

## The Legal Effect of the Seal on an Instrument

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eral government depend upon this power. Therefore, the Supreme Court has not hesitated to disregard fine-drawn distinctions reaching into infinity. Unless the sections relating to undistributed profits flagrantly violate all tests under the 5th Amendment the entire Act must be declared constitutional.

SAMUEL B. POLLACK.

THE LEGAL EFFECT OF THE SEAL ON AN INSTRUMENT.—The New York Legislature in recent enactments hastened the final destruction of the common-law effects of a seal on a written instrument. One of the statutory changes is the new Section 342 of the Civil Practice Act, which reads as follows:

"1. A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of consideration. A written instrument, hereafter executed, which changes or modifies or which discharges in whole or in part a sealed instrument shall not be deemed invalid or ineffectual because of the absence of a seal thereon. A sealed instrument may not be changed, modified or discharged by an executory agreement unless such agreement is in writing and signed by the party against whom it is sought to enforce the change, modification or discharge. A sealed instrument so changed or modified shall continue to be construed as an instrument under seal.

"2. The rights and liabilities of an undisclosed principal under any sealed instrument hereafter executed shall be the same as if the instrument had not been sealed."<sup>1</sup>

Through the years, regulations concerning the seal became embedded in our statutory law. Instances of this may be seen in the necessity of a seal on public documents, on certificates issued by public officers, and on statutory bonds.<sup>2</sup> The seals that are thus required by statute remain unaffected by the recent legislation.

<sup>1</sup> N. Y. LAWS 1936. c. 685.

<sup>2</sup> N. Y. CIV. PRAC. ACT § 330. A writ of *habeas corpus* must be issued under the seal of the court awarding it. N. Y. CIV. PRAC. ACT § 1236. A certified copy of a record kept by a court or officer having a seal must be admitted into evidence if certified under the hand and seal of such court or officer. N. Y. CIV. PRAC. ACT § 382. Courts of record are required to have seals. N. Y. JUDICIARY LAW § 28. The seal kept by the county clerk of each county shall continue to be the seal of the Supreme Court in that county, N. Y. JUDICIARY LAW § 158, except New York County where the seal of the county clerk shall continue to be the seal of the county court. N. Y. JUDICIARY LAW § 194. An order under the Agriculture and Markets Law must have the official seal attached thereon. N. Y. AGRICULTURE AND MARKETS LAW §§ 15, 36. N. Y. EDUCATION LAW § 25. N. Y. LABOR LAW § 15. N. Y. INS. LAW § 4. N. Y. EXECUTIVE LAW § 74. N. Y. TAX LAW § 172. N. Y. Surr. Ct. Act §§ 3, 31. N. Y. C. MUNI. Ct. CODE § 143, (2). N. Y. BANKING LAW § 11.

The seal played an important part in juridical formality at common law. The employment of a seal, sometimes essential, was deemed most beneficial. A written contract under seal carried with it a conclusive presumption of sufficient consideration.<sup>3</sup> A seal was necessary to pass legal title to real property;<sup>4</sup> a deed to be valid required the seal.<sup>5</sup> The presence of a seal on a negotiable instrument destroyed its negotiability.<sup>6</sup> The seal as utilized in the relationship of principal and agent had various effects. An agent could not execute an instrument under seal unless his authority to act as agent was given under seal or the principal desired to hold the third party.<sup>7</sup> An agent who was given authority to act by a written instrument under seal, could execute an instrument under seal although the instrument conveying his authority to act did not expressly authorize him to execute such an instrument.<sup>8</sup> It was impossible to apply the doctrine of undisclosed principal, where an agent executed an instrument under his own seal, because evidence from outside the confines of the instrument was inadmissible to show that he was acting as agent for another.<sup>9</sup> An instrument under seal could be altered in no way except by another instrument under seal.<sup>10</sup>

At common law the seal on a written instrument, as mentioned above, carried with it a conclusive presumption of sufficient consideration which could not be rebutted.<sup>11</sup> The New York Legislature in 1829 took the first step away from such conclusive effect when they incorporated in the Revised Statutes of that year a section providing substantially that a seal should only be presumptive evidence of consideration.<sup>12</sup> This provision remained unchanged until 1876 when it was incorporated as Section 840 of the Code of Civil Procedure when such presumption was restricted to executory instru-

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<sup>3</sup> *Vulcan Iron Works v. Pittsburgh Eastern Co.*, 144 App. Div. 827, 129 N. Y. Supp. 676 (3d Dept. 1911); *Dunham v. Countryman*, 66 Barb. 268 (N. Y. 1873); *Douglass v. Howland*, 24 Wend. 35 (N. Y. 1838); *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42 (1876); *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692 (1911).

<sup>4</sup> *Morss v. Salisbury*, 48 N. Y. 636 (1872).

<sup>5</sup> *Grandin v. Hernandez*, 29 Hun 399 (N. Y. 1883); *Jackson ex dem. Gauch v. Wood*, 12 Johns. 73 (N. Y. 1815); *Jackson ex dem. Wadsworth v. Wendell*, 12 Johns. 355 (N. Y. 1815).

<sup>6</sup> *Chase National Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164 (1896). A sealed instrument can not be a bill of exchange. *Lake v. Village of Williamsburgh*, 4 Denio 520 (N. Y. 1847).

<sup>7</sup> *Peterson v. City of N. Y.*, 194 N. Y. 437, 440, 87 N. E. 772 (1909).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925).

<sup>10</sup> *Cammack v. Slattery*, 241 N. Y. 39, 148 N. E. 781 (1925); *McKensie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890).

<sup>11</sup> *Vulcan Iron Works v. Pittsburgh Eastern Co.*, 144 App. Div. 827, 129 N. Y. Supp. 676 (3d Dept. 1911); *Dunham v. Countryman*, 66 Barb. 268 (N. Y. 1873); *Douglass v. Howland*, 24 Wend. 35 (N. Y. 1838); *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42 (1876); *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692 (1911); *Dubois v. Hermann*, 56 N. Y. 673 (1874).

<sup>12</sup> 2 N. Y. REV. STAT. 406, § 77 (1829).

ments only.<sup>13</sup> This section later became Section 342 of the Civil Practice Act and in 1935 the New York Legislature amended this section so as to read that: "A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of a sufficient consideration."<sup>14</sup> The first sentence of the amendment passed in 1936 is substantially the same as that of the amendment passed in 1935.

The New York Legislature in 1936 had first enacted Chapter 353<sup>15</sup> which abolished the common-law effect heretofore given to a seal on a written instrument and provided further that the seal was no longer necessary for the valid modification of a sealed instrument. This amendment was to take effect September 1st, 1936. Fortunately the Legislature realized the consequences of language so broad as that contained in these provisions and then enacted Chapter 685 of the Laws of 1936 which expressly repealed Chapter 353 and substituted in its place the present Section 342 of the Civil Practice Act.<sup>16</sup>

Consideration was necessary for the validity of a release.<sup>17</sup> A release furnished merely *prima facie* evidence of facts stated therein which might be controverted or explained by parol evidence.<sup>18</sup> A release which was under seal, however, could not be attacked for want of consideration<sup>19</sup> and consequently the seal was useful in terminat-

<sup>13</sup> N. Y. LAWS 1876, c. 448, 449.

<sup>14</sup> N. Y. LAWS 1935, c. 708.

<sup>15</sup> N. Y. LAWS 1936, c. 353.

<sup>16</sup> N. Y. LAWS 1936, c. 685, § 2. (Chapter 353 of the laws of 1936, entitled "An act to amend the Civil Practice Act, in relation to abolishing the common law effect of seals upon written instruments hereafter executed and repeating section three hundred and forty-three thereof, relating to the effect of such seals," is hereby repealed.)

<sup>17</sup> Plaintiff performed services for defendant at his request and held a legal demand against the defendant for their reasonable value, a subsequent statement by plaintiff that he made no claim in respect thereto, was held to be founded on no consideration and was no defense to an action for services. *Osborn v. Keech*, 3 Hun 223 (N. Y. 1875), *aff'd*, 64 N. Y. 640 (1876). A writing not under seal and signed by one of the parties to an executory contract, after partial performance by him, purporting to revoke and cancel the contract by mutual consent, is not effectual as a release unless supported by consideration. *Gallo v. City of N. Y.*, 15 App. Div. 61, 44 N. Y. Supp. 143 (2d Dept. 1897).

<sup>18</sup> *Ryan v. Ward*, 48 N. Y. 204 (1872).

<sup>19</sup> Releases being merely declarations or admissions in writing, are not executory instruments within § 840 N. Y. CODE OF CIV. PROC., which provides that a seal on an executory instrument is only presumptive evidence and hence consideration for a release under seal can not be disproved. *Steibel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692 (1911), *rev'g*, 137 App. Div. 275, 121 N. Y. Supp. 923 (1st Dept. 1910); *Homans v. Tyng*, 56 App. Div. 383, 67 N. Y. Supp. 792 (1st Dept. 1910). Consideration for a release under seal (not within § 840 N. Y. CODE OF CIV. PROC. because it is not an executory instrument) is conclusively presumed. *Hogan v. Produce Development Co.*, 200 App. Div. 29, 192 N. Y. Supp. 337 (1st Dept. 1922); *Finch v. Simon*, 61 App. Div. 139, 70 N. Y. Supp. 361 (1st Dept. 1901). (Where a release of liability for rent is under seal, a sufficient consideration is presumed.) If the jury was justified in finding that the release was under seal the question of sufficiency of considera-

ing much litigation. A release is not considered a contract or an executory instrument, but merely a declaration or admission in writing.<sup>20</sup> Therefore, it was held that the subsequent modification of the statute in reference to a seal on executory instruments, *i. e.*, Section 840 of the Code of Civil Procedure, did not extend to releases. The seal on releases continued to be conclusive evidence of sufficient consideration.<sup>21</sup> When the Legislature in 1935 eliminated the presumptions in reference to a seal on any written instrument a serious condition arose. Lawyers found difficulty in obtaining a good release of a liquidated and undisputed claim by the payment of a smaller sum than was admittedly due.<sup>22</sup> The Legislature remedies this situation by enacting Chapter 222 of the Laws of 1936, known as Section 243 of the Debtor and Creditor Law, which provides that:

"A written instrument hereafter executed, which purports to be a total or partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand, or obligation, or a release or discharge in whole or in part of a mortgage, lien or charge upon personal or real property, shall not be invalid because of absence of consideration or of a seal."

The second sentence of Section 342 (1) of the Civil Practice Act states that:

"A written instrument, hereafter executed, which changes or modifies or which discharges in whole or in part a sealed instrument shall not be deemed invalid or ineffectual because of the absence of the seal thereon."

It was possible to discharge, modify, or vary a simple contract at common law by parol or by a written agreement,<sup>23</sup> but a sealed instrument could only be discharged, modified or varied by an instrument of equal solemnity.<sup>24</sup> It has been held in New York that an executed parol agreement could validly modify a sealed instrument,<sup>25</sup> but it is still the rule that a sealed contract can not be varied by a wholly executory modification. The New York Court of Appeals made a further distinction when they held that a sealed instrument

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tion was immaterial. *Weitling v. Sorenson*, 241 App. Div. 377, 272 N. Y. Supp. 338 (1st Dept. 1935).

<sup>20</sup> *Steibel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692 (1911).

<sup>21</sup> *Ibid.*

<sup>22</sup> See Correspondence, N. Y. L. J., June 4, 1935, Sept. 11, 1935, Sept. 24, 1935, Oct. 1, 1935.

<sup>23</sup> *Farrington v. Brady*, 11 App. Div. 1, 42 N. Y. Supp. 385 (2d Dept. 1896).

<sup>24</sup> *Farrington v. Brady*, 11 App. Div. 1, 42 N. Y. Supp. 385 (2d Dept. 1896); *McKensie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890); *Cammack v. Stattery*, 241 N. Y. 39, 148 N. E. 781 (1925).

<sup>25</sup> *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198 (1890).

could be validly modified by a parol agreement which had been executed by one of the parties but remained executory as to the other.<sup>26</sup> It is now no longer necessary for a written instrument to be under seal to effectuate the valid discharge or modification of a sealed instrument. This is true whether the agreement is executed or executory. The law remains unchanged by this amendment in respect to modification or discharge by parol.

The third sentence of Section 342 (1) provides that:

“A sealed instrument may not be changed, modified or discharged by an executory agreement unless such agreement is in writing and signed by the party against whom it is sought to enforce the change, modification or discharge.”

A sealed instrument could not be modified at common law by an executory instrument unless it was under seal.<sup>27</sup> The second sentence of Section 342 (1) authorizes the modification, variation, or discharge of a sealed instrument by a *written* instrument not under seal. Thus, a sealed instrument may not be modified, varied or discharged by an oral executory agreement.<sup>28</sup> This seems to be only a reiteration of what has been said before except that the writing must be signed by the party against whom it is sought to enforce the change, modification or discharge. It is possible that the purpose of this sentence is to overcome the rule established by the case of *Harris v. Shorall* that a sealed instrument may be modified by a parol agreement which has been executed by one of the parties.<sup>29</sup> Of course this sentence could not apply to a parol modification executed on both sides, for there is no one, “against whom it is sought to enforce the change, modification or discharge.”

The Legislature by including the fourth sentence of Section 342 (1) which reads, “A sealed instrument so changed or modified shall continue to be construed as an instrument under seal”, has shown an unwillingness to exclude the use of the seal on an instrument. They recognize that there are some benefits still to be derived from the presence of the seal.

Section 342 (2) provides that:

“The rights and liabilities of an undisclosed principal under any sealed instrument hereafter executed shall be the same as if the instrument had not been sealed.”

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<sup>26</sup> *Harris v. Shorall*, 230 N. Y. 343, 130 N. E. 572 (1921).

<sup>27</sup> *Farrington v. Brady*, 11 App. Div. 1, 42 N. Y. Supp. 385 (2d Dept. 1896).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Harris v. Shorall*, 230 N. Y. 343, 130 N. E. 572 (1921).

This sentence abolishes the rigid common-law rule in reference to undisclosed principals.<sup>30</sup> No longer will undisclosed principals be able to hide behind the cloak of the seal. Thus where an agent places his own seal on an instrument, the undisclosed principal may be held. Nothing has been said in the amendments in reference to an agency to execute sealed instruments, consequently an agent to be able to enter into an instrument under seal must have his authority to act as agent under seal.<sup>31</sup>

Section 47 of the Civil Practice Act which deals with the statutory period of limitation on sealed instruments remains unchanged. The period of limitation of actions on sealed instruments remains twenty years.<sup>32</sup>

The New York Legislature has indicated, by passing the amendments to the Civil Practice Act and the Debtor and Creditor Law, its attempt to clarify many outstanding questions in reference to the seal. There is little reason for affixing a seal to an instrument, yet there are some remaining attributes as the twenty-year period of limitation of actions which will entice cautious lawyers to affix seals to instruments. The New York Legislature should continue its commendable movement toward the elimination of any effect of the seal and finally determine that it is a worthless surplusage.<sup>33</sup>

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<sup>30</sup> *Briggs v. Partridge*, 64 N. Y. 357 (1876); *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925).

<sup>31</sup> *Peterson v. City of N. Y.*, 194 N. Y. 437, 440, 87 N. E. 772 (1909).

<sup>32</sup> N. Y. CIV. PRAC. ACT § 47.

<sup>33</sup> *Legis.* (1935) 10 ST. JOHN'S L. REV. 161; N. Y. L. J., Oct. 5, 1936, p. 1002, col. 1; N. Y. L. J., Oct. 6, 1936, p. 1020, col. 1; N. Y. L. J., Oct. 7, 1936, p. 1042, col. 1.