was no provision for winding up in the rules), and hence the risk of the members benefiting individually would not have been high. He was prepared to assume that the testatrix was willing to take this chance.

Adam J. made no mention at all of the High Court judgment in *Bacon v. Pianta*,[24] and mentioned *Leahy's* case[25] only in passing, without really examining the judgment. *Bacon* could have been distinguished on the form of the gift and the attributes of the association, but rather than attempting to distinguish it, His Honour chose simply to ignore it.

It should be noted that if there had been a rule of the association prohibiting a member from ever sharing in the common fund, then the gift would have been construed as a purpose trust. Here, the gift was to be paid into the club funds but there was no condition that the members were never to take their share. It was this, in the view of Adam J., which distinguished it from a purpose trust. Another point which perhaps may be mentioned is that the learned judge seemed to accept the strict view of *Morice v. The Bishop of Durham*[26] in that he implied that if there is a purpose trust, the gift is invalid regardless of whether there had been a breach of the perpetuity rule.

The case represents an enlightened solution to overcome a serious problem. The decision is to be welcomed as perhaps reflecting a judicial attitude, which will help to decide cases such as *Bacon v. Pianta* in a more sensible way.

PATRICIA BELLON

SHARP v. ELLIS; RE EDWARD LOVE & CO. PTY LTD (IN VOL. LIQ.)[1]

Contract—Consideration—Promissory Notes—Performance of void agreement not consideration for later valid agreement.

The recent case of *Sharp v. Ellis*[2] raised anew the question of Lord Mansfield's doctrine of moral consideration. In the Supreme Court of Victoria Gillard J. had to consider the 1863 case of *Flight v. Reed*[3] which Professor Holdsworth has characterized as one of the last manifestations of Lord Mansfield's heretical views on consideration.[4]

The applicant Sharp had loaned various sums of money amounting to $17,000 to Edward Love & Co. Pty Ltd. He took as security ten promissory notes. The notes had been drawn from 1954 onwards. When they had fallen due new notes had been issued. By virtue of clause 4 of its memorandum of association the company was empowered to receive deposits only from its shareholders. Though the applicant sought to establish that the directors had drawn the notes on their own behalf, on the evidence before him Gillard J. held that the company was the principal debtor.[5] Since such deposits were *ultra vires* the company's memorandum of association Adam J. had held in

[24] (1966) 114 C.L.R. 634. [25] [1959] A.C. 457.
[26] (1805) 32 E.R. 656, 947.

[1] [1972] V.R. 137. Supreme Court of Victoria, Gillard J.
[2] *Ibid.* [3] (1863) 1 H. & C. 703.
[4] Holdsworth, *History of English Law* (4th ed., 1966) viii, 31.
[5] [1972] V.R. 137, 138-9.

previous proceedings that deposits accepted from non-shareholders prior to 1 July 1962 were void and raised no liability to repay.[6]

On 1 July 1962 section 20 of the Companies Act 1961 came into force. It provides

> No act of a company (including the entering into of an agreement by the company) . . . shall be invalid by reason only of the fact that the company was without capacity or power to do such act . . .

Though the deposits had been made prior to 1962, as the notes fell due new ones were issued subsequent to the commencement of section 20. The liquidator of Edward Love & Co. Pty Ltd, Reginald Wilfrid Ellis, had refused to accept proof of debt. The applicant Barnett Sharp had applied to the Supreme Court pursuant to section 279 of the Companies Act 1961 for a reversal of the decision.[7]

Counsel for the respondent liquidator argued that the earlier decision of Adam J. made the issue *res judicata* or alternatively raised an issue estoppel. Counsel for the applicant submitted that the issue should be reconsidered since the decision of the Court of Exchequer in *Flight v. Reed*[8] had not been cited to Adam J.[9] Without giving a final ruling on this point Gillard J. proceeded to consider the submissions made on behalf of the applicant. It was submitted that notwithstanding that the deposits were originally void, the re-issue of the promissory notes was supported by consideration.[10]

Under the Bills of Exchange Act, 1909-36 (Cth) consideration for a promissory note may be constituted by (a) consideration sufficient to support a simple contract or (b) an antecedent debt or liability.[11] In view of the previous ruling of Adam J.[12] the applicant could not rely upon the latter. There simply was no antecedent debt or liability. Whilst conceding this, counsel for the applicant submitted that there was consideration sufficient to support a simple contract. His argument was based on *Flight v. Reed,*[13] and was in essence as follows. When an agreement which is illegal is entered into by parties and one of them takes the benefit in the form of a sum of money then, when the illegality is removed, a later promise to pay the sum of money is enforceable.[14] Some support for this proposition is to be found in the textbooks, notably *Treitel* and *Corbin on Contracts*.[15]

In *Flight v. Reed* the Court of Exchequer held by a majority that 'a man by express promise may render himself liable to pay back money he has received as a loan though some positive rule of law intervened at the time to prevent the transaction from constituting a legal debt'.[16] The court enforced a promise, given after the repeal of the Usury Acts, to pay a debt which had been void by virtue of the repealed legislation. This promise was supported by consideration since 'the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise to be made originally, does not cease to be sufficient when the legal restriction is abrogated'.[17]

[6] *Re Edward Love & Co. Pty Ltd (in vol. liq.)* [1969] V.R. 230, 232.
[7] [1972] V.R. 137, 138.
[8] (1863) 1 H. & C. 703.
[9] *Re Edward Love & Co. Pty Ltd (in vol. liq.)* [1969] V.R. 230.
[10] [1972] V.R. 137, 140.
[11] S. 32(1). S. 95 makes the provisions of s. 32(1) applicable to promissory notes.
[12] *Re Edward Love & Co. Pty Ltd (in vol. liq.)* [1969] V.R. 230.
[13] (1863) 1 H. & C. 703.
[14] [1972] V.R. 137, 142.
[15] Treitel, *The Law of Contract* (3rd ed. 1970) 63-4; *Corbin on Contracts* (1963) iA, para. 236; *Williston on Contracts* (3rd ed. 1957) para. 150.
[16] (1863) 1 H. & C. 703, 715.
[17] *Ibid.* 716.

With regard to this decision, Gillard J. held that Pollock C.B. had 'overstated the principle of the rule he [had] relied upon and [had] misapplied it to the facts . . . before him'.[18] Sir Frederick Pollock regarded the decision as wrong.[19] Sir Alexander Cockburn C.J. is reported in the Law Times Reports[20] (but not in the Law Reports[21]) as having disapproved it. The main authority relied upon by the majority in *Flight v. Reed*[22] was the learned note to *Wennall v. Adney*[23] which has been approved again and again as the definitive statement of principle in this area.[24] The cases cited in the note involve voidable rather than void agreements.[25] Indeed the note states:

> If a contract between two persons be void and not merely voidable no subsequent express promise will operate to charge the party promising even though he has derived the benefit of the contract. Yet according to the commonly received notion respecting moral obligations and the force attributed to a subsequent express promise such a person ought to pay. An express promise therefore, as it should seem, can only revive a precedent good consideration, which might be enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but can give no original right of action if the obligations on which it was founded never could have been enforced at law though not barred by any legal maxim or statute provision.[26]

As the author of *Corbin on Contracts*[27] notes, the decision in *Flight v. Reed*[28] is in conflict with this rule. Though Scrutton L.J. cited *Flight v. Reed* in *Joseph Evans & Co. Ltd v. Heathcote*[29] it was by no means with full approval. Indeed His Lordship was careful to distinguish between void and voidable debts. In *Roscorla v. Thomas*,[30] Lord Denman C.J. did refer to an express promise being supported by 'equitable and moral obligations'. It is difficult to know what His Lordship meant, but since he elsewhere referred to voidable contracts subsequently ratified[31] it seems unlikely that he was referring to void contracts subsequently ratified, the more so because he cited with approval the note to *Wennall v. Adney*.[32] It was Lord Denman C.J. who finally laid to rest Lord Mansfield's doctrine of moral consideration.[33]

Relying on *Sinclair v. Brougham*,[34] Gillard J. held that the original deposits were void as being *ultra vires* and so could not constitute good consideration for a subsequent promise. Accordingly the application was dismissed.[35]

As Lord Sumner pointed out in his speech in *Spencer v. Hemmerde*,[36] when an unenforceable debt is revived by an express promise it is the original debt which is enforced, not a new one. Essential to the revival of a lapsed debt by an express promise is the requirement that the debt must have been rendered

[18] [1972] V.R. 137, 141.
[19] 130 Revised Reports vii.
[20] *Rimini v. Van Praagh* (1872) 27 L.T. 540, 542.
[21] (1872) L.R. 8 Q.B. 1.
[22] (1863) 1 H. & C. 703.
[23] (1802) 3 Bos. & P. 247, 249.
[24] *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 447; *Roscorla v. Thomas* (1842) 3 Q.B. 234, 237; Holdsworth, *op. cit.* 36-7.
[25] (1802) 3 Bos. & P. 247, 249; *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 447 (*per* Lord Denman C.J.).
[26] (1802) 3 Bos. & P. 247, 252.
[27] *Corbin on Contracts* (3rd ed. 1963) iA, para. 236, n. 3.
[28] (1863) 1 H. & C. 703.
[29] [1918] 1 K.B. 418, 432, 436ff.
[30] (1842) 3 Q.B. 234, 237.
[31] *Ibid.*
[32] (1802) 3 Bos. & P. 247, 249.
[33] *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 450.
[34] [1914] A.C. 398.
[35] [1972] V.R. 137, 147.
[36] [1922] 2 A.C. 507, 524-5.

unenforceable but not void by some rule of law. Since the original promissory notes were void and raised no liability to repay, the subsequent promise to pay them was not supported by good consideration. The promise acknowledged nothing. This is to be contrasted with the case where a promise to pay a statute-barred debt (for example one for which the limitation period has run) acknowledges something of substance. In the former the defect is substantive. There is simply no debt. In the latter case the defect is merely procedural. The debt exists, but it cannot be enforced.

It would seem logically that in both cases the promise to pay is supported only by a moral consideration. Nevertheless the perjorative (to traditional lawyers) epithet 'moral consideration' is applicable only to the first category—debts which are void. If this were allowed as consideration there is logically no reason why any bare promise should not be enforced. As Lord Denman C.J. commented:[37]

> Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The decision in *Sharp v. Ellis*[38] seems, with respect, manifestly correct in point of principle and authority, yet His Honour sympathised with the unsuccessful applicant.[39] In *Pillans v. Van Mierop*,[40] Lord Mansfield contended that in 'commercial cases among merchants, the want of consideration is not an objection'.[41] Wilmot J. stated that a written agreement did not require consideration to support it.[42] Is there any reason why this should not be the law? The United Kingdom Law Revision Committee recommended that written agreements be made enforceable irrespective of consideration.[43] Meritorious claims should not be defeated by highly technical rules depending on such fine spun distinctions as between void and voidable agreements.

M. F. MACNAMARA

BRESKVAR AND ANOTHER v. WALL AND OTHERS[1]

Torrens system—Registration in fraud of transferor—Transfer void—Indefeasibility of title—Certificate as conclusive evidence of title—Priority between equitable interests.

This is a unanimous decision by the High Court of Australia approving the Privy Council decision in *Frazer v. Walker*.[2] B, the registered proprietor of land, had obtained a loan of money from P. As security, he had given to P a signed memorandum of transfer and the certificate of title for the land. The memorandum of transfer was void under section 53(5) of The Stamps Act 1894 (Qld), which provides that any instrument of conveyance or transfer shall be void and inoperative 'unless the name of the purchaser or transferee is written therein in ink at the time of the execution thereof'. P, in fraud of

[37] *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 450.
[38] [1972] V.R. 137.
[39] *Ibid.* 146.
[40] (1765) Burr. 1663.
[41] *Ibid.* 1669.
[42] *Ibid.* 1670-1.
[43] United Kingdom Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (1937) Cmd 5449, para. 50(2).

[1] (1972) 46 A.L.J.R. 68. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.
[2] [1967] 1 A.C. 569.