

Note by the Auditor
of the Court of Session

i.c.

W v. W & G v. G

Law Society Legal Aid and
the Solicitors in the Cases
of [REDACTED]
and [REDACTED]

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1. Differences of view having arisen between the Solicitors and the Law Society Legal Aid Committee a taxation took place. Both the Law Society and the Solicitors were represented.

2. The dispute arises under Section 16(2)(b) of the Legal Aid (Scotland) Scheme 1958 which is in the following terms: - "a legal aid certificate shall cease 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 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."

The Auditor was informed that the Law Society now allow a period of six months and not three as stated in the Section.

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3. The Law Society contended that the Section provides that a Legal Aid Certificate ceases to have effect unless defences or other writ relating to the Applicant's initial interest in the proceedings and the Legal Aid Certificate are lodged in Court within six months, so that in this case (Westwater) the Certificate ceased to have effect on 29th May, 1979 - no defences or other writ having been lodged in terms of the Section. The Law Society construe the Section strictly.

4. The Solicitors contended that the construction put upon the Section by the Law Society was too strict, and that the defender's initial interest in the proceedings was indicated by his entering appearance. They argued that the entering appearance was a writing on the Summons and on the Calling List and was therefore a writ in the dictionary meaning. They submitted that if a motion for say aliment had been enrolled by the pursuer and opposed by the defender within the six months, and the defender appeared at the hearing it must be the position that the applicant's initial interest in the proceedings had been indicated by his opposing the motion in writing, i.e. by writ. Entering appearance and enrolling separately, they say must, clearly, in each case, show an initial interest.

5. They submitted in the case of [REDACTED] that the enrolling of a motion on 2nd November, 1977 for custody and aliment, marked as opposed on behalf of the defender and heard must/



must on a reasonable construction of the Section disclose the applicant's initial interest: that accordingly in [REDACTED] they had conformed to the Section and the Legal Aid Certificate had not ceased to have effect.

6. The Auditor has considered the submissions made to him and would like to comment on them. The Section of the scheme being construed has Statutory Authority in respect that it is made under Section 8 of the Legal Aid (Scotland) Act 1949. It should therefore in the opinion of the Auditor be construed in the same way as an Act of Parliament: so that when endeavouring to find the meaning of the word "writ" the words used immediately in front of it will give some indication of what the intention behind the Section was. The words are "summons, defences". Both of these documents are in terms of legal use Writs in the proper sense, so that the reference to writs subsequently seems to the Auditor to suggest a more formal document than for example one entering appearance. This approach however creates difficulties when the case of [REDACTED] is considered. There a motion for custody and aliment was enrolled by the Pursuer. The defender marked the motion as opposed and was present by Counsel and Agents when it was heard. Opposing a motion in its terms can hardly be said to be a Writ in the sense of Summons and defences, but its result in this case was equivalent to lodging a Writ relating to the applicant's initial interest. He was in fact represented, and so, present. It seems to the Auditor to be remarkable that/



that entering appearance or opposing a motion should be classed for the sake of this Section as "Writs". He has come to the conclusion therefore that the terms of the Section have not been complied with, and accordingly the Legal Aid Certificates have expired at the end of six months.

Having decided the Legal position the Auditor would like to say for the attention of the Legal Aid Authorities that such a state of affairs as this should not be allowed to continue, and that the Section should be amended to make it clear and precise as to what is necessary to indicate an applicant's initial interest in the proceedings. In the Auditor's view the present ruling will encourage the lodging of defences in cases which could well be settled without such a step. The cost of unnecessary defences to the public could be substantial.



A handwritten signature in cursive script, appearing to read "J. Rogers Smith".

in causa

against

and

against

16th February 1982

Mr J.K. Mitchell appeared for the defender in both cases. Mr P. Vandore appeared for the Law Society. The matter arises following a taxation by the Auditor of the Court of Session. Article 16(2)(b) of the Legal Aid (Scotland) Scheme 1958 states "A legal aid certificate shall cease to have effect unless the summons, defences or other writ relating to the applicant's initial interest in the proceedings and the certificates are lodged in court within 3 months or in cases in which the induciae is 84 days, 5 months or such longer period as the committee may determine from the date of the certificate." I was informed, as was the Auditor that the Law Society now allow a period of 6 months and not 3 as stated in the article. The Auditor's view was that the terms of the article had not been complied with because no writs were lodged in either case and that the legal aid certificate in respect of both defenders had expired. The facts in the Westwater case were as follows. The pursuer raised

an action of divorce against the defender and the agent for the defender were instructed to represent the defender on intimation being received by him of the service copy summons. The agents were instructed only to defend the action so far as quantum was concerned. On 7th September 1978 appearance was entered in the action in the manner set out in the Rules of Court. A legal aid application was then lodged with the Law Society. A legal aid certificate was issued to the agents on 29th November 1978. I understand that the pursuer's agents who were also granted legal aid suggested that an agreement on quantum might be possible and as there were prospects of settlement the agents for the defender refrained from instructing defences at that stage in order to save public funds. A legal aid certificate was lodged in process on 11th December 1978. Various attempts thereafter were made to effect settlement without success and on 21st September 1979 the pursuer's motion to amend the conclusions was allowed and defences were appointed within 14 days. Defences were instructed on 17th December 1979 and lodged in process on 31st December 1979. The action thereafter proceeded. On the morning of the proof settlement was effected by way of joint minute and decree of divorce was granted in favour of the pursuer. The defender was found liable in the expenses of the action as an assisted person by interlocutor dated 28th October 1980. His liability for/

for expenses were assessed in terms of section 2(6) of the Legal Aid (Scotland) Act 1967 at £20. The defender's account of expenses was submitted to the Law Society who refused to pay in respect of any work charged on or after 4th June 1979 because they took the view that the terms of Article 16(2)(b) of the Legal Aid (Scotland) Scheme 1958 had not been complied with. The matter was considered by the Auditor and as stated he reached the conclusion that the terms of Article 16(2)(b) had not been complied with, and the legal aid certificate had expired on 29th May 1979. In [REDACTED] case the facts were as follows. [REDACTED] raised an action of divorce against the defender. The agents were instructed to represent the defender on intimation being received by him of the service copy summons. The agents' instructions were to represent the defender's interests so far as the matter of access and quantum were concerned and on the calling of the summons in court appearance was entered by entering counsel's name on the summons and in relation to the calling list. An interlocutor sisting the cause was pronounced on 21st September 1977. A legal aid application was thereafter lodged and a certificate was issued in the defender's favour on 25th November 1977. On 4th November 1977 the court heard an opposed motion relative to matters of custody and aliment when counsel and agents for the defender represented his interests. Following that motion attempts were made by both parties agents to effect settlement. The defender's agents felt/

felt that the lodging of defences at that stage would have been an unnecessary expenditure of public funds. A legal aid certificate was lodged in process on 11th December 1978. Settlement was not achieved however and accordingly the sist was recalled by interlocutor of 21st June 1978 and defences were lodged in process on 22nd June 1978. The action thereafter proceeded as a defended action but agreement in fact was eventually reached in a joint minute entered into and lodged in process and decree of divorce was granted on 14th June 1979. As in the case of [REDACTED] the defender's account of expenses was submitted to the Law Society. The Law Society refused to meet the account in respect of work charged on or after 11th April 1978. The matter went to the Auditor of the Court of Session and he reached the conclusion that Article 16(2)(b) of the Legal Aid (Scotland) Scheme 195 had not been complied with and that the legal aid certificate had expired at the end of 6 months. He therefore excluded any payment or charges incurred after that period. In both cases the Auditor took the view that no writs had been lodged within 6 months. Mr Mitchell's essential submission was that in considering Article 16(2)(b) the Auditor had taken a too restrictive view. He urged me to take a broader view and one generous enough to enable the entering of appearance and participation in a motion to be covered by Article 16(2)(b). I am not able to do so. The words used in the article are "Unless the summons, "defences/

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"defences, or other writ relating to the applicant's initial interest in the proceedings and the certificate are lodged in court". No writ was lodged in either of the cases concerned. Definitions in dictionaries essentially define a writ as a document with writing. In neither of these cases were documents lodged on behalf of the defenders. In my view the section envisages the lodging of an actual document. Mr Mitchell suggested somewhat tentatively that the powers available to the Secretary of State under Section 12(1) of the Legal Aid (Scotland) Act 1949 and that the powers given within the Act to the court under Section 13 were not accurately reflected in Article 16(2)(b). I did not consider there was any substance in that submission. He pointed out that in the Sheriff Court it was necessary to lodge a document in order to enter appearance. On the other hand he submitted that in, for example, a motion for variation following on divorce proceedings no document was necessary. Similarly in relation to an order by the court where a party is ordained to appear at the bar. These matters can be dealt with initially without the lodging of documents and they are almost certainly dealt with within 6 months. In any event provisions are made in fact in both these instances for certain documents to be lodged if the matter is not dealt with at the time of the initial appearances. It may be, as counsel submitted, there are anomalies in the legal aid procedures. None of these considerations, however, obviate the requirement under Article 16(2)(b) to lodge a writ within 6 months if/

if a legal aid certificate is to remain in force.
The auditor has expressed the view that because
such a requirement some solicitors may lodge def
at an early stage and when it is not necessary to
so. If there is substance in that observation no
the appropriate authority will give some consider
as to how such unnecessary expense be avoided.
Accordingly I refuse crave four of both notes of
objections.