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WHAT SHOULD BE DONE WITH THE COMMON SEAL IN PENNSYLVANIA?¹

I. IN GENERAL

The common law seal is still in use in Pennsylvania. The Legislature, by adopting the Uniform Written Obligations Act of 1927, May 13, P.L. 985, 33 P.S. 6, provided a substitute for the seal but did not abolish its use or functions. Should the seal now be abolished, rehabilitated, or remain in *statu quo ante bellum*?

The seal has a spectacular history and survives, as a vestigial remnant, from the days of heraldry. The theory was that when a writing was sealed, the whole performance—with parchment, wax, a signet ring or other stamp, an impression and a ribbon—was so unusual, and the document produced was so impressive in appearance, that the law regarded the result as final. No proof of consideration was necessary and delivery was presumed. The promise under seal was not regarded as evidence of a promise but as the contract itself: loss or destruction of the writing meant loss of the right. *American Law and Morals*, 22 *Harv. L. Rev.* 97, 1908. In *Long v. Ramsey*, 1 S. & R. 71, and *Mitten v. Binder*, 28 Pa. 489, will be found cases where the action was thought of as entirely on the sealed instrument without regard to consideration.

The doctrine of consideration grew up with the action of *assumpsit*. It was only then that a consideration was said to be "presumed" from the seal. Pennsylvania prefers now to say that a seal "imports" consideration: *Brereton's Estate*, 388 Pa. 206, 210; *Pankas v. Bell*, 413 Pa. 394, 397. The sealed contract is not merely evidence of the obligation. It is the obligation itself. *Sears Estate*, 313 Pa. 415, 420. In modern practice, want of consideration is no defense to

1. Being the report of the "Committee on The Seal as Substitute for Consideration" of the Section on Judicial Administration of the Pennsylvania Bar Association.

a specialty, but failure of consideration is an available defense: *Barnhart v. Barnhart*, 376 Pa. 44.

The deterioration in the status of the seal began when the courts no longer required the formal ceremony of sealing but the flourish made by a pen, the written word "seal" opposite a signature, the same word printed on the paper or the letters "L. S." (*locus sigilli*), sufficed as a seal.

Perhaps the solemnity and the convincing effect of the seal in the early days were more imaginary than real. At any rate, the vitality has quite gone out of the seal in modern practice. Justice Cardozo spoke of it as "the rubric of a vanished age."

It is well at this point to remember that certain **incidental consequences of and rules** regarding the seal have come to be of considerable importance. They are one of the chief impediments to wholesale and hasty abolition of the seal. A list—which is merely suggestive—is as follows:

(1) Deeds and some other instruments had to be under seal.

(2) No consideration was necessary.

(3) No modification, release or surrender of a sealed instrument was possible except under seal.

(4) No one could sue or be sued on a sealed instrument unless named therein. Because of this rule, no suit by or against an undisclosed principal was allowed.

(5) No agent could bind his principal under seal unless his authority was under seal.

(6) The ordinary statutes of limitation did not apply.

II. STATUTORY CHANGES IN THE LAW OF SEALS IN PENNSYLVANIA

A few statutes have contributed to the change in the law of seals in Pennsylvania.

A. Deeds and all instruments for conveying or releasing lands signed but not sealed were made of the same effect

as if sealed, by the Act of April 1, 1909, P.L. 91, and the Act of 1925, P.L. 404, paragraph 9, 21 P.S. 10. There is also a curative act for deeds without seals, Act of May 12, 1925, P.L. 582, 21 P.S. 276.

Originally, following Blackstone's definition, a deed was regarded as a "writing, signed, sealed, and delivered." The odd feature is that the law has come to regard signing, acknowledging, and delivery of a deed as conclusive against "total or partial failure of consideration": *Bruno v. Bruno*, 404 Pa. 502, 504; *Shook v. Bergstrasser*, 550 Pa. 101, 112. There are exceptions, e.g., fraud as in *Maguire v. Wheeler, et al.*, 300 Pa. 513, but the special status of the deed derives from the necessity for security of real estate titles and has nothing to do with the presence or absence of seals. This bit of legal experience should be kept in mind by those too deeply devoted to the seal.

B. *The Uniform Written Obligations Act of 1927, May 13, P.L. 985, 33 P.S. 6.*

This Act deals with the necessity for consideration, and it is intended to make the seal unnecessary. Mr. Charles F. Ahrensburg has collected and discussed the cases under the new act in an article in 21 *Temple Law Quarterly*, 122-137. This Act will be considered later.

C. The Uniform Commercial Code does two things to seals:

1. It destroys the efficacy of seals in contracts of sale, in this language:

"The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer." (1953, April 6, P.L. 3: 12A P.S., 2-203.)

2. It provides as to the effect of seals on negotiability, as follows:

"An instrument otherwise negotiable is within this Article even though it is under a seal." (1953, April 6, P.L. 3: 12A P.S., 3-113.)

III. MANY OTHER STATES IN THE UNION HAVE ABOLISHED THE SEAL IN WHOLE OR IN PART

No good use will be served at this time by an attempt to digest all the legislation of all the states bearing on the abolition of the seal. A concise compilation of these statutes made by Robert Braucher of the Harvard Law School in May of 1963 (*The Practical Lawyer*, Volume V, No. 5) is a useful reference. Mr. Braucher lists six states as abolishing the seal, but difficulties have arisen in some of these states. In Illinois, a reference in the statute to the abolition of seals on documents "heretofore required to be sealed" casts doubt upon the completeness of the abolition, notwithstanding later language providing that the addition of a seal to any document adds nothing to it. (Philip H. Ward, Jr., *U. of Ill. Law Forum*, Vol. 1954, page 113). Problems of drafting have caused difficulty also in Missouri (see Ward, *id.* 114), and in Utah (Donald B. Holbrook "The Status of the Common Law Seal Doctrine in Utah," 3 *Utah Law Review* 73, 1952).

According to Mr. Braucher, three other states have abolished the distinction between sealed and unsealed documents. He lists, also, fourteen states where the seal and the distinction between sealed and unsealed have been abolished but with the further provision that lack of consideration is an affirmative defense. California is among this group. Pennsylvania, Mississippi and New Mexico are listed as states which have a "writing substitute" for consideration or seal. Our substitute is a writing expressing the intent to be legally bound.

IV. IS THERE NEED OF THE SEAL AS AN AUTHENTICATING DEVICE FOR GRATUITOUS PROMISES?

The impression gathered from study of the experience in other states in abolishing the seal is that there was merit in the common seal, as a device for enforcing promises without consideration, because some gratuitous promises ought

to be enforced. The test of the law as to the enforcement of promises is the pragmatic test. The theory of consideration has developed because it furnishes a handy rule for sorting out promises which need not be enforced. The first definition, in the Restatements, was as follows :

“A contract is a promise or a set of promises for which the law provides a remedy or the performance of which the law in some way regards as a duty.” (Restatement of Contracts 1.)

At common law, a sealed instrument was a contract which the law would ordinarily undertake to enforce. The sealed promise might have been one of gift, of release, of assignment, of option; it might be one of the incidental promises which are made in performance of a business contract, and everyone might have known that there was no consideration for the promise. The primordial sanction of the seal cured all this, and made binding that which was otherwise only nudum pactum. But if the seal is abolished, is not an alternative device needed for the enforcement of some gratuitous promises?

The experience of the State of New York, at this point, is illuminating. New York, by statute and decision, was well on the way to strip the common law seal of its efficacy as a substitute for consideration. Then, during the depression years, there came an insistent demand from the debtor class for enforceable agreements whereby debts might be scaled down, postponed, or released. An Act was passed in 1934 validating such agreements, although made without consideration, provided they were signed. It was a situation where society had to decide between the needs of the debtor class and the claims of the creditor class. The law had developed to the point where sealed instruments were virtually abolished. Ordinarily the seal is thought of as favoring the creditor class, but here were hard-pressed debtors desiring the authority of the seal behind instruments designed to relieve their financial plight. The courts struggled with the problem, as did the legislature, aided by the Law Revision

Commission of the state. At the end, both Courts and Commission became convinced that an alternative device was desirable. The situation is here greatly over-simplified but rather than to attempt review, in this narrow space, of the many statutes, decisions, and recommendations of the Commission, reference is made to two fine articles. They are:

"Developments in the Law of Seal and Consideration in New York" by John W. Glendinning, Jr., *Cornell Law Review*, Vol. 26, 1941; and

"Consideration and the Seal in New York—An Unsatisfactory Legislative Program" by William J. Lloyd, *46 Columbia Law Review* 692, 1, January 1946.

Controversy developed about the category known as "gratuitous promises." There was pressure for a device which would allow enforcement of all gratuitous promises, especially gift promises.

The Commission, however, refused to recommend general enforcement for all promises without consideration but, instead, recommended inclusion of only certain gratuitous promises which are listed to help show the limits of our problem. They were as follows:

1. Releases.
2. Modifications and discharges.
3. Promises to keep offers open.
4. Assignment of choses in action.
5. Promises based on past consideration.

The Commission refused to sanction:

- (1) The promise to make a gift, apparently believing that with proper handling, charitable pledges can be made promises with a valuable consideration; and
- (2) The promise made in the course of business but not part of the bargain. (*46 Columbia Law Review*, page 24.)

To summarize on this point, both Courts and Commission in New York have been swinging back toward the view expressed by Mr. Williston:

"To abolish altogether the common law effect of the seal without substituting something in its place is a serious mistake." *1 Williston on Contracts, paragraph 29.*

V. IS PENNSYLVANIA'S ALTERNATIVE TO THE SEAL AN ADEQUATE SUBSTITUTE?

The Pennsylvania Act reads as follows:

"A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." (1927, May 13, P.L. 985, No. 475, paragraph 1; 33 P.S. 6.)

This Act does not abolish either the seal or the common law difference between sealed and unsealed instruments. It was intended as a change in the law of consideration, dispensing with the need for consideration if there is an additional express statement, in any form of language, that the signer intends to be legally bound. Pennsylvania and Utah are the only states which have adopted the act, and Utah has since dropped it (*The Status of the Common Law Seal Doctrine in Utah*, by Donald B. Holbrook, 3 *Utah Law Review* 73, 1952).

The Act can exist, and is existing, right alongside a continuous use of seals in the old manner. Indeed, there is now nothing in the law of Pennsylvania to prevent the practitioner from using two or three devices in the same instrument to make a promise binding. He may have and express an actual consideration: lacking a consideration, he may use the statutory language and also affix a seal. Often all three devices appear in the same instrument. Because the Act has not abolished the seal, it has had a much more feeble impact on our law than was anticipated for it.

A great many of the cases decided by our appellate courts under the Act are cases where both the statutory language and the seal are employed: *Gershman v. Metro-*

politan Life Insurance Co., 405 Pa. 585; *Rose v. Rose*, 385 Pa. 427; *Repos v. Dopkavich*, 362 Pa. 292; *Thomas v. First National Bank of Sharon*, 376 Pa. 181; *Eitel v. McCloskey*, 167 Pa. Super. 120.

The appellate courts have manifested the intention to stick by the new Act but it is difficult to see how any court could rule that the seal has been abolished as things stand at present. Until the difference between sealed and unsealed instruments is done away with, the true status of the Act cannot appear.

To understand our situation, let us compare our regulation of the seal with that of California. In 1872, a California statute provided:

"All distinctions between sealed and unsealed instruments are abolished." (Calif. Civil Code, paragraph 1629.)

In 1874, this statutory provision was enlarged by providing:

"Effect of a seal. There shall be no difference hereafter, in this state, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal." (Calif. Code of Civil Procedure, paragraph 1932.)

Under the California practice, the lawyer with a promise without consideration which everyone expected to be enforced would have to conjure up words which would look like consideration. Under the Pennsylvania practice, the lawyer might accomplish his result in all three ways. But, if both the California and the Pennsylvania statutes were in effect, every lawyer with a promise without actual consideration would follow the Pennsylvania statute.

Let us assume, therefore, that Pennsylvania adds to its statute the equivalent of the California Act. There are still difficulties of an intensely practical character before we may be sure that the complete abolition of the seal is desirable; this, in addition to the problems mentioned in the next section of this discussion. The common law seal fell into disrepute because it became too easy to seal an instrument. In particular, when the advent of printing made it an easy

and common practice to print the word "(seal)" on many types of writings which the promisor might be led to sign in entire ignorance of the meaning of the seal, the vitality had quite gone out of the practice of sealing documents of special importance.

But what if we completely abolish the seal in Pennsylvania and leave the Uniform Written Obligations Act intact? Then suppose that the printer, instead of printing the word "(seal)" indiscriminately on legal papers, prints instead—with equal promiscuity—the language "the parties intending to be legally bound"? The cutting edge of these words can wear off as did the pristine glamour of the seal. It is one form instead of another and, indeed, as Justice Holmes said in his youth:

"In one sense, everything is form which the law requires in order to make a promise binding, over and above the mere expression of the promisor's will. Consideration is a form as much as a seal." (The Common Law, page 273.)

New York State's Law Revision Commission adopted an individual approach, recommending that the simple substitute device of a signed writing should suffice to make binding:

- (1) Promises expressly based upon past consideration.
- (2) Assignments of a chose in action.
- (3) Offers expressly stated to be irrevocable for a specified time.

As to all other types of gratuitous promises, no device for enforcement was recommended (46 Colum. L. Rev. 16.) The Courts of New York State have the same caution about general enforcement of gratuitous promises (46 Colum. L. Rev. 20.)

The more ardent advocates of enforcement for all gratuitous promises have made other interesting suggestions:

- (1) Restore the old seal—wax, impression, ribbon and all.

- (2) Require the promise to be acknowledged.
 - (3) Require witnessing as in the case of a will.
- (46 Colum. L. Rev. 32, 33.)

There is nothing revolutionary about a proposal to make possible the enforcement of all kinds of gratuitous promises. After all, that is what the old seal did. It appears certain that the courts have a better opportunity to do justice, when trying to determine whether a promisor who is not bound, because of lack of consideration, has used words, appropriate in the circumstances, to make certain that he intends to be legally bound, than the courts had with nothing before them but a seal.

VI. THE INCIDENTS OF THE SEAL MUST BE KEPT IN MIND WHEN CHANGE IS PROPOSED IN THE LAW OF SEALED INSTRUMENTS

These incidents have been listed earlier in this discussion. Some of them may be dismissed briefly:

- (1) The rule that deeds and like instruments had to be under seal has long been repealed by statute in this State.
- (2) The rule that no consideration is required has been considered in a previous section.

A. *The common law rule that an instrument under seal could be modified, released or surrendered only under seal* has been the law in certain states: 17 Am. Jur. 2nd, 467, page 937. New York and Illinois are notable examples: Annotation 55 Am. L. Rev., page 685, 586-7. This rule has apparently never been the law in Pennsylvania. From earliest times it has been held that sealed instruments may be modified or terminated by a parole agreement in which case the whole contract becomes parole: *Vicary v. Moore*, 2 Watts 451, 456 (Gibson, C. J.); *McCauley v. Keller*, 130 Pa. 53. There must have been consideration: *Wilgus v. Whitehead*, 89 Pa. 131. Of course, under the new Act, the consideration

can be supplied by the expressed intention to be legally bound.

B. *No agent could bind his principal under seal unless his authority was under seal: Gordon v. Bulkeley, 14 S. & R., 331.* The rigor of this rule has long since been lessened: *Bausser et al. v. Dubois, 43 Pa., 260, 265*, where Lowrie, J. did not apply the rule because the action was ejectment rather than covenant. In *Dick et ux to use v. McWilliams, 291 Pa. 165*, the court allowed a conveyance under seal by an agent not under seal, advancing as a reason that the instrument which the agent signed did not require a seal for its validity, and hence the seal was surplussage. The Dick case seems to represent the present state of the law. If the seal is abolished, no difficulty is caused in this situation.

C. *No person not named in a sealed instrument could sue or be sued on it. Hence, the undisclosed principal could not sue or be sued on a sealed instrument.* On this subject, the advocates of change in the law of seals run squarely up against existing law. In *Smiler v. Toll, and Toll v. Pioneer Sample Book Company, 373 Pa. 127, 130* decided February 13, 1953. Justice (now Chief Justice) Bell summarized the existing state of the law as follows:

"In *Lancaster v. Knickerbocker Ice Co., 153 Pa., supra*, the Court said (p. 432): 'It is text-book law applied and enforced in a long and unbroken line of cases, that where a *simple contract*, other than a bill or note, *is made by an agent in his own name*, his undisclosed principal may maintain action, or be sued, upon it.'

"Where, however, a contract *made by an agent in his own name is under seal*, the general rule is that a principal is not bound, unless he is a party to the contract or named therein as one for whose benefit it was made: A.L.I., Restatement, Agency, paragraph 151; 2 C.J.S., Agency, paragraph 133b(1); 3 C.J.S., Agency, paragraphs 240, 246; 2 Am. Jur., Agency, paragraph 245; 32 A.L.R. 162; *Bellas v. Hays, 5 S. & R. 427*; *Ardesco Oil Co. v. North American Oil & Mining Co., 66 Pa. 375, 380*; *Shermet v. Embick, 90 Pa. Superior Ct. 269*; *Ottman v. Nixon-Nirdlinger, 301 Pa. 234, 241, 242, 151 A. 879.*"

The Restatement of Agency will help clarify the existing state of the law on the point:

"In the absence of statute, an obligor named in a sealed instrument given to an agent on behalf of the principal is not liable to the principal upon it in an action at law unless the principal appears therein as a covenantee." (Paragraph 296.)

"In the absence of statute, an undisclosed principal is not liable as a party to a sealed instrument." (Paragraph 191.)

The facts in the Toll cases were these. Toll owned real estate and agreed to sell it to Smiler who was the only one named in the agreement which was under seal. Smiler was acting for Pioneer Sample Book Company. \$9,500 was paid down and the balance when and if Smiler was able to get a mortgage of \$57,000. Smiler alleged his inability to get the mortgage and brought suit for the \$9,500. Toll's defense was that the seal was only a formality and that the Book Company alone had the right to sue. Some time later Toll, in the second suit, sued the Book Company for the balance of the purchase money. It was held that Smiler could recover in the first suit and that Toll could not in the second suit. Justice Bell pointed out that although there are exceptions to the rule that only the person named in a specialty can sue thereon, the general rule still stands.

What would be the consequences if Pennsylvania abolished the doctrine of common law seal? Perhaps the simplest way to answer this question is by reference to the comments of the Restatement of Agency (we quote only in part):

Paragraph 296(b): *Rights of unnamed principal*. "Although a principal is not a covenantee in a sealed instrument, he can maintain an action by obtaining an assignment from his agent. (This means a suit to use . . ."

Paragraph 296(c): *Where seal not effective*. "In jurisdictions in which the common law rules with regard to seals have been abrogated, a principal not named therein can sue on a sealed instrument. . . ."

Paragraph 296(d): *'Real party in interest' statutes*. "By statute in many states, the real party in interest can bring suit in cases in which, at common law, action had to be brought by one having legal title to the claim. Such statutes are frequently interpreted as not applicable to actions upon sealed instruments. . . ."

Procedural Rule 2002, requiring prosecution of actions by real parties in interest, gives us these actions in our state.

“(a) Except as otherwise provided in clauses (b), and (c) and (d) of this rule, all actions shall be prosecuted by and in the name of the real party in interest, without distinction between contracts under seal and parole contracts.

“(b) A plaintiff may sue in his own name without joining as plaintiff or use-plaintiff any person beneficially interested when such plaintiff

.....

(2) is a person with whom or in whose name a contract has been made for the benefit of another.”

Rule 2002 (b) (2) was relied upon by Justice Bell in the Toll case.

Now apply our test. Assume that the seal has been abolished in Pennsylvania: what principle is to govern decision as to the right to sue? Our answer is, precisely the principle relied upon in the Toll cases, which is stated in Rule 2002 (b) (2). This takes the problem out of the area of magic where the seal holds sway, and puts it into the area of legitimate theory where the decision is based on the nature of the legal writing itself.

In recapitulation, nothing is observed about the prospective operation of abolition of the seal upon the known incidents of the seal which should cause any difficulty or confusion in the procedural laws of our state.

This discussion has been limited to the seals of private individuals. Corporate seals furnish a real service and no change should be made in that law without considering corporate law as a whole. Of course, if corporations attempt to employ the common seal as used by individuals, the abolition should apply. Official seals are not considered here.

D. *The period established by the Statute of Limitations for actions on unsealed instruments should be made to apply to sealed instruments.* There never has been a statute of limitations in Pennsylvania applicable to sealed instruments.

The Act of March 27, 1713, (1 Smith Laws 76, 12 P.S. 31) which limits "all actions of debt grounded upon a lending or contract without specialty to six years does not apply to sealed instruments": *Moss's Appeal*, 43 Pa. 23 (1862). Nothing limits the force of the sealed instrument except the common law presumption of payment after twenty years: 22 P.L.E., page 418.

Whatever may have been said about the justice of this arrangement two hundred and fifty years ago, it is hard to see how there was any equity in it then; it is indefensible now. The promisor ordinarily never realizes that he has signed a note under seal and would not understand the difference if he did know. The law has removed the requirement of seals from deeds, has abolished the effect of seals on the negotiability of commercial paper, and has abolished their effect on contracts for the sale of personal property. Why should we continue what is, in effect, a twenty-year limitation on sealed instruments, as an obscure legal booby trap for the benefit of any one?

VII. CONCLUSIONS

A. The common law seal and the distinction between sealed and unsealed instruments should be abolished in Pennsylvania.

B. The Uniform Written Obligations Act furnishes a useful and available substitute for the seal as a device for enforcing some types of gratuitous promises. Consideration should be given to limiting the kinds of gratuitous promises which the law will undertake to enforce by this Act.

C. The Statute of Limitations should in any event be made the same for sealed and unsealed instruments.

Respectfully submitted,

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