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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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Section 40. What Lapse of Time Terminates an Offer.

1. The power to create a contract by acceptance of an offer terminates at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

2. What is a reasonable time is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know.

3. In the absence of usage or a provision in the offer to the contrary, and subject to the rule stated in Section 51, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time during the day of which the offer is received.

Comment

a. An offeror may fix any time that he wishes as that within which acceptance must be made. He need not make the time a reasonable one. If, however, no time is fixed the offeree is justified in assuming that a reasonable time is intended, and the law adopts this assumption.

b. Where a bilateral contract is contemplated a reasonable time for making the return promise requested is generally brief. Especially is this true in regard to commercial contracts.

c. Where a unilateral contract is contemplated, assent to the proposition is manifested by performing or refraining from

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performing an act, and a reasonable time for so doing is necessarily a reasonable time for acceptance. If, therefore, in the nature of the case what is requested cannot be done without considerable delay, the time within which acceptance may be made is equally long.

Annotation

(1) The power of creating a contract by acceptance of the offer is terminated by the lapse of the time stated in the offer. *Postal Tel. Co.* v. *Louisville C. S. Oil Co.*, 140 Ky. 506, 131 S. W 277 (1910), *Stembridge* v. *Stembridge's Adm.*, 87 Ky. 91, 7 S. W 611 (1888). See also *Gold Spring Distl. Co.* v. *Stitzel Distl.*, 150 Ky. 457, 150 S. W 516 (1912), and cases there cited. This is true although a consideration is paid for the offer. *Fields and Combs* v. *Vizard Invest. Co.*, 168 Ky. 744, 182 S. W 934 (1916), *Tevis* v. *Nugent*, 22 K. L. R. 894, 59 S. W 9.

If no time is specified in the offer, the power of creating a contract by acceptance is terminated by the lapse of a reasonable time. *Moxley's Adm.* v. *Moxley*, 59 Ky. (2 Metc.) 309 (1859), *Chiles* v. *Nelson*, 37 Ky. (7 Dana.) 281 (1836), *Hutcheson* v. *Blakeman*, 60 Ky. (3 Metc.) 80 (1860).

(2) What is a reasonable time is a question of fact depending on the circumstances of the case. *Mitchell & Co.* v. *Wallace*, 27 K. L. R. 967, 87 S. W 303 (1905), *Moxley's Adm.* v. *Moxley*, supra. It is said "the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose that the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have in mind." *Moxley* v. *Moxley's Adm.*, supra; *Paducah Packing Co.* v. *J. T Polk Co.*, 30 K. L. R. 979, 99 S. W 929 (1907).

(3) Subsection (3) states, as a matter of law, if the offer is by mail, that, in the absence of usage or a provision in the contract, an acceptance posted on the day the offer is received is seasonable. This statement is supported by the decision in *Mitchell & Co.* v. *Wallace*, supra. Of course, a later acceptance may be valid under the rule stated in subsection (2) as shown by the cases there cited and *Hutcheson* v. *Blakeman*, 60 Ky (3 Metc.) 80.

Section 41. REVOCATION BY COMMUNICATION FROM OFFEROR RECEIVED BY OFFEREE.

Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer.

Comment

a. Revocation, as stated in Section 35, does not terminate an offer in cases within the rules stated in Sections 45, 46, and 47.

b. What amounts to receipt of revocation within the meaning of the rule is considered in Section 69.

Annotation

"A mere proposal may therefore be withdrawn at any time before acceptance, though, if such offer is allowed to remain open until accepted, it will become a binding contract The right to revoke an ordinary offer before acceptance is unquestioned." *Walton's Exr* v. *Franks*, 191 Ky. 32 at p. 35, 228 S. W 1025 (1921). See also *Nolin Milling Co.* v. *White Gro. Co.*, 168 Ky. 417, 182 S. W 191 (1916), *L. A. Becker Co.* v. *Alvey*, 27 K. L. R. 832, 86 S. W 974 (1905), and *Burton* v. *Shotwell*, 76 Ky. (13 Bush) 271 (1877). This is true although the offer is expressly made for a definite time or although there is a promise to keep the offer open, if the promise is without consideration. *Stamper* v. *Combs*, 164 Ky. 733, 176 S. W. 178 (1915), *Litz* v. *Goosling*, 93 Ky. 185, 19 S. W 527 (1892), *Noble* v. *Mann*, 32 K. L. R. 30, 105 S. W. 152 (1907).

Section 42. ACQUISITION BY OFFEREE OF INFORMATION THAT OFFEROR HAS SOLD OR CONTRACTED TO SELL OFFERED INTEREST.

Where an offer is for the sale of a property interest of any kind, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, the offer is revoked.

Comment

a. Since revocation does not terminate offers falling within the rules stated in Sections 45, 46 and 47, the present section has no application to such offers.

Annotation

Even if there is an unsupported promise to keep the offer open for a definite time, the sale of the land to another is a repudiation of the "option." *Noble* v. *Mann*, 32 K. L. R. 30, 105 S. W 152 (1907). In this decision nothing is said as to the method by which the offeree acquired information of the sale, but in other cases it is stated that the acceptance must be made "before any intimation is received that the offer is withdrawn." *Hutcheson* v. *Blakeman*, 60 Ky. (3 Metc.) 80 (1860), *Shaw* v. *Ingram-Day Lbr Co.*, 152 Ky. 329, 335, 153 S. W 431 (1913). In *Stamper* v. *Combs*, 164 Ky. 733, 176 S. W 178 (1915), an

indirect communication of offeror's intention to revoke was said to be sufficient.

It has been held that a written offer given for a consideration to sell land at a stated price, within a limited time, if given to a broker is irrevocable and that a sale of the land to another acts as a revocation. *Faraday Coal & Coke Co.* v. *Owens*, 26 K. L. R. 243, 80 S. W 1171 (1904), or even the giving of an option has this effect. *Chesbrough* v. *Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725 (1913).

Section 43. HOW AN OFFER MADE BY ADVERTISEMENT OR GENERAL NOTICE MAY BE REVOKED.

An offer made by advertisement in a newspaper, or by a general notice to the public or to a number of persons whose identity is unknown to the offeror, is revoked by an advertisement or general notice giving publicity equal to that given to the offer.

Comment

a. In the case of such an offer as is stated in this section, revocation is not likely to be inoperative within the rules stated in Sections 45 and 46, but the rule stated in Section 47 may prevent a revocation within the rule of the present section from being operative.

Annotation

No Kentucky cases.

Section 44. REVOCATION OF OFFER CONTEMPLATING A SERIES OF CONTRACTS.

A revocable offer contemplating a series of independent contracts by separate acceptances may be effectively revoked so as to terminate the power to create future contracts, though one or more of the proposed contracts have already been formed by the offeree's acceptance.

Comment

a. An offer may propose several contracts, to arise at separate times (see Section 30) Such an offer is divisible, and the power to make an effective revocation continues *pari passu* with the continuing power of the offeree to accept.

b. Where an offer contemplates a series of unilateral con-

tracts, beginning performances of the consideration for any one of the series makes the offer for that one irrevocable (see Sections 45 and 52).

Annotation

White Sewing Machine Co. v. *Powell*, 25 K. L. R. 94, 74 S. W 746 (1903), *Aitken* v. *Lang's Adm.*, 106 Ky. 652, 51 S. W 154 (1899)—accord.

Section 45. REVOCATION OF OFFER FOR UNILATERAL CONTRACT, EFFECT OF PART PERFORMANCE OR TENDER.

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

Comment

a. What is rendered must be part of the actual performance requested in order to preclude revocation under this section. Beginning preparations though they may be essential to carrying out the contract or to accepting the offer, is not enough.

b. Tender, however, is sufficient. Though not the equivalent of performance, nevertheless it is obviously unjust to allow so late withdrawal. There can be no actionable duty on the part of the offeror until he has received all that he demanded, or until the condition is excused by his own prevention of performance by refusing a tender; but he may become bound at an earlier day It may be fairly contended that the main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promises. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (See Section 90)

Annotation

This principle has not been clearly stated by the courts but it has seemingly been applied where there has been a part performance by

the offeree. The explanation is that since part performance creates reciprocal obligations the offer is thereafter irrevocable and it is further said that both parties are bound to perform. *Louisville and Nashville R. Co.* v. *Coyle*, 123 Ky. 854 (1906), 97 S. W 772, 99 S. W 237 (holding that an offer to buy all ties delivered at a certain place within the next twelve months can not be withdrawn after some ties were delivered and accepted). See also *Ayer & Lord Tie Co.* v. *O'Bannon & Co.*, 164 Ky. 34, 174 S. W 783 (1915), and dictum in *Chesbrough* v. *Vizard Inv. Co.*, 156 Ky. 149, 154, 160 S. W. 725, as to agreements with brokers. But where there is an offer to buy two distinct and separate things, the shipment of one does not form a contract as to the other. *Courtney Shoe Co.* v. *Curd & Son*, 142 Ky. 219, 134 S. W 146 (1911).

It seems probable that a tendered performance is not sufficient as it may be refused and the offer withdrawn. *Citizens Nat'l Life Ins.* v. *Murphy*, 154 Ky. 88, 156 S. W 1069 (1913).

Section 46. OFFERS WHICH ARE THEMSELVES CONTRACTS CANNOT BE TERMINATED.

An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself or, if no time is fixed, within a reasonable time, either by revocation or by the offeror's death or insanity

Annotation

Cases involving this section are not numerous and no Kentucky decision has been found. This is probably due to the fact that the cases generally involve an offer under seal and in this state the distinction between sealed and unsealed instruments has been abolished.

Section 47 OFFERS WHICH OFFEROR HAS COLLATERALLY CONTRACTED TO KEEP OPEN CANNOT BE TERMINATED.

An offer cannot be terminated during the term therein stated, or if no term is therein stated for a reasonable time, either by revocation or by the offeror's death or insanity, if by a collateral contract the offeror has undertaken not to revoke the offer.

Comment

a. The promise of the offer itself may be a contract (see Sections 24, 46) For practical purposes the situation is the same where the offer is accompanied by a collateral contract to

keep the offer open. This collateral contract is in effect specifically enforced without suit by denying the offeror the power to terminate his offer.

b. Whether a contract based on such an offer as is within the rule stated either in this section or in Section 46 can itself be specifically enforced, or, if not, what damages are recoverable if the offeror repudiates or refuses to perform the contract, is determined by the law governing the performance of contracts.

Annotation

This section deals with options. Although the term "option" has been applied to any offer accompanied by a promise to keep the offer open irrespective of consideration. *Litz* v. *Goosling*, 93 Ky. 185, 19 S. W 527 (1892), the later tendency has been to use the word only when the promise to hold the offer open is based on a sufficient consideration. *Thompson & Co.* v. *Reid*, 31 K. L. R. 176, 101 S. W 964 (1907), *Caskey* v. *Williams Bros.*, 227 Ky. 73, 11 S. W (2d) 991 (1928). This section applies only to those cases where there is a collateral contract, that is where there is consideration for the promise to keep the offer open, as a bare promise to keep an offer open is without legal effect and the offer may be withdrawn at the pleasure of the offeror. *Noble* v. *Mann*, 32 K. L. R. 30, 105 S. W 152 (1907), *Stamper* v. *Combs*, 164 Ky. 733, 176 S. W 178 (1915). But if the offer is not withdrawn, it continues and may be accepted within the time limited regardless of the fact that there was no consideration for the promise to keep it open. *Thompson & Co.* v. *Reid*, supra. This view seemed to have escaped the court in some of the earlier cases. (For example see *Boucher* v. *Van Buskirk*, 9 Ky. (2 A. K. M.) 345 (1820), and *Litz* v. *Goosling*, supra.)

There seems to be doctrine, not frequently found elsewhere, as to the consideration for these collateral agreements. In line with the general rule it is said that consideration "may consist in money paid, or to to be paid for it, or in property, services, or counter benefit accruing to the owner or disadvantage incurred by the optionee; in short, it may be such consideration as will support any other sort of contract." *Thompson & Co.* v. *Reid*, supra. See also *Bacon* v. *Kentucky Central Ry. Co.*, 95 Ky. 373, 25 S. W 747 (1894). When connected with a lease it may be rent to be paid by the lessee of the land or expenses to be incurred in making it productive. *Bank of Louisville* v. *Baumiester*, 87 Ky. 6, 7 S. W 170 (1888). But it has been consistently held that one dollar is not sufficient consideration to support a promise to keep an offer to sell land or coal rights open for several months. The courts say "Such a consideration is so flagrantly disproportionate to the value of the privilege in these cases—the options extending over a year—that it is merely nominal. It is not substantial, and the parties could not have regarded it as in any sense an equivalent of the privilege which was being contracted for." *Thompson & Co.* v. *Reid*, supra at p. 178. See also *Litz* v. *Goosling*, *Noble* v. *Mann*, *Stamper* v. *Combs*,

supra, and *Berry* v. *Frisbie*, 120 Ky. 337, 86 S. W 558 (1905). But see *Sparks* v. *Ritter*, 204 Ky. 623, 265 S. W 26 (1924).

In this section it is said that where there is such a collateral contract the offer is irrevocable. It would probably be so treated in Kentucky. In most cases it is immaterial since the damages would be the same and an action could be maintained on the collateral contract. The question can arise in a suit for specific performance, but even then the aid of equity may be denied on other grounds. This is true in *Boucher* v. *Van Buskirk* and *Litz* v. *Goosling*, supra, which are cited as authority for the statement that these offers are revocable in Kentucky. Specific performance was granted after an attempted revocation in *Chesbrough* v. *Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725 (1913). An option to renew a lease is not terminated by the death of the lessor before exercise of the option. *Graham* v. *Rice*, 203 Ky. 614, 262 S. W 968, (1924). A counter-offer by the optionee does not prevent a later acceptance of the offer. *Caskey* v. *Williams Bros.*, 227 Ky. 73, 11 S. W (2d) 991 (1928).

Our courts have distinguished between options to buy and agreements with brokers giving an exclusive agency for a definite period, holding that the latter, although given for a consideration, are revocable at the will of the owner. *Faraday Coal & Coke Co.* v. *Owens*, 26 K. L. R. 243, 80 S. W. 1171 (1904). See also *Chesbrough* v. *Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725 (1913).

Section 48. TERMINATION OF OFFER BY OFFEROR'S DEATH OR INSANITY.

A revocable offer is terminated by the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract.

Annotation

The law of Kentucky is in accord with this statement. The death of the offeror terminates the offer although the offeree may be ignorant of the death at the time of the attempted acceptance. *Aitken, Son & Co.* v. *Lang's Adm.*, 106 Ky. 652, 51 S. W 154 (1899) (continuing guaranty). This statement is not to be confused with the law applicable to the discharge of an existing contract because of the death or insanity of one of the parties. Death of the lessor before the expiration of a lease will not terminate the contract right of the lessee to renew. *Graham* v. *Rice*, 203 Ky. 614, 262 S. W. 968 (1924).

Section 49. TERMINATION OF OFFER BY DEATH OF ESSENTIAL PERSON OR DESTRUCTION OF ESSENTIAL THING.

Where a proposed contract requires for its performance the existence of a specific person or thing, and before acceptance the person dies or the thing is destroyed, the offer is

terminated unless the offeror assumes the risk of such mischance.

Comment

a. If the essential person is not dead, but ill or otherwise apparently disabled or the essential thing is injured, it cannot be said that the offer is automatically terminated, though such facts may justify the offeror in refusing to fulfill any contract formed by acceptance.

Annotation

No Kentucky decisions directly in point have been found. It is probable that the statement would be followed should such a case arise as the proposition here may be compared with the discharge of contracts by subsequent destruction of the subject matter. *Brown & Long* v. *Childs & Co.*, 63 Ky. (2 Duv.) 314 (1865), with the additional element of mistake where the destruction is before the contract is formed. As applied to sales of goods, this section is covered by Kentucky Statutes, Sec. 2651b-7.

Section 50. TERMINATION OF AN OFFER BY ILLEGALITY.

Where after making of an offer and before acceptance the proposed contract becomes illegal the offer is terminated.

Annotation

There are no Kentucky decisions in point. This statement would probably be followed as it is a type of impossibility plus the element of illegality. This may be compared with the situation where after acceptance but before performance the act bargained for has become illegal, as in *L. & N. R. R. Co.* v. *Crowe*, 156 Ky. 27, 160 S. W 759 (holding no recovery on contract).

Section 51. EFFECT OF DELAY IN COMMUNICATION OF OFFER.

If communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the delay, though it is due to the fault of the offeror; but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows nor has reason to know that there has been delay a contract can be created by acceptance within the period which would have been permissible if the offer had been despatched at the time that its arrival seems to indicate.

Annotation

There do not seem to be any Kentucky cases involving the validity of an acceptance of a delayed offer. However, there are statements in our definitions of a reasonable time for acceptance which support this proposition. See *Moxley's Adm.* v. *Moxley*, 59 Ky. (2 Metc.) 309 (1859), and *Paducah Packing Co.* v. *J. T. Polk Co.*, 30 K. L. R. 979, 99 S. W 929 (1907).

Section 52. ACCEPTANCE OF OFFER DEFINED.

Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror. If anything except a promise is requested as consideration no contract exists until part of what is requested is performed or tendered. If a promise is requested, no contract exists, except as qualified by Section 63, until that promise is expressly or impliedly given.

Comment

a. In a unilateral contract the act requested and performed as consideration for the contract ordinarily indicates acceptance as well as furnishes the consideration, and, under Section 45, performing or tendering part of what is requested may both indicate assent and furnish consideration. In a proposal for a bilateral contract the mere assent of the offeree, whether manifested by words or acts, is by implication the promise requested and therefore here also mutual assent and consideration are indicated by the offeree at one and the same time.

b. A bilateral contract by definition consists of mutual promises. It is therefore essential that the offeree shall give the promise requested by the offeror. and doing this clearly indicates acceptance of the offer. The fact that this promise is given may be shown by any words or acts which indicate the offeree's assent to the proposed bargain.

c. As appears from Section 64 acceptance may be complete as soon as it is started on its way

Annotation

This section defines acceptance in general terms. Much of the material bearing on the definition is contained in the annotations to the subsequent sections referred to below. The definition may be divided into three separate statements:

(1) "Acceptance of an offer is an expression of assent to the

terms thereof made by the offeree in a manner requested or authorized by the offeror." The decisions in Kentucky are in accord with this statement. As to the necessity of an expression of assent, see Section 20 (1), supra. As to silence or inaction as an expression of assent, see Section 72, infra. The assent must be to the terms of the offer, see Section 58, infra. If the offer is made to several persons looking to a contract with all of them jointly, no contract is formed until it is accepted by all. *Burton* v. *Shotwell*, 76 Ky. (13 Bush) 271 (1877).

(2) "If anything except a promise is requested as consideration, no contract exists until part of what is requested is performed or tendered." This statement finds support in the decisions of this state. No contract exists until the act is performed. *Stembridge* v. *Stembridge's Adm.*, 87 Ky. 91, 7 S. W 611 (1888), and conversely, a contract is formed when the requested act is completed. *Jefferson Woodworking Co.* v. *Mercke*, 222 Ky. 476, 1 S. W. (2d) 532 (1927), *Paragon Oil Co.* v. *Hughes & Sons*, 193 Ky. 532, 236 S. W 963 (1922). However, tender of performance may not be sufficient. *Citizens' Nat. Life Ins. Co.* v. *Murphy*, 154 Ky. 88, 156 S. W 1069 (1913). In general, it is questionable whether part performance has any legal effect, makes the offer irrevocable, or completes the contract. The few Kentucky decisions have seemingly taken the view stated here, that a contract is formed. In reaching this result, the court assumed there was a bilateral contract, that part performance implied a promise to use reasonable diligence in completing the act. See the annotations under Section 45, supra.

But an offer to enter into a unilateral contract cannot be made into a bilateral contract by a promise to do the act. *Steadman* v. *Guthrie*, 61 Ky. (4 Metc.) 147 (1862).

(3) "If a promise is requested, no contract exists, except as qualified by Section 63, until that promise is expressly or impliedly given." The Kentucky cases are in accord with this statement. In most cases the giving of the promise is necessary to satisfy the requirement of consideration as well as that of agreement. The giving of the promise probably includes the additional requirement that it be actually or constructively communicated. See *Hopkins* v. *Phoenix Fire Ins. Co.*, 200 Ky. 365, 254 S. W 1041 (1923), *Kentucky Portland Cement Co.* v. *Steckel*, 164 Ky. 420, 175 S. W 663 (1915). The promise may be impliedly given, see the annotations of Section 5, supra, for implied promises generally, and Section 72, infra, as to implication by silence or inaction. Acceptance of an order generally implies a promise to fill it, but this is not true of the usual taking of an order by a traveling salesman. *John Matthews' Appar Co.* v. *Renz & Henry*, 22 K. L. R. 1528, 61 S. W 9 (1901), even when the order is received and acknowledged by the company, and notice of rejection is withheld several days. *Courtney Shoe Co.* v. *Curd & Son*, 142 Ky. 219, 134 S. W. 146 (1911), but see *Bluegrass Cordage Co.* v. *Luthy & Co.*, 98 Ky. 583, 33 S. W 835 (1896). (Failure to repudiate an order in 12 days held to be an acceptance.) And where a cash payment has been received

with the order, a contract will be formed if the company fails to reject the order and return the money within a reasonable time. *Enterprise Mfg. Co.* v. *Campbell*, 121 S. W 1040 (1909).

Section 53. NECESSITY FOR KNOWLEDGE OF OFFER

The whole consideration requested by the offer must be given after the offeree knows of the offer.

Annotation

This statement would probably be followed as a general rule, and it was followed in an early case involving a reward. *Lee* v. *Trustees of Flemingsburg*, 37 Ky. (7 Dana) 28 (1838), and although later cases have denied its application to reward cases. *Auditor* v. *Ballard*, 72 Ky. (9 Bush) 572; *Coffey* v. *Commonwealth*, 18 K. L. R. 646, 37 S. W 575 (1896), this does not seriously impair the validity of the rule since courts often treat offers of rewards with undue liberality.

Most of our cases have involved acts done not only before knowledge of the offer, but before the offer was in fact made. As a general rule these acts are not consideration. *Phillips* v. *Rudy*, 146 Ky. 780, 143 S. W. 397 (1912), *Howard* v. *McNeil*, 25 K. L. R. 1394, 78 S. W. 142 (1904). But even here certain exceptions have been engrafted as in the familiar housekeeper cases. *Greenup* v. *Wilhoite*, 212 Ky. 465, 279 S. W 665 (1926), and in the reward cases. *Coffey* v. *Commonwealth*, supra, at least where part of the acts were done after the offer was made. This principle is not involved where there is a request and expectation to pay, followed by the act and still later by the express promise, since in these cases the implied offer precedes the consideration. Some of the older cases show traces of the idea that a moral duty is sufficient to support a later promise. *Price* v. *Towsey*, 13 Ky. (3 Litt.) 423 (1823), *Weihing* v. *Kurfes*, 12 K. L. R. 893 (1891). See also Section 75, infra.

Section 54. WHO MAY ACCEPT AN OFFER.

A revocable offer can be accepted only by or for the benefit of the person to whom it is made.

Comment

a. The words "for the benefit of" are inserted to cover such contracts as are permitted by Section 75 (2), namely those in which the offeror's promise to B is conditional on an act being done or a promise made by C in exchange for the offeror's promise. C's act or promise is an acceptance.

b. An offer may also be accepted by an agent of the offeree, and even if one who accepts, purporting to be such an agent, is not authorized by the offeree so to do, his act may be

ratified, but throughout the restatement of this subject it is assumed, in the absence of contrary statement, that any necessary act may be done by an agent.

Annotation

No Kentucky cases involving attempted acceptance by one who is not the offeree have been found. If the offer is made to several looking to a contract with all, it must be accepted by all before there is a contract with any. *Burton* v. *Shortwell*, 76 Ky. (13 Bush) 271 (1877). This section applies only to revocable offers. Irrevocable offers, such as options, may be accepted by the assignee. *Chesbrough* v. *Vizard Inv. Co.*, 156 Ky. 149, 160 S. W 725 (1913), see also Sections 155 and 160, infra.

An offer addressed to the public may be accepted by any person. This is illustrated by the reward cases cited in the annotation to Section 53, supra. And although the offer is addressed to one person, it may be accepted by any within the class of persons for whose benefit it is made. This is illustrated by a general guaranty of credit in *Kincheloe* v. *Holmes, Sturgeon & Co.*, 46 Ky. (7 B. M.) 5 (1846).

Section 55. ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT, NECESSITY OF INTENT TO ACCEPT.

If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer.

Comment

a. When an offeror requests a certain act or forbearance as the consideration for his promise, the act or forbearance when furnished is an ambiguous expression of intent, since acts, like words, often have more than one objective meaning. The reasonable interpretation may be that the offeree accepts the proposal, but it is possible that the true interpretation is that the offeree as a free man has exercised his privilege of acting or forbearing in the manner requested, without accepting the proposal. The only way to determine what his conduct actually means even objectively, is to ascertain his intent.

b. This is not the same as saying that the offer must be the cause of the acceptance. The offer is, indeed, usually the sole cause of the acceptance; but frequently there are other causative factors, and occasionally contracts may exist where if the offer is in any sense a cause of the acceptor's action it is so slight a factor that a statement that the acceptance is caused by the offer is misleading.

c. Except to the extent stated in Sections 71 and 72, no question of intent to accept by words or acts apparently indicating assent arises when a bilateral contract is proposed. If, in accordance with Section 20, an offeree does act with intent to do them which indicate his assent to an offer of a bilateral contract communicated to him as required by Section 23, the offeree comes under a duty to the offeror; and as he is bound by the contract, he is also entitled to take advantage of it. Indeed, this is a necessary consequence of the axiom that both parties to bilateral contract must be bound or neither is bound. Whereas when a unilateral contract is proposed and the offeree does the act requested, he may do it either to make a gift or a bargain.

Annotation

This statement would be followed in Kentucky. The guaranty cases insist there must be an intention to accept the guaranty at the time the credit is extended. This intent may be established by the fact that the creditor requested the guaranty. See *McGowan* v. *Wells' Trustee*, 184 Ky. 772, 775, 213 S. W 573 (1919), and other cases cited in the next section, many going so far as to require notice of this intention.

Where an offer may be implied, as from a request or the receipt of benefits, it is clear that the benefits must be furnished with the intent to accept, and, if done as a gratuity, a contract will not be formed. *St. Joseph's Orphan Society* v. *Wolpert*, 80 Ky. 86 (1882), *Miller* v. *Cropper*, 16 K. L. R. 395 (1894).

Section 56. ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT, NECESSITY OF NOTICE TO OFFEROR.

Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance has been given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after performance of the act or forbearance, the offeree exercises reasonable diligence to notify the offeror thereof.

Comment

a. In the formation of a unilateral contract where the offeror is the party making the promise, as is almost invariably

the case, a compliance with the request in the offer fulfills the double function of a manifestation of acceptance and of giving consideration. It is only in the exceptional case where the offeror has no convenient means of ascertaining whether the requested act has been done that notice is requisite. Even then, it is not the notice which creates the contract, but lack of the notice which ends the duty

Annotation

This section states a general principle and an exception to it. The general principle would probably be followed in this state. Although no cases in direct support have been found, there are dicta to the effect that notification is not generally an essential part of the acceptance of an offer to enter into an unilateral contract. *Steadman* v. *Guthrie*, 61 Ky. (4 Metc.) 147 (1862), *Hopkins* v. *Phoenix Fire Ins. Co.*, 200 Ky. 365, 254 S. W 1041 (1923).

The exception, which requires notice if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, presents a matter of greater difficulty. This question usually arises in connection with guaranties of future credits and our decisions in regard to this are sadly confused. In an early case reasonable notice of advances made under a general letter of credit was required, and a petition by the creditor which did not contain this averment was held to be defective. *Kincheloe* v. *Holmes*, 46 Ky. (7 B. M.) 5 (1846). There was language in this decision which resulted in the requirement that there be notice of the *intention* to accept. In *Lowe* v. *Beckwith*, 53 Ky. (14 B. M.) 150 (1853), notice of intent was required but notice of extension of credit was said to be unnecessary. This is an unfortunate confusion with bilateral contracts and is based on a misconception of the reason for requiring notice in these cases, but the requirement has become well grounded in our law (see *Bell* v. *Kellar*, 52 Ky. (13 B. M.) 381 (1852), *Steadman* v. *Guthrie*, 61 Ky. (4 Metc.) 147 (1862), *Thompson* v. *Glover* 78 Ky. 193 (1879), *Greer Machine Co.* v. *Sears*, 23 K. L. R. 2025, 66 S. W 521 (1902), *Hughes* v. *Roberts-Johnson & Rand Shoe Co.*, 24 K. L. R. 2003, 72 S. W 799 (1903), and *McGowan* v. *Wells' Trustee*, 184 Ky. 772, 213 S. W 573 (1919) (Limiting to "conditional" guarantees). In many decisions it is apparent that notification that credit has been given, if given seasonably, would satisfy the requirement of notice of an intent to accept. Notice of extension of credit is required so that the guarantor may not only know the person to whom the debt is owed, but that he may know the amount of the debt. Mere notice of intention to accept the guaranty should not be sufficient and although *Lowe* v. *Beckwith* declared that notice after the transaction was unnecessary, it is followed by a line of cases requiring notice of the specific advances. *Estey* v. *Murphy*, 7 K. L. R. 596 (1886), *Gano* v. *Farmers' Bank*, 103 Ky. 508, 45 S. W 519 (1898), *Ford, Eaton & Co.* v. *Harris*,

19 K. L. R. 1236, 43 S. W 199 (1897). These cases are in turn followed by decisions denying the necessity of such notice, saying that a promise to pay on the default of the principal is an absolute guaranty and no notice of acceptance is required (see *White Sewing Mach. Co.* v. *Powell*, 25 K. L. R. 94, 74 S. W. 746 (1903), *Watkins Med. Co.* v. *Brand*, 143 Ky. 468, 136 S. W 867 (1911)). This is followed in the most recent case found—*McGowan* v. *Wells' Trustee*, supra—in which it is said that no notice of the transaction is necessary if the guaranty is "absolute" or a "primary obligation" and for this purpose distinguishes between guaranties of payment, which are said to be absolute, and guaranties of collection or solvency which require notice of the transaction. These decisions indicate an unexplained tendency to extend the rule and classification applicable to notice of default so as to cover notice of acceptance.

Notice may be waived by the guarantor. *Mast, Crowell & Kirkpatrick* v. *Lehman*, 100 Ky. 464, 38 S. W 1056 (1897), *Ford, Eaton & Co.* v. *Harris*, 19 K. L. R. 1236, 43 S. W 199 (1897), *Hughes* v. *Roberts, Johnson & Rand Shoe Co.*, supra. And although the guarantor is not bound to enquire, if he does have actual notice, from whatever source obtained, he can not require formal notification from the creditor. This is true where the advancement of credit is contemporaneous with the guaranty, or where the two transactions are closely connected. It seems that this notice may be presumed where the guarantor is an officer and stockholder in the debtor company, where he has an interest in the profits, or is otherwise in close contact or near relationship with the debtor. And it is said that notice is not required where the creditor requests the guaranty, or where a separate consideration is paid to the guarantor (see *Pittsburgh Plate Glass Co.* v. *Cassidy*, 194 Ky. 81, 238 S. W 172 (1922), *McGowan* v. *Wells' Trustee*, supra; *Greer Machine Co.* v. *Sears*, supra; *Ford, Eaton & Co.* v. *Harris*, supra; *Gano* v. *Farmers' Bank*, supra; *Thompson* v. *Glover*, 78 Ky. 193 (1897)).

It is to be noted that, according to this section, failure to give notice will not prevent the formation of the contract, but will result in its discharge. Although the confusion with bilateral contracts has often caused the courts to say that notice is essential to the formation of the contract, it is admitted that the contract is created upon the first extension of credit—*Ford, Eaton & Co.* v. *Harris*, supra—and that after the act, the offer can not be withdrawn. *Kincheloe* v. *Holmes*, supra.

Notice to a common carrier that goods have been placed in its control is necessary before it becomes liable as an insurer. *Pittsburg C. C. & St. L. Ry. Co.* v. *American Tob. Co.*, 126 Ky. 582, 104 S. W 377 (1907). See also *Dunnington* v. *L. & N. R. R. Co.*, 153 Ky. 388, 155 S. W 750 (1913).

Section 57. UNILATERAL CONTRACT WHERE PROPOSED ACT IS TO BE DONE BY OFFEROR.

If in an offer of a unilateral contract the proposed act or

forbearance is that of the offeror, the contract is not complete until the offeree makes the promise requested.

Comment

a. This section covers a particular and rather peculiar case covered by the more general language of Section 52. It occurs only where the performance of the offer automatically occurs at the moment the promise requested is given. This may happen where the proposal relates to the transfer of personal property The very act of the acceptor in promising to pay the price may, if the offer so specifies, transfer the ownership of the goods to the offeree.

Annotation

Any decision involving these unusual facts would probably agree with this statement. In *Kernan* v. *Carter*, 31 K. L. R. 865, 104 S. W 308 (1907), a contract for drilling a well provided that the plaintiff would sink a second well for a stated price. The owner of the land had a second well drilled by another. It was held that no contract was formed with the plaintiff in regard to the second well unless and until the land owner signified his assent to the proposal.

Section 58. ACCEPTANCE MUST BE UNEQUIVOCAL.

Acceptance must be unequivocal in order to create a contract.

Comment

a. An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.

Annotation

Kentucky cases are in accord with this section and require that the acceptance be positive and unambiguous. *Allen* v. *Roberts*, 5 Ky. (2 Bibb.) 98 (1810), *Hudson* v. *Arnold*, 29 K. L. R. 375, 93 S. W 42 (1906), *Combs* v. *Hazard* Ice & S. Co., 218 Ky. 29, 290 S. W 1035 (1927). An acknowledgment of the receipt of an order transmitted through a traveling salesman is not an acceptance although accompanied by the statement that it will receive prompt and careful attention. *Courtney Shoe Co.* v. *Curd & Son*, 142 Ky. 219, 134 S. W 146 (1911).

Section 59. ACCEPTANCE MUST COMPLY WITH TERMS OF OFFER.

Except as this rule is qualified by Sections 45, 63, 72, an

acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested.

Comment

a. This rule is a necessary corollary of the basic idea of contracts that duties are imposed by the law for only such performance as the parties have expressed a willingness to assume.

Annotation

Caskey v. *Williams Bros.*, 227 Ky. 73, 11 S. W (2d) 991 (1928), *Shaw* v. *Ingram-Day Lbr Co.*, 152 Ky. 329, 153 S. W 431 (1913), *New York Life Ins. Co.* v. *Levy*, 122 Ky. 457, 92 S. W 325 (1906), *Hutcheson* v. *Blakeman*, 60 Ky. (3 Met.) 80 (1860) accord.

The cases involving rewards again make a slight exception to this rule and it has been held that a statute which offers a reward for the capture and return of an escaped convict is satisfied by the return of one who has voluntarily surrendered to the claimant for the purpose of being returned. *Mudd* v. *Woodside*, 136 Ky. 296, 124 S. W 321 (1910).

Section 60. PURPORTED ACCEPTANCE WHICH ADDS QUALIFICATIONS.

A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.

Comment

a. A qualified or conditional acceptance is a counter-offer, since such an acceptance is a statement of what the person making it is willing to do in exchange for what the original offeror proposed to give. A counter-offer is a rejection of the original offer (see Section 38 and comment thereon) An acceptance, however, is not inoperative as such merely because it is expressly conditional, if the requirement of the condition would be implied from the offer, though not expressed therein.

Annotation

The Kentucky cases are in exact accord with this statement. *Caskey* v. *Williams Bros.*, 227 Ky. 73, 11 S. W. (2d) 991 (1928), *Cincinnati Equip. Co.* v. *Big Muddy R. Coal Co.*, 158 Ky. 247, 164 S. W 794 (1914), *Shaw* v. *Ingram-Day Lbr Co.*, 152 Ky. 329, 153 S. W 431 (1913), *L. & N. R. R. Co.* v. *Coyle*, 123 Ky. 854, 97 S. W 772 (1906), *New York Life Ins. Co.* v. *Levy*, 122 Ky. 457, 92 S. W 325 (1906), *Hutcheson* v. *Blakeman*, 60 Ky. (3 Met.) 80 (1860), *Hartford Life Ins. Co.* v. *Milet*, 31 K. L. R. 1297, 105 S. W 144 (1907).

However, if the acceptance, although conditional in form, merely states terms that are implied in the offer, it is unqualified and completes the contract. *Postal Telg. Cable Co.* v. *Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W 852 (1909). (Custom of the trade may be read into the offer.) And failure to object to the conditions is evidence that they were impliedly a part of the offer. *Fairmont Glass Works* v. *Crunden-Martin W W Co.*, 106 Ky. 659, 51 S. W 196 (1899).

Section 61. ACCEPTANCE OF OFFER WHICH STATES PLACE, TIME OR MANNER OF ACCEPTANCE.

If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.

Comment

a. If the offeror prescribes the only way in which his offer must be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.

Annotation

If the offer prescribes the time of acceptance, an attempted acceptance at a later time is invalid. If the offer prescribes the manner of acceptance, as delivery of a telegram, the contract is not complete when the telegram is transmitted. *Postal Tel. C. Co.* v. *Louisville Cotton S. O. Co.*, 140 Ky. 506, 131 S. W 277 (1910). If the offer requires an act as acceptance, a promise to do the act is not sufficient. *Steadman* v. *Guthrie*, 61 Ky. (4 Met.) 147 (1862), but a part performance may complete the contract (Section 45, supra). And when a promise is requested, performance of the act may be substituted as an acceptance (Section 63, infra).

Section 62. ACCEPTANCE WHICH REQUESTS CHANGE OF TERMS.

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

Annotation

No Kentucky cases involving this point have been found.

Section 63. EFFECT OF PERFORMANCE BY OFFEREE WHERE OFFER REQUESTS PROMISE.

If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract, subject to the provisions of Section 56, provided that such performance is completed or tendered within the time allowable for accepting by making a promise. A tender in such a case operates as a promise to render complete performance.

Comment

a. This section states an exception to Sections 52 and 59. If within the time allowed for accepting the offer full performance has been given, the offeror has received something better than he asked for and is bound, since the only object of requiring a promise is ultimately to obtain performance of it. Beginning to perform within the time allowed for accepting the offer will not amount to an acceptance, unless the offeror also gives an assurance that performance will be completed.

Annotation

Our courts have followed this equitable principle in *Graves* v. *Smedes' Adm.*, 37 Ky. (7 Dana.) 344 (1838).

A similar situation is found where the parties have attempted to enter into a bilateral contract but the contract is not formed because of a conditional acceptance (*Caskey* v. *Williams Bros.*, 227 Ky. 73, 11 S. W. (2d) 991), the required promise is illusory (*Rehm-Zeihler Co.* v. *Walker Co.*, 156 Ky 6, 160 S. W 777), or because of the incapacity of one of the parties (*Hoffman* v. *Colgan*, 25 K. L. R. 98, 74 S. W 724). In these cases it is held that performance by the party not bound is sufficient to bind the other and obviates the lack of verbal agreement.

The converse of this statement is not true. If there is an offer to enter into an unilateral contract, a promise to do the required act is not sufficient. *Steadman* v. *Guthrie*, 61 Ky. (4 Met.) 147 (1862).

Section 64. HOW ACCEPTANCE MAY BE TRANSMITTED, TIME WHEN IT TAKES EFFECT.

An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror.

Annotation

This section is applicable only when an authorized means of transmission is used. As to when a means is impliedly authorized, see Section 66, infra.

The law of Kentucky is in accord with this statement. *C. W Craig & Co.* v. *Thos. S. Jones & Co.*, 200 Ky. 113, 252 S. W. 574 (1923), *N. W Mut. Life Ins. Co.* v. *Joseph*, 31 K. L. R. 714, 103 S. W. 317 (1907) (Death of offeree after mailing of acceptance and before receipt.), *Carter* v. *Hibbard*, 26 K. L. R. 1033, 83 S. W 112 (1904) (Acceptance lost in mails.), *Chiles* v. *Nelson*, 37 Ky. (7 Dana.) 281 (1838). The statement in this section is followed in all respects by the dictum in *Postal Teg. C. Co.* v. *Louisville Cotton Seed Oil Co.*, 140 Ky. 506, 131 S. W 277 (1910). See also dictum in *Shaw* v. *Ingram-Day Lbr Co.*, 152 Ky. 329, 153 S. W 431 (1913), *Fairmont Glass Works* v. *Crunden-Martin W W Co.*, 106 Ky. 659, 51 S. W 196 (1899), *Hutcheson* v. *Blakeman*, 60 Ky. (3 Met.) 80 (1860)

An insurance contract is completed when the policy is mailed to the insured. *N. W Mut. Life Ins. Co.* v. *Joseph*, supra (dictum), but not when it is mailed to an agent of the company. *Provident S. L. A. Soc.* v. *Elliott's Exr.*, 29 K. L. R. 552, 93 S. W 659 (1906).

However, if the offeror demands actual communication, receipt or delivery of the acceptance, the contract does not arise until it is received. *Postal Telg. C. Co.* v. *Louisville Cotton Seed Oil Co.*, supra. But it has been held that a counter-offer containing the words "notify me at once" may be accepted by the mailing of the notification although it is lost in the mails and actual notice is not received for about a month. *Carter* v. *Hibbard*, supra.

Section 65. ACCEPTANCE BY TELEPHONE.

Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other.

Annotation

This statement is supported in *Sullivan* v. *Kuykendall*, 82 Ky. 483 (1885). (Holding, however, that when an operator acts for either of the parties, the one speaking to the operator is bound by the message delivered by her.).

Section 66. WHEN A PARTICULAR MEANS OF TRANSMISSION IS AUTHORIZED.

An acceptance is authorized to be sent by the means used by the offeror or customary in similar transactions at the time when and the place where the offer is received, unless the terms

of the offer or surrounding circumstances known to offeree otherwise indicate.

Annotation

Kentucky decisions are in agreement with this statement. A contract is formed when an unqualified acceptance is dispatched by the same means that were used in communicating the offer. *Carter* v. *Hibbard*, 26 K. L. R. 1033, 83 S. W 112; *Hutcheson* v. *Blakeman*, 60 Ky. (3 Metc.) 80; *Chiles* v. *Nelson*, 37 Ky. (7 Dana.) 281, or by a customary method in such transactions although it is not the means used by the offeror. *Fairmont Glass Works* v. *Crunden-Martin W W Co.*, 106 Ky. 659, 51 S. W 196 (dictum). And of course, there may be express authorization as in *C. W Craig & Co.* v. *Jones & Co.*, 200 Ky. 113, 252 S. W. 574.

Section 67. ACCEPTANCE BY MAIL OR FROM A DISTANCE, WHEN VALID UPON DESPATCH.

An acceptance sent by mail or otherwise from a distance is not operative when despatched, unless it is properly addressed and any other precaution taken which is ordinarily observed to insure safe transmission of similar messages.

Annotation

No Kentucky cases have been found. This section would undoubtedly be applied should such a case arise.

The fact that the letter is properly addressed and stamped is important even when the communication must be received in order to become effective. *Sullivan* v. *Kuykendall*, 82 Ky. 483 (1885) (It does not create a presumption of receipt but is evidence for the jury.), *Collins* v. *Swan-Day Lbr Co.*, 158 Ky. 231, 164 S. W 813 (1914). (It creates a presumption of receipt.).

(To be continued.)