

SOME WORDS ABOUT DEEDS

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This essay discusses three aspects of the law of deeds and contracts under seal. The issues are: the meaning of "specialty"; the irrelevance of consideration where a contract is under seal; and, that of the exposure of a principal under a contract made by an agent. The author concludes that the category of contracts under seal should be abolished.

Cet essai discute de trois aspects du droit sur les actes et les contrats faits sous le sceau. Les questions sont: la signification de 'contrat formaliste', la non-pertinence de la considération quand un contrat est fait sous le sceau, et la responsabilité du mandant pour un contrat fait par le mandataire. L'auteur en vient à la conclusion que la catégorie des contrats sous le sceau devrait être abolie.

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I. Introduction

The early history of the law of contract, before the emergence of the writ of *assumpsit*¹ and the decision in *Slade's Case*,² is closely connected with the writ of covenant, which could only be employed where the alleged obligation on which the suit was based was created by a deed, i.e., a document signed by, and under the seal of the promisor, and delivered to the promisee.³ It might have been thought that once the common law had accepted that contracts could be established by written but unsealed documents or by spoken words, the deed might have fallen into disuse. That did not happen. The use of deeds continued and still continues to be one method by which, in the twenty-first century parties can — and in some instances must⁴ — enter into contractual or other obligations. The recommendations of the Law Reform Commission in Ontario and British Columbia, by which the use of deeds would be consigned to the dustbin of history,⁵ have not been adopted and enacted. Indeed, recently the utility of deeds, i.e. instruments under seal, has been championed and expounded by the Supreme Court of Canada.

In *Friedmann Equity Developments Inc. v. Final Note Ltd.*,⁶ Bastarache J., speaking for the Supreme Court of Canada, admitted that it could be argued that the practice of sealing documents, and its incidents, was now out of step with the fabric of society. Critiques of the use of the seal had suggested that it was anachronistic, on the ground that “[s]carcely anyone in society today would agree that the affixation of a seal is evidence of the

¹ W.S. Holdsworth, *History of English Law*, 5th ed. (London: Methuen, 1942, reprinted London: Sweet & Maxwell, 1966) vol. iii at 429-46; T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworths, 1956) at 637-45; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (Toronto: Butterworths, 1981) at 316 ff.; W.R. Anson, *Law of Contract*, 27th ed. (Oxford: Clarendon Press, 1998) at 12-15; G.C. Cheshire, C.H.S. Fifoot & M.P. Furmston, *Law of Contract*, 13th ed. (London: Butterworth, 1996) at 4-6.

² (1602) 4 Co. Rep. 92b, 76 E.R. 1074; on which see Holdsworth, *supra* note 1 at 446 ff; Plucknett, *supra* note 1 at 645-46; Milsom, *supra* note 1 at 352-56.

³ On the writ of covenant, see Holdsworth, *supra* note 1 at 417 ff; Pollock & Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. vol. ii at 214-18 (Revised 1968, vol. ii at 216-20) (London: Cambridge U.P., 1968); Plucknett, *supra* note 1 at 365, 366, 634; Milsom, *supra* note 1 at 246ff; Cheshire, Fifoot & Furmston, *supra* note 1 at 2; British Columbia, Law Reform Commission of British Columbia, *Report on Deeds and Seals*, (Victoria: Queen's Press, 1988) at 5-6.

⁴ E.g., under the *Ontario Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, ss.2, 3, 9; *Statute of Frauds*, R.S.O. 1990, c. S.19, s.2. But the *Land Titles Act*, R.S.O. 1990, c. L.5, s.79(1); *Land Registration Reform Act*, R.S.O. 1990, c. L.4, s.13 have abolished the formal requirement that such documents be executed under seal.

⁵ Ontario, Ontario Law Reform Commission, *Report on the Amendment of the Law of Contract*, (Toronto: Queen's Press, 1987); *Report on Deeds and Seals*, *supra* note 3.

⁶ (2000), 188 D.L.R. (4th) 269.

greater solemnity and force of a promise”⁷. The “rationale for sealing a document,” in the words of the learned judge, “may appear to be no longer socially relevant.”⁸ However, these critiques did not apply to the rule relating to sealed documents. According to Bastarache J., the rule about sealed documents, although possibly artificial, like many other common law rules, continued to serve a useful commercial purpose.⁹ The common law was replete with artificial rules, which, although appearing to have no underlying rationale, promoted efficiency or security in commercial transactions. Those rules, where applicable, had to be followed in order to create a legally recognized and enforceable right or obligation. Parties structured their relations with such rules in mind, so that the rules themselves became part of commercial reality. Only if commercial relations evolved in such a way that a particular rule became unjust or cumbersome and no longer served its original purpose, should such a rule be changed. Before that could be permitted, however, there had to be evidence of a change in commercial reality that made such a change in the common law necessary. No such change, according to the Supreme Court, had yet occurred, so as to justify the abolition of the distinction between sealed and unsealed documents.

To effect a change in the law could have unwarranted, far-reaching and complex consequences in the law of contract and the law of property.¹⁰ Contracts under seal were governed by a system of rules and the incidents of the seal stemmed from the historic view of such contracts: that they were enforceable by virtue of the form of the instrument.¹¹ To abolish any one of the rules that were part of this system, on the ground that it no longer appeared to have a rationale, would call in question the validity of the other rules. Hence, the court refused to embrace the opportunity provided by this case to abolish what the court called the “sealed contract” rule, the nature, effect and present day desirability of which will be considered later. Before doing so, however, there are two other aspects of the law relating to deeds that merit discussion because, like the sealed contract rule, they reveal how the continued use of the seal has caused problems which, despite judicial decisions, it is suggested remain unsolved. One is the validity of a distinction between deeds and “specialties” The second is whether, at the present time, it is still correct to state that if a contract is under seal it is unnecessary to investigate the question of consideration.

⁷ *Ibid.* at 292.

⁸ *Ibid.*

⁹ *Ibid.* at 292-293.

¹⁰ *Ibid.* at 293.

¹¹ *Ibid.*

II. *The Meaning of Specialty*

A) *Importance of the term*

In the courts, at various levels, that considered this issue in the *Friedmann Equity* case,¹² it seems to have been assumed that, depending on the intentions of the parties, a simple contract could be transformed into a contract by specialty by means of its execution under seal. Thus the terms “specialty” and “contract under seal” appear to have been regarded as equivalent and interchangeable. That approach, however, is questionable in view of an earlier Ontario Court of Appeal case, which was obliged to consider the true meaning of the expression “a specialty”.¹³ That decision places in doubt the view that all contracts under seal are specialties. Such doubt or uncertainty is regrettable, because what exactly is a specialty is of great importance in the law of limitations and in the conflict of laws.

Statutes that set out the law of limitations provide for different periods of limitation for simple contracts and specialties. In place of six years for the former, the period becomes 12 years for the latter in the United Kingdom¹⁴ and 20 years in Ontario.¹⁵ In the conflict of laws, when it becomes necessary to determine what system of law governs an incorporeal moveable, a specialty is once again differentiated. Such a chose in action is governed by the law of the country where it is situated, whereas in the case of a simple contract, the proper law of the contract may govern.¹⁶ Consequently, confusion as to the meaning of specialty is unfortunate. Nevertheless, evidence of such confusion can be found in various judicial and extra-judicial definitions.

a) *Definitions*

In *Words and Phrases Legally Defined*,¹⁷ “specialty” is given two definitions. One, drawn from the Privy Council judgement in *Rex v. Williams*, states that the term means “an obligation under seal securing a debt, or a debt due from the Crown or under statute”.¹⁸ The other, which is

¹² Borins J., of the Ontario Court General Division (unreported); in the Divisional Court, [1997] O.J. No. 642 (Q.L.); the Court of Appeal (1999), 41 O.R. (3d) 712; the Supreme Court of Canada (2000), 188 D.L.R. (4th) 269.

¹³ 872899 *Ontario Inc. v. Iacovoni* (1999), 40 O.R. (3d) 715; discussed below.

¹⁴ *Limitation Act* 1980, c.58 s.8(1).

¹⁵ *Limitations Act*, R.S.O. 1990 c. L.15, s.45(1).

¹⁶ A.V. Dicey & J.H.C. Morris, *Conflict of Laws*, 13th ed. (London: Sweet & Maxwell, 2000) vol. 2 at 929-30; J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 460.

¹⁷ 3rd ed. (London: Butterworths, 1990), vol. 4 at 208-209.

¹⁸ [1942] A.C. 541 at 555.

found in the judgement of Goddard L.J. in *Leivers v. Barber, Walker & Co.*, refers to specialty more broadly, as being “confined to deeds or contracts under seal”.¹⁹ *Black’s Law Dictionary*,²⁰ citing an Illinois case, states that a specialty is a “contract under seal”,²¹ and a specialty debt, quoting Blackstone, is “a debt due or acknowledged to be due by deed or instrument under seal”.²² Specialty is also equated with a writing under seal (and delivered), “which is given as security for the payment of a debt, in which such debt is particularly specified.” *The Dictionary of Canadian Law* defines specialty, as well as “specialty contract”, as “a contract under seal.” But a “specialty debt” is either (1) a bond, mortgage or debt which is secured by writing under seal; or (2) (citing the *Williams* case) sometimes any contract under seal, but more often an obligation under seal securing a debt or a debt due from the Crown or under a statute.²³ *Halsbury’s Laws of England* avers that “specialty” includes “a bond, contract under seal, a deed, or a contract under a statute.”²⁴ But the relevant passage continues by saying that specialty is also applied “in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt or a debt due from the Crown or under statute.”²⁵

b) *Historical development*

In the major English historical works, namely Pollock and Maitland’s *History of English Law to the Reign of Edward I* and Holdsworth’s *History of English Law*, much is written about the early use of seals and about deeds, but there is nothing that significantly throws light on the alleged difference between a sealed document and a specialty. By the end of the twelfth century, a natural person was bound by his seal. And there was a deep-seated reverence for a seal.²⁶ But, in discussing a “covenant”, which is equated with a sealed document,²⁷ Maitland stated:

The man who relies upon a covenant must produce in proof some ‘specialty’ (*especialité, aliquid speciale*); the production of ‘suit’ is not enough. Thenceforward, however, it is only a short step to holding as a matter of law that a ‘deed’ — and by a deed (*fet, factum*) men are beginning to mean a sealed piece

¹⁹ [1943] 1 K.B. 385 at 398. Cp. *The Shorter Oxford English Dictionary* 3rd ed. (Oxford: Clarendon Press, 1937, rev. 1970) at 1961: “A special contract, obligation or bond expressed in a document under seal”, referring to a definition used in 1482.

²⁰ 5th ed. (St. Paul: West Publishing, 1979) at 1254.

²¹ *Furst v. Brody* 375 Ill. 425, 31 N.E. 2d 606 (1941).

²² 2 Bl.Comm. 465.

²³ 2nd ed. (Scarborough: Carswell, 1995) at 1178.

²⁴ 4th ed. reissue (London: Butterworths, 1997) vol. 28 at para. 882.

²⁵ *Ibid.*

²⁶ Pollock & Maitland, *supra* note 3, vol. i at 490 (Revised 1968, vol. i at 508).

²⁷ Pollock & Maitland, *supra* note 3 vol. ii at 217, (Revised 1968, vol. ii at 219).

of parchment — has an operative force of its own which intentions expressed, never so plainly, in other ways have not. The sealing and delivering of the parchment is the contractual act.²⁸

As Plucknett wrote in 1950, citing a case from the Year Books of Edward I,²⁹ the seal was “the essence of the deed and not mere corroborative detail.”³⁰ An indented acquittance of a specialty debt would be an insufficient discharge unless it was under seal.³¹

Holdsworth, citing Pollock and Maitland in support, also explains that a sealed writing could be relied on as irrebuttable evidence that the one whose seal was attached was bound, not because the writing evidenced an agreement, but because it was conclusive proof that the defendant had come under a liability to the plaintiff.³² During the reign of Edward I it was settled that the action of covenant would lie only if the agreement was in the proper form and that form had to be a writing that was sealed. This new form was “no product of the ancient folk-law. The ‘act and deed’ that is chosen is one that in the past has been possible only to men of the highest rank.” Thus here, as in other branches of the law, the law for the great had become law for all.³³

While these various authors all stress that a deed entails a seal and a sealed document (or a parchment, or even a wooden tally, if sealed) is a deed, there is nothing in what they have written that suggests that, at least by the reign of Edward I, a distinction was drawn between a document under seal, i.e. a deed, and a specialty. On the contrary, it is suggested, the language of Maitland that has been quoted above seems to indicate very clearly that the two expressions “deed” and “specialty” bore one and the same connotation. The fact that Holdsworth cites Pollock and Maitland’s *History* in the footnotes to his discussion of covenants, sealed documents and deeds suggests that held the same view.³⁴

²⁸ *Ibid.* at 218, (Revised 1968, vol. ii at 220).

²⁹ YB 30-31 Ed. I (Rolls Series) in *Chronicles and Memorials of Great Britain and Ireland During the Middle Ages*, A.J. Horwood, ed. and trans. (London: Longman, Green, Longman, Roberts & Green, 1863) at 158.

³⁰ Plucknett, “Deeds and Seals”, *Transactions of the Royal Historical Society*, 4th Series, (London: Offices of the Royal Historical Society, 1950), vol. xxxii, 141 at 150.

³¹ *Ibid.*

³² Holdsworth, *supra* note 1 at 417.

³³ Pollock & Maitland vol. ii at 221 (Revised 1968, vol. ii at 223), cited in Holdsworth at 417. For the issue of whether a seal imported consideration, on which see also below, see Holdsworth at 419; A.W.B. Simpson, *History of the Common Law of Contract* (Oxford: Clarendon Press, 1975) at 369-372.

³⁴ Hence, it is suggested, the citation of Holdsworth in support of the more restricted definition by the Privy Council in *Rex v. Williams*, [1942] A.C. 541, was misguided and incorrect.

Indeed, even later, in the eighteenth century, other decisions can be found according to which the suggested distinction between a deed and a specialty appears to be spurious. In *Benson v. Benson*, Sir John Trevor M.R. said that “an agreement under hand and by seal, by deed [was] a covenant and consequently a specialty”.³⁵ Seventeen years later, in *Deg v. Deg*, Lord Chancellor King referred to marriage articles as being a debt by specialty, or a specialty debt.³⁶ Lord Chancellor Talbot in 1735, in *Gifford v. Manley* remarked, “there [is] no other definition of such a debt but that it is under a seal”.³⁷ Such judicial statements appear to be saying that agreements under seal are specialties and debts that are contained in such agreements are specialty debts or debts by specialty.

c) *A different approach*

That view did not commend itself recently to courts in Ontario in *872899 Ontario v. Iacovoni*.³⁸ This case concerned a claim made under an agreement of purchase and sale of land. The allegedly purchasing defendants (who were husband and wife) moved to strike out the statement of claim on the ground that the claim was statute-barred because the plaintiff’s corporate status had been cancelled at the date the claim was issued and was not revived until the six-year limitation period had expired. The plaintiff corporation (the vendor) claimed that the agreement was a “specialty”, to which the twenty-year period applied under the *Ontario Limitations Act*. The chief reason for allowing the defendants’ motion to strike out the statement of claim was that no seals were ever attached to the agreement and the signatures of the parties opposite the recital “signed, sealed and delivered” were insufficient to make the agreement into a sealed document. A document without a seal could not be a contract under seal whatever the intentions of the parties and despite the fact that a seal in the traditional form of a wax impression or paper wafer was no longer necessary to consider a document to be sealed.³⁹ This decision, which was reached after a discussion of conflicting English and Canadian authorities that reveal the extent to which there was room for disagreement about something as fundamental as the essentials of a document under seal,⁴⁰ was enough to resolve the issue

³⁵ (1710), 1 P. Wms. 130 at 131; 24 E.R. 324 at 325.

³⁶ (1727), 2 P. Wms. 412 at 414; 24 E.R. 791 at 792.

³⁷ (1735), Ca. t. Talb. 109 at 110; 25 E.R. 689 at 689.

³⁸ (1999), 40 O.R. (3d) 175, affirming (1997), 33 O.R. (3d) 561: leave to appeal to the Supreme Court of Canada denied (1999) 236 N.R. 1999.

³⁹ Citing *Linton v. Royal Bank of Canada*, [1967] 1 O.R. 315; *Strondale & Ball Ltd. v. Burden*, [1951] 2 T.L.R. 1192.

⁴⁰ *Canadian Imperial Bank of Commerce v. Kean* (1985), 55 Nfld. & P.E.I.R. 88; *Royal Bank of Canada v. Kiska*, [1967] 2 O.R. 379; *South-West Oxford (Township) v. Bailak* (1990), 75 O.R. (2d) 360; *Bank of Nova Scotia v. Paradise Motor Inn (Guelph) Ltd.* (1982), 30 C.P.C. 183; *First National Securities Ltd. v. Jones*, [1978] Ch. 109; *TCB Ltd. v. Gray*, [1986] Ch. 621.

before the court. However, both Pitt J. at first instance and the Court of Appeal went on to consider the second point: whether each and every contract under seal was a specialty for the purposes of the law relating to limitation of actions.

Strictly speaking, therefore, what was said on this subject could be regarded as *obiter dicta*. However the language used by Pitt J. and the Court of Appeal indicates that both courts considered that what was held on this matter was conclusive rather than merely an expression of judicial opinion. And what was held, it is suggested, contradicts what appears to have been determined by the English courts, to which reference was made earlier.

d) *The Ontario reasoning*

Pitt J., whose judgement was confirmed by the Court of Appeal, canvassed a number of Canadian decisions⁴¹ that denied that all contracts under seal were specialties, so that a contract bearing a corporate seal was not automatically a specialty. This view was consistent with two Privy Council cases, involving appeals from Canada in respect of the liability of deceaseds' estates to succession duty. In one of these, *Royal Trust Co. v. Attorney-General of Alberta*, Dominion Government bonds, even though not under seal, were specialties situated in Albert where they were at the time of the death of the deceased. Hence, the deceased's estate was liable to pay succession duty under the relevant Alberta statute. Even though not under seal, debts due from the Crown and debts owing under a statute were specialties.⁴² The bonds in this instance were obligations of the sovereign authority of the Dominion, authenticated in the manner prescribed by the Legislature. This sufficed to make them specialties because the "sign manual and — far less immediate than that — the signature of an officer of the State, or of the Household, must have sufficiently evidenced what Wentworth calls 'a debt due from the King'".⁴³ That, in itself, would have settled the issue in hand. However, each bond was a statutory obligation. A debt arising under statute was "not a simple contract debt with a six years' period of limitation of liability, but by reason of its statutory origin a debt by specialty subject only to the period of limitation appropriate to specialties."⁴⁴ The language of this decision, it may be suggested, is

⁴¹ *Alton Renaissance I v. Talmanca* (1996), 88 O.A.C. 41; *Bell Canada v. Olympia and York* (1992), 4 C.L.R. (2d) 1; *South-West Oxford (Township) v. Bailak*, *supra* note 40.

⁴² [1930] A.C. 144. On the location of specialties or specialty debts, compare *Payne v. The King*, [1902] A.C. 552; *Toronto General Trusts Corp. v. The King*, [1919] A.C. 679.

⁴³ *Ibid.*, *Royal Trust* at 151, citing T. Wentworth, *On the Office and Duty of Executors*, 1763 ed. at 46.

⁴⁴ *Ibid.*, citing *Cork & Bandon Rly. v. Goode* (1853), 13 C.B. 826, 138 E.R. 1427. This was an action of debt brought by the railway company against a member for calls, under the *Companies Clauses Consolidation Act*; therefore, it was an action founded on a

consistent with the idea that contracts under seal are specialties⁴⁵ because all it seems to be holding is that certain contracts, viz., those that create or evidence certain debts, are also specialties even though not under seal. In other words, the decision in this case extends and does not restrict the meaning and scope of “specialty”.

The other Privy Council case referred to by Pitt J. and the Court of Appeal was *Rex v. Williams*. This case involved the location of shares, again for the purposes of determining whether succession duty was payable by the deceased's estate. He died in Ontario. The shares were in a New York State corporation.⁴⁶ Because the shares could apparently be dealt with in New York State (as well as Ontario) it was held that they were situated in New York State, and therefore were not subject to Ontario succession duty.⁴⁷ In this respect, the shares in this case were not to be equated with the bonds in the earlier Alberta decision.⁴⁸ The Privy Council held that, although the share certificates were under the seal of the corporation, they were not specialties. The dissenting judge, Masten J.A. of the Ontario Court of Appeal had held the contrary opinion when the case was before that court⁴⁹ (as well as in a later decision in which he also dissented,⁵⁰ based upon earlier decisions in Ireland and England⁵¹.) These had been criticized. But, according to Viscount Maugham, speaking for the Privy Council, they did not “justify the conclusion that a certificate for shares in a company is for general purposes a specialty.”⁵² That term, although sometimes used to denote any contract under seal, was more often used — as indicated earlier in this discussion and in *Royal Trust Co. v. Attorney-General of Alberta*, to

statutory liability, and so was an action on a specialty. Consequently, the plea that it was an action founded on contract without specialty, and so was statute-barred, was bad. The idea that an action on a statute was an action upon a specialty, which was put forward by counsel *arguendo* in *Cork and Bandon* at 829, was propounded in Bacon's *Abridgement*, Limitation of Actions D.3, and Comyn's *Digest*, Temps G.15. In *Commissioner of Stamps v. Hope*, [1891] A.C. 476 it was held that a debt contained in a promissory note was a debt by specialty. Therefore since the mortgage deed that contained the note was in the possession of the testator when he died in Victoria, the debt was not liable to duty in New South Wales.

⁴⁵ Cp. The language of Lord Field in *Commissioner of Stamps v. Hope*, *supra* note 44 at 482: “... a debt under seal or specialty ...”

⁴⁶ *Rex v. Williams*, *supra* note 18.

⁴⁷ See *Brassard v. Smith*, [1925] A.C. 371; *Erie Beach Co. Ltd. v. Attorney-General for Ontario*, [1930] A.C. 161; *Provincial Treasurer of Alberta v. Kerr*, [1933] A.C. 710.

⁴⁸ *Royal Trust*, *supra* note 42 at 151-152.

⁴⁹ [1940] O.R. 403 at 413-418.

⁵⁰ *Treasurer of Ontario v. Blondé*, [1941] O.R. 227 at 258, 259. Contrast Robertson C.J.O. at 247-248.

⁵¹ *Smith v. Cork & Bandon Rly. Co.* (1870), I.R. 5 Eq. 65 at 76 per Christian L.J.; *In re Drogheda Steampacket Co.*, [1903] 1 I.R. 512 at 515, 516, 517 per Porter M.R.; *In re Artisans' Land & Mortgage Corp.*, [1904] 1 Ch. 796.

⁵² *Rex v. Williams*, *supra* note 18 at 554.

which Viscount Maugham referred — in the sense of a specialty debt, i.e., an obligation under seal securing a debt, or a debt due from the Crown, or under statute.⁵³ In view of the *ratio decidendi* of this case, viz., that the shares could be dealt with in New York State, it is suggested that these remarks about the meaning of specialty were *obiter dicta*. However, the Ontario courts relied upon them in *Iacavoni*.

Those courts also relied upon the decision of the Newfoundland Court of Appeal in *Newfoundland & Labrador Housing Corp. v. Suburban Construction Ltd.*⁵⁴ This, like several other decisions,⁵⁵ involved an action by a corporation brought under a contract to which the corporation had affixed its seal. The corporation claimed payment for certain extras performed under the contract in question. The other party pleaded that the claim was out of time, since it had been brought more than six years after it originally arose. The trial judge held that the contract, being under seal, was a specialty to which the twenty-year period of limitation applied under the Newfoundland *Limitation of Action (Personal & Guarantees) Act*,⁵⁶ which, like the English and Ontario statutes, enacted a longer period for “actions upon a bond or other specialty”. Therefore the action could be brought.⁵⁷ That decision was reversed on appeal.

The argument of the Newfoundland Court of Appeal was that since a corporation was required to contract in writing under its common seal, while a private person was required to make a contract under seal, a simple contract was not transformed into a contract by specialty by its execution under seal. Whether that happened could only be determined “having regard to the intention of the parties as evidenced and [sic: did the court mean “by”?] the true construction of the document in question.”⁵⁸ The trial judge had erred in looking only at the formalities of execution of the contract, ignoring the nature of the claim. “Specialty” sometimes meant any contract under seal. But the context of the limitation statute restricted the meaning of the “specialty” to “that on which an action for debt lies”. The specialty was the “undertaking to pay under seal, and the action is taken, not on the debt, but on the obligation”. The statute did not extend to damages on a covenant. The action in this case was for damages: it was not an action on a “bond or other specialty”, as contemplated by the statute.⁵⁹

⁵³ *Ibid.* at 554-555.

⁵⁴ (1987), 38 D.L.R. (4th) 150.

⁵⁵ See the cases referred to *supra* note 51; see also *Re Cornwall Minerals Rly. Co.*, [1897] 2 Ch. 74.

⁵⁶ R.S.N. 1970, c. 206, s. 2.

⁵⁷ (1987) 38 D.L.R. (4d) 150.

⁵⁸ *Newfoundland and Labrador Housing Corp.*, *supra* note 54 at 152.

⁵⁹ *Ibid.* at 152-53.

In view of the importance of this reasoning to the way in which the courts in *Iacovoni* arrived at their conclusion, it is pertinent to point out some errors it contains. First, the court appears to be saying that, because corporations must execute contracts under seal, all contracts made by corporations are contracts under seal, whereas, where a private person makes a contract, he or she has a choice: to contract in writing but not under seal or to contract under seal. Therefore, it might be legitimate to conclude that a private person's contract under seal is a specialty. It is doubtful whether there is any justification for this, either historically or in principle. According to the older cases reviewed earlier, a contract under seal is a specialty; it should not matter whether the contract must be under seal (in the case of a corporation) or is under seal because the parties, having a choice in the matter, desire it to be.

Second, the statutory provision, which creates a twenty-year period of limitation, applies to "an action upon a bond or other specialty" (with an exception that is irrelevant here). The court in this case concluded that "or other specialty" must be construed as meaning something equivalent or akin to "a bond". Once again, there seems to be no justification for such a conclusion. The language of the statute, i.e., the use of "or" instead of "and", indicates that the *eiusdem generis* rule is inapplicable. Under that rule it would have been correct to interpret "other specialty" to mean something resembling a bond. But that, it is suggested, is not the way the actual words of the statute should be understood, since the statute reads "or" and not "and". In the judgement at first instance in *Iacovoni*, Pitt J. adverted to the fact that in the very first *Limitation Act* in 1623, actions "of covenant or debt upon any bond or other specialty" were not subject to limitation periods.⁶⁰ The juxtaposition of these terms — namely, covenant, debt upon any bond, specialty — suggests that the 1623 statute was intended to refer to all manner of documents or instruments under seal, distinguishing them from written contracts not under seal (since at that time "covenant" meant a contract under seal, as previously noted). Why then, in the later enactments, when reference is made only to actions upon a bond or other specialty, should a more restrictive interpretation be placed upon the wording of the section? Despite what is said by the Newfoundland Court of Appeal, the context of the *Act* does not seem to limit the "specialty" contemplated by the legislature to that on which an action for debt lies. It is hard, if not impossible, to understand how the court could have arrived at that conclusion.

Third, the Newfoundland Court of Appeal cited *Rex v. Williams*, in particular, the passage where Viscount Maugham supported his interpretation of "specialty"⁶¹ by reference to Holdsworth.⁶² However, as

⁶⁰ (1997), 33 O.R. (3d) 561 at 566.

⁶¹ *Rex v. Williams*, *supra* note 18 at 555.

⁶² Holdsworth, *supra* note 1, vol. iii at 417.

already noted,⁶³ his Lordship misinterpreted what Holdsworth wrote, and mistakenly thought that Holdsworth's (and Maitland's) statement that creating a specialty by deed was at one time only possible to men of the highest rank resulted in the expression "specialty" being limited in scope. Insofar as the judgement of the Newfoundland court can be said to be based on what was said in *Williams*, it is suggested that such judgement is incorrect.

e) *An uncertain question*

Leave to appeal the *Iacavoni* case to the Supreme Court of Canada was denied. Thus the law in Ontario, remains as stated by the Court of Appeal. However, the correct meaning of "specialty" is contentious and problematical, not only because the decisions previously considered may be criticised and their validity questioned for reasons already suggested. Additionally, there are other Canadian cases which, it is suggested, seem to provide a definition of the scope of "specialty" that differs from that accepted and applied in *Iacavoni*. One, admittedly, is a judgement of a single Ontario judge at first instance. But the other is a decision of the New Brunswick Court of Appeal that was affirmed by the Supreme Court of Canada on other grounds, but nonetheless without disturbing the lower court's view on this issue.

Betona North America Ltd. v. Barratt Spun Concrete Poles Ltd. was about the right of an assignee under an equitable assignment to sue the other original party to the contract. Lief J. held that such assignee could only bring an action by joining the assignor as a party. Because this course had not been adopted, the assignee sought leave to amend the pleading so as to add the assignor as a party plaintiff *nunc pro tunc*. A potential barrier to this was the question of limitation. The defendant argued that to permit the amendment would deprive the defendant of the opportunity of raising the limitation defence (based on the fact that six years had elapsed since the cause of action arose).⁶⁴ However, Lief J. held that because the contract involved in this case was under seal, it was a specialty; therefore, the proper limitation period was twenty years; therefore, the defendant could not have raised the limitation defence. Hence, the amendment could be allowed.⁶⁵

In *Nowlan v. Brunswick Construction Ltée.*, a homeowner sued a building contractor for damage resulting from the breach of the contractor's contract. At trial, Barry J. held that the real cause of the serious rotting condition in the walls of the house, of which the plaintiff complained, was the negligence of the architect who prepared the plans for the house, not the

⁶³ *Supra* note 34.

⁶⁴ [1970] O.R. (1d) 72.

⁶⁵ *Ibid.* at 79-80.

poor workmanship of the contractor.⁶⁶ On appeal, the New Brunswick Court of Appeal held that the architect and the contractor were both liable, the former for faulty design, the latter for poor workmanship and inadequate materials. The contractor, by way of defence, alleged that the cause of action did not accrue within six years prior to the commencement of the action, and relied on the provincial *Limitation of Actions Act*. The court held that, since the action was based on a contract under seal, the six-year period did not apply.⁶⁷ In other words, the contract was a speciality. A majority, (Dickson J. dissenting), dismissed the building contractor's appeal to the Supreme Court of Canada.⁶⁸ Although nothing was said by the majority of the court on the issue of limitation of actions or the character of the contract, Dickson J. made a passing reference to the issue when he said:

[I]f the owners are to succeed they must, I think, having regard to the *Limitation of Actions Act* ... take the position that their claim against the building contractor sounds in contract, indeed a speciality contract, if a 20-year period of contract is to apply...⁶⁹

This is by no means an affirmation that the contract in issue in this case was a speciality. Taken in conjunction with what was said in the court below, however, it may be considered to indicate that, in the opinion of Dickson J. at least, any contract under seal was and is a speciality.^{70a}

f) Conclusion

The decision of the Ontario Court of Appeal states that an agreement for the purchase of land and for the building of a house on that land should not be regarded as anything other than a simple contract. Pitt J. thought that lawyers in Ontario, especially those engaged in conveyancing, would be astonished by the conclusion that all contracts under seal amounted to specialties for the purposes of the *Limitations Act*. Misener J. went further, in *South-West Oxford (Township) v. Bailak*, when he said that "the speciality may now be said to be an anachronism" and that it would not be right to breathe life into it by broadening its definition to embrace every obligation under seal.⁷⁰ Perhaps the time has come to go still further and to erase the concept of speciality from the law, even if it is not thought desirable and acceptable to go so far as to abolish the use of all deeds, i.e., instruments under seal.

⁶⁶ (1973), 5 N.B.R. (2d) 552 at 559.

⁶⁷ (1973), 5 N.B.R. (2d) 529 at 544.

⁶⁸ (1975), 49 D.L.R. (3d) 93.

⁶⁹ (1975), 49 D.L.R. (3d) 93 at 100.

^{70a} See the diverse opinions of Robertson and Drapeau JJ.A. on the meaning of 'speciality' in *Kenmont Management Inc. v. Saint John Port Authority* [2002] N.B.J. No. 32 (Q.L.).

⁷⁰ (1991), 73 D.L.R. (4th) 411 at 419.

II. *Deeds and Consideration*

a) Irrelevance of consideration

In the *Friedmann Equity* case, Bastarache J. said that because of the historical view of sealed contracts, namely, that they were enforceable by virtue of the form of the instrument, “today a contract under seal does not require consideration.”⁷¹ There are many decisions and dicta that are to the same effect. Indeed, it is often taken as axiomatic that the presence of a seal on a contract negates the need for establishing what is the norm in the case of other contracts, whether written or oral — namely that consideration has moved from the promisee to the promisor — in order that the former may sue the latter in the event of a failure to fulfil the latter’s promise.⁷² Hence, in *Yellowega v. Yellowega*, the converse was stated: that the absence of a seal at the time of execution of a contract does not invalidate it, as it not necessary that it be under seal when “good” (which must be taken to mean “valuable”⁷³) consideration is given by each party to the other.⁷⁴

This doctrine led the New Brunswick Court of Appeal to hold that a daughter — who was named as a party in a deed made between her parents, but had given no consideration for her father’s promise to pay for her education — could sue when he did not provide the money.⁷⁵ It led a Manitoba judge to hold that an action would lie against the personal guarantor of the payment of the purchase price of shares for which the corporate promisor had not paid, even though the nominal amount stipulated in the guarantee had not been paid by the party to whom the guarantee was given. Since the contract and the guarantee were contained in a deed, there was no need for consideration, and any consideration set out in the document did not have to be paid for the guarantee to be valid and enforceable.⁷⁶ Similarly, Godin J. of the New Brunswick Court of Queen’s Bench said, *obiter*, that while, in fact, there was consideration for the conveyance of a house by the grandparents of the defendants — viz., the defendants’ promise to provide the grandparents with a home and shelter — there was no need for consideration because the conveyance was contained in a deed.⁷⁷ In a more recent Ontario case, *Re/Max Garden City Realty Inc.*

⁷¹ *Friedmann Equity*, *supra* note 6 at 293.

⁷² G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 123-125, 198.

⁷³ *Ibid.* at 93.

⁷⁴ (1969), 66 W.W.R. 241 at 242 per Hunt J.

⁷⁵ *Selby v. Selby* (1956), 3 D.L.R. (2d) 275.

⁷⁶ *Bay & Bay v. Three Hebermick Enterprises Ltd, Kronson, Kronson, Doherty & Kronson* (1983), 21 Man.R. (2d) 51.

⁷⁷ *Hickey & Hickey v. Hickey & Hickey*, (1988), 86 N.B.R. (2d) 428 at 434, *aff’d* (1988), 86 N.B.R. (2d) 421 (C.A.).

v. 828294 *Ontario Inc.*, an equitable assignment of the real estate agent's commission was valid because the agreement which gave rise to the assignment was under seal. Hence, no consideration was necessary to make the vendor's promise to pay the agent out of the purchase price actionable by the agent.⁷⁸ "Without a seal", said Philip J., "the need for consideration must prevail."⁷⁹ Hence, in *Bank of Montreal v. Sperling Hotel Co. Ltd.*, where there was no consideration for the contract in issue, and the contract was not under seal, the contract was not enforceable.⁸⁰

b) *The relevance of consideration*

It has sometimes been said that "a seal imports consideration".⁸¹ That, it is suggested, is a questionable statement. In the first place, as reference to the cases previously cited indicates, it is not that the presence of a seal "imports", i.e., establishes the existence of, consideration, but that the attachment of a seal seems to take the place of consideration. Secondly, there are some Canadian cases suggesting that even if a contract is under seal, the absence of consideration can have an effect upon the issue of liability. Thus in *Maguire v. Northland Drug Co.*, Dysart J., speaking for the Supreme Court of Canada in a case concerned with restraint of trade, in which, as it happened, it was held that there was ample consideration for the bond in question, added:

[a]lthough the necessity of proving consideration for the covenant is not dispensed with by the presence of seal in the case of this kind.⁸²

Unfortunately, the learned judge did not explain this remark further; nor did he cite authority for his statement. However, in *Chilliback v. Pawliuk*, Egbert J. of the Alberta Supreme Court expressed a similar opinion. He referred to earlier authority in support of his conclusion that the fact that a contract was under seal did not mean that it was valid and enforceable if consideration for a promise was lacking and it would be unconscionable to give effect to the promise.⁸³ As will appear, however, the authorities on which the learned judge relied do not seem to support his conclusion.

The plaintiff had been injured by reason of the defendant's negligence while the plaintiff was a gratuitous passenger in the defendant's vehicle. Subsequently, he signed a release under which he discharged the defendant

⁷⁸ (1992), 8 O.R. (3d) 787.

⁷⁹ *Ibid.* at 790.

⁸⁰ (1973), 36 D.L.R. (3d) 130.

⁸¹ See *Alberta (Director of Employment Standards) v. Sanche* (1992), 2 Alta.L.R. (3d) 14, *aff'd* on other grounds (1992), 5 Alta.L.R. (3d) 243.

⁸² [1935] S.C.R. 412 at 415.

⁸³ (1956), 17 W.W.R. 534.

from liability for his injuries. A red wafer seal was affixed to the document in which it was stated that the consideration received by the plaintiff in return for his promise not to sue the defendant was "Nil". The defendant admitted that he had given no consideration. When the plaintiff sued the defendant for negligence, the latter pleaded the release by way of answer, arguing that the absence of consideration did not matter since the document was under seal. There was no evidence as to who had affixed the alleged seal, nor whether such seal had been affixed before or after the plaintiff signed the document. Egbert J. held (i) that the parties did not intend the document to be a sealed document;⁸⁴ (ii) that a seal did not import consideration if the document expressly stated that there was not consideration;⁸⁵ (iii) that even if the document were to be considered a document under seal, lack of consideration rendered the release unenforceable, because the court, in the exercise of its equitable jurisdiction, could look at the true bargain between the parties, and the presence of a seal did not prevent the court from refusing to enforce an otherwise unenforceable contract.⁸⁶ In other words, if it would be unconscionable to give effect to a promise for which no consideration had been given, then even if the promise were contained in a sealed document, a court could deny recognition to and enforcement of such promise.

Egbert J. purported to derive this remarkable, even revolutionary, doctrine from several English and Canadian cases. One was *Xenos v. Wickham*, where, in fact, no deed was involved, because no deed was ever "delivered" in a manner that satisfied the law relating to deeds.⁸⁷ Another was *Groves v. Groves*, where the relevant agreement was voluntary, without consideration, and in addition, the contract was for an illegal purpose and so could not be enforced.⁸⁸ Nor was there a sealed document in the Canadian case cited by Egbert J., *Sawyer & Massey Ltd. v. Bouchard*.⁸⁹ Hence, it is suggested, the so-called authority justifying the learned judge's view that a document under seal could be disregarded if it could be interpreted as being unconscionable, upon closer examination, does nothing of the kind. Yet Professor Waddams cites the decision of Egbert J. to make the point that an unconscionable contract under seal may be set aside by a court.⁹⁰ He also refers to another case, *Solsberg & Solsberg v. McLaughlin & McMinn*, as a further instance of this. That case concerned a document that was not under seal and was therefore revocable. It raised the question,

⁸⁴ *Ibid.* at 539.

⁸⁵ *Ibid.* at 539.

⁸⁶ *Ibid.* at 540.

⁸⁷ (1863), 14 C.B.(N.S.) 435, 143 E.R. 515.

⁸⁸ (1828), 3 Y&J 163, 148 E.R. 1136.

⁸⁹ (1910) 13 W.L.R. 394.

⁹⁰ S.M. Waddams, *Law of Contract*, 4th ed., (Toronto: Canada Law Book, 1999) para.168, n.1.

without determination, whether if it had been under seal it would have been irrevocable.⁹¹ Neither this decision nor that in the *Chilliback* case, it is suggested, in fact provides strong support for any doctrine of the unenforceable nature of contracts under seal on the grounds of unconscionability. If such a doctrine is part of the law in England or Canada, then it will have to be discovered elsewhere.

c) *Aftermath*

The judgement of Egbert J. did not go unnoticed at the time. One comment adopted the view that the judgement confused the status and effect of a seal, and if valid, rendered the historical concept of a document under seal no longer valid or useful.⁹² Another approved of the judgement on the ground that the role of the seal in modern times involved a fiction and a deception, which meant that the decision and language of Egbert J. were justified and desirable as being in conformity with reality and everyday practice. If gratuitous promises were to be enforced, it should be on some other basis and for some other reason than that such a promise was contained in a document under seal.⁹³

In the *Friedmann Equity* case, the court did not have to consider this question of the effect of unconscionability on a contract under seal. As previously noted, the court endorsed the idea that such contracts, by virtue of their form, were valid without the need for consideration.⁹⁴ From this it may be inferred that the court would not have accepted the views of Egbert J.. However, it might be argued that even if contracts under seal do not require consideration for their enforceability, they are nonetheless contracts; since courts may refuse to enforce contracts if their content or effect is unconscionable, the same should be applicable where the contract in question is not a "simple" contract, supported by consideration, but is a contract under seal. Thus the opinions and approach adopted by Egbert J. could be upheld, not for the reasons and on the basis of the authorities referred to by the learned judge, but on basis of the greatly enlarged scope of the doctrine of unconscionability that has evolved in modern cases. Such an approach would preserve the right and ability of a court to exercise its equitable jurisdiction over contracts without undermining — or as one of the comments on Egbert J.'s decision indicated, rendering outdated and irrelevant to the modern commercial world — the classical, but still operative doctrine of contracts under seal.

⁹¹ [1948] O.W.N. 408 (C.A.).

⁹² A.B. Weston, "Case and Comment" (1956) 34 Can. Bar Rev. 453.

⁹³ S.J. Helman, "Contracts Under Seal" (1956), 34 Can. Bar Rev. 873. See also response by Weston at 879.

⁹⁴ *Friedmann Equity*, *supra* note 6.

IV. *Deeds and Agency*

a) *The sealed contract rule*

The issue that was raised in the *Friedmann Equity* case involves the interaction of the law relating to contracts under seal and the law of agency, in particular that part of the law of agency that regulates the extent to which an undisclosed principal can be treated as a party to a contract. The employment of an agent is one method developed by the common law to get around the doctrine of privity of contract. The scope of agency was extended by the evolution of the doctrine of the undisclosed principal who — subject to certain limitations — was permitted to sue and be sued on a contract made on his behalf by an agent who had not disclosed to the other party the existence of a principal.⁹⁵ However, an important limitation on the rights and liabilities of all principals, whether disclosed or undisclosed, developed in England in the nineteenth century and was adopted by the Supreme Court of Canada in 1903 in *Porter v. Pelton*.⁹⁶

Following earlier English authority,⁹⁷ the Supreme Court held that a third party who was not a party to, nor had signed an agreement under seal made between two other parties, could not be sued on such a contract. In *Porter v. Pelton*, there was an agreement under seal to purchase certain mining areas in return for stock in a company to be formed with others by one of the parties to the contract, the purchaser. The third party organised the company, which received a deed of the land in question. When the stock was not forthcoming, the vendor sued the third party. By the application of what the Supreme Court of Canada later in the *Friedmann Equity* case called the “sealed contract rule”, the action was unsuccessful.

The rule was subsequently endorsed and applied by the Supreme Court of Canada in *Margolius v. Diesbourg*. This involved an action for breach of a contract under seal between the plaintiff and K. The defendant was not a party to this contract. The plaintiff argued that the K was the defendant’s agent, though exceeding his authority; that the defendant had ratified the contract; and that there had been a novation of the original contract. None of these arguments succeeded. The action failed. No person could sue or be sued in an action at law upon a contract under seal unless that person was a party to the contract.⁹⁸ However, the court said that the rule only applied to actions at law. In a proceeding in equity in respect of a contract involving

⁹⁵ G.H.L. Fridman, *Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 253-270.

⁹⁶ (1903), 33 S.C.R. 449; see also *Pielsticker & Draper, Dobie & Co. v. Gray*, [1947] 3 D.L.R. 249.

⁹⁷ *Schack v. Anthony* (1813), 1 M & S 573, 105 E.R. 214; *Re Pickering’s Claim* (1871), 6 Ch.App. 525; *Calder v. Dobell* (1871), L.R. 6, C.P. 486; *Beckham v. Drake* (1841), 9 M & W 79, 152 E.R.35.

a trust, different considerations prevailed.⁹⁹ In this the court followed the decision of the English Court of Appeal in *Harmer v. Armstrong*.¹⁰⁰

Later, in *Whisper Holdings Ltd. v. Zamikoff*, the Supreme Court again endorsed and applied the rule that only parties as expressed in an agreement under seal can sue or be sued on a covenant in the instrument (although, on the facts, the action succeeded because there had been a novation).¹⁰¹ The Supreme Court affirmed the decision of the Ontario Court of Appeal, but on different grounds, since the lower court had held that the strict rule did not apply because *Whisper* had become a member of a syndicate or partnership.¹⁰² What is perhaps most important about this case, however, are some remarks made by Laskin J.A., as he then was. The learned judge said that the rule did not apply as stated in the *Porter* case in respect of a *cestui que trust* with regard to a covenant made on his behalf by the trustee. Nor did it apply to undisclosed principals where an equitable remedy, as opposed to one at common law, was being sought. Because of developments since the rule was originally propounded, what was left of the old common law rule in England was, in Laskin J.A.'s words, "a shell at best". The rule was originally founded on a formulistic view of a contract under seal, which has ceased to terrify.¹⁰³ There was no reason of substance for prolonging its life.

b) *Reactions to the rule*

Given the provenance of these remarks, it is not surprising that in three later cases in Alberta, Ontario and British Columbia, judges were prompted to suggest limitations on the application of the rule that might have reduced its operation and effect. The courts developed ways around the privity doctrine, the strict application of which had a confining effect on the law of contract and was inconsistent with commercial reality. The sealed contract rule, which ousted the normal rules of the law of agency and prevented third parties from being able to sue upon or being liable under contracts under seal, was a rule that extended the scope of the doctrine of privity and restricted the use of the doctrine of agency. Hence, it is suggested that judges were eager to find ways to control the extent to which the rule could be invoked.

⁹⁸ [1937] S.C.R. 183, following *Lord Southhampton v. Brown* (1827), 6 B & C 718, 108 E.R. 35.

⁹⁹ *Ibid.* at 189.

¹⁰⁰ [1934] 1 Ch 65, discussed in *Ibid.* at 190.

¹⁰¹ [1971] S.C.R. 933 at 941-942.

¹⁰² *Re Zamikoff v. Lundy* (1970), 9 D.L.R. (3d) 637.

¹⁰³ *Ibid.* at 648.

In *Napev Construction Ltd. v. Lebedinsky*, Ewaschuk J. stated that where a deed involved an undisclosed principal or beneficiary, the principal or beneficiary could not sue or be sued on the deed, as decided in the *Porter* case. However, this might be too wide in that later "British" (sic) jurisprudence (i.e., the decision in *Harmer v. Armstrong*¹⁰⁴) "would permit a beneficiary to sue on a deed repudiated by his trustee."¹⁰⁵ However, in view of the later comments on this decision by the Supreme Court in the *Friedmann Equity* case,¹⁰⁶ the view of the law taken by Ewaschuk J. may have been too broad. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* concerned a claim of subrogation.¹⁰⁷ Wachowich J. of the Alberta Court of Queen's Bench said that the rule applied to prevent a principal suing or being sued when his agent affixed his seal, not where the other party affixed its seal.¹⁰⁸ Moreover, the rule was restricted to claims at common law. Hence, it did not apply to the claim before him, which was a claim in equity seeking subrogation to a claim in equity. There was no difference between an action by a *cestui que trust* and an action by a third party to have a trust estate indemnify him for a liability incurred by the trustee on behalf of the estate.¹⁰⁹ In this respect, it may be suggested, the learned judge was also taking the effect of the *Harmer* decision in England further than it properly ought to have gone. In *Kootenay Savings Credit Union v. Toudy*, Bouck J. enunciated a restriction on the application of the sealed contract rule¹¹⁰ that appears, in light of what was later said by the Supreme Court of Canada,¹¹¹ to have been inconsistent with other decisions and to be wrong. It may well be that Bouck J. adopted the view that he did because of his opinion that the rule in question was not grounded in any good reason, but was merely a technical rule of law which owed its origin to the common law's aversion to third party rights and liabilities under contracts.¹¹² What Bouck J. held was that because corporations were no longer required to use their seals when making contracts (as a result of statutory changes), the sealed document rule did not apply where a corporation that was an undisclosed principal was being sued on a mortgage under seal made by its agent on its behalf.

¹⁰⁴*Harmer v. Armstrong, supra* note 100.

¹⁰⁵(1984), 7 C.L.R. 57 at 63.

¹⁰⁶*Friedmann Equity, supra* note 6 at 283-285.

¹⁰⁷(1988), 46 D.L.R. (4th) 37.

¹⁰⁸*Ibid.* at 45, referring to *Pelton v. Porter supra* note 96; *Central Trust Co. v. Milchem* (1986), 72 A.R. 321, aff'd (1986), 77 A.R. 324, affirmed March 9, 1987 (Alberta C.A.) (unreported); *Prince v. Gundy*, [1936] O.W.N. 397.

¹⁰⁹*Ibid.* at 46.

¹¹⁰(1988), 22 B.C.L.R. (2d) 201.

¹¹¹See *Friedmann Equity, supra* note 6.

¹¹²*Kootenay Savings, supra* note 110 at 204-05.

Decisions such as these appear to make significant inroads upon the strictness of the original sealed contract rule. It is worthy of note that in a leading English textbook of the law of contract, it was stated categorically, on the basis of English, not Canadian authorities, that the rule was "a dead letter".¹¹³ In 1987 the Ontario Law Reform Commission, in its *Report on Amendment of the Law of Contract*, argued that the seal had outlived its usefulness, and recommended changes in the law which would give effect to that conclusion.¹¹⁴ Presumably enactment of such changes, which has not occurred, would have rendered the *Porter* doctrine no longer valid.

c) *Reform of the doctrine of privity*

The Ontario Law Reform Commission also took the view that the privity doctrine, whereby third party beneficiaries are excluded from rights and liabilities under contracts, should also be the subject of change.¹¹⁵ This, too, has not yet occurred in Ontario. However, as noted in the Ontario Report, by 1987 change had already been enacted in Western Australia,¹¹⁶ Queensland¹¹⁷ and New Zealand.¹¹⁸ More recently, following a report by the English Law Commission,¹¹⁹ the law was changed in England. Third parties were given rights of action, under certain circumstance, so as to be able to enforce claims under contracts made for their benefit. The statute in question, the *Contracts (Right of Third Parties) Act*,¹²⁰ does not make third parties subject to liabilities. In fact, as Professor Treitel points out, all the statute does is to add another exception to the privity doctrine, leaving the common law and equitable exceptions still available in appropriate situations.¹²¹ Curiously enough, several years before England adopted the antipodean approach, and while Ontario has not yet enacted similar legislation, New Brunswick did so in section 4(1) of the *Law Reform Act*. Under this provision, which is very like the provisions of the statutes in Australia, New Zealand and England:

¹¹³ Anson, *supra* note 1 at 642. Contrast W. Bowstead & F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 16th ed. (London: Sweet & Maxwell, 1996) at 426-427; *Halsbury's supra* note 24 vol. 9(1) at para. 616-17.

¹¹⁴ Ontario, *Report*, *supra* note 5 at p. 43.

¹¹⁵ *Ibid.* Ch. 4 at 49-71.

¹¹⁶ *Property Law Act*, 1969, s.11, discussed in Ontario, *Report*, *supra* note 5 at 61-62.

¹¹⁷ *Property Law Act* 1974, s. 55, discussed in Ontario, *Report*, *supra* note 5 at 62-64.

¹¹⁸ *Contracts (Privity) Act* 1982, s. 4, discussed in Ontario, *Report supra* note 5 at 58-61.

¹¹⁹ U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Cm. 3329 (London: H.M.S.O., 1996).

¹²⁰ 1999 c. 31.

¹²¹ G.H. Treitel, *Law of Contract*, 10th ed. (London: Sweet & Maxwell, 1999) at 538-539.

A person who is not a party to a contract but who is identified by or under the contract as being intended to receive some performance or forbearance under it may, unless the contract provides otherwise, enforce that performance or forbearance by a claim for damages or otherwise.¹²²

The question then arises: What, if any, is the effect of such change in the law relating to privity of contract upon the sealed contract rule?

If that rule is an aspect or feature of the doctrine of privity, then it would seem to follow that the sealed contract rule should no longer apply where the law has changed, at least to the extent that a disclosed principal might be able to sue one of the parties to the contract. It is difficult to see how such a provision could assist an undisclosed principal, since the statute refers to a party “identified by or under the contract”, and the nature of undisclosed agency is such that no such identification “by or under the contract” is forthcoming. But is the sealed contract rule part of the law of privity? Or is it a distinct doctrine that applies, and may continue to apply, even if the doctrine of privity is altered as it has been, unless some specific repeal of the rule is enacted in the relevant legislation?

As far as Ontario is concerned (and other provinces which, unlike New Brunswick, have not adopted legislation similar to that of Western Australia, Queensland, New Zealand and England) this question is academic. As stated categorically by the Supreme Court of Canada in the *Friedmann Equity* case, repeating the opinion of Morden A.C.J.O. in the Ontario Court of Appeal:¹²³ “the sealed contract rule is clearly a part of the common law of Canada”.¹²⁴

d) *The Friedmann Equity case*

This case concerned a mortgage made under the corporate seal of an agent on behalf of undisclosed principals. The plaintiff, the mortgagee, wished to sue the beneficial owners, the undisclosed principals, when there was default on payment of the money advanced under the mortgage. The beneficial owners brought a motion to dismiss the action. Borins J. dismissed the motion, on the ground that it was not plain, obvious and beyond doubt that the plaintiff could not succeed at trial.¹²⁵ That decision was reversed by the Divisional Court, which allowed the motion to dismiss.¹²⁶ That court’s determination was upheld by the Ontario Court of Appeal, which held that under section 13 of the *Land Registration Reform Act*,¹²⁷ the

¹²²S.N.B. 1993 c. L-1.2 s.4(1).

¹²³(1999), 41 O.R. (3d) 712 at 719, 728.

¹²⁴*Friedmann Equity*, *supra* note 6 at 280.

¹²⁵*Friedmann Equity*, *supra* note 12 (Gen. Div.).

¹²⁶*Friedmann Equity*, *supra* note 12 (Div. Ct.).

¹²⁷S.O. 1984 c. 32, now R.S.O. 1990 c. L.4.

mortgage was a contract under seal, and under the sealed contract rule, the plaintiff could not sue the undisclosed principals.¹²⁸ In arriving at this conclusion, the Court of Appeal disagreed with the view adopted in *Cheshire, Fifoot & Furmston's Law of Contract*¹²⁹ that the decision in *Harmer v. Armstrong* had the effect of enabling the rule to be circumvented. On appeal to the Supreme Court of Canada, the decision of the lower court was affirmed.¹³⁰

For present purposes, it is unnecessary to discuss in detail the analysis by the Supreme Court that led to that conclusion. Suffice it to say that the Supreme Court held that, as already stated, the sealed contract rule was valid, operative and applied to the facts of this case. The decision in *Harmer v. Armstrong* did not carve out an exception to the sealed contract rule,¹³¹ but distinguished the equitable principle applied in that case from the sealed contract rule and was based on the law of trusts, not on the law of contract. It also laid down an equitable rule that did not create any legal relationship between the beneficiary and a party to the contract without which that party could not sue or be sued by the beneficiary.¹³² The equitable principle described in *Harmer v. Armstrong* might enable an undisclosed principal to recover on a contract made for his or her benefit when the agent refused to do so. But the rights enforced in such a situation were the rights of the agent: there was no direct legal relationship created between the beneficiary and the party to the contract. Hence, there was no corresponding right for such party to sue a beneficiary on a contract under seal.

The court also held that the rule applied where the agent was a corporation, despite the decision of Bouck J. in the *Kootenay* case, which contradicted the effect of legislation dealing with the powers and capacities of a corporation¹³³ as well as other Canadian decisions in British Columbia and Ontario.¹³⁴ The sealed contract rule clearly applied to corporate agents, although the intention of the corporation to create a sealed instrument had to be evident from the construction of the instrument and the circumstances surrounding its creation before the rule would be applied. The exception

¹²⁸ *Friedmann Equity*, *supra* note 12 (C.A.) at 724-27.

¹²⁹ *Cheshire, Fifoot & Furmston*, *supra* note 1 at 495.

¹³⁰ *Friedmann Equity*, *supra* note 6 at 269.

¹³¹ Contrary to the accepted opinion of English textbook writers: See *Cheshire, Fifoot & Furmston*, *supra* note 1 at 467-469; *Anson*, *supra* note 1 at 417-420; *Treitel*, *supra* note 121 at 595-599.

¹³² *Friedmann Equity*, *supra* note 6 at 285.

¹³³ *Canada Business Corporations Act*, R.S.C. 1985 c. C-44; *Business Corporations Act*, R.S.O. 1990 c. B.16.

¹³⁴ *Marbar Holdings Ltd. v. 221401 B.C. Ltd.* (1984), 54 B.C.L.R. 169; *Edelstein Construction Ltd. v. Fire Pit Inc.* (1996), 30 O.R. (3d) 383; *Tri-S Investments Ltd. v. Vong*, [1991] O.J. 2292 (Q.L.)

was if a statutory provision, as in the instant case, deemed the instrument to have all the effects of an instrument under seal.¹³⁵

Finally, the Supreme Court of Canada gave consideration to the question whether the rule should be abolished, and concluded that this should not occur, in spite of judicial and academic opinion that it should be. No change in commercial reality had occurred to justify such abolition. Furthermore, as previously noted, to abolish the rule would have serious and unwarranted consequences for the law of contract and the law of property, because the rule was part of the whole system of rules relating to contracts under seal and change of one part would "call into question the validity of the other rules".¹³⁶ Abolition of the rule would also have the effect of rendering undisclosed principals no longer able to avoid personal liability and would expose them to potential liability for as long as twenty years.¹³⁷

What the court did not clearly determine, was whether the rule was part of the law relating to instruments or documents under seal, the law of agency, or the law of privity. That issue was not before the court on the facts of this case. Nor could it arise, given that Ontario has not followed the example of some other jurisdictions and altered the law of privity, with the result that the sealed contract rule had to be applied. The language and analysis employed by the court involved the three areas of the law referred to above. Consequently, it is suggested, the possible effect of a change in the law of privity along the lines adopted elsewhere is an open issue.

e) *The character of the rule*

Prior to concluding that the rule should not be abolished, the discussion by the Supreme Court of Canada began with remarks about the legal situation of undisclosed principals and continued with an account of the nature and binding character of the sealed contract rule. They followed this by an analysis of the decision in and effect of *Harmer v. Armstrong* and the situation where the agent who entered into the contract on behalf of an undisclosed principal was a corporation. In the course of this discussion the court set out the major incidents of a contract under seal¹³⁸ and stated:

The sealed contract rule ... namely that only the parties to a contract under seal may sue or be sued on it, thus exists within a system of rules which apply to sealed contracts.¹³⁹

¹³⁵ *Friedmann Equity, supra* note 6 at 280.

¹³⁶ *Ibid.* at 293.

¹³⁷ *Ibid.* at 295. But this danger would be avoided if the category of contracts under seal were abolished, and all contracts were made subject to the same period of limitation, viz., 6 years.

¹³⁸ *Ibid.* at 279-80.

¹³⁹ *Ibid.* at 280.

This statement, by itself, it is suggested, seems to indicate that the rule under examination is part and parcel of the law dealing with the nature and effects of a contract under seal. It is not to be thought of as an aspect of the law of privity, nor of the important exception to the doctrine of privity that is created by the recognition of agency and its consequences, including those which stem from the acceptance by the law of the anomalous doctrine of the undisclosed principal.

In this respect, two features of the judgment should be particularly noted. The first is the way in which the decision in *Harmer v. Armstrong* was dealt with by the court, to which reference has been made. That case, according to most commentators, recognised another exception to the doctrine of privity, derived from the law of trusts, that was distinct from that created by the law of agency. By regarding the decision in that case as not creating such an exception, the Supreme Court appears to be saying that the case could not be invoked to finesse the operation of the sealed contract rule by appealing to equitable doctrines to counteract the strictness of a common law rule, as is frequently the effect of an equitable principle. Incidentally to that, it may be suggested, the court is accepting the idea that the sealed contract rule is not an integral part of the doctrine of privity, but something distinct from that doctrine.

The second is the way in which the court differentiated between the sealed contract rule and the legal principles under which an undisclosed principal was permitted to sue and be sued under a contract entered into on behalf of such a principal by an agent, whether or not that agent was itself a corporation. Again the court seems to be saying that the sealed contract rule is *sui generis*, not a part of the law of agency, which provides a qualification of the strict common law doctrine of privity, as already seen.

This leads to the conclusion that the Supreme Court intended to indicate that the sealed contract rule was not a rule that could or would be abolished by implication from legislation, if it were not stated expressly therein. For example, legislation that alters the privity doctrine by allowing third party beneficiaries under a contract to sue one of the parties to such a contract — in the event that the beneficiary did not receive the “performance or forbearance”¹⁴⁰ that such beneficiary was intended to receive — do not automatically apply to sealed contracts. Moreover, since such statutes only permit the beneficiary to sue in respect of what he, she, or it had not received, those statutes give no corresponding or correlative right to a party to the contract to sue the beneficiary. This is unlike the effect of the application of the law of agency in the case of undisclosed principals, as well as disclosed principals. Such legislation, therefore, it may be inferred, was not designed to alter the law of agency, but was more akin to — and perhaps can be regarded as a statutory extension of — the equitable doctrine

¹⁴⁰Law Reform Act, *supra* note 122.

that, despite the remarks and opinion of the Supreme Court of Canada, is exemplified in the case of *Harmer v. Armstrong*.

Thus, it is suggested, the sealed contract rule, as recognised by the Supreme Court of Canada, is a doctrine that will survive any changes in the law of privity. Changes that have already occurred in some jurisdictions and might one day occur in Ontario do not affect the sealed contract rule — at least as far as concerns the right of a beneficiary to sue under such a contract — in the absence of express statutory language that makes it clear that the scope of such legislation also reaches to abolish the sealed contract rule.

f) *Retention of the rule*

The court refused to abolish the sealed contract rule, although invited to do so by the plaintiffs. The plaintiffs contended that the rule was established by authority and precedent and did not depend on reasoning and argument;¹⁴¹ had been criticised by commentators;¹⁴² had been abolished by legislation in a number of American states; and was an exception to the general trend in agency law to make principals liable on contracts entered into on their behalf.¹⁴³ Having expressed the opinion, previously noted, that the rules relating to sealed documents continued to serve a useful purpose in the law, the court denied the existence of evidence of any change in commercial reality that would warrant the abolition of the sealed contract rule.

Two main reasons were put forward by the court in support of this conclusion. The first was that abolition would create uncertainty in commercial relations and the law.¹⁴⁴ The second was that abolition would have far-reaching effects on existing commercial relationships.¹⁴⁵ What the court meant by this was that abolition would expose undisclosed principals to potential liability for twenty years — the reason given in the United States for rejecting abolition.¹⁴⁶

¹⁴¹ See, for example, *Chesterfield & Midland Silkstone Colliery Co. v. Hawkins* (1865), 3 H & C 677, 159 E.R. 698.

¹⁴² E.g. Waddams, *supra* note 90 at para. 268, note 40; W.A. Seavey, "The Rationale of Agency" (1920) 29 Yale L.J. 859 at 880; see also Laskin J.A. in *Re Zamikoff v. Lundy* *supra* note 102 at 648.

¹⁴³ *Friedmann Equity*, *supra* note 6 at 292.

¹⁴⁴ *Ibid.* at 294.

¹⁴⁵ *Ibid.* at 294-295.

¹⁴⁶ *Crowley v. Lewis* 146 N.E. 374, 239 N.Y. 264 (C.A. 1925); *McMullen v. McMullen* 145 So.2d 568 (Dist. Ct. A. Fla. 1962); *Toll v. Pioneer Sample Book Co.* 94 A.2d 764, 373 Pa. 127 (S.C.1953).

It is respectfully suggested that the court was being unduly nervous and cautious in giving these reasons against abolition of the rule. Had the decision in this case gone the other way, with the result that the defendants would have been liable on the contract, it would have meant that the defendants would have been held accountable on a contract into which they had voluntarily entered (through the medium of their agents), presumably with the intention of being bound thereby. No obligation previously undesired or unintended would have been imposed upon them. In fact, in the result, the plaintiff was left without a suitable remedy to enforce its rights under the contract in question. One can only doubt whether justice was served by this decision.

Further, abolition of the rule by this case would not have been as disastrous as the court appeared to believe as regards the rights and liabilities of other parties in similar situations, all of whom, it may be assumed, intended to be bound by their contracts. The possibility that undisclosed principals would be liable to suit for up to twenty years could be avoided, if the rule were abolished along with the concept of contracts under seal — as recommended in Ontario and British Columbia — leaving such parties potentially liable only for six years.

The problem may have lain in the fact that the Supreme Court by itself could not rid the law of the concept of contracts and other instruments under seal. Abolition of only the sealed contract rule would not have effected a satisfactory reform. That much must be admitted. Hence, legislative action is necessary. Such action, it is suggested, is appropriate.

V. *The End of Deeds?*

In spite of the view of the Supreme Court of Canada in the *Friedmann Equity* case that the use of the seal continues to serve a valid purpose, it may be argued that the distinction between “simple” contracts and those under seal, or “specialties”, has no relevance to the law in the twenty-first century. The uncertainty has been previously discussed: questions about the meaning of “specialty”; the question whether consideration is still required (or at least possibly material) when a contract is under seal; the possibility that changes to the law of privity might ultimately affect the validity and operation of the sealed contract rule. All these uncertainties suggest that the law might be simplified, and perhaps made more in touch with the present-day world, by the abolition of the category of sealed instruments, or documents under seal, along with the complex of rules to which the Supreme Court referred that accompany and stem from recognition of such a category of transactions. It is clear from what the court said that only a clean sweep of the law relating to deeds could achieve a satisfactory resolution of the problems raised in the *Friedmann Equity* case and others.

At the present time, it may be questioned whether any significant purpose is served by differentiating two periods of limitation for two categories of contract, or in applying different legal systems depending upon in which of those categories a contract belongs. The erosion of the privity doctrine that has been gradually taking place seems to render irrelevant what must have been the original purpose of the sealed contract rule: namely, to protect undisclosed principals. There exist independently rules by virtue of which, in appropriate circumstances, an undisclosed principal will not be considered to be a party to a contract capable of being made liable under, or of enforcing it. When one adds the problem of sometimes deciding whether or not a contract can be regarded as being under seal, which has been the subject of many complex and conflicting decisions¹⁴⁷ and was also an issue in the *Friedmann Equity* case, the desirability of removing the category of contracts under seal from the law is increased.

¹⁴⁷See A. Herschorn, "Documents Under Seal: Consequences and Complexities" (1989) 10 *Advocate's Q.* 129.