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Restatement of the Law of Contracts Annotated with Kentucky Decisions

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RESTATEMENT OF THE LAW OF CONTRACTS

WITH

KENTUCKY ANNOTATIONS*

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Chapter 2

FORMATION OF CONTRACTS—GENERAL PRINCIPLES

Section 15. Parties Required.

There must be at least two parties in a contract, but may be any greater number.

Annotation

One can not enter into a legal obligation to himself. *Debard* v. *Crow*, 30 Ky. (7 J. J. M.) 7 (1831). See also *Cecil* v. *McLaughlin*, 43 Ky. (4 B. Mon.) 30 (1843).

It is essential that there be at least two parties to a contract. An instrument purporting to be a bond but which does not name an obligee is invalid—*McKinster* v. *Eastham*, 6 Ky. Opin. 423 (1873).

Section 16. Joint, Several, Joint and Several Promisors and Promisees.

Where there are more promisors than one in a contract, some or all of them may promise jointly as a unit, or some or all of them may each promise severally, or some or all of them may promise jointly and severally. Where there are more

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promisees than one in a contract, promises may be made to some or all of them jointly as a unit or to some or all of them severally, or to some or all of them jointly and severally.

Annotation

The subject matter of this section is covered in detail in Chapter 5.

Section 17. WHEN A PERSON MAY BE BOTH PROMISOR AND PROMISEE.

A contract may be formed between two or more persons acting as a unit and one or more but fewer than all of these persons, acting either singly or with other persons.

Comment:

a. This Section is applicable to both unilateral and bilateral contracts, and like the other Sections in this Chapter is applicable to both formal and to informal contracts.

b. The rule does not touch upon the *rightfulness* of making such contracts as fall within its terms. In a particular case such a contract might be voidable for fraud or for other reasons.

Annotation

Except in a very early decision—*Thomas* v. *Thomas*, 13 Ky. (3 Litt.) 8 (1823)—the validity of contracts of this nature is unquestioned, at least as to the parties that do not appear on both sides of the agreement. However, in holding the contracts valid, the courts have frequently said that the same person can not be both an obligor and an obligee on the same instrument. And since he can not be a plaintiff and defendant in the same suit, it has been necessary to ignore his existence on one side or the other. Where he is the sole obligor, but appears with others as obligees, it is necessary that he be retained as an obligor if the contract is to have any effect and so his position as an obligee will be disregarded—*Daniel* v. *Croocks*, 33 Ky. (3 Dana) 64 (1835) (a promise by one stockholder to all the stockholders). For the same reason, where he appears as the sole obligee, his position as an obligor is ignored and his co-obligor is bound for the whole—*Morrison* v. *Stocwell's Adm.*, 39 Ky. (9 Dana) 172 (1839) (a note executed to one of the partners by both of them), *Debard* v. *Crow*, 30 Ky. (7 J. J. M.) 7 (1831) (a note which the payee had signed as surety). In other cases where he is joined with other parties as obligors and as obligees as where A and B contract with A and C, there seems to be a tendency to drop A as an obligor and to allow him to remain as an obligee—*Cecil* v. *McLaughlin*, 43 Ky. (4 B. Mon.) 30 (1843), *Allin* v. *Shadburne's Reps.*, 31 Ky. (1 Dana) 68 (1833) (in

which it was intimated that the remaining obligor who had to pay the whole might have some recourse in equity). But in at least one case of this type, A was held as an obligor his interest appearing as such—*Quisenberry* v. *Artis*, 62 Ky. (1 Duv.) 30 (1864). However, it is to be noted that because of Section 2128 of the statutes a husband "can not, in a contract with his wife, occupy both the position of a grantor and that of a grantee" *O. V F & M. Ins. Co.* v. *Skaggs*, 216 Ky. 535, 287 S. W. 969 (1926).

Section 18. NECESSITY FOR CONTRACTURAL CAPACITY.

No one can be bound by contract who has not legal capacity to incur at least voidable contractual obligations. Contractual incapacity may be total or may be only partial.

Comment

a. Capacity, as here used, means legal power. The legal powers possessed by natural or artificial persons can be set forth only when the various classes are separately considered.

b. It is only when his contractural incapacity is total that it can be laid down broadly that a party to a transaction cannot enter into a contract.

Annotation

This statement is axiomatic and merely points out that a failure to incur a contractual obligation may be due to the incapacity of one of the parties to the transaction. If there is incapacity, whether it be total or only applicable to the particular agreement, there is no contract although the transaction is often and improperly spoken of as a "void contract"

Total incapacity is not common. It has been frequently said, particularly in the earlier decisions, that a lunatic has no power to contract, but it is now well established that even an absolute imbecile has capacity to enter into contracts although they may be voidable—*Parrot* v. *Parrot's Exrs.*, 8 Ky. Opin. 682 (1876), *Willis* v. *Mason*, 140 Ky. 88, 130 S. W 964 (1910), *Cawby* v. *Kurtz*, 209 Ky. 275, 272 S. W 746 (1925). However, after office found, inquest or adjudication there is a total contractual incapacity—*Pearl* v. *McDowell*, 26 Ky. (3 J. J. M.) 658 (1830). See also *Rusk* v. *Fenton*, 77 Ky. (14 Bush) 490, 29 Am. Rep. 413 (1879), *Garland* v. *Rice*, 4 K. L. R. 254 (1882), *Cawby* v. *Kurtz*, supra and *Fitzpatrick's Adm.* v. *Citizen's Bank & Trust Co.*, 231 Ky 202, 21 S. W (2d) 254 (1929).

Partial incapacity, that is incapacity to enter into certain contracts, is not to be confused with the capacity to enter into voidable contracts. A voidable contract is a contract and one who can enter into such a contract has contractual capacity. In this state an infant has only partial capacity. His agreements in respect to certain matters are not merely voidable but are void. It was formerly said that any

contractual acts which have no semblance of benefit to the infant are void—*Cannon* v. *Alsbury*, 8 Ky. (1 A. K. M.) 76 (1817)—but this statement is clearly too broad and was corrected by a decision which pointed out the distinction between void and voidable acts—*Breckinridge's Heirs* v. *Ormsby*, 24 Ky. (1 J. J. M.) 236 (1829). However, it may be doubted whether an infant has power to enter into a contract of suretyship—*Wills* v. *Evans*, 18 K. L. R. 1067, 38 S. W 1090 (1897)—and an attempted appointment of an agent is without effect—*Slusher* v. *Weller*, 151 Ky. 203, 151 S. W 684 (1912), see also *Pope* v. *Lyttle*, 157 Ky. 659, 163 S. W 1121 (1914). A married woman is under a partial incapacity. She may not have capacity to bind herself by a contract of suretyship—Ky. Stat., Sec. 2127; *Hall* v. *Hall*, 118 Ky. 656, 82 S. W. 269 (1904), *Baker* v. *Owensboro Bank*, 140 Ky. 121, 130 S. W. 969 (1910), *People's Bank* v. *Baker*, 238 Ky. 473, 38 S. W (2d) 225 (1931)—and she can not make executory contracts to sell or mortgage her real property unless her husband join—Ky. Stat., Sec. 2128; *Brown* v. *Allen*, 204 Ky. 76, 263 S. W 717 (1924). As to the power of a corporation to become a surety, see *Monarch Co.* v. *Bank*, 105 Ky. 430, 49 S. W. 317 (1899), and as to power to make contracts for the purchase of stock in other corporations, see *Lithgow Mfg. Co.* v. *Fitch*, 5 K. L. R. 604 (1884), and *Louisville & N. R. R. Co.* v. *Howard*, 15 K. L. R. 25 (1893).

Chapter 3

FORMATION OF INFORMAL CONTRACTS

TOPIC A. GENERAL REQUIREMENTS

TOPIC B. MANIFESTATION OF ASSENT

Topic A. General Requirements

Section 19. Requirements of the Law for Formation of an Informal Contract.

The requirements of the law for the formation of an informal contract are.

A. A promisor and a promisee each of whom has legal capacity to act as such in the proposed contract;

B. A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise, except as otherwise stated in Sections 85 to 94,

C. A sufficient consideration except as otherwise stated in Sections 85 to 94,

D. The transaction, though satisfying the foregoing requirements, must be one that is not void by statute or by special rules of the common law.

Annotation

This section states in broad terms the general requirements for the formation of a contract. Subdivision (a) deals with capacity, which was considered in the annotations under Section 18, supra. Subdivision (b) requires a manifestation of assent, and subdivision (c) makes the general requirement of consideration. Both of these requirements are treated in detail in the following sections. Subdivision (d) probably refers to agreements that are prohibited by statutes or the rules of common law and hence are not contracts in any sense of the word. Some examples are given in the annotations of Section 18. This subdivision probably does not refer to voidable contracts, as those of an infant, to contracts based on illegal consideration, or to contracts that are unenforceable because of the Statute of Frauds.

Topic B. Manifestation of Assent

Section 20. MANIFESTATION OF MUTUAL ASSENT NECESSARY.

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts, but, except as qualified by Sections 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

Comment

a. Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested. Moreover, if the manifestation is at variance with the mental intent, subject to the slight exception stated in Section 71, it is the expression which is controlling. Not mutual assent but a manifestation indicating such assent is what the law requires. Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally That is, there must be a conscious will to do those acts, but it is not material what induces the will. Even insane persons may so act, but a somnambulist could not.

Annotation

This section may be divided into four distinct statements

1. *A manifestation of mutual assent is essential.* In *Hopkins* v. *Phoenix Fire Ins. Co.*, 200 Ky. 365, 254 S. W 1041 (1923), a contract

was not formed because of the inaction of the offeree and it was said "To constitute acceptance of such an offer there must be an expression of the intention by word, sign, or writing communicated or delivered to the person making the offer" Manifestation of assent is required because, in the language of the courts, "to be a contract the agreement must be mutually binding" See also *Kentucky Portland Cement Co.* v. *Steckel*, 164 Ky. 420, 175 S. W 663 (1915). In these decisions it is admitted that where there is an offer to enter into a unilateral contract the doing of the act is a sufficient manifestation. And in implied contracts, "Such manifestation may consist wholly or partly of acts, other than written or spoken words"—*Kellum* v. *Browning's Adm.*, 231 Ky. 308, 21 S. W (2d) 459 (1929). As to manifestation by inaction or silence, see Section 72 infra.

2. *There must be an intent to do the acts manifesting assent.* "To constitute such a contract (implied in fact) there must, of course, be a mutual assent by the parties—a meeting of minds—and also an intentional manifestation of such assent"—*Kellum* v. *Browning's Adm.*, supra. This requires only an intent to do the act and not an intent to enter into the contract, and this intent may exist although the act is done by mistake, or induced by fraud or duress.

3. *Mental assent is not a necessary element in the formation of a contract,* except as required by Section 55 (acceptance by act or forbearance), Section 71 (when mistake prevents the formation of a contract), and Section 72 (acceptance by silence). Although the statement is frequently made that a contract is a "meeting of minds", it is clear that the test is objective rather than subjective and that a contract is formed on the expressed assent rather than the mental assent. See *Mercer* v. *Hickman-Ebbert Co.*, 32 K. L. R. 230, 105 S. W 441 (1907), *Brenard Mfg. Co.* v. *Jones*, 207 Ky. 566, 269 S. W 722 (1925).

4. *Real or apparent intent that the promises shall be legally binding is essential.* If this statement means that the understanding of the parties as to the *legal* effect of their words is immaterial, it states the law in this jurisdiction—*Brashears* v. *Combs*, 174 Ky. 350, 192 S. W. 482; *Bell* v. *Offutt*, 73 Ky. (10 Bush) 632; *Hartford Life Ins. Co.* v. *Milet*, 21 K. L. R. 1297, 105 S. W 144. But if it means that if even an apparent intent that the promise shall result in a contract or legal obligation is unnecessary it is not supported by our decisions—*Smith* v. *Richardson*, 31 K. L. R. 1082, 104 S. W 705 (holding that a contract was not formed when "the whole conversation was begun and continued in a spirit of banter and mutual raillery and was never intended to be regarded in a serious light"), *Tucker* v. *Sheeran Bros.*, 155 Ky. 670, 160 S. W 176 (Dictum, "the intention of the parties must refer to legal relations, and must contemplate the assumption of legal rights and duties as opposed to engagements of a social nature"), *Price* v. *Price*, 101 Ky. 28, 27 S. W 429 ("It must have been the purpose to assume a legal obligation"), *Allenworth* v. *Allenworth's Exr.*, 239 Ky. 43, 39 S. W (2d) (Statements not made in earnest and so understood can not be made the basis of a contract).

This is especially true of contracts implied in fact—*Montgomery* v. *Miller*, 43 Ky. (4 B. Mon.) 470; *Kellum* v. *Browning's Admr.*, 231 Ky. 308, 21 S. W (2d) 459. In such cases not only must the one receiving benefits have an apparent intent to pay for them, but the one rendering the service must also, and at that time, have an intent to charge for them—*Miller* v. *Cropper*, 16 K. L. R. 395; *Evan's Admr* v. *McVey*, 172 Ky. 1, 188 S. W. 1075, *Oliver* v. *Gardner*, 192 Ky. 89, 232 S. W 418.

Section 21. ACTS AS MANIFESTATION OF ASSENT.

The manifestation of mutual assent may consist wholly or partly of acts, other than written or spoken words.

Comment

a. Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise, and where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of a promise whether it is expressed (1) in writing, (2) orally, (3) in acts, or (4) partly in one of these ways and partly in others.

Annotation

The manifestation of mutual assent consists partly of acts in unilateral contracts. (An exception to this is stated in Section 57.) The doing of the required act alone is generally a sufficient manifestation of assent. See *Hopkins* v. *Phoenix Fire Ins. Co.*, 200 Ky. 365, 368, 254 S. W 1041 (1923). Whatever the theory, the same may be said to be true in the formation of bilateral contracts where the mailing of a letter or the dispatching of a telegram is considered a sufficient manifestation as stated in the Sections 64 and 67 infra and the decisions cited thereunder. The manifestation of assent may consist wholly of acts as in contracts implied in fact. This statement is copied verbatim and applied to such a case in *Kellum* v. *Browning's Admr.*, 231 Ky 308, 314, 21 S. W (2d) 459 (1929).

Section 22. OFFER AND ACCEPTANCE.

The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties.

Comment

a. This rule is rather one of necessity than of law. In the nature of the case one party must ordinarily first announce what he will do before there can be any manifestation of mutual assent. It is theoretically possible for a third person to state a

suggested contract to the parties and for them to say simultaneously that they assent to the suggested bargain, but such a case is so rare, and the decision of it so clear that it is practically negligible.

Annotation

The truth of this statement is assumed by the courts. In *Hopkins v. Phoenix Fire Ins. Co.*, 200 Ky. 365, 254 S. W 1041 (1923), it was said "proposition or offer made in the manner indicated must contain the essential and material terms of the proposed contract and the offeree must agree thereto"

However, this statement may not be true of recognizances and judicial bonds.

Section 23. NECESSITY OF COMMUNICATION OF AN OFFER.

Except as qualified by Section 70, it is essential to the existence of an offer that it be a proposal by the offeror to the offeree, and that it becomes known to the offeree. It is not essential that the manifestation shall accurately convey the thought in the offeror's mind.

Comment

a. Two manifestations of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other. An offeree, therefore, cannot accept an offer unless it has been communicated to him by the offeror. This may be done through the medium of an agent, but mere information indirectly received by one party that another is willing to enter into a certain bargain is not an offer by the latter.

Annotation

The general statement is that the manifestation or proposal is not an offer until it is communicated to the person to whom it is directed. It follows that acts of the intended offeree which would otherwise be a valid acceptance do not have that effect if they were done before knowledge of the proposal. (See also Section 53.) This question arises most frequently in connection with rewards and although the rule as here stated was followed in an early case of that kind—*Lee v. Trustees of Flemingsburg*, 37 Ky. (7 Dana) 28 (1828)—later cases do not require that the claimant have knowledge of the offered reward at the time of his performance—*Auditor v. Ballard*, 72 Ky. (9 Bush) 572, 15 Am. Rep. 728 (1873)—or at least at the time of partial performance—*Coffey v. Commonwealth*, 18 K. L. R. 646, 37 S. W 575 (1896). But

there is a tendency on the part of the courts to make an exception in reward cases (Williston on Contracts, Section 33) and it is probable that our courts would apply the rule as stated to other situations.

It seems clear that the knowledge of the offer, or at least knowledge of part of it, may be constructive as where a shipper is bound by the stipulations printed on the back of a bill of lading although he did not read them—*Louisville & N. R. R. Co.* v. *Brownlee*, 77 Ky. (14 Bush) 590 (1879). However, cases of this sort may be included in the exception of Section 70 which provides that negligent appearance of assent may bind the offeree although the offer is not in fact communicated.

Section 24. OFFER DEFINED.

An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance. An offer is also a contract, commonly called an option, if the requisites of a formal or an informal contract exist, or if the rule stated in Section 47 is applicable.

Comment

a. In an offer for a unilateral contract the offeror's promise is conditional upon an act other than a promise being given except in cases covered by Section 57 In an offer for a bilateral contract the offeror's promise is always conditional upon a return promise being given. The return promise may be in the form of assent to the proposal in the offer. (See Illustration 1 under Section 29.) In order that a promise shall amount to an offer, performance of the condition in the promise must appear by its terms to be the price or exchange for the promise or its performance. The promise must not be merely performable on a certain contingency

b. All offers are promises of the kind stated in this Section and all promises of this kind are offers if there has been no prior offer of the same tenor to the promisor. But if there has already been such an offer to enter into a bilateral contract, an acceptance thereof, like the offer itself, will be a promise of the kind stated in the Section.

Annotation

A promise is an undertaking that something shall or shall not happen in the future (see Section 2, supra). Not all promises are offers and hence not all promises are capable of being the basis of a

contractual relation. In general, but subject to the exceptions mentioned in Sections 86–90, only conditional promises can become legal obligations, for there must be the element of bargain. A promise to pay a debt already existing and requiring no further act or forbearance on the part of the promisee is not a contract [*Graves* v. *McGuire, Helm & Co.*, 79 Ky. 532 (1881)]. Nor does a bare promise to lend money create a legal obligation—*Spears & Sons* v. *Winkle*, 186 Ky. 585, 217 S. W 691 (1920). But a conditional promise on an expressed contingency may become complete and binding by the performance of the condition—*Graves* v. *Smedes' Admr.*, 37 Ky. (7 Dana) 344 (1838). However, not all conditional promises are offers capable of being made into contracts by the performance of the condition. This included those cases often classified as "gifts on condition" A written promise to pay a sum of money on the condition that a child is named for the promisor may not be enforceable—*Rain* v. *Sturgeon's Admr.*, 5 Ky. Opin. 575 (1872).

As to expressions of intent, willingness, or desire, see the annotations under Section 5.

Section 25. WHEN A MANIFESTATION OF INTENTION IS NOT AN OFFER.

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

Comment:

a. It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered, as well as the customs of business, and indeed all surrounding circumstances.

Annotation

If from the words themselves or from other circumstances the person addressed knows, or has reason to know, that the words, although in the form of an offer, are not the expression of a fixed in-

tention but in the nature of preliminary negotiations they are not an offer—*Allen* v. *Roberts*, 5 Ky. (2 Bibb.) 98 (1910). (The following words were said not to be an offer although written in reply to an inquiry as to the sale of the land: "The lands you wish to purchase, you may have for thirty pounds per hundred acres. Cash or negroes will answer me. I shall be down in your country this fall without fail.") Advertisements and quotations are generally considered to be calls of offers and not offers themselves, but a quotation sent in reply to an inquiry and with the words "for immediate acceptance" is an offer—*Fairmont Glass Works* v. *Crunden-Martin Woodenware Co.*, 106 Ky. 659, 51 S. W 196 (1899). Even if there is an apparently complete agreement, it may be expressly stated or mutually understood that it is only tentative or preliminary, and as such it will not have the effect of a contract—*Cincinnati Equipment Co.* v. *Big Muddy River Con. Coal Co.*, 158 Ky. 247, 164 S. W 794 (1914)—or circumstances may show that this was the intent of the parties—*Kentucky Portland Cement, Etc., Co.* v. *Steckel*, 164 Ky. 420, 175 S. W 663 (1915) (an agreement to exchange mules is not enforceable as a contract where the particular mules are not specified).

Section 26. CONTRACT MAY EXIST THOUGH WRITTEN MEMORIAL IS CONTEMPLATED.

Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in Section 25.

Annotation

This section is in accord with the law of Kentucky. "If the terms of the contract had been mutually agreed to, and the parties then made a further agreement to write and sign a paper evidencing those terms, the contract was valid without the writing"—*Bell* v. *Offutt*, 73 Ky. (10 Bush) 632, 638 (1874), *Barr* v. *Gilmour*, 204 Ky. 582, 265 S. W 6 (1924). See also *Springfield F and M. Ins. Co.* v. *Snowden*, 173 Ky. 664, 191 S. W 439 (1917), *Hollerbach* v. *Wilkins*, 130 Ky 51, 112 S. W. 1126 (1908), *Grainger* v. *Louisville Cornice, Etc., Co.*, 132 Ky. 563, 116 S. W 753 (1909). "Yet if it is the intention of the parties that it shall not be binding until put in writing, there can be no enforceable agreement until that is done"—*Tucker* v. *Sheeman Bro. & Co.*, 155 Ky. 670, 672, 160 S. W 176 (1913). "An agreement to be finally settled must comprise all the terms which the parties intend to introduce. Generally speaking, the circumstance that the parties did intend a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount to a contract"

—Dictum in *Cincinnati Equipment Co.* v. *Big Muddy River Con. Coal Co.*, 158 Ky. 247, 253, 164 S. W 794 (1914). For valuable dicta and citations as to oral agreements of insurance, see *Continental Ins. Co.* v. *Baker*, 238 Ky. 265, 37 S. W. (2d) 62 (1931).

Section 27. AUCTIONS. SALES WITHOUT RESERVE.

At an auction, the auctioneer merely invited offers from successive bidders unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder.

Annotation:

This statement is law in Kentucky by statutory enactment since the adoption of the Uniform Sales Act in 1928. (K. S. 2651b-21.) But this statute apparently made little or no change in the law in this respect. The decisions cited below are all prior to the effective date of the statute.

"Every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to, and that assent signified on the part of the seller by knocking down the hammer"—*Grotenkemper* v. *Achtermeyer & Co.*, 74 Ky. (11 Bush) 222 (1875) (holding that even in a judicial sale, the highest bidder may withdraw his bid before acceptance). The owner may withdraw the property from sale before the fall of the hammer even over the protests of the auctioneer with whom there is a contract to confirm the sale to the highest bidder if the property is about to sell unreasonably below its market value.—*Becker* v. *Crabb*, 223 Ky. 549, 4 S. W (2d) 370 (1928). (No mention was made as to whether the sale was "without reserve".)

In this state some exceptions have apparently been made in judicial sales. Although the bidder may retract his bid before the fall of the hammer (*Grotenkemper* v. *Achtermeyer & Co.*, supra) the commissioner is bound to accept all bids and to knock the property off to the highest bidder [*Morton* v. *Moore*, 4 K. L. R. 717 (1883)] unless he reasonably believes the sale would not be completed by the execution of a proper bond [*Briggs* v. *Wilson & Muir*, 204 Ky. 135, 263 S. W 740 (1924)]. In these sales, the commissioner may reopen the bidding after the fall of the hammer in order to correct a mistake if all the parties are still present [*Head* v. *Clark*, 88 Ky. 362, 11 S. W 203 (1889) where the auctioneer failed to hear one of two equally high bids and announced the sale to the other bidder]. There may be some question in these sales as to whether the contract is formed by the acceptance of the bid by the auctioneer or whether the bid is merely an offer until the approval by the court [See *Beavers* v. *Nelson*, 152 Ky. 31, 153 S. W 428 (1913)].

Although the statement is made that, in certain cases, a bidder may withdraw, repudiate or retract his bid after the fall of the ham-

mer, it is clear that the court does not deny the formation of the contract. The question in these cases is really as to the right of the purchaser to rescind because of fraud which induced his bid, or even because of fraud on the auctioneer as in *Thomas* v. *Kerr*, 66 Ky. (3 Bush) 619 (where property of another was included, without the knowledge of the auctioneer, in the goods which he was employed to sell). By-bidding, at least in auctions "without reserve" is a ground for rescission—*Burdon* v. *Sietz*, 206 Ky. 336, 267 S. W 219 (1924). As to what amounts to by-bidding see also *Osborn* v. *Apperson Lodge F & A. M.*, 213 Ky. 533, 281 S. W. 500 (1926), *Manuel* v. *Haselden*, 206 Ky. 796, 268 S. W. 554 (1925), and *Newman* v. *Woolley*, 201 Ky. 139, 255 S. W 1050 (1923).

Section 28. To Whom an Offer May be Made.

An offer may be made to a specified person or persons or class of persons, or it may be made to anyone or to everyone to whom it becomes known. The person or persons in whom is created a power of acceptance are to be determined by the reasonable interpretation of the offer.

Comment

a. An offer may give many persons a power of acceptance. In some such cases the exercise of the power by one person will extinguish the power of every other person, in other cases this will not be true. The decision depends on interpretation of the offer.

Annotation

As to the attempted acceptance by one other than the offeree see Section 54 infra.

General offers, i. e. offers made to everyone and capable of being accepted by anyone, are illustrated by published offers of rewards. "The offer of a reward in such cases is a proposal on the part of the Commonwealth to all persons, which anyone capable of performing the service may accept before the offer is revoked"—See *Auditor* v. *Ballard*, 72 Ky. (9 Bush) 572, 15 Am. Rep. 728 (1873). See also *Coffey* v. *Commonwealth*, 18 K. L. R. 646, 37 S. W 575 (1896).

The offer may be made to a class of persons, as in the case of a general letter of credit, and as such it may be accepted by any of the class. For an illustration of this see *Kincheloe* v. *Holmes, Sturgeon & Co.*, 46 Ky. (7 B. M.) 5 (1846).

Where an offer is made to several persons and it is apparent from the offer that it is to be accepted by all, no contract is formed until all do accept. *Burton* v. *Shotwell*, 76 Ky. (13 Bush) 271 (1877).

Section 29. HOW AN OFFER MAY BE ACCEPTED.

An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance.

Annotation.

Acceptance by the performance of a specified act is illustrated by *Stembridge* v. *Stembridge's Admr.*, 87 Ky. 91, 7 S. W 611 (1888), and *Braswell's Admr* v. *Braswell*, 109 Ky. 15, 58 S. W 426 (1900). This also includes acceptances of offers to enter into a bilateral contract. The making of the promise is the required act as in *Carter* v. *Hall and Martin*, 191 Ky. 75, 229 S. W. 132 (1921).

No decisions have been found where the offer invites acceptance by an affirmative answer, or where the offeree is given a choice of terms, but it is believed that the statement here would be applied should such cases arise.

Section 30. OFFER MAY PROPOSE A SINGLE CONTRACT OR A NUMBER OF CONTRACTS.

An offer may propose the formation of a single contract by a single acceptance or the formation of a number of contracts by successive acceptances from time to time.

Comment

a. An offer may request several acts or promises as the indivisible exchange for the promise or promises in the offer, or it may request a series of contracts to be made from time to time. Such a series of bilateral contracts, depending upon the terms of the offer. Whether several promises create several contracts or are all part of one contract is determined by principles of interpretation stated in Chapter 9.

Annotation

A single offer proposing the formation of a number of contracts by successive acceptances from time to time is illustrated by a continuing guaranty. "A continuing guaranty contemplates a series of transactions. As each takes place, a separate obligation arises as to that, and to that extent what was a revocable offer becomes an irrevocable contract. As to the future, however, death or notice may revoke it."—*Aitken Sons & Co.* v. *Lang's Admr.*, 106 Ky. 652, 51 S. W. 154, 21 K. L. R. 247, 90 Am. St. Rep. 263 (1899) (holding that a guaranty of future indebtedness, although containing a recital of a con-

sideration, is revoked as to future transactions by the death of the guarantor even if credit is extended without knowledge of the death). See also *White Sewing Machine Co.* v. *Powell*, 25 K. L. R. 94, 74 S. W. 746 (1902). As to the revocability of the unaccepted part of such an offer, see Section 44 infra.

Offers of this type should not be confused with offers to enter into a divisible or severable contract as in *Gilmore & Co.* v. *Samuels & Co.*, 135 Ky. 706, 123 S. W 271, 21 Ann. Cas. 611 (1909).

Section 31. PRESUMPTION THAT OFFER INVITES A BILATERAL CONTRACT.

In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree.

Comment

a. It is not always easy to determine whether an offeror requests an act or a promise to do the act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed.

Annotation

A statement of this presumption has not been found in the decisions, but it was applied in *Ayer and Lord Tie Co.* v. *O'Bannon & Co.*, 164 Ky. 34, 174 S. W 783 (1915). (An offer to buy such ties as the offeree could deliver before January 1 and part performance by the offeree, was said to create a bilateral contract in which the offeree assumed the duty of exercising reasonable diligence in procuring and delivering the ties and prevented a revocation of the offer.) See also *Louisville & Nashville R. R. Co.* v. *Coyle* 123, Ky. 854, 99 S. W 237 (1906). However, the decisions may be explained otherwise as under Sections 45 and 54.

We have applied the same presumption to charitable subscriptions —*Collier* v. *Baptist Soc.*, 47 Ky. (8 B. M.) 68; *Trustees* v. *Flemming*, 73 Ky. (10 Bush) 234.

Section 32. OFFER MUST BE REASONABLY CERTAIN IN ITS TERMS.

An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain.

Comments:

a. Inasmuch as the law of contracts deals only with duties defined by the expressions of the parties, the rule of this Section is one of necessity as well as of law. The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. A promise by A to give B employment is not wholly illusory, but if neither the character of the employment nor the compensation therefor is stated, the promise is so indefinite that the law cannot enforce it, even if consideration is given for it.

b. Promises may be indefinite in time or in place, or in the work or the property to be given in exchange for the promise. In dealing with such cases the law endeavors to give a sufficiently clear meaning to offers and promises where the parties intended to enter into a bargain, but in some cases this is impossible.

c. Offers which are originally too indefinite may later acquire precision and becomes valid offers, by the subsequent words or acts of the offeror or his assent to words or acts of the offeree.

Annotation.

This section is in accord with the law of Kentucky. An offer must contain the essential and material terms of the proposed contract—*Hopkins* v. *Phoenix Fire Ins. Co.*, 200 Ky. 365, 254 S. W 1041 (1923) (An application, made to an agent representing several fire insurance companies, which did not designate the company desired, nor state the terms or duration of the risk is not sufficiently definite so that the execution of a "binder" by the agent will complete a contract), *Kentucky Portland Cement Co.* v. *Steckel*, 164 Ky. 420, 175 S. W 663 (1915) (An offer to exchange mules which does not specify the mules to be exchanged is too indefinite), *Dean* v. *Meter*, 8 Ky. Op. 746 (1876) (Manner of the payment not definitely fixed), *Gaines* v. *R. J. Reynolds Tobacco Co.*, 163 Ky. 716, 174 S. W 432 (1915) (A "nice" or "reasonable" profit is not sufficiently definite).

This question often arises in connection with contracts of employment. If the period of employment is indefinite, the offer and acceptance creates no executory obligations and either party has the right to terminate the relation at any time with or without cause—*Bowen* v. *Chenoa-Hignite Coal Co.*, 168 Ky. 588, 182 S. W 635 (1916), *Hudson* v. *Cincinnati N. O. & T. P Ry. Co.*, 152 Ky. 711, 154 S. W 47 (1913), *Louisville & N. R. R. Co.* v. *Harvey*, 99 Ky. 157, 34 S. W 1069 (1896), *Louisville & N. R. R. Co.* v. *Offutt*, 99 Ky. 427, 36 S. W 181 (1896)—

however, notice of termination may be necessary—*Elkhorn Coal Co.* v. *Eaton, Rhodes & Co.*, 163 Ky. 306, 173 S. W 798. But in regard to presumptions as to time of employment when no time is mentioned, see *Smith* v. *Theobald*, 86 Ky. 141, 5 S. W. 394 (1887).

An offer or agreement, although indefinite as to material terms will not be invalid as an executory contract if the parties have provided some way by which the terms may be ascertained or determined. This is true where one of the parties has the right to name the date of performance within prescribed limits—*Bell* v. *Hatfield*, 121 Ky. 560, 89 S. W 544 (1905) (holding that a failure to name the day does not avoid the contract but excuses tender). *Sousely* v. *Burns*, 73 Ky. (10 Bush) 87 (1873), *Chandler* v. *Robertson*, 39 Ky. (9 Dana) 291 (1840) In these cases it is said that when an ultimate day is named it becomes the date for performance in case no selection is made or one party may have the right to select the plan of performance, at least within limits—*Boss-Vaughan Tob. Co.* v. *Johnson*, 182 Ky. 325, 206 S. W 487 (1908).

However, it is generally said that the determination of material terms can not be left to a future agreement of the parties—*Dean* v. *Meter*, supra. But see *Slade* v. *City of Lexington*, 141 Ky. 214, 132 S. W 404 (1910). (An agreement by city to purchase or renew a contract upon terms to be agreed on by parties is a contractual right that cannot be impaired by the state.) *Chesapeake & O. Ry. Co.* v. *Herringer*, 158 Ky. 267, 164 S. W 948 (1914) (holding that a promise by a railroad company to construct a crossing at a location to be agreed upon by the parties is valid and upon failure to agree the court will determine the location).

It is sufficient if the terms, although uncertain at the time of the contract, are to be made certain and definite by other future events—*Gaines* v. *R. J. Reynolds Tob. Co.*, supra. (The price to be paid to be determined by the future cost. *Hagins* v. *Combs*, 102 Ky. 165, 43 S. W 222 (1899) (payment for logs to be determined by a future market price as long as the employer is engaged in the business), *Kelly* v. *Peter & Burghard Stone Co.*, 130 Ky. 530, 113 S. W. 486 (1908) (Offer to employ at such times as employee was able to work, but see *Louisville & N. R. R. Co.* v. *Offut*, supra, as to promise to employ as long as employee did faithful and honest work), *Mitchell-Taylor Tie Co.* v. *Whitaker*, 158 Ky. 651, 166 S. W 193 (1914) (An agreement to sell the number of ties the seller could make within a year is not too indefinite), *Ayer & Lord Tie Co.* v. *O'Bannon & Co.*, 164 Ky. 34, 174 S. W 783 (1915) (All ties vendor could deliver before a certain date is not too uncertain but damages measured by the number of ties controlled by contracts made before the vendee's breach), *Pugh* v. *Jackson*, 154 Ky. 649, 157 S. W. 1082 (1913) (Agreement to meet pay rolls until all the coal is mined is not void for indefiniteness), *Hurley* v. *Big Sandy & C. Ry. Co.*, 137 Ky. 216, 125 S. W 302 (1910) (A contract to carry the personal freight of certain parties free of charge is not too indefinite), *Lewis* v. *Creech's Admr.*, 162 Ky. 763, 173 S. W 133 (1915)

(Holding that a promise to make an illegitimate child equal with legitimate children is not void for uncertainty but a promise to make the child "financially independent for all future time" is indefinite).

It is said that in a lease of minerals where the time for beginning exploration is not stated, the lessee must begin operations within a reasonable time—*Killebrew* v. *Murray*, 151 Ky. 345, 151 S. W. 662 (1912), *Eastern Kentucky Mineral & T. Co.* v. *Swann-Day Lbr Co.*, 148 Ky. 82, 146 S. W. 438 (1912). And where the compensation for employment is not set by the parties, a reasonable compensation will be implied—*Norris* v. *Philpot*, 12 K. L. R. 557 (1890).

(To be continued.)