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Restatement of the Law of Contracts Annotated with Kentucky Decisions

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RESTATEMENT OF THE LAW OF CONTRACTS ANNOTATED WITH KENTUCKY DECISIONS*

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Topic C. Consideration and Its Sufficiency.

Section.

Section 75. DEFINITION OF CONSIDERATION

(1) Consideration for a promise is

(a) an act other than a promise, or
(b) a forbearance, or
(c) the creation, modification or destruction of a legal relation, or
(d) a return promise.

bargained for and given in exchange for the promise.

(2) Consideration may be given to the promisor or to some

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other person. It may be given by the promisee or by some other person.

Comment:

a. The law generally imposes no duty on one who makes an informal promise unless the promise is supported by sufficient consideration (see Section 19.)

b. This Restatement distinguishes the two questions: whether there is consideration for a promise, and whether that consideration is sufficient.

Annotation:

Subdivision (1). With few exceptions, the Kentucky decisions have not followed the simple method proposed here in defining consideration apart from its sufficiency. Our definitions of "consideration" are generally attempts to define "sufficient consideration" and are of little practical value because of the generality of the terms used and of the loose language employed. The traditional benefit-detriment definition has been constantly repeated and subject to the usual qualifications that the words are used in the legal sense only. (*Wallace* v. *Cook*, 190 Ky. 262, 227 S. W. 279). A better definition, and one more in accord with this and the following sections, has been approved in a few cases; "There is consideration if the promisee in return for the promise does anything legal, which he is not bound to do, or refrains from doing anything, which he has a right to do." *Brady* v. *Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082; *Bank of St. Helens* v. *Mann's Exr.*, 226 Ky. 381, 11 S. W. (2d) 144; *Gannon* v. *Bronston*. 246 Ky. 612, 55 S. W. (2d) 358 (Citing this section). Recent definitions have mistakenly spoken of consideration as the motive or inducement to contract (See Section 84-2 *infra*). Despite the language used, the decisions involving consideration have been, on the whole, sound and support this definition by recognizing forbearance and all the acts stated here as consideration. There is much talk in the earlier cases concerning love and affection or other "good consideration" in executory contracts, but this is definitely settled by *Sullivan* v. *Sullivan*, 122 Ky. 707, 92 S. W. 966.

This section requires that, in order to be consideration, the act or forbearance must be bargained for and given in exchange for the promise. Many of our recent definitions have included this in the statement that consideration is the "price" of the promise. See *Greenwade* v. *First Nat'l. Bank*, 240 Ky. 60, 41 S. W. (2d) 369; *Cassinelli* v. *Stacy*, 238 Ky. 827, 38 S. W. (2d) 980. For this reason, if the act or forbearance precedes the promise it is not consideration (See Section 53). A promise to indemnify a surety when made on the sole consideration of, but after, the relation is created is not enforceable. *Moore* v. *Kuster*, 238 Ky. 292, 37 S. W. (2d) 863; *Daviess County Bank* v.

Wright, 33 K. L. R. 457; 110 S. W. 361; *Holloway's Assignee* v. *Rudy*, 22 K. L. R. 1406, 60 S. W. 650. In the same way the promise of the payee of a note, made after receiving the note (*Western Silo Co.* v. *Johnson*, 203 Ky. 704, 262 S. W. 1093), a promise by one of the parties to a contract if made after the contract is complete (*E. F. Spears & Sons* v. *Winkle*, 186 Ky. 585, 217 S. W. 691), the promise of a landlord after a lease is signed (*King & Metzger* v. *Cassell*, 150 Ky. 537, 150 S. W. 682), or a promise by the buyer of property to pay more (*Howard* v. *McNeil*, 25 K. L. R. 1394, 78 S. W. 142) or a warranty by the seller (*Walters* v. *Akers*, 31 K. L. R. 259, 101 S. W. 1179) if made after the contract and conveyance is complete, are all unenforceable unless supported by other consideration.

A moral duty is not consideration. *Smith* v. *Wager's Admr.*, 238 Ky. 609, 388 W. (2d) 685 (promise of father to provide for illegitimate child out of estate); *Mercer* v. *Mercer's Admr.*, 87 Ky. 30, 7 S. W. 401 (promise of father to support an illegitimate child); *Montgomery* v. *Lampton*, 60 Ky. (3 Met.) 519 (promise to pay a debt after composition with creditors). However, there are several cases, especially the earlier ones, that seemingly adopt the idea of moral consideration or at least do not require a pre-existing legal obligation. *Clarke* v. *McFarland*, 35 Ky. (5 Dana) 45; *Gardner Price & Co.* v. *Towsey*, 13 Ky. (3 Litt.) 423 (promise by former debtor to one who has voluntarily paid off the debt); *Campbell* v. *Young*, 72 Ky. (9 Bush) 240 ("Affirming" a contract that was void because made on Sunday). See also *Viley* v. *Pettit*, 96 Ky. 576, 29 S. W. 438 (promise by one who has accepted voluntary services by another).

Although the later cases frequently speak of "moral consideration," it is clear there must have been a pre-existing legal obligation, although now voidable or unenforceable. (Sections 85-94 *infra*). *Gilbert* v. *Brown*, 123 Ky. 703, 97 S. W. 40. However, one having paid a moral obligation cannot recover the payment. *Weihing* v. *Kurfes*, 12 K. L. R. 893.

Subdivision (2). Consideration for a promise may be given *to* one other than the promisor. *Brady* v. *Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082; *Miller* v. *Davis*, 168 Ky. 661, 182 S. W. 839; *Allen* v. *Pryor*, 10 Ky. (3 A. K. M.) 305; *Howard* v. *Lawrence*, 23 K. L. R. 680, 63 S. W. 589. (But see *Rasnick* v. *Ritter Lbr. Co.*, 187 Ky. 523, 219 S. W. 801). Or it may be given *by* one other than the promisee. *Williamson* v. *Yager*, 91 Ky. 282, 15 S. W. 660; *Reynold's Admr.* v. *Reynolds*, 92 Ky. 556, 18 S. W. 517; *Farrow* v. *Turner*, 9 Ky. (2 A. K. M.) 495. An accommodation maker of a negotiable instrument is liable to the holder for value. K. S. 3720b-29; *Howard* v. *So. Nat'l Bank*, 204 Ky. 71, 263 S. W. 719.

Section 76. WHAT ACTS OR FORBEARANCES ARE SUFFICIENT CONSIDERATION.

Any consideration that is not a promise is sufficient to satisfy the requirement of Section 19 (c), except the following:

(a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person;

(b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity;

(c) The transfer of money or fungible goods as consideration for a promise to transfer at the same time and place a larger amount of money or goods of the same kind and quality.

Annotation:

This section relates only to acts other than promises and makes the general statement that all acts (bargained for and given in exchange for the promise) are sufficient consideration unless they fall within one of the three stated exceptions. The Kentucky decisions are in accord with the general statement and exceptions.

Subsection (a). The Kentucky decisions hold that if the legal duty is not doubtful nor the subject of an honest and reasonable dispute, its performance is not sufficient consideration. This is true when it is a contractual duty owed to the promisor. Payment of part of an undisputed debt then due is not sufficient to support a promise to forgive the remainder. *Call* v. *Pinson*, 180 Ky. 367, 202 S. W. 883 (promisee's insolvency and fact promisor gave a receipt "in full" are immaterial); *Black* v. *O'Hara*, 175 Ky. 623, 194 S. W. 811; *New York Life Ins. Co.* v. *Van Meter's Adm.*, 137 Ky. 4, 121 S. W. 438 (acceptance of check marked "in full settlement"). Nor is it sufficient to support a promise extending the time for payment of the remainder. *Tudor* v. *Security Trust Co.*, 163 Ky. 514, 173 S. W. 1118. Completion of work according to a contract is not sufficient consideration for a promise to pay additional compensation: *Combs* v. *Burt & Brabb Lbr. Co.*, 27 K. L. R. 439, 85 S. W. 227. But, of course, this does not apply where the contract is such that it could be set aside in equity because of fraud or mistake. *John King & Co.* v. *L. & N. R. R. Co.*, 131 Ky. 46, 114 S. W. 308. Also, if the duty is imposed by law and owing either to the promisor or the public—the performance is not sufficient consideration. A peace officer cannot collect a reward if his act is done within the line of duty. *Benton* v. *Kentucky Bankers' Assn.*, 211 Ky. 554, 277 S. W. 858; *Mason* v. *Manning*, 150 Ky. 805, 150 S. W. 1020. See also

Trundle's Adm. v. *Riley*, 56 Ky. (17 B. M.) 396. (Promise to pay jailor for services to prisoner). Since the acts themselves are not sufficient consideration, a promise to do the acts would not be sufficient. *Watts* v. *Parks*, 25 K. L. R. (1908), 78 S. W. 1125; Section 78, infra.

If the act requested and performed differs from the legal duty it is sufficient consideration. Section 84 (c) infra. As to the performance of a contractual obligation to a third person, see Section 84 (d), infra.

Subsection (b) requires an honest and reasonable belief in the claim. All of our many decisions require an honest belief in the claim, "a bona fide dispute," and the surrender of an invalid claim that is not asserted in good faith is never sufficient. *Creutz* v. *Heil*, 89 Ky. 429, 12 S. W. 926; *Mills* v. *O'Daniel*, 23 K. L. R. 73, 62 S. W. 1123. The language in a few cases, such as *Barr* v. *Gilmour*, 204 Ky. 532, 265 S. W. 6 and *Ripy Bros. Distilling Co.* v. *Lillard*, 149 Ky. 726, 149 S. W. 1009, implies that good faith alone may be sufficient, but in these cases the claim, altho perhaps invalid, was at least doubtful. Other cases emphatically deny that good faith alone is sufficient and show a tendency to apply an objective as well as a subjective test. Some of the decisions have gone to the extreme in saying that the claim must be doubtful, and to be doubtful it must be one about which well informed lawyers and judges might easily differ. *Robb* v. *Sherrill-Russell Lbr. Co.*, 194 Ky. 835, 241 S. W. 64; *Simmons* v. *Hunt*, 171 Ky. 397; 188 S. W. 495; *Gray* v. *U. S. Savings & Loan Co.*, 116 Ky. 967, 77 S. W. 200; *Bunnell* v. *Bunnell*, 111 Ky. 566, 64 S. W. 420. The most recent decision says that the claim must not be "wholly or certainly groundless." *Forsythe* v. *Rexroat*, 234 Ky. 173, 27 S. W. (2d) 695. But an examination of the decisions indicates that the court does not inquire into the actual merits of the suit forborne or claim surrendered and that the real test is not the validity of the claim, but the reasonableness of the belief, that the claim may be *certainly* groundless, but it must not be *clearly* so to a reasonable man at that time. It is really an objective test of good faith. *Sellers* v. *Jones*, 164 Ky. 458, 175 S. W. 1002; *Forsythe* v. *Rexroat*, supra; *Hardin's Adm.* v. *Hardin*, 201 Ky. 310, 256 S. W. 417; *Western, etc. Life Ins. Co.* v. *Quinn*, 130 Ky. 397, 113 S. W. 456; *Berry* v. *Berry*, 183 Ky. 481, 209 S. W. 855. A claim is looked at as a whole, and payment of a part which is admittedly due and not disputed is consideration for the promise to release the remainder. *Cunningham* v. *Standard Const. Co.*, 134 Ky. 198, 119 S. W. 765. *Alcorn* v. *Arthur*, 230 Ky. 509, 20 S. W. (2d) 276. (Ignorance of facts or failure to investigate will not affect the question of "good faith").

Subsection (c): No Kentucky cases.

Section 77. A PROMISE IS GENERALLY SUFFICIENT CONSIDERATION.

Except as qualified by Sections 78, 79, and 80, any promise whether absolute or conditional is a sufficient consideration.

Annotation:

Section 76 was concerned with the sufficiency of consideration in unilateral contracts and this section deals with consideration in bilateral contract, and is in accord with the law of Kentucky. *Weatherford* v. *Boulware*, 102 Ky. 466, 43 S. W. 729. Mutual promises are sufficient to support each other. *Carter* v. *Hall and Martin*, 191 Ky. 75, 229 S. W. 132; *Elkhorn Consol. Coal & Coke Co.* v. *Eaton*, 163 Ky. 306, 173 S. W. 798. This is true, altho one of the promises is conditional. *Kernan* v. *Carter*, 31 K. L. R. 865, 104 S. W. 308 (dictum).

Section 78. A PROMISE IS INSUFFICIENT CONSIDERATION IF ITS PERFORMANCE WOULD OBVIOUSLY BE INSUFFICIENT.

A promise is insufficient consideration if the promisor knows or has reason to know at the time of making the promise that it can be performed by some act or forbearance which would be insufficient consideration for a unilateral contract.

Annotation:

Kentucky decisions are in accord: *Watts* v. *Parks*, 25 K. L. R. (1908), 78 S. W. 1125 (Promise to pay a debt then due); *Eblin* v. *Miller's Ex'r.*, 78 Ky. 371 (Promise not to abandon a lease); *Ford* v. *Crenshaw*, 11 Ky. (1 Litt.) 68 (Promise to perform a contractual duty owing to a third person).

Section 79. A PROMISE IN THE ALTERNATIVE AS CONSIDERATION.

A promise or apparent promise which reserves by its terms to the promisor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for.

Comment:

a. This Section is applicable to two classes of promises. In one class the promisor undertakes to give any one of several performances, each of which is in a greater or less degree an object of desire to the promisee. In the other class of cases one performance only is an object of such desire, but another course of conduct by the terms of the promise is permissible to the promisor in case he deems it for his advantage to adopt that course. In both cases the promise is sufficient consideration if it cannot be kept without some action or forbearance which would be sufficient consideration if it alone were bargained for.

Annotation:

No cases have been found where the promisor agrees to do one of two or more things desired by the promisee. In our cases there is a promise to do the one thing desired by the promisee, but the promisor reserves the right to avoid the consequence of his promise by doing something else. Our courts have, without discussion, sustained the validity of contracts involving such promises where the performance of the alternative is a detriment to the promisor, or, as stated here, where the alternative would be sufficient consideration if it alone were bargained for. *Shaw* v. *Hudson Engineering Co.*, 155 Ky. 4, 159 S. W. 653 (Promise to employ as long as the employer used patent rights assigned by the employee); *Bridgeford & Co. v. Meagher*, 144 Ky. 479, 139 S. W. 750 (as long as employing corporation is in existence); *Yellow Poplar Lbr. Co.* v. *Rule*, 106 Ky. 455, 50 S. W. 685 (as long as employer continued in business on the Ohio River).

On the other hand, if the alternative is such that its performance would not be a detriment to the promisor or a benefit to the promisee, that is, such that its performance would not be sufficient consideration if it alone were bargained for, the promise containing such an alternative is not sufficient consideration. Such a promise is illusory since it creates no obligation. Neither party would be entitled to the assistance of a court of equity. *Goff* v. *Saxon*, 174 Ky. 330, 192 S. W. 24 (Promise to pay for doing such work as the promisor shall assign); *Killebrew* v. *Murray*, 151 Ky. 345, 151 S. W. 662 (Lease determinable at will of lessee). *Berry* v. *Frisbie*, 120 Ky. 337, 86 S. W. 558 (dictum—lease is not binding on lessor).

Law courts deny the validity of such an agreement to the extent that it is executory and have borrowed from the language of equity in saying that the agreement is "unenforceable" because "wanting in mutuality" which in this case means no more than saying that the executory agreement is invalid because of lack of consideration. Other decisions speak of these agreements as "unenforceable because unilateral" which means the same thing. It has been frequently said: "Where it is left to one of the parties (to an executory bilateral agreement) to choose whether he will proceed or abandon the contract, and he may do this at any time without incurring any liability thereunder, the contract is not binding on either." *Combs* v. *Hazard Ice and Storage Co.*, 218 Ky. 29, 290 S. W. 1035; *Louisville Tobacco Warehouse Co.* v. *Zeigler*, 196 Ky. 414, 244 S. W. 899 (Promise to pay commissions on purchases for a definite period, but the employer reserved the right to determine the amount of the purchases); *Daniel Boone Coal Mining Co.* v. *Miller*, 186 Ky. 561, 217 S. W. 666 (Mineral lease with right in lessee to abandon at his discretion); *Rehm-Zeiher Co.* v. *Walker Co.*, 156 Ky. 6, 160 S. W. 777 (If any buyer has the right to refuse any or all of the goods which "for any unforseen reason" he finds he cannot use the seller is not bound to supply any goods). *Louisville & N. R. R. Co.* v. *Offut*, 99 Ky. 427, 36 S. W. 181 (Promise to employ as long

as employee did faithful and honest work is determinable at will of either). See also *Rodgers* v. *Larrimore & Perkins*, 188 Ky. 468, 222 S. W. 512; *Ross-Vaughan Tobacco Co.* v. *Johnson*, 182 Ky. 325, 206 S. W. 487.

Although the promise is illusory and creates no executory obligation on either side, there may be a recovery under the agreement in so far as it has been executed before notice of termination. *Elkhorn Consol. Coal & Coke Co.* v. *Eaton*, 163 Ky. 306, 173 S. W. 798; *Louisville & N. R. R. Co.* v. *Offutt*, supra; *Rehm-Zeiher Co.* v. *Walker*, supra. In this the agreement may be compared to agreements which have no executory effect because of indefiniteness, see Section 33, supra.

A promise to buy the amount of goods one "needs" or "requires" is not objectionable since the amount does not depend on the want, wish or will of the promisor. *Louisville Tob. Warehouse Co.* v. *Zeigler*, supra (obiter), and the same may be said of a promise to do what the promisor can or is able to do. *Ayer Lord Tie Co.* v. *O'Bannon*, 164 Ky. 34, 174 S. W. 783; *Mitchell-Taylor Tie Co.* v. *Whitaker*, 158 Ky. 651, 166 S. W. 193; *Kelly* v. *Peter & Burghad Stone Co.*, 130 Ky. 530, 113 S. W. 486.

There has been a marked tendency to interpret these promises so as to make them mutually obligatory where possible either by ignoring words that would defeat the validity of an oral agreement. *Ayer and Lord Tie Co.* v. *O'Bannon*, supra ("could or would" interpreted as "could"), or by reading in a promise to perform the part that would make the agreement optional. The latter has been used particularly in the interpretation of mineral leases. *Killebrew* v. *Murray*, 151 Ky. 345, 151 S. W. 662 (rent payable in share of the products implies a promise to begin operations within a reasonable time and to carry them on diligently). *Berry* v. *Frisbie*, supra (same). See also *Bell* v. *Hatfield*, 121 Ky. 560, 89 S. W. 544. If the same implication had been made in *Goff* v. *Saxon* and some of the other cases cited above a more desirable result would have been reached.

Section 80. A PROMISE WHICH IS NOT BINDING IS GENERALLY INSUFFICIENT CONSIDERATION.

Except as stated in Section 84 (e), a promise which is neither binding nor capable of becoming binding by acceptance of its terms is insufficient consideration, unless its invalidity is caused by illegality due solely to facts that the promisor neither knows nor has reason to know.

Annotation:

Kentucky decisions are in accord with this section. *Combs* v. *Hazard Ice & Storage Co.*, 218 Ky. 29, 290 S. W. 1035; *Second National Bank* v. *Rouse*, 142 Ky. 612, 134 S. W. 1121, *Rehm-Zeiher Co.* v. *Walker*

Co., 156 Ky. 6, 160 S. W. 777. It is generally said "if one party is not bound, neither is bound." *Brown* v. *Allen*, 204 Ky. 76, 263 S. W. 717 (If a promise by a married woman to sell land is void, she cannot enforce the promise to buy, even after discoverture); *Farmers' Bank* v. *Williams*, 205 Ky. 261, 265 S. W. 771 (If the agreement is void it cannot be "ratified" after the disability is removed unless there is new consideration); *Duncan* v. *Reed*, 47 Ky. (8 B. M.) 382 (A promise to pay a usurious rate of interest will not support a promise to extend time), *Anderson* v. *Mannon*, 46 Ky. (7 B. M.) 217 (same).

The exception in case of illegality would apply to acts as well as promises and allows a recovery on the contract by a party not in *pari delicto*. Our Court has said, "Where a party to a contract, who is innocent of any unlawful purpose in making the contract, seeks to have it enforced, it cannot be avoided by the other party on account of the unlawful purposes. . . .which he did not disclose." *Fears* v. *United Loan & Deposit Bank*, 172 Ky. 255, 189 S. W. 226.

Section 81. ADEQUACY OF VALUE OF CONSIDERATION IS IMMATERIAL.

Except as this rule is qualified by Sections 76, 78, 79, and 80, gain or advantage to the promisor or loss or disadvantage to the promisee, or the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration.

Annotation:

"A valuable consideration, however small, is sufficient to sustain a contract." *Price's Admx.* v. *Price's Admx.*, 111 Ky. 771, 785, 66 S. W. 529 (Promise to pay an annuity of $250 is sufficient to sustain a promise to release a debt of $4,000, although the annual payment was only slightly in excess of the legal interest); *Ill. Cent. R. R. Co. v. Heath*, 26 K. L. R. 19, 80 S. W. 502 (Payment of two dollars sufficient to sustain agreement to release claim for damages against the railroad company); *Thornberry's Admr.* v. *Dils*, 80 Ky. 241 (Payment of taxes amounting to $19.90 sufficient to support a promise to pay a much larger debt owing to the promisee); *Miller* v. *Davis*, 168 Ky. 661, 182 S. W. 839 (Promise, by purchaser of partnership interest to pay the previous debts of the partnership to prevent attachment, is binding, altho the promisor received no benefit from the act).

"The adequacy of the consideration can not be inquired into, but the want of any consideration whatever may be." *Gray* v. *U. S. Savings & Loan Co.*, 116 Ky. 967, 971, 77 S. W. 200. This is a distinction between sufficiency and adequacy. The giving up of a void note is not consideration for a renewal note. *Gilbert* v. *Brown*, 123 Ky. 703, 97 S. W. 40.

Adequacy of consideration may be important when the aid of

equity is sought. *Lexington & E. R. R. Co.* v. *Williams*, 183 Ky. 343, 209 S. W. 59. Although it is said that inadequacy of consideration alone will not be sufficient cause for rescinding a contract; *Matthis* v. *O'Brien*, 137 Ky. 651, 126 S. W. 156; *Lee's Exr.* v. *Lee*, 63 Ky. (2 Duv.) 134. Or for denying specific performance. *Darnell* v. *Alexander*, 178 Ky. 404, 199 S. W. 17. It is evidence of fraud and when connected with other circumstances it will be sufficient in either case. *Inter-Southern Life Ins. Co.* v. *Stephenson*, 246 Ky. 694, 56 S. W. (2d) 332.

Kentucky seemingly has a peculiar doctrine in regard to mineral options, since *Litz* v. *Goosling*, 93 Ky. 185, 19 S. W. 527, it is clear that consideration of one dollar is not sufficient to sustain these agreements. *Thompson & Co.* v. *Reid*, 31 K. L. R. 176, 101 S. W. 964; *Noble* v. *Mann*, 32 K. L. R. 30, 105 S. W. 152; *Berry* v. *Frisbie*, 120 Ky. 337, 86 S. W. 558; *Killebrew* v. *Murray*, 151 Ky. 345, 151 S. W. 662 ($5 recited consideration); *Stamper* v. *Combs*, 164 Ky. 773, 176 S. W. 178. It is said in these cases that the consideration is "insignificant" or "so flagrantly disproportionate to the value of the privilege. . . .that the parties could not have regarded it in any sense as an equivalent." However, it appears in some of the cases that the consideration was never paid and it might be said that the objection is not the inadequacy of the consideration, as much as it is to the fact that it was merely nominal. At least the doctrine is not extended to other options. *Sparks* v. *Ritter*, 204 Ky. 623, 265 S. W. 26 ($2 sufficient to support an option to convey land for a right of way within 25 years).

The amount of the consideration is important in some actions. In an action on an assignment of a writing, the amount recoverable by the assignee is limited to the consideration actually paid for the assignment. K. S. 475. But see K. S. 3720b-66 as to the liability of an indorser of a negotiable instrument. A devisee assuming debts of the ancestor or expressly promising to pay them is probably not bound in an amount in excess of the value of the property received. K. S. 2084; *Withers' Adm.* v. *Withers' Heirs*, 30 K. L. R. 1099, 100 S. W. 253; *Grimes* v. *Grimes*, 28 K. L. R. 549, 89 S. W. 548.

Section 82. A RECITAL OF CONSIDERATION IS NOT CONCLUSIVE PROOF.

A recital in a written agreement that a stated consideration other than a promise has been given as consideration is not conclusive proof of the fact.

Comment:

a. The parol evidence rule does not prevent denial of the truth of statements of fact contained in a written agreement, except statements that the promises contained in the agreement have been made. The rule forbids (see Section 238) proof that

a promise stated in a written agreement was not made in those terms.

Annotation:

"The consideration of any writing, with or without seal, may be impeached or denied by pleading verified by oath." K. S. 472. The true consideration may be shown, although it contradicts that stated in a contract or deed. *Wilson* v. *Mitchell*, 245 Ky. 60, 53 S. W. (2d) 175; *Apple* v. *McCullough*, 239 Ky. 74, 38 S. W. (2d) 955; *Ecton* v. *Flynn*, 229 Ky. 476, 17 S. W. (2d) 407; *Newton* v. *Newton's Adm.*, 214 Ky. 278, 283 S. W. 83; *McCray* v. *Corn*, 168 Ky. 457, 182 S. W. 640. It is said that the reason for this rule is that the true consideration is not material to the validity of a written contract, but may or may not be material to the parties. *Steele* v. *Hinkle*, 205 Ky. 408, 265 S. W. 931. However, the recited consideration is prima facie correct and is to be considered. *O'Neal* v. *Tuney's Exr'x.*, 222 Ky. 361, 300 S. W. 913.

Section 83. ONE CONSIDERATION MAY SUPPORT A NUMBER OF PROMISES.

Consideration is sufficient for as many promises as are bargained for and given in exchange for it if it would be sufficient:

(a) for each one of them if that alone were bargained for, or
(b) for at least one of them, and its insufficiency as consideration for any of the others is due solely to the fact that it is itself a promise for which the return promise would not be a sufficient consideration.

Annotation:

(a) That a single consideration will support as many promises as are bargained for if it would be sufficient for each of them alone is illustrated by the guaranty cases where the extension of credit is sufficient to support both the promise of the debtor and that of the guarantor. *J. I. Case Threshing Mach. Co.* v. *Patterson*, 137 Ky. 180, 125 S. W. 287; *Allen* v. *Pryor*, 10 Ky. (3 A. K. M.) 305. Or the promise of the tenant is sufficient consideration for the many promises made by the landlord, including an option to purchase or even an agreement to rescind under certain conditions. *Bank of Louisville* v. *Baumiester*, 87 Ky. 6, 7 S. W. 170; *Montanus* v. *Buschmeyer*, 158 Ky. 53, 164 S. W. 802. Payment, or the promise to pay, of the purchase price is consideration for the many covenants by a vendor. *Jones* v. *Waggoner's Adm.*, 30 Ky. (7 J. J. M.) 144.

Subsection (b) would be illustrated by cases holding A's promise sufficient consideration for two or more promises by B, although B was

already bound to perform one of the acts promised. This exact situation does not seem to have arisen, but it is comparable to the cases where B's promise is to do the thing he was previously bound to do, but at a different time. *Bell* v. *Pittman*, 143 Ky. 521, 136 S. W. 1026. See other cases cited under Section 84 (c) infra.

Section 84. APPLICATION OF RULES TO A NUMBER OF SPECIAL CASES.

Consideration is not insufficeint because of the fact

(a) that obtaining it was not the motive or a material cause inducing the promisor to make the promise, or

(b) that part of it does not fulfill the requirements of sufficiency, or

(c) that the party giving the consideration is then bound by a duty owed to the promisor or to the public, or by any duty imposed by the law of torts or crimes, to render some performance similar to that given or promised, if the act or forbearance given or promised as consideration differs in any way from what was previously due, or

(d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration, or

(e) that it is a promise, and a special privilege not expressly reserved in the promise but given by the law, makes the promise or the whole agreement unenforceable are voidable, or

(f) that it is a promise, performance of which is conditional on either a future or past event, if when the promise is made there is any possibility, or there would seem to a reasonable man in the position of the promisor to be any possibility, that the promise can be performed only by some act or forbearance which would be sufficient consideration.

Annotation:

(a) Although it has been frequently said that consideration is the "motive or inducement to contract"... *Bowman* v. *Vandiver*, 243 Ky. 139, 47 S. W. (2d) 947; *Cassinelli* v. *Stacy*, 238 Ky. 827, 38 S. W. (2d)

980; *Farmers' Bank* v. *Williams*, 205 Ky. 261, 265 S. W. 771. . . . this is merely a recognition of the fact that the two are generally identical. In *Spears & Sons* v. *Winkle*, 186 Ky. 585, 217 S. W. 691, the terms inducements and considerations, are defined and distinguished and it is held that an inducement is not necessarily the consideration for a promise. It is apparent that the converse of this would be true and that an act could be sufficient consideration although obtaining it was not the reason for the promise. The court has never looked into the actual inducement and there are many cases allowing insignificant acts to support valuable promises, and where it is clear that the act itself did not furnish the motive for the promise. For an example see *Sparks* v. *Ritter*, 204 Ky. 623, 265 S. W. 26 (holding an option on land for a period of 25 years is supported by payment of $2.00).

(b) *Murray* v. *Meagher*, 71 Ky. (8 Bush) 574 accord. A plea that part of the consideration has failed is bad. *Willett* v. *Forman*, 26 Ky. (3 J. J. M.) 292; *Wallace* v. *Barlow's Adm.*, 6. Ky. (3 Bibbs.) 168. But if part of the consideration is illegal and vicious the whole contract is void. *Fears* v. *United Loan and Deposit Bank*, 172 Ky. 255, 189 S. W. 226; *Averbeck* v. *Hall*, 77 Ky. (14 Bush) 505.

(c) Section 76 (a) states that performance of a duty then legally owing to the public or promisor is not sufficient consideration. This subsection states that if the promise or performance differs in any way from that which was previously due it may be sufficient consideration. This is really a corollary of subsection (b) above, and is in accord with the decisions in this state. *Bell* v. *Pitman*, 143 Ky. 521, 136 S. W. 1026 (Promise to pay a note before due is sufficient consideration for promise to accept less than the face of the note as payment); *Price* v. *Price*, 111 Ky. 771, 64 S. W. 746 (Agreement to pay in installments); *Murray* v. *Meagher*, 71 Ky. (8 Bush) 574 (Promise to pay an additional sum is supported by acceptance of face value and interest in a different form of currency); *Ricketts* v. *Hall & Long*, 65 Ky. (2 Bush) 249 (Payment of less by delivery of obligation of third person); *Trundle* v. *Riley*, 56 Ky. (17 B. M.) 396 (Services by a jailor beyond those required by law); *Tomlin* v. *McChord's Adm.*, 29 Ky. (6 J. J. M.) 1 (substitution of a new agreement containing some changes in terms); *Peace* v. *Stennet*, 27 Ky. (4 J. J. M.) 449 (Promise to pay a definite amount on a tort claim is sufficient to support a promise by the injured party).

(d) This statement is not in accord with the law of Kentucky. Our Court has not seen fit to make a distinction between promises to perform contractual duties owing to the promisee (Section 76-a) and those owing to a third person. Neither the promise to perform an existing contract with a third person, nor the performance of it, constitutes sufficient consideration. *Moore* v. *Kuster*, 238 Ky. 292, 37 S. W. (2d) 863 (Maker of note not bound where consideration was execution of a bond by one who had already bound himself to execute such bond); *McDevitt* v. *Stokes*, 174 Ky. 515, 192 S. W. 681 (Winning of race by jockey is not sufficient consideration for promise by third person, since the promisee was under a duty to the owner of the horse to

do what he did); *Holloway's Assignee* v. *Rudy*, 22 K. L. R. 1406, 60 S. W. 650 (Payment of debt by a surety is not sufficient consideration to support a promise to indemnify made by widow of insolvent principal); *Ford* v, *Crenshaw*, 11 Ky. (1 Litt.) 68 (Completion of a building contract will not support the promise of a third person to pay).

(e) A promise by an infant is sufficient consideration. If this were not true, bilateral agreements by infants would be void instead of voidable. The defense of infancy is not open to the other party. *Horney* v. *Downs*, 209 Ky. 255, 272 S. W. 728; *Younce* v. *Duty*, 205 Ky. 274, 265 S. W. 776; *Cannon* v. *Alsbury*, 8 Ky. (1 A. K. M.) 76.

(f) This subsection states the law in Kentucky. It is illustrated by the many cases allowing bonding or insurance companies to collect premiums, where it is clear that the consideration for the promise to pay premiums is a conditional promise by the company. *Fidelity and Deposit Co.* v. *Brown*, 230 Ky. 534, 20 S. W. (2d) 284; *Skaggs* v. *Ferguson*, 224 Ky. 775, 7 S. W. (2d) 213. It is said in *Kernan* v. *Carter*, 31 K. L. R. 865, 104 S. W. 308, "A promise is a sufficient consideration for a promise, though based upon a contingency."

However, if the condition in the promise is the wish or the desire of the promisor or its happening subject to his whim, the promise may be illusory and insufficient consideration under Section 79. supra.

(To be Continued.)

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