

FRAUD ON CREDITORS

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Transfers ‘out of a debtor’s indebtedness’ provoked in Elizabethan times a narrow range of rigid solutions based on legal doctrines of constructive fraud and a more broad-based evidential doctrine of ostensible ownership. One of these legal doctrines has been continued in recent cases, and others may be continued unless there is a clear understanding of why they arose in the first place. This article argues that legal as well as evidential doctrines are not appropriate in modern business contexts and develops a theoretical non-contractarian framework for demonstrating this.

I. INTRODUCTION

Business people make transfers of property all the time. Sometimes they do them for consideration; sometimes gratuitously or at an undervalue. When these transfers are made ‘out of indebtedness’, the question of whether there is prejudice to creditors as a body arises. This issue must seem to be a common experience, as a temporary state of indebtedness is not rare for business people. Yet few issues are as obscure as this issue, which requires for its understanding, knowledge of statutes rooted in very different times.

The earliest Elizabethan statutes which dealt with the problem had one striking peculiarity in that the law that evolved out of them relied heavily on presumptions, both legal and factual or evidential. As this article argues that such presumptions are no longer a suitable response to modern business conditions, it must first sketch in outline the background and case law on the two pertinent Elizabethan statutes. It must also cope with complications arising from the fact that the modern law is no longer contained in these statutes but, in this country, in ss. 73B and 73C of the *Conveyancing and Law of Property Act*¹ which re-enacted them in 1993 in fairly different terms. Section 73B has been the subject of recent cases and so the light shed by them must be considered.² Section 73C has attracted almost no judicial attention. No case has ever been decided in this country in connection with it and thus to a

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¹ Cap. 61, 1994 Rev. Ed. Sing. [*Conveyancing and Law of Property Act*]

² Namely, *Quah Kay Tee v. Ong & Co Pte Ltd* [1996] 3 S.L.R.(R.) 637 (C.A.); *Delta Engineering & Construction Pte Ltd v. Wiseco Trading Pte Ltd & Ors* [2002] SGHC 44; *Wong Ser Wan v. Ng Bok Eng Holdings Pte Ltd and another* [2004] 4 S.L.R.(R.) 365 (H.C.); *Larsen Oil & Gas Pte Ltd v. Petropod Ltd. (in official liquidation in the Cayman Islands and compulsory liquidation in Singapore)* [2011] 3 S.L.R. 414 (C.A.) [*Larsen Oil*], affirming [2010] 4 S.L.R. 501 (H.C.). However, it will be sufficient for the purposes of this article to consider the last mentioned case.

great extent, the light to be shed will be derived entirely from English jurisprudence. The main theses of the article are (1) that the recent adoption or continuance of the legal doctrine of constructively fraudulent gifts under s. 73B by the Court of Appeal is too hasty; and (2) that the significance of ostensible ownership as a mark or badge of actual fraud, as well as the legal presumptions created by s. 73C which establishes a doctrine of ostensible ownership of real property, should also be dropped. In the course of establishing its theses, this article also develops a theory of fraudulent conveyance which provides a better rationale for the law than the contractarian theory of Baird and Jackson,³ which is still the seminal work on the subject. If the theory espoused in this article is correct, legal and factual doctrines of constructive fraud, whether under section 73B or section 73C, ought to have no place in modern times.

II. SECTION 73B AND OSTENSIBLE OWNERSHIP

Section 73B of the *Conveyancing and Law of Property Act* states:

Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

In this section, the question to be considered is whether s. 73B has continued the doctrines which were evolved under its predecessor. Until this enactment replaced it, the Fraudulent Conveyance Act 1571, also known as the Statute of Elizabeth (13 Eliz. I, c. 5), was in force. The first thing which might be noticed about it is that it established among other things a factual or evidential, but not legal, 'doctrine' of reputed or ostensible ownership. *Twyne's Case*⁴ was an excellent early illustration of the doctrine. There, a debtor was indebted to two creditors for a total amount of 600 pounds. He delivered a bill of sale to one of them in full satisfaction of one of these debts but continued or was allowed to continue in possession of the goods. Despite the presence of good consideration, the bill of sale was held to be fraudulent within the Statute of Elizabeth. Significantly, the decision stressed the need to redress the false credit created when third parties seeing the debtor in possession of those goods took him to be the owner and dealt with him on that basis, giving him fresh credit.⁵

There is ample proof that the problem of false credit was very early on perceived to be contextual. For example, the course of subsequent applications of the doctrine in the United States can only be explained in this way.⁶ The false credit created by the transferor's continuance in possession after transfer was initially exacerbated by

³ See "Fraudulent Conveyance Law and its Proper Domain" (1985) 38 Vand. L. Rev. 829 and "Possession and Ownership: An Examination of the Scope of Article 9" (1982-1983) 35 Stan. L. Rev. 175.

⁴ (1602) 3 Rep. 82a.

⁵ See G. Gilmore, *Security Interests in Personal Property*, vol. 1 (Boston: Little Brown & Co, 1965) at 40.

⁶ This notion was not generally extended to possession of land since it was thought that the possession of ownership of land had to be shown by the title deeds alone. If a purchaser did not call for the title deeds, he would be deceived at will. See *Ryall v. Rolle* (1749) 1 Atk. 165 at 168 on the general question of possession; *Stone v. Grubham* (1615) 2 Bulst. 225. Cf. where there is such continuance in possession as to negate substantial change in ownership: *Russell v. Hammond* (1738) 1 Atk. 13 at 16. See also *Stileman v. Ashdown* (1742) 2 Atk. 481, aff'd (1742) 2 Atk. 608.

the absence of systems of recordation, prevalence of non-literacy, or social taboos including embarrassment in making certain inquiries of debtors, and lack of reliable sources of credit information about debtors. This is why there is a striking difference between the older cases and the more modern ones. In the older cases, the background or contextual factors just mentioned were present to a high degree. The problem of false credit consequently attracted a rigid solution in the form of a legal doctrine of ostensible ownership. For instance, it was held that a transferor who continued in possession after giving a chattel mortgage had committed fraud on his creditors without more.⁷ Another *per se* rule was commonly applied, namely that the reservation of a power of sale to the mortgagor made the chattel mortgage a fraudulent conveyance in law (whether or not it was so in fact) and hence void against the mortgagor's creditors.⁸ In the modern cases, however, the rigid *per se* rules were eventually dropped. This was often the result of amending legislation such as those which validated the chattel mortgage if it had been properly filed.⁹ But typically the legislation was fragmentary and "the legislatures left entirely to the courts the task of deciding what the law of chattel mortgages should be".¹⁰ As Gilmore concludes, "[u]ltimately the financial community had its way and personal property, both tangible and intangible, became available for security without a change of possession."¹¹

In England too, the influence of context is discernible. Although the very early cases treated continuance in possession after transfer as conclusive of fraud, by the late 18th and early 19th century, the rigid solution based on a legal presumption of fraud ceased to be favoured. Continuance in possession after transfer for valuable consideration merely gave rise to an inference or evidential presumption of fraud on creditors. It was a badge of fraud. It was not the only one, however, and the courts soon developed other reinforcing or complementary badges of fraud (as they were termed). These were capable singly of producing inferences of actual fraud or fraud in fact.¹² Thus, it was held that the transferor's continuance in possession after a secret voluntary transfer raised a very strong suspicion of fraud.¹³ It was also held that the transferor's continuance in possession after a secret sale for valuable consideration raised a strong suspicion of fraud.¹⁴ Much later, the doctrine retreated somewhat further when the rule was laid down that in the case of a conditional transfer, the possession which followed and accompanied the deed did not raise such presumption without more.¹⁵ Actual fraud therefore would have to

⁷ Gilmore, *supra* note 5 at 26-27.

⁸ *Ibid.*

⁹ See *e.g.*, *Griswold v. Sheldon* 4 N.Y. 581 (1851).

¹⁰ Gilmore, *supra* note 5 at 26.

¹¹ *Ibid.*

¹² W. Edwards, ed., *May on Fraudulent and Voluntary Dispositions of Property*, 3rd ed. (London: Stevens & Haines, 1908) at ch. 5; D. McDonnell & J. Monroe, eds., *Kerr on the Law of Fraud and Mistake*, 7th ed. (London: Sweet & Maxwell, 1952) both employ this terminology.

¹³ See *Twyne's Case*, *supra* note 4; *Stone v. Grubham*, *supra* note 6. See also *Edwards v. Harben* (1788) 2 T.R. 587.

¹⁴ See *Neate v. Latimer* (1836) 2 Y. & C. Ex. 257 at 263, *aff'd* (1837) 4 Cl. & F. 570; *Arundell v. Phipps* (1804) 10 Ves. Jr. 139; *Paget v. Perchard* (1794) 1 Esp. 205. For the case of secret revocation, see *Acraman v. Corbett* (1861) 1 J. & H. 410; *Smith v. Hurst* (1852) 10 Hare. 30 at 44. Secret revocation is a "constant evidence of fraud": *Peacock v. Monk* (1748) 1 Ves. Sr. 127.

¹⁵ See *Martindale v. Booth* (1832) 3 B. & Ad. 498.

be proved in such cases by evidence of badges of fraud other than continuance in possession.¹⁶

As in the United States, the weakening of the presumption of fraud in later cases is especially attributable to a particular change in context, namely the creation of a recordation system under the Bills of Sale Act 1855-1882. As the system enabled creditors to ascertain from the objective register of bills of sale whether the person in possession was still the owner, the courts were slow to regard continuance in possession after transfer as a badge of fraud if the transfer had been registered. However, it would be wrong to say that a bill of sale which had been registered could never be a fraudulent conveyance; and the courts so held.¹⁷ Similarly, it would be wrong to say that where an absolute bill which was unregistered was nonetheless valid under the Bills of Sale Act because possession had been taken by the grantee, it could never be a fraudulent conveyance. While these decisions added necessary qualifications, they did not fundamentally detract from the declining contextual importance of continuance in possession brought about by the introduction of the Bills of Sale Act.

With respect to the question of whether s. 73B has continued the evidential doctrine of ostensible ownership, the development of even further changes in the informal provision of credit information down to 1993¹⁸ suggests that there must be considerable doubts as to whether the doctrine of ostensible ownership was intended to continue under s. 73B.

III. SECTION 73B AND CONSTRUCTIVELY FRAUDULENT GIFTS

The factual doctrine of ostensible ownership was mainly relied on to defeat transfers for consideration, with the transferor remaining indebted to an extent. In the case of gifts, s. 73B's precursor produced a stronger legal doctrine of constructive fraud. It was a legal doctrine because its effect was that of an irrebuttable presumption of fraud that the transfer was intended to delay or hinder the creditors if the transferor was 'insolvent' or if the transfer resulted in his becoming 'insolvent'. Why was the reaction so different? The reason was said to be that a donor must be just before he can be generous.

As to whether the legal doctrine has been continued, there is no need to conjecture. In *Larsen Oil*¹⁹ the Court of Appeal affirmed the continued relevance of this doctrine under s. 73B, endorsing the analysis in an earlier ruling it had adopted which was based on and required consideration of the Statute of Elizabeth.²⁰ Perhaps regrettably, however, the persistence of the legal doctrine of constructively fraudulent gifts was not fully debated in *Larsen Oil*. In England, the contrary view appears to have

¹⁶ *Reeves v. Capper* (1838) 5 Bing. N.C. 136 at 140; *Cramphorne v. ___* (1827) 6 L.J. Ch. 91.

¹⁷ See Martin J. in *Darvill v. Terry* (1861) 6 H. & N. 812.

¹⁸ Such as the development of credit information bureaus in the motor car retail industry.

¹⁹ *Supra* note 2.

²⁰ The case was *Quah Kay Tee v. Ong & Co Pte Ltd*, *supra* note 2.

surfaced, albeit also without much discussion in *In re H.W. Baker*.²¹ In that case, the settlor made a voluntary settlement when he was indebted in an amount of 80 pounds. Under the terms of the settlement, he had a power to raise a sum of 150 pounds as well as an absolute power of revocation of the trusts in the settlement with the consent of either the trustees or the court. Upholding the settlement under s. 172 of the English Law of Property Act 1925 (*in pari materia* with s. 73B), Farwell J. decided that the settlement was not fraudulent simply in terms of the particular facts of the case. He made no reference to the legal doctrine of constructive fraud, although if he had relied on it, he could have arrived at the same conclusion by holding that there was no 'deep indebtedness' to warrant applying the doctrine.

In the present view, the persistence of the legal doctrine is doubtful. An important reason to be hesitant about following the older cases on the legal doctrine under s. 73B is that the provision now in force was not enacted in identical terms to the Statute of Elizabeth. Adapted from s. 172 of the English Law of Property Act 1925, s. 73B's wording differs considerably from the Elizabethan statute.²² Some differences are thought to be superficial. For instance, unlike its precursor which referred only to good consideration, s. 73B refers to both valuable consideration and good consideration. Still, strong doubts have been expressed as to whether there is any meaningful difference between the two terms.²³ Again, the Statute of Elizabeth was not in terms confined to protecting persons properly to be described as creditors (*i.e.* business creditors) only, whereas s. 73B seems to be. However, it has been thought arguable that "the use of the word 'person' in s. 172 was intended to make the protection of the section available to persons who were prejudiced, although they were not properly to be described as creditors and were not prejudiced in the capacity of creditors."²⁴ If so, there will be no palpable difference between them as to the coverage of persons who are not business creditors. The employment in s. 73B of the term 'conveyance' has also provoked discussion as to whether s. 172 from which s. 73B is copied is confined to written conveyances, unlike the Statute of Elizabeth. In one case, the English court acknowledged that it was uncertain whether oral fraudulent transfers such as gifts of money were also struck down under s. 172.²⁵ Arguing that the Law of Property Act was merely a consolidating statute and noting that the Statute of Elizabeth had not been part of the Law of Property Act of 1922, the court reached the tentative conclusion that the inclusion of s. 172 in the Law of Property Act 1925 was not intended to shrink its coverage so as to be confined to written conveyances.

There are of course striking resemblances between s. 73B and the Statute of Elizabeth. Like the latter, s. 73B reaches dispositions of all property, real and personal; so that for this purpose, its location or occurrence in the real property statute is inconsequential. Similarly, s. 73B reaches all kinds of transfers, whether absolute or for

²¹ (1936) 1 Ch. 61. However, there are cases on s. 172 of the English Law of Property Act 1925 (*in pari materia* with s. 73B) which have assumed that s. 172 was intended to re-enact the effect of the Statute of Elizabeth. For example *Holt v. Heatherfield Trust Ltd* [1942] 2 K.B. 1 reported on this point more fully in (1942) 111 L.J.K.B. 465 at 466.

²² In fact, it also deviates slightly from that of s. 172 of the English Law of Property Act 1925.

²³ See U.K. Law Commission, "Insolvency Law and Practice: Report of the Review Committee", Cmnd. 8558 (London: Her Majesty's Stationery Office, 1981) [*Report of the Review Committee*].

²⁴ *Cadogan v. Cadogan* [1977] 1 W.L.R. 1041 (C.A.).

²⁵ See *Re Eichholz* [1959] Ch. 708 at 725-728.

the purposes of security. There is equally no doubt that as with the Statute of Elizabeth, proceedings to set aside a fraudulent conveyance are not subject to limitation of time.²⁶ More accurately, the right of a creditor to set aside dispositions under the Statute of Elizabeth or s. 73B is limited to 6 years from accrual of his debt, but as the Statute and equally s. 73B may be invoked by subsequent creditors there is in substance “no time limit within which proceedings must be brought to set aside the disposition.”²⁷ In both instances, there is also similarity in that the benefit of the statute does not depend on showing that the debtor has been made bankrupt or insolvent.²⁸

The fact however that unlike the Statute of Elizabeth, s. 73B stipulates that the transfer with intent to defraud creditors is voidable and no longer void is a real difference. One reason for the difference is easily conjectured. The Statute of Elizabeth was by judicial construction first extended so as to benefit subsequent creditors provided that there was recovery of the property by existing creditors.²⁹ By a further extension, it was accepted that if subsequent creditors were entitled to participate in the recovered property, they must also have an equity to set aside the fraudulent conveyance, although they could not have been deceived by it.³⁰ As a result, the Statute of Elizabeth which rendered the fraudulent conveyance void could unfairly benefit some subsequent creditors who could not have been deceived by the diminution in available assets for paying creditors. Thus, the effect of voidability under s. 73B would furnish the courts with discretionary power to adjust the benefits of fraudulent conveyance law among subsequent creditors. This however could not have been the sole intended effect of the change in s. 73B. Another highly plausible intended effect would be to enable the courts to ameliorate any hardship that might be occasioned to the transferee if the transfer was set aside in favour of the creditors of the transferor. The doctrine of the constructively fraudulent gift rests, so the judges have declared, on the principle that a man must be just before he can be generous.³¹ If giving power to the court to avoid the transfer on terms was one of the purposes of enacting s. 73B, then it would appear that the section has undermined or rejected or seriously qualified the judicially avowed rationale. In short, the retention of the legal doctrine in *Larsen Oil* is not indefensible in view of the ambiguity in section 73B as to whether the legal doctrine was intended to be repealed.³² However, the better view is that the provision of a flexible power to avoid the constructively fraudulent gift has significantly cut away the ground on which the legal doctrine of constructively fraudulent gifts was perceived to stand.³³

²⁶ *Report of the Review Committee, supra* note 23 at [1203].

²⁷ See McDonnell & Monroe, eds., *supra* note 12 at 387.

²⁸ However, in England, s. 172 has not survived the legislative scrutiny and has been replaced by s. 423 of the Insolvency Act 1986 which relies on the concept of the debtor disposing of assets otherwise available to his creditors with intent to put them beyond their reach. See *Lloyds Bank v. Marcan* [1973] 1 W.L.R. 1387 at 1390 (C.A). See also J. Armour, “Transactions Defrauding Creditors” in J. Armour & H. Bennett, *Vulnerable Transactions in Corporate Insolvency* (Oxford and Portland, Oregon: Hart Publishing, 2002) at ch. 3.

²⁹ *Jenkyn v. Vaughan* (1856) 3 Drew. 419; *Townshend v. Windham* (1742) 2 Ves. Jr. 11.

³⁰ *Jenkyn v. Vaughan, ibid.*; *Freeman v. Pope* (1870) L.R. 5 Ch. App. 538 at 540.

³¹ See Lord Hatherley L.C. in *Freeman v. Pope, ibid.* at 540.

³² Section 173 in contrast made it clear that the legal doctrine was to be repealed.

³³ The change of effect (giving the courts power to set aside on terms) under s. 73B is of course also true of the legal doctrine of constructively fraudulent gifts. Under the enactment, a constructively fraudulent conveyance is no longer void but voidable at the instance of the prejudiced creditor.

In *Larsen Oil* further, there appears to be a restriction of the legal doctrine to ‘true’ insolvency as opposed to significant or ‘deep’ indebtedness.³⁴ V. K. Rajah J.A. delivering the judgment of the Court of Appeal first quoted with approval these remarks: “But if it can be proved that the donor, at the time he made the gift, was indebted to the extent of insolvency, or that he became so by the abstraction of the property comprised in the gift, then that is enough to invalidate the transfer.”³⁵ He then applied these remarks saying the essence of the s. 73B claim in that case was that the debtor had transferred property to another despite (or thereby causing) its insolvent status.³⁶ However, he went on to say, there is another kind of s. 73B case, a pre-insolvency case.³⁷ A pre-insolvency case falls outside the legal doctrine of constructively fraudulent gifts, since as the *obiter* judgment of V.K. Rajah J.A. (on this point) implies, express fraudulent intent must be shown before the gift can be avoided.³⁸

With respect, the Court’s *obiter* view on the pre-insolvency case does not reflect the established position under the English case law where the term insolvency is not used in the fraudulent conveyance law in the technical sense in which V. K. Rajah J. A. has formulated the legal doctrine.³⁹ On the one hand, the mere existence of some unsatisfied indebtedness, at the time of the gift (cash-flow insolvency), is not sufficient to invalidate the voluntary transaction.⁴⁰ On the other, proof of balance sheet insolvency is not required. The requisite proof lies in-between, as *Kerr on the Law of Fraud and Mistake* puts it.⁴¹ Thus, the true position is that as long as the gift is a significant reduction of the existing assets available to pay debts owed to his creditors (variously described as a condition of deep indebtedness or great indebtedness), the debtor’s gift will be irrebuttably presumed to be fraudulent.⁴² This separation between the legal doctrine and the bankruptcy law was real (in principle and practical operation) and firmly established⁴³ even when the making of a fraudulent conveyance

³⁴ This distinction is developed below.

³⁵ *Larsen Oil*, *supra* note 2 at [56].

³⁶ *Ibid.*

³⁷ *Larsen Oil*, *ibid.* at [55].

³⁸ There was a perspicuous reason that the Court was persuaded by and relied on the close association, on the facts of the case, between the s. 73B claim and insolvency. It had to decide whether the s. 73B claim should be treated as akin to an insolvency claim that was non-arbitrable. In those circumstances, it was unnecessary to decide whether the claim could, as before under the Statute of Elizabeth, have been made where there was indebtedness short of insolvency; and arguably the court never intended to do so.

³⁹ Edwards, *supra* note 12 at 28.

⁴⁰ *Ibid.* Cf. *Spirett v. Willows* (1865) 3 De G. J. & S. 293 at 302-303 in which a distinction is drawn between existing creditors and subsequent creditors. In the former case, it is immaterial whether the debtor was or was not solvent after making the settlement. In the latter case, it was required that the debtor should be reduced to a state of insolvency after making the settlement. But see Lord Hatherley L.C. in *Freeman v. Pope*, *supra* note 30 at 544.

⁴¹ McDonnell & Monroe, eds., *supra* note 12 at 309.

⁴² See Lord Hatherley L.C. in *Freeman v. Pope*, *supra* note 30 at 540.

⁴³ As the Cork Committee in *Report of the Review Committee*, *supra* note 23 at 274 observed, it has never depended on any declaration of insolvency in the first place, although in practice it has seldom been invoked unless the debtor has in fact become insolvent. Indeed, in the earlier decision of the Court of Appeal in *Quah Kay Tee v. Ong & Co Pte Ltd*, *supra* note 2, it was held that constructive fraud existed where the transfer was a voluntary conveyance and the donor was “indebted” at the time of the gift. This was despite the absence of proof of insolvency in the true sense; since at this time, the Bankruptcy Act 1996 had yet to be enacted and the pre-1995 law applied.

under the pre-1995 bankruptcy law (as under the English 1914 Bankruptcy Act) amounted to an act of bankruptcy.⁴⁴

IV. SECTION 73C

Unlike the Statute of Elizabeth which gave rise to the evidential doctrine of ostensible ownership and the legal doctrine of constructively fraudulent gifts without any limitations as to the type of property on which the doctrines would operate, the statute of 27 Elizabeth c. 4 was limited to real property. In this section, the question to be addressed is whether s. 73C of the *Conveyancing and Law of Property Act* has repealed all the legal doctrines of constructive fraud which were evolved under that Elizabethan statute. Section 73C was copied from s. 173 of the English Law of Property Act 1925, which was in turn a modernisation of the Elizabethan statute. Section 73C states as follows:

Every voluntary disposition of immovable property made with intention to defraud a subsequent purchaser is voidable at the instance of that purchaser. For the purposes of this section no voluntary disposition shall be deemed to have been made with intent to defraud by reason only that a subsequent disposition for valuable consideration was made.

The proviso to s. 73C makes it plain that the legal doctrine of constructively fraudulent gifts by subsequent sale is repealed. But what is its real effect? In a series of cases, the legal doctrine of constructive fraud by subsequent sale was evolved under s. 1 of the Act of 27 Elizabeth c. 4.⁴⁵ Notice, the courts held, was irrelevant to the operation of this doctrine.⁴⁶ The first conveyance was void and the possession of notice or awareness of the conveyance could not affect the subsequent purchaser.⁴⁷

The judicial pre-occupation throughout the intervening period between the promulgation of the 27 Elizabeth c. 4 and its amendment in 1893 was with the harsh extension of the legal doctrine to the subsequent purchaser with notice of the voluntary conveyance.⁴⁸ Such purchaser needed not to have bought the property. He could not have been defrauded by a conveyance of which he had notice before he bought the property. Yet he was afforded the advantage of striking down the voluntary

⁴⁴ The notion of an act of bankruptcy is traceable to the English Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 4(1)(a). That law provided that once an act of bankruptcy had occurred, any creditor with an unpaid debt could rely on it to present a petition for bankruptcy. Nevertheless, a receiving order would not be made if the fraudulent conveyance being avoided, the debtor's debt would be paid in full.

⁴⁵ Edwards, *supra* note 12 at 153.

⁴⁶ See *Gooch's Case* (1590) 5 Co. Rep. 60a.

⁴⁷ Notice also that the conveyance of an equitable interest in land is covered. See *Barton v. Vanheysthuysen* (1853) 11 Hare. 126.

⁴⁸ Although some judges accepted this with reluctance. For instance, in *Buckle v. Mitchell* (1812) 18 Ves. 100 at 110, Sir W. Grant M.R. said: "It must, I conceive, be assumed that the Statute of the 27 Eliz. has received this construction: that a voluntary settlement, however free from actual fraud, is by the operation of that Statute deemed fraudulent and void against a subsequent purchase for valuable consideration... I have great difficulty to persuade myself that the words of the Statute warranted, or that the purpose of it required, such a construction... But it is essential to the security of property that the rule should be adhered to when settled."

conveyance. In 1893, the Voluntary Conveyance Act⁴⁹ was enacted to remove the benefit of the doctrine of constructive fraud from the purchaser with notice. Much later, the 27 Elizabeth c. 4 and the 1893 amendments were repealed and replaced by s. 173 of the English Law of Property Act 1925. Since s. 173 was never part of the received common law in this country, s. 73C thus only entered the law books in this country for the first time in 1993.⁵⁰

As the cases on the 27 Elizabeth c. 4 show, judicial development of the legal doctrine led to the recognition of two qualifications. One was that where the first conveyance was an ante-nuptial settlement, marriage was good consideration if the settlement was a principal inducement for the marriage entered into honestly and in good faith.⁵¹ In the absence of collusive fraud between transferor and donee, the settlement in consideration of marriage was not rendered void by the legal doctrine of constructive fraud by subsequent sale.⁵² This qualification was introduced and adhered to for the sake of marriage which benefits not only the parties themselves, but their offspring, third parties and the moral order of civil society.⁵³ Incidentally, it was applied similarly to cases on the Statute of Elizabeth.⁵⁴ The second was that if there was subsequent consideration for the earlier voluntary conveyance, the doctrine of constructive fraud did not operate to avoid the conveyance. So where the voluntary conveyance was post-nuptial, it was not possible to consider it as valid against the subsequent purchaser since the consideration of the marriage did not extend to the conveyance.⁵⁵ However, if consideration moved afterwards from the grantee, the conveyance post-nuptial ceased to be voluntary and void against the subsequent purchaser.⁵⁶ This last concession was probably of general application so that between all other persons, consideration could be provided after the voluntary conveyance so as to support it against the subsequent purchaser.⁵⁷

Upon consideration of the nature of the legal doctrine of constructive fraud by subsequent sale which s. 1 raised, it is doubtful that the proviso to s. 73C has repealed the other legal doctrines of constructive fraud by subsequent sale which were evolved by construction of s. 4 of the 27 Elizabeth c. 4. Section 4 enacted that the reservation of power to revoke a first conveyance, whether voluntary or for valuable consideration, was deemed to be fraud against a subsequent purchaser. In substance, the doctrine was wielded to strike down an earlier conveyance for valuable consideration since it was not needed if the earlier conveyance was voluntary. Subsequently, although the 1893 amendments rendered a subsequent purchaser's notice of the earlier voluntary conveyance legally significant, in all probability, they left the legal doctrines which

⁴⁹ 56 & 57 Vict., c. 21.

⁵⁰ Albeit there is a view approved by the US Supreme Court in *Hamilton v. Russell* 5 U.S. (1 Cranch) 309 that like the Statute of Elizabeth, the Act of 27 Elizabeth c. 4 was merely declaratory of the common law. The better view however is that the common law merely made a voluntary conveyance void against a subsequent purchaser where the conveyance was actually fraudulent. The legal doctrine of constructive fraud could only have arisen under the statute. See W. Edwards, *supra* note 12 at 5, 6.

⁵¹ *Bulmer v. Hunter* (1869) L.R. 8 Eq. 46 at 49, 50.

⁵² Knowledge that marriage would count as consideration for the purposes of preserving the settlement alone will not amount to collusive fraud.

⁵³ Edwards, *supra* note 12 at 264.

⁵⁴ See *Re Reis, ex p. Clough* [1904] 2 K.B. 769.

⁵⁵ See *Warden v. Jones* (1857) 2 De G. & J. 76.

⁵⁶ See *Stephens v. Green* [1895] 2 Ch. 148.

⁵⁷ See *Payne v. Mortimer* (1859) 4 De G. & J. 447.

were relevant under s. 4 intact. This was because they were specifically focused on removing the benefit of the doctrine of constructive fraud by subsequent sale from purchasers with notice of the earlier voluntary conveyance. They arguably did “not interfere with the operation of the Statute where the conveyance also contains a power of revocation.”⁵⁸ If so, there were three irrebuttable presumptions after 1893: (1) a voluntary conveyance before a subsequent purchase unless the subsequent purchaser had notice was deemed fraudulent; (2) a voluntary conveyance subject to a power of revocation was deemed fraudulent even if the subsequent purchaser had notice of the conveyance; and (3) a conveyance for valuable consideration subject to a power of revocation was deemed fraudulent unless the subsequent purchaser had notice. It cannot be said that the second and third presumption arose by reason only that a subsequent disposition for valuable consideration was made. Under the Elizabethan statute they would arise because of reservation of a power of revocation and a subsequent disposition for valuable disposition. Thus, while s. 73C clearly has repealed the first presumptions, there may be considerable doubts whether it has repealed the second and third.

V. RATIONALE OF FRAUDULENT CONVEYANCE LAW

In relation to s. 73B, the foregoing outline has highlighted that s. 73B might seem to identify and embrace two distinct kinds of fraud with apparently very different rationales. It will next be important to demonstrate that this understanding is superficial, misleading and unsustainable in legal policy.

Baird and Jackson⁵⁹ theorise that the voluntary disposition out of a transferor’s indebtedness critically implicates the burdens of monitoring threats of debtor misbehaviour. The debtor who borrows faces risks he did not have previously and has an incentive to convert cash to assets. “He enjoys all the benefits if a risky venture proves successful, but he does not incur all the costs if the venture fails. Every transfer he makes that has the effect of making an asset less like cash benefits the debtor at his creditors’ expense.”⁶⁰ This is an important premise for contractarians such as Baird and Jackson. It means that the monitoring of debtor mischief or misbehaviour is indispensable and a necessary step for creditors. Moreover, if every transfer for no value has potential to harm creditors, it follows that every transfer at less than fair value will also incur potential harm to creditors as a body. There can be no *a priori* logical or economic difference between the potential harm to creditors posed by a transfer for no value and a transfer for less than fair value; though there may be *a posteriori* differences in the degree of harm inflicted. This is an important deduction for contractarians.

Building on these premises, contractarians defend fraudulent conveyance law as being an essential check on debtor misbehaviour. This law imposes a restraint upon debtors limiting threats of debtor misbehaviour which harms creditors. It achieves its object by giving creditors the power to void potentially harmful transfers. However,

⁵⁸ Edwards, *supra* note 12 at 165.

⁵⁹ See Douglas G. Baird & Thomas H. Jackson, “Fraudulent Conveyance Law and its Proper Domain”, *supra* note 3.

⁶⁰ *Ibid.* at 834.

there is a need to establish a convenient rule for transfers for no value. Baird and Jackson argue that:

The number of cases in which an insolvent debtor gives away something for nothing but is not trying to hinder, delay, or defraud his creditors, however, may be sufficiently small that it is preferable to treat all these cases as fraudulent conveyances. The benefits of a rule may warrant its supplementing the standard. The costs to society of setting aside legitimate transfers should be offset by the elimination of costs associated with proving actual fraudulent intent in cases in which the chances of fraud are very high.⁶¹

However, to the extent that the fraudulent conveyance law requires the avoiding of transfers at less than fair value, they argue that it is too broad. A *per se* rule is justifiable only if an overwhelming number of cases are harmful to creditors. It will inflict high costs on society if some transfers at less than fair value are not harmful or only harmful to some creditors while benefiting other creditors. For instance, “often the transaction such as a leveraged buyout might or might not injure creditors. If one applies fraudulent conveyance law to leveraged buyouts, one might protect some creditors who were injured after the fact, but one might work counter to the interests of those creditors who, before the fact, would have wanted their debtor to have the power to enter into such transactions.”⁶² In short, there is a scale of risks of harm ranging from slight undervalue which may or may not harm creditors to gifts which nearly always do. Where should the line be drawn? Baird and Jackson maintain that fraudulent conveyance law “should be viewed as a species of contract law, representing one kind of control that creditors generally would want to impose and that debtors generally would agree to accept.”⁶³ “A broad fraudulent conveyance rule does not provide an incentive for creditors to do the monitoring they are capable of doing.”⁶⁴

All the same, the theory rests on a number of questionable assumptions. It assumes first that all assets have high liquidity because what it posits as a justifiable rule of convenience of gift-making rests critically on such assumption. The disposal of liquid assets certainly poses difficulties of proof which may warrant sacrificing a few honest cases for a general rule that presumes fraud. Unlike liquid assets, however, low liquidity assets will leave visible traces or trails of fraud. Consequently, proof of fraudulent intent can more readily be established from the surrounding circumstances. The rule of convenience seems to have been indiscriminately and inconsistently applied to gifts of less liquid assets, the true donative intention of which is easier to establish. Moreover, some transfers at less than fair value are actually gifts of the difference in value. To be perfectly consistent, contractarians should also, but do not, apply the rule of convenience to such transfers.

The more serious criticism is that the contractarian theory seems to be limited by an over dependence on doubtful or disputable assumptions about debtor behaviour and the necessity of monitoring that behaviour. The criticism involves two aspects. First, while the debtor may have an incentive to take risks that he would not have

⁶¹ *Ibid.* at 830, 831.

⁶² *Ibid.* at 834.

⁶³ *Ibid.* at 836.

⁶⁴ *Ibid.* at 840.

taken had he not borrowed, this assumption ignores that the creditor can charge interest rates directly or indirectly by making appropriate price adjustments to reflect the anticipated degree of risk taking by the debtor. If the creditor does so, he will participate with the creditor in the gains which accrue from the conversion of cash into asset, where the creditor's risk taking pays off. So, it does not follow that the creditor is potentially always injured by the debtor's ready temptation to convert borrowed cash into assets and that cash and asset have differential values in the hands of a debtor. In fact, the more correct assumption is precisely the opposite of this. Cash and asset are functionally equivalent as long as the debtor is solvent; they do not become differentiated by reason only of indebtedness and risk taking.

Secondly, the assumption that every creditor needs to monitor threats of debtor misbehaviour is doubtful. The question rather is whether creditors should need to do so. Instead of assuming that they need to do so, it is more important to consider whether they are in a position to do so and if they are not, whether they should be spared from doing so. The problem is that the monitoring of debtor indebtedness seems to be an uneconomic task beyond the capacity of ordinary creditors. A state of indebtedness under fraudulent conveyance law is one that falls short of insolvency, as has been seen.⁶⁵ *Ex hypothesi*, the recovery of assets which have been given away fraudulently signifies that the debtor was not insolvent at the time of donation. Such a state in which some creditors may be unpaid may be fleeting and reversible unlike insolvency. There are good reasons not to monitor it in an *ex ante* manner. What might seem *ex ante* to be a state of indebtedness may cease to be such when assessed *ex post* over a longer period of observation. This fluidity adds complications and costs to the burden of monitoring. Further, the problems of monitoring indebtedness are aggravated if what is attempted to be monitored is the impact on creditors of a transfer at less than fair value out of a state of indebtedness. There are shades of undervalue. Some are in substance transfers of no value and some may be transfers at less than fair value only in a more limited market sense. For instance, the leveraged buy-out is of the second kind where the difference in market value may actually be rational when appraised in terms of the on-going value of the assets under the more effective management that the buyers will be bringing to the debtor's business. Some less than fair transfers may also be preferential transfers to buy goodwill or to stave off temporary pressure from some creditors; and some may simply be bad deals in which the debtor was honestly mistaken. In order to determine whether the undervalue was in the circumstances harmful to a substantial number of creditors, detailed contextual appraisal would be necessary. That however would be an immensely difficult and hazardous task for any creditor not in the same business as the debtor to undertake.

If the doubtful assumptions which underlie the contractarian theory are laid to one side, it will be seen that what is critical is not the threat of debtor misbehaviour when a debtor is indebted to an extent but when the debtor is on the brink of insolvency. It is only when the debtor is insolvent that cash and asset equivalence vanishes; with cash immediately becoming the more valuable when assets must be disposed of for less than their reasonable value in a forced sale. As the threat of debtor misbehaviour becomes acute and harm to creditors irreversible, what a creditor should want to monitor is the onset of insolvency. Unlike monitoring indebtedness, this is not a

⁶⁵ See the text above accompanying notes 41 and 42.

futile and uneconomic task. Insolvency by definition is a state of permanent deficit and ordinarily irreversible. There is also a sharp difference between a debtor who operates in a solvent state and one who does so in an insolvent state which is capable of fairly objective measurement over a short period of observation. In part, this is because should he desire to do so, a creditor can build reporting requirements into the credit relationship to be established with the debtor so as to facilitate the monitoring of insolvency. A creditor then might want to monitor for insolvency so as to minimise his future exposure to 'insolvency' losses, but why, with respect to debts already incurred and owing, should he be required to monitor indebtedness on *ex ante* basis?

It is possible to go further than merely demonstrating that the assumptions underlying the contractarian theory do not form a firm basis for its conclusions. This will involve noticing that a more rational and efficient fraudulent conveyance law would involve completely opposite assumptions; namely (1) an implicit guarantee of cash and asset equivalence before the onset of insolvency through an *ex post facto* void transfer rule; (2) which dispenses with the need to monitor transfers out of a state of indebtedness. Under such law (as advocated by what is here denominated as the equivalence maintenance theory), the power to void transfers retrospectively ensures that the debtor is free to transact as he pleases provided that he observe cash and asset equivalence. To ensure that no creditor be under any duty to monitor the debtor's observance of the premises, the *ex post* discovery of violation of these premises (typically by those monitoring for insolvency) has a relation back effect, extending to all dispositions in the antecedent period. By thus insisting that violation of cash and asset equivalence unravels all, an *ex post* rule thus channels debtor behaviour towards observance of the premises, removing the costly need to monitor debtor indebtedness.

To a great extent, such a fraudulent conveyance law will function substantially as a disclosure system and to that extent the conclusions reached under the equivalence maintenance theory will coincide somewhat with those of the contractarian theory. The contractarian theory posits that some costs of monitoring are better borne by creditors. In particular, the existence of legal rules which make relevant information publicly available at low cost will need to be taken into account. Creditors should monitor reliable information about the debtor's property and cannot legitimately complain that they would only have dealt with him if they could have evaluated his business credit where reliable information is publicly available. On the other hand, the debtor should disclose such information as are only available to him where not to do so would conceal or suppress information harmful to creditors. This is what creditors would have agreed with the debtor that the latter should do if they had contracted about the matter. Failure to disclose in these circumstances (which are certainly more limited than the existing fraudulent conveyance law based on badges of fraud admits) can be seen as giving rise to a rebuttable presumption that the debtor *ex ante* intended harm to creditors. Where the contractarian theory is satisfied because the debtor has provided enough information for the creditors notionally to evaluate his business credit, the strictures of the equivalence maintenance theory will also frequently be met. Where the debtor fails to disclose credit information showing that cash and asset equivalence no longer holds in his case, the dispensability of

monitoring would no longer hold and the rebuttable inference of *ex ante* intended harm can be drawn.

However, compared with the contractarian theory, the equivalence maintenance theory is less forgiving in some circumstances. Whereas the contractarian theory is objective in nature and takes into account other publicly available information, the equivalence maintenance theory demands more subjective standards of disclosure. To ensure that his transactions with others survive *ex post* scrutiny, the debtor will have to disclose such information about his transfer as shows that cash and asset equivalence is no longer true as a result of his voluntary or other disposition. He may need in the circumstances to assume full responsibility for all information to be made known and appraised. He cannot invariably assume that publicly available information will be accessed but may need to draw the attention of his creditors to the publicly available information, thereby showing that in view of the information actually available and known to them, no one who has extended credit to him or who intends to do so could have failed to see that as a consequence of the transfer, cash and asset equivalence had ceased to obtain. Also unlike the contractarian theory, showing that the transfer is of clear and cogent benefit to a significant number of his creditors (who would have notionally agreed to his disposition) will not necessarily save his disposition, under the equivalence maintenance theory, from suspicion of fraud. Taken as a whole then, the equivalence maintenance theory does not prohibit the debtor from making transfers at less than fair value or continuing in possession after a transfer, but the debtor who does so must reveal all pertinent information publicly so that creditors know that they may no longer assume that monitoring is dispensable.

As might be expected, the equivalence maintenance theory will have significant counter-intuitive lessons for the way the courts should approach s. 73B. First, continued adherence to the legal doctrine of constructively fraudulent gifts would be wrong. To use an illustration cited by Baird and Jackson, suppose an indebted debtor makes a gift of 1,000 dollars to his mother on her birthday as he has been wont to do for the past several years. Although they find it odd that the gift should be void when there is no intention to thwart creditors, they justify the avoiding of the gift in terms of the rule of convenience already mentioned. They posit that if creditors had been told about the gift they would still have agreed to it on account of the benefits of a simple rule of convenience outweighing the costs of monitoring indebtedness. In other words, the contractarian theory does not demand disclosure at all times and contemplates that there may not be fraud despite non-disclosure if disclosure would have made no practical difference to the outcome. Under the equivalence maintenance theory, however, the legal doctrine of constructively fraudulent gifts cannot be defended on any terms. The concealing of the purposes and amount of the transfer violates cash and asset equivalence when the result is that some creditors may be at risk of being unpaid, and the debtor has no answer that he has a right to privacy when he is indebted and is seeking credit. In the circumstances, upon proof of some indebtedness at the time of the gift, the theory would throw the burden of proof on the debtor to show that he could actually have paid all his creditors despite making the gift or that he had in any case disclosed publicly the amount of the gift and the purposes of it immediately when cash and asset equivalence no longer obtained.

If the equivalence maintenance theory implies that the doctrine of constructively fraudulent gifts cannot be defended, *a fortiori* any extension of the doctrine of constructive fraud to transfers at an undervalue will also be wrong. In this deduction, the equivalence maintenance theory agrees with the contractarian theory. Consider the example of the leveraged buyout. Under the contractarian theory, the leveraged buyout may simply be a transfer at a less than fair market value by reason that it anticipates the injection of management expertise which will bring benefits to some creditors. Why should the so-called less than fair value amount to fraud on creditors unless the debtor is actually insolvent? The equivalence maintenance theory is in general agreement but differs in prescribing that the debtor/buyer must make public disclosure of the leveraged buy-out if and when cash and asset equivalence no longer obtains as a result of the buy-out.

The final lesson which the equivalence maintenance theory teaches is perhaps where there is clearest proof that the equivalence maintenance theory is preferable to the contractarian theory of fraudulent transfer. The contractarian theory drives a wedge between the transfer for no value and at less than fair value on the one hand and the reputed ownership arising from continuing in possession after transfer on the other. Thus, Baird and Jackson in their seminal work argue that “possession is the best available source of information concerning ‘ownership’ of most types of personal property.”⁶⁶ “Therefore, the doctrine that deemed ‘ostensible ownership’ to be fraudulent may be viewed as a simple legal rule that, by deeming an externally observable event (possession) to be the sole relevant criterion, transmitted the necessary information to third parties.”⁶⁷ The premises which underlie Baird and Jackson’s work on ostensible ownership are the same premises which underlie their contractarian theory of fraudulent transfer at less than fair value; namely the threat of debtor misbehaviour and the need to monitor it. But whereas they criticise fraudulent conveyance law for ignoring the comparative advantage of creditor monitoring and the accrual of benefit to some creditors in some transfers at undervalue, they stress that in the case of ostensible ownership it is the complicating difficulty of monitoring continuance in possession after transfer which needs to be overcome. A doctrine of ostensible ownership helps to ensure that possession can continue to be the best available source of information concerning ownership. The bright line justification which Baird and Jackson provide for the doctrine of ostensible ownership is somewhat surprising at first blush. Could it not be argued that under modern business conditions, creditors will not expect to derive the same information from possession of personal property as to ownership?

The equivalence maintenance theory differs from the contractarian theory in revealing an essential similarity between the voluntary disposition out of indebtedness and the continuance in possession after disposition for valuable consideration which creates ostensible ownership. It posits that the latter case is also a matter of assuring cash and asset equivalence to creditors. The debtor’s continuing in possession after transfer does not necessarily disturb cash and asset equivalence for pre-existing creditors since there is *ex hypothesi* an injection of fresh value which benefits them. If for instance the asset has been converted into cash, it will not disturb

⁶⁶ Douglas G. Baird & Thomas H. Jackson, “Possession and Ownership: An Examination of the Scope of Article 9”, *supra* note 3.

⁶⁷ *Ibid.* at 180, 181.

the cash and asset equivalence for pre-existing creditors even though the debtor who has sold the property continues in possession. However, for subsequent creditors, the debtor seems to have assets which cannot really be converted into cash. They are only apparent assets. In truth, they belong to or are subject to the rights of others but may be offered to another creditor, frequently a secured creditor, at less than its fair value. This false credit is compounded by the fact that the debtor also seems to have more cash from sale of the asset which he continues to possess, which may also induce creditors to extend more credit for conversion to assets. The problem of ostensible ownership then is that a double false credit is created, which induces greater debtor indebtedness at the expense of creditors. Unless the *ex post* rule is applied, inefficient monitoring would be necessitated. To achieve dispensability of monitoring, where the debtor creates situations in which monitoring has to be done, the law should make him undo them. A person who wishes to continue in possession after separating ownership and possession must therefore disclose publicly his real interest to warn creditors that cash and asset equivalence no longer holds. Thus, under the equivalence maintenance theory, the continuing in possession after transfer, like the transfer out of indebtedness, calls for public disclosure from the debtor whenever it upsets cash and asset equivalence. What the theory leads to is not that continuance in possession *per se* suggests fraud. Rather, it is that upon proof of some indebtedness subsequent to continuance in possession, the burden is thrown on the debtor to prove that he is able actually to discharge all his indebtedness or that he had made the necessary public disclosure immediately when cash and asset equivalence no longer obtained. To conclude, if the true objective of fraudulent conveyance law is to maintain cash and asset equivalence and dispense with the monitoring of indebtedness, then the recent *obiter* decision in *Larsen Oil* which upholds the doctrine of constructive fraud can be criticised for ignoring the essentially contextual nature of a fraudulent conveyance and maintaining a doctrine which was evolved in very different times. As for the doctrine of ostensible ownership, it was evolved as an evidential presumption of actual fraud. This transpires to be an exaggerated response when evaluated from the perspective of the equivalence maintenance theory. That theory would place the emphasis on a state of some indebtedness arising subsequent to the continuance in possession after transfer, not on the mere continuance in possession after transfer.

VI. IS THE RATIONALE OF SUBSEQUENT PURCHASE AFTER A VOLUNTARY DISPOSITION DIFFERENT?

What of s. 73C? This provision seems very different in rationale, at least superficially, from s. 73B. The problem is neither that the seller of immovable property is selling twice nor that he is indebted and cannot afford to give property away. If it were otherwise, the case law on s. 73C would have required indebtedness as a pre-requisite, as with s. 73B.⁶⁸ Indeed, if a requirement of transfer out of indebtedness were part of s. 73C, with the problem of giving out of a state of indebtedness being already

⁶⁸ With respect to its precursor, Lord Hardwicke hinted as much in *Townshend v. Windham* (1750) 2 Ves. Sr. 1 at 10.

catered to by section 73B, s. 73C would be otiose.⁶⁹ Moreover, the mere possession of land, unlike possession of personal property, is unlikely without more to deceive creditors who may be presumed to know that the debtor may merely be occupying the land as a licensee. So superficially, it would appear that the doctrine of ostensible ownership is also not implicated.⁷⁰ It will next be important to demonstrate that this is far from correct and that s. 73C is also a bird of the same feather as s. 73B, serving as a doctrine of ostensible ownership applicable to real property.

There are a few basic observations to get out of the way. Section 73C contemplates that there is a purchase for valuable consideration after an earlier voluntary disposition. It implies a valid and effectual voluntary disposition since if the first were invalid in its own terms, there would be no need to avoid it. Again, the provision cannot be directed at sham transactions, there being a distinct and independent sham doctrine.⁷¹ What is less clear is whether the reference to the subsequent purchase implies that the purchase must be valid, apart from the provisions of s. 73C, so that although the seller has made a prior valid and voluntary disposition, he must also have made a valid sale to a subsequent purchaser. In other words, there is some uncertainty whether if the subsequent purchase is invalid, s. 73C would nonetheless be operative, making void the voluntary conveyance and validating the subsequent purchase in the same breath.

Although s. 73C's precursor had a long history, the answer is obscure. There are however some useful clues which shed light on the probable answer. One is derived from a comparison of the 27 Elizabeth c. 4 and s. 73C. Section 4 of the former statute enacted that if the seller had reserved an immediately exercisable or present power of revocation under the first conveyance, the first conveyance would be fraudulent in law as against the subsequent purchaser.⁷² The first conveyance would be void even if it was for valuable consideration.⁷³ The instructive point is that under the 27 Elizabeth c. 4, it was considered highly relevant that the reservation of control constituted fraud in law whether or not the seller had exercised the power of revocation before the second purchase. In the premises, he would not have done so, since if he had, the voluntary disposition would be determined and there would be a good and unencumbered title in the subsequent purchaser. There is as mentioned earlier uncertainty whether s. 73C has abolished the legal doctrines of constructive fraud by subsequent sale after reservation of the power to revoke an earlier conveyance,⁷⁴ but in any case the provision usefully indicates that the absence of title in the donor as seller is not an impediment to the operation of the provision. More distantly, it indicates that the seller's fraud consists in possibly getting more for the property

⁶⁹ See for example *Doe v. Manning* (1807) 9 East 59. Cf. *Jones v. Croucher* (1822) 1 Sim. & St. 315 where the transferor was not indebted at the time of transfer and so was outside the statute.

⁷⁰ All this may perhaps have influenced the Cork Committee in *Report of the Review Committee*, *supra* note 23 to ignore s. 173, which s. 73C copied, as being irrelevant to the discussion of transactions defrauding creditors.

⁷¹ See *Snook v. London & West Riding Investments Ltd.* [1967] 2 Q.B. 786 (C.A.); *Hitch v. Stone (Inspector of Taxes)* [2001] S.T.C. 214 (C.A.). See also *Shalson v. Russo* [2005] Ch. 281 at [188] on the need to show a common intention of the parties to the sham transaction.

⁷² In the case of a future power of revocation, the fraud would be deemed in favour of a purchaser dealing after the power had become exercisable and if the settlor by whom the power was exercisable was living at the time. See *Standen v. Bullock* (1601) 3 Co. Rep. 82b.

⁷³ *Hungerford v. Earle* (1691) 2 Vern. 262.

⁷⁴ See *supra* note 58.

than it is worth from the subsequent purchaser and thereby making the purchaser the seller's creditor.

Another important clue may be discerned from the circumstance that s. 73C is deliberately restricted in scope to transfers of real property⁷⁵ (through the term 'immovable' property). Unlike personal property, real property offers a well-known capacity for dismembered interests and fractional interests. It is not difficult for a seller to make a voluntary disposition of a more limited interest while remaining in possession and retaining the power to dispose of the reversionary interest. For example, he may charge the land with payment of a voluntary rent charge or create voluntary profits *à prendre* and then sell the land purportedly unencumbered to a subsequent purchaser who is none the wiser because the seller apparently has possession. Compared with the problem of ostensible ownership arising from possession of personal property, land being capable of dismemberment and fractional interests poses more severe problems of sale at an overvalue resulting in a reverse debt, one unintended by the purchaser.

This is so even where the settlor does not retain any reversionary interest but purports to sell the entire interest which he has given away. This may happen where the settlor obtains the equitable interest in land by a contract of purchase, which interest he then settles on a voluntary settlement, but afterwards purports to mortgage the land to a subsequent purchaser.⁷⁶ More dramatically, although the settlor may have no legal title to give to the purchaser by virtue of having conveyed the legal interest to a donee, the settlor who continues in possession of property to which he no longer has legal title can easily perpetrate a fraud by keeping the title deeds and selling that which he no longer has and making away with the consideration for the sale, leaving the purchaser as creditor to recover the purchase price from him.

There is of course a valid observation made earlier that ordinarily possession alone of land is insufficient to raise a serious problem of ostensible ownership. Continuance in possession may be consistent with a mortgage or gift where the donee feels morally obliged to allow the donor to remain in occupation or because of familial relationship. Ordinarily then, creditors of the debtor would not be misled by his possession of land after transfer to another unless they chose to be unreasonably presumptuous by not calling for the title deeds. However, what makes the s. 73C case different and exceptional is that the seller has himself taken active steps which are calculated to mislead or has positively misled the purchaser by suggesting explicitly that his possession is that of owner of the land, concealing the voluntary disposition from him. Creditors which he has not broached may not be deceived but the purchaser who is broached may be. Section 73C's purchaser includes a mortgagee and this again implies positively misleading the mortgagee by suggesting that his possession is that of owner, concealing the voluntary disposition from him. The purchaser is deceived and compelled into becoming a captive creditor of the seller unless there is power to avoid the voluntary disposition.

In short, s. 73C establishes a more limited notion of ostensible ownership, a real property equivalent as it were of the wider notion applicable to personal property.

⁷⁵ See *Jones v. Croucher*, *supra* note 69.

⁷⁶ As in *Barton v. Vanheythuysen*, *supra* note 47.

Under the precursor of s. 73C, a wider notion of ostensible ownership was not justifiable as there are always title deeds where real property is concerned that creditors and purchasers alike can ask for and look at. The limited notion thus directs attention to the positive steps taken by the seller to dispose of property which he has already disposed of to a volunteer.

From this analysis, two deductions are possible. The first is that the fact that a recordation system established under the Land Titles Act exists should suggest that legal doctrines of ostensible ownership are now out of place. The second is that there should be no requirement that the subsequent purchase must be valid in its own terms. In order to perpetrate a fraud on the subsequent purchaser, making him a creditor in substance instead of a purchaser, the fraud must be committed in two steps. Its effective perpetration would depend on taking advantage of the common law rule that the purchaser can have no better title than his seller has⁷⁷ as well as the rule that to avoid a transfer for fraud it is necessary that the claimant derive prior title from someone other than the fraudster.⁷⁸ The efficacy of s. 73C must thus depend on overcoming those two common law rules by reversing the effects of both transfers and giving the purchaser the title the fraudster had prior to the perpetration of the double fraud. Thus, it should not matter whether the subsequent purchase is valid or void if the purchase monies have in fact been paid to the fraudster. Fraud on the purchaser as a future creditor is equally perpetrated by a seller continuing in possession whether the sale procured is valid or voidable or void. This fraud can be undone only if reversing the transfers, the law supposes that the fraudster had sold and conveyed a good title to the purchaser prior to the fraud. Viewed in this light, the similarity in rationale between ss. 73C and 73B emerges unmistakably. The fraud to be prevented by s. 73C is the creation of false credit by the donor of land continuing in possession and dealing inconsistently with an earlier voluntary disposition, leaving the subsequent purchaser with a debt to claim by way of recovery of the price he has paid for property already disposed of and consequential losses.⁷⁹ The fraud is equally serious whether the subsequent purchase is valid or void and so it should not matter that the subsequent purchase is in fact void.

This is also what the equivalence maintenance theory suggests. If the important point is that the transferor fails to disclose that his act of selling after voluntarily conveying property earlier has violated cash and asset equivalence, then his fraud in making the second sale should not deprive the subsequent purchaser of the property. The greater must include the lesser. Actual fraud in violating cash and asset equivalence which is greater must include the objective violation which is the lesser conduct. The equivalence maintenance theory also suggests that it would be indefensible to continue to adhere to the other legal doctrines which were built upon s. 4 of the 27 Elizabeth c. 4, namely the doctrine that a prior voluntary conveyance of real property with reservation of a power of revocation is deemed fraudulent against a subsequent purchaser and the doctrine that a prior conveyance of real property for valuable consideration with reservation of a power of revocation is deemed fraudulent against a subsequent purchaser without notice of the earlier conveyance. Whether or

⁷⁷ Also known as the *nemo dat* rule.

⁷⁸ See *Upton v. Bassett* (1601) 3 Co. Rep. 83a.

⁷⁹ Cf. s. 423 of the English Insolvency Act and *Midland Bank plc. v. Wyatt* [1997] 1 Butterworths Company Law Cases 242 (C.A.).

not cash and asset equivalence is violated by subsequent sale after such reservation should in every case turn on whether the transferor has made the public disclosure that it has and not on whether there is a reservation of a power of revocation *per se*. As to whether the notion of post-transfer consideration furnished by the donee or transferee should continue to be part of the law contained in s. 73C, the equivalence maintenance theory suggests it should. The donee or transferee's injection of value restores cash and asset equivalence even if there is no public disclosure of it and thereby limits the violation of cash and asset equivalence to creditors who were affected within the interval.

VII. CONCLUSION

It is doubtful whether the legal and evidential doctrines of fraud evolved under the Statute of Elizabeth and the statute of 27 Elizabeth c. 4 have been continued under ss. 73B and 73C. Further, if they have been continued, it is quite clear that they have outlived their usefulness. If the contractarian theory is applied, there should be no place for legal, and perhaps also evidential, doctrines of constructive fraud. If the equivalence maintenance theory advanced in this article is applied, the key to understanding fraudulent conveyance law is that the juxtaposition in a debtor's affairs of a transfer made by him and some indebtedness which *prima facie* cannot be met out of available liquid assets throws the burden of explanation on the debtor when challenged by his creditors. The debtor discharges his burden by showing that his transfer did not disturb cash and asset equivalence, or that if it did, he had made necessary and sufficient disclosure of all relevant information to his creditors. If that burden is not discharged, the court may set aside the transfer for the benefit of the creditors.