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PAROL WRITTEN CONTRACT IN KENTUCKY

By JUDGE LYMAN CHALKLEY, Professor of Law, University of Kentucky, College of Law.

Perhaps there is no parol written contract in Kentucky. The rule of law laid down and recognized in the courts generally in America—and there has been no departure in Kentucky—has been that announced in the opinion in Rann vs. Hughes. The question was first raised in 1765, when it was decided, in the case of Pillans vs. Van Mierop, that consideration was only required as evidence of intention to be bound, and that where such evidence was effectually supplied in any other way, the want of consideration would not affect the validity of a parol promise. The issue in that case involved only a commercial contract in writing, and to that application the doctrine that a parol promise not supported by a valuable consideration is nevertheless binding because in writing, must be confined.

The law remained as laid down in Pillans vs. Van Mierop for thirteen years, until the same question was again raised in the case of Rann vs. Hughes, decided in 1778. In that case, the contention, founded upon the former case, was that an administratrix of an estate, who had promised in writing to pay out of her own pocket money which was due from the estate to the plaintiff, which promise was without consideration proceeding from her, was nevertheless bound, the observance of the form required by the Statute of Frauds making consideration unnecessary. The doctrine of Pillans vs. Van Mierop was emphatically disclaimed in the opinion of the judges. The court said:

"It is undoubtedly true that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such an agreement is nullum pactum ex quo non oritur actio; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. . . . . . All contracts are by the law of England divided into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved."

The distinction between the contract by specialty or covenant, and the
contract by parol here pointed out is fundamental and the two have very different forces and effects. The contract by parol, whether written or unwritten, operates and has the force and effect only to raise an obligation from a promise, and in that case, only when the promise is founded upon a valuable consideration. On the other hand, the contract by specialty or covenant, operates and has the force and effect to impose an obligation upon a promise reduced to writing, although the promise is not based upon a consideration.

This proposition is formulated in various phrases: "The contract under seal requires no consideration;" "In a contract under seal, consideration is presumed;" "In a contract under seal the form raises the obligation."

Moreover, other writings than those embodying a promise have a widely different force and effect, if sealed, from the same writing unsealed. For example, an ordinary receipt, not sealed, may be rebutted, but, if sealed, operates by way of estoppel, and the party is bound by its recitals. Other instances of difference in force and effect between sealed and unsealed instruments are:

(1) A deed operates to effect a merger. A devisee in trust to sell lands and pay debts, borrows money, by simple contract in writing, upon the faith of the land, and then afterwards executes a deed charging the land with the same debt; here the simple contract in writing is merged and can not be sued upon. (2) The discharge of a contract under seal can only be accomplished by an instrument under seal when the discharge is to take place by agreement of the parties. A parol contract, whether in writing or not, may be discharged by parol. (3) A representation or promise in an agreement respecting land, will, in many cases, run with the land, if the agreement is by specialty; the rule is otherwise if only by parol. (4) Heirs and devisees will be bound by an agreement by specialty if mentioned, but will not be bound by an agreement by parol even if mentioned. (5) Authority to an agent to execute a deed must be by specialty. (6) A representation or promise in an agreement respecting land, will, in many cases, run with the land, if the agreement is by specialty; the rule is otherwise if only by parol. (7) A representation or promise in an agreement respecting land, will, in many cases, run with the land, if the agreement is by specialty; the rule is otherwise if only by parol.

The remedies for breach of the obligation by specialty are through the actions of debt and covenant, each requiring the production of the writing sued upon, each admitting only of the plea of non est factum where the issue is as to the genuineness or obligation of the writing. The action of assumpsit does not require the production of the writing, and the genuineness and obligation of the writing may be contested under a very wide general issue.

The Statute of Kentucky provides:

"A seal or scroll shall in no case be necessary to give effect to a deed or other writing. All unsealed writings shall stand upon the same footing with sealed writings, having the same force and effect and upon which the same actions may be founded. But this section shall not apply to, nor shall it alter, any law requiring the state or county seal, or the seal of a court, corporation, or notary, to any writing."--Carroll's Statutes, Sec. 471 (1909 ed.).

It is apparent that the specialty has not been abolished. The provision operates only to dispense with the necessity of affixing a seal or scroll in order to the execution of a specialty. It is also apparent that the "same foot-
ing" upon which both sealed and unsealed writings stand is that of the sealed writing or specialty and not that of the unsealed writing or parol. It is also sufficiently plain from the use of the word "all" and the position of this section in the chapter entitled "Contracts"—rather than "Conveyances" or "Land"—that the application of the section is not to be restrained to the deed of conveyance of land nor to those cases in which an instrument under seal was required at common law.

This construction receives color from Secs. 2514 and 2515, Carroll Statutes (1909 ed.), providing that the period of limitation within which an action may be brought upon a bond, recognizance, or written contract, shall be the same; and also from the cases of Newberger vs. Adams, 92 Ky. 26; Helton vs. Asher, 103 Ky. 730, deciding that it is necessary to the validity of a writing concerning the sale of land, that it should be delivered as well as signed by the party to be bound.

It would seem that all contracts in Kentucky reduced to writing, whether sealed or unsealed, are specialties, and that the only contract in Kentucky requiring consideration for its validity is the unwritten contract.

From these considerations, it would seem that the division of contracts in Kentucky is into contracts in writing and contracts not in writing, the former having the nature, characteristics, incidents, functions, limitations and requirements as to execution and delivery, force and effect, of the contract by specialty as enforced in the courts of Kentucky at the time of the enactment of this statute.

THE LAWYER AND THE CORPORATION

By HON. BOYD WINCHESTER, of the Louisville Bar.

It is a matter worthy of serious consideration whether the accumulation and the predominance of pecuniary interests are not subjecting the legal profession too often, if not too complacently, to the promotion of ignoble purposes. Are not the finer and nobler elements, the traditional dignity and honor of the profession being impaired as corporate power increases and absorbs the larger part of its members?

Of course, the clear interest of society requires that every cause, every person, natural or artificial, even every criminal, should be fully defended. There should not be set up for the profession any austere code of ideal morals. No heavier burden is laid on the conscience of the lawyer than on that of every other man engaged in a lawful pursuit.

While the law is practiced for money, there are standards of aspiration and honor, professional ethics, conscious and unconscious, which are above and apart from mere gain. There are shyster lawyers and quack doctors, as there are mercenary persons in every vocation, but the rule, with the legal fraternity, let it be said, is largely otherwise.

Governor Wilson in an address before the American Bar Association in 1910, presented an inquiry worthy of very serious reflection. He asked, "has not the lawyer allowed himself to become part of the industrial development? Has he not been sucked into the channels of business? Has he not
changed his attitude and the spirit of the profession? Has he not become a part of the mercantile structure, rather than part of the general social structure of our Commonwealth, as he used to be? Has he not turned away from his former interests and duties, and become narrowed to a technical function?" Then he adds, "The lawyer does not play the part he used to play, he does not show the spirit in affairs he used to show, he does not do what he might do, with his disinterested and earnest advice, which is so much needed in the exigent processes of reform, in the busy processes of legislation, through which we are passing with so single a mixture of hope and apprehension."

These are mighty thoughts on the question of the lawyer's profession being one peculiarly affected with a public interest.

There can be no doubt that the immense growth of corporations, and the glittering prizes which they have held out to able lawyers, have tended both to specialize and narrow the activity of the leading men of the bar. In their hands the law has become, in a sort, commercialized. The word is not used in an offensive sense. Legal advice has been necessary to the captains of industry. Vast undertakings have needed the skilled service of the ablest lawyers at every step of their formation and conduct, with the result that many of the finest minds in the profession have become rather business men than lawyers. Their range is not so great as that of the older practitioners; it is hard for them to conceive of the law as a whole, and their profession is one that calls for service of the public as well as of their clients. It would not be just to say that the majority of lawyers are unmindful of their duty to the public. Yet one must concede that Mr. Bryce, that profound student of our institutions, in an article giving his impressions of the changes since he made his first studies here, was justified in mentioning the "diminution and well-nigh disappearance of the class of great lawyers who gave their time and strength, not only to legal reform, but to the leadership of all good public causes."

The relation of a lawyer to his client involves questions which touch, at vital points, the general interests of society, and the whole body of the profession; and which, like all questions of moral and social duty, assume new interest and importance whenever, from the force of circumstances, public attention is specially directed upon them.

No one would deny to the lawyer the right to serve a soulless corporation, having its being only by virtue of a charter. To represent it as a matter of strict professional right and on grounds of solid public interest, he is as fully justified in doing so in all fair and honorable ways as if it were the most beneficent institution which philanthropy ever founded or benevolence ever administered. But the corporation is not satisfied to receive professional service such as is rendered to other clients, however faithful and able, but will accept no less measure of loyalty than that described by Lord Brougham, in his speech before the House of Lords, in defense of Queen Caroline: "The advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world—that client and none other; to serve that client by all expedient means; to protect that client at all hazards and costs to all others, and, among others, to himself, is the highest and most unquestioned of his duties."

Such a relation between lawyer and client must inevitably lead to the
degradation of the profession, to its moral perversion. The lawyer owes to his client unremitting attention to the business confided to him, loyalty to his interests, and, if necessary, to sacrifice his repose, his pleasures to it, but his enlightened conscience he should not sacrifice to any man; it is a trust from Providence, for the abuse of which he alone is answerable.

Sydney Smith maintains that “No man can expect to be innocent before God, or respectable before men, who sacrifices to wealth or power the fixed and firm opinions of his life, or who puts his moral principles to sale, and larters his honor for the baubles of the world.”

It is this relation that, too frequently, exists between the corporation and its lawyer, which causes the public to hold lawyers largely responsible for practices that circumvent the law and the provisions of statutes, and court procedure, that might put a stop to them or square them with what the interests of the whole community demand. Naturally the public distrusts and regards with suspicion lawyers conspicuous in such service. It supposes them to be in sympathy, if not in league, with those to whom it ascribed a degree of selfishness, which, in effect, makes them public enemies, whatever their motives or private character may be.

Ex-President Roosevelt did not state it too strongly when he said, in an address at Harvard: “We all know as things actually are, many of the most influential and mostly remunerated members of the bar, in every center of wealth, make it their special task to work bold and ingenious schemes, by which their wealthy clients, individual or corporate, can evade the laws which were made to regulate, in the interest of the public, the uses of wealth.”

It is obvious that the corporation, having laid its hands upon every industrial element, is rapidly gathering within its coils, by virtue of steady employment and fat fees, the best representatives of the profession throughout the country. It is a great temptation to aspire to become the attorney of a great railroad, trust or corporation of some kind, and, when once attained, men of the strongest characters find it difficult to escape some of its baneful consequences—feeling of professional obligation, a breeding dread of decapitation, consciously or unconsciously, controls them, or, at least, destroys their independence and repose. There are the temptation and pressure to counsel and advocate what is not sound or right. Men are apt to believe, sooner or later, in the cause they are engaged in. The mind, however vigorous and fearless, soon adapts itself to its surroundings, and is subdued, as Shakespeare says of the dyer’s hand, to the colors with which it works. The influence of established, steady and lucrative interest on the mind is almost irresistible, and slowly, but surely, warps and controls the judgment. The attorney is in danger of becoming so completely identified and obsessed by the corporation retaining him, that he finally makes its indiscriminate defense his supreme and all-absorbing professional mission.

We witness daily the insatiable growth of aggregate wealth, capitalized and gigantic trusts, securing the enactment of legislation, not to establish justice and insure domestic tranquility or the public welfare, but to secure unjust privileges and unequal advantages. Vast monied combinations are constantly fostering class legislation, corrupting public life, lowering the tone of official life, blunting public conscience, creating false standards in the popular mind and placing civil life upon the low lever of a mercenary struggle and throwing legislation into the market for the scramble of jobbers, grafters and chafferers.
In their determination to compass their ends, the corporations require and demand the active co-operation of their attorneys. It exacts of them not only to study the powers which the Legislature may give and the rights already granted, which can not be taken away or modified; the means by which the powers claimed to be vested, may be extended and enforced, but, as faithful employes, they must take the stump in political campaigns, whenever called upon, in spite of the fact that their honest sympathies may be offended and antagonized.

It is a notorious fact that in the “lobby” of many legislatures, and even in Congress, are found lawyers busy plying the members. Learned and astute lawyers often receive their highest rewards for promoting legislation in the interest of powerful combinations and successfully protecting serious violations of the law.

Soon as a young lawyer gives promise of becoming locally influential, professionally or politically, some corporation places his name upon its roll of employes, though it may not require his services at once, but merely to prevent some unfriendly interest doing so.

As a profession, honorably followed, the law is the noblest; as the obsequious pensioner and servant of an arrogant corporation, it is the most contemptible.

It is true that the legal profession is not a charitable institution, nor is it adopted as a mere pastime, or as a science or art aiming at perfection for its own sake, with no thought of money or adequate compensation for services rendered. The rewards of earnest and honorable exertion in its pursuit are perfectly legitimate, and in every way desirable. Men practice law, as other business avocations are pursued, to get money to support themselves and families, and not from mere philanthropic motives. However, it is equally true that the profession, in its broad and highest meaning, is no trade or money grabbing vocation. Such a tendency would impair its traditional dignity and worth.

In justice, it must be admitted that it is not all corporations that leave their taint upon the attorney whose brains they suck while they fill their pockets. It is the law-defying corporation which needs skillful legal assistance to keep its officials out of jail; it is the speculative corporation, with its lying prospectus and gulled investors, which demands lawyers to prevent justice being visited upon its promoters; it is the public-service corporation, acquiring franchises by bribery and defending and exploiting them by systematic political corruption—these are the corporations which have dragged down and discredited the repute of the attorneys they employ.

It is, of course, trite to say that corporation business has become so dominant that if a lawyer refuses to work for a corporation, or to surrender to it what was meant for the service of his fellows, he will be in danger of being briefless. It is also true that almost all the leading lawyers have been, at one time or another, retained by a corporation. The ability of a mature lawyer, who had not been, would naturally be doubted. But nothing is more certain than that a man may be a master of corporation law and utilize this accomplishment without selling out his mind for money or mortifying his conscience. Indeed, he may make the noblest public use of his rare knowledge and skill, gained in the private service of corporations.

Many people think the lawyer has nothing to do with the truth or even
with conventional ethics; that his business is to pervert, to distort, to evade and crown the truth with the thorns of all manner of technicalities. This is a grievous mistake. There are some victories won for the wrong side; some injustice may be made to triumph; some fraud successfully defended; some weak judge may be misled; some assassin, with blood enough on his hands to "incarnadine the multitudinous sea," may be rescued and turned loose upon the community. The multitude may applaud this as an achievement, a brilliant success; but these are triumphs that bring no lasting reputation; not in any such way has the fame of great lawyers been won—men who sacredly regard their profession, not as an instrument of chicanery, but as the plainest, easiest, shortest way to the end of strife and justice; men who strive to guard and uphold the highest standards of professional ethics.

While the law, the expression of the sovereign will, which, as Burke declared, "with all its defects and errors, is the collected reason of ages, containing the principles of organized justice with the infinite variety of human concerns," so long as, in the words of Sir William Jones:

"Sovereign law, that State's collected will,
O'er thrones and globes elate,
Sits Empress, crowning good and suppressing evil,"

exciting reverence in the virtuous and commanding submission from the guilty; so long no anxious fear, no painful distrust need shake our confidence in the permanence of what we justly deem the keystone of civil and political liberty.

To the gracious protection of the law may be safely consigned, without reserve, the guardianship of liberty and its most cherished blessings, with all its various relations and all its dearest interests; and we may rejoice that so sacred a cause is committed to a guide, of whom we can say, in the eloquent words of Hooker: "Her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her honor; the very least, as feeling her care, and the greatest as not exempted from her power."

Let us hope that our lawyers may be recalled to the service of the public as a whole from which they have been drifting away; that they may be reminded that, no matter what the exactions of modern legal business, no matter what or how great the necessity of specialization in their practice of the law," they are not servants of special interests, the mere expert counsellors of this, that or the other group of business men; but guardians of the general peace, the guides of those who seek to realize by some best accommodation the rights of men; and above all the servants of society, the bond servants of justice."