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Restatement of the Law of Contracts Annotated with Kentucky Decisions

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AMERICAN LAW INSTITUTE'S
RESTATEMENT OF THE LAW OF CONTRACTS ANNO-
TATED WITH KENTUCKY DECISIONS*

By FRANK MURRAY**

Assignment of Contracts

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Section 154. What Future Rights May Be Assigned.

(1) Except as stated in Section 151, a right expected to arise in the future, under a contract or employment in existence at the time of the assignment, can be effectively assigned.

(2) An assignment of a right expected to arise under a contract or employment not then existing is operative only as a promise by the assignor to assign the right and an authorization to the assignee to enforce it, but neither imposes a duty upon the obligor nor precludes garnishment by the obligee's creditors.

Annotation:

The Kentucky decisions are in accord with this section.

Subsection (1) is illustrated by the assignment of the right to receive money made before payment is due as in *Carpenter v. Dummit*,

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221 Ky. 67, 297 S. W. 695 and *Richie v. Cralle*, 103 Ky. 483, 56 S. W. 963 or by the assignment of rights under option contracts as in *Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725.

This section has a special reference to the assignment of unearned wages which, if not prohibited by statute or public policy (see the annotations to Sec. 151-b) and if the requirements of K. S. Sec. 4758 are followed, are valid provided the wages are to be earned under a contract then existing—*Manly v. Bitzer*, 91 Ky. 596, 16 S. W. 464; *Boone v. Connelly*, 12 K. L. R. 190 and dictum in *Holt v. Thurman*, 111 Ky. 84, 63 S. W. 280 and *Levi v. Loevenhart*, 138 Ky. 133, 127 S. W. 748 (In the latter case the assignment was to continue “until my indebtedness . . . is settled” and it was held that the assignment was terminated by the bankruptcy of the assignor).

Subsection (2) is followed by our court in the frequent statement that a mere possibility or expectancy is not assignable. No case has been found involving an assignment of wages where the contract or employment did not exist at the time, but it is safe to say that the existence of a contract is an essential element and without it the attempted assignment would be ineffective. See *Manly v. Bitzer*, supra. It has been held that an assignment of interest to be earned on deposits thereafter made is invalid against a subsequent lien acquired by an attaching creditor of the assignor—*Peoples Bank v. Barbour*, 12 K. L. R. 231.

This subsection also covers what is commonly called “catching bargains with heirs”. That attempted assignments of expectancies by prospective heirs are invalid, see *Pendley v. Lee*, 283 Ky. 372, 25 S. W. (2d) 1030; *Riggsby v. Montgomery*, 208 Ky. 524, 271 S. W. 564; *Snyder v. Snyder*, 193 Ky. 233, 235 S. W. 743; *Hunt v. Smith*, 191 Ky. 443, 230 S. W. 936; *Burton v. Campbell*, 176 Ky. 495, 195 S. W. 1091; *Furnish's Admr. v. Lilly*, 27 K. L. R. 226, 84 S. W. 734; and other cases cited below.

We do not follow the Restatement in treating the ineffective assignment as a promise to assign in these cases. Since our decisions are based not only on the impossibility of transferring that which is not in *esse*, but also on public policy, the attempted assignment is absolutely void. After the death of the ancestor, the property is subject to levy and sale by a creditor of the assignor—*Alves v. Schlesinger*, 81 Ky. 290; *McCall's Admr. v. Hampton*, 98 Ky. 166, 32 S. W. 406. The assignee is treated as a party to an illegal contract and can neither enforce it nor recover damages for its breach. He cannot recover the value of improvements placed on the land, at least for those placed before the death of the ancestor, nor can he recover the consideration paid for the assignment. A warranty contained in the deed of assignment is also void.—*Hunt v. Smith*, 191 Ky. 443, 230 S. W. 936; *Spears v. Spaw*, 118 S. W. 275. But see *Lowry v. Spear*, 70 Ky. (7 Bush) 451 (Allowing recovery on a special covenant for indemnity but limited to the consideration received.)

The intended assignee cannot invoke an estoppel based on the deed of assignment, nor benefit by the inuring of after-acquired title, although the deed contains a covenant of warranty—*Riggsby v. Montgomery*, 208 Ky. 524, 271 S. W. 564; *Hunt v. Smith*, 191 Ky. 443, 230 S. W. 936; *Burton v. Campbell*, 176 Ky. 495, 195 S. W. 1091; *Spears v. Spaw*, 118 S. W. 275; *McDowell v. Neal*, 5 K. L. R. 331. However, if after the death of the ancestor, the heir stands by while there is a judicial sale of the assignee's claim to an innocent purchaser and allows the purchaser to enter and make improvements, he may assert his right to the land only upon refund of the purchase money and payment for the improvements—*Flatt v. Flatt*, 189 Ky. 801, 225 S. W. 1067.

It is immaterial that the assignment is made to a co-heir—*Hall v. Hall*, 153 Ky. 379, 155 S. W. 755; *Furnish's Admr. v. Lilly*, supra; *Wheeler's Exr. v. Wheeler*, 59 Ky. (2 Metc.) 474; *Alves v. Schlesinger*, 81 Ky. 290. Or that it is a release to the ancestor himself—*Weddington v. Adkins*, 54 S. W. (2d) 331; *Pendley v. Lee*, 233 Ky. 372, 25 S. W. (2d) 1030; *Elliott v. Leslie*, 124 Ky. 533, 99 S. W. 69.

Knowledge and acquiescence of the ancestor imparts no validity to these attempted assignments—*Wheeler's Exr. v. Wheeler*, 59 Ky. (2 Metc.) 474; *Alves v. Schlesinger*, 81 Ky. 290; *Elliott v. Leslie*, 124 Ky. 555, 99 S. W. 619; *Spears v. Spaw*, 118 S. W. 275; *Hall v. Hall*, 153 Ky. 379, 155 S. W. 755. And the fact that the consent is given in writing is wholly immaterial—*Burton v. Campbell*, 176 Ky. 495, 195 S. W. 1091. However, if the ancestor executes a separate writing sufficient to pass title or to bind himself in the disposition of the property to the assignee, he takes, not under the assignment, but by virtue of the grant—*McBee v. Meyers*, 67 Ky. (4 Bush) 356; *Lee v. Lee*, 63 Ky. (2 Duv.) 134. And if the ancestor join in the deed of assignment it has this same effect—*Snyder v. Snyder*, 193 Ky. 233, 235 S. W. 743 (holding that the intended assignee is entitled to the described property—undivided share of mothers' estate—thus reducing the shares of other heirs; that the heir-assignor may still claim a distributive share of the residue less the value of the consideration received by him which is treated as an advancement).

Section 155. A Right which is Conditional or Arises Under an Irrevocable Offer may be Effectively Assigned.

A right which is conditional or arises from an irrevocable offer is not for that reason incapable of effective assignment.

Annotation:

Kentucky decisions are in accord with this section. The fact that the right is conditional will not prevent its assignment—*Armstrong Mfg. Co. v. Gardner*, 209 Ky. 93, 272 S. W. 22; *Shuttleworth v. Ky. Coal & Iron Dev. Co.*, 22 K. L. R. 1341, 60 S. W. 534. A life insurance policy

is assignable—*Thompson's Ex'x v. Thompson*, 190 Ky. 3, 226 S. W. 350; *Meadows v. Meadows*, 13 K. L. R. 495. An option is assignable—*Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725.

Of course, the transfer, even to a bona fide assignee does not make the obligation absolute—*Armstrong Mfg. Co. v. Gardner*, supra; *Shuttleworth v. Kentucky Coal, etc., Co.*, supra.

Section 156. Partial Assignments.

An assignment of either a fractional part of a single and entire right against an obligor, or of a stated amount from such a right, is operative as to that part or amount to the same extent and in the same manner as if the part had been a separate right, subject to the limitation that if the obligor has not contracted to make such a partial performance no legal proceeding can be maintained by such an assignee against the obligor over his objection, unless all persons having collectively a right to the entire performance are joined in the proceeding.

Comment:

a. Several different kinds of transactions may be entered into by those who seek to transfer a partial interest in a right:

- (1) An intention may be manifested that the assignee shall enforce the entire right against the debtor, and, having done so, shall retain part for himself and turn over the remainder to the assignor.
- (2) It may be contemplated that the assignor shall enforce the whole right against the debtor and shall turn over a portion of what he collects to the so-called assignee.
- (3) It may be contemplated that the assignee shall be authorized to demand from the debtor directly payment of his portion of the right, but shall not be authorized to demand payment of the whole.

b. A transaction of the first sort is a total assignment although as to a portion of the amount collected the assignee is a trustee for the assignor. The statements, therefore, in regard to total assignments are applicable.

c. In cases of the second type there is no assignment, there is merely a promise to pay out of a fund collected in the future. It is cases of the third class that are covered by the present Section and which are properly referred to as partial assignments.

Annotation:

The Kentucky decisions do not agree in all respects with this section. Although we recognize the right of a partial assignee against his assignor or subsequently acquired claims of third parties—*Lexington Brewing Co. v. Hamon*, 155 Ky. 711, 160 S. W. 264 (superior to

a subsequent assignment of the entire claim); *Lutter v. Grosse*, 26 K. L. R. 585, 82 S. W. 935 (superior to a subsequent attachment by a creditor of the assignor); *Columbia Trust & Finance Co. v. First Nat'l Bank*, 116 Ky. 364, 76 S. W. 156 (superior to a subsequent conflicting partial assignment); *C. H. Brown Banking Co. v. Stockton*, 107 Ky. 492, 54 S. W. 854 (superior to a subsequent mortgagee); *Prichard v. Warner's Assignee*, 4 K. L. R. 349 (if the debt is secured, a partial assignee is entitled to a pro rata interest in the security); *Summers v. Kilgus*, 77 Ky. (14 Bush) 449 (same) and a partial assignee may recover on a cross-petition against a debtor who has not paid—*Kentucky Lbr., Etc., Co. v. Montz*, 158 Ky. 328, 164 S. W. 935—or set off the assigned claim in an action by the debtor—*Miller v. Malony*, 42 Ky. (3 B. Mon.) 105. In fact it has frequently been said that a partial assignee will be protected where it can be done without working a hardship on the debtor, but unfortunately this has not applied and it has been held that a debtor who has not consented to the partial assignment may discharge his obligation by payment to the assignor although he has notice of the assignment—*Henry Clay Fire Ins. Co. v. Denker's Exrs.*, 218 Ky. 68, 290 S. W. 1047. See also the dictum in *Kentucky Lbr. Etc. Co. v. Montz*, supra and *Columbia Trust and Finance Co. v. First Nat'l Bank*, supra. Although it has been held that death will not revoke an unaccepted partial assignment for value—*Just's Admr. v. Woodman*, 147 Ky. 493, 144 S. W. 379 and Section 163, infra—recent decisions have been based on the supposition that such assignments are revocable by the act of the assignor—*Stewart v. Continental Casualty Co.*, 229 Ky. 634, 17 S. W. (2d) 745; *Inter-Ocean Casualty Co. v. Dunn*, 219 Ky. 103, 292 S. W. 742. (These decisions may be justified since they involve assignments of wages so that under our statute an acceptance is necessary, but they seemingly adopt the broader dictum found in *Wallin's Creek Collieries Co. v. Saylor*, 214 Ky. 206, 282 S. W. 1095).

We agree with the Restatement in holding that, if the debtor has not consented to the partial assignment, no legal proceedings can be maintained against him by the assignee—*Henry Clay Fire Ins. Co. v. Decker's Exr.*, supra; *Weinstock v. Bellwood*, 75 Ky. (12 Bush) 139; *Bank of Gallioptis v. Trimble*, 48 Ky. (6 B. Mon.) 599; *Elledge v. Straughn*, 41 Ky. (2 B. Mon.) 81; *Snelling v. Boyd*, 21 Ky. (5 T. B. Mon.) 172. But we have not allowed the assignee to sue although all persons having collectively a right to the entire performance are joined—*Weinstock v. Bellwood*, supra (Right to sue denied although the assignor was joined); *Hubbard v. Prather*, 4 Ky. (1 Bibb) 173; *Snelling v. Boyd*, 21 Ky. (5 T. B. Mon.) 172 (Two partial assignees cannot sue although between them they have the entire beneficial interest. This decision is probably based on the ground that the assignors were joint owners and assigned separately, see Sec. 153); *Jarman v. Howard*, 10 Ky. (3 A. K. M.) 383 (A owed B and C. B assigned to C. Although A assents to the assignment, C cannot sue without joining B.)

Section 157. A Right can be Effectively Assigned Orally or by Writing:

A right can be effectively assigned either orally or by a writing.

Annotation:

The Kentucky decisions are in accord with this statement. An oral assignment is valid—*Newby v. Hill*, 59 Ky. (2 Metc.) 530; *Varnon v. Chestnut*, 8 K. L. R. 428; *Beard v. Sharp*, 23 K. L. R. 1582, 65 S. W. 810. It is superior to a subsequent written assignment—*Lexington Brewing Co. v. Hamon*, 155 Ky. 711, 160 S. W. 264. Although the chose is evidenced by a writing it may be assigned orally—*Armstrong v. Gardner*, 209 Ky. 93, 272 S. W. 22 (Commission certificates); *Guenther & Bro. v. Cary & Marble*, 17 K. L. R. 1262, 34 S. W. 232 (Fire Insurance Policy). An oral assignment of wages, coming within the provisions of K. S. Sec. 4758, would be ineffective.

Section 158. In What Cases Gratuitous Assignments are Revocable.

(1) The right acquired by the assignee under a gratuitous assignment is revocable by the assignor's death, by a subsequent assignment by the assignor, or by notice from the assignor received by the assignee or by obligor, unless,

- (a) the assignment is in a writing either under seal or of such a nature as to be capable of transferring title to a chattel without delivery thereof and without consideration; or
- (b) the assigned right is evidenced by a tangible token or writing, the surrender of which is required by the obligor's contract for its enforcement, and this token or writing is delivered to the assignee; or
- (c) the assignor should reasonably expect the assignment to induce action or forbearance of a definite and substantial character on one part of the assignee, and such action or forbearance is induced.

(2) If an assignee holding an assignment revocable because gratuitous obtains before revocation,

- (a) payment or satisfaction of the obligation, or
- (b) judgment against the obligor, or
- (c) a new contract of the obligor by novation,

he can hold what he has thus acquired. Whatever he obtains after revocation can be recovered from him by the assignor.

Annotation:

This section opens up the whole question of gifts of *choses in action*. The Kentucky decisions are generally in accord with the statement that, except in the three cases mentioned, a gratuitous assignment is revocable by the death of the assignor—*Cincinnati Finance Co. v. Atkinson's Adm'r.*, 235 Ky. 582, 31 S. W. (2d) 890; *Combs v. Roark's Adm'r.*, 221 Ky. 679, 299 S. W. 576; *Bowles v. Rutroff*, 216 Ky. 557, 288 S. W. 312; *Smith's Adm'r. v. Smith*, 214 Ky. 785, 284 S. W. 83 —or by a subsequent act of the assignor—*Kelley-Koett Mfg. Co. v. Goldenbert*, 207 Ky. 690, 270 S. W. 15; *White v. White*, 229 Ky. 666; 17 S. W. (2d) 733. However, in a few cases, the incomplete gift or assignment without delivery has been held to be irrevocable as a declaration of trust—*Thompson's Ex'r. v. Thompson*, 190 Ky. 3, 226 S. W. 350; *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660; *Roche v. George's Ex'r.*, 13 K. L. R. 493. But see *Cincinnati Finance Co. v. Atkinson's Adm'r.*, supra.

(a) A gratuitous assignment is irrevocable if it is in a writing of such a nature as to be capable of transferring title to a chattel without delivery or consideration, and if the writing itself is delivered—*Taylor v. Purdy*, 151 Ky. 82, 151 S. W. 45 (a "deed of gift" of personal property is a valid and irrevocable assignment of notes held by the donor although they are not delivered to the donee); *Weber v. Salisbury*, 149 Ky. 327, 148 S. W. 34 (order on a bank to pay entire deposit to donee); *Malone's Com. v. Lebus*, 116 Ky. 975, 77 S. W. 180 (recital in a deed that interest on a purchase-money note is to be paid to a named donee is an irrevocable assignment although the note itself is not delivered). See also *Gordon v. Young's Admr.*, 10 K. L. R. 681. That there must be a delivery of the writing, see *Baldwin's Exr. v. Barber's Ex'rs.*, 151 Ky. 168, 151 S. W. 686; *Payne v. Powell*, 68 Ky. (5 Bush) 248.

(b) A gratuitous assignment is irrevocable if there is a delivery to the assignee of a tangible token which is required by the obligor's contract for its enforcement—*Williams v. Letton*, 228 Ky. 371, 15 S. W. (2d) 296 (postal saving certificates); *Trevathan's Exr. v. Dees' Exr.*, 221 Ky. 396, 298 S. W. 975 (Certificate of deposit and bank stock); *Hale v. Hale*, 189 Ky. 171, 224 S. W. 1078 (Bonds); *Goodan v. Goodan*, 184 Ky. 79, 211 S. W. 423 (Certificate of deposit, notes and bonds); *McCoy's Admr. v. McCoy*, 126 Ky. 783, 104 S. W. 1031 (Savings Bank book); *Denunzio's Receiver v. Schlotz*, 117 Ky. 191, 77 S. W. 715 (Stock certificate); *Burge v. Burge's Admr.*, 25 K. L. R. 979, 76 S. W. 873 (Certificate of indebtedness); *Broadus v. Broadus*, 16 K. L. R. 330, 27 S. W. 989 (Notes); *Meadow's Guardian v. Meadow's Admr.*, 13 K. L. R. 495 (Life insurance policy); *Miller v. Owens*, 11 K. L. R. 440 (Notes); *Strelow v. Vonderhide's Ex'r.*, 3 K. L. R. 472 (Notes). Delivery may be to the assignee or to someone for him—*Williams v. Letton*, *Goodan v. Goodan*, *Burge v. Burge's Admr.*, supra; *Meriwether v.*

Morrison, 78 Ky. 572; *Sunderland v. Sunderland's Admr.*, 68 Ky. (5 Bush) 591. See also Sec. 159 (c).

Seemingly as an extension on this doctrine, the Court has held the assignment irrevocable where the token delivered was not required for the enforcement of the obligation, but was merely evidence of it. In this the Court has turned from the necessity of surrender of control to the mere requirement there shall be satisfactory evidence of the assignment. See *Jones' Admr. v. Moore*, 102 Ky. 591, 44 S. W. 126 (Delivery of an account book); *Stephenson's Admr. v. King*, 81 Ky. 425 (Delivery of a letter from an agent describing certain bonds which he held for the assignor). In *McCoy's Admr. v. McCoy*, supra, it is said that the delivery of a pass book will be sufficient to sustain an assignment of a checking account after the death of the assignor. However, it was held otherwise in the earlier case of *Ashbrook v. Ryan*, 65 Ky. (2 Bush) 228. In another case the assignment was held to be irrevocable because a third party refused to give up the token for delivery—*Simmonds v. Simmonds' Admr.*, 133 Ky. 493, 118 S. W. 304.

The same idea has been mistakenly applied in cases involving an oral change of beneficiary of a life insurance policy, and it has been held that such a change is possible if the policy is delivered to the new beneficiary—*Lockett v. Lockett*, 26 K. L. R. 300, 80 S. W. 1152—but not otherwise—*Hardin v. Hardin*, 191 Ky. 331, 230 S. W. 307. See Sec. 142.

If it is an assignment or gift *causa mortis*, the statements of this section apply only to the extent that the death of the assignor will not revoke the assignment. Although there has been a delivery of a tangible token, the assignment may be revoked by act of the assignor. *Drake v. Security Trust Co.*, 203 Ky. 733, 262 S. W. 4; *Lisle v. Trimble*, 92 Ky. 304, 17 S. W. 742.

(c) That a gratuitous assignor may be estopped, see the dictum in *Lisle v. Trimble*, 92 Ky. 304, 17 S. W. 742.

The statements in Subsection (2) would probably be followed in Kentucky. Even when we treated a check as an assignment (see Sec. 163, infra.) a gift of the donor's own check for part of the funds on deposit, was not such a writing or tangible token that prevented revocation by the act or death of the donor, but the cases all admit that if there had been acceptance or payment by the bank the gift would have been complete—*Foxworthy v. Adams*, 136 Ky. 403, 124 S. W. 381; *Throgmorton v. Grigsby's Admr.*, 124 Ky. 512, 99 S. W. 650. In *Reynold's Admr. v. Reynolds*, 92 Ky. 556, 18 S. W. 793, it was held that a novation made the assignment irrevocable.

Section 159. In what Cases an Effective Assignment may be Made without Assent by the Assignee.

(1) An effective assignment may be made without assent by the assignee in the following cases:

- (a) where the assignment is for value;
- (b) where the assignment is in a writing either under seal or of such a nature as to be capable of transferring title to a chattel without delivery thereof and without consideration, and the writing is delivered to some one other than the assignee;
- (c) where a tangible token or writing, the surrender of which is required by the obligor's contract for the enforcement of the assigned right is delivered to some one other than the assignee with a manifestation of intent to transfer the right.

(2) In all cases than those stated in Subsection (1) a manifestation of assent by the assignee to the assignment is essential to make it effective.

(3) Where an effective assignment is made without assent by the assignee it is regarded as if it were void from the beginning if he disclaims it within a reasonable time after acquiring knowledge thereof, except that acts lawful when done cannot by the disclaimer be made tortious.

Annotation:

The Kentucky decisions are in accord with this section.

- (a) No Kentucky cases found
- (b) *Weber v. Salisbury*, 149 Ky. 327, 148 S. W. 34 accord
- (c) *Williams v. Letton*, 228 Ky. 371, 15 S. W. (2d) 296 (Where a tangible token is delivered to a third person for the assignee, the assignment is valid "although the gift does not come to the knowledge of the donee, and is not accepted by him until after the donor's death"). See also *Meriwether v. Morrison*, 78 Ky. 572; *Kemper v. Kemper's Adm'r.*, 62 Ky. (1 Duv.) 403. In a few cases, the Court talked of the necessity of acceptance, but implied the acceptance as where the assignee is of unsound mind—*Malone's Com. v. Lebus*, 116 Ky. 975, 77 S. W. 180—or where the one receiving the writing is a joint donee, his acceptance is said to inure to the benefit of the other donees—*Goodan v. Goodan*, 184 Ky. 79, 211 S. W. 423.

Section 160. Delegation of Performance of a Duty or a Condition.

(1) A delegation by an obligor of the performance of a duty which he owes, or by an obligee of the performance of a condition to which his right is subject, is an authorization to another to render the performance.

(2) Delegation may give to the person delegated an option to render performance or not, and such an option may be given

gratuitously or by contract; or the person delegated may bind himself by contract conditionally or unconditionally to render performance.

(3) Performance or offer of performance by a person delegated has the same legal effect as performance or offer of performance by the person named in the contract, unless,

- (a) performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform, and there has been no such assent to the delegation as is stated in Section 162, or
- (b) the delegation is forbidden by statute or by the policy of the common law, or
- (c) the delegation of performance by an obligor, nor a contract with the obligor by the person to whom the performance is delegated to assume the obligor's duty, extinguishes it or prevents recovery of damages from him if the duty is not performed.

Annotation:

The language used in this section is not, as yet, found in the Kentucky decisions. Our Court speaks of the delegation of performance as an "assignment of the contract" but clearly recognizes the distinction between the assignment of rights and the delegation of duties in *F. Haag & Bros. v. Riechert*, 142 Ky. 298, 134 S. W. 191. That the person delegated may bind himself by contract and thus become liable to the obligee in case of non-performance, see *Frankfort & Cincinnati Ry. Co. v. Jackson*, 153 Ky. 534, 156 S. W. 103. This is similar to the cases involving the acceptance of a deed describing the land as being subject to a mortgage. That this of itself does not create a personal liability see *Bush v. Louisville Trust Co.*, 24 K. L. R. 2182, 73 S. W. 775; *Clay Fire Ins. Co. v. Hickman*, 6 K. L. R. 308. But the grantee may, by agreeing to assume the obligation, bind himself both to the grantor and the mortgagee—*Gray v. Gillim*, 166 Ky. 194, 176 S. W. 22; *Thompson v. McKee*, 119 S. W. 229; *Adams v. Morse*, 4 K. L. R. 264. Cf. Sec. 164.

Subsection (3) states the effect of performance, or of an offer to perform, by the person delegated in case the performance is delegable and classifies the situation where an attempted delegation is ineffective without the assent of the obligee. Paragraph (a) of this subsection is perhaps too narrow to include all our decisions. It is true that in most of these decisions, the difference between the performance the obligee would receive from the person delegated and that to which he is entitled under the contract is seemingly the deciding element—*Beard v. Beard*, 200 Ky. 4, 254 S. W. 430 (A son cannot delegate the performance of the contractual duty to furnish a home for his mother); *Davenport v. Gentry*, 48 Ky. (9 B. Mon.) 427 (An indenture

of apprenticeship is not assignable). There has been an attempt to lay down a general rule that a contract which "involves a personal liability, a relation of personal confidence, or calls for the skill or experience of one of the parties" is not assignable—*F. Haag & Bros. v. Reichert*, 142 Ky. 298, 134 S. W. 191, but a better statement is that the power to delegate the performance of duties does not depend on the subject matter of the contract, nor necessarily on the difference in the performances, but upon the intent of the parties as drawn from the whole agreement or implied from the circumstances. If this shows they expected to give and receive personal performance, it cannot be delegated.—*Beard v. Beard*, supra; *Shultz & Co. v. Johnson's Adm'r.*, 44 Ky. (5 B. Mon.) 497 (Holding that a contract to sell hemp "of his own raising" was intended to be *personal* and hence is not assignable.)

Many other Kentucky cases, frequently cited by authorities under the statement that personal contracts are not assignable, are not attempts to delegate performance, but are assignments of rights and are held ineffective in an action *at law* solely because an agreement to pay in services does not come under our statute. For example, see *Henry v. Hughes*, 24 Ky. (1 J. J. M.) 453; *Halbert v. Deering*, 14 Ky. (4 Litt.) 9; and *Force v. Thomason*, 12 Ky. (2 Litt.) 166.

Of course the performance of the duty may be delegated where the obligee assents—*Pulaski Stave Co. v. Miller's Creek Lbr. Co.*, 138 Ky. 273, 128 S. W. 96; *F. Haag & Bros. v. Reichert*, 142 Ky. 298, 134 S. W. 191 (Dictum).

Subsection (4) states the law in Kentucky. *Frankfort & Cincinnati Ry. Co. v. Jackson*, 153 Ky. 534, 156 S. W. 103. "This (delegation), however, is not an assignment of his liability, for he does not cease to be liable if the work is not done by his assignee in accordance with the contract"—Dictum in *F. Haag & Bros. v. Reichert*, supra.

Section 161. Assignment of Rights Under a Bilateral Contract.

Rights under a bilateral contract may be assigned as effectively as rights under a unilateral contract; but duties on which rights under a bilateral contract are conditional cannot be extinguished or varied materially by any assignment.

Annotation:

This section states the law in Kentucky. Rights under a bilateral contract are assignable even in those cases where the connected duties would not be delegable, but the assignment alone does not extinguish the liability of the assignor—*Armstrong Mfg. Co. v. Gardner*, 209 Ky. 93, 272 S. W. 22; *F. Haag & Bros. v. Reichert*, 142 Ky. 298, 134 S. W. 191. See also *Pulaski Stave Co. v. Miller Creek Lbr. Co.*, 138 Ky. 372, 128 S. W. 96 and *Hazel & Co. v. McCloskey*, 6 K. L. R. 736.

Section 162. In What Cases Assent to an Assignment of a Right or to the Delegated Performance of a Duty Precludes Subsequent Objection.

(1) If in a contract the obligor manifests assent to the future assignment of a right, or the obligee manifests assent to the future delegation of the performance of a duty, the power of assignment or delegation in accordance with the terms of the manifested assent exists despite any subsequent objection.

(2) If such assent is manifested after the creation of a contract, the assent is similarly effective if it is given for sufficient consideration or the facts are such that an informal promise would be binding or if, in reasonable reliance on the manifestation, a material change of position takes place. Comment on Subsection (1):

a. The obligor's assent to assignment is often expressed in a contract by the addition of the words "or his assigns" after the promisee's name.

Annotation:

Generally the assent of the obligor is not essential to the validity of an assignment—*Wallins Creek Collieries Co. v. Saylor*, 214 Ky. 206, 289 S. W. 1095; *Philadelphia Veneer & Lbr. Co. v. Garrison*, 160 Ky. 329, 169 S. W. 714; *Newby v. Hill*, 59 Ky. (2 Metc.) 539. But there are cases where the right is not assignable because of the effect of the assignment on the obligor (Secs. 151 and 152) and here the assent or "ratification" by the obligor precludes subsequent objections—*Pulaski Stave Co. v. Miller Creek Lbr. Co.*, 138 Ky. 372, 128 S. W. 96. Assent by an obligor to a partial assignment does not prevent him from objecting to a suit by the assignee—*Jarman v. Howard & Co.*, 10 Ky (3 A. K. M.) 333—but it probably takes away his right to pay the assignor although notice alone would not have this effect—See cases cited under Sec. 156. It is also said that assent to the delegation of a duty precludes a subsequent objection that the contract called for personal service—*F. Haag & Bros. v. Reichert*, 142 Ky. 298, 134 S. W. 191.

There is a distinction between assent to the assignment and a promise to the assignee. If the latter, and the assignee is prejudiced, the obligor is estopped to deny the validity of the claim—*Stone v. Hart*, 23 K. L. R. 1777, 66 S. W. 191; *Morrison's Adm'r. v. Beckwith*, 20 Ky. (4 T. B. M.) 73; *Short v. Jackson*, 2 Ky. (Sneed) 192. However, this is only a waiver of such defenses as were known at the time—*Dean v. Skinner's Adm'r.*, 3 K. L. R. 336.

Section 163. In What Cases an Order is an Assignment.

(1) An order by an obligee upon his obligor which is conditional upon the existence of a particular duty of the obligor to the obligee or of an indebtedness of the obligor to the obligee which will be wholly or partially extinguished by performance or payment in compliance with the order, is an assignment if the person to whom the order is given is authorized by the obligee to retrain the performance or payment.

(2) An order which directs the drawee to render a performance or make a payment irrespective of the existence of a duty or indebtedness is not an assignment, though the drawee is under a duty to the drawer to comply with the order and though the order is accompanied with a direction to charge the performance or payment to a particular account.

Annotation:

Philadelphia Veneer & Lbr. Co. v. Garrison, 160 Ky. 329, 169 S. W. 714.

Just's Adm'r. v. Woodman, 147 Ky. 493, 144 S. W. 379.

C. H. Brown Banking Co. v. Stockton, 107 Ky. 492, 54 S. W. 854.

Lutter & Voss v. Grosse, 26 K. L. R. 585, 82 S. W. 278.

Varnon v. Chestnut, 8 K. L. R. 428.

Prichard v. Warner's Assignee, 4 K. L. R. 349.

Accord

In most of the cases cited above the order was for only part of the debt due the drawer and was held to be irrevocable although unaccepted by the drawee—*Just's Adm'r. v. Woodman*, supra. The same was true of checks when they were treated as assignments—*Farmer's Bank and Trust Co. v. Newland*, 97 Ky. 464, 31 S. W. 38; *Lester & Co. v. Given, Jones & Co.* 71 Ky. (8 Bush) 357. But recent cases have held that orders affecting part of the debt only are revocable by the drawer at any time before acceptance by the drawee, and that before acceptance the drawee may ignore the order and pay the drawer—See the annotation to Sec. 156.

That to be an assignment, the order cannot be absolute, but must be conditional on a particular debt or duty, due or to become due, see *Hart's Assignee v. Dixon*, 5 K. L. R. 669 and 602. (This must appear on the face of the order); *Just's Adm'r. v. Woodman*, supra (dictum).

As to the distinction between an order that operates as an assignment and one that creates a mere agency, see the dictum in *Philadelphia Veneer & Lbr. Co. v. Garrison*, supra.

Checks were formerly assignments—*Boswell v. Citizens Bank*, 123 Ky. 485, 96 S. W. 797; *Farmers Bank & Trust Co. v. Newland*, supra;

Lester v. Given, supra, *Buckner v. Sayre*, 57 Ky. (18 B. Mon.) 745. But this was changed in 1904 by the adoption of the Negotiable Instruments Law—K. S. Sec. 3720b-189; *Dickerson v. Snyder*, 209 Ky. 212, 272 S. W. 384. And since that date a bank, in the absence of a written acceptance or certification of the check, is not liable to the payee for an arbitrary refusal to honor it—*Ewing v. Citizen's Nat'l. Bank*, 162 Ky. 551, 172 S. W. 955; *First Nat'l. Bank v. Hargis Commercial Bank*, 170 Ky. 690, 186 S. W. 741.

Section 164. Interpretation of Words Purporting to Assign a Bilateral Contract and Effect of Acceptance of the Assignment by the Assignee.

(1) Where a party to a bilateral contract which is at the time wholly or partially executory on both sides, purports to assign the whole contract, his action is interpreted in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties.

(2) Acceptance by the assignee of such an assignment is interpreted, in the absence of circumstances showing a contrary intention, as both an assent to become an assignee of the assignor's rights and as a promise to the assignor to assume the performance of the assignor's duties.

Comment:

a. A party to a bilateral contract does not always have clearly in mind the effect which can be produced or which he wishes to produce, by an attempted substitution of another in his place. He may say or write with reference to a bilateral contract "I assign this contract," or "I assign all my rights and obligations under this contract." By such words he purports to assign duties as well as rights. This Section provides a rule of interpretation in such cases, and gives as full effect to the assignor's probable intention as the law permits.

Annotation:

This interpretation was given to an assignment of a bilateral contract in *F. Haag & Bros. v. Reichert*, 142 Ky. 298, 134 S. W. 191.

(To be Continued.)

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