The Law Commission

(LAW COM. No. 163)

DEEDS AND ESCROWS

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed 29th June 1987*

LONDON
HER MAJESTY'S STATIONERY OFFICE

HC 1

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HC 1

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting reform of the law.

The Commissioners are—

The Honourable Mr. Justice Beldam, *Chairman*

Mr. Trevor M. Aldridge

Mr. Brian J. Davenport, Q.C.

Professor Julian Farrand

Professor Brenda Hoggett

The Secretary of the Law Commission is Mr. J. G. H. Gasson and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

DEEDS AND ESCROWS

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THE LAW COMMISSION

Item IX of the First Programme

DEEDS AND ESCROWS

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I

GENERAL INTRODUCTION

1.1 This report is submitted in the context of Item IX of our First Programme: Transfer of Land. The Commission did some work on the law relating to the execution of deeds in the context of Item III: Consideration, Third Party Rights in Contract and Contracts under Seal. However that work did not lead to any published proposals, and in 1984 it was decided to look again at the formalities for deeds and the law of escrows. Both had been the subject of recent judicial criticism. This, together with increasing interest in the simplification of conveyancing, led the Commission to take the view that this was an area ready for reform. A draft Bill to implement our proposed reforms appears at Appendix A.

The scope of the report

1.2 This report does not consider the need for deeds either generally or for particular transactions. It is confined to the formalities for deeds and the law of escrows. Although the work was done within Item IX, it should be emphasised that the proposed reforms generally relate to all deeds and escrows and not just to those that affect land (but see, e.g., paragraph 1.5 below). However, our proposed new formalities for the execution of deeds generally would apply only to deeds executed by individuals. There seems to be no good reason for changing the formalities for the execution of deeds by corporations [1] and we do not in general recommend any such change (but see, e.g., paragraphs 1.5 and 2.16 below). The report also considers the law of escrows but in the light of consultation no proposals for major change are made.

The working paper

1.3 In 1985, the Law Commission published, for consultation, a working paper [2] which considered the problems that the present law sometimes causes and which made provisional proposals for change. We are grateful to all those who commented on the working paper. [3] As a result of those comments and of further consideration by the Commission our final proposals for reform were formulated.

The proposed reforms in outline

1.4 The report sets out new formalities for the execution of deeds by individuals. Sealing would no longer be a requirement, nor would the deed have to be on paper or parchment. Instead, a deed would have to be in writing on any substance which can constitute a document, and signed and delivered. The signature would have to be witnessed and attested.

1.5 The working paper proposed radical reform of the law of escrows. [4] These proposals were not supported on consultation and we do not now recommend them. However, we make one proposal which would remove any need for reliance on escrows in a large number of cases. This is that the authority to deliver a deed should not have to be conferred by deed, and further that solicitors and licensed conveyancers should be conclusively presumed to have authority to deliver deeds on their clients' behalf in a conveyancing transaction. This reform would apply to deeds executed by corporations as well as by individuals.

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[1] Both aggregate and sole.

[2] Formalities for Deeds and Escrows (1985), Working Paper No. 93.

[3] A list is in Appendix B.

[4] See (1985) Working Paper No.93, paras. 5.1-5.5.

The scheme of the report

1.6 The remainder of this report is divided into four sections. The first section deals with the proposals for the reform of the formalities for deeds, the second with the law of escrows, the third with miscellaneous matters and the fourth summarises our proposals.

PART II

FORMALITIES FOR DEEDS

The present law

2.1 The working paper set out the present law and its problems as to formalities for deeds and this part of the working paper is reproduced as Appendix C. Since the working paper was completed, a further case has been reported where a seal was not affixed to a document. In *TCB Ltd* v. *Gray*[1] a power of attorney was expressed to be signed, sealed and delivered by the defendant, but there was no indication or evidence that it had ever been sealed. Sir Nicolas Browne-Wilkinson V.-C. declined to deem the document to have been sealed since to do so would have been to go against the evidence and the express statutory requirement[2] that the power of attorney should be sealed. However, he held that the defendant was estopped from denying that it was sealed as the plaintiff company had acted on it to their detriment. The effect of estoppel is always one-sided and this decision reinforces the arguments in favour of abolition of seals. Had the defendant wished to assert that the document was a deed, he would probably not have been able to do so. It is true that this could be the consequence whichever formality was overlooked, but our understanding is that the sticking on of a seal is the formality most likely to be overlooked in practice.

The proposed reforms

2.2 The working paper made the following proposals,that:

(i) the requirement of writing should be retained but extended beyond paper and parchment to other permanent substances;[3]

(ii) the requirement of sealing should be abolished;[4]

(iii) the requirement of signature should be kept;[5]

(iv) the requirement of delivery should be abolished;[6]

(v) the signature on a deed should be attested;[7]

(vi) it should be clear on the face of the document that it is intended to be a deed.[8]

These proposals, as has been said, related only to deeds executed by individuals. Each of these proposals is considered in detail below.

Writing on some substance

2.3 The working paper raised the issue of whether technological change meant that the requirement of writing on paper or parchment was now, or might shortly become, outdated. It was our view expressed in the working paper, that the requirement of writing should remain, but that the restriction to paper or parchment was no longer necessary. We expressed doubts as to whether it would be possible to devise adequate alternatives to the signature in order to prove that the grantor intended to execute a deed if deeds were to be made, for example, on a computer. The responses received on this point saw the need for new, electronic forms of deed as something for the future, and some gave helpful information as to how problems of verification might be overcome. The general view was that the restriction to paper and parchment was no longer necessary but that there should be a requirement of writing on some permanent substance. We agree that the requirement of writing should remain. We are not, however, convinced that it is necessary to place any restriction on the substance. In practice, the requirement of signature and writing will restrict the substances used. The present requirement of paper or parchment does not set

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[1] [1986] 1 All E.R. 587. We would also refer to *Commercial Credit Services* v. *Knowles* [1978] C.L.Y. 794, which was not cited in the working paper, where a county court judge held that a document was a deed even though it had no wafer seal or 'L.S.' mark because the defendant intended to make a deed, and the words 'signed, sealed and delivered' were on the deed.

[2] Powers of Attorney 1971, s. 1.

[3] Para. 8.2(i).

[4] Para. 8.2(ii).

[5] Para. 8.2(iii).

[6] Para. 8.2(iv).

[7] Para. 8.3(i).

[8] Para. 8.3(ii).

any standard of permanence. Some paper is extremely flimsy, and all paper is at risk from fire or flooding. While it is highly desirable that deeds which have to be referred to many years later should be on a durable substance, other deeds have a very short life. Why should a deed be invalidated because it is on some other substance? In short we see no good reason for the restriction and accordingly we recommend its removal.

Sealing

2.4 The responses to our working paper showed that we were right to suggest that sealing is no longer a meaningful formality for individuals. As few individuals have their own seals, sealing has become little more than the affixing of a small red circle of paper. The effect of a seal not appearing on a paper or parchment is unclear. In some cases the fact that there is a space for a seal may lead the court to accept that it was probably sealed. Alternatively the grantor may be estopped from asserting his own failure to seal.[9] Accordingly, we recommend that the seal should no longer be a requirement.

Signature

2.5 It should remain a requirement that the grantor should sign a deed (subject to the exception set out in paragraph 2.17). In the working paper we discussed, but made no proposals, as to the possibility that there should be a more restrictive definition of signature. On further reflection, we do not consider that any further restrictions are necessary. What we do wish to ensure is that there is some personal authentication of the document by hand-written signature or other individual mark. The requirement that the signature must be witnessed and attested will achieve this.

2.6 Our tentative proposal that all parties to a deed should sign it was not generally favoured by those who responded to the working paper. It was thought likely to increase delay and costs, and in the context of conveyancing (and particularly mortgage deeds) it was thought that it might cause considerable administrative difficulties. Against this it was suggested that it might be desirable in practice for donees to execute deeds of gift, and for purchasers to execute deeds of conveyance to them as these often contain express trusts. However, on balance, we think that the arguments against requiring signature by all parties as a matter of law outweigh the arguments in favour, and we do not recommend the introduction of any such requirement.

Delivery

2.7 In the working paper, we said that delivery should be abolished. We said that: "From being a matter of physical fact, it has become a question of the deliverer's intention to be bound ... it need not be communicated to any person in particular ... and may be difficult to prove".[10] This proposal was closely linked with our proposals for reform of the law of escrows. As will be seen, we do not now intend to recommend any change in the law of escrows, and consequently we have had to consider whether the abolition of delivery is either possible or desirable.

2.8 Delivery serves the purpose of fixing the date at which a deed takes effect. If delivery were not a requirement, a deed would become effective (under the present law) as soon as it was signed and sealed. This might be highly inconvenient as the grantor might wish to sign and seal in advance for convenience and still have the option of withdrawing from the transaction. It would be possible to have some sort of system of execution in effect in escrow (i.e. subject to conditions) not involving delivery but this would not allow the grantor to withdraw as and when he wished. In short we believe now that delivery does serve a useful purpose in that it fixes the date when the deed takes effect while allowing most of the work to be done beforehand.

2.9 Can anything be done to alleviate the problems with the present law of delivery which were outlined in the working paper? We did suggest in the working paper that one could confine delivery to physical delivery. As we said there, this could not be a general rule of physical delivery to the other party, as there may be no other party, or the other party may be physically or legally incapable of taking delivery. Any restriction to physical delivery could therefore only involve the deed passing out of the grantor's control. There was some support for this proposal from those who responded to the working paper, but

[9] See para. 2.1.

[10] Para. 8.2(iv)

we do not consider that it would add greatly to the clarification or simplification of the law. It could well be as difficult to discover, at a later date, whether and when a deed passed out of someone's control as it is to decide at present whether and when the grantor intended to be bound by the deed.

2.10 We have come to the conclusion that while the present law of delivery is not entirely satisfactory, no changes that we have been able to envisage as practicable would improve it sufficiently to warrant recommending them. We therefore somewhat reluctantly recommend that delivery should remain one of the required formalities for a deed.

Delivery by an agent

2.11 We did make one proposal relating to delivery in the working paper which has met with general approbation. At present authority to deliver a deed can only be given to an agent by deed. We suggested and we now recommend that this rule should be relaxed so that no deed is required for such authority.[11] Additionally, solicitors and licensed conveyancers[12] should be impliedly authorised to deliver deeds on behalf of their clients in conveyancing transactions.[13] Such authorisation should be conclusively presumed in favour of a purchaser,[14] but the authority would not be irrevocable (e.g. by death). Of course, our recommendation does not preclude parties from invoking the provisions of the Powers of Attorney Act 1971 in instances where they wish to confer an irrevocable authority. The main impact of our recommendation, which affects both corporations and individuals, will be on escrows and it is discussed further in that context.[15]

Attestation

2.12 Almost all of those who responded to the working paper were in favour of obligatory attestation of deeds. The imposition of this requirement will not in fact be a change in present practice, as deeds are nearly always attested now.[16] However, the fear was expressed that the introduction of a new legal requirement[17] might lead to the same sort of complex rules that are now found in the law relating to the witnessing and attestation of wills. We are conscious of this possibility and have endeavoured to ensure that our proposals do amount only to the formalising of present practice and will not lead to additional complications.

2.13 We recommend that the signature on the deed should be witnessed and attested by at least one person.[18] We do not propose any restrictions as to who may be a witness, nor do we propose any prescribed form of attestation. We did consider precluding other parties to the deed from being witnesses. However, we have been persuaded that this is an unnecessary restriction. The purpose of such a restriction would be to ensure that the witness was to some extent independent, and thus could be a reliable witness in the event of any dispute as to whether the deed had been properly executed. However, a simple ban on parties to the deed would not achieve this aim. A company director could still witness where the company was the other party, as could spouses or other close relations. Any restriction would have to be much wider. A restriction similar to that relating to wills, so

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[11]But there must be some authority given, and difficulties concerning evidence of authority, particularly oral, must be borne in mind.

[12]Also agents or employees, see cl. 1 of the draft Bill, and para. 3.5. post.

[13]In all other situations there would be no such implied authority.

[14]"Purchaser" is defined in the Bill to mean purchaser in good faith (see Explanatory Notes on clauses) so that a purchaser who knows of a lack of authority is unlikely to be able to take advantage of the presumption.

[15]See para. 3.5.

[16]Land Registry transfers must be attested, see Land Registration Rules 1925, Form 19, as also must powers of attorney executed under either the Powers of Attorney Act 1971 or the Enduring Powers of Attorney Act 1985. Note that attestation goes beyond merely witnessing the execution and involves signing a clause attesting to the fact of being a witness: see n.18 below. Thus attestation is already a requirement for a large number of deeds.

[17]The requirement of attestation is not a new concept for conferring efficacy on deeds, as can be seen from the following extract from Blackstone, *Commentaries* (c.1765), ii, 307:
"The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed". However, this is not a legal requirement at present.

[18]"Attestation" involves more than simply witnessing the execution of the deed; it also includes the subscription of the witness' signature following a statement (attestation clause) that the document was signed or executed in his presence (*Re Selby-Bigge* [1950] 1 All E.R. 1009). It is necessary for the witness actually to "observe" the event (*In the Estate of Gibson* [1949] P.434). These two requirements are essential as they preclude the necessity for later requiring parol evidence regarding the execution of the document, which would lead to great difficulties after a long lapse of time when there is the possibility that one or more of the parties may have died.

that anyone who witnesses could take no benefit although the deed would remain valid, would be inappropriate to deeds in general, as it might not always be clear what constitutes a benefit, and similar problems with companies would arise. In addition, as has been said, it was the clear wish of those who responded to the working paper that the provision as to witnesses should be as simple as possible. We believe that in practice people will continue to use witnesses not connected with the transaction. The general law as to incapacity and undue influence will continue to apply so that the use of witnesses whose evidence would not be accepted in the event of dispute would be, as it is now, unwise.

2.14 We do not favour a prescribed attestation clause. Prescribing an attestation clause would have the considerable disadvantage that it could easily be written wrongly and thus an otherwise valid deed would be invalidated.

Failure to comply

2.15 It would be undesirable if failure to have just one signature witnessed, perhaps on a deed which had many, were to render the whole deed invalid. We therefore recommend that failure to have a signature witnessed and attested should have the effect that the signatory would not prima facie be bound but that the deed, if capable of operating without that signatory, would still be valid. The signatory should still be bound if he took the benefit of the deed[19] or through estoppel if someone else had acted on the assumption that the deed was properly executed.[20]

Clear that it is a deed

2.16 In the working paper we suggested that there should be an additional requirement that it should be clear on the face of the document that it is intended to be a deed.[21] This is in any event felt to be desirable, as a matter of practice, in order to make it easy to distinguish, in practice, deeds from other documents which have similar provisions for witnessing and signing. We remain persuaded that documents should not acquire the still significantly different status of being deeds unless this was patently intended by the parties. Accordingly we recommend that, in addition to our proposals that the formal requirements of a deed should be that the document had been signed, attested and delivered it should also, as a matter of law, be clear on the face of the document that it was intended to be a deed. In the working paper we stated that generally this will be clear because the word "deed" will appear somewhere on the document. However, it is also thought that in order to emphasise the significance of the document that is being signed to an individual it would be worthwhile to incorporate the words "signed as a deed" where the signature will be put. Nevertheless, it is not intended that such words should be essential; they are recommended in order to give some indication of a general uniform practice which could usefully be adopted. This provision would still leave a court free to decide whether or not a document was intended to be a deed where a different formula was used, but only where there was evidence for such a finding within the document itself.[22] We therefore recommend that there should be a non-exclusive statutory formula, which can be adopted as a means of general practice, i.e. "signed as a deed", which makes it clear on the face of the document that it is intended to be a deed. Further, since obvious complexities and uncertainties could occur where the parties to a document include both individuals and corporations, we also recommend that this additional requirement for a deed should be a general one. It could certainly produce an anomalous result if such a document did not need to be clear on the face of it that it was intended to be a deed so far as concerns the corporation parties but did so need so far as concerns the individuals. For corporations presumably an appropriate formula would be "executed as a deed".

Execution by blind, illiterate, or incapable people

2.17 At present anyone who cannot sign his or her name can instead place his or her mark on a deed.[23] We consider that this practice should be allowed to continue and that therefore "signature" should be defined to include a "mark". Attestation would also be a supporting requirement in such cases for validity. Consideration has also been given to

[19] *Webb* v. *Spicer* (1849) 13Q.B. 886.

[20] *TCB Ltd* v. *Gray* [1986] 1 All E.R. 587.

[21] (1985) Working Paper No. 93, para 8.3(ii).

[22] (1985) Working Paper No. 93, para 8.3(ii), n71; *Re Stirrup's Contract* [1961] 1 W.L.R. 449.

[23] Law of Property Act 1925, s.73

making special provision for those who are incapable of signing. The method of execution provided in the Powers of Attorney Act 1971[24] permits the grantor to direct someone else to sign on his behalf and requires two witnesses to be present and attest the instrument. We did not think it should be mandatory to use this method as many blind, illiterate or incapable people can sign their names or place a mark; nor would we wish to restrict this method to any particular people as there may be difficulties of definition. We recommend instead that there should be a general alternative to signing personally which would be that another person may effectively sign on behalf of the party concerned at his direction and in the presence of two witnesses who attest the signature.

Relationship with present practice

2.18 We should like to emphasise that for the vast majority of deeds our recommendations will not require any departure from present practice.[25] Most deeds are signed, attested, sealed and delivered, and are quite clear upon their face that they are intended to be deeds. Although the seal will no longer be necessary, its presence will not invalidate the deed.

[24]s.1(2).

[25]See, e.g, Land Registration Rules 1925, Form 19.

PART III

ESCROWS

The present law

3.1 The working paper described briefly the present law of escrows, that is, instruments which are delivered to take effect as deeds on the happening of some specific event or the fulfilment of some condition.[1] We will not repeat here what we said there about the problems that exist with the present law.

Our proposals

3.2 Our proposals for the reform of escrows[2] were set in the context of our proposal for the abolition of delivery. Our decision to recommend the retention of delivery was influenced by the rejection on consultation of our proposals relating to escrows. The two topics are closely interrelated and neither can be considered in isolation. We provisionally proposed the abolition of delivery (and hence, necessarily, escrows in their present form). We suggested that if people did not want deeds to become operative as soon as they were executed, they should be able to execute them subject to conditions, but that the conditions should have to be express. It seemed to us at the time that one of the major problems with escrows was that the conditions are nearly always implied and it may be unclear just what they are.

3.3 The idea of express conditions was opposed by nearly all of those who commented on the proposal. It was thought that it could only add to the complications of conveyancing and that there could be considerable problems of proving, possibly at a much later date, whether the conditions had ever been fulfilled. The introduction of statutory presumptions to solve this problem was not thought to be satisfactory. We have therefore decided not to recommend any change in the law so that delivery in escrow will continue to be possible in its present form.

3.4 We also provisionally proposed that the law should clarify the date when the provisions of a deed came into effect if it is executed subject to conditions.[3] At present this is a retrospective operation as at the date of delivery in escrow, i.e. not as at the date of fulfilment of the condition.[4] It would be possible to implement this proposal even while retaining delivery in escrow. The dates we suggested were:

(i) the date agreed by the parties and expressed as such in the deed;

(ii) the date of execution of the deed;

(iii) the date when the conditions should have been fulfilled;

(iv) the date when the conditions are actually fulfilled.

Most people favoured (i), but if the present law of escrow is retained, allowing implied conditions, it is less likely that a date will be expressly included. Others favoured option (iv). While there may be good reasons for preferring a date different from the present one, we are not satisified that the present law is so unsatisfactory in principle or practice as to warrant making any change.

Escrows and agents

3.5 We have already described[5] our proposal that agents should be impliedly authorised to deliver a deed without being expressly authorised to do so by deed. We will here outline the implications of this recommendation for the law of escrows. One of the commonest occasions in which a deed is (albeit unknowingly) delivered in escrow is when a person executes a deed of conveyance and delivers it to his solicitor. "Usually a vendor of land will execute the conveyance some days before completion and deliver it to his

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[1] See (1985) Working Paper No. 93, paras. 5.1-5.5, set out in Appendix C of this report.

[2] Paras. 9.1-9.10.

[3] Para. 9.9.

[4] *Alan Estates Ltd.* v. *W.G. Stores Ltd.* [1982] Ch. 511.

[5] Para. 2.11.

solicitor in escrow, the condition being the completion of the purchase by the purchaser; and delivery on this condition will be inferred without proof."[6] However, the deed is delivered by the client, not by his solicitor (who in practice rarely has the requisite authority by deed to deliver it on completion). The effect of this is that the client strictly cannot withdraw the deed once he has sent it to his solicitor, and it remains valid even if he dies before completion. This almost certainly does not comply with people's expectations as they probably assume that they can recall the deed, even though this may place them in breach of contract. We recommend not only that the rule requiring agents to be authorised by deed if they are to deliver a deed should be abolished, but also that solicitors and licensed conveyancers[7] should be presumed, in favour of purchasers, to have authority to deliver deeds in conveyancing transactions. This should mean that there will be no need for an escrow to arise simply because a client wishes to sign a deed before completion. If the client does not wish to deliver the deed himself, he will simply sign it in front of a witness who will attest it and the solicitor will then deliver it, dating it correctly as at completion. Consequently, since the document has not been delivered at the stage of signing by the client and therefore is not a deed, the client may withdraw it prior to delivery although this may place him in breach of contract. Equally, in the case of the death of the client prior to delivery of the document, there would not be an effective deed, but the contract would remain binding on his estate. This recommendation does not preclude the deliberate use of escrows or of powers of attorney in appropriate circumstances.

3.6 We recommend that this reform should apply to corporations as well, so that they will not need to execute a deed to authorise an agent to deliver on their behalf.[8]

[6] R.E Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed. (1984), pp. 157-158, cited (from an earlier edition) with approval by Blackett-Ord V.-C. in *Lyme Valley Squash Club Ltd.* v. *Newcastle under Lyme B.C.* [1985] 2 All E.R.405, at p. 413.

[7] Also agents and employees.

[8] It has been drawn to our attention that the formal requirements for the execution of deeds by corporations can cause difficulties for foreign corporations which have no seals. We believe that s. 74(6) of the L.P.A. 1925 may offer a solution: "Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed." Alternatively a foreign corporation may be able to adopt a seal. See F.M. Pulvermacher, "Conveyances by Foreign Corporations", [1979] Conv. 127.

PART IV

MISCELLANEOUS

The Crown

4.1 The recommendations as to the formalities for executing a valid deed will not apply to the Crown, which is a corporation sole. The Bill makes express provision to preserve the present position of the Duchy of Cornwall as regards sealing because it is generally understood that section 73 of the Law of Property Act 1925 which requires signature does not apply to the Duchy whose deeds are sealed in accordance with the Duchy of Cornwall Management Act 1863.

Transitional Provisions

4.2 As our proposals will not significantly alter present practice, even where they alter present law, we see no reason to recommend elaborate transitional provisions. Accordingly we recommend that our reforms will apply to all deeds delivered after the commencement of the Act. They would not apply to deeds delivered in escrow before that commencement even though the conditions are fulfilled afterwards, because such deeds would still have been delivered and would operate from a date before the commencement of the Act.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 We *recommend* that the new formalities for deeds executed by individuals should be:

(i) the deed may be on any substance but must still be a document in writing;

(ii) it should be clear on the face of the document that it is intended to be a deed;

(iii) the document must be signed by each maker unless executed in the manner described at (viii) below;

(iv) instead of signing, each maker may place his mark on the document;

(v) the signature(s) or mark must be witnessed and attested by at least one witness;

(vi) the document must be delivered by each maker or by his agent;

(vii) sealing is no longer a requirement;

(viii) the document may be signed by another for the maker, at his direction and in the presence of two witnesses.

5.2 We *recommend* that corporations should continue to be able to execute deeds as they do at present except that they should become able to use any substance provided that the document is in writing, and that it should also be clear on the face of the document that it is intended to be a deed.

5.3 For both corporations and individuals we *recommend* that it should become possible to authorise an agent to deliver a document as a deed without the authority being by deed, and we *recommend* that there should be a statutory presumption in favour of a purchaser that a solicitor or licensed conveyancer delivering a document as a deed has authority to deliver it.

5.4 We do not recommend any reform of the law of escrow, although we hope that the recommendations in para 5.3 above will mean that delivery in escrow will no longer be an intrinsic but unappreciated part of ordinary conveyancing transactions.

(*Signed*) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

JOHN GASSON, *Secretary*
1 May 1987

APPENDIX A

DRAFT

OF A

B I L L

INTITULED

A.D. 1987.

An Act to make new provision with respect to deeds and their execution.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Deeds and their execution.

1.—(1) Any rule of law which—

(a) restricts the substances on which a deed may be written;

(b) requires a seal for the valid execution of an instrument as a deed by an individual; or

(c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is hereby abolished.

(2) An instrument shall not be a deed unless the instrument—

(a) makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) is validly executed as a deed by that person or, as the case may be, one or more of those parties.

(3) An instrument is validly executed as a deed by an individual if, and only if, the instrument—

(a) is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in the presence of him and of two witnesses who each attest the signature; and

(b) is delivered as a deed by him or by a person authorised to do so on his behalf.

(4) Where a conveyancer, or an agent or employee of a conveyancer, in the course of or in connection with a transaction involving the sale or other disposition of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the deed, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.

Clause 1

1. Clause 1 implements the recommendations in the report for the reform of the formalities for deeds and for delivery by agents.

Subsection (1)

2. Paragraph (a) enables deeds to be made on substances other than paper or parchment. It implements the recommendation in paragraph 2.3 of the report.

3. Paragraph (b) removes the requirement of sealing when a deed is made by an individual. It implements paragraph 2.4 of the report. The requirement of sealing is retained for corporations sole and aggregate.

4. Paragraph (c) enables a deed to be delivered by an agent who has been authorised to do so otherwise than by deed. Subsection (4) makes further provision in respect of deeds delivered in conveyancing transactions. Paragraph (c) implements paragraph 2.11 of the report.

Subsection (2)

5. Subsection (2) introduces a new requirement for all deeds. To be valid, it will, in future, have to be clear on the face of the instrument that it is intended to be a deed. The intention may be expressed in any way, but extrinsic evidence of intention will not be permitted. This subsection implements paragraph 2.16 of the report.

Subsection (3)

6. Subsection (3) sets out further requirements for the execution of a deed by an individual.

7. Paragraph (a)(i) provides that the individual must sign the deed in the presence of a witness and the witness must attest the signature. There are no restrictions as to who may be a witness. Signature includes a mark; see subsection (5). An alternative method is provided in paragraph (a)(ii). Paragraph (a) implements paragraph 2.13 of the report.

8. Paragraph (a)(ii) enables an individual making a deed to direct another person to sign on his behalf. The signing must take place in the presence of the person making the deed and in the presence of two witnesses who attest the signature. There are no restrictions as to who may be a witness. Although primarily intended for those who cannot sign, through physical incapacity, this method of execution may be used by anyone. Paragraph (a)(ii) implements paragraph 2.17 of the report.

9. Paragraph (b) provides that, whichever method of execution is used, the deed must be delivered either by the person who executed it, or by his authorised agent. Subsection (1)(c) provides that authority need not be conferred by deed. Paragraph (b) implements paragraph 2.10 of this report.

Subsection (4)

10. Subsection (4) gives purchasers the benefit of a conclusive presumption that a solicitor or licensed conveyancer, or his agent or employee, has authority from his client to deliver a deed when in the course of a conveyancing transaction. This provision will remove the need for any inference that in most cases clients deliver deeds to their conveyancer in escrow. Subsection (4) implements paragraph 3.5 of the report.

(5) In this section—

"conveyancer" means a solicitor or a licensed conveyancer (within the meaning of the Administration of Justice Act 1985);

1925 c.20.

"disposition" has the same meaning as in the Law of Property Act 1925;

"interest in land" means any estate, interest or charge in or over land or in or over the proceeds of sale of land;

"purchaser" has the same meaning as in the Law of Property Act 1925;

"sign", in relation to an instrument, includes making one's mark on the instrument and "signature" shall be construed accordingly.

(6) Nothing in this section applies in relation to instruments delivered as deeds before it comes into force; and nothing in sections (1)(b), (2) or (3) above applies in relation to deeds required or authorised to be made under the seal of the Duchy of Cornwall.

Subsection (5)

11. Subsection (5) contains five definitions:

(a) The definition of "conveyancer" includes both solicitors and licensed conveyancers. Licensed conveyancers are persons licensed to act in conveyancing transactions under Part II of the Administration of Justice Act 1985.

(b) The definition of "disposition" in section 205(1)(ii) of the Law of Property Act 1925 includes a conveyance and a devise, bequest or an appointment of property in a will, and "conveyance" is defined so as to include a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest in property by any instrument, except a will.

(c) By defining "interest in land" to include an interest in or over the proceeds of sale of land, it is made clear that an interest in land can be an interest behind a trust for sale of land.

(d) The definition of "purchaser" is

> "'Purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Act and elsewhere where so expressly provided 'purchaser' only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires 'purchaser' includes an intending purchaser; "purchase" has a meaning corresponding with that of 'purchaser', and 'valuable consideration' includes marriage but does not include a nominal consideration in money;"

Law of Property Act 1925, section 205 (1)(xxi).

(e) The definition of signature to include a mark ensures that illiterate people can execute a deed in the presence of one witness in accordance with subsection (3)(a)(i).

Subsection (6)

12. Subsection (6) provides that the Bill only applies to deeds delivered after the commencement of this Bill. Where a document is delivered in escrow, it does not become a deed until the condition subject to which it is delivered is fulfilled, at which point the document becomes a deed and relates back to the date of delivery. Hence the Act will not apply to deeds delivered in escrow before the Act comes into force. It also ensures, that as at present, deeds made under the seal of the Duchy of Cornwall do not have to be signed.

Short title, commencement etc.

2.—(1) This Act may be cited as the Deeds Act 1987.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) The enactments and instruments mentioned in Schedule 1 to this Act shall have effect subject to the amendments there specified, being amendments consequential on the provisions of this Act.

(4) The enactments mentioned in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(5) This Act extends to England and Wales only.

Clause 2

1. Clause 2 provides for the short title, commencement and extent of the Bill. It also provides for the consequential amendments and repeals.

Subsection (1)

2. Subsection (1) gives the short title of the Bill.

Subsection (2)

3. Subsection (2) provides for the commencement of the Bill.

Subsection (3)

4. Subsection (3) provides for the enactments set out in Schedule 1 to be amended in order to accommodate the changes made by clause 1. Paragraph 1 of the Schedule ensures that private instruments which were made before this Bill comes into force and which provide for the execution of a deed under seal will be included in these reforms. It also ensures that any enactments not covered by subsection (3) are amended appropriately.

Subsection (4)

5. Subsection (4) provides for the enactments set out in Schedule 2 to be repealed.

Subsection (5)

6. Subsection (5) provides expressly that the Bill is to apply to England and Wales only.

SCHEDULES

Section 2.

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

General

1. Subject to the following provisions of this Schedule, any enactment passed or instrument made before the commencement of this Act shall, so far as may be necessary in consequence of the provision made by this Act, have effect as if—

(a) any reference to an instrument under seal were a reference to an instrument executed as a deed;

(b) any reference to the signing and sealing of an instrument or, otherwise than in an attestation, to the signing, sealing and delivering of an instrument were a reference to the execution of an instrument as a deed; and

(c) any reference in an attestation to the signing, sealing and delivering of an instrument were a reference to the signing of an instrument as a deed.

The Gifts for Churches Act 1811 (c.115)

2. In section 2 of the Gifts for Churches Act 1811 for the words "under the hand and seal or hands and seals of any such person or persons, and under the seal or seals of" there shall be substituted the words "duly executed by any such person or persons or".

The Cinque Ports Act 1821 (c.76)

3. In section 1 of the Cinque Ports Act 1821 for the words "under his hand and seal" there shall be substituted the words "executed as a deed by him".

The Game Act 1831 (c.15)

4. In section 13 of the Game Act 1831 for the words "by writing under hand and seal, or in the case of a body corporate, then under the seal of such body corporate" there shall be substituted the words "by an instrument executed as a deed".

5. In section 15 of that Act for the words "by writing under his hand and seal" there shall be substituted the words "by an instrument executed as a deed".

The Ecclesiastical Corporation Act 1832 (c.80)

6. In section 1 of the Ecclesiastical Corporations Act 1832 for the words "in writing, under his or their hand and seal or hands and seals" there shall be substituted the words "by an instrument executed as a deed".

7. In section 3 of that Act for the words "sign, seal and deliver" there shall be substituted the words "execute as a deed".

The Tithe Act 1836 (c.71)

8. In section 71 of the Tithe Act 1836 for the words "any deed or declaration under his hand and seal" there shall be substituted the words "an instrument executed as a deed".

9. In section 72 of that Act for the words "under the hands and seals of", in both places where they occur, there shall be substituted the words "executed as a deed by".

The Tithe Act 1838 (c.64)

10. In section 1 of the Tithe Act 1834 for the words "any deed or declaration under his or their hand and seal or hands and seals" there shall be substituted the words "an instrument executed as a deed".

11. In section 31 of that Act for the words "any deed or declaration under his hand and seal" there shall be substituted the words "an instrument executed as a deed".

The Drouly Fund Act 1838 (c.89)

12. In section 4 of the Drouly Fund Act 1838 for the words "under the hands and seals of" and the words "under the hand and seal of" there shall be substituted the words "executed by".

The School Sites Act 1841 (c.28)

13. In section 10 of the School Sites Act 1841—

(a) for the words "hereunto set their hands and seals" there shall be substituted the words "executed this instrument as a deed"; and

(b) for the words "signed, sealed and delivered" there shall be substituted the words "signed as a deed".

The Companies Clauses Consolidation Act 1845 (c.16)

14. In section 97 of the Companies Clauses Consolidation Act 1845 for the words "under seal" there shall be substituted the words "executed as a deed".

15. In Schedule (B) to that Act for the words "As witness our hands and seals" there shall be substituted the words "Executed as a deed by us".

16. In Schedule (E) to that Act for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed".

Land Clauses Consolidation Act 1845 (c.18)

17. In section 75 of the Land Clauses Consolidation Act 1845 for the words from "it shall be lawful" to "any two of them" there shall be substituted the words "then, if the promoters of the undertaking think fit, it shall be lawful for the promoter to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation, for the promoters or any two of them to execute a deed poll (in either case)".

18. In section 77 of that Act for the words from "it shall be lawful" to "any two of them" there shall be substituted the words "then, if the promoters of the undertaking think fit, it shall be lawful for the promoters to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation, for the promoters or any two of them to execute a deed poll (in either case)".

19. In section 85 of that Act for the words "under the hands and seals of" there shall be substituted the words "executed by".

20. In Schedules (A) and (B) to that Act for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed".

The Leases Act 1845 (c.124)

21. In the Schedule 1 to the Leases Act 1845 for the words "hereunto set their hands and seals" there shall be substituted the words "executed this instrument as a deed".

The Commissioners Clauses Act 1847 (c.16)

22. In section 56 of the Commissioners Clauses Act 1847 for the words "under seal" there shall be substituted the words "executed as a deed" and for the words "under the hands and seals" there shall be substituted the words "executed as a deed by".

23. In Schedules (B) and (C) to that Act for the words "hereunto set our hands and seals" there shall be substituted the words "executed this instrument as a deed".

The Cemeteries Clauses Act 1847 (c.65)

24. In the Schedule to the Cemeteries Clauses Act 1847—

(a) for the words "Given under our common seal, [*or* under our hands and seals, *as the case may be*,] there shall be substituted the words "Executed as a deed"; and

(b) for the words "Witness my hand and seal" there shall be substituted the words "Executed as a deed".

The Literary and Scientific Institutions Act 1854 (c.112)

25. In section 13 of the Literary and Scientific Institutions Act 1854—

(a) for the words "hereunto set their hands and seals [*or* seals *only as the case may be*]" there shall be substituted the words "executed this instrument as a deed"; and

(b) for the words "Signed, sealed and delivered" there shall be substituted the words "Signed as a deed".

The Ordinance Board Transfer Act 1855 (c.117)

26. In section 5 of the Ordinance Board Transfer Act 1855 for the words "and if the instrument so executed be in the form of a deed, by setting or affixing a seal thereto and delivering the same as his deed" there shall be substituted the words "or if the instrument be in the form of a deed, by executing it as a deed".

The Sale of Advowsons Act 1856 (c.50)

27. In section 7 of the Sale of Advowsons Act 1856 for the words "deed (duly stamped) under the hands and seals of" there shall be substituted the words "an instrument (duly stamped) executed as a deed by".

The Defence Act 1859 (c.12)

28. In Schedule (A) to the Defence Act 1859 for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed".

The Land Registry Act 1862 (c.53)

29. In the Schedule to the Land Registry Act 1862 for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed".

The Clerical Disabilities Act 1870 (c.91)

30. In Schedule 2 to the Clerical Disabilities Act 1870—

(a) for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed"; and

(b) for the words "Executed by" there shall be substituted the words "Signed as a deed by".

The Places of Worship Sites Act 1873 (c.50)

31. In section 4 of the Places of Worship Sites Act 1873—

(a) for the words "hereunto set their hands and seals" there shall be substituted the words "executed this instrument as a deed";

(b) for the words "Signed, sealed and delivered" there shall be substituted the words "Signed as a deed".

The Colonial Stock Act 1877 (c.59)

32. In section 4(1) of the colonial Stock Act 1877 for the words "executed under his hand and seal and attested" there shall be substituted the words "executed as a deed".

33. In section 6 of that Act for the words "given under the hand and seal of the person not under a disability, and attested" there shall be substituted the words "executed as a deed by the person not under a disability".

The Bills of Sale Act (1878) Amendment Act 1882 (c.43)

34. In the Schedule to the Bills of Sale (1878) Amendment Act 1882 for the words "Signed and sealed" there shall be substituted the words "Signed as a deed".

The Stamp Act 1891 (c.39)

35. In section 122 of the Stamp Act 1891 for the words "under seal" there shall be substituted the words "executed as deeds".

The Colonial Stock Act 1892 (c.35)

36. In the Schedule to the Colonial Stock Act 1892—

(a) for the words "Witness our hands and seals" there shall be substituted the words "executed as a deed by us"; and

(b) for the words "Signed, sealed and delivered", in both places where they occur, there shall be substituted the words "Signed as a deed".

The Merchant Shipping Act 1894 (c.60)

37. In Part II of Schedule 19 to the Merchant Shipping Act 1892—

(a) for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed"; and

(b) for the words "Signed, sealed and delivered" there shall be substituted the words "Signed as a deed".

The Open Spaces Act 1906 (c.25)

48. In section 2(3) of the Open Spaces Act 1906 for the words "under the hands and seals of" there shall be substituted the words "executed as a deed by".

The Deeds of Arrangement Act 1914 (c.47)

39. In section 1(1) of the Deeds of Arrangement Act 1914 for the words "under seal" there shall be substituted the words "executed as a deed".

The Local Government (Emergency Provisions) Act 1916 (c.12)

40. In section 12(1) of the Local Government (Emergency provisions) Act 1916 for the words "under seal", in both places where they occur, there shall be substituted the words "executed as a deed".

The Law of Property Act 1925 (c.20)

41. In sections 52(2)(e), 74(2), 80(1) and 81(1) of the Law of Property Act 1925 for the words "under seal" there shall be substituted the words "executed as a deed".

42. Section 73 of that Act shall cease to have effect.

The Finance Act 1946 (c.64)

43. In section 57(1) of the Finance Act 1946, in the definition of "trust instrument" for the words "under seal" there shall be substituted the words "executed as a deed".

The Charitable Trusts (Validation) Act 1954 (c.58)

44. In section 1(14) of the Charitable Trusts (Validation) Act 1954 for the words "under seal" there shall be substituted the words "executed as a deed".

The Corporate Bodies' Contracts Act 1960 (c.46)

45. In section 1(4) of the Corporate Bodies' Contracts Act 1960 for the words "under seal" there shall be substituted the words "executed as a deed".

The Peerage Act 1963 (c.48)

46. In paragraph 1 of Schedule 1 to the Peerage Act 1963 for the words "under seal" there shall be substituted the words "executed as a deed", for the words "hereunto set my hand and seal" there shall be substituted the words "executed this instrument as a deed" and the words "and sealed" shall cease to have effect.

The Industrial and Provident Societies Act 1965 (c.12)

47. In section 14 of the Industrial and Provident Societies Act 1965—

(a) in subsection (1) for the words "subscribed his name and affixed his seal therto "there shall be substituted the words "executed them as a deed"; and

(b) in subsection (4) for the words from "as if" to the end there shall be substituted the words 'subscribed his name thereto'".

48. In sections 16(1) and 17(1) of that Act for the word "seal" there shall be substituted the words "executed as a deed".

49. In section 29(1) of that Act for the words "under seal" there shall be substituted the words "executed as a deed".

50. In Part I of Schedule 4 to that Act—

(a) in Form A for the words "Sealed with our seals" there shall be substituted the words "Executed by us as a deed" and for the words "Sealed and delivered" there shall be substituted the words "Signed as a deed"; and

(b) in Form B for the words "sealed with my seal" there shall be substituted the words "executed by me as a deed", for the words "sealed with our seals" there shall be substituted the words "executed by us as a deed" and for the words "Sealed and delivered" there shall be substituted the words "Signed as a deed".

The Finance Act 1970 (c.24)

51. In paragraphs 4 and 17(3) of Schedule 7 to the Finance Act 1970 for the words "under seal" there shall be substituted the words "executed as a deed".

The Powers of Attorney Act 1971 (c.27)

52. In section 1 of the Powers of Attorney Act 1971 subsection (2) shall cease to have effect and, in subsection (1), for the words "signed and sealed by, or by direction and in the presence of," there shall be substituted the words "executed as a deed by".

53. In section 7(1)(a) of that Act the words "and, where sealing is required, with his own seal" shall cease to have effect.

The Local Government Act 1972 (c.70)

54. In section 13(2) of the Local Government Act 1972 for the words "under seal" there shall be substituted the words "executed as a deed" and for the words "with the seals of" there shall be substituted the words "executed as a deed by".

55. In sections 14(3) and 33(3) of that Act for the words "signed and sealed" there shall be substituted the words "executed as a deed".

56. In section 236(3) of that Act for the words "under the hands and seals of" there shall be substituted the words "shall be executed as a deed by".

The Friendly Societies Act 1974 (c.46)

57. In Schedule 3 to the Friendly Societies Act 1974, in the form applicable in the central registration area for the words "Sealed with our seals" there shall be substituted the words "Executed by us as a deed" and for the words "Sealed and delivered" there shall be substituted the words "Signed as a deed".

The Solicitors Act 1974 (c.47)

58. In section 2(3)(b) of the Solicitors Act 1974 for the words "under seal" there shall be substituted the words "executed as a deed".

The Petroleum and Submarine Pipe-lines Act 1975 (c.74)

59. In section 18(5)(b) of the Petroleum and Submarine Pipe-lines Act 1975 for the words "under seal executed" there shall be substituted the words "executed as a deed".

The Estate Agents Act 1979 (c.38)

60. In section 16(3)(b) of the Estate Agents Act 1979 for the words "under seal" there shall be substituted the words "executed as a deed".

The Ancient Monuments and Archaeological Areas Act 1979 (c.46)

61. In section 14(4) of the Ancient Monuments and Archaeological Areas Act 1979 for the words "made under seal" there shall be substituted the words "executed as a deed".

The Limitation Act 1980 (c.58)

62. In sections 7 and 36(1)(c) of the Limitation Act 1980 for the words "under seal" there shall be substituted the words "executed as a deed".

The Supreme Court Act 1981 (c.54)

63. In section 120(2) of the Supreme Court Act 1981 for the words "under seal" there shall be substituted the words "executed as a deed".

The Oil and Gas (Enterprise) Act 1982 (c.23)

64. In section 19(2) of the Oil and Gas (Enterprise) Act 1982 for the words "under seal executed" there shall be substituted the words "executed as a deed".

The Local Government (Miscellaneous Provisions) Act 1982 (c.30)

65. In section 33(1) of the Local Government (Miscellaneous Provisions) Act 1982 for the words "under seal" there shall be substituted the words "executed as a deed".

The Companies Act 1985 (c.6)

66. In section 36(1)(a) of the Companies Act 1985 for the words "under seal" there shall be substituted the words "executed as a deed".

67. In section 38(2) of that Act for the words from "signed" to "under his seal" there shall be substituted the words "executed by such an attorney on behalf of the company".

SCHEDULE 2

Section 2.

REPEALS

Chapter	Short title	Extent of repeal
15 & 16 Geo.5 c.20.	The Law of Property Act 1925.	Section 73.
1963 c.48	The Peerage Act 1963.	In Schedule 1, in paragraph 1, the words "and sealed".
1971 c.27.	The Powers of Attorney Act 1971.	Section 1(2). In section 7(1)(a), the words "and, where sealing is required, with his own".

APPENDIX B

List of individuals and organisations who responded to Working Paper No. 93

M.H. Boyd-Carpenter
Building Societies Association
D.L. Cannon
Chancery Bar Association
Conveyancing Standing Committee
Eversheds and Tomkinson, Solicitors
S. Farren
Finance Houses Association
D.F. Gray
Halifax Building Society
H.M. Land Registry
Holborn Law Society
Institute of Legal Executives
Justice
The Law Society
Lord Chancellor's Department
C. Marchant
Master of the Court of Protection
D. Price, Registrar
M.D. Redman
Royal Institution of Chartered Surveyors
R.F.J. Simon
M.P. Thompson
D. Tolstoy
R. Webb
P.R.H. Webber

APPENDIX C

EXTRACT FROM WORKING PAPER NO. 93

THE PRESENT LAW

4.1 At present there are four formalities required for a valid deed. There must be writing on paper (or parchment),[1] sealing, a signature or mark[2] and delivery. Attestation of a signature is not a requirement and yet is common practice. While the law has long been precise as to which formalities are necessary, there is some uncertainty as to how they have to be carried out.

(i) Sealing

4.2 In practice, sealing today is for most individuals a meaningless exercise involving sticking a small circle of red adhesive paper onto the document. It is probably not fixed to the document by the grantor himself, but by his solicitor. As long ago as 1937 it was said that "... a seal nowadays is very much in the nature of a legal fiction ... It is the party's signature, and not his seal, which in fact authenticates the document ..."[3] More recently Lord Wilberforce has suggested the removal of "this medieval doctrine of the seal."[4] He continued " ... sealing is now a completely fictitious matter ... I would have hoped that we might have got rid of that mumbo-jumbo and aligned ourselves with most other civilised countries."[5]

4.3 Quite apart from the lack of any reason of substance for requiring a seal, the law as to what constitutes a valid seal is still unclear. The Court of Appeal in First National Securities Ltd. v. Jones[6] held that a document which had no wax or wafer seal but which had a circle with the letters "L.S." printed on it was capable of being a deed. It was sufficient that the document purported to be a deed and indicated where the seal should be.[7] However, in Re Smith,[8] an earlier Court of Appeal case, the Court refused to presume due sealing despite the words "sealed with my seal" because there was no wafer, wax seal or other visible mark. It may thus be unclear to a layman what the effect of omitting a wax or wafer seal will be. Judicial relaxation of the strict requirements of a seal has been criticised[9] as creating uncertainty.

(ii) Delivery

4.4 Originally delivery involved a physical handing over of the deed which obviously signified the intention of the grantor of the deed to be bound by it.[10] However a deed is now effectively delivered in law "as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him"[11]. It is thus essentially a question of the grantor's intention, but it does not matter whether this intention is communicated to the grantee provided it is in fact evinced by some sufficient act or words.[12] Since delivery no longer requires any physical handing over, a deed may be taken as delivered even when kept with the grantor's own papers if there is evidence that he evinced an intention to be bound by it. Laymen might well think the word "delivery" here to be a dangerous misnomer as it does not accord with their understanding of the

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[1] Norton on Deeds 2nd ed., (1928) pp. 3-4.

[2] L.P.A. 1925, s. 73.

[3] Sixth Interim Report of the Law Revision Committee (1937), Cmd. 5449, p. 35.

[4] Hansard (H.L.), 25 February 1971, vol. 315, col. 1213.

[5] Loc. cit.

[6] [1978] Ch. 109, and see Re Sandilands (1871) L.R. 6 C.P. 411 where it was held that a wax seal was unnecessary; deeds could be sealed in a wide variety of ways.

[7] Also Stromdale & Ball Ltd. v. Burden [1952] Ch. 223 per Danckwerts J. at p. 230. "Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that, at the present day, if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed".

[8] (1892) 67 L.T. 64.

[9] D. Hoath, "The sealing of documents - fact or fiction", (1980) 43 M.L.R. 415.

[10] D.E.C. Yale, "The Delivery of a Deed", [1970] C.L.J. 52.

[11] Xenos v. Wickham, (1867) L.R. 2 HL 296; Alan Estates Ltd. v. W.G. Stores Ltd. [1982] Ch. 511.

[12] Delivery may be inferred from conduct (Keith v. Pratt (1862) 10 W.R. 296) and has been inferred from the mere facts of signing and sealing (Hall v. Bainbridge (1848) 12 Q.B. 699); but cp. per Kay L.J. in Powell v. London & Provincial Bank [1893] 2 Ch. 555 at pp. 565-566.

word. This may lead them to believe that until the deed is handed over to "the other side" it is still capable of recall. Another problem in practice is that, since delivery must be the final formality, a deed signed after delivery must be redelivered. At present, the inconvenient and perhaps unnecessary rule is that an agent can only deliver a deed for his principal if he is authorised to do so by deed.[13] However, once delivered, the grantor cannot revoke the deed, unless power to do so has been expressly reserved.

(iii) Signature

4.5 A signature need not be in handwriting. A rubber stamp with facsimile signature or anything similar which makes clear an intention to authenticate the deed should be sufficient in law.[14] However in 1954, the Court of Appeal agreed that as a matter of practice the use of a rubber stamp to sign a document is undesirable, since such a method of signing does not carry without the same authenticity or warrant of responsibility as a written signature. Lord Denning, dissenting but agreeing on this point, said: "The virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document."[15] Accordingly in practice it appears generally accepted that, irrespective of what may suffice in law, the signature on a deed should be written, pen in hand. In practice also such a signature would be attested.

ESCROWS

5.1 An escrow has been defined as follows: "If an instrument be delivered to take effect on the happening of a specified event, or upon condition that it is not to be operative until some condition is performed, then pending the happening of the event or the performance of the condition the instrument is called an escrow."[16] There are two established restrictions on the type of condition which can be imposed. The delivery cannot be conditional on the death of the grantor as this would amount to a testamentary disposition and so must be effected as a will, and it must not be contrary to public policy or illegal.[17] The conditions may be express but are more often implied. When the conditions upon which an instrument is delivered are implied, it may not always be clear what has to be done. Furthermore it may be unclear when a condition has to be fulfilled. Here the courts have adopted two alternative but similar approaches. One is to say that they will, in accordance with equitable principles, have regard to what would be a reasonable time.[18] The other is to consider the time-limit for fulfilment to be an implied part of the condition itself, and so to look to the condition to ascertain the time, rather than to any imprecise concept of reasonableness.[19] Once a document has been delivered in escrow it cannot be recalled and, once the condition is fulfilled, it becomes effective and binding as a deed.

5.2 Where a person is selling land, he often signs and seals the conveyance and hands or sends it to his solicitor ready for completion of the transaction. Many might think that the conveyance has not been delivered, but that it will be delivered by his solicitor on completion. Such a conclusion, although understandable, is unlikely to be correct in law, because of the rule that an agent, such as a solicitor, has to be appointed by deed to have power to deliver a deed[20] and in practice there will be no such appointment (the additional execution of a power of attorney for this single purpose would seem to involve an unacceptable complication in conveyancing). It is clearly not intended that the legal estate should vest in the purchaser as soon as the conveyance is executed (i.e. prior to completion). It must therefore be the case that the conveyance is delivered in escrow subject to the condition of completion taking place. What in fact amounts to completion,

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[13]Re Seymour [1913] 1 Ch. 475, Powell v. London & Provincial Bank [1893] 2 Ch. 555.

[14]Bennett v. Brumfitt (1867) L.R. 3 C.P. 28; Goodman v. Eban Ltd. [1954] 1 Q.B. 550; L.C.C. v. Agricultural Food Products Ltd. [1955] 2 Q.B. 218.

[15]Goodman v. Eban Ltd. [1954] 1 Q.B. 550 at p. 561 per Lord Denning M.R. dissenting as to a particular point of statutory construction; see also L.C.C. v. Agricultural Food Products Ltd. [1955] 2 Q.B. 218 and per Walton J. in Graddage v. Haringey L.B.C. [1975] 1 W.L.R. 241 at p. 246 and per Michael Davies, J. in R v. Brentford Justices, ex parte Catlin [1975] Q.B. 455 at p. 462 as to facsimile signatures sufficing.

[16]Norton on Deeds, 2nd ed., (1928) p. 18.

[17]Cp. Plymouth Corporation v. Harvey [1971] 1 W.L.R. 549.

[18]See Beesly v. Hallwood Estates Ltd. [1961] Ch. 105 per Harman L.J. at p. 118 and per Lord Evershed M.R. at p. 120.

[19]Kingston v. Ambrian Investment Co. Ltd. [1975] 1 W.L.R. 161; Glessing v. Green [1975] 1 W.L.R. 863.

[20]See per Joyce J. in Re Seymour [1913] 1 Ch. 475 at p. 481; also per Bowen L.J. in Powell v. London & Provincial Bank [1893] 2 Ch. 555 at pp. 562 and 563.

however, may not be clear. Completion is usually taken to be the execution of a deed of conveyance of the property by the vendor and payment of the purchase price by the purchaser together with the final settlement of business.[21] However it has been held, on the one hand, that completion involves the purchaser accepting the deed,[22] and, on the other, that a lease can effectively be granted without any acceptance on the part of the lessee.[23]

5.3 When a lease is granted, in practice, the lessor will execute the lease and the lessee will execute a counterpart. The parties are unlikely to consider the lease binding until the two parts have been exchanged.[24] However, unless the lessor has delivered the lease as an escrow, conditional on execution of the counterpart, the lease will take effect immediately.[25] It will in any event be binding upon fulfilment of the condition[26] so that if the condition is simply execution of a counterpart, rather than actual exchange, the lease does not remain open to negotiation pending exchange, but in practice it is probably treated as though that were the case.

5.4 Not only is the document binding as a deed upon fulfilment of the condition, but the deed is to be treated as having been executed absolutely and effectively as at the time of delivery.[27] It follows that the death of the grantor in the meantime does not affect the operation of the deed[28] and the grantor must have had the legal capacity to convey at the time of the delivery as an escrow.

5.5 When all the conditions of an escrow have been satisfied, the title of the grantee relates back to the date of delivery. So, for example, where a lease has been delivered in escrow, once the conditions are fulfilled, the lessee may have to pay the rent from the date of delivery. It is somewhat surprising that despite the fact that escrows have been in existence for a long time, this very practical point has only recently been decided in the Court of Appeal, and even then only by a majority decision.[29] The relation back does not operate to affect third parties[30] and the grantee does not, while the conditions are unfulfilled, have a title which enables him to deal with third parties.[31] However, if he does so, they should acquire a good title when the grantee does,[32] but it is far from clear whether this will date from fulfilment of the condition of the escrow or whether it also will operate retrospectively.

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[21]Killner v. France [1946] 2 All E.R. 83; Maktoum v. South Lodge Flats Ltd. The Times, 22 April 1980; Re Atkins' Will Trusts [1974] 1 W.L.R. 761 at pp. 765-766.

[22]Maktoum v. South Lodge Flats Ltd. The Times, 22 April 1980.

[23]D'Silva v. Lister House Development Ltd. [1971] Ch. 17 and see Emmet on Title 18th ed., (1983), p. 230. See also (1970) 34 Conv. (N.S.) 145 especially at p. 147 where it was argued that "[t]he law ought to be reconsidered as a matter of urgency because it is impossible for the rules to be followed".

[24]The rule as to formation of contracts relating to land by exchange was endorsed in Eccles v. Bryant & Pollock [1948] Ch. 93 C.A.

[25]Luke v. South Kensington Hotel Company (1879) 11 Ch.D. 121 and Lady Naas v. Westminster Bank Ltd. [1940] A.C. 366.

[26]Beesly v. Hallwood Estates Ltd. [1961] Ch. 105; Vincent v. Premo Enterprises Ltd. [1969] 2 Q.B. 609.

[27]Graham v. Graham (1791) 1 Ves. 272.

[28]Perryman's Case (1599) 5 Co. Rep. 84a.

[29]The Court of Appeal in Alan Estates Ltd. v. W.G. Stores Ltd. [1982] Ch. 511 declined to follow the decision of Walton J. in Terrapin International Ltd. v. I.R.C. [1976] 1 W.L.R. 665.

[30]Butler and Baker's Case (1591) 3 Co. Rep. 25a.

[31]Security Trust Co. v. Royal Bank of Canada [1976] A.C. 503 P.C.

[32]Church of England Building Society v. Piskor [1954] Ch. 553.

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