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Sealing and Delivery of Contracts in Kentucky and the Restatement

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NOTES

SEALING AND DELIVERY OF CONTRACTS IN KENTUCKY AND THE RESTATEMENT

According to Section 110 of the Restatement, a sealed promise is binding without consideration. No specific statement in any Kentucky case has been found regarding this precise point, but it is believed that this was not the law in Kentucky even before the Statute raised certain unsealed promises to the dignity of sealed instruments.¹ The Statute raising certain un-

¹The Statute of 1812 Sec. 8, reads as follows: "All writings hereafter executed without seals stipulating for the payment of money or property or for the performance of any act or acts, duty or duties, shall be placed upon the same footing with sealed writings, containing the like stipulations; receiving the same consideration in all courts of

sealed promises to the dignity of sealed contracts did not apply to contracts for the sale of land and to conveyances, but did apply to a warranty of soundness contained in a bill of sale.²

It was held prior to this statute that a seal imports consideration.³ The negative inference of such a statement is that the presumption of consideration may be rebutted and that if it is rebutted a sealed promise is not enforceable. This was probably the view of the Kentucky court. Evidence that this was the position of the court prior to the passage of the statute is furnished by the statute itself. The statute placed all writings "on the same footing with sealed instruments." Had sealed instruments been binding without consideration, this would have meant that all written promises henceforth would likewise be binding without consideration, and that result is obviously unthinkable. Our court therefore, may have changed the common law in that respect, even before the statute of 1801⁴ since the common law rule unquestionably was that the seal itself was the stamp of enforceability of the promise quite apart from any consideration.⁵ Pretty clearly, at the common law a defendant

justice; and to all intents and purposes having the same force and effect, and upon which the same species of action may be founded as if sealed." See Laws of Kentucky of 1811-1812 p. 180 Ch. 375; 1 Litt. Dig. Kentucky Statutes (1822) p. 264 Sec. 8; 1 Morehead and Brown Statute Law of Kentucky (1834) p. 343 Sec. 8. In 1843 a statute was passed obviating the necessity of seals in other cases, especially as to conveyances: "All and every instrument of writing hereafter executed shall be as effectual and have the same dignity in law, without a seal or scroll as with one; Provided: that this act shall not alter the law requiring the state or county seal or the seal of corporations to certain instruments as heretofore; and provided that a *delivery of executed contracts* shall not be dispensed with by this act. Debt on bond may be joined with debt on simple contract." See Laws of Kentucky (1843) Chap. 42; Revised Statutes of Kentucky (Wickliffe, Turner and Nicholas 1851 and 1852) p. 196; Chap. 24, Sec. 5. The Statute of 1812 also substantially reappears in the Revised Statutes of 1852 p. 192, Chap. 22, Sec. 2; in the General Statutes of Kentucky of 1873, Chap. 22, Sec. 2; and in Kentucky Statutes of 1894 Sec. 471; Carroll's Kentucky Statutes 1922, Sec. 471. The two provisions are now combined in Sec. 471.

² *Tribble v. Oldham*, 5 J. J. Marsh. (28 Ky.) 137 (1830); *Kirby v. Chitwood*, 4 T. B. Mon. (20 Ky.) 91 (1826).

³ *Steele v. Mitchell, Sneed* (2 Ky. Dec.) 37 (1801). Cf. *McClanahan v. Henderson*, 2 A. K. Marsh. 388 (1820); *Hanna v. McKenzie*, 5 B. Mon. 314 (1845). An assignee may sue on a covenant between the obligor and the assignor, *Schultz v. Johnson*, 5 B. Mon. 497 (1845).

⁴ See next note.

⁵ 1 Williston on Contracts, Sec. 205; Ames "Specialty Contracts and Equitable Defenses" 9 Har. L. Rev. 49, 51 (1906). As to the law in Kentucky however, prior to 1801, one cannot speak with assurance since in that year a statute was passed to the effect that where an

could not plead lack of consideration to an action in covenant.⁶ But it is not necessary to allege nor to prove that consideration was given in those cases governed by the statute,⁷ though if the consideration is unnecessarily alleged it must be proved,⁸ and if that which is alleged as consideration is not in law consideration, there is no further presumption of valid consideration.⁹

Though the statute purports to raise all contracts which come within its purview to the dignity of sealed instruments, there are still some significant differences between such contracts and those that are sealed, in Kentucky. In one case,¹⁰ it is stated that in an action on a note the plea of release is not effective without a seal, thus intimating that a release might be effective without consideration if sealed. Again it has been held that if partners enter an agreement under seal to submit to an award, both must join.¹¹ But if the agreement is not sealed one partner may bind the other. That statute therefore, does not alter the mode of executing such instruments. It is also held that there are various distinctions still between these contracts so elevated, and sealed contracts. For example a sealed contract was wholly ineffective before delivery, whereas these contracts may be effective without delivery. Thus, in *Taylor v. Craig*¹² defendant had signed a note as surety for X but deliv-

action was brought on a sealed instrument the consideration might be impeached by a special plea. See *I Morehead and Brown Statute Law of Kentucky* (2 Vols. 1834) p. 331; and the amendatory act of 1815, *ib.* p. 345.

⁶ For the Kentucky rule under the statute see *Buford v. McKee*, 1 Dana 107 (1833); *Wilhite v. Roberts*, 4 Dana 172 (1836).

⁷ *Bronston v. Lakes*, 135 Ky. 173, 121 S. W. 1021 (1909); *Moore v. Gatewood*, 5 Ky. Law Rep. 777 (1884); *Snowden v. Leight*, 6 Ky. Law Rep. 118 (1884); *Boone v. Shackelford*, 4 Bibb (7 Ky.) 67 (1815); *Trustees v. Fleming*, 10 Bush (73 Ky.) 234 (1874).

⁸ *Drexelins v. Leathers*, 12 Ky. Law Rep. 142 (1890).

⁹ *Noe v. Keen*, 5 Ky. Law Rep. 928 (1884).

¹⁰ *Gibson v. Weir*, 1 J. J. Marsh. (24 Ky.) 446 (1829). In *Jenkins v. Morton*, 3 T. B. Mon. 28 (1825) a wife was not permitted to join in an action for breach of covenant in which her husband was promisee but the promise was made for her benefit. The statute had raised all promises to the dignity of covenants, and in Kentucky donee beneficiaries may sue on promises made for their benefit. See 18 Ky. L. Jour. 101, 111 (1930).

¹¹ *Southard v. Steele*, 3 T. B. Mon. (19 Ky.) 435 (1826); see Re-statement Sec. 108.

¹² 2 J. J. Marsh. (25 Ky.) 449 (1829); see also *Southard v. Steele supra* n. 9; a conveyance (deed) must be delivered and accepted; see *Cates v. Cates*, 152 Ky. 47, 153 S. W. 10 (1913); *Alexander v. De Kernel*, 81 Ky. 345 (1883); *Bunnell v. Bunnell*, 111 Ky. 566 (1901). Delivery by grantor of deed to be recorded without knowledge of the grantee is

ered the note to Y with instructions to see Z and if Z should say that he, defendant, could safely become X's surety, then Y was to deliver the note to the payee; otherwise not. It was held that defendant was bound even though Y delivered the note without consulting Z.¹³ The court says that this would not have been a delivery if the instrument had been a deed.¹⁴ Furthermore, a deed could not be altered by filling in blanks, but the aforementioned statute does not prevent the filling in of blanks after the instrument has been delivered so that the instrument is avoided.¹⁵

An action in *indebitatus assumpsit* at common law could not be sustained by the introduction of a sealed instrument as evidence of the claim, says the Kentucky Court, and it therefore holds that these promises raised to their new dignity by the statute, likewise, may not be used as evidence in an action of *indebitatus assumpsit* though that was possible before the passage of this Statute.¹⁶ The action must be grounded on the instrument. The date a sealed instrument bears is presumed to be the date of delivery.¹⁷

A seal in Kentucky may consist of a scroll.¹⁸ This is the rule at common law and by statute passed in 1797,¹⁹ and there need be no recital regarding the seal in the contract.²⁰

The Kentucky Court agrees that where the word "seal" is written after the name of one co-obligor and not after the name

not a delivery but it may be *prima facie* evidence of delivery. Where the deed was found unrecorded sixteen years later in the county clerk's office it was presumed to have been delivered and accepted. If grantor hands deed to notary to deliver to grantee and latter tells notary to keep it and obtain the signature of the grantor's wife, the deed is not accepted till that has been done; *Ward v. Rittenhouse Coal Co.* 152 Ky. 228, 153 S. W. 217 (1913); see also *Jefferson County Bldg. Assn. v. Heil*, 81 Ky. 513 (1883). Acceptance is presumed from a delivery to the grantee who retains the instrument; *Smith v. Noble* 174 Ky. 15, 191 S. W. 641 (1917). See Restatement Sec. 106.

¹³ But cf. *Murrell v. American Ry. Exp. Co.* 207 Ky. 322, 269 S. W. 293, 745 (1924).

¹⁴ See Restatement, Sec. 102, 103.

¹⁵ *Bank v. Penick*, 5 T. B. Mon. (21 Ky.) 25 (1827).

¹⁶ *Colyer v. Jackson*, 3 B. Mon. (19 Ky.) 22 (1825); *McDowell v. Greenup*, 2 A. K. Marsh. 568 (1820).

¹⁷ *McConnell v. Brown*, Litt. Sel. Cases, 459 (1821).

¹⁸ *Growning v. Behn*, 10 B. Mon. (49 Ky.) 383 (1850); Restatement Sec. 96.

¹⁹ 1 Litt, Dig. p. 254 Sec. 40; 1 Morehead and Brown (1834) p. 326, Sec. 41.

²⁰ *Hubbard v. Beckwith*, 1 Bibb (4 Ky.) 492 (1809); Restatement Sec. 100.

of the other, the seal may be the common seal of both, but whether it is or not cannot be determined by inspection only. Evidence is necessary on the point.²¹

A corporation may contract with an employee for services informally²² and may assign an obligation without a seal,²³ but may not make contracts generally save by sealed instruments.²⁴

It thus appears that in Kentucky, cases dealing with the subject matter of sections 95, 96, 97, 98, 99, 100, 101 and 108 are to be found, but no Kentucky cases directly apply to sections 102-107, and 109. The statute raising certain contracts to the dignity of sealed instruments is in conflict with the theory of section 110, as all promises now must be supported by a consideration, though in the cases affected by the statute, consideration for the promises is presumed.

ALVIN E. EVANS

²¹ *Bohannons v. Lewis*, 3 T. B. Mon. (19 Ky.) 376 (1826); Restatement Secs. 97, 98, 99.

²² *Waller v. Bank of Kentucky*, 3 J. J. Marsh. (26 Ky.) 201 (1830).

²³ *Garrison v. Combs*, 7 J. J. Marsh. (30 Ky.) 84 (1831). A credit on a specialty may be entered and the plaintiff is not entitled to have the credit scaled down though paid in depreciated currency. *Phelps v. Taylor*, 4 T. B. Mon. (20 Ky.) 170 (1826.)

²⁴ See *Long v. Madison Hemp & Flax Co.*, 1 A. K. Marsh. (8 Ky.) 105 (1817).