SCOTTISH LAW COMMISSION

MEMORANDUM No: 12

JUDGMENTS EXTENSION ACTS

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This Memorandum is designed to elicit comments upon and criticism of the proposals which it contains. It does not represent the concluded views of the Scottish Law Commission.

SCOTTISH LAW COMMISSION

JUDGMENTS EXTENSION ACTS

PRELIMINARY

1. In presenting our Second Programme of Law Reform, we stated that the statutes concerned with the enforcement in one part of the United Kingdom of decrees granted by courts in other parts have various anomalies and that complaints about the operation of those statutes had come to our notice. We suggested that they should be examined by the Commission in consultation with the Law Commission and the Director of Law Reform in Northern Ireland. The approval of our Second Programme on 25 June 1968 by the Secretary of State for Scotland and by the Lord Advocate enabled us to proceed with this examination and we now present a Memorandum which considers reciprocal enforcement in the light principally of the Judgments Extension Act 1868 and of the Inferior Courts Judgments Extension Act 1882. The Memorandum is not concerned with judgments relating to status, which are recognised but not as such "enforced", and whose special problems require separate treatment[1]. The Memorandum makes tentative proposals for dealing with such difficulties as appear to arise, but these do not represent the concluded views of the Scottish Law Commission nor, of course, those of the Law Commission or of the Director of Law Reform in Northern Ireland, whom we

[1] The two Commissions are considering these problems in the course of their review of "Family Law". See Item XIX of the Law Commission's Second Programme published on 25 January 1968 and Item 14 of the Scottish Law Commission's Second Programme.

consulted during the preparation of this Memorandum. The Law Commission tell us that they share our view that the Acts are in need of reform and that they would wish to be associated in the consideration of any legislative proposals that may result from our investigation. This Memorandum is accordingly being circulated in England, Wales and Northern Ireland as well as Scotland and, where appropriate, the nearest English equivalents of Scottish technical expressions are included. The Scottish Law Commission would welcome comments on this Memorandum before 31 March 1970.

2. In a state which comprises several distinct legal systems with separate hierarchies of courts the need for efficient procedures for the reciprocal enforcement of judgments hardly requires emphasis. A judgment is of value only to the extent that it may be enforced and, while common law procedures are available, they are rather slow, complicated, and expensive. Statutory procedures are desirable to spare the party who is successful in proceedings in one part of the United Kingdom the trouble and expense of resorting to common law procedures and to protect him in consequence from the risk of delaying or evasive tactics on the part of the unsuccessful party. They are desirable also to ensure that an action can be raised in the forum most appropriate for the decision of the case on the merits without special regard being paid to the practicability of enforcement in other parts of the United Kingdom.

3. The first steps towards the establishment of a system for the reciprocal enforcement of judgments were taken in the early part of the nineteenth century. The Crown Debts Acts 1801 and 1824 provide both for the recovery in England and Ireland of judgments for Crown debts issued by the Courts of Exchequer in Ireland and England respectively, and for the reciprocal enforcement in the two countries of Chancery orders "for payment or for accounting for money"[1]. The procedure is by way of enrolling in the books of the registering court a copy of the original order or decree. These Acts do not apply to Scotland. Subsequently, the Joint Stock Companies Act 1848 permitted orders made by the Court of Chancery in

[1] Especially sections 5 and 6. See also the Crown Debts Act 1824, section 1. These Acts are now applicable to Northern Ireland only.

liquidations to be registered in Scotland with a view to their enforcement there[1]. The 1848 Act was followed by the Bankruptcy (Scotland) Act 1856 and the Bankruptcy Act 1861 which provided for the reciprocal enforcement of orders in bankruptcy proceedings made in the various parts of the United Kingdom. At this time there was pressure for the introduction of a more general system of reciprocal enforcement of judgments and various bills were introduced into the House of Commons. However, in the words of Lord Chelmsford, "all those measures were rejected in consequence of a fear prevalent among the Irish Members that the jurisdiction of the Irish Courts would be unduly interfered with"[2]. In consequence, it was not until the passing of the Judgments Extension Act 1868 that a general system for the reciprocal enforcement of judgments was instituted, but even it was confined to money judgments emanating from superior courts. The extension of a similar system to inferior courts[3] had to wait for a further fourteen years until the Inferior Courts Judgments Extension Act 1882 became law.

4. The system established by the Acts of 1868 and 1882 has proved of enormous value. It is true that the number of certificates registered each year under these Acts is small[4], but the knowledge that judgments may be registered under the Acts will often ensure their satisfaction without recourse to the procedures of the Acts, and the cases actually registered are probably no more than the small visible tip of a large iceberg of cases which are otherwise settled. Nevertheless, while those Acts have proved generally satisfactory, they are

[1] Section 116, now incorporated in the Companies Act 1948, section 276 and the Companies Act (Northern Ireland) 1961, section 246.

[2] Hansard, 3rd Series, vol. 193, col. 367.

[3] See paragraphs 57 to 59 below.

[4] See Appendix.

obsolete in terminology and exhibit a number of serious defects. One of these defects - the fact that they are not adapted to deal with orders for periodical payments - has been cured in large measure by the Maintenance Orders Act 1950. It is not the intention of this paper to examine that Act in detail, but attention will be given to one defect which it shares with the Acts of 1868 and 1882, namely, the arbitrary distinction between "superior" and "inferior" courts.

Scheme of the Acts of 1868 and 1882

5. The general principles followed in the Acts of 1868 and 1882 were these -

(1) Both Acts apply to judgments for the payment of a sum of money (including expenses or costs) and do not extend, as the Crown Debts Act 1801 extends, to an accounting for money; nor do the Acts extend to judgments ad factum praestandum[1] nor to judgments in the nature of interdicts or injunctions. While judgments or decrees relating to status are excluded, the ancillary monetary conclusions of such judgments or decrees, however, may be enforced.

(2) The decree or judgment which it is sought to enforce in another part of the United Kingdom is not enforceable directly. A certificate of the judgment must be obtained from the court which issued it and that certificate must be registered in books kept by the court of the place where it is sought to enforce it. The certificate may then be enforced as though it were a decree of the registering court.

(3) Certificates of the judgments of superior courts may be registered only in the books of another superior court and certificates of the judgments of inferior courts may be registered, with one exception, only in the books of another inferior court.

(4) The scope of the control of the registering court is expressly limited to execution under the Act in question[2].

[1] The expression "judgment ad factum praestandum" or "decree ad factum praestandum" refers to judgments or decrees ordering the performance of a particular act, such as the delivery of a thing or the signing of a deed.

[2] 1868 Act, section 4; 1882 Act, section 6.

It is not possible to oppose the registration with pleas challenging the jurisdiction of the original court or challenging the decision on the merits[1]. There are, however, exceptions to this rule which preclude the enforcement under the 1868 Act of Scottish decrees pronounced in absence in an action proceeding upon an arrestment to found jurisdiction[2] and the enforcement under the 1882 Act of certain decrees pronounced against persons not domiciled in the part of the United Kingdom where the issuing court is situated[3].

Examination of the principles of the Acts of 1868 and 1882

(a) Non-exclusive character of the system

6. The 1868 and 1882 Acts do not preclude the holder of a decree obtained in one part of the United Kingdom from suing upon the decree in the courts of another part at common law: they merely discourage recourse to the common law by providing that, where an action at common law is brought for the purpose of enforcing any judgment which might competently be registered under the Acts "the party bringing such action shall not recover or be entitled to any costs or expenses, . . . unless the Court in which such action shall be brought . . . shall otherwise order"[4].

[1] Wotherspoon v Connolly (1871) 9 M. 510; In re Low [1894] 1 Ch. 147.

[2] 1868 Act, section 8; but if the defender has appeared in the process the decree can be registered [In re Low supra p.160]. A decree in absence where the action does not proceed on arrestment to found jurisdiction is within the ambit of the 1868 Act [Wotherspoon v Connolly supra p. 513].

[3] 1882 Act, section 10.

[4] 1868 Act, section 6; 1882 Act, section 8. It is thought that, at least in so far as Scotland is concerned, section 8 of the 1882 Act is superfluous, because no action for a decree conform to a foreign judgment is competent in the Sheriff Courts; O'Connor v Erskine (1906) 22 Sh. Ct. Rep. 58; Stoddart v Hotchkiss (1917) 33 Sh. Ct. Rep. 60; Strachan v Strachan (1951) 67 Sh. Ct. Rep. 51.

7. We have considered whether the adoption of the system of registration should be made obligatory where it is competent. Although this approach is adopted in the Foreign Judgments (Reciprocal Enforcement) Act 1933[1], we do not recommend this. Quite apart from the presence of time-limits, which may exist under judgments extension procedures, but not under the common law, the availability of common law procedures may be useful to avoid disputes as to whether the judgments extension procedures are in fact competent in the particular case. Common law actions, however, should continue to be discouraged by the disallowance of expenses unless the court otherwise orders.

(b) Courts to which the Acts apply

8. The 1868 Act in terms applies to the judgments of the Courts of Queen's Bench, Common Pleas and Exchequer at Westminster or Dublin and to the decrees of the Court of Session in Scotland. With reference to England, the jurisdiction of the Courts of Queen's Bench, Common Pleas and Exchequer was transferred to the High Court of Justice by the Judicature Act 1873[2]. Though not originally applying to the Court of Chancery, the 1868 Act now applies to every division of the High Court[3]. It has been held that a certificate of the "High Court of Justice, Queen's Bench Division, Liverpool District Registry," may be registered under the 1868 Act[4]. Following the creation of the Irish Free State (now the Republic of Ireland) it was held in England that, at least from the standpoint of English law (and presumably from that of

[1] Section 6.

[2] Section 16, and see now the Supreme Court of Judicature (Consolidation) Act 1925, section 224.

[3] In re Howe Machine Co (1889) 41 Ch.D. 118; Supreme Court of Judicature (Consolidation) Act 1925, section 224.

[4] English's Coasting and Shipping Co Ltd v British Finance Co Ltd (1886) 14 R. 220.

Scots law), the 1868 Act no longer applied to the judgments of Irish courts[1], but the Act was applied in Ireland until repealed by the (Irish) Courts of Justice Act 1936.

9. The 1882 Act applies to judgments obtained in the "inferior courts" of England, Scotland, and Ireland (now Northern Ireland)[2]. The expression "inferior courts" is defined as including "County Courts, Civil Bill Courts, and all Courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts of Justice; and in Ireland, Courts of Petty Sessions and the Court of Bankruptcy; and in Scotland shall include the Sheriffs Courts and the Courts held under the Small Debts and Debts Recovery Acts"[3].

10. The system is satisfactory in that it applies to virtually all civil courts in England, Scotland and Northern Ireland. It is a matter of regret to us, however, that the system - or at least a modernised version of it - does not apply to the courts of the Channel Islands and of the Isle of Man, and no longer applies to those of the Republic of Ireland. We think it particularly desirable that any amendments to the present system should facilitate rather than impede the participation of the Republic of Ireland in a more liberal system than that of the Foreign Judgments (Reciprocal Enforcement) Act 1933, and we have kept this point in view in preparing this Memorandum.

(c) The distinction between superior and inferior courts

11. The main objection to the existing general scheme of the 1868 and 1882 Acts is that a distinction is made between the

[1] Jakely v Triumph Cycle Co [1924] 1 K.B. 214, Irish Free State Constitution Act 1922; Irish Free State (Consequential Adaptation of Enactments) Order 1923 (No. 405).

[2] Irish Free State (Consequential Provisions) Act 1922; Irish Free State (Consequential Adaptation of Enactments) Order 1923 (No. 405).

[3] 1882 Act, section 2.

judgments of inferior courts and those of superior courts. When the Judgments (Inferior Courts) Bill received its Second Reading the Lord Chancellor objected to the original form of the Bill saying, as reported in Hansard, that "what he objected to was that a judgment of a Local and Inferior Court should be placed upon the same footing as that of a Superior Court"[1]. The distinction maintains in the Acts, especially in relation to the judgments of inferior courts, an undesirable element of rigidity. The certificate of an inferior court judgment may be registered only in the books of another inferior court. Moreover, the Sheriff Courts and County Courts may order execution only upon such goods or chattels of the debtor "which are within the jurisdiction of the [registering] Court"[2]. A Scottish writer comments that, if a debtor possesses four articles in different Sheriffdoms, "the creditor would have to obtain four certificates, procure four registrations, give four charges of payment, and execute four poindings before he could appropriate them. Moreover, he would have to take these sets of proceedings successively and not simultaneously"[3]. A similar problem arising under the Maintenance Orders Act 1950 is discussed below[4].

12. The rigid distinction between the judgments of superior and those of inferior courts is reflected in the principle of the 1882 Act that the existing limits of local jurisdiction should not be exceeded. Section 9 of that Act provides that "Nothing contained in this Act shall authorise the registration in an inferior court of the certificate of any judgment for a greater amount than might have been recovered if the action or

[1] Hansard, 3rd Series, Vol. 271, Col. 11.

[2] 1882 Act, section 5.

[3] Dove Wilson, Sheriff Court Practice, 4th edition. (Edinburgh, 1391) page 360.

[4] See paragraphs 57 to 59 below.

proceeding had been originally commenced in such inferior court". Since there has never been any general monetary limitation upon the jurisdiction of the Sheriff Courts in Scotland, this provision was coupled with a proviso permitting Scottish Sheriff Court decrees for sums higher than those recoverable in the County Courts of England or Ireland (now Northern Ireland) to be registered in the High Courts of those countries. This proviso, however, does not deal with the presently existing situation in which the monetary limits of the general jurisdiction of the English County Courts is higher than that of the courts of Northern Ireland[1]. Nor does it cope with particular situations where the monetary limit of the English County Courts is higher than that of the Sheriff Courts in Scotland. It would appear, for example, that an English County Court judgment in respect of a salvage claim in excess of £300 could not be registered in Scotland[2].

13. We are aware, too, of the special difficulties which may arise in connection with the enforcement of money judgments in England by reason of the different modes of enforcement appropriate in different courts and because of the need to make separate applications in respect of those different modes[3]. These difficulties, however, are peripheral to the present subject and would be largely removed if the recommendations of

[1] The present financial limit of the County Courts in contract and tort is £500, but the Administration of Justice Act 1969 increases this limit to £750 and contains a power to increase it further by Order in Council. The corresponding limit in Northern Ireland is at present £300.

[2] The English County Court has jurisdiction in matters of salvage where the claim does not exceed £1,000 - County Courts Act 1959, section 56. The Scottish Sheriff Courts are limited to the original figure of £300 - Merchant Shipping Act 1894, section 547.

[3] We do not neglect the fact that section 139 of the County Courts Act 1959 permits High Court Judgments, and foreign judgments enforceable as if they were High Court Judgments, to be enforced in a County Court.

the Committee on the Enforcement of Judgment Debts[1] (the Payne Committee) were to be followed by the creation of a new enforcement system. The extension, indeed, of such a system to other parts of the United Kingdom might permit further rationalisation of the system of reciprocal enforcement of judgments within the United Kingdom. In this Memorandum, however, the present system of enforcement must be taken as the basis of discussion.

14. In that context, the distinction presently made between the judgments of superior courts and those of inferior courts lacks justification and leads to unnecessary complications. Among possible answers to the problems two appear to merit consideration. One approach would be to create for each legal system within the United Kingdom a unique central register of extraneous judgments and to provide that certificates of judgments, or judgments, as the case may be, registered therein should permit execution to proceed as if the judgment were a judgment of a superior court within the system. This approach would be a logical and attractive one within the context of the present law which admits of no jurisdictional control by the registering court. We consider, however, for reasons which we develop in paragraphs 37 to 44, that some controls by the courts of the country in which execution is sought are desirable to protect judgment debtors. On this basis we suggest, as an alternative approach, that the judgment creditor should be allowed to choose between registering his judgment in the books of a superior court or in those of an inferior court. This solution would go a long way to meet the problems presented by the evasive debtor and by the differences in the monetary limits of the jurisdiction of inferior courts.

[1] Report of the Committee on the Enforcement of Judgment Debts, Cmnd. 3909 (1969).

(d) Subject-matter of judgments to which Acts apply

15. Another possible objection to the general scheme of the 1868 and 1882 Acts lies in their restriction to judgments for "any debt, damages, or costs"[1]. "It excludes . . . all judgments or decrees ad facta praestanda, or of the nature of prohibitions or injunctions - in short, it is only a money decree that can be enforced under this statute"[2]. The same restriction would appear to affect the enforcement procedures of the Companies Acts[3].

16. This restriction presumably found its justification[4] in the fact that money judgments are the most important from a practical standpoint, that all United Kingdom legal systems enforce such judgments, that the order for enforcement can be expressed in simple terms comprehensible to practitioners in other systems, and that enforcement of the order can be secured by methods which are substantially similar in the systems concerned, in particular by execution against the property of the debtor.

17. The Law Society of Scotland, however, has suggested that the Acts of 1868 and 1882 should be extended to cover decrees of delivery. This is an aspect of the general question whether the Acts should be extended to all decrees ad factum praestandum. The main obstacle from a Scottish point of view to the general enforcement of such decrees is that not all obligations ad factum praestandum will be enforced specifically by the Scottish courts. Very generally, it may be said that the Scottish procedures are not designed to

[1] In re Dundee Suburban Railway Co (1883) W.N. 205.

[2] Wotherspoon v Connelly (1871) 9 M. 510 at page 513.

[3] Johnstone's Trustees v Roose (1884) 12 R. 1.

[4] The historical explanation may be that the form of action used in England for the enforcement of a foreign judgment was originally debt - Dicey and Morris, Conflict of Laws, 8th edition page 1017, footnote 55.

secure the performance of acts of a continuing nature or which require special supervision or the exercise of a discretion[1]. This objection, however, does not apply to requests for the performance of a specific act, such as the delivery of a particular thing[2] (as opposed to a course of work), the consignment of money in court, or the execution of a deed[3]. We consider, therefore, that decrees emanating from courts in other parts of the United Kingdom and requiring the performance of a specific act should come within the scope of the Judgments Extension Acts so that they may be enforced in Scotland and that corresponding provision should be made for the enforcement of Scottish decrees of the same species in other parts of the United Kingdom.

18. In considering the general question of applying the Judgments Extension Acts to decrees ad factum praestandum we examined the question whether it would be appropriate to provide for the reciprocal enforcement of orders made in actions of accounting or, in the language of Scots law, actions of count, reckoning and payment. Decrees in such actions are not incontestably judgments for a debt within the sense of the Acts of 1868 and 1882. As between England and Northern Ireland decrees pronounced in and orders made in actions of accounting

[1]Graham Stewart, Treatise on Diligence (Edinburgh, 1898) p. 726.

[2]Stewart v McDougal 1908 S.C. 315; Rudman v Jay & Co 1908 S.C. 552.

[3]The deed, it is conceded, may be a deed relating to land in Scotland. We do not, however, regard this as an important objection to the extension of the Judgments Extension Acts to decrees ordering the execution of deeds. The Scottish court is prepared, in appropriate cases and subject to the plea of forum non conveniens, to ordain a defender to execute a deed relating to foreign land, and to compel him to do so by diligence against the defender's person and property in Scotland - Hume's Lectures, Vol. V, p. 245 founding on Leader v Hodge (1810) unreported; Earl of Buchan v Harvey (1839) 2 D. 275; Ruthven v Ruthven (1905) 43 S.L.R. 11; Ayton's Judical Factor 1937 S.L.T. 86. The English court adopts a similar approach - Richard West and Partners (Inverness) Ltd and Another v Dick [1969] 2 W.L.R. 383.

are enforced by virtue of the Crown Debts Acts 1801 and 1824. When, for example, a copy of an Irish order or decree is enrolled in England provision is made for "process of attachment and committal to issue against the person of the party against whom such order or decree shall have been made respectively, in order to enforce obedience to and performance of the same, as fully and effectually, to all intents and purposes, as if such order or decree had been originally pronounced in the said Court of Chancery in England"[1].

19. While advantages might accrue from the extension of this system to Scotland, we hesitate at this stage to come to a definite conclusion as to its desirability, and invite views on the question. If the reciprocal enforcement of such orders or decrees were to be admitted, it is thought that a discretion should be conceded to the registering court to vary such orders or decrees to conform with normal practice in Scotland for the purpose of their enforcement there. This is a problem which does not arise as between England and Northern Ireland because of the similarity of the systems.

20. An analogous question is whether provision should be made for the reciprocal enforcement of interdicts or injunctions. It may seem strange that a defender or defendant against whom such a decree is issued should be able to defy it by moving into another part of these islands. The obstacles to such enforcement, however, should not be under-rated. One difficulty arises from the fact that the legal systems of the United Kingdom tend to equiparate breach of an interdict, or of an injunction, with contempt of court[2] and, although in Scotland breach of interdict is prosecuted in the civil courts,

[1] Crown Debts Act 1801, section 6.

[2] J A McLaren, Court of Session Practice (Edinburgh, 1916) pp. 131 et seq. and 915 et seq.

it is so prosecuted with the concurrence of the Lord Advocate[1]. The method of enforcement differs materially from that of ordinary civil judgments, since the party in breach is brought to court and summarily punished. The process, therefore, in the words of Lord Deas "may not inaptly be termed quasi-criminal"[2]. The procedures for the enforcement of injunctions in England (and Northern Ireland) are not fundamentally different[3]. Breach of an interdict or injunction is a serious challenge to the administration of justice and is met by a quasi-criminal sanction rather than by the ordinary remedies of the civil law. This would seem to render the enforcement of interdicts and injunctions impracticable within a system designed essentially for the enforcement of civil judgments.

21. But there are other obstacles of greater substance. The existence of separate legal systems in the British islands means that a person may lawfully perform acts in one part of these islands which he is, or has been, prohibited from performing in another. Indeed, in performing the acts prohibited by the courts of one system, he may be acting under the orders of the courts in another[4]. If injunctions and interdicts are to come within the scope of the Judgments Extension Acts the registering court must be vested with discretion whether or not to register the decree and discretion to vary its terms. The same conclusion flows from the fact that injunctions may be granted in England in terms much too vague to be acceptable for an interdict in Scotland.

[1] Johnson v Grant 1923 S.C. 789 at page 790.

[2] Kelso School Board v Hunter (1874) 2 R. 228, at page 231.

[3] Scott v Scott 1913 A.C. 417.

[4] The Orr Ewing litigations point in a dramatic way to the difficulties involved. In re Orr Ewing (1882) 22 Ch.D. 456; Orr Ewing's Trs v Orr Ewing (1884) 11 R. 600; (1885) 13 R. (H.L.) 1.

Lord Leas has remarked: "An interdict is thus of the nature of an extraordinary remedy, not to be given except for urgent reasons, and even then not as a matter of right, but only in the exercise of a sound judicial discretion. If granted at all it must be in terms so plain that he who runs may read"[1].

22. We have come to no firm conclusion whether injunctions and interdicts should come within a scheme for the reciprocal enforcement of judgments within the United Kingdom. We do think, however, that if they are to do so the registering court must be conceded a discretion whether or not to register the judgment and a discretion to vary its terms so that a decree may be framed in accordance with the practice of the registering court. We should, however, welcome views on these points.

(e) Reciprocal enforcement of arbitral awards

23. Neither the 1868 Act nor the 1882 Act makes explicit provision for the reciprocal enforcement within the United Kingdom of arbitral awards. Under the rules of Scots law, an award made under a foreign (including an English) submission may be enforced by an action for a decree-conform[2]. Similarly under the rules of English law, a foreign arbitration award may be enforced by an action in England[3].

24. Although detailed statutory provisions are made for the recognition and enforcement in England and in Scotland of arbitral awards issued in countries outside the United Kingdom[4], there appears to be no express provision for the reciprocal

[1] Kelso School Board v Hunter (1874) 2 R. 228 at page 232.

[2] Ochterlony v Grant (1754) Mor. 4470; Johnson v Crawford (1776) Mor. Arbitration (Appendix Part 1) page 3; Irons and Melville, The Law of Arbitration in Scotland (Edinburgh 1903) page 417.

[3] Dicey and Morris, The Conflict of Laws, 8th edition, pp. 1043-1052.

[4] Arbitration Act 1950, sections 4(2), 34 and Part II of the Act; Administration of Justice Act 1920, Part II; Foreign Judgments (Reciprocal Enforcement) Act 1933; Administration of Justice Act 1956, section 51(a).

enforcement of arbitral awards issued within the United Kingdom. That the absence of such provision has not created difficulties or called for comment is to be explained, it is thought, as follows:-

(1) A Scottish submission will usually contain a consent to registration in the Books of Council and Session and, under section 3 of the 1868 Act, the certificate of an extracted decreet of registration in the Books of Council and Session may be registered in terms of the Act.

(2) In England an award on an arbitration agreement may, with leave of the High Court, "be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."[1] Such a judgment may be registered in Scotland and enforced there as a judgment "entered up" in the Courts of Queen's Bench.

25. In practice, then, the reciprocal enforcement of arbitral awards presents a smaller problem than might at first sight appear. It is suggested, however, that explicit statutory provision should be made for the reciprocal enforcement of arbitral awards throughout the United Kingdom in cases where the arbitral award requires the payment of a sum of money and, if the scheme for the reciprocal enforcement of judgments is so extended, in cases where the arbitral award requires the performance of a specific act.

(f) Types of Judgments to which the Acts apply

26. The 1868 Act does not expressly specify whether it applies: (a) to judgments which are of a provisional or interlocutory nature; or (b) to judgments which are subject to appeal. The 1882 Act permits the registrar of the issuing court to grant a

[1] Arbitration Act 1950, section 26.

certificate under the Act only when the time for appeal has elapsed[1], and on proof that the judgment has not been satisfied. It does not expressly deal with the question whether judgments of a provisional or interlocutory nature may be enforced under its procedures.

27. In the common law of England and Scotland, it is a condition of the enforcement of a foreign decree that it should be final in the sense that it is not liable to variation[2]. It must also be enforceable without further orders or authorisation in the territory of the issuing court[3]. On the other hand, "a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal."[4]

28. The Foreign Judgments (Reciprocal Enforcement) Act 1933 is in consonance with the common law since, while it applies only to judgments which are final and conclusive as between parties and under which a sum of money is payable[5], the Act provides that a judgment shall be deemed to be final and conclusive notwithstanding that the judgment is open to appeal in the country of the issuing court, or that an appeal is there pending[6].

[1] The reader is referred to section 3 for its terms. These appear to be exclusive of any suggestion, such as that made in Warwickshire County Court v British Railways Board [1969] 1 W.L.R. 1117 that, where an appeal has been lodged the time for appeal may be said to have expired notwithstanding that the appeal remains undetermined.

[2] Nouvion v Freeman (1890) 15 App.Cas.1 at page 13; Pattisson v McVicar (1886) 13 R. 550 at page 555.

[3] Harrop v Harrop [1920] 3 K.B. 386; Blohn v Desser [1962] 2 K.B. 116.

[4] Nouvion v Freeman supra per Lord Watson at p. 13; see also Findlay v Wickham 1920 2 S.L.T. 325; Colt Industries Inc v Sarlie [1966] 3 All E.R. 85.

[5] Section 1(2)(a) and (b).

[6] Section 1(2)

29. It would seem inappropriate in principle to adopt narrower rules for the enforcement of United Kingdom judgments than for the enforcement of foreign judgments generally. We suggest, therefore, that it should not be a condition of the enforcement of a judgment emanating from another part of the United Kingdom that all rights of appeal from it should have been exhausted. We consider that a better test should be that of enforceability in the territory of the issuing court. We also suggest that there is a case for permitting the enforcement of interim or interlocutory judgments. The absence of a power to enforce interim execution may be prejudicial to the creditor's interests. Such enforcement would require to be subject to the imposition of conditions safeguarding the interests of the parties. One of these should be that the judgment is enforceable within the territory of the issuing Court.

(g) The system of registration of certificates

30. The system of the 1868 and 1882 Acts does not envisage the direct enforcement in other parts of the United Kingdom of the judgments to which the Acts apply. A certificate of the judgment must be obtained from the issuing Court and that certificate, rather than the judgment itself, is registered in court books in the territory where it is sought to enforce the judgment. This system of indirect enforcement of judgments clearly stems from the recognition of the separate identity of the various United Kingdom systems of law, of the limits to their territorial authority, and of the variety both of the terms in which judgments may be couched and of their enforcement procedures. Would it be practicable to discard either or both of the two steps of obtaining a certificate of the judgment and of registering it in the books of a court of the territory where recognition is sought?

31. The system of obtaining and registering certificates would appear to present at least two advantages. In the first place, the requirement that a certificate must be obtained from the issuing court would permit that court to refuse, as in proceedings under the 1882 Act the County Courts in England are required to refuse, to grant a certificate unless there is proof by affidavit that the judgment has not been satisfied, or, if partly satisfied, of the amount remaining unsatisfied, or that it is not being prematurely enforced[1]. The same advantages, however, could be secured by requiring such proof at the time of registration, a point to which reference is made below[2]. A second advantage associated with the registration of a certificate is that it simplifies the task of the registering court, since it makes for uniformity in the mode of expression of foreign decrees which come to its notice. This simplicity is achieved, however, at the expense of an additional formal step in the process of enforcement and, especially in the case of money judgments which inevitably take a similar form it is not thought that the advantage of convenience for the registering court justifies the added formality. Under the procedures of the Bankruptcy and Companies Acts and of the Maintenance Orders Act 1950 it is not a certificate of the order but a certified copy of the order which is transmitted to the registering court. It is thought that this system should be extended to the reciprocal enforcement of judgments for the payment of a sum of money or for the delivery of a specific thing, but we should welcome comments on this point.

32. The second question is whether the system of registration of judgments should be abandoned in favour of a system of direct enforcement. We do not favour this. Enforcement

[1] County Court Rules 1936 Order 42, rules (1) and (2).

[2] See paragraph 35.

officers are officers of the legal system which appoints them, within which they operate, and to which they are responsible for their actions. It would make for confusion if they took their orders from more than one source. A Messenger-at-Arms or Sheriff Officer in Scotland, moreover, can hardly be expected to be aware of the methods of authentication of English or Irish judgments, nor to give effect to judgments authorising enforcement in terms or by methods foreign to the Scottish legal system.

33. It was suggested above that, if interdicts and injunctions are to be included within the mechanisms for the reciprocal enforcement of United Kingdom judgments, a discretion must be conferred upon the registering court to decline to register the decree or to vary its terms. Direct enforcement would be inconsistent with the operation of such a discretionary power. In addition, it is thought that the courts of the country in which it is sought to execute a decree must retain a more general power to refuse to permit execution of a decree granted by a court which, in the circumstances, lacked jurisdiction. This is a matter which is discussed below.

34. A minor defect in the system of registration may be noticed. The terms of section 3 of the 1882 Act seem to restrict applications for certificates thereunder to the party who has actually "recovered the judgment". This would seem to exclude his successors or assignees[1], an undesirable limitation which does not appear in the 1868 Act. The Foreign Judgments (Reciprocal Enforcement) Act 1933 envisages registration thereunder by a person other than the person in whose favour the original judgment was issued[2].

[1] Graham Stewart, The Law of Diligence, p. 437.

[2] Section 4(1)(a)(vi).

(h) Information to be supplied before registration

35. One of the advantages claimed for the system of registering certificates of judgments rather than the judgment itself is that it enables a certificate to be withheld if the judgment is no longer operative, for example, because it has been satisfied. Where the judgment has been partially satisfied, the applicant for a certificate may be required, as in proceedings under the 1882 Act he is required by the County Court Rules 1936[1], to disclose the amount which has not been paid. The same advantages might be obtained, however, by requiring disclosure at the time of registration of the judgment. This is the system adopted in the 1933 Act[2], and it is clearly preferable in view of the interval which may elapse under the present practice between the obtaining of a certificate and its registration[3].

36. We suggest, therefore, that the applicant in registration proceedings should be required to disclose whether the judgment has been satisfied or partially satisfied and, in the latter case, the extent to which it has been satisfied. He should also have a duty to disclose whether the rights under the judgment have become vested in another person. Where the applicant is a person other than the person who obtained the original judgment, the applicant should be required to disclose how the rights thereunder have come to be vested in him. The registering court should have power to order that a judgment be registered, or enforced, in relation to a part only of the subject-matter to which it applies, or in relation only to outstanding expenses.

[1]Order 42, Rule 1.

[2]Section 2(4).

[3]1868 Act, sections 1, 2 and 3 ad finem; 1882 Act, section 4.

(i) Absence of jurisdictional control by the registering court

37. Under the common law rules for the recognition and enforcement of foreign judgments a foreign judgment is not recognised unless it emanates from a court whose right to be concerned with the circumstances of the case is accepted by the recognising court, and rules determining "jurisdiction in the international sense" have been developed. Rules analogous to these have been incorporated into Part II of the Administration of Justice Act 1920[1] and into the Foreign Judgments (Reciprocal Enforcement) Act 1933[2]. Similar rules appear in international instruments such as the Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters[3]. These rules in each case specify positively the circumstances in which the foreign court is deemed to have properly exercised its jurisdiction.

38. No such positive specification of the recognised grounds for assumption of jurisdiction is contained in either the Act of 1868 or in that of 1882, and under both Acts the scope of the control of the registering court is limited to the execution of the judgment[4]. In consequence, it was held in Wotherspoon v Connolly[5] that registration of a judgment under the 1868 Act may not be opposed with pleas challenging either the jurisdiction of the original court or its decision on the merits. In that case Lord Kinloch remarked[6]: "The theory of the statute is, that each of the Courts is alike

[1]Section 9(2).
[2]Section 4(1)(a)(ii) and section 4(2) and (3).
[3]Printed, for example, in 15 American Journal of Comparative Law (1967) page 362.
[4]1868 Act, section 4; 1882 Act, section 6.
[5](1871) 9 M. 510.
[6]At page 515.

competent to pronounce on this as on the other points of the case; and the judgment, if ex facie regular, is to receive immediate execution in the three countries alike." The legislature may have had in view the fact that there is, in the House of Lords, a common court of appeal whose decrees are binding equally in all parts of the United Kingdom. The remedy of a litigant, who objects either to the assumption of jurisdiction or to the decision on the merits, is to appeal to that common court of appeal[1]. It follows that, in cases under the 1868 Act, it is inappropriate to consider whether the English or Irish court possessed jurisdiction in the "international sense", or, indeed, whether it possessed jurisdiction under its own jurisdictional rules. It is true that in Wotherspoon v Connolly[2] Lord President Inglis guardedly remarked that he was "not prepared to say that it is impossible to raise a question of jurisdiction . . . if it were manifest that another Court had gone beyond its jurisdiction", but it seems likely that in such a case the court would merely sist process for a limited period to enable the complainer to refer back to the original court[3].

39. The absence of control by the registering court over the jurisdictional basis of the original decision presents dangers in the case of default judgments and virtually compels a person to defend an action raised against him in another part of the United Kingdom, however doubtful its jurisdictional basis and despite the existence of proceedings elsewhere. To some extent these dangers are recognised by the terms of section 8 of the 1868 Act and section 10 of the 1882 Act

[1] Wotherspoon v Connolly (1871) 9 M. 510, per Lord President Inglis at page 514 and Lord Kinloch at pp. 515 and 516.

[2] Supra at pp. 513-4.

[3] See also Gartland v Sweeny 1920 2 S.L.T. 152.

which create exceptions to the general principle. The former declares that "This Act shall not apply to any decreet pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland". This rule, it may be presumed, may be noticed by the registering court as well as the issuing court. Section 10 of the 1882 Act, on the other hand, excludes the application of the Act in relation to any person domiciled in another part of the United Kingdom at the time of the commencement of the action unless "the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior court, and the summons was served upon the defendant personally within the said district". This provision, however, applies only where it is sought to operate diligence in relation to the defender. A decree for expenses is enforceable against a foreign pursuer although the action has not been personally served on the defender[1].

40. These exceptions to the general rule of automatic recognition of judgments emanating from the courts in other parts of the United Kingdom are designed to deal with situations where an assumption of jurisdiction is thought to be arbitrary, or "exorbitant", because of lack of adequate links between the forum and the defender or the facts of the case[2]. It is arguable, however, that the exceptions are inadequately formulated. They are too narrow in that they require the recognition of English judgments based jurisdictionally on the mere presence of the defender within England. Outside England, this is generally regarded as an

[1] Carr & Sons v McLennan Blair & Co (1885) 1 Sh. Ct. Rep. 262; Hudson v Innes & Grieve (1903) 24 Sh. Ct. Rep. 190.

[2] These situations have been identified at an international level in the Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters dated 15 October 1966. This protocol is discussed by Professor L I de Winter in "Excessive Jurisdiction in Private International Law" 17 I.C.L.Q. (1968) pp. 706-720.

"exorbitant" ground of jurisdiction. They are too narrow, also, because the present rules seem to require the recognition of a judgment emanating from a court in England, Northern Ireland or Scotland, and perhaps even to permit its execution, when there are earlier proceedings pending or concluded in the registering court or in another court having jurisdiction in the matter. The exceptions are too wide in that no qualification is made recognising jurisdiction on the one hand based upon submission express or implied or, on the other hand, founded upon arrestments when the action was brought to assert proprietary, possessory or security rights in the arrested property itself. It seems perfectly reasonable for the court of the situs of the property to assume jurisdiction over such questions.

41. We may add here in parenthesis that there are additional and special objections to the drafting of, and to the criteria adopted in, section 10 of the 1882 Act. A heavy burden is placed on the successful party:-

(a) Because he is unlikely to know, and may find it difficult and expensive to establish, the domicile of the defender. The criterion of domicile seems quite out of place in the field of the money judgments to which the Act applies.

(b) Because it will often be difficult for the successful party to show that the whole cause of action arose within the district of the issuing court.

(c) Because of the restricting effect of the requirement that the summons must be served upon the defender personally within the district of the inferior court in question. Quite apart from the fact that in Sheriff Court procedure in Scotland actions are seldom served personally upon the defender, it will not be possible to

serve it personally on the defender within the district of the Sheriff Court unless he resides in that district or frequently visits it. In England the County Court Rules have been amended[1] so as to permit service on a defendant out of the jurisdiction of a County Court where a cause of action in tort has arisen within the jurisdiction. There may be a case for a similar extension of the jurisdiction of the Sheriff Court in Scotland. Judgments, however, in such actions would not be enforceable under the terms of the 1882 Act as it stands at present.

It has been represented to us that some Sheriff Clerks in Scotland refuse to grant a certificate in terms of section 3 of the 1882 Act unless they are satisfied that there has been compliance with the terms of section 10. It may be that their right to do so is implicit in the language of the section, but it does present a formidable hurdle to the successful party in the original proceedings. If, on the other hand, a certificate in respect of a judgment which does not comply with the terms of section 10 is brought to be registered in the court of the judgment debtor, the remedy available in that court specified by the proviso to section 10 is obtainable only in the superior courts of the two countries, a rule which would appear to add unnecessarily to the expense of the proceedings.

42. There is, however, a more fundamental objection. The system of control by stating exceptions to the general rule of recognition only caters for the more blatantly exorbitant jurisdictional rules in force at the time the statute was passed. In the nature of things this negative specification

[1] County Court (Amendment) Rules 1969 S.I. 1961/585 Rule 3.

of unrecognised grounds of jurisdiction will not necessarily catch new grounds which may be thought to be exorbitant. It is for consideration, therefore, whether a set of positive rules should not be established specifying limitatively the cases where the jurisdictional basis of a judgment issued in one part of the United Kingdom is to be recognised in other parts of it. The rules of the 1933 Act provide an example. If no such rules are established, the existing rules should be modified to apply uniformly to "superior" and "inferior" courts and should require the registering court on the application of the defender in the registration proceedings to set aside registration of the judgment where the defender shows that jurisdiction of the original court was based and, in the circumstances, could only have been based upon -

(1) the mere presence of the defender within the jurisdiction; or

(2) unless the original action was brought to assert a proprietary, possessory or security right in the property arrested, an arrestment to found jurisdiction.

43. Neither the 1868 Act nor the 1882 Act makes it clear whether the registering court must proceed with registration in the presence of proceedings relating to the same matter in the courts of its own, or of another, country. It seems right that the registering court should have a discretion to set aside registration if it is satisfied that an action relating to the controversy determined by the decree of the original court is:

(a) pending before a court of the country in which registration is sought; or

(b) has resulted in a decision by a court of that country; or

(c) has resulted in a decision by a court of a country other than the country of origin or the country where

registration is sought, which falls to be recognised as conclusive in the country where registration is sought.

(j) Other aspects of control by registering court

44. Apart from control over certain aspects of jurisdiction, it is thought that the registering court should be empowered to set aside registration -

(a) where the original judgment, though partially satisfied, was registered for the whole amount payable under it[1];

(b) where the original judgment was not in fact directed against the person against whom it is sought to enforce it[2]; and

(c) where the rights under the original judgment are not vested in the person by whom registration was effected[3].

(k) Time-limits

45. The 1868 Act prescribes that, unless with the leave of the registering court, the certificate of a judgment may not be registered after twelve months have elapsed from the date of the judgment[4]. The 1882 Act imposes a similar time-limit, but does not allow the registering court to waive it.

46. We do not favour the system of the 1868 Act in which a time-limit is coupled with an apparently unlimited discretionary power to waive it. This merely conduces to uncertainty. A fixed time-limit, on the other hand, of twelve months is too short. A creditor, it has been represented to us, may be reluctant to resort to diligence in case this should cause further financial embarrassment to the debtor, and may make arrangements for payment to be made by

[1] Cf. 1933 Act section 5(3).

[2] Cf. Cumming v Parker, White & Co 1923 S.L.T. 455; Wilson v Robertson (1834) 11 R. 893.

[3] Cf. 1933 Act, section 4(1)(a)(vi).

[4] Sections 1, 2 and 3 ad finem.

instalments. A year may elapse without payment of the sum due in full. If at some point the debtor chooses to move to another jurisdiction, the existence of the time-limit upon registration of the judgment serves to complicate the process of recovery. It is arguable, therefore, that the period of the time-limit should be increased or, alternatively, that no time-limit of any kind should be imposed in judgments extension legislation.

47. There is a contrast between the approaches of English law and of Scots law respectively to proceedings following, and execution upon, civil judgments. The Limitation Act 1939 provides that an action (a term which is deemed to include any proceeding in a court of law[1]) shall not be brought upon any judgment after the expiration of twelve years from the date the judgment became enforceable[2]. In relation to execution the position differs in the High Court and County Courts. In the High Court, execution may not issue without leave upon a civil judgment after six years from the date upon which it was registered[3]. In the County Courts the relevant period is after two years from the date of its registration or from the date of the last payment into court thereunder[4]. In Scotland, on the other hand, there appears to be no prescription of the right to obtain an extract decree[5], or of the right to enforce it. Apart from the long negative prescription, at present of twenty years duration, the only time-bar arises from the fact that a foreign judgment will not be enforced once action upon it is no longer competent by the

[1] Section 31.

[2] Section 2(4). Cf Lamb v Rider [1948] 2 K.B. 231.

[3] Rules of the Supreme Court, Order 46, rule 2.

[4] County Court Rules 1936, Order 25, rule 16(1).

[5] J A MacLaren, Court of Session Practice (Edinburgh 1916) page 463.

law of the country from which it emanates[1]. It may be that, in this respect, the law of Scotland is in need of change but, as far as we are aware, no pressures for such change exist.

48. In the context of judgments extension within the United Kingdom those differences between the two systems present a special problem. A possible view is that the rules relative to time-limits for enforcement are a matter of essential public concern within the territory where the enforcement takes place and that these time-limits should be applied in the case of external as well as in that of internal judgments. In both cases there is the same need to protect individuals from the prosecution of stale claims. There should come a time when accounts may be ruled off and insurance liabilities terminated. Another approach, however, takes as its point of departure the view that the differences in the time-limits imposed by different legal systems in the one state cannot be a matter of vital public policy and that to impose the time-limits of the debtor's forum would facilitate evasion on the part of debtors to whom their creditors had allowed time to pay on the basis of the rules of their own system. On this view no time-limit of any kind should be imposed in Judgments Extension legislation, the sole relevant factor - at least in the case of United Kingdom decrees - being their enforceability in the territory of the issuing court.

49. As at present advised, we think that a limit should be placed on the time during which an external judgment may be enforced. No time-limit is imposed by the Maintenance Orders Act 1950; but this Act deals with obligations of a continuing nature and, in regard to arrears, contains a power of remission[2]. A limit, however, is placed by the Foreign

[1] Delhi and London Bank v Loch (1895) 22 R. 849.

[2] Section 18(2).

Judgments (Reciprocal Enforcement) Act 1933[1] upon the enforcement of foreign judgments, and, while there is less justification for its imposition in the case of United Kingdom judgments, there are advantages in securing general correspondence between the two systems. We favour a period of five years in line with the proposals we make in Memorandum No 9[2] for a general short negative prescription.

(1) Effect of registration

50. The 1868 Act declares that a certificate registered in terms of the Act "shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered"[3]. Despite this language, there was a disposition on the part of the English courts, reinforced by the limitation of the control of the registering court in section 4 to "execution under this Act", to limit the effect of registration to permitting legal execution in the narrowest sense. On this view it was held that neither a judgment summons[4] nor a bankruptcy notice[5] could be issued on the basis of a registered certificate. A movement away from this restrictive interpretation of the Act began in Thomson v Gill[6], where the appointment of a receiver

[1] Section 2(1).

[2] Prescription and Limitation of Actions.

[3] Section 1. See also sections 2 and 3.

[4] Re Watson [1893] 1 Q.B. 21.

[5] In re a Bankruptcy Notice [1898] 1 Q.B. 383. Cf In re a Judgment Debtor [1939] 1 Ch 601 at page 603.

[6] [1903] 1 K.B. 760.

by way of equitable execution was authorised upon a Court of Session decree registered under the Act. More recently the effect of these earlier decisions was reversed in relation to England by section 40 of the Administration of Justice Act 1956, and in relation to Northern Ireland by Part II of Schedule 1 to the 1956 Act. No similar amending legislation was enacted for Scotland, but it seems clear that in Scots law a registered judgment must be treated in every respect as though it were a judgment of the registering court.

51. In contrast, however, the 1882 Act merely states that where a certificate has been registered under it process of execution may issue thereon in "like manner as if the judgment to be executed had been obtained in the Court in which such certificate shall be so registered as aforesaid"[1]. The 1882 Act, therefore, by its express terms, seems to authorise only "process of execution" of the certificate of the judgment. There would seem to be no justification for this difference between the two Acts. We prefer the approach of the 1863 Act and recommend that a registered certificate (or judgment) should have the same effect as a judgment of the registering court.

(m) Limitations upon execution

52. A major limitation upon execution has been noticed earlier in this paper. Section 5 of the 1882 Act authorises execution to issue only against "any goods or chattels of the person against whom such judgment shall have been obtained, which are within the jurisdiction of . . . [the registering] . . . Court". The limitation to goods and chattels within the jurisdiction of the registering Court causes serious inconvenience, but inconvenience is also caused by the limitation to execution upon "goods and chattels". This would

[1] Section 5.

preclude, as Love Wilson has pointed out, the use of attachment or arrestment of debts[1]. But it would also preclude the use of diligence upon heritage in Scotland[2]. In England, the High Court or County Court may impose a charge upon land to secure the enforcement of decrees emanating from other countries[3]. These difficulties, it is thought, could also be avoided if a registered certificate (or judgment) had the same effect as a judgment of the registering court.

53. Section 3 of the 1868 Act ad finem requires the English court to stay execution upon a registered decree on production of a certificate from the Court of Session that a note of suspension of the decree has been passed by that Court or a sist of execution allowed[4]. There is no corresponding provision allowing the Court of Session to stay execution upon English and Irish certificates. In practice the Court of Session will do so[5] but it is thought that express powers to this effect should be conferred on the Court of Session.

(n) Obsolete institutions and practices

54. An objection to the 1868 Act consists in the frequency of its references to obsolete institutions and practices. The references to the courts in Dublin are obsolete, and have led possibly to mistaken decisions[6].

[1] Love Wilson, Sheriff Court Practice 4th edition, page 354; Graham Stewart, The Law of Diligence page 438.

[2] Graham Stewart ibidem.

[3] Administration of Justice Act 1956, section 35 (which now applies to the High Court only); County Courts Act 1959, section 141.

[4] For a consideration of this aspect of section 3 see Peake v Lale (unreported) "The Scotsman" 23 March 1891, cited by Graham Stewart, The Law of Diligence page 435.

[5] Wotherspoon v. Connolly (1871) 9 M. 510; Wilson v Robertson (1884) 11 R. 893.

[6] Reference may be made to Harley v Kinnear Moodie & Co Ltd 1964 SLT 64 and the letter in 1964 SLT (News) page 127.

55. The references to the courts at Westminster have also caused difficulties[1]. The terms of the Act do not include Chancery Orders, though these would be covered, it is presumed, by the Supreme Court of Judicature Consolidation Act 1925, section 224(1). The Scottish practitioner, however, would not discover this merely by consulting the Index to the Statutes in Force.

Scheme of the Companies and Bankruptcy Acts

56. Sections 121 and 122 of the Bankruptcy Act 1914 and section 276 of the Companies Act 1948 contemplate that courts in different parts of the United Kingdom should be auxiliary to one another in matters of bankruptcy and liquidation and should in these domains enforce orders emanating from other parts of the United Kingdom. In the case of orders made in the course of winding up a company, section 276 of the 1948 Act expressly envisages the registration of the order in the courts of the country where it is sought to enforce it, and Court of Session Rule IV, 216, elaborates the registration procedure for the enforcement of an English order in Scotland. On registration the judgment is enforceable as if it had been a decree originally pronounced by the Court of Session[2]. The current Rules of Court of Session make no specific provision for the enforcement of orders under section 121 of the 1914 Act, though it would appear that such provision existed with reference to prior legislation[3]. This is a matter about which we shall consult our Working Party on Bankruptcy and Liquidation. In the meantime, we should welcome comments on the operation of the rules relating to the reciprocal enforcement of orders in bankruptcy and liquidation.

[1] English's Coasting and Shipping Co v British Finance Co Ltd (1886) 14 R. 220.

[2] Companies Act 1948 section 276; Rules of Court of Session IV, 216A.

[3] See Codifying Act of Sederunt 1913, E.iv.1.

Maintenance Orders Act 1950

57. The reciprocal enforcement of maintenance orders is a subject which calls for a separate study, but there is a feature of the existing rules in Scotland which occasions difficulty. Under the Maintenance Orders Act 1950, those orders to which the Act applies made by a superior court in England and Wales, Scotland or Northern Ireland can only be registered and enforced in a superior court of one of those countries. Orders made by an inferior court may be registered and enforced only in another inferior court[1]. There is a risk in some cases that once a decree has been registered in the inferior court of the defender's residence, the defender may move out of the jurisdiction of the registering court so that the creditor has to begin all over again. Certain provisions[2] of the Maintenance Orders Act 1958 facilitate the enforcement in England and Wales of those orders to which Part I of the Act applies by enabling such orders made by the High Court or a county court to be registered in a magistrates' court and those made by a magistrates' court to be registered in the High Court. Such orders while registered may be enforced in like manner as an order made by the court of registration.

58. The orders to which the 1958 Act applies are "maintenance orders" as defined by section 21 of that Act, which include orders registered in a court in England under Part II of the 1950 Act. For this purpose the 1958 Act does not extend to Scotland or Northern Ireland.

59. The feature of the Maintenance Orders Act 1950 to which we refer above is also characteristic of the distinction drawn in the Judgments Extension Acts themselves between reciprocity

[1] Section 17(3).
[2] Sections 1 and 2.

of enforcement between superior courts and reciprocity between inferior courts, each arrangement being kept separate. It is suggested that, in principle, inferior court judgments in one country of the United Kingdom should be registrable in the superior courts of the others. This proposal, however, is made tentatively because it may be that the implementation of the recommendations of the Payne Committee by the establishment of an enforcement office and an integrated system of enforcement of money judgments in England would eliminate the particular problem in that country[1]. It would however remain a problem in Scotland in the absence of comparable legislation there and suitable provision for the enforcement of Scottish judgments under the proposed new enforcement system in England would be required.

Enforcement of Instalment Orders

60. The procedures of the Judgments Extension Acts are not well adapted to the enforcement of orders for the payment under a judgment of sums of money by instalments[2]. The implementation of the recommendations of the Payne Committee would provide a comprehensive means of enforcing English judgments of this kind. But, again, appropriate provision would be required for the reciprocal enforcement between England and Scotland of such judgments. We invite views as to what form this provision should take.

[1] Report of the Committee on the Enforcement of Judgment Debts Cmnd. 3909 (1969), especially the summaries of conclusion contained in paragraphs 39-44 inclusive and in paragraph 169 and the terms of paragraph 1311.

[2] See Strachan v Strachan (1951) 67 Sh.Ct.Rep.51.

Summary of suggestions and requests for advice

61. The purpose of this paper is to point to problems rather than to reach conclusions on the matters which it discusses, but our preliminary views may be summarised as follows:

(1) The distinction made in existing legislation between superior courts and inferior courts should be discarded and uniform legislation in modern language should be introduced applicable to all courts possessing civil jurisdiction in Scotland, England and Wales, and Northern Ireland (paragraphs 11-14, 53, 57-59).

(2) A judgment issued by inferior courts in Scotland should be registrable in the High Courts of England and Northern Ireland and, similarly, judgments of the inferior courts in England and Northern Ireland should be registrable in the Court of Session. It is tentatively suggested that section 17(3) of the Maintenance Orders Act 1950 should be amended in the same sense (paragraphs 14 and 59).

(3) Judgments extension procedures should apply to money judgments and to decrees for the performance of a specific act, but not to decrees ad factum praestandum generally (paragraphs 17-19). We invite views as to whether the procedures should apply to orders made in actions of accounting and to interdicts and injunctions and, if so, subject to what conditions (paragraphs 20-22).

(4) Explicit provision should be made for the reciprocal enforcement of arbitral awards requiring payment of a sum of money or the performance of a specific act (paragraphs 23-25).

(5) A judgment or award, which is enforceable within the territory of the issuing court, should be registrable even if it is of an interim character and even if it may be

appealed. In ordering its enforcement, however, the registering court should have the power to impose conditions safeguarding the interests of the parties (paragraphs 26-29).

(6) There is a case for abandoning the need to obtain a certificate of the foreign judgment and for permitting a certified copy of the judgment to be registered in the books of a court in the territory where execution is sought (paragraphs 30-32).

(7) Registration should be competent at the instance not only of the judgment creditor but of his assignees and successors (paragraph 34). Where registration is sought by a person other than the person who obtained the original judgment, the applicant should be required to disclose how the rights under that judgment came to be vested in him (paragraph 36).

(8) It should be the duty of a person registering a judgment to advise the registering court whether the judgment has been satisfied in whole or in part, and, in the latter case, to what extent. The registering court should have power to order that a judgment be registered, or enforced, in relation to a part only of the subject-matter to which it applies, or in relation only to oustanding expenses (paragraphs 35 and 36).

(9) The registering court should have power to refuse registration, or to set aside registration -

(a) where the original court has acted without jurisdiction or upon a basis of a jurisdiction which is exorbitant;

(b) where an action relating to the controversy determined by the original court is:

(i) pending before a court of the country in which registration is sought; or

(ii) has resulted in a decision by a court of that country; or

(iii) has resulted in a decision by a court in another country which falls to be recognised as conclusive in the country where registration is sought;

(c) in the following circumstances -

(i) where the original judgment, though partially satisfied, was registered for the whole amount payable under it;

(ii) where the original judgment was not in fact directed against the person against whom it is sought to enforce it; and

(iii) where the rights under the original judgment are not vested in the person by whom registration was effected (paragraphs 42-44).

(10) A time-limit prohibiting registration of a certificate or judgment after the lapse of 12 months is of too short duration and the existence of a waiver is undesirable (paragraphs 45 and 46). We provisionally conclude that a time-limit of five years should be imposed, but invite views on this proposal (paragraphs 47-49).

(11) There should be no limitations upon the methods of execution open to the holder of a registered judgment and, in this respect, a registered judgment should take effect in every respect as if it were a judgment of the registering court (paragraphs 51 and 52).

(12) The system should continue to be non-exclusive in character, but common law actions for enforcement should

be discouraged by permitting the court to decline to award expenses or costs where extension procedures are available (paragraphs 6 and 7).

(13) The procedures of the Judgments Extension Acts are not well adapted to the enforcement of orders for the payment under a judgment of sums of money by instalments and views are invited as to what alternative procedures are required (paragraph 60).

(14) It would be desirable to secure the extension of the foregoing or of a similar scheme for the reciprocal enforcement of judgments to the Republic of Ireland, the Channel Islands, and the Isle of Man (paragraph 10).

Appendix

1. English registrations of Scottish and Northern Irish Judgments under the Judgments Extension Act 1868.

1963	1964	1965	1966	1967
8	15	11	10	17

2. Scottish registrations of English and Northern Irish Judgments under the Judgments Extension Act 1868.

1963	1964	1965	1966	1967
15	18	16	22	31

3. English and Northern Irish Judgments registered in the Sheriff Court, Glasgow, under section 4 of the Inferior Courts Judgments Extension Act 1882.

1964	1965	1966	1967
11	6	4	10

Certificates applied for in the Sheriff Court, Glasgow, under section 3 of the 1882 Act.

1964	1965	1966	1967
11	1	7	5