THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 56 - 1998)

REPORT

ON

LAND LAW AND CONVEYANCING LAW:

(6) FURTHER GENERAL PROPOSALS

INCLUDING THE EXECUTION OF DEEDS

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
Ms Hilary A Delany, B.L., Lecturer in Law, Trinity College, Dublin;
The Right Honourable Dr Turlough O'Donnell, Q.C.;
Mr Arthur F Plunkett, Barrister-at-Law;
Ms Patricia T Rickard-Clarke, Solictior, Partner - Mc Cann Fitzgerald Solicitors.

Mr. John Quirke is the Secretary to the Commission.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General fifty five Reports containing proposals for the reform of the law. It has also published eleven Working Papers, twelve Consultation Papers, a number of specialised Papers for limited circulation and eighteen Reports in accordance with Section 6 of the 1975 Act. Details may be found on pp.40-45.

Dr. Gerard Quinn, BA, LLB, LLM (Harv), SJD (Harv), Barrister-at-Law is the Director of Research to the Commission.

Mr Geoff Moore, B.C.L., Ms. Lia O'Hegarty, B.C.L., LL.M. (Michigan), LL.M. (Harvard), Barrister-at-Law and Ms. Róisín Pillay, LL.B., LL.M (Cantab.), Barrister-at-Law are Researchers.

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NOTE

This Report was submitted on 21st May 1998 to the Attorney General, Mr. David Byrne, S.C., under section 4(2)(c) of the Law Reform Commission Act, 1975. It embodies further results of an examination and research in relation to Land Law and Conveyancing Law (Report on Land Law and Conveyancing Law: (6) Further General Proposals including the Execution of Deeds) which was carried out by the Commission at the request of the former Attorney General, Mr. John Rogers, S.C., together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made to the said relevant Government Departments by persons or bodies with special knowledge of the subject.

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INTRODUCTION

Section 4(2)(a) of the *Law Reform Commission Act, 1975* provides that the Law Reform Commission shall, from time to time and in consultation with the Attorney General, prepare, for submission by the Taoiseach to the Government, programmes for the examination of different branches of the law with a view to their reform. Section 5(2) of the same Act states that where a programme so submitted is approved by the Government, a copy of the programme shall, as soon as may be, be laid before both Houses of the Oireachtas. In accordance with the above statutory provisions, the Commission's First Programme of Law Reform was, on the 4th January 1977, approved by the then Government and a copy thereof laid before each House of the Oireachtas. Included in the First Programme of Law Reform was "The desirability and feasibility of enacting in one statute or in some codified form a law dealing with the sale, and matters arising form the sale, of both movables and immovables are matters that the Commission proposes to examine."

On the 6th March 1987, the then Attorney General, in pursuance of section 4(2)(c) of the *Law Reform Commission Act 1975* requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was:

> "Conveyancing law and practice in areas where this could lead to savings for house purchasers."

Recognising that a comprehensive review of land law and conveyancing law was not feasible within the limited resources available to it, the Commission established a Working Group which was asked to identify a number of areas in which reform of land law or conveyancing law could be brought about within a reasonably short time. The Working Group was asked to concentrate on areas where it could recommend changes in the law which would remove anomalies or redundant provisions.

The members of the Working Group appointed were Mr John F. Buckley, Commissioner (Convener), Miss Justice Mella Carroll, Professor J.C. Brady, Mr George Brady S.C., Ms Mary Laffoy S.C., Mr Ernest B Farrell, and Mr Rory McEntee, Solicitors. Miss Justice Carroll resigned from the Working Group in November 1988 following her appointment as a judge of the Court of the International Labour Organisation.

Ms. Mary Laffoy, S.C. and Mr. Rory McEntee resigned from the Working Group following the publication of the first two Reports and Ms. Mary Geraldine Miller, Ms. Deborah Wheeler, Barristers-at-Law, Mr. Patrick Fagan and Mr. Tom Connor, Solicitors joined the Working Group. Following the appointment of a new Commission in April 1997, Ms Patricia T. Rickard-Clarke, Solicitor and Commissioner, joined the Working Group. In April 1998, Judge Buckley stepped down as Convenor of the Working Group, and Ms Patricia T. Rickard-Clarke became Convenor. Judge Buckley remains a member of the Working Group.

The work of Judge John F Buckley, as Convenor of the Working Group since its inception, has been of fundamental importance to the Working Group's research and recommendations on Land Law and Conveyancing. Judge Buckley has been instrumental in the publication of the Working Group's five reports to date. Following his appointment as a Judge of the Circuit Court in 1997, Judge Buckley, at the request of the President of the Commission, agreed to remain as Convenor of the Working Group, in order to oversee the preparation of this Report, and both the Working Group and the Commission would like to express their gratitude to him for his committment and dedication, which have enabled the publication of this Report. The work of Judge Buckley on a number of other areas of land and conveyancing law will also form the basis of future publications of the Commission.

The Working Group has continued to concentrate on matters which occur in a significant number of conveyancing transactions and which give rise to unreasonable delays in the completion of those transactions. It has also identified a number of aspects of statute law which are in need of reform.

The Commission has already published five reports in the area of land law and conveyancing law. The first contained General Proposals (LRC 30-1989) and the second dealt with Enduring Powers of Attorney (LRC 31-1989). In 1991, the Commission published two further reports; The Passing of Risk from Vendor to Purchaser and Service of Completion Notices published in one volume as (LRC 39-1991). Both of these Reports dealt with the relationship between a Vendor and Purchaser in the period between the contract for sale and completion of the sale. Further General Proposals (LRC 44-1992) was published in 1992 and a Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion in 1995 (LRC 49-1995).

Chapter One of this Report contains general proposals aimed at removing anomalies arising from modern legislation, amendments to landlord and tenant law and the simplification of conveyancing. Chapter Two contains an examination of the law and recommendations relating to the requirement for sealing in the particular context of execution of valid deeds. Chapter Three contains a comment on a proposal for statutory conditions of sale.

CHAPTER 1: GENERAL PROPOSALS

(1) The requirement for a *Family Home Protection Act, 1976* consent for the execution of a valid assent

1.1 The definitions section of the *Family Home Protection Act, 1976* (the "1976 Act"), section 1, includes the word "assent" in the definition of "conveyance". Under section 3 of the Act any purported conveyance by a spouse of any interest in the family home to any person, except the spouse, is void subject to certain exceptions which do not relate to assents.

1.2 It seems clear that the word "assent" appears to include "assent" within the meaning of the *Succession Act, 1965* (the "1965 Act") particularly under sections 52 to 54. Such assents are properly made by a personal representative when all the debts and other obligations of the estate have been met or the personal representative is satisfied that he retains sufficient other assets to enable such debts and obligations to be discharged. It is far from clear why the word "assent", assuming that it was intended to include assents within the meaning of the 1965 Act, was included in the definition of "conveyance". Once a personal representative has taken out a Grant of Administration to the estate, the estate is vested in the personal representative as trustee for the persons by law entitled thereto. The stated purpose of the 1976 Act was to prevent a sale of the family home by one spouse leaving the other spouse without a roof over that spouse's head. This policy extended to the creation of mortgages over the property which, by virtue of the power of sale vested in the mortgagees, might well lead to the same conclusion. The legislation therefore only applies to "conveyances" by one spouse without the other spouse's consent.

1.3 It is important to keep in mind that an assent by a personal representative is not the equivalent of a "conveyance" by the deceased in so far as the deceased's spouse is concerned. The 1965 Act itself had already provided protection for a spouse of the deceased owner. By virtue of the provisions of section 56, the surviving spouse had a right to have the dwelling in which that spouse resided at the date of the other spouse's death appropriated to the surviving spouse. The protection of the spouse of the deceased owner is exclusively contained in the 1965 Act. It is true that the definition of "family home" in the 1976 Act is wider than that of "dwelling" under the 1965 Act but section 56 clearly implements a similar policy to that in the 1976 Act.

1.4 The 1976 Act cannot be invoked by the spouse of the deceased because the personal representative selling in course of administration, or assenting to a

devise or vesting a share of the estate in a residual legatee or next-of-kin, is not the spouse of the deceased.

1.5 The only spouse whose consent might be in issue on the occasion of a personal representative assenting to the vesting of an interest in a family home would be the spouse of that personal representative and then only in the situation where that spouse had actually lived with the personal representative in the house which formed part of the deceased's estate. As the personal representative has no interest in that house other than as a personal representative, not only is it logical that his spouse's consent should not be required to any assent but it would certainly be in conflict with the duties of the personal representative in relation to the distribution of the estate. If a third party is entitled to have the house vested in that third party under the terms of the will or intestacy it would clearly be wrong for that person's entitlement to be restricted by the supposed right of the personal representative's spouse to give or withhold her consent under the 1976 Act.

1.6 A dies intestate, leaving a spouse B, and two children C and D. C lives with his spouse, E, in the same house as B and D. The house is both the dwelling in which B resided at the time of A's death and C and E's family home. B has the protection of section 56. C, with the consent of B, extracts letters of administration to A's estate. If B decides not to seek the appropriation of the dwelling and decides to live elsewhere, and to take other assets in lieu of his/her share in the estate, then C is free to assent to the vesting of the dwelling in C and D, and indeed may be obliged to do so. It would be quite inappropriate that E's consent to this "assent" would be required. Even if C were to enter into an arrangement with B and D, in his capacity as personal representative following a request for the appropriation of the dwelling to B, which arrangement involved C and D vacating that dwelling, such appropriation does not appear to be an assent within the meaning of the 1965 Act and would not require any consent under the 1976 Act.

1.7 *It is recommended that the word "assent" be deleted from the definition section of the Family Home Protection Act, 1976.*

(2) Should an assent in writing be an essential prerequisite to the vesting of immovable property in a beneficiary or next-of-kin following the owner's death?

1.8 Section 52 sub-sections (2) and (5) of the *Succession Act, 1965* provide:-

> (2) the personal representatives may at any time after the death of the deceased execute an assent vesting any estate or interest in any such land in the person entitled thereto....
>
> (5) An assent not in writing shall not be effectual to pass any estate or interest in land.

1.9 Section 53 sub-section 1 provides:

> "An assent to the vesting of any estate or interest in unregistered land of a deceased person in favour of the person entitled thereto shall -
>
> (a) be in writing,
>
> (b) be signed by the personal representatives,
>
> (c) be deemed for the purposes of the *Registration of Deeds Act, 1707* to be a conveyance of that estate or interest from the personal representatives to the person entitled... ."

1.10 In the case of *Mohan v Roche*,[1] Keane J held that where a property had devolved and was vested in the personal representative and was to be distributed to him or he became beneficially entitled to it, then an assent was not required.

1.11 The facts in *Mohan v Roche* were as follows: Michael Roche died intestate in 1967 and Letters of Administration were granted to his widow Mary Bridget Roche in 1968. By deed of family arrangement made in 1969, the nine children of the marriage "granted released and conveyed" their interest in a dwelling-house which formed part of the estate to Mary Bridget Roche for natural love and affection. Mary Bridget Roche died in 1989 and appointed her son Thomas Roche to be her executor. Thomas Roche extracted a Grant of Probate of the will of Mary Bridget Roche and entered into a contract to sell the house as such executor. The purchaser objected to the title on the ground that no assent had ever been executed by Mary Bridget Roche and declined to complete the sale, until such defects were cured by a grant *de bonis non* to the estate of Michael Roche and by the due execution of an assent and its registration in the Registry of Deeds. Keane J refused the purchaser a declaration that the vendor had not shown good marketable title to the premises in accordance with the terms of the contract on the grounds set out above.

1.12 The Commission has considered the question of whether legislation should be recommended which would have the effect of reversing the decision in *Mohan v Roche* by requiring assents to be completed in all cases even where the personal representative and the beneficial owner were one and the same person.

1.13 It may be assumed that in *Mohan v Roche* all the debts of the estate had been discharged by the date of the deed of family arrangement and that the personal representative would have been entitled to execute an assent to herself immediately after the completion of the deed of family arrangement. Even if the debts of the estate had not been discharged the Statute of Limitations would

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1 [1991] 1 IR 560

presumably have operated to bar any such debts long before the death of Mary Bridget Roche in 1989.

1.14 The situations in which the *Mohan v Roche* doctrine can safely be applied seem to be limited to the following:-

1. In the case of an intestacy, where the administrator is beneficially entitled to the entire of the estate and all the liabilities of the estate have been discharged or have become statute barred.

2. In the case of a testate estate where the executor is beneficially entitled only to the part of the estate which remains unadministered so that not only would all the liabilities of the estate have been discharged or have become statute barred, but all legacies would have been paid and all other devises would have been implemented.

1.15 It seems clear that in the great majority of cases it would be much more satisfactory if assents were to be completed. Section 53(3) of the Succession Act provides that:

> An assent or conveyance of unregistered land by a personal representative shall, in favour of a purchaser, be conclusive evidence that the person in whose favour the assent or conveyance is given or made is the person who was entitled to have the estate or interest vested in him, but shall not otherwise prejudicially affect the claim of any person originally entitled to that estate or interest or to any mortgage or incumbrance thereon.

1.16 The absence of an assent will put a purchaser on inquiry, in the case of an intestacy, not only that all liabilities of the estate have been discharged but that the person claiming to be entitled to the land was the only person beneficially entitled to the land.

1.17 In the case of a testate estate the purchaser must be satisfied again that all liabilities have been discharged and that all legacies and devises (other than to the person claiming to be the beneficial owner of the land) have been paid or implemented.

1.18 The existence of an assent will avoid all these queries and accordingly it is suggested that it should remain the norm.

1.19 There are, however, a limited number of cases, of which *Mohan v Roche* is one, where it may be advisable to allow the *Mohan v Roche* doctrine to continue to apply. If the personal representative of the deceased owner is still alive an assent can, even if belatedly completed, perfect the title. Where, however, the personal representative is dead or incapable of completing an

assent, then in order that an assent might be completed a grant *de bonis non* to the estate of the original owner would have to be extracted. Grants *de bonis non* should only be extracted where the estate of the deceased has not been fully administered. It must be at best very doubtful if in situations such as *Mohan v Roche* where the person beneficially entitled has been in beneficial occupation of the property for some considerable time whether it can properly be said that the estate is unadministered. Even if the estate can be said not to be fully administered, by reason of the absence of an assent to the particular property, there will be some costs involved in the extraction of a *de bonis non* grant and it seems unnecessary to impose them where it is clear that all debts etc. have been discharged or statute barred and the property has been beneficially occupied for a significant number of years.

1.20 *Accordingly, the Commission recommends that the provisions of the Succession Act, 1965 continue to apply in relation to the requirement to execute assents as the decision in Mohan v Roche would only apply to a limited number of cases.*

(3) Extension of the doctrine of advancement

1.21 A recent article by Dr Alan Dowling of Queen's University, Belfast, *The Presumption of Advancement between Mother and Child*,[2] draws attention to the anomalous nature of the doctrine of advancement.

1.22 The doctrine operates to displace the presumption of a resulting trust in certain circumstances. Where a person acquires property in the name of a second person and that second person has not provided consideration for the acquisition of the property there is a presumption of a resulting trust in favour of the first person. This category of resulting trust is called a **Constructive Trust.**

1.23 However, where certain relationships exist between the first person and the second person, the presumption of a resulting trust may be displaced by another presumption in favour of a gift, namely the presumption of advancement. This presumption arises in the case of a father and child and also extends to anyone to whom a father stands in *loco parentis*. It also applies where a husband transfers property to his wife voluntarily or buys property in her name.

1.24 The reverse does not apply. Where a wife transfers property to her husband voluntarily or buys it in his name the presumption of advancement does not apply. This was because prior to the *Married Women's Property Act 1882* the common law did not accept that a married woman could dispose of property and the Courts of Equity took the position that they had to protect the spouse's interest. The Courts of Equity also took the view that a wife, so long as her

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2 [1996] 60 Conv. 274.

husband remained alive, did not have a legal obligation to maintain her children, so that the presumption did not apply as between mothers and children.

1.25 Under Irish law parents are automatically regarded as joint guardians of their children. In many family law proceedings sole custody of children is given to the mother although the parties remain married. It seems wholly anomalous that where a mother is a guardian of her child and may have sole custody of that child a gift to that child may be challenged on the basis of a resulting trust and the presumption of advancement cannot be called in aid.

1.26 Indeed, it seems remarkable that this doctrine should continue to operate in this way at the end of the twentieth century and perhaps even more remarkable that it should do so in a State with a Constitution which includes a provision that "[a]ll citizens shall, as human persons, be held equal before the law."[3]

1.27 In spite of views expressed by various learned writers, in neither the High Court nor the Supreme Court has there been a decision that the doctrine of advancement should apply as between wife and husband or between a mother and her children or any other persons to whom she is in *loco parentis*.

1.28 Accordingly, legal practitioners can only operate on the basis that the historical doctrine of advancement still applies. Solicitors and counsel advising clients and appearing on their behalf are obliged to apply the doctrine, particularly in the Circuit Court which has a substantial jurisdiction in family law matters and where arguments as to the ownership of property are common.

1.29 In an era when there is a constitutional guarantee of equality and where married women are in a great many cases economically independent of their husbands, the time has come to adapt the doctrine to reflect these changes. It is significant that in a recent case, *McKinley v. Minister for Defence*,[4] the Supreme Court[5] rejected the submission that the common law action for loss of consortium, which was available only to husbands, should be abolished by reason of its inconsistency with the Constitution and chose instead to extend it to wives.

1.30 It is important to note, however, that the decision represents a departure from previous decisions of the Court in marital equality cases, where equality was achieved by abolishing the discriminatory rule altogether.[6] Therefore, it cannot

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3 Article 40.1.

4 [1992] 2 IR 333

5 O'Flaherty, Hederman and McCarthy JJ (Finlay CJ and Egan J dissenting).

6 It is arguable, however, that these cases are distinguishable from *McKinley* in that they involve provisions which were objectionable not simply because of their discriminatory application. Some involved rules which were inherently objectionable on policy grounds, such as *The State (Director of Public Prosecutions) v. Walsh* [1981] IR 412). There, the defence of marital coercion, which provided a defence to a wife who committed an offence in the presence of her husband, was abolished. In other cases, a gender-neutral extension of the rule would have been meaningless: in the case of *In re Tilson, infants* [1951] IR 1, the rule giving fathers a permanent right to custody and control of children was abolished; so too in *CM v. TM (No. 2)* [1992] 2 IR 52, where extension of the rule on dependent domicile would have been no solution in that a wife's domicile would have been dependent on that of her husband, and the husband's on that of his wife.

be assumed that the doctrine of advancement would, if challenged on constitutional grounds, be similarly rectified in a positive manner.

1.31 The doctrine represents a useful and frequently invoked mechanism for making advance provision for spouses and children which is currently at risk of being struck down. This risk can be conclusively defeated only by the enactment of legislation.

1.32 *The Commission is therefore of the view that the doctrine of advancement should be extended by statute to apply to gifts made by a wife to her husband or a mother to her children or other persons to whom she is in loco parentis. This is merely to widen the application of a presumption; as with all legal presumptions it is rebuttable, in this particular situation by evidence as to the intention of the parties.*

(4) Abolition of the need for the use of words of limitation in the creation or transfers of easements appurtenant to registered land

1.33 In our earlier Report *Land Law and Conveyancing Law (5) Further General Proposals*[7] we recommended the abolition of the requirement for words of limitation in assurances of unregistered freehold land, the need for such words in transfers of freehold registered land having been abolished by section 123 of the *Registration of Title Act, 1964.* We now note that an anomaly exists in respect of registered land, in that words of limitation are still required for the creation or transfer of easements or other appurtenances to freehold registered land.

1.34 Although section 123 of the *Registration of Title Act, 1964* abolished the need for words of limitation in transfers of freehold registered land, this did not affect the position with regard to the transfer of easements appurtenant to registered land. Neither the definition of "land" contained in the *Registration of Title Act, 1964* nor that contained in the *Interpretation Act, 1937* is sufficiently wide to include easements appurtenant to freehold land. There is no logical reason why transfer of the benefit of easements, which are a lesser interest in land than an absolute fee simple, should still require the use of words of limitation when that requirement has been abolished in respect of the transfer of the fee simple in registered land.

1.35 Accordingly we recommend that section 123 of the *Registration of Title Act 1964* be amended so as to provide that words of limitation should not be required for the creation or transfer of any interest in freehold registered land.

1.36 *In endorsing our earlier recommendation in respect of unregistered freehold land, we would now extend that recommendation to include the creation or transfer of easements or other appurtenances to unregistered freehold land.*

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7 (LRC 44-1992, pp6-7)

(5) Restriction on the creation of certain leases entitling a lessee to acquire the fee simple

1.37 Under the provisions of the *Landlord and Tenant (Ground Rents) (No. 2) Act, 1978*, as amended, (the "1978 Act") persons who hold under certain types of lease (a qualifying lease) are entitled to acquire the fee simple in that property.

1.38 In the case of *Wanze Properties (Ireland) Ltd. v. Mastertron Ltd.*[8] it was suggested that a lessee who did not hold under a qualifying lease could grant a lease to a third party which would itself be a qualifying lease and enable that third party to acquire the fee simple in the property. This would have the effect of nullifying the intention of the superior landlord who had deliberately granted the lease in a particular form believing that that landlord was secure against any application to acquire the fee simple under the *1978 Act.*

1.39 An example of this situation would be where a landowner, seeking to have a shopping centre built on particular land, grants long term leases at relatively nominal rents to the operators of supermarkets including covenants by the lessee to erect the supermarket. In order to avoid the lease being a qualifying lease, provisions enabling alteration of the amount of the rent to be reserved by the leases within twenty six years from the commencement of the leases would also be included. It is likely that the landowner will develop the remainder of the shopping centre itself, constructing smaller retail units and granting occupational leases of perhaps twenty to twenty five years duration to the traders in those units.

1.40 The lease to the supermarket operator will contain a number of covenants which are essential for the operation of the shopping centre, as will the short term leases to the traders. In particular, it is certain that the lease to the supermarket operator will include service charge and insurance provisions and will require that lessee to carry on satisfactory trade and will probably impose particular hours at which trade is to be carried on. The success of such shopping centres depends on the satisfactory operation of the supermarket which is usually referred to as "the anchor tenant".

1.41 While the lease of the supermarket will undoubtedly contain a restriction on the granting of sub-leases, the provisions of section 66 (2) of the *Landlord and Tenant (Amendment) Act, 1980* are likely to nullify that restriction. Paragraph (b) of section 66 (2) removes any requirement that the landlord's licence or consent be required where the lease is made for a term of more than forty years and is made wholly or partly in consideration of the erection of a building so long as the alienation is to take place more than seven years before the end of the term and the landlord is given one month's notice of the proposed alienation.

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8 [1992] ILRM 746

1.42 Accordingly, if a supermarket operator holds under a one hundred and fifty year lease from 1985, which would not be a qualifying lease, that lessee can, without being obliged to seek the landlord's consent, grant a lease which would be a qualifying lease. The existence of the supermarket building would ensure that the lease complied with section 9 of the *1978 Act* and the lease could clearly be drafted so that it complied with alternative condition 7 of section 10, being a lease for not less than fifty years made partly in consideration of payment of a sum of money by the lessee to the lessor, which sum is not less than fifteen times the greatest rent reserved by the lease.

1.43 If such a qualifying lease is created then that lessee can acquire the fee simple in the supermarket and under the provisions of section 28 of the *1978 Act,* on which we have already commented adversely in our *Report on Land Law and Conveyancing Law: (1) General Proposals*[9], and do again later in this Report, it is likely that all the covenants contained in the qualifying lease would cease to have effect. Similar scenarios arise in industrial estates and business parks.

1.44 Lessees holding under certain long leases were originally given rights to reversionary leases under the *Landlord and Tenant Act, 1931* which was amended by the *Landlord and Tenant (Amendment) Act, 1943.* Significant changes were made in the *Landlord and Tenant (Reversionary Leases) Act, 1958* which conferred the right to reversionary leases on persons holding under "building leases" or "proprietary leases". A person holding under a building lease could only acquire a reversionary lease with the consent of any persons holding under a proprietary lease which was defined as a sub-lease under a building lease. The holder of a proprietary lease was entitled to obtain a reversionary lease without the consent of any other party. The *Landlord and Tenant (Ground Rents) Act, 1967* for the first time conferred on lessees a right to acquire the fee simple. This legislation was largely based on the *Reversionary Leases Act, 1958.* Accordingly, it was clear that only a proprietary lessee was automatically entitled to acquire the fee simple and that any building lessee holding under a lease superior to that proprietary lessee had to obtain the consent of that proprietary lessee.

1.45 In the *Landlord and Tenant (Ground Rents) Act, 1978,* a new categorisation of qualifying leases was established. This abandoned the classifications of building lease and proprietary lease and simply listed a number of categories of lease which were deemed to be qualifying leases. The effect of this was that whereas under the old legislation a building lessee had to get the consent of the proprietary lessee, this was no longer required. It was felt, presumably, that the interests of the person holding under the former proprietary lessee were protected because that person still had the right to acquire the fee simple even if a superior lessee had acquired it from the fee holder. However, the effect of this change is that in certain circumstances a person who does not hold under a qualifying lease can create a qualifying lease and thus deprive the landlord of a right or interest in property and in particular the benefit of certain

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9 LRC 30-1989

covenants which may have been put into the qualifying lease not merely for the protection of the landlord but also for the protection of other lessees of that landlord.

1.46 We considered the possibility of making a simple recommendation that a person who holds under a lease which was not a qualifying lease could not in creating a sub-lease make that lease a qualifying lease. This would, however, exclude the situation where a lessee of a lease containing a building covenant which had not been complied with, grants a sub-lease and the sub-lessee erects buildings which comply with the building covenant in the head-lease. If the only reason why the head-lease was not a qualifying lease was the fact that the buildings had not been erected, there seems no reason why the lessee can not create a lease which would be a qualifying lease once the appropriate buildings had been erected.

1.47 *We therefore recommend that a lessee who holds under a lease which is not a qualifying lease may not create a qualifying sub-lease, unless the only reason why the head-lease is not a qualifying lease is that the appropriate buildings have not yet been erected.*

(6) Renewal rights of tenants holding under leases where the landlord is unknown

Occupational Leases

1.48 Tenants who are protected as occupational lessees under Part II of the *Landlord and Tenant (Amendment) Act, 1980* (the "1980 Act") are required to serve a Notice of Intention to Claim Relief in order to claim a new tenancy. That notice does not have to be served in the case of leases expiring by effluxion of time until after the service by the landlord of a notice of termination in the prescribed form. On receipt of such notice the tenant has three months to serve the Notice of Intention to Claim Relief. A tenant may, however, serve a Notice of Intention to Claim Relief in a number of circumstances even if no notice of termination has been served by the landlord.

1.49 Having served the Notice of Intention to Claim Relief the tenant is entitled to bring an Application to the Court seeking a new tenancy. Once such an Application is brought the tenant is entitled, under section 28 of the 1980 Act, to remain in occupation of the property under the same terms and conditions as the expired lease until determination of the Application by the Court.

1.50 Accordingly, it would appear that if a tenant serves a Notice of Intention to Claim Relief and issues an Application to the Court, he or she automatically becomes entitled to the rights conferred by section 28 and therefore cannot claim to be in adverse possession.

1.51 If a tenant either serves a Notice of Intention to Claim Relief but does not issue an Application to the Court, or does not serve a Notice of Intention to Claim Relief, that tenant is not entitled to the rights conferred by section 28. Accordingly, assuming that no rent is being paid or other acknowledgment of a tenancy given, the tenant can claim to be in adverse possession.

1.52 Where a tenant overholds with the consent of the landlord, there are two general provisions of Irish law which may apply. The first is the general Irish common law position that if a tenant remains in occupation following the expiry of a tenancy in writing for a fixed term where the rent was payable yearly (and the tenant pays rent which is accepted by the landlord or otherwise acknowledges the existence of a new tenancy) that tenant is deemed to hold on a yearly tenancy on the same terms as the expired tenancy. There is also a provision in section 5 of Deasy's Act (*The Landlord and Tenant (Amendment) (Ireland) Act 1860*) which provides that where, following the expiry of a lease or tenancy in writing, the tenant remains in occupation following a demand for possession by the landlord, (and again presumably paying rent or otherwise acknowledging the existence of a new tenancy) that tenant is deemed to hold on a yearly tenancy, at the election of the landlord.

1.53 If, however, the tenant does not know the identity of the landlord it would appear that the tenant has no method of enforcing the rights to which the tenant is entitled under the 1980 Act. Although entitled to serve a Notice of Intention to Claim Relief even if no notice of termination is served by the landlord, there is no procedure in the Act for service of Notice of Intention to Claim Relief where the identity of the landlord is unknown. Because no Notice of Intention to Claim Relief can be served and therefore no Application for a new tenancy brought, the tenant cannot have the protection of section 28. Such a tenant would be entitled to claim that he or she is in adverse possession of the property on and from the date of expiry of the lease so long as no rent is paid or other acknowledgment of the tenancy made by the tenant.

1.54 Even if the tenant is in adverse possession, the title of that tenant until the expiry of the relevant Statute of Limitations period is unsatisfactory. Until such time, the best title that such a tenant can claim is the right to a new tenancy under the 1980 Act if and when the tenant becomes aware of the identity of the person entitled to serve a Notice of Termination of Tenancy under section 20(2) of the 1980 Act.

1.55 While the number of tenants in such situations is not likely to be very large, there are certainly tenants holding under long leases, perhaps up to 99 years, at fixed rents which may originally have constituted rack-rents. With the passage of time and enormous inflation in property values, however, they have become nominal and are no longer being collected.

1.56 Section 8 (3) of the *Landlord and Tenant (Ground Rents) Act, 1967* established a procedure whereby persons entitled to acquire the fee simple who do not know and are unable to ascertain the identity of their landlords are

entitled to apply to the County Registrar to appoint a person to convey to them any necessary interest, up to and including the fee simple. The County Registrar may order the tenant to pay into Court, before execution of the conveyance, a sum of money representing the purchase money to which the untraceable party would be entitled for the conveyance of his interest in the land.

Tenants Entitled to Reversionary Leases

1.57 The position of a tenant whose lease entitles the tenant to a reversionary lease but not to acquire the fee simple is not quite as unsatisfactory as the position of a tenant holding under an occupational lease. A tenant who is entitled to a reversionary lease is entitled to remain in occupation under the provisions of section 40 of the 1980 Act and such occupation is not dependent on serving any notice on the lessor or the Court.

1.58 However, such a tenant has no means of obtaining a reversionary lease if the lessor is unknown or untraceable, since where the lease has expired the tenant must await service of notice by the lessor before his right to take action will arise. Section 31 (1)(b) allows application by the tenant to the immediate lessor

> "not later than ... the expiration of three months from the service on him by his immediate lessor or any superior lessor of notice of the expiration of the lease."

1.59 The provisions of the 1967 Act dealing with the untraceable landlord apply only to conveyances of the fee simple and not to reversionary leases.

1.60 *It is recommended that persons holding under leases which have expired and who are entitled to new tenancies under Part II of the 1980 Act or to reversionary leases under Part III of that Act should be entitled, where the persons competent to grant such new tenancies or reversionary leases cannot be traced, to apply to the Circuit Court.*

1.61 The Court, on being satisfied as to the tenant's entitlement to a new lease under Part II or a reversionary lease under Part III and as to the untraceability of the person entitled to the lessor's interest, shall grant such a lease to the lessee upon such terms as the Court shall decide. Such tenants should be required to pay the rents reserved by such new tenancy or reversionary lease into Court as they fall due, pending the establishment of a claim to entitlement to the lessor's interest by any person.

1.62 *Where the lease has expired, the fact that section 31 makes notice by the lessor a prerequisite to the exercise of the right to apply for a new lease leads us to conclude that our recommendation should also apply to tenants entitled to reversionary leases whose landlords are known but who do not serve such notice.*

(7) Amendment of section 28, *Landlord and Tenant (Ground Rents) (No. 2) Act, 1978* - merger of interests in land

1.63 In an earlier Report *Land Law and Conveyancing Law (1) General Proposals* (LRC 30-1989, p32) we drew attention to a difficulty which arises out of a literal interpretation of section 28 of the *Landlord and Tenant (Ground Rents) (No.2) Act, 1978* (the "1978 Act") in that it provides that on the acquisition of the fee simple by a person with an interest in the land, all covenants subject to which that person held the land, save for those specified in sub-section 2 of section 28, would cease to have effect. Our view was that this provision, if construed literally, would affect not only the covenants in any lease under which such a person held the land but also any collateral covenants that might affect the land.

1.64 We have considered section 28 further and are concerned that it contains other unsatisfactory provisions. Section 28 had its origins in section 31 of the *Landlord and Tenant (Ground Rents) Act, 1967* (repealed by the 1978 Act). Section 31 was limited in its application to situations in which a lessee enlarged his interest into a fee simple under the provisions of the 1967 Act.

1.65 Section 28(1) of the 1978 Act contains no such restriction. It simply states that

> "[w]here a person having an interest in land acquires the fee simple in the land, all covenants subject to which he held the land, other than a covenant specified in sub-section (2) shall thereupon cease to have effect ..."

1.66 The effect of this sub-section is not confined to persons who are entitled to acquire the fee simple under Part II of the Act, nor is it confined to persons who enlarge an existing interest in land into a fee simple by acquiring the fee simple and any intermediate interests under section 8 of the 1978 Act.

1.67 This difference between the former section 31 and section 28 (1) gives rise to a great anomaly in the situation where a head landlord grants a lease of a plot of land on which the lessee under the head lease constructs a building, which that lessee as an intermediate landlord then leases to a sub-tenant for a short term, say twenty to thirty-five years, under a full repairing and insuring lease with restrictive covenants as to the use of the premises. The sub-tenant has no entitlement under the 1978 Act, as amended, to acquire the fee simple. The head lease may well have been drafted in such a way as to exclude the intermediate lessee from acquiring the fee simple under the legislation.

1.68 If the sub-tenant acquires the interest of the head landlord by negotiation, the sub-tenant will then be a person having an interest in land who has acquired the fee simple. Under section 28 (1) the effect of that purchase

would be that all the covenants, other than those specified in sub-section (2), would cease to have effect. The sub-section (2) covenants are those which 1) protect or enhance the amenities of any land occupied by the immediate lessor 2) relate to the performance of a duty imposed on the immediate lessor and 3) relate to a right of way over the acquired land or a right of drainage or other right necessary to secure or assist the development of other land.

1.69 The occupational lease from the intermediate lessee to the sub-tenant may well contain such covenants, but it is not at all certain that the principal covenants in a full repairing and insuring lease would fall within sub-section (2), even where the lessor in that lease does occupy land the amenities of which are protected or enhanced by covenants in the lease. Covenants such as those for the payment of rent, insurance premiums or service charges, would not be saved by sub-section (2).

1.70 It cannot have been the intention of the legislature that a sub-tenant who "leapfrogs" his immediate lessor and acquires the fee simple from the head lessor, would thereby be entitled to escape from liability under the covenants in the sub-lease, which remain "live". We have already criticized the section for being too wide in that it apparently applies to covenants other than those between a lessee and a lessor whose interest the lessee acquires. On further consideration we are satisfied that the rendering ineffective of covenants should apply only where such covenants are contained in a lease where the lessee acquires the lessor's interest and only apply where a lessee has a right to acquire the fee simple under Part II of the 1978 Act and exercises that right by enlarging his interest into a fee simple by acquiring the fee simple and any intermediate interests.

1.71 Another issue which arises in relation to section 28 is the restriction on the creation of new covenants. It is far from clear why a person owning the fee simple and another person having an interest in land whether that person is a mediate or immediate lessee, and who does not have the right to acquire the fee simple under Part II, cannot agree on the purchase of the fee simple by that person and thereupon enter into fresh covenants. In our earlier Report we raised the question of the possible unconstitutionality of the provisions of section 28. It also appears to us that so long as the section contains a restriction on parties involved in the acquisition of a fee simple outside the terms of the Act creating new covenants, it may well be open to challenge on the grounds of interference with the property rights guaranteed by Article 43 of the Constitution.

1.72 It is of course appropriate that where a lessee exercises a right to acquire the fee simple under Part II of the Act, such lessee should not be required to enter into any fresh covenants. Why such a lessee should be precluded from entering into fresh covenants is not obvious, given that the parties may wish to negotiate the matter on being properly advised.

1.73 Since the Commission commenced its further study of section 28, the *Landlord and Tenant (Ground Rent Abolition) Bill, 1997* was introduced in the Dáil. It fell with the dissolution of the Dáil, but the Minister for Justice has

recently announced his intention of proceeding with the Bill. As introduced, it proposes the repeal of the *Landlord and Tenant (Ground Rents) Act, 1967* and of the *Landlord and Tenant (Ground Rents) (No. 2) Act, 1978*, including section 28. The Bill introduces new provisions relating to the enlargement of existing interests in land into fees simple and consequential provisions. Section 48 of the Bill deals with covenants; while it generally renews the provisions dealing with covenants in the 1978 Act, there is one significant difference in that it applies only

> "*[w]here the interest of a person in land is upon the appointed day* enlarged to the fee simple all covenants subject to which the person held the land prior to the appointed day other than a covenant specified in subsection (2) of this section shall cease to have effect."[10]

1.74 The reference to the enlargement of an interest into a fee simple appears clearly to be a reference to section 7 of the Bill which confers on a person to whom Part II of the Bill applies the right to have his interest in land enlarged into a fee simple. Accordingly, it would appear that the provisions of section 48 apply only to cases where an existing interest in land has been enlarged into a fee simple under the Bill and does not extend, as section 28 of the *Landlord and Tenant (Ground Rents) (No. 2) Act* did, to acquisitions other than under the Act. We welcome this change. Should the Bill be enacted without any amendment of this draft section, it would remedy the situation created by section 28 (1) of the 1978 Act. Unfortunately, section 48 continues the provision contained in section 28 which provides that "all covenants subject to which the person held the land" were to cease to have effect.

1.75 *This is the matter which was the subject of our earlier Report and we renew the recommendation made in that Report. We recommend that in any amending legislation the provision relating to the relaxation of covenants should only apply where a person holding under a qualifying lease enlarges that interest into a fee simple under the provisions of the legislation.*

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10 Emphasis supplied

CHAPTER 2: ABOLITION OF SEALING AS A REQUIREMENT FOR THE EXECUTION OF A VALID DEED

2.1 The Commission has considered the question of whether sealing should remain an essential requirement for the execution of a valid deed. The issue arose initially in connection with the specific difficulties experienced by foreign companies wishing to engage in property transactions in Ireland, many of which are not required by their domestic law to have a seal. We have decided, however, to consider the formalities necessary in documents transferring interests in land as a general matter.

I. IRISH LAW

A. Execution of Instruments Generally

2.2 Irish law effectively requires that any instrument creating or dealing with any existing interest in land be signed (by an individual), sealed (both by individuals and corporate bodies) and delivered in order to become effective. Signatures of individuals and sealing by corporate bodies are required to be attested. It is true that conveyances of fee simple interests in land can still be effected by livery of seisin but this method has fallen into total disuse.

2.3 This situation was brought about by the provisions of section 2 of the *Real Property Act, 1845*, which provided that from 1845 "all corporeal tenements and hereditaments shall as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery".

1. Sealing

2.4 At Common Law before an instrument in writing could be regarded as a deed it had to be executed under seal. Under Irish law, corporate bodies impress their corporate seals on such instruments. Formerly, most individuals who required to execute deeds had their own personal seals. More recently, red wafers were attached to documents which were then touched by the individuals who said the words "I deliver this as my act and deed". It has become the practice for an individual to sign (or make his or her mark on) the instrument and to have such execution attested by a witness who appends his or her name to the attestation clause.

2.5 The importance of an instrument being regarded as a deed is twofold:

1. At Common Law a contract for which there is no consideration cannot be enforced unless it is under seal.

2. Transfers of interests in land are normally required to be by deed.

2.6 Transfers of interests in land must be completed with sufficient formality to ensure their authenticity. On the question of whether that requirement mandates the retention of deeds, we must emphasise that the scope of this project does not extend to a consideration of whether deeds should continue to be required in the situations currently mandated by the law. We are concerned here with the question of the formalities required to execute a valid deed transferring interests in land.

2. Delivery

2.7 The requirement of delivery has its origin in the old common law method of the transfer of land, namely feoffment with livery of seisin. Livery of seisin involved a formal handing over of possession of the land, such handing over taking place on the land itself in the presence of witnesses.

2.8 In modern practice, delivery consists of the physical handing over of the instrument of transfer. In the case of a sale, this normally takes place at the completion of the sale, and in exchange for the balance of the purchase money. The instrument itself will contain the words "signed, sealed and delivered" in the attestation clause, usually in respect of all the parties, even though delivery is only required in the case of a grantor. Indeed, execution of a fee simple assurance by a grantee is only required if such assurance contains a certificate required by Stamp Duty legislation.

3. Delivery in escrow

2.9 It is standard practice among conveyancers in Ireland to engross deeds in a form which provides for them to be "Signed, Sealed and Delivered by the said A B in the presence of ...". Deeds are in fact usually signed and sealed by a Vendor some time in advance of the actual completion of the transaction. (It is not convenient to delay the execution of purchase deeds until the closing of the sale, partly because the Vendor will almost certainly be executing other instruments which require attestation by a Commissioner for Oaths or Practising Solicitor in connection with the transaction.) It is not the intention of the Vendor that such a deed would be deemed to be delivered on execution. The intention of the Vendor (shared by the Purchaser) is that delivery is to take place on completion of the purchase and in exchange for the balance of the purchase price. The executed deed is held by the Vendor's solicitor pending completion

of the purchase transaction. On occasion a difficulty may arise at the completion, often the temporary unavailability of a document, and again, for convenience, the purchase deed may actually be handed over to the purchaser's solicitor who agrees to hold it in escrow pending production of the missing document. Thus, although the purchase deed has physically been handed over, the existence of this escrow postpones delivery until the escrow is released on the production of the missing document.

2.10 Wylie points out in this regard that

> "The condition of the escrow is ... that the balance of the purchase money must be so handed over and the deed will not operate, *even though in fact handed over*, so long as any of this remains outstanding",[1]

which demonstrates once again that delivery is, in fact, a misnomer. In England and Wales, section 36A(6) of the *Companies Act 1985* (the "1985 Act") allows the presumption of delivery (and thus of an immediately effective deed) to operate in favour of the Purchaser where the document has been signed according to the provisions of the Act and which makes clear on its face that it is intended to be delivered upon signing. The section makes no specific mention of escrow, so that we may assume the corollary of section 36A(6) to be that in a situation where some condition is required to be performed in the future, it is advisable for the parties to make clear on the face of the document that it is *not intended* to be delivered upon signing.

B. *The Companies Act, 1963*

2.11 The Irish *Companies Act 1963* (the "1963 Act") provides that:

> 38(1) Contracts on behalf of a company may be made as follows:
>
> (a) a contract which if made between persons would be by law required to be in writing and to be under seal, may be made on behalf of the company in writing under the common seal of the company;
>
> (b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied;
>
> (c) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing may be made by parol on behalf of the company by any person acting under its authority, express or implied.

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1 JC Wylie, *Irish Conveyancing Law* (3rd. edition, 1996) para 18.125 (emphasis supplied).

2.12 The effect of the section is that instruments between individuals which require to be made under seal, e.g. instruments conveying an interest in land, must similarly be made under seal when made by companies. Contracts other than those which must be made under seal may be so made; this is an internal matter for which provision may be made by the company in its Articles of Association. The 1963 Act also provides that a company which transacts business outside the jurisdiction may, if permitted to do so by its Articles of Association, employ an official seal which displays the names of all the territories in which it is to be used. It further provides that a document which requires authentication may be signed by a director, secretary or other authorised officer of the company and need not be under the common seal.

2.13 That Irish law requires strict adherence to the formalities regarding affixing of a seal, despite the enabling nature of the language of section 38(1), is evident from the case of *Safeera Ltd. v Wallis and O'Regan*.[2] Morris J held that the Purchaser had not acted unreasonably in refusing to close the sale until the seal had been attested by a second director in accordance with the Vendor's Articles of Association. He pointed out that since there was no provision in Irish law similar to section 74 of the English *Land Purchase Act 1925*, which permits purchasers to assume that a deed has been properly executed by a company if a seal purporting to be that of the corporation has been affixed and attested by persons with apparent authority to do so, the onus remained on a company to comply strictly with its Articles of Association in affixing its seal and upon the purchaser to ensure such compliance.

2.14 The Court concluded that the purchasers were justified in refusing to complete the contract until the date on which they were notified that the requisite signature had been affixed. The significance of the case lies in the emphasis on strict compliance with the Articles of Association and justifies the caution exercised by practitioners in reviewing the memorandum and articles of companies when checking whether documents have been properly executed.

2.15 As the law now stands, where a Vendor Company in a sale for valuable consideration fails to execute a purchase deed in accordance with the appropriate requirements (its Articles of Association or Table A of the relevant Companies Act) and the sale is subsequently completed, the Vendor Company will hold any outstanding interest, remaining vested in it by reason of the defective execution, in trust for the Purchaser.

2.16 Should that Company be dissolved subsequently the outstanding interest will not vest in the Minister for Finance under the *State Property Act, 1954* (as would property beneficially owned by the Company, subject of course to the Minister's right to disclaim) because of the provisions of section 28 (2) of the Act which states that upon dissolution

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2 July 12 1994, High Court (unreported).

(a) all land which was vested in or held in trust for such body corporate immediately before its dissolution (other than land held by such body corporate upon trust for another person) shall, immediately upon such dissolution, become and be the property of the State... .

2.17 Only two options exist for the Purchaser seeking to have the defective deed rectified:

1. An application, either to the Registrar of Companies or to the Court, to have the Company restored to the Register for the purpose of re-executing the deed; or

2. An application to the Court under section 26 of the *Trustee Act 1893* for a declaration that the property purporting to pass under the deed is vested in the Purchaser.

2.18 Each of these courses is costly. The Commission believes that where a company, subsequently dissolved, has defectively executed an assurance of land or an interest in land, so that while the beneficial interest is vested in the transferee, an interest purported to have passed under the deed remained vested in the Company by reason of the defective execution of the deed, then the law should provide that *after the expiry of 12 years from the date of the defective deed any interest outstanding as a result of such defective execution should be deemed to be vested in the transferee by the operation of a Statute of Limitation.*

2.19 The problems associated with the need for companies to execute documents under seal are twofold. Firstly, the Land Registry requires that all transfers of interests in land, whether freehold or leasehold, by a corporate body, must be executed under seal. As far as individuals are concerned the forms of transfer included in successive Land Registration Rules have always included the words "signed, sealed and delivered". While sealing is not explicitly required under the *Registration of Title Act, 1964*, the forms prescribed under the Land Registration Rules 1972 for the transfer of registered land require signing, sealing and delivery.

2.20 Secondly, the *Real Property Act 1845* made the "deed of grant" the standard form of conveyance in Ireland, as in England. The seal is therefore required in respect of conveyances of both registered and unregistered land.

2.21 In many civil law countries there is no statutory requirement or common practice that a corporate body execute documents by means of a seal. Directors or other officers are specially nominated, and their names entered in official registries, as the persons authorised to execute documents on behalf of the corporate body.

2.22 Difficulties arise when companies from these jurisdictions wish to either register an interest in Irish land or to convey such an interest. The fact that the Land Registry will accept a seal affixed by a foreign corporation as *prima facie* evidence of due execution, and in general will not enquire further, gives rise to the anomalous position that such corporations may formalise deeds to the satisfaction of Irish law by affixing seals which have no status under the law of the jurisdiction in which they were incorporated.

II. THE LAW IN JURISDICTIONS OTHER THAN THE UNITED KINGDOM

2.23 Most civil law countries require more formality than does Ireland; important documents must be executed before a notary or other dignitary. In New Zealand the requirements of sealing and delivery were abolished by the *Property Law Act 1952*, section 4. In Australia, sealing has been abolished as an absolute requirement in three states (Victoria, Queensland and New South Wales); its abolition has also been recommended by the *Law Reform Commission of Tasmania*.[3] Those states which no longer require sealing provide that its absence does not invalidate the document if there is an attested signature and the 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 has been retained in all states.

III. LAW REFORM IN THE UNITED KINGDOM

A. Individuals

2.24 The question of formalities for the valid transfer of interests in land was addressed by the Law Commission of England and Wales (the "Law Commission") in 1985.[4] A deed is described as a document

> "whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property has passed."[5]

2.25 Section 52 of the *Law of Property Act, 1925* makes all conveyances of interests in land void for the purpose of conveying or creating a legal estate unless made by deed. A deed is also required to create a binding obligation where there is no consideration. In these two cases failure to use a deed will

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3 "[A] document which is intended from its form to be a deed should no longer require sealing", para 2.16, Law Reform Commission of Tasmania *Report and Recommendations on 15 Conveyancing Matters* (1984). The Commission did not differentiate between individuals and corporations.

4 *Transfer of Land - Formalities for Deeds and Escrows* Working Paper No. 93 (1985).

5 Norton on Deeds (2nd. edition, 1926), p3, cited at Law Commission Working Paper No. 93, para. 2.1. This definition appears to exclude one well-known category of deed, the Deed Poll, a unilateral document the most common form of which is the document used to evidence a person's change of name.

render the transaction completely ineffective at law.[6] While no statutory provision analogous to section 52 exists in Irish law, the *Real Property Act, 1845* made the "deed of grant" the standard form of conveyance in Ireland, as in England. Unlike England, however, the forms of conveyance used prior to the Act, such as feoffment with livery of seisin and the bargain and sale,[7] have not been abolished in Ireland though they have, in practice, become obsolete.

2.26 In its Report, the Law Commission recommended that sealing be abolished, but only in relation to the execution of documents by individuals.[8] It was of the view that where companies were concerned, the seal was "not simply a hollow formality but a real symbol of the corporation, specific to that body".[9]

Alternatives to Sealing

2.27 While the Law Commission recommended abolition of sealing in respect of individuals, it was concerned that alternative formalities needed to be put in place to protect against the inadvertent execution of deeds and the confusion between an unenforceable agreement lacking consideration and an enforceable promise made by deed, which it regarded as a danger if signature alone were required.

2.28 As we shall see sealing in the UK was ultimately replaced, in the case of deeds executed by individuals, by a provision requiring signature in the presence of a witness who attests the signature or, alternatively, signature by a third party at the party's direction and in the presence of two witnesses who each attest the signature. These changes were effected by the *Law of Property (Miscellaneous Provisions) Act 1989*.[10] The Act also implemented the Law Commission's recommendation[11] abolishing restrictions on the substances on which a deed may be written and the requirement that authorization by one party to another to deliver a deed be itself a deed.

1. Attestation

2.29 At the time of the Law Commission's 1985 Working Paper,[12] the law of England and Wales already required attestation of a signature on a deed; it

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6 Working Paper No. 93, *op. cit.*, at para 2.1.

7 These were abolished in England by section 51 of the *Law of Property Act, 1925*; see JC Wylie *Irish Conveyancing Law* (2nd edition, 1996), para. 17.02.

8 The Law Commission, *Transfer of Land - Formalities for Deeds and Escrows* Report No. 163 (1987).

9 Working Paper No 93, *op. cit.*, para. 10.1.

10 The Act applies to all deeds, not just those which transfer an interest is land. The title of the Act is therefore potentially misleading.

11 Report No 163 *op. cit.*

12 Working Paper No. 93, *op. cit.*

was also obligatory in registered conveyancing.[13] The Law Commission recommended that this be made a general requirement, on the basis that it would distinguish deeds from mere signed documents, would emphasise to the person executing the deed the importance of his act, would give rise to an evidential presumption of due execution and might assist in the prevention or at least the detection of forgery. A provision similar to that currently in force for the attestation of wills was suggested.

2.30 This view was affirmed in the Report despite concerns that imposition of an additional formality could lead to some of the same difficulties as are created by the law relating to the attestation of wills. The Law Commission wished, in making this recommendation, to formalise current practice and avoid adding an additional layer of complexity. It therefore recommended that while the signature on a deed should be witnessed and attested by at least one person, no restriction should be imposed as to who could act as a witness, nor was any specific form of attestation proposed. It did not favour, for example, a prescribed attestation clause, on the view that if it were written wrongly it would invalidate an otherwise valid deed.

2. Face of document

2.31 In addition, the Law Commission was of the opinion that it should be clear on the face of the document that it was intended to be a deed. This is generally apparent because the word "indenture"[14] appears at the top of the document; alternatively a seal could still be used. It also suggested that a court should be free to find a document to be a deed, even if it is not expressed to be such, only where there is evidence for such a finding within the document itself. The Law Commission referred to the importance of avoiding a situation where a document is held to be a deed simply because it was used in a transaction where a deed is required: this would amount to the abolition of formalities altogether:

> "to say that a conveyance is deemed to be a deed because the transaction is one where a deed is required would be to say that the formality was complied with because the formality was required.[15]"

2.32 In its Report, the Law Commission affirmed these recommendations, stating in addition that it did not favour a strict statutory format, preferring courts to exercise discretion in deciding whether a particular document manifested the requisite intention. The discretion envisaged by the Law

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13 In England and Wales by section 73 of the Law of Property Act, 1925; in Ireland there is no statutory provision but forms of transfer prescribed by the Land Registry Rules 1972 require signing, attestation, sealing and delivery.

14 "A deed between two or more parties, with mutual covenants, executed in two or more copies, all having their tops or edges correspondingly indented for identification and security": *Oxford English Dictionary*. "A deed to which two persons are parties and in which these enter into reciprocal and corresponding grants or obligations towards each other": *Black's Law Dictionary*.

15 Working Paper No 93, *op. cit.*, para 8.2(iv).

Commission was, however, limited - courts would not be free to evaluate the document in the context of other evidence in coming to a conclusion on whether a deed was intended. These views were incorporated into the *Law of Property (Miscellaneous Provisions) Act, 1989*.[16]

3. Signature

2.33 The Law Commission recommended that signature, meaning some personal authentication of the document by hand-written signature or individual mark, should remain a requirement. It decided against a requirement that all parties to the deed should sign it, reasoning that it would be likely to increase delay and costs and could cause administrative difficulties in the context of conveyancing.

4. Delivery

2.34 As we have seen, the original delivery was livery of seisin, where actual possession was handed over without any accompanying documents. When documents were introduced, the delivery of the document was seen as the equivalent of livery of seisin.

2.35 What constitutes delivery has changed from being the physical handing over of the deed (which signified the intention of the grantor to be bound by it) to the requirement merely that there are acts and words sufficient to show that the grantor intended the document to be a deed immediately binding on him.[17]

2.36 The Law Commission reluctantly recommended retention of the existing requirements relating to delivery. If it were abolished, a deed would become effective upon signing and sealing, a situation which in the Law Commission's view could cause significant inconvenience to the grantor who might wish to sign and seal the deed in advance for convenience and still have the option of withdrawing from the transaction.

2.37 The opposite conclusion had been reached in the Working Paper, where the Law Commission had provisionally recommended abolition of delivery as a prerequisite to the making of a valid deed, on the view that

> [f]rom being a matter of physical fact, it has become a question of the deliverer's intention to be bound. Although as a rule, this intention does have to be sufficiently evinced, it need not be communicated to any person in particular (i.e. not necessarily to the person taking under the deed) and may be difficult to prove. ... If the grantor wished to postpone the actual operation of the deed, for example by preventing the grantee

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16 Section 1(2)(a).
17 Working Paper No.93, *op. cit.*, para 4.4.

from obtaining the legal estate until the price were paid, he could do so *by imposing express conditions to that effect.*[18]

2.38 A further difficulty identified in the Working Paper was that the current law runs counter to what one, in logic, might expect: that until the document is physically handed over delivery has not taken place and that therefore the document is capable of recall. In the Report, however, the Law Commission's view was that "if delivery were not a requirement, a deed would become effective (under the present law) as soon as it was signed and sealed".[19] It did not discuss the option, raised in the Working Paper, of a grantor imposing express conditions as to when the document is to take effect.

B. Companies

2.39 In its Eighth Report, the Law Reform Committee (of England and Wales)[20] looked at the reasoning behind the requirement that for contracts and other documents to be legally binding on the company making them they must be executed under its common seal:

> a corporation, being an invisible body, cannot manifest its intention by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole.[21]

2.40 The evidence adduced by the Committee demonstrated that the rule was being widely disregarded in practice. Strict adherence to it would result in serious inconvenience, particularly to those corporate bodies which enter into large numbers of agreements requiring to be made under seal. Furthermore, the rule was subject to many exceptions, for example in the case of contracts for trivial matters of daily occurrence. Difficulty arose for the body in question to decide whether, in a particular instance, a seal was required. The other party was also in difficulty as it was often unclear whether or not the company with which it was contracting was one which fell within the exception.

2.41 The Committee commented that a "law which is ignored because it is both uncertain and impracticable and which, if enforced, may lead to inequitable results is a bad law".[22] It pointed out that there was nothing to prevent a corporation from instituting rules requiring that particular classes of contract be

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18 *Ibid.*, at para 8.2(iv) (emphasis supplied).
19 Report No 163, *op. cit.*, para 2.8.
20 *Sealing of Contracts by Bodies Corporate*, HMSO 1958 (Cmnd 622).
21 Blackstone's Commentaries Vol I p 475.
22 Eighth Report, *op. cit.*, para 13.

executed under seal, but this was a matter of internal management and discipline and would not affect the enforceability of the contract by a party unaware of the particular rule provided that the contract was not one which if entered into by a natural person would have to be under seal.[23]

2.42 While the Committee criticised the seal as having little value in modern society in the realm of either authentication or of expressing the collective voice of a corporate body, in recommending that contracts entered into by companies be dealt with in the same way as those made by individuals it did not address the usefulness of the seal *per se*.

2.43 The Committee recommended that section 32(1) of the *Companies Act 1948*, which applied only to specific types of corporate body (including non-trading and charitable corporations) be extended to cover all types of corporate bodies. This recommendation resulted in the passing of the *Corporate Bodies' Contracts Act 1960*, which enabled corporations to enter into contracts with no more formality than was required in the case of individuals.[24]

Recent Legislation in the United Kingdom

2.44 Despite the Law Commission's view that the seal remained an important symbol of corporate personality,[25] the requirement for companies to have seals was abolished by section 130 of the *Companies Act 1989*.

2.45 Under that section, section 36 of the *Companies Act 1985* was substituted by section 36A, under which a new set of formalities for the execution of documents by companies was instituted. A company is no longer required to have a common seal and a document signed by a director and the secretary, or by two directors of the company has the same effect as if it were executed under the common seal of the company. In the particular case of deeds, a document which makes clear on its face that it is intended to be a deed and which has been executed as prescribed by the Act, has effect upon delivery as a deed unless a contrary intention is proved.

2.46 Section 36A of the *1985 Act* does not distinguish deeds transferring interests in land, from other types of deed. The common law requirement that powers of attorney be conferred by deed remains,[26] so that domestic corporations must now execute such deeds in the manner outlined in section 36A. For a foreign company wishing to convey an interest in land, the requirements are somewhat different. If it seeks to rely on the law of its jurisdiction of incorporation, it must provide evidence of compliance with the law of that

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23 *Ibid.*, at para 16.

24 A similar provision appears in the Irish *Companies Act, 1963*, section 38.

25 Report No. 163, *op. cit.*

26 In Ireland, the *Powers of Attorney Act, 1996* has dispensed with the requirement that a power of attorney be made under seal: section 15(2). Such power may now be created by the signature of the donor or at his or her direction, in which case the signature must be attested: section 15(1).

jurisdiction pertaining not only to the execution of deeds of conveyance but also where appropriate to deeds (or other instruments required in that jurisdiction) conferring a power of attorney, as well as with the company's articles of association.[27]

2.47 The *Foreign Companies (Execution of Documents) Regulations 1994* extends these provisions to companies incorporated outside the UK so that a document executed in accordance with the laws of the territory in which the company was incorporated has the same effect as if it had been executed by a UK company in accordance with UK law.

Recent Legislation - Response of the Law Commission of England and Wales

2.48 These developments have not been entirely successful in practice. In response to representations by practitioners to the Department of Trade and Industry, the Law Commission was asked to examine the present law on the execution of documents by corporate bodies. Its main focus was on the identification and removal of practical difficulties caused in large part by the lack of consistency between the relevant sections of the *Companies Act 1985*, the *Law of Property (Miscellaneous Provisions) Act 1989* and the *Law of Property Act 1925*.

1. Delivery

2.49 Changes in the law relating to delivery, effected by the *Law of Property (Miscellaneous Provisions) Act 1989* and the *Companies Act 1989*, have proved problematic. The *Law of Property (Miscellaneous Provisions) Act 1989* abolished the requirement that authority to deliver a deed be itself by deed, and created a conclusive presumption in favour of a purchaser of authority to deliver a deed where a solicitor, licensed conveyancer or notary public, or any agent or employee of theirs, purports to deliver an instrument as a deed on behalf of a party to the instrument.

2.50 It is important to note that these provisions apply to individuals and companies alike. Section 36A of the *Companies Act 1985* as inserted by section 130 of the *Companies Act 1989* lays down additional provisions for companies, which however, give rise to difficulty. Section 36A(5) creates a presumption, rebuttable if a "contrary intention is proved", of delivery upon execution if a document makes clear on its face that it is intended to be a deed. Section 36A(6) provides in favour of a purchaser that a document will be deemed to have been duly executed by a company if it purports to have been signed by two directors or a director and the secretary of the company. This is followed by a

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27 The *1994 Regulations* provide that "a contract may be made ... on behalf of a company, by any person who, in accordance with the laws of the territory in which the company is incorporated is acting under the authority (express or implied) of that company": *Companies Act 1989* section 36 as extended by section 4(1)(b) of the *1994 Regulations*.

provision to the effect that if the document makes clear on its face that it is intended to be a deed, it is deemed to have been delivered upon being so executed. The Law Commission comments that this arguably creates an irrebuttable presumption in favour of delivery[28] given, first, that there is no reference to a contrary intention and secondly, its wording as a deeming provision.

2.51 These inconsistencies have given rise in practice to a lack of clarity as to the nature of the delivery in particular cases. Delivery may be achieved in one of two ways; by delivery of the deed so that it does not take effect until certain conditions, expressly set out in the deed or implied from the circumstances of the transaction, have been satisfied[29] (such an instrument being known as an escrow), or by authorising a third party (usually the maker's solicitor) to deliver it on behalf of the maker.

2.52 It is important to note that conveyancing practice in Ireland is not in accordance with that described above. It appears to be accepted by all concerned - vendors, purchasers and their solicitors - that the Vendor's solicitor has implied authority to hold a deed executed by the Vendor pending completion of the purchase although on the face of the deed it is stated to have been signed, sealed and delivered by the Vendor.

2.53 In England and Wales, prior to the *Law of Property (Miscellaneous Provisions) Act 1989* authority to deliver was itself required to be under seal. The differing methods are important in practice: if delivery is in escrow it is irrevocable and cannot be recalled by the maker whereas if it is to be performed by a third party it is capable of recall since while it is in the hands of that third party it has not yet been delivered. While these methods are legally distinct, it is not always clear in practice which has been used. The Law Commission notes[30] that prior to the 1989 legislation there was a line of cases which held that where a person executed a deed and handed it over to a solicitor pending completion, it was assumed that the document was executed as an escrow. The difficulty was that it could not then be recalled. This could be avoided only where the deed was sealed but not delivered and authority was given by deed to the solicitor to deliver on behalf of the maker, something which was rarely done in practice.[31]

2.54 These problems have been compounded by the various presumptions in the 1989 Act. While the Law Commission favoured repeal of the irrebuttable presumption of delivery in section 36A(6) of the *Companies Act 1985*[32] it

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28 *The Execution of Deeds and Documents on Behalf of Bodies Corporate*, Consultation Paper No. 143, para 6.23.

29 The Law Commission has noted that this should be distinguished from the situation in which a document is delivered as a deed but certain terms therein become operative only upon satisfaction of certain express conditions laid down in the deed; Consultation Paper No 143, *op. cit.*, para. 6.5, n.3.

30 Consultation Paper No. 143, *op. cit.*, para 6.13 *et seq.*

31 As far as solicitors and clients are concerned, this rule is ignored in conveyancing transactions. The solicitor (usually that of the Vendor) holds the sealed document in escrow until the sale is actually completed, when it is handed over. On rare occasions it may even be handed over to the Purchaser's solicitor (or a lending institution's solicitor) to be held on behalf of the Vendor.

32 Consultation Paper No. 143, *op. cit.*, para 11.63.

defended retention of the delivery requirement *per se,* despite the difficulty in determining whether an intention to deliver existed, on the view that it should be possible for practitioners to make clear to their clients the basis on which deeds are sent to them for execution - whether in escrow or as a "delayed delivery".[33] This could be done by sending the document under cover of a letter asking for him or her "to execute and return it to me for delivery on your behalf on completion".

2.55 It has been suggested[34] that the effect of section 36A(5) and (6), by providing that execution and delivery may be deemed to have occurred on signing and/or sealing, may deprive the parties of control over the timing of the transaction. If this is the correct interpretation of the section, we would not favour such a clause. As we have already noted, it has long been accepted in practice in Ireland that a company may deliver a deed in escrow, the deed not taking effect until such time as some further action is taken in respect of it.

2. Face of document

2.56 Problems of interpretation have arisen also as to what is necessary to fulfil the "face-value" requirement; this is partly due to inconsistencies between the various pieces of legislation laying down this requirement, and also to judicial interpretation and Land Registry practice. In *Johnsey Estates (1990) Ltd v. Marketworld Ltd and Others*[35] the mere fact that a contract was executed under seal was held to be sufficient to show an intention to create a deed. The Law Commission commented that this finding would appear to be wrong in principle:[36] it would, in the case of registered companies, dispense with the requirement in section 36A(5) of the *Companies Act 1985* that a document executed by a company must make clear on its face the intention to create a deed in order for it to take effect as a deed; furthermore, section 36A(3) specifies that "the following subsections apply whether [the company] does or not [have a common seal]".

2.57 The position of the Land Registry of England and Wales is that a document which describes itself as an instrument of a type which by its nature requires to be a deed is sufficient to satisfy the face value requirement. To accept this position would, however, be to risk abolishing formality altogether, a point which the Law Commission previously made in a 1985 Working Paper.[37]

2.58 Having considered a provision which would make the affixing of a seal sufficient evidence of an intention to create a deed, the Law Commission

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33 *Ibid*, para 11.60.

34 Cullen, S *Estates Gazette*, August 2, 1997.

35 10 May 1990. The Law Commission based its comments on the case on a transcript of the judgment, which has not yet been reported. Parts of the decision have been noted in (1996) NPC 81 and [1996] EGCS 87. The decision has not been appealed.

36 Consultation Paper No 143, *op. cit.*, para 11.8.

37 Working Paper No. 93, *op cit.*, para 8.2(iv).

ultimately rejected this approach[38] on the view that it would be inconsistent with the recent legislation which sought to establish alternatives to the seal and would undermine the face value requirement; some companies, particularly small ones, may find it convenient to affix a seal to all kinds of documents without wishing to make deeds. Furthermore, to suggest that a document made under seal thereby acquired special significance flew in the face of the policy behind section 1 of the *Law of Property (Miscellaneous Provisions) Act 1989.*

2.59 The Law Commission favoured a provision to the effect that an instrument is not a deed merely because it has been executed under seal.[39] It asked for submissions on whether, if it were conceded that the face value requirement should be made more specific, an instrument should be required to expressly describe itself as a deed or, alternatively, contain a prescribed form of attestation clause.

IV. THE COMMISSION'S RECOMMENDATIONS

A. General

2.60 The Commission recommends that where a company, subsequently dissolved, has defectively executed an assurance of land or an interest in land, the law should provide that *after the expiry of 12 years from the date of the defective deed any outstanding interest should be deemed to be vested in the transferee by the operation of a Statute of Limitation.*

B. The Requirements for a Deed

1. Attestation

2.61 There is in our view a strong argument that as an alternative to sealing, individuals wishing to make effective deeds should be able to do so by signing the instrument (or acknowledging their signature) in the presence of a witness who attests the signature.

2.62 Where a party to a deed directs another person to sign on his or her behalf, the Commission is of the view that the witness should observe the direction as well as attest the signature. This requirement provides a safeguard against undue influence being exerted on the grantor by a person who then purports to sign on his or her behalf.

2.63 Where a person executes a deed by affixing his mark rather than his signature, witnesses should advert in some way to this in the attestation clause. For example, the witness may state that A signed by setting his mark on the

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38 Consultation Paper No. 143, *op. cit.*, para 13.9.
39 *Ibid.*

instrument, "he being unable to write by reason of physical infirmity" or "the purport and effect of the same having been previously explained to him and he appeared perfectly to understand same".[40] Likewise, amendments made to the deed prior to its execution should properly be referred to in the attestation clause.

2.64 Furthermore, evidence may be provided in the form of a statutory declaration. While the making of such declarations is not obligatory, it is good practice for witnesses to clarify the circumstances which necessitated execution by mark by making a statutory declaration as soon as possible after attestation.

2.65 While it is not mandatory for witnesses to do so,[41] it is the Commission's view that the procedures referred to in the preceding two paragraphs should be followed as a matter of good conveyancing practice. We do not favour making the procedures mandatory, however, on the view that to do so would increase the risk of invalidating deeds in respect of which extrinsic evidence may be readily available to clarify any unusual circumstances.

2.66 As it is unlikely that the long established practice of individuals sealing deeds would be abandoned overnight, and in view of the fact that under our recommendations it will continue to be necessary for corporations sole and aggregate to seal documents, *we recommend that our proposals in respect of execution by individuals should constitute an alternative to, rather than a replacement of, existing requirements.*

2.67 *In the case of companies, we recommend no change to the requirement for countersigning of the impression of the company's seal under Table A of the Companies Acts of 1908 and 1963, or under the company's Articles of Association.*

2. Substance on which a deed may be written

2.68 Notwithstanding developments in the UK which dispense with restrictions regarding the substance on which a deed may be written, *the Commission is not in favour of changing the current law which requires that deeds must be written on paper or parchment.* While this is likely to become a pressing

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40 Laffoy, M and Wheeler, D, *Irish Conveyancing Precedents*, (1997) F22-23.

41 One exception to this is Rule 54 of the Land Registry Rules which provides that

> The execution of every application, except an application by a solicitor, and of every instrument shall be attested by a witness. The execution of an application or an instrument by a blind or illiterate person shall be verified by affidavit of an attesting witness to the effect that it was read over and explained to such person and that such person appeared to understand same. The execution of an application or an instrument by a person by his mark, due solely to physical disability, shall be verified by affidavit of an attesting witness giving the reason for such execution. In any case where the attestation clause contains this information the Registrar may dispense with such affidavit. The execution of an application or an instrument by other persons shall be verified by affidavit of an attesting witness whenever the Registrar so requires.

See also, Glover *A Treatise on the Registration of Ownership of Land in Ireland* (1933), p325.

issue in the future[42] it is not so today and it is, therefore, advisable to leave the law as it stands.

3. Delivery

2.69 If it is the law in Ireland that where delivery is in escrow it is irrevocable (it certainly is not the practice to so regard it) the law should be amended to provide that the 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. Any other provision would be so different from the established practice in Ireland that the Commission would not recommend its adoption here. The Commission is not aware of any significant difficulties arising out of the Irish practice.

2.70 We have noted that the requirement that authority to deliver a deed be itself by deed is routinely ignored in practice. While the *Powers of Attorney Act, 1996* has dispensed with the need for such authority to be conferred under seal, we consider that formality of any kind is unnecessary in the circumstances at issue. *We therefore recommend that any rule of law which requires authority to deliver a deed to be conferred by deed should be abolished.*

2.71 *Furthermore, any rule of law which provide that a deed is deemed to be delivered on being sealed by a corporate body should be repealed. The same rules should apply to the delivery of deeds by corporate bodies as to individuals.*

4. Sealing by individuals

2.72 We have considered whether the law should provide that instruments in writing not under seal should be deemed to have the same effect as deeds, or alternatively that certain instruments may constitute deeds although they are not under seal. The second alternative represents the approach taken in the UK.[43] We prefer the second approach.

2.73 *It is recommended that the status of deeds be retained by providing that a document shall be the deed of a person if*

> *1. 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*

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42 It should be noted that the United Nations Commission on International Trade Law (UNCITRAL) has adopted a Model Law on Electronic Commerce. The UN General Assembly, on December 16, 1996 adopted a Resolution recommending that all States give favourable consideration to the Model Law "in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information". The issue of digital signatures and certification authorities is also under consideration by UNCITRAL.

43 Section 1 of the *Law of Property (Miscellaneous Provisions) Act 1989*; section 36A, *Companies Act 1985*.

2. *It is executed by that person as a deed by the use of words such as "signed as a deed" or "executed as a deed".*

2.74 The Commission believes that while sealing by individuals should no longer be required before a document is deemed to be a deed, certain documents (in particular those relating to transfers of interests in land) should continue to be by deed.

2.75 The Commission would not wish to interfere with the long established common law doctrine which provides that a contract made without consideration is enforceable only if it is made under seal. We consider it important to emphasise that if our recommendations are implemented by legislation, the requirement that individuals affix a seal to such contracts should not fall into disuse.

5. Sealing by companies and other bodies corporate

(i) Irish Companies

2.76 The Commission accepts that for a small number of large companies, notwithstanding the provisions of section 38(1)(b) of the *Companies Act, 1963*, it is inconvenient to have to execute large numbers of documents under the companies' seal. On the other hand, for the vast majority of companies, the number of times that such companies are required to execute documents under seal is very limited. When such execution is required it is normally in respect of very significant documents such as those dealing with the transfer of interests in land or the establishment or variation of pension schemes. It is the Commission's view that the completion of such instruments, in the case of the majority of companies, is a matter of such importance to those companies that it should be marked with appropriate formality. *Accordingly, it recommends the retention of the requirement of sealing for those documents which are required to be deeds.*

(ii) Irish Bodies Corporate other than Companies

2.77 The Commission intends its recommendations to extend also to bodies corporate which are not companies. If such bodies comply with the legal requirements - under domestic law and in accordance with their internal rules - governing execution of deeds by such bodies, and a document is either described at its head by the use of such words as "Deed", "Indenture" etc. or executed by the use of such words as "signed as a deed", such document should constitute a valid deed.

(iii) Foreign Bodies Corporate including Companies

2.78 The Commission made a recommendation in 1992[44] to the effect that documents relating to land executed by bodies incorporated outside the State

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44 *Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44-1992).

should be accepted by the registering authorities as having been validly executed where such execution is in accordance with the law of the jurisdiction of incorporation. This recommendation has not been acted upon and even if it were the second problem referred to above would remain: such bodies corporate would continue to be unable to dispose of property in Ireland and in some circumstances to acquire it unless they used a seal.

2.79 This issue was resolved in the UK by the enactment of the *Foreign Companies (Execution of Documents) Regulations 1994*, which extends the provisions of section 130 of the *Companies Act 1989* to foreign companies. Such companies may now execute deeds which are legally acceptable in the UK if they are effected in one of three ways: under seal according to section 36 of the *Companies Act 1985*, in accordance with section 36A of the 1985 Act as inserted by section 130 of the *Companies Act 1989*, or in accordance with the law of the jurisdiction of incorporation under the *Foreign Companies (Miscellaneous Provisions) Regulations 1994*. The UK solution deals only with foreign *companies*, and does not include corporate bodies other than companies.

2.80 We agree with the approach taken in the UK but would not limit it to companies. *We therefore recommend the introduction of a provision to the effect that a body incorporated in another jurisdiction may execute a deed recognised as such in Ireland where it is executed in accordance both with the laws of that jurisdiction governing the execution of such documents by such bodies and the internal rules of those bodies governing the execution of documents.*

C. Proposed Legislation

2.81 The following is an outline of legislation:

1. (1) Any rule of law which

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

   (b) requires authority to deliver a deed to be given by deed, is abolished.

2. (1) An instrument shall not be a deed unless

   (a) It is described at its head by words such as "Deed", "Indenture", "Conveyance", "Transfer", "Assignment", "Lease", "Surrender", "Mortgage", "Charge"; or

   (b) It is made clear on its face that it is intended by any of the persons making it to be a deed, by expressing it to be executed or signed as a deed,

   and

(2) it is executed in the following manner:

(a) if made by an individual
(i) it is signed by him in the presence of a witness who attests the signature or

(ii) it is signed by a person at his direction given in the presence of a witness who attests the signature or

(iii) it is acknowledged by him in the presence of a witness who attests the signature or

(iv) it is signed and sealed by him.

(b) if made by a company registered in Ireland, it is executed under the seal of the company in accordance with its Articles of Association;

(c) if made by a body corporate registered in Ireland other than a company, it is executed in accordance with the legal requirements governing the execution of deeds by such bodies;

(d) if made by a foreign body corporate, it is executed in accordance with the legal requirements governing the execution of such documents by such bodies corporate in the jurisdiction of incorporation.

CHAPTER 3: COMMENT ON A PROPOSAL FOR STATUTORY CONDITIONS OF SALE

3.1 Following the publication of the Supreme Court decision in *Boyle v Lee and Goyns*[1] the Working Group on Land Law and Conveyancing considered the comments of some of the Judges in that case, particularly those of O'Flaherty J. and McCarthy J. In his judgment O'Flaherty J. advocated that the Statute of Frauds should be amended so as to provide that all contracts for the sale of land should be in writing. On the other hand McCarthy J. clearly contemplated the continuation of the practice that property transactions in Ireland be made with the minimum of formality.

3.2 The Working Group was more sympathetic to the views of McCarthy J. believing that it should be possible for lay persons of reasonable skill and knowledge to enter into binding agreements for the sale of land. The most obvious situation which occurred to the group was where one farmer wished to sell a field to an adjoining farmer or indeed where two adjoining farmers wished to exchange fields. It seemed to the Group that to require the parties in such situations to consult solicitors in advance with a view to having formal contracts prepared before a binding deal could be reached was unnecessary.

3.3 Amendments of the Statute of Frauds in other jurisdictions have not always been entirely successful and the Working Group have reservations about how easy it would be to draft amending legislation successfully. The majority decision in *Boyle v Lee and Goyns*[2] appears to have settled the doubts which existed following certain earlier decisions of the Supreme Court in *Kelly v Park Hall and*[3] *Casey v Irish Intercontinental Bank*[4] as to the efficacy of "subject to contract" provisions.

3.4 Concerns that the views of O'Flaherty J might gain support from other members of the Court in some subsequent cases led the Working Group to consider whether it might be possible to enact legislation which would lay down a statutory structure governing informal deals entered into by parties without the aid of solicitors. It did not see any great difficulty in prescribing what an appropriate deposit should be nor the gap between the making of the deal and the completion of the transaction. In practice 10% deposits have become the

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1 [1992] 1 IR 555

2 op. cit.

3 [1979] IR 340

4 [1979] IR 364

norm in the majority of conveyancing transactions and the Law Society's Conveyancing Committee has recommended a minimum six week period between contract and conveyance.

3.5 The Working Group commenced to draft a set of statutory conditions of sale which would automatically apply where two parties entered into an informal deal for the sale of land. In so doing the Working Group used as its model the current edition of the Law Society's standard conditions of sale and believed that it might be possible to adopt a number of standard conditions of sale for use in a statutory set of conditions.

3.6 After a number of meetings the Working Group came reluctantly to the conclusion that the preparation of a statutory set of conditions even with the advantage of an apparently suitable model presented insuperable difficulties and that the drafting of a statutory set of conditions was not feasible.

First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) **[out of print] [photocopy available]** [10p Net]

Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977) [£ 1.50 Net]

Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977)**[out of print]** [£ 1.00 Net]

Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977) [£ 2.50 Net]

First (Annual) Report (1977) (Prl. 6961) [40p Net]

Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978) [£ 1.00 Net]

Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse (Dec 1978)**[out of print]** [£ 1.00 Net]

Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbouring of a Child (Feb 1979) [£ 1.50 Net]

Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) [£ 1.00 Net]

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Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]

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First Report on Family Law - Criminal Conversation, Enticement and Harbouring of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) [£ 2.00 Net]

Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting

Factors in the Conflict of Laws (Sep 1981) [£ 1.75 Net]

Fourth (Annual) Report (1981) (Pl. 742) [75p Net]

Report on Civil Liability for Animals (LRC 2-1982) (May 1982) [£ 1.00 Net]

Report on Defective Premises (LRC 3-1982) (May 1982) [£ 1.00 Net]

Report on Illegitimacy (LRC 4-1982) (Sep 1982) [£ 3.50 Net]

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Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983) [£ 1.50 Net]

Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (Nov 1983) [£ 1.00 Net]

Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (Dec 1983) [£ 1.50 Net]

Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (Dec 1983) [£ 3.00 Net]

Sixth (Annual) Report (1983) (Pl. 2622) [£ 1.00 Net]

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