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## Does a Covenant to Stand Seized Require a Seal?

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# NOTES

## DOES A COVENANT TO STAND SEIZED REQUIRE A SEAL?\*

It is commonly stated<sup>1</sup> that a covenant to stand seized has two requirements: 1) blood relationship and 2) a seal. The state of the authorities on the second point only will be examined.

The requirement of a seal has generally been accepted since Holdsworth's statement<sup>2</sup> so indicating (although the point had long been made before) and most modern writers rely on his authority.

Holdsworth relies on *Callard v. Callard*<sup>3</sup> decided in 1597. Thirty-two years earlier in *Sharington v. Strotten*<sup>4</sup> the courts had first recognized the covenant to stand seized, but that case did not mention whether a seal was necessary. It was not until *Callard v. Callard* that the point allegedly arose. That case is reported in law French. The facts show that the covenant to stand seized was there made orally. It is important that the report uses the French verbs "parler" and "dire," meaning "to speak." The report also uses the French word "parol." It is here possibly that some might claim the seal requirement has its basis. In legal French "parol" means "not under seal" and hence includes both oral and written contracts not under seal.<sup>5</sup> Thus it could be argued that holding a parol covenant to stand seized invalid established the necessity of a seal. Although the case uses such language, it is submitted that the facts show the *decision* of the court was merely that an oral covenant to stand seized is ineffective whereas the argument from the word "parol" is at best dictum.

In the sixteenth century the difference between dictum and decision had not yet developed. But today courts should be free to reject the dictum of *Callard v. Callard*. This the more so in view of the contemporaneous decline in the significance of a seal<sup>6</sup> as expressed in state

\* The author is indebted to Dean Roscoe Pound of Harvard Law School for aid with this problem.

<sup>1</sup> E.g., SCOTT, TRUSTS (1939) sec. 68, p. 412.

<sup>2</sup> 4 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 426. In the second edition (1937) IV, 426.

<sup>3</sup> 2 Anderson 64, Popham 47, Cro. Eliz. 344, Moore P. L. 689, 950, 23 Eng. Rep. 547 (1597).

<sup>4</sup> Plowden 298, 75 Eng. Rep. 454 (1565).

<sup>5</sup> 2 BOUVIER, LAW DICTIONARY (8th ed., 1914) tit. parol.

<sup>6</sup> *Callard v. Callard* seems to have been unchallenged down the centuries in its statement that a deed (which requires a seal) is necessary. No case has arisen in which it was necessary to decide the point, however. The matter of a deed should not weigh heavily since most legal documents of this period were sealed as a matter of course and particularly because illiteracy and the inability to write were widespread. The development of the liberal doctrine as to seals so that any mark would be inferred to be a seal and the theory of adoption or prior seals bolsters the position that off-hand droppings of sixteenth century courts are not to be rigidly construed. Ames in CASES ON TRUSTS (2d ed., 1893) at 120 in n. 1 cites further dicta that a deed is necessary. *Hore v. Dix*, 1 Sid. 25, 82 Eng. Rep. 983 (1659); *Fox v. Wilcocks*,

statutes doing away with the importance of a seal.<sup>7</sup> No objection to denying a seal can be based on a theory of fraud since *Callard v. Callard* requires a writing.

The argument that the word "covenant" implies a seal is fallacious. The word covenant as used in the latter half of the sixteenth century did not have its narrow meaning of a sealed instrument but rather was used in a broad sense of any agreement oral or written, as Ames<sup>8</sup> and Holdsworth<sup>9</sup> point out.

There is also a general argument in this field which will support the position that no seal is necessary for a covenant to stand seized. The court in *Roe v. Tranmer*<sup>10</sup> upheld an instrument intended to operate as a release (but defective for that purpose because it was a grant of a freehold to commence in futuro) as a covenant to stand seized where there was blood relationship and a sealed instrument. This case was followed in the United States in *French v. French*.<sup>11</sup> The spirit of these cases demands minimizing the importance of formalities since in both instances the principle of the case was to uphold the instrument if possible even though it could not operate as had been intended.

It would seem then that there are only two requirements for a covenant to stand seized: 1) a writing and 2) blood relationship.

In response to the above argument, Holdsworth has replied by letter:

"I don't know of any authority other than *Callard v. Callard* which I think must have fixed the law for the future. The need for a writing under seal seems to be assumed with later authorities. The rule may have been carried over from the time when a covenant to stand seized operated as a contract to create a use unless money had been paid when it would be a bargain and sale. At common law a deed was needed for such a contract. Equity after some hesitation followed the law but with the variation that love and affection were needed as a consideration if the agreement was to raise a use and so operate as a conveyance."

ERWIN ESSER NEMMERS.\*

2 Roll. Ab. 788, pl. 2 (1637); *Pierse v. Petfield*, 2 Roll. Ab. 788, pl. 2 (1639); *Jones v. Morley*, 1 Ld. Ray. 287, Comb. 429, Salk. 677, 12 Mod. 159, 91 Eng. Rep. 1089 (1697). But no necessary holding that there be a seal has been found. (Indeed, *Hore v. Dix*, supra at p. 26 recognizes that no seal is necessary in the case of wills but cites for this the Statute of Wills, 32 Hen. VIII, c. 1 (1540).) Nor have the textwriters been able to adduce further cases, e.g., *SHEPPARD'S TOUCHSTONE* (1643), *SANDERS, ON USES AND TRUSTS* (1792), and *GREENLEAF, CRUISE ON REAL PROPERTY* (1850).

<sup>7</sup> 2 TIFFANY, *REAL PROPERTY* (2d ed., 1920) sec. 458, p. 1724. In third edition (1940) sec. 1024, p. 182 of vol. 4.

<sup>8</sup> Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261 at 268, n. 1 (1908).

<sup>9</sup> Holdsworth, *The Political Causes Which Shaped the Statute of Uses*, 26 HARV. L. REV. 108 at 120, n. 67 (1912).

<sup>10</sup> 2 Wils. 75, 95 Eng. Rep. 694 (1757).

<sup>11</sup> 3 N.H. 234 (1825).

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