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Restatement of the Law of Contracts Annotated with Kentucky Decisions

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

By FRANK MURRAY**

Section 33. AN INDEFINITE OFFER MAY CREATE A CONTRACT UPON PERFORMANCE BY OFFEREE.

An offer which is too indefinite to create a contract if, verbally accepted, may, by entire or partial performance on the part of the offeree, create a contract.

Annotation

This section states the law in Kentucky. *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 97 S. W 772 (1906) (Stating that the indefiniteness of a verbal agreement may be cured by part performance), *Curry v. Kentucky Western Ry. Co.*, 25 K. L. R. 1372, 78 S. W 435 (1904) (Holding that a promise to donate a right of way to a railroad company which did not specify the company to receive it nor the land to be conveyed is not open to objection of uncertainty when a company has been formed and has taken possession of land with consent of the donor). See also *Schweitzer v. Schweitzer*, 26 K. L. R., 888, 82 S. W 625 (1904) and *Caskey v. Williams Bros.*, 227 Ky. 73, 11 S. W (2d) 991 (1928).

When material terms are left to the future agreement of the parties the agreement is generally too indefinite, but this objection can not be raised after the parties have agreed on the terms—*Slade v. City of Lexington*, 141 Ky. 214, 132 S. W 404 (1910). See also dictum in *Kentucky Portland Cement Co. v. Steckel*, 164 Ky. 420, 175 S. W 663 (1915).

Part performance may remove the objection of uncertainty at least as to the part performed as where the time of employment is so indefinite that no executory contract is formed yet the employee is entitled to payment under the agreement until terminated—*Louisville & N. R. Co. v. Offutt*, 99 Ky 427, 31 S. W 181 (1896); *Elkhorn Con. C. & C. v. Eaton, Rhodes & Co.*, 163 Ky. 306, 173 S. W 798.

* This is a continuation of the Kentucky Annotations to the Restatement of Contracts. The work is being done by Professor Frank Murray of the College of Law, University of Kentucky in co-operation with the Kentucky State Bar Association. The publication of material for this issue has been shortened in order to publish other material.

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But even if there is part performance, if the substantial part of the promise remains indefinite, the agreement is invalid—*Killebrew v. Murray*, 151 Ky. 345, 151 S. W 662 (1912).

Section 34. OFFER UNTIL TERMINATED MAY BE ACCEPTED.

An offer until terminated gives to the offeree a continuing power to create a contract by acceptance of the offer.

Annotation

This is the doctrine of "continuing offer" which is so well established that it is seldom mentioned by the courts. In *Walton's Exr. v. Franks*, 191 Ky. 32, 228 S. W 1025 (1921) it is said "if such offer is allowed to remain open until accepted, it will become a binding contract."

Section 35. HOW AN OFFER MAY BE TERMINATED, EFFECT OF TERMINATION.

1. An offer may be terminated by
 - a. rejection by the offeree, or
 - b. lapse of time, or the happening of a condition stated in the offer as causing termination, or
 - c. death or destruction of a person or thing essential for the performance of the proposed contract, or
 - d. supervening legal prohibition of the proposed contract;

or, except as stated in Sections 45, 46 and 47, by

- e. revocation by the offeror, or
 - f. the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract.
2. Where an offer is terminated in one of these ways a contract cannot be created by subsequent acceptance.

Annotation

Subsection (1) is introductory to the sections which follow and states in general terms the various ways in which an offer *may be* terminated. The statements are seemingly in accord with the Law of Kentucky. Since much of the same matter is covered in detail in later sections, there will be no attempt to cite cases in this note except as to the parts not repeated.

a. Rejection by the offeree terminates the offer—*Davis v. Parish's Rep.*, 16 Ky. (Litt Sel Cas) 153, 12 Amer. Dec. 287 (1812), *Henson & Co. v. Wilson*, 21 K. L. R. 1382, 55 S. W 209 (1900). See also Sections 36 and 37 (what amounts to a rejection), Section 39 (when effective), Section 69 (when received), Section 38 (counter-offers as rejections), and Sections 60-62 (qualified acceptances).

b. See Section 40 *infra*.

c. See Section 49 *infra*.

d. See Section 50 *infra*.

e. Unless the offer comes within the exceptions stated, it may be revoked by the offeror at any time before acceptance—*Walton's Err v. Franks*, 191 Ky. 32, 228 S. W 1025 (1921), *L. A. Becker Co. v. Alvey*, 27 K. L. R. 332, 86 S. W 974 (1905). This is true although the offer is made in writing—*Burton v. Shotwell*, 76 Ky. (13 Bush) 271 (1877) and even if the offer is expressly made for a definite time—*Litz v. Goosling*, 14 K. L. R. 91, 19 S. W 527 (1892). See also Section 41 (necessity of communication of the revocation), Section 42 (knowledge by offeree that subject-matter has been sold), Section 43 (revocation of general offers), Section 44 (revocation of an offer to enter into a series of contracts), Section 45 (revocation of an offer for a unilateral contract) and Section 27 (revocation of a bid at an auction sale).

f. See Section 43 *infra*.

Subsection (2) completes the statement made in Section 34 *supra* and states the legal effect of the termination of an offer in any of the ways mentioned in Subsection (1). In *Walton's Err v. Franks*, 191 Ky. 32, 228 S. W 1025, it is said that "either rejection or withdrawal leaves the matter as if no offer had ever been made." In *Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W 431 it is said "An offer when once rejected loses its legal force and cannot be accepted thereafter so as to create a binding agreement without the assent of the party making the original offer." Since most of the cases have arisen because of attempted acceptance after the offer was terminated, this statement finds support in practically all of the decisions cited above and in the following sections.

Section 36. WHAT IS A REJECTION OF AN OFFER.

An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offer or to give it further consideration.

Annotation

This is a general definition of a rejection as it is applied to particular situations by later sections. See Section 37 as to outright rejections; Section 60 as to qualified acceptances; and Section 62 as to an acceptance coupled with a request.

Section 37. COMMUNICATION BY OFFEREE DECLINING THE OFFER IS A REJECTION.

A communication from the offeree to the offeror, stating in effect that the offeree declines to accept the offer is a rejection.

Annotation

This section deals with avowed rejections. The rejection may be outright as in *New York Life Ins. Co. v. Levy's Adm.*, 122 Ky. 457, 92 S. W 325 (1906) or it may be gathered from the meaning of language that is less emphatic—*Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W 431 (1913) (A reply that the performance of the contract is impossible is a rejection of the offer), *Henson & Co. v. Wilson*, 21 K. L. R. 1382, 55 S. W 209 (1900) (A reply that a warrant will not be accepted at a premium is a rejection of a tender of the warrant as payment in full of a sum greater than the face of the warrant).

Section 38. COUNTER-OFFER BY OFFEREE IS A REJECTION.

A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeree at the same time states in express terms that he is still keeping the original offer under advisement.

Comment

a. A counter-offer amounts in legal effect to a statement by the offeree not only that he is willing to do something different in regard to the matter proposed, but also that he will not agree to the proposal of the offeror. A counter-offer must fulfill the requirements of an original offer. There is none unless there is a manifestation sufficient to create a power of acceptance in the original offeror. This distinguishes a counter-offer from a mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer. Likewise, an offer dealing with an entirely new matter and not proposed as a substitution for the original offer is not a counter-offer.

Annotation

This statement is in accord with the law of this state. Our courts have said "A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer, and ends the negotiation, unless the offer is renewed, or the proposed modification accepted"—*Shaw v. Ingram-Day Lbr Co.*, 152 Ky. 329, 335, 153 S. W 431 (1913).

See also *Hutcheson v. Blakeman*, 60 Ky. (3 Metc) 80 (1860) and *Gold Spring Dist. Co. v. Stitzel Dist. Co.*, 150 Ky. 457, 150 S. W 516 (1912).

But a counter-offer does not have this effect if the offer is irrevocable as in case of an option contract—*Caskey v. Williams Bros.*, 227 Ky. 73, 11 S. W (2d) 991 (1928).

Section 39. TIME WHEN REJECTION IS EFFECTIVE.

Rejection by mail or telegram does not destroy the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of the rejection is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection.

Annotation

No Kentucky cases.

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