

EQUITY AND THE DOCTRINE OF CONSIDERATION

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I. INTRODUCTION

There are two areas of the law where the doctrine of consideration plays a part: in the law of contract, and in the law of conveyancing. The whole structure and corpus of the English law of contract is, of course, vitally affected by the existence of the doctrine, but its influence in the law of conveyancing, though important, seems at first sight episodic and arbitrary. It soon becomes obvious to the law student that the term "consideration" as used by conveyancers means something different from the term as defined for the purposes of the law of simple contracts in *Currie v. Misa*,¹ and that the function of the doctrine of consideration is markedly different in the two branches of the law. At least, he learns that for certain purposes the law of conveyancing is satisfied with "good" consideration as opposed to "valuable" consideration; and while he is aware that the doctrine of consideration serves in the law of contract to differentiate between enforceable contracts and unenforceable agreements, he is probably unable to say with any degree of precision what its function is in the law of conveyancing. But what he will observe is that consideration in the law of conveyancing seems to be somehow linked with the device of the use, and this might well suggest that the conveyancing rules are the creation of equity. Moreover, he learns that even in the province of the law of contract, equity refuses to follow the law in the sense that it denies its remedies where the promise sought to be enforced is under seal but otherwise lacks the element of consideration, and also that it seems to enforce in certain cases informal promises made without common law consideration.

What this might plausibly suggest to the student is that there exists an equitable conception or conceptions of the doctrine of consideration, distinct from the common law doctrine; and if equity has indeed developed a separate theory, he might reasonably expect to be able to find without difficulty a statement of that theory, an account of its development, and an explanation of its functions and applications. If, however, he turns to the standard text-books on equity, he will find

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1. (1875) L.R. 10 Ex. 162.

that none of them has a chapter on consideration in equity, and he is left to make out the relevant principles as best he may by studying the index references to a number of disparate subjects and synthesising the results.² The purpose of this article is to assist the student by sketching in outline the elements of the equitable doctrine.

II. CONSIDERATION AND CONVEYANCING

We must begin our survey by considering the place of the doctrine of consideration in the law of conveyancing; for it seems unquestionable that it was the development of the new modes of conveyancing made possible by the willingness of the Chancellors to enforce uses which led them to formulate the doctrine in the form that certain uses would be enforced only if consideration was to be found, or that a use would be implied in the conveyor unless he had received consideration for the conveyance.

In the forms of conveyance developed by the common law in the Middle Ages by means of which a freeholder could dispose of his interest, consideration had no place; and this was true whether a conveyance took effect by the act of the parties as in a feoffment with livery of seisin or depended upon the machinery of the courts, as in a fine or a recovery. The development of the oldest and simplest form of use, in which the legal estate was conveyed to one or more feoffees upon uses declared either at the time of the conveyance or, more commonly, by the feoffor's testament, led to no change in this respect. But a major change did occur with the emergence of the doctrine of implied uses. In the course of the fifteenth century it became very common for a feoffor to convey land to feoffees to be held to his use until he gave them further directions, and meanwhile to remain in possession and enjoy the profits of the land. This practice led to the growth of a rule that if there was a feoffment to the feoffees, and the feoffor continued in possession and enjoyed the profits, the law implied a use in the feoffor's favour, and a corresponding duty in the feoffees to make estates according to his direction. Under this rule, the presumption of a resulting use arose in concrete and readily determinable circumstances; but an important shift occurred when, in Edward IV's reign, it was decided that whenever a man conveyed land to feoffees without express declaration of a use, the use resulted to him.³ The existence of a resulting use was thus no longer ascertainable merely by examining who was in possession and who derived economic benefit from the land. Hence, once the rule had become settled in this form, it became imperative to have some test by which it could be determined whether a feoffment to uses was intended

2. It is a great merit of Professor Ford's *Cases on Trusts* that it collects in one chapter many important cases and much useful material on this subject.

3. Holdsworth, H.E.L. Vol. IV, p. 423.

when A enfeoffed B and made no express declaration of uses. The test which was applied was whether or not consideration existed for the feoffment. If the feoffees gave no consideration for the feoffment, there was a presumption of a resulting use to the feoffor.

It will be realised that the purpose of the doctrine of consideration in this context was to serve as a means for determining a presumptive intention. An intention that feoffees were to hold to the use of the feoffor would be implied unless some good reason existed for the enfeoffment; and the term "consideration" was used simply as an expression for any reason which was deemed sufficient to rebut the presumption of a resulting use.⁴ Such a reason might be found in the payment of money by the feoffees or in other facts which established that the feoffees had given valuable consideration in the common law sense. But it might also be found in the existence of a blood relationship between feoffor and feoffee. Such a relationship was regarded as supplying a "good" consideration sufficient to negative the presumption of a resulting use to the feoffor.

The notion of consideration was used also in connection with the use which arose when the legal owner of an estate agreed to sell his freehold to another, or when he covenanted to stand seised to the use of another. It had been settled prior to the enactment of the Statute of Uses that a use would be implied from a bargain and sale, so that the bargainor by virtue of the agreement would be seised to the use of the bargainee. The effect of the Statute was to vest the legal estate in the bargainee, with the result that there was made available a new form of conveyance operating without any transmutation of possession. In the case of the bargain and sale, the payment of the purchase price constituted sufficient consideration to raise the use; and as the name itself implied, the consideration was necessarily a pecuniary one. But a wider view was taken of the kind of consideration which sufficed to raise a use upon a covenant to stand seised. Until the beginning of the sixteenth century, a covenant to stand seised to a use would be enforced in equity only if the covenantee had given value. But, shortly before the passing of the Statute, the opinion that natural love and affection was a sufficient consideration had begun to gain ground. This view finally prevailed in the case of *Sharlington v. Strotton*.⁵ By an indenture between Andrew Baynton and Edward his brother, the former, to the intent that a certain manor might descend to the heirs male of his body and might continue to such persons of the blood and name of Baynton as were named in the indenture, covenanted to stand seised to the use of himself for life, remainder to the use of his brother Edward and his wife for their lives, remainder to the use of his own heirs male,

4. Simpson: An Introduction to the History of Land Law, p. 167.

5. (1565) 1 Plowd. 298.

and in default of heirs male, remainder to his other brothers. The Court of King's Bench held that the considerations of the continuance of the land in the name and blood, and of brotherly love, were sufficient to raise the uses limited. The arguments which led to this decision are recorded in great detail in the report. On the one hand it was urged that the covenant was a mere *nudum pactum*, that there was no benefit to the covenantor, and that there was "no cause here but what would have been if no such covenant or indenture had been made". The arguments on the other side admitted that consideration was necessary to raise a use, but asserted that a consideration proceeding from the natural affection for one's kindred was sufficient. The latter argument prevailed; nature, said Catline C.J., was the greatest consideration that can be to raise a use.

In this context, the doctrine of consideration was obviously not applied as a test of a presumptive intention. Its functions were rather to determine the situations in which claims of covenantees under a covenant to stand seised would be enforced; and for this purpose the courts declared themselves prepared to recognise the claims of those who would be the proper objects of a family arrangement. The circle of those who were regarded as within the natural love and affection of the covenantor was extended to his wife and to the wife of his son, but love and affection for an illegitimate child or for an old acquaintance were held not to be a sufficient consideration to raise a use.⁶

Thus from the rules evolved by the Court of Chancery as to the circumstances in which a use would arise by operation of law or be implied from the acts of the parties there developed the concept of good or meritorious consideration, the sphere of operation of which has always remained confined to the law of conveyancing. But reciprocally there developed in the law of conveyancing a body of law on the doctrine of consideration which had its origin in two Elizabethan statutes, and which equity subsequently took over and applied outside the sphere of conveyancing. The Statute 13 Eliz. c. 5 of 1571 enacted that conveyances made with intent to defraud creditors should be void as against creditors whose actions might be in any way hindered or delayed thereby; but it excepted from the operation of this provision any estate or interest in lands or goods, on good consideration and bona fide, lawfully conveyed to any person not having notice of the fraud. The Statute 27 Eliz. c. 4 of 1584-1585 provided that conveyances of land made with intent to defraud a purchaser for money or other good consideration were void as against such purchasers. Under the earlier statute, the critical question was whether the conveyance was made with a fraudulent intent. In

6. See the cases collected in Cruise's Digest, Vol. 4, at pp. 117-121.

*Twyne's Case*⁷ the court set out in detail the circumstances in which it would infer such an intent, for example, the fact that the settlor remained in possession of the property; but later cases recognised that there were no rules establishing particular circumstances as infallible signs of fraud, and that the question whether the fraudulent intent existed in a particular conveyance was to be determined only on the facts of the case in question. Under the operative part of the Act, the lack of consideration for the conveyance is a material fact in considering whether there was an intent to defraud, but it is not conclusive that there existed any such intent; and the existence of consideration is not conclusive that there was no intent to defraud. But under the proviso, it is necessary for one who relies thereon to prove both good consideration and the fact that he had no notice of the intent to defraud.⁸ It would seem, therefore, that under the operative part of the Act consideration serves as a test of the commercial honesty of the settlor,⁹ whereas under the proviso it is a factor, the presence of which absolves the grantee's conscience from the obligation to restore the property to the grantor. Despite the use of the term "good consideration", it was decided in 1601 in *Twyne's Case* that what was meant was valuable consideration¹⁰ and that all considerations of nature or blood were excluded. The result therefore is that the prima facie right of a creditor who establishes the fraudulent intent of a settlor to have a conveyance set aside will be defeated if the conveyee proves that he took an estate or interest in good faith and for valuable consideration; and a person takes in good faith under the Act unless he was aware of the fraudulent intent.¹¹

The tendency manifested in *Twyne's Case* to erect external tests of fraudulent intent left a more permanent mark on the interpretation of the Statute 27 Eliz. c.4. For the rather remarkable view was taken of this Act that if a settlor made a voluntary conveyance, this was void against a subsequent purchaser for value, even though he had notice of it.¹² The rule was expressed and criticised by Grant M.R. in these terms:¹³

7. 3 Rep. 80. See Smith's Leading Cases, p. 1.

8. *Glegg v. Bromley* [1912] 3 K.B. 474, at p. 492 (Parker J.).

9. Where a settlement is founded upon valuable consideration, it is necessary for the creditor to prove an actual and express intent to defraud; but where it is not founded upon valuable consideration, it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect: *Freeman v. Pope* (1870) L.R. 5 Ch. 538.

10. The Law of Property Act, 1925 (England), which replaces 13 Eliz. c.5, excepts conveyances made in good faith for either valuable or good consideration.

11. See *Re Holland, Gregg v. Holland* [1902] 2 Ch. 360.

12. Except in the case of a voluntary conveyance to a charity: *Ramsay v. Gilchrist* [1892] A.C. 412.

13. In *Buckle v. Mitchell* (1812) 18 Ves. 100, at p. 110.

"It must, I conceive, be assumed, that the Statute of the 27th of Elizabeth has now 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 purchaser for a valuable consideration, even when the purchase has been made with notice of the prior voluntary settlement. I have great difficulty to persuade myself, that the words of the Statute warranted, or that the purpose of it required such a construction; for it is not easy to conceive, how a purchaser can be defrauded by a settlement, of which he has notice, before he makes his purchase."

The significance of these two Statutes in the present context is this: that as very many of the settlements which it was sought to impugn as fraudulent were made in favour of close relatives of the settlor, and as the giving of valuable consideration by the grantee was an essential element in enabling him to avail himself of the exception clause in 13 Eliz. c.5 or to avoid the effect of the interpretation placed upon 27 Eliz. c.4, the question frequently arose under both statutes whether a relative had given valuable consideration. As remarked above, it was of no avail for a grantee to establish kinship or natural love and affection to him by the grantor, since this amounted merely to good or meritorious consideration. It was thus necessary for him in many instances to establish that he came within the consideration of marriage; and it was largely in cases involving allegations of fraudulent settlements that the scope of marriage consideration was defined by the Court of Chancery, and then applied as a test for the enforcement of covenants in marriage settlements.

III. MARRIAGE SETTLEMENTS

The rules which were worked out as to what constituted valuable consideration under the Statute 27 Eliz. c.4 may be stated summarily in these terms:

- (a) An ante-nuptial settlement followed by marriage, or a post-nuptial settlement made in pursuance of an ante-nuptial agreement, was good as against a subsequent purchaser for value.
- (b) The consideration of marriage extended to the issue of the marriage, who took as purchasers in right of both parents.
- (c) Limitations in favour of collaterals were, as a general rule, voluntary, but they would be supported if there was any party to the settlement who purchased on their behalf.¹⁴
- (d) A gift to volunteers would not be defeated by a conveyance to a purchaser when the gift to them was so mixed up with a gift to non-volunteers as to be incapable of being separately held invalid.¹⁵

14. *Heape v. Tonge* (1851) 9 Hare 90, at p. 104.

15. Per Lindley L.J. in *Att. Gen. v. Jacobs Smith* [1895] 2 Q.B. 341, at p. 350.

It is still an unresolved question whether this last rule is peculiarly one for avoiding the principle that voluntary settlements are void against subsequent purchasers, or whether it is one which the courts would apply in determining whether to enforce an incompletely constituted marriage settlement.¹⁶ In the case of *Newstead v. Searles*¹⁷ it was held that a settlement by a widow in favour of her issue by a former marriage was not liable to be avoided on the ground that they were volunteers. The explanation of that case given by the Privy Council in *De Mestre v. West*¹⁸ was that the order of the limitations in that case was such that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument without also giving effect to the others. There seems to be nothing in this statement which would confine it to the particular case of settlements which were to be regarded as voluntary under the Statute of 27 Eliz. c.4. But in *Att. Gen. v. Jacobs Smith*¹⁹ Lindley L.J., referring to the use which could be made in the interpretation of revenue legislation referring to a "voluntary disposition" of cases upon the construction of the statute of 27 Eliz. c.4, stated:

"The only use of those cases on the present occasion is to throw light upon the meaning of the term 'volunteer'. I have listened to the arguments upon them, and I do not think it is easy to deduce from them any one general proposition which would be consistent with the whole of them. Some of the decisions are very difficult to reconcile with each other, some of them, indeed, are to my mind irreconcilable; but there is one feature which appears to me to be common to the whole of them, namely, that the consideration of marriage extends only to the husband and wife and the children of that marriage, and that all other persons whether they are children of a former marriage or children of a subsequent marriage, or whether they are brothers, or whether they are illegitimate children, or whether they are strangers altogether, are volunteers in some sense. But there are cases, of which *Newstead v. Searles* is one, to the effect that children of a first marriage may not be volunteers in such a sense that the limitation to them is necessarily invalid in favour of a purchaser of value under the Statute of 27 Eliz. c.4. I do not think you can read *Newstead v. Searles* or any other case as going the whole length of saying that those persons to whom I have alluded are not volunteers. They are volunteers, but not liable to be defeated under the Statute of 27 Eliz. c.4."

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16. This question was recently argued fully in *Rennell v. Inland Revenue Comrs.* [1962] 1 Ch. 329, but left unresolved. See the report at pp. 341-2.
 17. 1 Atk. 265.
 18. [1891] A.C. 264, at p. 270.
 19. [1895] 2 Q.B. 341.

It is, of course, trite law that an agreement to create a trust will not be enforced in equity in favour of volunteers: equity will not assist a volunteer. It is in the field of agreements to settle property upon marriage that the rules which determine whether a person has given valuable consideration by way of marriage find their most frequent application. Some of the more important cases on this point are conveniently brought together in Professor Ford's Casebook on Trusts. In *Re Plumtre's Marriage Settlement*²⁰ a husband and wife covenanted in an ante-nuptial settlement to settle the wife's after-acquired property on certain trusts, with an ultimate trust for the wife's next of kin. The wife died intestate without issue, and her husband obtained administration of her estate. The question for decision was whether certain stock standing invested in the name of the wife at her death was bound by the trusts for the settlement of the after-acquired property. It was held by Eve J. that it was not. The next of kin, not being within the marriage consideration, were mere volunteers, and hence unable to enforce an executory contract to settle the property. In *Pullan v. Koe*²¹ it was held by Swinfen Eady J. that the trustees of an ante-nuptial settlement containing an after-acquired property clause were entitled to obtain such property from the husband's executors, since they had the right to come into a Court of Equity to enforce a contract to create a trust for the benefit of the wife and the issue of the marriage, who alone were entitled under the terms of the settlement. In *Re Kay's Settlement*²² the children of the settlor were mere volunteers, since the settlement in their favour had been executed by her while she was a spinster and not as part of a marriage settlement. They were thus unable to compel performance by her of a covenant to settle after-acquired property. But could they, or the trustees on their behalf, claim damages for breach of that covenant? It was held by Simonds J., following the decision of Eve J. in *In re Price*,²³ that they could not. However, in *Cannon v. Hartley*²⁴ a volunteer was held entitled to damages for breach of a covenant to settle after-acquired property contained in a deed of separation of her parents to which she was herself a party, since, as Romer J. remarked, she did not require the assistance of the court to enforce the covenant for she had a legal right herself to enforce it. In *Re Price* and *Re Kay's Settlement* the next of kin or children were not parties to the deed nor within its consideration, and thus had no right to claim the assistance of a court of equity nor to proceed at common law by an action for damages, but in *Cannon v. Hartley* the plaintiff did not need to invoke the assistance of equity,

20. [1910] 1 Ch. 609; Ford, p. 154.

21. [1913] 1 Ch. 9; Ford p. 158.

22. [1939] Ch. 329; Ford p. 161.

23. [1917] 1 Ch. 234.

24. [1949] Ch. 213; Ford p. 166.

since she was entitled as a party to the deed to seek damages at common law for the breach of covenant.

IV. CONSIDERATION AND CONTRACTS

It is not intended to discuss in this article the question how far, if at all, the origins of the doctrine of consideration in the law of simple contracts are to be found in the Chancellor's adaptation of the Canonist's doctrine of *causa*.²⁵ It is possible that the common lawyers appropriated a conception which had first been utilised by the Chancellors, but it is more likely that they merely took over a term which had become familiar and developed a quite independent doctrine.²⁶ What is significant for the present discussion is that whether or not the common lawyers borrowed the concept from Chancery, and whether or not the stimulus to find a simple test for the enforceability of informal promises came from a determination to check the encroachments of equity, the result of the sixteenth century developments in the law of contract was that equity in exercising its concurrent jurisdiction over contracts eventually accepted the common law doctrine that voluntary informal contract would not be enforced. In *Colman v. Sarrel*²⁷ Lord Chancellor Thurlow observed:²⁸

"The question is, whether you can have a voluntary agreement executed in Equity. The difficulty is to show a case, where any voluntary gift has been executed in Equity."

And again:²⁹

"Where a deed is not sufficient in truth to pass the estate out of the hands of the conveyor, but the party must come into Equity, the Court has never yet executed a voluntary agreement. To do so would be to make him, who does not sufficiently convey, and his executors after his death, trustees for the person, to whom he has so defectively conveyed; and there is no case, where a Court of Equity has ever done that. Whenever you come into Equity to raise an interest by way of trust, you must have a valuable or at least a meritorious consideration."

As the last sentence clearly shows, there was still some doubt late in the eighteenth century whether good consideration sufficed to found a claim for specific performance. Moreover, in the case of family arrangements, it was stated by Lord Chancellor Hardwick³⁰ that "a court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family"; and the same view was expressed by Lord Chancellor Northington.³¹

25. See on this topic Pound: *Consideration in Equity*, 13 Ill. L. Rev. 435.

26. See Fifoot: *History and Sources of the Common Law*, at p. 398.

27. (1789) 1 Ves. Jun. 50.

28. At p. 52.

29. At p. 54.

30. In *Stapilton v. Stapilton* (1739) 1 Atk. 2, at p. 11.

31. In *Wycherley v. Wycherley* (1763) 2 Eden. 175, at p. 178.

"I know no instance where a court of equity has compelled a man to execute what was a mere act of volition. But I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say, that it has done so) attend to slight considerations for confirming family settlement and modifications of property. They pay a regard to reasonable motives, and honourable intentions. In these cases they will not weigh the value of the consideration. They consider the ease and comfort and security of the families as a sufficient consideration."

That a decree of specific performance would not be made in favour of a grantee who had given only good consideration was first clearly established only in 1841 in the case of *Jefferys v. Jefferys*.³² A father had by a voluntary settlement covenanted to convey certain copyhold estates to trustees in trust for the benefit of his daughters. Later he devised part of these estates to his widow. A suit by the daughters to compel the widow to surrender the copyholds was dismissed. Lord Chancellor Cottenham stated:³³

"With respect to the copyholds. I have no doubt that the Court will not execute a voluntary contract; and my impression is that the principle of the Court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement."

But although there was some doubt until the mid-nineteenth century whether meritorious consideration would suffice to invoke the Court's assistance to enforce the specific execution of contracts, there was no doubt that equity would not make its remedies available where the transaction was under seal but without consideration. It should not, however, be concluded that equity ignored the effect of a seal in all instances. The case of *Fletcher v. Fletcher*³⁴ is instructive on this point. A settlor by a voluntary deed covenanted with trustees that if his two illegitimate sons, or either of them, survived him, he or his executors would pay a sum to the trustees upon trust for his illegitimate sons or such of them as should attain twenty-one. One of the sons having survived the settlor and attained twenty-one claimed to be entitled to the sum. The trustees in their answer declined to take proceedings at law or in equity to recover the sum, but stated they were willing to act as the Court should direct. It was held that the son was entitled to payment of the sum out of the assets of the testator. This decision is stated in Nathan³⁵ to lay down a rule which is an exception to the principle that equity will not perfect an imperfect gift. It is, however, suggested that the case creates no exceptional rule. Sir James Wigram V.C. was careful to point out

32. (1841) Cr. & Ph. 139.

33. At p. 141.

34. (1844) 4 Hare 67; Ford p. 149.

35. Equity through the Cases, 4th Edition, at p. 307.

that the plaintiff was claiming no assistance against the settlor or his personal representatives. By executing the deed, the settlor had bound himself absolutely, and there was a debt created and existing which the trustees might have recovered. The question for decision therefore was whether the rights of the cestui que trust were to depend on the caprice of the trustees, or whether he was to be allowed to sue for himself in the name of the trustees. Referring to the rule that volunteers may not recover in equity, he stated:³⁶

"The rule against relief to volunteers cannot, I conceive, in a case like that before me, be stated higher than this, that a Court of Equity will not, in favour of a volunteer, give to a deed any effect beyond what the law will give to it. But if the author of the deed has subjected himself to a liability at law, and the legal liability comes regularly to be enforced in equity the observation that the claimant is a volunteer is of no value in favour of those who represent the author of the deed. If, therefore, the Plaintiff himself were the covenantee, so that he could bring the action in his own name, it follows, from what I have said, that in my opinion he might enforce payment out of the assets of the covenantor, in this case. Then, does the interposition of the trustee of this covenant make any difference? I think it does not."

The sequence in the argument is clear. Equity will not make its remedies available to a volunteer. But if in a proceeding in Chancery the Court is only required to give effect to legal rights, and such rights accrue under a voluntary deed, the absence of consideration is no reason why it should not enforce those rights. The execution of the deed vested a right to recover the money, that is, a chose in action, in the trustees at the time of the suit, and the rights of the cestui que trust were not to be defeated by their refusal to sue the executor.

V. THE CREATION OF TRUSTS

The rules relating to the necessity for valuable consideration in the constitution of a trust are in part a logical result of the principle expounded in the preceding section. If a settlor promises to transfer property to trustees and fails to do so, or if the transfer is ineffectual, equity will intervene in favour of the cestuis que trust only where consideration has been given for the promise or the transfer. Where, however, the property has been effectively transferred to the trustees, a valid and enforceable trust will be created though no consideration was given for the transfer. A promise to create a trust³⁷ or an ineffectual transfer in trust will be treated as a contract to create a trust and will be specifically enforced in equity if valuable consideration (including marriage consideration) has been given by the party seek-

36. 4 Hare, at p. 77.

37. See hereon *Brennan v. Morphett* (1908) 6 C.L.R. 22, Ford p. 146.

ing performance; but where the settlor has done everything necessary on his part to transfer the trust property, a decree for specific performance is unnecessary to constitute the trustees' title and the existence of consideration is irrelevant. This is clearly expressed in a famous dictum of Lord Eldon in *Ellison v. Ellison*:³⁸

"I take the distinction to be, that if you want the assistance of the Court to constitute you cestuy que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestuy que trust; as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant: but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court."

There remains the method of creating a trust by way of declaration of trust.³⁹ At first sight it would appear that whether the analogy of a contract or of a conveyance was to be applied, consideration for the declaration would be essential if the cestuis que trust were to seek to enforce it. To hold that the owner of property was bound by a gratuitous declaration of trust of that property would seem to be inconsistent both with the contractual principle that gratuitous promises are not binding and with the conveyancing principle that delivery is essential to the validity of a gift not under seal.⁴⁰ Moreover, in the case where the property was land, the analogy of the covenant to stand seised would seem to suggest that at least good consideration was necessary: for although the effect of consideration in the covenant to stand seised was to raise a use which would be executed by the Statute of Uses, and it would be logically consistent with this to hold that a declaration of trust of land would be enforced in equity though gratuitous, it would seem to indicate a change of policy so far as the effect of gratuitous undertakings was concerned. But none of these problems seems to have bothered Lord Eldon, whose decision in *Ex parte Pye*⁴¹ created *uno actu* the rule that a gratuitous declaration of trust is valid. In the very brief report, Lord Eldon used language which is reminiscent of the above-quoted dictum in *Ellison v. Ellison*. He repeated that the court would not assist a volunteer, but would enforce a voluntary completed act. His point seems to be that whether a settlor had effectively transferred property to trustees or whether without transmutation of possession he had by a declaration of trust changed the character in which he himself held the property, the title of the trustee to the property was complete and

38. (1802) 6 Ves. 656, at p. 662.

39. See Scott on Trusts, Vol. 1, Secs. 28-30.

40. It should be remembered, however, that the rule that delivery was an essential element in parol gifts was only finally settled in *Cochrane v. Moore* (1890) 25 Q.B.D. 57.

41. (1811) 18 Ves. 140; Ford p. 72.

did not require any intervention by the Court to perfect it; and consequently consideration was not required.

The principle expressed in *Ex parte Pye* was grudgingly admitted to be well established by Lord Chancellor Cranworth, who stated in *Jones v. Lock*⁴² that "there is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty⁴³ may be perfectly valid even when voluntary". Inevitably the co-existence of rules that equity will enforce a gratuitous promise to hold property in trust for a donee, and that it will not enforce a gratuitous promise to give property to a donee or an ineffectual transfer to a donee has led to attempts to torture invalid gifts into valid declarations of trust. *Ex parte Pye* itself would seem to be a case where the attempt was successful, and *Morgan v. Malleon*⁴⁴ was another. But Turner L.J., in his classical summary of the law relating to voluntary settlements in *Milroy v. Lord*,⁴⁵ pointed out that if a voluntary settlement was intended to take effect by transfer, "the Court would not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." According to Jessel M.R. in *Richards v. Delbridge*⁴⁶ this last sentence contains the whole law on the subject, and it is difficult to find any case since that decision where the Courts have shown readiness to construe an ineffectual transfer as a valid declaration of trust.

VI. PERFECTING IMPERFECT GIFTS

One interpretation which might have been given to the principles expressed in *Ellison v. Ellison*⁴⁷ was that if a donor purported to give property to a donee, or to a trustee for a donee, and for any reason the assignment was ineffective to transfer the property, equity would not intervene to compel the donor to perfect the assignment or to hold the property in trust for the intended donee. If this view had been adopted and consistently applied, it would have had the effect prior to the Judicature Act of making voluntary equitable assignments of legal choses in action unenforceable except in the case of those exceptional choses which were assignable at law. There is authority for saying that where the legal title to choses in action was transferable, a voluntary assignment bound the assignor only if he had transferred the legal title to the donee or to a trustee in trust for the

42. (1865) 1 Ch. App. 25 at p. 28; Ford p. 86. His Lordship had stated the contrary in *Scales v. Maude* (1855) 6 De G.M. & G. 43, at p. 51.

43. The rule was held to apply to trusts of land in *Steele v. Walker* (1860) 28 Beav. 466.

44. (1870) 10 Eq. 475, Ford p. 88.

45. (1862) 4 De G.F. & J. 264.

46. (1874) 18 Eq. 11, Ford p. 86.

47. (1802) 6 Ves. 656.

donee.⁴⁸ But where the chose was not assignable, the test first laid down by Sir John Leach M.R. in *Fortescue v. Barnett*⁴⁹ was "whether any act remained to be done by the grantor which, to assist a volunteer, the Court would not compel him to do". The effect of the authorities on this point is expressed by Marshall⁵⁰ in these terms:

"When, therefore, was an assignment complete? The answer seems to be that the assignor must have done everything possible to perfect the assignment, as for example, by executing a deed of assignment, or giving the assignee an irrevocable power of attorney, or covenanting to perfect the assignment, so that a Court of Equity would not have to act against the assignor in favour of the volunteer."

The Judicature Act made available a procedure by which all legal choses in action could be transferred at law. One question which arose out of this was whether the former rule that a voluntary assignor would be bound only if he transferred the legal title would now be universally applied, or whether an assignment would be considered in equity as perfect if the assignor had done everything necessary to be done by him to assign the chose. This was essentially the question for decision in *Anning v. Anning*.⁵¹ In this case there was a voluntary assignment of bank deposits which would have been a valid legal assignment under the Judicature Act if notice had been given to the debtor (the bank), but it had not. At the time when the action was brought it was impossible to perfect the legal title, since the bank was no longer the debtor; though it would seem that the gift would have been perfect if the donees had given notice to the bank upon the donor's death. The question was whether the assignees were entitled to recover the amount of the deposits from the donor's estate. The actual decision was that they were so entitled, but what is of more importance is the opinion of the three judges on the principles to be applied.

Griffith C.J. interpreted the words "necessary to be done" as used by Turner L.J. in *Milroy v. Lord*⁵² as meaning "necessary to be done by the donor" in order that the donee may establish his title to the property. As notice could have been given by the donees, the donor had done everything necessary to be done by him to perfect their title under the Judicature Act. Hence the assignment was good in equity.

48. See Sheridan: Informal Gifts of Choses in Action 33 Can.B.Rev. 284. The learned author cites as authorities for requiring transfer of the legal title *Searle v. Law* (1846) 15 Sim 95; *Milroy v. Lord* (1862) 4 De G.F. & J. 264; and *Heartley v. Nicholson* (1875) L.R. 19 Eq. 233. A more extensive list of authorities is given in Marshall: Assignment of Choses in Action, pp. 136-7.

49. (1834) 3 My. & K. 36.

50. Op. cit., at p. 132.

51. (1907) 4 C.L.R. 1049.

52. [1862] 4 De G.F. & J. 264, at p. 274.

Isaacs J. took the same view of the meaning of the expression "necessary to be done", and considered that independently of the Judicature Act the question whether the transfer was complete depended upon whether there was anything left undone which the donee was required to ask the donor to do. But in his opinion the effect of the Judicature Act was to render it impossible to make a voluntary equitable assignment of a legal chose in action. He stated:^{52a}

"If the legal title is assignable at law it must be so assigned or equity will not enforce the gift. If for any reason, whether want of a deed by the assignor, or a specifically prescribed method of transfer, or registration, or statutory notice, the transfer of the legal title is incomplete when the law permits it to be complete, equity regards the gift as still imperfect and will not enforce it. In such a case, the fact that the assignor has done all he can be required to do is not applicable."

Nevertheless, Isaacs J. held that the amount deposited was recoverable on the ground that the purported gift had been made by deed, and there was an implied covenant not to do anything which would have the effect of preventing the donee from obtaining the benefit of the gift. Hence the amount of the debt could be recovered from the donor or his executor for breach of this covenant by receipt of the debt before notice was given by the donee to the debtor.

Higgins J. agreed with Isaacs J. as to the effect of the Judicature Act, but declined to follow him on the point as to the liability of the donor's estate on the implied covenant.

This case is clear authority for saying that the old rule that an imperfect or voluntary assignment of a chose in action assignable at law will not be enforced in equity has since the enactment of the Judicature Act become a principle of universal application. But if the purpose of the Judicature Act was to fulfil and not to destroy, it was certainly arguable that the Act did nothing to impair the former rule that voluntary equitable assignments would be enforced in equity if the assignor had done everything necessary so far as he was concerned to enable the assignee to obtain the legal interest. In *Re Rose*⁵³ the Court of Appeal applied this rule to hold that an assignment of company shares was complete in equity once the donor had executed a document which was appropriate for transferring the shares to the donee, and had handed this document and the relevant share certificate to her. The legal title to the shares did not pass to the donee until the company registered the transfer, but as the beneficial interest had passed, the donor held the legal title until registration upon trust for the donee. Under the old rule, the purported gift would not be effective even in equity until the transfer

52a. 4 C.L.R. at p. 1069.

53. [1952] Ch. 449, Ford p. 90.

had been registered; and if the company refused to register, the donor would not be compelled to be a trustee of the shares for the donee.

Recently, Windeyer J. in a discussion of the subject of voluntary equitable assignments⁵⁴ expressed the opinion that the weight of authority was in favour of the view "that in equity there is a valid gift of property transferable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that on his part is necessary to give effect to that intention and arms the donee with the means of completing the gift according to the requirements of the law." His Honour thus gave his support to the principles expounded in *Re Rose*, though he recognised that this involved a departure from the majority rule in *Anning v. Anning*.

One case cited by his Honour to support this proposition was *Brunker v. Perpetual Trustee Co. Ltd.*⁵⁵ It should be observed that there were at least two critical differences between the position of the donee in that case and in the case of *Re Rose*.⁵⁶ One was that the memorandum of transfer handed to the donee was not a registrable instrument, as it did not contain a memorandum of the encumbrances to which the estate was subject, and hence was not the appropriate instrument for transferring the donor's interest. The other was that the memorandum of transfer was not delivered to the donee or to any one on her behalf.⁵⁷

Parol Gifts of Land

There are a number of cases in which it has been held that if X gratuitously promises to convey land to Y, and Y relying upon the promise enters upon the land and makes improvements on it, equity will compel X to carry out his promise. *Dillwyn v. Llewelyn*⁵⁸ is the leading authority for that principle. The head-note to that case in the English Reports⁵⁹ reads:

"A father placed one of his sons in possession of land belonging to the father, and at the same time signed a memorandum that he had presented the land to the son for the purpose of furnishing him with a dwelling-house. The son, with the assent and approbation of the father, built at his own expense a house upon the land and resided there. Held, that this was not a mere incomplete gift, but that the son was entitled to call for a legal conveyance, and not merely of a life estate, but of the whole fee simple."

54. In *Norman v. F.C.T.* (1963) 37 A.L.J.R. 49. Of this discussion Dixon C.J. remarked that "I do not know that there is anything contained in it with which I am disposed to disagree".

55. (1937) 57 C.L.R. 555; Ford p. 123.

56. [1952] Ch. 499.

57. An important question which was discussed but not settled in that case was whether a gift of land held under the Torrens Act would be complete on execution of the memorandum of transfer and delivery of it to the donee, or whether delivery of a certificate of title was also requisite.

58. (1862) 4 De G.F. & J. 517.

59. 45 E.R. 1285.

At first sight this would seem to be a clear exception to the principle that equity will not perfect an imperfect gift. Lord Chancellor Westbury attempted to answer this difficulty:⁶⁰

“About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage of B., included, with the knowledge of A., in the marriage settlement of B., A. would be bound to complete the title of the parties claiming under that settlement. So if A. puts B. in possession of a piece of land, and tells him, ‘I give it to you that you may build a house on it’, and B. on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made. The case is somewhat analogous to that of a verbal agreement not binding originally for the want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance. The early case of *Foxcroft v. Lester* (2 Vern. 456), decided by the House of Lords, is an example nearly approaching to the terms of the present case.”

It is suggested with respect that the analogy referred to in the above remarks is even more misleading than most analogies are wont to be. The principle established by *Foxcroft v. Lester* was, as Lord Redesdale said in *Bond v. Hopkins*⁶¹ “that it was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out”. If, therefore, a valid though unenforceable parol contract existed between the parties, and the plaintiff relied upon the equitable doctrine of part performance to avoid the effect of the Statute of Frauds, then the acts done in execution of the contract would give rise to those equities upon which, as the Earl of Selborne L.C. said in *Maddison v. Alderson*,⁶² the defendant is really charged in a suit founded on part performance. But the preliminary question must always be whether a valid contract existed, and as part of this whether valuable consideration for the promise is to be found. The statement in *Dillwyn v.*

60. (1862) 4 De G.F. & J., at p. 521.

61. 1 Sch. & L. 433. See White & Tudor's Leading Cases in Equity, Vol. 2, p. 414 (9th ed.).

62. (1883) 8 A.C. 467, at p. 475.

Llewelyn that the subsequent expenditure by the son, with the approbation of the father, supplied a valuable consideration originally wanting seems to be an admission that what was being enforced was not the contract itself but the equities arising out of the acts of the parties. And the same conclusion emerges even more clearly from the further statement that "the equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum except as that shews the purpose and intent of the gift".

In *Raffaele v. Raffaele*,⁶³ D'Arcy J. of the Supreme Court of Western Australia, followed *Dillwyn v. Llewelyn* in holding that where parents, having orally promised to transfer land to their son if he built a house on it, put him into possession of the land and acquiesced in his building a house on it, the expenditure of money by the son supplied a valuable consideration for the parents' promise. Here again it would seem that the only purpose of trying to find valuable consideration was to enable the son's administratrix to rebut the contention that this was a voluntary imperfect gift which equity would not enforce.⁶⁴ The same concern seems to lie behind the classification by Gresson J. in *Thomas v. Thomas*⁶⁵ of *Dillwyn v. Llewelyn* as a case of equitable estoppel by acquiescence. His Honour recognised that if it were so regarded, it was "an authority for the use of that doctrine as a sword and not merely as a shield". But this admission, it is submitted, is fatal. What it suggests is not that *Dillwyn v. Llewelyn* is an exception to the rule that estoppel operates only as a shield, but that the case does not rest on the principle of estoppel at all.

A quite different explanation of the principle that equity will compel the owner of land who makes an ineffective gratuitous conveyance to complete his gift in favour of a donee who has entered into possession and made improvements on it is suggested by Pound⁶⁶ and Williston.⁶⁷ Pound's view is that these are not cases of contracts enforced specifically, but are rather cases of parol conveyances in which putting the donee into possession is in substance equivalent to a livery of seisin. Williston suggests that it is probable that the actual delivery of possession of the land has been regarded as analogous to completing a gift. It is, however, submitted that this attempt to reconcile the principle with the rule that equity will not perfect an imperfect gift by asserting that the gift is perfect fails as much as does the approach

63. [1962] W.A.L.R. 29. This case is discussed in Allen: An Equity to Perfect a Gift. 79 L.Q.R. 238.

64. It should be observed that in *Raffaele v. Raffaele* there did exist valuable consideration for the parents' promise under what D'Arcy J. termed the "contract proper" as opposed to the "notional contract" created by the conduct of the parties.

65. [1956] N.Z.L.R. 785.

66. Consideration in Equity. 13 Ill. L. Rev. 435.

67. Law of Contract, s.139.

which maintains that the promise is not gratuitous. For it would seem to be patently clear that the legal interest in the land would not pass by virtue of the promise and the subsequent acts done thereunder, and that consequently the gift is imperfect.

It is therefore suggested that this is a case of a genuine exception to the principle that equity will not perfect an imperfect gift. Equity is prepared to enforce the promise to convey not because it is supported by valuable consideration, nor because it regards the delivery of possession as completing the gift, but because the acts done by the donee in reliance upon the donor's promise and with his acquiescence give rise to an equity which is enforced against the donor. The principle which is applicable in these circumstances is identical with that expounded in such cases as *Ramsden v. Dyson*,⁶⁸ *Plimmer v. Wellington Corporation*⁶⁹ and *Chalmers v. Pardoe*.⁷⁰ In the last of these cases, the principle was expressed in these terms:⁷¹

"There can be no doubt upon the authorities that where an owner of land has invited or expressly encouraged another to expend money upon part of his land upon the faith of an assurance or promise that that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation, and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended."

There is no suggestion in this passage that equity's intervention is based on the existence of a notional contract⁷² or notional conveyance. In these circumstances it enforces a gratuitous promise because it would be against conscience to allow the promisor to retain the benefit of the buildings erected on his land by the promisee in reliance upon his promise. The promisor is thus compelled to repay to the promisee the sums expended on their erection or even to convey the land to him. The head-note to the case in the Weekly Law Reports refers to the principle as one of restitution for unjust enrichment. This is, it is suggested, a far better explanation of the decisions than those expressed in terms either of the enforcement of contracts upon valuable consideration or of conveyances which equity treats as perfect because the promisee has entered into possession of the land.

68. (1866) L.R. 1 H.L. 129.

69. (1884) 9 App. Cas. 699.

70. [1963] 1 W.L.R. 677.

71. At p. 681.

72. "Their Lordships observe that Chalmers in both the courts below founded his claim exclusively on his alleged right to an equitable charge. No claim on his part was made arising out of any contract express or implied": [1963] 1 W.L.R. at p. 683.