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# Fraud on Transfer and on Insolvency: *ta....ta.... tantum et tale?*

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## A. MAXIMS AND PRINCIPLES

Consider three well-known Latin maxims in the Scots law of transfer:

- (i) *nemo plus juris ad alium transferre potest quam ipse haberet*
- (ii) *assignatus utitur jure auctoris*
- (iii) *tantum et tale.*

The first is a basic principle of property law. A transferor cannot give a better right to the transferee than he had himself.<sup>1</sup> The second is said to be peculiar to the law of assignation:<sup>2</sup> the *debtor cessus* can raise all defences against the assignee that he could have raised against the cedent.<sup>3</sup> The third maxim is seen to be a principle

<sup>\*</sup> I would like to thank Peter Webster and an anonymous referee for helpful comments.

1 The principle is elementary and probably older than the classical Roman law where it was thus formulated: D 50.17.54; D 20.1.3.1. See also J Voet, *Commentarius ad Pandectas*, 2nd edn (1707, transl P Gane 1956) 20.6.8. In Scotland, and indeed in England, the same principle is often expressed as *nemo dat quod non habet*.

2 *Scottish Widows Fund v Buist* (1876) 3 R 1078 at 1082 per Lord President Inglis; Scottish Law Commission, Consultative Memorandum on *Defective Consent and Consequential Matters* (Scot Law Com CM No 42, 1978) para 3.137.

3 *Robertson v Wright* (1873) 1 R 237 at 243 per Lord Ardmillan; G Watson (ed), *Bell's Dictionary and*

of insolvency law: the creditors cannot have any greater right than the debtor. Are these maxims helpful? The first principle is core to the transfer of property. Yet it is formulated negatively. That the transferee cannot have a better right than his author is interesting; but it is surely as important to know what rights the transferee acquires as what rights he does not.<sup>4</sup> The *assignatus* principle applies to the tripartite situation involved in the transfer of a claim. But the maxim has been applied to transfers of land,<sup>5</sup> and, shorn of the “*assignatus*” prefix – as it was originally in Scots law<sup>6</sup> – the maxim may be applied generally to all transfers: the transferee takes *jure auctoris*, he exercises the rights of his author.<sup>7</sup> This is but a positive formulation of *nemo plus*.<sup>8</sup> Similarly, although *tantum et tale* tends to be used only where creditors are involved<sup>9</sup> (such as to describe the rights of an arrester<sup>10</sup> or other judicial assignee,<sup>11</sup> or the position of a trustee in sequestration), it has also been employed to describe the effect of a voluntary assignment.<sup>12</sup>

The same principles that regulate the transfer of real rights regulate the transfer of personal rights. The only difference is in formulation. What is more contentious, however, is whether the principles which regulate voluntary transfers also apply to transfers which occur by force of law. There are no reasons in principle why there should be differences. But if some authorities were taken at face value, a more complicated and perhaps unintelligible picture would emerge. With Lord

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*Digest of the Law of Scotland*, 7th edn (1890) 74; J Trayner, *Latin Maxims and Phrases* 4th edn (1894, reprinted 1986 and 1993) 53.

- 4 Cf P Birks, “Definition and division: a meditation on Institutes 3.13”, in P Birks (ed), *Classification of Obligations* (1997) 1.
- 5 *Governors of Heriot’s Trust v Caledonian Railway Company* 1915 SC (HL) 52 at 62 per Lord Dunedin. Feudalism provided a tripartite relationship that made the *assignatus* maxim attractive.
- 6 Eg Stair, *Inst*, 3rd edn, by J Gordon and W Johnstone (1759) 1.10.16. There is no mention of the maxim even in abbreviated form in the first or second editions of Stair. The textual variations were the subject of full argument in *Scottish Widows Fund v Buist* (1876) 3 R 1078. Cf Bankton, *Inst* 3.1.8. The first reference to the full maxim, “*assignatus utitur jure auctoris*”, traced by the writer is relatively late: *Irvin v Osterbye* (1755) Mor 1,715 at 1,716, 6 March 1755 FC. The first institutional writer to refer to the full *assignatus* maxim is Erskine, *Inst* 3.5.10. Erskine’s *Institute* was first published, posthumously, in 1773.
- 7 Cf H Jackson (ed), *Latin for Lawyers* (1915, reprinted 2000) 127, no 77.
- 8 Cf K G C Reid, *The Law of Property in Scotland* (1996) (henceforth Reid, *Property*) para 660: “The *assignatus utitur* rule has no general application in property law but is confined to the transfer by assignment of personal rights”. Compare J S Muirhead, *An Outline of Roman Law* (1937) 150 and *Redfearn v Sommervails* (1805) 5 Pat 707 at 710 per Lord Bannatyne, viewing *assignatus* as synonymous with *nemo plus*.
- 9 J Graham Stewart, *Law of Diligence* (1898) 128, 620 ff; *Greenlees v Port of Manchester Insurance Co Ltd* 1933 SC 383 at 400 per Lord Justice-Clerk Alness; *Cheltenham & Gloucester plc v Sun Alliance & London Insurance plc* 2001 SLT 347; *Aitken v Independent Insurance Co* 2001 SLT 376 at para 4 per Lord Macfadyen.
- 10 See the arguments for the defender in *McCubbins v Ferguson* (1715) Mor 10,215 at 10,216.
- 11 *Chamber’s JF v Vertue* (1893) 20 R 257.
- 12 *Gairdners v Royal Bank of Scotland* 22 June 1815 FC per Lord President Hope. Cf *Livingstone v Allan* (1900) 3 F 233.

Rodger's speech in *Burnett's Tr v Grainger*<sup>13</sup> comes an opportunity to clarify many of the problems that surround the rules of competition. Some of the confusion is attributable to the Scots lawyer's focus on Latin maxims rather than underlying legal principle;<sup>14</sup> but much stems simply from inherent complexity. The topics involved are notoriously difficult: fraud, trusts, diligence and insolvency. When Lord Meadowbank encountered this subject, he cautioned, "I am afraid to speak of this case with too much confidence. It goes deep into principle."<sup>15</sup> He was not wrong.

## B. FRAUD AND TRANSFER

Scots law has a wide and general principle of fraud. As McBryde points out, fraud is an example of where damages in delict are available for pure economic loss.<sup>16</sup> Erskine describes fraud as "any machination or contrivance to deceive".<sup>17</sup> With such breadth and flexibility, however, comes imprecision. In the case of a double sale, for example, the transferee's knowledge of prior rights has been labelled "bad faith". And bad faith has been equated with fraud. But is the transferee's fraud really the same as the fraud of the person transferring to him, which was criminalised by the Stellation Act of 1540?<sup>18</sup> Stellation was perpetrated by the seller, not the buyer.<sup>19</sup> Similarly the rules regarding the preservation of a bankrupt's assets for the benefit of his creditors are linked to fraud. The *actio Pauliana* no doubt developed from the painful experience of desperate debtors *vergens ad inopiam* dissipating their assets to friends and family with a view to frustrating the claims of lawful creditors.<sup>20</sup> Yet dispositions made in good faith could still be considered

13 [2004] UKHL 8, 2004 SC (HL) 19.

14 A Rodger, "The use of Civil Law in the Scottish courts", in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition in Scots Law* (1997) 225 at 234-235. That said, Latin is usually a language particularly suited to articulating legal ideas. In the twenty-first century, while the decline of Latinity may be understandable, the attack on its use in the courts by those who should know better is not; in Lord Rodger's words it is "not only patronising but simplistic": see "A time for everything under the law: some reflections on retrospectivity" (2005) 121 LQR 57 at 66.

15 *Redfean v Sommervails* (1805) 5 Pat 707, Mor "Personal and Real" App No 3, *sub nom Sommervails v Redfean* 22 November 1805 FC. Lord Meadowbank's opinion is only to be found in Paton's report of the appeal to the House of Lords in 1813: (1813) 5 Pat 707 at 710.

16 W W McBryde, *The Law of Contract in Scotland*, 2<sup>nd</sup> edn (2001) (henceforth McBryde, *Contract*) para 14-73.

17 Erskine, *Inst* 3.1.16.

18 APS, c 23; 12mo, c 105.

19 See R G Anderson, "Offside goals before *Rodger Builders*" 2005 JR 277.

20 The classic text is J A Ankum, *De Geschiedenis der Actio Pauliana* (1962). There is much to be gained from this seminal work. It was recently cited to the Privy Council in a Jersey Appeal, *Snell v Beadle* [2001] UKPC 5, [2001] 2 AC 304, where the opinion of the Board was given by Lord Hope of Craighead. See too *In re Esteems Settlement* [2002] JLR 53. It is to be regretted that Ankum did not consider Scots law in his companion work, *De Pauliana buiten Faillissement in het Nederlandse Recht sedert de Codificatie* (1962). English law is briefly mentioned.

fraudulent. Take the genuine gift. No motive is apparent other than love, favour and affection. But, if the donor quickly becomes bankrupt, such a gratuitous alienation is deemed fraudulent,<sup>21</sup> the fraud being perpetrated against creditors who are entitled to exact their dues from the bankrupt's assets.

If this were not enough, we must also observe the complex historical development of the effect of fraud on transfer. In modern law, fraud is a vice of consent and not a real vice: "Fraud is no *vitium reale* affecting the subject but only the committer of the fraud and those who are partakers of the fraud".<sup>22</sup> It does not, therefore, transmit against onerous singular successors.<sup>23</sup> The position in Roman law and in the *jus commune*, which was influential in Scotland,<sup>24</sup> is more confused. The post-Justinianic Civil Law distinguished fraud giving rise to the contract<sup>25</sup> and incidental fraud.<sup>26</sup> This the medieval lawyers distilled from a passage by Ulpian.<sup>27</sup> If the contract was one *bonae fidei* as opposed to *stricti juris*, fraud giving rise to the contract rendered it null.<sup>28</sup> In contracts *stricti juris* either the *actio de dolo* or the *exceptio doli* was available, irrespective of the type of fraud.<sup>29</sup> Fraud giving rise to the contract also prevented property from passing, and the defrauded party could still vindicate.<sup>30</sup>

At one time this post-Justinianic view was widely held,<sup>31</sup> especially by those who required a valid underlying *causa* for transfer.<sup>32</sup> It was not without its problems. In the first place, it proceeded on a distinction which has no counterpart in modern law, *viz* between contracts *bonae fidei* and contracts *stricti juris*.<sup>33</sup> Secondly, no

21 Bankton's strikingly modern phrase is, "statutory presumptive fraud": Bankton *Inst* 1.10.85.

22 Stair, *Inst* 1.9.15; Reid, *Property* para 616 (W M Gordon).

23 Stair, *Inst* 1.9.10, 4.35.19; *New Mining and Exploring Syndicate v Chalmers and Hunter* 1912 SC 126; *Clydesdale Bank v Paul* (1877) 4 R 626; *Gibbs v British Linen Co* (1875) 4 R 630.

24 See eg *Schuermans & Sons v Goldie* (1828) 6 S 1110 at 1113 per Lord Alloway; but compare Lord Justice-Clerk Boyle and Lord Glenlee at 1114-1115.

25 *Dolus dans causam contractui*: J Trayner, *Latin Maxims* (n 3) 68. Cf R J Pothier, *Traité des obligations* (1761) § 31.

26 *Dolus incidens in contractum*.

27 D 4.3.7.pr. See R Zimmermann, *The Law of Obligations* (1990) 667 ff; L van Vliet, "Iusta causa traditionis and its history in European private law" (2003) *European Review of Private Law* 342 at 350; N Whitty, "Indirect enrichment in Scots Law" 1994 JR 200 and 239 esp at 256 ff.

28 See Zimmermann, *Obligations* 662 ff. The Civil Law position is recounted by Lord Brougham in *Attwood v Small* (1838) 6 Cl & Fin 232 at 444-445, (1835-40) 7 ER 684 at 764.

29 Zimmermann, *Obligations* 663. The absence of the *exceptio doli* in modern South African law was only determined by the Appellate Division in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

30 *Allan Stewart & Co v Creditors of James Stein* (1788) Mor 4,949 and 14,218, Hailes 1059. See, in particular, Lord Monboddo's opinion. The case was reversed on appeal but this understanding of fraud was not doubted.

31 For example by Voet, *Commentarius ad Pandectas* (n 1) 4.3.3.

32 These are discussed in George Joseph Bell's posthumously published work, *Inquiries into the Contract of Sale of Goods and Merchandise* (1844) 120 ff.

33 Both Stair, *Inst* 1.10.11 and Bankton *Inst* 1.11. 20, 22 observe that the peculiarities of Roman contract

distinction was made between vices of consent and real vices.<sup>34</sup> Yet to characterise fraud as a real vice is impractical: commerce would be impeded. Thirdly, much depended on *justa causa*. The role accorded to this doctrine varies from legal system to legal system and views may vary in any one legal system, as in Scotland.<sup>35</sup> Fourthly, conduct which might be labelled fraudulent in the civil courts might not be criminal (and perhaps *vice versa*).<sup>36</sup> Fifthly, conduct that would now be described as undue influence,<sup>37</sup> negligent misrepresentation, force and fear,<sup>38</sup> facility and circumvention<sup>39</sup> or bad faith<sup>40</sup> have all been treated as “fraud” in earlier Scots law.

Sources referring to fraud and its effect on purchasers and creditors must, therefore, be approached with caution. Is the fraud genuine? When was the case decided? Was it decided at a time when the prevailing view was that fraud was a real vice? This vague notion of fraud translated into vague appeals to the *tantum et tale* maxim.

### C. *BURNETT’S TR v GRAINGER*

The facts of *Burnett’s Tr v Grainger*<sup>41</sup> are well-known. Heritable property was sold. The seller delivered a disposition. The disposition remained unrecorded for some fifteen months. In the interim the seller was sequestrated and the trustee recorded a notice of title. The question was whether both the heritage and the price were available to the seller’s creditors. On general principles of property law the answer was in the affirmative. But the controversial decision in *Sharp v Thomson*,<sup>42</sup> on one interpretation, clouded what was once clear. In *Burnett’s*

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law were not adopted in Scots law, though they do not explicitly advert to the Roman distinction. Cf *Estate Schickerling v Schickerling* 1936 CPD 269 at 275-276.

34 Cf McBryde, *Contract* para 13-08: “In relation to nullities the early Scots lawyers were practical. There was no point in attacking a transaction as null, if the implementation of the transaction was not also invalidated”.

35 The prevailing view is that the doctrine is not part of Scots law: D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) paras 8.08 ff; Reid, *Property* paras 611 and 612. But compare McBryde, *Contract* paras 13-01 ff.

36 See generally B Gill, *The Crime of Fraud: A Comparative Study* (Unpublished PhD thesis, University of Edinburgh, 1975), esp ch 12. Cf *Muir Wood and Co v Moore and Kidd* (1869) *Guthrie’s Sheriff Court Reports* vol 1, 444 at 445 per Sheriff Guthrie: “[I]t cannot affect the question of civil right in this case that [the alleged fraudster] suffered a punishment on his own confession as for breach of trust”.

37 *Wright and Ritchie v Murray* (1746) Mor 4,952.

38 See J E du Plessis, “Force and Fear”, in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 101 at 118-119; J E du Plessis, *Compulsion and Restitution* (Stair Society vol 51, 2004).

39 *Anderson v Spence* (1683) Mor 10,286; *Allison v Bothwell* (1696) Mor 4,954.

40 See *Morison’s Dictionary*, s v “Bona et Mala Fides”.

41 2004 SC (HL) 19.

42 1997 SC (HL) 66.

*Tr* the sheriff principal adopted the view, deriving from *Sharp*, that “property” equals “beneficial interest”.<sup>43</sup> On appeal, the Inner House distinguished *Sharp* and adhered to general principle,<sup>44</sup> and this view prevailed in the House of Lords. The property was held to be available for division among the seller’s unsecured creditors. The content of the speeches varied. The English judges appeared perplexed by the idea of undivided *dominium* that prevails in Scotland and, for that matter, throughout much of Europe. The Scottish Law Lords, Lords Hope and Rodger, gave speeches that were, to some extent, unexpected. For present purposes, it is Lord Rodger’s speech that is of interest. His Lordship approached the question from the perspective of knowledge of prior rights and, in particular, the effect of such knowledge on creditors. This question is intimately linked with the *tantum et tale* doctrine; one much debated, and perhaps much misunderstood, in the Scottish sources.

Lord Rodger’s speech is veritable *tour de force*. This note cannot do it justice. The results of his analysis are, generally, to be welcomed. Lord Rodger identifies with admirable clarity the guiding principle, one which, hitherto, had not been properly articulated:<sup>45</sup>

And it is because [the trustee in sequestration] is treated as an adjudging creditor, and not merely as a purchaser, of the debtor’s heritable estate that the trustee can set out to destroy the rights of uninfert purchasers of that estate by inferting himself before they do. A purchaser could not do this: *Rodger (Builders) v Fawdry* 1950 SC 583.

“The requirement of good faith”, he adds later, “applies only to purchasers”.<sup>46</sup>

#### D. TRUSTEES IN SEQUESTRATION

The act and warrant awarded to a trustee in sequestration is but a collective diligence for the benefit of the bankrupt’s creditors. In *Burnett’s Tr*, Lord Rodger went to considerable trouble to trace the development of the *tantum et tale* principle and its effect on diligence creditors. As he pointed out, there has been considerable oscillation of views in respect of the trustee in sequestration’s position.<sup>47</sup>

43 2000 SLT (Sh Ct) 116.

44 2002 SC 580.

45 2004 SC (HL) 19 at para 111. Cf Lord Hope’s speech at para 26.

46 At para 144.

47 With the result that many cases faced with competing claims struggle to identify a proper basis on which to proceed: see, for example, *Halifax plc v Gorman’s Tr* 2000 SLT 1409. Even that great protagonist of equity in Scots law, Lord Kames, would not have gone as far as some of the *dicta* in the *Halifax* case. As Kames himself observed in a competition case: “I cannot discover in the laws of any country, that equity has been carried so far. And it would make a great innovation in law that has not been dreamed of”: *Duke of Norfolk v Annuitants of York Buildings Company* (1752) Kames Sel Dec 1 at 2, (1752) Mor 7,062 at 7,063, Elchies, *Competition* No 12.

*Bona fide* purchasers cannot be prejudiced by their author's fraud. If, therefore, a trustee in sequestration were viewed as a *bona fide* purchaser, the position would be clear: the assets transferred to the trustee would not be affected by the fraud of the bankrupt.<sup>48</sup> But some pre-*Burnett* sources did not recognise creditors to be in such a position. There are numerous *dicta* to the effect that, because he takes *tantum et tale*, a trustee in sequestration "cannot have a greater right than the bankrupt".<sup>49</sup> At one time *tantum et tale* was referred to as a "general principle".<sup>50</sup> Later the principle was said not to be different from maxims invoked to describe other transfers.<sup>51</sup> This was followed by the somewhat arbitrary assertion that the doctrine applies only to moveables.<sup>52</sup> It is therefore not surprising that some writers are careful never to use the term. Others, however, use it freely;<sup>53</sup> and, on one view, *tantum et tale* plays a central role in the Scots law of insolvency.<sup>54</sup> Often the maxim is employed in situations that could equally be governed by the brocards *nemo plus* or *utitur jure auctoris*; but there are also cases where *tantum et tale* is used in the specific sense that creditors cannot "take advantage"<sup>55</sup> of the

- 48 *Edmund v Mags of Aberdeen* (1855) 18 D 47 at 58 per Lord Deas. But compare Lord Deas' lone dissenting opinion in *Wyper v Harveys* (1861) 23 D 606 at 625 and his opinion in *Watson v Duncan* (1879) 6 R 1247 at 1252.
- 49 Cf W W McBryde, *Bankruptcy*, 2nd edn (1995) (henceforth McBryde, *Bankruptcy*) paras 9-24-9-29. See too *Watt v Finlay* (1854) 8 D 529; *Littlejohn v Black* (1855) 18 D 207; *Davidson v Boyd* (1868) 7 M 77 at 78 per Lord Kinloch; *Dundee Calendering Co v Duff's Tr* (1869) 8 M 289 at 296 per Lord Deas; *Abbott v Mitchell* (1870) 8 M 791 at 794 per Lord Deas, 797 per Lord Kinloch; *Forbes' Tr v McLeod* (1898) 25 R 1012 at 1015 per Lord McLaren; *Lord Napier and Ettrick's Tr v Lord de Saumarez* (1899) 1 F 614 at 618 per Lord President Robertson; *National Bank of Scotland v City Commercial Restaurant* (1902) 10 SLT 7 at 7 per Lord President Balfour; *Paul's Trs v Paul* 1912 2 SLT 61; *Campbell v Carphin* 1925 SLT (Sh Ct) 30.
- 50 *Thomson v Douglas Heron & Co* (1786) Mor 10,229 and 10,299, *sub nom Thomson v Creditors of Armstrong* (1786) Hailes 1002.
- 51 *Mansfield v Walker's Tr* (1835) 1 Sh & McL 203 at 339 per Lord Brougham.
- 52 *Watson v Duncan* (1879) 6 R 1247 at 1252 per Lord Deas. But cf *Heritable Reversionary Co Ltd v Miller* (1891) 18 R 1166 at 1170 per Lord Adam.
- 53 For a recent example, see *Jackson v Laurieston Homes (Howwood) Ltd* [2005] CSOH 7, 2005 GWD 10-146. It is perhaps no coincidence that, in some of the more controversial cases in Scots insolvency law (especially those dealing with the interaction between trusts and insolvency), repetitions of the *tantum et tale* mantra reverberate: *Heritable Reversionary Co Ltd v Miller* (1891) 18 R 1166 rev (1892) 19 R (HL) 43; *Smith v Liquidator of James Birrell Ltd* 1968 SLT 174; *Sharp v Thomson* 1994 SC 512 at 503, 521 per Lord Penrose.
- 54 R Rennie, "The race to the registers revisited" (2005) 50 JLSS July/53; W W McBryde, *Bankruptcy* para 9-24. In its Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot Law Com No 68, 1981) para 11.22 the Scottish Law Commission described the *tantum et tale* rule as an "equitable and adaptable" principle and, more recently, the Commission has recommended the principle's retention: Report on *Diligence* (Scot Law Com No 183, 2001) paras 3.70-3.71.
- 55 Cf *Colquhoun's Trs v Campbell's Trs* (1902) 4 F 739 at 744 per Lord Kinnear: "There was a gross fraud, and the creditors cannot take advantage of it without making themselves art and part in the crime. It is a general rule of law and morals that nobody can wilfully take advantage of a fraud for his own benefit without making himself *particeps criminis*, and therefore a trustee cannot claim for the creditors the advantage of a fraud of the bankrupt". Compare the opinion of the same judge in *Gamage Ltd v Charlesworth's Trs* 1910 SC 257 at 264. See too Sir George Mackenzie, *Observations on the 28th Act of 23rd*



bankrupt's fraud. These cases require the defrauded creditor to be returned to his pre-fraud position without having to rank as an ordinary unsecured creditor. But fraud is a personal obligation. And a bankrupt debtor, by definition, cannot fulfil his personal obligations. Preferring the fraud creditor over other personal creditors is, therefore, quite arbitrary. What is given to one must be taken from many.

In some *tantum et tale* cases, it is unclear how the trustee in sequestration was viewed. If the "take advantage" cases are correct, the trustee cannot be a *bona fide* onerous transferee. We can therefore sympathise with Lord Westbury who, when confronted with a Scotch appeal on the issue, characterised the trustee as a gratuitous alienee.<sup>56</sup> That could not be correct. Unusually, three distinguished Scottish judges later criticised Lord Westbury's speech. Two did so in the House of Lords,<sup>57</sup> while the third was no less a figure than Lord President Inglis.<sup>58</sup> Lord Westbury's approach was, however, shared by one of the most gifted (if at times unreliable) jurists of the time, Lord McLaren.<sup>59</sup> But whatever may be the correct category to place a trustee in sequestration, the trustee cannot be categorised as a gratuitous alienee.

In a case not cited by the House of Lords in *Burnett's Tr*, the First Division considered the position of a trustee in sequestration in some detail. The case is

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*Parliament of James VI* (1687) 100-102, quoted by Bell, *Commentaries*, 7th edn (1870) II, 184 n 4; M P Brown, *Treatise on the Law of Sale* (1821) para 599, IV: "[creditors] cannot lawfully profit by the fraud of their debtor". See too the cases cited in n 49 above.

<sup>56</sup> *Fleming v Howden* (1868) 6 M (HL) 113 at 121.

<sup>57</sup> *Bank of Scotland v Hutchison, Main & Co* 1914 SC (HL) 1 at 17 per Lord Shaw of Dunfermline, following Lord Watson in *Heritable Reversionary Co Ltd v Miller* (1892) 19 R (HL) 43. J Burns, "English and Scottish bankruptcies" (1913) 29 LQR 460 at 462 confidently ventured that "Certainly no Scottish lawyer can be got to subscribe to Lord Westbury's dictum that a trustee in bankruptcy is only a 'gratuitous alienee'". Disapproval of Lord Westbury's speech extends beyond his reference to "gratuitous alienee". His suggestion that "an obligation to do an act with respect to property creates a trust" was described by Lorimer as "a hare whose course was devious and not to be followed": see J C Lorimer, "*Tantum et tale* in Scots bankruptcy law" (1914) 26 JR 429 at 436.

<sup>58</sup> First, in *Graeme's Trs v Giersberg* (1888) 15 R 691; and, again, on 14 July 1891, when he sat in his last week at the head of the First Division: *Heritable Reversionary Co Ltd v Miller* (1891) 18 R 1166 at 1181-3. Lord Inglis died on 20th August 1891. His passing was noted by H Goudy in his critical note of the First Division's decision at (1891) 3 JR 365. Though Goudy was complimentary as to Lord Inglis' reasoning, at one and the same time he felt able to argue that the decision should be reversed by legislation. That legislation became unnecessary as a result of direct intervention by Goudy who, as counsel for the appellants in their successful appeal to the House of Lords, persuaded the House to reverse the Division: see (1892) 19 R (HL) 43.

<sup>59</sup> *Don's Tr v Cameron* (1885) 22 SLR 348 at 350; *National Bank of Scotland v Dickie's Tr* (1895) 22 R 740 at 754; *Heritable Reversionary Co Ltd v Miller* (1891) 18 R 1166 at 1173; *Forbes' Tr v McLeod* (1898) 25 R 1012 at 1015; *Livingston v Allans* (1900) 3 F 233 at 237-238. And see, in particular, *William Morton & Co v Muir Bros* 1907 SC 1211 at 1223: "Assuming a trustee in bankruptcy takes no higher right than that of a gratuitous alienee (which I take to be the meaning of the expression *tantum et tale*) was the trustee in this case affected by the condition ..."; and at 1225: "I think it is perfectly clear that the trustee in bankruptcy is bound by any personal condition which limits the condition of the bankrupt". See also the opinion attributed to Lord McLaren by J Burns in "English and Scottish bankruptcies" (1913) 29 LQR 460 at 463 but which this writer has failed to trace.

*Graeme's Trs v Giersberg*.<sup>60</sup> A Mrs Giersberg entered into an antenuptial marriage contract, which conveyed her whole estate, heritable and moveable, present and future, in trust, *inter alia*, for her aliment. Her brother, Patrick, was one of the trustees. Mrs Giersberg became entitled to a legacy. As a trustee, Patrick was obliged to ensure that the legacy was assigned in terms of the marriage contract. This required intimation of the assignation to the testator's executors. But instead of intimating the assignation, Patrick arrested the legacy for debts allegedly due to him by Mrs Giersberg.<sup>61</sup> He then became bankrupt. Patrick's trustee in sequestration claimed the legacy. Mrs Giersberg argued that Patrick's failure to intimate was a gross breach of trust from which the trustee could not benefit. The question thus arose for decision: how was the trustee's position to be characterised? Lord President Inglis refused to follow Lord Westbury's view that a trustee in sequestration was a gratuitous alienee:<sup>62</sup>

The position of the trustee in sequestration does not seem to me to differ from that of any other assignee as regards a claim of this kind. The claim is in the nature of a *nomen debiti* – an incorporeal moveable right which passes by assignation – and therefore the trustee is in no better position than an onerous assignee ... but I should only like to say that I am not inclined to go so far as Lord Westbury does [in *Fleming v Howden*] in describing the position of a trustee in a sequestration as being the same as that of a "gratuitous alienee". I should rather put it in this way – that a trustee in sequestration is in no better position than an onerous assignee who has bought a debt.

Unfortunately there is no positive assertion that a trustee in sequestration *is* an onerous *bona fide* transferee, only that he is *no better than* an onerous transferee. At best, this wording is an indication that a trustee in sequestration is not to be considered as different from an onerous *bona fide* alienee. At worst, the *dictum* suggests that a trustee in sequestration is somewhere between a gratuitous transferee and a *bona fide* one.<sup>63</sup> That is an unsatisfactory answer. It tells us nothing about the principles that should be applied on competition.

In the event, Lord Inglis came to the somewhat incongruous conclusion that, although the trustee was not a gratuitous alienee, he was subject to the debtor's personal obligations: "If the bankrupt had used the arrestments he would have committed a breach of trust, and I do not think the trustee can do what would

60 (1888) 15 R 691.

61 For the converse situation, where a creditor purports to arrest a claim against himself, see: R Kelbrick, "Malice in Wonderland" (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 232. With the exception of an earnings arrestment, it is not possible for an arrester to arrest in his own hands.

62 (1888) 15 R 691 at 694-695.

63 This approach is taken by Lords Gillies, McKenzie, Medwyn and Corehouse in *Mansfield v Walker's Tr* (1833) 11 S 813 at 822. See also McBryde, *Bankruptcy* para 9-24: "The principle remains that a trustee in bankruptcy cannot have the same rights as a *bona fide* purchaser for value".

have constituted a breach of trust in the bankrupt”.<sup>64</sup> Yet it is indisputable that an onerous *bona fide* assignee (with which Lord Inglis, on one interpretation, groups a trustee in sequestration) would have been in an unimpeachable position.

Lord Shand, in contrast, took the argument that a trustee is an onerous transferee to its logical conclusion:<sup>65</sup>

The right to raise action and do diligence for the recovery of debt is a legal incident of the right to the debt. It arises as a common law right in favour of all creditors against their debtors, and the pursuer [the trustee in sequestration] in using the arrestment in question is availing himself of that right only. Having an unqualified right to the debt, why shall he be prevented from doing so? Because it is said that the bankrupt could not have effectually used an arrestment. The answer to that argument – an answer I humbly think sound – is this, that the objection to an arrestment by the bankrupt is personal – a personal bar which applies to him individually because of the duty or personal obligation which lay upon him ...; but although he failed in his duty – and his failure might give rise to a claim of damages ... – yet (1) this obligation in no way affects or binds the trustee for his creditors, who is not bound to fulfil personal obligations of the bankrupt – least of all obligations arising out of the bankrupt holding the office of a trustee; and (2) that the duty and obligation which affected and affect the bankrupt were not in any sense inherent qualifications of the right which the trustee in sequestration acquired under the Bankrupt Statute. So there is nothing to deprive him of the ordinary remedy of a creditor for recovery of his debt.

Lord Shand’s approach appears to this writer sound. It is also consistent with the leading case of *Mansfield v Walker’s Trs*<sup>66</sup> and with later House of Lords authority.<sup>67</sup>

### E. ASSIGNEES: AN EXCEPTION?

In *Burnett’s Tr*, Lord Rodger states that while creditors need not, purchasers must, be in good faith.<sup>68</sup> But that helpful principle does not directly address the purchaser’s position. What, precisely, are his rights? Assuming a purchaser is in good faith, can he take the object transferred free of the transferor’s personal obligations? In particular, is a good faith assignee subject to his author’s fraud?

The paradigm assignment involves three parties: cedent, assignee and debtor. It is still a transfer and as such should be subject to the general principles which affect all transfers. Admittedly, matters are complicated slightly because the object

64 (1888) 15 R 691 at 695. It is implicit in this approach that if Patrick had simply not known of the bequest, or had failed to intimate or arrest, his creditors could have benefited. Cf *Colquhoun’s Tr v Campbell’s Tr* (1902) 4 F 739.

65 At 697.

66 (1833) 11 S 813 affd (1835) 1 Sh & McL 203; *sub nom Stewart’s Trs v Walker’s Trs* 3 Ross LC 139.

67 *Edmond v Gordon* (1858) 3 Macq 116 at 131 per Lord Wensleydale.

68 2004 SC (HL) 19 at para 144, discussed at C. above.

of the transfer is a personal right, so that defences arising out of the relationship which gave birth to the claim being assigned may be raised by the debtor against any subsequent assignee. But vices (such as fraud) perpetrated by an assignee against a cedent are different. They give rise to personal obligations, but personal obligations that are unrelated to the personal rights which are the object of transfer. Fraudulent conduct which induces a transfer may render the transfer voidable. Or again, a transfer in breach of an obligation not to transfer may be voidable. Such voidability may be pled against the immediate transferee (subject to the requirements of the offside goals rule) but not against subsequent transferees.

Nevertheless it has long been suggested that assignation of claims is exceptional: the claim of a defrauded fourth party (e.g. an earlier cedent in the transfer chain), it is argued, can be pled against even *bona fide* onerous singular successors. Stair writes:<sup>69</sup>

But in personal rights the fraud of authors is relevant against singular successors though not partaking or conscious of the fraud when they purchased; because assignees are but mere procurators, albeit *in rem suam*: and therefore they are in the same case with their cedents, except that their cedents' oaths after they were denuded, cannot prejudice their assignees.

If, however, assignees are mere procurators, why does Stair describe the cedent as being “denuded”? The contradiction lays bare the incoherence of the *procuratio* analysis of assignation. Either claims can be transferred or they cannot. And in Scots law they can be; the language of *procuratio* being clothing and cosmetics. Stripped of that superficial exterior there is a concept of substance: the idea of transfer.

Yet the *procuratio* analysis, outdated and artificial as it is, endures. Indeed the most recent exponent of the view that an assignation is nothing more than a *procuratio in rem suam* is Lord Rodger himself.<sup>70</sup> Such an approach is, with respect, unhelpful. Scots law never needed the *procuratio* analysis to explain assignation. Like French customary law, assignation or cession – i.e. outright transfer – had long been sanctioned. In making references to *procuratio*, Stair sought to bring the Scottish history into line with the Civilian history of cession. That treatment, however, was inconsistent with the existing body of Scots law. Bell, for example, strongly criticises Stair's view.<sup>71</sup>

Once it is accepted that assignation is a transfer (as it always has been in Scots law), then the position with regard to fraud should, in principle, be no different than with other assets. A transfer induced by fraud or made fraudulently may be

69 Stair, *Inst* 4.40.21. See also Gosford's report of *Duff v Fowler* (1672) Mor 10,282.

70 *Caledonia North Sea Ltd v London Bridge Engineering* 2000 SLT 1123 at 1140A.

71 Bell, *Commentaries*, 2nd edn (1810) 150, note n; 3rd edn (1816) I, 182; 7th edn (1870) I, 303.

voidable, but a reduction cannot affect subsequent onerous transferees.

The history of fraud in Scots law has been charted by Professor McBryde.<sup>72</sup> For present purposes, however, attention can be focussed on a decision of 1772, *McDonnells v Carmichael*.<sup>73</sup> D was indebted to A1. A1 assigned this claim to A2. A2 then assigned to A3. A3 was in good faith and gave value. A1 then sought to reduce the assignation he had granted to A2 on the basis of fraud. A3 claimed his position was unassailable. The pursuers pointed to the distinction between fraud giving rise to the assignation (*dolus dans*) and incidental fraud (*dolus incidens*). Fraud of the former type rendered the transfer null and void. The assignee, A3, it was argued, was thus unprotected.<sup>74</sup> The fraud argument was typical for the times. It was a broad-axe approach. No distinction was made between void and voidable conveyances. Although multifarious conduct of a generally wrongful nature could amount to “fraud”, once that imperceptible line was crossed and the conduct labelled “fraudulent”, that, so to speak, was that. The fraud had to be undone and the whole transaction would be brought tumbling down.

Such reasoning, however, is unsophisticated. It ignores a crucial fact: since the time when the assignation induced by fraud had been granted to A2, A2 had assigned to an onerous transferee, A3. No one would countenance A3 being prejudiced if the transfer were of land or goods. The rationale would be that the effect on commerce would be catastrophic. Yet claims are more moveable and tradable than goods, to say nothing of land. Claims have considerable economic value. As a starting point, then, we would expect at least the same protection to be accorded

<sup>72</sup> *Contract* paras 14-93 to 14-101. See also W W McBryde, “Error”, in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 72. McBryde suggests that the court probably first gave effect to the law as articulated by Stair in *Burden v Whitefoord of Dunduff* (1742) Elchies, *Fraud* No 11. This case, however, can only be fully understood in the light of Lord Pitfour’s opinion in *McDonnells v Carmichael* (1772) Mor 4,974, Hailes 513 (discussed in the text). *Burden* apparently involved a reduction of a disposition elicited from one Kennedy while he was drunk, “in so far as the property was not vested in a third party by infestment”. Since the third party transferee was not infest, there was no problem with reduction. There was no *bona fide* onerous transferee. Although it was customary to refer to the holder of an unrecorded disposition as an “uninfest proprietor”, such a description was a misnomer: an unregistered holder was not owner and could not become owner without registration. The other relevant case is *Irvin v Osterbye* (1755) Mor 1,715, but the facts are ambiguous.

<sup>73</sup> (1772) Mor 4,974, Hailes 513.

<sup>74</sup> *Resolutio jure dantis resolvitur jus accipientis* (the right of the giver having ceased or become void, the right of the receiver ceases also). This apparent principle was not an accurate statement of the law of transfer then, nor is it one now. The only detailed consideration of it is in Kilkerran’s report of *Heron v Stewart and Hawthorn* (1749) Mor 1,705, Kilkerran 389, Elchies, *Fraud* No 21, affd (1749) 1 Craigie, Stewart and Paton 432. But the court’s reasoning is not without its problems. The maxim is also invoked in *Livingston v Menzies* (1705) Mor 14,004; *Sinclair v Shaw* (1739) 5 Br Sup 658, Elchies, *Arrestment* No 11, Kilkerran 36; *Countess of Moray v Stewart* (1772) Mor 4,392; *Elliot v Wilson* 9 February 1826 FC; *Johnstone-Beattie v Dalzell* (1868) 6 M 333 at 346 per Lord Ardmillan. Cf T Huc, *Commentaire théorique et pratique du code civil* (1894) vol VII, 299-300; P Malaurie and L Aynès, *Droit civil: obligations*, 11th edn (2001) vol 3, para 82.

to onerous assignees of claims as to transferees of other assets. That assignees should receive less protection from extrinsic fraud is inexplicable.

The court in *McDonnells* may have been alive to these concerns. On Stair's view of assignation as a mere *procuratio*, however, the answer was clear: if each assignee was but a procurator – a representative – of the cedent, then it was readily understandable that any assignee, no matter how remote, would be subject to attack if any prior assignee had procured his transfer by fraud. So, in *MacDonnells*, the court granted reduction. Lord Kames, though not dissenting, was perplexed by the effect of the decision:<sup>75</sup>

The difference between the case of *nomina debitorum* and the other cases is this, and it is mentioned by Lord Stair, – An assignee is nothing else than a procurator *in rem suam*. Hence, in England, at this day, an assignee must pursue in the name of his cedent. With us an assignee is now held to have the total right. In that respect the law has changed. Why should not the effects of assignations also be changed? For want of this change, our law is, in one particular, a sort of hotch-potch; but we cannot help that.

Lord Kames' protest that he "could not help" the decision is uncharacteristically deferential.<sup>76</sup> It was a point he had investigated.<sup>77</sup> He appreciated that, but for Stair, there was little basis for the *procuratio* theory of assignation in Scots law. On the contrary, there was a considerable strand of opinion that *bona fide* onerous assignees took free from the claims of fourth parties. Although the authorities were not altogether consistent, the issues had been well and long appreciated. It was the analysis of assignation as a *procuratio* that was problematic. That analysis became orthodox only in 1681 when it was embossed with Stair's seal of approval in the *Institutions*.

There is, however, at least one detailed statement before 1681 of the irrelevance of fourth party pleas to a *bona fide* assignee. It is not widely known and may thus justify a lengthy quotation:<sup>78</sup>

But if he be an assignee for a cause onerous and not *participes fraudis*, knowing nothing of the back-bond, it is not easy to comprehend how the back-bond or trust can be

<sup>75</sup> Hailes 513 at 514. For decisions where extrinsic fraud affected a subsequent *bona fide* assignee, see *Monteith and his Factor v Captain Douglas and his Factor* 8 November 1710, Forbes Dec; *Wylie v Duncan* (1803) Mor 10,269, 3 Ross LC 134 at 137 per Lord President Campbell.

<sup>76</sup> Kames was not the last judge to balk at contradicting Stair. Lord Dunedin's speech in *Carmichael v Carmichael's Exx* 1920 SC (HL) 195 is perhaps the best-known, and least-successful, attempt to reconcile what was decided with Stair's stated opinion.

<sup>77</sup> H Home, Lord Kames, *Principles of Equity*, 3rd edn (1825) 264.

<sup>78</sup> *Anent Trusts and Back-Bonds* (1677) 3 Br Sup 185. The writer owes this reference to Professor Paisley: see M J de Waal and R R M Paisley, "Trusts", in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 846 n 224. It is not clear whether this is a report of a decided case. The report opens, "This case was started among the advocates...". For a modern example where an alleged "back-letter" was pled against an assignee, see *The Herald*, 4 August 2003, 3 ("Pensioner to launch £1m action over ex-husband's estate").

obtruded or declared against him, so as to clog his right; for what was there in law to put him *in male fide* to bargain and contract with that person whom he found to have the sole and undoubted right of the lands or bond standing in his person? How could he without divination know it was only a trust, and that there was a back-bond; there having been no intimation of it [i.e. the trust] to him, no inhibition served upon it to put the lieges in male fide, or to ascertain that there is such a thing? And if such latent deeds were regarded, there could be no commerce nor freedom in bargaining anent rights. Yea, though the back-bond was registrate, yet that cannot be esteemed a sufficient intimation, since that registration is not *necessitatis*, but only “*actus merae voluntatis*”; and the lieges are not bound to search for it because there is no law enjoining the registration of such back-bonds as necessary, and so no law obliges one to take notice of him. Where a man gets an assignation to a bond and puts his assignation in the register, that will not be such an intimation as will hinder another party from taking a second assignation to that same bond and from being preferred if he intimate first, notwithstanding the registration; for registration is not by our law a sufficient way of intimation, unless where a special statute has declared and determined it shall be so, as in the case of registration of seasines [*sic*] by the Act of Parliament of 1617.

This analysis was advanced for its time. There is also little doubt that it was an analysis that was not universally accepted – as *McDonnells v Carmichael* shows. But it was the view that, correct in principle, was subsequently to prevail in the House of Lords in *Redfearn v Sommervails*.<sup>79</sup> It is no coincidence that George Joseph Bell first compared the relative claims of a *bona fide* onerous assignee and a fourth party asserting a latent right only in the third edition of his *Commentaries*, published in 1816, shortly after the decision in *Redfearn*:<sup>80</sup>

Recollecting the principles upon which assignations were originally admitted, it will not appear wonderful that persons acquiring, by assignation, the rights to debts, and other *jura incorporalia*, should be considered as coming precisely into the place of the cedent, and as liable, of course, to all the personal exceptions pleadable against him. In that way arose the maxim, “*assignatus utitur jure auctoris*” which has so often been misunderstood, and held to imply a responsibility like that of an heir.<sup>[81]</sup> But this doctrine, in so far as it has been considered as applicable to any other exceptions than those competent to the debtor in defence against the claim, should not be held good in the present day, when the whole aspect of the law relative to assignations, is altered; and when, instead of being a mere procurator of the original creditor, the assignee is considered as a proper purchaser, holding a *cessio in jure*, as against the defender, the full *jus obligationis*, transferred by intimation as property is by delivery.

There is, then, no reason why a predecessor’s “fraud” should prejudice an onerous singular successor. There is also no reason to assume that Lord Rodger’s speech in *Burnett* was limited to the transfer of heritable property. Indeed the

79 (1813) 1 Dow 50.

80 *Commentaries*, 3rd edn (1816) I, 184; 4th edn (1821) I, 223-224. By the fifth edition (1826), as Bell developed his treatment, this had been relegated to a footnote: I, 284 n 2; see also McLaren’s edition, the seventh, of 1870: I, 302 n 5.

81 Who would take, Bell might have said, *tantum et tale!* But the heir’s position requires consideration of the doctrine of universal succession.

“seminal” case on which his argument was founded concerned an assignment.<sup>82</sup> Lord Rodger’s approach is unitary. He examines the principles of the law of diligence and their interaction with the law of transfer generally, irrespective of the nature of the asset being transferred. Assignations must not be viewed as exceptional for the law of transfer: indeed Stair (despite frequent references to Civil Law analyses in terms of *procuratio*) viewed assignation as the paradigm form of transfer.<sup>83</sup>

## F. PURCHASERS AND CREDITORS

“As to *bona fides*, although *male fides* may cut down a right, *bona fides* cannot establish a right”.<sup>84</sup> This principle is core: it is, George Gretton observes, part of property law’s DNA.<sup>85</sup> How does Lord Rodger’s principle – that purchasers need to be in good faith though creditors do not<sup>86</sup> – fit this analysis? What is the difference between a creditor and purchaser? Suppose Stuart Seller contracts to sell property to Brian Buyer. At this point there are reciprocal obligations: Stuart to transfer, and Brian to pay. These obligations are discharged, contingently, by performance: the disposition is delivered and the money is paid.<sup>87</sup> By virtue of the missives, Brian may well be characterised as a “purchaser”. But as soon as that

82 *Bell v Gartshore* (1737) Mor 2,848, 5 Br Sup 198, 2 Ross LC 410, discussed by Lord Rodger in *Burnett’s Tr v Grainger* 2004 SC (HL) 19 at para 113.

83 Stair, *Inst* 1.1.23.

84 *Mitchells v Ferguson* (1781) Mor 10,296, 3 Ross LC 120, Hailes 879 at 880 per Lord Justice-Clerk Braxfield. This *dictum* mirrored counsel’s submissions: 3 Ross LC 120 at 123. Francis Jeffrey colourfully sketched the nature of the principle in his powerful and eloquent submissions for the pursuer in the important, but anonymous, case reported only by R Bell, *Report of a Case of Legitimacy under a Putative Marriage, tried before the Second Division of the Court of Session, February 1811* (1825) 41: “In all cases it has been shown, that *bona fides*, however strong, cannot create or give any right whatever. It may keep alive what has been struck with a mortal wound, but it cannot raise from the dead or bring into existence what did not exist before”. The Second Division divided equally and the case then settled. One of the judges Jeffrey did persuade was Lord Newton, who stated (at 168): “[*Bona fides*] may be a good plea against *male fides*, but it cannot alter the true rights of the parties. It cannot make white black, nor black white, right wrong nor wrong right”. Powerful as Jeffrey’s submissions were, he met his match in junior counsel for the defender, his close friend, Thomas Thomson. There is much to be learned from the submissions of counsel in this case, which are a joy to read. In *Menzies v Menzies* (1863) 1 M 1025 at 1037, Lord Neaves described the plea of *bona fides* as “a shield and not a sword. It is not meant to injure the other party, but to protect the party pleading it...”

85 G L Gretton, “Equitable ownership in Scots law?” (2001) 5 EdinLR 73 at 76 n 23.

86 *Burnett’s Tr v Grainger* 2004 SC (HL) 19 at para 144. See C. above.

87 The content of the seller’s obligation has never been properly focussed. Is it to deliver a disposition? Burnett had done so. If delivery of a disposition is the sum total of the seller’s obligation, then Burnett discharged his obligation on delivery. On the seller’s insolvency, on this analysis, the buyer who fails to register would not only lose the price and the house but would have no claim in the seller’s sequestration. This cannot be correct. The contract, therefore, is for the transfer of the real right of ownership. If transfer is prevented for reasons attributable to the seller – such as the seller’s sequestration or inconsistent disposition – a claim for breach of the missives arises.



contract comes into existence, Brian Buyer is no longer just a purchaser. He also becomes a creditor. Indeed, a creditor, by definition, is the holder of a personal right.<sup>88</sup> *All purchasers are creditors.*<sup>89</sup> And a purchaser is a creditor who can use diligence: indeed, the use of diligence – by adjudication in implement<sup>90</sup> – was once a common method of implementing the missives. Where does this leave Lord Rodger’s principle? On the one hand the purchaser, *qua* purchaser, must be in good faith; on the other, the purchaser, *qua* creditor, need not be. Put another way, Lord Rodger’s principle – that purchasers must be in good faith, creditors need not be – discriminates against those creditors who happen to be purchasers. The distinction, long discernible in the sources, is illogical and unhelpful. Separating the position of purchasers from creditors does not assist in analysis of the role of good faith in transfer.

The reason is simple: good faith is for the law of contract not the law of transfer. The so-called “offside goals rule” has been extended beyond sensible boundaries. Good faith is only relevant at the moment of contract. Privileges may be accorded to the good faith *purchaser*. Purchase – sale – is a contract. As Stair pointed out, knowledge (of any sort) acquired after conclusion of the contract is not relevant;<sup>91</sup> while anterior knowledge must be certain: private knowledge is also probably irrelevant.<sup>92</sup> Provided the buyer is in good faith when he enters into the contract,<sup>93</sup> his position may not be attacked thereafter. After conclusion of the missives, the

88 This was the whole point of *Burnett’s Tr*: The Graingers could not claim the property because they did not have a real right. As matters stood, the Graingers were in the invidious position of an unsecured creditor – hence the action. A heritable creditor may have a subordinate real right, but that real right must be held in security of a debt.

89 Of course, not all creditors are purchasers.

90 Adjudication in implement is merely a “judicial disposition to supply the voluntary disposition promised” (Stair, *Inst* 4.51.9). An adjudication in implement will found an application for registration in the Land Register: A Rennie and I Davis (eds), *Registration of Title Practice Book*, 2nd edn (2000) para 6.50. See Rules of the Court of Session 1994, form 13.2-B(21) for a style conclusion for adjudication in implement. Neither heritable creditors nor other competitors are entitled to lodge defences to an action of adjudication in implement. For sheriff court procedure, see Sheriff Courts (Scotland) Act 1907 s 5A.

91 *Inst* 1.14.5, 4.40.21. See generally, Anderson (n 19).

92 *Inst* 2.1.24. See too T M Taylor, “Bona et Male Fides”, in Lord Dunedin et al (eds), *Encyclopaedia of the Laws of Scotland* (1927) vol 2 para 675: “Mere uncertainty is not sufficient to induce male fides and generally there must be some sort of legal interpellation (J Rankine, *The Law of Landownership in Scotland*, 4th edn (1909) 81). In some cases, *bona fides* had been held to cease from the date of citation in an action in which the defender’s grounds of belief are contradicted or challenged, but in general *bona fides* will not be held to cease till after the first judgement setting it aside has been pronounced, provided this judgment stands without being altered through the various stages of the litigation. In cases where the point is attended with difficulty, *bona fides* will not be held to cease till the ultimate judgment setting it aside has been pronounced (*Cleghorn v Elliot* (1842) 4 D 1389).” With respect, Lord Rodger’s approval of *Alex Brewster & Sons Ltd v Caughey* 2002 GWD 15-506 in *Burnett’s Tr v Grainger* 2004 SC (HL) 19 at para 142 was not only incorrect but also inconsistent with his own decision in that case. Cf R Wintgen, *Etude critique de la notion d’opposabilité* (2004) 212-213.

93 This may be problematic where, as is the regrettable modern practice, missives take weeks to conclude. Is good faith required throughout?

purchaser is a creditor. And, as Lord Rodger rightly concluded, creditors need not be in good faith.

### G. GRATUITOUS TRANSFEREES

Perhaps Lord Rodger meant that all creditors *except purchasers* are relieved of the requirement of good faith. “Purchase” and “credit” imply onerosity. Suppose, then, there is good faith but no consideration? Normally a transfer for no consideration may be subsequently impugned irrespective of the *bona fides* of the transferee in the event that the transferor becomes insolvent. But is good faith relevant? A purchaser, having provided consideration, must, in addition, show good faith. What of a donee? One would not expect a donee to be in a better position than a purchaser. If the donation is spontaneous, i.e. there is no prior promise to make it, the answer, on Lord Rodger’s analysis, remains elusive. But suppose Davey Donor promises to give Rima Lucrativa his house. The obligation is reduced to writing. Davey has undertaken a binding legal obligation which Rima can enforce. In other words, though a donee, Rima is also a creditor. Even if Rima subsequently learns that Davey had already promised to give the house to another, Rima is a creditor and she can adjudge in implement.<sup>94</sup>

### H. REVERSING HERITABLE REVERSIONARY?

The decision of the House of Lords in *Heritable Reversionary Co Ltd v Miller*<sup>95</sup> sits, at best, uneasily with the general principles of Scots property law. It may be that the decision is no longer consistent even with the English law on which it was based, for English law has since embraced the mandatory publicity of land rights.<sup>96</sup> *Heritable Reversionary*, on the other hand, disregards the publicity principle. The

94 In *Laurie v Laurie* (1854) 16 D 860, the pursuer failed to record before the seller’s bankruptcy. The pursuer sought to enforce this *jus ad rem* by adjudication in implement, an action the Second Division peremptorily refused. Lord Justice-Clerk Hope remarked (at 863) that he “was sorry to see the point disturbed at all... the deed founded on... is nothing more than a good personal obligation. The pursuer acknowledges this by adopting the form of adjudication in implement and unless we reverse the whole law, we cannot hold that the right can compete with the statutory right of the trustee”.

95 (1892) 19 R (HL) 43. The facts were these. A property investment company acquired land. The manager of the company took title in his own name but subsequently executed a declaration of trust in favour of the company. The trust was not, however, recorded in the Register of Sasines. The manager then became bankrupt. His trustee in sequestration took the view that the property fell into the sequestration; the company argued the property was held in trust and should not be divided among the general creditors. The property was sold and the proceeds consigned. The Court of Session held that a latent trust of land could not prejudice creditors and so the proceeds should be distributed *pari passu*. The House of Lords reversed: the trustee held under a “bare trust” and the company was the “beneficial owner” of the land. The entire proceeds were therefore given to the company.

96 See B Rudden and F H Lawson, *The Law of Property*, 3rd edn (2002) 104.

beneficial interest theory<sup>97</sup> Lord Watson sought to introduce into Scots law has its origins in Equity. The very existence of Equity as a separate system of law is barely consistent with publicity. Equitable rights tend to be latent rights. The *tantum et tale* doctrine attempts to give effect to such latent rights. But a system, like Scots law, that has for so long been jealous of publicising land rights cannot tolerate a principle like *Heritable Reversionary*. In *Burnett's Tr*, Lords Hoffmann and Hobhouse were absolutely correct to highlight the *Heritable Reversionary* anomaly.<sup>98</sup> In elevating the exception to a rule, however, they drew the wrong conclusion. The only way to deal with the *Heritable Reversionary* doctrine is to extirpate it.

But, if that is correct, how are trusts to be accommodated? Two points can be made about the effect of *Burnett's Tr* on trusts. The first is one of general principle. In *Heritable Reversionary* it was said that personal creditors of the trustee cannot attach trust property because they take *tantum et tale*.<sup>99</sup> This is insufficient. If creditors do not need to be in good faith post-*Burnett*, then diligence creditors would not be affected by a trustee's latent personal obligation to a beneficiary. But this does not mean that personal creditors can now attach trust property. The explanation lies in the doctrinal basis of the law of trusts. Trust assets are not attachable by the trustee's personal creditors because trust assets are held in a different patrimony. The trustee's private creditors may only attach assets which are held in the trustee's private patrimony.<sup>100</sup> That is the general principle. To this extent, therefore, *Burnett's Tr* is welcome. For it fortifies the patrimony theory as a doctrinal basis of the trust in Scots law, a theory long discernible in the Scottish sources which has been well articulated by George Gretton<sup>101</sup> and taken up by the Scottish Law Commission.<sup>102</sup> That said, however, the principles of trust law must yield to legal policy. Owners of land who hold *as trustees* should publicise the nature of their holding on the register. If they do so, trust law can prevail; if not – and despite the decision in *Heritable Reversionary* – trust law cannot. Third parties cannot be prejudiced by a beneficiary's latent right. So, where trusts of land are kept secret, it should be possible for the trustee's personal creditors to do diligence against the land; and, if the trustee becomes insolvent, the land should

97 The theory even found its way into the order issued by the House ([1892] AC 598 at 625): "...declared that the subjects in question did not pass to the respondents, and that the appellants, *as beneficial owners*, are entitled to the sum consigned in Bank" (emphasis added).

98 *Burnett's Trs* (n 13) at paras 6-7 and at para 53 respectively.

99 (1892) 19 R (HL) 43

100 See Bankruptcy (Scotland) Act 1985 s 33.

101 See in particular G L Gretton, "Trusts without equity" (2000) 49 ICLQ 599.

102 Scottish Law Commission, Discussion Paper on *The Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) paras 2.16-2.28.

fall into the trustee's sequestration.<sup>103</sup>

The second point is a specific one. Suppose a trustee conveys in breach of trust. The grantee is protected unless he is in bad faith or took gratuitously.<sup>104</sup> If the transferee gave value, the beneficiaries are protected: the consideration, by real subrogation, will be held in the trust patrimony. Subject to one exception, the obligation of a bad faith transferee to retransfer property in his possession is indefinite. It will never prescribe.<sup>105</sup>

## I. RELIANCE ON THE REGISTER

Why are *bona fide* purchasers given such favourable treatment? In *Burnett's Tr*, Lord Rodger opened his analysis with an account of the historical development of the law:<sup>106</sup>

At an early stage it was accepted that *bona fide* purchasers were not affected by personal rights of the seller which were not recorded in the register. After all, such purchasers could be taken to have consulted the register and to have proceeded on the information about the seller's title to be found there. The same could be said of creditors who insisted on the debtor providing them with a heritable security. Both groups transacted on the faith of the register. But, it was argued, creditors who used adjudication to obtain a security over their debtor's property were different. They had originally chosen to lend money or to transact with the debtor either without taking any security at all or else on the basis of a personal security, such as caution from a third party. At all events, these creditors had not relied on the debtor's land for security and had not therefore relied on his title to the land as set out in the register. So, if it turned out that the debtor had entered into personal obligations relating to the land, such creditors could not claim to have been misled by the unqualified nature of his title in the deeds recorded in the register. If they proceeded to adjudicate their debtor's property, there was therefore no reason why they should be in any better position than the debtor himself on whom they had chosen to rely: they should take his property *tantum et tale*, subject to any personal

103 This whole issue is under consideration by the Scottish Law Commission: see Discussion Paper on *The Nature and Constitution of Trusts* paras 4.29 ff.

104 Trusts (Scotland) Act 1961 s 2. Admittedly s 2 does not require good faith or consideration, but the residual, common law, offside goals rule does. It should be emphasised that third parties who take an assignation in breach of trust are not protected by s 2. Assignations by trustees are covered by the Trusts (Scotland) Act 1921 s 4(1)(h). Section 2 of the 1961 Act, however, does not cover s 4(1)(h) of the 1921 Act. But onerous assignations are protected by the decision in *Redfearn v Sommervail* (1813) 1 Dow 50.

105 Prescription and Limitation (Scotland) Act 1973 Sch 3 para (f). The exception relates to assignations in breach of trust. Only the obligation to re-transfer *property* in the transferee's *possession* is imprescriptible. The objects of assignation are claims, not things. And claims, at least in this writer's view, cannot be possessed: they are incorporeal. This leads to the conclusion that an obligation to retrocess a claim procured by fraud can prescribe. Cf Bankruptcy (Scotland) Act 1985 s 55(2)(c): a bankrupt will never be discharged from obligations arising from his fraudulent acts.

106 *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 112. For the views of one of the major proponents of this approach, see the opinion of Lord McLaren in *Heritable Reversionary Co Ltd v Miller* (1891) 18 R 1166.

obligations, including obligations to unfeft purchasers, that affected his right to the property. So ran the argument that was eventually to fail – but only after a valiant fight by its proponents.

To say that only purchasers rely on the register is as unrealistic as attempts to draw a distinction between creditors and purchasers are artificial.<sup>107</sup> The register is there for all to see.<sup>108</sup> The register may be consulted and relied upon for any number of reasons of which purchase may be but one. In any event, the purchaser who has checked the register has acted properly. A purchaser is affected by what is on the register, by some off-register real rights,<sup>109</sup> and by some statutory rights.<sup>110</sup> Personal rights, whatever their basis, are a different matter. To allow latent personal rights to affect ownership of land is inconsistent with the rationale underlying registration. The *tantum et tale* doctrine is attractive to litigators: anything and everything becomes arguable. But endless litigation, and the uncertainty and expense which that engenders, is not something which the law of transfer ought to endure.<sup>111</sup>

Where the asset is a personal right, there is no register to consult. But the same principles apply. Latent fourth party rights (or, indeed, the extrinsic defences held by the *debitor cessus*) cannot affect onerous transferees. Similarly, latent fourth party rights or extrinsic defences cannot affect creditors. Trusts do not fit neatly into the doctrinal analysis, for they are often latent and normally constituted in a document extrinsic to a personal right which creditors may seek to arrest. But the law is clear. If there is a trust, then, all other things being equal, the trust must be given effect. Consequently, claims which the common debtor holds in trust are not available to the common debtor's personal creditors.

107 Cf *Lindsay v Webster* (1841) 4 D 231 at 234 per Lord Moncreiff.

108 Unlike, for example, in German law, where a “legitimate interest” is necessary (*Grundbuchordnung* § 12: “Die Einsicht des Grundbuchs ist jedem gestattet, der ein *berechtigtes Interesse* darlegt...”). In modern Scots law, it must be conceded, while anyone can look, all there is to see is the title sheet.

109 In particular, short leases and servitudes.

110 See R R M Paisley, “Real rights: practical problems and dogmatic rigidity” (2005) 9 EdinLR 267.

111 Cf *Hastie and Jamieson v Arthur* (1770) Hailes 381 per Lord Pitfour: “It is a rule as old as the Romans and adopted by every commercial nation – *traditionibus, non nudis pactis, dominia transferuntur*. Every nation will deal confidently with us if that be the rule: but otherwise no nation will trust us. Every private hypothec must be ruinous. It is said that an arrester cannot take a subject but *tantum et tale* as in the debtor: Does that imply that all the latent obligations of the debtor go along with the subject? The proof is not relevant. Merchants, who have lost by trusting to consignments, will be of one opinion: merchants who have prevailed upon arrestments, will be of another, – for every man thinks his own cause is right. I would require the judgment of courts or the opinion of writers, that such is the established practice: but nothing of this kind is offered.” It must be observed, of course, that English law does not seem to have suffered from its ready willingness to equate an agreement to transfer to an executed transfer. See too J van den Sande, *De Actionum Cessione* (transl P C Anders as *Commentary on Cession of Actions*, 1906) 240.

## J. CONCLUSIONS

“Words are not spells, though spells may be in words”.<sup>112</sup> The words “*tantum et tale*” carry no magic but their effect has often been mystical: one party, otherwise unsecured, ends up running away with a proportion of the bankrupt’s assets to the prejudice of the general body of creditors. To concede a preference in a hard case of “fraud” is to fail to treat like cases alike:<sup>113</sup> for which unsatisfied creditor has not been treated harshly?<sup>114</sup> Hardship is hardship is hardship; but “an argument does not gain force in proportion to the vehemence with which it is uttered”.<sup>115</sup> Insolvency is manifestly unfair: hence the principle of *paritas creditorum*. It is not for the faint-hearted. Hard decisions must be made. Meekly according a preference to the party who shouts loudest is no basis for a law of competition. While a legal system may adopt an incremental approach to the division of assets on insolvency,<sup>116</sup> this is not Scots law: “It is a rule established, beyond all memory, that there are no equities in competitions among creditors”.<sup>117</sup> *Burnett’s Tr* focuses the issues. Claimants reciting the *tantum et tale* mantra can no longer expect to make off with assets that should be distributed *pari passu*.

112 T Weir, “Difficulties in transposing directives” (2004) *Zeitschrift für Europäisches Privatrecht* 595 at 611.

113 Cf D N MacCormick, *Legal Reasoning and Legal Theory*, 2<sup>nd</sup> edn (1994).

114 See, above all, G L Gretton, “Ownership and insolvency” (2004) 8 *EdinLR* 389.

115 Attributed to Sir Henry de Villiers by G A Mulligan, “Bellum juridicum (3): purists, pollutionists and pragmatists” (1952) 69 *SALJ* 25, and accentuated by J S Scholtens, “Difficiles nugae: once again double sales” (1954) 71 *SALJ* 71 at 86.

116 Cf S Worthington, “Integrating Equity and the Common Law” (2002) 55 *CLP* 223 at 237.

117 *Mansfield v Walker’s Tr* (1833) 11 S 813 at 828 per Lord Craigie. See also *Duke of Norfolk v Annuity-tants of York Buildings Co* (1752) *Mor* 7,062; *Kames Sel Dec 1*; *Elchies, Competition No 12* per Lord Kames in his title on the contents page. This approach is preferable to that of Lord President Inglis in *Taylor v Charteris & Andrew* (1879) 7 R 128 at 131. In *Raymond Harrison & Co’s Tr v North Western Securities* 1989 *SLT* 718 and *Burnett’s Tr v Grainger* 2002 *SC* 580, arguments based on equity were rejected by Lord Clyde and the Inner House respectively.