Trust Beneficiaries and Third Parties

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Trust Beneficiaries and Third Parties

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Preface

This book is an amended version of my doctoral thesis, *Trust Beneficiaries and Third Parties*. The thesis was submitted to the University of Edinburgh in March 2021, examined in June and awarded in December of the same year. Insofar as they impact its subject matter, the book takes into account the significant changes made to the law by the Trusts and Succession (Scotland) Act 2024. At the time of writing the 2024 Act had yet to be brought into force.

The book, and the thesis upon which it is based, have as their principal purpose a consideration of the juridical nature of a beneficiary's right in a trust. As will quickly become clear, that issue is soluble only by reference to the relation between the beneficiary and third parties to the trust. Much of the book is accordingly concerned with two groups of third parties, transferees of trust property and trust creditors, whose relation to the beneficiary is capable of providing an indication of the nature of that beneficiary's right. This study requires a consideration of some of the most difficult issues in the law of trusts, including the position of a party who receives trust property in breach of trust (or in breach of the trustee's fiduciary duty) and the rationale for the protection of trust property from personal creditors of the trustee. Although the book does not seek to provide comprehensive answers to these questions it does, it is hoped, provide a starting point from which they may be answered. If this can serve as a basis for further scholarship in this area, so worthy of further research, then the book will have achieved one of its principal aims.

Many people have made an invaluable contribution to the process of writing of this book. For their patience, generosity and constant encouragement, my first and greatest thanks are due to the supervisors of the thesis, Kenneth Reid and David Fox. I am also very grateful to my examiners, Dan Carr and Jill Robbie, for their helpful comments. I owe a further debt of gratitude to Kenneth Reid as the editor of the *Studies in Scots Law* series in which this book is published. Last, but certainly not least, thanks to Colin Lilburn, whose support and friendship has made the journey through an often abstruse part of the law far more enjoyable than it might otherwise have been.

Finally, I gratefully acknowledge the generous (and, given the subject matter, perhaps fitting) support of the Edinburgh Legal Education Trust. Without that assistance, this book could never have been written.

Patrick Follan
London
October 2023

Table of Cases

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Abbreviations

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PART I

THEORETICAL BACKGROUND

1 Introduction

A. CONCEPTUAL FUNDAMENTALS

1-01. This book is about the juridical nature of the beneficiary's right in a trust. Its central contention is that the beneficiary's right is properly characterised as a personal right against the trustee. In advancing that argument, particular reference is made to the relationship between the beneficiary and third parties to the trust, including transferees of trust property and personal creditors of the trustee seeking to have recourse against that property.

1-02. It is necessary at the outset to explain the nature of the inquiry into the beneficiary's right in general and the relevance of the relationship between beneficiaries and third parties to that inquiry in particular.

(1) Juridical nature

1-03. Rights in private law are of two kinds: real and personal. Real rights involve a relationship between a person and a thing. They are typically conceived as exigible against all comers. Personal rights, by contrast, involve a relationship between two (or more) persons and are, accordingly, generally exigible only by and against the persons involved in that relationship. A right must normally occupy one category or another. In recent times, however, there have been a number of attempts to engraft on to this orthodox distinction a third category of rights which are neither wholly real nor wholly personal. As will be seen, these attempts have often been motivated by a desire to explain the nature of the beneficiary's right in a trust.

1-04. It is against this conceptual background that the inquiry at the centre of

this book proceeds. The work is concerned to describe the juridical nature of the beneficiary's right in a Scottish trust; in other words, it seeks to state whether that right is either real or personal, or whether it might instead fall in some respects outside that traditional and binary distinction. It is thus principally a work of doctrine, although the process of demonstrating the emergence of particular ideas and structures involves much historical and theoretical inquiry. Comparison is also made with certain other legal systems which recognise the trust, particularly where they represent or have represented a significant influence on Scots law.

(2) Beneficiaries and third parties

1-05. It will be apparent from the foregoing discussion that the characterisation of a right as real, personal or intermediate has to do with its exigibility, that is, its capability of affecting a person other than the rightholder. It is for this reason that the relationship between beneficiaries and third parties is relevant: that relationship is indicative of the juridical nature of the beneficiary's right. Of course, the analysis is not so straightforward as to compel (for example) the conclusion that the right must be real if the beneficiary is capable of proceeding against a third party. But the notion that real rights are exigible against all, and personal rights not, provides a principled basis from which to analyse the nature of the beneficiary's right.

1-06. At this juncture it is necessary to address a preliminary objection to the assessment of the nature of the beneficiary's right by reference to the relationship between that beneficiary and third parties. This objection is that such an analysis is necessarily circular: the nature of the right conditions the beneficiary's relationship with third parties yet is in turn conditioned by that relationship.

1-07. The problem of circularity is not insurmountable. It may be overcome by adopting a particular view of the beneficiary's right as a starting point and testing the appropriateness of that view according to the existing rules governing the relationship between beneficiaries and third parties. That approach is taken here, with the starting point that the beneficiary's right is a personal right against the trustee.

(3) Transferees and creditors

1-08. There are two rules with which the view that the beneficiary's right is personal in nature must be reconciled: first, the ability of that beneficiary to proceed in certain circumstances against a third-party transferee of trust property or debtor to the trust and, second, the protection of the trust property from the personal creditors of the trustee. It is necessary to say something more

about these rules, and the challenge each presents for the characterisation of the beneficiary's right as personal.

1-09. In some circumstances a beneficiary may maintain a claim against a third party who receives trust property from a trustee acting in breach of trust[1] or in breach of fiduciary duty.[2] Further, a beneficiary may sometimes sue a trust debtor (that is, a party who has incurred a personal obligation to the trust by, for example, wrongfully damaging trust property).[3] If the beneficiary's right is merely personal, such claims are, *prima facie,* problematic: how can a third party be implicated in a purely personal relationship between beneficiary and trustee? Answering this question necessitates a detailed consideration of the circumstances in which a claim may be brought against a third party and the substantive basis of those claims.

1-10. Also well established in Scots law is the proposition that trust property is protected from the personal creditors of the trustee, whether acting by way of diligence or in the trustee's sequestration.[4] This rule also presents serious explanatory difficulties for the view that the beneficiary's right is personal in nature: creditors, as persons distinct from their debtor, should not be affected in this way by personal rights exigible against the debtor, including the personal right of the beneficiary against the trustee. How such a rule can be reconciled with a conception of the beneficiary's right as personal in nature again requires a detailed consideration of its terms and substantive basis.

1-11. The book seeks to demonstrate that the view of the beneficiary's right as personal is compatible both with the capacity of beneficiaries to pursue a transferee of trust property and also with their entitlement to have preserved the trust property on the personal insolvency of the trustee. Indeed, it will be shown that not only is the view of the beneficiary's right as personal in nature able to be reconciled with rules on transferees of trust property and on insolvency but that it also allows for a functioning law of trusts which does no violence to the fundamental doctrines of private law.

(4) Other indicators?

1-12. As will be seen, the need to account for the relationship between a beneficiary on the one hand and a transferee or personal creditor of the trustee

[1] See discussion at para 3-01 below.

[2] See discussion at para 6-01 below.

[3] See discussion at para 7-01 below. For the avoidance of repetition, references in this book to claims against third-party transferees of trust property should (unless otherwise indicated) be taken to include this additional claim, though it may not always represent a claim by the beneficiary against a "transferee" of trust property: see discussion at paras 7-11ff below.

[4] See discussion at para 8-01 below. Also of significance to corporate trustees are the various corporate insolvency procedures. Those procedures are discussed alongside diligence and sequestration.

on the other has proved to be the single most important influence on the different conceptualisations of the beneficiary's right. This is not without good reason. Relationships with third parties represent the most fruitful line of enquiry into the juridical nature of the beneficiary's right given that the nature of that right should be the primary determinant of those relationships.[5]

1-13. This is not to say, however, that third-party effect is the sole area of doctrine relevant to an inquiry into the nature of the beneficiary's right. It is possible to imagine a range of other tests which might be used to determine whether the right is best conceptualised as personal, real or otherwise. Such tests might include, for example, the means by which the right is transferred or the possibility of its persisting in a shifting fund of trust assets. For two reasons these other indicators are not considered further in this book. The first is that they have been adequately canvassed elsewhere[6] and the conclusion reached that they demonstrate that the beneficiary's right is not real but personal in nature. It thus would serve little purpose to repeat these discussions here. The second reason is that they are dwarfed in importance by the relation of the beneficiary to transferees and creditors. Those relationships are thus made the main objects of study and accordingly serve to inform the structure of the book.

B. STRUCTURAL OVERVIEW

1-14. This book is in three parts. Part I considers by way of background the theoretical debates in relation to the beneficiary's right. Part II addresses actions by beneficiaries against transferees of trust property. Part III considers the protection of trust property from creditors. More detail as to the content of these parts is given below.

1-15. Part I of the book, including this introductory chapter (chapter 1), seeks first to set out the conceptual framework of rights in private law. The controversy as to the nature of the beneficiary's right, both in trust law scholarship generally, and in Scots law in particular, is then set within that framework (chapter 2). A significant theme in this preliminary discussion, which has already been raised here, will be that relationships between beneficiaries and third parties are of immediate relevance to the juridical nature of the beneficiary's right.

1-16. Part II begins by demarcating the range of different claims which a beneficiary might maintain against a transferee of trust property, before

[5] Indeed, insolvency is sometimes referred to as the "acid test" of property rights: see e.g. *Joint Administrators of Rangers Football Club Plc, Noters* [2012] CSOH 55, 2012 SLT 599 per Lord Hodge at para 31.

[6] GL Gretton, "Trusts without Equity", in R Valsan (ed) *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 87 at 94–96; KGC Reid, "National report for Scotland", in DJ Hayton et al (eds), *Principles of European Trust Law* (1999) 67 at 70–72.

examining the history and substantive basis of the most important such claim – that which arises in cases of breach of trust – in greater depth (chapter 3). An attempt is then made, across two chapters, to describe the functioning of claims for breach of trust in the modern law. The first chapter considers the operation of the statutory restriction on such claims under section 43 of the Trusts and Succession (Scotland) Act 2024 (as well as the history of its important statutory predecessor, section 2 of the Trusts (Scotland) Act 1961) (chapter 4). The second considers the requisites of, defences to, and remedies for such claims (chapter 5). The discussion then moves to consider the history, substantive basis and functioning of another claim exigible by beneficiaries against third parties, namely the claim predicated on a breach of fiduciary duty by the trustee (chapter 6). Finally, the ability of a beneficiary to proceed against a third-party debtor to the trust – a so-called "derivative claim" – is examined and a conclusion reached as to the significance of that claim, and of claims against third parties generally, to the nature of the beneficiary's right (chapter 7).

1-17. Part III of the book examines, over two chapters, the development and substantive basis of the immunity enjoyed by trust property from the personal creditors of the trustee. The development of this rule in relation to protection from diligence creditors and in the early law of personal insolvency is examined first (chapter 8). The radical changes in extent and basis of the rule in the modern law are then considered, including the development of separate patrimony theory in the last quarter century as the most plausible explanation of the immunity of trust property (chapter 9). An overall conclusion completes the book (chapter 10).

2 The Theoretical Debate

A. INTRODUCTION

2-01. Before examining the relationship between beneficiaries and transferees or creditors, it is necessary to say something of the broader controversy which has attended the juridical nature of the beneficiary's right. In trust scholarship generally, such debates have been protracted and, in some instances, bitterly contested.[1] Above all, they have been characterised by a failure to reach compromise or consensus as to the proper conceptualisation of that right.[2]

[1] See e.g. Maitland's characterisation of Austin's view of the beneficiary's interest as "nonsense" and "not merely nonsensical but mischievous": FW Maitland, *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (1909) 111. See also HF Stone, "The Nature of the Rights of the '*Cestui Que Trust*'" (1917) 17 Columbia LR 467 at 501.

[2] For a critical view of the character of the debate ("stultifying"), see e.g. DWM Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Canadian Bar Review 219 at 219–226 and 279.

Debate has, with certain exceptions, also focused on the beneficiary's right as conceived by the Anglo-American common law, making the uncritical acceptance of the views of either side potentially hazardous for those taking as their starting point a civilian or semi-civilian legal tradition (a category which must include Scots lawyers).[3] A final complicating factor is the tendency to conflate the nature of the beneficiary's right with the conceptualisation of the trust in general, typically because a particular conception of the latter is seen as integral to an understanding of the former.

2-02. This is not the place to consider in detail this vast and, in many respects, still ongoing controversy.[4] For two reasons, however, it is useful to review in outline the positions taken in the debate. The first is that a description of those positions demonstrates the centrality of the relationship between beneficiaries and third parties in arriving at a satisfactory conceptualisation of the beneficiary's right. The second is that the contours of the broader debate resemble in some respects the same disagreements in Scots law.

B. THE BROADER CONTROVERSY

2-03. So far as it is possible to generalise, the views of the beneficiary's right held in the broader debate fall into three categories. Either it is seen as a right against the trustee (the "personal" conception), a right in the trust property (the "proprietary" conception), or in various ways as in some sense intermediate between those categories ("alternative" views). The exposition of these viewpoints below also broadly represents their emergence in chronological terms.

(1) Personal conceptualisations

(a) The orthodox personal approach

2-04. As just mentioned, the basic tenet of the personal approach is that the beneficiary's right is properly conceptualised as a personal right against the trustee. This approach has attracted significant scholarly approval. For example, in the second half of the nineteenth century, the beneficiary's right was described by Langdell as an "equitable obligation" of the trustee.[5] At the heart of that

[3] Thus imprecision has, for example, resulted from a tendency to treat the frequent references in the common law tradition to the beneficiary's right as a "proprietary interest" as denoting something directly equivalent to a civilian real right in the trust property.

[4] See e.g. the recent perspectives discussed at paras 2-12ff below.

[5] CC Langdell, "A Brief Survey of Equity Jurisdiction" (1887) 1 Harvard LR 55. See similar views expressed by Ames: JB Ames, "Purchase for Value without Notice" (1887) 1 Harvard LR 1 at 11ff, and JB Ames, *Lectures on Legal History* (1913) 76.

characterisation was the relationship between the beneficiary and a third party receiving the trust property:

> [A]n equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership.[6]

For this early commentator, the ability of the beneficiary to proceed against third parties, except those taking for value without notice, provided good grounds to characterise the beneficiary's right as personal in nature; full exigibility would, Langdell argues, indicate something close to ownership by the beneficiary of the trust property. To reach this conclusion, however, Langdell makes a distinction between equitable and conventional obligations, with only the former exigible against new owners of the trust property.[7] His approach cannot therefore be seen as an unqualified endorsement of the view that the beneficiary's right is personal.

2-05. No such distinction was made by Maitland, the best-known proponent of the personal approach. In his *Lectures on Equity*, Maitland argued that the beneficiary's right is a personal right against the trustee, albeit one which has come to acquire the appearance of a property right.[8] The relationship between a trust beneficiary and third parties was again at the heart of this analysis. Maitland thus contended that the beneficiary's right, originally binding only on the trustee,[9] was by stages held in equity to extend to third parties including, in particular, that trustee's creditors[10] and third parties taking the trust property with notice of the beneficiary's interest.[11] But there could be no exigibility against a good-faith purchaser without notice, something which Maitland, like Langdell, took as an indication that the right was fundamentally personal in

6 Langdell, "A Brief Survey of Equity Jurisdiction" 60.

7 That a good-faith purchaser of trust property is protected from the claim of a beneficiary is also recognised by the law of Scotland. This rule is not, it will be shown, evidence that the beneficiary's right is anything other than personal in nature: see para 5-31 below.

8 Maitland, *Equity* 112: "[T]he thesis that I have to maintain is this, that equitable estates and interests [including that of the beneficiary of a trust] are not *jura in rem*. For reasons that we shall perceive by and by, they have come to look very like *jura in rem*; but just for this very reason it is the more necessary for us to observe that they are essentially *jura in personam*, not rights against the world at large, but rights against certain persons."

9 Or, at an even earlier stage, the feoffee to uses.

10 For a consideration of the rule that the right of a trust beneficiary is preserved in the insolvency of the trustee in English law, and the influence of that rule in Scots law, see paras 9-14ff.

11 Maitland, *Equity* 117–18.

nature.[12] The result was that, while the beneficiary's right could appear to be a right *in rem*, it should, historically and doctrinally, properly be conceived as personal in nature.[13] A similar conclusion is reached later in this work as to third-party recipients of trust property, albeit without reference to an equitable jurisdiction.[14]

(b) Approval of the personal approach

2-06. Though sharply criticised by Scott,[15] Maitland's views also attracted significant support. Thus in a response to Scott's article,[16] Stone agreed that the beneficiary's right was personal not, as Scott had contended, proprietary.[17] That view was based substantially upon Stone's approval of Maitland's analysis of the relationship between beneficiaries and third parties, which he presented in the following terms:

> To summarize the matter, it is believed that the view of the nature of the right of the *cestui que trust* most consistent with the decisions and which gives greatest promise of the development of the law upon a moral basis is that the right of the *cestui* is a right *in personam* against the trustee, specifically enforceable with reference to the trust *res*; that the *cestui* acquires rights *in personam* against the third persons, not because he is equitable owner of the trust *res*, but through equity's imposing upon third persons, obligations *in personam*, because of their unconscientious interference with the right which the *cestui* has against the trustee; that, therefore, equity imposes on all the world the duty of not consciously aiding in a breach of trust or preventing the *cestui* from having the benefit of the obligation of the trustee.[18]

Stone thus endorsed Maitland's view of the beneficiary's right as personal but sought also to furnish a doctrinal basis for the exigibility of that apparently personal claim against third parties. That basis, Stone argued, was an obligation imposed by equity of non-interference with the trustee-beneficiary right.[19] Third parties who breached that obligation by, for example, their involvement in a breach of trust would be open to action by the beneficiary in a way

[12] Maitland, *Equity* 119–20.

[13] Maitland, *Equity* 122: "Equitable estates and interests are rights *in personam* but they have a misleading resemblance to rights *in rem*. This resemblance has been brought about in the following way. The trust will be enforced not only against the trustee who has accepted it and his representatives and volunteers claiming through or under him, but also against persons who acquire legal rights through or under him with knowledge of the trust – nor is that all, it will be enforced against persons who acquire legal rights through or under him if they ought to have known of the trust."

[14] See chs 3–7 below, especially para 7-18.

[15] See para 2-10 below.

[16] SP Scott, "The Nature of the Rights of the '*Cestui Que Trust*'" (1917) 17 Columbia LR 269.

[17] HF Stone, "The Nature of the Rights of the '*Cestui Que Trust*'" (1917) 17 Columbia LR 467.

[18] Stone, "Rights of the *Cestui*" 500.

[19] See also Stone, "Rights of the *Cestui*" 470.

which conferred upon that beneficiary's right an apparently, but not actually, proprietary quality. As will be seen, a similar analysis can be deployed in Scots law to explain the liability of third parties, at least in relation to some kinds of claim by beneficiaries.[20] Again, however, that analysis is developed without reference to intervention by an equitable jurisdiction.

2-07. Although the views of Maitland and Stone represent the most important expositions in Anglo-American law of a conception of the beneficiary's right as personal in nature, the approach continues to find support in contemporary scholarship. One example is provided by Langbein, who, though seeking principally to emphasise the broad capacity of a settlor to shape the interests of beneficiaries, also co-opts Maitland and Stone's views on the exigibility of the beneficiary's right against third parties in his 'contractarian' view of the trust.[21] There remains, nevertheless, a second, proprietary, school of thought to which it is necessary now to turn.

(2) Proprietary conceptualisations

(a) Trusts, law and equity

2-08. Central to the proprietary theory is the conviction that a beneficiary's right is best conceived as a right in the trust property itself, although this view is usually combined with an acceptance that the beneficiary has personal rights exigible against the trustee. In this view of the beneficiary's right, more than any other, is evident the influence of the distinction between law and equity. In Anglo-American systems, that distinction results from a historical separation between courts of common law and courts of equity. In the development of the trust, the distinction between law and equity has proved especially important: as will be seen, it has allowed the recognition of legal and equitable rights which, on one view, subsist concurrently in the trust property. Yet although the law/equity distinction remains fundamental to the structure of Anglo-American private law, it is unknown to Scots law. This fact has proved an important influence on the reception of the proprietary theory in Scotland.

2-09. An illustration of the proprietary theory is provided by Salmond, a contemporary of Langdell and Maitland. In the early twentieth century Salmond wrote that:

> Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust ownership. The latter is called the beneficiary, and his ownership

[20] See paras 3-44ff.

[21] JH Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale LJ 625 at 647–48.

> is beneficial ownership. [. . .] The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of some one else is fictitiously attributed by the law, to the intent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner.[22]

Salmond's discussion gives some indication of the diversity of views which are encompassed by the "proprietary" label. Thus there are those who hold that the trust is an instance of double ownership,[23] to which is sometimes added the qualification that one of those forms of ownership (the trustee's) is "formal" and opposed to the "beneficial" ownership (the beneficiary's). That division is said to proceed from the law/equity duality,[24] which makes the beneficiary owner in equity and the trustee owner in law. What unites these positions is, as has been suggested, the conception of the beneficiary's right as existing in the trust property as a legal relationship with that property, rather than being merely a right against the trustee. This approach is again substantially influenced by the relationship between beneficiaries and third parties. Thus for Salmond the fact that a trust is capable of affecting a third-party recipient of the trust property is a consequence of the beneficiary's having concurrent ownership of that property in equity.[25]

2-10. The same tendency to look to the position of the beneficiary with respect to third parties also characterises the approach of the leading exponent of the proprietary approach, Scott. Scott, as was noted earlier, criticised Maitland's view that the beneficiary's right was fundamentally a personal right against the trustee.[26] Where Maitland had found in the relationship between beneficiaries and third parties evidence that the right was personal, Scott found the converse. The fact that the beneficiary's right was exigible against all except the good-faith purchaser without notice indicated that it was not personal but proprietary: the beneficiary should be seen to hold a proprietary right in the form of equitable ownership of the trust property which would, for reasons of fairness and commercial expediency, be defeated by a good-faith purchaser's acquisition

[22] JW Salmond, *Jurisprudence or the Theory of the Law* (1st edn, 1902) 278.

[23] See e.g. WF Fratcher, "Trust", in R David et al (eds), *International Encyclopaedia of Comparative Law* (1973) Vol 6 ch 11 para 1; see also comments by GL Gretton, "Trusts without Equity", in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 87 at 89.

[24] Including by Salmond, *Jurisprudence* 282ff.

[25] Salmond, *Jurisprudence* 280–81.

[26] SP Scott, "The Nature of the Rights of the '*Cestui Que Trust*'" (1917) 17 Columbia LR 269.

of the trust property.[27] The conclusion that the beneficiary was equitable owner of the trust property, Scott argued, must also be reached when considering the rights of a beneficiary against the trustee's creditors.[28]

(b) Approval of the proprietary approach

2-11. Though often a point of reference, Scott's views would not ultimately win favour in the later debates as to the proper characterisation of the beneficiary's right[29] (not least after the defence of Maitland's views by Stone, considered above). Nevertheless, the view of the beneficiary's right as equitable ownership of the trust property has proved very influential. It has been readily taken up by a number of leading texts on trust law[30] and by courts required to consider directly or incidentally the nature of the beneficiary's interest.[31] Nor can the description of the beneficiary's right as a proprietary interest in the trust property be taken as mere shorthand to denote (for example) a division of management and benefit between trustee and beneficiary. In English law the principle that the beneficiary has a proprietary right in the trust property is central to many aspects of the relationship between beneficiaries and third parties including, for example, the beneficiary's entitlement to recover trust property *in specie* from any recipient but the good-faith purchaser without notice.[32] The proprietary theory is thus typically described as the orthodox conceptualisation of the beneficiary's right in the common law tradition, although that designation is complicated by the existence of alternatives to either of the two theories already described. Those alternatives are the subject of the section which follows.

(3) Alternative and intermediate approaches

2-12. Although the personal and the proprietary approaches have been the dominant analyses of the beneficiary's right, others have been advanced. These alternative views of the right may be divided roughly into two kinds: either it is sought to reconceptualise the right in a way which leaves it outside of the

[27] Scott, "Rights of the *Cestui*" 279–80.

[28] Scott, "Rights of the *Cestui*" 283.

[29] See e.g. the discussion of later support for the personal approach at para 2-07 below and of alternative conceptions of the beneficiary's right at paras 2-12ff.

[30] See e.g. J McGhee et al (eds) *Snell's Equity* (34th edn, 2019) paras 21-001 to 21-003; L Tucker et al, *Lewin on Trusts* (20th edn, 2020) paras 1-006 to 1-008; J Glister and J Lee, *Hanbury & Martin: Modern Equity* (21st edn, 2018) para 1-019.

[31] Confining the review only to recent decisions of the Supreme Court or House of Lords, see e.g. *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250; *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240; *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

[32] See e.g. *Foskett v McKeown* [2001] 1 AC 102 especially the speech of Lord Millett; Lewin, *Trusts* para 1-006.

traditional personal and proprietary division, or alternatively the trust itself is recast in such a way that issues raised by the conceptualisation of the right are circumvented. As in the cases of the personal and proprietary approaches, the need to account for the relationships between beneficiaries and third parties is a significant influence on these alternative approaches.

(a) 'Rights against rights' and 'protected rights in personam'

2-13. One of the most prominent modern alternatives to the proprietary and personal conceptions of the beneficiary's right is the view that the beneficiary holds a "right against a right". Central to this view, which has been advanced in particular by McFarlane and Stevens,[33] is the contention that the beneficiary's interest (as well as any other equitable right) is best characterised not as a right against the trustee or in the trust property, but rather as a right against the right held by the trustee in that trust property.[34] Critical to this analysis is its explanatory value for the actions available to beneficiaries against third parties. Thus the authors reject the proprietary approach on the basis that beneficiaries have no claim against a third party who wrongfully damages trust property.[35] Equally, a conceptualisation of the beneficiary's right as merely personal is rejected on the basis that the beneficiary is able to bring a claim against a third party who has no notice of the trust but fails to provide value for the transaction. That third party cannot, the authors argue, be said to become subject to the beneficiary on the basis of interference with the trustee-beneficiary personal right, as some adherents of the personal theory had contended.[36] However, the conceptualisation of the beneficiary's right as a right against the trustee's own right provides, in the view of McFarlane and Stevens, a satisfactory answer to both situations: the beneficiary cannot sue a third party damaging the trust

[33] B McFarlane and R Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1. This is the most frequently cited account, although the theory also appears in R Chambers, *An Introduction to Property Law in Australia* (2nd edn, 2001) 115 as well as in successive editions. Further mention is made in LD Smith, "Trust and Patrimony" (2008) 38 Revue Générale de Droit 379 at 390ff. For critical responses, see JE Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014) 17 Canadian Journal of Law & Jurisprudence 473, and EC Zaccaria, "The nature of the beneficiary's right under a trust: proprietary right, purely personal right or right against a right?" (2019) 135 LQR 460. For an attempt to apply the approach in a civilian context, see R Valsan, "Rights against rights and real obligations", in L Smith (ed), *The Worlds of the Trust* (2013) 481.

[34] McFarlane and Stevens, "The Nature of Equitable Property" 5–6.

[35] McFarlane and Stevens, "The Nature of Equitable Property" 3–4. The same phenomenon in Scots law is analysed at ch 7 below, albeit without the conclusion that the beneficiary's right must necessarily be conceptualised as a right against a right.

[36] McFarlane and Stevens, "The Nature of Equitable Property" 4–5. The liability of a gratuitous transferee in Scots law is analysed later: see para 3-53 and paras 5-24ff. Again this liability does not, it will be argued, necessitate the conclusion that the beneficiary has a right against a right.

property because it is the trustee who is owner of the trust property, but an action will lie against the gratuitous recipient because any acquirer of the trustee's right is bound by the beneficiary's right against that right.[37] As was indicated above, it will be contended that – at least in Scots law – a conception of the beneficiary's right as personal in nature is capable of accounting for the effects upon which McFarlane and Stevens' account concentrates. That account nevertheless serves as a useful reaffirmation of the centrality of beneficiary-third party relations to conceptualisations of the former's right.

2-14. A further example of an alternative or intermediate approach to the beneficiary's right is provided the conceptualisation of that right in South African law by Honoré as a "protected right *in personam*".[38] Particularly significant for present purposes for its having been formulated in a semi-civilian system, Honoré's theory cleaves mostly to the view that the beneficiary holds a personal right against the trustee. In one important respect, however, that right differs from a conventional personal right:

> When the trustee owns the trust property the trust beneficiary has a right in personam against the trustee to claim the income or capital due under the trust. The beneficiary has in general no real right in the trust property. [. . .] But so long as the trustee retains the legal ownership of the trust property the beneficiary is to some extent protected because in principle trust property forms no part of the trustee's personal estate. The beneficiary does not therefore have to compete with the trustee's private creditors for the trust assets owned by the trustee but only with trust creditors. This protection does not make the beneficiary's right in rem (enforceable against all comers), as is sometimes supposed, but the right in personam is safeguarded and rendered more valuable by the separation of trust assets from private assets. The beneficiary may be said to have a protected right in personam.[39]

Again, then, there is a need to account for the relationship of beneficiaries to third parties: because the trust property is immune from the personal creditors of the trustee, Honoré is forced to the conclusion that the beneficiary's right is in its nature greater than, or at least distinct from, a personal right of any other kind. The same conclusion, it will later be argued, need not follow in Scots law.[40]

(b) Reconceptualising the trust

2-15. More recent attempts to address the question of the nature of the beneficiary's right have sought to sidestep the issue by reconceptualising the

[37] McFarlane and Stevens, "The Nature of Equitable Property" 5–6.
[38] E Cameron et al, *Honoré's South African Law of Trusts* (6th edn, 2018) para 302.
[39] Honoré, *Trusts* para 302.
[40] See discussion at ch 9 below.

legal institution of which that right forms part. One example of this approach is provided by Clarry, who argues that an explanation of some of the most troubling features of the trust would best be achieved not by focusing on the beneficiary's right but upon the ownership of the trustee.[41] In that exercise, Clarry argues, it would be desirable to set aside as misleading[42] the notion of a duality of ownership between trustee and beneficiary and instead conceptualise the trustee as a "fiduciary owner".[43] In similar style, Cutts argues that the trust would be better seen as involving not rights but a power-liability relationship;[44] that reconceptualisation too would serve to account for the beneficiary's relationship with third parties.[45] Something akin to these approaches is adopted later in the work, where it is argued that a recasting of the trust along patrimonial lines provides one means of accounting for the protection of trust property from personal creditors of the trustee.[46]

2-16. This overview has served to outline the main characteristics of the broader debate on the nature of the beneficiary's right in the common law tradition (and in South Africa). One such characteristic is the tendency to adopt a view of that right as either personal, proprietary or, more recently, as in some respects intermediate. Regardless of the position adopted, however, there is a preoccupation with the relationship of the beneficiary to third parties (particularly transferees of trust property and creditors of the trustee) as a determinant of the nature of that beneficiary's right.

C. THE DEBATE IN SCOTS LAW

2-17. In some respects, the debate as to nature of the beneficiary's right in Scots law replicates the features of the broader controversies in the Anglo-American common law. Thus there is a coalescence around the three positions – personal, proprietary and intermediate – described above. As will be seen, however, it is far from clear whether those positions, heavily influenced as they are by the Anglo-American law of trusts, can easily be equiparated with

[41] D Clarry, "Fiduciary Ownership and Trusts in a Comparative Perspective" (2014) 63 International and Comparative Law Quarterly 901.

[42] Clarry, "Fiduciary Ownership" 903: "'Dual ownership' is misleading since it suggests that trusts comprise two contemporaneous owners of property, which in turn relies on an overstated historical division between the Common Law and Equity. 'Split ownership' in trusts is mistaken in that it implies that 'ownership' is divided into discrete incidents and apportioned between separate persons. The succinct phraseology of 'fiduciary ownership' better communicates the encumbered form of ownership of trust property and highlights the essential interplay between fiduciary loyalty and trusteeship."

[43] Clarry, "Fiduciary Ownership" 927.

[44] T Cutts, "The nature of 'equitable property': A functional analysis" (2012) 6 Journal of Equity 44.

[45] Cutts, "The nature of equitable property" 62ff.

[46] See paras 9-20ff below.

their counterparts in Scots law. In similar vein, it might be imagined that the absence of a separate equitable jurisdiction in Scots law would hamper the use of theories of the beneficiary's right predicated upon a division between legal and equitable title. In fact, this has proved not to be the case,[47] although it may well be argued that the absence of an equitable jurisdiction affects the extent to which such theories can coherently be received.

2-18. Aside from the existence of three relatively distinct positions, a further point of similarity between the controversy in Scots law and the general debate is its close association with disputes as to the nature of the trust itself. Thus in a valuable account Carr traces the differences of views of the trust as either contractual or proprietary in nature and, in this exercise, highlights the role played in that wider debate by different conceptions of the beneficiary's right.[48] Above all, and importantly for present purposes, the debate in Scotland has, like the broader debate, been shaped by a need to explain the relationship between beneficiaries and third parties. To demonstrate the centrality of this aspect of the debate it is useful to give brief consideration to each of the three positions in turn.

(1) The beneficiary's right as a personal right

2-19. The notion that a beneficiary's interest in a trust is a personal right against the trustee has a long history in Scots law. The most cogent statement of this approach came, however, in the comparatively modern decision of *Inland Revenue v Clark's Trustees*:

> [T]he beneficiary's right is nothing more than a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions it contains. . .[49]

Over the long development of the trust in Scots law, this approach to the beneficiary's right has been most strongly associated with two broader theories – one old, and one new – about the trust in general.

(a) Trust as contract

2-20. The old theory with which a view of the beneficiary's right as personal in nature is associated conceives of the trust as arising from contract or a

[47] Particularly in relation to the proprietary approach to the beneficiary's right, see paras 2-24ff below.

[48] See generally DJ Carr, *Ideas of Equity* (Studies in Scots Law vol 5, 2017) ch 4.

[49] *Inland Revenue v Clark's Trustees* 1939 SC 11 per the Lord President (Normand) at 22. A similar right exists in English law: see e.g. *Target Holdings v Redferns* [1996] AC 421 per Lord Browne-Wilkinson at 434 ("The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law").

combination of contracts.[50] This approach is taken by Stair, who describes the trust as a form of the nominate contract of deposit.[51] That view is followed in broad terms by Bankton,[52] Erskine[53] and Bell,[54] all of whom describe the trust as contractual in nature. In this conception, a trust arises as a contract between truster and trustee, with the beneficiary usually seen as holding a *ius quaesitum tertio* enabling the enforcement of the contract. Where the trust is conceived in these terms, the logical corollary is that the beneficiary's right against the trustee is personal. Thus Bell states:

> The beneficial interest raised to others [i.e. the beneficiaries], is in its nature a *jus crediti.* It is secured to them, on the one hand, by preference over the creditors of the trustee; who can take no share of the trust estate in competition with the beneficial interest. [. . .] As a mere *jus crediti*, this beneficial (or as it is sometimes called equitable) interest is not a *jus in re*, or real estate in the land, entitling those interested to maintain any real action; as of maills and duties: It gives only a personal action against the trustee, to execute the trust or to denude.[55]

Reference by Bell to the "equitable" right of the beneficiary is probably a response to the increasing vigour of the proprietary approach to the trust in the early nineteenth century, discussed below. Despite that reference, Bell rejects the characterisation of the beneficiary's right as in any sense real. In that rejection, and indeed in his explicit characterisation of the beneficiary's right as personal, Bell is unique among the institutional writers. Nevertheless, all of the writers who accept a contractual formulation of the trust also treat the beneficiary's right as personal in nature.

2-21. A contractual approach to the trust, and the associated conception of the beneficiary's right as personal, are not solely the preserve of institutional writings. A number of classic texts on trusts also take a similar approach, including Menzies' *The Law of Scotland Affecting Trustees*. Menzies describes the beneficiary's right in the following terms:

> The nature of the interest vested in the beneficiary under the trust has been the subject of considerable discussion. The matter seems, however, to have been unnecessarily complicated, and it may be most respectfully doubted that the discussion has cleared the difficulties dealt with. The real question appears to be much simpler than that

[50] For a full discussion of this approach, see Carr, *Equity* paras 4-13 to 4-18 and 4-30.

[51] Stair, *Inst* I.13.7: "Trust is also a kind of deposition, whereby the thing intrusted is in the custody of the person entrusted, to the behoof of the intruster, and the property of the thing intrusted, be it land or moveable, else it is not a proper trust".

[52] Bankton, *Inst* I.18.12 where trust is treated with, and described as, a form of mandate.

[53] Erskine, *Inst* III.1.32: "A trust is also of the nature of depositation, by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it may be applied to certain uses for the behoof of a third party."

[54] Bell, *Comm* vol I, 31.

[55] Bell, *Comm* vol I, 36-37. See also Bell, *Principles* §1996.

> discussed. The beneficiary is the obligee – the creditor – in a contract *ad factum praestandum* in which the trustee is the obligor – the debtor. The beneficiary has accordingly a personal claim – a *ius in personam*, it may be a *ius ad rem* – against the trustee to perform his contract. The right of a beneficiary under a particular trust deed is dependent on the particular form of title that the trustee may make up under that deed, but insofar as the title taken gives the beneficiary a right of property – a *ius in re* – in any part of the property subject to the trust deed, he is not after the completion of that title, in regard to that part a beneficiary, nor the trustee a trustee.[56]

Menzies rejects any suggestion that the beneficiary has a right in the trust property as such, preferring to conceptualise the position by way of contract as a personal right of action against the trustee. The same view, whether or not relying on a contractual analysis of the trust, is taken by other writers.[57]

(b) The trust as a patrimony

2-22. A much more recent theory of the trust which takes to heart a conception of the beneficiary's right as personal is the notion of the trust as a patrimony. That conceptualisation of the trust is discussed at length in a later chapter.[58] At this juncture, it is sufficient to note that patrimonial theory, and the conception of the beneficiary's right as personal with which it is associated, represent a response to a proprietary account of the protection of trust property from creditors. It thus provides a further example of the importance of the relationship between beneficiaries and third parties to the conception of the beneficiary's right (although, as will be seen in the substantive discussion of the theory, the patrimonial approach to the trust allows an account of protection from creditors which is not dependent on any particular characterisation of the beneficiary's right).

2-23. Outside of these two theories of the trust, a view of the beneficiary's right as personal in nature has also been frequently mentioned or endorsed on the bench.[59] These judicial statements must, however, be treated with some caution, both because they often derive from cases where the beneficiary's right

[56] AJP Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) 11.

[57] See e.g. the passage from Bell, *Comm* quoted at para 2-20 below and from Forsyth, *Trusts* quoted at para 2-26.

[58] See paras 9-20ff below.

[59] See e.g. *Gordon's Trustees v Harper* (1821) 1 S 185 at 186; *Selkrig v Russell* (1824) 2 S 682 at 684; *Gavin v Kirkpatrick* (1826) 4 S 629 per Lord Alloway at 631; *Hunter's Trustees v Carleton* (1865) 3 M 514 per Lord Curriehill at 520; *Watson v Wilson* (1868) 6 M 258 per the Lord Justice-Clerk (Patton) at 260; *Campbell's Trustees v Campbell's Trustees* 1900 8 SLT 232 per Lord Kyllachy at 233; *Livingstone v Allans* (1900) 3 F 233 per Lord McLaren at 238; *MacLeod's Judicial Factor v Busfield* 1914 SLT 268 per Lord Cullen at 269; *Crerar v Bank of Scotland* 1921 SC 736; *Lawrence v Lawrence's Trustees* 1974 SLT 174 per Lord Dunpark at 176.

is not directly at issue and also because courts of the same period are typically equally willing to characterise the beneficiary's right as real in nature.[60] Having given an overview of the conception of the beneficiary's right as personal in Scots law, it is now possible to turn to that alternative view.

(2) The beneficiary's right as a real right

2-24. The diversity of ways in which a proprietary approach to the beneficiary's right might be formulated has already been noted as a feature of the broader debate in the common law world.[61] The same diversity is also evident in proprietary conceptualisations of that right in Scots law. As in the broader debate, however, it is possible to define proprietary conceptualisations as those which envisage the beneficiary's right not (or not merely) as a relationship with the trustee in the form of a personal right, but as a direct relationship with the trust property. Unlike that broader debate, the proprietary approach in Scots law occasionally adopts the civilian terminology of real rights, such that the beneficiary is seen as holding a real right in the trust property.

2-25. The proprietary approach in Scots law is helpfully illustrated by the definition of the beneficiary's right given by McLaren:

> The beneficial interest under deeds of settlement, conveying the estate ostensibly for uses and purposes, may be more correctly defined as a personal right of property in the estate which is the subject of disposition. It is a right of property in the same sense that a ground annual, real burden, or other right by reservation, or an estate standing upon a decree or minute of sale, is a right of property. For although the title to the estate stands in the person of the trustee, the interest of the beneficiary is by the terms of the trust deed protected in so far as the nature of the property in each particular case admits of protection, against the acts of the trustee and the claims of his creditors.[62]

McLaren goes on to describe the beneficiary's right as an "equitable interest" or "equitable estate",[63] the trust itself being a "means of separating the titles of two interests in the same subject".[64] His account thus demonstrates two of the most distinctive features which characterise the proprietary approach in Scots law.

[60] See para 2-26 n 68 below.

[61] See paras 2-8 ff above.

[62] J McLaren, *The Law of Wills and Succession as Administered in Scotland including Trusts, Entails, Powers and Executry* (3rd edn, 1894) para 1527.

[63] McLaren, *Wills* para 1528 (adopting the definition of Lord Westbury in *Buchanan v Angus* (1862) 24 D (HL) 5, (1862) 4 Macq 374 at 378).

[64] McLaren, *Wills* para 1534. Confusingly McLaren does not always discount the view of the beneficiary's right as a *ius crediti*. Thus McLaren holds that where the right held in trust is itself personal, the beneficiary's right must also be taken as a personal right (although it is unclear whether this is a personal right exigible against the trustee): see para 1527.

The first is the strong association of that approach with the conception of the trust as an equitable construct, readily able to be assimilated to its counterpart institution in English law. The second (as was also seen in the conceptualisation of the right as personal) is a concern to account for the relationship between beneficiaries and third parties (hence McLaren's suggestion that the proprietary approach follows from the protection of trust property against the trustee's creditors). Something is said about each of these characteristics below.

(a) Law and equity

2-26. The view that the Scottish trust has its basis in equity has a shorter history than the contractual model already discussed. Carr associates this approach, and the resultant conception of the beneficiary's right as proprietary in nature, with English influences in the development of the trust in the nineteenth century.[65] This is borne out by the views of writers of that period – including those of McLaren[66] quoted above – to the effect that the trust involves a division of ownership along the lines of law and equity, and also the vesting in the beneficiary of an interest in the trust property.[67] A similar trend is evident from cases of the period.[68] It is not, however, always possible to generalise: even authors examining the subject through the lens of English law did not always adopt the proprietary view. Thus Forsyth, the author in 1844 of the first work on trust law, *The Principles and Practice of the Law of Trusts and Trustees in Scotland: With Notes and Illustrations from the Law of England,* describes the beneficiary's right in the following terms:

> The right of the beneficiary has never in Scotland been acknowledged as a positive, vested, equitable and co-existent right, as distinguished from the legal right of the trustee, as in England; but merely as a personal right of action against the trustee, to

[65] Carr, *Equity* paras 4-19 - 4.33. A similar view is presented by GL Gretton, "Trusts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 480 at 502ff.

[66] The third edition of McLaren's *The Law of Wills and Succession as Administered in Scotland, Including Trusts, Entails, Powers, and Executry* was published in 1894.

[67] See e.g. J Lorimer, *A Handbook of the Law of Scotland* (6th edn, 1894) 228–29; J Erskine, *Principles of the Law of Scotland* (18th edn by J Rankine, 1890) III.XA.2 discussed in Carr, *Equity* paras 4-26ff; A Mackenzie Stuart, *The Law of Trusts* (1932) 1ff.

[68] See e.g. *Gordon's Trustees v Harper* (1821) 1 S 185; *Crawford v Earl of Dundonald* (1838) 16 S 1017; *Fyfe v Kedslie* (1847) 9 D 853 per Lord Fullarton at 862; *Liddell v Wilson* (1855) 18 D 274 per the Lord Justice-Clerk (Hope) at 277 (". . .the existence of the trust-deed renders it likely that the beneficial interest may be separate from the legal title."); *Stevenson v Wilson* 1907 SC 445 at 452 (argument for the respondent); *Sleigh v Sleigh's Factor* 1908 SC 1112 per Lord Ardwall at 1121. As with the conception of the right as personal in nature, the cases are inconsistent and it is possible to detect instances of a proprietary approach before the nineteenth century: see e.g. *Drummond v McKenzie* (1758) Mor 16206 (where the beneficiary's right is described as equitable but not truly real); *Dalziel v Dalziel* (1756) Mor App "Trust" No 1.

> fulfil an obligation undertaken for behoof of him, the beneficiary; the actual right of property being in the trustee alone.[69]

Forsyth is careful to distinguish the Scottish from the English approach,[70] ultimately finding that according to the former only a personal right exists against the trustee. As has been seen, the same is true of Bell who refers to the beneficiary's right as "equitable" but does not go so far as to assert that it exists as a real right in the trust property.[71] In the main, however, where English doctrine or theory has influenced the Scottish trust, the effect of that influence has been to encourage the trust to be conceptualised in proprietary terms.

(b) Accounting for third-party relationships

2-27. The second (and for present purposes, more important) driver of a proprietary characterisation of the beneficiary's right has been the need to account for the relationship of the beneficiary to third parties. Indeed, it has been noted already that the personal, patrimonial approach was in part a response to attempts to account for the protection of trust property from creditors by means of a proprietary conception of that right. Like the patrimonial theory, which sought to respond to the proprietary conception, such attempts will be discussed in greater detail later.[72] For present purposes, it is enough to note the contention that trust property is immune from the personal creditors of the trustee on the basis of the beneficiary's having a proprietary interest in that property[73] or, more faintly, that third-party recipients of trust property might be liable to an action by the beneficiary on the basis of the beneficiary's having a proprietary right in the property received.[74] The same drive to explain relationships with third parties and creditors has also been central to the intermediate views of the beneficiary's right which are the subject of the next section.

(3) Alternative and intermediate approaches

2-28. Scots law, in common with most jurisdictions where civil law represents a significant influence, recognises an exhaustive and strict division of rights in private law as either real or personal:[75] exhaustive because no intermediate right

[69] C Forsyth, *The Principles and Practice of the Law of Trusts and Trustees in Scotland: With Notes and Illustrations from the Law of England* (1844) 12.

[70] Cf. comments by Gretton, "Trusts" 486.

[71] See the passage from Bell, *Comm* quoted at para 2-20 above.

[72] See paras 9-2ff below.

[73] See e.g. *Heritable Reversionary Company v Millar* (1892) 19 R (HL) 43, [1892] AC 598.

[74] See e.g. reference to the beneficiary's right as "*accidens reale*" in *Anent Trusts and Back Bonds* (1677) 3 Bro Sup 185, discussed at para 3-6 below.

[75] See e.g. *Sharp v Thomson* 1995 SC 455 per the Lord President (Hope) at 468 ("Scots law does not recognise a right which lies between the personal right on the one hand and the real right on

is generally recognised; strict because characteristics of real rights are never associated with personal rights (and vice-versa). The rigidity of this division may well have discouraged attempts to define the beneficiary's right as anything other than real or personal in nature, but it has not completely prevented them. In most cases, the attempt to cast the beneficiary's right as intermediate in nature is motivated by explanatory difficulties posed by relations between beneficiaries and third parties. Thus writers adhering to an intermediate approach begin with the proposition that the beneficiary's right is personal but, after considering the possibility of that beneficiary proceeding against a third party (or the protection of trust property from the trustee's creditors), concede that the right must be more than personal in nature. This approach, which resembles Honoré's "protected right *in personam*" thesis discussed above,[76] is helpfully exemplified by Wilson and Duncan in the most recent full-length treatment of the Scottish trust:

> The beneficiary's right has often been described as a *jus crediti* and this term is to some extent appropriate in that the right is a right of action and not a *jus in re* or right of property. *Jus crediti*, however, is frequently applied to a mere contractual right and the beneficiary's right is higher than this. He can vindicate the trust property on the sequestration of the trustee and he can procure the recovery of property from a third party who has received it gratuitously or in the knowledge that the conveyance is in breach of trust.[77]

A similar view is taken by a number of other writers,[78] as well as by the courts in some cases,[79] always in an attempt to explain why the beneficiary's apparently

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the other."); *Fleming's Trustee v Fleming* 2000 SC 206 per Lord Sutherland at 216; *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 per Lord Hope at 26; *3052775 Nova Scotia Ltd v Henderson* [2006] CSOH 147 per Lord Hodge at para 11 ("Scots law does not recognise a right which lies between a real right and a personal right [. . .] There is no such thing as a '*quasi-real* right'."); *Hollister v MacInnes* 2017 SLCR 134 per Lord Minginish at para 14. See also KGC Reid, *The Law of Property in Scotland* (1996) para 3 esp n 3.

[76] See para 2-14 above.

[77] WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) para 10-01. See also para 1-51 of the same work, where a conception of the beneficiary's right as only personal in nature is rejected on the basis of the protection of trust property from creditors and the right instead described as "a type of personal right".

[78] See e.g. KM Norrie and EM Scobbie, *Trusts* (1991) 3–4; Y Evans, "Trusts, Trustees and Judicial Factors" (Reissue, 2016), in *The Laws of Scotland: Stair Memorial Encyclopaedia* para 48 ("The right of the beneficiaries of a trust is anomalous in nature, in that it can be categorised neither as a purely personal right nor as a real right of property. In some respects it is akin to a real right in that the beneficiaries' right is preferred to the claims of a trustee's personal creditors in the event of the trustee's sequestration. Similarly, trust property cannot be affected by the diligence of a trustee's personal creditors. Also, the beneficiaries' right is not defeated by the alienation of trust property in breach of trust, as long as the person acquiring it either has not given full value for the property or has acquired it with actual or constructive knowledge of the trust.").

[79] See e.g. *Johnston v MacFarlane's Trustees* 1986 SC 298 per the Lord Justice-Clerk (Ross) at 307–08, apparently endorsing the views of Wilson and Duncan (quoted at para 2-28 above);

personal right against the trustee prevails against creditors and transferees. Indeed, in chronological terms such attempts have tended to displace conceptions of the beneficiary's right as a real right, although (as has been suggested) the latter view has had an important historical and developmental influence.

2-29. The conception of the beneficiary's right as to some extent intermediate might be subject to the preliminary criticism that Scots law recognises no right lying between the real and personal. There is, however, a more cogent objection: in the beneficiary's relations with third parties, there is no need to conceptualise that beneficiary's right as anything other than personal in nature. That view forms the central claim of the remainder of this book.

D. CONCLUSION: DO CONCEPTS MATTER?

2-30. In the middle of the twentieth century, Scott, one of the original participants in the controversy as to the nature of the beneficiary's right, wrote:

> I think . . . that it really makes little difference in actual results whether you adopt my theory of equitable ownership by the beneficiary or Stone's theory, which follows that of Maitland and Ames, that the beneficiary has only a *chose in action*. The important thing is to understand what actual rights are created by a trust rather than the theoretical nature of those rights.[80]

Might Scott have been right to suggest that it would be more desirable to eschew theory and concentrate instead on the particular rights of the trust beneficiary? The answer to that suggestion must, for two reasons, be in the negative. The first is that the theoretical conceptualisation of the beneficiary's right is meaningful in a number of senses. It serves to determine how that right is to be treated for the purposes of (amongst other things) taxation,[81] international private law[82] and domestic civil procedure.[83] It may prove decisive in broader questions relating to the law of trusts, including where the trust is properly to be situated within

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Joint Administrators of Rangers Football Club Plc, Noters [2012] CSOH 55, 2012 SLT 599 per Lord Hodge at para 37.

[80] Private correspondence from SP Scott to RG Patton, quoted in RG Patton, "The Nature of a Beneficiary's Interest in a Trust" (1950) 4 Miami LR 441 at 449. See also comments by Patton himself at 449 ("It is the conclusion of the author of the present study that any difference of opinion on this particular item of a beneficiary's rights is more a matter of words than of substance").

[81] See e.g. *Inland Revenue v Clark's Trustees* 1939 SC 11; *Parker v Lord Advocate* 1958 SC 426 (affirmed by the House of Lords *sub nom Parker and Others v Lord Advocate* 1960 SC (HL) 29, [1960] AC 608) where the nature of the beneficiary's right was determinative of the taxpayers' liability.

[82] See e.g. *Webb v Webb* (Case C-294/92) [1994] QB 696 where the nature of the beneficiary's interest determined the application of the Brussels Convention and thus the appropriate forum for an action in respect of real property held on trust.

[83] *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240 considered at paras 7-10ff below.

the broader scheme of private law and whether it may be received, and indeed adequately accommodated, within civilian or semi-civilian legal systems.[84]

2-31. The second objection to the discounting of theory is that, as the discussion here has demonstrated, the "actual rights" of the beneficiary – particularly rights against transferees and creditors – depend on the particular theoretical conception adopted. We thus find theory inescapable. As has been indicated, then, this work takes as its starting point the view that the beneficiary's right is personal in nature and seeks to demonstrate that this approach is compatible with the "actual rights" of the beneficiary so esteemed by Scott.

[84] For recent perspectives in this expansive area of scholarly debate, see GL Gretton, "Up there in the Begriffshimmel?" in L Smith (ed), *The Worlds of the Trust* (2013) 524, as well as other contributions to the same volume. Similarly, see L Smith (ed), *Re-Imagining the Trust: Trusts in Civil Law* (2012).

PART II

BENEFICIARIES AND THIRD PARTIES

3 Claims for Breach of Trust I: Introduction and Emergence

A. CLAIMS AGAINST THIRD PARTIES

3-01. It is an established rule of Scots law[1] that if a trustee, acting in breach of trust or breach of fiduciary duty, transfers trust property to a third party who takes in bad faith or without consideration, that third party is liable to a claim at the instance of the trust beneficiary.[2] Equally, a beneficiary is, in some circumstances, able to recover from a debtor to the trust.[3] Yet if, as was contended in the previous chapter, a beneficiary's right is personal in nature (and thus normally exigible only against the trustee) the possibility of such claims calls for explanation. Part II of the book is thus concerned with the development, basis and extent of the actions available to beneficiaries against third parties to the trust. The present chapter, the first of five, traces the emergence of the claim in relation to breaches of trust and demonstrates that (despite their apparently real effects) these claims are compatible with,

[1] See e.g. WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) para 10-13; AJP Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) paras 1270ff; Y Evans, "Trusts, Trustees and Judicial Factors" (Reissue, 2016), in *The Laws of Scotland: Stair Memorial Encyclopaedia* para 48; KGC Reid, *The Law of Property in Scotland* (1996) para 691 ("a grantee taking either without consideration or in the knowledge that the grant was in breach of trust received a subsistent title but one which was voidable at the instance of the beneficiaries. This is still the law in respect of grants without consideration"). Reid's analysis is based on Stair's classical formulation of the trust which, in its affirmation of the security of the title of a good-faith acquirer, suggests a corresponding remedy that might be maintained by the beneficiary against bad-faith or gratuitous acquirers: see Stair, *Inst* I.13.7. For other statements of the rule, see *Redfearn v Somervail* (1813) 1 Dow 50, (1813) 5 Pat App 707; *Magistrates of Airdrie v Smith* (1850) 12 D 1222; *Callander v Callander* 1975 SC 183 per Lord Cameron at 210; *Moir v Moir* [2013] CSOH 177, 2013 GWD 39-747 per Lord Tyre at para 16; *De Fazio v De* Fazio [2014] CSOH 56, 2014 GWD 13-251 per Lord Glennie at para 57. For claims involving a breach of fiduciary duty, see e.g. *Dunn v Chambers* (1897) 25 R 247 and *Meff v Smith's Trustees* 1930 SN 162.

[2] That claims of the kind discussed here, at least in relation to breach of trust, are possible in principle seems also to follow from the Hague Trust Convention which forms part of Scots law: see Recognition of Trusts Act 1987 s 1(1) and sch 1. The Convention provides for the right of a beneficiary of a trust recognised as such by a signatory to the Convention to recover trust property from a third party: see Hague Convention on the Law Applicable to Trusts and on their Recognition (1 July 1985, in force 1 January 1992) Art 11(d). Thus a claim is available to the beneficiary of an (express) trust constituted under Scots law as a matter of statute, although the Convention and the 1987 Act contain the important qualification that the third party's position is subject to the national law: see Hague Convention Art 11(d) proviso. The possibility of claims by beneficiaries against third-party recipients of trust property is also contemplated by the most recent legislation on trusts, the Trusts and Succession (Scotland) Act 2024: see e.g. section 33(4), which preserves the right of a beneficiary to "recover trust property from a person, other than a trustee, to whom a payment would not have been made" but for the *ultra vires* act of the trustee. To similar effect is s 46(4) of the Act.

[3] See e.g. *Anderson v Wilson* [2019] CSIH 4, 2019 SC 271; *Roberts v Gill* 2010 UKSC 22, [2011] 1 AC 240, discussed at paras 7-9ff below. A claim of this kind is also envisaged by the Trusts and Succession (Scotland) Act 2024: see s 32(2) of the Act, which mentions a claim against a third party by the trustee or "any person claiming through the trustee".

and indeed developed from, a model of the trust in which the beneficiary holds only a personal right against the trustee. The next chapter considers an important statutory limit to claims for breach of trust in the form of section 43 of the Trusts and Succession (Scotland) Act 2024 (and its important statutory predecessor, section 2 of the Trusts (Scotland) Act 1961).[4] After a discussion in the third chapter of the modern rules for such claims,[5] the manifestation of the rule in cases of breach of fiduciary duty is examined.[6] This too is shown to be compatible with a view of the beneficiary's right as personal.[7] A final chapter shows that the same conclusion should also attach to the analogous but distinct action by a beneficiary seeking to recover from a debtor to the trust.[8]

3-02. In view, then, are claims of three kinds: for breach of trust (arising where trust property is transferred by the trustee in breach of the terms of the trust); for breach of fiduciary duty (arising where the transfer is in breach of the trustee's fiduciary duty); and "derivative" claims (where the beneficiary derives from the trustee a right of action against a third-party debtor).[9]

3-03. In the discussion which follows, the emphasis is on those instances in which a beneficiary may recover trust property as such (*in specie*) from a transferee.[10] Recovery of this kind might be thought to indicate most obviously that the beneficiary holds a right in the trust property, exigible against all takers.[11] Yet there is no need for recourse to that view: claims against third parties are, it will be shown, compatible with a conception of the beneficiary's right as personal.

4 Chapter 4.

5 Chapter 5.

6 While some accounts treat breach of fiduciary duty as an example of breach of trust, the former is treated separately in the discussion which follows both because a different analysis must be deployed to account for the right of the beneficiary to proceed against a third party and also because of the need to account for developments unique to the law on breach of fiduciary duty.

7 Chapter 6.

8 Chapter 7.

9 In some circumstances these grounds may be concurrent. Thus, if a trustee transfers trust property contrary to the terms of the trust, a claim for breach of trust arises (assuming the other requisites of that claim are satisfied). If that transaction was in breach of the trustee's fiduciary duty – being, for example, to a company controlled by the trustee – a claim for breach of fiduciary duty might also be maintained by the beneficiary.

10 The exception is a derivative claim, where what is recovered will generally be money rather than specific trust property. Nevertheless, such claims present their own explanatory difficulties on the basis that they may be brought in relation to acts done to trust property by someone who (as far as a conception of the beneficiary's right as personal in nature is concerned) is not the owner of the trust property: see paras 7-13ff below.

11 As, in some instances, in English law: see para 2-11 above.

B. CLAIMS FOR BREACH OF TRUST: INTRODUCTION

3-04. Claims by beneficiaries against transferees who receive trust property in breach of trust are the most familiar of the three forms of claim outlined above. This chapter traces the emergence of such claims and seeks to describe their rationale both historically and, ultimately, in the modern law. For the reasons just given, the discussion here is principally concerned with the entitlement of a beneficiary to recover *in specie* property transferred in breach of trust. In the early law and thereafter that end would normally be achieved by an action to reduce the transaction in question.[12] Claims for the value of trust property (as opposed to the trust property itself) are, however, considered more briefly later.[13]

3-05. The historical material considered in this chapter indicates that claims for breach of trust – including, in particular, for the reduction of a transaction in breach of trust – did not emerge as a unified category until the early nineteenth century. Prior to that time the entitlement of a beneficiary to proceed against a transferee taking in breach of trust was a matter for the body of rules concerned with the transfer of property more generally (involving, in particular, those which determined the exigibility of personal rights against an acquirer of property). This body of rules was the subject of considerable controversy in the seventeenth and eighteenth centuries, and the position of a transferee taking in breach of trust was implicated in, and would ultimately become central to, broader controversies around the rules. Before those debates are considered, however, it is instructive to review the position in the early law at the time of the first reported claims for breach of trust.

(1) Doubts in the early law: *Anent Trusts and Back-Bonds* (1677)

3-06. The uncertain position in the early law of a transferee taking property in breach of trust is well illustrated by the report in *Anent Trusts and Back-Bonds* (1677).[14] Taking the example of a trustee transferring a bond in breach of trust, the report considers the effect of that initial breach on later acquirers of the right:

[12] Or, in the case of corporeal moveable property, for redelivery of the property to the trustee.

[13] See, in the context of claims for breach of trust para 5-35 below, and in the context of claims for breach of fiduciary duty para 6-15 below.

[14] *Anent Trusts and Back-Bonds* (1677) 3 Bro Sup 185. The report is considered in RG Anderson, "Fraud on transfer and on insolvency: ta. . .ta. . .tantum et tale?" (2007) 11 Edin LR 187 at 199–200 and n 78; see also MJ de Waal and RRM Paisley, "Trusts", in R Zimmermann, D Visser and KGC Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 819 at 846 and n 224. As Anderson notes, it is unclear whether the report records a decided case or is an account of a discussion among advocates. Comparable reports appear to contain both unreported decisions of the court and the individual opinions of advocates: see e.g. *Anent a Base Seasine of Ward Lands* (1677) 3 Bro Sup 154 and *Anent Denuding of Liferent by Consent to Alienate* (1671) 2 Bro Sup 549.

> This case was stated among the Advocates –
>
> A man assigns a bond owing to him by a certain person in favours of another . . . and that other person, who is the trustee, feoffee, or fidei-commissary, to whom it is conveyed, grants a back-bond, declaring the trust, and obliging to denude. The trustee, either voluntarily, or upon legal diligence,[15] transfers this bond . . . in favours of another party not him by whom he was entrusted, or the right of it is adjudged or apprised from him by some of his creditors legally, who found the right of it standing in his [the trustee's] person, and they become infeft upon their diligence, and dispone and assign it to another, and he to a fourth, and so it passes amongst many hands, and to sundry singular successors.
>
> Now, the question is, the first person that intrusted him, and to whom the back-bond clearing the trust was granted, or his heirs and assignees, getting notice of this conveyance clearly to his defraud and prejudice, made by one in whom he put confidence, if he may not raise a declarator of the trust, founded upon the back-bond against these singular successors; (for that he will prevail against the granter of the back-bond and his heirs, there can be no imaginary doubt) and if the trust be so connexed to the thing trusted that it is inseparable from it, and follows it, *licet transient per mille manus*[16] as *accidens reale*,[17] or if it be only a personal obligement that affects not *rem ipsam realiter*[18] . . .[19]

Anent Trusts indicates that some aspects of the law were settled even at an early stage: thus it was clear that the beneficiary had an immediate action against the trustee and any universal successor as primarily liable for the breach. But the position of a transferee – whether acquiring through the trustee or a creditor of the trustee – was uncertain. Did the beneficiary have unlimited recourse against any such acquirer, however remote, or was the beneficiary's reach in some respects circumscribed?[20] The answer to this question, which tended more towards the latter position than the former, was ultimately to be found within

[15] The references to "legal diligence" here (and later to adjudication in the same report) are interesting as indicating that the position of creditors taking trust property by diligence, as well as transferees acquiring that property by disposition, was not clear. The position of creditors in the early law is considered at ch 8 below.

[16] 'Though passed through a thousand hands'.

[17] 'A real quality'.

[18] 'The thing itself.'

[19] *Anent Trusts* at 185. The report then refers to the case of *Mackenzie v Watson and Stewart* (1678) Mor 10188 (*sub nom Hector Mackenzie's Case*). That decision is discussed at paras 3-30 and 8-34 below.

[20] The report also indicates concern for the position of transferees should extensive claims on the part of beneficiaries be allowed against transferees, given the lack of a register of trusts or other back bonds: see *Anent Trusts* at 185–86 ("How could [a transferee], without divination, know it was only a trust, and that there was a back-bond; there having been no intimation of it made to him, no inhibition served upon it to put the lieges *in mala fide*, or to ascertain them there was such a thing?"). This was to be an important consideration of legal policy which occurred repeatedly in the early law.

the body of rules dealing with transfer.[21] As will be seen, that area of the law was, at the time of *Anent Trusts*, confused at best. That doubts were raised in the report is thus hardly surprising.

(2) Variation by property

3-07. The liability of a transferee to a claim at the instance of a beneficiary depended, in the initial period, on the liability of the transferee to be affected by the beneficiary's right against the trustee. As previously suggested, the approach of the early law was to characterise that right as personal in nature.[22] Such an analysis presented an immediate difficulty: how could a transferee, a person necessarily distinct from the trustee and beneficiary (and so not party to the trustee-beneficiary personal right) be affected by the beneficiary's right? In the early law at least, the answer lay within the rules on transfer: in certain instances, a particular form of transfer imposed liability on a transferee in respect of personal rights exigible against the transferor.[23] The rules determining in which instances a transferee would be so liable existed in a state of some instability and were marked by large variations between the different types of property capable of being transferred.[24]

[21] This is anachronistic, since there was no unified body of rules dealing with "transfer" *per se*. The term is used here as a convenient shorthand to refer to the disparate rules dealing with the transfer of property in the early law.

[22] As well as the discussion at paras 2-19ff above, see e.g. Stair, *Inst* IV.45.21 ("trust with a back-bond is only trust in so far as the trustee disponing for causes onerous may betray his trust, because the back-bond being personal, and not a recorded reversion, will not recover the thing intrusted"). The same notion is implicit in Stair, *Inst* I.13.7. A contemporary of Stair, John Nisbet of Dirleton, considered the question of the nature of the beneficiary's right in the context of a competition between the beneficiary of a trust and the Crown where money in the hands of a trustee guilty of treason was forfeited to the Crown. In this context, too, it appears that the beneficiary's right was personal: see Dirleton, *Doubts and Questions in the Law of Scotland* (1698) 215 ("The right of the Sum is in the person of the Traitor; and by the Backbond he is only Debitor, and obligated to denude [the sum to the beneficiary]: And he to whose use it is entrusted, has not *ius in re* but *ad rem*: and a personal action against the Trustee, whereunto the King is not liable").

[23] It appears that a transferee would not be subject to all personal obligations but only to those which related to the property. In the reported cases of the early law, at least, most of the obligations owed by trustees fell into that category.

[24] This feature of the early law has been noted by a number of commentators, including in particular by Bell: see Bell, *Comm* vol II, 282, where the beneficiary's right is considered as a "qualification" to the right of the trustee, albeit a personal one. See also the extended account given in vol I, 300 of the 7th edition (by J McLaren) of 1870. Variation of this kind is noted more recently by Reid, *Property* para 688. MacLeod considers the variation in the context of the susceptibility of a transferee to fraud on the part of the transferor: see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) paras 3-74ff. The earliest treatment of the distinction between different types of property appears to be that of Elchies who, in discussing the issue in the particular context of trusts, also stresses the importance of determining whether a "true" trust has been created in the sense of vesting in the trustee title to the trust property:

3-08. The variation in the rules relating to the transmission of personal rights between different types of property requires that each type be given separate consideration. Discussion here accordingly begins by considering the rules relating to heritable property before moving to those pertaining to corporeal and to incorporeal moveables.

C. HERITABLE PROPERTY

3-09. Where the property alienated by a trustee in breach of trust was heritable, the liability of the transferee to personal rights held against the trustee (and so also to the beneficiary's claim) depended principally upon the means by which the heritable property was acquired. There were two main possibilities. The first was a voluntary conveyance by the trustee.[25] The second was acquisition by apprising, a form of real diligence by which a creditor could obtain ownership of land belonging to the debtor. Each form of acquisition had different consequences for the liability of a transferee to the beneficiary; each is examined in turn here.

(1) Acquisition by disposition: *Workman* (1672) and *Anderson* (1702)

3-10. Where property was disposed of voluntarily by a trustee in breach of trust, the beneficiary had limited recourse against the transferee. Stair, in the course of his discussion of reversionary rights, gives the general rules for property voluntarily disponed:

> [D]eclarations, back-bonds or conditions of trust . . . remain obligements personal upon the person intrusted unless they contain express obligements to re-dispone, which is a reversion, albeit it be not formal; or if it bear, to denude in favours of the disponer or any others; but if it be but in trust to his behoof, though thereupon, *via actionis*, the trustee might be compelled to denude, yet it is no reversion, and however, hath no effect against singular successors, unless they be registrate as aforesaid, except in so far as they may be grounds of reduction against the parties intrusted, or their singular successors, partakers of the fraud.[26]

Reversions, which were used frequently as a kind of security over heritable property in connection with wadsets, could be registered in the Register of

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see Patrick Grant, Lord Elchies, *Annotations on Lord Stair's Institutions of the Law of Scotland* (1824) 69–74.

[25] Effected, in the case of a disposition, by sasine and infeftment: see Reid, *Property* paras 87ff (GL Gretton).

[26] Stair, *Inst* II.10.5 To the same effect see Erskine, *Inst* II.3.49; Bankton, *Inst* III.214; Forbes, *Inst* III.I.4; Bell, *Comm* vol I, 282.

Sasines under the Registration Act 1617.[27] Registration created a real right which would affect any transferee of the property subject to the reversion. By contrast, if property was subject to a trust rather than a reversion, a person acquiring from the trustee was generally secure: the beneficiary had only a personal right to sue the trustee which would not prevail against the transferee after the latter's infeftment. An exception was, however, made in cases where the transferee "partook" in the fraud of the trustee. The meaning of fraud in this context – and how a transferee might partake therein and so become liable to an action by the beneficiary – is an important question which is considered later.[28] For present purposes, it is sufficient to note that the transferee was deemed to have partaken in the fraud if he or she was either in bad faith or took the trust property gratuitously.

3-11. At least where heritable property voluntarily disponed was concerned, then, a good-faith transferee who gave value was secure from a claim by the beneficiary including, in particular, a claim for reduction. That principle is clear from two early cases in which beneficiaries sought to claim against transferees receiving heritable trust property in breach of trust.

3-12. The first is *Workman v Crawford*.[29] The pursuer, Workman, was the beneficiary of a trust of tenement property. The trustee, Stirling, disponed the property to Crawford, and Workman sought reduction of the disposition as having been made in breach of trust.[30] Crawford argued that Workman's personal right was ineffective against an acquirer after infeftment[31] and that, having acquired the property in good faith and for value, there could be no fraud on his part.[32] The court agreed: Workman's action of reduction failed.[33]

3-13. A similar result was reached in *Anderson v Dempster*[34] where land was disponed by Anderson in trust to a Sir John in order to allow the latter to represent the burgh of Inverkeithing (entitlement to political office as a burgh commissioner being, at the time, contingent upon landholding). Some time after the disposition Anderson died and the trust property was bought from Sir John by Dudgeon, who in the meantime had married Anderson's widow. Anderson's heir sought reduction of the disposition to Dudgeon, again on the ground that

27 *RPS* 1617/5/30, *APS* iv, 545 c 16. Reversions were abolished by the Title Conditions (Scotland) Act 2003 s 3(5)(a). For the law prior to abolition, see Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) paras 10.4 and 10.17 to 10.18.

28 See para 3-47 below.

29 *Workman v Crawford* (1672) Mor 10208, (1672) 3 Ross LC 115.

30 The trust in *Workman* appears to have been established for the security of Stirling in relation to sums borrowed by *Workman*: see the reference (at 10208) to Stirling's obligation to denude "being paid of the sums due to him".

31 *Workman* at 10208.

32 *Workman* at 10208.

33 *Workman* at 10208.

34 *Anderson v Dempster* (1702) Mor 10213 and 12460, (1702) 3 Ross LC 115.

the disposition was in breach of trust. Dudgeon's defence – that he acquired the property for valuable consideration – was upheld on a similar rationale to *Workman*:

> Dudgeon having acquired it by an onerous title, equivalent to the value of the house, the trust in Sir John's person could not affect his right, it not being a *vitium reale*, and that Sir John his cedent and author's oath could not prejudice him, unless it could be qualified that Dudgeon was *conscius fraudis*, or knew of the trust . . .[35]

Given Dudgeon's close relation to the beneficiary, this outcome is a surprising one. The judgment in *Anderson* appears to suggest that some positive knowledge of the trust, or breach thereof, was necessary in order to hold the transferee liable to the beneficiary as participant in the trustee's fraud. The beneficiary was not, however, completely without remedy: the report in *Anderson* indicates that the heir was allowed an action on the basis of the heir's personal right against Sir John as trustee.[36] *Anderson* was thus a further articulation of the general principle that an acquirer of heritable property by disposition was secure in the absence of bad faith or lack of consideration. The same did not hold true for all acquirers of heritable property, however; including, in particular, those who derived title from an apprising.

(2) Acquisition through apprising

3-14. Apprising (occasionally, "comprising") was a diligence principally exigible against land.[37] Although now long since superseded by adjudication, it was, until the late seventeenth century, an important means by which ownership in heritable property might be acquired:[38] the ability of a beneficiary to proceed against a party deriving title from an apprising was thus an issue of some significance. In the seventeenth and eighteenth centuries, that issue was particularly acute given the frequent use of the trust in conjunction with apprising where it was sought to recover debts due to multiple creditors.

[35] *Anderson* at 10213.

[36] *Anderson* at 10213.

[37] For apprising generally, see Stair, *Inst* III.1.13–43 and *passim*; Erskine, *Inst* II.7.1–55; G Watson, *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 2, 2012) 15ff. Apprising (or "comprising") was an ancient diligence in use for some time even before its regulation through the Diligence Act 1469 (*RPS* 1469/26, *APS* ii, 96 c 12). It was replaced with adjudication by the Adjudications Act 1672 (*RPS* 1672/6/55, *APS* viii, 93 c 45). Apprising entitled the creditor to sell or take ownership of the debtor's lands in satisfaction of the debt; the debtor was in turn entitled to recover the apprised lands within the "legal", a period of seven years (extended to ten after the Diligence Act 1661 (*RPS* 1661/1/433, *APS* vii, 317 c 344)) after the date of the apprising. For a consideration of the significance of apprising in the context of the protection of trust property from the personal creditors of the trustee, see paras 8-10ff below.

[38] Indeed, Stair called the apprising the "foundation of the rights of most lands in the kingdom": see Stair, *Inst* III.1.21 (considered below at para 3-16 n 39).

(a) Apprising and the trust

3-15. In a typical arrangement involving an apprising and a trust, creditors transferred their claims against a particular debtor to another person who was often, but not always, one of their own number. That party would in turn grant a back-bond of trust narrating the terms of the transfer and the trustee's obligation to repay the creditors (and, if relevant, recording the granter's own entitlement to repayment).[39] The trustee would then lead an apprising of the debtor's lands to satisfy the debts of the whole body of creditors. This method was quicker and less costly than recovery by each creditor through individual diligence.[40] The practice could, however, be fraught with difficulties. A particular problem arose when the trustee, having successfully led an apprising, transferred the right in security which resulted from the apprising[41] to another for the trustee's personal gain. This problem gave rise to a number of cases in which the creditor-beneficiaries pursued the transferee of the apprising. The central issue in such cases was whether the beneficiary's nominally personal right bound the transferee who took either the apprising or was infeft on the lands apprised.

3-16. Compared to the transferee in a voluntary disposition, a party who acquired ownership of heritable property by apprising enjoyed less protection from the claim of a beneficiary. While, as will be seen, the acquirer by apprising's position was a matter of some controversy, a useful starting point from which that position may be considered is Erskine's discussion of the general rule:

> [B]ackbonds or other personal declarations, restricting an apprising, if granted by the appriser before he be infeft, are effectual during the currency of the legal, even against his singular successor infeft upon his conveyance, though such backbonds should continue latent deeds . . . because an apprising without seisin is a personal right, which therefore may be restricted or charged with personal declarations. But

[39] For an example of an early back-bond (though not of trust), see P Gouldesbrough, *Formulary of Old Scots Legal Documents* (Stair Society vol 36, 1985) 8–9.

[40] Gretton also notes this device in the early law: see GL Gretton, "Trusts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 480 at 496–97 ("[A common use of the trust] was the practice whereby creditors would assign their claims to one of their number, who would then enforce on behalf of everyone. This had the advantages of speed and convenience. The assigned debts were held in trust by the assignee"). The rights in security arising from the diligence undertaken by the trustee would also be held in trust for the creditors: *Drummond v Mackenzie* (1758) Mor 16206; *Kennedy v Cunningham and Wallace* (1670) Mor 10205, (1670) 3 Ross LC 116. Indeed, the practice may have also had a social basis as enabling creditors who considered it beneath their dignity to lead an apprising personally to recover sums due to them: see e.g. the facts in *Monteith v Douglas and Leckie* (1710) Mor 10191. The practice is also recorded in *Anent the Transferring of Apprisings* (1671) 2 Bro Sup 531, *Anent Apprisings* (1680) 3 Bro Sup 318, and *Anent Trusts and Back Bonds* (1677) 3 Bro Sup 185. It appears to have fallen out of use with the introduction of the administration of the debtor's affairs in the form of sequestration.

[41] 'Apprising' was used to refer both to the process by which a right in security was acquired as well as to the right in security itself.

such declarations by an appriser after he is infeft, can have no effect against his singular successors, even within the legal.[42]

The time at which a back-bond, including a back-bond of trust, was granted thus served to determine its exigibility against a singular successor. There were two possibilities: the back-bond might be granted prior to the holder of the apprising's taking infeftment upon the apprising, or it might be granted after such infeftment. Where the back-bond was granted before the holder of the apprising's infeftment, an uninfeft singular successor taking the apprising would be affected by that back-bond during the legal (i.e. the period during which the debtor whose lands had been affected by the apprising was entitled to discharge the apprising by repayment of the debt).[43] More controversially, that singular successor might also be affected in the same circumstances even after his own infeftment.[44] Where the back-bond was granted after the infeftment of the holder of the apprising, however, it could be of no avail against a singular successor, even during the legal. Where liability did arise under these rules, the fact of a transferee's good faith or provision of consideration was irrelevant.[45] As will be seen, this position affected several noteworthy decisions concerning actions by beneficiaries against transferees.

(b) Apprising and the uninfeft transferee: Brown *(1673) and* Gordon *(1676)*

3-17. A number of early cases considered the liability of the transferee of an apprising to an action by a beneficiary where infeftment had not been taken by

[42] Erskine, *Inst* II.12.36. See also Stair, *Inst* III.1.21; Bankton, *Inst* III.2.60; Forbes, *Inst* III.I.6.1; *Sinclair v Sinclair* (1685) Mor 5324 ("[F]ound, [t]hat if infeftment had followed upon the apprising before restriction, the restriction was but personal; but if it preceded infeftment, it did affect and regulate the apprising against the singular successor, because, till infeftment, the apprising was transmissible by assignation"). For a discussion of the doctrine and its manifestation in the case law, see G Ross, *Leading Cases in the Law of Scotland* vol 3 (1851) 114–19.

[43] As the apprising remained incorporeal property this was simply an expression of the more general rule that the assignee (that is, the transferee of the apprising) *utitur iure auctoris*: see e.g. *Gordon v Skein and Crawford* (1676) Mor 7167, (1673) 3 Ross LC 118. The rule is discussed in relation to incorporeal moveable property at para 3-27 below.

[44] The reason for the exceptional susceptibility of the singular successor to even a latent backbond in these circumstances was, according to Erskine, attributable to the design of the system of registration which served to protect a purchaser of land but not of an apprising or other contingent right: see Erskine, *Inst* II.12.36. For a consideration of how similar rationales affected the vulnerability of a creditor to latent personal rights, see para 8-18 below.

[45] Cf. the position where the transferee derived ownership from a voluntary security transferred by the trustee. Thus in *McCubbins v Ferguson* (1715) Mor 10215, (1715) 3 Ross LC 110 a trustee appointed to lead an adjudication transferred a heritable bond belonging to one of the beneficiary-creditors to the defender-transferee who then took infeftment. In an action of reduction at the instance of the beneficiary, the court preferred the defender as being in good faith and giving value: see *McCubbins* at 10219. For the liability of a creditor, who had taken voluntary security, to the personal obligations of a debtor, see para 8-18 below.

the transferee. The first of these, *Brown v Gairns*,[46] concerned the arrangement, discussed above, of a trustee acting on behalf of a creditor. John Brown transferred a debt to Alexander Brown, who in turn granted a back-bond of trust obliging him to retrocess. Alexander Brown went on to lead an apprising against the debtor's lands and to transfer the apprising to another who was not infeft. The question thus arose of the exigibility of John Brown's back-bond against that transferee.[47] In answering that question, the court accepted John Brown's argument[48] that a distinction existed between a disposition on the one hand and an apprising on the other, and found the trust to be effective:

> The Lords . . . found that a comprising within the legal was such a right as might be extinguished by private deeds, such as discharges or intromissions . . . and thereupon a back-bond granted by the compriser, bearing a trust, before leading of the comprising or any infeftment, was sufficient to denude or qualify his right against a singular successor, as hath been found by the constant practice. [. . .] [E]specially considering, that if it were otherways there would be an absolute necessity that every creditor, albeit for never so small a sum, behoved to lead a several comprising, to the ruin of the common debtor, and would open a door to those whose names were entrusted, to defraud all other creditors, against their own back-bonds and declarations, which hath always been looked upon as a perfect security . . .[49]

Thus while the uninfeft transferee was held liable to the beneficiary because of the particular nature of the apprising, the court in *Brown* was also anxious to preserve the device whereby one party was appointed to do diligence on behalf of a number of others. That rationale would be used to justify the application of special rules to apprisings in a number of other early cases, including a further decision – *Gordon* – concerning the transferee of an apprising.

3-18. *Gordon v Skein and Crawford*,[50] though arising on complex facts,[51] involved the familiar issue of a competition between the uninfeft transferee of an apprising and the beneficiary of a trust constituted to do diligence. In finding that the beneficiary prevailed, the court, as in *Brown*, adopted the pursuer's argument that the transferee of an apprising qualified by back-bond was in the same position as an assignee of incorporeal property, such that the former

[46] *Brown v Gairns* (1673) Mor 10209, (1673) 3 Ross LC 117.

[47] This issue arose only obliquely, however: Alexander Brown had by contract restricted the scope of the apprising and renounced the restricted portion of the lands in favour of a second appriser who then transferred the apprising. The precise question was thus whether the earlier declaration of trust affected the transferee such that John Brown was entitled to rank equally to that transferee on the apprised lands: see *Brown* at 10209.

[48] *Brown* at 10210.

[49] *Brown* at 10210.

[50] *Gordon v Skein and Crawford* (1676) Mor 7167, (1673) 3 Ross LC 118.

[51] The pursuer-beneficiary Ludovick Gordon and defender-transferee Alexander Skein had acquired their respective rights through lengthy chains of assignations, as Stair's report indicates: see *Gordon* at 7169.

took subject to any personal rights exigible against the transferor, including the personal right of the trust beneficiary.[52] The same policy considerations as in *Brown* were also at the fore in the arguments of the pursuer.[53] Unlike *Brown*, however, the court in *Gordon* was not unanimous in finding for the beneficiary: Dirleton's report of the case indicates that a substantial minority of the judges dissented and produced separate policy reasons in favour of the defender, including the potential prejudice to transferees in good faith and the possibility of intimation as a means of protecting the beneficiary's position:

> It would be an irreparable prejudice to the people, and to singular successors, who, finding a right pure without any quality, are in *bona fide* to think that they may securely take a right thereto, and yet should have no remedy, if, upon pretence of back-bonds, and deeds altogether extrinsic, their right may be questioned. [. . .] As to the pretence of the prejudice to the people, *viz*. That they are in use to grant assignations, in order to the deducing of comprisings thereupon, and may be frustrated if the back-bond should not affect the same, it is of no weight, seeing they trust the assignees; and it is their own fault, if they trust persons that do not deserve trust; and they have a remedy by intimating the back-bonds . . . whereas a singular successor has none . . .[54]

However persuasive these reasons, they had no immediate impact on the law relating to apprisings. Indeed in another decision involving a competition between a trust beneficiary and the transferee of an apprising – *Kennedy* – the notion that the transferee was liable to the beneficiary was carried yet further.

(c) Apprising and the infeft transferee: Kennedy *(1670)*

3-19. In *Kennedy v Cunningham and Wallace*[55] John Kennedy was a debtor of Edward Wallace, who led an apprising of Kennedy's land to recover the sum due. Having successfully apprised Kennedy's lands, Wallace declared that he held the apprising in trust for his brother, William. Edward Wallace then transferred the apprising to Adam Cunningham, who took infeftment. Some time after this transfer, Kennedy repaid the debt, not to Cunningham as holder of the apprising but to the beneficiary, William Wallace. Kennedy then sought recovery of the land, arguing that the apprising had been discharged by payment.[56] Cunningham, for his part, argued that payment to the beneficiary

[52] *Gordon* at 7170. A similar result was reached in *Sinclair v Sinclair* (1685) Mor 5324 although it is unclear whether the transferee in that case was infeft.

[53] *Gordon* at 7170–7171: "[T]here is nothing more ordinary than for many creditors to assign all their debts to one person to comprise, and to give back-bonds, declaring the assignation to be in trust, which were never doubted but to be effectual, even against singular successors . . . and any thing in the contrary would exceedingly disquiet and unsecure the lieges".

[54] *Gordon* at 7171.

[55] *Kennedy v Cunningham and Wallace* (1670) Mor 10205, (1670) 3 Ross LC 116.

[56] *Kennedy* at 10205. Repayment to the apprising creditor generally resulted in the extinguishing of the apprising and any infeftment founded thereon: see Stair, *Inst* III.2.37.

could make no difference against a transferee who was infeft and so unaffected by personal rights against the transferor.[57]

3-20. In *Kennedy*, then, the question, though posed indirectly, was once more of the exigibility of the trust against a transferee of an apprising: if the transferee took subject to the trust, payment by Kennedy to the beneficiary rather than to Cunningham would be sufficient to extinguish the apprising. In finding the trust effective against the transferee, the court's decision was predicated upon the special nature of apprisings compared to property of other kinds.[58] So distinct were the rules for apprisings that the fact that Cunningham as transferee was infeft was said to be irrelevant: the trust remained effective against him.[59]

3-21. *Kennedy* indicates the particularly vulnerable position of a transferee of heritable property by apprising. Even where the transferee of the apprising had acquired a real right by infeftment, the transferee remained in many respects at the mercy of the beneficiary who (provided his right had been constituted before the holder of the apprising's own infeftment) had nearly unlimited recourse regardless of good faith or onerous consideration on the part of the transferee. As has been seen, this stood in stark contrast to the position of a transferee acquiring by voluntary disposition.

3-22. The significance of the separate position of those acquiring by apprising compared to parties taking by voluntary disposition was eventually to diminish. This attenuation in significance did not, however, result from the assimilation of the rules for apprisings with those applying to other forms of property.[60] Instead, apprising itself declined in the eighteenth century as a means by which title to heritable property was acquired. With it disappeared the particular vulnerability of the transferee of an apprising to the personal obligations of the transferor[61].

[57] *Kennedy* at 10205

[58] *Kennedy* at 10207: "By our law and practice, comprisings are found to be such rights, that albeit infeftment follow, yet they may be extinguished by a discharge of the sums for which comprising is led." The same policy considerations of preserving trust arrangements for creditors as had appeared in *Gordon* also figured prominently in the reasoning of the court: see *Kennedy* at 10207.

[59] *Kennedy* at 10206. A similar outcome was reached in *Earl of Southesk v Marquis of Huntly* (1666) Mor 10203 and 4712 as well as in *Innes and Wiseman v Chalmers* (1715) Mor 16539, though neither case involved a back-bond of trust.

[60] Cf. the position of incorporeal moveable property discussed below at paras 3-25ff.

[61] It might be questioned whether the rules discussed here might now also prevail in relation to adjudications, the successor diligence to apprising. The issue is, however, unlikely to be of significance in the modern law given the exceptional rarity of adjudication as a means of acquiring ownership of heritable property.

D. CORPOREAL MOVEABLE PROPERTY

3-23. None of the early cases considers a beneficiary's entitlement to proceed against a transferee who received corporeal moveable property in breach of trust.[62] Assuming, however, that the beneficiary's right was properly characterised as a personal right against the trustee,[63] the liability of a transferee of corporeal moveables in the early law may be deduced from principle. Stair analyses that liability in the following terms:

> [M]oveables acquired *bona fide*, for onerous causes, were found not liable to hypothecation or conditions of a written disposition of them, unless they had been affected with diligence, when they were in the hands of him, to whom they were disponed with these conditions . . .[64]

As in the case of heritable property transferred by disposition, then, a transferee of moveable property apparently took free of the personal rights of the transferor (including, it must be assumed, a beneficiary's personal right against a trustee-transferor). Again, an exception was made where the transferee participated in the transferor's fraud in the sense of taking the trust property in bad faith or for no consideration.[65] In such cases the beneficiary would, as in the case of heritable property, be entitled in the first instance to have the transaction set aside.

[62] Indeed to the present day no case ever reported appears to feature such a claim. The paucity of case law is probably explicable by the uncommonness of trusts of corporeal moveable property and the relatively lower value of that form of property as the subject of a claim compared to heritable and incorporeal property. A similar dearth of early case law exists in relation to the exigibility of a beneficiary's personal right against a diligence creditor (in other words, an involuntary transferee) seeking to take corporeal moveable trust property: see para 8-31 below.

[63] See paras 2-19ff above and para 3-07 n 19 above.

[64] Stair, *Inst* II.1.42. Here Stair relies upon the case of *Creditors of Masterton v Creditors of Thin* (1675) Mor 11830. Similarly, see Stair's treatment of the effect of the transferor's fraud (creating a personal obligation in favour of the party defrauded) on the acquirer of corporeal moveables: Stair, *Inst* IV.40.21 ("[I]n moveables, purchasers are not quarrelable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is, because moveables must have a current course of traffic"). A similar rationale is used by Stair to justify the presumption of ownership arising from possession of moveables: see Stair, *Inst* III.2.7 and IV.30.9. Bell interprets Stair's requirement that moveables should have a current course of traffic to the effect that a good-faith onerous transferee would be secure, in some circumstances at least, even where the property is stolen. That view, however, appears to misinterpret Stair: see Bell, *Comm* (7th edn) vol I, 305–06 n 2 (added by the editor, J McLaren).

[65] Erskine, *Inst* III.5.10: "How far in contracts whereof the foundation is laid in fraud, a purchaser *bona fide* will be secure? [. . .] Purchasers of real rights rely on the faith of the records, and the subject of their purchase is the most valuable of all of those which fall under the consideration of law . . . for which reason the legislature hath for their security, enacted a special statute 1621 c 18 [against gratuitous alienations by bankrupts] that they shall not be affected by the fraud of their authors, if they themselves have not been *participes fraudis*. There was also a necessity for extending the same doctrine to purchasers of moveable subjects."

3-24. The liability of a transferee of corporeal moveable property to the claim of a beneficiary was, therefore, comparable to a transferee of heritable property acquiring by voluntary disposition. The same was not however true of incorporeal moveable property, to which this chapter now turns.

E. INCORPOREAL MOVEABLE PROPERTY

(1) Two maxims

3-25. The starting point for any discussion of the liability of a transferee of incorporeal property to the claim of a beneficiary must be the particular view of assignation which prevailed in the early law. The essential features of that view were expressed in two maxims: *procurator in rem suam* and *assignatus utitur iure auctoris*.

(a) Procurator in rem suam

3-26. In the modern law assignation is looked upon as the transfer of a personal right wholesale. The same was not, however, true of the early law.[66] Instead the assignee was a *procurator in rem suam*[67] and thus was seen as coming to some extent into the place of the assignor.[68] That view had important consequences for the liability of a transferee of incorporeal moveable property to personal rights exigible against the transferor. Stair explains:

> Except in the matter of probation, all exceptions competent against the cedent before the assignation or intimation, are relevant against the assignee, as payment,

[66] This is to oversimplify, since the *procuratio* view described here was one of a number of competing conceptualisations of assignation and did not, in any event, gain universal acceptance: see RG Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) ch 5 esp paras 5-02 to 5-03, 5-16 to 5-18 and 5-21; RG Anderson, "Fraud on transfer and on insolvency: ta. . .ta. . .tantum et tale?" (2007) 11 Edin LR 187 at 196ff; K Luig, "Assignation", in R Zimmermann and K Reid (eds), *A History of Private Law in Scotland* (2000) vol 1, 399. The theory was, however, sufficiently influential – particularly due to its having been expounded by Stair – to have material consequences for a transferee of incorporeal moveable property and so be worthy of consideration here.

[67] That is, "procurator [in the sense of representative or manager] for his own behalf".

[68] An important source of the *procuratio* analysis was Stair, who relied upon the it to enable the use by another of personal rights which would in many cases otherwise be incapable of transfer: see Stair, *Inst* III.1.3 ("[T]hat obligations may become the more useful and effectual, custom hath introduced an indirect manner of transmission . . . whereby the assignee, is constitute procurator; and so as mandatar for the creditor he hath power to extract and discharge, but it is to his own behoof, and so he is also denominat donatar, and this is the ordinary conception of assignations"). See also Stair, *Inst* I.12.1 and Appendix II. Erskine, *Inst* III.5.8 takes the same view.

> compensation &c. which was found, even as assignees to tacks, that the tacks-man back-bond was sufficient against his singular successor by assignation . . .[69]

In the early law, then, at least one conception of assignation saw the transferee of incorporeal moveable property as subject to any personal rights against the transferor that related to the property.[70] Included in those personal rights was, in principle, the right of the beneficiary of a trust against the cedent trustee. As will be seen, this aspect of the early law left the transferee of incorporeal moveables uniquely vulnerable to a claim by the beneficiary.

(b) Assignatus utitur iure auctoris

3-27. The notion that the assignee came into the place of the assignor which inhered in the *procuratio* view of assignation was also expressed from time to time in the formulation *assignatus utitur iure auctoris*.[71] Unlike the *procuratio* conception, the *assignatus utitur* rule survives in the modern law where it indicates that defences pleadable by the debtor against the assignor are equally competent against the assignee.[72]

3-28. An understanding of the differing usage of the *assignatus utitur* rule in its modern and earlier senses is aided by outlining the distinction between conditions extrinsic to the right being assigned (*extra corpore iuris*) and conditions intrinsic to that right (*in corpore iuris*). The first category encompasses obligations owed by the assignor to other parties, the second obligations owed by the assignor to the debtor in the right sought to be transferred.[73] Principally

[69] Stair, *Inst* III.1.20 relying on *Swinton v Brown* (1668) Mor 3412. Similarly see Stair's discussion of fraud (nominally a personal right against the transferor for reduction) in which the *procuratio* maxim is employed: Stair, *Inst* IV.40.21 ("[I]n personal rights, the fraud of authors is relevant against singular successors, though not partaking nor conscious of the fraud, when they purchased; because assignees are but procurators, albeit *in rem suam*: and therefore they are in the same case with their cedents, except that their cedent's oaths after they were denuded, cannot prejudge their assignees"). See also Erskine *Inst* III.5.10 quoted at n 65 above.

[70] Anderson argues that, while the *procuratio* view was sometimes adopted in name, it was rarely of significance for the substantive rules of assignation: see Anderson, *Assignation* para 5-02. Rules on the relationship between the assignee and other parties may, however, been one of the few exceptions: Anderson, *Assignation* paras 5-16 to 5-17.

[71] While the *assignatus utitur* maxim is best seen as a rule, the *procuratio* formulation is probably most satisfactorily described as a particular conception of assignation. The ideas have an affinity in that the former is a logical corollary of the latter: if the assignee is merely a procurator for the assignor, then he or she necessarily makes "use" of his or her author's right.

[72] For the rule in its modern sense, see Reid, *Property* para 660; Anderson, *Assignation* paras 8-05ff. The latter's treatment of the rule under the heading of "The Debtor's Defences" is suggestive of its modern scope.

[73] See Reid, *Property* paras 660 and 688. See also Bell, *Comm* vol I, 284: "[I]t is necessary to distinguish between such conditions as are incorporated with the right . . . and such as are extraneous to it. [. . .] Conditions of the former kind, inherent in the value of the right, or (in the case of debts) existing as exceptions or counterclaims by the original debtor against his

as a result of the changes traced in this chapter,[74] the modern formulation of the *assignatus utitur* rule leaves the assignee subject only to intrinsic qualifications. In the early law, however, the rule meant that the assignee came into the place of the assignor and so was subject to conditions both intrinsic and extrinsic.[75] As the counterpart of the obligation owed by an assignor-trustee to a beneficiary under the trust, the right of a beneficiary was conceived as an extrinsic condition capable of transmission to an assignee. So by the application of the *assignatus utitur* rule, too, the transferee of incorporeal moveables was vulnerable to a claim by a beneficiary.

3-29. Having explained the principles by which that vulnerability arose, it is now convenient to examine those decisions which saw a beneficiary succeed against a transferee of incorporeal moveables.

(2) Beneficiaries and assignees: *Mackenzie* (1678) and *Monteith* (1710)

3-30. The earliest reported decision considering the liability of a transferee of incorporeal moveable property to the claim of a beneficiary is *Mackenzie v Watson and Stewart*, decided in 1678.[76] That case concerned the familiar arrangement by which a trustee agreed to undertake diligence for the benefit of a creditor.

3-31. In *Mackenzie*, the pursuer (Roderick Mackenzie) was unwilling to pursue the debtor in a bond in his own name and so transferred that bond to another (Hector Mackenzie) who in turn declared that he held the bond for

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creditor, are effectual both against creditors and purchasers coming in place of the original holder of the right. [. . .] Conditions of the latter species, collateral obligations, or latent trusts extraneous to the deed and of which the new holder of the right has no notice, have given occasion to great diversity of opinion among our lawyers." Anderson criticises Bell for, *inter alia*, including trusts as extrinsic conditions under the *assignatus utitur* rule: see Anderson, *Assignation* paras 8-09 to 8-10. Whether Bell was well-founded in including trusts as extrinsic conditions or not, the *assignatus utitur* rule was, as will be seen, used on a number of occasions prior to Bell's *Commentaries* to justify the exigibility of a trust against an assignee.

74 See paras 3-35ff.

75 See e.g. Erskine, *Inst* III.5.10. See also Bankton, *Inst* III.1.8.

76 *Mackenzie v Watson and Stewart* (1678) Mor 10188. *Mackenzie* was not, however, the first instance in which the *assignatus utitur* rule was applied to hold an assignee liable to obligations owed by the cedent: see e.g. *Scot v Montgomery* (1663) Mor 10187 where conditions contained in a back-bond in favour of a debtor were found relevant against an assignee. The report in *Scot* is, however, very brief and it is unclear if the case is concerned with intrinsic or extrinsic conditions. Anderson considers *Scot* to relate to an extrinsic condition: see Anderson, *Assignation* para 807 n 34. Stronger candidates for the application of the *assignatus utitur* rule to extrinsic conditions include *Brown v Gairns* (1673) Mor 10209, (1673) 3 Ross LC 117 and *Gordon v Skein and Crawford* (1676) Mor 7167, (1673) 3 Ross LC 118, discussed at paras 3-17ff above. As has been noted, those cases held the transferee of an apprising before infeftment (a form of incorporeal heritable property) liable to a beneficiary on the basis of the *assignatus* rule: see e.g. *Gordon* at 7170.

the pursuer. Before the debt could be recovered the bond was arrested by Hector's creditors. *Mackenzie* was, therefore, strictly a case relating to creditors rather than transferees.[77] Nevertheless, in holding that the pursuer-beneficiary prevailed over the arresting creditor, the court appeared to accept the former's argument that a singular successor – whether creditor or transferee – took subject to the personal obligations of the transferor:

> [T]he common ground of law is that *nemo plus juris in alium transfert quam ipse habet*,[78] *et quisque scire debet cum quo contrahit*;[79] and therefore in personal rights singular successors can never be secure against the deeds of their cedents instructed by writs, though their oaths are not receivable against singular successors, and therefore no party, by seeing a clear liquid bond, and contracting *bona fide*, can be further secure . . .[80]

As well as an appeal to the rule that, in the transfer of incorporeal property, personal rights of the transferor could affect a transferee, the pursuer also sought to rely upon the fact that a transferee of heritable property might also be subject to the personal obligations of the transferor as a result of the decision in *Gordon*[81] two years previously.[82] The same policy considerations raised in that case in relation to preserving trusts for creditors were imported directly into the argument of the pursuer.[83] Following the logic of the decision in *Mackenzie*, then, an action by the beneficiary against a transferee of incorporeal moveables was destined to succeed in all cases. That view was bolstered by a further early case involving a competition between beneficiary and assignee: *Monteith v Douglas and Leckie.*[84]

3-32. *Monteith* arose in similar circumstances to *Mackenzie* and, like that decision, was principally concerned with the liability of a creditor seeking to do diligence against personal rights held by the debtor.[85] In *Monteith*, Douglas assigned a debt to Leckie who declared the debt in trust and obliged himself to retrocess. The debt was eventually arrested by Leckie's creditors. The question of those creditors' liability to Douglas' personal right against Leckie thus arose once again.

[77] The case is considered for its significance to beneficiaries and creditors at para 8-34 below.

[78] That is, "no one may transfer a greater right than he has". As Reid, *Property* para 660 notes, the *assignatus utitur* principle was from time to time identified as an offshoot of the broader *nemo plus* rule.

[79] The second brocard, "everyone must know those with whom he contracts", embodied the common argument in favour of the *assignatus utitur* rule that it was incumbent upon the assignee to know the qualifications to which the assignor was subject.

[80] *Mackenzie* at 10188.

[81] *Gordon v Skein and Crawford* (1676) Mor 7167, (1673) 3 Ross LC 118.

[82] *Mackenzie* at 10188.

[83] *Mackenzie* at 10189.

[84] *Monteith v Douglas and Leckie* (1710) Mor 10191.

[85] *Monteith* is discussed in the context of creditors at para 8-34 below.

3-33. By reliance on *Mackenzie*, Douglas successfully established the exigibility of the trust against the creditors.[86] Indeed, many of the arguments raised, including those of legal policy,[87] were identical to the earlier decisions. As in *Mackenzie*, the court appeared to accept the pursuer's argument[88] that an assignee would be liable for the personal obligations of the assignor, whether intrinsic or extrinsic. Again, therefore, *Monteith* was a demonstration of the especially precarious circumstances of the transferee of incorporeal moveable property. Unlike acquirers of heritable property by disposition or of corporeal moveables generally, an assignee could never prevail against a trust beneficiary, regardless of the acquirer's good faith or the onerous character of the transaction.

3-34. One final aspect of the decision in *Monteith* remains worthy of note. In a break from the decisions which preceded it, the court in *Monteith* registered explicitly its unhappiness with the effects of the *assignatus utitur* rule:

> The Lords were sensible of the hardship that parties might be circumvened by such latent rights, but the decisions were so pat, there was no remedy. It might deserve either an act of sederunt, or act of Parliament, that back-bonds should be registered within 60 days of their date, which would prevent many mistakes. . .[89]

Despite the concerns of the court, the *assignatus utitur* rule and associated *procuratio* view of transfer would endure for more than a century after its judgment. How the rule came to be modified was a crucial step in the development of claims for breach of trust and in the law of transfer more generally. That change is the subject of the following section.

F. *REDFEARN* AND ITS SUCCESSORS

(1) Discontent with *assignatus utitur* and *procuratio in rem suam*

3-35. The decision in *Monteith* was not the sole occasion on which dissatisfaction with the law of assignation was expressed. In fact, the view of assignation adopted in that and other cases was the subject of sustained criticism both from judicial quarters and elsewhere. Perhaps the most forceful critique was made by Lord Elchies in his *Annotations on Stair's Institutions*.[90] In discussing the effect of a back-bond of trust on a singular successor to incorporeal property, Elchies wrote:

[86] See also the similar result reached in *Black v Sutherland* (1705) Mor 10189.
[87] *Monteith* at 10191.
[88] *Monteith* at 10191.
[89] *Monteith* at 10191.
[90] Patrick Grant, Lord Elchies, *Annotations on Lord Stair's Institutions of the Law of Scotland* (1824) 73.

> [I]t were against reason, and a great impediment to commerce, if these back-bonds, or declarations of trust by creditors, should affect their assigneys; since certainly the *jus crediti* is constitute in the person of the truster . . . But . . .it was found that these back-bonds did affect personal rights even against singular successors . . . especially 6th July 1676 Gordon against Crawford[91]. . .which appears to have been designed for a leading decision. [. . .] But this decision is likewise followed by another 5th February 1678 McKenzie against Watson and Stewart[92]. . . and I think it the greatest defect I have observed in our law, in personal rights, entirely against the analogy of law, a great handle for fraud, and the greatest obstruction to trade and commerce that I know.[93]

In the following century, Elchies' criticism was repeated by Bell, who took a similarly hostile view of the *assignatus utitur* rule and *procuratio* analysis.[94] In this they were joined by courts which, although invariably professing themselves unable to act, called on a number of occasions for a register of back-bonds to avoid possible hardship to the transferee of incorporeal moveables.[95] Despite those calls, it would be through judicial means, rather than registration, by which the concerns referred to would be ameliorated. The leading decision in this regard was *Redfearn v Somervail*.

(2) *Redfearn v Somervail*

3-36. The facts of *Redfearn* were relatively straightforward and, unlike its predecessor decisions, did not relate to a trust constituted to undertake diligence. Steuart was the owner of a share in the Edinburgh Glass House Company, and

[91] *Gordon v Skein and Crawford* (1676) Mor 7167, (1673) 3 Ross LC 118.

[92] *Mackenzie v Watson and Stewart* (1678) Mor 10188.

[93] Elchies, *Annotations* 72-73. Significantly the discussion arises in the context of Elchies' comments upon Stair, *Inst* I.2.17 (Of Trust).

[94] Bell, *Comm* vol I, 284-85 n 2: "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 *iura 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."

[95] See e.g. *Black v Sutherland* (1705) Mor 10189 at 10190 ("Though our registers are a great security in many cases, yet here they are defective; and it were to be wished, that a register were appointed for such personal backbonds, to certify the lieges thereof, that they may be no longer ensnared by such latent deeds"); *Monteith v Douglas and Leckie* (1710) Mor 10191 at 10192, quoted at para 3-33 above; *Gordon v Skein and Crawford* (1676) Mor 7167 at 7171–72. See also argument for the defender in *Cunningham of Corsehill's Creditors v Cunningham of Robertland* (1698) 4 Bro Sup 412 at 413; argument for the defender in *Douglas v Alcorn* (1702) 4 Bro Sup 528 at 528; argument for the defender in *Gardiner v Laird of Lag* (1688) Mor 1082 at 1082; argument for the defender in *Innes and Wiseman v Chalmers* (1715) Mor 16539 at 16539. See also *Haliburton v Barrie* (1681) Mor 13555 in which it was found that a back-bond of trust need not be recorded in the Register of Sasines and the potential hardships were noted.

held that share in trust for Allan, Steuart & Co, a partnership in which he was partner. The share was assigned to Redfearn as security for advances made to Steuart, who subsequently became bankrupt but not before the assignation to Redfearn had been completed by intimation. A competition thus arose between Redfearn as assignee and Somervail as representative of the beneficiary partnership.

3-37. On the basis of the cases predating *Redfearn*, the solution to the issue now before the court – that Somervail as beneficiary was entitled to prevail – must have seemed obvious. Yet on this issue the Inner House and House of Lords reached different conclusions, with significant implications for the beneficiary's claim against a transferee.

(a) Inner House: Somervails v Redfearn *(1805)*[96]

3-38. Before the Inner House, Redfearn argued forcefully that, as assignee, he was entitled to prevail.[97] In Redfearn's view, assignation should be conceptualised as a wholesale transfer of the right in question, not simply as a form of procuration for the benefit of the assignee, with the result that any good-faith and onerous assignee should take free of personal rights exigible against the assignor.[98] That approach was bolstered, in his argument, by the policy-based view that latent claims should not prejudice assignees to the detriment of commerce.[99] Perhaps most importantly, Redfearn sought a reconceptualisation of the *assignatus utitur* rule:

> It is true, that no one can confer upon another a better right in a subject than he possesses himself . . . according to the principles in the civil law "*Nemo plus juris in alium transferre potest quam ipse habet*" and "*Assignatus utitur iure auctoris*". But this rule seems to apply merely to questions between an assignee and the original debtor or obligant in the right assigned . . . The rule does not seem at all applicable to

[96] *Somervail v Redfearn* (1805) Mor App "Personal and Real" No 3, 22 November 1805 FC 508.

[97] Redfearn had initially succeeded in the Outer House, the court holding that, since he was not in *mala fide* and had purchased the share, he was secure. Somervail reclaimed and that result was overturned before a further reclaiming motion brought the case before the Inner House in the case considered here. No formal report exists of the judgments at Outer House stage, but an account is found in Morison's report cited above (n 96) at 7–8.

[98] *Somervail v Redfearn* (1805) Mor App "Personal and Real" No 3 at 8.

[99] *Somervail* at 9: "If effect be given to latent personal claims, at the instance of third parties, the commerce of all kinds of stock, and other moveable securities will be greatly injured." This consideration was not a new one: see e.g. argument for the defender in *Gordon v Skein and Crawford* (1676) Mor 7167. It may well have seemed more forceful in view of the increasing commercial importance of incorporeal property such as shares in the late eighteenth and early nineteenth centuries: see n 103 below. Cf. the grounds of policy advanced to support the notion that the beneficiary's right in the trust should prevail against singular successors in e.g. *Mackenzie v Watson and Stewart* (1678) Mor 10188 at 10188–89.

questions between an assignee and third parties, whose claim upon the cedent cannot be discovered by any inquiry or investigations.[100]

Thus, in Redfearn's submission, the *assignatus utitur* rule should be restricted to conditions intrinsic to the subject being transferred. The merely extrinsic right of a beneficiary should not, therefore, inevitably be enforceable against the assignee.

3-39. Despite these arguments, the court decided by a majority of 4–3 that Somervail should be preferred.[101] The view of the majority followed closely the earlier decisions in the Court of Session. Indeed, a number of these cases, including *Gordon* and *Monteith*, were relied upon in Somervail's successful argument.[102] Redfearn's efforts were not, however, entirely in vain. A number of those judges in the minority accepted the arguments on policy,[103] on assignation as a form of transfer rather than mere procuration,[104] as well as on the proposition that the *assignatus utitur* rule should apply only to intrinsic conditions affecting the right assigned.[105] Those arguments found still greater favour on appeal to the House of Lords.

(b) House of Lords: Redfearn v Somervail *(1813)*[106]

3-40. In its reconsideration of *Redfearn*, the House of Lords arrived at an entirely different conclusion from the court below. In holding Redfearn entitled to retain the share, some account was taken of the argument that assignation transferred wholesale the right assigned[107] and that *assignatus utitur* should

[100] *Somervail* at 9.

[101] Though not given in either the Faculty Collection or Morrison's Dictionary reports, brief opinions of the judges of the Inner House appear as a footnote to Dow's report: *Redfearn v Ferrier*, *Somervail and Others* (1813) 1 Dow 50.

[102] *Somervail* at 8. That argument might be counted as one of the high-water marks of the *assignatus utitur* rule as applied to trusts, referring as it does to the entitlement of beneficiaries to "vindicate" their right as "real proprietor" and suggesting that the trustee was not the "true owner" of the trust property.

[103] See e.g. *Redfearn* (Dow's report) per Lord Hermand at 51 (note): "It is a possible thing that a conspiracy to cheat third parties might be executed. I wish to know how this would do in Change Alley, in a purchase of stock?". Now Exchange Alley, Change Alley was in the eighteenth and nineteenth centuries an important site in the City of London for speculation on company shares. The Alley became an increasingly popular meeting point for traders when reforms to the Royal Exchange limited the conditions of trading; for a vivid account, see E Chancellor, *Devil Take the Hindmost: A History of Financial Speculation* (2000) 30ff.

[104] See e.g. *Redfearn* (Dow's report) per Lord Meadowbank at 51 (note).

[105] See e.g. *Redfearn* (Dow's report) per Lord Meadowbank at 51 (note).

[106] *Redfearn v Somervail* (1813) 1 Dow 50, 5 Pat App 707. As Anderson, *Assignation* para 9-25 notes, the reports of the proceedings in the House of Lords are unsatisfactory and, in particular, give only a limited indication of the parties' arguments. The discussion here is drawn from a combination of reports: reference to a particular report is noted accordingly.

[107] *Redfearn* (Dow's report) per Lord Redesdale at 65.

apply only to intrinsic, not extrinsic, qualifications of that right.[108] The court also found no authority to support the contention that the *assignatus utitur* rule might allow the beneficiary of a trust to succeed in a question with an assignee[109] (a surprising conclusion, given the considerable weight of authority – including *Gordon*,[110] *Mackenzie*[111] and *Monteith*[112] – brought before the court by Somervail). The most important factors in Redfearn's favour were, however, considerations of policy. Those considerations were expressed colourfully in the judgment of Lord Eldon:

> If latent equities[113] were suffered to prevail against assignations, the effect would be that nothing could ever be assigned; for as long as their Scotch neighbours retained any part of their characteristic shrewdness, they would never take an assignment if they were aware that by means of latent equities such assignments might give them nothing.[114]

Redfearn was thus to take the share absolutely; Somervail's personal right was of no effect against an onerous assignee in good faith.

(c) Redfearn *and English law*

3-41. *Redfearn* was pled by English counsel[115] and with reference to the equivalent principles in English law.[116] This, combined with the departure by the House of Lords from the relatively well-settled earlier position, has led to some

[108] Thus the court interpreted the reference to compensation in Stair's classical statement of the rule as excluding extrinsic qualifications: see *Redfearn* (Dow's report) per Lord Redesdale at 66 quoting Stair, *Inst* I.10.16 ("Lord Stair was speaking of the defence that might be made against an assignee of the original debtor, and not by a third person"). Lord Redesdale draws the same conclusion, somewhat more dubiously, from Stair, *Inst* IV.40.21 (considered at n 64 above).

[109] *Redfearn* (Dow's report) per Lord Redesdale at 66 and per Lord Eldon at 72.

[110] *Gordon v Skein and Crawford* (1676) Mor 7167, (1673) 3 Ross LC 118.

[111] *Mackenzie v Watson and Stewart* (1678) Mor 10188.

[112] *Monteith v Douglas and Leckie* (1710) Mor 10191.

[113] Somervail's right is referred to throughout as a "latent equity" by the House of Lords, most probably because this formulation reflected most closely the equivalent English law terminology for the beneficiary's right: see discussion at paras 3-41ff below especially n 116.

[114] *Redfearn* (Dow's report) per Lord Eldon at 72.

[115] John Leach (1760–1834) appeared for Somervail as respondent and Sir Samuel Romilly (1757–1818) for Redfearn as appellant. Both were experienced Chancery barristers. Romilly, it appears, had little fondness for Leach and, upon the latter's appointment to political office, wrote: "His loss is not very great. [. . .] He is extremely deficient in knowledge as a lawyer. [. . .] In judgment he is more deficient than any man possessed of so clear an understanding that I ever met with": see S Romilly, *Memoirs* vol 3 (1840) 215–17.

[116] Indeed, even the terminology acquired an English gloss. Thus the share became a "chose in action", Somervail the "*cestui que* trust", and his right against Stuart a "latent equity" in the trust property (see the passage quoted at para 3-40 above). As will be seen, this shift in terminology does not appear to have had substantive consequences.

suggestion that the decision was simply an application of English rules to Scots law.[117] It is, however, far from clear that, had *Redfearn* been decided according to English law, the same result would have been reached.

3-42. In English law, as in Scots law,[118] restrictions existed in relation to the assignment of incorporeal property. It was not generally possible to assign a chose in action[119] at common law;[120] and where in Scots law recourse was had to the *procuratio* view of assignation to circumvent such restrictions, in English law it was possible to assign incorporeal property in equity with the result that the assignee would receive an equitable interest in the property assigned.[121] Where there were multiple equitable assignments of – or alternative claims in equity to – the same property, reference was made to the general principles governing priorities in equity. Those principles included, in particular, the maxim that where the equities are equal, the first in time prevails.[122] Although this rule was modified in relation to assignment some years after *Redfearn*,[123] it remained the law at the time of that decision. Thus in a case decided a year after *Redfearn*, the first assignee of an equitable interest was entitled to prevail over a subsequent assignee, notwithstanding the fact that the subsequent assignee had intimated his claim to the debtor.[124]

[117] See e.g. *Gordon v Cheyne* (1824) 2 S 566 (NE), 5 February 1824 FC per the Lord President (Hope) at 572 (note) ("I admit that I am happy that our law has, by Redfearn's case, been assimilated to that of England."); *North British Railway Company v Lindsay* (1875) 3 R 168 per the Lord Justice-Clerk (Moncreiff) at 176 ("the judgment [in *Redfearn*] proceeded on views of expediency which prevailed in the law of England"); *Littlejohn v Black* (1855) 18 D 207 per Lord Ivory at 219. Indeed, even courts in England have considered *Redfearn* an application of English law: see *BS Lyle Ltd v Rosher* [1959] 1 WLR 8 per Lord Keith of Avonholm at 25 ("*Redfearn v Somervail*, will, in my opinion require more consideration. Though a Scots decision, I have little doubt Lord Eldon and Lord Redesdale were applying English law, and would have reached the same decision in like circumstances in an English case"). Anderson, discussing these cases, notes that *Rosher* appears to be one of the few reconsiderations of *Redfearn* by the House of Lords: see Anderson, *Assignation* para 9-25 n 93.

[118] See paras 3-26ff above.

[119] That is, a right of action against a person (the closest equivalent in Scots law being a personal right).

[120] J McGhee et al (eds), *Snell's Equity* (34th edn, 2019) para 3-002. The reason for the rule was, it seems, the prevention of surplus litigation - see e.g. *Lampet's Case* (1612) 77 ER 994 at 997. See now the Law of Property Act 1925 s 136.

[121] Snell, *Equity* para 3-002.

[122] Snell, *Equity* paras 3-024 and 5-008.

[123] *Dearle v Hall* (1828) 3 Russ 1, (1828) 38 ER 475 held that the assignee of a subsequent equitable interest who intimated first to the debtor held a better equity, and so was entitled to prevail over a prior assignee.

[124] *Cooper v Fynmore* (1824) 3 Russ 60, 38 ER 498 (decided 1814). Notably, *Cooper* recognised that a narrow exception to the temporal priority rules existed where the first assignee had displayed "such laches as in a court of equity, amounted to fraud": see *Cooper* per Sir Thomas Plumer VC at 499.

3-43. Applied to *Redfearn*, then, these rules would have resulted in a competition of equities[125] which would have been resolved in Somervail's favour as the holder of the prior equity. That Redfearn was preferred indicates that the House of Lords was not applying English law; nor was the court applying Scots law which (though not completely settled) would also have favoured Somervail. Instead the case set down a new rule that the *assignatus utitur* principle resulted in the transmission to the assignee only of the intrinsic limitations of the right assigned. By the same token, *Redfearn* marked the end of the *procuratio* view of assignation. In future, that assignation would be viewed as a complete transfer of the property in question. *Redfearn* was, in this respect, a triumph of policy over principle.

(d) Burns v Lawrie's Trustees *(1840)*[126]

3-44. At least partly for the reasons just explored, the decision in *Redfearn* was not immediately accepted as good law in Scotland. The decision of the House of Lords was criticised by later courts[127] and its scope vigorously contested in subsequent cases.[128] For present purposes, the most important of these cases was *Burns v Lawrie's Trustees*, decided in 1840. In that case a last-ditch attempt was made to limit the scope of *Redfearn* by arguing that the decision did not extend to cases where the consideration given by the transferee was (as in *Burns*) not immediately payable.[129] That argument was rejected, and *Redfearn* held to apply to any assignation regardless of the circumstances of the transaction:

> The real right stood vested in [the trustee]. All that was in [the beneficiary] was an obligation by [the trustee] to assign the shares. I cannot see that there is any principle in the case of *Redfearn* unless it applies to the one state of things as well as to the other. Can we look upon it as a case invoking a great and broad principle, and not as a special case, and yet not apply that principle *viz*. that an assignee for valuable considerations shall be preferable to a party in right of a latent obligation?[130]

After *Burns*, then, the effect of *Redfearn* was clear: a transferee of incorporeal moveable property was not subject to of extrinsic personal rights, of whatever kind, exigible against the transferor. That result was an important one; it is now

[125] Somervail's interest in the trust being equitable title to the trust property.

[126] *Burns v Lawrie's Trustees* (1840) 2 D 1348.

[127] See e.g. *Gairdner v Royal Bank of Scotland* 22nd June 1815 FC per the Lord President (Hope) at 458, cited in Anderson, *Assignation* para 9-25.

[128] A particular point of controversy was whether *Redfearn* extended to creditors so as to relieve them from liability to the personal obligations of the debtor as a result of the *tantum et tale* maxim: see, in particular, *Gordon v Cheyne* (1824) 2 S 566 (NE), 5 February 1824 FC, and *Dingwall v McCombie* (1822) 1 S 433 (NE), 6 June 1822 FC, both discussed at paras 8-36ff below.

[129] *Burns* at 1354.

[130] *Burns* per Lord Moncreiff at 1356.

convenient to consider its effect on the overall structure of the law in relation to claims by beneficiaries against transferees.

G. THE LAW AFTER *REDFEARN*

(1) Transferees and personal rights: from fragmentation to unity

3-45. In holding that a transferee of incorporeal moveable property was not subject to (extrinsic) personal rights against the transferor, *Redfearn* elided the position of those transferees with that of a party who had received heritable property by disposition or moveables by delivery.[131] The same result was achieved in heritable property more generally by the decline of apprising (and its procedural successor, adjudication) as a means of acquiring heritable property.[132] Whereas at the beginning of the eighteenth century different rules still prevailed in respect of different types of property, by the time of *Redfearn*, a century later, there was but a single rule: where the appropriate formalities for transfer were met, a transferee took free of any personal rights to which the transferor was subject, including the right of a beneficiary under a trust.[133] Thus, after *Redfearn*, a beneficiary could never succeed against a transferee solely on the basis that the transferee had, by virtue of the form of transfer by which his right was acquired, taken subject to the beneficiary's personal right.

3-46. But that is not the end of the story. As will be seen, *Redfearn* did not entirely preclude the claim of a beneficiary against a transferee taking in breach of trust. Some explanation for the transferee's continuing vulnerability is therefore needed beyond his acquisition by assignation or apprising. That ground is fraud on creditors.

(2) Fraud on creditors

3-47. It has already been shown that, while an acquirer from a trustee of heritable property or corporeal moveables generally took free of beneficiaries' rights, liability to a claim, particularly a claim for reduction, might still arise where the acquirer was seen to be acting fraudulently with respect to the trust beneficiary.[134] With the unification of the approach to transfer – such that no transferee was ordinarily subject to personal rights – that notion could be

[131] Reid, *Property* para 688; Bell, *Comm* vol I, 284–85.

[132] See para 3-22 above.

[133] This, as has been noted, is simply an expression of the distinction between real and personal rights. Where the formalities for transfer are completed the transferee receives a real right. That right is not affected by personal rights, since such rights necessarily concern not the thing but a bilateral personal relationship of which the transferee is not part: see para 3-07 above.

[134] See the discussion at para 3-10 and 3-23.

extended to all forms of property. In this context, fraud is properly characterised as a manifestation of the doctrine of "fraud on creditors", and fraud in this particular sense, it will be argued, provides the most satisfactory explanation for a transferee's liability in a claim for breach of trust after *Redfearn* and indeed in the modern law. The theory is broader in ambit than the law of trusts: it is, therefore, sketched here in general terms before its application to the claim of a beneficiary against a transferee is considered in greater detail.

(a) Two senses of fraud

3-48. The leading scholar of fraud on creditors is John MacLeod. MacLeod has shown how a doctrine which, to many, seemed to have only a marginal existence in modern times, underpins a number of different areas of law, including the rule against "offside goals".[135] In understanding fraud on creditors, it is important, at the outset, to exclude a meaning of fraud which is liable to create confusion. This meaning is of fraud as intentional deceit, that is, a fraud characterised by an attempt on the part of the fraudster actively to deceive the defrauded party.[136] While this form of fraud has acquired much greater significance in the modern law,[137] it is an unreliable guide to the early law. As MacLeod has demonstrated, fraud in the sense of the early doctrine of fraud on creditors had a considerably broader scope and, in particular, could give rise to liability where no intentional deception existed.[138]

(b) The basic rationale

3-49. When might this broader sense of fraud as fraud on creditors be relevant? Inherent within the fraud-on-creditors approach is the idea that wrongdoing is perpetrated against a *creditor*. Thus one manifestation of fraud on creditors identified by MacLeod is the transfer by an insolvent debtor of his assets to another (whether in the form of a gratuitous alienation or preferential transaction).[139] Such a transaction is liable to be impugned by a creditor because the transaction results in prejudice to the general body of creditors in the sense of reducing the insolvent estate available to meet their rights against the debtor.[140]

[135] J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020).

[136] MacLeod, *Fraud* paras 7-39 to 7-42.

[137] MacLeod, *Fraud* para 7-42 attributes this to nineteenth-century developments and, in particular, to the influence of the decision in *Derry v Peek* (1889) 14 App Cas 337 which placed renewed emphasis on deliberate wrongdoing by the fraudster. For a detailed discussion of the shifting meaning of fraud in the nineteenth century and the influence of *Derry v Peek*, see D Reid, *Fraud in Scots Law* (PhD thesis, University of Edinburgh, 2013) ch 4 esp 145–68.

[138] MacLeod, *Fraud* paras 7-48ff.

[139] MacLeod, *Fraud* ch 4.

[140] MacLeod, *Fraud* para 4-18: "A fraudulent transaction might be characterised as one which was calculated to frustrate satisfaction of the creditors' rights." See also also paras 1-09 and 4-116.

(c) Accessory liability and transferees

3-50. Fraud on creditors also serves to explain why, in a transfer by an insolvent debtor, a transferee who took property from the debtor knowing of the insolvency might be open to an action of reduction by a creditor.[141] In accepting the transfer, the transferee was accessory to the debtor's fraudulent act of transferring away property which would otherwise have been used in satisfaction of the claims of the general body of creditors.[142] In concrete terms, the transferee's acceptance of the transfer resulted in the creditors' personal rights against the insolvent debtor being – wholly or in part – defeated. Combining this result with a duty of non-interference with the personal rights of others, and with transferee knowledge of the insolvency, gave rise to accessory liability.[143]

3-51. A similar analysis is capable of being extended to a gratuitous transferee on the basis, not of knowing interference with personal rights but of principles of unjustified enrichment, broadly conceived. On its face, such an analysis is not free from difficulty:[144] a donation supplies a justification for transfer, such that there would appear to be no room for an analysis of the transferee's liability grounded in unjustified enrichment.[145] However, a basis within (or at least peripheral to) the law of enrichment may be found in the rule that no one may profit from the fraud of another. As MacLeod demonstrates, that principle imposes liability on the recipient of an enrichment which was gained in fraud of another, notwithstanding the existence of a justification for the enrichment.[146]

3-52. The fraud-on-creditors analysis in transfers by insolvent debtors is an important one which is capable of articulation at a higher level of generality. Thus it might be said that a transfer will be an instance of fraud on creditors – and a transferee liable accordingly – wherever a transfer is accepted gratuitously or in the knowledge that the act of transfer will defeat a personal right in respect of the property which is exigible against the transferor. Liability in this

[141] In the civilian tradition sometimes referred to as the *actio Pauliana*.

[142] MacLeod, *Fraud* para 4-19: "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".

[143] MacLeod, *Fraud* para 4-23: "[Transferee liability] might be achieved by positing a duty not to induce or knowingly facilitate the breach of obligations to which you are a third party. [. . .] 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." Elsewhere (e.g. paras 7-59 to 7-64), MacLeod presents the delict of inducing breach of contract as a manifestation of this duty.

[144] MacLeod, *Fraud* paras 4-30ff.

[145] MacLeod, *Fraud* para 4-30 and n 50. MacLeod also points out that recovery by the creditor would run contrary to the presumption against indirect enrichment.

[146] MacLeod, *Fraud* paras 4-33ff. MacLeod seeks to reconcile this approach with a broader analysis of accessory liability, and to demonstrate how the presumption against indirect enrichment might be overcome, by the argument that a transferee taking property gratuitously from an insolvent debtor would have been bound to refuse the transfer. By retaining the enrichment, the transferee would be deemed a participant in the fraud: see para 4-37. See also paras 7-93 to 7-95.

context arises from knowing interference with the personal rights to which the transferor was subject or (in the case of gratuitous transfers) on the basis of unjustified enrichment.[147] Liability means the transferee taking a *voidable* title (explained by MacLeod as a personal right held by the defrauded creditor against the transferee to reverse the transaction).[148] Expressed in these terms, the fraud-on-creditors analysis is capable of explaining a number of instances in which a transaction might be impugned by a party prejudiced thereby including the well-known "offside goals rule"[149] and, importantly for present purposes, claims for breach of trust.

(3) Fraud on creditors and breach of trust

3-53. The starting point for the explanation of the liability of a transferee taking property in breach of trust on the basis of the fraud-on-creditors approach is the recognition that (as has been contended) the beneficiary holds a personal right against the trustee. The beneficiary is, on this view, a creditor of the trustee.[150] In a typical case, a transaction in breach of trust results in that personal right being defeated, in the sense that by disposing of the trust property the trustee will no longer be able to discharge his obligations to the beneficiary as creditor. Such a transaction was, in the early law, accordingly described as fraudulent.[151] A transferee taking the trust property in bad faith[152] or gratuitously[153] was accessory to (or a participant in) the trustee's fraud (*particeps fraudis*).[154] The

[147] As has been noted, the gratuitous transferees in the latter scenario are still regarded as accessory to the fraud of the transferor because of their retention of an enrichment which they would otherwise have been bound to refuse: see n 146 above.

[148] MacLeod, *Fraud* para 9-02. See also Erskine, *Inst* IV.1.36.

[149] As to which see Reid, *Property* paras 695-700; MacLeod, *Fraud* ch 7.

[150] Articulating precisely the content of that personal right is not necessary for present purposes: at this juncture, however, it is helpful to note that it has been characterised as a right to compel the trustees to administer the trust: see *Inland Revenue v Clark's Trustees* 1939 SC 11 per the Lord President (Normand) at 26.

[151] See e.g. *Anent Trusts and Back Bonds* (1677) 3 Bro Sup 185 at 185.

[152] At this juncture, it is sufficient to note that bad faith signified knowledge that the transaction was in breach of trust. The precise level of knowledge required on the part of the transferee is discussed at paras 5-21ff.

[153] At this juncture, it is sufficient to note that to take gratuitously signified an absence of consideration. The precise scope of this principle is discussed at paras 5-24ff.

[154] Cf. the rationale developed in relation to the enforcement of uses in English law discussed by Bacon: see F Bacon, Viscount St Alban, *Reading Upon the Statute of Uses* (1642, reprint 1785) 14–16. A purchaser with notice of the use (or later, with notice of the trust) could not at common law be held liable as a *particeps criminis* in the feoffee's fraudulent act of transferring the land, but might in equity be held to the use on the basis that the purchaser's conscience had been affected by knowledge of the use. A similar rationale is adopted in *Gervys v Cooke* (1522), reported in JH Baker (ed), *Year Books of 12–14 Henry VIII* (Selden Society vol 119, 2002) 108 and discussed in D Fox, "Purchase for value without notice", in P Davies et al (eds), *Defences in Equity* (2018) 53 at 54ff.

act of accepting the transfer deprived the trustee of the means of satisfying his obligation to the beneficiary. In so doing the transferee either breached knowingly the duty of non-interference (in the case of a transferee in bad faith) or retained an enrichment which the transferee would otherwise have been bound to refuse (in the case of a gratuitous transferee).[155] A transferee's liability was principally manifested by receiving voidable title: in other words, the transaction in breach of trust created a new personal right in the beneficiary (the creditor) to reverse the objectionable transaction by reduction. Though reduction was the primary means of redress for the beneficiary in the early law, it will be argued that a transferee might also incur liability for the value of the property on the basis of a fraud-on-creditors analysis.[156]

3-54. Conceptualising claims for breach of trust as an instance of fraud on a creditor has important implications for the extent of any such claim. One significant consequence of the fraud-on-creditors rationale is that the beneficiary must have a right under the trust to specific trust property – in other words, a *ius ad rem* – in order for a claim against the transferee to arise. The requirement exists because, in order for liability for fraud on a creditor to be engaged, the action of the debtor-trustee must serve to defeat the personal right of the creditor-beneficiary. Thus where a trustee, in breach of trust, alienates the very property to which a beneficiary is entitled under the trust, the beneficiary's entitlement is defeated. But where, conversely, the beneficiary has only a claim to money (as in many modern trusts), the transfer of particular trust assets in breach of trust cannot in any meaningful sense be said to defeat the right:[157] it remains capable of fulfilment, either through the proceeds of the offending transaction or, to the extent there is a shortfall in the value of the trust fund, by a claim against the trustee.[158] Although a possible qualification to this analysis is considered later,[159] it would, if correct in general, align Scots law with the law of South Africa, where beneficiaries must also show a right to specific property in order to recover from a third-party recipient of trust property.[160]

[155] See also JM Thomson, "Unravelling Trust Law: Remedies for Breach of Trust" 2003 JR 129 at 139, suggesting by analogy with the doctrine of dishonest assistance in English law that the third party should incur liability for interference with the beneficiary's right against the trustee. As will be argued later, an approach based upon fraud on creditors makes recourse to dishonest assistance (or the associated principle of knowing receipt) unnecessary: see paras 6-43ff below.

[156] See para 5-35 below (in relation to claims for breach of trust) and para 6-15 (in relation to claims for breach of fiduciary duty).

[157] A similar analysis may be deployed where the beneficiary has no claim against the trustee whatever (as in a charitable trust). In such cases a beneficiary is not, on this approach, normally entitled to bring a reductive claim for breach of trust against a third-party transferee: see paras 5-13ff.

[158] Indeed, where the beneficiary has no entitlement to specific trust property the transaction is unlikely to be in breach of trust (although there may be some transactions which, although not contrary to the specific entitlement of a beneficiary, are nevertheless in breach of trust).

[159] See paras 5-16 and 5-17 below.

[160] See E Cameron et al, *Honoré's South African Law of Trusts* (6th edn, 2018) §309: "If the beneficiary's rights are merely *in personam* against the trustee, a third party who acquires the

3-55. The requirement of a right to specific trust property also illuminates the underlying policy that is at work. Fraud on creditors in general, and claims for breach of trust as a particular manifestation of that doctrine, serve to protect the interest of the creditor-beneficiary to specific property and are principally concerned with the recovery of that property as such (*in specie*). Where such an interest exists, and is defeated by a third party's taking the property in bad faith or gratuitously, it is right that the trust property should be restored to the trustee by reduction. If, however, the beneficiary had no such specific interest, no claim against the third party can usually be allowed on the basis of fraud on creditors.

3-56. In the final analysis, then, a conceptualisation of claims for breach of trust as an instance of fraud on creditors has broad explanatory appeal. As well as its basis in policy, the strength of the fraud-on-creditors theory lies in its capacity to explain why a transferee can in some circumstances be liable to an action by a beneficiary even where the beneficiary's right is personal in nature. It also explains why, in the vast majority of cases, a transferee has no such liability. Given that, after *Redfearn*, an analysis of transferee liability based on the transmissibility of personal rights against the transferor through the mode of transfer can no longer be sustained, fraud on creditors provides the best alternative rationale.

H. CONCLUSION

3-57. This chapter has sought to introduce the principal kinds of claim which might be maintained by a beneficiary against a third party and, in particular, to consider the development and basis of the most important of such claims, namely claims for breach of trust. The discussion has demonstrated that, in the early law, the competency of such a claim was often dependent upon the transmission to the transferee of the beneficiary's personal right against the trustee. That possibility varied widely with the type of trust property being transferred, resulting in significant differences in the vulnerability of transferees of, respectively, corporeal moveables, incorporeal moveables and heritable property to a claim by the beneficiary. Those differences were resolved, in the case of heritable property, by the decline of apprising as a means of acquiring

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trust property does not become a trustee even if the third party has notice of it. In the latter case, however, the third party will be liable in delict for his or her participation in a breach of trust if he or she knows that the acquisition is contrary to the terms of the trust. When the beneficiary has a personal right to acquire the ownership of a real right in specific property (*ius in personam ad rem acquirendam*) and the trustee is bound to hand over to the beneficiary the capital of the trust *in specie*, then the ordinary rule should apply, that is to say that any third party who at the time of acquiring trust property has notice of the beneficiary's right is bound by it. The same rule should apply if the acquisition is gratuitous even if they acquirer does not have notice of the trust."

property, and in the case of incorporeal property by the abandonment in *Redfearn v Somervail* of much of the *assignatus utitur* principle and the associated *procuratio* analysis of assignation.

3-58. With the coming of a common rule for the exigibility of personal rights against transferees, it became necessary to account for the continuing liability of bad-faith and gratuitous transferees of trust property taking in breach of trust. Fraud on creditors, it has been argued, is the most appropriate explanation. As has been seen, that analysis was always applicable to transferees of heritable property (other than those taking through apprising) and also to transferees of moveable property. The consolidation of the position of transferees enables the analysis to be extended to all transferees. It provides a principled basis for claims arising from a breach of trust and serves to explain those claims according to a conception of the beneficiary's right as personal in nature.

3-59. Adopting the fraud-on-creditors analysis also provides greater insight into the scope of such claims including, in particular, the requirement that a beneficiary must have a specific interest in the trust property to mount a competent claim. An examination of the extent of claims for breach of trust, framed in terms of the fraud-on-creditors analysis, is undertaken in the chapters that follow.

4 Claims for Breach of Trust II: Statutory Protections

A. INTRODUCTION

4-01. The preceding chapter enumerated the several kinds of claim which may be maintained by a trust beneficiary against a third party. The emergence of the most familiar of these claims, that arising from a breach of trust, was traced and the doctrine of fraud on creditors isolated as the most appropriate doctrinal explanation.

4-02. The purpose of this and the following chapter is to consider in greater detail claims for breach of trust as a matter of modern Scots law. An adequate account of such claims must begin with the significant statutory restriction imposed upon them by section 43 of the Trusts and Succession (Scotland) Act 2024, which substantially re-enacts the earlier statutory protection created by section 2 of the Trusts (Scotland) Act 1961. Section 2 has a remarkable history with which the first part of this chapter is principally concerned; the second part examines the operation of, and limitations to, the modern statutory protection in the form of section 43. The following chapter then considers the operation of claims for breach of trust in the modern law in light both of the limitation created by section 43 and the fraud-on-creditors rationale identified in chapter 3.

4-03. The extent of the statutory protection conferred by Scots law against claims by beneficiaries is in many respects remarkable. As will be seen, the introduction of that protection in the form of section 2 of the 1961 Act was almost accidental but its effect (particularly in combination with other factors) is to make many formulations of a claim for breach of trust distinctly unlikely. To reach that conclusion, it is helpful to examine the operation and history of section 2 before turning to the modern protection in the form of section 43 of the 2024 Act.[1]

B. THE SECTION 2 PROTECTION: OPERATION

4-04. Section 2 of the Trusts (Scotland) Act 1961 provided:

> **2 Validity of certain transactions by trustees**
>
> (1) Where, after the commencement of this Act, the trustees under any trust enter into a transaction with any person (in this section referred to as "the second party"), being a transaction under which the trustees purport to do in relation to the trust estate or any part thereof an act of any of the descriptions specified in paragraphs (a) to (eb) of subsection (1) of section four of the Act of 1921 (which empowers trustees to do certain acts where such acts are not at variance with the terms or purposes of the trust) the validity of the transaction and of any title acquired by the second party under the transaction shall not be challengeable by the second party or any other person on the ground that the act in question is at variance with the terms or purposes of the trust:
>
> Provided that in relation to a transaction (other than a transaction such as is specified in paragraph (ea) of that subsection) entered into by trustees who are acting under the supervision of the Accountant of Court this section shall have effect only if the said Accountant consents to the transaction.

[1] A version of sections B and C of this chapter was published as PJ Follan, "A Strange Genesis: Section 2 of the Trusts (Scotland) Act 1961" (2020) 24 Edin LR 323.

(2) Nothing in subsection (1) of this section shall affect any question of liability between any of the trustees on the one hand and any co-trustee or any of the beneficiaries on the other hand.

Section 2 relied in its operation on the Trusts (Scotland) Act 1921: it extended protection only to those transactions specifically enumerated in certain paragraphs of section 4(1) of that Act.[2] Reading section 2 and section 4 together created six "protected" transactions: the sale of trust property, the granting of leases, the borrowing of money by the trustee, the granting of security over trust property, the excambing (i.e. exchange) of heritable trust property, the investment of the trust estate, and the acquisition of heritable property for any other reason.[3] According to section 2, none of these transactions, or the title acquired by a transferee as a result thereof, could be challenged as invalid on the ground that the act in question was at variance with the terms or purposes of the trust (that is, that the transaction was in breach of trust).

4-05. On its face, the protection created by section 2 presented a serious impediment to a claim for breach of trust, including, in particular, a claim for reduction:[4] third-party transferees enjoyed complete immunity from any such claim even if they were in bad faith[5] or offered no consideration for the transaction.[6] To understand the extent to which the protection might frustrate a claim for breach of trust, it is necessary to examine in detail the operation of and possible limitations to its successor provision, section 43 of the Trusts

[2] Cf. the approach of section 43 of the 2024 Act, discussed at paragraph 4-27 below.

[3] Trusts (Scotland) Act 1921 s 4(1)(a)–(eb).

[4] The case of *Brodie v Secretary of State for Scotland* 2002 GWD 20-698 is sometimes held up as an instance where a bad-faith third party successfully took advantage of the section 2 protection. But in that case the court explicitly rejected any suggestion of bad faith on the part of the defender-third parties: see *Brodie* per Lady Smith at para 28.

[5] Carey Miller, relying on KM Norrie and EM Scobbie, *Trusts* (1991) 156–58, appears to suggest that a bad-faith transferee of trust property was not entitled to rely on the s 2 protection: see DL Carey Miller, "Good Faith in Scots Property Law", in ADM Forte (ed), *Good Faith in Contract and Property Law* (1999) 103 at 122 ("A statement of the authors of one text on the law of trusts, to the effect that good faith is a necessary requirement, appears to reflect a view that a requirement of good faith is implicit in the situation concerned [*i.e.* reliance upon s 2]"). In the passage referred to, however, Norrie and Scobbie discuss s 7 of the Trusts (Scotland) Act 1921, a provision which, unlike s 2 of the 1961 Act, contains an explicit requirement of good faith. Given its protection of a bad-faith third party, s 2 also could not have been (as Thomson argues) "merely declaratory of the common law": see JM Thomson, "Unravelling Trust Law: Remedies for Breach of Trust" 2003 JR 129 at 135.

[6] The defining feature of s 2 was, however, protection against bad faith, not lack of consideration. This is because each of the six protected transactions presupposes that consideration of some kind is provided in order for the transferee to receive a right in the trust property and so come within the scope of the provision. Thus in order to be constituted as a real right in the trust property a lease, for example, requires some consideration: see *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82. The question of whether a transaction made for nominal consideration, or at a significant undervalue, may be sufficient to bring the statutory protection into operation is a difficult one which is considered below at paras 4-36ff.

and Succession (Scotland) Act 2024. Before considering the protection in the modern law, however, it is useful to review the remarkable history which underlies its emergence.

C. THE SECTION 2 PROTECTION: HISTORY

(1) The Trusts (Scotland) Act 1921

(a) Section 4 and trustee powers

4-06. The origins of the statutory protections against claims by beneficiaries lie in an important piece of twentieth-century legislation on the law of trusts and trustees in Scotland, the Trusts (Scotland) Act 1921.[7] That Act set out to consolidate and amend the existing legislation on trusts which had developed piecemeal, mainly in the later part of the previous century.[8] In common with a number of the statutes from which it was derived, the 1921 Act conferred power on trustees to deal with trust property in certain ways.[9] The critical provision in this respect was section 4 of the Act ("General powers of trustees") which began:

> (1) In all trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust deed, *viz*.: —

The first power listed was the power to "sell the trust estate or any part thereof, heritable as well as moveable".[10]

4-07. The requirement that the exercise by the trustees of the powers conferred by the section should not be "at variance with the terms or purposes of the trust" – that is to say that it should not be in breach of trust – was to prove problematic. Although this condition was not a novel one, it was used in the 1921 Act for the first time to qualify the powers of trustees and judicial factors

[7] Hereafter, the "1921 Act".

[8] Eight measures were consolidated by the 1921 Act: the Trusts (Scotland) Act 1861 (24 & 25 Vict c 84), the Trusts (Scotland) Act 1867 (30 & 31 Vict c 97), the Trusts (Scotland) Amendment Act 1884 (47 & 48 Vict c 63), the Trusts (Scotland) Act 1867 Amendment Act 1887 (50 & 51 Vict c 18), the Trusts (Scotland) Act 1897 (60 Vict c 8), the Trusts (Scotland) Amendment Act 1891 (54 & 55 Vict c 44), the Trusts (Scotland) Act 1898 (61 & 62 Vict c 42), and the Trusts (Scotland) Act 1910 (10 Edw 7 and 1 Geo 5 c 22).

[9] See now the Trusts and Succession (Scotland) Act 2024 ss 15 and 18, considered at paras 4-27ff below.

[10] See Trusts (Scotland) Act 1921 s 4(1). In English law a comparable provision came in the form of the Trustee Act 1925. Section 69 of that Act included the (marginally) clearer qualification that the powers it conferred should be exercisable only "if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument".

to sell trust property.[11] It gave rise to a number of applications to the court seeking a declarator that a proposed sale of property was not in breach of trust in the sense of being at variance with either the terms or the purposes of the trust in question. The problem was particularly acute in relation to judicial factors, who, although treated as "trustees" for the purposes of section 4, were generally appointed by a court decree containing little or no detail as to the factor's powers to deal with trust property.[12] The existence of a duty upon most classes of judicial factor to conserve the estate under administration further compounded the difficulty.[13]

(b) Problems of interpretation

4-08. Of the cases decided immediately after the passing of the 1921 Act, some supported the notion that a judicial factor (or, as the case may be, a trustee) had considerable discretion to determine, without an application to the court, whether the exercise of a power was at variance with the terms or purposes of the trust. Thus in *Lowe's Judicial Factor, Petitioner*[14] the court appeared to support the proposition that the 1921 Act conferred a blanket power of sale upon judicial factors:

> I am prepared to lay down the general proposition that, by the provisions of the 1921 Act, every judicial factor who is appointed by the Court, and whose duties are supervised by the Accountant of Court, is entitled to sell the heritable portion of the factorial estate without the sanction of the Court.[15]

More influential for the interpretation of section 4, however, were those decisions which limited any discretion conferred by section 4, and so suggested that more frequent applications to the court might be required. The most important of these was *Leslie's Judicial Factor, Petitioner*.[16] In that case a judicial factor

[11] The words first appear in the Trusts (Scotland) Act 1867 s 2. That Act, however, conferred no power of sale on trustees.

[12] Section 2(b) of the 1921 Act defines a "trust deed" for the purposes of s 4 as including any "decree, deed, or other writing appointing a judicial factor". Prior to the 1921 Act the position where an express power of sale had not been conferred on a trustee or judicial factor was still more difficult. Menzies described sale as an "exceptional" act which, in the absence of express power in the trust deed, invariably required judicial authorisation: see AM Menzies, *Lectures on Conveyancing* (1856) 679–80.

[13] See *Macqueen v Tod* (1899) 1 F 1069 per the Lord President (Robertson) at 1075. In *Macqueen* the factor was, accordingly, held not to be permitted to sell trees growing on property belonging to the factory estate for timber. This was the case even where the beneficiary was 85 years of age and making no use of the trees.

[14] *Lowe's Judicial Factor, Petitioner* 1925 SC 11.

[15] *Lowe's Judicial Factor* per Lord Anderson at 19; see also the Lord Justice-Clerk (Alness) at 15. The case of a trustee exercising a power under s 4 was said to be *a fortiori* of the case of a judicial factor.

[16] *Leslie's Judicial Factor, Petitioner* 1925 SC 464.

sought authority to sell heritable property forming part of the factory estate. In considering the petition, the court opined that it was for the factor and purchaser to satisfy themselves that any such sale was not at variance with the terms or purposes of the appointment.[17] In cases of doubt, an application to the court was necessary:

> [T]he Legislature has reserved for the determination of the Court and excluded from the unfettered discretion of the trustees cases where a sale does any violence to the terms of the trust directions.[18]

Although attempts were made to retreat from this position in subsequent decisions, both explicitly[19] and in refusing apparently unnecessary petitions,[20] the uncertainty for purchasers from judicial factors and trustees was significant.[21] There is evidence that purchasers, fearing the reduction of the transaction by a beneficiary on the basis of breach of trust, often required judicial factors and trustees to petition for authority to sell even when the terms of the trust were relatively clear.[22] A petition of this kind was competent only before the Court of Session[23] and would, accordingly, present a significant expense to a small trust or factory estate.

4-09. Dissatisfaction with this state of affairs was expressed from time to time from in a number of contexts. In a letter of July 1943, for example, the Accountant of Court complained to the Principal Clerk of Session that:

[17] See *Leslie's Judicial Factor* per the Lord President (Clyde) at 470–72 and per Lord Sands at 473.

[18] *Leslie's Judicial Factor* per Lord Sands at 473.

[19] See *Stormonth Darling (Marquess of Lothian's Judicial Factor)* 1927 SLT 419 per Lord Sands at 423 ("I should not like to encourage the idea that, even where the sale is one of tenement or shop property, a factor is always justified *ob majorem cautelam* in applying to the Court for powers; or that the action of a purchaser who refused to accept from a factor a title to such property would be upheld"); *Tennent's Judicial Factor v Tennent No 1* 1954 SC 215 per the Lord President (Cooper) at 225–26.

[20] In a number of other cases petitions were refused as unnecessary given the availability of the s 4 powers: see e.g. *Francis Cooper & Son's Judicial Factor* 1931 SLT 26 per Lord Pitman at 27; *Cunningham's Tutrix* 1949 SC 275 per Lord Mackintosh at 277.

[21] It appears that, prior to the decision in *Leslie's Judicial Factor*, the problems relating to the exercise of the s 4 powers were restricted to judicial factors. However, the broad framing of that decision – the passage above refers, for example, to "trustees" rather the judicial factor who was the subject of the case – seems to have extended the uncertainty to trustees.

[22] See e.g. *Ninth Report of the Law Reform Committee for Scotland* (Cmnd 1102, 1960) para 14. The position is also evident from conveyancing texts of the time: see e.g. J Burns, *Conveyancing Practice According to the Law of Scotland* (4th edn, 1957) 311–12, and J Burns, *Handbook of Conveyancing* (4th edn, 1932) 296–99, both of which suggest that a purchaser from a trustee take note of the qualification of s 4 and require a trustee to seek judicial authority in cases of doubt.

[23] See Trusts (Scotland) Act 1921 ss 2 and 5. A petition to the *nobile officium* was also competent for the same purpose: see e.g. *Campbell, Petitioner* 1959 SC 395. Such a petition could, of course, only be entertained by the Court of Session.

> It can scarcely have been the intention of the legislature that the time of the Court should be occupied in case after case in formally refusing special powers which from the outset everyone concerned has known would be refused because they are clearly unnecessary.[24]

This expression of unhappiness was not unique.[25] It would, however, be some time after the passing of the 1921 Act and the problems it created before the process of law reform was commenced.

(2) The Law Reform Committee for Scotland

4-10. Responsibility for reforming the 1921 Act fell to the Law Reform Committee for Scotland which, until the creation of the Scottish Law Commission in 1965,[26] was the principal body concerned with reform of Scots law. The problems which had arisen under the Act were the subject of a reference by the Lord Advocate to the Committee in July 1958.[27] Following this reference, a sub-committee under the chairmanship of Harry Monteath, former Professor of Conveyancing at the University of Edinburgh,[28] was established to gather evidence and examine the issues in greater detail.

(a) Initial recommendations

4-11. The initial conclusions of Monteath's sub-committee are of interest.[29] In its first report to the full Law Reform Committee, issued more than a year after the initial reference from the Lord Advocate, the sub-committee recommended that no change be made to the law:

> The case of *Leslie's Judicial Factor* gave rise to serious concern regarding power of sale in trustees generally, including those acting under trust settlements, where the constituent document did not define the power of trustees regarding sale, and

[24] See Memorandum by the Accountant of Court of 14 July 1943 (NRS AD61/49). This was later considered during the process of law reform.

[25] A degree of judicial disquiet also appears from decisions concerning the 1921 Act: see e.g. *Tennent's Judicial Factor No 1* per the Lord President (Cooper) at 225: "Section 4 of the Act of 1921 is not very happily expressed and has given rise to certain difficulties in the past."

[26] See the Law Commissions Act 1965 s 2.

[27] See Minutes of the Law Reform Committee (Scotland) Meeting of 14 July 1958 (NRS AD61/50). In fact, the procedure appears to have been that recommendations for areas of the law requiring reform were made by members of the Committee to the Lord Advocate; those recommendations were then encapsulated in a formal reference. In 1958, the Committee had a mixed composition of practising and academic lawyers, including three professors of conveyancing. Many of those who made up the Committee would have been aware of the problems with the 1921 Act.

[28] Harry Henderson Monteath (1885–1962) had been Professor of Conveyancing at Edinburgh from 1935 until 1955. At the time of the Lord Advocate's reference he was 73.

[29] See the Sub-Committee Report on Remitted Subject No 8 (NRS AD61/50).

> purchasers grew increasingly restive. Differences of opinion between selling trustees and purchasers were very common in the late 1920s, though they did not necessarily reach the court owing perhaps to some solvent being found, such as an indemnity.
>
> It seems clear that these difficulties have greatly decreased in recent decades, probably because of an increasing practice of defining trustees' powers more amply, and specifically including power of sale. We have considered whether such difficulties as still remain could be removed by an amendment of the opening part of section 4(1) of the Trusts (Scotland) Act 1921, and in particular of the words "where such acts are not at variance with the terms or purposes of the trust". We are not satisfied that it is possible to make any such amendment which would remove the difficulties without giving to trustees power to sell even where a sale would be contrary to the terms of the trust deed. Such an unrestricted power would not be appropriate.[30] Moreover we have received memoranda of evidence from several legal societies, and none of these memoranda recommend a change in the law on this point.[31]

Thus while earlier cases dealing with section 4 had indeed given rise to uncertainty as to a trustee's power of sale (and the associated potential for a reductive claim based on breach of trust), the issue had substantially abated by the time the law was reviewed by Monteath's sub-committee. Problems still remained in relation to judicial factors, however, and the sub-committee accordingly made the relatively conservative recommendation that power should be given to the Accountant of Court to certify the compliance of a particular transaction with the section 4 powers.[32]

(b) Maxwell's evidence

4-12 Given the finding of Monteath's sub-committee that no problems existed between trustees and purchasers at the time of the Law Reform Committee's review, why did section 2 of the 1961 Act become law less than two years later? The explanation appears to lie in a reversal of the Law Reform Committee's position, the critical date being 29 February 1960. On that day, the full Committee met to consider the report of Monteath's sub-committee.[33] Involved

[30] This was also the view of, for example, the Law Society of Scotland which, in a letter of 10 February 1959, opposed the conferral of unrestricted powers of sale or otherwise on trustees: see letter from the Secretary of the Law Society of Scotland to John Gibson (NRS AD61/36): "[It] would be improper to seek unlimited powers for trustees to purchase or otherwise deal with heritable property of all kinds." A similar conclusion was reached by the Council of the Society of Writers to Her Majesty's Signet: see Report by the Professor's Committee to the Council of the Society of Writers to Her Majesty's Signet of 12 January 1959 (NRS AD61/36); similarly, see Memorandum by the Scottish Law Agents Society to the Committee (NRS AD61/49).

[31] Sub-Committee Report on Remitted Subject No 8 (NRS AD61/50) paras 13–14.

[32] See Sub-Committee Report on Remitted Subject No 8, paras 18–19.

[33] See Minutes of the Law Reform Committee (Scotland) Meeting of 29 February 1960 (NRS AD61/50).

in this discussion was Peter Maxwell,[34] an advocate practising in Edinburgh and a member of the sub-committee. Maxwell, it appears, presented the problem in relation to trustees as being considerably more serious than the sub-committee had found. This was sufficiently persuasive to convince a majority of the full Committee to invite Monteath's sub-committee to reconsider its initial report and give effect to a recommendation "that the law should be left as presently set out in section 4(1) of the Trusts (Scotland) Act 1921, but with the addition of a provision designed to protect purchasers".[35]

4-13. Although persuasive, Maxwell's views were not, in the event, accurate. Apparently realising that he had misled the Committee as to the scale of the problem relating to trustees, Maxwell wrote apologetically to Monteath shortly after the meeting of 29 February 1960 to correct his comments:

> It rather appears that I have misled the Committee by certain remarks I made and Professor Henry thought it would be helpful if I were to write to you to clarify the position. I am afraid that I gave the impression that I had had a substantial number of cases in which there was a real doubt as to whether or not the trustees had power to sell. This is not correct.
>
> I am afraid that, as I do not keep any records, I cannot give a "chapter & verse", but so far as my recollection serves me, the majority of cases which have come my way have been cases in which, at least to my mind, there has been no real doubt on the question. Normally, I think, they are cases where there plainly is no power of sale and in which, accordingly, a petition under section 5 is necessary. My impression is that I have had one or two cases where there has been an element of doubt, but I would agree that, so far as my limited experience goes, these are not common.
>
> I am sorry that a remark of mine may have misled the Committee, but fortunately it is not too late to correct the matter. I anticipate that I will be present at the next meeting, but, if by any chance I should not manage to be there, I should be glad if you would quote from this letter if you think it would be helpful to do so in order to remove any false impression.[36]

Monteath replied to Maxwell, saying that he believed members of the Committee had been influenced by his comments and suggested that the sub-committee's initial report might be left unchanged after Maxwell's retraction was circulated:

> I did think that your experience required very careful consideration, and I have no doubt you influenced several members of the full Committee. They may, on

[34] Peter Maxwell (1919–1994), later Lord Maxwell, was to be Chairman of the Scottish Law Commission from 1981 to 1988. In 1960 Maxwell had been at the bar for nine years, and was to take silk the following year.

[35] See Minutes of the Law Reform Committee (Scotland) Meeting of 29 February 1960, para 6.

[36] See letter from Peter Maxwell to Harry Monteath of 7 March 1960 (NRS AD61/49).

> reconsideration in light of your explanation, feel that the modification of the sub-committee's report is unnecessary.[37]

Monteath then wrote to John Gibson,[38] the secretary of the Committee, to notify him both of the retraction and of his intention to write to members of the full Committee with a view to preserving the sub-committee's initial report:

> I am taking the liberty of writing to one or two members of the full Committee who, I think, were much impressed by what Maxwell under a complete misapprehension, said. We may yet be able to retain our draft Report as it stood![39]

If such letters were sent, no record has survived.

(c) The recommendations amended

4-14. While this private correspondence continued, the sub-committee produced a note to reflect the sentiment of the meeting of 29 February 1960.[40] It conceded, clearly rather reluctantly, that the law could be amended to protect the position of a purchaser but warned that this might give rise to undesirable consequences, including effectively conferring upon trustees a power of sale even where their action would be in clear breach of trust:

> As instructed at the meeting held on 29th February last, the Sub-Committee have, in an attempt to give effect to the feeling of that meeting, drafted for consideration the following proviso to be added at the end of subsection (1) of section 4 of the Trusts (Scotland) Act 1921:
>
> > "Provided that a party contracting with trustees on any of the matters specified in paragraphs (a) to (e) hereof shall have no concern with the power of the trustees to enter into such contract, and the right and title of such party shall not be liable to challenge by reason only that the trustees had no power to enter into the contract."
>
> With deference, we beg to point out that this proviso will mean, for example, that in a case where a will or other trust deed prohibits, either expressly or by clear implication, the sale by the trustees of heritable property, they will nevertheless be

[37] See letter from Harry Monteath to Peter Maxwell of 8 March 1960 (NRS AD61/49).

[38] John (later Sir John) Gibson (1907–1985) spent his career in the Lord Advocate's Department, which was based in London, ultimately becoming Legal Secretary and First Parliamentary Draftsman for Scotland (1961–1969).

[39] See letter from Harry Monteath to John Gibson of 8 March 1960 (NRS AD61/49). See also letter from Harry Monteath to John Gibson of 8 March 1960, sent before Maxwell's formal retraction: "I now understand that Maxwell was speaking under a misapprehension, and I believe he is writing me today. As it was Maxwell's experience in practice at the Bar which in my view turned the Meeting in favour of drastic amendment of the 1921 Act, it may turn out that the sub-committee, and possibly the full committee, will, on further enlightenment from him, favour retention of the sub-committee's recommends."

[40] See Law Reform Committee (Scotland) Remitted Subject No 8: Note by Sub-Committee (NRS AD61/37).

> able to give a good title to a purchaser. We doubt whether the Committee intended to go to this length.[41]

As can be seen, the sub-committee's proposed amendment was framed as a provision exempting the title of a third party from challenge (principally, it must be assumed, from challenge by a beneficiary). It would be this amendment which would later appear as section 2 of the 1961 Act.

4-15. The note itself was considered by the full Committee on 28 March 1960[42] and, after lengthy discussion, the Committee decided by a 5–4 majority to adopt a clause along the lines put forward by the sub-committee. This was to apply both to trustees and to judicial factors.[43] In what would later become an important feature of the section 2 protection, the Committee made no recommendation that a purchaser be in good faith in order to receive a title unchallengeable by a beneficiary or otherwise. The reason, it seems, was that the inclusion of such a requirement risked undermining the protection in cases where the terms of the trust were ambiguous as to the powers of the trustees.[44]

4-16. The Committee's decision is surprising in light of Maxwell's earlier retraction, and it is only possible to guess at the reasons for which it was made. One possible explanation is that the retraction was not shared with all members of the Committee: Monteath refers only to "one or two" members to whom it was copied.[45] Both Monteath and Maxwell were, however, present at the meeting of the 28 March so it seems unlikely that the full Committee was not made aware of the retraction at that stage.[46] A better explanation is provided by a letter sent from the Law Society of Scotland to Gibson after Maxwell's retraction.[47] This reversed the Society's position expressed a year earlier that no change to the law was required[48] and argued instead that reform was necessary:

41 Law Reform Committee (Scotland) Remitted Subject No 8: Note by Sub-Committee, para 1.

42 See Minutes of the Law Reform Committee (Scotland) Meeting of 28 March 1960 (NRS AD61/50).

43 Minutes of the Law Reform Committee (Scotland) Meeting of 28 March 1960, para 4. The Committee noted that, since judicial factors acted under the supervision of the Accountant of Court, the Accountant's consent would be required for the provision to apply. This requirement appeared as a proviso to s 2(1) of the Trusts (Scotland) Act 1961, and now appears as section 43(3) of the Trusts and Succession (Scotland) Act 2024.

44 Although it chose to omit a requirement of good faith, the Committee did consider whether a requirement that the trust property be sold for market value could substitute for a requirement for good faith: see letter from John Gibson to Harry Monteath of 4 March 1960 (NRS AD61/49). No such provision was, however, included in either the Committee's recommendations or the legislation which resulted.

45 See letter from Henry Monteath to John Gibson of 8 March 1960 (NRS AD61/49).

46 See Minutes of the Law Reform Committee (Scotland) Meeting of 28 March 1960.

47 See letter from the Secretary of the Law Society of Scotland to John Gibson of 30 March 1960 (NRS AD61/49). It is true that this letter arrived after the meeting of 28 March, but the minutes of that meeting make clear that the Law Society's views had been intimated to the Committee before the letter was sent.

48 See letter from the Secretary of the Law Society of Scotland to John Gibson of 10 February 1959 (NRS AD61/36).

> I have been asked by my Council formally to advise you that it is their view that there is urgent need for an amendment of the Trusts Act [1921] to provide that third parties should have no concern with the power of sale of trustees (unless possibly in those limited cases where the trust deed contains an express prohibition in the clearest terms) in transactions involving heritage. The question of trustees powers causes difficulty and it is thought that purchasers ought not to have any concern with matters which are not on the register.[49]

It might well be speculated that this letter was engineered by a member of the Committee sympathetic to reform, particularly given the Society's earlier position, the timing of the letter, and its use of the exact terms of the proposed clause (which would otherwise have been known only to the members of the Committee). There is, however, no documentary evidence of the motivations underlying the letter.

4-17. Whatever the reason for the Committee's decision, the sub-committee's recommendation was incorporated into the Law Reform Committee's Ninth Report which went to the Lord Advocate in July 1960.[50] An earlier draft of the report did, however, record the disagreement in the Committee in the following terms:

> [A]lthough we are not unanimous on the subject, the majority of us consider that a purchaser contracting with trustees who are exercising or purporting to exercise a power of sale of heritage should not be concerned with their power to sell . . .
>
> The minority of us consider that the law should remain as it stands, particularly when the problem facing purchasers has so largely subsided in everyday practice, and foresee that a change in the law such as is proposed may conjure up more criticisms and issues than it settles.[51]

Having regard to the later uncertainties in the operation of section 2,[52] the minority's intuitions would prove to be accurate. These misgivings were not, however, carried forward into the final version of the Committee's report. In a letter to Gibson, Monteath contended that *"*if we disclose a majority of one, the report on Branch (a) of the remit [i.e. as it related to trustees] will be so much waste paper".[53] So the Committee was apparently persuaded to agree to the change unanimously and the final report, which was to form the basis of the 1961 Act, was laid before Parliament with any doubts about the new provision having been expunged.[54]

[49] See letter from the Secretary of the Law Society of Scotland to John Gibson of 30 March 1960 (NRS AD61/49). The letter is referred to in the Minutes of the Law Reform Committee (Scotland) Meeting of 28 March 1960.

[50] *Ninth Report of the Law Reform Committee for Scotland* (Cmnd 1102, 1960). A final copy of the report is held at NRS AD61/50–51.

[51] Draft Ninth Report of the Law Reform Committee for Scotland (NRS AD61/37).

[52] Discussed at paras 4-20ff below.

[53] See letter from Harry Monteath to John Gibson of 26 April 1960 (NRS AD61/49).

[54] *Ninth Report of the Law Reform Committee for Scotland*.

(3) The Trusts (Scotland) Bill of 1961

4-18. Compared to their progress in the Law Reform Committee, the passage of the reforms through Parliament was relatively smooth. Shortly after the publication of the Committee's final report, the Secretary of State for Scotland sought, and was granted, permission to bring forward legislation to implement the Committee's recommendations.[55] This took the form of a Trusts (Scotland) Bill, a wide-ranging measure which, as well as the provisions on acquisitions from trustees, dealt with a number of other areas of trust law in need of reform. The initial draft, completed in August 1960,[56] addressed in its clause 2 the question of transferee protection in instances of breach of trust. That clause would prove to be substantially similar to section 2 as enacted.[57]

4-19. Clause 2 received little attention in the course of the Bill's passage through Parliament. The most detailed scrutiny was instead directed towards the more controversial provisions on accumulations[58] and variation of trust purposes.[59] Where it became necessary to review clause 2, the measure was successfully cast by the Government as a technical reform that would reduce the financial burden on trustees. In the Scottish Grand Committee,[60] for example, the Lord Advocate explained the basis for the provision in the following terms:

> [Clause 2] deals with a difficulty which arises under Section 4(1) of the Act of 1921. That subsection empowers trustees to enter into certain transactions, some of which relate to land, where to do so is not at variance with the terms and purposes of the trust. These qualifying words are troublesome because their effect is obscure in the case of a trustee acting by virtue of an order of the court, which has in fact no terms or purposes specified in it.
>
> As a result, in the case of such trustees it has been the practice for persons who, for example, buy land from them, to require the trustees to obtain the express authority

[55] See Memorandum by the Secretary of State for Scotland to the Home Affairs Committee (NRS ED56/126).

[56] See Trusts (Scotland) Bill Draft Clauses (NRS AD63/465/3). The first draft, prepared in less than a week, was not substantively amended before the enactment of the 1961 Act. One reason for the speed with which the legislation was brought forward appears from the records to have been pressure on the Government to implement a measure similar to the Variation of Trusts Act 1958, which did not extend to Scotland.

[57] Perhaps the most significant break from the Law Reform Committee's recommendations was the drafting of the protection of transferees as a distinct provision, rather than an amendment of s 4 of the 1921 Act.

[58] Clause 1 of the Bill, now s 1 of the 1961 Act.

[59] Clause 5 of the Bill, now s 5 of the 1961 Act.

[60] See Scottish Grand Committee, Consideration of Principle of the Trusts (Scotland) Bill, Official Report, 22 November 1960 (UK Parliamentary Archives, HC/OF/SC/86). Less than 1 of the 34 pages of the report records consideration of clause 2. Moreover, no discussion of the clause appears from the proceedings of the Scottish Standing Committee's Consideration of the Trusts (Scotland) Bill, Official Report 26 January 1961 (UK Parliamentary Archives, HC/OF/SC/85).

> of the court for their entering into the transaction. Otherwise the purchasers feel that they might not get a completely unquestionable title to the land. The net result is that the trust estate is involved in an expense which is often burdensome and the only people who profit are the lawyers.[61]

Clause 2, it was said, would resolve this technical issue and would be of particular benefit to small trusts.[62] That this line, and the virtues of clause 2 more generally, went almost[63] unchallenged is hardly surprising in view both of the removal of the minority's views from the Law Reform Committee's Report and the government's unwillingness to distinguish between trustees and judicial factors for the purposes of the protection of transferees. The Bill passed into law, to little fanfare, on 27 July 1961.

(4) Later reforms and the 2024 Act

4-20. The story of section 2 after its entry into statute as part of the 1961 Act cannot be said to be a particularly happy one. Initial reaction to the reform was, however, fairly upbeat. Writing in the *Conveyancing Review* shortly after the introduction of the Act, Jack Halliday,[64] a member of the Law Reform Committee, painted a sunny picture:

> [S]ection 2 will much reduce the anxieties of those who advise persons transacting with trustees. Much of the benefit will be felt immediately, but of course the provisions are not retrospective and it will still be necessary in the examination of title for conveyancers to address themselves to the old problems when the transaction took place before 27th August 1961. The full blessings of the reform will come in time when prescription has run its kindly course – the older conveyancers may never see the time, but they will be happy in the knowledge that others will. As any practitioner of the old school will tell you, such were the deficiencies in the technical

[61] Scottish Grand Committee, Consideration of Principle of the Trusts (Scotland) Bill, 10. This view was accepted by members of the Committee: e.g. p 26 of the same proceedings.

[62] A similar line was taken when the Bill reached the House of Lords: see Hansard: HL Deb, 18 Jul 1961, vol 233, cols 545–48.

[63] A last-minute objection came from the National Coal Board, which was concerned that the enactment of clause 2 might remove a check on the trustees of miners' welfare trusts: see letter from Scottish Home Department to John Gibson of 21 February 1961 (NRS AD63/465/1): "Apparently miners' welfare trusts give the Board a good deal of difficulty since suitable persons to act as local trustees are not always easy to find, and the legal remedy against such persons in the event of breach of trust may for one reason or another be valueless in practice. They are therefore a little concerned about the effect of Clause 2 of our Bill in removing a check to the possible improper disposal of land."

[64] Jack (or John) Menzies Halliday (1909–1988) served as Professor of Conveyancing at the University of Glasgow (1955–1979) and, following his tenure as a member of the Law Reform Committee, as a part-time Scottish Law Commissioner (1965–1974).

> equipment of his junior colleagues upon the hard road of conveyancing that they stand in much greater need of having the rough places made plain.[65]

While similarly favourable commentary appeared elsewhere,[66] it was not long before problems began to appear. As has been noted, the difficulties which gave rise to section 2 existed primarily in relation to judicial factors rather than trustees.[67] After its enactment, however, it quickly became clear that the provision failed to resolve the central issue of the uncertainty of the powers exercisable by a judicial factor.[68] That issue was revisited twice in the years following the 1961 Act, first by the Halliday Committee on Conveyancing in 1966[69] and subsequently by the Scottish Law Commission in its *Report on the Powers of Judicial Factors* published in 1980.[70] The latter assessed the impact of section 2 in the following terms:

> [S]ection 2 of the Act of 1961 (which protects parties transacting with trustees who purport to do any of the acts specified in paragraphs (a) to (ee) of section 4(1) of the Act of 1921) should have eliminated any reluctance or refusal of a person to engage in a property transaction with a judicial factor without the approval of the court. It may be noted, however, that the section neither empowers a trustee to do acts which are at variance with the trust purposes nor affects the liability of a trustee in a question with a co-trustee or beneficiary.
>
> Where a judicial factor is uncertain whether the doing of an act mentioned in section 4 of the Act of 1921 would or would not be at variance with the terms or purposes of the trust, the safe and obvious course is for him to seek the approval of the court to the doing of the act.[71]

Thus, while section 2 extended a degree of protection against a potential claim to purchasers from judicial factors, the fact that liability for acts at variance with the terms of the factor's appointment was in some respects preserved meant that

[65] JM Halliday, "The Trusts (Scotland) Act 1961: Powers of Trustees" (1962) 3 Conveyancing Review 29 at 32.

[66] Anonymous, "The Pleader: Trusts (Scotland) Act 1961" (1962) 78 Scottish Law Review 76. In relation to the reforms proposed by the Law Reform Committee, see Anonymous, "More Powers for Trustees" (1960) 5 Conveyancing Review 143; "The Trusts (Scotland) Act 1961" 1962 SLT (News) 5.

[67] See paras 4-06ff above.

[68] Compared with its application to judicial factors, trustees have also encountered some difficulty with section 2: see the discussion at paras 4-22ff below. See also DJ Hayton, "Liability of Trustees to Third Parties: The Scottish Law Commission's Proposals" (2008) 12 Edin LR 446.

[69] See Halliday Committee Report on *Conveyancing Legislation and Practice* (Cmnd 3118, 1966) para 138. The Report noted that where the terms of a factor's appointment were unclear, the factor was – in spite of the existence of the s 2 protection – likely to err on the side of caution and make an application for the exercise of a power to the court.

[70] See Scottish Law Commission, *Report on Powers of Judicial Factors* (Scot Law Com No 59, 1980).

[71] Scottish Law Commission, *Report on Powers of Judicial Factors* paras 7–8.

the authority of the court would continue to be sought in cases of uncertainty.[72] What was required instead was a means – other than by recourse to the courts – by which a transaction by a judicial factor could be recognised as not being at variance with the terms or purposes of the factor's appointment. Reform of this kind was proposed in the Scottish Law Commission's 1980 Report,[73] which ultimately led to an amendment of section 2 enabling judicial factors to apply to the Accountant of Court for certification that a particular transaction was not at variance with the terms or purposes of the appointment.[74] Ironically, this reform was in essence what had initially been proposed by Monteath's sub-committee before it was overruled by the full Committee.[75]

4-21. A further difficulty of section 2 was outlined by a subsequent report of the Scottish Law Commission on judicial factors published in 2013.[76] That report considered the possibility that the provision might not, after all, apply to judicial factors but only to trustees properly so called. This reading of section 2 was advanced on the basis that it would be wrong to interpret the proviso to the section – on "trustees acting under the supervision of the Accountant of Court" – as applying to judicial factors since all judicial factors fall inherently under that supervision.[77] Although the Commission ultimately concluded that the insertion of provisions relating specifically to judicial factors as a result of

[72] This limitation to s 2 was acknowledged in Halliday's initial assessment of the Act: see Halliday, "The Trusts (Scotland) Act 1961" at 31. For an example of a petition for authority presented after the 1961 Act, see *Barclay, Petitioner* 1962 SC 594. That case also interpreted s 2 to the effect that the permission of the Accountant of Court to a transaction could not confer a power which a judicial factor would not otherwise have had and thereby allow the factor to act in breach of the factory. In the words of Lord Cameron at 596: "it is plain that the consent of the Accountant is essential to give validity to the type of transaction specified in subsection (1) as regards a limited category of questions with second parties or any third party. But this, in my opinion, does not mean that the Accountant, at his own hand, can give powers to a curator which are at variance with the terms of his appointment, which would not normally include the power to sell heritage."

[73] Scottish Law Commission, *Report on Powers of Judicial Factors* para 13. This reform is described by the Commission as a temporary solution. The proposed permanent solution, a statutory code for judicial factors, came to fruition in the Commission's *Report on Judicial Factors* (Scot Law Com No 233, 2013).

[74] See the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 s 8, amending the 1961 Act.

[75] Notably, however, Monteath's sub-committee also contemplated preserving the rights of beneficiaries against judicial factors even where the consent of the Accountant had been granted: see Sub-Committee Report on Remitted Subject No 8 (NRS AD61/50) paras 18–19.

[76] Scottish Law Commission, *Report on Judicial Factors* (Scot Law Com No 233, 2013).

[77] Scottish Law Commission, *Report on Judicial Factors* paras 5.8–5.10: "[Applying section 2 to a judicial factor] would leave considerable doubt as to the effect of the proviso. All judicial factors are subject to the supervision of the Accountant. An enactment making special provision for judicial factors subject to that supervision makes no sense." The Commission's analysis does not appear to have been made with the benefit of the preparatory materials discussed in this chapter. As has been shown, those materials indicate that s 2 was always intended to have applied to judicial factors: see paras 4-08ff above.

its 1980 report put the matter beyond question,[78] the existence of uncertainty as to its application cast further doubt on the usefulness of the provision.

4-22. While, as has been noted, the difficulties created by section 2 initially prompted suggestions for reform of the application of the provision to judicial factors, such suggestions also were also, ultimately, raised in relation to trustees. Section 2 was considered again as part of the Scottish Law Commission's broader re-appraisal of the law of trusts, principally in the form of the Commission's 2003 *Discussion Paper on Breach of Trust*[79] and eventual *Report on Trust Law*.[80] The Commission's suggestions for reform were ultimately reduceable to three areas: the extension of the statutory protection to all onerous transactions, the inclusion of beneficiaries in the scope of the protection, and, most significantly, the continuation of the protection for bad-faith third parties.[81]

4-23. The rationale for the first of these proposed reforms is, according to the Commission, that there is no reason why the protection should apply to some, but not all, onerous transactions.[82] On the basis of the historical account set out above, and assuming that the need for any kind of protection is accepted, that suggestion is a justifiable one: as has been seen, the extension of protection to only those transactions enumerated in section 4 of the 1921 Act was the structural result of the formulation of section 2 so as to address specifically the problems raised by the former provision.[83]

4-24. The proposal that trust beneficiaries be expressly included within the scope of the protection is advanced by the Commission on the basis that beneficiaries are likely to have less information in relation to the powers of the trustees and so, like a third party but unlike a co-trustee, should benefit from the same degree of protection.[84] This suggestion is a surprising one: nothing in

[78] Scottish Law Commission, *Report on Judicial Factors* para 5.12. The report suggests that the provisions in s 2 relating to judicial factors should be re-enacted as part of a Judicial Factors (Scotland) Bill and the 1961 Act provisions repealed. The result of this, following the Commission's logic at least, would be that s 2 would apply only to trustees.

[79] Scottish Law Commission, *Discussion Paper on Breach of Trust* (Scot Law Com DP No 123, 2003).

[80] Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014).

[81] Scottish Law Commission, *Report on Trust Law* paras 13.16ff.

[82] Scottish Law Commission, *Report on Trust Law* para 13.21: "[W]e thought that there was no reason for restricting the onerous transactions that were unchallengeable to sale, lease, excambion, borrowing money on the security of trust property, acquiring property as an investment and acquiring heritable property other than as an investment. It would be simpler to include all onerous transactions within the protection of the section."

[83] See paras 4-14ff above.

[84] Scottish Law Commission, *Report on Trust Law* para 13.22: "Section 2 of the 1961 Act does not extend protection to third parties who are co-trustees or beneficiaries. We thought that co-trustees ought to be aware of their powers, so that their exclusion was justified. Beneficiaries, however, might have little information as regards the scope of the powers of the trustees, and therefore should not be expected to undertake detailed investigations.".

section 2 indicated that a beneficiary could not be considered as the "second party" referred to in that section, and so take advantage of the protection it created for "the second party or any other person". The reform appears therefore to be an unnecessary one.

4-25. The Commission's rationale for the continued protection of bad-faith third parties is threefold.[85] First, the absence of a requirement for good faith prevents arguments about the third party's knowledge, thereby protecting third parties dealing with trustees. Second, beneficiaries remain protected because the requirement that transactions must be onerous in order to fall within the protection prevents any diminution in value of the trust fund. Third, the lack of any requirement for good faith in section 2 appears to have worked well in practice for more than 40 years. Assuming it is accepted that a protection for third parties transacting with trustees is necessary in principle, these reasons seem a relatively convincing ground for continuing to dispense with a requirement for good faith. Yet as has been shown, the creation of a protection for those transacting with trustees was unnecessary, and was the result mainly of a desire to hasten reforms that were appropriate only for judicial factors.

4-26. A Bill based on the draft which accompanied the Scottish Law Commission's Report was introduced to the Scottish Parliament in 2022 and in due course enacted as the Trusts and Succession (Scotland) Act 2024. Section 43 of that Act substantially implements the reforms to the protection suggested by the Commission. Having set out the history of its predecessor, it is to this new provision that the discussion may now turn.

D. THE SECTION 43 PROTECTION: OPERATION

4-27. Section 43 of the Trusts and Succession (Scotland) Act 2024 provides as follows:

> **43 Validity of certain transactions entered into by trustees**
>
> (1) Subsection (2) applies where –
>
> (a) the trustees enter into an onerous transaction with any person, and
> (b) the transaction is one under which the trustees purport to exercise, in relation to the trust property, or to any part of the trust property, a power under section 15(1) or 18(1) whether the power derives from the trust deed or is implied by those sections.
>
> (2) The validity of the transaction, and of any title acquired under the transaction by the second party, are not challengeable by that or any other person on the ground that –

[85] Scottish Law Commission, *Report on Trust Law* para 13.20.

(a) the exercise of the power is at variance with the terms or purposes of the trust or
(b) on the part of the trustees, there has been some procedural irregularity or omission.

(3) Except that, if the trustees are acting under the supervision of the accountant of court and the exercise of the power is under section 15(1), then subsection (2)(a) applies only if the accountant consents to the transaction.

(4) Nothing in subsections (1) to (3) affects any question of liability as between the trustees.

(5) This section applies –

(a) irrespective of when the trust was created, but
(b) only as respects a transaction entered into after the section comes into force.

Like its predecessor, section 2 of the Trusts (Scotland) Act 1961, section 43 relies in its operation on other provisions relating to trustees' powers: this time, sections 15 and 18 of the 2024 Act, which replace section 4 of the 1921 Act. So far as is relevant, section 15 states:

(1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees have in relation to the trust property all the powers of a natural person beneficially entitled to the property.

(2) But this section is without prejudice to –

(a) a trustee's fiduciary duty (including a trustee's duty to fulfil the trust purposes),
(b) a trustee's duty of care, and
(c) any restriction or exclusion imposed by or under this Act or any other enactment

The powers of a "natural person beneficially entitled" appear to be capable of equiparation with ownership, and thus represent the broadest possible range of powers exercisable in relation to property.[86] The combined effect of sections 43 and 15 is therefore that, subject to the limitations discussed below, any onerous transaction by a trustee is unchallengeable on the ground that the exercise of the power is at variance with the terms or purposes of the trust. That outcome is, as has been discussed, the intended result of the recommendations for reform made by the Scottish Law Commission's *Report on Trust Law*.[87]

[86] See e.g. Erskine, *Inst* II.1.1.
[87] Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014) discussed at paras 4-22ff above.

4-28. While the linking of section 43 to the broadly drafted provision on trustee powers contained in section 15 represents, in some respects, an augmentation of the statutory protection against claims by beneficiaries by comparison to the former section 2, there remain limitations to that protection. These are discussed below along with other constraints on the protection in order to reach an overall conclusion on the scope of the protection and the consequential impact on a beneficiary's claim against a third party.

E. THE SECTION 43 PROTECTION: SCOPE

4-29. While, as has been noted, the section 43 protection is cast in broad terms, it is not entirely without qualification. The question of the scope of the protection may therefore be assessed by an examination of those qualifications.

4-30. The limitations to the protection conferred by section 43 are discernible both from inclusions in and exclusions from the wording of the provision itself. Limitations of the former kind are, in general terms, more straightforward than those of the latter and so are considered first in the discussion which follows.

(1) Accountant of Court transactions

4-31. The first and most obvious limitation to the section 43 protection applies to trustees acting under the supervision of the Accountant of Court. In such cases the consent of the Accountant to a transaction by the trustees is necessary in order for the protection to apply.[88]

4-32. A limitation based on the consent of the Accountant of Court is surprising in more than one respect. First, it is not clear why, in this context, a relaxation of the section 43 protection is necessary or useful given that transactions by trustees under the Accountant's supervision will naturally attract a higher degree of scrutiny.[89] Perhaps more significantly, a transferee has no

[88] Trusts and Succession (Scotland) Act 2024 s 43(3). This provision is a continuation of the proviso to section 2, which was added as a result of the Scottish Law Commission's *Report on the Powers of Judicial Factors* (Scot Law Com No 59, 1980). Following that amendment, a judicial factor was entitled to apply to the Accountant of Court for consent to do an action which might be at variance with the terms or purposes of the trust: see s 2(3) as inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 s 8: ". . . where in relation to the trust estate, or any part therefor, a judicial factor thinks it expedient to do any of the acts [mentioned in s 4(1)(a)–(ee) of the 1921 Act] but the act in question might be at variance with the terms or purposes of the trust, he may . . . apply to the Accountant of Court for his consent to the doing of the act." The procedural rules governing applications of this kind (which continue to refer to section 2 of the 1961 Act) may be found in the Rules of the Court of Session rr 61.14ff.

[89] The historical explanation for this peculiarity is, of course, that this qualification was hastily tacked on to section 2 of the 1961 Act in order to deal with the position of judicial factors and was never intended to apply to trustees: see para 4-11 above. As has been noted, this

means of discovering whether a trustee with whom he or she deals is acting under the supervision of the Accountant.[90] Where consent is not obtained, the transferee may be prejudiced by an action of reduction on the basis of breach of trust unhindered by the application of section 43. In this respect, the provision appears to fail in upholding one of its core aims – to shield a transferee from a beneficiary's latent claim for breach of trust.

4-33. These observations aside, the reality that the majority of those subject to the supervision of the Accountant are judicial factors renders the qualification of limited significance to trusts. Nevertheless, trustees may in some instances act under the supervision of the Accountant. It is accordingly possible to conceive of circumstances where a trustee must seek consent in order for a purchaser to enjoy protection from claims by a trust beneficiary. A trustee might, for example, be made the subject of a supervision order at the trustee's own request[91] or by the court.[92] Both are rare; a transaction by such a trustee in breach of trust is rarer still.

(2) Non-onerous transactions

4-34. Unlike its predecessor, which extended protection only on the limited number of transactions enumerated in section 4 of the 1921 Act, section 43 now extends to onerous transactions of all kinds. There are two kinds of transaction lying outside of this wide class. The first, and by far the most important, is donation. The second are transactions which fall somewhere between donation and a transaction for full value. Both potential limitations are considered in turn below.

(a) Donation

4-35. As a limitation to section 43, donation means the transfer of ownership of (or grant of any right in) the trust property to another for no consideration. The omission is significant in a number of respects. First, donation is one of the transactions which, from the point of view of the beneficiary, will be of most

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engendered confusion in the Scottish Law Commission's interpretation of the provisions: see n 77 above.

90 Except perhaps if this is disclosed by the trustee or trustees themselves. But a trustee acting in breach of trust such as to make the s 43 protection relevant is, in any event, less likely to be upfront.

91 See Trusts and Succession (Scotland) Act 2024 s 75, replacing the Trusts (Scotland) Act 1921 s 17. It is, admittedly, difficult to envisage a situation where a potentially delinquent trustee would place himself voluntarily under the supervision of the court.

92 See e.g. *The Glasgow Lock Hospital, Petitioners* 1949 SLT (Notes) 26 where trustees of a hospital were made subject to a requirement not to sell the trust property (consisting of the hospital itself) and placed under the supervision of the Accountant of Court.

importance to challenge.[93] This is because donation, unlike sale, results in the alienation of the trust property without any corresponding receipt of value by the trustee in relation to which a claim might be asserted by the beneficiary.[94] Donation is also of significance because it is likely to be easier from the perspective of a beneficiary to satisfy the requirements of a claim for breach of trust since the difficult questions of transferee knowledge encountered in an action predicated upon bad faith need not be addressed.[95]

(b) Transactions involving nominal or inadequate consideration

4-36. The requirement that a transaction is onerous in order to benefit from the protection of section 43 raises the question of whether there exist transactions which, although not donative in their nature, nevertheless fall short of the standard of onerousness envisaged by section 43. It is helpful to divide the potential transactions within this class into two kinds: those involving nominal consideration and those made for inadequate consideration.

4-37. The paradigmatic example of a transaction made for nominal consideration is a constructed sale: does the protection apply where, for example, a trustee sells, and the transferee buys, trust property for (say) £1?[96] On a literal reading of the wording of section 43, this question must be answered in the affirmative, since a transaction involving nominal consideration is still "onerous" in the sense that it imposes an obligation on the counterparty to provide value, albeit of a limited kind.[97] It might be contended, however, that a "sale" for nominal consideration is not onerous in the true sense of that word but is, in fact, much closer to a gratuitous transaction in its nature. On this view, it would be wrong to confer protection upon a transaction which is not,

[93] Indeed, the vast majority of reported cases concerning a claim for breach of trust involve either the outright donation of the trust property or a sale to a purchaser in bad faith; cf. however *De Fazio v De Fazio* [2014] CSOH 56, 2014 GWD 13-251 which concerned a loan allegedly made in breach of trust. Further, this view appears to coincide with that of the Scottish Law Commission, which rejected any suggestion that any reform to section 2 should extend to donative transactions: see Scottish Law Commission, *Report on Trust Law* para 13.21 ("We could see no basis for extending the protection of section 2 to gratuitous *ultra vires* transactions. We thought that those were and should remain challengeable as the trustees have no power to give trust property away except as directed by the trust deed. To make such gifts unchallengeable would weaken the position of the beneficiaries to a substantial extent.").

[94] A beneficiary might, of course, maintain a claim against the trustee for the value of the property donated where the donation was in breach of trust.

[95] Those requirements are discussed in relation to a claim predicated upon bad faith at paras 5-21ff below.

[96] The question applies equally to (e.g.) a lease by the trustee for nominal rent which also raises questions of the onerousness of the lease for the purpose of s 43(1)(a).

[97] As has been noted, a requirement that a transaction be made for market value was considered during the law reform process but ultimately not incorporated into section 2 of the 1961 Act: see n 44 above.

in reality, within the intended scope of section 43. The obvious problem with a definitional argument of this kind is in determining the level of consideration required to meet the requirement for onerousness. Nonetheless, a transaction involving nominal consideration is at least relatively easy to identify given that it will typically involve a bare minimum or merely tokenistic consideration.

4-38. The issues become more acute when considering transactions for inadequate consideration. A transaction of this kind may also form the basis of a claim for breach of trust,[98] and it is therefore relevant to consider the applicability of the section 43 protection in such cases. Transactions made for inadequate consideration give rise to similar issues as those made for nominal consideration but it is less clear that a transaction made for inadequate consideration could not be characterised as onerous such that the section 43 protection is engaged.[99] The view of the Scottish Law Commission appears, however, to be that transactions both for nominal and inadequate consideration would fall outside of the protection:

> [T]he concept of an onerous transaction is in our opinion confined to transactions at full value, or what reasonably appears to the parties to be full value.[100]

Although the meaning of the second formulation is not entirely clear – what "reasonably appears to be full value" to the parties is surely in most instances simply the price they have agreed upon – the Scottish Law Commission's view does provide some guidance on the interpretation of section 43: a strong case may be made for the exclusion of transactions made for nominal consideration from the protection, and there is a relatively compelling argument that transactions for inadequate conclusion might be similarly excluded.[101]

(3) Transactions not "at variance with the terms or purposes" of the trust and claims not based on "title"

4-39. A further limitation of the section 43 protection is again an incident of the history of the provision. As has been seen, the predecessor of section 43,

[98] See para 5-25 below. The availability of a claim of the kind considered here is, however, unclear and thus the question of the applicability of s 43 is of correspondingly less importance as compared to its application to transactions made for nominal consideration.

[99] In the same circumstances English law will protect a purchaser of trust property from a claim by the beneficiary except where collusion between the purchaser and trustee can be demonstrated: see Trustee Act 1925 s 13(2).

[100] Scottish Law Commission, *Report on Trust Law* para 13.24.

[101] Both conclusions would seem to accord with the Scottish Law Commission's own view that the requirement that the transaction be onerous counterbalances the lack of a requirement for good faith, since as has been noted the resultant receipt by the trustee of value prevents any diminution of the trust patrimony as a whole: see Scottish Law Commission, *Report on Trust Law* para 13.24 ("We think that, provided the transaction is onerous, good faith should not be a necessity; the onerous character of the transaction should ensure that the trust property is not prejudiced."). See also para 4-25 above.

section 2 of the Trusts (Scotland) Act 1961, was conceived principally to prevent the avoidance by the beneficiary of the title of a transferee taking in breach of trust. But while section 2 was, and section 43 is, indeed drafted so as to exclude claims made on this basis – the provision protects the "title acquired by the [transferee]" from challenge on the ground that the transaction was "at variance with the terms or purposes of the trust" – the provision has no effect on claims made by beneficiaries on grounds other than those protected categories. The limits to the protection resulting from the "title" and "at variance" qualifications are explored in turn.

(a) Transactions not "at variance with the terms or purposes" of the trust

4-40. There are a number of instances in which a claim by a beneficiary may arise on grounds other than the trustee acting at variance with the terms or purposes of the trust (that is to say, in breach of trust). It has been noted already[102] that a claim by a beneficiary may be based on breach of fiduciary duty by the trustee[103] or a derivative claim (arising from the assumption by the beneficiary of a right held by the trustee against a third party).[104] Neither of these claims relies on an act at variance with the terms or purposes of the trust and thus, it must be assumed, neither is forestalled by the section 43 protection.

(b) Claims not directed at transferee's "title"

4-41. Equally, the restriction of section 43 to the protection of a transferee's "title" has the effect of excluding certain claims available to a beneficiary from the scope of the provision. Thus while the protection of a transferee's "title" will prevent reduction on the basis of breach of trust, other remedies not directed at the transferee's title may not be so impeded. Thus (as will be argued) a breach of trust or of fiduciary duty may entitle a beneficiary to recover damages or, alternatively, profits made by a transferee from trust property wrongfully received.[105] Similarly, most derivative claims seek to impose personal liability on a transferee rather than attack his title to trust property.[106]

[102] See the discussion at para 3-01 above.

[103] For discussion of claims for breach of fiduciary duty see ch 6 below.

[104] For discussion of derivative claims see ch 7 below.

[105] See paras 5-32ff and 6-19ff below. A transferee taking property in breach of fiduciary duty may also be liable on the basis that he or she holds that property as a constructive trustee, as in *Commonwealth Oil v Baxter* [2009] CSIH 75, 2010 SC 156 and *Ted Jacob v Robert Matthew Johnson Marshall and Partners* [2014] CSIH 18, 2014 SC 579, discussed at paras 6-29ff below. Such a claim may well be outside the scope of s 43 in any event as not relating to an act at variance with the terms or purposes of the trust: see para 4-40 above.

[106] See, for example, the claim sought to be maintained by the beneficiaries in *Armour v Glasgow Royal Infirmary* 1909 SC 916 (discussed at para 7-08 below) which appears ultimately to be founded upon the unjustified enrichment of the transferee.

4-42. An argument against the exclusion of the section 43 protection from non-title-based claims may be made on the basis of statutory construction. Allowing the protection to operate where an action against the transferee by the beneficiary seeks to attack the former's title, but not where the claim is a personal one creates, it might be argued, an artificial distinction given the potential equality of outcome for the transferee. Making such a distinction arguably frustrates the central objective of the provision to ensure that, at least in a breach of trust case, the transferee is not subject to a claim by the beneficiary.[107] In the final analysis, however, there is no clear indication that claims not based on title are within the scope of the section 43 protection.[108] Section 43 thus offers protection only from an action of reduction (or equivalent).

(4) Transactions between trust parties

4-43. A final limitation to the section 43 protection relates to the parties between whom the transaction sought to be impugned takes place. The protection is expressly restricted such that it does not apply to transactions between trustees.[109] The reason for that restriction, as explained by the Scottish Law Commission in its *Report on Trust Law*, is that co-trustees are likely to have sufficient information on the scope of their powers that it would be inappropriate to confer upon them the benefit of the section 43 protection.[110] That conclusion seems a justifiable one, not least given that a policy intention stated to underlie section 43 (and section 2 before it) is the protection of third parties otherwise ignorant of the powers of the trustees.

(5) Significance of the qualifications

4-44. Do the various qualifications of section 43, taken together, represent a meaningful limitation of its scope? The answer, at least in relation to protection against claims founded on breach of trust,[111] must be in the negative. It is true

[107] That argument is fortified if references to "title" in s 43 are read broadly to signify the transferee's entitlement to the property received, rather than in the narrow sense of ownership or a subordinate real right in that property. On that reading, there would be little difference for the purposes of s 43 between an action for reduction on the one hand and an action for the value of the trust property on the other: an equivalent degree of protection should apply in both circumstances.

[108] In its discussion of s 2 the Scottish Law Commission also appears to consider claims not directed against the transferee's title to be outside the scope of the provision: see *Discussion Paper on Liability of Trustees to Third Parties* (Scot Law Com DP No 138, 2008) para 2.31.

[109] See Trusts (Scotland) Act 2024 s 43(4).

[110] Scottish Law Commission, *Report on Trust Law* para 13.22.

[111] Breach of fiduciary duty and derivative claims are, as has been noted, outside of the scope of the protection. For claims of this kind which are considered in the discussion which follows and are, or would be, outside the scope of s 43, see e.g. *Dunn v Chambers* (1897) 25 R 247 and

that certain such claims, such as those for damages and profits,[112] fall outside section 43 and thus represent limitations to the provision. But section 43 provides considerable protection from the beneficiary's most common means of recourse against a third party, namely a reductive claim for breach of trust. Moreover, other circumstances which do not attract the protection are rare (in some instances vanishingly so, as in the case of a breach of trust by a trustee under the supervision of the Accountant of Court). The result is that section 43 is sufficiently broad in scope to encompass most claims for breach of trust and so make unlikely the possibility that any such claim might succeed.

4-45. The conclusion that a successful reduction founded on breach of trust will be rare in the modern law is reinforced by the existence of other limitations to, and requisites of, claims of this kind. Most important among these is the requirement that, in order to maintain an action, a beneficiary must normally have under the trust not merely a right to money but a claim to identifiable trust property, being the property which has been disposed of by the trustee. This precondition, as has been discussed,[113] results from the fraud-on-creditors rationale upon which claims for breach of trust are based. That rationale imposes liability on the basis that, by taking property from a trustee in bad faith, the acquirer has participated fraudulently in the defeasance of the beneficiary's personal right to the property. Where, conversely, a beneficiary has no claim to particular trust property, a transfer by the trustee does not defeat the beneficiary's personal right since the right is still capable of fulfilment either from the proceeds of the transaction or by a claim directly against the trustee. No liability can therefore accrue to the transferee as having been involved in a fraud upon the beneficiary,[114] even if the transferee was in bad faith or gratuitous.[115] This impediment is of particular significance in the modern law since many contemporary trusts (in contrast to those of the seventeenth and eighteenth centuries examined earlier)[116] confer a claim to money rather than to specific property.

Meff v Smith's Trustees 1930 SN 162 (actions of reduction of transfers made in breach of fiduciary duty); *Laird v Laird* (1855) 17 D 984 (action for accounting for profits made in breach of fiduciary duty); *De Fazio v De Fazio* [2014] CSOH 56, 2014 GWD 13-251 (action to recover loans made in breach of trust to a co-trustee); *Commonwealth Oil v Baxter* [2009] CSIH 75, 2010 SC 156 and *Ted Jacob v Robert Matthew Johnson Marshall and Partners* [2014] CSIH 18l, 2014 SC 579 (actions to hold recipient of property transferred in breach of fiduciary duty liable as constructive trustee); *Armour v Glasgow Royal Infirmary* 1909 SC 916 (derivative action for repayment of trust funds from a third party unjustifiably enriched thereby); *Teulon v Seaton* (1885) 12 R 971 and *Watt v Roger* (1890) 17 R 1201 (derivative actions for repayment of trust funds, apparently on the basis of delict or unjustified enrichment).

[112] That is, claims not directed at the "title" of a transferee: see paras 4-41 and 4-42 above.

[113] See para 3-54 above.

[114] A possible exception to this rule is considered at paras 5-16 and 5-17 above.

[115] The application of the requirement to claims for breach of trust predicated upon a donation of trust property is particularly significant since, as has been seen, such claims escape the effects of s 43: see para 4-35 above.

[116] In ch 3.

4-46. The broad ambit of section 43, as well as the requirement that the beneficiary must normally have a specific entitlement to trust property, together create an almost insurmountable obstacle to a claim for reduction founded on breach of trust (to say nothing of the other defences which may be available to a transferee).[117] It is thus difficult to imagine a realistic set of facts which might form the basis of such a claim.[118] A complete analysis must nevertheless consider what must be made out in order that a claim for breach of trust be maintained.[119]

F. CONCLUSION

4-47. The previous chapter traced the emergence of claims against third-party acquirers on the basis of breach of trust; the purpose of the present chapter has been to discuss such challenges in the modern law by reference, in particular, to the limitation imposed by section 2 of the Trusts (Scotland) Act 1961 and its successor, section 43 of the Trusts and Succession (Scotland) Act 2024, to a claim by the beneficiary for the reduction of a transaction in breach of trust. Section 2, as has been seen, was the almost unwitting result of a process of law reform which sought to resolve problems relating to the powers of judicial factors but which, in effect, has largely blocked title challenges founded on breach of trust. Although a number of exceptions to its replacement in the form of section 43 can be identified, the exceptions, even taken collectively, do not represent a significant qualification of the provision. The result of the broad scope of section 43, particularly when combined with the requirement that a pursuer-beneficiary must normally have a right to specific property, will be to hinder many such claims. The requisites of what remains of a claim for breach of trust are considered in the next chapter.

[117] Discussed at paras 5-29ff.

[118] Thus a viable claim, to surmount the various obstacles discussed here, would need to involve a breach of trust by the granting, to a bad-faith third party, of (for example) a proper liferent of trust property to which the beneficiary had a specific entitlement and where *restitutio in integrum* is possible and none of the common law defences applies. A combination of circumstances such as this is, to say the least, improbable.

[119] These requisites are also of significance as they are equally applicable to a claim for breach of fiduciary duty on the basis that a claim of that kind is properly conceptualised as an instance of fraud on creditors: see paras 6-19ff below.

5 Claims for Breach of Trust III: Requisites and Remedies

A. INTRODUCTION

5-01. This is the second of two chapters considering the modern law on claims by trust beneficiaries against those acquiring property from trustees in breach of the trust. The previous chapter considered the restriction imposed on such claims by section 43 of the Trusts and Succession (Scotland) Act 2024. That provision serves significantly to limit the availability of most forms of claim for breach of trust in the modern law. This limitation, it was argued, is compounded by the requirement that the beneficiary must normally have a right to specific property in order to bring a claim.

5-02. With those limitations in view, the purpose of this chapter is to provide an account of the requisites of,[1] defences to,[2] and remedies for,[3] claims for

[1] See paras 5-03ff below.
[2] See paras 5-29ff below.
[3] See paras 5-32ff below.

breach of trust in the modern law. In this exercise a particular effort is made to state the elements of the claim in terms of the fraud-on-creditors-rationale, which was identified earlier as the most suitable doctrinal basis, and one which explains how the beneficiary's merely personal right against the trustees can be pled against third parties.[4] This in turn allows developments from other manifestations of fraud on creditors including, in particular, the offside goals rule to be compared with (and, where appropriate, applied to) the context of breach of trust. Emphasis is also placed on the requisites of claims arising from the donation of trust property: claims of that kind are, on the basis of the analysis given above,[5] the most likely to survive the application of section 43 and so remain a viable route for the beneficiary seeking redress as a result of a breach of trust.

B. CLAIMS FOR BREACH OF TRUST: REQUISITES

5-03. What must be established by a beneficiary in a claim for breach of trust? There are four main requisites: first, there must be a transfer by the trustee; second, that transfer must be of trust property in respect of which the beneficiary has a specific entitlement; third, the transfer must be in breach of trust; and, fourth, the transferee against whom the claim is asserted must either be in bad faith or have failed to provide consideration for the transfer. Negatively, it might be added that the transferee must have no relevant defence of the kind discussed later.

(1) Transfer

5-04. The first and most straightforward requirement of a claim for breach of trust is that there must be a transfer of trust property by the trustee to a third party. In terms of the fraud-on-creditors rationale, it is this transfer that renders the trustee unable to discharge his obligation to the beneficiary. The transfer is thus the putatively fraudulent act in which the transferee may, by accepting the transfer, be implicated. For the purposes of this requirement the transferee may be any person apart from the beneficiary actually entitled to the trust property transferred.[6] Further, "transfer" will, on this view, include not only the transfer of ownership of trust property outright – doubtless the most common case[7] – but

4 See para 3-52 above.

5 See para 4-29ff above.

6 As was noted at para 4-43 above, the application of the section 43 protection may differ for parties involved in the trust (such as co-trustees) and "true" third parties.

7 For a claim involving a transfer of heritable property, see *Anderson v Dempster* (1702) Mor 10213 and 12460 (discussed at para 3-13 above); for an offside goals rule claim involving incorporeal moveable property, see *The Mortgage Corporation v Mitchells Robertson* 1997 SLT 1305.

also any transaction with a dispositive aspect (such as loan) since a trustee may be equally unable in such cases to discharge his obligations to the beneficiary.[8]

(a) Subordinate rights

5-05. A more difficult question is whether "transfer" extends to a transaction by which a third party receives some right in the trust property but which does not result in a transfer of property including, in particular, the granting of rights in security or other subordinate real rights. In *Redfearn v Somervail*,[9] for example, a challenge was allowed to the granting of a security over the trust property. It is, however, difficult to take this as evidence of any wider rule given that the means by which the grant was effected – an assignation in security – is inherently dispositive in nature (i.e. the assignee acquires title to the right).

5-06. The formulation of the statutory protection in section 2 of the Trusts (Scotland) Act 1961 lent support to the suggestion that a claim by a beneficiary against a third party who received a subordinate real right in the trust property was competent. As has been seen, the section 2 protection extended to the grantee of, amongst other subordinate rights, a lease[10] or a right in security[11] and so appeared to contemplate the possibility of a claim by a beneficiary in these circumstances.

5-07. Most compellingly, the possibility that a claim for breach of trust arising from the grant of a subordinate right is competent seems to follow as a matter of principle from the fraud-on-creditors rationale: a trustee's performance of his obligation to the beneficiary may be frustrated by the grant of a subordinate real right as much as an outright alienation of the trust property since a trustee will normally be required to provide the trust property to the specifically entitled beneficiary unencumbered.[12] Indeed, an analogous approach is taken in other manifestations of the fraud-on-creditors rationale: thus the grant of a subordinate real right may be challenged by the creditor in an antecedent obligation on the basis of the offside goals rule,[13] while the giving of security

[8] Thus, in *De Fazio v De Fazio* [2014] CSOH 56, 2014 GWD 13-251 the court accepted that loans made in alleged breach of trust which resulted in an alienation of the trust property were, in principle, recoverable by a beneficiary.

[9] *Redfearn v Somervail* (1813) 1 Dow 50, (1813) 5 Pat App 707, discussed at paras 3-36ff above.

[10] Trusts (Scotland) Act 1921 s 4(1)(c) read with Trusts (Scotland) Act 1961 s 2(1).

[11] Trusts (Scotland) Act 1921 s 4(1)(d) read with Trusts (Scotland) Act 1961 s 2(1).

[12] Indeed if the trustee was entitled by the terms of the trust to transfer the property to the beneficiary encumbered by one or more subordinate real rights, there could be no breach of trust and so no claim by the beneficiary.

[13] See e.g. in relation to the grant of a lease, *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74 and in relation to the grant of a standard security, *Trade Development Bank v Crittal Windows Ltd* 1983 SLT 510, both discussed in KGC Reid, *The Law of Property in Scotland* (1996) para 697.

by an insolvent debtor may be reducible as conferring an unfair preference on a particular creditor to the prejudice of others.[14]

(b) Subsequent alienation

5-08. A further issue is whether a claim for reduction on the basis of breach of trust may be maintained by a beneficiary where there is a subsequent transfer or grant to a fourth party. Discussion of this issue also naturally encompasses consideration not only of the fourth party but also of any subsequent transferee of trust property.[15]

5-09. The competence of claims against fourth-party transferees can again be resolved by resorting to principle including, in particular, the approach of the fraud-on-creditors rationale to successor voidability. The analysis, as developed by Reid[16] and, in the context of the offside goals rule, by MacLeod[17] proceeds as follows. A transferee who takes contrary to the offside goals rule receives voidable title in the trust property, i.e. a title which is vulnerable to attack on the basis of a personal right held by the disappointed creditor.[18] A further transfer by that person is thus capable of bringing into effect the offside goals rule once more: the subsequent transfer breaches the creditor-third party personal right such that a fourth party who takes in bad faith or fails to provide consideration is as liable as his predecessor.[19]

5-10. Applied to the context of trusts, the successor-voidability analysis would hold liable to reduction any bad-faith or gratuitous singular successor taking trust property from a third party against whom a reductive claim was competent. Where, however, the property transferred in breach of trust falls into the hands of a good-faith and onerous fourth party,[20] the ability of the beneficiary to seek reduction against that party, and the party's successors, ends. This approach accords with the few available cases which consider subsequent

[14] See e.g. Stair, *Inst* I.9.15ff; Erskine, *Inst* IV.1.28ff*;* Bell, *Comm* vol II, 205ff. In the modern law unfair preferences are challengeable by statute: see now Bankruptcy (Scotland) Act 2016 s 99 (in relation to personal insolvency) and the Insolvency Act 1986 s 243 (in relation to corporate insolvency).

[15] The question of the competence of claims of this kind appears to have arisen at an early stage: see *Anent Trusts and Back Bonds* (1677) 3 Bro Sup 185 (discussed at para 3-6 above).

[16] Reid, *Property* para 692.

[17] J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) paras 7-101 to 7-107.

[18] That is, in the context of the offside goals rule, the holder of the antecedent obligation breached by the transaction.

[19] Reid, *Property* 692; MacLeod, *Fraud* para 7-101 ("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").

[20] Or indeed a transferee who enjoys protection on the basis of s 43 of the Trusts and Succession (Scotland) Act 2024, since that transferee enjoys an absolutely good, not a voidable, title.

alienations. Thus in *Macgowan v Robb*[21] property was transferred in breach of the provisions of a marriage contract to a third and, subsequently, to a fourth party both of whom were in bad faith. The fourth party was held liable in an action of reduction at the instance of the beneficiary[22] on the basis that he was not in the position of a good-faith transferee providing value.[23]

(c) Transferee insolvency

5-11. Perhaps the most difficult issue in relation to this aspect of a claim is the effect of the insolvency of the original (or subsequent) transferee. In such cases the primary concern of the beneficiary will be whether his claim survives against the creditors of the transferee (represented by a trustee in sequestration or otherwise). No reported case appears to have considered this issue, either in relation to breach of trust or other forms of fraud on creditors. Analysis must therefore proceed on the basis of principle.

5-12. The beneficiary's claim, if well-founded, is a personal right against the transferee for reversal of the transaction carried out in breach of trust.[24] Whether or not the claim persists against the creditors of the transferee thus depends upon the vulnerability of those creditors to that personal right. The normal rule is that creditors are not affected by the personal obligations of their insolvent debtor (i.e. the transferee).[25] As will be discussed,[26] however, an important exception to the rule developed in relation to a debtor's fraud to the effect that creditors were not entitled to take property which had been fraudulently acquired. Application of this principle (sometimes framed as the rule that fraud "passes against creditors") would indicate that the beneficiary's claim is protected in the insolvency of the transferee.[27] Evidence to support this conclusion is, however, very slight: the last successful invocation of the

[21] *Macgowan v Robb* (1864) 2 M 943; see separate proceedings reported *sub nom M'Gowan v Robb* (1862) 1 M 141 relating to the beneficiary's title to sue.

[22] It is unclear if the rights arising under the marriage contract were in the nature of the right of a beneficiary in a trust, although the court appears to have approached the case on this basis: see *Macgowan* per Lord Deas at 953: "The right vested in the *nominatim* fiars was of the nature of a trust for behoof of themselves and the other beneficiaries, and the trust remained, I think, in the persons of the two who survived". Even if the case is seen as an instance of the offside goals rule it is, on the analysis presented above, applicable by analogy to a claim for breach of trust.

[23] *Macgowan* per Lord Deas at 952.

[24] In other words, the transferee receives a voidable title: see para 3-53 above.

[25] See Reid, *Property* para 694. The general rule is of some antiquity and is well settled: see paras 8-10ff below.

[26] See para 8-09 below.

[27] A similar argument is made by Thomson who presents the analysis as an alternative to the protection of trust property from creditors of the transferee through a constructive trust: see JM Thomson, "Unravelling Trust Law: Remedies for Breach of Trust" 2003 JR 129 at 141.

rule is more than a century ago[28] and the cases upon which it proceeds were possibly incorrectly decided.[29] Indeed, the balance of policy appears to weigh in favour of creditors rather than the beneficiary, particularly given that the latter will have a monetary claim against the delinquent trustee as an alternative to a reductive claim against the transferee.[30]

(2) Trust property and beneficiary entitlement

5-13. As a second requirement of a successful claim, and subject to what is said below,[31] the beneficiary must show that the property transferred is trust property to which that beneficiary was, at the time of the transfer, specifically entitled in terms of the trust. As has already been stressed, this requirement flows from the fraud-on-creditors rationale, which allows the transferee's title to be challenged only where the transfer would render impossible the trustee's discharge of an obligation towards the creditor-beneficiary.[32] Where there is no specific entitlement, the beneficiary's right is unaffected by the transfer: before, as after, the right may be satisfied from the trust estate or, to the extent necessary, by a claim against the trustee.

5-14. The task of the beneficiary is thus twofold: he or she must establish the existence of a trust and, it appears, demonstrate an entitlement within that trust to the specific property that has been transferred. For the first of these tasks the normal rules on the constitution and proof of trust apply.[33] Failure to prove

[28] See MacLeod, *Fraud* paras 8-30 to 8-32 especially the comments of Lord Johnston in *AW Gamage v Charlesworth's Trustee* 1910 SC 257 there quoted.

[29] See para 8-27 below, particularly the discussion of *Thomson v Douglas, Heron and Company* (1786) Mor 10229 and 10299, (1786) 3 Ross LC 132.

[30] Cf. the decisions in *Commonwealth Oil v Baxter* [2009] CSIH 75, 2010 SC 156 and *Ted Jacob v Robert Matthew Johnson Marshall and Partners* [2014] CSIH 18l, 2014 SC 579, where the court appeared to suggest that property taken in breach of fiduciary duty or, potentially, in breach of trust might enjoy protection on the insolvency of the transferee on the basis of its being held on constructive trust. Those decisions are discussed at paras 6-29 ff below.

[31] See para 5-16 and 5-17.

[32] See para 3-54 above. Cf. DA Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 32.62 where it is argued that transfer in breach of trust represents an exception to the normal rule in offside goals cases that the prior obligee must have a specific entitlement to property. This approach appears to arise from the authors' view that the offside goals rule is not a manifestation of fraud on creditors but is instead "based on the publicity principle applicable in property law": see para 32.53, and also S Wortley, "Double Sales and the Offside Trap: Some Thoughts on the Rule Penalising Private Knowledge of a Prior Right" 2002 JR 291. This view is convincingly rejected by MacLeod, *Fraud* paras 7-09 to 7-11.

[33] As to which see WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) chs 2–3 and 5; Y Evans, "Trusts, Trustees and Judicial Factors" (Reissue, 2016), in *The Laws of Scotland: Stair Memorial Encyclopaedia* paras 12–27.

that the property was held in trust will, of course, be fatal to the beneficiary's claim.[34]

5-15. The second requirement (an entitlement to specific trust property) is likely to prove a significant obstacle to a claim. In many modern trusts, the beneficiary's entitlement, discoverable on the basis of an examination and interpretation of the trust deed, will be to the payment of money rather than to a specific asset. Further, the beneficiary of a discretionary trust has no claim either to money or to particular trust property if the trustee has not exercised his or her discretion in that beneficiary's favour.[35] In either case, a strict application of the fraud-on-creditors approach would deny the beneficiary a claim on the basis that no personal right was defeated by the transfer of trust property to a third party.

5-16. That conclusion may appear harsh, not least because beneficiaries might acquire a specific entitlement to trust assets in the future by (for example) the exercise of the trustee's discretion. And indeed on one view of the law, the lack of a specific entitlement need not always preclude a beneficiary's claim. The starting point for this alternative analysis is the notion that, while a non-entitled beneficiary, considered alone, may not have been defrauded by a transfer in breach of trust, the same cannot be said of all of the trust beneficiaries considered as a totality. Thus it might be argued that if the beneficiaries, taken together, are entitled to the whole of the trust fund, a transfer by the trustee of that fund, or any part of it, in breach of trust must represent a breach of the entitlement of that same aggregate of beneficiaries. On this view, a single beneficiary, even without a specific entitlement to a trust asset, might bring a representative claim for breach of trust on behalf of all of the beneficiaries.[36]

[34] See e.g. *Graham & Co v Raeburn* (1895) 23 R 84 where the pursuer attempted unsuccessfully to argue that an obligation to remit profits under a loan agreement gave rise to a trust. Similarly, in *Style Financial Services Ltd v Bank of Scotland No 1* 1996 SLT 421 the pursuer tried, and failed, to establish a trust on the basis of an agreement by a parent company to remit payments collected to its subsidiary.

[35] See e.g. *Paterson's Trustees v Paterson* (1870) 8 M 449, cited in RC Henderson, *The Law of Vesting* (2nd edn, 1938) 246: "A testator, in making a bequest to a party through the hands of trustees, may give to the trustees a power of determining whether the bequest shall or shall not take effect in favour of the legatee. Where this intention is expressed, the trustees are not, as in other cases, merely the agents for carrying out the dispositions made by the testator; they are arbiters as to whether the party shall or shall not receive the legacy. They cannot be controlled in the exercise of the power entrusted to them by the testator, and consequently the party has no claim to, and no vested interest in, the subject of the gift, unless and until the trustees determine that he shall receive it." Prior to the exercise of the trustee's discretion, a would-be beneficiary may, however, be entitled to compel the trustees to administer the trust in accordance with its terms: see *Inland Revenue v Clark's Trustees* 1939 SC 11.

[36] In English law a beneficiary absolutely entitled to the trust fund is entitled to recover property transferred in breach of trust directly from a third party. Where no such specific entitlement exists the trust fund must be reconstituted so that it may be administered in favour of all of the beneficiaries: see e.g. *Target Holdings v Redferns* [1996] AC 421 per Lord Browne-Wilkinson at 433ff.

A similar idea finds expression in the well-established rule that beneficiaries whose rights, considered together, represent the whole of the trust fund may, by their common consent, end the trust and call upon the trustees to distribute the fund.[37] Significantly, that rule appears to extend to cases where the rights of the beneficiaries seeking to end the trust have not yet vested.[38]

5-17. This alternative view is not free from difficulty. One issue is the consent necessary to bring a representative claim: as has been mentioned, the associated principle on termination by beneficiaries requires the agreement of all beneficiaries before the trust is brought to an end. It seems likely that the same requirement might apply where a non-entitled beneficiary seeks to sue on behalf of the other beneficiaries. That requirement is likely to prove especially problematic where one or more of those beneficiaries is unable to provide consent due to minority or lack of capacity.[39] Difficulty in obtaining consent may also arise in the case of public trusts, where the beneficiaries typically form a broad and unascertained class.[40] Finally, the approach does nothing to curtail the effect of section 43 which, as has been suggested, is likely to remain a significant obstacle to any claim. Nevertheless, this alternative and extended application of the fraud-on-creditors approach provides a possible means by which the rigour of the normal requirement for a specific entitlement might, in some circumstances at least, be mitigated.

(3) Breach of trust

5-18. In the third place, a beneficiary seeking to claim must establish that the transfer of property to which he or she was entitled constituted a breach of trust. Where, however, the first and second requirements (a transfer by the trustee of property to which a beneficiary is specifically entitled) are both satisfied, this third requirement is also satisfied since such a transfer is necessarily in breach

[37] *Gray v Gray's Trustees* (1877) 4 R 378; *Earl of Lindsay v Shaw* 1959 SLT (Notes) 13. For helpful discussion of the law on termination of a trust by the beneficiaries, see Scottish Law Commission, *Report on Variation and Termination of Trusts* (Scot Law Com No 206, 2007) paras 2.1–2.6; Wilson and Duncan, *Trusts* ch 12.

[38] Scottish Law Commission, *Report on Variation and Termination of Trusts* para 2.5.

[39] This problem is noted by the Scottish Law Commission in relation to the general rule on the termination of a trust by the consent of the beneficiaries: see *Report on Variation and Termination of Trusts* para 2.5.

[40] In the case of charitable trusts this problem is in part lessened by the existence of statutory regulation for charities: see e.g. the Charities and Trustee Investment (Scotland) Act 2005 s 31 which entitles the Office of the Scottish Charity Regulator (OSCR), among other powers, to require certain third parties to repay to a charitable trust sums which have been collected for the charity. See also s 34, conferring the same power on the Court of Session. See also *Magistrates of Airdrie v Smith* (1850) 12 D 1222 where an action for reduction of a transfer of heritable property (a school) in breach of a public trust was brought by the Magistrates of the town on behalf of its inhabitants.

of trust. Where, conversely, one or both of those requirements are not satisfied there may still be a breach of trust but that breach is not actionable on the basis of the fraud-on-creditors rationale.

5-19. What kinds of breach of trust may give rise to a claim? This question may be approached by adopting the familiar distinction between *ultra vires* and *intra vires* breaches. According to the Scottish Law Commission:

> An *ultra vires* breach occurs when trustees perform some act which is not authorised by the trust deed or the rules of trust law. An example of such a breach is making over trust property (income or capital) to a person who is not entitled to it in terms of the trust, i.e. paying the wrong "beneficiary". Investing in types of property outwith their powers of investment is another way in which trustees may commit an *ultra vires* breach. [. . .] Trustees may commit an *intra vires* delictual breach when they carry out an authorised action carelessly, or fail to take appropriate steps which they have power to take, and thereby cause loss to the beneficiaries. They may, for example, have invested trust funds in a rash speculation without proper consideration of the risks, or failed to dispose of a poorly performing investment left by the truster, or failed to supervise an agent or co-trustee appointed to manage some part of the trust business.[41]

Every reported case involving a claim for breach of trust has arisen from an *ultra vires* breach:[42] in other words, a breach resulting from the violation of the terms of the trust or of general rules of trust law, rather than a merely negligent but otherwise authorised act. Although this paucity of case law alone might support the conclusion that only *ultra vires* breaches can give rise to a claim against third parties for breach of trust, that conclusion also seems to follow from principle. What is struck at by the fraud-on-creditors doctrine is a transfer of trust property which renders impossible a trustee's performance of his obligation to a specifically-entitled beneficiary. Such a situation can, it appears, only arise in the event of an *ultra vires* breach of trust, not least because *intra vires* breaches will almost never result only from a transfer of trust property whereas *ultra vires* breaches result almost always from such a transfer. Thus where the other elements of the claim are made out but the breach of trust is *intra vires*, the trust property to which the beneficiary is specifically entitled will be preserved *in specie* and the trustee's obligation will remain capable of discharge, such that a fraud-on-creditors type liability will not be engaged.[43]

[41] Scottish Law Commission, *Discussion Paper on Breach of Trust* (Scot Law Com DP No 123, 2003) paras 1.14–1.15.

[42] See e.g. *Magistrates of Airdrie v Smith* (1850) 12 D 1222 where property was transferred despite a term requiring that it be held by the trustees "in all time coming".

[43] Any diminution in the value of the trust property resulting from the *intra vires* breach being recoverable from the trustee in that trustee's personal capacity (provided the appropriate degree of fault is proved).

(4) Bad faith or absence of consideration

5-20. Unlike the first three requisites of a claim for breach of trust, the requirement that there must either be bad faith or an absence of consideration pertain to the transferee against whom the beneficiary's action is ultimately directed. Indeed it is by establishing one of these elements that the beneficiary is able to hold liable that transferee on the basis of either his participation in the fraudulent act of the trustee (in the case of bad faith) or on the basis of his being unjustifiably enriched (in the case of absence of consideration). These separate bases of liability make the requirements disjunctive: provided the other elements of the claim are made out, the beneficiary need establish only one to succeed. In the discussion which follows, then, it is helpful to take each requisite in turn although a briefer treatment is afforded to bad faith than to lack of consideration given the significant obstacle posed by section 43 for claims predicated upon the former.[44]

(a) Bad faith

5-21. Whether a transferee of trust property is in bad faith depends, as in other instantiations of the fraud-on-creditors doctrine, upon his knowledge of the circumstances of the transaction. In this context, knowledge capable of placing a transferee in bad faith means principally awareness of an antecedent personal right against the party from whom the transferee receives the property, the performance of which would be frustrated by the transfer.[45] In the context of trusts, then, this antecedent personal right is that of a specifically-entitled beneficiary against the trustee: a transferee who takes trust property knowing of that right will be in bad faith.[46] As in instances of (for example) the offside goals

[44] See paras 4-27ff.

[45] See e.g. KGC Reid, *The Law of Property in Scotland* (1996) para 699, discussing the requirement in the context of the offside goals rule; DA Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 32.56 ("C will be in bad faith if C knows that the transaction with A contravenes an earlier obligation between A and B"). Reid relies upon Stair, *Inst* I.14.5 ("Though there may be fraud in the [transferor], 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, and 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 [transferor], 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"). Cf. RG Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) paras 11-07 to 11-10, suggesting that Stair held only public information or formal legal acts capable of placing a transferee in bad faith.

[46] At least as a matter of common law. In practice a bad-faith claim is likely, as has been noted, to be subject to the s 43 protection.

rule, the transferee is only affected by knowledge arising prior to the completion of the transfer formalities.[47]

5-22. On the face of it, then, it is not sufficient for liability that a transferee knows only that he or she is dealing with a trustee; instead the transferee must know that the transfer would defeat a beneficiary's entitlement arising under the trust.[48] The position is, however, complicated by the development, in other manifestations of fraud on creditors, of a duty of inquiry which may arise in certain circumstances and which, if not discharged by the transferee, may put that transferee in bad faith.[49] Although the precise formulation of this duty varies, it appears to arise, at least in the context of the offside goals rule, where the intending transferee becomes aware of a prior contract relating to the property sought to be transferred.[50] The transferee must then satisfy himself that the transfer would not be in breach of an antecedent obligation: in this exercise inquiries of, and assurances by, the seller as to the existence of such an obligation are not in themselves sufficient.[51]

5-23. How might a duty of inquiry be relevant in the context of claims for breach of trust? The most obvious circumstance which might place a transferee on his inquiry, analogous to a contract of sale in the offside goals context, is the fact of dealing with a trustee. This fact suggests that there may be entitlements arising from the trust which would be defeated by the transferee's accepting a transfer of trust property. To avoid being placed in bad faith, the transferee must thus discharge his duty of inquiry by ensuring either that no such interest

[47] Reid, *Property* para 699 citing Stair, *Inst* IV.40.21 This point is not, however, uncontroversial: see Anderson, *Assignation* paras 11-24ff.

[48] This appears to be the approach in a number of breach of trust cases involving bad faith: see e.g. *Taylor v Forbes and Company* (1827) 5 s 785, subsequent proceedings reported *sub nom Taylor's Trustees v Forbes* (1834) 12 s 564; *Style Financial Services Ltd v Bank of Scotland No 1* 1996 SLT 421. See also *Style Financial Services Ltd v Bank of Scotland No 2* 1998 SLT 851; *Macgowan v Robb* (1864) 2 M 943 per Lord Deas at 951–52 ("the defender admits in the record . . . that he knew of the marriage contract before his purchase, and it is plain from his statements that he knew there were consequent claims affecting the subjects").

[49] See e.g. *Marshall v Hynd* (1828) 6 s 384; *Petrie v Forsyth* (1874) 2 R 214; *Stodart v Dalzell* (1876) 4 R 236; *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; *Alex Brewster & Sons v Caughey* 2002 GWD 15-506; *Gibson v Royal Bank of Scotland Plc* [2009] CSOH 14, 2009 SLT 444, all discussed in J MacLeod and R Anderson "Offside Goals and Interfering with Play" 2009 SLT (News) 93. See also Brand, Steven and Wortley, *Conveyancing Manual* para 32.56.

[50] See e.g. *Rodger (Builders)* per Lord Sorn at 495. The requirement that there be a prior purchase may be putting things too stringently: see the broader formulation in *Gibson* per Lord Emslie at 451–42 relying on *Stodart v Dalzell*: "On the authorities, all that is required is knowledge of '. . . some sort of right' in respect of the subjects, or '. . . any right in any third party, or any circumstances imposing a duty of inquiry' [...] [E]ven quite limited knowledge of antecedent rights will be sufficient to put a party on his inquiry, and to expose a transaction to challenge if, in bad faith, no such inquiry is carried out."

[51] *Rodger (Builders)* per Lord Jamieson at 499.

exists or that the transaction would not be in breach of the interest,[52] perhaps by an examination of the trust deed or, where relevant, by making enquiries of the beneficiaries. The painstaking examination of trust deeds and consequent applications to the court for ratification of transactions was, of course, precisely the mischief which the framers of the section 2 protection set out to resolve,[53] a policy aim also recognised in the reconsideration and eventual re-enactment of the protection in the form of section 43.[54] This aim was substantially achieved by both provisions making most claims predicated upon transferee bad faith unviable[55] and it is proposed to say nothing more about this category of claim which is, in practical terms, unlikely to arise.

(b) Absence of consideration

5-24. Failure by the transferee to give value for the trust property received is the second of the alternative elements which a beneficiary must establish. Donation – that is, the outright disposal of trust property for no consideration – is the paradigmatic example. It is thus clear that where the other requisites of a claim are made out, a donee of trust property is liable to a reductive claim at the instance of the beneficiary. As has been seen, donation also represents a significant exception to the section 43 protection.[56]

[52] In other words, that the transaction was within the powers of the trustee and would as such not constitute an *ultra vires* breach of trust.

[53] For the view of one of these framers, see JM Halliday, *Conveyancing Law and Practice in Scotland* (2nd edn by IJS Talman, 1996) vol 1, para 1-24 n 43: "The underlying reason for [section 2] was that it was thought to be inequitable that the title of a person transacting for value with trustees should be periled upon his construction of a trust deed which especially when it was not professionally prepared, was ambiguous as to the powers of the trustees. The protection given by the subsection, however, is not restricted to transactions for value nor need the second party be in *bona fide*; it is available even when the transaction is obviously *ultra vires* of the trustees." See also Scottish Law Commission, *Discussion Paper on Liability of Trustees to Third Parties* (Scot Law Com DP No 138, 2008) para 2.27 for a helpful discussion of the divisions of opinion in relation to a third party's duty of inquiry prior to the enactment of s 2.

[54] See Scottish Law Commission, *Report on Trust Law* para 13.17: "[T]he purpose of section 2(1) is to obviate the need for third parties to be satisfied as to the trustees' powers ..."

[55] See paras 4-27ff above. Indeed this was a key reason why the lack of a requirement for good faith was continued in section 43: see Scottish law Commission, *Report on Trust Law* para 13.20: "[T]he lack of any requirement of good faith protects those buying from, selling to and lending to trustees. It prevented any argument that a third party who has some knowledge of the trust deed or trustees' powers was not acting in good faith. In some cases, third parties or their agents may carry out a cursory check on the trust deed into, for example, the names and designations of the trustees, but the question then arises as to whether they have knowledge of further provisions of the deed. We thought it better to avoid these uncertainties by continuing with the present simple rule that good faith was not required, in any form."

[56] See paras 4-29ff above.

5-25. A more difficult issue relates not to those cases where consideration is absent but instead to circumstances where the consideration provided falls short of the true value of the trust property. It was argued above that a claim for breach of trust founded on nominal (or somewhat more doubtfully, insufficient) consideration might escape the section 43 protection[57] and it is thus relevant to discuss substantively whether such a claim may be possible.[58] In this exercise it is not sought to establish a definitive measure of adequate consideration in all cases, but instead to determine whether a claim for breach of trust predicated upon inadequate consideration may be possible, as well as to consider how the adequacy of consideration might be assessed.

5-26. To decide the question of whether a claim for breach of trust based upon inadequate consideration is possible, it is instructive to begin once again with the underlying rationale of fraud on creditors. As has been noted,[59] a transferee who fails to provide value incurs liability on the basis of a broad principle of unjustified enrichment law against the retention of a gain fraudulently received. On this approach, then, a transferee might still be enriched (perhaps considerably so) even where some value has been given for the transaction.[60] This approach appears to underlie the ability of a disappointed creditor to challenge transactions involving inadequate consideration in other manifestations of the fraud-on-creditors doctrine. The major example is the law on gratuitous alienations, by virtue of which a transaction by an insolvent debtor may be set aside where inadequate consideration is offered.[61] Some commentators have suggested challenges based on insufficiency of consideration may also be relevant in the offside goals context.[62] As a matter of principle, then, it seems at

[57] See paras 4-36ff above.

[58] In English law, where the giving of value by a transferee forms part of the defence to the beneficiary's claim, known as good-faith purchase without notice, any consideration is sufficient to establish this aspect of the defence: see L Tucker et al, *Lewin on Trusts* (20th edn, 2020) para 41-118 ("There must be a purchase for a consideration in money or money's worth, but there is no requirement of full value, so that a purchase for a small fraction of the true value of the property concerned suffices to support the defence"); *Bassett v Nosworthy* (1673) 23 ER 55. On the development of this defence in English law, including the shifting conceptions of consideration, see D Fox, "Purchase for value without notice", in P Davies et al (eds), *Defences in Equity* (2018) 53.

[59] See discussion at para 3-53 above.

[60] For the meaning of "enrichment" generally, see e.g. HL MacQueen et al (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017) para 24.02; R Evans-Jones, *Unjustified Enrichment* vol 1 (2003) ch 7.

[61] For the common law, see the discussion of unfair preferences at n 14 above. The modern statutory restatement is the Bankruptcy (Scotland) Act 2016 s 98 (in relation to personal insolvency) and the Insolvency Act 1986 s 242 (in relation to corporate insolvency). For a discussion of gratuitous alienations as an instance of fraud on creditors, see generally J MacLeod, Fraud and Voidable Transfer (Studies in Scots Law vol 9, 2020) ch 4.

[62] See Reid, *Property* para 699: "[The offside goals rule] applies most obviously to cases of pure donation, but it may perhaps also apply where, despite the payment of some consideration, the grant is taken at a material under-value." The inclusion of "material" in the formulation

least possible that a claim for breach of trust might be founded upon inadequate consideration. It remains to consider briefly how the adequacy of consideration offered might be assessed.

5-27. Assistance in determining a proper approach to assessing the adequacy of consideration may again be obtained from other manifestations of fraud on creditors including, in particular, gratuitous alienations.[63] A transaction by an insolvent debtor will be challengeable as a gratuitous alienation where adequate consideration has not been provided (and indeed will invariably succeed unless adequate consideration has been established).[64] Although not defined in statute, the meaning of adequate consideration has been considered in a number of contexts. Bell, for example, discusses in general terms the nature of the consideration which is "adequate" and so sufficient to defeat a claim by a creditor under an earlier statutory regime.[65] Two points of particular interest appear from Bell's analysis. The first is the stipulation that a transferee need only provide a "fair"[66] price – rather than the highest possible price – in order for consideration to be deemed adequate.[67] Second, if the property is resold soon afterwards without a "change of market or of circumstances", the price paid on this second sale provides conclusive evidence of the sufficiency of consideration.[68]

5-28. As well as the discussion by Bell, a number of cases have also considered the meaning of adequate consideration for the purposes of the law on gratuitous

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naturally suggests that the value given must fall far short of the actual value of the property transferred for the rule to apply in this context.

63 In English law, the approach of bankruptcy legislation dealing with collusive sales in prejudice of creditors was also used to determine whether a third-party recipient of trust property had provided adequate consideration to raise the defence of purchase for value without notice: see Fox, "Purchase for Value without Notice" at 68.

64 Bankruptcy (Scotland) Act 2016 s 98(6)(b); Insolvency Act 1986 s 242(4)(b).

65 That is, the Bankruptcy Act 1621 (*RPS* 1621/6/30, *APS* iv, 615 c 18). The term "adequate consideration" is not used by the 1621 Act; what is now the defence of adequate consideration is given in the following terms: "[I]ncace 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 . . . the right lauchfullie acquyrit be him quha is nawayes partaker of the fraude sall not be annulled in maner foirsaid ...".

66 Defined by Bell, *Comm* vol II, 192 as "a price which, in the whole circumstances of the case, indicates a fair and *bona fides* transaction".

67 Bell, *Comm* vol II, 192. A number of other commentators on the statute share similar views: see e.g. Stair, *Inst* I.9.15: "Though this statute requires a just price, it did not annul a disposition . . . if the price received was the ordinary rate of the country". Of these commentators, Bankton seems to go furthest in protecting the transferee, suggesting that an action will not lie as long as the price was "suitable" even if a higher price was offered by another purchaser: see Bankton, *Inst* I.10.78. Similarly, see the relatively lenient rules given by Erskine, *Inst* IV.1.35 for proving that adequate consideration was provided by a transferee: "Where there is no ground however to suspect fraud [on the part of the transferee], the slightest adminicles of the onerosity are admitted in support of the deed."

68 Bell, *Comm* vol II 192.

alienations. An expansive review of these authorities was undertaken by the Supreme Court in the leading case of *MacDonald v Carnbroe Estates Ltd*.[69] The picture which emerges from that case as well as from the authorities upon which it relies is that that questions of the adequacy of consideration invariably turn on the facts of the case at issue.[70] This absence of hard-and-fast rules[71] means that reliance must be placed on a number of general principles. These include, so far as they may be applied to the law of trusts, the rule stated by Bell that a transferee need not provide the best possible price[72] as well as the requirements that the question of adequacy be judged objectively[73] and at the time of the transaction.[74] The outcome of the application of these principles in any given case is likely to be that transactions made for nominal consideration or for a significant undervalue may support a claim. As ever, the effect of section 43 must be kept in view: as the consideration provided moves from a merely nominal amount towards a full price for the trust property, so the transaction sought to be impugned is increasingly likely to be characterised as "onerous" and therefore within the scope of the section's protection.[75] A claim predicated on inadequate, as opposed to nominal, consideration thus has more limited prospects of success.[76]

(5) Defences

5-29. In order to succeed, a beneficiary's claim must not only satisfy the requisites discussed in the previous section but must also be directed against a transferee who can raise no relevant defence. Naturally, transferees have available the defences allowed in any private law claim including, for example,

[69] *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23.

[70] *MacDonald* per Lord Hodge at para 31, relying on *Kerr v Aitken* [2000] BPIR 278 per Lord Eassie at 282. See also *Short's Trustee v Chung* 1991 SLT 472 per Lord Sutherland at 477; *MacFadyen's Trustee v MacFadyen* 1994 SC 416 per Temporary Judge G H Gordon QC at 421. See also D McKenzie Skene, *Bankruptcy* (2017) 343 where authorities cited here are discussed and the question characterised as one of "mixed fact and law".

[71] But see *Cay's Trustee v Cay* 1998 SC 780 where the value of consideration could be ascertained with sufficient accuracy that the court suggested a figure of 60 per cent of the property's value could not amount to adequate consideration: see Lord McCluskey at 787.

[72] *MacDonald* per Lord Hodge at paras 29-30, relying on *Lafferty Construction Ltd v McCombe* 1994 SLT 858 per Lord Cullen at 861. See also *Short's Trustee* per Lord Weir at 475.

[73] *MacDonald* per Lord Hodge at para 32; *Lafferty Construction Ltd* per Lord Cullen at 861.

[74] *Nova Glaze Replacement Windows Ltd v Clark Thomson & Co* 2001 SC 815 per Lord Eassie at para 12.

[75] See para 4-38 above.

[76] It might be argued that nominal consideration is simply one example of inadequate consideration. As has been observed above, however, the two cases can reasonably be distinguished on the basis that the former is likely to involve the offering of a bare minimum or tokenistic consideration.

negative prescription[77] or personal bar.[78] A transferee might also seek to resist a claim on the basis of section 43 of the Trusts and Succession (Scotland) Act 2024 or on the ground that, at the time of the transaction, he or she was in good faith and had provided value. Absence of bad faith and the provision of value, while not defences properly so called, are discussed here either because of their resemblance to a defence or their status as a defence in other jurisdictions allowing claims by beneficiaries against third parties.

5-30. The first defence outside of the general law which might be raised by a transferee is section 43 of the Trusts and Succession (Scotland) Act 2024. The protection conferred by this provision was discussed extensively above and, as has been argued, is likely in practice to forestall almost all claims for breach of trust.[79]

5-31. In the uncommon case where the section 43 protection is not available, a transferee is protected at common law from a claim for breach of trust where he or she provided value and was in good faith. As has been suggested, this is not strictly a defence but rather an assertion on the part of the transferee that the beneficiary has failed to establish either of the alternative requisites of bad faith or failure to provide consideration.[80] That position is notably in

[77] In at least some respects a claim for breach of trust by a beneficiary against a transferee of trust property is imprescriptible by statute. Thus sch 3 para (f) of the Prescription and Limitation (Scotland) Act 1973 makes imprescriptible "any obligation of a third party to make furthcoming to any person entitled thereto any trust property received by the third party otherwise than in good faith and in his possession". This provision appears to extend to claims for breach of trust against a bad-faith transferee of trust property but would not, on a strict interpretation, apply to a good-faith donee in possession of trust property (the most likely target of a claim for breach of trust). If such claims are indeed subject to negative prescription, the appropriate prescriptive period, as in other obligations based upon enrichment, is five years: see Prescription and Limitation (Scotland) Act 1973 s 6 read with sch 1 para 1(b): "Subject to paragraph 2 below, section 6 [five year negative prescription] of this Act applies ... to any obligation based on redress of unjustified enrichment, including without prejudice to that generality any obligation of restitution, repetition or recompense". For a discussion of prescription in this context see *Shore Porters' Society of Aberdeen v Brown* [2021] CSOH 37 at para 45 ff, and for an illustration of the alternative common law rule, see *Scott v King's Remembrancer* 1920 1 SLT 369 (Outer House) and 1920 SC 555, 1918 2 SLT 295 (Inner House).

[78] The classic formulation of personal bar requires inconsistency of conduct by a rightholder (the beneficiary) resulting in unfairness to the party seeking to rely on personal bar (the transferee): see EC Reid and JWG Blackie, *Personal Bar* (2006) ch 2. The breadth of the doctrine means it is not possible to set out every instance in which it might apply as between a beneficiary and transferee, but a number of examples might be imagined including the consent by the beneficiaries to the transfer later sought to be impugned (see e.g. *De Fazio v De Fazio* [2014] CSOH 56, 2014 GWD 13-251) or their delay in acting to challenge a breach of trust of which they were aware (see e.g. *Rankin v Connell* (1894) 22 R 116).

[79] See paras 4-44ff above.

[80] The source of this rule is sometimes said to be *Redfearn v Somervail* (1813) 1 Dow 50, (1813) 5 Pat App 707 discussed at paras 3-36ff above. In fact, the effect of *Redfearn* was to regularise rules on the susceptibility of transferees to personal rights affecting the transferor. This allowed a fraud-on-creditors analysis (along with the possibility that the transferee might assert the

contrast to English law, where good-faith purchase for value without notice is conceptualised as a defence against a claim by a beneficiary.[81]

C. CLAIMS FOR BREACH OF TRUST: REMEDIES

5-32. The remedies open to a beneficiary against a transferee reduce, in essence, to a claim for the recovery for the trust of the trust property or of the value of that property.

(1) Setting aside of the transaction

5-33. The primary remedy available to a successful beneficiary is the setting aside, typically by reduction,[82] of the offending transaction.[83] In concrete terms, the effect of reduction is to undo the transaction by the trustee to the third party such that title to the trust property is reinvested in the trustee[84] (or, quite possibly, in that trustee's replacement). It is, therefore, not strictly accurate to speak of "recovery" by the beneficiary because in a normal case the property will return to the trustee, where it will be held subject to the terms of the trust. An exception arises where the beneficiary is immediately and absolutely entitled to the trust property:[85] in such cases it appears that courts are willing to order that trust property be transferred directly to the entitled beneficiary,[86] rather than to

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defrauded creditor's failure to establish either bad faith or failure to provide consideration, i.e. the "defence") to be applied to property of all kinds. A better authority for the rule, which provides a direct example of its application in relation to a form of property where fraud on creditors was established prior to *Redfearn*, is *Workman v Crawford* (1672) Mor 10208, discussed at para 3-12 above.

81 See generally D Fox, "Purchase for value without notice", in P Davies et al (eds), *Defences in Equity* (2018) 53; J McGhee et al (eds), *Snell's Equity* (34th edn, 2019) paras 4-017ff.

82 As reduction is directed at the writing by which a transfer is effected, the appropriate alternative in cases of corporeal moveables (where no written title will typically exist) is an order for the delivery of the goods to the trustee: see Reid, *The Law of Property in Scotland* (1996) paras 607 and 692; *AW Gamage v Charlesworth's Trustee* 1910 SC 257.

83 Reduction is not, of course, a remedy confined to the law of trusts: on reduction generally, see C Mackenzie, "Remedies" (Reissue, 2016), in *The Laws of Scotland: Stair Memorial Encyclopaedia*. Developments in the general law of reduction may thus have an impact upon a beneficiary's claim: see e.g. *Colquhoun's Trustees v Marchioness of Lorne's Trustees* 1990 SLT 34 where the court exercised its equitable discretion to refuse reduction of a transfer in alleged breach of trust; similarly see *Cameron v Lightheart* 1995 SC 341.

84 That is, where there has been a transfer of the property outright. Where a subordinate right has been granted in the trust property, there is no reinvestment but rather a setting aside of the burden affecting the trust property: Stair, *Inst* IV.19.20; Erskine *Inst* IV.1.19.

85 Absolutely entitled here indicating that the beneficiary might call upon the trustee to make over the trust property to them according to the rule in *Miller's Trustees v Miller* (1890) 18 R 301.

86 See e.g. *De Fazio v De Fazio* [2014] CSOH 56, 2014 GWD 13-251. This finding was, however, complicated by the fact that the pursuer in that case apparently sued in the capacity both as

the trustee from whom the property might then be demanded.[87] This procedural expedient does not, however, imply a general right on the part of a beneficiary to "recover" trust property to which he or she is not already entitled.

5-34. In any action of reduction proceeding upon a claim for breach of trust, a significant consideration will be the possibility of *restitutio in integrum*. A classic statement of this requirement came in the speech of Lord Wright in *Spence v Crawford*:

> [Reduction] is equitable. Its application is discretionary, and, where the remedy is applied, it must be moulded in accordance with the exigencies of the particular case. [. . .] The Court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff. But restoration is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of the relief is not punishment, but compensation. The rule is stated as requiring the restoration of both parties to the *status quo ante*.[88]

In order for reduction to be granted, then, the beneficiary must demonstrate that after avoidance of the offending transaction it will be possible to restore the transferee to his pre-transactional position.[89] The beneficiary cannot obtain a windfall for the trust by retaining both property and price. In some cases this requirement will be unproblematic: thus in a case of pure donation, *restitutio* will be possible so long as the donee still holds the trust property sought to be recovered. In other cases the proceeds of the transaction which, by real subrogation, become trust property may have to be repaid as part of any reduction.

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beneficiary of the trust and as trustee: see Lord Glennie at para 53: "It would be unnecessarily cumbersome to grant decree in favour of the pursuer [beneficiary] as trustee, acting on behalf of the trust, for payment to the trust of a sum which, when received, would then be divided equally between the pursuer and the defender [beneficiary and trustee] – much better simply to grant decree in favour of the pursuer for payment of one half of the sum loaned to the defender." English law also recognises that the absolutely entitled beneficiary may have a right to direct recovery rather than reconstitution of the trust fund: see discussion of *Target Holdings v Redferns* [1996] AC 421 at n 39.

87 According to the rule in *Miller's Trustees.*

88 *Spence v Crawford* 1939 SC (HL) 52 per Lord Wright at 76–77. See also *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23 per Lord Hodge at para 58 and authorities cited in paras 57ff.

89 Equally, it must be possible for the transferee to hand back the property transferred. This raises the difficult question of whether reduction might still be available where the property is no longer held by the transferee but has instead been replaced by a substitute.

Indeed, a number of authorities suggest that courts may impose, alongside a decree for reduction, a requirement that the pursuer make appropriate redress in the form of payment or otherwise.[90] Finally, the requirement that *restitutio* be possible might also be seen as a further obstacle to the beneficiary's ability to pursue a transferee taking in breach of trust.

(2) Payment and profits

5-35. Is the beneficiary entitled to seek payment of the value of the trust property as an alternative to reclaiming for the trust the property itself? If so, the remedy is likely to be necessary in only the narrowest of circumstances. In the first place, payment is unlikely to be relevant in claims predicated only upon the transferee's bad faith. A case proceeding upon bad faith alone invariably results in the receipt of value in the form of the proceeds of the transaction.[91] If need be, the beneficiary may recover those proceeds by a claim against the trustee (or perhaps by laying claim to them directly)[92] in preference to a money claim against a third party. A claim for payment is thus likely to be sought only where the claim proceeds upon the basis of donation or inadequate consideration, where recovery of the trust property itself is barred due to, for example, the impossibility of *restitutio in integrum*, or where a claim against the trustee is, for whatever reason, unattractive. Such circumstances will rarely occur and indeed no reported case considers the issue.

5-36. Proceeding once again on the basis of principle, it seems likely that a claim against a third party for payment may be a competent alternative to reduction.[93] If the third party is in bad faith, such a claim might again be grounded in the doctrine of fraud on creditors on the basis of the third party's having incurred delictual liability by participation in the fraudulent defeating of the beneficiary's right. Where the third party is in good faith but the transfer

[90] *Spence* per Lord Wright at 77–78: "the Court can go a long way in ordering restitution if the substantial identity of the subject-matter of the contract remains. [...] Certainly in a case of fraud the Court will do its best to unravel the complexities of any particular case, which may in some cases involve adjustments on both sides." This approach was endorsed by the Supreme Court in *Macdonald*: see Lord Hodge at para 63.

[91] Section 43 applies to prevent a claim against a bad-faith transferee only where the transaction is onerous in nature – see para 4-27 above.

[92] It is uncertain, and perhaps even doubtful, whether the specifically entitled beneficiary may lay claim to the proceeds of a transaction made in breach of trust. Even if such proceeds are, by the operation of real subrogation, transferred to the trust patrimony, it is unclear whether the beneficiary's interest will extend to those proceeds (particularly where that interest was, prior to the offending transaction, an entitlement to specific property).

[93] In *Macdonald* it was held that it would be competent in appropriate circumstances for a court to order payment to the pursuer in a gratuitous alienation claim: see Lord Hodge at paras 52–53. It should however be borne in mind that the statutory provisions under consideration in *Macdonald* confer an express power to provide for "other redress" as an alternative to reduction: see Bankruptcy (Scotland) Act 2016 s 98(5)(b) and Insolvency Act 1986 s 242(4).

gratuitous, the claim may find a basis in the principle of unjustified enrichment that the third party may not profit from the fraud of another.[94] Unlike reduction, a claim to payment would provide direct redress to the beneficiary rather than to the trust. A claim to payment would be subject to the same inquiry in relation to the nature of the beneficiary's right as applicable to a reductive claim; only where a beneficiary had a more than merely contingent right to trust property would loss sufficient to found a delictual or enrichment claim exist. Finally, claims of this kind also appear to be beyond the scope of the section 43 protection.[95]

5-37. A similar analysis, albeit based only upon the law of unjustified enrichment, must apply to a beneficiary's restitutionary claim to recover profits made by a transferee from property transferred in breach of trust. Thus where, for example, property is donated by a trustee and subsequently leased by the donee, the property is recoverable through a reductive claim for breach of trust and any rent, representing profits, on the basis of unjustified enrichment.[96]

D. CONCLUSION

5-38. This chapter has sought to expound the requisites of, defences to and remedies for those claims for breach of trust which might survive the application of section 43 of the Trusts and Succession (Scotland) Act 2024. This exercise proceeded on the basis of the earlier conclusion that the claim is best conceived as a manifestation of the doctrine of fraud on creditors which, as has been argued, is consistent with conception of the beneficiary's right as no more than personal in nature. The discussion demonstrated that the fraud-on-creditors doctrine provides a useful rationale with the capacity to account for many aspects of a claim for breach of trust, albeit that a number of those aspects represent, like section 43 itself, a significant hindrance to a claim (including, in particular, the requirement resulting from fraud on creditors that the beneficiary must normally have a specific entitlement to trust property transferred in breach of trust). Last were considered the remedies available to the successful beneficiary. These too disclosed challenges to a competent claim, including the requirement that *restitutio in integrum* be possible where the primary remedy of reduction is sought.

[94] Under the "no profit from another's fraud" principle, discussed further at paras 6-45ff below.

[95] On the basis that such claims are not directed at the transferee's "title": see paras 4-41ff above.

[96] This enrichment claim again appears to arise on the basis of the "no profit from another's fraud" principle. Where the transferee is in good faith, however, the defence of *bona fide* perception and consumption of fruits will (if relevant) be available: see Stair, *Inst* I.7.12; KGC Reid, "Unjustified Enrichment and Property Law" 1994 JR 167 at 196-97. See also *Morrison v St Andrews School Board* 1914 1 SLT 31, 1914 1 SLT 69, 1917 1 SLT 72, 1918 SC 51, 1917 2 SLT 198; *Hunter's Trustees v Hunter* (1894) 21 R 949.

5-39. Although claims on the ground of breach of trust are the best-known of the claims which might be maintained by a beneficiary against a third party, two others – breach of fiduciary duty and derivative claims – were also identified as relevant in the previous chapter. The first of these has important commonalities with the subject matter of the present chapter, and it is to these claims for breach of fiduciary duty that the discussion now turns.

6 Claims for Breach of Fiduciary Duty

A. INTRODUCTION

6-01. While claims founded on breach of trust are the most familiar type available to beneficiaries against third-party transferees, a separate claim may be maintained by a beneficiary on the basis that the transferee received property in breach of the trustee's fiduciary duty. These claims are the subject of discussion here. That discussion will interrogate the precise mechanism by which claims for breach of fiduciary duty arise and, in that exercise, will show that such claims, like those based on breach of trust, are explicable by reference to the doctrine of fraud on creditors. That doctrine, it will be argued, enables a view of claims for breach of fiduciary duty that is fully compatible with a classification of the beneficiary's right as personal in nature.

6-02. In the course of considering claims founded on breach of fiduciary duty, particular account is taken of the decisions in *Commonwealth Oil v Baxter*[1] and *Ted Jacob v Robert Matthew Johnson Marshall and Partners*,[2] each of which substantially developed the law in relation to the liability of a third party taking in breach of fiduciary duty. First, however, it is instructive to begin with the fiduciary duties of trustees as the starting point for any claim by the beneficiary against a third party predicated upon breach of those duties.[3]

B. A STARTING POINT: THE FIDUCIARY DUTIES OF THE TRUSTEE

6-03. Trustees are fiduciaries and, as such, owe fiduciary duties to the beneficiaries of the trust.[4] While the precise scope and content of these duties remains open, it is uncontentious that a trustee is at least obligated to avoid conflicts between his own interests and those of the beneficiary.[5] Thus it is a breach of a trustee's fiduciary duty to buy from and sell to the trust[6] or to purchase the beneficiary's interest.[7] The immediate consequence of such a breach is clear: the delinquent trustee will be open to action by the beneficiary, pursuant to which a number of consequences – including perhaps the imposition of a constructive trust on any misappropriated property – may result.[8]

6-04. While there exists a degree of uncertainty in relation to the claims which may be maintained by a beneficiary against a defaulting trustee, the law is still less clear as to the liability of a third party who receives property as a result of

1 [2009] CSIH 75, 2010 SC 156.

2 [2014] CSIH 18, 2014 SC 579.

3 The analysis presented in this chapter concentrates on claims by the beneficiary of a trust following a breach of duty by the trustee. Because fiduciary principles are applicable in a range of legal relationships, much of the material here is relevant to, and indeed derived from, areas outside of trust law.

4 See generally WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) ch 26; AJP Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913) 236ff; GL Gretton, "Trusts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 480 at 482. In the context of Scots law, the fiduciary concept is sometimes expressed in the formulation that the trustee must not be *auctor in rem suam*, a principle which finds its origin in Roman law: see D.18.1.34.7 (Paul). English law has also been a significant influence: see D Carr, "English Influences on the Historical Development of Fiduciary Duties in Scottish law" (2014) 18 Edin LR 29.

5 *The York Buildings Co v Mackenzie* (1793) Mor 13367 and 16212, (1795) 3 Pat 378. For proceedings in the House of Lords see (1795) 8 Bro PC 42, (1795) 3 ER 432. See also *Aberdeen Railway Co v Blaikie Brothers* (1854) 17 D (HL) 20.

6 *Hall's Trustees v M'Arthur* 1918 SC 646; *Thorburn v Martin* (1853) 15 D 845.

7 Although such a transaction may not be in breach of duty if the beneficiary is given full value and provided with all information relevant to the transaction: *Dougan v Macpherson* (1902) 4 F (HL) 7.

8 See para 6-06 below.

that trustee's breach of fiduciary duty. It is with this issue that the remainder of this chapter is concerned. As has been noted, the law in this respect was substantially altered by the decisions of the Court of Session in *Commonwealth Oil* and *Ted Jacob*. It is instructive, therefore, first to review the position prior to those decisions.

C. THE LAW BEFORE *COMMONWEALTH OIL*

6-05. Prior to the decisions in *Commonwealth Oil* and *Ted Jacob*, the liability of a third party who received property in breach of a trustee's fiduciary duty was in some respects uncertain, and views expressed in earlier decisions, as well as in commentary, varied. This section reviews that material and, ultimately, suggests a rationale upon which the third party's liability might be founded.

(1) Statements of principle?

6-06. Few attempts have been made, in the context of Scots law at least, to articulate in detail the effects of a breach of fiduciary duty on a recipient third party. An attempt to state the position prior to *Commonwealth Oil* and *Ted Jacob* may, however, be found in the *Stair Memorial Encyclopaedia*. That treatment links in some respects the liability of a third party with that of the trustee who was in breach: in what follows, then, it is necessary to set out the passages which deal both with the liability of the trustee and of a recipient third party:

> **Remedies for breach of fiduciary duty**
>
> The primary consequence of a breach of fiduciary duty is that the fiduciary becomes a constructive trustee of any property that he obtains or any profit or other advantage or benefit that he derives therefrom. Accordingly the persons to whom the duty is owed may raise an action of declarator of trust in respect of any such property or profit. The second consequence is that the fiduciary is accountable to those persons for all profits derived by him as a result of the breach.[9] This is a purely personal liability, whereas the constructive trust gives rise to rights that are to some extent real in nature.
>
> **Rights against third parties**
>
> In cases where a constructive trust is imposed on any property in consequence of a breach of fiduciary duty, the rights of the beneficiaries under the trust will avail against third parties in all cases where the rights of an ordinary beneficiary would be effective. Thus the beneficiaries can assert their rights against any third party

[9] In this passage it is not immediately clear how profits which are subject to a constructive trust might be distinguished from the (apparently separate) profits in respect of which the fiduciary is personally accountable to his or her constituent.

> who has acquired property subject to the constructive trust unless he is a bona fide onerous transferee who took without knowledge of the constructive trust. [. . .] Otherwise the liabilities of the fiduciary are personal, and the beneficiary's rights will thus not be enforceable against third parties unless they are party to the breach of fiduciary duty. If they are party to the breach, an action for damages will lie, and in some circumstances an action of accounting may even be appropriate.[10]

In these passages the starting point for the liability of a third party is the imposition of a constructive trust on the defaulting trustee. That a trustee who obtains profit or other trust property in breach of his fiduciary duty might be made a constructive trustee is not uncontroversial. Thus Gretton has argued that it is better to dispense with the terminology of constructive trust in cases of breach of fiduciary duty,[11] not least because of the dearth of authority.[12] Instead, a trustee's receipt of trust property in breach of fiduciary duty is better explained as an instance of real subrogation:[13] any benefits received by the trustee in breach of duty are held by that trustee in his (original) trust capacity.[14] As such, they would be have the protection from the trustee's personal insolvency sought also from the constructive trust[15] although, as will be argued later, this need not imply that the trust gives rise to "rights that are to some extent real in nature".[16]

[10] Y Evans, "Trusts, Trustees and Judicial Factors" (Reissue, 2016), in *The Laws of Scotland: Stair Memorial Encyclopaedia* paras 185–86. These passages appear both in the original and in the (post-*Commonwealth Oil*) reissued version of the *Stair Memorial Encyclopaedia* title on trusts.

[11] GL Gretton, "Constructive Trusts: I" (1997) 1 Edin LR 281.

[12] Indeed, Carr notes a lack of authority cited for the propositions in the passages quoted: see Carr, "English Influences" at 56.

[13] Cf. Lord Hodge, "Property Law, Fiduciary Obligations and the Constructive Trust", in F McCarthy et al (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 97 at 108ff: "there is . . . clear authority in Scots law for the existence of an institutional constructive trust as an incident of a fiduciary relationship. In my view the cases where the court has treated money or assets which a solicitor or factor has received from his client for a specific purpose as belonging to a separate patrimony and thus excluded from the former's insolvency are consistent with an implied trust or an institutional constructive trust." Lord Hodge refers in this passage to, among other cases, *Macadam v Martin's Trustee* (1872) 11 M 33 and *Jopp v Johnston's Trustee* (1902) 4 F 739 in which money appropriated by fiduciaries was found not to fall into their respective personal insolvencies. Depending on the scope of real subrogation, an issue outside of the ambit of this discussion, these cases may well be explicable without reference to constructive trusts.

[14] Gretton, "Constructive Trusts: I" at 297–98. Gretton refers to *Laird v Laird* (1855) 17 D 984, *Magistrates of Aberdeen v University of Aberdeen* (1877) 4 R (HL) 48, and *Inglis v Inglis* 1983 SLT 437, all cases involving an appropriation of trust assets by the trustee, and argues that each represents an instance of real subrogation by which the benefit was held in the original express trust. The same argument is also made in JM Thomson, "Unravelling Trust Law: Remedies for Breach of Trust" 2003 JR 129 at 133.

[15] *Heritable Reversionary Company v Millar* (1892) 19 R (HL) 43 (discussed at para 9-02 below); Bankruptcy (Scotland) Act 2016 s 88(1)(c).

[16] See paras 9-21ff.

6-07. Setting aside the liability of the defaulting trustee, what is the position of a third-party recipient? The passage above appears to contemplate two kinds of claim by beneficiaries. The first takes as its starting point an appropriation or acquisition of property by the trustee in breach of fiduciary duty. That appropriation results in the imposition of a constructive trust on the property so acquired or appropriated. If, rather than being restored to the original trust, the property is transferred to a third party then the "rights of the beneficiaries under the [constructive] trust will avail against third parties in all cases where the rights of an ordinary [non-constructive] beneficiary would be effective". What results, therefore, appears to be a conventional claim for breach of trust allowing principally for the reduction of the offending transaction,[17] albeit one which arises not from breach of an express trust but from breach of a constructive trust.[18]

6-08. The second kind of claim is described as proceeding on the "personal" liabilities of the "fiduciary". This is not well expressed. As the previous kind of claim – in essence a claim for breach of trust – is not "real", it is inaccurate to set up a distinction between this and the personal claims of damages or accounting.[19] In any event, these claims are available only where a recipient of property is "party to the breach of fiduciary duty"[20] and will allow the beneficiary to "enforce" his rights in the form of damages or, in some circumstances, through an action of accounting.

6-09. At best, then, this statement of principle advances the understanding of the liability of a third party only marginally: something akin to a claim for breach of trust (entailing reduction) may be possible against a third party taking property in breach of fiduciary duty and, in certain circumstances, other remedies such as damages and an account of profits may be available. To move from this position closer to a satisfactory conception of the third party's liability it is helpful to consider the approach taken in cases decided before *Commonwealth Oil* and *Ted Jacob*.

[17] The claims might also be partially assimilated where a breach of fiduciary duty also constitutes a breach of trust.

[18] The alternative analysis based on real subrogation would hold that the appropriation or acquisition by the trustee would result in the property entering or remaining within the trust patrimony: see para 6-06 above. On this view, the beneficiary's later claim is invariably based on breach of an *express* trust and an analysis based on a constructive trust is unnecessary.

[19] Admittedly, reductive claims for breach of trust have from time to time been taken as an indication that the beneficiary's right is real in nature. This does not, however, appear to be the view of the authors who in a different passage refer to the beneficiary's claim as non-vindicatory: see *Stair Memorial Encyclopaedia*, "Trusts" para 48.

[20] Again this seems confused: the claims mentioned in the previous passage – that is, claims for breach of trust – are, as has been seen, also predicated upon the transferee's being party to the breach of trust or fiduciary duty: see paras 3-52ff above. This is tacitly acknowledged in the earlier passage by the reference to a good faith and onerous transferee's freedom from liability.

(2) Cases before *Commonwealth Oil* and *Ted Jacob*

6-10. As has been seen, commentary on the liability of a third party taking in breach of fiduciary duty prior to *Commonwealth Oil* and *Ted* Jacob indicates that three remedies – reduction, account of profits and damages – might be available to a beneficiary. Here the support in the decided cases for each of these remedies is considered before a principled basis for liability for breach of fiduciary duty is suggested.

(a) Reduction

6-11. The clearest line of cases dealing with the position of a third party relates to the right of a beneficiary to reduce a transaction in breach of fiduciary duty: it appears to be relatively well established that an action of reduction will lie where a third party receives property in breach of fiduciary duty with knowledge of the breach of duty.

6-12. The earliest cases concerning the voidability of a transaction in breach of fiduciary duty take the form of actions by beneficiaries against the fiduciary himself rather than against a third party. In *The York Buildings Company v Mackenzie*,[21] for example, property belonging to an insolvent company was purchased by an agent for the company's creditors. The sale was reduced on the ground that the agent was, effectively, a trustee for the company and the sale created a conflict between his own interests and those of the company.

6-13. The first cases dealing with the effect of a transfer in breach of fiduciary duty to a third party in the true sense – and not simply to a fiduciary in his personal capacity – arose in the mid-nineteenth century. In *Dunn v Chambers*[22] a curator bonis sold shares to a company of which he was a shareholder and managing director. The sale was again reduced at the instance of the ward on the basis that it represented a breach by the curator of his fiduciary duty. The fact that the sale was made to a third party – the company – was irrelevant because of that third party's knowledge of the breach of fiduciary duty:

> I am of opinion that this is a case of a purchase of the ward's interest by a person in the position of a trustee, and it makes no difference in the result that [the curator] had his co-directors in partnership with him in the purchase, because they are all affected with knowledge of the trust. They knew that the shares which they purchased from [the curator] were the estate of his ward, and they were not entitled to purchase that

[21] *The York Buildings Company v Mackenzie* (1793) Mor 13367 and 16212, (1795) 3 Pat 378. Carr argues that *York Buildings* represents a significant reception of English authority and marks the beginning of a common approach to fiduciary duties in Scots and English law: see D Carr, "English Influences on the Historical Development of Fiduciary Duties in Scottish law" (2014) 18 Edin LR 29 at 39–42.

[22] *Dunn v Chambers* (1897) 25 R 247, separate proceedings reported (1898) 25 R 688.

estate, or at least they could not purchase it except under the condition that the sale was voidable at her instance.[23]

The same conclusion was also arrived at in a number of other cases from this period.[24] Those cases also addressed the position of a subsequent transferee of property where the original transfer was in breach of fiduciary duty. In *Meff v Smith's Trustee*,[25] a lease was assigned by testamentary trustees in favour of one of the trustees as an individual. That trustee then assigned the lease to a third party who executed a further assignation to a fourth party. Each of the assignations was held to be voidable – the first as having been made in breach of fiduciary duty and the subsequent assignations because of the third and fourth parties' notice of that breach.[26]

6-14. By the end of the nineteenth century, then, it was relatively well settled that a beneficiary was entitled to reduce a transaction in breach of fiduciary duty where trust property remained in the hands of the trustee in his personal capacity or had been transferred to a third party with knowledge of the trustee's breach of duty.[27] The law was, however, less clear in relation to a third party's liability to account to the beneficiaries for any profit made as a result of such a breach.

(b) Account of profits and damages

6-15. As in the case of voidability, early decisions on account of profits addressed the liability of the defaulting fiduciary – rather than that of a third-party recipient – to account for profits resulting from a breach of fiduciary duty. One such early decision was *Wilsons v Wilson*[28] where lands were let and, after the landowner's death, a tutor appointed to manage the deceased's property for

[23] *Dunn* per Lord McLaren at 251.

[24] See e.g. *Aberdein v Stratton's Trustees* (1867) 5 M 726 (where the losing bidder at an auction was held not entitled to reduce a sale made to an agent of the trustee, this being a right reserved for the beneficiaries: see Lord Neaves at 736); *Thorburn v Martin* (1853) 15 D 845. But cf. *Fleming v Imrie* (1868) 6 M 363 and *Burrell v Burrell's Trustees* 1915 SC 333 where sales to the wives of trustees were held not reducible on the basis that a fair price was paid in each case.

[25] *Meff v Smith's Trustee* 1930 SN 162.

[26] *Meff* at 163. See also *Fraser v Hankey & Co* (1847) 9 D 415 where lands were transferred in breach of fiduciary duty by a trustee in sequestration to the trustee's solicitor before being conveyed to the trustee as individual and conveyed again to the defender company. That company was held not liable to an action of reduction on the basis (*inter alia*) of the lapse of time in bringing the action (39 years) and because of the company's good faith at the time of the transfer by the trustee.

[27] For a modern application of these principles, see *Clark v Clark's Executors* 1989 SC 84 where an assignation by executors to a third party, then to one of the executors in her personal capacity, was held reducible. See also *Johnston v McFarlane's Trustees* 1986 SC 298 where a sale to an executor-beneficiary was also held to be liable to reduction.

[28] *Wilsons v Wilson* (1789) Mor 16376.

his children. The tutor entered into a new lease with the tenant and appropriated the rent received. The court found the tutor liable to account to the pupils for the entire profit.[29]

6-16. Only a handful of reported cases consider a beneficiary's entitlement to seek an account of profits against a third party. From the middle of the eighteenth century there exist some faint suggestions in the case law that liability to account might be extended to a third party. The most important case in this respect was *Laird v Laird*[30] where a trustee, in breach of fiduciary duty, allowed trust funds which were to be paid to beneficiaries to remain with a firm of which he was a partner. The beneficiaries sought, and were granted, an accounting of the profits made by the trustee on the share of trust funds remaining with the partnership. In the course of its judgment, the court also addressed the liability of the other partners of the firm to account for profits:

> If the trustee has put out his constituent's money to any speculation . . . the rule is, that the profits accrue to the estate, the loss to the trustee. The act is a breach of duty; but this is a cumulative rather than exclusive ground, for the real principle is, that the trustee cannot profit by any use of the trust-estate. If he join others in speculation in a trading adventure, and furnishes the capital for all out of the trust-estate, still it is the same – exactly the same, of course, as to his own share, but not less so as to that of the rest of the partners. The whole are tainted by the abuse of trust, and each, as a *particeps*, is liable accordingly.
>
> But to come nearer to the case in hand. If, being already a partner with his truster, the trustee retain money of the latter, whether stock or debt, in his own company's hands . . . he is liable for the profits. . .[31]

Laird thus contained some indication that a third party would be liable to account to a beneficiary for profits made on property received as a result of a breach of fiduciary duty.[32] That *obiter* suggestion was, however, made in the particular context of partnership where a closer relationship existed between the trustee and a third party than might otherwise be the case.[33]

[29] The pursuer had the advantage of considerable institutional authority in support of the trustee's duty to account in the circumstances of the case: see Stair, *Inst* I.6.17 ("Tutors or their factors, are presumed to do that to the behoof of the pupil, which they ought to do; and though it be done, *proprio nomine*, it accresseth to the pupil"); Bankton, *Inst* I.7.39; Erskine, *Inst* I.7.17.

[30] *Laird v Laird* (1855) 17 D 984. See also separate proceedings reported (1858) 20 D 972 and *sub nom Laird's Trustees v Laird's Legatees* (1862) 24 D 104. Gretton notes that *Laird* has been mischaracterised as a case of constructive trust: see GL Gretton, "Constructive Trusts I" (1997) 1 Edin LR 281 at 299–300.

[31] *Laird* per Lord Ivory at 993.

[32] See also *Cochrane v Black* (1855) 17 D 32, (1857) 19 D 1019 where trust funds were again left in the hands of a firm. The Inner House again suggested that third parties who were aware that funds belonged to the trust could be called to account for profits made using those funds: see the Lord Justice Clerk (Hope) at 330.

[33] Contemporaneous decisions involving partnerships addressed the issue as a technical one

6-17. A further decision of apparent relevance is *Morrison's Trustees v Morrison*[34] where the widow of a bankrupt was held liable to account to his estate for profits made as a result of continuing to run her husband's business. But in that case the wife's liability was founded on the fact of her additional capacity as her husband's executrix, not as a third party in the true sense.[35] In the final analysis, then, few decisions suggest that a third party taking in breach of fiduciary duty may be liable to account to the beneficiary.

6-18. Still less evidence exists for the availability of damages in the same circumstances: no case appears to involve an action for damages by a beneficiary against a third party on the ground of breach of fiduciary duty. The lack of authority may well be explicable on the basis that a breach of fiduciary duty is more likely to result in the making of a profit by the defaulting fiduciary (or third party) than a loss to the trust in respect of which a beneficiary may seek damages. It is, nevertheless, important to understand whether damages (as well as reduction and account) may be competent remedies in principle given the suggestion above that they are available to the beneficiary against a third party taking in breach of fiduciary duty.[36] The next section accordingly seeks to advance a rationale upon which third parties may be liable in instances of breach of fiduciary duty and on the basis of which the appropriate remedial responses may be determined.

D. CLAIMS FOR BREACH OF FIDUCIARY DUTY: RATIONALE

(1) Fraud on creditors and liability to reduction

6-19. In an earlier chapter the doctrine of fraud on creditors was identified as the most suitable rationalisation of a beneficiary's entitlement to challenge by way of reduction a transaction in breach of trust.[37] That rationale, it will be

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relating to the quantification of the trustee's liability to the beneficiaries: see e.g. *Cochrane v Black* (1855) 17 D 32, (1857) 19 D 1019 per the Lord Justice Clerk (Hope) at 330 and Lord Cowan at 339.

[34] *Morrison's Trustees v Morrison* 1915 2 SLT 296.

[35] See *Morrison's Trustees* per Lord Anderson at 298: "[The wife's] duty as executrix was to realise the goodwill of the business and to account for what that realisation produced as part of the estate of the deceased. Instead of doing this she appropriated the goodwill for her own individual purposes. She is bound in these circumstances to make good to the pursuer the value of the goodwill."

[36] See para 6-06 above.

[37] See discussion on claims for breach of trust at paras 3-44ff above. The Trusts and Succession (Scotland) Act 2024 now provides an alternative statutory basis for a claim resulting from a breach of fiduciary duty with a number of similar consequences to those outlined here, albeit not to the beneficiary alone: see section 68 of the 2024 Act (Petition in respect of defective exercise of fiduciary power etc).

argued, also has the capacity to account for the ability of a trust beneficiary to proceed against a third party taking in breach of fiduciary duty in terms of a conception of the beneficiary's right as a personal right against the trustee.

6-20. As has been seen, the doctrine of fraud on creditors provides a rationale for the liability of a bad-faith or gratuitous transferee taking in breach of an obligation of the transferor. Where the transferee is in bad faith, liability proceeds on the basis of his being party (as *particeps fraudis*) to the transferor-debtor's fraudulent disregard of his creditor's right to the property and, where the transferee is a donee, on the basis of an enrichment principle against the retention of gains fraudulently received.

6-21. How might this rationale be extended to cases of breach of fiduciary duty? A typical instance of breach of fiduciary duty, such as purchase by a trustee of trust property, has two stages.[38] At the first stage, property belonging or due to the trust is transferred to a trustee personally in breach of fiduciary duty.[39] At the second stage, the same property is then made over to a third party against whom the beneficiary then asserts a claim.[40]

6-22. The precise characterisation of the transfer to the trustee at the first stage is in some respects uncertain.[41] Its consequences are, however, clear enough: the trustee's title to the misappropriated property is voidable such that a beneficiary may reduce the offending transaction, thereby restoring the property to the trust.[42] A right to reduction is, as was argued earlier,[43] properly conceptualised as a personal right (vested in this case in the beneficiary) against the party holding voidable title for reversal of the transfer.

6-23. It is upon the further transfer of the property to a third party at the second stage that a fraud-on-creditors analysis becomes relevant. That second transfer represents a breach of the trustee's obligation (and the beneficiary's right) to reverse the first transaction; it is thus in principle a fraud upon the beneficiary

[38] Here the analysis proceeds on the assumption that the property transferred in breach of fiduciary duty is already owned by the trustee. Where property is acquired by the trustee in breach of fiduciary duty, it is necessary first to consider whether that property is held on constructive trust or whether it may fall into the existing trust patrimony by operation of real subrogation (possibilities discussed at para 6-06 above). The approach outlined here is, however, equally applicable to a constructive trust or to a real subrogation-based account of property acquired in breach of fiduciary duty.

[39] In patrimonial terms, the property is transferred from the trust patrimony to the trustee's personal patrimony.

[40] See e.g. *Meff v Smith's Trustee* 1930 SN 162 and *Clark v Clark's Executors* 1989 SC 84, both involving the assignation to a trustee personally followed by a transfer to a third party.

[41] A breach of fiduciary duty is characterised in some sources as fraudulent: see e.g. *Fraser v Hankey & Co* (1847) 9 D 415 per Lord Mackenzie at 428. Alternatively the breach might be considered simply unlawful as contrary to the rule that a trustee must not be *auctor in rem suam*.

[42] Or, in patrimonial language, returning the property in the trustee's personal patrimony to the trust patrimony.

[43] See para 3-53 above.

in respect of which a bad-faith or gratuitous third party may be liable.[44] The particular form of fraud on creditors engaged in this respect is the offside goals rule which, as has been seen,[45] holds liable a gratuitous or bad-faith transferee where property is received in breach of an antecedent right to that property.[46] As was noted in relation to the liability of a successor third party taking from an acquirer in breach of trust, this liability is sometimes described in terms of the rule that gratuitous or bad-faith transferees of a voidable title should themselves receive a voidable title. The end result, as in other forms of fraud on creditors, is that the transferee is subject to an action of reduction at the instance of the disappointed creditor (in this case, the beneficiary).

6-24. Fraud on creditors thus represents a common basis for breach of trust and this aspect of breach of fiduciary duty; the latter, unlike the former, does not however represent a unique manifestation of that doctrine. Instead, the rule allowing for the reduction of property which was originally acquired in breach of fiduciary duty is merely the familiar rule against offside goals (sometimes referred to expediently by the characterisation of the bad-faith or gratuitous third party as "taking the voidable title" of the defaulting fiduciary). There is thus a common basis for both breach of trust and breach of fiduciary duty: both are exigible against bad-faith or gratuitous third parties and both share the common requisite of a transfer of property to which the beneficiary was specifically entitled in breach of trust or, as the case may be, of fiduciary duty.[47] Both kinds of claim also share similar limitations and allow in the first instance for the restoration of the property to the trust by the remedy of reduction.

[44] In some instances property is transferred in breach of fiduciary duty directly to a third party without a prior appropriation to the trustee: see e.g. *Dunn v Chambers* (1897) 25 R 247 where a curator bonis sold shares to a company of which he was the managing director and shareholder. In cases of this kind the voidability of the third party's title is explicable on the basis of the general rule that a transaction in breach of fiduciary duty is voidable at the instance of the beneficiary (that is, the same rule applicable to the misappropriation by a trustee of property in breach of fiduciary duty discussed above).

[45] See also the application of similar principles in the discussion of successor liability in claims for breach of trust at paras 5-08ff above, citing KGC Reid, *The Law of Property in Scotland* (1996) para 692 and J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) paras 7-101 to 7-107.

[46] In breach of fiduciary duty cases, the beneficiary's personal right to reversal of the transaction is almost invariably an entitlement to specific property (a *ius ad rem*) as it arises in relation to the property which must be restored to the trust as a result of the breach of duty. This is in contrast to breach of trust cases where the absence of a specific entitlement may represent a serious obstacle to a claim: see paras 5-13ff.

[47] The requisites of a claim for breach of trust explored at ch 5 above will thus be applicable, with appropriate modifications, to a claim for breach of fiduciary duty. Aside from the substitution of breach of trust for breach of fiduciary duty, the most significant difference between these requisites is likely to be the meaning of bad faith: in claims for breach of trust, bad faith arises from knowledge on the part of the transferee that a transaction would be in breach, in claims for breach of fiduciary duty from knowledge that the transfer would prevent the restoration of the appropriated property to the trust.

6-25. Despite their common basis in the doctrine of fraud on creditors some differences between claims for breach of trust and for breach of fiduciary duty remain. Perhaps the most significant is the applicability of section 43 of the Trusts and Succession (Scotland) Act 2024. As was argued previously, that provision operates to forestall most reductive claims for breach of trust. It has no application to a claim for breach of fiduciary duty, however, both because the provision has in view only cases where the trustee acts "at variance with the terms or purposes of the trust"[48] and, more fundamentally, because a reductive claim for breach of fiduciary duty will almost always arise from a transfer by the trustee not in the capacity of trustee but in his personal capacity. The result is that, in practice, such a claim will enjoy much more favourable prospects of success than a claim proceeding on the basis of breach of trust.[49]

(2) Account of profits and damages

6-26. The evidence for a beneficiary's entitlement to seek either profits or damages from the recipient of property in breach of fiduciary duty is, as has been seen, scant.[50] It is nonetheless useful to consider whether such claims might be available as a matter of principle.

6-27. In the earlier discussion of claims for breach of trust it was contended that, as well as accounting for the entitlement of a beneficiary to avoid a transaction in breach of trust, fraud on creditors may also provide a rationale for a claim to payment (damages) against a bad-faith third party.[51] A good-faith third party who failed to provide value might also be liable to the same remedy on the basis of unjustified enrichment. The same analysis, it is submitted, would apply to cases of breach of fiduciary duty: the doctrine of fraud on creditors provides a rationale for the recovery by reduction of property originally taken by the trustee in breach of fiduciary duty and later transferred to a third party, as well as to an alternative claim for payment against the third party if in bad faith. The liability of a donee, or liability for profits in general, must find its basis in delict or unjustified enrichment.[52] These alternatives to reduction are, like reduction for breach of fiduciary duty itself, seemingly outside of the scope of the protection conferred by section 43 of the Trusts and Succession (Scotland) Act 2024.[53]

[48] See para 4-27 above.

[49] A beneficiary seeking to assert a claim for breach of fiduciary duty is also likely to establish more easily the important requisite of an entitlement to specific property.

[50] See paras 6-11ff above.

[51] See paras 5-35ff.

[52] On the basis of the principle that one cannot profit from the fraud of another, discussed further below at paras 6-45ff.

[53] The same conclusion is reached in relation to damages and profits (but, importantly, not reduction) in instances of breach of trust: see para 5-36 above.

6-28. The liability of a third party taking property which the transferor had acquired as a result of a breach of fiduciary duty is thus explicable on the basis of fraud on creditors or, where the third party is a donee or profits are sought, on the basis of delict or unjustified enrichment. This conclusion must, however, be reconsidered in light of the recent decisions of the Court of Session in *Commonwealth Oil* and *Ted Jacob* which propose a different basis for the liability of a third party taking in breach of fiduciary duty. It is to those decisions that the discussion now turns.

E. *COMMONWEALTH OIL* AND *TED JACOB*

(1) English law

6-29. The decisions of the Court of Session in *Commonwealth Oil*[54] and *Ted Jacob*[55] marked a significant development in the law on fiduciary duties. Those decisions were heavily influenced, in particular, by the approach of English law to third-party recipients from a defaulting fiduciary. Before the decisions are examined, therefore, it is useful to consider the position of English law in relation to that issue.

(a) Personal and proprietary claims

6-30. As in Scots law, the beneficiary of an English trust may in certain circumstances maintain a claim against a recipient of property transferred in breach of fiduciary duty.[56] In this respect, a distinction is drawn in English law between "proprietary"[57] and "personal"[58] claims. Proceeding on the basis that the beneficiary holds an equitable interest in the trust property,[59] a proprietary claim may be asserted against a third party who receives trust property, or the traceable proceeds thereof, in breach of fiduciary duty. That third party, unless a *bona fide* purchaser without notice of the beneficiary's equitable interest,[60] will be required to return the misappropriated property to the trust *in specie* or, if relevant, to return its substitute.[61]

[54] *Commonwealth Oil v Baxter* [2009] CSIH 75, 2010 SC 156.

[55] *Ted Jacob v Robert Matthew Johnson Marshall and Partners* [2014] CSIH 18, 2014 SC 579.

[56] Although a focus is retained in this discussion on the beneficiary of a trust, much of the law outlined in this section is also applicable to other fiduciary relationships.

[57] See J McGhee et al (eds), *Snell's Equity* (34th edn, 2019) paras 30-050ff.

[58] See Snell, *Equity* paras 30-067ff.

[59] This conceptualisation of the trust was discussed in greater detail in ch 2.

[60] As to whom see generally D Fox, "Purchase for value without notice", in P Davies et al (eds), *Defences in Equity* (2018) 53.

[61] The basis of the beneficiary's proprietary claim is unclear and in some respects controversial. The accepted view, at least judicially, appears to be that where a claim is asserted to the original asset the basis of that claim is the enforcement of the beneficiary's equitable interest in the

6-31. A personal claim, by contrast, does not depend on the third party's continued holding of trust property. Instead, a beneficiary need show only that the third party either knowingly received property transferred in breach of fiduciary duty or assisted in that breach.[62] Claims of the second, personal, kind proved the more influential on the decisions of the Court of Session in *Commonwealth Oil* and *Ted Jacob*. Before those decisions are considered, however, it is necessary to say a little more about the nature of personal claims in English law.

(b) "Knowing receipt" and "dishonest assistance"

6-32. To speak of "personal claims" in the context of claims by beneficiaries against third parties describes, in English law, only a category of claims which have certain unifying features.[63] Probably the best-known statement of the kinds of claim making up the category came in the case of *Barnes v Addy*[64] where the following distinction was made by the Lord Chancellor, Lord Selborne:

> [S]trangers are not to be made constructive trustees unless [they] receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.[65]

The two[66] grounds of liability which emerged from *Barnes* have been described in modern decisions as "knowing receipt" and "dishonest assistance".[67] Liability

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trust property, an interest which subsists except where property is received by a good-faith purchaser without notice: see e.g. *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102, and *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91. More troubling is a proprietary claim to a substitute. That claim has alternatively been grounded once again upon the assertion ("vindication") by the beneficiaries of their equitable interest in the substitute (see e.g. G Virgo, *The Principles of the Law of Restitution* (3rd edn, 2015) 559ff) or upon unjust enrichment (see e.g. P Birks, "Property, Unjust Enrichment, and Tracing" (2001) 54 Current Legal Problems 231 at 242ff; A Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 LQR 412).

62 See Snell, *Equity* para 30-067.

63 These features are discussed in Snell, *Equity* para 30-067. For present purposes one of the most important is that liability to a personal claim may result in the imposition of a "constructive trust". That consequence is discussed further below.

64 *Barnes v Addy* (1874) LR 9 Ch App 244.

65 *Barnes* per Lord Selborne at 251–52.

66 Taxonomies vary, however. Some accounts distinguish "knowing receipt" (where trust property is dealt with in a beneficial capacity, e.g. by a bank applying misappropriated trust monies to an overdrawn account) and "inconsistent dealing" (where the misappropriated property is received and dealt with in an administrative capacity, e.g. by an agent of the trustee): see Snell, *Equity* para 30-069, and *Uzinterimpex JSC v Standard Bank* [2008] EWCA Civ 819, [2008] All ER 196 per Moore Bick LJ at para 30.

67 Historically the term "knowing assistance" was used to describe this ground of liability. The modern terminology of "dishonest assistance" was adopted after *Royal Brunei Airlines v Tan* [1995] 2 AC 378: see Lord Nicholls at 382: "the first limb of Lord Selborne LC's formulation is

for knowing receipt is usually held to arise where it would be unconscionable for a recipient to retain a benefit acquired as a result of (for instance) a breach of fiduciary duty.[68] For dishonest assistance, the party sought to be made liable must have assisted in a breach of trust or of fiduciary duty and, in so doing, must have, in an objective sense, acted dishonestly (not merely negligently or inadvertently).[69] Although the decisions in *Commonwealth Oil* and *Ted Jacob* were ultimately framed in terms of knowing receipt, both doctrines were readily taken up by the Court of Session in the course of its judgments.

6-33. The effect of a successful claim predicated upon either knowing receipt or dishonest assistance is that the recipient or assistant is said to be liable "as a constructive trustee" to the beneficiary. Importantly, the use of the term "as a constructive trustee" signifies nothing more than a duty to account to the beneficiary for the property received in breach of the trustee's fiduciary duty.[70] It does not result in the normal incidents of trusteeship, such as the shielding of the property which is the subject of the personal claim from the insolvency of the recipient or assistant.[71] Taking note of this non-proprietary formulation of the constructive trust is a necessary precursor to understanding some of the criticism levelled at the decisions in *Commonwealth Oil* and *Ted Jacob*. The scene for those decisions having been set in both Scots and English law, they may now be examined in turn.

(2) *Commonwealth Oil & Gas Co Ltd v Baxter*[72]

6-34. A complete retelling of the complex circumstances in which *Commonwealth Oil* arose would do little to advance the discussion here.[73] It is, accordingly, sufficient to recount only the salient facts.

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concerned with the liability of a person as a *recipient* of trust property or its traceable proceeds The second limb is concerned with what, for want of a better compendious description, can be called the liability of an *accessory* to a trustee's breach of trust."

[68] See e.g. *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. More controversial is the possibility of holding liable a good-faith recipient who fails to provide value: see discussion at n 118 below.

[69] *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

[70] Snell, *Equity* para 30-067; D Carr, "Equity Rising? *Commonwealth Oil & Gas Co Ltd v Baxter*" (2010) 14 Edin LR 273 at 277–78; D Carr, "Equity Stalling?" (2014) 18 Edin LR 388 at 394.

[71] For a discussion of the emergence of this principle in Scots law, including a consideration of the role of English authority, see chs 8 and 9 below.

[72] *Commonwealth Oil & Gas Co Ltd v Baxter* [2007] CSOH 198, 2008 GWD 9-159 (Outer House), [2009] CSIH 75, 2010 SC 156 (Inner House).

[73] For commentary, including an account of the facts, see D Carr, "Equity Rising? *Commonwealth Oil & Gas Co Ltd v Baxter*" (2010) 14 Edin LR 273. For a detailed discussion, see DJ Carr, *Ideas of Equity* (Studies in Scots Law vol 5, 2017) paras 5-75 to 5-85. A full description of the relevant facts is given in the judgment of the Lord Ordinary, Lord Reed: see [2007] CSOH 198 at paras 15–153.

6-35. Baxter was a non-executive director of the pursuers, Commonwealth Oil and Gas Co Ltd ("COGCL"). In December 2005 a company controlled by Baxter, Eurasia Energy Limited ("Eurasia"), entered into a memorandum with the Azerbaijani State Oil Company.[74] That memorandum extended to Eurasia an exclusive right to negotiate with the State Oil Company to conclude a further agreement, allowing for the exploitation of oil reserves in eastern Azerbaijan.[75] Upon learning of this COGCL sought declarator that Baxter had breached his fiduciary duties to COGCL by entering into the memorandum. Importantly for present purposes, COGCL also sought an account of profits from Eurasia on the basis that the memorandum was a commercial opportunity which had been diverted by Baxter from COGCL and knowingly received by Eurasia.[76]

6-36. In the Outer House, the doctrines of knowing receipt and dishonest assistance were accepted with little hesitation by the court. Relying principally on AJP Menzies' *The Law of Scotland Affecting Trustees*, the Lord Ordinary found that Lord Selborne's *dictum* in *Barnes* setting out the personal remedies available to a beneficiary was an accurate statement of Scots law.[77] In the event, however, Eurasia was not to be liable either under either knowing receipt or dishonest assistance. That conclusion was reached as a consequence of the Outer House's finding that Baxter did not knowingly breach his fiduciary duties. His knowledge of any such breach could not, therefore, be attributed to Eurasia and so questions of knowing receipt by the latter were irrelevant.[78]

6-37. On appeal, the Inner House again accepted the formulation of the law in *Barnes* as representative of Scots law.[79] Following that acceptance, the court considered in detail the requirements of a claim for knowing receipt and found these requirements to be comparable to the claim in English law.[80] Given,

[74] [2007] CSOH 198 per Lord Reed at para 135.

[75] [2007] CSOH 198 per Lord Reed at paras 135 and 144.

[76] At the level of the Outer House, there appears to have been some confusion, perhaps occasioned by the mixing of terminology by counsel, as to whether COGCL's claim was based on knowing receipt or dishonest assistance: see [2007] CSOH 198 per Lord Reed at para 193. By the time the case reached the Inner House, COCGL had adjusted its pleadings so as to maintain the claim on the basis of knowing receipt alone: see [2009] CSIH 75 per the Lord President (Hamilton) at paras 16–22 and Lord Nimmo Smith at para 84. In English law, a number of cases involving circumstances where a company controlled by the defaulting fiduciary is sought to be made liable have been dealt with by way of dishonest assistance: see e.g. *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333; *Gencor ACP Ltd v Dalby* [2000] BCLC 734.

[77] [2007] CSOH 198 per Lord Reed at para 193. Counsel for both parties also appear to have accepted the potential applicability of knowing receipt and dishonest assistance, with contention instead focused on the relevant standard of knowledge: see paras 159, 165 and 197.

[78] [2007] CSOH 198 per Lord Reed at para 200.

[79] [2009] CSIH 75 per Lord Nimmo Smith at para 85 and the Lord President (Hamilton) at paras 16–17.

[80] [2009] CSIH 75 per the Lord President (Hamilton) at para 17, accepting the formulation of knowing receipt in *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 per Hoffmann LJ at 700.

however, that acquisition of some property by a defender was a foundational requirement of liability for knowing receipt, the court found Eurasia not liable on the basis that the opportunity to enter into the memorandum did not constitute property which had been appropriated from COGCL.[81] Thus while the pursuers in *Commonwealth Oil* were ultimately unsuccessful, the position of the court on the law was clear. Claims predicated on the basis of knowing receipt and dishonest assistance formed part of Scots law. Those claims were, moreover, available to the beneficiary of a fiduciary relationship whose principal was in breach of duty. That conclusion was, as will be seen, affirmed in *Ted Jacob*.

(3) *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners*[82]

6-38. Like *Commonwealth Oil*, *Ted Jacob* arose on complex facts;[83] only an abbreviated version is given here.

6-39. The petitioner, Ted Jacob Engineering ("TJE"), sought to expand its business in the Middle East.[84] To undertake this expansion TJE agreed to purchase a Dubai-based engineering business belonging to the respondent,[85] Robert Matthew Johnston-Marshall and Partners ("RMJMP"). In order to conduct business in Dubai, TJE required certain licenses and, while applications for those licenses were pending, TJE agreed that funds received for work it conducted would be paid into an account in the name of RMJMP (but in fact held in trust for TJE).[86] Matters progressed normally until November 2012, when TJE lost access to the trust account and the balance in that account of £5 million was, in TJE's submission, transferred to the other companies in the RMJMP group who were joined as second and third respondents.[87]

6-40. Following the allegedly wrongful transfers, TJE sought to recover certain documents from RMJMP group companies.[88] Successful recovery required TJE

[81] [2009] CSIH 75 per Lord Nimmo Smith at para 94 and the Lord President (Hamilton) at para 16. The court also made the point that, even if it could be characterised as property, the memorandum was entered into by Eurasia (albeit acting through Baxter as its agent) and accordingly there was no "disposal" by Baxter to Eurasia as envisaged by the formulation in *El Ajou*.

[82] *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners* [2014] CSIH 18, 2014 SC 579.

[83] A description of the facts of *Ted Jacob* is also given in see D Carr, "Equity Stalling?" (2014) 18 Edin LR 388.

[84] *Ted Jacob* per Lady Paton at paras 3–4.

[85] *Ted Jacob* per Lady Paton at para 4.

[86] *Ted Jacob* per Lady Paton at para 5.

[87] *Ted Jacob* per Lady Paton at paras 8–9.

[88] The petition which initiated the proceedings in *Ted Jacob* was thus presented under the Administration of Justice (Scotland) Act 1972 s 1. On this aspect of the case see Carr, "Equity Stalling?" at 390–92.

to show a *prima facie* intelligible and stateable case.[89] As one aspect of that case turned on the suggestion that the second and third respondents were knowing recipients of the funds held in the trust account, the applicability of that doctrine in Scots law arose for consideration once again.

6-41. The most detailed consideration of the question of the second and third respondent's potential liability for knowing receipt was given by Lord Drummond Young in the Inner House. Importantly, that opinion accepted from the outset the application of knowing receipt in Scots law on the basis of the decision in *Commonwealth Oil*:

> If funds have been transferred in breach of fiduciary duty, it is now established in Scots law that a recipient who takes the funds in the knowledge that they have been transferred to him in breach of fiduciary duty is not only liable to pay those funds to the person truly entitled to them but is also a constructive trustee of those funds: *Commonwealth Oil & Gas Co Ltd v Baxter*. [. . .] In the circumstances of the present case, the petitioner submits that the principles of knowing receipt of funds derived from a breach of fiduciary duty, or knowing assistance in committing such a breach, would be available to it if it can establish that the first respondent acted in breach of fiduciary duty. In my opinion that is correct, at least at a general level.[90]

The court thus affirmed the potential for a claim based on knowing receipt, as well as the concomitant raising of a constructive trust. The Inner House went on to consider the nature of liability for knowing receipt as it might be imposed in Scots law and, on one reading of the decision,[91] suggested the constructive trust which might result would be remedial in its nature[92] and proprietary in effect.[93]

6-42. Given the requirement that the pursuers need show only a *prima facie* case to succeed, the court in *Ted Jacob* did not seek to settle definitively the precise formulation of knowing receipt in Scots law.[94] The case is nevertheless significant for its affirmation of the decision in *Commonwealth Oil* and for having provided some further conceptual detail in relation to knowing receipt and dishonest assistance in Scots law.[95] The section which follows evaluates

[89] *Ted Jacob* per Lady Paton at para 60 relying on *Pearson v Educational Institute of Scotland* 1997 SC 245 per Lord Nimmo Smith at 250–52.

[90] *Ted Jacob* per Lord Drummond Young at paras 98–101; see also Lady Paton at paras 44 and 76.

[91] See Carr, "Equity Stalling?" at 393–94; DJ Carr, *Ideas of Equity* (Studies in Scots Law vol 5, 2017) paras 5-86 to 5-90. These suggestions, as well as their implications, are discussed at para 6-51 below.

[92] That is, the trust would be imposed by the court according to its own discretion rather than its arising in predefined circumstances (a so called "institutional" constructive trust): see *Ted Jacob* per Lord Drummond Young at para 102.

[93] That is, the property subject to the constructive trust would be shielded from the insolvency of the trustee: see *Ted Jacob* per Lord Drummond Young at para 102.

[94] *Ted Jacob* per Lord Drummond Young at para 102.

[95] A number of subsequent cases have referred to *Commonwealth Oil* and *Ted Jacob* as they relate to knowing receipt or dishonest assistance in neutral or approving terms: see e.g. *Shore*

both decisions – and the concepts laid down therein – in the context of claims by beneficiaries against recipients of trust property in breach of fiduciary duty.

F. THE LAW AFTER *COMMONWEALTH OIL* AND *TED JACOB*

6-43. In their transposition of the English law doctrines of knowing receipt and dishonest assistance, *Commonwealth Oil* and *Ted Jacob* provide an important alternative account of the liability of a third party taking property in breach of fiduciary duty. The purpose of this section is to consider, through a critical analysis of the decisions, whether that account represents a more appropriate basis for liability to the one presented earlier.[96]

6-44. The decisions in *Commonwealth Oil* and *Ted Jacob* may be criticised in both general and specific terms. The general criticism is that the decisions seek to import, wholesale, doctrines of English law despite the existence in Scots law of adequate rules for recipient liability.[97] The specific criticism relates to way the terminology of constructive trusts is employed by the Inner House.[98] Both grounds of criticism are examined here.[99]

(1) Knowing receipt and the "no profit" and "author's fraud" rules

6-45. The starting point for importing novel doctrines into any legal system must be that such importation is undesirable unless there exists a lacuna or defect in that system which can be remedied only by the use of external legal

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Porters' Society of Aberdeen v Brown [2021] CSOH 37; 2021 GWD 16-236 per Lady Wolffe at para 40 (also accepting the passages in AJP Menzies, *The Law of Scotland Affecting Trustees* relied upon in *Commonwealth Oil*); *King's Trustees v King* [2020] CSOH 101, 2021 GWD 1-3; *Macleod and Mitchell Contractors Ltd v Revenue and Customs Commissioners* [2019] UKUT 46 (TCC), [2019] STC 993 per Lord Docherty at para 31 (accepting in principle that a recipient of property in breach of fiduciary duty was a constructive trustee of that property); *Mitchell v Revenue and Customs Commissioners* [2017] UKFTT 0139 (TCC) at para 30 (accepting knowing receipt as "well established" on the basis of *Commonwealth Oil*). See also *Dryburgh v Scotts Media Tax Ltd* [2014] CSIH 45, 2014 SC 651 at para 15; *Parks of Hamilton Holdings Ltd v Campbell* [2014] CSIH 36, 2014 SC 726 per Lady Dorrian at para 34; *Joint Liquidators of CS Properties (Sales) Ltd* [2018] CSOH 24, 2018 GWD 12-161 per Lord Bannatyne at para 9. For proceedings subsequent to *Ted Jacob*, in which the question of knowing receipt was not a live issue, see *Ted Jacob Engineering Group Inc v Morrison* [2018] CSOH 51, 2018 GWD 18-230, [2019] CSIH 22, 2019 SC 487.

96 See paras 6-19ff above.

97 See paras 6-45ff below.

98 See paras 6-51ff below.

99 Although the discussion which follows focuses principally upon knowing receipt, many of the criticisms made are equally applicable to dishonest assistance.

concepts.[100] In the view of Whitty, who advances the most significant criticism of *Commonwealth Oil*, there is no such lacuna or defect in the case of breaches of fiduciary duty.[101] The importation of knowing receipt and dishonest assistance is therefore inappropriate.[102]

6-46. To demonstrate the pre-existing doctrine in Scots law on the liability of a third party taking in breach of fiduciary duty, Whitty posits two principles: the "no profit from another's fraud" rule[103] and the "author's fraud" rule.[104] Each is considered in turn.

6-47. The "no profit" principle allows for the recovery of money paid in breach of trust or breach of fiduciary duty. It is, Whitty argues, predicated upon unjustified enrichment where the transferee is in good faith but fails to provide value, and upon bad faith where the transferee provides value but is aware of the breach of trust or of fiduciary duty.[105] A similar analysis was suggested above where it was argued that the liability of a good-faith but gratuitous transferee taking in breach of trust or fiduciary duty to a claim for payment or profits by the beneficiary might rest upon the general enrichment principle against profit from the fraud of another (sometimes expressed by way of the more general maxim *nemo debet locupletari ex aliena jactura*): this appears, at least in the case of gratuitous recipients, to be the "no profit" principle relied upon by Whitty. In the (rarely significant) case of a claim directed against a bad-faith but onerous transferee, liability is, it was suggested earlier, predicated not upon bad faith but rather upon the transferee's delictual liability.[106] It appears, then, that the liability sought to be imposed by the court in *Commonwealth Oil* and *Ted Jacob* is anticipated by existing rules imposing liability on a donee by way of unjustified enrichment and on a bad-faith recipient on the basis of delict (or, as Whitty argues, of "bad faith").

[100] A whole subfield of comparative law originating from the work of Alan Watson (and the responses of Pierre Legrand) now exists in relation to the notion of a "legal transplant": see originally A Watson, *Legal transplants: an approach to comparative law* (1974) and P Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 Maastricht Journal of European and Comparative Law 111. One of the insights of that field has been the need to review carefully the context into which a new legal rule is to be transposed, including a consideration of any relevant pre-existing rules: see e.g. H Kanda and CJ Milhaupt, "Re-Examining Legal Transplants" (2003) 51 American Journal of Comparative Law 887. Kanda and Milhaupt at 892 stress the lack of a substitute legal institution as a determinant of the success of a transplant. See also s Ferreri and LA DiMatteo, "Terminology Matters: Dangers of Superficial Transplantation" 37 (2019) Boston University International Law Journal 35.

[101] See NR Whitty, "The 'No Profit from Another's Fraud' Rule and the 'Knowing Receipt' Muddle" (2013) 17 Edin LR 37. Whitty's criticism is considered, and ultimately dismissed, by the court in *Ted Jacob* per Lord Drummond Young at para 99.

[102] Whitty, "Knowing Receipt" at 39.

[103] Whitty, "Knowing Receipt" at 46–51.

[104] Whitty, "Knowing Receipt" at 55–59.

[105] Whitty, "Knowing Receipt" at 49.

[106] See paras 5-35 and 6-15 above.

6-48. While the "no profit" principle deals with recovery of money, the "author's fraud" rule applies to property of any other kind. As Whitty explains:

> Under a principle or rule called here "the author's fraud" rule, the owner of property, who has been fraudulently induced to transfer it to a fraudster, may obtain restitution of it from the fraudulent transferee's mala fide or gratuitous singular successor on setting aside the latter's voidable title. This rule is very similar to the "no profit" principle because it likewise involves a liability chain, a fraudulent rogue intermediary and twin bases of liability dependent on either bad faith or gratuitous receipt. The difference is that "the author's fraud" rule relates to property other than money while the "no profit rule" relates to money.[107]

As can be seen, the "author's fraud" rule resembles the fraud-on-creditors analysis adopted earlier to explain why beneficiaries can recover property transferred in breach of trust or, as the case may be, of fiduciary duty. Indeed, both principles ground the liability of a donee upon unjustified enrichment.[108] There exists, however, an important difference of approach between the two principles in relation to the liability of a bad-faith successor of a party holding voidable title. As has been seen, the fraud-on-creditors approach as expounded by Reid and MacLeod accounts for the liability of a successor on the basis of the offside goals rule: the successor is liable because he or she takes in the knowledge of a prior right to reduction exigible against the transferor.[109] That analysis was used to account for the liability to a claim for breach of trust or breach of fiduciary duty of bad-faith successors taking from a transferee in breach of trust[110] or from a trustee who had appropriated property in breach of fiduciary duty.[111] Whitty, who argues that a bad-faith third party's liability is *sui generis*,[112] rejects the fraud-on-creditors analysis of successor liability on the basis that the reduction of the title of the third party must be preceded by a reduction of the antecedent contract. Thus there is not (Whitty implies) the breach of an antecedent obligation sufficient to bring into play the offside goals rule and render the successor vulnerable as to title.[113] As MacLeod has shown,[114] however, the reduction of a transfer need not involve the avoidance of the antecedent contract and indeed a transfer may be voidable even where no such contract exists.[115] A satisfactory analysis of successor liability on the basis of fraud on creditors thus remains possible, indeed arguably necessary. Whichever

[107] Whitty, "Knowing Receipt" at 55.
[108] See para 3-53 and paras 6-19ff above; Whitty, "Knowing Receipt" at 58–59.
[109] See para 5-09 above.
[110] See para 5-10 above.
[111] See paras 6-21ff.
[112] Whitty, "Knowing Receipt" at 59–61
[113] Whitty, "Knowing Receipt" at 55
[114] J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) para 7-103.
[115] Including, for example, a gratuitous alienation: see MacLeod, *Fraud* para 7-107. As MacLeod indicates, reduction is directed against the transfer because it is the transfer, not any antecedent contract, which causes prejudice to the creditor in the antecedent obligation.

analysis is favoured, however, it is clear that there exist satisfactory rules which explain the liability of a transferee taking property other than money in breach of fiduciary duty and which pre-empt any account based on knowing receipt.

6-49. With these pre-existing rules in view, might there be another argument for the rejection of an analysis of a third party's liability based on knowing receipt? An analysis based on knowing receipt should be rejected, Whitty argues, because it would not allow for recovery from a good-faith but gratuitous recipient. The pre-existing law, by contrast, allowed such recovery on the basis of unjustified enrichment:

> The "no profit" principle achieves what the English doctrine of "knowing receipt" notoriously fails to achieve, namely provision for cases of gratuitous benefit. In English law "knowing (or unconscionable) receipt", as the adjectives "knowing" and "unconscionable" imply, is confined to fault or wrongdoing (analogous to bad faith under the Scottish "no profit" principle).[116]

But while it is true that a claim for knowing receipt is normally exigible only against a recipient with knowledge of a breach of trust or fiduciary duty,[117] there is some authority for the availability of a claim in unjust enrichment.[118] Further, it is not immediately clear why the importation of knowing receipt into Scots law would abrogate the possibility of a claim against a donee in unjustified enrichment under the "no profit" (or "author's fraud") rules proposed by Whitty.

6-50. In the final analysis, there seems little to distinguish the requisites of a claim based on the pre-*Commonwealth Oil* law from the same claim accounted for in terms of knowing receipt. There remain, nonetheless, cogent reasons why the application of knowing receipt (and indeed dishonest assistance)

[116] Whitty, "Knowing Receipt" at 50.

[117] See paras 6-32ff above.

[118] See more recently *CMOC Sales & Marketing Limited v Person Unknown* [2018] EWHC 2230 (Comm), [2019] Lloyd's Rep FC 62 per HHJ Waksman QC at paras 140–61; *Relfo v Varsani* [2014] EWCA Civ 360, [2015] 1 BCLC 14 per Arden LJ at paras 69–99 esp para 96; *AAH Pharmaceuticals Ltd v Birdi* [2011] EWHC 1625 (QB) per Coulson J at para 29. That such a claim might be recognised has also been endorsed by members of the bench writing extrajudicially: see D Nicholls, Baron Nicholls, "Knowing Receipt: The Need for a New Landmark", in W Cornish et al (eds), *Restitution Past, Present and Future* (1998) 238. See also P Birks, "Receipt", in P Birks and A Pretto (eds), *Breach of Trust* (2002) 213. Equally, a number of commentators have argued strongly that strict liability claims of this kind should not be recognised: see e.g. LD Smith "Property, Unjust Enrichment, and the Structure of Trusts" (2000) 116 LQR 412 (arguing that other forms of strict liability claim cannot easily be reconciled with the beneficiary's claim against a recipient); D Salmons, "Claims Against Third-Party Recipients of Trust Property" (2017) 76 Cambridge LJ 399 (discussing the cases quoted above and arguing, *inter alia*, that the introduction of unjust enrichment would prejudice an innocent recipient and that the appropriate strict liability claim would be against the trustee). See also the vigorous rejection of a strict liability claim in knowing receipt by the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 81 ALJR 1107.

in place of the earlier law should be resisted. One reason is the conceptual uncertainty in relation to knowing receipt, noted by Whitty.[119] That uncertainty is well illustrated by the Inner House's misapprehension of the nature of the constructive trust which arises as a result of a successful claim for knowing receipt (of which more later).[120] Above all, the use of knowing receipt in place of the existing rules on fiduciary liability offends the principle, stated above, that it will generally be inappropriate to apply the doctrine of one legal system to another unless there exists a gap or defect which might suitably be remedied by that application.[121] This alone forms a convincing ground upon which the approach of the court in *Commonwealth Oil* and *Ted Jacob* may be rejected, but it is also helpful to examine a particular aspect worthy of criticism.

(2) Constructive trust confusion

6-51. An alternative point of criticism of the decisions in *Commonwealth Oil* and (in particular) of *Ted Jacob* is directed at the use made by the court of the term "constructive trust". In both decisions, the consequence of a successful claim for knowing receipt or dishonest assistance is said to be that the third party holds any property received as a result of a breach of fiduciary duty on constructive trust for the beneficiaries.[122] That proposition is consistent with English law where, as has been noted, "constructive trust" in this context denotes no more than a duty to account to the constructive beneficiary for the profits received.[123] In both *Commonwealth Oil* and *Ted Jacob*, however, the Inner House appears to conceive of the constructive trust imposed in cases of knowing receipt or dishonest assistance in Scotland as capable of having a proprietary – that is, an asset-shielding – effect beyond its more limited role in English law:

> While the concept has never been the subject of detailed analysis in any Scottish case, the references to it treat it as a form of remedy of an essentially restitutionary nature. The advantage over straightforward restitution is that the rights of the beneficiary of a constructive trust will normally prevail in the insolvency of the constructive trustee.[124]

Two objections may be made to the approach of the court on this point. First,

[119] Whitty, "Knowing Receipt" at 51–55.
[120] Paragraphs 6-51ff below.
[121] See para 6-45 above.
[122] *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156 per the Lord President (Hamilton) at 94; *Ted Jacob v Robert Matthew Johnson Marshall and Partners* [2014] CSIH 18, 2014 SC 579 per Lord Drummond Young at para 99.
[123] See para 6-33 above.
[124] *Ted Jacob* per Lord Drummond Young at para 102. See also *Commonwealth Oil* per Lord Nimmo Smith at para 94.

as Carr argues,[125] English law will not impose a proprietary constructive trust on a knowing recipient (or dishonest assistant); instead the imposition of a "constructive trust" is a mere formula used to express the liability of the recipient (or assistant) to the claimant.[126] Thus if *Commonwealth Oil* and *Ted Jacob* are taken as interpretations or transpositions of the English law on knowing receipt and dishonest assistance, the judgements are, to that extent, inaccurate.

6-52. A second objection to the approach of the Inner House in relation to proprietary constructive trusts in particular is similar to the argument made above against the decisions in general: namely, there is a pre-existing body of rules in Scots law which adequately addresses the problem which the Inner House sought to resolve by the imposition of a proprietary constructive trust. That imposition, as the Inner House records, would result in the shielding of the assets knowingly received in the event of the recipient's insolvency. It might, however, be argued that a protection of this kind already exists for property acquired in breach of fiduciary duty. Thus it was suggested earlier that property acquired in breach of trust might be protected from the creditors of a transferee on the basis that such property was acquired fraudulently (according to the fraud-on-creditors doctrine) and might thus come within the scope of the rule that fraud passes against creditors.[127] If a fraud-on-creditors analysis is also relevant to breaches of fiduciary duty,[128] it might be suggested that – at least in the hands of a third party – property acquired in breach of fiduciary duty should enjoy protection in the insolvency of that third party: the third party's acquisition of the property, as was argued above, involves the fraudulent defeat of the beneficiary's right to reverse the original misappropriation by the trustee.[129] As has been argued, the scope of the doctrine that fraud passes against creditors is unclear.[130] Yet even if the doctrine was rejected as a ground for protecting assets in the insolvency of the recipient, it would be a preferable starting point for the analysis of the court as compared to the potentially confusing language of constructive trusts.

6-53. Taking these grounds of criticism together, there would appear to be limited merit in the analysis, as advanced by the court in *Commonwealth Oil* and *Ted Jacob*, for the liability of a third party taking in breach of fiduciary duty based on knowing receipt or dishonest assistance. At best, that analysis

[125] D Carr, "Equity Rising? *Commonwealth Oil & Gas Co Ltd v Baxter*" (2010) 14 Edin LR 273 at 278, relying on *Dubai Aluminium Co v Salaam* [2002] UKHL, [2003] 2 AC 366; D Carr, "Equity Stalling?" (2014) 18 Edin LR 388 at 394, relying on *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.

[126] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 per Millet LJ at 409; *Williams* per Lord Sumption at paras 6ff.

[127] See paras 5-11ff above.

[128] As was argued at paras 6-19ff above.

[129] See para 6-23 above.

[130] See para 5-12 above especially nn 29 and 30.

contributes little to a proper understanding of the basis of a third party's liability; at worst, it has the potential to engender confusion (as, for example, was evident from the treatment by both cases of the nature of the constructive trust imposed on a knowing recipient). That approach has, nevertheless, been referred to in approving terms on more than one occasion since *Commonwealth Oil* and *Ted Jacob*.[131] It is, accordingly, all the more important that the law should be clarified through an analysis of the third party's liability in terms of the doctrine of fraud on creditors or, in the case of a donee third party, on the basis of unjustified enrichment.

G. CONCLUSION

6-54. This chapter has sought to explore claims for breach of fiduciary duty, or more precisely the claim available to a trust beneficiary against a third party taking trust property which the trustee originally acquired in breach of that trustee's fiduciary duty. As has been argued, the basis for such a claim and the available remedies are matters of some uncertainty in Scots law. Nevertheless, a principled basis for the recovery, by reduction, of trust property transferred in breach of fiduciary duty is to be found in the doctrine of fraud on creditors or, in some cases, on the basis of unjustified enrichment. As in the case of claims for breach of trust, this approach is fully consistent with a conception of the beneficiary's right as personal in nature; there is, accordingly, no need to characterise that right as real on the basis of the beneficiary's ability to recover from a third party.

6-55. Discussion then moved to consider the decisions in *Commonwealth Oil* and *Ted Jacob*. In those two cases the Inner House sought to ground the liability of a third party taking in breach of fiduciary duty on the English law doctrines of knowing receipt and dishonest assistance. After considering the substance of each case it was argued, in accordance with the views of other commentators, that this shift in explanatory rationale is undesirable. To characterise a third party taking in breach of fiduciary duty as a knowing recipient would, it was contended, add little to an understanding of the pre-existing law and indeed risked introducing confusion (particularly through the language of constructive trusts). In the final analysis, then, the best explanation for the liability of a third party taking property originally acquired in breach of fiduciary duty lies, principally, in the fraud-on-creditors analysis.

[131] See e.g. the cases referred to in n 95 above and a recent extended treatment in *King's Trustees v King* [2020] CSOH 101, 2021 GWD 1-3 where the Lord Ordinary appeared to accept that a third party receiving funds transferred in (alleged) breach of fiduciary duty might be liable on the basis of knowing receipt. That case decided only the competency of the pursuer's case for a proof before answer and did not resolve the difficult issues raised by *Commonwealth Oil* and *Ted Jacob*.

7 Derivative Claims

A. INTRODUCTION

7-01. The earlier chapters of this part principally considered the entitlement of a beneficiary to recover property transferred to a third party in breach of trust or breach of fiduciary duty. This chapter is concerned with a claim of a quite different kind, namely that pursued by a beneficiary in the name of the trustees on the basis of a right normally accruing to the trustees alone. In the discussion which follows, a claim of this kind is described as a "derivative claim" because of the beneficiary's derivation of his right against the third party from a pre-existing right of the trustee or trustees.

7-02. Although a derivative claim (like a claim founded on breach of trust or breach of fiduciary duty) enables a beneficiary to proceed against a third party to the trust, that fact does not, it will be argued, support the conclusion that the beneficiary's right should be characterised as real. Instead, the substantive basis and, indeed, the very existence of derivative claims, serve to strengthen a characterisation of that right as personal. Before the requirements of, and basis for, derivative claims are examined, however, it is instructive to consider their historical development in Scots law.

B. DERIVATIVE CLAIMS: A BRIEF HISTORY

(1) Early executry cases

7-03. The notion that the beneficiary of a fund of assets under the management

of another person might wish to pursue a claim against a third party in place of that person is not unique to trust law. Thus in the law of succession a claim may, in certain circumstances, be maintained against a debtor to an estate by an estate beneficiary in preference to the executor.[1] Indeed it was in this context that the derivative claim now available to the beneficiary of a trust (or something equivalent to that claim) appears first to have arisen.[2] The earliest reported decisions on the matter, which begin in the late sixteenth century, set down the rule that an estate beneficiary has no claim against a debtor to the estate: thus in *Dunduff v Craigie*[3] a relict sought to sue a debtor of an estate for the one-third share of her deceased husband's moveable property. She was held to have an action against the executors alone and, in the event of their default, an alternative action to confirm as executrix-creditrix. The doctrinal basis for this rule is examined below;[4] for present purposes, however, it is useful to note its basis in policy, stated concisely by Hope[5] as follows:

> The legator may not persew ane wther pro re legata bot the executers; for the executers most pey the creditors, et quotum testamenti, cum expensis funeris, aliisque neccessariis quhilk aucht to be deduced of the haill, and peyit befor the legacies; and, if ther restis nothing, the legator will get nothing, quamvis illi certa spes fuerit relicta.[6]

Given the executor's duty to pay creditors as well as funerary or other charges, it would not be appropriate to allow an action by a legatee against a third party, lest what he or she sought to recover be consumed by these other expenses. This view, which apparently underpinned the decision in *Dunduff*, was also taken by a number of contemporaneous cases.[7]

1 For the modern law see WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) paras 34-02 to 34-04.

2 The lack of early authority on derivative claims by trust beneficiaries seems explicable on the basis of the limited uses made of the trust in the seventeenth and eighteenth centuries. Early trusts often existed to hold unchanged a defined asset for a limited period of time: see para 3-15 above. There would be few if any cases where a trustee might trade, thereby causing a third party to incur a debt to the trust which might be enforced by a beneficiary through a derivative claim. An executor, on the other hand, might well enter into more diverse commercial relationships or indeed be required to ingather money owed by the deceased's debtors.

3 *Dunduff v Craigie* (1612) Mor 3843.

4 See paras 7-13ff below.

5 Or more likely by Lord Kerse, as the passage is an interpolation: see the introduction to Hope, *Major Practicks* 15–17.

6 Hope, *Major Practicks* IV.2.2: [The legatee may not pursue any person for the legacy but the executors; for the executors must pay the creditors, and the amounts stated in the testament, with funerary expenses, and whatever else must be deducted from the whole and paid before the legacies; and, if nothing remains, the legatee will get nothing, even if he was left a specific thing] (author's translation).

7 See e.g. *Stevin v Govan* (1622) Mor 3843 and the brief report in *Executors of the Bishop of Dumblane v Anonymous* (1564) Mor 3842 (apparently the first reported case on the matter).

7-04. Signs that the strict rule might be relaxed began to appear in the first half of the seventeenth century. Thus in *Leitch v Balnamone*[8] the court indicated that, where an executor failed to confirm a legacy, the legatee should seek confirmation as executor-dative but might alternatively pursue a debtor to the estate (at the risk of later being found liable as an intromitter if the estate debts exceeded the legacies).[9] In *Falconer v Irvin*[10] a wife was found entitled to raise an action against a debtor in a bond notwithstanding that the bond had apparently been vested in the executors of her deceased husband. That case was, however, complicated by the fact of the bond's being payable to both husband and wife.

7-05. Early cases dealing with exceptions to the general rule also began to recognise the special circumstances in which an action would be allowed: thus in *Bissett v Bissett*[11] a universal legatee sought to bring an action against a debtor to the estate on the basis that "the pursuer desired a contract, made betwixt the executor and [debtor], to be reduced; because thereby they had divided the defunct's goods betwixt them, and so had prejudged the universal [legatee], who thereby had the only right thereto".[12] This action succeeded, apparently on the basis that there had been collusion between the executor and the third party.[13] Equally, in *Mackie v Dumbar*[14] a similar action failed on the basis that the pursuer could establish no conspiracy between executor and third party.[15] In cases where an action was allowed to the estate beneficiary, the usual procedure appears to have been that the executor would be required to assign the claim (even if against his or her wishes) to the beneficiary on condition that the latter indemnified the executor for the expenses of the litigation.[16] Protection of the interests of creditors, identified above as the underlying policy rationale for the rule against claims by estate beneficiaries,[17] was to be secured by making the executor a party to any action by the beneficiary.[18]

8 *Leitch v Balnamone* (1623) Mor 3844.

9 *Leitch* at 3844.

10 *Falconer v Irvin* (1625) Mor 3845, considered in *M'Aulay v Bell* (1712) Mor 3848.

11 *Bissett v Bissett* (1627) Mor 3846.

12 *Bissett* at 3846.

13 The pursuer's success was only partial as the court declared only that the pursuer "should not be prejudged in his right by any deed done betwixt [the executor and third party]": see *Bissett* at 3846.

14 *Mackie v Dumbar* (1628) Mor 1788.

15 *Mackie* at 1788: "no defalcation was admitted for the relict's third, seeing no sentence was obtained by the relict against [the executor and third party] therefor, without which they could not have been compelled to pay the same, seeing the debtor remains only obliged to the executor, and the executor to the relict."

16 *Pool v Morison* (1628) Mor 3846 and 3493. See also *Harlaw v Home* (1671) Mor 3932 and 3495, (1672) 1 Bro Sup 664, where the court resolved to "make this a practic in future".

17 See para 7-03 and n 6 above.

18 See e.g. *Forrester v Clerk* (1627) Mor 2194 at 2194–95: "the legatar could not convene the debtor [for the legacy], except the executors of the defunct had been also convened in that

7-06. By the second half of the seventeenth century, then, the general rules for derivative claims in executry cases were established. In general, a claim by an estate beneficiary against a third-party debtor to the estate was incompetent. An exception was, however, allowed, and the beneficiary authorised to proceed against the third party, in instances of malfeasance by the executor or refusal to pursue the debtor. That action, typically enabled by compelling the executor to assign to the beneficiary the claim against the third party, would be permitted only where the executor had been called and indemnified against any expenses of litigation.[19] This position, as will be seen, was to influence the claim of a trust beneficiary in similar circumstances.

(2) Extension to trusts generally

7-07. The precise stage at which rules governing claims by estate beneficiaries against third party debtors were extended to trusts is difficult to identify. In general terms, however, that extension appears to coincide with the rise of the trust in the early nineteenth century as a commercially active entity engaged in a broad range of economic relations.[20] One of the earliest decisions where the rules for executries were seemingly applied in the context of trust law is *Sprot v Paul*[21] where a minority of creditor-beneficiaries in a sequestration sought to bring an action against a third-party debtor, thereby bypassing the trustee in sequestration. That trustee, it appears, had refused to bring an action on the basis that the majority of the creditors opposed its being pursued. The court found the minority creditors entitled to compel an assignation of the right against the third party and to proceed against the third party provided the trustee be kept *indemnis*. The decision was apparently made on the basis of the same recourse having been granted in "similar cases"[22] and, although it is not clear if any of the executry cases were before the court, the same principles were applied.[23]

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pursuit; for they might have alleged some reasons why the legacy should not have been paid, as *quod debita excedunt bona*, or some other lawful defence, which makes them necessary parties to have been called; so that the process, without their citation or concourse, could not be sustained."

19 See e.g. Stair, *Inst* III.8.39 citing *Forrester v Clerk* (1627) Mor 2194, *Leitch v Balnamone* (1623) Mor 3844, and *Bissett v Bissett* (1627) Mor 3846 where the issue is discussed first in the context of claims by special legatees. See also Stair, *Inst* III.8.64 citing *Pool v Morison* (1628) Mor 3846 and 3493. See also Bankton, *Inst* III.8.46 and Erskine, *Inst* III.9.11.

20 Cf. the trusts of the seventeenth and eighteenth centuries discussed at n 2 above.

21 *Sprot v Paul* (1828) 6 S 1083. See also *Gray v Newlands* (1821) 1 S 94; *Spence v Gibson* (1832) 11 S 212; *Duke and Duchess of Buckingham v Breadalbane Trustees* (1844) 6 D 403.

22 *Sprot* at 1084.

23 See also the judgment of the Lord Ordinary in *Spence* at 214: "it is the right of any creditor upon a bankrupt estate, when it is proposed to compromise a claim competent to the estate against a third party, on terms which he thinks unfair or inadequate, to insist that the claim shall either be prosecuted by the trustee, or exposed to public sale, or shall be assigned to himself,

7-08. *Sprot* and other early cases dealing with claims by trust beneficiaries were later to be applied in what became the leading cases on the subject, all of which were decided in the late nineteenth or early twentieth century. Among these decisions, *Rae v Meek*[24] was perhaps the most significant. That case, though best known for its consideration of the standard of care due by trustees, also involved the important question of whether the trust beneficiaries might be entitled to sue not only the trustees but also a third party for having negligently advised those trustees. Both the Inner House[25] and, on appeal, the House of Lords[26] reaffirmed the earlier position that such claims were incompetent except in special circumstances. What might constitute special circumstances was not explained by either court. The approach of other leading cases, however, was to move away from a requirement of special circumstances and instead to focus on a two-stage approach, as explained by the court in another significant case, *Henderson v Robb*:[27]

> I am of opinion that the pursuer [beneficiary] has no title to sue. He is doing that which has been found over and over again to be incompetent, trying to sue his debtor's debtor. [. . .] The remedy of the pursuer is to claim against the estate, which, I suppose, he has done, and then if the trustee declines to sue the alleged debtor, to ask him to put him in a position to do so by lending him his name or by granting him an assignation. That of course the trustee will not be bound to do except upon condition of being kept free of the costs of the litigation, and upon that being done, the trustee, if not willing, may be compelled to put the pursuer in a position to insist on the claim.[28]

Thus to bring an action against a third-party debtor the beneficiary should first request that the trustee pursue the action and, in the event of the trustee's refusal, then compel the trustee to allow the beneficiary to proceed against the third party on condition that the trustee be indemnified against the costs of any action.[29] This approach, which made refusal by the trustee rather than his connivance with the third party the principal ground on which a claim

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on his making payment of the sum offered, under the proposal of compromise, and binding himself with security to keep the estate *indemnis*."

24 *Rae v Meek* (1886) 13 R 1036 (for initial proceedings in the Inner House), (1888) 15 R 1033 (for subsequent proceedings in the Inner House), (1889) 16 R (HL) 31 (for proceedings in the House of Lords).

25 See e.g. *Rae* (1888) 15 R 1033 per Lord Shand at 1051.

26 See e.g. *Rae* (1889) 16 R (HL) 31 per Lord Herschell at 33: "There may be cases where, if trustees failed to call to account those who are under liability in respect of acts injurious to the trust-estate, the beneficiaries may compel them to do so, or even enforce the right themselves."

27 *Henderson v Robb* (1889) 16 R 341. See also *Blyth v Rurdom* (1893) 1 SLT 77; *Blair v Stirling* (1894) 1 SLT 599; *Robertson v Muill* (1894) 1 SLT 447.

28 *Henderson* per the Lord President (Inglis) at 343–44.

29 See also *Brown's Trustees v Brown* (1888) 15 R 581.

might be established,[30] was affirmed in a number of subsequent cases. Thus in *Armour v Glasgow Royal Infirmary*[31] beneficiaries of a testamentary trust sought repetition of money paid to Glasgow Royal Infirmary under a clause of a will which was, in the beneficiaries' view, void. The testamentary trustees maintained that the money was properly paid and the beneficiaries could have no standing to sue the third party on the basis of unjustified enrichment. Accepting that any such action would normally require to be at the instance of the trustees, the court decided that, because of their refusal to sue, the trustees could be bypassed and the beneficiaries could proceed against the Infirmary directly.[32] A similar conclusion was reached in *Morrison v Morrison*[33] where the court, relying on *Rae*, allowed an action by a beneficiary where a testamentary trustee refused to recover a debt from a third party.[34] By the first half of the twentieth century, then, the position of a beneficiary seeking to bring a derivative claim was relatively clear. It would remain so in the modern law.

(3) Modern cases

7-09. Given that the law was largely settled in the twentieth century, relatively little modern consideration exists of the beneficiary's entitlement to sue a third party on the basis of a pre-existing right of the trustee. The most significant modern case is *Anderson v Wilson*.[35] Beneficiaries of an estate sought to sue a third party who, they alleged, had acquired property from their deceased father by fraud,

[30] Cf. *Teulon v Seaton* (1885) 12 R 971 and 1179 where malfeasance by the trustee was alleged but the action dismissed on the basis of the pursuer's failure to find caution. See also *Watt v Roger's Trustees* (1890) 17 R 1201 although in that case there was apparently a refusal by the trustees to lend their names to an action against one of the trustees as individual. The case was also described as not involving a claim by a beneficiary against a debtor to the trust: see Lord Lee at 1204. See also the discussion of both decisions as merely dubious instances of a claim by a beneficiary against a third-party debtor in *Morrison v Morrison* 1912 SC 892 per the Lord Ordinary (Skerrington) at 893.

[31] *Armour v Glasgow Royal Infirmary* 1909 1 SLT 40 (Outer House), 1909 SC 916 (Inner House); see also separate proceedings reported *sub nom Armour v Glasgow Infirmary* (1908) 16 SLT 435. *Armour* has been cited, perhaps incautiously, as an example of a "direct" claim by a beneficiary against a third party: see e.g. Scottish Law Commission, *Discussion Paper on Breach of Trust* (Scot Law Com DP No 123, 2003) para 2.15 n 36.

[32] *Armour* 1909 1 SLT 40 per Lord Skerrington at 41–42.

[33] *Morrison v Morrison* 1912 SC 892.

[34] *Morrison* per the Lord Ordinary (Skerrington) at 893: "the person who has the beneficial interest may compel the person who has the formal title to lend his name as pursuer on receiving security against expenses, or, alternatively, may in certain cases demand an absolute assignation of his own share of the alleged asset. The latter alternative is not always available, and if the former is adopted the pursuer may be unable to find the necessary security. I am of opinion that where justice absolutely requires it, the action may, in spite of legal technicalities, be allowed to proceed at the instance of the party who has the beneficial interest. Lord Herschell indicates an opinion to that effect in [*Rae v Meek* (1886) 13 R 1036, (1888) 15 R 1033, (1889) 16 R (HL) 31]."

[35] *Anderson v Wilson* [2019] CSIH 4, 2019 SC 271.

facility and circumvention, or undue influence. That action failed, apparently on the basis that the beneficiaries had neglected to go through the initial stage of calling upon the executor to proceed against the third party on their behalf.[36]

7-10. A more significant consideration came in a decision of the Supreme Court, *Roberts v Gill & Co*.[37] Although an English appeal, the case contains significant discussion by the Scottish justices of the equivalent law on derivative claims by beneficiaries in Scots law. Aside from a restatement of the existing law,[38] a particular point of contention was whether a derivative claim could proceed only where the trustee had been joined as party to the claim. In a rare divergence between Scottish and English justices on a (perhaps rather sterile) point of Scots law, Lord Collins found, on the basis of the nineteenth and early twentieth century cases, that the rule that trustees require to be joined in a derivative claim was an absolute one in Scotland as well as in England.[39] On the basis of the same cases, however, Lord Hope found that, to avoid injustice, the requirement that the trustee be joined might be dispensed with.[40] For his part, Lord Rodger thought there was no conclusive support for either view as in none of the earlier cases was a beneficiary's claim resisted on the basis of a plea of all parties not called.[41] As will be seen, Lord Hope's view – that making the trustee party might not always be necessary – appears to be the better one. For present purposes, however, it is sufficient to note that *Roberts* did not suggest any change to the existing law on derivative claims in Scotland and indeed serves mainly as an affirmation of the view taken in the earlier cases.

C. DERIVATIVE CLAIMS: REQUIREMENTS AND BASIS

(1) Requirements

7-11. With the confirmation of the law in modern cases, it is possible to state with some certainty the requirements of a derivative claim. Though developed in those modern cases mainly in the context of trusts these rules should, it is thought, apply to analogous offices where property is administered by one party in favour of another (including, for example, by executors or judicial factors).[42]

[36] *Anderson* per Lord Bannatyne at paras 31 and 35. The court also appears to have been influenced by the fact that the beneficiaries' right to their father's estate was originally vested in their deceased mother (as the sole beneficiary of her husband's estate) and they were thus a further step removed from the third party sought to be made liable. They were, in other words, "beneficiaries of the deceased's beneficiary": see Lord Bannatyne at para 32.

[37] *Roberts v Gill & Co* 2010 UKSC 22, [2011] 1 AC 240.

[38] See paras 7-11ff below.

[39] *Roberts* per Lord Collins at para 54.

[40] *Roberts* per Lord Hope at paras 79–83.

[41] *Roberts* per Lord Rodger at paras 87–93.

[42] Indeed the same principles were applied in *Morrison v Morrison* 1912 SC 892 in which the administrator is alternatively described as executrix or testamentary trustee.

7-12. The starting point, as was explored above, is that a beneficiary has no claim against a third-party debtor to the trust.[43] Where a beneficiary wishes that recovery be made from such a debtor, or indeed where the beneficiary seeks to have a potential debtor's liability contested, that beneficiary must first call on the trustee to pursue the action against the third party.[44] If the trustee refuses, the beneficiary may then either require the trustee to lend his name to the action or, where possible, require the assignation of the claim by the trustee.[45] In either instance the trustee must be indemnified against the expenses of any claim.[46] Whether the trustees must be joined depends, it is argued below,[47] on the manner in which the claim is made available to the beneficiary. Where it is assigned, there is no need to join a trustee; where the trustee's name is used, he or she must be joined.[48] To explain this specific rule, as well as the existence of derivative claims generally, it is necessary to turn to their substantive basis.

(2) Basis

7-13. As with claims for breach of trust and breach of fiduciary duty, the availability of a claim against a debtor to the trust does not require the view that the beneficiary's right is real. Indeed, the opposite conclusion emerges from an analysis of the substantive basis of derivative claims. The starting point of that analysis is the principle that the trustee is the owner of the property held in trust.[49] That principle has two, related, consequences.

7-14. The first is that personal rights pertaining to acts done to trust property accrue to the trustee as owner of that property. Thus if, for example, trust property is damaged by the wrongful act of a third party, the resulting personal right arising from delict is held by the trustees and not by the beneficiaries.[50] Had a beneficiary any interest in the trust property, direct recourse would be possible against a third party without the need for dealings with the trustees.

[43] *Rae v Meek* (1889) 16 R (HL) 31 per Lord Herschell at 33; *Roberts* per Lord Hope at para 79 and Lord Rodger at para 87.

[44] *Henderson v Robb* (1889) 16 R 341 per the Lord President (Inglis) at 343–44; *Brown's Trustees v Brown* (1888) 15 R 581 per the Lord President (Inglis) at 582–83; *Anderson v Wilson* per Lord Bannatyne at para 31.

[45] E.g. *Rae v Meek* (1886) 13 R 1036, (1888) 15 R 1033, (1889) 16 R (HL) 31.

[46] E.g. *Spence v Gibson* (1832) 11 S 212.

[47] See para 7-16 below.

[48] Notably, s 43 of the Trusts and Succession (Scotland) Act 2024 has no application to a claim of this kind on the basis that the claim does not arise from the trustee acting "at variance with the terms or purposes of the trust" or alternatively, on the basis that the claim is not directed at the transferees "title": see paras 4-34ff above.

[49] See e.g. Stair, *Inst* I.13.7.

[50] This is in contrast to breach of trust or breach of fiduciary duty cases, where the right interfered with is the beneficiary's personal right against the trustee. In such cases, the right of action accrues to the beneficiary.

In Scots law, however, direct recourse is not possible as the beneficiary lacks any right against the third party.[51] The second consequence is that the trustees, as holders of the claim against the third party, have a general discretion as to its disposal.[52] In principle, therefore, a beneficiary cannot dictate whether trustees should act on the right by pursuing third-party debtors. This discretion is bolstered by express statutory provision entitling trustees to compromise or elect not to pursue any claim belonging to the trust.[53]

7-15. Taken together, these consequences make the trustees masters of any claim against trust debtors. From this position emerges the general rule, also the starting point of the historical account given above,[54] that a beneficiary has no right of action against a third party (although there remains the possibility of requesting that the trustees pursue a claim). In most instances this rule will be unproblematic: the trustees will be best placed to assess whether a claim against a third party is appropriate, taking into account the resources of the trust, the interests of all beneficiaries, and (particularly in executry cases) the claims of creditors. Equally, it will rarely be either necessary or desirable for a beneficiary to control litigation relating to the trust.

7-16. In some circumstances, however, this strict rule may be productive of injustice. As was seen earlier, cases in the early law focused on connivance between a delinquent trustee and third party to defeat a legitimate claim by the beneficiary. In later decisions, a refusal of any kind by the trustee to pursue a claim accruing to the trust came to be established as a ground upon which the rule might be relaxed. A procedural expedient thus exists in the form of a derivative claim by the beneficiary. For that expedient to function, however, the beneficiary must be invested with the relevant right of action, either by an assignation by the trustees of the claim against the third party or by the granting of permission that the beneficiary might pursue in their name.[55] On this basis, it

[51] See e.g. *Henderson v Robb* (1889) 16 R 341 per Lord Adam at 345 ("The bankrupt estate is vested in the trustee, and he is the only person who has a title to sue a debtor to the estate"); *Morrison v Morrison* 1912 SC 892 per the Lord Ordinary (Skerrington) at 893 ("It is certainly logical that no one should be allowed to sue an action unless the contract or property right sought to be enforced has been duly transferred to him and is vested in his person.").

[52] On the rights of an owner, see KGC Reid, *The Law of Property in Scotland* (1996) paras 5 and 531 relying on Erskine, *Inst* II.1.1 ("the sovereign or primary real right is that of property; which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction").

[53] See also Trusts (Scotland) Act 1921 s 4(1)(i) and (j) granting power to trustees "[t]o compromise or to submit and refer all claims connected with the trust estate" and "[t]o refrain from doing diligence for the recovery of any debt due to the truster which the trustees may reasonably deem irrecoverable" where not at variance with the terms or purposes of the trust.

[54] See paras 7-03ff above.

[55] See e.g. *Inland Revenue v Clark's Trustees* 1939 SC 11 per the Lord President (Normand) at 22: "the right of property in the estate of the trust is vested in the trustees to the exclusion of any competing right of property, and the right of the beneficiary is merely a right *in personam* against the trustees to enforce their performance of the trust. It is true that, in the assertion of

is possible to resolve the question of joining of the trustee which was the subject of controversy in *Roberts v Gill*:[56] only in the cases where the beneficiary sues in the name of the trustee will the trustee require to be joined to the claim, since joining the trustee operates to cure the absence of the right against a third party in the beneficiary.[57] Where by contrast, the claim is assigned, the beneficiary has a direct right of action and may, like any other assignee,[58] pursue the debtor in his own name. Finally, the mitigation of the normal rule in favour of a beneficiary should not serve to prejudice the trustees, other beneficiaries or trust creditors. From this consideration results the condition that a beneficiary wishing to bring a derivative claim must indemnify the trust against any expenses associated with the claim.

7-17. In the final analysis, then, derivative claims represent a procedural expedient which provides a palliative for the absence of a beneficiary's right in the trust property. Although *prima facie* an instance of action by a beneficiary against a third party to the trust, derivative claims are thus compatible with, and indeed supportive of, the idea of the beneficiary's right as personal in nature.

D. END OF PART II: CLAIMS AGAINST THIRD PARTIES

7-18. The present chapter concludes part II of the book, which examined the principal claims available to beneficiaries against third parties to the trust. Such claims are potentially problematic if the beneficiary's right is conceived of as personal. After all, if that right is truly a personal right against the trustee, and not a real right in the trust property, why should transferees taking trust property in breach of trust or in breach of fiduciary duty be liable to an action by the beneficiary? Further, why can a beneficiary in certain circumstances sue a third party to the trust whose liability has arisen because, for example, of that third party's having damaged trust property? The existence of such claims might suggest that the beneficiary's right is real (or at least more than personal) in nature. That conclusion is particularly tempting because the trust beneficiary, unlike (for example) the creditor in a contractual relationship, has access to

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that right, a beneficiary will in certain cases obtain the aid of the Court to enable him to use the names of the trustees, but it is only as representing the trustees in such a case that he can attach or assert any property right over the assets of the trust."

[56] 2010 UKSC 22, [2011] 1 AC 240.

[57] See e.g. *Roberts v Gill* 2010 UKSC 22, [2011] 1 AC 240 per Lord Hope at para 84: "The procedure which Scots law uses to cure the absence of a personal right in the beneficiary is different from that which is under discussion in this case. But there is much common ground. The beneficiary has no personal right to sue. The requirement that the personal representative must be joined is more than just a matter of procedure."

[58] See e.g. *Fraser v Duguid* (1838) 16 S 1130; *Manson v Baillie* (1850) 12 D 775.

the range of different claims examined here.[59] To reach that conclusion would, however, be misguided.[60] Those claims allowed to the beneficiary are explicable either on the basis of the doctrine of fraud on creditors (in the case of claims for breach of trust or breach of fiduciary duty) or of a procedural expedient (in the case of derivative claims). Taken together, those rationales account for claims against third parties in a way compatible with, and indeed supportive of, a conception of the beneficiary's right as personal in its nature.

[59] A phenomenon noted by Maitland in his consideration of the nature of the right of an English trust beneficiary: see FW Maitland, *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (1909) para 2-5.

[60] For a court led astray, see *Johnston v MacFarlane's Trustees* 1986 SC 298 per the Lord Justice-Clerk (Ross) at 307–08: "Although the right of a beneficiary is frequently described as a *jus crediti*, it is more than that because in certain circumstances a beneficiary can follow the trust property against third parties."

PART III

BENEFICIARIES AND CREDITORS

8 Protection from Creditors I: Emergence

A. INTRODUCTION

8-01. In the modern law, the proposition that trust property, in all its forms, enjoys protection from the personal creditors of the trustee is a familiar one. The very existence of this protection has often been taken as an indication that the beneficiary's right is either real in nature or, at least, more than personal (and indeed, as will be seen, has actually led to the former conclusion in the view of some Scottish courts). The chapters of this part will contend that a conclusion of that kind is neither necessary nor justifiable: creditor protection is explicable on a view of the beneficiary's right as personal.

8-02. In Scots law, the rule that trust property enjoys protection from a trustee's personal creditors has a tangled history. It was not until a relatively late stage, perhaps as late as the end of the nineteenth century, that a unitary approach to protection from creditors emerged. Prior to that time the protection of trust property was by no means a settled question: significant changes in the attitudes of courts meant that the protection available to beneficiaries was limited and, in some cases, absent entirely. The complex story of the emergence of the rule requires to be examined across two chapters. The present chapter considers the emergence in the early law of the rule that trust property could not, in certain circumstances, be seized by the diligence of the trustee's personal creditors. The chapter also examines the early material in relation to sequestration which, as will be seen, substantially replicates the position as to protection from diligence. Chronologically, the chapter provides an account of the development of the law up to the first half of the nineteenth century. From that point, the chapter which follows considers the emergence of the modern position that trust property of all kinds enjoys protection from the personal creditors of the trustee. Important elements of the account include the significant changes wrought by the decision of the House of Lords in *Heritable Reversionary Company v Millar*[1] as well as the modern development of patrimony theory as a means of explaining the protection-from-creditors rule.

(1) Protection from diligence and in sequestration

8-03. Protection of trust property from personal creditors of the trustee has two main aspects, corresponding to the different processes by which a creditor might seek to have recourse to that property. The first (as well as the earliest in the development of the law) is protection from diligence, the process by which an individual creditor seeks to take property of the trustee in satisfaction of an unpaid debt owed by the trustee in a personal capacity.[2] The second (and later in developmental terms) is protection in the trustee's sequestration. A third, still later, possibility is protection in the various forms of corporate insolvency which may be of relevance where the trustee is a legal person.

8-04. Both diligence and sequestration are considered in this chapter. Although each had relatively similar consequences for a defaulting trustee[3] – and so for the protection of property held in trust thereby – important differences remained. Accordingly, protection from creditors doing diligence is considered first before sequestration and its effects are introduced. Given the later provenance of

1 (1892) 19 R (HL) 43, [1892] AC 598.

2 For diligence generally, see GL Gretton, "Diligence", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991). For an extensive earlier treatment, see JG Stewart, *A Treatise on the Law of Diligence* (1898).

3 Not least because sequestration was framed as a collective diligence and imbued with many of the same proprietary characteristics of that process: see paras 8-42ff below.

sequestration, this approach is also broadly in keeping with the development of the law in chronological terms. The arrival of corporate insolvency procedures only with the modern law means that they are of comparatively less significance to the development of the general rules. They are, accordingly, considered briefly towards the end of this discussion.[4]

(2) Voluntary transferees and diligence creditors

8-05. A useful starting point for the inquiry undertaken by this chapter is provided by a comparison between the positions of a person taking trust property by voluntary transfer on the one hand and a creditor taking that property by diligence on the other.[5]

8-06. In the discussion of voluntary transferees earlier in this book, it was contended that, at least initially, the liability of a transferee to a beneficiary's claim depended on the ability of that beneficiary to assert his personal right in the trust against the transferee. As singular successors to the trustee, transferees could not, in principle, be held liable to personal rights (including those of a trust beneficiary) exigible against their author, absent some additional explanation. That explanation, it was contended, was that some modes of transfer, but not others, resulted in the subjection of the transferee to personal obligations of the trustee, with the result that the transferee was open to the beneficiary's claim. Because the mode of transfer depended in turn on the particular type of property (heritable, corporeal moveable, or incorporeal moveable) sought to be transferred, a degree of variation existed between these different types.[6]

8-07. The same analysis is to some extent applicable to a creditor acquiring trust property by way of diligence. Thus the protection of trust property from a diligence creditor depended, at least initially, on that creditor's vulnerability to the personal right of the beneficiary against the debtor-trustee.[7] Like a voluntary transferee, a diligence creditor was a singular successor who acquired a real right in the property of the debtor and was not, in principle, subject to personal rights held against that debtor. Again, then, some explanation must be sought for the creditor's vulnerability to the personal right of a trust beneficiary which resulted in the protection of the trust property from the creditor. As in the case

4 See discussion at para 9-17 n 73 below.

5 The position of a voluntary transferee taking trust property is considered in ch 3 above.

6 See para 3-07 above.

7 Although the effect in general terms of a creditor's being vulnerable to the personal right of the beneficiary was to deny that creditor recourse to the trust property, the precise means by which this effect was achieved varied. In some cases a creditor would be unable to acquire ownership of property in respect of which a debtor – including a debtor-trustee – owed a personal obligation. In others a creditor would gain ownership but would be equally liable to the obligations owed in respect of that property as the debtor from whom the property was acquired.

of a transferee, that explanation lay in the type of property sought to be acquired from the debtor-trustee.

(3) Further variation by property

8-08. Just as liability to a trust beneficiary depended, in the case of a transferee, on the particular form of transfer used (appropriate to the type of property being transferred), so the vulnerability of a diligence creditor turned on the kind of diligence employed by that creditor. Like modes of voluntary transfer, different forms of diligence were exigible against property depending on whether the property was heritable, corporeal moveable, or incorporeal moveable. Further, the rules relating to the vulnerability of a diligence creditor to personal rights exigible against the debtor differed for each form of diligence. The result was, once more, a degree of variation by property: certain forms of trust property enjoyed protection because the form of diligence relating thereto rendered the creditor vulnerable to the personal right of the beneficiary against the debtor-trustee.[8]

(4) *Tantum et tale*

8-09. The various liabilities which attach to a creditor are, in Scots law, sometimes accounted for on the basis that the creditor takes the property of the debtor "*tantum et tale*".[9] The same idea is capable of being, and in some instances actually has been, pressed into service in order to explain the protection of trust property from creditors of the trustee.[10] As an explanatory rationale, however, the usefulness of *tantum et tale* is limited. The phrase is used to explain a creditor's liability in a broad range of circumstances[11] and

[8] On this analysis a creditor was not, however, liable for all of the personal obligations of the debtor, but only those which related to the property sought to be taken. This aspect of the analysis could give rise to difficulties in explaining the availability of the protection where a beneficiary had either no right to the trust property or a personal right to money rather than to a particular asset. Nevertheless, in the early law it was often, if not invariably, the case that the beneficiary had a right to particular trust property. See also below, n 116 and para 9-26.

[9] That is, "to the same extent and as such a kind" as the property held by the debtor. The term is also applied to describe the position of a trustee in sequestration.

[10] See e.g. H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn by TA Fyfe, 1914) 285–86; Stewart, *Diligence* 128ff. See also *Dingwall v McCombie* (1822) 1 S 433 (NE), 6 June 1822 FC at 627; *Gordon v Cheyne* (1824) 2 S 566 (NE), 5 February 1824 FC at 568; *Heritable Reversionary Company v Millar* (1892) 19 R (HL) 43 per Lord Watson at 49.

[11] Thus *tantum et tale* is relied upon to explain (i) an adjudging creditor's liability to reduction where property was acquired by the debtor (*Leslie v Creditors of Leslie* (1710) Mor 1018 and 12926), (ii) an arrester's liability to a claim of compensation against the arrestee (*Creditors of Moonie v Broomfield* (1736) Mor 12471 at 12472), (iii) a trustee in sequestration's inability to rely upon prescription (*Thomas v Stiven* (1868) 6 M 777 at 780 (note)) or liability to conditions in a lease granted by a debtor landlord (*Caird v Paul* (1888) 15 R 313 at 320), or (iv) the

moreover says nothing about the nature of the qualifications to which a creditor may be subject. *Tantum et tale* thus provides little insight as to the substantive reasons for a creditor's vulnerability.[12] In the discussion which follows, then, it is sought to avoid unguarded use of the phrase as a possible rationale for a creditor's vulnerability. One of the few areas, however, where *tantum et tale* might appropriately be applied – and indeed where the term appears to find its origin – is in relation to diligence exercised against heritable property. It is to property of that kind which this discussion now turns.

B. HERITABLE PROPERTY

8-10. In the early law, the diligence competent against heritable property owned by a debtor, including a debtor-trustee, was apprising (occasionally, "comprising").[13] Towards the end of the seventeenth century, apprising was replaced by adjudication as the principal diligence exigible against land.[14] That change was, however, procedural rather than substantive in nature:[15] rules dealing with the enforceability of the debtor's personal obligations against an apprising creditor were thus imported into the law on adjudications. It is accordingly possible to treat both adjudications and apprisings together.

8-11. Whether an apprising or adjudging creditor could be subject to personal rights exigible against the debtor was a matter of significant controversy for more than two hundred years.[16] From the starting point that an apprising or

liability of the creditor in a standard security to certain obligations of the debtor (*David Watson Property Management v Woolwich Equitable Building Society* 1990 SLT 764 per the Lord President (Hope) at 769). Indeed the maxim has significant currency outside the context of bankruptcy, being used to explain, for example, (i) the liability of an heir to real burdens (*Murray v Creditors of Pilmure* (1736) Mor 5346 at 5346), (ii) the position of a beneficiary receiving property under a trust (*Graeme v Stevenson's Trustees* (1774) Mor 2979 at 2981), (iii) the obligation of a landlord to keep a tenant in the same degree of possession as originally granted (*McGill v Ferrier* (1838) 16 S 934 at 938), or (iv) the liabilities of an heir receiving an entailed estate (*Sands v Sands* (1844) 6 D 365 at 367).

12 See e.g. KGC Reid, *The Law of Property in Scotland* (1996) para 694: "It is frequently stated that a creditor takes the property *tantum et tale*, as it stood in the debtor but this phrase evades rather than confronts the difficulties." The same conclusion is reached by MacLeod, who examines the maxim in the context of a creditor's liability to claims against the debtor predicated upon fraud: see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) para 8-03, citing Bell, *Comm* vol I, 218. See also RG Anderson, "Fraud on transfer and on insolvency: ta. . .ta. . .tantum et tale?" (2007) 11 Edin LR 187 at 193.

13 For the significance of apprising as a means of acquiring property, see paras 3-14ff above.

14 Effected by the Adjudications Act 1672 (*RPS* 1672/6/55, *APS* viii, 93 c 45): see para 3-14 n 37.

15 The introduction of adjudication was intended to remedy a range of procedural injustices which had arisen under the old law of apprisings, an intention which can be seen clearly in the opening words of the 1672 Act.

16 A discussion covering some of this period is given in the characteristically scholarly speech of Lord Rodger of Earlsferry in *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19

adjudging creditor was not vulnerable to such personal obligations, the remainder of this section traces the fluctuations of the law to the settled position whereby that original rule was, in large part, reaffirmed.

(1) Apprisers, adjudgers and personal obligations of debtors: *Livingston* (1664)

8-12. As already mentioned, a creditor seeking to take the property of a debtor by way of diligence should not, as a matter of principle, be subject to personal rights exigible against the debtor. The rationale for this principle was, and is, straightforward: by the process of diligence a creditor came to acquire a real right in the property of the debtor and accordingly need have no concern with the debtor's personal obligations which, by their very nature, affected only the parties thereto.[17] The earliest considerations of a creditor's vulnerability to the personal obligations of the debtor reflect this principled position. Thus Craig, in his discussion of the circumstances in which an apprising might competently be opposed, says:

> It not unfrequently happens that the debtor astutely avoids any appearance in the proceedings for apprising, and sometimes a third party, who in good faith claims to have a real right in the subject of the apprising, and apprehends prejudice to his interests, appears to oppose them. It becomes an important question whether the appearance of such a third party should be allowed; and in solving it the first point to consider is the nature of the right alleged by him. For, unless he can shew that he has a real right in the estate which is to be sold, there is no ground whatever for allowing him to interfere. Unless, in short, his interest in the subject is a "jus in re" he has no interest in the proceedings at all. Thus, if the Tusculan estates are about to be sold, any person infeft therein and seised accordingly in a real right thereto, or any usufructuary thereof, must be admitted as a party to the proceedings, provided he can instantly instruct his right by writ. On the other hand, if he has no more than a right of action "ad rem" (say, for an investiture in the estates in his favour), then, even though he may already have got judgment against the debtor, he cannot be admitted as a party, because he has not yet acquired a "jus in re".[18]

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at paras 112–138. For a consideration of aspects of the issue from the perspective of fraud, see generally MacLeod, *Fraud* ch 8.

[17] To similar effect see MacLeod, *Fraud* para 8-09, citing *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 per Lord Rodger at para 137 ("since the debtor and the [creditor] are different persons, the [creditor] is not affected by any personal obligations that may have affected the debtor").

[18] Craig (Clyde trans), *Jus Feudale* III.2.9 (digested in the original Latin as "Si alius a vero debitore compareat, ut appretiationem impediat, non est admittendus, nisi jus reale habeat & id instanter doceat").

Craig thus confirms, in accordance with other sources of the period,[19] that a personal obligation could be of no effect against a creditor seeking to take the heritable property of a debtor by apprising or adjudication.

8-13. A possible application of this approach to trusts in the early law is provided by *Livingston v Creditors of Grange*.[20] In that case Hamilton transferred land to Forrester who, by way of a back bond, agreed to hold the land in trust for Hamilton, his spouse and heirs. The back bond was comprised by Hamilton's creditors and, sometime later, the creditors raised an action against Forrester to have the property transferred to them as the now beneficiaries of the trust. Before this action was completed, however, the trust property itself was adjudged by Forrester's own creditors. This adjudication was opposed by Hamilton's creditors who contended that, since Forrester held only as trustee, the property could not be adjudged.[21] For their part, Forrester's creditors argued that they should not be affected by a latent personal right such as had been created by the back bond.[22] That argument was, in part, successful: the adjudication was allowed to proceed, but only "with the burden of the back bond".[23]

8-14. In view of the apparently unqualified principle expounded by Craig and others, the result in *Livingston* seems a strange one. If the trust was merely a personal right against Forrester (something which the court apparently had in mind),[24] how could it affect third parties in the form of Forrester's creditors? The answer seems to lie in the fact that the case was, in more than one sense, exceptional. First, Forrester's creditors appear to have agreed in the course of proceedings to take the property with the burden of the back bond if the adjudication was allowed to proceed.[25] Further, the fact that Hamilton's creditors entered appearance seems also to have been of significance, as the account of *Livingston* given in Ross' *Leading Cases* indicates:

> The judgment in the case of Livingston v Grange's Creditors appears at first to run counter with the principle applied in the previous case of Shaw v Kinross[26] [i.e. that a

[19] See e.g. Hope, *Major Practicks* II.13.4 ("Found that a compryseing of lands and teynds should be preferrd to ane assignatione of fermes of the ferme lands, quhilk wes mad befoir the compryseing, bot intimat efter; becaus a compryseing neids not intimatione"); Hope, *Major Practicks* VI.28.39 (appriser not affected by unregistered deed); Hope, *Minor Practicks* para 277 (appriser not affected by debtor's fraud). See also *Shaw v Kinross* (1629) Mor 10198, (1629) 3 Ross LC 114, where an appriser of an annualrent was held not subject to a personal obligation of the debtor to make payments from the annualrent on the basis that such an obligation was not exigible against a singular successor.

[20] *Livingston v Creditors of Grange* (1664) Mor 10200, (1664) 3 Ross LC 114.

[21] *Livingston* at 10200 (argument for the defenders).

[22] *Livingston* at 10200 (argument for the pursuers).

[23] *Livingston* at 10200.

[24] *Livingston* at 10200: "some being of opinion, that a personal exception upon a back-bond could not be competent to burden or qualify a real right, or an action for obtaining thereof".

[25] *Livingston* at 10200.

[26] *Shaw v Kinross* (1629) Mor 10198, (1629) 3 Ross LC 114.

> creditor should be invulnerable to the personal obligations of the debtor]. But it does not really do so. Had the creditor of Lord Forrester been infeft on an heritable bond, or had he succeeded in obtaining an adjudication of the lands of Grange without Grange's creditors compearing and opposing it, his right would not have been qualified by the back-bond granted by his debtor. But the creditor of Grange having compeared in cursu diligentiæ and opposed the adjudication, the Court held that the right of Lord Forrester's adjudging creditors should be qualified by it.[27]

That *Livingston* represented an exception to the normal rule is indicated by its being virtually controverted two years later in *Chein v Christie*,[28] another case concerning the exigibility of qualifications of a debtor's right against a creditor.[29] *Livingston* cannot, therefore, be taken as having modified the normal immunity available to creditors from the personal obligations of the debtor, whether relating to trusts or otherwise. In the same period, however, a genuine exception to the normal rule began to take root.

(2) Fraud and the inception of *tantum et tale*: *Leslie* (1710), *Ireland* (1755) and *Gibb* (1763)

8-15. As has been shown, apprising (or later, adjudging) creditors in the early law were unaffected by personal rights exigible against their debtor. Although the trust would later come to represent a significant qualification to this rule, the most important exception which arose in the course of the law's early development related to property which a debtor had acquired by fraud. In such cases the perpetrator of the fraud came under a personal obligation to the defrauded party to restore the property so acquired.[30] The personal nature of this restitutionary obligation might well have indicated that, in principle, the defrauded party had no recourse against a creditor who took the fraudulently acquired property by apprising or adjudication. During the seventeenth century, however, obligations arising from fraud began to emerge as a class of personal right which might affect creditors doing diligence against heritable property.

[27] *Livingston* (Ross' report) at 115. See also *Livingston* (Mor) at 10200.

[28] *Chein v Christie* (1666) Mor 192.

[29] The reason given for reaching a different result from *Livingston* appears to have been that Forrester disputed the existence of the trust in favour of Hamilton (a fact not suggested by the report in *Livingston* itself): see *Chein* at 192: "The Lords found, that the allegeance was not competent hoc loco against the adjudication; and, that the said debate would only be competent after the adjudication, when he should pursue a poinding of the ground. The Lords found the contrary before, in an adjudication pursued by Sornbeg against the Lord Forrester, which practick was obtruded and not respected; because the Lord Forrester's right in that case was clear; and this the Lords thought hard, Forrester being content to dispute his right, that a right to his lands should be established in the person of another to trouble him. But it were fit our practicks were uniform: And it appears hard, that a creditor who is a stranger, and has not the papers in his hands, and is not in a capacity to pursue for them, before he can get a title by adjudication, should be forced to dispute his debtor's right."

[30] See e.g. Stair, *Inst* I.14.5.

8-16. The origin of the unique exigibility of obligations arising from fraud against creditors appears to lie in the Bankruptcy Act 1621.[31] That Act was the first statutory attempt to regulate fraudulent transfers by bankrupt debtors. Its effect was to render voidable any gratuitous alienation made by a bankrupt debtor, in the sense of vesting in a party seeking payment from the bankrupt a personal right to reduce the prejudicial transaction.[32] For present purposes, the Act's most significant feature was its protection in explicit terms of a purchaser of property which the seller had won by fraud:

> [I]ncace 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 [i.e. through reduction by the defrauded party], 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.

Thus a purchaser who did not partake in the fraud (i.e. who was in good faith and gave value for the property) was not affected by any personal right against the seller to challenge the transaction. That purchasers were singled out for protection appears, however, to have led to a view that creditors did not enjoy the same immunity and indeed that they would invariably be vulnerable to a debtor's fraud.

8-17. One of the earliest indications of a shift from the original position towards a rule that diligence creditors were not invulnerable to the fraudulent acts of their debtor came in *Jack v Jack*.[33] Property donated by a father to his children was apprised in the hands of the children, and a challenge brought by a creditor of the father against the appriser. The court accepted, apparently on the basis of the 1621 Act, that the position of an apprising creditor who took property which had been fraudulently acquired was weaker than that of a purchaser:

> [F]ound, that a creditor having comprised the [property] from the bairns was also null in consequentia [as having been donated] . . . whereas the Lords inclined that if the children . . . had for an onerous cause assigned or disponed [the property] to their creditors before the reduction, that then the same would not fall in consequentia. For they found a great difference, by the act of Parliament, of dispositions made by a conjunct person to his creditors, and of comprisings led against them at the instance of creditors; and that though a right may be reduced, upon the act of Parliament so

[31] *RPS* 1621/6/30, *APS* iv, 615 c 18. For a detailed historical account, see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) para 4-76.

[32] Bankruptcy Act 1621; Erskine, *Inst* IV.1.36. See also MacLeod, *Fraud* para 9-02.

[33] *Jack v Jack* (1666) 2 Bro Sup 427.

> long as it stands in the person of the children, as being conjunct persons: and yet if it be disponed to creditors by the children, they found it not to fall under the compass of the act of Parliament, but found it more favourable in the creditor's person. But why a creditor compriser ought not to be as favourable, I see no reason: but the reason it seems is the express tenor of the act of Parliament.[34]

The appriser was thus vulnerable in respect of the original creditor's personal right to reduction and the apprising was apparently found to be void.[35] Following the doubts expressed in decisions of the seventeenth century as to a creditor's susceptibility to the debtor's fraud (or participation therein), the issue was discussed with some authority in Sir George Mackenzie's *Observations* on the Bankruptcy Act 1621.[36] On this issue Mackenzie wrote:

> I have heard it debated; that tho' a third person, who acquires a right from the [alienee], for an onerous cause, be not lyable to this action; yet a compryser, comprysing this right from the interposed person, had no such priviledge. As for instance, a right made by one brother to another without an onerous cause; is reduceable, and therefore if one of the creditors of that brother, to whom the right was made, should compryse the right so made to him: It was alleged, that as this right would have been reduceable in the person of the [alienee], so it should be reduceable from the compryser; and that for these reasons. [. . .]
>
> 1. A compryser compryses only omne just quod in debitore erat, tantum et tale: and therefore since it was reduceable in his debitors person, it ought to be so in his, even as it had been reducable from his creditor, ex capite inhibitionis aut interdicitionis &c.
>
> 2. The express words of the privilege, given by this paragraph [of the 1621 Act], does not meet this case, for the words run thus; if any of his Majesties good subjects, shall by lawful bargains purchase. But so it is, that he who compryses, cannot be said to purchase by way of bargain. [. . .]
>
> 3. This case seems not to fall under the reason of the Act, for the Act privileges such, as having a good security, do in contemplation of that right, (which for ought they can know, is sufficient) lay out their money, and so follow the faith of that right, in the first constitution of their debt. But the compryser lent his money to his debitor, without shewing that he relyed upon the right now quarrelled, but finding thereafter that he could not recover his debt, he comprysed anything he could find.[37]

[34] *Jack* at 427.

[35] In a contemporaneous decision, *Crawford v Ker* (1680) Mor 1012, the court appears initially to have decided against the apprising creditor but, on reconsideration, reversed its position: see 1013–14.

[36] G Mackenzie, *Observations upon the 18 Act 23 Parl King James VI against Dispositions made in Defraud of Creditors etc* (1698).

[37] Mackenzie, *Observations* at 60–61.

Thus in Mackenzie's view an apprising or adjudging creditor was, on the basis of the 1621 Act, indeed subject to a personal right exigible against the debtor where that personal right arose from fraud. Mackenzie's use of *tantum et tale* to describe that liability appears to be original.[38] Its imposition on an adjudging creditor was often justified on the basis of a related idea, forming part of Mackenzie's treatment of the 1621 Act as well as of the earlier case law, namely a distinction between the position of purchasers (and secured creditors) on the one hand and that of diligence creditors on the other. The former, as is evident from Mackenzie's treatment, were seen as interested in only one asset of the debtor (i.e. the asset purchased or over which security was taken) and thus entitled to benefit from protection. The latter, on the other hand, could lay no claim to a particular asset and instead relied upon the position of the debtor when diligence was ultimately levied against whatever property the debtor then held. From this it was reasoned that an apprising or adjudging creditors could not better their position compared to that of the debtor: they took *tantum et tale* and subject to any latent qualifications (such as fraud) which affected the property in that debtor's hands.[39]

8-18. One important way in which this distinction, and its impact on a creditor's vulnerability, were manifested was in debates about the relative entitlements of purchasers and creditors to rely on the system of registration of deeds relating to land, first introduced in 1617. As Lord Rodger was to note in *Burnett's Trustee v Grainger*:

> 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 adjudge their debtor's property, there was therefore no reason why they should be in any better

[38] Mackenzie's extended formulation, which adds "*omne jus quod in debitore erat*" [all right that was in the debtor] was soon abbreviated simply to "*tantum et tale*".

[39] In the context of fraud, the same idea was sometimes expressed in the formulation that the creditors could not "take advantage" of their debtor's fraud, or indeed that the fraud "passed against" creditors.

position than the debtor himself on whom they had chosen to rely: they should take his property *tantum et tale*, subject to any personal obligations.[40]

This view, widespread in the early law,[41] meant that purchasers or heritable creditors took free of personal rights affecting their authors while creditors doing diligence by way of apprising or adjudication did not.[42] As will be seen, that distinction, and the associated *tantum et tale* principle, were extended to describe the vulnerability of creditors to a broader range of personal rights against their debtor than those arising from fraud (and, in the long run, much else besides). Initially, however, its use was confined to fraud. What is seemingly the first case in which *tantum et tale* appears, *Leslie v Creditors of Leslie*,[43] concerned almost exactly the issue of an adjudging creditor's vulnerability to a debtor's fraud as raised by Mackenzie. In seeking to argue that the adjudger was indeed subject to that personal obligation, the pursuer relied upon the Mackenzie's *Observations* as well as the extended *tantum et tale* maxim used by Mackenzie therein. That argument was accepted by the court in a judgment which clearly suggests the special position of unsecured creditors with respect to personal obligations of their debtor arising from fraud.[44]

8-19. Although a creditor's particular vulnerability to a debtor's fraud was to be challenged in a series of later cases, the rule, as well as the associated *tantum et tale* maxim, continued to be applied without modification. In *Ireland v Creditors of Neilson*,[45] William Ireland the elder disponed land by way of a marriage contract to his son William Ireland the younger and to the heirs of the same. Ireland the younger was never infeft. Ireland the elder then transferred the land to Neilson who obtained infeftment before Neilson's own creditors adjudged the land. Representing his deceased father, the son of Ireland the younger (and grandson of Ireland the elder) then sought to challenge that adjudication on the basis that the sale by Ireland the elder had been fraudulent

[40] *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 per Lord Rodger at para 112. See also MacLeod, *Fraud* para 8-04.

[41] See e.g. Stair, *Inst* III.2.38 and I.9.15; Erskine, *Inst* II.12.36 ("An appriser, for instance, when he uses diligence, consults no records, but affects the subject apprised *tantum et tale* as it was vested in his author"). See also Dirleton, *Doubts and Questions in the Law of Scotland* (1698) 175–76 where Dirleton concludes on this basis that an apprising creditor is not entitled to benefit from the protection afforded to a good-faith onerous purchaser. See also *Brugh v Forbes* (1715) Mor 10213 at 10213 (argument for the defender: "it is hard to tie purchasers who pay an adequate price, by backbonds that may be latent; but arresters and adjudgers only affect the subject as the debtor had it in his person, with its qualities; and therefore can never be in a better case than he himself."

[42] The position of a purchaser of heritable property in the early law was considered at paras 3-10ff above.

[43] *Leslie v Creditors of Leslie* (1710) Mor 1018 and 12926.

[44] *Leslie* at 1020: "[Creditors] could only adjudge *omne jus quod erat in debitore, tantum et tale* . . . And adjudgers cannot be understood lawful purchasers by true bargains, for just and complete prices, in terms of the [1621] Act, M'Kenzie Observ p 32".

[45] *Ireland v Creditors of Neilson* (1755) 5 Bro Sup 286 and 828, (1755) 3 Ross LC 128.

as contrary to the rights of heirs under the marriage contract. The competition which resulted was thus a question of the enforceability of the grandson's personal right to reduce the fraudulent transaction against adjudgers in the form of Neilson's creditors.

8-20. In support of his position, the grandson advanced the distinction between purchasers and creditors which appeared in earlier cases.[46] That argument was successful, the court holding that Neilson's adjudging creditors took subject to the grandson's latent personal right. They were thus open to an action of reduction:

> [T]he creditors were only adjudgers . . . an adjudication carries the subject only *tantum et tale,* liable to all the exceptions that the right was liable to while in the person of the adjudger's debtor.[47]

The report in *Ireland* indicates that this view was held by the whole bench with the exception of Lord Kames, who rejected any distinction between purchaser and creditor:

> Kaimes [sic] *solus* of a different opinion. [. . .] Kaimes put his opinion upon this, that fraud is but personal, and cannot, in the nature of the thing, affect a *bona fide* onerous purchaser, and he saw no difference between a voluntary purchaser and a legal purchaser by adjudication.[48]

Kames' dissent was insufficient to sway the court which, in another case involving fraud, *Gibb*, would reach a similar conclusion to that arrived at in *Ireland*.[49]

8-21. *Gibb v Livingston*,[50] like *Ireland*, involved an allegation of fraud on the part of the debtor. Lawrence Gibb transferred a heritable bond to Williamson. That bond was then adjudged by Livingston, a creditor of Williamson's. Janet Gibb, a creditor of Lawrence Gibb, sought to have the bond reduced on the basis of its being granted fraudulently and argued that her personal right to do so was exigible against Livingston as adjudger. As in *Ireland*, the court ultimately agreed that the right to reduction could be so enforced.[51] That result

[46] *Ireland* at 287. Cf. The argument for the pursuers denying any such distinction: *Ireland* (Ross' report) at 129.

[47] *Ireland* at 288.

[48] *Ireland* at 288.

[49] See also *Menzies (Renton's Trustee*) *v McHarg and Creditors of Gillespie* (1760) Mor 14165, where the adjudging creditor of a party who had allegedly procured land by facility and circumvention was found open to an action of reduction at the instance of the defrauded party. Again there was an unsuccessful attempt to deny any distinction between the vulnerability of purchasers and creditors to the debtor's personal obligations: see *Menzies* at 14166–67.

[50] *Gibb v Livingston* (1766) Mor 909, (1763) 5 Bro Sup 897, (1763) 3 Ross LC 131.

[51] *Gibb* (Ross' report) at 131.

was reached in spite of Livingston's reliance on authority, considered below,[52] which had suggested that other kinds of personal right might be unavailing against an adjudging creditor.

8-22. By the second half of the eighteenth century, then, the rule that adjudging creditors were affected by the personal obligations of their debtor arising from fraud – expressed through the *tantum et tale* formulation – was well established. This rule persisted despite its apparent inconsistency with the default position that creditors should be subject only to real rights. Fraud was not, however, the sole instance in which it was sought to advance an exception to that general principle. It is to this second possible class of exceptions that the discussion now turns.

(3) Incomplete conveyances: *Bell* (1733)

8-23. Although fraud constituted the most significant qualification to an adjudging creditor's immunity from personal obligations, an incipient exception also arose in the form of incomplete conveyances granted by the debtor. In this class of cases, an adjudging creditor's entitlement to proceed against heritable property was challenged on the basis that the debtor had conveyed that property to another prior to the adjudication, albeit that the conveyance had not yet been followed by infeftment. The most important early discussion of this issue, which was sometimes framed as concerning the position of an "uninfeft proprietor",[53] was *Bell v Garthshore* (1737).[54] Chatto conveyed land to Bell. Before Bell obtained infeftment (but after the granting of the disposition) the lands were adjudged by Chatto's creditor, Garthshore, and both parties claimed the land. Bell argued that the disposition divested Chatto of all right to the property, such that there was nothing for Garthshore's adjudication to attach. That argument was ultimately rejected and Garthshore found entitled to adjudge the land notwithstanding the earlier conveyance to Bell.[55]

[52] See the discussion of *Bell v Garthshore* at paras 8-23ff below. *Bell* was relied upon by *Livingston* but rejected as not having considered the distinction between purchasers and creditors: see *Gibb* at 897.

[53] This issue, which was long to trouble Scots law, was raised most prominently in *Sharp v Thomson* 1995 SC 455, 1997 SC (HL) 66 and substantially resolved in *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19.

[54] *Bell v Garthshore* (1737) Mor 2848, (1737) 5 Bro Sup 198 (as *Bell v Gartshore*). See also the discussion in *Burnett's Trustee v Grainger* per Lord Rodger at paras 113–116.

[55] This result appears to have modified the earlier position: see e.g. *Rule v Purdie* (1710) Mor 2844 (separate proceedings reported (1708) Mor 7818 and (1711) Mor 12566); *Erskine v Hamilton* (1710) Mor 2846 and 6319; Erskine, *Inst* II.7.26. The decision in *Bell* was motivated to a significant extent by a policy of protecting the system of registration; indeed, it appears that Henry Home (later Lord Kames) expressed the importance of this principle to members of the bench out of court: see J Finlay, *The Community of the College of Justice* (2012) 96: "Henry Home, when at the bar, thought himself justified in the public interest (rather than his client's

8-24. Although in some respects similar to the cases relating to a debtor's fraud, a careful reading of *Bell* and other such "incomplete conveyance" cases indicates that material differences existed between each line of authority. Thus while the fraud cases were concerned with the exigibility of the personal right of the defrauded party against the apprising or adjudging creditor, the principal question in incomplete conveyance cases was whether such a conveyance operated to divest the debtor of his property such that the creditor's diligence would be frustrated. Nonetheless, the fact that each class of case concerned, at a certain level of generality, the same issue – that is, the vulnerability of adjudging creditors to latent qualifications of their debtor's title – meant that the decision in *Bell* was later to be used as an indication that a debtor's fraud should not affect creditors and, ultimately, that a creditor should not take *tantum et tale*.[56] This broader issue of a creditor's vulnerability to the personal obligations of the debtor was, as will be shown, substantially resolved at the end of the eighteenth century.

(4) A settled position: *Douglas* (1765), *Mitchells* (1781), *Thomson* (1786) and *Russell* (1792)

8-25. After the debates of the late seventeenth and eighteenth centuries, a move towards a final settlement of the question of an adjudger's susceptibility to the personal obligations of the debtor began with the related cases of *Douglas v Stewarts*[57] and *Douglas v Arresting Creditors of Kelhead*.[58] Both cases involved a challenge, by the substitute in an entail, of an adjudication of the entailed lands. As the entail had not been completed by infeftment, the substitute held only a personal right to the land[59] and so the question in each case was of the vulnerability of the adjudging creditor to that personal right. In an instance of the invocation of the maxim in a context different from its origins in fraud, the substitute sought to argue that a distinction existed between purchasers and creditors and accordingly that the adjudge, being a creditor, could take only *tantum et tale*, subject to the substitute's personal right.[60] This argument failed:

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private interest) in approaching judges extrajudicially. As counsel in *Bell of Blackwoodhouse v Gartshore* . . . he solicited the judges privately to ensure they were fully aware of the consequences of not guaranteeing the security of infeftment."

56 See e.g. *Mitchells v Ferguson* (1781) Mor 10296 at 10298; *Russell v Creditors of Ross* (1792) Mor 10300 at 10301; *Buchan v Farquharson* (1797) Mor 2905 at 2906.

57 *Douglas v Stewarts* (1765) Mor 15616, (1765) 3 Ross LC 174 (as *Stewart v Douglas*).

58 *Douglas v Arresting Creditors of Kelhead* (1765) 3 Ross LC 169. See also a note of Lord Monboddo given at (1765) 5 Bro Sup 907 which considers aspects of both cases.

59 An entail (tailzie) would have real effect only if it was both registered in the register of entails and completed by infeftment: see Entail Act 1685 (*RPS* 1685/4/49, *APS* viii, 477 c 26); ED Sandford, *A Treatise on the History and Law of Entails in Scotland* (2nd edn, 1842) 143–46. In *Douglas*, it appears that the former was done but not the latter.

60 *Douglas* at 171.

the adjudging creditor was held entitled to proceed regardless of any personal right held against the debtor.

8-26. A more significant advance towards a settled position came in the well-known case of *Mitchells v Ferguson*.[61] Like *Bell*, *Mitchells* related to the position of an uninfeft proprietor and was as much concerned with that issue as with the vulnerability of an adjudger to latent personal obligations of the debtor.[62] In *Mitchells*, Ferguson, the holder of an unregistered disposition, sought preference over the adjudging creditors of the disponer, David and Hugh Mitchell. In arguing that he should be preferred, Ferguson sought to press the purchaser-creditor distinction, using once again the language of *tantum et tale*:

> A disponee . . . is entitled to demand the subject conveyed, according as it appears from the records. An adjudger, on the other hand, having no reliance on these, must be contented to take that which he has adjudged, *tantum et tale*, as it stood in the person of his debtor.[63]

Ferguson sought to distinguish *Bell* on the basis that the distinction was not, in that case, before the court. This point, along with Ferguson's broader claim to a preference, failed. The decision in *Bell* was explicitly approved by the majority in *Mitchells* and considered to have definitively rejected a distinction between purchasers and creditors of the kind Ferguson sought to advance.[64] For their part, *Ireland* and *Gibb* were distinguished as being concerned with rights acquired fraudulently by the debtor.[65] Having dealt with the conflicting earlier cases, the way was open for the court in *Mitchells* to find in favour of the adjudging creditors, who were thus held to be unaffected by any latent personal right of Ferguson's as uninfeft proprietor.

8-27. Following the distinguishing of *Ireland* and *Gibb* in *Mitchells,* the notion that personal rights arising from fraud should, in light of *Mitchells*, continue to enjoy special favour was apparently confirmed in *Thomson v Douglas, Heron and Company*.[66] Thomson, conveyed land to Armstrong,

[61] *Mitchells v Ferguson* (1781) Mor 10296, (1781) 3 Ross LC 102.

[62] For a discussion of *Mitchells* in this first sense, see GL Gretton, "Equitable Ownership in Scots Law?" (2010) 5 Edin LR 73.

[63] *Mitchells* (Ross' report) at 122.

[64] *Mitchells* (Ross' report) per Lord Braxfield at 122: "[*Bell*] is a clear judgment in favour of [the Mitchells]. It is said, the distinction between a purchaser and adjudger is not stirred there. The reason is, that the Counsel must have been of opinion that it was not tenable, therefore not pleaded for. I cannot presume it was not thought of. I have always understood the law to stand so: and it would cut deep to find otherways." See also per the Lord President (Miller) at 126.

[65] *Mitchells* (Ross' report) per Lord Braxfield at 125: "All the decisions appealed to by [Ferguson] . . . applies to cases where the person in the right of the estate had a fraudulent right; and I am clear in that case, that an adjudger must take the right *cum sua labe*; but that [sic] nothing to do with this case."

[66] *Thomson v Douglas, Heron and Company* (1786) Mor 10229 and 10299 (NB the near-identical citations but conflicting reports), (1786) 3 Ross LC 132. The Session Papers in this case are

an advocate and Thomson's man of business. Although it was intended that Armstrong should make up titles to the property only as trustee, he appears to have fraudulently omitted any such condition with the result that he appeared on the Register of Sasines as holding unqualified ownership of the land. At some stage after his infeftment, Armstrong granted a heritable security over the property to the defenders Douglas, Heron and Company, apparently in relation to his own indebtedness to them. The land was later adjudged by other creditors of Armstrong. Thomson sought to argue that, since Armstrong had obtained ownership of the land in fraudulent circumstances, his (Thomson's) personal right as the defrauded party should pass both against the heritable creditors and the adjudgers. That argument was, in part, successful, with the court finding adjudging creditors to be in a special position:

> A *bona fide* purchaser . . . might have effectually acquired such property from the disponee; and an heritable creditor by infeftment is held to be in the same situation. The adjudging creditors stand, however, in a different predicament for, as it has been found by decisions, which, for the stability of the law, ought not to be departed from, they must take the right of their debtor *tantum et tale* as it was in his person.[67]

Fraud, it seemed, continued to be effective against adjudging creditors notwithstanding the decision in *Mitchells* adverse to the notion of *tantum et tale.* Nevertheless, there exist some grounds for doubting the special status of fraud as a rationale for the decision in *Thomson*. One such ground, provided by an inspection of the Session Papers, was that the argument for the adjudgers was not pressed, since the entire value of the land at issue would be consumed in the sale by the heritable creditors, thus leaving the former with nothing to contest.[68] This conclusion is supported by a brief separate report of the case, which indicates that the court did not intend to disturb the position of adjudgers set out in *Mitchells*:

> A party having acquired a right to lands under trust. . .his adjudging creditors were thought liable to the objection which lay against him. [. . .] NB. This point, though stated in the report, No.52 p.10229 [considered above] was little discussed, as the fund was said to be exhausted by preferable debts; and the court did not mean to lay down the rule in general, that adjudgers take *tantum et tale*.[69]

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available digitally as part of the SCOS Archive: see scos.law.virginia.edu/scos/node/54756 and scots.law.virigina.edu/scos/node/47021.

67 *Thomson* at 10229.

68 See *Information for Mess Douglas Heron and Company, late Bankers in Ayr and others Creditors of Mr David Armstrong of Kirtleton, Advocate* 9: "How far the adjudging creditors can be affected by the fraud of their debtor? [T]hey believe it will be unnecessary to enter at present into any discussion of that question, because it has already been mentioned that the heritable debt due to Mess. Douglas Heron and Company, will exhaust, or nearly exhaust the utmost price that can be expected from the subjects upon a sale. If the lands should not yield more than pay their [Douglas, Heron and Company's] debt, there is here no subject of competition."

69 *Thomson* at 10299.

That the decision in *Thomson* was, at least to some extent, in conflict with *Mitchells* appears to have engendered confusion, necessitating resolution in subsequent cases such as *Russell v Creditors of Ross*.[70] That decision, like the earlier *Douglas* cases, was concerned with an adjudger's vulnerability to an unrecorded entail – in other words, to a latent personal right of the substitute against the owner of the entailed lands.[71] In holding that the adjudger was not affected, any suggestion that *Thomson* might have overruled *Mitchells* was dismissed:

> [I]n the case of Douglas, Heron and Company v Thomson, 15 November 1786, where it was held that adjudging creditors take the estate *tantum et tale* as it stood in their debtor; and I find the same doubts entertained in the case of Mitchell v Fergusson, in July 1781; but there, upon a hearing, it was found that creditors could not be hurt by personal deeds; and I think the principle of that decision determines the present question."[72]

In its endorsement of *Mitchells* and rejection of *Thomson*, *Russell* reaffirmed the general rule expounded by Craig some two centuries earlier: diligence creditors are not affected by (latent) personal rights exigible against their debtor and do not, in general, take *tantum et tale*. Given the doubt cast on *Thomson*, cases of fraud were, arguably, left in an uncertain position. In the event, the rule that creditors remained uniquely vulnerable to personal rights arising from fraud persisted and, in principle, continues to form part of the modern law.[73]

8-28. What, then, of trusts? Beyond the dubious authority of *Livingston*,[74] no indication exists that the personal right of a trust beneficiary enjoyed a special status of the kind afforded to those arising from fraud. By the end of the eighteenth century, then, the position for trusts must be assumed to have reflected the rules on personal obligations generally: a creditor taking heritable property by adjudication would not be vulnerable to the right of a beneficiary against a trustee-debtor. Thus where the property entrusted was heritable the beneficiary had no protection from the diligence creditors of the trustee. A single but important exception existed where the trust was patent, for the notion that a creditor (or purchaser) might rely on the register served only to protect them from those rights which did not appear *ex facie* of the records. Any trust recorded in relation to heritable property would thus continue to affect creditors who, having seen this qualification to their debtor's title, continued to adjudge the property.[75]

[70] *Russell v Creditors of Ross* (1792) Mor 10300, (1792) 3 Ross LC 177 (as *Peirse v Ross*).

[71] See para 8-25 above.

[72] *Russell* (Ross' report) per the Lord President (Campbell) at 182.

[73] For the later history of the rule, see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) paras 8-30ff. As MacLeod notes, no examples of the application of the rule in a modern bankruptcy process exist.

[74] *Livingston v Creditors of Grange* (1664) Mor 10200, (1664) 3 Ross LC 114, discussed at para 8-13 above.

[75] See e.g. Patrick Grant, Lord Elchies, *Annotations on Lord Stair's Institutions of the Law of Scotland* (1824) 71 comparing trusts to reversions which, if unregistered, had no effect on a singular successor.

8-29. The settling of the troubling issues of this period might also have marked the end of the *tantum et tale* maxim which, as has been shown, was coined to describe the particular liability of an adjudging creditor in respect of a debtor's fraud or other personal obligations. By the time of the decision in *Russell v Ross' Creditors*[76], however, *tantum et tale* was being used in a much broader range of contexts than personal obligations of the debtor alone. The maxim thus survived the modification of the rule for which it had served as shorthand. *Tantum et tale* continued to figure in debates relating to the vulnerabilities of creditors including, as will be seen, in attempts by trust beneficiaries to assert rights against creditors of the trustee. Before these later debates are examined, however, it is necessary to consider the other forms of trust property which might be subject to diligence by personal creditors of the trustee.

C. CORPOREAL MOVEABLE PROPERTY

8-30. A personal creditor of a trustee acting by way of diligence might also seek to realise corporeal moveable trust property. The diligence by which property of that kind might be taken – and which corresponded to the apprising or adjudication of heritable property – was poinding.[77] That process enabled an unpaid creditor to have the goods of the debtor sold in satisfaction of the debt or, where no buyer could be found, to have ownership of the goods transferred to the creditor.

8-31. As in the case of diligence against heritable trust property, any protection of corporeal moveables from poinding by the personal creditors of the trustee must have relied upon an assertion of the trustee's personal obligation to the beneficiary against the buyer (or, in the absence of a buyer, the creditor taking ownership of the goods). In the case of corporeal moveable property there is, however, no evidence of the extensive debates as to the vulnerability of poinding creditors to the personal obligations of their debtor which characterised the law on heritable and incorporeal moveable property. Two reasons seem to explain why. The first is the comparative rarity of trusts of moveable property and the lower value of property of that kind in general, a factor which is also a reason for the lack of contemporaneous discussion as to the liability of a voluntary transferee of moveable property.[78] The second is the absence of a system of registration for moveable property on the basis of which arguments about the

[76] *Russell v Ross' Creditors* (1792) Mor 10300, (1792) 3 Ross LC 177.

[77] For poinding generally, see Erskine, *Inst* III.6.20 ff; Bell, *Comm* vol II, 58ff; JG Stewart, *A Treatise on the Law of Diligence* (1898) chs 13–16. For an extensive historical account of poinding and its predecessor diligences up to the end of the eighteenth century, see W Ross, *Lectures on the Practice of the Law of Scotland* (1792) at 385–442. In the modern law, poinding has been superseded by the diligence of attachment: see the Debt Arrangement and Attachment (Scotland) Act 2002 s 58.

[78] See para 3-23 n 62 above.

parties entitled to rely on that register – purchasers or creditors – might be raised (as they were in the case of heritable property).

8-32. The absence of clear evidence as to the vulnerability of a poinding creditor to the personal obligations of the debtor makes it possible only to surmise the position as to the protection enjoyed by corporeal moveable trust property in the early law. The starting point must be that poinding creditors were not vulnerable (on the basis that the trustee-beneficiary personal right was capable of binding those parties alone).[79] Further, there appears to be nothing akin to the *tantum et tale* doctrine in heritable property or the *assignatus utitur* principle in incorporeal moveable property serving to displace that general principle in the case of corporeal moveable property.[80] On this approach, corporeal moveable trust property would – in the early law at least[81] – have been unprotected from the personal creditors of the trustee, there being no opportunity to hold the poinding creditor affected by the personal obligations of a debtor trustee (including obligations owed to a trust beneficiary). Without direct evidence, however, that view must remain conjectural. A firmer conclusion may be reached in relation to moveable property of a different kind.

D. INCORPOREAL MOVEABLE PROPERTY

8-33. Differences in the vulnerability of diligence creditors to personal obligations of the debtor, including a debtor-trustee, also extended to those creditors taking incorporeal moveable property by arrestment.[82] That diligence comprised, and comprises, two main stages. The first, the arrestment proper, prevented the arrestee from dealing with the property inconsistently with the rights of the arresting creditor. By the second stage, furthcoming (sometimes, "forthcoming"), the property was transferred to the creditor in satisfaction of the debt. For present purposes the latter stage is of greater interest: it is at this

[79] Indeed, all of the reported cases relating to a challenge by a third party to a poinding involve a claim by that third party of ownership of the goods sought to be poinded, not a personal right against the debtor: see e.g. *Wedderburn v Hay* (1543) Mor 10503; *Hamilton v Sheriff Depute of Perthshire* (1564) Mor 10505; *Cotts v Harper* (1675) Mor 10513; *Gordon v Manderston* (1724) Mor 10529. Cf. *Eadie v M'Kinlay* 7 February 1815 FC and *Walker v Irwin and Company* (1841) 3 D 985, which might obliquely be seen to be challenges predicated, unsuccessfully, upon personal rights. The modern rule is that poinding creditors are not affected by personal rights exigible against their debtors: see e.g. GL Gretton, "Diligence", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 23; also Bell, *Comm* vol I, 286–87.

[80] Cf. however Bell's suggestion that fraud might pass against a creditor arresting moveable property: Bell, *Comm* vol I, 289ff.

[81] That is, until the changes to all forms of protection from creditors, discussed later in ch 9.

[82] For arrestment generally, see Erskine, *Inst* III.6.1ff; Bell, *Comm* vol II.65ff; Hume, *Lectures* V, 89ff. Arrestment remains a competent diligence against, *inter alia*, incorporeal moveable property of a debtor: for a modern treatment, see Gretton, "Diligence" paras 247ff; RG Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) paras 6-18ff.

stage that the creditor obtained a real right in the property arrested and so the question arose of the extent to which that creditor might – notwithstanding that real right – be vulnerable to personal obligations of the debtor.

(1) *Assignatus utitur* and arrestment

8-34. Furthcoming was, in general, seen as a judicial assignation of the debtor's incorporeal property to the arresting creditor;[83] and, as has already been noted in relation to assignation as a form of voluntary transfer, an assignee was, in the early law at least, seen as coming into the place of the cedent with the result that the former would be vulnerable to all personal rights exigible against the latter in respect of the thing assigned.[84] That liability, normally expressed by the maxim *assignatus utitur iure auctoris*, extended equally to an arresting creditor. Erskine describes the position of an arrester in the following terms:

> [T]he arrester affects by his diligence the subject arrested, *tantum et tale* as it stood in his debtor, with all its burdens. . .[85]

Here *tantum et tale* (displaced from its seemingly original usage as a description of the liability of an adjudging creditor) is used to indicate that an arrester would be susceptible to personal obligations of the debtor. On this view, a creditor taking the incorporeal property of a debtor-trustee would be subject to all personal obligations of the trustee which related to the property in question. A beneficiary would, according to the same analysis, enjoy protection from the arresting creditors of a trustee. That conclusion is borne out by two cases examined earlier in relation to voluntary assignations by trustees:[86] *Mackenzie v Watson and Stewart*[87] and *Monteith v Douglas and Leckie*.[88] In both, the assignee of incorporeal property granted a back bond recording that the property was held in trust for the assignor. The trust property was then arrested by personal creditors of the trustee who sought furthcoming and argued that, as singular successors, they were not vulnerable to their debtor's personal obligations to the beneficiaries. For their part the beneficiaries argued that the arresters were, like assignees of any other kind, subject to the relevant personal obligations

[83] Stair, *Inst* III.1.42; Bankton, *Inst* III.1.39; Erskine *Inst* III.6.17; Hume, *Lectures* VI, 89; JG Stewart, *A Treatise on the Law of Diligence* (1898) 126 ("The decree of furthcoming is the completion of the arrester's right to the subject arrested; it adjudges the fund attached, or if the subject is corporeal moveables the proceeds thereof, to belong to him, and operates as a judicial assignation in his favour."); cf. Anderson, *Assignation* para 6-18.

[84] See para 3-27 above.

[85] Erskine, *Inst* III.6.16; to similar effect Stewart, *Diligence* 128–33. See also the authorities cited in relation to the *assignatus utitur* principle at paras 3-27ff above.

[86] See paras 3-30ff above.

[87] *Mackenzie v Watson and Stewart* (1678) Mor 10188.

[88] *Monteith v Douglas and Leckie* (1710) Mor 10191.

of the cedent.[89] In each case this latter argument was successful: the creditors were held vulnerable to the personal obligations of the beneficiaries against the debtor-trustees such that the trust property was safe from their arrestments.[90]

8-35. Though important as illustrations of the position of a creditor taking incorporeal property, the decisions in *Mackenzie* and *Monteith* were not the last occasions on which that issue was considered. The question was to arise again, this time prompted by a significant development in the law of assignation.

(2) Effects of *Redfearn v Somervail*: *Dingwall* (1822) and *Gordon* (1824)

8-36. As seen in chapter 3, the decision of the House of Lords in *Redfearn v Somervail*[91] in 1813 altered considerably the position of an assignee of incorporeal property.[92] Before *Redfearn* an assignee was seen as coming into the place of the cedent and subject to the personal obligations owed thereby, including obligations owed to a trust beneficiary. The effect of decision of the House of Lords in *Redfearn* was to reconceptualise assignation as an outright transfer of the property to the assignee who*,* in consequence*,* was not subject to those personal obligations.[93]

8-37. Although concerned in substance with a voluntary transfer, the modified view of assignation which prevailed in *Redfearn* might also, in principle, have been applied to a creditor taking incorporeal property through involuntary transfer, including by arrestment. Two important attempts were thus made in the wake of the judgment of the House of Lords to argue that *Redfearn* had modified the liability of creditors as well as of voluntary assignees.

8-38. The first of these attempts came in *Dingwall v McCombie*.[94] The pursuer, Dingwall, purchased two shares in a shipping company. Finding that the company would register him as holder of only one share,[95] Dingwall transferred

[89] *Monteith* at 10191–92. See also the argument for the beneficiary in *Mackenzie* at 10188.
[90] *Monteith* at 10192. Similarly see *Mackenzie* at 10189.
[91] *Redfearn v Somervail* (1813) 1 Dow 50, (1813) 5 Pat App 707.
[92] See paras 3-36ff above.
[93] Where the property assigned was a personal right, an assignee remained subject to any defences available to the debtor in the original obligation: see para 3-43 above.
[94] *Dingwall v McCombie* (1822) 1 S 433 (NE); 6 June 1822 FC.
[95] In the early nineteenth century, restrictions of this kind were often imposed (in the absence of statutory regulation) as a form of minority shareholder protection: see E Hilt, "When did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century" (2008) 63 Journal of Economic History 645; but cf. H Hansman and M Pargendler, "The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption" (2014) 123 Yale Law Journal 100. Trusts were a natural means by which such controls might be thwarted.

the other to Thomson who subsequently became bankrupt.[96] Against Thomson's creditors Dingwall sought declarator that he had right to the share: as assignees, they could, in Dingwall's argument, be in no better position than Thomson himself.[97] The creditors argued, conversely, that the effect of *Redfearn* was to secure any assignee, voluntary or otherwise, from liability for the personal obligations of the debtor.[98] That latter argument was rejected both by the Lord Ordinary and on appeal: *Redfearn* was held to extend only to purchasers.[99] This conclusion may well have seemed a surprising one, given that the decision in *Redfearn* purported to apply to all assignees, whether voluntary or judicial, and the issue was to arise before long for reconsideration

8-39. *Dingwall* was reviewed in the remarkably similar circumstances of *Gordon v Cheyne*.[100] A share in another shipping company was held in trust for Gordon by Sanders, who became bankrupt some fourteen years after the creation of the trust.[101] Before the Lord Ordinary, Gordon was found entitled to the share over the creditors of Sanders on the basis of *Dingwall*. Some doubt was, however, expressed as to the compatibility of that decision with the judgment of the House of Lords in *Redfearn*.[102] On appeal, the creditors took up this argument, contending that *Redfearn* applied to onerous assignees of all kinds and that the distinction drawn in *Dingwall* between purchasers and creditors could not be justified.[103] The Inner House disagreed, holding again that *Redfearn* applied only to purchasers; creditors took *tantum et tale* and Gordon as a beneficiary was thus entitled to protection on the bankruptcy of his trustee.[104] Significantly, the judgment in Gordon's favour displays a number of features which would later come to characterise the approach of courts to protection of trust property from creditors. Included in those features is, in particular, a reliance for the first time upon the equivalent position in English law, which protected beneficiaries in the event of trustee insolvency,[105] as well

[96] *Dingwall* was, strictly speaking, concerned with bankruptcy rather than arrestment *simpliciter*. It is, however, clear that the court in *Dingwall* was seeking to clarify the post-*Redfearn* position in respect of all creditors, whether taking by sequestration or otherwise.

[97] *Dingwall* (FC report) at 627. In support of this proposition Dingwall relied upon a number of authorities expressing the *assignatus utitur* principle (e.g. Stair, *Inst* IV.40.21 and Erskine, *Inst* III.5.10).

[98] *Dingwall* (FC report) at 628.

[99] *Dingwall* per Lord Gillies at 433: "There is a great difference where the question is with the creditors of the trustee and a *bona fide* purchaser. The creditors stand in the situation of the bankrupt, whereas a purchaser is entitled to rely on the holder, being the true owner. The case of *Redfearn*, being that of a purchaser, is not applicable."

[100] *Gordon v Cheyne* (1824) 2 S 566 (NE); 5 February 1824 FC.

[101] Thus *Gordon* was, like *Dingwall*, concerned principally with bankruptcy: see n 96 above.

[102] *Gordon* at 566.

[103] *Gordon* at 566–67.

[104] *Gordon* at 568–71.

[105] *Gordon* per Lord Balgray at 569: "I have also been influenced in my opinion by the views and decisions in England; and, in regard to matters of this nature, it is expedient to approximate

as a related inclination to characterise the beneficiary as the "true owner" of the trust property.[106] Further, just as considerations of policy had led the court in *Redfearn* to protect purchasers, policy also appears to have influenced the court's decision in *Gordon* to prioritise beneficiaries over creditors:

> Trusts in moveables have been always acknowledged by us as lawful, and indeed it is impossible to carry on commerce without them. [. . .] It is well known that millions of the public funds belong to foreigners, and are held for their behoof by trustees. It is, therefore, a very alarming doctrine to maintain that, by the bankruptcy of the trustee, all the funds belonging to third parties, and confided to his care, pass immediately to his creditors.[107]

Gordon thus served as final confirmation that, despite the change in the status of purchasers of incorporeal moveables occasioned by *Redfearn,* a creditor taking property of that kind by judicial assignation remained vulnerable to the relevant personal obligations of the debtor. This liability extended to obligations owed by the debtor as trustee, with the result that incorporeal trust property could never be subject to the diligence of a trustee's personal creditors. As has been shown, that rule stood in contrast to the position for heritable and (apparently) for corporeal moveable trust property which, by the end of the eighteenth century at least, could competently be attached by the diligence of a trustee's creditors. These divergent rules were ultimately to be brought together

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the two systems as nearly as possible. The English law appears indeed to be conclusive as to the distinction between purchasers and creditors and the case of Chion is directly applicable." See also per Lord Succoth at 570. Both judges relied on the English decision of *ex parte Chion* (1721) 3 P Wms 187. Cf. the more cautious approach of Lord Gillies at 570: "As to the law of England, I will not venture to speak, as I cannot know what distinctions may exist." Similarly the Lord President (Hope) said at 571: "We must look, in the first place, to Scotch principles and decisions." As will be seen, *ex parte Chion* was not the primary authority in English law for the proposition that the interest of a beneficiary survived the bankruptcy of the trustee. The case seems to have been seized upon by the pursuer as well as the court because of its appearance the most recent edition of Bell's *Commentaries*, where it was used to support the proposition that shares purchased by a factor were not available to creditors upon his bankruptcy: see Bell, *Comm* vol I, 260 n 5. For a full discussion of the position in English law and its influence on Scots law, see para 9-14 below.

[106] This means of rationalising protection for the beneficiary was used in preference to an explanation based on *assignatus utitur.* See *Gordon* per Lord Hermand at 568: "although a sequestration operates as an intimated assignation, there is no room here for the application of the rules by which competition between assignations is governed. If Sanders had been the *verus dominus*, and had granted an assignation to Gordon, and, before intimation, sequestration had been awarded, there can be no doubt that the trustee would have been preferable. But Gordon was the *verus dominus*, and, therefore, he required no assignation. Sanders never had the true property – he merely held it in trust for Gordon." See also per Lord Succoth at 569 and the Lord President (Hope) at 571.

[107] *Gordon* per Lord Balgray at 569–70. To similar effect see the comments of the court in *ex parte Chion* (1721) 3 P Wms 187 at 187: "Determined, that the trust stock was not liable to the bankruptcy. By the Lord Parker, who said it would lessen the credit of the nation to make such a construction."

such that all forms of trust property enjoyed immunity from diligence creditors. Before that change is examined, however, it is necessary to say something of the alternative process by which a creditor might seek to seize trust property – sequestration.

E. FROM DILIGENCE TO SEQUESTRATION

8-40. Discussion so far has concentrated upon whether immunity was enjoyed by trust property from creditors seeking to exercise diligence against a debtor who is also a trustee. Diligence was not, however, the only route by which the assets of a debtor might be realised upon the debtor's default. An important alternative to diligence was (and continues to be) sequestration. By that process, a third party was appointed in the interests of all creditors to liquidate the assets of the debtor. The proceeds of sale would then be employed to satisfy, so far as possible, the claims of unpaid creditors.[108]

8-41. After its introduction in the latter half of the eighteenth century, sequestration acquired progressively greater importance as a means by which creditors might have recourse to the assets of a debtor (including a debtor-trustee) compared to the individualistic route of diligence.[109] Significantly for present purposes, it was in the context of sequestration, not diligence, that a rule protecting trust property from the claims of creditors was definitively established for both of those processes. To explore the emergence of that rule, it is first necessary to consider in greater detail the effect of sequestration on the property of a debtor-trustee.

(1) Sequestration: the proprietary consequences

8-42. Although an established component of sequestration in the modern law, the compulsory transfer ("vesting") of the debtor's assets in a trustee prior to their realisation did not feature in the initial forms of the process in Scots law. Thus the earliest statute concerned with sequestration, the Bills of Exchange (Scotland) Act 1772,[110] required debtors on pain of imprisonment to grant

[108] For the modern law of sequestration, see D McKenzie Skene, *Bankruptcy* (2017) chs 6–18 or, for a detailed older account, see H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn by TA Fyfe, 1914) chs 12–34.

[109] For a useful historical overview, see D McKenzie Skene, "Plus Ça Change, Plus C'est La Même Chose? The Reform of Bankruptcy Law in Scotland" (2015) 3 Nottingham Insolvency and Business Law eJournal 285. For the equivalent position in English law (which also underwent significant changes in the period under review), see M Lobban, "Bankruptcy and Insolvency", in *The Oxford History of the Laws of England*, vol XII: *Private Law 1820–1914* (2010) 779.

[110] Bills of Exchange (Scotland) Act 1772 (12 Geo 3 c 72). The history of sequestration in Scots law is marked by a large volume of statutes which have served either to modify and extend existing measures (which were typically time-limited) or replace them completely. Thus the

a disposition of their moveable property to a factor who would manage the property for the benefit of the creditors.[111] Indeed, it was not until the Payment of Creditors (Scotland) Act 1793 that a more recognisable form of sequestration was introduced. Under that Act, which extended to both heritable and moveable property, the debtor was again required to grant a disposition in favour of a third party (by this stage termed a "trustee in sequestration").[112] Alongside this voluntary disposition there was introduced an aspect of compulsory vesting in the following terms:

> [W]hether such [disposition] be executed [by the debtor] or not, it is hereby statuted and declared, that the said whole estate and effects, of whatever kind, and wherever situated . . . shall be deemed and held to be vested in the said trustee or trustees . . . and the court shall . . . adjudge, decree and declare the whole lands and other heritable estate belonging to the bankrupt . . . to pertain and belong to the trustee or trustees . . . which adjudication, being of the nature of an adjudication in implement, as well as for payment . . . shall be subject to no legal reversion. . .[113]

1772 Act was extended by the Payment of Creditors (Scotland) Act 1780 (20 Geo 3 c 41) and superseded by the Payment of Creditors (Scotland) Act 1783 (23 Geo 3 c 18). The 1783 Act was extended by the Payment of Creditors (Scotland) Act 1790 (30 Geo 3 c 5) and superseded by the Payment of Creditors (Scotland) Act 1793 (33 Geo 3 c 74). The 1793 Act was extended seven times by the Payment of Creditors (Scotland) Acts 1799 (39 Geo 3 c 53), 1804 (44 Geo 3 c 24), 1806 (46 Geo 3 c 24), 1808 (48 Geo 3 c 25), 1809 (49 Geo 3 c 38), 1811 (51 Geo 3 c 25), and 1813 (53 Geo 3 c 65), and superseded by the Payment of Creditors (Scotland) Act 1814 (54 Geo 3 c 137). The 1814 Act was extended ten times by the Payment of Creditors (Scotland) Acts 1822 (3 Geo 4 c 29), 1823 (4 Geo 4 c 8), 1825 (6 Geo 4 c 11), 1827 (7 & 8 Geo 4 c 11), 1829 (10 Geo 4 c 11), 1831 (1 Will 4 c 16), 1832 (2 & 3 Will 4 c 35), 1834 (4 & 5 Will 4 c 74), 1836 (6 & 7 Will 4 c 90), and 1837 (7 Will 4 & 1 Vict c 40), and superseded by the Bankruptcy (Scotland) Act 1839 (2 & 3 Vict c 41). The 1839 Act was amended by the Bankruptcy (Scotland) Act 1853 (16 & 17 Vict c 53) and replaced by the Bankruptcy (Scotland) Act 1856 (19 & 20 Vict c 79). The 1856 Act was amended by the Bankruptcy and Real Securities (Scotland) Act 1857 (20 & 21 Vict c 19) and the Bankruptcy (Scotland) Amendment Act 1860 (23 & 24 Vict c 33), and superseded by the Bankruptcy (Scotland) Act 1913 (3 & 4 Geo 5 c 20). The 1913 Act was in turn superseded by the Bankruptcy (Scotland) Act 1985 which was amended by the Bankruptcy (Scotland) Act 1993. The 1985 Act was superseded by the modern consolidating statute, the Bankruptcy (Scotland) Act 2016.

[111] Bills of Exchange (Scotland) Act 1772 (12 Geo 3 c 72) s 1: "[The debtor shall] grant a disposition of his whole personal estate, wherever situated, to the factor so named, for the benefit of his whole creditors . . . and if the debtor or debtors shall refuse to obey such orders, the court may compel him, her, or them, by imprisonment, until he, she, or they, shall comply. . .". The 1772 Act provided no comparable procedure for heritable property although, as McKenzie Skene "Reform of Bankruptcy Law" at 288 notes, the Judicial Sale Act 1681 (*RPS* 1681/7/41, *APS* viii, 351 c 83) enabled land which was subject to multiple adjudications to be sold by a factor under the supervision of the court.

[112] Payment of Creditors (Scotland) Act 1793 s 23: "the nomination of the trustee . . . shall . . . ordain the bankrupt to execute and deliver . . . a disposition or other proper deed or deeds of conveyance or assignment, making over to the said trustee or trustees, in their order, his whole estate and effects, heritable and moveable real and personal".

[113] Payment of Creditors (Scotland) Act 1793 s 23.

Given the automatic vesting introduced by the 1793 Act, the requirement for a voluntary disposition by the debtor was rendered superfluous: it was accordingly dispensed with by the Bankruptcy (Scotland) Act 1839. The formulation by which the property of the bankrupt was vested in the trustee was, however, retained virtually unchanged through successive reforms of bankruptcy law.[114] For the purposes of the present discussion, then, the effect of sequestration on the property of a bankrupt debtor (including a bankrupt trustee) was always the same: corporeal and incorporeal moveable property were deemed to have been transferred to the trustee in sequestration as if assigned or delivered, while the trustee took heritable property as if under a decree of adjudication.

(2) Sequestration and trust property

8-43. How would the proprietary consequences of sequestration bear upon trust property held by a bankrupt trustee? On the basis that the beneficiary's right against the trustee was personal in nature, the primary analysis must be similar to that deployed in the case of a transferee[115] or diligence creditor:[116] if the trustee in sequestration was a person different from the parties to the personal right, and then acquired a real right in the debtor's property, that trustee could not in principle be bound by the debtor-trustee's personal obligation to the beneficiary.[117] As has been seen, however, certain forms of voluntary transfer or diligence led to the transferee or creditor's becoming subject to the personal obligations of the transferor or debtor. Thus, given the effects of transfer by delivery and assignation,[118] a trustee in sequestration would not be affected by personal rights to corporeal moveable property but would be subject to personal rights to incorporeal moveables.[119] After the introduction of sequestration,

[114] See Payment of Creditors (Scotland) Act 1814 s 29; Bankruptcy (Scotland) Act 1839 s 79; Bankruptcy (Scotland) Act 1856 s 102(2); Bankruptcy (Scotland) Act 1913 s 97(2); Bankruptcy (Scotland) Act 1985 s 31(1)(b).

[115] See paras 3-07ff above.

[116] See paras 8-05ff above.

[117] In one sense, of course, the trustee in sequestration was affected by all the personal obligations of the debtor in that he was required, in distributing the insolvent estate, to give effect to those obligations rateably and to the extent allowed by the assets of the debtor. For the protection of trust property in sequestration, however, the situations of importance are those in which the trustee in sequestration was required to give priority to personal obligations owed by the debtor-trustee relating to specific trust property: it is in this sense that the expression "bound by the debtor-trustee's personal obligation to the beneficiary" is used here. The question of what personal obligations "related" to the trust property raises similar difficulties to the case of creditors seeking to take that property by diligence (see n 7 above), difficulties which would ultimately be resolved by a new account of protection from creditors (as to which see para 9-26 below).

[118] See paras 8-30 and 8-33 above.

[119] This would continue to be the case after the decision in *Redfearn v Somervail* (1813) 1 Dow 50, (1813) 5 Pat App 707 because of the interpretation of that decision as applying only to transferees, but not creditors: see paras 8-36ff above.

then, the immunity enjoyed by trust property was again subject to a degree of variation by property. Incorporeal moveable trust property would enjoy protection in the event of the trustee's bankruptcy; corporeal moveables would not. This would remain the position until the changes wrought by *Heritable Reversionary Company Ltd v Miller*[120] at the end of the nineteenth century.

8-44. The position in relation to heritable property was more complex. Given their equivalent status to an adjudging creditor, and on the basis of the settled position for such creditors described earlier,[121] trustees in sequestration should not have been subject to personal obligations, including trust obligations, relating to the heritable property of the debtor. The reality was not so straightforward. The introduction of sequestration led to a brief reopening of the debate relating to the position of an adjudger with respect to personal rights of the debtor. It is to that renewed debate that this discussion now turns.

(3) Sequestration, heritable property and latent personal rights: *Taylor* (1795), *Wylie* (1803) and *Mansfield* (1833)

8-45. The first case concerning the liability of a trustee in sequestration to personal rights relating to heritable property of a debtor was *Taylor and Smith v Marshall*[122] decided in 1795, shortly after the enactment of the 1793 Act. Though apparently unreported, the brief records which exist of that decision suggest that the court found, contrary to the normal rule for adjudging creditors established after *Mitchells*[123] and *Russell*,[124] that the trustee in sequestration was indeed subject to latent personal obligations which, in *Taylor*, consisted of a personal right against an uninfeft debtor who had, despite that lack of infeftment, granted a heritable bond. That result appears to have been achieved by a revival by the holder of the personal right of the *tantum et tale* maxim which had previously been invoked in the adjudication cases:[125] the trustee in

[120] (1892) 19 R (HL) 43, discussed at paras 9-02ff below.

[121] See paras 8-23ff above.

[122] *Taylor and Smith v Marshall* (1795) 3 Ross LC 185. An account of the case is also given in *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 per Lord Rodger at para 128.

[123] *Mitchells v Ferguson* (1781) Mor 10296, (1781) 3 Ross LC 102.

[124] *Russell v Ross' Creditors* (1792) Mor 10300, (1792) 3 Ross LC 177.

[125] See the account given by Bell, *Comm* vol I, 288 n 3: "[*Mitchells*] was a solemn decision; but it was thrown into some doubt by a decision pronounced in Smith v Taylor, Dec 18, 1795, where a person, though his right was merely personal, borrowed money on heritable bond. Infeftment was instantly taken on this bond, but of course no real right could be constituted in the lender till the borrower himself was infeft; and the latter having become bankrupt, the trustee on his sequestrated estate made up titles without infefting the debtor, by dropping him out of the feudal progress. Thus the trustee came to hold a real right, while that of the person holding the heritable bond continued only personal. The only chance which the latter had for a preference was upon the general plea that the creditors could take no better right than stood in their debtor. The Lord Ordinary repelled this plea, and sustained the right of the creditors; but the Court (erroneously) altered the judgment."

sequestration, as creditor, could take no higher right than the debtor and so was bound to give effect to the personal right affecting the uninfeft debtor.

8-46. Something close to a resolution of the issue raised by *Taylor* was to come in the important case of *Wylie v Duncan*.[126] That case concerned the device of the *ex facie* absolute disposition in security, whereby a borrower would transfer heritable property to a lender who would in turn grant a back-bond agreeing to reconvey on satisfaction of the loan. Wylie, the pursuer, transferred tenement property to Archibald who undertook, upon being given notice, to re-sell the property to Wylie at the same price. Before notice could be given, Archibald was sequestrated and the tenements sold by Duncan, Archibald's trustee in sequestration. Wylie objected to the sale, arguing that Duncan took *tantum et tale* and subject to his personal right to a reconveyance. Before the Lord Ordinary that proposition was successful,[127] and on appeal was bolstered by a suggestion by Wylie that the heritable property was held by Archibald in trust for Wylie's benefit.[128] For his part, Duncan contended that he was subject only to real rights over the property and was not bound by any of Archibald's latent personal obligations.[129] An argument based on registration, also seen in the adjudication cases, was revived by Duncan, who asserted that, as Archibald's creditors had contracted on the basis of the records, they could justifiably disregard any latent personal obligations.[130] These arguments succeeded on appeal to the Inner House which, relying upon the earlier authorities on adjudging creditors, found that the trustee was not bound to give effect to Archibald's personal obligation to Wylie.[131] Despite doubts expressed by some members of the court,[132] the same result would, in the opinion of the majority, have been reached had Wylie's contention that a trust existed in his favour been upheld:

[126] *Wylie v Duncan* (1803) Mor 10269, (1803) 3 Ross LC 134. See also the decision in *Buchan v Farquharson* (1797) Mor 2905, (1797) 3 Ross LC 137, 24 May 1797 FC where *Taylor* was disapproved insofar as it suggested that the trustee in sequestration could be affected by the personal rights of the debtor: see *Buchan* at 2906.

[127] *Wylie* at 10269: "The Lord Ordinary . . . finds, that whatever might have been the plea of onerous creditors of the disponee, contracting with him on the faith of a right apparently absolute to the subject in question, the trustee on Archibald's sequestrated estate is not entitled to urge that plea, but must take the subject disponed to him *tantum et tale* as it stood in the debtor's own person, and therefore subject to the same right of redemption".

[128] *Wylie* at 10270–71: "even although the transaction were held not strictly to fall under the notion of an heritable security, it must be considered as a species of trust vested by the pursuer in Archibald; and, consequently, in terms of the act 1696, he is entitled to prove the trust, either by Archibald's written declaration, or by his oath. [. . .] The trustee must take the property *tantum et tale* as it stood in the person of the bankrupt; and if the property was subject to redemption, or was fiduciary in the person of the bankrupt, it must remain so in the person of his trustee."

[129] *Wylie* at 10270.

[130] *Wylie* at 10270.

[131] *Wylie* (Ross' report) per the Lord President (Campbell) at 136 and Lord Armadale at 137.

[132] *Wylie* (Ross' report) per Lord Meadowbank at 137: "I agree in the general doctrine. Nothing in answer moved me but the notion of a trust, which, if established by a back-bond, I think would affect adjudgers."

> I convey my estate absolutely to a friend, and take a back-bond of trust. If he sells it as for himself, or gives an heritable bond over it, the purchaser or lender is safe. As to an adjudger, if there is any doubt, let us solemnly hear the case. But I hold that there is none. He takes on the faith of the record, not *tantum et tale*.[133]

The position of a trustee in sequestration with respect to heritable property was thus equivalent to that which had been established for an adjudger: neither was subject to latent personal rights of the debtor, with the result that the rights of beneficiaries in respect of heritable property held on a latent trust would enjoy no protection from the personal creditors of a bankrupt trustee.

8-47. Though the decision in *Wylie* apparently left little doubt as to a trustee in sequestration's freedom from the personal obligations of the debtor, the principle was to be considered once again in *Mansfield v Walker's Trustees*.[134] In that case, Stewart agreed to grant a bond and disposition in security to Walker over certain parcels of land. The bond which was ultimately granted failed to include all of the heritable property which Stewart intended to provide as security and, before the error could be rectified, Stewart was sequestrated and his estate vested in a trustee, Mansfield. The suggestion advanced by Walker's personal representatives, that Mansfield should take subject to the former's personal right to a security over the remaining land, was rejected by both the Inner House and House of Lords: the trustee did not take *tantum et tale*, and was not subject to latent rights but only to those qualifications which appeared from the records.[135]

8-48. The effect of the early nineteenth-century cases was thus to place beyond question the principle that a trustee in sequestration taking heritable property was not bound to implement personal obligations of the bankrupt, including any obligation owed to the beneficiary of a trust. Thus by this stage it was possible, following the above analysis,[136] to state in concrete terms the rules

[133] *Wylie* (Ross' report) per the Lord President (Campbell) at 137.

[134] *Mansfield v Walker's Trustees* (1833) 11 S 813, (1833) 3 Ross LC 139 (as *Stewart's Trustee v Walker's Trustees*) (Court of Session), and *Inglis v Mansfield* (1835) 1 Sh & Macl 203, (1835) 6 ER 1472, (1835) 3 Cl & F 362 (House of Lords). See also the discussion in *Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 per Lord Rodger at paras 132–137.

[135] *Mansfield v Walker's Trustees* (1833) 11 S 813 at 822–23 per Lords Gillies, Mackenzie, Medwyn and Corehouse: "[Mansfield] as trustee for Stuart's creditors, took the heritable estate in which the bankrupt was infeft, subject to no limitation or burden which did not appear on the face of the records [. . .]. If Stuart, therefore, in terms of his agreement, was bound to give Walker an heritable security over all the lands of Hillside, as well as Hillside proper, and nobody can doubt that he was so bound, that obligation, though effectual against himself and his representatives, is not transmitted against his creditors." See also per the Lord President (Hope) and Lord Moncreiff at 840–43. Cf. the dissent of the Lord Justice Clerk (Boyle) at 845–48 and of Lord Glenlee at 849–52.

[136] See paras 8-43ff above.

for the immunity of trust property upon the insolvency of a trustee.[137] Where the trustee was sequestrated, heritable and corporeal moveable trust property formed part of the sequestrated estate and so were available to the trustee's creditors; incorporeal moveable property was not.[138] The same variation existed where creditors sought to take property of a defaulting trustee by diligence. Thus heritable or corporeal moveable trust property was liable to be taken by adjudication or poinding, but incorporeal moveable trust property was immune from arrestment. Finally, the familiar exception existed in relation to both diligence and sequestration where property was held on a trust which was patent as appearing from the records.[139]

F. CONCLUSION

8-49. This chapter has traced the first stage of the emergence of the rule that trust property enjoys protection from the personal creditors of the trustee. Beginning with creditors seeking to take trust property by diligence, the discussion has demonstrated that the question of whether or not protection was available turned upon the vulnerability of the diligence creditor to the beneficiary-trustee personal right. The question of protection thus became a corollary of broader debates about the susceptibility of creditors to personal

[137] Mention should, however, be made of the decision in *Paul v Jeffrey* (1831) 10 S 75, (1831) 9 S 667 (as *Cook v Jeffrey*) (Inner House) and *Jeffrey v Paul* (1835) 1 Sh & Macl 767 (House of Lords). See also proceedings subsequent to the decision of the House of Lords, reported at (1834) 12 S 718. The circumstances of *Paul* involved three heritable bonds, worth £3,000, £1,925 and £400 respectively, held in trust by three co-trustees. In the case of only one of these (the bond for £1,925) did the trust appear on the face of the register. Eventually, one of the trustees became insolvent and that trustee's own trustee in sequestration, relying on the previous cases including *Wylie* and *Mansfield*, claimed right to the two bonds held on latent trusts. This claim failed before the Inner House which, in holding that all three bonds were to be realised first to defray trust expenses, might appear to have suggested that, as trust property, all three bonds enjoyed protection from the personal creditors of the insolvent trustee. On appeal the House of Lords, apparently in contradiction of the principle advanced by the Inner House, found that one (only) of the bonds held in latent trust (for £400) could be seized by the trustee in sequestration. No reasons for this decision were reported and accordingly it is not possible to say with any certainty that the decision in *Paul* extended protection to property held on a latent trust. Indeed, the question of why the same analysis did not apply to the other bond in a latent trust (for £3,000) became a significant point of contention in later decisions: see e.g. *Heritable Reversionary Company Ltd v Millar* (1891) 18 R 1166 per Lord Adam at 1171–72 where it is suggested that the bond for £3,000 was not available to the trustee in sequestration on the basis that it was granted as corroboration for a prior and separately secured debt; but cf. *Heritable Reversionary Company Ltd v Millar Ltd* (1892) 19 R (HL) 43 per Lord Watson at 52 suggesting, conversely, that the trustee in sequestration was only entitled to claim the bond for £400 on the basis that it was equivalent to a payment to the insolvent trustee from the trust.

[138] See also GL Gretton, "Trusts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 480 at 500.

[139] See n 75 above.

rights of their debtor in respect of the property being attached, debates which were typified by disagreement about the entitlement of creditors to rely on the system of registration of deeds as well as uncertainty as to the extent to which those creditors stood in the place of their debtor (represented in the *tantum et tale* maxim). Because these debates were resolved by the end of the eighteenth century with different results for different forms of diligence, the vulnerability of creditors to the personal obligations undertaken by their debtors, and so the fate of trust property, varied with the type of property held in trust. In the case of heritable property, a further difference resulted from the protection only of property held on a patent trust.

8-50. As for trustees in sequestration, the question of whether protection was available depended similarly on the effect on the trustee in sequestration of the personal obligations of the bankrupt trustee. The same debates as had attended the liability of diligence creditors to personal obligations were thus re-argued in the case of sequestration, with a settled position, mirroring that of diligence, eventually being reached by the first half of the nineteenth century. According to this position the trustee in sequestration (or diligence creditor) took incorporeal moveable property subject to the personal obligations (including trust obligations) of the debtor; but a trustee in sequestration or diligence creditor was free of such obligations where that which was taken was consisted of corporeal moveable or heritable property. The result of this analysis, when applied to trusts, was that incorporeal moveables held in trust, but not heritable property or corporeal moveables, were protected from the personal creditors of the trustee. The sole exception in the case of heritable property was where the trust was patent as having been registered. Just as this apparently stable position had been reached, however, all was to change once again.

9 Protection from Creditors II: *Heritable Reversionary* and After

A. INTRODUCTION

9-01. This is the second of two chapters examining the rule that trust property enjoys protection of from the personal creditors of the trustee. In the previous chapter it was demonstrated that, by the first half of the nineteenth century, variation existed between the protection of different forms of trust property from the personal creditors of the trustee acting by way of diligence or in sequestration. Thus incorporeal property enjoyed protection while moveable and heritable property (except where held on a patent trust) did not. The object of this chapter is to examine the emergence of the modern rule that all forms of trust property, whether held on a latent or patent trust, enjoy protection from the personal creditors of the trustee. While this rule was settled in the second half of the nineteenth century with the decision of the House of Lords in *Heritable Reversionary Company*, its doctrinal basis remained unsettled for many years thereafter. As will be seen, the ultimate resolution of this issue in the modern law has significant implications for the overall theoretical inquiry as to the nature of the beneficiary's right in the Scottish trust.

B. *HERITABLE REVERSIONARY*

9-02. *Heritable Reversionary Company Ltd v Millar*[1] is the leading decision on the immunity of trust property to the personal creditors of the trustee. In *Heritable Reversionary,* the House of Lords established the modern rule that trust property of all kinds is immune to the trustee's creditors, whether or not that property is held under a latent or a patent trust. Before reviewing how that conclusion was reached, it is instructive first to consider the relationship of the decision with the earlier body of case law dealing with the status of the creditors of a bankrupt trustee.

(1) Antecedents of *Heritable Reversionary*: *Fleeming* (1867) and *Watson* (1879)

9-03. *Heritable Reversionary* is often presented as a singular reversal of the settled position established by the cases on diligence creditors and trustees in sequestration.[2] The decision was, however, prefigured in important respects by earlier cases. It is true that by the first half of the nineteenth century the liability of a creditor to personal rights of the debtor was mostly settled. Yet, in a number of instances, courts and litigants suggested that a different approach should apply to obligations owed by a debtor-trustee to the beneficiaries of the trust.[3] Often this alternative approach involved an attempt by the court or parties to characterise beneficiaries as having "true" ownership of the trust property, in contrast to the "bare" or "representative" title of the trustee holding on their behalf.[4] As will be seen, this was a view which was later to figure prominently in the judgment of the House of Lords in *Heritable Reversionary.*

1 *Heritable Reversionary Company Ltd v Millar* (1891) 18 R 1166 (Inner House), (1892) 19 R (HL) 43, [1892] AC 598 (House of Lords).

2 Summarised at paras 8-49 and 8-50 above.

3 See e.g. *Wylie v Duncan* (1803) Mor 10269, (1803) 3 Ross LC 134 per Lord Meadowbank at 137; *Thomson v Douglas, Heron and Company* (1786) Mor 10229 and 10299, (1786) 3 Ross LC 132.

4 See e.g. *Thomson* at 10229 (argument for the pursuer: "The right of the disponee was in the nature of a trust; the property of the estate still remaining substantially, in the disponer"); *Dingwall v McCombie* (1822) 1 S 433 (NE), 6 June 1822 FC ("Everyone knew that the share belonged to [the beneficiary]"), per Lord Succoth and Lord Balgray at 433; *Gordon v Cheyne* (1824) 2 S 566 (NE), 5 February 1824 FC; *Lindsay v Giles* (1844) 6 D 771 per the Lord Justice-Clerk (Hope) at 801. Outside the context of sequestration see e.g. *Redfearn v Somervail* (1805) Mor App "Personal and Real" No 3 at 9 (argument for the pursuer: "When any person holds a subject in his possession, which is not his property, no act of his can transfer the property to another, to the prejudice of the real owner. [. . .] The right to this stock never belonged to [the trustee], but was a mere trust in him from the beginning, for his creditors"); *Mackay v Ambrose* (1829) 7 S 699 at 701-02 (argument for the pursuer); *Scott v Miller* (1832) 11 S 21 at 22 (argument for the defenders); *Gibson v Forbes* (1833) 11 S 916 per the Lord Ordinary at 922; *Bryson v Crawford* (1834) 12 S 937 per the Lord President (Hope) at 941; *Barron v National Bank of Scotland* (1852) 14 D 565 per Lord Cuninghame at 572; *Anstruther v Mitchell and Cullen* (1857) 19 D 674 per Lord Cowan at 684; *Union Bank of Scotland v National Bank of Scotland* (1886) 14 R (HL).

9-04. From initial suggestions in the first half of the nineteenth century, the notion that a special analysis might apply to property held on trust gained increasing prominence. This trend can usefully be exemplified by two decisions. The first, *Fleeming v Howden*,[5] was similar in its circumstances to those earlier cases which considered the liability of a creditor to an unrecorded entail.[6] In *Fleeming*, the terms of an entail (recorded in the Register of Sasines but not in the Register of Entails) provided that, if the proprietor of the entailed lands succeeded to a peerage, the lands should pass to the next heir. At the time of *Fleeming* the proprietor, Elphinstone (previously John Fleeming), gained a peerage but, before the lands could be passed to the next heir, Cornwallis Fleeming, Elphinstone was sequestrated. As the entail was unrecorded Fleeming had, at best, a personal right against Elphinstone for transfer of the lands.[7] The principal question which arose was thus a familiar one: was that personal right exigible against Howden, Elphinstone's trustee in sequestration? A majority of the Inner House, relying on the principle established by the earlier decisions, gave its answer in the negative. Elphinstone's creditors were entitled to rely on the state of the records showing that he was proprietor, and need pay no heed to any contingent personal obligation:

> The case to be dealt with is that of the feudal owner of a property contracting debts, in whose title there is a personal obligation to denude. [. . .]. The entail not being recorded, the owner was fee-simple proprietor in all questions with creditors and singular successors. [. . .] Yet it is contended that creditors, contracting on the faith and credit of the real right vested in their debtor . . . are open to have their legal right to attach their debtor's real estate destroyed, by the personal condition attached to the destination clause, that in a certain event the estate is to devolve on the next heir of the destination. The reasoning leading to that result appears to me, as at present advised, to be not a little anomalous; and I know of no authority to sanction it.[8]

A rather different result was reached on appeal to the House of Lords. At that stage Fleeming revived an argument which had been rejected by the majority in the Inner House,[9] namely, that the clause requiring the entailed lands to be

[5] *Fleeming v Howden* (1867) 5 M 658, (1868) 7 M 79 (for initial and subsequent proceedings in the Inner House, reported as *Howden v Fleeming*), (1868) 6 M (HL) 113, (1866–69) LR 1 Sc 372 (House of Lords). See also the separate proceedings reported as (1867) 5 M 676 and (1868) 6 M 782.

[6] See paras 8-25 and 8-27 above for a discussion of *Douglas v Stewarts* (1765) Mor 15616, (1765) 3 Ross LC 174; *Douglas v Arresting Creditors of Kelhead* (1765) 3 Ross LC 169, (1765) 5 Bro Sup 907; and *Russell v Ross' Creditors* (1792) Mor 10300, (1792) 3 Ross LC 177.

[7] See the discussion at para 8-25 n 59.

[8] *Fleeming* (1867) 5 M 658 per Lord Cowan at 668. See also the Lord Justice-Clerk (Inglis) at 665 and Lord Neaves at 674. Cf. the dissent of Lord Benholme at 670.

[9] *Fleeming* (1867) 5 M 658 per the Lord Justice-Clerk (Inglis) at 664 and Lord Neaves at 674. Cf. Lord Benholme at 671: "from the moment of the devolution [Elphinstone], though feudally vested in the estate till his death, was a mere hand, a mere trustee. [. . .] A trustee is vested in an estate, but he is vested in trust. Though he has no proprietary interest in the estate, he is feudally vested as trustee".

transferred to the next heir operated to create a trust in Fleeming's favour. That argument was accepted by the House of Lords,[10] which held that Elphinstone's creditors could have no recourse to property held on trust. Importantly for present purposes, that conclusion was reached not on the basis that Fleeming's personal right was exigible against Howden but because the effect of the trust was to make Fleeming the true owner of the trust property:

> [T]he clause of devolution (as it is called here) was one which was of the quality of the right which [Elphinstone] possessed in the estate, and that from the time that that clause became operative by his succeeding to the peerage, the estate was no longer to be regarded as his property. He held it under the feudal title, but he held it merely because the title had been so made up, but made up with the quality to which I have alluded. And from that time forward the real property in the estate belonged to the party to whom it had devolved, and he only held the feudal title as trustee for the benefit of that party. That being so, I think it would follow that debts contracted by him subsequently to that date could not be made chargeable on the estate.[11]

Though undoubtedly marking a departure from the established position of a personal creditor of the trustee seeking to take trust property, *Fleeming* might still be reconciled with that position on the basis that the trust in question was patent: the devolution clause appeared in the title of the entailed property and thus it might be contended that the trust which that clause created was also, effectively, registered in the Register of Sasines.[12] Nevertheless, the decision of the House of Lords came perilously close to finding that property held on a latent trust was immune from the trustee's creditors.

[10] *Fleeming* (1868) 6 M (HL) 113 per Lord Westbury at 121: "an obligation to do an act with respect to property creates a trust; and if a fiar bound to fulfil an obligation acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled." As a general proposition, Lord Westbury's statement has been much criticised: see e.g. GL Gretton, "Up there in the Begriffshimmel?", in L Smith (ed), *The Worlds of the Trust* (2013) 524 at 543; RG Anderson, "Fraud on transfer and on insolvency: ta. . .ta. . .tantum et tale?" (2007) 11 Edin LR 187 at 194 n 57. See also the criticism in *Heritable Reversionary Company Ltd v Millar* (1891) 18 R 1166 per the Lord President (Inglis) at 1184 ("I cannot see how it is possible in any view to reconcile the dicta of Lord Westbury with the judgment pronounced by the Lord Chancellor and Lord Chelmsford in [*Fleeming*], and still less are his dicta reconcilable with the precise terms of the Bankruptcy [Scotland] Act of 1856."); *Heritable Reversionary Company Ltd v Millar* (1892) 19 R (HL) 43 per Lord Watson at 49.

[11] *Fleeming* (1868) 6 M (HL) 113 per Lord Colonsay at 122. See also per Lord Westbury at 121: "The creditors cannot attach or take in execution any estate of which the bankrupt is a trustee. They can attach such interest only as the bankrupt is beneficially entitled to." See also Lord Cranworth at 119 and Lord Chelmsford at 120.

[12] Indeed this appears to have been the basis of the decision of the House of Lords: see e.g. Lord Colonsay at 123, Lord Westbury at 122, and Lord Cranworth at 118. The same view was to be taken by those judges in *Heritable Reversionary* opposed to the recognition of an effective latent trust: see e.g. para 9-10 and n 38 below.

9-05. The second decision of significance prior to *Heritable Reversionary* is *Watson v Duncan*.[13] In that case a shipbuilder, John Watson senior, sought to transfer shares in a ship to his son, John Watson junior. That transfer was effected by way of a bill of sale which was executed and delivered to Watson junior. The bill was not, however, registered in the shipping register with the result that Watson senior remained on the register as proprietor.[14] When Watson senior was sequestrated, Watson junior argued that he was entitled to the shares as the true owner and beneficiary of a trust of which his father was trustee.[15] The court agreed and, relying on the principle of *tantum et tale,* held Watson junior entitled to the shares as the party beneficially interested therein:

> There is nothing in [the statutory] provisions which strikes at the validity of this transaction, and unless some other ground for the trustee's claim can be stated he cannot get the benefit of these shares for those whom he represents. But no other ground has been pleaded, except that a trustee in a sequestration is in the same position with any individual onerous purchaser or assignee, and therefore entitled to cut out the real owner. That, however, is not so at all. The trustee in a sequestration takes the moveable estate of a bankrupt *tantum et tale* as it was in the bankrupt, and subject to all equitable exceptions pleadable against the bankrupt.[16]

In its seeming acceptance that registered trust property (that is, the shares in the ship) might enjoy protection in the insolvency of the trustee, *Watson* might appear more difficult than *Fleeming* to reconcile with the earlier position on protection from creditors. The case was not, however, a straightforward divergence from that position. Thus the Lord President (Inglis) suggested that the protection of the shares in the insolvency of Watson senior rested upon an interpretation of the Merchant Shipping Acts, allowing the "property" in those shares to pass upon execution and delivery of a bill of sale.[17] Nevertheless, the willingness on the part of the court to give effect to Watson junior's latent right can be seen as a further step towards the recognition of an effective latent trust in respect of registered property. Having reviewed how that position was reached in two specialist contexts, it is now possible to examine how in *Heritable Reversionary* the principle was extended to trusts in general.

[13] *Watson v Duncan* (1879) 6 R 1247.

[14] According to the Merchant Shipping Act 1854 (17 & 18 Vict c 104) s 42.

[15] *Watson* at 1249 (argument for the pursuer): "The bankrupt, after granting the bill of sale, could have no higher right than that of a mere trustee for the petitioner, and so the shares in question were not attachable for debt . . . and therefore never vested in the respondent".

[16] *Watson* per Lord Deas at 1252.

[17] *Watson* per the Lord President (Inglis) at 1249–51. A further complicating factor was s 3 of the (then applicable) Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict c 63). That provision recognised "equitable interests" in shares of ships and allowed those interests to be enforced "against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property".

(2) *Heritable Reversionary Company v Millar*

9-06. The facts of *Heritable Reversionary* were relatively uncomplicated and, in particular, were free of the specialities which had characterised earlier cases. In 1882 Daniel McKay, the manager of the Heritable Reversionary Company Ltd, purchased heritable property on the company's behalf. The disposition, duly recorded in the Register of Sasines, was granted in favour of McKay. After ceasing to act as manager of the company in 1886, McKay granted a declaration of trust in favour of the Company whereby he undertook to convey the property to it upon repayment of expenses incurred in relation to the property. The declaration was not registered. In 1890, before any steps were taken to transfer the property to the company, McKay was sequestrated. Both Robert Millar as McKay's trustee in sequestration and the Heritable Reversionary Company as trust beneficiary claimed the sale proceeds of the property. The question of which of the two should prevail came first by way of special case before the Inner House.

(a) Inner House[18]

9-07. At the stage of the Inner House, *Heritable Reversionary* consisted essentially of a re-arguing of many of the points of controversy which had arisen over the past century in relation to the position of a trustee in sequestration. Millar, on the strength of considerable previous authority,[19] argued that McKay's creditors were entitled to rely on the records which disclosed no trust in favour of the Company.[20] Moreover, whatever the effect of *tantum et tale* might be, the doctrine was inapplicable to heritable property.[21] Both of these propositions were disputed by Heritable Reversionary Company[22] although without attempting to disturb the older authorities dealing with the liability of a trustee to latent personal rights of the debtor. Instead, taking its lead from *Fleeming* and *Watson*, the Company contended that the effect of the trust was to make the beneficiary truly the owner of the land with the result that it was not within the

[18] *Heritable Reversionary Company v Millar (McKay's Trustee)* (1891) 18 R 1166.

[19] Including, *inter alia*, *Wylie v Duncan* (1803) Mor 10269, (1803) 3 Ross LC 134; *Russell v Ross' Creditors* (1792) Mor 10300, (1792) 3 Ross LC 177; *Mitchells v Ferguson* (1781) Mor 10296, (1781) 3 Ross LC 102; *Paul v Jeffrey* (1831) 9 S 667, (1831) 10 S 75, (1835) 1 Sh & Macl 767; and *Mansfield v Walker's Trustees* (1833) 11 S 813, (1833) 3 Ross LC 139, (1835) 6 ER 1472, (1835) 3 Cl & F 362, (1835) 1 Sh & Macl 203.

[20] *Heritable Reversionary* (1891) 18 R 1166 at 1169.

[21] *Heritable Reversionary* (1891) 18 R 1166 at 1169.

[22] *Heritable Reversionary* (1891) 18 R 1166 at 1168: "It was for [purchasers'] protection that the system of public records and the efficacy which attached to them had been introduced. There was justice in according absolute safety to a purchaser or to a mortgagee who bought or lent on the faith of the records. The case of an ordinary creditor was distinct. He only trusted to the personal credit of his debtor, and knew nothing of the state of any title-deeds which he might happen to have."

"property" of the bankrupt vested in the trustee.[23] A notable difference in the submissions of the parties lay in the Company's reliance on considerations of policy in favour of protection of trust property from the personal creditors of the trustee. As counsel for the Company argued,

> There was no question that if equitable considerations were to prevail, the subjects belonged to [the Company], and they were entitled to the surplus.[24]

Such considerations should prevail even if contrary to legal principle.[25]

9-08. Millar's argument was accepted by the majority of the First Division and the settled position reaffirmed: creditors were entitled to rely on the state of the records and did not take *tantum et tale*.[26] Moreover there was, in the view of the court, no justification for holding the beneficiary's interest as anything other than a personal right against the trustee:

> It has been said . . . that there is a material distinction between the case of a personal obligation arising in any other way and a personal obligation arising from a trust reposed by the true owner of land in the ostensible owner. I confess I am unable to see any solid ground of distinction between these two cases. [. . .] The true distinction is between those obligations which by their constitution are merely personal, and those, on the other hand, which have . . . been expressed in the title to land.[27]

Alongside this affirmation of the traditional view there came a rejection of the authorities to the contrary relied upon by the Company. Thus *Fleeming* was distinguished on the basis that it dealt with a patent, not a latent, trust;[28] *Watson* was seemingly passed over because it related, as Millar had argued, to statutory particularities.[29] Especially in contention was the decision in *Thomson v Douglas*, *Heron and Company*[30] which, as discussed earlier, appeared to contradict previous authorities holding that creditors did not take *tantum et*

[23] *Heritable Reversionary* (1891) 18 R 1166 at 1168.

[24] *Heritable Reversionary* (1891) 18 R 1166 at 1168. No countervailing arguments of policy (on the basis of, for example, parity of creditors) were advanced by Millar.

[25] *Heritable Reversionary* (1891) 18 R 1166 at 1168: "in view of the fact that, if Professor Bell was right in his interpretation of these cases [holding trust property should enjoy no protection] it would lead, as in this case, to the greatest injustice, they were worthy of reconsideration".

[26] *Heritable Reversionary* (1891) 18 R 1166 per Lord Adam at 1170: "the doctrine of *tantum et tale* has no application in the case of real rights perfected by sasine. I have always understood that any person, whether creditor or purchaser, dealing with a proprietor infeft, was entitled to rely on the public records, and was not affected by any qualification, burden, or condition on the real right not there appearing. It appears to me that to give effect to the claim of the Reversionary Company would be to violate this well-settled principle." Also per Lord Kinnear at 1180.

[27] *Heritable Reversionary* (1891) 18 R 1166 per Lord Adam at 1180.

[28] *Heritable Reversionary* (1891) 18 R 1166 per Lord Adam at 1171 and Lord Kinnear at 1181.

[29] See e.g. *Heritable Reversionary* (1891) 18 R 1166 at 1169.

[30] *Thomson v Douglas, Heron and Company* (1786) Mor 10229 and 10299, (1786) 3 Ross LC 132.

tale. The case was rejected by the majority (with considerable justification)[31] as having been wrongly decided.[32] With these authorities considered and the general principles affirmed, the court held Millar was entitled to the property at issue.

9-09. Millar's success was not total. One member of the court, Lord McLaren, dissented firmly from the conclusions of the majority. As well as rejecting the cases favouring Millar, Lord McLaren was clearly sympathetic to Heritable Reversionary Company's arguments on *tantum et tale* and reliance upon the records[33] as well as considerations of policy.[34] And although he did not go so far as a full endorsement of the "true ownership" view advanced by the Company, Lord McLaren's dissent came close to this in its description of a trustee as having merely the "administrative title" to the trust property.[35] It was a version of that theory which was ultimately to prevail in the House of Lords.

(b) House of Lords[36]

9-10. The arguments of both Millar and Heritable Reversionary Company were hardly modified on appeal. Nevertheless, the unanimous finding of the House of Lords that the Company should prevail, as well as the justification offered for that conclusion, were radically different from the results reached by the Inner House. The most important change was an endorsement of the view that it was the beneficiary, not the trustee, which had true ownership of the trust property. Though shared by all members of the court, that approach is most evident from the judgment of Lord Watson:

> I think it may be useful to consider the nature of the relations existing between a solvent trustee who is feudally vested in the heritable estate of the trust by a title

[31] See para 8-27 above.

[32] *Heritable Reversionary* (1891) 18 R 1166 per Lord Kinnear at 1177–79.

[33] See e.g. *Heritable Reversionary* (1891) 18 R 1166 per Lord McLaren at 1176: "Creditors in general do not give credit to a bankrupt in reliance on any supposed presumption that property standing in his name is his private property. Unless they are going to advance money on heritable security they know nothing of his title-deeds, and trust only to his personal credit. The security offered by our system of records is an excellent thing to those who desire to take advantage of it, and I should be the last person to wish to impair its efficiency. But it is not at all involved in the present case." Also per Lord McLaren at 1173.

[34] See e.g. *Heritable Reversionary* (1891) 18 R 1166 per Lord McLaren at 1172: "If it were possible to approach this question uninfluenced by the supposed tendency of previous decisions and professional impressions, I can hardly conceive that a Court of justice would give countenance to the proposal to divide trust property amongst the creditors of a trustee."

[35] *Heritable Reversionary* (1891) 18 R 1166 per Lord McLaren at 1176. As previously mentioned, McLaren was, in his extrajudicial capacity, a supporter of the proprietary conception of the trust: see para 2-25 above.

[36] *Heritable Reversionary Company Ltd v Millar* (1892) 19 R (HL) 43, [1892] AC 598.

> *ex facie* absolute, and his cestui que trust,[37] whose right rests upon a latent backbond. As between them there can, in my opinion, be no doubt that according to the law of Scotland the one, though possessed of the legal title, and being the apparent owner, is in reality a bare trustee; and that the other, to whom the whole beneficial interest belongs, is the true owner.[38]

An important implication of this approach was the abandonment of an analysis based on *tantum et tale*;[39] for there was no need to have recourse to the notion that trustees in sequestration took subject to the personal rights of their debtor when, in the court's more radical account, the trustee was simply unable to be vested in property which the debtor did not truly own.

9-11. At this juncture, it is important to note that, while the assertion that the beneficiary had the true ownership of the trust property was an important premise of the court's decision in favour of the Company, it was not the only ground for that decision. Thus the judgment was also framed on the basis that the property could not be taken in the trustee's bankruptcy because that trustee held merely an "apparent title" to the land (or indeed that the property did not belong to the trustee).[40] *Heritable Reversionary* thus suggested that, at least to some extent, the question of protection from creditors might turn on the way the trust property was held rather than simply the nature of the beneficiary's right.[41] That insight was, as will be seen, significantly developed in the new conception of the trust which forms the end point of this discussion.[42]

9-12. Nevertheless, the view that the beneficiary held a proprietary right in the trust property was the principal basis of the decision in *Heritable Reversionary*. That view created several immediate difficulties which the court sought to pre-empt. The first was that the trustee appeared for all purposes to be owner of the trust property: if ownership rested, wholly or partly, in the beneficiary, how could a trustee (even if acting in breach of trust) confer a good title on a third party? This point, advanced on the strength of the settled authority of *Redfearn*

[37] I.e. trust beneficiary.

[38] *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Watson at 46–47; per Lord Herschell at 43 ("It seems beyond dispute that as between M'Kay and the appellants he was a bare trustee, and they were the true and beneficial owners of the property. I do not understand it to be questioned that the law of Scotland recognises such a relationship, or that, if it appeared *ex facie* of the dispositions, the beneficiary would be regarded as the true owner as against all persons and for all purposes"); per Lord Macnaghten at 53–54; per Lord Field at 54.

[39] *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Watson at 48: "the doctrine of *tantum et tale* has no application".

[40] *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Field at 55 and Lord Watson at 49 ("An apparent title to land or personal estate, carrying no real right of property with it, does not, in the ordinary or in any true legal sense, make such land or personal estate the property of the person who holds the title.").

[41] The same idea finds expression in Lord McLaren's view that the trustee held "administrative title" to the trust property: see para 9-09 above.

[42] See paras 9-21ff below.

v Somervail,[43] was disposed of on the basis that the beneficiary of a latent trust would be personally barred from challenging the title of a transferee.[44] A second difficulty was the significant volume of authority, including such important decisions as *Mitchells*,[45] *Wylie*[46] and *Mansfield*,[47] which indicated that personal obligations of a debtor (including those owed as trustee) were not exigible against creditors. The response of the House of Lords, following the earlier moves made in cases such as *Dingwall*,[48] *Gordon*,[49] *Fleeming*[50] and *Watson*,[51] was to characterise trusts as distinct from personal obligations of other kinds such that the earlier authorities were inapplicable:

> *Mitchells v Ferguson* . . . *Wylie v Duncan* . . . and *Mansfield v Walker's Trustees* . . . were brought fully under your Lordships' notice by counsel; but, in my opinion, they have little, if any, bearing upon the point which your Lordships have to decide, because in all of them the competition related, not to estate held by the bankrupt under a bare trust, but to estate of which he was the beneficial proprietor.[52]

Authoritatively and for the first time, trusts were to be treated as distinct from personal obligations, since only trusts resulted in the removal of true ownership of the trust property from the trustee and the vesting of that true ownership in the beneficiary. Thus the result in *Heritable Reversionary* would not be achieved, following the reasoning of the House of Lords, had the Company held a merely personal right against McKay:

> [A] personal obligation to convey heritable estate, undertaken by one who is the beneficial as well as the feudal owner, does not, according to the law of Scotland, denude him of his beneficial interest, or confer upon the person to whom it was contracted either the character or the rights of a trust beneficiary.[53]

[43] *Redfearn v Somervail* (1813) 1 Dow 50, (1813) 5 Pat App 707. *Redfearn* is considered in detail at para 3-35 above.

[44] *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Watson at 47: "It must, however, be kept in view that the validity of a right acquired in such circumstances by a bona fide disponee for value does not rest upon the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that 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 considerations under contracts with his fraudulent trustee." Also per Lord Herschell at 44.

[45] *Mitchells v Ferguson* (1781) Mor 10296, (1781) 3 Ross LC 102.

[46] *Wylie v Duncan* (1803) Mor 10269, (1803) 3 Ross LC 134.

[47] *Mansfield v Walker's Trustees* (1833) 11 S 813, (1833) 3 Ross LC 139, (1835) 6 ER 1472, (1835) 3 Cl & F 362, (1835) 1 Sh & Macl 203.

[48] *Dingwall v McCombie* (1822) 1 S 433 (NE), 6 June 1822 FC.

[49] *Gordon v Cheyne* (1824) 2 S 566 (NE), 5 February 1824 FC.

[50] *Fleeming v Howden* (1867) 5 M 658, (1868) 7 M 79, (1868) 6 M (HL) 113, (1866-69) LR 1 Sc 372.

[51] *Watson v Duncan* (1879) 6 R 1247.

[52] *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Watson at 48 and Lord Herschell at 44.

[53] *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Watson at 51.

As well as its differentiation of trusts from personal obligations, the court found further justification for its conclusions in the policy considerations in favour of protecting trust property which had featured in the court below.[54]

9-13. In the final analysis then, it was the beneficiary, Heritable Reversionary Company, which was seen as having the true ownership of the trust property. That ownership was not within the "property" of McKay (who held only apparent or administrative title), and so was unable to vest in Millar as McKay's trustee in sequestration. The Company had thus the preferable claim, and judgment was given in its favour.

(c) Heritable Reversionary *and English law*

9-14. Though not explicitly recognised in the judgment of the House of Lords,[55] the influence of the equivalent rules in the English law of trusts appears to have been significant. For a full understanding of the decision, therefore, it is helpful briefly to examine that equivalent position before tracing its influence in Scots law and its eventual culmination in *Heritable Reversionary.*

9-15. By the time of *Heritable Reversionary*, the notion that property held on trust was secure from the personal creditors of the trustee had long been recognised in English law.[56] It appears that, although the rule was a matter of some controversy, it was established both in relation to judgment creditors and those claiming in bankruptcy by the late seventeenth or early eighteenth century.[57] Significantly for present purposes, the rationale commonly provided for the rule was that creditors should have no recourse to the trust assets because

[54] See e.g. *Heritable Reversionary* (1892) 19 R (HL) 43 per Lord Macnaghten at 52: "My Lords, if this House were compelled to uphold the decision under appeal, I rather think I should be inclined to doubt whether the law of bankruptcy in Scotland was in a condition altogether satisfactory."

[55] Thus the judgment of the House of Lords did not feature extensive use of English law authorities. Indeed, only three non-Scottish cases were cited, all by Lord Field: *Hill v East & West India Dock Co* (1884) 9 App Cas 448, *Railton v Wood* (1890) 15 App Cas 363, and *Ex parte Walton* (1881) 17 Ch D 746 (cited erroneously as *Ex parte Waller*), one of which (*Railton*) was a Privy Council decision originating from Australia. All three cases related to the interpretation of the equivalent bankruptcy statute.

[56] For the modern rule, see J McGhee et al (eds), *Snell's Equity* (34th edn, 2019) para 2-005; Insolvency Act 1986 s 283(3)(a).

[57] FW Maitland, *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (1909) 112ff; J Morley, "The Common Law Corporation: The Power of the Trust in Anglo-American Business History" (2016) 8 Columbia LR 2145 at 2153–54 and n 45. The most important developments seem to have taken place during the tenure of Lord Nottingham who gave judgment in several formative cases. Thus in *Burgh v Francis* (1673) 23 ER 16, (1673) Rep T Finch 28 an equitable mortgagee was preferred to judgment creditors seeking to enforce against the legal estate; in *Medley v Martin* (1673) 23 ER 33, (1673) Rep T Finch 63 judgment creditors were held unable to execute against property held in trust by their debtor.

those assets belonged in equity not to the trustee but to the beneficiary.[58] Thus in an early case, *Finch v Earl of Winchelsea*,[59] the beneficiary of a trust of land sought to resist the claims of creditors of the trustee in the following terms:

> [The late Earl] was but a trustee for the uses in the settlement so agreed to be made as aforesaid; and if a trustee confessed a judgment or statute, tho' at law these were liens upon the estate, yet, in equity, they would not affect it; because the estate in equity would not belong to the trustee, but to the *cestuique trust*.[60]

Although the beneficiaries were unsuccessful,[61] the court accepted this argument in general terms and held trust property immune from the creditors of the trustee.[62] The same reasoning would later be used to support the protection of trust property from creditors claiming in the bankruptcy of a trustee;[63] eventually, in the second half of the nineteenth century, this would become the subject of a statutory provision.[64]

9-16. The first indications of the influence of this rationale on Scots law are evident nearly seventy years prior to *Heritable Reversionary* in the case of *Gordon v Cheyne*.[65] As previously mentioned,[66] in *Gordon* an English

[58] Indeed the recognition of this protection was an important step in the process by which English law came to envisage a concurrence of ownership of the trust in law and equity between the trustee and beneficiary respectively: see Maitland, *Equity* 117.

[59] *Finch v Earl of Winchelsea* (1715) 1 P Wms 277, (1715) 24 ER 387, cited in Maitland, *Equity* 117 n 1.

[60] *Finch* at 278. The trust had arisen after the Earl had agreed to settle the property on the plaintiff after having mortgaged part of the land. Although the trust was never formalised, the plaintiff sought to rely upon the rule that equity would supply the defective formalities and therefore make the Earl a trustee.

[61] Apparently on the basis that inadequate consideration had been provided for the agreement that the beneficiary sought to have executed in equity as a trust: see *Finch* per Cowper LC at 283: "In the principal case, the consideration was not adequate; for the [plaintiff], with whom the agreement was made, parted with no money, having only made a conditional surrender."

[62] *Finch* at 278–79: "That if one articled to buy an estate, and paid his purchase-money, and afterwards the person who agreed to sell, acknowledged a judgment or statute to a third person, who *had no notice*, yet this judgment should not, in equity, affect the estate; because from the time of the articles, and payment of the money, the person agreeing to sell would be only a trustee for the intended purchaser; which was admitted, and affirmed by the Lord Chancellor." To similar effect see *Medley v Martin* (1673) 23 ER 33, (1673) Rep T Finch 63*; Bennett v Davis* (1725) 24 ER 746, (1725) 2 P Wms 316; *Taylor v Wheeler* (1706) 23 ER 968, (1706) 2 Vern 564.

[63] See e.g. *Copeman v Gallant* (1716) 24 ER 404, (1716) 1 P Wms 314 at 318 (argument for the plaintiff); *Scott v Surman* (1742) Willes 400, (1742) 125 ER 1235 per Willes LCJ at 401ff; *Ex parte Marsh* (1744) 1 Atkyns 158, (1744) 26 ER 102 per Lord Hardwicke LC at 159; *Winch v Keeley* (1787) 99 ER 1284, (1787) 1 Term Rep 619 at 622 (argument for the defendant); *Ex parte Martin* (1815) 34 ER 598, (1815) 19 Ves Jun 492 per Lord Eldon LC at 494.

[64] Bankruptcy Act 1869 (32 & 33 Vict c 71) s 15(1).

[65] *Gordon v Cheyne* (1824) 2 S 566 (NE), 5 February 1824 FC.

[66] See para 8-39 above.

authority[67] was cited for the first time in support of the proposition that trust property should be protected in the bankruptcy of the trustee.[68] It was in *Gordon*, too, that the first indications of a view of the beneficiary as the true owner of the trust property can be detected.[69] After *Gordon* that view re-emerged sporadically[70] but came particularly to the fore in the judgment of the House of Lords in *Fleeming v Howden*.[71] It comes as little surprise, then, that both *Gordon* and *Fleeming* featured prominently in the decision of the House of Lords in *Heritable Reversionar*y to the effect that the true ownership of trust property rested with the beneficiary. On this analysis, it is difficult to see that decision as anything other than a (tacit) application of the equivalent principles and rationale of English law, in places reinforced by anomalous earlier decisions from Scotland and by considerations of policy. At least initially, however, none of this affected the reception of *Heritable Reversionary* in Scots law.

(3) The Impact of *Heritable Reversionary*

9-17. The decision of the House of Lords in *Heritable Reversionary* had obvious and significant implications for the immunity of trust property from creditors. The old position by which only certain types of property enjoyed protection, and indeed only such property as was held under a patent trust, was swept away. All trust property, held under a trust of any kind, was now protected in the bankruptcy of the trustee.[72] Furthermore, though *Heritable Reversionary* was concerned with sequestration, the effect of the decision was also to confer protection against creditors exercising diligence, since such creditors could have no access to property of which the debtor was not the "true" owner.[73]

[67] *Ex parte Chion* (1721) 3 P Wms 187.

[68] See para 8-39 n 104.

[69] See para 8-39 n 105.

[70] See the cases cited at n 4 above.

[71] *Fleeming v Howden* (1867) 5 M 658, (1868) 7 M 79, (1868) 6 M (HL) 113, (1866–69) LR 1 Sc 372.

[72] For a statement of the rule promulgated shortly after *Heritable Reversionary*, see e.g. H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (3rd edn by WJ Cullen, 1903) 276: "As it is only the property of the bankrupt in the true sense of beneficial interest which passes to the trustee, property held by him in trust does not pass, whether the title on which it is held be one *ex facie* qualified by the trust or *ex facie* absolute." See also W Wallace, *The Law of Bankruptcy in Scotland* (1914) 233ff.

[73] JG Stewart, *A Treatise on the Law of Diligence* (1898) 67–68 ("whether the trust be *ex facie* of the trustee's title or latent, his general creditors or his trustee in bankruptcy cannot attach what does not in point of fact belong to him"); GL Gretton, "Diligence", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 113. A similar analysis is applicable to the insolvency procedures relevant to a corporate trustee. Thus in (for example) liquidation, where it is uncommon for ownership of the property of a bankrupt company to pass to the liquidator, the decision in *Heritable Reversionary* would prevent the latter from dealing with trust property on the basis that the insolvent corporate trustee was not its true owner. In the uncommon circumstance of a liquidator seeking to be vested in a company's property under the

9-18. It might be thought that the radical departure from the previous position – as well as the means by which that departure was achieved – would provoke a negative reaction to *Heritable Reversionary*. The possible charge against the House of Lords can usefully be illustrated by an article by Richard Brown (tellingly entitled "The Faith of the Records")[74] published shortly after the decision:

> We have long been accustomed to look upon our Scottish system of land registers as ideally perfect, and to view with a touch of contempt the partial and imperfect efforts in the same direction of our English neighbours. "Some inventions", says Sir George Mackenzie, "flourish more in one country than another, nature allowing no universal excellency; and God designing to gratify every country He hath created; so Scotland hath above all other nations, by a serious and long experience, obviated all fraud by their public registers."
>
> This patriotic outburst was occasioned by a violent attack on our records by an English writer, who contemptuously spoke of them as machinery for registering the usurious gains of money-lenders, and attempted to trace their origin from the registers of the Italian brokers of the twelfth century. The recent judgment of the House of Lords in the case of *The Heritable Reversionary Company v M'Kay's Trustee* may perhaps be looked upon by some as another blow from the same quarter. We are, in effect, told by the House of Lords that in Scotland creditors have hitherto been placed by means of the registers on a platform of superiority they should never have occupied, and that there has been created on their behalf a species of statutory reputed ownership which the statutes themselves do not warrant.[75]

In fact the author was to conclude that, rather than undermine the system of registration, the decision of the House of Lords upheld it. Only purchasers and secured creditors were entitled to rely on the state of the records; unsecured creditors were not and thus could justly be postponed to a trust beneficiary.[76] Further, even if the decision was not strictly in accordance with principle, it was justified by compelling arguments of policy in favour of the protection of trust property on the bankruptcy of the trustee.[77] Reference to those considerations

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Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict c 101) s 25 or the Insolvency Act 1986 s 145, that vesting would, it must be assumed, exclude property held in trust.

74 R Brown, "The Faith of the Records" (1893) 5 JR 63.

75 Brown, "Faith of the Records" at 63.

76 Brown, "Faith of the Records" at 64: "The creditors in effect maintained that they allowed the debtor credit on the faith of the records, and that anyone permitting his property to appear in the public registers in the debtor's name, must take the risk of having it applied in discharge of the debtor's obligations. The obvious answer is that de facto the general creditors do nothing of the kind. It never occurs to the butcher or the baker to employ a searcher of the records before allowing their debtor to run up an account". Brown does not, however, explain why the same analysis should not apply to a trust beneficiary who, after all, would have been considered a general creditor prior to *Heritable Reversionary*.

77 Brown, "Faith of the Records" at 66: "Apart from previous decisions, a strong case for reversal was presented, both on equitable and legal grounds, and the effect of the judgment would not

would come to characterise the essentially positive reaction to *Heritable Reversionary* which was looked upon as a pragmatic and equitable decision, albeit an innovative one.[78]

9-19. Given the favourable reception of *Heritable Reversionary*, it is unsurprising that subsequent reconsiderations mounted no challenge to its rule or rationale but sought only to clarify its scope. Thus in *Forbes' Trustees v MacLeod*,[79] *Heritable Reversionary* was held to extend to an *ex facie* absolute disposition qualified by a back-bond of trust.[80] Subsequently, in *Bank of Scotland v Liquidators of Hutchison, Main, & Co*,[81] the distinction between trusts and other personal obligations was accepted, and a debtor's obligation to convey accordingly held not to be exigible against a creditor.[82] *Heritable Reversionary* was therefore taken as the leading authority in support of the protection of trust property for close to a century[83] before the principle was placed on a statutory footing in 1985.[84]

9-20. With this settled position, the development of the law was nearly complete. Before drawing conclusions, however, it is necessary to take account of one final development which served as a change, not of rule but of rationale.

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have been lessened had the contradictory nature of such decisions been fully recognised, and their authority discounted."

78 See e.g. Brown, "Faith of the Records" at 67 ("The result in the case of *M'Kay's Trustee* is that an inequitable principle, more or less recognised by the common law, has been brought into accord with modern ideas by means of the common law itself"); NJD Kennedy, "Lord McLaren" (1910–11) 22 JR 181 at 194 ("*Heritable Reversionary* . . . raised a serious conflict between feudal principle and obvious equity"); Anon, "Anglo-Scottish Bankruptcy Contrasts" (1918) 34 Scottish Law Review 33 at 35 ("As is well known, Lord M'Laren's dissent [in *Heritable Reversionary*] was sustained in the House of Lords . . . with just and beneficial results."); JC Lorimer, "*Tantum et Tale* in Scots Bankruptcy Law" (1914) 26 JR 429 at 432 ("There is no doubt that [*Heritable Reversionary*] was received by the Bench and the profession with surprise [. . .] The judgment of the House of Lords has of course been unhesitatingly accepted").

79 *Forbes' Trustees v MacLeod* (1898) 25 R 1012. To similar effect see *Colquhoun's Trustee v Campbell's Trustees* (1902) 4 F 739.

80 *Forbes' Trustees* per Lord McLaren at 1015.

81 *Bank of Scotland v Liquidators of Hutchison, Main & Co* 1913 SC 255 (Inner House), 1914 SC (HL) 1 (House of Lords).

82 *Bank of Scotland* 1913 SC 255 per Lord Salvesen at 263. See also *Bank of Scotland* 1914 SC (HL) 1 per Lord Shaw at 15–16.

83 See e.g. *William Morton & Co v Muir Brothers & Co* 1907 SC 1211 per Lord McLaren at 1225; *Bank of Scotland v MacLeod* 1914 SC (HL) 1 per Lord Shaw at 335; *National Bank of Glasgow Nominees Ltd v Adamson* 1932 SLT 492 per Lord Moncrieff at 495; *Veitchi Co v Crowley Russell & Co* 1972 SC 225 per Lord Hunter at 229; *Gibson v Hunter Home Designs Ltd* 1976 SC 23 per the Lord President (Emslie) at 27.

84 Bankruptcy (Scotland) Act 1985 s 33(1)(b). See now Bankruptcy (Scotland) Act 2016 s 88(1)(c). As Gretton notes, the rules for diligence and corporate insolvency remain non-statutory: see GL Gretton, "Trusts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 480 at 500.

C. PATRIMONY: A NEW RATIONALE

(1) A conceptual predicament: *Clark's Trustees* (1939)

9-21. Although the most important result of *Heritable Reversionary Company Ltd v Millar*[85] – the protection of all trust property from the personal creditors of the trustee – proved (at least initially)[86] to be uncontroversial, the means by which that result was achieved by the House of Lords soon gave rise to difficulties. The most significant problem was conceptual: with some exceptions,[87] the beneficiary's right had typically been characterised as personal in nature (and, as has been argued, the law preceding *Heritable Reversionary* had developed according to that premise); yet the speeches in the House of Lords appeared to make a proprietary formulation of that right indispensable. This conceptual tension was enhanced by a series of twentieth-century decisions reaffirming that the beneficiary of a trust held no more than a personal right against the trustee.[88] In the best-known of these decisions, *Inland Revenue v Clark's Trustees*,[89] it was sought to levy estate duty on trustees holding shares in a Scottish company on the basis that the vesting of a beneficial interest in a beneficiary of the trust represented a "passing" of "property" in terms of the legislation then in force.[90] To determine if the trustees were in fact liable it was thus necessary to examine the scope and nature of the beneficiary's right. The outcome of that inquiry was, in the view of the Lord President (Lord Normand), that the right was personal in nature:

> When counsel was asked to state what rights of action a beneficiary has by our law to protect his interest in the trust estate, he was obliged to admit that these rights of action were a right to interdict the trustee from committing any breach of trust, and a right by personal action, for example a declarator or an action of accounting against the trustees, to compel them to administer the trust according to its terms. There is also a personal action of damages against the trustees for breach of trust, and it is open to the beneficiary, by suitable procedure in this Court, to bring about a change

[85] (1892) 19 R (HL) 43.

[86] Cf. RG Anderson, "Fraud on transfer and on insolvency: ta. . .ta. . .tantum et tale?" (2007) 11 Edin LR 187 at 204–05, arguing that *Heritable Reversionary* should be reversed such that property held in latent trusts should enjoy no protection from the personal creditors of the trustee.

[87] See e.g. paras 2-24ff above.

[88] See e.g. *Campbell's Trustees v Campbell's Trustees* (1900) 8 SLT 232 per Lord Kyllachy at 233; *Livingstone v Allans* (1900) 3 F 233 per Lord McLaren at 238; *MacLeod's Judicial Factor v Busfield* 1914 SLT 268 per Lord Cullen at 269.

[89] *Inland Revenue v Clark's Trustees* 1939 SC 11. See also *Crerar v Bank of Scotland* 1921 SC 736, 1922 SC (HL) 137, in which it was held that where shares were transferred to a bank as trustee in order to provide security for advances made by the bank, the transferor and beneficiary ceased to have any proprietary interest in the shares and held only a personal right against the trustee bank for retrocession upon repayment.

[90] Finance Act 1894 (57 & 58 Vict c 30) s 2(1).

> of administration of the trust either by a transfer of the administration to new trustees or by transfer of the administration to a judicial factor. But there is no action by which a beneficiary as such can in any way vindicate for himself any of the trust property. [. . .] The result of this is, in my opinion, that the beneficiary's right is nothing more than a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions which it contains.[91]

Though convincing in historical and doctrinal terms, this approach could not easily be reconciled with the proposition that trust property enjoyed protection from personal creditors of the trustee on the basis that the beneficiary was its true owner. That this rule was, by the time of *Clark's Trustees* and comparable decisions, well established and seen as supported by sound considerations of policy served only to compound the difficulty. No resolution was, however, immediately forthcoming and the issue was to continue to trouble Scots law. One of the most important results of this difficulty was the emergence of the view, discussed earlier, that the beneficiary's right could not be seen as wholly personal in nature but rather was better conceptualised as a different or stronger form of personal right[92] (an approach that was also to take hold in South Africa where a similar rule protecting trust property from creditors existed).[93] This view was to prevail, for a time, in Scots law until the emergence of an important reconceptualisation of the trust.

(2) The idea of patrimony

9-22. To explain the view of the Scottish trust which arose towards the end of the twentieth century, it is helpful first to outline an idea which would prove central to that new conception. This is the notion of patrimony, an idea which, in its contemporary development, is most closely associated with the French jurists Aubry and Rau[94] but which has in some form always been part of the civilian tradition.[95] According to Aubry and Rau,[96] every person, natural and

[91] *Clark's Trustees* per the Lord President (Normand) at 22.

[92] See paras 2-28ff above.

[93] See the discussion of the "protected right *in personam*" approach in South African law at para 2-14 above.

[94] C Aubry and F Rau, *Cours de droit civil français d'après la méthode de Zachariae* (4th edn, 1873) vol 6 §§573-583. As its title suggests, Aubry and Rau's work was based on an earlier German work, KS Zachariae, *Handbuch des französischen Civilrechts* (1811). In their treatment of patrimony, however, Aubry and Rau departed from Zachariae's account in important respects including, in particular, by denying the latter's contention that separate patrimonies existed for moveable and immoveable property.

[95] In Roman law, for example, the *peculium* of a child or slave formed a separate fund and comprehended both assets and liabilities.

[96] For a discussion of the idea of patrimony in the work of Aubry and Rau, including an English translation of relevant sections of the *Cours de droit civil*, see N Kasirer, "Translating Part of France's Legal Heritage: Aubry and Rau on the *Patrimoine"*, in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 163; similarly see F Zenati, "Mise en

legal, has a patrimony (*patrimoine*) but no-one has more than one patrimony.[97] The patrimony represents the aggregate of that person's assets and liabilities,[98] and thus current and future patrimonial rights[99] are answerable for obligations contracted by the holder of the patrimony.[100] Conversely, a creditor is entitled to claim only against the contents of the patrimony in which the debt is comprised. Changes in the constitution of a patrimony are accommodated by the doctrine of real subrogation which provides that where assets in a patrimony are used to acquire new property, that new property replaces the original asset as a surrogate.[101] The result is that each patrimony is unaffected by the state of any other patrimony except insofar as bound by obligation thereto.

9-23. That the concept of patrimony might have explanatory value in the context of trusts was the insight of another French theorist, Pierre Lepaulle. Much of Lepaulle's work consisted in attempts to describe and rationalise from a civilian perspective the – as Lepaulle saw it – characteristically common law notion of the trust.[102] Lepaulle's efforts led to the conclusion that the trust

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perspective et perspective de la théorie du patrimoine" (2003) 4 Revue Trimestrielle de Droit Civil 667.

97 Various justifications are offered by Aubry and Rau for the "one person, one patrimony" rule. Doctrinally, the rule was based on the proposition that, since patrimony was an emanation of indivisible legal personality, a patrimony itself could not be divided in the hands of one person: see *Cours de droit civil* §574. As well as resting on questionable foundations in substantive law that rule has, as will be seen, often been broken in service of novel and fruitful applications of the patrimonial concept.

98 Aubry and Rau, *Cours de droit civil* §573: "The patrimony is the aggregate property of a person, envisaged as forming a legal universality. [. . .] Patrimony, considered as an aggregate of property or of monetary value, indicates of itself that property is represented by that value. To determine its content it is essential that the value of liabilities be deducted from that of assets. But in the event that liabilities exceed assets, the patrimony will not cease to exist since it incorporates liabilities just as it incorporates assets."

99 Excluded from the patrimony are, for example, human rights which, as inalienable and ultimately non-economic, are classically considered to fall outside the scope of private law: see Aubry and Rau, *Cours de droit civil* §573. Of course, a violation of such extra-patrimonial rights may give rise to a patrimonial right to pecuniary redress.

100 Aubry and Rau, *Cours de droit civil* §§579–581 where the notion is encapsulated in the maxim *Qui s'oblige, oblige le sien* [he who obliges himself, obliges that which is his own] and in the expression that the patrimony is the *gage commun* [common pledge] of the patrimonial creditors.

101 Aubry and Rau, *Cours de droit civil* §575: "La subrogation réelle est, dans le sens le plus général, une fiction par suite de laquelle un objet vient en remplacer un autre, pour devenir la propriété de la personne à laquelle appartenait ce dernier, et pour revêtir sa nature juridique" [Real subrogation is, in the most general sense, a fiction by virtue of which an object comes to replace another, becoming the property of the person to which the latter belonged and taking on that property's juridical nature].

102 The best-known of these attempts came in P Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscale international* (1932). For a discussion of the role of patrimony in Lepaulle's view of the trust, including a translation of the second chapter of the *Traité*, see A Popovici, "Lepaulle Appropriated", in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 13. See also P Lepaulle, "Civil Law Substitutes for Trusts"

was best conceptualised as a *patrimoine d'affectation*, that is, an ownerless[103] patrimony dedicated (or appropriated) to a particular purpose:

> Trusts appear to us, then, as a segregation of assets from the patrimonium of individuals, and a devotion of such assets to a certain function, a certain end. When property is held in trust, one knows how it is going to be used; its purpose, its raison d'être are determined; while, on the contrary, when property is subjected to private ownership, no one knows what is going to become of it. We may then formulate this first conclusion that a trust is an appropriation of assets; that some one will be in charge of such appropriation and that the whole world must respect it.[104]

The subsequent enactment by a number of civilian jurisdictions[105] of a trust structure in terms of a *patrimoine d'affectation* indicates that Lepaulle's aim of providing a trust intelligible to the civil lawyer was, in some measure, successful. More important for present purposes, however, is the effect of a patrimonial conception of trust on third parties, including creditors. These effects are suggested by Lepaulle's statement above that third parties must respect the holding of property in a trust patrimony. More precisely, the structuring of a trust as a separate patrimony means that a personal creditor of the trustee has no claim to the trust property since that property forms no part of the trustee's private patrimony.[106] Before this approach could be applied to Scots law, however, a final developmental step was necessary.

(1927) 36 Yale LJ 1126; P Lepaulle, "An Outsider 's View Point of the Nature of Trusts" (1928) 14 Cornell LR 52; P Lepaulle, "Les fonctions du 'trust' et les institutions equivalents en droit francais" (1929) 58 Bulletin de la Société de législation comparée 312; P Lepaulle, "Les éléments essentiels du trust" (1930) Bulletin de la Société de législation comparée 467; P Lepaulle, "Trusts and the Civil Law" (1933) 15 Journal of Comparative Legislation and International Law 18; P Lepaulle, "La notion de 'trust' et ses applications dans les divers systèmes juridiques", in *Actes du Congrès international de droit privé* vol 2 (1951) 197.

[103] Lepaulle, *Traité* 31: "le trust est une institution juridique qui consiste en un patrimoine indépendant de tout sujet de droit et dont l'unité est constituée par une affectation qui est libre dans les limites des lois en viguer et de l'ordre public" [The trust is a legal institution consisting of a patrimony which is independent of any legal person, its integrity constituted by an appropriation which is free within the bounds of law and public order"].

[104] Lepaulle, "The Nature of Trusts" at 56.

[105] Notable adopter jurisdictions include Mexico, Quebec and France. For an overview of the impact of Lepaulle's theory, see L Smith, "Trust and Patrimony", in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 42 at 44; A Popovici and L Smith, "Lepaulle Appropriated", in Valsan (ed), *Trusts and Patrimonies* 13 at 15.

[106] Lepaulle, *Traité* 12: "Le trust crée non seulement des droit valables entre les parties: 'settlor', 'trustee', 'cestui'; mais encore des droit opposables aux tiers. C'est ainsi que les biens qui en font partie ne constitutent pas le gage des créanciers du trustee . . . bref, ils ne sont pas dans son patrimoine" [The trust not only creates effective rights against the parties – the settlor, trustee and cestui – but also rights enforceable against third parties. Thus, the assets which form part of the trust are not available to the trustee's creditors . . . in short, they are not in his patrimony].

(3) Trust as dual patrimony

9-24. A patrimonial conception of the Scottish trust arrived some time after the developments discussed in this chapter including, in particular, the judgment of the House of Lords in *Heritable Reversionary*. Its introduction is attributable to the work of Gretton and Reid who, in separate articles,[107] argued that the trust in Scots law was best cast in patrimonial terms. Gretton and Reid's view was not, however, that the Scottish trust is an ownerless *patrimoine d'affectation*; instead, they argued, the trustee owns the trust assets but holds those assets in a special patrimony. The result is that the trustee has two patrimonies: a personal (or private) patrimony comprising the trustee's personal assets and personal liabilities and a second patrimony comprising trust assets and trust liabilities.[108] Real subrogation operates separately in respect of each patrimony, such that acquisitions by the trustee fall into the relevant patrimony (the integrity of which is thereby maintained even where the patrimonies are not static).[109]

9-25. The most significant feature of this "dual patrimony theory" for present purposes is its capacity to account for the protection of trust property from the personal creditors of the trustee.[110] This explanation proceeds on the basis that trustees may incur obligations in either their trust or personal capacity. A creditor of the trustee will thus either be a personal creditor (with access to the trustee's personal patrimony) or a trust creditor (with access to the trust patrimony). In principle,[111] a creditor can have access to only one patrimony with the result that a trustee's personal creditor has no right of recourse to assets in the trust patrimony. Thus the issue of diligence or insolvency[112] (personal

[107] GL Gretton, "Trusts without Equity", in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015) 87 (= (2000) 49 International and Comparative Law Quarterly 599); KGC Reid, "Patrimony not Equity: The Trust in Scotland", in Valsan (ed), *Trusts and Patrimonies* 110 (= (2000) 8 European Review of Private Law 427, updated).

[108] Gretton, "Trusts without Equity" at 99ff; Reid, "Patrimony not Equity" at 116ff.

[109] Thus if an asset is sold from one patrimony, the proceeds of sale fall into the same patrimony: see Reid, "Patrimony not Equity" at 116–17. Detailed consideration of the issues raised by the operation of real subrogation within the trust is outside the scope of this work.

[110] Gretton and Reid emphasise the importance of accounting for this feature of the trust in providing an adequate conceptualisation: see e.g. Gretton, "Trusts without Equity" at 91: "The main difficulty in the obligational view of trusts is that it does not explain the effect of the trust in relation to the rights of creditors – the 'insolvency effect'. This (the priority which the beneficiaries have over the trustee's creditors) is surely the central fact of the trust which any theory must recognise and explain."

[111] In some instances a claim may be maintained by a creditor against more than one patrimony. Thus where a trustee commits a breach of trust, a beneficiary (that is, a creditor of the trust patrimony) may claim against the private patrimony of the trustee. As Reid notes, however, such claims are invariably by trust creditors against the personal patrimony of the trustee such that a personal creditor can never have recourse against trust assets: see Reid, "Patrimony not Equity" at 117–18.

[112] The sole exception is the enforcement or realisation in insolvency of a voluntary security granted over trust property. But as has been seen, trust property has never been immune from claims by creditors holding security of this kind: see para 8-18 above.

or corporate)[113] affecting such assets simply does not arise. Importantly, this enables the conceptual dilemma raised by *Heritable Reversionary* to be resolved. As Gretton writes:

> With the explanation of trust as patrimony everything falls into place. The rights of beneficiaries are personal rights. They are personal rights against the trustee, enforceable against the special patrimony. (And sometimes, depending on the legal system and the circumstances of the case, against the general patrimony also.) Conversely, personal rights enforceable against the trustee in his personal capacity are not (in general) enforceable against the special patrimony. There is thus no need to seek to classify the right of beneficiaries as being in some way privileged or quasi-real or as in some way "trumping" the rights of the creditors of a trustee in his personal capacity. There is no need to resort to duality of ownership. Instead of duality of ownership, there is duality of patrimony.[114]

The patrimonial conception of the trust thus makes it possible to dispense with the idea, advanced in *Heritable Reversionary,* that the beneficiary holds either a real right in the trust property or an enhanced form of personal right, while, at the same time, preserving the protection of trust property in the trustee's insolvency. That is not to say that the decision in *Heritable Reversionary* was in all respects at odds with a patrimonial conception of the trust. As was noted above,[115] the decision in that case was in part predicated on the way trust property was held by the trustee (thus the references at both instances to the "administrative" or "apparent" title of that trustee). In its decision in that case the House of Lords thus came closer to a satisfactory account of protection of trust property from creditors than a superficial reading might suggest.

9-26. As well as its compatibility with the decision in *Heritable Reversionary*, a patrimonial approach also holds certain advantages over previous explanations. These sought to account for the protection of trust property on the basis of a creditor's (or trustee in sequestration's) vulnerability to the personal right of the beneficiary. Yet that could be true only in relation to those rights which related in some way to the property sought to be taken.[116] It thus failed to explain why protection existed even where the beneficiary had either no right against the trustee (for example, in the case of a discretionary trust) or no right to particular trust property (as in many modern trusts). This difficulty is avoided by a patrimonial approach which shifts the explanatory emphasis from the right of the beneficiary to the way in which the trust property is held.

[113] The protection of trust property in the insolvency of a corporate trustee proceeds on the basis that (for example) a liquidator is not entitled to deal with trust property outside of the general patrimony of the insolvent company or, as the case may be, have property outside of that patrimony vested in him- or herself. Cf. the rationale for the protection in corporate insolvency following *Heritable Reversionary* discussed at n 73 above.

[114] Gretton, "Trusts without Equity" at 100–01.

[115] See para 9-11 above.

[116] See para 8-08 n 8 and para 8-43 n 116.

9-27. As an account of the trust in general, and of its effects on creditors of the trustee in particular, dual patrimony theory has been taken up readily, including by scholars in Scotland and further afield,[117] the Scottish Law Commission,[118] by the bench,[119] and, obliquely, by legislation.[120] Its promulgation, and eventual acceptance, provide a definitive end to the tortuous process of development considered here.

D. CONCLUSION

9-28. The subject of this chapter has been the emergence of the modern rule that trust property of all kinds (and, in the case of heritable property, whether held on a trust latent or patent) enjoys protection from the personal creditors of the trustee. The final stage of development began with the gradual differentiation of trust rights from other personal rights. At first this was achieved, under the influence of English law, by a characterisation of the beneficiary as the true owner of the trust property. That view, which reached its zenith in *Heritable Reversionary Company Ltd v Millar*,[121] meant that all property held in trust, both patent and latent, enjoyed protection from personal creditors of the trustee (today as a matter of statute as well as common law).

[117] See for example the contributions to R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Studies in Law vol 12, 2015), in particular LD Smith, "Scottish Trusts in the Common Law" 127; E Schmieman, "Dual Patrimony Dutch Style: The Magic Spell for Introducing the Trust in the Netherlands?" 221; and, for a critical view, P Matthews, "Square Peg, Round Hole? Patrimony and the Common Law Trust" 62. For use of the patrimonial approach to analyse an issue of trust law, see ADJ MacPherson, "Floating Charges and Trust Property in Scots Law: A Tale of Two Patrimonies?" (2018) 22 Edin LR 1.

[118] Scottish Law Commission, *Discussion Paper on Liability of Trustees to Third Parties* (Scot Law Com DP No 138, 2008) paras 1.3 to 1.11 ("We consider that the dual patrimony theory provides a principled theoretical basis for the rules of trust law, especially in the field of liability of trustees to third parties"); Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) paras 2.16 to 2.27 ("There is little doubt that the dual patrimony theory provides a convincing and satisfying explanation of the nature of a trust in Scots law"); Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014) paras 3.3 to 3.4.

[119] See e.g. *Joint Liquidators of Scottish Coal Co Ltd v Scottish Environment Protection Agency* [2013] CSIH 108, 2014 SC 372 at para 67; *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76, 2014 GWD 16 per Lord Malcolm at para 12 ("In my view, the notion of a trustee's dual patrimony is helpful and can assist in an understanding of many of the implications and consequences of our law of trusts"); *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners* [2014] CSIH 18, 2014 SC 579 per Lord Drummond Young at para 90; *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 per Lord Mance at para 35. For an endorsement by the First Division of the explanation provided by dual patrimony theory for the protection of trust property see *O'Boyle's Trustee v Brennan* [2020] CSIH 3, 2020 SC 217 at para 32.

[120] See e.g. s 38 of the Trusts and Succession (Scotland) Act 2024, which envisages a patrimonial approach to the liability of trustees to *ultra*- and *intra vires* contracts.

[121] (1892) 19 R (HL) 43.

9-29. Though the application in *Heritable Reversionary* of a single rule for property of all kinds was met with general approval, the rationale for that decision was to prove problematic. The idea of the beneficiary as the true owner sat uneasily with the traditional conception of that beneficiary's right as personal in nature, particularly after the reaffirmation of this view in *Inland Revenue v Clark's Trustees*. The conceptual difficulty was resolved by the development of a patrimonial view of the trust: this view explained the protection of trust property on the basis that the trustee holds two patrimonies, with recourse available to creditors only against the patrimony in respect of which their particular obligation was incurred. Trust property is thus protected from the personal creditors of the trustee because of its being held in a trust patrimony to which personal creditors of the trustee have no access. As well as having something in common with *Heritable Reversionary* in its emphasis on the way in which trust property is held as the basis of protection, the patrimonial view also carries advantages over the pre-*Heritable Reversionary* account of protection from creditors.

9-30. The conclusion that the trust may be conceptualised in patrimonial terms has important consequences for the theoretical inquiry into the nature of a beneficiary's right. With a patrimonial view of trust there is no need to look upon that right as in any sense proprietary in order to account for protection from creditors. Instead that protection results from the separation of patrimonies in the trustee, the beneficiary's right against that trustee remaining at all times personal in nature.

10 Conclusion

10-01. This book began with the assertion that the beneficiary's right in a Scottish trust is best conceived as a personal right against the trustee. An examination of the relationship between beneficiaries and third parties demonstrates that this assertion is a correct one.

10-02. The discussion began with the suggestion that the exigibility of a right in private law is generally decisive as to its status as real or personal in nature. Indeed in trust scholarship generally, questions of exigibility – including, in particular, against transferees of trust property and personal creditors of the trustee – have served to drive the primary conceptualisations of the beneficiary's right as real, personal or to some extent intermediate in nature. Third-party effect has also predominated in the controversy as to the nature of the right in Scots law, where a desire to explain the recourse available to beneficiaries against transferees and creditors has often led the beneficiary's right being seen as either a stronger form of personal right or (under the influence of English law) as proprietary in nature.

10-03. These theoretical controversies have practical significance, not least because the arrival at a particular conceptualisation of the beneficiary's right serves to condition the approach to the relationship between beneficiaries and third parties in the future. To ascertain the nature of the beneficiary's right in Scots law, it is necessary to consider the compatibility of a view of that right as personal in nature both with the rule that a beneficiary may proceed against a third-party transferee and the rule that trust property enjoys protection from the personal creditors of the trustee.

A. TRANSFEREES

10-04. There are three groups of transferees or third parties against whom the beneficiary might claim. Each must be accounted for in terms of a

conceptualisation of the beneficiary's right as personal. The first is those taking trust property in breach of trust. Claims for breach of trust have a long history. In the early law, the ability of a beneficiary to proceed against a third party taking property in breach of trust depended on the type of property acquired. Some forms of property allowed the beneficiary automatic recourse against a transferee. because the means by which the property was acquired had the effect of subjecting the transferee to any personal obligations of the transferor trustee in relation to that property. The acquirers of other forms of property generally took free of personal obligations, including those of a trust beneficiary. But under the doctrine of fraud on creditors, a transferee taking property, in bad faith or by donation, in breach of a prior obligation of the transferor was liable, principally to reduction, on the basis that the transfer constituted a fraud on the creditor in that obligation (including the beneficiary of a trust as creditor in the personal right against the trustee). Ultimately, any special rules as to the liability of transferees to the personal obligations of their authors fell away, either by judicial development or by the falling into disuse of particular forms of transfer. The result was that the fraud-on-creditors doctrine came to apply to transfers of all types of property, including transfers in breach of trust. That doctrine constitutes the modern basis for the rule that a beneficiary may recover for the trust any property transferred in breach of trust to a bad-faith or gratuitous transferee. Significantly for the overall theoretical inquiry, that result is achieved by the doctrine of fraud on creditors without the need to see the beneficiary's right as anything other than personal in nature.

10-05. The operation of claims for breach of trust in the modern law was then examined. Of particular importance in this area is section 2 of the Trusts (Scotland) Act 1961 and its modern successor, section 43 of the Trusts and Succession (Scotland) Act 2024, provisions which confer on a transferee of trust property an exceptionally high degree of protection from most forms of claim for breach of trust. Section 2 and the statutory protection for third parties which it inaugurated were, it was shown, the result of a law reform process which would have been better directed at judicial factors rather than trustees and trust beneficiaries. The combined effect of the modern statutory protection in the form of section 43 of the 2024 Act and certain aspects of the fraud-on-creditors doctrine is to forestall almost all claims for breach of trust, leaving the beneficiary with recourse only against the trustee. Discussion then explored the requisites of a claim for breach of trust in light of the limitation posed by section 43. This showed that the fraud-on-creditors doctrine, together with the view of a beneficiary's right as personal in nature, provides a principled basis according to which a number of aspects of such claims might be analysed, including the liability of successor transferees of trust property and the possibility of claims by the beneficiaries of discretionary trusts.

10-06. The second type of claim which must be accounted for is a beneficiary's claim against a person taking property in or as a result of breach of fiduciary

duty by the trustee. Much obscurity surrounds both the nature and substantive basis of such claims in Scots law. It was suggested that, at least where it is sought to recover the property transferred in breach of fiduciary duty, claims of that kind are, again, best conceptualised as an instance of fraud on creditors, albeit on the basis of a somewhat different analysis than claims for breach of trust. If that view is adopted, the recent judicial reconceptualisation of such claims as involving knowing receipt or dishonest assistance is unnecessary, and, insofar as the reconceptualisation creates confusion through the language of constructive trusts, undesirable. Again, seeing breach of fiduciary duty as an instance of fraud on creditors allows this form of third-party effect to be accounted for on the basis that the beneficiary's right is personal.

10-07. The final type of claim by a beneficiary against a third party requiring explanation is the beneficiary's entitlement to proceed, in certain circumstances, against someone who is a debtor to the trust. "Derivative" claims of this kind are not only compatible with a conception of the beneficiary's right as personal in nature but serve actively to demonstrate the validity of that conception. Derivative claims are necessary precisely because the beneficiary has no right in the trust property and because the right of action lies primarily with the trustee who, as owner of the trust property, may decide whether or not to proceed against a third party. Derivative claims thus represent a procedural exception by which injustice resulting from that general rule can be avoided and the beneficiary allowed to derive from the trustee a right of action against a third party.

10-08. The possibility of a claim by a beneficiary against a third-party transferee or debtor may thus be reconciled with a conception of the beneficiary's right as merely personal. That the existence of such claims has from time to time invited the conclusion that the right is either real or more than personal in nature is understandable, not least because the beneficiary is uniquely entitled to dispose of a range of different claims against recipients of trust property, something *prima facie* suggestive of a right in that property. Yet any indication that the beneficiary has such an interest is merely superficial: effects against third parties are in every case explicable either through fraud on creditors or the procedural expedient of derivative claims.

B. CREDITORS

10-09. The rule that trust property enjoys protection from the personal creditors of the trustee has two main aspects. First, trust property is not liable to be affected by diligence. Second, trust property is not able to be realised in the personal insolvency of the trustee through, for example, sequestration or liquidation.

10-10. In the early law of diligence, as in the case of transferees, it is possible to detect different rules for different types of property: certain types enjoyed

protection from the diligence creditors of the trustee on the basis that the form of diligence by which they could be taken rendered the creditor vulnerable to the personal obligations of the debtor (including the obligation owed by a debtor-trustee to a trust beneficiary). Where the creditor was vulnerable by virtue of the form of diligence employed, trust property was protected; where the creditor was not vulnerable, there was no such protection. In the early law, only creditors seeking to take incorporeal property were vulnerable to the personal obligations of their debtor. Where moveable or heritable property was taken by diligence, the creditor was not vulnerable and thus trust property of those kinds enjoyed no protection from creditors. The sole exception was that heritable trust property held in a patent trust would enjoy protection from an adjudging creditor.

10-11. The system of sequestration which arrived in the late eighteenth and early nineteenth centuries in large part replicated the rules for diligence. The result was that the fate of trust property in sequestration depended once more on the type of property in question: incorporeal property enjoyed protection; moveable and heritable property (unless held on a patent trust) did not.

10-12. A step towards the modern position of protection for all types of trust property was taken in a series of cases where trust property was found immune to creditors on the basis of the beneficiary's having ownership of, or at least a proprietary right in, the trust property. This trend culminated in the decision of the House of Lords in *Heritable Reversionary Company Ltd v Millar* in 1892. That decision held trust property of all types (and whether held on latent or patent trust) to be immune from the personal creditors of the trustee. The basis of the decision was that the beneficiary held the true ownership of trust property in contrast to the merely administrative title vested in the trustee.

10-13. What followed *Heritable Reversionary* was a change of rationale but not of rule. The basis of the House of Lords' decision in that case sat uneasily with the increasing acceptance of the beneficiary's right as personal in nature. Resolution of the difficulty was to come through the development of a patrimonial conception of the trust which explains the protection of trust property by its separation from the personal patrimony of the trustee. That conception allows for an account of the creditor-protection effect which, like the approach to other third parties, sees the beneficiary solely as holder of a personal right against the trustee.

10-14. The question of the nature of a trust beneficiary's right has long troubled Scots law. It need do so no longer. Those qualities of the right that might appear, at first sight, to be more than personal, or even real, in nature are explicable either by the doctrine of fraud on creditors and by the procedural expedient of derivative claims or by a patrimonial conception of the trust. The beneficiary's right is personal in nature.

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