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Fraud and Voidable Transfer:
Scots Law in European Context

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Declaration

I declare

(a) that this thesis has been composed by me,

(b) that the work is my own, and

(c) that the work has not been submitted for any other degree or professional qualification except as specified.

Abstract

This thesis examines fraud as a basis for the voidability of transfers in Scots law. In particular, it focuses on misrepresentation and fraud on creditors. In so doing, an attempt is made to provide a principled account of the effect of fraud on transfer which can explain the well-established rules in this area, show how these rules fit within the broader framework of private law and provide some guidance as to the appropriate result in cases where a rule is not clearly established.

This account depends on examining the development of the law from a historical and comparative perspective, with particular emphasis on the periods during which the relevant rules and institutions were being developed or received in Scotland and on the links between this process and the wider *ius commune* tradition.

The central contention is that avoidance of a transfer on the basis of fraud is justified by a personal right held by the party at whose instance the avoidance takes place. In the core cases, this personal right is a right to reparation for a wrong for which the transferee is liable. At the periphery, the personal right may arise from the law of unjustified enrichment rather than from the law of delict. This characterisation of the basis of avoidance explains the protection afforded to subsequent acquirers and the limited effect which avoidance has in certain circumstances. It shows the interaction between the law of property and the law of obligations in this area and enables principles developed in the context of one instance of fraud on creditors to be applied to difficult problems in relation to other instances.

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Contents

Chapter 1

INTRODUCTION

This thesis is concerned with voidable transfers. It examines a number of instances of voidability (misrepresentation, challengeable transfers by insolvent debtors, litigiosity and the offside goals rule) and seeks to explain them by reference to fraud.

Voidable transfers must be distinguished from transfers which are absolutely good and therefore unimpeachable on the one hand and those which are void on the other. The notion of voidness or nullity[1] is relatively clear in modern Scots law: the legal relations remain as they were before the purported juridical act. As far as the law is concerned, nothing happened. A void transaction is a legal nothing.[2]

A voidable transaction is initially effective but liable to be set aside at the instance of a particular person or group of persons. An account of an instance of voidability should explain why the transfer is problematic but also why the problem does not lead to voidness.

Chapter 2 traces the emergence of voidability as a category distinct from voidness. The picture which emerges from this examination is that rules which render transactions voidable rather than void exist for the purpose of protecting the interests of a particular person or group.

The position is different when we consider the classic cases of voidness: incapacity, error, overwhelming force, forgery, vagueness and failure to conform to formal requirements. Rather than being vulnerable to being stripped of effect or set aside, the act of transfer simply does not come into existence because one of the positive requirements for its constitution is missing.

In the case of the first four mentioned, intention that the transfer should take effect is missing. Since, in giving effect to any juridical act, "the law makes itself, in fact,

[1] The two terms appear synonymous in modern usage and are used synonymously throughout, unless otherwise specified.
[2] Eg Stair I.x.13; Erskine III.i.16; Bell *Comm* I, 313–7; Bell *Prin* §§11–4 and Note on §§11–3; WM Gloag *The Law of Contract in Scotland* (2nd edn, 1929) 13–14; WW McBryde *The Law of Contract in Scotland* (3rd edn, 2007) paras 13-13–15.

the instrument of [the parties'] intentions",[3] absence of such intention essentially makes even partial success impossible: where there is no intention, there is nothing to which the law can give effect.[4] The intrinsic nature of the requirement of intention means that voidness seems to be an unavoidable consequence of its not being present. Similarly, with vagueness there is no clearly defined intention to which effect may be given.

Formalities, on the other hand, are artificial rather than intrinsic requirements for constitution. That does not make them less necessary. The difference lies in their origin rather than their operation. They have been introduced because of policy concerns. In contrast to the rules which give rise to voidability, they are motivated by the general interest in certainty (and in some cases in publicity) in important transactions rather than for the protection of a particular person or group.[5]

If voidability arises from rules designed for the protection of particular persons, it is understandable that the validity of the affected act should depend on the will of the protected party and thus why it should be voidable at that party's instance rather than simply void.

In the following chapters it is argued that voidability in the instances examined is a mechanism for giving effect to a personal right held by the party with the right to avoid. This explains why the protected party has a choice about whether the transaction in question should be upheld or not. It also explains why good faith purchasers are not affected by the voidability of their authors' titles.

It is further argued that in the core case of each of the instances described, the personal right held by the avoiding party is a right to reparation for fraud. This fraud may be straightforward deceit or it may be fraud on a creditor. The latter type of fraud is less prominent in the modern law but it underlies the rules on grants by insolvent debtors, litigiosity, and offside goals. The core of the concept is an action

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[3] F Pollock *A First Book of Jurisprudence for Students of the Common Law* (6th edn, 1929) 145. The phrase is used to describe the *Rechgeschäft* in H Titze "Rechtsgeschäft" in F Schlegelberger (ed) *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* Vol V (1936) 789 at 790.

[4] Of course, in some cases, the law deems an intention where it is not there. Once such a fiction has been adopted, however, it operates as if there was true intention and thus does not unduly disrupt the analysis above.

[5] Public policy considerations clearly also motivate the refusal to enforce illegal contracts. For a similar argument, see FS Wait *A Treatise on Fraudulent Conveyances and Creditors' Bills: with a Discussion of Void and Voidable Acts* (2nd edn, 1889) §411.

by the debtor which is calculated to frustrate the ability of one or more creditors to get satisfaction from the debtor's patrimony.

As well as concerning a type of fraud which is not widely known, fraud on creditors presents a further challenge: avoidance of the transfer in these cases does not affect the person who commits the fraud (the debtor) but the transferee. The latter's vulnerability is explained on the basis of accessory liability. If a debtor is to frustrate his creditors by transferring property, he requires someone who will accept the transfer. Therefore, a bad faith transferee may be regarded as a participant in the debtor's fraud and liable to make reparation along with the debtor. This analysis is supported by the idea that third parties have a duty not to induce or facilitate breach of obligations, an idea which is evidenced not only by fraud on creditors but also by the delict of inducing breach of contract.

While fraud (and thus conscious wrongdoing) are central to the core case in each of the instances of voidability examined, voidability can also occur where the transferee is innocent: innocent misrepresentation, gratuitous alienations by insolvent debtors and the gratuitous variant of the offside goals rule. It is difficult to explain these rules in terms of a right to reparation. However, they can be explained on the basis of the law of enrichment, supported by the fact that, had the transferee known what he was doing, his actions would have been fraudulent.

The common root which litigiosity, transfers by insolvent debtors and the offside goals rule have in fraud on creditors gives an insight into the effect of avoidance in such cases. The idea that this might be restricted is well established in the context of one of the instances of inhibitions. And since fraud on creditors is the common basis of both inhibitions (being an instance of litigiosity) and the offside goals rule, ideas developed in the context of inhibition can be applied in the latter context in order to address certain problems in the offside goals rule.

A. METHODOLOGY

(1) Contracts, conveyances and grants of subordinate real rights

An investigation into the Scots law of voidable transfers quickly encounters a problem: many sources dealing with voidability are concerned with voidable contracts rather than voidable conveyances. This raises two questions: is an

investigation of the phenomenon of voidable transfer necessary and can materials directed towards the law of contract legitimately be drawn on in the course of such an investigation?

The answer to the second question lies in the fact that contract and conveyance are both bilateral juridical acts. Both change the legal landscape. Both are underpinned by private autonomy and personal responsibility. Both require the co-operation of two parties in order to be effective.[6]

The notion of the juridical act does not seem to have appeared in a refined form until the Pandectist movement in nineteenth-century Germany.[7] However, the ideas lying behind the notion have a long heritage in the *ius commune*[8] and have been employed even in systems which do not adhere to the Pandectist scheme.[9] While the concept is not much used in Scottish legal writing, the tendency in the early law to treat contracts and conveyances (as well as other acts such as wills and promises) as essentially similar might be regarded as hinting at inklings of such a notion in the minds of Scots lawyers.[10] Detailed evidence for this position is presented in more detail in chapter 3.

Therefore, materials discussing invalidity of contracts are discussed alongside those concerned with transfer. The principles discussed also apply to the grant or voluntary discharge of subordinate real rights. For the sake of brevity and simplicity, these transactions are only discussed explicitly in cases where their treatment differs from that afforded to a transfer.

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[6] The bilateral nature of contracts is obvious, but transfers are also bilateral because no benefit can be conferred upon one unwilling to accept it: D.50.17.69; *Stein v Hutchison* Nov 10, 1816, FC.
[7] A von Tuhr *Allgemeiner Teil des deutschen bürgerlichen Rechts* (1910 repr 1997) §50 fn 3.
[8] See MJ Schermaier "Das Rechtsgeschäft" in M Schmoeckel, J Rückert and R Zimmermann (eds) *Historisch-kritischer Kommentar zum BGB* Vol I (2003) vor §104 paras 2 and 3.
[9] See Titze "Rechtsgeschäft" 793–800; M Planiol with G Ripert *Traité elementaire de droit civil* (12th edn, 1935) Vol I para 265; L Badouin *Les aspects généraux du droit privé dans law province de Québec* (1967) 122ff; S Litvinoff and WT Tête *Louisiana Legal Transactions: The Civil Law of Juridical Acts* (1969); JC de Wet (revd AG du Plessis) "Agency and Representation" in *The Law of South Africa*, Vol 1 Reissue (1993) para 101; B van Heerden et al *Boberg's Law of Persons and the Family* (2nd edn, 1999) 749–853; Pollock *Jurisprudence* 144–5 and 162–6; F Pollock *Principles of Contract* (10th ed, 1936) 2; TE Holland *Elements of Jurisprudence* (13th edn, 1924) 117–25.
[10] For instance, the terms of the first part of the Bankrupcy Act 1621 strike only gratuitous "alienations, dispositions, assignations and translations" but this was quickly extended to cover grants of personal rights such as bonds for payment (Bankton I.x.75). Similarly, when sales were reduced on the grounds of minority and lesion, the property and contract elements were not teased apart (Bankton I.vii.94; Erskine I.vii.44).

(2) Objects of transfer

Throughout this thesis the term "property" is used to signify patrimonial assets and thus to include rights. Accordingly, ownership is used to designate the relationship of appurtenance between a person and a right as well as that between a person and a corporeal thing. This is the orthodox position in Scots law[11] but is not uncontroversial.[12] It was thought appropriate here because of the absence of a word other than ownership to designate these relationships of appurtenance and because Scots law has, at least since Stair, taken an essentially unitary approach to transfer.[13]

(3) A historical approach

While the primary aim of this thesis is to provide an account of the modern law, examination of the process by which these rules became established in Scots law provides important insights into the nature of the rules and the connections between them. For that reason, particular attention has been paid to the early development of the relevant rules. For most of the material covered, this involves concentrating on sources prior to the mid-nineteenth century since most of the relevant rules were clearly established by that point in time, although the crucial period was later in the case of the development of the law of misrepresentation and of offside goals. Constraints of space mean that it is not possible to examine the later authorities in the same degree of detail but these have fully examined by the major modern textbooks in this area and in each case the development of the rule is traced to the point where it reflects the principles of the modern rule.

The fact that the rules in question developed at a time which Scots lawyers drew heavily on European materials means that it has also been necessary to examine the background of the rules in the Civilian tradition. Again, particular attention has been paid to materials which had a formative influence on Scots law so historical materials are treated in more detail than contemporary ones.

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[11] KGC Reid *The Law of Property in Scotland* (1996) para 16

[12] GL Gretton "Ownership and its Objects" (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 802.

[13] See PM Nienaber and GL Gretton "Assignation/Cession" in R Zimmermann, D Visser and KGC Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 787 at 789.

Chapter 2

THE EMERGENCE OF VOIDABILITY

The term "voidable" was a rather late arrival in Scots law. In his commentary on section 23 of the Sale of Goods Act 1893, Richard Brown felt the need to explain it:

> 'Void' and 'voidable' are not Scottish law terms but they are convenient, and are now freely used in Scotland. 'Void' corresponds to 'null *ab initio*'; and 'voidable' to reducible.[14]

In fact, the 1893 Act was not the first Scottish source to use the term 'voidable', although it was rather rare before the twentieth century. None of this means that the concept was previously.

Voidability as a concept emerged in the course of the seventeenth and eighteenth centuries. The process was complex and rather opaque but it is possible to trace the emergence of several key insights necessary for the concept:

- an understanding that not every problem with a juridical act instantly and inevitably deprives it of effect;
- the idea that some of the rules which render a juridical act invalid do so to protect particular parties;
- the idea that the validity of a problematic act might therefore depend on the decision of the protected party;
- a move from a procedural to a substantive understanding of the consequences of different types of problem with juridical acts; and

[14] R Brown *Treatise on the Sale of Goods* (2nd edn, 1911) 148.

- a move from a system of categorising problems with juridical acts which was based on procedural considerations to one which was based on substantive considerations.

From an early stage, Scots law drew distinctions between different types of problem with acts and attached different consequences to the problems in each class. The key to the emergence of voidability was the move from an essentially procedural distinction, concerned with how a problem might be raised in court, to a substantive one.

A. NULLITY BY EXCEPTION AND NULLITY BY ACTION

(1) Not all problems are instantly fatal

In the early sources, most juridical acts which have something wrong with them are described as "null". Thus the term null covers the situations which modern lawyers would categorise as either void or voidable. The word "void" is relatively rare before Stair.[15] Sometimes "of nane avail, force nor effect",[16] "mak na faith"[17] or some

[15] The earliest example I have come across is *King v Borthuik* (1532): IH Shearer (ed) *Selected Cases from Acta Dominii Concilii et Sessionis* (St Soc 14, 1951) 2, but that seems to be an isolated incident. The term does not appear in Sinclair's *Practicks* (G Dolezalek (ed) *Sinclair's Practicks 1540–9* (http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm) or Hope's *Major Practicks* (JA Clyde (ed) *Hope's Major Practicks* (St Soc 3–4, 1937–8)) the body of Hope's *Minor Practicks* (*Minor Practicks, or A Treatise of the Scottish Law* (ed A Bayne, 1726)). (It does appear in the Index of Acts of Sederunt attached to Bayne's edition. Balfour uses it four times but only in the non-technical sense of emptiness (*The Practicks of Sir James Balfour of Pittendriech* (1754 repr as St Soc 21–2, 1962–3) 395 c XXXIX, 415 c XXIII, 484 c VII and 489 c I). An electronic search of Maitland's *Practicks* (R Maitland *The Practiques of Sir Richard Maitland of Lethington: from December 1550 to October 1577* (Scottish Record Society (NS) 30, 2007)) was not possible but my research did not bring any instances to my attention. It is used in a technical sense on a number of occasions by Robert Spotiswoode (eg *Practicks of the Laws of Scotland* (1706) 33, 72 and 237) and by Mackenzie (eg *Institutions of the Law of Scotland* in *The Works of that Eminent and Learned Lawyer, Sir George Mackenzie of Rosehaugh* (1716–22) Vol II, 278 at 287 and 325 and *Jus Regium*, in *Works*, Vol II, 439 at 474). The term does not feature in Mackenzie's *Observations upon the 18th Act of the 23 Parliament of King James the Sixth against Dispositions made in Defraud of Creditors* (also in *Works*, Vol II, 1, henceforth *Observations on the 1621 Act*). Stair himself makes relatively free use of the term (e.g. I.iii.7, I.iv.7, I.iv.16, I.vii.4, I.xvi.3).

[16] Eg *Ruthven v Muncreifs* (1496) KM Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (http://www.rps.ac.uk, henceforth *RPS*) 1496/6/15; Balfour *Practicks* 170 c VII and VIII, 184 c XXI,; *Dumbar* [*sic*] *v Crichtoune* (1575) Maitland *Practicks* Item 363; 1567 c 27, *RPS* A1567/12/33; 1581 c 102, *RPS* 1581/10/23. Where an act of the pre-1707 Scots parliament is cited,

variation thereon is used instead of, or in combination with a reference to nullity. The language might be taken to suggest a uniform approach to problematic acts: they are null and null acts have no effect. That, however, would be misleading.

There does appear to have been a period of uniformity, at least for written juridical acts but, rather than treating all null acts as ineffective from the start, the courts would treat any "evident" as valid until it was set aside by an action for reduction.[18] The deed might be null, but it had effect anyway for a period of time.

However, a more nuanced approach was soon evident. As early as the second half of the sixteenth century, cases turned on the distinction between nullities receivable by exception and those receivable by action.[19] There seems to have been relative unanimity as to the principal consequence of the classification. As the names suggest, nullities in the former category could be raised as exceptions (defences) in response to an action brought by another as well as in actions of reduction. Such a course of conduct was not available if the facts merely gave rise to nullity by action.[20] A defect in that category would not assist a defender who had not previously raised the matter in an action of reduction.[21] Whether a nullity was receivable by exception or action depended on the nature of the problem. For example, an allegation that a deed was forged was receivable by exception;[22] a challenge on the basis of minority and lesion or breach of interdiction required an action of reduction.[23]

The distinction was couched in procedural terms: it was about the proper way of raising the relevant issue. Despite that, it raised the possibility of a problem with a juridical act which did not deprive it of all effect: if the nullity was by action, the

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the first reference is to the duodecimo edition (where the act is included in that edition), the second to the RPS.

[17] Eg Balfour *Practicks* 382 c V; *Borthwick v Vassals* (1627) Mor 25; Hope *Minor Practicks* §286; 1555 c 29, *RPS* A1555/6/3; *RPS* 1599/7/6; 1605 c 4, *RPS* 1605/6/32; Registration Act 1617 c 16, *RPS* 1617/5/30.

[18] *Stirling v Stirling* (1543) Sinclair *Practicks* No 312.

[19] Eg *Bisset v Bisset*, (1564) Mor 4655; *Balfour v Grundistoune* (1565) Maitland *Practicks* Item 230; *Dumbar v Crichtoune* (1575) Maitland *Practicks* Item 363; *Countess of Crawfurde v Glasland* (1576) Maitland *Practicks*, Item 396; *Boyne v Boyne's Tenants* (1577) Maitland *Practicks* Item 414.

[20] See the cases in note 19 and Hope *Minor Practicks* §309 – substituting the terms *nullitates juris* and *nullitates facti* respectively; Mackenzie, *Observations on the 1621 Act* 23–4.

[21] Modern Scots lawyers still talk about reduction *ope exceptionis* where a challenge to a deed is raised in the course of litigation rather than as a freestanding action: e.g. *Scotia Homes (South) Ltd v McLean* 2013 SLT (Sh Ct) 68 at para 6; and *Rafique v Ashraf* [2012] CSOH 155.

[22] Balfour *Practicks* 384 c XIV.

[23] Stair I.vi.42 and 44.

court would ignore it and thus proceed as if the act was valid, at least until an action of reduction was raised.

(2) The "protected party's option"

The nature of the early sources means that their discussion of the distinction between the types of nullity is relatively limited. However, it is addressed by the seventeenth century writers. The most sophisticated analysis is given by Mackenzie who turns to the *ius commune* for aid. When he does so, he is faced with a problem: the Scottish terminology does not match that used in the *ius commune*:

> [B]y the Common Law [i.e. *ius commune*], Nullities are either such as are received *ipso jure*, or *ope exceptionis*. That is said to be null *ipso jure*, where the Thing is declared null by any express Law, as this is by this Statute… That was *nullum ope exceptionis*, which was not receiveable, except the nullity had been proponed, by him to whom it was competent: But in our Law *nullum ipso jure*, & *nullum ope exceptionis*, are the same, & *termini convertibiles*: And with us the Opposition is betwixt *nullum ope exceptionis*, & *actionis*; the Reason of which difference proceeds from the Favour designed by the Law, *quoad* the Form of Procedure[.][24]

This assumes a single *ius commune* position but other literature suggests a good deal of variation.[25] This variety may in turn be attributed to the fact that, in so far as there was a clear analysis in classical Roman law,[26] it related to the formulary procedure.[27]

Under the formulary procedure, each case had two stages:[28] one before the Praetor (the Roman magistrate responsible for the administration of civil justice) and one before a *iudex*. In the first stage, the Praetor drew up a formula. This was an

[24] Mackenzie, *Observations on the 1621 Act* 23.
[25] JMJ Chorus *Handelen in strijd met de wet: de verboden rechtshandeling bij de romeinse juristen en de glossatoren* (1976) 300–303; H Coing *Europäisches Privatrecht, Band I: Älteres Gemeines Recht (1500 bis 1800)* (1985) 414; R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (1990 repr 1996) 678–82. In Chorus *Handelen in strijd met de wet*, only the French summary has been consulted.
[26] Coing *Europäisches Privatrecht* 413 and RM Beckmann *Nichtigkeit und Personenschutz: Parteibezogene Einschränkung der Nichtigkeit von Rechtsgeschäften* (1998) 33–46.
[27] *Van der Westhuizen v Engelbrecht and Spouse* [1942] OPD 194. The relevant part of the decision is reproduced at (1943) 60 SALJ 331, see particularly 333. Zimmermann *Obligations* 681.
[28] The division of litigation into two parts was characteristic of Roman civil procedure in general, dating back to the more formal *legis actiones* procedure (M Kaser *Das römische Zivilprozessrecht* (2nd edn, revd by K Hackl, 1996) 44–48). Although the *cognitio* procedure (which later came to dominate) just involved a magistrate, the Romans still seem to have thought in terms of these two stages: Kaser *Das römische Zivilprozeßrecht* 169.

instruction to the *iudex* which essentially took the form of an if-then statement: if X is the case, condemn A to do Y for B; if X is not the case, absolve A.[29] The core of the formula was the relevant *actio* which set out what the pursuer had to establish and which remedy was to be granted if he did so. However, the defender could have an *exceptio* inserted into the formula. This was a negative condition. If the defender could show that it was fulfilled, the defender would be absolved.[30]

Some problems (*ipso iure* nullities) could be pled before the *iudex* even if they had not been raised before the Praetor. On the other hand, a nullity *ope exceptionis* required to be inserted as an *exceptio*, otherwise the facts could not be raised before the *iudex* and the party would be forced to rely on *restitutio in integrum* to reverse the result.[31]

The classical distinction ceased to be relevant with the move to *cognitio extraordinaria* procedure. As a result, *ius commune* lawyers struggled to give meaning to texts originally written in reliance on classical procedure, which led to some confusion. This led Van den Heever J to dismiss the great wealth of *ius commune* scholarship on the types of nullity with the observation that, "Before the Gaius Palmipsest was rediscovered and deciphered [in 1816[32]] commentators did not and could not understand this distinction between nullity *ipso jure* and nullity *ope exceptionis*".[33]

Mackenzie radically simplifies the *ius commune* position. Notably, he does not mention those Glossators who drew a tripartite division between *ipso iure* nullity, nullity *ope exceptionis* and nullity *ope actionis*, or those who assimilated *ipso iure* nullity with nullity *ope exceptionis* leaving an opposition between nullity *ipso iure* and nullity *ope actionis*.[34] Of course, the latter looks very like the early Scottish distinction.

In the passage quoted, Mackenzie suggests that nullity *ipso iure* and nullity *ope exceptionis* are equivalent terms in Scots law. He goes on to apply the *ius commune*

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[29] See F de Zulueta *The Institutes of Gaius* (1953) Vol II: Commentary 258–61; Kaser *Das römisches Zivilprozeßrecht* 310–22.
[30] De Zulueta *Institutes of Gaius* 280–1; Kaser *Das römische Zivilprozeßrecht* 260–1 and 363.
[31] F Schulz *Classical Roman Law* (1951) 51; M Kaser, *Das roḿische Privatrecht* (2nd edn, 1971–5) Vol I, 208 fn 28; Beckmann *Nichtigkeit und Personenschutz* 37. Kaser rejects the term *ope exceptionis* as "*unrömisch*": *Das römisches Privatrecht*, Vol I, 635.
[32] Gaius *The Institutes of Gaius* (trans WM Gordon and OF Robinson, 1988) 11.
[33] *Van der Westhuizen v Engelbrecht and Spouse* (1943) 60 SALJ 331 at 333.
[34] Chorus *Handelen in strijd met de wet* 301–2

discussion to the characterisation of nullity under the Bankruptcy Act 1621,[35] observing that the *ius commune* rules and the words of the statute suggested that the nullity prescribed by the Act "was receivable *ipso jure*".[36] However, the practice of the Scottish courts had departed from this position:

> the Nullity arising from this Act, is oft-times received only by Way of Reduction, whereby the Lords have receded from the express Words of the Law: And the only Reason I can give for it, is, That the Author or Disponer must be called to maintain his Right; which could not be if the Nullity were receiveable *ope exceptionis*.[37]

The departure from the express words of the statute is discussed in chapter 6. For present purposes, the important thing is that Mackenzie's approach suggests that he thought the *ius commune* distinction between *ipso iure* nullity and nullity *ope exceptionis* mapped onto the Scots distinction between nullity by exception and nullity by action. He was not alone in this.

This parallel usage can make reading the sources difficult. *Ius commune* nullity *ope exceptionis* corresponds to Scottish nullity by action. However, in the Scottish context, nullity by exception is sometimes Latinised as nullity *ope exceptionis*. In other cases, and particularly in Stair's *Institutions*, nullity *ipso iure* is used as a synonym for nullity by exception in Scots law and nullity *ope exceptionis* as a synonym for nullity by action.[38]

Despite these difficulties, the basic point is clear. While, the terminology had shifted, the underlying concepts were substantially the same. This explains why Mackenzie spends time discussing the nature of relationship between *ipso iure* nullity and *ope exceptionis* nullity in the *ius commune*: it had implications for the action-exception distinction in Scots law.

Mackenzie thought that only *ipso iure* nullities could be taken into account by the judge *ex proprio motu*. A nullity *ope exceptionis* was "not receivable, except the nullity had be proponed, by him to whom it was competent."[39]

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[35] Mackenzie *Observations on the 1621 Act* 24.
[36] *Ibid*.
[37] *Ibid*.
[38] Eg Stair I.xvii.14.
[39] Mackenzie *Observations on the 1621 Act* 23.

At first sight, this does not seem to take things much further than the sixteenth-century case law: nullity by action/*ope exceptionis* required something to be done before account could be taken of the nullity. There is, however, a subtle difference in Mackenzie's presentation of the rule. He draws attention to the person who had the power to invoke the nullity. That person had a choice about whether to invoke the nullity or not.[40]

Once again, the issue is cast in procedural terms: the question is whether the judge is entitled to take account of the nullity. The result of this procedural question, however, has significant practical consequences. If the judge is not entitled to have regard to the nullity then the act will be treated as valid. If the "party to whom it is competent" decides not to invoke it, it is not open to the counterparty to found on the nullity. From that point, it is a short step to the idea that someone might have the right to set aside a juridical act which is valid for the time being.

(3) Substantive consequences of a procedural distinction

A contrast between acts which are null by force of law from the start and those which persist but are vulnerable to being set aside at the instance of particular parties was also being drawn in Europe during this period.[41]

In his *Tractatus de nullitatibus contractuum*, Biagio Aldimari[42] distinguishes contracts which are *ipso facto* "*nulli*" from those which are "*annullandi*". Where a contract is in the latter class, the nullity requires to be determined judicially.[43] In the interim, the contract remains completely valid. Grotius had earlier drawn a similar distinction in his discussion of promises made in error: "For in view of the diversity of these cases the [*ius commune*] writers declare some acts void and others binding,

[40] To some extent, this is prefigured by Hope in his paraphrase of the 1621 Act: transactions vulnerable under the act were "null at the instance of true and just creditors": *Major Practicks* II.13.18. However, Hope did not link this to any contrast with *ipso iure* nullity.
[41] Beckmann *Nichtigkeit und Personenschutz* 46–7.
[42] Also known as Blasius Altimarius. Very little has been published about Aldimari. His *Tractatus de nullitatibus contractuum* was widely published. The earliest edition that I have traced was published in 1678 (held by the Max Planck Institute for European Legal History in Frankfurt and published in Naples). According to the title page of the *Tractatus*, he was a lawyer in Naples.
[43] *Tractatus de nullitatibus contractuum* bound with and under the spine heading of *Tractatus de nullitatibus sententiarum* (1720) Rubr I Q 36, Nos 283–5.

but in such a way as they may be annulled or changed at the choice of the one injured."[44]

Mackenzie appears to move towards a similar position in his second comment on the *ius commune* distinction:

> By the common Law, either a Penalty was not adjected to the prohibitory Law, but the Thing was simpliciter prohibited, and these Things were *ipso jure* null. But if the Law proceeded further, and adjected a Penalty; then either the Penalty was adjected to the annulling of the Deed: And then the Deed whereby the Law was contravened was null, and the Penalty was also due, or else the Deed was declared null; but so that it was some way allowed to subsist, but a Remedy was appointed, and then it was not null *ipso jure*, but was reducible by the Way appointed[.][45]

This passage seems to refer to the Civilian distinction between *leges perfectae*, *leges minus quam perfectae* and *leges imperfectae*[46] but the interesting thing for present purposes is the way Mackenzie characterises the types of invalidity. *Ipso iure* nullity is contrasted with a deed which is "some way allowed to subsist" but subject to reduction. The context makes clear that Mackenzie regarded the latter category as equivalent to nullity by action. So where there is a nullity by action, there is temporary subsistence of the relevant act until it is set aside.

Mackenzie was not the only writer to discuss nullity by action in terms which suggest temporary subsistence. Craig takes a similar approach in his discussion of inhibitions. Like breach of the 1621 Act, breach of inhibition gave rise to nullity by action.[47] Craig gives the following account of breach of inhibition:

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[44] H Grotius, *De Jure Belli ac Pacis Libri Tres* (1646, repr 1913) (trans FW Kelsey (1925)) 2.11.6.1. The Latin is "*Nam pro harum rerum varietate alios actus irritos pronuntiant scriptores, alios validos quidem, sed ut arbitrio ejus qui læsus est, rescindi possint, aut reformari*". Similarly, for promise made under the influence of fear: 2.11.7.1.

[45] Mackenzie, *Observations on the 1621 Act* 24.

[46] See generally M Kaser *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht* (1977) and Chorus *Handelen in strijd met de wet* 281–3. For a similar discussion see Hope *Minor Practicks* §313–4.

[47] *Murray v Mochtand* (1564) Maitland *Practicks* Item 205; *Rossie v Crichtoune* (1565) Maitland *Practicks* Item 241; *Tullibardine v Cluny* (1615) Mor 6944; *Ross v Dick* (1635) Mor 650 (Spottiswoode's report).

> [A]n alienation by an inhibited person is not "*ipso jure*" null so as to render it liable to be set aside by way of exception, but must always be reduced by a rescissory action "*ex capite inhibitionis*" as we phrase it.[48]

Again, we see a link between *ipso iure* nullity and nullity by exception while the action of reduction for a nullity by action is a mechanism by which the alienation can be rescinded rather than being a way a recognising or declaring a pre-existing nullity.

Aspects of Stair's treatment of these issues also suggest that he considered acts which were null by exception as non-existent and those which were null by action as subsisting until set aside. An example of the first occurs in a discussion of attempts by superiors to grant feus over land which had already been feued, which is found in Stair's oration for admission to the bar:[49]

> [I]f any lord superior qha granted to any man a few give to any man other infeftment therfor without infeftment changed without consent of his fewer, such an fact is voyde & null and sould be halden as vnmade, sall it then by Laufull to the king to give infeftment to any other of his vassals few without his consent, truly the text [*Lib Feu* I.xxii] answers that such ane fact is not only prohibited by the Law and so invalide and by way of action may be annulled but it is even by the law itselffe null as if it had not bein made[.][50]

The opposition Stair sets up here is between deeds which are null, that is, to be treated as if they had not been made, and those which are annullable by action. This seems to suggest temporary subsistence of the right which was null by action.

In the *Institutions*, Stair brings together the idea of temporary subsistence and the protected party's option. In his discussion of whether an oath can render an otherwise null act effective he observes that,

> [s]ome deeds are declared null *ipso iure*, and other are only annullable *ope exceptionis*, or by way of restitution, or at least, where something in fact must be alleged or proven, which doth not appear by the right or deed itself; and so belongeth not to the judge to advert to, but must be proponed by the party.[51]

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[48] Craig (trans JA Clyde, 1934) I.xii.31. The Latin is "Sed nec in immobilius haec alienation est ipso jure nulla, ut ope exceptionis tollatur, sed tantum per actionem rescissoriam ex capite (ut solemus loqui) inhibitionis".
[49] Recorded in G Neilson (ed) "Scotstarvet's 'Trew Relation'" (1916) 13 *Scottish Historical Review* 380. His subject was *Libri Feudorum* I.xxii.
[50] "Scotstarvet's 'Trew Relation'" at 386.
[51] Stair I.xvii.14.

The context makes clear that Stair regards the class of nullities *ipso iure* as identical to the class of nullities by exception and the class of deeds annullable *ope exceptionis* as identical to nullities by action.

In the latter case, the oath can fortify the act in question because it will bar the swearer from raising the relevant issue. This is not the case if the deed is null *ipso jure*. That can be considered by the judge *ex proprio motu* or raised by another party with an interest. An oath can only exclude points which "are not *partes judicis*, nor consisting in any intrinsic nullity or defect."[52] Stair's primary focus is on the procedural question of what the judge can take account of but the contrast between that which is null and that which is annullable is striking.

He uses similar language in his discussion of the shift away from the nullity by exception prescribed in the 1621 Act:

> Though the statute bears all alienations, without a cause onerous, in prejudice of prior creditors to be null *ab initio*, and without declarator by exception or reply; yet custom has found this inconsistent with the nature of infeftments, which cannot be reduced till they first be produced, and all authors called, which cannot be by way of exception but by action[.][53]

Again the contrast is drawn between instant nullity, which can be pled by reply and something else, which does not give rise to instant nullity but requires a further process of reduction.

That aspect of the passage seems to reflect a substantive distinction. However, Stair's approach also suggests that the shift to a substantive understanding of the distinction between different types of problematic act was not complete. For, although the fact that an action of reduction was required might lead to a different view of the substantive state of the relevant act prior to reduction, the reason for requiring reduction was procedural: the need to call the author of the deed to give him the chance to defend his deed. This reflects the general approach of both Mackenzie and Hope to classification of nullities,[54] and also Stair's comments

[52] I.xvii.14.
[53] I.ix.15.
[54] Hope *Minor Practicks* §§309–17 and Mackenzie *Observations on the 1621 Act* 24

elsewhere.[55] Discussion focuses on procedural concerns such as presumptions, burdens of proof and the availability of witnesses, albeit with some reference to *ius commune* rules on statutory interpretation which focus on the nature of the prohibition in question.

This gives a somewhat awkward combination: whether an act was valid for the time being might depend not on substantive considerations but upon questions of procedural convenience. In this Stair cuts something of a transitional figure. His general statements about the action-exception distinction found the classification on procedural issues. However, in certain specific cases, this approach seems to break down and the consequences are explained on the basis of substantive rather than procedural reasons. To understand the context of these cases, it is necessary to examine another opposition: that between nullity in the self and *restitutio in integrum*.

B. NULL IN ITSELF AND *RESTITUTIO IN INTEGRUM*

As well as distinguishing between nullity by exception and nullity by action, early-modern Scots lawyers drew a distinction between deed which were "null in themselves" and those which gave rise to a right to *restitutio in integrum*. The distinction was most important in the context of deeds granted by minors.

Before the Age of Legal Capacity (Scotland) Act 1991, Scotland followed the Civilian tradition of a two-stage approach to the legal capacity of the young.[56] Until the age of 14 or 12, depending on whether the child was male or female, he or she was a pupil and lacked legal capacity. Juridical acts by the pupil were null.[57] This is illustrated by cases such as *Bruce*.[58] Bruce warned the person in occupation of his lands to vacate them. The occupier pointed to a renunciation which Bruce had given of his right to those lands when he was six. Bruce in turn pointed out that his tutors had not consented and that the deed was therefore "null in itself". The Lords agreed,

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[55] I.vi.44; I.xvii.14.
[56] See generally Scottish Law Commission *Legal Capacity and Responsibility of Minors and Pupils* (SLC Consultative Memorandum No 65, June 1985) Part II.
[57] TD Fergus (ed) *Quoniam Attachiamenta* (St Soc 44, 1996) ch 50. There were some exceptions for transactions which were beneficial to the pupil but they do not change the analysis of the division between nullity in the self and *restitutio in integrum*.
[58] (1577) Mor 8979. See also *Grundiston v Lawson* (1561) Mor 8978.

finding that the deed was "null from the beginning without reduction" and so Bruce was entitled to invoke the nullity in the course of the litigation. Here it appears that a problem which renders a deed "null in itself" could be pled by exception.

With minors (those beyond pupillage but below the age of majority) the position was more complicated. A minor had legal capacity and could thus perform binding juridical acts without needing anyone to act for him. However, minors might have curators, in which case their consent was necessary for a valid juridical act. Without their consent, the act was "null in itself".[59] Whether the grant was by a pupil, or by a minor with curators who did not consent, the nullity was receivable by exception.[60]

Even a minor without curators had some protection: any minor who entered into a transaction which was prejudicial to his interests could challenge it on the basis of minority and lesion. Such prejudicial transactions were sometimes said to be null[61] but, as will be discussed below, the minor's power to challenge was usually expressed in different terms.

The period during which the minor could avail himself of the latter protection was limited. The challenge had to be brought within four years of attaining the age of majority.[62] Therefore, it was very important to distinguish between challenges on the basis of the absence of consent from tutors or curators on the one hand and challenges on the basis of minority and lesion on the other. The former, but not the latter, could be challenged even after the four years had expired.[63] The difference in treatment was explained by saying that deeds in the former class were null in themselves and therefore did not need to be set aside, while deeds affected by minority and lesion were not null. Instead, they were open to challenge by the minor. This right to challenge could be lost if not exercised within the relevant time. However, if the "act" in question was null, it simply did not exist so this logic did not apply.

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[59] *Bruce v Bruce* (1569) Balfour *Practicks* 124 c XIII; *Kincaid* (1561) Mor 8979. This reflected the position in post-classical Roman law: C.2.21.3. Again, there were some exceptions for transactions which were beneficial to the minor but they do not affect the opposition being discussed here.
[60] *Barnbougall v Hamiltoun* (1567) Balfour *Practicks* 180 c V; *Bruce* (1577) Mor 8979; *Ker v Hamilton* (1613) Mor 8968; *Maxwell v Nithsdale* (1632) Mor 2115 and Stair I.vi.33. Cf *Stirling v Stirling* (1543) Sinclair *Practicks* No 312 and *Douglas v Forman* (1565) Balfour *Practicks* 179 c III.
[61] *Glentoris v Kirkpatrick* (1543) Mor 8978 (where the language of nullity is borrowed from Justinian's Code).
[62] This rule, taken from Roman law (C.7.54.3) was established early: *Glentoris v Kirkpatrick*.
[63] See the cases in Morison from 8978–86.

Other rules surrounding minority and lesion also seem best explained in terms of temporary subsistence. To set the transaction aside, the minor was required to offer to return anything he had received under the transaction.[64] Subjecting challenges to a condition like this makes sense if the transaction is valid for the time being but much less sense if it is not.

Similarly, a minor's challenge was refused where the property in question had been sold on to a good faith successor.[65] Again, this suggests that the minor had a right against the initial transferee but that the transfer had nonetheless been valid, enabling a valid transfer to the third party.

Often the terminology of *restitutio in integrum* was employed in discussions of minority and lesion. Thus, when reporting one such case, *Kincaid*, Balfour says that deeds by minors without curators are "not in the self null; bot the minor within lauchfull time may revoke the samin, and seik restitution *in integrum*."[66]

In Roman law *restitutio in integrum* was a remedy which allowed the reversal of some legal change such as a transfer, loss of status (*capitus diminutio*) or a contract.[67] It was available for a number of reasons including minority and lesion, fraud and duress (ie *metus*).[68] Reference to this concept helped link Scots law with European thinking in this area but it also supported the idea of temporary subsistence. Restitution assumes that the act was initially effective: the remedy was not purely declaratory.[69] Were that not the case, there would be nothing to restore.

While Scots lawyers used the term *restitutio in integrum*, they do not appear to have regarded it as a distinct remedy. Rather, restitution was achieved using an action of reduction.

When reporting *Kincaid*, Maitland says the grant "sall not be null but the minor quhan he cums to perfyte age may reduce the samein".[70] Mackenzie suggests that a

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[64] *Barnbougall v Hamiltoun* (1567) Balfour *Practicks* 182 c XII; *M'William v Shaw* (1576) Mor 9022.
[65] *Craick v Maxwell* (1683) Mor 9029.
[66] (1567) Balfour *Practicks* 119 c XXIV. For other examples, see *Bruce* (1577) Mor 8979; *Robertson v Oswald* (1584) 8980; *Edgar v Edgar's Exrs* (1614) Mor 8986; *Houtson v Maxwell* (1631) Mor 8986; *Hume v Riddel* (1635) Mor 8989.
[67] B Kupisch *In integrum restitutio und vindicatio utilis bei Eigentumsübertragung im klässischen römischen Recht* (1974); Kaser *Das römische Zivilprozessrecht* 421–6, 493–4 and 581–2.
[68] D.4.1.1.
[69] Prior to Kupisch's work, the general view was that restitution was achieved by the Praetor's decree: Schulz *Classical Roman Law* 68. Kupisch shows, however, that this was not always the case and that the term *restitutio in integrum* could refer to an order for reconveyance: *In integrum restitutio* 12
[70] Maitland *Practicks* Item 178.

minor who wants to challenge a grant should "execute a Summons of Reduction of that Act, *ex capite minoritatis & laesionis*".[71] In his discussion of reduction for minority and lesion, Stair seems to use restitution and reduction as equivalent terms.[72]

Of course, reduction was also the appropriate remedy for nullity by action and we see the language of restitution being brought together with that of the nullity by action-exception distinction in *Craig v Cockburn*. Counsel for the minor's counterparty argued that the minor could not plead the nullity by exception but only proceed "*via restitutionis in integrum, et via actionis*".[73]

Craig makes a similar point, observing that feus granted by minors

> cannot be set aside by way of exception, but only by decree of declarator and reduction on proper grounds. There is an exception to this in the case of a minor who, having a curator, grants the feu without that curator's consent: not only is such a feu null and void–for the grant of a feu is a species of alienation–but so also is any let or assedation granted by him without the curator's consent.[74]

This reflects the link between *restitutio in integrum* and the action of reduction seen *Craig v Cockburn* but Craig does something else that is more interesting. He explains the distinction in the following terms: a minor with a curator has, in general, no power to contract without his curator's consent;[75] a minor without a curator does have such capacity but may be given restitution if he suffers by reason of his facility or of circumvention.[76] In this explanation, Craig brings a substantive analysis to bear on deciding whether a challenge can be brought by exception or not.

The reason for the difference in treatment of minors with and without curators is not one of procedural convenience; it is that a minor with a curator has no capacity and therefore his act is necessarily null *ab initio*. There can be no basis for treating it

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[71] Mackenzie *Institutions* 288.
[72] I.vi.44. Eg "There is no difference as to the restitution of minors, though the deed be done with the consent of curators. Nor did it exclude a minor reducing, because his curators had received the money in question."
[73] (1583) Mor 8980.
[74] I.xii.30. The link with the action-exception distinction is perhaps a little clearer in the Latin: "*A minore … feuda data omnino non sunt per exceptionem irritata; sed opus est actione rescissoria, judicis sententia declaratoria, nisi minor ille curatorem habeat, & sine ejus consensu feudum concesserit: nam non solum hoc feudum (cum in feudum datio sit species alienationis) sed & omnis locatio, & assedatio a tali minore, sine curatoris consensu nulla est*"
[75] "*generaliter contrahere non potest … sine curatoris consensu*".
[76] "*si ex sua facilitate aut circumventione laedatur, restitui possit*".

as valid for the moment. This is not the case where the challenge is based on minority and lesion.

Stair follows Craig in recognising the basic distinction. Acts done by minors without curators are "revocable and reducible upon enorm lesion"[77] while "once they choose curators, all deeds, done by them without the consent of their curators, are *eo ipso* null by exception, without the necessity to allege lesion."[78] However, unlike Craig, Stair gives a procedural justification for the distinction: "because they are *facti*, and abide probation, they are not receivable by exception."[79]

Stair returns to minors in his discussion of whether an oath can fortify an invalid deed.[80] Here, however, the cracks are beginning to show in his analysis. He gives the general rules quoted above: where an external fact requires to be proved in order to establish a nullity, it is not *ipso iure* null and may therefore be excluded by an oath. Having done that, he moves on to consider specific examples, including deeds by minors.

As might be expected, he argues that a plea of minority and lesion can be excluded by an oath. This fits nicely with Stair's analysis. At this stage he does not mention the Oaths of Minors Act 1681,[81] which prohibited the exacting of oaths from minors, and declared any contract purportedly fortified by such an oath "void and null", a declarator of which could be obtained by "any person related to the minor … by way of action, exception or reply."

Stair then comes to the position of a minor with curators and a problem presents itself. The age of the granter at the time of the deed and the fact that he had curators are external facts. Therefore, according to Stair's test the deed should be null by action and capable of exclusion by oath.

However, such a result was unacceptable. It was well established by authority, and Stair had acknowledged elsewhere, that deeds by minors with curators who did not consent were null by exception. Therefore no oath should exclude the plea. Stair tries to reconcile the two positions by pointing to the 1681 Act. According to Stair, the exception of nullity cannot be brought by the minor on account of the oath but

[77] I.vi.32.
[78] I.vi.33.
[79] I.vi.44.
[80] I.xvii.14.
[81] 1681 c 19, *RPS* 1681/7/43.

this does not stop the curators from invoking the nullity: they did not swear the oath and, in any case, the 1681 Act preserves the right of any relation of the minor to raise the issue.

Stair's argument neglects the fact that the 1681 Act is expressly directed at the protection of minors' right of "revocation, reduction and restitution *in integrum*" which suggests that it was concerned with minority and lesion rather than grants by minors with curators. Neither does he reflect on the fact that the problem regarding the effect of oaths only arose because he departed from the established rule that grants by minors with non-consenting curators were null by exception.

The 1681 Act renders the issue practically irrelevant but Craig's view of the difference between nullities by action and by exception provides a clearer basis for the pre-1681 law: the oath could bar a challenge on the basis of minority and lesion because there was a valid act there and the oath took away the minor's right of challenge; where there were non-consenting curators, there was no capacity and therefore no deed, meaning that there was nothing to fortify with the oath.

Later on in his discussion of oaths, Stair does employ an argument of this type but the problem he has in mind is not minority and lesion but the effect of force and fear and of fraud. They are considered in the next section.

C. MOVING TOWARDS A SUBSTANTIVE BASIS FOR THE DISTINCTION

(1) Stair's consideration of other rules

As with minority and lesion, Stair considers that pleas of force and fear[82] and of fraud can be excluded by oaths.[83] The result makes sense on Stair's analysis: in both cases, an external fact requires to be proved for the challenge to be established. Stair notes, however, that these rules are potentially problematic: "if oaths be so effectual, great inconveniences will follow, a door being opened to force and fraud." A

[82] On the conflicting approaches to force and fear in the Scottish sources prior to the nineteenth century see JE du Plessis *Compulsion and Restitution* (St Soc 51, 2004) ch 3.
[83] I.xvii.14

counterparty who can induce a deed by force and fraud is also likely to be able to get an oath from his victim.

Stair's first response is robust: "*Incommodum non servit argumentum*": "inconvenience will not avail as an argument".[84] However, he also seeks to take the edge off the harshness of the rule:

> if the fear be such as stupifieth, and takes away the act of reason, there is nothing done, because there can no contract in its substantials consist without the knowledge and reason of the party; or if the deceit be *in substantialibus*, as if a man should by mistake marry one woman for another, there is nothing done, except when an act of reason is exercised: but upon motives by fear, error, or mistake, the deed is in itself valid, though annullable by fear or fraud, which are excluded by the oath[.][85]

A party asserting fear which "stupifieth" or a fraud inducing an error which meant that he intended to do something different from what he appeared to intend would need to prove an external circumstance. There would be nothing in the body of the deed in question which disclosed these problems. Therefore, they seem to fail Stair's test for *ipso iure* nullity. However, he perceives a fundamental problem with such deeds: the basic conditions for the constitution of the juridical act have not been fulfilled. That being the case, there is nothing for the oath to fortify and, since oaths are accessory[86] to the principal juridical act, this means that the oath will not prevent a challenge to the act.

The distinction between those cases and situations where the challenge is based "upon motives by fear, error or mistake" is essentially the same as that drawn by Craig to distinguish deeds by minors with non-consenting curators from minority and lesion. In one case, the basic requirements for the constitution of the act have not been fulfilled so there is no act. This means instant nullity and the act cannot be propped up by the lapse of time or an oath. In the other case, the act has been validly constituted but the circumstances give the granter a right to have it set aside. Since

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[84] J Trayner *Latin Phrases and Maxims* (1861). In the 3rd and 4th editions (1883, and 1894 repr 1993 respectively) this phrase is replaced with *Incommodum non solvit argumentum*: "inconvenience does not answer an argument."
[85] I.xvii.14.
[86] *Ibid*.

the act exists, conditions can meaningfully be attached to the exercise of this right and third party successors can be protected.

This approach is also reflected in Stair's classification of challenges based on fraud and force and fear under the heading of reparation for delinquences.[87] The implications of such an approach are discussed more deeply in the following chapters. For the present, it suffices to note that, by basing the power to set transactions aside for fraud on the obligation to make reparation for a wrong done, Stair implies that the power is based on a personal right against the wrongdoer.

The distinction is based on substantive criteria: the nature of the problem with the act. It has substantive consequences: nullity *ab initio* or temporary validity. In short, the logic here is that which underlies the distinction between voidness and voidability set out in chapter 1.

Stair also casts the *ipso iure–ope exceptionis* distinction in substantive terms in his treatment of compensation:

> Compensation is a kind of liberation, as being equivalent to payment; for thereby two liquid obligations do extinguish each other *ipso jure* and not only *ope exceptionis*; for albeit Compensation cannot operate if it be not proponed, as neither can payment; yet both *perimunt obligationem ipso jure*, and therefore are not arbitrary, to either party to propone or not propone as they please; but any third party having interest may propone the same, which they cannot hinder[.][88]

Admittedly, the situation addressed here is not a juridical act created in problematic circumstances. Nonetheless, Stair's approach is relevant to the present discussion. If an obligation has been extinguished, it will not be given effect by a court. In that respect an extinct obligation parallels the consequences of a null juridical act. Stair addresses who can raise this issue in litigation and does so by contrasting *ipso iure* effect with *ope exceptionis* effect. He explains that both payment and compensation take away or annihilate[89] obligations *ipso iure*. For that reason there is no protected party's option. Anyone who wants to can rely on their extinction. The implication is

[87] I.ix.1–15.
[88] I.xviii.6.
[89] See *perimo* in CT Lewis and C Short *A Latin Dictionary* (1879, repr 1958) and PGW Glare (ed) *Oxford Latin Dictionary* Vol II (1976).

that this contrasts with *ope exceptionis* effects which do not destroy the relevant act of obligation automatically and which may only be invoked by certain parties.

The striking aspect of this analysis is that Stair derives the procedural consequence from a substantive effect: it is because the obligation has been destroyed that anyone can invoke payment. This is the case despite the fact that payment and the existence of another debt are external facts which would require to be proved. Thus here, as in the latter part of his discussion of the effect of oaths, a substantive approach to categorising types of nullity is beginning to displace a procedural one.

D. ESTABLISHING THE SUBSTANTIVE ANALYSIS

The basic concepts and distinctions which provide the basis for the modern understanding of voidability can be found in Craig and Stair. However, in Stair these co-exist with a competing analysis which categorises problems with deeds according to procedural rather than substantive considerations. For the establishment of voidability, it was necessary that the substantive analysis should prevail. That it did so is evident from consideration of the discussion of these issues in Bankton and Erskine.

(1) Minority and lesion

Like earlier writers, Bankton bases his treatment of the relationship between minority and lesion on the one hand and of deeds by minors with non-consenting curators on whether the act is instantly null or not.

Where there are non-consenting curators the deeds "are null, so that there is no occasion for reduction, or a proof of lesion".[90] Deeds affected by minority and lesion, on the other hand, "are not void, but only reducible upon minority and lesion".[91] So far, the analysis goes no further than Stair.

[90] I.vii.56. Although Bankton does take the view that the minor can ratify the contract and bind the other party to it.
[91] I.vii.52.

However, Bankton goes on to give a more detailed account of *restitutio in integrum* for minority and lesion. Here, there is a subtle difference between his analysis and Stair's. It will be recalled that Stair identifies the need to establish lesion, an external fact, and reasons back from that to the temporary subsistence of the grant. Bankton approaches things the other way round, explaining the reason for an action of reduction in the following terms: "the deeds are not void, but only voidable, and subsist, unless reduced by sentence of the lords".[92] This appears to be the earliest use of the word "voidable" in a Scots law source describing Scots law.[93] Bankton probably borrowed it from English law. He drew heavily on Matthew Bacon's *New Abridgement of the Law*[94] for his observations on English law in this area and Bacon makes extensive use of the term.[95]

More significant than the terminology is the logic of Bankton's argument. The substantive point (temporary subsistence) leads to the procedural effect (the need for an action of reduction). This brings minority and lesion into line with Stair's approach to fraud and force and fear.

For Bankton, that temporary subsistence explains how the minor's right to restitution can be restricted to the four years after attaining majority.[96] The analysis is also evident in his discussion of the protection of a good faith purchaser. He explains that such a successor is safe "because the minor's claim of restitution arises from the lesion in the contract committed by the author, which, being personal cannot affect his onerous singular successor".[97]

Bankton's account also suggests that the initial procedural distinction was being watered down by the mid-eighteenth century. Having noted that minority and lesion cannot be received by exception, he continues "but if one is sued on such a deed within the four years, he may use his privilege by way of defence, which will sufficiently save the privilege [of *restitutio in integrum*], and repeat a reduction to satisfy the form, if insisted on."[98] On this view, nullity by action was losing much of

[92] I.vii.74.
[93] *Ibid*. Bankton uses the term at I.v.2 (England) and I.v.19 (England) to describe the English law of marriage.
[94] M Bacon *A New Abridgment of the Law by a Gentleman of the Middle Temple* (5th edn, 1786).
[95] See I.vii.1–38 (England) and the references to Bacon therein.
[96] I.vii.74 and 88 and IV.xlv.40–1.
[97] I.vii.94.
[98] I.vii.75.

its significance as a procedural category. The fact that something was not receivable by way of exception did not prevent its being raised as a defence. It merely meant that, once this had been done, a separate action of reduction was needed to tick the formal box. This tendency to circumvent the procedural restriction was not novel. In *Kennedy v Weir*, a minor was charged to pay on a bond but was permitted to suspend execution in order to give him time to raise an action of reduction.[99]

One important aspect of the substantive analysis is absent from Bankton's treatment. He gives little or no attention to why a grant by a minor with non-consenting curators or by a pupil is void. This aspect is, however, addressed by Erskine.

Erskine suggests that "a pupil has no person [sic] in the legal sense of the word" and as such is deprived of all active capacity.[100] He uses a similar argument to explain why contracts by married women are "*ipso iure* void": their personalities are "sunk" into that of their husbands.[101] The position of a minor with curators is less extreme. He has legal personality and can therefore "act and be obliged."[102] Nonetheless, deeds done by minors with non-consenting curators and by pupils are null against the minor or pupil. Like Bankton, Erskine takes the view that the counterparty may be compelled to perform but he views this as an anomalous result which is only explained by the law's desire to penalise those who try to impose on the weakness of the young and by "the favour of minors, to whom the law has not denied the power of making their condition better, though they cannot make it worse."[103]

The key thing to note here is that this favour of minors applies both to minors in the narrow sense and to pupils. Erskine equates the position of minors with curators and pupils, suggesting that their acts are intrinsically null on the basis of fundamental lack of capacity.[104] In the latter case, their power to act is contingent on the curators' consent. This is the same argument which Craig used when distinguishing grants by minors with non-consenting curators from minority and lesion.

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[99] (1665) Mor 11658.
[100] I.vii.14.
[101] I.vi.25.
[102] I.vii.14.
[103] I.vii.33.
[104] *Ibid*.

(2) Other rules

Bankton and Erskine also show evidence of a move towards a substantive approach to categorising problems with deeds in other contexts.

(a) Bankton

Like Stair, Bankton discusses the power to avoid deeds induced by force and fear or fraud under the heading of reparation for wrongs and, again like Stair, he distinguishes between absolute force and conditional force. In the latter case, the granter of the deed "chuses the least of two evils". That means that the force "does not exclude all consent".[105]

Bankton thinks this explains the differing treatment of good faith purchasers of stolen and extorted goods.[106] If goods have been stolen, the victim can recover them from a good faith purchaser without paying compensation. If, on the other hand, the owner was compelled to sell, he can only recover from a good faith purchaser if he is willing to refund the price that the latter paid: "in rights extorted, a consent of the granter, tho' forced, intervenes, which supports the indemnity of third parties."[107]

Bankton concedes that there are some cases where an extorted deed has no temporary subsistence. Even here, however, his language suggests a modern understanding of the void-voidable distinction:

> In some cases the deed extorted is intrinsically null; because, if it did subsist, the law could hardly give a remedy: thus, a marriage, to which one is compelled, is void … the law prevented the right's taking effect, since, if it did, the favour of the case would bar the reducing it: marriage being a divine contract, if it did once subsist, it could not be easily set aside.[108]

Voidness and intrinsic nullity are clearly equiparated in this passage and the reason for the exceptional rule governing forced marriage is the difficulty which would be

[105] I.x.50.
[106] I.x.54.
[107] *Ibid*. He does not explain why the singular successor should be vulnerable to a challenge on the basis of force and fear when the same cannot be said of minority and lesion or fraud. At I.x.59, Bankton seems to suggest that good faith purchasers are safe.
[108] I.x.57.

caused by recognising the temporary subsistence of such an act. In the next paragraph, Bankton moves on to consider deeds extorted on behalf of third parties: "[T]hese [he observes] are likewise voidable in the same manner as if they had been granted to the offenders."[109]

Bankton's views on the effect of fraud will be considered in detail in later chapters. At present it suffices to note that the reduction was based on a personal right to reparation against the fraudster and that the basic principle was that good faith purchasers were protected.

(b) Erskine

Erskine appears to have taken the view that both force and fear and fraud rendered contracts void on the basis that there is no consent.[110] Thus, for Erskine, the fraud or the force and fear mean that there is no consent and it is the absence of consent that leads to the voidness. Since consent is a fundamental requirement for a valid contract, this is consistent with a modern understanding of the relationship between voidness and voidability.

Erskine's comments on other topics support this view. Like Stair and Bankton, Erskine offers an extensive discussion of interdiction. This was a mechanism whereby the capacity of "prodigal persons" to deal with heritable property could be restricted. "Interdictors" were appointed either by the court or by the prodigal himself and their approval was necessary for grants of heritable property by the prodigal.[111]

Stair suggests that prejudicial grants made without the consent of the interdictors are "void"[112] but that the nullity is not receivable by exception. Erskine takes a different approach. He agrees that reduction is necessary but the basis for this view is not the action-exception distinction. Rather, he argues that interdiction does not imply a defect of judgment on the part of a prodigal. The prodigal still has his reason.

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[109] I.x.58.
[110] III.i.16.
[111] Interdiction was commonly treated alongside and seen as a midpoint between minority and inhibition: Bankton I.vii.118 and 133. The presence and role of interdictors reflected that of curators in minority and the method of execution and publicity and restriction to heritable property reflected the approach to inhibitions.
[112] Stair I.vi.41–2.

Therefore, "all his deeds, though granted without the consent of his interdictors, are valid" albeit "subject to reduction" in cases of lesion.[113]

The same point emerges from the contrast which Erskine draws between court-imposed interdiction and the brieve of idiotry. The brieve of idiotry was retrospective "for an idiot, being destitute of reason, is incapable of obligation". The prodigal, on the other hand, has his reason and is therefore capable of binding himself.[114]

The contrast in approach is clear. For Stair, interdiction leads to nullity but the effect of that nullity is constrained by procedural rules. In Erskine's treatment, the procedural result remains but its basis is a substantive consideration of the effect of interdiction on the prodigal's capacity.

E. THE NINETEENTH CENTURY

The prevalence of the substantive approach to the classification of problems with deeds is more marked in late-eighteenth and early-nineteenth century accounts. Thus, when discussing the effect of restitution for minority and lesion, Hume explains that, where subjects sold to a minor at an excessive price are destroyed, the minor can reduce the transaction but only to the extent of recovering the excess that he paid. This is because the sale "is not null and void. It is reducible only, on proof of lesion. In the meantime, and till reduced, it is a good sale and transfers the house to the minor. As proprietor he is subject therefore to the risk of the destruction of the thing by the ordinary rule of law."[115]

When discussing interdiction, Hume follows Erskine's approach, noting that it does not "make [the interdictors'] consent essential, like that of a tutor, to all the prodigal's deeds."[116] Rather, it simply "serves as a means of more easily setting aside the deeds granted without consent if they are to his prejudice and lesion."[117] The nature of the contrast becomes clearer in light of his earlier comment that "in all matters of active exertion [the pupil] is not acknowledged even as a person in law as

[113] I.vii.58.
[114] I.vii.54.
[115] GCH Paton (ed) *Baron David Hume's Lectures 1786–22* (St Soc 5, 13, 15 and 17–9, 1939–58) Vol I, 302.
[116] *Ibid* Vol I, 316.
[117] *Ibid* Vol I, 317.

having a consent or will of his own."[118] In one case there is a protective right to recover, in the other the question concerns the basic requisites of the juridical act in question.

A similar distinction is evident in Hume's discussion of the effect of problems with transfer on singular successors. He contrasts the case of fraud with that of theft or violence. In the former case, there is consent to convey, albeit obtained by unjustifiable means. In the latter, there is no consent and therefore no transfer.[119]

Bell's approach is similar. He describes pupillarity as "a state of absolute incapacity" which means that the pupil's purported acts have no effect.[120] In Bell's view, minority is not "total incapacity" and therefore minors are "held capable of consent."[121] Nonetheless, deeds by a minor with a non-consenting curator are "null" by reason of "presumed imperfectness of judgment".[122] The minor's capacity means that, where curators consent or where there are no curators, deeds are valid but "liable to reduction on proof of lesion".[123]

Bell had doubts about the distinction drawn between the effect of fraud on the one hand and of error and force and fear on the other. Nonetheless, he accepted the general view that error and force and fear could affect good faith third parties while fraud could not and that the basis of the distinction was that there was no consent in cases of error of force and fear while there was consent, albeit improperly obtained, in cases of fraud.[124]

Perhaps the clearest proponent of the modern approach to categorising problems with juridical acts prior to the Sale of Goods Act 1893 was Mungo Ponton Brown. In his discussion of the effect of force and fear and of fraud he notes that, in questions with *bona fide* purchasers, it is necessary to "distinguish the cases in which goods are purchased from a party who has acquired them, *by a sale liable to reduction on the head of fraud*, from certain other cases in which goods are purchased from a party

[118] *Ibid* Vol I, 255.
[119] *Ibid* Vol III, 235.
[120] Bell *Prin* §2067.
[121] §2087.
[122] §§2090 and 2096.
[123] §2099.
[124] §14.

who does not hold them by a title of property at all" and suggested that a similar distinction was relevant to reduction for force and fear.[125]

Like Stair and Bankton, he takes the view that there can be cases where consent is obtained by threats of violence. Such action is clearly wrongful but the seller nonetheless consents and "although such a contract is clearly *voidable*, on the head of force and fear, *it is not ipso jure void*, and the property is, in the first instance, transferred so as to enable the wrong doer to give a good title to a *bona fide* purchaser."[126] To justify this view, Brown quotes extensively from Stair's discussion on the use of oaths to fortify invalid deeds[127] and but he does not discuss or take account of the elements in Stair which reflect the earlier procedural analysis.

Summing up his discussion of fraud and force and fear, Brown returns to the distinction contrasting "a sale which is *void ab initio*, in consequence of the *incapacity of the parties to the contract*,– of *some quality in the thing*,–or of the existence of error" with one which is merely voidable.[128] In the former case "there being *no contract at all*, the transaction is *ipso jure* null, and cannot have the effect of transferring the property of the thing sold", while in the latter, the buyer acquires for the time being, albeit subject to a challenge by the seller.[129] This distinction explains why a good faith purchaser is protected in one case and not the other. Where the transaction is void (ie non-existent), the purported transfer to such a purchaser is *a non domino* and therefore ineffective. In the latter case, the initial buyer is owner for the time being and therefore has the power to convey to the third party.

Notable for its absence from accounts by Hume, Bell and Brown is any attention to the action-exception distinction which had so dominated the earlier discussion. Now attention focuses on a distinction drawn on a substantive basis and with substantive consequences.

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[125] MP Brown *Treatise on the Law of Sale* (1821) §577, italics in original.
[126] *Ibid* §563, italics in original.
[127] *Ibid* §565.
[128] *Ibid* §570, italics in original.
[129] *Ibid*, italics in original.

F. SUMMARY

By the end of the eighteenth century, the approach to the classification of problems with juridical acts was one which would be familiar to a modern lawyer. The key distinction is between acts which are stillborn and those which are valid but liable to be set aside at the instance of some particular party. The latter are not null but reducible (and sometimes said to be voidable). Classification in one category or the other depends on the nature of the problem with the act. Broadly speaking, the absence of one of the essential requirements for the constitution of the relevant act will lead to nullity. Where, on the other hand, the basis of the challenge is a rule introduced to protect a particular individual (for instance, protection against the levity of youth or the consequences of fraud or force and fear) the act is voidable. The act is valid but the protected party has a right to have it set aside. Substantive as well as procedural consequences flow from this distinction.

The process by which this end point was attained was a complex one. At the beginning of the early-modern period, it appears that a general concept of nullity was applied to all problematic deeds. However, from an early stage a procedural distinction was drawn between nullities which could be pled by exception or reply and those which required an action of reduction. Acts affected by either kind of problem were null but the opportunities to invoke the nullities in the latter category were more restricted. Scots lawyers appear to have regarded the distinction as equivalent to a distinction between *ipso iure* nullity and nullity *ope exceptionis* which was drawn in the *ius commune*. It dominated discussion of the classification of nullities in the sixteenth and seventeenth centuries.

In the course of this discussion, aspects of nullity by action emerged which prefigured key characteristics of voidability. The need to bring an action of reduction meant that the party with the right to reduce could choose whether the nullity was "given effect" or not. Further, the procedural restriction meant that, until an action of reduction was brought, the deed was treated as being valid.

In light of these characteristics, it is perhaps no surprise that the language used by seventeenth-century writers to describe instances of nullity by action sometimes suggestd that juridical acts affected by such a nullity were valid until set aside. That

tendency was encouraged by use of the language of *restitutio in integrum* in discussion of minority and lesion.

However, the procedural distinction continued to play an important role and there is a sense, particularly in some passages of Stair, that a distinction is drawn on the basis of procedural considerations and that the result of that distinction is taken to have implications for the substantive validity of the act in question. So problematic acts were divided into those which were null from the outset and those which might be set aside, but classification in one category or the other did not depend on a substantive analysis of the nature of the problematic circumstance.

The procedural distinction was, however, under pressure during this period. On the one hand, courts were sanctioning other procedural devices which prevented effect being given to juridical acts which were null by action even where the action of reduction had yet to be raised. On the other, it was becoming clear that a distinction based on procedural considerations was not an appropriate basis for determining the substantive validity of juridical acts. This is particularly evident in Stair's discussion of the effect of oaths.

Alongside the procedural criteria, another basis for classification can be traced back at least as far as Craig. This divided problems with acts according to the nature of the problem: so the substantive consequence (initial nullity or temporary validity) depended on substantive criteria (broadly, whether the essential requirements for the constitution of a juridical act were fulfilled). In Stair, this analysis sits, rather uneasily, alongside the procedural analysis.

In Bankton and Erskine, it is clear that the substantive analysis has prevailed. Very little attention is given to the action-exception distinction which dominated the early discussions. On the other hand, there is extensive discussion of whether acts are null from the outset or merely liable to be set aside. Where an explanation is offered of why a particular circumstance gives rise to one consequence or another, reference is made to substantive rather than procedural considerations.

Brown's discussion sums up the post-Stair development. The elements in Stair's analysis which focus on the distinction between juridical acts where some essential element is missing and cases where the act has been done but was improperly obtained are emphasised and developed. The terms "void" and "voidable" are used to

denote this distinction and the distinction is used to explain the differing effect of invalidities in each class. All vestiges of the distinction between nullity by action and by exception appear to be forgotten.

Chapter 3

MISREPRESENTATION

Voluntary transfer involves A deciding to transfer property to B and B deciding to accept that transfer. If there is some interference with the decision-making process of either party then the voluntary nature of the transfer, and thus the justification for upholding it, may be undermined. Misrepresentation about some matter relevant to the decision is one of the most obvious ways in which this can happen. It is therefore not surprising that misrepresentation can render a transfer voidable.

The orthodox position in modern contract law is that misrepresentation can render a contract voidable even if the person making the representation was neither fraudulent nor negligent.[130] All that is needed is a misrepresentation which induced the contract,[131] made by or on behalf of the counterparty[132] together with the possibility of *restitutio in integrum*.[133] Fraud and negligence are only relevant to the question of damages. Authoritative statements explicitly endorsing avoidance of a transfer for misrepresentation in cases where there is no fraud are, on the other hand, rather thin on the ground.[134] Should the rules regarding innocent misrepresentation in contract be considered applicable to transfer?

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[130] Gloag *Contract* 471–4; JM Thomson "Fraud", in *The Laws of Scotland: Stair Memorial Encyclopaedia* Vol 11 (1990) para 715; McBryde *Contract* paras 15-67–74. Cf JJ Gow "Some Observations on Error" 1953 JR 221; TB Smith *A Short Commentary on the Law of Scotland* (1962) 834–5.

[131] McBryde *Contract* 15-68.

[132] *Ibid* 15-71.

[133] *Ibid* 15-72–3.

[134] Lord Shaw's comment *Mair v Rio Grande Rubber Estates Ltd* 1913 SC (HL) 74 at 82 is given in support of the position in Reid *Property* para 616 but the discussion concerned contracts rather than transfers. The strongest authority is *Abram SS Co v Westville Shipping Co* 1923 SC (HL) 68, where an assignation was incorporated into the contract of sale which was being attacked. In *Edinburgh United Breweries v Molleson* (1894) 21 R (HL) 10 an attempt was made to reduce a disposition on grounds of misrepresentation but the case was so complicated by concerns regarding title and interest to sue and hints of fraud that it is not a clear authority.

A. MISREPRESENTATION IN CONTRACTS AND CONVEYANCES

It might be objected that there is no need to apply these contract rules to transfer. Authorities dealing with the effect of misrepresentation (fraudulent or otherwise) on the transfer of moveables have a tendency to treat the problem as internal to contract law. *MacLeod v Kerr*[135]exemplifies this approach: a dispute between the defrauded party and the singular successor of the fraudster was discussed in terms of the effect of the misrepresentation on the contract rather than the transfer.

This reflects Bell's view of the relationship between contract and conveyance. For corporeal moveables Bell held what might be described as a "hard" *iusta causa* position. On this view, the prior contract is not merely necessary for a valid transfer, it also supplies the mental element for that transfer.[136] Delivery is a purely formal act, with no mental element. This leads Bell to conclude that misrepresentation (fraudulent misrepresentation in the case he was considering) could have no effect upon it. This is clearly some distance from the abstract analysis of transfer which dominates modern property scholarship in Scotland.[137] It should be borne in mind, however, that a similar approach may have prevailed in Roman law.[138]

This proclivity may have been exacerbated by the fact that, in a two-party case, reduction of a contract of sale will usually be a perfectly adequate remedy. It is well known that *restitutio in integrum* must be possible if a contract is to be reduced.[139] This is required because an order to restore performance tendered is part of the remedy given when a contract is reduced. In the case of sale, that will mean

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[135] 1965 SC 253. See Smith *Short Commentary* 816 (criticising the earlier case *Morrison v Roberston* 1908 SC 332) and "Error and Transfer of Title" (1967) 12 JLSS 206, criticising *MacLeod*.

[136] Bell *Comm* I, 262 and 268. MP Brown appears to have taken a similar view, although his expression of it is less explicit than Bell's: *Sale* §§570 and 577. See also Erskine II.i.18 and II.vii.23 and Hume *Lectures* Vol III, 245.

[137] Reid *Property* paras 606–13; DL Carey Miller "Systems of Property in Grotius and Stair" in DL Carey Miller and DW Meyers (eds) *Comparative and Historical Essays in Scots Law* (1992) 13 especially at 19 and 28–30; DL Carey Miller with D Irvine *Corporeal Moveables in Scots Law* (2nd edn, 2005) paras 8-06–10; and LPW van Vliet "The Transfer of Moveables in Scotland and England" (2008) 12 EdinLR 173 at 192–9.

[138] See Zimmermann *Obligations* 240 and authorities cited. See also JAC Thomas *Textbook of Roman Law* (1976) 180, suggesting that *traditio* was "essentially factual". Thomas, however, suggests that *error in persona*, *in corpore* and *in dominium* could affect the *traditio* directly, which seems to imply that it must have had some mental element: p 181.

[139] *Boyd & Forrest v Glasgow & South-Western Railway* 1915 SC (HL) 20.

retransfer of the object of the bargain. Therefore reduction of the contract will, in two-party cases, often lead to the same result as reduction of the transfer. *Restitutio in integrum* is more properly seen as part of the remedy sought when reducing a contract rather than as a prerequisite for its grant. The requirement that *restitutio* be possible is simply a requirement that the remedy sought be possible.

Despite this, however, Scots law historically regarded fraud (and thus fraudulent misrepresentation) as being as much an issue for conveyances as for contracts. This is evident in Balfour's record of one of the earliest Scottish statements about fraudulent misrepresentation:

> All contractis, infeftmentis, or obligatiounis quhatsumever, maid betwixt twa parties, quhairin the ane of thame is inducit to mak or give the same by deceipt or fraud usit be the uther partie; he that is deceivit and fraudfullie hurt, aucht and sould be restorit *in integrum*: And the samin contract, infeftment or obligatioun, as procedand fra fraud and deceipt, aucht and sould be decernit of nane avail, and reducit[.][140]

Similarly, Stair opens his discussion of fraud with a discussion of "circumvention" which "signifieth the act of fraud, whereby a person is induced to a deed or obligation by deceit".[141]

Balfour's note is under the heading "Restitutioun", Stair's under reparation for wrongs. Mackenzie discusses fraud in his chapter on "Actions".[142] Bankton follows Stair.[143] The first Scottish writer to consider fraud among the requirements for a valid contract is Erskine.[144] Even he, however, does not explicitly reject consideration of fraud in relation to transfers. The pre-Erskine approach suggests two things: first, contrary to the "hard" *iusta causa* position, transfers are capable of being directly affected by fraud and therefore require to be analysed independently of the contract; second, the default position is that rules concerning fraud are general, applying on essentially the same terms to contracts and conveyances of all types of asset.

This approach is consistent with Stair's tendency to draw parallels between the voluntary aspect of contracts and conveyances and his emphasis on the importance of

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[140] *Hervie v Levingstoun* (1516) Balfour *Practicks* 183 c XVIII.
[141] I.ix.9.
[142] *Institutions* 496–7.
[143] I.x.62.
[144] III.i.16. Bell follows Erskine's approach: *Prin* §§13–4.

the will in transfer. Stair conceptualised voluntary obligations as alienations of freedom:

> [F]or it is the will of the owner, that naturally transferreth right from him to the acquirer: so in personal rights, that freedom we have of disposal of ourselves, our actions and things, which naturally is in us, is by our engagement placed in another[.][145]

Further, Stair suggests that, as a matter of principle, "[t]hat the dispositive will of the owner alone, without any further is sufficient to alienate his right".[146] Thus, he places the will at the heart of his analysis of transfer. He goes on to discuss the various formalities introduced by "custom" motivated by "expediency" or "utility" for assignation, transfer of moveables and transfer of heritable property.[147] However, it is clear that these formalities supplement rather than supplant the requirement for the will to transfer. While clear distinctions are drawn between the formal aspects, Stair's treatment seems to suggest that the mental element is the same for all three types of transfer.

Note should also be taken of the line of cases concerning purchases by buyers who knew themselves to be insolvent. The nature of the insolvency which rendered such a purchase fraudulent changed over time. For present purposes, it is sufficient to note that a seller whose buyer knew himself to be relevantly insolvent at the time of the transaction could reduce it and recover any goods delivered from the trustee in sequestration or attaching creditors.[148] In many cases, the buyer had the requisite knowledge at the time when the contract was concluded so the contract was attacked and the transfer was swept up behind it.[149] However, in a number of cases knowledge of insolvency at the time of the contract was not established and the courts focussed on fraudulent intent vitiating the act of transfer.[150] As Bell well understood, a "hard"

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[145] I.x.1.
[146] III.ii.4.
[147] III.ii.4–12.
[148] For discussion of the defrauded party's preference over general creditors, see below.
[149] Eg *Prince v Pallat* (1690) Mor 4932; *Main v Keeper of the Weigh House of Glasgow* (1715) Mor 4934; *Forbes v Mains & Co* (1752) Mor 4937; *Dunlop v Crookshanks* (1752) Mor 4879.
[150] *Inglis v Royal Bank* (1736) Mor 4936; *Allan, Steuart & Co v Creditors of Stein* (1788) Mor 4949 (as Hume points out, this part of the decision was left untouched by the House of Lords on appeal: (1790) 3 Pat 191); *Stein v Hutchison* 16 Nov 1810, FC; *Carnegie & Co v Hutchison* (1815) Hume 704; *Brown v Watson* (1816) Hume 709; *Schuurmans & Sons v Tweedie's Trs* (1826) 6 S 1110 (here the issue is treated as fraud deployed to prevent exercise of the right of stoppage *in transitu*); *Watt v*

iusta causa position which denied independent intention to transfer would have no room for this result. He therefore rejected the relevance of such supervening knowledge of insolvency.[151] However, both the cases and his teacher David Hume appear to be against him on the point.[152]

Although the detail of the test for fraud in this situation changed over time, the same test was being applied whether the contract or the transfer was being challenged. In contrast, the rule in the straightforward case of direct fraudulent misrepresentation has remained remarkably stable over time. Balfour's summary of *Hervie v Levingstoun* would only need to have its spelling revised to pass for a modern statement of the rule. The requirements that the representation is made by the counterparty[153] and induces the deceived party to act[154] are already there. Once Mackenzie had made it clear that the nullity did not occur *ipso iure*[155] and Stair has shown that it was the injured party who was entitled to decide whether to avoid the transaction or not,[156] the basic content of the rule on fraudulent misrepresentation was established. The rule was common to contract and conveyance. While Erskine and Bell treated fraud as a question for the formation of contract, a general approach continued to be applied by lecturers and textbook writers on conveyancing.[157] Menzies, for instance, discussed fraud as part of a section entitled "The general requisites of all deeds, whatever may be the nature of the rights to which they relate".[158]

Findlay (1846) 8 D 529 and, somewhat uncertainly, *Booker & Co v Milne* (1870) 9 M 314; *Young v DS Dalgleish & Son* 1994 SCLR 696. In *Watt*, three of the judges are clearly uncomfortable with the conflict between the court authorities and Bell's position. Analogous support can also be derived from the interlocutor on the plea of error in *Dunlop v Crookshanks* (1752) Mor 4879 at 4880. In that case, the seller thought he was selling to a partnership which did not exist, so both the contract and the transfer were void but the interlocutor clearly focuses on the act of transfer rather than on the contract.

[151] *Comm* I, 262 and 268.

[152] *Lectures* Vol II, 15–6.

[153] McBryde *Contract* para 14-38

[154] *Ibid* para 14-44.

[155] *Institutions* 496.

[156] I.ix.14.

[157] AM Bell *Lectures on Conveyancing* (3rd edn, 1882) Vol I, 170; J Hendry *A Manual of Conveyancing in the Form of Question and Answer* (4th edn by J P Wood, 1888) 74; HH Brown *The Elements of Practical Conveyancing* (1891) 35; A Menzies *Conveyancing according to the Law of Scotland* (4th edn by JS Sturrock, 1900) 73; J Burns *Handbook of Conveyancing* (5th edn, 1938) 41–2.

[158] *Conveyancing* 25.

While there might be some doubt about whether Scots law employs an abstract system of transfer,[159] there can be little doubt that it recognises the principle of separation, under which contract and conveyance are separate juridical acts each requiring the will of the parties. Against this background, it appears clear that both contract and conveyance can be rendered voidable by fraudulent misrepresentation.[160] Furthermore, the approach taken in the sources suggests that the same test for voidability should apply irrespective of whether the affected act is a contract or a conveyance. For this reason authorities on contracts rendered voidable by fraudulent misrepresentation are relevant to the voidability of transfers.

B. FRAUD, MISREPRESENTATION AND INNOCENCE

Even if it is accepted that fraudulent misrepresentation can render a transfer voidable and that the same criteria are applicable to both contract and conveyance, the position might be different where the misrepresentation is innocent rather than fraudulent. Acceptance of non-fraudulent misrepresentation as a ground for avoidance of contracts was, after all, a nineteenth-century development. It emerged in a period when problems with the constitution of contracts tended to be considered without reference to other juridical acts.[161]

Further, many of the early cases on innocent misrepresentation seem to suggest that it has a closer connection with the vexed doctrine of error *in substantialibus* than with fraud.[162] Recognition of innocent misrepresentation might be regarded as the

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[159] See eg McBryde *Contract* paras 13-01–11.

[160] This analysis is also taken by other systems which employ an abstract theory of transfer: Germany (BGB §§123 and 142) and South Africa (at least as seen in the most recent edition of *Silberberg and Schoeman's Law of Property* (5th edn by PJ Badenhorst, JM Pienaar and H Mostert, 2006) paras 5.2.2.2(g) and 5.2.2.5). It is not, however, restricted to such systems. See Arts II–7:101 and VIII–2:101(1)(d) DCFR read with Comment H(d) on Art VIII 2:101. The law of unjustified enrichment could, in theory, be used to clean up after avoidance has removed the basis of the transfer, at least if reduction of contracts is retrospective in effect. I am not aware of any authority supporting this analysis.

[161] D Reid "Fraud in Scots Law" (PhD Thesis, University of Edinburgh, 2012) ch 4 and5; McBryde *Contract* paras 15-43–65. Even in 1899, Guthrie suggested that "an innocent misrepresentation (not leading to essential error and not being a warranty) does not invalidate a contract": Bell *Prin* (10th edn) §14 n (e).

[162] *Wardlaw v Mackenzie* (1851) 21 D 940; *Couston v Miller* (1862) 24 D 607; *Hogg v Campbell* (1864) 2 M 848; *Hare v Hopes* (1870) 8 SLR 189; *Stewart v Kennedy* (1890) 17 R (HL) 25; *Woods v Tulloch* (1893) 20 R 477. In this line of cases, misrepresentation seems to operate to allow a plea of error *in substantialibus* which would otherwise be excluded by the rule against pleas and evidence

result of an English equitable doctrine being shoehorned into Scots law, distorting the meaning of essential error and causing further confusion in an already troublesome area.[163] Innocent misrepresentation looks like an error issue rather than a fraud issue and a difficult one at that. Any attempt to tack it onto the established rule allowing reduction of transfers for fraud might therefore be considered ill-conceived.

These objections are, however, less weighty than they appear at first sight. Lord Watson's judgment in *Menzies v Menzies*[164] was certainly an innovation which some Scots lawyers had difficulty taking on board.[165] However, the analysis employed was not entirely novel. Reading the case in light of prior case law shows that, from the start, a distinction was drawn between *Menzies*-error and classical error *in substantialibus*. Further, murky as its origins may be, innocent misrepresentation has a form and rationale which are best understood as a development of the concern implicit in the early unitary treatments of fraudulent misrepresentation and therefore as equally applicable to transfers.

(1) The emergence of innocent misrepresentation

The first point to note is that, despite definitional formulae like those quoted above which suggest that fraud was limited to intentional deceit, Scots law recognised challenges to juridical acts in cases of misrepresentation where there was no proof of intentional deceit well into the nineteenth-century. As Peter Stein and Dot Reid have shown, the scope of fraud was broadened by employment of the maxim *culpa lata dolo aequiparatur*, by a reconceptualization of aedilitian liability for latent defects as presumptive fraud and by a tendency to infer fraud in cases where a bargain was unequal and there was some other aggravating factor.[166] Restrictions on methods of

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which sought to qualify a written deed. As Lord Deas' dissent in *Hogg* shows, even this was not uncontroversial.

[163] McBryde *Contract* paras 15-43–65, esp 15-60–5 and PG Stein *Fault in the Formation of Contract in Roman Law and Scots Law* (1958) 192–208.

[164] (1893) 20 R (HL) 108 esp at 142–3. (Discussed in more detail below.)

[165] Evidenced by Guthrie's comments in Bell's *Principles*. See fn 161 above.

[166] Stein *Fault in the Formation of Contract* 171–88; Reid "Fraud in Scots Law" 65–91. Examples of aggravating factors are facility in one of the parties, a relationship of trust and confidence or a gratuitous transaction.

proof which prevented parties from choosing to give evidence on their own behalf before 1853 rendered such presumptions difficult to rebut.[167]

However, certain nineteenth-century developments undermined this approach: section 5 of the Mercantile Law (Scotland) Amendment Act 1856 abolished aedilitian liability for latent defects, facility and circumvention and undue influence began to break away from fraud as discrete doctrines,[168] and there was growing insistence on specific proof of intentional deceit where fraud was alleged.[169]

Reid suggests that the majority of cases of negligent and even of innocent misrepresentation might be accommodated within fraud, provided that the making of a statement in the absence of a belief on reasonable grounds that the statement is true is regarded as fraudulent.[170] That was not, however, the route which the law took. First, a statement is now taken only to be fraudulent where there is knowledge that it is false or recklessness as to its truth.[171] Secondly, in the modern law, a juridical act is open to challenge without any requirement of fault on the part of the misrepresenter.

The starting point for innocent misrepresentation is *Adamson v Glasgow Waterworks Commissioners*.[172] The pursuer tendered for the construction of a tunnel on the basis of a specification given by the defenders, which included incorrect statements about the composition of the ground to be tunnelled through. The work turned out to be considerably more expensive that it would have been had the specification been correct. The pursuer sought reduction. The question eventually put to the jury was "Whether, by the misrepresentation of the defenders, on a material point, the pursuer was induced to enter into the said contract under error as to the work to be performed."[173] The First Division insisted that misrepresentation and essential error be combined in a single plea. Lord President M'Neill's explanation bears repetition:

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[167] Stair IV.lxiii.7; Evidence (Scotland) Act 1853 s 3.
[168] Reid "Fraud in Scots Law" 90–1.
[169] *Ibid* ch 4 and 176–82.
[170] *Ibid* 182–3.
[171] *Ibid* 183.
[172] (1859) 21 D 1012. It was, to some extent, prefigured by *British Guarantee Association v Western Bank of Scotland* (1853) 15 D 834.
[173] (1859) 21 D 1012 at 1018.

> Misrepresentation is the leading feature of the case. An issue on essential error is asked, apart from misrepresentation. Now we cannot grant that. Misrepresentation, which led to an erroneous opinion as to material or essential matters of the contract, is the subject of the issue. These two things are to be consolidated. It is the combined effect that produces the result. The element may be involved in the issue without using the technical expression of essential error, which is a ground of action apart from that of misrepresentation. The feature of the plea of essential error is the absence of that misrepresentation, which is the ground of this action.[174]

In this passage, Lord M'Neill separates essential error in its "technical" sense (presumably classical error *in substantialibus*), which requires no supplementary plea of misrepresentation, from the looser sense of the term which applies when the "ground of the action" is not the error but the misrepresentation. This seems to prefigure Lord Watson's approach in *Menzies* right down to the unfortunate decision to use the term "essential error" to refer to two different concepts. Crucially, *Adamson* indicates that a plea of misrepresentation plus error is quite distinct from "technical" essential error.

Adamson was followed in *Wilson v Caledonian Railway Co*[175] but it proved to be a false dawn for innocent misrepresentation. In *Hare v Hopes*,[176] *Adamson* was interpreted as a decision in the line of cases where misrepresentation had been used to allow a plea of error *in substantialibus* which would otherwise have been excluded as an illegitimate attempt to qualify a written deed, and thus as part of "technical" error *in substantialibus*.[177]

The breakthrough came with *Menzies*: Lord Watson famously opined that "Error becomes essential whenever it is shewn that but for it one of the parties would have declined to contract". He went on to hold that, if such an error was induced by or on behalf of the counterparty, the good faith of the misrepresenter would not prevent "rescission".[178] Lord Watson cited *Stewart v Kennedy*[179] along with the English case of *Adam v Newbigging*.[180] Giving the leading opinion in *Stewart* only three years earlier, he had endorsed and applied Bell's famous typology of essential error, which

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[174] *Ibid.*
[175] (1860) 22 D 1408.
[176] (1870) 8 SLR 189.
[177] See authorities at fn 167 above.
[178] (1893) 20 R (HL) 108 at 142–3.
[179] (1890) 17 R (HL) 25
[180] (1888) LR 13 App Cas 308.

bears little relation to the *Menzies* approach.[181] As Lord President Clyde was to put it in *Abram SS Co v Westville Shipping Co*:

> It is obvious that Lord Watson's description of the quality of essential error (for the purposes of a plea of essential error induced by innocent misrepresentation) covers any error material to the entering into the contract, and the consequent acceptance of its rights and obligations. It involves no closer relation with the essentials of the contract itself (as defined, for instance, in Bell's Principles, section 11) than is required in the case of fraudulent misrepresentation when pled as a ground for reducing a contract.[182]

It seems unlikely that Lord Watson would change his position so radically without at least adverting to the shift. The two judgments are more plausibly read as involving different kinds of essential error. In *Stewart*, essential error was of the "technical" kind and misrepresentation was needed, not to supplement the error but to circumvent the procedural restrictions on evidence which qualified written deeds.[183] In *Menzies*, on the other hand, misrepresentation was the "ground of the issue", and the error was merely part of what was necessary to make the plea of misrepresentation stick.

Whatever the circumstances of its introduction, innocent misrepresentation took hold and became firmly established as a ground of voidability and as a doctrine quite independent of the law of error *in essentialibus*.[184] As McBryde puts it, "It should be recognised that what has happened is that Scots law has adopted the concept of innocent misrepresentation which is unrelated to the original law of error."[185]

Innocent misrepresentation is not, therefore, so closely tied up with error *in substantialibus* as to bar any logical connection with the existing rules recognising voidability of transfers for fraudulent misrepresentation. Neither is it all the work of Lord Watson and his equitable tendencies. Furthermore, prior to the rise of innocent misrepresentation, these issues had tended to be addressed using the broader fringes of fraud. Nonetheless, it must be recognised that the pre-*Menzies* authority is

[181] (1890)17 R (HL) 25 at 28–9.
[182] 1922 SC 571 at 579 affd 1923 SC (HL) 68.
[183] Note the emphasis on the fact that the contract was written: (1890) 17 R (HL) 25 at 29. See also *Wardlaw v Mackenzie* (1851) 21 D 940 at 947.
[184] *Ferguson v Wilson* (1904) 6 F 779 (compare with *Hare v Hopes* (1870) 8 SLR 189); *Abram SS Co v Westville Shipping Co*; *Blaikston v London and Scottish Banking and Discount Corp Ltd* (1894) 21 R 417; *Ritchie v Glass* 1936 SLT 591.
[185] *Contract* para 15-65.

decidedly thin and it would be a hard task to trace the development from fraud to innocent misrepresentation in the Scottish case law.

(2) The logical connection between fraudulent and innocent misrepresentation

While a historical connection between fraudulent and innocent misrepresentation is difficult to establish, a logical one is not. When considering the modern law, coherence is a much more pressing concern than historical purity. A strong link is suggested by the fact that, as Lord Clyde observed, the same type of error is relevant for innocent and fraudulent representation, and by the fact that (apart from the question of damages) the remedy is the same.

This impression is fortified by the fact that the rationale of voidability for innocent misrepresentation can be seen as a development of that for fraudulent misrepresentation. To see this, it is necessary to return to Stair, who remains a major authority on reduction of transfers on the latter ground.

Stair was the first to give fraudulent misrepresentation a name which distinguished it from other forms of fraud, identifying "circumvention" as "the act of fraud, whereby a person is induced to a deed or obligation by deceit".[186] Later, the term took on a slightly different significance as part of the doctrine of "facility and circumvention". According to that doctrine, if the actor suffered from some mental weakness short of insanity then conduct short of fraud would be sufficient to render the transfer voidable. This conduct was described as "circumvention" and contrasted with fraud.[187] For that reason, "fraudulent misrepresentation" will be used to denote "circumvention" in Stair's sense. Stair's definition of "circumvention", however, captures the essence of fraudulent misrepresentation.

As well as coining its first term of art, Stair was the first to anchor the concept within a wider system. Stair presents three instances of fraud: fraudulent misrepresentation; simulation; and collusion. The latter two are exemplified rather than defined.

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[186] I.ix.9.
[187] *Clunie v Stirling* (1854) 17 D 15; *Gibson's Exr v Anderson* 1925 SC 774.

In the case of simulation the examples are gifts of single and liferent escheat and purported dispositions *retenta possessione*.[188] Essentially simulation concerns a difference between form and substance. The parties were at one in their actions, but those actions were in fraud of the law, directed at defeating the forfeiture in the first case and (for instance) attempting to circumvent the requirement for delivery in pledge in the second.[189] Collusion is exemplified by reference to a debtor who resists some creditors while allowing others to complete their diligence.[190] As with simulation, the parties to the act know what they are doing and intend to do it. In this case, however, it is not a general rule that is being circumvented but the interests of a defined group: the other creditors who are entitled to equal treatment.[191] Fraudulent misrepresentation is the very opposite of collusion. Far from the parties co-operating, one of them is interfering with the other's decision-making by deliberately supplying false information.

Stair's three cases of fraud reflect something of the breadth of *dolus malus*[192] in Roman law, to which Stair makes extensive reference.[193] As with Roman law, it is difficult to devise a formula for what the various actions have in common beyond

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[188] I.ix.9–13. The former example perhaps requires some explanation. Single and liferent escheat were general confiscations of property which could occur for a number of reasons. Very often, however, they were the result of horning (denunciation) for failure to fulfil an obligation. Under single escheat, the moveable assets of the party subject to the confiscation passed to the Crown. Heritable property was merely subject to liferent escheat so the property reverted to the heir of the party subject to confiscation on the latter's death. Unless the confiscation was for treason, the liferent went to the superior rather than the Crown. See the entries on "Escheat" and "Forfeiture" in G Watson *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890 repr 2012) for further details and *Kennedy v McClellane* (1535) *RPS*, 1535/50. The Crown often dealt with escheated property these by making "gifts of escheat", whereby the whole confiscated estate was granted as a single unit.

Friends of the forfeited person would sometimes take the gift of escheat and allow him to use the property, thus defeating the forfeiture. The act "Anent the eschaetis of rebellis" 1592 c 147, *RPS* 1592/4/88 declared the gift of escheat null in such circumstances. Hope describes these gifts as "simulate for the Behoof of the Rebel" Hope *Minor Prackticks* No 183.

[189] See also the discussion of infeftments *retenta possessione* as fraudulent in Stair II.iii.27.

[190] Stair refers to *Wardlaw v Dalziell* (1620) Mor 2427, a very tersely reported example of this practice. Morison records it, alongside a number of other similar cases under the heading "Collusion".

[191] This principle is discussed further in chapter 6.

[192] *Dolus* and *dolus malus* may both be broadly translated with fraud. *Malus* was sometimes added to distinguish from *dolus bonus* which was essentially acceptable sharp practice.

[193] *Dolus malus* appears to have been applied to an even wider range of situations than fraud in Scots law. See G MacCormack's series of articles: "Juristic Use of the Term *Dolus*" (1983) 100 ZSS (RA) 520; "*Dolus* in the Law of Early Classical Period (Labeo–Celsus)" 1986 SDHI 236; "*Aliud simulatum, aliud actum*" (1987) 104 ZSS (RA) 639; "*Dolus* in Republican Law" 1985 BIDR 15, as well as A Wacke "Zum *dolus*-Begriff der *actio de dolo*" 1980 RIDA 349 and A Pernice *Labeo* Bd 2 Abt 1 *Dolus malus und bona fides* (2nd edn, 1895 repr 1963) 134–261.

vague reference to unfairness or actions contrary to (objective) good faith.[194] Different interests are being protected: the rule against simulation protects the general public interest in legal rules being given effect rather than circumvented by resort to technicalities; that against collusion protects creditors' right to satisfaction for their debts; and the rule against fraudulent misrepresentation protects the private autonomy of the parties.

They do, however, have one thing in common which is very important. The justification for the invalidity of the act (and indeed for any obligation to pay damages) is the wrongful nature of the conduct. That is why all three can be examples of fraud and thus be discussed in the context of the "obediential" obligation[195] to make reparation for "delinquences". For Stair, fraudulent misrepresentation is a delict.

Fraudulent misrepresentation is set apart from error, which Stair locates within his analysis of consensus.[196] While error is discussed extensively in the course of his treatment of fraud,[197] the motivation for this is expository rather than systematic. Fraud and error are set alongside one another to give the reader a clear picture of what distinguishes one from the other. For Stair, the ground for any remedy in the case of error was the absence of consensus and so no reference to wrongdoing was necessary. In fraud, on the other hand, there was consensus. The remedy was granted because a wrong had been done.[198]

While a fraudulent misrepresentation needs to cause an error in order to induce a juridical act, the error is not the essence the problem; it is merely part of the chain of causation. The essence is the deceit, the deliberate incursion into the actor's right of

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[194] For discussion of the pre-classical Roman conception of *dolus* as deliberate contravention of (objective) *bona fides* see G Grevesmühl *Die Gläubigeranfechtung nach klassischem römischem Recht* (2003) 33 fn 138 with further citations; Zimmermann *Obligations* 664–9; E Descheemaeker *The Division of Wrongs: A Historical Comparative Study* (2009) 71–2. In its objective sense, *bona fides* (or simply *fides*) was a central value in Roman society and implied fairness, honesty and constancy, a sort of morally reasonable man: F Schulz *Principles of Roman Law* (2nd edn, trans M Wolff, 1936) 223–38 esp 227–8. For objective good faith in Scotland, see HL MacQueen "Good Faith in the Scots Law of Contract" in ADM Forte (ed) *Good Faith in Contract and Property* (1999) 5 at 7–8.

[195] Stair's primary division of obligations is between the obediential (i.e. *ex lege* – encompassing what would now be classified as delict, unjustified enrichment, *negotiorum gestio* and family law) and conventional (voluntary): I.iii.2.

[196] I.x.13.

[197] I.ix.9 and IV.xl.24

[198] See J MacLeod "Before Bell: The Roots of Error in the Scots Law of Contract" (2010) 14 EdinLR 385.

free decision-making.[199] It is the wrongfulness of that incursion which justifies the avoidance. Avoidance of the transaction is a mechanism by which the wronged party is put in the position he would have been in were it not for the misrepresentation. This is what German lawyers call *Naturalrestitution*.[200] It performs the same function as damages in delict but does so more effectively.[201]

The focus on wrongfulness helps to explain why the representation must usually be made by or on behalf of the counterparty,[202] for why should the counterparty make reparation for the wrong of a third party? It also explains why any wrongful statement which induces the act is relevant while a much narrower range of wrongs is relevant for error. If a lie was sufficient to draw the other into the act, why should it matter that it did not relate to one of the *essentialia* previously laid down by the law?

Emphasising the wrongfulness of fraudulent misrepresentation seems to make an unpromising entry point for the acceptance of innocent misrepresentation as a ground for avoidance of transfers. Surely, the whole point of innocent misrepresentation is that it is not wrongful?

It might, however, be better to say that innocent misrepresentation is distinguished by not being culpable. The innocent misrepresenter has still done something that he should not have done. If he had known what he was doing, he would be guilty of fraud. The position is clarified by consideration of an innocent misrepresenter who discovers that his statement was untrue before a transaction is concluded. He is clearly bound to correct the earlier statement. In *Brownlie v Miller*, Lord Blackburn went as far as to suggest (albeit obiter) that failure to do so would amount to fraud.[203]

Why does failure to correct an innocently-made misrepresentation amount to fraud? It might be explained on the basis that the prejudice to the party misled is the same whether the misrepresentation is fraudulent or not. The misrepresenter had an opportunity to prevent that harm from occurring and chose not to do so. Although the

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[199] For a similar analysis see FC von Savigny *System des heutigen römischen Rechts* (1840) Vol III, 115–7 and B Häcker *Consequences of Impaired Consent Transfers* (2009) 165.

[200] §249 I *BGB*, H Oetker "§249" in K Rebmann et al *Münchner Kommentar zum Bürgerlichen Gesetzbuch* Bd 2a (4th edn, 2003) RdNr 308–39.

[201] J Thomson *Delictual Liability* (4th edn, 2009) para 16.5.

[202] The point is evident, as noted above, in *Hervie v Levingstoun* and in Stair I.ix.9. It remains the basic position today: *Smith v Bank of Scotland* 1997 SC (HL) 111 at 116–7 with further authorities.

[203] (1880) 7 R (HL) 66 at 79; see also *Shankland & Co v John Robinson & Co* 1920 SC (HL) 103 at 111 per Lord Dunedin (also obiter).

"*mens rea*" and "*actus reus*" of the fraud did not occur in the order that would normally be expected, they were both present at the time that the harm was sustained: when the contract or transfer was concluded.

From here, it is not a great leap to consider it fraudulent (at least in some broad sense) to try to uphold an act induced by an innocent misrepresentation. The small leap was made (again obiter) by Lord Shaw in *Mair v Rio Grande*:

> Fraud is not far away from–nay, indeed, it must be that it accompanies–a case of any defendant holding a plaintiff to a bargain which has been induced by representations which were untrue; for it is contrary to good faith and it partakes of fraud to hold a person to a contract induced by an untruth for which you yourself stand responsible.[204]

Lord Shaw did not refer to Roman law in his opinion but his thinking reflected an aspect of the *exceptio doli*.[205] It was a procedural mechanism which allowed the defender to resist an action of the basis of the *dolus* of the pursuer. The defender had two options: either he could show some relevant *dolus* on the part of the pursuer in the past or he could show that because of previous conduct (which might itself have been innocent) bringing the action amounted to *dolus*.[206] In such cases, the *dolus* was said to be incomplete until the action was brought, just as it is in cases of innocent misrepresentation.

Fraudulent misrepresentation, of course, can give rise to liability for damages while innocent misrepresentation will not. This, however, can be explained on the basis of the analysis proposed. Since discovery that an innocent misrepresentation has been made raises a duty of disclosure, it would surely be fraudulent to wait knowingly until *restitutio in integrum* is impossible before disclosing. This appears to leave only two possible cases of innocent misrepresentation: the fact of the misrepresentation comes to the attention of both parties either before *restitutio* is impossible or after it has become impossible. In the former case, upholding the transaction would be a kind of fraud but it is a fraud which the law prevents the misrepresenter from implementing by allowing avoidance. In the latter, no wrong has

[204] 1913 SC (HL) 74 at 82.
[205] Ie the defence based on *dolus*.
[206] See MacCormack "*Dolus* in the law of the early classical period" 250–263.

been committed. Knowledge was fixed only after it was too late to do anything about the situation and so it is reasonable to let the loss lie where it falls.

While the recognition of innocent misrepresentation was certainly spurred by reference to English case law, it can legitimately be understood as a development of the voidability for fraud discussed by Balfour, Stair and Bankton. What is more, it is a development which echoes the position in Roman law.

On that basis, despite the paucity of authority for the rule, there seems no reason to deny that voidability can occur when a transfer has been induced by an innocent misrepresentation. Therefore fraud, in the sense of a deliberately deceitful statement, should not be thought of as a requirement for reduction of a transfer on grounds of misrepresentation. However, the roots of the rule in Stair's concept of circumvention must be borne in mind in order to understand why the rule works the way it does.

C. REQUIREMENTS FOR VOIDABILITY FOR MISREPRESENTATION

The requirement of fraud being discounted, four elements remain necessary for avoidance of a transfer on grounds of misrepresentation: there must be a misrepresentation; the misrepresentation must induce the transaction; the misrepresentation must be made by or on behalf the counterparty; and reversal of the transfer must still be possible.

(1) There must be a misrepresentation

Most of the authorities on what counts as a misrepresentation concern contracts but they are equally applicable to transfer. It is difficult to see how a statement considered a misrepresentation in a contract case could be considered either true or not to be a representation if made to induce a transfer. Aside from the issue of *verba jactantia* or trade puffs,[207] the main issue raised by the first element is what counts as a representation.

[207] On which see McBryde *Contract* paras 14-11 and 15-67.

It is self-evident that a statement – whether written or oral – will, if false,[208] constitute a misrepresentation. Such statements are clearly the most important cases of misrepresentation. The term "misrepresentation" can, however, obscure other significant cases. A transferor may be misled by actions as well as words.[209] The most difficult cases, however, are those where the alleged misrepresentation consisted of doing nothing at all.

(a) Misrepresentation by silence

It is widely acknowledged that each party to a transaction is responsible for his own decision to act. The counterparty's basic duty generally extends no further than non-interference. However, there have been some cases where it has been considered fraudulent to allow a counterparty to act in ignorance of some relevant fact. There is a clear tension between the two principles,[210] but the trend of development in Scots law has clearly been away from wide-ranging duties of disclosure.

The earlier cases simply describe a "concealment" as fraudulent without giving much explanation as to why this is the case.[211] In this context, "concealment" is failure to disclose rather than taking active steps to prevent the truth from being discovered. In these cases, fraud seems to be understood as breach of objective *bona fides* rather than deceit.[212] The range of situations when it might be considered bad faith not to inform a counterparty of some relevant fact is obviously very wide. Bell stated the general principle thus:

> wherever the circumstances are of a secret nature, or such as a purchaser does not usually or naturally think of inquiring into, or which he can only learn from the seller's information, the concealment is a fraud[.][213]

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[208] The boundary between truth and falsehood can be less clear than appears at first sight. Whether a representation is false must ultimately be a question of fact. See McBryde *Contract* para 15-67 with further authorities.

[209] *Patterson v Landsberg & Co* (1905) 7 F 675 at 681 per Lord Kyllachy; *Gibson v National Cash Register Co Ltd* 1925 SC 500. It is also worth noting that neither Stair's definition of circumvention (I.ix.9), nor Erksine's definition of fraud ("a machination or contrivance to deceive", III.i.16 – cf D.4.3.1.2) requires an express statement. See the discussion in EC Reid and JWG Blackie *Personal Bar* (2006) para 2-10.

[210] One which has been evident since Cicero: *De Officiis* (trans W Miller, 1913) III.50–7.

[211] Eg *Kincaid v Lauder* (1629) Mor 4857; *Wood v Baird* (1696) Mor 4860.

[212] As Cicero puts it, "It is one thing to (actively) conceal, it is another to keep silent": *De officiis* III.52.

[213] Bell *Comm* I, 263. See also Art II-3:101 DCFR, which is somewhat less extensive.

Bell, however, may have been somewhat out of touch with general sentiment. Hume had already stressed the general entitlement of a trader to take advantage of his better information and this approach was to prevail.[214] The development of the law is illustrated by the changes in attitude to the buyer's aedilitian remedies for latent vices not declared by the seller, and by an insured's duty to disclose facts material to the risk to the insurer.

Stair classified the former as a remedy for fraud.[215] There was, however, a move away from that in the eighteenth century: Bankton discusses the remedy in the course of his treatment of sale rather than fraud,[216] while Erskine and Hume explain the remedy as being the result of an implied term in the contract of sale.[217] Erskine and Hume's approach is reflected in the modern law, which covers much of the scope of the aedilitian remedies by terms implied by section 14 of the Sale of Goods Act 1979.

Bell considered failure to disclose some matter materially relevant to the assessing risk when applying for insurance as a good illustration of his general principle.[218] Failure to disclose remains a ground for avoidance of insurance contracts.[219] By the time M'Laren came to edit the seventh edition of Bell's *Commentaries* in 1870, however, insurance was seen as a special case which was "deceptive as to the general question of concealment."[220] Since the late nineteenth century, the rule has been regarded as the result of a specific duty of disclosure particular to insurance rather than a general principle. The details of the duty have been further refined in terms specific to the insurance contract, in particular calibrating the extent of the duty depending on the type of insurance.[221] Further, despite being justified in terms of

[214] Hume *Lectures* Vol II, 12, citing *Morison v Boswall* (1801) Mor App (Damages & Interest) No 1 (affd (1812) 5 Pat App 649) and *Paterson & Co v Allan* (1801) Hume 681; *Broatch v Jenkins* (1866) 4 M 1030. See McBryde *Contract* paras 14-13-8.
[215] I.ix.10.
[216] I.xix.2.
[217] Erskine I.iii.10; Hume *Lectures* Vol II, 40–5.
[218] Bell *Comm* I, 263 fn 2.
[219] Eg *Cuthbertson v Friends Provident Life Office* [2006] CSOH 74; 2006 SLT 567 at paras 42–52 per Lord Eassie.
[220] Bell *Comm* I, 263 fn 2.
[221] *Hooper v Royal London General Insurance Co Ltd* 1993 SC 242.

insurance as a contract *in uberrima fides*, the duty to disclose can be breached despite the subjective good faith of the insured.[222]

Thus, the idea of a general rule that failure to disclose was fraudulent came to be replaced by a number of specific duties of disclosure.[223] The fraud was found, not in the non-disclosure *tout court* but in the fact that it constituted a breach of the duty of disclosure.

(b) Failure to disclose insolvency

The most important duty of disclosure for property law is that of a buyer who is verging on insolvency. Early authorities tended to cast conclusion of the contract, or the acceptance of delivery, by an insolvent buyer as fraudulent in itself.[224] Bell, however, made clear that the basis for fraud in these cases was the buyer's failure to disclose his circumstances to the seller.[225] Over time, this duty of disclosure showed the same tendency to become narrower and more specific evident in the other duties of disclosure.

The earliest case, *Prince v Pallat*,[226] suggests that proof of absolute insolvency at the time of contracting or taking delivery was regarded as sufficient to establish fraud. This rule was rejected in *Inglis v Royal Bank*.[227] The (very brief) note of the Lords' decision in Morison suggests some concern that the buyer might be unaware of his insolvency at the relevant time. However, they followed the *ius commune* rule which directed that fraud was to be presumed when *cessio bonorum*[228] followed the

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[222] *Life Association of Scotland* v *Foster* (1873) 11 M 351 at 359 per Lord President Inglis, approved by Lord Eassie in *Cuthbertson* at para 48.
[223] Reid "Fraud in Scots Law" 165. For discussion of the cases where such a duty arises, see McBryde *Contract* para 14-17 and DM Walker *The Law of Contracts and Related Obligations* (3rd edn, 1995) paras 14.63–7.
[224] Eg *Prince v Pallat* (1690) Mor 4932; *Creditors of Robertson v Udnies & Patullo* (1757) Mor 4941; *McKay v Forsyth* (1758) Mor 4944; Hume *Lectures* Vol II, 12.
[225] Bell *Comm* 263–7. This analysis is clear even in the first edition of the *Commentaries*: (1804) Vol II, 169–70.
[226] (1690) Mor 4932.
[227] (1736) Mor 4936.
[228] Sequestration was introduced in Scotland by the Sequestration Act 1772. *Cessio bonorum* was procedure similar to the voluntary trust deed for behoof of creditors. Under it, the debtor surrendered his estate to his creditors and thus obtained protection from personal diligence (ie imprisonment for debt): see H Goudy *A Treatise on the Law of Bankruptcy* (4th edn by TA Fyfe, 1914) 2.

purchase within three days.[229] Bankton appears to follow *Inglis*[230] in treating knowledge of insolvency as the criterion for fraud.[231]

Counsel for the creditors in *Inglis* appears to have proposed a test for fraud which was narrower still. He suggested that, even if the buyer knew himself insolvent, failure to disclose insolvency would not be fraudulent provided that he still had some hope of trading out of his difficulties. In a number of late eighteenth-century cases, this argument was repeated by counsel and apparently endorsed by the courts,[232] although the terseness of the early reports makes firm conclusions based on these cases difficult.

The position was made clear by Lord Chancellor Thurlow in *Allan, Steuart & Co v Creditors of Stein.*[233] As well as rejecting the presumption of fraud adopted in *Inglis*, he endorsed the argument that a buyer was not fraudulent until he gave up hope of trading out of his difficulties.[234] Whether or not *Allan Steuart & Co* was the spur or not,[235] that test became firmly established.[236] Hume and Bell note the narrowing of the criteria for fraud in these cases. Hume attributes the shift to "our more lax morality" and a greater faith in merchants' ability to trade their way out of difficulty[237] while Bell suggests that the earlier rule was "inconsistent with an advanced state of commerce."[238]

At this point in its development, the rule illustrates the general principle lying behind the duties of disclosure and explains why breach of such a duty can be regarded as a species of misrepresentation. Payment clearly goes to the root of sale. In the normal course of events, concluding a contract of sale implies an intention to

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[229] Successful counsel referred to "several foreign lawyers, particularly Simon van Leeuwen."
[230] See also the earlier case, *Main v Keeper of the Weigh-House of Glasgow* (1715) Mor 4934.
[231] Bankton I.x.66 (the case cited *Bruce* 22 Dec 1680 does not appear to be reported).
[232] *Creditors of Robertson v Udnies & Patullo* (1757) Mor 4941; *McKay v Forsyth* (1758) Mor 4944; *Gordon v Gardner* (1758) Mor 6678; *Crawfurd Newell v Mitchell* (1765) Mor 4944; *Sandieman & Co v Creditors of Kempt* (1786) Mor 4947.
[233] (1790) 3 Pat 191.
[234] *Ibid* at 196.
[235] The third volume of Paton's Appeals was not published until 1853. Some in Scotland were clearly aware of the decision before then: the reversal of the Court of Session's decision is mentioned in the 4th edition of Erskine's *Institute* (1805, III.iii.8).
[236] *Carnegie v Hutchison* (1815) Hume 704; *Brown v Watson* (1816) Hume 709; Hume *Lectures* Vol II, 14; Bell *Comm* I, 265–6. Bell explicitly disapproved of Bankton's test in the text of the first edition of the *Commentaries* (Vol II, 1810, 171). Thereafter, the comment was relegated to a footnote: 2nd edn, 1810, 117 fn g; 7th edn II, 265 fn 2.
[237] Hume *Lectures* vol II, 13
[238] Bell *Comm* 264–5.

pay. The buyer is obliged to pay the price, the seller is induced to sell by the expectation of receiving payment.[239]

Thus, the duty to disclose can be seen as a duty to correct a legitimate but mistaken assumption on the part of the seller which the buyer's conduct invites. In entering into the contract, the buyer invited the seller to believe that he was able to pay. If he knew himself to be insolvent, the buyer misled the seller and interfered with the seller's free decision-making in a manner very similar to a fraudulent misrepresentation. If he discovers his inability to pay later, between contract and conveyance, his situation is similar to that where an innocent misrepresentation has been made: failure to correct it amounts to fraud.

A similar analysis may be applied to other cases. The party subject to the duty is deemed to have acted in a manner which invited the counterparty to assume some fact which is not true. Taking on a fiduciary role implies that the fiduciary will put first the interests of the party to whom fiduciary duties are owed. That in turn entitles the latter party to assume that the normal rules which expect each party to look to his own interests and to find out the relevant facts do not apply. An insurer has a similar entitlement to assume that he will be provided with all the information necessary to assess the risk. It goes to the heart of insurance as a contract *in uberrima fides*. The duty to disclose, thus understood, is an aspect of the duty to correct a misrepresentation and thus a part of the protection against fraudulent misrepresentation discussed by Stair.

The assumptions which a counterparty will be thought entitled to make on the basis of certain conduct may vary with time and this may explain why absolute insolvency was sufficient for fraud in *Prince* but not in the later cases. That does not, however, challenge the structural analysis of the way that the duty interacts with the wider law of misrepresentation.

The test for the duty of disclosure in the case of a buyer's insolvency was settled with Hume and Bell,[240] although the courts' tendency in the later nineteenth and early twentieth century was to apply the rule more and more restrictively. *Watt v*

[239] *AW Gamage Ltd v Charlesworth's Tr* 1910 SC 257 at 264 per Lord Kinnear.
[240] All four editions of Goudy's *Treatise on the Law of Bankruptcy* say that an insolvent debtor is free to trade without disclosure of his circumstances until he has given up: 1st edn, 1886, 21 and 278–9; 2nd edn, 1895, 22 and 294; 3rd edn by WJ Cullen, 1903, 22 and 308–9; 4th edn, 20–1 and 281.

Findlay[241] and *Richmond v Railton*[242] suggest that mere failure to disclose inability to pay before delivery was not sufficient. In the latter case, Lord Justice Clerk Hope said that, if delivery was made voluntarily and there had been no further fraud, it might be effective despite the fact that it was pursuant to a contract which had been induced by a fraudulent misrepresentation regarding ability to pay, "the delivery not being within the shadow and blight as it were of the misrepresentation."[243]

A trio of early twentieth-century cases applied an extremely stringent test for proof of the debtor having given up hope of trading out of his difficulties, essentially suggesting that positive evidence of deliberate intention not to pay was required.[244] It is not surprising that Lord Kinnear suggested that failure to disclose insolvency was "a very difficult case to prove"[245] or that sellers usually preferred to try and show some direct misrepresentation[246] failing which they gave up on trying to recover from the trustee on account of fraud altogether.[247]

The courts had good reason to take a very narrow view of the rule because it operated to give a preference in insolvency. The concern is evident in *Richmond v Railton*, where Lord Justice Clerk Hope seems to link his narrow reading of *Watt v Findlay* with concerns about the proper administration of a sequestrated estate.[248] It is easy to see why. Consider a shop-owner who knows he has no hope of paying his creditors. Despite this, he orders goods from a wholesaler and instructs work from a tradesman. After the work is done and the goods are supplied, the shop owner is sequestrated. The goods could well constitute the vast majority of the assets free of any security. Were it not for the rule, the wholesaler and the tradesman might each receive a substantial dividend. As a result of the rule, the wholesaler, having

[241] (1846) 8 D 529.
[242] (1854) 16 D 402. See also *Clarke & Co v Myles* (1885) 12 R 1035.
[243] (1854) 16 D 402 at 406.
[244] *Muir v Rankin* (1905) 13 SLT 60 at 61 (the context makes clear that the insolvency Lord Dundas has in mind is irrecoverable); *AW Gamage Ltd v Charlesworth's Tr* 1910 SC 257 at 264 per Lord Kinnear; *Price & Pierce Ltd v Bank of Scotland* 1910 SC 1095 especially at 1118–9 per Lord President Dunedin The last case was reversed on appeal (1912 SC (HL) 19) but the reversal concerned another aspect of the decision.
[245] 1910 SC 257 at 264.
[246] As in *AW Gamage*.
[247] No twentieth or twenty-first century case has been found in which fraudulent concealment of insolvency was pled successfully.
[248] (1854) 16 D 402 at 406 and 408.

recovered the goods, merely loses his profit on the sale while the tradesman receives either nothing or very little.

It is difficult to see any justification for such a preference. The fact that a rule is potentially inequitable might be a good reason for restricting the ambit of its application and thus for a stringent test for when the relevant duty of disclosure arises. Yet this can never be a full answer to the problem. The inequity of differentiating between the wholesaler and the tradesman would be just the same if both had been induced by positive representations rather than a failure to disclose. This is really a problem concerning the interaction of fraud and insolvency. It is discussed further in chapter 8.

(2) The misrepresentation must induce the transfer

The second element is a simple causation requirement: if the misrepresentation does not induce the transfer, then the transferor's freedom to decide can hardly be said to have been interfered with. That is the sense in which Scots authorities have traditionally understood the requirement of *dolus dans causam contractui*.[249] It seems preferable to express the matter in terms of causation rather than to attempt to engage with the *ius commune* distinction between *dolus dans causam contractui* and *dolus incidens*.[250]

Despite its importance in the *ius commune* tradition, the category of *dolus incidens* seems to be irrelevant in Scots law. A misrepresentation must cause a transaction before there can even be liability for damages, and any misrepresentation which does so renders the transaction voidable.[251] Since *dolus incidens* could not give rise to liability in damages or be used to set the transaction aside, it is rather difficult to see what value there is in recognising it as a category.

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[249] Erskine III.i.16; Bell *Prin* § 13; Brown *Sale* §582; *Irvine v Kirkpatrick* (1850) 7 Bell's App 186 at 237–8 per Lord Brougham LC.

[250] For which see Zimmermann *Obligations* 670–4. *Dolus incidens* covered cases where the defrauded party would have entered into the transaction without the fraud but would only have done so on different terms. The classic example was a defrauded buyer who would still have bought the subjects, had he known the truth but would not have paid the same price.

[251] Bell *Comm* I, 262–3 fn 2; Bell *Prin* §13 per Guthrie. Cf Hendry *Conveyancing* 75; Burns *Conveyancing* 41 and Walker *Contracts and Related Obligations* para 14.107.

Bell suggested otherwise, writing that *dolus incidens* "will give relief in damages only," but his editors M'Laren and Guthrie reject his position, primarily on the basis of Common Law sources.[252] There is no suggestion in the institutional writers prior to Bell that *dolus incidens* was recognised in Scots law.[253] Bankton mentions the category but appears to regard the distinction between *dolus incidens* and *dolus dans causam contractui* as tied to the Roman distinction between *stricti iuris* and *bona fide* contracts and therefore as irrelevant to Scots law.[254] Further, as Zimmermann shows, the meaning attached to the distinction has not been entirely consistent in the European tradition. The trend of European development seems to be against referring to it.[255]

Analysing the requirement that the misrepresentation induce the transfer as a causation requirement means that it is largely a question of fact. Although not expressly adverted to in the case law, the standard "but-for" test for causation seems a reasonable starting point for analysis.

(3) Misrepresentation by the counterparty

If the right to avoid a transfer for misrepresentation is based on a personal right to reparation, the explanation for requiring misrepresentation to be made by or on behalf of the counterparty is obvious. Something, however, needs to be said about the exceptions to this rule.

McBryde identifies three cases of misrepresentation by third parties: where the misrepresentation was made by someone for whom the counterparty has vicarious

[252] Relying in particular on Lord Brougham's speech in *Attwood v Small* (1835–40) 6 Cl & Fin 232 at 447; 7 ER 684 at 765. Guthrie also refers to Lord Curriehill's judgment in *Gillespie v Russell* (1856) 18 D 677 at 686. It is not clear Lord Curriehill had claims for damages in mind when he made those remarks. Insofar as he did, the remarks are *obiter*. He also seems to rather confuse the distinction between *dolus dans causam contractui* and *dolus incidens* with that between *dolus bonus* (acceptable sharp practice such as trade puffs) and *dolus malus* (fraud).

[253] Stair I.ix.9; IV.xl 23–4; Erskine III.i.16.

[254] Bankton I.x.64.

[255] See Note I to Art II–7:205 DCFR. The DCFR applies a simple causation test for voidability on grounds of fraudulent misrepresentation (Art II–7:205(1)). Somewhat confusingly, the DCFR rule covering innocent misrepresentation appears to include Voet's definition of *dolus incidens* (*Commentarius ad Pandectas* (6th edn, 1731) IV.iii.3): Art II–7:201(1)(a) and (b)(i). The comments, however, suggest that Art II-7:201(1)(a) should not be so understood: Comment C on Art II–7:201.

liability; where the counterparty is a participant in a fraudulent scheme with the third party or where a misrepresentation leads to a gratuitous benefit.[256]

The first exception can be easily explained. If the counterparty had vicarious liability for the actions of the person who made the misrepresentation, then the counterparty has responsibility to make reparation for the wrong done.

Where the counterparty is a participant in the scheme of the person who made the misrepresentation, he is liable for the wrong as an accessory. Accessory liability for fraud is discussed in more detail in chapters 4 to 7 in the context of fraud on creditors, where the authorities are more extensive. For the present, it suffices to say that each accessory to a fraud is liable to make reparation for it.

It is difficult to imagine how a counterparty could be a participant in a fraudulent scheme when the misrepresentation was innocent, since it is difficult to see how parties might collude where one of them did not know what was going on.

The last exception is sometimes explained on the basis of the so-called "no profit from another's fraud" rule. The rule has a long history, having its roots in the maxim *nemo debet locupletari ex aliena iactura*[257] and thus in principles of unjustified enrichment. However, the key authorities for the "no profit from fraud" rule itself were nineteenth-century cases on caution. [258] The development and detail of the rule are discussed by Reid and Whitty[259] and in chapter 4 below but the basic application in a case like the present is straightforward: where a gratuitous transfer has been made under the influence of a third party's fraudulent misrepresentation, the transfer can be set aside despite the fact that the transferee was unaware of the fraud.

In this context, application of the basic principles of unjustified enrichment seems to make sense of the result. A gratuitous benefit has been conferred when the apparent basis for the transfer did not in fact obtain. The law of enrichment has shown itself ready to reverse transfers in analogous circumstances as evidenced by the *condictio indebti* and the *condictio causa data causa non secuta*. Furthermore, had the recipient known what was going on, he would have been a party to the

[256] McBryde *Contract* para 14-44. See also, *Smith v Bank of Scotland* 1997 SC (HL) 111 at 116–7.
[257] "No one may be enriched at another's expense." Reid "Fraud in Scots Law" 246–9; N Whitty "The 'No Profit From Another's Fraud' Rule and the 'Knowing Receipt' Muddle" (2013) 17 EdinLR 37 at 49.
[258] Eg *Wardlaw v Mackenzie* (1859) 21 D 940 and *Clydesdale Bank v Paul* (1893) 4 R 626.
[259] Reid "Fraud in Scots Law" 242–9; Whitty "The 'No Profit From Another's Fraud' Rule" at 47–9.

fraudulent scheme so it can be seen as an instance of incomplete *dolus* of the kind discussed above.

(4) *Restitutio in integrum* must still be possible

Reversal of the transfer (*restitutio in integrum*) must still be possible. The requirement is readily understandable if the voidability is seen as being founded on a duty to make reparation or to reverse an unjustified enrichment. The transferee cannot be required to do the impossible. In relation to transfers, this effectively boils down to a requirement that the asset transferred continues to exist and continues to form part of the transferee's patrimony. The first of these requirements is fairly obvious: no-one can return what no longer exists.[260]

The second requirement is the reverse side of the rule that good faith onerous successors are not liable for the fraud of their authors.[261] The successor is protected because the fraudulent transferee had received a valid, albeit vulnerable, transfer and was thus able to transfer the asset to the successor. After the second transfer, the asset is no longer part of the misrepresenter's patrimony. Therefore it is no longer available to satisfy his obligation to make reparation. There is no reason why the innocent transferee's asset should be used to make reparation for his author's wrong. Similarly, while the misrepresenter may be liable for damages if the misrepresentation was culpable, he or she cannot be asked to do the impossible and effect the transfer of an asset which no longer forms part of his patrimony.

This analysis assumes that the transfer induced by misrepresentation is initially valid (albeit subject to challenge) and that the transferor's right is personal rather than real. As noted above, the idea that fraudulent misrepresentation does not lead *ipso iure* to nullity[262] is already present in Mackenzie.[263] It is repeated by Stair.[264]

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[260] It may also be regarded as a subset of the second requirement.
[261] Stair IV.xl.21; Bankton I.x.65; Bell *Prin* §13A and "Note relative to sections 11, 12 and 13". The rule is well attested throughout Europe and often designated with the maxim *dolus* [or *fraus*] *auctoris non nocet successori*.
[262] Ie does not cause voidness.
[263] See text at fn 155.
[264] I.ix.14, IV.xl.21.

Likewise, the settled modern rule is that misrepresentation leads to voidability rather than voidness.[265] This view has, however, not always been unchallenged.

D. VOID OR VOIDABLE?

(1) Heritable, corporeal moveable and incorporeal property

One preliminary issue requires to be addressed: is it legitimate to assume a general rule on the effect of fraud irrespective of the type of property at issue. The general nature of the early authorities on the effect of fraud suggests a positive answer. The question is whether there is anything which points in the other direction.

The only significant challenge to a uniform understanding of the effect of fraud arose in relation to the interpretation of the maxim *assignatus utitur iure auctoris*.[266] For a long time, many Scots lawyers held that even onerous good faith assignees were vulnerable to personal claims against the assignor which related to the right.[267] These were not restricted to "intrinsic" objections (for example, where A fraudulently induces B to enter into a contract and then assigns his rights to C). Claims which would now be regarded as "extrinsic" (as in the case where A and B enter into a valid contract but C fraudulently induces B to assign his rights and then assigns those rights on to D) were also included.[268] This approach prevented the application of the maxim *dolus auctoris non nocet successori*[269] to transfer of incorporeal moveables.

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[265] *Price & Pierce Ltd v Bank of Scotland* 1910 SC 1095; *Boyd & Forrest v Glasgow & South-West Railway Co* 1915 SC (HL) 20; *MacLeod v Kerr* 1965 SC 253; *Young v DS Dalgleish & Son* 1994 SCLR 696. Although *MacLeod* and *Young* are cast in terms of contract law, the decisions clearly concern the proprietary effect of the transaction.

[266] Anderson suggests that the first recorded use of the maxim in Scotland was in *Irvine v Osterbye* (1755) Mor 1715 at 1716: *Assignation* paras 8-02–3.

[267] See further Hume *Lectures* Vol III, 12–4; McBryde *Contract* paras 14-74–80; Anderson *Assignation* paras 9-20–5.

[268] On the intrinsic-extrinsic dichotomy, see Anderson *Assignation* paras 8-12–6. The other important extrinsic claim is that of a beneficiary under trust. As discussed in chapter 8 below breach of trust was often considered an instance of fraud (in the broad sense).

[269] "The fraud of the author does not affect the successor": Trayner *Latin Maxims and Phrases*.

Some considered this broad version *assignatus utitur* rule to express a general principle of the law of transfer.[270] In that case, an explanation was needed for the good faith purchaser's protection where corporeal moveables or heritable property were acquired. Special rules based on the freedom of commerce and "the faith of the records" were invoked to do this.

The broad *assignatus utitur* rule offered one way of understanding the effect of trusts in insolvency.[271] The beneficiary's right was a "qualification" of the right in the hands of the trustee, and so prevailed against the trustee's creditors in the case of his insolvency. The trustee's capacity to give good title to purchasers of heritable or corporeal moveable property was explicable by the rules designed for the protection of the freedom of commerce or faith of the records, sometimes allied with elements of personal bar.[272] These considerations did not apply to creditors doing diligence. They could have no better right than their debtor and so were affected by the beneficiary's right.

Others took the rule applying to heritable property and corporeal moveables to be the basic position, explaining the rule in assignations either by reference to the fact that they are not proper objects of commerce,[273] or by reference to the *procuratorio in rem suam* analysis of assignation. The term *procuratio in rem suam* derives from the Roman law device developed to circumvent the prohibition of assignations in that legal system. Formally, the *de facto* assignee sued or received payment as the

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[270] J Steuart *Dirleton's Doubts and Questions in the Law of Scotland Resolved and Answered* (2nd edn, 1762) 332 (here Steuart invokes the maxim *resoluto jure dantis, resolvitur jus accipientis*); *M'Donells v Carmichael* (1772) Mor 4974; Hailes 513 per Lord Pitfour; *Redfearn v Somervails* (1813) 5 Pat App 707 at 710 per Lord Bannatyne (in the Inner House); *Gordon v Cheyne* (1824) 2 S 566 at 569 per Lords Balgray and Succoth and at 571 per Lord President Hope.

[271] *Dingwall v M'Combie* (1822) 1 S 431 at 432 per Lord Hermand; *Gordon v Cheyne* (1824) 2 S 566 at 569 per Lords Balgray and Succoth; *Giles v Lindsay* (1844) 6 D 771 at 796–801 per Lord Justice Clerk Hope, at 808 per Lord Medwyn and at 816 per Lord Moncrieff; *Heritable Reversionary Co Ltd v Millar* (1891) 18 R 1166 at 1174–5 per Lord M'Laren; *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43 at 43 per Lord Herschell, at 46–7 per Lord Watson and at 54 per Lord MacNaughton; H Goudy "Note on *Heritable Reversionary Co Ltd v M'Kay's Trustee*" (1891) 3 JR 365 at 366. These cases are, of course, not limited to incorporeals.

[272] Eg Lord M'Laren's argument in *Heritable Reversionary Co v Millar* at 1172: "it is the act of the truster that has enabled the trustee to commit the fraud, and it is therefore considered proper that the loss should fall on him rather than on the innocent purchaser or mortgagee" and Lord Watson in the House of Lords: "a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the *indicia* of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous consideration" (1892) 19 R (HL) 43 at 47. Cf sub-section 21(1) of the Sale of Goods Act 1979.

[273] Hume *Lectures* Vol III, 12. This position may have been influenced by Stair's view that transfer of personal rights had originally been prohibited was only recognised rather grudgingly thereafter.

original creditor's agent but the latter did not require the assignee to account for what he received.[274] Since the assignee acted in the name of the assignor, it was obvious that he was vulnerable to all claims affecting the assignor. It is open to question whether the device ever played the same role in Scots law as it had in Roman law,[275] but it was central to Stair's analysis of assignation,[276] and so was influential in Scotland. Even some who did not accept it used it as a historical explanation and Hume uses it to supplement his policy justification for assignees' vulnerability.[277]

The ambit of the *assignatus utitur* rule now appears to be restricted to intrinsic claims (although the debtor retains his right to plead compensation).[278] Therefore, an assignee whose author had acquired the assigned right fraudulently would only be vulnerable if he was a bad faith or gratuitous successor. This brings the position for incorporeals into line with corporeal moveables and heritable property and implies that the broad *assignatus utitur* rule cannot be taken to have stated the basic principle of the law of transfer.

The turning point appears to have been the *Redfearn v Sommervails*,[279] where the House of Lords decided that a latent trust could not be pled against an onerous assignee in good faith. If latent trusts were excluded, then so, by implication, were other extrinsic claims such as those relating to fraudulently induced assignations.[280] The principle in *Redfearn* was not readily accepted. For many years, it was regarded as a piece of judicial legislation by the House of Lords and one which had left the underlying principles of Scots law untouched.[281] In the course of the nineteenth

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[274] Zimmerman *Obligations* 58–62.

[275] Anderson *Assignation* paras 5-13–23. Cf, however, the entry recording the view that an assignation not intimated before the death of the assignor fall "sic ane assignatioun comparatur mandato" in the anonymous "Practicks 1574/5/2–1577/5/4" in Adv.MS.24.1.11 reprinted in G Dolezalek *Scotland Under Jus Commune* (St Soc 55–7, 2010) Vol II, 186. This shows that arguments were being made based on the parallel between mandate or *procuratio* (both terms for agency) before Stair.

[276] Stair IV.xl.2. Some who did not accept the *procuratio in rem suam* analysis none the less used it as a historical explanation for the rule for assignations: *M'Donells v Carmichael* (1772) Mor 4974; Hailes 513 at 514 per Lord Kames.

[277] Hume *Lectures* Vol III, 12.

[278] Anderson *Assignation* paras 8-38–66.

[279] (1813) 5 Pat App 707. See Anderson *Assignation* para 9-25.

[280] There was a long-running tendency to treat breach of trust as a species of fraud.

[281] Hume doubted how widely the principle in the case would be applied and observed that "some of our Judges continue to entertain doubts about this judgement [*sic*] of the House of Lords in that case of *Redfearn*": *Lectures* Vol III, 13. Further, *Gairdners v Royal Bank of Scotland* 22 June 1815, FC at 463 per Lord President Hope; *Gordon v Cheyne* (1824) 2 S 566 at 569 per Lord Balgray and at 571 per Lord President Hope and even *North British Railway Co v Lindsay* (1875) 3 R 168 at 176 per Lord Justice Clerk Moncrieff.

century, however, it became established[282] and by 1892 Lord Watson felt able to use it as a general authority for the protection of all onerous singular successors from latent trusts.[283]

Once the broad *assignatus utitur* rule had been rejected even in the context of assignation, it could hardly be regarded as expressing any general principle of the law of transfer. In the post-*Redfearn* world, the cases on corporeal moveables and heritable transfer are therefore a more reliable guide than early materials on assignation when considering the effect of fraud in the modern law.

(2) Roman Law background

The tendency in some sources to treat fraud as leading to nullity has its roots in the texts in the *Corpus Iuris Civilis* which deal with the effect of fraud on contracts of sale. To understand these properly, it is necessary to bear in mind two specialities of classical Roman law.

First, as Flume has shown, the "two poles" of classical Roman legal thinking were the "legal act"[284] and the *actio* (largely synonymous with remedy), without paying much attention to the legal relationship which modern thinking would see as mediating between them.[285] As a result, the jurists' discussion focussed on whether an *actio* would be granted in certain circumstances. They spoke of the act of sale and its circumstances, discussing whether the *actio empti* (the buyer's action) and the *actio venditi* (the seller's action) would be granted, but made little or no direct reference to the validity of the contract of sale.[286]

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[282] *Burns v Lawrie's Trs* (1840) 2 D 1348; *Littlejohn v Black* (1855) 18 D 207; *Scottish Widows v Buist* (1876) 3 R 1078 at 1081 per Lord President Inglis. Even in the early cases, most judges accepted that, within its proper scope. Lord Gilles's suggestion (in *Gordon v Cheyne* at 570) that the full court should be consulted on whether *Redfearn* should be followed or not was exceptional (and not followed).

[283] *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43 at 47. Lord President Inglis did the same in the Inner House: (1891) 18 R 1166 at 1181.

[284] "Legal act" (*Rechtsakt*) is broader than juridical act (*Rechtsgeschäft*). It encompasses all actions which could give rise to an *actio* (ie a legal claim) in Roman law. Thus actions (such as delicts) which gave rise to involuntary obligations are also covered by the term.

[285] W Flume *Rechtsakt und Rechtsverhältnis* (1990) esp at 2. See also B Nicholas *An Introduction to Roman Law* (1962) 19–21.

[286] Flume *Rechtsakt und Rechtsverhältnis* 2.

Secondly, in the classical period, Roman litigation was conducted mainly on the formulary system.[287] As discussed in chapter 2, formulary procedure involved two stages, one before the Praetor and one before a law *iudex*. Normally, a defence of fraud would need to be raised as an *exceptio* and thus inserted into the formula.

In certain actions, known as the *bona fidei iudicia*, it was unnecessary to insert the *exceptio doli* into the formula.[288] The reason for this was essentially procedural: the formula in such cases instructed the *iudex* to condemn the defender for what he ought to do or give *ex fide bona*.[289] If the pursuer had obtained his right by *dolus*, ie breach of *bona fides*, he could hardly be said to be entitled to performance *ex fide bona*.[290] There was no need for insertion of the *exceptio doli* because its content was already implied by the terms of the formula.[291] Among the *bona fidei iudicia* were the *actio empti* and the *actio venditi*. Contracts enforced through *bona fidei iudicia* came to be known as *bona fide* contracts, the others as *stricti iuris* contracts, but the terms are not classical.[292] The Romans felt no need to decide whether fraud rendered a contract null *ab initio* or whether it was valid until the matter was raised by the defender either through the *exceptio doli* or before the *iudex* in the *bonae fidei iudicia*.

The post-classical period saw the abandonment of the formulary system.[293] This in turn meant that Justinian's compilers sought to excise references to it from the texts they included in the Digest. As a result, the procedural context of the Roman jurists' comments on the interaction between fraud and the contract of sale was obscured and *ius commune* jurists were led to look for other interpretations of the texts. This led to a change in the understanding of the distinction between *stricti iuris* and *bona fide* contracts.

According to Voet's view, which was one of the most influential, fraud rendered a *bona fide* contract and any transfer made in pursuance of it void, while a *stricti iuris*

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[287] On the formulary system in general, see Kaser *Das römische Zivilprozeßrecht* 149–432 and E Metzger "Actions" in E Metzger (ed) *A Companion to Justinian's Institutes* (1998) 208 at 212–4.
[288] Or indeed the *exceptio pacti*: Kaser *Das römisches Zivilprozeßrecht* 262.
[289] Kaser *Das römische Privatrecht* Vol I, 485.
[290] It has been suggested that the notion of *bona fides* was the spur for the recognition of informal contracts such as sale and hire in early Roman law: Schulz *Principles* 224–5; *Classical Roman Law* 36.
[291] Kaser *Das römisches Privatrecht* 488; *Das römisches Zivilprozeßrecht* 262.
[292] Schulz *Classical Roman Law* 35–6.
[293] *Das römisches Zivilprozeßrecht* 517–9.

one could be set aside using the *actio de dolo*.[294] This view is understandable because it offered some explanation for the texts in the *Corpus Iuris* which suggested that an attempt to enforce a contract induced by fraud would fail despite the absence of any plea of fraud on the part of by the defrauded party in the form of an *exceptio doli*. Scots writers recognised from a very early stage that there was no *stricti iuris–bona fide* distinction in their system of contract law.[295] Stair had established an essentially unitary, will-based approach to contract law.[296]

The Roman model, as they perceived it, could not be applied directly. Nonetheless, *ius commune* accounts of the division presented Scots lawyers considering the effect of fraud with a number of options: all contracts could be treated as *bona fide* and thus rendered null by fraud; they could all be treated as *stricti iuris* and thus as voidable. Further, although the contract might be rendered null, a different rule might be applied to transfers.[297]

Scots authorities flirted with all of these possibilities. The confusion which such variety implies is related to two apparently inconsistent rules which any theory regarding the effect of fraud had to account for. It is not altogether clear whether the lack of theoretical clarity allowed the inconsistent rules to develop or whether, conversely, these results caused the theoretical confusion.

(3) Two inconsistent rules

The first of these rules is the well-known proposition that a good faith buyer is not prejudiced by his author's fraud: suppose A fraudulently induces B to sell X to him and that A then sells X on to C who is unaware of A's fraud. In Scotland, as in the

[294] Voet *Commentarius ad Pandectas* IV.iii.3 and 6, trans P Gane in *The Selective Voet* (1955–8). For discussion of others, see LPW van Vliet "*Iusta Causa Traditionis* and its History in European Private Law" (2003) 11 ERPL 342 at 350–60.

[295] Mackenzie *Institues* 495–6; Bankton I.x.64. Somewhat surprisingly Bankton's account of Roman law differs significantly from Voet's. In Bankton's view, Roman law restricted the remedy for fraud to damages where the contract was *stricti iuris*. Stair uses the term *stricti iuris* a number of times (I.xi.6, I.xvii.17 and II.x.7) but he only once uses it in express contrast with *bona fide* (I.xvii.7). Even there, he is discussing the content of an obligation in Roman law rather than its validity in Scots law.

[296] G Lubbe "Formation of Contract" in KGC Reid and R Zimmermann *A History of Private Law in Scotland* (2000) Vol II, 1 and M Hogg "Perspectives on Contract Theory from a Mixed Legal System" (2009) 29 OJLS 643 esp at 648–53.

[297] Logically, the contract might be also have been regarded as voidable but the subsequent transfer void. There seems to have been no support for this proposition. Had it been adopted, it would not have aided the rationalisation of the specific rules on the effect of fraud on onerous good faith successors and attaching creditors.

rest of Europe, B cannot claim X from C. The result is uncontroversial and has been well established for many years, often expressed by the maxim *dolus* [or *fraus*] *auctoris non nocet successori*.[298]

The second rule is much less well-known and much more controversial. If C is a creditor doing diligence rather than a buyer, the result is reversed: B can claim X from C.[299] The result is most often relevant when A is insolvent. It is therefore unsurprising that the large number of cases attesting to this rule tend to concern the buyer's fraudulent failure to disclose insolvency. The same rule allows a defrauded seller to claim the object of sale from the trustee in sequestration. Some authorities go even further, suggesting that if A fraudulently acquires X from B, sells to C who is in good faith and is then sequestrated, B will have a preferential claim for the price, the price being regarded as *surrogatum* for X.[300]

The seller's preference over general creditors[301] is rather shocking to Scots lawyers in the post-*Burnett's Trustee* age. It treats sellers better than other defrauded creditors, potentially at the direct expense of the latter. Further, the rule suggests a radical difference in treatment between two types of successor which Scots lawyers have tended to treat in the same way.

Arguments concerning the security of purchasers were central to the case made on behalf of Burnett's trustee,[302] and they have a long heritage in this context.[303] Further, from 1793 to 2008, vesting in the trustee was said to operate as an adjudication in implement of sale as well as an adjudication for debt. In the Inner House in *Heritable Reversionary Co v Millar*, Lord Kinnear argued, with some justification, that this meant that the trustee's position is as good as that of a good

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[298] "The fraud of the author does not harm the successor." The proposition was, however, doubted by some in Scotland: Steuart *Dirleton's Doubts* 332 arguing that the protection for *bona fide* purchasers in the 1621 Act is exceptional and ought to be strictly construed. The maxim could be seen as conflicting with another, now less well known, maxim: *resoluto iure dantis, resolvitur ius accipientis*: "The right of the giver having ceased, or become void, the right of the receiver ceases also." Trayner *Latin Phrases and Maxims.*

[299] See the authorities discussed in section C(1)(b).

[300] *Chrysties v Fairholms* (1748) Mor 4896; *Creditors of Robertson v Udnies & Patullo* (1757) Mor 4941; Hume *Lectures* Vol II, 18; Brown *Sale* §597 but cf *Dunlop v Jap* (1752) Mor 741.

[301] "General creditors" is used here as a global term to describe the position of both the trustee in sequestration acting on behalf of all creditors and of creditors doing diligence.

[302] Admittedly, the House of Lords took a rather ambivalent view of this argument: *Burnett's Tr v Grainger* 2004 SC (HL) 19, [2004] UKHL 8 at para 79 per Lord Rodger.

[303] See, eg Lord Braxfield's views in *Douglas v Adjudging Creditors of Kelhead* (1765) 3 Ross LC 169 at 171 (as counsel), *Mitchells v Fergusson* (1781) Mor 10296, 3 Ross LC 120 at 124–5 and *Black v Gordon* (1794) 3 Pat App 317.

faith purchaser.[304] He went on to point to Bell's view that adjudgers for debt had as much right to execute against an asset as adjudgers in implement.[305] This, he argued, implied that adjudgers for debt were in as strong a position as a good faith purchaser.[306] While this type of analysis sits very easily with modern thinking on the distinction between real and personal rights, it did not prevail in *Heritable Reversionary* and the sharp distinction between purchasers and both adjudgers and creditors doing diligence was maintained.

It should be borne in mind, however, that the result is not unique to Scots law. Although, as Mackeurtan and Moyle point out, there are no texts in the *Corpus Iuris* supporting it,[307] Bowen LJ suggested that it was generally prevalent in "the Civil Law".[308] It also appears to have obtained in Roman-Dutch law and persisted for some time in South Africa.[309] It remains the position in Germany.[310]

It very difficult to produce a general principle which can account for both rules. If transfers induced by fraud are voidable rather than void, then A owns X at the time of the sale or attachment by C. As a matter of the general principles of property law, X is therefore available for voluntary transfer or attachment. On this analysis, which came to prevail, the good faith buyer is protected as a matter of course. Some explanation is required, however, for the vulnerability of the attaching creditor. The somewhat problematic attempts to construct the explanation for the exception are discussed in chapter 8.

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[304] (1891) 18 R 1166 at 1176 per Lord Kinnear. Lord Kinnear was concerned with the effect of a latent trust rather than of fraud but the argument applies to cases of fraud as much as to latent trusts because good faith purchasers enjoyed the same protection in each case.

[305] At least where their common debtor was insolvent: Bell *Comm* I, 784.

[306] (1891) 18 R 1166 at 1177. For a similar argument which runs the logic in the other direction, see RG Anderson "Fraud on Transfer and on Insolvency: *ta … ta… tantum et tale?*" (2007) 11 EdinLR 187 at 201–3.

[307] JB Moyle *The Contract of Sale in the Civil Law* (1892 repr 1994) 155; HG Mackeurtan *Sale of Goods in South Africa* (5th edn, 1984 by GRJ Hackwill) 214 fn 4.

[308] *Kendall v Marshall, Stevens & Co* (1883) 11 QBD 356 at 358: "The doctrine [of stoppage in transitu] was at variance with the Civil Law, which laid down that although the goods had been sold on credit and were in the possession of the vendee, there might be reception by the vendor if the vendee became insolvent." Bowen LJ does not mention fraud but it seems likely that he had this rule in mind. Cf Moyle *Contract of Sale* 155.

[309] This is, of course, not surprising given Voet's position. See Mackeurtan *Sale of Goods in South Africa* 213–216. In the Appellate Division of the Supreme Court of South Africa held, in 1971, that the fact that a delivery was fraudulently induced was not sufficient to allow a seller to reclaim goods from an insolvent estate *Cornelissen, NO v Universal Caravan Sales (Pty) Ltd* (1971) 3 SA 158. The shift may be explained by the abandonment of Voet's analysis of the effect of fraud.

[310] Häcker *Consequences of Impaired Consent Transfers* 78. The German rule, however, is the result of the wider German position regarding the retrospective effect of avoidance: §142 *BGB*.

Some attention should first be given to those authorities which took the other route, assuming that fraud rendered a transfer void and thus had to explain the protection of good faith purchasers.

(a) Fraud as a bar to consent

These authorities suggested that fraud excluded consent and thus rendered a transfer void *ab initio*.[311] Many of them quote a Latin tag along the lines of *dolus dans causam contractui reddit contractum nullum*.[312] On this approach, the defrauded seller's right to recover X from attaching creditors is relatively straightforward. The nullity of the transfer means that it never passed into the debtor's patrimony and was therefore not available for attachment by his creditors. However, some explanation is then needed for the protection of the good faith purchaser. Since many of the authorities taking this approach involved cases where the seller was in dispute with attaching creditors or the trustee in sequestration, they rarely adverted to the rule protecting good faith purchasers.

The court does appear to have felt the difficulty in *Prince v Pallat*, the earliest case attesting to the seller's right against attaching creditors. Fountainhall reports that, while the judges in the Court of Session felt that fraudulent intent would prevent delivery effecting a transfer of ownership, good faith purchasers would be protected for the sake of the freedom of commerce.[313]

Stair invoked the faith of the records and freedom of commerce in support of the good faith purchaser's protection.[314] However, he also treated avoidance for fraud as a means of reparation for a wrong done and suggested that the defrauded party had a

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[311] *Prince v Pallat* (1680) Mor 4932 (especially Fountainhall's report); argument of counsel in *Inglis v Royal Bank* (1736) Mor 4936; *Crawfurd Newell v Mitchell* (1765) Mor 4944; *Sandieman & Co v Creditors of Kempt* (1786) Mor 4947; *Allan, Steuart & Co v Creditors of Stein*: see the opinion of Lord Justice Clerk Braxfield recorded by Lord Hailes, (1788) Hailes 1059 (this point was also left untouched on appeal); *Watt v Findlay* (1846) 8 D 529 at 532 per Lord Mackenzie and *Richmond v Railton* at 406 per Lord Justice Clerk Hope. See also Erskine III.i.16 and III.iii.8 and Trayner *Latin Phrases and Maxims* "*Dolus dans causam contractui*".

[312] This particular version comes from counsel's submissions in *Shepherd v Campbell, Robertson & Co* 28 June 1775, FC and is also found in counsel's argument before the Inner House in *Allan, Steuart & Co v Creditors of Stein*. Such expressions appear to have been common in the *ius commune*: see eg WA Lauterbach *Compendium juris brevissimis verbis* (New edn, JJ Schütz (ed), 1707) IV.iii.D.

[313] (1680) Mor 4932. It should be noted that Stair's report of the case is much less conclusive and could conceivably be read as suggesting that the voidability model was applied.

[314] IV.xl.21.

choice about whether to pursue avoidance of the transaction or damages.[315] Taken together with his discussion of the effect of an oath on a plea of fraud,[316] these factors suggest that he considered fraudulently-induced transfers valid and that the victim's right to avoid the transfer was based on a personal right to reparation. In that context, the freedom of commerce and "faith of the records" are merely supplementary to the validity of the fraudster's right at the time of the sale to the good faith purchaser.[317]

Bankton's approach was essentially the same as Stair's. He presents reduction on the basis of fraud as a remedy in delict.[318] Discussing "civil obligations", he observes that they "are such as may be made effectual by legal compulsion; some of these are only binding, till set aside by a sentence of the proper court, sustaining a just defence of force, fraud of the like against them."[319] He also, however, invokes freedom of commerce and "the faith of the records" as justifications for protecting the *bona fide* purchaser.[320]

The first institutional writer to adopt the nullity analysis is Erskine. The issue first arises in his discussion of consent as a prerequisite for contract formation. Following the model commonly found in Europe, Erskine discusses a triumvirate of vices of consent: error, fraud and violence.[321] All three are treated as excluding, rather than merely impairing, consent. In relation to fraud he says "he [the defrauded party] is justly said not to have contracted, but to be deceived."[322]

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[315] I.ix.9 and 14.
[316] I.xvii.14, discussed in chapter 2.
[317] Bell (*Comm* I, 309 fn 1) reads Stair as taking singular successor vulnerability as a general rule, subject to policy exceptions for the sake of commerce regarding heritable property and corporeal moveables. This seems to be a misreading of Stair IV.xl.21. Stair does give a policy justification for the protection of purchasers, but his motivation for holding assignees vulnerable on account of the fraud of their authors is that they are mere procurators *in re suas*. That is a justification specific to assignation so Stair's rule in cases of assignation cannot be considered a general principle.
[318] I.x.62.
[319] I.iv.15. Bankton distinguishes between natural, civil and mixed obligations. Natural obligations are "founded in the law of nature alone, without legal remedy from the civil authority". Performance of them is not gratuitous (I.iii.22) but neither is it compellable: (I.iv.12). Mixed obligations were both civil and natural and were therefore enforceable and not liable to be set aside.
[320] I.x.59 and 65.
[321] Erskine prefers "violence", rather than the traditional Scottish terms extortion and force and fear: cf Stair I.ix.8, Bankton I.x.50 and Bell *Prin* §12.
[322] III.i.16.

Given the context, Erskine's argument might be thought limited to the law of contract but the same analysis (perhaps evidencing a *iusta causa* analysis) is applied to transfers of goods in his discussion of the contract of sale:

> Delivery in a sale, *ubi dolus dedit causam contractui, ex gr.* where the buyer knew himself insolvent, has not the effect to transfer the property to him; it remains with the seller, who was ensnared into the bargain—so that the contract becomes void; *Dunlop* [*v Jap*].[323, 324]

When Erskine later comes to address the protection of *bona fide* purchasers, he justifies it with a combination of "the faith of the records" and freedom of commerce.[325] In contrast to Stair and Bankton, these arguments are Erskine's only basis for protecting the good faith purchaser. He holds that the prior transfer was null, and therefore he cannot fall back on technical arguments regarding personal rights or the fact that the *bona fide* purchaser acquired from someone who owned the property at the time of the transfer.

It is perhaps rather surprising that the doctrine of the "faith of the records" was thought by some to be capable of curing at least some cases of nullity. There is now widespread consensus the General Register of Sasines operated a negative system: while recording of a conveyance was an essential condition for transfer, it was not a sufficient one.[326] On such a view, the most that the "faith of the records" could do is protect against the existence of rights not appearing in the register. It could not guarantee the validity of what is there. While this has probably always been the dominant view, it has not always been universally accepted. Hume held the conventional view but reports that:

> It is true,—some have thought otherwise—have been disposed to think that a purchaser infeft, and who buys from an author infeft, does enjoy an absolute impregnable (unimpeachable) security against all mortals,—and is secure against challenge of every sort, though of the deepest, the most substantial and most fundamental nature. As they conceive, it was the object and intendment of our

[323] (1752) Mor 741.
[324] III.iii.8.
[325] III.v.10.
[326] Scottish Law Commission *Report on Land Registration* (SLC 222, December 2009) Vol I, paras 19.1–6.

> Statutes establishing the Records to invest and array a purchaser with this invincible (impregnable) defence.[327]

References to the "faith of the records" and freedom of commerce in moveables essentially come down to the same appeal to "dynamic security": in this context, the idea that it should be possible to be certain that property has been acquired without unduly burdensome investigation of the transferor's right to sell.[328] However, dynamic security proves too much in these circumstances. It is now well established that a *bona fide* purchaser is not protected if the seller has stolen the goods and (prior to the Land Registration Act 1979 coming into force) was not protected by the "faith of the records" if the seller only appeared on the register because of a forged deed. These risks pose just as much of a threat to dynamic security as the risk that the author's title has been acquired by fraud.

Attempts to moderate the dynamic security argument by suggesting that the victim of theft is more worthy of protection because he or she has not voluntarily ceded possession do not seem very convincing. It is doubtful that someone who has been duped is significantly less worthy of protection than the victim of theft.[329] Further, once one type of undetectable defect is allowed to affect good faith purchasers, dynamic security is undermined in a manner which is fatal to purchasers' confidence. It would be an unusual purchaser who was willing to tolerate the risk that his author had stolen the subjects or forged the prior disposition, if and only if he was protected from the risk that the property had been acquired fraudulently.[330]

(b) Fraud as a ground for avoidance of transfers

Erskine proved to be something of a high point for the nullity analysis. The beginnings of a move away from that position can be discerned in a case cited by

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[327] Hume *Lectures* Vol IV, 319. More recently, see R Rennie "Land Registration and the Decline of Property Law" (2010) 14 EdinLR 62 at 64–5, arguing that the positive system applied by the Land Registration (Scotland) Act 1979 was the true application of the "faith of the records" principle.

[328] P O'Connor "Registration of Title in England and Australia" in E Cooke (ed) *Modern Studies in Property Law* Vol 2 (2003) 81 at 85–6. See also R Demogue "Security" in A Fouliée et al *Modern French Legal Philosophy* (trans FW Scott and JP Chamberlain, 1916 repr 1968) 418, especially at 427–8.

[329] Compare, for instance, the facts of *Morrisson v Roberston* 1908 SC 332 and *MacLeod v Kerr* 1965 SC 253.

[330] This view lies behind protection against so-called "Register error" in modern registration of title systems. See *Report on Land Registration* paras 19.17–26.

Erskine: *Dunlop v Jap*.[331] Although the nullity analysis was maintained in some later cases,[332] the views of Lords Kilkerran and Elchies in the *Dunlop* cases were adopted by Bell, Hume and Brown. Their in turn approach forms the basis of the modern law.[333]

Dunlop v Jap was the second action in litigation which can only be properly understood in light of the first. *Dunlop v Crookshanks*[334] concerned the sale of spirits by Dunlop to Forbes, a bankrupt merchant. Forbes' order was fraudulent on two grounds. Firstly, he was insolvent when he made it. Secondly, he placed the order on behalf of himself and Crookshanks "in Company".[335] Crookshanks and Forbes had previously ordered goods from Dunlop together but Crookshanks knew nothing of this order. Forbes also ordered a second set of goods on his own behalf. All of the goods were then sold on. The truth about Forbes' circumstances emerged and an array of actions for payment, arrestments, multiplepoindings, and actions for reduction was unleashed.

The court drew a distinction between the two orders. In the first, Dunlop had intended to transfer "not to William Forbes alone, but to William Forbes and William Crookshanks in Company". Since the latter had refused to accept the goods, ownership remained with Dunlop. The offer to transfer had not been accepted by the person to whom it was made.[336] In respect of the second order, on the other hand, there was general agreement that, despite the fraud, "the property would nevertheless be transferred" and that a *bona fide* purchaser was therefore protected.[337]

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[331] (1752) Mor 741.

[332] *Crawfurd Newell v Mitchell* (1765) Mor 4944; *Sandieman & Co v Creditors of Kempt* (1786) Mor 4947; *Allan, Steuart & Co v Creditors of Stein*: see the opinion of Lord Justice Clerk Braxfield recorded by Lord Hailes, (1788) Hailes 1059 (this point was also left untouched on appeal); *Watt v Findlay* (1846) 8 D 529 at 532 per Lord Mackenzie and *Richmond v Railton* (1854) 16 D 402 at 406 per Lord Justice Clerk Hope.

[333] M'Laren was content with the voidability analysis in 1870: Bell *Comm* I, 309. See also, *Price & Pierce Ltd v Bank of Scotland* at 1106-7 per Lord Kinnear and *MacLeod v Kerr*.

[334] (1752) Mor 4879 and Elchies, Fraud No 25 and 26. The case is also noteworthy for the court's focus on intention to transfer rather than intention to contract.

[335] That is, as partners.

[336] This analysis is clear from the Lords' interlocutor recorded by Kilkerran (Mor 4879 at 4880). Lord Elchies also held this view but he seems to have had the impression that his judicial colleagues based their decision regarding the first sale on fraud rather than failure to agree to the transfer: see Elchies, Fraud No 25. The situation is complicated somewhat by the fact that Dunlop was content to seek the price from the buyer even in this case. This is unsurprising since he was a merchant. It does not seem to have affected the court's analysis.

[337] Mor 4881.

The part of the litigation cited by Erskine[338] was a contest between two arrestments which did not turn on the validity of the transfer in pursuance of the second sale.[339] Stewart's report does include the rather ambiguous phrase: "the Court seemed to be of opinion, that, had the goods been extant, there was sufficient evidence to have annulled the sale". In light of the earlier case, this seems better understood as saying that the fraud entitled the seller to have it set aside rather than that the fraud rendered the sale null *ipso iure*.[340]

However the phrase should be read, *Dunlop* came to be the authority principally relied on by Hume, Bell and Brown as they revived Stair and Bankton's voidability analysis of the effect of fraud on transfers.[341] Hume was Professor of Scots law at Edinburgh from 1786 until 1822.[342] Bell attended his first full course of lectures from 1787–8[343] and but Hume did not consider himself above reference to his student's work. The Stair Society edition of Hume's lectures is based on notes from the session 1821–2. By this time Bell had already published three editions of his *Commentaries*.[344] In these lectures, Hume refers to the *Commentaries* in his discussion of the effect of fraud on transfer.[345] Unsurprisingly, Hume and Bell adopt very similar analyses. They mark a significant development from the brief statements of Lords Elchies and Kilkerran in relation to *Dunlop,* and a thoroughgoing revival of Stair's view.

Although Hume appears to follow Erskine in regarding the absence of fraud as a prerequisite for valid consent when concluding a contract,[346] the difference in his approach is revealed by his treatment of the effect of fraud on transfer. Explaining

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[338] *Dunlop v Jap* (1752) Mor 741.

[339] The question was complicated by the fact that Forbes had employed a porter to collect the goods and sell them to the *bona fide* purchaser. The porter appears to have purported to sell in his own name and certainly took a bill payable to himself as payment. These are questions for the law of agency rather than the law of transfer.

[340] For a similar use of "annul" see Stair I.ix.14.

[341] Other authorise to similar effect were *Christies & Co v Fairholms* (1748) Elchies' Notes Fraud No 20 (also reported at Mor 4896 but without the detail of judicial reasoning); *Forbes v Main & Co* (1752) 4937 at 4939 *Shepherd v Campbell, Robertson & Co* (1775) Hailes 637 at 638 per Lord Kames; and Kames *Elucidations Respecting the Common and Statute Law of Scotland* (2nd edn, 1800) 12–5.

[342] JW Cairns "Hume, David (*bap* 1757, *d* 1838)" *Oxford Dictionary of National Biography* (online edn, 2007).

[343] DM Walker *The Scottish Jurists* (1985) 316 at 317 and 337.

[344] The 4th edition was published in 1821 but Hume does not refer to it in his lectures.

[345] *Lectures* Vol II, 236–7, referring to Bell *Commentaries* (3rd edn, 1816–19) Vol I, 188–9. The relevant passage is on p 189.

[346] *Lectures* Vol II, 7.

the protection of the *bona fide* purchaser, Hume stresses that fraudulently acquired consent is nonetheless consent and therefore, when combined with delivery, effective to transfer ownership.[347] That being established, Hume directs his attention to the defrauded party's remedy in the case when the fraudster has not transferred the goods. He suggests that, in strict form, the defrauded party may not bring the *rei vindication*.[348] Rather he must first set the transfer aside and, until he does so, his claim is a mere right to reparation for a delict.[349] Thus, the *bona fide* purchaser's protection follows as a matter of course. Hume concedes that "you do find expressions in our Reports and Interlocutors, which at first sight seem as if the property in such cases never passed at all" and that Erskine takes this view. However, he dismisses this position as "a looseness only, or inaccuracy of expression".[350] Hume also suggests that the protection of good faith purchasers is "a rule which is essential to the daily traffic of moveables"[351] but this argument merely supplements the more convincing technical argument.

Bell and Brown adopt an analysis which is essentially the same.[352] Both are somewhat clearer than Hume is that fraudulently acquired consent is nonetheless consent for the purposes of contract as well as transfer.[353] Despite occasional dicta to the contrary, the settled position in both contract and property law is that fraudulent misrepresentation renders a juridical act voidable rather than void.

Of course, this leaves open the question of how to account for the seller's right against the fraudulent buyer's general creditors. If the seller has a mere personal right against the buyer, it is difficult to see why it should prevail over the diligence of other creditors. Supporters of the voidable analysis did this by invoking the doctrine that creditors who acquired right by diligence or insolvency did so *tantum et tale* as the right stood in the hands of the debtor. This doctrine brings its own difficulties and they are sufficiently complex to require their own chapter. Therefore, further discussion of the *tantum et tale* doctrine is deferred until chapter 8.

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[347] *Ibid* 17 and Vol III, 235–6 (for moveables), Vol IV, 310 (for heritable property).
[348] Ie the action asserting the real right of ownership.
[349] *Lecture* Vol II, 236–7.
[350] *Ibid* 17.
[351] *Ibid* 237.
[352] Bell *Comm* I, 309; Brown *Sale* §§560 and 599.
[353] Brown *Sale* §§554–60; Bell *Prin* "Note relative to sections 11, 12 and 13". It must be conceded that, by the time he came to write this note, Bell seems to have come to doubt the validity of regarding fraudulently induced consent as valid but challengeable but he does not dispute that this is the law.

E. CONCLUSION

In light of the above, the Scots law position on misrepresentation as a ground of voidability for transfers may be stated in the following terms:

> If a party to a transfer has been induced to consent to it by a misrepresentation made by or on behalf of the counterparty in the transfer, the party misled may have the transfer set aside, provided that the object of the transfer continues to form part of the transferee's patrimony. Misrepresentation should be understood to include failure to comply with a legally recognised duty of disclosure. The basis for the right to set the transfer aside is a personal right based on either delict or unjustified enrichment.

The success of the voidability analysis is to be welcomed. It reflects the basic principles which underlie the law's response to misrepresentation and which can be traced back to Stair. It also provides a convincing explanation for the protection of *bona fide* purchasers from their author's fraud but not their author's theft, and of the innocent party's right to choose whether the transfer should be upheld or not.

Chapter 4

TRANSFERS BY INSOLVENT DEBTORS[354]

The rule that transactions by insolvent debtors which diminish the assets available to their creditors may be subject to attack by or on behalf of the creditors (often referred to as the *actio Pauliana*) is very widely recognised in both Civil and Common Law systems.[355]

The classic examples are well-known. A debtor recognises that he is irrecoverably insolvent. Knowing that his assets will be sold to pay his debts, he decides that he would rather see them go to his friends, so he gives them away. In some cases the transfer might be intended to allow the debtor continued use of the property, as where a businessman in embarrassed circumstances transfers the family home to his wife. Whatever the purpose, the result is the same: a pool of assets which was already insufficient to meet the debtor's obligations is further diminished. Creditors' interests are thus prejudiced. It is uncontroversial that the creditors, or an insolvency official acting on their behalf, can recover property so alienated and apply it to the satisfaction of creditors' rights.

Alternatively, an insolvent debtor might confer a right in security on a favoured but hitherto unsecured creditor. For instance, a tradesman provides services to the debtor and is content to give credit without any security. Once the debtor becomes aware of his circumstances, the debtor and tradesman decide that action must be taken to protect the latter. The debtor pledges some of his stock to the tradesman. The right in security is granted so that that the favoured creditor does not have to share the proceeds of the sale of the stock with the other creditors. This makes it more likely that the favoured creditor will be paid in full but this is achieved by

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[354] An extract from this chapter has previously been published as "The Reception of the *actio Pauliana* in Scots Law" in TM Safley (ed) *The History of Bankruptcy* (2013) 200.

[355] BM Goodman "The Revocatory Action" (1934–5) 9 *Tulane Law Review* 422; A Boraine "Towards Codifying the *actio Pauliana*" (1996) *South African Mercantile Law Journal* 213; A Vaquer "Traces of Paulian Action in Community Law" in R Schulze (ed) *New Features in Contract Law* (2007) 421; JJ Forner Delaygua *La protección del crédito en Europa: La acción pauliana* (2000); PR Wood *Law and Practice of International Finance* (University edn, 2008) 79–85; Von Bar and Clive *Draft Common Frame of Reference* (Full edn) Vol 5 2634ff and RJ de Weijs "Towards an Objective Rule on Transaction Avoidance in Insolvencies" (2011) *International Insolvency Review*, doi: 10.1002/iir.196.

diminishing the pool of assets available to the other creditors. In certain circumstances, they or their representative may be able to set the right in security aside, restoring equality of creditors in respect of the pledged assets.

The range of transactions subject to challenge goes beyond these core examples[356] but the focus of this chapter will be on grants made by the debtor because they are the most relevant to the wider aims of this thesis.

A. WHAT DOES THE RULE PROTECT?

The widespread acceptance of this principle is perhaps apt to mask how surprising it is. In contrast to the case of misrepresentation, the two parties to the transaction under attack consented freely to it without any interference to their private autonomy. The transaction is not set aside for the granter's protection or at his instance, but at the instance of third parties, the creditors of the granter, in order to protect their interests.[357] These creditors have mere personal rights against the granter and no relationship at all with the grantee. It is not immediately clear why holders of personal rights against a granter should be entitled to challenge the transfer. Their rights are against the person of the debtor rather than against the relevant assets. The creditors' right of challenge appears to grant them equality with or a preference over holders of real rights. Therefore, this rule presents a significant theoretical challenge to systems which draw a strict division between real and personal rights.

In response to this, some scholars in the Germanic tradition have suggested that the rule exists to protect a right termed the *Befriedigungsrecht*[358] or *Zugriffsrecht*.[359] On this view, such a right exists alongside every personal right to performance and is directed not against the debtor but his patrimonial assets.[360] Similarly, francophone scholars have typically regarded the *actio Pauliana* as protective of the *gage général*

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[356] For instance, the debtor may co-operate with one creditor's attempts to do diligence while resisting others or pay a debt before it is due. See further, WW McBryde *Bankruptcy* (2nd edn, 1995) para 12-24.

[357] The challenge may be made by a liquidator or trustee in sequestration but, as Lord Hope observed in *Burnett's Trustee v Grainger* [2004] UKHL 8 at para 11, an insolvency administrator merely acts on behalf of the general body of creditors.

[358] Literally "satisfaction-right".

[359] Literally "seizure-right".

[360] As Koziol puts it, "*auf die Vermögenswerte gerichtet*". H Koziol *Grundlagen und Streitfragen der Gläubigeranfechtung* (1991) 4–5.

des créanciers, a phrase which describes the creditors' right to execute against the assets but whose wording implies that it lies against the assets themselves.[361] These concepts may be attractive in systems with a strong concept of patrimony, explaining why a right against a person can give rise to rights against assets in his patrimony.[362] Scotland, however, does not have such a strong concept of patrimony, and the stringency with which the distinction between real and personal rights has been maintained makes such approaches uncomfortable.[363]

The closest that Scottish writers have come to this approach is Goudy's suggestion that "so soon as a man becomes insolvent, his estate becomes the property of his creditors, and ought to be distributed among them according to their several rights and preferences."[364] A similar approach is perhaps evident in Bell's suggestion that "From the moment of insolvency a debtor is bound to act as the mere trustee, or rather as the *negotiorum gestor*, of his creditors."[365]

Taken literally, these statements could be stronger than the Continental approaches because they suggest that the creditors are owners (or beneficiaries of a trust) rather than merely holding some right in the assets. However, that reading is implausible since it implies a transfer of all of the debtor's assets at the moment of insolvency despite the fact that both the debtor and creditors are likely to be unaware of the fact. A reading which took Goudy's statement literally would also sit uncomfortably with the rules on vesting of the estate in the trustee in sequestration in section 31 of the Bankruptcy (Scotland) Act 1985, which are drafted on the

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[361] *Code civil* art 2284, L Sautonie-Laguionie *La fraude paulienne* (2008) No 4; Goodman "The Revocatory Action" at 436. A minority of French writers have conceptualised the rule as offering natural reparation for delict: J-P Chazal "*L'action paulienne en droit francais*" in Forner Delaygua *La protección del crédito en Europa* 177 at 179.

[362] Ie the right to do diligence.

[363] It also seems to be implicitly rejected by the suggestion in WM Gloag and JM Irvine *Law of Rights in Security* (1897) 1–2 that the creditor has a single right of action and execution correlative to the debtor's obligation.

[364] Goudy *Bankruptcy* 1. The text is the same in all four editions. Unless otherwise indicated, references are to the fourth edition.

[365] Bell, *Comm* II, 170, Goudy *Bankruptcy* 22. See also Kames *Principles of Equity* Vol II, 197 and Hume's comment that "A person who becomes bankrupt tho continuing in possession of his goods, is considered only a factor or trustee of his creditors." D Hume *Lectures on Scots Law, Session 1792–93* Vol V, GUL Murray 322, 165. The chapter on bankruptcy was omitted from his lectures after 1800 and are not included in the Stair Society edition: GCH Paton "Biography of Baron Hume" in Hume *Lectures* Vol VI, 404. This passage is not found in the equivalent part of the notes on the 1796–7 lectures J Skene *Notes taken from a course of lectures on Scotch law, delivered by Professor David Hume, 1796 and 1797* GUL MS Gen 1113 fol 409r. The relevant parts are missing from the pre-1800 notes held by Edinburgh University library: EUL Dc.5.37–8 and Dc.6.122–4.

assumption that the transfer is from the debtor rather than from the various creditors.[366] Similarly, if the debtor did, in fact, become a trustee from the moment of insolvency, section 33 (1)(b) of the 1985 Act would mean that none of his assets would vest in the trustee in sequestration.

Even if these statements were understood in the strongest possible sense, however, they would not have the same explanatory power as the *Befriedigungsrecht* or the *gage général*. The Continental concepts may be considered as general concomitants of personal rights. The position suggested by Bell and Goudy, however, only arises on insolvency. It is not simply an aspect of every personal right. Therefore some explanation is needed of why it is triggered by insolvency.

Even where every creditor is regarded as having a right in his debtors' assets, an explanation is needed of why this renders some transactions vulnerable and not others. In the Germanic tradition, it has been variously suggested that a grant is ineffective as a matter of property law because it is in breach of a statutory prohibition, that the creditors can attack the transaction on the basis of either the law of delict or unjustified enrichment, and that the transfer is *haftungsrechtliches unwirksam*.[367] The last-mentioned is rather difficult to render in English but essentially involves a distinction between the debtor's patrimony and the pool of assets liable to execution for his debts (the *Haftungskreis*). On this view, assets may pass in some circumstances from the debtor's patrimony but nonetheless remain within the *Haftungskreis* and thus subject to the *Befriedigungsrecht*. Such transfers are said to be *haftungsrechliches unwirksam*. Of course, some reason must be found to explain why some transfers suffer from this defect while others do not.

In light of these considerations, the *Befriedigungsrecht* and the *gage général* seem redundant in analysis of the Scottish position. If a principle of property or obligations law must be employed to explain the protection of a right, which itself only exists to ensure the fulfilment of a personal right, why should the relevant principle not be regarded as explaining protection of the personal right directly? Further, they do not

[366] Bankruptcy (Scotland) Act 1985 ss 31(3) and (5).
[367] "Ineffective in terms of liability law". For surveys of the conflicting theoretical approaches in the Germanic legal tradition, see Koziol *Grundlagen und Streitfragen* ch 3 and W Gerhardt *Die systematische Einordnung der Gläubigeranfechtung* (1969) especially ch 1.

mesh well with the distinction between real and personal rights and there is very little precedent for them in the Scottish sources.

It seems better to present the challenge in simple terms and to ask why the holders of personal rights can set aside proprietary grants made by the debtor. To answer this question, it is necessary to look at the manner in which Scots law received this rule. The latter process also sheds some light on a further peculiarity: why Scots law has two sets of statutory rules and one set of common law rules which all deal with the same problem.

B. SCOTS LAW PRIOR TO THE 1621 ACT

In light of the existence of common law rules which allow challenges to transactions in fraud of creditors, statutory intervention in 1621 is rather surprising. Why was it thought necessary when fraudulent misrepresentation and minority and lesion were left to judicial development on the basis of Roman law materials? Bell suggests that Scots law had received the Roman rule that gratuitous alienations were challengeable prior to the passage of 1621 Act[368] and that the part of that Act which deals with gratuitous alienations was solely concerned with matters of proof.[369]

The 1621 Act does make provision regarding proof and questions of probation generated a significant amount of litigation under the Act.[370] There are also some hints of recognition of the Roman law rules prior to its enactment. However, examination of the pre-1621 sources and of the Act itself suggests that it had a substantive as well as a procedural impact. The relationship between the 1621 Act and the common law is significant because the Act was repealed by the Bankruptcy (Scotland) Act 1985[371] on the assumption that it merely supplemented the common law.[372] That has been the assumption on which the courts and legal profession have proceeded since the 1985 Act came into force.[373]

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[368] 1621 c 18, *RPS* 1621/6/30.
[369] Bell *Comm* II, 171. See also *Obers v Paton's Trs* (1897) 24 R 719 at 734 per Lord M'Laren.
[370] Eg *Monteith v Anderson* (1665) Mor 1044; *Crawford v Ker* (1680) Mor 1012; *Spence v Creditors of Dick* (1692) Mor 1014; *Leslie v Creditors of Lauchlan Leslie* (1710) Mor 1018; *Guthrie v Gordon* (1711) Mor 1020; *Gibb v Livingstone* (1766) Mor 909.
[371] s 75(2), Sch 8.
[372] Scottish Law Commission *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (SLC 68, February, 1982) paras 12.5 and 12.16 and s 46(4) and Sch 7 of the draft bill.
[373] Eg McBryde *Bankruptcy* para 12-04.

(1) *Quae in fraudem creditorum facta sunt ut resitutuantur*

A case from 1492, *Ramsay v Wardlaw*, saw a transfer attacked on the basis that it was "in defraud and hurt of creditors".[374] The result in *Ramsay* would not be explained on that basis today since the creditors who challenged the transfer had already comprised[375] the relevant property, which seems enough to give priority over the transferee without the need to establish fraud. The sphere of the fraud-on-creditors rule is protection of creditors who have not obtained judicial security by diligence before the grant is made.[376] If diligence has been done, there is no need to rely on the fraud-on-creditors rule: the completed diligence gives the creditor a right which is good against third parties irrespective of fraud.

Ramsay is significant, however, because it is evidence of very early use of the formula "in defraud of creditors" to describe transactions which disappoint creditors' attempts to seek satisfaction from the debtor's patrimony. The phrase echoes the opening words of Digest 42.8 "*quae in fraudem creditorum facta sunt ut restitutuantur*".[377] This title is the major collection of texts discussing the Roman law rules on challengeable transactions by debtors.[378] The phrase would have brought these rules to the mind of Scots lawyers educated in the Civilian tradition.

The details of the classical Roman rules on this topic remain a matter of some controversy.[379] However, there is more agreement about the position presented in the

[374] (1492) Balfour *Practicks* 184 c XX.
[375] A form of diligence against heritable property which was the precursor of adjudication for debt.
[376] A point Stair makes at I.ix.16. Inhibition is, of course, an exception. For discussion of inhibition see chapter 5.
[377] Cf the title of Hope *Major Practicks* II.xiii: *De creditoribus et his qui in fraudem creditorum*.
[378] The other major texts are C.7.75 and J.4.6.6.
[379] The most recent contribution to the discussion is Grevesmühl *Gläubigeranfechtung*. Perhaps the most notable aspect of this work is the revival of the view that there was a remedy known as the *actio Pauliana* which allowed creditors to challenge fraudulent transactions. Since Otto Lenel's *Die Anfechtung von Rechtshandlung des Schuldners im klassischen römischen Recht* in 1903 (reprinted in O Behrends and F d'Ippolito (eds) *Gesammelte Schriften* (1991)) the dominant view has been that the *actio Pauliana* was the product of interpolation, although there was some dissent (summarised by Grevesmühl at 12). The reception of Grevesmühl's thesis has been mixed: see reviews: JD Harke (2004) 72 *Tijdschrift voor Rechtgeschiedenis* 383 and I Kroppenberg (2006) 123 ZSS (RA) 433. For a summary of the discussion, see C Willems *Actio Pauliana und fraudulent conveyances: Zur Rezeption kontinentalen Gläubigeranfechtung in England* (2012) 23–45.

Corpus Iuris and inherited by the *ius commune*. A transaction was challengeable if four requirements were fulfilled: diminution of the debtor's estate, resulting loss to the creditors,[380] intention to defraud on the part of debtor, and knowledge of that intention on the part of the counterparty to the transaction.[381]

These requirements raise one major question: what was it that rendered a scheme fraudulent? Roman jurists were famously ambivalent about abstract concepts and particularly so regarding general definitions,[382] so it is no surprise that the *Corpus Iuris* gives a multitude of examples of fraudulent conduct but no general definition. Radin suggests that *fraus* in the relevant sense means merely "prejudice" or "disadvantage", pointing to the fact that *dolus* is the Latin word for fraud in the sense of deceit.[383] It is certainly true that *fraus* involves prejudice to creditors but there is more to the concept. A careless act by the debtor which diminished the value of an asset could hardly be regarded as *fraus* in the sense in which the term is used in Digest 42.8.

In order to qualify as fraud on creditors, the act of the debtor required to harm creditors in their role as creditors rather than in some other capacity. A debtor who stole from his creditor would certainly be acting intentionally to the creditor's prejudice but, while he would be liable for theft, it would not be a case of fraud on creditors. Therefore, Kaser, Krüger and Ankum seem closer to the truth in suggesting that *fraus* had two elements: harm to the creditors *qua* creditors and intention to do

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[380] The term generally used for this is *eventus damni*. *Eventus damni* essentially turned on establishing absolute insolvency (the insufficiency of the debtor's assets to meet his liabilities) although it is not entirely clear whether the relevant time for assessing solvency was the moment of transfer or at the time of the insolvency procedure: Grevemühl *Gläubigeranfechtung* 106–10.

[381] BT Windscheid *Lehrbuch des Pandektenrechts* (9th edn by T Kipp, 1906 repr 1963) Vol I, §463; H Dernburg *System des römischen Rechts* (8th edn by P Sokolowski, 1912) Vol II, §400; JA Ankum *De Geschiedenis der "Actio Pauliana"* (1962) 396; and Gerhardt *Die systematische Einordnung* 56. Ankum's work is in Dutch with an extensive resumé in French. Only the latter has been consulted in detail.

[382] The most famous example of this is perhaps Javolenus' suggestion in D.50.17.202 that "[e]very definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown."

[383] M Radin "Fraudulent Conveyances at Roman Law" (1931-2) 18 *Virginia Law Review* 109 at 111. Radin's view was anticipated in the German literature. See H Krüger and M Kaser "Fraus" (1943) 63 ZSS (RA) 117 at 118–9 for a summary and Willems *Actio Pauliana* 24 fn 23.

so on the part of the debtor.[384] A fraudulent transaction might be characterised as one which was calculated to frustrate satisfaction of the creditors' rights.[385]

It is perhaps surprising that the transaction did not require to be gratuitous or at least at undervalue. How can the patrimony be diminished unless the transaction is at least partly gratuitous? It is important to bear in mind that what matters is the pool of assets available to creditors rather than the state of the patrimony the instant after the transaction. Someone who buys assets from a debtor knowing that the proceeds of sale will be used to fund the debtor's absconding can be understood as participating in a fraudulent scheme to disappoint creditors although the transaction itself is onerous. One who takes a disposition of assets subject to a secret obligation to hold them for the benefit of the debtor might be regarded in similar terms.[386]

The primary situation addressed by the Roman rule was fraudulent collusion between the parties. In the core case, the remedy might be characterised as one undoing the wrong done by the granter and transferee in their common plan to frustrate satisfaction of the creditors' rights. Such a plan is obvious where the transferor has purchased assets from the debtor in order to furnish him with cash to fund an escape or where their intention is that the debtor will continue to have the use of the assets after the transfer.

Less clear-cut cases are imaginable. Suppose, for instance, that the buyer has other, legitimate motives for making the purchase but is nonetheless aware that the debtor will use the funds to evade his creditors. It might be difficult to regard such a transaction as collusion in a narrow sense but it would still be caught by the rule in the Digest. First, while the Roman jurists appear to have require intention to defraud (*consilium fraudis*) on the part of the debtor,[387] they speak of mere knowledge on the

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[384] Krüger and Kaser "Fraus"; Kaser *Das römische Privatrecht* Vol I 628 and Ankum *Geschiedenis* 392. See eg D.42.8.1pr and D.42.8.6.8.

[385] Cf Forbes' definition: "A fraudulent deed is that of a Debtor to deceive his Creditors, and defeat or disappoint the payment of what he owes to them" *Institutes of the Law of Scotland* Vol I (1722 repr 2012) 222 and Lord Justice Clerk Hope's definition of fraud as "any device on the eve of bankruptcy, in favour of one creditor to disappoint the legal rights of prior creditors": *M'Cowan v Wright* (1853) 15 D 229 at 232. In Forbes' *Institutes*, the page numbers of the reprint have been followed because the original print had inconsistent page numbering.

[386] Cf Act 1592 c 147, *RPS* 1592/4/88 providing *inter alia* that proof that the rebel or his friends and family remain in possession of the property covered by a gift of escheat was a relevant objection to the title of the donee.

[387] Eg D.42.8.15 and 17.

part of the grantee.[388] Secondly, even for the debtor, the line between intention and knowledge or foresight is a fine one. Julian records a case where a debtor transfers all of his assets to his children.[389] There was no suggestion, Julian reports, that the debtor had fraudulent intent but because he knew that he had creditors and knew that he was transferring all of his assets, he was understood as having *consilium fraudis*. He must have known that the inevitable result of his actions would be the frustration of his creditors' attempts to recover. Therefore, he is taken to have intended it whether that is his purpose or not.

It is possible to take this analysis a step further. The basis of the recipient's liability is wrongful conduct. At least on a modern view, a wrong must be a breach of some duty.[390] The debtor's duty in this case is fairly obvious. If he has a duty to perform, that may be taken to imply a duty not to render himself incapable of performing and not to take steps to evade claims for performance. The position of the grantee is more difficult. The duty owed by the debtor is a personal one. It might be thought that whether it is breached or not is a matter between the debtor and the creditors. The sources describe the transferee as being a participant in the debtor's fraud.[391] Since transfer is a bilateral act, it is certainly the case that that the grantee facilitates the debtor's wrongful act. In and of itself, however, that does not seem quite sufficient to hold the grantee liable alongside the debtor.

The grantee may have been a co-actor with the debtor but he was not bound by the same duty and it is the relationship between the act and the duty which renders the conduct wrongful. The challenge is to explain why the grantee's conduct is wrongful.

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[388] Eg D.42.8.10.2.

[389] D.42.8.17.1.

[390] See Descheemaeker *Division of Wrongs* 13–28. Cf N Jansen "Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability" (2004) 24 OJLS 443 especially at 446–7 arguing that liability in tort or delict may attach for infringment of a "fundamental right" which has no prior correlative duty. For present purposes, it is not necessary to take a view on whether Descheemaeker or Jansen is correct. The difference between them is at its sharpest in relation to strict liability which is not a concern here. (Even the good faith, gratuitous acquirer cannot be said to be strictly liable since his liability is limited to his enrichment.) Further, the analysis in the main text also holds on Jansen's analysis. Holding the grantee liable implies that he has infringed a fundamental right pertaining to the creditor, which is worthy of respect by third parties. The difference between that, and a universal passive obligation is a narrow one. Descheemaeker's contention that not every wrong is a violation of a right is not relevant to the present discussion because breach of a duty with no correlative right would not *per se* give rise to any private law right.

[391] D.42.8.10.2–3. For use of the term in Scots law see, eg Mackenzie *Observations on the 1621 Act* 25 and 34; *Bateman & Chaplane v Hamilton & Co* (1686) Mor 1067; *Spence v Creditors of Dick* (1692) Mor 1014.

This end might be achieved by positing a duty not to induce or knowingly facilitate the breach of obligations to which you are a third party. This does not amount to binding third parties to the contract, because no positive performance can be exacted from them. Failure by the debtor to perform will not entitle the creditor to sue a third party for performance. Their obligation is merely a passive duty not to interfere, analogous to the general duty of non-interference which applies to corporeal property owned by another. The extent of the passive obligation is different but that is explicable because it is much more difficult for third parties to know about personal rights. Given the rule *quod nullius est fit domini regis*, all physical things are owned (except those narrowly defined classes which are considered *res nullius* and thus subject to appropriation by *occupatio*).[392] Therefore, someone who knows an object is there also knows that it is subject to a right of ownership which means that he should not interfere with it. There is no such warning with personal rights because they are invisible.[393] If either a traditional Gaian or a Ginossarian view[394] of ownership is accepted then the passive obligation might be regarded as an incident of the creditor's ownership of his personal right against the debtor.[395]

It might still be objected that a private act between the creditor and the debtor is imposing an obligation on third parties who have no part in the transaction. However, the law already recognises the creation of servitudes and liferents, which impose passive obligations on third parties who have no say in the relevant transaction. Indeed, it recognises *occupatio* by unilateral act, which has the same effect. The difference between the situation at hand and *occupatio* or a grant of liferent or servitude is that the object of the passive obligation is a personal rather than a real right. Hitherto, that distinction has been thought to be crucial in the standard Scots law analysis.[396] Therefore, a general passive obligation not to interfere with personal

[392] Reid *Property* paras 540–6.
[393] S Ginossar *Droit réel, propriété et créance: Élaboration d'un système rationnel des droits patrimoniaux* (1960) No 32–3.
[394] For an English language summary of both the Gaian and Ginossarian positions, see Gretton "Ownership and its Objects" especially at 809–10.
[395] See Ginossar *Droit réel, propriété et créance* No 4 and 22–34, especially No 25. The argument is perhaps easier to make in the context of French law because of its concept of *opposabilité* (see in general R Wintgen *Étude critique de la notion d'opposabilité: les effets du contrat à l'égard des tiers en droit français et allemand* (2004)) and its use of the *gage général*.
[396] See eg Stair I.xv.4 and Reid *Property* para 3.

rights is a controversial proposition. If it only served to explain the voidability of transfers to bad faith grantees by insolvent debtors, it might be thought unjustified.

However, such a universal passive obligation would also explain the bad faith element of the so-called "offside goals rule" and the liability of bad faith successors to voidably acquired property. It also appears to be implied by the nominate delict of inducing breach of contract. These matters will be discussed further in chapter 7. For the present, it suffices to observe that, together with the present subject, they constitute a group of rules which would be conveniently explained by such a proposition.

Therefore, it might be suggested that the vulnerability of a bad faith grantee from an insolvent debtor is based on his knowing facilitation of the debtor's attempt to frustrate measures which creditors might take to obtain satisfaction, and that this knowing facilitation amounts to breach of a duty which everyone owes in respect of all personal right-obligation relationships to which they are not parties.

There is no evidence of any attempt to analyse the issues at this level of abstraction in the *Corpus Iuris* but the basic rule on participation in fraud was clear. This general rule was subject to two significant qualifications, which would have a major impact on Scots law and indeed on the development of the *ius commune*.[397] First, the requirement that the recipient knew of the debtor's fraudulent scheme was waived where the transaction was a gift. However, in that case the donee's liability was limited to his enrichment.[398] Secondly, one who merely received what was due did not commit fraud even if he knew of the debtor's insolvency.[399]

(a) Gratuity as a substitute for fraud

Since the basic rule was based on the grantee's fault, some justification was needed for extending it to cases of gratuitous acquisition in good faith. The reason given by Ulpian is that stripping away an enrichment did not amount to imposing a loss on the donee.[400] On a very short-term view, this is patently false: immediately prior to the

[397] For the latter see Ankum *Geschiedenis*.
[398] D.42.8.6.11.
[399] D.42.8.6.6.
[400] D.42.8.6.11.

restoration of the gifted property, the donee had an item is his patrimony which is not there afterwards.

The argument might be refined, suggesting that the loss which is imposed merely strips away an enrichment which was not justified and that such a stripping away is not a true loss.[401] Since the enrichment was unjustified, an obligation to return the item arose as soon as it was received. That duty might be regarded as forming either a negative part of the patrimony or as a liability of the patrimony. Reversing the transaction removes the asset received but it also extinguishes an obligation of equal value. Therefore, in some sense at least, the patrimony is undiminished by the reversal. That analysis has the advantage of reflecting the limitation placed on recovery in Roman law (ie to the donee's enrichment). To hold good, however, it must be possible to establish that the donee was indeed liable in enrichment. At least from the perspective of Scots law, this presents some challenges.

The transfer cannot be said to be without justification. The donative intention of the giver is generally accepted as a sufficient ground to support the transfer.[402] The *condictio ob turpem vel iniustam causam* is of no assistance, since it does not justify a retransfer from an innocent transferee to a guilty transferor.[403] Further, the creditor is a third party to the relevant transaction and so must overcome the general presumption against claims for reversal of indirect enrichment.[404] Even within the category of indirect enrichment, the third party creditor's case is a tenuous one. It is difficult to locate a transfer of wealth from the pursuer to the defender. This is not a case where the asset has passed into the defender's patrimony from the pursuer's through that of a third party.[405] It is a case where the asset in question was never part of the pursuer's patrimony at all. Neither is it necessarily the case that the debtor used funds obtained through his relationship with the creditor to acquire the asset transferred.

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[401] Windscheid *Lehrbuch des Pandektenrechts* Vol I, §42.
[402] Eg Stair I.vii.1 and Bell *Prin* §533.
[403] See R Evans-Jones *Unjustified Enrichment – Enrichment by deliberate conferral: condictio* (2003) ch 5, esp para 5.50.
[404] Evans-Jones *Unjustified Enrichment* para 8.01.
[405] This might be regarded as "vanilla" indirect enrichment: see N Whitty "Indirect Enrichment in Scots Law" 1994 JR 200 at 205.

It is true that modern analysis of the English rules on fraudulent conveyances has suggested that they are based on unjust enrichment.[406] However, the analysis which supports that is dependent on the unjust-factor model of enrichment, particularly recognition of "policy motivated unjust factors" including the general policy of insolvency legislation.[407]

Scots law does not adopt an unjust-factor approach to enrichment claims[408] so the English analysis would sit uncomfortably.[409] There is perhaps also a question about whether saying that a transfer by the debtor gives rise to an unjust enrichment adds very much when the enrichment is only considered to be unjust because the policy of insolvency law says that it should be. An enrichment based account has also been proposed in Germany.[410] The general approach to enrichment law in Germany is a little closer to Scotland's so it might be thought a more promising model.[411] It must be borne in mind, however, that the German analysis bases the claim to recovery not on the *Leistungskondiktion*[412] but on the *Eingriffskondiktion*[413].[414] The former covers those cases which Scots lawyers would regard as instances of enrichment by deliberate conferral; the latter typically covers cases where the enrichment arises through unlawful interference with the disenriched party's property.[415] At first sight, the *Leistungskondiktion* might seem the more appropriate basis because there has been a direct transfer to the enriched party. The problem is that the expense which is being relied on is not that of the transferor but that of the creditors, who have had no part in the performance. Therefore, it is necessary to fall back on the *Eingriffkondiktion*. That option is plausible in German law, because the actions of the insolvent debtor and his grantee can be seen as instances of unlawful interference

[406] S Degeling "Restitution for Vulnerable Transactions" in J Armour and H Bennett (eds) *Vulnerable Transactions in Corporate Insolvency* (2003) 385; R Goode "The Avoidance of Transactions in Insolvency Proceedings and Restitutionary Defences" in A Burrows and A Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (2006) 299. Goode relies (at p 300) on Degeling's analysis to justify the enrichment analysis.
[407] Degeling "Restitution for Vulnerable Transactions" paras 9.49–59.
[408] See Evans-Jones *Unjustified Enrichment* paras 1.63–1.84.
[409] In passing, it may be noted that some have suggested that English law no longer follows an unjust factor approach either: P Birks *Unjust Enrichment* (2nd edn, 2005) 101–128.
[410] Summarised in Koziol *Grundlagen und Streitfragen* 55–65.
[411] Evans-Jones *Unjustified Enrichment* paras 1.67–1.78.
[412] "Performance *condictio*".
[413] "Interference *condictio*".
[414] Koziol *Grundlagen und Streitfragen* 55.
[415] H Sprau "§812" in O Palandt *Kommentar zum Bürgerlichesgesetzbuch* (67th edn by P Bassenge et al, 2008) Rn 2 and 12–5.

with the *Haftungkreis* contrary to the creditors' *Befriedigungsrecht*. That option is not available in Scots law (and presumably was not available in Roman law) because there is no right analogous to the *Befriedigungsrecht* whose object can be regarded as having been interfered with.

The most promising Scottish basis for the exception is the "no profit from fraud rule". This rule takes its name from a *dictum* of Lord Chancellor Campbell, which was adopted by Lord Shand in *Clydesdale Bank v Paul*:

> I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he is not only innocent of the fraud, but has given some valuable consideration.[416]

The principle was later adopted in *New Mining and Exploring Syndicate v Chalmers & Hunter*[417] and then by Menzies and Gloag.[418] Menzies used it to justify imposing a constructive trust on gratuitous or bad faith acquirers of property transferred in breach of trust. For present purposes, Gloag's characterisation of the rules as giving rise to "a liability closely resembling that resulting from recompense" is more relevant. It suggests a rule which exists at the edge of the law of unjustified enrichment.[419]

In *New Mining*, the Lord Ordinary, Lord Skerrington (whose judgment was approved in the Inner House) suggested, that the statement was equivalent to Stair's invocation of "that common ground of equity, *Nemo debet ex aliena damno lucrari*."[420] The maxim and its cognates[421] may be traced back to two fragments from the Digest,[422] one from the title on the *condictio indebiti*, the other from the collection of *regulae iuris*, expressing the general rule against unjustified enrichment. They became particularly associated with attempts to develop a general

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[416] (1877) 4 R 626 at 628. The English case from which the passage is take is *Scholefield v Templer* (1859) 45 ER 166.
[417] 1912 SC 126.
[418] AJP Menzies *The Law of Scotland Affecting Trustees* (2nd edn, 1913) No 1271 and Gloag *Contract* 332.
[419] Gloag discusses the rule in his chapter on "*Quasi*-contract and implied obligations".
[420] 1912 SC 126 at 133 and 137 per Lord Mackenzie, quoting Stair I.vi.33. Trayner translates the maxim: "No one should be enriched out of the loss or damage sustained by another."
[421] *Nemo debet locupletari aliena jactura*, *Nemo debet ex aliena jactura lucrari* and *Nemo debet locupletari ex alterius incommodo* are all given by Trayner.
[422] D.12.6.14; D.50.17.206.

enrichment action which went so far as to encompass *negotiorum gestio*.[423] The particular example discussed by Stair is that of a minor who transacted without the consent of his curators. Such transactions were void, but the counterparty could recover if the money lent had been spent on necessities. Stair bases this exception on the "common ground of equity" expressed by the maxim. Of course, this situation is far removed from one who has benefited from the fraud of another.

Lord Skerrington's approach may be seen as an attempt to tie the no profit from fraud rule into a broad conception of unjustified enrichment. In the modern law, however, this is somewhat problematic. Scots enrichment law may be broad and unitary but it is rarely suggested that it is broad enough to capture the law of *negotiorum gestio*, and some explanation would still be needed of why recovery is permitted despite this being an instance of indirect enrichment.

This concern about fit may be part of what led Gloag to describe the rule as one "closely resembling" recompense rather than an instance of recompense itself. Similarly, Dot Reid has suggested that the rule owes more to the broad Scholastic conception of restitution, which cuts across the classical categories of obligation.[424] However, such accounts have the potential to leave the rule adrift from the broader framework of private law.

This problem may be mitigated by seeing the "no profit" rule as relating to the rule in cases of fraud in a similar manner to the way voidability for innocent misrepresentation relates to fraudulent misrepresentation. Had the recipient been aware of the circumstances of the gift at the time it was made, he would have been bound to refuse it. Failure to do so would have amounted to participation in the fraud. As with innocent misrepresentation, it might be considered fraudulent to attempt to hold on to an enrichment when the donee would have been bound to refuse it had he known at the time of the transfer what he knows now.

It should be borne in mind that, while voidability for innocent misrepresentation was explained by reference to its connection with fraudulent misrepresentation, this does not imply liability in damages (at least for the period until the misrepresenter

[423] See DH van Zyl "The General Enrichment Action is Alive and Well" 1992 *Acta Juridica* 115 at 117–28.
[424] Reid "Fraud in Scots Law" 238–42. Further on this topic see G Dolezalek "The Moral Theologians' Doctrine of Restitution and Its Justification in the Sixteenth and Seventeen Centuries" 1992 *Acta Juridica* 104.

becomes aware of the true facts). By setting aside the transaction, the court effectively prevents a delict from being done. Similarly, understanding the vulnerability of a gratuitous alienee as related to fraud need not imply an obligation to pay damages on the grantee. This line of reasoning does not, therefore, imply that the gratuitous acquirer is liable in delict. Rather, it explains why an exception might be made to the technical objections to recovery in enrichment.[425]

In Scotland, due to the terms of the 1621 Act, the gratuity exception has tended to overwhelm the rule,[426] with non-gratuitous cases existing on the analytical periphery. When the focus is on gratuitous alienations, it can seem rather difficult to see why early-modern Scots lawyers linked the rule so closely to fraud. This approach makes a lot more sense, however, if they saw the Scottish rules as merely the local version of a European rule which was firmly grounded in fraud.

The terms of the 1621 Act also meant that it was not initially necessary to engage with arguments of this type. The first part of the Act was directed against gratuitous transactions, so there was no need to derive their vulnerability from fraud. As will be shown below, Scots law eventually developed a distinct common law challenge to fraudulent transactions which existed alongside the 1621 Act. When this ground was used to challenge gratuitous grants, and the grantee was in good faith, Scots lawyers deployed a line of reasoning which contains the germ of the argument set out above.

(b) Creditors who received what they were due

The second qualification was that one who merely received his due could not be regarded as acting fraudulently.[427] This meant that a creditor who had been paid, or received a conveyance or real right which the debtor was specifically obliged to grant, was safe from challenge. Even if a passive obligation to respect other people's personal rights is recognised, it is balanced by an entitlement to look to one's own

[425] On indirect enrichment see Whitty "Indirect Enrichment in Scots Law".
[426] Goudy's discussed the subject under the headings "Gratuitous Alienations at Common Law", "Fraudulent Preferences at Common Law", "Act 1621, c 18—Gratuitous Alienations" and "Act 1621, c 18—Alienations in Defraud of Diligence". McBryde *Bankruptcy* appears to take a similar approach, as the chapter dealing with challengeable transactions is entitled "Gratuitous Alienations and Unfair Preferences". The substance of McBryde's treatment does not privilege the gratuitous alienation to the same extent that Goudy's, however.
[427] D.42.8.6.6.

interests first and to seek satisfaction from the debtor. This principle would be a significant controlling factor in the development of the law of fraudulent preferences.

(2) The common law prior to the 1621 Act

The description of a transfer of property against which diligence was being done as being "in defraud of creditors" was not unique to *Ramsay v Wardlaw*. A statute of 1592 described purported transfers of moveables by debtors at an unrelaxed horn as "maid in defraud of the creditour".[428] Similarly, the old form of letters of inhibition[429] narrated that the inhibited party "does therefore intend, in defraud and prejudice of the complainer (as he is informed) to sell, annailzie, wadset, dispone, resign, burden or otherwise dilapidate" all of his property, heritable as well as moveable. Although, by Craig's day, the inhibition was no longer thought to affect moveables,[430] the form of words used suggests that inhibition was regarded as Scots law's response to attempts to defraud creditors. This impression is supported by Stair's comment that inhibitions were introduced because debtors were "dilapidating their estates" and that they "are much more ancient and extensive than the remedy by reduction *ex fraude creditorum*, which is determined by that excellent statute of Session, ratified in Parliament, *anno* 1621."[431] For Balfour, alienations in breach of inhibition "ar of nane avail, as done *in fraudem creditoris*".[432]

Craig's position is even stronger. He uses the Roman law rule as a comparative counterpoint in his discussion of inhibitions.[433] He suggests that inhibitions, which are publicised and thus a matter of constructive notice, are preferable to the Roman law remedy because of the difficulty of proving the recipient's knowledge. Craig

[428] Act 1592 c 147, *RPS* 1592/4/88. As discussed in chapter 5, horning was a form of diligence which gave rise to single escheat by which his moveable assets were confiscated by the Crown *inter alia* for the benefit of the creditor who had used the horning. Therefore grants by a debtor on whom horning was used diminished the pool of assets available to the creditor.
[429] Recorded by Stair at IV.xl.3. A short form was introduced by the Titles to Land Consolidation (Scotland) Act 1868 s 156, Sch QQ. These were repealed by the Abolition of Feudal Tenure (Scotland) Act 2000 s 76(2) and Sch 13 para 1. Under s 146 of the Bankruptcy and Diligence (Scotland) Act 2007, letters of inhibition are no longer a competent method of inhibiting.
[430] Craig I.xii.31.
[431] IV.xl.3.
[432] *Practicks* 185 c XXIV.
[433] I.xii.31.

took the idea that inhibition was a remedy against fraud by creditors sufficiently seriously to consider whether a transfer in breach of inhibition by a solvent debtor was nonetheless valid. Craig thought that there was "much to commend" this view but recalled that the court had decided to the contrary in a case between the Dowager Countess of Crawford and the Laird of Garthland.[434]

The widespread view that inhibition was Scots law's response to fraud on creditors might be expected to discourage reliance on the *ius commune* rules in this area. There were, however, some cases in the sixteenth century in which transfers were held null on the basis that they were "in defraud of creditors" despite the absence of any diligence.

The most striking is *Kennedie v Somervill*. It concerned a debtor who, prior to summons, had alienated so many of his assets that he was incapable of complying with the decree when it was obtained. Balfour explains that the court held that the transfer "aucht and sould be reducit, as done and maid efter the dait of the decrete, in defraud and hurt of the creditour obtenar thairof."[435] This indicates that a rule was already established which rendered null any alienation made after decree which rendered the debtor unable to comply with it.[436] It also illustrates the court's willingness to employ a legal fiction (deeming the transfer to have been made after the decree rather than before it) to expand the ambit of this rule. The extended rule also seems to have been applied in *Innes v Oliphant*[437] but that case indicates some reticence: Balfour's account emphasises the fact that the alienation was made after the date of summons.

Balfour stresses that there is no requirement of a close relationship between the debtor and the recipient, although the disponee in *Innes* was the debtor's "tendir kinsman".[438] He gives no indication of whether either bad faith or gratuity was requisite. However, some other sources suggest that they were being taken into account. This first appears in the manuscript record of the Acts of the Lords of

[434] This case has not been found.
[435] (1504) Balfour *Practicks* 184 c XXI.
[436] A number of subsequent cases attest to this rule: *Fleming v Drummelzear* (1525); *Mouat v Kynnaird* (1531) (also summarised on the basis of the manuscript records of the Acts and Decreets of the Lords of Council and Session in A M Godfrey *Civil Justice in Renaissance Scotland* (2009) 350); *Waterstoun v Laird of Teiling* (1553) and *Spens v Chalmer* (undated) (all listed in Balfour *Practicks* 185 c XXIII).
[437] (1530) Balfour *Practicks* 184–5 c XXII, Godfrey *Civil Justice* 349–50.
[438] See Godfrey's paraphrase.

Council and Session. In 1512, John Inglis sold lands to his brother Gilbert. At the time, he was liable in warrandice to Margaret Allan and did not have other lands which were sufficient to meet the obligation. Twenty years later[439] she challenged this, alleging that Gilbert knew of both the liability and the absence of other lands. There was also a suggestion that the sale was a sham because Gilbert had not paid the agreed price. Gratuity was also alleged to support a plea for nullity in *Spens v Anstruder*.[440] Strikingly, the pursuer in *Spens* sought to cast an assignation as "simulat" on the basis that it was made "to ane conjunct person without any reasonable caus [sic]".

These cases seem to suggest that Scots law was on the way to developing a common law rule along the lines which the 1621 Act would eventually establish. Key elements such as the insufficiency of assets to meet obligations, the link with simulation, and the relevance of gratuity and bad faith, were beginning to emerge. Unfortunately, the laconic nature of the records from this period mean that there is no indication of the sources which were relied on.

One contrast with later law is worthy of note, however. The majority of these decisions turn on the sufficiency of the debtor's assets to meet a particular decree rather than on absolute insolvency (ie ability to meet all debts).[441] The approach is not surprising. In the absence of a collective insolvency procedure (which was not introduced into Scots law until 1772),[442] absolute insolvency would be very difficult to establish.[443] This did mean, however, that many transfers caught by the later law would not have been captured by the rules in these early cases. A debtor may well have sufficient assets to pay any one of his creditors without having enough to pay all of them. This focus also makes it much more difficult to see the rules as being primarily directed at ensuring equal treatment of creditors. Rather the policy behind the rule is clearly to prevent frustration of particular creditors' attempts to obtain satisfaction.

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[439] Godfrey *Civil Justice* 350. Godfrey gives no date for the case but the manuscript in which it is recorded (NAS CS 6/2) covers the period 12 November 1532 to 5 July 1533).
[440] (1570) Maitland *Practicks* Item 312.
[441] *Spens* is an exception.
[442] Goudy *Bankruptcy* 1–3.
[443] See Ankum *Geschiedenis* 392 and Grevesmühl *Gläubigeranfechtung* 110 making the same point in respect of Roman law.

C. THE 1621 ACT

The matter was not left for the courts to develop. One of the areas of law reform which the 1567 Commission was instructed to consider was "ane artickle for thame that puttis thair sonnis or freindis in thair landis or makis assignatiounis of thair gudis in defraude of the executioun of decreitis".[444] The desire for legislation in this area reflects a preference for statute over other sources of law in this period,[445] a general concern with the state of the statute book during the reign of James VI,[446] and legislation on this topic elsewhere in Europe.[447] The reference does, however, frame the issue in distinctly Scottish terms, following the sixteenth-century cases in focussing on defraud of decrees.

Neither the 1567 Commission nor the 1581 Commission produced the general statute envisaged. In 1582, however, the Lords made an Act of Sederunt concerning the execution of decrees. Its narrative discloses that it was motivated by concern that delays in execution opened the way for "simulatt and fals assignationis of [the debtors'] movable guidis, fraudfull and private alienationis of thair possessionis, landis and heretageis". The remedy, however, was not a challenge to the grants but expedited execution. The Act of Sederunt was ratified by Parliament in 1584.[448]

Eventually the judges took the matter up with a further Act of Sederunt in 1620, ratified by parliament the following year. It is reproduced in the Appendix to this thesis with added section markers. The Act falls into five parts: [a] the ratification by Parliament, [b] the preamble to the Act of Sederunt, [c] the provision regarding

[444] *RPS* A1567/12/24. The Commission was renewed in 1581: *RPS* 1581/10/28.
[445] Eg Craig I.viii.12–17. On Skene's view see JD Ford *Law and Opinion in Scotland During the Seventeenth Century* (2007) 57–58 and 129–30.
[446] Two commissions were instructed to collect and revise the statutes in the 1570s (1575 (*RPS* A1575/3/7) and 1578 (*RPS* 1578/7/18)) and there were further attempts in the seventeen century (*RPS* 1633/6/47). These produced no effect but the period saw a battery of particular statutes, the best known are probably the Compensation Act 1592 c 143, *RPS* 1592/4/83; the Prescription Act 1617 c 12, *RPS* 1617/5/26; and the Registration Act 1617 c 16, *RPS* 1617/5/20.
[447] Gerhardt summarises provisions in municipal laws in Germany and Italy: *Die systematische Einordnung* 62–79. For Italian and French legislation of the period, see Ankum *Geschiedenis* 417. For discussion of English law, see Willems *Actio Pauliana*.
[448] 1584 c 139, *RPS* 1584/5/21.

transfer to conjunct or confident persons, [d] the provision protecting partially completed diligence and [e] a provision imposing a Scots law version of *infamia*.

(1) An Act of Sederunt[449]

To modern eyes, the first surprising thing is that the legislation was initially an Act of Sederunt rather than a statute. The statute ratifying the institution of the College of Justice had expressly conferred on the judges a power to make "sic actis, statutis and ordinancis as thai sall think expedient for ordouring of processes and haisty expeditioune of justice"[450] but, on its face, this legislation seemed to concern substantive rights rather than procedure.[451]

Discomfort about competence may explain why the Lords felt it necessary to make explicit reference to the basis in Roman law.[452] Mackenzie adopts this line of thinking, arguing that, had the court been faced with a case in which a disposition had been made in fraud of creditors, it would have been justified in adopting the Roman law rule (and indeed expected to do so). Instead it had decided the case "in *Hypothesi* [rather] than in *Thesi*."[453]

Any deficiency of competence was, of course, quickly cured by the parliamentary ratification but the origins of the Act might go some way to explaining the judges' later willingness to adopt a very flexible interpretation. If the Act had been simply concerned with proof, it would have been easier to present as within the court's procedural jurisdiction but this argument did not occur to Mackenzie. This is not

[449] The statutory text is the most reliable record of the Act of Sederunt because the Book of Sederunt for the period 1608 to November 1626 was lost in 1674. See I Campbell (ed) *The Acts of Sederunt of the Lords of Council and Session from the Institution of the College of Justice in May 1532, to January 1553* (1811) 64. However, Campbell's collection does reproduce an abstract of the Act of Sederunt as preserved in Fountainhall's manuscripts in the Harleian collection (now held at the British Library) and in Pitmedden's Abridgment of the Books of Sederunt (Adv MS 25.2.2). The abstract gives the date as the 13th rather than 12th July (as does Hope *Major Practicks* II.13.18) includes no preamble or summary of parts [c3] or [e]. The summary of part [d] mentions payment but not the grant of any other right.

[450] 1540 c 93, *RPS* 1540/12/64.

[451] There are other examples of essentially substantive Acts of Sederunt which were later ratified by parliament: eg 1579 c 75, *RPS* 1579/10/28; 1584 c 139, *RPS* 1584/5/21. See also the apparently substantive Act of Sederunt "Anent executors creditors" of 28 February 1662, but cf Campbell's view that the statute merely articulated a principle of common law: Campbell *Acts of Sederunt* xii. For a discussion of changing attitudes to the proper scope of Acts of Sederunt see *ibid* xv–xvii.

[452] None of the Scottish materials (and indeed none of the European materials consulted) make reference to Canon law texts on this point. It seems likely that the phrase "lawis, civill and cannone" is simply a catch all term for the *ius commune*.

[453] Mackenzie *Observations on the 1621 Act* 5–6. See Erskine making a similar argument and identifying other instances at I.i.40.

surprising because the terms seem to make express provision regarding the validity of juridical acts. Similarly, if Mackenzie had taken the view that the Roman law rule had already been received into Scots law, he might have been expected to make reference to this as well as to the Roman law precedent. He did not do so.

It may, however, be that nineteenth-century perceptions about the proper sphere of Acts of Sederunt contributed to Bell and M'Laren's view that the Act was essentially concerned with proof. In fact, the Act has substantive provisions and they give an insight into the way Scots lawyers thought about the issue in the first part of the seventeenth century.

(2) Narrow scope

The Act focuses on two relatively narrow cases: a transfer to a conjunct[454] or confident person for which there was no "trew, just and necessarie" cause; and voluntary payment or transfer in prejudice of prior diligence. In contrast to the approach in the *Corpus Iuris* and in the English statutes[455] there is no general provision striking down deeds made with the intention of defrauding creditors.[456]

This narrow scope was to prove a major defect. A great number of the cases which came before the courts did not fit into either of the two categories. As discussed below, this led to pressure for flexible interpretation[457] and to recognition of common law rules alongside the statutory provisions.

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[454] Ie related.

[455] 34 & 35 Henry VIII c 4; 13 Eliz c 5 s 2. Bell suggests that it the latter provision was clarified by later legislation (1 James I c 15, s 5), which provided that grants by the commissioners of bankruptcy would prevail over voluntary deeds given without onerous consideration. It should be borne in mind, however, that the latter statute (in contrast with the Stature of Elizabeth) only applies to deeds by one who has committed an act of bankruptcy (similar to the requirements for notour bankruptcy) as defined in s 2 of the statute.

[456] This approach was also that adopted in France in a 1609 Edict of Henry IV and in the *Code marchand* promulgated by Louis XIV in 1673 (for which see Gerhardt *Die systematische Einordnung* 83).

[457] Which was at odds with the general approach to statutes with penal elements (as this act did in part [e]).

(3) Fraud or gratuity?

There is a tension within the provision on transfer to conjunct or confident persons. The latter part[458] provides that fraudulent intent is presumed where it is proved either (i) that the transfer was made without a just price really paid or (ii) that the receiver sold the assets on and the debtor got the benefit of the price obtained. This suggests that the drafters still regarded fraudulent intent as essential for liability. This is rather surprising because the condition for nullity expressed at the beginning of the provision is not fraud but the absence of a "trew, just and necessarie" cause. One might reasonably ask why it was necessary to establish fraud in these circumstances.

The tensions within the Act might be explained in the following way. The Civilian background of Scots lawyers from the period made it almost inevitable that they would conceive of actions by debtors which defeated their creditors in terms of fraud. They would have been aware of the *praesumptiones fraudis* which were recognised in the *ius commune*. One of these arose when a gift was made to a close relation.[459] It is clear from the preamble to the Act of Sederunt that the drafters considered fraud by the debtor as the relevant mischief. This is also reflected in part [e], which is an attempt to reflect Roman law *infamia*.[460]

As Craig makes clear, they were also aware of the challenges regarding proof of intention to defraud. One possible response would be to introduce a presumption of fraudulent intent triggered by proof of certain objectively discernible facts. The other would be to craft a rule which turns on such criteria *tout court* rather than using them to establish fraud. These objective conditions could, nonetheless, refer to circumstances where fraud is likely to be present.

At a conceptual level, there is a substantial difference between the two approaches: one operates at the level of proof and ensures that the relevant boxes are ticked; the other operates at the substantive level, controlling which boxes require to be ticked. In practical terms, however, they feel very similar. In both cases, the grant can be challenged by establishing certain objective facts (since it will typically be

[458] Marked [c3] in the appendix.
[459] Willems *Actio Pauliana* 178–181.
[460] In Roman law, condemnation under a number of *actiones* where the relevant conduct reflected badly on the character of the person liable resulted in *infamia*. Infamous persons were subject to various legal disabilities and regarded as disgraced: see WW Buckland *A Textbook of Roman Law from Augustus to Justinian* (3rd edn by P Stein, 1963) 91–2.

very difficult for the debtor to rebut any presumption once it has been raised). Given this, and the fact that both techniques can be regarded as responses to the problem of proof, it is not surprising that the distinction is not always strictly maintained. [461]

If the starting point for development is a rule based on fraud, a system might initially deal with problems of proof by means of presumptive fraud and develop from there to objective conditions for challengeability.[462] It may be that the tensions in the 1621 Act reflect a lack of clarity about where Scots law was in this process. The ambiguity persisted for some time. Bankton describes the effect of part [c] as "Statutory Presumptive fraud",[463] despite having earlier observed that this part of the act "concerns Gratuitous rights granted by a bankrupt in prejudice of prior creditors".[464]

(4) Prejudice to creditors

Part [c] makes no reference to the condition of the granter at the time of the act which was impugned. Instead it merely requires that a lawful debt had been contracted prior to the act which was impugned and that the act was prejudicial to creditors' interests. This marks a departure from the earlier Scottish approach because it focuses on prejudice to creditors in general rather than to a particular decree.

The formulation left two questions open for later litigation to settle. Did the creditor bringing the challenge require to have been a creditor at the time of the grant or did it suffice that there were other creditors? And did it suffice that the debtor was

[461] See eg Gerhardt *Die sytematische Einordnung* 78 suggesting that the presumption of fraud in the period running up to bankruptcy laid the foundation for the objectivisation of the requirements for challengeability in the Italian city states. See also N Hoffmann "*Die Actio Pauliana im deutschen Recht: Gläubigeranfechtung nach dem Anfechtungsgesetz und der Insolvenzordnung*" in Forner Delaygua *La protección del crédito en Europa* 153 at 155 and 161. For a Scottish example see JS More *Lectures on the Law of Scotland* (1864) Vol II, 339–40.

[462] This pattern of development is evident in a number of systems, although the fraud based rule often remains as a fall back: Gerhardt *Die systematische Einordnung* 75, 77-8, 82-8, 108 and De Weijs "Towards an Objective Rule on Transaction Avoidance in Insolvencies". There was also resistance to this approach, however. In Germany, the *gemeines Recht* rejected the objective rules found in the municipal laws of many of the Hanseatic cities in favour of the traditional Roman law approach: Gerhardt *Die systematische Einordnung* 81.

[463] I.x.85.

[464] I.x.73.

bankrupt at the time of challenge or did the creditor require to show something about his condition at the time of grant?

(5) Conflation of simulation and fraudulent grants

Fourthly, parts [b] and [c3] follow *Spens v Anstruder*[465] as well as the English statutes in conflating simulation and fraud on creditors. The former provision describes the acts of debtors as "simulate and fraudfull"; the latter gives a clear example of simulation: where the disponee sells the assets and applies the proceeds for the benefit of the debtor. The transfer is effectively a sham to protect the proceeds of the sale from the creditors. In this way, the statute rejects the distinction, first observed by Bartolus but generally accepted thereafter, between simulated acts (which were null *ipso iure*) and acts in fraud of creditors (which were valid until challenged by creditors).[466]

Part [c3] also casts some light on the nature of the creditors' right against the disponee. The disponee is liable to pay over the proceeds to the creditors, subject to a deduction for any part of the price already paid to creditors. If part [c] was simply concerned with the validity of the act such a provision would be difficult to explain.[467] The fact that the transfer was challengeable when the asset was in the disponee's hands would not, in and of itself, explain why the price should be paid to the creditors. If, however, the basis of the challenge is the fraudulent grantee's liability to make reparation for his role in diminishing the pool of assets available to the creditors, then it makes sense that (as with misrepresentation) either natural or pecuniary reparation would be possible.

Such an analysis would also explain why there was a deduction for funds paid out to creditors. To the extent that the funds had been paid to lawful creditors, no wrong was done and therefore the right to reparation could only cover the residue. While a right to reparation in delict is frequently subject to such modification, it is more difficult to marry such thinking with the "on-off" analysis which would apply if the question was simply whether the act was valid or not. An analysis in terms of

[465] (1570) Maitland *Practicks* Item 312.
[466] Ankum *Geschiedenis* 399–400 and Willems 158–9.
[467] Unless resort was had to an argument based on tracing or real subrogation.

personal rights against the grantee would also explain why it was possible to limit the donee's liability to his enrichment.[468]

(6) Protection for good faith purchasers

Finally, the rules on protection for good faith purchasers are evidence of the relative immaturity of thinking about voidness and voidability in this period. It was clear that good faith purchasers were to be protected. In modern law this result can be explained very simply. The transfer is valid until the creditors choose to attack it, meaning that the acquirer has the power to make someone else the owner up to that point.

The protection for such buyers in part [c2] might be thought closer to that in sections 24 and 25 of the Sale of Goods Act 1979 than to a voidability rule, particularly since part [c1], provides that the relevant deeds are null by exception. However, at least in relation to heritable grants, nullity by exception was quickly replaced by nullity by action.[469] Further, as has been noted, other aspects of the Act suggest the creditor's right is a personal one. When Scottish writers sought to present the protection of good faith purchasers in a conceptual framework, they characterised the challenge as being based on a personal right rather than a question of the fundamental nullity of the impugned transaction. That meant that the protection of good faith third parties followed as a natural consequence.

When Mackenzie discussed [c2], his first resort was to the characterisation of the *actio Pauliana* by "the Doctors". He noted that the Gloss and certain other interpreters considered the *actio Pauliana* to be a personal rather than a real action because the receiver's liability depended on his conduct rather than the mere fact of possession, and observed that "Our Law agrees in this with the Civil Law".[470] Mackenzie's position, however, was not altogether consistent.

In an earlier passage, Mackenzie cast doubt on the standard justification for allowing challenges under the 1621 Act or the *actio Pauliana* to be brought by

[468] D.42.8.6.11.
[469] Mackenzie *Observations on the 1621 Act* 24; Stair I.ix.15; Forbes *Institutes* Vol I, 223; Bankton I.x.108 and Bell *Comm* II, 181–2.
[470] Mackenzie *Observations on the 1621 Act* 24-5. The European position was not quite as clear cut as Mackenzie suggests. On the debates on the characterisation of the *actio Pauliana*, see Ankum *Geschiedenis* 402–5.

creditors with "incomplete" rights: those whose right is either not yet due or subject to an as yet unfulfilled condition.[471] The common view, he suggested, was that such creditors needed to be protected from the risk of the transferee's insolvency. This analysis flows naturally from the personal right analysis. Mackenzie, however, objected that "Reductions are *in rem*" and so are not affected by supervening insolvency. He conceded that a transfer to a good faith purchaser would defeat the reduction but pointed out that it was open to creditors to protect themselves against that risk with an inhibition.

The other interesting thing about this passage is the absence of any reference to the so-called *tantum et tale* rule.[472] The precise scope of this rule has always been rather uncertain but, at its narrowest, it suggested that attaching creditors took their debtor's property subject to any rights of recovery arising from fraud by the debtor in its acquisition. Given that the transfer was thought to be a species of fraud, *tantum et tale* might have provided an explanation for the results which Mackenzie suggests: the right to challenge survives the transferee's insolvency but not subsequent transfer. Conversely, if *tantum et tale* was accepted here, the necessity on which proponents of the standard justification relied for recognising 1621 Act challenges by holders of incomplete rights would not obtain. The absence of reference to *tantum et tale* is evidence of its lack of purchase as a general principle in this period.

Whatever its cause, the absence of *tantum et tale* left Mackenzie with an analysis which implies that the right to avoid is a real right but that there is overriding protection for the good faith purchaser of the type found in the Sale of Goods Act 1979. As such it is inconsistent with the personal right analysis which he gives in his treatment of part [c2]. It seems, however, that the personal right analysis enjoyed more support. It is certainly the one which is reflected in discussion by other Scottish writers.

Stair explains the protection by observing that "Fraud is no *vitium reale* affecting the subject, but only the committer of the fraud and these who are partakers of the fraud".[473] Furthermore, Stair presents the Act within his title on the obligation to

[471] Mackenzie *Observations on the 1621 Act* 11.
[472] On which see chapter 8.
[473] I.ix.15. A similar approach is taken by Bankton: I.x.85.

make reparation for wrongs done.[474] This aspect of Stair's structure is followed by Forbes[475] and Bankton.[476]

Erskine treats the statute in the context of actions of reduction,[477] Bell in the context of bankruptcy.[478] These classifications, however, are contextual rather than analytical and do not imply that the reparation analysis is incorrect. This analysis is reflected in Hope's description of part [c] as rendering acts in defraud of creditors as "null at the instance of true and just creditors".[479] If the nullity operated *ipso iure*, there would be no question of it operating at anyone's instance. The phrase implies an innocent party's option of the type described by Stair in his general discussion of the remedies for fraud.[480]

The reparation analysis is also supported by the fact that a grantee could defeat a challenge by offering to pay the debt owed by the creditor. By doing so, he makes reparation for any wrong done, thus removing the creditor's interest in challenging the grant.[481]

As with misrepresentation, this analysis implies that avoidance of the gratuitous transfer is simply a direct way of placing the creditors in the position in which they would have been were it not for the debtor's wrongful conduct.

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[474] I.ix.15. There appears to be a slight confusion in the wording of the opening sentence of this section which seems to suggest that the debtor was a victim of the fraud but the general point is clear.
[475] *Institutes* Vol I, 222.
[476] I.x.73.
[477] IV.i.28.
[478] *Comm* II, 171; *Prin* §2324. Hume also treated the 1621 Act as part of his discussion of bankruptcy, which was treated after succession and before actions: Hume *Lectures on Scots Law, 1792–3* 165; Skene *Notes* fol 409r. In the latter, he explained his placement on the basis that bankruptcy, like succession was "one of the modes of transferring property."
[479] Hope *Major Practicks* II.13.18. It is also used in the abstract of the Act of Sederunt preserved by Fountainhall and Pittmedden. The phrase was picked up by Bell in the *Commentaries on the Municipal & Mercantile Law of Scotland: Considered in relation to the subject of Bankruptcy* (1804) Vol I, 65. This work would, in later editions, become the *Commentaries on the Law of Scotland*. In the later editions, the phrase used is "null, when challenged" (2nd edn, 1810 Vol I, 159; 7th edn Vol II, 172) but the sense is the same.
[480] I.ix.14.
[481] Steuart *Dirleton's Doubts* 331 and W Forbes *Great Body of the Laws of Scotland* (http://www.forbes.gla.ac.uk/) Vol I, 987.

D. APPLICATION OF THE 1621 ACT AND DEVELOPMENT OF THE COMMON LAW

As observed above, the scope of the two bases of challenge in the 1621 Act was, on its face, very narrow. This is illustrated by Bankton's summary:

> it consists of two principal parts: the first concerns Gratuitous rights granted by a bankrupt in prejudice of prior creditors who had done no diligence; the second, Rights granted by a bankrupt to one creditor, in prejudice of another's lawful diligence.[482]

Many of the transactions by fraudulent debtors were either not purely gratuitous or not made with conjunct or confident persons, and the creditors prejudiced had often not commenced their diligence. These pressures led the court to adopt a flexible approach to the conditions in the Act. Where this was felt to be impossible, the common law of fraud was allowed to resurface and fill the gap. The end point of this process was an independent common law challenge to transactions in fraud of creditors, which sat alongside the 1621 Act.

(1) Gratuitous grants

(a) The debtor's condition at the time of the grant

The most immediate challenge in applying the 1621 Act was establishing which transferors were caught by part [c]. As noted above, it made no mention of the condition of the granter beyond the fact that he was a debtor. However, the rubric of the Act indicated that it was concerned with deeds by "dyvoures and banckruptis".

There was considerable uncertainty as to whether these words should be read as limiting part [c]'s sphere of application. Even in those cases where it was presumed to do so, there was some uncertainty as to who could be considered a bankrupt or dyvour. A number of early cases on the Act seem to focus not on the sufficiency of the debtor's assets to meet his debts, but on events such as flight or its contemplation

[482] I.x.73.

or charges to pay which would later be considered conditions of notour bankruptcy.[483]

At the same time many argued that, provided the debtor was unable to pay his creditors at the time of challenge, his solvency at the time of the grant was irrelevant. This view rested on the fact that part [c] was limited to gratuitous transfers to conjunct or confident persons. The argument was that donees bore the loss more equitably than creditors and that those close to the debtor were in a better position to locate assets which were not well-known and to do diligence against them.[484]

The requirement that the debtor be absolutely insolvent at the time of the grant first established itself as a defence.[485] If the donee could demonstrate that the debtor had sufficient assets to pay his debts after making the gift then (absent any fraudulent scheme) he could establish that the creditors had not been prejudiced. The debtor had assets sufficient to meet his obligations. What he did with the rest of his assets was none of their business.[486]

The focus was on absence of prejudice rather than solvency *per se*, as is evidenced by the suggestion that certain assets which would be difficult for creditors to find out about or get access to could not be relied on for establishing solvency.[487] This objection lost some of its potency once a formal process of sequestration was introduced in 1772 because individual creditors no longer needed to find the assets.

Over time, absolute insolvency began to mature into a positive requirement. Steps in this direction are evident in cases where there was a significant lapse of time

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[483] Flight: *Finlaw v Park* (1621) Mor 895; *Richardson v Eltone* (1621) Mor 1047; *Scougal v Binnie* (1627) Mor 879. Charge to pay: *Craw v Persone* (1623) Mor 1047.

[484] *Kilgour v Thomson* (1628) Mor 910; *Lady Greenhead v Lord Lourie* (1665) Mor 931 (in the end the creditor failed for lack of prejudice in this case because the transferee was content to allow the access to the lands on the basis of his diligence against the transferor); *Dewars' Creditors Competing* (1710) Mor 923; Mackenzie *Observations on the 1621 Act* 4–5.

[485] *Pringle v Ker* (1624) Mor 931; *Lady Borthwick v Goldilands* (1629) Mor 914; *Garthland v Ker* (1632) Mor 915; *Clerk v Stewart* (1675) Mor 917; *Creditors of Mouswell v Children of Mouswell* (1679) Mor 934; *M'Kell v Jamieson & Wilson* (1680) Mor 920; *Guthrie v Gordon* (1711) Mor 1020; *M'Kenzie v Fletcher* (1712) Mor 924; *Executor Creditors of Meldrum v Kinnier* (1717) Mor 928 *Creditors of Hay, Competing* (1742) Mor 929; Stair I.ix.15.

[486] Formally, Mackenzie appears to support this position but his exceptions seem to swallow his rule and place him effectively among those who did not require insolvency at the time of the grant: *Observations on the 1621 Act* 3–5

[487] As in Kerse's report of *Garthland v Ker* (1632) Mor 915 (suggesting that lands were the only assets suitable for establishing solvency). See also *Callander v M'Kell* (1680) Mor 932; *Lord Queensberry and Creditors of Mouswell v Children of Mouswell* (1682) Mor 936; *Children of Mousewell v Duke of Queensberry* (1688) Mor 932; *Deas v Fullerton* (1710) Mor 921.

between the disputed grant and the challenge. Those relying on the transfer were discharged of any burden in establishing the granter's solvency.[488]

Bankton's analysis reflects a further shift,[489] suggesting that granter required to be a "bankrupt" in the sense of having insufficient assets to which "creditors might have had free access".[490] He went on to argue that, while solvency was generally presumed, the opposite was the case under the Act. Thus, while in theory those challenging the deed required to establish insolvency, the presumption operated immediately to throw the burden of proof onto the grantee.

As discussed below, by the time Bell came to address the issue, grants to persons who were neither conjunct nor confident were being brought on the basis of the common law rather than the 1621 Act. Bell suggested that it was the fact that a grant was made to a conjunct or confident person (and presumably the subsequent failure) that raised the presumption of insolvency.[491] With Goudy, he further suggested that, while each case required to be considered on its merits, the presumption should apply as readily to common law challenges to grants to conjunct persons as to challenges under the 1621 Act.[492] The point does not appear to have been raised in modern case law.[493]

The shift from Bankton's analysis to Goudy's is significant because the former depends on the 1621 Act (and would not therefore survive its repeal)[494] while

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[488] *Spence v Creditors of Dick* (1692) Mor 1014; *Brown v Creditors of Kennet* (1696) Mor 1055. See also the common law case *Street v Mason* (1672) Mor 4911, where a full proof of the debtor's solvency at the time of the grant was ordered.

[489] Forbes position is not entirely clear. In his *Institutes*, he suggests that the terms debtors in part [c1] means "Bankrupts, or Dyvours, or Persons actually insolvent, whose Estates are, by the Alienation, rendered insufficient to satisfy their Debts." (Vol I, 223) That might suggest a positive burden on the challenge to establish absolute insolvency. However, when he discusses the matter in the *Great Body* he seems to tend in the other direction. Having considered, at some length, the debate about whether the debtor's solvency at the time of grant was relevant at all, he concludes that the defender is safe "if he should either prove that the Disponer had a sufficient Estate *aliunde* to pay the Reducer, or should offer to pay the Reducer upon an Assignation to his Debt." (*Great Body* Vol I, 987.)

[490] Bankton I.x.73, he relies on *Lourie v Dundee* (1663) Mor 911 (Bankton gives the case as *Laurie* but the dates tally exactly) and *M'Kenzie v Fletcher* (1712) Mor 924. In both cases, solvency was proposed as a defence and the even acceptance on that basis was vigorously contested. Forbes report of the latter case does disclose reference to commentators on the *Corpus Iuris* who suggested that the requirement of *consilium fraudis* referred to knowledge of insolvency.

[491] Bell *Comm* II, 174.

[492] Bell *Comm* II, 184 and Goudy *Bankruptcy* 32.

[493] McBryde does not discuss any presumption in his discussion of the requirement for insolvency in common law challenges: *Bankruptcy* para 12-32–3.

[494] Incidentally, Bankton's view that gratuitous grants to strangers were challengeable on the basis of an extended reading of the statute rather than on common law (I.x.75) meant that he would have applied it to cases which both Bell and Goudy would have regarded as excluded.

Goudy's does not. The matter is perhaps not of great practical importance because of section 34 of the Bankruptcy (Scotland) Act 1985 sufficiently addresses most cases of fraudulent transfer by an insolvent debtor. Goudy's position might be justified with an argument parallel to that used by earlier writers to justify the requirement that a conjunct donee prove that his grant was onerous without reliance on the narrative of the deed. The conjunct person was thought to be in a better position to find evidence of the consideration for the grant than another grantee because of his close connection with the granter. Similarly, he might be thought to have more chance of establishing the solvency of the granter at the time. Whether either argument would stand up to empirical examination is perhaps open to question.

(b) Posterior creditors

The court took a narrow view of the other major question raised by the wording of part [c], restricting the right to challenge to creditors whose rights were constituted prior to fraudulent act.[495] However, where it felt that an arrangement was fraudulent in respect of posterior creditors (typically because of simulation or latency) it was willing to entertain a challenge on the basis of fraud at common law.[496] This approach persists, without much further analysis, into modern treatments.[497]

The Scottish approach reflects the continued conflation of simulation and fraud, contrary to the Bartolist tradition,[498] and a conflation between simulation and latency.[499] This is problematic on two levels. First, simulation and latency are mirror images of each other: in the former, the parties are effectively holding themselves out to have done something which they did not do; in the latter, they have done something but are pretending to have done nothing. Furthermore, neither analysis should lead to voidability for fraud on creditors in the sense relevant to this chapter.

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[495] *Pollock's Creditors v Pollock and Son* (1669) Mor 1002; *Street and Jackson v Mason* (1673) Mor 4911 (cf *Street v Masson* (1669) Mor 1003); *Reid v Reid* (1673) Mor 4923, summarised and endorsed in Stair I.ix.15; *Watson v Malloch* (1681) Mor 883. See also Forbes *Great Body* Vol I, 982–3, with references to further cases.

[496] *Pollock's Creditors v Pollock and Son* (1669) Mor 1002; *Kolston v Weir* (1682) Mor 902 Bankton I.x.89 and Erskine IV.i.44.

[497] Eg Goudy *Bankruptcy* 33, relying on *Wink v Speirs* (1867) 6 M 77, and McBryde *Bankruptcy* para 12-49, adopting Goudy's analysis.

[498] Ankum *Geschiedenis* 399–400 and Willems 158–9.

[499] Sometimes collusion was thrown in as well. There is no necessary conflict here since collusion refers to the process by which a scheme is executed while simulation or latency refer to what is done.

For simulated transactions, Bartolus' analysis is persuasive. In holding a transfer to be simulated, the law concludes that the parties did not intend ownership to pass. They just wanted to take advantage of the insolvency consequences of transfer without accepting any of its other incidents. That being the case, the requisite intention is missing so the grant is void rather than voidable. Thus, where a debtor has made a simulated transfer, the asset remains in his patrimony and subject to the diligence of his creditors.

Alternatively, the simulated transaction may be a transfer to rather than from the debtor which creates apparent wealth on the basis of which credit is given by a third party. In that case, there is still no intention to transfer. The simulation is not fraudulent in the sense of being designed to defeat creditors' rights. Rather, it is fraudulent because it is a misrepresentation by an act. That misrepresentation may have induced a creditor to transact with the debtor. If so, the transaction is voidable on the basis of misrepresentation.[500] If the counterparty to the simulated transaction understood that its purpose was to mislead potential creditors, then he may be liable in delict for the creditor's losses as an accessory to the fraud. This might lead to diligence being done against the asset which was the subject of the simulated transaction (but which is still in his patrimony), just as it might lead to diligence against any of his other assets.

Similarly, a latent transaction will prejudice creditors where the debtor has transferred assets while appearing to retain them. The publicity principle means that, in many circumstances, a latent transfer is simply ineffective meaning that the assets remain liable to creditor's diligence. Even when the transfer is effective, the latency only matters where the creditors cannot challenge the act on the basis that it is gratuitous or an unfair preference. Typically, this is because the creditor making the challenge was not a creditor at the time of the transfer. Once again, the real issue in that situation is that the latency was an attempt to deceive. That being the case, the transaction under which the posterior creditor gave credit will be voidable and the counterparty to the latent transfer might be liable in delict as an accessory to the fraud, but it is difficult to see why either of these things should render the latent transfer voidable.

[500] And, if the *tantum et tale* rule remains good law, sellers induced to give credit by the apparent wealth might be able to recover what they sold from the insolvent estate.

In each of these cases, the nature of the fraud is different from the classic case of gratuitous alienation. The object of the simulate or latent transaction is to deceive potential creditors rather than to frustrate their rights. The transactions make them think that they will be able to have recourse against assets rather than take away assets against which they would have had recourse. Therefore, Scots law would do better to consider such cases as instances of misrepresentation rather the fraud on creditors.

(c) Sale at undervalue

Seventeenth-century case law also established that a sale at undervalue could be challenged on the basis of the 1621 Act, although the transfer was not entirely gratuitous.[501] Mackenzie justified this position by arguing that there was no true cause for the transfer, making reference to the equivalent rule in the *ius commune*.[502] Without such a rule, the protection offered by part [c] would have been very easily evaded. Indeed, the rule is best thought of as an anti-avoidance measure. Both Mackenzie and Stair stress that the price need not be the highest that could have been obtained, and the former suggested that the challenger must show either that the low price was intended as a device to cheat creditors or that it was "extraordinary [sic] low in itself".[503]

(d) Gratuitous grants to strangers

By the time Mackenzie was writing his commentary on the 1621 Act,[504] it was clear that gratuitous deeds could be attacked on the basis of part [c] even where the grantee was a stranger.[505] Faced with the requirement in the text of the Act that the grant be to a "conjunct or confident person", counsel sought to bolster their arguments with reference to other factors indicating fraudulent intent, such as the fact that the grant

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[501] *Glencairn v Brisbane* (1677) Mor 1011 and 911.
[502] Mackenzie *Observations on the 1621 Act* 21–2.
[503] *Ibid* 22; Stair I.ix.15. See also *Murray v Drummond* (1677) Mor 1048.
[504] Published in 1675.
[505] A distinction continued to be drawn between conjunct and confident persons and others: the latter, but not the former, were entitled to rely on the narrative in a deed to establish that the grant was onerous: Forbes *Great Body* Vol I, 984. See also *Hume v Smith* (1673) Mor 889; Bankton I.x.76; Erskine IV.i.35.

was of all of the debtor's goods and gear.[506] Mackenzie and Stair saw this move as a change in the interpretation of the statute based on judicial practice,[507] although Mackenzie, in particular, appears to have found the position troubling.[508] In his later writings, he rationalised the extension to strangers as an *actio utilis*, justified by parity of reason with the rule explicitly set out in the Act.[509]

This line of reasoning held sway for a long time.[510] However, other circumstances were making it more and more vulnerable. First, the developing case law regarding challenges by posterior creditors and challenges to transactions with existing creditors meant that, by the end of the eighteenth century, it was well established that actions by insolvent debtors in fraud of their creditors were challengeable at common law. This meant that challenges to gratuitous grants to strangers had an alternative justification which did not require the words of the statute to be stretched. Further, attitudes to statutory interpretation were becoming less flexible.

The shift emerged dramatically in the first edition of Bell's *Commentaries* in 1804. After his treatment of part [c] of the 1621 Act, Bell devotes a separate section to "Fraudulent Embezzlement of Funds, as reducible at Common Law".[511] Here he deals with gratuitous grants to strangers. He begins by suggesting that "it was held by some of our lawyers, that, if the grantee was not a conjunct or confident person, under the statute, the deed was not liable to challenge as gratuitous."[512] He supports this by quoting the passage from Mackenzie's *Observations on the 1621 Act* where the

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[506] *Henderson v Anderson* (1669) Mor 888. Such an action is deemed fraudulent in D.42.8.17.1. This was a presumption of fraud in the *ius commune*: Willems *Actio Pauliana* 179–80.

[507] Mackenzie *Observations on the 1621 Act* 18; Stair I.ix.15: "This excellent statute hath been cleared by many limitations and extensions, in multitudes of decisions occurring since … *Thirdly* the statutory part declares all alienations to any conjunct or confident person without a just price, being in prejudice of anterior creditors, to be annulled, which hath always been extended, not only to dispositions of bankrupts made to confident persons, but to any person."

[508] He concludes his discussion of the point by observing that "This shews how mysteriously our Statutes are conceived."

[509] Mackenzie *Treatise of Actions* in *Works* Vol II, 492 at 495. This treatise was published for the first time in the second volume of the collected works in 1722. See *Works* Vol I, x.

[510] Forbes does not really discuss the point, but the placement of his comment suggests that he followed Mackenzie's approach: *Institutes* Vol I, 223, *Great Body* Vol I, 988. Mackenzie's justification is repeated by Bankton, without reference to *actio utilis* as a characteristic: I.x.75 and by Erskine *Principles* (3rd edn, 1769) IV.i.13, *Institute* IV.i.35. In his 1792–3 lectures, Hume simply comments that "This part of the Stat: was laid aside as far back as the time of Mackenzie" and cites Mackenzie's *Observations on the 1621 Act* and Stair: Hume *Lectures on Scots Law, 1792–3*, 169. By 1796–7, even this explanation had been removed and Hume simply comments that the statute "likewise extends" to grants to conjunct and confident persons: Skene *Notes* fol 411r.

[511] Bell *Commentaries* (1st edn, 1804) Vol I, 98

[512] Bell *Commentaries* (1st edn, 1804) Vol I, 99.

narrow terms of the Act and the broader practice are discussed. He does not address the other authorities considered above which make it very clear that the broader practice was seen as being based on an extended reading of the statute. Instead, he moves on to attack Erskine's suggestion that, in a grant to a stranger, an assertion in the narrative that the deed is onerous can only be rebutted by writ or oath.[513] Part of Bell's argument is the simple point that, if this was truly the case, fraud would be very easy indeed. A few extra words in the deed would secure it from challenge.[514] This is true, and Erskine's statement of the distinction between grants to conjunct persons and to strangers probably went too far. What is more interesting, however, is Bell's other argument.

Erskine had relied on *Trotter v Hume*[515] to support his position. In *Trotter*, a grant to a stranger had been challenged on the basis of the 1621 Act, but the challenge was unsuccessful because the narrative of the grant disclosed that it was in consideration of "money paid and undertaken, conform to an inventory". Bell rightly points out that the court merely held that the narrative threw the burden of proof onto the pursuer rather than necessarily limiting his options for discharging it.[516] He also argues, however, that the reason for the citation of the statute in *Trotter* and cases like it was that the ambit of the Act was not clear and that pursuers were invoking it in cases where it was not appropriate "with the view of throwing the burden of proving the onerous cause on the holder."[517] The assumption behind this argument is that the challenges could have been brought on the basis of the underlying common law and that part [c] of the 1621 Act was concerned with proof rather than the substantive law.[518] The argument also provided some sort of explanation for the multitude of cases in which the 1621 Act had been invoked although the grantee was not a conjunct or confident person. There can be little doubt, however, that Bell's approach was a departure from the previous analysis.

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[513] Erskine IV.i.35.
[514] Bell *Commentaries* (1st edn, 1804) Vol I, 100
[515] (1680) Mor 12561.
[516] Bell *Commentaries* (1st edn, 1804) Vol I, 101.
[517] *Ibid*.
[518] A contention Bell would later make explicitly: *Comm* II, 171.

Novel as it was, Bell's approach found support in the nineteenth-century case law. Mackenzie's analysis was rejected by the Lord Ordinary in *Wilson v Drummond*,[519] a decision which was upheld by the Inner House and Bell's approach received explicit support in the Inner House in *Obers v Paton's Trustees*.[520]

Bell's treatment provided the bedrock for common law challenges to gratuitous alienations in the modern era.[521] The finishing touch may, however, be said to have been applied by Goudy. The order of Bell's treatment betrayed something of the history which his account concealed. Even in the later editions of the *Commentaries*, the 1621 Act was discussed first and received much more extensive discussion than the common law. [522] Yet, if the common law provides the general rule, it should have been treated first with consideration of the alterations made to the general rules by a special statute discussed thereafter. Goudy reversed the order,[523] and his approach persists into the modern law, which, as noted at the start of the chapter, proceeds on the assumption that a common law ground of challenge exists alongside the statutory ground.

(2) Transactions with existing creditors

In their treatment of transactions in defraud of creditors, both Bell and Goudy draw a fundamental distinction between transactions undertaken with existing creditors and those undertaken with others.[524] This distinction and Goudy's terminology (which contrasts "gratuitous alienations" and "fraudulent preferences"), mirrors the traditional approach in English law[525] marks the structure of the modern statutory provisions in this area.[526]

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[519] (1853) 16 D 275.
[520] (1897) 24 R 719 at 734 per Lord M'Laren.
[521] McBryde challenges aspects of Bell's treatment and notes criticism of his approach in *M'Cowan v Wright* (*Bankruptcy* para 12-19) but the challenges do not bear on the idea that gratuitous alienations are challengeable at common law.
[522] Bell *Commentaries* (2nd edn, 1810) 169; 7th edn, Vol II, 184.
[523] Chapters III and V respectively.
[524] Bell deals with both in Book VI of the Commentaries, devoting chapter II to the latter and chapter III to the former. Goudy deals with the latter in chapters III and V and the former in chapters IV and VI.
[525] Which distinguished between "fraudulent preferences" (dealings with creditors) and "fraudulent conveyances" (grants to third parties): R Stevens and L Smith "*Actio Pauliana* in English Law" in Forner Delaygua *La protección del crédito en Europa* 195 at 195.
[526] Bankruptcy (Scotland) Act 1985 ss 34 and 36; Insolvency Act 1986 ss 242 and 243.

However, in respect of the common law, the value of this distinction has been doubted. McBryde prefers a general category of "fraudulent transactions" of which gratuitous alienations and unfair preferences are merely particular instances.[527] He proposes a uniform analysis applicable to all common law challenges to fraudulent transactions by debtors.[528] McBryde's analysis is preferable because the law did not develop in two hermetically sealed categories. Many of the existing creditors who received preferential treatment did so because they were relatives (ie conjunct persons). Further, one the most important types of fraudulent preference (the grant of a security for an existing debt without additional consideration) can be understood as a gratuitous grant. However, transactions with existing creditors do pose extra analytical challenges because such creditors have a legitimate claim on the debtor's assets while third parties do not.

The only provision in the 1621 Act devoted to transactions between the debtor and existing creditors was part [d], but it had a very narrow scope. Creditors did not qualify for its protection until they had commenced diligence; and, as soon as the diligence was complete, they no longer needed its protection because they could rely on their priority of diligence. This restrictive approach is understandable. The development of this area in the *ius commune* exposed certain fundamental tensions which certainly had not been resolved by 1621.

(a) The ius commune context

As mentioned above, a text in the *Corpus Iuris* suggested that payment of a debt which was due was not fraudulent.[529] This principle had strong support in the European tradition, bolstered by the consideration that payment of a debt has a neutral effect on the patrimony since it operates to discharge a liability equal to its value.[530]

Such an approach rather neglects the fact that the creditor who is paid will receive complete satisfaction while the other creditors must typically be content with a

[527] McBryde *Bankruptcy* para 12–24.
[528] *Ibid* para 12–29.
[529] D.42.8.6.6. Early payment was considered fraudulent: D.42.8.10.12.
[530] See Ankum *Geschiedenis* 409–10.

proportion of their entitlement.[531] If the payment to the favoured creditor is reversed, he will rank alongside them for a proportion of his debt, while the pool of assets available to all will be increased by its full value. Thus, its reversal is clearly beneficial to the other creditors. It is very difficult to say that a transaction whose reversal would be beneficial to creditors was not prejudicial to them in the first place.

Similar concerns are expressed in the Digest,[532] although Scaevola's concluded views on the matter are not entirely clear from the fragment. He does seem to hint that those who have diligently enforced their rights are entitled to retain their advantage in a question with those who neglected to do so. This implies that the problem is where the debtor decides of his own accord to favour one creditor over others. This line of thinking was developed by certain glossators who took the view that a payment to one of many creditors was vulnerable to challenge under the *actio Pauliana*.[533] However, in the Civilian tradition, this view was largely overwhelmed by the view that creditors were entitled to look to their own interests and accept payment debts owed to them.[534]

Creditors' freedom to take what they can get was generally more limited if what they get is not cash payment but a transfer in lieu of payment or a right in security, granted after the constitution of the debt.[535] This approach was, however, rejected by Voet, Wissenbach and some of the *usus modernus* writers on the basis that it made no sense to allow a creditor to accept total satisfaction in the form of payment but not a right in security, which was something less than total satisfaction.[536]

(b) Hostility to preferential conduct

While these considerations may have led to a narrow approach in the drafting of part [d], the general attitude of Scottish judges was hostile to preferential conduct by insolvent debtors. Even prior to the 1621 Act, courts were willing to set aside diligence where the debtor had assisted the creditor using it while not offering the

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[531] Although formal sequestration was not introduced until 1772, *cessio bonorum* and the rules on equalisation of diligence meant that creditors often acted collectively.
[532] D.42.8.24.
[533] See Ankum *Geschiedenis* 409.
[534] Ankum *Geschiedenis* 409–10.
[535] D.42.8.10.13. D.42.8.13 was explained in the *ius commune* as concerning a right in security granted or promised before the debt was constituted: Ankum *Geschiedenis* 410.
[536] Ankum *Gescheidenis* 410–1.

same help to others. This was considered to be collusion (a species of fraud) and continued to be recognised after the Act was passed.[537] It reflects an attempt to strike a balance between the creditors' right to look to their own interests and the debtor's duty to be neutral in respect of them.

The court's desire to prevent preferences by the debtor was also evident in a liberal attitude to the requirement in part [d] that the creditor had commenced diligence against the debtor, accepting horning as sufficient although it did not, in itself, attach any assets[538] and by recognising a horning as sufficient even when it was open to a technical objection in its execution.[539]

Another technique employed in extending the capacity of the 1621 Act to catch fraudulent preferences was to read the reference in part [c] to a true, just and necessary cause cumulatively. On this basis it could be argued that a transfer made in discharge of a debt which was not under the pressure of diligence was without necessary cause. However, the reception of this line of argument was, at best, mixed.[540]

Beyond the 1621 Act, however, the cases are somewhat inconsistent, suggesting some uncertainty about the right balance between protecting equality of creditors and recognising their right to look to their own interests. Thus, in *Scougal v Binnie*[541] the Lords suggested that even a payment would have been struck down had the creditor

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[537] See the cases reported under Collusion in Morison's dictionary, starting at page 2427. The earliest is *Kinloch v Haliburton* (1618) Mor 2427. See also *Creditors of Hunter, Competing* (1695) Mor 1023; Stair I.ix.13; Bankton I.x.72. However, the court did take a pragmatic attitude so a payment which merely anticipated the inevitable result of diligence and thus saved further expense was safe from challenge in respect of either collusion, part [d] of the 1621 Act or challenge as a common law fraudulent preference: *Bishop of Glasgow v Nicolas* (1677) Mor 1060; *Gellaty v Stewart* (1688) Mor 1053; *Dalgleish v Gibson* (1709) Mor 1035; *Gordon v Bogle* (1724) Mor 1041; *Grant v Smith* (1758) Mor 1043.

[538] *Richardson v Eltone* (1621) Mor 1047; *Veitch v Pallat* (1675) Mor 1029; *Murray v Drummond* (1677) Mor 1048; *Bathgate v Bowdoun* (1681) Mor 1049; *Bateman & Chaplane v Hamilton & Co* (1686) Mor 1067; *Hamilton v Campbell* (1709) Mor 1059; *Chaplain v Drummond* (1686) Mor 1067; *Wordrop, Fairhom and Arbuthnot & Co Competing* (1744) Mor 1025. However, hornings not proclaimed at the relevant head burgh were not sufficient: *Cockburn v Creditors of Hamilton of Grange* (1686) Mor 1046; *Gordon or Davach v Duff* (1707) Mor 1078. Similarly, a creditor who delayed in prosecuting his diligence lost the protection of part [d]: *Drummond v Kennedy* (1709) Mor 1079. See also *Dalrymple v Lyell* (1687) Mor 1052, where an inhibition was found enough to ground a 1621 part [d] challenge to an alienation of moveables.

[539] *Kilkerran v Couper* (1737) Mor 1091.

[540] *Birkinbog v Grahame* (1671) Mor 881; *Creditors of Tarpersie v Laird of Kinfawns* (1673) Mor 900

[541] (1627) Mor 879. The case is also noteworthy for the willingness to treat an assignation in satisfaction of a debt as equivalent to payment. On this point see also *Dempster* (1622) Mor 895 and *Newman v Preston* (1669) Mor 880 and 897.

been a participant in the debtor's fraud (ie aware of his intention to abscond), although no other creditor had done diligence prior to the payment. Five years later, however, in *Jack v Gray*[542] the court held that, in the absence of prior diligence, a creditor could accept either payment or security even from a debtor known to be contemplating absconding.

A further nuance is evident in *Creditors of Tarpersie v Kinfawns*.[543] Some but not all of the creditors who were challenging a disposition had done diligence. The reports are inconsistent: Stair suggests that the diligence was enough to render the debtor a notour bankrupt and therefore incapable of preferring one creditor over another, while Gosford's report seems to suggest that the protection was limited to those creditors who had done diligence.[544] The difference is significant because Gosford's account can be explained as a mere application of part [d] of the 1621 Act while Stair's cannot.

(c) Notour bankruptcy

The concept of notour bankruptcy (ie notorious bankruptcy) was deployed in later cases. In some, the requirement in part [d] that the debtor be a "dyvour" at the time of the grant was taken to require notour bankruptcy.[545] In others, notour bankruptcy was used to establish fraudulent intent and thus a common law challenge. A number of these cases involved dispositions *omnium bonorum*. Where a disposition was, on its face, one which covered all of the debtor's assets, it was taken to establish participation in the fraud on the part of the preferee since he must have been aware that the debtor was left with nothing to meet other creditors' claims.[546] As noted above, a disposition of all or most of a debtor's assets also gave rise to a presumption of fraud in the *ius commune*. Taken together, these cases established that a notour

[542] (1632) Mor 897.
[543] (1673) Mor 900.
[544] See also *Cunninghame v Hamilton* (1682) Mor 902, where the Lords appear rather ambivalent towards the idea that a debtor who is a notour bankrupt is barred from preferring one creditor over another. In later proceedings, they limited the protection to those creditors who could bring themselves within 1621d: (1682) Mor 1064. See further *Bateman & Chaplane v Hamilton* (1686) Mor 1076, where the bench was split as to whether personal creditors could be protected where a disposition was *de facto* of all goods and geir but not so on its face.
[545] *Veitch v Executors of Ker and Pallat* (1675) Mor 1073
[546] *Kinloch v Blair* (1678) Mor 889; *Cranston v Wilkie* (1678) Mor 889; *Pollock v Kirk Session of Leith* (1679) Mor 890; *Brown v Drummond* (1685) Mor 891; *Duchess of Buccleugh v Sinclair* (1728) Mor 893.

bankrupt (presumptively known to be bankrupt by the creditor taking any grant and also aware of his own condition[547]) could not prefer one creditor over another even where there was no prior diligence.[548] The justification for the recipient's liability is close to that noted above in relation to fraudulent transfers: the preferee who accepts the security in the knowledge of the bankrupt's condition is also presumed to know the law and thus that preferential conduct by the debtor is wrongful. By accepting the transfer anyway, he knowingly facilitates the fraudulent scheme.

There was, however, considerable dispute about the precise criteria for notour bankruptcy and whether something less, such as "material bankrupt[cy]", was sufficient for a challenge.[549] The issue would be settled by statute in 1696,[550] which established clear criteria for notour bankruptcy and declared that all acts in favour of creditors were "voyd and null" if undertaken within the 60 days prior to notour bankruptcy or at any time thereafter.[551]

Following the 1696 Act, some doubted whether it was necessary to satisfy its requirements in order to bring a challenge under part [d] of the 1621 Act.[552] The majority of cases suggested that this was not so but that the preferee did require to be a participant in the debtor's fraud.[553]

Whatever its effect on the 1621 Act, the 1696 Act's express provision might have been expected to bring common law challenges to an end. However, as the with 1621 Act, the conditions for challenge under the 1696 Act were quite restrictive. Creditors continued to bring common law challenges to preferences in situations falling short of the Act's requirements and the court was receptive to them. Some of these were

[547] *Campbell's Creds v Lord Newbyth* (1696) Mor 883. Although the case was decided after the 1696 Act, the statute did not have retrospective effect: *Creditors of Hunter, Competing* (1695–7) Mor 1023.
[548] *Shaw v M'Millans* (1685) Mor 105; *Moncrief v Creditors of Cockburn of Lanton* (1694) Mor 1054; *Scrymzeor v Lyon* (1694) Mor 903. *Moncrief* would become the key authority on the point.
[549] *Spence v Creditors of Dick* (1692) Mor 1014; *Moncrief v Creditors of Cockburn of Lanton* (1694) Mor 1054; *Moncrieff v Lockhart* (1696) Mor 884.
[550] 1696 c 5, *RPS* 1696/9/57.
[551] As with the 1621 Act, the statute reflects foreign influence. Suspect periods prior to the moment of bankruptcy during which acts by the debtor are presumed to be fraudulent were known in both Italy and France in this period: Gerhardt *Die systematische Einordnung* 77–8 and 82–3. The idea of establishing bankruptcy on the basis of particular events which strongly suggest that debtor's inability to pay his creditors closely resembles the English concept of an "act of bankruptcy". On "acts of bankruptcy", see WJ Jones *The Foundations of English Bankruptcy: Statutes and Commission in the Early Modern Period* (Transactions of the American Philosophical Society Vol 69, Part 3, 1979) 24–5. On the English approach generally, see Willems *Actio Pauliana* 89–150.
[552] *Miln v Nicolson's Creditors* (1697) Mor 1046; *Deans v Hamilton* (1703) Mor 1062; *Bank of Scotland v Kennedy* (1708) Mor 1057; *Hamilton v Campbell* (1709) Mor 1059.
[553] Eg *Tweddie v Din* (1715) Mor 1037. The exception was *Deans v Hamilton* (1703) Mor 1062.

dispositions *omnium bonorum*[554] but others simply involved intention to prefer.[555] In one case, a sale at full price by an insolvent debtor was set aside because certain favoured creditors were informed of the sale and thus put in a position to arrest the price in the buyer's hands.[556]

The picture that emerges from these cases is that a bankrupt debtor had a duty of neutrality in respect of his creditors. This duty might be explained by reference to the distinction between a solvent and an insolvent debtor. A solvent debtor may pay some creditors early or grant them extra rights in security just as he may make gifts. He does not prejudice the remaining creditors by so doing. Each is still in line to get what they are due. That being the case, the debtor's dealings with others are none of their business. The insolvent debtor,[557] however, is in a different position. His case is one of insufficient assets. This means that he cannot be generous to friends but it also means that he cannot prefer one creditor over another. By favouring one creditor he renders himself even less able to meet his obligations to others, just as surely (if not always to the same extent) as he would by giving a gift. He cannot justify his action by saying that it was necessary to satisfy the preferred creditor because he has no justification for sacrificing the rights of some for the sake of others. He is equally bound to all his creditors, as is reflected by their ranking *pari passu* in his insolvency and their equal right to use diligence against his assets.[558]

(d) The creditor's knowledge

In the vast majority of the cases, the creditors receiving the preference knew what was going on: either there was express collusion, or the transfer was of all of the debtor's assets, or the debtor was notour bankrupt. In such circumstances, it is easy to see why the preferee would be liable to other creditors. The preferential transaction is impossible without the preferee's willing participation. Therefore, he facilitates the debtor's wrongful conduct just as much as someone who buys goods

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[554] *Weems v Murray* (1706) Mor 912; *Crammond v Bruce* (1737) Mor 893.
[555] *Cochrans v Couts* (1747) Mor 947; *Grant v Grant* (1748) Mor 949.
[556] *Brown v Murray* (1754) Mor 886.
[557] It is generally conceded that, for a common law challenge, the debtor must either be insolvent or act in contemplation of his failure: *M'Cowan v Wright* (1853) 16 D 494 at 498 per Lord Justice Clerk Hope, at 510 per Lord Cockburn and at 513 per Lord Wood; *MacDougall's Trustee v Ironside* 1914 SC 186
[558] See Kames *Principles of Equity* Vol II, 197–8.

from the debtor knowing that the funds will be used to abscond.[559] That being the case, a knowing preferee is liable as an accessory to the debtor's wrongful conduct and has a duty to make reparation. Since the wrongful conduct is typically a juridical act such as a payment, transfer or grant, the *status quo ante* can be restored by reversal of the transaction. The vulnerability of the transaction can be understood in terms of that party's duty of reparation to the other creditors.

However, in *Grant v Grant*,[560] a successful challenge was brought against heritable bonds granted to certain favoured creditors, with the design on the part of the debtor that they should be preferred to his major creditor, the pursuer in the case. The Lords proceeded on the basis that the preferees were innocent of the debtor's scheme but nonetheless reduced the bonds to allow the pursuer to come in alongside the bondholders. The case would become particularly influential in the later development of the common law relating to fraudulent preferences.[561] McBryde suggests that, together with the nineteenth-century case, *M'Cowan v Wright*,[562] which relied on it, it established that a preference could be challenged as fraudulent despite the good faith of the preferee.[563] They remain the key authorities.

On this basis, fraudulent preferences seem to raise a serious challenge to the analysis presented so far. The preferee can hardly be liable as an accessory to a fraudulent scheme if he does not know what is going on, while Goudy suggests that a transaction with a creditor is not gratuitous because the creditor "in getting satisfaction or security for his debt, is only getting some equivalent for what the debtor is under a legal obligation to give him."[564] This line of reasoning led Goudy to doubt the soundness of the decisions which dispensed with the need for knowledge on the part of the preferee.[565] However, examination of *Grant* and *M'Cowan* suggests that the decisions are not inconsistent with the principles examined so far. The apparent difficulty is created by analysis of fraudulent preferences as a uniform category set in opposition to gratuitous alienations.

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[559] *Ibid*, 201–2.
[560] *Grant v Grant* (1748) Mor 949.
[561] See *M'Cowan v Wright* (1853) 15 D 494 at 500–1 per Lord Justice Clerk Hope.
[562] (1853) 15 D 494.
[563] McBryde *Bankruptcy* paras 12–16 and 12–34.
[564] Goudy *Bankruptcy* 36.
[565] *Ibid* 37–9.

In his (very brief) report of *Grant*, Lord Kilkerran suggested that acceptance of the bonds rendered the preferred creditors participants in the debtor's fraud, despite their ignorance of it. In *M'Cowan*, Lord Justice Clerk Hope explained how this could be:

> [I]f a party for his own benefit uses a deed fraudulently granted by his debtor as a preference to him, he really becomes a party to the fraud, and is so dealt with just as if he had assisted in the preparation of the security.[566]

The rationale is a familiar: it would be fraudulent to seek to retain a benefit which could not have been acquired in full knowledge of the circumstances once those circumstances are disclosed. However, it is only persuasive if the preferee is seeking to hold on to a benefit acquired gratuitously. Otherwise the preferee would have a legitimate basis for insisting on his right. To set the transaction aside would simply be to shift the loss caused by the debtor's fraud from one innocent party to another.

Here the effect of Goudy's mischaracterisation is evident. Although the transactions in *Grant* and *M'Cowan* were between a debtor and one of his existing creditors they were, in substance, gratuitous transactions.[567] Unlike other transactions attacked as fraudulent preferences, the grant of a security does not discharge the debt. After the grant, the preferee still has the personal right to repayment which he had before but he also has something extra: a right in security. It is an extra right for which he has given no value.[568] Since the transaction is gratuitous, well-established principles explain why bad faith on the part of the preferee is unnecessary.[569] It also answers Voet and Wissenbach's objection that it is strange to allow payment of the debt but not the grant of a right in security which is something less than full satisfaction. Payment discharges the debt. Where a right in security is granted, the creditor retains a right to full satisfaction but has a new right as well.

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[566] *M'Cowan v Wright* (1853) 15 D 494 at 500.
[567] Similarly, in the cases cited by Goudy as following *M'Cowan* in this respect, the transaction was gratuitous.
[568] Had he done so, the transaction would not be a fraudulent preference thanks to the *nova debita* rule: *Renton & Gray's Trustee v Dickison* [sic] (1880) 7 R 951 and Bankruptcy (Scotland) Act 1985 s 36(2)(c).
[569] It is noteworthy that, in *M'Cowan*, Lord Justice Clerk Hope expressly reserved his opinion on the situation where the security was granted in consideration for the creditor's forbearance from claiming payment (at 498).

(e) Preferences resulting in discharge

The other types of fraudulent preference cannot be explained as gratuitous transactions. When an insolvent debtor makes payment before the debt is due or transfers property in its satisfaction the transaction cannot be said to be gratuitous, since the debtor's obligation is discharged.

Nonetheless, the transaction is prejudicial to other creditors and, as observed above, in fact beneficial to the preferee. Some of the *dicta* in *M'Cowan*, where the judges observe that the bad faith or otherwise of the preferee makes no difference to the prejudice to the other creditors, appear to suggest that such prejudice is sufficient to justify the vulnerability of a preferential transaction.[570] On this reasoning, it might be argued that, although such preferences are not formally gratuitous, because the debtor gets a discharge, in substance they represent an enrichment of the preferee at the expense of the other creditors since he gets full satisfaction when otherwise he would not have done so.

Tempting as such a line of argument may be, it should be resisted for a number of reasons. First, the argument that the mental state of the preferee has no relevance to the prejudice to the other creditors would apply with equal force to the mental state of the debtor. The prejudice arises from the fact that his affairs are beyond recovery, not from the fact that he knows them to be so. However, all of the judges in *M'Cowan* accepted that the debtor's mental state was relevant to the vulnerability of the transaction.

Secondly, not all transactions which operate to prefer a particular creditor are challengeable. The distinction between acts which the debtor would undertake in the normal course of his business and extraordinary acts was drawn by Kames in his report of *Grant* and it continues to be relevant.[571] Ordinary transactions are safe while extraordinary ones are vulnerable. The class of "ready money" transactions, when a debtor satisfies a debt which is due in cash have sometimes been given special attention[572] but such transactions are essentially payments made in the course of business.

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[570] Eg Lord Justice Clerk Hope at 498, per Lord Cockburn at 509 and per Lord Wood at 512.
[571] See generally McBryde *Bankruptcy* paras 12-40–6.
[572] Eg *Bean v Strachan* (1760) Mor 907; *Coutt's Trustee & Doe v Webster* (1886) 13 R 1112; Goudy *Bankruptcy* 39–40.

As McBryde suggests, the range of potentially fraudulent circumstances is wide.[573] Nonetheless, the protection for transactions in the ordinary course of business, when taken together with the protection for *nova debita*, where fresh value is given, means that preferences which give rise to discharge are challengeable in only two circumstances: where there is active collusion between debtor and creditor, and where an insolvent debtor discharged a debt by an unusual method.

If the insolvent debtor's duty of neutrality is accepted, rationalisation of these cases becomes easier. In the former, there is conscious participation in the debtor's wrongful conduct. In the latter, the creditor may be regarded as having been "put on notice" that something strange is happening. This might be regarded as the insolvency equivalent of circumstances which would raise a duty of enquiry in offside goals cases.

(f) Justified transactions

Even this line of reasoning might be thought to prove too much because there is clear authority that even a creditor who knows that his debtor is insolvent may accept payment of a debt which is due[574] and may even accept grants of real rights if the debtor was contractually obliged to grant them.[575] Some of these decisions might be explained on the basis that an insolvent debtor is entitled to try to trade his way out of insolvency and, if that is the case, his creditors must be entitled to continue to transact with him in the normal fashion. However, certain passages in the case law go a step further and suggest that even a creditor who was aware of the debtor's irretrievable insolvency might be entitled to accept payment or transfer.[576] That being the case, the ground of protection cannot be the grantee's or payee's good faith but rather the legitimacy of accepting such performance.

The first point to make is that a creditor is not generally entitled to refuse performance which is due and offered. Should he do so, the debtor can consign the

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[573] McBryde *Bankruptcy* para 12-25.
[574] The authorities are traced in detail by Lord President Emslie in his opinion in *Nordic Travel Ltd v Scotprint Ltd* 1980 SC 1.
[575] *Horne v Hay* (1847) 9 D 651. See also *Taylor v Farrie* (1855) 17 D 639 at 649, discussing the 1696 Act.
[576] Eg *Nordic Travel Ltd v Scotprint Ltd* at 18–9 per Lord President Emslie, at 27 per Lord Cameron and at 32–3 per Lord Stott.

goods or funds discharging the debt.[577] This would not, however, be the case if the "performance" that was offered was not in strict compliance with the contract.

Secondly, it must be borne in mind that, up to sequestration (and subject to retrospective suspect periods), each creditor is entitled to pursue satisfaction by diligence without regard to the interests of other creditors. Similarly, there is no liability for inducing breach of contract, if the purpose of the interference is "to protect and equal or superior right" of your own.[578]

Thirdly, there is the well-established principle that it is no fraud to get what is due. Taken together, these principles form a plausible justification for allowing creditors to accept performance which is due to them, particularly since this right is very narrowly constrained being limited to performance which accords precisely with the creditor's right.

(3) The effect of reduction

One of the most striking features about the case law in this area is the court's regular specification of the persons against whom reductions were to be effective and the extent of that effect. Thus, in *Lourie v Dundee,*[579] the pursuer sought reduction of a disposition on the basis of part [c] of the 1621 Act. The Lords allowed reduction to the effect that the land should be subject to Lourie's diligence. Similarly, in *Kinloch v Blair*, a disposition of all the debtor's assets was reduced but only to the extent necessary to bring in the other creditors *pari passu* with the preferee.[580] In other cases, a decree of reduction was granted but its effect was limited to protecting certain classes of creditor.[581] Similarly, when the transfer made as part of a fraudulent scheme to favour creditors who would arrest the price was reduced in

[577] Stair I.xviii.4.
[578] *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1 at para 193 per Lord Nicholls.
[579] (1663) Mor 911.
[580] (1678) Mor 889. See also *Cranston v Wilkie* (1678) Mor 889: *Gordon v Ferguson* (1679) Mor 1012; *Cunninghame v Hamilton* (1682) Mor 902 and 1064; *Brown v Drummond* (1685) Mor 891; *Crammond v Bruce* (1737) Mor 893. A similar approach was taken to reductions under the 1696 Act: *Mitchell v Rodger* (1834) 12 S 302.
[581] *Cunninghame v Hamilton* (1682) Mor 1064; *Bateman & Chaplane v Hamilton* (1686) Mor 1076; *Deas v Fullerton* (1710) Mor 921.

Brown v Murray, the Lords reduced it "not as to the purchaser, but only as to the creditors, to the effect of ranking them all *pari passu* upon the price."[582]

The court's willingness to limit the effect of reductions under part [d] of the 1621 Act marked a rejection of Mackenzie's suggestion that, in contrast to part [c], the basis for the challenge was that the act was contrary to lawful diligence rather than that it was fraudulent. From this he inferred that, "the Ground of Nullity being real, it ought to be extended to all" excluding protection even for *bona fide* purchasers.[583]

The approach taken by the court also reflects the fact that part [d] of the 1621 Act is aimed at addressing fraudulent avoidance of diligence rather than at giving effect to that diligence. The conditions for the general third-party effect of diligence were as established part of the law regarding diligence, rather than the result of the 1621 Act. This distinction supports the view that the basis for a challenge under part [d] was a personal right held by the pursuer.[584]

On the whole, the court's approach was endorsed and reflected by legal writers. Mackenzie himself seems to analyse reductions under part [c] in these terms. Bankton comments that under part [d] "the right reduced still subsists, burthened with the reducing right."[585] In his 1796–7 lectures, Hume observes that "The effects and benefits of a Reduction extends [sic] to all creditors, and not to the pursuer only."[586] It seems unlikely that Hume would have made specific reference to creditors if he had considered that reduction operated to revest the property with respect to all parties. A similar approach is taken by Bell.[587]

The limitation on the effect of the reduction can be explained by reference to the limit of the personal right. The fraudulent preference was a wrong done to the creditors. Reduction of the grant is a mechanism for making good that wrong. If the wrong had not been done, the preference (typically a right in security) would not have been granted and so the wronged creditors would have ranked alongside the preferee in respect of that asset. To go further, and strip the transfer of all effect

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[582] *Brown v Murray* (1754) Mor 886.
[583] *Observations on the 1621 Act* 38. Bell notes but doubts Mackenzie's position: *Comm* II, 190–1.
[584] As suggested by the successful party's argument in *Henry v Glassels & Coning* (1709) Mor 1062. See also *Elliot v Elliot* (1749) Mor 905.
[585] I.x.108, relying on *Street and Jackson v Mason* (1673) Mor 4911.
[586] Skene *Notes* fol 411r. The passage does not appear in the printed edition of Hume's lectures (which are based on notes taken in 1821–2).
[587] *Comm* II, 183 and 190.

would be to add a penal element to the rule. If the challenge was on the basis of part [d] of the 1621 Act, then the effect of this would be to confer a windfall on creditors who had not done diligence.

Since the basis of both the challenges under both the 1621 Act and the common law is reparation for wrongful conduct, there seems no reason to believe that different principles would apply to common law challenges. The fact that common law challenges to fraudulent preferences are based on personal rights to reparation is illustrated by *Munro v Rothfield.*[588] The court held that, while an agreement between a debtor and certain of his creditors that he would set aside a portion of his income to the satisfaction of their debts was challengeable by the other creditors, it was not a *pactum illictum* and therefore it was effective between the parties. If the result of a fraudulent preference at common law was nullity rather than voidability, such a result would be impossible. The personal right analysis has also recently been endorsed for common law challenges to fraudulent preferences in *Liquidator of Letham Grange v Foxworth Investments*.[589]

As has already been noted, the personal right analysis of voidability for fraud on creditors provides a natural explanation for the protection of good faith successors. In doing so, however, it raises another challenge: explaining the vulnerability of gratuitous or bad faith successors. These, however, fall within the broader category of "successor voidability". The same challenges arise in relation to misrepresentation and the offside goals rule and they will be addressed together in chapter 7.

(4) Summary of the common law position

The net result of this analysis is that modern Scots law has ended up very close to the position described in the Digest. There is a common law ground of voidability for all types of transaction in fraud of creditors. However, most of the development which undergirds this position arose from the interaction between common law and statute rather than from independent common law development. The final step of

[588] 1920 SC (HL) 165. Indeed, that case, the courts employed the language of voidness and voidability to express the contrast.
[589] [2011] CSOH 66, 2011 SLT 1152 at para 12 per Lord Glennie. The decision was reversed on appeal ([2013] CSIH 13) but the basis of the appeal was Lord Glennie's treatment of the evidence rather than his fundamental analysis of the nature of the challenge.

recognising a common law challenge in circumstances which overlap directly with the 1621 Act was the work of Bell, with very little basis in the earlier sources.

The basic proposition is that it is wrongful for a debtor to render himself unable, or even less able, to fulfil his obligations to his creditors. The insolvent debtor's duty of neutrality between creditors is really a special instance of this general duty because, by favouring one creditor, he aggravates his inability to meet his obligations to the others.

It is not enough to establish that the debtor has acted wrongfully. Any challenge to the transaction will typically damage the counterparty to the prejudicial transaction rather than the debtor. Therefore, it is necessary to explain the counterparty's liability.

The basic explanation is that the counterparty is a participant in the debtor's wrongful conduct. The actions by the debtor are bilateral transactions: transfers, payments and grant of rights in security. If the debtor did not have a willing recipient, the wrongful conduct would be impossible. Therefore a knowing counterparty can be regarded as an accessory to the wrongful conduct. It is wrongful knowingly to participate in acts by a debtor which render him incapable of fulfilling his obligations to his creditors. Since an insolvent debtor has a duty of neutrality between his various creditors, a creditor who knows and accepts such preferential treatment is just as guilty of wrongful conduct as someone who accepts a gift from the debtor or buys goods from him knowing that he will use the funds to abscond.

The conduct is prejudicial to creditors and a wrong against them. In short, it is a delict. Therefore, creditors are entitled to reparation of that wrong from both the debtor and the accessory. Since the wrongful conduct took the form of a transaction between the debtor and the accessory, it is amenable to natural restitution. Reversal of the transaction puts the wronged parties in the position they would have been in had the wrong not been done. Therefore, the basis for avoidance of a grant to a recipient who is aware of what the debtor is doing is a right in delict.

As in the case of innocent misrepresentation, an attempt (once apprised of the relevant facts) to retain a benefit which it would have been wrongful to acquire in full knowledge of those facts would itself be wrongful. In this context, that concern is expressed through the "no profit from fraud" rule. If, however, reversal of the

transaction would go beyond stripping away a benefit and impose a loss on the recipient, it is not justified because the recipient did not have the relevant "*mens rea*" at the time it was concluded. Therefore, where the grantee was innocent at the time of the grant, the basis for the liability is best placed in enrichment rather than in delict.

E. TWENTIETH CENTURY STATUTORY INTERVENTIONS

Today, the first port of call for those looking to challenge a transaction done in fraud of creditors is not the common law but certain provisions in the Bankruptcy (Scotland) Act 1985[590] and the Insolvency Act 1986.[591] They replaced the 1621 and 1696 Acts, implementing of recommendations by the Scottish Law Commission.[592] Detailed discussion can be found in the major modern textbooks. For present purposes, the key question is the extent to which these statutory interventions can be considered as continuing along the lines established in the pre-1985 law.

(1) Essential elements

The provisions in the 1986 Act take those from the 1985 Act and apply them to corporate insolvency. Therefore, there is effectively a single statutory regime irrespective of the nature of the debtor.

Gratuitous alienations and unfair preferences are dealt with separately but in each case the legislative technique is the same. There is a suspect period running up to the date of sequestration, liquidation or administration. Transactions entered into in that

[590] Sections 34 and 36. Detailed commentary can be found in McBryde *Bankruptcy* paras 12-58–148.
[591] Sections 242 and 243. Detailed commentary can be found in Drummond Young and St Clair *Corporate Insolvency* paras 10-06–10-12 and 10-15–10-21. Section 245 of the 1986 Act contains a similar provision which is directed specifically at floating charges. The policy concerns and general shape of this provision is similar to that of the provisions discussed in the main text. However, the match with the other rules discussed in this chapter is not complete: the provision limits the effective scope of the relevant grant directly rather than giving the court power to set it aside: s 245(2). As such, it fits less well with a reparation based model. This is perhaps unsurprising given that the provision applies in both Scotland and England so it is not a direct development of the Scottish rules in the way that the provisions discussed in the main text are.
[592] See Scottish Law Commission *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* ch 12.

period are vulnerable unless the counterparty can bring himself within one of the stated defences.[593]

An alienation made at the relevant time will be set aside at the instance of creditors or the insolvency administrator unless the recipient can show that the transferor was solvent at some point between the grant and the sequestration[594] (thus demonstrating that the gift did not contribute to or worsen the insolvency which led to the ultimate failure), or that the transaction was for adequate consideration (and therefore, absent some fraudulent scheme, not prejudicial to creditors' interests),[595] or that the transfer was a permitted gift.[596]

Similarly, a preference over other creditors granted within the relevant period will be set aside unless the transaction was in the ordinary course of business,[597] cash payment of a debt which was due,[598] a *novum debitum*,[599] or anticipating the inevitable effect of arrestment.[600]

The basic structure is familiar and replicates much of the common law position. The difference is that solvency is cast as a defence rather than a positive requirement. This is a return to the position developed in the early cases on the 1621 Act. While the requirements are cast in substantive terms, there are indications that the mischief aimed at remains fraud by the debtor in which the other party participates. The rules are designed to catch cases where it is likely that the debtor has behaved fraudulently with the recipient's collusion but the creditors are relieved of the difficult task of proving the debtor's state of mind at the relevant time.

The Scottish Law Commission took such deliberate frustration of creditors as the starting point for their discussion.[601] Further, the Commission's discussion of the effect, particularly of the new rules on gratuitous alienations presents them in terms of placing an "onus of proof" on the recipient.[602]

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[593] 1985 Act ss 34(2)(b), (3) and 36(1); 1986 ss 242(2)(b), (3) and 243(1). The periods vary depending on whether the transaction is a gratuitous alienation or an unfair preference and, in the former case, on whether the alienation is to a closely connected person.
[594] 1985 Act s 34(4)(a); 1986 Act s 242(4)(a).
[595] 1985 Act s 34(4)(b); 1986 Act s 242(4)(b).
[596] 1985 Act s 34(4)(c); 1986 Act s 242(4)(c).
[597] 1985 Act s 36(2)(a); 1986 Act s 243(2)(a).
[598] 1985 Act s 36(2)(b); 1986 Act s 243(2)(b).
[599] 1985 Act s 36(2)(c); 1986 Act s 243(2)(c).
[600] 1985 Act s 36(2)(d); 1986 Act s 243(2)(d).
[601] *Report on Bankruptcy* paras 12.3 and paras 12.33–5.
[602] *Report on Bankruptcy* para 12.18.

This attitude is also reflected by the fact that the suspect period for gratuitous alienations is longer where the recipient is an associate of the debtor.[603] The justification for this can hardly be that close associates are less worthy of protection than strangers. It is however plausible that the debtor is thought more likely to engage in fraudulent schemes with his close associates.[604] Thus, these rules can be seen as an instance of the general tendency to take rules which are motivated by concerns about fraudulent conduct by the debtor and those he deals with and to cast them in objective terms to avoid problems of proof.

(2) The nature of the challenge

None of the statutory provisions use the term "voidable". Instead, they provide that "the court shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate" together with a proviso protecting good faith purchasers.[605] This led the Lord Ordinary in *Liquidator of Letham Grange* to treat the statutory regime as independent and distinct from the voidability which arises at common law.[606] In response to this, it may be observed that the term "voidable" was not used in the 1621 Act either and that the recognition of voidability in this context arose from A rationalisation of a proviso for the protection of good faith purchasers very much like the one in the modern statutes. Further, as a matter of general principle, it is not desirable to multiply concepts, particularly when they are so close in content. Doing so renders the law unnecessarily complex and makes consistent and coherent application more difficult.

Finally, the wording of the statute fits well with the picture of voidability presented hitherto. The alienation or preference is a wrong done against the creditors, requiring reparation to be made. There is no particular reason to impose narrow constraints on the range of remedies which might be applied to this.

This analysis also meshes well with the Inner House's decision in *Short's Trustee v Chung (No 2)*,[607] where a gratuitous alienation was reversed by an order to deliver

[603] 1985 Act s 34(3); 1986 Act s 242(3).
[604] *Report on Bankruptcy* para 12.20.
[605] 1985 Act ss 34(4), 36(5); 1986 Act ss 242(4), 243(5).
[606] [2011] CSOH 66 at para 16.
[607] 1999 SC 471.

a disposition rather than by reduction, because the wording of the Land Registration (Scotland) Act 1979 meant that a decree of reduction could neither be registered nor used as a basis for rectification.[608]

Therefore, the provisions in the 1985 and 1986 Acts are best understood as instances of voidability and their underlying rationale can be understood as a development of that which underlay the 1621 Act and the common law which developed out of and alongside it. Since the common law challenges had come to be regarded as independent of the 1621 Act by the time it was repealed by the 1985 Act, these challenges also survive.

[608] See *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14.

Chapter 5

RESTRICTIONS ON TRANSFER ARISING FROM COURT ACTION: ADJUDICATION AND INHIBITION

Litigation is often a time-consuming process.[609] Even after decree has been obtained, it may be some time before the pursuer obtains satisfaction. In the meantime property can be delivered, transferred or burdened by the defender. This may give rise to both procedural and substantive problems. Where the pursuer founded on a real right, transfer of property by the defender might force the pursuer to raise a fresh action since the transferee will not have been called as a defender in the first one. A vindicatory action brought against Alfred may of little use if Barbara has possession by the time the decree becomes enforceable. At the substantive level, a pursuer seeking to enforce a personal right which entitles him to grant of a real right may be frustrated by transfer of the relevant property. Suppose the pursuer is suing Alfred on a contract of sale and the latter transfers the subjects to Barbara. The pursuer has no contractual right against Barbara.

The latter risk is more serious than the former. If the pursuer had a real right, he could raise a fresh action against any transferee or possessor. The problem where the right is personal is more fundamental: the debtor is no longer in a position to perform. It is in this circumstance that the pursuer has an interest in setting the transfer aside. Where he has a real right, it would be simpler just to assert that right against the transferee.

[609] See generally CH van Rhee *Within a Reasonable Time: The History of Due and Undue Delay in Civil Litigation* (2010).

A. LITIGIOSITY IN THE *IUS COMMUNE*

Rules which seek to prevent dealings with property in the course of litigation have a long history. The Twelve Tables prohibited the dedication of property which was the subject of litigation as a *res sacra*[610] and enforced this with a penalty of twice the item's value.[611] The validity of the dedication was not impugned and only a narrow class of evasive action was affected, but later developments rendered the transfer of a *res litigiosa* ineffective.[612]

This rule was preserved in the *Corpus Iuris* and continued in the *ius commune*.[613] However, there was some doubt as to its scope. This is understandable. The prohibition is imposed in circumstances when the pursuer's rights are not clearly established. Yet it can take assets out of commerce for a long time, while annulling the transfer has consequences for third parties. At a more abstract level, it might be argued that litigation about a personal right is not a dispute about a "thing" since the object of a personal right is an act by the debtor. These considerations might be taken to point to a narrow application: confining the prohibition to litigation concerning real rights and delaying its application until *litis contestatio*[614] so as to give the defender the opportunity to point out an irrelevant claim, and to ensure some sort of public procedure which puts third parties on notice.

Other considerations pull in the opposite direction. Restricting the prohibition to litigation concerning real rights means that the rule only protects against procedural problems. This is the lesser of the two risks to which the pursuer is exposed. Delaying its application leaves the defender with a period in which to transfer or burden the property.

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[610] This would have the effect of taking the property *extra commercium*.

[611] D.44.6.3.

[612] G 4.117a; CT 4.5; C 8.36; Nov 112; Kaser *Das römische Privatrecht* Vol I 406, Vol II, 267; and H Kiefner "*Ut lite pendent nil innovetur*: Zum Verbot der Verfügung über *res* und *actiones litigiosae* im römischen Recht und im gemeinem Recht des 19 Jahrhunderts" in D Nörr and D Simon (eds) *Gedächtnisschrift für Wolfgang Kunkel* (1984) 119. Kiefner suggests that the Augustinian legislation was directed not against the defender but against the pursuer in the *vindicatio* and that its purpose was to protect those in possession from speculative claims: 120–2. This was discovered too late to influence the modern law.

[613] D Zeffert "The Sale of a *res litigiosa*" (1971) 88 SALJ 405; Kiefner "*Ut lite pendente nil innovetur*" 147–8, noting the role of Canon law in bringing the rule under the rubric of the maxim *ut lite pendente nil innovetur*; S Schlinker *Litis Contestatio* (2008) 66, 152, 193, 308 and 492.

[614] *Litis constestatio* can be traced back to Roman civil procedure and had a long influence throughout the *ius commune*. For present purposes, it suffices to note that it was an element of litigation in which the two parties clarified the issues in dispute before a judge or magistrate.

In light of these conflicting pressures, it is not surprising to find variation within the *ius commune*. Some considered property to be rendered litigious by service of the summons on the defender, others required *litis contestatio*.[615] The Gloss restricted the prohibition to cases where ownership was in dispute.[616] Others excluded litigiosity where the matter at issue was an *actio in personam*.[617] However, it was suggested elsewhere that personal rights were in just as much need of protection.[618] Another view was that some, but not all, actions on personal rights relating to property rendered the property litigious.[619] The *ius commune* also saw the prohibition on alienation being gathered together with other rules intended to prevent the conduct of litigation being frustrated or impeded under the Canon law maxim *ut lite pendente nihil innovetur*.[620]

One aspect of the rule's scope is yet to be mentioned. This prohibition is not made in the general interest but for the protection of the pursuer. Suppose Peter seeks to enforce a personal right to property against David and this litigation renders the property litigious. The prohibition on transfer is there to protect Peter's attempt to enforce his personal right. There might be others who have an interest in challenging the transfer (perhaps creditors of David who wish to do diligence). However, the prohibition does not exist for their benefit, and allowing them to challenge the transfer by relying on it could subvert the rules on transactions by insolvent debtors.

In light of this, simple voidness of the transfer might be thought to go too far.[621] The pursuer's interest is sufficiently protected by allowing the decree obtained

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[615] Schlinker *Litis Contestatio* 152, 193, 308; I Menocchio *De praesumptionibus, coniecturis signis et indiciis, commentaria* (1608) II.97.7–10. On Menocchio in general, see M Stolleis (ed) *Juristen: Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert* (2001) 436.

[616] *Glossa ad* X.2.16.3, verb. *litigiosi*, col 672.

[617] A Favre *Codex Fabrianus definitionum forensium et rerum in sacro sabaudiae senatu tractatarum* (1610) VII.xxiv. 8. On Favre in general, see Stolleis *Juristen* 207. This attitude persists in Germany: Kiefner "*Ut penedente lite nil innovetur*" 146–8; K Reichold "§265" in H Thomas *Zivilprozessordnung* (25th edn by H Putzo, K Reichold and R Hüßtege, 2003) para 4; K Becker-Eberhard "§265" in T Rauscher et al (eds) *Münchner-Kommentar zum Zivilprozessordnung, Band 1: §§ 1–510c* (2008) paras 17, 18 and 23.

[618] Craig I.xv.25. *Ius commune* sources refer to *actiones in personam* rather than personal rights. For present purposes, it is sufficient to understand the former as an action asserting a personal right and to draw its distinctive characteristics from the nature of that right.

[619] Menocchio *De praesumptionibus* II.97.14–26; Zeffert "The Sale of a *res litigiosa*" at 406–7. The approach which persisted in Roman-Dutch and South African law.

[620] *Decr Grat* II.xvi ; Kiefner "*Ut penedente lite nil innovetur*" 148.

[621] Of course, where the action is vindicatory, the purported transfer will be void but the reason for the voidness is that the grant is *a non domino* rather than because it is in breach of any prohibition on the transfer of litigious property.

against the transferor to be enforced against the transferee. Such a restriction has the potential to ameliorate the unwanted effects of the prohibition, while retaining the benefit which it is designed to secure. The defender remains free to deal with the property in question. He just has to find a counterparty who is content to take the risk of the ongoing litigation. The pursuer cannot complain because he has no legitimate interest in controlling the property beyond the enforceability of his decree. Third parties cannot free ride on a rule which is not intended for their benefit.

Of course, this model cannot be regarded as a prohibition in the strong sense of the term. Neither the defender nor the transferee is necessarily doing anything wrong, provided that the transferee complies with any decree against the transferor.

Certain discussions of Roman-Dutch and French law which talk about the abandonment of the prohibition on alienation of a *res litigiosa* in fact concern a move to such a weak prohibition.[622] The transfer is permitted but this is done saving the interest of the pursuer, which implies that his decree will continue to be enforceable.[623] In Germany, where the prohibition on transfer was abolished in 1879 when the *Civilprozessordnung* came into force,[624] alienation of a *res litigiosa* is expressly permitted.[625] However, it is also provided that such transfer "shall not affect the proceedings",[626] which implies *inter alia* that any decree is enforceable against the successor.[627] While it is clear that transfer of litigious property is not prohibited in these systems, transferability is nonetheless restricted. The result of the rules protecting the pursuer is that the defender cannot transfer the asset free of vulnerabilities which would not otherwise concern the transferee.

In Scotland, litigiosity has been understood as a prohibition on grants which would frustrate the relevant court action. The prohibition is not absolute in the sense

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[622] H Grotius *Introduction to Roman-Dutch Law* (trans RW Lee, 1931) III.xiv.10; S à Groenewegen van der Made *Tractatus de legibus abrogatis et inusitatis in Hollandia vincinisque regionibus* (trans B Beinart and ML Hewett, 1987) 60; Voet *Commentaries on the Pandects* 44.6.3; Kiefner "*Ut lite pendente nil innovetur*" 148.

[623] Groenewegen *Tractatus de legibus abrogatis* 60; Voet 44.6.3; *Coronel v Gordon Estate & GM Co* (1902) TS 95.

[624] Kiefner suggests, however, that the tendency of in legal practice had been to move away from the Roman law restrictions but that this position was not recognised by the Pandectists and the Processualists: "*Ut lite pendente nil innovetur*" 149.

[625] §265 I ZPO.

[626] §265 II ZPO, trans by C von Schöning for the *Bundesministerium der Justiz*: http://www.gesetze-im-internet.de/englisch_zpo/. The original German is perhaps slightly clearer: "Die Veräußerung oder Abtretung hat auf den Prozess keinen Einfluss."

[627] § 325, 727 ZPO. See Becker-Eberhard "§265" paras 6–7.

of denying the grant all effect; but then not all prohibitions have that strong sense. For example, if Alfred contracts with Bertie, binding himself not to transfer a plot of land, transfer by Alfred is prohibited in the sense that Alfred owes Bertie a duty not to make the transfer and this duty is recognised by law. That does not mean, however, that a disposition by Alfred would necessarily be ineffective. The idea that a party to litigation is obliged to hold on to property which is the subject of litigation is central to the way in which litigiosity has been rationalised and it is in this weak sense that the term "prohibition" is used in this chapter.

Craig appears to be the first Scots lawyer to mention litigiosity.[628] He does so in discussing "what kinds of property may be the subject of infeudation",[629] giving a sketch of the Roman law rule and mentioning the debate about whether litigation concerning personal rights gives rise to litigiosity. However, he ends by suggesting that there is no restriction on alienation of feudal property arising from litigiosity in Scotland.[630] This attitude did not persist. Part of Craig's discussion was included in Hope's *Major Practicks* but Hope omitted Craig's observation that the rule did not apply to the transfer of feus in Scotland.[631]

Reflecting the trend noted above, the restriction on transfer of litigious property was set alongside a number of other rules under the *pendente lite* maxim, and the term "litigiosity" would come to be applied to all such situations. However, the early development of the concept in Scotland focussed on two areas. The first, which is not relevant to the present discussion, concerned the rules that the oath of an assignor could not be invoked against an onerous assignee and that a wife could not be put on oath to her husband's prejudice. There was an exception to these rules when the matter had become litigious prior to the assignation.[632] The other concerned diligence.

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[628] Craig I.xv.25–6.
[629] Clyde's translation of the title of I.xv. The Latin is "Quae res in feudum dare possint".
[630] Craig I.xv.26.
[631] Hope *Major Practicks* III.iii.3.
[632] *Sharp v Brown* (1666) Mor 8324; *Somerville* (1673) Mor 8325; *Mitchell v Johnston* (1703) Mor 8326.

B. ADJUDICATION

(1) Relationship with apprising

By the time litigiosity began to be recognised in Scotland, the early debt-recovery procedures[633] had begun to be replaced by rules which are recognisable to the modern lawyer. The old forms were remodelled by the Diligence Act 1469,[634] which provided first of all for sale of the debtor's moveables in satisfaction of the debt.[635] If that proved insufficient, a process known as apprising (or sometimes comprising)[636] was used.

Apprising was effectively a judicial wadset of the lands.[637] Under the supervision of a sheriff or (more usually) a messenger at arms, a jury of "apprisers" estimated the value of the lands which were transferred to the creditor in (part) satisfaction of the debt. The income from the lands replaced the right to interest, and the debtor had a reversionary right to redeem the lands by paying the principal sum within seven years. Notice of an impending apprising was given by "denunciation" on the lands and at the market cross of the relevant head burgh fifteen days prior to the apprising.[638] Copies of the denunciation were to be left at the market cross and on the lands. The creditor's real right was completed by infeftment.

The Adjudication Act 1672 replaced apprisings with adjudications for debt.[639] Adjudication was known to Scots law prior to 1672 but was restricted to special cases such as diligence against a *hereditas jacens* (which allowed creditors to recover when the heir declined to enter) and adjudication in implement of obligations to

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[633] The brieve of distraint for moveables (including those of the debtor's tenants) (*Quoniam Attachiamenta* c 36) and the Statute of Alexander which provided for the sale of the debtor's lands if moveables proved insufficient to pay the debt.
[634] 1469 c 36, *RPS* 1469/15.
[635] Relieving tenants of their former exposure to diligence for their landlord's debt.
[636] The terms are synonymous in this context.
[637] For styles disclosing the detail of procedure for apprising see G Dallas *A System of Stiles [sic] as now practiced within the Kingdom of Scotland* (2nd edn, 1773–4) Vol I, 27–48. On wadset, see W Ross *Lectures on the History and Practice of the Law of Scotland: Relative to Diligence and Conveyancing* (2nd edn, 1822) Vol II, 330–91; Hume *Lectures* Vol IV, ch VII; *Bell's Dictionary* "wadset"; AJM Steven *Pledge and Lien* (2008) paras 2-12–3 and 3-62–5 and "Accessoriness and Security over Land" (2009) 13 EdinLR 387 at 395–6.
[638] Balfour *Practicks* 401; Spotiswoode *Practicks* 44, recording an Act of Sederunt of 27 Jun 1623.
[639] 1672 c 19, *RPS* 1672/6/55.

dispone.[640] The 1672 Act sought to remedy some of the abuses associated with apprisings. The most significant change was replacing procedure before a messenger at arms and a jury of apprisers with an action in the Court of Session. Allied to this was a change in the method of initiating the procedure. Instead of denunciation on the lands and at the head burgh, the procedure commenced with citation of the debtor. This, as Mackenzie pointed out, was a very inadequate mechanism for public notice.[641] The 1672 Act carried most of the rules which applied to apprisings forward and applied them to adjudications.[642]

At the heart of both procedures was a judicial process at the end of which the creditor had a real right transferred to him by the court. In both cases, the creditor did not obtain his real right until infeftment.[643] This meant that the basic rule gave preference to the appriser or adjudger who was first infeft and that infeftment regulated competition with other real rights. Superiors were entitled to payment of a year's rent by the appriser or adjudger, which gave them an incentive to co-operate, although if necessary, they could be charged to give entry on pain of horning.[644]

(2) Protecting the gap

The first stage of the diligence (denunciation in the case of apprising and citation in the case of adjudication) conferred no real right. This left a significant gap during which the creditor was at risk of his diligence being frustrated. However, case law established that rights granted by the debtor after denunciation or citation would prevail over the the apprising or adjudication only if (a) completed prior to infeftment on the diligence and (b) based on a specific obligation to grant which pre-

[640] Craig III.ii.23–4; Mackenzie *Institutions* 312; Stair III.ii.45 and 54; Bankton III.ii.79; Erskine II.xii.47 and Adjudications Act 1669 c 18, *RPS* 1669/10/55.
[641] Mackenzie *Observations on the Acts* in *Works* Vol I, 311.
[642] Strictly speaking, it applied them to "general adjudications" but the alternative procedure, "special adjudication" proved so unpopular that it was very rarely used: Erskine II.xii.40; Hume *Lectures* Vol IV, 481. It was abolished by the Statute Law Revision (Scotland) Act 1906 s 1.
[643] Mackenzie *Institutions* 311; Stair III.ii.23; Bankton III.ii.49 and 52; Erskine II.xii.23; Bell *Comm* I, 754; *Comptroller v Lord Sempill* (1555) Balfour *Practicks* 403 c XI; *M'Adam v Henderson* (1612) Mor 8374; *M'Culloch v Hamilton* (1627) Mor 8383; *Neilson v Ross* (1681) Mor 8387; *Buckie v Bell* (1731) Mor 8388.
[644] Stair II.iii.30; III.ii.24.

dated the denunciation or citation.[645] Diligence for pre-citation or denuncation debts continued to be competent.[646] The first requirement is easily explained on the basis of the rule *prior tempore potior iure* but the latter is not. The reason for the second requirement was that denunciation or citation rendered the property litigious, and once property was litigious the debtor was not free to do any "voluntary" acts which affected it.[647]

Stair appears to have been the first to deploy the word "litigious" in this context.[648] The earliest printed instance is his report of *Johnston v Johnston*[649] and he also uses it in his *Institutions*.[650] The term was picked up by the writers and became part of the standard account of inchoate adjudication.[651]

Stair's description of the effect of litigiosity is typical: it is because the object of the apprising becomes litigious from the moment of denunciation that "no voluntary deed of the debtor, after the denunciation, can prejudge the appriser."[652]

(3) Protection by prohibition

In the context of adjudications, four aspects of the development of litigiosity are striking. First, Scots law comes down firmly against restricting litigiosity to cases where a real right is being asserted. The function of litigiosity in this context is to ensure that the adjuger or appriser is able to obtain a real right.

The second point is related to this. Litigiosity was merely a temporary state, intended to prevent the frustration of appriser or adjudger's right. Therefore, the

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[645] *M'Adam v Henderson* (1612) Mor 8374; *Gardin* (1627) Mor 8375; *A v B* (1629) Mor 8375; *Blackburn v Gibson* (1629) Mor 8378.
[646] *Massey v Smith* (1785) Mor 8377.
[647] *A v B* (1629) Mor 8375; *Cardross v Somerdycke* (1684) Mor 8376.
[648] I have found no instances prior to Stair. Mackenzie does not use the term litigious in his discussions of adjudication and apprising (*Observations on the Acts* in *Works* Vol I, 431–2; *Institutions* 310–11) although his observations on the 1672 Act show he was aware of the rule which it describes.
[649] *Johnston v Johnston* (1674) Mor 8386.
[650] III.ii.21. The term was also used in the 1681 edition (II.xxiv.20).
[651] Forbes *Institutes* Vol I, 292; Bankton II.ii.47; Erskine II.xii.16; Kames *Elucidations* Art 19; Hume *Lectures* Vol IV, 453 and Bell *Comm* II, 145.
[652] Stair III.ii.21.

creditor who was unduly dilatory in completing that right lost its protection on account of his *mora*.[653]

Thirdly, the subordinate function of litigiosity, and the way its effect was expressed suggest that it only had effect with respect to the creditor doing diligence. The deed was not struck out *erga omnes*. This does not stop Stair from describing tacks deprived of their 1449 Act effect on the basis of litigiosity as "null",[654] but the nullity is relative rather than absolute.

Bell classified litigiosity, alongside consent to a preference, inhibition and rules on grants by insolvent debtors, as a "preference by exclusion".[655] He treats these preferences within the broader class of "securities"[656] and notes that preferences by exclusion are not real rights but that they "operate merely in the way of Prohibition of Exclusion against claims which would otherwise be entitled to a preference." However, not all prohibitions are securities because "[w]hen such a prohibition is general, it can scarcely be said to operate as a security". Therefore, Bell only discusses those cases "where the exclusive diligence or contract belongs to individual creditors, allowing full effect to their securities, and excluding others".[657]

Even in respect of the relevant creditor, litigiosity's effect is limited to protecting his interest in doing the diligence, which is why it ceases to be competent when he appears to have abandoned any attempt to complete the diligence.

Fourthly, litigiosity developed to maturity remarkably quickly. There seems to be no evidence of the term being used in the sense which is relevant to this chapter prior to 1674, but the form of the rule stated in Stair's report of *Johnston v Johnston*[658] closely resembles the view of Roman-Dutch lawyers who considered that they had abandoned the rule: the transfer was effective, saving the right of the creditor doing

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[653] *M'Culloch v Hamilton* (1627) Mor 8383; *Earl of Gallow v Gordon* (1636) March 29 Mor 8384; *Johnston v Johnston* (1674) Mor 8386; *Earls of Southesk and Northesk v Lord Powerie* (1680) Mor 8387; *Buckie v Bell* (1731) Mor 8388; Stair III.ii.21.

[654] III.ii.21.

[655] Bell *Comm* II, 132–3.

[656] Bell *Comm* I, 711. Book V (of which the discussion of preferences by exclusion forms the fifth chapter) is entitled "Of Real Securities over the Moveable Estate" but the introduction to Book IV (I, 711) and the inclusion of inhibitions and adjudications makes it clear that Bell intended to cover aspects of heritable property in Book V.

[657] Bell *Comm* II, 133.

[658] (1674) Mor 8386: "Denunciation of apprising makes the subject litigious, after which the debtor cannot make any voluntary alienation in prejudice of the apprising, provided that the appriser proceed in diligence to obtain infeftment, or charge the superior; but if he be *in mora*, the effect of the litigousness ceases."

diligence. Subject to some refinement regarding what a creditor must do to avoid *mora*[659] the account recorded by Stair is a serviceable statement of the relationship between litigiosity and adjudication in the modern law.

The only major statutory intervention was the addition of the obligation to register a notice of litigiosity.[660] As noted above, the major disadvantage of adjudication as compared with apprising what the inadequacy of the means of publicity. This was addressed by section 159 of the Titles to Land Consolidation (Scotland) At 1868, which suspended litigiosity until a notice was registered the Personal Register.

Part of the reason for the rapid achievement of a mature position may have been that Scots law had already developed this pattern of results (vulnerability of voluntary deeds concluded after the initiation of the diligence but before the creditor's right was completed) in the context of the escheat which fell as a result of horning by a creditor.[661] Horning for civil debts was abolished by the Tenures Abolition Act 1746[662] and the first Scots lawyer to rationalise its effect by reference to litigiosity was Kames, writing after 1746.[663] The materials on horning had one other characteristic which is important to the later law: grants made by the debtor between the commencement of the process of horning and the escheat were said to be made "in defraud of the creditor"[664] or of the Crown (which acquired escheated property in the first instance).[665]

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[659] The subject of Art 19 of Kames *Elucidations*.

[660] Titles to Land Consolidation (Scotland) Act 1868 s 159. Although the 1868 Act was a consolidating act, this provision appears to have been novel: J Marshall *An Analysis of the Titles to Land Consolidation (Scotland) Act 1868* (1868) 16; JG Stewart *A Treatise on the Law of Diligence* (1898) 608 fn 5. The current rules are contained in s 159 as amended by s 44 of the Conveyancing (Scotland) Act 1924, The form is prescribed by Schedule RR of the 1868 Act.

[661] *Hamilton v Ramsay* (1623) Mor 7832; *Dundas v Strang* (1626) Mor 8354; *Lindsay v Porteous* (1627) Mor 8354; *Inglis v Wood* (1627) Mor 8356; *Raith v Lord Buckie* (1628) Mor 8356; *Lord Lochinvar v Lindsay* (1632) Mor 8358; *Lindsay v Nisbet* (1632) Mor 8357; *Mossman v Lockhart* (1635) Mor 8365; *Cochran v Dawling* (1638) Mor 8358; *Lumsden v Summers* (1667) Mor 8359; *Veitch v Pallat* (1673) Mor 8367; *Jackson v Simpson* (1676) Mor 8362; *Nicholas v Archbishop of Glasgow* (1677) Mor 8369; Hope *Major Practicks* VI.xxvii.15; Stair III.iii.16, III.iv.65, IV.x.3 and IV.ix.6; Forbes *Institutes* Vol I, 145–6 and *Great Body* Vol I, 651–5.

[662] 1746 c 50 s 11.

[663] In the first edition of the *Principles of Equity* (1st edn, 1760) 214–5.

[664] 1592 c 147, *RPS* 1592/4/88.

[665] Hope *Major Practicks* VI.xxvii.6.

(4) Third-party effect

It is relatively easy to see why the debtor should be obliged not to frustrate creditors' efforts at satisfaction. The diligence is a way to get him to fulfil his obligations. Those obligations might reasonably be said to include or imply a duty to undergo diligence if he does not perform. Erskine observes that the rule "was without doubt introduced, that the debtor might not have it in his power to defeat or evacuate his creditor's diligence."[666] Similarly, Bell defines litigiosity as "an implied prohibition on alienation to the disappointment of an action, or of diligence, the direct object of which is to attain the possession or to acquire the property of a particular subject."[667] This analysis echoes the background of litigiosity in the Civilian tradition. To say a thing was a *res litigiosa* was to say that its alienation was prohibited. By saying the property was litigious, Scots lawyers were saying that the debtor was prohibited from dealing with it in a way which prejudiced the diligence (which was, of course, a form of judicial process). However, it is the third-party grantee rather than the debtor who will suffer if a grant is set aside. Some justification is needed for this result.

While the institutional writers say little on the point, the problem was addressed by Kames. He suggests that the third party who knows of the inchoate diligence is accessory to the debtor's wrong by accepting the grant.[668] This is a plausible explanation. By the denunciation, or citation and registration, the creditor doing diligence gives notice that he is pursuing the relevant asset in satisfaction of his right. Third parties are also presumed to know the law and thus the implied prohibition on alienation which the inchoate diligence triggers. A third party who accepted a grant would thus be colluding with the debtor's attempt to evade his obligation to undergo the diligence. The duty not to do this might be regarded as flowing from a duty not to facilitate or induce breaches of obligations owed to other people. In other words, the debtor is defrauding the creditor by frustrating satisfaction of his right, and the grantee is an accessory to that fraud. The reasoning echoes the fraud on creditors analysis deployed in relation to grants by insolvent debtors.

Elsewhere in the *Principles of Equity*, Kames argues that, once diligence has commenced, the debtor has an obligation to convey the subject to the creditor

[666] Erskine II.xii.16.
[667] Bell *Comm* II, 144.
[668] Kames *Principles of Equity* Vol II, 43–4.

voluntarily to save the latter the expense of further execution, and he grounds the implied prohibition on that obligation.[669]

Some aspects of Kames' analysis are less than persuasive. He suggests that the third party is "postponed to the creditor in a court of equity, as a punishment."[670] If the purpose of the rule was punitive, it might be expected that the grant would be struck down altogether. Merely rendering the grant subject to the inchoate diligence seems a rather half-hearted punishment. However, it does make sense if the rule seeks to make reparation rather than to punish. The creditor doing diligence is put in the position in which he would have been had the wrongful grant not been made.

Secondly, Kames argues that the logic which renders voluntary transfers vulnerable is equally applicable to the diligence of other creditors "for it is unjust to demand from a debtor a subject he is bound to convey to another."[671] This neglects the important difference between existing creditors and post-citation purchasers. An existing creditor who does diligence or accepts satisfaction of an existing right has as much right to seek satisfaction from the debtor as the first adjudger. Unlike a third party with no prior right, he cannot avoid a conflict by standing aside and not getting involved with the debtor. Therefore, the duty of non-interference which is owed in respect of obligatory relationships to which they are strangers is not so extensive as to prevent them from taking normal steps to seek satisfaction of their own rights. Kames' approach would also imply that buyers who had yet to complete title would be protected from the diligence of their seller's creditors. Since a seller is obliged to transfer that item which is sold to the buyer. This is clearly not the law.[672]

C. INHIBITION

In addition to adjudications, which allow creditors to realise the value of the debtor's heritable property, the law provides inhibitions. These serve a very different function: prohibiting the voluntary grant of any deed in respect of that property which would prejudice the inhibiting creditor. Inhibitions prepare the way for adjudication by preserving the debtor's heritable property until it can be adjudged.

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669 *Ibid* Vol II, 179–80.
670 *Ibid* Vol II, 43.
671 *Ibid* Vol II, 180.
672 *Burnett's Tr v Grainger* [2004] UKHL 8. See further ch 8.

(1) Comparative and historical context

While interim measures intended to secure a debtor's property for execution at some point in the future are widely recognised, the form of the inhibition is somewhat unusual. The interim measures in Germany (*Arrest* and *einstweilige Verfügung*) and France (*saisie conservatoire* and *sûreté judiciaire*) can cover both moveable and immoveable property,[673] and relate to particular assets rather than to a class of property as a whole.[674] The various types of *Arrest* in German law are modelled on means of execution directed at realisation of the assets' value.[675] Similarly, a *saisie conservatoire* can be used to realise the value of the attached asset once a *titre exécutoire* is obtained.[676] A *sûreté judiciaire* gives the creditor a right in security rather than prohibiting transfer.[677] The *einstweilige Verfügung* is closer to an interim interdict than an inhibition.

Under English law, it is possible to obtain a "freezing injunction" which restrains the defendant from dealing with his assets.[678] However, this is a relatively recent development stemming from a Court of Appeal decision from 1975.[679] As the name suggests, it derives from the general power of the Courts of Equity to grant injunctions.

Scots lawyers have long considered inhibition an unusual institution. Craig, Forbes, Bankton and Kames all point out that there was nothing like inhibition in England.[680] Craig appears to have felt that the closest comparator in Roman law was the *actio Pauliana*.[681] Mackenzie also pointed to the absence of an inhibition in Roman law but draws a different Civilian parallel. Citing David Mevius' *Tractatus*

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[673] §§916 I, 938 ZPO; arts L521-1 and L531-1 *Code des procedures civiles d'exécution*.
[674] §§930 I, 932 I, 938 II ZPO.
[675] §§928, 930 (with 804), 932 (with 866–8) ZPO.
[676] Arts L522-1, L523-2 *Code des procedures civiles d'exécution*.
[677] Arts L531-1 and 2 *Code des procedures civiles d'exécution.*
[678] *Civil Procedure Rules* 1998/3132 r 25.1(f).
[679] *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213; [1975] 2 Lloyd's Rep 509.
[680] Craig I.xii.31; Forbes *Great Body* Vol I, 1245; Bankton I.vii.39 (England) and Kames *Elucidations* Art 18.
[681] Craig I.xii.31.

iuridicus de arrestis,[682] he suggest that "the Doctors" recognised a prohibition on the alienation of immoveable property which was analogous to arrestment. In the passage to which Mackenzie refers, Mevius suggests that arrestment would be superfluous for immoveables since they cannot be removed.[683] In relation to them, a *prohibitio alienationis* can be obtained from the court. Mevius observes that this prohibition on alienation is similar to arrestment but notes that it leaves the owner or possessor with ownership or possession and the right to the fruits of the property. Mevius also applied the term *inhibitio* to the prohibition. However, he does not seem to have regarded it as a technical term since he also refers to it as a *praeceptum* and an *interdictio*.

Mackenzie concludes that inhibition is a "Resemblance, if not a Species of Arrestments."[684] But, while he feels that arrestment provides a parallel and thus an analytical model, Mackenzie looks elsewhere for the origin of inhibition, pointing to Canon law, in particular to the device used by ecclesiastical judges to prevent secular courts from impinging on their jurisdiction.[685] He notes that inhibition's first application in Scotland was in respect of teinds. This impression is fortified by the chapter "Anent inhibitioun" in Balfour's *Practicks*, which is dominated by discussion of inhibition of teinds.[686] This suggests that Balfour regarded teinds as the primary focus for inhibitions.

Since teinds were originally a pecuniary burden on land due to the church, this fortifies the Canon law hypothesis.[687] To modern eyes, inhibition of teinds looks very

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[682] Mackenzie *Observations on the Acts* 287, referring to D Mevius *Tractatus iuridicus de arrestis: Ex Iurisconsultorum scriptis et Germaniae legibus moribusque* ch 9 paras 25, 29 and 32. A number of editions were printed but none predated Mevius' death in 1670: see the entries for Mevius at http://www.worldcat.org and http://gso.gbv.de. Mevius' foreword is dated 2 August 1645. The edition consulted was that printed by JA Plener in 1686, whose foreword indicates that he had not altered Mevius' work. On Mevius in general, see Stolleis *Juristen* 437.

[683] For Mevius, as for others in the *ius commune*, arrestment was as much about ensuring that the defender remained within the jurisdiction of the court as it was about preservation of his assets. The primary concern was with things or people moving beyond the jurisdiction of the relevant court: *Tractatus iuridicus de arrestis* ch 1 para 12.

[684] Mackenzie *Observations on the Acts* 287.

[685] *Ibid*. Mention is made of this type of inhibition in the set rules of the Commissary Court made in 1610 and preserved in Balfour's *Practicks* 664–665. Similarly, Sinclair records a case where the Lords of Council "put inhibitioun to the official of Sanctandrois that he suld nocht cognose upone the reductioun of xix yeiris takis", on the basis that they had juridiction over these matters whoever the parties were: *Prior of St Andrews v Bishop of Dunkeld* (1542) Sinclair *Practicks* No 284. Similarly, No 290, 430.

[686] Balfour *Practicks* 476.

[687] On teinds in general, see *Bell's Dictionary* "Teinds or tithes".

different to standard inhibition. It was used by those entitled to teinds to prevent collection by others. The remedy for breach was not reduction but spuilzie of teinds.[688]

The process by which inhibition in the modern sense emerged is rather hazy.[689] Although Balfour focussed on inhibition of teinds, he did discuss standard inhibition elsewhere.[690] That fragment and some cases noted by Sinclair provide clear evidence of inhibition in the 1540s.[691]

No attempt was made to offer an account of how inhibition of teinds might have developed into a standard inhibition until Walter Ross's *Lectures*.[692] Ross claims that Scots law had at one time recognised conventional hypothec[693] and that most bonds included both a hypothec and an oath. The oath brought the whole matter within ecclesiastical jurisdiction. Inhibitions initially supported the enforcement of the conventional hypothec just as the inhibition of teinds supported enforcement of the right to the teinds. As with teinds, inhibition became essential in order to give third party effect to the hypothec since there was no other publicity for the security. The conventional hypothec was undermined by the rising significance of feudal sasine in relation to heritable property. This, coupled with the fact that the hypothec was useless without the inhibition, led the basic right to wither and the inhibition, which was originally part of the mechanism of enforcement to be left standing alone. Thus inhibition came to be granted for all debts without the need for any hypothec in the original bond.

Ross suggests that the allegations of intention to defraud creditors found in the style for letters of inhibition were an attempt to find a fresh basis for inhibitions once the hypothec had fallen away. The format of Ross's *Lectures* did not lend itself to extensive referencing and there is no trace of this course of development in the standard sources. It should also be noted, however, that the sources do not provide evidence which contradicts Ross's account.

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[688] Stair II.viii.23.
[689] See eg Stair IV.l.3; Ross *Lectures* Vol I, 459 and Stewart *Diligence* 525.
[690] Balfour *Practicks* 185 c XXIV (under *Restitutio in integrum*).
[691] *Hering v Dowhill* (1541) No 89; *Maxwell v Maxwell* (1543) No 347 (Mor 7013); *Queen's Advocate v Earl of Crawford* (1543) No 349 and 494 (Mor 7013).
[692] Ross *Lectures* Vol I, 460–7.
[693] Ie non-possessory security.

For the later law, its truth or falsehood is of little significance. The majority of Scots lawyers who considered inhibition make no mention of the Canon law connection. The exceptions are Bell[694] and Stewart[695] but even they did not lay any emphasis on this aspect in their analyses.[696] In its developed form, inhibition had nothing to do with competing jurisdictions and inhibition of teinds was considered a distinct remedy.[697]

Further, there is no reference to any European literature on the topic in other Scottish discussions. This is perhaps a little surprising since the term "inhibition" was used in the *ius commune* and there is a tract of works devoted to the subject.[698] In some cases, it was applied in a broad sense for any kind of prohibition.[699] In others, however, it had a meaning and force very close to arrestment.[700] Of course, arrestment was recognised by Scots lawyers as a parallel diligence to inhibition.[701] Part of the reason for this may have been that, once the view that inhibition was unique to Scots law had established itself, Scots lawyers saw no reason to look abroad for assistance in understanding it. As noted above, the basic approach in modern French and German law differs considerably from that seen in Scottish inhibiton.

(2) Letters of inhibition

Until the Rules of the Court of Session were revised in 1994, creditors obtained a warrant to inhibit by applying to the Court of Session for letters of inhibition.[702] In

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[694] *Comm* II, 134
[695] Stewart *Diligence* 525–6.
[696] Although Bell's rather confusing suggestion that, while conventional hypothecs are not recognised in Scots law, "inhibition is a device which has been borrowed from the canon law, to supply that want" perhaps makes a little more sense in light of Ross's account.
[697] Bankton I.vii.148.
[698] Eg Q Mandosi *De inhibitionibus* (2nd edn, 1581); B Carpzov *De inhibitionibus curiarum provincialium Saxonicis, earumque processu in momentaneo possessorio* (1649); J de Sessé *De inhibitionibus et executa privilegiata* (1661); BL Schwendendörffer *De inhibitione in vim arresti* (1691); J Klein *De inhibitione iudiciali in causis appellationum* (1705); Carpzov *Responsa juris electoralia* (1709) I.iii; JG Lotich *De inhibitionibus et processu inhibitivo* (1754). On Carpzov see Stoellis *Juristen* 119.
[699] Mandosi *De inhibitionibus* 1; Klein *De inhibitione* 623; Carpzov *Responsa* I.iii.21.1–2.
[700] Schwendendörffer *De inhibitione in vim arresti* esp 4–5.
[701] On the parallel between inhibition and arrestment, see Mackenzie *Observations on the Acts* 287; Stair IV.l.pr and 24.
[702] Stair IV.l.4. The 1994 reforms are discussed below in section (6) Formalities.

the absence of a statutory framework or a *ius commune* background, the style of these letters,[703] and the analogy with interdiction of prodigals, formed the bases of analysis.[704] Stair felt the form of the letters was sufficiently important to warrant reproducing it.[705]

The letters were issued in the king's name and instructed messengers at arms to make two prohibitions. First, they were to "inhibit and discharge" the debtor, prohibiting any dealing with his property whether heritable or moveable and any act pursuant to which diligence might be done against his assets. Secondly, "all our lieges of this realm, and all others whom it effeirs" were to be inhibited and discharged from concluding any of the prohibited transactions with the debtor. The former prohibition required to be by personal service on the debtor, the latter by proclamation at the market cross. The reason for this drastic action was also narrated in the letters: namely that the king is informed that the debtor intends to diminish his estate "in defraud and prejudice of the complainer". This justification echoes some of the criteria for a prohibition on alienation applied in the *ius commune*.[706]

In light of this, it is not surprising that Scots lawyers characterized inhibition as a "personal prohibition"[707] against transactions "in fraud" of the inhibitor. Fraud in this context refers to transactions undertaken with a view to frustration of the inhibiting creditor's hopes of recovery. This conception was to have profound consequences for the way in which inhibition was understood, the most obvious being that inhibition conferred no real right, but merely cleared the way for a later adjudication.[708]

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[703] Craig I.xii.31; Stair IV.l.3–4; Forbes *Great Body* Vol I, 1245–6; Erskine II.xi.2; Kames *Principles of Equity* Vol II, 186; *Syme v Laird of Coldingknows* (1614) Mor 6943; and *Crichton v Earl of Tulllibardine* (No date) Mor 6941.

[704] Bankton I.vii.133.

[705] Stair IV.l.4

[706] Mevius *Tractatus* ch 9 para 28, himself referring to P Rebuffi *Tractatus de literis obligatoriis regio sigillo vel alio authentico signatis* art 6 gloss 3 num 28. This can be found in *Commentarii in constitutiones seu ordinationes regias* (1554) Vol I, 14. Mevius also refers to Rebuffi's "*Roman. Consil.* 241" This is probably a reference to *Consiliorum sive Responsorum iuris D Petri Rebuffi* published in Venice in 1588. This volume is rare. Internet searches disclosed one copy in the Library of Congress and a number in Itailian libraries. It has therefore not been possible to check this reference. The reference does not match Rebuffi's *Responsa et consilia* (1587). On Rebuffi in general, see Stolleis *Juristen* 528. Mevius also mentions apparent insufficiency of assets as a ground for prohibition.

[707] The phrase recurs through the Scottish sources: eg Mackenze *Institutions* II.xi at 310; Forbes *Institutes* Vol I, 281; Erskine II.xi.2; Hume *Lectures* Vol VI, 69. See, similarly Bell *Comm* II 134.

[708] Stair IV.l.25; Bankton I.vii.139; Erskine II.xi.13; Bell *Prin* §2309; Stewart *Diligence* 551.

Read literally, the letters prohibit the debtor from dealing with his property or from concluding any contract until the creditor is paid. Such a prohibition comes close to a total deprivation of active capacity. Given that any attempt to verify the alleged risk to the creditor's prospects of recovery was soon abandoned,[709] and that inhibition was available on the dependence,[710] a strict application of the terms of the letters would have amounted to an intolerable restriction on the inhibited party. Therefore, it is not surprising that they were not interpreted with this degree of rigour.

(3) Extent of the restriction

By Stair's day, the idea that inhibitions restricted alienation of moveables had been abandoned on ground of freedom of commerce and the need for debtors to be able to purchase food.[711] The shift led Dallas to remove the reference to "goods and gear" from his version of the style in the only major change in the formalities surrounding inhibitions between Stair and the nineteenth-century reforms.[712]

Other aspects of the effect of inhibitions required to be clarified. These clarifications can be seen as applications of the idea that inhibition was a personal prohibition of transactions which would defraud the inhibiting creditor. This is evident in discussion of the rule that inhibition against a debtor required to be reconstituted if he died. If this was not done, the inhibition did not affect dealings with the defunct debtor's property by the heir.[713] The rationale given for this was that the prohibition was personal to the defunct, and the heir had not been prohibited from dealing with the property.[714]

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[709] Balfour *Practicks* 185 c XXIV, 476 c I; Craig I.xii.31; Stair IV.l.5 and 21. Particular grounds to fear frustration of eventual enforcement did require to be averred where the inhibition was sought to secure a conditional obligation: Stair IV.xx.29; Stewart *Diligence* 528–9. Such grounds now require to be demonstrated in order to inhibit on the dependence: Debtors (Scotland) Act 1987 ss 15E(2)(b) and 15F (3)(b).

[710] *Kae v Stewart* (1664) Mor 6952; *Fraser v Keith* (1668) Mor 6953; Bankton I.vii.194; Ross *Lectures* Vol I, 485.

[711] Craig I.xii.31; *Aitken v Anderson* (1620) Mor 7016; *Lord Braco v Ogilvy* (1623) Mor 7016; Stair IV.xx.33 and IV.l.5.

[712] Dallas *System of Stiles* 26; Ross *Lectures* Vol I, 478.

[713] *Pyrie* (1612) Mor 6943; *Hamilton v Kirkpatrick* (1625) Mor 6945.

[714] Stair IV.l.6; Bankton I.vii.140; Erskine II.xi.2; Bell *Comm* II, 141; Stewart *Diligence* 554.

Similarly, it was soon established that grants made in satisfaction of prior obligations,[715] and diligence done for satisfaction of prior rights, were safe.[716] As with horning and apprising or adjudication, the distinction between vulnerable and invulnerable grants was explained on the basis that the protected grants were not voluntary.[717] An explanation for why involuntary grants should not be vulnerable has already been attempted in relation to adjudications, but the well-known fragment from the Digest[718] which says that one who merely receives what is due to him does not commit fraud should also be borne in mind. Performance of a prior obligation is not a breach of the prohibition because the debtor is merely giving the grantee his due rather than defrauding the inhibitor.

Conversely, an inhibiting creditor who received payment of his debt could not be said to be defrauded even if the debtor made grants in respect of his heritable property. The grants may have been made despite the prohibition in the letters but they did not operate to defeat the inhibitor's hopes of satisfaction. Therefore, the inhibitor's right to reduce was said to persist "ay and while he were paid of his debt."[719] Once it was paid the inhibition fell away.

The concept of fraud did not provide as wide-ranging a restriction on the scope of inhibition as it might have done. Craig toyed with the idea that a grantee who could show that the inhibiting creditor's hopes of satisfaction were unprejudiced because of a sufficiency of assets even after the relevant grant was safe.[720] However, the court had rejected such arguments.[721] Further, in *Douglas v Johnston* the court allowed an inhibitor to reduce an apprising *in toto* despite the appriser's protestations that the land was sufficient to satisfy both their claims.[722]

Craig provides a hint at the reason for this narrower approach in his argument that inhibitions are preferable to the *actio Pauliana* because of the difficulty in proving

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[715] *Laird of Tullibardine v Laird of Cluny* (1615) Mor 6944; *Ross v Dick* (1635) Mor 6949; *Lord Scotstarbet v Boswell* (1639) Mor 7029; *Gordon v Seatoun* (1675) Mor 7034; Balfour *Practicks* 185 c XXIV; Hope *Major Practicks* II.xv.3 and 5; Mackenzie *Institutions* II.xi at 310; Stair IV.xx.29 and IV.l.18; Stewart *Diligence* 562–3.
[716] Mackenzie *Institutions* II.xi at 310; Stair IV.l.19; Bell *Comm* II, 139; Stewart *Diligence* 560–1.
[717] *Elleis v Keith* (1667) Mor 7020; Hope *Major Practicks* II.xv.5; Mackenzie *Institutions* II.xi at 310; Stair IV.xxxv.21 and IV.l.20 and 22; Bankton I.vii.138; Erskine II.xi.11; Hume *Lectures* Vol VI, 72.
[718] D.42.8.6.6.
[719] *Douglas v Johnston* (1630) Mor 6947. See similarly Forbes *Institutes* Vol I, 283–4.
[720] I.xii.31 and I.xv.24.
[721] I.xii.31.
[722] (1630) Mor 6947.

knowledge of the debtor's insolvency.[723] By the same token, depriving inhibitions of effect where the debtor was solvent may have been thought to introduce an unacceptible level of uncertainty.[724]

(4) Consequences of breach

Even where a grant was covered by inhibition, the prohibition did not render it void *ab initio*. Rather, the inhibitor has a "rescissory" action, which allows him to set aside the grant.[725] The act is thus valid until challenged by the inhibitor.[726] If the inhibitor chooses not to exercise that option, then the transfer stands. Thus, the inhibitor seems to enjoy a "protected party's option" of the kind discussed in relation to misrepresentation. This suggests that his right might be characterised as a personal right to have the transfer reversed. Reduction on the basis of this personal right might be seen as natural restitution, reversing a grant in breach of a prohibition which was imposed for his benefit.

The interim validity meant that the grantee, rather than the debtor or the inhibiting creditor, was entitled to fruits generated by the property.[727] It also suggests that, as in the case of misrepresentation, a further transfer made by the grantee would be safe. Kames made this point explicitly, deriving his conclusion from the personal nature of the prohibition.[728] The inhibited debtor had been prohibited from dealing with the property and the lieges had been prohibited from dealing with him. However, no such prohibition had been made in respect of his singular successor and the inhibitor had no real right. He suggested, however, that the position would be different if the inhibitor had raised an action of reduction on the basis of the inhibition, for this would render the property litigious.

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[723] I.xii.31.
[724] Cf Erskine's suggestion that inhibition established a *praesumptio juris et de jure* that any deed in breach of the inhibition was fraudulent: II.xi.2.
[725] Craig I.xii.31; Stair IV.l.22.
[726] Stewart *Diligence* 552.
[727] *Crichton v Anderson* (1684) Mor 7050.
[728] *Elucidations* 17 and 21: placing inhibition alongside fraud, minority and lesion, and reduction of a sale for failure to pay the price in the context of a discussion of which challenges also affect the rights of singular successors.

Hume doubts Kames' position, arguing that (while inhibition gives no real right), the inhibition is known to all the world by reason of being registered.[729] Therefore, he suggests, the third party buyer must have known that his author had taken the property in breach of the inhibition. Hume pointed out that there was no judicial authority to support Kames' view. Hume's approach is not inconsistent with the view that the right to reduce is personal. Since it is based on constructive notice of the content of the register, it would simply bring all purchasers within the rule that bad faith successors are vulnerable where their authors have acquired by means of a voidable grant.[730]

The position is somewhat modified by section 32 of the Land Registration (Scotland) Act 2012, which requires that, if the Keeper accepts a deed whose validity "might be affected by an entry in the Register of Inhibitions", a note disclosing that fact must be included in the title sheet. There is no equivalent provision in the Scottish Law Commission's draft bill and it seems to run counter to the Commission's view that "voidability does not make the register inaccurate".[731] It is difficult to see what the purpose of such a provision could be other than to put potential grantees on notice that the current owner's title was subject to challenge and thus to put them in bad faith.

An inhibition could only be exercised with a view to securing satisfaction of the relevant debt. Although the contention that no reduction could be brought unless the inhibiting creditor had some real right was rejected,[732] a grantee could "purge" the inhibition by payment of the debt with interest.[733] Further, reduction was excluded if it would be of no benefit to the inhibiting creditor. Bankton posits the following case (paraphrased for reasons of clarity):[734]

> Angela has borrowed £100 each from Brenda, Carmen and Daisy in that order. Her heritable property is worth £100. Carmen had inhibited Angela prior to the loan from Daisy. Brenda adjudges first and Daisy follows within a year and a day, entitling her to rank *pari passu* with Brenda under the 1661 Act. After the year and day have passed Carmen tries to reduce Daisy's adjudication on the basis of

[729] Hume *Lectures* Vol VI, 75
[730] Discussed further in chapter 7.
[731] *Report on Land Registration* para 20.2
[732] *Monteith v Haliburton* (1632) Mor 6947; Bankton I.vii.139.
[733] *Trotter v Lundie* (1683) Mor 7048; Hope *Minor Practicks* (1726) No 259; Bankton I.vii.141.
[734] I.vii.142. See also Stewart *Diligence* 553.

her inhibition. She cannot do so because, even if she were otherwise allowed, she could get no benefit: it is too late to come in *pari passu* with Brenda.

(5) Effect of reduction

Where the right to reduce is exercised, the effect of the reduction is limited. It only operates for the benefit of the inhibiting creditor. This can be seen as a consequence of the nature of inhibition. The grant was a wrong done against the inhibitor, not against anyone else, so there is no need for consequences which go beyond what is necessary to protect the inhibitor's interest.

Thus, in *Lady Borthwick v Ker*, the Lords held that an infeftment which had been reduced *ex capite inhibitionis* could nonetheless be relied on in disputes with others "who could pretend no interest in the inhibition."[735] Debts contracted in breach of the inhibition and diligence done in enforcement of them remain exigible against the debtor despite reduction *ex capite inhibitionis*.

Stair gives an example of the application of this limited or *ad hunc effectum* reduction in his title on Competition.[736] To make sense of it, it is necessary to say a little about competitions as a class of procedure. Stair makes it clear that competitions are different from normal actions because they involve a number of putative rightholders coming together with competing claims. "[T]he competition of rights ... implies as many different actions as there are competing rights."[737] In this melting pot, any objection which one creditor could raise against another's right may be raised, without regard for the normal restrictions which meant (in Stair's day) that some challenges had to be raised in separate actions. This explains why inhibition sometimes appears to confer a preference without the need for an action of reduction.[738]

Stair is considering the case where a debtor's estate is to be subject to a judicial sale for creditors.[739] In the interim, rents are being collected from the estate and Stair

[735] (1636) Mor 6952.
[736] IV.xxxv.
[737] IV.xxxv.1.
[738] See GL Gretton "Diligence" in *The Laws of Scotland: Stair Memorial Encyclopaedia* Vol 8 (1991) para 169.
[739] IV.xxxv.26.

considers how they should be divided between annualrenters[740] who were infeft before the first adjudication and adjudgers (all of whom were infeft within a year and a day of each other). Having stated the basic rule that the annualrenters were to take their rights according to the order of their constitution by infeftment and the adjudgers were to share any surplus proportionately,[741] he continues:

> This is the rule of division; but all the former grounds of reduction are exceptions from the rule; so that if any of the competitors could reduce the right of another in the process of reduction, they may make use of the same reason in a competition.[742]

Stair takes inhibition as his example and works through a number of hypothetical situations. The process described is that which would later become known as Bell's canons:[743] the position is analysed as if there were no inhibition and then again as if the grant done in breach of inhibition had not been made. Those creditors who neither inhibited nor breached the inhibition are paid according to the first analysis. The inhibiting creditor is paid according to the second analysis. This is made possible by taking what is necessary to make up the difference between the inhibiting creditor's share on the first and second analysis from the creditor whose right was in breach of inhibition. Stair's last hypothetical case illustrates the process relatively simply but a paraphrase of it may clarify matters further:

> There are three adjudging creditors (Andrew, Basil and Colin) all ranking *pari passu* under the 1661 Act. Each is entitled to annual interest of £400. However, Basil had inhibited the debtor before Colin lent the money and the property adjudged only has annual rents of £600. How is the rent to be shared?
>
> Step 1 is to share the rent as if there was no inhibition. That would mean each getting £200, since they rank *pari passu*. That fixes Andrew's entitlement.
>
> Step 2 is to share the rent as if Colin had complied with the inhibition and not dealt with the debtor. If that had been the case, the £600 would have been split two ways so Andrew and Basil would have received £300 each. That fixes Basil's entitlement.

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[740] An annualrent was a real right in land which entitled the holder to annual payment from the land: Steven "Accessoriness and Security over Land" at 396.
[741] IV.xxxv.28.
[742] IV.xxxv.29.
[743] Bell *Comm* II, 413.

> It remains to establish Colin's entitlement. Basil is entitled to £100 more than the *pari passu* division would yield. That is achieved by taking £100 from Colin and giving it to Basil. Thus Andrew ends up with £200, Basil with £300 and Colin with £100.

It is clear from this example that Andrew cannot rely on the nullity of Colin's right in relation to Basil. If he could plead the inhibition then both Andrew and Basil would have to £300 and Colin would have got nothing. Stair does not seem to have felt that this required any explanation beyond the observation that the inhibition "should neither profit nor prejudge him".

On the other hand, Stair is careful to explain why the party whose right is reduced cannot claim any compensation from others, even if they rank below him. The situation is illustrated by his second example:

> In this case, Basil inhibited the debtor. The debtor then granted an annualrent to Colin in breach of the inhibition. The annualrent is a subordinate real right which entitled him to £400 a year from the debtor's property. Thereafter, Basil and Andrew (a pre-inhibition creditor) both adjudged the same property. These adjudications also entitled them to a rent of £400 to cover their interest.[744]
>
> Colin's annualrent was constituted before either of them had adjudged but after Basil had inhibited the debtor. Basil adjudged within a year and a day of Andrew's adjudication. The rent from the property is £600.
>
> Step 1, as before is to divide the rent ignoring the inhibition. As noted above, the basic rule is that the annualrent ranks ahead of the adjudications because it was constituted first (and the 1661 Act is no help to the adjudgers when competing with an annualrent). Therefore, Colin would get the full £400 and Andrew and Basil would share the remaining £200, giving them £100 each. That fixes Andrew's share because he did not inhibit but neither was his adjudication vulnerable to challenge on the basis of the inhibition.
>
> Step 2 is ranking as if no annualrent had been granted in breach of the inhibition. On that hypothesis, Andrew and Basil would have shared £600 between them so Basil would receive £300. That fixes his share.
>
> Step 3 involves making up the difference between Basil as per Step 1 and Basil as per Step 2 by taking something from Colin because Colin's right was constituted

[744] In Stair's day, the idea was that the rents from adjudged property would cover the interest due and the capital would be repaid by the debtor exercising his reversionary right.

in breach of the inhibition. Basil needs an extra £200, so Colin loses £200, leaving him with £200.

Therefore Andrew gets £100, Basil gets £300 and Colin gets £200.

Colin might object that he ranks ahead of Andrew and that Andrew is therefore only entitled to be paid once Colin is fully satisfied. On that basis, he might argue that he should get Andrew's £100, making his share up to £300. Stair, however, rejects such an argument. Colin's right "is faulty and defective, as proceeding against the King's authority, prohibiting to take any such right; and therefore it cannot claim to be made up out of any other right which is not faulty, which holds in the other grounds of reduction".[745]

This comment stresses the centrality of the idea of inhibition as a prohibition. Breach of the prohibition is effectively a private matter between the person for whose benefit the prohibition was imposed (Basil) and the person who breached the prohibition (Colin). Basil is put in the position he would have been in had the wrong not been done but Andrew, a third party to all this, is not affected. This fits very well with a model which conceptualises reduction as a mechanism for reparation of a wrong which had been done to the reducing party by the party whose right is being reduced.

One other aspect of this passage requires to be emphasised: Stair's reference to other grounds of reduction. Here, as at the beginning of the section, Stair makes clear that inhibition is just one example and that any of the grounds of reduction which he has outlined in this title would give rise to a similar analysis.[746] These cover the full gamut from lack of some necessary formality[747] and prescription on the 1617 Act[748] to litigiosity arising from incomplete diligence,[749] the effect of the 1621 Act,[750] fraud,[751] and force and fear,[752] and others besides.[753]

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[745] IV.xxxv.29.
[746] IV.xxxv.13–25.
[747] IV.xxxv.13.
[748] IV.xxxv.15.
[749] IV.xxxv.17.
[750] IV.xxxv.18.
[751] IV.xxxv.19.
[752] IV.xxxv.20.
[753] The others are primarily concerned with statutes of less contemporary interest such as those regulating priority between base infeftments one of which is clad with possession or restricting the apparent heir from doing deeds to the prejudice of his father's creditors.

In principle, Stair seems to have regarded his relative-reduction analysis as applicable to any of these grounds. However, the nature of some of the grounds means that it would play out differently. Stair's analysis only operates to give results of the kind just described where the ground of challenge affects the relationship between some of the competing rights but leaves others untouched. A defect which could be raised by every claimant would move the affected right to the bottom of the pile and a ground which operated against all other rights would move the relevant right to the top.

If Colin's problem was lack of some necessary formality rather than breach of inhibition, Andrew would be just as entitled to rely on it as Basil because the lack of formality would render the grant void. Any creditor in the competition could table the objection against Colin's right and all other creditors would rank as if Colin had no right.

However, a number of the grounds of reduction which Stair mentions share inhibition's limited scope. Fraud, litigiosity, and challenges on the 1621 Act can only be raised by certain parties against certain other parties. In light of this, it seems reasonable to assume that Stair regarded reduction on these bases as having the same relative effect as reduction *ex capite inhibitionis*.

The idea that a transfer can be set aside in relation to some parties and not others might be thought a troubling one, particularly in a system which has a unitary conception of ownership. Although *ad hunc effectum* reduction was generally accepted in relation to inhibitions,[754] substantial effort was expended on trying to work out how its implications, particularly in relation to the maxim *qui vincit vincentem me, vincit me*.[755] However, Stair's model eventually prevailed in the form in which it was stated by Bell.[756]

Bell did not to limit his analysis of *ad hunc effectum* reduction to inhibitions. Rather, he discusses the canons of ranking in a section entitled "Of ranking of

[754] Forbes *Great Body* Vol I, 1253; Bankton I.vii.147; Erskine II.xi.14; Stewart *Diligence* 552.
[755] Mackenzie *Observations on the 1621 Act* 39; Kames *Essays upon Several Subjects in Law* (1732) 61– 99.
[756] The developments in the case law are set out by Bell in his *Commentaries* (II, 409–13). His summary of the effect of these rules was endorsed by the Inner House in *Baird & Brown v Stirrat's Trustee* (1872) 10 M 414.

creditors entitled to preferences by exclusion".[757] At its narrowest, that includes the four categories which he mentioned earlier: consent to a preference, inhibition, litigiosity, and breach of the bankruptcy statutes.[758] However, a case could also be made for including the offside goals rule in this category too. It also gives one party a right to challenge a grant which is not available to general creditors.

(6) Formalities

Ross suggests that the mode of execution of inhibition was borrowed from France.[759] Initially, the form was twofold (as is also evidenced by the terms of the letters of inhibition): personal execution against the inhibited party and general execution at the market cross of the relevant head burgh, which involved crying the three oyesses and affixing a copy of the inhibition to the cross.[760] From 1581, this was augmented by registration.[761] In 1868, the requirement for public execution at the market cross was removed and registration replaced it as the time at which inhibition took effect.[762]

1868 also saw the introduction of a statutory short form for letters of inhibition and introduced the option of having the warrant to inhibit included in the summons rather than in separate letters.[763] This short form removed the narration of grounds for the inhibition as well as any reference to a prohibition directed at the general public. On this model, inhibition is a prohibition imposed on the debtor, of which the public have notice. As with inchoate adjudication, the public has an implied duty not to participate in the debtor's breach of that prohibition.

This can be seen as the culmination of a tendency which had been embedded within the common law for some time. The primacy of the prohibition on the debtor

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[757] Bell *Comm* II, 407.
[758] *Ibid* 133.
[759] Ross *Lectures* Vol I, 469.
[760] Stewart *Diligence* 583.
[761] 1581 c 119, *RPS* 1581/10/42.
[762] Land Registers (Scotland) Act 1868 s 16. See further J MacLeod "Chalk Dust in the Law of Inhibition" (2009) 13 EdinLR 294 at 295–6.
[763] Court of Session Act 1868 s 18; Titles to Land Consolidation (Scotland) Act 1868 s 156, Sch QQ; Marshall *Analysis of the Titles to Land Consolidation (Scotland) Act 1868* 195–9. The latter statute also provided for registration of notices of inhibition which could be registered prior to execution and from whose date the inhibition would be effective, provided execution and registration took place within 21 days: s 155, Sch RR.

was clear from the outset and was emphasised by the fact that personal execution was needed in addition to the general publication.[764] Stair sees publicity as putting the lieges "*in mala fide*" to transact with the debtor.[765] In his *Commentaries*, Bell describes an inhibition as a "double prohibition" in the body of the text but in the first footnote he says that "It is not by the force of the prohibition against the public that the inhibition operates, but by the prohibition against the debtor himself, and the public notice."[766] The 1868 form was itself superseded by thost introduced by the 1994 Rules of Court,[767] now themselves superseded in turn by section 146 of the Bankruptcy and Diligence (Scotland) Act 2007 which provides that decrees for payment, documents of debt or decrees *ad factum praestandum* for grant of real rights over heritable property warrant inhibition. It also removes the Court of Session's power to grant letters of inhibition.

However, the forms to be used under the new system[768] conform to the basic model arising from the 1868 reforms, under which inhibition is a prohibition on the debtor of which the general public have notice.

(7) Inhibition and litigiosity

In *Burnett's Trustee v Grainger*, Lord Hope suggested that inhibition operates by rendering the debtor's heritable property litigious.[769] As with apprising, however, the rule was well-established before the term litigiosity was applied to it. Craig discusses inhibition alongside litigiosity as a distinct category.[770]

The first step towards recognition of inhibition as giving rise to litigiosity appears to have been taken by Kames in the composition of his Dictionary of Decisions, where he categorised *Cruikshank v Watt* (where the court held that a disposition made between publication at the market cross and registration could be reduced *ex capite inhibitionis*) under the heading "Litigious by inchoat [sic] inhibition".[771] Even

[764] As the court held in cases like *Syme v Laird of Coldingknows* (1614) Mor 6943.
[765] Stair IV.l.7.
[766] Bell *Comm* II, 134.
[767] For which see GL Gretton *The Law of Inhibition and Adjudication* (2nd edn, 1996) 15–16.
[768] Provided for in the Diligence (Scotland) Regulations 2009.
[769] [2004] UKHL 8 at para 22.
[770] I.xv.24 and 25.
[771] *The Decisions of the Court of Session from its first Institution to the Present Time* (1741) Vol I, 559.

here, it might be argued that litigiosity was only being applied to cover the gap between initiation and completion of the diligence. In the *Principles of Equity*, however, Kames gathers inhibition alongside a process in the Court of Session, citation in adjudication, and denunciation for apprising or horning as circumstances giving rise to litigiosity.[772]

Kames' analysis does not appear to have attracted general support. Erskine and Bell both say that service of the schedule and publication at the market cross render property litigious,[773] but they regard this as limited to the period before inhibition is completed by registration. On this analysis, litigiosity plays the same role that it does for adjudication. Bell maintained this approach despite noting the similar effect of litigiosity and inhibition:

> The effect of [litigiosity] is analogous to that of inhibition. It tacitly supplies the place of that diligence in all real actions. And inhibition itself, when begun but not yet completed, requires the aid of litigiosity to give it effect during such reasonable time as the law deems sufficient for bringing the proceedings to completion.[774]

Kames' approach does not appear to have found favour until Stewart applied it in his *Treatise on the Law of Diligence* in 1898.[775] The reason is definitional: if litigiosity is defined as an "implied prohibition on alienation", inhibition is excluded because it is an express prohibition. Nonetheless, the rules on inhibition developed in a way which mirrored those applied to adjudications and apprisings between initial publication and acquisition of the real right and which were explained by reference to litigiosity. Kames' suggestion contained an important insight. He gathered together a number of cases which all operated in the same way and which were motivated by the same basic concern: preservation of a debtor's property in order to ensure that the creditor could enforce his decree. Whether the prohibition is express or implied is of little moment. Therefore, Kames' approach, as endorsed by Stewart and Lord Hope gives an appropriate account of inhibition and its relationship with litigiosity.

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[772] Kames *Principles of Equity* Vol II, 184–5.
[773] Erskine II.xi.7; Bell *Comm* II, 144–5.
[774] *Comm* II, 144. See also his discussion at II, 132–3, where he treats inhibition and litigiosity as sub-categories within the broader class of preferences by exclusion.
[775] Stewart *Diligence* 553.

(8) Bankruptcy and Diligence (Scotland) Act 2007

In addition to the abovementioned changes to the procedure by which a warrant to inhibit is obtained, the 2007 Act includes provisions which concern the effect of inhibition. If they constitute an exhaustive statement of the law, they amount to a very substantial innovation which would cast doubt on the appropriateness of understanding inhibition as giving rise to litigiosity. The doubt concerns two rules which are central to the operation of litigiosity: inhibition only affects future voluntary acts, and reduction *ex capite inhibitionis* operates *ad hunc effectum*.

Section 160 provides that inhibition is breached by conveying or otherwise granting a right in property which is subject to the inhibition. The Act makes provision for termination of the inhibition on satisfaction of the creditor's right[776] and for protection of good faith purchasers of inhibited property.[777] Alarmingly, however, there is no provision to protect grants made in satisfaction of prior personal rights. However, in *Playfair Investments v McElvogue*,[778] Lord Hodge held that such grants continue to be safe, pointing to the Scottish Law Commission discussion paper and report which preceded the legislation.[779] These make it clear that the Commission intended that grants in satisfaction of pre-inhibition obligations remain unaffected by the inhibition.

The definition of breach of inhibition in section 160 gives rise to a further doubt since no mention is made of diligence done to enforce post-inhibition debts. This might be taken to suggest that post-inhibition creditors are now free to do diligence against the debtor's heritable property without regard to the inhibition. This also seems unlikely. As discussed below, section 154 of the Act makes express provision regarding the effect of inhibitions in ranking procedures. If inhibitions no longer affected diligence done to enforce future debts, such a provision would be unnecessary. Once again, despite initial appearances the better reading appears to be that the law remains the same and inhibitions may thus be used to challenge diligence done to enforce future debts outwith the context of ranking procedures.

[776] Ss 157–8.
[777] S 159.
[778] [2012] CSOH 148; 2013 SLT 225.
[779] *Ibid* at paras 21–4.

In contrast to these two issues, Parliament's intention to change the rules on the effect of inhibition in ranking procedures was very clear. The combination of the relative effect of reduction and the right of the inhibiting creditor to attack diligence done to enforce future debts did have the potential to render ranking in insolvency procedures somewhat complex, particularly when there was more than one inhibition.[780] The Scottish Law Commission regarded the level of complexity as intolerable and recommended that inhibition should confer no preference over future debts.[781] An attempt was made to give effect to this recommendation in section 154 of the 2007 Act, which provides that inhibition confers no preference in insolvency proceedings or "any other proceedings in which there is ranking."[782]

The nature of the change effected by this provision is less than clear. In part, this is because the provision attacks the symptom rather than the cause. The causes of the complexities just mentioned are the *ad hunc effectum* nature of reduction *ex capite inhibitionis* and the fact that, in a competition such as a ranking procedure, account is taken of any objection one competitor has against another's right. The 2007 Act makes no provision regarding the effect of reduction *ex capite inhibitionis* in general and the Scottish Law Commission Report suggests that "reduction on the ground of inhibition should continue to benefit the inhibitor only."[783]

This approach gives rise to difficulties. First, the limited effect of reduction is retained in theory but is discounted in the most important instance of its application. Secondly, section 154 seems to generate some problematic results.

> Suppose Colin is David's creditor and inhibits him. Some time thereafter, David borrows money from Celia and grants her a standard security over his farm to secure the debt. The grant of the standard security to Celia is clearly a breach of the inhibition and it would be open to Colin to reduce it and adjudge the farm free of the security.

[780] See Gretton *Inhibition and Adjudication* 110–124 for examples.
[781] Scottish Law Commission *Report on Diligence* (SLC 183, May 2001) paras 6.45–7.
[782] s 154(1).
[783] *Report on Diligence* para 6.92.

> Before Colin raises his action of reduction, David is sequestrated and the trustee in sequestration sells the farm. Under the old law, account would have been taken of Colin's right to reduce Celia's security when the proceeds of sale were distributed. To do so now would offend against section 154. It amounts to giving Colin a preference in the ranking by virtue of his inhibition. It is no answer to say that Colin's preference flows from his right to reduce rather than from his inhibition because the inhibiting creditor's preference in insolvency always flowed from his right to reduce.
>
> Now suppose that Colin had reduced Celia's security and that David was then sequestrated. Assuming that the general rule on the effect of reduction *ex capite inhibitionis* remains, Celia's security appears to remain valid in a question with the trustee in sequestration and any other creditors. How is the trustee to divide the proceeds of sale? Is Colin to have the benefit of his reduction? It might be argued that it should be denied because it is derived from his inhibition and so this is just another case of an inhibition conferring a preference in ranking. If that is the case, however, it gives rise to the rather bizarre situation whereby Celia can strip Colin's reduction of its effect by petitioning for David's sequestration. That might be avoided by taking the view that Colin's reduction makes all the difference and that it means he is not affected by section 154. However, since Colin's reduction was only *ad hunc effectum*, all of the difficult ranking problems which section 154 was intended to avoid arise once again.

This analysis may be thought unfair. The Commission's intention appears to have been to permit diligence in execution of post-inhibition debts but to retain reduction of real rights granted in breach of inhibition even in the context of sequestration.[784] On that model, an inhibitor could reduce a standard security granted after the inhibition, and there would be no question of the challenge being barred by sequestration. On the other hand, if the holder of the same security were to adjudge in execution of the debt, the adjudication would be safe from reduction *ex capite inhibitionis* whether sequestration followed or not. Of course, the canons of ranking

[784] *Report on Diligence* para 6.45.

continue to be required in cases where there were two standard securities to other creditors but only one was in breach of the inhibition.

As George Gretton pointed out in his response to the Commission's Discussion Paper, it would also mean that a posterior creditor with a judicial security would be in a better position than one with a voluntary security.[785] It is difficult to see that the distinction would be of much comfort to the inhibiting creditor. The distinction also gives Celia and David an incentive to collude, since she is better off with an adjudication than with a standard security.

Further, this is not what the statute has provided. Preferences over voluntary rights in security are not excluded by section 154 so it remains competent to challenge diligence on future debts outwith ranking procedures. That means, of course, that the abovementioned hypothesis would play out in roughly the same way if Celia adjudged rather than taking a standard security. Finally, because the scope of section 154 is restricted to inhibitions while reductions on other grounds may have similar effect, complex ranking remains part of Scots law.

The reforms in the 2007 Act change certain aspects of the law of inhibition which were previously thought to be fundamental and they do so in ways which are not always helpful. The changes, however, are probably not as wide-ranging as they appear at first glance. In particular, inhibition continues to operate as a prohibition on dealings by the inhibited party; deeds in satisfaction of prior obligations probably continue to receive protection; and reduction *ex capite inhibitionis* continues to operate *ad hunc effectum* outwith the context of ranking procedures. Therefore, it remains appropriate to continue to regard inhibition as an instance of litigiosity and to see breach of inhibition as giving rise to a personal right to reduce the relevant grant.

[785] *Ibid.*

Chapter 6

RESTRICTIONS ON TRANSFER ARISING FROM COURT ACTION: ARRESTMENT AND PROCEDURES OTHER THAN DILIGENCE

A. ARRESTMENT

Reference has already been made to Lord Hope's suggestion, in *Burnett's Trustee v Grainger*, that inhibition operated by rendering heritable property litigious.[786] In that passage, he makes the same suggestion regarding arrestment, presenting it as the equivalent of inhibition for moveable property.

Arrestment is more complicated than inhibition. First, it applies to two types of property: corporeal moveables and personal rights. Secondly, it is directed against two parties: the debtor himself and the third party who possesses the debtor's corporeal moveables or who owes an obligation to the debtor.[787] With inhibition, there is no such third party.

Despite these complications, however, it is conceivable that arrestment may be understood in terms of a prohibition which bars the third party who possesses the moveables or owes a debt to the debtor from giving up possession of the moveables or paying the debt. Any effect on the rest of the world (who might, in this case, be called fourth parties) would be explained by reference to litigiosity as was the case with inhibition. This approach, which is sometimes called the "prohibition theory",[788] has a long history in Scots law. It is evident in Mackenzie's willingness to draw on Continental materials on arrestment in his discussion of inhibition. He adopts it explicitly in his *Institutions*, describing arrestment as "the Command of a Judge, discharging any Person in whose Hands the Debtor's Moveables are, to pay or

[786] [2004] UKHL 8; 2004 SC (HL) 19 at para 22.
[787] Depending on whether goods or a right belonging to the debtor have been arrested.
[788] Gretton "Diligence" para 285.

deliver up the same, till the Creditor who has procured the Arrestment to be laid on, be satisfied."[789] Stair describes arrestment as "a personal prohibition".[790]

Certain rules supported this analysis. The most striking was that, where moveables were poinded between arrestment and furthcoming or warrant to sell, the poinder had priority. This follows naturally from the view that arrestment merely renders the property litigious.

Arrestment means that the debtor is prohibited from dealing with the property, so that someone who accepts a transfer or grant from him is complicit in his breach of that obligation (at least where the transfer is not in implement of a prior obligation). The same can be said of an arrestee who accepts a discharge of the arrested debt.[791]

The poinder was in a different position: he was enforcing an existing obligation and doing so without the consent of the debtor. The debtor could not be said to be taking steps to evade the arrester's diligence. Therefore, the poinder was not complicit in any fraud. Further, since the poinder was pursuing implement of an obligation, he could not be required to stand aside in favour of the arrester. If poinding was considered as constituting a real right, where the arrester acquired no such right prior to furthcoming or warrant to sell, then it would be obvious that a poinder should prevail over the arrester.

This reflects the rule for inhibitions, which cannot prevent adjudications in implement of prior obligations. Some have suggested a parallel between the relationship of inhibition to adjudication and that of arrestment to furthcoming.[792] On this view, there is an initial stage where the relevant asset is frozen by a prohibitory diligence which renders it litigious, followed by a second "seize" stage where the creditor obtains a subordinate right in the asset.

However, other aspects of arrestment are difficult to harmonise with the prohibition theory. The most obvious are that arresters compete among themselves by date of arrestment not date of furthcoming and that an arrestment executed between delivery of a deed of assignation and its intimation beats the assignation. If furthcoming were to arrestment as adjudication is to inhibition, then having the first

[789] Mackenzie *Institutions* 321.
[790] Stair III.i.26 and III.i.39. See also III.i.24, describing arrestment in similar terms to Mackenzie.
[791] *Campbell v Beaton* (1665) Mor 8349; *Home v Taylor* (1679) Mor 8352.
[792] Kames *Principles of Equity* Vol II, 175. See, similarly, Forbes *Great Body* Vol I, 1219.

arrestment would do no good: the two arresters would have a race to furthcoming. Similarly, where the debtor had made the assignation prior to the arrestment and thus the prohibition, he cannot be said to have breached the prohibition and an assignee who intimates a lawfully acquired assignation does nothing wrong. The prohibitory theory struggles to account for these results. If, however, arrestment confers a real right, the arrester's priority becomes a simple application of *prior tempore potior iure*.[793] The idea that arrestment confers a real right has been referred to as the "attachment theory".[794]

The dilemma is an old one. It was one of Dirleton's *Doubts*.[795] It has implications for the relevance of litigiosity and voidability to the law of arrestment. If the prohibition theory is correct, then litigiosity is key to explaining arrestment's effect on transferees: the transfer is voidable because the the property was litigious. However, the account of litigiosity may need to be modified in order to take account of the arrestment rules. If, on the other, hand the attachment theory is preferred, litigiosity and voidability are of less interest because the arrester's access to the arrested property can be justified on the basis of his real right without the need to attack any post-arrestment transaction.

Gretton has suggested that "there is no settled rational framework in which the law can be developed".[796] If the law of arrestment is to develop usefully, one account must prevail.

(1) European background

Arrestment (often referred to as "arrest") was a widely recognised legal institution across northern Europe. Charles du Moulin gave an extensive and influential discussion in his *Secunda pars commentariorum in consuetudines parisienses* of 1576.[797] Discussion can also be found in works on the law of other parts of France,

[793] See, for example, *Inglis v Robertson and Baxter* (1898) 25 R (HL) 70 at 73 per Lord Watson. If the Gaian approach is rejected, then arrestment would be said to generate a subordinate personal right but the consequences for competition with third parties are the same: Gretton "Ownership and its Objects" at 837–40.
[794] Gretton "Diligence" para 285.
[795] Dirleton *Some Doubts and Questions in the Law* (1698) 7.
[796] Gretton "Diligence" para 285.
[797] (1576) 13ff.

the Low Countries and Germany.[798] Complete treatises, such as those of David Mevius, Pierre Peck[799] and Andreas Gaill,[800] were devoted to it. Their focus, however, is not on the Roman or Canon law tradition but arrest as an institution of municipal (or, in the case of Gaill and Mevius, imperial German) law. [801]

The focus on municipal law reflects the consensus that the institution was "barbarian" in origin.[802] Nonetheless, the search for a Roman law parallel was a common concern. The principal candidate appears to have been *manus iniectio*.[803] This might seem slightly surprising, since the modern view is that *manus iniectio* was directed at the debtor's person rather than his property.[804]

Manus iniectio was attractive to the *ius commune* writers for two reasons. First, they believed that it covered restraint of assets as well as of the person.[805] Secondly, their view of arrest included restraint of a person as well as of assets.[806] Indeed, the early-twentieth-century legal historian, Hans Planitz, suggested that arrest of the person was the older and more fundamental institution out of which arrest of assets

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[798] P van Christynen *In leges municipales civium Mechliniensum notae seu commentationes* (1625) 291ff (on van Christynen, see Académie royale des sciences, des lettres et des beaux-arts de belgique *Biographie nationale* (Vol IV, 1873) col 11); B d'Argentré *Commentarii in consuetudenines ducatus Britanniae* (1628) Tit xv (on D'Argentré, see Stolleis *Juristen* 155); Pothier *Traité de la procedure civile* 238–40; S van Leeuwen *Commentaries on Roman-Dutch Law* (trans JG Kotzé, 1881–6) Vol II, ch VII; P Vromans *Tractaet de foro competenti* (New edn ed by H van Middellant, 1722) 121 fn 34 (brief details on Vromans can be found in A J van der Aa (et al) *Biographisch Woordenboek der Nederlanden* (vol 19, 1876) 476); B Carpzov *Jurisprudentia Forensis Romano-Saxocanonica* (1703) Pt 1 const 28 and 29.

[799] P Peck *Tractatus de iure sistendi et manuum iniectione, quam vulgo arrestationem vocant* (1665). Like van Christyen, Peck was a member of the civic council of the city of Mechelen, in Flanders. On Peck see *Biographie nationale* (Vol 16, 1901) col 782.

[800] A Gaill *Tractatus de manuum iniectionibus impedimentis, sive arrestis imperii* (1586) 8ff. On Gaill generally, see Stolleis *Juristen* 228.

[801] Given that many of the laws under discussion were of cities or provinces rather than nation states, the term municipal rather than national is used in opposition to *ius commune*.

[802] Du Moulin *In consuetudines parisienses* 14; Gaill *Tractatus* 8; Peck *Tractatus* 1–2; Mevius *Tractatus* ch 1 para 9. See also A Wach *Der italienische Arrestprocess* (1868) and H Planitz "Studien zur Geschichte des deutschen Arrestprozesses" (1913) 34 ZSS (GA) 49, (1918) 39 ZSS (GA) 223 and (1919) 40 ZSS (GA) 87.

[803] Eg Van Christynen *In leges mechliniensum* 291; Gaill *Tractatus* 8; Mevius *Tractatus* Ch 1 para 6; B d'Argentré *Commentarii* Tit V "*de manus inietione et obsidibus*/*Des Arrests & Ostages*"; P Peck *Tractatus*; J van den Sande *Decisiones Frisicae* (2nd edn, 1639) Lib I Tit xvii: *De manus injectione sive arresto.* On Van den Sande in general, see PC Molhuysen and PJ Block (eds) *Nieuw Nederlandsch Biografisch Woordenboek* (Vol 4, 1918) col 1199–1200.

[804] G Mousourakis *Fundamentals of Roman Private Law* (2012) 315–6, contrasting it with the *legis actio per pignoris capionem*.

[805] Gaill *Tractatus* 9, with reference to the French humanist Guillaume Budé.

[806] Gaill *Tractatus* 8; Mevius *Tractatus* ch 1 para 11; Van Christynen *In leges mechliniensum* 291; D'Argentré *Commentarii* 21; Peck *Tractatus* ch 1 para 4.

had developed.[807] The references to *manus iniectio* reveal something about the scope of arrestment in the eyes of Continental European lawyers but they seem to be an example of application of Roman material to an institution which had already developed rather than evidence of a Roman law basis.

Despite the fact that arrestment's roots lie neither in Roman nor Canon law, it can be seen as part of the *ius commune.* There is extensive cross-reference between works which are concerned with different systems of municipal law and the widespread use of the single non-Roman term is remarkable. However, it must be acknowledged that the approach taken varied in significant aspects between particular systems and the various writers do not speak with one voice.

There was even disagreement about the way in which the word was used. "Arrest" had two senses. On the one hand it denoted the mechanism for restraining a person or his assets in the prosecution of a legal dispute; on the other, it could mean the decision of a court or tribunal. The latter use of the term is reflected in the modern French *arrêt*. Du Moulin suggested that it was derived from the Greek term ἄρεσον, which he considered to be equivalent to the Latin *placitum*.[808] He offered no etymological suggestions about the other use. Du Moulin's approach was followed by Peck.[809] Peck also suggested a connection with another Greek word, ἄῤῥαισον, which he equated with *incorruptum* and *inviolatum*.[810] Both Du Moulin and Peck believed that the use of the word arrest for prohibitions on movement was distinctive to France.

Gaill and Mevius saw things differently. They suggested that the distinctive French usage was in relation to court decisions.[811] This is perhaps unsurprising since the term was being used in Germany to denote restraint of person or his assets. Mevius did, however, repeat Peck's views on the etymology of arrest in the sense of a court decision.

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[807] Planitz "Studien zur Geschichte des deutschen Arrestprozesses" with further references. The most important statement of the contrary view is Wach *Der italienische Arrestprocess*.
[808] Du Moulin *In consuetudines parisienses* 14. From *placeo*, to satisfy or please.
[809] Peck *Tractatus* 1–2.
[810] From *incorruptus*, unspoiled and *inviolatus*, unhurt or inviolate. I have not been able to find the term ἄῤῥαιζον other than in Peck and Mevius. It may be related to ἀκέραιος, which means pure, unharmed or inviolate.
[811] Gaill *Tractatus* 9; Mevius *Tractatus* 3.

In addition to disputes where the word was used in a particular sense, there were different approaches to the effect of arrest in competition with other creditors. This is evident in the discussions of lawyers from the Low Countries. In his *Commentaries on the Roman-Dutch Law*, Simon van Leeuwen noted that while in Friesland and "throughout Germany" an arrester obtained a preference, this was not the case in Holland.[812] Pieter Vromans made the same point distinguishing the position in Holland from that of Utrecht.[813] Both make reference to the maxim *Arrest geeft geen praeferentie* and Vromans explains the reason for the rule: no distinction was made between an arrest which was directed at preserving the subject of litigation (*een litigieuse saak*) until the dispute was decided and arrestment in execution. The purpose was to keep things as they were and no priority was obtained until possession was taken.

According to Josias Bérault, the position in Utrecht, Friesland and Germany was also adopted in the majority of French *coutumes* (although not in Normandy). Bérault suggested that the first arrester's preference was justified by reference to the maxim *vigilantibus iura subveniunt*.[814] Pothier gives the same rule for *saisie-arrêt* under the *Coutume d'Orléans*.[815]

Peck also subscribed to this view of the effect of arrest[816] but his account makes it easier to see how the contrary view could arise. He suggests that arrest gave rise to *pignus praetorium*.[817] This was a post-classical procedure (also known as *pignus in causam iudicati captum*) allowing execution against particular assets belonging to the debtor.[818] As understood in Holland, this did not imply a preference for the creditor using arrest, since he was obliged to publicise the sale by execution to allow

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[812] Van Leeuwen *Commentaries* Vol II, 396.
[813] Vroman *Tractaet de foro competenti* 122–3. A translation of this passage can be found in *Buller, QA v Racket* (1843) *Reports of Important Cases Heard and Determined in the Supreme Court of Ceylon during the Years 1843–'55* (1884): Supreme Court Minutes 1843, p 2.
[814] J Bérault *La coustume reformée du pays et duché de normandie* (4th edn, 1632) 739.
[815] Pother *Traité de la procedure civile* 237. Pothier distinguished *saisie-arrêt*, which was directed at payment from *simple arrêt*, which was merely directed at preserving the arrested asset: *ibid* 238–9. The former was only available where the creditor had a *titre exécutoire* (ie it was not available on the dependence or in security). It was, however, possible to convert a *simple arrêt* into a *saisie-arrêt* if sentence was obtained: *ibid* 240. Pothier offers no comment on the ranking of *simple arrêt*.
[816] Peck *Tractatus* 202–5.
[817] *Ibid* 189–90.
[818] D 42.1.15; C 8.21; Mousourakis *Fundamentals of Roman Private Law* 340–1; Schulz *Classical Roman Law* 411.

other creditors to claim their share of the price.[819] However, the language of *pignus* inevitably suggested that arrestment conferred some kind of security right on the arrester. Indeed, Dirleton uses the term *pignus praetorium* to characterise the attachment theory.[820] Mevius refers to this passage from Peck and goes on to discuss Saxon law. There, arrest gave the arrester a tacit hypothec to which the rule *prior tempore potior iure* applied.[821] He suggests that the position varied across Germany but that the *ius commune* position (here the term is better understood as a precursor of *gemeines Recht*)[822] tended away from conferring a real right on the arrester and therefore away from ranking by the date of arrestment.[823]

At first sight, litigiosity does not appear to have played an important role in European analysis. Mevius considered whether arrest rendered property litigious but concluded that it did not. His reasons reflect the narrow German understanding of litigiosity, arguing that the requisite *actio realis* was absent and that, if arrestment did not confer a hypothec on the creditor, it could not be said to render the property litigious.[824] However, in a passage heavily dependent on Peck, Mevius suggests that arrestment means that the arrested property cannot be burdened, sold or alienated.[825] Mevius goes on to explain that the basis of this restriction is that the relevant act would be done in fraud of the litigation and of the pursuer.[826] On this view, arrestment prohibits the voluntary grant of rights in the arrested property and gives effect to this prohibition in disputes with third parties on the basis of fraud but it does not confer a real right on the arrester. That analysis is very close to what Scots lawyers would understand as litigiosity. The European systems which followed this approach might be considered equivalent to the prohibition theory in Scotland while

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[819] *Buller v Racket*, quoting Peck "*on Arrest*". The passage does not appear in the *Tractatus*. It is likely to be from the Dutch edition of the work: P Peck *Verhandelinghe van handt-opleggen ende besetten: Dat is, arrest op persoon ende goederen* (1659) which included notes by Simon van Leeuwen. This is not held by any Scottish library and so was not consulted.
[820] *Doubts* 7.
[821] Mevius *Tractatus* 177–8 and 219-20. The same approach is taken by Carpzov *Jurisprudentia forensis* Pt 1 const 28 defs 143–4.
[822] That is, the common law of Germany, largely based on received Roman law. Mevius was explicitly concerned with arrestment as it was understood in Germany.
[823] Mevius *Tractatus* 178, 182 and 220–3.
[824] *Ibid* 182.
[825] *Ibid* 182–3. Cf Peck *Tractatus* 190.
[826] Mevius *Tractatus* 183. Here he quotes Favre *Codex Fabrianus* VII.xxiv.5. See, similarly, Carpzov *Jurisprudentia forensis* Pt 1 const 29 def 4.

those which did accord a preference to arrestment might be considered equivalent to the attachment theory.

Arrestment, therefore, was addressed in the *ius commune* literature but not in a way that made things easy for Scots lawyers. There were significant differences of analysis between the various municipal laws. It is striking, however, that the two major approaches to arrestment which are evident in the Scottish approach can also be seen in the *ius commune* literature. This is not the place to trace the development of arrestment in the various European systems. However, it may be noted that in modern German[827] and French law,[828] the equivalents of arrestment appear to confer a subordinate right on the arrester.

(2) Scotland and Europe

The relationship between Scotland and Continental thinking on arrestment was a complex one. In everyday usage (and indeed in criminal law) "arrest" refers to seizure of the person rather than restraint on the movement or transfer of assets. There is evidence of use of the term in both senses in the records of the old Scots Parliament. It was used most frequently to refer to seizure of a person[829] but was being applied to seizure of assets in the fourteenth and fifteenth centuries.[830] However, seizure of the debtor's person as a mechanism for enforcing obligations

[827] §930 I ZPO.

[828] The position is less obvious in France because the *Code de procedures civiles d'exécution* presents rendering the asset untransferable as the primary effect of *saisie conservatoire*: art L521-1. However, in relation to *créances*, art L523-1 expressly invokes art 2350 C civ (and via that, art 2333 C civ) from which it is clear that the pursuer using the *saisie conservatoire* gets a security right in the *créance*. The position is less clear for corporeal moveables, but art L522-1 does provide that a pursuer who has used *saisie conservatoire* in relation to a corporeal moveables and who then obtains an enforceable title (ie a court decree) can proceed to sell the assets which have been frozen. This right of sale seems inconsistent with a mere prohibition.

[829] Eg *RPS* 1357/11/5–7 and 19; 1424/5 and 7; 1426/23. 1357/11/6 and 7 are particularly interesting because assets are seized in those cases but they are said to escheat to the Crown rather than to be arrested.

[830] For instance, a letter from Robert the Bruce to various officials regarding a remission granted to Henry Cheyne, the bishop of Aberdeen refers arrears of "revenues issuing from our justiciary, chamberlain and sheriff courts of Aberdeen and Banff" which were "not raised by us or our people during the times in which they were under our arrest [*sub arresta nostra*]." *RPS* A1318/31. Similarly, a general letter of James II, giving notice of a decreet of the General Council in a dispute about privileges of sale between Irvine and Ayr, refers to "*bonorum arrestationibus*". See also 1482/12/84 and 85, using the term to describe official seizure of merchants' goods.

was achieved by horning and caption rather than by arrestment[831] Thus Scots law does not seem to have received the whole of the European institution.

A similar independence is evident in the deployment of the concept of litigiosity. Despite suggestions in the *ius commune* literature that arrestment did not give rise to litigiosity, Stair used the latter term to describe the effect of arrestment.[832] Thus the word "litigious" was being applied to arrestment long before it was used to describe inhibition. Arrestment stands alongside apprising and adjudication in the first wave of instances of litigiosity in Scotland.

Further, the variation between treatments of arrestment in the *ius commune* meant that there was no single European position to receive. Scots lawyers do not appear to have chosen a particular European system to follow, nor is there any evidence of a particularly systematic approach to borrowing. This left Scots law vulnerable to incoherent development.

In contrast to inhibition, Scottish sources did acknowledge a connection between arrestment in Scots law and equivalent procedures elsewhere in Europe. In his *Observations on the Acts,* Mackenzie suggests that arrestments in Europe "are used in the same Sense, and are execute in the same Way that we use them; and all this Subject is very well treated by *Christin. Tit.* 3. *ad leges Mechlin. Argent. Tit. des Arrest.* 8."[833] Mackenzie's references are to Paul van Christynen's *In leges municipales civium Mechliniensum notae seu commentationes*[834] and Betrand d'Argentré's *Commentarii in consuetudenines ducatus Britainniae*.[835] Mackenzie somewhat overstates the similarity between these accounts and Scots law, since they consider arrestment to encompass arrest of the debtor's person as well as his assets.

As noted above, Mackenzie also made reference to Mevius' *Tractatus iuridicus de arrestis* in his discussion of inhibitions.[836] He relies on Mevius for his account of the origin of the term arrestment but appears to have misread him. Mackenzie takes

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[831] Ross does begin his chapter on arrestment with a discussion of chapter one of *Quoniam attachiamenta*, which discusses attachment of either the person or goods of the defender as part of the mechanism for initiating a plea of wrang or unlaw: *Lectures* Vol I, 449; *Quoniam attachiamenta* 116–7. Ross suggests that this is the basis of arrestment on the dependence but even he concedes a different basis for arrestment in execution.
[832] III.i.32.
[833] *Observations on the Acts* 287.
[834] 291ff.
[835] The title on "*Des Arrests & Ostages* is in fact the fifteenth and begins with fragment number 112.
[836] *Observations on the Acts* 287.

Mevius' etymological argument to refer to arrestment in the Scottish sense rather than to court decisions and to have conflated the two Greek terms. As a result, Mackenzie derives arrestment from ἄρεϛον, which he equates with *placitum*, *incorruptum* and *inviolatum*.[837]

This reading does, however, give a hint at Mackenzie's view of the functions of arrestment: *placitum* fits with a view of arrestment which is directed at the satisfaction of a claim, and *incorruptum* and *inviolatum* suggest that it is directed at preservation of the *status quo* so that a matter could be dealt with judicially and steps taken to enforce any decision. It may also suggest that reference to European materials may not always have been particularly careful.

In fact, explicit references to continental material are relatively rare. The work and system used seem to vary with the writer rather than with the issue at hand. As we have seen, Mackenzie referred to works from Brittany, Mechlen and Germany. Forbes mentions the works Mackenzie cited (with the exeception of Mevius) but his most important foreign source concerned the law of Saxony.[838] Kames quotes from Van den Sande's *Decisiones Frisicae* (and suggests that arrestment was borrowed from Friesland, or at least the Netherlands, rather than France).[839] Walter Ross attributes the development of arrestment in execution on an attachment model to Scots law's "imbibing the customs of France, and the principles of Roman jurisprudence"[840] and quotes the passage from Bérault mentioned above.[841] Bell makes a similar comment about arrestment being borrowed from France and cited Pothier's *Traité de la procedure civile*.[842]

Some of the difficulties in this area may be attributable to the way in which this European material was assimilated. It is tempting to think that two distinct approaches developed because Scots looked to one system in relation to some problems and another in relation to others but there is not enough detailed reference for a confident conclusion on this point. Also, Scots lawyers did not swallow what

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[837] *Ibid.*
[838] Forbes *Great Body* Vol I, 1212, 1225 and 1227 citing Carpzov *Jurisprudentia Forensis Romano-Saxocanonica* and at 1216, citing Van Christynen *In leges mechliniensum* and D'Argentré *Commentarii*
[839] Kames *Principles of Equity* Vol II, 184.
[840] Ross *Lectures* Vol I, 450. See similarly, Stewart *Diligence* 14.
[841] Ross *Lectures* Vol I, 455.
[842] Bell *Comm* II, 62.

they read whole. For example, although Forbes drew heavily on Carpzov, he did not take the Saxon approach to characterising arrestment but followed Stair and Mackenzie in adopting the prohibition theory.[843]

(3) Letters of arrestment

As noted above, the style of inhibitions was the starting point for their analysis. Less attention was paid to letters of arrestment. Some writers make reference to them but no attention is paid to the particular wording.[844] Dallas gives two styles for arrestment.[845]

Their basic form bears strong similarities to letters of inhibition: the pursuer's right is narrated, and the letters assert that the defender will take various steps to dilapidate his estate "in manifest defraud, hurt and prejudice of the said complainer". Once again, the basic concern is an attempt to defeat the creditor's satisfaction by diminution of the estate. Once again, this attempt is characterised as fraud.

However, there are some important differences. Letters of inhibition were addressed to the debtor and to the lieges and they quite obviously contained a prohibition. Letters of arrestment, on the other hand, are addressed to messengers at arms, who are directed to "fence and arrest" all of the debtor's moveable property "wherever, or in whose hands the same may or can be apprehended, to remain in their hands, under sure fence and arrestment" until caution is provided to the pursuer.

At first sight, the words "fence and arrest" might be taken to suggest that the messenger at arms should do something to the property itself, perhaps even seizing it (given the common understanding of arrest of a person). However, the words "to remain in their hands" prevent such an inference. The best reading seems to be that the messenger was mandated by the court to order whoever was in possession of the property or whoever owed the debt not to give it up.

As Kames notes, arrestment neither orders nor authorises payment or delivery to the arrester.[846] That does not come until the summons for the action of furthcoming. He therefore infers that arrestment, like inhibition, is merely prohibitory and that it is

[843] Forbes *Institutes* Vol I, 274–5; *Great Body* Vol I, 1202–3 and 1214–5.
[844] Kames *Principles of Equity* Vol II, 176–7; Ross *Lectures* Vol I, 457; Bell *Comm* II, 63.
[845] Dallas *System of Stiles* Vol II, 72 and 79.
[846] *Principles of Equity* Vol II, 177.

the action of furthcoming that establishes the arrester's right to the property.[847] This explains his contention that furthcoming is like adjudication and can be brought without a prior arrestment.[848] However, the need for an action of furthcoming does not necessarily favour the prohibition theory. Not every right in security entitles to the security holder to immediate possession or sale of the encumbered property.[849]

For the modern law, Kames' view is further weakened by section 73J of the Debtors (Scotland) Act 1987, which provides for the automatic release of arrested funds to the arrester after 14 weeks without the need for further procedure. Of course, automatic release is subject to exceptions but the principle that an arrester can get his hands on funds after nothing more that arrestment and the lapse of time is established. That makes it difficult to see arrestment as the inhibition which matches furthcoming's adjudication.

Although arrestment involves a prohibition, it is a different kind of prohibition from that which we see in letters of inhibition. The prohibition is not directed at the debtor but at the third party who either possesses the goods or is the debtor's debtor. That being the case, there is no explicit prohibition on the debtor dealing with the property (and thus no concomitant prohibition on the lieges participating in such dealings). That said, there is a clear implication that the debtor would be acting fraudulently by dealing with the property. This may explain why arrestment was considered an instance of litigiosity long before inhibition: the prohibition is implied rather than express. If arrestment operates by rendering property litigious, it seems closer to an inchoate adjudication than to inhibition: the creditor has made his intention to seek satisfaction from this asset clear by the service of the arrestment, from which point the debtor is obliged to pay or submit.

Since arrestment is served on the third party rather than the debtor, there is a risk that the debtor might not be aware of the arrestment. The court soon developed a rule that, until the arrestment was intimated to the owner of the arrested goods, it

[847] *Ibid* 177–8.
[848] *Ibid* 175.
[849] For instance, the holder of a standard security over residential property has to go through an extensive procedure before selling or foreclosing in the event of non-payment: Conveyancing and Feudal Reform (Scotland) Act 1970, ss 19–20, 28.

remained lawful for him to deal with them.[850] The debtor was not the only person neglected by the arrestment procedure; there was no provision for notice to the lieges, potential fourth parties who might accept a transfer. The only public act was the raising of the letters of arrestment.

As noted above, doubts arose in the context of adjudication about the efficacy of a court action as a means of publicity. These concerns apply *a fortiori* to arrestment, particularly because the level of care expected in the purchase of moveables is less than with heritable property. The position may have been ameliorated by the fact that the arrestee would usually need to be involved if the debtor was to deal with the arrested property. At a minimum, intimation would require to be made to the arrestee or he would need to accept an instruction to hold corporeal moveables on behalf of a transferee. This would give the arrestee an opportunity to make the arrestment known to the fourth party and to refuse to accept the instruction. The arrestee had a strong incentive to do this: the penalty for breach of arrestment was single escheat.[851]

Overall, the form of letters of arrestment suggests that the core idea behind arrestment was less clearly established than was the case for inhibition. This might be the result of mixed messages from the Continent.[852] However, it is also possible that their lack of clarity made Scots lawyers more open to outside influence in this area.

(4) The 1581 Act

The consequences of breach of arrestment were addressed by legislation in 1581.[853] The statute dealt with three issues: deforcement of execution,[854] breach of arrestment, and "alienationis maid in defraud of creditouris". All three concern actions which frustrate a pursuer's efforts to get satisfaction. The legislation is evidence of a dual response to such conduct.

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[850] *The King v Lumisden* (1533) Mor 685; *Seytoun v Forbes* (1566) Mor 685. Cf *Brown v Gairns* (1682) Mor 13986.
[851] *The King v Dingwall* (1524) Mor 785.
[852] Walter Ross's account of arrestment suggests an initial, pure, prohibitory model which was polluted by the attachment theory under the pernicious influence of the French.
[853] 1581 c 118, *RPS* 1581/10/42.
[854] That is, impeding the messenger in the execution of the diligence.

In relation to deforcement and breach of arrestment, the remedy was escheat of moveables[855] with the modification that the pursuer in the action for deforcement or breach of arrestment was entitled to payment of his debt from the gift of escheat. Here we see both punishment for disobedience to an official command and recognition that the command was imposed for the benefit of a particular individual. Escheat goes beyond what is necessary to compensate the arresting creditor for loss of the opportunity to execute against the relevant assets. The punitive aspect is emphasised by the fact that the Act uses the word "comtempnandlie"[856] to describe breach of arrestment. By breaking the arrestment, the defender has acted in defiance of an order of the court.

However, the response is not simply punitive. The operation of escheat was modified to ensure satisfaction of the arrester's claim. Further, a fragment in Hope's *Major Practicks* suggests that where an arrestment was put on when it should not have been, then breach does not give rise to any penalty, despite the Crown seeking to claim the escheat.[857] This rule would make little sense if the sole purpose of the escheat was to impose a sanction for contempt but it does make sense if a prominent role is accorded to the reason for the order in the first place. By 1792, compensation had replaced punishment and the arrestee who breached the arrestment was only liable for the value of the arrested goods.[858]

In 1581, an alienation in defraud of a creditor was understood as one aimed at defeating satisfaction of a particular decree rather than as a transfer by a debtor who knows himself to be absolutely insolvent. The provision in the 1581 Act for expedited procedure in such cases casts some light on arrestment. It is drafted on the assumption that a fraudulent alienation of either land or goods could be set aside. This in turn suggests that, prior to 1581, it had already become clear that a transfer made in breach of an arrestment was subject to challenge as a fraud on the creditor.

One important consideration is missing from the 1581 Act. There is no suggestion that the arrester obtains any kind of right in security in the arrested asset. If that were the case, there would be no need to try to set the transfer aside and the arrester would

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[855] Ie confiscation of all moveable property by the Crown.
[856] Ie contemptuously.
[857] Hope *Major Practicks* VI.xxxvii.8.
[858] *Grant v Hill* (1792) Mor 786. On the penal consequences of breach of arrestment see further GL Gretton "Breach of Arrestment" 1991 JR 96 at 104–6.

not need any supplementary recourse against the arrestee's escheat. The Act therefore sits slightly more easily with the prohibition theory than with the attachment theory. However, it is difficult to put too much emphasis on this. As noted above, in *Ramsay v Wardlaw*[859] a transfer was reduced on the basis of fraud on a creditor despite the fact that the defrauded creditor had already completed a comprising (obtaining a real right in the property which was disponed).

The early materials on arrestment in Scots law do not, therefore, tip the scales very far one way or the other. It is necessary to examine the detailed rules, most of which developed in the seventeenth and eighteenth centuries.

(5) Detailed rules on arrestment

(a) Death of the arrestee or debtor

The death of the arrestee or the debtor provides the first test for a theory of arrestment. If arrestment gives a right in security, neither death should pose a problem for the arrester: the arrested asset would remain burdened. On the prohibitory model, however, the obligation may require to be reconstituted as was the case with inhibition.

Cases from the early seventeenth century established that furthcoming could be pursued where the debtor died, provided that the debtor's executor or other representative was also called.[860]

Mackenzie and Stair argued that, since arrestment was a personal prohibition on the arrestee, it required to be renewed if the arrestee died, just as an inhibition did.[861] The point appears to have been accepted by Steuart[862] and Forbes,[863] although the former was very doubtful about the soundness of the rule. It did not give rise to any further ligation until 1738, when Stair's position was challenged in *Earl of Aberdeen*

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[859] (1492) Balfour *Practicks* 184 c XX.
[860] *Dempster v Dingwall* (1610) Mor 778; *Clark v Erle of Perth* (1611) Mor 778. If litiscontestation had already occurred in the action for furthcoming, it was necessary to transfer the summons so that the representative could be included but this does not represent a serious departure: *Stirling v Lady Auldbarr's Tenants* (1616) Mor 779.
[861] Mackenzie *Institutions* 321; Stair III.i.26.
[862] Steuart *Dirleton's Doubts* 13–4.
[863] *Institutes* Vol I, 275; *Great Body* Vol I, 1214.

v Creditors of Scot.[864] The arguments presented brought the two theories into sharp focus. The arrestee had died and the arrester sought furthcoming from the heir. The latter objected that the arrestment did not extend to him on the basis of Stair's "personal prohibition" theory, suggesting that arrestment was analogous to inhibition and furthcoming analogous to adjudication.

The arrester argued that arrestment must be more than a mere prohibition since it formed the basis for the action of furthcoming. If it was merely a prohibition, then it was difficult to see why the arrestee should be obliged to deliver or pay out to the arrester without the latter obtaining some right. Secondly, in contrast to the rule for inhibitions, the date of arrestment established priority in questions with other arresters. Thirdly, an arrestment beat an assignation which was not intimated prior to the arrestment. Fourthly, an arrester competed with an executor-creditor by date of arrestment rather than furthcoming.

The contrast between the two approaches might be presented in the following terms. The heir relied on the basic characterisation of arrestment which was found in Stair and on the analogy with inhibition, with little regard for the rules on the interaction of arresters with other creditors which developed in the seventeenth century (and which are considered in more detail below). The arrester relied on these rules.

The latter approach prevailed and the action of furthcoming was successful, much to the surprise of Lord Kilkerran, who noted that "This was new, and till it shall be followed by another judgment, cannot be called a settled point." Kilkerran's reserve seems to be echoed by Bankton, who tries to take a middle way, beginning with Stair's analysis, suggesting that the arrestee's heir "might lawfully pay, without regard to the arrestment, before he is interpelled by reviving the action against him" but pointing out that the arrester can nonetheless bring an action of furthcoming, provided that the debt is proved by writ. From this, he concludes that "while the subject is *in medio* [ie prior to the heir paying or delivering up the arrested asset], an arrestment is understood to be a *nexus realis*, a real lien"[.][865]

[864] (1738) Mor 774; J Fergusson of Kilkerran *Decisions of the Court of Session, from the year 1738 to the year 1752* (1775) 35–6.
[865] Bankton III.i.36.

Erskine makes a clearer break from Stair, endorsing the attachment theory[866] and explaining the lawfulness of payment by the heir as protection of *bona fide* payment.[867] Erskine's approach was repeated by More in his notes on Stair[868] and by Stewart.[869] It appears to remain good law. The rule on the death of the arrestee appears to be a case of a move from the prohibition to the attachment theory; yet it is reconcilable with the prohibition theory, for most obligations survive the death of the obligee and thus bind the executor.

(b) Arrestment and poinding

The clearest application of the prohibition theory is the treatment of competition between arrestment and poinding. By the end of the seventeenth century, it was clear that poinding of arrested goods released the arrestee from the obligation to make furthcoming[870] and that the arrestment did not operate to prevent poinding.[871] Mackenzie summarises the position in the *Institutions*:

> Arrestment being but an inchoated Diligence, discharging the Party in whose Hand the *Arrestment* is made, to pay, the Right to the Goods arrested remains still in the Debitor, and may be *poinded* for his Debt; for *Poinding* is a complete Diligence, giving an absolute Right to the Goods *poinded*.[872]

The arrester has merely taken a step towards acquiring a right in the arrested asset. This is enough to prohibit a voluntary grant but, if the poinder acts before forthcoming, he is preferred. Poinding gives a real right. If the arrester had a real right, the poinder would have taken subject to that real right.[873]

Steuart took a more radical approach. The rule on poinding led him to draw a parallel with the inhibition-adjudication relationship from which he inferred (contrary to the established rule) that a second arrester who got furthcoming first

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[866] Although he does suggest, rather surprisingly, that the *nexus* is caused by litigiosity.
[867] III.vi.11.
[868] Stair *Institutions of the Law of Scotland* (5th edn, ed with notes by J S More, 1832) Vol II, cclxxxix.
[869] *Diligence* 134 despite his general preference for the prohibition theory: 126–6.
[870] *Wright v Thomson and Archibald* (1611) Mor 2757; *Lesly v Nune* (1636) Mor 2759.
[871] *Hunter v Dick* (1634) Mor 2757; *Dick v Spence and Thomson* (1635) Mor 2758; *Lesly v Nune* (1636) Mor 2759; *Forrester v Tacksman of Excise of Edinburgh* (1679) Mor 2760; *Competition, James Corrie, Provost of Dumfries, with Robert Muirhead* (1736) Mor 2760
[872] *Institutions* 322. See also Stair III.i.37.
[873] This is true even for the "weak" real rights which are discharged by loss of possession: Bell *Comm* II, 60–1.

would beat the prior arrester.[874] This does not seem to have garnered much support elsewhere.

Kames uses vulnerability to poinding as part of his argument for the prohibition theory. He suggests that arresters would rank by date of furthcoming under "the common law" but that equity intervenes to bring about the established rule in relation to competing arrestments.[875]

The rule on interaction with poinding clearly presented problems for those who tended towards the attachment theory. Given his characterisation of arrestment as a *nexus realis*, Bankton might fairly be placed in this category. Initially, he presents the rule as a simple exception.[876] Later, however, he seems to hint that the arrester's vulnerability to later poinding is a consequence of the fact that arrestment is a "preparatory diligence".[877] Erskine is similarly ambivalent, observing that "an arrestment is only an inchoated or begun diligence, which of itself gives no preference" and that it must therefore be completed by furthcoming,[878] despite favouring the attachment theory elsewhere. Erskine acknowledges that arrestment secures a preference against assignees and subsequent arrestments.[879]

Bell follows Erskine in explaining that post-arrestment poinding prevails because arrestment is "incomplete".[880] Furthcoming is necessary, "the transference of the real right not being completed till decree of forthcoming be pronounced."[881] He does not address the difficulties which the prohibition theory faces in relation to other rules, being content merely to list the rules for competition with authority in the footnotes but no analysis.[882]

Hume had more enthusiasm for the attachment theory, suggesting that it had replaced the prohibition theory "[i]n our later practice", although he concedes that the change was not uniform.[883] Hume deals with the rule on poinding by suggesting

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[874] *Dirleton's Doubts* 13–4. See also Forbes *Great Body* Vol I, 1215.
[875] Kames *Principles of Equity* 174-8. The rule on arrestments is discussed further below.
[876] III.i.32.
[877] III.i.54.
[878] III.i.15.
[879] III.i.18–9.
[880] *Comm* II, 61.
[881] *Ibid* 63.
[882] *Ibid* 69
[883] Hume *Lectures* Vol VI, 107. Lord Deas endorsed Hume's view of a transition from the prohibition to the attachment theory in an *obiter dictum* in another significant 19th century case on arrestment *ad fundam jurisdictionem*: *Lindsay v London and Northwestern Railway Co* (1860) 22 D 571 at 598.

that arrestment of corporeal moveables does not attach the items themselves but rather the debtor's right to have them returned. On Hume's analysis, completed poinding takes away the debtor's ownership of the goods and thus destroys his personal right to have them returned. That in turn means that the arrester has no right in security because its object no longer exists.[884]

This analysis deals with one of the principal obstacles to acceptance of the attachment theory and also provides an explanation for the apparent overlap between diligences against moveable property. A similar approach was taken in very different circumstances in *Heron v Winfields, Ltd.*[885] There the purported arrester had deposited goods belonging to the debtor and then sought to arrest them *ad fundandam jurisdictionem*. Among the grounds for finding that the arrestment was not good was the absence of a personal obligation to deliver the goods to the debtor.

Gretton criticises the analysis in *Heron* on four grounds: goods are arrestable even where there is no contractual relationship between the arrestee and the debtor;[886] goods which are exempt from poinding (now attachment) are also exempt from arrestment; documents cannot usually be arrested; and arrestments are subject to prior real rights.[887]

It is possible to defend Hume's thesis from at least some of these challenges. It proposes an obligation to return the property but this is not necessarily a contractual one. Hume seems to refer to the general, non-contractual obligation to return property which belongs to another.[888]

On the overlap between the property exempt from poinding or attachment and that exempt from arrestment, it should be noted that arrestment is only worthwhile insofar as it can lead to furthcoming. While, on Hume's approach, arrestment does not affect the arrested corporeal moveable, furthcoming certainly does. If it did not, the property could not be sold. Property is excluded from poinding or attachment because there are policy reasons for refusing to deprive the debtor of it. These

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[884] *Ibid* 108–9.
[885] (1894) 22 R 182.
[886] *Moore and Weinberg v Ernsthausen* 1917 SC (HL) 25.
[887] Gretton "Diligence" para 281.
[888] Stair I.vii.2. See similarly, Lord Kinnear's suggestion that the obligation might arise "*ex contractu* or *quasi contractu*": (1894) 22 R 182 at 185. This general obligation to make restitution of the property did not apply in *Heron* because the "arrestee" held the property on behalf of the debtor who had a lien over the property. The lien meant that neither he, nor anyone holding on his behalf was obliged to return the property to the owner.

reasons would apply to furthcoming as much as to poinding or attachment. If furthcoming of an item would be barred, there seems to be little point in permitting it to be arrested.

The fact that the arrester takes subject to prior real rights might be explained on an analogous basis. The point of arresting the right to recover the property is to get access to that property by means of furthcoming. If the property is acquired by furthcoming, it will be encumbered by the real rights in it which exist at the time of acquisition. If it is sold free of these burdens, the holders of the prior real rights must be compensated, just as prior security holders must be paid off if a subordinate security holder sells property which is subject to a right in security.

These defences against Gretton's challenges point to a deeper problem. The debtor's personal right is merely a right to have the property delivered to him, not a right to conveyance. He already owns the property, he cannot be granted any greater right in it. All that the third party possessor can do for him is put him back in possession.

The arrester does not want mere possession of the property. He wants ownership (or to be able to confer ownership on a buyer pursuant to a warrant to sell). Acquiring the debtor's right to delivery will not give him that since it is merely concerned with giving possession. If the arrester is to get ownership or the power to sell, furthcoming has to be conceived as some kind of adjudication. There is authority for this view of furthcoming[889] but it creates problems for the rules on competitions between arrestments.

> Suppose David owes money to Andrew and Alexa. His classic car is possessed by Terence, who borrowed it for a month. On day one, Andrew arrests the car. On day two, Alexa does the same. A month later, Alexa gets a decree of furthcoming. The day after Alexa's decree, Andrew gets his.
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> As discussed below, it is well established that Andrew should prevail in this case on the basis of his prior arrestment. However, on Hume's analysis, it looks as if Alexa is in a stronger position. Andrew might have a better right to delivery of the

[889] Eg Stair III.i.42 and IV.l.26.

car by Terence because he attached that first. However, Alexa has the first furthcoming and thus, by the time it was "adjudged" to Andrew, Alexa has already obtained a prior real right. In that situation, the right that Terence delivers the car will be of little comfort.

Hume gets round this by suggesting that "the decreet of forthcoming, when given, relates back to the execution—[so] that it lays a nexus or line on the fund arrested".[890] For Hume, Alexa does acquire a right to the car but this is later retrospectively undermined by Andrew's decree of furthcoming since, when both rights are backdated to their respective arrestments, Andrew's ends up being the first. Such retrospectivity is unattractive and liable to give rise to uncertainty: how long must Alexa wait for Andrew to get his decree? Further, it undermines the strength of Hume's argument in relation to poinding. If backdating can defeat Alexa's prior furthcoming, why would it not have stopped Peter who poinded the car between Andrew's arrestment and his furthcoming? Hume's approach does not provide a satisfactory way to read the rule on poinding in a manner consistent with the attachment theory.

In his discussion of arrestment and poinding, Stewart is firm in his adoption of the prohibition theory: it gives "no right of real security in, and operates no transference of, the subject arrested".[891] For him, therefore, the rule on poinding was easy to reconcile with his approach although he does not lean heavily on it when stating the prohibition theory. Neither does he allow it to push him to conclusions in the teeth of the authorities in the way that Steuart did.

The picture was somewhat muddied by discussions in the nineteenth century about whether poinding was completed by mere execution or whether the poinder required to secure either sale or possession of the poinded goods.[892] However, these considerations do not bear too heavily on the present question because it has always been accepted that once a poinder acquires his real right (whatever may be necessary to do that) he beats an arrester who has not obtained furthcoming. If arrestment gave the arrester a real right in the goods, even a completed poinding should rank behind

[890] Hume *Lectures* Vol VI, 107–8.
[891] Stewart *Diligence* 125
[892] For a summary see Stewart *Diligence* 159–60 and 364–6.

him.[893] The relationship of arrestment and poinding provides strong support for the prohibition theory.

(c) Arrestment and buyers of corporeal moveables

While the 1581 Act suggests a clear approach to bad faith transferees of arrested property, the position of those who were not complicit was less clear. *Jornaw v Drumond*[894] seems to suggest that a buyer is not affected by an arrestment unless it is intimated to him. *Aitken v Anderson* is similar: the court held that "an arrestment made upon goods could not hinder the lieges to buy in the public market".[895] Given the lack of proper publicity for the arrestment, this approach is understandable.

Different priorities motivated the court in *Wardlaw v Gray*[896] and *Innerweek v Wilkie*.[897] In both cases, a prior arrester beat a *bona fide* purchaser. In *Innerweek*, the basis of the decision was that the arrestment "did so affect the wool really at the instance, and to the behoof of the arrester" that nothing done thereafter could prejudice him. The result might have been explained on the basis of litigiosity by arguing that the raising of the letters of arrestment was a matter of public notice and that the buyer was therefore in constructive bad faith.[898] Instead, the language of the attachment theory was deployed.

Innerweek was somewhat unusual since the arrestment was done in the debtor's own hands.[899] Again, the language tends to support the attachment theory: "Arrestment of goods in the debtor's own possession found to affect, and to be a *nexus realis*, as well as if it had been in the hands of a third party."[900]

Allowing arrestment in the debtor's hands raises the problem of lack of publicity particularly sharply because there is no third party possessor to sound the alarm. For this reason, and because it could operate to freeze all of the debtor's liquid assets,

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[893] Bell *Comm* II, 60.
[894] (1615) Hope *Major Practicks* VI.xxxvii.20.
[895] (1620) Mor 786.
[896] (1611) Mor 786.
[897] (1624) Mor 733.
[898] As Stair argues at III.i.40 and 42.
[899] For other examples, see *Schaws v M'Churoch* (1685) Mor 733 (where the matter did not arise for decision because the arrestment had prescribed); *Gairn v Toschoch* (1688) Harcarse *Decisions* 18.
[900] *Gairn v Toschoch*.

arrestment in the debtor's hands was rejected by Stair.[901] His view persists in the modern law.[902] But even if arrestment in the debtor's hands is barred, potential purchasers have no reliable way of ascertaining whether goods are subject to arrestment. This concern led some eighteenth-century writers to suggest that a good faith purchaser would be protected from arrestment. For Kames, the result was a simple application of the principles of litigiosity. Since there was no mechanism for public notification as was the case with other instances of litigiosity, potential purchasers could not be in constructive bad faith.[903]

Even those who tended to favour the attachment theory recognised that good faith purchasers should be protected. For example, Bankton concedes that the purchaser was protected in the same paragraph as he states his general view that "arrestment imposes a kind of real burthen, and is not simply a prohibition". His justification was the maxim *mobilia non habent sequelam*.[904]

This rule persisted in the nineteenth century. Bell says that, while arrestment "confers a preference", it "creates no further real right, so as to entitle the creditor to follow and vindicate it from third parties acquiring *bona fide*."[905] This is consonant with his general preference for the prohibition theory. Stewart agrees,[906] subject to the rather surprising caveat that the purchaser must have obtained possession of the goods even if ownership has passed without delivery under the Sale of Goods Act.[907] He offers no argument to explain why this might be the case. It may be that he reasoned that the arrestment persisted for as long as the arrestee was able to comply with an action of furthcoming.[908]

It seems likely that a good faith purchaser would continue to be protected in the modern law. No authority has been discovered which expressly disapproves such

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[901] III.i.25.
[902] Erskine III.vi.5 (Stair seems less enthusiastic about arrestment in the debtor's hands than Erskine suggests); Hume *Lectures* Vol VI, 96; Bell *Comm* II, 70; Gretton "Diligence" para 261. Cf Forbes *Great Body* Vol I, 1208–9; Bankton III.i.32.
[903] *Principles of Equity* Vol II, 184–5.
[904] III.i.32.
[905] *Prin* §2278. Adherents of the attachment theory would not suggest that the arrester should be able to vindicate the property since no-one alleges that the arrester owns it. Despite that, Bell's intention is tolerably clear.
[906] *Diligence* 126–7.
[907] *Ibid* 127–8.
[908] See Gretton "Breach of Arrestment" 103.

protection.[909] Gretton endorses Stewart's position.[910] Of course, an arrester will prevail over a gratuitous or bad faith acquirer[911] but that result can be explained under the prohibition theory by the normal principles of litigiosity. The rules governing the relationship between the arrester and subsequent purchasers are consistent with the prohibition theory but Bankton does provide a possible mechanism for reconciling them the with the attachment theory.

(d) Competition between arrestments

Evidence of early adoption of the attachment theory is found in *Wallace v Scot*.[912] A prior arrester without a decree competed with a subsequent arrester who had obtained one. The question divided the Lords but the first arrester prevailed. The majority were persuaded by the analogy of pledge. This set the tone for the rule which would eventually prevail.[913] However, note should be taken of a number of cases where the first arrester ranked behind or alongside a subsequent arrester. In some, the Lords felt that two creditors who had the same diligence and had pursued their remedy assiduously should rank equally provided that one arrestment followed the other closely.[914] This might been seen as motivated by concerns analogous to those which led to the Diligence Act 1661. Thus it is not necessarily inconsistent with the attachment theory. Whatever its rationale, it did not persist.

By Stair's day, priority by date and time of arrestment appears to have been settled.[915] In *Wightman v Seton*,[916] the result was justified in terms of the attachment theory. The first arrester was preferred although both had obtained decrees of furthcoming on the same day and the second arrester had possession of the arrested goods. The Lords found that arrestment gave "an *onus reale* on the goods".[917] The

[909] Although it is somewhat perplexing that a good faith purchaser of corporeal moveables should be protected where a good faith assignee is not.
[910] "Breach of Arrestment" 102–3.
[911] See, eg Stewart *Diligence* 128.
[912] (1583) Mor 807.
[913] *Robertson v M'Ewan* (1680) Mor 814
[914] *Speir v Mure and Mureson* (1611) Mor 808.
[915] Stair III.i.46; *Cunningham & Lyle v Wallace* (1666) Mor 809; *Lauder v Watson* (1685) Mor 814, although a prior arrester could lose his priority on grounds of *mora* and Stair does appear to suggest that the basic rule is priority by date of decree at IV.xxxv.6.
[916] (1697) Mor 815.
[917] See further, *Laird of Dundas v Murray* (1738) Mor 821; *Lister v Ramsay* (1787) Mor 824; Erskine III.vi.18; Hume *Lectures* Vol VI, 108.

equivalent rule whereby assignations intimated on the same day ranked *pari passu* was reconceived as a response to uncertainty about the timing of the competing acts.[918] Where there was no uncertainty, the *prior tempore* rule could be applied. These authorities and reasoning were applied to competing arrestments in the eighteenth century.[919]

A posterior arrester with a decree was preferred to a prior arrester without one in *Scott v Keith*.[920] The first arrester lost out because of a concern that one creditor should not have to wait for a less diligent creditor to get his act together.[921] However, this case did not establish that arrestments were ranked by date of decree.[922] Where both creditors had obtained decrees, the first to arrest prevailed even if he was second to obtain decree.[923] Further, from the eighteenth century, arrestments on the dependence began to be permitted to compete by date of arrestment even when there was no decree, providing that the prior arrester was not dilatory in the pursuit of his decree.[924] This shift removes any doubt that this class of cases might be thought to cast on the attachment theory.

Posterior arresters were also able to obtain a preference in cases where the first arrestment had been done on a bond which was not yet due, even if both had become due by the date of the competition.[925] The challenge that this result poses to the attachment theory may be illustrated by considering analogous application to standard securities. Craig lends £50,000 to Danni to be repaid in one lump sum 10 years from the date of the advance. The loan is secured by a standard security which is duly registered. During the 10-year period, Danni borrows another £50,000 from Colin. That is to be repaid in 2 years. Danni having defaulted on the second loan,

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[918] Stair IV.xxxv.7; Erskine III.vi.18; Hume *Lectures* Vol VI, 109–10; *Wright v Anderson* (1774) Mor 823.
[919] Steuart *Dirleton's Doubts* 16 (although Steuart preferred an equalisation rule); Forbes *Great Body* Vol I, 1225–6; Bankton III.i.42 and Erskine III.vi.18; *Cameron v Boswell* (1772) Mor 821. The *pari passu* rule continued to be applied in cases of uncertainty: *Wright v Anderson* (1774) Mor 823.
[920] (1626) Mor 808.
[921] Stair III.i.46; Erskine III.vi.18.
[922] Although Stair appears to suggest as much on the basis of the prohibition theory: IV.xxxv.6.
[923] *Seatoun v Jack* (1665) Mor 809; *Cunningham & Lyle v Wallace* (1666) Mor 809; *Montgomery v Rankin* (1667) Mor 809; *Sutie v Ross* (1705) Mor 816; *Brodie v M'Lellan* (1710) Mor 816; *Roystown v Brymer* (1716) Mor 819.
[924] *Watkins v Wilkie* (1728) Mor 820; *Bayne v Graham* (1796) Mor 2904; Hume *Lectures* Vol VI, 110.
[925] *Charters v Neilson* (1670) Mor 811; *Mader v Smith* (1673) Mor 812; *Pitmedden v Patersons* (1678) Mor 813.

Colin seeks to enforce. We would be very surprised to find Craig ranking behind Colin because his loan was not yet due.

However, that approach did not persist. Erskine modified it, treating competitions where the arresters' debts were due on different dates on the same terms as competition between an arrestment in execution and an arrestment on the dependence: the arrester whose debt is not due must stand aside because he is not in a position to demand furthcoming.[926] That meant that, where both debts had fallen due, the first arrester would prevail.

Bell took a more robust attitude, arguing that a fundamental difference between English and Scots law was that the latter followed the Civil law tradition in allowing diligence to be done in security of future and contingent obligations.[927] He suggested that, while Erskine's argument might be "unobjectionable" where the debtor is solvent, it is "unsound" in cases of insolvency.[928] Bell pointed out that Erskine's approach would deprive a creditor who had used arrestment in security of the benefit of his diligence in the very circumstance when he was likely to need it.[929] He did not, however, consider the implications of this approach for the theory of arrestment. Bell's approach established the rule which persists to the present day, that even those who arrest on the dependence or whose debts are not yet due rank by their date of arrestment.[930]

The rule that arresters competed by date of arrestment rather than of furthcoming posed an obvious challenge for the prohibition theory. As noted above, Steuart and Forbes went as far as to deny prior by date of arrestment but such a position is impossible to sustain in the face of the authorities to the contrary.

Stair tried to explain ranking by date of arrestment as an effect of litigiosity. He suggested that it meant that neither a voluntary deed nor posterior diligence could affect litigious property, unless the party who rendered the property litigious was negligent.[931] This understanding of litigiosity differs from that found elsewhere in Scots law and it is not even consistent with Stair's own view on the relationship

[926] III.vi.18.
[927] *Comm* I, 332–3.
[928] *Ibid* 333–4.
[929] *Ibid* 334.
[930] Hume *Lectures* Vol VI, 111; Stewart *Diligence* 138–40; Gretton "Diligence" para 287; *Mitchell v Scott* (1881) 8 R 875.
[931] III.i.42. Kames makes a similar argument in his note on *Stevenson v Grant* (1767) Mor 2762.

between poinding and arrestment.[932] If arrestment did prohibit posterior diligence by rendering the property litigious, it should exclude poinding as much as arrestment.

Kames' argument was similar. As already mentioned, he suggested that the common law rule was ranking by furthcoming but that arresters ranked by date of arrestment because equity intervened by rendering the property litigious.[933] A creditor who knows about an arrestment should stand aside and let the person who had started first complete his right.[934] The problem with this argument is that it proves too much, just as Stair's did. It would also mean that a poinder should stand aside,[935] and it would mean that no-one could adjudge property which the debtor had contracted to sell. Also, like Stair, Kames seems to stretch litigiosity beyond the normal understanding of the concept. The result is not consistent with the "race to completion" principle which Scots law generally applies to competing personal rights to real rights.[936]

Recognising that a mere prohibition was not sufficient to explain why competing arresters ranked by date of arrestment, Stewart, argued that arrestment was not simply a prohibition but also "an inchoate attachment".[937] That meant that the arrester had staked some sort of a claim to the asset (making it more like citation in adjudication than an inhibition) and Stewart believed this explained the result of competitions between two inchoate diligences (eg where a multiplepoinding was raised by the arrestee before either arrester could seek furthcoming or where an arrester competed with an incomplete poinding).[938]

Stewart goes on to say that an arrestment depends "for its preference over a completed diligence on decree of furthcoming having been obtained prior to the completion of the competing diligence."[939] This might seem to suggest that, where a second arrester completes his diligence by furthcoming first, he will prevail. However, Stewart appears to have had other diligences in mind such as poinding

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[932] As Hume points out: *Lectures* Vol VI, 108.
[933] Kames *Principles of Equity* 179–80.
[934] *Ibid.*
[935] Kames does recognise this, and criticises the rule on competition between arrestment and poinding: *Ibid* 182.
[936] This was famously illustrated by *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 but Lord Rodger shows that the approach has a long tradition in Scots law.
[937] *Diligence* 125–6.
[938] *Ibid.*
[939] *Ibid.*

because he later recognises that "In competition *inter se*, arrestments are preferred according to priority in date, and it is immaterial who gets the first decree of furthcoming."[940] He makes no attempt to relate this back to his endorsement of the prohibition theory.

(e) Arrestment and confirmation as an executor-creditor

Arresters also found themselves in competition with executor-creditors whose real right was acquired by confirmation. The early authorities on this topic are mixed. In *Riddell v Maxwell*[941] and *Hume v Hay*,[942] an arrester was preferred to an executor-creditor who obtained confirmation between arrestment and forthcoming. In the latter, Harcarse records that the Lords came to this view on the grounds that arrestment was "*nexus realis*, which could not be prejudged by the debtor's death, more than real rights of poinding the ground, &c."

These cases support the attachment theory: the arrester prevails because his real right predates the executor-creditor's. Other authorities, however, point in the opposite direction. Reporting *Russell v Lady Balincrieff*,[943] Harcarse suggests that, "if the confirmation of the rents had been anterior to the decreet [of furthcoming] they would probably have decerned in favour of the [executor-creditor]." The most likely basis for such a decision would be an application of the prohibition theory, since it would mean that the arrester did not acquire the right until furthcoming.

The prohibition theory appears to have been applied in *Carmichael v Mossman*,[944] where the executor-creditor was preferred because of confirmation prior to furthcoming. Kilkerran suggests that counsel must have failed to cite *Riddell* but that the arrester did not reclaim because "the Lords, in a full Bench, were so unanimous". The approach in *Carmichael* was followed by two nineteenth century cases.[945] No consideration was given to the earlier authorities which support the attachment

[940] *Ibid* 137.
[941] *Riddell v Maxwell* (1681) Mor 2790.
[942] (1688) Mor 2790. See also *Crawford v Simson* (1732) Mor 2791.
[943] (1688) Mor 2791.
[944] (1742) Mor 2791.
[945] *Wilson and M'Lellan v Fleming* (1823) 2 S 430; *Anderson v Stewart* (1831) 10 S 49.

theory. These cases have been taken by subsequent writers to establish the law.[946] Alongside the rule on poinding, the rule regarding executor-creditors is one of the major obstacles to acceptance of the attachment theory.

(f) Arrestment and heritable property

Where rents were arrested, arresters could find themselves in conflict with holders of rights in heritable property. The authorities here are mixed. In *Warnock v Anderson* a creditor had arrested rents and sought furthcoming.[947] The buyer of the relevant land compeared and pled that he had a contractual right to the land which predated the arrestment, pointing to the parallel with inhibition. He suggested that the same rule should apply to arrestment. This argument was rejected on the ground that arrestment was different to inhibition because it "behoved to work upon an existing body."

In *Stewart v Stewart*, an adjudger of a heritable bond was preferred to an arrestment between citation and decree of adjudication. The successful argument relied on the fact that an arrester was vulnerable to poinding until furthcoming.[948]

(g) Arrestment and assignation

The clearest application of the attachment theory can be found in the relationship between assignation and arrestment. As Hume notes,[949] if arrestment were truly analogous to inhibition, an assignee to whom the deed of assignation was delivered prior to the arrestment should be safe. The act of assignation was not prohibited when the assignor acted.[950] In fact, an assignee must have intimated before the arrestment in order to prevail. That suggests a race to intimate or serve between the assignee and the arrester and thus gives strong support to the attachment theory. The arrester's preference is not based on the assignee's wrongful conduct, since the assignee has done nothing wrong. Rather it is based on the principle *prior tempore potior iure est*. He completed his real right first.

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[946] Bell *Comm* II, 69 fn 2; Hume *Lectures* Vol VI, 109; Stewart *Diligence* 134–5; Gretton "Diligence" para 299.
[947] (1633) Mor 2787.
[948] (1705) Mor 703.
[949] Hume *Lectures* Vol VI, 108.
[950] *Fairholm v Hamilton* (1755) Mor 2778 does appear to have been decided according to this logic.

Competition by date of arrestment and intimation was applied in the early seventeenth century.[951] In a case from 1630, the assignee and arrester were ranked equally because both intimation and arrestment were done on the same day.[952] This is best understood as an instance of the reasoning which (for a while) led to arresters being ranked equally: both had pursued satisfaction with all diligence. Similarly, *Adie v Scrimzeor* reflects the later rule on competing arrestments. Arrestment and intimation were on the same day and the Lords felt that they could not determine which had been earlier because the schedule of arrestment did not give the particular hour it was made so the two arrestments ranked *pari passu*.[953]

Another parallel with the rules on competing arrestments can be seen in *Douglas v Mitchell*.[954] An arrestment was followed by an assignation to a creditor who intimated by serving an arrestment. The first arrester was not in a position to object to payment because he had not yet obtained a decree. This was an application of the rule that a creditor who is not ready to seek furthcoming cannot expect another who is ready to wait for him.

As these special rules fell away, the rule on competition by date of arrestment became clear. The approach to arrestments and assignations presented challenges for proponents of the prohibition theory which were similar to those posed by the rule on competition between arrestments.

As noted above, Stair invoked litigiosity to explain the arrester's success. Kames took the same approach but his account was more subtle.[955] Noting that both the debtor and the assignee may be ignorant of the arrestment, Kames argues that both must be in bad faith before they will be affected by the prior arrestment.[956] He concedes that there are "many decisions" which prefer an arrester where the deed of assignation was delivered prior to the arrestment but not intimated until afterwards but simply says that he "cannot comprehend" the basis for these decisions and points out that the authorities are not uniform.[957]

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[951] *A v B* (1618) Mor 2771; *Davidson v Balcanqual* (1629) Mor 2773.
[952] *Inglis v Edward* (1630) Mor 2773.
[953] (1687) Mor 2775.
[954] (1638) Mor 2774.
[955] Kames *Principles of Equity* Vol II, 182.
[956] *Ibid* 183–9.
[957] *Ibid* 189. He argues on the same basis that an assignee who has not intimated prior to the competition should be preferred to an arrester who arrests after the assignation.

The first example which Kames gives of contrary authority concerns a competition between assignees of rent and adjudication.[958] He points out that an assignee to whom the deed of assignation was delivered prior to citation prevails over the adjudger provided that he intimates before the decree. From this he argues that "An arrestment surely makes not a stronger *nexus* upon the subject than is made by the summons of adjudication."[959] This seems very close to begging the question, since the essence of the attachment theory is that arrestment does indeed make a stronger *nexus* than citation in an adjudication. The other authority is *Fairholm v Hamilton*,[960] which concerned a competition between a Scottish arrestment and an English assignment. Kames relies heavily on the fact that at that time English law considered an assignment as a procuratory *in rem suam*, but he rather neglects the fact that it operated to transfer title in Equity without the need for intimation. Neither of Kames' arguments seems to have enough force to rebut the weight of authority which suggests that the relationship between arrestments and assignations is best understood in terms of the attachment theory.

Despite having endorsed the attachment theory elsewhere, Erskine attempted to explain the interaction between assignation and arrestment without recourse to it. He suggested that, where delivery of a deed of assignation was followed by arrestment by another creditor and finally by an intimation, the assignee's intimation was "accounted part of the voluntary deed" with the result that the voluntary deed is completed after the prohibition is laid on and so is struck at by litigiosity.[961] Once again, this is a version of litigiosity which is much stronger than that which applies in the case of inhibition or inchoate adjudication. Further, the intimation is the act of the assignee, who is surely as entitled to look to his own interests as any other creditor.[962]As with competition between arresters, Bell and Stewart state the rule but do not attempt to integrate it with their broader theory.[963]

It seems clear that the prohibition theory cannot account for the settled rules on competition between arrestment and assignation.

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[958] *Smith v Hepburn and Barclay* (1637) Mor 2804.
[959] *Ibid* 189–90.
[960] (1755) Mor 2778, referred to in Kames *Principles of Equity* Vol II, 191.
[961] III.vi.19.
[962] See further Scottish Law Commission *Report on Diligence on the Dependence and Admiralty Arrestments* (SLC 164, March 1998) para 9.18–9.
[963] Bell *Comm* II, 69; Stewart *Diligence* 141.

(h) Arrestment and sequestration

As noted in chapter 4, collective insolvency procedures did not develop until relatively late in Scots law. The first collective sequestration procedure covering moveable property was introduced in 1772.[964] That statute provided for equalisation of diligence done in the window from thirty (later extended to sixty) days before notour bankruptcy and four months after it.[965] The rule is preserved in the modern legislation with apparent insolvency taking the place of notour bankruptcy.[966] Further, arrestments done during the sixty days prior to the date of sequestration are struck down as ineffective to create a preference (as are post-sequestration arrestments)[967]

These equalisation rules meant that the cases in which an arrestment without furthcoming competed with a trustee in sequestration were limited. The effect of sequestration on the right of an arrester, therefore, did not come to be settled until the nineteenth century.

Aside from the equalisation provision,[968] the 1772 Act made no direct provision regarding the effect of sequestration on an arrestment. Nor did it raise the issue quite as sharply as later legislation would. Under section 1, the debtor was ordered by the court to grant a disposition of his moveable estate to the factor for creditors. This meant that the rules restricting what the debtor could validly grant could be applied. Further, section 14 provided that "all Debts claimed upon, which are intitled to a preference by the Law of Scotland not altered by this Act, shall be preferred accordingly."

Under the 1783 Act, the factor had been replaced by a trustee who could apply to the court for a "Decree, finding the Property of the whole sequestrated Estate and Effects, real and personal, to be in the said Trustee" for the behoof of creditors.[969]

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[964] 12 Geo 3 c 72. The progress of Scots bankruptcy legislation is traced in Bell *Commentaries* II, 281–3; Goudy *Bankruptcy* 1–11 and in Scottish Law Commission *Insolvency, Bankruptcy and Liquidation in Scotland* (SLC Consultative Memorandum No 16, November 1971) paras 9–13.
[965] Stewart *Diligence* 179.
[966] Bankruptcy (Scotland) Act 1985 Sch 7 para 24(1).
[967] Bankruptcy (Scotland) Act 1985 s 37(4).
[968] 12 Geo 3 c 72, s 17.
[969] 23 Geo 3 c 18, s 19

The vesting was, however, limited to "that Right and Interest in the Estate which the Bankrupt himself has, and which his Creditors can validly attach".

The 1793 Act did away with the need to apply for a specific order vesting the property,[970] and included a qualification to the trustee's duty to pay out to creditors: "Regard being had to Preferences obtained by Securities or by Diligence, before the said Deliverance [ie the date of sequestration], and not expressly set aside by this Act."[971] This was replicated in the 1814 Act[972] but does not seem to add much to the qualification on the vesting provision.

The 1814 Act was the legislation which Bell discussed in the fifth edition of the *Commentaries* (the last which he would produce himself).[973] Under this legislation, the only possible grounds for giving the arrester a preference were that the arrestment was considered to have limited the debtor's right in the relevant property that arrestment was considered a diligence which secured a preference. Bell goes as far as to say that the trustee's right "cannot be obstructed by any diligence used, or security held, by an individual creditor, if not completed as real right till after [vesting in the trustee]."[974] Inhibition confers no such preference and so, neither would arrestment if the prohibition theory is followed. That being the case, it is slightly surprising that Bell included arrestment in his list of diligences which secure a preference in sequestration.[975] It is difficult to argue that he had in mind an arrestment which had been followed by a forthcoming, since furthcoming would operate to remove the asset from the bankrupt's estate and there would therefore be no question of ranking. Bell says little about the basis for this view, but it is striking that he covers arrestment under the heading "Of the ranking of creditors holding securities over the moveable fund" rather than alongside inhibition under "Of the ranking of creditors

[970] 33 Geo 3 c 74, s 23 and 24.
[971] 33 Geo 3 c 74, s 29. Cf 23 Geo 3 c 18, s 22.
[972] 54 Geo 3 c 137, ss 29, 30 and 38.
[973] (1826). While M'Laren restored most of Bell's text in the 7th edition of the *Commentaries*, the legislative changes between 1826 and 1870 were so great that he used Shaw's edition for the chapter on sequestration: Bell *Comm* (7th edn, 1870) II, 281 fn 1. Bell did discuss the 1838 Act in his *Commentaries on the Recent Statute relative to Diligence or Execution against the Moveable Estate; Imprisonment; Cessio Bonorum and Sequestration in Mercantile Bankruptcy* (1840). He does not say anything further about the ranking of arresters or the nature of their right. Further references to Bell's *Commentaries* in this section are to the 5th edition, unless otherwise specified.
[974] Bell *Comm* II, 405.
[975] Bell *Comm* II, 512.

entitled to preferences by exclusion". That suggests that, in this context at least, he tended towards the attachment theory.

Sequestration was put on a permanent footing and extended to all types of debtor in 1838.[976] The 1838 Act also leaves arrestments to be covered by the general provisions which protect creditors with "securities" or "preferences". Vesting of the debtor's moveable property in the trustee was provided for in section 78, but was "subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible."[977]

Section 83 provided that sequestration operated as an arrestment and furthcoming and as a completed poinding on behalf of all creditors as at the date of sequestration.[978] Given that a completed poinding defeated an arrestment without furthcoming, this might be thought to imply that arrestment should confer no preference in sequestration. In fact, courts have consistently recognised the arrester's preference on the basis of the protection for securities in section 78.[979]

This was challenged in *Brown v Blaikie*.[980] Lord Fullerton suggested that, because the trustee becomes entitled to payment of debts owed to the bankrupt, the arrester's "security no longer exists as a substantive *nexus* on any part of the moveable estate."[981] However, he still accepted that the arrestee was entitled to a preference on the proceeds of the claim.[982] Lord Fullerton's qualms about the nature of the arrester's right were rejected in *Gibson v Greig* and the arrester's preference can now be considered well-established.[983]

This characterisation of arresters as having rights in security, and the preference accorded to them in sequestration procedures on that basis, provide strong support for the attachment theory.

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[976] 2 & 3 Vict c 41.
[977] The same words are found in the Bankruptcy (Scotland) Act 1913 s 97. The modern equivalents are Bankruptcy (Scotland) Act 1985 s 33(3) and Insolvency (Scotland) Rules 1986 r 4.66(6)(a).
[978] The equivalent modern provision is Bankruptcy (Scotland) Act 1985 s 37(1)(b). Of course, poinding has been replaced by attachment.
[979] Stewart *Diligence* 186; Goudy *Bankruptcy* 254; Gretton "Diligence" para 292.
[980] (1849) 11 D 474.
[981] *Ibid* at 479.
[982] *Ibid* at 479.
[983] (1853) 16 D 233 at 237 per Lord Ivory and at 240 per Lord Rutherfurd. See further, *Mitchell v Scott* (1881) 8 R 875, *Stewart v Jarvie* 1938 SC 309 and *James Gilmour (Crossford) Ltd v John Williams (Wishaw) Ltd* 1970 SLT (Sh Ct) 6.

(i) Lucas's Trustees v Campbell & Scott[984]

Most of the rules which are relevant to the characterisation of arrestment were settled by the end of the nineteenth century but the introduction of the floating charge opened a new front. Before that is discussed, some attention should be given to *Lucas's Trustees v Campbell & Scott* because of the influence it had on the floating charge cases. It concerned an attempt to arrest industrial plant which was located in a quarry in the hands of the tenant of the quarry. Under the lease, the plant was owned in common by the landlord (who was the arrester's debtor) and tenant. At the ish, the tenant was obliged to vacate the quarry leaving the plant behind but entitled to payment for his share of the plant.[985] The Inner House held that the arrestment was invalid because it could not lead to a decree of furthcoming. For Lord Kinnear, the heart of the problem was that an arrestment, like an assignation, could not make the arrestee's position worse.[986] That meant that the arrestment could not operate to compel him to take or retain possession of the plant after the ish in order to be able to make furthcoming to the arrester.[987]

The decision is understandable: the arrestee was not entitled to retain possession of the quarry, and asking him to keep the plant elsewhere may well have involved undue difficulty and expense. Even on the attachment theory, arrestment involves a direction to the arrester that he should retain possession.

Lord Kinnear justified the decision with a thorough endorsement of the prohibition theory, describing arrestment as "a diligence *in personam*"[988] and characterising furthcoming as an adjudication, which is "the essential part of the diligence".[989] This is also understandable: the case concerned corporeal moveables so to follow the approach taken to arrestment and poinding may have seemed obvious.

While the Scottish sources were divided in their approach to arrestment, most of the support for the attachment theory has come from the courts. Until the twentieth century, writers tended towards the prohibition theory, perhaps because they relied on each other more heavily than on case law. In Bankton, Erskine and Hume,

[984] (1894) 21 R 1096.
[985] *Ibid* at 1106.
[986] *Ibid* at 1105.
[987] *Ibid* at 1107.
[988] *Ibid* at 1106.
[989] *Ibid* at 1103.

however, there are the beginnings of a move to the attachment theory. Hume, in particular, seems to have thought the law had shifted in that direction. But even these moves were tentative. Despite the odd ambiguous expression later writers, notably Bell and Stewart,[990] tended towards the prohibition theory. When a new problem arises in any area of law, it has to be solved by recourse to the principles of the field. General statements about the principles of arrestment are more easily found in the work of legal writers than in the cases. Therefore, it is not surprising that the prohibition theory should be favoured in novel situations.

(j) Twentieth-century debate: arrestment and the floating charge

Another novel situation was created by the introduction of the floating charge: competition between an arrester and a floating chargeholder. It is well recognised that a floating charge does not affect particular assets until attachment. This takes effect "as if the charge were a fixed security over the property to which it has attached",[991] but subject *inter alia* to the rights of other creditors with "effectually executed diligence on the property" affected by the charge.[992] Whether an arrester prevails in a competition with a floating charge depends on whether the arrester has an "effectually executed diligence".

This issue arose in *Lord Advocate v Royal Bank of Scotland*.[993] The majority in the First Division affirmed the decision of the Lord Ordinary that an arrester who had yet to obtain furthcoming did not have effectually executed diligence and, therefore, that the chargeholder's right was not subject to the arrestment. The basis for this decision was a straightforward adoption of the prohibition theory, relying on quotations from Stair, Erskine, Stewart, and Lord Kinnear's opinion in *Lucas's Trustees*.[994]

For the arrester it was argued that arrestment gave a security over the arrested property: hence the priority over voluntary acts of the debtor (eg assignations) and

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[990] Of course, Stewart's work was not published until after *Lucas's Trustees* was decided.
[991] Companies Act 1985 s 463(2); Insolvency Act 1986 s 53(7) and 54(6); (when it comes into force) s 45(5) of the Bankruptcy and Diligence (Scotland) Act 2007.
[992] Companies Act 1985 s 463(1)(a); Insolvency Act 1986 s 55(3)(a) and 60(1)(b); (when it comes into force) s 45(3)(a) of the Bankruptcy and Diligence (Scotland) Act 2007.
[993] 1977 SC 155. The legislation in force at the time was the Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 15(2)(a) but the relevant wording was the same.
[994] 1977 SC 155 at 159 per Lord Kincraig, at 169–70 per Lord President Emslie, and at 175–7 per Lord Cameron.

subsequent arrestments.[995] The majority suggested that these results could be accommodated within the prohibition theory by reference to litigiosity, relying on Erskine's analysis.[996] The problems with this have already been discussed and they were acknowledged by the judges although that does not appear to have led them to reconsider their approach.[997]

It is no surprise that the court looked for statements of general principle to deal with this novel situation and that this led them towards the prohibition theory. However, while the court's approach reflected the historical preferences of writers on Scots law, it was not welcomed by modern scholars.[998] Not all of the criticisms of the decision depended on favouring the attachment theory over the prohibition theory but many did.[999] In particular, there was forceful rejection of the idea that litigiosity could explain the rules on competitions between arrestments and assignations.[1000] Further, it was shown that the mismatch between the approach to a competition between an arrestment and assignation and that to arrestments and floating charges created a circle of priorities.[1001] Where an assignation is intimated after an arrestment but before the attachment of a floating charge and there has been no furthcoming, the arrestment beats the assignation, the assignation beats the floating charge because the right to payment left the debtor's patrimony prior to attachment but, according to *Lord Advocate v Royal Bank*, the floating charge beats the arrestment.

The decision is widely regarded as problematic, but the Inner House did not take the opportunity to change tack when floating charges and arrestments came back before it in *Iona Hotels Ltd v Craig*.[1002] In that case, the floating charge had been granted after the arrestment and therefore the grant of the charge could be attacked on the basis of litigiosity. Lord Hope made his support for the prohibition theory clear. Indeed, he seems to have had fewer doubts about the capacity of litigiosity to

[995] *Ibid* at 164.
[996] *Ibid* at 170 and 176–7.
[997] *Ibid* at 170.
[998] See S Wortley "Squaring the Circle: Revisiting the receiver and 'effectually executed diligence'" 2000 JR 325.
[999] Wortley "Squaring the Circle" at 333–4.
[1000] Eg Scottish Law Commission *Report on Diligence on the Dependence and Admiralty Arrestments* paras 9.17–20.
[1001] Which forms the primary focus of Wortley's article.
[1002] 1990 SC 330.

explain the ranking of arrestments and inhibitions than Lord Emslie in *Royal Bank*, observing that "for my part I am content to accept it as sound in law."[1003]

Iona Hotels did little to assuage academic concerns and the judgment does not give any answer to the objections which were made to *Lord Advocate v Royal Bank*. Indeed St Clair and Drummond Young go so far as to suggest that the decisions were so unsatisfactory that later courts would simply decline to follow them.[1004]

The cases on floating charges and arrestment provide evidence of the continuing tenacity of the prohibition theory but they also illustrate the deep practical problems which it can generate and the difficulties which result from combinations of rules with differing theoretical foundations.

(k) Conclusions

The material surveyed supports Gretton's contention that no consistent approach to the characterisation of arrestment can be discerned. Whatever view one adopts, it is impossible to avoid doing some violence to well-established rules.

While there is clear support for the prohibition theory, its proponents' attempts to account for the way arrestments rank among themselves and with assignees suffer from serious problems. They prove too much (suggesting that poinders ought to have been subject to challenge as well), and they stretch litigiosity beyond the understanding which applies in other situations. This approach would change litigiosity from an effect which is justifiable in terms of Scots law's understanding of fraud to something approaching equitable title. It is difficult to see why arrestment (for which there is no real public notice) should be accompanied by a stronger litigiosity than occurs elsewhere.

In the modern law, incorporeal property is often significantly more valuable than corporeal moveables. Confirmation as an executor-creditor is not a commonly used diligence. Therefore the most important task for any theory of arrestment is to account for its interaction with other arrestments, with assignation, and with insolvency processes. These are the very situations for which the prohibition theory struggles to provide a convincing account. Only the attachment theory can provide a consistent explanation of the most important rules surrounding arrestment.

[1003] *Ibid* at 335.
[1004] *Corporate Insolvency* para 9.15.

It might even be possible to argue that, since poinding has been abolished and replaced by attachment,[1005] one of the major obstacles to the attachment theory has been removed. Attachment bears a strong resemblance to poinding but it is a fresh institution. Nothing in the Debt Arrangement and Attachment (Scotland) Act 2002 demands that the rules on the relationship between poinding and arrestment be applied to competitions between arrestments and attachments. Furthermore, arrestment of corporeal moveable property is now restricted to making up any shortfall between the value of rights which are arrested and the debt in execution of which the arrestment has been done.[1006]

The floating charge presents a more serious obstacle to wholesale acceptance of the attachment theory. Its importance as a means of granting security over companies' moveable property (whether corporeal or incorporeal) means that its interaction with arrestment is of real practical importance in a way that confirmation as an executor creditor is not. The established law in this area is based on a clear and deliberate adoption of the prohibition theory. However, it rests on an unloved decision of the Inner House, which gives rise to serious practical difficulties. For these reasons, even the floating charge does not provide a good reason to favour the prohibition theory over the attachment theory.

The attachment theory also provides a much clearer basis for automatic release of attached funds to an arresting creditor under section 73J of the Debtors (Scotland) Act.

The best that can be done for the development of the law of arrestment is a wholesale adoption of the attachment theory. It is some comfort that this approach has also been adopted elsewhere in Europe against the background of conflicting approaches to the ranking of arresting creditors. If the attachment theory is adopted there is less room for litigiosity: someone with a real right in an asset has little need to call in aid a prohibition on dealings with that asset. Adoption of the attachment theory would also prevent any suggestion that the stronger effects of arrestment can be applied by analogy in other cases of litigiosity since those stronger effects are attributable to the arrester's subordinate real right.

[1005] Debt Arrangement and Attachment (Scotland) Act 2002 Parts 2–4.
[1006] Debtors (Scotland) Act 1987 ss 73E (4) and (5).

B. LITIGIOSITY BEYOND DILIGENCE

Scots law was slow to develop a general theory of litigiosity. In the course of his discussion of arrestment, Kames put forward a theory which anchored the concept within a broader framework and linked it to specific instances. However, aspects of his treatment made it unlikely to garner widespread acceptance. Applied to its fullest extent, it would have meant something akin to equitable title in Scots law.

(1) "Real actions"

Although Bell did not regard inhibition as a species of litigiosity, and his approach was not as wideranging as Kames', he too presented an account of litigiosity which went beyond the traditionally recognised instances of apprising, adjudication and arrestment. Bell located the concept in a broader comparative and conceptual framework:

> It is a general rule, which seems to have been recognised in all regular systems of jurisprudence, that during the dependence of an action, of which the object is to vest the property, or to attain the possession of a real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the decree which shall ultimately be pronounced.[1007]

He suggests that the basis of the rule is the maxim *pendente lite nihil innovandum* and that the doctrine is accepted both in England and on the Continent, where it is known as "*vitium litigiosum*".[1008] Unfortunately, he gives no specific references for the Civilian position.

When Bell moves from general comparative comments to discussion of Scots law, he suggests two broad categories of litigiosity: that which arises from diligence and that which arises from "real actions". This might be taken to indicate that, outside diligence, its effect was limited to actions which involve the assertion of a real right. However, Bell's observation that "There is litigiosity in all real actions for

[1007] *Comm* II, 144.
[1008] *Ibid*.

recovering the property or possession of lands"[1009] suggests otherwise. A pursuer who seeks to recover "property of lands" does not own them.

The sense that Bell considered real actions to extend to cases when the pursuer asserted a personal right to a real right is reinforced by his use of *Menzies v MacHarg* as an example of a real action.[1010] There, Mary Renton, having been fraudulently induced to sell land to James Gillespie, raised an action for reduction of the sale and disposition which followed. In the interim, she assigned claim to Menzies, while Gillespie contracted a number of debts and granted a trust deed for creditors. MacHarg purchased the land from Gillespie's trustee. Menzies wakened the action and sought to recover the land from MacHarg on the basis of Gillespie's fraud. MacHarg pointed to the maxim *dolus auctoris non nocet successori* but this was rejected. No hint is given as to the Lords' reasoning but the argument before the court was that the raising of the initial action had rendered the land litigious. Bell's account of litigiosity has echoes of a phrase from submissions on behalf of Menzies:

> By the laws of all countries, a real action which concludes that the defender's right be reduced and the pursuer's declared, interpels the defender from making an alienation *judicii mutandi causa* and third parties from dealing with him.[1011]

As discussed in the previous chapter, reduction on grounds of fraud is a remedy which gives return of property in satisfaction of a personal right to reparation of a wrong done. Therefore, the action which rendered the property litigious was one where a personal right to property was being asserted.

One question remains in relation to litigiosity and personal rights. The focus seems to be on personal rights to recover property or on personal rights to property which arise from diligence. There is, however, a third source from which a personal right to property may arise: a voluntary obligation undertaken by the owner. Can litigation to enforce such rights render property litigious?

It is not easy to see why a personal right to get something back should be privileged over a right to acquire the thing in the first place. Bell speaks with a wavering voice. His initial comment about the general rule, recognised in all systems

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[1009] *Comm* II, 145.
[1010] (1760) Mor 14165, cited at Bell *Comm* II, 145.
[1011] *Ibid* at 14168.

refers, to actions whose object "is to vest the property … of a real estate."[1012] That is the aim of an action for implement of missives as much as it is the aim of a reduction. However, when he comes to discuss Scots law specifically, he restricts the rule to "real actions for recovering" ownership or possession.[1013] In the third edition of the *Principles*, Bell has a section on litigiosity which says it arises in "real actions, declarators, reductions, adjudications, [and] ranking and sale".[1014] Whether this covers litigation asserting a personal right to property depends on how broadly the term "real actions" is understood to be.

Of course, a transfer made in frustration of a personal right to acquire property calls to mind the offside goals rule. A possible explanation for the omission of actions to enforce personal rights to acquire property from Bell's catalogue of actions triggering litigiosity can be found in Kames' attitude to the relationship between the offside goals rule and litigiosity.[1015]

The parallels between the instances of litigiosity and offside goals cases are clear. In the classic offside goals case, a transfer to a bad faith second buyer is set aside because it frustrates the first buyer's personal right to the property. When the first contract of sale was concluded, the seller came under an obligation not to transfer the property to anyone else. Where a creditor was in the process of doing diligence, there was an obligation not to transfer the property and defeat the diligence. Where property has been fraudulently acquired, there is an implied obligation not to transfer it on which is a corollary of the obligation to give the property back.

For Kames, both cases are explained by reference to the accessory liability of the grantee where the granter breaches an obligation not to transfer. However, there was a major difference between the two. The offside goals rule was concerned with accessory liability for stellionate: fraudulently granting the same right twice.[1016] Cases characterised as giving rise to litigiosity could not be brought under stellionate because there was no double grant. There was some other reason why the transfer was prohibited. Thus, litigiosity is once again playing a suppletive role, filling in to

[1012] Bell *Comm* II, 144.
[1013] *Ibid* 145.
[1014] Bell *Principles* (3rd edn, 1833) § 2345. The section forms part of a discussion of civil procedure which was omitted from the fourth edition.
[1015] Kames *Principles of Equity* Vol II, 43.
[1016] For further discussion of stellionate, see section C(1) below.

catch those cases which could not be accounted for by accessory liability for stellionate. Offside goals cases are excluded from litigiosity because they are already covered by stellionate.

The net result of all this was that the broadest account of the scope of litigiosity which would have been available to Bell stopped short of protecting personal rights to acquire real rights for the first time. This may explain why they do not make it into his class of actions which give rise to litigiosity in the *Principles*.

(2) Public notice and bad faith

A major difference between litigiosity and the offside goals rule is the absence of attention to bad faith or gratuitousness in the former. This is explicable on the basis that litigiosity only affects third parties after an event of which they were deemed to have notice. If everyone is in bad faith, there is no need to worry about particular knowledge or whether a transfer is gratuitous.

Notice could arise from something as slight as calling of a case in court. While calling a case is a public event, it is unrealistic to expect the general public to take notice of this. This difficulty was addressed by section 159 of the Titles to Land Consolidation (Scotland) Act 1868 which, as discussed above, provided that adjudication should only render property litigious once a notice of litigiosity was registered. It also provided that no summons of reduction should render the relevant lands litigious until a notice of litigiosity was registered. This provision suggests parliamentary endorsement of the view that litigiosity extended beyond diligence to actions of reduction, but it follows Bell in stopping short of recognising actions asserting personal rights to acquire property for the first time.

It might be argued that raising an action for implement of missives creates constructive notice of that right, putting the general public in bad faith for the purposes of the offside goals rule, since calling of an action of reduction was taken to put the general public in bad faith in the past and section 159 makes no mention of actions for implement of missives. However, it is unlikely that such an argument would find favour today given the general dissatisfaction with that mechanism of giving notice.

While the principle underlying the offside goals rule may be substantially the same as that which underlies challenges to transfers on the basis of litigiosity, it seems unlikely that litigiosity can be invoked to circumvent the need to show bad faith on the part of the grantee.

C. CONCLUSION

As with the *actio Pauliana*, the core principle in litigiosity is an obligation not to participate knowingly in transactions which would defraud the pursuer. Fraud in this context means an act which is undertaken to frustrate the pursuer's attempts at satisfaction by transferring or burdening the relevant assets.

This principle accounts for the effect of inchoate adjudication, inhibition, and actions of reduction in rendering property litigious. In each case, there is public notice of the affected asset or assets. Someone who accepts a transfers of this property is thus knowingly facilitating the defender's attempt to frustrate the pursuer's satisfaction and is thus an accessory to the fraud. He is therefore liable to make reparation by having the grant set aside, putting the pursuer in the position he would have been in had the wrongful grant not been made. As with misrepresentation, the reduction is natural restitution for the wrong which has been done.

The prohibition on transfer is imposed to protect the pursuer's interest. Therefore, it is a personal obligation owed to the pursuer. That in turn implies that the protected party has discretion whether or not to set the transfer aside and that the effect of the reduction is limited to what is necessary to protect the pursuer's interest meaning that third parties cannot rely upon it.

Basing the restriction on transfer on fraud on creditors also explains the protection of grants made or diligence done in satisfaction of prior obligations, because the grantee of such rights has a legitimate interest to pursue and therefore cannot be said to be a wilful party to the frustration of the pursuer's rights.

Arrestment is something of an outlier. Aspects of the institution were developed using a litigiosity analysis, while other rules drew on the view that arrestment did more than merely prohibit certain acts. Litigiosity cannot provide a satisfying account of these rules. That means that arrestment can do little to inform an account

of litigiosity because, where it deviates from the rules applicable to inhibition or inchoate adjudication, the likely explanation is that this is an aspect of the attachment theory. Furthermore, examination of the materials suggests that the attachment theory is the more promising basis for the future development of arrestment.

Chapter 7

OFFSIDE GOALS AND SUCCESSOR VOIDABILITY

Few areas of Scots property law have attracted as much modern scholarly interest as the offside goals rule.[1017] It addresses actions by an owner which render him incapable of fulfilling a prior obligation to transfer his property or grant a real right in it. The core case is double sale: Alfred concludes a contract for the sale of his field to Betty; before Betty has obtained her real right, Alfred sells a second time to Cecil, who registers first. The offside goals rule says that, if Cecil was in bad faith, the transfer to him is voidable at Betty's instance. Betty can also set aside a gratuitous transfer to Cecil even if he is in good faith.

There is broad consensus on the basic elements. A grant is voidable on the basis of the offside goals rule if:

1) the granter was under a prior obligation to grant a real right to the avoiding party, which obligation gave rise to a concomitant obligation not to alienate or burden the property;
2) the grant was made in breach of the prior obligation;
3) the grantee knew of the obligation or the grant was not for value.[1018]

The rule appears to run contrary to the general principle that personal obligations[1019] bind debtors personally rather than affecting their assets, and to undermine the

[1017] D Carey Miller "A Centenary Offering: The double sale dilemma – time to be laid to rest" in M Kidd and S Hoctor (eds) *Stella Iuris: Celebrating 100 years of the Teaching of Law in Pietermaritzburg* (2010) 96; RG Anderson *Assignation* (2008) paras 11-04–30; Carey Miller *Corporeal Moveables* paras 8.28–32; DA Brand, AJM Steven and S Wortley *Professor McDonald's Conveyancing Manual* (7th edn, 2004) paras 32.52–62; S Wortley "Double Sales and the Offside Trap: Some thoughts on the rule penalising private knowledge of a prior right" 2002 JR 291; Reid *Property* paras 695–700.

[1018] Reid *Property* para 695, approved in *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at para 46.

[1019] Ie duties correlative to personal rights.

application of the maxim *prior tempore potior iure* to real rights.[1020] It presents a broader challenge than either inhibition or the rules on grants by insolvent debtors because controlling factors such as the need for the authority of the court or the specific context of insolvency are absent.

The problem of double sales has attracted considerable attention in continental European scholarship[1021] and in South Africa, where the equivalent to the offside goals rule is known as the doctrine of notice.[1022] The modern South African debate may be considered to begin with an article by R G McKerron in 1935[1023] and picked up pace with an exchange of articles in the *South African Law Journal* in the late 1940s and early 1950s.[1024] South African law in this area deserves special attention because it has had a particular influence on academic debate in Scotland.[1025]

The mid-twentieth century also marks a turning point for Scots law in this area. Although the topic was addressed during the foundational period in the seventeenth and eighteenth centuries, the rule received of a fresh impetus from the decision in *Rodger (Builders) Ltd v Fawdry*.[1026] Indeed, its very name derives from a dictum of Lord Justice Clerk Thomson in this case.[1027] With the exception of Anderson, modern treatments have not sought to make extensive use of historical sources, although some reference is made to nineteenth-century cases. Because Anderson provides a recent and extensive discussion of the history of the rule,[1028] and because of the extensive modern analysis, a slightly different approach to that found in other chapters is needed in this here. Historical comments are made only where necessary

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[1020] For a very forceful statement of this view, see Anderson *Assignation* paras 11-05 and 11-30.
[1021] For modern surveys with further references, see W Ernst "Der zweifache Verkauf derselben Sache – Bertrachtungen zu einem Rechtsproblem in seiner europäischen Überlieferung" in E Jakob and W Ernst (eds) *Kaufen nach römischem Recht* (2008) 83; R Michaels *Sachzuordnung durch Kaufvertrag* (2002); S Sella-Geusen *Doppelverkauf* (1999).
[1022] For modern surveys see FDJ Brand "Knowledge and Wrongfulness as Elements of the Doctrine of Notice" in H Mostert and MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 21. Carey Miller "A Centenary Offering"; G Lubbe "A Doctrine in Search of a Theory: Reflections on the so-called doctrine of notice in South African Law" 1997 *Acta Juridica* 246; *Meridian Bay Restaurant v Mitchell* [2011] ZASCA 30, 2011 (4) SA 1 (SCA).
[1023] RG McKerron "Purchaser with Notice" (1935) 4 *South African Law Times* 178.
[1024] GA Mulligan "Double Sales and Frustrated Options" (1948) 65 SALJ 564; JE Scholtens "Double Sales" (1953) 70 SALJ 22; GA Mulligan "Double Sales: A rejoinder" (1953) 70 SALJ 299; JE Scholtens "*Difficiles Nugae* – Once again double sales" (1954) 71 SALJ 71; GA Mulligan "Double, Double Toil and Trouble" (1954) 71 SALJ 169.
[1025] Carey Miller "A Centenary Offering" and Wortley "Double Sales and the Offside Trap".
[1026] 1950 SC 483.
[1027] *Ibid* at 501.
[1028] Anderson *Assignation* paras 11-06–23.

to show the links between Scots and *ius commune* material and between the offside goals rule and the broader law of fraud on creditors.

A. *MALA FIDES*, PERSONAL BAR AND THE PUBLICITY PRINCIPLE

Rodger (Builders) itself offers little in the way of serious consideration of the basis of the rule. Lord Jamieson, who gave the leading judgment, was content to rely on three nineteenth-century cases where the rule had been applied and to observe that the purchaser was in bad faith.[1029]

In the first of these, *Marshall v Hynd*,[1030] the judges' primary concern was the level of knowledge of the prior contract needed to put the second purchaser in bad faith. For knowledge to constitute bad faith, however, there must be some rule which explains the relevance of that knowledge to the action in question.

This issue was addressed in the second case, *Stodart v Dalzell*, where both Lord Ormidale and Lord Gifford suggested that the second purchaser's knowledge of the prior right meant that he was not entitled to rely on the faith of the records regarding his seller's right.[1031] The analysis echoes that of Lord Kinloch in another nineteenth-century case, *Morrison v Somerville*: "No one can allege that he trusted the records, when he knew of his own knowledge how the case actually stood. The records imply constructive information. The case here is that of actual knowledge".[1032] This approach was picked up in *Rodger (Builders)* where Lord Jamieson observed that "[t]he right to rely on the register does not extend to one in knowledge of prior obligations or deeds affecting the subjects."[1033]

This approach makes Lord Gifford's characterisation of the rule as a species of personal bar in another nineteenth-century case, *Petrie v Forsyth*, understandable.[1034] On this model the first buyer has acquired a right, albeit not one which has been published. Under normal circumstances, that right would be non-opposable to the second buyer who had registered because the latter could invoke the faith of the

[1029] 1950 SC 483 at 500, citing *Marshall v Hynd* (1828) 6 S 384, *Petrie v Forsyth* (1874) 2 R 214 and *Stodart v Dalzell* (1876) 4 R 236.
[1030] (1828) 6 S 384.
[1031] (1876) 4 R 236 both at 242.
[1032] (1860) 22 D 1082 at 1089.
[1033] 1950 SC 483 at 500.
[1034] (1874) 2 R 214 at 223.

records. However, the second buyer's knowledge of the right means that he is barred from making this argument since he knew better. As Reid and Blackie point out, however, personal bar is difficult to maintain in this context because of the absence of inconsistent conduct by the second buyer.[1035]

Even if the language of personal bar is eschewed, a rule which restricts reliance on the register to those who are in good faith is conceivable. Indeed such rules exist in the Land Registration (Scotland) Act 2012.[1036] Wortley makes tentative moves towards such an analysis with his suggestion that the basis of the offside goals rule might lie in an aspect of the publicity principle: "the publicity principle is not merely there to protect third parties: in certain circumstances, it can also be used to penalise them."[1037]

The difficulty with this approach is that the act of publicity (be it registration, intimation or delivery) is not merely a mechanism for making a transfer known. It is constitutive of the transfer. Until the relevant public act, ownership remains with the seller and the first buyer's right is merely personal. The first buyer has no proprietary interest of which third parties could have notice. This stands in contrast to the good faith requirements in the 2012 Act,[1038] which cover cases where the Land Register misstates the relevant real rights.

In that context, an argument based on the faith of the records or the publicity principle might have difficulty answering Lord Low's objection: "Assuming that they knew of the obligation, they knew also that it did not affect the lands."[1039] Like its correlative right, the seller's duty is personal. The second buyer might argue that his knowledge of it was irrelevant because the obligation of which he knew did not bind him.

Further, arguments about publicity or personal bar offer little in the way of an explanation for why a gratuitous transferee who was ignorant of the earlier transfer should be vulnerable.

[1035] EC Reid and JWG Blackie *Personal Bar* (2006) para 2-08. See further JWG Blackie "Good Faith and the Doctrine of Personal Bar" in ADM Forte (ed) *Good Faith in Contract and Property Law* (1999) 129 at 147–60.
[1036] Eg Land Registration (Scotland) Act 2012 s 86, particularly paragraph (3)(c).
[1037] Wortley "Double Sales and the Offside Trap" at 314.
[1038] Land Registration (Scotland) Act 2012 ss 86–93.
[1039] *Morier v Brownlie & Watson* (1895) 23 R 67 at 74.

B. *MALA FIDES* AND THE TRANSFER AGREEMENT

Carey Miller suggests that the import of the second buyer's bad faith can be explained, not by reference to the publicity principle but by invoking the principle of separation of contract and conveyance.[1040] This principle recognises transfer as a distinct juridical act requiring intention on the part of transferor and transferee. Carey Miller argues that the second buyer's bad faith means he has a defective intention to acquire, which renders his right voidable.[1041]

This involves an unusual understanding of intention. Both seller and second buyer wish the transfer to take place. At the time of the transfer their wills are directed to that end. The fact that one or both parties knows it to be wrong does not affect their intention. A poacher has a sufficient *animus acquirendi*, although he knows that he is committing a crime.[1042] Further, the vices of consent, such as fraud and force and fear, operate for the protection of one of the parties to a transaction where his consent has been improperly obtained. What is being suggested here is something completely different: both parties give free and informed consent and it is a third party who needs the protection.

A second problem with Carey Miller's analysis is a variant of the problem with the publicity principle argument. Even if it is conceded that bad faith affects intention to acquire, some explanation is needed of why the knowledge amounts to bad faith. That means an explanation of why the second buyer should have acted differently.

As for the gratuity case, Carey Miller addresses this in straightforward policy terms, suggesting that the reason is simply that "a party who fails to give value should not trump a competing party with an earlier right".[1043] This approach has

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[1040] Wortley describes Carey Miller's analysis as an "abstract system approach" ("Double Sales and the Offside Trap" at 312), a characterisation which Carey Miller accepts ("A Centenary Offering" at 96). However, the analysis turns on the need for a real or transfer agreement. A transfer agreement might be necessary even in a system which also required a valid *causa* for the transfer. Therefore, it seems marginally preferable to see the analysis as resting on the principle of separation.
[1041] *Corporeal Moveables* para 8.28. See also para 8.30 and "A Centenary Offering" at 114.
[1042] Erskine II.i.10.
[1043] Carey Miller *Corporeal Moveables* para 8.32.

intuitive appeal. The law of transfer is primarily geared towards the needs of commerce and thus of onerous transferees. Donees are not worthy of this protection. Once again, however, a little more seems to be needed. Suppose Donna makes a written promise to David that she will convey a field to him. The next day, she concludes a contract with Betty for the sale of the same field. Foolishly, Betty pays up front. On the third day, Donna delivers the disposition to David who duly registers it. Betty clearly has a right against Donna for breach of contract but David is safe. The story would be different if Betty's missives had been concluded on Day 1 and the promise to David made on Day 2. If the basic idea behind the vulnerability of donees under the offside goals rule is that they are less worthy of protection than onerous transferees, it is difficult to see why Betty should be worse off because the promise happened to come first. To say that David has the earlier right is to fall into the error which underlies the personal bar analysis: the idea that some kind of proto-property right is acquired before completion of the transfer of which the act of transfer merely gives notice. All David has on Day 1 is a personal right against Donna.

Similarly, if the gratuity case is explained by lack of sympathy for donees, why can a donee invoke the rule against later donee?[1044]

C. *MALA FIDES* AND FRAUD: SCOTLAND AND THE *IUS COMMUNE*

The difficulties with the publicity principle and the transfer agreement as bases for the offside goals rule drive analysis back to an earlier approach. The nineteenth-century cases cited in *Rodger (Builders)* marked a shift in the analysis of the rule. Up to that point, it was thought to rest on fraud. This analysis was not unique to Scotland. The idea that the double seller behaved fraudulently has a long history in Europe.

A constitution of the Emperor Hadrian which appears to provide for the punishment of a double seller is recorded in the Digest.[1045] However, discussion of the private law aspects of double sales was not helped by the fact that the main

[1044] Eg *Alexander v Lundies* (1675) Mor 940.
[1045] D.48.10.21. 20th century scholarship suggests that the text did not originally refer to double sales: E Levy "Gesetz und Richter im Kaiserlichen Strafrecht" (1938) 4 BIDR (NS) 57 at 67–8 (fn 32). Of course, the scholars who influenced Scots law took the text at face value.

Digest text on the topic[1046] deals with a very complex situation but makes no mention of Hadrian's penalty. Neither is there any mention of a penalty in C.3.32.15.pr, the major text setting out the principle that the first of two competing buyers to obtain *traditio* prevailed.

Much ink has been spilt trying to analyse and reconcile the texts and, although none of them mention *fraus* or *dolus*, the concept of fraud would play a key role in the endeavour. The story is too lengthy to be recounted in detail but some elements of significance to later discussion in Scotland and South Africa can be highlighted.

(1) *Stellionatus*

The Glossators were particularly concerned the application of the word "*iure*" (from *ius*, meaning right or law) to the second sale in C.3.32.15pr. How could a contract which was declared criminal by another text be so characterised? Azo reconciled the two by drawing a sharp distinction between civil and criminal law.[1047] The second sale was valid (thus *iure*) but it rendered the seller criminally liable.

Azo drew a parallel between double sale and double *pignus* which was punishable as *stellionatus*.[1048] The earliest text on *stellionatus* concerns *pignus*.[1049] However, the term appears to have had wider import. A text from Ulpian suggests that it did in criminal law what the *actio de dolo* did in private law.[1050] Thus *stellionatus* was a residual category, catching criminal conduct not otherwise provided for. Both the reference to the *actio de dolo* and the well-established cases of *stellionatus* make the

[1046] D.18.4.21.
[1047] Sella-Geusen *Doppelverkauf* 69–71.
[1048] Azo *Ad singulas leges XII liberorum codicis iustinianei commentarius* (1577, repr *sub nom Azonis, Lectura super codicem*, 1966) 224–5. On non-possessory *pignus*, see HLE Verhagen "The Evolution of *Pignus* in Classical Roman Law, *Ius honorarium* and '*Ius novum*'" (2013) *Tjidschrift voor Rechtgeschiedenis* 51 at 57–60
[1049] D.13.7.16.1. For discussion see P Stein "The Origins of *Stellionatus*" (1990) 41 *IURA* 79 at 81–2. The word derives from *stellio*, a term applied to geckos who, according to Pliny, could shed their skin when threatened by a predator: "The situation of the predator who is left holding the rejected skin (*tunicula*) of his intended victim resembles that of the pledgee who has received by way of pledge a thing not belonging to the debtor or already pledged to another." Stein "The Origins of *Stellionatus*" at 82–3. Discussion of the origin of the term was a favourite topic of humanist scholars (F Schaffstein "Das Delikt des Stellionatus in der gemeinrechtlichen Strafrechtsdoktrin" in O Behrends et al (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 281 at 283–4) and was picked up by Erskine: IV.iv.79.
[1050] D.47.20.3. See generally Stein "The Origins of *Stellionatus*" 83–9, expecially at 87 where he points out that the phrases which make this most obvious are generally accepted as having been interpolated.

link with fraud clear.[1051] Most of the instances of *stellionatus* mentioned in the Digest involve some kind of trickery but two are of particular significance for the offside goals rule. Destruction of property which is subject to a contract of sale does not involve deception but it does involve deliberate frustration of the buyer's contractual right. Secondly, collusion to the detriment of another was regarded as *stellionatus*. Of course, a bad faith instance of the offside goals rule involves a collusive action which is directed at the frustration of a personal right.

The term "stellionatus" persisted in the Civilian tradition. A wide-ranging interpretation appears to have been maintained in the Netherlands and Germany.[1052] In France lawyers were aware of the broad Roman definition, and Pothier used the word in his *Traité de la procédure civile*.[1053] However, the term was most commonly applied to purported sales of property which did not belong to the seller or purported grants of first-ranking hypothecs over property which was already burdened.[1054] Whether the view taken was broad or narrow, however, it was clear that the term referred to fraud in its criminal aspect. But while the fact that an act was punishable as stellionate undoubtedly points to fraud for civil purposes, the latter classification does not depend on the former.

In Scotland, the word "stellionate" was used particularly in relation to double grants[1055] and so assumed a central role in some discussions of the offside goals rule. In some sources, a broader significance was attached to the term.[1056] Mackenzie, following the Civilian tradition, stresses its residual role.[1057] He suggests that the

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[1051] As well as double pledge, a number of other cases are mentioned in the the Digest: sale of a *statuliber* (ie a slave to whom liberty had been granted subject to a certain condition) without disclosure of his status as such (D.40.7.9.1); accepting payment in satisfaction of debt you know to have been satisfied (D.17.1.29.5); swapping or destroying the goods which are to be pledged or sold for others or imposture or collusion to the detriment of another (both D.47.20.3).

[1052] HP Glöckner "Stellionatus" in A Erler and E Kaufmann (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* Vol 4 (1990); Schaffstein "Das Delikt des Stellionatus in der gemeinrechtlichen Strafrechtsdoktrin"; Van Leeuwen *Commentaries* Vol II, 268.

[1053] Pothier *Traité de la procédure civile* 314.

[1054] *Code Napoléon* (1810, repr 2001) art 2059.

[1055] 1592 c 142, *RPS* 1592/4/82; Balfour *Practicks* 166 c I; Kames *Principles of Equity* Vol II, 40; Bell *Comm* I, 308.

[1056] G Mackenzie *The Laws and Customs of Scotland in Matters Criminal* (ed O F Robinson, St Soc 59, 2012) 210–2, Erskine IV.iv.79 and *Bell's Dictionary* "stellionate".

[1057] Mackenzie *Matters Criminal* 210. Hume takes the idea of stellionate as a residual category even further, suggesting that it might be applied to a nondescript offence against the person: *Commentaries on the Law of Scotland* (4th edn, 1844) Vol I, 328. For other 19th century writers who followed this see MGA Christie "Assault and Related Offences" in "Criminal Law (Reissue)", *The Laws of Scotland: Stair Memorial Encyclopedia* Vol 7 (1995) para 204.

statutes of 1540 and 1592, which make provision for the consequences of double grants, operate on the presupposition that Scots law in relation to stellionate is the same as "the civil law".[1058] However, the broader view does not seem to have had any impact on the discussion of double grants.

The term is most closely associated with legislation of 1540, which is often referred to as the Stellionate Act.[1059] Curiously, it does not use the word "stellionate" but simply characterises the relevant conduct as fraudulent. It deals primarily with a fraudulent scheme which was made possible by the then absence of a register for heritable transactions. This created the possibility of "private" transfer, usually by base infeftment. The fraudster would sell and grant infeftment to his son or close confidante but remain in possession. He would then sell the land to an unsuspecting third party. Later, the first grantee would emerge and produce his prior title. The statute offered limited protection to the second buyer: if he had possessed peaceably for a year and a day, he would prevail over the first buyer. The seller was declared infamous and "to be punist in his persoune and guidis at the kingis grace will and plesour." The final words of the Act, almost as an afterthought, extend the punishment to superiors who knowingly receive double resignations for the purpose of such a scheme and extend the Act to those who grant double assedations[1060] or assignations.[1061]

The Act was pressed into service to support the offside goals rule by Bankton and Kames. The former explains the vulnerability of a gratuitous second assignee on the basis that "the objection that lay against the cedent, of granting double rights [for which Bankton cites the 1540 Act], is good against the second gratuitous alienee",[1062] such actions being "manifestly fraudulent". Curiously, he does not invoke the rule in his equivalent discussion of double dispositions, where instead he

[1058] Mackenzie *Matters Criminal* 210.
[1059] 1540 c 105, *RPS* 1540/12/77.
[1060] Defined in Bell's *Dictionary* as "an old law term, used indiscriminately to signify a lease or feu-right."
[1061] The act is remarkably similar to a law of Lothair I: *Lotharii I. lex XXX* in F Walter (ed) *Corpus Iuris Germanici Antiqui* Vol III (1824) 642. On this law, see W von Brünneck *Über den Ursprung des sognennanten jus ad rem: Ein Beitrag zur Geschichte dieses Dogma* (1869) 20–1.
[1062] Bankton III.i.8.

relies on fraud at common law, although he does cite *Alexander v Lundies*, the assignation case which he explained by reference to the 1540 Act.[1063]

Kames defines stellionate as double grant and notes that it is punishable under the 1540 Act. He then sets out a classic offside goals scenario and suggests that "it was a tortious act in [the second purchaser] to receive from me what I could not lawfully give; and he is punished for this act by the voiding of his purchase."[1064]

Yet it is difficult to see how the 1540 Act can provide a basis for the offside goals rule. The situations envisaged by this statute differs quite significantly from an offside goals case. Under the Act, the second purchaser is protected from the fraud of the first purchaser. The offside goals rule is about protecting an innocent first purchaser from a fraudulent second purchaser. Conversely, if the rule was not based on the 1540 Act, the latter's repeal in 1964[1065] cannot be considered to undermine it.

The broader view of stellionate espoused by Mackenzie might be taken to provide some basis for the offside goals rule. However, this view depends on being able to characterise the relevant conduct as fraudulent.

One important insight can be derived from Bankton and Kames, however. Both recognised that the primary wrong was done by the seller, and that the transferee was vulnerable as an accessory to the granter's wrong. This idea of accessory liability was prefigured in Mackenzie's discussion of the superior's liability under the 1540 Act. He observes that "if the superior was conscious to the design of making these double resignations he cannot but be art and part of the cheat".[1066]

(2) Double grants and fraud on creditors

Like Azo, Accursius addresses the use of the word *iure* in C.3.32.15.pr. However, he accounted for it in a different way, arguing that *iure* signified *bona fides* and the absences of *dolus*.[1067] This raised the possibility that the priority of the second purchaser who obtained *traditio* first was restricted to cases where he or she was in

[1063] Bankton I.x.90.
[1064] Kames *Principles of Equity* Vol II, 40–1.
[1065] Statute Law Revision (Scotland) Act 1964 s 1, Sch 1.
[1066] Mackenzie *Matters Criminal* 211.
[1067] Sella-Geusen *Doppelverkauf* 71–3.

good faith.[1068] The connection between double sale and fraud would be developed by later scholars.

Baldus took the next step in his commentary on C.7.75: *De revocandis his quae per fraudem alienata sunt*. Drawing on Canon law,[1069] he suggested that a distinction had to be made between creditors with a right to a quantity of fungibles and those with a right to a specific asset. In the latter case, the creditor did not need to sue the debtor in order to establish his insolvency before pursuing the transferee for the asset.[1070] This approach, described by modern Dutch scholars as the *ruime Pauliana*[1071] (broad *Pauliana*) was followed by a number of Commentators and some humanist scholars but it was vigorously resisted by many humanists.[1072] However, it was picked up with enthusiasm by *usus modernus* writers in Spain and Germany.[1073]

Ankum found little evidence of application of the rule by Dutch and French lawyers.[1074] Voet does record that some jurists thought that a personal *actio in factum* should lie against a second buyer who knew of a prior sale. The rationale was that the second buyer would thereby be prevented from benefiting from his fraud.[1075] Ankum notes that there is more evidence of recognition in Belgium. The rise of consensual transfer in late scholastic and Natural law accounts rendered the analysis irrelevant in some systems because it tended to eliminate the gap between contract and conveyance, although even these can be seen as reflecting a policy concern to protect the first buyer.[1076]

The logic of Baldus' analysis is attractive: the *actio Pauliana* dealt with acts by a debtor which rendered him incapable of fulfilling his obligations. Where the

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[1068] Sella-Geusen points out that there is insufficient evidence to conclude that Accursius would have endorsed this view.
[1069] Ernst "Der zweifache Verkauf derselben Sache" 95–6 and Ankum *Geschiedenis* 183–4.
[1070] Baldus de Ubaldis *In vii, viii, ix, x et xi Codicis libros Commentaria* (1599, repr in *Commentaria Omnia von Baldus de Ubaldis*, Vol VIII, 2004) 127: see Ernst "Der zweifache Verkauf derselben Sache" 96; Sella-Geusen *Doppelverkauf* 185–8; Ankum *Geschiedenis* 167, 182–6 and 402.
[1071] Ankum *Geschiedenis* 66.
[1072] *Ibid* 402 and 411.
[1073] *Ibid* 411–2 and Michaels *Sachzuordnung durch Kaufvertrag* 139 although Ernst suggests that the *usus modernus* writers also deployed the concept of the *ius ad rem*, suggesting that the first buyer had a right which, while not real was more than merely personal: "Der zweifache Verkauf derselben Sache" 96–7.
[1074] *Geschiedenis* 411–2, 417, 420 taking the view that the *advys* of Schomaker cited by McKerron ("Purchaser with notice" at 181) was an isolated instance. There was more evidence in Belgium: *ibid* 420.
[1075] Voet *Commentary on the Pandects* D.6.1.20.
[1076] Ernst "Der zweifache Verkauf derselben Sache" at 94.

obligation is to transfer some quantity of money or wheat, a solvent debtor remains capable of meeting it even if he makes other transfers. Where, on the other hand, the debtor is bound to transfer a particular item, giving that asset away renders him incapable of fulfilling the obligation even if he is otherwise solvent. The other elements of the *actio Pauliana* would help to account for the need for either bad faith or gratuity on the part of the post-sale acquirer.

(3) Initial recognition of fraud as the rationale in Scots law

Fraud on a creditor seems to have been central to analysis of the offside goals rule in Scotland since its inception. *Seatoun v Copburnes*,[1077] decided in 1549, is probably the first recorded case which can be understood in terms of the offside goals rule. Lady Seatoun sought to reduce an infeftment given to James Copburne by his father. She argued that, prior to that sasine, she and the priests and college of the Kirk of Seatoun had bought an annualrent of the lands from him. Lady Seatoun alleged that infeftment on the annualrent had been completed, so she might have been able to rely on her prior real right but for some reason she chose not to rely on that. Instead she suggested that "the said laird in manifest defraud of the said lady and preistis *dolose infeodavit suum filium in suis terris*, and sua, said scho [ie she], that that alienatioun *in dolo et fraude (ut predicitur) facta de iure erat retractanda*."

Fraud on creditors had been recognised even earlier in *Ramsay v Wardlaw*,[1078] but *Seatoun* is nonetheless remarkable because the *actio Pauliana* was not firmly established in Scots law until the seventeenth century. It cannot be said to have opened the floodgates, however.

The first major scholarly discussion of the offside goals rule comes in Stair's treatment of resolutive conditions in contracts of sale. A resolutive condition is a term which purports to make the property revert to the transferor in given circumstances. Stair's view was that such conditions had no proprietary effect. The transferee merely had an obligation to reconvey if the condition occurred. This raised the question of the effect of the obligation on third parties who obtained the property from the transferee. Although the origin of the obligation to convey differs from

[1077] (1549) Sinclair *Practicks* No 459.
[1078] (1492) Balfour *Practicks* 184 c XX.

double sale, the end result is the same: an alienation in breach of an obligation to grant a real right to someone else.

As with *Seatoun v Copburnes*, Stair analyses the situation in terms of fraud but makes no direct reference to fraud by an insolvent debtor:

> …though there may be fraud in the acquirer, which raiseth an obligation of reparation to the party damnified by that delinquence, yet that is but personal; and another party acquiring *bona fide* or necessarily, and not partaking of that fraud, is *in tuto*. But certain knowledge, by intimation, citation, or the like, inducing *malam fidem*, whereby any prior disposition or assignation made to another party is certainly known, or at least interruption made in acquiring by arrestment or citation of the acquirer, such rights acquired, not being of necessity to satisfy prior engagements, are reducible *ex capite fraudis*, and the acquirer is partaker of the fraud of his author, who thereby becomes a granter of double rights; but this will not hinder legal diligence to proceed and be completed and become effectual, though the user thereof did certainly know of any inchoate or incomplete right of another.[1079]

In this passage, we see the key elements of the offside goals rule are already present: the idea that the primary wrong is done by the granter; that the successor is only vulnerable if the prior right is known of and that the basis of this is participation in the granter's fraud.

It is also worthy of note that, as with his analysis of fraudulent misrepresentation and of fraud on creditors, Stair characterises the vulnerability in terms of a personal right to reparation from the wrongdoer. Further, as with fraud on creditors, the second purchaser's liability is accessory. It takes two to transfer and so the second purchaser is an essential accomplice in the seller's fraud.

The pattern of development in Scotland is slightly different from that in the wider *ius commune* tradition. There is no sense of the *actio Pauliana* expanding to cover cases other than insolvency. Rather, the Scottish analysis seems to jump straight to the idea that an offside goal is a fraud on the first buyer.

[1079] Stair I.xiv.5. He does go on to consider whether the 1621 Act might apply to gratuitous alienations of property subject to a resolutive condition but concludes that the law is not clear. It would later become firmly established that insolvency at the time of the grant was a prerequisite of such a challenge.

D. FRAUD AS THE RATIONALE IN THE MODERN LAW

(1) Is fraud a broad enough concept to account for the offside goals rule?

As Anderson and Reid show,[1080] the fraud analysis persisted until the nineteenth century. Indeed references to it can also be found in the cases from that era, alongside arguments based on the publicity principle. Thus, in *Morrison v Sommerville*, Lord Kinloch gives a classic fraud-based analysis:

> In granting a second right, the seller is guilty of fraud on the first purchaser. Against the seller himself the transactions would be clearly reducible. But, in taking the second right in the knowledge of the first, the second disponee becomes an accomplice in the fraud, and the transactions is reducible against both alike.[1081]

Even in *Petrie v Forsyth*, Lord Neaves proceeded on the basis that the second purchaser's conduct was fraudulent.[1082] However, Lord Gifford took a different approach, distinguishing between fraud, *mala fides* and "mere knowledge".[1083] He concluded that what was needed was knowledge sufficient to put the second purchaser under a duty to contact the first. Lord Gifford clearly considered this to fall short of fraud. On such a model it is difficult to see how fraud can form the basis for the doctrine.

A similar line of reasoning is articulated by Lord Drummond Young in *Advice Centre for Mortgages*:

> The theoretical basis for the foregoing principle is not discussed in any detail in the decided cases, perhaps because its practical application is very obvious, at least in simpler cases. The origins of the principle seem to lie in the concept of

[1080] Reid *Property* para 695; Anderson *Assignation* 11-06–23.
[1081] (1860) 22 D 1082 at 1089. This analysis is reflected in the issue which the Inner House appointed to be put to the jury: "whether, in violation of a previous minute of agreement, dated 7th October 1850, No 8 of the process, the said disposition was granted fraudulently by the said George Somerville, and was taken fraudulently by the said John Craig Waddell, in the knowledge of the said previous agreement, and in defraud of the pursuer's rights under the same." (1860) 22 D 1082 at 1090.
[1082] (1874) 2 R 214 at 221.
[1083] *Ibid* at 223.

> fraud in its older sense. This is not the modern sense, involving a false representation made knowingly, but rather consists of actings designed to defeat another person's legal right. Nevertheless, the law has moved away from the concept of fraud. In *Rodger* Lord Jamieson said: "[F]raud in the sense of moral delinquency does not enter into the matter. It is sufficient if the intending purchaser fails to make the inquiry which he is bound to do. If he fails he is no longer *in bona fide* but *in mala fide* ". Thus implied or constructive knowledge, just as much as actual knowledge, will bring the principle into operation and render the second purchaser *in mala fide*.[1084]

The discomfort with fraud as a rationale is also evident in academic analysis: Kenneth Reid is careful to specify that "the original analysis based on 'fraud' remains correct, provided that 'fraud' is not confined to its narrow modern meaning."[1085] Wortley goes further, seeming to regard the second purchaser's liability in cases of mere knowledge of the prior right as being more than a fraud-based justification can support.[1086] Dot Reid regards offside goals as part of the law of fraud, specifically of secondary fraud, but suggests that this is a survival of the older, broader view which was heavily dependent on the concept of inequality derived ultimately from scholastic thinking. This leaves the offside goals rule in the law of obligations but outside the established categories of enrichment or delict.[1087]

A similar train of development occurred in South African law: initial recognition of the doctrine based on fraud, recognition that mere knowledge of the prior transaction was sufficient to render the transfer voidable, followed by uncertainty as to the doctrinal basis of the rule.[1088]

In Scotland, the doubt stems from the interaction of two distinct developments. First, there is the sense that, while Scots law took a broad view of fraud in the early-modern period, later developments saw it narrow considerably so as to be limited to deliberate deceit, particularly under the influence of *Derry v Peek*.[1089] Secondly, there appears to be a relaxation in the level of knowledge required in some of the

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[1084] [2006] CSOH 58 at para 44.
[1085] *Property* para 695.
[1086] Wortley "Double Sales and the Offside Trap" at 301.
[1087] "Fraud in Scots Law" ch 7, esp pp 243–4 and 250–1.
[1088] See Brand "Knowledge and Wrongfulness as Element of the Doctrine of Notice" at 22–25 and Lubbe "Doctrine in Search of a Theory".
[1089] (1889) 14 App Cas 337. This development is discussed in detail in Reid "Fraud in Scots Law" ch 4 and 5.

dicta in the nineteenth-century cases. This broadened the scope of the rule and can appear to move it away from a category of intentional wrongdoing.

However, it seems possible to address these concerns and thus to continue to rely on fraud as a basis which can guide future development.

(a) Fraud on creditors rather than fraud as deceit

In response to the objection that the meaning of fraud has narrowed, reference may be made to a species of fraud which is recognised by the modern law but which does not involve deception: fraud on creditors as discussed in chapters 4 and 5. Furthermore, mere knowledge of what is going on is sufficient to render the debtor's counterparty a participant in the fraud in that context.

Anderson notes the parallel between the offside goals rule and the *actio Pauliana,* but points to two differences in respect of the latter: having given good consideration will be a defence and the relevant *mala fides* is knowledge of insolvency rather than knowledge of a prior right.[1090] The analysis in chapter 4 suggests, however, that these differences reflect a different context rather than a fundamental conceptual division. The reason that payment is usually a good defence to the *actio Pauliana* is that such payment renders the transaction neutral in its effect on the patrimony. There is no prejudice to ordinary creditors. It makes no difference to them whether the debtor has a piece of machinery worth £5000 or £5000 in his bank account. Both are assets which are available to them for the satisfaction of their rights. Things are different in the offside goals situation because what matters for the creditor is not the value of the patrimony as a whole but the presence in it of the particular asset to which he is entitled.

This line of thought leads to an explanation of why the relevant *mala fides* is knowledge of the insolvency in an *actio Pauliana* situation and knowledge of the competing right in an offside goals situation. Knowledge that someone is insolvent implies knowledge of personal rights against his patrimony: if you know someone is insolvent you know that he has creditors whom he cannot pay. Specific knowledge of the rights is not necessary because the counterparty knows enough to understand that the transaction will frustrate the creditors' hopes of recovery. Conversely, if the

[1090] Anderson *Assignation* para 11-17.

counterparty knows that someone else has a personal right to a particular asset, the general solvency of the seller is not relevant. Even if the seller is generally solvent, the competitor will still be frustrated.

This point is illustrated by the rules on another device aimed at preventing fraud on creditors: inhibition. A general creditor's inhibition covers the heritable property of the debtor because any of it could be subject to an adjudication for enforcement of the debt. Where, however, the creditor has a personal right to a particular plot, the effect of the inhibition is restricted to that asset.[1091] The general state of the patrimony is irrelevant to the creditor, provided that his access to that plot is secured.

The fraud in the offside goals situation consists of an attempt to frustrate a creditor's hopes of satisfaction from the debtor's patrimony. That fraud in this sense is not restricted to situations where the debtor is insolvent is evidenced by the fact that this type of fraud also underlies the rules on litigiosity where no insolvency need be shown.

(b) Mala fides without knowledge

The second problem identified by the modern accounts relates to the knowledge requirement. *Mala fides* can be fixed even in cases where the second purchaser is unaware of the prior right, provided that he knows enough to put him on his inquiry and then fails to make the relevant inquiries. Thus the rule can apply where a naïve second purchaser honestly thought that there was no problem. That is the basis for Lord Jamieson's observation that "fraud in the sense of moral delinquency does not enter into the matter."[1092]

The courts have been somewhat evasive about the precise circumstances which will raise the duty of inquiry and what the content of the duty is.[1093] This is regrettable because it makes life difficult for potential purchasers, but the basic rationale is clear enough: where there is a duty of inquiry on a purchaser and he fails to make that inquiry, he cannot rely on his ignorance of a fact of which he would

[1091] Bankruptcy and Diligence (Scotland) etc Act 2007 ss 150(1) and 153.
[1092] 1950 SC 483 at 499.
[1093] See further J MacLeod and R Anderson "Offside Goals and Interfering with Play" 2009 SLT (News) 93 at 94–5.

have known had he fulfilled the duty. You are treated as knowing what you should have known.

Lord Drummond Young was therefore correct to characterise circumstances where the duty of inquiry is neglected as cases of "implied or constructive knowledge."[1094] Again, this reflects analysis found in other instances of fraud on creditors: the result of publication of an inhibition or a notice of litigiosity is that everyone is deemed to know of it. Where there is constructive knowledge of a prior right, the grantee is deemed to have that knowledge and the analysis may therefore proceed on the basis that he does know.

Where Lord Drummond Young went astray was to conclude that this amounted to a move away from the concept of fraud. The fraud is still there: the seller knows of the prior right and sells anyway. *Mala fides* is not watered-down fraud; *mala fides* is knowing that the fraud is happening. Such a view is consistent with the standard understanding of *bona fides* in property transactions: ignorance of another's right.

It is worth bearing in mind that the offside goals rule is not the only circumstance where failure to come up to an objective standard of reasonable inquiry can leave a naïve counterparty liable on the basis of complicity in fraud. As suggested in chapter 4, that is the basis of the analysis of the voidability of some unfair preferences. Further, a solicitor's naïve trust in his client was held sufficient to render him liable as an accessory to (conventional) fraud by deception in *Frank Houlgate Investment Co Ltd v Biggart Baillie*.[1095]

(c) Why is the faith bad?

If fraud is to provide a convincing rationale for the offside goals rule some explanation is needed of why the third party must take account of a personal duty owed by someone else.

It is not quite sufficient to point to the accessory nature of the liability. In criminal law, such an assertion suffices because criminal law duties typically bind everyone and therefore the conduct in question is wrong for both principal and accessory. The

[1094] [2006] CSOH 58 at para 44.

[1095] [2013] CSOH 80; 2013 SLT 993, esp at paras 37–46 (where the parallel with the offside goals rule is drawn). As with the offside goals rule, there is an argument that the requisite mental element here should be drawn relatively narrowly: EC Reid "'Accession to Delinquence': *Frank Houlgate Investment Co Ltd (FHI) v Biggart Baillie LLP*" (2013) 17 EdinLR 388 at 394.

same can be said of inducing a payment by deception.[1096] Everyone owes everyone else a duty not to commit such fraud. So, where Alfred induces Brenda to pay him by deception using forged documents and Cecil helps to prepare the documents, knowing what they are for, both are liable. Cecil was obliged not to deceive Brenda just as much as Alfred.

In offside goals, however, the position is different. The seller's conduct is only wrong because of a particular duty that he and only he owes to the first purchaser. Until the first contract was concluded, a sale to the second purchaser was perfectly lawful. The duty not to sell flows from that contract to which the second purchaser was not a party. The second purchaser might argue that, although he knew that the seller was behaving wrongfully, this fraud arose from the personal relationship between the seller and the first buyer and was therefore none of his business.

This problem is not unique to the offside goals rule. It is also raised by fraud by insolvent debtors and was discussed briefly in chapter 4 but it is felt more sharply in relation to offside goals, perhaps because the *actio Pauliana* is so ubiquitous and perhaps because the requirement of insolvency is thought to keep the problem within reasonable bounds.

Dot Reid explains the accessory's liability by reference to the moral sense of Stair and Aquinas and the latter's broad notion of inequality.[1097] That, however, raises the question of how this moral sense might be conceptualised as a duty with legal consequences.

The rules on fraud on creditors, whether they arise in the context of offside goals, insolvency or litigiosity, presuppose a limited duty of non-interference with other people's personal rights. While a personal right is only enforceable against the debtor, it is not a matter of complete indifference to third parties. They have a duty not to facilitate breaches of the relevant obligation. However, since personal rights are invisible, facilitation only renders the facilitator liable in circumstances when he knew or ought to have known of the relevant right and that the relevant conduct would breach it.

[1096] As in *Frank Houlgate*.
[1097] "Fraud in Scots Law" 242.

Further evidence of such a duty can be found in the delict of inducing breach of contract. The five characteristics or essential elements of that delict were set out by Lord Hodge in *Global Resources Group Ltd v Mackay*:[1098]

1) breach of contract;
2) knowledge on the part of the inducing party that this will occur;
3) breach which is either a means to an end sought by the inducing party or an end in itself;
4) inducement in the form of persuasion, encouragement or assistance;
5) absence of lawful justification.

The parallels with the requirements for the offside goals rule are close but not exact.[1099] Some differences are not surprising given the differing origins. Nonetheless, the parallels between the two rules are striking: in the core offside goals case, the second purchaser persuades the seller to sell when the latter was already contracted to transfer the property to another; in the foundational authority on inducing breach of contract a theatre owner persuaded a singer to appear in his theatre when she was contractually bound to sing in another.[1100]

Both rules are part of modern Scots law and both point towards recognition of an obligation to take account of other people's personal rights. Both do so on the basis of accessory liability.[1101] Absent an obligation not to participate in breach of a personal right, it is difficult to see how inducing breach of contract or participating in a fraud on creditors could be considered wrongful.

Of course, that answer raises its own question: if third parties owe the holder of a personal right a duty not knowingly to participate in or encourage the breach of that right, why is the third party's liability accessory? The answer lies in the trigger for the liability. Liability depends on breach by the debtor. Until the debtor defaults on

[1098] [2008] CSOH 148; 2009 SLT 104 paras 11–4. Lord Hodge drew heavily on the restatement of the law in this area in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.
[1099] See further J MacLeod "Offside Goals and Induced Breaches of Contract" (2009) 13 EdinLR 278.
[1100] *Lumley v Gye* (1853) 2 E & B 216; 118 ER 749.
[1101] The basis for the distinction between inducing breach of contract and causing loss by unlawful means in *OBG v Allan* was that the former, but not the latter was concerned with accessory liability: [2007] UKHL 21 at paras 3–8 and 32 per Lord Hoffmann.

his obligation, the third party is not liable. So a third party who tried, unsuccessfully, to persuade a seller to sell to another incur no liability.

A duty of non-interference sits well with the idea that personal rights are property which is owned in essentially the same way as corporeal property.[1102] It can then be seen as equivalent to the duties of non-interference which protect corporeal moveables or land. Of course, the content of the duty is not absolute but neither is the duty not to interfere with corporeal property: a landowner, for example, must tolerate access taken under Part 1 of the Land Reform (Scotland) Act 2003, and the law of nuisance does not give a remedy against every use of neighbouring property which has implications for the enjoyment of his own; likewise a *bona fide* possessor of a corporeal moveable belonging to another does no wrong.

Admittedly, the duty of non-interference is not the same as the duty of non-interference with corporeal property, but that is because the nature of the property being protected is different. And in any event, rules like those in the Land Reform (Scotland) Act 2003 show that the level of protection against interference by third parties is not uniform between the different types of corporeal property. There is no right to roam over corporeal moveables.

Thus, a duty of this kind sits particularly well within a Ginossarian or Gaian view of the relationship between creditors and their rights but it should be noted that there is some support for delictual protection against the second purchaser even in Germany, where the intellectual environment unsympathetic to such protection because the Pandectist scheme rejects the idea that a right can be the object of ownership.[1103]

[1102] See eg Ginossar *Droit réel, propriété et créance* No 22–5.
[1103] Michaels *Sachzuordnung durch Kaufvertrag* 360–98 (surveying the arguments). It must be conceded that the analysis does not command the *herrschende Meinung* in Germany.

(2) The scope of the offside goals rule

(a) Personal rights to real rights

Traditionally, the offside goals rule was said to protect only "rights capable of being made real"[1104] or, more precisely, "personal rights to real rights." This limitation the rule has been doubted in light of *Trade Development Bank v Warriner & Mason (Scotland) Ltd.*[1105] In that case, a condition against leasing in a standard security was given effect against a tenant on the basis of the tenant's bad faith *vis-à- vis* the prohibition. This led Kenneth Reid to suggest that the personal-right-to-a-real-right requirement had fallen away and that the scope of the rule was instead controlled by the requirement that the granter was in breach of an antecedent obligation in making the grant.[1106]

As Webster has pointed out,[1107] framing the rule's application in these terms is difficult to reconcile with the earlier decision of the Inner House in *Wallace v Simmers*.[1108] There the court declined to apply the rule to protect a licensee against an action for ejection by a third party purchaser on the basis that this was not a personal right to a real right. Sale by one who has granted an irrevocable licence is a breach of an antecedent obligation (since it renders the licensor unable to fulfil his obligation), but *Wallace* means that the rule will not apply even if the third party is in bad faith. Webster suggests that the restriction is necessary in order to maintain the distinction between lease and licence in particular and between real and personal rights in general.[1109]

The view that not every grant in breach of a prior obligation is challengeable as an offside goal is also supported by recent authority.[1110] In *Gibson v Royal Bank of Scotland plc*, Lord Emslie expressed some doubts about whether the test was

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[1104] *Wallace v Simmers* 1960 SC 255 at 260 per Lord Gurthrie.
[1105] 1980 SC 74, approved in *Trade Development Bank v Crittall Windows Ltd* 1983 SLT 510.
[1106] Reid *Property* paras 695–6.
[1107] P Webster "The Relationship of Tenant and Successor Landlord in Scots Law" (PhD thesis, University of Edinburgh, 2008) 211–3.
[1108] 1960 SC 255.
[1109] Webster "The Relationship of Tenant and Successor Landlord in Scots Law" 211.
[1110] *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 and *Gibson v Royal Bank of Scotland Plc* [2009] CSOH 14, 2009 SLT 444.

appropriately expressed.[1111] However, his alternative formulation: that the right be capable of "affecting the records" seems to come to much the same thing for heritable property. The records are only affected in any meaningful way by transfer, extinction or grant of a real right.

Lord Emslie's formulation has the disadvantage of not being apposite to cover moveable property. On the other hand it usefully raises the question of the holder of a real right who is contractually bound to grant a discharge transferring that right before the discharge is granted. For instance, Dominic may own a plot which has the benefit of a right of way over Serena's land. She pays him for a discharge because she wants to develop the land. Before the discharge is granted, Dominic gifts the plot to Gary, who refuses to grant the discharge. Should Serena be able to invoke the offside goals rule? On Lord Emslie's formulation, she can. On the traditional model, the picture is less clear but protecting her seems to be the correct result. Had Dominic contracted to grant a servitude to her, Serena would have been able to rely on it and there is no obvious reason why one type of transaction with a servitude should be favoured over another.

Therefore, the requirement might be better rephrased as a personal right to the grant, transfer, variation or discharge of a real right.[1112] This is a rather cumbersome formulation. The basic point expressed by the "personal-right-to-real-right" formulation appears to be widely accepted and the phrase remains a useful (if slightly imprecise) handle for the concept. The question remains, however, of how this idea sits with the rationale for the offside goals rule presented here.

(b) Personal rights to subordinate real rights

One implication of the suggestion that the offside goals rule protects personal rights to the grant, transfer or discharge of real rights is that the rule extends beyond double sale. In principle, someone with a personal right to the grant of a servitude or a lease should be able to invoke the rule too. [1113] So, if Bert contracts to grant a right of way

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[1111] [2009] CSOH 14 at paras 43–50, esp para 44.

[1112] If Gaian view of ownership of rights is rejected, further modifications are necessary to account for dealings with personal rights.

[1113] There is express authority to this effect in South Africa *Grant v Stonestreet* 1968 (4) SA 1 (A). A similar result was reached in *Greig v Brown and Nicholson*(1829) 7 S 274, although the court's reasoning is not clearly enough expressed to make it a clear instance of the offside goals rule.

to Sally but transfers the property to Ernie before Sally is able to register the grant, Sally can invoke the offside goals rule against Ernie if he was in bad faith or the transfer was gratuitous.

Subordinate real rights present difficulties in terms of remedies. If, the holder of the prior personal right hears of the wrongful grant before it is completed, he may be able to obtain an interdict against completion.[1114] What of the case, where the prior rightholder only discovers the grant after the fact? Where the first grantee was entitled to transfer of the asset, there is no difficulty in returning the property to the seller. That is only a short term step, after which it will pass to the first grantee. Where, on the other hand, the first grantee is merely entitled to a subordinate right, setting a transfer aside seems to go too far. If the first grantee is entitled to a servitude, all he needs is an opportunity to complete his real right. He has no interest in the seller being the owner instead of the second buyer.

The South African solution is to allow the personal right to be enforced directly against the successor.[1115] This result has been explained in terms of a broad, equitable approach.[1116] It seems to come close to collapsing the distinction between real and personal rights and may explain the tendency in South Africa to suggest that the doctrine of notice affords "limited real effect" to personal rights.[1117] Such an approach is not particularly attractive for Scots law. How then can the problem of the offside goal against a right to a servitude be solved?

Categorisation of the rule as an instance of fraud on creditors is helpful. The discussion in chapters 4 and 5 suggested that reduction *ad hunc effectum* is not limited to cases of inhibition and that it could restrict the scope of a reduction as well as the people it affects.

[1114] *Spurway, Petr* (10 December 1986, unreported), OH, available on LexisNexis.

[1115] 1968 (4) SA 1 at 20 per Ogilvie JA. The reasoning of the court in *Greig v Brown and Nicholson* in Shaw's report is limited to the brief and rather surprising suggestion that since both rights were personal "the common owner is divested by the conveyance" without the need to complete the grant of servitude by taking possession. This analysis would be difficult to maintain light of the clarification of the relationship between real and personal rights and of the race to completion in *Sharp v Thomson* 1995 SC 455 and *Burnett's Trustee v Grainger* [2004] UKHL 8; 2004 SC(HL) 19.

[1116] *Meridian Bay Restaurant (Pty) Ltd v Mitchell* [2011] ZASCA 30; 2011 (4) SA 1 (SCA) at paras 30–1 per Ponnan JA.

[1117] "Die juiste siening na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklike werking verleen word": *Associate South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckerien (Pty) Ltd* 1982 (3) SA 893 (A) at 910 per van Heerden JA.

The classic instances of fraud on creditors are about putting assets back in a patrimony so that creditors can obtain rights in them. This is obviously the case with inhibition, or fraud by an insolvent debtor, but it is also the case in a classic double sale of land. Reduction is not an end in itself. Rather, it puts the fraudulent granter in a position to perform by granting a real right affecting the asset. Alternatively, it allows the creditors to get the court to make the grant for the debtor by means of diligence. This endgame is what justifies the reduction.

Where reduction is *ad hunc effectum*, its effect is specified so it goes no further than necessary to secure the protected interest. Thus reduction *ex capite inhibitionis* merely operates to render an adjudication against the former owner competent. That being achieved, it has no further value.

In some cases, the practical distinction between *ad hunc effectum* and catholic reduction is a minor one: if a transfer to Billy is reduced to allow Dan to register his disposition, Dan's registration will deprive Billy of any right that he has. However, it makes a big difference where an offside goal has been scored and there is a personal right to a servitude. The reduction would be *ad hunc effectum* to enable a deed of servitude granted by the seller to be registered and constituted a real right, but it would go no further. For all other purposes Billy would remain owner.

Of course, the net result of this approach is very similar to the South African rule. A transferee who was faced with a valid offside goals challenge in these circumstances could save everyone a lot of time and money simply by agreeing to grant the relevant subordinate real right. In doing so, he would be in no worse a position than if reduction *ad hunc effectum* had been obtained and the grant had been made from his author. The courts might even be justified in allowing the procedure to be short-circuited and compelling the transferee to make such a grant. Nonetheless, for the sake of a proper understanding of the relationship between real and personal rights, it is important to understand properly why such a short cut might be permitted.

(c) Does the fraud-on-creditors analysis prove too much?

Therefore, the fraud-on-creditors analysis can account for one implication of the view that the offside goals rule is a mechanism for protecting personal rights to real

rights. However, it appears to struggle with a more fundamental aspect. If the basis of the offside goals rule is fraud on creditors and some general duty not to participate in the breach of personal rights owed to others, why is it restricted to creditors holding a particular class of personal rights? After all, any kind of creditor can challenge a fraudulent grant by an insolvent debtor, protect his right with an inhibition, or rely on the doctrine of inducing breach of contract. Why then, should the offside goals rule be restricted to a particular class of personal right?

The first point to note is that the doctrine of inducing breach of contract gives personal rights some external effect. The personal-right-to-a-real-right restriction does not apply. The fact that a right is not a personal right to a real right does not necessarily mean that the third party is safe. Rather, it is likely to mean that he is liable in damages but safe from reduction of the transfer (as there is no offside goal). The consequences of the personal-right-to-a-real-right restriction are not as sharp as first appears.

This argument depends on the mental element of inducing breach of contract being substantially the same as that for offside goals. This is broadly the case: the test for the mental element of inducing breach of contract is not unduly stringent and is likely to be met in most bad-faith offside goals cases. If the second purchaser knows of the prior right, then breach of its correlative obligation is a necessary means to the end sought by the second purchaser: obtaining the property for himself. The difficulty arises in those cases where the second purchaser is put on notice but has something which falls short of clear and certain knowledge of the prior right.

This is a divergence between inducing breach of contract and offside goals. However, it is not as big a gap as may appear at first. In *OBG v Allan*, Lord Hoffmann made it clear that wilful blindness, where someone decides not to inquire for fear of what they might find, was as good as knowledge.[1118] That is sufficient to cover a lot of the offside goals cases and a reining in of the mental element to match that for inducing breach of contract would be desirable since the present approach creates too much uncertainty for potential purchasers.[1119]

[1118] [2007] UKHL 21 at paras 40–41.
[1119] See further MacLeod and Anderson "Offside Goals and Interfering with Play" at 94–5 and MacLeod "Offside Goals and Induced Breaches of Contract" 278 at 281–2.

Even under the present law, there will be few cases where the mental element for the offside goals rule is fulfilled but that for inducing breach of contract is not. Where both are fulfilled, the restriction of the offside goals rule to personal rights to real rights affects which remedies are available rather than whether a remedy is available.

This brings the analysis back to the nature of the remedy under the offside goals rule. As suggested above, avoidance for fraud on creditors is aimed at putting an asset back in a patrimony so that a creditor can obtain a real right in it. It operates *ad hunc effectum* and goes no further. It gives the fraudulent transferor no right to possess the property.

That, in turn, provides a rationale for the result in *Wallace v Simmers*.[1120] Miss Simmers had a licence (a personal right) against her brother which entitled her to occupy a house on his property. He sold the property in breach of that licence. Suppose that she had obtained a reduction of the transfer from her brother to the buyer. What would the effect of that reduction have been? Her brother had no obligation to grant her any real right and, since reduction would not have given him any right to possess the property, he would not be in a position to secure her possession and thus to fulfil his obligation under the licence. The *hunc* in *ad hunc effectum* in this case would have no content. Therefore the reduction would have been pointless.

Restricting offside goals to personal rights to the grant is therefore consistent with the fraud rationale because it reflects the nature of avoidance for fraud on creditors.

(3) Objections to "an interference with contract" approach in South Africa

A similar analysis to the one proposed here has been advocated in South Africa by N J van der Merwe.[1121] He suggested that the doctrine of notice be explained on the basis of Aquilian liability for interference with contract. Two major objections have

[1120] 1960 SC 255.

[1121] NJ van der Merwe and PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (2nd edn, 1970) 229–48. Van der Merwe wrote in Afrikaans. The discussion here is based on the summaries of his views and the reaction to them in Brand "Knowledge and Wrongfulness as Elements of the Doctrine of Notice" at 30, Wortley "Double Sales and the Offside Trap" at 308–9 and Lubbe "A Doctrine in Search of a Theory" 259.

been raised against this, and Wortley suggests that they would be equally significant in Scotland.[1122]

The first group of criticisms refer to the respective mental elements of the doctrine of notice and of interference with contract.[1123] In this respect Van der Merwe has been attacked from both sides. The standard view of interference with contract is that it is limited to intentional conduct and therefore incapable of accounting for the full scope of the doctrine of notice.[1124] Van der Merwe's answer to this criticism was to suggest that interference with contract extends to cover negligence as well as intentional wrongdoing.[1125] On the other hand, Brand criticises Van der Merwe's position as too broad, precisely because it covers cases of negligence where there is no actual knowledge of the right which is frustrated.[1126] Brand does not consider the doctrine of notice to extend that far.

Criticisms in the second group focus on the fact that the remedy granted to the first purchaser is not compensation. Rather the doctrine "effectively affords" specific performance,[1127] which is not considered to be the proper province of the law of delict.

Whatever their merits in relation to South African law, these arguments do not seem sufficient to displace the analysis in the Scottish context. On the view presented here, the remedies for both fraud on creditors and the delict of inducing breach of contract presuppose the same duty not knowingly to facilitate or encourage breach of someone else's personal right. The fraud on creditors rules, however, are not part of the inducing breach of contract rules. Inducing breach of contract is its own delict covering the right to damages. The offside goals rule does not, in a strict sense, derive from inducing breach of contract. That being the case, some divergence

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[1122] "Double Sales and the Offside Trap" at 309.
[1123] This term is still used in South Africa. It had wide currency in Scotland and England until *OBG v Allan*, when the House of Lords rejected that category in favour of two distinct torts/delicts: causing loss by unlawful means and inducing breach of contract.
[1124] J Neethling, JM Potgieter and PJ Visser (trans JC Knobel) *Law of Delict* (5th edn, 2006) 282–4 and Wortley "Double Sales and the Offside Trap" at 309.
[1125] Brand "Knowledge and Wrongfulness as Elements of the Doctrine of Notice" at 30.
[1126] *Ibid*.
[1127] *Ibid*.

between the conditions for availability of damages for inducing breach of contract and those for reduction may be tolerated.[1128]

As far as remedies are concerned, there are two assumptions implicit in the argument: that reduction is not an appropriate remedy for a delict, and that damages would not be available for a bad faith offside goal.

On the first point, compensation is not the only remedy afforded by the law of delict: where a wrong can be anticipated, interdict may also be available. Unlike in South Africa, there is no suggestion in Scotland that the effect of the offside goals rule should be to render the personal right positively enforceable against the successor. Reduction does exactly what damages in delict try to approximate: it restores the *status quo ante*. This is rarely possible: a court decree will not turn the clock back and redirect the negligently driven car. That does not mean, however, that it should not be done in those cases where it is possible.

On the second point, it is not clear that damages cannot be awarded for offside goals. If they have never been granted that is because they have not been sought rather than because they have been refused. It is not surprising that damages have not been sought: a first buyer who was content with money would be likely to sue the seller for breach of contract rather than pursuing reduction of the offside goal. Further, it might be argued that inducing breach of contract covers liability for damages in this situation.

Finally, it is worthy of note that, while Brand shares the general South African scepticism about Van der Merwe's approach, his own proposed approach draws heavily on principles which, at least to Scots lawyers, look delictual:

> [A]lthough the doctrine of notice is not founded in delict it shares a common element with delictual liability, namely wrongfulness (sometimes referred to as unlawfulness). Secondly, that in determining wrongfulness for the purposes of the doctrine we should be guided by the principles that have become crystallised in delictual parlance.[1129]

[1128] Cf Lord Hodge's comments on the conditions for damages for fraud on the one hand and for setting a contract aside on account of fraud on the other in *Frank Houlgate*: [2013] CSOH 80 at para 44.

[1129] Brand "Knowledge and Wrongfulness as Elements of the Doctrine of Notice" at 31. Brand goes on to suggest that, because the loss in the doctrine of notice is purely economic, wrongfulness depends on public or legal policy considerations. The wrongful but not delictual approach is also proposed in P J Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoeman's Law of Property* (5th edn, 2006) 87.

An analysis based on the wrongful nature of conduct which is guided in its development by the principles of the law of delict seems to be best located in the law of delict.

(4) Gratuitous acquirers

An analysis based on the wrongful nature of the second purchaser's conduct faces obvious challenges in dealing with the case of gratuitous acquisition.[1130] Yet recognition that the seller's conduct amounts to fraud means that the "no profit from fraud" rule and the law of unjustified enrichment can be invoked to explain the vulnerability.[1131] As discussed in chapter 4, this rule presents its own challenges because of the indirect nature of the enrichment. However, this exception to the normal rule against recovering indirect enrichment can be explained as an extension of the fraud rule: had the donee known what was being done, he would have been bound to refuse the property. An attempt to retain the benefit once the full facts are known amounts to completion of the incomplete *dolus* and hence to wrongful conduct. The voidability of the grant enables the party who would be so-wronged to prevent this wrong from being done. Therefore, an obligation to reverse the enrichment is justified although the enrichment is indirect.

Of course, an onerous transferee in good faith may also discover later that he was an unwitting accomplice in the seller's wrong, but in such a case the balance of policy is a little different. Such a transferee is not seeking to retain a pure enrichment but rather the benefit of a lawful bargain. Were it to be forfeited, he would be left with a claim for money and so exposed to the risk of the seller's insolvency. Given the personal rights do not rank according to the rule *prior tempore potior iure*, there is no obvious reason why that burden should be shifted from the first buyer to the second when both were duped by the seller.

This analysis draws on the point made by Carey Miller regarding the relative lack of favour which the law shows to donees, but it gives a reason for allowing a donee

[1130] For examples of an offside goals challenge by a gratuitous acquirer, see *Alexander v Lundies* (1675) Mor 940 and *Anderson v Lows* (1863) 2 M 100.
[1131] Reid "Fraud in Scots Law" 243–9 and 256–8.

whose personal right predates a right under an onerous contract to keep the property if he got his real right first. In that case, the donee was not an unwitting accomplice in any fraud because his author was perfectly entitled to make the promise at the time when he made it.

E. IMPLICATIONS OF FRAUD ON CREDITORS AS A RATIONALE

On the analysis suggested above, avoidance of the transfer gives effect to the first creditor's delictual right to reparation against a second purchaser who acquired in bad faith. It does that by putting the second purchaser in the position he would have been in had the wrongful act not taken place. The voidability of gratuitous grants is based on an analogous rule in the law of enrichment, which can be viewed as an extension of the fraud rule. One advantage of this view is that it allows the offside goals rule to be set alongside the other instances of fraud on creditors. Once that is established, they can offer guidance on some of the contested issues surrounding the offside goals rule.

The implications for the relationship between offside goals and subordinate real rights have already been discussed but the fraud-on-creditors analysis also casts light on another point of contention in modern discussions of the offside goals rule: the time at which the grantee must be put in bad faith. It was suggested *obiter* in *Rodger (Builders)* that a buyer who was in good faith when missives were concluded but who discovered the prior right before registration of the disposition would be vulnerable under the offside goals rule.[1132] This view was followed by Lord Eassie in *Alex Brewster & Sons v Caughey*,[1133] whose decision was, in turn, endorsed by Lord Rodger in *Burnett's Trustee v Grainger*.[1134] Lord Rodger took pains to explain why the position of the trustee in sequestration was distinguishable from that of a second buyer in an offside goals case. That was necessary because of his view that a second buyer who hears of a prior right must stand aside for the first purchaser whereas there is no such obligation on the trustee.

[1132] 1950 SC 483 at 500 per Lord Jamieson.
[1133] Unreported, 2 May 2002 (available at http://www.scotcourts.gov.uk/opinions/EAS0904.html).
[1134] [2004] UKHL 8 at para 142.

Despite this high authority, however, this seems to be wrong in principle and has rightly been subject to academic criticism.[1135] A clue as to why it is wrong can be found in the extract from Stair which Lord Rodger gave to distinguish between the position of the trustee or the creditor doing diligence and the second purchaser:

> But certain knowledge, by intimation, citation, or the like, inducing *malam fidem*, whereby any prior disposition or assignation made to another party is certainly known, or at least interruption made in acquiring by arrestment or citation of the acquirer, such rights acquired, not being of necessity to satisfy prior engagements, are reducible *ex capite fraudis*, and the acquirer is partaker of the fraud of his author, who thereby becomes a granter of double rights. [1136]

While the general rule is that a bad faith acquirer will be vulnerable as a partaker in his author's fraud, the rule does not apply to those who acquire "of necessity to satisfy prior engagements". As Lord Rodger rightly observed, the trustee in sequestration and creditors doing diligence may readily be considered to fall into this class.

However, Lord Rodger neglects the fact that, once a purchaser has concluded his contract with the seller, he too is a creditor[1137] and takes "of necessity" because, like other creditors, taking an asset is the only way that he can ensure that his right is fulfilled. Indeed, it might be argued that the necessity affecting a purchaser is more pressing than that affecting a creditor who is owed money. It makes no difference to the latter which of the debtor's assets is sold provided that it raises sufficient funds to pay the debt. A purchaser's right, on the other hand, can only be satisfied by transfer of the asset he contracted to buy.

The point becomes clearer after reflection on other cases for fraud on creditors in the context of insolvency and of inhibition. It is no fraud to accept what you are owed and that is all that a buyer who registers with supervening knowledge of a prior contract does. There is an unavoidable conflict of rights and, in such a situation, each person is entitled to look to his own interests. The purchaser who knows of the prior

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[1135] Anderson *Assignaton* paras 11-24–31
[1136] Stair I.xiv.5, cited 2004 SC (HL) para 142.
[1137] RG Anderson "Fraud and Transfer on Insolvency: ta … ta… *tantum et tale*" (2004) 11 EdinLR 187 at 202.

contract before he concludes his own contract is in a different position because he can avoid the conflict of rights by not agreeing to buy the property.

F. OFFSIDE GOALS AND SUCCESSOR VOIDABILITY

Throughout this thesis, it has been suggested that voidability is the result of a personal right against the recipient to have property returned. If that is the case, then transfer by one who himself holds as a result of a voidable transfer is an offside goal if the acquirer is in bad faith or gratuitous. Of course, this maps directly onto the circumstances in which a successor to voidable title will be affected by the voidability which affected his author. Thus Reid is correct to analyse this "successor voidability" as a special case of the offside goals rule.[1138]

This approach has been criticised by Whitty, who suggests that the right to recover voidably-transferred property is initially "a power or option to rescind the antecedent contract"[1139] and that it is only when this is exercised that the right to return of the property arises. He further argues that the "author's fraud" rule provides a sufficient, free-standing, explanation for the vulnerability of bad faith and gratuitous successors with a distinct history.

Whitty's criticisms seem misplaced. It is not the case that, in order to avoid a transfer, one must first rescind the antecedent contract. This is evident in relation to both fraud on the transferee and fraud on creditors.

Take fraudulent misrepresentation: in almost every circumstance, a misrepresentation which affects a contract will also affect the transfer agreement. If the transfer agreement is affected by the misrepresentation, then the transferor is entitled to avoid the transfer without bothering with the contract. This option becomes a necessity where the transfer but not the antecedent contract is affected by fraud. Such cases are rare but they are possible. The effect of fraud which supervenes between contract and transfer was discussed in chapter 3. In those cases only the

[1138] Reid *Property* para 698. Dot Reid takes a similar approach, casting both as instances of secondary fraud: "Fraud in Scots Law" 231–5.
[1139] N Whitty "The 'No Profit from Another's Fraud' Rule and the 'Knowing Receipt' Muddle" (2013) 17 EdinLR 37 at 56.

transfer is voidable so Whitty's model would deprive the defrauded party of any protection.

The fact that voidability can affect the transfer alone is also evident when fraud on creditors is considered. A gratuitous alienation might be a bare transfer, with no antecedent obligation. Nonetheless, it would be challengeable if made by an insolvent debtor. Similarly, the prior rightholder is not prejudiced by the seller's contract with the second buyer but by the transfer to him. Therefore, it is the transfer that is voidable.

The author's fraud rule which Whitty invokes is typically stated as the maxim *dolus auctoris non nocet successori nisi in causa lucrativa*. This tells us who is safe from the author's fraud but it is only possible to work out who is vulnerable by looking to the gaps in the statement. Neither does the bare maxim provide any explanation for the result in question.

The fraud of the author does not affect onerous successors because the right to avoid the transfer for fraud is a personal one which does not affect singular successors. What is needed is an explanation of why bad faith and gratuitous successors *are* vulnerable despite the fact that the right to challenge is personal. It does not seem enough to say that they are vulnerable because they do not fall within the scope of the maxim (not least because the maxim says nothing about bad faith). Categorising bad faith and gratuitous transferees' vulnerability in terms of the offside goals rule provides such an explanation. Therefore, Reid seems correct to place successor voidability in the context of the offside goals rule.

G. SUMMARY

The analysis in this chapter has suggested that the offside goals rules is best understood as an instance of the law's response to fraud on creditors. Avoidance is natural restitution, giving the defrauded creditor reparation for the wrong. Like the other instances of fraud on creditors, grantees may be liable as participants in the fraud (where they are in bad faith) or on the basis of an enrichment rule which prevents the completion of an incomplete *dolus* (where the grant is gratuitous).

Categorisation of the rule as an instance of fraud on creditors suggests that avoidance on the basis of the offside goals rule is *ad hunc effectum*, with the scope of

the reversal being defined by what is necessary to allow the defrauded creditor satisfaction by obtaining a real right in the relevant property. This factor explains both how the offside goals rule can protect a personal right to a subordinate real right and why the rule is limited to personal rights to real rights.

The fraud-on-creditors rationale also implies that a creditor who was in good faith when he acquired his personal right is entitled to pursue satisfaction of that right even if he discovers a conflicting personal right before he gets his real right. Further, since the basis of voidability is the personal right to have a transfer reversed, this rationale suggests that successor voidability is an instance of the offside goals rule.

Chapter 8

TANTUM ET TALE

One challenge to the account of the effect of fraud presented in previous chapters arises from the treatment of defrauded parties in insolvency. Chapter 2 included discussion of a line of cases where sellers sought to establish that buyers had defrauded them by failing to disclose insolvency. This might be thought a pointless exercise. Fraud gives rise to a personal right to reparation but a personal right against an insolvent debtor is worth little. Further, the sellers in these cases already had a personal right, a right to the price.

However, these sellers had a strong reason to act as they did. Fraud received special treatment in insolvency. This meant that they could recover the items sold rather than merely being content with a dividend in insolvency. The basis for this preference was said to be the fact that creditors doing diligence (and thus insolvency officials) took the debtor's assets *tantum et tale* as the debtor had them.

The expression *tantum et tale* is scattered widely throughout Scottish authorities. Its influence has not always been positive. As Bell puts it, "Out of this phrase of '*tantum et tale*' a new host of difficulties arose".[1140] Not least of these is determining what it actually means. Trayner glosses it thus: "So much and of such a kind; both as regards quality and extent."[1141]

The terseness of the phrase has led to flexibility in application. Discussing the decision of the Inner House in *Heritable Reversionary Co v Millar*,[1142] Goudy observed that the decision gave effect

> to a supposed principle that in heritable property the title of a trustee in bankruptcy, as well as all other singular successors, must be determined by the state of the public registers. … The supposed principle has been sometimes

[1140] Bell *Comm* I, 298.
[1141] Trayner *Latin Maxims and Phrases*.
[1142] (1891) 18 R 1166.

> expressed by the maxim—a trustee in bankruptcy succeeds to property vested in the bankrupt, *tantum et tale*, as it stands upon the record.[1143]

However, Goudy also uses the phrase later on in his note, describing a decision contrary to that of the Inner House in *Heritable Reversionary*: "The simple and equitable rule applied was, that creditors can take no higher right than their constituent, that they stand in his shoes and must take *tantum et tale* as he held [ie subject to latent trusts]."[1144]

As a matter of language, there is no problem with this. However, the fact that the phrase fits so easily into two contrasting propositions shows how dangerous it is to talk about a "doctrine of *tantum et tale*".[1145] The danger is particularly acute because of Scots lawyers' lack of familiarity with Latin. Bell complained that some were led astray by "taking the sound instead of the sense of the phrase".[1146]

Tantum et tale might therefore seem a poor title for a chapter. It is, however, the best available name for the rule that certain claims against the debtor in respect of assets, which could not be raised against the debtor's onerous good faith successor to those assets, may none the less be raised against creditors doing diligence or the debtor's trustee in sequestration. The origins and extent of this rule are murky and it is problematic in light the sharp division between real and personal rights re-affirmed in *Burnett's Trustee v Grainger*.[1147] Perhaps it is appropriate that even the name presents difficulties.

At the heart of the *tantum et tale* debate was a policy argument which might be regarded as the converse of the dynamic security argument advanced in support of protection for good faith purchasers of fraudulently acquired property. Unsecured creditors, it was argued, had trusted the personal creditworthiness of the debtor and thus relied neither on the registers nor on the presumption that the possessor of moveables owned them. They could make no claim on the publicity principle. Therefore, even when they did diligence or had the debtor's estate sequestrated, they did not deserve the protections afforded to singular successors and those who took real security.

[1143] H Goudy "Note on *Heritable Reversionary Co Ltd v Millar*" (1891) 3 JR 365 at 366.
[1144] Goudy "Note on *Heritable Reversionary Co Ltd v M'Kay's Trustee*" at 366.
[1145] Eg *Heritable Reversionary Co Ltd v Millar* (1891) 18 R 1166 at 1170 per Lord Adam.
[1146] Bell *Comm* I, 298.
[1147] [2004] UKHL 8; 2004 SC (HL) 19.

This debate around *tantum et tale* took place in three main arenas: attaching creditors' general invulnerability to personal rights against their debtor;[1148] the trust;[1149] and the clarification of the effect of fraud on transfer.

A. ATTACHING CREDITORS' INVULNERABILITY TO PERSONAL RIGHTS AGAINST THE DEBTOR

The strict division between real and personal rights and the resulting invulnerability of attaching creditors to prior personal rights against their debtor are seen as fundamental in modern Scots law. The essence of a personal right is that it exists against a particular person or group of persons and, as Lord Rodger put it, "since the debtor and the trustee in sequestration are different persons, the trustee is not affected by any personal obligations that may have affected the debtor."[1150] As Lord Rodger goes on to acknowledge, the trustee takes the bankrupt's estate subject to personal rights but they do not affect particular assets and rank *pari passu*. Therefore, they cannot be used to lift particular assets out of the sequestrated estate. Further, the trustee's liability for the debts of the estate is a result of his office. The same cannot be said of creditors doing diligence. They are absolutely free of their debtor's personal obligations. The same principle can be used to explain why good faith purchasers take free of their author's personal obligations.

A line of eighteenth and nineteenth century cases concerning the effect of adjudication, and most recently surveyed by Lord Rodger in *Burnett's Trustee*,[1151] shows that the principle has sometimes been challenged, generally by purchasers of assets which were then subject to diligence. It is unnecessary to repeat Lord Rodger's extensive analysis but note may be taken of the elements relevant for the present discussion.

The challenges were made on the basis of the argument mentioned above that adjudgers must take the right of their debtor *tantum et tale* as it stood in him. Since the debtor was bound to respect these personal rights, it was argued, so were

[1148] Discussed, in relation to heritable property by Lord Rodger in *Burnett's Trustee v Grainger* [2004] UKHL 8 at paras 112–38.
[1149] For which see GL Gretton "Trusts" in Reid and Zimmermann *History of Private Law in Scotland* Vol I, 480.
[1150] *Burnett's Trustee v Grainger* [2004] UKHL 8 para 137.
[1151] Paras 112–31. See also Bell *Comm* I, 301.

adjudging creditors. This approach, which might be styled the "broad" *tantum et tale* rule, was eventually rejected.

The line of authorities which prevailed "seems to have proceeded on the basis … that feudal rights were not affected by personal rights"[1152] and involved a rejection of a policy-based distinction between purchasers and adjudgers.[1153] The reasoning which prevailed was not based on policy considerations. Rather the key factor was the technical conclusion that the requirements for constitution of the right in the property had not been fulfilled by the holder of the personal right but had been fulfilled by the adjudger.[1154]

The resulting principle was considered to be a general one, applicable to moveable as well as heritable property.[1155] The reasoning applied even to the personal rights of so-called "uninfeft proprietors".[1156] As the court pointed out in *Earl of Fife v Duff*, the disposition "vests in him most of the essential attributes of ownership" including the right to take possession of and fruits from the property.[1157] If any personal right was going to qualify as a *ius ad rem*, a right to a thing which might stand between the status of a real and a personal right, defeating attaching creditors but not purchasers, it would be the right of the uninfeft proprietor. However, even that right had no effect against adjudgers. This point once again became a matter of some doubt in the late twentieth century.[1158] However, the uninfeft proprietor's argument was decisively rejected by the House of Lords in *Burnett's Trustee v Grainger*.[1159]

The adjudgers' success might have been expected to prevent any further recourse to the *tantum et tale* argument. In fact, it was merely recast in a narrower form. To understand why, it is necessary to examine two areas which needed the *tantum et tale* rule to explain their effect.

[1152] [2004] UKHL 8 para 125.
[1153] *Ibid* para 122.
[1154] *Ibid* para 125.
[1155] *Wylie v Duncan* (1803) 3 Ross LC 134 at 137 per Lord President Campbell; Bell *Comm* I, 308. In *Wylie*, Lord Presdient Campbell does suggest that a different rule applies to assignations but that is readily explicable because the decision pre-dates *Redfearn v Sommervails* (1813) 5 Pat App 707.
[1156] *Earl of Fife v Duff* (1862) 24 D 936 (affd (1863) 1 M (HL) 19) at 942.
[1157] (1862) 24 D 936 at 941.
[1158] *Sharp v Thomson* 1997 SC (HL) 66.
[1159] Esp per Lord Hope at para 19. See also Lord Hope's judgment as Lord President in the Inner House in *Sharp v Thomson* 1995 SC 455.

B. TWO RULES IN NEED OF A RATIONALE

The defeat of the broad *tantum et tale* rule in the adjudication cases removed the obvious rationale for two rules that were well-established by 1800: the immunity of trust assets to general creditors[1160] and the right of a defrauded seller to recover the object of sale from the fraudulent buyer's general creditors.[1161] Both involved rights to specific assets owned by the debtor. If, however, the asset was owned by the debtor, and no mid-right between a real right and a personal right was recognised, the rights of beneficiaries and defrauded sellers must have been personal. Why then did they prevail over the general creditors of the trustee or the fraudster?

Some accounts of these rules did not encounter this problem because they denied that the debtor owned the relevant assets, arguing that the beneficiary was the true owner of the trust assets and that fraud rendered the transfer null. However, such analyses faced substantial difficulties in explaining the protection of good faith purchasers against the beneficiary or defrauded seller and did not represent the consensus in respect of either situation. Stair, Bankton, Erskine and Hume all made it clear that the trustee was the owner of the trust property.[1162] In *Redfearn v Sommervails*, Lord Meadowbank confirmed that the right of beneficiaries was personal.[1163] The view that fraudulently-induced transfers are valid until set aside has already been discussed.[1164]

(1) Surviving by distinguishing

The rules concerning trusts and fraudulent acquirers were too well established to be dropped as a result of a conceptual challenge, particularly since the adjudication cases did not concern trusts and only two of them concerned fraudulent acquisition.[1165]

[1160] See Gretton "Trusts" at 494 and 499–500.
[1161] See chapter 3, part D(4) above.
[1162] Stair I.xiii.7; Bankton I.xviii.12 (marginal heading); Erskine III.i.32 and Hume *Lectures* Vol II, 145–6.
[1163] (1813) 5 Pat App 707 at 710.
[1164] Chapter 3 part D.
[1165] *Ireland v Neilson* (1755) 5 BS 828 and *Gibb v Livingston* (1763) 5 BS 897.

To modern eyes, at least, the adjudication cases undermine the rule protecting defrauded sellers.[1166] If their right to avoid is delictual and therefore personal, the rejection of the idea that personal rights bind adjudgers seems to leave little scope for protection. Further, the cases seem to reject any policy distinction between purchasers and creditors in relation to personal rights. At the time the law was developing, however, this may have been less evident. Opponents of the broad *tantum et tale* rule may not have understood their views as having any implications for fraud. The precise effect of fraud on transfers was not settled and they may have thought fraud rendered transfers void.[1167] Those who accepted that fraud was a ground of avoidance rather than of nullity took comfort from the fact that the decisions concerned adjudication, while the bulk of the decisions about defrauded sellers concerned poinding or arrestment of moveables.[1168] The adjudication cases could therefore be quite easily distinguished without addressing the points of principle which they raised.

Such considerations cannot, however, provide an adequate justification in the modern law. While the language of Lord Rodger's line of cases is that of feudal conveyancing, the principles are applicable to all types of property because they flow from the personal nature of personal rights. Personal rights do not become less personal because they relate to moveable property. Furthermore, unless a particular class of personal rights can be set apart, the idea that a personal right could give a preference over other creditors in relation to a specific asset is incoherent.

All creditors have a personal right, and no personal right links the right-holder to a specific asset. Therefore, saying that attaching creditors take subject to the debtor's personal obligations amounts to saying that each creditor has a preference over all the other creditors in respect of each asset. A preference conferred on every creditor is no preference at all because preferences work by making some people better off than others.

[1166] The dual patrimony theory means that trusts are not similarly undermined, although that development was still almost 200 years in the future.

[1167] Lord Braxfield, the major opponent of the broad *tantum et tale* rule appears to have taken this view: *Allan Stewart & Co v Creditors of Stein* (1788) Hailes 1059.

[1168] Compare Hume *Lecutres* Vol II, 16 (on the defrauded seller) with Vol I, 474 (discussing the *tantum et tale* rules in adjudications). See *Mansfield v Walker's Trustees* (1833) 11 S 813 at 822–3 per Lords Gillies, Mackenzie, Medwyn and Corehouse.

(2) *Tantum et tale* reborn – taking advantage of the debtor's fraud

Perhaps as a result of these problems, lawyers did not content themselves with seeking to confine the rule to adjudication of heritable property. Even as the distinction between heritable and moveable property in this area was being asserted, its weaknesses were being felt. While Lords Gillies, Mackenzie, Medwyn and Corehouse scolded the defenders in *Mansfield v Walker's Trustees* for referring to cases concerning moveables which are "nowise connected" with the cases on personal rights and adjudication, they none the less felt obliged to concede that "Even in the case of moveables … the creditor using diligence does not take them *tantum et tale*, as they stand in the debtor, that is, he is not responsible for the personal obligation of the debtor concerning them."[1169]

Although the adjudication cases did not put an end to the distinction between purchasers and general creditors, they do seem to have caused, or at least been accompanied by, a significant narrowing of its scope. From now on, general creditors were only to be affected by a small class of personal rights.

The key to the new approach can be found in Hume's treatment of the defrauded seller's right to recover from the fraudster's general creditors. He seems to begin with the broad *tantum et tale* rule, that the general creditors "are held to attach their debtor's interest such as it is in his own person and no better; they occupy his place, and are liable to the same exceptions as he." He does not stop there, however. He goes on: "As their debtor himself, if the question were with him, could not avail himself of his fraudulent acquisition, so neither can they take benefit by it who plead his right."[1170]

In context, the latter passage looks like a mere specific instance of the general principle enunciated in the former, but it would become the essence of the new, narrow *tantum et tale* rule. It is easy to see how a special rule, prohibiting creditors from taking advantage of their debtor's fraud, could explain the protection of defrauded sellers. First, it seems intuitively wrong to allow other creditors to "take the benefit of" or "adopt" the debtor's fraud. On a technical level, their special status as victims of fraud rather common or garden creditors allows them to be

[1169] (1833) 11 S 813 at 822.
[1170] Hume *Lectures* Vol II, 16.

distinguished from the wider body of creditors and thus given a meaningful preference. Adoption of the debtor's fraud could also include doing something which would be fraud were the debtor to do it.[1171]

Some appear to have been concerned, however, that simple reference to fraud was insufficient to establish a connection with a particular asset, leading to the additional requirement that the fraud be one of the "conditions which affect the constitution of the real right in the debtor".[1172] On this view, a defrauded party is a mere personal creditor unless the fraud had induced the transfer of the asset in question. Others, however, focussed directly on the prohibition on taking the benefit of the debtor's fraud. This meant they were willing to grant preferences to compensate defrauded parties even in cases where the fraud did not cause the acquisition of property.[1173]

The distinction was most significant in trust cases, due to the courts' willingness to characterise breach of trust as fraud.[1174] This is readily understandable if the broad understanding of fraud as *dolus*, and thus as breach of *bona fides*, is borne in mind. Appropriation of the trust assets to satisfy his personal debtors would be breach of trust were the bankrupt to do it himself. Breach of trust is a betrayal of the good faith (*fides*) with the truster and thus a species of fraud. Of course, breaches of trust can occur which are not related to the acquisition of property.

The point is illustrated by *Graeme's Trustee v Giersberg*.[1175] In her marriage contract, Mrs Giersberg had assigned all her property and *acquirenda* to a trust for the rather dubious purposes of avoiding her husband's *jus mariti* and the diligence of her creditors. As beneficiary, she was entitled to alimentary payments from the trust. In order to incorporate incorporeal *acquirenda* into the trust it was necessary to make intimation to the relevant debtors. For some time, the trustees neglected to do so, in

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[1171] Eg *Graeme's Tr v Giersberg* (1888) 15 R 691 at 694 per Lord President Inglis.
[1172] *Mansfield v Walker's Trs* at 822–3 per Lords Gilles, Mackenzie, Medwyn and Corehouse (affd (1835) Sh & MacL 203 at 338–9 per Lord Brougham). See also Bell *Comm* I, 299 and Lord Shand's dissent in *Graeme's Tr v Giersberg* (1888) 15 R 691 at 697.
[1173] *Mansfield v Walker's Trs* at 842–3 per Lord President Hope and Lord Moncrieff (dissenting – their position was essentially supported by Lord Justice Clerk Boyle and Lord Glenlee at 843–51) when the Second Division was called to advise on the matter; *Molleson v Challis* (1873) 11 M 510; *Colquhouns' Tr v Campbell's Trs* (1902) 4 F 739.
[1174] Lord President Hope's note on *Dingwall v M'Combie* printed in *Gordon v Cheyne* (1824) 2 S 566 at 567–8; Bell *Comm* I, 310 suggesting the application of this analysis to *Thomson v Douglas, Heron & Co*; *Mansfield v Walker's Trs* at 847 per Lord Justice Clerk Boyle explaining *Gordon v Cheyne* in terms of fraud and *Heritable Reversionary Co v Millar* (1892) 19 R (HL) 43 at 45 per Lord Herschell and at 50–1 per Lord Watson; *Colquhouns' Trustee v Campbell's Trustee* at 744 per Lord Kinnear.
[1175] (1888) 15 R 691.

breach of their duties. Thereafter, one of the trustees became insolvent. As well as being a trustee, he was owed money by Mrs Giersberg, and his trustee in sequestration sought to arrest the *acquirenda* rights to payment. This was, of course, only possible because of his breach of trust. Mrs Giersberg opposed the arrestment.

Lord Shand reasoned that the right which the trustee in sequestration sought to enforce had not been acquired through fraud: Mrs Giersberg's debt to the marriage trustee was not the result of fraud, and never had anything directly to do with the trust; the right to do diligence to enforce a debt was an automatic incident of the debt, so its existence could not be attributed to fraud either.[1176] Therefore, he argued, the trustee was quite free to arrest the debts.

The majority, however, took the opposite view. Lord President Inglis and Lord Adam justified their position by reference to a broad reading of the *assignatus utitur* rule.[1177] Lord Kinnear, however, based his decision on the *tantum et tale* rule. He argued that the trustee in sequestration was seeking to take advantage of the marriage trustee's breach of trust because, had the marriage trustee performed his duties properly, arrestment would have been impossible.[1178] Lord Kinnear's approach was adopted by Lord President Kinross in *Colquhouns' Trustee v Campbell's Trustees*.[1179] In the absence of a requirement that the fraud be involved in the constitution of the right,[1180] the rule came to be stated in fairly wide terms. For instance:

> [T]he creditors cannot enlarge the estate for distribution by adopting a fraud on the part of the bankrupt, or doing something which would have been a fraud if done by him while solvent.[1181]

Given the broad nature of fraud in Scots law,[1182] this comes very close to opening the door to the old view of *tantum et tale*.[1183] The early twentieth-century authorities thus

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[1176] At 697.
[1177] At 694 and 698.
[1178] At 692.
[1179] (1902) 4 F 739 at 742.
[1180] Cf Stewart *Diligence* 620 and the Scottish Law Commission *Discussion Paper on Adjudication for Debt and Related Matters* (SLC DP 78, November 1988) para 5.36 and *Report on Diligence* para 3.70 suggesting that the fraud requires to affect the grant of the right to the debtor.
[1181] (1902) 4 F 739 at 744 per Lord Kinnear.
[1182] Particularly since, grant of a second disposition by the bankrupt would be fraud.
[1183] See Anderson "Fraud on Transfer and on Insolvency: *ta … ta... tantum et tale?*" at 189–91.

left the law rather unclear. This represents an endpoint for the rule's development as the case law dried up.

C. THE WITHERING OF *TANTUM ET TALE*

Perhaps the most remarkable thing about the *tantum et tale* rule is its disappearance in the twentieth and early twenty first centuries. The rule, it seems, has been left largely without a role.[1184]

Trust assets' invulnerability to the trustee's attaching creditors can now be explained by reference to the dual-patrimony theory[1185] and to section 33 (1)(b) of the Bankruptcy (Scotland) Act 1985. Although the rule is mentioned in a major modern textbook on the law of diligence[1186] it is only used in relation to arrestments and the situations discussed seem explicable on the basis of either the *nemo plus* rule, separate trust patrimony, or the *assignatus utitur* rule.[1187] Similarly, when Lord Cameron used the term in relation to adjudications in *Gibson v Hunter Home Designs Ltd*, he seemed to regard it as merely meaning that adjudgers take property subject to prior real rights.[1188] These modern uses of *tantum et tale* add nothing to other, better established rules in these cases.

Most curiously of all, there has been no successful claim for restoration of goods by a defrauded seller for a hundred years.[1189] And in contrast to trusts, no fresh construction has emerged to explain the rule. The constructive trust might have been employed to allow reliance on the separate patrimony rationale. There is, however, no support for such a construction in the authorities. Therefore, the fraudulently acquired assets must be considered to pass into the fraudster's personal patrimony, meaning that the defrauded party continues to require to assert his right to recovery

[1184] The term continues to be mentioned in a number of cases but it does not signify any result which could not be explained by reference to other rules of property law.
[1185] This process was started, albeit rather imperfectly, by the House of Lords in *Heritable Reversionary* when they shifted their attention from trying to characterise breach of trust as fraud to examining the nature of the trustee's title: see Lord Watson at 49. The separate patrimony theory provides Scots lawyers with a non-fraud analysis which does not require recourse to divided title: GL Gretton "Trusts without Equity" (2000) 49 ICLQ 599; Scottish Law Commission *Discussion Paper on the Nature and Constitution of Trusts* (SLC DP 133, October 2006) paras 2.1–2.28.
[1186] G Maher and DJ Cusine *The Law and Practice of Diligence* (1990) para 5.37.
[1187] See also Gretton "Diligence" para 262.
[1188] 1976 SC 23 at 29–30.
[1189] *Muir v Rankin* (1905) 13 SLT 60 appears to be the last instance.

against the trustee as he would have done against the fraudster, rather than bringing a declarator of trust. In doing so, explicit reliance on the *tantum et tale* doctrine is still necessary. It is difficult to believe that there have been no insolvent fraudulent acquirers since the beginning of the twentieth century. Apparently counsel have not seen fit to rely on the doctrine for many years.

The question was addressed, albeit obiter, in *AW Gamage v Charlesworth's Trustee*.[1190] There Lord Johnston expressed serious doubts about whether the seller would have been able to recover the goods from the trustee in sequestration:

> I doubt whether the doctrine of *tantum et tale* can be carried so far. A subject held on a title with a latent trust seems to me to be a very different thing from one acquired on a contract tainted with fraud, and to apply the doctrine to the latter, as to the former, appears to me to come very near to treating fraud in contract as a *vitium reale*.[1191]

Lord Johnston was right. The *tantum et tale* rule does come very close to treating fraud as a *vitium reale*. None the less, it is remarkable that what was once a core case for the rule had become, in Lord Johnston's mind, a marginal one. It must be conceded, however, that Lord Salvesen had no such doubts. Since *AW Gamage*, very little has been heard of the rule.[1192] Perhaps the increasingly stringent approach to establishing fraud in these cases made the rule practically unworkable.

D. *BURNETT'S TRUSTEE v GRAINGER*

In *Burnett's Trustee* Lord Rodger took great care to distinguish the position of the trustee from that of a purchaser.[1193] He did so because he was concerned to show why the trustee in sequestration was not prevented from completing his title by the offside goals rule. Lord Rodger took the view that the offside goals rule applied even to cases where the second buyer found out about the first sale after his contract had been concluded. Doubts about the soundness of this analysis have been expressed in chapter 7. Nonetheless, Lord Rodger's line of reasoning is interesting. He suggests

[1190] 1910 SC 257.
[1191] *Ibid* at 270.
[1192] It is noted in Reid *Property* para 694 on the basis of the earlier case law.
[1193] [2004] UKHL 8 at paras 67 and 141–2.

that attaching creditors are to be accorded greater licence than purchasers (even when the purchaser was in good faith when the contract was concluded). This is a complete reversal of the policy which underlies the *tantum et tale* rule, ie the view that the purchasers are more worthy of protection than attaching creditors.

E. CONCLUSIONS

The *tantum et tale* rule could be regarded as presenting a serious challenge to the approach to fraud taken in this thesis. In its later form, it involved a sharp distinction between fraudulent misrepresentation and innocent misrepresentation or concealment[1194] and elevated the right to recover fraudulently acquired property above the status of a mere delictual right to reparation.

The Scottish Law Commission has consistently recommended the retention of the *tantum et tale* rule because of its equitable flexibility.[1195] However, they suggest that "it would be unwise to put the adaptability of the *tantum et tale* principle at risk by attempting to make it the subject of express statutory statement" and so the legislature "should not attempt to define the content of that principle."[1196] The value of a principle so flexible that its content cannot be stated in legislation is perhaps open to question, particularly in an area of law where certainty is valued so highly. A rule which is best expressed in three Latin words which mean very little even when translated must surely come under suspicion.

The rule seems better considered as an anomaly and something of an anachronism. In so far as a clear effect can be identified, its primary function in the modern law is to accord a preference to one class of unsecured creditors which is difficult to justify. If it sits uncomfortablly with the approach taken to misrepresentation, it also sits uncomfortably with the principle of *paritas creditorum*. Allowing creditors to take advantage or adopt the bankrupt's fraud sounds unfair but it must be borne in mind that the bankrupt is likely to have harmed all creditors, and giving effect to the *tantum et tale* rule will worsen their lot. Further, it disrupts the

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[1194] *Inglis v Mansfield* (1833) 11 S 813; *Muir v Rankin* at 61 per Lord Dundas.
[1195] *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* para 11.22; *Discussion Paper on Adjudication for Debt* para 5.37 and *Report on Diligence* paras 3.70–2 and 3.206–7.
[1196] *Discussion Paper on Adjudication for Debt* para 5.37. See also *Report on Bankruptcy* para 11.22 and *Report on Diligence* para 3.71.

strict division between real and personal rights which is central to Scots law and was recently reaffirmed in *Burnett's Trustee v Grainger*.

Chapter 9

CONCLUSION

This thesis has examined several key grounds of voidable transfer in Scots law: misrepresentation, insolvency of the granter, litigiosity, and the offside goals rule. It began with an examination of the emergence of voidability as a category of invalidity distinct from voidness or nullity with the following characteristics:

- The act is valid for the time being.
- Whether the act is set aside depends on the decision of the person or persons whose interests are protected by the rule which rendered the act voidable.
- Good faith purchasers of voidably acquire property are protected.

It is suggested that, in the instances which are examined, these phenomena can be explained by characterising voidability as a mechanism for giving effect to a personal right to the reversal of the relevant transaction. This personal right arises either from the law of delict, as a right to reparation for fraud, or in a case where the grant is gratuitous, from the law of unjustified enrichment. The enrichment analysis is supported by the fact that the acquirer would have been liable for fraud had he known what was going on, so that in one sense the enrichment rules can be considered as extensions of the relevant fraud rule. Were the acquirer to retain the property with full knowledge of the circumstances of the acquisition, he would effectively complete the fraud. This is permitted where a transfer is onerous, in order to maintain security of transactions, but a gratuitous transferee has no relevant reliance interest and so is not entitled to the same degree of protection.

They type of fraud is not the same in all of the cases examined. In the case of misrepresentation, it is straightforward deceit. This is a wrong against the autonomy and free decision-making of the transferor in disposing of his assets. Reversing this

wrong necessitates the unwinding of the transaction and returning the assets, which is achieved by avoidance of the transfer.

The other cases examined concern fraud on a creditor. In those cases, the fraud consists in attempting to frustrate an existing creditor's attempts to get satisfaction from the debtor's patrimony.

In the case of the transferor's insolvency, the attempt to defraud creditors is general in nature. The debtor is aware that his assets are insufficient to satisfy his creditors and he deepens his inability to pay by making the grants which are challenged.

In the case of litigiosity, a prohibition on dealing is imposed as a result of court action. As in insolvency, its purpose is preservation of the estate or relevant asset in order to ensure satisfaction of the creditor's right. Consideration of litigiosity also included extensive examination of the effect of arrestment, which is sometimes attributed to litigiosity.

Arrestment is a challenge to the present account because its effects go beyond that which are explicable by a personal right to have dealings with the arrested property set aside. Examination of the sources suggests that these effects are attributable to the view that arrestment gives the arrester a subordinate real right in the arrested property and that this view is a preferable basis for explaining arrestment. It is therefore unnecessary to be account for the stronger effects of arrestment by reference to fraud on creditors.

In the case of the offside goals rule, the restriction on dealings with an asset is implied by the transferor's pre-existing obligation to grant a real right in the property to someone else. By transferring the property, the debtor renders himself incapable of fulfilling this obligation. Characterising the right to avoid as a personal right to the reversal of a transaction explains in turn why bad faith or gratuitous successors to voidably acquired property can be brought within the offside goals rule.

The transferee is liable as an accessory to the fraud and therefore subject to the right to reduce. The interest protected is in avoiding frustration of the creditor's efforts to obtain satisfaction. In some cases, adequately protecting this interest does not require the transfer to be set aside to its full extent or against all parties. The extent of the reduction may then be specified and the act remains valid for all other

purposes. This modification of the effect of reduction is particularly associated with reduction *ex capite inhibitionis* but examination of the early-modern materials and the principles surrounding the law in this area shows that it is applicable beyond the case of inhibitions.

Understanding the offside goals rule in this way gives a clearer view of certain problematic aspects of the rule. The parallel with inhibition and with grants by insolvent debtors suggests that a purchaser who is in good faith when his contract is concluded is entitled to protect his own interests by pursuing satisfaction, despite later acquiring knowledge of a competing personal right which predates his own.

The limited effect of avoidance for fraud on creditors helps to explain how the offside goals rule would apply to cases where the first creditor's right was to the grant of a subordinate real right rather than to transfer the property. It further explains why the offside goals rule only protects personal rights to real rights. Avoidance of a transfer on the basis of the rule is *ad hunc effectum*, the *hunc* being so as to enable the debtor to make the relevant juridical act. For all other purposes, the transfer remains effective. If, therefore, the debtor has no obligation to make a juridical act affecting an asset, setting its transfer aside would serve no purpose. It is important to bear in mind, however, that the creditor is not necessarily without a remedy as he may often be able to pursue a damages claim for inducing breach of contract.

The so-called *tantum et tale* rule presents a further challenge to the account of voidability presented in this thesis. This rule gives a defrauded party a preference over attaching creditors, which appears to run contrary to the idea that the defrauded party has a mere personal right. The wider difficulties with the *tantum et tale* rule, the tensions with recent case law and the absence of successful reliance on the rule in the modern era are explored. Taken together, these cast doubt on the continuing relevance and utility of the rule and suggest that failure to account for the *tantum et tale* rule should not be considered fatal in an analysis of voidability.

In summary, this thesis maintains that avoidance of transfers on grounds of misrepresentation, insolvency of the debtor, litigiosity or the offside goals rule is best understood as a mechanism for giving effect to a personal right to the reversal of the transaction. That right arises from an obligation binding on the transferee which is

imposed for the protection of the avoiding party. The extent to which the transfer is reversed is determined by what is necessary for the interest protected by the obligation. This account provides a plausible explaination of the position of good faith purchasers, of the choice which the avoiding party has about whether to set the transfer aside or not, and of the connections between the various instances examined.

APPENDIX: THE BANKRUPTCY ACT 1621 (c 18)

A ratificatioun of the act of the lordis of counsell and sessioun made in Julii 1620 aganis unlauchfull dispositiones and alienationis made be dyvoures and banckruptis

[a] Oure soverane lord, with advyse and consent off the estaittis convenit in this present parliament, ratiefies and apprevis and for his hienes and his successoures perpetuallie confermes the act of the lordis of counsell and sessioun made aganis dyvoures and bankruptis at Edinburgh, the tuelff day of Julii 1620, and ordanis the same to have and tak full effect and executioun as ane necessarie and proffitable law for the weill of all his hieghnes subjectis, off the quhilk act the tennoure followes:

[b] The lordis off counsall and sessione, understanding by the grevous and just complayntis of many of his majesties gude subjectis that the fraude, malice and falshoode of a number of dyvoures and bankruptis is becum so frequent and awowed and hathe alreddy taikin sick progres to the overthairow of many honest menis fortounes and estaittis that it is liklie to dissolve trust, commerse and faythfull dealing amang subjectis, quhairupoun must ensew the ruine off the whole estate gif the godles deceatis of those be not preventit and remeidit, who, by there apparent welth in landis and guidis and by thair schow of conscience, credite and honestie drawing into thair handis upoun trust the money, merchandice and guidis of weilmeaning and credoulous persounes, do no wayes intend to repaye the same, bot ather to leiff ryioutouslie by wasting of uther menis substance, or to enriche thame selffis by that subtile stealthe of trew menis guidis, and to withdraw thame selffis and thair guidis furth of this realme to elude all executioun of justice; and to that effect, and in manifest defraud of thair creditouris, do mak simulate and fraudfull alienationes, dispositiounes and

utheris securities of thair landis, reversiounes, teyndis, guidis, actiounes, dettis and utheris belanging unto thame to thair wyiffes, childrene, kynnismen, alleyis and uther confident and interposed persounes without anye trew, lauchfull or necessarie caus and without anye just or trew pryce intervening in thair saidis barganis, wherby thair just creditoures and cautioneris ar falslie and godleslie defraudit off all payment off thair just dettis and manye honest famelies liklie to cum to utter ruine.

[c1] For remeid quhairoff, the saidis lordis, according to the powar gevin unto thame by his majestie and his most noble progenitoures to sett doun ordouris for administratioun of justice, meaning to follow and practize the guid and commendable lawis, civill and cannone, maid aganis fraudfull alienatiounes in prejudice of creditouris and aganis the authoures and partakeris of suche fraude, statutes, ordanis and declairis that in all actiounes and causes depending or to be intentit by any trew creditour for recoverie of his just debt or satisfactioun of his lauchfull actioun and right, they will decreit and decerne all alienatiounes, dispositiounes, assignatiounes and translatiounes whatsoevir made by the dettour of ony of his landis, teyndis, reversounes, actiounes, dettis or guidis quhatsoevir to anye conjunct or confident persoun without trew, just and necessarie causes and without a just pryce realie payit, the same being done efter the contracting of lauchfull dettis frome trew creditoures, to have bene frome the beginning and to be in all tymes cuming null and off nane availl, force nor effect at the instance of the trew and just creditour be way off actioun, exceptioun or replye, without farder declaratour.

[c2] And incace anye of his majesties gude subjectis (no wayis pertakeris of the saidis fraudis) have lauchfullie purchesit anye of the saidis bankeruptis landis or guidis by trew barganis frome just and competent pryces or in satisfactioun of thair lauchfull dettis frome the interposed persounes trusted by the saidis dyvoures, in that cace the right lauchfullie acquyrit be him quha is nawayes partaker of the fraude sall not be annulled in maner

foirsaid, bot the ressaver off the pryce of the saidis landis, guidis and utheris frome the buyer salbe haldin and obleisit to mak the same furth cuming to the behuiff of the bankruptis trew creditouris in payment of thair lauchfull dettis;

[c3] and it salbe sufficient probatioune of the fraude intended aganis the creditoures if they or onie of thame salbe hable to verefie by wreate or by oathe of the pairtie receaver of anye securitie frome the dyvoure or bankrupt that the samen wer made without anye trew, just and necessarie caus or without anye trew or competent pryce, or that the landis and guidis of the dyvoure and bankrupt being sold by him who bocht thame frome the said dyvoure, the whole or the maist pairt of the pryce thairoff wes converted or to be converted to the bankruptes proffite and use, prowyding alwayes that so muche of the saidis landis and guidis or pryces thairof so trusted by bankruptis to interposed persounes as hathe bene reallie payit or assignet by thame to anye of the bankruptis lauchfull creditoures salbe allowed unto thame, they making the rest forthcuming to the remanent creditoures who want thair dew paymentis.

[d] And if in tyme cuming anye of the saidis dyvoures or thair interposed partakeris of thair fraude sall mak anye voluntarie payment or right to ony persoun in defraude of the lauchfull and more tymelie diligence of ane uther creditoure haveing servit inhibitioun or useit horning, arreistment, comprysing or uther lauchfull meane dewlie to affect the dyvoures landis or guidis or pryce thairoff to his behuiff, in that cace the said dyvoure or interposed persone salbe holdin to mak the same furthcumand to the creditour haveing used his first lauchfull diligens, who sall lyikwayis be preferrit to the concreditour, who being posteriour unto him in diligence hathe obtenit payment by partiall favoure of the dettour or of his interposit confident, and sal have gude actione to recover frome the said creditour that whiche wes voluntarlie payit in defraude of the persewaris diligens.

[e] Finallie, the lordis declairis all suche bankruptis and dyvoures and all interposed personis for covering or executing thair fraudis and all utheris who sall gif counsell and wilfull assistance unto the saidis bankruptis in the dewysing and praktiezing of thair saidis fraudis and godles deceittis to the prejudice of thair trew creditoures salbe reputed and holden dishonest, fals and infamous persones, uncapable of all honoures, dignities, benefices and offices or to pas upoun inquestis or assysses or to beir witnes in judgement or outwith in anye tymes cuming.

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G MacCormack “*Aliud simulatum, aliud actum*” (1987) 104 ZSS (RA) 639

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J MacLeod “Chalk Dust in the Law of Inhibition” (2009) 13 EdinLR 294

J MacLeod “Offside Goals and Induced Breaches of Contract” (2009) 13 EdinLR 278

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GA Mulligan “Double Sales and Frustrated Options” (1948) 65 SALJ 564

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JE Scholtens “Double Sales” (1953) 70 SALJ 22

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HLE Verhagen “The Evolution of *Pignus* in Classical Roman Law, *Ius honorarium* and ‘*Ius novum*’” (2013) *Tjidschrift voor Rechtgeschiedenis* 51

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Scottish Law Commission *Insolvency, Bankruptcy and Liquidation in Scotland* (SLC Consultative Memorandum No 16, November 1971)

Scottish Law Commission *Legal Capacity and Responsibility of Minors and Pupils* (SLC Consultative Memorandum No 65, June 1985)

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G Dolezalek (ed) *Sinclair's Practicks 1540–9* (http://www.uni-leipzig.de/~jurarom/scotland/ dat/sinclair.htm)

W Forbes *Great Body of the Laws of Scotland* (http://www.forbes.gla.ac.uk/)

Roman Law Library (http://droitromain.upmf-grenoble.fr/index.htm)

ABBREVIATIONS

Anderson *Assignation*	RG Anderson *Assignation* (2008)
Anderson "Fraud and Transfer on Insolvency: ta … ta… *tantum et tale*"	RG Anderson "Fraud and Transfer on Insolvency: ta … ta… *tantum et tale*" (2004) 11 EdinLR 187
Ankum *Geschiedenis*	JA Ankum *De Geschiedenis der "Actio Pauliana"* (1962)
Balfour *Practicks*	*The Practicks of Sir James Balfour of Pittendriech* (1754 repr as St Soc 21–2, 1962–3)
Bankton	A McDouall, Lord Bankton *An Institute of the Laws of Scotland* (1751–5, repr as St Soc 41–3, 1993–5)
Becker-Eberhard "§265"	K Becker-Eberhard "§265" in T Rauscher et al (eds) *Münchner-Kommentar zum Zivilprozessordnung, Band 1: §§ 1–510c* (2008)
Beckmann *Nichtigkeit und Personenschutz*	RM Beckmann *Nichtigkeit und Personenschutz: Parteibezogene Einschränkung der Nichtigkeit von Rechtsgeschäften* (1998)
Bell *Comm*	GJ Bell *Commentaries on the Law of Scotland* (7th edn, 1870 ed J M'Laren)
Bell *Prin*	GJ Bell *Principles of the Law of Scotland* (4th edn, 1839 repr 2010)
Bell's Dictionary	G Watson *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890 repr 2012)
BIDR	Bullettino dell'Istituto di Diritto romano
BIDR (NS)	Bullettino dell'Istituto di Diritto romano (Nueva Serie)

Biographie nationale	Académie royale des sciences, des lettres et des beaux-arts de belgique *Biographie nationale* (1866–1968)
Brand "Knowledge and Wrongfulness as Elements of the Doctrine of Notice"	FDJ Brand "Knowledge and Wrongfulness as Elements of the Doctrine of Notice" in H Mostert and M J de Waal (eds) *Essays in Honour of C G van der Merwe* (2011)
Brown *Sale*	MP Brown *A Treatise on the Law of Sale* (1821)
Burns *Conveyancing*	J Burns *Handbook of Conveyancing* (5th edn, 1938)
Carey Miller "A Centenary Offering"	D Carey Miller "A Centenary Offering: The double sale dilemma – time to be laid to rest" in M Kidd and S Hoctor (eds) *Stella Iuris: Celebrating 100 years of the Teaching of Law in Pietermaritzburg* (2010) 96
Carey Miller *Corporeal Moveables*	D Carey Miller with D Irvine *Corporeal Moveables in Scots Law* (2nd edn, 2005)
Carpzov *Responsa*	B Carpzov *Responsa juris electoralia* (1709)
Carpzov *Jurisprudentia forensis*	B Carpzov *Jurisprudentia Forensis Romano-Saxocanonica* (1703)
Chorus *Handelen in strijd met de wet*	JMJ Chorus *Handelen in strijd met de wet: de verboden rechtshandeling bij de romeinse juristen en de glossatoren* (1976)
Cicero *De officiis*	MT Cicero *De officiis* (trans W Miller, 1913)
Coing *Europäisches Privatrecht*	H Coing *Europäisches Privatrecht, Band I: Älteres Gemeines Recht (1500 bis 1800)* (1985)
Craig	T Craig *Jus Feudale* (3rd edn, 1732)
Craig (trans J A Clyde)	T Craig *Jus Feudale* (trans J A Clyde, 1934)

D'Argentré *Commentarii*	B d'Argentré *Commentarii in consuetudenines ducatus Britainniae* (1628)
Dallas *System of Stiles*	G Dallas *A System of Stiles [sic] as now practiced within the Kingdom of Scotland* (2nd edn, 1773–4)
DCFR	C von Bar and E Clive *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference Full Edition* (2009)
De Weijs "Towards an Objective Rule on Transaction Avoidance in Insolvencies"	RJ de Weijs "Towards an Objective Rule on Transaction Avoidance in Insolvencies" (2011) *International Insolvency Review*, doi: 10.1002/iir.196
De Zulueta *Institutes of Gaius*	F de Zulueta *The Institutes of Gaius* (1953) Vol II: Commentary
Degeling "Restitution for Vulnerable Transactions"	S Degeling "Restitution for Vulnerable Transactions" in J Armour and H Bennett (eds) *Vulnerable Transactions in Corporate Insolvency* (2003) 385
Descheemaeker *Division of Wrongs*	E Descheemaeker *The Division of Wrongs: A Historical Comparative Study* (2009)
Dirleton *Doubts*	J Nisbet of Dirleton *Some Doubts and Questions in the Law, especially of Scotland* (1698)
Drummond Young and St Clair *Corporate Insolvency*	JE Drummond Young and J St Clair *The Law of Corporate Insolvency in Scotland* (4th edn, 2011)
Du Moulin *In consuetudines parisienses*	C du Moulin *Secunda pars commentariorum in consuetudines parisienses* (1576)
EdinLR	Edinburgh Law Review

Ernst "Der zweifache Verkauf derselben Sache"	W Ernst "*Der zweifache Verkauf derselben Sache – Bertrachtungen zu einem Rechtsproblem in seiner europäischen Überlieferung*" in E Jakob and W Ernst (eds) *Kaufen nach Römischem Recht: Antikes Erbe in den europäischen Kaufrechtsordnungen* (2008) 83
ERPL	European Review of Private Law
Erskine	J Erskine *An Institute of the Law of Scotland* (7th edn, 1871, ed J B Nicholson)
Evans-Jones *Unjustified Enrichment*	R Evans-Jones *Unjustified Enrichment – Enrichment by deliberate conferral: condictio* (2003)
Favre *Codex Fabrianus*	A Favre *Codex Fabrianus definitionum forensim et rerum in sacro sabadiae senatu tractatarum* (1610)
Flume *Rechtsakt und Rechtsverhältnis*	W Flume *Rechtsakt und Rechtsverhältnis* (1990)
Forbes *Great Body*	W Forbes *Great Body of the Laws of Scotland* (http://www.forbes.gla.ac.uk/)
Forbes *Institutes*	W Forbes *Institutes of the Law of Scotland* Vol I (1722 repr 2012)
Forner Delaygua (ed) *La protección del crédito en Europa*	JJ Forner Delaygua *La protección del crédito en Europa: La acción pauliana* (2000)
Gaill *Tractatus*	A Gaill *Tractatus de manuum iniectionibus impedimentis, sive arrestis imperii* (1586)
Gerhardt *Die systematische Einordnung*	W Gerhardt *Die systematische Einordnung der Gläubigeranfechtung* (1969)
Ginossar *Droit réel, propriété et créance*	S Ginossar *Droit réel, propriété et créance: Élaboration d'un système rationnel des droits patrimoniaux* (1960)

Gloag *Contract*	WM Gloag *The Law of Contract in Scotland* (2nd edn, 1929)
Godfrey *Civil Justice*	A M Godfrey *Civil Justice in Renaissance Scotland* (2009)
Goodman "The Revocatory Action"	BM Goodman "The Revocatory Action" (1934–5) 9 *Tulane Law Review* 422
Goudy *Bankruptcy*	H Goudy *A Treatise on the Law of Bankruptcy* (4th edn by TA Fyfe, 1914)
Gretton "Breach of Arrestment"	GL Gretton "Breach of Arrestment" 1991 JR 96
Gretton "Diligence"	GL Gretton "Diligence" in *The Laws of Scotland: Stair Memorial Encyclopaedia* Vol 8 (1991)
Gretton *Inhibition and Adjudication*	GL Gretton *The Law of Inhibition and Adjudication* (2nd edn, 1996)
Gretton "Ownership and its Objects"	GL Gretton "Ownership and its Objects" (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 802
Grevesmühl *Gläubigeranfechtung*	G Grevesmühl *Die Gläubigeranfechtung nach klassichem römischem Recht* (2003)
Groenewegen *Tractatus de legibus abrogatis*	S à Groenewegen van der Made *Tractatus de legibus abrogatis et inusitatis in Hollandia vincinisque regionibus* (trans B Beinart and ML Hewett, 1987)
Häcker *Consequences of Impaired Consent Transfers*	B Häcker *Consequences of Impaired Consent Transfers* (2009)
Hendry *Conveyancing*	J Hendry *A Manual of Conveyancing in the Form of Question and Answer* (4th edn by J P Wood, 1888)
Hope *Major Practicks*	JA Clyde (ed) *Hope's Major Practicks* (St Soc 3–4, 1937–8)
Hope *Minor Practicks*	T Hope *Minor Practicks, or A Treatise of*

	the Scottish Law (ed A Bayne, 1726)
Hume *Lectures*	D Hume *Baron David Hume's Lectures 1786–22* (ed GCH Paton) (St Soc 5, 13, 15 and 17–9, 1939–58)
JLSS	Journal of the Law Society of Scotland
JR	Juridical Review
Kames *Principles of Equity*	H Home, Lord Kames *Principles of Equity* (3rd edn, 1778)
Kaser *Das römische Privatrecht*	M Kaser *Das römische Privatrecht* (2nd edn, 1971–5)
Kaser *Das römische Zivilprozessrecht*	M Kaser *Das römische Zivilprozessrecht* (2nd edn, revd by K Hackl, 1996)
Kiefner "*Ut lite pendent nil innovetur*"	H Kiefner "*Ut lite pendent nil innovetur*: Zum Verbot der Verfügung über *res* und *actiones litigiosae* im römischen Recht und im gemeinem Recht des 19. Jahrhunderts" in D Nörr and D Simon (eds) *Gedächtnisschrift für Wolfgang Kunkel* (1984) 119
Klein *De inhibitione*	J Klein *De inhibitione iudiciali in causis appellationum* (1705)
Koziol *Grundlagen und Streitfragen*	H Koziol *Grundlagen und Streitfragen der Gläubigeranfechtung* (1991)
Krüger and Kaser "*Fraus*"	H Krüger and M Kaser "*Fraus*" (1943) 63 ZSS (RA) 117
Kupisch *In integrum restitutio*	B Kupisch *In integrum restitutio und vindicatio utilis bei Eigentumsübertragung im klässischen römischen Recht* (1974
MacCormack "*Dolus* in the Law of Early Classical Period"	G MacCormack "*Dolus* in the Law of Early Classical Period (Labeo–Celsus)" 1986 SDHI 236

Mackenzie *Institutions*	G Mackenzie *Institutions of the Law of Scotland* in *The Works of that Eminent and Learned Lawyer, Sir George Mackenzie of Rosehaugh* (1716–22) Vol II, 278
Mackenzie *Jus Regium*	G Mackenzie *Jus Regium* in *The Works of that Eminent and Learned Lawyer, Sir George Mackenzie of Rosehaugh* (1716–22) Vol II, 439
Mackenzie *Observations on the Acts*	G Mackenzie *Observations on the Acts of Parliament, made by King James the First, King James the Second, King James the Third, King James the Fourth, King James the Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second* in *Works* Vol I, 311
Mackenzie *Observations on the 1621 Act*	G Mackenzie *Observations upon the 18th Act of the 23 Parliament of King James the Sixth against Dispositions made in Defraud of Creditors* in *The Works of that Eminent and Learned Lawyer, Sir George Mackenzie of Rosehaugh* (1716–22) Vol II, 1
Mackenzie *Matters Criminal*	G Mackenzie *The Laws and Customs of Scotland in Matters Criminal* (ed O F Robinson, St Soc 59, 2012)
Mackeurtan *Sale of Goods in South Africa*	HG Mackeurtan *Sale of Goods in South Africa* (5th edn, 1984 by GRJ Hackwill)
MacLeod and Anderson "Offside Goals and Interfering with Play"	J MacLeod and R Anderson "Offside Goals and Interfering with Play" 2009 SLT (News) 93
MacLeod "Offside Goals and Induced Breaches of Contract"	J MacLeod "Offside Goals and Induced Breaches of Contract" (2009) 13 EdinLR 278
Maitland *Practicks*	R Maitland *The Practiques of Sir*

	Richard Maitland of Lethington: from December 1550 to October 1577 (Scottish Record Society (NS) 30, 2007)
Mandosi *De inhibitionibus*	Q Mandosi *De inhibitionibus* (2nd edn, 1581)
Marshall *Analysis of the Titles to Land Consolidation (Scotland) Act 1868*	J Marshall *An Analysis of the Titles to Land Consolidation (Scotland) Act 1868* (1868)
McBryde *Bankruptcy*	WW McBryde *Bankruptcy* (2nd edn, 1995)
McBryde *Contract*	WW McBryde *The Law of Contract in Scotland* (3rd edn, 2007)
McKerron "Purchaser with notice"	R G McKerron "Purchaser with notice" (1935) 4 *South African Law Times* 178
Menocchio *De praesumptionibus*	I Menocchio *De praesumptionibus, coniecturis signis et indiciis, commentaria* (1608)
Mevius *Tractatus*	D Mevius *Tractatus iuridicus de arrestis: Ex Iurisconsultorum scriptis et Germaniae legibus* (1686)
Michaels *Sachzuordnung durch Kaufvertrag*	R Michaels *Sachzuordnung durch Kaufvertrag: Traditionsprinzip, Konsensprinzip, ius ad rem in Geschichte, Thorie und geltendem Recht* (2002)
Mousourakis *Fundamentals of Roman Private Law*	G Mousourakis *Fundamentals of Roman Private Law* (2012)
Moyle *Contract of Sale*	JB Moyle *The Contract of Sale in the Civil Law* (1892 repr 1994)
OJLS	Oxford Journal of Legal Studies
Peck *Tractatus*	P Peck *Tractatus de iure sistendi et manuum iniectione, quam vulgo arrestationem vocant* (1665)
Planitz "Studien zur Geschichte des deutschen Arrestprozesses"	H Planitz "Studien zur Geschichte des deutschen Arrestprozesses" (1913) 34 ZSS (GA) 49, (1918) 39 ZSS (GA) 223

	and (1919) 40 ZSS (GA) 87
Pollock *Jurisprudence*	F Pollock *A First Book of Jurisprudence for Students of the Common Law* (6th edn, 1929)
Pothier *Traité de la procedure civile*	RJ Pothier *Traité de la procedure civile* in in *Oeuvres de Pothier* (ed J J Bugnet) Vol 10 (1861)
Pothier *Traité de la procédure criminelle*	RJ Pothier *Traité de la procédure criminelle* in *Oeuvres de Pothier* (ed J J Bugnet) Vol 10 (1861)
Quoniam Attachiamenta	TD Fergus (ed) *Quoniam Attachiamenta* (St Soc 44, 1996)
Reid "Fraud in Scots Law"	D Reid "Fraud in Scots Law" (PhD Thesis, University of Edinburgh, 2012)
Reid *Property*	KGC Reid *The Law of Property in Scotland* (1996)
Reid and Zimmermann *History of Private Law in Scotland*	KGC Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000)
Ross *Lectures*	W Ross *Lectures on the History and Practice of the Law of Scotland: Relative to diligence and conveyancing* (2nd edn, 1822)
RPS	KM Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (http://www.rps.ac.uk)
SALJ	South African Law Journal
Schaffstein "Das Delikt des Stellionatus in der gemeinrechtlichen Strafrechtsdoktrin"	F Schaffstein "Das Delikt des Stellionatus in der gemeinrechtlichen Strafrechtsdoktrin" in O Behrends et al (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 281
Schlinker *Litis Contestatio*	S Schlinker *Litis Contestatio: Eine Untersuchung über die Grundlagen des gelehrten Zivilprozesses in der Zeit vom*

	12. bis zum 19. Jahrhundert (2008)
Schulz *Classical Roman Law*	F Schulz *Classical Roman Law* (1951)
Schulz *Principles*	F Schulz *Principles of Roman Law* (2nd edn trans M Wolff, 1936)
Schwendendörffer *De inhibitione in vim arresti*	BL Schwendendörffer *De inhibitione in vim arresti* (1691)
"Scotstarvet's 'Trew Relation'"	G Neilson (ed) "Scotstarvet's 'Trew Relation'" (1916) 13 *Scottish Historical Review* 380
SDHI	*Studia et Documenta Historiae et Iuris*
Sella-Geusen *Doppelverkauf*	S Sella-Geusen *Doppelverkauf: Zur Rechtsstellung des ersten Käufers im gelehrten Recht des Mittelalters* (1999)
Sinclair *Practicks*	G Dolezalek (ed) *Sinclair's Practicks 1540–9* (http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm)
Skene *Notes*	J Skene *Notes taken from a course of lectures on Scotch law, delivered by Professor David Hume, 1796 and 1797* GUL MS Gen 1113
Smith *Short Commentary*	TB Smith *A Short Commentary on the Law of Scotland* (1962)
Spotiswoode *Practicks*	R Spotiswoode *Practicks of the Laws of Scotland* (1706)
Stair	J Dalrymple, Viscount Stair *The Institutions of the Law of Scotland* (ed DM Walker, 1981)
Stein *Fault in the Formation of Contract*	PG Stein *Fault in the Formation of Contract in Roman Law and Scots Law* (1958)
Steuart *Dirleton's Doubts*	J Steuart *Dirleton's Doubts and Questions in the Law of Scotland Resolved and Answered* (2nd edn, 1762)

Stewart *Diligence*	JG Stewart *A Treatise on the Law of Diligence* (1898)
Stolleis *Juristen*	M Stolleis (ed) *Juristen: Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert* (2001)
Titze "*Rechtsgeschäft*"	H Titze "*Rechtsgeschäft*" in F Schlegelberger (ed) *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* vol 5 (1936) 789
Trayner *Latin Maxims and Phrases*	J Trayner *Trayner's Latin Maxims* (4th edn, 1894 repr 1993)
Van Christynen *In leges mechliniensum*	P van Christynen *In leges municipales civium Mechliniensum notae seu commentationes* (1625)
Van Leeuwen *Commentaries*	S van Leeuwen *Commentaries on the Roman-Dutch Law* (trans Issakszoon, 1820)
Voet *Commentarius ad Pandectas*	J Voet *Commentarius ad Pandectas* (6th edn, 1731)
Voet *Commentaries on the Pandects*	J Voet *The Selective Voet: being the Commentary on the Pandects* (trans P Gane, 1955–8)
Wach *Der italienische Arrestprocess*	A Wach *Der italienische Arrestprocess* (1868)
Walker *Contracts and Related Obligations*	DM Walker *The Law of Contracts and Related Obligations* (3rd edn, 1995)
Webster "The Relationship of Tenant and Successor Landlord in Scots Law"	P Webster "The Relationship of Tenant and Successor Landlord in Scots Law" (PhD thesis, University of Edinburgh, 2008)
Whitty "Indirect Enrichment in Scots Law"	N Whitty "Indirect Enrichment in Scots Law" 1994 JR 200
Whitty "The 'No Profit From Another's Fraud' Rule"	N Whitty "The 'No Profit From Another's Fraud' Rule and the 'Knowing Receipt' Muddle" (2013) 17 EdinLR 37

Willems *Actio Pauliana*	C Willems *Actio Pauliana und fraudulent conveyances: Zur Rezeption kontinentalen Gläubigeranfechtung in England* (2012)
Windscheid *Lehrbuch des Pandektenrechts*	BT Windscheid *Lehrbuch des Pandektenrechts* (9th edn by T Kipp, 1906 repr 1963)
Wortley "Squaring the Circle"	S Wortley "Squaring the Circle: Revisiting the receiver and 'effectually executed diligence'" 2000 JR 325
Zeffert "The Sale of a *res litigiosa*"	D Zeffert "The Sale of a *res litigiosa*" (1971) 88 SALJ 405
Zimmermann *Obligations*	R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (1990 repr 1996)
ZSS (RA)	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*
ZSS (GA)	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung*