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Restatement of the Law of Contracts Annotated with Kentucky Decisions

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Section 165. Repudiation of a Duty Is Not Excused by Providing a Competent Person to Assume its Performance; But Acceptance of Any Performance from the Delegated Person May Effect a Novation.

(1) Where a party to a contract who is subject to a duty manifests an intention not to perform it and to be subject to no duty in case of its non-performance, the legal effect of such manifestation is not limited by the fact that he has made a contract with a competent person, by which the latter promises to perform the duty.
(2) If the other party to the contract, with knowledge of such a manifestation of intention, as is stated in Subsection (1), accepts performance of any part of the duty from the person who has assumed it, without previously informing either the party who delegates or the person who assumes performance of an intention to retain unimpaired the rights under the contract, a novation arises which discharges the delegating party from his duty to perform, and substitutes instead a similar duty in the person who assumes performance.

Annotation:

(1) There are seemingly no Kentucky cases in point, but since the assignor remained liable (see the annotation to Section 161), this follows our general doctrine of repudiation—Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S. W. 242.

(2) Our decisions are in accord with this statement. Although silence alone does not generally give consent to the substitution or effect an offered novation—O'Kain v. Davis, 186 Ky. 184, 216 S. W. 354—but acceptance of part performance from one who has assumed the duty, with knowledge and without complaint, may have this result—Atcorn v. Arthur, 230 Ky. 509, 20 S. W. (2d) 276.

Section 166. Effect of a Promise to Assign in the Future.

(1) A contract to assign a right in the future is not an assignment. But a contract to assign as security a right which is specified and capable of effective present assignment under Sections 151 and 154, gives the promisee a right against the obligor inferior to that of an assignee only in that the right will be extinguished if, before satisfaction is obtained by the promisee, an assignment of the obligee's right is made to a purchaser for value in good faith who neither knows nor has reason to know of the prior contract.

(2) The obligor may require that the promisor be joined in any action to enforce the right brought against him by the promisee.

Annotation:

This section states the law in Kentucky—Taylor's Exrs. v. Gibbs, 42 Ky. (3 B. Mon.) 316 (Where A, as security for and as a method of paying a debt due B, agreed to set apart a sum of money collected or to be collected by C, B has an equitable lien on the fund superior to the rights of general creditors of A). In Williamson v. Yager, 91 Ky. 282, it is said that a contract to assign will be specifically enforced,
although in this case the assignment was not to be as security but was intended as a donation to third parties. The rights under a contract to assign on condition may be cut off by an assignment to another before the happening of the condition—Newby v. Hill, 59 Ky. (2 Metc.) 530. These cases are not to be confused with agreements to pay out of a particular fund as in People's Bank v. Barbour, 14 K. L. R. 98, 19 S. W. 585, and Marshall v. Strange, 10 K. L. R. 410, 9 S. W. 250.

Section 167. Defenses and Set-offs to Which An Assignee's Right is Subject.

(1) An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor.

(2) Except as stated in Subsection (3), an assignee's right against the obligor is subject to all set-offs and counterclaims which would have been available against the assignee if he were the original obligee.

(3) A sub-assignee's right against the obligor is not subject to the set-off or counterclaim of a right of the obligor against a prior assignee unless the obligor's right was acquired prior to any sub-assignment by the prior assignee, nor even in that case if a sub-assignee claiming under such prior assignee is a purchaser for value in good faith of the assigned right, who neither knows nor has reason to know of the existence of the obligor's right.

Annotation:

Subsection (1) states the law in Kentucky. Section 474 of our Statutes provides for the assignment of bonds, bills and notes but "not to impair the right to any defense, discount, or offset which the defendant has or might have used against the original obligee, or any intermediate assignor, before notice of the assignment." See also Carroll's Kentucky Codes, 1932, Section 19. Since the adoption of the Negotiable Instrument Law in 1904, this section does not apply to negotiable instruments in the hands of holders in due course (Ky. S., Sec. 3720b-57) but it does apply to other negotiable instruments (Ky. S., Sec. 3720b-58) and to non-negotiable bonds, bills and notes and to assignments of other rights, i.e., "equitable assignments."
That the assignee is subject to all defenses existing at the time of the assignment and which would have been available against the obligee, see: Armstrong Mfg. Co. v. Gardner, 209 Ky. 93, 272 S. W. 22 (Non-performance of condition precedent); Bitzer v. Mercke, 111 Ky. 299, 63 S. W. 771 (Judgment barring claim of assignor); Richie v. Orelle, 108 Ky. 483, 56 S. W. 963 (Failure of consideration); Day v. Billingsly, 66 Ky. (3 Bush) 157 (Statute of limitations); Pace v. Martin, 63 Ky. (2 Duv.) 522 (Illegality); True v. Triplet, 61 Ky. (4 Metc.) 57 (Usury); Turney v. Hunt, 47 Ky. (8 B. Mon.) 401 (Usury); Hunt v. Brand's Heirs, 44 Ky. (5 B. Mon.) 562 (Failure of consideration) Clark v. Boyd, 22 Ky. (6 T. B. Mon.) 293 (Payment); Thompson v. Moore, 20 Ky. (4 T. B. Mon.) 79 (Illegality); Chiles v. Corn, 10 Ky. (3 A. K. M.) 230 (Fraud).

The same is true of defenses arising after the assignment and before notice of it to the obligor—Wallins Creek Coal Co. v. Saylor, 214 Ky. 206, 282 S. W. 1096; Marr v. Hanna, 30 Ky. (7 J. J. M.) 642; Gibson v. Pew, 26 Ky. (3 J. J. M.) 222; Stockton v. Hall, 3 Ky. (Hardin) 168; The same rule applies to counterclaims and set-offs: City of Frankfort v. Brislan, 126 Ky. 477, 104 S. W. 1199; Clark v. Raison, 126 Ky. 486, 104 S. W. 342 (Set-off); Brown v. Vance's Ex'rs., 18 Ky. (2 T. B. Mon.) 156; Union Bank & Trust Co. v. Ford, 31 K. L. R. 8, 101 S. W. 247 (Counterclaim).

Deposits in an insolvent bank may be set-off against debts due the bank in an action by the receiver—Reid v. Owensboro Saving Bank, 141 Ky. 444, 132 S. W. 1026; Finnell v. Nesbit, 55 Ky. (16 B. Mon.) 133. To be used as a set-off against an assignee for value the debt must be due before notice of the assignment—Walker v. McKay, 59 Ky. (2 Metc.) 294; Graham v. Telford, 58 Ky. (1 Metc.) 112; Henderson Nat'l. Bank v. Lagow, 3 K. L. R. 173; Phillips v. Offut, 18 K. L. R. 1011, 38 S. W. 1044; cf. Chenault v. Bush, 84 Ky. 528 (assignment for benefit of creditors).

Of course, defenses, set-offs or counterclaims arising after notice of the assignment may not be used against an assignee for value—Jackson v. Holloway, 53 Ky. (14 B. Mon.) 133; Small v. Browder, 50 Ky. (11 B. Mon.) 212; Bank of Gallipolis v. Trimble, 45 Ky. (5 B. Mon.) 599; McDonald v. Ford, 31 Ky. (1 Dana) 464; Marr v. Hanna, 30 Ky. (7 J. J. M.) 642.

As to what constitutes notice, see Wallins Creek Coal Co. v. Saylor, 214 Ky. 206, 282 S. W. 1095; Clark v. Boyd, 22 Ky. (6 T. B. Mon.) 293; Stockton v. Hall, 3 Ky. (Hardin) 168.

The obligor may be estopped to use defenses or set-offs against an innocent assignee for value. Where the note is executed for the purpose of enabling the payee to raise money on it, the maker can't, as against such an assignee, show a lack of consideration—Gano v. Finnell, 52 Ky. (13 B. Mon.) 390—nor set-off debts due him by the payee—Barbaroux v. Barker, 61 Ky. (4 Metc.) 47. A face-to-face representation by the obligor to the prospective assignee that the obligation is valid and free from defenses or set-offs, or a promise to pay it in full,
precludes the use of defenses or set-offs if the obligation is purchased in reliance on the representation or promise—Smith v. Stone, 56 Ky. (17 B. Mon.) 168; Morrison's Admr. v. Beckwith, 20 Ky. (4 Mon.) 73; Fugate v. Hansford's Exrs., 13 Ky. (3 Litt.) 262. A subsequent letter from the obligor to the prospective assignee may create an estoppel—Short v. Jackson, 2 Ky. (Sneed) 192. It seems that a "certificate of good character" executed simultaneously with and accompanying the obligation would generally have the same effect—Crabtree v. Atkinson, 93 Ky. 333, 20 S. W. 260; Wells v. Lewis, 61 Ky. (4 Metc.) 269. But this is not true where both the note and certificate were obtained by fraud, and in this a distinction is made between simultaneous certificates and subsequent face-to-face representations—Hill v. Thixton, 94 Ky. 38, 23 S. W. 947.

The defense of illegality has also given trouble. Early cases show a reluctance to prevent the obligor from using this defense although the whole transaction was entered into with the intent of defrauding innocent assignees—Thompson v. Moore, 20 Ky. (4 Mon.) 79—or although a certificate accompanied the obligation and was seen and relied on by the assignee—Pace v. Martin, 63 Ky. (2 Duv.) 522. But it was held that a new promise, a renewal note, made directly to the assignee, on consideration of an extension of time and surrender of the old note, prevented the obligor from showing the illegality of the original consideration—Woodridge v. Gates, 25 Ky. (2 J. J. M.) 221—and the most recent case holds that a face-to-face representation which induced the purchase of the note had this effect although the particular obligation was void by statute—Holzbog v. Barkow, 156 Ky. 161, 160 S. W. 792.

Subsection (2) states the law in Kentucky—Ward v. Martin, 19 Ky. (3 T. B. M.) 18; Lee v. Russell, 18 K. L. R. 961, 38 S. W. 874. Of course if the obligation is held by the assignee in a representative capacity, an individual liability cannot be set-off against it—Thompson v. Sunrise Coal Co.'s Trstee, 181 Ky. 158, 104 S. W. 89; Cummings v. Bradford's Admr., 14 K. L. R. 527.

Subsection (3) states the law in Kentucky. Our statute (Sec. 474), applicable to non-negotiable bonds, bills and notes, preserves the defenses or set-offs which the obligor has against the obligee "or any intermediate assignor." It is possible that under the wording of our statute, defenses, against an intermediate assignor acquired after the sub-assignment but before notice, would be effective against the sub-assignee.

It is clear that if the sub-assignee takes with notice, actual or constructive, of the rights of the obligor against the intermediate assignee, he takes subject to those rights—Louisville Water Co. v. Fullenlove, 12 K. L. R. 556; Shuttleworth v. Kentucky Coal, Etc., Co., 22 K. L. R. 1806, 61 S. W. 1013.

No cases have been found involving the right of the obligor to use such defenses against an innocent sub-assignee for value, but the situa-
tion is comparable to the many cases where such a sub-assignee has been protected from liens or claims by a prior assignor—Taylor v. Ford, 64 Ky. (1 Bush) 44; McBrayer v. Collins, 57 Ky. (18 B. Mon.) 833; Anderson's Adm'r. v. Wells, 45 Ky. (6 B. Mon.) 540.

Section 168. New Facts Which Would Remove Defects in an Assignor's Right Have the Same Effect in Favor of an Assignee.

Except as stated in Section 92, defects in the assignee's right or legal disadvantages to which it is subject may be removed by such new facts as would have had that effect in favor of the assignor had there been no assignment.

Comment:

a. Where the new facts which would have the effect of removing legal disadvantages if there had been no assignment are promises to the assignor of the kind referred to in Section 92, they are of no avail to the assignee if made after the assignment.

Annotation:
The Kentucky decisions are in accord with this section. An estoppel in favor of an assignor inures to his assignee—Short v. Jackson, 2 Ky. (Sneed) 182. An assignee of a conditional right benefits by the performance of the condition by his assignor—F. Haag & Bros. v. Reichert, 142 Ky. 298, 134 S. W. 191.

This statement does not apply to cases where the assignor has no contract right at the time of the attempted assignment. An assignee of interest on deposits to be thereafter made acquires no right by the fact that deposits are later made—Peoples Bank v. Barbour, 12 K. L. R. 231. Although an heir's right becomes indefeasible on the death of the ancestor, this does not affect the claim of an assignee of the expectancy—Riggsby v. Montgomery, 208 Ky. 524, 271 S. W. 564; Hunt v. Smith, 191 Ky. 443, 230 S. W. 936, and cases cited under Section 154(c).

Section 169. Interpleader Lies Where An Assignment Is Voidable.

If an assignment is voidable the obligor may interplead the assignee and the person having the power of avoidance. If the latter elects to exercise his power the obligor is under no duty to the assignee.

Annotation:

No Kentucky cases in point have been found. That the right to interplead the assignor exists in all non-statutory assignments regardless of voidability, see the annotations to Section 151(a).
Section 170. By Whom An Obligor May Be Discharged.

(1) Except as stated in Subsection (3), an obligor is discharged from any duty to the obligee or to any assignee if he obtains a discharge of the duty from the person then having the right to receive performance.

(2) Except as stated in Subsection (3) an obligor is discharged from any duty to the obligee or to any assignee, if he obtains for value, by performance or otherwise, a discharge of the duty.

(a) from the obligee or from any holder of an irrevocable assignment, if the obligor neither knows nor has reason to know facts showing that another person than the person giving the discharge has the right to receive performance, or

(b) from any holder of an assignment defeasible because gratuitous but on no other ground, unless the obligor knows or has reason to know facts showing not only that the assignment is gratuitous but that it has been effectually revoked or superseded;

(c) from any holder of an assignment voidable by the assignor because of infancy, insanity, fraud, duress, mistake, or illegality, if the discharge is obtained in good faith prior to avoidance of the assignment by the assignor, and the obligor neither knows nor has reason to know facts showing that the assignment is voidable.

(3) If there is a tangible token, or writing the surrender of which is required by an obligor’s contract for its enforcement, the obligor is discharged from any duty to the obligee or to any assignee if he obtains a discharge of the duty and surrender of the token or writing.

(a) from the obligee or from any assignee if such obligee or assignee then has indefeasible ownership thereof, or

(b) from the obligee or from any assignee, if such obligee or assignee, though not having indefeasible ownership, then has possession thereof with the consent of the person having the right of possession, provided that the obligor gives value in good faith by performance or otherwise, neither knowing nor having reason to know of the defect in ownership of the person giving the discharge.
If the obligor does not obtain surrender of the token or writing he is under a duty to render the agreed performance in spite of a previous discharge within the terms of Subsections (1) or (2), to an assignee who for value in good faith, neither knowing nor having reason to know of the discharge, purchases from the obligee or from any assignee such token or writing.

Annotation:

This section, with the exceptions noted, states the law in Kentucky.

Subsection (1) includes the usual cases of discharge by the assignee and the more unusual cases of discharge by the obligee before the assignment, as in *DeBaun v. Davis*, 1 Ky. Opin. 281.

Subsection (2a) deals with discharges by the apparent owner of the right. An obligor is discharged from a duty to the assignee if he obtains for value a discharge from the obligor before he has notice of the assignment—*Gibson v. Pew*, 26 Ky. (3 J. J. M.) 222; *Clark v. Boyd*, 22 Ky. (6 Mon.) 238; *Stockton v. Hall*, 3 Ky. (Hardin) 160. And conversely, the obligor cannot be so discharged by the obligee after notice of the assignment—*Turneys v. Hunt*, 47 Ky. (8 B. Mon.) 401; *Marr v. Hanna*, 30 Ky. (7 J. J. M.) 642; *Johnston v. Lewis' Adm'r.*, 8 Ky. (1 A. K. M.) 401.

This statement is not true as to partial assignments in Kentucky, as the obligor may safely pay the obligee regardless of notice of the partial assignment—*Henry Clay Fire Ins. Co. v. Denker's Ex'r.*, 218 Ky. 65, 290 S. W. 1047. See also *Kentucky Lbr. Co. v. Montz*, 158 Ky. 328, 164 S. W. 935. And where a judgment is rendered in the name of the obligee, the interest of the assignee not appearing therein, a payment to the obligee, discharges the obligation although it is made with notice of the assignment—*Eastburn v. Wells*, 37 Ky. (7 Dana) 430. Unfortunately, we also have a recent decision which is contra to this section in that “actual notice” is required—*Wallins Creek Collieries Co. v. Saylor*, 214 Ky. 206, 282 S. W. 1095 (Holding that after the obligor has received, and stamped as approved, an unsigned order to pay the entire claim to another, he may safely pay to the obligee). Notice to one of two joint obligors is not notice to the other—*Clark v. Boyd*, supra.

(b) Performance to a gratuitous assignee discharges the obligation—*Henderson Nat'l. Bank v. Lagow*, 3 K. L. R. 173. Since the obligor cannot object that the contract of assignment was based on a usurious consideration payment to such an assignee should discharge the obligation—*Little v. Hord*, 3 Ky. (Hardin) 87.

(c) It seems that a discharge by a fraudulent assignee would not be sufficient if at the time of payment or performance, the obligor knew of the fraud, but otherwise it is sufficient—*Field's Adm'r. v. Perry County State Bank*, 214 Ky. 24, 282 S. W. 555. Of course if no assignment was in fact made, as in case of a forged endorsement, the obligor
is not protected in his payment—Taylor’s Adm’r. v. Scott, 218 Ky. 302, 291 S. W. 393; Smith v. Shield, 5 Ky. (2 Bibb.) 328.

Subsection (3) deals with the discharge of the obligor where there is a tangible token of the obligation.

(a) A discharge from one then having an indefeasible ownership is, in the absence of facts creating an estoppel, sufficient—Taylor’s Adm’r. v. Scott, 218 Ky. 302, 291 S. W. 393.

(b) The same is true of a discharge by one having possession with the consent of the one entitled to possession if payment is made without knowledge of the rights of others—Harrison v. Burgess, 21 Ky. (5 Mon.) 417. Although the obligor pays to, and receives a discharge from, the holder of the token he takes the risk that the possession was with the consent of the one entitled, or that the assignment was in fact made—Kentucky Title Saving Bank, Etc. v. Dunaven, 205 Ky. 801, 266 S. W. 667; Currens v. Hart, 3 Ky. (Hardin) 41. It is assumed that an assignment in blank or to bearer would create an estoppel against the rightful owner, but where there is a special endorsement, the obligor takes the risk of the agency of the one who presents the instrument for payment—BarneZl v. Ringgold, 80 Ky. 289. As to the burden of proof, see Taylor’s Adm’r. v. Scott, supra.

(c) One giving a renewal note and failing to take up the matured obligation is bound to bona fide assignees of either or both—Citizen’s Bank v. Bank of Waddy, 126 Ky. 169, 103 S. W. 249.

Section 171. An Assignee Succeeds to Any Right of Priority of the Assignor in an Obligor’s Insolvent Estate, and to Any Securities Available to the Assignor.

(1) An assignee is entitled to priority of payment from the obligor’s insolvent estate if the assignor was so entitled.

(2) Unless otherwise provided in the assignment or by agreement of the assignee with the assignor or with the obligor, an assignee under an effective assignment for value has the same right to any securities for the assigned right that were available to the assignor, though he has not bargained for them as if the assignor had agreed to transfer them; but the right of such an assignee is inferior to that of one who purchases the securities for value in good faith and who neither knows nor has reason to know of the assignee’s right.

Annotation:

This section restates the law of Kentucky.

(1) Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker’s Trustee, 117 Ky. 478, 78 S. W. 413, accord.

(2) In the absence of an agreement an assignee for value has a right to the securities which accompanied the obligation in the hands.

This protection is given to a partial assignee—Summers v. Kilgus, 77 Ky. (14 Bush) 449; M'OClanahan v. Chambers, 17 Ky. (1 Mon.) 43; Prichard v. Warner's Assignee, 4 K. L. R. 349; Carlisle v. Jumper, 51 Ky. 282; Garvin v. Barren, 10 Ky. Opin. 584—and his right to the se-curity is probably superior to the right of the assignor—Forwood v. Dehoney, 68 Ky. (5 Bush) 174 (Dictum).

It seems that one who has constructive knowledge of the character of the holding by the obligee, cannot acquire a right to the security so as to separate it from the obligation to the prejudice of even a sub-sequent assignee—Drinkard v. George, supra. See also Guy v. Butler, 69 Ky. (6 Bush) 508.

Section 172. In What Case an Assignee Prevails Over an Attachment of the Assigned Right by a Creditor of the As-signor.

(1) Except as stated in Subsection (2), the right of an assignee whose assignment is effective and irrevocable is su-perior to that of a subsequently attaching creditor of the assignor, unless the assignment is made in fraud of creditors; but the right of an assignee is inferior to that of such a creditor if the assignment is gratuitous or is voidable for fraud or duress in its procurement or is in fraud of creditors.

(2) If an obligor garnisheed for a debt due from him to the assignor neither knows nor has reason to know, until after judgment has been rendered charging him, of an assignment of the debt made prior to the garnishment, he is discharged from his obligation to the assignee.
Annotation:

The Kentucky decisions agree with the statements in this section.


An oral assignment is effective for this purpose, and it is not necessary that the obligor have notice of the assignment before the attachment—Newby v. Hill, 53 Ky. (2 Mete.) 530; Rich v. Swetman, 15 K. L. R. 629; Lexington Brewing Co. v. Harmon, supra.

But it must be such an assignment that releases the obligor from his duty to the assignor—Boswell v. Citizens Saving Bank, 123 Ky. 485, 96 S. W. 797—or such that he can be compelled to pay the assignee although forbidden to do so by the assignor—R. C. Poage Milling Co. v. Economy Fuel Co., supra.

An assignment of a right, if represented by a tangible token and if given as security is invalid against subsequent attachments by creditors of the assignor unless there is an actual delivery of the token to the assignor—Ky. Stats., Sec. 1908; Peoples Bank v. Continental Supply Co., 213 Ky. 44, 280 S. W. 468.

Subsection (2): An obligor garnisheed to judgment in ignorance of the assignment is not bound to the assignee—Coburn v. Currens & Owens, 64 Ky. (1 Bush) 242. But an obligor cannot discharge his duty to an assignee by payment to the attaching creditor if he have notice of the assignment before he makes his confession as garnishee—Stockton v. Hall, 3 Ky. (Hardin) 168—or before judgment is rendered against him—Forepaugh v. Appold & Sons, 56 Ky. (17 B. Mon.) 625.

If the obligor pay the attaching creditor without notice of a legal assignment, the assignee may recover from the creditor—Garrott v. Jaffrey, 73 Ky. (10 Bush) 413 (saying it would be otherwise in case of an equitable assignment as defined in Section 151, supra).

Section 173. Priorities Between Successive Assignments of the Same Right.

Where the obligee or an assignee makes two or more successive assignments of the same right, each of which would have been effective if it were the only assignment, the respective rights of the several assignees are determined by the following rules:

(a) A subsequent assignee acquires a right against the obligor to the exclusion of a prior assignee if the prior assignment is revocable or voidable by the assignor;

(b) Any assignee who purchases his assignment for value in good faith neither knowing nor having reason to know of a prior assignment, and who obtains—
(i) payment or satisfaction of the obligation, or
(ii) judgment against the obligor, or
(iii) a new obligation of the obligor by a novation, or
(iv) delivery of a tangible token or writing, surrender of which is required by the obligor’s contract for its enforcement,
can retain any performance so received and can enforce any judgment or novation so acquired, and, if he has obtained a token or writing as stated in paragraph (iv), can enforce against the obligor the assigned right;

(c) Except as stated in Clauses (a) and (b), a prior assignee is entitled to the exclusion of a subsequent assignee to the assigned right and its proceeds.

Annotation:
This section restates the law of Kentucky.

Subsection (a): A subsequent assignment for value is superior to a prior revocable or voidable assignment—McCormac v. Smith, 19 Ky. (3 T. B. Mon.) 429. (Where the prior assignee of a tangible token took with knowledge that it had been sold to one who later took an assignment on a separate paper); Stewart v. Continental Casualty Co., 229 Ky. 634, 17 S. W. (2d) 745. (An assignment of wages before an acceptance by the employer, may be revoked, or the same claim assigned to a third party so as to defeat the prior assignee.)

Subsection (b): The cases we have which touch on this subsection, seemingly admit the rules stated here but deal with exceptions to them. A subsequent assignee does not obtain a priority by the wrongful application of money to his claim—Columbia Finance & Trust Co. v. First Nat'l. Bank, 116 Ky. 364, 76 S. W. 156. The tangible token must be purchased without notice of the prior assignment—Armstrong v. Flora, 19 Ky. (3 T. B. Mon.) 43.

Subsection (c) states the general rule that in a contest between successive assignees that which is prior in time will prevail. This is true although the subsequent assignment is for value and without notice of the prior equity—Newby v. Hill, 59 Ky. (2 Metc.) 530; Lexington Brewing Co. v. Harmon, 155 Ky. 711, 160 S. W. 264 (Although the first assignment is oral and the later assignment written); Carlisle v. Jumper, 51 Ky. 282; Talbot v. Cook, 23 Ky. (7 T. B. Mon.) 483; Millar v. Field, 10 Ky. (3 A. K. M.) 104. And this is true although the subsequent assignee is the first to give notice to the obligor—Columbia Finance & Trust Co. v. First Nat'l. Bank, 116 Ky. 364, 76 S. W. 156 (Which applies this rule for the protection of a partial assignee).

If an assignor's right against the obligor is voidable by someone other than the obligor or is held in trust for such a person, an assignee who purchases the assignment for value in good faith neither knowing nor having reason to know of the right of such person cannot be deprived of the assigned right or its proceeds.

Annotation:

The Kentucky decisions are in accord with this section—Pranther v. Weissiger, 73 Ky. (10 Bush) 117 (Although a non-negotiable note is held in trust, an assignee for value from the trustee takes it free from the unknown interest of the cestui que trust); Newby v. Hill, 59 Ky. (2 Metc.) 530 (Free from an unknown agreement to assign to another).

A lien for the consideration exists in favor of an assignor of a title bond and affects the interest acquired by a remote assignee who takes the bond with notice—Ligon v. Alexander, 30 Ky. (7 J. J. M.) 289
—or one who does not pay value—Royal v. Miller, 33 Ky. (3 Dana) 55. But a bona fide assignee for value takes free from the lien—Taylor v. Ford, 64 Ky. (1 Bush) 44; McBrayer v. Collins, 57 Ky. (18 B. Mon.) 833; Anderson's Adm'r. v. Wells, 45 Ky. (6 B. Mon.) 540.

In Shuttleworth v. Kentucky Coal, Etc., Co., 22 K. L. R. 1341, 1806, 60 S. W. 534, 61 S. W. 1013, it was held that an assignee for value of what appeared to be an absolute undertaking held it subject to the right of the obligor to avoid it at will according to a separate contemporaneous agreement then unknown to the assignee.


Section 175. Warranties of an Assignor.

(1) An assignor of a right by assignment under seal or for value warrants to the assignee, in the absence of circumstances showing a contrary intention,

(a) that he will do nothing to defeat or impair the value of the assignment;
(b) that the right, as assigned, actually exists and is subject to no limitations or defences other than those stated or apparent at the time of the assignment;
(c) that any token, writing or evidence of the right delivered to the assignee as part of the transaction of
assignment or exhibited to him as an inducement to accept the assignment, is genuine and what it purports to be.

(2) An assignor does not by the mere fact of assigning warrant that the obligor is solvent or that he will perform his obligation.

(3) An assignor is bound by affirmations and promises to the assignee with reference to the right assigned, in the same way and to the same extent that one who transfers chattels is bound under like circumstances.

(4) An assignee's rights under his assignor's warranties are not assigned to a sub-assignee by the mere assignment of the right against the obligor, to which the warranties relate, but the rights under such warranties may be expressly assigned.

Annotation:

With the exception of the special cases coming under subsection (2) our decisions agree with the statements in this section. There are certain implied warranties if the assignment is for value—Royal v. Miller, 33 Ky. (3 Dana) 35. Of course, a warranty will not be implied against an express agreement—Ooffman v. Allin, 16 Ky. (Littell) 200 (an assignment "without recourse" throws even the risk of forgery on the assignee)—or the assignor may undertake to transfer only such rights as he has which precludes the implication of a warranty—Allen v. Cockrill, 7 Ky. (4 Bibb.) 264. It is said that an assignee may rely on an implied warranty although he takes with knowledge of the defect—Emmerson v. Claywell, 53 Ky. (14 B. Mon.) 15—But this is clearly not true where the defect is an equity of the assignor.—See the annotations to Section 174.

It is to be noted that in an action upon an assignment of a writing the recovery is limited to the amount of consideration actually paid by the assignee—Carroll's Kentucky Statutes (1930), Section 475. In proper cases, this includes interest on the consideration paid—Elliot v. Threlkeld, 55 Ky. (16 B. Mon.) 341; Short v. Trabue, 61 Ky. (4 Metc.) 299.

Subsection (1) sets out the implied warranties.

(a) The assignor warrants that he will do nothing to defeat or impair the value of the assignment—Kenningham v. Bedford, 40 Ky. (1 B. Mon.) 325. The assignment deprives the assignor of his right to receive payment and he is guilty of a felony if he thereafter obtains payment upon the representation that the claim was not assigned—Commonwealth v. Johnson, 167 Ky. 727, 181 S. W. 368. In case of a partial assignment the assignor assumes an affirmative duty of collecting for and paying over to the partial assignee—Hubbard v. Pranther, 4 Ky. (1 Bibb.) 178.

(b) "An assignor of a bond, either for money or land, undertakes,
by implication, that he has a right to pass to the assignee what his assignment purports to pass." If he makes an absolute assignment, he impliedly warrants "that he is the absolute and unconditional owner of the bond, and has an indefeasible right to demand what the bond calls for"—Emmerson v. Claywell, supra, at p. 16. See also Winstill v. Hehl, 69 Ky. (6 Bush) 58 and Tribble v. Davis, 26 Ky. (3 J. J. M.) 633.

(c) Turney v. Hunt, 47 Ky. (8 B. Mon.) 401, 409; Coffman v. Allen, supra. One who presents and cashes a forged, or otherwise void, order or check is liable for the consideration received—Thompson v. First State Bank, 216 Ky. 703, 288 S. W. 702.

Subsection (2) is law in Kentucky as far as non-statutory (equitable) assignments are concerned—Robinson's Adm'x. v. White, 14 Ky. (4 Litt.) 237; Crawford v. Duncan, 7 K. L. R. 134. But it is not true of the assignments authorized by statute (K. S., Sec. 474). It was decided in very early cases that a statutory (legal) assignment placed the additional liability on the assignor—Smallwood v. Woods, 4 Ky. (1 Bibb.) 524; Boals v. McConnell, 2 Ky. (Sneed) 130—providing the assignment was by endorsement—Markley v. Withers, 20 Ky. (4 Mon.) 14. Today the liability of an endorser of a negotiable instrument is specifically set out by statute (K. S., Secs. 3720b-65 to 68) but the rule established by numberless decisions still controls the liability of an assignor of bonds, bills and notes for money or property, which are not technically negotiable or which, before the transfer, have become non-negotiable because of maturity, restrictive endorsement, or otherwise.

By these decisions it is clearly established that such an assignor, by an unqualified endorsement, impliedly warrants the solvency of the obligor, or, his ability to perform in other cases such as title bonds or contracts to lease. But in order to fix the liability of the assignor, the assignee must prosecute with due diligence all equitable as well as legal remedies against the obligor and generally a judgment and an execution thereon with a return of nulla bona is essential evidence. Due diligence requires that the suit against the obligor be brought at the first term of court after default and if both the Quarterly Court and the Circuit Court have jurisdiction, in the one that first sits after default—Dotson v. Owsley, 141 Ky. 453, 132 S. W. 1037; Citizens' Nat'L. Bank v. Hubbert, 97 Ky. 768, 31 S. W. 735; Rives v. Brown, 81 Ky. 636; Francis v. Gant, 80 Ky. 190; Green v. Cummings, 77 Ky. (14 Bush) 174; Hurst v. Chambers, 75 Ky. (12 Bush) 155; Coleman's Exrs. v. Tully's Exrs., 70 Ky. (7 Bush) 72; Tucker v. Togle, 70 Ky. (7 Bush) 290; Winstill v. Hehl, 69 Ky. (6 Bush) 58; Chambers v. Keene, 58 Ky. (1 Metc.) 289; Bays v. Patton, 47 Ky. (8 B. Mon.) 228; Hunt v. Armstrong's Adm'r., 44 Ky. (5 B. Mon.) 399; Harnett v. McCarvey, 43 Ky. (4 B. Mon.) 393; McFadden v. Finnell, 42 Ky. (3 B. Mon.) 121; Sayre v. Bayless, 40 Ky. (1 B. Mon.) 304; Tribble v. Davis, 26 Ky. (3 J. J. M.) 633; Bedell v. Stith, 19 Ky. (3 Mon.) 290; Parker v. Owings, 10 Ky. (3 A. K. M.) 59; Allen v. Pryor, 10 Ky. (3 A. K. M.) 305.

It has been held that the assignee is not required to take a null judgment against the obligor, as a judgment against a married woman.
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—Green v. Page, 80 Ky. 376—or against an adjudged bankrupt—Roberts v. Atwood, 47 Ky. (8 B. Mon.) 209—or to sue when the obligor has moved from the Commonwealth after the assignment—Wood v. Berthold, 27 Ky. (4 J. J. M.) 303; Clay v. Johnson, 22 Ky. (6 Mon.) 644. But this does not apply to cases where the obligor resided outside the jurisdiction at the time of the assignment, at least if this fact is known to the assignee, and insolvency of the obligor does not excuse the failure to take all legal steps to collect the debt—Citizens' Nat'l. Bank v. Hubbert, 97 Ky. 768, 31 S. W. 735; Francis v. Gant, 80 Ky. 190; Brinker v. Perry, 15 Ky. (5 Litt.) 195; Parker v. Owings, 10 Ky. (3 A. K. M.) 59.

As to the right of the assignor to notice of and to manage the suit against the obligor, see Samuel v. Hall, 48 Ky. (9 B. Mon.) 374.

Of course prompt action is excused where the assignee is lulled into security by the assurances of the assignor—American Nat'l. Bank v. Smallhouse, 113 Ky. 147, 67 S. W. 260, Rives v. Brown, 81 Ky. 636; Kracht's Adm'r. v. Obst, 77 Ky. (14 Bush) 37, or if the assignor otherwise waives his right to action by the assignee—Mardis v. Tyler, 49 Ky. (10 B. Mon.) 376.

Subsection (3) states the law in Kentucky—Crawford v. Duncan, 7 K. L. R. 134.

Subsection (4): It is clear that an assignee's rights against his assignor do not run with the obligation. An assignor is not primarily liable to a remote assignee—Short v. Trabue, 61 Ky. (4 Metc.) 299; Mardis v. Tyler, 49 Ky. Opin. 296. But one who reassigns does not thereby part with his right of recovery against his assignor and it is said that his sub-assignee may in certain cases and by proper proceedings in equity be substituted to this right—Oline v. Edwards, supra; Mardis v. Tyler, supra, and recovery against a remote assignor has been allowed where the immediate assignor was absent from the jurisdiction—McFadden v. Finnell, 42 Ky. (3 B. Mon.) 121—or insolvent—Turney v. Hunt, 47 Ky. (3 B. Mon.) 401. (The immediate assignor is a necessary party and recovery is limited by the amount that could have been recovered against him.)

Section 176. Effect of Prohibition in a Contract Against Its Assignment.

A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from discharging his duty under the contract in any way permissible if there were no such prohibition.

Annotation:

The Kentucky decisions are in accord with this statement. A clause in a contract prohibiting assignment is for the protection of the obligor
and may be waived by him—Lee v. Murrell, 9 K. L. R. 104. The same
is true where the contract prescribes the method of assignment or
requires the consent of the obligor and even in the absence of both
compliance and waiver, the assignment is valid between the assignor
and the assignee—Baker's Trustee v. Peoples Bank, 217 Ky. 56, 288
S. W. 1030 (insurance policy); Thompson's Ex'x. v. Thompson, 190
Ky. 3, 226 S. W. 350 (policy); Doty v. Dickey, 29 K. L. R. 900, 96 S. W.
544 (shares of stock); Embry's Adm'r. v. Harriss, 107 Ky. 61, 52 S. W.
958 (policy); Bank of America v. McNeil, 73 Ky. (10 Bush) 54 (shares of
stock). Such an assignment is good against a subsequent attachment

This does not apply to cases where the assignment is prohibited
by law as against public policy such as the assignment of wages by
a public officer (see the cases cited in the annotation to Section 151-b)
or an attempted assignment by an heir apparent (see Section 154)
nor does it apply to cases where the method is prescribed by law for
the protection of third parties as assignments between husband and
wife (Ky. Stat., Sec. 4758-a)—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.

On the other hand, if the obligation is made assignable by law, as
are wage coupons, an attempted prohibition in the contract is with-
out effect—Pond Creek Coal Co. v. Lester, 171 Ky. 811, 183 S. W. 907;

The words "not negotiable" do not prohibit an assignment—Arm-

Section 177. Assignment of Supposed or Asserted Rights
and Delegation of the Performance of Supposed or Asserted
Duties.

Assignment of supposed or asserted rights and delegation
of the performance of supposed or asserted duties or conditions
are governed by principles analogous to those stated in this
Chapter as applicable to the assignment of rights and the dele-
gation of the performance of actual duties or conditions.

Annotation:

An assignment of an asserted right under a "void" obligation
creates the relation of assignor and assignee with a liability to the
extent of the consideration received—Thompson v. First State Bank,
216 Ky. 703, 288 S. W. 702; Turney v. Hunt, 47 Ky. (8 B. Mon.) 401, 409.
However, this is not true of "catching bargains with heirs." Since
these are contrary to public policy, the assignee acquires no right,
even against the assignor—Hunt v. Smith, 191 Ky. 433, 230 S. W. 936;
Spears v. Spaw, 118 S. W. 275.
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President Roosevelt addressing the Attorney General's Conference on Crime, Washington, D. C., Dec. 10, 1934. Kentucky was represented by delegates from the State Bar Association.
The annual meeting of the Kentucky State Bar Association was held in Louisville at the Seelbach Hotel on Thursday and Friday, April 4th and 5th.

On the evening of Wednesday, April 3rd, Round Table Meetings were conducted respectively by the Committees on Criminal Law, Law Reform, Legal Education and Admission to the Bar, Cooperation with the American Bar Association, Unlawful Practice of Law and District Bar Organization.

The following addresses were made as a part of the program of the meeting:

“Judicial Selection” .......................................................... Edmund F. Trabue
“The Kentucky Utilities Act”.................................Hon. Wilbur K. Miller
“Some Phases of the Work of the Court of Appeals”..............
.......................................................................................... Judge James Stites
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