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The Seal as Consideration on a Negotiable Instrument - Citizen's Nat. Bank of Pocomoke City v. Custis

THE SEAL AS CONSIDERATION ON A NEGOTIABLE INSTRUMENT

Citizen's Nat. Bank of Pocomoke City v. Custis[1]

Plaintiff, the payee of a sealed instrument, brought this action against the defendant bank, the executor of John T. M. Sturgis, maker of the instrument. The pleader declared on it as upon a bill obligatory "payable to the said Bertha D. Custis on demand". The writing proved to possess all the requirements of negotiability as specified in Art. 13, Sec. 20. The trial court treated the instrument as a specialty and maintained that the seal precluded a defense on the ground of absence of consideration, and a verdict was rendered for the plaintiff. On appeal, *Held*: Reversed and new trial awarded. Since the instrument was in writing signed by the maker, and contained an unconditional promise to pay to the order of the appellee a sum certain in money on demand,[2] it was a valid and negotiable promissory note despite the presence of the seal.[3] That the Negotiable Instruments Act[4] was within the contemplation of the parties and was anticipated in the formation and execution of the instrument could be inferred from the provision wherein the "maker and endorser" engaged to waive demand, protest and notice of non-payment.[5] The position taken by the trial court was prejudicial to the appellant as it had apparently accepted the appellee's argument that, even though without consideration, the instrument was enforceable as a gift. The Court gave the following clear statement of the Maryland law as to the effect of a seal as consideration on a negotiable instrument:

[10] For a penetrating analysis of the question in various aspects, see Field, *op. cit supra* note 7, particularly Chapter IV.

[1] 153 Md. 235, 138 Atl. 261, 53 A. L. R. 1165 (1927).
[2] Md. Code, Art. 13, Sec. 20.
[3] Md. Code, Art. 13, Sec. 25 (4).
[4] Md. Code, Art. 13, Secs. 13-208.
[5] Md. Code, Art. 13, Sec. 24 (3).

> "The Negotiable Instruments Act therefore abolishes the conclusive presumption of consideration for a sealed instrument which is otherwise negotiable, but gives to every negotiable paper, whether with or without seal, the prima facie presumption that it was issued for a valuable consideration, and that every person whose signature appears thereon becomes a party thereto for value, subject however to the right of the maker, as against any person not a holder in due course, to show affirmatively the consideration to be absent, as in the case of a gift, or to have failed in whole or in part."

The Maryland view is supported by at least one leading text writer[6] and the argument is to the effect that as the N. I. L.[7] operates to convert an instrument otherwise non-negotiable under the Law Merchant because of the seal into a negotiable instrument, it follows that such instrument is necessarily subject to other provisions of the Act which state that "absence or failure of consideration is a matter of defense as against any person not a holder in due course,"[8] and "In the hands of any holder other than a holder in due course an instrument is subject to the same defenses as if it were non-negotiable."[9]

At common law a sealed promise or covenant was binding by its own force. Professor Williston condemns[10] the often used phrases that a seal "imports" consideration, or that consideration is "presumed" from the seal; he criticizes such usage as "absurd historically, since sealed instruments were binding centuries before the development of informal contracts and the law of consideration." The seal was sufficient in itself where no other consideration was bargained for and no defense could be made on the ground of the "absence" or "want" thereof, but, where some other exchange was intended by the parties, the failure to receive the same provided a ground for equitable relief, although at law failure of consideration was unavailing as a defense. The Court of Appeals recognizes this distinction in the principal case: "In an action at law on such a sealed instrument the absence or failure of consideration could not be inquired into, except through a

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[6] Lile's note in his edition of Bigelow's Bills and Notes, P. 39.
[7] *Supra* note 3.
[8] Md. Code, Art. 13, Sec. 47.
[9] Md. Code, Art. 13, Sec. 77.
[10] Williston, Contracts (Rev. Ed.), Sec. 109.

plea by way of equitable defense."[11] Under the N. I. L. "the legislative intent was to put negotiable papers whether sealed or unsealed, on a common substantive and procedural equality, and so to permit this defense of total or partial failure of consideration to be made without reference to the presence or absence of a seal to an instrument of writing, if otherwise negotiable."[12] Today then "*every*[13] negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."[14]

The only other Maryland case wherein the specific question was raised is *Dever v. Silver*.[15] In that case the Court, holding the burden of proving want of consideration to be on the payer, said:

> "The seal upon the note when considered as a specialty, imports a consideration, and in the absence of all proof on the part of the obligor of a want of consideration, would, upon such defense, entitle the obligee to a verdict; and should the note under the Negotiable Instrument Act of this State be regarded as a negotiable instrument to be treated as such in respect to the question before us, then it is we think clearly established in this State that under such Act the burden of proof was on the defendant to show that there was a failure or want of consideration."[16]

The problem does not seem to have been decided in many jurisdictions but the apparent trend favors the Maryland view.[17] In *Citizens Bank of Blakely v. Hall*[18] the Georgia Court said: "A proper construction of the Negotiable Instruments Law, now adopted as a statute in all of the states, requires the ruling that want of consideration may be pleaded as a defense in a suit on a sealed promissory note." Similarly, in *Cracowaner v. Carlton Nat. Bank*:[19] "The Negotiable Instruments Act expressly provides that the seal shall not affect either the validity or the negotiability of the note. Such a note is open to the

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[11] *Supra* note 1, 153 Md. 235, 238.
[12] *Supra* note 1, 153 Md. 235, 242.
[13] Italics supplied.
[14] Md. Code, Art. 13, Sec. 43.
[15] 135 Md. 355, 109 Atl. 67 (1919).
[16] Ibid, 135 Md. 355, 362.
[17] 53 A. L. R. 1173, 97 A. L. R. 617.
[18] 179 Ga. 662, 177 S. E. 496, 499 (1934).
[19] 98 Fla. 792, 124 So. 275, 276 (1929).

defense of want of consideration. . . . All of the common-law distinctions between an unsealed note and a note under seal or a bill single are gone." Connecticut[20] concurs with Maryland, Georgia and Florida: ". . . an instrument (Sealed) . . . is a negotiable promissory note, and . . . is open to the defense of want of consideration." Pennsylvania, in *Balliet v. Fetter*,[21] reached an opposite conclusion, reasoning that merely because the N. I. L. provides that an instrument under seal may be negotiable, it did not destroy the significance thereof. The Court consequently refused to "sweep aside the principle enumerated in this long line of cases" that a seal was not merely presumptive evidence of consideration but actually imports consideration. In *Homer Building and Loan Assoc. v. Noble*[22] the Court said: "In Pennsylvania a seal is more than mere presumptive evidence of consideration. It imports consideration and therefore want of consideration is no defense to an action on a sealed instrument." Delaware[23] may follow the Pennsylvania view, but as pointed out in the principal case, the decision was made at nisi prius in an oral instruction to the jury without any citation of authority, so it should not be accorded the weight of a judgment by an appellate tribunal.

If the policy of the Negotiable Instruments Act is to facilitate the negotiation of negotiable paper, it is possible to argue that the Pennsylvania view is preferable in that a prospective purchaser of sealed paper would feel less hesitancy in buying paper on which the defense of want of consideration could not be made. Even though the presence or absence of consideration is of no concern where holders in due course are involved, it may be that the extrinsic policy of encouraging the negotiation of commercial paper, and of increasing the number of dealings therein in order to provide a larger volume of transactions in money and credit, is best served by sustaining the potency of the seal even as between parties with notice. The Maryland view however, has a certain symmetry and it may be logical to say that, if the Act operates to impart negotiability to a sealed instrument, such instrument becomes thereby subject to the control of the other sections of the N. I. L. so that the defense of want of consideration is available as against a party not a holder in due course. But if the

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[20] St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145 (1909).
[21] 314 Pa. 284, 171 Atl. 466 (1934).
[22] 181 Atl. 848 (Pa. 1935).
[23] Kennedy v. Collins, 30 Del. 246, 108 Atl. 48 (1919).

seal is held to be of no significance as far as consideration is concerned, consistency would seem to require that it be deemed ineffectual to prolong the period of limitations. The Courts do not go to this length[24] and they hold, as in the principal case,[25] that as the statute of limitations has no effect on the validity or negotiable character of an instrument, its execution with a seal continues to make applicable the twelve year period of limitations.

[24] 97 A. L. R. 617, 620.

[25] *Supra* note 1, 153 Md. 235, 241. The Court also considered an interesting point of pleading, *supra* note 1, 153 Md. 235, 244. Since the declaration referred to an instrument under seal "payable to Bertha D. Custis" rather than "payable to the order of Bertha D. Custis," it alleged a "non-negotiable single bill." According to the Court, the general issue pleas of *non assumpsit* and *nil debet* were inapplicable to this declaration and were demurrable; the correct plea should have been *non est factum*, i. e., the general issue plea suited to an action of debt upon a specialty. This is correct as a statement of the common law rules of pleading, but in 1918 the General Assembly amended Md. Code, Art. 75, Sec. 4, so as to abolish the action of debt and extend the action of assumpsit to cover all actions *ex contractu* on sealed as well as unsealed instruments; and further to make *non assumpsit* and *nil debet* the proper general issue pleas in all such actions. Apparently the Court overlooked this statute. See 1 Poe, Pleading and Practice (Tiffany's Ed.) 649, note.

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[1] 197 Atl. 117 (Md. 1938).