Void, Voidable, Illegal and Unenforceable Contracts in Scots Law

by

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Table of Contents

	Page
Summary	i - ii
List of Abbreviations	iii - v
Introduction	1
CHAPTER 1 **Incapacity to Consent**	
Non-age	6
Married women	12
Insanity	15
Intoxication and disease	18
Ultra vires	22
Breach of fiduciary duty	29
Summary	31
CHAPTER 2 **Consent improperly obtained**	
Force and fear	33
Error	36
Fraud	71
Facility and circumvention	92
Undue influence	102
Summary	106
CHAPTER 3 **Public Policy**	
Early development	108
Usury	114
Buying pleas	116
Contracts by insolvents	117
Gaming	118
Public policy in the eighteenth century	119
Smuggling	121
Combinations	126
Sale of offices	129
The eighteenth century changes	132
Public policy since the eighteenth century -- conflicting views	142
Development of eighteenth century attitudes	144
Contracts in restraint of trade	148
Contracts contrary to public policy -- general principles	154
Statutory invalidity	159
CHAPTER 4/	

Page

CHAPTER 4
Analysis of Invalidities

Introduction 165
The position in Scots law 168
Illegal contracts 171
Unenforceable contracts 176
Void contracts 178
Voidable contracts 183
Conclusion 185

Summary

This thesis seeks an answer to the question "What types of contractual invalidities does Scots law recognise?". It is concerned with defects which exist at the time of the making of a contract. Three groups of invalidities are examined, viz. (a) contracts in which one of the parties was incapable of giving consent, (b) contracts in which consent was improperly obtained and (c) contracts in which consent is given, but the law refuses to give effect to the contract.

The distinction between deeds which were null ab initio and those which were reducible was recognised in relation to deeds of minors by the Court of Session in the sixteenth century. A deed by a minor without the consent of existing curators may be void, whereas in other circumstances, and subject to exceptions, the deed is voidable. Contracts by married women at common law show more complex forms of nullities which may still be relevant to contracts by a minor wife. A contract by an insane person is void and it is argued that the same result should occur in a contract by a person who is absolutely intoxicated or whose ability to consent is removed by disease or drugs. Contracts which are ultra vires illustrate another variation of the idea of a void contract and have to be contrasted with contracts in breach of fiduciary duty which are merely voidable.

The authorities state that a contract induced by force and fear is void but it can be argued that in certain circumstances it is voidable. The history of the law of error is examined to show that both void and voidable contracts may be produced by error. Likewise fraud, which has a wider meaning in Scots law than is sometimes thought, may have a varied effect on a contract. Out of fraud has developed the doctrine of facility and circumvention and in the middle of the nineteenth/

nineteenth century undue influence appeared as a ground of reduction. Both facility and circumvention and undue influence render a contract voidable.

Prior to the eighteenth century the general attitude of Scots law was that contracts were not unenforceable because of their subject matter. This changed in a period of about a dozen years from 1774. The Court of Session in that period gave fuller scope than previously to the doctrine of public policy. Out of this development, the reasons for which are discussed, there developed complexities in the nature of invalidities. The unenforceable contract and the illegal contract emerged.

Scots law may recognise many types of invalidities because the number of possible categories of invalidities is infinite. Generally speaking, however, an invalid contract is illegal, void, voidable or unenforceable. The consequences of assigning a contract to one category rather than another are explained and it is shown that the four categories are distinct.

List of Abbreviations

(Excluding recognised Law Reports and periodicals)

A.D.	Decisions of the Appellate Division of the Supreme Court of South Africa 1910-46.
A.D.C.	Acta Dominorum Concilii in Civil Causes, vol. i (1478-95) (1839); vol. ii (1496-1501) (1918); vol. iii (1501-4) (Stair Society, vol. viii).
A.D.C. et S.	Acta Dominorum Concilii et Sessionis, vol. i (1532-3) (Stair Society, vol. xiv).
Adv. MS.	Advocates' Manuscripts, National Library of Scotland.
Anson	Anson's Law of Contract, ed. A.G. Guest (24th ed. 1975).
A.P.S.	Acts of the Parliament of Scotland 1124-1707 (record ed., 12 vols. 1814-75).
Balfour	Sir James Balfour of Pittendreich, d.P., Practicks, (1469-1579) (Stair Society, vols. 21 and 22).
Bankt.	Andrew McDouall (Lord Bankton), Institutions of the Law of Scotland, (3 vols., 1751-3). Bankton's own method of citation by volume, page and paragraph has been used. It is the easiest method to use. cp. The Manual of Legal Citations (1958) p.31.
Bell, Comm.	George Joseph Bell, Commentaries on the Law of Scotland (7th ed. 1870).
Bell, Princ.	George Joseph Bell, Principles of the Law of Scotland (10th ed. 1899).
Brown, Sale	H.C. Brown, Law of Sale (1821).
Brunton & Haig	G. Brunton and D. Haig, Historical Account of the Senators of the College of Justice from its institution in 1532 (1832).
Cheshire & Fifoot	Cheshire and Fifoot's Law of Contract (8th ed. 1972).
Chitty	J. Chitty, The Law of Contracts (23rd ed. 1968), vol.1.
Citrine	N.A. Citrine, Trade Union Law (3rd ed. 1967).
Cockburn, Memorials	Lord Cockburn, Memorials of His Time (1856).
Craig	Sir Thomas Craig, Ius Feudale (1655; 1716; 1732; translated by Lord President Clyde, 2 vols., 1934).
Edinburgh MS.	Manuscripts, University of Edinburgh Library.
Ersk. Inst.	John Erskine of Carnock, An Institute of the Law of Scotland (9th ed. 1871).

Ferguson — William Ferguson, Scotland 1689 to the Present (1968).

Fraser, Parent and Child — P. Fraser, Law of Scotland relative to Parent and Child, and Guardian and Ward (3rd ed. 1906).

Glasgow G.U. Gen — Manuscripts, University of Glasgow Library

Gloag — W.M. Gloag, Law of Contract (2nd ed. 1929).

Gow — J.J. Gow, The Mercantile and Industrial Law of Scotland (1964).

Graham, Social Life — H.G. Graham, The Social Life of Scotland in the Eighteenth Century (5th ed. 1969).

Grunfeld — C. Grunfeld, Modern Trade Union Law (1966).

Holdsworth — Sir William S. Holdsworth, A History of English Law (1903-).

Hope — Sir Thomas Hope, Major Practicks, 1608-33, 2 vols. (Stair Society, vols. iii and iv).

Hume, Crimes — D. Hume, Commentaries, etc., respecting Trial for Crimes, 2 vols. (4th ed. 1844).

Kames, Elucidations — Henry Home, Lord Kames, Elucidations respecting the Common and Statute Law of Scotland (2nd ed. 1800).

Kames, Principles of Equity — Henry Home, Lord Kames, Principles of Equity, 2 vols. (3rd ed. 1778).

Keeton & Sheridan — G.W. Keeton and L.A. Sheridan, Equity (1969).

Mackenzie — Sir G. Mackenzie, Laws and Customs of Scotland in Matters Criminal etc. (2nd ed. 1699).

Murray M.S. — Dr. David Murray manuscripts, University of Glasgow Library.

R.M. — Regiam Majestatem (Stair Society, vol. xi).

Ramsay — John Ramsay of Ochtertyre, Scotland and Scotsmen in the Eighteenth Century, 2 vols. (1888).

Rankine, Personal Bar — Sir J. Rankine, Law of Personal Bar in Scotland and Estoppel in pais (1921).

Ross — Walter Ross, Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence, 3 vols. (2nd ed. 1822).

S.A. ... (A.D.) — South African Law Reports (Appellate Division) (1947-)

S.A.L.J. — South African Law Journal.

Smith, Short Commentary — T.B. Smith, A Short Commentary on the Law of Scotland (1962).

Smout — T.C. Smout, A History of the Scottish People 1560-1830 (1969).

Spotiswoode — Sir R. Spotiswoode, Practicks of the Laws of Scotland (1706).

Stair — Sir James Dalrymple, Viscount Stair, Institutions of the Law of Scotland, 2 vols. (5th ed. 1832).

Stair Soc. History — An Introduction to Scottish Legal History, various authors, Stair Society, vol. xx (1958).

Stair Soc. Sources — An Introductory Survey of the Sources and Literature of Scots Law, various authors, Stair Society, vol. i (1936).

Trotter — W.F. Trotter, Law of Contract in Scotland (1913).

Walker, Civil Remedies — D.M. Walker, The Law of Civil Remedies in Scotland (1974).

Walker, Principles — D.M. Walker, Principles of Scottish Private Law, 2 vols. (2nd ed. 1975).

Wessels — Sir J.W. Wessels, The Law of Contract in South Africa 2 vols. (2nd ed. 1951).

Wille's — Wille's Principles of South African Law (6th ed. 1970).

Williston — S. Williston, A Treatise on the Law of Contracts (3rd ed. 1957).

Introduction

The jurist Planiol correctly dispelled the illusion that obligations form an immutable part of the law with rules which are universal and external truths like those of geometry and arithmetic[1]. Nevertheless some of the problems of the law of obligations are common to developed legal systems. One of those problems is that the recognition of a contract based on consent implies circumstances in which the contract is invalid. In early law there may be an insistence on external formalities in the creation of a contract and it is only the absence of a formality which nullifies the obligation[2]. In contracts stricti iuris, fraud or duress could be irrelevant[3]. When the law shifts to considering the intention of the parties there must arise a need to define valid and invalid consent. Little further analysis will show that invalidity cannot easily be maintained as a unitary concept but must be refined into categories.

In the Middle Ages the glossators adopted a distinction between nullity ipso iure and nullity per integrum restitutionem. This developed to produce the current distinction between void and voidable[4]. French law distinguishes two categories of nullities, nullité absolue and nullité relative although there has been much discussion in the doctrine to institute other categories, especially l'inexistence[5]. Carbonnier has concluded that "pour beaucoup d'auteurs, la notion d'inexistence n'a pas de valeur propre et/

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1. M. Planiol and G. Ripert, Traité Pratique de Droit Civil Français (1952), vol. 6, p.2.
2. E. Sabbath, "Effects of Mistake in Contracts", 13 Int. & Comp. L.Q. 798, at p.799 (1964); S. Nabachy, "The System of Nullities in Muslim Law", 13 Amer. J. Comp. Law 61; J. Briesaud, A History of French Private Law (1912 trans. R. Howell), para. 379.
3. W.W. Buckland, A Text-Book of Roman Law (3rd ed. 1963), pp. 415, 416.
4. Sabbath, sup. cit. pp. 799-804.
5. M. Planiol et G. Ripert, op. cit., vol. 6, pp. 357-369.

et s'absorbe dans la nullité absolue"[1]. Belgian law has faced a similar problem of attempts to subdivide nullities, but like French law appears to have settled on only two types of nullities, les nullités absolues and les nullités relatives .[2]

German law distinguishes acts which are void (nichtig), and those which are voidable (anfechtbar)[3]. The influence of the Romano-Germanic family of laws may explain why the Soviet Civil Code of 1922 has a distinction, recognisable to a Western lawyer, between invalid transactions, and transactions which a person has a right to bring an action to have declared invalid[4]. The reframing of the Code in 1964, however, has produced a result more obviously dominated by socialist thinking although the type of invalidity does regulate who may bring an action to challenge the transaction and what are the obligations of restitution[5].

Possibly independent of the influence of European thought, Muslim law made a distinction between absolute (Mutlaq) and relative (Nisbi) nullity. There was a discussion amongst Muslim jurists on other forms of nullity including that of non-existence of the contract (Ka'an Lam Yakun)[6].

English law distinguishes between void, voidable and unenforceable contracts and illegal contracts[7]. These distinctions exist in countries which have adopted English common/

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1. J. Carbonnier, Théorie des Obligations (1963), p.193.
2. Henri De Page, Traité Elémentaire de Droit Civil Belge (3rd ed. 1964), vol. 2, para. 780.
3. M.J. Schuster, The Principles of German Civil Law (1907), p.30; E.J. Cohn, Manual of German Law, vol. 1, pp. 78-82 (2nd ed. 1968). See also Italian Civil Code, arts. 1418, 1425; Swiss Code des Obligations, arts. 20,21,23.
4. Civil Code R.S.F.S.R. (1922) Arts. 30-32, trans. in J.N. Hazard, I. Shapiro, The Soviet Legal System (1962), Part III, p.41.
5. Civil Code R.S.F.S.R. (1964) Arts. 48, 49, 57, 58, trans. in J.N. Hazard, I. Shapiro, P.B. Maggs, The Soviet Legal System (1969), pp. 438,9.
6. Habachy, sup. cit. pp. 62,3.
7. Chitty, paras. 15-17; Anson, pp. 7,8; P.S. Atiyah, Law of Contract (2nd ed. 1971), pp. 30 et seq.; W.R. Anson, "Some Notes on Terminology in Contract", 7 L.Q.R. (1891), p.337.

common law, although the exact forms of invalidity may differ. For example, the English degrees of invalidity were accepted in Singapore, Penang and Malacca but in Malay States "unenforceable" was merged with "void" and "illegal" and given a restricted meaning[1]. South Africa has adopted a similar categorisation to English law[2] and the English use of void and voidable has been equated to that found in Dutch law[3]. As is to be expected American jurisdictions have been influenced by English concepts and the distinction between void, voidable and unenforceable contracts is recognised[4].

The meaning of "contract" differs amongst legal systems and so does the effect of types of invalidity. What at first sight may appear to be void or an absolute nullity in two systems may, on closer inspection, be shown to be treated differently. Systems differ on who may challenge transactions, what form of challenge is necessary, the grounds of challenge, the effect of failure to challenge, and the effect of successful challenge on third parties. Nevertheless major legal systems have types of invalidity and at least two types, corresponding to void and voidable, are commonly recognised. With this background it is surprising that there is doubt whether the distinction between void and voidable is part of Scots law. Professor Smith has stated that the distinction was not often relevant in Scottish practice[5]. Professor Gow rejected the distinction as "unworkable and incoherent" and as arising from the complacent acceptance of "the dogma of English misrepresentation"[6]. We shall attempt to show that the distinction was recognised in Scots law four hundred years ago and is part of the present law.

Nullity/

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1. L.A. Sheridan, The British Commonwealth, The Development of its Laws and Constitutions, vol. 9, Malaya and Singapore (1961), p.292.
2. Wessels, paras. 638, 639, 643, 644; Wille's, p.302.
3. Breytenbach v. Frankel, 1913 A.D. 390 at p.397 per Lord de Villiers, C.J.
4. Williston, secs. 15, 16, 226, 231, 250; Corpus Iuris Secundum, vol. 92, pp. 1020-1027; A.L. Corbin, Corbin on Contracts (1952), paras. 6-8. cp. Louisiana Civil Code, arts. 1881, 1892.
5. Smith, Short Commentary, pp. 789, 817.
6. Gow, p.X.

Nullity may arise in several contexts and it is necessary to limit the scope of our inquiry. Informalities in the constitution of a contract are a troubled area of Scots law which is in need of detailed analysis, but it is separable from the problems of invalidity in the consent to a seeming contract. We are concerned with essential or substantive validity rather than formal validity although it is recognised that these terms are indefinable and there is considerable scope for argument about their correct use[1]. We will concern ourselves with defects in consent which exist at the time of making the contract. This excludes events arising afterwards, such as material breach or irritancy, both of which have been described as rendering a contract voidable[2]. That leaves a large group of invalidities which may be classified into three categories, viz. (a) contracts in which one of the parties was incapable of giving consent, (b) contracts in which consent was improperly obtained and (c) contracts in which consent is given but the law refuses to give effect to the contract. We shall examine the development of these categories in Scotland with a view to throwing light on the present law. It follows from our purpose that it is not appropriate to examine in detail, if at all, some controversies which arose and disappeared in a short time without leaving a permanent mark. This particularly applies to the period prior to Stair[3]. Nor are we concerned except indirectly/

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1. vide A.E. Anton, Private International Law (1967) p.275, fn. 57. "In discussions of the law of contract in the conflict of laws questions of 'essential validity' are thought of as including such matters as lack of consent, mistake, absence of cause and illegality". The topics we consider comprise Part II of Anson, under the heading "Factors Tending to Defeat Contractual Liability".
2. Walker, Civil Remedies, pp. 521, 87; J. Rankine, A Treatise on the Law of Personal Bar in Scotland (1921), pp. 196 et seq.
3. Also the Regiam Majestatem is little referred to because of doubts on the extent to which it represents Scots law. In any event the passages on pacts add little to our knowledge of the law. Their origins are discussed in H.G. Richardson, "Roman Law in the Regiam Majestatem", 1955 J.R. 155 at pp. 170-173.

indirectly, with the problems of possible reform of this area of the law. Nullities are only part of a problem which includes the larger question of whether, or to what extent, any effect should be given to a factor which vitiates consent. Ours is a broad canvas which includes many troubled spots. For example, the law of error immediately suggests difficulties other than that of nullity. The strange rules on the capacity of minors are in need of detailed examination[1]. Facility and circumvention and undue influence could perhaps be merged into a single doctrine[2]. The relationship between fraud and bankruptcy deserves reappraisal. The application of public policy is sometimes obscure and anomalous[3]. Each of these and other problems could occupy a thesis of conventional length. Our purpose is limited and descriptive. It is to describe for the first time the development of a part of the law of contract in Scotland. We seek an answer to the question, "What type of invalidities does Scots law recognise?".

Authorities

The work on this thesis has been done principally at the University of Glasgow and the authorities cited are mostly those available in the University Library. Use has also been made of material in Edinburgh University Library. In addition, manuscripts were consulted in the National Library of Scotland. The principal source, however, has been the reported case law of Scotland. Our heaviest debt is to the case reporters throughout the centuries whose painstaking drudgery is too often taken for granted.

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1. vide Scottish Law Commission, Eighth Annual Report, 1972-73, Scot. Law Com. No.33, para. 30.
2. vide M.D. Green, "Fraud, Undue Influence and Mental Incompetency", 43 Columbia Law Review (1943), p.176.
3. vide D. Lloyd, Public Policy - A Comparative Study in English and French Law (1953).

Chapter 1

Incapacity to Consent

The categories of those who are incapable of consenting to a contract are now open to little dispute, but this was not always so. Balfour put rebels in a special position[1] and a person might "gainsay or cum aganis his awin deid" if he were "in prisoun, in bandis, in the handis and powar of reifferis, or of his enemies"[2]. This last category, which today would be classified under force and fear, was treated as though it were a species of temporary incapacity, being linked to those who were of "les age" and "lunatique, wod and furious". Craig thought that deafness incapacitated a person from granting a feu[3]. While Stair allowed the deaf and dumb to contract if they knew what they were doing[4], Erskine raised doubts about whether those who had been deaf and dumb from birth were capable of contracting[5]. Spotiswoode states that monks and friars were forbidden to contract[6]. The categories we consider are non-age, married women, insanity, intoxication and disease, ultra vires and breach of fiduciary duty.

Non-age

The plea of non-age has been recognised from an early date[7]. It is mentioned by Balfour[8], Craig[9] and Spotiswoode[10]. As/

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1. Balfour, pp. 507,8.
2. Balfour, p.179.
3. Craig, vol. 1, p.231.
4. Stair 1.10.13. vide. 4.3.9.
5. Ersk. Inst. 3.1.16. vide 1.7.48. The appointment of a curator was the practical answer, but it was established in Kirkpatrick (1853) 15 D. 734 that the Court must be satisfied that the handicap prevented a person from managing his affairs.
6. Spotiswoode, p.72.
7. Borthwicks v. Hoppringill (1494) A.D.A. 200 (pursuer in non-age); Bothuile v. Bolton (1494) A.D.A. 199 (reduction of charter granted in non-age); Kennedy v. Kennedy (1499/1500) A.D.C. 11, 388 (reduction of apprising).
8. Balfour, vol. 1, pp. 179, 180, 189.
9. Craig, vol. 1, pp. 223, 225.
10. Spotiswoode, p.72.

As the law evolved a series of rules and exceptions developed so that even today the law can be described as archaic, anomalous and absurd[1]. We do not intend to comment on all those problems but to concentrate on one aspect, the early recognition of the distinction between a deed null ipso iure and a deed which was reducible. In 1577 the Court of Session decided that a deed by a pupil was "null from the beginning, without reduction, albeit that the pupil tacuit per utile quadriennium[2]." Deeds by pupils, however, have given rise to few reported cases on the nature of the nullity and the main development is in deeds by minors. In 1561, the Court drew a distinction between acts of minors which depended on the curatorial position --

> "... a minor wanting curators may give or analzie lands, which gift shall not be null; but the minor when he comes to perfect age may reduce the same; and if he have curators, and gifts or analzies without their consent, that is null in itself, as was reasoned among the said Lords"[3].

Thus, in effect, deeds of some minors are voidable and of others void, although these terms were not used. When the deed was null it could be challenged by the minor even after the expiry of the quadriennium utile[4]. Craig attempted to rationalise the distinction[5] and it was referred to in argument[6]. That a minor's deed without the consent of existing curators was "ipso iure null" was several times affirmed[7] with the phrase changing to "void and null" in the eighteenth century[8].

Alongside/

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1. Scottish Law Commission, Eighth Annual Report, 1972-73, Scot. Law Com. No. 33, para. 30.
2. Bruce v. ---- (1577) M. 8979.
3. Kincaid v. ---- (1561) M. 8979.
4. Hamiltons v. Hamilton (1587) M. 8981; McKenzie v. Fairholm (1666) 8959.
5. Craig, vol. 1, p.226.
6. Lamsay v. Maxwell (1672) M. 9042; Thomson v. Pagan (1781) M. 8985.
7. Seton v. Caskieben (1622) M. 8939; Cardross v. Hamilton (1708) M. 8951; Bell v. Southerland (1728) M. 8985.
8. Campbell v. Lovat (1731) M. 9035; Craig v. Lindsay (1757) M. 8956.

Alongside this development was a confusion as to whether enorm lesion was required to challenge any deed by a minor. Balfour[1] and Spotiswoode[2] said enorm lesion must always be proved and this uncertainty is reflected in the case law[3]. This view is not consistent with the deed being ipso iure null and it was not followed by Stair[4], nor by decisions after Stair[5]. Yet the matter was raised again in argument in 1726[6] and Kames thought that a bond by a minor without consent of curators was voidable and not void, although he admitted that other writers said the contrary. He went further and insisted that the daily practice of the Court was to refuse to reduce the minor's bond upon evidence that it was not hurtful to the minor[7]. Bell thought that the deed raised an "absolute presumption of lesion" with the result that such deeds "if not null, are at least ... exceptionable at any time, even after the anni utiles, without the necessity of a formal reduction"[8]. This must be contrasted with the simpler views of Bankton who thought the deed "intrinsically null"[9] and of Erskine that "a deed signed by the curator only, without the minor, is as truly void as one subscribed by the minor only, without his curator"[10].

Clearly/

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1. Balfour, p.180.
2. Spotiswoode, p.301.
3. Davidson v. Hamilton (1632) M. 8988; Hamilton v. Lamington (1678) M. 8949. The uncertainty is also found in a case of insanity - Lindsay v. Trent (1684) M. 6280 at 6281.
4. Stair, 1.6.33.
5. Bell v. Southerland, supra; Thomson v. Fagan, supra; Bannatyne v. Trotter (1704) M. 8983 which suggests that the deed is reducible is a curious case and was doubted in Manuel v. Manuel (1853) 15 D. 284.
6. Harvie v. Gordon (1726) M. 5712.
7. Kames, Elucidations, p.3. As will be seen later, Kames was one of the first to use the term "voidable".
8. Bell, Comm. 1.130.
9. Bankt. 1.183.88.
10. Ersk., Inst., 1.7.14.

Clearly if the deed was by the minor with the consent of the curator it was not null but reducible on proof of enorm lesion[1] and to reduce the deed the minor might have to offer restoration of money received[2], although total restitution might not be ordered[3]. The reduction operated retrospectively and not from the time of litiscontestation[4].

The forms of nullity which exist are restricted in their operation by a series of exceptions which allow the minor to contract validly even without the consent of existing curators. The Laird of Cockburnspath could contract for the purchase of a horse without the consent of his curators[5], and likewise a minor could grant a valid bond to his pedagogue[6]. It is doubtful if curators' consent is needed for a contract of apprenticeship[7]. Their consent is not necessary to the minor taking up employment[8] and may not be necessary if the curator is absent from the country[9].

There are other categories of exceptions but of particular interest to us are the early decisions of the Court of Session that when a sum was applied profitably and for the utility of the minor, this barred reduction of a deed by a minor, having curators, and without their consent[10]. The profitable application of sums was also a bar to reduction on the grounds of minority and lesion[11]. This is difficult to explain if it is treated as affecting the nature of the nullity of the contract. It is easier to treat it as an example of the application of recompense/

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1. Clerk's Creditors v. Gordon (1699) M. 3668.
2. McWilliam v. Shaw (1576) M. 9022.
3. Carmichael v. Castlehill (1698) M. 8993.
4. Houston v. Maxwell (1631) M. 5936.
5. Brown v. Nicolson (1629) M. 8940.
6. Drummond v. Broughton (1627) M. 8939.
7. Stevenson v. Adair (1872) 10 M. 919.
8. McFeetridge v. Stewarts & Lloyds Ltd., 1913 S.C. 773 at p.783 per L.J.C. Macdonald.
9. McFeetridge, supra, at p.790 per Lord Salvesen.
10. McAdam v. Lag (1605) M. 8939; Corser v. Deans (1672) M. 8944.
11. Thomson v. Stevenson (1666) M. 8991; Blantyre v. Walkinshaw (1667) M. 8991.

recompense, and Stair[1], Erskine[2], Bell[3] and Gloag[4] mention that a minor will be liable to the extent to which he profits from a transaction. It is also possible to argue that the supply of necessaries to a minor gives a quasi contractual remedy to the supplier, and that this is not an exception to the rules on nullity of the contract[5]. Gloag would not have agreed[6], but it is the case that the reasonableness of the supplier's price has often been put in issue, which seems more appropriate to a quasi contractual than a contractual remedy[7]. Now, by statute, the minor must pay a reasonable price for necessaries[8].

One qualification has been made to the rules of nullities which, if correct, will affect all contracts by minors and pupils. It is stated by some authorities that minors and pupils may enforce contracts beneficial to them, but such contracts cannot be enforced against them[9]. The origin of this rule is Erskine[10]. He quotes no authority, although he probably derived it from Roman law[11]. No instance of its application has been found. If it is the law it would make pupils' and minors' contracts at most a form of limping nullity. We would be in the position of South African Law which borrowed the negotium claudicans of the Glossators from Dutch writers[12]. The result would be that the minor's or pupil's/

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1. Stair, 1.6.33; 1.8.6; 1.8.2.
2. Ersk., Inst. 1.7.33.
3. Bell, Comm. 1.130.
4. Gloag, Contract, p.83.
5. Gow, p.99.
6. Gloag, p.83, fn. 5.
7. Inglis v. Ex. of Sharp (1631) M. 8941; Johnston v. Maitland (1782) M. 9036; Wilkie v. Dunlop & Co. (1834) 12 S. 506 at p.507.
8. Sale of Goods Act 1893, s.2.
9. Gloag, p.77; Lord Fraser, Parent and Child (3rd ed. 1906), p.206. The passage in Bankton referred to by Fraser and, with a misprint in the citation, by Gloag, does not support the rule.
10. Ersk., Inst. 1.7.33.
11. Inst. 1.21.pr.
12. H. Grotius, The Jurisprudence of Holland (trans. R.W. Lee, 1926), 1.8.5; 3.1.26; J. Voet, Commentary on the Pandects (trans. P. Gane, 1956), 26.8.3. D. Donaldson, Minors in Roman-Dutch Law (1955), p.11; Wessels, para. 799; Wille's p.72.

pupil's contract was a category sui generis. They would never be simply void, and the unassisted minor's contract would not be voidable, but may be described as "relatively void" -- i.e., void in relation to the minor or unenforceable against the minor[1].

Leaving that consideration aside, whether or not a contract by a minor is void or voidable will depend on the answers to three questions, namely (1) Did the minor have curators? (2) Was the curators' consent necessary to the contract and (3) did they consent? If the answer to the first two questions is "Yes" and to the third "No", the contract is void or null ab initio. In other circumstances the contract is voidable or reducible on proof of enorm lesion and there are even exceptions to that rule, such as when the minor is engaged in trade or represents himself of full age. This is not an admirable result. There would be much to be said for a simpler rule which would ask only one question -- was the minor substantially prejudiced by the contract?[2]. The idea that enorm lesion must be proved in all cases was rejected at an early stage in the law, although approved by Kames. This has led to more complexity in the law than the need to protect the inexperienced requires.

Married/

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1. Donaldson, op. cit., p.14.
2. Whether the contract should be void, voidable or some other form of invalidity would depend, not only on the desire to protect the minor, but also on the law's attitude to the protection of innocent third parties. A void contract is the most drastic form of nullity and it is notable that in American jurisdictions there is a tendency to reject English authority and to hold contracts voidable rather than void because this results in flexibility. Williston, secs. 226, 250, 271. Gloag showed a similar reluctance to hold contracts void. American experience suggests that there is sufficient protection to an infant if the contract is merely voidable. Williston, sec. 226. The relatively meagre Scottish experience does not suggest that we should dissent from that conclusion. Whatever solution is adopted, the contracts of minors should be subject to one type of invalidity, not several.

Married Women

The nature of deeds by minors was founded on when the Court considered the nature of deeds by married women[1], but however attractive the analogy, it is misleading. There are several differences, particularly in restitution on the grounds of lesion[2]. The invalidity of contracts by married women at common law presents a complex picture not least because many parts of the law were never, and may never be, settled.

The fundamental principle was that the personal obligation of a married woman was null[1]. The nullity was independent of the ius mariti or the ius administrationis of the husband and, as a result, the consent and concurrence of the husband would not validate the obligation[3]. Yet it cannot be said that the obligation was void, because the woman could found on the obligation when it was to her advantage, such as to claim relief as a cautioner[4]. The obligation was null ope exceptionis[5]. The obligation was invalid, and incapable of subsequent ratification either by the woman[6] or by the husband[7]. Yet it was enforceable by the woman. This resembles the negotium claudicans of a minor's contracts: Neither void, nor voidable, but relatively void.

To the general rule on nullity there were many exceptions. An obligation could be binding if it was in rem versum of the woman or related to her separate estate[8]. These were the principal exceptions but there were others, such as when the husband was abroad[9], or insane[10], or civilly dead[11]. In some/

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1. Birch v. Douglas (1663) M. 5961.
2. vide Fraser, Husband and Wife, vol. 1, p.521.
3. Ulysses v. Bonnington (1611) M. 5957; Douglas v. Hamilton (1616) M. 5957; Greenlaw v. Galloway (1626) M. 5957; Matthew v. Sibbald (1626) M. 5959, and other cases.
4. Watson v. Bruce (1672) M. 5964.
5. Thomson v. Stewart (1840) 2 D. 564.
6. Birch v. Douglas, supra.
7. Melvill v. Dunbar (1566) M. 5993 and 6001.
8. Cairns v. Arthur (1667) M. 5954; Pringles v. Irvine (1711) M. 5970.
9. Russel v. Paterson (1629) M. 5955; Hay v. Corstorphin (1663) M. 5956.
10. Bold v. Montgomerie (1729) M. 6002.
11. Ball v. Southesk (1773) M. 6002.

some cases the existence and nature of the exceptions were open to dispute, such as the liability for necessaries or luxuries or obligations in the course of trade[1].

Even within the exceptions it still might be necessary for the husband to consent to the contract. This arose from the husband's ius administrationis. It was decided that when a wife assigned property excluded from the ius mariti the husband's consent could be given subsequently[2]. The obligation was, therefore, invalid until ratified in contrast to the obligations which were invalid and incapable of ratification.

The result is three basic situations. Where the wife was incapable of contracting even with the consent of her husband, the obligation was relatively void. Where the husband's consent was necessary the obligation was null until that consent was obtained. This is not an absolute nullity ab initio. It may be relatively void, or a category sui generis. Where the husband's consent was not necessary, the wife could enter valid contracts.

The theoretical situation is even more complex if there is superimposed on those basic situations the rule that the personal obligation could be null, and yet an accessory obligation, such as an obligation to infeft, could be valid[3]. This "anomalous distinction"[4] adds to the difficulty of finding any coherent structure in the nullities of married women's contracts.

All this should have been of only historical interest following the series of statutes commencing in 1861 and ending in 1920[5] whereby the limitations on a wife's contractual capacity were removed and a married woman is now capable of entering/

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1. Vide W.M. Gloag, The Law of Contract (1st edn., 1914), pp. 110 et seq. from which it is obvious that many points were unsettled.
2. Cochran v. Hamilton (1698) M. 6001.
3. Elcis v. Keith (1665) M. 5987; Marshall v. Ferguson (1683) M. 5990; Somervell v. Paton (1686) M. 5990.
4. Thomson v. Stewart, supra, at p.571 per L. Fullerton.
5. Conjugal Rights (Scotland) Amendment Act 1861; Married Women's Property (Scotland) Acts 1877, 1881 and 1920.

entering into contracts and incurring obligations as if she were not married[1]. The remaining difficulty is the status of the minor wife. If the wife is a minor, her husband is her curator, unless he also is a minor or subject to some legal incapacity, in which case the wife's parents will normally be her curators[2]. The nature of these curatorial powers is doubtful[3]. They could be a limited preservation of the husband's common law powers, which is difficult to understand because the Act abolishes the right of administration of a husband without reference to the age of the married woman[4]. They could be a form of paternal curatory on the grounds that section 2 refers to the wife's curator being her husband, who if disqualified is replaced by her "father, or other curator, if she have any". If this is correct, and it is the most likely solution, it raises the problem of the circumstances in which the curator's consent is necessary and the possibility that the minor wife can plead enorm lesion.

The Act was born out of the activities of the suffragette movement[5] and several aspects of its drafting, which was done by a committee of conveyancers, leave something to be desired[6]. It has added problems to an already complex situation, and unfortunately produces the possibility that the pre-1920 law on the nullity of married women's deeds is still relevant.

Insanity/

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1. 1920 Act, s.5.
2. 1920 Act, s.2; Guardianship Act 1973, s.10.
3. E.M. Clive and J.G. Wilson, The Law of Husband and Wife in Scotland (1974), pp. 247-250.
4. 1920 Act, s.1.
5. Vide "The Legal Emancipation of the Scottish Married Woman" (1918) vol. 34 Scot. L. Review, p.65; "The Married Women's Property Act" (1921) vol. 37 Scot. L. Review, p.1; Nowadays it would be difficult to justify treating minor wives as having a special form of incapacity.
6. Vide "The Married Women's Property Act", supra; Hansard, 1920, vol. 134, col. 110. The Bill was revised by the Lord Advocate (T.B. Morison) and the Solicitor-General (C.D. Murray).

Insanity

The problems of those who were not compos mentis feature in our printed records at least since 1292[1]. The Court of Session from its institution dealt with many cases in which, in modern terminology, insanity was pled as a ground of reduction[2]. The law distinguished between fatuous persons or idiots, on the one hand, and furious persons, on the other[3]. The distinction, which contains much uncertainty, is described by Bell[4]. For the purposes of the law of contract there appears no difference between the effect of a verdict of a jury whether under a brieve of idiotry or of furiosity, and indeed the practice was "to purchase both brieves, to make up a claim applicable to each, and to retour that brieve under which the jury found the character of the party's insanity could be brought"[5]. Those brieves were abolished by the Court of Session Act 1868[6] and in their place there was introduced a procedure for cognition of the insane proceeding on a brieve from Chancery. A person was to be deemed to be insane "if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs"[7]. Cognition is now never used[8] and the procedure has been superseded by the appointment of a curator bonis to an incapax. The usual ground for appointment is that a person is "of unsound mind and incapable of managing his own affairs or of giving instructions for their management".

Balfour states that "All contractis, obligatiounis, infeftmentis or decretis arbitrall, maid be ony man, or gevin betwix twa parties, of the quhilkis ony ane is furiosus, or mente/

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1. A.P.S. 1, 446; other cases in A.D.C. 1, under index heading "Curators Ad Lites"; Pook v. Park of that Ilk, A.D.A., 43.
2. Morison, s.v., "Idiotry and Furiosity".
3. Ersk., Inst. 1.7.48.
4. Bell, Comm. 1.133.
5. Fraser, Parent and Child, p.657.
6. S.101.
7. Ibid.
8. N.M.L. Walker, Judicial Factors, (1974), p.22.

mente captus, is of nane availl ..."[1]. Spotiswoode put furious persons in the same class as pupils and provided a reason for the legal incapacity: "Others again are not iure prohibiti contrahere, as infans and furious persons; but yet whatever is done by them is void by law, as being inhibiles ex iuris dispositione to contract, seeing the chief ground of contracts is consent, and consent groweth of knowledge whereof such persons are not capable"[2]. Likewise Stair thought that there could not be a contract by idiots or furious persons except in their lucid intervals[3]. There was an early confusion as to whether lesion was necessary to reduce the contract and this is criticised by Fountainhall who states "if the furiosity be proved, then the deed is simply null, whether there be lesion or not"[4].

The nature of the invalidity was established in Gall v. Bird[5] when deeds of an insane person which were null were contrasted with deeds which were merely reducible. A deed by an insane person is void if he is insane at the time of granting the deed[6]: "He is considered as a pupil incapable of transacting any of the business of life"[7]. Knowledge of the/

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1. Balfour, vol. 1, p.123.
2. Spotiswoode, p.72.
3. Stair, 1.10.13.
4. Lindsay v. Trent (1684) M. 6281. cp. Gloag p.92 and J.B. Miller, The Law of Partnership in Scotland, (1973), p.39,n.9, who come close to treating Fountainhall's remark as if it were the decision of the Court. If the deed had been treated as null, it would have been a rare instance of a second purchaser of heritage affected by the incapacity of the granter of a disposition many years previously.
5. (1855) 17 D. 1027.
6. The situation is different if incapacity supervenes on continuous contracts. Pollock v. Paterson, 10 Dec. 1811 F.C.; Wink v. Mortimer (1849) 11 D. 995; Partnership Act 1890, s.35(a); Miller, supra, p.40.
7. Fraser, Parent and Child, p.685. This reasoning is logical but its practical application is not convincing. The policy of the law is to protect pupils, and all pupils can be treated in the same way. All adults are not equally incapacitated by insanity nor in any individual need the degree of insanity be constant throughout his life. The situation is more fluid and arguably the law's attitude should be more flexible. Anyone who contracts with a pupil can hardly complain if the contract rebounds in his face. A contract with an adult who appears eccentric is another matter. cp. Williston, sec. 251.

the insanity by the other contracting party is not a relevant consideration. The voidable nature of the contract in English law is not Scots law[1].

Sheriff M.H.L. Walker stated that "the interlocutor appointing the curator bonis has the same effect as a 'proven' verdict of a jury in a cognition and is conclusive as to incapacity"[2]. First, it may be doubted whether the appointment of a curator and cognition have the same effect. A curator may be appointed in circumstances in which an inquest would not cognose a person as insane[3], and Lord Fraser drew a distinction between the effect on status depending on whether there was a verdict[4]. Furthermore, it is unlikely that the appointment is conclusive as to incapacity. Even in the case of cognition, which is the stronger case for Sheriff Walker's view, "the trial on the brieve is ex parte, and ... evidence which the holder of the deed may possess of a lucid interval during which the deed was made may still be produced"[5]. The effect of the appointment of a curator bonis may be to alter the presumption of sanity to a presumption of insanity, but it is possible for proof to be led that the incapax was capable of understanding a contract into which he entered./

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1. John Loudon & Co. v. Elder's C.B., 1923 S.L.T. 226. This may be unfortunate. If the contract is void it seems that a sane party to a bargain with a lunatic may repudiate the bargain although the lunatic has performed or is ready to perform. Third parties may deny the title of the lunatic's grantee. Is it really the law that an insane person who has escaped from a mental hospital may sell his car, spend the proceeds, and yet at any time within twenty years, reclaim his car from the person then unfortunate enough to possess it? Vide Williston, sec. 250.
2. Ibid., p.26.
3. Fraser, Parent and Child, p.676.
4. Ibid., p.684, and in the authority referred to by Sheriff Walker, Mitchell & Baxter v. Cheyne (1891) 19 R. 324 it is said that the two procedures are "practically the same".
5. Bell, Comm., 1.132. Bell considered the verdict raised a presumption of incapacity but he obviously regarded the presumption as rebuttable. A.G. Walker and M.H.L. Walker, The Law of Evidence in Scotland, (1964), pp. 53 & 54, consider the presumptions arising from the appointment of a curator bonis under the heading "Examples of Rebuttable Presumptions".

entered. Conversely the lack of appointment of a curator does not prevent evidence that a person was insane at the time he entered the contract[1].

Intoxication and Disease

Insanity is not the only affliction which may affect capacity to consent. Stair equated drunkenness to disease, both of which could prevent a party legally contracting[2]. Just after the publication of his first edition, however, the Court did not reduce a deed on the grounds that the granter was extremely drunk and incapable of consent. It was necessary for reduction to allege deceit[3]. A case reported by Fountainhall shows uncertainty on how a person could be held to have knowledge and consent when he was so drunk that he had no senses or reason, but there was a hint that one should not give way to one's own intoxication[4]. Erskine and Bankton distinguished degrees of drunkenness. According to Erskine a person in the state of absolute drunkenness cannot contract, but a lesser degree of drunkenness did not annul the contract[5]. Bankton thought that drunkenness would not annul a contract unless it deprived the party of the use of reason[6].

These distinctions became settled law in Taylor v. Provan[7] in which it was decided that of the varying degrees of drunkenness only such as would render a person incapable of entering a/

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1. Reduction for furiosity could proceed although there had been no inquest: Alexander v. Kinneir (1632) M. 6278; Loch v. Dick (1638) M. 6278; Lindsay v. Trent (1683) M. 6280, and for idiotry: Christie v. Gib (1700) M. 6283. Thus in Gall v. Bird, supra, so far as appears from the report, there had been no cognition or appointment of a curator bonis to the pursuer.
2. Stair, 1.10.13; 4.20.49.
3. --- v. --- (1682) 2 B.S. 19.
4. Gordon v. Ogilvy (1693) 4 B.S. 62. cp. the attitude of the criminal law: Hume, Crimes, vol. 1, pp. 45-46.
5. Ersk., Inst., 3.1.16; 4.4.5.
6. Bankt., 1.342.66.
7. (1864) 2 M. 1226. There was no allegation of fraud. See also the terms of the issue in Johnston v. Clark (1854) 17 D. 228.

a bargain was relevant in a reduction of a contract. It was not sufficient for reduction that a person was "in such a condition from drink that he had not all his wits about him"[1] or that it was "an after-dinner bargain, when the buyer is in a more than usually liberal humour"[2] which was a lack of facility of common occurrence[3]. Furthermore the earlier cases reported by Hume of Jardine v. Elliot[4] and Hunter v. Stevenson[5], which had suggested that partial intoxication would result in a contract not being binding, were explained as being decided on the ground of lack of evidence of a serious bargain and not on the ground of lack of capacity.

In Pollock v. Burns[6] the action was for suspension of a charge upon a bill on the grounds that the bill had been signed by a person in a state of intoxication. The bill was not challenged until six months after it was signed. The action failed before the Second Division but the grounds for failure differ in the judges' opinions.

Lord Justice-Clerk Moncreiff considered that Sir Hew, who signed the bill, was exceedingly drunk at the time. Sir Hew could have successfully challenged the document if the challenge had been made at once. His Lordship continued: "Where the plea of intoxication is taken by the person who says he was intoxicated and incapable when he did the act which he wishes to repudiate, he is bound, the moment his sober senses return and he knows what he has done, to take his ground at once. That is essential"[7]. After pointing out the/

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1. Ibid., p.1232 per L.J.C. Inglis.
2. Ibid., p.1233 per L. Benholme.
3. Ibid., p.1234 per L. Neaves; cp. Ibid., p.123 per L.J.C. Inglis.
4. (1803) Hume 684. The sale of the entire sheepstock on a farm contracted by two persons under the influence of alcohol was not enforced although the price was fair. The transaction was not challenged until the time for implement, 3 months later.
5. (1804) Hume 686: The seller of sheep was under the influence of alcohol and the bargain was not enforced.
6. (1875) 2 R. 497.
7. Ibid., at p.503.

the time which Sir Hew took to challenge the transaction, the Lord Justice-Clerk concluded: "I think the actings of Sir Hew Pollock necessarily amount to a confession that the bill was obtained when he was not unconscious, that he knew what he was doing .... I assume, from the fact that he never stated the plea until the judicial demand was made, that he was conscious that he was not incapacitated, and that he knew what he had done".

It is difficult to know what to make of this reasoning. Either Sir Hew was capable of contracting or he was not. Taking the whole of the Lord Justice Clerk's opinion it seems that his Lordship considered that Sir Hew was capable of contracting. The lack of prompt challenge was an item of evidence on capacity at the time of the transaction. This was the approach of Lord Ormidale[1] and Lord Gifford[2]. Lord Neaves was much influenced by the consideration that Sir Hew was a habitual drunkard and the ground of his decision seems to be that habitual drunkards must make prompt challenge or be personally barred.

It is dangerous to isolate the statement of Lord Justice-Clerk Moncreiff that a person is bound to challenge a transaction the moment his sober senses return. By itself this would make the contract voidable and not void. The majority view in Pollock v. Burns is consistent with the theory of Stair and Erskine, which had been approved[3], that to succeed in a reduction on the ground of intoxication it must be shown that there was an absence of reason. If this is shown the contract, it is submitted, is void.

Gloag saw the force in the argument that the contract was void, but nevertheless stated that "it would seem to be merely voidable"[4]. The authority referred to is Wilson & Fraser v. Nisbet[5] which is reported briefly and proceeds on the basis "that/

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1. Ibid., p.505.
2. Ibid., p.506.
3. In Taylor v. Provan, supra.
4. Gloag, p.95.
5. (1736) M. 1509.

"that drunkenness is but a temporary incapacity, which ought not to be regarded, especially as it was the acceptor's own fault". This reflects the early uncertainty as to whether drunkenness should be held to have any effect on a contract. This attitude would not now be followed and, in any event, the case is not authority for the proposition that the bill was voidable. There was no relevant ground for challenge of the bill.

Gloag also refers to English law taking the view that the contracts are voidable, but English authorities are an unsatisfactory guide. In England incapacity by reason of drunkenness is equated to the incapacity of mentally disordered persons[1]. It is clear that the English approach to the incapacity of the insane produces different results from the Scottish authorities on such incapacity, hence the danger of following their cases on drunkenness[2].

There seems no reason why intoxication and insanity should be the only physical afflictions which deprive a person of reason. Stair recognised this by mentioning disease separately from idiocy and furiosity as a ground for reduction. There are some old cases in which it was held relevant for a woman to argue that a deed was signed by her while she was in labour and in terms indicating that there could be a lack of capacity at that time[3]. Conversely it/

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1. Chitty, para. 459; Cheshire and Fifoot, p.419.
2. The older and now discredited approach to drunkenness in England shown in Pitt v. Smith (1811) 3 Camp. 33 is nearer to the Scottish approach and in 1864 Lord Cowan said Scots law, English law and Pothier were identical: Taylor v. Provan, supra, at p.1233. English law, however, was changing. The change came with Molton v. Camroux (1848) 2 Ex. 487 affd. (1849) 4 Ex. 17 and Matthews v. Baxter (1873) L.R. 8 Ex. 132. A brief criticism of the English tendency to hold the contracts voidable is in P.S. Atiyah, An Introduction to the Law of Contract (2nd edn., 1971), p.111. In South African law the English rules have not been followed and contracts by mentally disordered persons, whether insane, feeble minded or intoxicated, are void. Willie's, p.146.
3. Belford v. Scot (1683) M. 6297; A. v. B. (1686) M. 6298; Mason v. Mason (1686) 2 B.S. 89.

it was not relevant, so far as third parties were concerned, for a man to argue that a deed was granted in aestu amoris "at which time he would refuse nothing"[1].

It is possible that the development of the doctrine of facility and circumvention in the nineteenth century may have removed much of the practical need for showing lack of capacity. It will usually be much easier to show that a facile person was imposed upon than to show that such a person lacked contractual capacity. Nevertheless facility and lack of capacity raise different issues as grounds for challenge of a contract[2]. If there is incapacity, the amount of alleged imposition is irrelevant. There is no reason why the incapacity produced by insanity or absolute intoxication should not also be imposed by other conditions such as produced by disease or drugs, although merely to aver that the pursuer was in a weak state of body and mind would be insufficient[3].

Ultra vires

In one sense everyone, even although adult and compos mentis, has a limited contractual capacity. No one may validly sell or purchase res communes, res publicae, res universitatis or res nullius[4]. Examples of such res extra commercium are the records of a court[5], a burgh charter[6], and a town house, unless other premises have been obtained by the Council[7]. If the subjects are inalienable a contract for/

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1. Currier v. Rutherford-Hyslop (1696) M. 6299.
2. A matter discussed infra.
3. N.B. Railway Co. v. Wood (1891) 18 R. (H.L.) 27; Mackie v. Strachan, Kinmond & Co. (1896) 23 R. 1030; Mathieson v. Hawthorns & Co. Ltd. (1899) 1 F. 468.
4. Ersk., Inst., 2.1.5-8.
5. Presbytery of Edinburgh v. University of Edinburgh (1890) 28 S.L.R. 567.
6. Mags. of Dumbarton v. Edinburgh University (1909) 1 S.L.T. 51.
7. Mags. of Kirkcaldy v. Marks & Spencer Ltd., 1937 S.L.T. 574.

for their sale is void[1]. Indeed it is probably the most extreme nullity there is because certain of the normal consequences of a void contract do not result. It seems from Presbytery of Edinburgh v. University of Edinburgh[2] that personal bar does not operate to exclude challenge of the transaction and this therefore would exclude adoption of the void contract. Nor, according to that case, will the negative prescription prevent challenge, a rule which is now statutory[3].

Normally, however, acts which are ultra vires are considered in relation to legal personae with limited powers and contrasted with the fuller capacity of the sane adult. The term "ultra vires" is used in widely differing situations. In the seventeenth century it was argued that decrees arbitral were ultra vires compromissi[4]. Later uses include the description of incompetent acts by a tutor[5], a trustee[6], a majority of a trade corporation[7], a company registered under the Companies Acts[8], harbour trustees vested with rights by private Act of Parliament[9], a building society[10], a provident society[11], and a trade union[12]. It has also been applied/

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1. Ibid., at p.577 per L. Jamieson.
2. Supra.
3. Prescription and Limitation (Scotland) Act 1973, Sch. 3.
4. A v. B (1616) M. 662 and 6834; Trumble v. Scott (1634) 1 B.S. 351; Pitcairn v. More (1680) M. 647. A decree pronounced outside the terms of the submission was "null": Cuninghame v. Drummond (1491) M. 635; "(made) no faith": Hamilton v. Hay (1608) M. 643; "null": Campbell v. Calder (1612) M. 637; Pitcairn v. More, supra; "null ipso iure": Earl of Linlithgow v. John Hamilton (1610) M. 636; and, much later, "inept and void": Napier v. Wood (1844) 7 D. 166.
5. Vere v. Dale (1804) M. 16389.
6. Kidd v. Paton's Trs., 1912 2 S.L.T. 363.
7. Gray v. Smith (1836) 14 S. 1062.
8. Klenck v. East India Co. etc. (1888) 16 R. 271.
9. J. & J. Nicol v. Dundee Harbour Trs., 1915 S.C. (H.L.) 7.
10. Sheill's Trs. v. Scottish Property Investment Building Soc. (1884) 12 R. (H.L.) 14.
11. Alexander v. Muddy, 1956 S.C. 24.
12. Wilson v. Scottish Typographical Assoc., 1912 S.C. 534.

applied to decisions of statutory bodies[1], to statutory instruments and regulations[2] and to bye laws[3]. In many instances the concept is not applied to contracts but that is the accident of events. A body which acts ultra vires may do so in various ways, of which the making of a contract is only one.

The variety of usages raises a problem of the meaning of ultra vires. If it were to be applied to any act contrary to the powers invested in a body the concept would be so wide as to be meaningless. The trustee who assaults a beneficiary would not be described as acting ultra vires although he is acting outside the terms of the trust deed. Assault is actionable apart from ultra vires. A contract may be objectionable on one ground, such as being contrary to public policy, and also be objectionable on the ground of ultra vires, but the arguments to be applied under each head will be different. Ultra vires is more restricted than illegality.

> "It is not a question whether the contract sued upon involves that which is malum prohibitum or malum in se, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the/

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1. Inland Revenue v. Barr, 1956 S.C. 162 (determination of General Commissioners of Income Tax); Glasgow & District Restaurateurs' etc. Assoc. v. Dollan, 1941 S.C. 93 (order of licensing court); School Board of Barvas v. Macgregor (1891) 18 R. 647 (regulation of Committee of Council on Education).
2. e.g. Somerville v. L.A., 1933 S.L.T. 48; McCallum v. Buchanan-Smith, 1951 S.C. 73; Duncan v. Crighton (1892) 19 R. 594.
3. e.g. Robert Baird Ltd. v. Glasgow Corp., 1935 S.C. (H.L.) 21.

the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract"[1].

It is at this point that the doctrine of ultra vires applying to contract may depart from the doctrine as it applies in other spheres. A bye law or decision of a statutory body which departs from the enabling statute is not "perfectly legal". The question there is the legality of the act. This is a problem of semantics which is not easily solved. For our purposes it is sufficient to state that a contract will be treated as ultra vires if it would be valid and unobjectionable if made by a person of full legal capacity, but is made by a legal persona with limited powers and made outside those powers.

There is a link between the doctrine of ultra vires and incapacity to contract.

"But after all the only effect of the doctrine of ultra vires is to render contracts which are ultra vires a nullity. You cannot have more than a nullity, and such a nullity was equally found in the Roman law in the case of the contracts of pupils, who were totally incapable of contracting"[2].

"One of the passages cited from the Digest (xxvi, viii.5) shows that the doctrine (of ultra vires) applies even when the transaction is between pupil and tutor"[3].

Early/

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1. Ashbury Rly. Carriage and Iron Co. v. Riche (1875) L.R. 7 H.L. 653 at p.672 per L.C. Cairns. Professor Gower makes a plea for restricting the use of the expression: L.C.B. Gower, The Principles of Modern Company Law (3rd ed., 1969), p.37.
2. Sinclair v. Brougham [1914] A.C. 398 at p.434 per L. Dunedin, quoted with approval in Mags. of Stonehaven v. Kincardine-shire C.C., 1939 S.C. 760 at p.770 per L.J.-C. Normand (on appeal, 1940 S.C. (H.L.) 56).
3. L.J.-C. Normand, ibid.

Early Scottish examples of deeds which were ultra vires were tacks of churchlands for the life of the lessee, or feus of churchlands either of which unless confirmed were "null"[1], or, more fully, "null and of nane availl"[2] or "of nane availl, force nor effect"[3]. Assignations and feus by tutors were in the early authorities described as "null"[4] but the term "ultra vires" was in use by 1804[5].

The usual situation in which the doctrine of ultra vires is encountered is the challenge of acts by corporations[6]. Before limited liability companies posed these problems, Scottish Courts were considering the limitations on the powers of guilds. The issue arose when some trade corporations attempted to use their funds to support general plans for the reform of the government of Royal Burghs[7] and to oppose a Bill for maintaining police and extending the royalty of the city of Glasgow[8]. The Court of Session refused to allow such use of funds, it being observed on the bench that "the funds of public bodies must be applied to the purposes for which they have originally been appropriated"[9]. In fact the decision of the Court did not trouble the Trades House of Glasgow nor the Incorporated Trades who continued with their political protests for/

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1. Bishop of Aberdeen v. Johne Forbes (1501) M. 7933.
2. Abbot of Crosraguell v. Hamilton (1504) M. 7933.
3. Balmerino v. Kynneir (1569) M. 7938; on this principle vide Bankt. 1.557.55. The statutes referred to 1584 c.8 (12 dco.ed. c.7) and 1606 c.71 (12 dco.ed. c.3) were repealed by the Statute Law Revision (Scotland) Act 1906.
4. Lands v. Douglass (1629) B.D.1.173; M.16250; Geddes v. Dousie (1629) M. 16250; Stair, 1.6.18.
5. Vere v. Dale (1804) M. 16389.
6. Situations other than those already mentioned would include deeds by heirs of entail, deeds contrary to letters of inhibition or interdiction and deeds contrary to the law of deathbed. Vide A.J.G. Mackay, The Practice of the Court of Session (1879), vol.2, p.154.
7. Finlay v. Newbigging (1793) M. 2008; Wilson v. Scott (1793) M. 2010.
8. Recausland v. Montgomery (1793) M. 2010.
9. Ibid.; on a distinguished circumstance vide Anderson v. Incorp. of Wrights of Glasgow (1862) 1 M. 152; (1865) 3 M. (H.L.) 1.

for many years[1] but it foreshadowed the problem of political application of trade union funds[2].

It was also ultra vires for the majority of a trade corporation, or even the unanimous voice of the corporation, to alter its constitution and thus divert its funds from its original purposes[3], and this sanctity of the constitution prevented such administrative changes as altering the rules on the election of the Deacon[4]. It may be that alteration was possible with the authority of the magistrates[5], but, in any event, in 1846 when the exclusive privilege of trading in burghs was abolished provision was made for alteration of bye laws of incorporations with the sanction of the Court of Session[6].

The attitude to the sanctity of funds being applied for their created purpose was repeated in connection with the powers of a statutory railway company[7]. There was then a series/

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1. H. Lumsden, History of the Skinners, Furriers and Glovers of Glasgow (1937), p.165; vide H. Lumsden & P.H. Aitken, History of the Hammermen of Glasgow, p.146.
2. Amalgamated Soc. of R. Servants v. Osborne [1910] A.C. 87, negatived by Trade Union Act 1913.
3. Incorp. of Wrights etc. of Leith (1856) 18 D. 981 at p.984 per L. Ivory.
4. Gray v. Smith (1836) 14 S. 1062.
5. Crooks v. Turnbull (1776) M. 2007; Tudors of Canongate v. Milroy, 1777, Hailes, vol. 2, 775.
6. The Burgh Trading Act 1846, s.3; Several applications for sanction have been presented, some involving considerable alteration, e.g. Guildry of Arbroath (1856) 18 D. 1207; Incorp. of Skinners of Glasgow (1857) 20 D. 211; The United Incorp. of Masons & Wrights of Haddington (1881) 8 R. 1029; Incorp. of Tailors in Glasgow v. Trades' House of Glasgow (1901) 4 F. 156; Incorp. of Coopers, 1911 S.C. 1118; Incorp. of Tailors of Edinburgh v. Muir's Trst., 1912 S.C. 605 (a rare instance of refusal of the petition); Incorp. of Baltrons of Stirling, 1917 S.C. 887 (one of the most extensive changes approved).
7. Balfour's Trs. v. Edinburgh and Northern Ry. Co. (1848) 10 D. 1240.

series of classic English cases with parallel attitudes[1]. In General Property Investment Co. v. Matheson's Trs.[2] the Court of Session decided that when a company made an ultra vires purchase of its own shares, the purchase was not only voidable but void.

> "A transaction of this kind is not merely voidable, but is void, as being ultra vires of the company. It is a transaction which not only the directors had no right to enter upon, but which even the company themselves at a meeting of all the share holders could not adopt, because it was directly in the teeth of the statute of 1862"[3].

> "It is a nullity originally, and the company cannot homologate or adopt a nullity, for that is equally ultra vires"[4].

> "The sale was null and void from the first ..."[5].

> "a clear and absolute nullity"[6].

In this instance the void contract cannot be adopted and it would be strange if a person who acts ultra vires could himself cure the invalidity. It may sometimes be possible for others to adopt the contract. Beneficiaries may adopt the void acts of trustees.

One case involving trustees shows the void nature of an ultra vires contract[7]. Trustees, acting ultra vires, conveyed property to a company which then granted a bond over the property.

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1. Eastern Counties Ry. Co. v. Hawkes (1855) 5 H.L.C. 331; Ashbury Ry. Carriage and Iron Co. v. Riche (1875) L.R. 7 H.L. 653; Att. Gen. v. Great Eastern Ry. Co. (1880) 5 App. Cas. 473; Baroness Wenlock v. River Dee Co. (1885) 10 App. Cas. 354. The nature of the nullity is unaffected by European Communities Act 1972, s.9.
2. (1888) 16 R. 282, distinguished in General Prop. Inv. Co. v. Craig (1891) 18 R. 389. Vide Balfour's Trs. v. Edinburgh and Northern Ry. Co., supra, at p.1254 per L. Cockburn.
3. (1888) 16 R. 282 at p.290 per L. Shand.
4. Ibid. at p.291 per L. Shand.
5. Ibid. at p.293 per L. Mure.
6. Ibid. at p.293 per L. Adam.
7. Kidd v. Paton's Trs., 1912 2 S.L.T. 363.

> If the reconveyance to the company was ab initio void as an act ultra vires of them, the trustees acting on behalf of the trust estate may, in the absence of adoption by the beneficiaries, get the deed set aside whatever the consequences may be. On the other hand, if the deed of reconveyance was merely voidable, i.e. an act within the powers of the trustees but procured from them by the fraud of (the company secretary), reduction would not be granted in prejudice of the rights of those acquiring for value and without notice of the fraud"[1].

The decision was that a deed ultra vires of trustees was void and "if the reconveyance to the company was ab initio void, ... the Company had no title to the property and could not confer a valid title thereto upon anyone dealing with them"[2].

Another consequence of a contract being ultra vires and void is that money paid on the faith of it may be recovered on the principles of recompense[3], whereas English law is trammelled by the complicated rules on tracing laid down in Sinclair v. Brougham[4].

Breach of Fiduciary Duty

In contrast to those situations in which a person in a fiduciary position acts ultra vires, are those in which he acts in breach of fiduciary duty. The development of auctor in rem suam can be traced from 1583[5], but the general rule was/

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1. Supra at p.365 per L. Hunter.
2. Ibid. The principle remains although the validity of certain transactions by trustees is affected by Trusts (Scotland) Act 1961, s.2.
3. Haggarty v. S.T.G.W.U., 1955 S.C. 109; Mags. of Stonehaven v. Kincardineshire C.C., 1939 S.C. 760 at p.771, per L. Normand (on appeal the averments on ultra vires were abandoned, 1940 S.C. (H.L.) 56).
4. [1914] A.C. 398; vide criticism in R. Goff and G. Jones, The Law of Restitution (1965), p.321.
5. Lord Sanquhar v. Crichton (1583) M. 16233; Hushet v. Dog (1639) M. 9456; Hamilton v. Borthwick (1680) M. 9457 and cases cited in Brown's Synopsis, vol. 4, 2630 et seq.

was not settled until the great cases of York Buildings Company v. Mackenzie[1] and Aberdeen Railway Co. v. Blaikie Brothers[2]. No one who has fiduciary duties to discharge "shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect"[3]. In York Buildings Company the purchaser of an estate who had a conflicting interest had his title reduced but "without prejudice to the titles and interests of the lessees and others, who contracted with the (purchaser) bona fide". That this would mean that the transaction was voidable and not void was settled by Fraser v. Hankey & Co.[4]. A trustee on a sequestrated estate purchased, through another, heritable property of the bankrupt. Lord President Boyle entertained no doubt that the purchase was "illegal" but it was not an absolute nullity. The challenge of the transaction was barred by long delay or acquiescence. Lord Mackenzie distinguished the situation in which purchaser and seller were the same, as in this case the estate was sold by the creditors and the bankrupt.

> "The ground of reduction is ... founded on breach of duty, on the misconduct of the trustee. It may be weaker than fraud on his part; it cannot be stronger. It is not like insanity, a natural and absolute nullity. It was reducible by the creditors or bankrupt if they chose, on account of failure in duty to them by the trustee. If these parties acquiesced, it was no longer reducible"[5].

Similar views were expressed by Lord Fullerton and Lord Jeffrey. The lands had been conveyed to an onerous bona fide third party, and this also barred challenge of the trustee's transaction./

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1. (1795) 3 Paton 378.
2. (1854) 1 Macq. 461.
3. Aberdeen Ry. Co. v. Blaikie, supra, p.471, per L.C. Cranworth.
4. (1847) 9 D. 415.
5. Ibid., at p.428.

transaction.

There are now a series of decisions and *dicta* indicating that a transaction in breach of fiduciary duties is voidable and not void[1].

Incapacity to Consent - Summary

The distinction between deeds which were null *ab initio* and those which were reducible was recognised in relation to deeds of minors by the Court of Session in the sixteenth century. The theoretical place of enorm lesion in that distinction remains uncertain but in modern terminology a deed by a minor without the consent of existing curators is void, whereas in most other circumstances minors' deeds are voidable. These rules are affected by exceptions. The exception based on profitable application of a sum for the benefit of a minor can probably be explained on the basis of recompense. If it is the law that a minor may enforce a contract beneficial to him, but such contract cannot be enforced against him, there is a form of limping nullity. The contract would be void in relation to one party, the minor, but not in relation to the other party.

The/

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1. e.g. Thorburn v. Martin (1853) 15 D. 845 at p.850 per L. Cockburn; Perston v. Perston's Trs. (1863) 1 M. 245 at p.251 per L. Neaves; Aberdein v. Stratton's Trs. (1867) 5 M. 726 at p.732 per L.J.C. Patton; Mackie's Trs. v. Mackie (1875) 2 R. 312 at p.316 per L. Neaves; Mags. of Aberdeen v. University of Aberdeen (1877) 4 R. (H.L.) 48 at p.51 per L.C. Cairns, cp. (1876) 3 R. 1087 at p.1093 per L.P. Inglis; Buckner v. Jopp's Trs. (1887) 14 R. 1006 at p.1018 per L. Lee; Dunn v. Chambers (1897) 25 R. 247 at p.250 per L. McLaren; Ashburton v. Escombe (1892) 20 R. 187 at p.198 per L. Kinnear; Hall's Trs. v. McArthur, 1918 S.C. 646 at p.652 per L. Skerrington; Wilson v. Smith's Trs., 1939 S.L.T. 120; cases on beneficiaries ratifying the transaction include Lord Gray Petn. (1856) 19 D. 1 (rubric misleading); Scott v. Handyside's Trs. (1868) 6 M. 753 at p.760 per L. Deas; Howard & Wyndham v. Richmond's Trs. (1890) 17 R. 990. cp. Taylor v. Hillhouse's Trs. (1901) 9 S.L.T. 31; Dougan v. Macpherson (1902) 4 F. (H.L.) 7.

The difficulties of minors' contracts are insignificant compared with the complexities of contracts by married women at common law. An obligation by a married woman could be null and yet it could be founded on. Where the wife was incapable of contracting even with the consent of her husband, the obligation was relatively void. Where the husband's consent was necessary the obligation was null until that consent was obtained. These distinctions may still be relevant in contracts by a minor wife.

It is settled that a contract by an insane person is void and, we have argued, the same result occurs in a contract by a person absolutely intoxicated or whose ability to consent is removed by disease or drugs. Contracts which are ultra vires produce another variation on the theme of invalidity. They are void and in some instances cannot be adopted nor will prescription cure the defect. They have to be contrasted with contracts in breach of fiduciary duty which are merely voidable.

Chapter 2

Consent Improperly Obtained

The characteristic of situations in which consent is improperly obtained should be that in fact consent is given. It is the method of obtaining consent which is tainted, not the consent. This should be separable from the situation in which no consent is given. Yet it is doubtful whether Scots law distinguishes those two situations, with resulting confusion in the form of nullity. The categories considered are force and fear, error, fraud, facility and circumvention, and undue influence.

Force and Fear

As befits Scottish history, force and fear is a ground for reduction at an early date[1]. It is repeatedly mentioned by Balfour[2] and examples are given by Spotiswoode[3]. The Court of Session had barely come into being when it was granting a reduction on this ground[4]. Morison reports many cases from 1543 onwards[5].

Most of the case law is concerned with whether certain facts amount to force and fear. Scots law faced some of the other problems, namely, whether the threat need be to the contracting party[6] and the effect of threats of lawful action, which, in the context of civil imprisonment, produced most of the case law[7]. This fruitful source of litigation diminished when/

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1. Lady Torrs v. Lyoun of Logy (1483) A.D.A. 128*, 145*; Hamilton v. Abbot of Culross (1494) A.D.A. 202, A.P.S. 11, 205.
2. Balfour, vol. 1, pp. 179,182,183.
3. Spotiswoode, p.205.
4. King & Gray v. Hammilton of Preston (1532/33) A.D.C. et S., p.119.
5. S.v. "Vis et Metus", M. 16479 et seq.
6. McIntosh v. Farquharson (1671) M. 16485; Craig v. Paton (1865) 4 M. 192.
7. An illustration of the difficulties is Fraser v. Knox, 13 Dec. 1810 F.C. in which the court drew a puzzling distinction between two types of disposition.

when civil imprisonment, "one of the most usual instruments of intimidation in modern times"[1], was with certain exceptions abolished from 1st January 1881[2]. The exit was accompanied by litigation on illegal imprisonment in August 1880 and the effect of the authorities was summarised by Lord Justice-Clerk Moncreiff[3].

It was settled, at an early date, that reduction of a deed on the grounds of force and fear was effective against bona fide third parties[4]. We find this result contrasted with the effect of fraud. In Stuarts v. Whitefoord[5], which was argued in praesentia, some of the Lords thought that there was a difference between a reduction ex capite metus, which was competent against singular successors, and a reduction ex capite doli, which was not competent against a singular successor who had acquired a right bona fide and for an onerous cause. This shows an appreciation of the distinction between a deed which was voidable, although the term was not used, and a deed which was void. This distinction had been evolved in cases involving minors and it is not surprising that in Stuarts reference was made to this familiar touchstone. In argument it was said that a deed procured by force and fear was "a more palpable nullity than a deed done by a minor, having curators without their consent"[6].

The basis on which force and fear results in invalidity is that it excludes consent and the nature of the invalidity interacts with the extent of the required concussion. In Priestnell v. Hutcheson[7] the Lord Ordinary commented:

> "That the reduction on the ground of force and fear operates to annul the deed even against onerous third parties/

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1. Bell, Comm., 1.315.
2. Debtors (Scotland) Act 1880.
3. McIntosh v. Chalmers (1883)11 R. 8 at p.15.
4. Cassie v. Fleming (1632) M. 10279; Woodhead v. Nairn (1662) M. 10281.
5. (1677) M. 16489.
6. At 16493.
7. (1857) 19 D. 495.

parties, suggests the necessity of the extortion being of such a character as substantially to interfere with the freewill of the party, and so to exclude the consent which the law holds to be necessary to the due execution of any deed"[1].

On appeal Lord Deas recognised the inaccuracy of the expression "force and fear" which suggests that two elements have to be proved. In fact the case law has rarely been concerned with force. The issue is usually one of fear, which may be called concussion[2] or extortion through the influence of fear[3].

Stair[4] and Bell[5] treat a contract induced by force and fear as void. Apart from the other authorities already mentioned, there are two clear instances in which force and fear was found good against the onerous indorsee of a bill of exchange[6]. There are contrary indications. Bankton stated "Nor indeed can any embargo be laid upon purchasers of moveables, by allegations of force or fraud in the author, that being destructive to commerce"[7]. Professor Gloag thought that "it may perhaps still be open to the Courts to consider whether a disposition of property, granted under the apprehension of inconvenient consequences not amounting to physical violence, would be reducible in a question with an onerous and bona fide third party"[8].

There/

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1. Supra at p.498.
2. Sutherland v. Mackay (1834) 8 S. 313 at p.316 per L. Glenlee.
3. Priestnell v. Hutcheson, supra, at p.499, per L. Deas.
4. Stair 1.9.8 - "utterly void".
5. Bell, Princ. s.12; Comm. 1.314. "Force and fear annul engagement".
6. Willocks v. Callender & Wilson (1776) M. 1519; Wightman v. Graham (1787) M. 1521. Now affected by the Bills of Exchange Act 1882, s.29(2).
7. Bankt. 1.257.59. Some support might be derived from Anderson v. Spence (1693) M. 10286.
8. Gloag, p.488.

There is something to be said for distinguishing two situations. If a person is physically forced to sign a contract, there is no consent and the act is a nullity. On the other hand, if consent is obtained through fear there is still consent and, as in other cases where the method of obtaining consent is tainted[1], the contract should be voidable. South African law makes this distinction[2] and in England it is generally considered that a contract entered under duress is voidable and not void;[3] but a contrary view has been expressed[4]. In American jurisdictions it is recognised that "Duress, like fraud and mistake, may completely prevent the mutual assent necessary for the formation of a contract or sale, or it may be merely a ground for setting aside a bargain because the expression of mutual assent thereto was improperly obtained"[5].

The Scots authorities, however, are virtually unanimous in treating the contract as void. It is thought that only the House of Lords would be able to treat some contracts induced by force and fear as voidable. This would bring more logical consistency to the law.

Error

It is difficult to decide the extent to which error was recognised as a ground of challenge prior to Stair. Craig mentions error induced by the promissor[6] and there are some cases which might have involved error but it is not clear when a case involved error or breach of contract and whether any/

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1. Fraud, facility and circumvention and undue influence.
2. Wessels, p.360 et seq. cp. Lee and Honoré, p.16.
3. Chitty, p.351; and see M. Pothier, Law of Obligations (trans. W.D. Evans, 1806), sec. 21.
4. D.J. Lanham, "Duress and Void Contracts", 1966 M.L.R. 615.
5. Williston, sec. 1624.
6. Craig, Ius Feudale, p.350.

any error was induced or not[1]. Several of the cases may be tentatively classified as involving error as to quality[2], but it must be remembered that they could be examples of the warrandice against faults or actio redhibitoria[3].

Stair's theory of error was simple. If there is error in the substantials "there is no true consent, and the deed is null". Conversely, if the error is not in the substantials the contract is valid[4]. An example given of error is a contract under which the owner ignorantly takes in custody or pledge that which is his own with a promise to restore it. The error is to the substance of the contract and the contract is void[5].

Stair's proposition that error in substantialibus would annul a transaction was echoed by Erskine, who said that consent was excluded by error in the essentials[6] and by Bankton[7]. This proposition was given effect to in Sword v. Sinclair in 1771[8]. An agent made a unilateral error as to price in a contract for the sale of tea. The error arose due to a mistake in/

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1. Andro Brown v. Simon Walker (1490) A.D.C. 1, 159 (insufficient ship); Brown v. Nicolson (1629) M. 14229 (crooked horse); Hogersworth v. Hamilton (1665) M. 14230 (bad madder); Aiton v. Fairie (1668) M. 14230 (horse of incorrect age); Alston v. Orr (1668) M. 14231 (seed which would not grow); Shewell v. Mowbray (1678) M. 14233 (silk of wrong colour and quantity); Wallwood v. Gray (1681) M. 14235 (infected horse); Paton v. Lockhart (1675) M. 14232 (spoiled skins).
2. Aiton v. Fairie, supra; Alston v. Orr, supra; Paton v. Lockhart, supra; Wallwood v. Gray, supra.
3. Vide Ersk., Inst., 3.3.10; Brown, Sale, p. 287 et seq.
4. Stair, Inst., 1.9.9; 4.40.24. When an error was substantial or essential and when it was accidental has been little discussed by Scots writers and indeed it is probably impossible to lay down general rules. The distinction is, however, part of the common stock of civilian thought and a useful analysis of the problem of classification is in Wessels, vol. 1, pp. 280-298.
5. Stair, Inst., 1.7.4.
6. Ersk. III, 1.16.
7. Bankton, op. cit., 1.470.63; 1.343.67; 1.409.6.
8. M. 14241.

in the note of sale prices supplied to the agent by his principals. An action for delivery and damages by the purchaser against agent and principals failed.

In Hepburn & Somerville v. Campbell in 1781[1] a mistake was made in fixing the upset price of part of an estate. It was observed by Lord Monboddo:

> "Every sale, whether voluntary or judicial, may be set aside by an error in substantialibus; nor will even a decree of sale be sufficient to bar a purchaser from pleading such an error; as was determined in the case of Balmahoy. But here no decree has been pronounced; there seems to have been an error on both sides; and neither party is entitled to take advantage of the other's mistake".

His Lordship decided that part of the lands were sold but that it was in the option of the purchaser to accept that part or reject it.

A contract for building a bridge was not enforced when there was found to be an error on the part of both contracting parties as to the nature of foundations required for the bridge. The House of Lords, upholding the Court of Session, ordered that the portion of the contract price which had been paid was to be repaid and the builder was entitled to take away the materials already used[2]. In a later case the House of Lords upheld a plea that a lease had been entered into under error as to the extent of the land[3]. The tenant originally took the plea that the error was induced by fraud but this was apparently abandoned and the case decided on the grounds of unilateral error in substantialibus. The opinion of the House of Lords has not been preserved[4] which is all the more unfortunate because they reversed the interlocutors of the Court of Session. The House of Lords ordered that the lease/

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1. M. 14168. cp Blair of Balthayock v. Murrays; Bell, Comm. 2.263.
2. Mags. of Rutherglen v. Cullen (1773) 2 Paton 305.
3. Riddell v. Grosset (1791) 3 Paton 203.
4. See note in Scots Revised Reports.

lease was to be "reduced, rescinded, cassed and annulled from the beginning, and that the same is now, and shall be in all time coming void and null, and of no avail". They also ordered the tenant to pay for the three years during which he had occupied the land.

Thus it can be said that by the end of the eighteenth century Scots law recognised that an error in substantialibus could result in a contract being reduced even if the error was on the part of one contracting party and not induced by the other party. That proposition can be derived from Sword v. Sinclair and Riddell v. Crosset. It is consistent with Hepburn & Sommerville v. Campbell and Mags. of Rutherglen v. Cullen which involved error on the part of both parties. This left unsettled the effect of error on third parties and what errors were in substantialibus. How does it seem that a distinction was appreciated between two types of bilateral error, namely, common error, where both parties make the same mistake, and mutual error, where the parties misunderstand each other[1]. The distinction is fundamental because in common error there is consensus and in mutual error there is not[2].

The implication had always been that essential error subverted consent and thus the contract was void. It is not surprising to find a Lord Ordinary in 1833 thinking it "a point of law well understood, that where two contracting parties are in error about the essentials of a contract it must be void and null"[3]. On the facts the Lord Ordinary considered that there was not error in the essentials and this/

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1. cp Sutherland v. Bremner's Trs. (1903) 40 S.L.R. 324, a case of common error (called mutual error) in which L. Moncreiff treats the two types of error as having the same effect (at p.329).
2. cp Cheshire and Fifoot, p.203. Thus common error is a candidate for different treatment from other types of error, but Scots law does not make the distinction. Apart from cases otherwise referred to, vide Hamilton v. Western Bank of Scotland (1861) 23 D. 1033 and Smith, Short Commentary, pp. 818-9.
3. Grieve v. Wilson (1833) 6 W. & S. 543, 549.

this view was affirmed on appeal in the Court of Session and by a majority of the House of Lords. Lord Wyndford dissented in the House of Lords on the conclusions to be drawn from the facts but in his speech on the question of law he distinguished void and voidable contracts and quoted without disapproval the passage mentioned from the Lord Ordinary's opinion. He stated that "if there is an error in the essentials of this contract it is null and void, and cannot be set right"[1], which position he reiterated when quoting Stair[2].

Unilateral error may arise in a situation in which there is the appearance of consensus ad idem, but in fact one party would not have contracted if he had known the true position. This may raise acute problems of proof and of the nature of essential error but Scots law would reduce a contract where there had been uninduced unilateral essential error.

The basic situation is illustrated by Purdon v. Rowat's Trs.[3]. A reduction of a discharge was sought on the grounds of error as to its effect and on the ground of fraud. A jury found for the pursuers on both grounds and a motion was made for a new trial. Much of the opinions are concerned with the effect of fraud but Lords Cowan and Wood thought that there would be no contract if there was error as to the substance and effect of the deed. In a joint opinion they stated[4]:-

> "There can be no doubt, that in the inquiry, whether the deed was executed in error as to its substance and effect, it was all-important for the jury to consider, on the evidence, the state of the granter's knowledge as to the claims he was discharging by the deed ... the consent truly applies only to the claims which at the time/

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1. Ibid., 558.
2. Ibid., 560.
3. (1856) 19 D. 206.
4. At pp. 222,3.

> time he holds himself to possess. And if there were claims of a different kind, or exigible by him in a different character, and on another title, than those of which he believed himself possessed, the generality of the discharge goes beyond his true meaning and intent. There has truly been substantial error, on his part, in what he did, though he knew it not at the moment; and 'those who err in the substantials of what is done contract not'".

Some objections may be raised to giving effect to unilateral error, which do not apply in cases of bilateral error. The party in error may be in error as a result of his own carelessness. Should that have any effect? A theory of error based on consensus would suggest not. In Sword v. Sinclair[1] the unilateral error was caused by a principal's mistake. An action on the contract failed against both the principal and the agent who contracted on his behalf.

If the other party is aware of the error, does that have any effect? Again in a theory based on consensus this should be irrelevant. Either there is essential error, or there is not; either there is consensus or there is not. Taking advantage of an error would, in the absence of fraud, be irrelevant. However, in Stewart's Trs. v. Hart[2] the sellers of ground were under unilateral essential error as to the amount of feuduty. The sale and subsequent disposition were reduced, but the Court was much influenced by the fact that the defenders knew of and took advantage of the seller's error.

Error as to the law is in a special position. It is a trite proposition that everyone is presumed to know the law. That is not a complete answer to a case based on error as to law./

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1. (1771) M. 14241. In Civilian terms, however, an error must be both essential and real and reasonable (iustus error). Vide Wessels, vol. 1, pp. 298-304.
2. (1875) 3 R. 192.

law. A contract may be reduced when both parties are in error as to legal rights[1]. If the error as to law is induced by the other party it seems unfair to ignore the error. Unilateral uninduced error as to law is in a different situation.

Firstly, a party sciens et prudens cannot generally aver ignorance of the meaning of the deed which he has signed[2]. Secondly, to allow one party to found on his misinterpretation of the deed would be unfair to the other party[3]. It is such considerations which probably lead to dicta such as "A reduction on the head of error implies in the general case error in point of fact. Error in point of law is, generally speaking, insufficient"[4] and "The general rule is ... that an error in law will not avail to set aside an agreement or contract"[5].

It was, however, the problem of induced unilateral error which produced most of the important discussion of error after the middle of the nineteenth century.

Error and innocent misrepresentation before 1893

For a long time Scots law drew no distinction between induced and uninduced error. Thus in Oliver v. Suttie[6] the Lord Ordinary thought that there was "no room or authority, or sound principle, for any mid plea between fraud and unintentional error"[7]. It was alleged that a tack was induced by misrepresentations of the defender. These were not said to be fraudulent and the plea stated on record was of error in essentialibus. He rejected the idea that negligent/

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1. Dickson v. Halbert (1854) 16 D. 586; Mercer v. Anstruther's Trs. (1871) 9 M. 618 (7 judges); on appeal (1872) 10 M. (H.L.) 39.
2. Maclaggan v. Dickson (1832) 11 S. 165.
3. Bankier v. Robertson (1865) 3 M. 536, 537, per L. Kinloch.
4. Scrabster Harbour Trs. v. Sinclair (1864) 2 M. 884, 887, per L. Kinloch.
5. Kippen v. Kippen's Trs. (1874) 1 R. 1171, 1179, per L.J.C. Moncreiff.
6. (1840) 2 D. 514.
7. At 516.

negligent misrepresentation was relevant, but his view is coloured both by the lack of development of the law of culpa in 1840, and the defective state of the pleadings before him.

The issue arose again the following year in Campbell v. Boswall[1]. The pursuer alleged that he had been induced to enter a lease by the defender's representations. Damages were claimed. The issue proposed for trial called the representations "false". The defender objected that only "false and fraudulent" representations were a ground for damages. The Court ordered the insertion of the word "fraudulent" in the issue. There are dicta which suggest that erroneous and innocent misrepresentations are not actionable unless fraudulent, but the case should be considered in the light of the remedy sought, namely damages. The question of reduction did not arise because the lease was at an end.

The problem did arise in an action of reduction in Johnston v. Smellie's Trs.[2]. There was allegedly fraud and error in essentialibus induced by the party founding on the contract. There were separate issues allowed on fraud and error. The terms of the issue on error was "whether, in entering into and concluding the said agreement to purchase the said lands, the pursuer was under an essential error as to the substance of the agreement". The issue did not refer to the fact that the error was induced[3].

The difference between uninduced and induced error arose more sharply in Adamson v. Glasgow Water Works Commissioners[4]. The/

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1. (1841) 3 D. 639.
2. (1856) 18 D. 1234. The defenders' representation was of lands extending to 250 acres whereas there were only 220 acres and rental of £308 instead of £293. The jury found for the pursuer on the issue of essential error.
3. Contrast the issue of fraud.
4. (1859) 21 D. 1012. An issue of misrepresentation was allowed in Johnston v. Johnston (1857) 19 D. 706; (1860) 22 D. (H.L.) 3 but it is not clear whether fraud was being pled. Fraud is not mentioned in the issue but vide defenders objection to issue at 19 D. 710.

The pursuer proposed an issue on whether he was induced to enter a contract by the misrepresentations of the defender as to the nature of the work to be performed and also an issue of whether he entered the contract under essential error as to the nature of the work. The Court held that there should not be separate issues because they were not separate grounds of action. After some difficulty the form of issue approved was "Whether the pursuer, in entering into said contract, was under essential error, induced by the misrepresentations of the defenders as to the work to be performed".

Shortly thereafter Lord Kinloch rejected the argument that essential error, induced by misrepresentations, was not a legal ground of action, unless the misrepresentations amounted to fraud[1]. "Essential error is a well established ground of reduction. It is properly connected with misrepresentation, in the case of an onerous contract, in which both parties are not said to have been deceived, but one to have misled the other"[2].

In Couston v. Miller[3] the issue approved was "whether the said document was signed by the pursuer when he was under essential error as to its substance and effect, caused by misrepresentation or concealment on the part of the defender?". In Hogg v. Campbell[4] the First Division, not without difficulty and/

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1. Wilson v. Caledonian Railway Co. (1860) 22 D. 1408; Professor Walker considered Adamson, supra, and Wilson as as the recognition of innocent misrepresentation: "Equity in Scots Law", 1954 J.R. 103 at p.130. This interpretation is not accepted. On the contrary, they show that innocent misrepresentation was not a separate ground of relief from essential error. Nor do we accept Professor Stein's treatment of this issue in Faults in the Formation of Contract in Roman Law and Scots Law, (1958), pp. 192 et seq.
2. Ibid., at p.1410.
3. (1862) 24 D. 607.
4. (1864) 2 M. 848.

and with Lord Deas dissenting, granted separate issues of fraud and of essential error induced by the defender. Lord Ardmillan pointed out to Lord Deas that "if mutual error will support a reduction of the deed, on the head of essential error, then the error of one, induced by the other, even though innocently induced by the other, must have as much effect as the mutual error"[1]. It is not surprising, on the other hand, that the editors of Bell's Principles should state "an innocent misrepresentation (not leading to essential error and not being a warranty) does not invalidate/contract"[2].

The development was logical. Innocent misrepresentation emerged as a branch of essential error. The situation in which essential error was not produced was faced by the Court in Woods v. Tulloch[3]. This case fits in well with the previous development of the law. It is interesting because although it has never been overruled, it may not represent the present law.

The action was for reduction of a sale of mineral property on the grounds that the purchaser had entered into the contract under essential error induced by the seller's misrepresentations as to the extent and rental of the subjects. The seller was alleged to have said that the extent was 132 acres and the rental £157 whereas in fact the extent was 125 acres and the rental £120.10/-. Lord Kyllachy held that there was no relevant averment of essential error. The error was as to the qualities of the subject but it was not essential error. It followed that the averment of misrepresentation was irrelevant. On appeal the four judges of the First Division unanimously agreed with Lord Kyllachy.

One may query the refusal to classify the error as essential and also the making of such a decision on a plea to the/

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1. Ibid., at p.862.
2. Para. 14, fn. e.
3. (1893) 20 R. 477.

the relevancy[1]. Nevertheless the point of law is clear -- to be relevant, innocent misrepresentation must induce essential error. In the context of the development of Scots law up to the middle of the nineteenth century this proposition was correct[2]. Furthermore, consent would be subverted and the contract void. The idea that innocent misrepresentation might render a contract voidable was not part of the law. In his first edition, Professor Gloag states that "this was probably the view generally held until the decision of the House of Lords in Stewart v. Kennedy"[3].

Stewart v. Kennedy, and after

Various strands of the law of error came together in Stewart v. Kennedy[4]. This is an important case which must be analysed in detail. The basic facts were simple. Sir Archibald Douglas Stewart signed an offer to sell an entailed estate "subject to the ratification of the Court". The offer was accepted by Mr. Kennedy who later raised an action of declarator and implement against Sir Douglas. Sir Douglas contended that under the missives he was bound to proceed under the Entail Act of 1882. The Court held that the phrase "subject to the ratification of the Court" must apply to a sale under the Entail Amendment Act 1853[5]. The next heir of entail/

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1. cp. Johnston v. Smellie's Trst. (1856) 18 D. 1234 in which a jury found essential error proved on similar facts.
2. Except in the case of insurance contracts where under English influence special rules were being developed. Vide cases in B.S. 1074-1077; Newcastle Fire Insurance Co. v. Macmowan & Co. (1815) 3 Dow 255 at pp. 262-3 per L.C. Eldon; Dennistoun v. Lillie (1821) Shaw's Appeals 1,22; Stirling & Robertson v. Goddard (1822) Shaw's Appeals 1,238.
3. Gloag (1st ed. 1914), p.521. In the 2nd edition this passage is rewritten in such a way as to more strongly represent the doctrine of innocent misrepresentation as part of Scots law.
4. (1889) 16 R. 857; (1890) 17 R. (H.L.) 25.
5. (1889) 16 R. 421; (1890) 17 R. (H.L.) 1.

entail had objected to a sale under the 1882 Act. Following the proceedings under the 1853 Act as amended, the consent of the next heir of entail could be dispensed with by ascertaining the value of his interest. In effect under the 1853 Act the next heir of entail could be bought off. Sir Douglas did not realise that the sale was subject to this monetary burden and he brought an action for reduction of the missives. In summary, the grounds of reduction were (1) facility and circumvention, (2) essential error as to the import of the missives, (3) such essential error induced by the defender's agent, (4) such essential error induced by false and fraudulent representations of the defender's agent and (5) such essential error on the part of both pursuer and defender.

Despite the multiple grounds of challenge, Sir Douglas's position was not strong. In substance he was alleging unilateral essential error as to the meaning of a deed. As we have seen that is one type of error which the existing authorities would not readily support as a ground of reduction. There must always be a difficulty in allowing a party to an onerous contract to found on his own error in law.

The Lord Ordinary, Lord Kinnear, allowed an issue of facility and circumvention, but refused issues on error. "But a contract deliberately executed in the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by their contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him"[1]. This is an understandable position.

The pursuer appealed. The First Division under Lord President Inglis held that there were relevant averments to support an issue of facility and circumvention and no relevant averments to support issues of error induced by misrepresentations of fraudulent concealment. The opinions were mainly concerned/

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1. (1889) 16 R. 857 at p.862.

concerned with the issue relating to the pursuer's essential error[1]. With Lord Shand dissenting, the Court adhered to the opinion of the Lord Ordinary.

The Lord President held that the error was not in the essentials of the contract:

> "The essentials of this contract are the identification of the parties contracting, the subjects sold, and the amount of the price; and as regards these in the present case there is no room for doubt. The parties are certainly ascertained, the lands are sufficiently described in the missives, and the price is twenty-five years' purchase of the existing rental. As to the application of the price the purchaser has no interest or concern; and nothing can be an essential of a contract which does not concern both parties. Neither is there any error as to the nature of the contract, as in the case of a person signing a disposition believing it to be a lease, or a bond for borrowed money believing it to be a testament. The parties well knew they were making a contract of sale, and nothing else"[2].

Further, the error was as to the construction of a clause not affecting the essentialia and a contract cannot be reduced because one party has misconstrued its terms. Lords Mure and Adam adopted a similar reasoning[3].

Lord/

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1. The issue on mutual error was ignored. It would today be more acceptable to describe the error as common.
2. (1889) 16 R. 857 at p.864.
3. It would be interesting to speculate what would have happened if the averments on misrepresentation had been specific. Having held that there was no essential error, would there nevertheless have been held to be a relevant case? It is thought not. In pleading misrepresentation the pursuer nevertheless based his case on essential error and founded on Adamson v. Glasgow Water-Works Commrs., supra, to show that misrepresentation and essential error might be combined. It apparently never occurred to the Dean of the Faculty (Balfour), who appeared for the pursuer, that misrepresentation and essential error could be pled separately.

Lord Shand dissented. He followed an approach which illustrates the dilemma of a legal system in construing the intention of contracting parties. It is the difference between an objective and a subjective approach. The majority decision can be said to follow an objective approach. Lord Shand thought that the Court was not called on to construe the language used but to go behind the language to the intention and mind of the parties. Starting from that position it is not surprising that he reached the conclusion that the averments relevantly suggested that there was no consensus in idem. There were differences between the parties in essentialibus. One thought the sale was subject to a suspensive condition; the other that it was only subject to a potestative condition. One thought the price was subject to the reconsideration of the Court; the other that the price was fixed by the missives.

There is nothing illogical in Lord Shand's approach. Proof of subjective intention may be difficult but that is of no importance when the question is relevancy of averments.

The difficulty of the approach is that in a legal system which places emphasis on written obligations, it can be only exceptionally that a party can be allowed to contradict the terms of his writing by proof of subjective intention. The plea that "I wrote X but meant Y", if generally accepted, would lead to havoc in a mercantile community.

The majority decision did no violence to Scots law. It clarified the meaning of essential error. It otherwise involved no innovation. The pursuer appealed to the House of Lords.

Lord Herschell disagreed with the majority of the First Division. He considered that there was error as to the substance of the contract. There was error as to the price. He then approved of the Lord President's view on the mischief of allowing a person to challenge his contract on the ground that he had misconstrued it. In the end, Lord Herschell therefore disapproved of allowing an issue of essential error. In/

In doing so, he made this observation:

"The authorities cited, when carefully examined, tell, in my opinion, against the appellant. They shew, I think, that in the case of bilateral obligations it was always considered essential that the error which was said to be taken advantage of by one party to reduce the contract should have been induced by the other party to it".[1]

It is respectfully suggested that this was an unfortunate remark. It was not the effect of the authorities cited. In particular the opinion of Lords Cowan and Wood in Purdon v. Rowat's Trs.[2] supports the view that unilateral essential error as to the effect of a deed is a ground for reduction. In McLaurin v. Stafford[3] seven judges had held that the pursuer was entitled to an issue of essential error without the addition of the words "induced by the defenders". The case involved a gratuitous deed but that is not a ground for saying that in the case of an onerous deed the law is the opposite. Nor was the remark consistent with almost all the other authorities on unilateral error which we have previously examined[4], a fact which was recognised in the respondents' arguments in the House of Lords[5].

Lord Watson's speech is one of the most important in the law of error. It was subsequently treated as an authoritative statement of the law and has often been quoted. He did not accept the views of either the majority of the First Division or all the views of Lord Shand. He quoted, with approval, Professor/

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1. (1890) 17 R. (H.L.) 25 at p.27. The authorities cited were McConechy v. McIndoe (1853) 16 D. 315; Johnston v. Graham (1856) 18 D. 1234; Lewyss v. Campbell (1858) 20 D. 1090; McLaurin v. Stafford (1875) 3 R. 265; Purdon v. Rowat's Trs. (1856) 19 D. 206.
2. (1856) 19 D. 206 at p.222.
3. Supra.
4. Such as Stair; Sword v. Sinclair, supra; Steuart's Trs. v. Hart, supra.
5. 15 App. Cas. 108 at p.115 -- "In old cases essential error induced by representation has been tried under the issue of essential error, but it would not be now". Rettie does not report the arguments.

Professor Bell's definition of error in substantials[1]. He stated:

> "I believe that these five categories will be found to embrace all the forms of essential error which, either *per se* or when induced by the other party to the contract, give the person labouring under such error a right to rescind it"[2].

He then considered the problem of unilateral uninduced error. We have submitted that such error, if essential, was a ground for reduction in Scots law. This does not mean that every subjective whim of a contracting party was relevant, because *consensus* may have to be tested objectively. Lord Watson said:

> "Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in the case of onerous contracts reduced to writing the erroneous belief of one of the contracting parties in regard to the nature of the obligation which he has undertaken will not be sufficient to give him the right (to rescind), unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract"[3].

This is unexceptionable if it is taken with its qualifications, namely (1) there may be exceptions, (2) the *dictum* applies to onerous contracts, (3) it applies to contracts reduced to writing and (4) the error is by one party as to the nature of the obligation. As will be seen, the second qualification has been given effect to, but the others, of which the most important is the fourth, generally have been ignored. The importance of the fourth qualification is seen from the subsequent parts of Lord Watson's speech. He thought, following Lord Chand and contrary to the majority of/

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1. Bell, *Princ.*, s.11.
2. (1890) 17 R. (H.L.) 25 at p.29.
3. *Ibid.*

of the First Division, that the pursuer's error was error in substantials but, and here disagreeing with Lord Shand, such error was not a ground for annulling the contract because this would "destroy the security of written engagements". The parties to a contract were bound by the interpretation which a Court placed on the contract. Such error induced by the other party was, however, a relevant ground of reduction.

Lord Macnaghten concurred in the reasonings of his two colleagues.

The House of Lords ordered the interlocutors in the Court of Session to be reversed to the extent of allowing the pursuer his issue of essential error induced by the defender's agent[1].

The end result was a practical limitation on legal theory. On the one hand there is the principle that those who err in the substantials do not contract. On the other hand there is the principle that parties must be bound by what they say and not what they think. In Stewart v. Kennedy those two ideas came into conflict. The decision is not objectionable, but several unfortunate consequences have flowed from it.

The seeds were sown in Lord Herschell's statement that in bilateral obligations error must be induced for there to be reduction of the contract[2]. This can perhaps be balanced by Lord/

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1. The case was therefore sent to jury trial on this issue and an issue of facility and circumvention. The further proceedings are not reported but shortly after Sir Archibald Douglas Stewart died and his heir served as heir of tailzie and provision by decree of special service dated 2nd and recorded in Chancery 3rd and in G.R.S. Perth 29th December 1890. The estates were disentailed by the heir, Sir Walter Thomas James Scrymsoure Stewart Fotheringham, by Instrument of Disentail dated 6th January and recorded in the Register of Entails 10th February and in G.R.S. Perth 21st February 1891. Mr. Kennedy never did acquire the estate of Murtly (our search in G.R.S.).
2. See, however, Mercer v. Anstruther's Trs. (1871) 9 S. 618 at p.649 per L. Ardmillan (on appeal (1872) 10 S. (H.L.) 39).

Lord Watson who thought that essential error *per se* was a ground for reduction, but not in the instance of the particular error founded on. The danger was that the result of the case suggested that there was in general a distinction between the effect of induced and non-induced error[1]. Professor Gloag's treatment of error was coloured by this assumption. In his first edition of *The Law of Contract* he describes the House of Lords as proceeding "on the general principle that mere essential error by one party, not averred to have been induced by the misrepresentation of the other, was not a relevant ground for the reduction of a contract"[2], and "The important point in the judgment is that it establishes that error not induced by the other party, and error induced by him, though without fraudulent intention on his part, have different legal effects. In the former case an error as to the legal obligations imposed by the contract, or, in the words of the issues, as to its 'import and effect', leaves the validity of the contract unaffected, in the latter it renders it voidable"[3]. The second statement is not repeated in the second edition, but it explains much in his treatment of error[4].

Any possibility of treating the ideas in *Stewart* v. *Kennedy* as limited to a special situation disappeared when Lord Watson returned to a consideration of essential error in *Menzies* v. *Menzies*[5]. The action was for reduction of an agreement to disentail. One of the grounds of reduction was ignorance by the pursuer of his ability to raise money on his *spes successionis*. This ignorance was induced by the defender's law agent. Lord Watson considered those allegations relevant. He stated:

"Error/

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1. Which was the basis on which this case was argued before the House of Lords: 15 App. Cas. 108 at pp. 112-116.
2. Gloag, p.482 (1st ed.).
3. Gloag, p.524 (1st ed.).
4. cp the treatment in England of *Stewart* v. *Kennedy* in *Gilding* v. *Sanderson* [1897] 2 Ch. 534 at p.550 *per* Lindley, L.J.
5. (1893) 20 R. (H.L.) 108.

"Error becomes essential whenever it is shewn that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent, made in the course of negotiation, and with reference to the subject-matter of the contract. If his error is proved to have been so induced, the fact that the misleading representations were made in good faith affords no defence against the remedy of rescission. That principle has been recently affirmed by the House in Adam v. Newbigging (1888) L.R., 13 App. Cas. 308; Stewart v. Kennedy (1890) L.R., 15 App. Cas. 108, 17 R. (H.L.) 25 -- a Scotch case; and in Evans v. Newfoundland Bank decided this week"[1].

In the context of the facts in Menzies this observation was harmless and unnecessary. The opinions of all the Courts in Menzies are concerned with the conclusions to be drawn from the facts and little is said about the law. For two reasons, however, this dictum was potential dynamite. Firstly, it was expressed in wide terms which lay it open to the criticisms of a similar expression of Lord Herschell in Stewart v. Kennedy. If it were to be treated as a general principle it would destroy the law on unilateral essential error and, indeed, it was inconsistent with Lord Watson's speech in Stewart. Secondly, it can be read as incorporating into Scots law the English law on innocent misrepresentation. To speak of Adam v. Newbigging and Stewart v. Kennedy in the same breath was to cause a confusion which is still with us. To understand why Lord Watson spoke as he did, it is necessary to explain/

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1. Ibid., 142, 3. It may not be without significance that Lord Watson spoke of the English remedy of rescission, instead of reduction. Vide P. Stein, Fault in the Formation of Contract in Roman Law and Scots Law (1958) p.205. The passage is also redolent of the English reluctance to give effect to unilateral error. Vide F.H. Lawson, "Error in Substantia" (1936) 52 L.Q.R. 79 at pp. 84, 102. Thus Cheshire and Fifoot's consideration of unilateral mistake is a consideration of a mistake by one party known to the other party: op. cit., pp. 203,223,233 and vide Chitty, para. 254 and 209.

explain English law in 1893.

English law and misrepresentation

In English common law, innocent misrepresentation was effective only if it became a term of the contract. If it was not a term the representee had no remedy unless he could establish fraud or a total failure of consideration[1]. The classic illustration of this is Kennedy v. Panama etc. Mail Co.[2]. There was an innocent misrepresentation in a company prospectus. The purchaser of shares on the faith of the prospectus was unable to rescind the contract. As Blackburn, J. put it:

> "Where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration"[3].

He quoted the Digest, Paulus and Ulpianus, and concluded that:

> "The principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration"[4].

Although there is the reference to the doctrine of consideration this bears a close resemblance to Scots law. Non fraudulent misrepresentation must induce substantial error to lead to reduction of a contract. It is not surprising that Lord/

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1. Chitty (22nd ed., 1961), para. 287. The 23rd ed., 1968, is in the relevant passages rewritten because of the coming into force of the Misrepresentation Act 1967: Keeton and Sheridan, 544.
2. (1867) L.R. 2 Q.B. 580.
3. Ibid., at p.587.
4. Ibid., at p.588.

Lord Kyllachy in Woods v. Tulloch[1] considered that Lord Blackburn's judgment "appears to state the law exactly as it would be stated in Scotland"[2] although, paradoxically, it had ceased to be English law[3].

In Equity, however, rescission was granted if the representee could prove that he was induced to contract by a material representation[4]. A person seeking redress had to show (1) that the language relied upon imports or contains a representation of some material fact, (2) that it is untrue, and (3) that he was induced to enter into the contract in reliance upon it[5]. The nature of this equitable jurisdiction was established in Redgrave v. Hurd[6] and Adam v. Newbigging[7]. It was imported into Scots law in Stewart v. Kennedy and Menzies v. Menzies.

Until those cases "innocent" misrepresentation in Scots law had been treated as part of the law of essential error. Essential error subverts consent; a fortiori if the error is induced by misrepresentation. In English law innocent misrepresentation had developed separately from the English law of mistake. Indeed that was why it developed. The equitable remedy was doing what Lord Blackburn with his reliance on mistake as to substance would not have done. Thus in Adam v. Newbigging there is no reference to the doctrine of mistake. One thing is certain about Stewart v. Kennedy. It was a case on/

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1. (1893) 20 R. 477.
2. Ibid., at p.479.
3. As a result of the Judicature Act 1873. The case was decided at common law prior to that Act and therefore the remedy of innocent misrepresentation was not then available, Chitty, para. 294. Vide J.J. Gow, "Some Observations on Error", 1953 J.R. 221 at p.244. The decision in Kennedy has not met with universal approval in England: F.H. Lawson, "Error in Substantia" (1936) 52 L.Q.R. 79 at p.98; S.J. Stoljar, Mistake and Misrepresentation (1968), p.77; Chitty, loc. cit.
4. Chitty, op. cit., para. 288.
5. Brown v. Raphael [1958] Ch. 636 at p.641 per L. Evershed, M.R.
6. (1881) 20 Ch.D. 1.
7. Supra.

on essential error. It did not involve the same principles as Adam v. Newbigging. Lord Watson in Menzies said it did. He said so in a dictum which amalgamated a reference to essential error and the law administered by the Court of Chancery. It is no wonder that thereafter it became difficult to explain the Scots law of error, with resulting difficulties in explaining the types of nullities. Certain trends emerged. These were (1) that essential error is not relevant unless induced or mutual, (2) that essential error has a different effect on gratuitous obligations, and (3) that misrepresentation need not induce essential error.

(1) Essential error is not relevant unless induced or mutual

The above proposition was stated frequently. In Stewart Bros. v. Kiddie[1] Lord Trayner observed on an allegation of essential error:

> "Essential error to warrant reduction must be averred, and proved to be error induced by the statements or actings of the party by whom and in whose favour the discharge was taken"[2].

In Seaton Brick and Tile Co. Ltd. v. Mitchell[3] a party to a written contract for carpentry work alleged that he had made an error in the price quoted for the work done. This error was not induced by the other party. The Second Division held that the contract was binding. The grounds for the decision seem to be that the error was caused by the party's own blunder. Lord Moncreiff observed, however:

> "I understand the law to be that a party who enters into a contract under a mistake must be held to it unless the mistake was induced by the other party or was brought under the other party's notice before acceptance"[4].

In Dornan v. Allan & Son[5] a discharge of a workman's claim was not reduced although both parties were under error as to the/

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1. (1899) 7 S.L.T. 92.
2. At p.93.
3. (1900) 2 F. 550.
4. Ibid., p.556.
5. (1900) 3 F. 112.

the medical condition of the workman. The error was not essential error. Lord Trayner stated:

> "But essential error, to form a ground of reduction, must be error induced by misrepresentation or undue concealment on the part of the person in whose favour the deed sought to be reduced was granted"[1].

He went on to point out that mutual error might be pleaded but only on the grounds that the parties never agreed in idem.

In Ferguson v. Wilson[2] there was a successful reduction of an agreement to enter a partnership. The contract was induced by the innocent misrepresentations of the defender which induced essential error on the part of the pursuer. The Lord Ordinary, Lord Kyllachy, observed:

> "The error which induced this contract was, considering the nature of the contract, essential error, error perhaps sufficient, if mutual, per se to rescind the contract, but certainly sufficient to do so both according to our law and the law of England, if induced by misrepresentation — misrepresentation even in the moral sense innocent"[3].

He did not see this as a modification of the position adopted in Woods v. Tulloch[4] but it does indicate more doubt as to the law. On appeal his interlocutor was adhered to. The remarkable feature of the appeal is that Lord Justice Clerk Macdonald considered Lord Watson's language in Adam v. Newbigging to be directly applicable.

In Kelkirk v. Ferguson[5] Mr. Ferguson refused to implement a contract on the ground that there was a material alteration in the contract assigned compared with the draft. Lord President Dunedin opined that the defender was bound to say that his essential error was induced by the representations of the other party to the contract[6]. The case did not involve/

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1. Ibid., at p.117.
2. (1904) 6 F. 779.
3. At p.782.
4. Supra.
5. 1908 S.C. 26.
6. Ibid., at p.29.

involve an error as to the type of contract. The Lord President returned to the problem the following year in Ellis v. Lochgelly Iron & Coal Co. Ltd.[1]. A workman signed a discharge believing it to be a receipt for past compensation. The Sheriff Substitute refused to give effect to the discharge. On appeal to the First Division the appellants argued, inter alia, that the only grounds on which such a document could be set aside were either mutual error in essentials, or error induced by misrepresentation. Lord President Dunedin observed:

> "I do not think it necessary, in this case, to go into the somewhat difficult question of how far there may be, in certain instances, relief from a contract on the ground of essential error not induced by the representations of the other parties. That there may be some cases of that sort is, I think, fairly evident from the opening words of Lord Watson in the House of Lords in the well known case of Stewart v. Kennedy. On the other hand, I think the cases are few and far between. But one of them, I think must be a case where the real error in the person's mind is not as to the true legal effect of the document which he has signed -- a case in which, I have no doubt, the error must be induced by the opposite party, and in which it is not enough simply to say that there was error in his own mind -- but a case where there is actual error as to the corpus of the document which is being signed at the time. A case is put by Professor Bell where a person is thinking he is signing one thing while he is in fact signing another"[2].

He then pointed out the difficulty of deciding into which category a case fell. The importance of this dictum is that it recognises that unilateral uninduced error is still, in some cases, a ground for reduction. There is a suggestion that the error in Ellis was induced by the company's cashier. On/

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1. 1909 S.C. 1278.
2. Ibid., at p.1282.

on the facts this seems unlikely, but it robs the case of its value as a simple instance of uninduced error.

In Stein v. Stein[1], which was concerned with the nullity of marriage, Lord Skerrington[2] recognised that in relation to nullifying a contract essential error must "as a general rule" be mutual or be induced by misrepresentation, but he did not exclude the possibility of a class of cases in which essential error alone will nullify a contract.

In the most recent consideration of the topic, uninduced unilateral error as to price did not allow reduction of missives although the possibility of some unilateral errors resulting in reduction was not excluded[3].

(2) Essential error has a different effect on gratuitous obligations

The above proposition could be stated as Scots law prior to Stewart v. Kennedy. There were indications that a gratuitous contract could be challenged more easily on the ground of error than an onerous contract[4]. In Stewart v. Kennedy Lord Watson specifically referred to "onerous contracts"[5]. The result has been that it has been possible to preserve the idea of unilateral error in the case of gratuitous obligations. In McCaig v. Glasgow University Court[6] the Lord Ordinary, Lord Low, stated[7]:

"The defenders argued upon the authority of the decision of the House of Lords in Stewart v. Kennedy ... that essential error alone was not a ground for reducing a deed. I do not think that that is the import of the judgment in the/

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1. 1914 S.C. 903.
2. At p.908.
3. Steel v. Bradley Homes (Scotland) Ltd., 1974 S.L.T. 133.
4. Dickson v. Halbert (1854) 16 D. 586; McLaurin v. Stafford (1875) 3 R. 265, 270 (argument of pursuer); Kippen v. Kippen's Trst. (1874) 1 R. 1171, 1179 per L.J.C. Moncreiff.
5. (1890) 17 R. (H.L.) 25 at p.29.
6. (1904) 6 F. 918.
7. At p.923. The decision of the Lord Ordinary was upheld on appeal to the Second Division.

the House of Lords. What was sought to be reduced in that case was a contract, and what was laid down was that a contract could not be reduced on the ground of essential error on the part of one of the parties, unless that error was induced by the other party, or someone acting for him. The same rule would probably apply in the case of onerous unilateral obligations, but I think that it does not do so in the case of a purely gratuitous grant".

This misstates the effect of Stewart v. Kennedy. It ignores the qualifications laid down by Lord Watson on the application of the rule which he stated, with the exception of the qualification on the onerosity of the obligation. Thus Lord Low arrived at the correct conclusion in the case before him but perpetuated a misapprehension of the meaning of Stewart v. Kennedy.

This misapprehension may have been repeated by Lord Born in Sinclair v. Sinclair[1]. So far as revealed by the brief report, his Lordship contrasted an onerous deed and a gratuitous deed in this way. On the authority of Stewart v. Kennedy an onerous deed could only be reduced if essential error were induced by the other party. On the authority of McCaig's Trs. v. University of Glasgow, if the deed were gratuitous essential error alone was a ground for reduction. This is too simple a contrast. Unfortunately it has been repeated recently in the First Division[2], and in the House of Lords where Lord Reid observed: "of course, unilateral error would not be a ground for reduction if the contract was not gratuitous"[3]. In that case the nature of the error was difficult to define. It was probably an error as to the nature, not of the document under challenge, but of a prior agreement./

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1. 1949 S.L.T. (Notes) 16.
2. Hunter v. Bradford Property Trust Ltd., 1970 S.L.T. 173 at p.177 per L.P. Clyde; at p.181 per Lord Russell.
3. Ibid., at p.184.

agreement. It was error as to private right rather than error as to general law. The House of Lords decided that as the document challenged was gratuitous, unilateral essential error was a relevant ground of reduction. In the First Division, Lord President Clyde and Lord Russell had indicated that even a pure error of law might not bar the reduction of a gratuitous obligation.

Thus the relevance of unilateral error has been affirmed in the case of gratuitous obligations, but at the needless expense of denying the existence of a similar remedy in the case of onerous obligations.

(3) Misrepresentation need not induce essential error

Authorities until and including Woods v. Tulloch[1] indicate that misrepresentation evolved as an aspect of essential error. This approach was preserved in McCaig's Trs.[2] when Lord Low disallowed an issue in the form "whether the pursuer was induced to grant the said deed by misrepresentation or concealment of X". He did so on the grounds that not every misrepresentation will entitle a person to reduce a deed. Instead, he allowed an issue in the form adopted in Stewart v. Kennedy, namely "whether the pursuer was under essential error induced by X".

The difficulty was that in Menzies v. Menzies Lord Watson had changed the meaning of essential error. Until then essential error had to be such as to preclude consent. Lord Watson said "Error becomes essential whenever it is shewn that but for it one of the parties would have declined to contract"[3]. This was a different standard. An example may illustrate this. Assume that I buy an area of farmland believing that it contains vast oil reserves. I intend to exploit these resources. I am the only person believing in the/

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1. (1893) 20 R. 477; see a similar approach by the Lord Ordinary (Ardwall) in Hamilton v. Duke of Montrose (1906) 8 F. 1026.
2. Supra.
3. Menzies v. Menzies (1893) 20 R. (H.L.) 108 at p.142.

the existence of the oil. There is no oil. According to the theory of Stair and Bell on the nature of essential error, there is no essential error on my part. According to Lord Watson's standard, I am in essential error. It is not surprising that Lord Watson's view has led to the qualifications that the error is only relevant if induced, or mutual, or the contract is gratuitous. Nevertheless, even with these qualifications, Lord Watson's definition led to an extension of the law. In effect it was applying the rule in the case of fraud to non-fraudulent situations. In the cases on fraud the problem of the essential nature of the error produced by fraud has rarely arisen. That itself raises a problem of the situations in which a contract induced by fraud is void. To reduce a contract on the grounds of fraud it is sufficient to prove that the fraud induced the contract. There must be dolus dans locum contractui. The false representation has to be viewed objectively and a party cannot found on a representation which is "flimsy and transparent as well as general"[1]. Apart from that, the question of the materiality of the mistake induced does not arise. One can copy Lord Watson's phraseology and state that fraud becomes relevant whenever it is shown that but for it one of the parties would have declined to contract[2].

The possibility existed following Menzies v. Menzies that the English law on innocent misrepresentation could be imported so that the necessity for misrepresentation to induce essential error in the old sense would cease to be the law. It would be sufficient if the misrepresentation induced essential error in Lord Watson's sense, i.e. it induced the contract. In this respect there would be no difference between fraudulent/

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1. A.M. Gamage Ltd. v. Charlesworth's Trst., 1910 S.C. 257, 269 per L. Johnston; vide discussion of materiality in Lees v. Tod (1882) 9 R. 807, 846 per L. Shand.
2. cp Ersk., Inst. III.1.16 -- "where it appears that the party would not have entered into the contract had he not been fraudulently led into it ... he is justly said not to have contracted, but to be deceived".

fraudulent and non-fraudulent misrepresentation.

Professor Gloag eased the passage of this development when he argued in his first edition of Contract that "an innocent misrepresentation will render a contract voidable if it produces error which is essential in the sense that without it the other party would have refused to contract, though the error may not be so extreme as to exclude any real consensus"[1]. Before the publication of his second edition support for this idea had come from Lord President Clyde. His Lordship, founding on Lord Watson in Menzies v. Menzies, saw no relationship between the error which must be induced by misrepresentation and the essentials of the contract defined by Bell. He compared the nature of the error required in a case of innocent misrepresentation to that required in the case of fraudulent misrepresentation, but there was argument on the materiality of the misrepresentation[2].

Subsequently Lord Carmont observed:

"It appears clear that Scots law recognises, as indicated by Bell, that when misrepresentation by a party is alleged inducing error in the other in regard to some matter, that matter need not be an essential of the contract, but it must be material and of such a nature that not only the contracting party but any reasonable man might be moved to enter into the contract; or, put the other way, if the misrepresentation had not been made, would have refrained from entering/

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1. Gloag, p.522 (1st ed.).
2. Westville Shipping Co. v. Abram Steamship Co., 1922 S.C. 571, 579; on appeal, 1923 S.C. (H.L.) 68; a case in which essential error was relevantly averred is Straker v. Campbell, 1926 S.L.T. 262. Lord Constable referred in that case to Lord McKenzie's definition of essential error in Westville Shipping Co.. This shows the nature of the confusion which was arising. The sentence quoted from Lord McKenzie's opinion suggests that he was following the traditional view of essential error. In other parts of this opinion, however, there are traces of Lord Watson's view.

entering into the contract"[1].

The two cases which he quotes in support of this proposition are, if any thing, support for the contrary view. In both of them there are dicta indicating that they were decided on the basis of essential error induced by misrepresentation[2]. One can, of course, insert "material" for "essential" as one can insert "substantial" for "essential" and if that were all that was involved the dispute would be an arid controversy on semantics. It is clear that Lord Carmont meant more than this. He thought that misrepresentation created a wider ground for reduction than essential error. He doubted the soundness of Woods v. Tulloch, which is an unusual criticism by a Lord Ordinary of a unanimous decision of the First Division.

Lord Carmont's views were followed by Lord Guthrie[3]. Fifteen years later when Lord Guthrie came to write Lord Carmont's obituary, he recalled out of what must have been many incidents in a long career that "One of [Lord Carmont's] Outer House judgments contains a masterly discussion of essential error in contract, and is, in my opinion, an invaluable contribution to the law"[4].

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1. Ritchie v. Glass, 1936 S.L.T. 591,593; Lord Carmont's expression is open to the criticism of Cheshire and Fifoot of a similar statement. To say that a representation must be material is ambiguous. If it means that the misrepresentation must induce the contract, the statement is accurate but redundant. If it means that only a material misrepresentation inducing a contract is relevant, the statement is inconsistant with the latter part of the passage quoted from Lord Carmont. cp. Cheshire and Fifoot, p.251.
2. Blakiston v. London and Scottish Banking Discount Corpn. Ltd. (1894) 21 R. 417 at p.421 per L. Kinnear; at p.426 per L. McLaren; Ferguson v. Wilson (1904) 6 F. 779, at pp.780,781, 782 per L. Kyllachy; 782 per L.J.-C. Macdonald. At p.784 L. Moncreiff refers to misrepresentations on matters material to the contract but this is not necessarily significant. In Blakiston L. McLaren referred to "material error" and "essential error" as though they were interchangeable terms.
3. McCulloch v. McCulloch, 1950 S.L.T. (Notes) 29.
4. 1965 S.L.T. (News) 153. Lord Carmont served only three years in the Outer House, from 1934 to 1937, thus Ritchie v. Glass, supra, is almost certainly the case alluded to.

A good example of the potential confusion that could be caused by this new meaning of essential error is Boyd & Forrest v. Glasgow & South Western Railway Co.[1]. In its later stages this litigation was fought on the basis of essential error induced by innocent misrepresentation. The impossibility of restitutio in integrum was decided to be a bar to reduction of the contract[2]. Thus it was assumed that the contract was voidable and not void. If the meaning of essential error is kept in mind there is no conflict with previous authority, but it would be better if, in the context of innocent misrepresentation, the phrase "essential error" was dropped. It should be recognised that what has happened is that Scots law has adopted the concept of innocent misrepresentation which is unrelated to the classical law of error[3]. That law in effect denied any importance to whether or not error was induced. Uninduced essential error and induced essential error had the same effect on a contract. The contract was void. Innocent misrepresentation came into Scots law on the back of an extended doctrine of essential error.

Summary of Development of Error

One result of this development was to complicate the analysis of nullities. Until Stewart v. Kennedy the position was relatively straightforward. Essential error subverted consent and rendered a contract void. This posed a difficult problem of what was meant by essential error, but not a problem of the nature of the nullity. Lord Watson, however, changed the meaning of essential error in Menzies v. Menzies. He broadened the term and thereafter it was necessary to limit the effect of error, by saying that essential error was not relevant/

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1. 1911 S.C. 33; 1912 S.C. (H.L.) 93; 1914 S.C. 472; 1915 S.C. (H.L.) 20.
2. 1915 S.C. (H.L.) 20. It is not clear what sense of essential error was being used by Lord Shaw when he said -- "As a ground of rescinding the contract, error and misrepresentation must be in essentialibus", ibid., p.35.
3. cp J.J. Gow, "Some Observations on Error", 1953 J.R. 221, who concludes that innocent misrepresentation is not part of Scots law.

relevant unless induced or mutual. Confusion increased when essential error was held to have a different effect on gratuitous obligations and innocent misrepresentation was introduced as a separate ground for challenge of a transaction. Essential error could no longer be said to subvert consent and this would suggest that some contracts induced by error were voidable.

Void or voidable?

Stair's proposition that "Those who err in the substantials of what is done, contract not"[1] is followed by Erskine[2] and Bell[2]. Later writers have had to contend with the confused meaning of essential error but have stated that in certain circumstances error makes a contract void[3].

Judicial opinion has also shown ambivalence. Lord Justice Clerk Hope thought that the effect of error on a deed in favour of an onerous and bona fide third party was "a very serious question, but is not raised, I think, in the present case".[4] Lord Deas considered the effect of essential error on a deed in terms indicating that transfer to a bona fide singular successor might be a bar to reduction[5].

The trend of authorities is to indicate that the contract is void. There are dicta to this effect in Grieve v. Wilson in 1833 which are of particular value because the distinction between void and voidable is aporeciated[6]. When both parties were/

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1. Stair 1.10.13.
2. Ersk., Inst. 3.1.16; Bell, Comm. 1.313; Bell, Princ., para. 11; vide Bankt. 1.470.63.
3. Gloag, pp. 441-2; J.J. Gow, "Mistake and Error", (1952) 1 Int. & Comp. L.Q. 472 at p.479; Walker, Principles, p.585. Professor Smith has tended to argue that the contract is voidable, in so far as he recognises the concept of voidability. T.B. Smith, "Error in the Scottish Law of Contract", 1955 L.Q.R. 507; Smith, Short Commentary, pp. 810, 814 et seq.
4. McConechy v. McIndoe (1853) 16 D. 315 at p.316.
5. Stewart's Trs. v. Hart (1875) 3 R. 192.
6. (1833) 6 W. & S. 543 at p.549 per L. Cringletie; 558 at p.560 per Lord Wyndford.

... under essential error, Lord Kinloch described their deed as void[1]. Again, when parties entered a charterparty of a ship which was not in existence at the date of the contract, Lord Young thought, "the contract consequently was void altogether from the beginning, and never came into operation at all"[2].

In Dunlop v. Crookshanks in 1752[3], Forbes wrote to John Dunlop for cargo. His letter was in the plural "We etc." and induced Dunlop to think that the contract would be with a partnership of Forbes and Crookshank with whom Dunlop had had a previous dealing. Forbes became insolvent and Dunlop could not prove that Crookshank was Forbes' partner. The cargo had been bought from Forbes by Crookshanks, Jop and several others in whose hands Dunlop had arrested. In an action of multiplepoinding the court found that the property in the goods had not passed from Dunlop and found Crookshanks liable to pay Dunlop for the price of goods bought by Crookshanks from Jop as Forbes' agent, leaving Crookshanks with an action of relief against Jop. We suggest that error as to who the other contracting party is would, in a sale on credit, be error in substantialibus[4]. This error was induced by fraud, and that fraud affected a third party purchaser of the goods. It would follow that the contract between Dunlop and Forbes was void.

The clearest case of essential error rendering a contract void is Morrisson v. Robertson[5]. X sold cows to Y believing him to be Z. X relied on the good credit of Z. Y sold the cows/

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1. Mercer v. Anstruther's Trst. (1871) 9 M. 613 at p.653; on appeal, (1872) 10 M. (H.L.) 39.
2. Gibson & Kerr v. Ship "Barcraig" Co. Ltd. (1896) 24 R. 91 at p.99. The case was decided on another ground. If parties take the risk of existence of a certain state of affairs, there is no essential error. Ponder-Small v. Kinloch's Trs., 1917 S.C. 307. The Sale of Goods Act 1893, s.6, provides for a contract of sale being void in certain circumstances where goods have perished.
3. M. 4879. cp Smith, Short Commentary, p.821, who adopts a different view of the case.
4. In the Institutional writers' sense.
5. 1908 S.C. 332.

cows to A, who purchased in good faith. X sued A for delivery of the cows or for payment. This case involved not only essential error as to the person with whom one was contracting, but also the effect of such error having been induced by the fraud of Y.

The Sheriff Substitute was clear that error with regard to the identity of a supposed purchaser in the case of a sale on credit was error in substantials which prevented consent. Fraud inducing such error did not make it cease to be such error. There was no contract, no transfer and no title to retransfer. The Sheriff Depute reversed the finding of the Sheriff Substitute and the pursuer appealed to the First Division. The Division held that there had been no contract of sale between X and Y, and as a result Y could give no title to A. It has subsequently been observed that the ratio of the case was that there was essential error as to the identity of the purchaser and the contract of sale was therefore void. If a seller decides to sell to a person on his premises who gives a false name, the contract is not void. If a cheque in the false name is handed over in return for the goods sold, the contract will be voidable, having been induced by fraud[1].

The result is that we consider it to be the law that a contract induced by essential error, in the sense that that phrase is used by Institutional writers, is void. If the essential error is induced by fraud, the contract is likewise void. It should follow, but there is no clear authority on this point, that essential error induced by innocent misrepresentation will render the contract void.

It remains to consider the effect of innocent[2] misrepresentation which does not induce essential error. Because innocent misrepresentation is a comparatively recent introduction into Scots/

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1. Macleod v. Kerr, 1965 S.C. 253.
2. "Innocent" is used in the sense of non-fraudulent, i.e. including negligent misrepresentation.

Scots law, its effect is not considered by the Institutional writers. Gloag stated, "A contract, it is submitted, is voidable if induced by misrepresentation, whether that misrepresentation is made innocently or fraudulently"[1]. It is significant that he cites no authority for the voidable characteristic of innocent misrepresentation and that in his first edition he was more hesitant about this view of the law[2].

Professor Walker has stated that innocent misrepresentation renders the contract induced voidable unless the misrepresentation produced such error as wholly to exclude true consent, when the contract is void[3]. The authorities cited, however, do not directly support this proposition.

There is no reported case in which the effect of innocent misrepresentation on third parties has been considered.

To determine the nature of the invalidity it is necessary to look at other factors. The starting point is Lord McLaren's observation that "where a pursuer only desires to set aside a contract of sale on the ground of innocent misrepresentations he may obtain relief, but only on condition of making restitutio in integrum"[4]. No authority was cited but the decision of the House of Lords in Boyd & Forrest v. Glasgow and South Western Ry. Co.[5] is now authority for that proposition. If restitutio in integrum is impossible, the contract cannot be reduced. This must mean that a contract induced by innocent misrepresentation is reducible or voidable; it is not null ab initio/

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1. Gloag (2nd ed.), p.471.
2. Gloag (1st ed.), p.521.
3. Principles, p.537; Civil Remedies, p.153.
4. Manners v. Whitehead (1899) 1 F. 171 at p.176.
5. 1915 S.C. (H.L.) 20.

initio or void[1]. This view has the support of Lord President Clyde[2] and it is in accordance with the principle that innocent misrepresentation may induce consent but need not exclude consent.

Fraud

As may be expected, fraud has an early history as a ground for challenge of a deed[3]. It is mentioned by Balfour[4], Spotiswoode[5] and Hope[6]. The Scottish Parliament used fraud as a ground for reduction of infeftments[7]. Fraud was frequently pled before the Court of Session[8].

The initial difficulty is deciding what was considered to be fraud. Bell saw a distinction between two types of fraud:

> "Hence the distinction of fraud into that 'quod causam dedit contractui' and that 'quod tantum in contractum incidit'. Fraud of the former kind annuls the contract; fraud of the latter species gives only an action for restitution or damages"[9].

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1. A similar rule on restitutio in integrum applies to fraudulent representations. Graham v. Western Bank (1864) 2 M. 559; Western Bank of Scotland v. Addie (1867) 5 M. (H.L.) 80; Houldsworth v. City of Glasgow Bank (1879) 6 R. 1164; (1880) 7 R. (H.L.) 53; Tennent v. City of Glasgow Bank (1879) 6 R. (H.L.) 69; although in considering whether restitution is possible there may be a difference between the effect of fraudulent representations and innocent representations. Spence v. Crawford, 1939 S.C. (H.L.) 52. It is settled that a contract induced by fraud is voidable.
2. Westville Shipping Co. v. Abram Steamship Co., 1922 S.C. 571 at p.580 (on appeal, 1923 S.C. (H.L.) 68). It is clear that his Lordship was considering essential error, in Lord Watson's sense, which had been induced by innocent misrepresentation.
3. William of Cunningburgh (1473) A.D.C. 1,8; The King v. James Hering (1501) A.D.C. 111,147.
4. Balfour, vol.1, p.183.
5. Spotiswoode, p.91.
6. Hope, vol.1, p.142.
7. 1555 c.56. A.P.S. III,413; 1661 c.94, A.P.S. VII,66 and App. 27-28.
8. c. 4857 et seq.
9. Bell, Comm. 1.262.

His use of the word "annuls" should not be equated to "void", despite Bell's own use of the word "void" on the effect of fraus dans causam contractui[1]. Bell is clear that the consent is "revocable" and not available against bona fide purchasers[2]. Bell's distinction is criticised by Lord McLaren in his notes to the passage and it is doubted by Gloag[3]. Lord Thurlow suggested a distinction between legal fraud and non-legal fraud[4] but this "dogmatic assertion had no justification"[5].

The truth is that fraud was given a wide meaning. Under the heading "Fraud" Morison reports 68 cases[6]. The actings treated as fraudulent are diverse and classification is difficult[7]. We consider, however, that allegations of fraudulent representation and concealment account for 19 cases, contracts by insolvents 26, and allegations of facility 10. A balance of 9 cases involve various underhand dealings which do not readily fit these categories. A further 5 are not concerned with fraud[8]. This analysis does not show the relative frequency of types of cases, for Morison reports only a minute fraction of the cases before the Court[9]. It does show that fraud had a wide meaning.

In some cases there is proof of fraudulent intent[10], but clear/

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1. Op. cit. 1,316.
2. Op. cit. 1,261; 1,316.
3. Gloag, p.479.
4. Elphinstone v. Campbell (1787) 3 Paton 77 at p.83.
5. A.D. Gibb, Law from over the Border (1950), p.39.
6. M. 4857 et seq. and Appendix. Cases involving fraud are also reported under other headings. See Brown's Synopsis s.v. "Fraud".
7. Morison classified under 13 headings. The wide grounds stated by pursuers combined with the brevity of the report of the Court's decision make analysis difficult.
8. This produces a total of 69 as one case is in two categories.
9. The Register of Acts and Decrees 1542-1659 in Register House comprises 607 vols.; the Register for Dalrymple, Durie and Mackenzie's offices from 1661-1811 comprises 2,695 vols. [CS.7,19,228.26].
10. e.g. Dunlop v. Crookshanks etc. (1752) M. 4879; Chrystie v. Fairholms (1748) M. 4896.

clear proof of deceit did not always amount to proof of fraud. A misstatement by a landlord of the rent which he had previously obtained did not result in a reduction of a later tack, some of the Lords feeling that this would open "too large a door to quarrel tacks of any kind"[1]. One characteristic is a tendency to infer fraud[2]. No clear indication is given of those circumstances in which fraudulent intent must be proved and those in which it may be inferred. Bankton provides a useful list of the circumstances in which fraud is inferred[3]. A common feature is that, on the whole, they would be dealt with today other than by the common law of fraud. Two important categories, namely transactions with weak persons and with insolvents, have developed their special rules.

It is doubtful if it is possible to be more precise than Erskine's definition of fraud as "a machination or contrivance to deceive"[4], which is reminiscent of the Civilian definition[5] and similar to Pothier[6]. This type of definition has been characterised as the "shotgun, or rather shrapnel" definition of fraud[7], but whatever criticism may be implied in that description it was the approach of the Scottish Courts. That is not to say that fraud should always have the same effect on a contract. Even Williston, who shows a tendency to treat invalid contracts as voidable, recognised that:

> "Fraud may induce a person to assent to do something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is. In the first case, the act of the defrauded person is operative though voidable; in the second case, the act of the defrauded person is void/

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1. Kisbet v. Kinnaird (1698) M. 4872.
2. e.g. cases in Morison's 4th section.
3. Bankt., 1.259.66.
4. Ersk., Inst. III.1.16.
5. Dig. 4.3.1.2 and 3.
6. R. Pothier, Law of Obligations (1806 trans. W.D. Evans), p.28.
7. Vide H.D. Green, "Fraud, Undue Influence and Mental Incompetency" (1943) 43 Columbia Law Review, 176 at p. 179.

void, because he does not know he is doing, and does not intend to do, this act"[1].

If Bell had seen a distinction, not between the two types of fraud he refers to, but between fraud which produced substantial error and fraud which did not, a clarification of the law would have resulted. His treatment of fraud and error was, however, inconsistent with this approach[2].

Before we consider the categories of fraud two general observations must be made.

Fraud must induce the contract. If a party relies on his own judgment and not on a false representation, there is no relevant case of fraud[3]. Likewise if a false representation is made to X, who then discovers the truth, but persists in entering the contract, there is not dolus qui dat locum contractui[4]. If a false representation is made to an employee of a company, and the contract is made by the company, those facts by themselves are insufficient to show that the representation induced the contract[5]. There is a suggestion that the problem of inducement should be viewed objectively[6]. Thus a party is not able to found on a representation which is "flimsy and transparent as well as general"[7].

It became settled that fraud to be relevantly averred must be expressed in specific averments[8]. The mere use of the word/

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1. Williston, sec. 1488.
2. Bell, Comm. 1,316.
3. McLellan v. Gibson (1843) 5 D. 1032.
4. Irvine v. Kirkpatrick (1850) 7 Bell 186 at p.238 per L. Brougham.
5. A.M. Garage Ltd. v. Charlesworth's Trst., 1910 S.C. 257 at p.265 per L. Kinnear.
6. Ibid., p.268 per L. Johnston.
7. Ibid., p.269.
8. Sheddon v. Patrick (1852) 24 J. 33 at p.335 per L. Fullerton; Halliday v. Morison (1857) 19 D. 929 at p.931 per L. Ardmillan; Turner v. Tunnock's Trs. (1864) 2 M. 509 at p.512 per L. Kinloch. It probably predates these cases.

word "fraud" is insufficient[1] nor can fraud be averred by innuendo[2]. "We must know precisely what the things are, and what the acts are which are alleged. What was it? Did he nod, or wink, or what was it that led them to believe"[3].

Although fraud had a wide meaning it can be treated in three categories, fraudulent misrepresentation, fraudulent concealment, and a residual, much ignored category, of unfair activities.

Fraudulent Misrepresentation

A fraudulent misrepresentation is the most obvious and direct method of committing fraud. After Stair there are some clear instances of contracts not being enforced because of fraudulent representations made prior to the contract. A contract on sharing inheritance was reduced because of a false statement about the nature of the inheritance[4]. Property did not pass under a contract of sale which was induced by a false statement as to who a contracting party was[5]. Property did not pass under a contract of sale which was induced by the forged signature of an acceptor of a bill of exchange[6]. The result of a false statement by a seller about the riding qualities of a horse was that the Court ordered the seller to take back the horse, restore the price with interest and pay for the horse's keep while in the possession of the purchaser[7]. A misstatement by a potential insured of the terms of insurance obtainable elsewhere was held to be a fraud and/

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1. Smith v. Watt's Trs. (1854) 16 D. 372; Gillespie v. Russel (1856) 18 D. 677 at p.684 per L.J.C. McNeill; Ehrenbacher & Co. v. Kennedy (1874) 1 R. 1131, at p.1135 per L.P. Inglis.
2. Gillespie v. Russel, supra, at p.682 per L.J.C. McNeill.
3. Drummond's Trs. v. Melville (1861) 23 D. 450 at p.463 per L.J.C. McNeill, echoed in an English case later in the same year: Walters v. Morgan, 3 De G.F. & J. 718 at p.723 per L.C. Campbell - "a nod or a wink, or a shake of the head, or a smile".
4. Ballantyne v. Neilson (1682) M. 4891.
5. Dunlop v. Crookshanks (1752) M. 4879.
6. Christie v. Fairholms (1748) M. 4896.
7. Beddie v. Gilroy (1812) Hume 695.

and resulted in the setting aside of a contract of insurance[1].

The latter half of the nineteenth century saw discussion of the extent to which lack of honest belief was fraud[2]. Professor Gloag considered that the general trend of Scottish decisions was reflected in the English case of Derry v. Peek[3]. Lord Herschell's dictum in that case[4] has often been quoted and, indeed, sometimes as if it were the sole content of the Scots law of fraud[5]. If this were so it would be a remarkable result. Derry v. Peek was a decision on the English common law of deceit and in equity fraud had a much wider meaning[6]. Lord Hardwicke's famous judgment in Earl of Chesterfield v. Janssen[7] is more in accordance with the early Scottish treatment of fraud but, as will be shown later, the equitable use of fraud in England is wider than the Scots concept of fraud.

Fraudulent Concealment

"Concealment" in this sense means silence. It has to be distinguished from concealment which is an aspect of misrepresentation, e.g. covering over the defects in property sold, or making secondhand machines appear to be new[8]. However difficult it may be to distinguish between them, failure to disclose defects and fraudulent misrepresentation are different[9].

Some/

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1. Gibbald v. Gill (1814) 2 Dow 263. A difficult decision to understand because the misrepresentation did not affect the nature of the risk.
2. Western Bank of Scotland v. Addie (1865) 3 S. 899; (1867) 5 S. (H.L.) 80; Brownlie v. Miller (1878) 5 R. 1076 at p.1091 per L. Shand; (1880) 7 R. (H.L.) 66 at p.79 per L. Blackburn; Lees v. Tod (1882) 9 R. 807.
3. (1889) 14 App. Cas. 337; Gloag, p.478.
4. At p.374.
5. Ersk, Princs. (21st ed.), p.291 (a passage which is Rankine's addition.)
6. Gocton v. Lord Ashburton [1914] A.C. 932 at pp. 946-57 per Viscount Haldane, L.C.
7. (1750) 2 Ves. Sen. 125, 155-7.
8. Gibson v. National Cash Register Co., 1925 S.C. 500.
9. Vide Broatch v. Jenkins (1866) 4 M. 1030 at p.1032, per L.P. McNeill.

Some of the early cases in which fraud was pled successfully involved concealment of knowledge[1]. In one case, which would not now be followed, the defender failed to inform the pursuer of a defect in a ship known to the defender. The defect was that the ship was leaking. A contract for sale of the ship was reduced on the grounds that the defender was under a duty to explain the defect to the pursuer[2].

It was settled that for concealment to be relevant there must be a duty to disclose[3]. For example, a seller of property is under no duty to disclose his previous difficulties in selling at the price now asked[4]; nor is a creditor bound to volunteer information on the debtor's account to a potential cautioner[5], nor a person seeking a job bound to disclose a previous dismissal[6].

A duty to disclose exists in contracts uberrimae fidei and in fiduciary relationships. As the law has developed it will not often be necessary to found on fraudulent concealment in such circumstances. There is, however, one category in which fraudulent concealment is still relevant albeit that, in accordance with the early law, the fraud may be inferred. That category is contracts by insolvents.

In Morison's Dictionary, transactions by insolvent persons form the largest class of reported cases on fraud. Kames described the challenge of deeds by insolvents as being on the basis of "a covenant procured by deceit that amounts not to/

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1. Wood v. Baird (1696) M. 4860; Hoggs v. Hogg (1749) M. 4862; Dickson v. Graham (1671) M. 4870; cp. Morison v. Boswall, 1801 Hume 679, affd. (1812) 5 Paton 649; Paterson & Co. v. Allan (1801) Hume 681.
2. Duthie v. Carnegie, Jan 21, 1815 F.C.
3. Irvine v. Kirkpatrick (1850) 7 Bell 186 at p.232 per L. Brougham; Broatch v. Jenkins, supra.
4. Irvine v. Kirkpatrick, supra, at p.232 per L. Brougham.
5. Young v. Clydesdale Bank (1889) 17 R. 231; Loyal Bank v. Greenshields, 1914 S.C. 259.
6. Walker v. Greenock & District Combination Hospital Board, 1951 S.C. 464.

to fraud"[1], but this is inconsistent with the authorities. The Bankruptcy Act 1621 had considered the problem of insolvents' contracts to be one of "fraud malice and falsehoode" and the Bankruptcy Act 1696 referred to "fraudfull alienations" and "frauds and abuses"[2]. The technicalities of bankruptcy law were to take these ideas of fraud on a path far removed from that on which it began, but its origins are shown in the current use of the term "fraudulent preference".

The Bankruptcy Act 1621 was in some respects a defective statute. The result was the development of the common law of bankruptcy after the act. The Act did not extend to posterior creditors, but this defect was overcome by an application of the common law which did not favour a "contrivance betwixt the father and son, which did ensnare the creditors who continued to trade"[3]. That decision obviously was thought to be important because the Lords ordained it to be "inserted in the books of sederunt, to be a leading cause (sic) in all time coming". It was followed by a series of decisions in which deeds to relatives were held to have been granted in defraud of posterior creditors[4]. The facts inferred a presumptive fraud. Obviously limitations had to be placed on this doctrine. The presumption was not applied when the deed was onerous[5] and security to a creditor was not reduced when the granter was not notour bankrupt[6].

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1. Kames, Principles of Equity, p.89.
2. The 1696 Act was passed because of defects in the definition of notour bankruptcy shown in Moncreiff v. Cockburn (1694) M. 1054 (Bell, Comm. II.192). The development of the common law of fraudulent preference is explained by Bell, Comm. II.226 et seq. Most of the development is after 1696. Prior to 1696 alienations by a debtor omnium bonorum were treated as fraudulent. See M. 383 et seq.
3. Creditors of John Pollock v. Pollock (1669) M. 4909.
4. Street v. Mason (1672) M. 4911; Reid v. Reid (1673) M. 4923; Blair v. Wilson (1677) M. 4927; Creditors of William Robertson v. his children (1688) M. 4929.
5. Paul v. Davidson (1694) M. 4929. In Morison the date is misprinted as 1694. See Fountainhall's Decisions, vol.1, p.277.
6. Creditors of Carloury & Halyards v. Lord Mersington (1694) M. 4929.

A general principle that it was fraudulent for an insolvent person to trade emerged from Prince v. Pallat in 1680[1]. If a person who was absolutely insolvent purchased goods, the sale would be reduced, but the transaction was not treated as null ab initio, because the fraudulent purchaser could transfer a good title to a third party. This "albeit that be a single decision" was followed in 1715[2], and in Inglis v. Royal Bank in 1736[3] it was held that there was a presumptive fraud if a person took delivery of goods three days before his cessio bonorum. After cessio a person should disclose his circumstances to anyone with whom he traded[4].

In Inglis the purchaser had been ignorant of his insolvency. The idea that a person who knew he was insolvent should not trade was applied[5]. "To purchase goods in actu proximo of becoming bankrupt, without prospect or purpose to pay the price, is a gross cheat"[6]. In one case the Lords found such a transaction "void and null"[7]. This was an unfortunate expression. That such a transaction was reducible but not void had been recognised in Prince v. Pallat[8].

This development was halted by the House of Lords. The presumption of fraud arising from goods supplied within three days prior to bankruptcy was declared not to be a positive rule of/

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1. (1680) M. 4932.
2. Main v. The Keeper of the Neighhouse of Glasgow (1715) M. 4934.
3. (1736) M. 4936.
4. Forbes v. Mains & Co. (1752) M. 4937.
5. Creditors of John Robertson v. Udnies (1757) M. 4941; Mckay v. Forsyth (1758) M. 4944; Mandieman & Co. v. Creditors of Gavin Kempt (1786) M. 4947.
6. Mckay v. Forsyth, supra.
7. Mandieman & Co. v. Creditors of Gavin Kempt, supra.
8. Supra: cp. Ersk., Inst. 3.3.83 who shows a similar confusion which is pointed out by Oliphant in Bell, Comm. 1,309, note 1. See also Ersk. 3.3.8 and Lord Ivory's notes to that passage.

of Scots law[1]. The case also limited the idea that insolvent persons should not trade, an idea which was given a further blow by Bell who described it as "inconsistent with an advanced state of commerce"[2]. As if that were not a sufficient alteration of Scots law, the case is remarkable for the introduction of the young English doctrine of stoppage in transitu which Lord Thurlow conceived to be "certainly now a part of the law of England, and I understand it to be the law likewise in Scotland"[3].

The presumption of fraud in trade within three days of bankruptcy was effectively replaced by a rule that a bankrupt who had resolved to give up business, should not continue to trade. Goods delivered to him after his resolution were restored to the seller[4]. So long as a person entertained the hope, though delusive, of ultimately retrieving his losses, he might continue to trade. After a resolution to declare failure then to take delivery of items "without a prospect even of being able to pay, would have been, ... a dishonest act and unavailable either to him or his creditors"[5].

Lord President Inglis had doubts about whether a buyer, conscious of his insolvency, but not yet sequestrated, had a duty to reject goods which were delivered, although he certainly had a right to reject[6]. This doubt was not shared by/

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1. Allan Steuart & Company v. Creditors of James Stein (1788) 3 Paton 191 (which is preferable to the report at M. 4949). Gow, p.197, states the presumption as if it were still part of Scots law. He also states that the effect of the presumption is to make a contract of sale void, sed quaere.
2. Comm. 1,265.
3. Ibid., at p.196.
4. Carnegie & Co. v. Hutchison, 1815 Hume 704, and see earlier doubts on ability of bankrupt to accept delivery in Stein v. Hutchison, 16 Nov., 1810 F.C.
5. Brown v. Watson, 1816 Hume 709.
6. Booker & Co. v. Milne (1870) 9 M. 314 at p.319; Ahrenbacher & Co. v. Kennedy (1874) 1 R. 1131 at p.1135. In Booker he discusses an insolvent, who could be distinguished from a person in contemplation of bankruptcy, but in Ahrenbacher there is no doubt that the latter is in view. These decisions materially affect Bell's treatment of this topic: Comm. 1,268.

by Lords Ardmillan and Kinloch[1]. A useful illustration of the application of the rule is a Sheriff Court case in which a merchant bought tea and coffee from one supplier. The tea was delivered at 10.30 a.m. and the coffee at 1.40 p.m. At about 1.00 p.m. the merchant had resolved to apply for sequestration and signed a mandate authorising an agent to present a petition. The tea, but not the coffee, was part of the bankrupt's estate[2].

The principle is that once there is a resolution _ederе foro_, to take delivery of goods prior to sequestration is fraud. No active misrepresentation is needed for this result[3]. Since the rules on passing of property in the Sale of Goods Act 1893[4] there is a need for extension of the application of the principle. The fraud on the seller is that property has passed in goods for which he has not received the price. If no relief is granted, he cannot recover the goods and he is left to rank in the sequestration for the price. A resolution _ederе foro_ may now take place after property has passed but before delivery. Should there not be a duty on the buyer to refuse delivery, even although the goods are his property? The unpaid seller has certain remedies which he can exercise only so long as the goods are within his control. Acceptance of delivery by the buyer defeats those remedies and it is suggested that the buyer's action should be treated as fraud.

The principle has its application to sales on credit. There is no need to apply it where the seller is paid at or before delivery. If a mail order firm has received its money, there/

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1. Hooker & Co. v. Milne, supra, pp. 321 and 323. L. Neas considered the matter one of "honour and fairness", ibid., p.320.
2. Birrell's Trst. v. Clark & Howe, 28 July 1874, Guthrie's Select Sheriff Court Cases, First Series (1879), p.86.
3. A fortiori if there is misrepresentation cp. A.M. Gamage Ltd. v. Charlesworth's Trs., 1910 S.C. 257.
4. S.17, under which property passes when intended to pass. cp. Bell, Comm. 1,177 -- "In Scotland, property is not transferred, either nominally or effectually, without delivery of the commodity".

there is no reason why the goods it supplies should be rejected on the doorstep by the buyer because immediately prior to delivery he had decided to petition for his own sequestration.

Despite one curious case[1] it is thought that the general rule would be adhered to that the fraud makes the contract voidable[2]. The peculiarity is that fraud may occur not only at the time the contract is entered into but also after the contract is entered into. On sequestration and appointment of a trustee, the trustee can acquire no better title than the bankrupt. In one case[3] doubts were expressed on whether the appointment of a trustee might not bar a seller from recovering goods in the hands of the bankrupt. It is thought, however, that another principle may be referred to, namely that the trustee cannot take advantage of the bankrupt's fraud[4]. Furthermore, the trustee acquires his title retrospectively to the date of the first deliverance[5]. There is, therefore, a limited time in which the insolvent could transfer property to a third party, but it is thought that a transfer to a bona fide onerous third party would be effective[6].

Unfair/

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1. Watt v. Findlay (1846) 8 D. 529; commented on in Richmond v. Hailton (1854) 16 D. 403.
2. Richmond v. Hailton, supra; Bell, Comm. 1,264; cp. a case of fraudulent misrepresentation on intention to pay -- A.M. Garage v. Charlesworth's Trs., 1910 S.C. 257 at p.266 per L. Kinnear; pp. 267 and 269 per L. Johnston.
3. A.M. Garage v. Charlesworth's Trs., supra.
4. Vide Gloag, p.537.
5. Bankruptcy (Scotland) Act 1913, ss. 97, 28 and 29.
6. There are also the possibilities (a) that sequestration will not be awarded, or, if it is, (b) that no trustee will be appointed: Scot. Law Com. Memo. No. 16 (Nov. 1971), p.17; R.A. Gilbey Ltd. v. Franchitti, 1969 S.L.T. (Notes) 18. Can a third party be bona fide after the recording of an abbreviate of sequestration in the registers of inhibitions and adjudications and intimation in the Edinburgh and London Gazettes, all in terms of s.44, Bankruptcy (Scotland) Act 1913?

Unfair activities - the residual category

The general nature of the Scots law of fraud means that there are situations which cannot reasonably be described as fraudulent misrepresentations or concealments, but which are, nevertheless, machinations or contrivances which deceive. The tendency has been for such instances to develop special rules and for their origins to be forgotten. Thus gratuitous alienations or fraudulent preferences by insolvent persons represent part of the law of bankruptcy with little need to rely on principles of fraud applied in other spheres. Likewise a common type of fraud was, at one time, devices practised on facile persons[1]. There is now the doctrine of facility and circumvention, the history of which is traced later. Some instances of fraud may be regarded now as examples of situations contrary to public policy although that concept developed at a later date than fraud. An example of such an offspring may be pacta contra fidem tabularum[2]. Another, more recent, example is an agreement between a director and manager of a company to divide between them a sum of money belonging to the shareholders[3]. One may regard the agreement as being contra bonos mores as, apparently, did the majority of the Court, but equally one can support Lord McLaren's reference to it as "a dishonest attempt to defraud a third person"[4].

One can point to an instance of fraud in the unfair conduct of public auctions.

> "... if the exposer employs somebody else to bid for him under a disguise, that is to say, puts forward a white bonnet for the purpose of running up the price against the public, that is plainly fraud, and a sale effected under such circumstances cannot stand. The sale must be reduced, and the party bidding in competition with the white bonnet preferred/

1. E. 4954-4956; 4962-4967.
2. Discussed infra.
3. Laughland v. Millar, Laughland & Co. (1904) 6 F. 413.
4. Ibid., p.417.

preferred, if he choose, to the subject at his first bid"[1].

This situation must be distinguished from purchase in breach of fiduciary duty, in which case the sale is voidable, although there is no fraud, but the title to challenge the purchase is confined to the beneficiaries to whom the duty is owed[2].

Despite the wide nature of Scots fraud, the English use of fraud in equity is even wider. In Scotland, breach of fiduciary duty and fraud are distinguishable. In England breach of fiduciary duty is sometimes regarded as a type of fraud in equity[3]. This has led in Scotland to the adoption of the English term "fraud on minority" in relation to oppression of shareholders. In English law this use of "fraud" has a meaning wider than deceit or dishonesty, and has a meaning nearer abuse of power[4].

The danger of relying on English terminology is shown in Harris v. A. Harris Ltd.[5]. One shareholder challenged a resolution passed by the majority. The Lord Ordinary considered whether the resolution was fraudulent and applied the test of whether it was so oppressive and extravagant that no reasonable man could consider it to be for the benefit of the company. On appeal Lords Hunter and Anderson applied a similar criterion. Lord Murray, however, protested and said:-

"I am of opinion that the true test to be applied is not whether the pursuer has or has not established that the/

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1. Shiell v. Guthrie's Trs. (1874) 1 R. 1083 at p.1089 per L.P. Inglis.
2. Shiell v. Guthrie's Trs., supra, at p.1089 per L.P. Inglis; Wright v. Buchanan, 1917 S.C. 73 esp. per L. Sherrington at pp. 89, 90. Breach of fiduciary duty is discussed supra.
3. Feeton and Sheridan, pp. 336 et seq.
4. L.C.B. Gower, The Principles of Modern Company Law (3rd ed., 1969), pp. 564, 566. Cp. examples of doctrine in Palmer's Company Law (21st ed., 1968), pp. 504 et seq.
5. 1936 S.C. 183.

> the defenders were guilty of fraud in the common law sense; I adopt as the true test a higher standard of conduct, whether they were or were not in breach of a fiduciary duty to the company and its constituent shareholders"[1].

He then analysed the meaning of fraud in English law and showed how the reference in English case law to "fraudulent" meant breach of fiduciary duty.

Likewise the doctrine of "fraud on a power" derives its terminology from chancery practice and is not related to dishonesty.[2]

There are, therefore, limitations to the idea that in Scots law "fraud is infinite". Within those limits there remains a residual power which is flexible enough to be used to attack any "machination or contrivance to deceive", even although it cannot be classified as a representation or concealment. The categories of fraud should never be closed[3].

Effect/

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1. At p.202. His Lordship equated the Scots common law of fraud to the English action for deceit. Sed quaere. See also Oliver's Trs. v. W.G. Walker & Sons (Edinburgh) Ltd., 1948 S.L.T. 140 in which L. Mackintosh followed, as he was bound to, the majority view.
2. Keeton and Sheridan, pp. 368 et seq.; Vatcher v. Paull [1915] A.C. 372 at p.378 per L. Parker. Cp. McDonald v. McGrigor (1874) 1 R. 817 at p.822 per L. Neaves; J. McLaren, Law of Wills and Succession (3rd ed., 1894), p.1107 and comments in Dyke's Supplement (1934), p.258.
3. An interesting problem is whether damages may be obtained in delict for all types of fraud. This issue has tended to be obscured by discussion of fraud in terms of Derry v. Peek. In England a Court of Equity could not give damages which is another reason for cautious reference to English authorities: vide Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218-9 per L. Blackburn. The position was affected by statute, e.g. Chancery Amendment Act 1858; Misrepresentation Act 1967. It is not appropriate to discuss this matter further here.

Effect of Fraud on Third Parties

Stair adopted a complex attitude to the effect of fraud on singular successors. It was an attitude much more complex than necessitated by the reported case law. If one ignores a possibly inconsistent passage[1] Stair's treatment of fraud was that in heritable rights fraud is not relevant against singular successors who are not partakers of the fraud; in moveable rights onerous purchasers are not affected by the fraud of their authors; but in 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"[2]. This distinction was followed by Bankton[3] and was probably first recognised by the Court in 1742[4].

The distinction and authority for it was discussed in Irvine v. Osterbye in 1755[5]. A dispute arose in a multiplepoinding between insurers and an onerous assignee. The assignee pleaded that:

> "Dolus auctoris non nocet successori ex titulo oneroso prevails with us, in the case of one purchasing a real estate from a person infeft, or moveables which the seller neither stole nor got by robbery, or of one purchasing bills of exchange for value; the same rule must obtain, by purity of reason, in the case of a fair purchaser of personal rights".

Stair, it was argued, was repugnant to the statute 1621 on bankruptcy and the decision in 1671 of Crichton v. Crichton[6].

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1. Stair, 4,40,28.
2. 4,40,21. See also 1,9,10; 4,35,19; 1,9,15.
3. Bankt., 1.257.59; 1.259.65.
4. Burden v. Whitefoord, 1742 Mich. Dec. Fraud 11. It had earlier been decided that an assignee was affected by some defences pleadable against his author - Scot v. Montgomery (1663) M. 10,157; Keith and Glenkindie v. Irvin (1635) M. 10,185.
5. (1755) M. 1715.
6. (1671) M. 4886.

The insurers argued that bonds were different from the purchase of real estate, purchase of moveables and bills of exchange. In the case of bonds the rule was assignatus utitur iure auctoris. Stair and Burden v. Whitefoord[1] were in point. Crichton v. Crichton could be distinguished because it concerned a real right. In the result, the Lords preferred the insurers to the bond.

The matter was reargued in 1772. It was argued that Stair and Bankton were wrong, but without success[2]. Kames thought the distinction was based on a misunderstanding of the nature of assignation in Stair's time, but when Kames wrote the law had been settled[3].

A multitude of reasons, but none convincing, are suggested for the distinction. Stair states that assignees are but procurators, albeit in rem suam. Fraud does not affect singular successors as to feudal rights "the reason whereof is, to secure land rights, and that the purchasers be not disappointed". "Yet in moveables, purchasers are not quarrellable 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, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as labes reales, following the subject to all successors, otherwise there would be the greatest encouragement to theft and robbery"[4]. Bankton adds nothing to this reasoning and, indeed, is less explicit[5]. Erskine adopts Stair's reasoning[6]. It was argued for the insurers in Irvine v. Osterbye[7] that "the/

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1. Supra.
2. McDonells v. Carmichael & Others (1772) M. 4974.
3. Kames, Illucidations, pp. 13, 14.
4. Inst. 4,40,21. Spuilzie was a vitium reale - Hay v. Leonard & Others, 1677 M. 10286.
5. Bankt., 1.257.59.
6. Ersk., Inst. III,5,10. cf. McLaren's curious note in Bell, Comm. 1.309 that the doctrine of Stair and Erskine is "obsolete".
7. Supra.

"the case of bonds is different; they are not the proper objects of commerce, they are securities for money, and are transmissible only by the form of assignation and procuratory". That is an argument which did not go beyond the requirements of the case. In McNeills v. Carmichael[1] it was argued that the purchaser of a personal right "does not purchase upon the faith of the records, but he relies upon the faith and credit of the person with whom he contracts" and that "in the purchase of every personal right, the purchaser can have no earthly security to rely upon, except the credit and good faith of his author". The doctrine was said to be "clearly founded in expediency" but the arguments adduced in the case are not convincing. The good faith of the author is insufficient for that author's title may in turn be tainted by the fraud of another.

What will probably be the last attempt to challenge the distinction was made in the famous case of Scottish Widows' Fund v. Buist[2]. Rather than say that the doctrine did not exist, the defenders argued that there were exceptions to it. Lord President Inglis replied:-

> "It appears to me to be long ago settled in the law of Scotland - and I have never heard of any attempt to disturb the doctrine[3] - that in a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is nevertheless subject to all the exceptions and pleas pleadable against the original creditor. That is the doctrine laid down in all our institutional writers, and it has been affirmed in many cases. But it seems to be said that this doctrine admits of some exceptions. Now, that I entirely dispute. I think the true/

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1. Supra.
2. (1876) 3 . 1078. The action was based both on breach of warranty and on fraud in entering into an insurance contract.
3. McNeills v. Carmichael, supra; Irvine v. Osterbye, supra, might be suggested.

true view of the law is that these things that are called exceptions are classes of cases to which the doctrine does not apply. The doctrine does not apply to the transmission of heritable estate; the doctrine does not apply in the sale of corporeal moveables. But within the class of cases to which the doctrine is applicable - I mean the transmission to assignees of a creditor's right in a personal obligation - I know of no exception to the application of the doctrine"[1].

Gratuitous and Onerous Third Parties

Their made an incidental reference to "that common ground of equity, Nemo debet ex alieno damno lucrari"[2]. The full significance of this has yet to be worked out in Scots law. When Lord Shand was describing its effect on benefits gained by fraud he relied mainly on English authorities and observed:-

"It is a recognised principle both in the law of this country and in that of England that a gratuitous benefit conferred or obtained by one party and gained through the fraud of another cannot be retained by the person benefited, even though innocent of the fraud. The most familiar application of this principle is the case of legatees or beneficiaries taking under a settlement which has been procured by fraud, to which they were no parties, and of which they were entirely ignorant. They cannot retain a benefit so gained. But the principle is throughout the authorities limited to the case of benefits conferred or received gratuitously, and does not apply where a valuable consideration has been given"[3].

This concept has been applied to principals who have benefited from the fraud of their agents[4] and has been discussed/

1. Ibid., p.1082.
2. Stair 1.6.35.
3. Glass v. British Linen Co. (1875) 2 R. (H.L.) 30 at p.634. An example in relation to beneficiaries is Taylor v. Tweedie (1[illegible] 3 R. 998.
4. Traill v. Smith's Trs. (1876) 3 R. 779; Clydesdale Bank v. Paul (1877) 4 R. 846. There is another rule that "a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can show that the recipient of the money did not transact in good faith with his agent": Thomson v. Clydesdale Bank Ltd. (1893) 20 R. (H.L.) 59 at p.61 per L. Watson, i.e. the employer may lose by the fraud of his agent.

discussed in a case of partnership[1].

Void or voidable?

Apart from instances of transmission to assignees and transmission to a third party who is gratuitous or mala fide, the general rule is that a third party can acquire an indefensible title despite the fraud of his author. In other words, a contract induced by fraud is valid unless and until it is challenged and the contract cannot be voided if restitutio in integrum has become impossible by a third party acquiring a title to property which was the subject matter of the contract[2].

The voidable nature of the contract was settled by Stair[3]. This has become one of the accepted canons of the law. "I think the whole matter is substantially solved by keeping in view that a contract induced by fraud is not void, but only voidable; and that it is the party defrauded who has the option either to void the contract or not to void it, as he thinks proper"[4].

"It is very clear in law that a contract induced by fraud is not null and void, but voidable. It is valid until it is rescinded, and accordingly the party defrauded has in general the option, when he discovers the fraud, of rescinding the contract or of affirming it. But he must do either one or other"[5].

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1. New Mining etc. Syndicate v. Baimers & Hunter, 1912 S.C. 126, discussed in J. A. Miller, The Law of Partnership in Scotland (1973), pp. 329-332, where the conceptual basis of the law is examined.
2. Cp. Mouldsworth v. City of Glasgow Bank (1879) 6 R. 1164, 1173, per L. Deas; Smyth v. Muir (1901) 19 R. 21, 29, per L. Kinnear; Dement v. City of Glasgow Bank (1879) 6 R. 554, 559, per L.P. Inglis, affd. (1879) 6 R. (H.L.) 69.
3. I.St. 1.9.10: 4.40.21: 4.39.19, which are discussed supra.
4. Dement v. City of Glasgow Bank, supra, at p.561 per L. Deas.
5. Smyth v. Muir, supra, at p.29, per L. Kinnear.

Many other dicta support this proposition[1].

A later example of its operation which received the support of the House of Lords is Price & Pierce Ltd. v. Bank of Scotland[2]. A contract for sale of timber was induced by fraudulent misrepresentations as to solvency. Third parties obtained a title to the timber for value and in good faith. Lord Salvesen observed:-

"Rescission of the contract, however, cannot prejudice the rights of third parties previously acquired over the cargo in good faith, and for value ..."[3].

On appeal, Lord Kinnear stated:-

"The legal principle is perfectly clear and beyond dispute. It is well settled law that a contract induced by fraud is not void, but voidable at the option of the party defrauded. In other words, it is valid until it is rescinded. It follows that when third parties have acquired rights in good faith and for value, these rights are indefeasible"[4].

Lord President Dunedin thought that it was:

"trite law that a contract induced by fraud is voidable and not void, and is good until rescinded"[5].

A more recent example of a third party acquiring a good title despite the fraud of his author is Macleod v. Kerr[6].

Although it is the general rule that the contract induced by fraud is voidable and not void, yet there may be an exception. Whether fraud inducing essential error rendered the contract void was a point on which Stair was silent and it remains unsettled. It did, however, trouble Lord Justice-Clerk Inglis in Wardlaw v. Mackenzie[7]. In an obiter dictum he/

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1. Bell, Comm. 1.261; Princ. 13A; Williamson v. Sharp (1851) 14 D. 127, esp. L. Ord.; Wardlaw v. Mackenzie (1859) 21 D. 940 at p.947 per L.J.-C. Inglis; Graham v. Western Bank (1864) 2 M. 559; Western Bank v. Addie (1867) 5 M. (H.L.) 80.
2. 1910 S.C. 1095; 1912 S.C. (H.L.) 19.
3. 1910 S.C. 1095, 1099.
4. Ibid., 1106.
5. Ibid., 1117.
6. 1909 S.C. 253. cp. Graham v. Western Bank, supra.
7. (1859) 21 D. 940.

he recognised that fraud varies in its effect[1]. His consideration of the topic is too lengthy to quote here but it is a dictum of considerable significance. Its effect is to say that fraud inducing error in essentialibus is an exception to the general rule that a contract induced by fraud is voidable. Such fraud subverts consent and the contract is a nullity. Furthermore, the editors of Bell's Principles added a passage commencing -- "An obligation induced by fraud (in the absence of essential error) is not void, but only voidable on the election of the party defrauded"[2]. Morrisson v. Robertson[3] is an instance of fraud inducing essential error and rendering a contract void.

In our view a distinction should be drawn between, on the one hand, fraud which induces consent, and thus renders the contract voidable, and, on the other hand, fraud which produces essential error and subverts consent, thus rendering the contract void.

Facility and Circumvention

The period after Stair is notable for the development of facility and circumvention as a ground of reduction. It developed from the Scots "fertile mother of actions", namely, fraud.

There was much confusion between fraud and facility in the period up to the middle of the 19th century. The early position seems to have been that fraud was necessary for reduction, but fraud could be inferred readily and fraud was found in circumstances which today would be treated at most as cases of improper influence on facile persons.

Thus/

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1. At p.947.
2. Princ. 13A. This may have been under the influence of the English rule judging from the authorities cited. cp. the curious passage in Bell, Comm. 1.316 in which a contract induced by fraud is said to be void.
3. 1908 S.C. 332, discussed supra s.v. "Error".

Thus a deed from a dying person which was not read by her was held on those two facts to have been elicited by fraud and circumvention[1]. If a weak person entered a grossly unequal bargain, fraud and circumvention might be presumed[2], but the attitude of the Court of Session is difficult to predict, because six days previously a different result was reached on apparently similar facts[3]. The attitude of presuming fraud is repeated in the middle of the 18th century. In Mackie & Husband v. Laxwell[4] an heiress was abandoned to drunkenness and it was in any person's power by bribing her with a few shillings to make her accept a bill of any sum or dispone any part of her lands. She was persuaded to transfer her lands for an onerous consideration to her sister. Her sister thereupon brought a reduction of dispositions of the lands previously granted to innkeepers. Upon the facts the Court had no difficulty in finding fraud and circumvention relevant and proved. Although the Court may have called the ground of reduction "fraud and circumvention" that was not what had happened. There was no evidence that the heiress had been imposed on or circumvented in any way. She granted her dispositions voluntarily, well knowing what she did. The reporter felt that the reason for reduction was that "It was certainly unjust to take advantage of weak persons, who cannot resist certain temptations, and to make use of such temptations to rob them of their goods". This is to be contrasted with the situation in which "a weak person makes a deed, perhaps foolish, but voluntary, in favour of any person who is entirely passive, such a deed admits of a very different construction. It is not reducible, however strong the lesion may be". Who this prescient reporter was, Morison does not reveal, but it may have been Lord Kames whose comments on the case in his Principles of Equity have a remarkable/

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1. Galloway v. Duff (1672) M. 4959.
2. Maitland v. Fergusson (1729) M. 4956; affd. by House of Lords, 1 Paton 73.
3. Gordon v. Ross (1729) M. 4956. The report is brief.
4. (1752) M. 4963.

remarkable resemblance to the reporter's words[1].

A change of attitude in the Court is apparent by 1777 from Tait's report of Robertson v. Fraser[2]. He mentions two cases in which the Lords seem to have held facility and lesion, without fraud, sufficient ground for reduction. In Robertson's case, the Lord Ordinary, Lord Monboddo, refused a proof in a reduction of a transaction in which it was alleged that an unequal bargain was made by a weak woman. He did so apparently on the grounds that insufficient averments of fraud were made. The Lords reversed his decision.

At the beginning of the nineteenth century the law was settled by decisions of the House of Lords, who had acquiesced in earlier readiness to infer fraud[3]. A deed by a person weak in intellect, although with capacity to contract, could be reduced if the person did not fully understand the deed[4]. Deeds by a person who was capable of disposing of her estates were reduced because she was not in such a state of mind as to enable her to judge correctly with regard to the effect of the deeds. There was no evidence of undue influence by the defenders[5]. This is a high water mark in the development of this branch of the law. It comes close to saying that ignorance of the effect of the deed is a ground for reduction, but stops short of this as a general principle by applying that idea only in cases in which the granter was of weak mind. Conversely a weak mind was of itself not sufficient to set aside a deed, but if combined with circumstances indicating that/

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1. Kames, Principles of Equity, vol. 1, p.68. Kames may have taken part in the decision. He was raised to the bench on 4th February 1752 and Morison gives the case the date of 24 November 1752.
2. 5 B.S. 566. cp. Scott v. Archibald & Others (1789) M. 4964.
3. Maitland v. Ferguson (1729) 1 Pat. 73.
4. White v. Ballantyne (1823) 1 Shaw's Appeals 472.
5. Gibson & Others v. Watson & Others (1823) 2 S. & B. 648. Thus the decision goes much further than the reporter in Mackie v. Husband, supra.

that an unfair advantage had been taken, the deed would be reduced[1].

The need to label the transaction as fraudulent was slow in disappearing. Thus in McNeill v. Moir[2] the argument on a deed granted by an infirm man of 80 proceeded on the basis that the transaction was so grossly unequal and irrational "that it was plain that it could only have been brought about by a fraudulent advantage having been taken of his facility"[3]. In Scott v. Wilson[4] Lord Pitmilly insisted on proof of fraud and circumvention, as well as facility and lesion. If facility and lesion were great, slighter proof of fraud and circumvention would suffice, but that was the only limitation which he would allow[5]. The pursuer moved for a new trial on the grounds inter alia that separate proof of fraud was not necessary but it might be inferred from facility and lesion. The new trial was granted but this argument is not mentioned in the Court's opinion.

In retrospect it is clear that Lord Pitmilly's view could not last. The readiness with which fraud had been inferred in cases involving facile persons made it a very different form of fraud from that required in the absence of facility. When it was settled that fraud needed specific averments[6], it must have been difficult to reconcile this with cases of facility in which the proof of fraud was absent, but fraud was inferred.

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1. McNeill v. Moir (1824) 2 Shaw's Appeals 206. Vide Morrison v. Morrison (1841) 4 D. 337 in which facility but not fraud was proved.
2. Supra.
3. Ibid., p.212. Vide McDiarmid v. McDiarmid (1826) 4 S. 583; (1828) 3 W. & S. 37, where a daughter and her husband obtained from her father, who was 83 years old, facile and addicted to alcohol, a deed lacking in consideration. The House of Lords supported the view of the Court of Session that the transaction was an imposition and fraud. There was, however, an element of fraudulent misrepresentation on the need to execute the deed.
4. (1825) 3 Mur. 518.
5. Ibid., pp. 526 et seq.
6. Supra.

The distinction between the situations was recognised in Clunie v. Stirling[1]. The opportunity this case gave for the recognition arose because of a dispute over the form of issues between the Court of Session and the House of Lords. In Clunie there were separate issues of facility and circumvention on the one hand, and fraud on the other. The separation of the issues was a change from usual practice and had been prompted by the House of Lords[2]. Under the issue of facility and circumvention Lord Justice Clerk Hope, with Lord Wood concurring, rejected the contention that a distinct act of circumvention must be proved. Circumvention could be inferred from the circumstances of a bad bargain made by a facile person. Lord Cockburn observed that "circumvention sometimes amounts to fraud, and some cases of fraud are cases of simple circumvention; and the two pass into each other by such shadowy gradations that they are often difficult to be distinguished"[3].

To complete the picture it should be added that because circumvention and facility have a bearing on each other the result is that if there is strong evidence of facility there is less need for evidence of circumvention, and conversely[4]. Furthermore, specific instances of facility need not be proved, but it is sufficient if there is proof of a general lack of will power[5].

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1. (1854) 17 D. 15.
2. Ibid., p.18 per L.J.C. Hope. The case which caused this is not mentioned but presumably it was Marianski v. Cairns (1852) 1 Macq. 212 which with Irvine v. Kirkpatrick (1850) 7 Bell App. 186 shows that the House of Lords were hostile to the practice of the Court of Session in framing issues in the alternative form. The Court of Session were unyielding and in Mann v. Smith (1861) 23 D. 435, and Love v. Marshall (1870) 9 M. 291 under Lord Justice Clerk and then Lord President Inglis, the debate continued.
3. Ibid., p.20.
4. Munro v. Strain (1874) 1 R. 1039.
5. Gibson's Ex. v. Anderson, 1925 S.C. 774.

The derivation of facility and circumvention from fraud has raised some problems.

(a) The relationship between fraud and circumvention

Determining the relationship became necessary after it had been decided that facility and circumvention raised different problems from fraud. The distinction between the concepts had arisen in the form of the issue to be tried by a jury, and the form of that issue has continued to reflect the problems of the substantive law.

The issue adopted in the middle of the nineteenth century was:-

> "Whether, on or about --- the pursuer was weak and facile in mind, and easily imposed on; and whether the defenders, or any of them, by themselves, or by another or others, taking advantage of the pursuer's said facility and weakness did, by fraud or circumvention, procure deed X, to the lesion of the pursuer?"[1].

The words "or by another or others" were later dropped because of the development of vicarious responsibility[2], and the word "procure" may need to be altered according to circumstances[3].

Not only was this the usual form of issue, but the Court of Session refused to alter it[4]. Lord Justice Clerk Inglis thought that the precise terms of the issue should never be departed from. He wished to adhere to the exact words of the style[5]. When the House of Lords criticised the practice of/

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1. McCulloch v. McCracken (1857) 20 D. 206; Mann v. Smith (1861) 23 D. 435. In Mann L.J.C. Inglis indicated that this form of issue had been in use for a long time, ibid. at p.437, and see the arguments of parties. The terms were settled in an unreported case - Bryson v. Bryson - vide Taylor v. Tweedie (1865) 3 M. 928,931 per L.J.C. Inglis.
2. Taylor v. Tweedie, supra, at p.931 per L.J.C. Inglis.
3. Ibid.
4. Mann v. Smith, supra; Taylor v. Tweedie, supra.
5. Taylor v. Tweedie, supra, at p.930.

of alternative issues[1], Lord Ardmillan gave effect to this criticism by altering "fraud or circumvention" to "fraud and circumvention" but he was reversed on appeal to the Inner House[2]. Nine years later Lord President Inglis pointed out that the form of issue of which he approved did not cause the confusion which some alternative issues could[3]. Lord Deas indicated that the House of Lords had misunderstood Scottish practice[4]. Lord Ardmillan, by now elevated to the First Division, thought that "fraud and circumvention" and "fraud or circumvention" meant the same thing[5].

With this history it is surprising that Lord Anderson should state in 1931:-

"It was made quite clear on the authorities that the proper form of issue now is the issue of fraud and circumvention. That form of issue seems to imply that a pursuer under it requires to establish both fraud and something else in the shape of circumvention. But I am not sure that this is the correct view, despite the form which the issue takes, and I think that is borne out by the citation from Stair[6] which was read by your Lordship in the chair. In other words, the view I take is that there are not two distinct species of fraudulent conduct put to the jury, but that circumvention is a species of the genus fraud. In my opinion it is a nomen iuris given to that form of fraud which takes the form of dishonest impetration of a will. But, while that is so, there is no/

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1. Marianski v. Cairns, supra.
2. Mann v. Smith, supra.
3. Love v. Marshall (1870) 9 M. 291, 294.
4. Ibid., 295.
5. Ibid., 296; vide Mann v. Smith, supra, 436, in which he tried to distinguish fraud from circumvention.
6. Inst. 1.9.9. -- "Circumvention signifieth the act of fraud, whereby a person is induced to a deed or obligation by deceit". It should be pointed out that Stair was not writing in the context of deeds by facile persons and it is only in that context that the term 'circumvention' is used.

no doubt that this is the standardised form of issue. Fraud and circumvention united conjunctively must be in the issue. That being the form of issue, these terms ought to be found in a plea of law; and, further, I think that the words ought also to be in the averments"[1].

Lord Anderson did not state the authorities on which he founded. This is surprising in view of the history which we have mentioned and also because, with one exception, all the cases cited to the Court, in which the terms of the issues are reported, proceeded on issues of "fraud or circumvention"[2], and in one of these cases there is the authority of Lord President Dunedin, if more authority is needed, to describe that form of issue as "recognised"[3].

To speak against the weight of Lord Presidents Inglis and Dunedin and many others; to do so without referring to authority; and to speak as though there was no doubt as to the correctness of your view, is, to say the least, acting with temerity. It is, therefore, even more surprising that Lord Anderson's view has been followed twice, although on both occasions the point does not seem to have been argued[4].

Today/

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1. McDougal v. McDougal's Trst., 1931 S.C. 102 at p.116.
2. Munro v. Strain (1874) 1 R. 1039 at p.1040; Horsburgh v. Thomson's Trst., 1912 S.C. 267 - issues reported in 49 S.L.R. 257,259; Lord Advocate v. Davidson's J.F., 1921 2 S.L.T. 267; Gibson's x. v. Anderson, 1925 S.C. 774 at p.775 - the pursuer's plea in law stated "fraud and circumvention"; Ross v. Gosselin's x., 1926 S.C. 325 at p.329. cp. plea in law. The junior counsel for the pursuer was the same as in Gibson's x., supra, which may explain the consistent discrepancy. The exception is the early case of Blunie v. Stirling (1854) 17 D. 15 which had unusual issues.
3. Horsburgh v. Thomson's Trst., supra, 273; Lords Dundas and Johnston concurred.
4. Bremner v. Bremner, 1959 S.L.T. 94 at p.450 per L. Russell; McKay v. Campbell, 1966 S.C. 237 at p.250 per L.J.-C. Grant.

Today parties are unlikely to be enthusiastic about arguing whether a word should be "and" or "or" as they did in the Inner House in 1861. It is respectfully suggested, however, that Lord Anderson was wrong. Apart from the authorities which were ignored there is a danger that the use of the phrase "fraud and circumvention" will lead to a confusion which he recognised. The phrase is inexact because two elements, fraud on the one hand, and circumvention on the other, do not need to be proved. Circumvention is a form of fraud. In its relationship to facility, it is one of the surviving instances in which fraud may be inferred.

As we have seen, other parts of the law of fraud have developed differently and in particular the development of fraudulent misrepresentation has led to a concentration on the element of deceit in fraud. It may be this which led Lord Blackburn to feel that:-

> "It is perhaps a little unfortunate that the word "fraud" should always be included in this issue as a mere matter of form. But 'fraud or circumvention' has a distinct meaning in our law, and can be established by evidence far short of that required to establish a mere charge of fraud"[1].

He pointed out the distinction by quoting an unreported charge of Lord Wyllachy:-

> "The meaning of the issue being that you have the question put to you whether, facility existing, there have been either distinct machinations, tricks, importunities, solicitations, even suggestions, towards the testator while the testator's facility was such that she was not in a position to resist - not likely to be in a position to resist. It is not necessary that there should be deceit. It is enough that there should be solicitation, pressure, importunity, even in some cases, suggestion. The degree of circumvention would/

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1. Gibson's Ex. v. Anderson, supra, at p.788.

would depend on the degree of facility"[1].

It is unfortunate that in its most recent consideration of this topic, the House of Lords has indicated that where the granter of a deed is alive, circumvention requires proof of deceit or dishonesty[2]. The case was a unique one in that the party alleged to be suffering from weakness and facility of mind was the defender, and facility was transient and temporary, and indeed the averments of facility were of very doubtful relevance. Such a case is in that grey area in which facility and circumvention merge into fraud. It is not the typical case of facility and circumvention and it is suggested that it should not be treated as having general application. It is thought that the case can be explained by reference to an earlier dictum of Lord Dorn:-

> "In circumstances which do not lend themselves to the suggestion of imputation, it might be that the Court would refuse to entertain an action in the absence of some specific averment of circumvention. On the other hand, where circumstances do lend themselves to the suggestion, the general averment may be treated as enough to entitle the aggrieved person to have the matter tried out. Were it otherwise, you might have a case in which the surrounding circumstances all pointed irresistibly to imputation and yet in which the aggrieved party would have no remedy because/

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1. Ibid. The case is Parnie v. MacLean. Cp. the dissenting opinion of L.J.C. Alness who equated circumvention to dishonesty. In Gibson's Ex. a testamentary and non-testamentary document were challenged and it was not suggested that differing rules applied to the two documents. Cp. the doctrine of undue influence infra in which there may be a difference, and Mackay v. Campbell, 1967 ... (H.L.) 53 in which the House of Lords said there was a difference between the challenge of a deed by a person who is dead and one who is alive.
2. Mackay v. Campbell, supra.

because, not being privy to the fraud, he could not specify the actual form of suasion used"[1].

(b) The distinction between lack of capacity and facility

One cannot accept this statement in 1824 as representing modern Scots law:-

"The question then is, whether the degree of facility together with the imposition or imposture proved in this case, is such as to render this not the deed of Mrs. Thomson"[2].

To plead that a deed is not that of a granter raises the question of capacity which is distinct from that of facility and circumvention[3]. The concepts are related because the question is whether the mental state has passed beyond the line which separates facility and insanity[4], an issue of 'not the deed' being allowed only where there are averments of mental derangement amounting to insanity[5]. If there is insanity, the degree of alleged imposition is irrelevant. It follows that it is illogical to answer both an issue of 'not the deed' and an issue of circumvention and facility in the affirmative[6]. The issue of circumvention and facility assumes the presence of capacity.

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1. Cleugh v. Fleming, 1948 S.L.T. (Notes) 60, approved in Mackay v. Campbell, 1966 S.L.T. 329 at p.333, per L. Cameron (not reported in S.C.).
2. Clark v. Spence (1824) 3 Mur. 450, 477, per L.C.C. Adam. Vide the use of the word "capacity" in the context of facility in Home v. Hardy (1842) 4 D. 1184 at p.1187.
3. cp. Morrison v. Morrison (1841) 4 D. 337; Morrison v. Maclean's Trsts. (1862) 24 D. 625.
4. Gibson's Ex. v. Anderson, 1925 S.C. 774 at p.786 per L. Blackburn.
5. Bremner v. Bremner, 1939 S.L.T. 448 at p.449 per L. Russell.
6. Spring v. Martin's Trst., 1910 S.C. 1087 in which the authorities are reviewed.

(c) Void or Voidable?

It would be logical to say that a contract affected by facility and circumvention was voidable. This is because, on the one hand, the concept derives from and has a relationship to fraud and, on the other hand, it assumes a capacity to contract. In Gall v. Bird[1] it was established that a deed procured by facility and circumvention was reducible, in contrast with a deed granted by an insane person which was null.

Undue Influence

A new ground of reduction was suggested in the middle of the nineteenth century - undue influence. It did not at first meet with the approval of Lord President Inglis, who classified the grounds for reduction of deeds as incapacity, force and fear, facility and circumvention, fraud and essential error. "Beyond these categories, I am not myself, as a lawyer - as a Scottish lawyer, - acquainted with any other ground of reduction applicable to deeds"[2].

Nevertheless, the doctrine of undue influence had been slowly fermenting. In 1856 a gift by a client to his agent had been attacked in part on the grounds of undue and unfair advantage. The case can also be viewed as one of extortion or of "pactum illicitum".[3] In 1864 an issue was allowed on averments of a law agent taking advantage of his position and influence to induce his client to enter a transaction[4]. In 1869 a law agent succeeded in proving that a settlement by a client in his favour was her free and uninfluenced act[5]. The considerations which affected transactions between agent and client probably also extended to clergymen and parishioners and/

1. (1855) 17 D. 1027.
2. Tennent v. Tennent's Trst. (1863) 6 M. 840 at p.876 on appeal (1870) 8 M. (H.L.) 10.
3. Anstruther v. Wilkie (1856) 19 D. 405.
4. Harris v. Robertson (1864) 2 M. 664.
5. Grieve v. Cunningham (1869) 8 M. 317.

and medical men and patients[1]. Moreover, the influence of a parent on a child would be regarded as subject to the same doctrine[2], although at one time undue influence by a parent on a child would probably have been considered evidence of fraud[3].

There can be little doubt that the impact of English law was responsible for the reference to the doctrine. Undue influence had been recognised in England as part of the law of fraud in Lord Hardwicke's judgment in Earl of Chesterfield and Janssen in 1750[4], but its acceptance probably starts from Huguenin v. Baseley in 1807[5]. The English law and the traces in earlier Scots cases were founded on when undue influence was clearly accepted into Scots law in Gray v. Binny in 1879[6].

A deed consenting to disentail was reduced on the grounds of the influence of a mother and her solicitor on her son and the inequity of the bargain. The Lord Ordinary, Lord Young, mentioning Huguenin v. Baseley, stated the broad principle thus:-

> "Where a relation subsists which imports influence, together with confidence reposed, on the one side, and subjection to the influence and the giving of the confidence on the other, the Court will examine into the circumstances of any 'transaction of bounty' ... between parties so related, whereby the stronger party (using the term for brevity) greatly benefits at the cost of the weaker, and will give relief if it appears to have been the result of influence abused or confidence betrayed"[7].

On/

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1. Munro v. Strain (1874) 1 R. 522. Sequel at 1039.
2. Cuninghame v. Anstruther's Trs. (1872) 10 S. (H.L.) 39 at p.46 per L.C. Hatherley; and Tennent v. Tennent's Trst. (1870) 8 S. (H.L.) 10 at p.17 per L.C. Hatherley.
3. cp. Murray v. Murray's Trst. (1826) 4 S. 374; Fraser v. Fraser's Trst. (1834) 13 S. 703.
4. (1750) 2 Ves. Sen. 125.
5. (1807) 14 Ves. 273, and vide W.M.M. Winder, "Undue Influence in English and Scots Law", 1940 L.Q.R. 97.
6. (1879) 7 R. 332.
7. Ibid. at p.338.

On appeal Lord President Inglis departed from his previous stance and adopted the Lord Ordinary's reasoning. Lord Shand negatived the suggestion that either fraud or facility and circumvention need be proved. He gave his definition of the circumstances which establish a case of undue influence:-

> "The existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstances that the granter entered into the transaction without the benefit of independent advice or assistance".[1]

Lord Deas did not dissent from his brethren's approach but he thought the case could be tried on an issue of facility and circumvention, the facility in this case arising from filial affection.

Subsequent case law[2], which it is not necessary to analyse here, has explored the scope of the doctrine. It is important to observe that the meaning and effect of undue influence may not be the same in the law of contract as in the law of wills[3], and that the concept may not apply uniformly to the different relationships of granter and grantee[4].

Void/

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1. Ibid., at p.347.
2. e.g. Carmichael v. Baird (1899) 6 S.L.R. 369; McKechnie v. McKechnie's Trst., 1908 S.C. 93; Forbes v. Forbes' Trst., 1957 S.C. 325; Allan v. Allan, 1961 S.C. 200.
3. Weir v. Grace (1899) 2 F. (H.L.) 30; Forbes v. Forbes' Trst., supra, at p.331 per L. Guthrie and the authorities there referred to. These authorities suggest that in the ordinary case undue influence to invalidate a will must amount to coercion or fraud.
4. Forbes v. Forbes' Trst., supra, at p.330.

Void or voidable?

From the nature of undue influence it seems justifiable to regard it as rendering a contract voidable and not void. The influence procures consent: if consent is not procured there is no need to resort to the doctrine of undue influence to attack the transaction. This would mean that there was a distinction between the effect of pressure amounting to force and fear and the effect of undue influence. As has been seen, force and fear makes a contract void.

Such authority as there is supports this conclusion. Lord Shand described a deed procured by undue influence as "voidable when it is challenged"[1]. Lord Guthrie referred incidentally to the situation where "a contract has been voidable on the ground of undue influence"[2]. The fullest consideration is by Lord Kinnear who in dealing with an assignation to a law agent said:-

"I do not think that the assignation is absolutely null. If it were null ab initio, it could not be set up by any subsequent confirmation or acquiescence; and thus parties acquiring right under the donee, in good faith and for value, would be unable to maintain their rights against the donor and his representatives. It would appear to me, therefore, that conveyances obtained by undue influence, whether actually exercised or presumed by law in consequence of the relation of the parties, are in precisely the same position as conveyances obtained by fraud. Such a conveyance is not void, but voidable, at the option of the granter or his representatives, and it is valid until it is rescinded"[3].

Consent/

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1. Gray v. Binny, supra, at p.347.
2. Forbes v. Forbes' Trst., supra, at p.333.
3. Logan's Trs. v. Reid (1905) 12 S.L.R. 1094 at p.1100. In South African law the concept has also been borrowed from English law being unknown to Roman law or the law of Holland. The contract is voidable. Wille's, op. cit., p.328. Wessels, vol. 1, p.380.

Consent improperly obtained - summary

The authorities state that a contract induced by force and fear is void, although we have argued that in certain circumstances it should be voidable. The law of error has a tortuous history. Until 1893 it was possible to maintain that substantial or essential error rendered a contract void - a fortiori if the error was induced by the other contracting party. After Stewart v. Kennedy and Menzies v. Menzies a new meaning was given to essential error and innocent misrepresentation emerged as a separate ground of challenge. It was stated that essential error was not relevant unless it was induced or was mutual. Essential error had a different effect, depending on whether the obligation was gratuitous or onerous. Misrepresentation to be a ground of reduction need not induce essential error. The main difficulty is that essential error is used in two senses. The difference is illustrated by contrasting Stair and Bell with Lord Watson in Menzies v. Menzies. It should be the case that a contract induced by essential error, in the Institutional sense, is void whether or not the error is induced. If there is no such essential error, but there is innocent or fraudulent misrepresentation, the contract is voidable.

Fraud has a wide meaning in Scots law. Recent treatment has tended to confine its meaning to that of a dictum of Lord Herschell in Derry v. Peek, but, although some of the categories in which fraud was inferred have developed special rules, there remains a residual power to treat unfair dealings as fraudulent. The way in which fraud could be inferred is reflected in the history of the law of bankruptcy. It is settled that a contract induced by fraudulent misrepresentation is voidable although it can be argued that fraud which produces essential error and subverts consent, should render the contract void. Out of fraud has developed the doctrine of facility and circumvention and in the middle of the nineteenth century undue influence appeared as a ground of reduction. Facility/

Facility and circumvention and undue influence obtain consent, but by tainted means. They, therefore, render a contract voidable but not void.

Chapter 3

Public Policy

Early Development

There is a category of cases in which the parties to a contract have given their consent, with capacity to do so and free from factors vitiating the obtaining of consent, and yet the law will not give effect to the contract. At the early stages in the development of the law this category cannot be described as comprehending contracts contrary to public policy or *contra bonos mores*, because that would beg the question of the grounds for non recognition of the contracts and imply a unity of classification which does not exist.

The earliest extensive treatment of this topic is in Hope's *Major Practicks*[1]. He distinguished contracts, pacts and obligations and mentioned unlawful actions under each heading. No coherent classification emerges. The instances considered are penalty clauses[2], a bond by an adulterer to the adulteress and bairn[3], profits made by an interdictor[4], and leagues and bonds of manrent[5]. Usury and alienations in defraud of creditors are treated separately[6].

In one respect Hope gives the impression that Parliament had formed a general doctrine on unlawful contracts. He quotes an Act of 1592 as stating "It is not laufull to ane privat partie be contract or obligation to astrict or burthen any uther with unlaufull and impossible conditions against law, equity/

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1. Hope, vol.1, pp. 94,99,103. With some doubtful exceptions, the latest dates occurring in the *Practicks* are in 1633, *op. cit.*, vol.1, introd. p.xiii (L.P. Clyde); Balfour mentions the category, Balfour, pp. 189,190.
2. Hope, vol.1, p.99.
3. Hope, vol.1, pp.97,103, quoting *Durhame* v. *Blackwood* (1622) which is reported by Morison, M. 9469.
4. Hope, vol.1, p.103.
5. Hope, vol.1, p.100, which is also treated by Bankt. 1.69.84; 1.70.85. Ross, vol.11,p.157; Jennifer M. Brown, *Bonds of Manrent in Scotland before 1663*, unpublished Glasgow Ph.D. Thesis (1974).
6. Hope, vol.1, pp.118 *et seq.*

equity, reasone, and good; albeit their necessity for the tyme causes them to yield thereto"[1]. This quotes a limited part of the narrative of the Act, but it was not what was enacted. The Act prohibited a condition under which a debtor bound himself to be charged at the market cross of Edinburgh although he resided in the furthest parts of the realm[2]. With a liberal interpretation it might have been possible to apply the Act outside the sphere of diligence but it seems to have been forgotten nearly a century later[3].

Until the eighteenth century the common law, so far as it concerned itself with public policy, centred on the relationship of marriage and the attitude of the Court of Session was unpredictable. A bond to a child procreated in adultery was at first found to be null ipso iure as given ob turpem causam adulterii[4], but twenty years later the contrary was found[5]. It has been suggested judicially that the later decision proceeded on the basis that a man should provide for the illegitimate child and the woman who had been robbed of her chastity[6].

The problem of pacta contra fidem tabularum has received scant attention from writers and yet it raised many difficult issues. The basic situation was a marriage contract accompanied at the same time, or at least prior to the marriage, by a private contract between father and son in which the son burdened or disposed of the estate which was transferred to him in the marriage contract. Such arrangements were declared null/

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1. Hope, vol.1, p.94.
2. c.140, 12 m.o.ed.; c.56, Record ed.
3. An inference drawn by Ross from the introduction of a special period of charge for the inhabitants of Orkney and Shetland in 1685. Ross, vol. 1, p.293. The 1592 Act was repealed by the Statute Law Revision (Scotland) Act 1906.
4. Durhame v. Blackwood (1622) M. 9469.
5. Ross v. Robertson (1642) M. 9470.
6. Lord Ordinary in Duke of Lamilton v. Esten (1820) 2 Bligh 196 at p.204, which is the best report. cp. other reports 6 Pat. 644; A. v. B., 21 May 1816 F.C.

null in a series of decisions[1]. The contract between father and son could be challenged by those prejudiced by it, including the son[2]. The reason for allowing the challenge was difficult to explain. There is something unfair about a situation in which a marriage contract proclaims a man's future wealth to his intended wife, and in an unpublished deed the man reconveys his fortune to his donor. The elastic concept of fraud could be used to explain the availability of challenge but this was awkward in its application to the son who, if anything, was a party to the deceit. Kames considered that the son was relieved, not on the ground of fraud, but on the ground of implied extortion, whereas the relief granted to the wife and children was on the ground of fraud[3]. In the absence of a doctrine of public policy this is a complicated but logical analysis.

The reason for reduction is better explained by an argument in 1705 which combines elements of fraud and public policy:-

> "Private deeds, contrary to solemn contracts of marriage, are fraudulent contra bonos mores, and ought to receive no encouragement from any judicature; and such discharges are prejudicial to the wife, not only for her liferent interest, but in so far as they cut off the fund of sustaining the married couple, and educating the children; and such unfair dealings could even be quarrelled by the granters of private discharges themselves, as being elicited at a time when children cannot debate nor contend with their parents, and ought not to be imposed upon; and it is reasonable, and necessary, that all such underhand practices should be discouraged/

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1. Hepburn v. Seton (1633) M. 9473; Paton v. Paton (1668) M. 9475; Walker v. Walker (1700) M. 9476; McGuffock v. Blairs (1709) M. 9483; An agreement to burden or dispone carried into effect after the marriage was also challengeable - Pollock v. Campbell (1718) M. 9489; Russel v. Gordon (1739) M. 9490.
2. Russel v. Gordon, supra.
3. Kames, Principles of Equity, vol.1, pp. 77 et seq.

> discouraged; for who can be secure in matching their daughters, if private pactions can evacuate solemn contracts of marriage, upon the faith whereof matches are made, and settlements for maintenance of the married persons and their issue?"[1].

Fountainhall's report of the case records that "the generality of the Lords thought the taking of a gratuitous discharge in such a manner was an act against common honesty and morality, and therefore reduce it simply et in toto; for if such pactions were in any way sustained, then none had security by any provisions made to them in contracts of marriage"[2]. It was not decided whether the reduction affected onerous third parties, although the matter was raised[3]. Kames referred to the English practice which treated the contract as voidable[4].

The attack on pacta contra fidem tabularum can be seen as an extension of the concept of fraud. In other circumstances contracts were enforced in ways which startle the modern mind. The Court would not annul a bond on grounds which look like interference with the course of justice. The bond was granted by a person pursued for slaughter and granted to the Earl of Murray who was assisting the pursuit[5]. The Court's attitude to restraints on liberty was harsh. An arbitral decree which decerned for banishment for certain years was not null[6], although the Court would not uphold a contract for perpetual banishment unless the King consented, but there were precedents quoted for such consent being given[7].

Authorities involving the liberty of the subject show equivocation. A bond for perpetual service as a collier was not contra bonos mores nor against Christian liberty, nor contrary/

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1. Grieve v. Thomson (1705) M. 9478 at 9479.
2. Ibid, at p.9480.
3. McGuffock v. Blairs, supra.
4. Kames, Principles of Equity, vol.1, p.80.
5. Earl of Murray v. Dunbar (1630) 1 B.S. 302.
6. Arthur v. Geddies (1590) 1 B.S. 124.
7. Wedderburn v. Monorgun (1612) M. 9453.

contrary to Acts of Parliament[1], although a child could not be sold as a tumbling-lassie[2]. Kidnapping followed by transportation increased with the increasing value of American plantations. Prior to the abolition of heritable jurisdictions there was a trade in the "voluntary" transportation of convicts[3]. The superior Courts, however, never allowed slavery after the fourteenth century[4], although Erskine thought that slavery would be permitted in some instances of Turks, Moors and Negroes[5]. After false starts in 1757[6] and 1770[7], the Court of Session decided by a majority that Scots law would not support slavery to any extent[8].

These cases caused stirrings in the hearts of colliers[9]. The statutes governing colliers and salters[10] perhaps did not result in universal serfdom for these workers but the institution was widespread[11] and restitution enforced of colliers who deserted their masters[12]. Despite Cockburn, the colliers were not "literally slaves"[13]. They could acquire property[14]. The attitude of the Court of Session to their situation contrasts with that towards the enserfdom of fishermen. The Privy Council in 1683 and 1684 had ordered fishermen to be returned to their employers in the manner of colliers[15].
The/

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1. Laird of Caprington v. Geddew (1632) M. 9454.
2. Reid v. Harden (1687) M. 9505.
3. J. Hill Burton, History of Scotland, vol.8, p.521.
4. C. Innes, Lectures on Scotch Legal Antiquities (1872), p.159.
5. Ersk., Inst. 1.7.62.
6. Sheddan v. a Negro (1757) M. 14545.
7. Ferguson, p.188. In Nicolson v. Nicolson, 6 Dec. 1770 F.C. a slave was held an admissible witness.
8. Knight v. Wedderburn (1778) M. 14545; Hailes, 776.
9. Ferguson, p.188.
10. 1606 c.11, A.P.S. iv. 286, c.10 and 1661 c.56 A.P.S. vii. 304, c.333; they were exempted from the Act for preventing wrongous imprisonment and against undue delays in tryals - 1700 c.6 A.P.S. x. 274a.
11. Smout, p.168, who at p.169 refers to lead miners being enserfed between 1607 and 1698.
12. M. s.v. "Coaliers".
13. Cockburn, Memorials, p.76.
14. Bankt. 1.69,82.
15. R.P.C. 3d series viii, 119,495.

The Court, however, rejected extending the servitude to fishermen on the grounds that it would tend "to introduce slavery, contrary to the principles of the christian religion, and the mildness of our government"[1].

The status of serfdom disappeared partly by statute in 1775[2], which was in many ways a nominal victory[3], and finally by statute in 1799[4].

Stair recognised that an obligation might be invalid ex turpi causa, but the meaning of this concept is obscure[5]. His formulation that "every paction produceth action"[6] has to be taken more literally than such a statement would be today. There are in argument, more than in the Court's decisions, glimpses of a realisation that in some circumstances pactions should not produce actions, but a dominant feature of the law of contract at the time of Stair was that, except in rare cases, a contract was not null because of its subject matter.

The Scots Parliament was not inactive on legislation on contracts but even when there was a statutory nullity the tendency of the Courts was to interpret the statute restrictively/

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1. Reid v. Woodney (1696) M. 4427; Allan v. Skene (1728) M. 9454.
2. 15 Geo. III, c.28.
3. Henry Hamilton, An Economic History of Scotland in the 18th Cent., (1963), p.370.
4. 39 Geo. III, c.56. The repealing statutes were themselves repealed by the Statute Law Revision Acts 1871 and 1948.
5. Stair, 1,7,8; 1,18,1.
6. Stair, 1,10,7. This statement showed that a general theory of contract based on consent had emerged from a consideration of the method of proof and the doctrine of causa. Stair Soc. History, chap xix, passim, (Mackenzie Stuart), where part of the argument in Deuchar v. Brown (1672) M. 12386 is treated as the decision of the Court. See also Balfour, pp. 190,150; Hope, vol.1, pp. 93,99. The elimination of causa and the resolution of the manner of proof are developments which have not been treated because of the purpose of this historical survey.

restrictively and thus, where possible, give effect to a contract. Statutory control existed on usury, buying pleas, contracts by insolvents and gaming.

Usury

There were many statutes of the Scottish Parliament prohibiting usury, i.e. contracts demanding an exorbitant rate of interest[1]. The most notable of these were the Acts 1587 c.35[2], 1597 c.18[3], 1633 c.21[4], and 1661 c.345[5]. The Act of 1587 refers to "lawis of this realme alreadi maid" but it is uncertain what the earlier laws were[6].

The rationale for the usury laws was stated in the early Acts to be condemnation by the law of God[7]. This may reflect the influence of the Canon law which prohibited usury[8]. Stair points out that Protestant nations allow the "profit of money" subject to limitations[9]. One may doubt, however, the extent to which the church condemned usury after the end of the sixteenth century[10], and when the rate of interest was reduced in 1633 the reason for reduction was not expressed as a strengthening in theological doctrine, but as an economic necessity[11]. When the substance of the laws were repealed in 1854, the reasons for repeal were stated to be partly economic and partly the subsidence/

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1. General Index of A.P.S. s.v. "Usury". The heading omits the Acts 1649 c.367 and 1661 c.345.
2. A.P.S. III, 451.
3. A.P.S. IV, 119-121 and 133.
4. A.P.S. V, 39.
5. A.P.S. VII, 320.
6. Ross, vol. II, p.33; Balfour refers to a statute of Robert III, Balfour, p.553; Usury is referred to several times in Reg.
7. 1594 c.32; 1597, c.18; 1597 c.30.
8. Stair Soc., Sources, p.190; Deut. 23v.19,20.
9. Stair, 1,15,7; also Johnstoun v. Laird of Haining (1680) M. 16414.
10. Smout, p.85.
11. 1633 c.21.

subsidence of religious superstitions[1].

The Acts prohibited more than 10 per cent interest[2], which was later reduced to 8 per cent[3], then 6 per cent[4], and then 5 per cent[5]. The penalty for usury varied. The terms of the earlier Acts suggest that usury was a criminal offence. It was so treated by Hume[6] and there are printed reports of criminal proceedings[7]. The definition of usury was wide, taking into account indirect forms of receiving interest such as annual-rents before the term of payment, and devices using wadsets[8].

Under 1594 c.32 the debtor on revealing usury could be freed from his contract and under 1597 c.18 contracts in contravention of the laws on usury were to be "null and of nane availe force nor effect". The Act of 1597 was not interpreted literally. A usurious contract could be enforced if the unlawful interest had not been paid and the demand was restricted to the lawful rate[9].

This attitude bears a resemblance to the attitude of the Courts in the nineteenth century when penalty clauses were modified. As is well known, the doctrine on penalty clauses evolved from the usury provisions. Balfour cites three cases in which a penalty was allowed to be exacted[10]. Forty years later/

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1. Hansard, vol.134, cols. 930, 1, 29 June 1854. The Acts were repealed by the Usury Laws Repeal Act 1854 and the Statute Law Revision (Scotland) Act 1906.
2. 1587 c.35 with an alternative of 5 bolls victual.
3. 1633 c.21.
4. 1649 c.367; 1661 c.345.
5. 12 Anne 1713 Stat. 2 c.16.
6. Hume, Crimes, chap. xxv. Hume knew of no instance in which the corporal punishment referred to in the statutes had been used. Hume, 1, 505. On other penal consequences see 1597 c.18.
7. Justiciary Records vol.I & II, 1661-1678; Scottish History Society, vols. XLVIII and XLIX (1905). Curiously, Mackenzie writing at the end of this period is cautious: "Most lawyers think it may be punished criminally", Mackenzie, p.247.
8. Mackenzie, pp. 236-247.
9. Wauchop v. Lady Blackburn (1610) M. 16405; King's Advocate v. Morison (1623) M. 16406.
10. Balfour, pp.150,151; Laird of Cokpuil v. Carutheris (1501); King's Treasurer v. Earl of Caithness (1506); Bruce v. Lindsay (1502).

later the Lords decided that "Be the law of this realme, poena conventionalis, sic as ane soume of money adjectit, with consent of parties, in ony contract or obligatioun, in name of pane, may not be askit be ony persoun, bot in sa far as he is interestit, hurt or skaithit; because all sic panis are in ane maner usuraris, and unhonest, maid for lucre or gane"[1].

One might have expected that ideas on exorbitant profit would be extended to cases in which a price was exorbitant. An attempt to challenge a contract on inter alia the ground of exorbitant price failed in Fairlie v. Inglis[2]. No mention is made of usury. In Borthwick v. Ramsay[3] the Lords challenged an account for funeral expenses as exorbitant and refused to "countenance or sustain any such extortion". The approach may have been influenced by the Act 1681 c.80 on restraining the exorbitant expense of Marriage, Baptisms and Burials[4], although the Act is not referred to[5]. If so, it was a liberal interpretation of the spirit of the Act, which only provided fines as the penalty for contravention.

Buying Pleas

The practice of buying pleas was common for more than half a century after the Restoration, it being at that time a "vile traffic, in which, in an age of great lawyers, who were remarkable for seriousness and soberness of mind, almost every man, from the judge to the lowest practitioner, was engaged"[6]. There was a restrictive interpretation of the Land Purchase/

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1. Home v. Hepburn (1549) M. 10033.
2. (1669) M. 14231, 1 B.S. 589.
3. (1697) M. 4981.
4. A.P.S. VIII, 350; repealed Statute Law Revision (Scotland) Act 1906.
5. The Act was discussed in a subsequent unseemly dispute on the cost of burying a Lord Justice Clerk. The dispute was between the deceased's heir and the deceased's widow who had married the new Justice Clerk, but the arguments considered the price charged by undertakers: Ormiston v. Bangour (1709) M. 4981.
6. Ramsay, vol.1, p.431.

Purchase Act 1594 "Anent the bying of landis and possessionis dependand in pley be Jugeis or memberis of courtis"[1]. An advocate could buy land subject to a depending process. The transaction was valid although the contravener of the Act might lose his office and privileges[2]. The transaction had to take place pendente lite before it could be challenged[3], and the gift of a plea, as opposed to its purchase, was allowed[4]. The argument that the Act declared it to be unlawful to buy pleas and therefore the transaction was null, was expressly rejected[5].

Contracts by Insolvents

Transactions by an insolvent debtor give rise to many problems. Balfour notes several cases in which alienations in defraud of creditors were of "nane avail" and in terms which suggest that third parties could not acquire rights from a debtor in a tainted transaction. The situations which he gives as being struck at are alienations after comprising, after the pronouncing of decree, after the serving of a summons, and after inhibition[6].

The law became more sophisticated by allowing a creditor to challenge a transaction although he had not taken active steps to enforce his debt. In imitation of a Roman remedy for annulling deeds in defraud of creditors, the Lords passed an Act/

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1. c.26 A.P.S. IV, 68; given its short title by the Statute Law Revision (Scotland) Act 1964 Sch.2. Sch.1 of the 1964 Act deleted three obsolete words, but otherwise the 1594 Act remains in force.
2. Colt v. Cunningham (n.d.) M. 9495; Cunningham v. Maxwell (1611) M. 9495; Home v. Home (1713) M. 9502; Ersk. Inst. 2.3.16.
3. Hume v. Misbet (1675) M. 9496.
4. Earl of Hume v. Hume (1678) M. 9498.
5. Richardson v. Sinclair (1635) M. 3210.
6. Balfour, pp. 184, 185; the case of James Ramsay v. Henrie Wardlaw (1492) is more fully reported in A.D.C. 1, 238.

Act of Sederunt on 13th July 1620[1] which was ratified by Parliament in 1621[2]. The curious thing about this statute was that it was so deficient that the common law on gratuitous alienations developed after the statute. This was part of the development of fraud which has already been examined. The Act applied to alienations to "wyiffes Childrene Kynnismen alleyis and uther confident and Interposed persounes". A gift to a creditor was not struck at but as such gifts could elude the rules on interest rates they could be attacked on the grounds of usury. This was decided in 1677[3] and although the decision was described later as "very severe", it was followed[4].

Gaming

The Act 1621 c.14[5] "Anent Playing at Cardes and dyce and Horse races" provided for winnings above 100 merks to be consigned to the church for distribution amongst the poor, and on certain premises forbad the playing at cards or dice. The Act may have been inspired by a provision of French law[6]. An Act in 1657[7] provided that the winner of specified gaming transactions should repay the loser and pay the same amount again to the Protector.

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1. L.P. Clyde stated that he could not find this A.S. (Hope, vol.1, p.121). It is included in the Acts of Sederunt of the Lords of Council and Session from 1532 to 1533 which were published in 1811 and which include some later Acts.
2. c.18; Bankruptcy Act 1621.
3. Nisbet v. Laird of Humbie (1677) M. 9459.
4. Sutherland v. Sinclair (1696) M. 9460.
5. A.P.S. IV, 613. The Act was not formally repealed until the Betting and Gaming Act 1960, s.15, Sch.6. The last reported case in which it was applied was Maxwell v. Blair (1774) M. 9522, although in 1854 an action founded on the Act was sustained in Falkirk Sheriff Court, Trotter, p.204. In 1864 the Act was not in desuetude: O'Connell v. Russell (1864) 3 M. 89 at p.93 per L. Deas.
6. Bell, Comm. 1,319.
7. A.P.S. VI, ii, 910a. This Act was, of course, affected by the Act Rescissory of 1661 which annulled the legislation "of all pretendit parliaments since the yeer 1633".

The attitude of the Courts was that contracts should be enforced. If a winner of a gaming transaction obtained more than 100 merks, the excess was to be consigned for the poor in terms of the 1621 Act, but otherwise the paction was valid[1]. In 1776 the Lords sustained an action for a wager of a pipe of port wine between two gentlemen, to be paid to him who should walk first to Edinburgh from a certain place in the country, although apparently because the wager was not seriously laid, absolvitor was granted in the circumstances of the case[2].

The Gaming Act 1710[3] declared bills and other documents given in consideration of gaming to be "utterly void, frustrate and of none effect." Despite this the Court held that onerous and bona fide indorsees of bills were not affected by a challenge that the bill had been granted for money at play[4], although subsequently it was held that the Act did not apply to Scotland[5].

Public Policy in the Eighteenth Century

At the beginning of the eighteenth century the doctrine of public policy existed in a rudimentary form. The position was broadly that contracts were enforced wherever possible. To this there were two exceptions, first when fraud was involved as in pacta contra fidem tabularum and contracts by insolvents, and secondly in the interpretation of the usury laws. By the end of the century the position was radically different.

In two areas which we have considered there was a change in direction. In Bruce v. Ross[6] a wager on the election of a Member/

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1. Park v. Sommervile (1668) M. 3459; Stair, 1.10.8.
2. Hope v. Tweedie (1776) M. 9522.
3. 9 Anne c.14; given title by Short Titles Act 1896.
4. Neilson v. Bruce (1740) M. 9507; Stewart v. Hyslop (1741) M. 9510.
5. Kirk Session of Dumfries v. Kirk Sessions of Kirkcudbright and Kelton (1775) M. 10580; Rayner v. Kent, 1922 S.L.T. 331.
6. (1787) M. 9523.

Member of Parliament was found not actionable. The report in Morison's Dictionary states that "the Judges in general regarded a wager as in no case a legal ground of action; while some, who thought differently, were, nevertheless, disposed to deny action in this particular case, from the idea that political operations were a peculiarly improper subject of wagering". The report by Hailes[1] makes it clearer that it was political gaming which was regarded as dangerous. Hailes, himself, was troubled by the thought that there might be wagers on the judgments of a Court. The interlocutors of the Court of Session were affirmed on appeal to the House of Lords[2].

In Bruce the respondent had argued that the unenforceability of sponsiones ludicrae was early adopted as common law in Scotland and had been constantly adhered to. It would be interesting to know what the authority was for that proposition. The only authority mentioned is Stewart v. Dundonald[3], which related to a wager on succession to an Earldom. It was decided by a casting vote in 1753 and, if anything, is evidence for the novelty of the proposition that wagers were not actionable.

Bruce v. Ross was followed in 1799 when it was observed that courts "were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard sponsionibus ludicris; as to money gained or lost, on which melior est conditio possidentis"[4].

Tait has a brief report of a decision in 1774 under The Land Purchase Act 1594. A contract contravening the Act was declared void and the agent suspended from office[5]. When Bell wrote his Principles he stated that the contract was null. His/

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1. Hailes, Dec., 1016.
2. 3 Paton 107.
3. (1753) M. 9514.
4. Wordsworth v. Pettigrew (1799) M. 9524.
5. McKenzie v. Forbes (1774) 5 B.S. 528. A change foreshadowed by W. Forbes, The Institutes of the Law of Scotland (1722), vol.1, 2.3.1,3.

His editors have inserted the word "not" before "null"[1], a change which was justified by the authorities referred to, but one wonders whether this frustrated an attempt to alter the law. A recent consideration of the topic follows the older authorities[2].

The century also saw the introduction of new problems arising from smuggling, combinations and sale of offices.

Smuggling

Smuggling did take place on a large scale before the Union in 1707[3], but it seems to have posed no problems for the civil Courts. After the Union, possibly because of the imposition of a malt tax in 1725, "No crime was so respectable as 'fair trading'; none was so widely spread"[4]. It was a trade carried on more widely in Scotland than in England[5]. "Smuggling was accepted by high and low alike and even connived at by judges, not ex officio but in their private capacities"[6]. The source of Lord President Forbes' fine brandy and claret was almost certainly the smuggling activities of Bailie Stewart of Inverness[7]. "Every person who in Scotland buys claret, knows that he buys French wine, which has not paid the duty of French wine; and purchases it indeed as such, since he would not give the price for it, if it were Spanish, under the name whereof it is entered"[8].

A series of smuggling cases came before the Courts and they posed difficult problems, not only because of the popularity of the activity. There are theoretical difficulties about holding that Courts should, in civil matters, be influenced/

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1. Bell, Princ., para. 36(1).
2. Walker, Principles, p.541.
3. T.C. Smout, Scottish Trade on the Eve of the Union, 1660-1707 (1963), p.38 et seq., p.202 et seq.
4. Graham, Social Life, p.527.
5. Ibid., p.528.
6. Ferguson, p.160.
7. Ibid.
8. Comms. of Custom v. Morison (1723) M. 9533 at 9535.

influenced by the fact that a contract of sale involved a breach of revenue laws. Smuggling might be criminal, but it was not immoral. According to Lord Mansfield "An immoral contract it certainly is not, for the revenue laws themselves, as well as the offences against them, are all positivi iuris"[1]. There were many statutes applying to smuggling. Their complexity was such that when they were codified in 1825, the codification needed twelve statutes involving the repeal of 337 English statutes. It was "the greatest feat in the consolidation of statute law that had ever been made"[2]. Despite this mass of law, it seems that no statute provided that any contract was to be void. There was a precedent in the cases on The Land Purchase Act 1594 for interpreting statutes in such a way as to limit the penalty for contravening the statute to those penalties specifically stated. Penal laws should be strictly construed[3].

Against these considerations, there is obviously something awkward in a Court enforcing performance of a contract, when performance is in breach of an Act of Parliament. Kames regarded an importation in contravention of revenue laws as "clearly a contempt of legal authority and consequently a moral wrong"[4]. This was a corollary to Kames' attitude to the interpretation of prohibiting statutes. He would have been more inclined than the Court had been in some cases to look to the "spirit and intendment of the statute"[5]. He drew a distinction between reducing a bargain and refusing to sustain an action on it[6]. The significance of this distinction is not elaborated on, but whether or not as a result of Kames' influence, it was a key to be seiz d by a puzzled Court of Session.

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1. Holman v. Johnson (1775) 1 Cowp. 341.
2. Holdsworth, vol.13, pp. 261,2.
3. See argument in Comms. of Custom v. Morison (1723) M. 9533; McClure & McCree v. Paterson (1779) M. 9546.
4. Kames, Principles of Equity, vol.1, p.357.
5. Ibid., pp. 351-363.
6. Ibid., p.353.

As a first step the Court held that goods known to have been smuggled could be validly bought and sold[1]. A seller of "run goods" was not liable in damages for failure to deliver[2], but when goods had been delivered to a purchaser, an action for the price was sustained[3].

If one pauses there in the historical development, the theoretical situation has already become hard to explain. The contract of sale of smuggled goods is not void, or voidable, for an action may proceed on it and property may pass. But neither is the contract in all its respects enforceable, because the seller is entitled to fail to deliver goods, and thus prevent a breach of the revenue laws.

Lord President Forbes' attempt to have smuggling bargains held pacta illicita was not encouraged by his brethren[4]. The Court continued to allow actions on such bargains. Foreign merchants could sue for the price of tea imported in contravention of a statute which prohibited such importation[5]. Knowledge that the goods were to be smuggled would not prevent an action for the price[6]. Lord Pitfour thought "that smuggling was not malum in se, but only by particular statute, and that statute did not annul the smuggling contracts, but only imposed penalties upon smuggling. Others of the Lords thought this reason too general, because it went the length of giving action for implement of a smuggling contract, by delivery of the goods, which it was twice found was not competent"[7].

Then/

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1. Comms. of Customs v. Morison (1723) M. 9533.
2. Scougal etc. v. James Gilchrist (1736) M. 9536; Cockburn v. Grant (1741) M. 9539.
3. Wilkie v. McNeil (1740) M. 9538.
4. Wilkie v. McNeil (1740) 5 B.S. 217. Forbes was, of course, responsible for "managing" Scotland along with Argyll and Islay and it cannot have escaped his notice that the Porteous riot in 1736 had its origins in smuggling.
5. Walker v. Falconer (1759) M. 9543; More and Irvine v. Steven (1765) M. 9545.
6. Crawford v. Boyd (1765) 5 B.S. 914; also McMaster v. Forsyth (1775) 5 B.S. 530.
7. Crawford v. Boyd, supra.

Then came a change. In 1776 it was decided by a majority of five to three with two judges "non liquet" that no action lay between smugglers for implement of a smuggling contract[1]. It was ominously argued that it was "a question which falls to be determined rather upon the principles of the English law, than upon those of the law of Scotland, the whole of our revenue laws being English, and the consequences therefore that result from them, being deducible only from the law of England". The argument was accepted by Lord President Dundas[2] and, in a later case, by Lord Justice Clerk Glenlee[3]. It ignored that there were several Scots statutes regulating importing and exporting[4] and that smuggling took place on a large scale before the Union.

In 1779 the Court departed from the trend of earlier decisions and found a purchase of smuggled goods unlawful and unenforceable[5]. The decision was unanimous but the judges differed in their reasons[6]. The difficulties of reconciling this position with the Court's earlier attitude increased when the Court allowed an action on a contract for the purchase of smuggled goods because the transaction took place on land and not at sea[7]. By now the law was in an uncertain state. It is/

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1. Duncan v. Thomson (1776) M.App. "Pactum Illicitum", p.1. Hailes, Dec., 683. In the majority were L.P. Dundas, L.J.C. Glenlee, Kames, Auchinlock and Hailes. Dissenting were Covington, Kennet and Stonefield; non liquet Monboddo, Elliock.
2. Hailes, ibid.
3. McIure & McCree v. Paterson (1779) Hailes, Dec., 829.
4. e.g. 1681 c.78, A.P.S. VIII, 348 (gold and silver threads etc.); 1701 c.8, A.P.S. X, 275 (wool); 1701 c.13, A.P.S. X, 280 (silk stuffs); 1701 c.11, A.P.S. X, 278 (French wines); 1703 c.10, A.P.S. XI, 109 (Irish victual); 1703 c.13, A.P.S. XI,112 (Wines). The statutes mentioned were not repealed until the Statute Law Revision (Scotland) Act 1906, but they were affected by Art. VI of the Treaty of Union.
5. McIure & McCree v. Paterson (1779) M. 9546. See also Tibbald v. Wallace (1779) 5 B.S. 532.
6. Hailes, Dec., 829.
7. McLean v. Sword (1788) M. 9549. cp. Burns v. Forbes & Boyd (1807) Hume 694, in which a bargain was not enforceable when it involved the smuggling of whisky from the Highlands to the Lowlands across the forbidden line.

is not surprising that when the situation of foreign merchants sending tea to Scotland repeated itself, the Court allowed an action for the price and then had doubts about this[1]. When the matter came before the Court again, Lord Stonefield sustained the action, and by a narrow majority the Lords adhered. Hailes was with the majority only for the sake of uniformity with previous judgments. When the case came before the Lords again it was found that no action lay, the alteration being caused by the absence of the Lord Justice Clerk. On a third occasion the case came before the Lords. This time Hailes was absent and so the majority against the action remained. The defender was assoilzied[2].

Thereafter the position was affirmed that a merchant settled abroad, whether native or foreign, had no action for the price of smuggled goods when he was an accessory to smuggling, but, if not an accessory, he could maintain an action though he suspected, or even knew, that the goods were meant to be smuggled[3].

It was in this way that the Court declared itself against enforcing some contracts tainted with smuggling. It had grappled with a problem which remains, the effect on a contract of implied illegality. The result was that we cannot say that a contract for sale of smuggled goods was either void or voidable, even if all the parties to the sale were concerned in the smuggling. The Court's attitude after 1776 is still consistent with the decision in 1723[4] that property could pass in goods which had been smuggled[5]. The principle was stated/

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1. Trustees of Henry Greig v. Davidson (1789) M. 9550.
2. Cantley v. Robertson (1790) M. 9550; Hailes, Dec., 1077.
3. Young & Co. v. Imlach (1790) M. 9553; Cullen v. Philp (1793) M. 9554; Isaacson v. Wiseman (1806) Hume 714. Cases on accession to smuggling were applied to a sale of lottery tickets in McLaren v. McManus, 21 Nov. 1878, Guthrie's Select Sheriff Court Cases, Second Series (1894), p.105.
4. Comms. of Customs v. Morison, supra.
5. Bell, Comm. 1,327; cp. Nisbet's Creditors v. Robertson (1791) M. 9554 which involved the assignation of a bond. The bond was reduced as a pactum illicitum; Brown v. Limond (1791) Hume 672 is a case special on its facts.

stated by the Court to be "in turpi causa melior est conditio possidentis"[1]; that "no action lies"[2]; a bond "could produce no action"[3]; and "the pursuer could not maintain an action"[4]. The conclusion must be that in their treatment of smuggling contracts and also in the contemporaneous treatment of gaming contracts, the Court had created a new form of invalidity -- the unenforceable contract[5].

Combinations

The eighteenth century development of trade was accompanied by the organisation of workmen. The Court of Session refused to enforce the contracts of combinations and, indeed, after differing opinions had been expressed, combinations were held criminal. Why the embryonic trade unions should be attacked is for the social historian to explain. Strikes were accompanied by violence and the example of the French Revolution provided a reason for not dismissing the events as merely the activities of the traditional mob[6]. The legal justification is hard to find. Prior to the first reported cases involving workmen, Bankton stated "Because commerce ought to be free to all, therefore monopolies are prohibited. By these, private persons or societies enter into combinations, or obtain grants to ingross to themselves a certain species of merchandise, trade or manufacture, in exclusion of all others from being concerned in it"[7]. Such a philosophy could be extended to the control of labour by combinations[8]. There are/

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1. Cullen v. Philp, supra.
2. McClure & McCree v. Paterson, supra; Mitchel v. Morgan (1790) Hailes, Dec., 859; 5 B.S. 533.
3. Stewart v. Lamont (1751) M. 9542.
4. Cockburn v. Grant, supra.
5. A view consistent with George Joseph Bell's last consideration of the topic, Inquiries into the Contract of Sale, (1844), pp. 22,23.
6. Ferguson, p.248; A. Briggs, The Age of Improvement 1783-1867, (1959), p.136.
7. Bankt., 1.411.11; Kames' view was radical -- Principles of Equity, vol.2, p.98.
8. As it was by Lord Meadowbank; see J.M. Gray, "The Law of Combinations in Scotland", Economica (1928), vol.8, p. 332 at 341.

are reported instances in the eighteenth century of the court refusing to uphold monopolies[1], but the law's attitude cannot be regarded as straightforward because of the existence of trading monopolies in burghs, the origins of which are uncertain[2] and which were not abolished until 1846[3].

It is more likely that the possibility of disturbance of the peace influenced the Court of Session. Kames deals with the topic under the heading "Acts and covenants in themselves innocent, prohibited in equity, because of their tendency to disturb society, and to distress its members"[4] and he shows his feelings when he commences by referring to the "spirit of mutiny" among workmen. The first reported civil case on combinations was in 1762. A society of journeymen woolcombers in Aberdeen was ordered in effect to be disbanded or to contribute sums for the maintenance of the poor, because "such combinations of artificers, whereby they collect money for a common box, inflict penalties, impose oaths, and make other by-laws, are of a dangerous tendency, subversive of peace and order, and against the law" and "contra bonos mores"[5]. That case was followed four years later. Journeymen weavers in Paisley formed a partnership of over 600 persons. Some of the members refused to pay their contributions. When the partnership sued them, the partnership was held an unlawful combination "of dangerous tendency to society" and the contract of copartnery was "void" as contra utilitatem publicam[6]. It seems/

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1. Brown v. Town of Edinburgh (1707) 4 B.S. 656; Incorp. of Girdle Smiths of Culross v. Watson & Masterton (1725) M. 1924; John Young v. Procs. of Bailie - Court of Leith (1765) M. 9564.
2. W.M. Mackenzie, The Scottish Burghs (1949), chaps. I and V.
3. 9 & 10 Vict. c.17. That is not to say that merchant and craft guild restrictions were in full force until 1846. The substance of restrictionism had vanished in Glasgow by 1740: Smout, p.363; and in Stirling by 1835: H. Whitbread, The Guildry of Stirling (1966) p.157.
4. Principles of Equity, vol.2, p.[illegible].
5. Procurator Fiscal v. Wool-combers in Aberdeen (1762) M. 1961.
6. Barr v. Carr (1766) M. 9564.

seems, however, that a partnership "for carrying on a manufacture" would have been treated differently[1]. A combination of masters was censured by Justices but they then proceeded to take more effective steps to end a combination of journeymen[2].

The result is a clear instance of the Court of Session using policy to determine that contracts should not be enforced. This policy was carried further when a combination to raise wages unaccompanied by violence was held criminal in the case of the cotton weavers in 1813 after previous cases had held that the conduct was not criminal[3]. This was not an auspicious use of the declaratory power of the High Court as a few years later a statute gave a limited right of combination for the purpose of raising or lowering the rate of wages or of regulating the hours of labour[4]. The Act did not affect the law of contract, so contracts for those purposes remained liable to attack at common law[5].

A discussion of combinations inevitably leads to a concentration on combinations of workmen. Other activities might be regarded as combinations if it is accepted that the essence of combination is that the agreement of the combiners is intended to produce an effect on a third party. Combinations had been treated as criminal prior to the case of the cotton weavers./

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1. Supra at 9566.
2. Corp. of Master Shoemakers of Edinburgh v. Marshall (1798) M. 9573. cp. the case of Peter Arnot, Hume, Crimes, vol.1, 494 fn. Other cases on combinations in this period are noted in H. Hamilton, An Economic History of Scotland in the Eighteenth Century (1963), pp. 345-351.
3. Hume, Crimes, vol.1, pp. 494-496; Gray, supra, p.342.
4. Combinations of Workmen Act 1825. Whether the Acts 39 Geo. III c.81 and 39 & 40 Geo. III c.106 or many other earlier Acts (Holdsworth, vol. XI, pp. 488 et seq.) applied to Scotland is now an academic question. With one important exception they were not applied in practice. Gray, op. cit., pp. 336-338.
5. Hollsworth, vol. XV, p.68, who considered such contracts "void".

weavers. A combination to refuse to accept halfpence resulted in fines[1]. The House of Lords considered a combination to fix the rate for posting in terms indicating that it was a criminal offence[2]. An example of the civil consequences of a combination is that of a white bonnet at an auction who acts in concert with the seller[3]. A combination of intending bidders at a sale was "illegal", the sale "void and null" and damages awarded to the seller[4]. This shows a feature of combinations. It is not the agreement among the combiners alone which is affected. The combination's contract with innocent third parties may be void.

Sale of Offices

In England trafficking in offices seems to have been common prior to the eighteenth century, judging from the evidence led in the impeachment of Lord Chancellor Macclesfield in 1725[5]. Scottish authority indicates that the practice was no less common north of the Border. For example, Fountainhall reports on a judicial promotion:-

> "Alexander [Falconer] Lord Halkerton ... entered to his place in Session by simony, or rather committendo crimen ambitus, for he paid to my Lord Balmanno 7000 merks (a great soume at that tyme when their salaries ware small), to dimit in his favors, and by my Lord Traquaire's moyen, the Treasurer, whosse creature he was, he got the dimission to be accepted by his Majesty"[6].

When/

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1. Hall v. Billerwell (1787) M. 9573.
2. Scott v. Smith (1798) 4 Paton 17; M. 7625.
3. cp. Grey v. Stewart (1793) M. 9560.
4. Murray v. MacVhan (1783) M. 9567; Hailes, Dec., 920; A special case involving elections is Paterson v. Mags. of Stirling (1775) M. 9527; see 16 Geo. 2, c.11, s.24; Hoggan v. Wardlaw (1735) 1 Paton 148.
5. H.D. Gibb, Judicial Corruption in the United Kingdom (1957), pp. 7-41.
6. Journals of Sir John Lauder, Lord Fountainhall, (1900), Scottish History Society, 1st series, vol.36, pp. 215, 216.

When James Hamilton was appointed one of the principal clerks of session by the Lord Register's gift he was ordained on 1st June 1697 to be tried by a committee of the Lords of Session, and at the same time "obliged to give his oath that he had given no more to the Register then 4000 merks for the said post, directly or indirectly"[1]. When a clerk of session retired at the beginning of the nineteenth century, he had no pension. The system was that he either resigned in favour of his successor who advanced a sum of money or a "co-adjutor" was associated with him in his patent and undertook the duty on condition of a division of salary. Sir Walter Scott obtained his clerkship on condition of allowing his predecessor, Home, to retain its emoluments during Home's lifetime[2].

In Scotland there was an excuse that heritable offices could be sold under the feudal law. There is no case in which it was decided that all such offices could be sold, but some of them were in commercio. Heritable jurisdictions could be sold[3]. On the assumption that adjudgeability of an office must imply a power of voluntary sale, the office of king's usher[4] and the office of king's printer granted to a person and his heirs and assignees[5] were both saleable. Offices of trust granted during pleasure or for life were not adjudgeable[6]. Kames, as usual, saw the problem as being more involved. A distinction should be drawn between an office which was not adjudgeable and emoluments which might be. Where there was power to appoint a deputy the emoluments might/

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1. Brunton & Haig, p.494, quoting the Books of Sederunt.
2. J.G. Lockhart, Memoirs of Sir Walter Scott, (1900 ed.), vol. 1, pp. 436-443.
3. Ersk., Inst., 1.2.11.
4. Cockburn v. Creditors of Langton (1747) M. 150. The interlocutors of the Court of Session were affirmed by the House of Lords. Note, however, arguments on the value of this case in Earl of Lauderdale v. Scrymgeour Wedderburn, 1910 S.C. (H.L.) 35.
5. Blair v. Freebairn (1737) M. 148.
6. Ersk., Inst., 2.12.7; Wilson v. Falconer (1759) M. 165.

might be adjudged, however personal the office, but it would be otherwise when there was no power of deputation, as in the case of Supreme Judges[1]. Whether or not Kames' view is consistent with feudal theory[2], its value for the purposes of analysis was to draw a distinction between the disposition of an office and the assignation of its emoluments.

In the latter half of the eighteenth century the Court of Session started to refuse to support sales of offices. The General Assembly of the Church of Scotland passed two Acts against simoniacal pactions[3]. Shortly thereafter the Court refused to support such a paction, holding it "ob turpem causam et contra bonos mores". The opinions show a concern for the purity of the Scottish Church[4].

In secular cases the Court's attitude shifted from one of tolerance, but it never prohibited all sales of offices. In Young v. Thomson[5] a member of Parliament procured an office for his wife's brother. In return the brother bound himself to pay an annuity to his aunt. "It was generally the opinion of the Court, that if Mr. Ker had taken the sum payable to himself, the paction would have been contra bonos mores; but not where it is taken by him payable to a friend or relation, such as Mrs. Young, who was his wife's aunt". This is a narrow view and it is not surprising that it did not last.

In Dalrymple v. Shaw[6] it was argued that "nothing is more openly sold than are public offices every day; the clerk-ship of the High Court of Justiciary, for example, the depute clerk-ships of the bills, the sheriff-clerkships"[7]. If that were so, the/

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1. Wilson v. Falconer, supra.
2. Were the emoluments heritable? If not, they would not appear to be the proper subject of an apprising or an adjudication. The appropriate remedy of the creditor is arrestment.
3. Sess. 7, June 17, 1753; Sess. 5, May 30, 1759.
4. Maxwell v. Earl of Galloway (1775) M. 9580; Hailes, Dec., 624.
5. (1759) M. 9525.
6. (1786) M. 9531; Hailes, Dec., 989.
7. An argument repeated in Thomson v. Dove, 16 Feb., 1811 F.C.

the Court wished to end the practice. "The Court were agreed, that it is contra bonos mores, and illegal, for those in power, procuring from government, offices to other people, to stipulate a sum of money, or any of the emoluments, either to themselves, or to third parties".

The Lord Chancellor in 1802 issued a strong obiter opinion that the sale of public offices was illegal, despite previous practice[1]. This was followed in 1811 when it was held that apart from instances in which offices were in use to be bought and sold, a sale of a public office was illegal[2]. In the interval an English Act of 1551[3] had been extended to Scotland and expanded by the Sale of Offices Act 1809[4]. Broadly speaking the 1809 Act applies to Crown and government offices and in terms of the 1551 Act[5] a contract contravening the provisions of the Acts "shal be voide".

The eighteenth century changes

At the beginning of the eighteenth century the dominant pattern was that contracts would be enforced despite their subject matter. By the end of the century this was no longer true. Contracts were attacked as contra bonos mores. Combinations were struck at in 1762[6]. The trend of authorities on the Act anent buying pleas was not followed in McKenzie v. Forbes in 1774[7]. The attempts to have smuggling contracts held pacta illicita failed until Duncan v. Thomson in 1776[8] and/

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1. Stewart v. Miller (1802) 4 Paton 286 at pp. 290-294.
2. Thomson v. Dove, supra. The sale was arranged by those with power to fill the office. Lord President Blair reserved his opinion on the validity of a bargain between the two candidates.
3. 5 & 6 Edw. VI c.16; given the title "The Sale of Offices Act, 1551" by the Short Titles Act 1896.
4. 49 Geo. III, c.126; given the short title in 1896.
5. s.2.
6. Procurator Fiscal v. Wool-combers in Aberdeen (1762) M. 1961.
7. 5 Fac. 528.
8. M.App., "Factum Illicitum", p.1.

and two decisions in 1779[1]. The Court of Session declared firmly against the sale of public offices in Dalrymple v. Shaw[2] in 1786 in terms inconsistent with previous authority and practice. Wagers were unenforceable until Bruce v. Ross[3] in 1787 and Wordsworth v. Pettigrew in 1799[4].

These changes show some remarkable features. With the exception of combinations, where there was no previous authority, the refusal to enforce a contract arose in varying situations and despite previous authority. The alteration in attitude took place in a period of about a dozen years from 1774. Further, with one exception[5], the changes survived. Why did this happen?

Fundamental changes in attitudes are not common in lawyers. Changes in the law are likely to need, as a precondition, changes in the lawyers administering the law. This occurred in the Court of Session in the middle of the century. At the Revolution settlement there was a clean sweep of the Bench. Of those who took their seats on 1st November 1689, Stair, Newblyth and Mersington were the only judges who had previously sat on the bench and Mersington was the only judge at the Revolution who was appointed after it[6]. By 1726 only one of the Revolution judges, Arniston, was still on the Bench and he was soon to die. However, all was not well with their replacements and in November 1726 Wodrow thought "Many of the Lords of Session are at this time failing, and in a little time there will be a vast change in that bench, on which so much depends as to civil property. Arniston, Pollock, Ormiston, Forglend, the President, and some others, are really tender and old. I wish their places be as well filled"[7]. It is true/

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1. McLure & McCree v. John Paterson (1779) M. 9546; Sibbald v. Wallace (1779) 5 B.S. 532.
2. (1786) M. 9531.
3. (1787) M. 9523; 3 Paton 107.
4. (1799) M. 9524.
5. McKenzie v. Forbes, supra.
6. Information on dates of appointment is derived from Brunton & Haig.
7. Quoted Brunton & Haig, p.500.

from that just over half the seats changed hands in the following ten years but that is not comparable with the "vast change" which was to come. Between 1750 and 1755, eleven judges ceased to hold office. The bench by 1766 was relatively stable in composition and remained that way until the 1780's[1]. It was that bench which started development of public policy in the law of contract.

The bench in 1776 when Thomson v. Duncan was decided could have consisted of Lord President Dundas, Lord Justice Clerk Glenlee, and Lords Auchinleck, Kennet, Pitfour, Barjarg, Hailes, Stonefield, Covington, Gardenstoune, Kames, Coalston, Elliock and Monboddo[2]. In the period in which we are interested there were only two changes of note. Pitfour died in June 1777. This was a loss to the bench and his successor, Westhall, was an inadequate replacement. Kames had sought Pitfour's appointment on the grounds that it would remedy the low reputation of the court[3] and Bell described him as one of our best lawyers[4]. It is to Pitfour that we owe the expression "some judges are like the old bishop who, having begun to eat the asparagus at the wrong end, did not choose to alter". Pitfour's loss was to some extent compensated by Braxfield replacing Coalston in December 1776. Braxfield gained the same praise from Bell as Pitfour[5] and Braxfield was no respecter of precedent[6].

Of/

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1. There were only four changes between 1766 and 1782, and they all occurred 1775-1777.
2. In fact only ten seem to have taken part in the decision: Hailes, Dec. 683. The case was heard on 8th Feb., 1776. Alemore had just died. Ankerville did not take his seat till 22nd Feb.
3. Letter, Kames to Hardwicke, 3 April 1761, quoted W.C. Lehmann, Henry Home, Lord Kames, and the Scottish Enlightenment (1971) p.37.
4. Bell, Comm. 1.60.
5. Ibid.
6. F.P. Walton, "The Humours of Hailes", 1894 J.R. 223 at p.232.

Of the others on the Bench, the radicalism of Kames is well enough revealed by his writings. Monboddo, in the opinion of a recent writer, had much more solid learning than Kames[1]. Monboddo was a great "dissenter" but had a reputation for never having had his judgments reversed by the House of Lords[2]. Hailes was a man of letters and represented "the eighteenth century Scottish ideal of a man of law"[3]. His collected Decisions show that he often took an independent, if conservative, line and was not always enamoured with Monboddo's view[4], and there is evidence of animosity towards Braxfield[5]. A bench containing Kames, Braxfield, Monboddo and Hailes must have been difficult to control, let alone the problems posed by the lesser Covington, "infirm, deaf and impatient of contradiction from his brethren"[6]. It was a bench capable of innovation but there were influences greater than the personalities involved.

There is some evidence that, after the middle of the eighteenth century, there was an awakening of interest in English ideas. English ideas were introduced, notably in agriculture, and episcopalianism became increasingly fashionable[7]. One result was an attitude to language. The writings of Home, Reid, Robertson and others were not in Scots but in English. "We who live in Scotland are obliged to study English/

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1. D. Daiches, The Paradox of Scottish Culture: The Eighteenth-Century Experience, (1964), p.61; see also W. Knight, Lord Monboddo and Some of His Contemporaries, (1900), Preface X.
2. F.P. Walton, "Lord Monboddo", 1896 J.R. 360 at p.365; Knight, op. cit., p.10; Daiches, op. cit., p.62.
3. Daiches, op. cit., p.57.
4. e.g. Murray v. McWhan (1783) Hailes, Dec., 920; McClure & McCree v. Paterson (1779) Hailes, Dec., 829; F.P. Walton, sup. cit., pp. 234,5.
5. E.H. Carnie, Lord Hailes, A Study, unpub. Ph.D. Thesis, St. Andrews, 1954, p.57.
6. Ramsay, vol.1, p.132.
7. J. Clive, "The Social Background of the Scottish Renaissance" in Scotland in the Age of Improvement, ed. N.T. Phillipson and R. Mitchison (1970), p.225. Referred to hereafter as "Age of Improvement".

English for books like a dead language which we can understand but cannot speak. Our style smells of the lamp and we are slaves of the language, and are continually afraid of committing some gross blunders"[1]. Advocates appearing before the House of Lords saw the amazement which their pronunciation produced[2]. Young advocates like Wedderburn, and mature judges like Kames; noble lords - Galloway, Eglinton, Errol; literary men like Hume, Blair and Robertson, all began to try to syllable their words aright, to the sarcastic amusement of the old-fashioned at their efforts to rid themselves of the old tongue without being able to learn the new"[3]. Auchinleck is noted for his adherence to the Scots dialect[4].

It would be surprising if such an intense desire to copy the English did not produce an acceptance of English ideas. Kames and Bankton were the first writers to use the English word "voidable". The footnotes of Kames' Principles of Equity show that many of his propositions are derived from English Equity practice, and indeed he was interested in assimilating Scots and English law[5]. Bankton's Institutes contained much reference to English law "to give my countrymen, especially my junior companions at the bar, a taste of the law of South Britain, with which, by the union of the two kingdoms, we have so great intercourse"[6]. He intended, however, to illustrate the differences between English and Scots law[7], not to assimilate the systems. The borrowing lists of the Advocates Library show the familiarity of the advocates with the then current/

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1. Letter to Lord Glenbervie, Forbes' Life of Beattie, vol.ii, 243, quoted Graham, Social Life, p.114; see also J.A. Smith, "Some Eighteenth Century Ideas" in Age of Improvement, p.107.
2. Ramsay, vol.ii, p.543; Graham, Social Life, p.118.
3. Graham, Social Life, p.120.
4. Ramsay, vol.i, p.162.
5. Kames, Historical Law - Tracts, (4th ed., 1792), preface xi.
6. Bankt. vol.1, preface xii.
7. loc. cit., preface ix.

current series of English Reports[1].

Despite all this, there is little evidence of English influence in cases before the Court of Session which involved public policy. Errors in decisions on the law of gaming in the 1740's were attributed in 1826 to an erroneous notion of English practice[2]. It was argued in Duncan v. Thomson that smuggling contracts should be decided on the principles of English law[3] and this argument was accepted by Lord President Dundas[4] and, in a later case, by Lord Justice Clerk Glenlee[5]. These instances involved the application of British statutes and that apart it seems that the English influence on contract was not obvious until near the end of the century. Then the process of assimilation of Scots and English mercantile law was begun by Ilay Campbell, Braxfield and Hailes[6], and continued in the nineteenth century by George Joseph Bell and his editors.

There are grounds for believing that there were native Scottish developments which inspired changes of attitude to contract. Professor Stein has shown that the institutional writers followed a natural law line of strict adherence to agreements. Philosophical treatment of public interest by Hutcheson, Hume and Smith and the attitude of lawyers such as Millar and Kames, developed the idea of limitation of contractual obligations[7].

So/

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1. J. Ramsay, "Eighteenth-Century Advocates and Their Study of Legal and General Literature", 1939 J.R. 23 at p.24. Ramsay does not give the details of the reports but, with the dates of the periods covered, followed by the date of first publication, they were Holt's K.B., 1688-1710(1738); Burrow's K.B., 1756-71(1766); Atkyn's Chancery, 1736-54(1765); Salkeld's K.B., 1689-1712(1717); Modern Reports K.B., 1669-1755(1682).
2. Whyte v. Sir J.L. Johnston's Trst. and Elliot v. Cocks & Co. (1826) 5 S. 40.
3. M.App. "Pactum Illicitum", 1.
4. Hailes, Dec., 683.
5. McLure & McCree v. Paterson (1779); Hailes, Dec., 829; M. 9546.
6. F.P. Walton, "The Humours of Hailes", 1894 J.R. 223 at p.230
7. P. Stein, "Legal Thought in Eighteenth Century Scotland", 1957 J.R. 1; "The General Notion of Contract and Property in Eighteenth Century Thought", 1963 J.R. 1; "Law and Society in Scottish Thought", in Age of Improvement, p.148.

So far as Scots law is concerned, the genesis of the idea that public interest may result in contracts not being enforced may be the publication of Montesquieu's L'Esprit de Lois. This work may have influenced Kames[1], despite Kames' criticism of it as containing "manifold errors"[2]. Part of this influence was a historical and sociological approach to law[3] which could result in a more flexible attitude to contracts than the natural law theory. The key to a change in attitude to contract is utility.

When Francis Hutcheson wrote his Introduction to Moral Philosophy he saw utility as justifying the enforcement of contracts[4]. The extension of utility to justify non enforcement is shown by comparing Hutcheson's view with that of a later Glasgow Professor, John Millar[5].

Millar was the most noted law teacher of his day[6]. He published little on law, however, and the contents of his lectures must be derived from existing manuscripts of students' notes. Most of the known surviving notes have been examined. A general impression is that the lectures justify the description historical and sociological. They differ markedly from the style of Millar's predecessor, William Forbes[7], and from the style of the lectures of Baron Hume. According to present notions they would be more likely to be delivered in the class of Jurisprudence than in the class of Scots law.

Millar/

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1. W.C. Lehmann, "The Juridical Writings of Lord Kames", 1964 J.R. 17 at p.37. On the Scottish reception of Montesquieu, see I.S. Ross, Lord Kames and the Scotland of his Day, (1972), pp. 203 et seq.
2. Kames, Elucidations, preface xii.
3. Stein, sup. cit., 1963 J.R. 1 at p.9.
4. F. Hutcheson, A Short Introduction to Moral Philosophy, (1747 trans.), p.179, and note the absence of anything resembling a doctrine of public policy at p.191 except "to violate directly the reverence due to God". Grounds of nullity such as lack of capacity, error, fraud and fear are recognised and discussed, pp. 180 et seq.
5. Hutcheson was Professor of Moral Philosophy 1730-46; Millar, Professor of Law, 1761-1801.
6. W.C. Lehmann, John Millar of Glasgow, (1960), passim.
7. W. Forbes, Institutes of the Law of Scotland, (1722-30), Professor of Law at Glasgow, 1714-46.

Millar made frequent reference to utility[1]. The idea of utility was an old one[2], but what was new was its effect in producing a public interest in whether a contract should be enforced[3]. First, following the view earlier expressed by Hutcheson, utility explains why contracts are enforced. "Humanity then utility seem to be the two principles which render contracts obligatory, the former comes first in the order of time, the latter when it is once introduced is by far the stronger of the two"[4]. "The Principles of Utility, or general interest makes men write in supporting promises. One man trusts another from a presumption of his general benevolence, on a disposition not to injure his neighbour by disappointing him"[5]. "There is no doubt utility is the great reason why contracts are enforced"[6]. From this, however, it follows that some promises are not obligatory such as when force and fear is used or there is error or lack of capacity[7]. In the last case "It is for the Public good that the goods of such People should be withdrawn from commerce lest they should be imposed on"[8]. Equity operates between the parties, but a Judge must also take into account "what effect on general utility such a rule will have among society -- how it may affect future cases; hence his decisions will be either founded/

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1. Esp. in Adv. M.S. 28.6.8. From internal evidence the second course of these Civil law lectures ended in May 1778.
2. Vide W.C. Miller, The Data of Jurisprudence, (1903), p.438; Stair, 1.1.18 - "three prime principles of positive law; whose aim and interest is the profit and utility of man".
3. Although even non enforcement was not without precedent. Stair 1.10.13 - "Positive law, for utility's sake, hath disabled minors having curators, to contract without their consent".
4. Adv. M.S. 20.4.8, p.156. This M.S. is dated 1778 and is not listed in the National Library catalogue as Millar's lectures. That they are his lectures can be seen by a comparison with Adv. M.S. 28.6.8. On passage cited cp. Adv. M.S. 28.6.8, p.294, 2nd Course.
5. Murray M.S. 96, p.88 (1789).
6. Edinburgh L.B., Millar, pp. 2.45 and 46., vol.2, p.66. (Dated 1794 and of interest because it bears the bookplate of George Joseph Bell).
7. Adv. M.S. 20.4.8, p.156; Adv. M.S. 28.6.8, p.294, 2nd Course.
8. Adv. M.S. 28.6.8, sup. cit.

founded in equity or in utility"[1]. "The interest of the individual should always yield to that of Society, when they are opposite, though they generally coincide. Sometimes however they may not coincide and a promise made to an individual would hurt Society. In this case it ought not to be performed"[2].

The result is that "every innocent paction which is agreeable to the principles of Justice et non contra bonos mores should be supported"[3]. "All innocent contracts may be enforced by a civil Magistrate"[4]. "By the law of Scotland all contracts and promises with exception of such as appear hurtful to society are enforced by the Magistrate"[5].

It was not Millar's style to expand such observations by reference to the practice of Scottish Courts. That was, however, the style of Kames.

Kames' Principles of Equity is a discussion of the differences between equity or justice and utility. "Equity, when it regards the interest of a few individuals only, ought to yield to utility when it regards the whole society"[6]. "Two great principles, justice and utility, govern the proceedings of a court of equity; and every matter that belongs to that court, is regulated by one or other of these principles. Hence a division of the present work into two books, the first appropriated to justice, the second to utility"[7]. When one looks at the contents of the second book the practical expression of utilitarian philosophy is seen. Thus if the chapter headings are taken and there are appended examples/

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1. Ibid., p.144, 1st Course.
2. Edinburgh M.S., sup. cit., vol.2, p.66. His examples are restricted to e.g. force, fraud, error, insanity, underage.
3. Ibid., p.308, 2nd Course; similarly, Edinburgh M.S., sup. cit., vol.2, p.77.
4. Glasgow M.S. Gen. 178, p.224 (1783).
5. Glasgow M.S. Gen. 181(2), p.353 (1790) repeated verbatim. Glasgow M.S. Gen. 107?, lect.24 (1792).
6. Kames, Principles of Equity, vol.1, p.24.
7. Op. cit., vol.1, pp.39,40.

examples from the text the result is:-

Chap. 1: Acts in themselves lawful reprobated in equity as having a tendency to corrupt morals, e.g. breach of fiduciary duty by a trustee, pactum de quota litis (n.b. at common law), bond to a marriage broker.

Chap. 2: Acts and covenants in themselves innocent prohibited in equity[1] because of their tendency to disturb society, and to distress its members, e.g. combinations of workmen.

Chap. 3: Regulations of commerce, and of other public concerns, ratified where wrong, e.g. power over monopolies.

Chap. 4: Forms of the common law dispensed with in order to abridge law-suits, e.g. retention.

Chap. 5: Bona fides as far as regulated by utility, e.g. payment to wrong creditor.

Chap. 6: Interposition of a court of equity in favour even of a single person to prevent mischief, e.g. appointment of factors loco absentis and tutors.

Chap. 7: Statutes preventive of wrong or mischief extended by a court of equity, e.g. statutes on usury, gaming, purchasing law-suits[2].

Utility comprehends more than what would today be regarded as instances of the application of public policy but the importance of utility is that it can provide a reason for not enforcing a contract. This philosophy was preached in the eighteenth century by Kames and Millar. From the 1770's onwards the Court of Session was refusing to enforce contracts on the grounds of public policy.

Public/

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1. "Equity" is sometimes used to mean justice as opposed to utility and sometimes to mean, in general, the powers of a court of equity. Here it comprehends utility.
2. "Such statutes, preventive of wrong and mischief, may be extended by a court of equity, in order to complete the remedy intended by the legislature", op. cit., vol.2, p.117.

Public policy since the eighteenth century

Conflicting views

Natural law views were not ousted by philosophical treatment of public interest and the result was two different general notions of contract existing at the beginning of the nineteenth century[1]. So far as contracts *contra bonos mores* were concerned this involved a potential conflict between two attitudes. This arose in relation to bankruptcy and *pacta de quota litis*.

In bankruptcy, public policy was applied to explain a ground of challenge which predates the doctrine of public policy. The common law on challenge of some agreements in relation to a bankrupt's estate had its origins in fraud. Bell's editors treated some fraudulent preferences as examples of contracts immoral or *contra bonos mores*[2] and Lord Dunedin, attributing this to Bell, came to the conclusion that an example of such an agreement was "inconsistent with public law and arrangement"[3]. Examples of such agreements are an agreement by a trustee to share his fee with a potential creditor[4], or an agreement by a bankrupt which favours one of his creditors above the others in a composition contract[5], or as a price for that creditor agreeing to a composition[6].

It may obscure the nature of the objection to such arrangements if their origins in fraud are forgotten. The challenge of a fraudulent preference is a challenge of a voidable preference which only certain persons have a title to make. This exceptional characteristic of a voidable agreement/

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1. Stein, *sup. cit.*, 1963 J.R. 1 at p.11.
2. Bell, *Princ.*, para. 37 fn (1).
3. *Farmers' Mart. Ltd.* v. *Milne*, 1914 S.C. (H.L.) 84 at p.86.
4. *Farmers' Mart. Ltd.* v. *Milne*, *sup. cit.*.
5. *Robertson* v. *Ainslie's Trst.* (1837) 15 S. 1299.
6. *Arrol* v. *Montgomery* (1826) 4 S. 499; it may be different if all the creditors know of and consent to the situation: *Levick* v. *Cadell, Sons & Co.* (1829) 7 S. 327. This would suggest that the arrangement was voidable and not void.

agreement was the ground of decision of the First Division and the House of Lords in Munro v. Rothfield[1].

An insolvent debtor entered into an agreement with some of his creditors whereby he bound himself to pay them by instalments in return for the creditors not enforcing their claims. Despite the debtor's adherence to the agreement, one of the creditors raised an action for his debt and obtained a decree in absence. The debtor and creditors brought a suspension of the decree and were met with the plea that the agreement was illegal. The Division and the House of Lords were in no doubt that the agreement was not illegal. It might be challenged as a preference by creditors not a party to it, but between the parties it was enforceable. The agreement was voidable, not void. It was contrasted in both courts with some agreements which involved dishonesty[2], the implication being that such agreements were null ab initio.

Thus the common law of bankruptcy shows two types of objections to agreements. The agreement may involve dishonesty or otherwise be contrary to public policy and arguably is void. The agreement may be a fraudulent preference, in which case it is voidable. The statutory law of bankruptcy shows a similar dichotomy. Some agreements are "null and void"[3]; on the other hand, while a preference which is fraudulent under the Bankruptcy Act 1696 is stated to be "voyd and null", it is in fact voidable[4].

The interaction between the new ideas of public policy and the old grounds of challenge is less confusingly illustrated in the/

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1. 1920 S.C. 118; 1920 S.C. (H.L.) 165.
2. As in Farmers' Mart, Ltd. v. Milne, 1914 S.C. (H.L.) 84.
3. e.g. Thomas v. Haddell (1869) 7 M. 558 (Bankruptcy Act, 1856, s.150); see now Bankruptcy (Scotland) Act 1913, s. 150.
4. This follows from Munro v. Rothfield, supra; Goudy, Law of Bankruptcy in Scotland, (4th ed., 1914), p.101; Drummond v. Watson (1850) 12 D. 604 at p.611 per L. Moncreiff.

the case of pacta de quota litis. We have shown that the Land Purchase Act 1594 had been restrictively interpreted. A possible attempt to change the law in 1774 has not been accepted. In 1831, however, an argument was presented that an agreement between a client and his legal adviser to divide the subject of the law suit was not affected by the 1594 Act because there was no depending action[1]. The majority of judges held that the case fell under the common law doctrine of pactum de quota litis, with Lord Meadowbank dissenting on the significant ground that there was no such common law doctrine. The majority view was followed nearly twenty years later[2]. So the common law was invoked to such an extent that if it had always been the law there would have been little need for the statute[3].

Development of eighteenth century attitudes

In two areas the nineteenth and twentieth centuries saw the development of those invalidities which were born in the Court of Session's attitude in the last quarter of the eighteenth century. These were gaming and sales of office. In those instances there was no old law to confuse this development as there had been with bankruptcy and pacta de quota litis. The problem to be faced was one of defining the limits of the new invalidities.

In the case of gaming this involved the definition of sponsio ludicra. It is a sponsio ludicra to ask a Court to decide which horse has won a race[4]; or who has won at cards[5]; or/

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1. Johnston v. Rome (1931) 9 S. 364.
2. Bolden v. Fogo (1850) 12 D. 798, esp. per L. Wood at p.800; vide L. Moncreiff's reference to public policy at p.807; Kames had argued for a common law doctrine, Principles of Equity, vol.2, pp. 87 and 117.
3. A similar situation arose to a limited degree after the Bankruptcy Acts 1621 and 1696.
4. O'Connell v. Russell (1864) 3 M. 89.
5. Paterson v. Macqueen & Kilgour (1856) 4 M. 602; it may be different if there are distinct allegations of total incapacity, ibid., p.607, per L. Curriehill.

or to seek decree for payment against a bookmaker for a balance due on bets[1]; and, conversely, a bookmaker cannot sue his client despite the fact that it is not thought frivolous by Parliament for Sheriffs to have jurisdiction in connection with betting permits and licences[2].

A difficulty has arisen over whether seeking recovery of money from a stakeholder is sponsio ludicra. The two recent authorities[3] indicate that some earlier authorities may need to be reconsidered. It is not a sponsio ludicra to decide which person is entitled to a prize which had been awarded for a greyhound's performance[4] and in a joint adventure a person may sue the other gambler for an appropriate share of the winnings[5]. Nor is there anything objectionable in lending money to make or pay bets[6] or suing for the price of gaming chips purchased before gaming[7].

The nature of the invalidity was settled in Robertson v. Balfour[8]. A sponsio ludicra is unenforceable. In the words of an early decision, sponsio ludicra "ought to be left upon private faith, and neither be supported by an action nor cut down, unless attended with the circumstances of fraud or extortion; in which case a party will be relieved even after performance"[9].

Statute has taken a different view of certain transactions associated with gaming or betting. The Gaming Act 1710 declared/

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1. Hamilton v. McLauchlan, 1906, 16 S.L.T. 341; approved, Robertson v. Balfour, 1938 S.C. 207, 223 per L. Wark.
2. Macaffer v. Scott, 1963 S.L.T. (Sh.Ct.) 39; Johnston v. T.W. Archibald (Commission Agents) Ltd., 1966 S.L.T. (Sh.Ct.) 8.
3. Robertson v. Balfour, supra; Kelly v. Murphy, 1940 S.C. 96.
4. Graham v. Pollok (1548) 10 D. 646.
5. Forsyth v. Szattowski, 1961 S.L.T. (Sh.Ct.) 22.
6. Hopkins v. Baird, 1920, 2 S.L.T. 94.
7. Cumming v. Mackie, 1973 S.L.T. 242.
8. Supra.
9. Sir Michael Stewart v. Earl of Dundonald (1753) M. 9514, approved Robertson v. Balfour, supra, p.216 per L. Mackay.

declared bills and other documents given in consideration of gaming or betting "utterly void, frustrate, and of none effect to all intents and purposes whatsoever". The result was that even a bona fide onerous holder of a bill granted for a gambling debt held "a piece of waste paper"[1]. This was altered by the Gaming Act of 1835 which deemed such documents to have been given for an illegal consideration instead of being void[2]. The 1710 Act was subsequently held not to apply to Scotland[3] and doubt exists whether the 1835 Act applies to Scotland[4,5].

There remains uncertainty as to what sales of offices are valid. If the Sale of Offices Act 1809 applies, the contract is void and the sale is also a criminal offence. If that Act does not apply, the sale of a public office is presumably void unless the office is customarily bought and sold. Public offices, at least formerly, would have included the offices of clergymen, professors and schoolmasters[6]. Thus in 1823 a sale of an Army commission would have been competent if the Army regulations had been complied with[7]. A Bill for abolition of the sale of commissions passed the Commons in 1871 but was rejected by the House of Lords. The Cabinet then abolished the practice/

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1. Hamilton v. Russel (1832) 10 S. 549 per L. Cringletie; Eliott v. Cocks & Co. (1826) 5 S. 40; White's Trs. v. Johnstone's Trs. (1819) 5 S. 40 note.
2. Modified as regards cheques by the Gaming Act 1968, s.16(4).
3. Wayner v. Kent & Stansfield, 1922 S.L.T. 331.
4. Cumming v. Mackie, 1973 S.L.T. 242 at p.243, per L. Fraser.
5. The Act 1621 c.14 was repealed by Betting and Gaming Act 1960, s.15, Sch.6; Acts of 8 & 9 Vict. 109 (1845) and 55 Vict. c.9 (1892) have been held not to apply to Scotland. Russell v. Grey (1894) 1 S.L.T. 529; Levy v. Jackson (1903) 5 F. 1170. This means substantial differences between English and Scots law. Every contract of marine insurance by way of gaming or wagering is void. Marine Insurance Act 1906, s.4(1).
6. Thomson v. Love, 16 Feb., 1811 F.C., per L.J. Blair.
7. Carmichael v. Erskine (1823) 2 S. 530.

practice by Royal Warrant in the same year[1].

Many problems remain. The case law has been concerned with public offices, not private offices[2] and there is a problem of definition. Certain transactions relating to a public office may not be objectionable, such as influence being used on behalf of X to procure X's appointment. What is objectionable is pecuniary stipulation to the patron or third parties in return for the use of influence. The later case law has been concerned not so much with outright sale of the office but with transactions involving assignation of the emoluments. If an appointee is deprived of so much of the profits that he is unfit for office, the assignation is a pactum illicitum[3]. The Court of Session refused to enforce an agreement between a depute and assistant clerk of Session whereby the assistant clerk was to perform the duties of both offices[4]. An assignation of the duties of an office and the emoluments may not often be competent given that in a contract of service there is usually delectus personae[5]. These problems have not been commented on by writers, presumably because alterations in the practice of filling public offices have rendered remote the possibility of a sale of a public office.

Contracts/

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1. P.H. Winfield, "Public Policy in the English Common law", 52 Harv. L.R. 76 at p.95.
2. Mason v. Wilson (1844) 7 D. 160.
3. Gardner v. Grant (1835) 13 S. 664; Hill v. Paul (1841) 2 Robin. 524, at p.544 per L.C. Cottenham; sequel Ord v. Hill (1847) 9 D. 1118.
4. Mason v. Wilson (1844) 7 D. 160. The report is not clear but it seems that the assistant clerk must have received a proportion of the sum due to the depute as salary. The decision in Haldane v. De Maria, 6 March, 1812 F.C. is doubtful.
5. Berlitz School of Language v. Duchêne (1903) 6 F. 181; some offices, such as the Standard Bearer of Scotland, may be extra commercium -- Earl of Lauderdale v. Scrymgeour Wedderburn, 1910 S.C. (H.L.) 35.

Contracts in restraint of trade

The development of contracts in restraint of trade did not get under way until the second half of the nineteenth century. It had been held in Stalker v. Carmichael[1] that there could be a good agreement that a man should not carry on a particular trade in a particular place. The problem of restraint of trade imposed by a contractual provision of a similar type did not arise again until 1863 when Lord Justice Clerk Inglis observed:-

> "There can be no doubt that, according to the law of Scotland, a paction against the liberty of trade is illegal; and that agreements, by which a man binds himself that he will not carry on a trade of any kind though limited in space, or a particular trade if unlimited in space, are both equally bad in law"[2].

When was this so settled as Scots law that there was no doubt about it? There could be analogies drawn from the cases on combinations or a development of pactions against personal liberty[3] but that would not explain the specification of the "bad" types of agreements. There may be unreported cases. Judging from the authorities cited to the Court, however, English cases must have had a strong influence[4].

Before Scots law had a chance to develop its own case law, the House of Lords had decided Nordenfelt v. Maxim Nordenfelt Guns/

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1. (1735) M. 9455.
2. Watson v. Neuffert (1863) 1 M. 1110 at p.1112. One prior case mentioned a restrictive covenant - Curtis v. Sandison (1831) 10 S. 72.
3. Which is the treatment in Hope's Notes to Stair 1.lxiv.
4. There were English cases going back to the second half of the 16th century. The most important case was Mitchel v. Reynolds (1711) 10 Mod. 130; South Africa took the rule from English law, there being no Roman or Roman Dutch equivalent: J.P.R. Gibson, South African Mercantile and Company Law, (3rd ed., 1975), p.16.

Guns and Ammunition Co.[1]. Scots law developed thereafter[2] and the English influence is apparent in the cases cited by counsel and by the Court. An attempt to argue that Scots and English law had different approaches would have even less chance of success now than it did when this was argued in 1899[3]. Even when the argument was about a restrictive covenant in such a Scottish document as a back letter relative to an ex facie absolute disposition, Lord Hunter found no real assistance from Scottish authorities, and gave weight to recent English decisions, counsel having agreed that the general principles in Nordenfelt were equally applicable to Scots law[4].

Lord Ardwall was historically inaccurate when he said in relation to a restrictive covenant in a contract of service:-

> "Originally at common law all such agreements as that under consideration in the present case were void as being made in restraint of trade and contrary to public policy. To this general rule exceptions have been from time to time admitted in certain cases, on the ground that the restraint imposed in these cases was reasonable and proper on a consideration of the contract between the parties"[5].

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1. [1894] A.C. 535. The only reported Scots case prior to this, apart from those already mentioned, is Macintyre v. Macraild (1868) 5 S.L.R. 362; (1866) 4 M. 571.
2. e.g. Meikle v. Meikle (1895) 3 S.L.T. 204; Dumbarton Steamboat Co. Ltd. v. MacFarlane (1899) 1 F. 993; Stewart v. Stewart (1899) 1 F. 1158 (disapproved in Vancouver Malt Co. v. Vancouver Breweries [1934] A.C. 181, at p.191 per L. Macmillan); British Workman's and General Assurance Co. Ltd. v. Wilkinson (1900) 8 S.L.T. 67; Mulvein v. Murray, 1903 S.C. 528; Remington Typewriter Co. v. Sim, 1915, 1 S.L.T. 168; Scottish Farmers' Dairy Co. (Glasgow) Ltd. v. McGhee, 1933 S.C. 148; S.M.T.A. v. Gray, 1951 S.C. 586.
3. Stewart v. Stewart, supra (argument of pursuer). The argument is not referred to in the opinions of the Court.
4. MacIntyre v. Cleveland Petroleum Company Ltd., 1967 S.L.T. 95.
5. Mulvein v. Murray, supra, at p.533; what his Lordship said may be true of English law: Cheshire & Fifoot, pp. 357 et seq.; Anson, p.343.

On the contrary, originally at common law contracts were enforced[1] except in cases of severe restraint on personal liberty[2]. At the end of the nineteenth century Scots Courts adopted English authority which was based on a test of reasonableness and at one time also on the adequacy of consideration[3]. Scots law mitigated the harshness of "every paction produceth action", not the converse[4].

The nature of the invalidity in the case of a contractual provision in restraint of trade is unsettled. In Nordenfelt, Lord Chancellor Herschell and Lords Macnaghten and Morris referred to such a provision as "void"[5]. Lord Watson spoke in terms of enforceability[6]. Lord Ashbourne used both concepts[7]. In a later House of Lords decision, Lord Moulton, in one paragraph, refers to contracts in restraint of trade as "void or unenforceable" and "void or voidable" and to their "illegality"[8]. The only phrases omitted from this catalogue are pactum illicitum and contrary to public policy. These can be supplied by reference to a Scottish case[9].

There is judicial criticism of the use of the word "void" in this context[10]. It involves "a misuse of language" as a/

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1. Stalker v. Carmichael, supra.
2. Allan v. Akene (1723) M. 9454; Wedderburn v. Monorgun (1612) M. 9453.
3. Mitchel v. Reynolds, supra; Horner v. Graves (1831) 7 Bing. 735.
4. It is not without significance that Gloag thought Watson v. Neuffert, supra, Ballachulish Slate Quarries Co. v. Grant (1903) 5 F. 1105 and Macintyre v. Macraild, supra, in which restrictions were enforced, might not now be followed. Gloag, p.571.
5. [1894] A.C. 535, at pp. 538, 543, 544, 561-565 and 575.
6. Ibid., at pp. 551,552.
7. Ibid., at p.555.
8. North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd. [1914] A.C. 461 at p.474.
9. Scottish Farmers' Dairy Co. (Glasgow) Ltd. v. McGhee, supra, at p.154 per L.P. Clyde; at p.155 per L. Blackburn.
10. Joseph Evans & Co. v. Heathcote [1918] 1 A.C. 418, at p. 431 per Bankes, L.J.; Thompson v. British Medical Association [1924] A.C. 764, at p.769 per L. Atkinson.

a provision in restraint of trade is merely unenforceable[1]. In a recent consideration of this area of law none of the speeches in the House of Lords mention "void", but unenforceability is referred to[2]. In another recent case the Privy Council refer to unenforceability, although in the Courts below "void" is mentioned[3]. Shortly before, however, the House of Lords had affirmed a declaration that an agreement in restraint of trade "was contrary to public policy and void"[4]. One writer has argued that the effect of this decision is that the contract was unenforceable[5]. The point might be important because copyright had been assigned under the agreement. If the restrictive covenant in the agreement was contrary to public policy, who owned the copyright? If the agreement is void, property should not have passed. If the agreement is unenforceable, property had passed. Sometimes it will be possible to sever the restraint of trade clause from the rest of the agreement[6], and when this is done the nature of the invalidity will rarely be important because third parties will be unaffected. Severance is not always possible[7] and, given the extension of restraint of trade cases beyond employer/employee and seller/purchaser relationships[8], it seems more likely that the question may have to be faced of what rights may pass under a contract which is unreasonably in restraint of trade.

It/

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1. L. Atkinson, supra.
2. Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. [1968] A.C. 269 at pp. 295,296 per L. Reid, p.305 per L. Morris, p.318 per L. Hudson; also Chitty, para. 861.
3. Amoco Australia Pty. Ltd. v. Rocca Bros. Motor Engineering Co. Pty. Ltd. [1975] 2 W.L.R. 779.
4. Macaulay v. Schroeder Publishing Co. Ltd. [1974] 1 W.L.R. 1308; in [1974] 3 All E.R. 616 the word "void" only is used, cp. [1974] 1 All E.R. 171.
5. F. Dawson, "Contracts in Restraint of Trade: Meaning and Effect", 1974 L.Q.R. 455. The appeal of the case to the House of Lords does not affect the writer's reasoning.
6. Cheshire & Fifoot, pp. 381-386.
7. e.g. Amoco Australia Pty. Ltd., supra.
8. Vide Esso Petroleum Co. Ltd., supra, at p.293 per L. Reid.

It would be extravagant to describe a provision in restraint of trade as immoral. It is not criminal[1], nor is it unlawful means for the purposes of the tort of unlawful interference with the trade of another[2]. It is clearly at least unenforceable. There is no lack of consent, which is the usual ground for holding a contractual provision void. Normally one of the parties to the contract must raise an objection to the provision or it will be enforced[3], although there may be instances of ex facie illegality of which the Courts must take notice ex proprio motu[4]. To hold that the provision is void is more drastic than saying that it is unenforceable. Void means null ab initio and therefore there may need to be repetition of all monies paid since the date of the contract. Given the trend of recent decisions the probability is that provisions in unreasonable restraint of trade are unenforceable at the option of the parties.

When combinations or trade unions were legalised their previous illegality was treated as part of the doctrine of restraint of trade. The Trade Union Act 1871 provided:-

> "S.3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust".

This proceeded on the idea that combinations were unlawful because they were in restraint of trade, which is of doubtful validity in Scotland, although it has the support of Lord President Inglis[5]. He also assumed that if an association was/

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1. Mogul Steamship Co. v. McGregor Gow & Co. [1892] A.C. 25.
2. Brekkes Ltd. v. Cattel [1972] 1 Ch. 105.
3. Esso Petroleum Co. Ltd., supra, at p.297 per L. Reid; he gives an example at p.300.
4. Northern Salt Co. v. Electrolytic Alkali Co. [1914] A.C.461.
5. Aitken v. Associated Carpenters and Joiners of Scotland (1885) 12 R. 1206 at p.1211. The definition of "trade union" in s.23 also reflected this to such an extent that it was defective and had to be remedied by Trades Union Act Amendment Act 1876, s.16.

was a trade union it must have been an unlawful combination before the passing of the Act[1]. It is now accepted that trade unions can be lawful at common law[2] and as it may be necessary to determine the legality of a union at common law the appropriate question, on the authorities, is whether the union is in unreasonable restraint of trade[3].

Since 1871 the Scottish Courts have considered the extent to which they should interfere in union affairs and in particular in the application of section 4 of the 1871 Act. In several respects some of the decisions are doubtful in view of English House of Lords cases which must be taken to dominate this branch of the law[4]. Part of the English influence has been/

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1. Shanks v. United Operative Mason's Association (1874) 1 R. 823 at p.825.
2. Citrine, p.112; Russell v. Amalgamated Society of Carpenters and Joiners [1912] A.C. 421 at p.429 per L. Macnaghten.
3. Vide Trade Union and Labour Relations Act 1974, s.2(5).
4. (a) e.g. Courts jurisdiction excluded:- McKernan v. United Operative Masons' Association (1874) 1 R. 453; Shanks v. United Operative Mason's Association, supra; Aitken v. Associated Carpenters and Joiners of Scotland, supra; Shinwell v. National Sailors' Union, 1913, 2 S.L.T. 83 (but see National Union of Bank Employees v. Murray, 1948 S.L.T. (Notes) 51); Glasgow and District Potted Meat Manufacturers' Society v. Geddes, 1902, 10 S.L.T. 481; McLaren v. National Union of Dock Labourers, 1918 S.C. 834; Smith v. Scottish Typographical Association, 1919 S.C. 43 (doubtful in view of Amalgamated Society of Carpenters and Joiners v. Braithwaite [1922] A.C. 426); G. & J. Rae v. Plate Glass Merchants' Association, 1919 S.C. 426 (probably unsound in view of Y.M.A. v. Howden [1905] A.C. 256 and Braithwaite, supra, vide Grunfeld, p.77 and Citrine, p.125; Drennan v. Associated Ironmoulders of Scotland, 1921 S.C. 151 (unsound, Grunfeld, ibid.).
   (b) Courts jurisdiction not excluded:- Amalgamated Soc. of Ry. Servants v. Motherwell Branch (1880) 7 R. 867; Wilson v. Scottish Typographical Association, 1912 S.C. 534; Wilkie v. King, 1911 S.C. 1310 (not followed Baker v. Ingall [1912] 3 K.B. 106 at p.120 per Buckley, L.J.); Love v. Amalgamated Society of Lithographic Printers etc., 1912 S.C. 1078; McDowall v. McGhee, 1913, 2 S.L.T. 238; Edinburgh Master Plumbers Association v. Munro, 1928 S.C. 565; Berry v. T.G.W.U., 1933 S.N. 110 (in part unsound in view of Braithwaite, supra, and Bonsor v. Musician's Union [1956] A.C. 104 at p.154 per L. Keith).

been to regard the illegality of a union at common law by reference to restraint of trade. The uncertainty of the type of invalidity produced is reflected in section 3 of the 1871 Act which refers to agreements which are "void or voidable". Citrine considers that the word "voidable" was inserted ex abundanti cautela[1]. If so, caution was justified in view of the uncertainty on the nature of provisions in restraint of trade, which may in fact be neither void nor voidable, but unenforceable.

Contracts contrary to public policy - general principles

The effect of a contract being contrary to public policy will usually vary with the type of contract. For example, it would be odd if the law treated in an identical manner a contract in restraint of trade and a contract for the hire of the services of a prostitute. Yet some principles may apply throughout contracts contrary to public policy. These are expressed in various ways: Ex turpi causa non oritur actio. In turpi causa melior est conditio possidentis. In pari delicto potior est conditio defendentis. Nemo auditur propriam turpitudinem allegans. These include the allied concepts of refusing to enforce a tainted contract and refusing to allow restitution.

Dr. Sabbath has compared many systems, although not Scots law[2]. He states:-

"Most legal systems provide that, if a contract is void, the parties must be restored to the situation in which they were before it was concluded. Hence, one who has, fully or in part, performed his duty under the agreement may demand return of his performance. When, however, the contract is contrary to a rule of law, to morals or public order, and the plaintiff is in pari delicto, this general principle does/

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1. Citrine, p.105.
2. E. Sabbath, "Denial of Restitution in Unlawful Transactions -- A Study in Comparative Law", (1959) 8 Int. & Comp. L.Q. 486 and 689.

does not apply and recovery is not granted, because it is generally held that no action lies when the plaintiff must rely on his illegal act: in pari delicto potior est conditio defendentis. This maxim, which was already well established in Roman law and well known during the Middle Ages and subsequent centuries, is still followed by most countries. It is, however, also everywhere one of the most controversial legal principles"[1].

The principles of non recovery and of refusal to enforce tainted transactions have been accepted in Scots law, an example being the vitiation of a promissory note because its consideration was an orgy with a prostitute[2]. One difficulty is determining what types of unlawful transactions are affected. Many systems apply the concept of non recovery generally whereas others distinguish immoral and illegal acts and limit the concept to the former[3].

Stair states - "But in things received ex turpi causa, if both parties be in culpa, potior est conditio possidentis: so there is no restitution"[4]. This might suggest that the maxim was restricted to cases of immorality because of the term turpis. This, however, is not certain as the Roman texts refer to turpis causa although the Romans may not have distinguished between types of unlawful transactions[5].

Erskine recognises that "what is given ob turpem causam must be restored if the turpitude was in the receiver, and not in the giver, whether the cause of giving was performed or not"[6]. This recognises that recovery is only barred to the wrongdoer. Lord Ivory notes, "Where both parties are involved in the turpitude, e.g. in the case of obligations granted as the price of prostitution -- though action will not lie/

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1. Sabbath, op. cit., p.486.
2. Hamilton v. Main (1823) 2 D. 356.
3. Sabbath, op. cit., pp. 493-505.
4. Stair, 1.7.8.
5. Sabbath, op. cit., p.494.
6. Ersk., Inst., 3.1.10.

lie to enforce implement, yet, on the other hand, where performance of the obligation has already been made, neither will action lie for restitution"[1].

The principles of non recovery and non enforcement have been applied widely and are not limited to those actings which would normally be described as immoral. It has, for example, been referred to or applied in smuggling[2], a partnership of pawnbrokers carrying on business without names above the door as required by statute[3], to a pactum de quota litis[4], and to an agreement on sharing fees between a bank agent and a solicitor[5]. It has also been applied in more obviously immoral transactions such as a partnership of slave traders[6], a contract involving an attempt to defraud[7], and a contract for payment of money in consideration of not informing the public authorities of a crime[8]. It would seem, therefore, that Scots law denies action to wrongdoers over a wide sphere of contracts.

We cannot, however, say that Scots law is similar to other systems, such as German, Swiss, South African and Anglo-American law, in refusing restitution in all kinds of unlawful acts, without distinguishing between types of transactions. This is because of Cuthbertson v. Lowes[9]. The case involved the distinction between refusal to enforce a contract and refusal to allow restitution. The former is a remedy sought under the contract, and the latter is quasi-contractual. The contract in Cuthbertson was expressly void by statute. The issue was whether the purchaser of potatoes under the contract/

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1. Ibid., note 3, quoting A. v. B., 21 May, 1816 F.C.; 6 Paton 644; 2 Bligh 196.
2. Cullen v. Philp (1793) M. 9554.
3. Fraser v. Hill (1852) 14 D. 335.
4. Bolden v. Fogo (1850) 12 D. 798.
5. A.B. v. C.D., 1912, 1 S.L.T. 44.
6. Stewart v. Gibson (1840) 1 Rob. 260.
7. Henderson v. Caldwell (1890) 28 S.L.R. 16.
8. T. Smith & Sons v. Buchanan, 1910, 2 S.L.T. 387.
9. (1870) 8 M. 1073.

contract need pay for the potatoes. Lord President Inglis founded on the absence of turpitude:-

> "No doubt the Court cannot enforce performance of an illegal contract, and in turpi causa melior est conditio possidentis, but there is no turpitude in a man selling his potatoes by the Scotch and not by the imperial acre; and although he cannot sue for implement of such a contract, I know of no authority, in the absence of turpis causa, to prevent the pursuer from recovering the market value of the potatoes, at the date when they were delivered to the defender. That is not suing upon the contract ..."[1].

The difficulty is that neither was there any authority in favour of the Lord President's approach. In a system in which turpis causa is restricted to immoral acts, Cuthbertson would fit well. In a system which does not distinguish unlawful acts, it is difficult to apply. Gloag accommodated Cuthbertson by saying that "Where a contract involves an element of illegality, as distinguished from the case where it is merely declared void by statute, the effect is to debar the parties concerned from the right to appeal to Courts of Justice"[2]. Cuthbertson was distinguished in Jamieson v. Watt's Tr.[3] in terms indicating that Cuthbertson was a very special case on its facts. In Jamieson the failure to obtain a licence to carry out some repairs to a house, contrary to Defence Regulations, prevented recompense for the cost of the work. The result is that it is difficult to state what is meant by turpis causa in Scots law. It appears that the general principle in pari delicto potior est conditio defendentis applies to all contracts contrary to public policy, except in the Cuthbertson v. Lowes situation. Even in that situation the contract will not be enforced. It is to/

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1. Sup. cit. at p.1075.
2. Gloag, p.585.
3. 1950 S.C. 265. Cuthbertson was applied in Ewing v. Glasgow, 1952 S.L.T. (Sh.Ct.) 104; Jamieson has been followed in several Sheriff Court decisions, e.g. Firth v. Anderson, 1954 S.L.T. (Sh.Ct.) 27; Dunbar & Cook v. Johnston, 1956 S.L.T. (Sh.Ct.) 26 (where its application was restricted to work done in excess of a licensed figure).

to be hoped that, on an appropriate occasion, the House of Lords will clarify matters.

In common with Anglo-American systems, Scots law allows exceptions to the general rules prohibiting enforcement of or restitution in consequences of an unlawful contract. The main exceptions are where the parties are not in pari delicto[1] and where a statute has been passed to protect a particular class[2]. There may be other exceptions[3].

The English Courts have been troubled by the problem of whether property may pass under an "illegal" contract. If one assumes that a contract contrary to public policy is void, then property cannot pass under the contract. This is the stance of Cheshire and Fifoot[4], who doubt the correctness of two decisions[5] stating the contrary. Anson, on the other hand, states "It is settled law that the ownership of property can pass under an illegal contract if the parties so intend, as in the case of goods sold to a buyer under an illegal contract of sale"[6].

There is no Scots authority. The initial difficulty is determining the nature of the contractual invalidity. In the case of statutory invalidity, which is discussed below, the invalidity will vary according to the statute. If the contract is void, it is difficult to see how property can pass under it. If it cannot, and that is the normal result of a void contract, one of the peculiar consequences of Cuthbertson v. Lowes was that/

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1. Arrol v. Montgomery (1826) 4 S. 499; Macfarlane v. Nicoll (1864) 3 M. 237.
2. Phillips v. Blackhurst (1912) 2 S.L.T. 254; McCarroll v. Maguire (1920) 2 S.L.T. 108.
3. Vide Gloag, pp. 586-589; Walker, Principles, pp. 492,3; J.J. Gow, "Ex Turpi Causa Non Oritur Actio", 1958 S.L.T. (News) 74.
4. Cheshire and Fifoot, pp. 334-338. Support for this view is in M.J. Biggins, "The Transfer of Property under Illegal Transactions" (1962) 25 M.L.R. 149.
5. Singh v. Ali [1960] A.C. 167; Belvoir Finance Co. Ltd. v. Stapleton [1971] 1 Q.B. 210.
6. Anson, pp. 380,1.

that the defender had to pay for potatoes which he did not own. If the potatoes had been stolen from him, under what principle could he have recovered them from the thief? Nullity may not only be expressed by the statute but also implied from it,[1] and implied nullity should be capable of varying in effect as express nullity does.

Where the contract is contrary to public policy at common law the invalidity should alter with the nature of the contract. Contracts in restraint of trade are unenforceable at the option of one party; contracts for gaming or smuggling are simply unenforceable. Some bankruptcy agreements are void and others voidable. Pacta de quota litis are unenforceable[2]. The position of other contracts is unsettled[3].

Statutory invalidity

Express statutory nullity has existed for a long time and, of course, has been framed in differing ways with differing results. Early examples, although they do not relate to the types of invalidity we have been discussing, describe obligations as "of nain avail"[4] and deeds to "mak na fayth"[5]. In 1681 we have the expression "the Contract to be void and null"[6]. The expression "voyd and null" used in 1696 has subsequently been interpreted as meaning voidable[7].

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1. e.g. Trevalion & Co. v. Blanche & Co., 1919 S.C. 617. It is inconceivable that property could have passed in the permit in question.
2. Johnston v. Rome (1831) 9 S. 364. Note the interlocutor reserved to the agent all claim for suitable remuneration for trouble.
3. e.g. Home v. Home, 1713 M. 9502.
4. The Prescription Acts 1469 and 1474.
5. The Subscription of Deeds Act 1579; cp. The Subscription of Deeds Act 1540.
6. The Oaths of Minors Act 1681; "void" and "null" are used in the Interlocutors Acts 1686 and 1693, The Citation Act 1686.
7. The Bankruptcy Act 1696; Drummond v. Watson (1850) 12 D. 604. H. Goudy, Law of Bankruptcy in Scotland (4th ed., 1914), p. 101.

After the Union some statutes adopted lengthy phrases to declare a contractual provision void: "shall be null and void to all intents and purposes whatsoever"[1]; "shall be and is hereby declared illegal, null and void"[2]. Changing fashions perhaps can be illustrated by the provision which in 1745 was "shall be null and void to all intents and purposes"[3]. On re-enactment in 1906, this became "is void"[4].

The phrase "shall be void" appears to be the most common statutory expression of nullity in current use. Where the whole of the contract is not void, but only a provision of a contract and then only if that contravenes certain rules, the phrase is a variation of "an agreement is void, if and to the extent that ...". Numerous examples are listed below[5].

There are variations. A recent Scottish statute used "null" instead of "void"[6], and another statute "null and void"[7]. Some/

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1. The Life Assurance Act 1774, s.1.
2. The Truck Act 1831, s.2.
3. Marine Insurance Act 1745, s.1.
4. Marine Insurance Act 1906, s.4(1).
5. Agricultural Credits (Scotland) Act 1929, s.3(1); Law Reform (Misc. Provs.)(Scotland) Act 1940, s.4(1); Law Reform (Personal Injuries) Act 1948, s.1; Agricultural Wages (Scotland) Act 1949, s.11(1); Army Act 1955, s. 203(1); Air Forces Act 1955, s.203(1); Crofters (Scotland) Act 1955, s.3(4); Road Traffic Act 1960, s.151; Resale Prices Act 1964, s.1(1); Housing (Scotland) Act 1966, s.10(2); Employer's Liability (Defective Equipment) Act 1969, s.1(2); Conveyancing and Feudal Reform (Scotland) Act 1970, s.7; Industrial Relations Act 1971, s.7(1); Supply of Goods (Implied Terms) Act 1973, s.4(3), s.12(2); Consumer Credit Act 1974, s.56(3), s.59(1), s.173(1); Land Tenure Reform (Scotland) Act 1974, s.21; Health and Safety at Work etc. Act 1974, s.47(5). On the effect of such phrases as "in so far as" or "to the extent that" see Malcolm Muir Ltd. v. Jamieson, 1947 S.C. 314.
6. Prescription and Limitation (Scotland) Act 1973, s.13.
7. Agricultural Holdings (Scotland) Act 1949, s.11(1).

Some use the phrase "void and unenforceable"[1] and an example has been found of "shall be of no effect"[2] and of "shall be invalid"[3]. An instance of a reverse phrasing is "the provisions of this Act shall have effect notwithstanding any contract to the contrary"[4].

Examples of a contract being declared voidable are the irregular allotment of shares[5] and the Auctions (Bidding Agreements) Act 1969, which in certain circumstances allows the seller to avoid the contract[6]. A contractual provision may be rendered unenforceable, but not void, either by express use of "unenforceable" or "not enforceable"[7] or by equivalents such as "shall not bind"[8] or "shall not be liable to make any payment"[9].

In this varied usage it would be unwise to suggest that there are any general rules of interpretation. Words should be construed in the context in which they appear. There is no guarantee that "void" always has the same meaning.

Statutory nullity implied

A statute may be silent on its effect on civil rights. Silence does not mean that there may be no effect. There is an instance in 1743 of a contract being invalid as a result of implication from penal statutes[10]. The problem is illustrated/

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1. Agricultural Marketing Act 1958, s.17(3); Conveyancing and Feudal Reform (Scotland) Act 1970, s.11(4)(b). cp. s.7.
2. Road Traffic Act 1972, s.148(3), being similar to the "shall have no effect" in the Mercantile Law Amendment (Scotland) Act 1856, s.6, the meaning of which is uncertain. W.M. Gloag and J.M. Irvine, Law of Rights in Security (1897), pp. 684,5; Gow, pp. 305-7.
3. Films Act 1960, s.35 (repeating provisions of Cinematograph Films Act 1938, s.20).
4. War Damage to Land (Scotland) Act 1939, s.[illegible].
5. Companies Act 1948, s.49(1).
6. S.3(1).
7. Registration of Business Names Act 1916, s.8(1). Supply of Goods (Implied Terms) Act 1973, s.4(4); s.12(3).
8. Merchant Shipping Act 1970, s.11(1)(b), (only one contracting party not bound) cp. s.16(1).
9. Unsolicited Goods and Services Act 1971, s.3(1).
10. Fullarton v. Scot (1743) M. 9586.

illustrated by the Scottish Courts' consideration of smuggling contracts. There is obviously something awkward in ordaining specific implement of a contract the performance of which is in breach of revenue laws. Kames saw the difficulty and distinguished between statutes respecting evil of a general bad tendency and those with respect to evils less pernicious. For the former the Courts use every means for effecting the will of the legislature, including voiding bargains although the statute only provides a penalty[1]. For the latter, the penalty imposed by the statute is imposed but the bargain is not reduced, of which an example is the interpretation of the Land Purchase Act 1594. Kames considered that the Court had overlooked the distinction between reducing a bargain and refusing to enforce it. Enforcing a bargain contrary to the 1594 Act is to make the effect of the statute like laying a tax on the bargain and "is a gross misapprehension of the spirit and intendment of the statute"[2].

Kames' distinction between two types of statutes is so vague as to be almost unworkable. There is more merit in the idea that the contract should be unenforceable and, in the absence of authority, the simplest test would be that the Court should not aid what has been penalised by statute.

When a contract may be impliedly affected by statute has been analysed little in Scotland[3]. Stair showed that nullity may not be implied by reference to cases on long leases by prelates and contracts for buying pleas[4]. Bell stated that a penalty imposed by statute implied prohibition[5]. Erskine thought that "in general, a statute where it prohibits not only the act but the obligations resulting from, or the effects consequent/

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1. His example is usury.
2. Kames, Principles of Equity,1,pp. 349-358. The penalty under the 1594 Act is, however, not like a tax.
3. Thus in the leading case, Jamieson v. Watt's Trst., 1950 S.C. 265 the effect of criminal provisions on the invalidity of the contract was not discussed as a result of English authority.
4. Stair, 1.17.14.
5. Bell, Princ., 36.

consequent on it, must be construed to annul: Or where the law enacts that it shall not be in one's power to do a thing, the act, if done, must necessarily be void; because the very right which the person had to do it, is taken from him"[1]. Today it is probable that attention would be paid to a long line of English authority.

The question asked in England is "whether the statute means to prohibit the contract"[2]; "does the Legislature mean to prohibit the act or not?"[3]. "But whether it is the terms of the contract or the performance of it that is called in question, the test is just the same; is the contract, as made or as performed, a contract that is prohibited by statute?"[4]; "the true test is whether the statute impliedly forbids the provision in the contract to be sued upon"[5]. As an aid to determining what statutes prohibit this seems less than helpful, but no other aid is available.

The English Courts have not faced the problem of the nature of the resulting invalidity. There is an early reference to the contract being "void"[6] and a later, more cautious, reference to the contract being unenforceable[7], but in neither instance was the nature of the invalidity of moment. An express invalidity varies in its expression and effect/

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1. Ersk., Inst., 1.1.59. The problem is illustrated by contrasting Balfour v. Sharp (1833) 11 S. 784 with Blaikie v. Aberdeen Ry. Co. (1851) 14 D. 66 at p.71 per L.P. Boyle (on appeal, 1 Macq. 461).
2. Cope v. Rowlands (1836) 2 M. & W. 149 at p.157 per Parke, B.
3. Smith v. Mawhood (1845) 14 M. & W. 452 at p.464 per Alderson, B.
4. St. John Shipping Corp. v. Joseph Rank Ltd. [1957] 1 Q.B. 267, at p.284 per Devlin, J. cp. Cheshire and Fifoot, p.314, who say there is a distinction between illegality on formation and on performance of a contract.
5. Shaw v. Groom [1970] 2 Q.B. 504 at p.518 per Harman, L.J.
6. Parke, B., supra loc. cit.
7. St. John Shipping Corp., supra, at p.283 per Devlin, J.

effect, so it could be argued that by analogy implied invalidity should also vary. The tests to be used to determine differences in the implied intention of the legislature would seem to require a high level of sophistication, if not of sophistry. Yet in Cuthbertson v. Lowes[1] an express statutory nullity did not involve moral turpitude, whereas an implied nullity did in Jamieson v. Watt's Tr.[2]. If Cuthbertson is correctly decided there should be circumstances in which an implied nullity does not involve turpitude. This would be distinct from the Jamieson situation and would raise the problem of what effect, if any, that had on the contract[3]. If turpitude or other test, such as public interest, be of moment, then we are not far removed from Kames with his distinction between statutes on different degrees of perniciousness. The House of Lords have not recently considered the problem of implied illegality but the difficulties which have arisen from their consideration of the parallel problem of implied right to a delictual claim from breach of statute do not suggest that it will be easy to avoid entering the morass inevitably created by the legislature's silence[4].

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1. (1870) 8 M. 1073.
2. Sup. cit. This was expressly stated by L. Jamieson and can be implied from L. Patrick.
3. As opposed to quasi-contractual remedies.
4. Occasionally a statute states that it has no effect on contracts -- Plant Varieties and Seeds Act 1964, s.17(5); Resale Prices Act 1964, s.1(3); Race Relations Act 1968 s. 23(1) (there is provision for revision of the contract); Trade Descriptions Act 1968, s.35; Road Traffic Act 1972, s.60(5) (thereby overruling Smith v. Nugent, 1955 S.L.T. (Sh.Ct.) 60) and s.66(4).

Chapter 4

Analysis of Invalidities - Introduction

We have considered invalidities arising in three situations, viz. (a) contracts in which one of the parties was incapable of giving consent, (b) contracts in which consent was improperly obtained, and (c) contracts in which the consent given is not recognised by law. We began by showing that different categories of invalidities have been recognised in several legal systems. Scots law is no exception. The problems are - what categories does Scots law recognise, how are the categories distinguished and what are the effects of the distinctions? Prior to answering those questions we must consider the degrees of invalidity which it would be possible for Scots law to adopt.

One of the difficulties which bedevils a study of this area of the law is the lack of an adequate vocabulary to describe types of invalidity. "There is great looseness and no little confusion in the books in the use of the words 'void' and 'voidable' growing, perhaps, in some degree, out of the imperfection of the language, since there are several kinds of defects which are included under the expressions 'void' and 'voidable', while there are but those two terms to express them all"[1]. An example of the confusion taken from another jurisdiction, is given by Van den Heever, J.A.:-

> "From the cases to which I have referred it would appear that the expression '*ipso iure* null and void' is a rather overworked simplification. It had a well-defined meaning in relation to the dualism of Roman law, but nowadays is hardly more than a forceful expression to convey the notion of voidability. It is clear from the English cases to which I have referred that a juristic act may be 'null and void' as against one individual and yet be fully valid as against/

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1. *Corpus Iuris Secundum*, vol.92, p.1020,1.

against another. This limping operation is not unknown to Roman-Dutch law. Voet explains that where a minor contracts without his guardian's assistance, the other contracting party will be bound by the contract, but as against the minor the contract 'is ipso iure null and void'".[1]

Those problems led Turpin to call for a settled and uniform terminology and use of 'void' and 'voidable'.[2] Honoré replied by criticising Turpin because

"he has failed to notice that there are more than two ways in which contracts or other acts may be invalid and that it is desirable to have different words for those varying shades of invalidity. The simple dichotomy of 'void' and 'voidable' is not adequate to describe the various subtle ways in which the law refuses to a greater or less extent to give effect to contracts, marriages and other juristic acts"[3]

Honoré distinguished between bilateral and multilateral invalidity on the one hand and unilateral invalidity on the other. He found nine degrees of invalidity, namely bilaterally and unilaterally void, bilaterally and unilaterally voidable, bilaterally and unilaterally illegal, bilaterally and unilaterally penalised, and inchoate transactions. Examples are, the contract for non-existent subject matter (bilaterally void), the unassisted contracts of a minor in South African law/

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1. Messenger of the Magistrate's Court, Durban v. Pillay, 1952 (3) S.A. 678 (A.D.) at p.683. On other uses of the word 'void' to mean 'voidable' see Estate Phillips v. Commissioner for Inland Revenue, 1942 A.D. 35 at p.51 per Tindall, J.A.; Ewell v. Daggs (1883) 108 U.S. 489 per Mr. Justice Matthews; Corpus Iuris Secundum, vol.92, p.1022; Stroud's Judicial Dictionary, s.v. 'void'. Drummond v. Watson,(1850) 12 D. 604 at p.611 per L. Moncreiff.
2. C.G. Turpin, "Void and Voidable Acts", (1955) 72 S.A.L.J. 58.
3. A.M. Honoré, "Degrees of Invalidity", (1958) 75 S.A.L.J. 32 at p.32.

law (unilaterally void), a contract induced by fraud (unilaterally voidable), and a contract in which there is dolus on the part of both parties (bilaterally voidable).

Honoré's analysis is useful in that it shows that whether one party is not bound or both are not bound produces considerable variation on the theme of invalidity. His analysis is, however, too simple. There are many other variables. For example, a legal system might reasonably ascribe to a void contract three characteristics, viz. the contract is null ab initio; rescission of the contract is unnecessary; third parties are affected by the invalidity. To a voidable contract the further three characteristics are assigned, viz. the contract is valid until rescinded, rescission operates retrospectively; innocent third parties are not affected by the invalidity. Into which category should one place a contract which is null ab initio, for which rescission is unnecessary, but as a result of which innocent third parties can acquire rights? An example would be the protection given by the German Civil Code to second purchasers of immoveable property[1], or in Scots law the holder in due course of a bill of exchange issued through force and fear[2]. What also of the contract which has all the characteristics of a voidable contract, but rescission does not operate retrospectively? Scope for further variation is produced by the delineation of the characteristics. What is "rescission"? Who are "innocent" third parties? Nor, of course, need the characteristics be limited to three. One could add other factors: for example, title to challenge. In French law the nullité absolue may be founded on by anyone with an interest, whereas the nullité relative can only be founded on by the party whom the law has intended to protect[3]. In the 1964 Soviet Civil Code the/

1. B.G.B., art.891 and art. 892.
2. Bills of Exchange Act 1882, s.30(2). The example does not hold good for English law because duress makes a contract voidable. See also the problems of interpretation of the Infants Relief Act 1874, Anson, pp. 198-201.
3. G. Ripert et J. Boulanger, Traité de Droit Civil, vol.2, p.259 (1957).

the differences in title to challenge are prominent in distinguishing invalidities[1]. If to all this one adds the categories of unenforceable contracts and illegal contracts, it seems that degrees of invalidity are not limited to nine. They are infinite.

The position in Scots law

What categories of invalidity does Scots law recognise? The terms "void" and "voidable" were unknown in early Scots law. The usual phrase in the late 15th century was "nane avale"[2], or, more fully, "nane avale force nor effect in tyme tocu"[3]. The earliest use of the term "void" in relation to a contract which has been traced is in Spotiswoode's Practicks in his discussion of contracts by infants and "furious" persons[4]. He quotes an Act of Session on the admission of Lords of Session dated 26th June 1593 which uses the term "null and void"[5]. Stair makes frequent use of "void".

The word "voidable" was introduced much later. It was first used by Bankton in 1751 and used to compare deeds which are "not void, but only voidable"[6]. Kames also used the term[7] and it is tempting to conclude from the acquaintance of these two authors with English authorities that its use was a result of/

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1. J.N. Hazard, I. Shapiro, P.B. Maggs, The Soviet Legal System, (1969), pp. 438,9.
2. Earl of Bothuile v. Lady Bolton (1494) A.D.A. 199.
3. Countess of Ross v. Dunbar of Cunok (1488) A.D.A. 122; Prior and Convent of Inchmaholme (1491) A.D.C. 1, 201 and see generally in index A.D.C. I and II, under "Reduction".
4. p.72, 1706 ed. Spotiswoode was executed in 1646. Apparently no manuscript earlier than c.1700 survives. Stair Soc., Sources, p.25.
5. Op. cit., p.366. In England the word is of Middle English origin. In the sense of having no legal force its use can be traced to 1433-4. O.E.D.
6. Bankt. 1.180.74; 1.257.58; 3.57.41.
7. Kames, Principles of Equity, vol.1, pp. 80,363; Elucidations, pp. 3,4.

of English influence[1]. This is a possibility, if not a probability. "Voidable" has been traced in England to 1485[2] and "In the sixteenth century it was frequently provided in leases that, on the non-payment of rent or on the non-performance of some other condition, the lease should be void or voidable. At that time a good deal turned, ... on the use of the words 'void' or 'voidable'"[3].

The late introduction of the term 'voidable' into Scotland meant that at the formative period in Scots law in the seventeenth century it was not used. It is not found in Stair. Erskine does not use it, which one would have expected if it had been common currency when his contemporary, Bankton, wrote. One should not draw the conclusion that the concept of a "voidable" contract did not exist when the term was not known. As we have shown, the concept was adopted even earlier than Stair.

The concept of the unenforceable contract arose in the treatment of gaming and smuggling contracts in the eighteenth century, although whether there is a definable category of unenforceable contracts or merely an ill-assorted list of unenforceable contracts is a matter we will discuss.

There are also problems, mainly arising this century, on defining "illegal contracts" in the sense of contracts involving turpis causa. There is, as always, the problem of terminology. A good example is the variety of expressions used to describe contractual provisions in restraint of trade. Another instance is Gloag's treatment of a contract interfering with elections which he describes as a "pactum illicitum", "void", "illegal", and "an unlawful agreement"[4]. However, subject/

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1. cp. Smith, Short Commentary, p.817, who wrongly attributes to Bell's editors the start of "a fashion of distinguishing, as the English do, between 'void' and 'voidable' contracts".
2. O.E.D.
3. Holdsworth, vol. vii, p.292.
4. Gloag, p.565.

subject to the qualification that invalidities are infinite and hybrids may exist, as in contracts by minors or married women, it seems that Scots law will treat an invalid contract as illegal, void, voidable or unenforceable. What are the main examples of those types? Since Jamieson v. Watt's Trs.[1] one must recognise that an illegal contract[2] is a separate category; but, apart from saying that that category contains contracts affected by moral turpitude, there is little guidance on what it may contain. Void contracts include contracts by pupils, and the insane; contracts which are ultra vires; some contracts by minors; contracts induced by force and fear; some contracts induced by error; and some bankruptcy agreements which may be examples of a wider category of dishonest contracts contrary to public policy. Voidable contracts include some contracts by minors; contracts in breach of fiduciary duty; contracts induced by facility and circumvention; contracts affected by undue influence; some contracts affected by error, fraud and innocent misrepresentation; and some bankruptcy agreements. Unenforceable contracts include contractual provisions in restraint of trade (probably); gaming contracts; and smuggling contracts.

There is some sort of pattern which is discernible. Subject to a qualification, a contract is void when one of the parties has gone through the formalities of a contract but has not consented. A contract is voidable when consent is given but the method of obtaining consent is tainted. In an unenforceable contract consent is validly given, but an interest other than that of protecting the parties prevents enforcement of the contract.

The qualification is that the distinction between void and voidable is more complicated if the reason for attacking the/

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1. 1950 S.C. 265.
2. In the sense in which we have used this unsatisfactory expression. The English use of the term is different. Anson, chap. IX; Cheshire and Fifoot, chap. 4; M.P. Furmiston, "Analysis of Illegal Contracts", U. Toronto L.J. 16, p.267 (1966).

the transaction is other than that of protecting one of the parties to the contract. For example, Munro v. Rothfield[1] shows that bankruptcy agreements may be void or voidable and in those instances consent may validly be given. Public policy may make a contract invalid in any way. If public policy were removed from the scene, there would remain two types of invalidity, void and voidable, explicable on the basis of differences in consent. Given that a contract falls into one of the four principal categories of invalidity, what are the consequences?

Illegal Contracts

As a result of Jamieson v. Watt's Trustee[2] it seems that a contract is illegal if it involves moral turpitude or is subversive of the interests of the state, both of which are very vague concepts. Subversion may mean little more than impliedly contrary to statute, but, as Cuthbertson v. Lowes[3] has not been overruled, a contract in contravention of any statute is not necessarily illegal[4]. Presumably partnerships of moneylenders where the name of one of the partners did not appear on the pawntickets, or over the door of the premises, or in the licence, contrary to statute, were illegal[5]. They were analogous to the Jamieson situation. If one wishes, one can see the interests of the state being affected by a law partnership between a solicitor and an unqualified person[6]. It is easier to assign as illegal a contract which involves contravention of statute and moral turpitude, such as a partnership of slave traders[7].

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1. 1920 S.C. (H.L.) 165.
2. 1950 S.C. 265.
3. (1870) 8 M. 1073.
4. cp. the English use of the term "illegal": "A contract that is expressly or implicitly prohibited by statute is illegal" Cheshire and Fifoot, p.312.
5. Fraser v. Hill (1852) 14 D. 335; Gordon v. Howden (1845) 4 Bell 254.
6. A.B. v. C.D., 1912 1 S.L.T. 44.
7. Stewart v. Gibson (1840) 1 Rob. 260.

Leaving aside the difficulties of definition, the illegal contract is unenforceable and quasi contractual remedies are not available. "The rule of law is that if the consideration for granting a document of debt be one of turpitude, the document will not sustain action"[1]. The partnership cases mentioned above illustrate this principle. The contract is not, at common law, void, although there is no reason why statute should not make a contract both illegal and void. It would be somewhat startling if no one could ever acquire a good heritable title to a brothel except through the benevolent operation of prescription. In one case a lease granted ob turpem causam was not reduced as null[2]. An obligation ob turpem causam will not be implemented by the Court, but neither will action be allowed to be restored against implement. Nor will these principles be evaded by quasi contractual remedies[3].

The problem then posed is whether the illegal contract differs in any respect from the unenforceable contract. Wessels has argued that there is a difference in the readiness of a court to assist recovery of money and that an unenforceable contract gives rise to a natural obligation, whereas an illegal contract gives rise to no obligation whatsoever[4]. An English example of the difference in recovery of property is Cohen v. Lester (J.) Ltd.[5], which involved securities deposited with a moneylender under an unenforceable contract. Subsequent development of this area of law has become involved in technicalities of the vendors' lien which a Scots lawyer cannot be certain that he understands[6].

Scots/

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1. Webster v. Webster's Trs. (1886) 14 R. 90 at p.92 per L. Young.
2. A. v. B., 21st May, 1816 F.C. revd. on other grounds (1820) 6 Paton 644; 2 Bligh 197 (the best report).
3. Jamieson v. Watt's Trs., supra.
4. Wessels, para. 643-651.
5. [1939] 1 K.B. 504 and vide W.R. Anson, "Some Notes on Terminology in Contract", 7 L.Q.R. (1891) 337 at p.339.
6. Congresbury Motors Ltd. v. Anglo-Belge Finance Co. Ltd. [1970] Ch. 294; [1971] 1 Ch. 81; Coptic Ltd. v. Bailey [1972] 1 Ch. 446; Burston Finance Ltd. v. Speirway Ltd. [1974] 3 All E.R. 735.

Scots authority is meagre.[1] There may be a difference between contracts associated with an illegal transaction and contracts associated with an unenforceable transaction.

"Horseracing is not illegal. Nor is betting illegal in the sense of being prohibited or punishable. It is true that the Courts in Scotland do not entertain actions to determine wagers; it is also true that by the cautious provisions of the Act 1621, cap.14, which is directed against excess in wagering, kirk-sessions were given right to the surplus over 100 merks of every racing bet, and by more modern statutes it is an offence to keep a house for betting. But there is no such legal taint in betting as to infect all the contracts which are in any way related to it"[2].

This difference may reflect itself not only in whether associated contracts are tainted, but also in whether illegality of part of a contract results in the whole contract being affected or whether the contract is severable.

English law has a long and confused history of the problem of severance of illegality in contract[3]. Some recent authority has indicated that if a contractual condition is illegal as being contra bonos mores, it will so infect the rest of the contract that the contract will not be enforced. This has been contrasted with severance in contracts in restraint of trade, which we have argued are usually merely unenforceable. In the context of a contract with the enemy McNair, J. stated:-

"... there/

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1. vide Gloag, p.589 and authorities there cited.
2. Knight & Co. v. Stott (1892) 19 R. 959 at p. 962 per L.P. Robertson. A transaction associated with an illegal transaction may be so inextricably mixed with the other that both fall under the umbrella of illegality. R.G. Napier Ltd. v. Patterson, 1959 J.C. 48; R.G. Napier Ltd. v. Corbett, 1961 S.L.T. (Sh.Ct.) 2 (sequel, 1962 S.L.T. (Sh.Ct.) 90). cf. R.G. Napier Ltd. v. Gallacher (1960) 76 Sh.Ct.Rep. 16.
3. R.S. Marsh, "The Severance of Illegality in Contract", (1948) 64 L.Q.R. 230, 347; Anson, p.351.

"... there is no authority for the proposition that for the purpose of the matter under consideration severance can ever take place and no ground of public policy which requires such severance. The decisions relating to severability, of covenants in restraint of trade, such as Mutsman v. Taylor[1], seem to me to have no application at all in the present context. Secondly, that severance can only take place, if at all, if the part which it is sought to sever stands by itself supported by separate consideration"[2].

In Bennett v. Bennett[3] Somervell, L.J., in the context of a case on ousting jurisdiction of the Court, considered restraint of trade cases. He pointed out that there were many decisions in which part only of the restraint had been treated as unenforceable and contrary to public policy. This had not vitiated the rest of the clause, but

"If promises in restraint of trade were the sole subject matter, and those promises were wholly or in the main contrary to public policy, it seems to me clear that the court would treat the whole contract as void.

"The cases to which we were referred seem to me to indicate that if one of the promises is to do an act which is either in itself a criminal offence or contra bonos mores, the court will regard the whole contract as void. In restraint of trade cases there is nothing wrong in not trading. What is objectionable is or may be a promise for consideration not to do so"[4]

His Lordship expressed those views in another similar case by pointing out that there were two kinds of illegality with differing effects:-

"The first is where the illegality is criminal, or contra bonos mores, and in those cases, which I will not attempt to/

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1. [1927] 1 K.B. 637,741.
2. Kuenigl v. Donnersmarck [1955] 1 Q.B. 515 at p.537,8.
3. [1952] 1 K.B. 249.
4. At p.253.

to enumerate or further classify, such a provision, if an ingredient in a contract, will invalidate the whole, although there may be many other provisions in it. There is a second kind of illegality which has no such taint; the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court, on grounds of public policy will not enforce"[1].

This distinction can be seen as a distinction between an illegal contract, in our narrower use of the term, where severance is not allowed, and an unenforceable contract, where severance is allowed if possible. This distinction turns on the nature of invalidity and it is a difficult distinction to apply. There is something to be said in favour of alternative tests in continental systems with their emphasis on the intention of the parties[2]. Scots law, however, has tended to follow English law in the sphere of illegal and unenforceable contracts and when the matter comes to be considered in Scotland these English authorities will be treated as highly relevant[3].

When illegality exists the Courts will take notice of it ex proprio motu even though it is not pled by either party. There is a long line of English authority on this and the principle is reasonable[4].

The/

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1. Goodinson v. Goodinson [1954] 2 Q.B. 118 at p.120; see, however, Napier v. National Business Agency Ltd. [1951] 2 All E.R. 264, which involved an agreement contrary to public policy and arguably criminal or contra bonos mores, and yet the impossibility of severance was a ground of decision.
2. Marsh, sup. cit., pp. 230-232.
3. Some authority indicates that if the consideration for the contract is illegal the whole contract must fall: Freedlander v. Bateman, 1953 S.L.T. (Sh.Ct.) 105; Farmers' Mart. v. Milne, 1914 S.C. (H.L.) 34 at p.86, per L. Dunedin. This is separate from the question whether any illegality taints the whole contract.
4. e.g. Scott v. Brown, Doering, McNab & Co. [1892] 2 Q.B. 724; Montefiore v. Menday Motor Components Co. Ltd. [1918] 2 K.B. 241; Commercial Air Hire Ltd. v. Wrightways Ltd. [1938] 1 All E.R. 89; Snell v. Unity Finance Co. Ltd. [1964] 2 Q.B. 203; vide Trevalion & Co. v. Blanche & Co., 1919 S.C. 617 at p.623 per L. Dundas.

The result is that an illegal contract is one which the law will not enforce, but the law is not indifferent to it. A court will have nothing to do with the rights of parties to the contract which arise under the contract. If the parties are in pari delicto, quasi contractual remedies will be denied to them. The Court will not enforce the obligations which arise under the contract even if the illegality is not pleaded. The illegal nature of the contract will infect all parts of it and the Court will not separate unobjectionable from objectionable conditions[1].

Unenforceable contracts

Gloag states: "The term unenforceable, as applied to an agreement, has no special or technical meaning, but is most commonly applied to cases where by terms of a statute, such as the Trade Union Act, a particular agreement cannot be directly enforced, but may be productive of rights to the one party against the other"[2]. Statutory invalidity apart, there is truth in the idea that the unenforceable contract does not exist as a class.

One can describe as unenforceable a variety of contracts whose only connection is that they "are valid in all respects except that one or both parties cannot be sued on the contract"[3]. Thus, although there is no direct Scottish authority, it could hardly be disputed that a sovereign state could not against its will be sued for breach of contract, but, conversely, that the state could itself sue for damages for breach[4]. In that situation the contract is unenforceable at the option of a party. This is different from the betting or gaming contract where the parties cannot waive/

1. Vide Wessels, para. 644, for a similar definition.
2. Gloag, p.14.
3. Chitty, para. 17.
4. Illustrated outside the law of contract by Govt. of Republic of Spain v. National Bank of Scotland, 1939 S.C. 413; Grangemouth and Forth Towing Co. Ltd. v. Netherlands East Indies Govt., 1942 S.L.T. 228.

waive the invalidity[1] and the Court will ex proprio motu take note of the fact that an action is founded on a gaming transaction[2]. These in turn differ from a restraint of trade provision which "is generally not unlawful at common law if the parties choose to abide by it; it is only unenforceable if a party chooses not to abide by it"[3]. On the other hand public interest is a factor in contracts in restraint of trade[4] and there are situations in which a Court will take notice that ex facie of parties' pleadings a contract is in restraint of trade, although the point is not pled[5].

The following are unenforceable contracts: contracts with a sovereign or sovereign government; pacta de quota litis, gaming contracts, smuggling contracts, and contracts in restraint of trade[6]. The nature of the invalidity has been discussed/

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1. Robertson v. Balfour, 1938 S.C. 207.
2. Hamilton v. McLauchlan, 1908 16 S.L.T. 341; Brown v. Coats, 1954 S.L.T. (Sh.Ct.) 31.
3. Chitty, para. 861, note 90.
4. J.W. Heydon, The Restraint of Trade Doctrine (1971), pp. 25-36, p.277.
5. North-Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd. [1914] A.C. 461.
6. It should be borne in mind that we are not discussing formalities of constitution nor events subsequent to the making of a contract, such as the running of prescription, which would provide other examples of unenforceable contracts. It is possible to argue that collective agreements between trade unions and employers' associations are examples of unenforceable contracts. The contracts may expressly or impliedly contain terms rendering them unenforceable. We prefer the view that these are not contracts because there is no intention to create legal relations. It is the essence of a contract that there must be what the Roman jurists called a vinculum iuris. The parties must have animus contrahendi. The two theories are discussed in J.P. Casey, "Collective Agreements: Some Scottish Footnotes", 1973 J.R. 22; R.E.C. Hunter, "Collective Agreements, Fair Wages Clauses, and the Employment Relationship in Scots Law", 1975 J.R. 47. Vide Trade Union and Labour Relations Act, 1974, s.18. We, therefore, distinguish between the unenforceable contract and the agreement which the parties do not intend to be enforced.

discussed at the appropriate place in considering the development of those contracts. Of these instances, smuggling contracts are a prime candidate for removal to another category. The contracts have not been treated as immoral. Kames would not have agreed[1] and it may be that the Courts today would agree with Kames or at least consider the contracts subversive to the interests of the state and to be treated as illegal contracts on the lines of Jamieson v. Watt's Trs. The illicit importation of fine French wines is no longer expected of Lord Presidents. If this change took place[2], and it could be viewed as a natural development, it would alter the nature of the invalidity of a smuggling contract and affect the remedies available on it. It would be a reasonable change to make as it is difficult to justify treating smuggling more favourably than breach of the licensing requirements of Defence Regulations.

An unenforceable contract has all the requisites of a contract except that a Court action will not be sustained on it. There is the negative characteristic that the contract is neither illegal, nor void, nor voidable. The circumstances in which a contract is unenforceable depend on the rules evolved for the particular type of contract under consideration.

Void Contracts

As has often been pointed out a void contract is a contradiction in terms. "Properly speaking, a void contract should produce no legal effects whatsoever"[3]. "It may be objected/

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1. Principles of Equity, vol.1, p.357.
2. A change is necessary because there are circumstances in which an action can be brought on a smuggling contract. Att. of Young & Co. v. Imlach (1790) M. 9553; Cullen v. Philp (1793) M. 9554; Reid & Parkinson v. Macdonald (1793) M. 9555; Isaacson v. Iseman (1806) Hume 714. This is not the same as the quasi contractual remedy available to a party who is not in pari delicto under an illegal contract.
3. Chitty, para. 15.

objected that a void contract is a meaningless expression; but it is a useful one to describe a contract that is perfect in form but void in substance"[1]. It is a "seeming contract"[2]. "To speak of a 'void contract' is rather like speaking of a dead or unborn 'person'; we may be puzzled, but we are not misled"[3].

A void contract is null ab initio. From this several consequences flow.

(1) Reduction of the written contract is unnecessary, in theory. "A deed which ... is void is already a nullity and, in theory, need not be, and indeed cannot be, reduced"[4]. If an action is brought on the contract it may be sufficient to prove that the contract is void, without reduction[5] and, in any event, reduction is not an appropriate remedy for oral transactions[6]. In practice it may be unwise to ignore a void contract. It may be necessary, for example, to reduce a disposition recorded in the General Register of Sasines and so prevent the running of the positive prescription[7]. Rectification of a share register may be necessary although the shareholders had no valid contract to obtain the shares[8]. A share transfer may need to be reduced to restore the transferor's name to the register[9]. Furthermore, the problem of the void contract may have to be raised by other remedies such as declarator or interdict[10] or suspension of summary diligence[11].

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1. Ingram v. Little [1961] 1 Q.B. 31, at pp. 63,64, per Devlin, L.J.
2. Gloag, p.531.
3. M.J. Stoljar, Mistake and Misrepresentation (1968), p.73.
4. Walker, Civil Remedies, p.145.
5. e.g. Loudon v. Elder's Curator, 1923 S.L.T. 226.
6. Walker, Civil Remedies, p.139.
7. Vide Stobie v. Smith, 1921 S.C. 894.
8. e.g. Klenck v. East India Co. for Exploration and Mining Ltd. (1888) 16 R. 271.
9. General Property Investment Co. v. Matheson's Trs. (1888) 16 R. 282.
10. Wilson v. Scottish Typographical Association, 1912 S.C. 534.
11. e.g. Pollok v. Burns (1875) 2 R. 497.

(2) No title may pass under a void contract, with one statutory exception[1]. Reduction of a deed on the grounds of force and fear is effective against bona fide third parties[2]. The effect on third parties is so drastic that Gloag hesitated over whether they would be unable to acquire a valid title through the sale of a pupil or a minor without his curator's consent[3]. If there is a void contract between seller X and buyer Y because of essential error as to the identity of Y, then Y can give no title to Z[4]. An ultra vires deed by trustees to a company conferred no title on the company who, in turn, could confer no title on anyone dealing with them[5].

These should be instances of a wider principle, namely, that the normal consequences of a valid contract do not apply to a void contract. For example, the contract may be repudiated with impunity (subject to quasi contractual remedies) and damages are not available for breach of the contract.

(3) Failure to offer restitutio in integrum is no bar to the reduction of a void contract. Thus an assignation of an alimentary interest may be reduced although restitution is impossible[6]. The contrary would mean that a declaration of a provision as alimentary could be defeated at any time[7]. Similarly the failure to offer restitution is no bar to the reduction of an agreement and memorandum of allocation by persons with no title to grant the deeds[8], or the reduction of/

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1. Bills of Exchange Act 1882, s.30(2) (force and fear affecting bill).
2. Cassie v. Fleming (1632) M. 10279; Goodhead v. Nairn (1662) M. 10281; Priestnell v. Hutcheson (1857) 19 D. 495 at p. 498; Willocks v. Callander & Wilson (1776) M. 1519; Wightman v. Graham (1787) M. 1521.
3. Gloag, p.91.
4. Morrisson v. Robertson, 1908 S.C. 332.
5. Kidd v. Paton's Trs., 1912 2 S.L.T. 363.
6. Balls v. J. & W. Macdonald, 1909 2 S.L.T. 310.
7. Ibid., at p.311 per L. Mackenzie.
8. Dowell's Ltd. v. Governors of George Heriot's Trust, 1941 S.C. 13. Vide arguments in General Property Investment Co. v. Matheson's Trs. (1888) 16 R. 282.

of an assignation by an insane person[1]. This is to be contrasted with a voidable contract in which "if there cannot be restitutio in integrum the contract cannot be rescinded but must remain in force"[2].

(4) In contrast to an illegal contract, quasi contractual remedies are available. A pupil or minor may be liable, not under his contract, but on the principle of recompense[3]. Money paid on the faith of an ultra vires contract may be recovered on the principles of recompense[4].

(5) It is sometimes said that a void contract may be adopted, whereas a voidable contract may be homologated[5]. This raises two problems: the distinction, if any, between adoption and homologation and the consequences of the distinction. We are not concerned with adoption and homologation in all their senses[6], but with their application to void and voidable contracts.

The older authorities treat adoption as one aspect of homologation and, as Rankine has observed, "the distinction between homologation and adoption has not been scrupulously observed in judicial utterances"[7]. Erskine queried whether deeds/

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1. Clark v. Black, 1948 S.L.T. (Notes) 58.
2. Houldsworth v. City of Glasgow Bank (1880) 7 R. (H.L.) 53 at p.60 per L. Hatherley.
3. Gloag, p.7; Stair 1.6.33; 1.8.6; 1.8.2; Ersk. 1.7.33. Discussed further supra in connection with minors' contracts for necessaries.
4. Haggarty v. D.T.G.W.U., 1955 S.C. 109; Mags. of Stonehaven v. Kincardineshire C.C., 1939 S.C. 760 at p.771 per L.P. Normand. On appeal: 1940 S.C. (H.L.) 56.
5. It is thought that neither illegal nor unenforceable contracts can be homologated or adopted. The principles on which the contracts are invalid preclude the parties making the contracts valid: Fenman v. Fife Coal Co., 1935 S.C. (H.L.) 39.
6. e.g. excluding adoption of a contract by a trustee in bankruptcy or homologation in so far as it excludes locus poenitentiae from an imperfectly constituted agreement, or adoption of forged signatures or adoption of improperly authenticated deeds.
7. J. Rankine, A Treatise on the Law of Personal Bar in Scotland (1921) p.209. A good example is Gall v. Bird (1855) 17 D. 1027, which is sometimes used to illustrate the distinction (Bell, Comm. 1,140, note 3).

deeds intrinsically null could be validated by homologation and drew a distinction between deeds by one naturally incapable of consent, which could not be homologated, and deeds inducing a natural obligation which could be homologated[1]. This view was questioned by More[2], is contrary to Bell[3], and was treated by Dickson as irreconcilable with authority[4]. It cannot now be accepted.

Bell was the last writer to treat adoption as part of homologation. "Where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding"[5]. The more recent considerations of Bell's editors[6], Gloag[7], Rankine[8], A.G. Walker and W.M.L. Walker[9], and D.M. Walker[10], treat adoption as applicable to void deeds and homologation as inappropriate to such deeds.

There are cases which involve adoption of void contracts, but being old authorities the adoption is referred to as homologation[11]. This raises the problem of whether there is an arid controversy on semantics or whether the distinction matters. Erskine regarded homologation (including adoption) as always operating retrospectively[12]. Bell thought that homologation/

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1. Ersk. 3.3.47.
2. More's Notes, 68.
3. Bell, Comm. 1,140; Princ. 27.
4. W.G. Dickson, Law of Evidence in Scotland (1887), p.854.
5. Bell, Comm., ibid.
6. Bell, Princ., ibid.
7. Gloag, p.546.
8. Op. cit., p.142.
9. A.G. Walker and W.M.L. Walker, The Law of Evidence in Scotland (1964), p.315.
10. Walker, Principles, p.573.
11. Grant v. Anderson (1706) M. 16509 (force and fear); Hume v. Lord Justice Clerk (1671) M. 5688 (minor); Harvie v. Gordon (1726) M. 5712 (pupil); vide Bankt. 3.48.14; Rigg v. Durward (1776) M.App. "Fraud" No.2 (dictum on force and fear); Thomson v. Annandale (1929) 7 S. 305 (force and fear); Oliphant v. Scott,(1830) 8 S. 985 (ultra vires).
12. Ersk. 3.3.49.

homologation (meaning adoption) of void deeds only had effect from the date of the particular acts done, whereas homologation of voidable deeds operated retrospectively[1]. This view was approved by Lord Cowan[2], and followed by Dickson[3] and A.G. Walker and N.M.L. Walker[4]. Rankine[5] and Gloag[6] followed a modified view. They saw no reason why adoption should not operate retrospectively if this may be inferred from the circumstances. It is thought that there is merit in this, although it is contrary to one dictum[7]. The law may, therefore, be this. Homologation of a voidable contract always operates retrospectively. Adoption of a void contract, if competent[8], may or may not operate retrospectively, depending on circumstances.

In summary, a void contract is null ab initio. No property may pass under it and third parties, even if bona fide and for value, can acquire no rights under it. Failure by one party to comply with the contract does not give the other party the remedies for breach of contract. The failure to offer restitutio in integrum is not a bar to rescission of the contract. Quasi contractual remedies are available to adjust parties' rights and the contract may be adopted.

Voidable Contracts

A voidable contract may be rescinded, under certain circumstances, but it is not null ab initio. The normal principles of title and interest to sue regulate those who may/

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1. Bell, Comm. 1.140.
2. Gall v. Bird (1855) 17 D. 1027 at p.1030.
3. Op. cit., para. 866.
4. Op. cit., p.315.
5. Op. cit., p.214.
6. Op. cit., p.546.
7. Logan's Trs. v. Reid (1885) 12 R. 1094 at p.1100 per L. Kinnear.
8. A company may not adopt its own ultra vires act. General Property Investment Co. v. Matheson's Trs. (1888) 16 R. 282. In broader terms, the incapacity making the contract void must be at an end before adoption is possible.

may challenge the contract. This may result in considerable differences depending on the ground of invalidity. Thus in contracts by bankrupts the title to challenge is strictly limited and may be denied to some contracting parties while allowed to non contracting parties[1]. In other circumstances it is possible, though unusual, for both parties to have the right to challenge[2].

A person with a title to challenge may be personally barred. Personal bar may arise through lapse of time[3] or by homologation[4]. Or a person may expressly waive his right to challenge[5]. Apart from personal bar, an alteration in circumstances since making the contract may preclude reduction. The classic case is transfer of property to a bona fide onerous third party. If A sells X to B, as a result of the fraud of B, then the subsequent sale by B to C, who is bona fide and onerous, will bar the reduction of the sale by A to B. C acquires a good title to X[6]. C cannot reduce the contract between A and B even by offering restitutio in integrum[7]. Only if C can reduce his contract with B may A reduce his contract with B[8]. This is an example of the principle that for reduction of a voidable contract restitutio/

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1. Munro v. Rothfield, 1920 S.C. (H.L.) 165.
2. e.g. each induced by the fraud of the other.
3. Gloag, pp. 542 et seq.
4. Considered supra; Gall v. Bird (1855) 17 D. 1027 (facility and circumvention); L.A. v. Hemyss (1899) 2 F. (H.L.) 1 (curator's contract); Rigg v. Durward, H.App. "Fraud" No.2 (fraud); Scott v. Handyside's Trs. (1868) 6 M. 753 (trustee's remuneration).
5. Ommanney v. Smith (1854) 16 D. 721; Dixon v. Rutherford (1863) 2 M. 61; Howard & Lyndham v. Richmond's Trs. (1890) 17 R. 990 (all cases involving beneficiaries and trustees).
6. Price & Pierce Ltd. v. Bank of Scotland, 1912 S.C. (H.L.) 19. It is assumed, of course, that the fraud makes the sale voidable, and it does not induce essential error which makes the sale void.
7. Edinburgh United Breweries Ltd. v. Molleson (1894) 21 R. (H.L.) 10.
8. Westville Shipping Co. v. Abram Steamship Co., 1923 S.C. (H.L.) 68.

restitutio in integrum, although not in a literal sense[1], must be possible[2]. Until and unless rescinded a voidable contract operates as a valid contract.

In summary, a voidable contract is not null ab initio. It is valid until rescinded. As a condition for rescission, the party seeking to rescind must not be personally barred from rescinding and must be able to offer restitutio in integrum.

Conclusion

The types of invalidity are infinite. In Scots law hybrid invalidities exist or have existed in some contracts by minors and married women, but generally speaking an invalid contract is illegal, void, voidable or unenforceable. If invalidity was analysed only in terms of the presence or absence of consent it would be possible to have only two categories, void and voidable, but public policy requires more flexibility in dealing with a tainted transaction. The consequences of assigning a contract to one category rather than another can be explained, thus showing that the four categories are distinct.

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1. Spence v. Crawford, 1939 S.C. (H.L.) 52. The doctrine of restitutio in integrum is not always satisfactory. What happens, for example, if the subject-matter of a sale is eggs which are rotten? Vide J.G. McLennan, "Restitutio In Integrum and the Duty to Restore", 90 S.A.L.J. 120 (1973).
2. Houldsworth v. City of Glasgow Bank (1880) 7 R. (H.L.) 53; Western Bank v. Addie (1867) 5 R. (H.L.) 80; Boyd and Forrest v. Glasgow and South Western Ry. Co., 1915 S.C. (H.L.) 20.