



1932

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

Frank Murray
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Contracts Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Murray, Frank (1932) "The American Law Institute's Restatement of the Law of Contracts Annotated with Kentucky Decisions," *Kentucky Law Journal*: Vol. 20 : Iss. 4 , Article 1.
Available at: <https://uknowledge.uky.edu/klj/vol20/iss4/1>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

KENTUCKY LAW JOURNAL

Volume XX

May, 1932.

No. 4.

THE AMERICAN LAW INSTITUTE'S
RESTATEMENT OF THE LAW OF CONTRACTS WITH
ANNOTATIONS TO THE KENTUCKY DECISIONS*

By FRANK MURRAY

THE LAW OF CONTRACTS

Chapter 1

Meaning of Terms

SECTION

1. Contract defined
2. Promise defined
3. Agreement defined
4. Bargain defined
5. How a promise may be made
6. Contracts classified
7. Formal contracts

SECTION

8. Contracts under seal
9. Recognizances
10. Negotiable instruments
11. Informal contracts
12. Unilateral and bilateral contracts
13. Voidable contracts
14. Unenforceable contracts

Section 1. CONTRACT DEFINED.

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Annotation:

This section is copied verbatim in *Kellum v. Browning's Adm.*, 231 Ky. 308, 314; 21 S. W. (2d) 459 (1929).

*Note.—The annotating of the Restatement is being done by the members of the faculty of the College of Law, University of Kentucky, in cooperation with the Kentucky Bar Association. It is an attempt to make the Restatement more valuable to the profession as well as to clarify the law of contracts by collecting Kentucky decisions and statutory references under appropriate sections. No authority has been found for some of the statements and others are supported or opposed only by dicta, which has been indicated as such. Under other sections, particularly where there is little or no question as to the established principle, there has been no attempt to list all the decisions but preference has been given to the most recent decisions, to those containing the greatest wealth of citations, or to those that are the most difficult to find by use of the digests and usual reference books.

Other chapters of the Restatement with Annotations will be published in subsequent issues of the KENTUCKY LAW JOURNAL.

The Kentucky cases have usually defined a contract as an "agreement" and follow the statement here in, requiring legal efficacy. "To amount to a contract, the agreement must be of a nature to produce a binding result upon the mutual relations of the parties." *Tucker v. Sheeran Bros. & Co.*, 155 Ky. 670, 672; 160 S. W. 176 (1913). But in a few decisions, the term has been loosely used to refer to promises or agreements that have no legal effect. See the annotations of Sections 12 and 96.

Section 2. PROMISE DEFINED.

(1) A promise is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future.

(2) Words which in terms promise the happening or failure to happen of something not within human control, or the existence or non-existence of a present or past state of facts, are to be interpreted as a promise or undertaking to be answerable for such proximate damage as may be caused by the failure to happen or the happening of the specified event, or by the existence or non-existence of the asserted state of facts.

Annotation:

Subdivision (1). "A promise is an express undertaking or agreement to carry the purpose into effect, a declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act." *Hoskins v. Black*, 190 Ky. 98, 101; 226 S. W. 384 (1920). In the above case and in *Harrow v. Dugan*, 36 Ky. (6 Dana) 341 (1838), a statement of indebtedness made by the debtor was held to import a promise to pay it.

As to implied promises see Section 5, *infra*.

Subdivision (2). This statement is illustrated by warranties in the sales of goods which, if broken, allows the purchaser to retain the goods and sue for damages. *Junius H. Stone Corp. v. Princeton Ice Co.* 212 Ky. 404, 279 S. W. 642 (1920); *Frick & Lindsey Co. v. Holbrook*, 202 Ky. 416, 259 S. W. 1033 (1924).

Section 3. AGREEMENT DEFINED.

An agreement is an expression of mutual assent by two or more persons.

Comment:

a. Agreement has a wider meaning than contract, bargain or promise. The word contains no implication that legal consequences are or are not produced. It applies to transactions

executed on one or both sides, and also to those that are wholly executory.

Annotation:

"An agreement has been well expressed to consist in two persons being of the same mind concerning the matter agreed upon. But many agreements do not produce any legal effect on the relations of the parties." *Tucker v. Pete Sheeran Bros. & Co.*, 155 Ky. 670, 672; 160 S. W. 176 (1913).

"An agreement is the expression by two or more persons of a common intention to affect their legal relations; it consists in their being of the same mind and intention concerning the matter agreed upon." *Dixie Fire Ins. Co. v. Wallace*, 153 Ky. 677, 679; 156 S. W. 140 (1913).

Section 4. BARGAIN DEFINED.

A bargain is an agreement of two or more persons to exchange promises or performances.

Comment:

a. Bargain has a narrower meaning than agreement, since it is applicable only to a particular class of agreements. It has a broader meaning than contract, because it includes not only transactions of which a promise forms a part, but also completely executed transactions such as exchanges of goods (barter) or of services, or sales where goods have been transferred and the price paid for them. It also includes transactions where one party makes a promise and the other gives something in exchange which is insufficient consideration.

Annotation:

This term is seemingly not defined by the Kentucky Courts.

Section 5. HOW A PROMISE MAY BE MADE.

Except as stated in Section 72 (2), a promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise.

Comment:

a. Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Implied contracts must be distinguished from quasi-contracts, which also

have often been called implied contracts or contracts implied in law. Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice. Such obligations were ordinarily enforced at common law in the same form of action (*assumpsit*) that was appropriate to true contracts, and some confusion with reference to the nature of quasi-contracts has been caused thereby.

Annotation:

This section is quoted verbatim in *Kellum v. Browning's Administrator*, 231 Ky. 308, 21 S. W. (2d) 459 (1929). See also Section 21, *infra*.

An expression of willingness is not a promise. *Cumberland & O. V. R. R. Co. v. Shelbyville, B. & O. R. R. Co.*, 117 Ky. 95, 77 S. W. 690 (1903). An acknowledgment of gratitude on the part of one receiving services is not sufficient to imply a promise nor is the expression of a wish or desire that the person rendering them should be compensated. *Oliver v. Gardner*, 192 Ky. 89, 93; 232 S. W. 418 (1921). A written statement that the writer feels bound and disposed to pay a pre-existing debt of another is not a promise. *Bright's Exr. v. Bright*, 47 Ky. (8 B. Mon.) 194 (1847); *Bishop v. Newman's Exr.*, 168 Ky. 238, 182 S. W. 165 (1916).

As a general rule, a request for service implies a promise to pay for them—*Ransom v. Milward*, 5 K. L. R. 252 (1883); *Coleman v. Simpson*, 32 Ky. (2 Dana) 166 (1834). And even if there is no request, the acceptance of the services or benefits with knowledge that pay is expected may imply a promise to pay—*Caskey v. Williams Bros.*, 227 Ky. 73, 11 (2d) S. W. 991 (1928) (acceptance of delivery of horses with knowledge of the price asked by the vendor); *Star Drilling Machine Co. v. McLeod*, 122 Ky. 564, 92 S. W. 558 (1906) (retention and use of a machine offered for sale). However, receipt of benefits without this knowledge is not sufficient to create a legal duty to pay—*Viley v. Pettit*, 96 Ky. 576 (1895). And under our Hospitality Act (K. S. 2178) this implication does not arise upon receipt of board and lodging from one other than an innkeeper or keeper of a house of private entertainment—*Evans' Adm. v. McVey*, 172 Ky. 1, 188 S. W. 1075 (1916) but the statute does not apply to clothing and nursing—*Thomas v. Arthur*, 70 Ky. (7 Bush) 245 (1870); *Fralley's Adm. v. Thompson*, 20 K. L. R. 1179, 49 S. W. 13 (1899). And at best, such promises, whether based on a request or receipt of benefits, are mere inferences of fact, and may be rebutted by showing an intent to render the services gratuitously—*St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86 (1882); *Miller v. Cropper*, 16 K. L. R. 395 (1894), or by showing that the recipient justifiably believed they were so rendered—*Evans'*

Adm. v. McVey, *supra*. It is frequently said that where the parties are closely related, there can be no recovery on an implied promise to pay, and there must be an "express contract"—Allen v. Smith, 208 Ky. 207, 270 S. W. 782 (1925); Lucius' Adm. v. Owens, 198 Ky. 114, 248 S. W. 495 (1923); Nicely v. Howard, 195 Ky. 327, 242 S. W. 602 (1922); Oliver v. Gardner, 192 Ky. 89, 232 S. W. 418 (1921); Armstrong's Adm. v. Shannon, 177 Ky. 547, 197 S. W. 950 (1917), but it is very clear even in the cases cited that a contract implied in fact is sufficient. See in particular Kellum v. Browning's Adm., 231 Ky. 308, 21 S. W. (2d) 459 (1929). It is frequently said that where the parties are closely related a promise will not be implied from the giving and receiving of benefits, but a better statement seems to be that the presumption exists but is met by the counter-presumption that in such a case the services are a gratuity—Bishop v. Newman, 168 Ky. 238, 182 S. W. 165 (1916), and the presumption of gratuity is considered the stronger—Kellum v. Browning's Adm., *supra*, at p. 315.

This presumption of a gratuity exists where the parties are parent and child [Thomas v. Arthur, 70 Ky. (7 Bush) 245 (1870)] brother and sister [Price v. Price's Exr., 101 Ky. 28, 39 S. W. 429 (1897)]; Allen v. Smith (*supra*)], or uncles and aunts and nephews and nieces—[Weir v. Weir's Adm., 42 Ky. (3 B. Mon.) 645 (1843); Armstrong's Adm. v. Shannon, 177 Ky. 547, 197 S. W. 950, 1907; Kellum v. Browning's Adm., *supra*.] The rule has been extended to include those who are related other than by blood "where they occupy the same home and render mutual services for the benefit of all"—Oliver v. Gardner, *supra* (services by a step-son, overruling Hardiman's Adm. v. Crick, 131 Ky. 358, 115 S. W. 236 (1909) on this point); Nicely v. Howard, *supra* (daughter-in-law); Ballard v. Ballard, 177 Ky. 253, 197 S. W. 661 (1917) (divorced daughter-in-law). It is further said that a promise will not be implied from receipt of benefits since there is a presumption of gratuity "where there was a duty, moral obligation or natural affection, or mutuality of benefit"—Kellum v. Browning's Adm., *supra*.

For other implied promises, see the annotations under Section 72, *infra*.

Section 6. CONTRACTS CLASSIFIED.

Contracts are classified as formal or informal; as unilateral or bilateral.

Annotation:

The classification into formal and informal contracts is not so important in this state since sealed and unsealed writings are upon the same footing by statute. See Kentucky Statutes, Sec. 471.

The classification into unilateral and bilateral contracts is employed, but see the annotations in connection with Section 12.

Section 7. FORMAL CONTRACTS.

Formal contracts are

- (a) Contracts under seal,
- (b) Recognizances,
- (c) Negotiable instruments.

Annotation:

As to sealed instruments see Sec. 6.

Although a recognizance may be enforced as a contract by an ordinary action, it may also be enforced in a summary proceeding (*Kinney v. O'Bannon's Exx.*, 69 Ky. (6 Bush) 692 (1869)).

Section 8. CONTRACTS UNDER SEAL.

A contract under seal is a contract expressed in a writing which is sealed and delivered by the promisor.

Comment:

a. The rules governing the formation of sealed contracts are stated in Sections 95-110. Where peculiar incidents are attached to such contracts after their formation, attention is called to these incidents in appropriate connections.

Annotation:

See the annotation under Sec. 6.

Section 9. RECOGNIZANCES.

A recognizance is an acknowledgment in court by the recognizer that he is bound to make a certain payment unless a specified condition is performed.

Comment:

a. Recognizances are in use chiefly to secure (1) the attendance in court at a future day of the recognizer, or (2) the prosecution of an action, or (3) the payment of bail.

Annotation:

With the additional requirement that the acknowledgment be before the proper officer of the court and of record therein; this definition seems to be followed by the courts of the Commonwealth.—*Kinney v. O'Bannon's Ex'x*, 69 Ky. (6 Bush) 692 (1869); *Commonwealth v. McBrayer*, 29 Ky. (6 J. J. Marsh) 617 (1831); *Davis v. Commonwealth*, 20 Ky. (4 T. B. Mon.) 113 (1827).

Section 10. NEGOTIABLE INSTRUMENTS.

Negotiable instruments are such bills of exchange, promissory notes and bonds as are payable to bearer, or to the order of a specified person. By statutes, in many States, bills of

lading and warehouse receipts, also, if running to bearer or to the order of a specified person, are negotiable.

Comment:

a. The foregoing Section is inserted for completeness of enumeration. The instruments referred to are to be treated of in a Restatement especially devoted thereto. Certificates of shares of stock are also made negotiable by statute in some states, but such certificates do not usually contain promises.

Annotation:

Negotiable instruments are governed in Kentucky by the N. I. L. (Ky. Stats., Secs. 3720b-1 to 195); warehouse receipts are made negotiables by Ky. Stats., Sec. 4770.

Section 11. INFORMAL CONTRACTS.

Informal contracts are all others than those enumerated as formal contracts in Section 7.

Annotation:

See annotation under Sec. 6.

Section 12. UNILATERAL AND BILATERAL CONTRACTS.

A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.

Comment:

a. In a unilateral contract the exchange for the promise is something other than a promise; in a bilateral contract promises are exchanged for one another.

b. There must always be at least two parties to a contract, whether unilateral or bilateral, and there must usually be an expression of assent by each. In many cases, however, a promise becomes a contract even though no return promise is made by the promisee. In such cases the legal duty is unilateral, resting on the promisor alone. The correlative legal right is also unilateral, being possessed by the promisee alone. The statement often made that unless both parties are bound neither is bound is quite erroneous, as a universal statement.

Annotation:

The courts of this state recognize the distinction between unilateral

and bilateral contracts [see *Hogg v. Edley*, 236 Ky. 142, 32 S. W. (2d) 744 (1930); *Aitken, Sons & Co. v. Lang's Adm.*, 106 Ky. 652, 51 S. W. 154 (1899)] and, in general, have used the terms as here defined and have given effect to unilateral contracts.—*Jefferson Woodworking Co. v. Mercke*, 222 Ky. 476, 1 S. W. (2d) 532 (1927); *Miles v. United Oil Co.*, 204 Ky. 345, 354; 264 S. W. 761 (1924); *Hopkins v. Phoenix Fire Ins. Co.*, 200 Ky. 365, 368; 254 S. W. 1041 (1923). But some confusion in language has arisen due to a further use of the word "unilateral" to refer to a promise or agreement unsupported by any consideration, particularly where there was an offer to enter into a bilateral contract and the required promise was not given, or if given was indefinite or illusory. See *Pennagrade Oil & Gas Co. v. Martin*, 211 Ky. 137, 277 S. W. 302 (1925); *Hendricks v. Butt*, 197 Ky. 443, 247 S. W. 357 (1923); *Paragon Oil Co. v. Hughes & Sons*, 193 Ky. 532, 236 S. W. 963 (1922). (In which a head-note writer assumed that a contract lacking in mutuality is unilateral and wrote "A unilateral contract is unenforceable and there is no liability for its breach") *Goff v. Saxon*, 174 Ky. 330, 192 S. W. 24 (1917); *Rehm-Zeiher Co. v. Walker Co.*, 156 Ky. 6, 160 S. W. 777 (1913); *Killebrew v. Murray*, 151 Ky. 345, 151 S. W. 662 (1912); *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558 (1905).

Section 13. VOIDABLE CONTRACTS.

A voidable contract is one where one or more parties thereto have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by ratification of the contract to make it valid and enforceable.

Comment:

a. Typical instances of voidable contracts are those where one or both parties are infants; or where the contract was induced by fraud, mistake or duress; or where breach of a warranty or of another promise justifies the injured party in rescinding a bargain or avoiding its legal effect. Usually the power to avoid is confined to one party of the contract, but where, for instance, both parties are infants, or where both parties enter into the contract under such a mutual mistake as affords ground for rescission by a court of equity, the contract may be voidable by either one of the parties.

b. The consequence of avoidance in some cases is to entitle the party who avoids the contract to be restored to a position as good as that which he occupied immediately before the formation of the contract; in other cases to leave the situation of the parties in the same condition as at the time of the avoidance.

c. In many cases it is a condition qualifying a power of

avoidance that the original situation of the parties can be and shall be restored at least substantially, but this is not necessarily the case. An infant, for instance, in many jurisdictions is allowed to avoid his contract without this qualification, so that when the infant exercises his power the parties frequently are left in a very different situation from that which existed when the contract was made.

d. In some contracts included under the designation of voidable contracts, it is unnecessary for one who wishes to avoid them to take promptly the position of an actor. No manifestation of intention is necessary until an action is brought against him. He may, however, by ratifying the transaction make the contract enforceable.

e. Where both parties have a power of avoidance the propriety of calling the transaction a voidable contract rather than calling the transaction void, is due to the fact that action is necessary in order to prevent the contract from producing the ordinary legal consequences of a contract; and often this action in order to be effectual must be taken promptly. Moreover, ratification by either party may terminate his power of avoidance.

Annotation:

This definition is in accord with the law of Kentucky. Voidable contracts are treated in detail in later sections of the Restatement in connection with fraud, mistake, duress, etc. For general statements see the following decisions: As to the effect of *intoxication*, Glenn v. Martin, 179 Ky. 295 (1918), 200 S. W. 456; *intoxication plus unfair bargain*, Matthis v. O'Brien, 137 Ky. 651, 126 S. W. 156 (1910); *fraud*, Kentucky Cent. Life Ins. Co. v. Edmonson, 218 Ky. 825, 292 S. W. 511 (1927); *mental incapacity*, Collins v. Isaacs, 231 Ky. 377, 21 S. W. (2d) 474 (1929); *mistake*, Sheeran v. Irvin, 230 Ky. 307, 19 S. W. (2d) 976 (1929); *unilateral—mistake caused by the other party*, Germer v. Gambill, 140 Ky. 469, 131 S. W. 268 (1910); *duress*, Watson v. Watson, 190 Ky. 270, 227 S. W. 270 (1921); Wiley v. Wiley, 178 Ky. 501, 199 S. W. 47 (1917); *infancy*, Marceilliac v. Stevens, 206 Ky. 333, 267 S. W. 229 (1924); *coverture*, K. S., sec. 2128.

Section 14. UNENFORCEABLE CONTRACTS.

An unenforceable contract is one which the law does not enforce by legal proceedings, but recognizes in some indirect or collateral way as creating a duty of performance, though there has been no ratification.

Comment:

a. Both voidable and unenforceable contracts, as they have been classified in the Restatement of this Subject, frequently involve a power on the part of one or the other of the parties to create the full contractual rights and duties of an ordinary contract. If this were their only effect they might be classified together; but in the transactions classified as unenforceable some legal consequences, other than the creation of a power of ratification, follow without further action by either party.

Annotation:

It is clear that many agreements, frequently said to be void, are merely unenforceable and have some legal consequences. The Statute of Frauds does not make oral promises to pay the debts of another void. Its only effect is to prevent the enforcement by suit, and if the money is paid, it cannot be recovered—*Craig v. Vanpelt*, 26 Ky. (3 J. J. M.) 489 (1829). Lessee who enters under a verbal lease within the statute may rely on the contract to show he is not a trespasser—*Ragsdale v. Lander*, 80 Ky. 61 (1883); *Gugdell v. Duvall*, 27 Ky. (4 J. J. M.) 229 (1830). An agreement, unenforceable because of the Statute of Frauds may be employed as a defense—*Drake v. Rowe*, 162 Ky. 646, 172 S. W. 1068 (1915). And a verbal lease is evidence of the amount of rent recoverable—Ky. Statutes, sec. 2300.

(To be continued.)