R(IS) 17/94

Mr. J. G. Mitchell QC **CSIS/28/1992**
Mr. R. A. Sanders **CSIS/40/1992**
Mr. W. M. Walker QC
5.7.93

Applicable amount - severe disability premium - whether claimants had no "non-dependants" living with them - applicability of Scots Law doctrines of recompense and *negotiorum gestio* - meaning of "commercial basis"

Both cases concerned severely mentally handicapped single adults residing with their mothers and in receipt of attendance allowance. They were awarded income support from its inception in April 1988 but without the severe disability premium being included in their applicable amounts. The claimants appealed against the initial awards of income support. In CSIS/28/1992, the social security appeal tribunal decided that the claimant was entitled to severe disability premium until 9 October 1989 but not thereafter because the claimant's mother was excluded from the amended definition of "non-dependant" in regulation 3 of the Income Support (General) Regulations 1987. In CSIS/40/1992, the social security appeal tribunal decided that the claimant was entitled to severe disability premium not only up to 9 October 1989 but also from 10 October 1989 onwards. Both cases were the subject of appeals to the Commissioner, in CSIS/28/1992 by the claimant and in CSIS/40/1992 by the adjudication officer.

Held, allowing both appeals, that:

1. the appeal tribunals erred in failing to consider the period from April 1988 down to the date when the issues were finally decided (preferring the approach of the tribunal of Commissioners in CIS/391/1992 to that in CIS/649/1992);

2. it was necessary to have regard to each of the appeals in the context of the five amendments made to regulation 3 of the regulations during the period under consideration;

3. as a matter of Scots Law, an *incapax* cannot enter into contracts on his own behalf:

   (i) it was therefore necessary for adjudicating authorities to determine whether a claimant was so mentally incapacitated as to be *incapax* as understood in Scots Law;

   (ii) if so it was then necessary to consider the Scots Law doctrines of recompense and *negotiorum gestio*. Relying on the doctrine of recompense, the parents of an *incapax* adult might reclaim monies expended by them in maintaining the *incapax*. For that it would be necessary to show that the expenditure was not incurred *ex pietate* or *animo donandi*. It must be equitable for the *incapax* to make recompense. It was doubtful if reclamation could be based on the doctrine of *negotiorum gestio* but the tribunal of Commissioners did not exclude the possibility;

4. this result under Scots Law was not dissimilar to that under English Law in CIS/195/1991;

5. the words "commercial basis" govern the nature of the liability and not the quality of the payments made. Adjudicating authorities should consider whether the payments were broadly in line with what a lodger might be expected to pay for the accommodation and facilities offered.

DECISION OF THE TRIBUNAL OF COMMISSIONERS IN CSIS/28/1992

1. This claimant's appeal succeeds. We hold the decision of the appeal tribunal dated 22 October 1991 which held the claimant not entitled to severe disability premium (SDP) from 10 October 1989 to be erroneous in point of law and so we set it aside. The case is remitted to a tribunal for determination afresh in light of the

guidance contained herein and in the appendix hereto. For the avoidance of doubt we should confirm that the decision which the same tribunal gave on the same occasion but in respect of a period down to 9 October 1989 was correct, subject only to the observation that that was the date on which a relevant change in the legislation took effect and so the award should only have been to the previous day, that is to 8 October 1989. We regard that error as but a venial slip and *de minimis*. A formal correction would be appropriate.

2. An adjudication officer had not allowed SDP in respect of the claimant when making an original award for him of income support on its inception. After a late appeal had been accepted by a chairman an adjudication officer submitted to the tribunal that the claimant had been entitled to SDP from the outset so that it was open to the tribunal to award SDP for a period prior to 9 October 1989. He also submitted that the claimant was not entitled to SDP thereafter. Thus it was that the tribunal came to issue two decisions, the first overturning that of the adjudication officer in respect of the period to October 1989, and the second refusing SDP thereafter. In the event, by the time that the tribunal sat, there had been three further changes in the legislation and so, in line with what they did do, they should have issued four decisions, one in respect of the consequence upon the claimant's award of each reldvant change in the legislation. That would have been the best way to set out their conclusions and the new tribunal should seek to so do.

3. Before proceeding further we should make it clear that our endorsement of the tribunal's having determined the claimant's right to SDP after the date of claim is made in knowledge of decision CIS/649/1992 wherein it was held that an adjudicating authority should only consider an income support claim as at the date from which that benefit is sought and not down to the date of decision. That, it was appreciated, was contrary to what had been held in paragraph 13 of R(SB) 4/85. We have not thought it right to seek submissions upon this issue since we have also become aware of the decision by another tribunal of Commissioners, more recently, on file CIS/391/1992. In the last, at paragraph 10, it was clearly stated by that tribunal that the issue in that appeal covered a period from 15 March 1991, the date of claim in that case, down to:

> "... the date when the issues in this case are finally decided."

We have made the same approach to these issues in this case, in preference to the views expressed in CIS/649/1992.

4. This was one of two cases which required consideration of difficult questions of law in determining whether for the purposes of the Income Support (General) Regulations 1987 (the "ISG Regulations") an *incapax* claimant resident in Scotland had or had not adult non-dependents residing with him and so whether he could or could not qualify for the addition of the SDP to his income support. The history of the cases, the appearances, the law involved, the submissions made thereon and our conclusions therein are set out in the appendix, which is common to both cases.

5. This case concerned a 29 year old man living with his mother. He is severely mentally disabled. It was confirmed at the hearing before us that he suffers from Down's Syndrome. The house in which both reside is hers. We note at this stage that almost no evidence or facts were recorded. That may have been because the tribunal, in its own words, took it to have been asked:

> " ... to rule only on the meaning of the regulations in their present form (from 1 October 1990) particularly the definition of "non-dependant" in General Regulation 3. [They then went on] But our reasoning applies also to the amendments from 10 October 1989 ..."

They should have gathered the evidence available and made findings of fact as to the claimant's condition and as to how, if at all, his mother acted in regard to his finances, before seeking to apply the law. Their hearing was not just a kind of preliminary hearing on the law.

6. As noted, the tribunal found the claimant entitled to the SDP from April 1988 to October 1989 but not thereafter and it was accepted before us that such an award was correct. We were given to understand that an appropriate payment of the SDP has since been made. The tribunal incorporated a separate typescript which related also to a case other than the one before us. It is only right to commend the tribunal and their chairman for the fullness of the exposition of their views.

7. The tribunal concluded that the principles of recompense or *negotiorum gestio* invoked by the claimant applied only in a commercial, and not in a purely domestic, situation as here. We have some sympathy with that but for the reasons set out in the appendix we have come to the view that as matter of law that was erroneous. The tribunal seem to have gone into further error when they considered whether there could be imposed upon the claimant in this case a liability in contract. That was to ignore a central fact, namely that the claimant was an *incapax* and so could in no way be put under such a liability in Scotland.

8. Moreover the tribunal considered recompense and *negotiorum gestio* without regard to the changing forms of ISG regulation 3(2) over the period with which they were concerned. They then concluded against recompense as having been established because:

> "In the absence of specific evidence to the contrary, [the tribunal would] infer an intention to make a gift in such cases."

But in the previous sentence they had noted that they did not feel:

> " ... the need to ask the parents in the present cases whether they had willingly shouldered the burden of caring for their children and of bearing any financial loss ..."

And the record of proceedings notes that the claimant's mother had been present. It was an error of law for the tribunal to conclude in favour of gift in the absence of evidence. That was a serious error since the conclusion was adverse to the claimant and he had a witness from whom the tribunal did not seek to hear. But, having said that, we appreciate that in this case the fundamental error probably was the tribunal's approach, adopted be it noted at the invitation of the parties, that they were only sitting to determine the law applicable to the case. It may be that they were persuaded that the facts had been agreed. But far from all the relevant facts had been agreed. It would have been preferable for the tribunal to have first ascertained them. Had they done so it might have been that we could have made final determinations on all the periods involved.

Date: 5 July 1993

(signed) Mr. J. G. Mitchell QC
Commissioner
(signed) Mr. R. A. Sanders

Commissioner
(signed) Mr. W. M. Walker QC
Commissioner

DECISION OF THE TRIBUNAL OF COMMISSIONERS IN CSIS/40/1992

1. This adjudication officer's appeal succeeds. We hold the decision of the appeal tribunal dated 27 November 1991 which awarded severe disability premium (SDP) from 9 October 1989 to be erroneous in point of law and so we set it aside. The case is remitted to a tribunal for determination afresh in light of the guidance contained herein and in the appendix hereto. For the avoidance of doubt we should confirm that the decision which the same tribunal gave on the same occasion but in respect of a period down to 9 October 1989 was correct, subject only to the observation that the last mentioned date cannot be both the terminal date for that award and the starting date for the next period. It is correct in respect of the latter being the date on which a relevant change in the legislation took effect. We regard that error as but a venial slip and *de minimis*. A formal correction would be appropriate.

2. An adjudication officer had not allowed SDP in respect of the claimant when making an original award for him of income support from its inception. After a late appeal had been accepted by a Chairman an adjudication officer submitted to the tribunal that the claimant had been entitled to SDP from the outset of income support, but only until the change in the legislation effective from October 1989. Thus it was that the tribunal properly came to two decisions, the first overturning that of the original adjudication officer and the other making an award for the period after that change in the legislation. In the event, by the time they sat there had been three further changes and so, in line with what they did do, they should really have issued four decisions, one in respect of the consequences upon the claimant's income support of each relevant change in the legislation. That would have been the best way to set out their conclusions and the new tribunal should seek so to do.

3. Before proceeding further we should make it clear that our endorsement of the tribunal's having determined the claimant's right to SDP after the date of claim is made in knowledge of decision CIS/649/1992 wherein it was held that an adjudicating authority should only consider an income support claim as at the date from which that benefit was sought and not down to the date of decision. That, it was appreciated, was contrary to what had been held in paragraph 13 of R(SB) 4/85. We have not thought it right to seek submissions upon this issue since we have also become aware of the decision by another tribunal of Commissioners, more recently, on file CIS/391/1992. In the last, at paragraph 10 it was clearly stated by that tribunal that the issue in that appeal covered a period from 15 March 1991, the date of claim in that case, down to:

> "... the date when the issues in this case are finally decided."

We have made the same approach to the issues in this case, in preference to the views expressed in CIS/649/1992.

4. This was one of two cases which required consideration of difficult questions of law in determining whether for the purposes of the Income Support (General) Regulations 1987 (the "ISG Regulations") an *incapax* claimant resident in Scotland had or had not adult non-dependants residing with him and so whether he could or could not qualify for the addition of the SDP to his income support. The history of

the cases, the appearances, the law involved, the submissions made thereon and our conclusions thereon are set out in the appendix, which is common to both cases.

5. This case concerned a 24 year old man who lives with his widowed mother in her house. She acts as his appointee as he is severely mentally handicapped. His mother takes charge of his income support and uses it along with her own widow's benefit to pay the house rent, fuel bills, water charges, his community charge and the like.

6. This appeal was against a decision of an adjudication officer issued on 12 October 1987 whereby the claimant had been found entitled to income support but without the SDP. The tribunal decided thus:

> "The tribunal overturned the decision of the adjudication officer that severe disability premium is due from 11 April 1988 to 9 October 1989 only and grants severe disability premium from 11 April 1988 to 9 October 1989 and from 9 October 1989 onwards."

The tribunal there confused a concession made to them by the adjudication officer with what he had actually decided and, as noted, they incorrectly recorded the terminal date for the first period.

7. The basis upon which the tribunal awarded the SDP from and after 9 October 1989 was that the claimant's mother was found to stand in the position of a *negotiorum gestor.* In that regard they have neither considered nor made findings of fact nor expressed reasons dealing with the issues relevant to such a position, as referred to in the appendix. In particular they failed to consider or exclude donation. No evidence dealing with the essentials of *negotiorum gestio* had been put before them. We also draw attention to the possible scope and involvement of the principle of recompense as set out in the appendix.

8. There are further defects in the decision. The first is that it was asserted in the reasons that the claimant's mother was being reimbursed on, a commercial basis and so regulation 3(2)(da) of the ISG Regulations was satisfied. That particular form of the regulation only came into force on 1 October 1990. Second, with effect from 11 November 1991 a further change in the regulations came into force which, it was agreed before us denied any further possible access by this claimant to the SDP. That was not dealt with by the tribunal. Their decision is in error of law.

Date: 5 July 1993

(signed) Mr. J. G. Mitchell QC
Commissioner

(signed) Mr. R. A. Sanders
Commissioner

(signed) Mr. W. M. Walker QC
Commissioner

THE APPENDIX
(CSIS/28/1992 AND CSIS/40/1992)

INDEX

Introduction

1. These two cases primarily concerned the applicability of the Scots Law doctrines of recompense and *negotiorum gestio* to the question whether parents living in Scotland and with whom resided a person suffering from a severe mental disability could be "non-dependants" of that person for the purposes of paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987, SI 1987 No. 1967, the ISG Regulations. We should immediately record that whilst similar issues about "non-dependants" may arise in cases where claimants suffer forms of incapacity other than mental these will require to be considered upon their own particular facts and tested against the normal rules for express or implied contract. That is, we think, the result in both Scotland and England. However, many other appeals to Commissioners have raised the applicability of the doctrines in regard to claimants in Scotland suffering from mental incapacity. We were appointed on 25 February 1993 by direction of the Chief Commissioner to be a tribunal of Commissioners under section 57 of the Social Security Administration Act 1992 in order to determine all issues arising in these appeals. A hearing was subsequently directed on 3 March 1993. It occupied some three days. We were much assisted by the appointment by the Lord Advocate of an *amicus curiae*.

2. The adjudication officer for both cases was represented by Mrs. Eileen P. Davie, Advocate, instructed by the Solicitor in Scotland to the Department of Social Security. The claimant in CSIS/40/1992 (the Greenock case) was represented by Mr. Chris Orr, Welfare Rights officer with Strathclyde Regional Council. The claimant in CSIS/28/1992 (the Inverness case) was represented by Mr. Victor Tough, a solicitor with the Citizens Advice Bureaux in Scotland, and Mr. W. Graham of the Citizens Advice Bureau in Inverness. The Hon. D. R. A. Emslie, QC instructed by Mr. N. R. Whitty, Solicitor with the Scottish Law Commission, appeared as *amicus curiae*. We are grateful for the assistance afforded by the various submissions in a difficult but important area of law. It would be wrong not to record our particular appreciation of the full and objective submissions by the *amicus.*

3. Each claimant had been found entitled to income support from its inception in April 1988. In each case the SDP had been disallowed. Each claimant had been allowed by a chairman to appeal late to a tribunal. Because the Greenock case was an appeal to us by the adjudication officer and he was represented by Counsel it seemed appropriate that that appeal should be opened first. We next heard opened the claimant's appeal in the Inverness case. Thereafter we heard Counsel for the adjudication officer in response to that appeal. The *amicus* then presented an over-view and review of the doctrines and offered suggestions in regard to their application to the law of social security in general and in relation to these cases. No submission was offered in contradiction or modification of his general presentation although there were suggestions on the extent to which the doctrines should operate in the circumstances of each of the cases.

The statutory provisions

4. Income support provides for certain premiums or additional allowances. In particular section 22(3) of the Social Security Act 1986, now section 135(5) of the Social Security (Contributions and Benefits) Act 1992, provided that a severely disabled person's appropriate amount was to include an amount in respect of his

being a severely disabled person. Section 22(4) of the 1986 Act, now section 135(6) of the 1992 Act, provided that regulations could specify circumstances in which persons were to be treated as being, or as not being, severely disabled.

5. Regulations were duly made in the form of the ISG Regulations. Regulation

convenient now to note the important changes affecting regulation 3(2) and its successors.

Regulation 3(2) - version I

8. This version endured until 10 April 1989. Its paragraph (c), alone then of relevance, as was accepted before us, covered:

> "a person who jointly occupies the claimant's dwelling ..."

We have no hesitation in accepting what was not in dispute before us, namely that each of the present claimants who normally resided with a parent in the parental home could satisfy sub-paragraph (c). In any event this is in line with what had already been made clear by one of our number, in *Trotman* (CIS/180/1989), in May 1990, namely that claimants in the position of the present claimants were entitled to the SDP during the life of the original version of the regulation.

3(2) - version II

9. This version took effect from 10 April 1989 by virtue of the Income Support (General) Amendment Regulations 1989, SI 1989 No. 534. That amendment affected only 3(2)(d) by to some extent expanding it. It then provided:

> "(d) ... **any person** who is liable to make payments to the claimant or the claimant's partner or **to whom** or to whose partner **the claimant** or the claimant's partner **is liable to make payments in respect of his occupation of the dwelling**..." [we have emphasised the wording relevant to the present cases.]

3(2) - version III

10. This version took effect from 9 October 1989. Regulation 3 of the Income Support (General) Amendment No. 3 Regulations 1989, SI 1989 No. 1678, then added words to the end of sub-paragraph (c) so that it read:

> "(c) a person who jointly occupies the claimant's dwelling and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling;"

There was not involved in either of the cases before us any question of co-ownership. Nor could there be involved any question of joint liability because such necessarily required some form of contract between the parties involved. An argument to the contrary which was based upon a comparison of the word "jointly" as expressly used in relation to occupation in the opening words of the sub-paragraph with its replacement by "with" at the later payment stage, so implying some non-joint liability in regard to that latter, we found simplistic and unacceptable. And because under the domestic law of Scotland an *incapax* can never be held to have entered into a contractual relationship, express or implied, we conclude that no *incapax* claimant in Scotland can derive any benefit from Version III from and after 9 October 1989.

3(2) - version IV

11. With effect from 1 October 1990 ISG Regulation 3(2)(d) was again amended, and split, by regulation 3 of the Income Support (General) Amendment No. 3 Regulations 1990, SI 1990 No. 1776. The successor provisions then read:

> "(d) any person who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of the occupation of the dwelling;
>
> (da) any person to whom or to whose partner the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the occupation of the dwelling;
>
> (db) any other member of the household or the person to whom or whose partner the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the occupation of the dwelling;"

In the circumstances of these cases sub-paragraph (da) alone continued to be of relevance. It should be noted that here the concept of "commercial basis" first appears.

3(2) - version V

12. The last amendment for our purposes was made by regulation 2 of the Income Support (General) Amendment No. 6 Regulations 1991, SI 1991 No. 2334, which further split the old 3(2) and introduced (2A). The scope of the exceptions from "non-dependant" was thereby further narrowed by the exclusion of any "close relative". The result, having regard to the definition of "close relative" in ISG regulation 2(1) which includes parents, and indeed in the reverse situation children, is that after it came into effect from 11 November 1991 there could be no further possible entitlement to the premium in the present claimants. There was no dispute before us about that.

The appeal cases

13. The decisions before us had introduced and dealt with the Scots law doctrines thus:

> **i. The Greenock case**
>
> This tribunal's findings and reasoning led them to a conclusion that the claimant's mother had been a *negotiorum gestor* to the claimant and as such was entitled to her expenses in keeping him housed. Thus he had been and was liable to make payments to her on a commercial basis.
>
> **ii. The Inverness case**
>
> This tribunal rejected the application both of the Scots law doctrine of recompense, which was primarily founded-upon in this case, as well as that of *negotiorum gestio*.

The law so far

14. The period now remaining at issue is from 9 October 1989 to 10 October 1991 and the relevant versions of ISG Regulation 3(2) are II and IV. In *Scarborough* (CIS/195/1991) a claimant, living with his parents, had been held by an appeal tribunal to be entitled to the SDP because those parents had been excluded from being "non-dependants" by reason of satisfaction of regulation 3(2)(d), Version IV. It was there contended on behalf of the claimant and accepted by Counsel for the adjudication officer that the adult claimant, who paid £20 per week to his parents, was their licensee. That was said to follow from a combination of factors including

the payments trade, their nature and the general arrangements made by the parents in regard to the claimant. Counsel for the adjudication officer further conceded that it was then legitimate to regard that claimant as "liable to make payments" to the parents "in respect of his occupation" because, had he not made them, the parents could have terminated the licence and required him to go. That particular claimant was both physically and mentally handicapped but his mental condition, as both sides agreed, did not raise any legal problems because, under the domestic law of England, such a person may enter into a contract although it may later be voidable at his instance. Counsel for the adjudication officer accepted before us that *Scarborough* had been correctly decided in relation to the domestic law of England. In the domestic law of Scotland, however, an *incapax* has no personal contractual capacity at all. It follows that had the *Scarborough* case arisen in Scotland the same decision might well not have been reached. The application of Scots domestic law could have resulted in any purported contract being void *ab initio* depending upon the degree of the mental incapacity, Gloag "Contract" 2nd Edition, page 92, where the authorities, and indeed the contrast with the domestic law of England, are discussed. We do not need to go into the matter further because that starting point was entirely accepted before us.

15. The practical point from which we start therefore is that by the application of the relevant domestic law based on the *Scarborough* concession there appeared likely to be a different and more beneficial result in England than in Scotland for claimants suffering mental incapacity. And, as was accepted before us, there is nothing in the legislation to indicate that that result had been intended by the Secretary of State.

The Scots doctrines:

i Recompense

16. Something of this doctrine can be gained from Bell's "Principles" (10th Edition) at page 538 where the author defined it thus:

> "Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain."

That definition is now accepted as too wide (*Edinburgh and District Tramways Ltd v. Courtenay* [1909] SC 99 at 105) but it does give something of the direction of approach necessary when considering its application. The *amicus* demonstrated that the doctrine has been applied in three different situations; first commercial, second occupation of heritage and third aliment. The latest cases in respect of the commercial application are *Varney (Scotland) Ltd v. Lanark Town Council* [1974] SC 245 and *Lawrence Building Co Ltd v. Lanark County Council* [1978] SC 30 from which it is clear that for that application the essentials are, first, that he who claims the benefit of the doctrine must have incurred a loss; second that he against whom the claim is addressed must be *lucratus* (that is must have gained) by what the loser had done; third that there must have been no intention of donation; and fourth that it must also be equitable for the loser to be recompensed. A factual error may also be of some importance. In regard to the occupation of heritage the doctrine seems to have been applied in such cases as where a tenant, the lease having expired, remained in possession. Upon the principle of recompense the landlord may then be able to recover some payment in respect of that possession, most recently exemplified by

HMV Fields Properties Ltd v. Skirt 'n' Slack Centre of London Ltd [1987] SLT 1 and *Shetland Island's Council v. BP Petroleum Development Ltd* [1990] SLT 82. In both the landlord was held entitled to seek to recover the real worth or annual value of the subjects which had been affirmed to be the proper measure in *Glen v. Roy* [1882] 10 R 239. These two applications of the doctrine clearly involve relationships at arm's length. What we have to deal with is inherently unlikely to be so businesslike. The alimentary application of recompense is one involving a close rather than an arm's length relationship and we prefer such guidance as can be derived from decisions illustrating the alimentary application because that situation is close to that with which we are concerned.

17. By common law in Scotland a parent was liable to aliment his child even after adulthood if that was required through poverty or other necessity, such as incapacity: *Erskine "Institutes" (Ed Nicolson)* 1 VI 53 *et seq* and the cases there discussed. Stair perhaps best encapsulated the alimentary application of the doctrine of recompense in his "Institutions" at 1.8.3:

> "In all cases, aliment or entertainment, given to any person without paction, is presumed a donation, if the person was major, and capable to make an agreement. But entertainment to minors and weak persons doth ever infer recompense, according to the true value of the benefit received."

In *Bain v. Bain* [1860] 22 D 1021 the Second Division approved a statement by Lord Rames that aliment of adult children involved only support beyond want, anything else being left to parental affection. We consider that the social climate and development have tended to transfer some part at least of the responsibility for such maintenance to the State by means of just such benefits as we now have under consideration, see similar comments in para. 1249 of Volume 10 of the Stair Memorial Encyclopedia: "The Laws of Scotland".

18. The application of recompense to an alimentary situation is helpfully summarised in the Scottish Law Commission's Consultative Memorandum No. 22 "Aliment and Financial Provision" (1976) Volume 2, in particular pages 45 - 48. At paragraph 2.79 onwards reimbursement from the alimented person is discussed and the author notes that ability to recover under recompense depends upon an absence of any legal liability to pay the aliment provided. And that is now the position in both of the present cases because of an amendment to the common law effected by section 1 of the Family Law (Scotland) Act 1985 whereby the common law liability to aliment children has been terminated at age 18, subject to an educational exception which does not apply to the present cases. The Memorandum goes on to note that donation must be excluded in such cases and that where a person of full age and capacity is involved there is a presumption of donation since otherwise there could first have been made an express agreement for recovery. That is vouched by such cases as *Wilson v. Patterson* [1826] 4 S 817 and *Drummond v. Swayne* [1824] 12 S 342. In these cases the absence of evidence in the way of accounts and receipts and the like and the fact that the alimented individual had been capable of making an agreement were factors warranting a conclusion that the payments had been made either by donation or *ex pietate*, which is much the same thing. In the latter decision is to be found an observation that each case must be decided on its own circumstances.

19. More recently *in M'Gaw and others v. Galloway (Corkran's Executor*) [1882] 10 R 157 the finding went the other way. There a brother and sister had set up house jointly and after the brother's funds had become exhausted the sister continued to support him with the aid of a son-in-law. After the brother's death a question arose as to the extent to which the alimentary payments had been matter of gift or debt. The Lord Justice Clerk opined that the brother:

> "... was bound to pay his sister for his maintenance if he ever was put in funds to do so, and that in the circumstances the presumption in favour of aliment being a gift and not a debt has no place at all. I think that where there is, as here, a joint establishment, the matter is in an entirely different position from cases where aliment has been given to children or other persons unable in any way to provide for themselves. I look upon this as a case where both parties were bound to pay what they could."

And in *Fairgrieves v. Hendersons* [1885] 13 R 98 it was held that a widow, unable otherwise to support her children from her own funds, but who had in her hands a sum belonging to her minor daughter, had been entitled to impute the interest thereon to account of sums expended on that daughter's maintenance and education but not any part of the capital.

20. Finally in *Turnbull v. Brian* [1908] SC 313, where an individual had taken in his wife's brother, then a destitute orphan aged 11, and alimented him for two years, Lord Ardwall in the Second Division observed:

> "... that the tendency of the more recent authorities is to consider the question whether in cases such as the present the aliment supplied was intended to be a donation or a debt as one depending on the circumstances of each case, and not on any fixed rules or presumptions of law. And in the present case a consideration of the facts ... leads me to the conclusion that the aliment ... was given *ex pietate* as a donation and with no intention that it should form a debt against the defender."

The Scots doctrines:

ii *Negotiorum gestio*

21. It is enough first to refer to paragraph 14.10 of the standard text book, Gloag and Henderson "Introduction to the Law of Scotland" (9th Edition: 1987), wherein the doctrine is described as of application where someone intervenes and manages the affairs of another:

> "... who, temporarily or permanently, is unable to manage them himself, and in circumstances where it is reasonable to assume that authority would have been given had the circumstances rendered it possible to apply for it. The position is held by one who acts on behalf of a pupil, minor, or absentee, of a person in prison, or even of a person who has become insane [i.e. an *incapax*]."

22. Any expenses must be shown to have been for the good of the *incapax.* As in the case of recompense there must have been no *animo donandi*, Stair 1.8.2. No case was cited to us showing that this doctrine had been applied to an alimentary question as between relatives. The case nearest thereto was *Fernie v. Robertson* [1871] 9 M

473. It demonstrated the application of the doctrine in a third party situation where the daughter of an *incapax* had employed tradesmen to do repairs and an action by the tradesmen for payment of his account succeeded against the heir of the *incapax* so far as *lucratus*. We therefore tend to the view that this doctrine is indeed more limited in its application to relationships of a commercial nature.

The application of the doctrines to the regulation

i General considerations

23. It will be necessary in any particular case such as the present for the adjudicating authorities first to consider the extent of a claimant's mental disability and to determine whether that person is so mentally incapacitated that he is "*incapax*" as understood in Scots law. We do not suggest, of course, the full investigation required for the appointment of a *curator bonis* but an impression must be formed upon a broad view of the claimant's condition as to whether he can properly give meaningful and useful directions in regard to such funds and other arrangements as might be called "his affairs". If a claimant is held properly to be able to give such directions then the normal law of contract will have to be considered to see what, if any, arrangement, actual or implied, is to be held to be in place, bearing in mind that it is not normal to expect enforceable legal relationships to be established in such a domestic situation. We should add that in some "appointee" cases incapacity may be expressly conceded in which event it will be enough that the concession be recorded.

24. We are persuaded that it remains competent for the parents of an *incapax* adult to seek to reclaim monies expended on maintaining that adult by way of recompense. We are doubtful whether any reclamation could be based upon the doctrine of *negotiorum gestio* but we are not prepared to say that it never could be so based. Clearly only expenses may be recovered by that route. For the purposes of regulation 3(2) versions II and IV, however, such expenses would have to be related to the occupation of the dwelling by the claimant and that would, we suspect, almost certainly require some form of vouching to prove the particular sums or expenses involved and also that they had been exclusively incurred for the claimant. As we have already observed that is probably too nearly a commercial standard of accounting to be capable of satisfaction in a family situation and certainly in one where income support is involved. It would be necessary also to show that the expenditure had not been made *ex pietate* or *animo donandi.* What follows about that in respect to recompense would apply equally to any suggested application of *negotiorum gestio*.

25. Recompense we therefore conclude is in practical terms the only doctrine likely to be relevant. To establish it in any particular case will require at least three vital and central points to be satisfied. The first is loss; the second its opposite, gain. We doubt if these will cause much difficulty, at least in principle. Maintaining an *incapax* in their home must almost inevitably cause parents some expense in respect of that occupation which they would not otherwise have incurred. By occupying some part of the accommodation in the parental home the *incapax* claimant will almost as inevitably, have gained something of financial value which he would not have had had he been resident elsewhere.

26. The third and more difficult point concerns the intent or intentions involved. We accept that in cases of mentally incapacitated adults donation is not to be automatically implied: there is no presumption of donation. All will depend on the circumstances. Thus if there never has been any thought of seeking recoupment of any part of the cost of the occupation of the dwelling by the claimant it may be fairly simple to infer donation, or that the cost was given *ex pietate.* But in so far as an

intention to charge is accepted by the adjudicating authority as having been established, if only by the use made of the claimant's benefit monies, then to that extent donation may be negatived as the proper conclusion from the whole circumstances. We must at this stage emphasise that we are dealing with cost and charging only in respect of the accommodation. How much is being charged, no doubt usually by way of being taken, will be relevant as will the regularity thereof. The amounts must not be *de minimis* and the method of their application may be indirect, thus by benefit being put into some general fund used for household costs. These must include those for the accommodation, such as rent and other costs related to the claimant's occupation of the dwelling. Fundamentally it will be for the adjudicating authority to determine the nature, method, pattern and application of any payments and their amounts, and then to apply common sense in reaching a conclusion as to whether or not there is a real charging for the *incapax's* occupation of the accommodation.

27. Next, there may be some advantage to be got in certain cases from consideration of the position, where it existed, of what was done before the claimant either became an *incapax*, or before the claimant became an adult. Thus where a young *incapax* recently become adult had had any benefit monies received in respect of him actually applied, broadly, to pay for things to do with his occupation of the dwelling, that may be relevant when considering whether any benefit later awarded to him has been so applied. Again in the case of an elderly and now incapacitated parent residing with descendants it may be that if, before becoming *incapax*, there had been an arrangement, however informal, that pension or other income was to be applied sufficiently towards rent or board and lodging in a general way, that could be enough assuming that the arrangement continued after the onset of incapacity. And since we have introduced that concept it is perhaps as well to note that immediate descendants in the sense of children, children-in-law and stepchildren, including any spouse of such, are all "close relatives" in terms of ISG regulation 2(1) and so the ultimate cut-off date of 11 November 1991 will apply even in these reverse situation cases.

28. Finally in our view it will remain necessary that in the whole circumstances it be equitable that the *incapax* make recompense. This must always be a matter of pure judgment as to the equities of the situation and cannot in our view be further enlarged upon nor defined.

ii Particular considerations

(a) Liability

29. Before we consider the possible application of the doctrines to the two relevant versions of the regulation which are still in issue we must first consider if and how any liability can be fixed upon an *incapax* who by definition cannot contractually acquire it.

30. We start by noting that each of the doctrines, when satisfied, creates quasi-contractual rights and liabilities which are enforceable and would entitle a parent in appropriate circumstances to recover monies expended for the benefit of the *incapax*, by imposing a corresponding liability on the *incapax.* But the present cases are the reverse in fact of such a situation. The parents' position there appears to have been based on their use of money belonging to the *incapax* for his benefit but without any contractual authority so to do. We consider that there is involved in such use a

tacit assertion of a right and of a corresponding liability on the part of the *incapax* which, if challenged, could be established by the parent by invoking the doctrines. There is no authority upon the matter that has been put before us or that we have been able to discover but, unless some such defence were to be available, the result would appear to be a conclusion of something like embezzlement despite the money having been *bona fide* used for the *incapax's* proper benefit. That, it seems to us, would be absurd. We are therefore satisfied that if the applicability of either doctrine can be established then it will follow that the *incapax* can properly be held to be "liable to make payments" in terms of regulation 3(2).

(b) Version II

31. Having determined matters thus far it will be necessary for the adjudicating authorities in cases where this version applies next to consider whether it has been satisfied. In our opinion, even if there has been no more than a contribution towards the cost of the occupation of the dwelling and there has been some regularity about deductions made by the parent from the claimant's movies it will be legitimate to conclude that in respect of his occupation there has been and is being imposed upon the claimant a liability to make the payments for that purpose. So long as some such real i.e. not *de minimis*, liability is involved that will satisfy the terms of this version of the regulation. But more difficulty will be encountered when the following version is considered.

(c) Version IV

32. As a preliminary we should first deal with arguments before us as to the nature of the liability now being referred to. Mrs. Davie argued that it was governed by the words "on a commercial basis". A counter argument was advanced for the claimants and supported by the *amicus* suggesting that the words "on a commercial basis" primarily described the quality of the payments. We prefer the view that those words, added after earlier tribunal decisions, were designed to affect the whole concept of the liability to make payments. In short it imported to that concept something of an arm's length test: ie what might be arranged with a paying lodger. A similar conclusion was reached in England in the case of *Scarborough*.

33. Thus it will be necessary at this stage for the adjudicating authorities to take account of any payments actually made and then consider whether or not that is broadly in line with what a lodger might be expected to pay for the accommodation and facilities offered. We suspect that in many cases local knowledge will provide an answer but if so in any particular case we must caution that such knowledge must be exposed to the parties before the end of the hearing so that the claimant and those acting for him in particular may have an opportunity to respond thereto by comment or further evidence.

34. We are happy to find, in the result and upon reflection, that our conclusions as set above in regard to the consequence of the application of the domestic law of Scotland in such cases concerning *incapax* claimants living with parents can produce a result not wholly dissimilar in practical terms to that conceded for England in *Scarborough*.

The Interpretation Act

35. Because the possible application of section 16(1)(c) of the Interpretation Act 1978 was raised in some other pending SDP cases the parties were invited to consider that provision. The section provides that:

> "Where an Act repeals an enactment, the repeal does not, unless the contrary intention appears-
>
> .
>
> .
>
> . affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment ..."

Section 23(1) provided that the provisions of the Act, including said section 16, were to apply to subordinate legislation made after the commencement of the Act, the exceptions thereto not appearing to apply to any of the legislation now before us. The suggestion was that once a claimant had acquired right to the SDP under any version of regulation 3(2)(c), section 16(1)(c) prevented its removal, even if by subsequent amendment of 3(2) which narrowed the exception from "non-dependant", because such an adverse intendment had not been clearly expressed.

36. In the event the suggestion was not supported before us, but we had the benefit of certain submissions from the *amicus* upon it. In deference thereto it is only right to record that we are entirely satisfied from provisions in each of the amending regulations that the adverse intendment was sufficiently clearly expressed. It is in the circumstances enough to take as an example the first, namely the Income Support (General) Amendment Regulations 1989, SI 1989 No. 534, which by regulation 1(1) provided:

> "These regulations may be cited as … and shall come into force in relation to a particular claimant, as follows-
>
> (a) regulations...2... at the beginning of the first benefit week to commence for that claimant on or after 10 April 1989;
>
> (b) ..."

The remainder does not affect the present cases. Regulation 2 of the General Amendment Regulations alone is relevant. We conclude that the provision did provide for the amended regulations to bite upon existing claimants, that is to say claimants in existence as such prior to 10 April 1989. An individual making a claim after that date would automatically and inevitably be caught thereby without regard to that particular provision. The phrase "in relation to a particular claimant" could not apply to him. So it seems to us clear that that phrase was intended indeed to provide only for existing claimants whose claims had been accepted prior to the date of coming into force of the amendment, namely 10 April 1989. That in turn, in our opinion, manifests a sufficiently clear indication that the amended regulations were to apply, albeit adversely, to existing claimants.

THE SCHEDULE

The wordings of regulation 3 of the Income Support (General) Regulations 1987 during the period 11 April 1988 to 11 November 1991

1. From 11 April 1988:

"**Definition of non-dependant**

3.- (1) In these Regulations, "non-dependant" means any person except someone to whom paragraph (2) applies, who normally resides with a claimant.

(2) This paragraph applies to-

(a) any member of the claimant's family;

(b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same household);

(c) a person who jointly occupies the claimant's dwelling;

(d) subject to paragraph (3) , any person who is liable to make payments in respect of his occupation of the dwelling to the claimant or the claimant's partner;

(e) ... (not relevant) ...

(3) ..."

2. From 10 April 1989:

"**Definition of non-dependant**

3.- (1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2) applies, who normally resides with a claimant.

(2) This paragraph applies to-

(a) any member of the claimant's family;

(b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same household);

(c) a person who jointly occupies the claimant's dwelling;

(d) subject to paragraph (3), any person who is liable to make payments to the claimant or the claimant's partner or to whom or to whose partner the claimant or the claimant's partner is liable to make payments, in respect of his occupation of the dwelling;

(e) ... [not relevant] ...

(3) ..."

3. From 9 October 1989:

"Definition of non-dependant

"3.- (1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2) applies, who normally resides with a claimant.

(2) This paragraph applies to-

(a) any member of the claimant's family;

(b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same household);

(c) a person who jointly occupies the claimant's dwelling and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling;

(d) any person who is liable to make payments to the claimant or the claimant's partner or to whom or to whose partner the claimant or the claimant's partner is liable to make payments, in respect of his occupation of the dwelling;

(e) ... [not relevant] ...

(3) ..."

4. From 1 October 1990:

"**Definition of non-dependant**

3.- (1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2) applies, who normally resides with; a claimant.

(2) This paragraph applies to-

(a) any member of the claimant's family;

(b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same household);

(c) a person who jointly occupies the claimant's dwelling and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling;

(d) any person who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of the occupation of the dwelling;

(da) any person to whom or to whose partner the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the occupation of the dwelling;

(db) any other member of the household of the person to whom or to whose partner the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the occupation of the dwelling;

(e) ... [not relevant] ...

(3) ..."

5. From 11 November 1991.

"Definition of non-dependant

3.- (1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2), (2A) or (2B) applies, who normally resides with a claimant.

(2) This paragraph applies to -

(a) any member of the claimant's family;

(b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (circumstances in which a person is to be treated as being or not being a member of the household);

(c) a person who lives with the claimant in order to care for him or for the claimant's partner and who is engaged for that purpose by a charitable or voluntary body (other than a public or local authority) which makes a charge to the claimant or the claimant's partner for the care provided by that person;

(d) the partner of a person to whom sub-paragraph (c) applies.

(2A) This paragraph applies to a person, other than a close relative of the claimant or the claimant's partner-

(a) who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of his occupation of the claimant's dwelling;

(b) to whom the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of his occupation of that person's dwelling;

(c) who is a member of the household of a person to whom sub-paragraph (a) or (b) applies.

(2B) Subject to paragraph 2(C), this paragraph applies to-

(a) a person who jointly occupies the claimant's dwelling and who is either-

(i) a co-owner of that dwelling with the claimant or the claimant's partner (whether or not there are other co-owners); or

(ii) jointly liable with the claimant or the claimant's partner to make payments to a landlord in respect of his occupation of that dwelling;

(b) a partner of a person to whom sub-paragraph (a) applies.

(2C) Where a person is a close relative of the claimant or the claimant's partner, paragraph (2B) shall apply to him only if the claimant's, or the claimant's partner's, co-ownership, or joint liability to make payments to a landlord in respect of his occupation, of the dwelling arose either before 11th April 1988, or, if later, on or before the date upon which the claimant or the claimant's partner first occupied the dwelling in question.

(3) ..."