a difficult point of law involved. The onus of showing that Counsel should be instructed rests on the Solicitor and there is no appeal if sanction is refused.

It is however competent for the Local Committee on cause shown to sanction the employment of Counsel in the Sheriff Court, Scottish

36. House of Lords Scheme, Art.5.

37. 1958 Scheme, Art.13(4); Restrictive Practices Court Scheme, Art.6(4).

38. 1958 Scheme, Art.13(4); Scottish Land Court Scheme, Art.6(4); Lands Tribunal for Scotland Scheme, Art.6(4); Employment Appeal Tribunal Scheme, Art.6(4).

Land Court, Lands Tribunal for Scotland and Employment Appeal Tribunal notwithstanding that such employment had not been previously approved by them.<sup>39</sup>

(2) Employing Expert Witnesses

Under all the civil Schemes except the House of Lords Scheme the sanction of either the Supreme Court Committee or the Local Committee is required before an expert witness can be employed.<sup>40</sup> But in actions of reparation one medical expert witness and one other expert witness, not being a medical expert, may be employed without the consent of the appropriate Committee.<sup>41</sup> In all cases retro-active sanction may be granted on cause shown.<sup>40</sup> Applications to sanction the employment of expert witnesses should be accompanied by a print of the closed record and a note of the particular aspect of the case to which each expert will speak. A note from Counsel may also be necessary.

(3) Execution of Diligence

A distinction falls to be drawn here between decrees for aliment and other decrees obtained by assisted persons. In relation to the latter type of decree the sanction of the Central Committee is required for each and every step of diligence.<sup>42</sup>

In alimentary decrees or where a certificate has been granted for the purpose of execution of diligence on a decree for aliment, diligence may be done on the decree for up to eighteen months from

39. Ibid.

40. Ibid. This provision appears somewhat misplaced in the Employment Appeal Tribunal Scheme, which covers appeals to the Tribunal.

41. 1958 Scheme, Art.13(4).

42. 1958 Scheme, Art.16(9)(d). The Solicitor will be entitled to render a Supplementary Account against the Fund for doing diligence if his original account has been paid.

the date of the decree or the date of the issue of the certificate.<sup>43</sup>  
 But diligence in this connection does not include a pointing,  
 unless the prior sanction of the Central Committee is obtained.<sup>44</sup>  
 If it is desired to proceed by way of Minute for Civil Imprison-  
 ment, a fresh certificate must be sought, although an extant  
 certificate may be amended to allow for this; but while such an  
 amended certificate is valid for eighteen months vis-à-vis other  
 diligence, it must be lodged within three months vis-à-vis Civil  
 Imprisonment. A fresh application is always required for a petition  
 for sequestration following on notour bankruptcy, and for actions of  
 furthcoming,<sup>45</sup> although the latter action is not competent under the  
 Scheme if it is for under £500 and the liability to pay and the  
 amount thereof are admitted.<sup>46</sup>

If diligence is necessary after the eighteen month period has  
 expired, a further certificate is necessary.

(4) Any unusual expense

In all cases of difficulty where the Solicitor is not covered  
 by the Opinion of Counsel or the order of the Court<sup>47</sup> any unusual  
 steps or expense should not be taken or incurred without consulting  
 the Local Secretary or the Secretary of the Central Committee to  
 ensure that the steps taken will be paid for from the Fund.

43. Ibid., Art.16(9).

44. Ibid., Art.16(9)(b).

45. Ibid., Art.16(9)(c).

46. Such Summary Causes probably do not come within the ambit of  
 the Scheme: see supra, pp. 108-109.

47. For example, in relation to a Commission which has been  
 ordered.

### Obligations of Disclosure

Every legal aid certificate contains a statement drawing the attention of the assisted person to his obligation to disclose to his Solicitor any change in his circumstances, financial or otherwise relevant to the conditions under which the legal aid certificate was issued.<sup>48</sup> The obligation is laid out in detail in General Regulation 11. As well as informing his Solicitor of relevant changes in his own circumstances, financial or otherwise, the assisted person is also obliged to report such changes, so far as known to him, of any other person jointly concerned with or having the same interest in the matter.<sup>49</sup>

The kinds of changes which should be reported are not listed, but they obviously include changes in income and expenditure, acquisition or disposal of capital assets, the personal status of the assisted person, additional financial commitments due to the birth of a child and the like. The only matter which he is not obliged to report is a change resulting from an increase or decrease in the rate of income tax or in the amount of any local rate which he or the other person is liable to pay.<sup>50</sup>

It will be observed that the obligation is on the assisted person to report changes, not on the Solicitor to discover changes. If the latter receives information from the assisted person regarding a change of circumstances (and only in that case) he must report the change to the appropriate Committee which may, after such inquiry

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48. 1958 Scheme, Art.16(3)(e) followed in all the other Schemes. Cf. the duties of disclosure on the assisted person's Solicitor: see infra, pp. 205-206.

49. The sanction for not reporting changes is prosecution under s.18(1) of the 1967 Act.

50. General Regulation 11(1).

(including such references to the Supplementary Benefits Commission) as they consider necessary, vary the amount of the assisted person's contribution or may discharge the legal aid certificate as the case may be.<sup>51</sup>

But although all changes of circumstances must be reported, the Committee does not take any change into account unless it appears that such change has increased the assisted person's disposable income by an amount greater than £156 or decreased it by an amount greater than £78, or that his disposable capital has increased by an amount greater than £120.<sup>52</sup>

#### Other Practical Effects of a Certificate

The grant of legal aid has a number of other practical effects which are discussed separately. The most important of these are:

- (1) the Solicitor (and Counsel) for the assisted person will be paid from the Fund for the work done;<sup>53</sup>
- (2) the assisted person's personal liability for expenses awarded against him may be modified;<sup>54</sup>
- (3) his certificate may be amended, suspended or discharged because of a change of circumstance or, broadly speaking, his conduct;<sup>55</sup> and
- (4) the assisted person becomes liable to penal sanctions in the event of his failure to comply with the Regulations or if he gives false information.<sup>56</sup>

51. Ibid., Reg.11(2).

52. Ibid., amended by the Legal Aid (Scotland)(Assessment of Resources) Amendment Regulations, 1977 (S.I. 1977/1761).

53. See infra, Chapter XVI.

54. See infra, Chapter XIV.

55. See infra, Chapter XIII.

56. See infra, Chapter XIII.

Where a Section 1 certificate has been granted for proceedings in the Employment Appeal Tribunal or Restrictive Practices Court in Scotland, and the Tribunal or Court subsequently direct that the proceedings be wholly or partly conducted in England and Wales or Northern Ireland, the certificate remains in force and the Scottish lawyers representing him may continue to do so.<sup>57</sup>

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57. See General Regulations 4A(4) and 4B(4).

CHAPTER XIIEMERGENCY CERTIFICATESMain provision: General Regulation 9Introduction

There are certain situations of urgency in which legal aid is essential to allow court proceedings to be taken or defended. To cover these urgent situations provision is made for the grant of an Emergency Section 1 certificate to allow essential steps in process to be taken while a full Section 1 application is being applied for and processed. The provisions are applicable to all the civil Schemes except the House of Lords Scheme and the Children Scheme.

This Chapter deals with the situations in which an Emergency Certificate may be granted and the effect of such a certificate.

Availability

Provision is made by Regulation 9 of the General Regulations for applications for legal aid in matters of special urgency and for the granting of Emergency Certificates. The terms "urgency" and "emergency" are nowhere defined, and common situations in which applications are made include actions for interdict, custody or aliment where there is a conclusion or crave for interim decree. But Regulation 9 allows the Secretary and one member (or two members) of the appropriate legal aid Committee to issue an Emergency Certificate without reference to the Committee or Supplementary Benefits Commission where it appears to them " .... that it is likely that an applicant for legal aid is eligible for a certificate and that it is desirable, in the interests of justice, that legal aid should be made available as a matter of urgency .... " <sup>1</sup>

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1. General Regulation 9(1).

So it would appear to be for the applicant to convince the legal aid authorities that a real emergency exists; it was never intended that Emergency Certificates would be granted for the purpose of overcoming administrative obstacles. It is practically never an "emergency" that the applicant or Solicitor has neglected to put in an application which could have been presented earlier, nor is it necessarily an "emergency" that the applicant is the defender in the action; the procedure in the latter case is to enter or lodge a notice of appearance and move the Court to sist the action to enable the defender to apply for legal aid. If the Court refuses to sist the action for this purpose the Central Committee should be advised; in one case where this happened in the Sheriff Court the Committee advised the applicant to appeal to the Sheriff-Principal.<sup>2</sup>

But, according to the Central Committee an Emergency Certificate is appropriate in a case where the presentation of a full Section 1 application (which involves intimation to the defender) would give the defender warning to move out of the jurisdiction. As an application for an Emergency Certificate does not require to be intimated to the defender,<sup>3</sup> the first formal notice that the latter will receive concerning the proposed action will be when the summons or initial writ is served. One example of this sort of case is the application for legal aid in Scotland for the purpose of enforcing an English order for maintenance which has been registered in Scotland in terms of the Maintenance Orders Act 1950.

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2. I am obliged to the Chairman of the Central Committee for this information.
  3. The subsequent s.1 application does require to be so intimated.

Proceedings for which Emergency Certificate may be granted

An Emergency Certificate may be granted for proceedings in all courts and tribunals in which Section 1 civil legal aid is available, except in connection with proceedings in the House of Lords on appeal from the Court of Session.<sup>4</sup>

How to Apply

Application is normally made on Form SCLA 38 but may also be made by letter to the Secretary of the appropriate Committee. It is sent to the Committee which normally would deal with legal aid for the case, were it to be a full Section 1 application.

The form simply specifies the details of the Solicitor, the parties to the case and the nature of the emergency. There is no Statement of Means, nor does the form require to be accompanied by a Memorandum or other documents, although a short precognition by the prospective assisted person is often enclosed. However, in appeal proceedings sought to be taken (but not defended) by the applicant, the application must be accompanied by a Statement from the Solicitor who conducted the original proceedings that he is of opinion that in all circumstances ~~these~~ <sup>there</sup> are good grounds for the appeal being taken.<sup>5</sup>

The form also contains a Letter of Undertaking to be signed by the applicant whereby he agrees that:

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4. General Regulation 9(1), proviso. Emergency Certificates are also of no application in proceedings involving children under the Social Work (Scotland) Act, 1968, nor in relation to criminal proceedings. They may also be granted on the application of the assisted persons for the purpose of varying a legal aid certificate already in force, except where such variation is required by reason of a change of circumstance: General Regulation 9(9).
  5. General Regulation 9(2).

- (1) if a Legal Aid Certificate is subsequently issued in lieu of the Emergency Certificate, he will pay into the Legal Aid Fund, in such manner as the Committee may direct, the contribution fixed by them - i.e. the "actual contribution" as opposed to the "maximum contribution" fixed by the Supplementary Benefits Commission; and
- (2) if the Emergency Certificate is discharged without being replaced by a Legal Aid Certificate, he will pay into the Fund such sum as has been paid or shall be payable out of the Fund on his account in respect of the proceedings for which the Emergency Certificate was issued.<sup>6</sup>

The decision on an application for an Emergency Certificate is normally taken immediately on its receipt; if a certificate is issued it has effect in all respects as if it were a legal aid certificate, and any person holding such a certificate shall, while the certificate is in force, be deemed to have a disposable income of less than the income limit.<sup>7</sup>

#### Period of Validity

By Regulation 9(6) an Emergency Certificate is valid only for six weeks. If on the expiry of that period a legal aid certificate has not been issued in lieu thereof, the Emergency Certificate is deemed to have been discharged.<sup>8</sup>

6. Ibid., Reg.9(4).

7. Ibid., Reg.9(3). "Income limit" means the disposable income limit for eligibility for legal aid: see Reg.9(10)(a).

8. General Regulation 9(6).

However, the Certificate may be extended for another six weeks if the Committee for good cause so determine.<sup>9</sup> Application for extension is normally made by letter enclosing the Emergency Certificate.

#### Subsequent Procedure

It is essential that an application for an Emergency Certificate be followed up immediately by a full Section 1 application with all the necessary accompaniments, so that the applicant's means can be determined.<sup>10</sup> In any event the Committee members who issued the Emergency Certificate are bound to bring the case to the attention of the full Committee,<sup>11</sup> who may discharge the Emergency Certificate or require the Commission to determine the applicant's means and contribution,<sup>12</sup> and normally the latter course is adopted.

The practical importance of such a determination is simply that on investigation of the applicant's means it may be discovered that he is liable to pay only a small contribution, or none at all. But if no Section 1 application is made or the applicant does not co-operate with the Commission, the Law Society will enforce the Letter of Undertaking and extract from the applicant the full amount which is paid out of the Fund on his account.

If a Section 1 application is made, the Committee are obliged to issue a legal aid certificate to replace the Emergency Certificate unless the Commission determine that the holder's disposable income is greater than the income limit for the time being, and such a

9. Ibid., proviso.

10. See supra, Chapter IX.

11. General Regulation 9(5).

12. Ibid., Reg.9(7).

certificate has effect from the date on which the Emergency Certificate was issued.<sup>13</sup> However, where the Commission determine that the holder's disposable capital is more than the capital limit<sup>14</sup> the Committee must discharge the Certificate unless they estimate that, if the Certificate were discharged, the expenses which might reasonably be incurred by the holder in taking or defending the proceedings in respect of which he applied for legal aid would exceed any maximum contribution exigible from him.<sup>15</sup>

It sometimes happens that proceedings are completed during the currency of the Emergency Certificate e.g. where the applicant is respondent to an appeal taken by his employers to the Employment Appeal Tribunal. A full Section 1 application should still be made in such cases to avoid a situation where the Law Society are forced to proceed on the Letter of Undertaking to recoup all the sums paid out to the applicant's Solicitor during the currency of the Emergency Certificate.

If the proceedings have not been completed and the holder of the Emergency Certificate does not wish to receive further legal aid, he may require the Committee to discharge the Emergency Certificate and he is thereby liable only for such sums paid out on his account during the currency of the certificate or his maximum contribution (if assessed) whichever is the less.<sup>16</sup>

If an Emergency Certificate is granted it must be lodged in process with the Court or Tribunal in which the proceedings are

13. Ibid.

14. i.e. the disposable capital limit for eligibility for legal aid: Gen. Reg. 9(10)(b).

15. General Regulation 9(7), proviso.

16. General Regulation 9(8).

pending.<sup>17</sup> If the Emergency Certificate is issued during the dependence of such proceedings, it must similarly be lodged and its lodging intimated to all other parties to the proceedings.<sup>18</sup> The Committee may borrow the lodged copy for the purpose of varying it or of marking it as having been discharged.<sup>19</sup>

Appeals against Refusal of Emergency Certificate

The Central Committee view is that such an appeal is incompetent. In any event the question of such an appeal would seldom arise, because the emergency would usually have passed before the appeal could be disposed of.<sup>20</sup>

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17. Act of Sederunt (Legal Aid Rules) 1958 para.3(2).

18. Ibid., para.3(3).

19. Ibid., para.3(4).

20. See 22nd Report of Law Society on the Legal Aid Schemes (1971-72) Schedule 24.

CHAPTER XIIITHE PREVENTION OF ABUSES

Main provisions: 1967 Act, s.18; 1958 Scheme,  
Art.16(5) and (6); General Regulation 8

Introduction

The history of legal aid in Scotland before the 1949 Act vividly illustrates that the system of the Poor's Roll gave ample opportunity to dishonest lawyers and litigants to abuse those provisions which were designed to provide a benefit. Particularly significant in the civil field is the succession of Acts of Sederunt dealing with the Poor's Roll in the Court of Session in the 18th and early 19th centuries,<sup>1</sup> and the 20th century fear prevalent at the inception of the 1949 Act that lawyers and their clients would bring the Scottish legal system into disrepute as a result of misusing the privileges to be conferred by statute.<sup>2</sup>

Present day legislation and the legal aid Schemes made thereunder contain a number of provisions designed to stop abuses; all the civil Schemes contain provisions detailing the circumstances in which a Section 1 certificate may be suspended or discharged. In certain circumstances this may be done by the Law Society itself; or the Court before which the proceedings are pending may itself discharge the certificate.

This Chapter deals with these situations and their effect. It also deals with the criminal offences which can be committed by applicants in connection with legal aid; these are of equal applicability to all Schemes, civil and criminal.

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1. See supra, Chapter II.

2. See supra, Chapter IV.

Where the issuing Committee may suspend or discharge a Certificate

In all cases where a Section 1 certificate has been issued, sound business practice would seem to dictate that the Solicitor for the assisted person should always advise his client as to consequences of not complying with the terms on which a certificate has been granted,<sup>3</sup> particularly in relation to payment of the contribution. The issuing Committee have powers in all the civil Schemes<sup>4</sup> to suspend or discharge the certificate in the following circumstances:

- (a) Where the assisted person fails to pay any instalment of his contribution

Where any contribution is being paid by instalments the date and amount of the payments is shown on the certificate. The certificate is not issued until the first instalment has been paid and until the assisted person has signed the Letter of Undertaking to comply with the conditions of the certificate. By General Regulation 8 a person paying the contribution by instalments is bound to pay timeously; if he fails to do so the Committee may suspend or discharge the certificate.<sup>5</sup>

If this is done, the Solicitor acting will not receive payment for work done during the period of suspension or after the discharge, so normally the Solicitor will not act further after suspension or discharge is intimated to him.<sup>6</sup>

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3. On the practical effect of a certificate, see supra, Chapter IX.
  4. See 1958 Scheme, Art.16(5)(6); House of Lords Scheme, Art. 8(5)(6)(7); Scottish Land Court Scheme, Art.9(5)(6); Lands Tribunal for Scotland Scheme, Art.9(5)(6); Restrictive Practices Court Scheme, Art.9(5)(6); Employment Appeal Tribunal Scheme, Art.9(5)(6).
  5. General Regulation 8(1). The issuing Committee normally warn the assisted person and his Solicitor in advance that this may happen.
  6. But the certificate will be held still to cover reporting to the Court that it has been suspended or discharged and that the client is no longer an assisted person: see Summary of Practice Notes on Legal Aid (1977) Parliament House Book, page E.220.

Where two or more instalments are in arrear the Committee may require the assisted person forthwith to pay the whole balance outstanding of his contribution and the Law Society of Scotland has the right to recover from him (i.e. by Court Action) any sum not paid in pursuance of such a requirement.<sup>7</sup>

- (b) where the issuing Committee are of opinion that it appears unreasonable that the assisted person should continue to receive legal aid

This covers the situation where for any reason it appears to the Committee that the certificate was improvidently granted e.g. because of the subsequent conduct of the assisted person, or because of a breakdown in the professional relationship between Solicitor and assisted person. It is clear from s.6 of the 1967 Act,<sup>8</sup> that a Solicitor may give up a case for good reason; one such reason not uncommonly encountered is where the client fails to keep in touch with his Solicitor or fails to provide necessary information. Quite apart from the powers of the Court in such a situation,<sup>9</sup> it would be open to the Solicitor to report the position to the issuing Committee, who would be free to act themselves.

A situation which does not yet appear to have arisen in Scotland is where the issuing Committee themselves may wish to exercise an overriding duty to stop the waste of public funds. The matter arose in England in Iverson v Iverson [1967] P.134 where both parties were legally aided and the Area Committee pressed their advisers to try and settle the case. The case is discussed by Matthews and Oulton<sup>10</sup> where the opinion of Latey J. is summarised. Briefly, in England the situation appears to be that while the

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7. General Regulation 8(1).

8. As amended by the Administration of Justice Act 1977, s.1(2).

9. Discussed infra, p.208.

10. Op. cit. at pp.247-248

assisted person's advisers have the responsibility for the way the litigation is conducted, the Area Committee have a duty to see that they explore the possibility of a settlement, and to discharge the certificate if it appears that the assisted person no longer has reasonable grounds for continuing, or that for some other cause it is unreasonable for him to continue to have legal aid. But it must be remembered that in England, the test for the granting of legal aid is that the person must show reasonable grounds for taking, defending or being a party to proceedings,<sup>11</sup> and therefore the decision in Iverson should be treated with caution in Scotland.

But with this caveat, it is submitted that in Scotland, even in situations where the assisted person's conduct is not in issue, it would be open to a Committee to suspend or discharge a certificate if they were satisfied that there was no longer a probabilis causa litigandi and even although Art.16(5)(b) of the 1958 Scheme is couched in general language. It is generally accepted in practice that there is a clear duty on the Solicitor to report an offer of settlement which he or, if Counsel is involved, Counsel think should be accepted. In that event a local Committee would normally discharge the certificate unless it is satisfied that the Solicitor or Counsel is clearly wrong.

One other existing remedy in such a situation is of course for the Central Committee to disallow items on a Solicitor's account where they think that public money is being wasted, subject of course to the right of taxation.<sup>12</sup>

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11. Legal Aid Act 1974, s.7(5); cf. 1967 Act, s.1(6).

12. On the Remuneration and the Final Accounting, see infra, Chapter XVI.

- (c) where representations are made by any person as to a ~~as to a~~ change pendente lite in the circumstances of the assisted person

It will be observed that the word "circumstances" here is not qualified in any way: so financial circumstances are not the only matters covered, although they will continue to be of major interest to the issuing Committee. "Any person" would presumably include the Court and the assisted person's opponent.<sup>13</sup>

Before ~~suspending or discharging~~ the certificate <sup>is suspended or discharged</sup> the assisted person must be given the opportunity of submitting representations.<sup>14</sup>

If the certificate is suspended, the Committee must intimate to the assisted person that if the arrears of contribution are not paid by him within three months of the date of suspension, the legal aid certificate will be discharged without further intimation to him.<sup>15</sup>

If the certificate is suspended or discharged, this is intimated to the Counsel and Solicitor for the assisted person, and to the opponent and the Court or Tribunal. The Committee must inform Counsel and the Solicitor that they are relieved from acting for the assisted person until the suspension is removed or a fresh certificate is issued, as the case may be.<sup>16</sup>

#### Discharge in Cases of Fraud or Misrepresentation

There is a general duty in all the civil Schemes on the issuing Committee to discharge a certificate if they are satisfied that the

13. As Matthews & Dulton, op. cit. say at p.180 " .... and on occasion even bystanders, some officious and some not, may proffer information and advice".
14. These may be in writing.
15. 1958 Scheme, Art.16(5).
16. Ibid. In House of Lords cases, intimation is also made to the London Solicitor and the Clerk of the Parliaments: House of Lords Scheme, Art.8(7).

certificate has been obtained by fraud or misrepresentation.<sup>17</sup>

Discharge by the Court

In civil cases this is dealt with by para. 5 of the Act of Sederunt (Legal Aid Rules) 1958. If the Court before which there are depending any proceedings to which an assisted person is a party is satisfied that the assisted person

- (a) has without reasonable cause failed to comply with any proper request made to him by the Solicitor acting for him to supply any information relevant to the proceedings; or
- (b) has delayed unreasonably in complying with any such request as aforesaid; or
- (c) has wilfully or deliberately given false information in connection with the proceedings to the Solicitor acting for him or wilfully or deliberately concealed from him any information relevant to the proceedings; or
- (d) has without reasonable cause failed to attend at any diet of the Court at which he has been required to attend or at any meeting with the Solicitor or Counsel acting for him at which he has reasonably and properly been required to attend; or
- (e) has been guilty of any contempt of court or has otherwise conducted himself in connection with the proceedings in such a way as to make it appear to the Court unreasonable that he should continue to receive legal aid;

the Court may direct that his legal aid certificate shall be discharged. In this connection "Court" means Court or Tribunal, unless

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17. 1958 Scheme, Art.16(6) followed in all the other civil Schemes.

the context otherwise requires,<sup>18</sup> and the provisions thus apply to all the civil Schemes. Discharge by the Court in terms of para. 5 is very much a last resort and it happens very rarely in civil cases in practice. The powers of the Court are quite separate from those in the hands of the Committee issuing the certificate and they are to be contrasted with the criminal offences contained in s.18 of the 1967 Act.

It appears from the wording of para. 5 that the Solicitor for the assisted person can and should bring to the Court's attention factors which would entitle the latter to discharge the certificate, quite apart from the situation where the Court observes or becomes aware of the assisted person's conduct at first hand.

No regulation or provision deals with the procedure to be followed when a Court wishes to discharge a certificate; it appears that this may be done summarily without the assisted person being given an opportunity to show cause why his certificate should not be discharged. The only step of procedure laid down is that if the Court makes a direction that the certificate be discharged, the clerk of the Court or Tribunal must send a copy of the direction to the issuing Committee, who must forthwith discharge the certificate in relation to the proceedings before that Court.<sup>19</sup>

The question of discharge of a criminal legal aid certificate and its effects is dealt with separately.<sup>20</sup>

#### Effects of Suspension or Discharge

If the certificate is suspended or discharged by the issuing

18. Act of Sederunt (Legal Aid Rules) 1958, para.1(2).

19. Ibid., para.5(2).

20. See infra, pp.330-333.

Committee for any reason, the assisted person remains liable to pay to the Society so much of his contribution as is required to defray the expenses incurred up to the date of suspension or discharge.<sup>21</sup>

In addition, if the certificate is discharged because it was obtained by fraud or misrepresentation, or because a Court or Tribunal directed its discharge because the assisted person wilfully gave false information to his Solicitor or concealed information from him, or in any other case where the Court so directs, the Society has the right to recover from the person by whom the certificate was held any sum over and above the amount of his contribution which may be required to meet the sums paid or payable by the Society on his account in respect of the proceedings to which the discharged certificate related.<sup>22</sup>

Any expenses recovered after a person has ceased to receive legal aid in relation to the proceedings for which the expenses were recovered, must be paid to the Fund in so far as the expenses were incurred while he was an assisted person<sup>23</sup> and likewise priority payments in terms of s.3 of the 1967 Act may be made out of property preserved or recovered if the assisted person's litigation continues in spite of the suspension or discharge of his certificate.<sup>24</sup>

A suspended certificate may be restored by the issuing Committee; a certificate which is discharged may not be revived, but a fresh application is competent.

21. General Regulation 8(2). If he ceases completely to receive legal aid, he must also serve notice of the fact by registered letter or recorded delivery on all other parties to the proceedings: A.S. (Legal Aid Rules) 1958, para.3(5).

22. Ibid.

23. Ibid., Reg.8(3)

24. Ibid., Reg.8(4). On priority payments, see infra, Chapter XVI.

When an assisted person's certificate has been suspended or discharged the Central Committee will allow in the Solicitor's account those items necessary to clear the Solicitor's position with his client and the Court.

#### Criminal Offences

All the Schemes, civil and criminal, provide that if it appears to any Committee that any person seeking or receiving legal aid or advice and assistance has been guilty of an offence under s.18(1) of the 1967 Act, they shall report the matter to the appropriate criminal authority and also to the Central Committee.<sup>25</sup> Section 18 provides that it is an offence for any person seeking or receiving legal aid

- (a) wilfully to fail to comply with any regulations as to the information to be furnished by him; or
- (b) in furnishing any information required by the regulations or required for the purpose of establishing whether he has a probabilis causa litigandi or whether he has substantial grounds for taking proceedings by way of appeal against conviction or sentence knowingly to make any false statement or false representation.

Proceedings may be commenced within two years of the date of commission of the offence or within six months from the date when sufficient evidence comes to the knowledge of the Lord Advocate, whichever period is the shorter.<sup>26</sup>

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25. See e.g. 1958 Acheme, Art.21. In the House of Lords Scheme only the Central Committee is concerned with the application, so they themselves report the offence: see House of Lords Scheme, Art.12. Art.29 of the Criminal Scheme places additional reporting duties on the Solicitor.

26. 1967 Act, s.18(3).

The interpretation of s.18(1) of the 1967 Act came before the Sheriff at Paisley in Skeen v Simpson 1973 S.L.T. (Sh. Ct.) 8. A woman appeared on petition charged with murder and it appears that legal aid was requested from the Duty Solicitor. A legal aid application Form SCLA 2 was put before the Court which contained a false statement and the woman was subsequently prosecuted under s.18(1). The Sheriff (R.D. Ireland Q.C.) held the complaint to be irrelevant in that there was no averment that the information required on the Form was required at the time the appearance was made on Petition. The statutory offence, said the Sheriff, is committed only where the conditions laid down in the statute and the Regulations are satisfied i.e. when the proceedings have reached the stage at which the Court becomes entitled, as a condition of granting legal aid, to demand information about the financial circumstances of the accused and provides a form for the disclosure of such information. This stage is reached, in proceedings on indictment, when the accused, having been brought before the Court for examination on declaration, is admitted to bail or committed for trial. Thus, even although Form SCLA 2 was before the Sheriff at that stage, he was not strictly entitled to require the information on it, because legal aid is normally provided automatically without enquiry at that stage.

All the application forms for all types of legal aid warn intending applicants of the consequences of making false statements.

Another offence is created by s.18(2) of the 1967 Act. The section contains a general prohibition on the disclosure of information by anyone employed by or acting on behalf of the Law Society, being information communicated to the Society or any Committee or person on their behalf by persons seeking or receiving legal aid,

unless that person consents to the information being disclosed.

But the prohibition does not apply to the disclosure of information:

- (1) for the purpose of facilitating the proper performance by any person or body of functions under the 1967 Act; or
- (2) for the purpose of any criminal proceedings for an offence thereunder or of any report of any such proceedings.<sup>27</sup>

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27. 1967 Act, s.18(2). Information furnished to Counsel or a Solicitor as such by or on behalf of a person seeking or receiving legal aid is not information furnished to the Law Society or a person on their behalf: ibid., s.18(4).

CHAPTER XIVLIABILITY OF AN ASSISTED PERSON FOR  
HIS OPPONENT'S EXPENSES

Main provisions: 1967 Act, s.2(6)(e), 7, 8;  
General Regulation 12

Introduction

It is sometimes thought that a legally aided litigant is not liable for any of his opponent's expenses in the event of losing the case. But the true position is that while an order for expenses may be made against an assisted person in the same way as against any other unsuccessful litigant, the amount of the expenses exigible personally from the assisted person will almost never be the amount for which he would be liable if he were not legally aided. The assisted person is protected by statute and can never be called upon to pay more than a sum which the court considers reasonable in all the circumstances, including the means and conduct in connection with the dispute of all parties.<sup>1</sup> He is further protected in that his house and contents, clothes and the tools of his trade are left out of account in assessing his means for the purposes of assessing his liability for expenses, and cannot be subject to diligence in execution of the award.<sup>2</sup>

In the result, the successful opponent of an assisted person may find that he has achieved a Pyrrhic victory and that he has to bear much of the cost himself. Any modified award against the assisted person is unlikely to bear much relation to the true cost of the opponent's case, and the likelihood of an award from the legal aid Fund under s.13 of the 1967 Act will often be small.<sup>3</sup> In consistorial

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1. 1967 Act, s.2(6)(e).

2. Ibid., s.2(8).

3. On s.13 of the 1967 Act, see infra, Chapter XV.

causes there is the additional complication that even if an award of expenses is made against a legally aided party, to collect those expenses, even to the modified sum, might well prejudice the payment of any periodical allowance or similar sum for which the assisted person has been found liable. Only if the assisted person's financial position improves dramatically will the opponent stand any chance of alleviating his situation, since provision is made for a reassessment of the award within a period of ten years from the date on which it was made.<sup>4</sup>

Thus, from the viewpoint of the assisted person, modification of his personal liability in expenses to as great an extent as possible is obviously in his best interests; and the Fund itself will not bear any extra loss even if the assisted person's personal liability is modified to nil; the Fund will still require to pay the assisted person's Solicitor.

#### Expenses generally

At common law there is a right inherent in every civil court in Scotland to award expenses in any cause that comes before it, and that right may be exercised unless expressly taken away or qualified by statute.<sup>5</sup> The 1967 Act says nothing to derogate from this discretionary right, so a Court will consider making an award of expenses on

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4. 1967 Act, s.2(7); General Regulation 12.

5. McLaren, Expenses in the Supreme and Sheriff Courts of Scotland (1912) p.3. The normal principles regarding modification of expenses before legal aid was introduced were applied in Deans v Deans 1952 S.L.T.(Sh. Ct.) 37, even although in that case the pursuer was legally aided. See also Neville v Neville (1952) 68 Sh. Ct. Rep. 265; Anderson v Lambie 1954 S.L.T. (Notes) 22 where a person who was legally aided in the Inner House lost on appeal to the House of Lords, which modified his expenses in both Courts, even although legal aid did not at that time apply in the House of Lords.

its normal principles, even where one or both of the parties are legally aided.<sup>6</sup> An award of expenses may thus be made against an assisted person who has received civil legal aid in all Courts or Tribunals which have power to award expenses.<sup>7</sup> But the Fund will not be liable for expenses awarded against an assisted person unless the opponent can invoke s.13 of the Act; the assisted person will be personally liable to the extent of the amount fixed by the Court or Tribunal in terms of s.2(6)(e) of the 1967 Act.<sup>8</sup>

#### Caution for Expenses

In practice, persons who are granted legal aid are not asked to find caution for expenses, but it appears that there is no reason why this should not be done.<sup>9</sup> The Court has power to regulate by Act

6. Tait v Tait 1954 S.L.T.344; Reynolds v Reynolds 1965 S.L.T. (Notes) 56; Nelson v Nelson S.L.T.(Notes) 56. In England the matter is one on which there is an express provision: see Legal Aid Act 1974, s.2(5)(b).
7. The only civil proceedings to which s.2(6)(e) and s.2(7) of the 1967 Act do not apply are proceedings before the Sheriff or on appeal to the Court of Session in cases involving children's hearings and children's referrals: 1967 Act, s.2(6). On legal aid for proceedings involving children, see infra, Chapter XVII.
8. On the contrast between the situation under the Poor's Roll and under legal aid see Waddell v Waddell 1954 S.L.T.(Sh.Ct.) 82.
9. On caution for expenses generally, see McLaren, op. cit., Chapter V. An assisted person resident outside Scotland may be ordained to sist a mandatory, but perhaps only on the basis that he should not be liable in expenses: Herzberg v Herzberg 1952 S.L.T. (Sh. Ct.) 65. This case was not referred to in Harley v Kinnear Moodie & Co. Ltd. 1964 S.L.T. 64, where a motion to order an assisted pursuer to sist a mandatory was refused. It was observed in the latter case (at p.65) that s.2(3)(e) of the 1949 Act (now s.2(6)(e) of the 1967 Act) applies only to expenses awarded against an assisted person, not his mandatory, who, if the action failed, might be liable for full expenses. But this reasoning assumes that the mandatory must be sisted on the basis that he will be liable in expenses, which does not appear to have been the position on the Poor's Roll (see Carling v Campbell (1826) 4 S.548) and was not the approach adopted in Herzberg.

of Sederunt the cases in which and the extent to which a person receiving legal aid may be required to find caution and the manner in which caution in such cases may be found,<sup>10</sup> but it does not appear that such Rules of Court have ever been made.

There appear to be no reported examples in Scotland where caution has been ordered to be found, although there are several in England, covering situations such as that where an assisted person is ordinarily resident abroad,<sup>11</sup> or where the assisted person wished to appeal.<sup>12</sup>

The ordering of an assisted person to find caution is probably unknown in Scotland simply because firstly, failure to find caution entitles the opponent to decree of absolvitor,<sup>13</sup> a draconian punishment for someone who has, in the opinion of the Law Society, a probabilis causa litigandi; and secondly, because the assisted person may have to pay a contribution anyway out of his own pocket.

#### The Statutory Protection

Section 2(6)(e) of the 1967 Act provides that where a person receives legal aid in connection with any proceedings

"his liability by virtue of an award of expenses against him with respect to the proceedings shall not exceed the amount (if any) which in the opinion of the Court or Tribunal making the award is a reasonable one for him to pay having regard to all the circumstances, including the means and the conduct in connection with the dispute of all parties".

It is apparent from this that before a Court proceeds to assess the amount payable by the assisted person there must be an award

10. 1967 Act, s.16(1)(b)(ii).

11. See e.g. Jackson v John Dickinson & Co. (Bolton) Ltd., [1952] 1 All E.R.104; Caldwell v Sumpters [1972] Ch.478.

12. See e.g. Wyld v Silver (No. 2) [1962] 2 All E.R.809.

13. Gray v Ireland (1884) 11 R.1104.

against him personally. Although again there appear to be no reported cases in Scotland, in England there have been cases where expenses were payable not out of the assisted person's own pocket, but out of property in which he had an interest, such as mortgaged property<sup>14</sup> or a trust fund.<sup>15</sup> An order for modification under s.2(6)(e) would presumably be incompetent in such cases in Scotland also, if only because the whole flavour of legal aid under s.1 of the 1967 Act relates to individuals.<sup>16</sup>

Any award of expenses, whether at first instance or on appeal, is subject to modification under s.2(6)(e), but it is essential that an "award" be made by the Court or Tribunal. In Collum v Glasgow Corporation 1964 S.L.T. 199 the assisted pursuer abandoned the cause shortly before a diet of jury trial. He failed to pay the defenders' expenses (which would have meant dismissal of the cause) and the defenders moved the Court for absolvitor and for the taxed amount of the expenses. The pursuer opposed this and sought modification. It was held that as no "award" of expenses fell to be made against the pursuer before, or as a condition of, dismissal the Court had no jurisdiction to make an assessment of the pursuer's liability under s.2(3)(e) of the 1949 Act (now s.2(6)(e) of the 1967 Act). At p.201 Lord Fraser commented:

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14. See Saunders v Anglia Building Society [1971] A.C. 1039.

15. See Re Spurling's Will Trusts, Philpot v Philpot [1966] 1 All E.R. 243.

16. See the definition of "person" in s.20(1) of the 1967 Act; and General Regulation 6(2) relating to actions by persons acting in a representative, fiduciary or official capacity. See also supra, p. 144.

"The word 'award' is evidently used in paragraph (e) of the subsection in its strict sense, as appears from the reference later in the paragraph to 'the court or tribunal making the award'. I refer also to paragraph (d) of the same subsection where an 'award of expenses' is contrasted with an 'agreement as to expenses'. In coming to that opinion I recognise that it may appear to operate somewhat harshly in the case of a pursuer who is an assisted person under the Act of 1949, but that result follows, in my opinion from the terms of the Act itself."<sup>17</sup>

#### Necessity of Applying for the Protection

Section 2(6)(e) is not applied automatically in a case where expenses are awarded against the assisted person. The assisted person must seek to invoke it himself,<sup>18</sup> and should always do so to avoid hardship. Formerly in the Court of Session this was done after taxation of the account of expenses of the party in whose favour the award was made, but since the promulgation of a Practice Note on 16th January 1970 the Court may, on the motion of any party to the cause (and not merely the party in whose favour the award of expenses is made) proceed forthwith (presumably at advising) to determine to what extent the liability of the assisted person shall be modified. In the Sheriff Court the motion to modify should be made either at the end of a hearing on evidence or when the matter of expenses is being debated or simply by separate motion, provided there has been no decerniture for expenses.<sup>19</sup> The Central Committee has frequently

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17. Lord Fraser went on to state that his opinion was inconsistent with that of Lord Hill Watson in Thompson v The Fairfield Ship-building and Engineering Co. 1954 S.C.354, but in that case the point argued in Collum v Glasgow Corporation was not raised. The reasoning of Lord Fraser has been followed in the Sheriff Court: Campbell v Lindsay 1967 S.L.T.(Sh. Ct.) 30. Modification may also be refused because of a party's conduct in connection with the dispute: see infra, pp. 226-229.
18. In England it appears that the Court applies the equivalent English provision automatically: see Matthews & Oulton, op. cit., p.270.
19. On the distinction between an award of expenses and a decerniture for expenses see James Sim Ltd. v Haynes 1968 S.L.T.(Sh. Ct.) 76.

stressed the advantages of having the judge deal with the question before any Solicitor's account is adjusted or settled; it is particularly unnecessary to wait until the Central Committee instruct the Solicitor to seek modification.<sup>20</sup> The difficulties inherent in not having the matter of modification determined at the time when expenses are being debated is illustrated in James Sim Ltd. v Haynes 1968 S.L.T.(Sh. Ct.) 76 where the parties lodged a joint minute craving the Court inter alia to find the defenders liable in expenses. Authority was interponed thereto, and, after taxation, decree for the amount of expenses was granted. The defenders then disclosed that legal aid had been granted to them at an early stage of the proceedings, and moved for modification in terms of s.2(6)(e). This was held to be incompetent, as the award had been made when authority had been interponed to the joint minute; modification could not be made after decerniture for the amount awarded.

Although the amount may be fixed at the time when expenses are debated, the person against whom an award has been made may not necessarily have to pay the expenses then. Extract of the decree for expenses may be superseded for a period;<sup>21</sup> and, in one early Sheriff Court case, liability for expenses was not fixed at the time decree was granted, the cause being continued until the defender had paid his instalments to the Legal Aid Fund.<sup>22</sup>

#### How the Amount is Fixed

Little guidance is given in the terms of s.2(6)(e) on how to compute the award. Apart from the case law, the only other guidance

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20. See (1976) 21 J.L. Soc. Sc. 267.

21. Ballantyne v Douglas 1953 S.L.T. 310.

22. Smith v Smith 1954 S.L.T. (sh. Ct.) 86. This course of action is not usually adopted now, as it leads to inevitable delay in settling accounts.

which a Court is given is contained in para.4(1) of the Act of Sederunt (Legal Aid Rules) 1958 which provides that before making an award of expenses against an assisted person, the Court may, for the purpose of determining the amount payable under s.2(6)(a), require the Committee by whom the legal aid or emergency certificate was issued to that person to lodge in process a copy of the application for legal aid made by that person, so far as relating to his means,<sup>23</sup> and of the report of the Supplementary Benefits Commission thereon, and may require the other party to the proceedings to furnish for the consideration of the Court such particulars with respect to his means as the Court may direct. The Court may also require from the parties such further particulars as to their respective means as the Court may deem necessary.

In practice Courts rarely require a Committee to lodge the applicant's Statement of Financial Circumstances. The matter is likely to be dealt with much more broadly and the case law on this point indicates that fixing the amount for which the assisted person will be liable is a matter of some difficulty. At the risk of being repetitive, his liability cannot exceed ".... the amount (if any) which ~~is~~ in the opinion of the court or tribunal making the award is a reasonable one for him to pay having regard to all the circumstances, including the means and the conduct in connection with the dispute of all parties". Commenting on this provision in the leading case of Armstrong v Armstrong; Shevline v Shevline 1970 S.L.T.247, the First Division said:<sup>24</sup>

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23. Part II of Form SLA 3 (Statement of Financial Circumstances).

24. At p.249.

"The very general language of this statutory provision shows that no precise mathematical formula is envisaged. It is a discretionary matter in each case for the court dependent upon the fixing of a reasonable figure on the information placed before the court. The figure should not be so high as to render it for practical purposes impossible for the party, with the resources available to him, to meet the liability. It equally seems clear that it was not intended that the liability should as a matter of course be fixed at a nominal sum or even at nil. This would be contrary to the interests of the public who have to pay for the legal aid scheme, and it would be contrary to the spirit and intention of the legal aid scheme itself."

(1) "The amount (if any) which is a reasonable one for him to pay"

There would appear to be nothing to prevent a Court refusing modification completely and ordering an assisted person to pay the whole expenses awarded against him, but this does not often appear to have been done in Scotland.<sup>25</sup> Such an order would normally be totally unreasonable even if the assisted person just qualifies on means for legal aid and consequently has a high contribution. The fact that he may well have to pay all his contribution to satisfy his liability towards his Solicitor's account will normally make it impossible for him to pay all his opponent's expenses as well.

Conversely, the amount payable will not automatically be modified to nil, although this often happens in practice if it is reasonable to do so.

(2) "Having regard to all the circumstances"

The only reported Scottish case in which considerations other than those relating to the means and conduct of the parties have taken into account in considering whether to modify expenses under s.2(6)(e) appears to be Douglas v Cunningham 1966 S.L.T. (Notes) 7. In that case the liability for expenses by an unsuccessful legally-aided

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25. But see Douglas v Cunningham 1966 S.L.T. (Notes) 7, where the Motor Insurers Bureau was standing behind the defender.

defender was not modified, even although he had a nil contribution, because the Motor Insurers Bureau was standing behind the defender and would pay the pursuer's expenses provided an order for the full amount thereof was made by the Court. In refusing modification the Court of Session followed the course of action adopted in the similar English case of Godfrey v Smith [1955] 2 All E.R.520 and granted decree for full expenses in favour of the pursuer.

In England only two other situations appear to be mentioned in the law reports,<sup>26</sup> which seems to confirm that this phrase in s.2(6)(e) is not frequently invoked.

(3) "Including the means of all the parties"

The starting point in fixing the party's liability is usually to look at the litigant's means. In normal practice, to do this the Court looks first at the legal aid certificate which is lodged in process as soon as legal aid is granted, and this discloses the disposable income and capital of the assisted person at the time of granting legal aid.<sup>27</sup> If the financial position of a party has improved or deteriorated by the time of the proof in comparison with the figure shown in the certificate, the change should be brought out in the course of the proof, particularly in a consistorial case where a legally aided wife is pursuer.<sup>28</sup>

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26. See Dugan v Williamson [1963] 3 All E.R.25 and Cook v S. [1967] 1 All E.R.299 both of which cases relate to technical English procedure regarding awards of costs.
27. It was observed in an early Sheriff Court Case that the estimate of the National Assistance Board (now Supplementary Benefits Commission) as to the assisted person's financial position should form the basis of the Court's decision unless challenged by one of the parties: O'Neill v Railway Executive 1953 S.L.T. (Sh. Ct.) 10.
28. Armstrong v Armstrong, Shevline v Shevline 1970 S.L.T. 247 at 249. If the question of modification arises at an Appeal before the Inner House or Sheriff Principal, the fact that there may have been an earlier legal aid certificate in the proceedings at the first instance should also be brought to the notice of the Court.

In enquiring into the means of a person who has been found liable in expenses, his dwelling-house, wearing apparel and household furniture and the tools and implements of his trade or profession are to be left out of account to the same extent that they are left out of account by the Commission when determining his disposable income and capital.<sup>29</sup>

It is clear that the maximum contribution of the assisted person to the legal aid Fund and his liability to pay into the Fund an amount up to his actual contribution are relevant factors in assessing his means.<sup>30</sup> But these are clearly not the sole determining factors,<sup>31</sup> and in particular it is not the law that as a broad general guide the amount which an unsuccessful assisted person should be required to pay towards his opponent's expenses ought roughly to correspond to the amount of his maximum contribution. While there are dicta in Cosgrove v Edinburgh Corporation 1953 S.L.T. (Sh. Ct.) 78 to the effect that the latter proposition is accurate, these dicta cannot stand alongside the decision of the Second Division in Ballantyne v Douglas 1953 S.C.285. In that case Lord Patrick contrasted the financial assessment carried out by the National Assistance Board<sup>32</sup> with that which required to be done by the Court and continued:<sup>33</sup>

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29. 1967 Act, s.2(8); General Regulation 13. Likewise they are not subject to diligence or any corresponding process in execution of the award.

30. Cosgrove v Edinburgh Corporation 1953 S.L.T.(Sh. Ct.) 78 at pp.78-79, in which contrary views implicit in the judgments of Sheriff A.G. Walker in Miller v Urquhart 1952 S.L.T.(Sh. Ct.) 59 and Lohead v Lohead 1953 S.L.T. 12 were not followed. See also Carnegie v Ruthven (1954) 70 Sh. Ct. Rep.89; Le Cun v Le Cun (1954) 70 Sh. Ct. Rep.3.

31. Young v Barclay Curle & Co. Ltd. 1953 S.L.T. (Notes) 70

32. Now the Supplementary Benefits Commission.

33. At p.288.

"When we come to the provisions of the Act dealing with awards of expenses against assisted persons who have lost their cases, none of these artificial creations like 'disposable income', 'disposable capital', and 'maximum contribution', nor the elements which constitute them, are made applicable. The simple direction is that the award shall not exceed the sum which in the opinion of the Court is a reasonable one for the assisted person to pay. No doubt the Court will find in the application for legal aid and in the report of the National Assistance Board thereon details of outgoings which the assisted person must make or may reasonably make, but the Court has an unfettered right and duty to determine the applicant's resources, what outlays he will have to make, and what award of expenses is a reasonable one for him to pay."

In particular the fact that the Board bases its assessment on the income and outlays of the applicant for one year does not fetter the Court in modifying an award under s.2(6)(e); the Court may make a wide survey.<sup>34</sup>

This wide survey may include various other factors. The amount of the expenses awarded against the party is always relevant; the successful party's account of expenses does not now require to be taxed and it is sufficient if the Court at advising is provided with an estimate, particularly in a consistorial action where the items are well stereotyped. Likewise the amount of aliment and periodical allowance payable by the assisted person is of importance; if this were disregarded the liability for expenses might be fixed at so high a figure as to jeopardise the payment of such sums.<sup>35</sup>

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34. Ibid. See also Keir v Keir 1959 S.L.T.(Sh. Ct.) 70; Todd v Todd 1966 S.L.T. 50, where an extremely wide survey was made on the basis of agreed estimates of expenses. In that case it was held incompetent to reclaim and to argue on a reclaiming motion that the estimates were wrong, on the basis that s.2(3)(e) (now s.2(6)(e)) conferred an exclusive jurisdiction to assess the amount to be paid by the assisted litigant on the Court making the award.
35. Armstrong v Armstrong, Shevline v Shevline 1970 S.L.T. 247 at p.249. The Law Society had argued that aliment included aliment for illegitimate children and a future wife, but this argument does not appear to have been dealt with in the Opinion.

It has been held in England that the fact that the assisted person has recovered damages in the action is a circumstance which the Court may take into account,<sup>36</sup> but Matthews and Dulton point out that such damages will be subject to diminution where the total contribution exigible from the assisted person is less than the net liability of the fund on his account (s.3(4) of the 1967 Act) and in some cases they may be totally absorbed, leaving nothing available with which to pay the opponent's expenses.<sup>37</sup>

If a party is legally aided for only part of the proceedings and is found liable for the full expenses of the non-assisted portion of the litigation, that fact may be taken into account in assessing his means from the viewpoint of modifying his liability for expenses while he was an assisted person.<sup>38</sup>

(4) "And their conduct in connection with the dispute"

This consideration was designed to ensure that parties whose behaviour in relation to the progress of the litigation is unreasonable should not necessarily be excused from the normal consequences as regards expenses, merely because one or other of them is legally aided.

The earliest Scottish case in which the matter was considered was Burns v James McHaffie & Son Ltd. 1953 S.L.T.238 in which a pursuer had failed to "beat" two tenders by the defenders. The Lord Ordinary found the defenders liable to the pursuer in expenses to the date of the first minute of tender and the pursuer liable to the

36. See e.g. Carr v Boxall [1960] 1 All E.R.495.

37. Matthews and Dulton, *op. cit.*, p.275. It will of course be exceptional that damages are awarded to an assisted person but expenses awarded against him.

38. On the whole question of modification in such cases, see infra, pp. 230-232.

defenders in expenses subsequent to that date. Inter alia, the pursuer moved for modification of her liability for the defenders' expenses subsequent to the first tender. This was refused by Lord Guthrie, who stated that it was immaterial that the pursuer's rejection of the tender was done on the advice of her Counsel. He continued<sup>39</sup>

"Our procedure with regard to tenders is designed to avoid unnecessary litigation, and a defender who has made a fair tender should be entitled to the benefits of his wise decision, even if his opponent is an assisted person. Indeed it would be contrary to the public interest if persons litigating with the assistance of public funds were led to believe that, although the sum awarded was less than that tendered, because of the provisions of section 2(3)(e) of the 1949 Act, they could still obtain payment of the amount of the award irrespective of the expense caused to the defender by the rejection of his offer. When a litigation is being conducted with the aid of public funds, it is desirable that a settlement upon fair terms should not be unreasonably rejected by the assisted person."

In the event the defenders were held entitled to set off their claim against the pursuer for expenses against the damages and expenses awarded her.<sup>40</sup>

It appears from Ross and Cromarty County Council v Kennedy 1954 S.L.T. (Sh. Ct.) 69 that "conduct in connection with the dispute" includes conduct both before and after the action comes to Court. A tenant had refused to pay rent for a house immediately after entry on the ground that it was not wind and water-tight, and vacated the house as soon as repairs were completed. He was then granted legal aid to defend an action for payment of arrears of rent at the instance

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39. At p.240.

40. See also O'Donnell v A.M. & G. Robertson 1965 S.L.T. (Notes) 32 where there was a similar result after an assisted pursuer had refused three offers to settle and an unnecessary action was raised.

of the landlords and at the proof most of his evidence was irrelevant and only increased the expenses of both sides. The pursuers obtained decree with expenses amounting to £80 and on a motion for modification by the defender his liability was assessed at £65. It is clear that the Sheriff Substitute regarded the defender's conduct as deserving of very grave censure, and would have refused him any relief at all had he not been of little means.

In Armstrong v Armstrong, Shevline v Shevline 1970 S.L.T. 247, as well as giving guidance on the considerations as to means which should be applied, the First Division had this to say on the question of conduct:<sup>41</sup>

"There may be cases in which the conduct of one or more of the parties in the course of the litigation has been such that the Court considers that an improper advantage has been taken of the opportunity of getting legal aid, in which case a somewhat higher figure of that party's liability should be assessed. But this should not be carried the length of seriously jeopardising his meeting this liability or of his failing to meet his obligation to pay aliment or periodical allowance."

Presumably this reasoning would not apply with such force where the case is non-consistorial, as was the situation in Burns v James McHaffie & Son Ltd.<sup>42</sup> and Ross and Cromarty County Council v Kennedy.<sup>43</sup>

But in all cases there would seem little practical advantage in creating a situation where an assisted litigant is personally heavily penalised for his unreasonable conduct; the net result is likely to be that the expenses for which he is held liable will be irrecoverable or at least inordinately uneconomic to collect. This

41. At p.249.

42. 1953 S.L.T. 238.

43. 1954 S.L.T.(Notes) 69.

is certainly the view taken in England,<sup>44</sup> where, like Scotland, there is little authority on the types of conduct which have been treated as relevant.<sup>45</sup>

It should also be borne in mind that the Solicitor for the assisted person is under a duty to report to the Law Society an unreasonable rejection of an offer of settlement. The Law Society might suspend or discharge the certificate and the assisted person may lose the full protection of s.2(6)(e) if this happens.

#### Setting Off Expenses

The general principle where expenses are found due reciprocally for different parts of the litigation is that one set of expenses is set off against the other.<sup>46</sup> By s.3(6) of the 1967 Act, even if damages and expenses are ultimately awarded to the assisted person, a Court may allow any damages or expenses to be set off against other damages or expenses. Thus, in a case involving legal aid the same general principle as to set-off applies, but the amount set off by the unassisted party against his liability to the assisted party may be modified in terms of s.2(6)(e). In Hanley v James Bowen & Sons Ltd. 1976 S.L.T.(Notes) 32, the assisted pursuer was successful in his action. His account of expenses came to £552 but he had previously been unsuccessful in a procedure roll discussion in respect of which the defenders' account of expenses amounted to £111. The pursuer was successful in having this award modified to £50 in terms of

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44. See Crystall v Crystall [1963] 2 All E.R.330 per Willmer L.J. at p.333: "Whatever one may think of the conduct of a party it would still not be right to make an order for costs against him which was unreasonable having regard to his means."

45. See Matthews and Dulton, op. cit., pp.276-277.

46. McLaren, Expenses, p.262.

s.2(6)(e) and the defenders were only entitled to set off that amount against their liability of £552. In rejecting the defenders' argument that the sum of £111 should not be modified, Lord McDonald stated that there might be situations where this would be appropriate and referred to Burns v James McHaffie & Son Ltd. 1953 S.L.T.238 and O'Donnell v A.M. & G. Robertson 1965 S.L.T. (Notes) 32, in both of which cases expenses were divided in consequence of failure by the pursuer to beat tenders. In both of these cases modification was refused.<sup>47</sup> Lord McDonald continued:<sup>48</sup>

"I do not consider that it follows, however, that in every case in which a legally aided pursuer succeeds in the end of the day with an award of expenses in his favour he must pay in full up to the limit of that award any incidental expenses he has incurred to the defenders without benefit of modification. The ultimate question is what the Court considers to be a reasonable amount for him to pay having regard to all the circumstances."

Where a person is legally aided for part only of the proceedings

A distinction falls to be drawn here between firstly, the situation where a party was an assisted person only during the currency of one part of the case e.g. where he became legally aided after the case started or where the certificate was later discharged; and secondly, where the certificate applies to less than the full merits of the action e.g. to defend only on aliment or periodical allowance.

So far as the first situation is concerned, where, after proceedings have been instituted in any court, a party thereto becomes

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47. In O'Donnell, s.3(6) of the 1967 Act was operated to allow the defenders to set off their expenses from the date of refusal of a tender which the pursuer failed to 'beat' against damages awarded to the pursuer. The pursuer's liability for those expenses was not modified because of his conduct in connection with the dispute.

48. At p.33.

an assisted person, modifications under s.2(6)(e) of the 1967 Act can only be made of so much of the expenses of the proceedings as were incurred while his certificate was in force.<sup>49</sup> This means that an assisted person will be liable for all the expenses incurred before he became legally aided. In Lyall v The Atholl Palace Hotel, Pitlochry Ltd. 1951 S.C.512 an action had been commenced before legal aid was introduced in 1949, and in the course of the action the pursuer obtained legal aid. Her action was ultimately unsuccessful and, on a motion by the defenders for expenses, the Court awarded full expenses against the pursuer down to the date of the grant of legal aid, but modified to nil her liability for expenses subsequent to that date. Where an assisted person's legal aid certificate is discharged by the Law Society on the ground that it was obtained by fraud or misrepresentation, or a Court directs that the certificate be discharged because the assisted person has wilfully or deliberately given false information in connection with the proceedings to the Solicitor acting for him, or wilfully or deliberately concealed from him any information relevant to the proceedings, then the assisted person loses the protection of s.2(6)(e) of the 1967 Act and thus becomes liable for the full expenses of his opponent if he loses the case.<sup>50</sup> But where a person ceases to receive legal aid for any other reason at any stage in proceedings, he is deemed to be an assisted person for the purpose of any award of expenses made against him only to the extent that those expenses were incurred before he ceased to receive legal aid.<sup>51</sup>

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49. General Regulation 10(4).

50. General Regulation 10(5).

51. Ibid.

So far as the second situation is concerned, by Article 16(8) of the 1958 Scheme a legal aid certificate has effect only for the purposes of the proceedings mentioned in the certificate. So s.2(6)(e) confers no protection regarding the non-assisted part of the proceedings, and, where both parties are legally aided and expenses are awarded against the defender, modification is only applied to the part of the pursuer's account relating to the legally aided defences, even though the opponent may have defended on the whole of the merits. In these cases the Central Committee apportion the pursuer's account between the legally aided defences and the remainder.<sup>52</sup>

Where there is more than one legally aided party

Even where both pursuer and defender are legally aided, if expenses are awarded against one of them the award is subject to modification in terms of s.2(6)(e). In a consistorial case this will be subject to the practical difficulty mentioned in Armstrong v Armstrong, Shavline v Shavline of enforcing any award of expenses,

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52. See (1976) 21 J.L. Soc. Sc. 264. See also the opinion of Lord Thomson in Vacha v Vacha & Another 1968 S.L.T. (Notes) 101 where expenses were awarded against a legally aided co-defender in a divorce, who defended only on the quantum of damages. The husband and wife disputed custody and it was argued that the co-defender's liability for expenses should be modified to nil or at least there should be excluded from his liability expenses incurred in connection with the parties' dispute as to custody. Lord Thomson indicated that he did not agree with this reasoning, and, having considered the co-defender's circumstances, found him liable in the whole expenses of process, but modified his liability to £50. The short report in the S.L.T. (Notes) does not disclose whether the co-defender's legal aid certificate was limited to defending on quantum only; in any event this particular point is now academic, since a husband cannot now cite a co-defender or claim damages from him: Divorce (Scotland) Act 1976, s.10(1).

even modified, against a person who is also found liable for periodical allowance or alimentary payments.<sup>53.</sup>

It has also been decided in England (although not yet in Scotland) that where joint parties are found entitled to expenses against a legally aided litigant, the latter's liability may be modified separately vis-à-vis each successful party.<sup>54</sup> It seems likely that this would also be the situation in Scotland.

#### Enforcement of Award

An order for modified expenses against a legally aided litigant can be enforced by normal diligence, except that his dwellinghouse, wearing apparel, household furniture and the tools and implements of his trade or profession cannot, in any part of the United Kingdom, be subject to diligence or any corresponding process in execution of the award.<sup>55</sup>

#### Re-assessment of the Award

Any person concerned in an award of expenses under s.2(6)(e) may apply to the Court or Tribunal by which the award was made within ten years from the date of the award for a re-assessment of its amount on the ground that there has been a relevant change of circumstances, and on such application the Court or Tribunal may re-assess the amount of the award as seems to them proper.<sup>56</sup> The phrase "relevant change of circumstances" is nowhere defined, but apparently is **not** confined

53. 1970 S.L.T.247 at p.249. The Law Society may be represented where a Court has to decide the amount of expenses due from one legally aided litigant to another: A.S.(Legal Aid Rules) 1958, para.4(2).

54. See Re Spurling's Will Trusts [1966] 1 All E.R.745 per Ungood-Thomas J. at p.763.

55. 1967 Act, s.2(8).

56. 1967 Act, s.2(7).

to the circumstances of the assisted person.<sup>57</sup> The matter has never been determined in Scotland and the English provisions relating to re-assessment are worded differently.<sup>58</sup>

An application for re-assessment is made by Minute lodged in the original process and the Law Society of Scotland may be represented at the hearing,<sup>59</sup> which may be in chambers.<sup>60</sup>

In practice re-assessments of awards of expenses are uncommon.

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57. But re-assessment is obviously appropriate if the assisted person's circumstances improve: see L. Hill Watson in Thompson v Fairfield Shipbuilding and Engineering Co. 1954 S.C. 354 at p. 356.

58. Legal Aid (General) Regulations 1971 (s.1 1971/62) Reg.20(5), referred to in Matthews and Oulton, op. cit., at p.285.

59. A.S. (Legal Aid Rules) 1958, para.4(3).

60. Ibid., para.4(4).

## CHAPTER XV

THE RIGHT OF A SUCCESSFUL UNASSISTED  
PARTY TO EXPENSES FROM THE FUNDMain provisions: 1967 Act, ss.13, 14Introduction

One of the gravest injustices in the Legal Aid (Scotland) Act 1949 was the absence of any provision whereby a successful but unassisted litigant could recover expenses from the Legal Aid (Scotland) Fund. A Court might award expenses to such a party against an assisted person, but the latter's liability to pay those expenses was restricted to

" .... the amount (if any) which in the opinion of the Court or Tribunal making the award (was) a reasonable one for him to pay having regard to all the circumstances, including the means and conduct in connection with the dispute of all parties."<sup>1</sup>

In the result few unassisted litigants recovered much in the way of expenses, since the general tendency of the Scottish Courts was to modify any such award of expenses to a sum not exceeding the assisted person's contribution to the Fund, which was quite often nil.<sup>2</sup>

To remedy this situation the Legal Aid Act 1964<sup>3</sup> was passed, the principal provisions of which are now ss.13 and 14 of the Legal Aid (Scotland) Act 1967. An unassisted person now has a limited right to receive his expenses from the Fund if he is successful against an assisted person; this right does not extend to a successful assisted litigant. The provisions have not been used extensively in Scotland, partly because they have been construed restrictively by

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1. 1949 Act, s.2(3)(e), now 1967 Act, s.2(6)(e).

2. See supra, Chapter XIV.

3. 1964 c.30, a statute applying throughout the U.K.

the Courts and partly because the right to expenses thereunder is subject to stringent conditions.<sup>4</sup> It seems ironic that while the State will not generally hesitate to try and collect expenses from an unassisted party if his assisted opponent is successful, it will not necessarily bear the expenses due to the unassisted party if the assisted party loses.

#### The Right to Payment

Section 13(1) of the 1967 Act provides:

"Where a party receives legal aid in connection with any civil proceedings between him and an unassisted party and those proceedings are finally decided in favour of the unassisted party, the court by which the proceedings are so decided may, subject to the provisions of this section, make an order for the payment to the unassisted party out of the legal aid fund of the whole or any part of the expenses incurred by him in those proceedings."

The term "expenses" means expenses as between party and party, but the expenses in respect of which an order may be made under this section include the expenses of applying for that order.<sup>5</sup>

Any civil court in which legal aid may be granted has power to make an order under s.13.<sup>6</sup>

#### The Conditions which must be satisfied

Sections 13(2), (3) and (4) of the 1967 Act specify the conditions which must be satisfied before an order can be made.

4. In the period from 15th April 1964 (when the 1964 Act came into force) to 31st March 1976, there have been only 25 cases in which payments have been ordered. The total sum paid in these cases was a paltry £4,768.
5. 1967 Act, s.13(6).
6. Although proceedings under the Social Work (Scotland) Act 1968 are "civil proceedings", s.13 appears to have no application thereto, if only because s.13(4) prohibits an order under s.13(1) in any proceedings in which apart from the 1967 Act, no order for expenses would be made.

- (i) The proceedings in the Court of first instance must have been started by the assisted party

No order under s.13(1) of the Act can be made in respect of expenses incurred in a Court of first instance, whether by that Court or by any appellate Court unless the proceedings in the Court of first instance were instituted by the party receiving legal aid.<sup>7</sup> An unassisted party who is successful on appeal is therefore eligible for an order whether he is appellant or respondent, but unless he was the defender (or party minuter<sup>8</sup>) in the original action he will only be eligible for an order against the Fund for the expenses of the appeal(s).<sup>9</sup>

- (ii) The unassisted party must have succeeded

Only once the proceedings are finally decided in favour of the unassisted party can an order be made under s.13.<sup>10</sup> Proceedings are treated as finally decided:

- (a) if no appeal lies against the decision in favour of the unassisted party; or
- (b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted; or

7. 1967 Act, s.13(3)(a).
8. See Leishman v Leishman 1965 S.L.T. (Sh. Ct. ) 51.
9. In other words, an unassisted defender who succeeds at first instance and successfully resists an appeal by an assisted pursuer is eligible for full expenses from the Fund, subject of course to the other conditions contained in s.13. There have been no cases under s.13 where an unassisted defender has e.g. won in the Outer House, lost in the Inner House and won in the House of Lords, but such a defender is prima facie eligible for an order. Cf. Saunders v Anglia Building Society (No.2) [1971] A.C. 1039.
10. 1967 Act, s.13(1).

- (c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal.<sup>11</sup>

Even if expenses are paid under s.13 the unassisted party may find himself having to repay them in whole or in part if the assisted party has not exhausted his rights of appeal. If an appeal is brought out of time by the assisted party, the Court by which the appeal (or any further appeal in those proceedings) is determined may make an order for such repayment by the unassisted party to the legal aid Fund.<sup>12</sup>

Where an unassisted party is successful but an appeal lies against that decision, the Court may either make or refuse to make an order under s.13 forthwith, but any such order does not take effect

- (a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted; or
- (b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.<sup>13</sup>
- (iii) The Court must have considered what order for expenses should be made against the assisted party

Before making any order for payment from the legal aid Fund to the unassisted party, the Court must in every case consider what orders should be made for expenses against the party receiving legal aid and for determining his liability in respect of such expenses, whether the successful party applies for expenses or not.<sup>14</sup> Thus,

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11. Ibid., s.14(1).

12. Ibid. It does not appear that such an order has ever been made in Scotland.

13. 1967 Act, s.14(2).

14. Ibid., s.13(2).

any motion for modification of expenses under s.2(6)(e) of the 1967 Act must be disposed of before the Court can entertain a motion under s.13.<sup>15</sup>

- (iv) Irrespective of the 1967 Act, an order would have been made for payment of the unassisted party's expenses.

By s.13(4) of the 1967 Act it is provided:

"An order under this section shall not be made by any Court in respect of expenses incurred by the unassisted party in any proceedings in which, apart from this Act, no order would be made for the payment of his expenses."

So if, apart from the 1967 Act, no order for expenses would be made against the assisted party, the unassisted party will not be entitled to payment of his expenses out of the legal aid Fund.

In Leishman v Leishman 1965 S.L.T. (Sh. Ct.) 51 it was not contested that a motion under s.13 by a successful party minuter in an action of separation and aliment was competent, on the view that someone who enters such a process to clear his or her name and is successful is always entitled to expenses. But the situation where an unassisted defender in a consistorial action was successful against an assisted pursuer did not fall to be considered in Leishman, since both pursuer and defender were legally aided.

The situation was however considered in detail by Lord Justice-Clerk Grant in Wilson v Wilson 1969 S.L.T. 100. This was an action of divorce at the instance of an assisted wife against her unassisted husband. The defender was successful but in accordance with the normal practice, the pursuer's expenses were awarded against him. The Court refused a motion by him for an order that he should lodge a statement on oath of his grounds for claiming out of the legal aid

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15. See e.g. Leishman v Leishman 1965 S.L.T. (Sh. Ct.) 51; Christensen v Rank Hovis McDougall Ltd. 1974 S.L.T.(Notes) 69.

Fund payment of the whole or part of the expenses incurred by him,<sup>16</sup> holding that the defender's proposed claim was excluded by s.13(4) of the 1967 Act. Lord Grant stated:<sup>17</sup>

"There is, I think, no doubt that, had this been a case prior to the introduction of legal aid, the defender would have had to bear not only his own expenses, but the pursuer's as well. It is arguable that with the advent of legal aid the old general rule that in consistorial causes the husband was liable in expenses to his wife, even if she was unsuccessful has been substantially eroded inasmuch as a major justification for it, namely the difficulty which a wife without separate estate would have in obtaining legal representation in the absence of such a rule, no longer applies where a wife, as here, obtains legal aid. No such argument, however, was presented to me when expenses were dealt with. In any event, the fact remains that, whatever might be the situation in regard to the pursuer's expenses, no order would have been made and none was in fact made for payment of the defender's expenses. Looking at the whole facts and circumstances of this case, it seems to me to be clear that, apart from the 1967 Act, no order would be made for the payment of his 'expenses'."

Lord Grant went on to express the view that the reasoning of Lord Denning M.R. in Nowotnik v Nowotnik [1967] P.83, [1965] 3 All E.R. 167 on this point accorded with the result reached in Wilson v Wilson.<sup>18</sup> In Nowotnik Lord Denning analysed what is now s.13(4) of the 1967 Act in some detail<sup>19</sup> stating:

"When a judge comes to consider whether, apart from the Acts, he would have made an order for costs against the unsuccessful assisted plaintiff or petitioner litigant, he should be careful not to be influenced by the consideration that the conclusion (that he would have made such an order) is one step towards the making of an order in favour of the unassisted litigant/-

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16. This is a necessary preliminary before a motion under s.13 can be dealt with: see infra, p.246.

17. At p.101.

18. Ibid., at pp.101-102.

19. [1967] P.83 at pp.100-102.

litigant against the legal aid fund. He must first come to his independent conclusion that he would have made an order."<sup>20</sup>

Although it has subsequently been held in England that the Court of Appeal in Nowotnik interpreted the Legal Aid Act 1964 wrongly, the decision itself has been held to be correct insofar as it was based on this condition, namely that, apart from the Act, no order would have been made in favour of the successful unassisted party.<sup>21</sup>

(v) The unassisted party will suffer severe financial hardship

An order under s.13 in respect of expenses incurred in a Court of first instance cannot be made either by that Court or by any appellate Court unless the Court is satisfied that the unassisted party will suffer severe financial hardship unless the order is made.<sup>22</sup> Of the reported Scottish cases on s.13, only in Leishman v Leishman 1965 S.L.T. (Sh. Ct.) 51 was this condition in issue, a party minuter having succeeded at first instance and having sought expenses from the Fund. Sheriff J. Irvine Smith considered the definitions of "hardship" given by Sheriff Bryden in Hamilton Central Co-operative Society v Simpson (1952) 68 Sh. Ct. Rep. 148.<sup>23</sup> and Mr. Justice Mayo

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20. Ibid. at p.102. See also Povey v Povey [1972] Fam. 40 per Ormrod J. at p.54. At p.55 it was stated:

"It is .... easy to fall into the error of saying that no order for costs would be made for the successful party's costs because the other side is legally aided with a nil contribution and has no means to pay; and consequently that subs.(4) operates to defeat the claim against the legal aid fund. In my judgement the right way to approach the matter is to put out of mind the fact that the legal aid fund provides assets out of which an order for costs can be met and to keep in mind the difference between no order for costs and a nil assessment."

21. See Hanning v Maitland (No.2) [1970] 1 Q.B. 580 at p.587.

22. 1967 Act, s.13(3)(b).

23. "Something harsher and more severe than trifling inconvenience and negligible loss of profit"

in Returned Soldiers etc., League of Australia Incorporate v Abbott (1946) S.A.S.R. 270<sup>24</sup> and applied those definitions in support of his conclusion that an order should be made. The party minuter's account of expenses came to £179.7.10 which would have consumed just under 20% of her capital if an order was not made; she had a low income and heavy domestic commitments. Although it was argued that because she had capital she should bear her expenses, the Sheriff refused to leave the capital out of consideration.

In England, the Court of Appeal have held that the words should be construed so as to exclude insurance companies<sup>25</sup>

" .... and commercial companies who are in a considerable way of business; and wealthy folk who can meet the costs without feeling it. But they should not be construed so as to exclude people of modest income or modest capital who would find it hard to bear their own costs."<sup>25</sup>

(vi) It must be just and equitable for an order to be made

An order may be made under s.13 in respect of any expenses if, and only if, the Court is satisfied that it is just and equitable in all the circumstances that provisions for those expenses should be made out of public funds.<sup>27</sup>

Compared to the position in England, there has been little judicial discussion of this condition in Scotland, in spite of its universal application to every case under s.13. The Scottish Courts

24. "The subjective effect of a detrimental nature upon the person concerned, directly consequent upon the deprivation of a benefit subsisting or potential .... "

25. Hanning v Maitland (No.2) [1970] 1 Q.B. 580 (overruling Nowotnik v Nowotnik [1967] P.83 on this point); General Accident Fire and Life Assurance Corporation Ltd. v Forster [1973] Q.B. 50.

26. Hanning v Maitland (No.2) [1970] 1 Q.B. 580 at p.587.

27. 1967 Act, s.13(2).

have refused to delineate the circumstances in which it will be "just and equitable" to make an order, thus avoiding the pitfalls into which their English counterparts have fallen.<sup>28</sup> What is clear is that in Scotland a Court has a wide discretion in considering the matter, insofar as it has been considered at all.

The first case in which it arose was Leishman v Leishman 1965 S.L.T. (Sh. Ct.) 51 in which a successful party minuter in an action of separation and aliment was awarded expenses from the Fund under s.13. One of the grounds advanced by the Law Society of Scotland in opposing the application was that it must have been obvious to the party minuter that if she intervened in the action she ran the risk of being unable to recover her expenses from the pursuer. The Sheriff (J. Irvine Smith) rejected this as an argument for saying that it was not "just and equitable" for an order to be made, holding that the circumstances of the case were such that it was unjust and inequitable if the party minuter were to be without a remedy for her expenses against the Fund. Those circumstances disclosed that the pursuer's allegations were "malicious or at least irresponsible" and the party minuter was ".... wholly justified in defending her name against such allegations".<sup>29</sup>

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28. For a review of the English decisions see Matthews and Oulton, cit. sup. The most recent decision of the House of Lords appears to be Davies v Taylor (No.2) [1973] 1 All E.R. 959 in which it was held that inter alia the fact that the unassisted party had been successful in the appeal was an important circumstance and might alone be sufficient to make it just and equitable for an order to be made. The approach to this condition taken by the Court of Appeal in Nowotnik v Nowotnik [1967] P.83 has now been held to be erroneous: Hanning v Maitland (No.2) [1970] 1 Q.B. 580.

29. At p.53.

The matter came before the Court of Session in Christensen v Rank Hovis McDougall Ltd. 1974 S.L.T. (Notes) 69 where it was held to be "just and equitable" to make an order under s.13 where an assisted pursuer had failed to "beat" two tenders by his unassisted opponents and where his motion for a new trial had been refused by the Second Division. The defenders were found entitled to the expenses of the process subsequent to the lodging of the first tender and their motion under s.13 for expenses from the Fund relating to opposing the pursuer's motion for a new trial was granted. The Court stated<sup>30</sup> that it was of no assistance to analyse the reported cases on this matter, as each depended on its own circumstances, although it was clear from those cases that two circumstances were very important in dealing with such a motion: firstly, that the unassisted party was successful in the appeal; and secondly, that the appeal was taken by the assisted party.

The importance of these two factors was re-iterated by the Second Division in Bell v Fife County Council 1975 S.L.T. (Notes) 5 in which the assisted pursuer lost at the proof and lost a reclaiming motion. The defenders were granted an order under s.13 relating to the expenses incurred by them in connection with the reclaiming motion. The Court again stressed that it was undesirable to attempt to state ab ante factors which were determinative of the question one way or another, but stated that it would be wrong to assume that a motion under s.13 would be automatically granted if these two factors were established. The Court continued:<sup>31</sup>

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30. At p.70.

31. At p.4.

"Other factors (and we make no endeavour to give an exhaustive definition of these) could be the conduct of the parties, the issues of fact and/or law involved and in the last analysis the court's view on the justification for the appeal in all the circumstances. In coming to a decision whether it is satisfied that an order should be made, the court is obviously vested with a wide discretion."

In the circumstances of this case the defender's motion was granted on a combination of factors, including the fact that the pursuer's appeal had no real merit.

It will be observed that in both Christensen v Rank Hovis McDougall Ltd. and Bell v Fife County Council no application was made by the defenders for their expenses from the Fund in respect of the proceedings at first instance; for such an application to be successful the defenders would have had to show that they would have suffered severe financial hardship unless an order under s.13 was made.<sup>32</sup>

#### Who may apply for an order

There are no restrictions on the kind of unassisted litigant who may apply for an order under s.13, nor are there any conditions of eligibility special to such a person. A limited company or a partnership has the same right to apply as an individual, since s.13 relates to "an unassisted party", not "an unassisted person".<sup>33</sup>

Where an unassisted party is concerned in proceedings only in a fiduciary, representative or official capacity, then for the purposes of determining whether he will suffer severe hardship unless an order is made for the payment of his expenses out of the legal aid

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32. 1967 Act, s.13(3)(b). See also supra, p. 241.

33. Limited companies and partnerships are ineligible for legal aid by virtue of the definition of "person" in s.20(1) of the 1967 Act. Throughout the Act and subsidiary legislation the word "person" is generally used to describe a litigant, but s.13 refers throughout to "parties".

Fund, no account is to be taken of his personal resources. The Court is however directed to have regard to the value of the property, estate or fund out of which the unassisted party is entitled to be indemnified and may in its discretion also have regard to the resources of the persons if any who are beneficially interested in that property, estate or fund.<sup>34</sup>

How to apply for an order

An application for an order under s.13 is made by motion to the Court,<sup>35</sup> presumably the Court which has finally disposed of the case in favour of the unassisted party. As the Court is enjoined by s.13(2) to consider what orders should be made for expenses against the party receiving legal aid as a preliminary to dealing with an application under s.13(1), it would appear that such an application should be made at the time when the whole question of the expenses of the case is dealt with.

On an application under s.13 being made the Court must order the applicant to lodge a statement on oath of his ground for claiming payment out of the Legal Aid Fund of the whole or any part of the expenses incurred by him, together with an estimate of the probable amount of those expenses, or must dismiss the application forthwith.<sup>36</sup>

If the applicant is ordered to lodge his grounds for claiming payment, together with an estimate of his expenses, the Court must order intimation of those grounds and the estimate by the applicant

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34. Legal Aid (Scotland)(Expenses of Successful Unassisted Parties) Regulations 1964 (S.I. 1964/1513) para.2.

35. Act of Sederunt (Legal Aid Rules) 1964 (S.I. 1964/1622 amended 1976/60) para.2.

36. Ibid., para.3 and see Wilson v Wilson 1969 S.L.T. 100

to the Law Society of Scotland which is entitled to be represented at the hearing when the Court disposes of the application, and to cite any party to the cause to attend that hearing.<sup>37</sup>

Party legally aided for part of the proceedings only

Where a party begins to receive legal aid in connection with the proceedings after they have been instituted, or ceases to receive legal aid before they are finally decided, or otherwise receives legal aid in connection with part only of the proceedings, the Court, if it decides to make an order under s.13 of the 1967 Act, must make an apportionment of the expenses. In such cases the unassisted party may be paid from the legal aid Fund only so much of those expenses as are attributable to that part of the proceedings during which a legal aid certificate was in force.<sup>38</sup>

Appeals against orders or their refusal

By s.13(5) of the 1967 Act it is provided:

"Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under this section, or a refusal to make such an order, except on a point of law."

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37. Ibid., para.4.

38. 1967 Act, s.14(3).

CHAPTER XVI

REMUNERATION AND THE FINAL ACCOUNTING

Main provisions: 1967 Act, ss.3, 6, Sch.2; 1958 Rules, para. 6

Introduction

The grant of Section 1 legal aid relieves the assisted person of any personal liability for his own legal expenses beyond the amount of his maximum contribution (if any).<sup>1</sup> His Solicitor and Counsel (if any) acquire a statutory right to payment from the Legal Aid (Scotland) Fund of their fees and outlays, but <sup>it</sup> is important to remember that the Account of Expenses ultimately drawn up by the Solicitor is subjected to close scrutiny to ensure that the Fund is not called upon to bear unnecessary or unreasonable expense. As previously explained, certain steps cannot be taken without prior sanction,<sup>2</sup> and in any event payment for all steps taken is a matter for adjustment between the Central Committee and the Solicitor. If the amounts cannot be agreed, the Account will be taxed.

At the time when the legal fees payable from the Fund are being assessed, the Central Committee require to balance the assisted person's account therewith. By statute, property preserved or recovered, such as a principal sum, must be paid into the Fund along with any judicial expenses paid by the opponent; the Fund is entitled to recoup the amounts paid to the assisted person's legal advisers firstly from the contribution payable by the assisted person; secondly, from any judicial expenses recovered; and lastly from the principal sum itself. Certain types of property recovered are

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1. He may of course be held personally liable for his opponent's expenses: see supra, Chapter XIV.
  2. See supra, pp. 189-192.

exempt from this priority right of payment, sometimes referred to as the "statutory charge".

This Chapter deals with the legal aid provisions governing such matters, although the intricacies of the accounting procedures are not explored in detail.

#### Remuneration of Solicitors and Counsel

By s.6(4) of the 1967 Act, a statutory right to payment from the Fund is given to the Solicitor and Counsel (if any) who act for the assisted person.<sup>3</sup> They are not entitled to take any payment whatever in respect of the legal aid except such payment as is directed to be made out of the legal aid Fund.<sup>4</sup>

#### Rendering Accounts of Expenses

All the civil Schemes provide that the Solicitor for the assisted person must report immediately to the appropriate Committee<sup>5</sup> on the completion of the case and to submit to the Committee as soon as practicable an account of all his intromissions with sums received by him in connection with the case and an Account of Expenses, which may be in abridged form.<sup>6</sup>

3. By s.6(8) of the 1967 Act, reference to acting for a person receiving legal aid shall, in relation to a Solicitor, include references to acting for such a person on the instructions of another Solicitor.
4. 1967 Act, s.2(6)(b). This provision excludes all private payments while the accused is in receipt of legal aid.
5. In the House of Lords Scheme and for the Court of Session, this is the Central Committee; for the Lands Valuation Appeal Court and Restrictive Practices Court this is the Supreme Court Committee; under all the other Schemes this is the Local Committee. This Committee transmits the Account to the Central Committee: 1958 Scheme, Art.18(2), followed in all the other civil Schemes.
6. 1958 Scheme, Art.18(1); followed in all the other civil Schemes.

The Report is rendered on the Law Society's form "Stage 4 Report" which requires the Solicitor to give certain data, statistical and otherwise. Central Committee records are largely computerised and it is therefore essential that full information be given.

The Account of Expenses details those expenses which are claimed against the Fund. The Solicitor should bear in mind that he can exercise various options as to the method of charging:

- (a) he may render an Account claiming the detailed charges specified in the appropriate Court Table of Fees, computed on the Solicitor and Client scale;
- (b) he may elect to charge an inclusive fee covering all work, again as specified in the appropriate Court table; but in consistorial cases in either the Court of Session or Sheriff Court he may only do so if he acts for the Pursuer who has a finding for expenses in his favour and has been throughout the whole of the proceedings an Assisted Person;<sup>7</sup>
- (c) in reparation cases where expenses are recovered from the defender he may accept these expenses (which are of course computed as between party and party) in satisfaction of his Solicitor and client expenses against the Fund.<sup>8</sup>

Outlays are of course dealt with in the Tables of Fees; it should be observed here that Counsel's fees are treated as outlays on the Solicitor's Account and are taxed (if they are not agreed) as if

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- 7. For the details of these fees, see the Parliament House Book.
- 8. The party and party expenses recovered are roughly equivalent to the 90% of the amount chargeable on the Solicitor and Client scale, which is the maximum permitted on a taxation: see infra, p. 253.

they had been paid by the Solicitor. Counsel's fee note in a legal aid case is sent by Faculty Services Ltd. to the instructing Solicitor for inclusion with his Account; the latter does not pay it but merely attaches it to his Account.

The vast majority of Accounts of Expenses are not taxed. All the civil Schemes provide that an Account shall not be referred to the Auditor for taxation unless the Central Committee are unable to fix in agreement with the Solicitor submitting the Account an amount payable in respect thereof.<sup>9</sup> Normally in practice the Central Committee will offer the Solicitor a sum in settlement of the Account; only if this is not acceptable, will the matter go to the Auditor. By General Regulation 14 fees agreed between the Central Committee and the Solicitor are treated as if the amounts agreed were amounts allowed on taxation.

#### Payments to Account of Expenses

By Article 18(4) of the 1958 Scheme,<sup>10</sup> the Central Committee may, on the recommendation of the Supreme Court Committee or a Local Committee, make a payment to account of expenses<sup>11</sup> to a Solicitor acting for an assisted person in any case where they consider the circumstances render it reasonable and proper. The Central Committee policy has always been to restrict payments to account to those in respect of outlays.

Only advances in excess of a total of £40 are generally made, for the purposes of meeting outlays such as ordinary witnesses' fees

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9. See e.g. 1958 Scheme, Art.18(3).
10. Followed in all the other Schemes, except the Legal Advice and Assistance Scheme.
11. Art.26(4) of the Criminal Scheme refers to 'outlays' rather than 'expenses'.

and expenses, fees of enquiry agents and expert witnesses, expenses of commissions, custody reports and shorthand writers' and printers' accounts, but excluding charges by Solicitors and Counsel, except in cases where there appears to be hardship. An advance cannot be made after the proceedings have been concluded.<sup>12</sup> Applications for such advances should be made to the Local Committee or Supreme Court Committee, as the case may be, giving full details and enclosing vouchers, if possible.

In the Court of Session, the Solicitor acting for the assisted person may apply for an automatic advance of £15, subject to the following conditions:

- (a) in the case of an assisted pursuer, immediately the Summons has been signetted; and
- (b) in the case of a defender or Party Minuter, immediately after lodging the document with which the party first enters the process.<sup>13</sup>

Automatic advances of £15 may also be made in respect of Sheriff Court actions. In the case of pursuers, application should be made immediately the Initial Writ has been served; in the case of any other party, immediately he enters the process.

<sup>Applications</sup>  
~~Process~~ for advances of £15 in either Court of Session or Sheriff Court cases must be made direct to the Secretary of the Central Committee on an official form.<sup>14</sup>

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- 12. See (1978) 23 J.L. Soc. Sc. 69. Where there is doubt as to whether a particular outlay will be allowed, the Solicitor should check with the Central Committee in advance.
  - 13. See (1977) 22 J.L. Soc. Sc. 143. The request should give full details of the assisted person and the date on which the appropriate document was lodged in process.
  - 14. See 22nd Report of the Law Society of Scotland on the Legal Aid Schemes (1971-72) Schedule 24.

### Taxation of Accounts

If the matter of fees and/or outlays cannot be agreed between the Solicitor and the Central Committee, the matter goes to the Auditor of the Court of Session or other appropriate Court Auditor depending on the Court or Tribunal in which the proceedings are brought. The question of taxation of accounts is outwith the scope of this work, but a number of points should be noted for their legal aid implications:

#### (a) Statutory 10% deduction

The remuneration of persons giving legal aid is covered in Schedule 2 of the 1967 Act and the Act of Sederunt (Legal Aid Fees) 1971. Both of these instruments provide broadly for a 10% deduction in civil cases<sup>15</sup> from the amount of fees payable to both Solicitors and Counsel which are calculated according to the appropriate Table of Fees.<sup>16</sup> Outlays are not generally subjected to the deduction and both instruments deal more fully with the mechanics of the taxation.

#### (b) The scale to be applied on taxation

By paragraph 5 of Schedule 2 of the 1967 Act it is provided that expenses shall be taxed for the purposes of that Schedule ".... according to the ordinary rules as between Solicitor and client". But it is important to remember that these "ordinary rules" in Scottish practice have, for over a century, provided for two situations: firstly, taxation of expenses between agent and client, client paying; and secondly, a lower scale between agent and client, third party paying. In the former situation the client is liable

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15. Criminal fees and those chargeable under the Legal Advice and Assistance and Children Scheme are not affected.

16. For the reasons behind the 10% deduction, see supra, p. 51.

for all expenses which it is within the mandate of the agent, express or implied, to incur: to put it another way, the client is liable for those expenses which are necessary and proper, as well as those authorised by him. In the latter situation, all expenses are allowed which would be incurred by a prudent man of business without instruction from his client, in the knowledge that the account would be taxed. The distinction between these two situations was recognised in Hood v Gordon (1896) 23 R.675, where the fees of a third Counsel in an election petition case were objected to and disallowed against the opposite side, although there had been an award of expenses as between agent and client.<sup>17</sup>

The scale to be applied in legal aid cases came before Lord Cameron and ultimately the Second Division in Park v Colvilles Ltd. 1960 S.C. 143 where the Law Society objected to the Auditor allowing certain fees to Counsel and medical witnesses. It was decided that the proper scale to be applied in a taxation under the Third Schedule of the 1949 Act (now the Second Schedule of the 1967 Act) was that of agent and client, third party paying, the third party paying being the Law Society of Scotland as administrators of the Fund. The Solicitors for the successful assisted pursuer had contended that as their account would be paid out of the damages their client had recovered, and out of his contributions to the Fund, the proper scale should be that of agent and client, client paying, but this contention was rejected by the Second Division as being contrary to the whole assumption of the legal aid scheme that the client is not free to authorise expenditure on any scale he chooses. Such would be the assumption, said Lord Patrick (at p.153) " .... underlying a

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17. See also MaClaren, Expenses, op. cit., p.508 et seq.

taxation as between agent and client, client paying. It may be, as the Lord Ordinary observes, that when the Auditor taxes the account of expenses as between agent and client, third party paying, that scale will have little effect on the fees marked to counsel which are here in question, but that is the scale on which the account should be taxed."

#### Payment of Accounts

After receiving payment of his Account, the Solicitor is obliged to pay any outlays in so far as not already paid.<sup>18</sup>

A Supplementary Account of Expenses may be necessary after the principal Account has been paid if diligence on a decree is authorised.<sup>19</sup>

The situation where the client has been in receipt of Legal Advice and Assistance is dealt with separately.<sup>20</sup>

#### V.A.T. on Legal Aid Accounts

The Law Society of Scotland has published a guide to the whole matter of V.A.T. on Solicitors' accounts, to which reference may be made. It has not been thought necessary to deal with the matter here.

#### Balancing the Assisted Person's Account

In all legal aid cases where a Section 1 certificate or Emergency Certificate has been issued, the assisted person's account with the Fund must be balanced on conclusion of the case. The Fund is of course liable to the Solicitor (and Counsel, if any) who acted for the assisted person for the amount of his fees as agreed or

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18. See e.g. 1958 Scheme, Art.18(5).

19. See Art.18(4)(c) of the 1958 Scheme and *supra*, pp. 191-192. An additional Account may also be necessary where recovery of expenses has been carried out. For the policy of the Central Committee relating to additional accounts for items omitted in the original account, see (1977) 22 J.L. Soc. Sc. 215.

20. See *infra*, Chapter XXIII

taxed; accordingly the Law Society has the right to recover these sums from three sources in the following order:

- (1) from any expenses recovered by the assisted person;
- (2) from any contributions paid to him into the Fund; and
- (3) from any damages or other property or sums recovered or preserved for him.

It should be noted that by s.10 of the 1967 Act it is declared that any provision of the 1967 Act or the 1972 Act requiring anything to be paid into or out of the legal aid Fund is not to be taken as requiring the making of an actual payment, so as to prevent the obligation to make it being satisfied in whole or in part by an allowance in account or in any other way; and thus references in these Acts to payments, to sums paid or payable or to receipts and similar references (whether in connection with that fund or not) shall be read accordingly. So it appears that technically accounting transactions in the Solicitor's books may be carried on; if e.g. he receives a sum in respect of expenses due to his assisted client but is already entitled to be paid his own expenses, he need not technically make an actual payment but can retain the sum received on account of the sum due to him. But the practice seems to be that actual payments in and out of the Fund are normally made.

(i) Expenses recovered

By s.2(6)(d) of the 1967 Act, any sums recovered by virtue of an award of expenses or of an agreement as to expenses in favour of the assisted person with respect to the proceedings must be paid to the legal aid Fund. It is further provided that the sums so recoverable are not affected by the fact that the sums payable to a Solicitor

or Counsel for acting for a person receiving legal aid are fixed by Schedule 2 of the 1967 Act.<sup>21</sup>

The Law Society of Scotland may take all such proceedings as may be necessary to enforce such an award or agreement, and they may require the assisted person's Solicitor to act in any such proceedings; the legal aid certificate or emergency certificate is deemed to relate to such proceedings. It is also competent for the Law Society to do diligence on a decree for expenses either in the name of the assisted person or in the name of the Society without obtaining a formal assignation from the assisted person. Only the receipt of the Law Society is a good discharge to a person paying such sums.<sup>22</sup>

In practice, the recovery of expenses from those so found liable to the assisted person gives great difficulty, particularly in consistorial causes. If the Law Society were to attempt to enforce a decree for expenses in many such cases, the payment of any periodical allowance or aliment awarded in the decree might often be prejudiced; in the result sizeable sums are written off each year in respect of irrecoverable expenses. In each case therefore the Society must consider the chances of recovery, coupled with the amount of the debt and the social consequences before proceeding to authorise the Solicitor to recover expenses; they are unlikely to do so if the Solicitor for the assisted person advises that recovery action would not have been undertaken if the case had been private.

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21. 1967 Act, s.6(9). On the situation regarding an award of expenses where an offer of settlement is refused and that refusal is subsequently held to be justified see Graham v Graham 1955 S.L.T. (Notes) 15.

22. A.S. (Legal Aid Rules) 1958, para.6(1).

(ii) Contributions payable

By s.2(6)(c) of the 1967 Act the assisted person's contribution to the Fund is made " .... in respect of the sums payable thereout on his account ....", so if the expenses recovered from the opponent are insufficient to meet the Fund's liability to the assisted person's Solicitor and Counsel, the Law Society will look next to the assisted person's contribution to make up the deficiency.<sup>23</sup> By accepting a certificate, the assisted person is deemed to have accepted an undertaking to pay all the instalments of his contribution,<sup>24</sup> and he should do so until he is told to stop by the Law Society, irrespective of the result of the proceedings. If the total contribution made is more than the net liability of the Fund on his account, the excess is repaid to him.<sup>25</sup> If, however, the actual contribution paid by the assisted person is not sufficient to meet the liability of the Fund on his behalf then, subject to the maximum contribution determined by the Commission, the Committee who issued the certificate may vary ~~is~~<sup>it</sup> as respects either the amount of the contribution, the instalments thereof or the date or dates of payment thereof and must intimate any such variation to the assisted person.<sup>26</sup>

Special provisions apply where the certificate is suspended or discharged.<sup>27</sup>

23. 1967 Act, s.3(3) and (7).

24. See e.g. 1958 Scheme, Art.16(3)(d). The Law Society occasionally sue an assisted person for unpaid contributions and, in a consistorial case, a female assisted person cannot plead that her husband is liable for those contributions as "necessaries": see Law Society of Scotland v McMahon 1956 S.L.T. (Sh. Ct.) 93.

25. 1967 Act, s.3(3).

26. See e.g. 1958 Scheme, Art.16(7).

27. See General Regulation 8(2).

The Law Society of Scotland always consider the prospects of recovering unpaid contributions from assisted persons, but some contributions prove to be irrecoverable and are written off.

(iii) Property recovered or preserved for the assisted person

If, after there is paid into the Fund the expenses recovered from the opponent and the contribution exigible from the assisted person, there is still a deficiency on his account, s.3(4) of the 1967 Act comes into play.<sup>28</sup> It provides that:

- (1) any sums remaining unpaid on account of the assisted person's contribution; and
- (2) if the total contribution is less than the net liability of the Fund on his account, a sum equal to the deficiency

shall be paid, in priority to any other debts, out of any property (wherever situate) which is recovered or preserved for him in the proceedings. Property "recovered or preserved" includes the assisted person's rights under any settlement arrived at to prevent or bring to an end the proceedings and any sums recovered by virtue of an award of expenses made in his favour, provided such latter sums are not payable into the Fund under s.2(6)(c) of the 1967 Act.<sup>29</sup>

The Law Society may again take proceedings to enforce any judgment or settlement whereby property is recovered or preserved for the assisted person and may require the Solicitor for the assisted person to act under the cover of the legal aid or emergency certificate; in any event any moneys payable or preserved for the

28. Along with s.3(7) of the 1967 Act.

29. 1967 Act, s.3(5). A Court may allow any damages or expenses to be set off against other damages or expenses: ibid., s.3(6).

assisted person must be paid initially to the Law Society, only whose receipt is a good discharge.<sup>30</sup>

The effect of this requirement is that payment in full of a principal sum to an assisted person cannot be made until the debit balance on the assisted person's account with the Fund is known. If the Solicitor delays in making up his account, the successful assisted person may not receive the sums due to him for quite a considerable time. But frequently the Solicitor will elect to accept in satisfaction of his "solicitor and client" account against the Fund, the judicial expenses recovered on the "party and party" scale, and in practice he is always offered the opportunity of so doing. If this is done, any principal sum is likely to be paid over without undue delay. In any event the practice is for the Central Committee to make a substantial payment to account of any principal sum agreed by the assisted person's Solicitor, but to retain a sufficient balance to meet any possible deficiency.<sup>31</sup>

Particular difficulty arises where the principal sum awarded is small. If the expenses recovered are insufficient to meet the whole expenses of the action and any outstanding balance of contribution due, the whole principal sum may be swallowed up in making good the deficiency. As the 25th Report of the Law Society on the

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30. A.S. (Legal Aid Rules) 1958, para.6(1). Even sums obtained under an extra-judicial settlement agreed after a certificate is issued must be paid into the Fund, even if the action does not proceed and no certificate is lodged in process. There must also be paid into the Fund any interim payment of damages to an assisted person in terms of R.C. 89A: see (1974) 19 J.L. Soc. Sc. 304.

31. If there is likely to be a delay for any reason in paying out the principal sum, the Central Committee will place it on deposit, where it may earn interest: see (1977) 22 J.L. Soc. Sc. 101.

Legal Aid Schemes puts it:<sup>32</sup> "It is difficult for an assisted person to understand why he should receive nothing when he knows that he has won his action and was awarded a sum with expenses". In the same report it was suggested that principal sums up to £250 should be disregarded at the discretion of the Central Committee, which already has power to disregard principal sums recovered by a Solicitor under the Legal Advice and Assistance Scheme,<sup>33</sup> but so far nothing has been done.

Where a principal sum has been awarded to a pupil or minor, the policy of the Central Committee has been to take steps to preserve such money for the benefit of the pupil or minor concerned. In actions in the Court of Session they have the assisted person in whose name the proceedings have been raised conjoined with some responsible person in administering the money and then make payment to the assisted person's Solicitor on a Mandate. In the Sheriff Court where a principal sum is awarded to a pupil or a minor under a decree, payment is made first to the Law Society to recoup any debit balance due to the Fund on the assisted person's account and then into Court in terms of Rule 172 of the Sheriff Courts (Scotland) Act 1907. Where an extra-judicial settlement is made the Joint Minute should be framed in such a way as to enable decree for the agreed sum of damages to be granted against the defender and to incorporate an application to have Rule 172 applied at that stage.<sup>34</sup>

The Law Society has additional powers where the property recovered or preserved for the assisted person consists of corporeal

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32. At p.19.

33. See Legal Advice and Assistance Regulation, Reg.6(2).

34. See 11th Report of the Law Society on the Legal Aid Schemes, page 39; A.S.(Legal Aid Rules) 1958, para.6(2).

moveables or can be made the subject of a heritable security. In the former case, corporeal moveables which are deliverable to the assisted person shall, if the Law Society so require, be delivered to them, in which event only their receipt is a good discharge; the Law Society have power (exercised rarely) to sell any of the corporeal moveables in order to make payment to the Fund of any sum necessary to balance the assisted person's account. In the latter case, the Law Society may make in favour of themselves a charging order, charging and burdening the property with an annuity to pay to the Law Society any sum due to the Fund by the assisted person, together with the expenses of making the charging order and recording it in the appropriate Register of Sasines; the legal aid or emergency certificate is deemed to relate to making thereof.<sup>35</sup>

By Rule 6(6) of the Act of Sederunt, if it appears to the Law Society that the Solicitor acting for a person who has received a legal aid certificate has failed to carry out any of the obligations contained in Rule 6, they may report the matter by minute lodged in the original process, to the Court before which the proceedings concerned depended, and that Court may authorise the Society to refuse payment to the Solicitor of the whole, or of such part as the Court may deem proper, of the sums, other than cash outlays, otherwise payable out of the Fund.

Certain types of property are however exempted from the provisions of s.3(4) of the 1967 Act in order to prevent hardship to the assisted person.<sup>36</sup> There are excluded any moneys payable under a decree for payment of aliment or under a settlement arrived at to

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35. A.S. (Legal Aid Rules) 1958, para.6(3)(4)(5).

36. See General Regulation 3.

prevent or bring to an end proceedings in which such a decree may be granted; in this connection "decree for payment of aliment" is given an extended meaning and includes:

- (a) an order for the payment of an annual or periodical allowance under the Divorce (Scotland) Act 1976;
- (b) an order for the payment of weekly or periodical sums under the Guardianship of Infants Act 1925;
- (c) an order for the payment of sums in respect of aliment under the Illegitimate Children (Scotland) Act 1930;
- (d) any order for the payment of sums for the maintenance of any person which is, by virtue of the Maintenance Orders Act 1950, enforceable in Scotland as if it were a decree for payment of aliment;
- (e) an order for the payment of a capital sum or a periodical allowance or both under the Succession (Scotland) Act 1964.

Also excluded from the provisions of s.3(4) of the 1967 Act are any moneys payable under an order made by the Employment Appeal Tribunal.<sup>37</sup> All such excluded sums may therefore be paid direct to the assisted person.

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37. General Regulation 3(2).

CHAPTER XVII

LEGAL AID IN PROCEEDINGS UNDER PART III  
OF THE SOCIAL WORK (SCOTLAND) ACT 1968

Main provisions: The Legal Aid (Scotland) Act 1967,  
ss.1(6A), 2(5A) ("the 1967 Act"); The Legal Aid (Scotland)  
(Children) Scheme 1971 ("the Children Scheme");  
The Legal Aid (Scotland)(Children) Regulations 1971  
("the Children Regulations"); The Act of Sederunt  
(Legal Aid)(Children) 1971

Introduction

Under the provisions of Part III of the Social Work (Scotland) Act 1968 a system of Children's Panels was established to provide Children's Hearings to deal with cases of children requiring compulsory measures of care. Proceedings before a Children's Panel are instituted by the Reporter, who may refer a case involving a child to the Panel on a variety of grounds.<sup>1</sup> Although the Panel makes the ultimate decision on what disposal is in the best interests of any child whose case is referred to it, a Hearing frequently takes place without the presence of any legally qualified person and in particular in the absence of any legal representative for child or parent. This is in accordance with the policy behind Part III of the 1968 Act, which was to remove juveniles from the Court system and to deal with them on the basis of social welfare principles.

Legal aid is therefore only of relevance in those cases where the policy behind the Act makes legal representation desirable, and for this reason it has only been made available under the Children Scheme in four situations:

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1. See Social Work (Scotland) Act 1968, s.32.

- (1) where the Panel has issued a warrant for the child's detention in a place of safety pending disposal of the case by a Hearing and the child or parent wishes to appeal to the Sheriff against this detention;
- (2) where the child or parent disputes the grounds of referral to the Panel by the Reporter and the latter applies to the Sheriff for a finding as to whether those grounds are established;
- (3) where the child or parent wish to appeal to the Sheriff against any other decision of the Hearing; and
- (4) where it is sought to appeal to the Court of Session against any decision of the Sheriff.<sup>2</sup>

Section 16 of the Social Work (Scotland) Act 1968, as amended by s.74 of the Children Act 1975 deals with the assumption by local authorities of parental rights of a child by a resolution to that effect served on the parent or guardian and provides that when the latter objects, the local authority may make an application to the Sheriff in connection therewith. These are proceedings outwith the scope of the Children Scheme, but Section 1 legal aid is appropriate and may be granted in these cases.

The various legal aid provisions which are contained in the Children Scheme have considerable resemblance to those which affect criminal cases, but proceedings under Part III of the 1968 Act are sui /-

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2. 1967 Act, ss.1(6A) and 2(5A).

sui generis.<sup>3</sup> Of the four situations above, only in the last situation is the grant of legal aid in the hands of the Law Society of Scotland; in the others it is in the hands of the Sheriff. All four situations are distinct proceedings for the purposes of legal aid and thus require separate applications.

I. Legal aid for an appeal to the Sheriff against a decision of a Children's Hearing to issue a warrant for a child's detention

There are two situations in which a Hearing may issue a warrant for the detention of a child, both of which occur pending final determination of the case by the Hearing.

- (a) If a child has been detained in a place of safety<sup>4</sup> either under s.37(2) of the 1968 Act or s.14(1) or 323(1) of the Criminal Procedure (Scotland) Act 1975, it is the duty of the Reporter, if he considers that the child may be in need of compulsory measures of care, to arrange wherever ~~practicable~~<sup>practicable</sup> a Children's Hearing to sit not later than in the course of the first lawful day after the commencement of such detention. If the Panel is unable to dispose of the case and is satisfied that the child's further detention is necessary in his own interest/-

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3. In McGregor v T. and Another 1975 S.L.T. 76 it was held that proceedings before the Sheriff under s.42 of the 1968 Act for the determination of a disputed referral were not criminal proceedings but were "judicial proceedings". The implication in s.1(6) of the Legal Aid (Scotland) Act 1967 is that proceedings under s.1(6A) of that Act are civil proceedings, but of these, disputed referrals under s.42 of the 1968 Act have a criminal flavour, as does the method of appealing by stated case to the Court of Session. It is perhaps better to regard the whole area of procedure as unique.
4. This is defined in s.94(1) of the 1968 Act as "any residential or other establishment provided by a local authority, a police station, or any hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive a child".

interest, or has reason to believe that he will run away during the investigation of his case, it may issue a warrant for his detention in any place of safety for up to twenty-one days.<sup>5</sup> Such a warrant may be renewed by the Hearing on one occasion for up to another twenty-one days on cause shown by the Reporter.<sup>6</sup>

- (b) Where a Hearing before whom a child is brought is unable to dispose of his case and has reason to believe that the child may not attend at any continued Hearing or any other proceedings arising from the case, or any requirement under s.43(4) of the 1968 Act,<sup>7</sup> or are satisfied that detention of the child is necessary in his own interest, it may issue a warrant requiring the child to be detained in a place of safety for up to twenty-one days.<sup>8</sup> On cause shown by the Reporter a warrant by the Hearing authorising detention for securing the attendance of a child at the hearing of his case or at any proceedings arising therefrom/-

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5. 1968 Act, s.37(4).

6. Ibid., s.37(5). See also fn. 9, infra.

7. I.e. a requirement to attend or reside at any clinic, hospital or establishment pending disposal by the Hearing.

8. 1968 Act, s.40(7), as amended by s.84 of the Children Act 1975.

therefrom may be renewed once only for up to  
twenty-one days.<sup>9</sup>

In both of these situations the issue by the Hearing of a warrant to detain is subject to appeal to the Sheriff under s.49(1) of the 1968 Act by the child, his parent or both within twenty-one days of the decision appealed against. Legal aid is available for such an appeal under s.2(5A) of the Legal Aid (Scotland) Act 1967. Very few such appeals are made annually, presumably because very few warrants are granted.

#### Eligibility

Under s.2(5A) of the 1967 Act legal aid is available to the child or parent without any enquiry into means. There appears to be no other precondition to the grant of legal aid; in particular the presence of other rights or facilities which may be available to a

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9. Ibid., s.40(8). It should be noted that by ss.37(5A), (5B) and 40(8A), (8B) of the Social Work (Scotland) Act 1968 (inserted by ss.83 and 84 of the Children Act 1975) where a warrant has been renewed but it appears to the Reporter that the Hearing will not be able to dispose of the child's case before the expiry of the period of detention required by the warrant as renewed, and that the further detention of the child is necessary in the child's own interest, the Reporter may apply to the Sheriff for a further warrant to detain the child, and this Sheriff's warrant may be renewed once only for a further twenty-one days. No consequential amendment of the Legal Aid (Scotland) Act 1967 has been made and legal aid is thus not available thereunder to a child or parent for the purpose of opposing the grant by the Sheriff of an extended warrant. But legal advice and assistance may be given under s.2(1) of the Legal Advice and Assistance Act 1972 to advise the child and parent, and also under s.2(4) thereof to permit representation at the hearing on the Reporter's motion, if the Court so approves. See infra, p. 387.

child or parent under Part III of the 1968 Act is irrelevant to the grant of legal aid under s.2(5A) of the 1967 Act.<sup>10</sup>

#### How to Apply

Application may be made orally, but in practice it is made in writing on Form SLA (CH) 2 which is lodged with the Sheriff Clerk at the Sheriff Court where the appeal is being made. Although the financial resources of the applicant and the presence of other rights and facilities is irrelevant, it appears that the whole form including the sections thereanent, must be completed. The Sheriff or the Law Society may demand further particulars of the case or other circumstances.<sup>11</sup> When the application is lodged with the Sheriff Clerk it is laid before the Sheriff immediately.

#### The Grant of Legal Aid

The Sheriff must grant the application forthwith if he is satisfied that the child is entitled to legal aid.<sup>12</sup> Normally, the applicant will have contacted a Solicitor and intimated on the application form that he wishes that Solicitor to act. If legal aid is granted, such a person is deemed to be the appointed Solicitor for the purposes of advising on and, if necessary, conducting the appeal to the Sheriff against the detention of the child, unless it is not, for any reason,<sup>13</sup> practicable for him to act. In that event, the

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10. Children Regulations, reg.6(1).

11. Children Regulations, reg.4.

12. A.S. (Legal Aid (Children)) 1971, para.3. He may examine the applicant on oath: ibid., para.9.

13. Children Scheme, para.6(1), 7(1).

Local Committee (to whom the Sheriff Clerk intimates the grant of legal aid) must forthwith appoint a Solicitor to act.<sup>14</sup>

Duties of the Appointed Solicitor

In addition to acting for the assisted person, the Appointed Solicitor must render the normal services provided by a Solicitor in the Sheriff Court.<sup>15</sup> "Normal services" are not defined, but include making the appeal and attending with the assisted person at all diets in the case and considering and advising on the question of an appeal to the Court of Session.<sup>16</sup> Under s.49(7) of the 1968 Act, the appeal must be disposed of within three days of lodging the appeal.

II. Legal Aid for applications to the Sheriff for a finding under s.42 of the 1968 Act as to whether the grounds for referral are established

This is the most common form of children's proceeding in which legal aid will be encountered in practice.<sup>17</sup> Section 42(2)(c) of the 1968 Act provides that where the child or parent does not accept the grounds of referral to the hearing, or accepts only part of those grounds, the Children's Hearing must direct the Reporter to make application to the Sheriff for a finding as to whether such grounds for the referral as are not accepted are established. Section 42(7) provides that an application by the Reporter for such a finding must also be made where the child cannot or does not understand the grounds of referral.

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14. Intimation of the grant of legal aid is made to the child, its parent, the Reporter and the Sheriff Clerk on Form SLA (CH) 5.

15. Children Scheme, para.4.

16. Ibid. On the forms of appeal and procedure therein see Renton and Brown Criminal Procedure (4th ed.) (1972) paras.19-82 to 19-88.

17. In the year to 31st March 1976, 632 applications for legal aid were considered, of which 577 were granted and 55 refused.

Legal representation for the child or parent (or both) is a frequent occurrence at the diet fixed by the Sheriff for the hearing of the application.<sup>18</sup> Normally one Solicitor appears for both child and parent and legal aid may be granted to either if the Sheriff is satisfied

- (a) that the giving of legal aid is necessary in the interests of the child and grants a legal aid certificate;<sup>19</sup> and
- (b) after consideration of the financial circumstances of the child and his parent, that the expenses of the case cannot be met without undue hardship to the child or his parent, or the dependants of either.<sup>20</sup>

#### Eligibility

- (i) Is legal aid in the interests of the child?

No guidance is given to the Sheriff in assessing whether the grant of legal aid would be in the child's interests. As with criminal cases, the Sheriff is left a discretion which is not open to review and which individual Sheriffs exercise in different ways.<sup>21</sup> The comparison with criminal cases becomes stronger in view of

18. Section 42(4) of the 1968 Act provides for representation without prejudice to the right of the child or parent to legal representation, so it appears that someone other than a Solicitor may represent child or parent before the Sheriff. Legal aid cannot be granted in the latter case in view of s.1(5) of the Legal Aid (Scotland) Act 1967, which provides generally that legal aid shall consist of representation by a Solicitor and, so far as necessary, by Counsel.

19. Legal Aid (Scotland) Act 1967, s.1(6A).

20. Ibid., s.2(2).

21. This has been the subject of almost continuous criticism, not only by Solicitors, but by the shrieval bench itself.

para.4(4) of the Act of Sederunt (Legal Aid)(Children) 1971<sup>22</sup> which directs the Sheriff to consider whether it is "in the interests of justice" that legal aid should be made available to the applicant (whether that be child or parent), but the interrelation between the interests of justice and the interests of the child has never been made clear. As the law stands it is presumably open to a Sheriff to hold that while it is in the interests of justice that legal aid be granted, it is not in the interests of the child that this be done, and perhaps even to hold that the reverse is true. The condition that legal aid be in the "interests of justice" contained in the Act of Sederunt is culled from the equivalent criminal legal aid provisions, and is obviously an attempt to exclude cases where the child has no stateable defence to an "offence-referral" under s.42 of the 1968 Act. But even where this is the case, the Sheriff will probably hold that the interests of the child are not served by granting legal aid and thus allowing the child to experience court proceedings which he thinks are unlikely to be successful.<sup>23</sup>

(ii) Are the financial conditions satisfied?

The sole test here is whether the expenses of the case can be met without undue hardship to the child or his parent, or the dependants of either.<sup>24</sup> No assessment of disposable income or disposable capital is carried out by the Law Society or the Supplementary Benefits Commission and there are no statutory capital or income limits beyond which legal aid is unavailable. No contribution to the expenses of the case is exigible from the successful applicant.

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22. S.I. 1971/287.

23. In a sense then the Sheriff is placed in the unenviable position of having to prejudge the child's defence, hearing only one side of the story.

24. Legal Aid (Scotland) Act 1967, s.2(2).

The term "undue hardship" is nowhere defined; once again the Sheriff has a discretion in this matter. It is however obvious that if the applicant is the child the financial conditions will almost invariably be satisfied; only where the applicant is the parent does the possibility arise that undue hardship may not be suffered. The financial details which must be disclosed are shown on the application form.<sup>25</sup>

Where it appears to the Sheriff that an applicant for legal aid, or his parent or child as the case may be, has available rights or facilities making it unnecessary for him to obtain legal aid, or has a reasonable expectation of obtaining financial or other help from a body of which he is a member, the Sheriff cannot grant legal aid except on special cause shown.<sup>26</sup> Under reg.6(3) of the Children Regulations, where the Sheriff makes legal aid available to a person, or the parent or child of a person, who is a member of such a body, the Sheriff must require him to sign an undertaking (Form SLA (CH) 26) to pay to the Law Society any sum received from that body on account of the expenses of the proceedings.

#### How to Apply

Application is almost invariably made on Form SLA (CH) 2, but may be in such other manner, being in writing, as the Sheriff may accept as sufficient in any particular case in which exceptional circumstances obtain.<sup>27</sup> The application is lodged along with a copy of the Reporter's Referral<sup>28</sup> with the Sheriff Clerk and must be brought as soon as possible before the Sheriff in chambers for determination.<sup>29</sup>

25. Form SLA (CH) 2.

26. Children Regulations 1971, reg.6(2).

27. Ibid., reg.3(2).

28. Form 4A of the schedule to the Children's Hearings (Scotland) Rules 1971.

29. A.S. (Legal Aid)(Children) 1971, para.4(1).

The reason why applications for legal aid are determined quickly is simply that the Reporter's application to the Sheriff for a finding as to whether the grounds of referral <sup>are established</sup> must itself be heard<sup>30</sup> not more than twenty eight days from the day on which the Reporter lodges his application for a diet with the Sheriff Clerk. However, there will often be a much shorter period between the receipt of instructions by the Solicitor and the hearing before the Sheriff. Although the Solicitor may know that the initial Children's Hearing before the Panel is taking place and that the grounds of referral are not being accepted, it is submitted that the earliest point at which an application for legal aid for representation before the Sheriff may be made is on receipt by the child and parent of the service copy of the Reporter's application under s.42 of the 1968 Act and warrant with citation. Several days will often elapse between the lodging of this application by the Reporter with the Sheriff Clerk and service thereof, simply because the Sheriff Clerk has to fix a diet and issue a warrant before service can be made.

It should be noticed that the child and parent receive an initial notification<sup>31</sup> after the Children's Hearing that the Reporter is making an application to the Sheriff for a finding. This notification is made before formal service of the copy application and warrant is effected and contains a statement of the grounds of referral. A child or parent may often wish to make an application for legal aid on receipt of this notification but it is doubtful whether such an early application will be entertained in view of

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30. "Heard" means that the hearing must at least have started before the Sheriff: H. v Mearns 1974 S.L.T. 184; C. v McGregor 1976 S.L.T. (Notes) 13.

31. Forms 5 and 6 laid down by Rule 16 of the Children's Hearings (Scotland) Rules 1971 (S.I. 1971/492).

Regulation 4 of the Children Regulations 1971. This provides inter alia that every applicant for legal aid shall furnish such particulars as are required by the Law Society's application form and such other particulars with respect to his case as may be required by the Sheriff. The latter will normally require to see the service copy application by the Reporter and warrant in preference to the initial notification that the Reporter is making such an application and thus refuse to deal with an application for legal aid until formal service of that application is effected.

#### The Grant of Legal Aid

If the conditions of eligibility are satisfied the Sheriff will grant the application;<sup>32</sup> the Sheriff Clerk sends the certificate to the Local Committee with a copy to the applicant.<sup>33</sup> The Solicitor nominated on the application form will be appointed by the Local Committee to act for the assisted person unless it is not, for any reason, practicable for him to act in which event the Local Committee must forthwith appoint another Solicitor to act.<sup>34</sup> The Local Committee notifies the appointment to the Appointed Solicitor and intimates his name and address to the child, his parent, the Reporter and the Sheriff Clerk.<sup>35</sup>

#### Duties of the Appointed Solicitor

The Appointed Solicitor acts for the assisted person in accordance with the provisions of the Scheme, the Regulations and the Act of Sederunt, providing the normal services provided by a Solicitor in

32. A.S.(Legal Aid)(Children) 1971, para.4(4). He may examine the applicant on oath: ibid, para.9.

33. Ibid., para.5. The certificate is Form SLA (CH) 3.

34. Children Scheme, Art.7(1).

35. Ibid., Art.7(2). Intimation is made of Form SLA (CH) 5.

the Sheriff Court including acting in the application under s.42 of the 1968 Act and attending with the assisted person at all diets in the case and considering and advising on the question of an appeal to the Court of Session.<sup>36</sup>

There appears to be no provision in the Scheme or other legal aid regulations for instructing Counsel to appear before the Sheriff on a referral under s.42 of the 1968 Act. Counsel may appear in such cases, but it appears that the grant of legal aid does not extend to this.<sup>37</sup>

Expert witnesses may be employed, subject to whatever conditions are imposed by the Local Committee, whose sanction for such employment must be sought.<sup>38</sup>

A typical summary of the duties to be carried out by the Solicitor would include at least the following: interviews with child/parent; obtaining list of witnesses from Reporter and interviewing them; preparing for hearing before Sheriff; attending to conduct case before Sheriff; and advising on the question of an appeal to the Court of Session.

III. Legal aid for an appeal to the Sheriff against a decision of a Children's Hearing other than a decision to issue a warrant for a child's detention

Under s.49(1) of the 1968 Act, a child or his parent or both may, within a period of three weeks beginning with the date of any decision of a Children's Hearing, appeal to the Sheriff in chambers against that decision, and the child or his parent or both shall be

36. Ibid., Art.7(4).

37. Art.8 of the Children Scheme refers only to the employment of Counsel in the Court of Session.

38. Children Scheme, Art.8(2).

heard by the Sheriff as to the reasons for the appeal. A typical ground of appeal may be that any prescribed supervision requirement imposed by the Hearing is inappropriate, or that there was some sort of irregularity in the conduct of the Hearing.<sup>39</sup> Legal aid is available for such an appeal under s.1(6A) of the Legal Aid (Scotland) Act 1967. A very small number of such appeals occur each year and an even smaller number are legally aided.

#### Eligibility

If the appeal is taken to the Sheriff without any prior dispute as to whether the grounds of referral to the Hearing have been established, i.e. where there has been no prior application to the Sheriff by the Reporter under s.42 of the 1968 Act, then the provisions regarding eligibility for legal aid which apply to applications under s.42, apply to legal aid for the purposes of an appeal under s.49. Legal aid must therefore be in the interests of the child and the financial conditions must be satisfied.<sup>40</sup>

If however there has been a prior hearing before the Sheriff on the question of the grounds of referral under s.42 and legal aid was made available therefor, then the child or parent continue to be regarded as financially eligible for legal aid for an appeal.<sup>41</sup> The requirement that legal aid be in the interests of the child must still be satisfied.

#### Method of applying and the grant of legal aid

These are the same as in an application for legal aid in an

39. On the forms of appeal and procedure, see Renton and Brown Criminal Procedure (4th Ed. 1972), paras.19-82 to 19-88.

40. See supra, pp.271-273.

41. Legal Aid (Scotland) Act 1967, s.2(4)(c).

application to the Sheriff for a finding as to whether the grounds of referral are established.<sup>42</sup> A copy of the decision appealed against must be lodged with the Sheriff Clerk.

#### Duties of the Appointed Solicitor

These are basically the same as in other cases where legal aid is granted under the Children Scheme.<sup>43</sup>

#### IV. Legal aid for an appeal to the Court of Session against a decision of the Sheriff

By s.50(1) of the Social Work (Scotland) Act 1968 an appeal lies to the Court of Session by stated case on a point of law or in respect of any irregularity in the conduct of the case, at the instance of the child, his parent or both, or of the Reporter against any decision of the Sheriff under Part III of the 1968 Act. The application for a stated case must be made within twenty eight days of the Sheriff's decision,<sup>44</sup> and on deciding the appeal the Court of Session remits the case to the Sheriff for disposal in accordance with such directions as the Court may give.<sup>45</sup>

If the child or parent<sup>46</sup> wishes to appeal to the Court of Session or to oppose an application by the Reporter for a stated case, he must apply for an Appeal Certificate in much the same way as is followed under the equivalent provisions in the Legal Aid (Scotland) (Criminal Proceedings) Scheme 1975.<sup>47</sup>

42. See supra, pp. 273-274.

43. See Children Scheme, Art.7(4). See Renton and Brown Criminal Procedure (4th Ed. 1972) paras.19-82 to 19-88 for the forms of appeal and procedure.

44. Social Work (Scotland) Act 1968, s.50(2).

45. Ibid., s.50(3).

46. Whether or not either was an assisted person in the proceedings before the Sheriff: see para.9 of the Children Scheme.

47. See infra, Chapter XXI.

In all cases irrespective of who is the appellant, the child or parent must be financially eligible for legal aid.<sup>48</sup> In addition, where the child or parent is the appellant (but not where the appellant is the Reporter)<sup>49</sup> there must be substantial grounds for the appeal and it must be reasonable that legal aid should be granted.<sup>50</sup>

#### Financial eligibility

If the child or parent was legally aided in connection with any proceedings before the Sheriff under Part III of the Social Work (Scotland) Act 1968 out of which the proposed appeal arises, then the child or parent continues to be regarded as financially eligible for legal aid in connection with any subsequent proceedings on appeal to the Court of Session or on remit from that Court.<sup>51</sup> Thus, if legal aid was granted in connection with a referral to the Sheriff under s.42(2)(c) of the 1968 Act, then no fresh determination of financial eligibility requires to be carried out.

Such a determination must however be made if the child or parent was not legally aided in the proceedings out of which the proposed appeal arises or if legal aid was made available only under s.2(SA) of the 1967 Act in connection with an appeal against the child's detention in a place of safety while awaiting the outcome of a Children's Hearing, and initially an application for a Provisional Financial Certificate must be made.<sup>52</sup> Such a certificate is to the

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48. 1967 Act, s.2(4)(c) and (d).

49. See Children Scheme, Art.10(2).

50. 1967 Act, s.1(6A); Children Scheme, Art.10(1).

51. 1967 Act, s.2(4)(c).

52. Children Regulations, para.7(1).

effect that it appears that the applicant is unable, without undue hardship to himself or to his parent or child as the case may be, or to the dependants of either, to meet the expenses of proceedings on appeal to the Court of Session and that he has no other rights or facilities making it unnecessary for him to obtain legal aid nor does he have a reasonable expectation of obtaining financial or other help from a body of which he is a member.<sup>53</sup> If these financial criteria are not satisfied, a Provisional Financial Certificate cannot be granted except on special cause shown.<sup>54</sup>

Where legal aid was refused by the Sheriff in the proceedings out of which the appeal arises on the ground that either the applicant did have other rights or facilities for legal assistance, or that he had sufficient means, a subsequent application for a Provisional Financial Certificate in connection with an appeal to the Court of Session will only be granted if the child or parent can show either that those rights or facilities do not cover appeals to the Court of Session, or that there has been a material deterioration in his financial circumstances.<sup>55</sup>

As with all similar matters, the Regulations give no guidance on the meaning of the terms "undue hardship", "reasonable expectation" of financial help, or "material deterioration" in financial circumstances.

#### How to apply for a Provisional Financial Certificate

Application is made on Form SLA (CH) 6 to the Sheriff Clerk for the Sheriff Court of the district in which the proceedings before the

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53. Ibid., paras.7(1) and 6(2).

54. Ibid., para.6(2).

55. Ibid., para.7(1).

Sheriff took place.<sup>56</sup> The Clerk may question the applicant and may, after such other enquiry as he thinks fit, decide whether or not to grant a Provisional Financial Certificate.<sup>57</sup> There is obviously some advantage to be gained in the Solicitor for the applicant appearing with him before the Sheriff Clerk, if only to ensure that all the financial details are covered and to argue, if legal aid was previously refused by the Sheriff on the ground of sufficient means, that there has been a material deterioration in the applicant's financial circumstances.

After the Sheriff Clerk has made his decision he must report the financial and other relevant circumstances of the applicant to the Sheriff in order that the latter may determine whether undue hardship in meeting the cost of the appeal or other rights or facilities for legal aid exist.<sup>58</sup> Again, there would appear to be an opportunity for the applicant's Solicitor to argue these matters before the Sheriff. The Sheriff must report his determination to the Supreme Court Committee;<sup>59</sup> if it is against the applicant, any Provisional Financial Certificate granted will be discharged or the refusal by the Sheriff Clerk to grant one will be confirmed.<sup>60</sup> The determination of the Sheriff on this matter is final, provided that it is open to a person at any time to make a further application for legal aid on the ground that there has been a material change in his financial circumstances or that he has additional facts affecting his eligibility for legal aid.<sup>61</sup>

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56. A.S.(Legal Aid)(Children) 1971, para.6(1)

57. Ibid. It is not clear whether the applicant may be required to make a statement on oath regarding his circumstances. Para.9 of the Act of Sederunt seems to indicate that this is so, but gives no guidance on procedure.

58. Ibid., para.6(2)

59. On Form SLA (CH) 10.

60. A.S.(Legal Aid)(Children) 1971, para.6(2).

61. Ibid., para.7.

Where a financial certificate is granted, the Sheriff Clerk transmits it to the Supreme Court Committee.<sup>62</sup> The assisted person, or his parent or child, must, if he is a member of a body which might reasonably be expected to give him financial help towards the cost of the proceedings, sign an undertaking to pay to the Law Society any sum received from that body on account of those expenses.<sup>63</sup>

#### Applying for an Appeal Certificate

Once it has been ascertained that the child or parent is financially eligible for an appeal certificate, applications must then be made to the Supreme Court Committee initially for an Interim Appeal Certificate, irrespective of who is the appellant to the Court of Session.<sup>64</sup> If the appellant is the Reporter and the application for legal aid is for the purpose of opposing such appeal, an Interim Appeal Certificate is issued on request by the Solicitor who acted under the Children Scheme before the Sheriff, or the child or parent.<sup>65</sup>

If the child or parent is the appellant, then the Solicitor who acted under the Children Scheme at the time of the decision by the Sheriff submits a statement in writing of the grounds of appeal along with the application Form SLA (CH) 7 to the Supreme Court Committee, if he is of opinion that in all the circumstances there are substantial grounds for the appeal.<sup>66</sup> If no Solicitor was acting for the child or parent under the Scheme before the Sheriff, the Sheriff

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62. Children Regulations, para.7(2). This is done on Form SLA(CH)8.

63. Ibid., para.6(3). This is done on Form SLA (CH) 26.

64. Ibid., para.8.

65. Ibid., para.9(1).

66. Ibid., para.8(1).

Clerk assists the child or parent to complete the application Form SLA (CH) 7 and sends it with the Provisional Financial Certificate to the Supreme Court Committee together with a statement in writing of the terms of the proposed appeal prepared by the child or parent.<sup>67</sup>

The application for an Interim Appeal Certificate is considered not by the full Supreme Court Committee, but immediately by either the secretary and one member, or two members, or exceptionally the secretary or one member alone. After such enquiry<sup>68</sup> as they or he deems sufficient in the circumstances, an Interim Appeal Certificate will be issued unless the person or persons considering the application is or are reasonably satisfied that there are no prima facie grounds for appealing to the Court of Session.<sup>69</sup> Nor will an Interim Appeal Certificate be issued unless the Supreme Court Committee has received a Provisional Financial Certificate in the case of an applicant who was not legally aided before the Sheriff, and in the case of someone who was refused legal aid before the Sheriff, the Committee must be satisfied that it would not be unreasonable that the services of an Interim Solicitor should be made available to the applicant in connection with his application for an Interim Appeal Certificate.<sup>70</sup>

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67. Ibid. Hopefully by the time the child or parent decide to appeal in a case where neither was legally aided before the Sheriff, they will have consulted a Solicitor who himself will be able to prepare a statement of the grounds of appeal.

68. No indication is given in the Regulations as to what sort of enquiry is carried out.

69. Ibid., para.8(2).

70. Ibid.

The Committee decision is intimated to all parties and is final, subject to any review that may be necessary following a determination by the Sheriff that an applicant who was refused a Provisional Financial Certificate by the Sheriff Clerk does in fact meet the conditions for issue of such a certificate.<sup>71</sup> The Solicitor appointed as Interim Solicitor will normally be the Solicitor requested by the applicant and his appointment will also be intimated to all parties.

The Interim Appeal Certificate and the appointment of the Interim Solicitor persists until the full application for an Appeal Certificate is determined at a meeting of the Supreme Court Committee, or until an adjusted stated case is lodged with the Court of Session.<sup>72</sup>

#### Duties of the Interim Solicitor

The reason for the granting of an Interim Appeal Certificate is simply to allow the Solicitor concerned to make progress with the appeal within the statutory limits laid down under the Social Work (Scotland) Act 1968. As already indicated an application for a stated case must be made within twenty eight days of the Sheriff's decision; the Sheriff prepares a draft which is then adjusted within time limits laid down by Rules of Court.<sup>73</sup>

Where an Interim Appeal Certificate is issued within the twenty-eight day period above-mentioned, the Appointed Solicitor or Interim Solicitor submits the certificate to the Sheriff Clerk along with the application for a stated case.<sup>74</sup> If it is issued after the application

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71. Ibid., para.8(3). See supra, p.281.

72. Ibid., para.9(4). At the meeting of the Supreme Court Committee the Interim Appeal Certificate will either be discharged or replaced by a full Appeal Certificate.

73. See Rules of Court, rule 288A; Renton and Brown Criminal Procedure 4th ed. (1972) paras.19-89 to 19-96.

74. Children Regulations, reg.9(2)(a).

for a stated case has been made, it must still be lodged with the clerk rather than retained by the Solicitor.<sup>75</sup>

After the Interim Appeal Certificate has been issued, the Solicitor named therein must carry out the procedure contained in Rule 289A of the Court of Session Rules of Court (which relates broadly to adjustment, service and lodging of the stated case) and must send a copy of the adjusted stated case to the Supreme Court Committee along with an application for an Appeal Certificate (Form SLA (CH) 14).<sup>76</sup> All work done up to the point where the adjusted stated case is lodged in the Court of Session is covered by the Interim Appeal Certificate, unless the Supreme Court Committee discharge the certificate on an earlier date.<sup>77</sup>

It will be observed that up to this point in the procedure there is no necessity for the involvement of an Edinburgh correspondent in cases which originate outside Edinburgh.

#### Consideration of applications for Appeal Certificates

This is carried out by the Supreme Court Committee. The Committee may make such enquiries as to the proposed grounds of appeal as they think necessary and will have before them the adjusted stated case, a statement of the grounds of appeal together with the appointed Solicitor's views on whether the grounds are substantial and whether it is reasonable that the applicant should receive legal aid for the appeal, the financial certificate (where appropriate) and the application Form SLA (CH) 14.

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75. Ibid., reg.9(2)(b).

76. Ibid., reg.9(3).

77. Ibid., reg.9(4).

The Committee must be satisfied that there are substantial grounds for the appeal and that it is reasonable that legal aid should be granted.<sup>78</sup> If they are not so satisfied they must refuse the Appeal Certificate and discharge any Interim Appeal Certificate.<sup>79</sup> They will also discharge the Interim Appeal Certificate if they receive information that the Provisional Financial Certificate has been discharged by the Sheriff.<sup>80</sup>

When considering an application for an Appeal Certificate, the Supreme Court Committee has power

- (a) to require the attendance before them of the Appointed Solicitor (who appeared before the Sheriff) or his Edinburgh Correspondent and of the child and his parent and, where applicable, the attendance of, or at the discretion of the Committee, a note from Counsel;
- (b) to authorise the Appointed Solicitor to have transcribed and transmitted to them all or such part of the shorthand notes (if any) taken at the proceedings before the Sheriff as they may direct; and
- (c) to appoint one of their number or some other person to interview the applicant and any other person and to report to the Committee.<sup>81</sup>

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78. Children Scheme, Art.10(1). If the appellant to the Court of Session is the Reporter, the applicant for legal aid does not have to show that he has substantial grounds for opposing the appeal: Art.10(2).

79. Ibid.

80. Children Regulations, reg.8(5). Discharge is intimated to all parties.

81. Children Scheme, Art.10(3).

The Supreme Court Committee decision on the application for an Appeal Certificate is final and is intimated to the child, its parent, the Appointed Solicitor or his Edinburgh correspondent, to the Reporter and the Principal Clerk of Session.<sup>82</sup>

It is unusual for the Supreme Court Committee to require attendance of anyone before them and it normally completes its deliberations on the basis of the written information before it.

#### Grant of the Certificate

If an Appeal Certificate is granted, this replaces the Interim Appeal Certificate under which legal aid has been given<sup>83</sup> and it entitles the assisted person to legal aid until the final disposal of the appeal, including a remit to the Sheriff in terms of s.50(3) of the Social Work (Scotland) Act 1968.<sup>84</sup>

The Interim Solicitor is appointed as Appointed Solicitor unless, on special cause shown, the Supreme Court Committee find it necessary to appoint another Solicitor to act as Appointed Solicitor.<sup>85</sup> The Committee also appoint an Edinburgh Solicitor <sup>(where appropriate)</sup> to act along with the Appointed Solicitor and the Appeal Certificate is sent to the former.<sup>86</sup>

An Appeal Certificate may be subsequently discharged by the Supreme Court Committee if they are of opinion that it appears unreasonable in the light of subsequent developments that the assisted person should continue to receive legal aid.<sup>87</sup> The assisted person

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82. Ibid., Art.10(4).

83. Children Regulations, reg.8(6).

84. Children Scheme, Art.12.

85. Children Regulations, reg.8(6).

86. Children Scheme, Art.11. This is Form SLA (CH) 15.

87. Ibid., Art.13.

and the Appointed Solicitor may be heard before the certificate is discharged.<sup>88</sup> If it is discharged, this fact is intimated to all parties and the Principal Clerk of Session.<sup>89</sup>

Duties of Solicitors in Appeals

It will be remembered that the Interim Appeal Certificate will cover all work done up to the lodging of the adjusted stated case or the replacement of the Interim Appeal Certificate by a full Appeal Certificate.<sup>90</sup> The procedures after such a point are carried out primarily by the Edinburgh Solicitor for the applicant and are detailed in Rules 289A and 277(h), (j) and (k) of the Court of Session Rules of Court.

It is the duty of the Appointed Solicitor (whether or not the case originates in Edinburgh) to arrange for the employment of Junior Counsel to advise or and argue the appeal. The employment of Senior Counsel or two Junior Counsel is not allowed except with the prior sanction of the Supreme Court Committee.<sup>91</sup>

The Court of Session may hear all or any of the proceedings in chambers.<sup>92</sup> After the decision, the case is remitted to the Sheriff to deal with<sup>93</sup> and the original Appointed Solicitor must appear for the assisted person at that diet.<sup>94</sup>

88. Ibid.

89. Ibid., Art.14.

90. See supra, p.285.

91. Children Scheme, Art.8(1).

92. Rules of Court, Rule 289A(7).

93. Social Work (Scotland) Act 1968, s.50(3).

94. Children Scheme, Art.7(4).

Final Stages

At the end of the case the Appointed Solicitor must <sup>report completion and</sup> submit his account of expenses in accordance with the civil judicial table of fees to the Central Committee.<sup>95</sup> This details the work done and can be submitted on Form SLA (CH) 25 or as a separate accompaniment thereto. The length of proceedings Form SLA (CH) 20 (where appropriate) must also be submitted along with the Legal Aid certificate itself.

The Central Committee will usually be able to agree the amount payable in respect of the account without the necessity of taxation, but provision is made for the latter.<sup>96</sup> After the account is paid, the Solicitor is obliged to make payment of any fees e.g. to Counsel and outlays in so far as these are not already paid.<sup>97</sup> Normally Faculty Services Ltd. render a fee note in respect of the appearance of Counsel in the Court of Session direct to the Edinburgh Solicitor. This is forwarded to the Central Committee along with the latter's account and is settled separately under the provision of Art.16(3) of the Children Scheme.

As no expenses are awarded in respect of any proceedings in the Sheriff Court or Court of Session, the provisions of para.10(1) of the Act of Sederunt (Legal Aid)(Children) 1971 regarding awards of expenses seem superfluous. But by paras.10(2) and 10(3) of that Act of Sederunt, where an applicant for legal aid is entitled, through the membership of any body or through the holding of or the terms of any <sup>insurance</sup> ~~insurable~~ policy, to payment of or to a contribution towards his

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95. Ibid., Art.16(1).

96. Ibid., Art.16(2). The amount agreed is treated as if it were an amount allowed on taxation: Children Regulations, reg.10.

97. Ibid., Art.16(4).

legal expenses in connection with which he has received legal aid, the payment or, as the case may be, the contribution is paid into the Legal Aid (Scotland) Fund through the Law Society by the body or insurance company concerned.

PART IV

CRIMINAL LEGAL AID

CHAPTER XVIIIINTRODUCTION TO CRIMINAL LEGAL AIDMain provision: 1967 Act, ss.2(2) and (5)Introduction

Legal aid for criminal proceedings is provided for under the 1967 Act and the following subsidiary instruments:

The Legal Aid (Scotland)(Criminal Proceedings) Scheme

1975 (hereinafter referred to as "the Scheme");

The Legal Aid (Scotland)(Criminal Proceedings)

Regulations 1975 ("the Regulations");<sup>1</sup>

The Act of Adjournal (Rules for Legal Aid in Criminal

Proceedings) 1964 ("the Rules") as amended;<sup>2</sup> and

The Act of Adjournal (Criminal Legal Aid Fees) 1964

as amended.<sup>3</sup>

Criminal legal aid was introduced in 1964, some fifteen years after legal aid in civil cases. Initially it was available only in the Sheriff Court and the High Court of Justiciary; accused persons appearing in the busiest criminal court, the Burgh (or Police) Court were not entitled to legal aid until 1975 when the District Court was set up.<sup>4</sup> Legal aid is therefore now available in all courts of summary and solemn jurisdiction and for all appeals. In addition, legal advice on a criminal matter is available under the Legal Advice and Assistance Act 1972, but of course that Act does not generally apply where the assistance given amounts to ".... a step in the

1. S.I. 1975/717.

2. S.I. 1964/1409, amended 1975/835 and 1976/371.

3. S.I. 1964/1410, amended 1965/1788, 1968/1933, 1971/926, 1973/673, 1973/1145, 1975/836, 1976/339 and 1976/1062.

4. District Courts (Scotland) Act 1975, s.21.

institution or conduct of any proceedings before a court ....".<sup>5</sup>

Between 1973 and 1975 advice and assistance under this Act was frequently given by a Solicitor to a person who was being prosecuted before the Burgh or Police Courts in the form of preparing the case until the point when the accused appeared for trial, the Solicitor then conducting the trial gratuitously or for a very small fee. With the introduction of legal aid in the District Court this practice has virtually ceased, but advice and assistance under the 1972 Act is still given on criminal matters if legal aid under the 1967 Act has been refused or withdrawn.<sup>6</sup> It is also competent for a Solicitor to give assistance under s.2(4) of the 1972 Act<sup>7</sup> to any person before a Sheriff or District Court whether by representation or otherwise where the Court so requests or approves, at a time before or during the proceedings when the Solicitor is present in Court, provided the accused is not at that time receiving legal aid for the purposes of those proceedings.<sup>8</sup>

The distinctive features of criminal legal aid under the 1967 Act appear to be threefold:

- (1) every person appearing from custody at the initial stages of criminal proceedings is entitled to entirely free advice and representation through those early stages, through the system of Duty Solicitors;<sup>9</sup>

5. 1972 Act, s.2(3). See also *infra*, Chapter XXIII.

6. *Ibid.*, s.2(2) and (5). Legal advice and assistance may also be given before a prosecution is taken up e.g. where a suspect seeks legal advice before being charged.

7. As amended by the District Courts (Scotland) Act 1975, s.21(2).

8. It does not appear that this provision has been widely used in Scotland. It involves as a condition precedent the completion of the appropriate application form and payment of any contribution. See *infra*, Chapter XXIII.

9. See *infra*, Chapter XIX.

(2) unlike civil proceedings, in criminal trial proceedings the grant of legal aid for a trial is in the discretion of the Court and not the Law Society of Scotland;<sup>10</sup> and

(3) if legal aid is granted, the accused pays no contribution to the expenses of his defence.<sup>11</sup>

Of these features, the latter two have been the subject of controversy at least since 1964. So far as the first of these two is concerned, a substantial body of opinion both among the Bench and the Solicitors profession is to the effect that the Court is not the proper vehicle for the grant or refusal of legal aid. Critics point to the arbitrary way in which some judges exercise their discretion, but anomalies and differing standards are inevitable when only the most rudimentary guidelines are given in the legislation. So far as the last feature is concerned the ever-increasing cost of criminal legal aid is frequently the butt of criticism, although fees in Scotland are in reality very moderate compared to those in England. But it may be doubted that the expense of extracting contributions from accused persons would ever be worthwhile.<sup>12</sup> It is submitted that at the root of the matter lies the presumption of innocence: if

10. But legal aid for an appeal against conviction or sentence is granted or refused by the Law Society.

11. This is in contrast to the position in England, where an accused may have to pay such a contribution. But it appears that in many cases the sum recovered in contributions is very small.

12. The Guthrie Report (1960 Cmnd.1015) included a Note of Dissent on these points by Mr. Ewan Stewart (now Lord Stewart). He felt that future income should be disregarded by a Court in assessing financial eligibility and an accused should be liable to pay a lump sum contribution to the cost of the proceedings on the basis of his existing resources: see Guthrie Report, pp.66-71.

we are prepared to presume a man innocent until proved guilty, then we must give him the facilities to establish his innocence if he can. It is no use conferring such a presumption without giving also the means of establishing whether it is well-founded. Furthermore, one of the oldest traditions in Scots law is that an accused person, particularly on a serious charge, should not go unrepresented; many think this tradition should not lightly be departed from.<sup>13</sup>

In this regard, Scotland's system is ahead of many others in the facilities it gives to the accused. In Magistrates Courts in England only a few Duty Solicitor schemes are in operation, even although legal aid for criminal trials was made generally available in England in 1930.<sup>14</sup> In the United States, many cities maintain Public Defender Services, but generally an accused will not be able to nominate the most distinguished criminal lawyer to act for him (as he can here), but will have one appointed for him by the Court.<sup>15</sup> In France, a court-appointed lawyer acts without fee for an accused, the system prohibiting an indigent accused from choosing a lawyer himself.<sup>16</sup>

The scope of the system in Scotland is best illustrated by an enumeration of the types of criminal proceedings in which legal aid

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13. Even on a minor charge legal assistance is frequently invaluable. It has hitherto been considered that many road traffic cases do not merit a grant of legal aid, but the Criminal Law Act 1977 has increased many of the penalties for common traffic offences, making the potential loss to an offender that much greater and the necessity of legal assistance that much more acute.
  14. Under the Poor Prisoners Defence Act 1930.
  15. The literature in the United States on public defender services is immense. See Index to Legal Periodicals (The H.W. Wilson Co., New York) sub. nom. Public Defenders.
  16. See Sheehan, Criminal Procedure in Scotland and France (1975) p.10.

is available. The following three categories are "distinct" proceedings:<sup>17</sup> in the first category, legal aid is available automatically as of right; in the latter two categories, it is available only after a certificate has been granted by the appropriate body.

- (1) without enquiry into the resources of the accused
- (a) in solemn proceedings, provided no prior determination as to his eligibility has been made, until, after the stage of judicial examination he is admitted to bail or fully committed; or
- (b) in summary proceedings before the Sheriff or District Court where he is in custody, until the conclusion of the first diet at which he is called upon to plead and of any application for liberation which follows, or if he has pleaded guilty at the first diet, until his case is finally disposed of.<sup>18</sup>

In these proceedings no application for legal aid need be made; representation is provided by the Duty Solicitor.

- (2) after enquiry into the resources of the accused and after consideration of whether he has any other rights or facilities in his defence
- (a) in solemn proceedings and
- (b) in summary proceedings, provided that the court considers the granting of legal aid to be in the interest of justice.<sup>19</sup>

This relates to legal aid for criminal trials.

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17. Rule 2.

18. Rule 2(a). See infra, Chapter XIX

19. Rule 2(b)(i) and (ii). See infra, Chapter XX.

(3) proceedings of any kind by way of appeal to the High Court<sup>20</sup>

In this category an application for legal aid must be made to the Law Society of Scotland.

Within these three "distinct" categories a number of steps of process may be taken without recourse to the Court or the Law Society.<sup>21</sup> In category (1) proceedings in connection with a bail appeal may be taken by the Duty Solicitor; if however the accused has already been granted legal aid for his trial, such a step would be taken as necessary by the Solicitor nominated by him. In category (2) if the accused has been remitted from the Sheriff Court to the High Court for sentence, representation in proceedings relating thereto is included under the legal aid certificate granted for the trial. Category (3) covers all types of appeals whether taken at common law or under the Criminal Procedure (Scotland) Act 1975 ("the 1975 Act") and thus appears to include:

- (a) an appeal against conviction and/or sentence under s.228 of the 1975 Act, including an application for bail under s.238(1) of the 1975 Act pending the determination of such an appeal;
- (b) an appeal by Stated Case under s.442 of the 1975 Act, whether the appeal is at the instance of the accused or the Procurator Fiscal, including an appeal by the accused under s.446(2) of that Act against the amount of caution fixed or the refusal of interim liberation by the Sheriff or District Court Justice;
- (c) an appeal by Bill of Suspension;
- (d) /-

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20. Rule 2(c). See infra, Chapter XXI

21. Rule 2.

- (d) proceedings where the Secretary of State refers a case or any point therein to the High Court under s.263(1) of the 1975 Act; and
- (e) proceedings following a remit from the High Court to an inferior court on the sustaining of a Crown appeal by Stated Case against an acquittal under s.452(2) of the 1975 Act.

#### Special procedures

It will be observed that the Rules are widely drawn with the result that doubts have arisen regarding the applicability of legal aid to various specialist aspects of the criminal process. In some of these cases the Central Committee has been faced with an interpretative decision and have concluded that legal aid is available for the following:

##### (i) Petitions for removal of driving disqualifications

These are made under section 95 of the Road Traffic Act 1972 and may come before the Court some considerable time after the disqualification was imposed. Although Lord Clyde and Lord Cameron in MacLeod v Levitt 1969 S.L.T.286 expressed the view<sup>22</sup> that such a procedure was not a continuation of the original process and had none of the essential qualities or characteristics that apply to a Court of criminal or civil jurisdiction, the Central Committee take the view that such proceedings must be either civil or criminal for purposes of legal aid, that it is more appropriate for the proceedings to be treated as criminal, and that applications for legal aid for such petitions should be made to the Court under the criminal scheme.<sup>23</sup>

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22. At pp.287 and 288.

23. See (1976) 21 Journal of Law Society of Scotland 240. See also infra, Chapter XX for details of making an application, which is exactly the same as that which applies to a trial. Form SCLA 2 should be amended accordingly.

(ii) Petitions to the Nobile Officium of the High Court

Such petitions are competent whenever there is an unforeseen occurrence in the course of criminal business for which there is no remedy in law.<sup>24</sup> When the matter of legal aid for such petitions came before the Central Committee it was clear that it had not been contemplated when the original Scheme was framed. The Committee holds the view that such petitions ought to be covered by the certificate for the proceedings in the inferior court, but that the Supreme Court Committee should scrutinise the merits of the petition. If that Committee approves, then the proceedings will be covered by the existing certificate.<sup>25</sup>

This of course presupposes that there is in existence a legal aid certificate, but it is clear that the Supreme Court Committee has merely a limited function. It should also be noted that apparently a petition to the nobile officium may be taken by the Crown;<sup>26</sup> legal aid would seem to be available to <sup>answer</sup> ~~defend~~ such a petition by lodging answers and appearing at the appropriate diet.

(iii) Bills of Advocation

This is a form of appeal only open to the prosecutor in a criminal case. It has experienced somewhat of a revival in recent

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24. See Stoddart, The Nobile Officium of the High Court of Justiciary 1974 S.L.T. 37 and cases there cited.

25. See (1976) 21 Journal of Law Society of Scotland 458.

26. In H.M. Advocate v Greene 1976 S.L.T.120, the Crown appealed to the nobile officium craving an order to recall an order admitting an accused to bail, which latter order had imposed certain conditions. The court dismissed the petition apparently as incompetent, but from the judgment it appears that the Court was really holding that there was no gap in the law or extraordinary or unforeseen occurrence warranting the use of the nobile officium. It is submitted that this was really a judgment on the merits rather than the competency and nowhere does the Court say that the Crown cannot competently present a petition to the nobile officium. Presumably if the Court had decided the petition to be fundamentally incompetent, it would have said so.

years<sup>27</sup> and in one of the cases in which a Sheriff had refused a Crown motion for an adjournment, the Crown presented a Bill of Advocation to the High Court. The question of representation of the accused immediately arose as he was in receipt of legal aid; the Central Committee's view was that the representation was covered by the legal aid certificate for proceedings in the inferior court.<sup>28</sup>

(iv) "Mental Health" Proofs

In some Sheriff Court summary cases it is the practice where an accused is found to be suffering from mental disorder to appoint a special diet at which evidence may be taken from two medical practitioners in terms of s.376 of the Criminal Procedure (Scotland) Act 1975, with a view to the Court making a hospital order. The question of mental disorder is usually made known to the Court at the first appearance on complaint, at which the accused is represented by the Duty Solicitor. The latter is not required to represent the accused at a subsequent diet of proof as part of his duties under the Scheme and it is submitted that a fresh application for legal aid requires to be made in the normal way.

The practice of fixing a separate diet arises simply because the Crown usually do not have reports from two medical practitioners at the time of the accused's first appearance; the accused is usually remanded for the reports to be obtained.<sup>29</sup>

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27. See e.g. MacLeod v Levitt 1969 S.L.T.286; Skeen v Skerret 1976 S.L.T. (Notes) 6; Skeen v McLaren 1976 S.L.T. (Notes) 14.

28. See (1976) 21 Journal of Law Society of Scotland 458.

29. See Criminal Procedure (Scotland) Act 1975, ss.375-379.

CHAPTER XIX

LEGAL AID UNDER THE DUTY SOLICITOR SYSTEM

Main provisions: 1967 Act, s.2(5); Scheme Arts.6-8

Introduction

In all Sheriff and District Courts throughout Scotland there exists a comprehensive system for the provision of entirely free legal services by "Duty Solicitors" to accused persons making their first appearances before these Courts.<sup>1</sup> The services, which are available without enquiry into the resources of the accused, are however normally restricted to persons appearing from custody; those accused who have been cited to attend Court for a first appearance do not normally come within the scope of this category of legal aid, although they may of course apply for legal aid for a subsequent trial.<sup>2</sup>

At the outset, it is important to note that an accused person can refuse to be represented by a Solicitor at any stage; in particular he can refuse the services of the Duty Solicitor. In the Sheriff Court he may be represented by a Solicitor other than the Duty Solicitor, provided that other Solicitor is not excluded from giving legal aid, has received instructions, is willing to provide the same services and is present in Court when they are required.<sup>3</sup> In the District Court no such formal rules apply, which

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1. Although Reg.3(1) envisages a situation where application for this type of legal aid must be made, in fact it is provided automatically without application.
  2. See *infra*, Chapter XX. Occasionally persons on petition or complaint appear at the first appearance "by arrangement" with the Fiscal, rather than from custody; such persons are entitled to the services of the Duty Solicitor.
  3. Scheme Art.8(5). It sometimes happens that the Police or the family of the accused contact a Solicitor other than the Duty Solicitor with a request that he should appear in the case. Such an arrangement may involve that Solicitor making an application for legal aid at the trial.

would appear to mean that provided a Solicitor other than the Duty Solicitor is present in Court then either he may act instead of the Duty Solicitor if the accused applies for legal aid in the normal way,<sup>4</sup> or he or the Court itself may take advantage of s.2(4) of the Legal Advice and Assistance Act 1972 in order to provide representation for an accused who refuses the services of the Duty Solicitor.<sup>5</sup>

#### The Duty Solicitor Scheme

##### (a) Preparation of the Duty Plan

Every Local Committee is obliged to prepare annually a Duty Plan for each Sheriff and District Court, providing a rota of Solicitors who will be available at all times throughout the year when required to act for or advise persons on criminal charges.<sup>6</sup> The Plan is prepared in draft form in the Autumn, Local Committees sending out circular letters to the Solicitors in each Court area asking if they wish to be included. Any Solicitor entitled to give legal aid may apply to be included in the Duty Plan but in many parts of Scotland there are too many Solicitors for the places available.

Depending on the number of applications for inclusion in the Plan, the rota is organised so that each Solicitor does a period of duty in each year, typically for a week or a month at a time. The Plan specifies precisely the class of duties for which each Duty Solicitor is responsible for each day of the year, and each Duty Plan

4. See infra, Chapter XX.

5. The latter course is not often adopted, simply because the existence of the provision is not well known and it involves filling in a Legal Advice and Assistance application with the payment of any contribution (or instalment thereof) before legal aid can be given. See infra, Chapter XXIII.

6. Scheme, Art.6(1).

makes provision that additional or alternative Duty Solicitors are available in special circumstances as, for example, illness or conflict of interest or duty.<sup>7</sup>

On completion of the draft Plan, it is sent to the Central Committee, with a copy to each Duty Solicitor named therein. The Sheriff Court Plan is also sent to the Sheriff Principal of any Sheriffdom within which the area of the Local Committee is situated;<sup>8</sup> the District Court Duty Plan is sent to the Justices' Committee for each Commission Area within the area of the Local Committee.<sup>9</sup>

The Sheriff Principal, the Justices' Committee and any Solicitor or group of Solicitors have two weeks to make representations to the Central Committee as to proposed amendments to the Plan including the removal of a Solicitor's name from the Duty Plan.<sup>10</sup> Normally such representations are confined to timetabling, but there appear to be no restrictions as to the type of representations which may be made, even perhaps if they relate to the professional experience of applicants for inclusion. In any event, the Central Committee, before considering any representations made to it, must hear, if requested, any persons who have made representations and may ask the Local Committee to reconsider and re-submit before a date to be specified by the Central Committee the Duty Plan prepared by them and thereafter may amend such Duty Plan. It is then presented for approval by the Central Committee.

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7. Scheme, Art.6(2).
  8. For a list of the Sheriffdoms and areas of Local Committees see supra, p.90.
  9. As defined in Section 26(1) of the District Courts (Scotland) Act 1975.
  10. Scheme, Art.6(3).

Once the Plan has been finally approved by the Central Committee, it is returned to the Local Committee for distribution to each Duty Solicitor named therein, to the Chief Constable(s) in the area of the Local Committee, the Sheriff Principal of any Sheriffdom in which that area is situated and in the case of the District Court Duty Plan to the Justices' Committee for each Commission Area within the area of the Local Committee.<sup>11</sup>

There is prima facie no reason that a Solicitor cannot undertake duty on more than one Duty Plan, for example where he has a place of business in more than one Sheriff Court district or where he is prepared to undertake duty in both the Sheriff Court and District Court. The view of the Central Committee is that there should be no hard-and-fast rule on this matter, it being essentially one for the Local Committee to decide having regard to the whole circumstances, including any other Duty Rota commitments of the Solicitor, and that the Central Committee should not interfere with the Local Committee's discretion at first instance, without prejudice to its own authority to review a plan upon representations being made upon it.<sup>12</sup>

This being so, it would appear to be up to the individual Solicitor concerned to convince his Local Committee that he is capable of duty in different Courts at different periods, bearing in mind the fact that one of the most time-consuming functions of the Duty Solicitor is conducting "follow-up duties" where, for example, in a summary case, sentence is deferred for Social Enquiry or other Reports.<sup>13</sup>

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11. Scheme, Art.6(4). There is no provision for the appointment of any Convener of the Duty Solicitors at any Court, as there was under the system of Agents for the Poor, but informal arrangements exist in some Courts.

12. See (1975) 20 Journal of the Law Society of Scotland 335.

13. See infra, p.306 and Scheme, Art.8(3)(b).

Article 7 of the Scheme provides that the Law Society may appoint and maintain a Salaried Solicitor for any area or court to perform the duties provided by a Duty Solicitor if a Local Committee fails or is unable to prepare a Duty Plan, or where the Central Committee is dissatisfied with the service to be provided in any Duty Plan or if it considers such an appointment desirable for the proper functioning of the Scheme.<sup>14</sup> No such appointment has been required since the inception of criminal legal aid in 1964.

(b) The Duties of the Duty Solicitor

The prime duty of the Duty Solicitor is to attend on persons in custody who are about to make their first appearances in Court and to represent them at those appearances, but certain other duties are prescribed. It should be observed at the outset that if the services of the Duty Solicitor are not required on a particular day, there is no obligation on the Solicitor to attend the Court.

(i) Call-out

When the Police have charged someone with murder, attempted murder or culpable homicide the services of the Duty Solicitor become available once the accused is in their custody. The Police have a general duty under s.19 of the Criminal Procedure (Scotland) Act 1975 to intimate to a Solicitor that his professional assistance is required if an accused so desires, and in practice this intimation is often made to the Duty Solicitor irrespective of the charge. But only in the

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14. If such an appointment is made, a person entitled to legal aid is not entitled to receive it otherwise than from the salaried Solicitor in respect of any of the duties for which the salaried Solicitor has been appointed, unless a Solicitor entitled to give legal aid has been instructed and is willing to act. The Law Society determines the conditions of employment of any salaried Solicitor: see Scheme, Art.7(2).

three above-mentioned cases is the Duty Solicitor obliged (if requested) to visit the accused in custody (usually the Police Station) and advise and act for him until he is brought to the Sheriff Court for judicial examination.<sup>15</sup>

(ii) Appearances on petition

All accused persons (including those charged with murder, attempted murder or culpable homicide as above) appearing on petition from custody are entitled to the services of the Duty Solicitor if they so desire. The Duty Solicitor interviews the person in custody in the precincts of the Court before judicial examination, obtains instructions as to the declaration or plea to be made, appears at judicial examination and continues to represent him until he is admitted to bail or fully committed. Representation includes appearing at the hearing of any application under s.30 of the Criminal Procedure (Scotland) Act 1975 for review of bail or as to the Court's decision thereon, or at any bail appeal to the High Court, the latter including instructing Counsel.<sup>16</sup>

After these steps have been carried out the Duty Solicitor ceases to act as such. The accused is now free to make an application for legal aid for his trial and to nominate the Duty Solicitor or any other Solicitor to act for him. However, in cases of murder, attempted murder or culpable homicide the Duty Solicitor is deemed to be the Nominated Solicitor as soon as the accused is fully committed or admitted to bail and continues to represent him and to render the normal services provided by a Solicitor for an accused person until the final disposal of the case; provided that:

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15. Scheme, Art.8(1).

16. Scheme, Art.8(2).

- (a) an application for legal aid for the trial is granted; and
  - (b) the accused does not request that another Solicitor should act for him and such Solicitor is appointed.<sup>17</sup>
- (iii) Appearances in Summary Cases

The Duty Solicitor is obliged to interview in the precincts of the Court all persons in custody awaiting their first appearance to answer any complaint under summary procedure. The Procurator Fiscal has of course to arrange for service of the complaints before the Court convenes and in busy Courts this is often not practicable until shortly before that time.<sup>18</sup> The interviews are usually conducted in the cell area of the Court.

The Duty Solicitor must offer his services and, if requested, take the accused's instructions as to his plea. He must thereafter render the other services normally provided by a Solicitor up to the conclusion of the first diet at which a plea is recorded, that is, he appears for the accused when he is brought before the Court, intimates his plea or any objection to the competency or relevancy of the charge.<sup>19</sup> If the plea is one of guilty he must make a plea in mitigation and if the case is continued e.g. for reports, he must appear at all subsequent diets until the case is finally disposed of, which means that he will require to "follow-up" the case throughout any continuations for reports or until the end of any period for which

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17. Scheme, Art.8(1).

18. This sometimes has the effect in practice of the Duty Solicitor interviewing accused persons before they have actually received service of any complaint etc.

19. Scheme, Art.8(3). If the case is continued without plea, the Duty Solicitor is obliged to appear at the continued diet.

sentence is deferred.<sup>20</sup> If the plea is one of not guilty, the Duty Solicitor also makes a bail application if necessary; if it is refused the Duty Solicitor acts, as in a solemn case, in connection with any bail appeal. The Scheme is not however clear as to whether this includes an application for review of bail under s.299 of the Criminal Procedure (Scotland) Act 1975, but s.2(5)(b) of the 1967 Act uses the expression " .... any application for liberation which may follow .... " on the first diet, which appears to cover this situation.<sup>21</sup> The point may however be academic, for an application for review of bail is incompetent until five days after the original decision on bail, by which time the accused may have been granted legal aid for his trial.<sup>22</sup>

(iv) Making a further application for legal aid

In all Sheriff Court cases the Duty Solicitor is also bound to assist where necessary any applicant in his application for legal aid, to advise such applicant of his right to select any Solicitor to act for him at his trial and to lodge the application with the Clerk of Court immediately.<sup>23</sup>

In practice all accused persons can see a list of available Solicitors prior to appearing in Court for the first time and make their choice for a subsequent trial. In some Sheriff Courts e.g. in

20. This is one of the most time-consuming duties especially if sentence is successively deferred for lengthy periods e.g. to allow an accused person to repay funds which he has obtained dishonestly.

21. See Scheme, Art.8(3) and the specific wording of Art.8(2) in relation to solemn proceedings.

22. See infra, Chapter XX.

23. Scheme, Art.8(4). No such specific rule appears to apply in the District Court, but the matter appears to be covered generally for all courts under Art.6(1)(d) of the Scheme.

Glasgow, the Local Committee have a member of staff in attendance to carry out the function of advising the accused person on the choice available to him if he does not wish the Duty Solicitor to act at the trial. If the application is lodged and the accused is cited to a special diet for the application to be determined it does not appear that the Duty Solicitor is obliged to attend such a special diet.<sup>24</sup>

If an application for legal aid for a trial is subsequently granted in the name of another Solicitor, the Duty Solicitor, if he originally acted, is obliged to report to that other Solicitor the steps so far taken and to give such other information and papers as that other Solicitor may reasonably require.<sup>25</sup> Some Duty Solicitors adopt the practice of directly passing on completed Legal Aid application forms in which another Solicitor is nominated to that Solicitor for him to lodge on behalf of the accused, but this practice would appear to be inconsistent with the terms of Article 6(1)(d) of the Scheme. The practice appears to have originated in busy Courts where legal aid applications are not determined at the first appearance, but at a later special diet. In any event neither the accused nor the Legal Aid Fund is prejudiced, provided the application is passed on and lodged without delay. If the accused is in custody the Duty Solicitor is entitled to act until the matter of bail is finally disposed of; if the application is passed on before bail is finally

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24. On the fixing of special diets and attendance thereat, see infra, Chapter XX. Nor is the Duty Solicitor obliged to attend at any hearing before a Means Enquiry Court: see 17th Report of the Law Society of Scotland on the Legal Aid Schemes (1966-67) p.58.

25. Scheme, Art.8(6).

granted or refused, a Solicitor nominated in any such application cannot claim fees for such work where the Duty Solicitor is still acting.

(v) Report to Law Society

On conclusion of the period of duty, the Duty Solicitor sends a Report (Form SCLA 19) to the Central Committee. This details the period of duty, the names of the accused represented and the fee claimed. It will be observed that the form carries a column for entering the number of the session at which the duty was performed. This applies where there are a large number of accused and where the maximum fees for duty at one session are rendered inoperative by the number of the accused represented. Briefly, at present the total fee for the first session cannot exceed £25.50, of which £11.90 covers the first case and £1.70 each subsequent case. It will thus be observed that if representation is afforded to more than nine accused, the sessional fee will be exceeded, so strictly speaking, the Duty Solicitor should ask for (and is entitled to) certification of a second session, and Form SCLA 19 should be completed accordingly.<sup>26</sup>

Form SCLA 19 only covers representation afforded during the period of duty. If the Duty Solicitor is obliged to provide "follow-up" duties by e.g. appearing at subsequent diets to which a case has been continued for reports or for other reasons, he should report such further appearances on Form SCLA 21 and claim fees accordingly.<sup>27</sup>

Discontinuance of entitlement to legal aid

It appears that Rule 10 applies to legal aid provided under the

26. On the whole question of criminal legal aid fees, see infra, Chapter XXII where the Act of Adjournal (Criminal Legal Aid Fees) 1964 is discussed in detail.

27. Ibid.

Duty Solicitor scheme as it does to legal aid for trial or appeal proceedings, although it is obviously more apt for use in connection with the latter. Rule 10 details the circumstances in which legal aid may be withdrawn; it is discussed in detail later.<sup>28</sup> The only speciality from the point of view of the Duty Solicitor is that if the Court directs for any reason under Rule 10 that the accused should cease to be entitled to legal aid, and such direction is made in the course of proceedings at which the Duty Solicitor is acting, the accused person is thereby debarred from legal aid in relation to any later stages of the same proceedings before the Court of first instance.<sup>29</sup>

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28. See infra, pp.330-332.

29. Rule 10(1).

CHAPTER XXLEGAL AID FOR A CRIMINAL TRIAL

Main provisions: 1967 Act, s.1(7), 2(2); Scheme, Article 9;  
Regulations 3-6; Rules 3-7

Introduction

If an accused person wishes legal aid for trial proceedings, whether solemn or summary, he must make a formal application to the Court for a legal aid certificate.<sup>1</sup> For Sheriff Court and High Court<sup>2</sup> proceedings the application is determined normally by the Sheriff in whose Court the accused made his first appearance whether on Petition or summary Complaint; in the District Court the application is determined by a Justice of the Peace (or Stipendiary Magistrate where one has been appointed) for the appropriate Commission area. In no case does the Law Society of Scotland itself determine applications for legal aid for criminal trial proceedings. No contributions are exigible from successful applicants.

Making the Application(i) Form of application

Regulation 3(2) provides that an application for legal aid for a criminal trial shall be made on a form provided by the Law Society of Scotland " .... or in such other manner, being in writing, as the court may accept as sufficient in any particular case in which

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1. Regulation 3(2).
  2. Rule 6(1) provides that where a case is being prosecuted before the High Court and the accused person applies for legal aid, the Court may, either remit the application to the Sheriff Court for determination or, if satisfied as to the merits of the application, may grant or refuse the same. In normal practice however an application for legal aid in solemn proceedings is made long before the indictment is served, i.e. before it is clear that those proceedings are to be in either the Sheriff Court or High Court, and it is made to the Sheriff in whose Court the accused appeared on Petition.

exceptional circumstances obtain". However, application is habitually made on Form SCLA 2, the applicant giving details of inter alia the charge(s) against him, the dates of his court appearances and the name of the Solicitor whom he wishes to nominate to act for him. The applicant also completes the Declaration of Means showing his dependants, capital, income and expenditure and whether he has any other rights or facilities for payment for his defence.<sup>3</sup>

Frequently, the Solicitor whom an accused person first consults or by whom an accused is first seen in custody will require to assist in the completion of the form. It is one of the duties of a Duty Solicitor acting under Article 6 of the Scheme to do this and to advise the applicant of his right to select any Solicitor to act for him.<sup>4</sup> Likewise, an accused not in custody may consult a Solicitor with a view to making an application for criminal legal aid and find that that Solicitor is unwilling to act for him, although prepared to assist in completion of the form. There would appear to be nothing legally objectionable in the latter Solicitor arranging for the lodging of a form which nominated someone else, but common sense would seem to indicate that the applicant be advised to consult the other Solicitor direct.

(ii) Choice of Solicitor

So far as trial proceedings are concerned an applicant for criminal legal aid has a completely free choice as to the Solicitor he wishes to nominate to act for him, subject to the qualification that the Solicitor must be entitled to give legal aid.<sup>5</sup>

3. Regulation 4.

4. Including himself.

5. On Representation of the Assisted Person, see supra, Chapter VII.

There does not appear to be any provision in any of the legal aid legislation that an applicant for criminal legal aid must in all cases be shown any list of Solicitors before he makes his choice and it appears that the practice varies widely. In custody cases in Glasgow a list is always available to accused persons in the Sheriff Court and District Court and indeed officials of the Law Society are present and assist applicants to complete Form SCLA 2 at the time they are interviewed by the Duty Solicitor.<sup>6</sup> In other Courts no such provision is made for custody cases. So far as applicants not in custody are concerned, a list of Solicitors is available in the offices of the Local Legal Aid Committee, the Sheriff Clerk's office and Citizens Advice Bureaux.

Freedom of choice is also subject to the qualification that no Solicitor is obliged to accept instructions from an applicant who requests his services. Under Article 7(1) of the Scheme it is provided that it is the Local Committee which actually makes the nomination after the Court has granted legal aid to a person who has requested the services of a particular Solicitor. Normally it will of course nominate that Solicitor, but it need not do so if it is not reasonably practicable for him to act, in which case the Committee may nominate someone else and intimate this to the assisted person. It would therefore seem open to a Solicitor to inform the Local Committee of any circumstances which make it impracticable for him to act in any particular case, although such circumstances (such as a conflict of

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6. Their function is simply to see each accused after he has seen the Duty Solicitor, to obtain personal details and information regarding financial circumstances and to show the accused the list. Completed legal aid applications are passed on to the Duty Solicitor for lodging or forwarding by him. There is, of course, nothing to stop an accused being seen by a Solicitor other than the Duty Solicitor if the accused has been able to contact such an individual.

interest between two accused) may not be apparent until the nomination is made.<sup>7</sup>

Furthermore, Article 16 of the Scheme provides that where the appropriate Committee is satisfied that a Solicitor has good reason to refuse or to cease to act for an assisted person it may, if it thinks fit in all the circumstances reasonable, and after such intimation and inquiry as it thinks necessary, designate another Solicitor to act in his place. If it does so it must intimate its decision to the assisted person, the retiring Solicitor and the Clerk of Court.

(iii) Time for making applications

It is obviously in the best interests of an accused person who qualifies for legal aid that he should be granted it as early as possible in the proceedings. Under Article 6(1)(d) of the Scheme the Duty Solicitor is obliged to assist an applicant for legal aid in making his application and to lodge it with the Clerk of Court immediately (even although the Duty Solicitor is not nominated in the application) but in practice the application is sometimes passed on to the Nominated Solicitor for lodging by him.

The earliest point at which the application may be lodged and determined would appear to be at the accused's first appearance on Petition or Complaint, even before any steps are made to represent the accused.<sup>8</sup> This would cover the situation where the accused does not wish the services of the Duty Solicitor but has been able to contact another Solicitor direct. Usually, however, the application

7. In such circumstances the Certificate is transferred. See infra, p.329.

8. Rule 3(1) seems to permit this, but of course the practice is normally for the Solicitor to state his client's position e.g. by tendering a plea, before the lodging of a legal aid application.

is lodged and determined either at the conclusion of the first appearance or at a subsequent special diet.<sup>9</sup>

Where an accused is in custody subsequent to his first appearance on complaint or after full committal in solemn proceeding, and he has not yet applied for legal aid for his trial, he may apply therefor and the Court is enjoined to determine his application "as soon as may be".<sup>10</sup> By Rule 7 this may be done in his absence if the accused is not before the Court for any purpose and provided that the Court is

- (a) satisfied that exceptional circumstances warrant the adoption of such procedure, and
- (b) satisfied that it has sufficient information before it regarding the financial circumstances of the applicant and all circumstances relevant to the application.

These provisions are obviously more applicable to cases where the accused is on Petition than on Summary Complaint. Persons on summary complaint are seldom refused bail and will therefore normally be at liberty to attend any special diet for the hearing of the legal aid application. In petition cases, if legal aid for the trial has not been applied for at Judicial Examination or full committal and the accused is thereafter committed in custody, the Court will

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9. See Rule 3(1). On special diets, see *infra*, p.321. It appears to be the view of the Central Committee that the effective date of legal aid in a criminal case is the date on which the application form is signed by the applicant, on the assumption that the application would be lodged with the Clerk immediately thereafter, even although it would not be considered by the Court until a later date. See 17th Report of the Law Society of Scotland on the Legal Aid Schemes (1966-67) p.58.

10. Rule 3(2).

normally consider the application as soon as it is lodged or at the first available special diet at which legal aid applications are being considered.<sup>11</sup>

The latest time at which legal aid for a trial may be granted is seven days before the date of trial, except where less than seven days elapse between the pleading diet and the trial.<sup>12</sup> When an application is made less than seven days before the trial, it must be refused unless, on special cause shown, the Court decides that the application may be considered at a timeous application.<sup>13</sup> No indication is given in the Regulations as to what amounts to a special case. The fact that the Solicitor has receive late instructions may be relevant, but may not be held to be a special cause. In any event, even if legal aid is granted there will be very little time to take the steps generally considered necessary for the preparation of a trial.

(iv) Eligibility

In all cases the applicant must be financially eligible and must in general have no further rights or facilities to assist him in his defence. A further condition in summary cases only is that the grant of legal aid should be in the interests of justice.<sup>14</sup> These conditions of eligibility are now considered in turn.

11. The Duty Solicitor of course 'bows out' after full committal in solemn cases; in practice he may well have been replaced by a Nominated Solicitor before then.
12. Regulation 3(4). This exception can only apply to summary cases. At least nine clear days must elapse between the pleading diet and the trial in solemn cases: s.75 of the Criminal Procedure (Scotland) Act 1975.
13. Regulation 3(4).
14. 1967 Act, ss.1(7) and 2(2).

(a) Financial

The statutory test is whether or not the expenses of the case can be met without undue hardship to the accused or his dependants. Rule 3(1)(b) obliges the Court to determine whether the financial circumstances of the applicant are such as to satisfy the Court that such hardship would ensue; if so, the applicant will qualify on the financial test; if not, the application will be refused even although the applicant has no other rights or facilities or, in summary cases, it is in the interests of justice that legal aid be granted.<sup>15</sup>

The Declaration of Means by the applicant on Form SCLA 2 provides the Court with its basic information on this matter, but the Court or the Law Society may require of the applicant further particulars as to his case generally or as to his financial circumstances or those of his dependants.

Beyond this, no further guidance on financial eligibility is given in any of the legal aid provisions. None of the information on means is normally checked by the Court, the Supplementary Benefits Commission, the Law Society or any other body, which means that the door is open to abuse by applicants. Nor is any guidance given to the Court on what would constitute 'undue hardship' to an applicant or his dependants, which has meant in practice considerable diversity of opinion among Sheriffs and judges of the District Court.<sup>17</sup> Every

15. Rule 3(2).
16. Regulation 4. Occasionally a Court will continue the hearing of a legal aid application for the accused to produce further information, but it is unknown for the Law Society to become involved at this stage.
17. Some judges have been known to refuse legal aid on means on the view that e.g. an unemployed accused should get a job and save up for the cost of the defence. Cf. civil cases, where the Law Society can never impose such a condition before deciding on a Section 1 application.

application must turn on its own facts but at least legal aid for solemn proceedings is usually more readily available than for summary proceedings on the simple view that the expenses of the defence are greater.<sup>18</sup> At the lower end of the scale, District Courts have experienced considerable difficulty with this question, with the result that the Scottish Home and Health Department issue from time to time financial guidelines based on the financial conditions which regulate the non-criminal legal aid schemes.<sup>19</sup> But any such guidelines are not mandatory and it is therefore for the applicant to show that 'undue hardship' would be suffered.

(b) Other rights and facilities for the defence

If the Court is satisfied that an applicant for legal aid for his trial has available rights or facilities making it unnecessary for him to obtain legal aid, or has a reasonable expectation of obtaining financial or other help from a body of which he is a member, it must refuse the application, except on cause shown.<sup>20</sup> This would appear to be so even although it appears that prima facie the applicant is financially eligible or that it is in the interests of justice that legal aid be granted.

Common instances of such other 'rights or facilities' are where the accused is insured under an insurance policy which covers payment

18. In 1975-1976 in the Sheriff Court in solemn cases 5754 applications for legal aid were made, but out of the 262 which were refused, only 68 were refused on means. In summary cases, 18850 applications were made, 4293 refused, of which 1227 were refused on means. See 26th Report of the Law Society of Scotland on the Legal Aid Schemes (1975-76).
19. From 15 May 1975 - 32 March 1976 out of 6922 applications for legal aid in the District Court, 1146 were refused, of which 327 were refused on grounds of sufficient means: see 26th Report, op. cit.
20. Rule 5(1) and Regulation 6(2). A very small number of criminal legal aid applications are refused on this ground.

of legal expenses, or where the accused is a member of a Motoring Organisation or Trade Union which runs such a scheme. Once again, no checks are made by anyone on the declaration regarding this matter made by the applicant on Form SCLA 2, nor is any guidance given on what constitutes 'cause shown' for ignoring any such other rights or facilities.

Where the Court makes legal aid available to a person who is a member of a body which might reasonably have been expected to give him financial help towards his defence, the Court shall require him to sign an undertaking to pay to the Law Society any sum received from that body on account of the expenses of his defence.<sup>21</sup>

(c) The interests of justice

This applies to summary cases only. It must be in the interests of justice that legal aid be granted in a summary case before the applicant can receive it.<sup>22</sup> Even although he may be financially eligible and have no other rights or facilities for his defence, if the Court feels that to grant legal aid would not be in the interests of justice, the application must be refused.<sup>23</sup>

This test has been the subject of continuous criticism since criminal legal aid was introduced in 1964 and has been given widely differing interpretations in different summary courts. Some judges hold that if the accused pleads not guilty to the charge, then it is always in the interests of justice that he receive legal aid; others

21. Regulation 6(3). This again is very rare in practice.

22. The assumption in solemn cases is that it is always in the interests of justice that legal aid be granted if the other conditions are satisfied, an assumption justified by the tradition that poor persons on serious charges should not go unrepresented. On this see supra, pp.55-70.

23. Rule 5(4).

enquire of the applicant the nature of his defence before deciding whether legal aid should be granted;<sup>24</sup> and some require the Nominated Solicitor to appear and plead the main points of the applicant's case. As a matter of history the Sheriffs were never in favour of the system whereby they would have to decide legal aid applications,<sup>25</sup> and it is this test which has given them (and now judges of the District Court) the most difficulty in practice.

Although once again no guidance on this test is given in any of the legal aid provisions, the following factors may suggest that it is in the interests of justice that legal aid should be available to an accused person:

- (a) that the charge is a serious one in the sense that the accused is in real jeopardy of losing his liberty or livelihood or suffering serious damage to his reputation;
- (b) that the charge raises a substantial question of law;
- (c) that the accused is unable to follow the proceedings and state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;
- (d) that the nature of the defence involves the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;

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24. By Rule 11 an applicant may be put on oath and asked to make a statement relating to any facts material to his entitlement to legal aid.

25. Under the system of Agents for the Poor, the Court itself took no part in deciding whether an accused was eligible for assistance from such an Agent.

- (e) that legal representation is desirable in the interests of someone other than the accused, for example, in cases involving children when it would be undesirable that the accused himself should cross-examine witnesses.

Of course not all of these factors need to apply before a Court will hold that granting the application is in the interests of justice. Indeed other factors peculiar to the individual case may have the same effect. It is difficult to resist the conclusion that the whole matter resembles a lottery, the grant or refusal of legal aid depending on the whim of the individual judge: what an American realist would label as 'gastronomic decision-making'.<sup>26</sup>

(v) Processing the application

Once the application is lodged with the Clerk of Court it is either determined by the Court immediately if the applicant is before the Court for any reason e.g. at full committal in solemn cases, or determined at a subsequent special diet.<sup>27</sup> In summary cases the fixing of a special diet is mandatory under Rule 4(1) for an accused person who has not applied for legal aid for the trial at his first appearance in Court, except where the Court holds that it is not practicable to determine the application at such a diet, in which case the Court decides on the application at the first diet at which the applicant is called upon to plead.

In practice in busy Sheriff and District Courts such as in Glasgow and Edinburgh the fixing of special diets is a regular

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26. There appears to be no prospect at present for taking the decision out of the Court's hands. The necessity is of course for a speedy decision and the present system at least allows for that.

27. Rule 3(1).

occurrence, simply to avoid holding up the daily summary criminal court by dealing with legal aid applications then. The procedure is for the Sheriff or District Court Clerk to intimate to the accused and the Solicitor chosen by the accused that the application will be heard on a particular day. The applicant is bound to attend; if he fails to attend a special diet of which he has received intimation, the application is refused.<sup>28</sup> The applicant or Solicitor brings with him a copy of the Petition or Complaint, or it may be lodged with the application. There is nothing in the legislation or subsidiary provisions which compels the attendance of the Solicitor and it should be noted that he will not be paid from the Legal Aid Fund for attending; nonetheless many Solicitors do attend at the special diet.

If the application is granted, the Clerk of Court sends to the Local Committee a legal aid certificate detailing the entitlement to legal aid of the accused person.<sup>29</sup> In terms of Article 17(1) of the Scheme the Local Committee formally nominate the Solicitor requested by the accused and intimate this to the Nominated Solicitor, the accused, the Clerk of Court and the Prosecutor, normally on a photocopy of Parts I-III of Form SCLA 2. The Nominated Solicitor will also receive Form SCLA 20 (Length of Trial), SCLA 25 (Claim Form) and a schedule for detailing payments to defence witnesses, all for submission later with his Account.

If the application is refused, there is no appeal, although a further application may be made on the ground that there has been a material change in the financial circumstances of the applicant, or

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28. Rule 4(1).

29. Rule 5(6). No contribution from the accused is exigible.

that he has additional facts affecting his eligibility for legal aid to bring to the notice of the Court.<sup>30</sup>

An application for legal aid may be withdrawn before it is laid before the Court;<sup>31</sup> it may also be continued by the Court e.g. for further information regarding the accused, his circumstances, or to allow fresh intimation of the diet where postal intimation has been ineffectual.<sup>32</sup>

#### The Duties of a Nominated Solicitor

Once legal aid has been granted in the name of a particular Solicitor, that Solicitor has the duty of rendering all the normal services provided by a Solicitor for an accused person, and will be passed all the papers by the Duty Solicitor if one has been acting. If legal aid is granted at the commencement of the accused's first appearance then the Nominated Solicitor can act under the Scheme immediately. If legal aid is granted before the question of bail is finally disposed of, the Nominated Solicitor may act in any application for bail, application for review of bail under ss.30 or 229 of the Criminal Procedure (Scotland) Act 1975, or bail appeal to the High Court (including the instruction of Counsel).<sup>33</sup>

The normal services to be provided for the accused depend of course on the accused's <sup>plea</sup> ~~plea~~ and the whole circumstances, in

30. Rule 9.

31. The fact that the system resembles a lottery has led in some busy Courts to the practice of Solicitors withdrawing applications when they find that they are to be heard by a notoriously unsympathetic judge, and re-lodging them at a later date.

32. Rule 4(1) provides that an application may only be refused for non-appearance at a special diet if the applicant has had the diet intimated to him.

33. Scheme, Art.9(2).

particular whether the proceedings are solemn or summary.<sup>34</sup> A list of the typical steps in the process is not included in the Schema and the question of whether a particular step taken or proposed by a Solicitor is 'normal' does not often arise until his account is later scrutinised by the Central Committee staff. In general there are no provisions which do or do not enjoin a Solicitor to seek the sanction of the Law Society for any step in process, save the employment of Counsel and Expert Witnesses, but if the Solicitor proposes to take any unusual or exceptional step he should consult the local secretary.<sup>35</sup>

#### Employment of Counsel

##### (a) High Court Trials

Only Counsel have right of audience in the High Court of Justiciary, although the Nominated Solicitor will of course be required to attend Court as instructing agent.<sup>36</sup> The steps to be taken by the Nominated Solicitor with regard to the instruction of Counsel in High Court trials can be divided into those requiring prior sanction<sup>37</sup> of the Local Committee and those which do not.

34. The fact that legal aid has been granted does not excuse a Solicitor from compliance with the technical procedural rules relating to criminal trials, particularly in relation to the timeous lodging of special defences: see 1967 S.L.T. (News) 237.
35. One common difficulty appears to be where it is necessary to travel a long distance to see a witness or an accused detained in custody at a Prison far removed from the Solicitor's place of business. The cost of such a visit will normally have to be included as part of the Solicitor's ordinary business account, but the Solicitor should bear it in mind regarding an application for a certificate under Articles 13(2) or 13(3) of the Act of Adjournal (Criminal Legal Aid Fees) 1964. See infra, Chapter XXII.
36. Failure to attend or send a qualified representative may prejudice an application under Article 13(2) of the Act of Adjournal (Criminal Legal Aid Fees) 1964. See infra, p. 376.
37. Sanction is normally sought by letter.

(i) Steps not requiring sanction

In murder cases it is the duty of the Nominated Solicitor to arrange for the employment of either Senior Counsel alone, Senior and Junior Counsel, or two Junior Counsel to appear for the accused.<sup>38</sup> The second alternative is usually adopted in view of the serious nature of the charge.

In non-murder trials in the High Court the Nominated Solicitor is restricted to instructing one Junior Counsel.<sup>39</sup>

(ii) Steps requiring committee sanction

In non-murder trials sanction must be given by the Local Committee before Senior Counsel <sup>and</sup> ~~or~~ an additional Junior Counsel can be instructed.<sup>40</sup> Obviously it is the duty of the Nominated Solicitor to consider whether the case is sufficiently serious to warrant application for permission to instruct a Senior and at one time the absence of Senior Counsel in a serious case was the subject of adverse criticism from the Bench. In High Court trials the Crown is usually represented by two Counsel, one of whom is often a Queen's Counsel, so fairness alone would seem to demand equal representation for the defence. Sanction for employing a Senior or additional Junior is likely to be granted if it appears that the evidence to be led is particularly complex or if the accused, by reason of his record or the gravity of the alleged offence, is likely to receive a substantial sentence if he is convicted. Such matters should be brought to the notice of the Local Committee when application for sanction is made.

38. Scheme, Art.15(1)(a).

39. Ibid.

40. Scheme, Art.15(1)(b).

(b) Sheriff Court Trials

The employment of Counsel in the Sheriff Court, whether the case is under solemn or summary procedure, is always subject to the sanction of the Local Committee. In solemn procedure, the Committee may allow the employment of Senior Counsel, whether alone or with a Junior, two Junior Counsel, or of a Junior alone. In summary cases, only one Counsel (who may be a Senior) may be instructed; again this is subject to Committee sanction.<sup>41</sup>

(c) District Court Trials

Committee sanction is likewise required in such cases; only one Counsel (who may be a Senior) may be instructed.<sup>42</sup>

Employment of Expert Witnesses

The Nominated Solicitor in a criminal case may wish to instruct an expert witness for the defence, but this step always requires the sanction of the Local Committee.<sup>43</sup> In many cases the assistance of experts in, for example, forensic science, pathology or psychiatry is required for the adequate preparation of the accused's case, and such expert assistance may be necessary at a very early stage in the proceedings. In some urgent cases however it is impossible to obtain the written authority of the Committee in advance; in these circumstances

41. Scheme, Art.15(1)(b). This fact is often forgotten, particularly by those Solicitors who do not conduct many criminal trials themselves. In Edinburgh there has developed a not uncommon practice of a Solicitor instructing one Junior to conduct a summary criminal trial in the Sheriff Court. The Solicitor doing this without Committee sanction may subsequently find that the Central Committee will not settle Counsel's fee for acting, but will pay the Solicitor for his attendance. Of course, the vast majority of summary criminal trials in courts outwith Edinburgh are conducted without Counsel's assistance.

42. Scheme, Art.15(1)(b).

43. Scheme, Art.15(2).

the Nominated Solicitor should attempt to contact the Local Secretary by telephone, or if unable to do so, instruct the expert witness. He must, however, write to the Local Secretary immediately to explain the circumstances and obtain confirmation.

The Committee in granting sanction may impose conditions relating to the employment of experts;<sup>44</sup> commonly these relate to the payment of the expert's fees, which must not exceed the sums payable from time to time by the Crown to witnesses of the same categories.

Where the Local Committee refuse to sanction the employment of Counsel or any expert witness or sanction it subject to conditions, the Nominated Solicitor may appeal to the Central Committee against such refusal or against such conditions.<sup>45</sup>

It is competent for the Local Committee, or for the Central Committee on appeal, on cause shown to sanction the employment of Counsel or any expert witness notwithstanding that such employment had not been previously approved by them.<sup>46</sup>

Once legal aid is granted the Nominated Solicitor must continue to act until the end of the case<sup>47</sup> unless he chooses to refuse to act, withdraws, or the accused becomes disqualified from receiving legal aid. In particular, where any proceedings against an assisted person are abandoned and other proceedings substituted therefor, whether or not such proceedings libel other or further crimes or offences than those libelled in the original proceedings, the Nominated Solicitor

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44. Ibid.

45. Scheme, Art.15(3).

46. Scheme, Art.15(4).

47. Scheme, Art.9(2).

must act in the substituted proceedings, notwithstanding that his services may include all or any of the services normally provided by a Duty Solicitor.<sup>48</sup> So where solemn proceedings are reduced to summary, or where a case is deserted pro loco et tempore and subsequently re-raised the Nominated Solicitor continues to act, assuming he is prepared to do so.<sup>49</sup>

The Nominated Solicitor is obliged also to consider and advise the accused on the question of appeal. This includes, if necessary, making an application for extension of the time within which to appeal or for an Interim Appeal Certificate, following upon the final disposal of the case and any consequential bail application pending the appeal.<sup>50</sup> But if legal aid is sought for the purposes of proceeding with an appeal, a new application for legal aid is necessary.

In this regard the Nominated Solicitor will normally require to interview his client immediately or soon after the verdict at the trial to advise on the question of an appeal. The time at which this is done is of course subject to the fact that appeals in solemn cases and by stated case must be marked within 10 days of conviction or sentence.<sup>51</sup> In solemn proceedings the Scheme provides that the Nominated Solicitor of an assisted person who has been convicted and sentenced on indictment, either in the High Court or the Sheriff Court,

48. Ibid., Art.9(3).

49. But if a case is deserted pro loco because e.g. the accused changes his mind on a plea under s.102 of the Criminal Procedure (Scotland) Act or some similar reason, the Solicitor may ask and be allowed to withdraw. See Rule 10.

50. Scheme, Art.9(2).

51. See ss.231, 442 and 444 of the Criminal Procedure (Scotland) Act 1975.

who is instructed by the assisted person to appeal against the conviction or sentence and to obtain legal aid therefor, shall complete on his behalf and sign, or have completed and signed by the assisted person, and lodge and intimate in accordance with the statutory provision, a statutory note of appeal or of application for leave to appeal.<sup>52</sup> He must also apply for an Appeal Certificate under Article 18 of the Scheme and comply with Article 21(2) thereof.<sup>53</sup> In summary cases, if the appeal is to be by stated case, the Nominated Solicitor should apply for an Interim Appeal Certificate (where appropriate).<sup>54</sup> He is not obliged by the Regulations to mark the appeal before an Interim Appeal Certificate is granted but will often do so. In appeals by Bill of Suspension, again the Nominated Solicitor should apply for an Appeal Certificate; when this is granted the Bill may be drafted and served.<sup>55</sup>

#### Transfer and Discharge of Certificates

##### Transfer

Once legal aid has been granted in the name of a particular Solicitor, the certificate may be transferred to another. This is of course subject to the consent of both the Solicitors concerned, the Local Committee and the assisted person.<sup>56</sup> The normal circumstance in which transfer is appropriate is where a Solicitor acts for more than one accused and a conflict of interest subsequently arises. The Solicitor wishing to withdraw his services from one accused normally

52. Scheme, Art.10(1).

53. See infra, pp. 338-339.

54. Scheme, Art.20.

55. See infra, p. 339.

56. See Scheme, Art.16.

intimates this to the Local Secretary by letter along with the name of another Solicitor who is prepared to act; the Local Committee normally approve the substitution.

Discharge of Certificates

This is covered by Rule 10. The Court may direct that the accused be disentitled to legal aid if it is satisfied, after hearing him where appropriate, that he

- (a) has without reasonable cause failed to comply with any proper request made to him by the Solicitor acting for him to supply any information relevant to the proceedings; or
- (b) has delayed unreasonably in complying with any such request as aforesaid; or
- (c) has without reasonable cause failed to attend at any diet of the Court at which he has been required to attend or at any meeting with the Solicitor or Counsel acting for him under the Scheme at which he has reasonably and properly been required to attend; or
- (d) has conducted himself in connection with the proceedings in such a way as to make it appear to the Court unreasonable that he should continue to receive legal aid; or
- (e) has wilfully or deliberately given false information for the purpose of misleading the Court in considering his financial circumstances or has wilfully or deliberately furnished false particulars in his application for legal aid; or

- (f) no longer wishes to be entitled to legal aid;<sup>57</sup> or  
 (g) wishes to dispense with the services of the  
 Nominated Solicitor.<sup>57</sup>

The Court may also direct that the assisted person cease to be entitled to legal aid if it is satisfied that it is otherwise unreasonable for the Nominated Solicitor to continue to act on behalf of the assisted person.<sup>57</sup>

It will be observed that these provisions are wide enough to cover most of the circumstances where the Solicitor/client relationship breaks down. If the Solicitor wishes to withdraw for any reason he normally waits until the accused is present (or supposed to be present) at one of the diets in the case and asks the Court to discharge the certificate; the Solicitor is then free to make up his account for submission to the Central Committee. He may also simply write to the Local Committee and ask to be relieved.

If legal aid is withdrawn under Rule 10, the Clerk of Court intimates this to the appropriate Committee.<sup>58</sup> If legal aid is withdrawn under paras. (1)(a), (b), (c) or (d) of Rule 10, the Court may consider that the relevant conduct of the assisted person in connection with the proceedings in the Court of first instance is such as to make it unreasonable that he would receive legal aid in connection with any appeal arising from those proceedings, and if so it must instruct the Clerk of Court to report that finding to the Committee for its consideration in the event that the assisted person seeks legal aid for the purposes of any appeal.<sup>59</sup>

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57. These three grounds of disqualification were added in 1976.

58. Rule 10(2). It appears that legal aid may subsequently be restored by the High Court using its power under the nobile officium: see J.P. Hartley, Petitioner (1968) 32 J.C.L. 191.

59. Rule 10(3)(a).

If legal aid is withdrawn because of the circumstances enumerated in Rule 10(1)(e) i.e. giving false information, such a direction persists and applies to any proceedings on appeal, unless the Court decides that such direction should cease to have effect.<sup>60</sup>

The Solicitor (or Counsel) acting under legal aid is under no different duty vis-à-vis his client or the Court merely because his client is legally aided and the same ethical problems as to withdrawal arise in a legal aid case as in a non-legally aided case. It is clear from Monteath v H.M. Advocate 1965 S.L.T. (Notes) 41 that a Solicitor may withdraw from acting for an assisted person and the Court will normally accede to a motion to be allowed to do so. In that case the Solicitor had tendered "certain professional advice" to his client, which advice was not accepted. The Solicitor was allowed to withdraw and the accused unsuccessfully conducted his own defence. He appealed on the ground that the Sheriff should have adjourned the case in order that the Law Society might appoint another Solicitor to act for him. His appeal was refused and Lord Clyde commented (at p.42): "We should take the opportunity of dispelling the idea that any professional adviser acting under this legal aid Scheme is bound to carry on the defence even although he is satisfied that the defence is a dishonest one, or that any judge is bound automatically to grant a postponement of the case whenever the professional adviser retires from the case because his client refuses to take his advice." By s.1(8) of the 1967 Act in the absence of express provision to the contrary, the fact that the services of Counsel or a Solicitor are given by way of legal aid does not affect the relationship between

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60. Rule 10(3)(b).

or the rights of Counsel, Solicitor and client. Needless to say, the usual standards of professional conduct are expected by the Court and the public of persons acting under the legal aid Schemes.<sup>61</sup>

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61. There has been considerable criticism in the media of the alleged practice of lawyers pleading not guilty for clients, and later advising a change of plea in a case which is supposedly hopeless from the start. But assuming the client instructs a plea of not guilty, is the Solicitor not bound to investigate the case and prepare for trial? Quite apart from the presumption of innocence, a technical (or substantial) defence may emerge and the presence of legal aid is surely irrelevant.

CHAPTER XXILEGAL AID FOR THE PURPOSES OF AN APPEALMain provisions: Scheme, Arts.18-25; Regulations 7, 8 and 9Introduction

The major distinction between legal aid for a criminal trial and for an appeal is that while the grant of legal aid for the former is at the discretion of the Court, for the latter the discretion rests with the Law Society of Scotland and it is to that body that application is made.<sup>1</sup> While in general legal aid for a trial is frequently granted, for an appeal it is more difficult to justify the grant of legal aid in the usual case, where the presumption of innocence has been displaced by the conviction of the accused.

In all appeals proceeding on legal aid the appellant (or respondent if the appeal is by Stated Case taken by the prosecutor) must have an Appeal Certificate granted by the Supreme Court Committee before his appeal can be heard under the Scheme by the High Court.<sup>2</sup> An Appeal Certificate may be granted to anyone in the following categories whether or not that person received legal aid for the purposes of his trial -

- (a) persons appealing against conviction and/or sentence by virtue of s.228 of the Criminal Procedure (Scotland) Act 1975 or at common law by Bill of Suspension;

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1. Appeal proceedings are treated as "distinct" from other proceedings for which criminal legal aid may be given: Rule 2(c).  
 2. This is so whether or not the inferior court proceedings were conducted under summary or solemn procedure.

- (b) persons appealing by Stated Case under s.442 of the Criminal Procedure (Scotland) Act 1975; and
- (c) persons against whose acquittal or disposal the prosecutor appeals by Stated Case under the said s.442.<sup>3</sup>

Persons in all of these categories may or may not have been legally aided at the conclusion of the proceedings at first instance, but the first question to be considered in all cases is whether the applicant is financially eligible for an Appeal Certificate.

#### Financial Eligibility

If the applicant was in receipt of legal aid at any time during the trial proceedings he continues to be regarded as financially eligible for legal aid in connection with any appeal proceedings.<sup>4</sup> This is so even although he may no longer be legally aided for one reason or another at the actual time when the trial proceedings were concluded. But where there is in force at that time a direction by the trial Court that the assisted person be disqualified from legal aid in those proceedings on the ground that he has given false information in his original application for legal aid, such a direction continues to apply to any proceedings on appeal, unless at the time of making the direction or subsequently on the application of the person concerned, the Court of first instance decides that it would be

3. It must be remembered that appeals by stated case are only competent "on the final determination of any summary prosecution", which may of course be considerably later than the date of conviction. See Renton & Brown, Criminal Procedure (4th ed. 1972) para.16-02 and Walker v Gibb 1965 S.L.T.2. Appeals by Bill of Advocation are covered by any legal aid certificate granted for the trial: see supra, p. 298.
4. 1967 Act, s.2(4)(a).

reasonable for the purposes of the appeal that the direction should cease to have effect.<sup>5</sup>

If however the applicant was not in receipt of legal aid at any point during the proceedings in the Court of first instance, or received only the services of the Duty Solicitor, then his means require to be assessed before an Appeal Certificate can be applied for. He must first make application to the Clerk of the Court in which the proceedings at first instance took place or were initiated<sup>6</sup> for a Provisional Financial Certificate, the test being broadly the same as in trial proceedings: whether he is able, without undue hardship to himself or his dependants, to meet the expenses of proceeding on appeal in connection with the charge specified in the certificate and whether he has any other rights or facilities in relation to his defence.<sup>7</sup>

The form of application for a Provisional Financial Certificate contains a Declaration of Means by the applicant. The Clerk of Court is entitled to question the applicant and may make such other inquiry as he thinks fit before deciding whether to grant a Provisional Financial Certificate.<sup>8</sup>

Obviously, if legal aid has been refused for the applicant's trial on the ground of sufficient means or that the applicant has other rights or facilities for his defence, a Provisional Financial

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5. Rule 10(3)(b).
6. Thus, e.g. the application may have to be made to the Clerk of the District Court if the proceedings started there and were subsequently remitted to the Sheriff Court under s.286 of the Criminal Procedure (Scotland) Act 1975; or to the Sheriff Clerk if the trial was in the High Court.
7. Regulation 7(1).
8. Rule 8(1).

Certificate becomes harder to obtain. If such legal aid was refused on the latter grounds the applicant will require to show that those rights <sup>or</sup> facilities do not extend to appeal proceedings; if it was refused on the grounds of means, he will have to show that there has been a material deterioration in his financial circumstances.<sup>9</sup>

The Clerk of Court, like the Court itself in trial proceedings, is given no guidance in assessing what constitutes undue hardship; very few Provisional Financial Certificates are however refused by Clerks of Court and they are granted almost automatically if the appeal is consequent to a trial on indictment.<sup>10</sup>

As soon as may be after the grant or the refusal of a Provisional Financial Certificate the Clerk of the Court concerned must report the financial and other relevant circumstances of the applicant to the Court in order that the Court may determine whether he is unable without undue hardship to himself or his dependants to meet the expenses of the proposed appeal and whether he has available to him other rights or facilities making it unnecessary for him to be granted legal aid; the Court reports its determination to the Local Committee and, where relevant, to the High Court; and where the determination is such that legal aid cannot be made available to the applicant the Court must discharge the Provisional Financial Certificate.<sup>11</sup>

9. Regulation 7(1).
10. In 1974-75 only 15 Provisional Financial Certificates were refused out of 166 applications, and the refusals were all in summary cases. See 25th Annual Report of the Law Society on the Legal Aid Schemes (1974-5) Schedule 13.
11. Rule 8(2). This very rarely happens. Although the decision of the Court on an application for a Provisional Financial Certificate is final, a further application may be made if there has been a material change in the circumstances: Rule 9.

Representation

Once financial eligibility has been settled as described, the next question arising is that of representation for the proposed appeal. Three possible situations present themselves:

- (i) the accused person had a Nominated Solicitor at the end of the proceedings in the Court <sup>of</sup> at first instance, and wishes him to act for the appeal;
- (ii) the accused person wishes another Solicitor to act for his appeal;
- (iii) the accused person was not represented at the end of the proceedings in the Court of first instance (or was represented only by the Duty Solicitor) and wishes a Solicitor to act for the appeal.

Each of these situations is dealt with separately in the legal aid provisions.

(i) Accused wishes Nominated Solicitor to continue acting

No particular problems arise here. As already indicated,<sup>12</sup> the Nominated Solicitor is obliged as part of his duties to the accused at the trial stage to consider and advise on the question of an appeal after the final disposal of the case at first instance. Thereafter if he is instructed to lodge the appeal he takes the necessary steps, namely:

- (a) if the appeal is against conviction and/or sentence on indictment, completing and signing (or having completed or signed by the applicant), lodging and intimating the statutory note of appeal or

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12. See supra, p.328.

application for leave to appeal and making an application for an Appeal Certificate;<sup>13</sup>

- (b) if the appeal is to be by Bill of Suspension, making an application forthwith for an Appeal Certificate;<sup>14</sup> and
- (c) if the appeal is taken by Stated Case, whether the appeal is by the accused or the Prosecutor, applying for an Interim Appeal Certificate.<sup>15</sup>

It should be stressed that in all cases where the accused wishes the trial Solicitor to continue for the appeal, and the accused was legally aided at the conclusion of the trial proceedings, there is no need to apply for a Provisional Financial Certificate.

(ii) Accused wishes a new Solicitor for his appeal

Freedom of choice by an accused person extends not only to the Solicitor acting at the trial, but also for the appeal. The accused is at liberty to select any Solicitor and request him to act in the appeal and this will be so irrespective of the mode of appeal and of how the accused becomes financially eligible for an Appeal Certificate.<sup>16</sup>

In practice however an accused is usually ill-advised to change his Solicitor for his appeal, for obvious reasons. In particular any Solicitor new to the case is unlikely to have at his fingertips sufficient information to certify to the Supreme Court Committee that

- 13. Scheme, para.10(1). On the mechanics of applying for an Appeal Certificate, see infra, pp.340-345.
- 14. Ibid.
- 15. Scheme, para.20(1). On the mechanics of applying for an Interim Appeal Certificate and the distinction between it and a full Appeal Certificate, see infra, pp.342-345.
- 16. Freedom of choice appears to be implicit in the wording of paras. 10(1), 11 and 12 of the Scheme; the Nominated Solicitor who acted at the trial is only obliged to take the steps prescribed therein "if instructed" or "if requested".

there are substantial grounds for the appeal, and for this reason alone some Solicitors decline to act in an appeal where the accused does not wish his original Nominated Solicitor to continue.

But it would appear that where the the professional relationship between the trial Solicitor and the accused breaks down after the verdict, the duties regarding appeals which would have to be carried out by the Nominated Solicitor as above described,<sup>17</sup> may be carried out by another Solicitor instructed by the accused. In such cases it appears that no transfer of the original trial certificate takes place; in the normal case the trial Solicitor will have advised against an appeal and the only reason the accused wishes to change would be that he does not like the advice. In such cases it appears that any new Solicitor accepting instructions may take the steps above outlined.<sup>17</sup>

(iii) Accused not represented under the Scheme at conclusion of case in Court at first instance, or represented only by Duty Solicitor of

If such an accused person wishes a Solicitor to act in an appeal, he must apply for an Interim Appeal Certificate.<sup>18</sup> He may be financially eligible either because a Nominated Solicitor acted at some stage in the trial proceedings but not at their conclusion, or by virtue of holding a Provisional Financial Certificate. An applicant for an Interim Appeal Certificate is free to nominate any Solicitor to act for him.

#### How to apply for an Appeal Certificate

All Appeal Certificates are granted or refused at the discretion of the Supreme Court Committee.<sup>19</sup> The purpose of the Scheme

17. See supra, p. 328.

18. Regulation 8(1).

19. Schema, Art.21.

and relative provisions is to ensure that frivolous appeals are not pursued at the public expense and accordingly an applicant has several hurdles to surmount before he can proceed with his appeal on legal aid. In certain cases the granting of an Interim Appeal Certificate is a necessary pre-requisite to application for a full Appeal Certificate and in such cases the Solicitor appointed to act is known as the Interim Solicitor.

Interim Appeal Certificate

(a) When necessary

(i) Where the appeal is by Stated Case. In all such cases, whether the appeal is by the accused or by the Prosecutor, an Interim Appeal Certificate must be applied for,<sup>20</sup> generally for the purpose of covering the work done in preparing and adjusting the Stated Case up to the point where the ~~final~~<sup>finally</sup> adjusted case is lodged with the High Court.<sup>21</sup>

(ii) Where a Provisional Financial Certificate has been granted. In all cases where the accused's means require to be assessed to ascertain whether he is financially eligible for legal aid for his appeal, a Provisional Financial Certificate must be applied for as described above.<sup>22</sup> If such certificate is granted, the applicant cannot proceed to apply immediately for a full Appeal Certificate, but must/-

20. Ibid., Art.20(1).

21. Regulation 9(7). See infra., p.345.

22. See supra, p.336.

must first apply for an Interim Appeal Certificate irrespective of the mode of appeal.<sup>23</sup>

- (iii) Where the accused was not legally aided at the conclusion of the proceedings in the Court of first instance, but did have a Nominated Solicitor at some stage in those proceedings. In these cases the applicant will generally be financially eligible for legal aid for the appeal, but since he has no Solicitor acting, he must be provided with one.<sup>24</sup>

(b) How to apply for an Interim Appeal Certificate

All applications for an Interim Appeal Certificate are determined by the Local Committee.<sup>25</sup>

(i) appeals by Stated Case

If the appeal is against conviction and/or sentence, the Nominated Solicitor or Duty Solicitor acting at the time of the accused's conviction assists the accused to complete Form SCLA 7. The accused nominates a Solicitor to act in the appeal and the form is forwarded to the Local Committee along with a written statement (usually a letter) of the grounds which in the opinion of the Solicitor merit an appeal by Stated Case.<sup>26</sup>

If at the time of conviction, the accused did not have the services of either a Nominated Solicitor or the Duty Solicitor, the

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23. Regulation 8(1).

24. Ibid. The applicant may however be debarred from legal aid for his appeal if the trial Court has made a direction under Rule 10(3) relating to the assisted person's conduct in connection with the trial proceedings.

25. Regulation 8(1).

26. Regulation 9(2)(a).

accused himself submits a statement of the proposed grounds of appeal along with his application for an Interim Appeal Certificate.<sup>27</sup> The Clerk of Court is obliged in such cases to assist the accused to complete Form SCLA 7,<sup>28</sup> but not of course the statement of the grounds of appeal.

If the prosecutor is the appellant, either the Nominated Solicitor or an unrepresented accused likewise submits Form SCLA 7, but there is no necessity to attach any statement of the grounds of appeal. In such cases the issue of an Interim Appeal Certificate is automatic, provided the accused is financially eligible either by virtue of the grant of a Provisional Financial Certificate or because a Nominated Solicitor acted at some stage during the trial.<sup>29</sup>

(ii) all other appeals

Only Form SCLA 7 need be completed by the applicant, with the assistance of the Clerk of Court. It is forwarded to the Local Committee along with the Provisional Financial Certificate if applicable, but there is no necessity to lodge any written statement of the grounds of appeal.<sup>30</sup>

(c) Determination of applications

(i) appeals by Stated Case

Due to the short statutory time limits for such appeals,<sup>31</sup> applications are considered not by the full Local Committee, but

27. Regulation 9(2)(b).

28. Regulation 8(1).

29. Scheme, Art.20(1); Regulation 9(4).

30. Ibid. The assistance of the Clerk of Court will not be required in the usual case where the applicant has consulted a Solicitor who is prepared to accept instructions.

31. See Criminal Procedure (Scotland) Act 1975, ss.442 to 448.

forthwith by the Secretary and one member, or two members, or where circumstances so demand, by the Secretary or one member of the Committee alone.<sup>32</sup> The Interim Appeal Certificate is granted, after such inquiry as may be deemed sufficient in the circumstances, unless those considering the application are reasonably satisfied that there are no prima facie grounds for the appeal.<sup>33</sup>

(ii) all other appeals

In all other cases the application for an Interim Appeal Certificate is considered by the full Committee as soon as possible.

In all cases an Interim Appeal Certificate is not issued unless the Local Committee has received a Provisional Financial Certificate where appropriate and is satisfied in the case of an applicant who was refused legal aid for his trial or who ceased to receive legal aid in the Court of first instance under a direction by the Court on the grounds that he had wilfully or deliberately given false information or furnished false particulars, that it would not be unreasonable that the services of an Interim Solicitor should be made available to him in connection with his application for a full Appeal Certificate.<sup>35</sup>

The decision of the Local Committee on an application for an Interim Appeal Certificate is final, subject to:

- (a) any review that may be necessary following a determination by the Court that an applicant who was refused a Provisional Financial Certificate by the Clerk of

32. Regulation 9(2).

33. Regulation 8(2) enjoins the Local Committee to issue the Interim Appeal Certificate as soon as possible after receiving the application.

34. Regulation 8(2).

35. Ibid.

Court, in fact meets the conditions for issue of such a certificate; or

- (b) a decision by the Court of first instance that it would be reasonable for the purposes of an appeal to remove a prior direction by that Court to debar an applicant from legal aid on the ground that he has given false information regarding his application to mislead the Court.<sup>36</sup>

The Committee will appoint as Interim Solicitor the Solicitor requested by the applicant; if it is not reasonably practicable for him to act they may appoint someone else; the appointment and issue of the Interim Appeal Certificate is intimated to the Prosecutor, the applicant and the Clerk of Court.<sup>37</sup>

(d) Duties of Interim Solicitor

(i) appeals by Stated Case

In such cases the Interim Appeal Certificate covers everything done during the period from the initial application to the Clerk of Court for a Stated Case until the adjusted Stated Case is lodged with the High Court, or until such earlier date as the Interim Appeal Certificate is discharged by the Supreme Court Committee.<sup>38</sup> The latter may only discharge the certificate if it receives intimation that any Provisional Financial Certificate has been discharged by the Court or where it is refusing a full Appeal Certificate,<sup>39</sup> but in appeals by Stated Case neither is likely to occur since an application for a full Appeal Certificate is not made until the Stated Case has been adjusted.

36. Regulation 8(3).

37. Regulation 8(4).

38. Regulation 9(7).

39. Regulation 8(6).

Thus the Interim Appeal Certificate will cover the fixing of caution,<sup>40</sup> applications for Interim Liberation (and any appeal relating thereto), framing and submitting adjustments to the draft Stated Case and attending any hearing(s) on those adjustments.

The Interim Appeal Certificate must be lodged with the Clerk of Court if it is obtained after the expiry of the statutory period for an application for a Stated Case.<sup>41</sup>

At the end of the period of adjustment, when the case is being lodged by the appellant or served upon him, the Interim Solicitor must make application for a full Appeal Certificate as described below.<sup>42</sup>

(ii) all other appeals

In all other cases where an Interim Appeal Certificate is necessary and has been granted, the Interim Solicitor acts as if he were the Nominated Solicitor in regard to the latter's duties in appeals.<sup>43</sup> In particular he will apply for a full Appeal Certificate and act until the application for this is determined, or until the Supreme Court Committee discharge the Interim Appeal Certificate, or the Court of first instance discharges any Provisional Financial Certificate.<sup>44</sup>

The Grant of a full Appeal Certificate

As indicated, the grant of a full Appeal Certificate is at the discretion of the Supreme Court Committee, irrespective of the mode of appeal and of whether the appellant is the prosecutor or the accused.<sup>45</sup>

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40. Regulation 9(a). In fixing caution the Court must have regard to the fact that an Interim Appeal Certificate has been granted: Rule 12.

41. Regulation 9(5)(b).

42. Regulation 9(6) and see infra, pp.349 et seq.

43. See supra, pp.328-329.

44. Regulation 9(5).

45. See supra, p.342.

In all cases the applicant must either have had a Nominated Solicitor acting for him at the conclusion of the proceedings in the Court of first instance who is prepared to accept instructions for an appeal or have previously obtained an Interim Appeal Certificate (and a Provisional Financial Certificate if necessary).<sup>46</sup>

The application for a full Appeal Certificate is made by the Nominated Solicitor or Interim Solicitor on Form SCLA 14. In all cases where the appellant is the person seeking legal aid,<sup>47</sup> he cannot receive it unless it appears to the Supreme Court Committee that:

- (i) he has substantial grounds for taking appeal proceedings; and
- (ii) it is reasonable that he should receive legal aid in the particular circumstances of the case.<sup>48</sup>

The Supreme Court Committee are given no guidance in any of the legal aid provisions on what are "substantial grounds" or what is "reasonable" but assess these matters on their experience of High Court appeal proceedings, having due regard to the preservation of public funds. In practice, of the applications considered by the Supreme Court Committee, slightly more are refused than are granted; the refusals are almost invariably on the merits (i.e. that there are no substantial grounds for the appeal) as opposed to refusals on the ground that it is unreasonable that legal aid be granted.<sup>49</sup>

46. See supra, p. 335.

47. The situation where the prosecutor appeals by Stated Case is dealt with infra at p. 349.

48. 1967 Act, s.1(7)(b).

49. See e.g. 26th Report of the Law Society on the Legal Aid Schemes (1975-76) Schedule 15.

Legal aid specialities of modes of appeal(a) appeals in solemn cases

Art.18 of the Scheme enjoins the Nominated or Interim Solicitor for a person who has been convicted and sentenced on indictment to send the following to the Supreme Court Committee:

- (1) Form SCLA 14.
- (2) a memorandum setting out the name and <sup>address</sup>~~address~~ of the Nominated Solicitor's Edinburgh Correspondent and the views of the Nominated Solicitor as to whether or not (a) the grounds of appeal are substantial and (b) it is reasonable in the particular circumstances of the case that the applicant should receive legal aid for the appeal. The grounds of appeal must be fully stated and the Solicitor must state fully the reasons why he believes the grounds to be substantial.<sup>50</sup>
- (3) a copy of the Statutory Note of Appeal or application for leave to appeal. This is now sent to the Supreme Court Committee direct from the Justiciary Office, along with copies of the Indictment, Minutes of Proceedings and Judge's Charge (where appropriate), so the Solicitor should not wait for any of these documents, but should apply for the Appeal Certificate as soon as

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50. Cases have arisen where this has not been done and legal aid has been refused, although subsequent examination has shown that substantial grounds of appeal might have existed: see (1974) 19 J.L. Soc. Sc. 334-335. If the Solicitor considers that there are no substantial grounds for the appeal, he should still assist the accused to complete and lodge Form SCLA 14, indicating thereon his own views adverse to the appeal. The application will normally be refused, but the Solicitor still has a duty to make it: see 17th Report of the Law Society on the Legal Aid Schemes (1965-66) p.59.

instructed or as soon as he is informed by the  
 Justiciary Office that an appeal has been taken  
 directly by the accused.<sup>51</sup>

(b) appeals by Stated Case

In such cases where the accused is the appellant the Supreme  
 Court Committee require the following documents:

- (1) Form SCLA 14
- (2) the Interim Appeal Certificate
- (3) the Provisional Financial Certificate (if granted)
- (4) the adjusted Stated Case
- (5) a statement (not necessarily in memorandum form) of  
 the Interim Solicitor's views on substantiality of  
 the grounds of, and reasonableness of the grant of  
 legal aid for, the appeal.<sup>51</sup>

These documents will normally be submitted by the Edinburgh  
 Solicitor for the appellant, since he is responsible to the High Court  
 for all procedural matters relating to the appeal.<sup>52</sup> It is necessary  
 for the Edinburgh Solicitor to wait until the Appeal Certificate is  
 granted before instructing the printing of the case, but in order to  
 avoid delays, the application for the Appeal Certificate should be  
 made not later than the day on which the principal Stated Case is  
 lodged in the Justiciary Office.<sup>53</sup>

Where the appellant is the prosecutor and the respondent wishes  
 to apply for legal aid, the Supreme Court Committee require only

51. Scheme, Arts.12, 20 and 21(2).

52. See the Act of Adjournal (Summary Procedure) 1975, reported at  
 1975 S.L.T. 163-164.

53. See (1974) 19 J.L. Soc. Sc. 334-335.

documents (1) to (4) inclusive. In such cases the judgment of the Court of first instance is held by the Committee to show that the applicant has substantial grounds for answering the appeal.<sup>54</sup>

(c) appeals by Bill of Suspension

The documents required by the Supreme Court Committee here are:

- (1) Form SCLA 14
- (2) a memorandum setting out the grounds of appeal and other particulars as in a solemn case
- (3) a copy of the Complaint
- (4) the Interim Appeal Certificate (if appropriate)
- (5) the Provisional Financial Certificate (if appropriate)<sup>55</sup>

The application for an Appeal Certificate must be made "forthwith", which means at least concurrently with the lodging of the Bill. It is not permissible to first present the Bill and obtain interim liberation, and then apply for the Appeal Certificate. If this is done and legal aid is subsequently refused, the Court is left with no-one to whom it can look for performance of the complainer's obligations in relation to printing and instructing Counsel.<sup>56</sup>

Procedure before Supreme Court Committee

The Committee normally makes its decision on the basis of the written papers before it, but may make such inquiries as to the proposed grounds of appeal as they think necessary.<sup>57</sup> They have power specifically:

54. Scheme, Art.21(3).

55. Ibid., Arts.11, 19, 21(2). It does not appear to be necessary to send the Committee a copy of the Bill of Suspension itself.

56. See (1974) 19 J.L. Soc. Sc. 334-335.

57. Scheme, Art.21(1).

- (a) to require the attendance before them of the Nominated Solicitor or his Edinburgh correspondent and of the applicant and, where applicable the attendance of, or at the discretion of the Committee, a note from his Counsel;
- (b) to authorise the Nominated Solicitor to have transcribed and transmitted to them all or such part of the shorthand notes taken at the trial as they may direct; and
- (c) to appoint one of their number or some other person to interview the applicant in person and to report to the Committee.<sup>58</sup>

If such powers are exercised, one of the consequences may be that the determination of the application will be delayed. If a decision is going to be deferred for any reason, the Committee inform the Justiciary Office direct and the case may be dropped from the Court Roll.

The application will not be granted until financial eligibility has been settled in cases where a Provisional Financial Certificate has been granted or where the application is made direct to the High Court and the latter remits the application to the Sheriff for determination;<sup>59</sup> in both cases the Court reports its determination on this question direct to the High Court.<sup>60</sup>

The Supreme Court Committee will not even consider the merits of an application if it is reported to them that the lower court has

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58. Ibid., Art.21(2).

59. Ibid., Art.21(1)(a).

60. Rules 6(2) and 8(2).

refused to confirm the granting of the Provisional Financial Certificate.<sup>61</sup>

The decision of the Supreme Court Committee is final and is intimated to the applicant, the Nominated Solicitor or his Edinburgh correspondent and the Clerk of Justiciary.<sup>62</sup> If a certificate is granted, it replaces any Interim Appeal Certificate and the Solicitor selected by the applicant is nominated by the Committee to act for him, unless it is impracticable for him to act.<sup>63</sup> An Edinburgh Solicitor is also appointed to act along with the Nominated Solicitor and it is to the former that the Court looks for implementation of the various duties to the Court.<sup>64</sup>

#### The effect of a full Appeal Certificate

If a full Appeal Certificate is granted, the Nominated Solicitor must provide the normal services provided by a Solicitor for an appellant, and must make satisfactory arrangements for the representation of the assisted person at all diets.<sup>65</sup> "Normal services" include making, if necessary an application for interim liberation and acting in any appeal therewith.<sup>66</sup>

Arranging representation of course involves instructing Counsel for all hearings before the High Court. Sanction of the Supreme Court Committee is not generally required for instructing Counsel, but representation is restricted to one Junior Counsel, except for murder

61. Scheme, Art.21(2)(d). This rarely happens.

62. Ibid., Art.21(4).

63. Ibid., Art.22; Regulation 8(7).

64. Ibid., Art.22.

65. Ibid., Art.14(2).

66. Ibid., Art.14(3).

appeals, where the Nominated Solicitor may instruct without sanction, either Senior Counsel alone, or Senior and Junior, or two Junior Counsel. In all other appeals additional Counsel (either Senior or Junior) may be instructed only with the sanction of the Supreme Court Committee.<sup>67</sup>

The Appeal Certificate entitles the assisted person to legal aid until the final disposal of the appeal<sup>68</sup> and thus covers all attendances, consultations and appearances.

#### Discharge of Appeal Certificate

An Appeal Certificate may be discharged if the Supreme Court Committee are of the opinion, after giving the assisted person the opportunity of submitting representations, that it appears unreasonable in the light of subsequent developments that the assisted person should continue to receive legal aid.<sup>69</sup>

An appellant may also cease to be entitled to legal aid for the reasons enumerated in Rule 10.<sup>70</sup>

If a certificate is discharged or ceases to be effective, the Supreme Court Committee informs the Solicitors concerned, the assisted person and the Clerk of Justiciary.<sup>71</sup>

67. Ibid., Art.15(1). Where sanction is refused, an appeal lies to the Central Committee who may also grant retroactive sanction on cause shown: Scheme, Arts.15(3) and (4).

68. Scheme, Art.23.

69. Ibid., Art.24.

70. See supra, p. 330.

71. Scheme, Art.25.

CHAPTER XXIICRIMINAL LEGAL AID FEESMain provision: 1967 Act, s.16(2)Introduction

In all criminal legal aid cases, the fees which may be charged by Solicitors are regulated by Act of Adjournal made by the High Court under s.16(2) of the Legal Aid (Scotland) Act 1967. Counsel's fees are not so fixed although there is an unofficial scale laid down by the Faculty of Advocates itself.<sup>1</sup>

The present provisions regarding Solicitors are to be found in the Act of Adjournal (Criminal Legal Aid Fees) 1964, which has been frequently amended.<sup>2</sup> Broadly speaking, the fees fixed therein are divided into three categories:

- (1) fees payable to Duty Solicitors;
- (2) fees payable to Nominated Solicitors acting in criminal trials, whether solemn or summary;
- (3) fees payable in connection with appeals.

Allowable fees(1) Duty Solicitors

Duty Solicitors in the Sheriff and District Courts are entitled to fees fixed on a sessional basis. By section 3(1) of the Act of Adjournal a sessional fee is fixed to cover attendance at the first session of the court on any day, subject to a stated maximum for the

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1. Section 14 of the Act of Adjournal provides: "There shall be allowed to Counsel in respect of the representation of any person receiving legal aid in connection with any criminal proceedings such sum as appears to the Law Society to represent fair remuneration for the work actually and reasonably done."
  2. S.I. 1964/1410, amended by S.I. 1965/1788; 1968/1933; 1971/926; 1973/673; 1973/1145; 1975/836; 1976/339; and 1976/1062.

session until its termination on completion of business for the day or on adjournment by the Court, whichever is earlier. Additional fees are payable for other sessions of the Court on the same day.<sup>3</sup> The fees chargeable cover not only the appearance in Court of the Duty Solicitor but also any interviews with the accused or others, whether such interviews take place during the same day or another session.<sup>4</sup>

The computation of the sessional fee depends on the number of accused persons who are represented in the session. The maximum amount presently chargeable for the first session is £25.50, which is made up of £11.90 for the first case and £1.70 for each additional case.<sup>5</sup> So where more than nine accused are to be represented the Duty Solicitor will not be able to claim more than £25.50 unless he makes application to the Court to allow a second (or subsequent) session. The wording of section 3(1)(a) of the Act of Adjournal seems to suggest that the Duty Solicitor should move the Court to adjourn after nine cases and to reassemble, certifying that it is in its second (or subsequent) session of the day, but in practice what appears to happen in some busy Courts is that the Duty Solicitor merely moves the Court to allow an additional session. For the additional session the maximum fee is presently £17.00 made up of £11.90 for the first case and £1.70 for each additional case.<sup>6</sup> So

3. Act of Adjournal, s.3(1).

4. Ibid. But if the Duty Solicitor is called out in e.g. a case of murder his fee for attendance at the Police station does not appear to be included in the sessional fee. It is not clear from the Act of Adjournal how this is chargeable.

5. Act of Adjournal, s.3(1)(a).

6. Ibid., s.3(1)(b).

if there are more than four accused to be represented in the additional session, it is open to apply for further sessions to be allowed by the Court.<sup>7</sup>

The other aspect of a Duty Solicitor's work for which fees are allowed relates to his "Follow-Up" duties. It will be remembered that by Article 8(3) of the Scheme, the Duty Solicitor in summary cases is obliged to represent the accused at all subsequent diets in the case following a plea of guilty where the case is adjourned for subsequent disposal. The commonest situation here is where a case is continued for social enquiry or other reports, or where sentence is deferred for some other reason. An additional fee is payable to the Duty Solicitor in such cases in respect of

- (a) additional interviews with the accused or others;
- (b) attendances at Court other than during the course of the Duty Solicitor's period of duty.<sup>8</sup>

The latter is usually the most time-consuming process, again particularly in busy Courts such as Glasgow Sheriff Court where all cases continued from daily summary criminal Courts are heard at a special weekly Remand Court.

At present it is provided that the amount of such additional fee "shall be such sum not exceeding £28.90 as shall form reasonable

7. On the vast majority of Court days in summary cases in Scotland, there is never more than one session, due to the small number of custody cases. These provisions are only therefore of application on busy Court days e.g. on a Monday following a large number of arrests, usually after a football match. In such cases, sometimes an additional Court is convened with an additional Duty Solicitor.
8. Act of Adjournal, s.3(2). If sentence is deferred for a lengthy period e.g. twelve months, the Duty Solicitor is still obliged to appear at the deferred diet. But he need not wait until this time before rendering his account for the period of duty, and can render a supplementary account later. The same considerations apply in the case of a Nominated Solicitor.

remuneration having regard to the additional work and time involved, together with any reasonable consequential outlays."<sup>9</sup> Such outlays would include e.g. travelling expenses incurred in visiting an accused in custody during the period of deferment.<sup>10</sup>

(2) Nominated Solicitors acting in trials

(a) Solemn cases

In solemn cases at trial in the Sheriff Court a minimum and a maximum fee allowable to the Nominated Solicitor are prescribed, presently £22.10 and £215.90 respectively.<sup>11</sup> An additional daily fee for cases in which a trial has not been concluded on the day on which it started is payable in respect of the second and every subsequent day. Where Counsel has not been instructed the additional daily fee must not exceed £61.20; where Counsel has been instructed, it must not exceed £42.50.<sup>12</sup>

In solemn cases at trial in the High Court of Justiciary the fees allowable to the Nominated Solicitor must be not less than £27.20 and not more than £215.90, with an additional daily fee not exceeding £42.50.<sup>13</sup>

These fees are exclusive of outlays, and are subject to the operation of Articles 11 and 13 of the Act of Adjournal.<sup>14</sup>

9. Ibid.

10. Such travelling expenses are chargeable in any event under Section 12(1) of the Act of Adjournal.

11. Act of Adjournal, s.5(1).

12. Ibid., s.5(2).

13. Ibid., s.6.

14. See infra, pp. 359 and 362.

(b) Summary cases

In summary cases whether in the Sheriff Court or District Court, the Nominated Solicitor is presently allowed a fee of not less than £17.00, not exceeding £130.90, and a further fee not exceeding £42.50 in respect of every day on which an adjourned hearing takes place.<sup>15</sup>

Again, these fees are exclusive of outlays and are subject to the operation of Articles 11 and 13 of the Act of Adjournal.

(3) Fees payable for appeals(i) Under an Interim Appeal Certificate

The Interim Solicitor nominated under an Interim Appeal Certificate is presently allowed a fee not exceeding £27.20 as appears to represent fair remuneration according to the work done.<sup>16</sup> Where the Interim Solicitor becomes the Nominated Solicitor, he is allowed one account only in respect of the appeal.<sup>17</sup>

(ii) Under a full Appeal Certificate

The Nominated Solicitor acting under a full Appeal Certificate, whether the appeal is taken after a summary or solemn trial is allowed a minimum fee of £22.10 and a maximum of £219.90.<sup>18</sup> Where the hearing of the appeal has not been concluded on the day on which it started an additional daily fee not exceeding £42.50 is allowed.<sup>19</sup>

15. Act of Adjournal, s.4.

16. Ibid., s.7. Preliminary work done in appeals, such as advising on the prospects, is done under the trial certificate.

17. Ibid. The Interim Solicitor normally becomes the Nominated Solicitor for the appeal, if an Appeal Certificate is granted.

18. Ibid., ss.8(1), 9(1), 10(1).

19. Ibid., ss.8(2), 9(2), 10(2).

Again, outlays are additional and the provisions of Articles 11 and 13 of the Act of Adjournal apply.

#### Multiple Accused

By section 11(1) of the Act of Adjournal, where the Solicitor acting under the Scheme represents two or more persons charged in the same indictment or Complaint or appealing in respect of the same indictment or Complaint, additional fees are allowable whether one or more certificates have been granted. The fees chargeable may be increased in respect of each such person, other than the first person so represented whose name appears in the relative indictment or Complaint, by such amount as appears to be proper in all the circumstances of the case.

Such increases must not exceed 40 per cent of the amount payable where there is a second accused, and ~~by~~ not more than 20 per cent for each additional accused.<sup>20</sup>

#### Outlays

These are dealt with under section 12 of the Act of Adjournal. Broadly, in addition to the fees payable as stated above, the following outlays are payable:

##### (i) Travelling expenses

The Solicitor is entitled to expenses actually and reasonably incurred by himself or his clerk<sup>21</sup> in travelling to and from the Court at which the accused appears or the trial or appeal takes place (not being a Court in the town or place where the Solicitor has a place of business) and to and from the prison and any place visited for the purpose of preparing or conducting the defence or appeal. In this

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20. Ibid., s.11(2).

21. This would appear to include any unqualified member of his staff, such as an Apprentice.

connection where public transport is not used then a reasonable mileage allowance is treated as an outlay; and in considering the whole circumstances of any case, time taken in travelling is treated as time employed in the case.<sup>22</sup>

Section 12 allows the Solicitor to charge for such items as travelling to interview witnesses or to prison, even in the same city as his place of business. It also seems that in an appeal a Nominated Solicitor whose place of business is outwith Edinburgh is entitled to travelling expenses as an outlay for travelling to the appeal.<sup>23</sup>

(ii) Witness expenses

The Nominated Solicitor is entitled to include in his account as an outlay any fee paid to any witness who is not on the Crown list. Such a fee must not exceed the sum payable from time to time by the Crown to the witness of the same category e.g. an Expert Witness for the defence is entitled to not more than the sum payable to the Crown Expert.<sup>24</sup>

In general witnesses are entitled to re-imbusement of wage loss and subsistence. The Law Society requires evidence of wage loss before admitting such a claim, which should normally be <sup>vouched</sup> by producing a Certificate of Loss of Wages. Travelling time is included in the period of wage loss.<sup>25</sup>

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22. Act of Adjournal, s.12(1)(a). This can lead to difficulties where the prison or Court is some distance from the Solicitor's office. The time involved in travelling e.g. from Glasgow to Inverness has to be included in the maximum fee chargeable for the trial or appeal (subject to the operation of s.13(2)) but the full travelling expenses are payable as an outlay.
23. This is in contrast to any fee he may be allowed. See *infra*, p. 362.
24. Act of Adjournal, s.12(1)(b).
25. An official claim form is sent out to the Solicitor with the legal aid papers at the start of the case; it gives the current rates of witness fees and expenses which are chargeable.

(iii) Other out-of-pocket expenses

A further outlay allowable is any other out-of-pocket expense actually and reasonably incurred, including Counsel's fees.<sup>26</sup> Normally in a legal aid case Counsel renders his fee note direct to the Solicitor. The latter includes it with his account but does not pay it. The fee note is sent by the Solicitor to the Law Society who settle direct with Faculty Services Limited.

Situation where Local Agent or Edinburgh Correspondent is acting along with Nominated Solicitor

Where the Nominated Solicitor requires to instruct another Solicitor, whether an Edinburgh Solicitor in connection with an appeal or on a remit for sentence, or a local agent at the place of the prison or the Court, or a local agent for the purpose of local recognitions or enquiry, only one account should be rendered by the Nominated Solicitor. The other Solicitor's account is a matter of adjustment between the Nominated Solicitor and the other Solicitor out of the fees payable to the Nominated Solicitor. But in determining the amount of such fees, account is taken of the work done by the other Solicitor.<sup>27</sup> His business account is normally included with the Nominated Solicitor's claim.

Value Added Tax

The Law Society add this to the Nominated Solicitor's Account.<sup>28</sup>

Determination of the sums due

In general, the determination of the sum to be allowed to a Solicitor must take into account all the relevant circumstances including

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26. Act of Adjournal, s.12(1)(c). Such other outlays include the time-honoured "Phones, posts and incidents".
27. Act of Adjournal, s.12(2).
28. Ibid., s.12(3) and (4)

the nature, importance, complexity or difficulty of the work and the time involved, including time necessarily spent at the Court on any day in waiting for the case or for the appeal to be heard where such time has not been occupied in waiting for or conducting another case.<sup>29</sup> It includes such amount as may be determined to be fair remuneration for the work actually and reasonably done, due regard being had to economy.<sup>30</sup> In determining what is fair remuneration, two matters require consideration:

- (1) the table of charges to be applied; and
- (2) whether the case is of exceptional length, complexity or difficulty.

(1) The table of charges to be applied

This is a simple matter and is the starting point for making up a criminal legal aid account. The charges for the individual steps taken to represent an accused or appellant are computed

- (a) in the case of all proceedings in the High Court, on the basis of the charges set out in Chapter I of the Table of Fees of Solicitors in the Court of Session;
- (b) in the case of all other proceedings, on the basis of the charges set out in Chapter III of the Table of Fees of Solicitors in the Sheriff Court,

being those charges in force at the date of the conclusion of the trial or other proceedings.<sup>31</sup>

29. Act of Adjournal, s.13(1). But the provisions of this section do not apply to the determination of the fees payable to Duty Solicitors under s.3 of the Act of Adjournal: ibid, s.3(3).

30. Ibid.

31. Ibid., s.13(5).

In the normal trial or appeal case then the Solicitor should make up his account on the basis of these charges, subject to the maximum limits which have been referred to for the various types of legal aid representation which ~~has~~<sup>have</sup> been provided. It then becomes a matter of adjusting this account with the Central Committee, subject to a right of taxation.<sup>32</sup> But the maximum fees allowable for criminal trials (but not appeals) are subject to increase under sections 13(2), 13(3) and 13(6) of the Act of Adjournal.

(2) Cases of exceptional length, complexity or difficulty

Introduction

No provisions of Scottish legal aid legislation have been more widely condemned, inequitably interpreted and open to abuse than those which deal with the additional fees which may be paid to Solicitors in criminal cases which involve lengthier or more complicated proceedings than the average trial. In order to appreciate fully the inequities of the present position, it is necessary to review the background to the problem before considering the present position. On the one hand, the Scottish Home and Health Department have always been concerned to keep the cost of legal aid in criminal cases within manageable and economic limits, while on the other the legal profession has always sought proper remuneration for work done. One of the reasons why criminal legal aid was not introduced until fifteen years after the civil scheme started was apprehension as to the cost involved and the expectation in some quarters that some unscrupulous Solicitors would abuse whatever provisions were introduced.<sup>33</sup> Such attitudes

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32. See infra, pp. 365-367.

33. These criticisms of course became more overt when criminal legal aid was introduced in 1964.

still persist today,<sup>34</sup> but at the Scheme's inception one of the major difficulties was the framing of a provision to cover exceptional cases which would satisfy all sides.

What emerged in 1964 when criminal legal aid was introduced was the inevitable compromise and it is most instructive to compare the original provisions with those presently in force. By the original section 13(1) of the Act of Adjournal (Criminal Legal Aid Fees) 1964<sup>35</sup> it was provided that the determination of the sum to be allowed to a Solicitor should take into account all the relevant circumstances, including the nature, importance, complexity or difficulty of the work and the time involved (including waiting days) and should include such amount as appeared to represent fair remuneration for the work actually and reasonably done. The original section 13(2) was in these terms:

"If it appears at any time after the final disposal of the case that for any reason, including the exceptional length, complexity or difficulty of the case, the sums payable by virtue of the foregoing paragraphs or any of them would not provide fair remuneration according to the work actually and reasonably done by the Solicitor, then any limitation contained in these provisions on the amount of any fee payable shall not apply and such fees shall be allowed, after taking into account all the relevant circumstances of the case, in respect of the work done as appears to represent fair remuneration according to the work actually and reasonably done."

It was further provided by s.15 that inter alia in the event of any dispute arising as to the amount payable to a Solicitor who appeared in a criminal case, then the dispute would be referred to the Auditor

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34. See "The Scotsman" correspondence columns of November, 1977, when Lord Wilson of Langside claimed that accounts were artificially inflated from 1964 onwards.

35. S.I. 1964/1410.

of the appropriate Court for his decision as to what represented fair remuneration.<sup>36</sup>

So it was clear at that time that the guiding principle was "fair remuneration for work actually and reasonably done". The limitation on fees chargeable would not apply not only in case of exceptional length, complexity or difficulty, but also if for any other reason the fees chargeable would not represent fair remuneration. This of course meant that provided the Solicitor could justify his account to the Law Society, and in a disputed case to the Auditor, he would be paid from the Fund. In particular it will be noted that there was no provision for certification by the Court (as there now is) and the Court had no locus in this matter at all.

This inevitably placed a great deal of trust in the hands of the Solicitor, but not more than he had in civil cases. However the idea that Solicitors should be properly paid for conducting criminal cases did not easily take root, and in 1967 pressure to change the system came from the High Court and the Scottish Home and Health Department.

By 1967 the adjustment of Solicitors' accounts, especially in exceptional cases, was causing the Central Committee much difficulty. Section 13(2) was being increasingly invoked, but the Central Committee was unable to obtain any guidance on the proper approach to the section, as Auditors of Court were reluctant to consider its applicability. The Scottish Home and Health Department became perturbed at the rising cost of legal aid in criminal causes and initially proposed that section 13(2) should be repealed. Although this was

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36. It was subsequently provided that "fair remuneration" was not to be assessed in the abstract but "under and in terms of" the Act of Adjournal: Act of Adjournal (Criminal Legal Aid Fees Amendment) 1965 s.2 (S.I. 1965/1788).

successfully opposed, the Department insisted that certification of the applicability of this section should be dealt with otherwise than by the Law Society or the Auditors of Court.<sup>37</sup>

This of course was a new departure. The idea that a Solicitor should have to plead for his fees was repugnant to most Solicitors, who were not accustomed to do so in civil cases, nor in matters not involving litigation. While no-one objected to the Court fixing maximum fees, the objection was directed to the necessity of justifying work which was properly done but which was more expensive than that allowed for by the Act of Adjournal.

Protracted negotiations were carried on between the Law Society, the Department and the Court towards the end of 1968.<sup>38</sup> The Department maintained its insistence that certification should be placed in the hands of the Court; the Law Society drew the Department's attention to the fact that in England the Government appeared prepared to accept that the adjudication of fees should be carried out by the Law Society of England.<sup>39</sup> In December 1968 a new Act of Adjournal was prepared providing for certification by the Court, which brought matters to a head. The Glasgow Legal Aid Committee received a letter from the Glasgow Bar Association intimating that the Association held over one hundred letters of resignation signed by Solicitors on the Glasgow criminal legal aid lists and that these were to be lodged with the Committee to take effect on 2nd January 1969 if the new Act of Adjournal in its present terms came into operation on that date. In

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37. It is frequently suggested that Solicitors brought this situation on themselves because they allegedly rendered inflated accounts.
38. For the whole story of the dispute see (1969) 14 J.L. Soc. Sc. 33.
39. The comparison between criminal legal aid fees in Scotland and England is striking. See N.H.F. Legal Aid in Criminal Cases 1973 S.L.T. (News) 210.

spite of disapproval from the Law Society's Council, the Act was introduced on the due date and 102 Solicitors in Glasgow resigned from the list.

This did not produce the disruption intended, and was criticised on many sides as not being in accordance with the standards of conduct which the profession should seek to uphold. Eventually the emotional atmosphere lessened and many Solicitors returned to the lists, but the Council expressed its great regret that an Act of Adjournal had been passed to which strong exception had been taken by the Solicitors' governing body.

The main point of difference between the Department and the Society related of course to the particular authority (i.e. the judge) on whom was conferred the exclusive right to determine whether or not section 13(2) was to apply. The Society maintained that the right should have remained with them in order to achieve uniformity and to avoid the undignified procedure of a Solicitor having to grovel for his fees.

It is now necessary to examine the 1968 provisions.<sup>40</sup> The new s.13(1) specifically excluded payment for waiting days when in fact those days were occupied in waiting for or conducting another case, and "fair remuneration" was to be assessed with due regard to economy. The new s.13(2) provided for an application to the trial judge for a certificate that the case had necessarily been one of exceptional length, complexity or difficulty. If such a certificate was granted then limitations on the statutory fees would not apply ".... and such fees shall be allowed, after taking into account all the relevant circumstances of the case, in respect of the work done as appears to

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40. Act of Adjournal (Criminal Legal Aid Fees Amendment) 1968 (S.I. 1968/1933).

represent fair remuneration according to the work actually and reasonably done due regard being had to economy".

It will be observed that while under the original provisions, fair remuneration was to be paid in all cases, the exceptional length, complexity or difficulty of the case being merely one factor in the assessment, the 1968 provisions excluded fair remuneration in all cases of exceptional length, complexity or difficulty where the trial judge was not disposed to grant a certificate. The result was that representing an accused in such proceedings became a gamble for the legal advisers: they might spend many hours preparing and conducting the case, but at the end of it, receive totally inadequate remuneration if a certificate was refused.<sup>41</sup>

Of all the difficulties, perhaps the most obnoxious was the differing standards applied by the Bench. Some judges would grant certificates in almost all cases which lasted more than a day or two; some would refuse certificates where on any reasonable view the issues were grave and complex, apparently with no recognition of the work done. Few cases appear in the law reports, but the difference in judicial approach is clear from those which do appear. In H.M. Advocate v Gray 1969 J.C. 35 the accused was charged on indictment with unlawful possession of firearms and explosives. His advisers prepared for the trial, but at the trial diet the accused pleaded guilty. A certificate under s.13(2) was refused by Lord Wheatley, who held that while a certificate could be justified by the presence of any one of the qualifications of exceptional length, complexity or difficulty, such an application could only be granted if, in the opinion of the presiding judge, the case, as presented in court, had necessarily been

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41. For a description of this and other iniquities, see N.H.F., Legal Aid in Criminal Cases 1973 S.L.T. (News) 210.

one of exceptional length, complexity or difficulty, the judge not being called upon to inquire into what happened in the course of preparing the case. In particular, he rejected a submission that "length" referred to the length of preparation time. Lord Wheatley was of the clear opinion that a certificate could only be granted if there was some special feature present which differentiated the case from a normal case in respect of one or other of the factors mentioned, and this was to be decided from the trial judge's experience of the case as presented in Court. "He is not an inquisitor at large, going, if need be, beyond the confines of the court to check on whether the submissions about the length or complexity or difficulty of the preparation work are justified."<sup>42</sup>

H.M. Advocate v Gray was decided on 8th January 1969 and was the first case in which the new Act of Adjournal was interpreted. In February 1969 in the unreported case of H.M. Advocate v Flynn an application under Article 13(2) was made to Lord Justice Clerk Grant.<sup>43</sup> Written grounds were submitted, but the application was refused on the ground of "length" and granted on the ground that the preparation of the case had been one of exceptional complexity or difficulty. In Court the matter was disposed of on a plea of guilty, but the submissions concerning the application related to matters which had not emerged in Court and would have been most unlikely to emerge even if the case had gone to trial. One matter which was taken into account consisted of certain difficulties which has arisen in the course of

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42. H.M. Advocate v Gray 1969 J.C. 35 at 39. Lord Wheatley regarded the case as one of "blatant simplicity" - see p.40. It is also worth noting that the accused replied to caution and charge "You've hit the jackpot".

43. See (1969) 14 J.L. Soc. Sc. 100.

preparing the defence as a result of the accused being an alcoholic and of a very low mental calibre.

The 1968 provisions continued to apply with this interpretation until 1973, when a change in judicial policy to the granting of certificates became apparent. In H.M. Advocate v Kenney & Others 1973 S.L.T. (Notes) 57 Lord Cameron granted a certificate on the ground of exceptional length, holding that "length" included length of preparation. In that case he adjourned the hearing of the application from open court to chambers and there considered written submissions, Counsel's file of precognitions and a rough draft account of expenses, before concluding that there had been a full and proper preparation of the defence.<sup>44</sup> He considered the wording of s.13(1), where it is clear that "time" includes time spent on preparation, and stated

"It would be a strange result if that time is to be taken into account in assessing what I may call a 'normal fee' but is to be disregarded when considering the 'length of the case' - not the trial - when the issue of a solicitor's right to claim on a written basis is raised. In addition it is the exceptional complexity or difficulty of the case, not of the trial, to which attention is to be directed in s.13(2). It would be strange that when considering exceptional complexity or difficulty the case as a whole has to be considered, but upon the issue of exceptional length only the time taken by the trial can be regarded."<sup>45</sup>

Lord Cameron's view that "length" included length of preparation was confirmed by a further amendment to Act of Adjournal of 1964 in 1973, when provision was also made for certificates in summary cases,<sup>46</sup> but in that rather uneasy state the matter rested until 1976.

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44. See p.58 of the report.

45. Ibid. at p.59.

46. Act of Adjournal (Criminal Legal Aid Fees Amendment) 1973 (S.I. 1973/1145).

In early 1976 the whole question was raised again with the allegation that the Central Committee were allowing too liberal a rate of payment on Criminal Legal Aid accounts and with the Court's intention to pass a further Act of Adjournal linking charges for work done in criminal cases to the then existing civil scales. Section 13(2) was to be amended to allow two types of certificate, one on length which would be granted relatively freely, and the other on complexity or difficulty which would be granted more sparingly. Despite opposition from the profession, which maintained its view that certification under s.13(2) should be removed from the Court, the Act of Adjournal was passed on March 2nd, 1976.<sup>47</sup> The result has been in practice that certificates on "length" have been granted frequently in the High Court, but certificates on "complexity or difficulty" have been uncommon.

#### The Present Law

##### Making the application

By ss.13(2) and (3) of the Act of Adjournal, at the end of every criminal trial, whether under solemn or summary procedure,<sup>48</sup> it is competent to apply to the trial judge for a certificate that the case has necessarily been one of exceptional length, complexity or difficulty. The application is made orally by the Counsel or Solicitor who appeared for the accused and is made immediately on conclusion of the trial or, where the proceedings are on indictment

47. S.I. 1976/339.

48. There appears to be nothing in the Act of Adjournal to render incompetent an application to a Justice of the Peace or Stipendiary Magistrate at the conclusion of a trial in the District Court.

and the trial is not the last trial of the sitting,<sup>49</sup> at the close of proceedings on the day on which the trial has ended. In Indictment cases it may be made either in Court or in chambers; in summary proceedings it is made in open Court.

The certificate may be granted forthwith, but if it is not so granted,<sup>50</sup> the judge must adjourn the application for a further hearing in chambers, which must take place within seven days of the adjournment. If this is done, written grounds for the application must be lodged within two days of the adjournment, otherwise the application will be refused.

No guidance is given as to the form of these written grounds but presumably they should include a full narration of the basis on which it is claimed the proceedings were exceptionally lengthy, complex or difficult, supported also by the precognitions taken in preparing the case and the draft account of proposed expenses.<sup>51</sup>

The prosecutor may be represented at such a hearing or adjourned hearing but rarely takes advantage of this right.

#### The criteria themselves

The terms are clearly disjunctive: a certificate may be granted either on grounds of exceptional length, exceptional complexity or exceptional difficulty, or any combination of these.<sup>52</sup>

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49. In indictment proceedings, most trials whether before the High Court or Sheriff and Jury are conducted under a "fixed diet" system. Only in the High Court on circuit and in Glasgow Sheriff Court are "sittings" used. The Thomson Committee on Criminal Procedure in its Second Report recommended an experiment being tried out with a "fixed diet" system in Glasgow High Court and the introduction of such a system in Glasgow Sheriff Court: (1975) Cmnd.6218 Chapter 33.
50. This wording seems to suggest that a certificate cannot be refused on an initial application, but the hearing must be adjourned. But certificates are commonly refused in practice in open Court!
51. This procedure was successfully adopted in H.M. Advocate v Kenney and Others 1973 S.L.T. (Notes) 57.
52. See H.M. Advocate v Gray 1969 J.C. 35; H.M. Advocate v Kenney and Others 1973 S.L.T. (Notes) 57.

"Exceptional"

The assessment of what is "exceptional" length, complexity or difficulty is highly subjective. To one judge, "exceptional" might simply have its usual meaning of "out of the ordinary"; to another it may denote something highly unusual or bizarre. Very little conformity of practice is discernible in the Sheriff Court, although in the High Court the fact that there are only a small number of judges leads to a rough similarity of approach.<sup>53</sup> No indication has ever been given by any Court of what factors would entitle a judge to hold that a case revealed "exceptional" factors: the onus would appear to be on the Counsel or Solicitor seeking a certificate to persuade the Court that this is so.

"Length"

This specifically includes length of preparation;<sup>54</sup> a certificate may thus be granted on a plea of guilty if the preparation for a potential trial has been exceptionally lengthy. This is usually measured on the amount of time spent interviewing witnesses, consulting with the accused and any defence witnesses, and any necessary travelling time. The latter element is particularly important when witnesses are resident some distance from the Solicitor's place of business or where the accused is not detained in a local prison.

Length of trial time itself will often justify the granting of a certificate on this ground alone. Once a trial has lasted more than two or three days, many judges will grant a certificate on the grounds of exceptional length.

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53. The statistics printed in the Annual Reports of the Law Society of Scotland on the Legal Aid Schemes do not reveal how many certificates are granted annually nor the reasons why they are granted or refused.

54. Act of Adjournal s.13(2)(3).

"Complexity or Difficulty"

It is difficult to ascertain the difference (if any) between these terms from the viewpoint of application for a certificate. Both appear to apply equally to problematic issues of law or fact, to unusual areas of expert evidence such as e.g. forensic odontology or to the practical inconveniences inherent in trying multiple accused together, all of whom have separate defences. In every case it would appear to be open to argue "complexity" or "difficulty" as separate issues, but in view of s.13(6) of the Act of Adjournal (discussed below) there is no practical advantage in having a certificate granted on "complexity" rather than "difficulty" or vice versa.

The remuneration payable

If a certificate under s.13(2) (Solemn cases) or under s.13(3) (Summary cases) is granted then any limitation on the fees chargeable for conducting a criminal trial, or such limitations as are referred to in the certificate, do not apply and the fees to be allowed after taking into account all the relevant circumstances of the case are determined according to the ground on which the certificate was granted.<sup>55</sup>

If the certificate is granted on the ground of exceptional length, there are no other limitations on the amount payable than what is "fair remuneration for work actually and reasonably done, due regard being had to economy".<sup>56</sup>

If the certificate is granted because the case was exceptionally complex or difficult or on grounds which include either or both of

55. Ibid., ss.13(4) (5) and (6).

56. In such cases, there is thus no fixed limitation on the fees chargeable, the amount thereof being ultimately a matter of adjustment with the Central Committee, subject to a right of taxation.

these grounds (i.e. on length as well) and the certificate so discloses, then "fair remuneration for work actually and reasonably done, due regard being had to economy" is assessed on the same basis, with the addition of up to 25% of the remuneration as would have been payable if the case was not exceptionally complex or difficult, the actual percentage depending on the extent of the exceptional complexity or difficulty.<sup>57</sup>

This latter situation is best illustrated by examples:

Example (1)

High Court case lasting 2 days: certified as exceptionally complex or difficult	£
Maximum Solicitor's fee covering preparation and conduct of trial	215.90
Extra day (maximum)	42.50
	<u>258.40</u>
<u>Add</u> (up to) 25% on grounds of complexity	64.60
	<u>£323.00</u>

Example (2)

High Court case lasting 12 days: certified as exceptionally lengthy <u>and</u> complex	£
Maximum Solicitor's fee covering preparation and conduct of trial	215.90
Eleven extra days (maximum)	467.50
	<u>683.40</u>
<u>Add</u> additional payment on grounds of exceptional length computed on relevant Court scale (say)	500.00
	<u>1,183.40</u>
<u>Add</u> (up to) 25% on grounds of complexity	295.85
	<u>£1,479.25</u>

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57. Act of Adjournal, s.13(6).

If the certificate under s.13(2) or (3) is refused, there is no right of appeal, nor can the refusal be appealed to nobile officium of the High Court.<sup>58</sup>

#### Submission of Account and Taxation

Like all the other Schemes, the Criminal Scheme enjoins the Nominated Solicitor to report to the appropriate Committee the completion of proceedings and to submit as soon as practicable an Account of Expenses.<sup>59</sup> This is usually in an abridged form and goes to the Central Committee along with Form SCLA 5 (Intimation of Grant of Legal Aid) or the appropriate Appeal Certificate (SCLA 12 or SCLA 15), the Certificate of Length of Trial (Form SCLA 20), the authority for employment of Counsel or expert witnesses and any other relevant papers such as the Indictment or Complaint, precognitions etc. and Claim Form SCLA 25.

The Central Committee's Accounts in Criminal Causes Sub-Committee then scrutinise the account and will offer the Nominated Solicitor an amount in settlement. If the Solicitor does not accept this amount, the Account may be taxed. The Central Committee may make a payment to account of outlays or pay them and Counsel's fees direct; in the latter case payment is made to Faculty Services Ltd. If outlays are paid to the Solicitor, he must pay them direct to anyone to whom they may be due.<sup>60</sup>

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58. Heslin, Petitioner, 1973 S.L.T. (Notes) 56. It was also suggested by Lord Wheatley in H.M. Advocate v Lafferty & Others (unreported) that a certificate might be refused if Solicitors did not carry out their duties as instructing agents in the High Court by attending the trials in which they were nominated, but left Counsel "uncovered". See the Note at 1975 S.L.T. (News) 13.

59. See Criminal Scheme, Art.26.

60. Criminal Scheme, Art.26(4) and (5).

Taxation of a criminal legal aid account is only resorted to in cases where a dispute arises in relation to the amount payable to Solicitors or Counsel. The decision as to what represents "fair remuneration" in terms of the Act of Adjournal is made, in the case of High Court proceedings (including appeals) by the Auditor of the Court of Session; and in the case of proceedings in the Sheriff or District Court, by the Auditor of the Sheriff Court for the district in which those proceedings took place.<sup>61</sup> The Law Society and any other party to the reference to the Auditor may make written objections to the High Court or the Sheriff (as the case may be) within seven days of the issue of the Auditor's report and may be heard in chambers thereon.<sup>62</sup>

Either the Solicitor or the Law Society may refer an account for taxation; if this happens, the Auditor gives notice of the diet to both sides.<sup>63</sup>

The Auditor must apply paras.(5) and (6) of s.13 of the Act of Adjournal when assessing what is fair remuneration.<sup>64</sup>

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61. Act of Adjournal, s.15(1) and (2).

62. Ibid.

63. Ibid., s.15(3).

64. Ibid., s.15(4). These are discussed supra, at p. 374.

PART V

LEGAL ADVICE AND ASSISTANCE

## CHAPTER XXIII

LEGAL ADVICE AND ASSISTANCEMain provisions: Legal Advice and Assistance Act 1972  
(the 1972 Act), ss.1 and 2Introduction

Prior to 1973, the facilities for legal advice and assistance on matters not involving litigation were somewhat fragmented and unsatisfactory. Basically, three types of legal aid could be given: firstly, under s.5 of the 1967 Act, which related to legal aid in taking steps to assert or dispute a claim where proceedings were contemplated but had not yet been taken; secondly, under s.7 of the 1967 Act which related to legal advice; and thirdly, under a voluntary non-statutory scheme run by the Law Society to fill gaps in the system not provided for under the legislation.<sup>1</sup> All of these were abandoned with the passing of the Legal Advice and Assistance Act 1972, Parts I and III of which came into force on 2nd April 1973,<sup>2</sup> the whole of which Act is to be read as one with the Legal Aid (Scotland) Act 1967.<sup>3</sup> As with all legal aid legislation, the statute merely provided the framework for legal advice and assistance; the details were filled in by the following subsidiary instruments:

- (a) The Legal Advice and Assistance (Scotland) Scheme 1973,
- (b) The Legal Advice and Assistance (Scotland) Regulations 1973,<sup>4</sup>
- (c) The Legal Advice and Assistance (Scotland) (Financial Conditions) Regulations 1973.<sup>5</sup>

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1. For a discussion of ss.5 and 7 and the non-statutory scheme and their defects, see supra, Chapter IV.
  2. Part II of the 1972 Act, which relates to employment of Solicitors by the Law Society, is not yet in force. For a summary of its provisions, see infra, pp. 412-414.
  3. 1972 Act, s.14(2)(b).
  4. S.I. 1973/390 amended by S.I. 1977/1762.
  5. S.I. 1973/545. These Regulations are regularly updated.

The result is that legal advice and assistance under the 1972 Act is widely available throughout Scotland. The main features of the system in brief are:

- (1) legal advice and assistance can be given by any Solicitor in private practice and, subject to certain conditions, by an unqualified person employed by a Solicitor;
- (2) it is immediately available once the application form is completed and the first instalment of any contribution is paid by the applicant to the Solicitor; there is no need for any assessment of eligibility by the Law Society of Scotland or the Supplementary Benefits Commission;
- (3) advice or assistance can be given on any matter involving the application of Scots law, although it does not generally cover steps taken in the institution or conduct of Court proceedings;
- (4) the advice or assistance need not be given in the Solicitor's office: if for example he requires to travel to the home of a disabled person, he may render the assistance there.

As with s.1 legal aid, the Central Committee has had to deal with a large number of practical queries from Solicitors in regard to matters covered by legal advice and assistance, financial eligibility and the extension of authorised expenditure. When the Scheme was introduced all Solicitors were issued with a copy of the Act, subsidiary legislation and a short commentary thereon. These were recently supplemented by a Summary of the notes for the guidance of Solicitors issued from time to time by the Central Committee and

published in the Journal of the Law Society of Scotland.<sup>6</sup> What follows is an attempt to sketch in the principal details of the Scheme as it has evolved in the light of the Central Committee policy decisions.

What is Legal Advice and Assistance?

Statutory provisions

This is defined as any oral or written advice

- (a) on the application of Scots law, where the advice is given in Scotland, to any particular circumstances which have arisen in relation to the person seeking the advice; and
- (b) as to the steps which that person might appropriately take (whether by way of settling any claim, bringing or defending any proceedings, making an agreement, will or other instrument or transaction, obtaining further legal or other advice or assistance or otherwise) having regard to the application of Scots law to those circumstances.<sup>7</sup>

It also includes assistance given to any person in taking any such steps as are mentioned in para. (b) above, whether the assistance is given by taking any such steps on behalf of the applicant or by assisting him in taking them on his own behalf.<sup>8</sup>

The arid words of this statutory provision give little clue to the extent to which advice and assistance may be carried. No attempt has been made in the Act or any other instrument to enumerate the

6. This Summary is referred to frequently in this Chapter although not all its detailed contents are referred to.

7. 1972 Act, s.2(1).

8. Ibid.

matters covered, and the claim that it is easier to say what is excluded rather than what is included is certainly justified. Nor has there been any case law at all in Scotland on the scope of advice and assistance; the interpretation of the statutory and other provisions is left entirely to the individual Solicitor. The Law Society of Scotland through the Central Committee exercises control of this discretion in only two ways: firstly, by refusing payment of items charged in Accounts of Expenses rendered under the Scheme by Solicitors; and secondly, by its own policy decisions on points of difficulty referred to it by Solicitors.<sup>9</sup>

Nonetheless, it is clear that generally the whole field of a Solicitor's business is included in the ambit of legal advice and assistance. Some matters which could never previously be done under legal aid, such as conveyancing or drawing a will, can now be done provided the applicant qualifies on means; likewise assistance may be rendered in the preparation (but not the institution or conduct) of court or tribunal proceedings which could not be made the subject of a Section 1 application under the 1967 Act, such as an action for defamation.<sup>10</sup>

The following items are however expressly excluded by the Act itself:

- (1) advice or assistance given to a person in connection with any proceedings before a Court or Tribunal at a time when he is receiving legal aid (i.e. under one of the other Schemes) for the purposes of those proceedings;<sup>11</sup>

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9. These are published regularly in the Journal of the Law Society of Scotland.

10. Actions of defamation are "excepted proceedings" for the purposes of s.1 legal aid: 1967 Act, Sch.I, Part II.

11. 1972 Act, s.2(2) and (5).

- (2) assistance given to a person by taking on his behalf any step in the institution or conduct of any proceedings before a Court or Tribunal or of any proceedings in connection with a statutory enquiry, whether by representing him in those proceedings or by otherwise taking any such step on his behalf (as distinct from assisting him in taking such a step on his own behalf), except
- (a) any step which consists only of negotiating the settlement of a claim in civil proceedings before a Court or Tribunal; and
- (b) any advice or assistance given in respect of criminal or civil proceedings before a Sheriff or a District Court where the advice or assistance is given at the request or with the consent of the Court.<sup>12</sup>

The words "statutory enquiry" have the meaning assigned to them by s.19(1) of the Tribunals and Inquiries Act 1971.<sup>13</sup>

It will thus be observed that generally advice and assistance stops short of conducting any case or part thereof in the Courtroom. All preparatory or investigative steps short of those taken "in the institution or conduct" of proceedings may be done under legal advice and assistance;<sup>14</sup> the only time it is available in the Courtroom is under paragraph (b) above.

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12. Ibid., s.2(3).

13. Ibid., s.2(6).

14. Such steps would include e.g. framing and lodging parts of a Court process.

Problems commonly encountered

The experience of the four years in which the Scheme has been operating has shown that it has been used mainly in connection with family and matrimonial matters, reparation, and crime;<sup>15</sup> all the normal steps taken by a Solicitor in advising on such matters are covered, such as conducting interviews, framing precognitions, letter writing and oral advice. Thus e.g. a divorce case may be completely prepared up to the point when the papers are ready for submission in support of a s.1 legal aid application; expert reports or the Opinion of Counsel may be obtained in a reparation action; or preliminary advice may be given to a person suspected of crime.

Advice limited to Scots law

By s.2(1) of the 1972 Act, advice is restricted to that which is given on the application of Scots law to a client's problem. If the matter relates to a problem arising in England or elsewhere, all a Scottish Solicitor is entitled to do is to give the client preliminary advice on his legal position and the courses open to him. The Central Committee will allow a Solicitor to incur reasonable charges for such matters provided they are minor e.g. in relation to a non-serious motoring offence, but not an English or foreign Solicitor's account as an outlay. Thus, if the matter becomes at all complex and cannot be disposed of with a minimum of advice and assistance, then the client should be advised to seek legal assistance from a Solicitor in the country of the problem's origin.<sup>16</sup> In matrimonial cases, the Scheme does cover investigations to discover whether English or Scots law applies; there will also be allowed payment for

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15. See 25th and 26th Reports of the Law Society of Scotland on the Legal Aid Schemes (1975/75 and 1975/76).

16. See (1977) 22 J.L. Soc. of Sc. 144.

minimum work done in advising a defender in an English case who is for the time being resident in Scotland.<sup>17</sup> If however there is a substantial defence on the merits, again the client should be advised to seek legal aid in the English Court. Similar principles apply to cases raised in other foreign jurisdictions.<sup>18</sup>

Scots law however includes those aspects of European Economic Community Law which apply in Scotland; the Scheme also covers advice on questions of the international private law of Scotland e.g. on questions of domicile.

#### Advice on criminal matters

At the Scheme's inception it was widely used to allow a Solicitor to assist a client charged before the inferior summary criminal Courts such as the Burgh or Police Courts.<sup>19</sup> These have now been replaced by the District Court,<sup>20</sup> in which legal aid is now available under the provisions of the Criminal Scheme.<sup>21</sup> Instances still occur in which advice and assistance is available, subject always to the condition that the Solicitor cannot take any step in the institution or conduct of proceedings before a criminal court.<sup>22</sup> For

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17. Ibid. He may be advised e.g. in relation to matters of alim-  
ment, access etc., provided the work done can be disposed of  
with a minimum of meetings and correspondence.
18. Ibid. Legal advice and assistance is available from a  
Scottish Solicitor in completing an application for an  
(English) civil aid certificate.
19. Legal aid was not available under the Criminal Scheme in these  
Courts, so legal advice and assistance was rendered in connection  
with all the preparatory work in cases in these Courts. Exten-  
sions of the amount which could be spent by the Solicitor were  
often granted, but see the correspondence at (1974) 19 J.L.  
Soc. Sc. 261 and 325 concerning the difficulties where an  
extension was not granted.
20. District Courts (Scotland) Act 1975, s.1.
21. See supra, Chapter XX.
22. 1972 Act, s.2(3).

example, it is not competent under the Scheme to intimate a plea of "Guilty" by letter since that amounts to a judicial step of procedure,<sup>23</sup> or to appear at a Means Enquiry Court to obtain an extension of time for payment of a fine.

But advice and assistance rendered e.g. before an accused is charged or before he receives a complaint or petition would appear to come within the Scheme, since at that stage there are no proceedings in Court for which the Criminal Scheme is provided. Advice and assistance under the 1972 Act may also be given where a criminal Court has refused an application for criminal legal aid,<sup>24</sup> or where the latter has been withdrawn, provided again that the Solicitor himself cannot take any steps in the conduct of the proceedings, but can advise his client on the steps he may take himself.

#### Advice in Relation to Conveyancing

Conveyancing work of course cannot be made the subject of any other form of legal aid, but provided the client qualifies on means, this is included within the ambit of advice and assistance.

All types of conveyancing are covered including e.g. making successive offers for houses, provided this can be done within the financial limits of the Scheme.<sup>25</sup> But in one case before the Central Committee, a client's title to his house was by way of a lease which the superior was willing to convert to feu-hold, subject to payment of the superior's legal expenses. The client was financially eligible for advice and assistance and the question was raised as to whether

23. See (1973) 19 J.L. Soc. Sc. 200.

24. See Summary of Notes for Guidance of Solicitors, p.5.

25. See (1973) 18 J.L. Soc. of Sc. 236. An extension of the certificate to £50 might be granted in such cases provided the Solicitor is able to convince the Local Committee that successive offers were necessary: see infra, pp.402-404.

such advice and assistance would extend to cover the superior's legal expenses. The Central Committee took the view that the legal expenses of another party to a transaction such as this could not competently be met under the Scheme.<sup>26</sup>

Subject to the client's eligibility on means, legal advice and assistance is available on tax matters, but any tax recovered under a repayment claim would fall to be regarded as property recovered or preserved in terms of s.5(3) of the 1972 Act.<sup>27</sup>

#### Executory matters

Again, legal aid is not available generally under any of the other Schemes to deal with such matters. But whether the client is executor or beneficiary, advice and assistance is available provided the client is eligible on means. In the former case it appears that his own personal resources will not be taken into account for the purpose of determining his financial eligibility.<sup>28</sup>

Although an application for confirmation of an Executor is technically a judicial step of procedure, it appears that s.1 legal aid would not be granted, but that legal advice and assistance is available.<sup>29</sup> Insofar as the Scheme is used at all for executory matters, it appears to be of most use in winding up small estates.

#### Instructing enquiry agents

Advice and assistance is often given to do this, provided the cost can be brought within the financial limits of expenditure. If a

26. See (1973) 18 J.L. Soc. of Sc. 374.

27. Ibid., p.337. On property preserved or recovered, see infra, pp. 404-408.

28. See Summary of Notes for Guidance, p.7. On financial eligibility generally, see infra, pp. 392-401.

29. See (1973) 18 J.L. Soc. Sc. 267.

Solicitor wishes to instruct an agent and incur considerable expenditure because the inquiries are to be wide-ranging he should clear it first with the Central Committee. "Fishing inquiries" are however excluded e.g. in a case where there is suspicion but not proof of adultery. Addresses e.g. in an alimentary claim, can be obtained from the D.H.S.S. without the necessity of instructing an agent. The Central Committee itself maintains a directory of inquiry agents and can also supply the names and addresses of agents in a particular area, or may be able to suggest an alternative method of obtaining the evidence.<sup>30</sup>

Advice not available for matters for which a Section 1 certificate available

Any judicial step in procedure may generally be made the subject of a Section 1 application; thus, work relating to Diligence, Letters of Inhibition and Division and Sale is not competent under legal advice and assistance; nor is the presentation of a Petition for appointment of an Executor-Dative; nor where a person detained under the Mental Health Act wishes to appeal to the Sheriff against his detention.<sup>31</sup>

Solicitors in the Precincts of the Court

By s.2(4) of the 1972 Act, advice and assistance may be given by a Solicitor to any party to proceedings (whether criminal or civil) before a Sheriff or the District Court, whether by representation in those proceedings or otherwise in connection with them, where the assistance is given in compliance with a request which is made to the Solicitor by the Court or given in accordance with a proposal which is made by the Solicitor and approved by the Court and which (in either case):

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30. See (1974) 19 J.L. Soc. Sc. 129.

31. See Summary of Notes for Guidance, pp.2-5.

- (a) is so made or approved at a time (whether at or after the beginning of the proceedings) when the Solicitor is present within the precincts of the Court, but
- (b) is not made or approved at any such time when the person is receiving legal aid for the purposes of those proceedings.

This provision appears to have been little used in Scotland, although it is of occasional use in criminal matters. But the reason for this is that it is a pre-requisite that the applicant shall have completed the application form and paid his contribution or the first instalment thereof.<sup>32</sup> In a criminal case it is thus preferable, at least where the suggestion is made by the Court, that an ordinary legal aid application be completed.

It is competent for the Solicitor to suggest to the Court that he be allowed to act for the applicant, but this is rarely done in practice.

#### Who may give advice and assistance

Although under s.2(1) of the 1972 Act advice may be given by a Solicitor and, if necessary by Counsel, almost all assistance rendered is given by the former. Lists of Counsel prepared to act under the Scheme are maintained by the Central Committee in conjunction with the Faculty of Advocates, but no such list of Solicitors is kept. Instead, in order to facilitate the giving of advice or assistance, it may be provided by any Solicitor whose name appears on the list maintained by the Law Society of Solicitors who hold a current practising certificate

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32. Advice and Assistance Scheme, Art.7(1) and (2).

and are entitled to practise on their own account, except for any excluded from giving legal aid by virtue of s.6(2) of the 1967 Act.<sup>33</sup>

Thus many Solicitors whose names did not appear prior to 1973 on the civil or criminal legal aid list can now give advice and assistance immediately, including Solicitors with only a chamber practice. Very few Solicitors refuse to give advice and assistance, but the Scheme preserves the right of any Solicitor for reasonable cause either to refuse to accept an application for advice or assistance or, having accepted an application to decline to act or continue to act without giving a reason to the client.<sup>34</sup>

Both the Scheme and the Regulations provide that a Solicitor may delegate any of his functions under the Scheme to either one of his partners or ".... a competent and responsible representative of his employed in his office".<sup>35</sup> This would normally include either an apprentice or unqualified staff, but of course the Solicitor concerned would remain personally responsible for the work done under the Scheme.

The provisions (not yet in force) relating to employment of Solicitors by the Law Society are dealt with separately.<sup>36</sup>

#### Who is Eligible for Advice and Assistance

##### General

Advice and assistance may be given only to "persons", a term

33. As amended by the Administration of Justice Act 1977. See also Advice and Assistance Scheme, Art.4.

34. Ibid., Art.6(1). But the Solicitor is required to give the appropriate Local Committee such information regarding the circumstances as the Committee may require for the purpose of performing their functions under the Scheme: Reg.5(1). The Solicitor is also entitled to withdraw if he considers that it is no longer reasonable to continue: see Advice and Assistance Scheme, Art.7(3). Withdrawal is subject to appeal: see Art.9(1).

35. Advice and Assistance Scheme, Art.6(4); Reg.5(3).

36. See infra, pp. 412-414.

which is not defined in the 1972 Act. But since that Act is to be construed as one with the 1967 Act,<sup>37</sup> the definition of "person" contained in s.20(1) of the latter is applicable and excludes any body of persons, corporate or unincorporate, from receiving advice and assistance. Eligibility is taken a step further by Regulation 2 of the Advice and Assistance Regulations which provides that:

- (1) any person (not being a pupil) shall be entitled to receive advice and assistance;
- (2) advice and assistance on behalf of a child may be applied for and received by his parent or guardian or other person under whose care he is, or by a person acting for the purposes of any proceedings as his curator or tutor;
- (3) a person (not being a pupil) authorised to do so by any person who cannot for good reason attend upon a Solicitor may apply for and receive advice and assistance on that person's behalf;
- (4) a person shall not be given advice or assistance for the same matter by more than one Solicitor without the prior authority of the appropriate Local Committee and such authority shall be given only on such terms and conditions as the Local Committee may in their discretion see fit to impose.<sup>38</sup>

There is no requirement that the applicant actually reside in Scotland provided he is otherwise eligible and seeks advice on a matter

37. 1972 Act, s.14(2)(b).

38. Where authority is not sought or given, the accounts incurred cannot be paid out of the Fund.

of Scots law.<sup>39</sup> The completion of the application form, including the declaration of means, may be done by post in such cases. It will also be observed that Regulation 3(3) allows an applicant to authorise someone else to receive advice and assistance on the applicant's behalf where e.g. the applicant is housebound or otherwise unable to attend. In that event of course the application form is completed on the basis of the capital and income of the person on whose behalf the advice or assistance is sought.<sup>40</sup>

Where the application is made on behalf of a child, the child's disposable income and disposable capital must be computed, as must the disposable capital of any person whose resources may be treated as the child's. In such cases the Solicitor must also determine such person's disposable income, or that he is in receipt of Supplementary Benefit or Family Income Supplement.<sup>41</sup> It should be explained at this point that the resources of any person who under s.17 of the Supplementary Benefits Act 1976 is liable to maintain a child or who usually contributes substantially to a child's maintenance may be treated as the resources of the child, if, having regard to all the circumstances, including the age and resources of the child, it appears just and equitable to do so.<sup>42</sup> In cases where such a person's resources require to be taken into account, the application is regarded as being made by that person, with appropriate allowances for his spouse and/or his children.<sup>43</sup>

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39. See supra, pp. 380 et seq.

40. Advice and Assistance Regulations, Reg.3(3).

41. Ibid., Reg.3(2).

42. Ibid., Schedule para.4.

43. See Summary of Notes for Guidance of Solicitors, p.7.

There is no reason why, subject to financial eligibility, a person acting in a fiduciary capacity should not apply for legal advice and assistance. In such cases his own means are not taken into account for the purpose of determining financial eligibility.<sup>44</sup>

#### Financial Eligibility

The major innovation in the 1973 Scheme is that it is the Solicitor who determines whether the applicant is financially eligible for legal advice and assistance.<sup>45</sup> No assessment of means is carried out by the Supplementary Benefits Commission; this is carried out by the Solicitor himself. The applicant requires however to qualify both on capital and income and the application Form LAA 3 gives the formula by which the computation is made. In most cases it is necessary to compute the applicant's disposable capital and disposable income, together with the amount of any contribution exigible therefrom. The contribution is collected by the Solicitor, not by the Law Society of Scotland.<sup>46</sup> The Solicitor takes account of the contribution in rendering his account to the Central Committee for payment.<sup>47</sup>

By s.1 of the 1972 Act, advice and assistance is available to a person if

- (a) his disposable income does not exceed (a prescribed weekly sum - currently £48 p.w.); or
- (b) he is (directly or indirectly) in receipt of supplementary benefit under the Supplementary

44. Ibid.

45. Advice and Assistance Scheme, Article 8.

46. Ibid., Art.6(2).

47. Ibid., Art.10 and see infra, p.408.

Benefits Act 1976 or of family income supplement under the Family Income Supplements Act 1970, and (in either case) his disposable capital does not exceed (a prescribed sum - currently £340).

The assessment of an applicant's resources is carried out by the Solicitor in accordance with the Schedule to the Legal Advice and Assistance (Scotland) Regulations 1973, from which several general points should be noted.

Firstly, in computing the capital and income of the applicant the subject matter of the claim is left out of account and the resources of the applicant's spouse are added to those of the applicant unless

- (i) the spouse has a contrary interest in the matter in respect of which he is applying for advice or assistance; or
- (ii) the person concerned and his spouse are living separate and apart; or
- (iii) in all the circumstances of the case it would be inequitable or impracticable to do so.<sup>48</sup>

This aggregation of resources sometimes causes difficulty and, although the Solicitor has to decide such questions, he is obliged to have regard to any guidance given by the Central Committee.<sup>49</sup> For example, where a man and woman are co-habiting, the Solicitor is required to decide whether there should be aggregation in the light of the particular circumstances. The Central Committee view is that where there is a co-habitation involving a stable relationship, there should

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48. Advice and Assistance Regulations, Schedule, para.6.

49. Ibid., para.2.

be aggregation and likewise the appropriate capital and income deductions for both should be allowed.<sup>50</sup>

Further cases which have arisen relate to the question of aggregation being considered "inequitable or impracticable". The following actions of Solicitors have all been approved by the Central Committee:

- (a) Disputes regarding winding-up of estate; applicant had been out of work owing to ill-health and had been supported by his wife who was also then unemployed. She had accumulated savings of £250 over a long period out of her own earnings. Solicitor considered that it was "inequitable" to aggregate her savings.
- (b) A national of Libya was in this country on a temporary resident's permit as a student. While here he married a girl of seventeen. He wished Advice and Assistance to investigate the possibility of being allowed to remain here permanently. He had no savings either here or in his own country but his wife had £750 in the bank and she wished to keep this either for a house or for living purposes. Solicitor considered it would be "inequitable" in the circumstances to aggregate.
- (c) The applicant, a woman, was divorced and remarried. She immediately thereafter was charged with an offence relating to Welfare Benefits committed before her remarriage. The husband's resources were very modest, but aggregation would have excluded the applicant from Advice and Assistance. Solicitor considered it would be "inequitable" to aggregate.

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50. Summary of Notes for guidance of Solicitors issued by Central Committee, p.8.

(d) The applicant and spouse were old age pensioners and spouse had capital - just sufficient to exclude Legal Advice and Assistance if aggregated. The capital was being gradually used up and could not be replaced. The Solicitor considered that it would be "inequitable" to aggregate capital of pensioner since he could never replace it.<sup>51</sup>

Secondly, if it appears to the Solicitor that the person concerned has, with intent to reduce the disposable capital or disposable income or maximum contribution, directly or indirectly deprived himself of any resource or has converted any part of his resources into resources which are to be left out of account wholly or partly, the resources of which he has so deprived himself or which he has so converted shall be treated as part of his resources or as not so converted, as the case may be.<sup>52</sup>

Thirdly, provision is made for redetermination of resources. Where it appears to the Solicitor that there has been some error or mistake in the determination of the disposable income, disposable capital or maximum contribution of the person concerned, these may be redetermined or amended.<sup>53</sup>

There is only one situation in which all three figures need not be computed and that is where the applicant (or the person on whose behalf the applicant is applying and, where that person is a child, of any person whose resources may be treated as the child's) is in receipt of Supplementary or Family Income Supplement.<sup>54</sup> Evidence of the

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51. Ibid.

52. Advice and Assistance Regulations, Schedule, para.5. Conversion or disposal of assets with the requisite intent will normally be difficult to prove.

53. Ibid., para.10.

54. Ibid., Regulation 5(1).

applicant being in receipt of these benefits is usually requested and sometimes provided in the form of the appropriate payment book. If the applicant is in receipt of either benefit, only his disposable capital need be computed - he qualifies automatically on income and he will have no contribution to pay.<sup>55</sup>

#### Computing Disposable Capital

Several of the provisions relating to this computation are similar to those used by the Supplementary Benefits Commission in computing disposable capital for the purposes of Section 1 legal aid, although the rules are much less complex.

"Capital" is defined as the "amount or value of every resource of a capital nature".<sup>56</sup> It is provided<sup>57</sup> that in computing the capital of the applicant,

- (a) the value of his household furniture and effects, of articles of personal clothing and of the tools and implements of his trade shall be left out of account.
- (b) there shall be left out of account the value of the main or only dwelling in which he resides.<sup>58</sup>
- (c) where the applicant resides in more than one dwelling in which he has an interest, there shall be taken into account in respect of the value to him of any interest in a dwelling which is not the main dwelling any sum which may be obtained by borrowing money on the security thereof.

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55. Ibid.

56. Ibid., Schedule, para.1.

57. Ibid., para.7.

58. Ibid., as amended by para.3 of the Legal Advice and Assistance (Amendment) Regulations 1977 (S.I. 1977/1762). Prior to the passing of this provision the practice was to ignore this element.

- (d) certain fixed deductions in respect of persons resident with him, namely a spouse whose resources are required to be aggregated,<sup>59</sup> a dependent child or a dependent relative wholly or substantially maintained by him. These fixed deductions are currently £125 for the first dependant, £80 for the second and £40 for each other dependant.

If after making this computation, the applicant has a disposable capital of £340 or less, he qualifies on capital.

The Central Committee have given the following points of guidance on the computation of capital:

- (1) capital in the hands of an applicant which is earmarked for a particular purpose, such as a deposit on a house, cannot be disregarded in computing capital;
- (2) when, on the conclusion of a bargain to purchase a property, the price has been placed on Deposit Receipt in joint names or a deposit has been paid over, the sums involved should be excluded in computing capital;
- (3) when, in an Executry, the capital resources of the deceased will be almost entirely consumed by payment of debts due by the deceased, the capital should be computed by reference to the net value of the estate.<sup>60</sup>

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59. If the capital resources are not required to be aggregated, then obviously the fixed deduction cannot be made. But it may still be competent to give a deduction against income in respect of the spouse even if there is non-aggregation of income, provided the spouses are living together. See Schedule, para.8(b).

60. Summary, op. cit., p.7.

### Computing Disposable Income

Unlike Section 1 legal aid, the period of computation here is the week ending on the day on which the application for advice and assistance is made. The Solicitor computes the income for that week, less Income Tax and National Insurance contributions.<sup>61</sup> He also has to decide whether to aggregate the income of the applicant and his spouse.<sup>62</sup>

"Income" is defined as the "total income from all sources which the person concerned received or became entitled to during or in respect of the seven days up to and including the date of his application."<sup>63</sup> Where a person's employment includes board and lodging, only the cash income of that person falls to be included.<sup>64</sup> Any income tax rebate received in the seven days up to the date of application should be ignored in that it is not part of normal income.<sup>65</sup> No allowances are given against income for outstanding commitments,<sup>66</sup> nor for rent.

The Solicitor deducts certain statutory amounts for the spouse (if the spouses are living together), and for the maintenance of dependent children and relatives provided they are members of his or her household. These statutory deductions are computed in accordance with para.8 of the Schedule to the Advice and Assistance Regulations and are regularly reviewed. At present they are:<sup>67</sup>

61. Advice and Assistance Regulations, Schedule, para.8.

62. On aggregation of resources, see supra, pp. 393-396.

63. Advice and Assistance Regulations, Schedule, para.1.

64. Summary, op. cit., p.6.

65. Ibid.

66. Ibid.

67. As from 28 November 1977.

	<u>Age</u>	<u>Rate</u>
Spouse		£9.05
Child	Under 5	£4.10
"	5 but under 11	£4.95
"	11 but under 13	£6.10
"	13 but under 16	£7.40
"	16 but under 18	£8.90
"	18 and over	£11.60

A further deduction is made in respect of maintenance payments. If the person whose resources are being computed is making bona fide payments for the maintenance of a spouse who is living apart, of a former spouse, of a child or relative who is not (in any such case) a member of the household of the applicant, there shall be a deduction of such payment as was made during or in respect of the seven days up to and including the date of the application for advice and assistance.<sup>68</sup>

After these deductions a figure is brought out representing the disposable income of the applicant. If this exceeds the limit for the time being (currently £48 p.w.) the applicant is ineligible for advice and assistance, even if he qualifies on capital. If the disposable income is below the limit, the Solicitor requires to determine whether any contribution is exigible from the applicant.

#### Computing Contributions

By s.4(1) of the 1972 Act, the client is not liable for any charges or fees in respect of the advice or assistance except through a contribution computed in accordance with the rates currently in force. These are contained in Schedule 1 of the 1972 Act and are regularly revised. At present they are as follows:<sup>69</sup>

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68. Advice and Assistance Regulations, Schedule, para.9.

69. See Legal Advice and Assistance (Scotland)(Financial Conditions) (No.3) Regulations 1977 (S.I. 1977/1663) para.2.

<u>Disposable Income</u>							<u>Contribution</u>
Not exceeding £23 per week							Nil
Exceeding £23 but not exceeding £26 per week							£3.00
"	£26	"	"	"	£28	"	£6.00
"	£28	"	"	"	£30	"	£9.00
"	£30	"	"	"	£32	"	£12.00
"	£32	"	"	"	£34	"	£15.00
"	£34	"	"	"	£36	"	£18.00
"	£36	"	"	"	£38	"	£21.00
"	£38	"	"	"	£40	"	£24.00
"	£40	"	"	"	£42	"	£27.00
"	£42	"	"	"	£44	"	£30.00
"	£44	"	"	"	£46	"	£33.00
"	£46	"	"	"	£48	"	£36.00

Having fixed the contribution from income, the Solicitor (not the Law Society of Scotland) is responsible for collecting it. It may be paid in a lump sum or by instalments; it is for the Solicitor to agree with the client as to how the instalments are to be paid.<sup>70</sup> The Solicitor may start acting as soon as the first instalment has been paid.

It is important to remember that where the Solicitor thinks that the total contribution exigible is likely to exceed the cost of giving the advice or assistance, he must restrict the contribution to the latter figure.<sup>71</sup> This is obviously only of application where the cost of the advice is less than the contribution figure at the top of the scale, i.e. £36 for those with high disposable income. The

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70. Advice and Assistance Regulations, Reg.5(6).

71. Ibid.

provision is designed to prevent hardship to such a person who perhaps seeks simple advice. In such cases it is doubtful whether the Scheme is used to a great extent; if the client's contribution is going to exceed the cost of the work done, then the Solicitor may well take the client on a fee paying basis, rather than under the Scheme. However, if the Solicitor's estimate of the cost is wrong, he may legitimately require the client to pay the balance of his contribution.<sup>72</sup>

If payment is made by instalments and the client defaults on an instalment, the Solicitor is entitled if he wishes immediately to stop acting for the client.<sup>73</sup>

If the Solicitor fails to collect the full amount of the contribution, he will have to bear the loss where the amount of his account exceeds the amount of the contributions actually collected.

Where the charges or fees properly chargeable for the advice or assistance are less than any contribution paid by the client the Solicitor must refund the excess contribution to the client.<sup>74</sup>

#### How to apply

The applicant must complete Form LAA 3. The Solicitor is responsible for computing the client's means and any contribution exigible.<sup>75</sup> Once the Form is signed, one copy is retained by the Solicitor and another sent immediately to the Secretary of the Local Legal Aid Committee.

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72. S.4(2) of the 1972 Act obliges the client to pay up to, but not exceeding, the contribution computed in accordance with the Regulations.
73. Advice and Assistance Scheme, Art.6(2). He is also entitled to require payment of outstanding instalments and to payment of any deficiency in respect of work done and outlays incurred. The client is entitled to an accounting for sums already paid.
74. Advice and Assistance, Regulations, Reg.5(9). On payment of the Solicitor's account, see infra, pp.408-410.
75. Advice and Assistance Scheme, Art.7(1).

The form specifies that precise brief details must be inserted of the subject matter on which advice and assistance is sought,<sup>76</sup> together with a declaration by the applicant that the facts set out in the application are correct to the best of his knowledge and belief.<sup>77</sup>

How much money can be spent?

Under s.3(2) of the 1972 Act the initial limit is £25 worth of work. This can be done immediately without reference to any Committee. By s.3(3) the £25 includes any charges or fees chargeable by the Solicitor or his firm in respect of the advice or assistance and outlays, including Counsel's fees.

The £25 limit has remained unaltered since the Scheme was introduced and has become totally unrealistic. The Act provides for extensions of this limit, and these are sought very frequently. If it appears at any time to the Solicitor from whom advice is sought (or where Counsel is instructed, ~~from~~<sup>to</sup> his instructing Solicitor) that the cost of giving advice is likely to exceed £25,

- (a) the Solicitor shall determine to what extent that advice or assistance can be given without exceeding that limit, and
- (b) shall not give it (or as the case may be, instruct Counsel to give it) so as to exceed that limit except with the approval of the appropriate authority.<sup>78</sup>

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76. In divorce cases, the grounds must be stated.

77. Advice and Assistance Scheme, Art.7(1). All advice given at the one time should be encompassed in one application under the main subject matter. An application should never be backdated.

78. 1972 Act, s.3(1).

The "appropriate authority" here is the Local Committee, to whom application for prior authority to exceed the limit should be made, giving such information as may enable them to consider and determine the application.<sup>79</sup> Sanction is normally sought by letter giving details of why £25 is insufficient. In a reparation or consistorial case, this will usually be the case if the Solicitor wishes to obtain e.g. a medical report and extensive precognitions. Authority to spend up to £50 is usually given without difficulty; further amounts may be authorised. The Local Committee must consider

- (a) whether it is reasonable for the advice or assistance to be given; and
- (b) whether the estimated amount of the cost to be incurred in giving the advice or assistance is fair and reasonable;

and, if they approve the application, shall prescribe whatever larger amount they think fit and may authorise that the advice or assistance be limited to such subject matter as they think fit.<sup>80</sup>

By para.9(2) of the Scheme, a client is entitled to appeal to the Central Committee against a decision of the Local Committee refusing to increase the authorised expenditure. The Central Committee may, after such investigations as they think fit, either allow the the appeal or dismiss it. They must forthwith intimate their

79. Advice and Assistance Regulations, Reg.5(5). Retrospective authority for increased expenditure cannot be granted and payment for such expenditure cannot be made. Authority, if granted, operates from the date when application therefor was made.

80. Ibid., Reg.7(1). The Central Committee view here is that applications to Local Committees for increased authorisation should be viewed strictly and full information must be given. As regards extraordinary items of expenditure the Central Committee should be consulted: see Summary of Notes for Guidance, p.9.

decision to the client, Solicitor and the appropriate Local Committee and their decision is final. Any appeal must be made within eight days of the date on which intimation of the Local Committee's decision was made.

There is no prescribed form of appeal but normally it should be made by letter to the Central Committee, quoting the Local Committee's case reference number.

Property Preserved or Recovered

This is covered by s.5 of the 1972 Act, by which provision is made for meeting out of expenses or property recovered or preserved that part of a Solicitor's fees and outlays not covered by the client's contribution, if any. "Solicitor" in this connection means, where the Solicitor is employed by a firm, that firm; and in any other case the Solicitor by whom any such advice or assistance is given or, where it is given by Counsel, the Solicitor on whose instructions Counsel gives it.<sup>81</sup>

By s.5(3) a right of priority payment is created in favour of the Solicitor firstly

- (a) on any expenses which (whether by virtue of a judgment or order of a Court or an agreement or otherwise) are payable to the client by any other person in respect of the matter in connection with which the assistance is given

and secondly

- (b) on any property (of whatever nature and wherever situated) which is recovered or preserved for the

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81. 1972 Act, s.5(2).

client in connection with that matter,<sup>82</sup>  
 including his right under any compromise or  
 settlement arrived at in connection with that  
 matter to avoid or bring to an end any proceedings.

In so far as the right of priority payment created by s.5(3)  
 in respect of the Solicitor's charges or fees is insufficient to  
 meet them, the Solicitor is entitled to look to the Legal Aid fund  
 for payment of the deficiency.<sup>83</sup>

A typical case in which s.5(3) will apply is where advice or  
 assistance is rendered in connection with a reparation matter which  
 is settled by e.g. the prospective Defender's insurers before any  
 court action is raised. If the Solicitor's account is not satisfied  
 by the contribution exigible from the client, he may look to any  
 expenses recovered to clear the deficiency, and finally the  
 principal sum.<sup>84</sup> But s.5(3) will also apply where the settlement  
 takes place after a Court action is raised: although the Solicitor  
 may not take any step in the institution or conduct of proceedings  
 before a Court,<sup>85</sup> he may, in the case of civil proceedings before a

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82. Where there is a sale of one property followed by the purchase  
 of another, the sale price will not be regarded as property  
 recovered, but only the excess of the sale price over the  
 purchase price: Summary of Notes for Guidance, p.11.
83. Ibid., s.5(4). But the mechanics of enforcing this right of  
 priority payment are in doubt. There is no provision in the  
 Advice and Assistance Regulations comparable to Rule 6 of the  
 Act of Sederunt (Legal Aid Rules) 1958 which allows the Law  
 Society to enforce such a judgment in a Section 1 case.
84. If the offer in settlement is made and accepted after the  
 Solicitor's legal advice and assistance account has been paid,  
 s.5(3) requires that any principal sum and expenses must still  
 be applied towards that account. If this happens, the matter  
 should be reported to the Central Committee: see Summary of  
 Notes for Guidance, p.10.
85. Ibid., s.2(3).

Court, take any step which consists only of negotiating on his behalf with a view to a settlement of a claim to which the proceedings relate.<sup>86</sup>

Certain expenses or property are exempt from the operation of s.5(3) of the 1972 Act.<sup>87</sup> These include

- (a) alimentary payments paid under a decree or agreement in writing for the payment of aliment, including arrears, and capital sums payable in lieu of aliment;<sup>88</sup>
- (b) periodical payments and capital sums payable under various statutes including the Divorce (Scotland) Act 1976, the Maintenance Orders Act 1950, and an order for payment of aliment under s.7 of the Divorce (Scotland) Act 1976;
- (c) money payable as unemployment, sickness, maternity, invalidity or widow's benefit, guardian's or attendance allowance, child's special allowance, retirement pension or death grant, and supplementary benefits;
- (d) industrial injuries benefits, invalid care allowance and mobility allowance;

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86. Ibid. But presumably framing, lodging and arguing a Joint Minute is a step in process which could not be done under Legal Advice and Assistance.

87. Advice and Assistance Regulations, Reg.6(1), as amended by S.I. 1977/1762.

88. See (1975) 20 J.L. Soc. Sc. 231. This would also include a sum paid on separation of husband and wife in full and final settlement of all claims competent to the wife against the husband, whether at present or in the future: see Summary of Notes for Guidance, p.9.

- (e) allowances payable under the Child Benefit Act 1975 or family income supplement; and money payable under an order by the Employment Appeal Tribunal;
- (f) housing rebates or allowances;
- (g) any dwelling, household furniture or tools of trade recovered or preserved for the applicant as a result of advice or assistance given to him by the Solicitor;
- (h) one half of any redundancy payment recovered or preserved for the applicant.

A further exemption is contained in Regulation 6(2) which provides that where in the opinion of the Solicitor the payment of his charges or fees in priority to any other debts out of any property recovered or preserved for the client

- (a) would cause grave hardship or distress to the client; or
- (b) could only be effected with unreasonable difficulty because of the nature of the property;

the Solicitor may apply to the Central Committee for authority not to enforce, either wholly or partly, such payment. Where the Central Committee gives authority the particular property concerned is not taken into account in assessing the deficiency in the Solicitor's fees and outlays and he will therefore be paid by the legal aid fund the difference between the amount of his account as agreed or taxed and the contribution of the client.<sup>89</sup>

An obvious example where authority will often be given is in relation to an item of moveable property recovered or preserved, where the value of the item was not such as would justify the expense of disposing of it, or perhaps where it was of sentimental

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89. Advice and Assistance Regulations, Reg.6(2).

value and its disposal would cause hardship or distress.<sup>90</sup>

Unlike s.1 cases, expenses and principal sums (or other property) preserved or recovered are paid direct to the Solicitor for the assisted person and not into the Legal Aid Fund.<sup>91</sup> If the Solicitor wishes to invoke Regulation 6(2) and seek authority not to enforce payment of his account from property recovered, he should apply by letter to the Central Committee immediately the work is completed, along with his claim for fees. He should indicate the hardship or distress which would in his view arise or the unreasonable difficulty which would be involved and confirm that there has been no substantial change in the client's resources. The letter to the Central Committee should initially be sent to the Local Committee, to whom all claims for fees are initially transmitted, merely for scrutiny.<sup>92</sup>

#### Payment of the Solicitor's Account

On completion of the advice or assistance, the Solicitor renders his claim for fees and outlays. This should be done as soon as possible<sup>93</sup> after completion and can take two forms: for claims of £25 or under, by submitting the second and third copies of Form LAA 3 to the Local Committee; and for claims exceeding £25 by submitting a detailed account (which may be in an abridged form along with the said copies, Part B of which should be completed).

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90. Hardship or distress may also be caused if the principal sum recovered is small, or if the proceeds of sale of a small property, or a small estate becomes subject to s.5(3): Summary of Notes for Guidance, p.11.
91. In any case where expenses or property are recovered or preserved for the client, the Solicitor must give him an accounting: Advice and Assistance Scheme, Art.10(2).
92. Summary of Notes for Guidance, p.10.
93. See Advice and Assistance Scheme, Art.10(1).

The fees chargeable are computed according to the Table of Fees for Conveyancing and General Business approved by the Council of the Law Society of Scotland.<sup>94</sup> There is no statutory deduction as in Section 1 legal aid cases.<sup>95</sup>

In the event that the client's contribution exceeds the Solicitor's account, the Solicitor must account to the client for the excess,<sup>96</sup> so in such a case there will be no claim on the Fund. The claim forms should be returned to the Local Secretary marked "No claim".

If the Solicitor's account is greater than the contribution, he sends it to the Local Committee for scrutiny and onward transmission to the Central Committee. But since a claim against the Fund will arise only where there is a deficiency in the charges or fees properly chargeable for advice or assistance after deduction of the client's contribution and any expenses or property recovered or preserved under s.5 of the Act,<sup>97</sup> it appears that no account need be rendered where there is no such deficiency. All the Solicitor need do is intimate to the Local Secretary that no claim is being made, and of course render an accounting to his client. The client is entitled to have his account scrutinised by the Central Committee or taxed by the Auditor.<sup>98</sup>

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94. Advice and Assistance Regulations, Reg.7(3).

95. Detailed decisions have been made from time to time by the Central Committee on the rates applicable for various items of business: see Summary of Notes for Guidance, p.11.

96. Advice and Assistance Scheme, Art.10(3).

97. Ibid., Art.10(4); Advice and Assistance Regulations, para.5(7).

98. Advice and Assistance Scheme, Art.10(3).

Accounts of expenses are not normally taxed, but are adjusted between the Solicitor and the Central Committee.<sup>99</sup> In the event of disagreement the matter is referred to the auditor of a Sheriff Court within the area of the appropriate Local Committee.<sup>100</sup> In the event of a claim on the Fund, the Solicitor is paid either the deficiency claimed or such other sum as the Central Committee consider to constitute fair and reasonable remuneration for work necessarily done.<sup>1</sup>

Various other practical matters on the submission and payment of accounts require brief mention.<sup>2</sup>

(a) Advice and assistance and criminal legal aid

If legal advice and assistance has been given to a client who subsequently obtains a criminal legal aid certificate, both accounts should be rendered together and sent together to the Local Secretary, who will verify the legal advice and assistance account and then forward both accounts to the Central Committee.

(b) Payment of Advances and Outlays

Although the Legal Advice and Assistance Scheme does not specifically provide for this, payments to account of expenses are made by the Central Committee, as under the 1958 civil scheme.<sup>3</sup> Advances may be of considerable use where outlays, such as Enquiry Agents' fees, may otherwise be outstanding for a lengthy period. In any event, the

99. Ibid., Art.10(5).

100. Advice and Assistance Regulations, Reg.5(8).

1. Ibid., Reg.7(2).

2. They are covered in detail in the Summary of Notes for Guidance, pp.12-15.

3. See 1958 Scheme, para.18(4).

Solicitor on receipt of payment from the Fund, is obliged to make payment of any outlays included in his account, insofar as not already paid.<sup>4</sup>

(c) V.A.T. on accounts

This is added by the Central Committee on the whole of the fees as agreed, unless the client has a contribution higher than the Solicitor's account. In the latter case, the Solicitor must deal with the V.A.T. situation and add V.A.T. to the account before accounting to the client for the balance, if any.

(d) Advice and Assistance and Section 1

It frequently happens that the work carried out under legal advice and assistance reveals that litigation is inevitable and that a Section 1 application must be made. The Solicitor has an option of rendering two separate accounts, but will often elect to include his work under advice and assistance with the Section 1 account.<sup>5</sup> To prevent items being charged for twice, all Section 1 accounts must contain a certificate to be completed by the Solicitor named on the legal aid certificate or, where a local correspondent is involved in the case, by the local correspondent. The certificate states that either the assisted person did not receive advice or assistance, or that he did receive it but the work is charged with the Section 1 account, or that the advice and assistance account has been rendered or paid.

False Statements and Offences

By regulation 8, where an applicant has wilfully failed to comply with the provisions of the regulations as to the information

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4. Legal Advice and Assistance Scheme, Art.10(7).

5. This is to the benefit of the client who has a contribution: see (1977) 22 J.L. Soc. Sc. 143.

to be furnished by him or, in furnishing such information, has knowingly made a false statement or false representation and the failure arose or the false statement or false representation was made prior to the receipt by the applicant of advice or assistance, the Law Society of Scotland may declare that the advice or assistance so given was not given under the Act and the regulations and shall so inform the applicant and the Solicitor; and thereafter the Society is entitled to recover from the applicant any sums paid out of the fund to the Solicitor in respect of the advice or assistance so given.

This right in the hands of the Law Society is quite separable from the criminal offences specified in Section 18 of the Legal Aid (Scotland) Act 1967.<sup>6</sup> Those offences can be committed equally by persons seeking or receiving advice or assistance as they can by persons in receipt of legal aid.

Employment of Solicitors under Part II of the 1972 Act

Although advice and assistance under Parts I and III of the 1972 Act was introduced as from 2 April 1973, Part II of the Act relating to employment of Solicitors by the Law Society is not yet in force in either Scotland or England. The Law Society of Scotland has gone on record as being particularly concerned that Part II should not be introduced until there has been the fullest consultation with the profession<sup>7</sup> and there is as yet no sign of a prospective date of introduction. As the matter may well have to await the findings of the Royal Commission on Legal Services, it is only intended to deal briefly with the provisions of Part II.

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6. See supra, Chapter XIII.

7. See 23rd Report of the Law Society of Scotland on the Legal Aid Schemes (1972-73), p.5.

Types of employment

Section 7(1) of the Act authorises the Law Society of Scotland to employ Solicitors either for giving advice and assistance under the 1972 Act, or to act for persons in receipt of legal aid generally or in prescribed cases, or to perform what might broadly be described as liaison services. The latter services are envisaged as being performed by Solicitors for or in connection with local advice organisations such as citizens' rights offices, advice bureaux and the like. The services would consist

- (a) of furnishing legal assistance to the organisation in its function of giving advice and guidance to applicants;
- (b) of promoting contacts between the organisation and Solicitors practising in the locality for which the organisation is established, with a view to enabling applicants to obtain the professional services of those Solicitors in cases where those services are required; and
- (c) of giving oral advice to applicants, instead of referring them to other Solicitors, in cases which can be readily disposed of by such advice.<sup>8</sup>

Paragraphs (a) and (c) would obviously allow an organisation such as a neighbourhood law centre and its clients to be advised by a Solicitor employed not by them but by the Law Society of Scotland, but, unlike England, Scotland has not yet seen the introduction of any full-scale centre,<sup>9</sup> let alone any where the Solicitor is not directly employed. Such plans as exist for neighbourhood law centres

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8. 1972 Act, s.7(2).

9. Plans have however been approved for a full-time centre in Castlemilk, although finance has proved to be a stumbling block.

in Scotland are going ahead without waiting for Part II of the 1972 Act to be introduced.

Section 8 of the 1972 Act allows the Law Society of Scotland to make a Scheme for provision of the services mentioned in Section 7 and provides that a Solicitor employed by the Society may be paid and acquire pension rights. By s.9 provides for such sums being paid from the Legal Aid Fund and prohibits an employed Solicitor from receiving any other remuneration from the Fund except arising from his employment. Section 10(1) provides that the Law Society be regarded as a firm of Solicitors for the purposes of enactments relating to Solicitors and other rules of law relating thereto; Section 10(2) allows two Solicitors employed by the Society to act for different parties having opposing or otherwise different interests in relation to the same proceedings or other matter.

## PART VI: CONCLUSION

It now seems appropriate to attempt to draw some conclusions from this lengthy study of legal aid. It has been shown that Scots lawyers have been operating legal aid continuously in one form or another for over five centuries and that the system has become firmly rooted in the Scottish legal tradition.<sup>1</sup> It has also been demonstrated that the present statutory provisions cover most of the situations in which legal assistance is desirable, whether for litigation or simple advice.<sup>2</sup> But the future for any legal system is uncertain, and this will be particularly true of the Scottish system after devolution.<sup>3</sup>

It is however safe to assume that the need for legal aid and legal advice is likely to increase, rather than decrease. The proliferation of statute law in the last twenty years, together with the ever-increasing complexities of modern living, is certain to ensure that the solution of problems will increasingly become the province of the lawyer. Although greater lay participation in problem-solving is advocated and practised in a number of important spheres,<sup>4</sup> there will continue to be a need for the professional advice and assistance of the legal profession which has served Scotland so well in the past. Such services must be made available (even if they are not taken up) across the board, irrespective of the issues involved and

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1. See supra, Part I.

2. See supra, Parts II-V.

3. For some views on the legal implications, see Independence and Devolution - the Legal Implications for Scotland (ed. J.P. Grant) 1976.

4. For example, in arbitration proceedings.

the means of the person seeking assistance. It thus appears that a system of legal aid will continue to be essential.

What is less certain is the form that the system will take. There have been suggestions that the responsibility for maintaining legal aid should be removed from the hands of the Law Society and that the system should be run instead through some Government body, as an integral part of the welfare state.<sup>5</sup> It seems to this writer that the need for this has never been demonstrated except on grounds of political dogma; in practical terms, comparatively few complaints are made against the running of legal aid by the Law Society, as opposed to complaints made against individual lawyers for failures in professional competence. In fact, the Law Society of Scotland has been conspicuously successful in running legal aid in the face of resistance to extensions of the Scheme by Governments and civil servants and carping criticism of the spiralling cost of legal aid, particularly in criminal cases.

It is perhaps on the criminal side that there is the greatest misunderstanding of the function of legal aid. All too often there is heard the familiar cry that legal aid should be granted much more sparingly (if at all); that lawyers are making excessive amounts of money by "bleeding" the legal aid fund; and that other abuses are rife. To all this the answer is simple: persons on criminal charges have been professionally detected in their alleged crimes by the Police; they will be professionally prosecuted by trained prosecutors; why then in a free society should the professionalism of the State authorities be assumed to be infallible and guaranteed to disclose the truth? Commonsense (and nothing else) indicates that these

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5. See Independence and Devolution, op. cit., pp.220-221

matters must be tested, so long as the accused has the benefit of the presumption of innocence and the adversary system is retained. In particular the claim that lawyers habitually render inflated accounts in criminal cases is one which has never been conclusively proved and which rests more on speculation, rumour and envy than on hard fact. Before such a claim could be substantiated, the whole question of professional fees would require examination, with particular emphasis on comparison between amounts claimed or charged for different types of legal business.<sup>6</sup> Criminal legal aid is perhaps the most essential facet of the whole scheme, as it is designed to ensure that the accused receives a fair trial and the putting forward of defences, whether technical or otherwise.

There is general agreement among the various legal bodies that legal aid must be extended to cover proceedings before tribunals. In particular, claims for compensation for unfair dismissal, which are heard before industrial tribunals, have become very widespread. Although such proceedings are conducted informally and do not involve (in practice) a rigid system of precedent, there is a great need for arguments to be properly presented. While it is fair to say that many lay pleaders, such as personnel officers or trade union representatives, are very skilled at appearing before such bodies, the lawyer has an important contribution to make, especially in relation to the cross-examination of witnesses. Likewise, the proliferation of cases before other forms of tribunal and the important issues involved therein would seem to necessitate the

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6. It is interesting to note that fees for conveyancing are often criticised for their amount; the criminal lawyer is not unique and should therefore not be singled out.

extension of legal aid thereto. However, it must be borne in mind that the present situation is not quite as bad as is sometimes claimed; as indicated,<sup>7</sup> legal advice and assistance under the 1972 Act is available for all the steps prior to the actual appearance before the tribunal; in practice, few lawyers would desert their clients at the door of tribunal room, but continue to represent them at the hearing.<sup>8</sup> Nonetheless, the situation is unsatisfactory and must be altered soon.

What of divorce? This (and other consistorial forms of process) has always been a proceeding predominantly supported by legal aid. But in England, legal aid has now been withdrawn for most undefended cases, presumably on the view that the presence of the parties in Court is not generally required. In Scotland affidavit procedure has been introduced in the Court of Session and it may be that there will be pressure to remove legal aid from such proceedings here, once the new procedure has settled down. It is submitted that this would be a most retrograde step and that we should not follow the English example. Not only is legal advice and assistance under the 1972 Act an essential service at the initial investigation stages, but at the decision-making stage, so long as this is done by a Court, legal aid under the 1967 Act will continue to be necessary, unless of course the ambit of advice and assistance is extended to cover steps in a Court process. It has never been the policy in Scotland to remove legal aid from an assisted person simply because his case has reached a certain stage on the way to judgment. Once legal aid is

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7. See supra, Part V.

8. This rarely happened in criminal matters between 1973 and 1975, when legal advice and assistance was frequently rendered on matters before the inferior summary criminal courts, for which legal aid was not available.

granted, it continues quoad the proceedings mentioned in the certificate until those proceedings are concluded, unless of course the certificate is suspended or discharged for some reason arising from the assisted person's conduct, or it no longer appears reasonable that he continue to be legally aided.<sup>9</sup> If it is to be argued that, for example, the fact that divorce proceedings under the affidavit procedure will become much simpler and that all the steps (apart from the most formal) can be done under legal advice and assistance, then surely the formal steps, if done by a lawyer, should also be covered by some form of legal aid. It is undesirable to cut the assisted person off just at the final stages of his case. But the present indications are that the new affidavit procedure is suffering teething troubles and may require considerable time to prove its worth.<sup>10</sup>

Scots law took on a European dimension with the entry of the U.K. into the Common Market. Ties with Europe are likely to become stronger with direct elections to the European Parliament timed to take place in 1979. But Scots litigants (or potential litigants) have as yet shown no great enthusiasm for using the European machinery of justice to vindicate their new rights. For this, there may be a number of reasons, perhaps the greatest of which is ignorance of the machinery by Scots lawyers. It has to be said that most lawyers do not yet think in European terms, and are unable to give effective advice on the European remedies available to clients. Until

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9. See supra, Chapter XIII.

10. It appears that one consequence of the new procedure is an increase in cases being put on the Procedure Roll in the Court of Session, thus necessitating skilled legal argument.

this failure of education is remedied, it is unlikely that the existing rudimentary facilities for legal aid in Europe will be much used.<sup>11</sup>

But of all the problems with legal aid in Scotland today, ignorance and lack of comprehension is perhaps the greatest. As mentioned in the Preface to this work,<sup>12</sup> the blame for this can be laid on the legislature for concocting the system piecemeal. Even the most cursory examination of Parts II-IV of this work will reveal the need for bringing all the legal aid provisions within one comprehensive statute or code. It is quite monstrous that the details of many important practical matters of legal aid are separated between Statute, Scheme, Regulation and Act of Sederunt. Happily, the Law Society of Scotland have set up a working party to review legal aid legislation;<sup>13</sup> the sooner it completes its deliberations and proposes a new format, the better it will be for everyone concerned. The law must be capable of being understood, particularly in matters relating to important civil rights. Legal aid is an essential right which is found in most legal systems of the world, but a right cannot be exercised if its import cannot be easily understood. If this thesis has demonstrated the need for reform of legal aid legislation, it will have served its purpose.

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11. See supra, pp.103-104.

12. See Preface, p. i.

13. See (1978) 23 J.L. Soc. Sc. 30.

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