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Some Characteristics of Formal Requirements for a Legal Transaction in American Law**

The main features of the American regulation of form of transaction are given in the article, providing the opportunity to learn about the experience of legal system, different from continental Europe, in this area. The following issues are discussed in the work: historical and contemporary understanding of formalism; functions of form established by the law and agreed upon by the parties; the Statute of Frauds (1677) as the important regulatory Act of this field; and finally, original historical form of Deed and current functional purpose.

Key Words: *form of transaction, function of the form, the Statute of frauds, deed.*

1. Introduction

Establishment of market economy in Georgia has facilitated the development of production and trade, as well as economic convergence of the country with other states, among them, with the United States of America. The "Treaty between the Government of the United States of America and the Government of the Republic of Georgia concerning the Encouragement and Reciprocal Protection of Investment", dated 7th March, 1994, ratified by the Resolution of 11th December, 1996 of the Parliament of Georgia, represents important contributing condition for strengthening the economic relationships between these two countries.[1] This document was preceded by the agreement of 27th June, 1992 "on Promotion of Investments between the Government of the Republic of Georgia and the Government of the USA". In addition to the above mentioned, later, in particular, on 20th June, 2007, the Framework Agreement "between Georgia and the USA on Trade and Investments" was signed. At the formation stage of the mentioned above relationship it was already discussed that knowledge of the legal norms, regulating the trade and business in these two countries, should have been given the great importance.[2]

In Georgia, in 1990-ies, as compared with the law of continental Europe, one of the main reasons for lower level of study of common law was the fact that Georgia, during the decades, belonged to the socialistic legal system and there was no interest towards the common law. And then, the situation has completely changed. In the process of reformation of the Georgian law, the norms were being introduced from the continental Europe, as well as from common law, raising the issue of study and research of very interesting, but less known for Georgia by that time, common law system.[3]

The Commission, working on the drafting of the Civil Code of Georgia, has not demonstrated particular interest towards the Anglo-American law.[4] Probably, the reason for the above attitude was the fact

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1 *Liluashvili G.,* Sale According to Uniform Commercial Code of the US, Journal "Samartali", №11-12, 1997, 31 (in Georgian).

2 Ibid, 31.

3 Ibid, 32.

4 *Zoidze B.,* The Influence of Anglo-American Common Law on the Georgian Civil Code, Journal "Georgian Law Review", 1999, 14-15 (in Georgian).

that societies of transition period of post-soviet space were not offered to take the Anglo-Saxon model, as far as the precision and compactness of expression of obligations was considered as necessary for them, in accordance with the traditions of continental Europe.[5] It should be also noted that the Greco-Roman law,[6] which is the basis of modern European law, [7] has significantly influenced the old Georgian law.

Nevertheless, at the initial stage of reform, there was some discussion about compatibility of Georgian law to the common law.[8] For example, in general part of Civil Code, the footprints of common law are less observed, however, certain influence on the transactions is still noticeable, as the Commission, in the process of working, was also getting familiar with the provisions effective in the common law. [9]

The purpose of the present work is to review the main features of Anglo-American legal regulation of form of transaction, representing a novelty as in Georgian sources the above issue is mainly reviewed on the basis of German law, which, undoubtedly, makes it interesting, to study the practices of legal system different from the system of continental Europe. Moreover, during recent years, reception of separate legal institutions or norms, characteristic for space of family of common law, in Georgian legislation can be observed.

2. Formal and Informal Contracts

Historically, the formalism meant the administration of oath, written form, seal and dependence on other forms and rituals for concluding the agreements, or for the demonstration of their existence. In modern times, this type of formalism was confronted by the general theory of agreement, which is independent of the form; as, according to the common law, the forms, which usually are recognized for demonstration of the existence of agreement, are - seal (or dead) and consideration; it is not surprising for some authors that in half of the states of America the need for sealed agreement is annulled.[10] Nevertheless, certain formalities accompany the fulfillment of many agreements.[11]

By requirements for the form the certain standards are set, which must be complied by the agreements, in order to be legally valid and/or enforceable. Based on the above, there can be a requirement for the agreement to be in a written form, concluded by means of sealed document, registered at the state bodies, hand-written and etc.[12]

The agreements are classified in different ways, based on this or that purpose. One of the bases for differentiating formal and informal agreements is the method of formation of agreement. Three types of formal agreements are still relevant: (1) contracts under seal;[13] (2) recognizances[14] and (3) negotiable in-

[5] *Knieper R.*, Methods of Codification and Concepts of the Transitory Period Societies (Regarding the Case that of Georgia), in: *Jorbenadze S., Knieper R.*, *Chanturia L.* (eds.), The Legal Reform in Georgia, Materials of International Conference Held in Tbilisi on May 23-25 in 1994, Tbilisi, 1994, 191 (in Georgian).

[6] *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 36 (in Georgian).

[7] Ibid.

[8] *Zoidze B.,* The Influence of Anglo-American Common Law on the Georgian Civil Code, Journal "Georgian Law Review", 1999, 14 (in Georgian).

[9] Ibid, 17-18.

[10] *Coote B.*, Contract as Assumption: Essays on a Theme, Hart Publishing, Oxford, 2010, 29-30.

[11] *Hunter H.O., Rowley K.A.*, Modern Law of Contracts, Vol. 1, Rev. ed., West Publishing, Eagan, 2011, 306-307.

[12] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 9.

[13] In many jurisdictions, the seal has lost all or some of its effect: *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19. The contract under seal has been executed based on the written order of the court on existing "covenant" at common law: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35.

[14] A recognizance takes place when a person, who undertakes an obligation before the court, recognizes the responsibility to implement certain payment, if the certain condition is not fulfilled. In federal courts they are known as "personal ap-

struments[15] and letters of credit.[16] All other types of agreements are considered as informal and are enforceable not by the form of transaction, but based on its contents. Such agreements were also referred to as "simple" and "parol" agreements.[17]

In general, in the law, there are two ways recognized, by which the promise[18] can become legally binding. The formal method makes the promise enforceable simply due to the fact that while giving a promise the certain formalities are observed. Informal method depends on existence of certain elements in promise, such as, for example, intention of interexchange of rights, which, usually, indicates that binding promises were given.[19]

The antithesis of formal agreement is informal agreement.[20] The informal agreement can be in writing, or based on any other formality, or, without it, if the laws have not changed the rules of the Common law. The Statute of Frauds requires confirmation of certain types of informal agreements in writing or by electronic record, in order to be enforceable. The informal agreements are typical agreements, which are well known to the public. The formal agreement, such as sealed agreement, has become rare, since the times when seal no longer represented the efficient mechanism for granting the legal power.[21]

The traditional separation between the "formal" and "informal" agreements was based upon the fact, whether in the process of drafting agreement, the certain ritual formalities were observed or not, such as melted wax imprint on the written agreement, with the imagination, which is known as a "seal". In this regard, the term "formal agreement" was applied for indication to the agreement form and played a role of key element in its enforcement. Its modern examples are negotiable instruments and letters of credit, which are regulated under the special provisions of Uniform Commercial Code. In this context, all other agreements were considered as "informal agreements", notwithstanding the fact whether it was written, or oral, or simple, or complex.[22]

At present, the formal agreement is the agreement, which is diligently agreed and expressed (or "memorialized") in final formal written document. The informal agreement is the agreement, which, without prior intention, may be drawn up without disturbance by any type written form. The differences in degrees

pearance bonds": *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19. The simple form of the recognizance was voluntary bringing of the debtor to the court, in order to recognize (*recognoscere*), that he/she owed certain amount to the creditor. After that the recognition was being recorded to the protocol of court meeting, which, essentially, represented the court decision, which was repealing the creditor's claim on agreement or debt: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35-36.

15 Negotiable documents are accepted with special inscription, due to the form, in which they are created. The ordinary printed check contains "words of negotiability" – "Pay to the order of...". Other documents may be "payable to bearer". Such formalities make such documents as freely transferable, when they are transferred to the "holder in due course", which takes the free document from most of the defensive measures, if certain conditions are met: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 36.

16 The transferrable documents and letters of credit are discussed in specialized works. They are regulated by the articles 3 and 5 of the Uniform Commercial Code: *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19. Another author, who separately distinguishes the transferable documents and letters of credit, indicates, that out of formal agreements, known for early law, only four is significant for the modern lawyer: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35.

17 *Perillo J.M.*, Contracts, 7th ed., West Academic Publishing, St. Paul, 2014, 19.

18 According to the definition existing in the scientific literature, the promise is a statement, by which one person undertakes the certain future fulfillment, or an obligation to refrain from the fulfillment, in favor of another person: *Hogg M.,* Promises and Contract Law: Comparative Perspectives, Cambridge University Press, Cambridge, 2011, 6.

19 *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 35.

20 Ibid, 36. Restatement 2d § 6 comment a (1973) refers that the terms "formal" and "informal" are annulled: *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 36.

21 *Murray J.E., Jr.*, Murray on Contracts, 5th ed., LexisNexis, New Providence, 2011, 36.

22 *Ferriell J.*, Understanding Contracts, 3rd ed., LexisNexis, New Providence, 2014, 7.

of formality do not affect the enforcement of agreement, although, they can affect the admissibility of those evidences of promises, which were never recorded in any final written version of agreement between parties.[23]

3. Functions of the Form of Transaction

The requirements for the form established by the law have several purposes. Some of them serve all the tasks given below, but others serve only one or few of them. The purpose of formal document is fulfillment of evidentiary (providing evidence) function. For example, the written or notarized, sealed document of agreement performs the function of reliable documentary evidence for a transaction and its terms and conditions and, thereby, contributes to the resolution of the disputed case at the court. The documents, drawn up in compliance with the requirements of the form, ensure that the registrars of public registry to have obvious reasons for their registration. The formal document serves the purpose to provide clear message to third parties. The requirements for the form perform the cautionary function, in order to avoid the conclusion of transaction hastily and insufficient awareness. The formal nature of document shall remind the parties its significance and warn them on possible negative consequences, in order the party, before the conclusion of the agreement in an appropriate manner, carefully weighs its conditions. According to the requirements for the form, the difference between nonobligatory negotiation and agreement and the obligatory agreement becomes clear, by means of "channeling" (providing of seriousness criteria) the latter to certain form. The requirements for the form become more and more established for the purpose of protection of relatively weak parties, for example, consumers, tenants, employees. The written agreement shall contain all the details of agreement and shall provide consumers with information about their rights. In any case, the requirements for the form serve the function of prevention of using the oral agreement for fraud purposes.[24]

By the requirements for the form considered under the agreement, the parties can achieve the same goals, even when the legislator does not consider the general requirements for the form as necessary for this type of transaction.[25] In particular, the agreed form may entail the constitutional or declarative standard. In case of constitutional goal, the agreement is void, if the requirements for the form are not met. In case of declarative goal, the requirements existing towards the form do not affect the signing of legally binding agreement. In this case, the parties are authorized to request observance of formalities, with the objective to provide evidences, which have retroactive effect over the agreement.[26]

In ancient common law a lot had been done for separation of sealed and unsealed instruments, for the purpose to achieve the order in relationships. On the background of last two centuries, there is unequivocal tendency of simplification of the requirements for the form in common law, where the form is only used for the form. The Contract Law is clear example of it; the emphasis on support of autonomy of parties has embodied the values, in which, as compared with the form, the content is given the preference. In American Law the refusal of form is viewed with doubts; in particular, in the context of activities implemented in business field. The testament and sealed document must still be concluded officially; in case of testament, the requirements to the form, in twentieth century, were mostly tougher compared with the requirement

[23] *Ferriell J.*, Understanding Contracts, 3rd ed., LexisNexis, New Providence, 2014, 7-8.

[24] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 9-10.

[25] Ibid, 10.

[26] Ibid, 13-14.

valid century earlier; the functional formalities have been maintained in the requirements for the form for American sealed documents; but the ritual and old-fashioned formalities have been reduced. The ritual was abandoned in American Law. According to the current opinion, for the purpose of facilitation of economic growth, the law shall avoid the excessive rituals. The requirements for the form, which do not have any function, are only misleading for defining the revealing of will of parties in terms of rationalization or regulation of transactions; in addition, it conditions unforeseen risks for transactions of economic nature. Formalism itself is unprofitable for business.[27]

Researchers of common law consider exceptional the simplification of form for the economic system, for which the evaluation and consideration of business risk is difficult. However, as noted, the "form" itself had a business function. According to the opinion of some authors, nothing can be much formal than a negotiable instrument, and its form was created not regardless the desire of traders, but taking it into consideration.[28]

One more example of market-oriented formality is the land registration act. The registration of land ownership agreement and sealed document has facilitated maintaining of safety of transaction and simplification of operations in the land market. The registration system has introduced the order in chaos of requirements and interests, by which it performed a vital function. The requirements for the form, unclear for the popular business, were excluded from the law. However, the registration was still admissible. The content of generally accepted thesis was that prior claims in time bore prior rights; "staking a claim" represented a kind of formality itself. The visible records on their requirements on land and country's wealth were needed and desirable for people. Earlier records on securing the demand could be used for balancing the conflicting interests; they were used as the source of information in market relationship, which were defining the value of certain properties.[29]

In addition, the formality represented the way of enforcement of public policy. This purpose was significantly growing over the years, not for supporting the market, but as the tool for its management.[30]

And finally, some authors discuss the option of the most general function, such as equipping of parties with benefit-making powers, by the actions of each other. For example, the aunt draws up the sealed document, by which it gives the promise that transfers 50,000 Pound Sterling to the nephew, with regard to the occasion of twenty-first birthday. Based on the above, the nephew borrows money from the bank, to pay the university tuition fees. The aunt is a person of resticted and variable altruism. If she gives informal promise, probably, she would change her mind to fulfill it, before the nephew reached twenty-one years of age; because she knows that nephew is able to fulfill its promise by powers of law, she fulfills the promise in time and nephew graduates from the university without a large debt. As it is noted, the sealed document has the function, which it performed in this example, in particular, to entitle the recipient of promise to benefit from the promise of other person, which would be quite unreliable in case of fulfillment of informal promise.[31]

4. The Role of the Statute of Frauds

Most important example of apparent persistence on formality was the Statute of Frauds, which was adopted in 1677 in England. It demonstrated particularly great vitality in the United States. There is an assumption that adoption of the law does not reflect the clearly deliberate policy; the law was a part of general

[27] *Friedman L.M.*, Contract Law in America: A Social and Economic Case Study, Quid Pro Books, New Orleans, 2011, 72.
[28] Ibid, 73.
[29] Ibid.
[30] Ibid.
[31] *Black O.*, Agreements: A Philosophical and Legal Study, Cambridge University Press, Cambridge, 2012, 240.

legal tradition and, according to the viewpoint, its non-adoption would require the courage. Essentially, it was considered under the law that certain type of agreements could not be enforced if not drawn up in writing and not signed by the person, who wished to rely on the transaction. During the majority of time-period of law existence, the courts had ruthless attitude towards it. Partially, the fact that law is not a deliberate legislative outcome was named as a reason for the above. The Statute of Frauds is not characterized with accuracy of formalities and regular nature. It represented just one of the "doctrines", which was linked to form of agreements of certain type. As a result, the history about Statute of Frauds is not identified with the history of requirements to the form in contract law; it is characterized by a close relationship with the doctrine, such as consideration, which, also, has been developed from formalistic basics. The abundance of rules and exceptions, created by the law, represents the "frightful source of litigation", as it was noted by the court in 1855. According to some of the authors' opinion, the phrase is exaggerated; however, this law has increased the number of contract cases in the court.[32]

The US and English laws were traditionally applying the Statute of Frauds. In England, all the provisions of Statute of Frauds, related to real property and promises to act as a surety, were annulled in 1954. Therefore, among other jurisdictions, England is considered as the one, not having the requirement for all types of general forms[33]. However, in addition to the Statute of Frauds, there are many other laws, establishing the requirements for the form for specific type of agreements. The outcomes of insecurity vary between the full or partial invalidity of agreement, unenforceable by both parties or enforceable only for one party, but only on the basis of court decision.[34]

In the United States the scope of application of Statute of Frauds is still quite broad. All the states of the United States have enacted certain rules of Statute of Frauds. This legislative act might have different scopes, but most of them includes the agreements listed in the §110 of Restatement (Second) of Contracts: agreements of executors or administrators; suretyship contracts; marriage contracts; contracts for the sale of an interest in land; contracts that are not to be performed within one year from the making thereof. In addition, many states established requirements for the form for other types of agreements.[35]

There are some exceptions from requirements for written agreement (memorandum) established by the law. It is considered as the critically important that the agreement is enforceable, despite non-compliance with the requirements of Statute of Frauds, if it is fulfilled partially or fully. In general, non-compliance with the Statute of Frauds makes the agreement unenforceable, but not void.[36] However, there are many exceptions, which allow the enforcement or claims, with economically similar outcomes, or result in the compensation of losses, which had been caused due to non-compliance.[37]

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[32] *Friedman L.M.*, Contract Law in America: A Social and Economic Case Study, Quid Pro Books, New Orleans, 2011, 74.

[33] "...the general rule of English law is that the parties to a contract may make their contract in whatever form they wish and may choose whether or not they will record all or some of its terms in a permanent form": Law Comm Report 1986, para. 2.37, 22, Cited: *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 10.

[34] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 10.

[35] Ibid, 11.

[36] The courts use the Statute of Frauds only in case if the party will appeal to it: *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 12.

[37] *Müller A.*, Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), Eleven International Publishing, The Hague, 2013, 12.

5. The essence of the Deed

The agreement is not a contract, if the parties do not intend to originate the legal relationships. This condition includes variety of cases, among them, informal, social or domestic agreements; the general rule is that agreement can be concluded free of form[38], but in some cases, the agreement, which does not comply with certain requirements for the form, is not an agreement. These exceptions are now covered by the legislation, which considers that some of agreements, for example, the lease for more than three years, must be made by dead.[39]

The history of the deed emerged from the tradition that courts never looked beyond the sealed document. In 1989 the requirement for actual seal was annulled and in its place the parliament declared that a deed should be evaluated only in essence and shall carry attested signature.[40]

The "seal" had its basis in the ceremony of real seal, by making a wax impression with a ring or symbol affixed to a formally executed document. If the promise was given in written form and sealed and was transferred to promise recipient, it was enforceable, regardless, whether any consideration took place or not. Before 19th century most of the wealth was linked to the land. At this time, giving of promise using the seal (an impression was made with a metal seal on wax) was widely spread. The seal was declared even for cases without consideration in place. With the time, just fixing of the word "seal" on the document, or even its availability on pre-printed form, became regular. Many jurisdictions declined use of seals. According to the Uniform Commercial Code necessity of seal was cancelled for transactions related to sale of goods.[41]

The parties shake hands and sign the documents. Often the notary or other verifying officer confirms the signatures. The paper is decorated with ribbons or sealing wax. Usually, there is the inscription "*L.S.*" (an abbreviation of the Latin term "*locus sigilli*", or "the place of the seal") below each signature. The ceremony of signing of agreement is accompanied by these formalities and it emphasizes the fact of transfer of property, in order to give more importance to the transaction, in social terms. Based on clear utilitarian understanding, they draw a line between the negotiation and transaction. However, a legally enforceable agreement can be drawn up without any signing and exchange of documents. Some formality bear not only historical but bit more meaning as well. There is a position that putting a ribbon around a deed does not add anything substantive to it, however, it can meet the aesthetic urge. Other formalities may be more important and slight negligence can turn into a real difficulty, if parties face further disagreement. Even though the agreement can be concluded via the phone, the rule of oral evidence[42] (Parol Evidence Rule) can make it difficult to verify terms and conditions of the transaction. Shaking of hands may seem as sufficient token of the agreement of parties, but it may not be so if the Statute of Frauds is applied.[43]

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[38] In England, the case is of precedential importance – *Beckham v. Drake*. *Zweigert & Kötz* speak about general principles of informality in modern legal systems, who found the tracks of weakening and strengthening of requirements towards the form: *Black O.*, Agreements: A Philosophical and Legal Study, Cambridge University Press, Cambridge, 2012, 227.

[39] *Black O.*, Agreements: A Philosophical and Legal Study, Cambridge University Press, Cambridge, 2012, 227. According to the opinion of some authors, the warning effect of the form is reflected in the fact that the person may hesitate longer, until a deed is duly signed, than it would have taken place prior to the issuance of an oral promise: *Treitel G.*, The Law of Contract, 11th ed., Sweet & Maxwell, London, 2003, 176.

[40] *Samuel G.*, Law of Obligations, Edward Elgar Publishing Limited, Cheltenham, 2010, 116.

[41] *Russell I.S., Bucholtz B.K.*, Mastering Contract Law, Carolina Academic Press, Durham, 2011, 183.

[42] This method of interpretation of the contract is referred in Georgian sources also as "the rule of oral testimony": *Ioseliani N.,* Interpretation of Agreement, Journal "Justice", 2007, №3, 108 (in Georgian).

[43] *Hunter H.O., Rowley K.A.*, Modern Law of Contracts, Vol. 1, Rev. ed., West Publishing, Eagan, 2011, 307.

6. Conclusion

The discussion developed in the work gives the opportunity to make certain conclusions with regard to some features of Anglo-American legal regulation on the form of transaction.

Historical and modern understanding of formalism radically differ, however, certain formalities of implementation of agreement is not declined at least, which is required for their legal power or enforceability. In addition, the basis for traditional and current separation of formal and informal agreements also differs.

The form prescribed by law has a number of objectives, among them, the classical, in particular, evidentiary, cautionary, clarity and information functions, as well as other specific objectives.

In the period of existence of Statute of Frauds (1677) due to prominent formalistic character, it received strong criticism from courts, as well as from scientists, however, it confirmed the capability for existence. Moreover, some exceptions established under the Statute out of legal consequences of non-compliance with formal requirements enjoy the special appreciation.

And finally, although the deed loses original historic appearance, it still maintains functional purpose among the formal agreements.