LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
DEEDS AND SEALS

LRC 96

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Table of Contents

TO THE HONOURABLE BRIAN R.D. SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON DEEDS AND SEALS

Whenever it is necessary to record an agreement, the parties usually do so by making a simple contract. Sometimes, however, the parties may affix seals to the contract following their signatures. Affixing a seal has a profound effect in law.

An instrument executed under seal is called a deed. Obligations recorded in a deed are subject to an area of law in which the principles sometimes differ dramatically from those which are applied to a simple contract. Since few people are aware of these differences, executing an instrument under seal is a practice which is attended by some danger. Moreover, curious results are to be found in the cases where one legal consequence follows from a contractual obligation, and another, totally different, consequence follows when the same obligation is contained in a deed.

In this Report the Commission examines the historical development of the current law governing deeds, and reviews amendments to the law enacted or proposed in other jurisdictions. It is recommended that legislation be enacted to provide the obligations created or recorded by deed have the same legal ef-

fect as obligations contained in a simple contract. The enactment of such legislation will dramatically simplify the law and render it more just.

CHAPTER I DEEDS AND SEALS

A. Introduction

It is difficult to see what aspect of contemporary life would emerge unscathed if people could not enter into binding arrangements. In general, the law acknowledges two methods for people to define the legal parameters of their dealings: the contract and the deed.

Deeds are not used very often anymore. Typically, the parties will enter into a simple contract. Many business arrangements, however, may also be the subject matter of a deed. Simply affixing a seal to a document at the time it is executed may be sufficient to transform a simple contract into a deed. In may cases, a seal is added out of an excess of caution, if there is any doubt about sufficiency of consideration.

What few people realize is that adding a seal to a contract alters its character completely. Different principles of law now apply to the instrument. A contract is governed by the law of contract. The obligations contained in a sealed instrument, or deed, are governed by the law of covenant.

Why do different principles apply? For one reason, the theory underlying enforcement differs between deeds and contracts. For another reason, since deeds are so seldom used, the principles of law which govern them have not been subjected to the same kinds of refinements we have seen in the law of contract over the last 100 years.

In most cases nothing turns on the fact that a document has been executed as a deed. The parties treat it as though it were a contract. Where, however, something goes awry, ingenious counsel will, from time to time, delve into the ancient learning respecting deeds and come up with a highly technical argument, that would not otherwise exist, to defeat the parties' expectations.

An example is useful to show just how different specialty obligations are from simple obligations.

A borrows $50,000 from B. C and D guarantee the repayment of the loan. They enter into a written guarantee with B, which is binding. The guarantee is not intended to be under seal but, after it is executed, B, without C or D’s knowledge, affixes seals. A defaults. B sues C and D on the guarantee.

The guarantee was enforceable before seals were affixed. Should it make any difference that they were added? In *Petro Canada Exploration Inc*. v. *Tormac Transport Ltd.*, the court felt that adding the seals so transformed the nature of the guarantee that it could not be enforced. It is difficult to see why tampering by one party should invalidate a guarantee. Perhaps this case was wrongly decided. Still, it lurks in the reports, waiting to do mischief.

B. Background to the Report

Initial work on deeds and seals was conducted by Professor Robert Howell of the Faculty of Law, University of Victoria. The consultative document he prepared for the Commission guided our earlier deliberations and made a convincing case for the need for reform in this area of the law. This Report draws heavily on Professor Howell's writing and research. The Commission is indebted to him for his assistance.

C. A Note on Terminology

The term "contract," strictly, embraces any consensual binding obligation, including one made by deed. A deed is a "specialty" contract. Other kinds of contracts are referred to as "parol" or "simple" contracts. For convenience, however, in this Report the term "contract" is used to refer only to simple or parol contracts. Contracts made under seal are referred to as deeds or specialty contracts.

Legal terms have been developed to distinguish between binding obligations created by deed or by contract. If they are created by deed, they are referred to as "specialty obligations." If they are created by contract, the term is "simple obligations."

D. Overview of the Report

The heart of this project involves a consideration of two questions:

(i) do the formalities required to create a specialty obligation operate sensibly today?

(ii) are the legal distinctions that exist between specialty and simple obligations justifiable?

The answers to these questions involve some understanding of the historical development of deeds and seals. That is discussed in Chapter II of this Report. In Chapter III, the law governing the making of a deed is discussed. Chapter IV is concerned with the legal distinctions drawn between specialty and simple obligations. Proposals for reform are to be found in Chapter V.

E. The Working Paper

This Report was preceded by Working Paper on Deeds and Seals (No. 56, September, 1987). The Working Paper was circulated widely among persons interested in this area of the law. Comments received on the Working Paper will be discussed later in this Report.

CHAPTER II HISTORICAL NOTE

A. Introduction

Many people make deeds without fully appreciating that they are entering into a legal transaction which differs fundamentally from a simple contract. The step which creates the deed involves affixing a red wafer, called a seal, next to their signatures. Many legal forms have printed on them a seal, so that parties signing those forms are making deeds. Why does a seal have this significance? The explanation requires an historical perspective.

B. Execution of Documents and Literacy

Today, the word "seal" is used to mean both the impression that is made on a document and the implement used to make the impression. Technically, however, the seal is the impression. The implement used to make it is called a "matrix" or "die."

Before the ability to write was common, the accepted method of executing and authenticating documents required the use of the seal. The earliest examples that have been found are from about 4500 B.C. in Babylonia, Assyria and Egypt. Seals (particularly signet rings) were common in ancient Greece. In Roman times, the seal gradually lost its place to the signature.

During the Dark Ages, the seal was again adopted as a means of identification and authentication by the Frankish Kingdoms of Western Europe. There is also evidence of similar use in England during the time of the Anglo-Saxons, but not until after the Norman Conquest did the seal flourish there.

A document was usually sealed with a drop of molten wax impressed with a matrix. Sometimes the wax was dropped onto a ribbon which was left hanging from the document. Later, other methods of sealing a document developed, such as making an impression with a handpress or attaching an adhesive disk of dried paste, called a wafer.

Even in very early times there was some flexibility as to the form a seal could take. The following quotation is attributed to a Charter of Edward III (1326 -1377):

> And in witness that it was sooth
> He bit the wax with his foretooth.

C. Actions of Covenant

Most legal issues involve resolving issues of fact. The manner in which facts are to be established has always been a problem for the courts. In ancient days, facts were established by the litigants and by members of the community. The plaintiff would produce a "good suit" and the defendant would respond with a "wager of law." Both involved the parties producing persons who would swear to their credibility. This was found to be difficult and unreliable outside of a local environment. The royal courts developed stringent requirements of evidence, proof and form, so that the facts in issue could be established objectively. The action of covenant was a means of enforcing obligations, but only those obligations which had been stipulated in an instrument made under seal - a deed:

> ... some time between 1290 and 1320, the royal judges made the momentous decision that the methods of proof [of private agreements] which were acceptable at the local level were inadequate [in the royal courts, where the] only proof they would admit was a deed, a written document under seal.

The seal at that time was merely a means of "signing" used by a person who was illiterate and unable to write his name. Hence, the royal courts required that agreements be in writing and "signed" using a seal. In the beginning, this requirement was adopted to ensure sufficient evidence of a promise. An obligation recorded in a deed was "a promise well-proved." Later the form itself - "the solemnity of parchment and wax" - became the important factor:

> The man who relies upon a covenant must produce in proof some 'specialty' [deed under seal] ... Thenceforward, however, it is only a short step to holding as a matter of law that a 'deed' ... has an operative force of its own ... The sealing and delivering of the parchment is the contractual act.

From a modern perspective this was an unfortunate transition. In effect, parties became magically bound merely by following ritual steps. This is a confusing notion, and remote from the two original concerns: was an obligation created? is there evidence of it?

D. Assumpsit and the Decline of Covenant

The action of covenant was hindered by a number of features. Written agreements, for example, were impractical or inconvenient for many smaller transactions. A rule or understood practice provided

that only transactions of a value of forty shillings or more should receive royal justice. The 14th and 15th centuries, however, were inflationary times. Monetary limits no longer prevented these smaller transactions from being pursued in the royal courts. Covenant would not serve in these circumstances, so that relief had to depend upon an alternative theory. By the mid 14th century, the royal courts recognized a form of action under the umbrella of "trespass on the case," which later came to be "assumpsit." Initially it focused upon a careless or wrongful performance of an obligation undertaken by persons in specified callings. From these origins developed the modern law of contract.

The decline of covenant was swift. It was supplanted by assumpsit. It continues, however, as a cause of action separate and distinct from contract.

E. Covenant Today

The action of covenant has survived to the present day. It is the means by which a deed under seal is enforced.

A deed is often used in those cases where a simple contract cannot be made or is inappropriate. For example, legislation sometimes requires that a deed be used (see Appendix A to this Report). In other cases, the parties may feel that the formalities required for making a deed are more in keeping with the significance of the legal arrangement being recorded, or it may be necessary to use a deed to ensure that the arrangement is binding in other jurisdictions. Lastly, in the circumstances a contract may not be enforceable, while a deed will be.

A basic feature of the law of contract is that each party must receive something of value under a contract before it will be binding. The exchange of value is referred to as "consideration." A promise which is not supported by consideration is referred to as a "gratuitous obligation" and it is not binding. For example, if A promises to give B a book in exchange for a magazine, the parties have entered into a binding contract supported by consideration. If A refuses to give B the book, B will be entitled to a legal remedy. If, however, A is to receive nothing in exchange for his promise to give B the book, the promise is not binding. The only method of entering into a binding gratuitous obligation is by deed. Many arrangements are entered into by deed where the parties are uncertain whether there is sufficient consideration to make the arrangement binding.

It is possible that the peculiar status of the deed and the seal today is the result of trying to rationalize the law of covenant with that of contract. Why is an agreement that is unsupported by consideration but executed under seal enforceable in covenant but unenforceable as a contract? The simple explanation is that covenant developed before the concept of consideration. The courts in the 13th and 14th centuries were prepared to enforce promises of which there was sufficient evidence. This concept, however, was foreign to the notions developed in contract. The formalities which were observed in making a deed, therefore, were identified as the distinguishing feature from contract. The fact that the primary function performed by deeds was evidentiary was forgotten.

It is sometimes mistakenly asserted that a seal "imports" consideration. This view is the result of another flawed attempt to rationalize contracts and deeds. The lineage of covenant pre-dates and is wholly distinct and separate from today's law of contract. Stoljar, rejecting any notion of a seal "importing" consideration, notes that the seal and consideration reflect different characteristics. The seal relates to the authenticity of an agreement. Consideration, in its broadest terms, is the motive or reason for making the agreement.

The seal and consideration do, however, perform similar functions. The law requires more than a mere promise before a transaction will be enforceable. Without consideration it is the solemnity of affixing the seal that has been required.

CHAPTER III THE MAKING OF A DEED

A. Introduction

Whether a deed is binding on its maker depends upon whether he intended to execute and be bound by it as his deed. This he signifies by executing the document under seal, which raises the issue of what is a sufficient act of sealing.

Affixing a seal does not in itself make an instrument a deed. That must be determined from the circumstances, such as the acts and words of the instrument's maker. It is useful to note the classic *dict* of Blackburn J.:

> No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient.

It has been held that what constitutes a good seal is a question of law, while what constitutes a sufficient act of sealing is a question of fact. This is nbot a particularly useful distinction. Whether something constitutes a good seal invariably involves a consideration of the process of sealing. Ultimately, the issue becomes whether the maker of the instrument *intended* to execute it under seal and make it a deed.

B. Form and Material Substance

1. INTRODUCTION

Today a deed is usually sealed by affixing a wafer or by adopting a stationer's seal that has been printed on the instrument. A number of other methods of sealing an instrument have been recognized by courts. The issue of what constitutes a good seal has inspired a great deal of litigation.

2. THE NEED FOR AN ATTACHMENT, MARK OR IMPRESSION

As a general rule, a seal must be formed using "wax, wafer or some adhesive substance." Nevertheless, there are circumstances falling short of this standard and courts have had to determine whether there is some magic in the material used to make a seal, or whether the intention of the person making the instrument might permit a seal to take some other form. For example, parties have attempted to seal instruments by drawing a flourish around the written word "seal," making a soot mark with a poker, or adopting a stationer's pre-printed seal as their own.

The requirement for wax, wafer or some adhesive substance has been gradually relaxed to a need for some kind of mark, attachment or impression apparent upon the document that could be regarded as a seal. In some cases, significance was attached to when the seal was placed on the document. If the seal is attached at, or close to, the time of execution, then it is likely the maker of the instrument directed his mind to the process of sealing. This, of course, was the focus of the dispute with respect to pre-printed seals, in contrast to the drawing of a seal where the mind's attention to the fact of sealing is obvious.

In many cases, particularly when it became necessary to determine the time of affixing a seal, the inquiry as to whether the seal was good began to merge with the inquiry into the sufficiency of the act of sealing. In each case, an assessment of the maker's intent was involved. At that point, it became clear that other evidence available from the document itself could assist a court in assessing the maker's intention. The court's inquiry may focus upon the mark or impression in the sense of its colour, shape, size or

position. Or it may focus upon words and phrases in, say, a clause in the document which provides that the document is signed, sealed and delivered, even though it hasn't been.

3. A SEAL WITHOUT ATTACHMENT, MARK OR IMPRESSION

Many instruments that are to be executed under seal contain a clause stating that the instrument is signed, sealed and delivered by the party executing it. A clause of this kind certainly reflects an intention that the instrument is to be executed under seal. A number of courts have given effect to deeds which contained a provision of this nature, but which did not actually bear a seal. In effect, these courts have found that there was a sufficient act of sealing, even in the absence of a seal.

C. Sufficient Act of Sealing

A seal, valid in "form and material substance," on a document is insufficient in itself to constitute the document a sealed instrument. The must be "acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him." The focus is then placed upon the intentions of the parties as revealed by the process or act of sealing.

The application of the seal must be the maker's conscious and deliberate act, but no particular form of words in the document is necessary. Disputes usually arise when a seal is applied after the instrument is signed. In each case the issue is the intent at the time of signing. A person signing a document is not bound because a seal is later affixed to it unless he intended the document to be executed under seal.

Furthermore, there is today no conventional procedure or ceremony to be followed in sealing a document. The traditional procedure (overlapping with the procedure for delivery of the deed) was for the executant to place his finger or thumb on the seal and at the same time to utter the words "I deliver this as my act and deed." Today, the signature, combined with whatever constitutes a seal in form and material substance is sufficient.

In *Wolff* v. *Oliver*, the document was signed, but did not bear a seal, mark or impression of any kind. The party making the document, upon the advice of the attending lawyer, placed his finger on the paper and signed below it, although he did not know why this procedure was being followed. Ruttan J. was prepared to presume a valid sealing from a clause in the document that provided it was signed, sealed and delivered, but could not make that finding on the evidence before him:

> ... there was in fact no seal or impression of any kind, nothing more than a finger impression. To accept such a gesture as an act of sealing, there must at least be evidence of an intent to adopt it as one's act of seal.

This case underscores the peculiarities of the current law relating to the making of a deed. Had the person signing the document been advised to place his finger on the document if he intended to seal it, perhaps that would have been a sufficient seal and act of sealing. It is difficult to see how Ruttan J. could have found that the document was validly sealed when the maker of the document did not understand what he was doing. However, even if a document actually bears a seal, or an inference is made that it was intended to do so because of words in the document to that effect, it is no more certain that the party understands what he is doing. Few laymen are familiar with the arcane law of specialty obligations. It is fair to say, however, that anyone signing a legal document, particularly if his signature is witnessed, understands that there will be legal consequences. For that reason, the modern law has largely moved away from a strict need for formalities of execution, and focused instead on the intentions of the parties. On this analysis, it would have been found that the document was validly sealed, in the sense that the party who signed it clearly intended it to have legal consequences and, no doubt, to be binding on him. That rights can turn upon meaningless ritualistic observances does little credit to the law.

D. Position in England

In England, the courts have generally required the presence of some visual factor together with evidence of the maker's intention to execute the agreement under seal to create an enforceable obligation under seal. In 1977, the English Court of Appeal brought a broader focus to what may be considered "sealing," that was still narrower than the position in Canada where a seal might be found based merely upon words in the instrument. *First National Securities Ltd.* v. *Jones* involved a document described as a deed which bore the pre-printed letters "l.s." in a circle signifying where the seals should be placed. The maker of the instrument had signed across the circle, which was a clear indication of an intention to seal the document. It was held that the document was executed under seal:

> ... in this day and age ... a document purporting to be a deed is capable in law of being such although it has no more than an indication where the seal should be.

The letters "l.s." stands for *locus sigilli*, which indicates where the seal is to be placed. Nevertheless, it was said that most business people and members of the public regard that abbreviation as standing for the seal itself. Moreover, the modern focus on the formalities of execution is on the signature in the preence of a witness. The validity of documents executed in that manner ought not to be challenged.

More recently, these problems have been addressed using the concept of estoppel. *TCB Ltd.* v. *Gray* concerned a power of attorney which by statute had to be executed under seal. There was no attachment, mark, impression nor even a printed *locus sigilli*. The power of attorney, however, did contain a clause which provided that it was "signed, sealed and delivered." Browne-Wilkinson V.C. declined to find that the document was sealed. Instead, the party signing the document was held to be bound by it upon an estoppel preventing her from asserting that the document was not sealed. She had executed the document with the intent that it be her deed, and her delivery of it was a representation acted upon by the other party. It was said:

> ... for myself I prefer to hold that in the ordinary case a person so executing a deed is subsequently estopped from denying that he has sealed it rather than to find as a fact that something has occurred which we all know has not occurred.

E. The Position in Australia and New Zealand

The requirement for sealing has been abolished by statute in New Zealand and Western Australia and modified in all other Australian states except Tasmania. It is interesting to note that the considerable debate at common law in Canada and England as to what may constitute a seal and the process of sealing has never surfaced in Antipodean common law.

CHAPTER IV
SIMILARITIES AND DIFFERENCES BETWEEN DEEDS AND CONTRACTS

A. Introduction

At one time, the most common legal document was the deed. In fact many matters could only be addressed by deed. Today, there are few legal transactions which must employ a deed rather than a simple contract. (See Appendix A). This chapter discusses when parties might consider using a deed or a contract, and the consequences that flow depending on the kind of instrument that is used.

B. Overview of Legal and Theoretical Distinctions Between Deeds and Contracts

Distinctions drawn between deeds and contracts are attributable to the legal theories underlying each kind of arrangement. It is useful, consequently, to discuss briefly the manner in which an obligation is formed and when an obligation is binding depending on whether the parties have made a deed or entered into a contract. In this context, it is also useful to consider the consequences that flow from recording an offer in a deed or contract.

1. FORMATION OF THE OBLIGATION

A contract is a bargain. It involves offer and acceptance and consideration flowing between the parties. A deed, on the other hand, does not necessarily reflect a bargain and is enforceable in the absence of consideration. It is made by executing and delivering it. Traditionally, execution has been by sealing. The common law does not appear to have required a signature. These differences in the formation of a simple and special obligation result in fundamentally different consequences.

2. WHEN IS THE OBLIGATION BINDING?

In a contract, the obligations are simultaneously imposed on both parties upon acceptance. That is the time when there has been a meeting of the minds and a bargain struck. The legal concepts of "offer" and "acceptance" are vehicles of analysis to determine whether there is evidence of a consensus of intention. Communication of the offer and of the acceptance are, consequently, fundamental to whether a contract has been formed.

Specialty obligations recorded by deed are not binding as such until the deed has been delivered. At one time, the requirement for delivery involved physical delivery of the deed to the party entitled to enforce it. Today, delivery is satisfied by such acts as evidence an intention to be bound. Consequently, a party who benefits by, or is entitled to enforce, a deed, need not accept or consent for its maker to be bound. In fact, he may never be aware of the existence of the deed.

Delivery may be unconditional, in the sense that it is intended to be binding immediately. Delivery may also be conditional, so that something further must occur before the deed is binding. When a deed is delivered but is not binding until certain conditions are satisfied, it is said to be in "escrow." For example, it may be intended that no party to the deed is bound by it until all have executed it. Parties to a deed may be bound at different times, so that there is not necessarily any mutuality of obligation.

A contract can be made subject to the performance of certain conditions precedent which may impose pre-contractual obligations, suspend performance of the contract or constitute anticipatory agreements that will release parties from their obligations in the event of a stipulated occurrence or at some future time. These features of the law of contract resemble the ability of a person to deliver a deed in escrow.

3. OFFERS

Under the law of contract, an offer, unless it is supported by consideration, can be revoked by the offeror at any time prior to an acceptance by the offeree:

> One of the minor mysteries of the legal occult learnt by neophytes is that a promise to keep an offer open for acceptance for a prescribed or reasonable period is not binding unless supported by consideration or unless it is made under seal. No businessman or other lay-person would understand what social purpose, economic need, or ethical principle is served by allowing someone to revoke an offer which he has promised to keep open ... Only someone steeped in 19th century analytical jurisprudence would understand why it is said that an executory contract is supported by consideration while a firm offer is not. The cleverness of the analysis is brought home by contrasting a firm offer which is revocable and the following contract which is enforceable. Offeror, "If I do this will you pay me $100?" Offeree, "Agreed." In both cases the promise is conditional, and there may never be performance on either side. Those 20th

century law students who are no longer steeped in 19th century analytical jurisprudence have to at least feign understanding in order to enter the profession.

There are also a number of other rules relating to offer and acceptance when, for example, an offer is rejected, a counter-offer is made, or the offeror or offeree dies before acceptance of the offer. The rules and principles in these situations have evolved upon the theory of bargain and consensus. As a general rule, there is no obligation until consensus is reached.

In contrast, the maker of a deed cannot revoke the deed before the other party has had a reasonable time to accept it.But if I purport to deliver a deed, and at the same time indicate that I am to be free to undo it at any time before it passes to the grantee, ... I am not delivering a deed at all; because delivery in this context indicates an intention to be bound presently by the deed, albeit in some cases subject to ao condition.
See also Burrows, *supra*, n. 4 at 256. There are, consequently, only two methods of making a firm offer: by a collateral contract to hold open to the offer, or by instrument under seal. *See Davidson* v. *Norstant*, (1921) 61 S.C.R. 493, 57 D.L.R. 377; *Savereux* v. *Tourangeau*, (1908) 16 O.L.R. 600 (Div. Ct.).

C. Areas of Assimilation

In the preceding section, some aspects of the law relating to contracts and deeds were discussed. Notwithstanding fundamentally different underlying concepts, in many respects contracts and deeds often function in similar ways. These aspects of the law do not amount to a formal assimilation of deeds and contracts. In a number of areas, however, the law of deeds and contracts has been assimilated, so that identical concepts are applied in each context. That is the subject of this section.

1. ESTOPPEL

When one person makes a representation with the intention that another rely upon it, in some cases he may not later dispute the representation. He is estopped from denying it.

An early form of estoppel is estoppel by deed. Parties to a deed are estopped from denying the facts stated in the deed. This principle was originally based on the solemnity of the occasion of a deed.Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof. It is now more commonly thought to be based upon an assumed or agreed statement of facts by the parties. The doctrine [of estoppel by deed] has been extended by analogy to written, and even to oral, tenancies.
See also Spencer, Bower and Turner, *supra*, n. 10 at 169-70:
... some of the judgments contain passages in which this estoppel is treated as if an estoppel by deed. This is obviously a convenient enough view where the tenancy has been created by deed ... But the estoppel does not rest essentially on the deed.

An identical concept exists with respect to simple contracts. In that context, it is referred to as "estoppel by agreement." Burrows attributes its development in contract as being by analogy with "estoppel by deed." He also suggests that, in turn, estoppel by deed was narrowed by notions of bargain to apply only in those situations where the parties can be said to have agreed to the facts set out in the deed, unless the intention of the parties is that the statement be confined to one party.

The equitable principle of rectification formerly did not apply to deeds recording obligations enforceable only at common law. Statements, even those mistakenly inserted in a deed, would estop denial. The law has developed, however, so that rectification is available for deeds. This development, essentially, completes the assimilation between contracts and deeds in this respect. In *Chitty on Contracts*, for example, it is observed that:

> ... there seems little point in preserving any separate category of estoppels by deed, since the basis of the estoppel appears now to be covered by estoppel by representation or by convention.

2. NON EST FACTUM

The defence of *non est factum* first applied to deeds. It now also applies to contracts.

Literally, *non est factum* means "it is not his deed." The defence originated in the action of covenant. It is based on the principle that a person should not be bound by a legal instrument that he either did not sign, or signed so mistaken as to the nature of the transaction that, effectively, he did not consent to it.

Originally the defence was restricted to cases involving deeds executed by persons who were blind or illiterate. The defence expanded in the 19th century to include simple contracts in writing.

> These cases apply to deeds; but the principle is equally applicable to other written contracts.

This passage was quoted with approval by the Supreme Court of Canada in *Marvco Colour Research Ltd.* v. *Harris*, (1983) 141 D.L.R. (3d) 577, 582. The history of the principle and its adaptation to simple contracts is set out in the speeches (principally Lord Wilberforce's) in *Saunders* v. *Anglia Building Society*, [1971] A.C. 1004, 1024-25, 1019-20, 1035 (H.L.). Some adaptation was necessary. The focus had been upon whether the party intended to execute the deed in question. When the defence was expanded to apply to contracts, the courts had to choose whether to discard it as obsolete or "try to adapt it to the prevailing structure of contract ... they chose the course of adaptation." The test today is whether the transaction set out in the document is different in substance or in kind from the transaction intended. If so, provided the difference is substantial and the party was not careless in executing the document, it will be set aside. The defence applies equally to deeds or contracts.

3. STATUTORY LIMITATIONS

At one time, the enforcement of obligations created by specialty and simple contracts was subject to different limitation periods. In 1975, legislation was introduced in British Columbia under which the same limitation periods apply to specialty and simple obligations.

4. PRIORITY OF SPECIALTY CREDITORS IN AN ESTATE OF A DECEASED PERSON

Before 1869, creditors with a specialty debt binding on the deceased's heirs had priority over other specialty creditors and all simple contract creditors in an estate administration. The priority accorded specialty creditors in the administration of an estate was abolished by statute in England in 1869. This legislation was initially picked up by British Columbia in 1887 and is now section 11 of the *Law and Equity Act*. Inexplicably, in 1907 the British Columbia legislature enacted this provision a second time. The 1907 provision is now section 130 of the *Estate Administration Act*. Priority for specialty debts is also removed by section 122 of the *Estate Administration Act*. This aspect of the historical divergence between specialty and simple contract debts has, it appears, been corrected numerous times in British Columbia.

5. ASSIGNMENT OF PATENTS

At common law, a patent could only be assigned by deed. The *Patent Act* provides that an assignment may be by an instrument in writing.

6. VARIATION, ACCORD AND SATISFACTION

At one time, the common law permitted a deed to be amended or varied only by another deed. This, however, has long ceased to be the position. A deed can be varied or replaced by a simple contract, if that is the intention of the parties. The consideration supporting the simple contract offsets the seal of the deed. Consideration in this context consists of the mutual releases of the parties from their respective duties under the deed.

It is not entirely certain whether a specialty obligation can be discharged by a simple contract. A specialty obligation will be discharged by a simple contract under which the person with the right of action accepts something in satisfaction of it. This is referred to as accord and satisfaction. Whether there has been satisfaction, however, may not be merely a question of the parties agreeing that there has been.... a strange doctrine ... contrary to every fundamental principle of the common law ... to state that a document under seal is not conclusive of the bargain or agreement between the parties, and that consideration may still be required is perhaps going rather far.

See also comment by A.B. Weston at (1956) 34 Can. B. Rev. 453 and letter from S.J. Helman at (1956) 34 Can. B. Rev. 873. Moreover, this position seems to be inconsistent with s. 40 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224, which provides:

Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

D. Areas of Difference

It was noted earlier that the fundamentally different legal theories underlying the creation of enforceable obligations by deed or by contract led to a number of different legal consequences. In some cases, the law of deeds and the law of contracts have developed similar or identical principles and rules. In other cases, significant differences remain. These differences are discussed in this section.

1. ASPECTS OF PRIVITY

As a general rule, a contract is only binding upon, and enforceable by, the parties to it. Many people believe a contract is the document that records it, but that is not true. The document is merely evidence of the contract. The issue of who are the parties to the contract, consequently, is not restricted to inquiring who signed, or is named in, the document.

Different rules apply to deeds. There are two kinds of deeds. A deed made by two or more parties is called an indenture because it was formerly indented or cut at acute angles. A deed made by one person, or several having common interests, is called a deed poll because it is shaved even or polled at the top.

A deed poll can be enforced by any person identified with reasonable certainty in the deed as a covenantor or covenantee. On the other hand, a person may not sue, or be sued, upon an indenture unless he is named or described in it as a party and it is executed in his name. Some cases suggest the even more strict position that such a person must have actually executed the deed. A contract under seal can bind none but those who signed and sealed it.

Per McPhillips J.A.: This is the case even though the deed in its terms set forth that the deed is made on behalf of someone not a party thereto or that the covenants are made with him. As a result of these rules, whether obligations are contained in a contract or a deed can have important consequences.

In *Marbar Holdings Ltd.* v. *221,401 B.C. Ltd*., the corporate plaintiff entered into an agreement to develop land with the corporate defendant. The agreement was entered into using corporate seals, partly because that is the usual way a company enters into an agreement. The court also found that the agreement was intended to create specialty obligations. As such, only parties named in the deed could be sued on it. It was not, consequently, open to the plaintiffs to argue that the defendant corporation was acting on behalf of undisclosed principals (in this case, the solvent shareholders and directors of the defendant company).

In *Kootenay Savings Credit Union* v. *Toudy*, however, a different position was adopted. A company entered into a mortgage on behalf of undisclosed principals. The mortgage was granted under the company's seal and, in terms of precedent, the undisclosed principals could not be liable under the mortgage. Bouck J. observed that the rule did not appear to be grounded in any good reason. Previous authority was distinguished on the basis that it concerned non-corporate entities acting on behalf of undisclosed principals. The *Marbar Holdings* case, apparently, was not referred to the court. The court observed that a company may enter into a binding arrangement without using its corporate seal, but an instrument dealing with land had to be under its seal if it was to be registered in the land title office. It was said:

> It is clear the personal defendants would be liable as undisclosed principals of LeRoi if the mortgage was simply executed by an authorized officer of LeRoi without affixing its seal. However, it is now said that because the seal of LeRoi was in fact stamped on the mortgage, that act relieved the personal defendants from liability. With respect, such a conclusion makes little sense. While this technical rule, which is peculiar to England, may also be part of Canadian law as it applies to individuals, I can see no good reason for extending its application to corporations, particularly since no higher authority compels that result.

Bouck J. refused to apply the rule. There is, consequently, a conflict in authority on British Columbia on this issue.

Section 8 of the *Partnership Act* provides that instruments executed in the name of the partnership by an authorized person, bind the firm and all the partners. Section 8, however, provides that it does not affect any general rule of law relating to the execution of deeds. These rules, consequently, present dangers for principal/agent relationships A principal or partner cannot be bound unless he has given authority for his signature under seal, and is designated as a party to the deed. and for partnerships. If actual execution by the party to be charged under the deed is required, even a disclosed but non-executing principal or partner will not be bound by, or able to enforce rights under, the deed. That result will be particularly disquieting if the contract need not have been executed under seal, as in the *Marbar Holdings* case.

These rules of privity virtually deny effective use of a specialty contract when an agent is contracting on behalf of a principal, or at least an undisclosed principal. In *Re Zamikoff* v. *Lundy*, Laskin J.A. (as he then was) was severely critical of the rule. Had he not been bound by an earlier Supreme Court of Canada decision he would have found a subsequent member of a partnership bound directly by a contract entered into by the original partners, even in the absence of a novation. He added:

> What is left of the old common law rule in England is a shell at best; and since, admittedly, it was originally founded on a formalistic view of the contract under seal which has ceased to terrify, there is no reason of substance for prolonging its life. It has ceased to be operative in most of the states of the United States ...

Characterizing the common law rule as "a shell at best" is a reference to a number of other rules of law and equity which have served to mitigate the sometimes harsh consequences of limited privity. These include:

a) a beneficiary's ability to sue on a contract made on his behalf by a fiduciary;

b) novation;

c) estoppel to prevent reliance upon a plea of no privity;

d) the principle of privity of estate and covenants that run with the land, in the context of real property;

e) the enforceability of a deed against a person who continues to accept or retain a benefit under the deed; ... a party who takes the benefit of a deed, is bound by it, although he has not executed it. *Lady Naas* v. *Westminster Bank, Ltd., supra*, n. 2 at 373; *Halsall* v. *Brizell*, [1957] 1 Ch. 169, 182. *See also* Norton, *supra*, n. 38 at 26-7; Megarry & Wade, *ibid*., at 769-770. and

f) the principle of "unjust enrichment", and the constructive trust.

2. POWERS OF ATTORNEY

An agent may not execute an agreement under seal on behalf of his principal unless his appointment is under seal. The rule is discussed fully by the English Court of Appeal in *Powell* v. *London and Provincial Bank*, where it is said:

> ... can it be true that an agent can deliver [an instrument under seal] without authority under seal? It cannot upon principle. It is a well-known law that an agent cannot execute a deed, or do any part of the execution which makes it a deed, unless he is appointed under seal.

In British Columbia, legislation now provides that an agent's authority to enter into a transfer of land on behalf of a principal need not be executed under seal:

> Subject to subsection (2) [concerning corporations], every instrument purporting to transfer, charge or otherwise deal with land or to release or otherwise deal with a charge, and every power of attorney under which the instrument is executed, may be executed without a seal.

In all other respects, an agent's ability to enter into a specialty contract on behalf of his principal will depend upon whether his appointment was made under seal.

3. THE PRINCIPLE OF MERGER

The principle of merger is found in various areas of law. It describes an incorporation of one right in another, a smaller into a larger, a lower into a higher.

A deed is regarded as an instrument of "higher nature" than a simple contract. A simple contract, consequently, may become merged in, or extinguished by, a later deed addressing the same obligation. The most common example is the conveyance. An agreement of sale and purchase may be later recorded in a deed, resulting in a merger. Provisions in the earlier agreement will not survive, unless expressly incorporated in the deed or expressly stated to survive the making of a deed.

Merger has been the subject of recent reconsideration by the Supreme Court of Canada in *Fraser-Reid* v. *Droumtsekas*. The operation of merger seems to be moving away from an automatic consequence by operation of law towards a defining of the obligations the parties intended to assume. Moreover, the doctrine of merger no longer applies to independent covenants or collateral stipulations. Merger, consequently, begins to resemble the techniques courts employ to resolve problems that arise when parties enter into a series of legally binding agreements. The inquiry in that context depends upon interpretation and principles of novation.

These developments in the law of merger are generally desirable. Few lawyers depend upon the law of merger to ensure that an earlier agreement does not cause problems with later agreements. It is too easy to provide in a later agreement how much, if any, of an earlier agreement is to survive.

How far this aspect of the law of merger is a problem in British Columbia is open to question. It has been suggested that merger only applies in the context of a disposition of real property. There is, however, some doubt as to whether it is applicable in a land title registration system. Moreover, in British Columbia, conveyances of land are not often executed under seal.

4. INTERPRETATION OF DOCUMENTS

In broad terms, the same construction is placed on the words of a contract under seal as on those of a contract not under seal. The overall focus in each case is upon the intention of the parties, but not their objectives when these are not reflected in the document.

Nevertheless, principles of construction are applied to specialty contracts that differ from those applied to simple contracts. A deed is a formal document and, consequently, its text is arranged in a formal sequence:

> ... although it is not absolutely necessary that a deed should be drawn in accordance with the generally received formulary, provided it exhibits the intention of the parties, yet it is not advisable to deviate from it unless in a matter of urgent necessity.

That is because the construction of a deed, in part, turns on its formal structure.

A deed consists of the following elements:

a) "*Exordium*" lists the commencement, date and parties. The commencement describes the style or character of the instrument.

b) "*Recitals*," also referred to as "premises," list the facts upon which the instrument is made and, perhaps, state its purpose.

c) "*Testatum*" embraces the consideration, if any, for the grant and its receipt, the name of the grantor, the operative words of transfer and the name of the grantee.

d) "*Parcels*" describes the property affected by the deed.

e) "*General Words*" once consisted of sweeping clauses drafted to ensure that no aspect of the transaction, or the property to be affected by it, was overlooked. These lengthy clauses are now replaced in instruments affecting land by general words which, under the *Land Transfer Form Act* are to be interpreted as if they contained the same form of words listed in the schedules to that Act.

f) "*Habendum*" refers to the clause that limits or defines the interest being granted under the deed.

g) "*Tenendum*" is a provision which says the grantee is "to hold, receive and take" the interest granted. Jowitt explains that the *tenendum* was formerly:

> ... the clause in a conveyance which indicated the tenure by which the grantee was to hold the land of the grantor - *tenendum de me et haeredibus meis sibi et haeredibus suis, per servitium, etc*. When the statute *Quia Emptores, 1289*, abolished subinfeudation, the clause was altered to indicate that the grantee was to hold of the superior lords - *tenendum de capitalibus dominis*; but now it simply says that the land is to be held by the grantee, without mentioning of whom ...

h) "*Declaration of Uses*" refers to the phrase "unto and to the use of" the grantee, which is used to avoid the provisions of the *Statute of Uses, 1535.* It is also used to avoid the presumption of resulting trust.

i) "*Reddendum*" stipulates any reservations in favour of the grantor. For example, in a lease of land, the grantor might reserve the rents.

j) "*Testimonium*" connects the contents of the deed with the signatures and seals of the parties.

k) "*Attestation*" refers to the portion of the deed where witnesses sign.

Specific rules of interpretation have been developed that focus upon the interrelationship of the particular clauses. The "operating" or "granting" clause (the *testatum*) is weighted in priority to clauses in other categories. For example, the *habendum* should be interpreted as only explaining, qualifying, lessening or enlarging the grant, but not directly abridging it. So far as it is repugnant or contrary to the grant, it is to be disregarded. The recitals are interpreted in the same fashion.

These rules of interpretation are still current in Canadian law. In *Smith* v. *The Queen*, a decision of the Supreme Court of Canada, Estey J. for a unanimous court cited a number of authorities as to the importance of the granting clause as opposed to the *habendum* and noted vividly:

> ... the effect of the *habendum* ... cannot be, as a tail, to wag the dog, the grant.

It is difficult to see what justification there is, apart from historical development, for applying different rules of interpretation to specialty and simple contracts. The formal rules for interpreting deeds add little to, and probably interfere with, the goal of ascertaining the parties' intentions from the document as a whole in its factual context.

5. RELIEF AVAILABLE FOR BREACH

When parties enter into a contract, and one of them defaults under it, the remedies available to the other depend on the nature of the default. Generally, the breach may be of a condition or of a warranty. If it is of a condition, the innocent party may be excused of further performance and will be entitled to damages. Breach of warranty, on the other hand, gives the innocent party only a right to damages.

These rules were derived from early cases that involved covenants or specialty contracts. As these rules developed, two things occurred. First, rules devised in covenant were assimilated into the law governing simple contracts. Second, as these rules were further refined in the context of contract they began to reflect notions of bargain and consideration, and thus influenced the development of covenant. It as a very clear situation of "cross-fertilization."

In only one respect do these rules differ in relation to specialty obligations. If there is no consideration for the obligation, it is unenforceable in contract. It is enforceable in covenant. However, since the obligation is gratuitous, the remedy of specific performance is not available. The only remedy for breach of a gratuitous specialty obligation is damages.

6. CONFLICT OF LAWS

The subject of conflict of laws is clearly beyond the scope of this Report. It is important, however, to observe that, in this area as well, distinctions are drawn between simple and specialty obligations. Usually, a creditor seeking to recover a debt will sue his debtor where he resides. For the purposes of determining the appropriate law to resolve the dispute, a debt is considered to be situate in the jurisdiction in which the debtor resides. A different rule applies if the debt is recorded under seal:

> A debt due on a deed or other specialty is situate in the country where the deed itself is situate from time to time and not in the country where the debtor resides. The origin of this rule is that in the view of the ecclesiastical tribunals a debt under seal had a "species of corporeal existence."

7. SUMMARY

Both a deed and a contract are means of entering into binding obligations. Their development historically was separate, so that different principles and rules apply to how they are made, interpreted and enforced. Today, however, there are far fewer differences than formerly. The course of legal evolution has seen an assimilation between deeds and contracts, largely as a result of a kind of borrowing, so that good ideas developed in one context are later applied in the other:

> ... there has been what may appropriately be called a "cross-fertilization" which has resulted in a degree of assimilation. Rules once thought to be peculiar to deeds have spread to simple contract, and, conversely, ideas developed in simple contract have had their influence on the law relating to deeds. The first of these developments has often been more apparent than real. Many of the old text books lay down rules which they say apply to "deeds," whereas even in those times it might have been better to express them as rules of the general law of contract; the books confined their discussion for no other reason than that most important contracts used to be by deed, and therefore most of the cases involved deeds. But with the rise of simple contract, it has been affirmed that these rules have a far wider scope, and apply equally to all forms of contract. Examples are the principle *non est factum*, the parol evidence rule and the detailed rules for the construction of documents found in books like Norton and Odgers. Similarly the old strict rules against implying covenants into deeds are now applied in simple contract cases, albeit in a slightly relaxed form.

Similarities between deeds and contracts are the result of "cross-fertilization" or assimilation. Even where there has not been assimilation, deeds and contracts are often functionally similar. For example, a contract subject to a condition resembles a deed delivered in escrow. In only a few discrete areas are significant differences between deeds and contracts to be found.

CHAPTER V RE-FORM

A. Introduction

As the discussion in the preceding chapters has disclosed, the law governing deeds and seals is complex and, over the years, has been the subject of a significant amount of litigation. Several jurisdictions have amended the law in this context, or proposed that it be amended.

In Chapter I two questions central to an examination of the law of deeds and seals were identified. These were:

(i) do the formalities required to create a specialty obligation operate sensibly today?

(ii) are the legal distinctions that exist between specialty and simple obligations justifiable?

In jurisdictions that have examined these issues, it has been concluded that the execution requirements for making a deed should be revised. It has also been concluded that specialty obligations should have the same legal effect as simple obligations.

B. Other Jurisdictions

1. AUSTRALIA AND NEW ZEALAND

The process of sealing has received considerable legislative attention in the Antipodes. In general, the focus has been to abandon the need for a seal to create a deed. In New Zealand and Western Australia, signature and the attestation by one witness is sufficient to authenticate a document. In Queensland, South Australia, New South Wales and Victoria, an instrument is deemed to be sealed if certain words are contained in the instrument, such as "indenture," "deed, or "sealed."

2. UNITED STATES

The problems presented by specialty obligations have been addressed in many jurisdictions in the United States. Often the problem is viewed as defining appropriate execution requirements. In this context, there have been three general approaches.

In Ohio and Illinois, for example, the use of the seal has been abolished. This approach raises the issue whether it is possible to make a binding gratuitous obligation. In Wisconsin, a seal is presumptive evidence of consideration. In California, a written instrument is presumptive evidence of consideration. These similar approaches equate specialty obligations with bargains, a not entirely apt model. Massachussets adopted an approach based upon the intention to be bound.

Several legislative approaches have been more concerned with removing the distinctions between specialty and simple obligations rather than redefining execution requirements. California, for example, provides that "all distinctions between sealed and unsealed instruments are abolished." Ohio provides that affixing a seal "shall not give such instrument additional force or effect, or change the construction thereof." Illinois Seal Inoperative
2-203. The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer. has adopted a similar approach.

C. England

The Law Commission has recommended the enactment of legislation abolishing the need for a seal to make a valid deed. Under this legislation, a valid deed must be clearly described as a deed. To make a deed, an individual must sign it in the presence of a witness who attests his signature.

D. Execution Requirements

The discussion in Chapter III demonstrated that there are many occasions when the execution of a deed falls short of the legal requirements. This has led to a great deal of litigation regarding whether meeting a lesser standard is sufficient to create a valid deed.

Part of the problem, no doubt, is attributable to the fact that most people do not really understand what a seal or, for that matter, a deed is. As a result, the call for altering the formalities required to validly execute a deed has been heard on many occasions. In *Koffman* v. *Fischtein*, for example McKinlay J. commented as follows:

> ... in the modern world the ancient concept of a seal just does not fit ... It is to be hoped that the Legislature will at some time consider the desirability of discontinuing the anachronism of the seal. It is inevitable that any decision on this type of issue, except in cases where the facts are crystal clear, will involve resort to an undesirable element of fiction.

In Newfoundland in 1976, Goodridge J. posed the question:

> What value has a seal? It was used in days when men could not write and executed deeds with a seal. Its usefulness insofar as the execution of deeds by individuals is concerned has long since disappeared. We surely should no longer consider a red wafer seal, or printed words importing a seal, or symbolic action such as placing one's thumb on a deed as things of magic, transforming an instrument or other document into a deed. Surely a man's signature is as good as, or even, better than his seal.

It is true that the seal's original purpose was as a substitute for a signature to serve a public that was generally illiterate. Today, however, the population is overwhelmingly literate and the focus for authentication is upon the signature.

Another justification that evolved for the seal and the process of sealing is the solemnity that the process is alleged to bring to the occasion of executing important documents. The mystique of wax and wafer, the fact that the maker of the instrument, when executing it, has engaged in an independent overt act or ceremony is said to impress upon his mind the seriousness of the occasion and give him an awareness that his action has brought about changed legal obligations and relationships.

Having made these observations, it is useful to add that they are largely overstated, in view of the current law in British Columbia and in England. If the requisite intent can be signified by signing the instrument alongside a clause that provides that it is signed, sealed and delivered, the seal in modern law has acquired little more than a symbolic importance. Professor Treitel has commented on the seal in the following terms:

> It is arguable that some simpler form might be substituted for the seal; but the seal appears to give little trouble in practice and the small amount of extra effort which it requires the promisor to make may be a useful safeguard against rash promises.

The many cases where the issue of execution has arisen were not concerned primarily with how a deed is made. They were, for the most part, the result of parties trying to achieve a different legal result from that which would follow if the transaction were only a simple contract. In the Working Paper that preceded this Report, we expressed the view that the concern is not with how a deed should be made. It is what effect a deed should have.

Our correspondents, for the most part, agreed. Two points of detail, however, were raised in the submissions received on the Working Paper.

First, it was suggested that legislation might clarify the position that arises when a instrument is intended to be executed under seal but no seal is affixed:

> With respect to the first issue the Commission's tentative view was that there is no need for legislation to restate the execution requirements necessary to create a deed. It would appear from the commentary in the Working Paper that issues can arise as to whether or not an instrument is properly a deed. It seems sensible to avoid such issues by enacting that the use of the usual form of words being "signed, sealed and delivered in the presence of ..." or "the corporate seal of XYZ was hereunto affixed in the presence of ..." are sufficient to make the instrument executed under seal. No issue could then arise based upon the absence of a seal or in respect of the intention to make a deed of the person executing the document.

In view of our conclusion, which is discussed below, that a deed should take effect as a simple contract, not much is to be gained by clarifying the execution requirements for making a deed. Whether a deed has been validly made is really only of significance with respect to two issues: are the obligations recorded in the deed enforceable? and what legal effect is the instrument to have? If a deed is to have the legal effect of a simple contract, then whether or not it is sealed only has significance with respect to enforceability. An arrangement which is unsupported by consideration will only be enforceable if it is a valid deed. Our correspondent's suggestion would clarify issues arising in that limited context, but these are issues already resolved by the current law relying upon the concept of estoppel. There is, consequently, no need for legislation to address how a deed is made.

The second comment suggested that reform in this area should be more forward looking. It was felt that it was not enough to solve problems that had arisen in the past, ignoring the changes that have been engendered by technology. Businesses frequently enter into agreements by telephone, telex, or computer. Our correspondent felt that there should be some means of entering into a binding gratuitous obligation using the new technology.

It should be observed that no problems in this regard have yet arisen in the cases. Second, most business arrangements entered into electronically will be supported by consideration. Last, nothing prevents the parties from providing that the agreement is signed, sealed and delivered. If the document specifically acknowledges the inability to enter into it under seal, but provides that it is deemed to be under seal, that would probably estop a party intent on avoiding the agreement.

Anticipating problems that might arise from existing, or not yet realized, technology is, at the very least, a perilous exercise. Moreover, little is to be gained by focusing on methods by which business arrangements may be entered into unsupported by consideration when, in virtually every case, the essence of a business transaction consists of the exchange of consideration. In the Working Paper that preceded this Report, we concluded that there is no need for legislation to restate the execution requirements necessary to create a deed. We see no reason to depart from that conclusion.

E. Reasons For Non-Assimilation

1. INTRODUCTION

The discussion in Chapter IV revealed a surprising number of similarities between deeds and contracts, notwithstanding that they depend upon entirely different legal theories. From an historical vantage point, it can be seen that good ideas have been borrowed by each from the other. That a deed reflects an intention to be bound while a contract depends upon a reason to be bound does not appear to alter the legal consequences of entering into a binding obligation, except in a few isolated instances.

Why is assimilation incomplete? An examination of aspects of the law of deeds which differ from those of the law of contracts reveals that the failure to achieve full assimilation is not the result of distinctions drawn on policy grounds. It is, for the most part, due to the fact that over the past hundred years the deed has increasingly fallen into disuse. Consequently, the principles of the law governing deeds have not been subject to the critical evaluation and synthesis expected from the legal evolution which marked its early development. The distinctions which remain today are historical baggage that can be safely abandoned.

2. CHIEF DISTINCTIONS

The following is a list of those aspects of the law of deeds which are usually put forward as being distinct from the law of contracts:

(i) formation of binding obligations: the concepts of delivery and escrow as opposed to the concept of offer and acceptance;

(ii) aspects of privity: historical distinctions between indentures and deed polls; privity problems arising in the context of agency and partnership and with respect to third party beneficiaries;

(iii) powers of attorney: the disability of an agent to execute an instrument under seal that will bind a principal unless his appointment is also under seal;

(iv) merger: the principle that a deed executed subsequently in the same transaction will incorporate an earlier simple contract;

(v) variation, accord and satisfaction: some residue of uncertainty whether a seal can amount to sufficient "satisfaction"; and

(vi) interpretation: the division of a deed into components and the weighting of the "granting" part ahead of others such as recitals and the *habendum*.

There are few circumstances where a deed must be used. In most cases, a simple contract is all that is needed. Deeds must be used to enter into a binding gratuitous obligation and may be used in circumstances where it is desirable for the arrangement to be attended with some formality. In some cases, legislation requires the use of a deed, although for the most part these provisions are based upon legislation of other centuries, when the deed was the customary legal document to use. A deed is most useful today when the parties wish to enter into a binding arrangement, but there is some doubt whether there is sufficient consideration to support a contract.

It is difficult to see any advantage to retaining those features of the law peculiar to deeds. The concepts of delivery and escrow provide no advantage over the ability to stipulate that certain conditions must be satisfied before an agreement is enforceable. Problems relating to the appointment of an agent, and whether he can enter into an arrangement under seal that is binding on his principal, are historical in nature. These principles do not serve any modern policy or need.

The principle of merger seems to depend upon the higher status once accorded a specialty obligation over a simple obligation. The higher status attributed to a deed certainly made sense several centuries ago. Important legal arrangements were recorded in deeds. Less important or casual legal arrangements would not be. The law's view that a deed was of a higher nature than a simple contract reflected the views of the community and the manner in which business was conducted. Today, however, it is more common for important legal arrangements to be recorded in simple contracts. If the parties enter into a contract and enter into a second contract relating to the same matters, it is difficult to see what is gained by providing for different results depending upon whether the second contract is recorded under seal.

The law governing variation, accord and satisfaction of specialty obligations is, in many respects, already assimilated to that governing simple obligations. Doubts exist with respect to aspects of the law which were developed centuries ago and which have not been scrutinized to determine their contemporary relevance.

The different rules of interpretation of deeds and contracts is an excellent example of how the legal evolution of deeds has been frustrated. The principles of interpretation of deeds reflect legal notions that lost relevance in the latter part of the 19th Century, the highwater mark of objective interpretation. Few lawyers today, when drafting a legal document which is to be executed under seal think in terms of *habenda* and *reddenda*. Modern principles of interpretation developed from these legal forebears. The set of principles of interpretation of deeds may be thought of as an experimental prototype, which has been replaced by more sophisticated tools.

Initially, the rules relating to deeds and those to contracts were aimed at two goals: ensuring satisfactory evidence of legal obligations; and certainty of result. That the modern law retains distinctions which have historical justification but little contemporary support, prevents those goals from being attained. Two recent British Columbia cases are examples on point.

Petro Canada Exploration Inc. v. *Tormac Transport Ltd*. concerned written guarantees of the indebtedness of a corporation. The guarantees were not intended to be executed under seal but, after they were signed, seals were affixed. It was held that the guarantors were released from liability since, by affixing the seals, the legal force and effect of the guarantees were altered fundamentally.

Marbar Holdings Ltd. v. *221,401 B.C. Ltd*. was mentioned in the last chapter. The court found that an agreement entered into between two companies was intended to create specialty obligations. As such, only parties named in the deed could be sued on it. If the agreement were a simple contract, it would have been open to the court to inquire whether the defendant corporation was acting on behalf of undisclosed principals (the solvent shareholders and directors of the defendant company).

These two cases suggest that the current law of specialty obligations often turns on technical points which have little to do with the merits of the parties' cases. Moreover, few people today are aware of the sometimes subtle distinctions that exist between specialty and simple obligations. For the most part, the more familiar law relating to simple obligations is thought to govern specialty obligations as well.

It is our conclusion that specialty obligations should be fully assimilated with simple obligations. Comment received on the Working Paper agreed with this position.

F. Recommendation

The Commission recommends that a section be added to the *Law and Equity Act* comparable to the following:

Where an obligation created or evidenced by an instrument would, but for this section, take effect as a specialty obligation, it shall

(a) take effect as if it were created by a simple contract and, without limiting the generality of the foregoing, any issue respecting

(i) remedies for breach;
(ii) interpretation;
(iii) merger;
(iv) the authority of an agent created by the instrument;

(v) variation;
(vi) accord and satisfaction; and
(vii) parties to the instrument

shall be determined by the law governing simple contracts; and

(b) unless otherwise intended by any party, be enforceable upon execution of the instrument, notwithstanding the absence of consideration or physical delivery.

It is useful to point out several features of the recommendation. The concept of specialty obligations is to be retained, but they will operate in the same manner as simple obligations. Legislation enacting the Commission's recommendation will achieve, in effect, a formal assimilation between all aspects of specialty obligations and simple obligations, other than the way in which they are formed.

This approach to reform raises the question: what advantage is there to retaining the concept of specialty obligations if they are to be indistinguishable from simple obligations? There is a very significant advantage.

For the most part, paralleling simple and specialty obligations should dramatically simplify the law. The parties may use either a contract or a deed to record their arrangements and be assured that the legal consequences are the same. There is, consequently, little advantage to using a deed, except in one respect.

As a general rule the law will not enforce a gratuitous obligation unless it is recorded by deed. The law of contract depends upon the concept of consideration. There are, however, circumstances where the parties will wish to enter into gratuitous obligations confident that they will be binding. That has been the chief utility of the deed in modern times and, in our view, it should be retained. That is the significance of the reference to consideration in subparagraph (b) of the Recommendation and the reason for retaining the concept of specialty obligations.

The point may be raised that a similar result could be achieved simply by enacting legislation that provides that obligations intended by the parties to be binding shall be binding. Reform along these lines would remove the need to retain the concept of specialty obligations.

We fear, however, that it would also do grave injury to the modern law of contract. Would these obligations be contractual? If not, what kind of obligations would they be? In our view, it is simpler by far to retain the concept of specialty obligations, altered as we have proposed, than to define a new kind of statutory obligation or to provide that there are contractual obligations enforceable by some theory totally inconsistent with that which underlies the enforcement of contractual obligations generally.

Subparagraph (b) of the Recommendation also merits further comment. It is designed to permit the parties to an instrument to decide when it is binding. Currently, under the law of deeds, parties may execute an instrument under seal and postpone its taking effect until it is delivered. Alternatively, the deed may be delivered pursuant to a trust condition that it will not be binding until several conditions are met. For example, a deed conveying land may be delivered to the other party or his lawyer pursuant to the trust condition that it not take effect until the other party holds sufficient funds in trust to complete the conveyance. For the most part, delivery is satisfied by such acts as evidence an intention to be bound. Parties do not rely upon principles governing when delivery occurs for these purposes. Parties will usually specify whether certain conditions must be met before the instrument is binding. Subparagraph (b) provides that the instrument is enforceable upon execution, "unless otherwise intended by any party." The parties, consequently, may determine when an instrument takes effect by terms in the instrument, a collateral agreement, or conduct evidencing such an arrangement.

The wording of subparagraph (b) differs from that proposed in the Working Paper by the addition of the words "by any party" after the words "unless otherwise intended." One submission suggested that the former wording relating to when a deed takes effect (immediately, unless otherwise intended) may import the requirement that all the parties must agree on this issue to avoid the usual rule. If that is true, it would have the undesirable effect of limiting the ability of a single party to execute a document and then postpone its operation until a particular event occurs.

The original formulation ("unless otherwise intended") was adopted to ensure that the proposal was not restricted to finding a contrary intention in the instrument itself. It was felt that evidence of the conduct of the parties could support a postponement of an instrument's operation. The addition of the words "by any party" clarifies that one party's unilateral intention that a deed not be immediately enforceable would be sufficient to effect a postponement.

G. Legislative Changes

A number of statutes refer to deeds or the use of a seal. Many of these references are obsolete, and should be replaced with a phrase such as "instrument in writing." This issue is discussed in greater detail in Appendix A to this Report. It is our view that these "housekeeping" amendments should be made during the next statutory revision.

H. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper that preceded this Report. The comments we received were thoughtful and of assistance in the preparation of this Report.

We also wish to record our indebtedness to Professor Robert Howell of the Faculty of Law, University of Victoria. His work for the Commission was heavily relied upon in the preparation of this Report. Moreover, Professor Howell provided valuable advice on the Working Paper and comments received on it.

Lastly, we wish to express our thanks to Thomas G. Anderson, Counsel to the Commission who, subject to the Commission's direction, prepared the Working Paper and this Report.

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APPENDIX A

COMPUTER SEARCH OF REFERENCES TO

DEEDS AND SEALS IN BRITISH COLUMBIA LEGISLATION

A. Introduction

References in British Columbia legislation to deeds and seals are numerous. Some of these provisions require the use of a deed or indenture to perform particular acts or record obligations or appointments. These provisions are usually patterned after legislation dating from the 19th century or earlier, when legal matters were customarily recorded by deed. Most often, however, the provision is drafted to permit the use of a deed or some other written legal instrument. Legislation referring to the use of seals usually deals with legal documents which must be made by companies, societies or government bodies. In these cases, the requirement for a seal is confined to a need for authentication.

No recommendations are made in the Report regarding whether British Columbia legislation should be revised to delete references to deeds and seals, or modified to clarify when they need be used. Such an exercise is essentially housekeeping although, undeniably, it is desirable that the statute books not be littered with archaic references and concepts. This exercise should be conducted for the next statutory revision. In most cases, the term "deed" should probably be replaced with a phrase such as "instrument in writing."

B. Overview of Computer Assisted Search

Very few of the listings generated by the computer search concerned the use of deeds and seals in private or commercial transactions. The words searched were "indenture", "deed" and "seal." Most of the listings concerned the use of seals by statutory authorities, such as courts, ministers or professional bodies.

Several common requirements for the use of a seal emerge from a comparison of the various statutory provisions. These include:

(a) annual certificates under the seal of professional organizations to certify that their members are entitled to practice their professions;

(b) sealed copies of official documents which are stipulated to be admissible as evidence or to have the same evidentiary value as the original documents;

(c) sealed certificates from registrars or ministers which incorporate bodies, recognize changes of name, constitution or bylaws or define certain operating conditions;

(d) requirements that corporations name nominees or signify decisions under seal;

(e) statements that where a natural person would be required to enter into a contract in writing and under seal, a corporate body will also enter into a contract in writing and under seal;

(f) securities issued are to bear the seal of the issuing body;

(g) members of some occupational groups are to seal their plans, specifications and other documents.