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CAINS

Doing a Good Deed:
The Uniqueness of the Manx Deed.

The Legal Mechanism of the Deed

It was said by the English Kings Bench Division in *Sharington v Strotton* (1564) 1 Plow. 298, 308 that the law of England was that there were two ways of making contracts or agreements. One by words and one in writing. The court opined that because words "*are oftentimes spoken by men unadvisedly and without deliberation*", a contract by words alone will not bind without valuable consideration (being a benefit gained or detriment suffered, per Lush J (at 162) in *Currie v Misa* (1874) LR 10 Ex 153). However, this would not be the case when an agreement was made by deed which would represent an enforceable promise made without valuable consideration due to the formality of the decision to make an accord. The court stated in *Sharington v Strotton* at [308]: -

> *"For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good-will that the thing in the deed should pass from him to the other."*

Contracts by deed therefore played a role in the common law to protect the party or parties from imprudent commitments. To take effect at law the formality of the execution of a deed had to be complied with for an agreement without consideration to be binding. The common law treated the solemnity in the act of sealing a deed as akin to the consideration of a simple contract. This was summarised by *Best CJ in Morley v Boothby* (1825) 3 Bing 107; 130 ER 455, 456: -

> "The common law protected men against improvident contracts. If they bound themselves by deed, it was *considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it."*

The exception to the enforceability of deeds under English law is found in the law of equity. In equity the maxim '*equity will not assist a volunteer*' governs. In agreements made by deed and without consideration, the promisor is considered a 'volunteer' rendering the equitable remedies such as specific performance of a contractual promise unavailable. This is not the case for damages, which Lord Hardwicke determined in the judgment of *Williamson v Codrington* (1750) 1 Ves Sen 511 (at 516) that equity would follow the common law meaning a volunteer could enforce by way of damages a deed made without consideration: -

> *"Undoubtedly a bill may be for satisfaction of a debt out of assets real and personal, which debt may be created voluntarily by the testator: for though one cannot come into equity to supply a defect in a voluntary deed without consideration (vide 1 Ves. sen. 236), or in many instances cannot come for specific performance of such an agreement (see Colman v. Sarell , 1 Ves. jun. 50, 54), yet if he has a specialty, he does not want proof of consideration; but may come into equity as well as law to have satisfaction for that debt on that specialty out of assets; and then the court will not send it to law; but will judge, whether he has a specialty or not."*

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Manx Deeds vis a vis English Deeds

With its legislature Tynwald reputed to be the oldest continuous parliament in the world and its ancient office of Deemster (Judge) as custodian of the law, the Isle of Man developed its own statute and common law as an independent jurisdiction. That said, the use of deeds to effect binding agreements and promises are equally present in Manx law as in English law. Originally the conveyance of land was delivered by the passing of straw at the Manorial Court witnessed by the officers of the Lord of Man (see paragraph 62.6 of *Parr's Abstract of The Laws, Customs and Ordinances of the Isle of Man* (1690) (transcription of Professor Peter Edge)). However, as stated by Deemster Sherwood in his *Manx Land Tenures* (1899), commercial efficacy necessitated an evolution of this system (at [32]):

> *"As dealings in land became more frequent the inconvenience of delaying the completion of the transaction until the holding of the succeeding Manorial Court was more felt, and consequently the practice of conveying at once by a deed became more common, until at length the primitive mode of assurance by the simple entry on the Roll went entirely out of use."*

Notwithstanding similarities in the uses of deeds, two areas that the law of the Isle of Man has diverged from English law have been the contemporary requirement under English law for the witnessing of deeds and the historic practice of sealing deeds.

Historically, under English law it was not in fact essential to the validity of a deed in general that it should be executed in the presence of a witness (see for example the application of an exception to the need to witness in *Fitzgerald v Elsee* (1811) 2 Campbell 635). The perceived requirement to witness the execution of a deed was necessary for the preservation of the evidence of the deed rather than to constitute its essence (page 11, *Woodfall's Law of Landlord and Tenant* (4th Ed, 1814)). As for the sealing of a deed, this was a common law requisite deemed to have been brought to England by William the Conqueror (page 304, *Blackstone's Commentaries of the Laws of England* (1859)).

The formalities of the preparation and execution of deeds in England & Wales is now governed by the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMP"). Section 1(1) of the LPMP removed the requirement in English law for a deed to be sealed by an individual. For companies under English law, the Companies Act 1989 abolished the requirement that every company must keep a common seal, and, for the first time, permitted companies to execute deeds by the signature of their officers alone. Section 1(3) of the LPMP also put on a statutory footing the now fundamental requirement under English law for an individual's execution of a deed to be witnessed.

Historic Formalities of the Manx Deed

It was said by Sir James Gell, a former First Deemster and eminent jurist of Manx law, that in the construction of Manx deeds, Manx courts applied a liberal interpretation to their terms on account of the "*rude state of Manx conveyancing*" (*Corrin v. Clague* 1906 MLR 401 at 404 (CLD)). Relative to the deeds of England & Wales, the lack of formality meant that a Manx deed need only be in signed writing, without seal or witness: -

> "Sealing has never been usual in the Island, the signature of the parties having always been held a sufficient execution.
>
> It is not essential to the validity of a deed by the law of England that there should be attesting witnesses, and in the absence of any authority to the contrary, it may be presumed that the Manx Law is in that respect similar."
>
> Deemster Sherwood, page 43, Manx Law Tenures (1899)

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Notwithstanding the reference to absence of authority observed by Deemster Sherwood, it does appear that the witnessing of deeds (to provide proof at court) had been very much alive in the Isle of Man. In Johnson's Jurisprudence of the Isle of Man (1811), at page 40 it is recognised (very much in accord with the position of England & Wales at that time) that witnesses to the execution of a deed were required to provide proof before a court should the existence of the deed be disputed. It also identified a provision of Manx customary law that was different to English law in the act of the parties acknowledging a deed following execution before a Manx Magistrate: -

"The common conveyance of a Manks free-hold, is a deed signed by the parties in the presence of two witnesses, in the nature of an English bargain and sale, not indented, and without seal or stamp, neither of which are necessary to any deed executed in the Island, except instructions of a public nature, and letters of attorney to be used out of the Island, in which case the government seal is requisite; and it is usual and advisable for the parties to acknowledge the deed before a magistrate, who verifies it to be their act under his hand. With this formality it is received in any court of justice in the Island, without the necessity of producing witnesses to prove the execution;"

The provision of Manx customary law that advised the additional formality of proof of execution before a Manx magistrate found the favour of The Privy Council (the Isle of Man's final appeal court) in *Blachford v. Christian* 1522 - 1920 MLR 39, at 42 (PC); (1829) I Knapp 73, where the virtue of such regulation was observed by the court: -

"There is an excellent law in the Isle of Man, which requires that after deeds are executed the parties should appear before a magistrate, acknowledge their deeds, and pray to have them registered. This law affords no protection against imposition, if the magistrate be not entirely independent of the parties to the deeds and unconnected with the transaction to which they relate."

The Contemporary Formalities of Manx Deeds

The introduction of the LPMP in England & Wales was a significant step in clarifying and codifying the execution of deeds. The Isle of Man has not introduced similar legislation to the LPMP and the position of the terms of the Manx deed is on the whole governed by the common law which guidance suggests an holistic appraisal of the instrument itself. Deemster Cain QC in *Aall Trust v McCormick* (judgment of 17 April 1998) 2012 MLR Note 1 observed that: -

"While there is no doubt that seals have never been used in the Isle of Man, except by corporations, and that the formality of affixing a seal has never been, and is not now, required in order to constitute a written paper a deed, in my view for a written paper to be a deed there must be some evidence that the parties intended it to be a deed. This will normally be found in the words of the document itself."

After *Aall Trust v McCormick*, the essential qualification terms for a Manx deed were set out by Deemster Doyle and Judge of Appeal Tattersall QC in the Staff of Government Division (the Appeal Division of the Isle of Man High Court) in *Oakley v. Osiris Trustees Limited* 2005–06 MLR Note 24, as: -

"(a) be a written document;
(b) be approved by those upon whom it is binding;
(c) demonstrate a degree of formality;
(d) be intended by those executing it to be binding on those affected by it."

Accordingly, and unlike the position in England & Wales under the LPMP, the contemporary position for an individual's execution of deeds under Manx law is that there is no requirement for a witness to the execution of the deed. The limited exception to the common law position is found at Rule 101(1) of the Land Registry Rules 2000 that sets out that the execution by an individual of an instrument which affects a dealing relating to registered land must be attested by at least one witness.

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The execution of deeds under Manx corporate law is governed by statute, principally and respectively sections 29-32 of the Companies Act 1931, section 21 of the Limited Liability Companies Act 1996 and section 86 of the Companies Act 2006. These sections provide for the combination of officers and authorised persons that can execute deeds on behalf corporate entities governed by Manx law. Similarly with the position of an individual, a corporate officer's execution on behalf of a Manx corporate entity is not required by general law (absent a specific provision demanding it) to be witnessed by another party.

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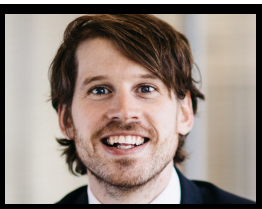

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