THE LAW RELATING TO DEEDS IN NEW ZEALAND

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Deeds used to be the most important and most common legal documents. In many situations they were required by law, and in others, although not necessary, they had distinct advantages over other forms of document. Deeds undoubtedly no longer occupy this pre-eminent position, although there seems to be considerable uncertainty among both practitioners and academics as to their exact status today. This investigation is an attempt to clarify the position to some small degree.

A. WHAT IS A DEED?

1. *Execution*

In England, a deed is a document under seal, written or printed on paper, vellum or parchment.[1] The seal is clearly the important feature. It was originally adopted as a requirement when, with the increase in writing as an accomplishment,[2] something was felt to be necessary over and above a mere signature to mark important legal documents off from other writings; the mode of execution used by the nobility was felt to be most appropriate.[3] But, paradoxically, over the years less and less was regarded as being sufficient to constitute a sealing. The result is that today the seal is usually no longer a wax impression; an adhesive wafer attached by the law stationer or typist will do just as well.[4] The requirement is little short of a fiction.

It is therefore not surprising that the New Zealand legislature has decided to dispense with the requirement altogether in this country. By section 4 subsections (1) and (2) of the Property Law Act 1952 sealing is not necessary to constitute a deed, except where the party to be bound is a corporation; all that is necessary is that the deed should be signed by the party to be bound, and attested by one witness who adds his address and calling. (The requirement of paper, vellum or parchment seems still to exist, something that is scarcely likely to give rise to any practical problems.)

Yet one is led here into a logical trap. While all deeds have, and must have, a signature and attestation, it seems that not all documents with a signature and attestation are deeds. Something over and above these minimum requirements is necessary, but there is a surprising lack of

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1 *Norton on Deeds* (1906), 1-4; *Odgers' Construction of Deeds and Statutes* 5th ed. (1967), 1-2. These two works are henceforth referred to as *Norton* and *Odgers*.

2 Originally, it appears that a deed was any writing at all; writing was such a rare accomplishment that anyone who went to the trouble of having a document scratched out on parchment must have attached particular solemnity to the transaction. See *Encyclopedia of the Laws of England* (1897), Vol. IV. 171.

3 *Pollock and Maitland*, ii. 223; *Holdsworth, H. E. L.*, iii, 417.

4 *Odgers*, 6-7.

unanimity as to just what it is. All one can say with certainty is that it is not necessary that the document should be described in the body of it as a deed.[5] The same problem exists in England, where not all sealed documents are deeds.[6] It is thus rather unhelpful to find New Zealand judges defining a deed as a document "which is of such a nature that if sealed it would be a deed at common law".[7]

It may be that "deed" is not susceptible of brief comprehensive definition. The cases do not proceed on any very logical basis, each judge tending to confine his decision to the document before him. The result is that we can list certain documents which are not deeds—probates, arbitrators' awards and the like—and certain documents which are, without being clearly able to explain why. Some have gone so far as to suggest that what is a deed and what is not varies according to the context in which the word is used:[8] that a "deed" for the purposes of, say, the crime of forgery is not the same as a "deed" for the purposes of the Stamp Duties Act. But, although many legal words have such a chameleon character, to include "deed" among them would be an affront to the usual understanding, and at least one New Zealand judge has doubted whether the word can thus change its colour.[9]

Inconclusive though they are, it is submitted that a perusal of the cases yields at least the following guides, none of them intractable. *First,* if a deed is required by law to accomplish a certain legal result, the court will very readily hold that a document attempting to achieve that result which meets the requirements of section 4 is a deed, even though it is nowhere described by the parties as one. Thus, a document headed "agreement to lease" which contained words of demise has been held to be a deed where the demise was for more than one year and was thus required by statute to be by deed.[10] This reasoning would suggest that if a promise without consideration is made by a witnessed document, the document would be held to be a deed, for it can be legally effective in no other way. Some caution is necessary, however, in applying this approach. For instance, before holding that a witnessed document conferring a benefit on a third person is a deed for the purposes of section 7 of the Property Law Act 1952, a court would need to convince itself that the parties wanted such arrangement to be directly enforceable by the third person.

Secondly, even in cases where no deed is required by law, it would seem that a witnessed document will be held to be a deed if the parties intended that it should be one. The simplest way for them to evince that intention is to include words in the document itself describing it as a deed, but it is probably enough if that intention appears from their other words and conduct. Thus, the principal reason that a licence

5 *Boyd* v. *Cooper* (1915) 34 N.Z.L.R. 807.
6 *R.* v. *Morton* (1873) L.R. 2 C.C.R. 22 at 27 per Bovill C.J. And see *Electricity Meter Mfg. Co.* v. *Manufacturers' Producers Pty. Ltd.* (1930) 30 S.R. (N.S.W.) 422.
7 *Domb* v. *Owler* [1924] N.Z.L.R. 532 at 538 per Salmond J.
8 See, for instance, *Mayor of Wellington* v. *Commissioner of Taxes* [1931] G.L.R. 333 per Myers C.J. at 333.
9 Christie J. in *Stellin Construction Ltd.* v. *Carr* [1948] N.Z.L.R. 578 at 585 (*semble*).
10 *Boyd* v. *Cooper* (1915) 34 N.Z.L.R. 807. See also *Goodson* v. *Hawera Lawn Tennis Club* [1931] N.Z.L.R. 1096; *Mayor etc. of Wellington* v. *Commissioner of Taxes* [1931] G.L.R. 333 and *Re Palmer* [1919] G.L.R. 82 at 83 per Edwards J.

to use a patent was held not to be a deed in the case of *Chanter* v. *Johnson*[11] was, to quote Parke B., that it did "not purport to be delivered as a deed".[12] Yet there is some doubt as to how far this principle extends, and whether *any* sealed or witnessed document whatever may become a deed just because the parties decide to describe it as one. For instance, there is authority that share certificates,[13] certificates of admission to learned bodies,[14] memoranda of association,[15] probates,[16] arbitrators' awards[17] and receipts[18] are not normally deeds, even though sealed or (in New Zealand) witnessed. Would it make any difference if the parties actually described such a document as a deed in the body of the document? There is some authority, although fairly oblique, that an award may be a deed if the parties clearly evince their intention that it should be,[19] and it seems fairly clear that the same is true of a receipt. But some of the others may well be instruments *sui generis*, which the parties cannot convert into deeds at their mere whim. That is obviously so of a probate,[20] which is not a document between private persons; this may well be an essential characteristic.[21]

Thirdly, it appears that if a witnessed document contains words which are immediately operative—words, for instance, having the effect *per se* of vesting or divesting property, or of discharging obligations—it is likely to be held to be a deed. Thus, an agreement to lease will readily be held a deed if it contains words of present demise;[22] whereas a renunciation of probate has been held not to be a deed, for such a document does not operate to convey anything.[23]

That leaves the class of case which is perhaps the most doubtful: the class where a contract not required by law to be by deed is embodied by the parties in a document which satisfies the formalities of a deed, although the parties nowhere describe it as one. An example would be an attested agreement for the sale and purchase of land. Such a document was held to be a deed in *Stellin Construction Ltd.* v. *Carr*,[24] and the words of Christie J. in that case strongly suggest that any contract which meets the minimum requirements of section 4 is a deed.[25] Yet that is very doubtful. In *Mayor of Wellington* v. *Commissioner of Taxes*[26] it was held that a drainage agreement entered into by a City Council was not a deed, although under seal;[27] the suggestion from the cases is that an agreement to lease which does not contain words of

11 (1845) 14 M. & W. 408. See also *Brown* v. *Vawser* (1804) 4 East 584.
12 14 M. & W. 408 at 411.
13 *R.* v. *Morton* (1873) L.R. 2 C.C.R. 22 at 27 per Bovill C.J.
14 *ibid.*
15 *Re Whitley Partners Ltd.* (1886) 32 Ch.D. 337 at 340 per Cotton L.J.
16 *Chanter* v. *Johnson, supra.*
17 *ibid.*
18 *Hurrey* v. *Bank of New South Wales* (1882) N.Z.L.R. 1 C.A. 115.
19 *Brown* v. *Vawser* (1804) 4 East 584.
20 Cf., however, Blackburn J. in *R.* v. *Morton* (1873) L.R. 2 C.C.R. 22 at 28.
21 It seems to be so treated by *Odgers*, 1.
22 An alternative ground of *Boyd* v. *Cooper* (1915) 34 N.Z.L.R. 807. See also *Malfroy* v. *Raymond* (1906) 26 N.Z.L.R. 563 and *Brown* v. *Turner* (1911) 13 G.L.R. 413.
23 *Re Palmer* [1919] G.L.R. 82. See also *Long* v. *Murray* [1934] G.L.R. 487, and *Fama* v. *Ryder* [1954] N.Z.L.R. 523, especially at 529-530 per Turner J.
24 [1948] N.Z.L.R. 578.
25 *Idem.* 584-585.
26 [1931] G.L.R. 333.
27 But it may be that that case turned on the construction of the particular statute in question.

present demise is not a deed;[28] and the words of Turner J. in *Fama* v. *Ryder*, the most recent case, are that "a contract executed with the formalities of a deed *may* be held to be a deed"[29]—not that it is always a deed. It is submitted hesitantly that whether such an instrument is a deed or not will turn on "the intention of the parties", to be gauged from such matters as the importance of the transaction, and the language used in the document—e.g. the presence of words such as "covenant" and "proviso".[30]

In the light of all this, it is extremely difficult to give a satisfactory brief definition of "deed". That of *Norton* is the most often quoted:

> A deed is a writing [signed and attested] 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.[31]

But this is not very satisfactory. Certain instruments well within this definition are not necessarily deeds (for instance an arbitrator's award, and the drainage agreement of the *Wellington City Council* case,[32] both of which create "an obligation binding on some person"); and, conversely, certain documents which are clearly deeds are not comprehended by this definition (for example a deed poll changing a surname). It is probably not possible to give a simple comprehensive definition; it is proposed to leave the matter with the guides already postulated. Nor is it proposed, in this general article, to tackle the even more complicated question of the difference between a deed and a document which by statute "has the effect of a deed";[33] or the problem of whether a document whose form is prescribed by a particular statute, and which happens to coincide with the requirements of a deed, is, or can be, a deed.[34] Suffice it to say that the courts have not as yet answered these questions.

2. *Delivery*

It has always been a requirement of the common law that, to be effective, a deed must be delivered. "After a deed is written and sealed, if it be not delivered, all the rest is to no purpose."[35] Originally, "delivery" probably bore its literal meaning, and the deed had actually to be handed over to the other party to the transaction. But before long something far less became sufficient; and today all that is required is that there should be "acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him".[36] Delivery, in other words, is now nothing more than a synonym for the party's intention to be bound.

28 See the cases cited n. 22 *supra*.
29 [1954] N.Z.L.R. 523 at 527. (Emphasis added) See also *Harper* v. *Commissioner of Stamp Duties* [1942] N.Z.L.R. 18.
30 See *Re Palmer* [1919] G.L.R. 82; *Malfroy* v. *Raymond* (1906) 26 N.Z.L.R. 563. For a discussion of the whole topic see Goodall, *Conveyancing in New Zealand*, 2nd ed., 10-16.
31 At p. 3. It is substantially taken from Bovill C.J.'s judgment in *R.* v. *Morton supra* n. 13.
32 *Supra* n. 26.
33 The two apparently need not be the same: *Re Whitley Partners Ltd.* (1886) 32 Ch. D. 337 at 340 per Cotton L.J.
34 See below, p. 246.
35 *Termes de la Ley*, Heading "Fait."
36 *Xenos* v. *Wickham* (1867) L.R. 2 H.L. 296 at 312 per Blackburn J. And see Co. Litt. 36a and 49b.

In the light of this, the definition of an "escrow" has become a matter of some difficulty. Classically, an escrow was a document delivered to a "stranger" or "third person" to be handed over by him to the other party to the transaction upon the happening of a certain condition, at which moment it became a deed.[37] But it was eventually established, after a number of fictitious extensions,[38] that even a document handed to the other party to the transaction could be an escrow if it was not intended to be effective as a deed until the happening of some condition precedent.[39] It might appear, then, having regard to the modern understanding of "delivery", that an escrow is simply a deed which, although it has left the grantor's possession, has not been "delivered". There are, indeed, some cases which use this terminology.[40] But apparently this is not quite correct. An escrow is a document which has been delivered, subject to a condition precedent: that is to say, it is a document which is intended to have effect as a deed provided a certain stated event happens.[41] While the parties await the happening of the event, the grantor cannot revoke the document.[42]

In the light of all this, section 4(3) of the Property Law Act 1952 is, at first sight, somewhat puzzling. It says, with regard to deeds, that "formal delivery and indenting are not necessary in any case". This obviously cannot mean that a deed invariably has immediate effect the moment it has been signed and attested, without any "delivery" at all; if that were so a conveyance of land under a deeds system would be completed as soon as the vendor signed the deed, and before the moment of settlement. It is clear that the important word is "formal", and that all this section does is to remove the ancient common law requirement of a *formal* handing over; it does not dispense with the need for an intention by the grantor, evidenced in some way, to be bound by the deed. Further, it has been held by the New Zealand Court of Appeal that this section does not preclude the possibility of an escrow in this country; a document may still be validly handed to another subject to a condition precedent as to its effectiveness as a deed.[43]

If this is so, the position in New Zealand as regards delivery is the same as that in England. The sub-section in question may therefore be mere surplusage.

B. WHERE THE DEED IS IMMEDIATELY OPERATIVE

A deed may operate in two ways. Sometimes it acts as a contract, and imposes an obligation on the parties to do something in the future.

37 *Sheppard's Touchstone,* 58. See *Blunden* v. *Wood* (1606) Cro. Jac. 85; *Holford* v. *Parker* (1618) Hob. 246.

38 See, for instance, *Watkins* v. *Nash* (1875) L.R. 20 Eq. 262.

39 *London Freehold & Leasehold Property Co.* v. *Suffield* [1897] 2 Ch. 608; *In re Carile* [1920] V.L.R. 427; *Odgers,* 12.

40 *In re Carile* [1920] V.L.R. 427 at 431 per Cussen J.

41 See the statements of law in *Xenos* v. *Wickham* (1867) L.R. 2 H.L. 296 at 323 per Lord Cranworth; *Beesly* v. *Hallwood Estates Ltd.* [1961] Ch. 105 at 116-119 per Harman L.J.

42 *Beesly* v. *Hallwood Estates Ltd.* [1961] Ch. 105; *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees Ltd.* [1961] Ch. 375. See the criticism of the present state of the law by Winn L.J. in *Vincent* v. *Premo Enterprises Ltd.* [1969] 2 Q.B. 609 at 622-623.

43 *In re Goile, Ex parte Steelbuild Agencies Ltd.* [1963] N.Z.L.R. 666. The same point is made, albeit by implication, in *In re Vanstone* [1955] N.Z.L.R. 1079.

At other times, however, the deed *eo instanter* accomplishes a legal act: the deed itself renders the legal position what it declares it to be.[44] For purposes of simplicity, this latter sort of deed may be described as a "conveyancing deed". There is admittedly a certain degree of overlap between these two functions of a deed: they sometimes appear side by side in the same document; sometimes a contract has the effect of a conveyance in equity;[45] and sometimes, especially in the case of a release of debt, there is some doubt into just which category the transaction falls. But for discussion purposes a reasonably clear division can be made. We shall deal first with cases where the deed accomplishes a legal act: with conveyancing deeds.

At one time the deed was the main mode of conveyancing. A great number of legal acts could only be accomplished by deed.[46] There were exceptions, of course: physical property—goods or land[47]—could be transferred by actual delivery (an illustration of how close the concepts of possession and ownership were in early law), and commercial convenience dictated that other informal acts developed by the practice of merchants should be sanctioned by the law: the negotiation of bills of exchange and the assignment of insurance policies, for instance.

Today, however, the deed is dwindling in importance in New Zealand. There inevitably remain certain situations where it is required by law, some of them the result of persistent common law rules, but rather more being enshrined in statutory provisions. They fall into three groups. First of all, there are a few instances where a deed is required to transfer property. For instance, in the rare case of land under the deeds system, the deed is still the only means of "partition, exchange, lease (for more than a year), assignment or surrender";[48] in the absence of delivery, a deed is the only effective means of transferring goods by way of gift;[49] and a power exercisable inter vivos can only be exercised by a deed.[50] In the second place, certain releases and disclaimers also require deeds: for instance disclaimers of any interest in land,[51] of a succession interest by a person entitled to a share on an intestacy,[52] and of a power;[53] releases or part releases of debts (unless supported by consideration)[54] and (what is rather the same thing) an approved compromise with creditors by a bankrupt.[55] Thirdly, a deed is sometimes necessary for a man to achieve a new status: to enter or leave a class of persons to whom special rights and duties attach. Thus

44 See Holdsworth, *H.E.L.*, iii, 226 and 357 *et seq* for the history of the deed, and its "double aspect".
45 See below. A covenant may operate as an assignment: *Re Lind* [1915] 2 Ch. 345; *Re Gilliot* [1934] Ch. 97.
46 See the list of circumstances where a deed was required by the common law set out in *Halsbury, Laws of England,* 1st ed., vol. 10, 361-364; 3rd ed., vol. 11, 327-330.
47 This was feoffment with livery of seisin in the case of land. It goes without saying that land is no longer transferable by delivery, although goods still are: goods may also be transferred by sale.
48 Property Law Act 1952, s.10.
49 Garrow and Gray, *Personal Property,* 5th ed., 48.
50 Property Law Act 1952, s.11. The words of the section are " . . . executed as a deed is hereby required to be executed."
51 Property Law Act 1952, s.12.
52 Administration Act 1969, s.81.
53 Property Law Act 1952, s.34.
54 The rule in *Foakes* v. *Beer* (1884) 9 App. Cas. 605.
55 Insolvency Act 1967 s.123.

a trustee may only retire,[56] and a new one be appointed, by deed;[57] a guardian of children can only be appointed extra-judicially by deed or will.[58] Under this head we may place also the man who wishes to change his name (he must do it by deed poll) and the man who is appointed attorney.[59]

Yet, overall, the deed has today nothing like the importance that once attached to it as a conveyancing instrument. This is largely the result of two influences: statute and equity.

Statute

Many modern statutes provide for the creation and transfer of particular interests in property by documents less than deeds. In some cases, the statute actually prescribes a special form. Occasionally these prescribed forms have the insignia of a deed (signature and attestation), although they are nowhere said actually to be deeds. Examples are the memoranda under the Land Transfer Act 1952[60] and the instrument by way of security under the Chattels Transfer Act 1924.[61] Others of these prescribed forms, however, fall short of the requirements of a deed; the legislature seems to have realised that there is more point in clarity and uniformity than in blind adherence to the format of the deed.[62] But most significant are quite a large number of statutes which require no more than a simple signed writing; the best known are perhaps the sections of the Property Law Act 1952[63] and the Copyright Act 1962[64] providing for the assignment of, respectively, choses in action and copyright.[65] These really are situations where intention appears to matter more than form.

Equity

"Equity looks to the intent rather than the form." Equity has never been as insistent as the common law on forms of words. It has never

56 Trustee Act 1956, s.45.
57 *Ibid.*, s.34.
58 Guardianship Act 1968, s.7.
59 For New Zealand authority, see *Richardson* v. *Harris* [1930] N.Z.L.R. 890 at 923.
60 By the Land Transfer Act 1952 s.157(2), as amended by the Land Transfer Amendment Act 1958, s.2, these are said to "have the effect of deeds".
61 See also the forms for bill of sale and mortgage of ships prescribed by the Shipping and Seamen Act 1952 ss. 412 and 418, and the form for mortgage of a life insurance policy provided by Life Insurance Act 1908 s.44.
62 See for instance the form of the assignment of a life insurance policy prescribed by the Life Insurance Act 1908 s.43; and the form of transfer prescribed by the New Zealand Loans Act 1953, s.30. Note also the Status of Children Act 1969 s.8 which provides that an acknowledgement of paternity may be made in the form of a deed *or* by writing in the presence of a solicitor.
63 s.130.
64 s.56(3).
65 The Bankruptcy Act 1908 s.84 (cf. Insolvency Act 1967 s.75) and Companies Act 1955 s.312 provide that the Official Assignee and liquidator respectively may disclaim onerous property in writing; the Charitable Trusts Act 1957 s.3 provides for succession of trustees by the most informal methods; the Friendly Societies Act 1909 s.65 and Industrial and Provident Societies Act 1908 s.15 provide for "instruments of dissolution" of the societies by relatively informal agreements; the National Provident Fund Act 1950 s.73A provides for the surrender of a pension for cash payment, which is to be in writing. Although assignments of patents, designs and trade marks are recognised by statute, no particular form is prescribed: see Patents Act 1953, s.84, Designs Act 1953, s. 27, and Trade Marks Act 1953 s.31.

required a deed for the creation or transfer of equitable interests:[66] a trust, for instance, can be set up by a completely informal verbal declaration.

This informal approach of equity has had important repercussions on the law. It has had the effect that sometimes, even though the legal formality of a deed has not been observed, a transaction may nevertheless have an effect in equity which is very nearly the same as if a deed had been used. The classic example of this is the doctrine of *Walsh* v. *Lonsdale*,[67] whereby an enforceable agreement to grant an interest in land (be it lease, mortgage or easement) has, by virtue of the maxim "equity looks on that as done which ought to be done", the same effect as a proper deed of grant, save only that it is defeasible by third persons.[68] This doctrine has even been extended beyond agreements to grant interests to actual attempts to grant those interests which fail for want of form—e.g. because they are not in the form of deeds.[69] The doctrine in such cases has the remarkable effect of converting an invalid act into a valid one,[70] which is very nearly to "neutralise the provisions of a statute",[71] as one judge has objected; but it would not be the first time that equity has done this.

The main application of *Walsh* v. *Lonsdale* and its associated doctrines in New Zealand today is in cases where the "proper legal document" is a Land Transfer memorandum rather than a deed.[72] But the equitable approach which they exemplify is certainly capable of extending further and rendering a deed less than mandatory in several of the situations where statute supposedly requires one. The extent of this is uncertain, for it is arguable that the availability of specific performance is central to equity's ability to interfere. Even if it is, the equitable doctrine would still seem wide enough to render effective, for example, a simple contract disclaiming a succession interest or a power.[73] But the courts may be persuaded by analogy to go even further and accord at least some effect to informal documents in other cases too, even if it be not the perfect effect which would have been achieved by a deed. By way of

66 11 *Halsbury, Laws of England,* 3rd ed., 335 *et seq.* It seems that the informal transfer of an equitable interest does not require consideration; *Halsbury, loc. cit.;* Garrow and Gray, *Personal Property,* 5th ed., 272.

67 (1882) 21 Ch.D. 9.

68 Besides *Walsh* v. *Lonsdale* itself, the doctrine is also seen in operation in *Swain* v. *Ayres* (1888) 21 Q.B.D. 289; *Manchester Brewery* v. *Coombs* [1901] 2 Ch. 608; *May* v. *Belleville* [1905] 2 Ch. 605.

69 The invalid grant is treated "as if it were an agreement". See *Parker* v. *Taswell* (1858) 27 L.J.Ch. 812; *Zimbler* v. *Abrahams* [1903] 1 K.B. 577; *Miller* v. *Jenner* [1921] N.Z.L.R. 841; *Harley* v. *Te Reneti Te Whauwhau* (1913) 33 N.Z.L.R. 256; *Rewiri* v. *Eivers* [1917] N.Z.L.R. 479; *Wellington City Council* v. *Public Trustee* [1921] N.Z.L.R. 1086. Query whether consideration is necessary: see a discussion of the parallel problem in assignment of choses in action in Garrow and Gray, *Personal Property,* 5th ed., 271 *et seq.*

70 See Garrow, *Real Property in New Zealand,* 5th ed., 633: "a void lease becomes equivalent to a valid lease."

71 *Zimbler* v. *Abrahams* [1903] 1 K.B. 577 at 581 per Vaughan Williams L.J.

72 See, for instance, *Harley's* case and *Rewiri* v. *Eivers, supra* n. 69.

73 See above at n. 53. It is notable that even in cases where statute requires a signed writing—e.g. the assignment of a chose in action or of copyright—something less will suffice in equity. See Garrow and Gray, *Personal Property,* 5th ed., 251 *et seq,* 320. Note also the effect of *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1 on the doctrine in *Wood* v. *Leadbitter* (1845) 13 M. & W. 838 (grant of licence). See the discussion of the licence cases in *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1970] 3 W.L.R. 538.

illustration, it has already been held that while a deed or will is by statute necessary to appoint a guardian for one's children,[74] the court will nevertheless pay close attention to an informal document embodying a parent's wishes.[75] Similarly, if a new trustee is appointed by something less than a deed, it is hard to imagine that the courts will not treat him as a constructive trustee the moment he intermeddles with the estate; and constructive trustees are just as much subject to the Trustee Act 1956 as express trustees.[76]

Yet it is well for the conveyancer not to take risks in this.[77] And it must always be remembered that even when *Walsh* v. *Lonsdale* is operating to its full extent, the informal document never has quite the perfect effect of the deed. The most one can say is that if the parties are too careless, or have insufficient time, to prepare a deed where one is required by law, their transaction will in many cases not be totally devoid of effect.

C. DEEDS EMBODYING CONTRACTS

We turn now to the deed which contains a contract imposing future obligations. Of this, rather more can be said. It has long been believed that the deed differs in many important respects from the simple contract: that rules applying to the one do not apply to the other, and vice versa. The older text books certainly do list a number of important differences; for instance, the 1865 edition of J. W. Smith's *Law of Contracts* spends 16 pages doing just that.

But the deed has waned in importance. Whereas in olden times it was the only effective method of contracting, it has now been supplanted almost entirely by the simple contract, the result of a growing realisation that form matters less than substance. Indeed, the only contracts which today are required by law to be by deed seem to be the bankrupt's compromise with creditors,[78] and the gratuitous promise (which of course is not within the modern understanding of "contract" at all.)[79] With this growing obsolescence has come a lessening of the old advantages of the deed over the simple contract. In other words, there has been something approaching an assimilation, perhaps hastened by the abolition of the forms of action. There are no longer many rules which are peculiar to deeds and which have no parallels in simple contract. There are still a few, however. The most important undoubtedly is that

74 *Supra* n. 58.

75 *In Re Hancock* [1932] N.Z.L.R. 318.

76 Trustee Act 1956, s.2. Note also *National Bank Ltd.* v. *Dharamshi Vallabhji* [1967] 1 A.C. 207: on the construction of the Chattels Transfer Act 1924, an unattested instrument by way of security is valid *inter partes*, although not *vis à vis* third persons.

77 Note the emphatic statement in 11 *Halsbury, Laws of England*, 3rd ed., 335, that "equity follows the law".

78 *Supra* n. 55; this arguably is a "conveyance" rather than a contract.

79 Some contracts are required to be in *writing* to be enforceable, and certain statutes prescribe a particular method of execution—e.g. Shipping and Seamen Act 1952 s.29—but these appear to be the only cases where a *deed* is required. There thus appears to be little scope for the secion commonly found in statutes dealing with corporations that the corporation must make under seal any contract which would have to be by deed if between private individuals. Unless the contract involves some element of conveyance, it would seem that it need never be by deed. See, for example, Companies Act 1955, s.42, Public Trust Office Act 1957, s.13, Charitable Trusts Act 1957, s.19, Public Bodies Contracts Act 1959, s.3.

no consideration is required to support a deed;[80] more will be said of this later. The doctrine of merger—that a simple contract obligation is nullified by and absorbed into a deed embodying the same obligation—also remains,[81] although its scope is narrow. It applies only where the subject matter of the two obligations is the same, so that the two are either identical, or unable to stand together.[82] The other notable instances are statutory. The limitation period is longer for an action on a deed than on a simple contract;[83] a deed "not otherwise charged" attracts stamp duty, whereas a simple agreement does not;[84] a person may sue on a deed although not a party thereto,[85] whereas the doctrine of privity adamantly prevents this in the case of simple contract. These are important differences, no doubt, even if the logic of their retention is at times a little hard to follow. It is interesting to speculate on what would have happened had they not been enshrined in statute.

Many differences which used to exist at common law between a deed and a simple contract have either narrowed or disappeared completely. Statute has accounted for some of them—for instance sections 33 and 37 of the Administration Act 1969 have removed the old rules giving specialty creditors priority over ordinary creditors in the administration

80 The rule is so fundamental that no authority is now ever cited to support it. But authority does exist. See, for instance, *Shubrick* v. *Salmond* (1765) 3 Burr. 1639; *Pratt* v. *Barker* (1828) 1 Sim. 1; *Clough* v. *Lambert* (1839) 10 Sim. 174.

81 See *Chitty on Contract,* 23rd ed., General Principles, 28.

82 The law on merger is complex, and could well form the subject of a special study. The early cases almost all involve debts, originally by simple contract, but later embodied in a specialty. The simple contract debt merged in the specialty not because of any theory that the parties intended it, but just because the deed was the higher obligation; indeed the doctrine of merger was thought to be quite independent of intention (*Price* v. *Moulton* (1851) 20 L.J.C.P. 102). At the same time if there was any difference in the two obligations, and they could stand together, there was no room for the doctrine: e.g. if the parties were different (*Holmes* v. *Bell* (1841) 3 M. & G. 213; *Ansell* v. *Baker* (1850) 15 Q.B. 20); again, if the simple debt was incurred after the specialty, the doctrine apparently had no application (*Norfolk Railway* v. *McNamara* (1849) 3 Ex. 628). However today the doctrine of merger is usually applied in a different context, that of conveyances: a contract obligation merges in a conveyance. The rule here may have a different basis: that after conveyance there should be an end to litigation. The rule here, at least today, is also far more dependent on the parties' intentions. The only provisions of the contract which merge are those which the parties intend should be performed by the conveyance. (*Knight Sugar Co.* v. *Alberta Railway Co.* [1938] 1 All E.R. 266; *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186 at 206-207). But within this limit, even if the contract and the conveyance are inconsistent, the conveyance prevails (*ibid.*). However, any provision of the contract which is not incorporated in the conveyance and which was intended to survive it, does not merge, but remains enforceable. This will included all such collateral matters as warranties of quality, date of possession, promises of vacant possession, etc. (Williams on *Vendor and Purchaser,* 3rd ed., 989; Stonham, *Vendor and Purchaser,* 861; *Lawrence* v. *Cassell* [1930] 2 K.B. 83; *Cumberland Holdings* v. *Ireland* [1946] K.B. 264; *Hissett* v. *Reading Roofing Co. Ltd.* [1969] 1 W.L.R. 1757, esp. at 1763). Apparently, also, the doctrine does not operate if the conveyance contains a genuine mistake: *Taitapu Gold Estates Ltd.* v. *Prouse* [1916] N.Z.L.R. 825.

83 Limitation Act 1950, s.4.

84 Stamp Duties Act 1954, s.151.

85 Property Law Act 1952, s. 7. See also Law Practitioners Act 1955, s.18, which makes it an offence for an unqualified person to draw deeds and certain other documents.

of a deceased estate.[86] Judicial process and the influence of equity have removed others—for instance the rule that a deed could only be varied by another deed.[87]

In other cases there has been what may appropriately be called a "cross-fertilisation" which has resulted in a degree of assimilation. Rules once thought to be peculiar to deeds have spread to simple contract, and, conversely, ideas developed in simple contract have had their influence on the law relating to deeds. The first of these developments has often been more apparent than real. Many of the old text books lay down rules which they say apply to "deeds", whereas even in those times it might have been better to express them as rules of the general law of contract; the books confined their discussion to deeds for no other reason than that most important contracts used to be by deed, and therefore most of the cases involved deeds. But with the rise of simple contract, it has been affirmed that these rules have a far wider scope, and apply equally to all forms of contract. Examples are the principle *non est factum*,[88] the parol evidence rule,[89] and the detailed rules for the construction of documents found in books like *Norton* and *Odgers*.[90] Similarly the old strict rules against implying covenants into deeds are now applied in simple contract cases, albeit in a slightly relaxed form.[91]

More troublesome are certain rules which have been embodied in statute in such terms as to suggest that they apply only to deeds, having been passed at a time when the deed was the principal means of contracting and conveyancing. Yet by dint of liberal interpretation it has often been possible for the modern courts to hold that these rules extend beyond deeds. By way of example, one may refer to a number of sections in the Property Law Act 1952 which apply, in terms, to "covenants". A covenant is, technically, a promise in a deed, so prima facie one is justified in construing these sections as applying only to deeds, particularly when one finds them alongside other provisions which apply to "covenants and agreements"[92] and therefore clearly have a wider ambit. But the courts have been generous. The tendency

86 For the old rules, see Smith *Law of Contracts* 4th ed. (1865), 28.

87 For the old rule, see *West* v. *Blakeway* (1841) 2 M. & Gr. 729; for the new *Berry* v. *Berry* [1929] 2 K.B. 316, *Creamoata Ltd.* v. *Rice Equalisation Assn. Ltd.* (1953) 89 C.L.R. 286.

88 Included under the heading "Deeds" in 10 *Halsbury, Laws of England,* 1st ed., 404. See Chitty, *General Principles,* 23rd ed., 26, and *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704 at 712 where Byles J. expressly holds that the principle has application to instruments other than deeds.

89 The eighth chapter of *Norton* is entitled, "Extrinsic Evidence Inadmissible to Add to Deeds."

90 Almost all the examples given in *Norton* are drawn from cases on deeds, for no other reason than that almost all important contracts were at that time drawn in the form of deeds. The rules are equally applicable to other written contracts, as is made clear in *Odgers,* 5th ed., 27.

91 It appears that originally one could not imply a covenant into a deed unless there were actually words in the deed which gave rise to the inference that one was intended (*Aspdin* v. *Austin*) (1844) 5 Q.B. 671). It is probable that a similar rule did not apply to simple contracts, at least bare contracts not containing much detail. But after the abolition of the forms of action, we find the same test used for both deeds and simple contracts—and, indeed, for both verbal and written contracts. It is the familiar "necessary intendment" test of *Hamlyn* v. *Wood* [1891] 2 Q.B. 488. See *Kelantan Government* v. *Duff Development Co.* [1923] A.C. 395 at 419-420 per Lord Parmoor.

92 For instance s.66.

is to construe the word "covenant" liberally as including any promise, whether by deed or not—a suggestion for which there is some slight authority in the older cases.[93] Thus, the rules relating to the running of covenants with landlords' and tenants' interests in leased land have been held to apply to promises in leases not by deed.[94] This makes sense, for, considering how few leases are by deed in New Zealand, any other view could upset much of the well-understood law of landlord and tenant. (By analogy with these cases, Megarry and Wade suggest that the general rules about the running of covenants with land probably now apply also to promises not by deed,[95] a matter of some importance in New Zealand when it seems likely that a positive covenant of the type in *Smith* v. *River Douglas Catchment Board*[96] cannot be incorporated in a memorandum of transfer.)

On the same liberal construction, other sections of the Property Law Act such as 67 and 106 probably apply also to documents other than deeds. The latter, which implies covenants into leases, was actually held in an old case, *Lyons* v. *Guy*,[97] to apply only to leases by deed, but the section has since been amended in such a way as to excise the words principally relied on by the judge in *Lyons* v. *Guy*; moreover the very similar section 107, implying lessor's powers into leases, has since been held to apply to leases not by deed,[98] and there would seem to be no reason for treating the two sections differently.

With other sections of the same Act there may be more difficulty, for they refer in express terms to "deeds", a far less equivocal term than "covenant". Section 70, providing that in the construction of a *deed* the masculine imports the feminine and the singular the plural, could readily enough be held merely to embody a rule of thumb for eliciting the parties' intention, which could be extended by analogy to all agreements. But section 65 is not so easy. It provides that a contract *by deed* with two persons jointly shall be deemed to include an obligation to do the act in question for the benefit of the survivor, thus averting the complicated old rules of law and equity relating to plurality of creditors.[99] This section emphatically applies to obligations by *deed* (the term is used twice), and stands with others which refer to "instruments" rather than "deeds".[1] It will require all the resources of section 5 (j) of the Acts Interpretation Act 1924 to avoid the literal meaning of this section.

Yet on the question of assimilation of deed and simple contract, two areas are of such interest and importance that they have been reserved for separate treatment. In each of them, deed and simple contract have

93 *Hayne* v. *Cummings* (1864) 16 C.B.N.S. 421.

94 The sections are Property Law Act 1952 ss. 112 and 113 (which deal with covenants running with the reversion); ss. 73 and 75 (which, together with the common law in *Spencer's Case* (1583) 5 Co. Rep. 16a, constitute the law on covenants running with the lessee's interest in the land). The cases are *Boyer* v. *Warbey* [1953] 1 Q.B. 234 and *Miller* v. *Jenner* [1921] N.Z.L.R. 841 (lessee's interest); *Weg Motors Ltd.* v. *Hales* [1962] Ch. 49 (reversion).

95 *The Law of Real Property*, 3rd ed., 729. It used to be thought that covenants only ran with land if they were by deed—see Smith, *Law of Contract* (1865), 26.

96 [1949] 2 K.B. 500.

97 (1899) 18 N.Z.L.R. 124.

98 *Harley* v. *Te Reneti te Whauwhau* (1913) 33 N.Z.L.R. 256.

99 For the statement of these rules, see Treitel, *Law of Contract* (2nd ed.) 428 and 432, and Martin, *The Property Law Act 1905*, 32.

1 E.g. ss. 56 and 61.

so interacted that there has been a substantial drawing together of the rules relating to them.

Estoppel by Deed

The old books all state unequivocally that a party is absolutely estopped by statements of fact in a deed.[2] The rule was originally stated very widely indeed, and seemed to apply to all statements in the deed, the only requirement being that they must be precise and certain. Thus Blackstone: "[A deed] is the most solemn and authoritative act that a man can possibly perform . . . Therefore a man shall always be estopped by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed."[3] Oddly enough, there was originally doubt as to whether a recital bound: oddly, for it is in the recitals that one commonly expects to find statements of fact. But it was conclusively held in *Bowman* v. *Taylor*[4] in 1834 that a recital did give rise to an estoppel.

It used to be believed that estoppel was peculiar to deeds, and arose by analogy with the rule that documents under the King's seal were indisputable. There are many assertions to be found—for instance in Smith's *Law of Contract*[5] and the early editions of Chitty[6]—that a statement in a simple contract did not estop; it was at most presumptive evidence.

Yet even if that used to be the position, it clearly no longer is. "Estoppel by deed" is now something of a misnomer, for it certainly does apply to documents other than deeds.

In the first place, from a fairly early date, certainly even before the time when Smith and Chitty were writing, there existed cases showing that there could be estoppel by agreement not under seal. The principle on which they proceeded was thus stated in *Blackburn on Sale*:

> When parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts and not on truth.[7]

This rule, which may have grown up through an analogy with estoppel by deed,[8] was flourishing in the nineteenth century. Thus, in *McCance* v. *L. N. W. Railway Co.*[9] it was held that when horses were given to the defendant to carry, and the plaintiff signed a declaration that they were not worth more than £10 each, this agreed value could not later be disputed. Other examples may be found in the rules that a tenant cannot dispute his landlord's title,[10] or a bailee his bailor's;[11] perhaps there

2 *Co. Litt.* 352a; *Bl. Comm.* 1st ed., bk. ii, 295; Smith, *Law of Contract,* 5th ed., 19; see also Holdsworth *H.E.L.* vol. ix, 154.
3 *Supra,* n. 2.
4 (1834) 2 A. & E. 278.
5 5th ed., 19.
6 12th ed. (1890) 7-8.
7 3rd ed., 204.
8 See *Lewis* v. *Morelli* [1948] 2All E.R. 1021 at 1204 per Harman J., speaking of agreements to lease.
9 (1864) 3 H. & C. 343.
10 *Phipps* v. *Sculthorpe* (1817) 1 B. & A. 50; *Cooper* v. *Blandy* (1834) 1 Bing. N.C. 45. Woodfall on *Landlord and Tenant,* 26th ed., 15-16.
11 *Stonard* v. *Dunkin* (1810) 2 Camp. 343; *Gosling* v. *Birnie* (1831) 7 Bing. 339. The same principle applies as between the licensor and licensee of a patent: *Crosley* v. *Dixon* (1863) 10 H.L.C. 293.

were originally elements of policy in such decisions,[12] but they were soon commonly explained as resting on this notion of "conventional" estoppel". This estoppel is based on agreement. The theory is that once parties have agreed to accept a certain set of facts as true, and contract on that basis, they will not be allowed to deny that set of facts, for otherwise they would upset the very basis of the transaction.[13] This estoppel does not require at all, as do some other forms, that the plaintiff should have been misled; both parties may have known full well that the facts were not so, yet nevertheless agreed to accept them as such for the purposes of the agreement.[14]

In the second place, however wide estoppel by deed may once have been, there is no doubt that its scope has progressively narrowed over the years until it today rests on precisely the same ground as this estoppel by agreement of which we have just spoken. In other words, although the doctrine seems originally to have been based on the sanctity of the deed,[15] it came later, when the element of bargain made its presence felt in deed law,[16] also to be based on agreement. This can be seen in three ways: (a) While it had been realised from an early time that an estoppel by deed was reciprocal, "so as to binde both parties",[17] the refinement was placed on this in 1850 that estoppel by deed only arises when the statement in question can be said to be the language of both parties.[18] Lord Russell rephrased this in the important case of *Greer* v. *Kettle*[19] in terms reminiscent of estoppel by agreement: "a statement only estops if it is the agreement of both parties to admit a fact."[20] This is not to preclude the possibility that if a statement in a deed is construed as being that of one party only he may be bound by it; but if he is, this is not estoppel by deed, but rather simple estoppel by representation, which requires that the other party should have been misled, and have acted to his detriment;[21] and such an estoppel may arise from a statement in a simple agreement just as much as in a deed.[22]

(b) Just as is the case with estoppel by agreement, it seems that estoppel by deed can only arise in respect of facts on which the very arrangement is based. In *Young* v. *Raincock*[23] Coltman J., in a judgment

12 See *Stonard* v. *Dunkin, supra* n. 11, and *Cooke* v. *Loxley* (1792) 5 T.R. 4 per Lord Kenyon and Grose J.
13 *Blackburn on Sale, supra* n. 2. See also the most informative judgment of Isaacs J. in *Dabbs* v. *Seaman* (1925) 36 C.L.R. 538 at 548-552, and Cross on *Evidence*, N.Z. ed., 186.
14 *Grundt* v. *Grear Boulder Proprietary Gold Mines Ltd.* (1938) 59 C.L.R. 641 at 676 per Dixon J. Cf. *Re McCathie* [1969] N.Z.L.R. 393 which is of doubtful validity on this point. The doctrine is obviously relevant to the doctrine of common mistake in contract; but a discussion of that relationship is beyond the scope of this article.
15 Blackstone, *supra* n. 98; *Goodtitle* v. *Bailey* (1777) 2 Cowp. 597 per Lord Mansfield. See also Holdsworth, *H.E.L.* vol. ix, 154.
16 See the discussion on the element of bargain, *infra.*
17 Co. Litt. 352a.
18 *Stroughill* v. *Buck* (1850) 14 Q.B. 781. The same principle was adumbrated in *Edwards* v *Brown* (1829) 3 Y. & J. 423.
19 [1938] A.C. 156.
20 *Idem.* at 167. He quotes *Stroughill* v. *Buck, supra.*
21 *Compania Naviera Vasconzada* v. *Churchill & Sim* [1906] 1 K.B. 237; *Silver* v. *Ocean S.S. Co. Ltd.* [1930] 1 K.B. 416; *District Bank Ltd.* v. *Webb* [1958] 1 W.L.R. 148; *Lowe* v. *Lombank Ltd.* [1960] 1 W.L.R. 196.
22 The first two cases cited in n. 21 *supra.*
23 (1849) 7 C.B. 310.

later approved by the House of Lords in *Greer* v. *Kettle*,[24] said: "Where the parties to a deed have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts . . . estops from averring the contrary."[25] Doubtless there will always be room for argument as to whether a certain fact is or is not "basic": but that is the sort of problem that is very familiar in the law of contract. In any event, the sorts of statement which have been held to create estoppel by deed are closely parallel to those giving rise to estoppel by agreement. There are numerous cases where grantees by deed have been held disentitled to dispute their grantor's titles whether the transaction be one of lease,[26] patent[27] or mortgage;[28] where borrowers have been estopped from denying that they borrowed the money in question for the purposes recited in the deed;[29] where grantors have not been allowed to allege that the property concerned differed from that described in the deed.[30]

(c) While it may have been the case under the old common law that even statements inserted in a deed by mistake could estop,[31] equity was never of that view, holding that if the error was of such a kind that the equitable remedy of rectification would lie, then the statement did not estop.[32] Since the amalgamation of law and equity it is the latter view which prevails. This has been held in several New Zealand cases,[33] and reaffirmed by the House of Lords in *Greer* v. *Kettle*.[34] It comes to this, that estoppel by deed now only applies where the statement in the deed is an accurate expression of what the parties have agreed will be taken as true for the purposes of their transaction.

Thus Spencer Bower and Turner on *Estoppel by Representation*, following the judgment of Isaacs J. in *Dabbs* v. *Seaman*,[35] settles on this definition:

24 [1938] A.C. 156.
25 7 C.B. at 338.
26 *Parker* v. *Manning* (1798) 7 T.R. 537; *Taylor* v. *Needham* (1810) 2 Taunt. 278.
27 *Bowman* v. *Taylor* (1834) 2 A. & E. 278.
28 *Doe d. Levy* v. *Horne* (1842) 3 Q.B. 757.
29 *Hill* v. *Manchester & Salford Waterworks* (1831) 2 B. & A. 544; *Horton* v. *Westminster Improvement Commissioners* (1852) 7 Ex. 780.
30 *Roberts* v. *Karr* (1809) 1 Taunt. 495; *Jones* v. *Williams* (1817) 2 Stark. 51; *Dabbs* v. *Seaman* (1925) 36 C.L.R. 538. For other instructive cases on estoppel by deed see *Carpenter* v. *Buller* (1841) 8 M. & W. 209; *Willoughby* v. *Brook* (1599) Cro. Eliz. 756; *Hart* v. *Buckminster* (1648) Style 103; *Pilbrow* v. *Pilbrow's Atmospheric Railway & Canal Propulsion Co.* (1848) 5 C.B. 950; *Wiles* v. *Woodward* (1850) 5 Ex. 557. The recent New Zealand decision *McCathie* v. *McCathie* [1971] N.Z.L.R. 58 affirms the principle that the doctrine only applies in a claim on the deed itself.
31 See *Lainson* v. *Tremere* (1934) 1 A. & E. 792.
32 *Scholefield* v. *Lockwood* (1863) 4 de G. J. & S. 22; *Brooke* v. *Haymes* (1868) L.R. 6 Eq. 25; *Empson's Case* (1870) L.R. 9 Eq. 597. It is *Greer* v. *Kettle, infra,* which lays down the requirement that the mistake must be one for which rectification lies; the other cases make no mention of this. In fact the requirement is not as restrictive as may appear, for rectification is not a narrow remedy. The comment might well be made that if a statement by mistake does not give rise to an estoppel, the doctrine of estoppel by deed is reduced to a very narrow compass indeed.
33 *Daniell* v. *Sinclair* (1881) N.Z.P.C.C. 140; *Firmin* v. *Public Trustee* (1889) 7 N.Z.L.R. 277; *Pearce* v. *Holmes* (1902) 21 N.Z.L.R. 544; *Buckland* v. *C.S.D.* [1954] N.Z.L.R. 1194; *In re McCathie* [1969] N.Z.L.R. 393, affd. [1971] N.Z.L.R. 58.
34 [1938] A.C. 156.
35 (1925) 36 C.L.R. 538 at 548-552.

> Estoppel by deed, then, arises where it appears from the formal writing of the parties that they have agreed to admit as true, or to assume the truth of, certain facts as the conventional basis upon which they have entered into . . . relations . . . In modern times the estoppel which Coke considered the peculiar consequence of contract under seal has readily been held to arise, in appropriate circumstances, from any formal writing . . . [36]

In any case, the question of whether there has been such an assumption will be a question of construction in all the circumstances; doubtless policy factors will play their part, as one assumes they already have in the landlord and tenant situation.[37]

But the chief point of all this is that nowadays "estoppel by deed" and "estoppel by agreement" are exactly the same thing. It may be better to adopt the expression of Six Alexander Turner and combine them both under the omnibus heading of "conventional estoppel."[38] There seems no longer to be a species of estoppel which is peculiar to deeds.

The element of bargain

The essence of the simple contract is bargain, a notion which involves two ideas—the first that both parties have consented to the transaction, and the second that each has supplied consideration to the other. But, in traditional theory, a contract by deed does not depend on bargain at all. The party or parties are bound because they have executed a deed with solemn formality, and not because they have struck a bargain. This truism remains correct, and nothing in this article should be taken as minimising its importance. It is still the outstanding point of departure between deed and simple contract. It results in two clear propositions: that a promise by deed is enforceable even if unsupported by consideration,[39] and that one party to a deed may be bound even though the other has not consented to the transaction.

The first of these propositions is self-explanatory. The second, although closely related, deserves illustration. The theory is that a man can be bound by a deed as soon as he has signed and delivered it, despite the fact that the other party has not yet appended his signature. The existence of the obligation depends on the objective acts of signing and delivery, not upon consent. This means that the simple contract rules of offer and acceptance have little place in deed law, as is clearly illustrated by *Naas* v. *Westminster Bank*.[40] A deed of settlement was entered into between A and B, by which A had the option of executing a later deed by way of variation of the first. A did execute such a deed; B, although named as a party to it, failed to sign. It was held that the later deed bound A immediately upon delivery by him. The deed was absolute and unconditional, and had not been delivered as an escrow. The House of Lords reversed the decision of the Court of Appeal,[41]

36 2nd ed., 146-148. Chapter VIII of this book contains, with respect, an excellent survey of estoppel by deed. See now the discussion by Turner J. in *McCathie* v. *McCathie* [1971] N.Z.L.R. 58 at 69-70.

37 *Supra* n. 12.

38 Spencer Bower and Turner, *Estoppel by Representation* 2nd ed., Ch. VIII. See also Cross on *Evidence*, N.Z. ed., 184. Note however that Phipson on *Evidence* still prefers to treat estoppel by deed and estoppel by agreement separately: 10th ed., 846-851.

39 *Supra*, n. 80.

40 [1940] A.C. 366.

41 *Sub nom. Westminster Bank* v. *Wilson* [1938] 3 All E.R. 652.

where two members of the court[42] had held that, by analogy with the law relating to offer and acceptance in simple contract, the deed was not binding until accepted by B. Lord Wright commented on this view:[43]

> I think is is misleading to import into the law of deeds analogies from an entirely different region of law, that of simple contracts. They, indeed, are consensual, and depend on a meeting of minds in a common intent, evidenced by words or conduct . . . [This deed] depended, not on the other party's consent, any more than on mutual consideration. It depended on the act of the settlor in executing the settlement.[44]

This has interesting repercussions. It means that the parties to a deed may become bound at different times, something which is quite impossible in the case of a simple contract. It also involves that certain types of escrow are possible which have no parallel in simple contract. For example, if A executes a deed and delivers it conditionally on B's executing it also, A will not be able to revoke his execution, at least until a reasonable time has elapsed without the other party appending his signature;[45] he is bound by the escrow, albeit only conditionally. Had this been a simple contract, however, he could have revoked at any time before "acceptance" by the other, for his conduct would then amount only to an "offer".[46]

There is evidently a close connection, on which it would be interesting to speculate, between this piece of theory and the view of Bramwell B. in *Wake* v. *Harrop*[47] that whereas in the case of a simple contract the writing is only evidence of the contract, which is constituted by their agreement, in the case of a deed the writing *is* the contract.[48]

42 Clauson and Scott L.JJ.

43 [1940] A.C. at 403.

44 See also *Bowker* v. *Burdekin* (1843) 11 M. & W. 128; *Re Vanstone* [1955] N.Z.L.R. 1079; *Federal Commissioner of Taxation* v. *Taylor* (1929) 42 C.L.R. 80; *Xenos* v. *Wickham* (1867) L.R. 2 H.L. 296 at 312 per Blackburn J. The decided cases all involve deeds of trust or present assignment of property. No doubt the same principle applies to deeds containing covenants of future obligation, but then an interesting question would arise as to whether the non-signatory could sue on the covenant. Presumably he could if, although not a signatory, he could nevertheless be described as a "party" to the deed, or if, by virtue of the Property Law Act 1952, s.7, he was a person for whose benefit the covenant was made.

45 *Beesly* v. *Hallwood Estates Ltd.* [1961] Ch. 105. There are types of escrow which are closely paralleled in simple contract—those where both parties' covenants are conditional upon the same event happening. There would seem to be no difference between these and a contract subject to a condition precedent as in *Pym* v. *Campbell* (1856) E. & B. 370. Cf. however Watts in 3 A.L.J. 11. His arguments that there is a difference are highly theoretical, and based on the doctrine in *Wake* v. *Harrop.* (See *infra* nn. 47 and 48, and the criticism therein contained). His view that to establish a condition precedent to a simple contract one must prove a collateral contract is, with respect, doubtful.

46 It also follows that a man may be bound by a deed even though the beneficiary is unaware of its existence: *Leech's case* (1692) Carth. 250; *Xenos* v. *Wickham loc. cit. supra* n. 39. The best short statement of the differences in theory between a simple contract and a deed is to be found in Salmond and Williams on *Contract,* 12-18.

47 (1861) 6 H. & N. 768 at 774-775. See Phipson on *Evidence,* 10th ed., 644.

48 One wonders just how much this theory was believed. If it were true, the parol evidence rule should have been applied much more stringently to deeds, which does not appear to have been the case; further, once the remedy of rectification had been developed by equity and applied to deeds, the very basis of the theory would seem to have disappeared.

However, despite all this, it would be misleading to say that the notion of bargain is totally absent from the law of deeds. And it is believed that the rise of simple contract, with its emphasis on bargain and consideration, has brought about an increasing intrusion of the notion into deeds. There has, of course, been nothing approaching an assimilation of deed with simple contract in this respect; the only point one is trying to make is that the law of deeds, despite traditional theory, does pay some attention, and apparently an increasing attention, to the idea of bargain.

This may be demonstrated in a number of ways, but in none more clearly than a study of the law relating to breach of covenant. When one party to a deed has broken a covenant, the question arises whether the other party is thereby released from his covenants. The early view was an interesting one.[49] The courts seemed to treat the problem without much concern at all for ideas of bargain or consideration; they tended to rely rather on the concept of condition. The old cases seem to modern eyes strange, and at times even rather unfair. *Ware* v. *Chappell*[50] in 1649 provides a good example. Ware covenanted to raise 500 soldiers, and bring them to a certain port: Chappell covenanted to find shipping and victuals for them. Chappell, having been sued on his covenant, pleaded that Ware had not raised the soldiers. The plea was held bad; Ware's breach would only excuse Chappell if performance by Ware was a condition precedent to Chappell's liability, and that was held not to be the case. Just what rendered a covenant a condition precedent always involved a certain degree of mystique,[51] but it does seem that the question of time was the principal factor; what we would call the element of return or consideration was not overtly[52] treated as relevant. For instance, if A promised to transfer land on 1 July, whereupon B was to pay A, A could not sue B on his covenant without first transferring the land, just because it was clear from the wording of the deed that the transfer was to come first in time. The question of whether one covenant was to be performed before another was a question of construction. As Lord Mansfield said in *Kingston* v. *Preston*:[53]

> The dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order in time in which the intent of the transaction requires their performance.

The determination of this question led to some subleties which bewilder the modern mind.[54]

Yet the rise of simple contract brought with it the idea of consideration (which may well have been latent in the approach to deeds all

49 For a survey of this problem, see Morison, *The Principles of Rescission of Contracts,* Chapter V.

50 (1649) Style 186.

51 Sergeant Williams evidently thought so too—see his notes to *Pordage* v. *Cole* (1607) 1 Wms Saund. 319 where he speaks of the "artificial and subtle distinctions" in the decisions.

52 It may have subconsciously affected the decisions.

53 Cited (1772) Douglas 689.

54 The following cases provide the best illustrations of the old approach: *Pordage* v. *Cole* (1607) 1 Wms Saund. 319; *Ughtred's case* (1591) 7 Co. Rep. 9b; *Russen* v. *Coleby* (1734) 7 Mod. 236; *Walker* v. *Harris* (1793) 1 Anst. 245. See also the detailed rules in the notes appended to *Pordage* v. *Cole* (*supra*), and *Norton,* Ch. XXX. Note the strange result obtained in *Peeters* v. *Opie* (1671) 2 Wms Saund. 742 by the use of similar reasoning.

along) and by the late eighteenth century that idea was beginning to have effect on the determination of the question of whether the breach of a covenant in a deed excused the other party from performance. A milestone is *Boone* v. *Eyre* in 1777, where Lord Mansfield laid down this principle:[55]

> The distinction is very clear, where mutual covenants go to *the whole of the consideration* on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.

It was not long before this test was extended, and the proposition developed that if a breach of covenant went to the substantial part of the consideration, the innocent party was relieved from his obligation.[56] So efficiently did the notion of consideration temper the judges' thinking, that as early as 1792, in *Goodisson* v. *Nunn*,[57] Lord Kenyon was heard to say of the older cases which had paid no attention to it that they "outraged common sense", and were "absurd". So ideas of consideration and bargain spread to deeds, and became the overt basis of decision in questions of breach.[58]

Unfortunately, however, there was cross fertilisation, for the doctrine of condition precedent infiltrated strongly into the law of simple contract. The doctrine is not wholly out of place there,[59] but a great deal too much was made of it, particularly by certain judges.[60] In many cases where a decision could have been reached on the simple ground that a breach went to the substance of the consideration, it was found necessary to resort to the tautology that the term broken was therefore a condition precedent.[61] There were also many clumsy and quite unnecessary attempts to apply the rules in *Pordage* v. *Cole* to simple contract.[62] But today simple contract has largely freed itself from the trammels of "condition", a course which some judges had advocated all along.[63] However the converse has not happened; the law relating to deeds has retained its connection with consideration, and there seems to be little difference now between the principles applied in deed and simple contract.[64]

55 *Boone* v. *Eyre* (1777) 1 H.Bl. 273n.
56 *Ellen* v. *Topp* (1851) 6 Ex. 424.
57 *Goodisson* v. *Nunn* (1792) 4 T.R. 761.
58 See also *Campbell* v. *Jones* (1796) 6 T.R. 570; *Duke of St Albans* v. *Shore* (1789) 1 H.Bl. 270. See the use of the concept of consideration in an early contract case, *Thorp* v. *Thorp* (1701) 12 Mod. 455. This was an action on the case, not an action in covenant.
59 See its recent appearance in *United Dominions Trust Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74.
60 One of the chief offenders was Blackburn J.
61 See, for instance, *Graves* v. *Legg* (1854) 9 Ex. 710, *White* v. *Beeton* (1861) 7 H. & N. 42, *Simpson* v. *Crippen* (1872) L.R. 8 Q.B. 14; *Bettini* v. *Gye* (1876) 1 Q.B.D. 183; *Poussard* v. *Spiers* (1876) 1 Q.B.D. 410; *Havelock* v. *Geddes* (1809) 10 East 555.
62 For example in *Simpson* v. *Crippen* and *Bettini* v. *Gye, supra* n. 61.
63 See *Hoare* v. *Rennie* (1859) 5 H. & N. 19 at 27 per Pollock C.B.; *Honck* v. *Muller* (1881) 7 Q.B.D. 92 at 100 per Bramwell L.J.: *"Pordage* v. *Cole* has absolutely nothing to do with the case. That was an action on a specialty. This is not."; *Bradford* v. *Williams* (1872) L.R. 7 Ex. 259 at 261 per Martin B.: "Now I think the words 'condition precedent' unfortunate. The real question is what in each instance is the substance of the contract?" It seems that the Exchequer judges were much more progressive on this point than those in Queen's Bench.
64 See for instance *Huntoon* v. *Kolynos Ltd.* [1930] 1 Ch. 528.

The cases on breach are only one example of the influence of notions of bargain and consideration on the law of deeds. There are many others, some dating from an early time, perhaps even before the rise of simple contract.

For one thing, equity was always reluctant to enforce a deed which did not embody a true bargain. For instance, it has long been established that equity will not grant specific performance of a gratuitous promise, even one by deed.[65] Hand in hand goes the doctrine that equity will not perfect an uncompleted voluntary assignment.[66]

There is other evidence in the common law itself. While the common law certainly does not require consideration to render a deed binding, most inter partes deeds do in fact embody bargains: i.e. they contain reciprocal mutual promises. Even the common law has for a long time recognised and, to some extent, protected this element of bargain where it exists. Firstly, a person not a party to such a deed could not sue on it at common law,[67] and even the earliest cases suggest that this rule was based on nothing more than the essential quality of bargain. In *Scudamore* v. *Vandestene*[68] in 1579, the phrase "agreement reciprocall" is used to explain the rule.

Secondly, if a deed clearly embodies a bargain, the common law will not enforce only part of that bargain. So if one party's promise fails for some reason, the common law will not enforce the other's part, for to do so would be to hold that other to a quite different arrangement from that which he intended.[69] This has been the law for some considerable time, although the familiarity with the concept of consideration bred by the growth of simple contract has refined it, and made it more articulate. Two illustrations will suffice. (a) If one party's covenant is contrary to public policy, the other's will not be enforced. As Smith preferred to express it in 1865, "the deed is invalidated by the taint".[70] A more recent refinement holds that if only part of one party's obligations are thus contrary to public policy, the deed will still be totally unenforceable if the offensive portion is the substantial part of the consideration for the other's promise; in other words, a tainted promise will only be severed if the deed is still left a reasonable arrangement between the parties.[71] The rule here is precisely the same for both deed and simple contract; indeed *Bennett* v. *Bennett*[72] and *Goodinson* v. *Goodinson*[73], commonly taught as illustrating a general principle of

65 *Jefferys* v. *Jefferys* (1841) Cr. & Ph. 138; *Groves* v. *Groves* (1829) 3 Y. & J. 163; *Kirk* v. *Greaves* [1924] N.Z.L.R. 260. In such cases, the law may nevertheless award damages: *Kirk* v. *Greaves, supra; Cannon* v. *Hartley* [1949] 1 Ch. 50.

66 Hanbury, *Modern Equity,* 8th ed., Ch. 6.

67 See Burrows, "Section 7 of the Property Law Act 1952", [1969] N.Z.L.J. 676.

68 Set out in *Norton,* 23. See also *Storer* v. *Gordon* (1814) 3 M. & G. 308.

69 See *Chitty on Contracts,* General Principles, 21st ed., 10. (Omitted from the latest edition.) Cf. however *May* v. *Trye* (1677) 1 Freeman 447. However this case as reported is difficult to understand. Compare the report in 3 Keble 780.

70 *Law of Contract,* 4th ed., 16 and 18. See *Collins* v. *Blantern* (1767) 2 Wils. 341, *Bunn* v. *Guy* (1803) 4 East 190, and the other cases cited by Smith, *Law of Contract,* 4th ed., 16-18.

71 It seems, even then, that severance is only possible if the illegality is of a relatively inoffensive kind.

72 [1952] 1 K.B. 249.

73 [1954] 2 Q.B. 118.

the law of contract, are in fact both cases involving deeds.[74] (b) If one party signs a deed in the expectation that the other party will sign also, and the latter fails to do so, there are at least two grounds on which the court may hold the first party not bound by his signature. In the first place, it may find that the first signor did not intend to be bound until all parties had executed the document. That is to say, it may find that the document is an escrow until the condition of signature by all parties has been satisfied.[75] This conclusion will surely be fairly readily reached in the case of a deed embodying reciprocal obligations. If, however, the facts will not support such a conclusion, there is an alternative escape route. It lies in the rule that if one party signs a deed "in the faith" that the other party will also sign, the court will not enforce it against him in the event of the other's failure to sign if "the obligation sought to be enforced is different from the obligation which would have been enforceable if the non executing party had executed the deed," or, apparently, if such enforcement would lead to injustice.[76] This will always be the case if a signatory, having signed on the faith of getting some return for his promise, is deprived of that return by the other party's refusal to sign. A gratuitous promise is a very different thing from a bargain.[77]

D. CONCLUSION

The conclusions drawn from this survey may be shortly stated. The deed is no longer the all-important legal document that it used to be. There are a few cases where it remains necessary to effect a conveyance or perform a legal act, but, mainly as the result of statute, lesser documents are sufficient to accomplish many conveyancing transactions. More than that, as a result of the intervention of equity, sometimes even where a deed is strictly required by statute a document not in the form of a deed may nevertheless have substantial legal effect.

Likewise, there are few situations today where a contract has to be by deed. Certain special rules still apply to contracts by deed, but they are dwindling in number and some of those which remain are of minimal importance: the liability to stamp duty, for instance. Many such rules have either been completely abolished, or else extended by

74 Note the attempt in Smith, *Law of Contract,* 4th ed. (1865), 18-19, to state the rule as it was then understood: "Even if there were several considerations, and any one of them was illegal, it avoids the whole instrument . . . . Though it is just the reverse where the consideration is good, and there are several covenants, some legal, some illegal." See *Wallis* v. *Day* (1837) 2 M. & W. 273.

75 *Beesly* v. *Hallwood Estates Ltd.* [1961] Ch. 105; *Re Vanstone* [1955] N.Z.L.R. 1079 esp. at 1090-1091 per Barrowclough C.J.; *Ani Waata* v. *Grice* (1883) N.Z.L.R. 2 C.A. 95 at 112 per Richmond J. See also *Moore* v. *Irwin* [1926] 4 D.L.R. 1120.

76 *Naas* v. *Westminster Bank* [1940] A.C. 366 at 376 per Lord Maugham; at 391 per Lord Russell; at 405 per Lord Wright; at 410 per Lord Romer; *Re Vanstone* [1955] N.Z.L.R. 1079 at 1095 per Barrowclough C.J.

77 One may note here the converse rule that a party to a deed who has not signed will be bound by the deed if he has accepted the benefit of the other party's performance. This is a simple application of the principle that he who takes the benefit must also take the burden. See *Macdonald* v. *Twiname* [1953] 2 Q.B. 304 at 316; *Re McCathie* [1969] N.Z.L.R. 393 (and note the cases cited at 397-398). See the more restrictive approach of the N.S.W. Spreme Court in *Commonwealth Dairy Produce Equalisation Committee Ltd.* v. *McCabe* (1938) S.R. (N.S.W.) 397 at 402-403 per Jordan C.J.

the courts to simple contracts as well—even if that may sometimes involve doing violence to the words of an Act of Parliament. There has been a movement the other way as well: ideas of bargain which had their growth in simple contract have spread to the deed, and modified certain of the rules applicable to deeds.

There are therefore many situations where, although a deed may be used, no real advantage is gained through its use: no different legal result will be obtained, and the same legal principles will be applied. In the light of this decline of the deed from its former pre-eminent position, it is perhaps not surprising that in New Zealand, with the abolition of the requirement of the seal, a deed does not even look very different from any other written document; and there is some irony in the fact that there is occasionally doubt today as to whether a particular document is a deed or not.