Deeds, Gifts, and Executed Agreements: A Theory of Unilateral Transfer at Common Law

by

Stéphane Sérafin

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

© Copyright by Stéphane Sérafin 2017
Deeds, Gifts, and Executory Agreements: A Theory of Unilateral Transfer at Common Law

Stéphane Sérafin

Master of Laws
Faculty of Law
University of Toronto

2017

Abstract

This thesis proposes to justify the place of the deed under seal within the common law of contracts. It argues that the effects of this particular device, at least in its more modern form, should not be understood by analogy to consideration-based contracts, but as the result of a unilateral transfer of rights analogous to the executed gift. Following the framework provided by Immanuel Kant’s The Metaphysics of Morals, this second type of agreement arises simultaneously with, and is mediated through, the immediate transfer of particular rights from the deed-maker to the offeree. Accordingly, the enforceability of the deed is tied not to the nature of the promise made, but to the simultaneous performance of the underlying agreement.
Acknowledgments

To my wife, Susana May Yon (美蓉), whose encouragement and support made this work possible, et à mon fils à naître, la source de mon inspiration.

À mes parents, Robert et Joanne, et à ma grand-mère, Estelle, pour leur appui incessant et inconditionnel

À Johanne, Gilbert et Thierry, pour leur aide et leur compagnie au cours de la dernière année.

To my mother-in-law and father-in-law, for their help and support.

To Peter Benson, for his mentorship, guidance, and support throughout my time in the Master of Laws program.

To Mariana Mota Prado, for involving me in her many interesting projects while I was writing this thesis.

To all my Master of Laws colleagues, and particularly to Simon, Jean-Paul, Reem, and Nicholas, for enriching my graduate school experience beyond measure.
# Table of Contents

Acknowledgements .......................................................................................................................................... iii

Introduction .................................................................................................................................................... 1

1 The Deed under Seal: A Theoretical Problem for the Common Law of Contract ...................................... 3  
  1.1 The Deed is an Exception to Contract as Exchange ........................................................................... 5  
  1.2 The Deed is Superfluous to Contract as Promise .......................................................................... 12

2 Agreement and Performance: The Executed Gift Paradigm .................................................................. 17  
  2.1 The Gift is an Agreement ................................................................................................................. 18  
  2.2 Delivery is Performance ................................................................................................................. 26

3 Explaining the Deed under Seal ............................................................................................................. 32  
  3.1 The Deed is Not the Agreement ...................................................................................................... 33  
  3.2 The Deed is Performance ............................................................................................................... 40

Conclusion ................................................................................................................................................... 48

Bibliography .................................................................................................................................................. 51
Introduction

In his influential account of contract as promise, Charles Fried identifies the requirement of consideration as superfluous and inconsistent at best, and contrary to the promissory nature of contractual obligation at worst.¹ He is not alone in this regard. Indeed, most contract theorists writing from the perspective of the Anglo-American common law appear to reject the requirement of consideration, even as they recognise its continued relevance as a matter of positive law.² Some have gone so far as to suggest that the enforcement of all seriously intended promises, whether supported by consideration or not, is much more consistent with the consensual nature of contractual obligation.³ As the argument goes, this approach is more broadly compatible with the two other requirements of a valid contract at common law, namely offer and acceptance, with which consideration appears difficult to reconcile.⁴

If the grounding for consideration appears precarious, however, these concerns pale in comparison to those of the deed under seal, which has historically allowed for the creation of binding contracts even in the absence of consideration. Indeed, while a number of jurisdictions have at one time or another debated the removal of consideration as a requirement of valid contracts, the use of sealed instruments has actually been abolished by statute in much of the United States.⁵ Even authors who defend an innate relationship between contract and

² As Stephen Smith has put it, “[t]here is probably no rule in the common law of contract that has been subject to more criticism than the consideration rule”, later adding that “[o]bservations such as these, together with the fact that civil law systems appear to function perfectly well without a consideration requirement, have led some contract theorists to conclude that the consideration rule is best regarded as an indefensible historical anachronism”: see Stephen A Smith, Contract Theory (Oxford: Oxford University Press, 2004) at 215-16.
³ This view is outlined and critiqued e.g. in Mindy Chen-Wishart, “Consideration and Serious Intention” (2009) Sing J Legal Stud 434.
⁴ These requirements in turn appear to have been adapted from civilian legal sources and imposed upon the existing, largely parole-focused framework of common law contract: see AWB Simpson, “Innovation in Nineteenth Century Contract Law” (1975) 91 LQR 247 at 258-62 [Simpson, “Innovation”].
⁵ On the abolition of deeds under seal and its recognised alternatives in various American states, see Eric Mills Holmes, “Stature and Status of a Promise under Seal as a Legal Formality” (1993) 29 Willamette L Rev 617 at 663-65; by contrast, the form of the deed remains viable in England and Wales even as the requirement of a seal has been abolished: see Law of Property (Miscellaneous Provisions) Act 1989 (UK), c 34, s 1(1)(b) [UK Law of Property Act]; for its part, Canadian common law still appears to require the seal as a condition of validity: see Zwicker v Zwicker, [1899] 29 SCR 527 at 532-33, 1899 CarswellNS 58 [Zwicker], citing Xenos v Wickham (1866), LR 2 HL 296.
consideration conceive of the deed as a customary formality recognised by the positive common law, rather than one tied to any essential feature of contract. ⑥

With these doubts as to the proper basis of the deed in mind, this thesis proposes an alternative, more defensible justification for the role of the deed within the common law of contracts. As I will argue, the effects of this particular device, at least in its more modern form, should not be understood by analogy to consideration-based contracts, but as the result of a unilateral transfer of rights analogous to the executed gift. Following the framework provided by Immanuel Kant’s *The Metaphysics of Morals*, this second type of agreement arises simultaneously with, and is mediated through, the immediate transfer of particular rights from the deed-maker to the offeree. ⑦ Accordingly, the enforceability of the deed is tied not to the nature of the promise made, but to the simultaneous performance of the underlying agreement.

My analysis will proceed in three main parts. The first will begin by examining the place of the deed within theoretical accounts of the common law of contracts. As such, I will first examine contemporary defences of consideration as an inherent feature of contract, to which the deed appears to present an important exception. After turning to alternative, promise-based conceptions of contract, I will argue that both sets of theories point towards an explanation for the deed that is tied not to the enforcement of promises or exchanges, but instead to executed agreements that effect a unilateral transfer of rights.

Part two will then examine the paradigmatic case of unilateral transfer, namely the executed gift, through the framework provided by Kant’s *The Metaphysics of Morals*. ⑧ As I will argue, the executed gift presents a strong contractual basis in the form of a bilateral agreement involving the donor’s intention to give and the donee’s acceptance. This is why civilian legal systems view


⑦ See Immanuel Kant, *The Metaphysics of Morals*, translated by Mary J Gregor, 2nd ed (Cambridge: Cambridge University Press, 1996) at 60-61; while the framework used in this thesis is explicitly Kantian, the reference here to agreements being “mediated” through the transfer of rights also consciously draws on Hegel’s account of contract as “the process in which there is revealed and mediated the contradiction that I am and remain the independent owner of something from which I exclude the will of another only in so far as in identifying my will with the will of another I cease to be an owner”: see Georg Wilhelm Friedrich Hegel, *The Philosophy of Right*, translated by TM Knox (Oxford: Oxford University Press, 1967) at para 72.

⑧ *Supra* note 7.
the donation as a particular species of contract. The chief difference with consideration-based agreements is that the enforcement of gifts is not dependant on promising, but rather the immediate performance of the agreement through the transfer of the gift property that occurs upon delivery. This is why an executed gift is enforceable not as an in personam right, but rather as the fully executed in rem transfer of the thing in question.

Finally, part three will build on this conclusion to argue that the enforcement of deed agreements is consistent with the rationale behind the enforcement of executed gifts. Just as delivery mediates offer and acceptance through simultaneous performance, so too does the deed: by accepting the deed, the receiving party accepts the simultaneous performance of an agreement to transfer the rights set out within the document. Drawing on the role of similar formalities recognised in civilian legal systems, I will conclude that the existence of something like the deed is consistent with, if not mandated by, the nature of an executed agreement.

1 The Deed under Seal: A Theoretical Problem for the Common Law of Contract

The first part of this thesis aims to examine the relationship between the deed and theoretical accounts of the common law of contracts. Before proceeding further, however, it is worth setting out what probably remains the most influential justification for both the deed and consideration, namely the one put forward by Lon Fuller in his 1941 article “Consideration and Form”. This is the conception of both doctrines to which I will propose an alternative below. As Fuller presents them, both consideration and the deed are justified on essentially evidentiary grounds: they mark the existence of agreements that should be enforced on external policy grounds. In this, he

---

9 See e.g. art 1806, para 1 CCQ, which states that “[g]ift is a contract by which a person, the donor, transfers ownership of the property by gratuitous title to another person, the donee”.

10 This conclusion serves to distinguish the deed, which is a form by which parties offer and accept a unilateral transfer through its simultaneous performance, from reified obligations like negotiable instruments that are the physical embodiment of an underlying obligation; I will have more to say on this distinction in Part III, below.

11 Lon L Fuller, “Consideration and Form” (1941) 41 Colum L Rev 799 [Fuller, “Consideration and Form”].

12 This is because Fuller understands both to supply evidence of compliance with various “desiderata” supporting the enforcement of an agreement: see ibid at 813-14.
appears to reject the view of consideration that is typically put forward by courts, according to which exchange stands as an intrinsic requirement of contractual relationships themselves.\textsuperscript{13}

In other words, Fuller’s account presents both consideration and the deed as formalities that are imposed upon the common law of contracts on policy grounds, rather than for reasons that correspond to any intrinsic feature of agreements or promising. This particular conception of both requirements has in turn produced more contemporary accounts that seek to justify their existence on the basis of various, often competing values.\textsuperscript{14} The most notable of these is undoubtedly the efficiency paradigm employed by law and economics scholars.\textsuperscript{15}

While there is much that can be said on the role of the deed in promoting or undermining policy objectives like efficiency, these questions are beyond the scope of this thesis. Instead, my objective is to examine whether the deed can be explained in more formal terms, and perhaps even by reference to an inherent feature of contractual relationships. To do so, I will attempt to place the deed within two broad sets of theories, which I will examine in turn below. The first set corresponds to those theories that view consideration in the form of an exchange as marking the existence of a valid contract.\textsuperscript{16} The second corresponds to those theories that move past a strictly consideration-based view of contracts, and provide a broader framework that can potentially account for all types of enforceable promises recognised at common law.\textsuperscript{17}

\textsuperscript{13} As Stephen Smith notes, “[c]ommon law judges and treatises do not explain the consideration rule by saying that ‘all agreements are in principle enforceable though gratuitous agreements require formalities such as nominal consideration or a seal’”, adding that “[w]hat judges say is that all contracts require consideration… [i]t is presented as a substantive requirement of validity”: see Smith, supra note 2 at 221.

\textsuperscript{14} This view presents a relatively easy solution to the problem identified by Stephen Waddams, according to which there appears to be nothing immutable, universal or eternal with the way that courts have approached the requirement of consideration: see Stephen Waddams, Principle and Policy in Contract Law (Cambridge: Cambridge University Press, 2011) at 58-59.

\textsuperscript{15} This approach to justifying consideration is discussed e.g. in Fried, supra note 1 at 36-37; as Fried concludes, however, theories that explain consideration through the relative economic sterility of gifts do not account for the enforcement of even non-commercial transactions backed by consideration.

\textsuperscript{16} This position appears most explicitly in the work of Peter Benson, who has argued that “[c]onsideration is both central and necessary to contractual liability in the sense that the law postulates an intrinsic link between this requirement and the enforceability of the wholly executory contract according to the expectation principle”: see Peter Benson, “The Unity of Contract Law” in Peter Benson, ed, Theory of Contract Law: New Essays (Cambridge: Cambridge University Press, 2001) 118 at 153 [Benson, “Unity”]; see also Weinrib, supra note 6 at 137-38; Alan Brudner with the collaboration of Jennifer M Nadler, The Unity of the Common Law, 2nd ed (Oxford: Oxford University Press, 2013) at 127-30.

\textsuperscript{17} See most notably Fried, supra note 1 at 5-6.
As between these two approaches, I will argue that neither provides us with the best way of understanding – and justifying – the place of the deed within the modern common law of contracts. Indeed, both of them tend to focus on promises – which are by their very nature executory – rather than the broader notion of agreement. I will then conclude by suggesting that the latter conception of contract provides a more proper basis for making sense of the deed.

1.1 The Deed is an Exception to Contract as Exchange

As Peter Benson has argued, “[n]o doctrine of the common law of contract is more distinctive of it or longer and more continuously established than the requirement of consideration”.¹⁸ This statement does not appear to be particularly controversial: as a legal historians have argued, English law has made the enforcement of promises conditional on a requirement like consideration since at least the sixteenth century.¹⁹ More controversial, however, has been the association of consideration with the notion of “exchange” or “bargain”, which has in turn been used to limit the scope of contractual liability to those cases in which the promisee has supplied something of value – by act of forbearance – in exchange for her receipt of the promise.²⁰

Without wading too far into this particular controversy, it is clear that the exchange-based conception of contract faces at least one major obstacle even on its face. Indeed, while the theory purports to exclude the enforcement of gratuitous promises, it does not – and perhaps cannot – account for the various forms of agreement that the common law does recognise even in the absence of consideration as exchange. The list of such arrangements is relatively long, and potentially includes bailments and negotiable instruments, among others.²¹ However, the most

---

¹⁸ Benson, “Unity”, supra note 16 at 153.
²⁰ For example, Grant Gilmore famously argued that the bargain theory of consideration was an invention of early twentieth century American legal scholarship, and of Oliver Wendell Holmes in particular: see Grant Gilmore, The Death of Contract (Columbus: Ohio State University Press, 1974) at 19-21.
²¹ The problem presented by these classes of agreement have been known since at least the nineteenth century: see Erwin Grueber, “A Difficulty in the Doctrine of Consideration” (1886) 2 LQR 33 at 37 (concluding that arrangements corresponding to the Roman law depositum and mandatum – that is, to the common law notions of bailment and agency – are enforceable even without consideration).
mysterious and ancient of these is probably the particular type of transaction that forms the core subject of this thesis: the agreement concluded by way of deed under seal.22

Viewed in this light, the very existence of the deed as a mechanism to create enforceable promises presents an important challenge to what has undoubtedly remained the prevailing judicial conception of contracts at common law. If the exchange-based conception of contract is to withstand scrutiny, then the deed under seal must inevitably be explained. The first and no doubt most prevalent way of doing so has already been outlined above, namely through Fuller’s particular justification for contractual formalities as marking the existence of societally useful transactions. Since the form of the deed evinces the presence of its own set of societally useful circumstances, Fuller suggests that agreements concluded in this form also warrant enforcement in a similar way as those promises properly backed by consideration.23 This argument is relatively compelling, but it is insufficient on its own to justify the deed in its entirety.24 More importantly, however, it bears repeating that it also offers precisely the type of explanation that this thesis seeks to avoid.

By contrast, the second way of explaining the deed in a manner consistent with contract as exchange has been to evacuate the deed from the contractual domain entirely. Indeed, for those authors who conceive of “contract” as somehow intrinsically tied to – and essentially synonymous with – consideration viewed as an exchange between the parties, then it is difficult to understand how mere compliance with the form of a deed would serve as a valid alternative. Consideration as exchange simply offers little explanation – let alone justification – for the enforcement of these kinds of ostensibly valid agreements. Accordingly, it appears necessary to accept that the deed simply falls outside the domain of contract, properly speaking, meaning that its capacity to generate enforceable rights must be justified on other grounds.

22 As David Ibbetson has argued, the first evidence of the formalisation of covenant through the requirement of a deed can be found in a Year Book case from 1292: see Ibbetson, Historical Introduction, supra note 19 at 25.
23 Fuller, “Consideration and Form”, supra note 4 at 799.
24 Fuller himself concludes that “[d]oubt may legitimately raised… whether there will be any place in the future for what may be called the ‘blanket formality,’ the formality which, like the seal, suffices to make any kind of promise, not immoral or illegal, enforceable”; adding that “[t]he question is whether with our present-day routinized and institutionalized ways of doing business a ‘blanket formality’ can achieve the desiderata which form is intended to achieve”: see ibid at 823.
This is precisely the view of the deed that Peter Benson adopts in his own defense of consideration as exchange. As he explains, the relationship between the parties to a consideration-based contract is “is not reducible to, but is genuinely distinct from, the idea of delivery (or other acts) in the case of a sealed document”, and adding that “[t]here is no reason to assume that the functions of one can be properly understood and explained through those of the other”. That being said, Benson distinguishes the enforcement of gifts from that of consideration-based contracts largely on the basis of the gift’s effect as a “present and exhaustive transfer of control from the donor to donee, leaving no residue of control to be transferred in the future”. He does not appear to do the same with the deed under seal, concluding as he does that each act that establishes some kind of contract-like liability “entails a definite and distinct kind of legal relation and these relations are constituted by different sorts of acts of the parties reasonably interpreted”.

This latter conclusion appears to be confirmed by statements that Benson has made in his older work, according to which the deed under seal can best be understood as a customary formality recognised by the positive common law. The thought implicit in this statement – namely, that the deed cannot really be given a coherent explanation at all – is largely reaffirmed by Ernest Weinrib. Indeed, he draws on Benson’s insight as a means of excluding the deed from his discussion of contract entirely:

Since I am looking at contract law as the juridical embodiment of corrective justice, the validity of unilateral promises under seal is not relevant. As Benson points out in “Contract Law and Corrective Justice,” promises under seal do not reflect the normative contours of transactions as such; rather, they are creations of positive law, which for instrumental purposes makes available a means of juridically binding oneself. Hobbes’s discussion of contract implicitly illustrates Benson’s point. Hobbes assumes that the natural law of contract, which is used to emerge from the state of nature, incorporates the doctrine of consideration, not the doctrine of seals, presumably because seals, being creations of positive law, have no validity in the state of nature.

26 Ibid at 259.
27 Ibid at 278.
29 Weinrib, supra note 6 at 138, n 30.
In other words, both Benson and Weinrib appear to recognise that the deed relates to a distinct kind of transaction from consideration-based contracts. At the same time, both explain its application on largely historical grounds, as a decision made by the positive common law, rather than on the basis of any higher order principle. This conclusion raises serious doubts as to the continued relevance of the deed under seal, and may well lend support to those jurisdictions that have chosen to abolish it completely.\textsuperscript{30}

At least two issues arise out of the particular solution put forward by these two authors. The first is that it is largely semantic: it simply redefines contract in a way that excludes exceptions to the consideration-based theory that they espouse, without explaining why consideration-based agreements are particularly deserving of the name.\textsuperscript{31} The second is that their proposed solution – classifying the deed as a customary formality – does not actually provide an answer to the core issue posed by the deed, namely why it provides, and whether it should continue to provide, a means of enforcing what would otherwise be unenforceable gratuitous promises.

Indeed, the role played by the deed in this respect is even more perplexing when one considers its deep incompatibility with consideration as exchange: not only does it remove the need for consideration, but the form of the deed corresponds to a one-sided transaction that necessarily lacks consideration.\textsuperscript{32} The explanation Weinrib offers via Benson – according to which the deed amounts to a customary formality – appears largely unsatisfactory against this backdrop. Even if we are to accept his suggestion that the deed is a formality recognised only by the positive

\textsuperscript{30} See note 5 above and accompanying text; this conclusion also lends further support to Fuller’s contention that the use of the deed as a universal formality may be largely eclipsed in modern contract law: see note 24 above and accompanying text.

\textsuperscript{31} A broader, agreement-based conception of contract is of course susceptible to the same kind of criticism; the main advantage this latter view of contract presents, however, is that it allows for all forms of voluntarily assumed rights and obligations to be understood through the lens of a single causative event that is distinct from the commission of a tort, on the one hand, and the receipt of something not due, on the other: see generally Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 UW Austl L Rev 1.

\textsuperscript{32} As Benson explains, “[w]hereas the acts giving rise to an obligation via a sealed document are unilateral, the acts that are requisite to an obligation via the requirement of consideration are bilateral”: see Benson, “Consideration”, supra note 25 at 246.
common law, one would hope that it could nonetheless be anchored in at least some underlying principle on which the common law has chosen to elaborate.33

By contrast to these authors, who cast the deed as a customary formality recognised by the positive common law, Alan Brudner proposes an alternative theory for the deed under seal that attempts to explain its operation, on the one hand, while distinguishing it from those contracts backed by consideration as exchange, on the other. The following excerpt summarizes his position on the issue:

In fact, gratuitous promises under seal are enforced not as executory contracts but as executed gifts. A gift does not pass title to the donee until delivered, but the delivery of a sealed deed of gift counts as symbolic delivery of the object. In the same way, a promise signed, sealed, and delivered transfers possessory title to the donee, and the court enforces that title. Thus, the seal is not an alternative to consideration in triggering the enforcement of a promise; rather it is something that (along with delivery) transforms a promise into an executed transfer—a conveyance. By contrast, the element required for the enforceability of a promise as promise is consideration. So, inasmuch as the seal belongs to the deed of gift whereas consideration belongs to contract, we cannot surmise anything about the point of consideration—even nominal consideration—from the function of the seal.34

As the last sentence of this excerpt suggests, Brudner’s discussion of the deed under seal appears to be aimed primarily at distinguishing it from consideration – or rather, to differentiate the nature of consideration from that of the seal, and thus from Fuller’s account of consideration as a “good reason for enforcing a promise”.35 In this, he echoes the position of both Weinrib and Benson.36 Nonetheless, the explanation that Brudner offers here goes further than these authors do in actually providing an explanation for the deed on the basis of an entirely separate legal category, namely the executed gift.

33 By this, I mean that it should at least be possible to frame the deed as a determination made by the positive common law on the basis of some higher-order principle; Kant provides three examples of such determinations in his work, one of which is not coincidentally the enforcement of gratuitous agreements: see Kant, supra note 7 at 78-79; for his part, Hegel recognises the role that positive legal determinations must play inter alia in setting the degree of control sufficient to unilaterally acquire particular things, and with respect to the effects of rights publication systems: see Hegel, supra note 7 at paras 55, 217.
34 Brudner & Nadler, supra note 16 at 199.
35 Ibid at 198.
Brudner’s chief contribution in this respect is through his proposed analogy with the notion of symbolic delivery, which the common law, like most civilian legal systems, admits as a way of completing gifts under particular circumstances. I will have more to say on this particular point below. For now, however, is it simply worth noting that this conclusion does not tell us why the form of the deed is recognised as a substitute for the physical delivery of gift property. All it tells us is that it should be understood as such. This being the case, it remains entirely possible – and indeed likely – that Brudner also means to anchor the effects of the deed in a determination made by positive law, rather than in ideal contract theory, even as it provides us with some deeper basis in which to ground its application.

That being said, Brudner’s explanation of the deed also raises a number of questions, and is subject to important limitations in its own right. First and foremost, it is clear that his proposed analogy between the deeds and the executed gift is not a natural one for most common lawyers: the former is usually understood as a part of contract, while the latter is usually given treatment in textbooks on property law. Brudner’s proposed connection between the deed and the executed gift thus appears to require that the category of contract be expanded to include other forms of gratuitous promises, or that the deed be reclassified as a part of property law.

Second, Brudner’s proposed analogy between the effects of the deed and the executed gift presents a number of important practical difficulties. This is because both types of agreement are not entirely the same, at least not on their face. While the executed gift corresponds to an immediate transfer of a particular thing, the deed can be used to create arrangements that are closer to what we might call obligations – which is to say, an undertaking to do something in the future. In theory, these obligations need not even pertain to the transfer of a particularised thing

37 See Part III B, below.
39 This much is further confirmed by enactments like the UK Law of Property Act, supra note 5, s 1(1)(a), which purports to eliminate any rule retraining the subject matter of a deed.
at all, even if the colloquial usage of the term “deed” tends to present it almost exclusively as an instrument used to effect the transfer of rights in real property. These features of the deed largely explain why it has tended to be associated with consideration-based contracts, and through them, the executory rather than executed agreement.

Finally, and perhaps most importantly, Brudner’s explanation of the deed does not actually explain why the delivery is required to effect a unilateral transfer in the first place, even if we accept that positive law is free to impose the deed as an alternative to it. This much is perhaps understandable given his primary focus on explaining – and justifying – the requirement of consideration as exchange. The closest that Brudner actually comes to explaining the operation of delivery thus arises in his discussion of exchange itself: it serves as a form of limited recognition of one’s possessory title through its alienation and acceptance by another.

This explanation is promising, though ultimately incomplete. What’s more, Brudner goes on to say that the unilateral transfer that results from gifts does not bind third parties, while a transfer effected by means of exchange is property binding against everyone. In this respect, his argument appears to be inconsistent with the basic position taken by the common law – and indeed, by most legal systems influenced by Roman law – according to which the executed transfer confers a full right in rem, while it is the executory contract that confers only a limited in personam right to claim a thing: a jus ad rem. These minor issues aside, however, it is relatively clear that Brudner’s analogy between the deed and symbolic delivery provides the

---

40 The confusion between deeds and the transfer of real property is of old vintage, and has occasionally been noted by courts; see e.g. Town of Eastview v Roman Catholic Episcopal Corporation of Ottawa, 47 DLR 47, 44 OLR 284 (SC, App Div) (stating that “[w]hile in technical language any document under seal… is a ‘deed,’ the word ‘deed’ is most frequently used in the popular sense of a conveyance of real estate”).
41 Brudner & Nadler, supra note 16 at 127.
42 Ibid.
43 This position is most notably enshrined in modern German law, which requires a separate dispositive act from the conclusion of a contract to actually effect the transfer of property: see arts 873, 929 BGB; that being said, even modern French law, which operates on the basis that consent alone is sufficient to transfer in rem rights, restrains the effect of that transfer until delivery has actually occurred: see art 1198 C Civ; Brudner’s position is instead more defensible as an explanation for the rule recognised in equity, according to which an equitable interest is opposable to all save for a purchaser for value in good faith without notice: see Pilcher v Rawlins (1871-1872), LR 7 Ch App 259.
most compelling explanation for the deed of any of the authors canvassed above, even if he largely completes Weinrib and Benson’s insight that its explanation must be found entirely outside the framework of contract as exchange.

1.2 The Deed is Superfluous to Contract as Promise

As I have suggested above, reconciling the deed with theories of contract as exchange presents some serious difficulties. Invariably, the solution for each of the authors canvassed has been to relegate the deed to a place outside the formal common law of contracts, leaving it to be explained through some other means. For Benson and Weinrib, that basis is to be found in the notion of customary formality – which is to say, in those rules recognised by the positive common law, but which have no place in an ideal theory of contract. For Brudner, the deed is instead more properly understood as a species of executed gift. As between the two, I have suggested that the latter holds greater potential in actually explaining the operation of the deed – if only because it actually seeks to provide an explanation for the deed at all.

Having made this argument, I will now turn to the second set of theories for which the deed presents a problem, namely those theories of contract as “promise”. For the purposes of my argument, this category is understood to encompass not only those theories of contract that are properly based on the act of promising, but also those theories that tie the enforcement of contracts primarily to detrimental reliance resulting from promises.44 This is because both properly promissory theories and detrimental reliance theories remain fundamentally tied to the act of promising in the manner that they explain the enforcement of contracts.45 Accordingly, it is reasonable to expect that both would be hostile to the deed in the same way they are to

44 See e.g. Gilmore, supra note 20 at 79-80; as most authors have recognised, however, reliance theories have never been developed into a singular, unitary theory of contract, and so even proponents like Patrick Atiyah have recognised the continued relevance of a more properly promissory conception of contractual liability: see PS Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979) at 778-79.

45 Contrast Smith, supra note 2 at 80 (arguing that “[t]he terminology of promisors and promisees… suggests that these authors regard the making of a promise as a necessary condition for the creation of a reliance-based duty”, but adding that “if the aim of contract law is to protect the reliance interest, there seems to be no good reason why reliance that is induced without a promise should be ignored”).
consideration – that is, because it amounts to a superfluous requirement to create an enforceable contract.

That these promise-based theories provide a general framework that attempts to explain the enforcement of all promises, whether gratuitous or not, emerges most clearly in the work of Charles Fried. As he explains, “[b]y promising we put in another man’s hands a new power to accomplish his will, though only a moral power: What he sought to do alone he may now expect to with our promised help”. 46 Thus, for Fried at least, the enforcement of gratuitous promises should not be denied on the basis of an absence of consideration, which is incompatible with, and may well actively undermine, the promissory nature of contractual obligation. 47 The same is true of the requirement of delivery attaching to a gift: since there are no external policy reasons that justify the distinction between executed gifts and gratuitous promises, the promissory principle requires that the latter be enforced even where delivery has not actually occurred. 48

In other words, requirements like consideration are considered superfluous because they operate in addition to – if not in contradiction with – the apparent promissory basis of contractual liability that is encompassed within the twin requirements of offer and acceptance. 49 For promise theorists like Charles Fried, this sort of accepted promise is all that should be required of a valid contract, meaning that the additional requirement of consideration as exchange is largely superfluous. 50 Without necessarily accepting Fried’s broader conclusions as to the nature of contract, it appears that he may have a point in this respect. Indeed, there is a relatively strong case to be made that the equation of contract with consideration as exchange has tended to

46 Fried, supra note 1 at 8.
47 As Fried puts it, “the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it”: see ibid at 37-38.
48 Ibid at 37.
49 To be more precise, offer and acceptance embody the bilateral consent more properly associated with an agreement, which is strictly speaking different from the unilateral consent that is required when one party simply makes a promise without the other’s input: see Simpson, “Innovation”, supra note 4 at 258-59; see also Smith, supra note 2 at 56.
50 As Fried concludes, consideration is unable to offer a coherent alternative to the promise made and accepted as a valid justificatory basis of contract; accordingly, all promises to which assent has been given, including those that are entirely gratuitous, should at least be theoretically enforceable: see Fried, supra note 1 at 35.
obfuscate its deeper connections with consent, such that consideration is often used to explain certain features that might be more properly explained through offer and acceptance alone.\textsuperscript{51}

As might be expected from the foregoing analysis, Fried is at least as hostile to the deed under seal as he is to consideration as a requirement to create an enforceable promise at common law. Indeed, his hostility to the deed may well run even deeper, as he suggests that the “trend away from the seal as an anachronistic relic” has left “the doctrine of consideration as very much the norm”.\textsuperscript{52} Like Weinrib, Fried thus appears to understand the deed under seal as a sort of anomaly, the discussion of which can largely be cast aside in order to deal with the real problem for his theory of contract as promise, namely consideration itself. A similar though far less antagonistic approach to the deed also appears in the work of Stephen Smith, who like Fried endorses a form of promissory theory as the most plausible explanation of contractual liability.\textsuperscript{53} This being the case, it is not surprising that Smith would also approach the deed in much the same way that he approaches consideration – that is, as a formality imposed upon, but not strictly required by, a rights-based theory of contract.\textsuperscript{54}

In other words, both Fried and Smith appear to reject the relevance of the seal on largely the same basis – namely, that the \textit{prima facie} existence of a valid contract should not require compliance with any additional formalities beyond the act of promising.\textsuperscript{55} In defending their respective positions, both authors appear to be aware of the experience of most civilian legal systems, where a highly theorised form of contract law has historically been understood to

\textsuperscript{51} One such example is the privity of contract rule, which has often been justified through the requirement that consideration move from the promisee: see \textit{Tweddle v Atkinson}, (1861), 1 B & S 393; \textit{Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd}, [1915] AC 847 (HL) at 853; while consideration is no doubt relevant to this particular formulation, at least some form of privity can also be derived from offer and acceptance alone, as is evinced by both the existence of a similar rule in almost all modern civilian jurisdictions and the application of an even more rigid form of privity to agreements concluded by way of deed under seal: see e.g. art 1199, para 1 C Civ; \textit{O’Donnell and Nicholson, Re} (1920), 54 DLR 701, 48 OLR 187 (SC).

\textsuperscript{52} Fried, \textit{supra} note 1 at 28-29.

\textsuperscript{53} Smith, \textit{supra} note 2 at 104-5; Smith’s argument is more nuanced than Fried’s, however, in that he argues that much of what is commonly understood as part of “contract law” has a decidedly non-promissory, and thus non-contractual, basis.

\textsuperscript{54} \textit{Ibid} at 151, 232; as might also be expected, Smith’s conclusion in this respect draws heavily on the framework provided by Lon Fuller.

\textsuperscript{55} Fried, \textit{supra} note 1 at 37 (“I conclude that the life of contract is indeed the promise, but this conclusion is not exactly a statement of positive law”); see also Smith, \textit{supra} note 2 at 65.
operate entirely on the basis of mutual consent alone.\textsuperscript{56} Indeed, whatever additional formalities these systems impose as a condition of contractual validity are usually explained on the basis of positive law, rather than as a reflection of any inherent feature of contractual relationships. The promise principle suggests that the common law of contracts should be understood in much the same way, such that additional requirements like consideration or a deed under seal must be explained by reference to extra-contractual principles.\textsuperscript{57}

This last point largely serves to distinguish properly promise-based theories of contract from those that frame contractual liability in terms of reliance. Although not without deeper historical precedent, the modern versions of these theories can largely be traced back to Fuller’s other famous article, “The Reliance Interest in Contract Damages”.\textsuperscript{58} There, he and Perdue argued that damages for breach of contract could often be understood to compensate not the promisee’s bare expectation of performance, but rather her \textit{reliance} on the promisor’s promise.\textsuperscript{59} Although this was probably not Fuller’s intention, many of the theories that have drawn inspiration from this conclusion appear to have used it to recast consideration in a manner that makes it synonymous with the reliance interest itself.\textsuperscript{60} This is the view of consideration that Atiyah appears to defend: rather than being limited to requiring an exchange, or even the receipt of a benefit, he suggests that courts also applied it to ground liability where the promisee had relied on a promise to her detriment.\textsuperscript{61}

Whatever the merits of these reliance-based theories of contract, it is relatively clear that they do not leave much room for the deed under seal. Like the properly promise-based theories of

\footnotesize
\begin{itemize}
  \item \textsuperscript{56} Fried, \textit{supra} note 1 at 36; Smith, \textit{supra} note 2 at 215.
  \item \textsuperscript{57} See \textit{ibid} at 217 (“according to this explanation, the civil law account of what kinds of promises are binding provides a more illuminating description of what actually happens in the common law than that provided by common law description… rather than describing the rule as (roughly) ‘only promises made in exchange for consideration are binding’, the rule should be described as (roughly) ‘promises are generally binding, although some promises, such as gratuitous promises and promises for the sale of land, also require the presence of a formality such as a seal or nominal consideration’”).
  \item \textsuperscript{59} \textit{Ibid} at 71-75.
  \item \textsuperscript{60} As Smith argues, this move appears to be required in order to account for consideration within a reliance-based framework: see Smith, \textit{supra} note 2 at 94; that this was probably not Fuller’s intention is of course supported by his defense of consideration as exchange as a basis for enforcing contracts in “Consideration and Form”, \textit{supra} note 4.
  \item \textsuperscript{61} Atiyah, \textit{supra} note 44 at 184-86.
\end{itemize}
contract, what matters to them is not the accomplishment of any particular formality, but rather the act of promising. The chief difference, of course, is that reliance theorists favour the attachment of liability to the consequences of promises (i.e. detrimental reliance and unjust enrichment), rather than to promises taken on their own. Accordingly, the deed only becomes relevant under this framework insofar as it can be used a sort of shorthand for particularly serious promises, the consequences of which are more likely to result in detrimental reliance or the conferral of an undue benefit. Beyond this, the common law’s insistence on this particular formality appears to contradict the fundamental principles of contract, such that it must be justified on some other basis if it is to be justified at all.

In sum, it appears that both strictly promissory and reliance theories provide only one avenue for explaining the deed under seal – namely, to exclude its operation from the domain of contract as promise entirely, and to seek another basis by which it can be justified. This much is also consistent with the conclusion drawn by proponents of an intrinsic link between contract and consideration as exchange, who likewise conceive of the deed as an exception to their particular theory of contract. Accordingly, it is possible to conclude that neither theory, be it based on contract as promise or contract as exchange, is capable of providing a satisfactory answer for the operation of the deed under seal.

That being said, there remains one potential explanation for the deed that may hold more potential. As I have already mentioned, Alan Brudner excludes the deed from the domain of contract by suggesting that it might be better explained through proprietary terms. In so doing, he goes so far as to analogise the deed with the executed gift – which is to say, with an executed agreement effecting a unilateral transfer of property, rather than an executory promise. It is this

---

62 See e.g. ibid at 4 (“[m]uch of this book is based on the conviction that this traditional attitude to promise-based obligations is misconceived, and that the grounds for the imposition of such liabilities are, by the standards of modern values, very weak compared with the grounds for the creation of benefit-based and reliance-based obligations”); according to Fried at least, the intention behind this move was to subordinate the voluntary aspects of contractual obligations to the more public form of liability enshrined in tort law: see Fried, supra note 1 at 4-5.

63 That the deed is not typically associated with these kinds of promises is consistent with its nearly complete absence from the account of contract provided in Atiyah, supra note 4.

64 See Part I A above.

65 See especially note 34, above, and accompanying text.
solution to the problem of the deed, or at least something very much like it, that I will explore further in Part III of this thesis. Before doing so, however, it is first necessary to explain why the executed gift is enforceable in this way, even if we accept that consideration is necessary to form a binding contract.

2 Agreement and Performance: The Executed Gift Paradigm

In the first part of this thesis, I argued that both exchange and promise-based theories of contract suffer from the same fundamental limitation. Namely, they are both incapable of accounting for the deed under seal, and invariably require that it be explained through principles found outside the domain of contract, as they define it. Having said that, there remains at least one alternative way in which the deed can be understood within a broadly contractual framework – that is, by casting contract not as an exchange or promise, but rather as an executed agreement effecting a unilateral transfer.

Following Alan Brudner’s argument, it is apparent that this sort of arrangement broadly corresponds to the paradigm of the executed gift, according to which a gratuitous promise that would not be recognised for want of consideration becomes enforceable upon delivery of gift property by the donor to the donee. As I will now argue, this result can be explained through recourse to a broadly Kantian framework, in which the gift amounts to an agreement that is simultaneously performed through the delivery and \textit{in rem} transfer of property. Thus, even as gratuitous promise is not enforceable for want of consideration, its simultaneous performance serves to complete the agreement, and means that the donor cannot claim that the donee has been unjustly enriched at her expense.

\footnote{This understanding of the gift is consistent with it amounting to a present act of transfer, rather than an obligation to render future performance; in this, it is largely consistent with the distinction between donations (gifts) and promises proposed in Martin Hogg, \textit{Promises and Contract Law} (Cambridge: Cambridge University Press, 2011) at 46-47.}

\footnote{Kant, \textit{supra} note 7 at 60-61.}
I will proceed in two parts. First, I will begin by outlining the agreement that lies at the heart of
the gift, and which is embodied in the twin requirements that the donor intend to transfer
ownership of the gift property, and that the donor intend to receive it. This intentional component
is crucial to understanding the operation of gifts in Anglo-American law, in that it serves to
distinguish them from related operations, like bailment, that also involve the immediate transfer
of rights in property. Second, I will turn to what is perhaps the most explicitly proprietary feature
of the executed gift, namely the requirement that it be completed by delivery of the gift property.
I will suggest that this requirement is necessary to give effect to the underlying agreement by
directly and immediately performing the transfer of an in rem right to the gift property.

2.1 The Gift is an Agreement

As I have suggested in the first part of this thesis, neither contract as exchange nor contract as
promise are properly capable of accounting for the effects of the deed under seal. Broadly
speaking, the same is also true of the executed gift, for which neither set of theories sets out to
offer a complete or satisfactory explanation. Just as both theories suggest that the deed cannot
be explained by recourse to properly contractual principles, the usual solution to the problem
posed by the executed gift has instead been to cast it outside of contract entirely, and to explain it
through recourse to property law principles. My objective in this section is to highlight how
this particular classification tends to obfuscate the more contractual aspects of executed gifts, and
to suggest that the primary basis of their enforcement is not to be found in property law, but
rather in the notion of agreement.

My starting point in this respect, and for the remainder of this thesis, is the account of property
transfers by contract found in Immanuel Kant’s The Metaphysics of Morals. As Helge Dedek
has argued, this account was primarily meant to avoid what had until then been a circular
argument found in most accounts of transfer theory. Namely, these older theories start from the

68 This much is to be expected in light of their own articular definitions of contract; the main exception in this
respect appears to be Peter Benson, who recognises that his account of consideration must also account for the
enforcement of executed gifts at common law: see Benson, “Consideration”, supra note 25 at 248.
69 See note 38, above, and accompanying text.
70 Kant, supra note 7, especially at 57-61.
presumption that contracts are valid by analogy to a completed transfer of property, but use the
notion of contract to justify the occurrence of that transfer in the first place.\footnote{Helge Dedek, “A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract” (2012) 25 Can J L & Jurisprudence 313 at 337.} This means that
these older transfer theories begin by using the result – that is, the transfer of property rights – to
justify the very thing – the agreement or contract – that was meant to bring said transfer about.\footnote{An example of this approach seems to appear in Grotius’ account of the relationship between contract and the transfer of property: see Hugo Grotius, \textit{De Jure Belli Ac Pacis Libri Tres}, translated by Francis W Kelsey (Oxford: Clarendon Press, 1925) book 2 at ch 11, para 4.}

Accordingly, these same theories are unable to explain the possibility of a truly derivative
acquisition, in which transferred rights pass directly from the transferor to the transferee, rather
than being unilaterally abandoned and subsequently acquired in an unowned state.\footnote{See the discussion in Dedek, \textit{supra} note 71 at 332; while Dedek is primarily concerned with the problem this
poses for the enforcement of promises by analogy to the transfer of property, the same problem applies to the
unilateral transfer of property by a donor to a donee, a point that Hegel appears to recognize when he frames the gift
(or “formal” contract) as the product of a common will: see Hegel, \textit{supra} note 7 at para 76.}

By contrast, Kant’s account presents the transfer of property that occurs upon delivery in a
manner that remains separate from, though the result of, an underlying agreement. As he
explains in the relevant portion of the \textit{The Metaphysics of Morals}:

\begin{quote}
If I conclude a contract about a thing that I want to acquire, for example, a horse, and at the same
time put it in my stable or otherwise in my physical possession, then it is mine (\textit{vi pacti re initii}),
and my right is a \textit{right to the thing}. […] Now if a contract does not include delivery \textit{at the same
time} (\textit{as pactum re initium}), so that some time elapses between its being concluded and my taking
possession of what I am acquiring, during this time I cannot gain possession without exercising a
separate act to establish that right, namely a \textit{possessory act} (\textit{actum possessorium}), which
constitutes a separate contract.\footnote{Kant, \textit{supra} note 7 at 60.}
\end{quote}

As can be gleaned from the above, Kant appears to go so far as to present the contract that
actually operates the transfer of property rights – that is, the \textit{in rem} rights to a thing that are
potentially enforceable against the world at large – as the result of a second, entirely separate
agreement that can be distinguished from the original promise to give.\footnote{See also \textit{ibid} at 59 (explaining that “[t]his right of mine [acquired by contract] is, however, only a right \textit{against a person}, namely a right against a \textit{specific} physical person, and indeed a right to act upon his causality (his choice) to
\textit{perform} something for me; it is not a \textit{right to a thing}…”).}

In this, he largely
follows the approach of German law, which as a rule requires that the transfer of property be
completed through an agreement that is coupled with the simultaneous physical delivery of the
thing in question.\textsuperscript{76} Kant’s intention in doing so seems to have been the separation of the obligation to perform a particular act – which, in the Kantian framework, relates to a right over one’s person that is transferred when one makes a promise – from its actual performance in the delivery of a particular thing.\textsuperscript{77} As Kant explains, this latter act is not a foregone conclusion, especially since the actual performance of the agreement almost inevitably imposes a new set of constraints upon the parties to the original executory agreement.\textsuperscript{78}

Drawing on this latter point for our purposes, it becomes possible to understand the executed gift as something more than just a transfer of property that completes an already-made promise. Instead, it amounts to a separate agreement in its own right, the conclusion of which occurs by way of offer and acceptance mediated through the delivery, and thus the transfer, of the gift property.\textsuperscript{79} This conclusion provides the basis for the donee acquiring ownership directly from the donor, rather than as a unilateral acquisition of abandoned property.\textsuperscript{80} It also suggests that the resulting rights and obligations of the parties are fully determined by the donor’s intentions vis-à-vis the gift property at the moment of delivery, combined with the donee’s acceptance of the property as a manifestation of that intention. Whatever proprietary aspects a common law gift may have, we will need to turn to the framework of contract – in the broader sense of an agreement – in order to understand how these proprietary aspects actually operate.

This argument is by no means an easy one to make. As Richard Hyland points out, the proper classification of the gift is probably one of the most perplexing and enduring issues in the history

\textsuperscript{76} See arts 873, 929 BGB.
\textsuperscript{77} Kant, \textit{supra} note 7 at 59.
\textsuperscript{78} As Kant puts it, “[t]his contract consists in my saying that I shall send for the thing… and the seller’s agreeing to it”, adding that “it is not a matter of course that the seller will take charge, at his own risk, of something for another’s use; this instead requires a separate contract, by which the one who is alienating a thing still remains its owner for a specified time”: see \textit{ibid} at 60.
\textsuperscript{79} This framework is broadly compatible with Hegel’s account of the gift, from which I have drawn the idea of property serving to “mediate” the agreement: see Hegel, \textit{supra} note 7 at paras 74, 76; the chief difference Hegel’s approach presents, however, is that it does not seem to distinguish between the executory promise and the executed agreement in the way that Kant proposes.
\textsuperscript{80} Kant posits that “[t]ransfer by contract of what is mine takes place in accordance with the law of continuity (\textit{lex continui}), that is, possession of the object is not interrupted for a moment during this act; for otherwise I would acquire, in this condition, an object as something that has no possessor (\textit{res vacua}), hence would acquire it originally, and this contradicts the concept of contract”: see Kant, \textit{supra} note 7 at 59; Dedek appears to have this problem in mind when he suggests that Kant had been concerned with the necessity of acceptance, which older theories had been unable to explain by reference to the transfer of property alone: see Dedek, \textit{supra} note 71 at 332.
of western legal thought. The answer one gives to the question depends in many ways on the precise nature of the framework being employed. Anthropological frameworks, for example, will emphasise the innate differences in the types of relationships generated by, and negotiated through, gifts and exchange-based contracts. Thus, a number of common law writers tend to distinguish between these two types of transaction on the basis of the fundamentally different values that each of them is said to embody.

Setting aside any difference in underlying values, however, it is apparent that the common law gift shares with consideration-based contracts the same basic requirement of bilateral assent. In this sense, it is hard to deny that they are both equally contractual, in the broad sense of their being voluntarily concluded agreements. This is an admittedly more formal understanding of the gift than the one Hyland proposes. It is also one that largely echoes modern civilian legal theory, which for its part usually presents the classification of gifts in a largely straightforward manner: the gift is a contract, albeit one to which special requirements apply.

In addition to allowing us to avoid the problem of circularity identified by Dedek, the main advantage of adapting this sort of agreement-based framework to the common law gift is that it allows us to account for a number of its features that are difficult to understand when viewed as a transfer of property alone. Three in particular stand out for our present purposes. The first, already mentioned above, is the requirement that a gift not only be intended by the donor, but also be accepted by the donee. The second, and probably the most important, is the donative

---

81 Hyland provides a relatively thorough overview of the problem and its history: see Richard Hyland, Gifts: A Study in Comparative Law (New York: Oxford University Press, 2009) at 575-95; see also Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (Cape Town, South Africa: Juta & Co, 1992) at 33 (suggesting that the problem can be traced back to Roman law, since the donatio “was not a contract in classical Roman law, but became one in post-classical times”).
82 Ibid at 585-86; see also generally Melvin Aron Eisenberg, “The World of Contract and the World of Gift” (1997) 85 Cal L Rev 821; Hyland adds that that there are a number of other kinds of agreements like trusts and bills of exchange that, at least within common law legal systems, are not governed by contract law, and which ostensibly each embody their own sets of values: see Hyland, supra note 81 at 584-85.
83 See note 31 above and accompanying text.
84 Perhaps the clearest example of this characterisation is found in art 931 C Civ, which provides that “[t]ous actes portant donation entre vifs seront passés devant notaires dans la forme ordinaire des contrats ; et il en restera minute, sous peine de nullité”; the special formalities applicable to gifts in civilian legal systems are discussed further in Part III B, below.
effect of the gift, as distinct from the effects of other kinds of transactions that also involve the delivery of a particular thing. The third is the possibility of making gifts subject to limited kinds of conditions, as in the *donatio mortis causa* or the gift made in contemplation of marriage.

Beginning with the first of these features, I have already suggested that donative intention is an essential element of a valid gift, but it is not sufficient on its own. Indeed, the notion of gift recognised at common law also requires that the donee accept the object of the gift before it becomes binding. In this, the gift is identical to the notion of contract recognised by most civilian legal systems, which have long recognised that no one should be made to accept something to which they have not assented. The main difference is that the common law presumes an intention to accept the gift, by contrast to both the intention to give and the offer and acceptance of a consideration-based contract, which must always be demonstrated. Accordingly, it does not matter that the donee accept the gift property while under the impression that the donor intends to lend it, rather than transfer it completely: the gift will be complete so long as the donor’s intention to give can be demonstrated, and the donee does not manifest an intention contrary to that of accepting the gift as a full and immediate transfer.

This much is consistent with Kant’s contention that a contract effecting the transfer of property amounts to an entirely separate operation from the original promise, even if the transfer only serves to complete the intention already encompassed in the first contract. Indeed, even if we accept that a gift might rest on a prior gratuitous promise that has been accepted by the donee, it is clear that the latter’s intention to actually accept the gift property must be determined on the same basis as the donor’s intention to give – which is to say, separately from the acceptance of the original promise, at the moment of delivery. In Kantian terms, the second operation thus

86 *Standing v Bowing*, 31 Ch D 284 (CA) at 286 (Halsbury LC) [*Standing*]; *Dewar v Dewar*, [1975] 2 All ER 728, 1 WLR 1532 at 1538-39 [*Dewar*].

87 If James Gordley is correct, this appears to have been one of the reasons for which Grotius drew an analogy between contract and the gratuitous transfer of ownership: see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Oxford University Press, 2011) at 81; for a similar but more recent defense of bilateral assent as a fundamental requirement of contract, see Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 119-20.

88 *Standing*, supra note 86 at 286.

89 *Dewar*, supra note 86 at 1538-39.

90 Ibid.
amounts to a “pactum re initium”, a contract in which the agreement occurs simultaneously with
the transfer in question through the bilateral assent of the parties, and which largely corresponds
to what Roman law and modern civilian legal systems recognise as a “real” contract.91

The above conclusion brings us to the second feature of the common law gift that can best be
understood through an agreement-based framework: the donative effect of the gift, as
distinguishable from the effects of other kinds of transactions that are also concluded upon the
delivery of a particular thing. Such is the case, for example, with the unique common law
category of bailment. Like the gift, it can be understood to encompass both properly contractual
and proprietary notions. On the one hand, historical accounts have tended to connect it explicitly
with various types of real contract recognised by Roman law, including the loan for use.92 On the
other, the doctrinal treatment of bailments, like that of gifts, has been mainly reserved for
property textbooks.93

Without wading too deeply into the controversy surrounding the proper classification of
bailments, it is worth noting that an essential feature of its conventional variant is that it requires
delivery of the bailed thing by the bailor to the bailee. In this way, a bailment becomes
enforceable even in the absence of consideration.94 This also means that the only way to
distinguish the executed gift from this particular kind of bailment – which is to say, the bailment
constituted upon delivery of a particular thing, as opposed to set up by a consideration-based
contract – is by reference to the agreement that underlies the delivery of a thing. Where the

91 Kant, supra note 7 at 60; for the Roman conception of real contracts, see Inst 3.14: “[r]eal contracts, or contracts
concluded by delivery, are exemplified by loan for consumption, that is to say, loan of such things as are estimated
by weight, number, or measure, for instance, wine, oil, corn, coined money, copper, silver, or gold: things in which
we transfer our property on condition that the receiver shall transfer to us, at a future time, not the same things, but
other things of the same kind and quality”.
92 See most notably Sir William Jones, An Essay on The Law of Bailments (Dublin: Graisberry and Campbell, 1790)
connecting the concept of bailment with a wide range of Roman law contract archetypes, including deposits,
mandates, and loans for use; see also Zimmermann, supra note 81 at 203 (suggesting that the common law bailment
shares many similarities with the loan contract recognised by both Roman law and modern civilian legal systems).
93 See e.g. in Brown, supra note 38; Ziff, supra note 38 at 319-333; for a contrary view, see e.g. Cosentino v
Dominion Express Co (1906), 16 Man R 563, 1906 CarswellMan 77 (CA); as Zimmermann notes, “To this day,
bailment is a somewhat labyrinthine concept”, adding that it is “often, or even generally, a contract, but it may also
be independent of a contract”: see Zimmermann, supra note 81 at 204.
94 Wheatley v Low (1791), Cro Jac 668, 79 ER 578 (KB); Whitehead v Greetham (1825), 2 Bing 464 at 468, 130 ER
385 (Exch); Shillibeer v Glyn, Bart and Others (1836), 2 M & W 143, 150 ER 704 (Exch of Pleas).
delivering party intends to bail said thing, and the receiving party accepts it on that basis, the
common law recognises a validly constituted bailment. Where the delivering party intends
instead to give the thing, or to deliver it for some other valid purpose, the common law will not
recognise a bailment, but rather a gift or some other form of unilateral transfer.  

The same logic applies with respect to the third and final feature of the common law gift under
study, namely the possibility of making *inter vivos* gifts subject to limited kinds of conditions.
Traditionally, the common law has recognised at least two categories of conditional gift, namely
the gift made in anticipation of death – the *donatio mortis causa* – and the gift in contemplation
of marriage.  

What both types of gift share in common is the possibility of imposing a condition
on the present transfer of property based on some potential future occurrence. Thus, delivery
must occur prior to death in the case of the *donatio mortis causa*, though the gift only becomes
effective if the donor subsequently dies as a result of the same peril that had led her to make the
gift in the first place. In the case of a gift made conditional upon marriage, by contrast, the gift
is considered to have failed if the condition attached to the gift is never satisfied, thereby
reverting back to the donor.  

In both cases, the conditions imposed upon the unilateral transfer of property are determined by
the donor’s intent, rather than the form of the delivery or the nature of the gift property.  

Consistent with the Kantian framework outlined above, delivery constitutes the moment that the

---

95 This same underlying intention is what distinguishes the bailment from property delivered in the context of a sale: see South Australian Insurance Co v Randell (1869) LR 3 PC 101.
96 Similar classes of conditional gift are also recognised by most civil law systems: see e.g. art 1088 C Civ (“[t]oute donation faite en faveur du mariage sera caduque si le mariage ne s’ensuit pas”; beyond these, there is also an interesting parallel to be drawn with the general right to revoke a gift for ingratitude recognised at art 955 C Civ; the historical basis for this right is discussed in John Dawson, Gifts and Promises: Continental and American Law Compared (New Haven: Yale University Press, 1980) at 45-48.
97 Thompson v Mechan (1958), 13 DLR (2d) 103, [1958] OR 357 (CA).
98 Schilthuis v Arnold, 66 ACWS (3d) 1163, 95 OAC 196 (Ont CA); McManus v McCarthy, 2007 ABQB 783, 431 AR 389.
99 See Robinson v Cumming (1742), 2 Atk 409 at 409 [Robinson] (“[i]f a person who makes addresses on a view of marriage, and a reasonable expectation of success, gives presents, and the lady deceives him afterwards, the presents ought to be returned, or the value of them allowed… [w]here made to introduce a person only to a woman’s acquaintance, [he] must take it for his pains…”); Brown v Rotenburg (1945), [1945] OWN 844, [1946] 1 DLR 135 at para 2 [Rotenburg] (“[t]he gift [in contemplation of death] must be made with a view to the donor's death and must be intended to take effect upon his death from the existing disorder”).
agreement crystallises around the gift property. The donor communicates her intention to give, and all the conditions attaching to it, through her offering of the thing, and the donee communicates her intention to receive by accepting it.\(^\text{100}\) What this means, however, is that the donor’s intention continues to dictate the terms of the donee’s resulting entitlement even beyond the point of delivery.

To be sure, the conditions that can be imposed are limited by the requirement that the gift effect an immediate, irrevocable transfer of ownership to be enforceable.\(^\text{101}\) This much is also consistent with the Kantian framework, according to which an agreement effecting the transfer of a thing amounts to an entirely separate contract that arises at the moment of delivery.\(^\text{102}\) Nonetheless, it remains possible for the gift to lapse due to subsequent developments over which the donor had no control. Thus, in the case of the *donatio mortis causa*, the gift is not effective until the donor actually dies: only then does the transfer of title become irrevocable, such that the donor has divested herself entirely of her ownership interest.\(^\text{103}\) In the case of the gift made in contemplation of marriage the transfer has indeed become irrevocable upon delivery, as the donor has conserved a reversionary interest that is subject to conditions outside of her control.\(^\text{104}\)

Taken as a whole, all three of these features of the common law gift – acceptance, donative effects, and limited conditionality – thus point to the primacy of the underlying agreement over the resulting transfer of property. Moreover, each of these features also tends to suggest that it is the agreement concluded at the point of delivery, rather than any previously accepted promise, that should be understood as the proper cause of the gift. This much is consistent with both the Kantian framework and the common law, which holds an executed gift to be enforceable, while the mere promise to give is not. What we have not yet examined, then, is precisely why delivery

\(^{100}\) *Hardy v Atkinson* (1908), 9 WLR 564, 1908 CarswellMan 142 at paras 10, 12 (CA).

\(^{101}\) In this sense, a gift agreement can also be effective if the donee is already in possession of the gift property: see e.g. *Woodard v Woodard*, [1995] 3 All ER 980 (CA) [Woodard]; a similar rule is also explicitly recognised in German law: see art 929 BGB.

\(^{102}\) *Kant*, supra note 7 at 60.

\(^{103}\) *Rotenburg*, supra note 99 at para 2.

\(^{104}\) *Robinson*, supra note 99 at 409.
operates this transfer, and in so doing serves to transform a gratuitous promise into a fully executed, and thus enforceable, gift.

2.2 Delivery is Performance

I have previously argued that the executed gift should be understood primarily as a particular form of agreement that arises simultaneously with its performance, such that the donor’s intention and the donee’s acceptance at the point of delivery determine the meaning and conditions that attach to the resulting transfer of the gift property. This conclusion provides us with a good starting point to understanding the operation of the common law gift, but it is insufficient on its own to account for the precise reason why delivery is required to effect the transfer – and thus the performance – of the agreement in the first place. Here, the common law’s position is quite clear: said transfer can only occur once the gift property has been delivered.105 And yet, the underlying intentional basis of gifts suggests that agreement alone should be sufficient to achieve this result.106

Drawing once again on the framework that Kant puts forward in *The Metaphysics of Morals*, my objective in this section is to provide a satisfactory answer to this question, all the while laying the groundwork for my discussion of the deed under seal in Part III. As I will argue, the basis of the delivery requirement to create an enforceable gift is to be found in Kant’s distinction between the right to demand performance, on the one hand, and the right to a thing that arises once performance has occurred, on the other. This distinction broadly corresponds to that between *in personam* and *in rem* rights, as well as that between executory and executed agreements.107 Accordingly, delivery can be understood as rendering performance of an agreement that may or


106 This latter position is consistent with the views of the medieval natural law scholars whose position Kant had attempted to refute: see e.g. Grotius, *supra* note 72 book 2 at ch 6, para 1 (“[t]he requirement that delivery of the property take place arises from municipal law”); as I have already mentioned, it is also largely the position adopted by modern French law.

107 Following Kant, only the executed agreement appears to be properly capable of transferring an *in rem* right to a thing, while the executory agreement transfers only an *in personam* right to demand the transfer of that thing: see Kant, *supra* note 7 at 59.
may not be enforceable as an *in personam* right, with the donee obtaining an enforceable right to the performance actually rendered in the form of an *in rem* right over the gift property.

The association of delivery with the transfer of property rights is ancient. Within the civilian tradition, it can be traced back to role of delivery – known as *traditio* – as the primary means by which such a transfer could be made. The version of that rule found in modern Anglo-American legal systems can similarly be traced back to the foundations of English property law, where delivery – or livery of seisin – was required to effect the transfer of title to all forms of corporeal property. As the majority judges of the English Court of Appeal explained in *Cochrane v Moore* (“*Cochrane*”):

In Bracton’s day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig’s ham… as to a manor or a field. At the same time the distinction between real and personal property had not yet grown up: the distinction then recognised was between things corporeal, and things incorporeal: no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognised seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or gift, and whether by word of mouth or by deed under seal.

Although rendered in 1890, the English Court of Appeal decision in *Cochrane* probably remains the leading authority on the requirement of delivery to complete a gift across the common law world. Whatever else the decision has to say, the majority’s reasons are thus typically used to support the requirement of actual physical delivery to effect a valid transfer of title in most cases involving chattel property.

---

108 Classical Roman law recognised three forms of conveyance, namely the *traditio, mancipatio*, and the *in iure cessio*; besides the latter category, which can be understood as essentially a court order recognising the transfer of any type of property, the mancipatio was a special form of ceremonial transfer required for particularly valuable things (*res mancipi*): see G 2.14a, 2.22.

109 *Cochrane, supra* note 105 at 65-66.

110 The case presented is presented as such in Brown, *supra* note 38 at paras 84-85; see also Ziff, *supra* note 38 at 156, n 149.

111 *Cochrane, supra* note 105 at 72-73; that being said, the actual result in *Cochrane* is somewhat difficult to understand: the majority judges found that the plaintiff had been constituted a trustee of the defendant as to his interest in the horse, but did not explain their reasoning.
This state of affairs appears somewhat mysterious at first glance. Indeed, while it is clear that the common law has always required delivery before a transfer of property can occur, this conclusion still does not tell us why it remains required to effect a valid transfer even today, especially in light of the prevailing conception of ownership as a bundle of potentially detachable rights. As Brown has pointed out, justifying this requirement appears to have been difficult even at the end of the nineteenth century, when the majority judges in Cochrane were providing what would remain an authoritative precedent for more than a century to come. What explanation the judges did provide in that case remained largely confined to a historical analysis of existing precedent, with the rule requiring delivery being drawn entirely from what the majority judges determined had been held in previous cases.

That being said, the rule requiring the delivery of gift property is not entirely without justification. As I have already suggested, the Kantian framework provides us with one way of making sense of it through the twin distinctions between executory and executed agreements, on the one hand, and in personam and in rem right, on the other. True to its name, an executed gift amounts to an executed agreement – which is to say, an agreement that is concluded simultaneously with its performance. It effects a full transfer of the property rights that form the subject matter of the agreement. By contrast, the executory agreement is one in which the parties have agreed to performance at some point in the future, which in the common law tradition at least must be supported by consideration in order to be enforceable. This type of agreement does not confer the immediate performance promised in the form of a “right to a

112 This conception of ownership is largely premised on Hohfeld’s view of in rem rights as rights against an indefinite class of persons rather than a right against a thing: see Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1916-1917) 26 Yale LJ 710 at 718.
113 Brown, supra note 38 at 85.
114 See Cochrane, supra note 105 at 73 (concluding that “as regards gifts by parol, the old law was in force when Irons v Smallpiece… was decided: that that case therefore correctly declared the existing law: and that it has not been overruled…”).
115 Kant, supra note 7 at 60.
thing”, but rather an *in personam* right to demand performance from the other contracting party at the agreed-upon future point.\(^{117}\)

In other words, the proper question under a Kantian framework is not why delivery operates the full transfer of property *in rem*, but rather why an executory agreement does not. There are effectively two ways of looking at this problem, both of which yield the same answer. The first is to focus on the role of delivery as *performance*: it puts the donee in physical possession of the gift property. In so doing, it serves to draw the line between executory and executed agreements to transfer property, thereby marking the precise moment where ownership of the gift property passes from the donor to the donee.\(^{118}\) The second, more complete way of addressing the problem requires us to focus on the distinction between *in rem* rights and the the *in personam* right to demand the performance of an executory agreement. This means digging a bit deeper into the Kantian framework, and particularly into Kant’s conception of property rights as a form of acquired right that is enforceable against a potentially indeterminate class of persons.\(^{119}\)

For Kant, the very notion of acquired right, as opposed to innate rights like the right to bodily integrity, appears to present a number of important problems. At their core is the necessarily arbitrary nature of rights that are so acquired, since there is no guarantee that any given individual will, or will not, acquire a particular thing as her own.\(^{120}\) A number of authors have elaborated on this concern, suggesting that the unilateral acquisition of an *in rem* right presents a particular difficulty within the Kantian framework: while the acquisition of a thing in this fashion should theoretically be binding against anyone who happens to later possess it per the principles of unilateral acquisition, there is no reason that the acquirer should be bound to respect the arbitrary rights to things that others have themselves acquired.\(^{121}\) Thus, the unilaterally acquired

\(^{117}\) Kant, *supra* note 7 at 59.

\(^{118}\) As Kant puts it, “[t]ransfer is therefore an act by which an object belongs, for a moment, to both together, just as when a stone that has been thrown reaches the apex of its parabolic path it can be regarded as, just for a moment, simultaneously rising and falling, and so first passing from its rising motion to its falling”: see *ibid*.

\(^{119}\) *Ibid* at 50; in this, Kant appears to have largely anticipated Hohfeld’s basic argument: see Hohfeld, *supra* note 112 at 718.

\(^{120}\) Kant, *supra* note 7 at 44-45.

\(^{121}\) See e.g. B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010) at 121 (suggesting that the problem that Kant appears to raise in respect of *in
in rem right attempts to impose duties on others, even as the acquirer is free from any similar duties of her own.

Whatever the ultimate merits of this particular interpretation of Kant’s argument, it is at least clear from reading The Metaphysics of Morals that he understood the true right in rem – which is to say, the right to a thing independent of one’s physical possession of it – as impossible outside of the civil condition.\textsuperscript{122} Indeed, Kant tells us that the only right one can have over a thing in the state of nature is “provisional”, while the recognition of the true right in rem requires the existence of the civil condition to guarantee the acquired rights of all individuals on an equal footing.\textsuperscript{123} Among other things, the latter means that the acquisition of property should be made public in a way that is known – or at least knowable – by all others who may subsequently seek to acquire it, so that it can become binding against them.

This is precisely the role that delivery plays in the transfer of property rights by gift: it renders the transfer public and knowable, in a manner that allows for what is an otherwise private transaction to be set up against anyone who may subsequently claim an interest in it. From the perspective of the common law at least, the relevant criterion in this respect is whether the donor has divested herself entirely of control over the gift property.\textsuperscript{124} Such will not be the case, for example, where the donor attempts delivery through the medium of a third party acting as her agent or trustee. In those cases, the donor conserves the power to revoke the gift, and will not have divested herself of control until the donee actually receives the thing in question. By contrast, where delivery to a third party who is not acting in such a capacity means that the donor

\textsuperscript{122} Kant, supra note 7 at 44-46, 51-52; as Kant makes clear, this right to a thing independent of physical possession is to be distinguished from the right to a thing that exists in the state of nature – which is to say, a right that is provisional and limited to the extent that one has physical possession of the thing in question; in this respect, it is clear that the provisional right to a thing is not an in rem right in the sense that is given to that concept by modern civil law – that is, as a right to revendicate (to “follow” it, as per the Roman law vindicatio) a thing that happens to be in someone else’s possession: see e.g. art 953 CCQ.

\textsuperscript{123} Kant, supra note 7 at 52.

\textsuperscript{124} See Murphy Estate, Re, [1998] NSJ No 325, 169 NSR (2d) 284 (where the transfer of control over sums placed in a safety deposit box was held to create an effective gift); this appears to be the position of the modern civil law as well, particularly since the “possession” of intangible property is usually determined on the basis of one’s effective control over the right in question: see e.g. art 3421, para 2 LCC, which codifies the “quasi-possession” of intangible property in this way.
will have properly divested herself from control over the gift property, allowing for the gift to be enforced as an immediate transfer.\(^{125}\)

That being said, the common law also recognises that physical delivery is not the only means by which the donor can signal that she has divested herself of control over the gift property. Indeed, the need for actual, physical delivery of a thing is typically relaxed where compliance with this requirement is impractical, though not necessarily impossible.\(^{126}\) What emerges from the relevant case law are essentially two ways of completing a gift through delivery. The first, physical delivery, operates much like its name suggests: the donor must simply physically hand over the gift property in a way that allows her to divest herself of control over it.\(^{127}\) The second way of completing a gift is through what we might call symbolic or constructive delivery, these terms being largely synonymous for our present purposes.\(^{128}\) This method involves handing over something other than the thing being transferred as a symbolic representation of it, as in those cases where the delivery of keys has been accepted as a substitute for the delivery of the thing those keys unlock.\(^{129}\)

The possibility of effecting a transfer of property through symbolic delivery is consistent with the Kantian framework outlined above. It is also consistent with the approach taken by a number of modern civilian legal systems, many of which recognise their own alternatives to physical delivery as a means transferring property.\(^{130}\) On the whole, it thus appears that the framework presented in this section presents a certain degree of universality: where an agreement to transfer property coincides with its immediate performance, however that performance is symbolised, the

\(^{125}\) *Walker v Foster*, [1900] 30 SCR 299 at 301 [*Walker*] presents the rule as follows: “[i]t is well established by authority that a delivery to a third person for the use of the beneficiary is sufficient”, adding however that “if… the third person is a mere trustee, agent or servant of the donor the delivery to him is insufficient”.

\(^{126}\) *Brown*, supra note 38 at 101.

\(^{127}\) *Irons*, supra note 105 at 552-53.

\(^{128}\) Put simply, symbolic delivery is said to *represent* the actual delivery of a thing, while constructive delivery refers to delivery that is deemed to have occurred.

\(^{129}\) See *Woodard*, supra note 101 (where the delivery of a second set of car keys to a son already in possession of the car and a first set of keys was held to be effective for the purposes of a *donatio mortis causa*); see also *Walker*, supra note 125 (where the delivery of keys to a locked desk was held to be effective).

\(^{130}\) The most notable of these is the conclusion of a donation by way of notarial act; I will have more to say on this subject in Part III B, below.
transferee will be able to enforce an *in rem* rather than *in personam* right. Put simply, delivery constitutes the default means of effecting such a transfer because it symbolises performance through the donor’s loss of control over the gift property, on the one hand, and signifies to others that the control now rests in the hands of the donee. This conclusion leaves the door open for other means, including the execution of an agreement in the form of a deed under seal, to potentially serve as a viable substitute.

### 3 Explaining the Deed under Seal

In the first part of this thesis, I argued that neither exchange nor promise theories of contract can properly account for the effects of the deed under seal. As I suggested, this conclusion is largely due to the focus of these theories on executory, rather than executed agreements, the latter of which might offer a more defensible explanation of the deed’s operation. In the second part, I then examined the paradigmatic executed agreement recognised by the common law, namely the executed gift. As I argued, the enforcement of these gifts as unilateral transfers can be understood through recourse to a Kantian framework, according to which an agreement that is immediately performed through delivery serves to transfer property, and therefore confers an *in rem* right upon the transferee.

What remains to be settled in the third and final part of this thesis, then, is where the sealed deed fits into this picture. For my overarching argument to be successful, I will need to show that the form of the deed can at least plausibly be viewed in the same way as the gift described above – that is, as an agreement whose offer and acceptance occur at the same moment as the agreement is performed, and is therefore mediated through the delivery of a particular thing. As I will argue, this argument will require that we view the deed as a whole – and not just its delivery – as a substitute for the physical delivery requirement that normally attaches to gifts. Thus, while there is an obvious connection between the deed and the notion of symbolic delivery outlined above, the deed is more accurately analogised to the civilian notarial act as a way of forcibly stipulating a transfer of rights through recourse to a written instrument.
My argument in this respect will proceed in two parts. Following the general division of Part II, I will first outline the properly agreement-based features of the promise made in the form of a deed under seal. As was the case with delivery and executed gifts, my objective here will be to distinguish the form of the deed from the underlying agreement that it renders enforceable. This conclusion will also allow for a distinction to be made between this type of agreement and other, outwardly similar types of arrangements such as bills of exchange. Having done so, I will then turn to the second part of my argument, in which I will attempt to outline why the deed serves to transform unenforceable gratuitous promises into enforceable executory agreements. As I will argue, the answer lies in the possibility of circumventing contractual formalities through terms inserted in written agreements.

3.1 The Deed is Not the Agreement

Beginning with the first part of my argument, it is worth briefly recalling the genesis of the difficulty presented by the sealed deed, namely that it is often associated with the executory agreement or “promise” with which the consideration-based conception of contract is properly concerned.131 Thus, many authors will typically refer to the deed under seal not on its own, but through its relationship with the act of promising: a “promise made under seal”, we are often told, is enforceable without consideration.132 As I concluded in Part I, however, most of these same authors, be they anchored to an exchange or a bare promissory theory of contract, must ultimately explain the operation of the deed in terms that betray this initial classification. Indeed, each of them points to the same conclusion, namely that the “promise made under seal” should be understood not as a promise at all, but as an already-executed agreement.133

131 This is because the necessarily executory “promise” appears to be the focus of what common law writers commonly label “contract”, as opposed to the broader notion of “agreement” that forms the focus of contract theory within the civilian tradition.
132 This phrase, or something much like it, appears e.g. in Fuller, “Consideration and Form”, supra note 4 at 820; Holmes, supra note 5; Waddams, Contracts, supra note 38 at para 168; Benson, “Consideration”, supra note 25 at 244.
133 See especially Brudner & Nadler, supra note 16 at 199; as I have argued, this conclusion is also implicit e.g. in Benson, “Consideration”, supra note 25 at 246; Weinrib, supra note 6 at 138, n 30; Fried, supra note 1 at 28-29; Smith, supra note 2 at 104-5.
133 Ibid at 151, 232.
My objective in this section is to outline precisely how the deed can be understood through this particular framework. Drawing on the approach developed in Part II, I will argue that the deed under seal should be understood not as an agreement per se, but as a means through which an agreement can be concluded and performed simultaneously, much in the same way that delivery operates the simultaneous offer, acceptance and performance of the executed gift. As was the case with the latter type of transaction, this conclusion emerges when one approaches the deed by starting not from its effects as a means of unilaterally creating obligations (or transferring rights), but from the perspective of the underlying agreement. I have already justified this approach above, on the basis that the alternative presents a fundamental circularity: the completed transfer would be made to justify the agreement that serves as its legal cause.\(^{134}\)

From this perspective, it is clear that the agreement that underlies the deed is fundamentally different from that of the consideration-based contract: more than simply being enforceable without consideration, the form of the deed actually requires that the agreement have been concluded without it. Since the “promise” of each party must be made by signing, sealing, and delivering a document, the only way in which truly bilateral “exchange”-like obligations can be created is where each of the parties have signed, sealed, and delivered their own respective deeds.\(^{135}\) Even the cosignatories of a deed are not bound by it unless they have also properly executed it on an individual basis.\(^{136}\)

In other words, it appears that the deed is not only a means by which the enforcement of a unilateral agreement can be obtained, but also a form that is intrinsically tied to the unilateral nature of that agreement.\(^{137}\) In this, the agreement concluded by way of deed presents a number of striking similarities to the gift concluded through the delivery of a thing. Above all, the

\(^{134}\) Dedek, supra note 71 at 337.

\(^{135}\) This is because the form of the deed considers incomplete execution to be no execution at all: see Exchange Bank of Yarmouth v Blethen (1885), (1886) LR 10 Ap Cas 293 at 298, CR [9] AC 113 (PC) [Blethen]; Wilkinson v The Anglo-Californian Gold Mining Company (1852), 18 QB 728 at 731, 118 ER 275 [Wilkinson]; the bilateral deed by which two parties contract mutual obligations has historically been called an “indented deed”.

\(^{136}\) Molsons Bank v Cranston (1918), 45 DLR 316 (Ont CA); Scandinavian American National Bank v Kneeland (1914), 8 WWR 61 (SCC).

\(^{137}\) This conclusion echoes that of Benson, who is particularly adamant that the deed to correspond to a fundamentally different kind of legal relationship than the consideration-based contract: see Benson, “Consideration”, supra note 25 at 246.
question of whether a deed is effective to execute the agreement, and thereby render it enforceable, is tied to the unilateral intention of the party drawing up the document. As is the case of the donor making a gift, her intention will be ascertained at the point where delivery of the deed document is actually made. Meanwhile, the party receiving the deed is also faced with the same choice as the donee receiving gift property: either to accept the deed on its face, with all the conditions attached to it, or to reject the deed and the underlying agreement entirely. She will be presumed to have accepted the agreement upon her acceptance of the physical document, unless a contrary intention is expressed.

That being said, there remains at least one major difficulty with the equation of executed gifts and agreements concluded by way of deed under seal, and which explains the latter’s continued association with promises rather than executed agreements. Namely, the deed under seal is usually understood as a means of creating any kind of voluntarily assumed obligation to perform, rather than simply effecting an immediate transfer of property rights. This characterisation certainly seems to be supported by the historical basis of the deed in the action of covenant, which likely corresponds to the oldest properly contractual cause of action recognised by the common law. As Simpson in particular has also pointed out, it appears as though the deed under seal was not admitted as a means of actually transferring property – a result that is of

138 Zwicker, supra note 5; Canadian Bank of Commerce v Dembeck, [1929] 2 WWR 586 (Sask CA).
139 See West Cumberland Iron & Steel Co v Winnipeg & Hudson’s Bay Railway (1890), 1890 WL 8974 (CA) (holding that the expressed intent to “deposit” the deed upon physical delivery of the document suggests the existence of a bailment rather than a transfer).
140 Fuller, Basic Contract, supra note 38 at 316-17.
141 See e.g. in Rowan and Eaton, Re (1927), [1927] 2 DLR 722, 60 OLR 245 (CA) (holding that “[t]he deed to [the purchaser] is registered, and, in the absence of evidence to the contrary, the presumption is that he, as purchaser, caused such registration”.
142 This is consistent with the above-mentioned propensity to refer to the deed as a “promise under seal” or a “sealed promise”: see note 129, above, and accompanying text, and especially Holmes, supra note 5; by contrast, the colloquial usage of the term “deed” suggests an immediate transfer, rather than a promise to convey in the future.
143 See e.g. Ibbetson, Historical Introduction, supra note 19 at 21; contrast Simpson’s view that debt, not covenant, is “the earliest writ of a contractual nature to be regularly issued”: see Simpson, A History, supra note 19 at 53.
course the chief consequence of an executed gift – until later in the history of the common law.\textsuperscript{144}

At the same time, it is still not entirely clear that the historical action in covenant can be properly analogised with the comparatively more modern action for the enforcement of promises – that is, executory agreements – that are backed by consideration.\textsuperscript{145} Without wading too deeply into the historical basis of the common law contract, it appears that liability for even informal, bilateral contracts remained for a long time the function of an already-performed agreement.\textsuperscript{146} This much explains why Fuller presents the half-completed exchange as the paradigmatic case of an enforceable contract: it has tended to be understood as the type of contract that the historical common law would have sought to enforce, since one party had already obtained the benefit of the agreement while the other was left deprived.\textsuperscript{147} Where the contract was concluded unilaterally through formal means – that is, by way of a deed under seal – it could instead be understood to simply confer an immediate entitlement upon the offeree, even if that entitlement did not yet amount to a full \textit{in rem} right in the property being transferred.\textsuperscript{148}

By contrast, focusing on the more modern conception of the deed under seal reveals just how connected the notion has become to the already-executed unilateral agreement to transfer property. Following Alan Brudner’s argument, this connection is probably most apparent in the requirement that the deed be delivered before it can be made enforceable.\textsuperscript{149} Historically, this

\textsuperscript{144} \textit{Ibid} at 19, 21-22; this conclusion is consistent with the views expressed by the majority judges in \textit{Cochrane, supra} note 105 at 65-66 (suggesting that delivery was historically required to transfer property even where an agreement had been concluded under seal).

\textsuperscript{145} The emergence of this type of action, also known as the action on the case in \textit{assumpsit}, has been well documented, and forms the main focus of \textit{Simpson, A History, supra} note 19.

\textsuperscript{146} See Atiyah, \textit{supra} note 4 at 420 (arguing in favour of a shift from the partly-executed contract paradigm to one based on a fully executory agreement); contrast Ibbetson, \textit{Historical Introduction, supra} note 19 at 74-75 (suggesting that part performance was probably never a general rule recognised outside the law of sale, which was an anomalous form of contract).

\textsuperscript{147} See Fuller, “Consideration and Form”, \textit{supra} note 4 at 815-16.

\textsuperscript{148} This is evident in the way that the deed actually came to convey property through the application of the \textit{Statute of Uses} (UK), 27 Hen 8, c 10 (the effect of which was to transform a deed conferring a use into one that performed an immediate full transfer of an interest in land); but see Simpson, \textit{A History, supra} note 19 at 371-72 (suggesting that this effect was only possible at the time where the deed was supported by something like the modern requirement of consideration).

\textsuperscript{149} Brudner & Nadler, \textit{supra} note 16 at 199.
appears to have meant that the person delivering the deed would need to part with the document, which would then need to remain in the physical possession of the receiving party as a precondition of her being able to enforce the underlying agreement.\textsuperscript{150} While the presence of an attesting witness at the moment a deed is made may now be sufficient to infer delivery, it remains the case that the receiving party must have accepted the document on its face.\textsuperscript{151}

Going further still, perhaps the deepest connection between the deed and the notion of executory agreement is not to be found in the requirement of delivery \textit{per se}, but rather in the contrast between the deed and its executory equivalent, commonly called the “escrow”. Underlying this distinction is the idea that an agreement concluded by way of deed, like the gift completed by delivery, must produce its effects immediately or else have no effects at all.\textsuperscript{152} The sole exception to this rule is where the deed can be considered an escrow – that is, a deed delivered subject to conditions under which it will take effect and become binding upon the parties.\textsuperscript{153}

The possibility of concluding a deed in this way presents another set of striking parallels with the executed gift, and particularly with those special categories of gift canvassed above – the \textit{donatio mortis causa} and the gift made in contemplation of marriage – that are made subject to very specific sets of conditions. Indeed, the conditions that are validly admissible to create an escrow appear to be largely identical to those attaching to these types of gift, in that they must be based on the occurrence of future events that are outside the parties’ control. Where the deed-maker in particular conserves the power to revoke the escrow, that power may invalidate the escrow as a whole.\textsuperscript{154} As is the case with the executed gift, the ultimate criterion appears to be one of

\begin{flushright}
\footnotesize
\textsuperscript{150} Ibbetson, \textit{Historical Introduction}, \textit{supra} note 19 at 73.
\textsuperscript{151} Zwicker, \textit{supra} note 5.
\textsuperscript{152} Blethen, \textit{supra} note 135 at 298; Wilkinson, \textit{supra} note 135 at 731; but see Blethen, \textit{supra} note 135 at 299 (suggesting that the imposition of a condition \textit{subsequent} does not bar the full execution of a deed).
\textsuperscript{153} See Governors and Guardians of the Foundling Hospital \textit{v} Crane, [1911] 2 KB 367 (CA) at 374, Vaughan Williams LJ \textit{[Crane]} (“[w]ith regard to the question whether the deed may be treated as an escrow, there can be no doubt but that, in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words, but you are to look at all the facts of the case attending the execution, to all that took place at the time, and to the result of the transaction; and, therefore, though in form there is an absolute delivery, if it can be reasonably inferred that the instrument was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow”).
\textsuperscript{154} Ibid at 375, 379, 381; see also Graham \textit{v} Graham (1791), 1 Ves Jun 724, Chief Baron Eyre; Hebert \textit{v} Gallien (1931), 2 DLR 150, 3 MPR 67 (NB CA).
\end{flushright}
control: in making the deed, the deed-maker must immediately divest herself of control over the rights set out in the escrow, even if said escrow does not take effect as a deed until the occurrence of some specified future event.\textsuperscript{155}

Framed in these terms, it becomes apparent that the form of the deed corresponds not only to a necessarily unilateral agreement, but also to a necessarily executed agreement: to the extent that the effects of the deed remain attached to the performance of some kind of the party granting it, it will not constitute a valid escrow, let alone a valid deed. Thus, the types of conditions that can be attached to an escrow are potentially broader than those that can be attached to a gift – the delivery of a written instrument being capable of signifying a much more detailed meaning than the delivery of a thing. Nonetheless, the deed-making party’s performance of any particular act cannot be made a condition of the deed’s effecting any particular result.\textsuperscript{156} Thus, while the practice in most common law jurisdictions has been to confine the deed’s use to effecting immediate transfers of property, it is unlikely that the deed – at least in its modern form – can actually be used as a substitute for a properly executory agreement backed by consideration.

Finally, there is at least one more way in which the deed under seal appears analogous to the delivery of property required to execute a gift. Namely, this is the result of the distinction that can be made between agreements concluded by way of deed, on the one hand, and those that relate to bills of exchange, on the other. Both involve an agreement concluded by intermediary of a written instrument. The chief difference, however, lies in the nature of the instrument itself, which is then translated into the resulting entitlement. Thus, while the bill of exchange is synonymous with the written instrument through which it is transferred, the deed under seal instead amounts to a means through which \textit{something else} – that is, a fully executed right of some kind – is transferred by way of the underlying agreement.

\textsuperscript{155} See Doe on the Demise of Garnons v Knight (1826), 5 B & C 671 at 692, LR 2 HL 309 (KB); this formulation of the rule relating to the delivery of a deed through third parties appears nearly identical to the one applicable to the third party delivery of gift property: compare Walker, supra note 125 at 301.

\textsuperscript{156} Such a condition would usually imply that the deed-maker has retained the power to revoke the deed made in escrow, contrary to the rule set out in the above-cited decisions.
This conclusion is largely consistent with the way that Simpson presents the deed – that is, as having served an essentially evidentiary rather than dispositive function since the earliest days of the common law.\textsuperscript{157} The relevant point here is that the deed is not synonymous with the agreement it evinces, a proposition that appears to be justified on the basis of the authorities he cites. It is also supported by his further argument that the notion of “covenant” never became linguistically assimilated to the sealed instrument, by contrast to the disposition of property by will, which is now assimilated to the document bearing the same name rather than to the actual “will” of the testator.\textsuperscript{158}

By contrast, the bill of exchange instrument can be understood as synonymous with the right it embodies: for all intents and purposes, the bill is to be treated as a “good” – which is to say, as the physical embodiment of what would otherwise constitute an intangible asset, namely the right to obtain payment.\textsuperscript{159} The right in question is enforceable by whoever happens to be in possession of the written instrument.\textsuperscript{160} As a result, it is not surprising that the bill of exchange can be transferred by a number of different means, including by executed gift. Rather than serving as a means to transfer something else, the bill of exchange – as the embodiment of the right to be paid – becomes the gift property through which the transfer is made.\textsuperscript{161}

In other words, the real difference between sealed deeds, on the one hand, and bills of exchange, on the other, is that the deed constitutes a means \textit{through which} a particular thing is delivered, while the negotiable instrument \textit{is} the thing being delivered. Once the transfer is complete, the continued existence of the deed only evinces the fact that the agreement came to be, even as its production is not strictly required to demonstrate the existence of that agreement. That agreement

\begin{itemize}
  \item \textsuperscript{157} Simpson, \textit{A History}, supra note 19 at 15.
  \item \textsuperscript{158} Ibid.
  \item \textsuperscript{159} See \textit{Marfani & Co Ltd v Midland Bank Ltd} (1967), [1967] 3 All ER 967, [1968] 1 WLR 956 at 970, Lord Diplock (CA).
  \item \textsuperscript{160} This rule is codified e.g. in \textit{Bills of Exchange Act, 1882} (UK), 45 & 46 Vict, c 61, s 38(1); \textit{Bills of Exchange Act}, RSC 1985, c B-4, s 73(a); by contrast, the right to enforce a deed is limited to the specific party or parties named in the deed instrument.
  \item \textsuperscript{161} See e.g. in \textit{Lumsden, Re} (1980), [1980] 4 WR 143, 110 DLR (3d) 226 (Alta QB) (held that cheque given to daughter by deceased constituted a valid \textit{donatio mortis causa}).
\end{itemize}
continues to exist even if the deed is returned to the deed-maker after execution, just as possession of the gift property can return to the donor without undoing the gift.\(^{162}\)

In sum, the agreement concluded by way of deed under seal can be distinguished from consideration-based contracts, and analogised with the executed gift, in three separate ways. First, the form of the deed, like the form of the gift, not only allows for the enforcement of a one-sided transfer not backed by consideration, but in fact requires that the transfer be completed unilaterally. Second, the deed is largely incompatible with the possibility of creating an executory – rather than already-executed – agreement. Finally, the agreement that underlies the deed remains distinct from the written instrument through which it is concluded, just as the gift property remains distinct from the agreement that underlies the gift.

Each of these points suggest that the same kind of bilateral assent that lies at the heart of the executed gift can also be found to operate within agreements concluded by way of deed under seal. The question that remains to be asked, however, is precisely why the deed allows for agreements to be concluded – and made enforceable – in precisely this way. I turn to this issue, which will be the final one that I consider in this thesis, below.

### 3.2 The Deed is Performance

As I have argued above, the deed should be understood not as a type of agreement \textit{per se}, but rather as a means by which a particular type of unilateral, executory agreement can be concluded. In this sense, the effects of the deed are largely analogous to the delivery of gift property as a way of concluding an enforceable, gift: it is a means through which offer, acceptance, and performance of the agreement occur simultaneously, and thus serves to mark the point at which a right ceases to belong to the offeror and is acquired by the offeree. This much is consistent with the Kantian framework outlined in part two, according to which an executory agreement is insufficient on its own to transfer a full right \textit{in rem}, and must be completed by a

\(^{162}\) See \textit{Zwicker, supra note 5} (an agreement concluded by deed can be validly enforced even if the deed is retained by the promisor after execution); compare \textit{Read v Rayner} (1943), [1943] 4 DLR 803 (SCC), affirming \textit{Read v Rayner} (1943), [1943] 2 DLR 225 (PEI SC) (the return of gift property by the donee to the donor for safekeeping does not invalidate the gift).
separate agreement to actually perform before the thing in question is properly transferred. Like the agreement that underlies an executed gift, the deed agreement is thus enforceable as an agreement to actually perform a particular act – and specifically, an agreement to immediately and unilaterally transfer particular rights.

Having made this argument, the question that remains to be asked is precisely how the form of the deed can achieve this sort of result, effectively replacing the role of delivery in executing a gratuitous promise. I have previously suggested that the latter formality can be understood to perform this function for two main reasons. The first is that the point of delivery is simply the easiest place to trace the boundary between an agreement to perform (the “promise”, to use common law parlance), and the agreement that actually entails performance. The second, more complete reason is that delivery operates to render what is an otherwise private transaction public, in a way that can potentially be known by – and thus legitimately enforceable against – all who may have an interest in the gift property after its transfer is completed.

In other words, the effects of delivery can be understood to create a sort of fait accompli, knowable by all parties who might be interested in a given transaction. Having voluntarily brought about this result, the offeror cannot complain that she has been wronged or that the offeree has been unjustly enriched at her expense. To establish a parallel justification for the deed under seal, my argument will begin from the insight put forward by Alan Brudner, according to which the deed under seal can be understood to operate as a kind of symbolic delivery.

This answer is largely consistent with the position of the common law, according to which the delivery deed is often explicitly linked to the symbolic delivery of real property. This

---

163 See Kant, supra note 7 at 59-61.
164 As I have previously suggested, the determinative factor in this respect appears to be the donor’s loss of control over the gift property: see note 121, above, and accompanying text.
165 In civilian parlance, this means that the agreement provided a “cause” for the offeree’s resulting enrichment, meaning that the enrichment could not be “sine causa”: see the formulation used in art 812, para 1 BGB; arts 1303, 1303-1 C Civ; arts 1493, 1494 CCQ.
166 Brudner & Nadler, supra note 16 at 199; the relevant excerpt is reproduced at note 34, above.
167 See e.g. also Lewis v Spurr (1966), 59 DLR (2d) 362, 57 WWR 705 (Alta CA), aff’d [1967] SCJ No 1, 65 DLR (2d) 672 (holding that the gift of a house was incomplete because the deed had never been delivered); Eldridge v
particular class of thing is usually incapable of physical delivery altogether, which is why it has tended to be governed by special transfer rules. It is also largely compatible with Peter Benson’s conclusion that the common law has within its power the capacity to recognise a special kind of customary formality – the deed – as a way of making otherwise gratuitous promises binding. The main difference is that Brudner anchors the deed in the category of executed gifts, rather than viewing it as a *sui generis* class of contract that is subject to its own special set of rules.

Perhaps most importantly, this conclusion also appears to be consistent with my overall argument, according to which the deed should be understood as an executed unilateral agreement instead of a promise to perform. On its own, Brudner’s conclusion that the deed should be associated with symbolic delivery does not get us much further towards understanding why it operates in this manner. However, it does provide us with a starting point for further inquiry: namely, that the deed should be understood as an alternative to delivery in the first place. In so doing, Brudner’s conclusion suggests that our answer may be found by looking at devices that at least superficially resemble the form of the deed even more closely than the delivery of gift property, and which likewise serve to render what are otherwise gratuitous promises enforceable.

Understood in this way, the deed under seal appears as a sort of intermediary formality between the requirement that a transaction be passed in writing, on the one hand, and the stringent requirements applicable to the civilian notarial act, on the other. The first of these formalities is not doubt the most straightforward: historically at least, it has attached to a wide range of specific transaction types recognised by the common law. The most notable instances are those involving the *Statute of Frauds*, the primary purpose of which has traditionally been understood

---

Royal Trust Co, [1923] 2 DLR, [1923] 2 WWR 67 (SCC) (holding that a father’s purchase of property in his son’s name, without his son’s knowledge and without registering the interest in his son’s name, was effective as a gift upon the son’s acceptance even after his father’s death).

See e.g. the ceremonial livery of seisin that was historically used to transfer real property interests in English law; see also the modern registration systems used by most civilian (and some common law) legal systems to effect this very same purpose.


This conclusion is not incompatible with Benson’s assessment of the deed as a largely customary device, but instead serves to ground how the operation of this device might be properly grounded within a theoretical account of contract.
to be the promotion of transactional security.\textsuperscript{171} Certain civilian legal systems recognise a similar application of the written instrument in commercial settings, where certain kinds of contract are required to take the form of a “private writing”.\textsuperscript{172}

That being said, the deed appears to require something \textit{more} than just the existence of a written document. Namely, it must be intended \textit{as a deed} taking immediate effect in order to count as such.\textsuperscript{173} In this, it appears to be more consistent with the second kind of formality under consideration – namely, the civilian notarial act. Among other things, it is compliance with this form that is usually required to effect a valid gift in most civilian jurisdictions.\textsuperscript{174} Although these same jurisdictions typically recognise the alternative possibility of completing the gift by delivery – that is, according to the main method of gift-making at common law – it is usually understood to be an exceptional measure.\textsuperscript{175} In the case of French law, the latter exception is not even enshrined within the \textit{Code civil}, but is instead merely the result of a court-fashioned rule that applies to movable property alone.\textsuperscript{176}

A number of authors have at least implicitly recognised the apparent overlap between this gift-making function of the civilian notarial act, and the possibility of using a deed to complete a

\begin{thebibliography}{9}
\bibitem{171} Statute of Frauds (UK), 29 Car 2, c 3; this view of the Statute’s purpose is supported by the text of its preamble, which states that it was enacted “FOR prevention of many Fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury”; it animates even more modern consequentialist analyses of the Statute’s effects: see e.g. Eric A Posner, “Norms, Formalities, and the Statute of Frauds: A Comment” (1996) 144:5 U Penn L Rev 1971.
\bibitem{172} See most notably art 1341, para 1 CcF (1804), which provided that “[i]l doit être passé devant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de cent cinquante francs, même pour dépôts volontaires ; et il n’est reçu aucune prevue par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu’il s’agisse d’une somme ou valeur moindre de cent cinquante francs”; see also art 1359 C Civ; at least one author has gone so far as to suggest that the Statute of Frauds was directly inspired by earlier continental legislation imposing a similar requirement on the conclusion of contracts: see E Rabel, “The Statute of Frauds and Comparative Legal History” (1947) 63 LQR 174 at 177.
\bibitem{173} See especially art 518 BGB (providing that “[f]or a contract by which performance is promised as a donation to be valid, notarial recording of the promise is required”, though “[a] defect of form is cured by rendering the performance promised”); see also art 1824, para 2 CCQ.
\bibitem{174} See e.g. art 931 C Civ; art 518 BGB; art 1824, para 1 CCQ.
\bibitem{175} See especially art 518 BGB (providing that “[f]or a contract by which performance is promised as a donation to be valid, notarial recording of the promise is required”, though “[a] defect of form is cured by rendering the performance promised”); see also art 1824, para 2 CCQ.
\bibitem{176} Art 931 C Civ provides that “[t]ous actes portant donation entre vifs seront passés devant notaires dans la forme ordinaire des contracts ; et il en restera minute, sous peine de nullité”; the exception is usually inferred from art 2276 C Civ, which provides that “[e]n fait de meubles, la possession vaut titre”.
\end{thebibliography}
gratuitous promise. However, this analogy also presents difficulties if one wishes to actually explain the operation of the deed. This is because both French and German law associate the effects of delivery and notarized instruments to the requirement of publicity required to transfer rights in rem. Such a view of the notarial act makes sense when the “notary” required to pass it is a public official whose main purpose is to record the passing of certain kinds of transactions. Once the transaction is recorded, it becomes part of the public record, and is thus known – or at least knowable – by all who may be subsequently interested in the particular thing being transferred.

This kind of notarial function has no true equivalent in Anglo-American jurisdictions. What’s more, the deed under seal remains a largely private act that depends on the deed-maker’s intention alone, rather than the presence of or actions taken by a third party. It is only relatively recently that legislative reforms in some jurisdictions have begun to emphasise the need for any kind of witness – though still not a public official – to attest to the deed’s proper execution. Thus, while the deed under seal amounts to a more solemn form than the mere record the existence of a transaction, it cannot be understood to actually publicise the transfer of rights in the same way that is possible through a civilian notarial act.

---

177 See e.g. Fuller, “Consideration and Form”, supra note 4 at 814 (suggesting that where the parties “go outside the field of exchange, we may require a seal, or appearance before a notary, for the validity of their promises”); see also Cartwright, supra note 116 at 127 (arguing that “[w]hen looked at this way, the civil lawyer may think that there is not really a substantive difference between his system and the common law if… his system does not exclude gratuitous promises from contracts but subjects gifts to special formality rules”).

178 In French law, transfers of in rem rights by contract are made enforceable against third parties only where they comply with the requirements of publicity, which occurs by delivery in the case of movable property and through registration (accomplished through a notary) in the case of immovable property: see art 1198 C Civ; in German law, the possibility of transferring in rem rights is itself made conditional on compliance with these same formalities: see arts 873, 929 BGB.

179 Beyond gifts, the form of the notarial act is usually imposed on any transaction that relates to immovable property, including the granting of hypothecary rights to immovables; the use of a notary also tends to be required when making a will or marriage contract: see e.g. arts 971, 1007, 1394 C Civ.


181 See Crane, supra note 153 at 374; see also Ray v Gilmore (1958), 14 DLR (2d) 572, 26 WWR 138 (BC CA).

182 See e.g. UK Law of Property Act, supra note 5, s 1(3)(a).
This conclusion leaves us with two further ways of explaining the effects of the deed under seal through the means of a written instrument. The first, already suggested above, is to concede that the common law simply recognises the effects of this particular type of written document for largely historical reasons.\footnote{This conclusion is certainly consistent with some of the stranger requirements that have historically been associated with the deed, including the use of velum as the medium on which the deed had to be written.} This assessment of the deed would be largely consistent with Hegel’s views on the nature of property acquisition, according to which the intention to acquire must actually be expressed in the world, but that it falls to positive law to determine when a particular expression will be sufficient to achieve this purpose.\footnote{Hegel, supra note 7 at para 55.}

However, there is a second answer to this problem, which corresponds to a third and little recognised function that written instruments continue to play in some legal systems – namely, the use of a written stipulation as a means of circumventing the need to perform a particular act. This characterisation would elevate the deed from one possible formality that the common law can recognise, to one that it \textit{must} recognise in at least one capacity or another. It amounts to taking the possibility of symbolic delivery to its logical conclusion by replacing the delivery of a particular thing with a contractual stipulation that all requisite formalities have already been accomplished.

The use of a written instrument in this way is not exceptional. Indeed, even later Roman law began to admit the practice of using a written statement to indicate compliance with particular formalities, even if the acts required to comply with these formalities had not actually occurred.\footnote{This sort of development occurred in the case of the \textit{stipulatio}, a type of general contract that required the parties to comply with a precise question-and-answer format, and thus to be in physical proximity to each other, in order to create binding obligations; over time, contracting parties began to circumvent this requirement by simply recording their compliance with the question-and-answer formality in a written agreement: see Zimmermann, \textit{supra} note 81 at 80.} This includes, most notably, the requirement that the parties be in physical proximity with each other at the time a particular form of contract – the \textit{stipulatio} – was concluded. This approach to circumventing contractual formalities has been received by German law as a way of avoiding the need to physically deliver movable property. Like the Roman rule, this exception can be understood as a response to the practical difficulties posed by the need for...
the physical presence of the parties. More formally, however, the German rule is explained on the basis that the stipulation grants the transferee “indirect” possession of the subject property, while the transferor’s retention of physical possession is transformed into a temporary entitlement in the nature of a usufruct or pledge.\textsuperscript{186}

In other words, the effects of the deed under seal can probably best be analogised to the effects of a contractual stipulation in which the parties have agreed to treat the accomplishment of certain formalities – in this case, the delivery and thus transfer of particular property or of particular rights – as having already occurred. As in the case of both the Roman \textit{stipulatio} and the German rule pertaining to the delivery of movable property, this allows them to effectively circumvent the need for both parties to be physically present when concluding a unilateral transfer. Given the additional flexibility of writing, it also becomes possible to signify a range of meaning in this way that is not strictly possible by way of physical delivery.\textsuperscript{187}

Among other things, this conclusion allows us to explain why the deed has sometimes been said to “import” consideration, and thus to create only a rebuttable presumption that the deed should be enforced as a valid agreement.\textsuperscript{188} It also partly explains equity’s related refusal to order the specific performance of a deed, since it remains possible for courts to look behind the stipulation and ensure that a proper unilateral transfer has actually occurred.\textsuperscript{189} That being said, the deed’s full effects in this respect – including, most notably, its use as a replacement for the physical delivery of a thing in the transfer of full \textit{in rem} rights – are admittedly of more recent vintage.

\textsuperscript{186} The rule is set out at art 930 BGB, while the notion of indirect possession is defined at art 868 BGB; consistent with the rules applicable to the delivery of gift property at common law, art 931 BGB also allows the transferor to complete the transfer of property by assigning to the transferee the right to claim delivery from a third party.

\textsuperscript{187} In theory, this means that a whole number of conditions and additional rights can be attached to those rights conveyed by way of deed, including warranties and restrictive conditions imposed on the receipt of transferred property (i.e. a “restrictive covenant”); the form of the deed can also be used as a means of providing a release: see e.g. \textit{Blethen, supra} note 135; \textit{Chiliback v Pawliuk} (1956), 1 DLR (2d) 611, 17 WWR 534 (Alta SC).

\textsuperscript{188} See \textit{ibid} at para 15 (“[a]s is stated in most textbooks and in many ancient authorities, a seal was said to ‘import’ consideration, so that a document under seal might be enforced even though no consideration appeared on the face of the instrument”).

\textsuperscript{189} \textit{Ibid} at para 20; this rule has much been criticised and is not recognised in some American jurisdictions: see e.g. \textit{Marine Contractors Co Inc v Hurley}, 365 Mass 280 at 285 (concluding that the rule according to which a seal will not be recognised in equity does not apply in Massachusetts).
substitute for delivery, since seisin was the universal means by which property – both personal and real – was transferred.\textsuperscript{190} As Simpson has pointed out, however, the deed did eventually become a second way by which the actual transfer of property might occur at common law, completing the requirement of seisin that had once been the sole universal basis for doing so.\textsuperscript{191}

In sum, the deed under seal can thus be understood as a form through which an agreement drawn up by one party can be said to be \textit{performed} at the same moment that it is accepted by the other party, whether or not that performance has the effect of actually transferring property. This means that Alan Brudner’s argument, according to which the form of the deed can be analogized with a kind of symbolic delivery, is at least partly correct.\textsuperscript{192} However, rather than characterising the deed as a form of symbolic \textit{delivery} – thereby setting up a full analogy between executed gifts and agreements concluded in the form of a deed under seal – it may be more accurate to qualify the delivery of a deed by one party to another as a form of symbolic \textit{performance}. This means that while gifts may well represent a paradigmatic case of executory agreement, not all executory agreements should be understood as gifts.\textsuperscript{193}

On this reading, the chief difference between the gift and the deed under seal is not that the former does not amount to the actual physical delivery of the particular thing being transferred, but rather that the latter need not relate to a transfer of property at all. Instead, it amounts to a way in which the performance of any particular act can effectively be tendered to another party, who must accept it or reject it on its face. Often, this type of act involves the transfer of real property by what effectively amounts to symbolic means – a state of affairs that explains the colloquial association of the term “deed” with evidence of an existing interest in land.\textsuperscript{194} These cases need not exhaust the potential application of the deed, however, which on the whole can

\begin{itemize}
  \item \textsuperscript{190} See note 107, above, and accompanying text.
  \item \textsuperscript{191} Simpson, \textit{A History}, supra note 19 at 21-22.
  \item \textsuperscript{192} See the discussion in Part I A, above.
  \item \textsuperscript{193} In a sense, this conclusion connects more properly with those of Benson and Weinrib, who argue that the deed under seal should be understood as a separate contractual category altogether: see Benson, “Corrective Justice”, supra note 6; Weinrib, \textit{supra} note 6 at 138, n 30.
  \item \textsuperscript{194} As I have already pointed out above, the colloquial usage of the term “deed” emphasises its role as effecting a symbolic delivery of real property: see notes 40, 169, above, and accompanying text.
\end{itemize}
create results that largely approximate those of the (executory) contract backed by consideration.195

Conclusion

This thesis has argued that the modern form of the deed under seal should be understood not by analogy to consideration-based contracts, but as a unilateral transfer similar to the executed gift. Rather than being tied to the intrinsically executory notion of “promise”, the deed should thus be understood as a particular way by which an agreement can be performed at the very same moment that it is concluded. This view of the deed in turn corresponds to the contract to perform recognised in *The Metaphysics of Morals*, which for Kant at least amounts to a necessary second step to perform – and thus complete – an already-existing executory agreement that pertains to the same subject matter.196

As I have argued elsewhere, this view of contractual transfers, according to which the act of promising should be understood separately from its performance, is largely consistent with both Roman law and modern German civil law.197 What I hope to have shown here, however, is that this same distinction provides a compelling basis for understanding a particularly thorny – though admittedly marginalised – feature of the common law of contracts. Thus, while both authors who defend consideration as exchange and those who reject its relevance to contract law have typically sought to exclude the deed under seal from their discussions, my purpose above has been to show how it can be fruitfully integrated into a theory of contract that encompasses both executory and executed agreements. Put simply, the latter are simply agreements to give and to receive immediate performance of a given act – whether that act has previously been

---

195 This conclusion makes sense to the extent that any right, be it *in rem* or *in personam*, can and should be understood to be transferred by performance; thus, while it may be that a promise can only transfer *in personam* rights, there is no reason to conclude that the performance of an agreement should not be able to transfer a further set of *in personam* rights, which will themselves require a separate act of performance at a future date.

196 Kant, *supra* note 7 at 59-61.

197 See generally Stéphane Sérafin, “Transfer by Contract in Kant, Hegel, and Comparative Law” [unpublished]; as I argue in that paper, this approach can in turn be distinguished from both Hegel’s account of contractual transfer and the position at least officially endorsed by most legal systems derived from the French *Code civil*. 48
made subject to a promise or not – and can be largely understood as the basis for those classes of “formal” contract still recognised by the common law.

This conclusion opens the door to a number of additional lines of inquiry. First and foremost, it allows us to break free from the association of consideration with the other formalities outlined in Fuller’s analysis, the most prominent of which is the deed under seal.198 Viewed in light of my argument, consideration applies to an entirely different class of agreement – the executory contract – which somehow allows the promisee to demand the performance of a promise without a prior executed agreement. By contrast, formal contracts like the deed under seal appear to correspond primarily – if not exclusively – to the notion of executed contracts, opening the door to a proper account of consideration that is based in the unique features of the properly executory agreement.

This conclusion supports the views of Peter Benson and Alan Brudner, who suggest that there is something fundamentally different about the relationship embodied in a consideration-based contract, and which serves to distinguish consideration itself from the other formalities outlined in Fuller’s work.199 At the same time, however, my conclusion also serves to lessen the hold that consideration has had over much of common law contract theory, and which has detracted from the deeper unity that most civilian jurisdictions recognise in the notion of agreement.200 Indeed, it is not much of an exaggeration to say that consideration has been viewed by both proponents and detractors as the defining feature of contracts at common law, such that most authors have come to understand the notion of “contract” itself as synonymous with the particular kind of executory agreement it exemplifies.201

198 Another way of presenting this conclusion is to say that there are indeed “natural formalities”, as Fuller calls them, “on which courts might seize as a test of enforceability”, a possibility that Fuller expressly denies: see Fuller, “Consideration and Form”, supra note 4 at 815.
199 Benson, “Consideration”, supra note 25 at 246; Brudner & Nadler, supra note 16 at 199.
200 See e.g. art 1378, para 1 CCQ, which provides that “[a] contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation”.
201 See generally Fried, supra note 1; see also the distinction between “promissory” and “agreement”-based theories outlined in Smith, supra note 2 at 56-57.
This being the case, stepping back from a strictly executory conception of contract potentially opens the door to a deeper understanding of a wide range of contractual and contract-like devices employed by the common law. At least one such example immediately springs to mind: namely, the otherwise strange difference that the common law appears to enshrine between an “agreement to sell”, on the one hand, and a “sale”, on the other. Like the deed under seal, this distinction can largely be traced back to the development of the common law at a time when the performance of an agreement was thought to be immediate. Although the law of sale is now enshrined by sale of goods legislation in most Commonwealth jurisdictions, this distinction has also been maintained into the present day, and also continues to frustrate scholars attempting to make sense of its operation.

At the same time, there is at least one major challenge to my attempt to transpose a Kantian two-part theory of contract onto the common law, especially where the second step – the actual performance – is meant to be understood as an entirely separate agreement in its own right. Namely, this is the challenge posed by the notion of strict liability, which in its traditional form attaches liability to the promisor’s non-performance of a promised act without regard to fault. The converse of this rule is that the promisor’s intention is said to be irrelevant to whether the promised performance has actually been rendered: even if the performance has been rendered accidentally, it has still been rendered in a way that is sufficient to extinguish contractual liability. This dilemma may well be resolved – though doing so will require a closer examination of the bases of strict liability itself. Unfortunately, this inquiry will need to wait for another time.

---

203 See e.g. in the Sale of Goods Act, 1979 (UK), c 54, s 2(4) and 2(5); Sale of Goods Act, RSO 1990, c S.1, s 1.
205 As Seana Shiffrin suggests, “[c]ontract law… counts inadvertent performance as successful performance, although it happened as it were, through no merit of the performer's own”, adding that “[t]he law supplies no remedy to the promisee who complains that the promisor's performance was merely accidental”: see Seana Valentine Shiffrin, “Enhancing Moral Relationships through Strict Liability” (2016) U Toronto LJ 353 359-60.
Bibliography

Secondary Sources


Peter Benson, “Contract Law and Corrective Justice” (1992) [unpublished].


Lon L Fuller, “Consideration and Form” (1941) 41 Colum L Rev 799.

Lon L Fuller, Basic Contract Law (St Paul, Minn: West Publishing, 1947).

*Gaius’ Institutes* (G).


Erwin Grueber, “A Difficulty in the Doctrine of Consideration” (1886) 2 LQR 33.


*Justinian’s Institutes* (Inst).


Stéphane Sérafin, “Transfer by Contract in Kant, Hegel, and Comparative Law” [unpublished].


**Case Law**


*Canadian Bank of Commerce v Dembeck*, [1929] 2 WWR 586 (Sask CA).

*Chiliback v Pawliuk* (1956), 1 DLR (2d) 611, 17 WWR 534 (Alta SC).

*Cochrane v Moore* (1890), 25 QBD 57 (CA).

*Cosentino v Dominion Express Co* (1906), 16 Man R 563, 1906 CarswellMan 77 (CA).

*D’Amore v Pulford*, 2006 BCCA 416.


*Doe on the Demise of Garnons v Knight* (1826), 5 B & C 671, LR 2 HL 309 (KB).

*Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*, [1915] AC 847 (HL) at 853.


Governors and Guardians of the Foundling Hospital v Crane, [1911] 2 KB 367 (CA).

Graham v Graham (1791), 1 Ves Jun 724.

Hardy v Atkinson (1908), 9 WLR 564, 1908 CarswellMan 142 (CA).

Hebert v Gallien (1931), 2 DLR 150, 3 MPR 67 (NB CA).

Irons v Smallpiece (1819), 2 B & A 55.

Kingsmill v Kingsmill (1917), 41 OLR 238, [1917] OJ No 30 (HC).

Lewis v Spurr (1966), 59 DLR (2d) 362, 57 WWR 705 (Alta CA).

Lewis v Spurr, [1967] SCJ No 1, 65 DLR (2d) 672.


McManus v McCarthy, 2007 ABQB 783, 431 AR 389.

Molsons Bank v Cranston (1918), 45 DLR 316 (Ont CA).

Murphy Estate, Re, [1998] NSJ No 325, 169 NSR (2d) 284.

O'Donnell and Nicholson, Re (1920), 54 DLR 701, 48 OLR 187 (SC).

Pilcher v Rawlins (1871-1872), LR 7 Ch App 259.


Ray v Gilmore (1958), 14 DLR (2d) 572, 26 WWR 138 (BC CA).

Read v Rayner (1943), [1943] 2 DLR 225 (PEI SC).
Read v Rayner (1943), [1943] 4 DLR 803 (SCC).

Robinson v Cumming (1742), 2 Atk 409.

Rowan and Eaton, Re (1927), 2 DLR 722, 60 OLR 245 (CA).

Scandinavian American National Bank v Kneeland (1914), 8 WWR 61 (SCC).

Schilthuis v Arnold, 66 ACWS (3d) 1163, 95 OAC 196 (Ont CA).

Shillibeer v Glyn, Bart and Others (1836), 2 M & W 143, 150 ER 704 (Exch of Pleas).

South Australian Insurance Co v Randell (1869) LR 3 PC 101.

Standing v Bowing, 31 Ch D 284 (CA).

Thompson v Mechan (1958), 13 DLR (2d) 103, [1958] OR 357 (CA).

Town of Eastview v Roman Catholic Episcopal Corporation of Ottawa, 47 DLR 47, 44 OLR 284 (SC, App Div).

Tweddle v Atkinson, (1861), 1 B & S 393.

Walker v Foster, [1900] 30 SCR 299.

West Cumberland Iron & Steel Co v Winnipeg & Hudson’s Bay Railway (1890), 1890 WL 8974 (CA).

Wheatley v Low (1791), Cro Jac 668, 79 ER 578 (KB).

Whitehead v Greetham (1825), 2 Bing 464, 130 ER 385 (Exch).

Wilkinson v The Anglo-Californian Gold Mining Company (1852), 18 QB 728, 118 ER 275.

Woodard v Woodard, [1995] 3 All ER 980 (CA).

Xenos v Wickham (1866), LR 2 HL 296.

Zwicker v Zwicker, [1899] 29 SCR 527, 1899 CarswellNS 58.
Legislation

*Bills of Exchange Act, 1882* (UK), 45 & 46 Vict, c 61.


*Bürgerliches Gesetzbuch* (BGB).

*Code civil des français* (1804) (CcF).

*Code civil français* (C Civ).

*Civil Code of Québec* (CCQ).


*Louisiana Civil Code* (LCC).


*Statute of Frauds* (UK), 29 Car 2, c 3.

*Statute of Uses* (UK), 27 Hen 8, c 10.