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RESTATEMENT OF THE LAW OF CONTRACTS OF THE
AMERICAN LAW INSTITUTE, CHAPTERS 1 AND 2,*
WITH MISSOURI ANNOTATIONS†

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INTRODUCTORY NOTE

On May 20, 1929, the American Law Institute officially approved the first seven chapters (sections 1-177) of the Restatement of the Law of Contracts. In his introduction to a special Pennsylvania edition of a portion of the Restatement of Contracts, Hon. George Wharton Pepper said:

The term "Restatement" is used because the object of the Institute is to state again in an orderly way those legal propositions which, although already stated by the courts, are scattered widely and buried deeply. The "Reporter" selected by the Institute to become primarily responsible for the Restatement of the Law of Contracts is Mr. Samuel Williston, author of the well-known textbook which bears his name. Assisted by an organized group of "advisers" he has prepared several tentative drafts of the Restatement and all these have been subjected to the scrutiny of the thirty-three representative lawyers who compose the Council and have passed the corporate test of critical discussion by the assembled membership of the Institute.

The Missouri Bar Association has assumed responsibility for preparing Missouri Annotations to the Restatements of Contracts and of Conflict of Laws. Assistance in this work is now being rendered by the faculties of the law schools of the Uni-

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versity of Missouri, St. Louis University, and Washington University. Particular portions of the two Restatements have been assigned for annotations to designated members of these faculties. In the following pages appear the official text of the first two chapters (sections 1-18) including comments and illustrations, as already published by the American Law Institute, and also the corresponding Missouri Annotations (now in tentative form) prepared by Tyrrell Williams, Professor of Law, Washington University School of Law, and submitted to the Missouri Bar Association.

Chapter I

MEANING OF TERMS

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.

Comment:

a. A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making a single promise to one or more persons. It is essential, however, for the formation of a single contract that all the promises shall form part of a set. In other words they must be parts of a single transaction.

b. It is not practicable in a definition of contract to state all the operative facts that are necessary or sufficient, or to state all the legal relations that are created by such facts. These will appear with greater fullness in the succeeding Chapters and Sections.

c. It has been pointed out that the word contract is often used to express indifferently:

1. The acts which create the legal relations between the parties;
2. A writing which if not itself such an act is the evidence of such acts;
3. The legal relations resulting from the operative acts.

As the term is used in the Restatement of this Subject, "contract" includes not only the act of making a promise or promises but the intangible duties which arise. Similarly "promise," under the definition in Section 2, includes not merely the act of speaking, but the continuous duty, whether moral or legal, which a promisor assumes when he makes a promise. The separation is not made in ordinary legal speech, and is not made in the Restatement of this Subject, between the physical act of speaking words of promise and the intangible duties which thereupon arise.

d. Not all the operative acts which are essential to create contractual relations between the parties are included in the definition. It does not attempt to state what acts are essential. When an act is done as the consideration for a unilateral contract (see Section 12) and is essential to make the promise obligatory the act is not a part of the promise, and hence is not part of the contract as contract is here defined. Similarly, delivery is necessary to make a sealed promise binding, but delivery is not part of the contract.

e. The term contract is generic. As commonly used, and as here defined, it includes varieties described as void, voidable, unenforceable, formal, informal, express, implied, unilateral, bilateral. In these varieties neither the operative acts of the parties nor the resulting relations are identical.

Annotation:

Following Marshall and Blackstone, Missouri courts have described a contract as an agreement. *Pfaff v. Gruen* (1902) 92 Mo. App. 560, 69 S. W. 405; *Weinsberg v. St. Louis Cordage Co.* (1909) 135 Mo. App. 553, 116 S. W. 461. However, the Restatement's definition is not inconsistent with the substantive law of Missouri. Since 1825 the official editions of the Missouri Statutes have contained a chapter headed "Contracts and Promises." In *Embry v. Hargadine, McKittrick Dry Goods Co.* (1907) 127 Mo. App. 383, 105 S. W. 777, an alleged contract was analyzed and the court said: "This measure of the contents of the promise will be found to coincide in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with actual expectation of the promisee." In *Strickler v. Consolidated School Dist.* (1927) 316 Mo. 621, 291 S. W. 136, an equitable suit to decree and enforce an alleged contract implied in fact, the court held that

"where the law prohibits the making of an express promise it will not imply one."

Procedure. The definition includes contracts actually implied in fact, but does not include quasi-contracts which are created by law without regard to the intention of the parties. However, it should be remembered that the term *contract* as used in the procedural statutes, is broad enough to include quasi-contracts. "Contract, express or implied," as used in R. S. Mo. 1919, Sec. 1221, relating to petitions, is broad enough to include quasi-contracts. *Nicholas v. Hadlock* (Mo. App. 1915) 180 S. W. 31. *Contract*, as used in R. S. Mo. 1919, Sec. 1233, relating to counterclaims, includes quasi-contracts. *St. Louis School Board v. Broadway Savings Bank* (1884) 84 Mo. 56. *Contract* in R. S. Mo. 1919, Sec. 2734, relating to Justices' Courts, includes quasi-contracts. *Redel v. Missouri Valley Stone Co.* (1907) 126 Mo. App. 163, 103 S. W. 568. See Section 5, Comment a.

Promises that are not Contracts. Oftentimes courts have to recognize promises which are not contracts because there is no remedy for a breach of them. See *Whaley v. Peak* (1871) 49 Mo. 80; *Bragg v. Israel* (1900) 86 Mo. App. 338.

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.

Comment:

a. Just as "contract" as used in this Restatement means not simply the act of promising, but duties arising therefrom, so "promise" means both physical manifestations by words or acts of assurance and the moral duty to make good the assurance by performance. If by virtue of other operative facts the promise is legally binding, the promise is a contract. The word promise, though in ordinary use, frequently bears different shades of meaning. So far as legal conceptions in the law of contracts

are concerned, it is immaterial whether a party to a contract undertakes that he will personally do or refrain from doing something or that he will cause something to come to pass. Even where the undertaking relates to an existing or past fact, as in case of a warranty that a horse is sound, or that a ship arrived in a foreign port some days previously, the existence and validity of the undertaking is dealt with in the same way as if the warrantor could cause the fact to be as he asserted, though the meaning of words in terms promising the existence of present or past facts must be interpreted as stated in Subsection (2). Such contracts are made when the parties are ignorant of the actual facts regarding which they bargain, and in view of their ignorance it is immaterial for purposes of contract that the actual condition of affairs is irrevocably fixed before the contract is made.

b. An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise. Such an expression is often called an illusory promise.

c. A promise must be distinguished from a statement of intention or of opinion and from a mere prophecy. As an unsealed promise is binding only if sufficient consideration is given for it, except as stated in Sections 85-94, and statements of intention or of opinion or sounding merely in prophecy are not ordinarily given for consideration, the distinction is not usually difficult. The problem is, however, frequently presented in determining whether the words of a seller of goods amount to a warranty.

Illustrations:

1. A on seeing a house of thoroughly fireproof construction says to B, the owner, "This house will never burn down." This is not a promise but merely a prophecy.

2. A, the builder of a house, or the inventor of the material used in part of its construction, says to B, the owner of the house, "I warrant that this house will never burn down." This is in effect a promise to be answerable for any proximate damage if the house should burn down; and if made for sufficient consideration is a contract.

3. A says to B, "I will employ you for a year at a salary of \$5000 if I go into business." This is a promise, for

although it is wholly optional with *A* to go into business or not, he does not keep his word if he goes into business without employing *B*.

4. *A* says to *B* that he will employ him for a fixed term at such salary as *A* sees fit to pay. This is not a promise to pay any salary.

Annotation:

This is in accord with the law of Missouri. As justifying subdivision (1), see *Crane v. Murray* (1904) 106 Mo. App. 697, 80 S. W. 280, where the court said: "Assumpsit is but another word for an undertaking or promise."

Subdivision (2) is illustrated by a warranty in the sale of chattels. *Thompson v. Botts* (1844) 8 Mo. 710, warranty of soundness in slave sold.

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:

Michael v. Kennedy (1912) 166 Mo. App. 462, 148 S. W. 983 contains a dictum that there is no difference between a contract and an agreement. But many Missouri cases have distinctly held that there was no contract in spite of a clear agreement. See *Bragg v. Israel* (1900) 86 Mo. App. 338, agreement by married woman before common law of *femme covert* was abolished.

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 (bar-

ters) 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 definition is not inconsistent with the law of Missouri. In *Vorchetto v. Sappenfield* (Mo. App. 1929) 14 S. W. (2d) 685, bargain means a contract consummated on both sides.

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.

Illustrations:

1. A telephones to his grocer, "Send me a barrel of flour." The grocer sends it. A has thereby contracted to pay a reasonable price therefor.

2. A, on passing a market, where he has an account, sees a box of apples marked "5 cts. each." A picks up an apple, holds it up so that a clerk of the establishment sees the act. The clerk nods, and A passes on. A has contracted to pay five cents for the apple.

3. A's wife, B, separates from A for justifiable cause, and, in order to secure necessary clothing and supplies,

charges their cost to A. A is bound, though he has given notice not to furnish his wife with such supplies; but his duty is quasi-contractual, not contractual.

Annotation:

This is in accord with the law of Missouri. *Hoggard v. Dickerson* (1914) 180 Mo. App. 70, 165 S. W. 1135 indicates a difference between express contracts and contracts implied in fact. *Anderson v. Caldwell* (1912) 242 Mo. 201, 146 S. W. 444 indicates a difference between contracts implied in fact and quasi-contracts. In *Weinsberg v. St. Louis Cordage Company* (1909) 135 Mo. App. 553, 116 S. W. 461, the court said: "Much confusion has been introduced by loose expression touching implied contracts and frequently the distinction which obtains, accurately speaking, between contracts implied by the law and contracts implied by or inferred from the facts, is overlooked. A contract implied by law is to be distinguished from an actual contract found from facts, in that there is no actual meeting of the minds of the parties. Such is frequently termed a constructive contract."

Section 6. CONTRACTS CLASSIFIED.

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

Annotation:

The classification of contracts as formal and informal, as defined in Sections 7 and 8, has not been recognized in the Missouri decisions. See Sec. 7. The classification of contracts as unilateral and bilateral, with the Restatement's meaning, has been recognized in some Missouri decisions. See Sec. 12.

Other Classifications. The classification of contracts as specialties and simple contracts has often been made. See *County of Montgomery v. Auchley* (1887) 92 Mo. 126, 4 S. W. 425. From this case it is apparent that a simple contract in Missouri is the informal contract of the Restatement.

The common classification of contracts as, (a) express, (b) implied in fact, and (c) implied in law (constructive, quasi-contract), is explained in *Weinsberg v. St. Louis Cordage Co.* (1909) 135 Mo. App. 553, 116 S. W. 461. See also *Anderson v. Caldwell* (1912) 242 Mo. 201, 146 S. W. 444.

The classification of contracts as executory and executed is also common. *Sooy v. Winter* (1915) 188 Mo. App. 150, 175 S. W. 132.

A statutory classification, important for procedural purposes, is suggested by R. S. Mo. 1919, Sec. 2160. In a certain type of

written and signed contract, consideration is presumed (but of course not conclusively), and does not have to be pleaded. In all other contracts, the consideration must be pleaded. *County of Montgomery v. Auchley* (1887) 92 Mo. 126, 4 S. W. 425.

Section 7. FORMAL CONTRACTS.

Formal contracts are

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

Comment:

a. Other contracts which by statute are required to be in writing or in some prescribed form are not classed as formal contracts. The classification is made for convenience of reference and designation. Contracts here classified as formal, in many cases, at least, have some characteristics analogous to those of contracts classified as informal. Promissory notes and bills of exchange, especially, are often called informal contracts for this reason. In many states also the effect of seals has been abolished by statute, thereby doing away with Class (a).

Annotation:

Before 1893, when the revolutionary statute was adopted affecting the significance of a seal in the law of contracts, now known as R. S. Mo. 1919, Sec. 2159, this Section of the Restatement would have been in accord with Missouri law. Since 1893, Class (a) in Section 7 has been done away with, except as to the conveyance of a legal title to real estate by a corporation possessing a seal. See *Pullis v. Pullis Bros. Iron Co.* (1900) 157 Mo. 565, 57 S. W. 1095; *Albers v. Acme Paving & Crusher Co.* (1916) 196 Mo. App. 265, 194 S. W. 61. In *State ex rel. v. Parke-Davis & Co.* (1915) 191 Mo. App. 219, 177 S. W. 1070, the court expressly stated that a bond is "no different from any other simple contract." In the terminology of the Restatement, a simple contract is an informal contract.

It should be remembered that in Missouri all sealed contracts, including conveyances of real estate by a corporation, can be impeached for a want of consideration. R. S. Mo. 1919, Sec. 1404.

Adopting the Restatement's classification, we may say that formal contracts in Missouri are (a) contracts in the nature of conveyances under seal by a corporation having a seal, (b) recognizances, and (c) negotiable instruments. (A conveyance

is not a contract unless it contains a promise. Some conveyances contain promises, often resting upon the grantee after acceptance, such as a promise to pay off a mortgage. Some conveyances are not contracts because they contain no promises.)

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. When peculiar incidents are attached to such contracts after their formation, attention is called to these incidents in appropriate connections.

Annotation:

In Missouri since 1845, a statutory designation of a sealed contract has been "specialty." R. S. Mo. 1919, Sec. 1404. The purpose of this statute was to make specialties the same as simple (informal) written contracts with respect to the element of consideration.

The Missouri Statute of Limitations makes no distinction between writings "whether sealed or unsealed." R. S. Mo. 1919, Sec. 1316.

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:

This is in accord with the law of Missouri. "A recognizance is in all cases a contract acknowledged by the parties and entered or filed in the records of the court." *State v. Wilson* (1915) 265 Mo. 1, 175 S. W. 603. This case points out essential differences between a recognizance and a bail bond, which is also a contract. A recognizance and a cost bond are compared in *Calhoun v. Gray* (1910) 150 Mo. App. 591, 131 S. W. 478. "There is no substantial difference between a recognizance at common law and

the one provided for by our statute." *State v. Poston* (1876) 63 Mo. 521.

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:

Bills and notes are governed in Missouri by the chapter in R. S. Mo. 1919 beginning with Sec. 787. Warehouse receipts and bills of lading are governed by the chapter in R. S. Mo. 1919 beginning with Sec. 13450.

This Section is in accord with Missouri decisions if the words designating the enumerated classes are construed somewhat broadly. Some types of certificates of deposit are promissory notes and, therefore, negotiable. *Howey Co. v. Cole* (1925) 219 Mo. App. 34, 269 S. W. 955. Another type of certificate of deposit is non-negotiable. *Aufderheide v. Moeller* (1926) 221 Mo. App. 442, 281 S. W. 965. A trade acceptance is a bill of exchange and, therefore, negotiable. *Fitzwilliams v. Northwestern Trust Co.* (Mo. App. 1928) 10 S. W. (2d) 334.

Section 11. INFORMAL CONTRACTS.

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

Comment:

a. Under this definition a written contract is an informal contract unless it falls within one of the classes enumerated in Section 7. As stated in the Comment to that Section, the classification of contracts as formal and informal is for convenience of reference and designation. Many contracts classified as informal have some requisites of form.

b. By the English Statute of Frauds, enacted in 1677, a number of contracts were made unenforceable unless evidenced by a writing. A great part of this statute has been re-enacted in all of the United States, and other contracts besides those enumerated in the English statute have frequently been subjected to the same formal requirement. Rules applicable to such statutes are stated in Chapter 8.

c. In a number of States by statute a written promise is presumed to have been made for sufficient consideration, though lack of consideration, if proved, establishes the legal nullity of the promise. In a very few States, the local statutes enact that a written promise, like a sealed contract at common law, shall be binding without consideration.

Informal contracts as that term is used in the Restatement of this Subject are often called simple contracts.

Annotation:

Informal contracts, as here defined, are in Missouri usually called *simple* contracts. *County of Montgomery v. Auchley* (1887) 92 Mo. 126, 4 S. W. 425. By reason of R. S. Mo. 1919, Sec. 2159, practically all sealed contracts are now converted legally into simple (informal) contracts. *State ex rel. v. Parke-Davis & Co.* (1915) 191 Mo. App. 219, 177 S. W. 1070.

By R. S. Mo. 1919, Sec. 2160, certain written promises are presumed (but not conclusively) to be for a sufficient consideration. *Terry v. Terry* (Mo. App. 1919) 217 S. W. 842; *Johnson v. Woodmen* (1906) 119 Mo. App. 98, 95 S. W. 951. As to nature of written promises affected by the statute, see *Jeffries v. Hager* (1853) 18 Mo. 272.

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.

c. A unilateral contract is in a very real sense, as its name implies, a one-sided contract. There are two parties to the contract, it is true, and an expression of assent on the part of each is usually necessary to its formation; but one of the requisites for making the contract should not be confused with the contract itself. The contract is merely the promise, not the mutual expression of assent nor the consideration paid for the promise. In a bilateral contract, on the other hand, as there are contractual promises on both sides, the contract is properly called bilateral.

d. Contracts are possible where there are more than two parties, but in disputes between any two of them, the principles applicable to the simpler forms of contracts will generally aid in the analysis of the rights and duties of the parties.

e. Contracts are also possible under Section 75 (2) where *A* promises *B* in consideration of *B*'s promise to *C*, or in consideration of *C*'s promise to *A*. The promises in such cases are not mutual, and, therefore, do not fall within the definition of bilateral contract. In view of possible differences in legal treatment they may properly be kept separate.

Annotation:

In Missouri cases, each one of the contrasting terms, *unilateral* and *bilateral*, is used with two separate and distinct meanings.

As to Mutuality. Sometimes *unilateral* indicates an alleged contract which, on examination, turns out to be an unaccepted gratuitous offer, and therefore not a binding contract at all. The transaction is one-sided as every gratuitous offer is one-sided. In *Royal Brewing Co. v. Uncle Sam Oil Co.* (1920) 205 Mo. App. 616, 226 S. W. 656, the court said: "Is the contract void for lack of mutuality—is it unilateral? The rule in respect to mutuality is that the contract must obligate each party to do something in consideration of what the other does, or is to do. It is frequently difficult in a given contract to say whether this

rule is complied with." See also *Laclede Construction Co. v. Tudor Iron Works* (1902) 169 Mo. 137, 69 S. W. 384; *Maccalum Printing Co. v. Graphite Compendius Co.* (1910) 150 Mo. App. 383, 130 S. W. 836. Sometimes *bilateral* indicates a challenged contract, which on examination is found to possess mutuality and is therefore binding. In *Loud v. St. Louis Union Trust Co.* (1926) 313 Mo. 552, 281 S. W. 744, there was an option which at first might have been a mere offer unsupported by any consideration, but shortly afterwards there was certainly an acceptance by performance. The court said: "Even though the Walker option may have been unilateral in its inception, when Walker, in reliance thereon, expended time and money in endeavoring to procure a purchaser for the stock, such acts upon his part, under the holdings of this court and our courts of appeals, made the contract bilateral and binding upon both parties."

As to Promises. Sometimes unilateral contract in Missouri decisions means, as always in the Restatement, a true contract where the consideration on one side is executed and the contract consists of only one promise. The transaction is binding, but is one-sided because the duty to perform is one-sided. In *Underwood Typewriter Co. v. Century Realty Company* (1909) 220 Mo. 522, 119 S. W. 400, the majority opinion by Lamm, J., quotes with approval from William L. Clark's note to *American Cotton Oil Co. v. Kirk* (1895) 15 C. C. A. 543, where Mr. Clark uses the term *unilateral* exactly as used in the Restatement. *Cal Hirsch & Sons Iron & Rail Co. v. Paragould & M. R. Co.* (1910) 148 Mo. App. 173, 127 S. W. 623, refers to both separate meanings of the one word *unilateral*. An ordinary option contract, where an offer cannot be withdrawn because of an executed consideration, is a unilateral contract. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink* (1908) 211 Mo. 671, 111 S. W. 480. In *German v. Gilbert* (1900) 83 Mo. App. 411, the court described a *bilateral* contract as one "where the consideration for a promise is a promise." To the same effect is *Wilt v. Hammond* (1914) 179 Mo. App. 406, 165 S. W. 362.

With the Restatement's distinctive meaning, *unilateral* was probably first used by Judge John F. Dillon in *Barrett v. Dean* (1866) 21 Iowa 423. Undoubtedly Professor Langdell of Harvard popularized the use of the terms *unilateral* and *bilateral* with exclusive reference to promises. See WILLISTON, CONTRACTS, Sec. 13, note.

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 to 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.

Illustrations:

1. *A*, an infant, sells and delivers his watch to *B*, an adult, in return for the latter's promise to pay \$20. There is a unilateral contract whereby *B* becomes owner of the watch and is under an enforceable duty to pay \$20 to *A*, but *A* has the power of extinguishing his own right to the money and the promisor's duty to pay it and of revesting in himself the ownership of the watch.

2. *A*, by fraud, induces *B* to make a promise to pay *A* money in consideration of goods delivered by *A* to *B*. There is a contract, but the fraudulent representations of *A* give *B* a power of disaffirmance by tendering back to *A* within a reasonable time the goods received from him.

3. *A*, an infant, makes a bilateral agreement with *B*, an adult, the infant promising to pay money and the adult promising to deliver a chattel. This is enforceable against *B*, but not against *A*, who may successfully demur to any declaration setting forth all the operative facts. If *A* has not previously disaffirmed he will have the power of ratification upon attaining his majority.

4. *A*, by fraud, induces *B* to promise to pay money for certain advice which *A* gives. This promise creates no duty in *B*, but is not wholly void, because it can be validated by ratification by *B* after he learns the facts.

Special Note: A promise or set of promises for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor, is often called a void contract, but this is a contradiction in terms in view of the definition of contract in Section 1.

In JENKS, DIGEST OF ENGLISH CIVIL LAW, Section 182, a contract is defined as including any agreement where the parties *intended* to create a legal obligation; and only under this artificial nomenclature could an agreement by which the parties intended to create such an obligation but which did not accomplish their intention, properly be called a void contract.

Annotation:

This Section is in general accord with the Missouri decisions. "When an infant makes a promise in any business transaction, though not absolutely void, it is voidable by him." *Kerr v. Bell* (1869) 44 Mo. 120. R. S. Mo. 1919 Sec. 2173 for procedural purposes limits the common law method of ratifying infants' contracts. "If a party defrauded misunderstands the nature

of the contract so that the minds of the parties never meet on its terms, it is void. But, if, understanding its terms, he is induced to sign it by fraudulent representations outside of its terms, it is voidable and must be set aside before the party defrauded can maintain an action." *Metropolitan Paving Co. v. Brown-Crummer Inv. Co.* (1925) 309 Mo. 638, 274 S. W. 815. This case holds that the assignment of a voidable contract is itself a voidable contract. *State ex rel. v. Stuart* (1905) 111 Mo. App. 478, 86 S. W. 471 construes R. S. Mo. 1919 Sec. 1238, which provides a special method of pleading, in a reply, defendant's fraud so as to avoid an alleged discharge relied upon in the answer. In *Broadwater v. Darne* (1847) 10 Mo. 277, drunkenness of a party was held to render a contract voidable. In *Rogers v. Warren* (1898) 75 Mo. App. 271, the facts justified an instruction on the theory that drunkenness rendered the contract void. When a person of unsound mind executes a promissory note and the person with whom he deals is ignorant of the mental infirmity, such note is not void but only voidable. *Hill-Dodge Banking Co. v. Loomis* (1909) 140 Mo. App. 62, 119 S. W. 967. What will "constitute duress to avoid a contract," is thoroughly considered in *Mississippi Valley Trust Co. v. Begley* (1923) 298 Mo. 684, 252 S. W. 76.

From the case last cited and from several of the other cases cited above, it will be seen that in Missouri the term *void contract* is used as a term of convenience, to contrast with *voidable contract*. Apparently the Institute favors the abandonment of the term *void contract* which is logically a solecism.

Missouri seems to be one of the "many jurisdictions," referred to in comment *c*, in which an infant can avoid a contract without necessarily putting the other party back into his original position. "The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent, where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed." *Craig v. VanBebber* (1890) 100 Mo. 584, 13 S. W. 906. To the same effect: *Ridgeway v. Herbert* (1899) 150 Mo. 606, 51 S. W. 1040; *Eagleburger v. Shelton* (Mo. App. 1925) 272 S. W. 698. The general rule as to *statu quo* is also relaxed when special reasons exist in an equitable suit to rescind a contract on the ground of fraud. *Parish v. Casner* (Mo. 1926) 282 S. W. 392; *Maupin v. Mo. State Life Ins. Co.* (Mo. App. 1919) 214 S. W. 398.

Section 14. UNENFORCEABLE CONTRACTS.

An unenforceable contract is one which the law does not enforce by legal proceedings, but recognizes in some indirect or col-

lateral 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.

Illustrations:

1. *A* is indebted to *B*, but the Statute of Limitations has barred the remedy. *A* has the power to make a contract without consideration by making a new promise or part payment of the debt (see Section 86). But even without such further acts, legal consequences may flow from the barred debt. If the creditor has security, he may apply it towards payment of the debt. If he can obtain service of process on the debtor in another jurisdiction, the debt may be enforced, unless enforcement is prohibited by the laws of that jurisdiction.

2. *A* has a contract with his government. This cannot be enforced by ordinary procedure, for even if the government allows itself to be sued, it does not allow execution to be levied against it. Yet the legal consequences of the contract show that what is promised *A* is due him as of right and not as a favor. Any money ultimately obtained by him will be regarded as money to which he was entitled under the contract. Therefore, if he becomes bankrupt after payment is due, but before it has been made or an appropriation voted, the money will belong to his trustee in bankruptcy and will not be dealt with as after-acquired property.

3. *A* makes an oral purchase of goods for an agreed price of \$1000. There is no delivery or part payment, and because of the local Statute of Frauds the bargain is unenforceable. *A* insures the goods as owner. The insurer cannot defeat a claim under the policy on the ground that *A* did not own the goods.

Annotation:

Missouri courts have used the term *non-enforceable* in describing this type of contract. *Donovan v. Brewing Co.* (1902)

92 Mo. App. 341 (Statute of Frauds). They have also used the term *voidable* to express the same idea. *Shelton v. Thompson* (1902) 96 Mo. App. 327, 70 S. W. 256. *Lowenstein v. Queen Ins. Co.* (1910) 227 Mo. 100, 127 S. W. 72, recognizes the difference between a contract unenforceable by reason of lapse of time and a void contract.

See also Sec. 86 (Statute of Limitations) and Sec. 87 (discharge in bankruptcy).

In distinguishing between voidable and unenforceable contracts, the Restatement follows SIR WILLIAM R. ANSON, LAW OF CONTRACT.

As to unenforceable contracts against municipalities in Missouri, see *Yost v. Dallas County* (1915) 236 U. S. 50, 59 L. ed. 460, approving *State ex rel. v. Hager* (1887) 91 Mo. 452, 3 S. W. 844.

Chapter 2

FORMATION OF CONTRACTS—GENERAL PRINCIPLES

Section 15. PARTIES REQUIRED.

There must be at least two parties in a contract, but may be any greater number.

Comment:

a. It is not possible under existing law for a man to make a contract with himself. This rule is one of substance and independent of mere procedural requirements. Even though a man has different capacities, as for instance as trustee, as executor, as partner, as an individual, it is impossible as matter of substantive law for him by his own individual will or expressions to contract with himself. As will be seen under the following sections, it is another question whether a contract may be formed in which the same person is one of several on one side of a bargain, and either alone or with others a party to the other side. The question is also distinct whether a contract is necessarily discharged where one party becomes both obligor and obligee and there are no other parties to the contract.

b. Several persons may act together, as in the case of a partnership, either as promisors or promisees, and where parties are thus acting jointly, they are for many purposes regarded as a single unit. But there are also contracts in which a number of persons are parties and where each has several interests.

Thus any number of persons may promise a certain performance to one or to any number of persons in return for acts or return promises, and all may be part of the same transaction.

Illustrations:

1. *A, B, C* and *D* enter into a written contract by which *A* makes certain promises to *B*, other promises to *C*, other promises to *D*. *B, C* and *D* jointly make a promise to *A* in return, or severally promise different things to *A* in return. In either case there is a contract, and numerous variations may be made from this illustration in regard to the number of parties and the various promises which they may make jointly or severally, or in groups of two or more.

2. *A*, as trustee, signs and seals a promise to himself as an individual or as an executor. The instrument is void.

Annotation:

This is in accord with Missouri law. "At least two parties are essential to a contract." *Watson Seminary v. Pike County Court* (1899) 149 Mo. 57, 50 S. W. 880. "It is elementary law that a trustee is not permitted to purchase at his own sale." *Newton v. Rebenack* (1901) 90 Mo. App. 650. For a case applying the principle to two transportation corporations with interlocking directorates, see *Johnson v. United Railways Co.* (1920) 281 Mo. 90, 219 S. W. 38. For a case declining to apply the principle to a trust company and a brokerage company, see *Loud v. St. Louis Union Trust Co.* (1926) 313 Mo. 552, 281 S. W. 744.

It should be remembered that if a trustee buys from his beneficiary, the contract is not void but voidable if circumstances justify avoidance. *Guy v. Mayes* (1911) 235 Mo. 390, 138 S. W. 510.

It should also be remembered that one individual can effectually declare himself the trustee for another person. A declaration of trust is not necessarily a contract, and may be valid even if the beneficiary is not informed of the trust. *Mize v. Bates County National Bank* (1895) 60 Mo. App. 358.

Section 16. JOINT, SEVERAL, JOINT AND SEVERAL PROMISORS AND PROMISEES.

Where there are more promisors than one in a contract, some or all of them may promise jointly as a unit, or some or all of them may each promise severally or some or all of them may promise jointly and severally. Where there are more promisees than one in a contract, promises may be made to some or all of

them jointly as a unit or to some or all of them severally, or to some or all of them jointly and severally.

Comment:

a. Procedure in English and American courts in actions at law, when there has been no statutory change fusing legal and equitable procedure, permits but two sides to a litigation, that of the plaintiff and that of the defendant. Either the side of the plaintiff or that of the defendant may consist of more than one person, but all the persons joined as plaintiffs must assert a common right, and all the persons joined as defendants must be charged with a common duty.

b. As matter of substantive law, however, an indefinite number of persons may contract with one another; each one of the persons or groups of the persons promising either one or any number of the others, whether dealing with them individually or jointly as a unit. If all the promises are entered into as part of a single transaction, they form part of one contract.

c. In equity there has never been the requirement that the parties to a suit must consist of merely two units, one seeking to enforce a right against the other. On the contrary, any number of diverse and conflicting interests can be dealt with under equity procedure; and under the code procedure, now enacted in most of the United States, the same thing is true.

Annotation:

This rule of the common law has been modified by R. S. Mo. 1919, Sec. 2155, which provides that joint contracts shall be deemed to be joint and several. The Missouri modification applies to promisors but not to promisees. *Dewey v. Carey* (1875) 60 Mo. 224.

The first sentence of the Section is in accord with Missouri law except that promisors using apt words to bind themselves jointly at common law, are bound jointly and severally. The second sentence is in accord with Missouri law.

The matter is treated fully in Chapter 5, *post*.

Section 17. WHEN A PERSON MAY BE BOTH PROMISOR AND PROMISEE.

A contract may be formed between two or more persons acting

as a unit and one or more but fewer than all of these persons, acting either singly or with other persons.

Comment:

a. This Section is applicable to both unilateral and bilateral contracts, and like the other Sections in this Chapter is applicable both to formal and to informal contracts.

b. The rule does not touch upon the *rightfulness* of making such contracts as fall within its terms. In a particular case such a contract might be voidable for fraud or for other reasons.

Illustrations:

1. A becomes a member of an unincorporated society, and by so doing promises to pay dues to the society. He is bound by a contract.

2. A, a trustee of an estate jointly with B, enters into a written agreement by which he individually promises to buy and A and B as trustees promise to sell a piece of land belonging to the trust. This is a contract; and, though it is voidable by the beneficiaries if made without either their consent or the authority of a court, it is enforceable unless the beneficiaries elect to avoid it.

Annotation:

This Section is in accord with Missouri law.

Partners. The common law rule preventing one partner from suing the partnership, has been so modified by the statute making all firm contracts joint and several, that a partner, to whom was executed a note by the partnership, may in his individual name sue the other partner to compel him to pay his share of such note. *Willis v. Barron* (1898) 143 Mo. 450, 45 S. W. 289. Apparently the procedural doctrine of this case has not been applied to contracts other than negotiable instruments. *Caldwell v. Dismukes* (1905) 111 Mo. App. 570, 86 S. W. 270. A contract between a firm and one partner, evidenced merely by a book entry, probably could be enforced only by an equitable suit for dissolution. See *Margolin, Actions at Law Between Partners in Missouri* (1928) 13 ST. LOUIS L. REV., 201. For a note comparing the doctrine of *Willis v. Barron* with the law of other states, see 21 A. L. R. 21. The fact that the same person is both co-maker and co-payee in a note, if he assign his interest to the other payee, will not prevent the latter from recovering on the note. *Smith v. Gregory* (1881) 75 Mo. 121. Other useful cases are: *Brockman v. Fehrenbach* (Mo. App. 1922) 238 S. W. 1087; *O'Day v. Sanford* (1909) 138 Mo. App.

343, 122 S. W. 3; *Gilliam v. Loeb* (1908) 131 Mo. App. 70, 109 S. W. 835.

Unincorporated Associations. In *Missouri Bottlers' Assn. v. Fennerty* (1899) 81 Mo. App. 525, it was held that an unincorporated association was not a partnership, a valid contract existed between the association and one member, and a suit at law could be maintained against that member by the association's assignee. The validity of such contracts is clearly recognized in *State ex rel. v. Kansas City Live Stock Exchange* (1908) 211 Mo. 181, 109 S. W. 675. See also *Lindsay v. Hotchkiss* (1917) 195 Mo. App. 563, 193 S. W. 902; *Kuhl v. Meyer* (1890) 42 Mo. App. 474.

Section 18. NECESSITY FOR CONTRACTUAL CAPACITY.

No one can be bound by contract who has not legal capacity to incur at least voidable contractual obligations. Contractual incapacity may be total or may be only partial.

Comment:

a. Capacity, as here used, means legal power. The legal powers possessed by natural or artificial persons can be set forth only when the various classes are separately considered.

b. It is only where his contractual incapacity is total that it can be laid down broadly that a party to a transaction cannot enter into a contract.

Annotation:

This is in accord with Missouri law. Under the common law of coverture in Missouri before 1899, a married woman's alleged contract was void. *Bragg v. Israel* (1900) 86 Mo. App. 338. An infant has no power to make a contract appointing an attorney. *Curtis v. Alexander* (Mo. 1923) 257 S. W. 432; *Turner v. Bondalier* (1888) 31 Mo. App. 582. R. S. Mo. 1919, Sec. 482 takes away from a person adjudicated insane, all contractual power as to ordinary business affairs. *Herman v. St. Francois County Bank* (Mo. App. 1927) 291 S. W. 156. But marriage is not an ordinary business contract. *Payne v. Burdette* (1900) 84 Mo. App. 332. Apart from the statute last cited, an insane person's contract is void or voidable according to circumstances. *McKenzie v. Donnell* (1899) 151 Mo. 431, 52 S. W. 214.

To Be Continued