# Scottish Law Commission

DISCUSSION PAPER No. 90

# EXTRA-TERRITORIAL EFFECT OF ARRESTMENTS AND RELATED MATTERS

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The Commission would be grateful if comments on this Discussion Paper were submitted by 30 April 1991. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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DISCUSSION PAPER NO 90

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TABLE OF ABBREVIATIONS

Anton
A E Anton Private International Law (Edinburgh, 1967)

Anton Civil Jurisdiction
A E Anton Civil Jurisdiction in Scotland (Edinburgh, 1984)

Dicey and Morris
Dicey and Morris on the Conflict of Laws (ed Lawrence Collins et al) (11th edn) (London, 1987)

Graham Stewart
J Graham Stewart The Law of Diligence (Edinburgh, 1898)

Maher and Cusine
G Maher and D J Cusine The Law and Practice of Diligence (Edinburgh, 1990)

Maxwell Report
Report of the Scottish Committee on Jurisdiction and Enforcement (Chairman: the Hon. Lord Maxwell) (Edinburgh, 1980)

Macphail Sheriff Court Practice
I D Macphail, A L Stewart and Elizabeth R Colwell Wilson Sheriff Court Practice (Edinburgh, 1988)

Wallace and McNeil
Wallace and McNeil's Banking Law (ed. D B Caskie) (9th edn) (Edinburgh, 1986)

Wilson, Debt
W A Wilson, The Law of Scotland Relating to Debt (Edinburgh, 1982)

NB References to any Institutional writing are references to the last edition thereof.

# PART I
# INTRODUCTION

## Preliminary

1.1 This Discussion Paper is issued in pursuance of Item No. 8 of our Second Programme of Law Reform,[1] the reform of the law of diligence[2] and Item No. 15 of our Third Programme of Law Reform[3] relating to the reform of private international law.

## Scope and arrangement of Discussion Paper

1.2 In this Discussion Paper, we consider the rules of private international law governing the validity and effectiveness of arrestments of obligations to pay pecuniary debts, obligations to deliver corporeal moveables, and generally obligations of an arrestee[4] to account to the defender or common debtor.[5] We are not here concerned with arrestments of certain special categories of property, namely ships, shares or interests in partnerships.[6]

1.3 We are primarily concerned with the requirements of the validity and effectiveness of arrestments from the standpoint of private international law. From that standpoint, there is at least one principal requirement, namely, that the arrestee must be

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[1] Scot Law Com No 8 (1968).

[2] Ibid, p 6. "Diligence" is the legal term used to denote primarily the methods of enforcing unpaid debts and other obligations due under decrees of the Scottish courts or on the dependence of actions in those courts.

[3] Scot Law Com No 29 (1973).

[4] The arrestee is the person in whose hands an arrestment has been executed.

[5] The "common debtor" is the technical legal name given to the arrester's debtor.

[6] See paras 3.44 to 3.46.

subject to the jurisdiction of the Scottish courts at the time of arrestment, and there may also be an additional requirement, namely, that the subjects of the arrestment (whether a corporeal moveable or an incorporeal moveable, such as a debt or obligation to account) must be located within Scotland at that time. The present law on the requirements of arrestment is set out in Part II and proposals for reform in Part III.

1.4 We also take the opportunity to review the law on jurisdiction in actions of furthcoming in Part IV, partly because there is some uncertainty about this branch of law and partly to lay a foundation for our discussion in Part III of the requirements of arrestment to which the rules on jurisdiction in actions of furthcoming are relevant.[1] In Part V we summarise our provisional proposals and questions for consideration.

**What is wrong with the present law?**

1.5 Requirements of arrestability: jurisdiction over the arrestee. It is remarkable that since the early 18th century, the authorities have been stating that for an arrestment to be valid and effectual, the Scottish courts must have jurisdiction over the arrestee (in the abstract, as it were) without explaining what is meant by "jurisdiction". There is thus some doubt as to what type of action or notional action, and at whose instance actually or notionally, the concept of jurisdiction has reference in this context. The reason for this vagueness is that the courts have not decided, indeed have scarcely discussed, what is the basis or rationale of the requirement. In Part II we attempt to identify the competing bases.[2] We conclude that probably the test of "jurisdiction over the arrestee" has reference to jurisdiction in an

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[1] See paras 3.3 and 3.4.

[2] These are summarised at paras 2.22 to 2.28.

action, or notional action, by the defender or common debtor against the arrestee, brought or competent at the time of arrestment to enforce the obligation to pay, account or deliver or to recover damages for breach of that obligation.[1]

1.6 It is unsatisfactory that the law should be uncertain in relation to so fundamental a question and in Part III we suggest that the interpretation of the common law rule which we identified should be placed on a secure statutory basis and its incidents clarified.[2] In particular, if the arrested obligation were not yet prestable at the time of arrestment, the rule should be applied as if the obligation were prestable and the action competent at that time.[3]

1.7 Requirements of arrestability: location of arrested pecuniary debts. There is also some doubt whether it is a requirement of the arrestment of a pecuniary debt that the debt must be located for ordinary purposes within Scotland.[4] The alternative view is that if the defender or common debtor may sue an action for payment or accounting in respect of the debt in Scotland, then the debt is treated for the purposes of arrestment as located within Scotland and accordingly is arrestable, even though by law it is located for other purposes outside Scotland. We consider the authorities on this matter in Part II where we conclude that the weight of authority favours the latter alternative.[5]

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[1] See idem and para 2.43.

[2] See paras 3.2 to 3.10; Proposition 1 at para 3.10.

[3] Proposition 1(2) at para 3.10.

[4] By ordinary purposes we mean for example confirmation of executors and liability to tax.

[5] See paras 2.44 to 2.86 and summary at para 2.86.

1.8 This extra-territorial effect rule is of very considerable practical importance.[1] It means for example that an arrestment laid in the hands of a branch office of a bank in Scotland will attach a credit balance in an account kept by the bank at any branch, including any branch outside Scotland. Banks therefore require to search their entire branch networks, including branch networks outside Scotland, to ascertain whether such a credit balance exists. The same or a similar rule applies to for example building societies and insurance companies. The arrested debt may have no connection with Scotland other than that the arrestee is subject to the Scottish courts and may be sued here. There may be a very extensive branch network in England and only one branch in Scotland.

1.9 We have anxiously considered whether the extra-territorial effect rule should be abrogated on the grounds that it is exorbitant and that an arrestment attaching a debt located for ordinary purposes in another country might be refused recognition by the courts of that country. The latter possibility would place the innocent arrestee in double jeopardy by being required to pay the debt twice over, once to the arrester in an action of furthcoming in Scotland and a second time to the common debtor who successfully brings an action for payment in the other country. Our provisional conclusion however, is that the extra-territorial effect rule should be retained[2] mainly because it pays regard to the over-all financial position as between the arrestee and the common debtor and attaches funds in the hands of an arrestee only if, on combining accounts, there is a net balance in his hands. Thus if for example a credit balance or debt due by

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[1] See paras 3.12 to 3.38 for a full discussion of the case for and against reform.

[2] Proposition 2 at para 3.38.

the arrestee in Scotland were, on combining the accounts, to be extinguished by a larger debit balance or debt due to the arrestee in England, it would be unjust to require the arrestee to pay the credit balance to the arrester and to disregard the debit balance. The extra-territorial effect rule avoids that injustice. The protection of arrestees from double jeopardy can be secured by other means to which we revert below.

1.10 Requirements of arrestability: location of arrested corporeal moveables. The weight of authority favours the view that it is a requirement of an arrestment of a corporeal moveable, or of an obligation to deliver or to account for, a corporeal moveable, that the corporeal moveable must be located in Scotland, though there is some doubt about this at least as respects cargo at sea.[1] We do not suggest any change in this common law rule except to place it on a secure statutory basis.[2]

## Protection of arrestee from double jeopardy

1.11 An arrestee is "a wholly innocent third party who has been dragged into somebody else's dispute"[3] and it is in our view of paramount importance that legal procedures should exist to enable the Scottish courts to protect an arrestee from double jeopardy, arising from separate enforcement proceedings in Scotland and another country, of the kind referred to in para 1.9 above. In England and Wales, the paramount need to protect garnishees (equivalent to arrestees) from double jeopardy was emphasised by the House of Lords in the recent Deutsche

[1] See paras 2.87 to 2.97.

[2] See paras 3.39 to 3.43; Proposition 3 (para 3.43).

[3] Cf Deutsche Schachtbau v. SIT Co [1990] A C 295 at p 355 per Lord Goff of Chieveley (referring to garnishees); quoted at para 3.53 below.

Schachtbau case[1] which illuminates the main issues of legal and social policy. Whereas the English courts have a discretion to refuse to make a garnishee order where there is a risk of double jeopardy, the Scottish courts have no equivalent power.

1.12 We propose therefore that the Scottish courts should have power to recall an arrestment where the arrestee is at risk of being required to pay a second time by legal process in another country.[2] Conversely, where a foreign attachment (or garnishee order) equivalent to arrestment is executed in the hands of an innocent third party and the Scottish courts do not recognise the attachment, the defender in the foreign proceedings would be entitled to obtain decree for the debt against the third party in the Scottish courts. We propose that the Scottish courts should have power to recall any diligence executed in pursuance of their decree in order to protect the third party from double jeopardy.[3] In all cases the double jeopardy would require to arise from legal process and not mere commercial pressure.

## Jurisdiction in actions of furthcoming

1.13 The rules for the assumption of jurisdiction in the international sense in actions of furthcoming are now governed by the European Judgments Convention and the Civil Jurisdiction and Judgments Act 1982, but there is evidently some doubt as to which provisions of the Convention and the 1982 Act apply. In Part IV, we argue that actions of furthcoming fall within the exclusive jurisdiction of the courts of the country, part of the United Kingdom or place where the judgment has been or is to be

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[1] [1990] A C 295.

[2] Proposition 5(1) at para 3.60.

[3] Proposition 5(2) at para 3.60.

enforced.[1] The effect seems to be that a valid and effectual arrestment will automatically confer on the Scottish courts exclusive jurisdiction in the international sense in an action of furthcoming. It does not seem to us that legislation is necessary or desirable to clarify or amend these statutory rules.[2]

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[1] European Judgments Convention, Article 16(5); Civil Jurisdiction and Judgments Act 1982, Sch 4, Article 16(5); Sch 8, Rule 4(1)(d).

[2] Proposition 6 at para 4.24.

## PART II

## THE EXISTING LAW ON EXTRA-TERRITORIAL EFFECT OF ARRESTMENTS

### (1) The main rules

2.1 The question whether an arrestment effectually attaches moveables, debts and liabilities to account outside Scotland is determined by reference to the following rules or possible rules.

(1) The arrestment must be executed in the hands of an arrestee within the jurisdiction unless the arrestment is executed edictally.

(2) The arrestee must be subject to the jurisdiction of the Scottish courts at the time of arrestment.

(3) There is a question whether there is an additional requirement under the common law that the subjects of the arrestment (whether a corporeal moveable or an incorporeal moveable such as a debt or obligation to account) must be located within Scotland.[1]

### (2) Preliminary: the nature and incidents of arrestment

2.2 Before considering these rules, it is necessary to describe in general terms certain aspects of the nature and incidents of arrestments, in particular the definition of arrestable subjects and the theory that arrestment operates as a judicial or legal assignation from the common debtor to the arrester of the subjects of arrestment.

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[1] We are here concerned with the common law rules and only incidentally with the power of the Court of Session to grant warrant for arrestment of "any assets located in Scotland" under the Civil Jurisdiction and Judgments Act 1982, s. 27(1)(a) (arrestment on the dependence of proceedings outside Scotland).

2.3 The definition of arrestable subjects. Arrestable subjects have sometimes been defined in very wide terms. Graham Stewart for example observes:

> "All personal debts due to the common debtor, or moveable property belonging to him in the hands of an independent third party, may be arrested... The debts may be pure or conditional, constituted or unconstituted, liquid or illiquid. In short, every claim of a moveable nature, though its extent or validity depends on the nature of a suit, may be arrested.[1]

Later he qualifies this definition in particular respects, especially in relation to contingent debts and liabilities to account.

2.4 Obligation or liability to account as the test of arrestability. Insofar as any one test of arrestability has won recognition, it is that there must be a present obligation or liability to account by the arrestee to the defender or common debtor at the date of arrestment. This is supported by a dictum by Bell[2] and was the view championed by Lord Dunedin in several cases[3]; eg. in Riley v. Ellis he said[4]:

> "The only general rule that I can deduce is that arrestment is only possible where there is a present

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[1] Graham Stewart, p 44.

[2] Bell Commentaries vol ii, p 71: "it is the obligation to account which is the proper subject of attachment".

[3] Riley v Ellis 1910 SC 934 at p 941; Shankland and Co v McGildowny 1912 SC 857 at p 862: "I think it is impossible to reconcile the various judgments except upon the proposition that arrestment always depends upon a present duty of accountability"; Caldwell v Hamilton 1919 SC (HL) 100 at p 109: "Arrestment can never be of anything but something of which there is a present liability to account".

[4] 1910 SC 934 at p 941.

liability to account. By present, I mean at the date of the arrestment. I deduce this from a consideration of the things which admittedly are, and things which admittedly are not liable to arrestment".

Earlier Graham Stewart by contrast had made arrestability depend on the arrestee's possession of funds or goods of the common debtor and referred to a liability to account as an exception to this general rule, pointing out that not all liabilities to account were arrestable where the arrestee was not in possession of the common debtor's funds or goods.[1] Thus a trustee's liability to account was arrestable but not an agent's in these circumstances.[2] It has been rightly observed that it is unclear what counts as an obligation to account for the purposes of the test of arrestability.[3] Nevertheless the test of a present liability or obligation to account is the primary test of arrestability even if it cannot explain all the decided cases.[4] The concept of an obligation or liability to account is important in connection with the rules on jurisdiction over arrestees and on the location of arrested debts for the purposes of the rules on the extra-territorial validity of arrestments.

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[1] Graham Stewart, p 71: "As a general rule it is necessary for the validity of an arrestment that the person in whose hands it is used should be actually possessed of funds or goods to which the common debtor is entitled. But the right which the common debtor has to call a party to account may be arrested in the hands of a party who is under obligation to account, although the latter has not at the time of the arrestment any funds or goods in his possession. It is not, however, every obligation to account which may be arrested under these circumstances, and it is somewhat difficult to state a test for the validity of an arrestment which will be reconcilable with all the decided cases".

[2] Graham Stewart pp 71 to 76.

[3] Maher and Cusine, para 4.37.

[4] See eg Kerr v R & W Ferguson 1931 SC 736 at pp 744, 745 per Lord Blackburn.

2.5 Arrestment as a judicial assignation. An important principle of the theory of arrestment is that for some purposes an arrestment is of the nature of a judicial or legal assignation in cases where it is competent[1] (though assignability is not the exclusive test of whether an obligation to pay, account or deliver is arrestable[2]). In Boland v. White Cross Insurance Association[3], Lord Justice-Clerk Alness observed[4]:

> "Arrestment operates as a judicial assignation of the rights of the common debtor to the arrester, and the latter stands in the shoes of the common debtor".

In the same case Lord Anderson remarked[5]:

> "the legal character of arrestment... is that of a legal or judicial assignation which clothes the arrester with all rights and remedies competent to the common debtor against the arrestees".

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[1] Stair Institutions III, 1, 3; III, 1,24; Erskine Institute III, 6, 16; Baron Hume's Lectures vol VI, p 89. See also Gibson v Wills (1826) 5 S 74; Cunninghame v Cunninghame (1837) 15 S 687; Adie v McMartin (1837) 15 S 1045; Hunter v Hunter's Trs (1848) 10 D 922; Chamber's Trs v Smiths (1878) 5 R (HL) 151; Wilson v Carrick (1881) 18 S L Rep 657; National Bank of Scotland v Adamson 1932 SLT 492; Maher and Cusine, para 5.37.

[2] Riley v Ellis 1910 SC 934 at p 943 per Lord President Dunedin: "Voluntary assignation is obviously no test, eg, ordinary debts are assignable and arrestable, a spes successionis is assignable but not arrestable". Transmissibility on death is a better test: ibid. As to a spes successionis, see Trappes v Meredith (1871) 10 M 38.

[3] 1926 SC 1066, applied in J Verrico and Co Ltd v Australian Mutual Provident Society 1972 SLT (Sh Ct) 57 at p 59 per Sheriff Principal Sir Allan Walker.

[4] Ibid at p 1071.

[5] Ibid at p 1077.

To the same effect are dicta in Park, Dobson and Co v. William Taylor and Son[1] in which Lord Morison said[2]:

> "It is also a well settled principle applicable to the diligence that the arresting creditor must take the common debtor's interest tantum et tale, otherwise there could be an act of the debtor conferring an interest on his creditor which he could not acquire for himself".

And Lord Blackburn stated[3]:

> "The arrestment vested [the arrester] in the same rights against the arrestee as were possessed by the debtor against the arrestee at the date of the arrestment".

This principle is relevant to the private international law aspects of arrestments. It may underlie the rule that an arrestment is valid and effectual to attach an obligation to pay, account or deliver only if at the time of arrestment the arrestee would be subject to the jurisdiction of the Scottish courts in an action at the instance of the common debtor to enforce that obligation. Otherwise the arrestment would confer on the arrester a higher right against the arrestee than the common debtor possessed.[4]

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[1] 1929 SC 571.

[2] Ibid at p 582 (dissenting on another point): see also at p. 584: "the well settled principle that the arresting creditor's rights are never higher than those of the common debtor".

[3] Ibid at p 582.

[4] This point was made by Sheriff Principal Sir Allan Walker in J Verrico and Co Ltd v Australian Mutual Provident Society 1972 SLT (Sh Ct) 57 at p 60, discussed below.

2.6 The classification of debts as "pure", "future" or "contingent". The general rule is that only debts or obligations for which the arrestee has a present liability to account are arrestable. Thus the test of arrestability in Scots law depends in part on the characterisation of the debt as (1) pure or simple; (2) future and non-contingent; and (3) contingent. There is no universally accepted terminology in the sources; and in particular there are differences in text-book, institutional and judicial usage as to the meaning of the labels "future" and "contingent" when applied to debts.[1] For present purposes the following definitions are used:-

(1) "A pure or simple debt is one which is presently due and can be exacted immediately".[2]

(2) A future and non-contingent debt or obligation is or was sometimes called "an obligation to a day" and has been defined as "one in which payment is to be made on a certain day in the future or on the occurrence of an event which must occur... The debt although it is not payable until a future time is nonetheless, in one sense of the word "due", it is debitum in praesenti solvendum in futuro".[3] It is resting owing but not yet payable.

(3) "A contingent debt is one which depends on the occurrence of an uncertain future event - an event which may or may

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[1] For the difficulties of definition and terminology, see Wilson, Debt pp 12 to 17.

[2] Wilson Debt p 12.

[3] Idem, citing Bell Principles, s 46: "A proper debt exists from the moment of completion of the engagement; the execution only is suspended till the arrival of the appointed day".

not happen".[1]

2.7 "Pure" or "simple" debts. A pure or simple debt is arrestable. It seems that the obligation owed by a banker to repay his customer sums payable on demand in current and other accounts is properly classified as pure.[2] Thus in the leading case of Macdonald v. North of Scotland Bank[3] it was held that the long negative prescription began to run as soon as a sum was placed to the credit of a customer on current account. Lord Justice-Clerk Cooper observed[4]:

> "I take first the rights and obligations as between banker and customer which are brought into being by the opening of a current account. The appellant conceded that, immediately upon the opening of the account, the banker incurred an obligation, but maintained that this was merely an obligation to account, and that the obligation to pay was not immediately prestable, but remained "future" or "conditional" until, by presentation of a cheque or otherwise, a demand for payment was made by the customer on the bank. I am unable to accept this view, or to regard the banker's obligation to pay as truly falling into the categories of "future" obligations or "contingent"

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[1] Wilson Debt p 13. It should be noted that Bell in his Principles s. 47 seems to recognise a fourth category consisting of "future" debts, distinct from a debt presently resting owing but payable in future and distinct also from contingent debts, but it is not clear what particular kinds of debts he had in mind; he gives no examples. It may be that he had in mind an unvested right to a debt payable in the future.

[2] Wilson Debt p 12.

[3] 1942 SC 369.

[4] Ibid at pp 372, 373.

obligations as defined in Bell's Prin., secs. 46 et seq. From the moment when the account is opened the customer can, if he wishes, operate upon it, and the bank is bound to allow him to do so. Even if the bank's obligation is to be regarded as an obligation to repay at an unspecified future date, that date is in the customer's control. Even if the bank's obligation is to be regarded as contingent, the customer can purify the contingency whenever he likes. However the relationship may be described according to the formal categories of classical jurisprudence, the fact remains that the bank's overriding obligation and the customer's overriding right are from the first substantially operative and enforceable".

Lord Mackay also took the view that the bank's obligation was neither future nor contingent.[1] Lord Jamieson considered that the debt was contingent not future: "there was an absolute obligation on the [bank] to repay, but conditional as to the time of payment", but the condition was "a potestative one, in the power of the pursuer to enforce at any time",[2] and accordingly he agreed that prescription ran against the customer although there was no prior demand.

2.8 All three judges found support for their view in the difference in theory and practice between English garnishee proceedings and Scottish arrestments.[3] In English law, in principle, a prior demand is a prerequisite of attachment by a garnishee order. This requirement is satisfied in the case of current accounts by the legal fiction that the service of the garnishee notice on the bank operates as a demand,[4] and in the case of savings accounts, deposit accounts and fixed deposits, by a

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[1] Ibid at p 377.

[2] Ibid at p 382.

[3] Ibid at p 376 per Lord Justice-Clerk Cooper; at p 377 per Lord Mackay; and at pp 382, 383 per Lord Jamieson.

[4] Joachimson v Swiss Bank Corporation [1921] 3 KB 110 (CA) at p 115 per Bankes L J and at p 131 per Warrington L J; see also Paget Law of Banking (10th edn; 1989) p 323 ff; Ellinger Modern Banking Law (1987) p 271 ff.

statute permitting garnishment.[1] In the Macdonald case, however, the Second Division expressly rejected[2] the leading English case of Joachimson v. Swiss Bank Corporation[3] insofar as it might have provided authority that prior demand is a prerequisite of the arrestability, or the running of prescription, of a banker's debt. In the recent case of Bank of Scotland v. Seitz[4], Lord President Hope referred with approval to a passage from Atkin L J's judgment in the Joachimson case which inter alia stated that:

> "the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept".[5]

This however was cited by the Lord President for the proposition that the place of payment of sums due under a banking contract is the branch where the account is kept[6] and so construed is not inconsistent with the Macdonald case.

2.9 Thus while a credit balance on current account is a 'pure' or 'simple' debt, it is payable only on demand. Likewise where money is lodged on deposit receipt or in a deposit account, the banker's obligation to return the equivalent sum with interest only arises on demand.[7] Where the only precondition of the obligation of payment is a demand for payment, the basis of arrestability seems to be that the arrestment operates as a judicial or legal assignation of the defender's or common debtor's right to make

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1 Administration of Justice Act 1956 s 38.

2 1942 SC 369 at pp 374 to 376; 377, 378; 382, 383.

3 Supra.

4 1990 SLT 584 at p 590.

5 Joachimson v Swiss Bank Corporation [1921] 3 KB 110 (CA) at p 127.

6 See para 2.51, head (6) below.

7 Wallace and McNeil, p 9.

the demand: the right to make the demand is then a potestative condition exercisable by the arrester.[1]

2.10 Arrestable debts payable in the future. We stated above[2] that one of the requirements of the validity and effectiveness of an arrestment is that the arrestee must be subject to the jurisdiction of the Scottish courts at the time of the arrestment. For reasons explored later, we think that "jurisdiction" in this context may refer to jurisdiction in an action or notional action to enforce the obligation to pay, account or deliver which is arrested or an action of damages for breach of that obligation. The question arises as to how that test can be applied to an arrestable debt which at the date of its arrestment is payable in the future, and where therefore an action for payment of the debt by the common debtor against the arrestee could not be raised at that date. In what sense can the Scottish courts be said to have jurisdiction over the arrestee at that date?

2.11 We discuss that question later,[3] but as a preliminary to that discussion, it may be convenient to identify in broad terms the category of debts payable in the future which are arrestable. It appears that in the case of a debt which is non-contingent and future, that is to say, payable on a certain, determinate day or on the occurrence of a determinate event which must occur, the general rule is that an action cannot competently be raised for payment of the debt before the date of

[1] See para 2.5 above, and cf. Boland v White Cross Insurance Association 1926 SC 1066 where it was held that the common debtor's right to avail himself of an arbitration clause was attached by an arrestment and became thereafter exercisable by the arrester.

[2] See para 2.1.

[3] See para 2.31.

payment has arrived.[1] Nevertheless it appears that some categories of such debts are arrestable provided certain conditions are satisfied. Under Lord Dunedin's test,[2] there must be a present liability to account at the date of arrestment but what is meant by that expression in this context is not entirely clear. It may be that the test is that there must be a relationship of debtor and creditor: the debt must be vested and "resting owing" though not yet payable. Thus where a call has been made on shares payable on a certain future day, the sum due is arrestable.[3] This has been distinguished from uncalled capital which is not arrestable[4] by saying that an arrestment of uncalled capital could only attach anything:

> "on the footing that uncalled capital is a debt due by the shareholder to the company, and it does not seem to be an essential of an arrestment that the debt is ... payable at the date of the arrestment; it may be a debitum in praesenti solvendum in futuro. But it must be a debitum, not a spes or contingency... until a call is made there is no debt but only a chance of being called on to pay".[5]

Other examples of non-contingent future debts are the current instalment of a termly payment such as rents or annuities payable at the next term day and sums due under personal bonds or contracts due on a date fixed by the bond or contract.

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[1] Wilson Debt p 12 citing Crear v Morrison (1882) 9 R 890; Hodgmac v Gardiners of Prestwick Ltd 1980 SLT (Sh Ct) 68.

[2] See para 2.4.

[3] Hill v College of Glasgow (1849) 12 D 46.

[4] Graham Stewart p 46.

[5] Lindsay v La Martona Rubber Estates Ltd (1911) 2 SLT 468 (sheriff court). The word omitted in line 3 of the quotation is "not" which was clearly inserted per incuriam.

2.12 In the case of contingent debts, that is to say debts in which the obligation to pay depends on the occurrence of an uncertain future event which may or may not occur, there is again authority that some categories of such debts are arrestable. Under Lord Dunedin's test, there must be a present liability to account.[1] Graham Stewart made arrestability depend on the vesting of the right to the debt in the common debtor; he observed:

> "Debts and claims which are truly contingent, that is debts and claims to which at the time of arrestment the common debtor had no vested right, which exist only _in spe_, are not arrestable. Where, however, the right has vested in the common debtor, although it is not yet prestable or is liable to be defeated by the occurrence or non-occurrence of some event before payment, arrestment will be sustained for what it may ultimately prove to be worth".[2]

Thus for example payments under a contract for services have been held to be arrestable although the common debtor's right to payment from the arrestee is contingent upon the arrestee's completion of the work to the common debtor's satisfaction.[3] The theory is that the arrestment does not attach any specific sum but attaches the right to demand payment when the term for payment arrives.[4] Other examples of an arrestable contingent interest include the right of an insured against whom decree has

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[1] See para 2.4 above.

[2] Graham Stewart, p 81 (footnotes omitted).

[3] _Marshall_ v _Nimmo & Co_ (1847) 10 D 328; _Maclaren & Co_ v _Preston_ (1893) 1 SLT 75; _Park Dobson & Co Ltd_ v _Willian Taylor & Son_ 1929 SC 571.

[4] _Marshall_ v _Nimmo & Co_ (1847) 10D 328 at p 331 per Lord Justice-Clerk Hope; see also _Park Dobson & Co Ltd_ v _William Taylor and Son_ 1929 SC 571 at pp 580 to 582.

been granted to be indemnified by the insurer[1], and probably the right of a beneficiary to payments from a trust contingent on the trustee not exercising a power of accumulation[2].

2.13 We discuss below[3] how the requirement of jurisdiction over the arrestee does or should apply to the category of arrestable debts payable in the future in respect of which no action for payment is competent at the date of arrestment. We turn now to discuss the main requirements of the validity and effectiveness of arrestments.

### (3) The first rule: execution within Scotland or edictal execution

2.14 An arrestment must be executed in the hands of an arrestee within the jurisdiction[4] unless the arrestment is executed edictally. An arrestment may be executed edictally in the hands of an arrestee outside of the jurisdiction if he is subject to the jurisdiction of the Scottish courts.[5] The arrestee's ignorance of the arrestment does not affect its validity, and it will be effectual so long as the arrestee has not paid away the arrested funds with notice of the arrestment.[6] But the arrestee is not liable if he pays the arrested fund to the common debtor in

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[1] Boland v White Cross Insurance Association 1926 SC 1066.

[2] Wilson Debt p 14.

[3] See para 2.27.

[4] Miller v Crawford (1671) Mor 7293; Stair Institutions III, 1, 24; Erskine Institute III, 6,3.

[5] Blackwood v Earl of Sutherland (1701) Mor 1793 (reversed on another point); Erskine Institute III, 6, 14; Baron Hume's Lectures vol VI, p 91; Bell Commentaries vol 2, p 63; Debtors (Scotland) Act 1838, s 18.

[6] Syme v Anderson (1824) 3 S 372.

ignorance of the edictally executed arrestment.[1]

### (4) The second rule: arrestee must be subject to the jurisdiction of the Scottish courts

2.15 The second rule is normally stated as being that the arrestee must be subject to the jurisdiction of the Scottish courts.[2] There has been little discussion of the nature, incidents and rationale of this requirement which requires analysis.

#### (a) The development of the rule

2.16 Stair deals with the invalidity of an arrestment upon the precept of an inferior judge executed outside the jurisdiction of that judge[3] but does not deal with the arrestment of goods abroad by an arrestment edictally executed within the jurisdiction. An edictally executed arrestment was held ineffectual in 1733 in Couts v. Miln,[4] a foundation case in this branch of law, the brief report of which states:

> "An arrestment at the market-cross of Edinburgh, pier and shore of Leith, of effects belonging to the common debtor, in the hands of an English merchant residing in Bristol, and who had no forum in Scotland, was found null and inept".

Bankton was the first Institutional writer to rely on this case. He remarked[5]:

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[1] Debts Securities (Scotland) Act 1856, s 1.

[2] See eg Graham Stewart, p 37; Anton p 112; Maher and Cusine, para 4.29.

[3] Stair Institutions III, 1, 24.

[4] Couts v Miln (1733) Mor 4835.

[5] Bankton Institute III, 1, 31.

> "The warrant of arrestment, is either a writ in the king's name, by letters under the signet, and is frequently, of course, contained in letters of horning or inhibition. This extends not only over the whole kingdom, but likewise may contain warrant to arrest at the market-cross of Edinburgh, pier and shore of Leith, in the hands of persons abroad, in order to reach their effects, in this kingdom, on a forthcoming. But is inept as to securing the debtor's effects in a foreign country". [citing Couts v. Miln].[1]

Bankton thus relies on Couts v. Miln for the proposition that an edictally executed arrestment does not attach property in a foreign country, but only in Scotland, and the emphasis is on the location of the property rather than jurisdiction by the arrestee's residence in Scotland.

2.17 Erskine states the effect of Couts v. Miln[2] in somewhat different terms. After stating that precepts of arrestment which issue from inferior courts cannot be executed outside the bounds of the inferior judge's territory, "for execution is an act of jurisdiction",[3] Erskine observed[4]:

> "Upon a similar ground, no creditor can, by an arrestment served edictally at the market-cross of Edinburgh, and pier and shore of Leith, effectually attach his debtor's effects which are lodged in a foreign country [citing Couts v. Miln (1733) Mor 4835]; because the person in whose possession such goods are lodged is not subject to the jurisdiction of any court in Scotland".

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[1] Bankton (idem) continues: "Or a precept from an inferior court, which can only be used within the territory of the judge who grants it; but if the party, in whose hands it is laid, change his domicil, nothing hinders it from being prosecuted before the judge where he resides at the time", citing Dalrymple v Johnston (1710) Mor 7662.

[2] (1733) Mor 4835.

[3] Erskine Institute III, 6, 3.

[4] Idem.

Here the emphasis is on the arrestee being subject to the jurisdiction of the Scottish courts as the factor which determines that an edictally executed arrestment can attach goods abroad. Erskine seems to have assumed that in Couts v. Miln, the arrestment was ineffectual because the goods were abroad in the possession of an arrestee who was resident abroad and therefore not subject to the jurisdiction. But by emphasising that the Scottish courts must have jurisdiction over the arrestee, rather than that the goods must be located in Scotland, Erskine can be construed as allowing arrestment where the arrestee is subject to the jurisdiction and the goods are abroad. This was apparently the situation in Rae v. Neilson[1] in which an arrestment of a partnership interest in the hands of partners in Scotland was upheld though the partnership assets were abroad. Erskine's reasoning seems to be that execution of an arrestment is an "act of jurisdiction" and therefore an arrestment can only be executed where the arrestee possessing the goods sought to be arrested is subject to the jurisdiction of the court which granted the warrant to arrest.

2.18 The principle in Couts v. Miln[2] was applied in 1777 in Douglas, Heron, and Company v. Palmer[3] an action of multiplepoinding where the fund in medio was the proceeds of a claim under a fire insurance policy due by an English insurance company (the Sun Fire Office Company) to the common debtor. The English insurance company had an agent in Edinburgh but no place of business of its own in Scotland. The Court found the action of multiplepoinding competent but the arrestments incompetent, and pronounced an interlocutor in the following terms:

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[1] (1742) Mor 716.

[2] (1733) Mor 4835.

[3] (1777) 5 Brown's Supp 449.

> "Find that the arrestments used by both parties in the hands of the Sun Fire Office Company at London, by execution at the market-cross of Edinburgh, pier and shore of Leith, were improper and inept, in respect that the said Sun Fire Office Company have no forum here, and consequently are not subject to the Courts of this country; and thereby the debts due by them to the common debtor could not be attached by arrestments issued by authority of this Court;...".

In the same case, the Court held that arrestments laid in the hands of the Edinburgh agent of the English insurance company were effectual because the insurance company had prorogated the jurisdiction of the Court. The Edinburgh agent acting for the English insurance company had submitted the fire insurance claim to arbitration and a decree-arbitral had been pronounced against the Edinburgh agent as representing the company. The company had "acquiesced and homologated" the decree-arbitral by raising the action of multiplepoinding in which they called the competing arresters to dispute their preference in order that the company might safely pay the sum decerned which they were willing to pay. It is not entirely clear why it was held that the multiplepoinding had the effect of rendering effectual the arrestments laid in the hands of the English company's agent but did not render effectual the arrestments laid in the hands of the English company themselves.

2.19 It may be noted incidentally that the requirement of jurisdiction over the arrestee was invoked in 1821 as an explanation for the much criticised doctrine of arrestment to found jurisdiction. Thus in Bertrams v. Berry and Bruce[1] the successful defender argued:

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[1] March 6 1821 FC.

"It is not from the Court having jurisdiction over the goods, much less over the person of the foreigner, that the arrestment is used, but from having jurisdiction over the persons who hold the goods in their hands;...".

This idea was not however developed in the case-law and the courts have abandoned any attempt to find a rational explanation of the doctrine of arrestment to found jurisdiction and base their decisions on practice and precedent.[1] The doctrine is now much attenuated by statute.[2]

(b) The basis of the requirement

2.20 Existing authorities. It is difficult to find an authoritative statement of the rationale underlying the requirement of jurisdiction over the arrestee which is informative and avoids circular reasoning. For example, as we have seen, Erskine[3] stated that the execution of an arrestment is an "act of jurisdiction", and goes on to say in effect that for that reason the Scottish courts must have jurisdiction over the arrestee.

2.21 The only modern judicial reference to the underlying rationale which we have traced is the following dictum of Lord Patrick in the Outer House case of O'Brien v. A Davies & Son Limited[4], viz:

"Parties were agreed that that arrestment could not be valid unless at its date the Scots Courts had jurisdiction

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[1] Anton p 107.

[2] Civil Jurisdiction and Judgments Act 1982, Sch 1 (European Judgments Convention) Article 3; Sch 4, Article 3; cf Sch 8, Rule 2(8).

[3] Erskine Institute III, 6, 3 quoted at para 2.17 above.

[4] 1961 SLT 85.

> over the arrestee. The reason would appear to be that, if the Court had no jurisdiction over the arrestee at the date of the arrestment, the Court's order upon him could have no validity".[1]

This dictum is not easy to construe. The words "the Court's order" may mean the order, which is implicit in every effectual arrestment, interpelling the arrestee from parting with the arrested funds or goods, although such a meaning seems perilously close to assuming as true the very proposition which has to be explained. The words may also include a reference to the subsequent decree of furthcoming. What seems to be true is that without jurisdiction over the arrestee, the court's notional order, implicit in the arrestment, interpelling the arrestee from parting with the arrested subjects could not be made effective by the court. It may be that Lord Patrick's dictum should be taken as referring to the principle of effectiveness.

2.22 Two possible bases. The incidents of the requirement of jurisdiction over the arrestee are uncertain because, in the virtual absence of direct authority examining the underlying rationale, the very basis of the requirement is not clear. It is thought that there are two possible main bases.

2.23 Principle of effectiveness and action by arrester. The first possible basis of the requirement which we have identified is the need to secure that the arrestment can be made effective by the Scottish courts by decrees or orders binding the arrestee, in other words the principle of effectiveness. As we have seen[2] that principle may conceivably have been accepted by Lord Patrick in the O'Brien case.[3] If that principle has been, or were to be, recognised as the main basis of the requirement, then

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[1] Ibid at p 86.

[2] See para 2.21.

[3] O'Brien v A Davies and Son Ltd 1961 SLT 85 at p 86.

"jurisdiction" in the sense of the requirement has, or would have, reference to jurisdiction in an action or notional action of furthcoming or other proceedings by the arrester against the arrestee designed to compel him to obtemper the arrestment or an action of damages by the arrester against the arrestee for breach of arrestment.

2.24 Judicial assignation theory and action by common debtor. The second possible basis which we have identified is the need to secure (in conformity with the judicial assignation theory of arrestments) that the arrester does not acquire, by virtue of the arrestment, a higher right against the arrestee than the common debtor had, but stands in the common debtor's shoes. If that theory has been, or were to be, adopted as the main basis of the requirement, then "jurisdiction over the arrestee" within the meaning of the requirement has, or would have, reference to jurisdiction in an action, or notional action, by the defender or common debtor against the arrestee brought or competent at the time of the execution of the arrestment to enforce the arrested obligation to pay, account or deliver or to recover damages for breach of that obligation.

2.25 We think that what we have called the judicial assignation theory is more consistent with the authorities than the competing theory. First, the judicial assignation theory is consistent with the internal rule of Scots law that the proper subject matter of arrestment is the arrestee's obligation to pay, account or deliver to the defender or common debtor which is enforceable by a direct personal action at the latter's instance.[1] It is not enough for example that the arrestee has possession or

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[1] See eg Mitchell v Burn (1874) 1 R 900; Heron v Winfields Limited (1894) 22 R 182; Young v A/B Overums Bank (1890) 18 R 163; Shankland & Cor v McGildowny 1912 SC 857; J & C Murray v Wallace, Marrs, & Co 1914 SC 114.

custody of goods in Scotland belonging to the defender or common debtor; the arrestee must have an obligation to account to the defender or common debtor enforceable by direct personal action. Thus, for example, in Mitchell v. Burn[1] Lord President Inglis said in respect of an arrestment of freight to found jurisdiction against shipowners,

> "The simple question is, whether the shipowners could maintain a direct personal action against the arrestees for payment of the freight or not. If they could not there is no subject of arrestment".[2]

Again, in J & C Murray v. Wallace, Marrs & Co[3], Lord Mackenzie observed[4]:

> "Unless the defenders could have brought an action against [the purported arrestee] founded upon a direct personal obligation, arising *ex contractu* or *quasi ex contractu*, the arrestments are bad. An action of the nature of *rei vindicatio* would not, for this purpose, be sufficient. It would not be enough to make the arrestments good, that the defenders had the ultimate right of property in what was arrested".

2.26 If, as these authorities demonstrate, the proper subject matter of arrestment under the internal rules of Scots law is an obligation to pay, account or deliver which is enforceable by direct personal action by the defender or common debtor against the arrestee, and given that an arrestment assigns both the obligation and the right of action to the arrester, one would

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[1] (1874) 1 R 900.

[2] Ibid at p 904.

[3] 1914 S C 114 (in action by agents against their principal, arrestments laid in hands of the agents' agent a Glasgow bank holding bills of lading belonging to the principal; arrestment held inept as agents' agent had no obligation to account to the principal).

[4] *Ibid* at p 122.

expect that, as a matter of private international law, the requirement of jurisdiction over the arrestee would have reference to jurisdiction in such an action.

2.27 Second, in the leading modern case of McNairn v. McNairn[1] discussed below,[2] the ground of judgment was that as the arrestee carried on business at a branch office in Scotland, and therefore payment of the debt could be enforced in Scotland, there was an arrestable liability to account in Scotland. Here the emphasis was on jurisdiction in an action for payment of the debt by the common debtor against the arrestee, and no mention was made of jurisdiction in an action by the arrester of furthcoming. The judicial assignation theory is expressly supported by the sheriff court case of J Verrico & Co Ltd v. Australian Mutual Provident Society[3]. That case concerned the validity and effectiveness of the purported arrestment of the surrender value of two insurance policies which by contract were payable only in London. Sheriff Principal Sir Allan Walker held[4] that the insurance company in whose hands the purported arrestment had beenn laid could successfully have resisted an action by the common debtors, for payment of the surrender values, on the ground of want of jurisdiction in Glasgow sheriff court, and that, as the purported arresters could claim no higher right than the common debtors had, it must follow that the purported arrestment was ineffectual. This case strongly supports the view that the test of jurisdiction over the arrestee has reference to jurisdiction in an action or notional action by the common debtor, in respect of the arrested obligation to pay, account or deliver, brought or competent at the time of the arrestment. We venture to suggest

[1] 1959 SLT (Notes) 35.

[2] See para 2.58.

[3] 1972 SLT (Sh Ct) 57.

[4] Ibid at p 60.

later[1] that the learned Sheriff Principal may have been incorrect in holding that such an action or notional action was not competent at the time of arrestment in the circumstances of that case. But we respectfully agree that the test of jurisdiction over the arrestee has, or should have, reference to an action at the instance of the common debtor to enforce the obligation sought to be arrested.

2.28 The judicial assignation theory does not however explain how the requirement of jurisdiction over the arrestee falls to be applied if the arrestable obligation is a debt which is not payable, and therefore not recoverable by action, until a date or event occurring after the date of arrestment. We revert to this matter at para 2.31 below.

### (c) Incidents of the rule requiring arrestee to be subject to the jurisdiction

2.29 Rule applies to all forms of arrestment. The rule that the arrestee must be subject to the jurisdiction of the Scottish courts applies to an arrestment to found jurisdiction[2], arrestment on the dependence[3], and arrestment in execution.[4] This comprehensive scope of the rule is consistent with the principle that though the effects of the three types of arrestment differ, the test of their validity and effectiveness and their conceptual foundation are the same, the test for arrestment to found jurisdiction and on the dependence being whether the

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[1] See paras 2.73 to 2.85.

[2] McNairn v McNairn 1959 SLT (Notes) 35; O'Brien v A Davies & Son Ltd 1961 SLT 85.

[3] Brash v Brash 1966 SC 56.

[4] J Verrico & Co Ltd v Australian Mutual Provident Society 1972 SLT (Sh Ct) 57.

subjects could be arrested in execution.[1]

2.30 Tempus inspiciendum for ascertaining ground of jurisdiction over the arrestee. It is clear that jurisdiction over the arrestee must be ascertained as at the date of the execution of the arrestment or purported arrestment.[2] Thus jurisdiction is jurisdiction in an action or notional action at that date against the arrestee and, as we argued at paras 2.20 to 2.28 above, probably the action is one at the instance of the defender or common debtor. It is not jurisdiction in a future action of furthcoming by the arrester against the arrestee. Although in Brash v. Brash[3] Lord Kissen said that an arrestment on the dependence could not be recalled "if the pursuer could have suggested a possible ground of jurisdiction which might be founded

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[1] See eg Trowsdale's Tr v Forcett Railway Co (1870) 9 M 88 at p 92 per Lord Justice-Clerk Moncreiff; North v Stewart 17R (HL) 60; Leggat Brothers v Gray 1908 SC 67 at p 71 per Lord President Dunedin and at p 76 per Lord Kinnear; J & C Murray v Wallace, Marrs, & Co 1914 SC 114 at p 120 per Lord President Strathclyde; Agnew v Norwest Construction Co 1935 SC 771 at p 778 per Lord Justice-Clerk Aitchison.

[2] See eg the dictum of Lord Patrick in O'Brien v A Davies & Son Limited 1961 SLT 85 at p 86 (quoted at para 2.21 above) which refers at two places to jurisdiction "at the date of the arrestment"; see also J Verrico & Co Ltd v Australian Mutual Provident Society 1972 SLT (Sh Ct) 57 at p 60: "The sole question for decision... is whether the [common debtors] could at the date of the purported arrestment, have enforced a claim against [the purported arrestees] in Glasgow, and in the sheriff court in Glasgow, for payment to them of the surrender value of the policies". (emphasis added).

[3] 1966 SC 56.

on in an action of furthcoming",[1] it is thought that his Lordship was not there referring to jurisdiction in an action of furthcoming but rather jurisdiction over the arrestee at the date of arrestment which could be founded on if and when the question of the validity of the arrestment was determined by the court in a subsequent action of furthcoming.

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[1] Ibid at p 57.

2.31 Jurisdiction over arrestee where arrested debt payable in future. The requirement that the arrestee must be subject to the jurisdiction of the Scottish courts in respect of an action to enforce the obligation to pay, account or deliver to the defender or common debtor at the date of the arrestment encounters an apparent difficulty where the arrested debt is not payable until the arrival of a date or the occurrence of an event after the date of the arrestment.[1] The requirement that the Scottish courts have jurisdiction over an arrestee can only mean jurisdiction in an action, or notional action, at the date of the arrestment. How can such a requirement be applied in practice in circumstances where, at the date of the arrestment, no action for payment is competent because the debt is not yet payable?

2.32 This apparent difficulty does not seem to have been expressly considered in any reported judgment. In none of the reported cases affirming the requirement of jurisdiction over the arrestee was the point raised that an action for payment at the date of the arrestment, or purported arrestment, was not competent because the debt was not yet payable or not yet payable on demand. In most of the cases the arrested debt could probably have been pursued by the defender or common debtor at the date of the arrestment since the arrested debt was apparently immediately payable on demand.[2] In the Verrico case[3], in which the surrender value of an insurance policy was held not to have been arrested, the ground of judgment was that the arrestee's debt was not actionable because at the time of arrestment no demand had been made in London as required by the insurance policy, but the arrestment did not relate to a future debt in the relevant sense.In one very old case involving an arrestment of an

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[1] For a brief discussion of arrestable debts payable on a future date, see para 2.11 above.

[2] Skardon (John Dunn's Executors v Canada Investment and Agency Company Ltd (February 1898, not reported) noted in Wallace and McNeil (9th edn) p 205, fn 3; Hopper & Co v Walker (1903) 20 Sh Ct Rep 137; McNairn v McNairn 1959 SLT (Notes) 35; Brash v Brash 1966 SC 56.

[3] J Verrico & Co Ltd v Australian Mutual Provident Society 1972 SLT (Sh Ct) 57.

interest in a partnership,[1] it is not clear that the partner-common debtor could have sued the partner-arrestees for his share of the partnership assets which were presumably not payable till the dissolution of the partnership,[2] but it may be that an action of accounting would have been competent at the date of arrestment. In a modern case,[3] relating to the purported arrestment of a payment under a contract, it is not clear from the report whether the time of payment had arrived: parties were agreed that the test of jurisdiction over the arrestee was whether at the time of arrestment the arrestee had a place of business and carried on business in Scotland.

2.33 In the absence of authority, it seems likely that, in the case of an arrestment of a debt which, at the date of the arrestment, is payable only at a future date, the test of jurisdiction over the arrestee falls to be applied either upon the fictional hypothesis that the debt is immediately payable and therefore actionable at that date or upon the hypothesis that although an action for payment is not yet competent, nevertheless an action of accounting is competent since the relationship of debtor and creditor exists. The second hypothesis seems artificial in the simple case where the future debt is specific and known to all parties, and does not require to be ascertained by an action of accounting. Given that jurisdiction must be established at the date of the execution of the arrestment and not on any future date such as the commencement of the action of furthcoming

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[1] Rae v Neilson (1742) Mor 716.

[2] Arrestment is competent while the partnership is a going concern but an action of furthcoming is not competent till the dissolution of the partnership: Erskine Institute III, 3, 24; Miller The Law of Partnership in Scotland (1973) p 397.

[3] O'Brien v A Davies and Son Ltd 1961 SLT 85.

(especially in arrestments to found jurisdiction where there is no action of furthcoming, but also in arrestments on the dependence and in execution), it is difficult to see what other test could be applied by the courts.

2.34 The question then arises whether such a test based on either hypothesis would in some circumstances infringe the general principle that an arrestment, as a judicial assignation, carries no higher right against the arrestee than the defender or common debtor had at the date of the arrestment. This possibility might arise if, between the date of the arrestment and the later date when the debt becomes payable, the Scottish courts were to lose jurisdiction over the arrestee because of a change in the arrestee's domicile (being the principal ground of jurisdiction since 1987[1]) so that at the date when the debt became payable, those courts no longer had jurisdiction to entertain an action for payment at the instance of the defender or common debtor. In Part IV below we argue that Article 16(5) of the European Judgments Convention automatically gives jurisdiction to the Scottish courts in an action of furthcoming brought after the date of payment of the arrested debt has arrived. On that view, the arrester would in effect have derived from the arrestment a higher right against the arrestee than the defender or common debtor had. We revert to the grounds of jurisdiction in actions of furthcoming below.[2]

2.35 The grounds of jurisdiction over the arrestee. We note below that the rules for the assumption of jurisdiction by the Scottish courts have been much altered by the Civil Jurisdiction and Judgments Act 1982 which came into force on 1 January

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[1] See para 2.38 below.

[2] See Part IV below.

1987. It is probable that, before that Act came into force, the proposition that the arrestee must be subject to the jurisdiction of the Scottish courts was not restricted to jurisdiction by reason of the arrestee residing, or carrying on business and having a place of business, in Scotland at the time of the execution of the arrestment. In principle it applied where at that time the arrestee had for example prorogated the jurisdiction of the Scottish courts in respect of his debt or liability to account to the common debtor. The terms of Erskine's statement of the law[1] and of the Court's interlocutor in the Douglas, Heron and Company case[2] suggest that the fundamental principle is that the arrestee must be subject to the jurisdiction of the Scottish courts,and that his having a "forum" (meaning presumably a residence or place of business) in Scotland was relevant simply as being at that time the normal connecting factor vesting jurisdiction over a foreign arrestee in the Scottish courts. The fact however that in the Douglas, Heron and Company case prorogation did not render effectual the arrestments laid in the hands of the English company[3] does introduce an element of doubt. Subsequent text-book authorities state the general rule as being that the arrestee must be subject to the jurisdiction of the Scottish courts[4] and do not add a requirement that the ground of jurisdiction had to be residence, or carrying on business and having a place of business, within the territorial jurisdiction.

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[1] Erskine Institute III, 6, 3: see para 2.17 above.

[2] Douglas, Heron, and Company v Palmer (1777) 5 Brown's Supp 449 quoted at para 2.18 above.

[3] See para 2.18 above.

[4] See eg Graham Stewart, p 37: "the arrestee must be subject to the jurisdiction of the Scottish courts"; Anton (1967) p 112: "It is essential, however, that the arrestee be subject to the jurisdiction and that his liability is to account within the jurisdiction"; see also Maher and Cusine, para 4.29.

In the Outer House case of Brash v. Brash[1], the pursuer in a divorce action used arrestments on the dependence in the hands of the Chartered Bank in London. She was unable to suggest how the Scottish courts could have jurisdiction over the bank and Lord Kissen held that in these circumstances it was competent for the court to recall the arrestment. The significance of this case for present purposes is that his Lordship did not require that jurisdiction be founded on a place of business in Scotland. He observed that "the position would have been very different if there was any real dispute about the question of jurisdiction or if the pursuer could have suggested a possible ground of jurisdiction which might be founded on in an action of furthcoming. It seems to me that where, as here, the pursuer cannot suggest how the Chartered Bank could ever be subject to the jurisdiction of the courts in Scotland, this court can say that these 'arrestments should never have been used at all'".[2] It is unlikely that his Lordship would have referred to "a possible ground of jurisdiction" if there were only one possible ground of jurisdiction, namely a place of business and carrying on business, and if for example prorogation had been excluded.

2.36 The main doubt about this arises from Trowsdale's Trustee v. Forcett Railway Co[3] (other aspects of which are considered more fully below[4]). In that case, an attempted arrestment at an estate in Ballachulish belonging to the purported arrestee was held ineffectual because the purported arrestee did not have a proper residence in Scotland. There was at that time good authority that ownership of a beneficial interest in heritable property in Scotland clothed the Court of Session with jurisdiction not only in actions relating to that property but also in personal actions against the

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[1] 1966 S C 56.

[2] Ibid at p 57 (emphasis added).

[3] (1870) 9 M 88.

[4] See para 2.64ff.

owner.[1] This continued to be the rule until 1 January 1987.[2] Nevertheless, in the Trowsdale's Trustee case, this rule was not referred to by two of the three judges who gave opinions. The third judge, Lord Cowan, remarked that[3]:

> "the proper domicile of [the purported arrestee] is England; and although he is proprietor of an heritable estate in Scotland, this does not in itself make him liable to the jurisdiction of the Scottish Courts for personal debts, more especially for debt contracted by him in England to an English creditor. Any such debt was exigible at the instance of the creditor only in England, unless diligence has been used by the creditor to constitute jurisdiction".

It appears therefore that the reason why Lord Cowan rejected the validity of the arrestment was inter alia that he believed (wrongly it is thought) that ownership of heritable property in Scotland was not a ground upon which the Court of Session could assume jurisdiction in a petitory or personal action against the owner. It seems to us therefore that Trowsdale's Tr. cannot be founded on as restricting jurisdiction over an arrestee to cases where the arrestee was resident in Scotland, but at most is only authority for its own facts, ie. as excluding arrestability in cases where jurisdiction is founded on ownership of heritage in Scotland. Even then, the fact that Lord Cowan misdirected himself as to the ownership of heritage jurisdictional rule makes it doubtful whether the case is even authority for its own facts.

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[1] Anton p 102 ff; Fernie and Fairley v Woodward (1831) 9 S 854; McArthur v McArthur (1842) 4 D 354.

[2] European Judgments Convention, Article 3; Civil Jurisdiction and Judgments Act 1982, Sch 4, Article 3; cf Sch 8, Rule 2(8)(b).

[3] (1870) 9 M 88 at p 93.

2.37 If the principle underlying the rule is that an arrestment is of the nature of a judicial assignation of the defender's or common debtor's right of action against the arrestee,[1] then any right which the defender or common debtor has to found jurisdiction in such an action on any competent ground should be available to the arrester by virtue of the deemed assignation.

2.38 Jurisdiction over arrestee determined by reference to the Civil Jurisdiction and Judgments Act 1982. In principle, the requirement that for an arrestment to be valid and effectual the arrestee must be subject to the jurisdiction of the Scottish courts, must, we think, have reference to the rules of jurisdiction for the time being in force relating to actions enforcing the obligation to pay, deliver or account which is said to be arrested. Before the Civil Jurisdiction and Judgments Act 1982 came into force on 1 January 1987, the principal grounds of jurisdiction in petitory actions to enforce obligations to pay, account or deliver, or for damages for breach of such an obligation, were (i) in the case of an individual defender, his residence in Scotland or in the sheriffdom, and (ii) in the case of a defender company, the company's carrying on business, and having a place of business, in Scotland or in the sheriffdom. The 1982 Act however has introduced new and more complicated rules which, it is thought, apply automatically to jurisdiction over an arrestee for the purpose of determining the validity and effectiveness of arrestments.

2.39 It is not appropriate or necessary to set out the new rules of jurisdiction in detail here but in summary the following main requirements would apply to jurisdiction over an arrestee (the list is not exhaustive).

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[1] See para 2.5 above.

(1) The arrestee's domicile is in Scotland. The Scottish courts will have jurisdiction over the arrestee if he is domiciled in Scotland under the European Judgments Convention (1982 Act, Sch. 1), Article 2; 1982 Act, Sch. 4, Article 2; and Sch. 8, Rule 1. "Domicile" is defined by sections 41 to 46 of the 1982 Act (see next paragraph).

(2) The arrestee's domicile is not in Scotland but the arrestee is required to perform the arrested contractual obligation in Scotland: here the Scottish courts have jurisdiction under the Convention (1982 Act, Sch. 1), Article 5(1) (where arrestee domiciled in another Contracting State); Sch. 4, Article 5(1) (where arrestee domiciled in another part of the United Kingdom, ie. in England and Wales or in Northern Ireland); and Sch. 8, Rule 2 (2) (where the arrestee is not domiciled in a Contracting State).

(3) The arrestee's domicile is not in Scotland but the arrested obligation arises out of the operations of a branch, agency or other establishment of the arrestee in Scotland: here the Scottish courts have jurisdiction under the Convention (1982 Act, Sch. 1), Article 5(5) (where arrestee domiciled in another Contracting State); 1982 Act, Sch. 4, Article 5(5) (where arrestee domiciled in another part of the United Kingdom); and Sch. 8, Rule 2(6) (where the arrestee is not domiciled in a Contracting State).

(4) The arrestee is not domiciled in any Contracting State and either (a) any moveable property belonging to him has been arrested in Scotland (ie in connection with an action against him by the defender or common debtor) or (b)

immoveable property in which the arrestee has a beneficial interest is situated in Scotland. Here the Scottish Courts have jurisdiction under Sch. 8, Rule 2(8). It seems unlikely that ground (a) will be relevant often to jurisdiction over an arrestee but ground (b) may well be important.

(5) The arrestee has prorogated the jurisdiction of the Scottish courts by agreement or by entering appearance in an action by the defender or common debtor: here the Scottish courts have jurisdiction under the Convention (Sch. 1) Articles 17 (agreement) and 18 (entering appearance); Sch. 4, Articles 17 and 18; and Sch. 8, Rules 5 and 6.

2.40 Section 41 defines the domicile of individuals. Section 41(2) of the 1982 Act provides that an individual is domiciled in the United Kingdom if and only if (a) he is resident in the United Kingdom; and (b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom. Section 41(3) makes similar provision concerning the domicile of an individual in a part of the United Kingdom (Scotland; England and Wales; Northern Ireland). Section 42 defines the domicile of corporations (including Scottish partnerships) and associations (unincorporated bodies of persons). Under Section 42(1) "the seat" of a corporation or association is treated as its domicile. Under section 42(3) a corporation or association has its seat in the United Kingdom if and only if (a) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address[1] in the United Kingdom or (b) its central management and control is exercised in the United Kingdom. Once it has been ascertained that a corporation or association has its seat in the

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[1] Under s 42(8), "official address" means an address which the corporation or association is required by law to register, notify or maintain for the purpose of receiving notices or other communications.

United Kingdom, section 42(4) provides that it has its seat in a particular part of the United Kingdom if and only if it has its seat in the United Kingdom and (a) it has its registered office or some other official address in that part; or (b) its central management and control is exercised in that part; or (c) it has a place of business in that part. It will be seen that jurisdiction over corporations is somewhat more limited than under the previous law where carrying on business and having a place of business in Scotland sufficed to establish jurisdiction in Scotland. Thus under the new rules, where a company was incorporated in a country outside the United Kingdom and exercises central management and control in such a country, it is domiciled outside the United Kingdom. However an arrestment laid in its hands at a place of business in Scotland will not necessarily be ineffectual through want of jurisdiction, because there are other special tests of jurisdiction eg. where the arrested obligation is a contractual obligation required to be performed in Scotland, or more importantly, the arrested obligation arises out of the operations of a branch, agency or other establishment of the arrestee in Scotland.

2.41 The Convention and the 1982 Act provide for certain special rules relating to insurance and consumer contracts[1] which limit the places where a policy holder or consumer may be sued and extend the places where he may sue.[2] These will be relevant inter alia to the arrestment of the contents of some insurance policies.

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[1] Convention (Sch 1) Articles 7 to 15; Sch 4, Articles 13 and 14; Sch 8, rule 3.

[2] See Anton Civil Jurisdiction, paras 6.01 - 6.33.

2.42 The only other provision of the Convention noted here is Article 16(5) which we discuss fully in Part IV below. It seems to us that Article 16(5) does not change or affect the rules on the validity and effectiveness of an arrestment but relates rather to jurisdiction in actions of furthcoming and incidental court applications for recall or restriction of an arrestment, or suspension of diligence , or other orders for the control of diligence.

2.43 Summary of incidents of rule. The foregoing discussion of the nature and incidents of the rule requiring the arrestee to be subject to the jurisdiction of the Scottish courts may be summarised in the following propositions.

(1) The basis of the rule is not clear but it is probably based on the theory that arrestment operates as a judicial assignation to the arrester of the right of action of the defender or common debtor against the arrestee (paras 2.20 to 2.28). In other words jurisdiction over the arrestee has reference to jurisdiction in an action or notional action, by the defender or common debtor against the arrestee, brought or competent at the time of arrestment to enforce the obligation to pay, account or deliver or to recover damages for breach of that obligation.

(2) The rule applies to arrestments to found jurisdiction, on the dependence and in execution (para 2.29 above).

(3) Jurisdiction over the arrestee must exist as at the date of execution of the arrestment (para 2.30).

(4) In the case of an arrestment of a debt which, at the date of the arrestment, is payable only at a future date, it seems likely that the test of jurisdiction over the arrestee falls to be applied either upon the fictional hypothesis that the debt was immediately payable or payable on demand on that date, or upon the hypothesis that although an action for payment is not yet competent, nevertheless an action of accounting is competent. There is however no reported decision on the matter. Such a test based on either hypothesis may give the arrester a higher right than the defender or common debtor had if the Scottish courts were to lose jurisdiction over the arrestee between the date of arrestment and the date when the debt becomes payable (paras 2.31 to 2.34).

(5) Though there is some doubt about the matter, deriving mainly from Trowsdale's Tr. v. Forcett Railway Co[1], it is thought that in principle jurisdiction over the arrestee may be based on any competent ground of jurisdiction upon which the defender or common debtor could found in an action to enforce the arrested obligation to pay, account or deliver or for damages for breach of such an obligation (paras 2.35 to 2.37) and that these now consist of the grounds introduced on 1 January 1987 by the European Judgments Convention and the Civil Jurisdiction and Judgments Act 1982 (paras 2.38 to 2.42).

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[1] (1870) 9 M 88 (discussed at para 2.36 above).

### (5) A possible third rule: the arrested subjects must be within the jurisdiction

2.44 Preliminary. There is a long line of judicial dicta to the effect that the validity and effectiveness of an arrestment depends on the fact that the location or situs of the arrested subjects is within the territorial jurisdiction of the Scottish courts. Many of these dicta relate to arrestment to found jurisdiction which, as we noted above,[1] attracts the same test of validity and effectiveness as an arrestment on the dependence or in execution. Thus there are cases dating from the period when it was thought that an arrestment to found jurisdiction imposed a temporary nexus, containing dicta stating that such an arrestment "fixes" the moveable property arrested within the jurisdiction of the court.[2] In Trowsdale's Tr. v Forcett Railway Co[3] Lord Justice-Clerk Moncreiff remarked that an arrestment in execution fixes the subject arrested within the jurisdiction, and the subjects must be capable of being fixed within the jurisdiction[4], and in another case[5] Lord President Dunedin said that that was the "underlying idea" of an ordinary arrestment. When it came to be accepted that an arrestment to found jurisdiction does not impose even a temporary nexus, it was stated that the basis of that form of arrestment is that it attests the existence of goods within the jurisdiction which could be taken in execution. For example in the Trowsdale's Tr case, Lord Neaves said with reference to arrestment to found jurisdiction:

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[1] Para 2.29.

[2] Eg McArthur v McArthur (1842) 4 D 354 at p 362; Lindsay v N W Rly Co (1860) 22 D 571 at p 585; Longworth v Hope (1865) 3 M 1049 at p 1055.

[3] (1870) 9 M 88 at p 95: quoted at para 2.93 below.

[4] Idem, quoted at para 2.64 below.

[5] Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967 at p 972 quoted at para 2.46 below.

"The principle rests on the fact that there is something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced".[1] (emphasis added).

In Leggat Brothers v. Gray[2] Lord Kinnear observed:

"The doctrine is that, whatever be the origin of arrestment for founding jurisdiction, it proceeds upon the hypothesis that there is in fact something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. I think it is a good test of the validity of an arrestment for founding jurisdiction to inquire whether it purports to affect any property or fund which could be taken in execution." (emphasis added).

2.45 This theory is however apparently contradicted by other cases affirming the validity and effectiveness of the arrestments of debts which, by the ordinary rules governing the location or situs of debts, are located outside the territorial jurisdiction of the court, in circumstances where the arrestee is subject to the jurisdiction of the Scottish courts for the purposes of the enforcement of the arrested debt.[3] The location of a debt, however, is a legal fiction and it might be possible to reconcile the apparently conflicting cases on the ground that a debt is located within the jurisdiction, for the purpose of the rules on the validity and effectiveness of arrestments, if the arrestee is subject to the jurisdiction of the Scottish courts. It is therefore necessary to examine what is meant by "arrestable subjects within the jurisdiction" for the purpose of the rules on the validity and effectiveness of arrestments.

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[1] Ibid at p 95. See also North v Stewart (1890) 17 R (HL) 60 at p 65 per Lord Herschell: "As I understand the law of Scotland, in order to found jurisdiction, it is necessary that there should exist in Scotland a subject-matter belonging to the defender capable of being arrested" (emphasis added).

[2] 1908 SC 67 at p 77.

[3] Eg Skardon (John Dunn's Executors) v Canada Investment and Agency Company Ltd (February 1898, not reported) noted in Wallace and McNeil (9th edn; 1986) p 205 fn 3; McNairn v McNairn 1959 SLT (Notes) 35.

2.46 Categories of arrestable subjects. For the purpose of ascertaining what is meant by the phrase "arrestable subjects within the jurisdiction", a number of distinctions have to be made. First, arrestments of ships form a special category. There the arrestment is not laid in the hands of an arrestee but is directed against the ship herself. There is no doubt that the ship must be at an anchorage within the jurisdiction at the time of execution of the arrestment. The effect of an arrestment is to fix the ship in the place where she is found, whereas an arrestment in the hands of an arrestee interpels the arrestee from parting with the arrested subjects. In Clan Line Steamers Ltd v. Earl of Douglas Steamship Co Ltd[1] Lord President Dunedin after referring to the foregoing difference, observed:

> "But although arrestment as applied to a ship is, so to speak, peculiar, none the less the underlying idea of it is precisely the same as ordinary arrestment, namely, to fix in the territory something which shall be a fund of payment for the decree which is got under the petitory conclusion".[2]

Though the underlying idea may be the same, two possible differences may be noted. In the first place, the notion of fixing an incorporeal pecuniary debt within the territory is artificial, and must have a different meaning from fixing a corporeal thing like a ship. In the second place, even as compared with an arrestment of corporeal moveables, arrestments of ships may differ. It is at least possible that an arrestee may have an obligation to deliver within the jurisdiction goods which are not, or not yet, within the jurisdiction. This possibility cannot arise in the case of an arrestment of a ship because it is the ship herself, and not the

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[1] 1913 SC 967.

[2] Ibid at p 972.

arrestee's obligation to deliver, which is arrested for there is no arrestee. We revert to these aspects of ordinary arrestments below.

2.47 Second, all other arrestments are laid in the hands of arrestees and these may be classified by reference to the type of obligation owed by the arrestee to the defender or common debtor which is sought to be attached by the arrestment. There seem to be three main categories of such obligations, namely:

(1) to pay a pecuniary debt;

(2) to deliver corporeal moveables; and

(3) to account in order to ascertain whether there is a balance due or property which must be delivered or conveyed.

Each of these obligations in turn raises further issues turning on whether the place of performance of the obligation to pay, deliver or account is within the jurisdiction and whether the location or situs of the debt, or the corporeal moveables, or the subject matter of the accounting, is within the jurisdiction. At present obligation to pay implies an obligation to account (though not vice versa)[1] and it is convenient to consider obligations to pay and to account together[2], leaving obligations to deliver corporeal moveables till later.[3]

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[1] Riley v Ellis 1910 SC 934 at pp 941, 942 per Lord President Dunedin: "an obligation to pay necessarily includes an obligation to acccount. But there may be an obligation to account when at the moment there is no obligation to pay".

[2] See next paragraph.

[3] See para 2.87 ff.

(a) **Arrestment of debts and obligations to account**

2.48 Two theories on extra-territorial effect of arrestment of debts. As we have seen, there are two theories underlying the case law on the extra-territorial effect of arrestments. The theories have a measure of common ground insofar as both agree that for an arrestment to attach subjects effectually, the arrestee must be subject to the jurisdiction of the Scottish courts, and the debt arrested must be one which may be recovered by an action raised in Scotland. Indeed as a matter of terminology both theories agree that the subjects of arrestment must be located in Scotland. The difference between the two theories probably narrows down to the view that under one theory a debt is located in Scotland for the purposes of the effectiveness of arrestments if it can be recovered by an action for payment, or may be the subject of an action of accounting, raised in Scotland, whereas the other theory holds that a debt is not located in Scotland for those purposes if there is no obligation to pay or to account for the debt in Scotland. We shall call the first theory the "recoverability by action" theory and the second "the place of payment" theory.

**The location or situs of a debt**

2.49 If the general principle be that the validity and effectiveness of an arrestment depends on there being subjects capable of arrestment within the jurisdiction of the Scottish courts, the critical task is to define the circumstances in which a debt is treated by Scots law as within Scotland for the purposes of the rules governing the validity and effectuality of arrestments. Since a debt is incorporeal and the location of a debt is a

creation of law or legal fiction, different locations can be ascribed to the same debt for different purposes: "it does not follow that if a particular type of chose in action [incorporeal moveable] is regarded for one purpose as situate in one country, it will be held there situate for another purpose".[1] There are however more or less general rules defining the location or situs of a debt for different purposes, eg. liability to tax[2] and the confirmation of executors[3], and it may be useful to describe these rules as a preliminary to assessing whether or how far they apply in relation to the arrestment of debts within Scotland.

2.50 A debt can be looked upon either as an obligation in the context of the relations between the debtor and creditor, or as a species of incorporeal moveable property, (called in English law a "chose in action"), owned by the creditor which he can assign to others.[4] At one time it was thought that, as an incorporeal obligation, a debt had no situs[5] but it is now accepted that the "law does in fact attribute a situs to debts for certain purposes".[6]

2.51 The courts have developed the following general rules determining the situs of a debt which apply in the absence of

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[1] Dicey and Morris p 908.

[2] Kwok v Estate Duty Commissioner [1988] 1 WLR 1035 (PC) at p 1040.

[3] Anton pp 489, 490 citing Graham Stewart pp 738 and 749 and Attorney-General v Bouwens (1838) 4 M & W 171 at p 191.

[4] See eg K G C Reid "Unintimated assignations" 1989 SLT (Articles) 267.

[5] See Graham Stewart, p 738, fn 1.

[6] Anton pp 408, 409; Dicey and Morris, p 908.

[7] See next paragraph.

special rules applicable in particular contexts. We revert later[7] to the question whether they have been changed by a side-wind by the new statutory rules of jurisdiction.

(1) The normal rule is that debts "are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced"[1], which is normally the debtor's residence or place of business[2].

(2) Since a debt is incorporeal, it can have more than one location. It follows that where the debtor is for example a company having a number of "residences" or places of business, a debt due by the company can likewise have a number of locations.[3]

(3) In English law, in the case of a corporate debtor, the test of the location of the debts which it owes is as follows:

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[1] New York Life Insurance Co v Public Trustee [1924] Ch 101 at p 109 (CA); Dicey and Morris p 907, Rule 115 (1).

[2] Anton p 409 "A simple contract debt... is deemed to be situated where the debtor resides and in the end, the co-operation of the country of his residence will be required to secure payment of the debt by the operation of diligence". See also Dicey and Morris, 908: "A debt (other than a judgment debt, a specialty debt, or a debt incorporated in a security transferable by delivery) is situated in the country where the debtor resides, for it is only in that place that the creditor can normally enforce payment".

[3] See eg Bishop v Mersey and Clyde Navigation Co Ltd (1830) 8 S 558; Aberdeen Rly Co v Ferrier (1854) 16 D 422; Thomson v North British and Mercantile Insurance Co (1868) 6 M 310; Anton, p 409.

"Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable, and, therefore, situated, in that one of those countries where the sum payable is primarily payable, and that is where it is required to be paid by an express or implied provision of the contract, or, if there is no such provision, where it would be paid in the ordinary course of business...".[1]

It is probable that Scots law would adopt this test for some purposes, but it does not follow that Scots law adopts that test for the purpose of determining the validity and effectiveness of arrestments.

(4) (a) At common law, in the absence of an express or implied agreement by the parties determining the place where a debt due under a contract is required to be paid, the rules of construction of the proper law of the contract determines that place.[2]

(4) (b) The test determining the proper law of a banking contract has been described in the recent English case of Libyan Arab Bank Co v. Bankers Trust Co[3] where Staughton J observed[4]:

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[1] Jabbour v Custodian of Israeli Absentee Property [1954] 1 All ER 145 at p 152 per Pearson J; citing R v Lovitt [1912] AC 212; New York Life Insurance Co v Public Trustee [1924] 2 Ch 101; applied in Rossano v Manufacturers' Life Insurance Co [1963] 2 QB 352 at pp 378-379 per McNair J and in Kwok v Estate Duty Commissioner [1988] 1 WLR 1035 (PC) at p 1042.

[2] Anton, pp 217, 218 (citing F A Mann The Legal Aspect of Money (2nd edn) p 174; see now 3rd edn, pp 205, 206).

[3] [1989] QB 728.

[4] Ibid at p 746.

"As a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary. Again there was no challenge to that as a general rule; the fact that no appellate decision was cited to support it may mean that it is generally accepted. However, since the point is of some importance, I list those authorities that were cited. They are X A G v. A Bank [1983] 2 All E R 464; Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation [1986] Ch 482, 494; Dicey & Morris, The Conflict of Laws 11th ed. (1987), p 1292, n. 51; Rabel, The Conflict of Laws, 2nd ed., p. 17; American Law Institute, Restatement of the Law, Conflict of Laws 2d, vol. 4 (1979), para. 622, and the Memorandum of Law in the Wells Fargo case[1] which I have referred to, and the Lexis report of judgment in that action.

That rule accords with the principle, to be found in the judgment of Atkin L J in N Joachimson v. Swiss Bank Corporation [1921] 3 K B 110, 127, and other authorities, that a bank's promise to repay is to repay at the branch of the bank where the account is kept.

In the age of the computer it may not be strictly accurate to speak of the branch where the account is kept. Banks no longer have books in which they write entries; they have terminals by which they give instructions; and the computer itself with its

[1] Wells Fargo Asia Ltd v Citibank NA (1985) 612 F Supp 351.

magnetic tape, floppy disc or some other device may be physically located elsewhere. Nevertheless it should not be difficult to decide where an account is kept for this purpose, and it is not in the present case".

(4) (c) The Contracts (Applicable Law) Act 1990 (c. 36) (which will come into force on an appointed day[1]) provides for the Rome Convention on the law applicable to contractual obligations to have effect in the United Kingdom.[2] Where a contract covered by the Convention has a connection with more than one country, the Convention will determine the law of which country is to govern the contract. The Convention will apply to conflicts between the laws of different parts of the United Kingdom.[3] The main provisions are that a contract covered by the Convention is to be governed by the law chosen by the parties[4] or, in the absence of choice, by the law of the country with which the contract is most closely connected[5] Certain

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[1] 1990 Act, s 7. The Act received the Royal Assent on 26 July 1990. At the time of writing this Paper, no commencement order had been made.

[2] The Convention is set out in Sch. 1 to the Act.

[3] 1990 Act, s 2(3).

[4] Convention, Article 4.

[5] Convention, Article 5(1).

presumptions are enacted for determining that country.[1] The Convention is to be interpreted in accordance with decisions of the European Court.[2]

(5) In the internal law of Scotland, the general rule is that the place of payment of a debt (ie. the place where the debt is required to be paid) is the place where the

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[1] The Convention Article 5 (2) provides: "Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated". Article 5(5) <u>inter alia</u> provides that Article 5(2) shall not apply "if the characteristic performance cannot be determined".

[2] 1990 Act, s 3.

creditor resides or has his place of business. Until recently the main authorities on the place of payment of a debt were text-book authorities,[1] one Scots Outer House case in which no ground of decision was reported[2] and English authorities. Thus Gloag on Contract[3] observed:

> "Where the contract makes no express provision regarding the place of payment, the legal implication is that the debtor is bound to tender payment to the creditor at his [scil. the creditor's] residence or place of business".

The matter has now been settled by the recent judgment of the First Division in Bank of Scotland v. Seitz[4] in which Gloag's statement of the law was approved and applied. A passage in Stair's Institutions[5] (not cited by Gloag) to a contrary effect was, for a variety of reasons, rejected so far as applicable to the place of payment of debts. Lord President Hope[6] adopted Lord Reid's dictum that "generally it is the duty of a debtor to seek out his

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[1] Gloag Contract (2nd edn, 1929) p 709; Anton p 217; Walker Contracts (2nd edn; 1985) para 31.14; McBryde Contract (1987) para 22-11.

[2] Haughhead Coal Co v Gallocher (1903) 11 SLT 156.

[3] (2nd edn) p 709 citing the Haughhead Coal Co case (supra); Robey v Snaefell Mining Co (1887) 20 QBD 152; Duval v Gans [1904] 2 KB 685; Fowler v Midland Electric Corporation [1917] 1 Ch 656.

[4] 1990 SLT 584 affg 1989 SLT 641.

[5] Stair Institutions I, 17, 19 stating inter alia: "...the debtor is not presumed to follow the creditor's residence if custom or paction be not otherwise".

[6] 1990 SLT 584 at p 589.

creditor and tender the amount of his debt".[1] It is thought that the foregoing rule normally applies where the creditor has two or more places of business so as to entitle the debtor to pay his creditor at any of those places of business.

(6) In the case of a contract between a banker and his customer, however, there is a special rule that the place of payment is normally at the branch where the account is kept. This exception was developed by English cases[2] and was accepted by Gloag[3] and all the judges in Bank of Scotland v. Seitz[4]. This special rule has the same effect as the general rule (ie. of payment at the creditor's residence) where the bank is creditor but differs in its effect from, and excludes, that general rule where the bank is debtor.[5] In the Bank of Scotland v. Seitz, Lord President Hope referred[6] with approval to the following dictum of Atkin L J in the Joachimson[7] case:

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[1] Arab Bank Ltd v Barclays Bank [1954] A C 495 at p 531.

[2] See Rex v Lovitt [1912] AC 212 at p 219; Clare & Co v Dresdner Bank [1915] 2 KB 576 at p 578; Joachimson v Swiss Bank Corporation [1921] 3 KB 110 at p 127; (all cited with approval by Lord President Hope in Bank of Scotland v Seitz 1990 SLT 584 at p 590); see also Richardson v Richardson [1927] P 228 at pp 232, 233; Libyan Arab Bank v Bankers Trust Co [1989] QB 728 at p 746 and 748, 749.

[3] Gloag Contract (2nd edn) p.709, fn 11.

[4] 1990 SLT 584 affg 1989 SLT 641.

[5] 1990 SLT 584 at p 594 per Lord Prosser.

[6] 1990 SLT 584 at p 590.

[7] Joachimson v. Swiss Bank Corporation [1921] 3 KB 110 (CA) at p 127.

"The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours... I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept".

The Lord President then observed: [1]

"In my opinion it makes no difference for this purpose whether the account is in credit or overdrawn. Whatever the state of the balance the account is to be seen for all ordinary purposes as localised at the branch where the account is kept, and it is to that branch that the customer must make payment in order to discharge or reduce his debt. No doubt he can make arrangements for the money to be transmitted to that account through other branches or agencies, but it is not until the money is received at the branch where the account is kept that the obligation is discharged".

In the Bank of Scotland v. Seitz case the same rule was applied to the payment of a debt due by a guarantor of the customer on the ground that the guarantees were so intimately connected with the customer's principal debt that no sensible distinction could be drawn as to the place of payment.

(7) It must be emphasised that the place of payment of the debt is normally only relevant in determining the situs of a debt in a case where the debtor has two or more "residences" or places of business as mentioned in head (3) above. Where the debtor resides in only one country, the debt is located only in that country even though it may be expressly or impliedly payable in another country.[2]

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[1] 1990 SLT 584 at p 590.

[2] Re Claim by Helbert Wagg and Co Ltd [1956] Ch 323.

(8) The foregoing rule that the situs of a debt or incorporeal moveable is in the country of the debtor's residence is general but not invariable.[1] Thus in an English case it was held that a debt due under an irrevocable letter of credit is located in the place where it is in fact payable against the documents.[2]

2.52 The rules fixing the situs of a debt primarily by reference to the debtor's residence or place of business have an out-of-date appearance now that the primary rule of jurisdiction is the debtor's domicile in terms of the European Judgments Convention, Article 2 and the Civil Jurisdiction and Judgments Act 1982, Sch. 4, Article 2, and Schedule 8, Rule 1.[3] We have seen that the debtor's residence or place of business was selected because it was thought that it is only in that country that the creditor can normally enforce payment.[4] If recoverability is the principle underlying the selection of residence or place of business as the primary test of situs, then the fact that domicile is the new primary test of jurisdiction arguably means that domicile should be recognised as the new test of situs. Indeed possibly other tests such as the place of payment might also be a test of situs since that is a ground of jurisdiction under the new rules.[5] It is thought however that the 1982 Act has not automatically changed the rules for determining the situs of debts by a side-wind, but the matter is not entirely free from doubt.

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[1] Cheshire Private International Law (11th edn; 1987) p 804.

[2] Power Curber International Ltd v National Bank of Kuwait [1981] 1 WLR 1233 at p 1240.

[3] See Kaye "Situs of Debts and Jurisdiction to Make Orders of Garnishee" [1989] Journal of Business Law 449 at p 452.

[4] See para 2.51, head (1), fn 2, above.

[5] Convention, Article 5(1); 1982 Act, Sch 4, Article 5(1); and Sch 8, Rule 2(2).

## The recoverability by action theory

2.53 These rules as to the *situs* of a debt are not, or not necessarily, applied under what we have called the recoverability by action theory. Under that theory, if at the time of the arrestment the arrestee is subject to the jurisdiction of the Scottish courts and can be sued for payment of the arrested debt at the instance of the defender or common debtor, the debt is validly and effectually attached by an arrestment in Scotland even though the location of the debt is outside Scotland under the rules for the attribution of a *situs* to a debt set out at para 2.51 above.

2.54 The recoverability by action theory can be reconciled with the general principle that only subjects within Scotland are arrestable by saying that although a debt may have for certain purposes a *situs* or location in one country for certain purposes (eg tax or confirmation of executors), nevertheless for other purposes (such as jurisdiction over an arrestee) it may have a different *situs* in another country. This results from the fact that a debt is an incorporeal obligation and so there is no logical difficulty in attributing to it different locations for different purposes. In relation to each context in which a rule of law attributes a *situs* to a debt, the courts must pay regard to the purpose of the attribution. If the recoverability of the debt by an action, or notional action, by the defender or common debtor against the arrestee is the basis of its arrestability, then a debt should in principle be located in Scotland for the purpose of arrestment if at the time of arrestment the arrestee would be subject to the jurisdiction in such an action. The debt is located wherever the arrestee may be sued in an action for payment or accounting in respect of the debt at the instance of the defender

or common debtor. It is thought that the weight of Scottish authority favours that approach.

2.55 In North v. Stewart,[1] it was held that an arrestment (to found jurisdiction) was effectual where there was a debt due by the arrestee to the defender. The debt was an English judgment debt, and the significance of the case for present purposes is that, at least under English law, a judgment debt is situated in the country where the judgment is recorded[2] (ie. granted). We revert to this case at para. 2.71 below.

2.56 In 1898 Graham Stewart on Diligence observed:

> "It is thought that arrrestment in the hands of a bank, which has its head office in Scotland, service being made at the head office, will attach funds deposited in a branch office in another country."[3]

The authority relied on was an old case[4] relating to the arrestment of a share in a partnership by arrestment in the hands of the other partners, though the assets of the partnership were abroad at the time of the arrestment. Arrestability in that case, however, may have rested on the fact that the obligation of the other co-partners to account to the debtor co-partner was in Scotland. So the authority was not necessarily conclusive.

2.57 Again in 1898, the unreported Outer House case of Skardon (John Dunn's Executor) v. Canada Investment and Agency

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[1] (1890) 17R (HL) 60.

[2] Dicey and Morris supra p 910, citing Attorney-General v Bouwens (1838) 4M and W 171 at p 191.

[3] Graham Stewart p 34.

[4] Rae v Neilson (1742) Mor 716.

Company Ltd was decided which supports Graham Stewart's view. This case has been noted in successive editions of Wallace and McNeil Banking Law including the 8th edition[1] which states:

> "In the case of Skardon (John Dunn's Executor) against the Canada Investment and Agency Company Ltd, February 1898 (not reported), Lord Kyllachy decided, and his judgment was acquiesced in, that an arrestment in the hands of officials at the head office of a Scottish bank was effectual to attach money at the bank's office in London".

It should be noted that although the money was apparently in an account kept by the bank at its branch office in London, and therefore under the rule set out in para. 2.51, head (6), the location or situs of the debt was presumably in London, nevertheless an arrestment at the head office of the bank in Scotland effectually attached that money.[2]

2.58 In the Outer House case of McNairn v. McNairn[3] an arrestment to found jurisdiction was laid in the hands of a Glasgow branch of an English building society. Funds of the defender had some months previously been paid into that branch but had been deposited by the branch in a bank account in England. A pass book had been issued, and the account was

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[1] 8th edn, p 417 (in same terms as 2nd edn (1899) p 203): see now 9th edn, p 205,fn 3.

[2] The next case chronologically is the sheriff court case of Hopper & Co v Walker (1904) 20 Sh Ct Rep 137 holding that a company having their registered office in England and a place of business in Aberdeen were subject at common law to the jurisdiction of the sheriff court at Aberdeen as arrestees. The case turned on the old common law jurisdictional requirement that the action had to arise out of business conducted in the sheriffdom. This rule survived the Sheriff Courts (Scotland) Act 1907 section 6(b) but was abrogated by the Civil Jurisdiction and Judgments Act 1982.

[3] 1959 SLT (Notes) 35.

operated by the society in London. Under the society's regulations, withdrawal of money from a deposit account could be effected only by the chief office in London. All such payments were to be made by crossed cheque drawn by the society on their London bank. Lord Strachan held that at the date of the arrestment the funds paid into the Glasgow branch could not be identified since they had become intermixed with the funds of the society's bank; that the defender's deposit account with the society was kept in England; and that the society was an English company with its head office in England. Lord Strachan upheld the validity of the arrestment basing his decision on the following ground[1]:

> "If the pursuer had been attempting to arrest only the defender's deposit with the Building Society the arrestment would have been invalid because in so far as any particular funds could be said to be identifiable, the deposit was in England. In any event the evidence has established the correctness of the defender's averment that there were no funds in the Glasgow Branch of the society belonging to him at the date of the arrestment. But that point is by no means conclusive of the question of jurisdiction. The arrestment purported to attach, inter alia, all debts. In this case the debt was the obligation of the society to repay the deposit. There is much to be said for the view that the debt was an English debt. Both debtor and creditor were resident in England but as the debtor carried on business at a branch office in Scotland, I think I am bound to hold that payment of the debt could be enforced in Scotland, and I can see no sufficient answer to counsel's point that there was a liability to account in Scotland... In the present case a liability to account in Scotland was arrested and in my opinion the requirements of arrestment ad fundandam jurisdictionem were thereby satisfied".

Although the question in the McNairn case related to arrestment to found jurisdiction, the test of validity and the conceptual foundation are (as already mentioned[2]) the same as in the case of

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[1] Ibid at p 35.

[2] See para 2.29 above.

arrestment on the dependence or arrestment in execution. In the McNairn case it should be noted that the debt was an English debt at least in the sense that the proper law was English law and possibly also in the sense that the location or situs of the debt was for some purposes in England since withdrawal of money could be effected only by the chief office in London. Nevertheless, Lord Strachan held that payment of the debt could be enforced by a court action in Scotland and that therefore there was an arrestable liability to account in Scotland. This case clearly supports the view that actionability within Scotland is the basis of arrestability.

2.59 In view of the scarcity of authority, reference may be made to O'Brien v. A Davies & Son Ltd[1] where, after debate before Lord Patrick, Mr J P H Mackay, Advocate (as he then was) abandoned an argument that the place of payment must be within Scotland. In that case Lord Patrick observed:[2]

> "Now it is not contested that at the date of the arrestment in this case the arrestee was indebted to the common debtor, but it was argued that since the money was due under a contract made in England, whereby the arrestee was only bound to pay to the common debtor in England, no moneys due by the arrestee to the common debtor could be situated and be arrestable in Scotland. In the course of the debate this preliminary point was abandoned as unmaintainable".

While an abandoned argument does not constitute a binding authority, nevertheless it does have some persuasive force since, if the argument had correctly represented Scots law, it seems most unlikely that it would have been "abandoned as unmaintainable".

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[1] 1961 SLT 85.

[2] Ibid at p 86.

## The "place of payment" theory

2.60 Under the "recoverability by action" theory, an arrestment is effectual if the arrestee is subject to the jurisdiction of the Scottish courts and the debt is recoverable in an action against the arrestee in Scotland. It is a matter of inference from this theory that the place where the debt is payable, or primarily payable, under the contract between the defender or common debtor and the arrestee is a matter of the mechanics of payment relevant at the stage when the matter is not litigious, but not at the later stage when an action is raised to enforce the debt against the arrestee.

2.61 Under the "place of payment" theory, the arrestee must be subject to the jurisdiction of the Scottish courts and the debt must be recoverable in an action against the arrestee in Scotland and so far the theory shares common ground with the recoverability by action theory. But the "place of payment" theory imposes the additional requirement that the place of payment of the debt must be in Scotland.

2.62 The place of payment theory may be thought to be supported by Anton on Private International Law who states: "It is essential, however, that the arrestee be subject to the jurisdiction and that his liability to account is to account within the jurisdiction".[1] The two cases cited do not support the place of payment theory however. One of these was the McNairn case discussed above.[2] There it was held that there was a liability to account in Scotland apparently because the arrestee's debt could be sued for in Scotland.

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[1] Anton, p 112.

[2] See para 2.58.

2.63 The other case cited was James Ewing and Co v. McLelland[1] in which an arrestment was held inept because it had been laid in the hands of an agent (not a branch) of the common debtor's debtor instead of in the hands of the common debtor's debtor as principal debtor. The agent was in no way concerned with the sums arrested, and the judgment seems to have rested on the general rule that an arrestment in the hands of an agent does not affect debts due to the common debtor by the agent's principal. It seems therefore that the case does not support the place of payment theory.

**The Trowsdale's Tr. case**

2.64 The place of payment theory may be thought to derive support from the decision of the Second Division in Trowsdale's Tr. v. Forcett Railway Co[2], in which it was held that the critical factor is the fixing of the subject of arrestment in Scotland. That case concerned an arrestment to found jurisdiction (equivalent for present purposes to an arrestment on the dependence or in execution). The head-note of the case states that "an arrestment of a debt due by a domiciled Englishman, the proprietor of an estate in Scotland, to an English company, was not validly executed by serving it at a house belonging to him in Scotland, which was occupied exclusively by his factor". The ground of the decision is probably set out in the following extract from the judgment of Lord Justice-Clerk Moncreiff [3]:

> "In regard to the other arrestment, ..., I am of opinion that it too is entirely inept, and for this simple reason that the debt was an English debt. In order to make an

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[1] (1860) 33 Sc Jur 1.

[2] (1870) 9 M 88.

[3] Ibid at p 92.

> arrestment effectual, the thing arrested must at least be capable of being fixed in this country. Here, even assuming that [the purported arrestee] had a domicile of citation at Ballachulish - which on the proof may be doubted - his real domicile of citation was unquestionably England and as moveable debts follow the domicile, this debt was an English one, which in spite of the arrestment [the purported arrestee] was entitled, and might have been forced, to pay to his creditor in England.

The passage however is not easy to construe. Thus expressions such as "an English debt", "fixed in this country", "moveable debts follow the domicile" and "real domicile of citation" are ambiguous, and require careful construction in their context.

2.65 The passage subdivides conveniently into the following propositions (1) the thing arrested must at least be capable of being "fixed in Scotland"; (2) the arrestee's "real domicile of citation" was in England, even if he had a domicile of citation in Scotland which was not clear; (3) moveable debts follow the domicile; and (4) the debt was an English one which the arrestee, was entitled, and might have been forced, to pay to his creditor in England.

2.66 The first proposition that the arrested debt must at least be capable of being "fixed in Scotland" suggests that the court was concerned to identify the location of the debt. But the proposition is difficult to understand in any literal sense insofar as it applies to pecuniary debts. In relation to arrested corporeal moveables, such a statement would be intelligible because the effect of the arrestment can be, and has been, construed as prohibiting the arrestee from taking the corporeal moveables out of Scotland without the authority of the court.[1] In relation to an incorporeal obligation to pay a debt, the proposition cannot have a

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[1] See our Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) para 3.94 (page 2.81) fn 2.

literal meaning. The location or situs of the debt is a creation of law, a legal fiction, and it is difficult to see how the arrestment fixes the debt in Scotland. No particular funds are due by the arrestee to the defender or common debtor since the debt is payable out of the general funds of the arrestee and those general funds are not laid under any embargo by virtue of the arrestment.[1] The concept of fixing the arrested debt in Scotland is thus a metaphor. From the context it appears to assume that the location of a debt within the territory depends on the debtor (ie the arrestee in the arrested debt) having his "real domicile of citation" or residence within the territory.

2.67 This brings us to the second proposition, namely that the arrestee's "real domicile of citation" was in England, even if he had a domicile of citation in Scotland where the arrestment was

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[1] Barclay, Curle & Co Ltd v Sir James Laing & Sons Ltd 1908 SC 82 at p 87 per Lord President Dunedin: "An arrestment in the hands of A of all moneys due by him to B does not put a nexus upon any particular money in A's hands, it does not prevent A from going on with his business, and using any money that he has got...". This reflects the reality of for example banking contracts. See Foley v Hill (1848) 2 HL Cas 28 at p 36 per Lord Cottenham: "Money, when paid into a bank, ceases altogether to be the money of the principal... it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it... The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases...". See also Libyan Arab Bank v Bankers Trust Co [1989] QB 728 at p 748 per Staughton J: "It is elementary... that the customer does not own any money in a bank. He has a personal and not a real right". This is true quoad the banker-customer relationship, but for the purpose of competitions with third parties, lawyers tend to "reify" the debt and to speak of real rights acquired by intimation of an assignation of the debt: see eg Anton, p 408; K G C Reid "Unintimated Assignations" 1989 SLT (Articles) 267.

served, which was not clear. Here the ambiguous phrase "real domicile of citation" seems to refer to the arrestee's principal residence, if he has residences in Scotland and in England, and to assume that he should be sued in his principal residence in England. It is difficult to see what other meaning can be given to the words "real" and the words "even if he had a domicile of citation at Ballachulish". If that was the meaning, the proposition was wrong in law because at that period and until 1987 there was no doubt that where a person had two or more residences or places of business which were domiciles of citation, then he could be sued at either of them and in particular could be sued at a branch place of business in Scotland though the main place of business was outside Scotland.[1] On this basis, the competence of arresting at a branch place of business in Scotland where the principal residence of the arrestee is furth of Scotland has been generally accepted.[2] It may be therefore that Lord Justice-Clerk Moncreiff's proposition should be construed as meaning that the arrestee did not have a proper domicile of citation in Scotland at all. This was the view of Lord Cowan[3], and is in accordance with the explanation of the ratio decidendi of the Trowsdale's Trustee case given by Sheriff Principal Sir Allan Walker in the

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[1] See eg Bishop v Mersey and Clyde Navigation Co (1830) 8 S 558 (held competent to sue in Scotland a joint stock company whose chief seat was at Liverpool but who had a branch of their establishment at Glasgow and Greenock); Anton pp 98 - 101.

[2] See eg McNairn v McNairn 1959 SLT (Notes) 35; O'Brien v A Davies & Son Ltd 1961 SLT 85.

[3] (1870) 9 M 88 at p 93: "the arrestment was not duly served upon the debtor [ie the arrestee] - there having been no execution of the writ personally, or even by edictal execution, or at any dwelling-house shown to have been his domicile within Scotland". The only other judge delivering an opinion, Lord Neaves (at pp 95, 96) did not deal with this precise point.

[4] J Verrico & Co Ltd v Australian Mutual Provident Society 1972 SLT (Sh Ct) 57.

Verrico case[4] where he observed[1] that in the Trowsdale's Trustee case:

> "an attempted arrestment in Scotland was held to be ineffective, mainly, as I read the opinions, because the person who owed the debt which the pursuers claimed to have arrested in Scotland, did not have a proper residence in Scotland and was accordingly not subject to the jurisdiction of the Scottish courts".

It seems to us that that is the most likely and true ratio decidendi of the Trowsdale's Trustee case, and accordingly that that case does not support the place of payment theory.

2.68 The third proposition, that "moveable debts follow the domicile" refers to the place where the debtor may be sued which establishes the location of the debt at which it may be "fixed" by arrestment.[2] This is broadly the same as the modern rules (of English origin) for the attribution of a situs to a debt, which normally also locate a debt at the debtor's residence,[3] with the difference that, as we have seen, under the modern rules, where there are two or more "residences" of a debtor and the debt is payable, or primarily payable, at one of them, that is the situs[4] except in a banking contract where the situs is always at the branch where the account is kept whether the bank is debtor or creditor.[5] These rules developed later and are not referred to in the judgment which thus gives no support to their acceptance as part of the Scots law on the validity of arrestments.

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[1] Ibid at p 59.

[2] It thus seems to mean something different from the brocard "mobilia sequuntur personam" which was at one time applied to choice of law questions as to the transfer of moveables: see Anton pp 400, and 408, 409.

[3] See para 2.51, heads (1), (2) and (7).

[4] See para 2.51, head (3).

[5] See para 2.51, head (6).

2.69 The fourth proposition that the debt was "an English one, which in spite of the arrestment [the purported arrestee] was entitled, and might have been forced, to pay to his creditor in England" contains three distinct ideas. The first is that the debt was "an English one" and in context that idea seems to refer to the location of the debt (derived from the purported arrestee's residence) in England so that the debt was incapable of being "fixed" in Scotland by an arrestment. The second idea is that since the arrestment was ineffective, the purported arrestee was entitled to pay it in England. Thus the place of payment was referred to, not as a ground for locating the debt in England, but rather as something which was not affected by an ineffectual arrestment. The third idea is that since the arrestment was ineffective, the purported arrestee might have been compelled to pay the debt in England and thus refers to the risk of double jeopardy. Lord Neaves also referred to that risk, observing that the "arrestment would not have furnished [the purported arrestee], a domiciled Englishman, with a valid excuse to pay the debt in England",[1] but the grounds of his judgment as to why the arrestment was ineffectual are unclear.

2.70 To sum up, the Trowsdale's Trustee case can be taken as authority for the proposition that an arrestment is invalid and ineffectual where the Scottish courts do not have jurisdiction over the arrestee. While it holds that the arrested debt must at least be capable of being "fixed" in Scotland, it does not hold that the place of payment determines the location of the debt, even where the defender has a residence in Scotland and another residence in another country in which payment is required to be made. It therefore does not support the place of payment theory.

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[1] (1870) 9 M 88 at p 96.

## Other cases

2.71 It may be that North v. Stewart[1] could be distingu and reconciled with the place of payment theory on the po ground that Scots law does not follow English law in holding the situs of a debt decerned for by decree (in English termino a judgment debt) is in the country of the court which grante decree or judgment for the purposes of the rules on the va and effectiveness of arrestments. In favour of this argume may be pointed out that the test for the validity effectiveness of an arrestment of a debt on the dependence found jurisdiction is whether the debt could be arreste execution[2] which suggests that the grant of decree or judg makes no difference to the rules on the effectiveness and va of arrestments under Scots law. In North v. Stewart there are dicta holding that there must exist in Scotland subjects capable of being arrested[3] but the opinions do not address the question whether for this purpose the location of a debt in Scotland is determined by its recoverability in Scotland or by the place of payment in Scotland. We think therefore that North v. Stewart neither supports nor conflicts with the place of payment theory.

2.72 It is however impossible to reconcile the Outer House judgments in the Dunn's Executor case[4] and McNairn v. McNairn[5] with the place of payment theory.

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[1] 17R (HL) 60, discussed at para 2.55 above.

[2] See para 2.29.

[3] 17R (HL) 60 at p 63, and p 65.

[4] Unreported, February 1898, discussed at para 2.57 above.

[5] 1959 SLT (Notes) 35 discussed at para 2.58 above.

The Verrico case

2.73 The sheriff court case of J Verrico & Co Ltd v. Australian Mutual Provident Society[1] presents a number of problems. In that case a creditor company holding a decree of payment against two debtors sought to arrest in execution the contents of certain insurance policies on the lives of the debtors in the hands of the insurance company. The insurance policies provided that the moneys due under the policies "shall be paid at the office of the society on the register kept in respect of which the policy is entered" and that "all claims in respect of that shall be made at such office". The register was kept at the London office of the society at the time of the execution of the arrestment. The creditor raised an action of furthcoming against the insurance company as arrestees and the common debtors. Sheriff Principal Sir Allan Walker held "not without difficulty"[2] that the arrestments were ineffectual.

2.74 Several aspects of the Sheriff Principal's decision may be noted. First, the Sheriff Principal accepted the McNairn case as good law (as he was bound to do) and thus far his decision supports the recoverability by action theory.

2.75 Second, the Sheriff Principal distinguished the McNairn case upon the ground that there were differences between the nature of the debts and the contracts giving rise to the debts involved in the two cases which he regarded as fundamental. After describing the McNairn case, the Sheriff Principal remarked[3]:

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1 1972 SLT (Sh Ct) 57.

2 Ibid at p 61.

3 1972 SLT (Sh Ct) 57 at p 60.

"At first sight the circumstances of the present case appear to be in many ways similar to those in McNairn v. McNairn (supra). In my opinion, however, each such case must be determined upon the terms of the particular contract, and where, as here, the arrestment is in execution, upon the exact nature of the debt which the pursuers claim to have arrested and seek to have made furthcoming. In the present case the pursuers claim to have lawfully arrested the contents of the insurance policies in question and the rights and interests of the [common debtors] therein, and they seek to have made furthcoming to them the subjects so arrested "and that by means of the said policies being surrendered or sold". What is sought by the pursuers, that is to say, is something quite specific. It is not the payment by the [arrestees] of sums due to the [common debtors] on a general accounting for the value of the policies at maturity, but the surrender values of the policies at the date of the purported arrestment. The sole question for decision, therefore, it appears to me, is whether the [common debtors] could, at the date of the purported arrestment, have enforced a claim against the [arrestees] in Glasgow, and in the sheriff court in Glasgow, for payment to them of the surrender value of the policies. In my opinion, if any effect is to be given to the contract between the parties, the answer to that question must be in the negative.

The policies expressly provide that all claims in respect thereof shall be made at what is agreed to be their London office, and that all moneys contracted to be paid by the policies shall be paid at that office. It is common ground between the parties that, at the date of the purported arrestment, no claim by the [common debtors] or by [the arresters] had been intimated to the [arrestees'] London office. In these circumstances, in my opinion, the [arrestees] could successfully have resisted any claim by the [common debtors] for payment of the surrender value of the policies in Glasgow, and, since the pursuers, as the arresters can claim no higher right against the [arrestees] than existed in the [common debtors], it must follow, I think, that the purported arrestment was ineffective. It is also my opinion that if, in this action, the [arrestees] were ordained to pay the surrender values of the policies to the [arresters], the [arrestees] would have no answer to a similar future claim at the instance of the [common

debtors], if such a claim were to be made in terms of the policies in London".(emphasis added)

It is noteworthy that the learned Sheriff Principal did not expressly state what elements in the nature of the debt and the terms of the contract involved in the McNairn case differed materially from the corresponding elements in the case before him. It follows that the precise grounds for distinguishing the McNairn case were never expressly defined. We are therefore left to make inferences from the quoted passage.

2.76 As regards the nature of the debts concerned in the two cases, in the McNairn case, the arrested debt was "the obligation of the society to repay the deposit".[1] That debt however does not seem any less specific than the obligation to pay the surrender values of the policies alleged to be arrested in the Verrico case.[2] Nothing seems to turn on the nature of the debt.

2.77 In principle, a distinction has to be drawn between three distinct and different rights of a common debtor against an arrestee which, under the judicial assignation theory of arrestments[3], an arrestment will transfer to the arrester, namely:

(a) the right to demand payment;

(b) the right to obtain payment; and

(c) the right to sue for payment if payment is not duly made.

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[1] 1959 SLT (Notes) 35; see the passage quoted at para 2.58 above.

[2] 1972 SLT (Sh Ct) 57.

[3] See para 2.5 above.

In the Verrico case, in terms of the insurance policies, the demand for payment had to be made by the common debtors outside Scotland to the London office of the insurance company arrestee, and payments contracted to be made by the policies had to be made outside Scotland at that office. It was held that, in the circumstances of that case, these contractual provisions had the effect of depriving the sheriff court in Glasgow of jurisdiction over the arrestee in an action by the common debtors to enforce the claim for the surrender values of the policies.

2.78 The place of the demand for payment. The first question is whether in the Verrico case the fact that the right to demand payment was under the contract exercisable only by a demand made by the common debtor to the London office, together with the fact that the common debtor had not made such a demand at the time of arrestment, sufficed to deprive the sheriff court in Glasgow of jurisdiction. The learned Sheriff Principal seems to have held that those facts did indeed deprive the sheriff court of jurisdiction as can be seen from the words underlined in the passage quoted at para. 2.75 above. This reasoning is difficult to follow. An alternative analysis is that the arrestment transferred to the arrester the right of the common debtor to demand payment, and that that right was under the contract exercisable by a demand to be made to the arrestee in London. It is thought that the fact that at the date of the arrestment, no demand had been made by the common debtor in London was (contrary to the reasoning of the Sheriff Principal) not fatal to the arrestment since the Macdonald case[1] establishes that prior demand is not a prerequisite of the arrestability of a debt payable on demand. If on the authority of the Macdonald case, the prior demand itself

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[1] Macdonald v North of Scotland Bank 1942 SC 369, discussed at para 2.7 above.

was not an essential of the validity of the arrestment, the fact that when the demand was made it had to be made in London could likewise not affect that validity. The implied assignation theory of arrestment[1] does suggest that the arrester should have made a demand in London, in exercise of the "potestative condition" transferred to him by the duly executed arrestment. But it follows on that theory that the demand would be made by the arrester not the common debtor in London, and that as such the demand, while it might be a prerequisite of the action of furthcoming, would not be a prerequisite of the arrestment. Moreover, and perhaps _a fortiori_, the fact that the _arrester_ had not made such a demand in London _prior_ to the execution of the arrestment was immaterial: no such demand could have been made by the arrester until the duly executed arrestment had transferred to him the right to make the demand. The crucial point is that, contrary to the theory underlying English garnishment proceedings, prior demand is not a prerequisite of arrestability and it may be that the Sheriff Principal was misled as to this matter by the English authorities cited by him later in his judgment.[2]

2.79 It is very doubtful whether the fact that the place where the demand was to be made was London was a sufficient ground for distinguishing the _McNairn_ case. The report of the _McNairn_ case discloses that, under the arrestee building society's regulations, withdrawal of money from a deposit account kept by the building society arrestee could be effected only by the society's chief office in London. It seems very likely that the obligation to pay would only have arisen on a demand being made

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[1] See para 2.5 above.

[2] These authorities are described at para 2.81 below.

by the depositor to the chief office in London, albeit transmitted perhaps through a local branch.

2.80 The place of payment. If we are right in thinking that in the Verrico case, the contractual requirement that the place of the demand for payment was in London should not by itself have excluded arrestability, should it have made any difference that under the contract the place where payment was to be made was also in London? The learned Sheriff Principal did not address this question by reference to Scottish authority because of his decision that the absence of a demand for payment in London before the arrestment was fatal to its validity and effectiveness. This raises the question whether a contractual requirement that money is to be paid at a particular place (at least in response to a demand also to be made at that place) necessarily entails that only the courts having jurisdiction in that place can entertain an action for recovery of the debt. We have not traced any Scottish authority to that effect.

2.81 The learned Sheriff Principal doubted whether English law and Scots law "would speak with different voices",[1] cited[2] English authorities on the situs of debts[3] and on the application of the situs to determine the power of the English courts to make garnishee orders where the prospective garnishee is resident in England and in another country,[4] and held that he would have arrived at the same opinion on the basis of these authorities. He continued:

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[1] 1972 SLT (Sh Ct) 57 at p 59.

[2] Ibid at pp 60,61.

[3] New York Insurance Co v Public Trustee [1924] 2 Ch 101; Jabbour v Custodian of Israeli Absentee Property [1954] 1 All ER 145 at p 152.

[4] Swiss Bank Corporation v Boehmische Industrial Bank [1923] 1 KB 673; Richardson v Richardson [1927] P 228.

"It appears to me that if the principles described in these English judgments were to be applied to the question at issue in this case, one would look at the terms of the contract and one would discover that payment under the policies must be demanded and made at the London office of the [purported arrestees]. Primarily, therefore, the debt is localised in London and is recoverable in London, although if payment were to be demanded in London and refused there, different considerations might thereafter apply and it might be possible to seek payment from the [purported arrestees] in Glasgow or elsewhere. In the present case, however, payment has never been demanded in London, and the other alternative possibilities have not therefore arisen. The result is that payment under the policies is not at present recoverable in Glasgow, and no debts or obligations arising under the policies have validly been attached by the arrestment in Glasgow".

2.82 These remarks overlook the fact that whereas prior demand or deemed demand is a prerequisite of garnishment under English law, it is not a prerequisite of arrestability in Scots law. Moreover there is no Scots authority holding that the place where a demand has to be made and a debt paid determines arrestability. These are simply matters relating to the mechanics of payment. Furthermore, it is quite true that the English authorities cited are still good law so far as they determine how to attribute a situs to a debt but they are not now good law so far as they held that a debt must be located within England before the English courts can make a garnishee order. Thus the Sheriff Principal cited[1] the decision of Hill J at first instance in Richardson v. Richardson[2], holding that the English court has no jurisdiction to make a garnishee order attaching a debt which is not located, and therefore not properly recoverable, within the territorial jurisdiction of the court. Hill J remarked:

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[1] 1972 SLT (Sh Ct) 57 at p 61.

[2] Richardson v Richardson, National Bank of India, Limited (Garnishees) [1927] P 228.

> "In principle, attachment of debts is a form of execution, and the general power of execution extends only to property within the jurisdiction of the Court which orders it. A debt is not property within the jurisdiction if it cannot be recovered here".[1]

This remark has, however, been disapproved by three recent decisions of the Court of Appeal.[2] Under these decisions, the fact that the garnishee is not indebted within the jurisdiction is or may be relevant to the court's exercise of its discretion to make a garnishee order absolute, but does not deprive the court of jurisdiction. In the last of these cases, Interpool Ltd v. Galani[3] Balcombe L J remarked[4]:

> "It is true that, as a matter of discretion, the court will not garnish a debt where the garnishee, although within the jurisdiction, is not indebted within the jurisdiction, if to do so might expose the garnishee to the risk of having to pay the debt or part of it twice over. It may also be true,... that there is no reported case where this discretion has been exercised so as to garnish a debt which is only recoverable outside the jurisdiction".

He held however that the English High Court has jurisdiction to garnish a debt recoverable outside England even if it rarely exercises that jurisdiction. It is of course not possible for the Scottish courts to adopt a similar solution since with us

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[1] Ibid at p 235; quoted 1972 SLT (Sh Ct) 57 at p 61.

[2] SCF Finance v Masri (No 3) [1987] 1 QB 1028 (C A) at p 1045 per Ralph Gibson L J (delivering the judgment of the court); Deutsche Schachtbau v SIT Co [1990] A C 295 (CA and HL, (E)) at p 319 per Sir John Donaldson MR (the other judges concurring); Interpool Ltd v Galani [1988] 1 QB 738 (C A) at p 741 per Balcombe L J (delivering the judgment of the court).

[3] [1988] 1 QB 738 (C A).

[4] Ibid at p 741.

arrestment is a matter of a litigant's legal right not judicial discretion. For all these reasons, we think that the Scottish courts would not, and indeed could not, apply to arrestments the English rules on the validity of garnishee orders. Moreover, insofar as English law now declares that garnishee orders may attach debts recoverable and therefore located outside England, it no longer provides persuasive authority in Scotland (if it ever did) that an arrestment cannot attach a debt properly recoverable and therefore located outside Scotland.

2.83 Another matter arising from the Verrico case may be considered. In New York Insurance Co v. Public Trustee[1], which concerned the situs of sums due under insurance policies, Warrington L J remarked[2]:

> "The place at which the debt is to be paid is laid down by the contract, and it seems to me that that provision is exclusive. If that contract is not performed, if the demand is made here, and the debt is not paid here, then no doubt an action could be brought against the corporation wherever it could be found... but in that case the action would be, not for a debt, but for breach of contract in not paying the debt at the place at which the corporation contracted to pay it".

Apparently on the basis of these remarks, the learned Sheriff Principal in the Verrico case said that if a demand for payment were made in London and refused, jurisdiction might be established over the arrestee in Glasgow[3], but he had earlier held that the demand must have been made prior to the time of arrestment[4].

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[1] [1924] 2 Ch 101.

[2] Ibid at p 116, quoted at 1972 SLT (Sh Ct) 56 at p 61.

[3] 1972 SLT (Sh Ct) 57 at p 61 quoted at para 2.75 above.

[4] Ibid at p 60.

2.84 An alternative and, it is thought, preferable analysis more consistent with Scottish authority would be as follows. A debt only payable in London on a demand made in London may be arrested in the hands of the arrestee at his domicile (formerly his residence or place of business) in Scotland if the Scottish courts have, at the time of arrestment, jurisdiction over the arrestee. Jurisdiction in this context means jurisdiction in an action, or notional action, by the common debtor to enforce (directly, or indirectly by damages) the arrested obligation to pay or account.[1] It matters not whether the action or notional action would be an action for payment under the contract, or an action of damages for breach of the contract by non-payment, because both rights of action against the arrestee are transferred by the arrestment to the arrester along with the right to demand payment.[2] A prior demand for payment is not a prerequisite of arrestability of a debt payable on demand.[3] On the other hand, it may be that in the Verrico case the common debtor's contractual right to make the demand, having been transferred tantum et tale by the arrestment to the arrester, should in principle have been exercised by the arrester in London in terms of the contract. If payment had been refused (eg because the common debtor refused to grant a mandate for release of the arrested funds), an action of furthcoming would then have become competent. In other words, a demand for payment in London, though not a prerequisite of arrestability, may yet be a prerequisite of an action of furthcoming. It has to be said that this analysis is generally not expressly adopted in reported cases because, in the case of a debt payable on demand, the Scottish courts generally hold simply that there is an arrestable present liability to account.[4] Nevertheless, the underlying assignation theory of arrestment does suggest that

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[1] See paras 2.24 to 2.28 above.

[2] See para 2.5 above.

[3] See paras 2.7 to 2.9 above.

[4] eg McNairn v McNairn 1959 SLT (Notes) 35.

the contractual conditions of an arrested right to demand payment should be observed by the arrester and it may be that this requirement is obscured by the reference to a liability to account.

2.85 It is clear that the terms of a particular contract may exclude arrestability.[1] If, however, we are correct in arguing that the fact that under a contract either the place of the demand or the place of payment, or both, are outside Scotland is to be regarded as a matter of the mechanics of payment and does not exclude jurisdiction over the arrestee in an action and therefore does not exclude arrestability, then the terms of the particular contract in the Verrico case should not have been construed as excluding arrestability.[2]

## Summary

2.86 To sum up, apart from the Verrico case, there does not seem to be any decision clearly supporting the place of payment theory in Scots law and the weight of authority favours the view that, if the Scottish courts have jurisdiction over the arrestee in an action of payment or accounting in respect of an arrested debt or obligation to account, the arrestment is or may be valid and effectual notwithstanding that, as a matter of the mechanics of payment, the place of payment is outside Scotland. As a matter of legal theory, the underlying reason may be expressed as being either that the debt is to be regarded as located in Scotland for the purposes of arrestment because the arrestee may be sued in

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[1] Eg a contractual provision excluding the jurisdiction of the Scottish courts over the arrestee in an action in respect of the allegedly arrested debt or obligation to account.

[2] Cf Maher and Cusine, para 5.06.

Scotland or that the location of the debt is not relevant for the purposes of determining arrestability provided that the Scottish courts have jurisdiction over the arrestee in respect of the obligation of payment. The former theory seems preferable though it adopts for the purpose of arrestability, a definition of the location of the debt which excludes the normal rules deeming the place of payment to be that location where the debtor (arrestee) has residences in two or more countries, and the place of payment is in one of them.

(b) Arrestments of corporeal moveables and obligations to deliver, or account for, corporeal moveables

The nature of the problem

2.87 In this Section, we are concerned with the arrestment of corporeal moveables other than ships.[1] There is no doubt that as a general rule, an arrestment of corporeal moveables, or of an obligation to deliver or to account for corporeal moveables, is only effectual if at the time of arrestment the arrestee is subject to the jurisdiction of the Scottish courts.[2] (An action of delivery is a petitory or personal action attracting the same grounds of jurisdiction as an action for payment, which grounds were described above[3]).The questions arise however whether there is an additional requirement relating to the location of the corporeal moveables, or of the obligation to deliver or account for the corporeal moveables, within Scotland and what the precise nature of that requirement is.

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[1] Ships are considered at para 2.46 above.

[2] See paras 2.15 to 2.43 above.

[3] See paras 2.35 to 2.42 above.

2.88 In the previous Section we saw that, in the case of arrestments of debts, if the fundamental theory is that there must be arrestable subjects located in Scotland, the critical task is to identify the circumstances in which the debt would be treated as being within Scotland at the time of arrestment, and the weight of authority favours the view that a debt is treated as within Scotland if it is recoverable by action of payment or may be the subject of an action of accounting in Scotland against the arrestee at the time of arrestment. In the case of corporeal moveables, the precise equivalent of the obligation to pay or account is the obligation to deliver, or to account for, the moveables. Strictly it is that obligation which is the subject matter of the arrestment. Thus, it has been observed that "all arrestments are directed not so much at the property of the defender which is in the physical possession of the arrestee, or the debt owing by the arrestee to the defender, but rather the arrestee's obligation to account to the defender".[1] Even on this view, however, one would expect that the place of the obligation to deliver or to account would be irrelevant, being merely a matter of the mechanics of delivery, in the same way as the place of payment is merely a matter of the mechanics of payment.

2.89 There is however an important difference between debts and corporeal moveables. Since a debt is incorporeal property and therefore its location or situs is (as it has to be) a legal fiction, it is possible to deem that location to be within the jurisdiction of the Scottish courts if the debt is at the time of arrestment recoverable by action in those courts, even though at the same time it may also be recoverable in the courts of other countries

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[1] Maher and Cusine, para 4.34.

and thus have other locations in those countries. By contrast, the location of a corporeal moveable is a physical fact which can only be at one place at any given point of time such as the time of arrestment. The physical location of corporeal moveables or goods within Scotland at that time is thus a possible requirement additional to jurisdiction over the arrestee. Furthermore, there are insuperable logical difficulties in regarding the goods as simultaneously situated both in Scotland and outside Scotland (whether in another country or at sea) at the time of arrestment.

The place of delivery not a requirement

2.90 Consistently with the absence of any "place of payment theory" the authorities strongly suggest that there is no requirement that the place of delivery must be within Scotland. First, we have found no authority which imposes a requirement that the place of delivery of the arrested goods must be within Scotland even though there are many cases in which such a requirement was badly needed by the defender or common debtor.[1] Second, in principle such a requirement could not always be applied because in many cases the place of delivery may be uncertain as where a custodier holds goods to the order of the common debtor or defender.[2] Third, there are many cases involving valid arrestments in which the arrested goods were located in Scotland at the time of arrestment but the arrestee was bound to deliver the arrested goods at a place outside Scotland. These include cases of the arrestment of cargo on board ship bound for a port outside Scotland[3] or the arrestment of goods or rolling stock held by carrier railway companies for

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[1] See eg the cases cited at fn 2 below and fn 1 on p 87.

[2] Eg Inglis v Robertson and Baxter (1898) 25 R (HL) 70.

[3] Eg McDonald and Halket v Wingate (1825) 3 S 494; Kellas v Brown (1856) 18 D 1089; Carron Co v Currie and Co (1896) 33 SL Rep 578; Svenska Petroleum Co AB v HOR Ltd 1982 SLT 343 (also reported in part 1983 SLT 493; 1986 SLT 513); West Cumberland Farmers Ltd v Director of Agriculture of Sri Lanka 1988 SLT 296.

delivery outside Scotland.[1]

2.91 Fourth, we have not traced any case where the arrested goods were located outside Scotland and the validity of the arrestment was held to depend on the existence of an obligation to deliver or to account within Scotland. In the old case of Rae v. Neilson[2] an arrestment of a share of a partner in a partnership was held effectual where the moveable assets of the partnership were at sea or abroad at the time of arrestment. In that case, the partner-arrestees clearly had an obligation to account in Scotland but the validity of the arrestment may have depended on the fact that the partner-arrestees were subject to the jurisdiction of the Scottish courts.

2.92 We conclude that although the subject matter of an arrestment of moveable goods is the obligation of the arrestee to deliver or account for the goods to the defender or common debtor at the time of arrestment, nevertheless there is no requirement of the validity of an arrestment of goods that there must be an obligation to deliver the goods in Scotland additional to the requirement that the arrestee must be subject to the jurisdiction of the Scottish courts. By parity of reasoning, there is no requirement that there must be an obligation to account for the goods in Scotland additional to the requirement of jurisdiction over the arrestee.

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[1] Lindsay v London and N W Ry Co (1860) 22 D 571; N B Ry Co v White (1881) 9 R 97; Frederick Braby & Co Ltd v Edwin Danks & Co (Oldbury) Ltd (1907) 15 SLT 161.

[2] (1742) Mor 716.

Whether the corporeal moveables must be located in Scotland?

2.93 We referred at para. 2.44 above to judicial dicta to the effect that it is a requirement of the validity and effectiveness of an arrestment that the subjects of arrestment are within the jurisdiction of the Scottish courts.[1] These dicta are consistent with Bankton's statement, quoted above[2], relying on Couts v. Miln[3], that an edictally executed arrestment in the hands of persons abroad is effectual "to reach their effects, in this kingdom, on a furthcoming. But is inept as to securing the debtor's effects in a foreign country".[4] There are also dicta to the effect that an arrestment in execution "fixes" the moveable property within the jurisdiction. Thus in the Trowsdale's Tr case[5], Lord Justice-Clerk Moncreiff observed:

> "It is perfectly true that in point of fact an arrestment ad fundandam does not fix the subject arrested within the jurisdiction; for the arrestee may safely part with it, and it so far differs from an arrestment in execution;..." (emphasis added).

There are also decisions discussed in Discussion Paper No. 84[6] which seem to proceed on the view that in the case of an arrestment of cargo on board ship, the arrestee is not entitled to take the cargo out of the jurisdiction of the Scottish courts

[1] See eg Trowsdale's Tr v Forcett Ry Co (1870) 9 M 88 at p 95; North v Stewart (1896) 17 R (HL) 60 at p 65; Leggat Bros v Gray 1908 SC 67.

[2] See para 2.16.

[3] (1733) Mor 4835, also quoted at para 2.16 above.

[4] Bankton Institute III, 1, 31.

[5] Trowsdale's Tr v Forcett Ry Co (1870) 9 M 88 at p 95.

[6] Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) paras 3.91 to 3.94.

without the leave of the court.[1] It could be argued that these cases and dicta such as Lord Justice-Clerk Moncreiff's observations quoted above relate to the effect of an arrestment, and not to the prerequisites of the validity of an arrestment; that they only provide authority that in an arrestment of corporeal moveables located within Scotland, the arrestee is impliedly prohibited from moving the goods outside the jurisdiction without judicial authority, and do not provide authority, whether expressly or by necessary implication, for the proposition that an arrestment of goods located outside Scotland at the time of arrestment is neither valid nor effectual. On the other hand, if an arrestment impliedly prohibits the removal of goods from the jurisdiction, it seems rather odd that they can be arrested outside the jurisdiction. Moreover there are other dicta unambiguously requiring that the goods must be within the jurisdiction. Thus as we have seen Lord Justice-Clerk Moncreiff in the Trowsdale's Tr case said: "In order to make an arrestment effectual, the thing arrested must at least be capable of being fixed in this country".[2] Moreover if, as Lord President Dunedin said in the Clan Line Steamers case[3], the "underlying idea" of an ordinary arrestment (as well as an arrestment of ships) is "to fix in the territory something which will be a fund of payment for the decree which is got under a pecuniary conclusion", an arrestment of corporeal moveables outside the territory would be invalid and ineffectual because inconsistent with that underlying idea.

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[1] Svenska Petroleum Co AB v HOR Ltd 1982 SLT 343 (also reported in part 1983 SLT 493); West Cumberland Farmers Ltd v Director of Agriculture of Sri Lanka 1988 SLT 296.

[2] Trowsdale's Tr v Forcett Ry Co (1870) 9 M 88 quoted at para 2.60 above.

[3] Clan Line Steamers Ltd v Earl of Douglas Steamship Co Ltd 1913 SC 967 at p 972 quoted at para 2.42 above.

2.94 The theory that corporeal moveables must be located within Scotland to be arrestable is also assumed as good law in text-book discussions of the choice of law rules affecting diligence. The leading Scottish text-book on private international law[1] states that:

> "...the lex situs of the [corporeal moveable] property prescribes the types of diligence available in respect of the goods and their effect.[2] Arrestments and other forms of diligence can only be a matter for the lex situs, since they require judicial authority and the intervention of an officer of court. These matters might be looked upon as governed by the lex fori; but the lex fori and the lex situs inevitably coincide,[3] and the recognition of diligence effected abroad must be based on the power of the lex situs to dispose of property within its control. The Scottish court recognises diligence in accordance with the law of a foreign country as effecting the transfer of property situated within it[4] and would expect diligence effected over property in Scotland in accordance with the rules of Scots law to be recognised abroad".

The proposition that "the lex fori and the lex situs inevitably coincide" presupposes that the situs of arrested corporeal moveables at the time of arrestment must be within Scotland since, as Anton states, Scots law as the lex fori must govern the requirements of arrestability.[5] It is moreover somewhat difficult to argue that corporeal moveables are within the control of the Scottish courts if they are not physically located within Scotland, and therefore the principle of effectiveness may suggest that the corporeal moveables should be within Scotland at the time of arrestment.

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1 Anton p 407.

2 Citing Strother v Read July 1 1803 FC.

3 Citing Graham Stewart p 737.

4 Citing Hamilton v Dutch East India Co (1731) Mor 4548 and (1732) I Paton 69; Gordon v Gordon November 12 1818 FC.

5 See also Robertson and Baxter v. Inglis (1897) 24 R 758 at p 778 per Lord Kinnear.

2.95 The theory that only corporeal moveables located, and therefore capable of being fixed, within the jurisdiction at the time of arrestment are arrestable is, however, contradicted by other authorities suggesting that if the arrestee is subject to the jurisdiction of the Scottish courts, an arrestment in his hands effectually attaches corporeal moveables in his possession outside Scotland.[1] Thus Bankton took the view that cargo on board ship at sea or abroad may be competently arrested by an edictally executed arrestment in the hands of the ship master.[2] Moreover, the authority of Bankton's other (and somewhat inconsistent) statement that an edictally executed arrestment does not secure the debtor's effects in a foreign country[3], based on Couts v Miln[4], is probably taken away by the greater authority of Erskine who, giving a different interpretation of Couts v. Miln, emphasised that the Scottish courts must have jurisdiction over the arrestee rather than that (as Bankton had said) the arrested effects must be located within Scotland.[5] Graham Stewart[6] remarked that "arrestments used in the hands of the shipowners would attach goods on board their vessels then at sea". The authority which he cites is the old case of Rae v. Neilson[7] discussed above.[8] That case involved the arrestment of a share in a partnership, the assets of which were at sea or abroad. As we observed in

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[1] See our Discussion Paper No 84, paras 3.86 and 3.87 in which some of the authorities cited in this paragraph were discussed.

[2] Bankton Institute IV, 12, 9: "if the goods, belonging to persons in this country, are in a ship which is at sea, or abroad, it must be done at the mercat cross of Edinburgh, pier and shore of Leith, in the hands of the ship master".

[3] Institute III, 1, 31 quoted at para 2.93 above.

[4] (1733) Mor 4835.

[5] Erskine Institute III, 6, 3, quoted at para 2.17 above.

[6] p 108.

[7] (1742) Mor 716.

[8] See paras 2.17 and 2.91.

Discussion Paper No 84[1], however,it may be that this differs from an arrestment of cargo at sea or abroad since in an arrestment of a share in a partnership, what is arrested is a species of incorporeal right (which includes a share of the profits of the sale of the assets) rather than the assets themselves. In the same Discussion Paper we referred to judicial dicta in Carron Co v Currie and Co[2] which on one view suggest that an arrestment of cargo on board a vessel at sea in the hands of the owner or his general manager would not be effectual, though the dicta are not very clear on this matter.

2.96 If the view of Bankton and Graham Stewart (regarding cargo at sea or abroad) is good law and applies to corporeal moveables generally and not simply cargo on ships, then the theory that only subjects within Scotland are arrestable is deprived of much of its content. For whereas it is justifiable, by a necessary fiction, to deem incorporeal moveables which have no physical location (such as debts) to be within Scotland in cases where they are recoverable by action in Scotland, it is scarcely justifiable to deem corporeal moveables outside Scotland to be within Scotland because that would be an unnecessary fiction ignoring their actual physical location. On the whole, it seems to us that the weight of authority favours the view that corporeal moveables must be located within Scotland.

**Summary**

2.97 To sum up, (1) it is not a requirement of the validity and effectiveness of an arrestment of corporeal moveables that the place of delivery must be within Scotland and (2) while there is

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[1] Discussion Paper No 84, para 3.87.

[2] (1896) 33 SL Rep 578.

some doubt whether it is such a requirement that the corporeal moveables themselves must be physically located within Scotland at the time of arrestment, the weight of authority and the principle of effectiveness suggest that they must indeed be so located, but the matter is not free from doubt, especially as regards cargo at sea or abroad.

## PART III

## PROPOSALS FOR REFORM OF LAW ON EXTRA-TERRITORIAL EFFECT OF ARRESTMENTS AND ON PROTECTION OF ARRESTEES FROM DOUBLE JEOPARDY

### Preliminary

3.1 We now turn to advance proposals for reform relating to the rules or possible rules that (a) the arrestee must be subject to the jurisdiction (described at paras. 2.15 to 2.43 above and summarised at para. 2.43) and (b) that arrested subjects must be within the jurisdiction (described at paras. 2.44 to 2.97 above and summarised at para. 2.97). We do not propose any change to the requirement that the arrestment must be executed within Scotland or edictal execution (see para. 2.14 above). In this Part we advance *inter alia* proposals relating to the introduction of procedures to protect arrestees and third parties suffering foreign attachments from double jeopardy. We have also considered whether it is necessary to propose rules for the recognition of foreign attachments equivalent to Scots arrestments (such as English garnishee orders). While there is scant authority on this topic, we think that it should be left to be developed by the courts without statutory intervention since, apart from the risk of double jeopardy to arrestees and their foreign equivalents, we have not identified any problems relating to the recognition of foreign attachments which require such intervention.

### A. Requirements of arrestability: jurisdiction over the arrestee

3.2 The main basis of arrestability. We have seen that the incidents of the requirement of jurisdiction over the arrestee are uncertain because the very basis of the requirement is not clear.[1] The authorities speak of "jurisdiction over the arrestee" but jurisdiction cannot exist entirely in the abstract: it must have

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[1] See paras 2.20 and 2.28.

reference to jurisdiction in an action which is either in existence or competent at the time of arrestment, and the task of law reform is to identify what is the type of action or notional action to which the requirement does and should refer. The choice of the fundamental basis seems to lie between two main bases.

(a) The first basis is the need to secure that the arrestment can be made effective by the Scottish courts by decrees or orders binding the arrestee, which might be called the principle of effectiveness. On this view, jurisdiction would have reference to jurisdiction in an action of furthcoming or other proceedings by the arrester against the arrestee designed to compel him to obtemper the arrestment or an action of damages for breach of arrestment whereby an arrestee who has parted with funds or property is made liable in "second payment" to the arrester.

(b) The second basis is the need to secure (in broad conformity with the judicial assignation theory of arrestments) that the arrester does not acquire, by virtue of the arrestment, a higher right against the arrestee than the common debtor had but is clothed with the same rights as were available to the common debtor, as at the date of arrestment, against the arrestee. On this view, jurisdiction would have reference to jurisdiction in an action, or notional action, by the common debtor against the arrestee brought or competent at the time of the execution of the arrestment to enforce the arrested obligation to pay, account or deliver, or to obtain damages for breach of that obligation.

3.3 Jurisdiction in action or notional action by common debtor or defender. We think that, whatever may have been the position before 1 January 1987 when the Civil Jurisdiction and Judgments Act 1982 and the European Judgments Convention came into force, the "principle of effectiveness" (ie construing jurisdiction over the arrestee to mean primarily jurisdiction in an actual or notional action of furthcoming) can no longer serve as a basis for the test of arrestability. The reason is that such a solution would involve circular reasoning. In Part IV below, we argue that by virtue of Article 16(5) of the Convention and corresponding provisions in Sch. 4, Article 16(5) and Sch. 8, Rule 4(1)(d) [1] the courts of the country in which a judgment has been or is to be enforced have exclusive jurisdiction irrespective of domicile in all proceedings concerned with the enforcement of the judgment. If that is right it would follow that where an arrestment has been executed in Scotland, Scotland is the country in which the judgment has been or is to be enforced by the diligence of arrestment and furthcoming. Only the Scots courts can entertain actions of furthcoming, because that form of action is within their exclusive subject-matter jurisdiction. It will be seen that the jurisdiction under Article 16(5), insofar as it applies to jurisdiction to entertain actions of furthcoming, derives from, and assumes, the fact that a valid and effective arrestment is in effect. In other words, Article 16(5) does not provide for grounds of jurisdiction applicable to actions of furthcoming, other than the fact that an arrestment has been used, and therefore does not specify distinct grounds of jurisdiction which could be invoked in determining jurisdiction over the arrestee for the purpose of arrestability. This solution would thus involve circular reasoning: the test of arrestability would depend on the ground of

[1] Quoted in para 4.11 below.

jurisdiction in actions of furthcoming to enforce the arrestment which would in turn depend on the test of arrestability.

3.4 By elimination of the first option, we conclude that the proper test should be jurisdiction (based on the implied judicial assignation theory) in an action or notional action which has been brought or is competent at the time of arrestment by the common debtor (or defender) against the arrestee to enforce the obligation to pay, account or deliver or to obtain damages for breach of that obligation. In some cases the defender or common debtor may have brought the action against the arrestee and even obtained decree against him before the time of arrestment, and in such cases the jurisdiction established at the commencement of the action would have continued in force thereafter. In most cases, however, the defender or common debtor will not have brought any action to recover the arrested debt, and there the test of jurisdiction should have reference to a notional action by the defender or common debtor against the arrestee.

3.5 Obligations not prestable at the time of arrestment. We have seen[1] that the implied assignation theory encounters a difficulty where the arrested obligation is a future or contingent obligation which, though arrestable under the internal rules of Scots law, is not yet prestable at the time of the arrestment. Given that jurisdiction in the sense of the requirement means jurisdiction in an action or notional action brought or competent at the time of arrestment, how can the requirement be satisfied if at the date of arrestment no action for payment or delivery is yet competent? One possibility is that the test is applied on the fictional hypothesis that such an action is competent.[2] Another possibility is that although an action for payment or delivery is

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[1] See paras 2.28 and 2.31 to 2.34 above.

[2] See para 2.33 above.

not competent, yet an action of accounting will be competent if the relationship of debtor or creditor exists.[1] The latter possibility seems artificial in the case of a debt or obligation to deliver which is known and specific and requires no action of accounting to ascertain whether money or moveables will be due at the future date.

3.6 We suggest that this difficulty should be solved by an express statutory provision to the effect that the test of jurisdiction over the arrestee should be applied as if the future or contingent obligation were prestable at the time of the execution of the arrestment.

3.7 It is conceded that, as we noted above[2], cases could arise under which the arrestee ceases to be subject to the jurisdiction of the Scottish courts between the date of arrestment and the date when the obligation becomes prestable, with the result that the arrester would have derived a higher right from the arrestment than the common debtor or defender had. The implied assignation theory is however only a broad legislative principle which will achieve justice in most cases, and which remains sound notwithstanding that in a literal sense it cannot be given universal effect by the legislation.

3.8 <u>The grounds of jurisdiction over the arrestee.</u> At paras. 2.35 to 2.41 above, we described the new grounds of jurisdiction introduced by the Civil Jurisdiction and Judgments Act 1982 and the European Judgments Convention. We seek views on whether it should be made clear by statute that the requirement of jurisdiction over the arrestee for the purposes of arrestability is

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[1] Idem.

[2] See para 2.34 above.

not limited to the primary ground of domicile but extends to any ground on which the common debtor or defender has brought or could bring an action at the time of arrestment to enforce the obligation sought to be arrested. If an arrester or his agent or messenger-at-arms or sheriff officer were to make a mistake in applying those grounds, the only effect would be that the arrestment would be ineffectual: the arrester and those acting for him would not be liable in damages for wrongful diligence. A provision limiting jurisdiction over the arrestee for the purposes of arrestability to the arrestee's domicile would be simpler to apply but lacking in principle, and would unduly narrow the test of jurisdiction over the arrestee. We refer in particular to the fact that, as we showed in paras 2.39 and 2.40 above, jurisdiction over corporations is more limited than under the old law because of the definition of domicile. We consider it important that tests of jurisdiction other than the arrestee's domicile, such as the fact that the arrested obligation arises out of the operations of a branch, agency or other establishment of the arrestee in Scotland, should apply for the purposes of arrestability.

3.9 <u>Proposals to apply to all types of arrestment.</u> For avoidance of doubt, we would mention that our proposals apply to all forms of arrestment, (other than arrestments of ships) whether the arrestment is to found jurisdiction, on the dependence or in execution, in conformity with the present law under which the prerequisites of all such forms of arrestment (as distinct from their effects) are the same.[1]

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[1] See para 2.29.

Our proposals

3.10 Views are invited on the following provisional proposals and questions.

(1) Subject to the rules provisionally proposed below, it should be, or continue to be, a requirement of the validity and effectiveness of an arrestment of an obligation to pay a pecuniary debt, or to deliver a corporeal moveable, or to account, that the person in whose hands the arrestment is laid is, at the time of the execution of the arrestment, subject to the jurisdiction of the Scottish courts in an action arising out of that obligation brought at or before that time, or as the case may be would be so subject if such an action had been brought at that time.

(2) Where an obligation is:

(a) prestable at a time or on the occurrence of an event falling after the time of the execution of the arrestment; and

(b) arrestable according to the internal rules of Scots law on the arrestment of future or contingent obligations,

the foregoing rule should be applied as if the obligation were prestable, and accordingly the action were competent, at the time of the execution of the arrestment.

(3) Should it be provided by statute that, for the purposes of the foregoing rules the requirement of jurisdiction over the arrestee is not limited to jurisdiction on the primary ground of the arrestee's domicile, but has reference to any competent ground of jurisdiction on which the defender or common debtor either:

(a) at the time of the execution of the arrestment has founded in an action arising out of the obligation against the arrestee or,

(b) as the case may be, would be entitled to found if he had raised such an action at that time?

(4) In this and the following Propositions, references to an arrestment include a reference to an arrestment to found jurisdiction, an arrestment on the dependence and an arrestment in execution.

(Proposition 1).

## B. Requirements of arrestability: location of subjects of arrestment

### Preliminary

3.11 We have seen that there is authority that it is a requirement of arrestability that the subjects of arrestment are located, and therefore capable of being "fixed", within Scotland[1] but that different rules and considerations apply where the arrestable subjects are pecuniary debts or obligations to account[2]

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[1] See paras 2.44 and 2.93 above.

[2] See paras 2.44 to 2.86.

from those applying where the subjects are corporeal moveables, or obligations to deliver, or to account for, corporeal moveables.[1] We therefore consider these two categories of subjects separately.

(1) Arrestment of pecuniary debts and obligations to account

3.12 In the case of the arrestment of pecuniary debts or obligations to account, we concluded in Part II that the weight of authority favours the view that if the Scottish courts have jurisdiction over the arrestee, the arrestment is or may be valid and effectual notwithstanding that the place where the debt is required to be paid (for short, the place of payment) is outside Scotland.[2] The theory seems to be that the debt is treated, for the purposes of arrestability, as located in Scotland because the debt may be sued for or may be the subject of an action of accounting in Scotland.[3] The place of payment is merely a matter of the mechanics of payment and has nothing to do with arrestability. This, however, adopts for the purpose of arrestability a different definition of the location of the debt from that applicable under the rules for attributing a situs or locality to a debt in other legal contexts, such as liability to tax and confirmation of executors[4], but there is no reason why different definitions should not be adopted for different purposes since the locality of a debt is a legal fiction.

3.13 The result is that in relation to the arrestment of pecuniary debts, there is no requirement relating to the location of the arrested debt additional to jurisdiction over the arrestee.

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[1] See paras 2.87 to 2.97.

[2] See para 2.86.

[3] Idem.

[4] See para 2.51 for the usual rules for attributing a locality or situs to a debt.

Since an arrestee may be sued in several different countries under the new rules of jurisdiction (eg. may have several domiciles), it is arguable that the test of arrestability is, for that reason, too wide. It is for consideration therefore whether the test of arrestability should be narrowed in scope, and the easiest way of achieving this would be to introduce a new requirement as to the location of the arrested debt, additional to the requirement of jurisdiction over the arrestee. We have identified three possible policy reasons for narrowing the scope of the test of arrestability.

(a) Protection of arrestees from double jeopardy

3.14 One possible policy reason for narrowing the scope of the test of arrestability is that it would lessen the risk that the arrestee may be placed in double jeopardy, by being required to pay the debt in Scotland and to pay the same debt a second time in another country in circumstances where the common debtor demands payment from the arrestee in that country and the courts of that country do not recognise the Scots arrestment. The main risk of double jeopardy will in practice arise from the refusal of the English courts to recognise and give effect to a Scottish arrestment.

3.15 Recognition by English courts of extra-territorial effect of Scots arrestments. The question whether the English courts will recognise and give effect to an arrestment executed at the place of business of an arrestee in Scotland and attaching, or purporting to attach, a debt payable by the arrestee to the defender or common debtor in England, depends on English law. We take as the paradigm case an arrestment (whether on the dependence or in execution) executed in the hands of a clearing

bank in Scotland in circumstances where the only funds due by the arrestee to the common debtor are funds administered in a branch of the bank in England. If an action were brought in England for payment of the funds purported to be attached by the arrestment, there are a number of grounds on which the bank might seek to found as a defence.

3.16 Recognition by English courts at common law or statute of foreign judgments. We are not aware of any rule of the English common law or any statutory provision on the recognition of foreign "judgments" which would require the English courts to recognise an arrestment in the circumstances outlined above.

3.17 An arrestment on the dependence would not be recognised under the Civil Jurisdiction and Judgments Act 1982, section 18 because under subsection (5)(d) that section does not apply to a provisional (including protective) measure of the class to which arrestments belong.

3.18 It seems to us that the rules for the recognition of foreign judgments would not be applicable since an arrestment is an "attachment" rather than a "judgment" and there are special rules (discussed at para 3.21 below) on the recognition by English law of foreign attachments.

3.19 Illegality of payment by arrestee under Scots law. In the Libyan Arab Foreign Bank v Bankers Trust Company[1] it was held by Staughton J that:

> "Performance of a contract is excused if (i) it has become illegal by the proper law of the contract, or (ii) it

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[1] Libyan Arab Foreign Bank v Bankers Trust Co [1989] QB 728.

necessarily involves doing an act which is unlawful by the law of the place where the act has to be done".[1]

In general the expression the "proper law of a contract" means:

> "the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from circumstances, the system of law with which the transaction has its closest and most real connection".[2]

In the case of an ordinary banking contract under which a customer of a bank with its head office in Scotland has a current or deposit account with a branch of the bank in England, it seems that the English courts would hold that the proper law of the contract is English law. Thus in the Libyan Arab Foreign Bank case[3], Staughton J said:

> "As a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary".

The report does not disclose the reasons underlying this general rule, but in principle these are likely to be that English law is the system of law with which "the transaction has its closest and most real connection", because the place where the account is administered and the place of primary performance are both in England. These two points are related because it is well established in English law that (in the absence of an express

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[1] Ibid at p 746. See also Euro-Diam Ltd v Bathurst [1987] 2 WLR 1368 at p 1385 per Staughton J.

[2] Dicey and Morris, supra, pp 1161-1162, Rule 180.

[3] [1989] QB 728 at p 746; see para 2.47 head (4)(b). Followed in Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co (No 2) [1989] Lloyd's Rep 608.

choice of law) "under the proper law of the contract between banker and customer the bank's obligation to repay is performable primarily at the branch where the account is kept, and accordingly in such a case all accounts at a particular branch are to be held as there situate".[1] The factors connecting the transaction with Scotland are ex hypothesi that the head office is in Scotland and that the debt could be recovered by an action in the Scottish courts. It does not seem from the authorities that these facts are likely to be held by the English courts as outweighing the connections of the contract with England in the ordinary case.

3.20 If English law is the proper law of the contract, then as payment is not unlawful by virtue of English law, payment will not be excused under the first requirement of Staughton J's test. The second requirement of that test[2] will not apply in the normal case of an account at an English branch since payment of the credit balance of the account does not require doing any act in Scotland.

3.21 Circumstances in which the English courts recognise "foreign" attachments of a debt. According to Dicey and Morris[3], "the validity and effect of a garnishment of a debt are governed by the lex situs of the debt". As a general rule, the English process of garnishment of a judgment debt (equivalent to

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[1] Dicey and Morris, supra, p 909 citing Martin v Nadel [1906] 2 KB 26, 31 (CA); R v Lovitt [1912] AC 212 (PC); Clare & Co v Dresdner Bank [1915] 2 KB 576; Joachimson v Swiss Bank Corporation [1921] 3 KB 110 (CA); Swiss Bank Corporation v Boehmische Industrial Bank [1923] 1 KB 673 (CA); Richardson v Richardson [1927] P 228; Arab Bank Ltd v Barclays Bank (DCO) [1954] AC 495.

[2] Ie performance of the contract necessarily involves doing an act which is unlawful by the law of the place where the act has to be done: see para 3.19 above.

[3] Dicey and Morris, p 966, Rule 124.

arrestment in execution of a decree for payment) is allowed, although the principal debtor (ie the common debtor) is out of the jurisdiction, "if the debt is properly recoverable, that is, situated, in England but not otherwise".[1] Until recently, that was regarded as an invariable rule, but, as indicated above,[2] recent decisions by the English Court of Appeal have held that the location of a debt outside England will not deprive the English court of jurisdiction to make a garnishee order but only goes to the English court's discretion to make such an order in the sense that it will generally refuse to make such an order if the debt is located outside England and where the making of the order might expose the garnishee to the risk of paying the debt twice over. Moreover in the recent case of Deutsche Schachtbau v SIT Co[3], the House of Lords, sitting as an English court, held that where the situs of a debt attached by a garnishee order nisi is England, but there is a real and substantial risk that the garnishee may be required by a foreign court to pay the debt twice over, the English court should refuse to make the garnishee order absolute even if the foreign court exercised an exorbitant jurisdiction in making its order.

3.22 Before these cases were decided, Dicey and Morris observed:

> "There is surprisingly little authority on the converse question, namely when will effect be given by English courts to a foreign garnishment order. Clearly, if no effect is given, there may be a risk that the garnishee will be compelled to pay his debt twice. Here again the test is whether the debt is situated, that is properly recoverable, in the foreign country where the order was

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[1] Ibid p 966.

[2] See para 2.82 above.

[3] [1990] AC 295.

made".[1]

In determining what is the situs or location of the debt the English courts apply English law, not the law of the place where the foreign attachment (or Scots arrestment) was authorised.[2] As mentioned above[3], since in the case of a banking contract, the situs of the debt is generally at the branch where the customer's account is kept, which is ex hypothesi in England, then the lex situs is English law not Scots law and the English courts would not recognise a Scottish arrestment as attaching the credit balance in the English branch of a Scottish bank.

3.23 It seems likely therefore that the English courts would not recognise a Scottish arrestment as attaching a debt which is by the rules of English law located in England, but that, if there is a real and substantial risk to the garnishee of double jeopardy, the English courts will exercise their discretion to refuse to make a garnishee order, where the debt is located in England and a fortiori where it is located outside England, in order to protect the garnishee from double jeopardy, a consideration which the House of Lords has held to be paramount. On this analogy, it may be that the English courts would not enforce an English judgment in favour of the common debtor for payment against the arrestee who, in pursuance of the Scots arrestment, refused to pay the common debtor on a demand for payment in England.

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[1] Dicey and Morris p 967, citing Gould v Webb (1855) 4 E & B 993; Rossano v Manufacturers Life Insurance Co Ltd [1963] 2 QB 352 at pp 374 to 383; Power Curber Ltd v National Bank of Kuwait [1981] 1 WLR 1233 (CA).

[2] Rossano v Manufacturers Life Insurance Co [1963] 2 QB 352 at pp 378-379.

[3] See para 2.51, head (6).

3.24 Modes of protection from double jeopardy. We have reached the provisional conclusion that the protection of an arrestee from double jeopardy should, following the lead given by the Deutsche Schachtbau case,[1] be a primary objective of law reform. If abolishing the extra-territorial effect of arrestments were the only means of protecting arrestees from double jeopardy, that would be a very strong argument in favour of abolition. As we note below,[2] however, there are other means of protecting arrestees from such jeopardy.

## (b) Relieving financial institution arrestees from need to search branch networks outside Scotland

3.25 Another possible legislative aim is to relieve financial institution arrestees with branch networks outside Scotland from the need to search those networks in order to ascertain whether funds belonging to the common debtor or defender have been arrested. If for example an arrestment only attached funds located in Scotland by the ordinary rules for attributing a situs to debts, an arrestment served on a bank would no longer attach accounts kept at branches of the bank in England and Wales, which might be much more numerous than the branches in Scotland. Given that arrestments are generally unsuccessful even when served on the Scottish clearing banks (successful in only 6% of cases[3]) much abortive work would be saved.

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[1] [1990] AC 295; see para 3.21 above.

[2] See paras 3.47 to 3.60.

[3] Information supplied by the Committee of Scottish Clearing Bankers.

3.26 There would also be a saving in the administrative and clerical expenses incurred in tracing arrested funds which are presently borne by the arrestees. If statutory fees for arrestees were introduced as we have recently proposed in Discussion Paper No. 87[1] and, in the case of financial institution arrestees, these took the form of scale fees broadly proportionate to the size of the arrestee's branch network, there would be a reduction in the fees exigible by the arrestee from the arresting creditor depending on the size of the non-Scottish branch network. In the case of arrestments served on the four Scottish clearing banks, the reduction in fees would be not insignificant since these banks have 1,958 branches in all, of which 368 are outside Scotland.[2] On the level of fees suggested in Discussion Paper No. 87, the aggregate of the fees for arrestments against all the four Scots clearing banks might be reduced from £132 to £115.[3]

3.27 We think however that if the sole objective of reform were to be regarded as relieving financial institution arrestees of the need to conduct searches of their branch networks outside Scotland, then any legislation narrowing the test of arrestability should be restricted to arrestments in the hands of financial institutions. These should be defined as deposit-taking institutions within the meaning of the Banking Act 1987.[4] This solution seems to us to have merely a pragmatic justification and to be somewhat lacking in principle. If the extra-territorial effect of an arrestment is regarded as exorbitant, the test of arrestability should in principle be narrowed to eliminate its exorbitant scope for the protection of all arrestees, not simply

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[1] Discussion Paper No 87 on Statutory Fees for Arrestees (1990).

[2] Ibid, para 3.35, Table B.

[3] Ibid, Table C (para 3.42) and Table D (para 3.44).

[4] For the definition of "deposit-taking institutions", see our Discussion Paper No 87 on Statutory Fees for Arresteess (1990) paras 2.37 and 2.38, and Appendix C.

those who are financial institutions. If as we argue below that effect is not regarded as exorbitant, then the arrestment should attach funds located outside Scotland even if it means that financial institutions have to search files and records in branch networks outside Scotland. We invite views on this question.

### (c) Should extra-territorial effect of arrestments of debts be regarded as exorbitant?

3.28 We seek views on whether (even apart from considerations of double jeopardy and expense) the extra-territorial effect of an arrestment should be regarded as so exorbitant that it should be eliminated by legal rules. By "extra-territorial" effect we mean the effect of the arrestment in attaching debts which, by the ordinary rules for ascribing a situs or locality to debts for purposes other than arrestability (eg tax or confirmation of executors)[1], are located outside Scotland.

3.29 On one view, the practical consequences which flow from the extra-territorial effect of arrestments may suggest that the rule is exorbitant. This is especially true of arrestment to found jurisdiction, though admittedly the scope of that ground of jurisdiction has been drastically limited by the Civil Jurisdiction and Judgments Act 1982 to cases not covered by the European Judgments Convention.[2] Thus in McNairn v. McNairn[3], Lord Strachan observed:

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[1] See para 2.51 above.

[2] See European Judgments Convention, Article 3(6); 1982 Act, Sch 4, Article 3; and compare Sch 8, Rule 2 (8)(a).

[3] 1959 SLT (Notes) 35 at p 36.

> "If jurisdiction is sustained in the present case, that would mean that every depositor, and indeed every member, of the Abbey National Building Society can be made liable to the jurisdiction of the Scots Courts no matter where they reside and the same would apply to the depositors and members of every other building society which has a branch in Scotland, and to every person who has a claim against any other society or company which happens to carry on business in Scotland. That is certainly a startling proposition".

These remarks are now largely superseded by the 1982 Act so far as arrestment to found jurisdiction is concerned. But it remains the case that if the English bank or building society were to establish one place of business in Scotland, an arrestment laid in the hands of the bank or building society at that Scottish place of business would by Scots law be treated as attaching all pecuniary debts due by the arrestee to the defender or common debtor in accounts kept and administered throughout its network of branches in other parts of the United Kingdom and elsewhere. Furthermore, this result would follow even though in all respects (other than the fact that the Scottish courts happen to have jurisdiction over the arrestee) the debt has its closest connections with a country other than Scotland. The debt, for example, may arise under a contract concluded in England and governed by English law; the place of the demand for payment and the place of payment may both be in England; the debt may be primarily recoverable in England and under English law the location of the debt may be in England; under Scots law for purposes other than arrestability the debt may be located in England; and all places of business of the arrestee (other than the place of business in Scotland where the arrestment was served) may be situated in England. It may be that this is an exorbitant rule unlikely to gain recognition under the private international law rules of other countries.

3.30 Moreover procedures now exist to enable a Scottish pursuer to obtain a Mareva injunction freezing bank accounts and other debts on the dependence of the Scottish action for payment,[1] and other provisional and protective measures in other Contracting States on that dependence[2], and decrees for payment will be recognised and enforced throughout all the Contracting States.[3]

## (d) Arguments for retaining the extra-territorial effect of arrestments

3.31 While these criticisms of the extra-territorial effect of arrestments are entitled to considerable weight, we think that they may well be outweighed by other policy considerations favouring the retention of that extra-territorial effect.

3.32 First, we find it difficult to escape from the fact that if an arrestment were to attach only debts situated in Scotland under the normal rule for attributing a location to a debt, and thus required the arrestee to disregard debts due by or to him which were located for ordinary purposes in another country, the result could well be unfair to either the debtor or creditor, and especially unfair to the innocent arrestee. It seems to us that, in obtempering an arrestment, the arrestee should be entitled and required to combine all accounts kept by him for the defender or common debtor irrespective of the country in which they are located. If for example a credit balance or debt due _by_ the

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[1] Civil Jurisdiction and Judgments Act 1982, s 25.

[2] Convention, Article 24.

[3] Convention, Articles 25 to 49; 1982 Act, ss 18 and 19.

arrestee in Scotland was cancelled out by a larger debit balance or debt due to to the arrestee in England, it seems unjust and unacceptable to require the arrestee to pay the credit balance to the arrester and to disregard the debit balance. It is thus a great advantage of the present law that an arrestment requires the arrestee to pay regard to the over-all financial position as between him and the defender or common debtor, and it would require formidable counter-vailing arguments to justify the loss of that advantage by abolition of the extra-territorial effect of arrestments.

3.33 Second, we have already mentioned[1] that in our view, protection of arrestees from double jeopardy should be a primary objective of law reform. For this reason, we suggest later[2] that the Scottish courts should have a discretionary power to recall an arrestment in order to protect an arrestee from double jeopardy. If this mode of protecting an arrestee by judicial discretion were to be introduced, we greatly doubt whether there would then be a need to narrow the test of arrestability in order to achieve that objective by means of a legal rule. Such a rule would be unlikely to be wholly successful in precluding double jeopardy: it could not for example preclude double jeopardy in cases where the competing foreign proceedings were exorbitant.

3.34 Third, we concede that retention of the extra-territorial effect of arrestments would require banks and other financial institution arrestees to continue to search files and records outside Scotland in order to determine the over-all state of indebtedness as between the defender or common debtor and the arrestee, and that this would preclude a reduction in the fees chargeable for

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[1] See para 3.24 above.

[2] See para 3.47 ff.

such arrestments which we propose in Discussion Paper No. 87 on Statutory Fees for Arrestees. If, however, we are right in thinking that the arrestee should be entitled and required to combine all accounts held for the defender or common debtor irrespective of their location, it would seem contrary to principle and unjustifiable to make a special rule for financial institutions in order to reduce the level of fees. We seek views on this provisional conclusion.

3.35 Fourth, the need or desirability of enabling and requiring arrestees to combine accounts wherever located arguably provides a sufficient answer to the argument that the extra-territorial effect of an arrestment is exorbitant. If the defender or common debtor can sue the arrestee in Scotland for payment of a debt whether under a contract or indirectly by way of damages for non-payment, it seems to us that there is a sufficiently close connection with Scotland to justify arrestability.

(e) Questions for consideration and provisional proposals

3.36 In our provisional view, therefore, the arguments for retaining the extra-territorial effect of arrestments of pecuniary debts outweigh the arguments for abolition of that effect. We seek views on that provisional view.

3.37 If (contrary to our provisional view) it were to be accepted after consultation that the extra-territorial effect of the arrestment of pecuniary debts should be abolished, thereby narrowing the scope of the test of arrestability, the question would arise of what rules should be adopted by statute to ascribe a *situs* or location to such a debt. One possibility would be to apply to arrestments the rules presently applicable otherwise than

for the purpose of arrestability, which were set out at para. 2.51 above. As we indicate at para. 2.52 above, however, these rules (which refer to residence and place of business) have an out-of-date appearance now that the debtor's domicile is the primary ground of jurisdiction under the European Judgments Convention and the 1982 Act. Another possibility would be to enact a statutory rule, eg. the primary place of payment. We seek views on these options and on any other option which might be adopted.

3.38 We invite views on the following questions.

**(1) Should the existing rule on the extra-territorial effect of arrestments of pecuniary debts (under which such an arrestment has the effect of attaching pecuniary debts which are located, for purposes other than arrestability, outside Scotland) be retained or abolished?**

**It is suggested that the extra-territorial effect rule should be retained provided that the Scottish courts are empowered to make discretionary orders for the protection of arrestees from double jeopardy, as proposed in Proposition 5 (para. 3.60).**

**(2) If (contrary to our provisional view) an arrestment of pecuniary debts should not in future attach debts located outside Scotland, views are invited on how debts located outside Scotland are to be defined for this purpose. In particular, views are invited on whether:**

**(a) a special statutory rule should be enacted to the effect that the location of a debt arising under a**

contract or unilateral promise should be treated as located in a country if, by the law applicable to the contract or promise, the primary place of payment is in that country; or

(b) the location of a debt (however arising) should be determined in accordance with the common law rules attributing a locality to debts (set out at paragraph 2.51 above) which presently apply outside the realm of the validity and effectiveness of arrestments.

(3) References in this Proposition to a pecuniary debt include a reference to an obligation to account for the purpose of ascertaining whether an obligation to pay a pecuniary debt (as distinct from an obligation to deliver a corporeal moveable) is or will be due.

(Proposition 2).

## (2) Arrestment of corporeal moveables and obligations to account for corporeal moveables

3.39 At para. 2.97 above we concluded that under the existing law, the preponderance of authority favours the view that it is a requirement of the validity and effectiveness of an arrestment of a corporeal moveable, or of an obligation to deliver or to account for a corporeal moveable, that the corporeal moveable must be physically located in Scotland.[1] There are some conflicting authorities relating mainly to the arrestment of a ship's cargo at sea or abroad,[2] so that some slight doubts remain.

3.40 In our view, the location of the corporeal moveable in Scotland should be, or continue to be, a requirement of the validity and effectiveness of an arrestment. We suggest that this requirement should be expressly enacted by statute to remove any doubts. Such a provison would be consonant with the general principle that for subjects to be arrestable, they must be capable of being fixed within Scotland at the time of arrestment. Such a provison could also be justified by the principle of effectiveness: corporeal moveables which are physically outwith the territorial jurisdiction of the Scottish courts are not in fact subject to the control of those courts. The requirement would also be consistent with the rule prohibiting an arrestee from taking an arrested corporeal moveable outside the jurisdiction of the Scottish courts without the authority of those courts.[3] The requirement would also cohere with the Civil Jurisdiction and Judgments Act 1987, s 27(1)(a).[4]

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[1] See generally paras 2.87 to 2.97.

[2] See paras 2.95 and 2.96.

[3] See para 2.93.

[4] This provision enables the Court of Session to grant a warrant for the arrestment of "any assets situated in Scotland" on the dependence of proceedings outside Scotland.

3.41 We concede that a requirement that the corporeal moveables must be located in Scotland is not entirely consistent with the principle that an arrestment clothes the arrester with all the rights available to the common debtor against the arrestee. There may be an obligation on the part of the arrestee to deliver the corporeal moveables to the common debtor which would not be transferred by the arrestment to the arrester because the corporeal moveables happened to be outside Scotland at the time of the execution of the arrestment. This disadvantage is, in our view, outweighed by the fact that an arrestment of corporeal moveables located abroad at the time of arrestment would be likely to be regarded as exorbitant and to fail to win international acceptance and recognition. Moreover the creditor is not left without remedy: he can apply for provisional or protective measures or recognition and enforcement of his decree in the country where the moveables are in fact located.

3.42 While in strict theory, it may be that for some purposes the proper subject of arrestment is not the corporeal moveable itself but the obligation to deliver,[1] we think that this theory goes so far as to require the existence of an obligation to deliver or account as a prerequisite of arrestability but should not require that the place of delivery should be within Scotland. Under the present law, there is no requirement that the place of delivery be within Scotland.[2]

3.43 We propose:

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[1] See para 2.25 above; and para 2.88, (quotation from Maher and Cusine, para 4.34).

[2] See paras 2.90 to 2.92.

(1) It should be, or continue to be, a requirement of the validity and territorial effect of an arrestment of a corporeal moveable, or of an obligation to deliver a corporeal moveable, that at the time of the execution of the arrestment the corporeal moveable is located in Scotland.

(2) As under the present law, the validity and territorial effect of an arrestment of a corporeal moveable, or of an obligation to deliver a corporeal moveable, should not be prejudiced by the fact that, at the time of the execution of the arrestment, the arrestee is, or may come, under an obligation to deliver the corporeal moveable outside Scotland, or to implement (by himself or with others) arrangements for its delivery or transport outside Scotland.

(3) References in this Proposition to an obligation to deliver a corporeal moveable include a reference to an obligation to account for the purpose of ascertaining whether an obligation to deliver a corporeal moveable is or will be prestable.

(Proposition 3)

## C. Special categories of moveable property

3.44 In our proposals we have referred to the arrestment of obligations to account for the purposes of ascertaining whether an obligation to pay a pecuniary debt is or will be due,[1] or an obligation to deliver a corporeal moveable is or will be prestable.[2] It is not all obligations to account, however, which would fall to be covered by our proposals. We see no reason why any change

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[1] Proposition 2(6) (para 3.36).

[2] Proposition 3(3) (para 3.41).

should be made to the law on the arrestment of shares or interests in partnerships.[1] The basis of arrestability of these species of incorporeal moveable property seems to be that the arrestee company or partnership owes the defender or common debtor an obligation to account.[2] But in effect these types of property differ in kind from pecuniary debts and obligations to deliver of the normal type and we suggest that they should be expressly excluded from any legislation which may ultimately be introduced.

3.45 As already mentioned arrestments of ships are excluded from this Discussion Paper since they do not raise the same problems and have been considered by us elsewhere.[3]

3.46 We invite views on the following.

(1) **The foregoing proposals are intended to apply only to arrestments laid in the hands of an arrestee and accordingly do not apply to the arrestment of ships and their apparel.**

(2) **The proposals in Propositions 2 and 3 above should not apply to the following interests in incorporeal moveable property, namely:**

(a) **shares in a limited company; and**

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[1] See Rae v Neilson (1742) Mor 716, discussed at paras 2.17, 2.32, 2.56 and 2.91 above.

[2] Riley v Ellis 1910 SC 934 at p 942 per Lord President Dunedin.

[3] See Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments (1989) Part III.

(b) the interest of a partner in the partnership.

Accordingly those interests should continue to be arrestable notwithstanding that pecuniary debts, corporeal moveables or other assets belonging to the company or partnership are located outside Scotland at the time of the execution of the arrestment.

(Proposition 4)

## D. Court's power to protect arrestee or other "innocent" third party from double jeopardy

### Preliminary

3.47 Whether or not provision is made limiting the territorial effect of arrestments to debts located in Scotland by the ordinary rules attributing a locality to debts, it is in our view desirable that statutory provision should be made enabling the Scottish courts to make orders protecting an arrestee, or other "innocent" third party whose debts are,or are likely to be, subject to a "foreign" garnishee order or attachment, from being required to pay the arrested or attached debt twice over (ie to the pursuer and to the defender) in the Scottish or foreign proceedings.

3.48 The problem of double jeopardy suffered by arrestees was first brought to our attention in discussions with representatives of the Committee of Scottish Clearing Bankers. Their interest stems from the risk of being required by an English court's judgment to pay in England to a common debtor a credit balance on an account kept at an English branch of the Scottish bank which has

been arrested under a Scottish warrant for diligence and perhaps made furthcoming to the creditor holding the warrant. The problem has recently been highlighted by the judgment of the House of Lords in the English case of Deutsche Schachtbau v. SIT Co[1], which illuminates many of the issues of legal policy in this realm.

## English law: the Deutsche Schachtbau case

3.49 As we have seen,[2] if the English courts have jurisdiction over the garnishee, they have jurisdiction to make a garnishee order absolute whether or not the debt is located within the jurisdiction but will almost always not make such an order if the debt is located outside the jurisdiction. In the converse case where a debt attached by a garnishee order nisi is located within the jurisdiction, it was held by the House of Lords in the Deutsche Schachtbau case[3] that if there is a real and substantial risk that the garnishee may be required by a foreign court to pay the debt twice over, the court should refuse to exercise its jurisdiction to make the garnishee order absolute even if the foreign court exercised an exorbitant jurisdiction in making its order.

3.50 In that case two foreign companies, Deutsche Schachtbau-Und Trefbohrgesellschaft m.b.H ("D.S.T.") and the R'As al-Kaimah Oil Co (Rakoil), entered into an agreement for the exploration of oil in one of the States in the Persian Gulf, R'As al-Kaimah ("the State"). The agreement contained a clause providing for the settlement of all disputes by arbitrators appointed in Geneva under

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[1] [1990] AC 295.

[2] See para 2.82.

[3] [1990] AC 295.

the rules of the International Chamber of Commerce. In March 1979, DST referred a dispute to arbitration in Geneva and obtained a substantial award. Rakoil, acting in breach of the arbitration clause, instituted proceedings in the Civil Court in the Stateand obtained rescission of the whole agreement and damages for misrepresentation. Neither party took any part in the proceedings by the other, and for a period neither the award nor the judgment was enforced. In June 1986, however, DST discovered that an English company, Shell International Petroleum Co Ltd, ("Sitco") owed money to Rakoil as the price of oil purchased by Sitco from Rakoil and obtained leave to enforce their arbitration award in England. The Government of the State, having obtained a judgment against Sitco for the cost of the oil, on the grounds that in selling the oil Rakoil had been acting as agent on its behalf, announced that it would not conduct any further trade with Sitco, until payment of the cost of the oil was made. The Civil Court, having arrested a ship chartered to an associate company of Sitco in apparent breach of the law of the State, announced that it would not release the ship until payment of the cost of the oil was made. In the meantime, DST obtained a garnishee order absolute against Sitco. The Court of Appeal dismissed Sitco's appeal against the making of the order. The House of Lords reversed the Court of Appeal's decision. Lord Templeman, dissenting, observed[1] that the jurisdiction claimed by the Civil Court was exorbitant three times. First, in the order made against DST usurping the jurisdiction confided by Rakoil and the State to arbitration in Geneva; second, in the order made against Sitco in favour of the State which was not a party to the contract with Sitco and in

[1] [1990] AC 295 at p 341.

usurpation of jurisdiction[1]; and third, in the order arresting the ship belonging to Sitco's associate company which was grossly exorbitant.[2] Further, Rakoil was the servant of the State and the Civil Court was not independent of the State. He concluded that the English court should not be influenced by the threats of the State or by the coercive detention of the ship of Sitco's associate company.

3.51 Discretionary factors: commercial pressure irrelevant. Lord Oliver of Aylmerton and Lord Goff of Chieveley (with whom Lord Keith of Kinkel and Lord Brandon of Oakbrook concurred) held that the garnishee order absolute should not be made. There were three possible grounds on which this decision might have been reached. The first was the commercial pressure to which Sitco was subjected, eg by the State's announcement that it would not trade with Sitco until the cost of the oil was paid. This factor was regarded as irrelevant. Lord Goff of Chieveley said

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1 The sale of the oil to Sitco by Rakoil was under a contract which provided that the validity, construction and performance of the contract was to be governed by the law of England and that any dispute in connection with the agreement was to be referred to arbitration under the International Arbitration Rules of the London Court of International Arbitration: [1990] AC 295 at p 334.

2 The ship was owned by a Panamanian corporation unconnected with Sitco and was chartered to a company which was an associate of, but separate from, Sitco. The State law did not permit the arrest of a vessel for a non-maritime debt which was not the liability of the owner or charterer: [1990] AC 295 at p 335.

that "as a general rule, commercial pressure cannot of itself be enough to render it inequitable to make an order absolute",[1] and approved[2] the reasoning of Hobhouse J at first instance when he said:

> "Any process of enforcement makes life more complicated for the garnishee. It may even lead to the judgment debtor venting his wrath in some way on the innocent garnishee. It may seriously damage the trading reputation and relationships of the garnishee in a particular trade or part of the world. But the administration of justice should not, without more, defer to such considerations. Just as Mareva injunctions or giving evidence on subpoena, etc., may cause such problems for the party affected, which he would much prefer to avoid, so here the mere commercial interests of Sitco cannot be allowed to defeat the ends of justice. There are obvious practical reasons which support this policy. The measure of commercial advantage and disadvantage, particularly in an international field, is very difficult to investigate and evaluate with any accuracy and depends upon the expression of opinions, which have to make assumptions about events which, ex hypothesi, have not yet occurred. Further, if the court were to allow such considerations to affect the administration of justice, it would provide obvious encouragement to defaulters to try and frustrate execution by imposing just such commercial pressures on the garnishee".

3.52 Discretionary factors: foreign court a tool of judgment debtor. In response to a submission by DST that the Civil Court's judgment was a sham in the sense that the Civil Court was not acting in accordance with the law as understood in the State but as a tool of the executive of the State, Lord Oliver of Aylmerton said[3] that the feature of the case which gave him most concern was the virtual identification of the judgment debtor (Rakoil) with the State in whose Civil Court judgment against the garnishee had been obtained and the serious doubt whether the Civil Court could

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[1] [1990] AC 295 at p 352.

[2] Ibid at pp 352, 353, citing [1988] 2 Lloyd's Rep 294, 300.

[3] [1990] AC 295 at p 343, 344.

in any real sense be regarded as independent of the judgment debtor itself. "The possibility has, therefore, to be faced that what the Court in England is confronted with is no more than illegitimate executive action under the cloak of legitimate legal process".[1] It was held however that that possibility could not be regarded as clearly established on the evidence. Lord Goff of Chieveley nevertheless remarked that[2]:

> "had those facts been established, they would have raised a difficult question whether such an exercise of power by a court could, on the facts of the case, properly be regarded as an order by a court of law at all, but should rather be regarded as an act of executive power by the State and so should be categorised with commercial pressure and as such be irrelevant to the making of a garnishee order absolute. I wish also to state that, in cases such as the present, the courts of this country must not shrink from the task of making the necessary assessment of the situation, reluctant though they will be to do so".

3.53 Discretionary factors: risk of double jeopardy to garnishee paramount. The House of Lords held that the English court considering the making of a garnishee order attaching a debt located in England was not automatically bound to assume as a matter of law that foreign courts would recognise the order as discharging the debt,[3] but must have regard to the factual question whether there is a real and substantial risk that a foreign court would not recognise the order and enforce the debt against the garnishee who would then have to pay the debt twice over. Furthermore where such a risk was shown it did not matter that the foreign court was exercising an exorbitant jurisdiction in making the order for payment against the garnishee. Lord Goff of Chieveley characterised the question as one of policy not susceptible to a logical answer, and of balancing the interests of

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[1] Idem.

[2] Ibid at p 358.

[3] [1990]AC 295 at pp 354-356.

the garnishor against that of the garnishee. He remarked[1]:

> "Powerful arguments of policy can be advanced in favour of either solution - the one favouring the interests of the garnishor in levying lawful execution upon the property of the judgment debtor, and the other favouring the interests of the garnishee. On the one hand, it can be said that the garnishee must ordinarily have to bear the consequences of any commercial pressure which may be inflicted upon him by a powerful judgment debtor, which may have serious financial consequences for him; it is not unreasonable, it may be argued, that he should likewise bear the consequences of action by some foreign court, invoked by the judgment debtor, which departs from the accepted norms of private international law. On the other hand, it can be said that the principle which is here being applied is that a garnishee order absolute should not be made where it is inequitable to do so, and further that it is accepted in the authorities that it is inequitable so to do where the payment by the garnishee under the order absolute will not necessarily discharge his liability under the attached debt, there being a real risk that he may be held liable in some foreign court to pay a second time. To deprive the garnishee of the benefit of this equity merely because the court which may hold him liable a second time is not acting in accordance with accepted principles of international law would not be right, especially bearing in mind that the garnishee is a wholly innocent party who has been dragged into somebody else's dispute, and that the judgment creditor has the opportunity of seeking elsewhere for assets of the judgment debtor which he may seize in satisfaction of the judgment debt".

Later he said[2]:

> "if the garnishee shows that he is in fact exposed to a real risk of being required by a foreign court to pay the debt a second time, it does not of itself matter that the risk which the garnishee shows to exist is one of being so required by a foreign court which does not have, by English law, or by generally accepted rules of international law, jurisdiction to make such an order. This is because the crucial feature is the reality of the risk".

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[1] Ibid at p 355.

[2] <u>Ibid</u> at pp 357, 358, agreeing with Hobhouse J at first instance.

3.54 Lord Oliver of Aylmerton concurred observing[1] that disapproval of the conduct of the judgment debtor should not be allowed to outweigh the injustice likely to be suffered by the garnishee whose involvement arose simply from the accident of residence in England which provided the requisite element of situs for the debt sought to be garnished. The fact that the foreign judgment had been irregularly obtained by the exercise of an exorbitant jurisdiction made no difference to the garnishee.

> "However irregularly he will, as a result of the order being made absolute, be compelled to pay the debt twice over, and it sweetens the pill not at all to be told that one such payment has been irregularly extracted from him".[2]

**The need for a safeguard under Scots law against double jeopardy**

3.55 If a similar case had risen in Scotland, the Scottish courts would have been powerless to grant relief to the innocent arrestee, whether by recalling a Scottish arrestment, or refusing decree of furthcoming, or otherwise. It seems to us first, that an innocent arrestee should not be compelled to pay a debt twice over in pursuance of separate proceedings in different countries which conform to the laws of these countries and second that, consistently with the Deutsche Schachtbau case, it should be irrelevant that the legal process in one of the countries is irregular and exorbitant according to the principles of private international law applying in Scotland.

3.56 Arrestment in Scotland: attachment or decree outside Scotland. We therefore propose that where an arrestment has been executed and there is a real and substantial risk of the

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[1] Ibid at p 343.

[2] Ibid at p 346.

arrestee suffering double jeopardy by being required by legal process (as distinct from commercial pressure) to pay the debt a second time in another part of the United Kingdom or a foreign country, the Scottish court should have power, exercisable on the application of the arrestee, to recall or restrict the arrestment so as to protect the arrestee from the double jeopardy.

3.57 Decree in Scotland against innocent third party subject to foreign attachment. It might happen that a foreign court makes an attachment order of funds in the hands of a third party having by the foreign law extra-territorial effect and attaching, or purporting to attach, a debt located in the foreign country and also located in Scotland by the local laws; the defender in the foreign proceedings may demand payment of the debt in Scotland; the third party may refuse payment in reliance on the foreign attachment; and if the Scottish courts do not recognise the foreign attachment the defender in the foreign proceedings may then obtain, in a Scottish action, a decree for payment of the debt under the contract or for damages for non-payment. In such a case, the innocent third party would be at risk of double jeopardy but the Scottish courts would be powerless to protect him from that jeopardy even if a power to recall arrestments was introduced on the lines proposed in para. 3.56 above. The double jeopardy may arise not only from legal process in the foreign country (eg a Gulf state) but, as in the Deutsche Schachtbau case, in other foreign countries (eg other Gulf states) recognising the judgment in the first-mentioned foreign country. If the Scottish courts did not recognise the foreign judgment or the foreign attachment, they would *ex hypothesi* be bound to grant decree and would be unable to prevent the enforcement of the decree by the usual modes of diligence - poinding, earnings arrestment, conjoined

arrestment order, arrestment and furthcoming, inhibition and adjudication.

3.58 If the policy of protecting innocent third parties from double jeopardy is to be given full effect by legislation, statutory provision will be necessary to enable the Scottish courts to recall or restrict not merely Scottish arrestments, but other modes of diligence in the circumstances just described. It has in our view to be recognised that a debt may be enforceable in two or more countries by attachment in the hands of innocent third parties not concerned with the action, and if by the accident of the third party having a domicile in Scotland, he is liable under Scots law to pay the debt here and if he is liable also under foreign law to pay in a foreign country, the third party should be as much entitled to protection as under our proposals he would be if the double jeopardy arose from the use of a Scottish arrestment not recognised abroad in the case outlined in para. 3.56. We do not think that the Scottish courts should be empowered to refuse decree in such a case but suggest that they should have power to recall diligence used in pursuance of the decree. If that proposal be accepted, it would logically follow that statutory provision should also be made to enable the court in Scottish bankruptcy or liquidation proceedings on the third party's estate to reject a claim by the defender in the foreign proceedings to rank for a dividend on the debt in respect of which the double jeopardy exists. Provisions on these lines would rarely be invoked, but appear necessary in principle. We invite views on these proposals.

3.59 Grounds of recall. Having regard to the considerations mentioned in the Deutsche Schachtbau case we suggest that the paramount consideration should be that there is a real and

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[1] See para 3.53 above.

substantial risk of double jeopardy to the arrestee or third party.[1] The court's power should be exercisable only where the double jeopardy arises from a legal process which does or may result in enforcement proceedings in another country and not where that risk arises from mere commercial pressure.[1] The Scottish courts should not be precluded from granting relief by reason only of the fact that the foreign legal process is, in the eye of Scots law, irregular and exorbitant.

3.60 Our proposals. We propose:

**(1) Where an arrestment has been executed in Scotland attaching a debt or other moveable property and there is a real and substantial risk of the arrestee suffering double jeopardy in the sense that, if the arrestee were to obtemper the arrestment and make the arrested debt or property furthcoming to the arrester as required by Scots law, the arrestee would be compelled, by reason of legal process in another country, either:**

**(a) to pay all or part of the arrested debt a second time to the common debtor (whether as a debt or as damages for the arrestee's refusal, in compliance with the arrestment, to pay the debt to the common debtor); or**

**(b) to pay damages to the common debtor for the arrestee's refusal, in compliance with the arrestment, to part with the arrested property to the common debtor,**

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[1] See para 3.51 above.

then the Scottish court should have a discretionary power, exercisable on the application of the arrestee, to recall or to restrict the arrestment so as to protect the arrestee from the double jeopardy.

(2) Where in a legal process for payment of a debt brought in a foreign country, the creditor attaches, in the hands of a third party, a debt due by the third party to the debtor in the process, and:

(a) the debtor in the foreign process demands payment from the third party but the third party refuses payment in reliance on the foreign attachment; and

(b) the debtor in the foreign process obtains decree or judgment in Scotland or in a foreign country against the third party for payment of the debt (whether as a debt or as damages for the third party's refusal, in reliance on the foreign attachment, to pay the debt to the debtor in the foreign process) and enforces the decree or judgment in Scotland by diligence,

the court should have power, on an application by the third party, to recall or to restrict the diligence in order to protect the third party from the double jeopardy of being required by the diligence and foreign process to pay the debt twice over.

(3) In para (2) above:

(a) "debt" includes a debt alleged to be due whether or not liability is recognised by Scots law;

(b) "diligence" includes poinding, arrestment, earnings arrestment, current maintenance arrestment, conjoined arrestment order, adjudication for debt and inhibition;

(c) "foreign country" includes any country or territory outside Scotland;

(d) "recall" means, in relation to a conjoined arrestment order, an order excluding the debtor in the foreign process from ranking as a creditor in the conjoined arrestment order, and includes, in relation to an action of adjudication for debt, an interlocutor dismissing, sisting or continuing the action.

(4) If the proposals in para (2) above are accepted, statutory provision should also be made enabling a Scottish court entertaining sequestration or liquidation proceedings on the third party's estate to reject a claim by the debtor in the foreign proceedings from ranking in the sequestration or liquidation for a dividend on the debt in respect of which the risk of double jeopardy exists.

(5) The court's power to recall diligence and to reject a claim in insolvency proceedings should be exercisable only where the risk of double jeopardy arises from legal process in a foreign country which does, or may, result in enforcement proceedings in the same or a different foreign country and not where that risk arises from mere commercial pressure.

(6) If the risk of double jeopardy is real and substantial, the Scottish court should not be precluded from exercising the foregoing powers by reason only of the fact that the legal process in the other country is an exorbitant or irregular exercise of jurisdiction.

(Proposition 5)

## PART IV
## JURISDICTION IN ACTIONS OF FURTHCOMING

### (1) Preliminary

4.1 We have found it necessary to consider the law relating to jurisdiction in actions of furthcoming, partly because there is some doubt and uncertainty about this branch of the law and partly to lay a foundation for our discussion in Part III of jurisdiction over the arrestee as a prerequisite of the validity and effectiveness of arrestments. We consider first the law in force before 1 January 1987 when the Civil Jurisdiction and Judgments Act 1982 came into force since that is necessary background to an understanding of the effect of the 1982 Act and the European Judgments Convention on jurisdiction in actions of furthcoming. In actions of furthcoming there are two defenders - the common debtor and the arrestee. In reviewing how the law developed, we deal with jurisdiction over the common debtor in the Court of Session[1]; the conflicting common law rule on jurisdiction over the common debtor in the sheriff court[2]; the reversal of the latter rule by the Sheriff Courts (Scotland) Act 1907, s. 6(g)[3] which laid down new rules covering both common debtor and arrestee; and the uncertain common law rule regarding jurisdiction over the arrestee in Court of Session actions of furthcoming.[4] Thereafter we consider the impact of the 1982 Act and the new rules introduced thereby[5].

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[1] Para 4.2.

[2] Para 4.3.

[3] Para 4.4.

[4] Paras 4.5 to 4.8.

[5] Paras 4.9 ff.

## (2) The law in force before 1 January 1987

4.2 Common law grounds of jurisdiction: the "continuation" theory. At common law there was an apparent conflict of authority as to the jurisdictional requirements of an action of furthcoming. On one view, an action of furthcoming was, from the standpoint of the rules for assuming jurisdiction over the common debtor, an ancillary process amounting to a continuation of the proceedings in which the warrant for arrestment was granted or of the arrestment itself, with the effect that a duly executed arrestment automatically carried with it jurisdiction over the common debtor in the action of furthcoming. Thus in 1844 in Burns v. Monro[1], an arrestment was used on an extract registered protest after the common debtor, who had had a Scottish residence or domicile of citation when the extract registered protest took place, lost his Scottish residence and domicile of citation on moving to another country. It was held that an action of furthcoming could be raised without the need to constitute jurisdiction over the common debtor afresh by arrestment ad fundandam or otherwise. As Dobie remarked, in that case the "furthcoming, although in form a separate process, was there regarded as really a continuation of the same judicial proceedings".[2] Lord Mackenzie observed[3]:

> "Now this extract and diligence must, I think, be in just the same situation as any other extract and diligence thereon.... Then arises the general question - Can a party by leaving Scotland, after action is raised and decree competently pronounced against him, render extract and diligence thereon incompetent, unless where arrestment jurisdictionis fundandae causa can be and is used or its

[1] (1844) 6 D 1352.

[2] Sheriff Court Practice p 66.

[3] Ibid at pp 1353, 1354.

equivalent exists by the right of the debtor to immovable property in Scotland? I know of no authority at all for the affirmative of that question. On the contrary, our common practice seems to require nothing more than presence (sic)[1] of the defender when the action is raised. After that, it is held his duty to remain in Scotland or sist a mandatary, and if he goes abroad during the process without a mandatary, decree immediately passes against him.... The pursuer having competently raised his process, is held entitled to the benefit of a decree in it valeat quantum. And I see no reason at all against this practice.... Accordingly, such seems to be the view to which our practice is suited, when a defender leaves Scotland after action raised. But if so, then this applies a fortiori to the issuing of extract, and diligence on the decree, in an action. And it seems equally applicable to extract and diligence in a decree of registration, of which the effect is equal to a decree on action raised".

In concurring, Lord Jeffrey remarked that "A forthcoming is not an original action, but a following out of diligence"[2]. Lord Deas later explained that Burns v. Monro "proceeded on the footing that a furthcoming, though in some sense an action, was properly speaking a step of diligence - part of the execution of arrestment; ... ".[3] Again in 1897 in Valentine v. Grangemouth Coal Co[4], an arrestment was executed on an extract registered certificate of an English High Court judgment registered in Scotland under the Judgments Extension Act 1868, section 2 of which made the registered certificate equivalent to an extract decree of the Court of Session. It was held that in an action of furthcoming, the Scottish court had jurisdiction over the common debtor, who was

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[1] The word "presence" here seems to mean residence.

[2] Ibid at p 1355.

[3] Wightman v Wilson (1858) 20 D 779 at p 786.

[4] (1897) 35 S L Rep 12(OH). Pace Anton p 114, this case did not concern the question whether arrestment ad fundandam was necessary or appropriate in a petition to register a judgment under the 1868 Act but whether it was necessary in an action of furthcoming following on an arrestment proceeding on a registered English judgment.

an Englishman resident in England, though jurisdiction in that action had not been constituted by arrestment ad fundandam or otherwise.

4.3 Furthcoming as separate process at common law in the sheriff court. The alternative view was that an action of furthcoming was an independent process separate from the prior arrestment with the effect that jurisdiction in the action of furthcoming had to be established afresh against the common debtor. So in 1858 in Wightman v. Wilson[1], it was held that where an action of furthcoming was raised in the sheriff court more than 40 days after the common debtor had left Scotland, the common debtor was not subject, and could not by letters of supplement be made subject, to the jurisdiction of the sheriff. The main ground of decision in that case was that the sheriff court was not an appropriate court in which to convene foreigners, ie. persons not having a residence in Scotland, since otherwise there might be as many actions of furthcoming against the common debtor as there are sheriffdoms. But the court also emphasised the separate and independent nature of a furthcoming. Lord Ivory said[2]:

> "It is said that this being an action of furthcoming, the common debtor is not a proper party to it, for any immediate or substantial interest of his own: and therefore that arrestment being used, citation was not indispensable. I cannot adopt that view of the process of furthcoming. It is no doubt a process in execution to a certain extent. But it is also a process in the shape of action, and it is so entirely in the shape of action, that citation of the common debtor is an indispensable requisite".

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[1] (1858) 20 D 779.

[2] Ibid at p 784.

In that case, it was observed (contrary to Burns v. Monro, supra) that the common debtor was the main defender in an action of furthcoming and the arrestee an "incidental" or subsidiary defender.

4.4 Jurisdiction of sheriff court under section 6(g) of 1907 Act. The effect of Wightman v. Wilson was that both the common debtor and the arrestee had to be subject to the jurisdiction of the sheriff and it seems that this led to many actions of furthcoming being raised in the Court of Session[1]. This rule was changed first by the Sheriff Courts (Scotland) Act 1876, s. 47 of which provided that an action of furthcoming was competent in any sheriff court to whose jurisdiction the arrestee was subject though the common debtor did not reside in such jurisdiction. This provision was repealed by the Sheriff Courts (Scotland) Act 1907, section 6(g) of which provided that "any action competent in the sheriff court may be brought within the jurisdiction of the sheriff... where in an action of furthcoming... the fund or subject in medio is situated within the jurisdiction; or the arrestee... is subject to the jurisdiction of the court". Graham Stewart[2] doubted whether the 1876 Act had reversed Wightman v. Wilson but in Leggat Bros v. Gray[3], construing the 1907 Act, s 6(g), his view was rejected and it was made clear that the jurisdiction of the sheriff court in an action of furthcoming was established if either of the requirements of section 6(g) of the 1907 Act was satisfied.

4.5. Jurisdiction of Court of Session over arrestee: common law requirements. There was surprisingly little direct authority

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[1] Mackay Practice of the Court of Session vol 2 (1879) p 103.

[2] p 228, fn 2.

[3] 1912 SC 230.

in primary sources relating to the question whether it was essential that, in an action of furthcoming in the Court of Session, the arrestee had to be subject to the jurisdiction of the Scottish courts at the time of the raising of the action of furthcoming. So far as jurisdiction over the common debtor was concerned, we have seen that different views were adopted in Wightman v. Wilson[1] and Burns v. Monro[2]. In the Outer House case of Valentine v. Grangemouth Coal Co[3] these differences were referred to by Lord Kincairney who remarked[4]:

> "It may be that the nature of a furthcoming was regarded somewhat differently in these two cases, being looked on in the case of Wightman as an action, and in the case of Burns rather as part of the diligence of arrestment; still I cannot hold that the authority of Burns v. Monro is affected by the judgment in Wightman v. Wilson...".

On the assumption that the "continuation theory" in Burns v. Monro represented the common law on jurisdiction over the common debtor in Court of Session actions of furthcoming, one might have expected that if the arrestee was subject to the jurisdiction of the Scottish courts at the time of the execution of the arrestment, then by parity of reasoning with the rule on jurisdiction over common debtors, jurisdiction over the arrestee would in principle not require to be established afresh at the date of commencement of the action of furthcoming. This however was not altogether clear because in Burns v Monro, the court took the view that in an action of furthcoming, the main defender was

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[1] (1858) 20 D 779.

[2] (1844) 6 D 1352.

[3] (1897) 35 S L Rep 12.

[4] Ibid at p 13.

the arrestee and the common debtor was not a "proper defender".[1] It was partly for that reason that jurisdiction did not have to be established against the common debtor afresh, but that reason would not apply to the arrestee. On the other hand, if the main ground of decision in Burns v. Monro was that the furthcoming had to be treated as part of the diligence of arrestment, jurisdiction would not have required to be established afresh against the arrestee.

4.6 Those secondary sources we have traced which dealt with the matter are conflicting. Thomson and Middleton observed in unequivocal terms:

> "To give jurisdiction [in an action of furthcoming] it is sufficient that the fund or effects have been validly arrested within Scotland, personal jurisdiction over either the common debtor or the arrester (sic) at the time the action is raised being immaterial".[2]

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[1] (1844) 6 D 1352 at p 1354 per Lord Mackenzie: "I think that where the arrestment proceeds on a decree, then the common debtor is called only to give him an opportunity to attend to his interest in the furthcoming against the arrestee, not to demand anything to be paid or done by him. He is called on to appear rather as joint co-puruser, to see that the pursuit is rightly conducted, rather than as a proper defender". See also at p 1353 per Lord President Boyle: "the persons truly interested are the arrestees, the common debtor being merely cited for his interest, and that edictally,...".

[2] Thomson and Middleton Manual of Court of Session Procedure (1937) p 149, citing the Valentine case (supra). Presumably "arrester" is a misprint for "arrestee".

This was followed by Maxwell[1]. The only primary source cited by these authors however was the Valentine case which, as we have seen, related to jurisdiction over the common debtor not the arrestee. Maclaren, by contrast, stated that if "the arrestee is subject to the jurisdiction, it is unnecessary to found jurisdiction against the common debtor",[2] which seems to have presupposed that jurisdiction over the arrestee was ordinarily necessary, but this is not entirely clear and in any event the proposition was not supported by the case cited so far as jurisdiction in Court of Session furthcomings was concerned[3]. At the opposite extreme from Thomson and Middleton, it is stated by Maher and Cusine that an "action of furthcoming is not competent if the arrestee is not subject to the jurisdiction of the Scottish courts"[4]; from the context, it seems that this statement has reference to jurisdiction when the action of furthcoming is raised[5]. No authority is cited for that proposition, and it is not clear whether the learned authors are relying on authorities in force before 1 January 1987.

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[1] Maxwell Practice of the Court of Session (1980) p 363: "It is sufficient if the money or effects have been validly arrested within Scotland", citing Thomson and Middleton op cit and the Valentine case (supra).

[2] Maclaren Court of Session Practice (1916) p 787.

[3] The case cited is Leggat Bros v Gray 1912 SC 230, discussed above, which related to the jurisdiction of the sheriff court under section 6(g) of the Sheriff Courts (Scotland) Act 1907 and not to the jurisdiction of the Court of Session in actions of furthcoming.

[4] Maher and Cusine, para 5.46.

[5] In the next sentence, the learned authors state that "the arrestee must also be subject to the jurisdiction of the Scottish courts at the time of the arrestment...".

4.7 It is clear that at common law actions of furthcoming are within the exclusive "subject-matter jurisdiction" of the Scottish courts because such actions are concerned with the completion of an inchoate diligence in a distinctively Scottish form executed under a warrant of the Scottish courts[1]. However, simply because jurisdiction in an action of furthcoming can only be vested in the Scottish courts, it does not follow (at least under the Scots common law rules in force before 1 January 1987) that an arrestment always vests in those courts jurisdiction in such an action. The reason is that, at common law, the Scottish courts generally do not recognise a jurisdiction ex necessitate[2] and have consistently refused to entertain actions within their exclusive "subject-matter jurisdiction" in circumstances where the ordinary rules for the assumption of jurisdiction ratione personae were not satisfied[3]. This traditional approach, (which has provoked strong judicial dissent and criticism and in at least one area has been reversed by statute[4]), can inflict great injustice because it can leave a pursuer or creditor entirely without remedy.

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[1] Cf Anton p 407 (quoted at para 2.94).

[2] Kerr v R & W Ferguson 1931 S C 736; Anton p 93.

[3] As where the Court of Session refused to grant decree of reduction of an earlier decree because the jurisdictional requirements of the action of reduction could not be satisfied notwithstanding that no other court could reduce or annul the decree: Longworth v Yelverton (1868) 7 M 70; Acutt v Acutt 1936 S C 386.

[4] In relation to jurisdiction to entertain actions of reduction of decrees, the rule has been reversed first in relation to consistorial decrees by the Domicile and Matrimonial Proceedings Act 1973, s 9, and now in relation to all decrees by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 20.

4.8 From the foregoing, it will be seen that before 1 January 1987 when the Civil Jurisdiction and Judgments Act 1982 came into operation, it was not entirely clear whether it was necessary to establish jurisdiction afresh over the arrestee where an action of furthcoming was raised in the Court of Session. The primary sources related to jurisdiction over the common debtor, not the arrestee; the secondary sources are conflicting; and there is no common law doctrine of jurisdiction ex necessitate which could be relied on. We think, however, that the better view is that the "continuation theory" adumbrated by Burns v. Monro[1], since it was applicable to jurisdiction over the common debtor in Court of Session actions of furthcoming[2], probably applied also to jurisdiction over the arrestee in such actions, and this is supported by Thomson and Middleton and by Maxwell[3] though not by other secondary authorities.

(3) **The present law**

4.9 The rules for the assumption of jurisdiction in the international sense in actions of furthcoming are now governed by the European Judgments Convention and the Civil Jurisdiction and Judgments Act 1982. The only basis for a contrary view would be an argument that, under the continuation theory outlined above, an action of furthcoming "though in some sense an action was properly speaking a step in diligence-part of the execution of arrestment".[4] On that argument, there would be no room for applying grounds of jurisdiction to actions of furthcoming. We do not think that such an argument can be sustained, however,

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[1] (1844) 6 D 135.

[2] See paras 4.2 and 4.5 above.

[3] See para 4.6 above.

[4] Wightman v Wilson (1858) 20 D 779 at p 786 per Lord Deas.

because, as we argue below, actions of furthcoming seem to be covered by Article 16(5) of the Convention and related provisions in the 1982 Act. Moreover the scheme of the Convention and the 1982 Act applies to actions in the Court of Session and sheriff court, whereas the continuation theory of the old common law applied only to Court of Session actions of furthcoming and so is unlikely to have survived in the face of the more comprehensive new rules. In fact, we think that the new rules have almost the same effect as the continuation theory. There seems, however, to be some doubt as to which provisions of the Convention and the 1982 Act apply to actions of furthcoming. Broadly speaking there are two different approaches, namely:

(a) that jurisdiction in the international sense in actions of furthcoming is governed by Article 16(5) of the Convention and "derived provisions" conferring exclusive jurisdiction on the courts for the country or place where a judgment has been or is to be enforced; or

(b) that jurisdiction is not exclusive and may be based on a number of different provisions, such as Article 6(1) (the primary ground of the defender's domicile) or the 1982 Act, Sch 4 Article 5(8)(b) or Sch 8, Rule 2(9) (the place where the moveable property is located).

By "derived provisions" we mean the provisions of Article 16(5) of Schedule 4 to the 1982 Act, which govern allocation of jurisdiction as between the different parts of the United Kingdom, and of rule 4(1)(d) of Schedule 8 to the 1982 Act, which govern jurisdiction in proceedings where the defender is not domiciled in another Contracting State or another part of the United Kingdom. We quote these important provisions below.

4.10 The first and most crucial question is whether jurisdiction in an action of furthcoming is governed by Article 16(5) and derived provisions because if Article 16(5) and those provisions apply, then they will oust all other grounds of jurisdiction by virtue of their exclusive character.

**(a) The application of Article 16(5) and derived provisions to jurisdiction in actions of furthcoming**

4.11 Article 16(5) of the European Judgments Convention, as set out in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982, provides:

> "The following courts shall have exclusive jurisdiction, regardless of domicile:...
>
> (5) in proceedings concerned with the enforcement of judgements, the courts of the Contracting State in which the judgement has been or is to be enforced".

Article 16(5) of Schedule 4 to the 1982 Act provides that:

> "the following courts shall have exclusive jurisdiction regardless of domicile...
>
> (5) in proceedings concerned with the enforcement of judgements, the courts of the **part of the United Kingdom** in which the judgement has been or is to be enforced".

Rule 4(1)(d) in Schedule 8 provides that notwithstanding anything in Rules 1 to 3 or 5 to 8 in the Schedule, "the following courts shall have exclusive jurisdiction...

(d) in proceedings concerned with the enforcement of judgements, the courts **for the place where** the judgement has been or is to be enforced".

4.12 In its commentary on Article 16(5), the Jenard Report defines the expression "proceedings concerned with the enforcement of judgements" as follows:

> "those proceedings which can arise from recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgements and authentic instruments,[1]

and observes:

> "Problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement".[2]

4.13 The Maxwell Report[3] states that Article 16(5):

> "relates to all proceedings which can arise from the doing of diligence. We think this can be widely interpreted to allow the Scottish courts all the control and discretionary powers which they at present exercise over the execution of judgments. This will apply both to Scottish judgments and to foreign judgments registered under the Convention."

Professor Anton comments that[4]:

> "At first sight this proposition may seem inconsistent with the disposition of the European Court to give a narrow interpretation to Art. 16,[5] but this narrow interpretation may go simply to the ambit of the phrase "proceedings

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[1] Jenard Report, OJ, No C59/36.

[2] Idem.

[3] Report of the Scottish Committee on Jurisdiction and Enforcement (1980) para 5.178.

[4] Anton Civil Jurisdiction para 10.71.

[5] Cross-referring to ibid para 7.03, quoted in the text.

concerned with the enforcement of judgments" and would not necessarily restrict the powers of the court in relation to proceedings falling within that class".

Discussing the narrow interpretation by the European Court of Article 16(5) the learned author remarks:[1]

> "The European Court has declared that the courts which were given exclusive jurisdiction were those best placed to deal with the disputes in question[2], and it is evident that the basis of the rules in Art. 16 is the close relationship between the subject-matter of the proceedings and the law and administrative apparatus of the States on whose courts the article confers jurisdiction. Where this close relationship does not exist, a restrictive interpretation is given to Art. 16. The European Court has said that:
>
> > 'the assignment, in the interests of the proper administration of justice, of exclusive jurisdiction to the courts of one Contracting State in accordance with Article 16 of the Convention results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them. Having regard to that consideration the provisions of Article 16 must not be given a wider interpretation than is required by their objectives'".[3]

4.14 The Maxwell Report does not specifically consider the question whether actions of furthcoming fall within the scope of

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[1] Anton Civil Jurisdiction para 7.03.

[2] Citing Sanders v Van der Putte (73/77) [1977] ECR 2383 [11].

[3] Sanders v Van der Putte, supra.

Article 16(5) or any other article. It does however refer in an Appendix to jurisdiction in actions relating to rights of ownership or possession of moveable property, and includes in that connection a reference to section 6(g) of the 1907 Act.[1] It points out that the "Convention makes no provision for jurisdiction based on the situs of the property in actions relating to rights in rem to moveable property" and observes that "Jurisdiction on this ground would be lost".[2] It will be borne in mind that section 6(g) relates to both actions of multiplepoinding and actions of furthcoming and gives jurisdiction in those actions on the grounds of (a) the situs of the fund or subject within the jurisdiction, and (b) the fact that the arrestee or holder of the fund is subject to the jurisdiction of the court. Likewise Anton on Civil Jurisdiction quotes section 6(g) of the 1907 Act in his discussion of proprietary and possessory actions relating to moveables.[3] There may be an implication in these passages that provisions other than Article 16(5) and the derived provisions apply to jurisdiction in actions of furthcoming by analogy with actions of multiplepoinding, but that is not expressly stated either by the Maxwell Report or by Professor Anton. On the other hand, Maher and Cusine[4] state that several grounds of jurisdiction under the 1982 Act and Convention apply, or may apply, to actions of furthcoming such as Sch 8, Rule 2(9) (proceedings brought to assert, declare or determine proprietary or possessory rights or rights of security in or over moveable property) or Article 6(1) (the primary ground of domicile) and "possibly also" (so the argument runs) Article 16(5). This interpretation of the Act and Convention, which sees Article 16(5) as possibly one among several provisions applying to actions of furthcoming, seems incorrect because the jurisdiction in Article 16(5) and Sch. 8, Rule 4(1)(d), if it applies (as we think it does) to actions of furthcoming at all, will oust all other grounds of

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[1] Maxwell Report p 371.

[2] Idem.

[3] Anton Civil Jurisdiction, para 19.41.

[4] Maher and Cusine, para 5.46.

jurisdiction by virtue of its exclusive character. Moreover Macphail states that the jurisdiction of the sheriff court in actions of furthcoming is regulated by rules 1 and 2(9) of Schedule 8 to the 1982 Act.[1] It seems to us however that these provisions are disapplied from actions of furthcoming by the terms of Rule 4(1)(d) of Schedule 8, to which they are subject.

4.15 We have not, or not yet, traced other relevant authority. It seems to us that an action of furthcoming does and should fall within the category of "proceedings concerned with the enforcement of judgments" within the meaning of Article 16(5) and derived provisions, and indeed that such enforcement is the primary and perhaps the sole object of an action of furthcoming.[2] It is very doubtful whether in an action of furthcoming the ranking of other creditors on the proceeds of the arrestment is competent (apart perhaps from equalisation of diligences under statute) but if such ranking is competent it is a subsidiary matter.[3] An action of furthcoming seems to us to fall squarely within the definition of proceedings for enforcement given by the Jenard Report.[4] It is a proceeding which can only arise from the doing of diligence, to use the language of the Maxwell Report.[5] In this, it differs from a multiplepoinding which can arise from the doing of diligence or can arise in respect of other competing

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[1] Macphail Sheriff Court Practice para 21 - 39.

[2] Graham Stewart p 226: "The object of the action of furthcoming is twofold, (1) to ascertain the extent of the debt due by the arrestee to the common debtor, or the goods in the arrestee's hands, and (2) to transfer to the successful arrester the fund, or such part of it as will satisfy his claim, either by adjudging to him the debts arrested or by selling for his behoof the goods attached".

[3] Paterson and Son v McInnes (1950) 66 Sh Ct Reps 226; Macphail Sheriff Court Practice para 21.44.

[4] Para 4.12 above.

[5] Para 4.13.

claims not founded on diligence against the property in medio[1].

4.16 An action of furthcoming is a distinctively Scottish form of action, being a judicial process for completing the distinctively Scottish diligence of arrestment. Once an arrestment has been used, it would be impractical to expect that it could be completed by a different form of action brought in the courts of a country or territory other than Scotland. There thus exists that close relationship between the subject matter of the proceedings and the law of Scotland, as the country on which Article 16 confers exclusive jurisdiction, to which the European Court has referred. The application of Article 16(5) to actions of furthcoming is also consistent with the Scottish common law "continuation theory" of jurisdiction in Court of Session actions of furthcoming under which a valid and effectual arrestment automatically vested jurisdiction in the international sense on the Court of Session to entertain an action of furthcoming irrespective of the residence or domicile of the common debtor or arrestee at the time when the action was raised.

## Is clarifying legislation desirable?

4.17 The European Judgments Convention has direct effect within the United Kingdom and it may not seem appropriate to amend the 1982 Act by inserting a provision to the effect that an action of furthcoming falls within Article 16(5) as set out in Schedule 1 to that Act. Moreover to amend Schedule 4 or Schedule 8 to make it clear that an action of furthcoming falls within Article 16(5) of Schedule 4 and Rule 4(1)(d) of Schedule 8 might throw doubt on the interpretation of Article 16(5) in the

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[1] See eg Macphail Sheriff Court Practice para 21.45 ff.

Convention in Schedule 1. In the light of our consideration of the authorities, we take the provisional view that clarifying legislation is both unnecessary and undesirable, and we seek comments on that view.

### (b) Local jurisdiction of sheriff court in actions of furthcoming

4.18 The rules in Schedule 8 to the 1982 Act serve a dual purpose. First, they regulate the assumption of jurisdiction in an international sense in cases where the defender is not domiciled in a Contracting State or a part of the United Kingdom. Second they regulate the allocation of local jurisdiction as between different sheriff courts in cases where those courts have jurisdiction in the international sense.[1]

4.19 In cases where an incoming foreign judgment is to be enforced in Scotland, Article 32(2) of the Convention provides:

> "The jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in which enforcement is sought, it shall be determined by reference to the place of enforcement".

Jurisdiction here seems to refer to jurisdiction in an application for enforcement.[2] But in Scotland the application must be made to the Court of Session or in the case of a maintenance judgment to the sheriff court on transmission by the Secretary of State.[3] Accordingly this provision appears to apply only to the small class of incoming maintenance judgments, and then only to the grant of warrant for arrestment rather than jurisdiction in actions of furthcoming.

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[1] See eg Anton Civil Jurisdiction paras 7.06; 10.61.

[2] Article 32(1).

[3] Idem.

4.20 Section 20(3) of the 1982 Act provides that:

> "Section 6 of the Sheriff Courts (Scotland) Act 1907 shall cease to have effect to the extent that it determines jurisdiction in relation to any matter to which Schedule 8 applies".

If we are right in thinking that Rule 4(1)(d) of Schedule 8 is concerned with local jurisdiction as well as jurisdiction in the international sense, then the effect of section 20(3) is to repeal section 6(g) of the 1907 Act, at any rate so far as it regulates jurisdiction in actions of furthcoming. We note that section 21(1)(a) of the 1982 Act provides that Schedule 8 does not affect the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds. While the scope of section 21(1)(a) is somewhat unclear,[1] it seems unlikely that is applies to section 6 of the 1907 Act since that is specifically regulated by section 20(3).

4.21 If our analysis so far is correct, then an action of furthcoming must be brought in, and only in, the sheriff court "for the place where the judgment has been or is to be enforced". We have found no authority on the interpretation of this provision in its application to arrestment and actions of furthcoming. The probable intention is that an action of furthcoming must be brought in the sheriff court for the place where the arrestment was executed, because that is the place where the judgment has been enforced by the arrestment in respect of which the action of furthcoming is raised. Of course other arrestments and poindings may have been executed in other sheriffdoms and in that sense the judgment has been enforced in those sheriffdoms, but it would

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[1] Anton Civil Jurisdiction para 10.07 as read with para 9.11.

be odd if the first diligence (poinding or arrestment) in a sheriffdom determined jurisdiction in actions of furthcoming in respect of an arrestment in another sheriffdom.

4.22 The foregoing interpretation would seem to be practicable, simple and convenient, since at the time when the action of furthcoming is raised, the arrestee will generally still have a domicile of citation at the place where the arrestment was executed. One difficulty would arise in relation to arrestments executed edictally, but in their case an action of furthcoming could be raised in the Court of Session.

4.23 We are aware that the interpretation of the 1982 Act advanced above is not the same as that set out in recent commentaries on the 1982 Act. The European Judgments Convention leaves it to Contracting States to determine the rules allocating local jurisdiction to local courts and it would be legislatively possible to amend that Schedule so as to clarify the effect of Rule 4(1)(d) in relation to actions of furthcoming. We have however reached the provisional view that such legislation is unnecessary.

### (4) Provisional conclusions

4.24

**(1) While there is some doubt and uncertainty as to the effect of the European Judgments Convention and the Civil Jurisdiction and Judgments Act 1982 in determining the rules for the assumption of jurisdiction in the international sense in actions of furthcoming, it seems to us that such jurisdiction is, and ought in principle to be, determined by**

reference to Article 16(5) of the Convention, Article 16(5) of Schedule 4 to the 1982 Act, and Rule 4(1)(d) of Schedule 8 to that Act (conferring exclusive jurisdiction respectively on the country, part of the United Kingdom or place where the judgment has been or is to be enforced). It is doubtful whether Parliament could enact satisfactory clarifying legislation because of the direct effect in Scotland of the Convention, and we suggest that in any event the law is sufficiently clear to make clarifying legislation unnecessary.

(2) In our view, the assumption of local jurisdiction by the sheriff courts in actions of furthcoming is and ought to be determined by Rule 4(1)(d) of Schedule 8 to the 1982 Act. While legislation clarifying that Rule, insofar as it applies to the local jurisdiction of the sheriff courts in actions of furthcoming, would be possible, we suggest that the existing law is sufficiently clear and satisfactory to make such legislation unnecessary.

(Proposition 6).

## PART V

## SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

Note. Attention is drawn to the notice at the front of this Discussion Paper concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to the Discussion Paper may be referred to or attributed in our subsequent report.

### A. Requirements of arrestability: jurisdiction over the arrestee

1.(1) Subject to the rules provisionally proposed below, it should be, or continue to be, a requirement of the validity and effectiveness of an arrestment of an obligation to pay a pecuniary debt, or to deliver a corporeal moveable, or to account, that the person in whose hands the arrestment is laid is at the time of the execution of the arrestment, subject to the jurisdiction of the Scottish courts in an action arising out of that obligation brought at or before that time, or as the case may be would be so subject if such an action had been brought at that time.

(2) Where an obligation is:

(a) prestable at a time or on the occurrence of an event falling after the time of the execution of the arrestment; and

(b) arrestable according to the internal rules of Scots law on the arrestment of future or contingent obligations,

the foregoing rule should be applied as if the obligation were prestable, and accordingly the action were competent, at the time of the execution of the arrestment.

(3) Should it be provided by statute that, for the purposes of the foregoing rules the requirement of jurisdiction over the arrestee is not limited to jurisdiction on the primary ground of the arrestee's domicile, but has reference to any competent ground of jurisdiction on which the defender or common debtor either:

(a) at the time of the execution of the arrestment has founded in an action arising out of the obligation against the arrestee or,

(b) as the case may be, would be entitled to found if he had raised such an action at that time?

(4) In this and the following Propositions, references to an arrestment include a reference to an arrestment to found jurisdiction, an arrestment on the dependence and an arrestment in execution.

(Para. 3.10).

B. <u>Requirements of arrestability: location of subjects of arrestment</u>

<u>Arrestment of pecuniary debts and obligations to account</u>

2. (1) Should the existing rule on the extra-territorial effect of arrestments of pecuniary debts (under which such an

arrestment has the effect of attaching pecuniary debts which are located, for purposes other than arrestability, outside Scotland) be retained or abolished?

It is suggested that the extra-territorial effect rule should be retained provided that the Scottish courts are empowered to make discretionary orders for the protection of arrestees from double jeopardy, as proposed in Proposition 5 (para. 3.60).

(2) If (contrary to our provisional view) an arrestment of pecuniary debts should not in future attach debts located outside Scotland, views are invited on how debts located outside Scotland are to be defined for this purpose. In particular, views are invited on whether:

(a) a special statutory rule should be enacted to the effect that the location of a debt arising under a contract or unilateral promise should be treated as located in a country if, by the law applicable to the contract or promise, the primary place of payment is in that country; or

(b) the location of a debt (however arising) should be determined in accordance with the common law rules attributing a locality to debts (set out at paragraph 2.51 above) which presently apply outside the realm of the validity and effectiveness of arrestments.

(3) References in this Proposition to a pecuniary debt include a reference to an obligation to account for the purpose of

ascertaining whether an obligation to pay a pecuniary debt (as distinct from an obligation to deliver a corporeal moveable) is or will be due.

(Para. 3.38).

Arrestment of corporeal moveables and obligations to account for corporeal moveables

3.(1) It should be, or continue to be, a requirement of the validity and territorial effect of an arrestment of a corporeal moveable, or of an obligation to deliver a corporeal moveable, that at the time of the execution of the arrestment the corporeal moveable is located in Scotland.

(2) As under the present law, the validity and territorial effect of an arrestment of a corporeal moveable, or of an obligation to deliver a corporeal moveable, should not be prejudiced by the fact that, at the time of the execution of the arrestment, the arrestee is, or may come, under an obligation to deliver the corporeal moveable outside Scotland, or to implement (by himself or with others) arrangements for its delivery or transport outside Scotland.

(3) References in this Proposition to an obligation to deliver a corporeal moveable include a reference to an obligation to account for the purpose of ascertaining whether an obligation to deliver a corporeal moveable is or will be prestable.

(Para. 3.43).

C. Special categories of moveable property

4.(1) The foregoing proposals are intended to apply only to arrestments laid in the hands of an arrestee and accordingly do not apply to the arrestment of ships and their apparel.

(2) The proposals in Propositions 2 and 3 above should not apply to the following interests in incorporeal moveable property, namely:

(a) shares in a limited company; and

(b) the interest of a partner in the partnership.

Accordingly those interests should continue to be arrestable notwithstanding that pecuniary debts, corporeal moveables or other assets belonging to the company or partnership are located outside Scotland at the time of the execution of the arrestment.

(Para. 3.46)

D. Court's power to protect arrestee or other innocent third party from double jeopardy

5. (1) Where an arrestment has been executed in Scotland attaching a debt or other moveable property and there is a real and substantial risk of the arrestee suffering double jeopardy in the sense that, if the arrestee were to obtemper the arrestment and make the arrested debt or

property furthcoming to the arrester as required by Scots law, the arrestee would be compelled, by reason of legal process in another country, either:

(a) to pay all or part of the arrested debt a second time to the common debtor (whether as a debt or as damages for the arrestee's refusal, in compliance with the arrestment, to pay the debt to the common debtor); or

(b) to pay damages to the common debtor for the arrestee's refusal, in compliance with the arrestment, to part with the arrested property to the common debtor,

then the Scottish court should have a discretionary power, exercisable on the application of the arrestee, to recall or to restrict the arrestment so as to protect the arrestee from the double jeopardy.

(2) Where in a legal process for payment of a debt brought in a foreign country, the creditor attaches, in the hands of a third party, a debt due by the third party to the debtor in the process, and:

(a) the debtor in the foreign process demands payment from the third party but the third party refuses payment in reliance on the foreign attachment; and

(b) the debtor in the foreign process obtains decree or judgment in Scotland or in a foreign country against

the third party for payment of the debt (whether as a debt or as damages for the third party's refusal, in reliance on the foreign attachment, to pay the debt to the debtor in the foreign process) and enforces the decree or judgment in Scotland by diligence,

the court should have power, on an application by the third party, to recall or to restrict the diligence in order to protect the third party from the double jeopardy of being required by the diligence and foreign process to pay the debt twice over.

(3) In para (2) above:

(a) "debt" includes a debt alleged to be due whether or not liability is recognised by Scots law;

(b) "diligence" includes poinding, arrestment, earnings arrestment, current maintenance arrestment, conjoined arrestment order, adjudication for debt and inhibition;

(c) "foreign country" includes any country or territory outside Scotland;

(d) "recall" means, in relation to a conjoined arrestment order, an order excluding the debtor in the foreign process from ranking as a creditor in the conjoined arrestment order, and includes, in relation to an action of adjudication for debt, an interlocutor dismissing, sisting or continuing the action.

(4) If the proposals in para (2) above are accepted, statutory provision should also be made enabling a Scottish court entertaining sequestration or liquidation proceedings on the third party's estate to reject a claim by the debtor in the foreign proceedings from ranking in the sequestration or liquidation for a dividend on the debt in respect of which the risk of double jeopardy exists.

(5) The court's power to recall diligence and to reject a claim in insolvency proceedings should be exercisable only where the risk of double jeopardy arises from legal process in a foreign country which does, or may, result in enforcement proceedings in the same or a different foreign country and not where that risk arises from mere commercial pressure.

(6) If the risk of double jeopardy is real and substantial, the Scottish court should not be precluded from exercising the foregoing powers by reason only of the fact that the legal process in the other country is an exorbitant or irregular exercise of jurisdiction.

(Para. 3.60).

E. Jurisdiction in actions of furthcoming

6. (1) While there is some doubt and uncertainty as to the effect of the European Judgments Convention and the Civil Jurisdiction and Judgments Act 1982 in determining the rules for the assumption of jurisdiction in the international sense in actions of furthcoming, it seems to us that such jurisdiction is, and ought in principle to be, determined by reference to Article 16(5) of the Convention, Article 16(5)

of Schedule 4 to the 1982 Act, and Rule 4(1)(d) of Schedule 8 to that Act (conferring exclusive jurisdiction respectively on the country, part of the United Kingdom or place where the judgment has been or is to be enforced). It is doubtful whether Parliament could enact satisfactory clarifying legislation because of the direct effect in Scotland of the Convention, and we suggest that in any event the law is sufficiently clear to make clarifying legislation unnecessary.

(2) In our view, the assumption of local jurisdiction by the sheriff courts in actions of furthcoming is and ought to be determined by Rule 4(1)(d) of Schedule 8 to the 1982 Act. While legislation clarifying that Rule, insofar as it applies to the local jurisdiction of the sheriff courts in actions of furthcoming, would be possible, we suggest that the existing law is sufficiently clear and satisfactory to make such legislation unnecessary.

(Para 4.24).

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