October 21, 1971

DEEDS

This paper will describe the instrument known as a deed, and its legal incidents. The purpose is to invite consideration of the present law of deeds. Is it in need of reform? More specifically do we need deeds at all? If so, for what transactions? If so, should we retain the seal?

From antiquity men have performed certain solemn and important acts by affixing their seals to an instrument in writing. In England, the Normans introduced the seal. Magna Carta is an example of a deed. Indeed, Blackstone says that a deed was sometimes called a carta or charter, and adds that the Latin word was factum "because it is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property" (2 Bl. Comm. 295).

It is true that the early feudal system required actual livery of seisin (delivery of possession) but deeds come to be used by way of supplement to livery, and ultimately by way of substitution for it. Moreover livery of seisin was impossible in the case of incorporeal interests such as an easement or a profit. The common law always require a deed of grant.

II

DEFINITION AND INCIDENTS

A deed is a writing (i) on paper vellum or parchment, (ii) sealed, and (iii) delivered, whereby an interest, right, or property passes,

> or on obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property has passed. (Norton on Deeds, 2nd ed. 1928).

The definition in 11 Halsbury, para. 516, is longer but adds nothing. It will be noted that in the definition, signing is not required but of course it became customary after people learned to write. The Law of Property Act 1925, section 73(1) requires signing as well as sealing.

Coke on Littleton 35.b describes the incidents of a deed as follows:

> First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eigthly, apt words required by law. Ninthly, sealing. And tenthly, delivery.

Blackstone in his Commentaries devotes the second of four books to the Law of Property (Of the Rights of Things). Several chapters deal with alienation of property and one of these, Chapter 20, is "Of Alienation by Deed". It lays down eight requisites of a deed:

(1) Competent parties, and a subject-matter.

(2) Good and Sufficient Consideration. (This does not mean valuable consideration but includes kinship and love and affection; it does not really contradict the general rule that no consideration need be shown.)

(3) Writing on parchment or paper, because they are durable and hard to erase or alter.

(4) The words must be clear; it is desirable though not strictly necessary to include the formal parts--premises, habendum and tenendum, reddendum, conditions, warranty, covenants and the conclusion (execution and date).

(5) Reading of the deed, if a party so requests.

(6) Sealing is necessary and signing is desirable.

(7) Delivery, which makes the deed take effect.

(8) Attestation and execution. (Blackstone says execution in the presence of witnesses is necessary, but it would be more accurate to say that it is desirable.)

Blackstone describes the types of deed used in conveyances of real estate. He divides them into original or primary and derivative. Original conveyances are the following: Feoffment, gift (of an estate tail), grant, lease, exchange, and partition. Derivative conveyances "presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance." (2 Bl. 324). They are release, confirmation, surrender, assignment, and defeasance. Blackstone has three more species of conveyance after the Statute of Uses, 1535. The

first is a covenant to stand seised to uses. This is the conveyance which required "good consideration in the form of natural love and affection." The second was bargain and sale, but such a conveyance had to be enrolled after 1535 and this fact gave rise to the third type of conveyance, lease and release. This avoided enrollment and also any need for entry on the land. This was the general form of conveyance until 1845, when it became possible simply to grant an interest in land, without any pretence of livery of seisin.

Since sealing and delivery are vital to the creation of a deed, it will help to look at them in more detail.

III

SEALING

Originally a seal was made of wax on which was made a physical impression, usually but not necessarily, in the form of the party's coat of arms. The significant requirement is the impression. It could even be made by biting the wax (Norton, p. 8). The wafer has of course taken the place of wax and even the wafer is not necessary. For a long time, some kind of an impression was essential, even if it were pressing the end of a ruler onto the paper. It now seems that not even an impression is essential. The only general rule is that some act must be done with the intention of sealing. The pressing of a finger to the ribbon used to hold the wax may amount to a sealing, according to Cotton L.J. but in the same case Lindley L.J. said "There must be something in the nature of an impression on the deed to denote that it has been sealed" (National Provincial Bank v. Jackson (1886) 33 Ch. D. 1). Halsbury vol. 11, para. 553 says:

> In modern practice . . . the usual manner of sealing a deed is for the party to place his finger or thumb on the seal (which is generally already attached) at the same time as he utters the words 'I deliver this as my act and deed' which are equivalent to delivery."

However Halsbury adds that this little ceremony is not essential.

> 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.

In Stromdale v. Burden [1952] 1 All E.R. 59, the court pointed out that in modern times signing has become more important than sealing.

> Meticulous persons executing a deed may still place their finger on 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.

The attestation clause, signed by the witness or witnesses, declares that the deed has been "signed, sealed and delivered", and if signature is proved, sealing and delivery are generally presumed (Norton, p. 25).

In Alberta it seems to be the universal practice to use a red wafer with glue on the back, and for the steographer

to put it opposite the place for signature, before the document is signed.

I think it likely that the party on signing never does any act to acknowledge the wafer as his seal and that no one explains its significance. He may not even note that it is on the paper.

The solemnity of affixing a seal has disappeared. In two Canadian cases the party which prepared the "deed" had printed it and had included the printed facsimile of a red seal. In Sawyer & Massey v. Bouchard (1910), 13 W.L.R. 394, Stuart J. held that it could be a seal but on the facts the buyer of the machinery had not intended to adopt the seal as his. He could not read English. In Re Imperial Canadian Trust Co., [1949] 2 W.W.R. 423, the document was an application for shares. The majority of the Manitoba Court of Appeal held it properly sealed but Trueman J.A. expressed great doubt.

What if the document merely has "L.S." enclosed in a circle or brackets? The letters mean "locus sigilli" or "place for the seal". In the only Canadian case I have seen, Thompson v. Skill (1909), 13 O.W.R. 887, this was held not to be a seal.[1]

The following section in New York's General Construction Law, section 44, might be of interest:

> The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L.S." opposite the signature.

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[1] In Royal Bank v. Kiska (1967), 63 D.L.R. (2d) 592 Laskin J.A. held a bank's guarantee form with "seal" in brackets not to be a deed. His judgment is a dissent but the majority, having found consideration, did not consider this point. His discussion is valuable.

IV

DELIVERY

Turning to the question, What is sufficient delivery? no formal ceremony of handing the document over is required. Blackburn J. said in Xenos v. Wickham (1867), L.R. 2 H.L. 296 at 312

> No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing of 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 . . . . Any . . . words or acts that sufficiently show that it was intended to be finally executed will do. . . .

It may seem surprising that the deed need not be physically delivered to the other party to the deed. The law is clear, however, that delivery may be complete and unconditional even though the maker retains the deed. This was settled in Xenos v. Wickham where an insurance policy was held to be effective though no actual delivery was made to the insured or his broker. In Zwicker v. Zwicker (1899), 29 S.C.R. 527, a deed conveying land and chattels was likewise effective, though the grantor kept it in his possession. Yanke v. Fenske (1960), 21 D.L.R. (2d) 419 (Sask. C.A.), a deed conveying land was executed but the grantor kept it. The majority found delivery, while Gordon J.A. dissented. He thought, as did the court in St. Cyr v. White (1956), 5 D.L.R. (2d) 769 (B.C.) that the grantor kept possession because he really wanted to make a testamentary disposition and to reserve the right to change his mind. In Chase v. Chase (1963), 36 D.L.R. (2d) 351, on the other hand, the New Brunswick Court

of Appeal believed the donee's story of delivery to her, and that though the grantor purported to leave the deed with his solicitor in escrow until his death, the delivery had been complete.

Where a party does not want the deed to become effective until some event occurs or some condition is performed, he may hand it over to a third party. When the event happens or the condition is performed delivery becomes complete but in the meantime the document is not yet a deed. It is merely "a scroll" -- hence the word escrow. Historically at least the delivery could be made to the grantee as well as to the third party (Norton, pp. 18-19). Halsbury vol. 11, para. 560, says that at law, delivery as an escrow cannot be made to another party to the deed because delivery to him is necessarily delivery as a deed. However equity will restrain him from enforcing the deed until the condition has been performed. Seemingly a solicitor for all the parties may hold the document in escrow.

Before leaving the subject of proper execution of a deed, the testimonium and attestation clauses should be noted. Though not strictly necessary they do have some weight in creating an inference that the deed was in fact sealed and delivered (Ray v. Gillmore (1958), 26 W.W.R. 138 (B.C.C.A.). Of course if the facts show for example that a deed such as a guarantee had the seal affixed by a stenographer of the creditor after the guarantor had signed and without his authority, the document is not a deed (Glens Falls Ins. Co. v. Peters (1958), 10 D.L.R. (2d) 459 (Ont.)). The onus is of course on the defendant to show the seal is not his (Pease v. Randolph 19 W.L.R. 625). If the seal has disappeared the Court may find it had been affixed and come off later (McDonald v. McDonald (190 2 O.W.R. 708

V

ALTERATIONS AFTER EXECUTION

The next topic is that of alterations to a deed after execution. The early common law rule was very strict, as Pigot's case in 1614 shows. It says that any material alteration in the deed renders it void, whether made by the plaintiff himself or by a stranger without his privity. It goes further and says that any alteration, whether material or not, made by the obligee renders the deed void. Where the deed had been in the custody of the plaintiff, damage to it by accident, fire and the like was attributed to the plaintiff because he should have taken care of the deed.

In Nichols v. Haywood (1645) 1 Dyer 59b the action was on a bond, and issue had been joined. Afterwards but before trial and when the bond was in custody of one of the clerks (presumably of the court) mice ate into the bond and the labels of the seals also. The action was upheld but the clear inference is that if the damage had been done before issue was joined then the defendant would have succeeded.

In Bayly v. Garford (1641), 82 E.R. 441 the defendant pleaded non est factum to an action on a bond. The defendant's testator and two others had entered a joint and several bond. Later the seals of the other two were eaten by mice and rats, presumably while the bond was in the custody of the plaintiff. Does this release the defendant?

The argument on both sides assumes that the other two were discharged by the destruction of their seals.

> The court . . . did strongly incline that judgment ought to be given for the defendant; and their reason was, that if the obligee by his act or own laches discharge one of the obligors, where they are jointly and severally bound, that the same discharge them all; but gave day for the further debating the case, for that this was the first time it was argued.

The old strict rule seems to be linked to the requirement that the plaintiff had to "proffer" the deed at trial. The doctrine of proffer no longer prevails in its strict form, and secondary evidence of the contents of a deed can be given if its absence is explained. Norton (p. 47) states the modern rule as follows: "The cancellation of a deed by accident or mistake does not affect the deed, or the rights of any person thereunder." Blackstone states that a deed may be avoided after execution in the following ways:

(1) by erasure, interlining or other alteration in any material part;

(2) by breaking off or defacing the seal;

(3) by delivering it up to be cancelled;

(4) by agreement of those whose concurrence is necessary for the deed to stand;

(5) by judicial decree.

I have difficulty with the first two of these. They seem to imply that a party by his unilateral act of making a material alteration in the body of the deed or by destroying or removing the seal can put an end to the deed. This is

understandable if it means that the party making the alteration can thereby discharge the other party of his obligations, but it surely cannot mean that the deed becomes completely void and that the party making the alteration has put an end to his own obligations.

The discussion of the same subject in Halsbury (vol. 11, paras. 593-595) has the same ambiguity and can be read as saying that a party can discharge his own covenants by making a material alteration in the deed. This cannot be the real meaning.

Norton states the modern rule (p. 38) in a way that makes sense and avoids the possibility that a party can by alteration or destruction of a seal relieve himself of his obligation. Norton's statement is:

> If a material alteration by rasure, interlination or otherwise, be made, after execution, in a deed by, or with the consent of, any party thereto, he cannot as plaintiff enforce any obligation contained in it against any party who did not consent to such alteration.

I have found few Canadian cases on alterations subsequent to execution of the deed. In Bank of Upper Canada v. Widmer (1832), 2 O.S. 256 the obligor tore off his signature in the hope of relieving himself of liability. The attempt failed.

In Loranger v. Haines (1922), 64 D.L.R. 364, the agreement for conveyance purported to be a deed but was not in fact sealed. The seal was affixed to the plaintiff's copy afterwards. The Ontario Court of Appeal held that this was not a material alteration so as to render the document void. (There

was consideration so prima facie the agreement was binding.)

In Richardson v. Tiffin, [1940] S.C.R. 635, the action was for an accounting on an agreement between two physicians, the main issue was whether the agreement was enforceable because of a covenant not to compete. Kerwin J. however mentioned an argument of the defendant that there was a material alteration by the plaintiff in affixing seals to his copy of the agreement in his own duplicate, after execution. He rejected this and added that the plaintiff could rely on the defendant's copy which had not been altered.

VI

DEEDS AND CONSIDERATION: COMMON LAW AND EQUITY

I turn now to the relationship between deeds and the doctrine of consideration. Historically a deed is binding on the maker without any consideration (leaving aside the special case of love and affection which for certain purposes was good, though not valuable, consideration in connection with covenant to stand seised to uses). Indeed it was binding before the common law developed the modern law of contract with its requirement that a promise is binding only if the promise gives consideration (which Cheshire and Fifoot define as something done by way of payment for the promise).

Where consideration exists the contract is binding even though not in the form of a deed. On the other hand an obligation in a deed does not require consideration. It is customary to say that "a seal imports consideration" but many writers have pointed out that this is an inaccurate way of putting it. It would be more accurate to say that in modern

times the existence of consideration dispenses with the need of a deed to make an obligation binding.

Because of the fact that consideration operates as a substitute for an agreement under seal, I am unable to understand why parties persist in putting agreements under seal when the seal gives no greater binding effect to the contract than it already has. It may be that there is a new tendency in the opposite direction. In a recent Alberta judgment, Alminex v. Berkley, [1971] 4 W.W.R. 401 a farm-out agreement was made by a letter written by one party and "agreed to and accepted" by the other with no formalities of execution and no corporate seals. The agreement in Calvan Ltd. v. Manning, [1959] S.C.R. 256 was in the same form. I am told that this form of contract is coming into increased use in real estate transactions.

In connection with documents which are registrable under the Land Titles Act--transfers, mortgages, easements and leases (the latter being registered rarely) there is no requirement in the Land Titles Act that these documents be under seal. All of these forms provide for signature and a witness and nowhere is there a reference to a seal, even in the power of attorney. Mauch v. National Securities, [1919] 2 W.W.R. 740 says that a transfer is not a deed. In McGee v. Lewis (1967), 59 D.L.R. (2d) 362, aff'd by S.C.C. 65 D.L.R. (2d) 672, McDermid J.A. pointed out that it is a document not under seal. Section 158 lays down the requirement of a witness and also provides that in the case of a corporation execution is sufficient if the document is sealed and countersigned.

It may be that mortgages given by a natural person and also leases are in practice executed under seal. Certainly at

common law a seal was necessary but I know no basis for this today. The Statute of Frauds of course requires writing for most land transactions but it does not require a deed. A memorandum under the Statute can consist of a letter or informal note.

Although the common law required a deed in transactions affecting realty, and the 1925 Law of Property Act says that conveyances must be in the form of a deed in order to convey the legal estate, yet equity has always enforced agreements though not in the form of a deed. Let us take as an example the ordinary lease. The Statute of Frauds required that it be in writing if for over three years and an Act of 1845 said that a lease required to be in writing shall be "void at law unless also made by deed". This was preserved in the 1925 Law of Property Act, sections 52 and 54 (Quaere: is the 1845 legislation in force in Alberta? I have not run down the point but if it is in force than this is some justification for the usual practice of making a lease in the form of a deed.) In equity however a tenant was entitled to call for the execution of a legal lease. After the Judicature Acts, Walsh v. Lonsdale (1882), 21 Ch. D. 9 held that where there is an agreement for a lease (not under seal) and the lessee goes into possession so that there has been past performance then equity will grant specific performance of the agreement for a lease. It may however be preferable to have an actual lease because equity will not always grant specific performance and an agreement for a lease is not always efficacious against third parties (Cheshire Real Property (5 ed.) 138-148).

A similar doctrine applies in the case of easements, as appears from McManus v. Cooke (1887), 35 Ch.D. 681.

The position appears to be the same in connection with a license to enter land coupled with an interest, such as a profit à prendre. At common law a deed is required but where equity would grant specific performance the interest is now enforceable and of course equity never required a deed in order to grant specific performance. This is illustrated by Hurst v. Picture Palaces, [1915] 1 K.B. 1.

Likewise an ordinary agreement for sale of land. The Statute of Frauds does not require any deed but merely a signed memorandum. Equity will enforce an agreement for sale that is within the Statute or even one that is not in writing as long as there has been past performance. I realize that it is the custom to make agreements for sale in the form of a deed. However equity's rule is that an agreement for sale makes the vendor trustee for the purchaser, and in the leading modern case so holding, the agreement does not appear to have been under seal (Shaw v. Foster (1872) L.R. 5 H.L. 321 at 322). Specific performance will be granted as long as there is consideration (and where the Statute of Frauds applies writing or part performance). On the other hand equity "does not enforce specific performance of contracts which are voluntary, whether under seal or not" (36Hals., Specific Performance, para. 364).

We shall next examine releases and gifts in that order.

VII

RELEASES

My understanding is that it is the invariable custom to make a release in the form of a deed. This is true in the case of a quit claim deed which is a form of release. It

also is true when a person who claims to have a cause of action gives a release of his right of action. In most cases there is consideration, and once again it seems clear that the release is binding even though not in the form of a deed.

An instructive case is Chilliback v. Pawliuk (1956), 1 D.L.R. (2d) 611, a judgment of Egbert J. The plaintiff had been a passenger in the defendant's car and an accident occurred. The defendant's drivers license was suspended. The Motor Vehicles Branch supplied him with a form of release, which the trial judge assumed had a seal on it at the time. The defendant took the form of release to the plaintiff (who had been in a beer parlor for three hours) and had him sign it. The consideration was shown as "nil". The plaintiff of course said that he signed the release to help the defendant get his license back. Subsequently he sued, alleging gross negligence, and was confronted by the release. The plaintiff's argument of non est factum failed and he then relied on complete lack of consideration. "I am left with no doubt that if there had been no seal the release would have been inoperative because of the absence of consideration. Does the presence of the small, red wafer seal make it operative?" Later his Lordship said, "There is no evidence that the plaintiff said any word or did any act which in any way amounted to an adoption by him of the seal as his seal." His Lordship stated the rule that a seal imports consideration but added that this cannot be so where the document itself expresses face that there is no consideration. He found that the parties did not intend that this document should be executed as a sealed document. He quoted with approval the judgment of Stuart J. in Sawyer & Massey v. Bouchard (1910), 13 W.L.R. 394 which says,

> . . . the question is not whether there is a seal on the instrument, but whether the person executing it affixed his seal thereto, either by doing so in fact or by doing something which the law will hold as equivalent thereto. The sealing must be either directly or indirectly the act of the party executing the instrument.

The presumption that signing is an adoption of the seal already affixed is rebuttable and the plaintiff has rebutted it here in spite of the attestation clause.

Egbert J. then made a second holding: even if the document was sealed, it is unforceable for want of consideration. The seal cannot "import" consideration for there was none. The Court has an equitable jurisdiction and equity will not enforce an otherwise unenforceable agreement merely because it is under seal. This decision provoked a critical comment by Professor A. B. Weston (1956), 34 Can. Bar Rev. 453. He says the judgment holds that a seal merely raises a presumption of consideration, so that where there is none the promisee must prove it. He then rebuts this proposition. It is a fiction or error to say a deed imports consideration, and Egbert J. followed the error in American states that a seal imports consideration only prima facie.

S. J. Helman Q.C. replied (34 Can. Bar Rev. 873), he thought the second ground was only a dictum and that there is no justification for upholding a unilateral promise merely because a seal has been affixed especially in this day of prepared forms, including the printed testimonium. The seal is an anachronism. Professor Weston's rejoinder appears at p. 879.

VIII

GIFTS

Cochrane v. Moore (1890), 25 Q.B.D. 57 is a leading case. The owner of a horse purported to give the defendant a one-quarter interest and later sold the horse to the plaintiff under a bill of sale. Interpleader as to the proceeds of sale. The trial judge held that delivery is not necessary to the validity of a gift. The Court of Appeal considered this question though it decided for the defendant on the ground that plaintiff had agreed before taking the bill of sale to hold the one-quarter interest in trust for defendant.

Held, delivery is necessary to transfer personal property by gift inter vivos in the absence of a deed. Originally delivery was necessary in all cases to transfer ownership. It has now disappeared from most transactions but it remains for gifts. By the time of Edward IV, a gift by deed was good without delivery until dissented from by the donee. Unless there is a deed delivery is essential.

We need not examine the question as to what is delivery of a chattel or chose in action, or as to the requisites for a gift of land, or the rule that equity will not turn an imperfect gift into a trust.

There may be many cases in which the execution of a deed of gift is the only practical way to complete the gift.

IX

OFFERS AND OPTIONS UNDER SEAL

Normally an offer is revocable at any time before acceptance. However an option for which consideration has been paid is binding for the period of the option. What then of an offer to buy or an option made under seal and without consideration?

In Waterous v. Pratt (1889) the plaintiff (vendor) sent to defendant a form of contract to buy a machine. He signed and sealed and returned it. The Court discussed offers under seal and quoting Pollock on Contracts said, "A promise . . . if made by deed is at once binding and irrevocable". It was binding on defendant for a reasonable time and plaintiff accepted the offer in time.

In Yuill v. White (1902), 5 Terr L.R. 275, plaintiff leased from defendant's intestate certain land and an option to purchase was included. Action for specific performance; held, a promise made by deed is irrevocable even before acceptance. The Court went on to say that the plaintiff gave consideration in executing the lease.

In Gaar Scott v. Ottoson (1911), 19 W.L.R. 474 (Man. C.A.) defendant executed a purchase order under seal. He then attempted to cancel the order and six days later plaintiff sent the goods. Held, the order having been executed under seal, it was not revocable before acceptance, as an ordinary order would be.

In Davidson v. Norstrant (1921), 61 S.C.R. 493 N gave D an option in gross under seal to buy a half interest in land.

The option recited consideration of $100, "now paid". It was in fact not paid.. D. tendered the purchase price but N refused it. Action for damages and accounting. D succeeded in a 3-2 judgment. Idington J. held that since the offer was under seal it cannot be revoked until a reasonable time has elapsed, and D's failure to pay the consideration makes no difference. Duff J. dissenting held that payment of the $100 was a condition precedent. Anglin J. held that N. had not insisted on his right to the $100. Mignault J. dissenting assumes that no consideration is necessary where the option is under seal, but since D agreed to pay $100, the seal does not protect the holder of the option against total failure to pay the consideration of $100.

The latest case is McAlister Oil Co. v. Petroleum Engineering Ltd. (1958), 13 D.L.R. (2d) 724 (Sask C.A.); defendant owned minerals and negotiated a P. & N.G. lease to plaintiff. Defendant drew and executed the lease under seal on 11 January. It had to go to Arkansas for execution by plaintiff. It was executed on 2nd February and arrived at Regina on 9th February. On 8th February defendant withdrew the "offer" to lease.

Plaintiff argued that the lease was "delivered" when plaintiff executed it on 2nd February. The court rejected this, though cases cited earlier show that delivery of a deed does not always require actual receipt by the other party.

Plaintiff next argued that the execution of the lease of the lease by defendant was an offer under seal and irrevocable. The Court doubted the categorical statements that an offer under seal is irrevocable, and in any event followed

Idington J. in Davidson v. Norstrant. At most it is irrevocable only for a reasonable time, and that time had passed before acceptance.

Real estate agents take from prospective purchasers an offer to purchase. One form in use has printed the word "seal" in a circle opposite the place for the offeror's signature. The form of acceptance has the same kind of "seal". Does the sealed offer make any practical difference?

On the cases it does for it makes the offer irrevocable for a reasonable time. Were the issue to arise in Alberta today the court might follow the cases. In that event the only question would be whether a reasonable time had passed before withdrawal. On the other hand the court might find the offer is not truly under seal, or it might simply reject the concept of "irrevocable offer".

X

ESTOPPEL BY DEED

Estoppels are of three kinds--by judgment, by deed and by conduct (estoppel in pais). The last is by far the most frequent, but we are concerned here only with estoppel by deed.

A party is estoppel from denying the statements in his deed and this extends to recitals insofar as they are connected with the operative part of the deed. Bowman v. Taylor (1834), 2 Ad. & E. 278; 111 E.R. 108, 15 Hals., Estoppel para. 402 et. seq.

Quebec has no such rule.

Louis v. Durocher (1897), 27 S.C.R. 303.

The estoppel arises because of the great solemnity attaching to execution of deeds. Once again one might ask whether present day deeds should be treated differently than any other instruments. I have not gone through the surprisingly large number of cases in the Canadian Abridgement (2 Ed., Vol. 14, Estoppel, #3005-3117).

XI

PARTIES TO ACTION ON DEED

Another rule peculiar to deeds is that the named parties and no one else can bring action on a deed or can be sued on it.

In Porter v. Pelton v. Holden (1903), 33 S.C.R. 449, Porter sold mineral lands to Pelton in return for shares in a company to be formed. The agreement was a deed. Porter never received the shares. He brought action and joined Holden as defendant because Holden was in fact a partner of Pelton though not a party to the deed. Held the action against Holden fails because he was not designated as a party to the deed. This applies to a cestui que trust, to a partner or an undisclosed principal.

In Margoluis v. Diesbourg, [1936] S.C.R. 183, M agreed to sell liquor to one Kellner. The action is by M for breach of contract. It is against D, who was M's undisclosed principal. Held, only a party to a deed can be sued. This is so even

if he purports to act as agent for a named principal. (The Court itself raised the point. It was the ratio of the judgment though the Court below had dismissed the action on the ground of illegality.)

A recent case, Whisper Holdings v. Zamikoff (1971), 19 D.L.R. (3d) 114 (S.C.C.) recognizes the rule. Basically Z and one Lundy went into partnership in a land speculation. They executed two documents informal in style but under seal. Z assigned his interest to his daughter and Lundy to Whisper. Whisper defaulted in payments and so forfeited its interest in the land. The court gave a declaration that Whisper had no interest. Whisper relied on the rule that it could not be sued because not a party. This defence failed because the court found a novation. In the Court below an additional ground was estoppel.

XII

LIMITATIONS

Under the 1623 Act, the period for bringing action on a deed (specialty) was 20 years, and on a simple contract, six. This remains the law of Ontario. Anomalous though it is, the Ontario Law Reform Commission has recommended that the distinction be preserved, though it would reduce the period for contracts under seal to 10 years (Report on Limitation of Actions, pp. 45-46). The Uniformity Conference in its 1931 Uniform Act abolished the distinction and Alberta has had this Act since 1935 (sec. 5(1)(c)). The period is six years for the recovery of money, "whether the claim is on a "covenant or other specialty or on a simple contract". I do not suggest for Alberta a return to the distinction. The

judgment of Stuart J. in Sawyer & Massey v. Bouchard will be recalled. This was a limitations case and his lordship refused to apply the longer period.

XIII

CORPORATIONS

Business corporations invariably have a seal. I will not attempt to refer to any statute except the Alberta Companies Act. I cannot find in the Act a specific provision for the common seal. It is referred to in section 151 in connection with powers of attorney, and section 152 provides for a facsimile seal for use outside the province. Article 60 of Table A sets out the authority for affixing the seal and the persons who must sign when the seal is affixed.

Section 149, dealing with contracts says that contracts required to be under seal may be under the common seal, contracts requiring writing between private persons may be signed on behalf of the company, and parol contracts may be made by parol (See Pyramid Construction v. Feil (1957), 22 W.W.R. 497).

I do not know whether practical difficulties arise or not.

As to municipalities, the Municipal Government Act requires the seal on by-laws (s. 109) and debentures (s. 342). On a quick look I did not find a general provision.

I have not examined the statutes governing School Boards, Universities, trust companies or insurance companies.

XIV

ESTATE TAX OR SUCCESSION DUTY

I have not examined the cases. This is from memory. The basic rule is that a speciality (which includes a deed but also a statutory obligation) is taxable where found at death. The leading case is Commissioner of Stamps v. Hope and there is a case on C.N.R. bonds. The rule does not apply to an agreement for sale in duplicate (Schmidt case around 1935) but not, if memory serves, to an Alberta mortgage.

The rule seems archaic to me, but I doubt that any province wanting to change its own law, could affect the rule of Hope.

XV

MODERN REFORMS

American Jurisprudence says that in most States seals have been abolished (2 ed., Vol. 23, Deeds, p. 96 and 1st ed. Seals, Vol , sec. 8). I shall set out some statutes.

The Model Written Obligations Act was prepared because of animosity to the seal. It says:

> A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

It has not been widely adopted so far as I can tell.

The New York Law Revision Commission attempted to change the rule that a sealed instrument does not require consideration. The Courts resisted the change and the Commission tried again (Read and McDonald, Legislation, 1st Ed., pp. 106-119). I have not been able to ascertain the present law, save for the following:

> A written instrument which purports to be a total or partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand or obligation, or a release or discharge in whole or in part of a mortgage, lien, security interest or charge upon personal or real property, shall not be invalid because of the absence of consideration or of a seal.

Illinois has abolished the need for private seals in the following provision:

> The use of private seals on written contracts, deeds, mortgages or any other written instruments or documents heretofore required by law to be sealed, is hereby abolished, but the addition of a private seal to any such instrument or document shall not in any manner affect its force, validity or character, or in any way change the construction thereof.

New South Wales has a provision which South Australia's Law Reform Committee has just recommended:

> 38.(1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.

(2) Indenting shall not be necessary in any case.

(3) Every instrument expressed to be be an indenture or a deed, or to be sealed, which is signed and attested in accordance with this Section, shall be deemed to be sealed.

(4) Every deed, executed and attested in accordance with this section may be proved in the same manner as a deed not required by law to be attested might have been proved heretofore.

(5) Nothing in this section contained shall affect--

(a) the execution of deeds by corporations; or

(b) the provisions of section eight, subsection two, of the Registration of Deeds Act, 1897; or

(c) any deed executed prior to the commencement of this Act.

XVI

CONCLUSION

My purpose here is not to make recommendations for change but to invite them.

Should we abolish the concept?

Should we abolish the need of a seal?

Should we require consideration?

What about gifts?