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SOUTH AUSTRALIA

SIXTEENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING TO THE LAW ON SEALING OF DOCUMENTS

1971

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman*.

B. R. COX, Q.C., S.-G.

K. P. LYNCH.

JOHN KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

SIXTEENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE LAW ON SEALING OF DOCUMENTS

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

We acknowledge the reference to us of the question raised by a Victorian firm of solicitors with relation to the usefulness of adopting Section 38 of the New South Wales Conveyancing Act as an amendment to the Law of Property Act in South Australia.

We have also considered a very helpful and informative memorandum from the Crown Solicitor which you were kind enough to furnish to us.

Our recommendation after considering the matter in detail is that not only Section 38 but Sections 39 and 40 of the New South Wales Conveyancing Act could be usefully adopted in South Australia. The sections are contained in Part III Division I of the New South Wales Conveyancing Act and read as follows:—

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

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

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

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

(5) Nothing in this section contained shall affect—

(*a*) the execution of deeds by corporations; or

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

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

39. (1) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same without any further receipt for the same being indorsed on the deed.

(2) This section applies only to deeds executed after the commencement of this Act.

40. (1) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part be sufficient evidence of the payment or giving of the whole amount thereof.

(2) This section applies to deeds executed or indorsements made before or after the commencement of this Act."

The reference to the provisions of Section 8 (II) of the Registration of Deeds Act 1897 is as follows:—

"8. (II) If such instrument appears to have been executed by any party unable to write, then such Judge or Registrar-General or other person shall refuse to complete such certified copy by certifying the same, unless the execution by such party is attested by some justice of the peace or barrister or attorney or notary public, other than the party by whom such instrument has been prepared, whose attestation shall contain a certificate that the contents of such instrument were previously explained to the party so unable to write, and that the nature and effect thereof were at the time of such attestation to the best of the belief of such justice or barrister or attorney or notary public understood by such party".

This Part also includes in Division I a Section 41 relating to the exercise of powers of appointment by deed but this is already contained in our Law of Property Act as our Section 58 in practically identical terms and accordingly we have not troubled to consider it in this Report to you.

At common law there is no doubt that a deed had to be sealed although it did not have to be signed. Signature to a deed is now required by Section 41 of our Law of Property Act.

In recommending the inclusion of Section 38 in particular we desire to make six comments:—

1. The enactment of Section 38 will render Section 41 of our present Law of Property Act otiose except in relation to marksmen and therefore with this exception we recommend the repeal of Section 41.

   Whilst it is outside our general terms of reference we draw attention to Section 8 (II) of the New South Wales Registration of Deeds Act referred to on page 3 of this Report not for inclusion as such in our Report but as indicating for consideration by the Government as a matter of policy whether or not there should be some protection for marksmen in relation to execution of all documents other than wills and documents intended to be registered under the provisions of the Real Property Act.

   We have considered whether there should be provision for the execution of deeds by an amanuensis. The two external commentators on this report whose comments are attached came to differing conclusions on this subject and we draw attention to these but think that the safer conclusion is to leave the existing law as it is.

2. We think that the language of Section 38 (1) above could be improved as the words "but no particular form of words shall be requisite for the attestation" imply that some words whether formal or not may be necessary. We recommend that where the witness merely signs near the signature of the party without words or where he merely adds the word "witness" after his signature this should be sufficient attestation.

3. We recommend the inclusion of subsection 3 of Section 38 although one commentator was of the opinion that a better solution might be to make it *prima facie* proof of the sealing of a document that it was expressed to be an indenture or a deed in the body of the document.

4. In view of the increasing irrelevancy of the distinction between an "Indenture" and a "Deed" exemplified by Section 38 (3) above we recommend that Section 7 of the Law of Property Act be amended to include "indenture" in the definition of "instrument".

5. We draw attention to the rule of the common law which was stated by Mr. Justice Blackburn (as he then was) in *Xenos* v. *Wickham L.R.* 2 *H.L.* 296 *at* 312—

   "The mere affixing of the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him it is sufficient".

   We think it probable that the point is covered by subsection (4) of the New South Wales Section 38 but to put the matter beyond doubt we think it might be wise if a subsection were added saying that nothing in this Section prevents the operation of deeds in escrow or affects the law relating to undelivered deeds.

   For the distinction between a deed delivered as an escrow and an undelivered deed reference may usefully be made to *Windsor Refrigeration Co. Limited v. Branch Nominees Limited* 1961 *Ch.* 88. It is true that this case was reversed by the Court of Appeal on another point (see 1961 *Ch.* 375) but there is nothing in the judgment of the Court of Appeal which casts doubt on the judgment of the trial Judge, Mr. Justice Cross (as he then was) on this particular point.

6. We also would like to draw attention to a decision on the New South Wales Section 38 which we think should be covered in the proposed legislation. The decision is *Commonwealth Dairy Produce Equalization Committee Limited* v. *McCabe* a decision of the Full Supreme Court of New South Wales reported in 55 *W.N. N.S.W. at page* 144 where it was held that because the signature of the defendant was not witnessed as required by Section 38 he had not executed the deed and although he had taken benefits under the deed he was not liable to be sued on the covenants in the deed.

   This while no doubt accurate is in our opinion an undesirable consequence of the Section and we recommend that a subsection should be added to Section 38 providing that where the execution of a deed does not comply strictly with Section 38 (1) but it is proved by evidence whether intrinsic or extrinsic—

   (*a*) that the execution of the deed by a person was defective;

   (*b*) that he intended to execute the deed, and

   (*c*) that he had in fact taken a benefit or benefits under the deed,

   that the execution shall be deemed to be valid and binding in all respects on him.

   It is possible that this decision would fall for reconsideration in the light of the judgment of the Privy Council in *National and Grindlays Bank Limited* v. *Dharamshi Vallabhji and Others* 1966

2 *All E.R.* 626 where it was held that in the absence of any express provision—in that case in a Kenya Ordinance relating to chattels transfer—as to the consequence of non-attestation, an unattested instrument was valid as between the parties even though ineffective against other persons. However, it must be noted that the letter of hypothecation in dispute in that case was not under seal. The New South Wales decision appears not to have been cited to their Lordships and we feel that it would be safer to include the additional subsection in the form we have recommended to put the matter beyond doubt whatever the implications may be of the later decision of the National and Grindlays Bank case on the earlier decision in New South Wales.

The Committee desires to express its grateful appreciation to the Honourable Mr. Acting Justice Sangster and to Mr. C. J. Thomson C. de G. for acting as commentators in relation to this report.

We have the honour to be

HOWARD ZELLING
B. R. COX
K. P. LYNCH
JOHN KEELER

The Law Reform Committee of South Australia

FIRST REPORT FROM THE HONOURABLE MR. ACTING JUSTICE SANGSTER ON THE SIXTEENTH REPORT RELATING TO DEEDS

I have looked at your letter of 26th November on execution of deeds when the seal was not affixed. My first reaction is in the alternative—

(*a*) there should be a seal and the party executing should say aloud in the presence of the attesting witness something to the effect of "I deliver this as my act and deed"

or

(*b*) if there is to be any relaxation it should be by way of treating all writings, under seal or otherwise, as having the same effect (with the consequential long and loud protests from conservative lawyers).

My reason is that the law makes such significant differences between deeds and instruments signed but not under seal, that it seems essential either to preserve a *real* difference in mode of execution or eliminate the difference in result. Who can really distinguish between signing a form marked "signed" or another one marked "signed sealed and delivered" if mere signing, with or without a seal physically attached, is sufficient.

I agree, with respect, with the Crown Solicitor's minute.

I would therefore heartily oppose the adoption of sub-section (3) of section 38 of the N.S.W. Act as either going too far, or not far enough. Whether it might be desirable to make it *prima facie* proof of sealing that this document is expressed to be an indenture or deed or to be sealed (on which I am doubtful) is another matter.

SECOND REPORT FROM THE HONOURABLE MR. ACTING JUSTICE SANGSTER ON THE SIXTEENTH REPORT RELATING TO DEEDS

I had not encountered an amanuensis in my travels, and I am rather relieved to find that the word itself is so little used as not to be indexed in *Halsbury, E. & E. Digest, Aust. Digest,* or *Black's Medical Dictionary.*

Wharton defines amanuensis as "one who writes on behalf of another that which he dictates", and both that definition, and the few references I have found, clearly put signing for another into the category of agency rather than a form of execution by the principal. I have a personal preference for either a signature, or a mark, by the party—or else execution by another pursuant to a power of attorney or other adequate authority.

As to signing by making a mark, I see no reason for prescribing the circumstances (*e.g.,* illiteracy or disability) for use of a mark—indeed many well known professional men sign by what looks more like a mark than a signature.

In my opinion, without much depth of consideration, execution by amanuensis should not be allowed.

THOMSON & Co.
Barristers and Solicitors

ADELAIDE
2nd December, 1970

His Honour Mr. Justice Zelling,
Chairman,
Law Reform Committee of South Australia,
Judges' Chambers,
Supreme Court,
ADELAIDE S.A. 5000

Dear Judge,

Thank you for referring to me the recommendation of your Committee concerning Deeds.

I have read the 16th Report, the report of the Crown Solicitor and the letter from Messrs. Mallesons. You have asked me whether there is anything which I think ought to be considered.

Section 38 (3) of the N.S.W. Conveyancing Act points to a matter which should be clarified namely, the virtual interchangeability of the word "Indenture" and "Deed" in legal and other circles. It seems to me that in Section 7 of the Law of Property Act the definition "instrument" could be altered to include "indenture". I do not consider this would affect Section 34 (2) of that Act.

I consider Section 38 (1) of the N.S.W. Conveyancing Act could be improved. The words "but no particular form of words shall be requisite for the attestation" implies that some words may be necessary. If a witness merely signs near the signature of the party without any words or if he signs and merely adds the word "witness" this should be quite sufficient and acordingly I would like to see this clarified.

The Committee's first comment on Section 41 of the Law of Property Act, should not lead to its repeal without making some provision covering the case of a person placing his mark. Despite that fact that the inability to write is almost unknown, there are still a number of documents executed by the blind and the sick by placement of marks.

I think that there is a great need to have a subsection saying that nothing in Section 38 prevents the operation of deeds in escrow or affects the law relating to undelivered deeds. The technique of executing deeds in advance of a settlement and the holding or delivery of same in escrow is quite frequent.

The Committee's third point seems to me to be essential to avoid obvious injustice. In passing I am assuming in this regard that "deed" includes "Indenture". If a provision such as suggested in the Committee's third point is proposed, the effect of such a provision on Section 57 of The Real Property Act should be considered. Will it have the effect of making an instrument under the Real Property Act, before registration, a deed? It has always seemed to me that an instrument should have the effect of a deed when it is handed over on settlement (at least between the parties) especially if the instrument has covenants by one party to another.

Yours Sincerely,

(Sgd.) CEDRIC THOMSON
(Cedric Thomson)

THOMSON & Co.
Barristers and Solicitors

ADELAIDE
19th March, 1971

His Honour Mr. Justice Zelling,
Chairman,
The Law Reform Committee of South Australia,
Judges' Chambers,
Supreme Court,
ADELAIDE S.A. 5000

Dear Judge,

Thank you for referring to me for a query you have concerning execution of deeds by an amanuensis.

I have read the letter from the Law Reform Commission of New South Wales and have now perused the references therein contained. You have asked me to comment on the execution of deeds by an amanuensis.

I have seen this form of execution in use several times only. There is a form for it shown in the Australian Encyclopædia of Forms and Precedents Volume 16 at page 114 (Form 43). However, even though this form is given in these precedent volumes, there is some dispute as to whether in fact it may be a valid execution of the deed. Fox in 24 A.L.J., at page 520 takes the view that such an execution would be a nullity although his argument is based on the provisions of certain Victorian Statutes.

The Law Commission of England on Powers of Attorney (Law Com. 30) takes the view that power should be given by Statute to enable a Power of Attorney to be executed by an amanuensis. This particular report of the Law Commission dealt only with Powers of Attorney, but its recommendation lends support to the view that a Power of Attorney is not valid if executed by an amanuensis and this would appear to be in line with Section 56 of the Commonwealth Inscribed Stock Act 1911-1966.

Because of the doubt surrounding this area of the Law, it would seem that the most appropriate action to take would be to provide a statutory provision to enable deeds (including Powers of Attorney) to be executed in this manner.

It seems to me that greater protection is given if only, say, a Justice of the Peace, Notary Public or a Commissioner for taking affidavits is authorized to sign, seal and deliver the deed on behalf of the person physically incapable of doing so.

Yours Sincerely,

(Sgd.) CEDRIC THOMSON
(Cedric Thomson)