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The American Law Institute's Restatement of the Law of Contracts Annotated with Kentucky Decisions

Frank Murray  
*University of Kentucky*

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Section 68. When an Acceptance Inoperative When Despatched is Operative Upon Receipt of Offeror.

An acceptance inoperative when despatched only because the offeree uses means of transmission which he was not authorized to use is operative when received, if received by the offeror within the time within which an acceptance sent in an authorized manner would probably have been received by him.

Annotation

No Kentucky cases.

Seemingly this section must be qualified by Section 61 ante.

Section 69. What Constitutes Receipt of Revocation, Rejection, or Acceptance.

A written revocation, rejection or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.

Comment

a. Under Section 41, a revocation when sent from a distance must be received in order to be effectual. Under Section 64 acceptance from a distance need not be received if started on its way in a method authorized, unless receipt is made a condi-
tion of the offer. This, however, may be the case, and though there is no such condition, an acceptance sent by an unauthorized method may, under Section 68, create a contract when received by the offeror. What amounts to receipt in all these cases is defined by the present Section, under which a written communication may be received though it is not read or though it does not even reach the hands of the person to whom it is addressed.

Annotation

There are no Kentucky cases defining receipt. Dicta in Postal Tel. Co. v. Louisville Cotton Seed Oil Co., 140 Ky. 506, 131 S. W. 277, may be of some value.

Section 70. An Offeror or Acceptor of a Written Offer is Bound by Its Terms.

One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

Comment

a. The effect of fraud and mistake as ground for avoiding a contract induced thereby is stated in a later portion of this Restatement. When mistake prevents the existence of a contract is stated in Section 71.

Annotation

This statement is in accord with our decisions. See Brown v. Central Life Ins. Co., 241 Ky. 514, 44 S. W. (2) 514 (1931), and cases cited to which may be added: J I. Case Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131, Blake v. Black Bear Coal Co., 145 Ky. 788, 141 S. W. 403; Case Mill Mfg. Co. v. Vickers, 147 Ky. 396, 144 S. W. 76; United Talking Machine Co. v. Metcalf, 164 Ky. 258, 175 S. W. 357.

In most of the decisions cited above, the rule is stated as applicable only in case the one signing the paper can read it and has a reasonable opportunity to do so. This qualification is the result of dicta in early cases, is not in accord with the weight of authority in other jurisdictions, and was not necessary in the decision of the cases cited. However, if there is a misrepresentation as to the content or the signer is prevented from reading it by other fraud it seems that he may avoid the obligation.—Ross v. Oliver Bros. & Honeycutt, 152 Ky. 437, 153 S. W. 756 (1913), Germer v. Gambill, 140 Ky. 469, 131 S. W. 268 (1910).
Signing the paper is not necessary for the application of this rule. It is possible for the parties, if they so intend, to adopt an unsigned writing, or a writing signed by only one of the parties, as their contract, or as evidence of the terms of an oral agreement. One who so accepts such a paper is bound by its terms whether he reads it or not—L. & N. R. R. Co. v. Brownlee, 77 Ky. (14 Bush) 590 (1879) (bill of lading), McGregor v. Metropolitan L. I. Co., 143 Ky. 488, 136 S. W. 389 (terms in the receipt given by the agent as well as those in the signed application are part of the agreement although not read by the insured), see also dicta in the following cases: Franklin Fire Ins. Co. v. Hewitt, Allison & Co., 42 Ky. (3 B. M.) 281 (holding that delivery of a fire insurance policy and retention for four months by the clerk of the insured was not a sufficient acceptance to invoke the rule), Bowen v. Chenoa-Hignite Coal Co., 168 Ky. 588, 182 S. W. 635 (contract of employment), Springfield F & M. Ins. Co. v. Snowden, 173 Ky. 664, 191 S. W. 439 (fire insurance).

However, it seems that a different rule may be applied in case of railroad tickets. Although the printing on the ticket is conclusive evidence of the contract as between the passenger and a conductor, still, as between the purchaser and the company, "the ticket is a mere memorandum of a contract, the real and true details of which are entered into before the delivery of the ticket" and one accepting a ticket for a different destination than that requested and paid for, or stamped with a different time limit than that represented by the agent, may, if ejected, recover "ex contractu"—L. & N. R. R. Co. v. Sandlin, 209 Ky. 442, 273 S. W. 912 (1925), Ill. Cent. Ry. Co. v. Fleming, 148 Ky. 473, 146 S. W. 1110 (1912), C. N. O. & T P Ry. Co. v. Carson, 145 Ky. 81, 140 S. W. 71 (1911), L. & N. R. R. Co. v. Fish, 127 S. W. 519; So. Ry. Co. v. Hawkins, 121 Ky. 415, 89 S. W. 258 (1905), Ill. Cent. v. Jackson, 117 Ky. 900, 79 S. W. 1187 (1904), L. & E. Ry. Co. v. Lyons, 104 Ky. 23, 46 S. W. 209 (1898).

**Section 71. Undisclosed Understanding of Offeror or Offeree, When Material.**

Except as stated in Sections 55 and 70, the undisclosed understanding of either party of the meaning of his own words and other acts, or of the other party's words and other acts, is material in the formation of contracts in the following cases and in no others

a. If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning.
b. If both parties know or have reason to know that the manifestations of one of them are uncertain or ambiguous and the parties attach different meanings to the manifestations, this difference prevents the uncertain or ambiguous manifestations from being operative as an offer or an acceptance.

c. If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance.

Comment

a. The mental assent of the parties is not requisite for the formation of a contract. If the words or acts of one of the parties have but one reasonable meaning, his intention is material only in the exceptional case, stated in Clause (c), that an unreasonable meaning which he attaches to his manifestations is known to the other party. If the words or other acts of the parties have more than one reasonable meaning, it must be determined which of the possible meanings is to be taken. If either party has reason to know that the other will give the words or acts only one of these meanings and in fact the words or acts are so understood, the party conscious of the ambiguity is bound in accordance with that understanding. On the other hand, if a party has no reason to suppose that there is ambiguity, he may assert that his words or other acts bear the meaning that he intended, that being one of their legitimate meanings, and he will not be bound by a different meaning attached to them by the other party.

Annotation

That, in general, the undisclosed understanding of either party is not material, see: C. N. O. & T. P Ry, Co. v. Rednower, 140 Ky. 370, 131 S. W. 179 (1910), Eagle Dist. Co. v. McFarland, 14 K. L. R. 360 (1893), Tunnell's Mill, etc., Road Co. v. Seleman, 14 K. L. R. 174 (1892).

a. But if the parties attach different meanings to an ambiguous manifestation which is reasonably unsuspected there is no contract—Tunnell's Mill, etc., Road Co. v. Seleman, supra (seemingly two things of the same name and the court required there be a mutual understanding).

b. No Kentucky cases.

c. If one party knows that the other does not intend that which his words clearly express, the words do not form a contract—Bell v.
Kentucky does not seem to follow the general rule as to mistakes by agents of transmission. Although there is no reason to suspect a mistake, one cannot rely on the clear meaning of an offer contained in a telegram since the offeror is only bound by the message he delivers to the telegraph company—*Postal Telp. C. Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119 (1901), *Western Union Tel. Co. v. Fischer*, 133 Ky. 768, 119 S. W. 189 (dicta), *McKee v. Western Union Tel Co.*, 158 Ky. 143, 164 S. W. 348 (1914). See also *Western Union Tel Co. v. Cowin*, 20 F. (2d) 103 (1927), in accord with our decisions. Inconsistent with this and in accord with the general rule, it has been held that the words spoken by a telephone operator in “repeating” a message may be shown in evidence against the one giving the message. This is true although the recipient of the message authorized the operator to talk for him—*Sullivan v. Kuykendall*, 82 Ky. 483 (1885).

**Section 72. Acceptance by Silence.**

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others.

a. Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

b. Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

c. Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.

(2) Where the offeree exercises dominion over chattels which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If other circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept.
Annotation

Generally the offeree need make no reply to an offer as his silence or inaction will not be construed as an acceptance—Cin. Equip. Co. v. Big M. Riv. C. Co., 153 Ky. 247, 164 S. W. 794 (1914). It has even been said, "the offeror cannot make silence on the offeree's part an acceptance by a stipulation to that effect in the offer"—Kentucky P. C. & Coal Co. v. Steckel, 164 Ky. 420, 425, 175 S. W. 663—but it is clear that this dictum is not followed.

Subsection (1-a). Viley v. Pettit, 96 Ky. 576, 29 S. W. 428 (accord). Of course, the receipt of services without objection will not be sufficient if at the time there was no expectation of compensation—St. Joseph's Orphans Soc. v. Wolpert, 80 Ky. 36 (1882), Miller v. Cropper, 16 K. L. R. 395 (1894)—nor if the recipient justifiedly believed they were gratuitous—Evans' Adm. v. McVeay, 172 Ky. 1, 188 S. W. 1075 (1916).

As to the effect of our Hospitality Act and the presumption that compensation is not expected when the parties are near relations or members of the same household, see the annotations under Section 5, supra.

Subsection (1-b). No Kentucky cases.

Subsection (1-c). If the offeree has led the offeror to believe that the silence or inaction is an acceptance and the offeror so understands it the contract is complete. This subsection includes cases involving the acceptance and retention, without objection, of a writing purporting to be the agreement between the parties, as cited in Section 7, supra. Failure to reject an order received through a traveling salesman may be construed as an acceptance after the lapse of a reasonable time—Bluegrass Cordage Co. v. Luthy & Co. 98 Ky. 583, 33 S. W. 335 (1896). Unless the delay is otherwise explained—Courtney Shoe Co. v. Curd & Sons, 142 Ky. 219, 134 S. W. 146 (1911). This is particularly true if the order is accompanied by a part payment which is retained—Enterprise Mfg. Co. v. Campbell, 121 S. W. 1040 (1909).

Subsection (2). Our cases are in accord with this statement. Caskey v. Williams Bros., 227 Ky. 73, 11 S. W. (2d) 991 (1928) (acceptance of horses with knowledge of, although an objection to, the price asked by the offeror), Star Drilling Mach. Co. v. McLeod, 122 Ky. 564, 92 S. W 553 (1906) (use of a machine offered for sale), Clore's Sons v. Johnson & Son, 21 K. L. R. 1005, 55 S. W 5 (1900), Caldwell & Drake v. Cunningham, 162 Ky. 272, 172 S. W 498 (1915) (dispute as to the contract price but acceptance of the goods with knowledge of the price charged).

Section 73. Effect of Receipt By Offeror of A Late or Otherwise Defective Acceptance.

An offeror who receives an acceptance which is too late or which is otherwise defective, cannot at his election regard it as valid. The late or defective acceptance is a counter-offer which
must in turn be accepted by the original offeror in order to create a contract.

Comment

a. How such a counter-offer as is referred to in the last sentence of the section may be accepted depends on the general principles which govern acceptance. In some cases Subsections (b) or (c) of Section 72 (1) may be applicable.

Annotation

It is clear that the original offeror must accept a qualified acceptance or other counter offer—Shaw v. Ingram-Day Lbr Co., 152 Ky. 329, 335, 153 S. W. 431, New York Life Ins. Co. v. Levy, 122 Ky. 457, 92 S. W. 325 (1906). However, a failure to object to the qualifications may give rise to a contract under Section 72 (1-c) or at least be evidence of their acceptance—Fairmont Glass Works v. Crunden-Martín W W Co., 106 Ky. 659, 51 S. W. 189 (1899). No cases involving the receipt of a late acceptance have been found.

Section 74. Time When and Place Where a Contract is Made.

A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done.

Annotation

Our decisions agree with this statement. A contract is formed when and where the last act essential to its validity is performed. If the offer is an order for goods, the contract is formed where the order is filled—Jameson v. Gregory's Exr., 61 Ky. (4 Met.) 363 (1863). A written contract is probably formed at the place of the last signature, but if delivery is essential to its validity, the contract is made where the instrument is delivered—Young v. Harris, 53 Ky. (14 B. M.) 447 (1854), and see Miller Bros. Co. v. Blackburn Coal Co., 212 Ky. 447, 279 S. W. 618 (1926), and cases cited. When an acceptance is complete on posting, the contract is formed at the place of posting—Swan-Day Lbr Co. v. Cornett, 161 Ky. 98, 170 S. W. 516 (1914)—and at the time of posting—Shaw v. Ingram-Day Lbr Co., 152 Ky. 329, 153 S. W. 431.

This section is quoted with approval in Gannon v. Bronston, 246 Ky. 612.

(To be continued.)
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