LAW REFORM ADVISORY COMMITTEE
FOR NORTHERN IRELAND

DISCUSSION PAPER No. 7

Deeds and Escrows

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PREFACE

The Law Reform Advisory Committee for Northern Ireland was established in April 1989 by the then Secretary of State for Northern Ireland, the Right Honourable Tom King MP, to "keep the civil law of Northern Ireland under review and to make recommendations for its reform".

The members of the Committee, all of whom serve on a part-time basis are

The Honourable Mr Justice Girvan (Chairman)
His Honour Judge Burgess (Vice-chairman)
Ms Mary Connolly, Barrister
Professor Brice Dickson
Mrs Ethne Harkness, Barrister
Mr V Alan Hewitt LLM, Solicitor
Ms Marie McAlister, Barrister
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The Secretary to the Committee is Mr Michael Foster, Barrister

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This paper is circulated for comment and criticism only and does not represent the final views of the Committee. The Committee would be grateful for responses in writing before (date to be inserted).

Please note that it may be helpful for the Committee, either in discussion with others concerned or in any subsequent report, to be able to refer to and attribute comments submitted in response to this paper. Any request to treat all or part of a response in confidence will, of course, be respected. If no such request is made, the Committee will assume that the response is not intended to be confidential.

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CHAPTER ONE

INTRODUCTION

1.01 While the law relating to deeds and escrows may seem a somewhat esoteric subject, it remains in practice an important part of the law in the field of property and commercial transactions. It finds its origins in medieval practices and concepts and the development of that area of law has not kept pace with the great changes experienced by the law in other fields relating to property and commercial law. It is for this reason that it is a topic worthy of investigation, reform and updating in the light of modern conditions. The Law Commission of England and Wales has considered the topic twice, firstly in its 1987 Report on Deeds and Escrows and more recently in its 1998 Report on the Execution of Deeds and Documents by or on behalf of Bodies Corporate. The law relating to this area has also been the subject of reform and recommendations for reform in some other Commonwealth jurisdictions and in the Republic of Ireland.

1.02 In this discussion paper the Law Reform Advisory Committee for Northern Ireland ("the Committee") considers the existing law, statutory changes which have been effected in other jurisdictions, particularly England and Wales, and recommendations for reform in this area of the law in Northern Ireland, in England and Wales and in the Republic of Ireland. It also considers the rule in *Pigot's Case* which deals with the consequences of alterations in deeds and written instruments and considers changes in the law

on that topic in other jurisdictions. It looks at the issues which need to be addressed in considering reform of aspects of the law in this field and sets out the matters on which the views of interested parties would assist the Committee in coming to its final conclusions and proposals for reform.

1.03 Chapter 2 of the report gives a synopsis of the existing law. Chapter 3 deals with changes in the law which have been effected in other jurisdictions. Chapter 4 looks at past proposals for reform in Northern Ireland, current proposals for reform in England and Wales and in the Republic of Ireland. Chapter 5 considers the rule in *Pigot's Case* and proposals for reform of the rule in certain other jurisdictions. In Chapter 6 we seek to identify the principles which should underline any reform of the law and identify the issues on which views are sought from interested parties.

CHAPTER 2

THE EXISTING LAW RELATING TO DEEDS AND ESCROWS

Definition of a deed

2.01 A deed is an instrument written on paper or parchment expressing the intention or consent of some person or corporation named therein to make (otherwise than by will), confirm or concur in some assurance of some interest in property or some legal or equitable right, title or claim therein or to undertake or enter into some obligation, duty or agreement enforceable at law or in equity or to do or concur in some other act affecting the legal relation or position of a party to the instrument or of some other person or corporation sealed with the seal of the parties so expressly such intention or consent and delivered as that party's act and deed to the person or corporation intended to be affected thereby. Consideration is not necessary and a deed will take effect according to its terms, notwithstanding the absence of any consideration whereas promises made otherwise than by deed are not enforceable unless given for valuable consideration. A court will not, however, order specific performance of a voluntary covenant contained in the deed.

2.02 The principal features of a deed are that it must comply with certain formalities. It must perform one of the functions referred to and certain transactions are only effective if carried out by deed. With certain exceptions all conveyances, transfers, mortgages, charges, leases and surrenders of legal estates or interests in land must be by deed. The grant of a power of attorney

must also be by deed. A deed is necessary for every transaction which the common law requires to be evidenced by writing.

Form of a deed

2.03 A deed must be written on paper or parchment and not on any other substance. It may be written in a book (see *Fox –v- Wright* (1598)). It may be written in any language and in any character. It is not necessary that the writing be done with pen and ink. Under the Administration of Justice (Language) Act (Ireland) 1737 all proceedings in courts of justice, patents, charters, judgments, fines and recoveries etc must be in English and not in Latin, French or any other tongue or language whatsoever. It is not clear whether deeds requiring enrolment in the High Court (such as disentailing deeds) must be in English. In practical terms this has not presented a problem.

2.04 Deeds may be categorised as either deeds poll or indentures. A *deed poll* is so called because the parchment required for such a deed has usually been polled or shaved at the top. A deed poll is a deed made by and expressing the act of intention of one party only. An *indenture* is a deed to which two or more persons are parties and which evidences some act or agreement between them other than mere consent to join in expressing the same act of intention on the part of all. An indenture is so called because historically the parchment or paper on which the deed was written was

indented or cut with an indented line on the top. The practice of indenting originated in early times when deeds were short and each part was cut off with an uneven line which afterwards showed that it tallied with the other part or parts. Under the Real Property Act 1845 after 1 October 1845 a deed purporting to be an indenture has the effect of an indenture though not actually indented or expressed to be an indenture.

2.05 A deed must be *sealed*, that is, it must have a seal fixed or impressed on it or attached to it and the party professing to be bound thereby must do some act expressly or impliedly acknowledging the seal to be his. The seal does not have to be of any particular form. A seal may be a wax affixed on the deed or attached by a ribbon or it may be a wafer or it may be simply impressed on the deed. The seal need not bear any indication that it is the particular seal of the person who affixes it and one may seal a deed with another's seal. The party sealing need not actually affix or impress the seal himself, so long as he delivers the deed in his own person and he need not touch the seal if he expressly or impliedly acknowledges it to be his. Thus it is sufficient if the seal be affixed by some other person in his presence with his consent and he so assents to the delivery of the deed or if some other person in his presence and with his consent writes his name opposite a seal previously affixed in token of his acknowledgment that the seal is his. At the present day, if a party signed the document bearing wax or wafer or the indication of a seal with the intention of executing the document as a deed that is sufficient adoption and

recognition of the seal to amount to due execution as a deed. A deed must be sealed before or at the time of delivery, but if it is delivered without being sealed it may subsequently be sealed and redelivered, in which case the sealing and delivery will be the only effective execution of the deed.

2.06 At common law it is not essential that a deed should be signed as well as sealed, but it was the regular practice for a person executing a deed to sign the same near the place where his seal was affixed as an acknowledgement that the seal was his and as a guarantee of authenticity. In England and Wales by virtue of section 73 of the Law of Property Act 1925 the authentication of a deed by signature is necessary, but this provision does not apply in Northern Ireland where the common law rule still prevails.

2.07 In order to be effective a deed must be *delivered* as the act and deed of the party expressed to be bound thereby as well as sealed. No special form is required for delivery and it may be made by words or conduct. The most correct, though not essential practice, would be for the executing party to say, while putting his finger on the seal, "I deliver this as my act and deed". It is not necessary that the deed should be actually delivered over into the possession or custody of the person intended to take the benefit of it, though if the party to be bound so hands over the deed that is sufficient delivery. What is necessary for a valid delivery of the deed is that the party whose deed the document is expressed to be (having first sealed it) shall by words of

conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it. If the sealing of a deed is proved, its delivery as a deed may be inferred provided there is nothing to show that it was only delivered as an escrow.

2.08 Apart from statute it is not necessary for the validity of a deed that its execution shall be attested by any witness. It is common practice for an attesting witness to sign his name to the statement and to add his address and description.

Delivery as an escrow

2.09 A deed may be delivered as an *escrow* (or scroll) not to become a deed as a party expressed to be bound thereby until some condition shall have been performed. The most common example is where a conveyance is executed, but it is not intended to take effect until the purchase price is paid. The essential thing is that the party should expressly or impliedly declare his intention to be bound by the provisions of the document, not immediately, but only in a case of and on performance of some condition. A deed may be delivered as an escrow, though the party to be bound retains it in his own possession or it may even delivered to the solicitor acting for the party to benefit thereunder, provided it is handed to him as the agent of the other party for the purpose of such delivery. At law, however, a deed cannot be delivered as an escrow to the party intended to benefit thereunder because

delivery of the document to him is necessarily its delivery as a deed. Any stipulation purporting to suspend its operation as a deed until performance of some condition would be repugnant to such delivery and the party delivering the deed would be estopped from varying such a stipulation in contradiction of the deed. However, in equity if a sealed document is delivered to a party to benefit thereunder on an agreement that it should not take effect until the performance of some condition, he will be restrained from enforcing it at law until the condition was fulfilled and if the condition was not observed the other party would be relieved from liability thereunder. Pending performance of the condition subject to which it is delivered, the sealed writing cannot take effect as a deed. If the condition is not fulfilled the sealed writing will not become operative. It takes effect as a deed without any further delivery immediately the condition is fulfilled and the rule is that the delivery will, if necessary, relate back to the time of its delivery as an escrow.

Special statutory provisions

2.10 Under the Registration of Deeds Act (Northern Ireland) 1970 a deed of conveyance affecting land in Northern Ireland may be registered in the Registry of Deeds. A deed or conveyance brought to the Registry of Deeds to be registered shall be produced to the registrar, together with a memorial in writing of that deed or conveyance. Originally the registrar was required to satisfy himself that the execution of the deed of conveyance had been witnessed in accordance with section 2 of the Act. Under the Registration

(Land and Deeds) (Northern Ireland) Order 1992 it is now provided that the Registrar of Deeds need not satisfy himself that the execution of a deed or conveyance has been witnessed.

2.11 In the case of registered land documents of transfer must be in accordance with the prescribed forms. Attestation requirements are governed by the Land Registry Rules (Northern Ireland) which require two witnesses unless the attesting party is a solicitor, in which case he or she alone will suffice.

2.12 In the case of deeds creating powers of attorney under section 1 of the Powers of Attorney Act (Northern Ireland) 1971, the instrument must be signed and sealed by or by the direction and in the presence of the donor of the power unless such an instrument is signed and sealed by a person by direction and in the presence of the donor of the power and two other persons shall be present as witnesses and shall attest the instruments. Under the 1971 Act the donee of a power may execute any deed with his own name, signature and seal, though the donee should make it clear that he is acting under a power of attorney otherwise he runs the risk of incurring personal liability. A person authorised to convey property in the name of or on behalf of a company may execute the conveyance by signing his own name and when a deed is required using his own seal. Alternatively he can execute the

conveyance in the name of the company in the presence of at least one witness by signing the name of the company and affixing his own seal.

Deeds by corporations

2.13 At common law the deed of a corporation must necessarily be under seal and requires to be delivered as well as sealed. Where, by the constitution of a corporation, any special mode of execution of its deeds is prescribed or any particular formality is required to be observed in fixing the corporate seal, in order to be completely binding the corporation's powers must be exercised in the manner and with the formality so prescribed. In the case of registered companies article 46A of the Companies (Northern Ireland) Order 1986 as substituted by the Companies (No. 2) (Northern Ireland) Order 1990 (reflecting section 36A of the English Companies Act 1985) allows documents to be executed as a deed by two methods, either by the affixing of the common seal or execution as a deed by two directors of the company or a director and secretary of the company. It is generally accepted that these provisions would still apply even if the sealing requirements of the articles have been contravened. Article 46A(5) provides that a document executed by a company which makes it clear in its face that it is intended by the person or persons making it to be a deed has effect upon delivery as a deed and it shall be presumed, unless the contrary intention is proved, to be delivered upon it being so executed. In favour of a purchaser in good faith for valuable consideration, a document shall be deemed to have been duly executed by a

company if it purports to be signed by a director and the secretary of the company or by two directors of the company and where it makes it clear on its face that it is intended by the person or persons making it to be a deed to have been delivered upon its being executed.

CHAPTER 3

CHANGES IN THE LAW AND OTHER JURISDICTIONS

England and Wales

3.01 The Law Commission published a report in 1987 on Deeds and Escrows (Law Com. No. 163) identifying shortcomings in the law as it stood in England and Wales in respect of deeds. Key recommendations were that the sealing should no longer be a requirement and a deed should be valid if made in writing on any substance which could constitute a document and if signed and delivered. The signature would have to be witnessed and attested. In relation to escrows the Law Commission recommended that the authority to deliver a deed should not have to be conferred by deed and further that solicitors and licence conveyancers should be conclusively presumed to have authority to deliver deeds on their clients behalf in a conveyancing transaction. They recommended that this latter recommendation should extend to deeds executed by companies as well as individuals.

3.02 Effect was given to the Law Commission Report by the Law of Property (Miscellaneous Provisions) Act 1989. Section 1(1) abolishes any rule of law which:

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

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

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

3.03 Under section 1(2) it is provided that an instrument shall not be a deed unless:

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

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

3.04 To be validly executed as a deed by an individual the document must be signed by him in the presence of a witness who attests the signature or at his direction and the document must be delivered as a deed by him or a person authorised to do so on his behalf. Alternatively an instrument is validly executed as a deed by an individual if it is signed at his direction and in his presence and in the presence of two witnesses who each attest the signature. (see section 1(3)). "Sign" and "signature" are defined as including making one's mark. Under section 1(5) when a solicitor or licensed conveyancer, or agent or employee of such person, in the course of a land transaction purports to deliver an instrument as a deed on behalf of the party

to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised to deliver the instrument.

Other jurisdictions

3.05 In New Zealand section 4 of the Property Law Act 1962 abolished the requirements of sealing and delivery. In Australia sealing has been abolished in a number of jurisdiction, for example, Victoria, Queensland and New South Wales and its abolition has been recommended in Tasmania. Those states which no longer require sealing provide that its absence does not invalidate the document if there is an attested signature and a document is expressed to be a deed. In the United States sealing of a deed has been abolished completely in at least 34 states while delivery is still required in all states.

3.06 Various other changes have been effected in the Australian states. For example, in Queensland under the Property Law Act 1974 section 47 provides that execution of an instrument in the form of a deed shall not of itself import delivery nor shall delivery be presumed from the fact of such execution unless it appears that execution of the document was intended to constitute delivery of the document. In Victoria section 73B of the Property Law Act 1958 abrogated the rule of law that the authority to an agent to deliver a deed on behalf of another must be conferred by deed. Section 57 of the same Act provides that a deed whether or not being an indenture may be described as a deed simply or as a conveyance, deed of exchange, settlement, mortgage

charge, transfer, lease or otherwise according to the nature of the transaction intended to be effected.

CHAPTER 4

REFORM PROPOSALS IN NORTHERN IRELAND AND OTHER JURISDICTIONS

NORTHERN IRELAND

4.01 In its final report the Land Law Working Group ("the Group") made a number of recommendations in relation to deeds and the draft Property Order attached to the report contained its suggestions for new legislation in this context.

4.02 It was recommended that in the case of deeds of individuals (as opposed to bodies corporate) sealing should no longer be required for the validity of a deed provided that:

(a) the document is expressed to be a deed or to be a conveyance, assurance, mortgage, settlement, covenant, bond, specialty or other document which is required by law to be by deed;

(b) the document is signed by the individual or by some other person in his presence and by his direction;

(c) duly witnessed; and

(d) delivered as a deed by the person executing it or by a person authorised to do so on his behalf.

4.03 In relation to witnessing the Group's recommendations were more prescriptive than the provisions of the 1989 Act in England and Wales. It

recommended that an individual executing a deed should make or acknowledge his signature in the presence of two witnesses or, if he or she is a solicitor, one witness. The witness or witnesses should make or acknowledge his or her signature in the presence of the individual executing the deed but not necessarily, where there is more than one witness, in the presence of any other witness, except where the document is signed by some person in the individual's presence and by his direction.

4.04 The Group recommended that a deed should still be capable of being executed under seal by an individual so long as the deed is signed and witnessed as aforesaid.

4.05 These recommendations do not apply to the deeds of corporations aggregate or corporations sole. Clause 84(1) of the draft Property Order provided that in favour of a purchaser, a deed should be deemed to have been duly executed by a corporation aggregate if its seal is fixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy and a member of the board of directors, council or other governing body of the corporation. Where a seal purporting to be the seal of a corporation has been affixed to a deed and attested by persons purporting to be persons holding such offices as aforesaid, the deed should be deemed to have been executed in accordance with the requirements of the provision and to have taken effect accordingly. In Clause 84(2) it is provided that the board

of directors, council or other governing body of a corporation aggregate might, by resolution o

the corporation taking part in the act of execution and the minutes are silent on the point.

ENGLAND AND WALES

4.07 In its report "The Execution of Deeds and Documents by or on behalf of Bodies Corporate" (Law Com No. 253) the Law Commission of England and Wales made a number of recommendations for reform of the law in England and Wales. Although in the main the report deals with the execution of deeds and documents by bodies corporate it makes a number of more general recommendations which would also apply to instruments executed by individuals.

A. General recommendations

4.08 The Law Commission referred in particular to the requirements of section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 which provides that an instrument is not a deed unless it makes clear on the face of the instrument that the person making it, or as the case may be, the parties intend it to be a deed whether by describing itself as a deed or expressing itself to be executed or assigned as a deed or otherwise. This is the so called "face value" requirement. There will be no problem if the document is headed with words such as "this deed" or states that it is "executed as a deed". More difficult questions arise if the document does not describe itself as a deed but, for example, as a mortgage which is a document required to be

under seal under the old law or if the document is one executed under seal which is no longer a requirement for execution as a deed under the 1989 Act. The Law Commission in its report after consideration of the views of consultees recommended against making the "face value" requirements more specific. It recommended that there should be a statutory provision making it clear that the face value requirements are not satisfied merely because an instrument is executed under seal. It further recommended that the discrepancy in the description of the face value requirements between section 36A of the Companies Act 1985 (equivalent to Article 46A of the Companies (Northern Ireland) Order 1986) and section 1(2) of the 1989 Act should be resolved by removing the reference to the face value requirements from section 36A. This recommendation must be read in conjunction with the Law Commission's recommendation for a redrafted section 36AA to make clear what a company needs to do to execute a deed or document for the purposes of section 1(2)(b) of the 1989 Act.

4.09 The Law Commission recommended that it should be made clear that for an instrument to be a specialty the instrument must be a deed and that execution under seal is not a requirement for an instrument to be a specialty. This recommendation does not affect specialties arising under statute.

4.10 The Law Commission came down against any rule of law that an instrument which fails to take effect as a deed nonetheless automatically has effect as a contract or other instrument under hand.

4.11 The Law Commission identified a problem in section 1(2)(b) of the 1989 Act. The section requires a deed to be validly executed as a deed *by* the person making it or the parties to it, but makes no reference to a deed being executed *on behalf of* such persons or parties. It recommended that section 1(2)(b) of the 1989 Act should be amended so to include reference to execution by a person who is authorised to execute in the name or on behalf of the maker or party to the deed. It further recommended that section 1(3) of the 1989 Act and section 36A of the 1985 Act should apply in the case of an instrument executed by an individual and company respectively in the name or on behalf of another person whether or not the person is also an individual or company. This recommendation would include not only individual attorneys but also others such as liquidators, administrators and administrative receivers where they are executing deeds on behalf of a company other than by affixing the company seal. It was further recommended that section 1(4) of the 1989 Act should be amended to provide expressly that "sign" includes an individual signing the name of a person or party on whose behalf he executes the instrument.

B. Execution by a registered company and other bodies corporate

4.12 The main thrust of the report, as the titles suggests, relates to the deeds of bodies corporate. The report makes a number of recommendations in respect of the law relating to the execution of deeds by companies and in respect of the execution of deeds on behalf of corporations.

4.13 For the avoidance of doubt the Law Commission recommends that section 36A of the Companies Act 1985 should be amended to provide that execution "as a deed" is by execution *and* delivery. This should apply to all bodies corporate.

4.14 The report recommends the retention of the current system whereby registered companies may continue to execute deeds either under the common seal of the company or by signature of relevant persons. The Law Commission looked at the question whether there should be any change in the method of execution by a company without using its common seal set out in section 36A(4) (eg. by widening the range of those eligible to sign beyond directors and the secretary and allowing execution by a single signatory). The Law Commission came down against any relaxation in the requirements for execution by a company without using a seal under section 36A(4). It did recommend that there should be provision to make it clear that a director or secretary of more than one company must sign separately for each company which is a party to the deed.

4.15 The Law Commission recommended that the legislation should be amended to provide that a director or secretary of the company which is itself a company or corporation may "sign" for the purposes of section 36A(4)(6) and "attest" by the signature of a person authorised to do so on its behalf.

4.16 The Law Commission recommended no change in a number of areas. Thus it recommended no change to section 36A(2) in the rules relating to the execution by affixing of the common seal. The requirement that the name of the company must be engraved on the seal should remain. There should be no provision for one or more duplicate seals. There should be no relaxation in the requirement for personal signature in the case of companies or in the requirement for execution of particular classes of documents. It came down against the introduction of a formula for execution by all corporations aggregate and against a statutory provision for execution of all corporations sole.

C. Rules relating to delivery of deeds by bodies corporate.

4.17 The Law Commission recommended the retention of the presumption of due execution in favour of a purchaser in good faith. It recommended that

recommended that the statutory or rebuttable presumption of delivery on execution contained in section 36A(5) of the Act should be retained and it strongly recommended that the *irrebuttable* presumption of delivery contained in section 36A(6) of the Act should be repealed.

4.18 The report made a number of additional recommendations for reform. Thus in the view of the Law Commission the wording of the rebuttable presumption of delivery contained in section 36A(5) of the 1985 Act should be changed so that it no longer referred to the fact that the instrument "has effect, upon delivery, as a deed". The presumption of authority to deliver on behalf of the maker of a deed contained in section 1(5) of the 1989 Act should be extended to transactions other than those involving the creation or disposal of an interest in land. There should be a new statutory provision extending the rebuttable presumption of delivery contained in section 36A(5) to all corporations aggregate.

D. Execution of deeds on behalf of corporations

4.19 The recommendations referred to in section 36A(4) above would apply to execution of deeds on behalf of bodies corporate as well as deeds executed on behalf of individuals.

4.20 The Law Commission identified a potential problem with the wording of the Powers of Attorney Act 1971. Since execution under the Act is said to

be as effective as if done "with the signature of the donor" and since a corporation does not execute by its signature it recommended that where an instrument is executed by the donee as a deed it should be as effective as if executed by the donee in a manner which would constitute due execution of it as a deed by the donor only if it is executed in accordance with section 1(3)(a) of the 1989 Act.

E. Execution by liquidators etc

4.21 The Law Commission recommended that the Insolvency Act should be amended to provide that the powers of a liquidator exercisable without sanction in any winding up should include:

(i) the power to do all acts and execute in the name and on behalf of the company any deed, receipt or document; and

(ii) as a separate power, the power to use the company's seal.

REPUBLIC OF IRELAND

4.22 The Irish Law Reform Commission ("ILRC") in its report (ILRC No. 56 1998) made a number of recommendations for reform of the law relating to deeds.

4.23 The ILRC recommended that the status of deeds should be retained by providing that a document should be the deed of a person if:

(i) it is executed by that person and is described at the head of it by such words as deed, indenture, lease, conveyance, assignment, surrender, transfer, mortgage or charge; or

(ii) it is executed by that person as a deed by the use of the words such as "signed as a deed" or "executed as a deed".

4.24 The ILRC further recommended that certain documents, in particular those relating to the transfer of interests of land should continue to be by deed under seal.

4.25 It further recommended that a contract made without consideration should remain unforceable unless the deed is made under seal.

4.26 It recommended that as an alternative to sealing individuals wishing to effect deeds should be able to do so by signing the instrument or acknowledging that signature in the presence of a witness who attests the signature.

4.27 As a safeguard against undue influence being exerted on a grantor by a person purporting to sign on behalf of another, where a party to a deed directs another person to sign on his or her behalf the ILRC recommends that the witness should both observe the direction and attest the signature.

4.28 The ILRC was not in favour of changing the current law which requires the deeds must be written on paper or parchment.

4.29 It was recommended that the law should be amended to make clear that a party delivering a deed in escrow should be entitled to revoke that escrow at any time prior to the fulfilling of any conditions on which the escrow depends.

4.30 It is recommended that any rule of law which requires authority to deliver a deed to be conferred by deed should be abolished.

4.31 The same rule in relation to delivery of deeds should apply to corporate bodies as to individuals.

4.32 In the case of deeds executed by bodies corporate the ILRC recommended the retention of the requirement of sealing for those documents which are required to be deeds. A document should not be deed unless executed under the seal of a company registered in Ireland in accordance with its articles of association, or if not a registered company, in accordance with the legal requirements governing the execution of deeds by such bodies. In the case of foreign bodies corporate the document should be executed in accordance with the legal requirements governing the execution of such documents by such bodies corporate in the jurisdiction of incorporation.

CHAPTER 5

THE RULE IN PIGOT'S CASE AND ITS POSSIBLE REFORM

5.01. In *Pigot's Case* (1614) 11 Co Rep 26B at 27A Lord Coke stated the law thus:

> "When any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void … so if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but … if a stranger, without his privity alters the deed by any of the said ways in any point not material, it shall not avoid the deed."

5.02 The rational for the rule was twofold. First the effect of the alteration renders the deed or instrument sued on no longer the deed or instrument party charged. Secondly, the rule was intended to prevent fraud (see *Master –v- Miller* (1791) 4 Term Rep 320).

5.03 The case involved an action in debt on a bond for appearance brought by Benedict Winchcombe, the Sheriff of the County of Oxford against Henry Pigot. Pigot entered the deed on 2 March 1611. However, between then and the commencement of the action in 1614, a stranger, without the permission of Winchcombe inserted some extra words to the deed (which was in Latin), namely the words, (translated) "Sheriff of the County of Oxford" between the words "Benedict Winchcombe Esq" and "in the sum of £60". As a result Pigot, relying on an earlier line of authority pleaded non est

factum, that is because of the alteration the deed was not, in fact, the one he actually entered into. The words inserted by the stranger were found to be not material since nothing turned on them. The bond was found to be an ordinary bond and not one taken by Winchcombe in his capacity as Sheriff of the County of Oxford. The result was that the bond was enforceable.

5.04 The decision of the court can be summed up as follows:

(i) a deed becomes void if it is altered *in any way* by the obligee;

(ii) a deed becomes void if it is altered in *a material way* by a stranger to the transaction;

(iii) a deed does not become void if it is altered in a way that is *not material* by a stranger to the transaction.

5.05 The decision in *Pigot's Case* modified a harsher earlier line of authorities exemplified by *Elliott –v- Holder*. In that case it was held that any alteration of a deed made it utterly void whether the alteration was in a material place or not.

> "for the deed is entire and when after the delivery it is altered in any point, otherwise than it was at the time of the delivery, it has become void in its entirety and is not his deed in every part as he delivered it."

5.06 Although the rule in *Pigot's Case* was originally closely related to the plea of non est factum and was really an aspect of it, in modern times it has been regarded as a separate defence. At common law an obligor could plead

non est factum if a deed was lost, destroyed or altered. Equity came to grant relief when the deed was lost or destroyed, but did not grant relief in cases of alteration.

5.07 The rule in Pigot's case came to be extended, not only to deeds, but also to other written contracts (*Master –v- Miller* (1791) 14 Term Rep 320).

5.08 While in its original form the rule established that a deed became void if it was altered in any way by the party in whose custody the document was, in *Aldous's* case (1868) LR 3 QB 573 it was held that any immaterial alteration made by the with the authority of the person in whose custody the document is did not render the deed void.

5.09 In general it seems clear that the touchstone of materiality has been whether or not there has been some alteration in the legal effect of the contract or instrument concerned simply in the sense of some alteration in the rights and obligations of the parties. Those cases in which an alteration or obliteration have been held to be immaterial have been cases of two kinds. First, those where it either was or could have been said that the alteration has rendered express, or added nothing to, what the law would otherwise provide or imply. Second, there is a class of case where the alteration corrects a 'mere misdescription' which can be cured by parol evidence that a person or entity referred to has been misdirected and the alteration merely

corrects the error. In the Irish case of *Caldwell –v- Parker* (1869) IR 3 Eq 519 the Master of the Rolls for Ireland observed that "material" in this context meant "having an effect on some contract or right contained in or arising out of the instrument itself". In *Raiffeisen Zentralbank Osterreich AG -v- Crossseas Shipping* [2000] 3 All ER 274 S executed a guarantee in favour of the claimant bank. One of the clauses which contains spaces for details of S's service agent was left blank but was later filled in by the bank without S's knowledge. The bank subsequently demanded payment under the guarantee and sent formal letters of demand to S in Kenya and to the service agent in England. Shortly afterwards it launched against S proceedings to enforce the bank's rights and obligations. S contended that the alteration had changed the bank's rights and obligations in respect of the service of demands and legal proceedings and that accordingly the change was a material one rendering the guarantee unenforceable. On the trial of the preliminary issues the judge held, inter alia, that the service agent clause was procedural in nature and the alteration made no difference to the operation of the guarantee or to its business effect, it followed that the guarantee was enforceable. The Court of Appeal upheld the ruling. The court held that the parties seeking to avoid the contract had to demonstrate that the alteration was one which was potentially prejudicial to his legal rights or obligations. Without an element of potential prejudice no inference of fraud or improper motive was appropriate. The service agent clause did not alter or accelerate S's liability to make the payment under the guarantee. On the facts potential

prejudice to S could only arise if he sought to evade service of proceedings against him personally in respect of the guarantee.

Potter LJ concluded:

> "In light of the conflict apparent in the authorities … to take advantage of the rule, the would-be avoider should be able to demonstrate that the alteration is one which assuming the parties act in accordance with the other terms of the contract is one which is potentially prejudicial to his legal rights and obligations under the instrument."

5.10 In the opinion of some the question of intention is relevant to the issue of materiality. Some, such as the British Columbia Court of Appeal, the Queensland Supreme Court and the South Australian Full Court have argued that the presence or absence of fraud is an indication of materiality, while the English authorities suggest that motive is irrelevant. In most jurisdictions in the United States the operation of the rule depends on fraudulent intent. In general an alteration has not involved the rule if it has been done innocently to express the intention of the parties more clearly or to correct a real or supposed mistake. This approach has been adopted in the American Restatement of the Law of Contract which states that an alteration must be both fraudulent and material for an agreement to be discharged.

5.11 The rule has been justly criticised as outdated and illogical. A material alteration made by a stranger renders the deed void, a result which Professor Glanville Williams described as absurd:

> "If a burglar steals a written contract, secondary evidence of its contents may be given, but if a burglar,

> with a perverted sense of humour, adds a nought to some material figures in the contract, he makes it hopelessly void (at the option of the promisor) and the promisee can, as all the authorities show, do nothing about it."

5.12 The Canadian courts have rejected this rule. In the United States the making of alterations by strangers without the knowledge or consent of the promisee is referred to as "spoliation" and has no effect on the instrument.

5.13 The law in relation to deeds took a different course with respect to alterations from that taken in the law in relation to testamentary documents even though testamentary documents were considered very susceptible to fraud. At common law an alteration to a will after execution and without the knowledge of the testator had no effect. Section 21 of the Wills Act 1837 provides that:

> "No obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent."

REFORM OF THE LAW

5.14 There are a number of alternative ways of reforming the law.

(1) The first option would be to leave the common law to develop. The common law evolved in the United States in such a way as to limit the rule to cases of fraud by one of the parties to the deed. However, the rule is deeply entrenched and short of a House of Lords ruling radically changing the law the rule remains and may not change for a considerable period.

(2) The rule could be left relatively intact but modified by statute so as, for example, to limit the rule to fraud by one of the parties and making clear that fraudulent or accidental action by a stranger in respect of the deed would not avoid the deed.

(3). The New Zealand Law Commission has recommended the following provision:

> "The rule that a deed becomes invalid if there has been a material alteration to it after its execution is abolished, but abolition of that rule does not validate any such alteration if it is invalid on any ground other than that rule."

(4). The Law Reform Commission of New South Wales favours abolition of the rule in *Pigot's Case* and a statutory declaration that accordingly a material alteration to a deed does not by itself invalidate the deed or render it voidable or otherwise affect any obligation under the deed. In this context deed is to be interpreted as including a written contract or any document evidencing a contractual intention.

5.15 The Committee provisionally favours the adoption of the recommendations of the Law Reform Commission of New South Wales but welcomes views on the issue.

CHAPTER 6

REFORMING THE LAW

Identifying the principles of reform

6.01 The distinction between deeds on the one hand and other written contracts and documents on the other is deeply entrenched in the law. Certain categories of documents need to be in the form of deeds, such as conveyances of real property. Other categories of documents may but do not have to be in the form of deeds. Different rules in relation to the need for consideration and in relation to limitation apply to deeds as compared to transactions effected by documents which do not constitute deeds. The distinction is now so fundamental and so entrenched in the law and practice that any reform proposals must proceed from the premise that that distinction should continue to be drawn and the distinction recognised.

6.02 Since deeds must remain distinct from other instruments which are not deeds, the law must specify the rules for the proper execution of deeds. These rules must be spelt out with clarity and must reflect modern conditions. The rules should be as simple and straightforward as possible and be designed to achieve consistency of practice so far as possible.

6.03 It should only be necessary to change the law in those areas in which it is evident that the existing rules serve no continuing useful purpose or where it has been demonstrated that the current law is unclear or impractical.

Well-established and workable principles and practices should only be disturbed where they are shown to serve no continuing purpose. Well-established principles of conveyancing law and practice should not lightly be disturbed.

6.04 **We welcome views on whether these should be the grounding principles for any reform of the law in this area and whether interested parties consider that there are other or additional principles which should apply.**

Identification of issues for reform

6.05 Having set out the principles underpinning the reform of the law we propose to look at the various areas relating to the law where we consider reform may be necessary and raise the questions which need to be addressed in formulating proposals for reform.

The requirement for the sealing of deeds

6.06 There are a number of options in this context:

(a) To leave the law as it is. It may be argued that the current law, antiquated as it is, continues to be understood by practitioners and the public and remains as a workable system. On the other hand the use of seals by individuals has fallen into desuetude and the form of sealing used nowadays is entirely fictional and in the form of a ritual that serves no purpose. The

conferring of a special status on a document can be achieved by other more sensible and more practical means.

(b) To abolish completely the need for sealing in the case of deeds by individuals. This is the course adopted in England and Wales under the 1989 Act. If this course were adopted it remains to be decided whether sealing should be fully abolished as a means of execution altogether or whether individuals should retain the option of sealing as a means of execution if they wished subject to the fulfilment of specified conditions.

(c) To retain sealing for certain categories of documents such as conveyances and documents constituting "specialties" but not all deeds. This seems to be the option favoured by the Irish Law Reform Commission.

6.07 **The Committee welcomes views generally on the issue of sealing and in particular on the following questions:**

(1) Should the current requirement for sealing be retained?

(2) Should the requirement for sealing be abolished for all deeds but leaving sealing as one mode of execution of a deed at the option of the parties?

(3) Should sealing be abolished for all deeds completely as a mode of execution of a deed?

(4) Should sealing be retained as a requirement for the execution of certain categories of deeds and if so what categories? In particular should there be a special rule in relation to specialties?

Alternative formal requirements for execution of a deed

6.08 If sealing is abolished as a requirement generally or in relation to certain deeds it is necessary to spell out the formal requirements to be fulfilled before a document will be a deed. The question is what are the appropriate requirements? There are a number of matters for consideration and a number of options.

The designation of the document

(1) The parties should be required to make clear on the face of the document that it is intended to be a deed whether by describing itself as a deed or expressing itself to be executed as a deed by the parties. This is the English approach.

(2) The parties may make clear on the face of the document that it is intended to be a deed or to be a conveyance, assurance, mortgage or some other document required by law to be a deed. This is the approach adopted in some of the Australian jurisdictions and recommended by the Land Law Working Group and by the Irish Law Reform Commission. We provisionally favour this option.

6.09 **The Committee welcomes views on these alternative options and on any other suggestions in this context.**

The signing and witnessing of the document

6.10 It seems to be unarguable that the law should require the party executing the deed to sign it or have it signed by some other person in his presence and by his direction. As to witnessing there are a number of options in relation to the number of witnesses who should witness the signature of the executing party or of someone acting on his behalf in signing the document. We have set out above the requirements under English law and suggestions made by the Irish Law Reform Commission and the Land Law Working Group. **We seek views on how the deed should be witnessed and in particular on the following questions:**

(1) Should the requirement normally be for two witnesses or one?

(2) If two, should the attestation of a single solicitor be sufficient?

(3) If the deed is executed at the direction of and in the presence of the relevant party should there be two witnesses even if normally only one witness is required?

(4) If the deed is executed at the direction of a grantor should the witness or witnesses both observe a direction and attest the signature?

The substance on which a deed may be executed

6.11 The 1989 Act in England abolishes any rule of law which seeks the substance in which deeds may be written. Neither the Land Law Working Group nor the Irish Law Reform Commission considered the law should be changed in this regard**. We welcome views on the question whether the**

law should continue to require that a deed should only be executed on paper or parchment or whether the rule should be abolished.

Delivery of the deed

6.11 The Committee does not at this stage consider that there needs to be any wide-ranging change in the law in relation to the principles relating to delivery and the requirement of delivery for a deed to become effective. **However the Committee welcomes views on this issue generally and also specifically on the following questions:**

(a) Should the current requirement that authority by one person to deliver an instrument as a deed be evidenced in a deed be abolished?

(b) When a solicitor or licensed conveyancer or agent or employee of such person purports to deliver an instrument as a deed on behalf of the party to the instrument -

(i) should it be conclusively presumed in all cases in favour of a purchaser that he is authorised to deliver the instrument?

(ii) should it be conclusively presumed in certain specified cases (eg in land transactions) that he is authorised to deliver the instrument?

(iii) should there be a rebuttable presumption of delivery on execution of the deed?

Deeds of bodies corporate

Execution of deeds

Registered companies

6.12 Under the current system a registered company may execute a deed using its common seal or execute by two directors of the company or a director and secretary of the company. **We welcome views generally on whether the law in this regard is satisfactory and particularly in relation to the following questions:**

(1) Should the law relating to execution of deeds by bodies corporate be brought into line with the execution of deeds by individuals so that if sealing is abolished as a means of executing a deed by an individual it should also be abolished in the case of deeds of registered companies and as all other corporations?

(2) Should the range of those eligible to sign on behalf of the company be widened beyond directors and secretary?

(3) Should execution by a single signatory be permitted?

(4) Should we follow the Law Commission recommendation that a director or secretary of more than one company must sign separately for each company which is a party to the deed?

(5) Should we follow the Law Commission recommendation that the legislation should make clear that where a company constitutes a director or secretary of a company a person authorised to do so on behalf of the company may sign for the company director or company secretary?

Other corporations aggregate

6.13 **We welcome views on whether the law should be stated in terms as set out in Clause 84 of the Land Law Working Group report (see paragraph 4.05 above).**

Company seals

6.14 **We welcome views on whether the existing law relating to company seals is adequate or requires amendment. In particular we welcome views on the following questions:**

(1) Is the current requirement that the name of a company must be engraved on the company seal satisfactory?

(2) Should a company be entitled to hold one or more duplicate seals?

Delivery of deeds by bodies corporate

6.15. **We welcome views on this issue generally with specific reference to the following questions:**

(1) Should the rebuttable presumption of delivery on execution contained in article 46A(5) of the Companies (Northern Ireland) Order 1986 be retained?

(2) Should the irrebuttable presumption of delivery contained in article 46A(6) of the 1986 Order be abolished as recommended by the Law Commission in respect of the equivalent provision of the English Act?

Execution of deeds on behalf of bodies corporate

6.16 **We welcome views on this issue generally and specifically on the following questions:**

(1) Whether section 7 of the Powers of Attorney Act (Northern Ireland) 1971 should be amended so as to make clear that a deed is as effective as if executed in a manner which would constitute due execution of the deed by the donor?

(2) Whether the Insolvency (Northern Ireland) Order 1989 should be amended to provide that the powers of a liquidator exercising any power without sanction in any winding-up should have power to execute deeds on behalf of the company and, as a separate power, have the power to use the corporate seal.

Escrows

6.17 The law relating to escrows appears to be generally satisfactory though concern has been expressed about the rule that when a deed is delivered as an escrow subject to the later fulfilment of a condition, on fulfilment of the condition the delivery of the deed relates back in time to the delivery of the escrow. It may be argued that it is more logical that the deed should be deemed to take effect on the fulfilment of the condition rather than by relating back to the date of the delivery of the deed as an escrow. **We welcome views on the issue.**

6.18 The Irish Law Reform Commission in its report identified a possible doubt in the law as to whether delivery of a deed in escrow is irrevocable,

pointing out that it is not the practice in Ireland to so regard it. The Commission recommended that the law should make clear that a party delivering a deed in escrow should be entitled to revoke that escrow at any time prior to the fulfilling of any conditions on which the escrow depends. **We would welcome views on that issue.**

6.19 The Land Law Working Group in its report identified some doubt in relation to the law of escrows affecting companies. **We welcome views in particular on the question whether for the avoidance of doubt the law should make clear that a corporation is and always has been capable of delivering a deed in escrow in the same way as an individual (as recommended by the Land Law Working Group referred to at paragraph 4.06 above).**

The Rule in Pigot's Case

6.20 **We welcome views generally on this topic and in particular in relation to the following questions:**

(1) Does the current law continue to serve any useful purpose?

(2) Should the rule be –

(a) abolished; or

(b) amended and if amended, amended in what respect?

APPENDIX

GLOSSARY OF ABBREVIATIONS

This glossary sets out simple explanations of the main terms used inn this report. Most, though not all, have a technical legal meaning.

Attestation – the witnessing of an act or event, for example witnessing the signature or sealing of a document.

Common seal – the seal adopted by a corporation aggregate in use for executing documents. The seal of a registered company must have the name of the company engraved upon it.

Company – an association of persons formed for the purpose of some business or undertaking carried on in the name of the association. A company may be incorporated or unincorporated but in this discussion paper the term is used exclusively to refer to an incorporated body, and generally in the sense the company registered under the Companies Act.

Contract under seal – traditionally the term has been used to refer to a contract entered into under seal, which is a "speciality" (see below).

Corporation – a body which is recognised by law as having a separate legal personality, distinct from those of its members. The corporation may, for example, generally hold property any may be sued in its own name.

Corporation aggregate – a corporation consisting of a body of persons (although it is technically possible to have a corporation aggregate with a

single member). Examples include registered companies (both public and private), local authorities and building societies.

Corporation sole – a corporation consisting of one person and his or her successors in a particular office or station. Examples include the Crown and Government Ministers.

Deed – a written document which is executed with the necessary formality and by which an interest, right or property passes or is confirmed, or an obligation binding on some persons created or confirmed. A common example is a conveyance or transfer of land.

Delivery – the final formality required for the execution of a deed by which the maker demonstrates in some way that they intend the deed to take effect and to be binding on them.

Escrow – an instrument which has been delivered so that it will only take effect as a deed when certain conditions are fulfilled. It is common to refer to such an instrument as being a deed which is executed in escrow.

Execution – the way in which a corporation enters into a document by sealing it or by signature of its directors or other officers or agents and gives it legal effect. The term is sometimes used simply to mean sealing their signature and sometimes to mean their signature *and* delivery. A corporation enters into a deed by executing it but the term is used sometimes in relation to any contract or document whether or not a deed.

Face-value requirement – the requirement, first introduced by the Law of Property (Miscellaneous Provisions) Act 1989, that an instrument is not a

deed unless it is clear on the face of the instrument that the maker or parties to the instrument intend it to be a deed. "Face-value requirement" is not a technical term, but a convenient shorthand for this requirement.

Power of attorney – a document by which one person (the donor) gives another person (the attorney) the power to act on the donor's behalf and in the donor's name. For example, a company may grant a power of attorney to enable an attorney to execute a document in which the company is a party on its behalf.

Presumption – a conclusion or inference as to the truth of some fact in question, for example as to whether the deed has been validly executed and delivered. The presumption may be conclusive or rebuttable by evidence to the contrary.

Parchment – the skin of a sheep, goat or other animal prepared for writing on.

Speciality – traditionally the term has been used to refer to a contract entered into under a seal, although it has been extended now to mean a contract entered into by deed. The term also has a range of more technical meanings, such as an obligation by deed securing a debt, or a debt due from the Crown or arising under statute (and also any such debt itself).