Bond Law Review

Volume 1 | Issue 1 Article 5

1989

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Abstract
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Keywords
property transactions, deeds

This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol1/iss1/5

THE ROLE OF DEEDS IN PROPERTY TRANSACTIONS— CONTRACTUAL AND DISPOSITIVE ACTS

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This article argues that deeds do not import consideration into those property transactions which are contractual rather than dispositive. For example, options, changes and purported assignments of future property depend for their efficacy upon equitable principles. Deeds, in equity, do not supply consideration, but operate as dispositive rather than as contractual instruments, a distinction which is often overlooked in analysis.

Introduction

Analysis of property transactions reveals a two-stage process—the contractual or agreement stage and the dispositive or conveyance stage. Confusion has arisen in a number of areas through lack of recognition of the fundamental distinction between these two separate aspects of the one transaction. In practical terms such confusion may result in the ineffectiveness, for example, of attempted assignments of future property or of fixed or floating charges.

This paper examines the role of deeds in the two phase process and identifies the so-called attribute of all deeds as 'importing consideration' into a transaction as the result of a confused analytical approach to property concepts. Where deeds operate as dispositive instruments and not as evidence of contractual arrangements, the contractual requirement of consideration is irrelevant. Accordingly, a voluntary dispositive deed will be entirely effective. However, a voluntary deed which operates only at the executory contractual level will be incapable of affecting proprietary rights.

This limitation on the operation of voluntary deeds in property transactions is clearly established in a series of cases often identified[1] as an exception to the general rule that consideration is not necessary to the operation of a deed. Where the deed relating to the transfer of property is voluntary and is contractual only (ie executory) and not

1 Eg *Halsbury's Laws of England* (4th edn) Vol 12 para 1355 n 7.

effectual as a dispositive instrument, no interest in the property will arise in the donee.[2]

It is not disputed that the common law courts will recognise not only specialty debts as recoverable without proof of consideration, but will regard, for example, a voluntary acknowledgment of satisfaction of a debt by deed as a bar to recovery of the debt.[3] Further, it is not disputed that the common law will allow recovery of damages for breach of a covenant in a voluntary deed by a party to the deed who is a direct covenantee.[4] However, the point of crucial importance in a property transaction, as opposed to transactions which, for example, merely involve payment of fixed sums or annuities,[5] where the common law remedy of damages for breach of covenant is adequate, is that a deed will not supply consideration in order to enable specific enforcement of a gratuitous promise to dispose of an interest in property.[6]

The following extract from Bacon, again often misquoted as authority for the general proposition, is in fact supportive of the distinction between the contractual and dispositive stages of a property transaction:[7]

> I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration. As for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it . . . for you cannot . . . raise [a use] neither by deed nor deed inrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason for chancery, and it is this: that no court of conscience will inforce donum gratuitum, though the intent appear never so clearly, where it is not executed, or sufficiently passed by law . . . .

Contractual and dispositive acts

The contractual stage can be identified utilising the classical formulation of offer, acceptance, consideration, intention to enter into legal relationships and formal requirements where these are appropriate. The latter requirements vary depending on the nature of the property, but the requirements of the Statute of Frauds and its later re-enactments usually

2 See *Ellison v Ellison* (1802) 6 Ves Jun 656; *Irons v Smallpiece* (1819) 2 B & Ald 550; *Jefferys v Jefferys* (1841) Cr & Ph 139; *McFadden v Jenkyns* (1842) 1 *Hare* 461; *Meek v Kettlewell* (1843) 1 Ph 344; *Hall v Bainbridge* (1848) 12 QB 698; *Dening v Ware* (1856) 22 Beav 185; *Tatham v Vernon* (1861) 29 Beav 604; *Dickinson v Burrell* (1866) 1 LR Eq 337; Contra see *Watson v Parker* (1843) 6 Beav 283.

3 *Pinnel's Case* (1602) 5 Co Rep 117.

4 Eg see *Cannon v Hartley* [1949] Ch 213 , 217 per Romer J where he distinguishes the right to recover damages at common law from the right to specific performance in equity.

5 See bond cases listed at n 2 above and *Clough v Lambert* (1839) 10 Sim 174 where a voluntary covenant under seal to pay an annuity to a separated wife was enforced against the executors of the covenantor but not against his creditors.

6 Obiter judicial statements have been relied upon from a number of cases as authority for the general proposition. However the obiter comments in *Shubrick v Salmond* (1765) 3 Burr 1637, 1639 per Lord Mansfield; *Bunn v Guy* (1803) 4 East 190, 200 per Le Blanc J; and *Wallis v Day* (1837) 2 M & W 274 , 277 per Parke B were clearly made without concern for the relevant remedies and, in each of these three cases cited by *Halsbury*, the cases were determined on a contractual basis, rather than in reliance on the deed form.

7 Bacon, *Readings on the Statute of Uses* (1600) reproduced by Garland Publishing (1979) 404.

provide the formal ingredients. The requirement of intention as a necessary ingredient is best illustrated by either the intra-family situation[8] or the sale of the fee simple interest in land where the parties have often been held not to intend to enter into legal relations until the formal exchange of signed counterparts of a written agreement.[9]

Once a contract comes into existence, where the substance of the contract is an agreement to transfer an interest in property, it is necessary for a further act of the vendor to take place in which the contractual promise to convey is implemented. Again, depending on the nature of the property, the observance of dispositive formalities may be required. Where such formalities are onerous, such as in a land transaction, where execution of a formal instrument such as a deed is required,[10] or the registration of a prescribed dealing as under the Torrens system of title,[11] the second dispositive stage is easily identified. However, where the interest to be conveyed also involves contractual elements as in a lease, both the parties and the judiciary often tend to telescope the two stages. For example, in *Vincent v Premo Enterprises (Voucher Sales) Ltd*[12] the English Court of Appeal decided a lease case on the basis of the dispositive stage. The issue determined by the court was that a deed of lease which had been signed, sealed and delivered, but not exchanged as anticipated, was operative once a particular condition had been fulfilled by the intended tenant. On the facts of the case, however, there was an underlying agreement for lease which appeared either to be evidenced in writing or partly performed and therefore enforceable.[13] While the Court of Appeal actually enforced the lease at the dispositive stage, the separate enforceability of the underlying contract to give a lease would have been crucial if the deed itself had been held inoperative to create the leasehold estate (as it had been so held by the judge at first instance).

Further contraction of the two stages occurs frequently in the sale of goods where the formalities for transfer of title are generally minimal.[14] Title to goods passes as the parties intend, which is assumed to be on delivery of the goods to the purchaser.[15] In many ordinary circumstances in a transaction relating to movables, the contractual and dispositive stages coincide. However, the issue is important where, for example, damage occurs after the contractual stage and before delivery of the

8 Eg see *Todd v Nicol* [1957] SASR 72; *Jones v Padavatton* [1969] WLR 328.

9 *Masters v Cameron* (1954) 91 CLR 353; *Eccles v Bryant* [1948] 1 Ch 93; and see *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109. See also *Comptroller of Stamps (Vic) v Associated Broadcasting Services Ltd* (1987) 37 ATC 4401, 4405-4406 per Tadgell J.

10 Eg see Conveyancing Act 1919 (NSW) s 23B; Property Law Act 1974 (Qld) s 10(1) ; Law of Property Act 1936 (SA) s 28(1); Conveyancing and Law of Property Act 1884 (Tas) s 60(1); Property Law Act 1958 (Vic) s 52(1); Property Law Act 1969 (WA) s 33.

11 Eg see Real Property Act 1900 (NSW) s 41.

12 [1969] 2 All ER 941; but see *Commissioners of Inland Revenue v Angus* (1889) 23 QBD 579 for an example of the distinction.

13 Section 4 Statute of Frauds 1677 (Imp) and equivalents and noted n 19 below.

14 Note however requirement of writing with respect to sales of goods for more than $20 which are not partly performed and with respect to contracts not to be performed within a year, eg Instruments Act 1958 (Vic) s 126 and Goods Act 1958 (Vic) s 9.

15 Eg see Sale of Goods Act 1923 (NSW) ss 22, 23; *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyds Rep 240.

goods. The standard form CIF and FOB contracts[16] are examples of contracts which specifically establish the parties' intention as to the time of the dispositive stage. Other contractual arrangements, such as the so-called Romalpa clauses, attempt to defer the dispositive stage to a time beyond the delivery of the goods. The efficacy of such clauses in delaying the passing of title has been judicially circumscribed in a number of more recent cases.[17] However, the device illustrates the two stage process in property transactions and the need for careful analysis.

In discussion of contractual theory, the process is often identified obliquely by reference to 'executory' and 'executed' contracts. Such differentiation is merely a recognition that an executory contract remains on foot as a contract, whereas an executed 'contract' no longer has contractual force because what the contracting parties promised has been implemented, and title to any relevant property has passed during the dispositive phase of the transaction. The distinction between the two phases was articulated by Lord Esher MR in *Commissioners of Inland Revenue v Angus*:[18]

> It is said that, when an agreement is such that equity will grant specific performance of it, it is to be considered as a conveyance in equity, or an 'equitable conveyance.' If that were true, it would be an equitable conveyance of a legal property or a legal right. But let us consider what the doctrine of specific performance is. If the instrument is a 'conveyance' in itself, why do you want a decree for specific performance? If the instrument has conveyed the property to the purchaser, he does not require specific performance of an agreement with reference to his own property which has been already conveyed to him. The fact that the instrument is one of which equity will decree specific performance, fixes it at once as an 'agreement', and not as a 'conveyance.' It would be a contradiction of terms to say that that which requires a decree for specific performance is in itself a 'conveyance' which has conveyed the property to the purchaser. If there has been a 'conveyance' of the property, you do not require specific performance. If property sold is conveyed by an instrument to the purchaser, and after that conveyance the vendor keeps it, the purchaser's remedy would not be by way of specific performance, but, if the property be personal property, by an action of trover; or, if it be real property, by an action of ejectment. In my opinion, therefore, however clear it may be that an instrument is an agreement of which a Court of Equity would instantly decree specific performance, if it were not performed by the vendor, such an instrument is not a 'conveyance on sale' within the meaning of the Act, but is only an 'agreement.'

Examples of confusion between dispositive and contractual acts

Before developing the argument that the alleged attribute of deeds of 'importing consideration' is a manifestation of confusion between contractual and dispositive acts, it is useful to examine particular areas

16 See generally Atiyah, *Sale of Goods* (1974) Ch 20 and the *Carlos Federspiel* case, n 15 above. The letters FOB stand for 'free on board' and CIF is an abbreviation for 'cost, insurance and freight'. Title to the goods passes on loading under FOB contract but at destination under a CIF contract.

17 See *Aluminium Industries BV v Romalpa Aluminium Ltd* [1976] 2 All ER 919; *Re Bond Worth Ltd* [1979] 3 All ER 919; *Borden UK Ltd v Scottish Timber Products Ltd* [1979] 3 All ER 961; *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 61 ALJR 415.

18 (1889) 23 QBD 579 , 591.

where failure to make the distinction has resulted in analytical confusion and practical difficulties.

Contracts to sell interests in lands

Recent judicial analysis in Western Australia of the relationship between the modern day equivalents of sections 3 and 4 of the Statute of Frauds[19] establishes a tendency by the judges to blur the distinction between the contract or promise to transfer an interest in land and the actual transfer of that property.[20] The formalities for the contractual stage are established by the equivalents of section 4 of the Statute of Frauds and require that there is in existence a written note or memorandum evidencing a concluded oral contract before such a contract with respect to the sale or other disposition of land or an interest in land be enforceable by the courts. Such a memorandum need not include the whole contract but needs to include at least the essential ingredients of parties, property, price, and any specific special promises.[21] It must, however, be signed either by the party against whom it is sought to be enforced or by that party's agent. There is no requirement that such an agent be himself authorised in writing.[22]

By contrast, the dispositive provisions derived from section 3 of the Statute of Frauds require that the instrument by which an interest in land is created or disposed of be itself in writing.[23] In other words, the act of disposition by the owner of an interest in land *must be implemented*

19 (1677) 29 Car II c 3; Conveyancing Act 1919 (NSW) s 23C(1)(a) and s 54A; Law of Property Act 1974 (Qld) s 11 (1) (a) and Statute of Frauds and Limitations Act 1867; Law of Property Act 1936 (SA) s 29(1)(a) and s 26(1)(a); Conveyancing and Law of Property Act 1984 (Tas) s 60(2)(a) and s 36(1); Property Law Act 1958 (Vic) s 53(1)(a) and Instruments Act 1958 s 127; Property Law Act 1969 (WA) s 34(1)(a) and Statute of Frauds 1677 (Imp) s 4. The NSW provisions for example are:

S 54 : (1) No action or suit may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of the Conveyancing (Amendment) Act, 1930, and does not affect the law relating to part performance, or sales by the Court.

(3) This section applies and shall be deemed to have applied from the commencement of the Conveyancing (Amendment) Act, 1930, to land under the provisions of the Real Property Act 1900.

S 23C: (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol—

(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of the law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; disposition, must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

20 See this writer's discussion of this example in 'Reconciliation of the Requirement of Writing in Land Transactions' (1987) 17 WALR 301.

21 See eg *Rossiter v Miller* (1878) 3 App Cas 1124, 1140-1141; *Plant v Bourne* [1897] 2 Ch 281; *Hawkins v Price* [1947] Ch 645.

22 NSW: s 52A(1) and equivalents noted at n 19 above.

23 NSW: s 23C(1)(a) and equivalents noted at n 19 above.

by writing. Further, that writing must be signed by the conveyor of the property or by his agent *authorized in writing*.

There is no conflict between these two sections, despite the divergence of requirements for the authorization of agents and the scope of the writing required, because the provisions are designed to deal with the two very distinct stages in a property transaction. Such an analysis obviates the tortuous rationalisation attempted by the Western Australian courts in a recent series of cases culminating in *Ratto v Trifid Pty Ltd*.[24]

By accepting that property transactions fall into these two stages, it is possible to recognise that the policy of the Statute of Frauds provisions has a basis in reason. At the contractual stage, less formality is required: an oral contract will be enforceable if either it is evidenced in writing as discussed above or it has been partly performed[25] or, for example, if the statute is not pleaded.[26]

At the dispositive stage, however, when the ownership of property is actually to be changed, the act of the parties required to effectuate the passing of title is quite sensibly more formalised: the passing of title is *by* an instrument in writing and not simply *to be evidenced* by writing and the signature of an agent will only be effective where that agent is authorized in writing.

Charges as security devices

A further example of confusion between the contractual and dispositive aspects of property transactions involves the juridical nature of charges as security devices. It has been argued elsewhere[27] that charges are recognised as security because transactions whereby charges 'are given' do not normally[28] pass beyond the contractual stage. The equitable remedy of specific performance is the only aspect of the transaction that gives it the nature of a security device. Accordingly lawyers recognise that charges, apart from statutory creatures,[29] are effective only in equity, without a close analysis of the reason.[30] Their nature as purely contractual transactions derives from the fact that the parties do not intend to dispose of an interest in the charged property, but intend rather notionally to allocate the property, while it remains undisturbed in the full ownership of the chargor, for the payment of the monetary obligation due to the chargee. Such an intention precludes the transaction from entering into the dispositive stage. On default, a receiver may be appointed to receive the property of the chargor and administer it for the benefit of the chargee, but even on default the subject property is not disposed of. It remains the property of the chargor, although subject to contractual or judicial

24 *Rattor v Trifid Pty Ltd* 56 LGRA 22; see also *Parker v Manesisis* [1974] WAR 54; *Redden v Wilks & Registrar of Titles* [1979] WAR 161; *Trifid Pty Ltd v Rattor* [1984] ANZ Conv R 650; [1985] WAR 19.

25 NSW: s 54A(2); SA: s 26(2); and Tas: s 36(2) in Acts noted at n 19 above.

26 See eg *Bogdanovic v Koteff* NSW CA 19 April 1988.

27 Everett, *The Nature of Fixed and Floating Charges as Security Devices* (Law Press, Monash University 1988).

28 Unless the transaction amounts to a declaration by the owner of the property that he holds it in trust for the chargee.

29 Eg charges under the Torrens system of land titles are given effect to by the courts in the common law jurisdiction through force of the statutes.

30 Eg see Sykes, *The Law of Securities* (4th edn 1986) 191-192.

intervention by way of injunction, specific performance, or receivership. None of these remedies indicates that the transaction of charging property ever passes beyond the contractual stage into the dispositive stage. As a consequence of lack of analysis, lawyers, however, often do consider that charges may be established by dispositive action. They frequently purport to create charges in the dispositive form. The form usually chosen will be a deed on the assumption that deeds, by some magical process, are effective in all circumstances.

Reliance on deeds to import consideration into transactions such as agreements to charge property is fraught with danger. If a charge remains purely contractual, a deed of charge will be entirely inoperative as a purported dispositive instrument. The transaction may amount to an enforceable charge, but only if the appropriate contractual basis for the transaction is established. A deed may supply good evidence of a note or memorandum of the underlying concluded oral contract and thus enable the transaction to be enforced even where land is involved; however, the establishment of the contract and all the necessary contractual ingredients, including consideration, will be determinative in the final analysis.

Delivery of deeds

A number of judicial decisions[31] on the effect of the sealing and imputed delivery of deeds, which are otherwise hard to reconcile, can be more easily understood if reference is made to the distinction between contractual and dispositive acts. Property rights are changed, or title to the property passes, at the time when the deed comes into operation. The decided cases that explore the question of when a deed operates also raise the issue of the need to distinguish between documents which operate as dispositive instruments and those that operate as contractual instruments only. Where the document, although formally constructed as a deed, is intended to affect only contractual relationships and not to operate as a disposition of the subject property, the document has been denied operation on its delivery and has been held to operate contractually in accordance with the parties' intentions.[32]

In *Beesley v Hallwood Estates Ltd* [33] an option to grant a renewal of a lease was held to be void. However, the lessor had already executed a deed of lease for the ensuing term following the tenant's purported exercise of the option to renew it. The deed was held to be operative immediately on its being signed, sealed and delivered by the lessor company, subject only to the lessee executing a counterpart of the deed of lease. Upon fulfilment of this condition, title to the leasehold interest passed to the lessee. The deed was dispositive and operated despite the

31 Eg *Beesley v Hallwood Estates Ltd* [1960] 1 WLR 549 and [1961] 1 All ER 90; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 All ER 941 and *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109.

32 Eg *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109. Note that while a deed will not itself be dispositive at law where title passes for example by registration under the Torrens System of land title an unregistered deed may be effective to create a legal short term lease which does not require registration even under this system of land title.

33 Ibid.

unenforceability of the contractual relationship involved in the option transaction.

The later Court of Appeal decision in *Vincent v Premo Enterprises (Voucher Sales) Ltd* [34] has been discussed above. It was decided on the effect of the deed as a dispositive act. That case could, on its particular facts, have been determined on a contractual basis, but the Court held that the deed, once executed by the company, was operative as a dispositive document. Lord Denning MR said:[35]

> A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. 'Delivery' in this connection does not mean 'handed over' to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound.

The crucial distinction between the contractual and dispositive stages touched on by Lord Denning in this extract from *Vincent* explains the apparently divergent decision in *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers*.[36] The Chief Judge in Equity in the New South Wales Supreme Court held that a deed executed by the trustees under seal was not operative despite apparently being within the ratio of *Beesley v Hallwood Estates Ltd*.[37] The distinction he made implicitly was that the parties were contemplating the contractual stage rather than the dispositive stage. Despite the fact that the documents had been formulated as deeds, the Chief Justice held that the parties 'had adopted the form of a deed, as a document to embody their agreement'.[38] He had referred earlier in his judgment to *Eccles v Bryant*[39] where Lord Greene MR said :

> When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well known, common and customary method of dealing, namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place.

Helsham CJ refused to allow the deeds to operate on execution, as they would normally do, because he held that they were, in fact, intended, not as dispositive instruments, but as no more than simple contractual documents and therefore not operative until exchanged in accordance with normal conveyancing practice.[40] The effect of this decision by Helsham CJ is a tacit acknowledgment that the operative function of deeds is a dispositive one. The particular attribute of deeds as instruments of disposition *viz* the rules as to their operation via delivery and the sub-rules as to conditional delivery or delivery in escrow, have no application in a purely contractual context.

34 See n 31 above.
35 [1969] 2 All ER 941 944.
36 [1977] 2 NSWLR 109.
37 [1961] 2 All ER 90.
38 [1977] 2 NSWLR 109 121.
39 [1948] 1 Ch 93, 99.
40 [1977] 2 NSWLR 109, 117. See also criticism of the effect of the execution by corporations of deeds under the Law of Property Act 1925 (UK) s 73(1) and s 74(3) in Alberry, 'Execution of Deeds by Companies' 89 LQR 14.

When a contractual instrument has been cast in the form of a deed, the contractual nature of the transaction prevails over the format of the instrument. Deeds, in other words, have a dispositive function only and not a contractual function in property transactions. They are not contractually functional except in so far as they may by chance fulfil, by their written nature, requirements of contractual form.

Deeds 'import consideration'—historical perspective

Judicial and academic acceptance at face value of the statement that 'deeds import consideration' in the modern commercial arena may have unforeseen consequences in transactions such as options to purchase interests in land, options to renew leases, contracts for sale of land and charges over real and personal property including floating charges. Accordingly, the historical basis for the statement needs to be explored to determine the legitimate application of this maxim, which has allegedly been elevated to a general rule of law.[41]

A series of cases relating to voluntary bonds executed under seal and delivered to the mistresses of the obligors, have often been quoted as authority for the general proposition that consideration is not necessary to the operation of a deed.[42] Bonds, of course, simply involve the obligor binding himself to another for the payment of a *fixed sum of money* payable immediately or at a *fixed time in the future*[43] and are to be distinguished from deeds generally. Deeds are described by *Halsbury*, for example, as requiring that the person named in the instrument makes, confirms, concurs in, or consents to some assurance of some interest in property or of some legal or equitable right, title or claim, or undertakes or enters into some obligation, duty or agreement enforceable at law or in equity, or does or concurs in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation.[44] The courts of common law allow an ascertained sum due under a deed to be recovered as a specialty debt and where this is possible lack of valuable consideration in the deed is immaterial.

Accordingly, the cases enabling fixed sum annuities granted by voluntary bonds to be recovered cannot be seen as justification for the general proposition for which they are quoted. It is now too late to expect a retraction of the attribute of deeds that enables recovery of a fixed sum covenanted to be paid under seal as a specialty debt. However, the explanation given in *Sherrington v Strotton*[45] that the common law considers entry into a deed sufficiently deliberative to require enforcement, whether there was consideration or not, is persuasive and appropriate as a rationale for the enforcement of a solemn promise and it is unnecessary

41 *Halsbury's Laws of England* (4th edn 1975) Vol 12 para 1355.

42 See eg *Halsbury* Vol 12 para 1355; *Spicer v Hayward* (1700) Prec Ch 114; *Turner v Vaughan* (1767) 2 Wils KB 339; *Hill v Spencer* (1767) Amb 641; *Gray v Mathias* (1800) 5 Ves 286; *Nye v Moseley* (1826) 6 B & C 133; *Hall v Palmer* (1844) 3 Hare 532; and *Re Vallance* (1883) 26 Ch D 353.

43 See eg definition in *Halsbury* Vol 12 para 1385.

44 Ibid para 1355.

45 Heard Michaelmas Term 7 & 8 Elizabeth and reported in *The Commentaries or Reports of Edmund Plowden* (1761) Vol 1 at 308-309 as *Sharington v Strotten* but later cited by eg Bacon, see n 47 below, as *Sherrington v Strotton.*

to import into the transaction consideration in the form of fictional value given or received.

As a statement of general application, the importing of consideration into a property transaction by the use of a deed has serious limitations and is not justified by the *Sherrington* case itself. The role of consideration was explained in that case as follows:

> Because words are often times spoken by Men unadvisedly and without deliberation, the law has provided that a Contract by words shall not bind without consideration . . . And the Reason is, because it is by Words which pass from Men lightly and inconsiderately, but where Agreement is by Deed, there is more Time for Deliberation. For where the Man passes a Thing by Deed, first there is the determination of the Mind to do it, and upon that he causes is to be written, which is one Part of Deliberation and afterwards he puts his seal to it, which is another part of Deliberation, and lastly he delivers the Writing as his Deed, which is the Consummation of his Resolution; and by Delivery of the Deed from him that makes it to him to whom it is made, he gives his Assent to part with the thing contained in the deed to him to whom he delivers the Deed, and this Delivery is a Ceremony in Law, signifying fully his Good-will that the Thing in the Deed should pass from him to the other. So that there is a great Deliberation used in the making of Deeds, for which reason they are received as a lien final to the party and are adjudged to bind the Party without examining upon what cause or consideration they were made.

Close perusal of this extract from *Plowden's Commentaries* and its context shows that the report itself was making a clear distinction between the contractual or executory stage of a property transaction and the passing of the property or dispositive stage. The extracted comment was preceded by the following analysis:

> Admitting the considerations to be insufficient, or admitting that no consideration had yet been expressed, yet the Covenant of itself without consideration is sufficient to raise the uses. And in order to understand this the better, let us see what advantage the party here shall have by the Deed, if the Deed be not sufficient to raise the uses. And it seems clearly that he shall have none. For he cannot have an action of Covenant upon the Deed, because there is nothing executory here . . . for he covenanted and granted presently to stand seized to use upon which no action of covenant lies. . . . So here when he covenanted from thence forth to be seized to the Uses Limited, Andrew Baynton had the land to his own use, and made an Indenture between him and Edward Baynton, that from thence forth he should be seized of it to other Uses, here is a sufficient consideration why the same should be done, viz. the will of him that has the thing, and greater than this there is no consideration.

Accordingly, in order to effectuate the transfer of property, consideration is necessary even when the promise is incorporated in a deed, unless the transfer of the property has been completely implemented by the deed. The following conclusion[46] from *Plowden's Commentaries, as* authority for the general proposition 'that every deed imports in itself consideration', often quoted,[47] must be seen in this context.

> So that where it is by Deed, the cause or consideration is not inquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself

46 Ibid 309.

47 Eg Bacon, *Readings on the Statute of Uses* (1600) reproduced by Garland Publishing (1979) 404; Fonblanque & Ballow, *A Treatise of Equity* (1793-1794) reprinted by Garland Publishing (1979) 27.

a consideration, viz the will of him that made it . . . and here there is a consideration contained in the Deed, viz. the will of Andrew Baynton, which is sufficient of itself, for this reason the uses shall be raised thereby, and if this should not be sufficient to raise them, yet they should have been raised by other considerations, if they had been without deed, whereas here they are by deed, and so they shall be raised a *fortiore.*

Sherrington's case clearly was based on the proposition that the covenantor has in fact *conveyed* the property to the use of the coventantee by the covenantor's present covenant and grant to stand seized of his property for the use of the covenantee. There was no cause of action based on the covenant because there was nothing executory or contractual to be enforced. The 'consideration' imported into the transaction by its formal implementation as a deed was the volition or will of the covenantor in passing over his property to another.

Practical consequences

One practical result of this analysis may be seen in relation to the transactions analysed above whereby a property owner agrees to 'charge' his property with the repayment of an obligation. Such an arrangement, it is argued, remains contractual[48] and, in the absence of consideration between the parties to the arrangement, the promise would be unenforceable even where embodied in a deed.

A further example, which has been subjected to detailed judicial analysis,[49] is the assignment of future property, particularly intangible property such as a chose in action. A future chose in action is by its very nature not a presently existing property right. It is a mere future expectancy—a possibility of a future right to the enforcement through the courts of an obligation that gives rise to an interest in property. Examples include the right to dividends not yet declared on shares in a company or interest to become due in the future on a loan. Such choses in action have no present existence and cannot be assigned or otherwise dealt with by a presently effective dispositive act of the person into whose ownership they may or may not come. However, in a loose sense, such property may be assigned in equity. Where a contract has been entered into for the assignment of the future choses in action, equity will regard the owner as bound to assign once the future chose comes into his ownership. Equity will, in other words, order specific performance of the contract to assign the chose when that contract is rendered capable of specific performance by the coming into existence, or the acquisition by the 'assignor' of the chose.

A voluntary conveyance of a future chose is entirely inoperative both at law and in equity and the use of a deed as the instrument of disposition is of no effect. The transaction remains in the contractual stage and a deed does not cure the absence of consideration where the transaction is not based on value received or to be received.

In *Norman v Federal Commissioner of Taxation*[50] Windeyer J said:

As it is impossible for anyone to own something that does not exist, it is impossible for anyone to make a present gift of such a thing to another person,

48 See discussion above.
49 See eg Windeyer J in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 24-41.
50 Ibid 24.

> however sure he may be that it will come into existence and will then be his to give. He can, of course, promise that when the thing is his he will make it over to the intended donee. But in the meantime he may change his mind and when the time comes refuse to carry out his promise, even though it were by deed. A court of law could not compel him to perform it. A court of equity would not. . . . Things not yet in existence could only be the subject of agreement, not of present disposition. And, in relation to promises and agreements, equity has been faithful to its maxim that it does not come to the aid of volunteers. For equity a deed does not make good a want of consideration.
>
> If we turn from attempted gifts of future property to purported dispositions of it for value, the picture changes completely. The common law objection remains. But in equity a would-be present assignment of something to be acquired in the future is, when made for value, construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. The purported assignee thus gets an equitable interest in the property immediately the legal ownership of it is acquired by the assignor, assuming it to have been sufficiently described to be then identifiable.

While his judgment was given as a dissenting judgment on the facts in *Norman*, Windeyer J's discussion of the law has been subsequently endorsed by the High Court.[51]

In the absence of consideration, a deed operates as a dispositive instrument and will therefore often accomplish the transfer of property to an intended donee in circumstances where the donee is powerless to enforce the underlying arrangement. However, where, as with non-statutory charges and assignments of future, tangible or intangible, property, the transaction does not progress beyond the contractual stage; a voluntary arrangement will remain unenforceable even when incorporated in a deed.

Conclusion

Once it is accepted that deeds are operative in property transactions as dispositive instruments, it becomes clear why the alleged general attribute of deeds as 'importing consideration' into voluntary transactions is fallacious. Deeds are operative as instruments by which the parties dispose of, and acquire, interests in property. Hence a voluntary conveyance is effective by deed, not because of some fictitional insertion of consideration into the transaction, but simply because the deed is the means whereby the donor has done all that the donor needs to do to complete the gift by transferring his rights to the property.[52] In other words, if there is no consideration involved in a transaction, it cannot be supported as a contract. The transaction can only be effective if the parties' expectations are fully implemented by transferring the relevant property interests to the donee. Therefore, a deed, rather than supplying consideration for a voluntary property transaction, actually implements the transaction and

51 See eg Kitto J in *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385, 397.

52 See *Anning v Anning* (1907) 4 CLR 1049 per Griffith CJ; *Brunker v Perpetual Trustee* Co Ltd (1937) 57 CLR at 600-602 per Dixon J; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 per Windeyer J. Where title to the particular property passes at law in accordance with the intentions of the parties, a deed provides evidence of that intention of land transactions where legal title passes only by deed of its equivalent; eg s 23B Conveyancing Act 1919 (NSW).

thereby obviates the necessity to rely on the non-existent preliminary contractual stage.

If deeds do not import consideration into a property transaction, but operate only as dispositive instruments, where the only basis for a particular relationship is contractual, the use of a deed in the absence of consideration will be ineffectual to affect property rights. A contract will not arise simply through the use of a deed. However, deeds have a further attribute apart from property transactions that is neither a dispositive nor contractual function. By reason of the solemn ceremony of execution of a formal document, the *common law* will enforce certain types of obligations expressed in a deed whether voluntary or for value. Bonds undertaking payment of annuities, gratuitous guarantees of another's obligations, deeds poll as to change of name or deeds undertaking to accept a lesser sum in satisfaction of a debt are all enforceable at common law, but are neither contractual nor dispositive property transactions and are accordingly outside the scope of this rationalisation. However, the enforceability of these obligations does not need to be rationalised as a fictional contract, but can quite sensibly be based on the deliberative intent of the covenantor, without creating a legal maxim of general import about the function of deeds as suppliers of consideration.