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RESTATEMENT OF THE LAW OF CONTRACTS OF THE
AMERICAN LAW INSTITUTE, SECTIONS 52-74,*
WITH MISSOURI ANNOTATIONS†

BY TYRRELL WILLIAMS

Section 52. ACCEPTANCE OF OFFER DEFINED.

Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror. If anything except a promise is requested as consideration no contract exists until part of what is requested is performed or tendered. If a promise is requested, no contract exists, except as qualified by Section 63, until that promise is expressly or impliedly given.

Comment:

a. In a unilateral contract the act requested and performed as consideration for the contract ordinarily indicates acceptance as well as furnishes the consideration; and, under Section 45, performing or tendering part of what is requested may both indicate assent and furnish consideration. In a proposal for a bilateral contract the mere assent of the offeree, whether manifested by words or acts, is by implication the promise requested and therefore here also mutual assent and consideration are indicated by the offeree at one and the same time.

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† Copyright, 1931, by Washington University. Previous sections of the Restatement, similarly annotated, will be found in the ST. LOUIS LAW REVIEW for December, 1930, and February, 1931.

b. A bilateral contract by definition consists of mutual promises. It is therefore essential that the offeree shall give the promise requested by the offeror, and doing this clearly indicates acceptance of the offer. The fact that this promise is given may be shown by any words or acts which indicate the offeree's assent to the proposed bargain.

c. As appears from Section 64 acceptance may be complete as soon as it is started on its way.

Illustration:

1. *A*, an auctioneer, requests bids at an auction. *B* makes the highest bid. A contract is formed, when, *A* by letting the hammer fall, or by other clear indication of his purpose, announces that a contract or sale has been made.

Annotation:

This Section is in accord with Missouri law. *Sawyer v. Walker* (1907) 204 Mo. 133, 102 S. W. 544, an offer to share commissions in the sale of property accepted by acting upon it and obtaining purchasers; *Williams v. Emerson Brantingham Implement Co.* (Mo. App. 1917) 198 S. W. 425, shipping machinery by offeree to offeree's agent held not acceptance of offer to buy machinery; *Nicholas v. Acme Cement Plaster Co.* (1909) 145 Mo. App. 523, 122 S. W. 773, offer to pay for replastering building accepted by conduct known to offeror. The cases just cited illustrate the first sentence of the Section. The second sentence is illustrated by *Trustees of LaGrange College v. Parker* (1918) 198 Mo. App. 372, 200 S. W. 663, offer to pay money to charitable institution held not accepted because there was no performance in reliance on offer. The third sentence is illustrated by *American Pub. & Engr. Co. v. Walker* (1901) 87 Mo. App. 503, a bilateral contract with a promise by offeree to perform services as requested by offeror who promised to pay money.

Section 53. NECESSITY FOR KNOWLEDGE OF OFFER.

The whole consideration requested by an offer must be given after the offeree knows of the offer.

Comment:

a. Consideration is defined in Section 75. In Section 53 no reference is made to the technical requirements of the sufficiency

of consideration; it is only stated that in order to constitute acceptance, whatever the offeror requests must be given.

Illustrations:

1. *A* offers a reward for information leading to the arrest and conviction of a criminal. *B*, in ignorance of the offer, gives information leading to his arrest and later, with knowledge of the offer and intent to accept it, gives other information necessary for conviction. There is no contract.

2. *A* offers \$500 to anyone who will give him a particular set of first editions. *B*, a friend of *A*, in ignorance of the offer, makes *A* a Christmas present of all but one of the books. Later, on learning of the offer, he tenders the remaining volume and demands \$500. He is not entitled to it.

Annotation:

This Section is not in accord with Missouri law. In *Hoggard v. Dickerson* (1914) 180 Mo. App. 70, 165 S. W. 1135, the court said: "It is sufficient if any essential part of the service is performed after the party claiming it had knowledge of the reward being offered and relied on the same being paid." This is dictum in a reward case, but seems to be accurately based upon a holding in *Smith v. Vernon County* (1905) 188 Mo. 501, 87 S. W. 949, also a reward case, where "the bare arrest was prior to the offer but was consummated by a delivery after the offer," the reward having been offered for the "apprehension and conviction" of a certain criminal.

It should be remembered that Section 23 is in accord with Missouri law.

Section 54. WHO MAY ACCEPT AN OFFER.

A revocable offer can be accepted only by or for the benefit of the person to whom it is made.

Comment:

a. The words "for the benefit of" are inserted to cover such contracts as are permitted by Section 75 (2), namely those in which the offeror's promise to *B* is conditional on an act being done or a promise made by *C* in exchange for the offeror's promise. *C*'s act or promise is an acceptance.

b. An offer may also be accepted by an agent of the offeree, and even if one who accepts, purporting to be such an agent is not authorized by the offeree so to do, his act may be ratified; but throughout the restatement of this subject it is assumed, in

the absence of contrary statement, that any necessary act may be done by an agent.

Illustrations:

1. *A* makes an offer to *B*, who dies after receiving it. His executor, though acting within the period stated in the offer, cannot accept it.

2. *A* sends an order for goods to *B*, *B* hands the offer over to *C* who fills the order without disclosing to *A* that the performance does not come from *B*. There is no contract.

3. *A*, in Illustration 2, before using the goods, discovers that they have come from *C*. *A*'s retention or use of them is an acceptance of an offer from *C*, and a contract arises.

Annotation:

This Section has nothing to do with irrevocable options (Sections 46, 47), or with contracts for the benefit of third persons (Sections 133-147).

The Section is not inconsistent with Missouri law. No cases exactly in point have been found.

Section 55. ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT; NECESSITY OF INTENT TO ACCEPT.

If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer.

Comment:

a. When an offeror requests a certain act or forbearance as the consideration for his promise, the act or forbearance when furnished is an ambiguous expression of intent, since acts, like words, often have more than one objective meaning. The reasonable interpretation may be that the offeree accepts the proposal, but it is possible that the true interpretation is that the offeree as a free man has exercised his privilege of acting or forbearing in the manner requested, without accepting the proposal. The only way to determine what his conduct actually means even objectively, is to ascertain his intent.

b. This is not the same as saying that the offer must be the cause of the acceptance. The offer is, indeed, usually the sole cause of the acceptance; but frequently there are other causative factors, and occasionally contracts may exist where if the offer is in any sense a cause of the acceptor's action it is so slight a

factor that a statement that the acceptance is caused by the offer is misleading.

c. Except to the extent stated in Sections 71 and 72, no question of intent to accept by words or acts apparently indicating assent arises when a bilateral contract is proposed. If, in accordance with Section 20, an offeree does acts with intent to do them which indicate his assent to an offer of a bilateral contract communicated to him as required by Section 23, the offeree comes under a duty to the offeror; and as he is bound by the contract, he is also entitled to take advantage of it. Indeed, this is necessary consequence of the axiom that both parties to a bilateral contract must be bound or neither is bound. Whereas when a unilateral contract is proposed and the offeree does the act requested, he may do it either to make a gift or a bargain.

Illustrations:

1. A offers a reward for information leading to the conviction of a criminal. B gives the information under circumstances compelling the conclusion that he did not intend thereby to secure the reward but was so completely actuated by motives of fear or public duty as to preclude such an intention. There is no contract.

2. B, the facts being otherwise as stated in Illustration 1, induced by motives of fear or public duty, would have given the information without hope of reward, but as there is an offer of reward he intends when he gives the information to accept the offer. There is a contract.

3. A communicates an offer to B requesting a return promise. B makes that promise intentionally. There is a contract, whatever B's state of mind may be.

4. A communicates an offer to B, who accepts it, being induced or caused to do so solely by C's fraudulent misrepresentations of which A is ignorant. There is a contract.

Annotation:

This Section is in accord with Missouri law. In *Ralls County v. Stephens* (1904) 104 Mo. App. 115, 78 S. W. 291, three parties claimed a reward offered for the capture of a murderer; the court decided in favor of one claimant because "he alone of the parties, when he learned of the murder and the reward for its perpetrator, became active and enterprising in endeavoring to effect a capture." An offer of guaranty is not turned into a contract by an act performed two years and eight months afterwards, and without notice to offeror. *Peninsular Stove Company v. Adams Hardware Co.* (1902) 93 Mo. App. 237. See also

Allen v. Chouteau (1890) 102 Mo. 309, 14 S. W. 869, taxes held to be paid on faith of offeror's letter, though claimed otherwise; *Sanderson v. Lane* (1890) 43 Mo. App. 158, offered reward claimed but not allowed when claimant had no knowledge of offer.

Section 56. ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT; NECESSITY OF NOTICE TO OFFEROR.

Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance has been given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after performance of the act or forbearance, the offeree exercises reasonable diligence to notify the offeror thereof.

Comment:

a. In the formation of a unilateral contract where the offeror is the party making the promise, as is almost invariably the case, a compliance with the request in the offer fulfills the double function of a manifestation of acceptance and of giving consideration. It is only in the exceptional case where the offeror has no convenient means of ascertaining whether the requested act has been done that notice is requisite. Even then, it is not the notice which creates the contract, but lack of notice which ends the duty.

Illustrations:

1. *A* writes to *B*: "Let *C* have \$100 and I guarantee its repayment." Immediately on receiving this communication, *B* lets *C* have \$100 but fails to notify *A* of the fact, although he knows that *A* is not otherwise likely to learn of it. *B* cannot enforce the guaranty if *C* fails to pay the debt.

2. *B*, the facts being otherwise as stated in Illustration 1, an hour after advancing the money receives a letter from *A* revoking the offer of guaranty. *B* promptly thereafter notifies *A* of the advance. The guaranty is binding. The contract is formed by the advance of the money, and notice being sent by *B* in a reasonable time the contract is not discharged.

Annotation:

By its terms this Section applies only to *unilateral* contracts. If a promissory offer contemplates a return promise, the situation is governed by Section 52.

The first sentence of Section 56 is in accord with the holdings in *Allen v. Chouteau* (1890) 102 Mo. 309, 14 S. W. 869, where the payment of taxes was the acceptance of an offer, the court saying "full performance of the consideration of an offer, before the offer is withdrawn, constitutes an acceptance of the offer"; *Carter v. Western Tie & Timber Co.* (1914) 184 Mo. App. 523, 170 S. W. 445, sawing of timber; *Leesley Bros. v. Fruit Co.* (1912) 162 Mo. App. 195, 144 S. W. 138, reduction of a draft. In the case last cited, the court said: "There is a radical distinction in regard to communication of acceptance between offers which ask that the offeree shall do something and offers which ask that the offeree shall promise something. In offers of the former kind, communication of the acceptance is ordinarily not required; in offers of the latter kind, communication of the acceptance is always essential." The cases just mentioned involved ordinary unilateral contracts, other than guaranty contracts.

Guaranty Cases. Section 56 as a whole is evidently intended as a rule of decision in guaranty cases. When compared with Missouri decisions in guaranty cases the entire Section is not inconsistent with Missouri law, although some Missouri dicta seem to imply that notice is required as a general rule, but is dispensed with in exceptional cases. *Pearsell Mfg. Co. v. Jeffreys* (1904) 183 Mo. 386, 81 S. W. 901; *Central Savings Bank v. Shine* (1871) 48 Mo. 456; *Nelson Mfg. Co. v. Shreve* (1902) 94 Mo. App. 518, 68 S. W. 376. In the case last cited the court said: "Occasionally the facts show the minds of guarantor and guarantee met without a formal notice of acceptance of the proposal by the guarantee, and also that the guarantor knew his proposal had been acted on and he had thereby become responsible; as when his promise was simultaneous with the grant of credit. Whenever it is apparent the guarantor had full knowledge of those facts without actual notice from the guarantee, such notice is not essential to render the former liable. One of such exceptions and the one with which we are at present concerned, is where the guaranty is given in response to a request for it by the creditor. In such instances the answer of the guarantor agreeing to become responsible for the money to be loaned or merchandise sold on credit to another party, at once concludes the contract and proves the guarantor knew he had assumed responsibility." Some Missouri dicta do not distinguish sharply, as the Restatement does, between *bilateral* and *unilateral* con-

tracts of guaranty. *Mitchell & Bro. v. Railton* (1891) 45 Mo. App. 273. No Missouri case has been found which justifies the Restatement's theory that a failure to exercise diligence to notify the offeror, in cases where notice is required, operates as a condition subsequent to discharge the contract. No Missouri case has been found where due diligence to notify was followed by an actual failure to notify.

In the following cases it was held that the facts indicated liability against the guarantor without express notification from the guarantee: *Davis Sewing Machine Co. v. Jones* (1875) 61 Mo. 409; *Barker v. Scudder* (1874) 56 Mo. 272; *American Nat. Bank v. Pillman* (1913) 176 Mo. App. 430, 158 S. W. 433. In the following cases it was held that under the facts, no liability would exist unless notice was given: *Taylor v. Shouse* (1881) 73 Mo. 361; *Central Savings Bank v. Shine* (1871) 48 Mo. 456; *Rankin & Rankin v. Childs* (1846) 9 Mo. 673. Actual knowledge may take the place of intended notice. *Tolman Co. v. Means* (1893) 52 Mo. App. 385.

The leading federal case pertinent to this Section is *Davis Sewing Machine Co. v. Richards* (1885) 115 U. S. 524, 29 L. ed. 480, cited with approval in *John Deere Plow Co. v. McCullough* (1903) 102 Mo. App. 458, 76 S. W. 716.

Section 57. UNILATERAL CONTRACT WHERE PROPOSED ACT IS TO BE DONE BY OFFEROR.

If in an offer of a unilateral contract the proposed act or forbearance is that of the offeror, the contract is not complete until the offeree makes the promise requested.

Comment:

a. This Section covers a particular and rather peculiar case covered by the more general language of Section 52. It occurs only where the performance of the offer automatically occurs at the moment the promise requested is given. This may happen where the proposal relates to the transfer of personal property. The very act of the acceptor in promising to pay the price may, if the offer so specifies, transfer the ownership of the goods to the offeree.

Illustration:

1. A writes to B, who is boarding A's horse, "I should like to sell my horse to you, and if you will promise to pay \$200 for it, the horse is yours." B makes the requested promise. Ownership of the horse is thereupon instantly transferred to him.

Annotation:

This Section is in accord with Missouri law. *Blow v. Spear* (1869) 43 Mo. 496, delivery of tobacco and promise to pay for same. See also *Botkin v. McIntyre* (1884) 81 Mo. 557, exchange of hay, the offeree's promise being implied.

Section 58. ACCEPTANCE MUST BE UNEQUIVOCAL.

Acceptance must be unequivocal in order to create a contract.

Comment:

a. An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.

Illustrations:

1. A sends an order for goods to B. B replies that the order will receive his attention. There is no contract.

2. A writes to B offering to sell a piece of land. B replies, "I shall meet you with the money in a few days and be ready to arrange particulars." There is no contract.

Annotation:

This Section is in accord with Missouri law. "The acceptance to close a contract on an offer must be absolute, unambiguous, unequivocal, without condition or reservation, and in exact accordance with the offer. It must not vary from the offer either by way of omission, addition or alteration. If it does, neither party is bound." *Scott v. Davis* (1897) 141 Mo. 213, 42 S. W. 714. To the same effect: *Krohn-Fechheimer Co. v. Palmer* (1920) 282 Mo. 82, 221 S. W. 353; *Remmers v. Bromschwig* (Mo. App. 1929) 18 S. W. (2d) 115; *Baker Matthews Lumber Co. v. Leach* (Mo. App. 1923) 255 S. W. 955; *Arnold v. Cason* (1902) 95 Mo. App. 426, 69 S. W. 34.

Section 59. ACCEPTANCE MUST COMPLY WITH TERMS OF OFFER.

Except as this rule is qualified by Sections 45, 63, 72, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested.

Comment:

a. This rule is a necessary corollary of the basic idea of contracts that duties are imposed by the law for only such performance as the parties have expressed a willingness to assume.

Illustrations:

1. *A* publishes an offer of reward for the "apprehension and conviction" of a criminal. *B* gives information leading to his apprehension and *C* later gives information necessary for his conviction. Neither *B* nor *C* is entitled to the reward. Nor are they entitled to it jointly unless they acted jointly.

2. *A* offers *B* \$5 for a book. *B* promptly communicates to *A* a promise to give the book. There is no contract, since *A* requested the actual delivery of the book, not a mere promise to give it.

Annotation:

This Section is in accord with Missouri law. *Scott v. American Express Company* (Mo. App. 1921) 233 S. W. 492, where a reward was offered for the conviction of an alleged criminal and the court held that within the meaning of the offer there could be no conviction pending an appeal from a judgment of conviction in the lower court; *Lovejoy v. Railroad Co.* (1893) 53 Mo. App. 386, where a reward was offered for the apprehension and conviction of a criminal and the court held that the giving of information leading to arrest and conviction was not an acceptance of the offer. But see *Smith v. Vernon County* (1905) 188 Mo. 501, 87 S. W. 949, suggesting a liberal application of the doctrine of substantial performance to reward cases.

Section 60. PURPORTED ACCEPTANCE WHICH ADDS QUALIFICATIONS.

A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.

Comment:

a. A qualified or conditional acceptance is a counter-offer, since such an acceptance is a statement of what the person making it is willing to do in exchange for what the original offeror proposed to give. A counter-offer is a rejection of the original offer (see Section 38 and Comment thereon). An acceptance, however, is not inoperative as such merely because it is expressly conditional, if the requirement of the condition would be implied from the offer, though not expressed therein.

Illustrations:

1. *A* makes an offer to *B*, and *B* in terms accepts but adds, "Prompt acknowledgment must be made of receipt of this letter." There is no contract, but a counter-offer.

2. A makes a written offer to B to sell him Blackacre. B replies, "I accept your offer if you can convey me a good title." There is a contract.

Annotation:

See Annotation to Section 38 as to the effect of a counter-offer. Section 60 is in accord with Missouri law. "The acceptance of the proposition presented by the one must be accepted by the other in the form tendered; and if the acceptance omits, adds to, or alters the terms of the proposition made, then neither party to the negotiations is bound." *State ex rel. v. Robertson* (Mo. 1917) 191 S. W. 989, application for life insurance met by what was held to be a counter-offer. To the same effect: *Scott v. Davis* (1897) 141 Mo. 213, 42 S. W. 714 alleged contract for sale of land; *Eads v. City of Carondelet* (1867) 42 Mo. 113, alleged contract with a municipality; *Lumber Co. v. Leach* (Mo. App. 1923) 255 S. W. 955, alleged contract for sale of lumber; *White Oak Coal Co. v. Squier Co.* (Mo. App. 1920) 219 S. W. 693, alleged contract to sell 100 cars of coal; *Railroad Co. v. Joseph & Bros. Co.* (1912) 169 Mo. App. 174, 152 S. W. 394, alleged contract for sale of steel rails; *Sarran v. Richards* (1910) 151 Mo. App. 656, 132 S. W. 285, alleged contract for sale of land; *Denton v. McInnis* (1900) 85 Mo. App. 542, alleged contract for sale of corn. In the following cases the principle of the Section was recognized but held not to apply under the facts: *Vantrees v. Trimble* (1923) 214 Mo. App. 30, 251 S. W. 396; *Lysle Milling Co. v. Sharp* (Mo. App. 1918) 207 S. W. 72; *McLean v. Gymnasium Assn.* (1895) 64 Mo. App. 55.

Section 61. ACCEPTANCE OF OFFER WHICH STATES PLACE, TIME OR MANNER OF ACCEPTANCE.

If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.

Comment:

a. If the offeror prescribes the only way in which his offer must be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.

Illustrations:

1. *A* writes an offer to *B* in which *A* says, "I must receive your acceptance by return mail." An acceptance sent by any other means which reaches *A* as soon as a letter sent by return mail would normally arrive, creates a contract.

2. *A* makes an offer to *B* and adds, "Send your office boy around with an answer to this by twelve o'clock." The offeree comes himself before twelve o'clock and accepts. There is a contract.

3. *A* offers to sell his land to *B* on certain terms, also saying: "You must accept this, if at all, in person at my office at ten o'clock tomorrow." *B*'s power is strictly limited to one method of acceptance.

4. *A* offers to sell his land to *B* on certain terms, also saying: "You may accept by leaving word at my house." This indicates one operative mode of acceptance; but *B*'s power is not limited to that mode alone. A personal notice to *A* would serve just as well.

5. *A* makes an offer to *B* and adds, "My address is 53 State Street." This is a business address. *B* sends an acceptance to *A*'s house which *A* receives promptly. There is probably a contract, but it is a question of interpretation whether *A* has made a positive requirement of the place where the acceptance must be sent.

Annotation:

This Section is in accord with Missouri law. In *Hollman v. Conlon* (1898) 143 Mo. 369, 45 S. W. 275, an equitable suit for specific performance, time for acceptance prescribed in the offer was held to be of the essence. *Eagle Mill Co. v. Caven* (1898) 76 Mo. App. 458, an action at law, differentiates clearly between the function of the court in construing words in an offer limiting the time for acceptance, and the function of the jury in determining the time when acceptance was attempted. Other cases in accord are: *Brewer v. Lepman* (1908) 127 Mo. App. 693, 106 S. W. 1107; *James & Sons v. Marion Fruit Jar & Bottle Co.* (1897) 69 Mo. App. 207.

Section 62. ACCEPTANCE WHICH REQUESTS CHANGE OF TERMS.

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

Illustration:

1. *A* offers to sell *B* 100 tons of steel at a certain price. *B* replies, "I accept your offer. I hope that if you can ar-

range to deliver the steel in weekly instalments of 25 tons you will do so." There is a contract, but A is not bound to deliver in instalments.

Annotation:

This Section is in accord with Missouri law. The principle was applied in *Stotesburg v. Massengale* (1883) 13 Mo. App. 221, where there was a valid acceptance coupled with a suggestion of a guaranty. To the same effect: *Vantrees v. Trimble* (1923) 214 Mo. App. 30, 251 S. W. 396, acceptance with a reference to a future contract in writing; *Cavender v. Waddingham* (1878) 5 Mo. App. 457, acceptance with a condition already implied by law.

Section 63. EFFECT OF PERFORMANCE BY OFFEREE WHERE OFFER REQUESTS PROMISE.

If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract, subject to the provisions of Section 56, provided that such performance is completed or tendered within the time allowable for accepting by making a promise. A tender in such a case operates as a promise to render complete performance.

Comment:

a. This section states an exception to Sections 52 and 59. If within the time allowed for accepting the offer full performance has been given, the offeror has received something better than he asked for and is bound, since the only object of requiring a promise is ultimately to obtain performance of it. Beginning to perform within the time allowed for accepting the offer will not amount to an acceptance, unless the offeree also gives an assurance that performance will be completed.

Illustration:

1. A writes to B, "I will pay you \$100 for plowing Flodden field, if you will promise me by next Monday to finish the work before the following Saturday." B makes no promise but completes the requested plowing before the following Monday and promptly notifies A that he has done the work. There is a unilateral contract. There would be no contract had B finished the plowing on Tuesday, having made no promise.

Annotation:

In so far as this Section sanctions a contract (not merely a quasi-contract) when the offeree substitutes performance for a promise to perform, without notice to the offeror, it is apparently in conflict with the following statement of Missouri law laid down in *Conklin v. Cabanne* (1881) 9 Mo. App. 579: "Where one writes to another requiring an answer as to whether the latter will accept certain employment at a certain sum, a voluntary compliance with the terms, without the writer's knowledge, will not amount to an acceptance by the latter where the letter remains unanswered."

Section 64. HOW ACCEPTANCE MAY BE TRANSMITTED; TIME WHEN IT TAKES EFFECT.

An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror.

Illustrations:

1. A makes B an offer by mail adding, "Telegraph your answer." B promptly telegraphs an acceptance. The telegram never reaches A. There is a contract as soon as the telegram is delivered to the telegraph company.

2. A makes B an offer by mail, or messenger, and B promptly sends an acceptance by his own servant or special messenger. There is no contract until the acceptance is delivered by the servant or messenger to the offeror, or to some person authorized to receive it on his behalf.

Annotation:

This Section is in accord with Missouri law. "The doctrine now is that the contract is complete when the acceptance is forwarded, without reference to the time of its reception." *Lungstrass v. German Insurance Company* (1871) 48 Mo. 201. The principle of the Section was the rule of decision in *Logan v. Waddle* (Mo. App. 1922) 238 S. W. 516, where the letter of acceptance was missing. The principle is recognized in the following cases: *Horton v. New York Life Ins. Co.* (1899) 151 Mo. 604, 52 S. W. 356; *Egger v. Nesbitt* (1894) 122 Mo. 667, 27 S. W. 385; *Trippin v. Western Union Telegraph Co.* (1916) 194 Mo. App. 80, 185 S. W. 539; *Hauck Clo. Co. v. Sharpe* (1900) 83 Mo. App. 385; *Lancaster v. Elliott* (1887) 28 Mo. App. 86.

Section 65. ACCEPTANCE BY TELEPHONE.

Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other.

Annotation:

This Section is in accord with Missouri law. The principle was a rule of decision in *St. Louis Maple & Oak Flooring Co. v. Knost* (1910) 148 Mo. App. 563, 128 S. W. 532, where no question was raised "as to the identity of the parties conversing."

Section 66. WHEN A PARTICULAR MEANS OF TRANSMISSION IS AUTHORIZED.

An acceptance is authorized to be sent by the means used by the offeror or customary in similar transactions at the time when and the place where the offer is received, unless the terms of the offer or surrounding circumstances known to the offeree otherwise indicate.

Illustration:

1. A makes B an offer by mail. B promptly mails an acceptance. There is a contract as soon as B's letter is mailed.

Annotation:

This Section is in accord with Missouri law. "Notice is not the only evidence of acceptance. Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties—the bringing their minds together—as a formal letter of acceptance. The terms, 'the nature of the offer, or circumstances under which it is made,' or relation of the parties, may indicate another mode; and if so, its adoption equally binds them." *Lungstrass v. German Ins. Co.* (1871) 48 Mo. 201. See also *Pearsell Mfg. Co. v. Jeffreys* (1904) 183 Mo. 386, 81 S. W. 901, a guaranty case where offeree's acceptance was notified to offerors' agent. The leading federal case in accord with this Section is *Eliason v. Henshaw* (1819) 17 U. S. 225, 4 L. ed. 556.

Section 67. ACCEPTANCE BY MAIL OR FROM A DISTANCE, WHEN VALID UPON DESPATCH.

An acceptance sent by mail or otherwise from a distance is not operative when despatched, unless it is properly addressed and any other precaution taken which is ordinarily observed to insure safe transmission of similar messages.

Annotation:

This Section is in accord with Missouri law. "An acceptance of an order for goods is effectual from the moment the letter of acceptance, properly directed and stamped, is deposited in the post office, or if by wire, the moment the telegram is paid for and delivered to the telegraph company for transmission." *Price v. Atkinson* (1906) 117 Mo. App. 52, 94 S. W. 816. The principle is recognized by well considered dicta in the following cases: *Egger v. Nesbitt* (1894) 122 Mo. 667, 27 S. W. 385; *Lungstrass v. German Ins. Co.* (1871) 48 Mo. 201; *Collins v. Hoover* (1920) 205 Mo. App. 93, 218 S. W. 940; *McCaskey Register Co. v. Redd* (1910) 145 Mo. App. 185, 130 S. W. 109.

Section 68. WHEN AN ACCEPTANCE INOPERATIVE WHEN DESPATCHED IS OPERATIVE UPON RECEIPT BY 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:

This Section is not inconsistent with Missouri law. No cases directly in point have been found. The principle seems to be recognized in *Collins v. Hoover* (1920) 205 Mo. App. 93, 218 S. W. 940, where the court said: "Plaintiffs had to prove that they accepted defendant's offer to permit them to sell his farm, and they undertook to make this proof by showing that they had accepted by letter, and to do this *in the absence of proof that defendant received the letter* plaintiffs were required to prove that the letter was written and properly mailed."

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 ac-

ceptance from a distance need not be received if started on its way in a method authorized, unless receipt is made a condition 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.

Illustrations:

1. *A* sends *B* by mail an offer dated from *A*'s house and states as a condition of the offer that an acceptance must be received within three days. *B* mails an acceptance which reaches *A*'s house and is delivered to a servant or is deposited in a mail box at the door within three days; but *A* has been called away from home and does not personally receive the letter for a week. There is a contract.

2. *A* sends *B* by mail an offer, but later, desiring to revoke the offer, telegraphs *B* to that effect. The messenger boy carrying the telegram from the receiving office meets *C*, *B*'s neighbor, who volunteers to carry the telegram to *B*, and accordingly is given it by the messenger boy. *C* forgets to deliver it to *B* until the following morning. An acceptance by *B* mailed prior to this time creates a valid contract.

Annotation:

This Section seems to be in accord with Missouri law. "A revocation of an order does not take effect until the letter or telegram revoking the offer is actually received." *Price v. Atkinson* (1906) 117 Mo. App. 52, 94 S. W. 816. To the same effect: *Outcault Advertising Co. v. Wilson* (1915) 186 Mo. App. 492, 172 S. W. 394. For cases justifying the last clause of this Section, see Annotation under Section 64.

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 the Restatement of this Subject. When mistake prevents the existence of a contract is stated in Section 71.

Illustrations:

1. *A*, supposing a document presented to him by *B* is a receipt, signs it. It is in fact a promise to pay a sum for which *B* has previously offered to settle a claim. *B* acts in good faith and makes no misrepresentation. There is a contract unless *A* is guilty of no negligence in supposing the document to be a receipt (see Section 71).

2. *A*, a carrier, receiving a shipment of goods delivers to *B*, the shipper, a bill of lading. The terms of the bill of lading, unless they are opposed to public policy, form part of the contract between *A* and *B*.

3. *A* orders goods from *B* and *B* ships the goods with a label plainly reading, "No warranty of kind or quality is given by the seller." *A* accepts the goods. The sale is without a warranty, though apart from the notice a warranty would be implied.

4. *A* makes *B* an offer on a sheet of paper having on the letterhead plainly printed, "All our contracts are subject to strikes." *B* accepts the offer. The statement on the letterhead is operative.

Annotation:

This Section is in accord with Missouri law. "To permit a party when sued on a written contract to admit that he signed it but did not read it or know its stipulations, would absolutely destroy the value of all contracts and negotiable instruments." *Crim v. Crim* (1901) 162 Mo. 544, 63 S. W. 489. See also *Drysen v. Union Electric Light & Power Co.* (1927) 317 Mo. 221, 295 S. W. 116, release signed without reading; *Donnelly v. Missouri-Lincoln Trust Co.* (1912) 239 Mo. 370, 144 S. W. 388, subscription contract for bonds signed without reading provision as to payee; *Porter v. Woods* (1897) 138 Mo. 539, 39 S. W. 794, declaration of trust on conditions accepted by beneficiary without reading; *Zeilman v. Central Mut. Ins. Assn.* (Mo. App. 1929) 22 S. W. (2d) 88, release of claim on life insurance policy by beneficiary alleged to be illiterate; *England v. Houser* (1914) 178 Mo. App. 70, 163 S. W. 890, written contract and alleged oral promise that it would not be enforced; *International Text-Book Co. v. Anderson* (1913) 179 Mo. App. 631, 162 S. W. 641, prin-

ciple applied to a foreigner who signed contract and then claimed he did not understand English; *Campbell v. Van Houten* (1891) 44 Mo. App. 231, written contract to sell potatoes and alleged mistake as to place of delivery; *Haddaway v. Post* (1889) 35 Mo. App. 278, printed interpretations referred to on face of written contract held to be part of contract.

The principle of this Section frequently has been applied to carriers' special contracts. *Railway Company v. Cleary* (1883) 77 Mo. 634; *O'Bryan v. Kinney* (1881) 74 Mo. 125; *Snider v. Adams Express Co.* (1876) 63 Mo. 376; *Aiken v. Wabash R. R. Co.* (1899) 80 Mo. App. 8; *Wyrick v. Railway Co.* (1898) 74 Mo. App. 406.

In several of the cases cited above, the principle of this Section is coupled with a warning that the principle is inoperative in the presence of fraud or mistake. And see *State ex rel. v. Bland* (Mo. 1929) 23 S. W. (2d) 1029, fraud in inducing illiterate foreigner to sign contract with an attorney; *Reddick v. Union Electric Light & Power Co.* (1922) 210 Mo. App. 260, 243 S. W. 382, substantial evidence of fraud in procuring a release.

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.

Illustrations:

1. *A* offers *B* to sell goods shipped from Bombay ex steamer "Peerless." *B* expresses assent to the proposition. There are, however, two steamers of the name "Peerless." It may be supposed, (1) that *A* knows, or has reason to know this fact, and that *B* neither knows nor has reason to know it; (2) conversely, that *B* knows or has reason to know it and that *A* does not; (3) that both know or have reason to know of the ambiguity; or (4) that neither of them knows or has reason to know it at the time when the communications between them took place. In the case first supposed there is a contract for the goods from the steamer which *B* has in mind. In the second case there is a contract for the goods from the steamer which *A* has in mind. In the third and fourth cases there is no contract unless *A* and *B* in fact intend the same steamer. In that event there is a contract for goods from that steamer.

2. *A* says to *B*, "I offer to sell you my horse for \$100." *B*, knowing that *A* intends to offer to sell his cow, not his horse for that price, and that the use of the word "horse" is a slip of the tongue, replies, "I accept." There is no contract for the sale of either the horse or the cow.

Annotation:

This Section treats of such mistake as prevents the formation of a contract. Mistake and fraud as grounds for avoiding a contract are not within the purview of the Section.

Section 71 is not inconsistent with the law of Missouri but judicial statements of Missouri law do not always differentiate between mistake which prevents the formation of a contract, and mistake or fraud which may avoid a contract. In *McCormack v. Lynch* (1897) 69 Mo. App. 524, the court, in holding a contract valid in spite of a mistake on one side, said: "The defendant could have avoided a recovery if his alleged mistake had been induced by some concealment or misrepresentation on the part of the plaintiff. Some authorities hold that he would be released even if the plaintiff was conscious of the fact that he was laboring under the mistake." In *Haubelt v. Rea & Page Mill Co.* (1899) 77 Mo. App. 672, there was a mistake in the terms of an offer unknown to offeree who accepted; held a contract.

Clause (a) seems to be in harmony with *Embry v. Hargadine, McKittrick D. G. Co.* (1907) 127 Mo. App. 383, 105 S. W. 777, where the court held there was a contract; the words of the acceptance were reasonably understood by the offeror in a sense different from the sense unreasonably attached to those words by the acceptor.

Clause (b) presents a principle in harmony with the decision in *Wilbur Stock Food Co. v. Bridges* (1911) 160 Mo. App. 122, 141 S. W. 714, although the court based its decision upon "misrepresentations" contained in a written offer which "was intentionally drawn to convey a false impression" with reference to offeror's "secret intention."

Clause (c) is in accord with *Buckberg v. Washburn-Crosby Co.* (1906) 115 Mo. App. 701, 92 S. W. 733, where an alleged acceptor must have known the price quoted in an offer was an error, the court saying: "That a binding contract cannot arise under such circumstances is too plain for argument." See also *Dameron v. Jamison* (1877) 4 Mo. App. 299, an equitable suit to correct a deed; relief granted. On the other hand, *Price Brokerage Co. v. Railroad Co.* (Mo. App. 1917) 199 S. W. 732 seems to be a case for applying the principle, but was decided without any reference to the knowledge of offeree as to offeror's mistake. See also *Cunningham v. Atterbury* (1912) 166 Mo. App. 137, 148 S. W. 176, wherein some dicta are at variance with this clause.

Section 72. ACCEPTANCE BY SILENCE.

(1) Where an offeree fails to reply to a 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.

Illustration of Subsection (1a):

1. A gives several lessons on the violin to B's child, intending to give the child a course of twenty lessons, and to charge B the price. B never requested A to give this instruction but silently allows the lessons to be continued to their end, having good reason to know A's intention. B is bound to pay the price of the course.

Illustrations of Subsection (1b):

2. A offers to sell to B a horse already in B's possession for \$250, saying: "I am so sure that you will accept that you need not trouble to write me. Your silence alone will operate as acceptance." B makes no reply, but he does not intend to accept. There is no contract.

3. The facts being otherwise as stated in Illustration 2, B replies by return mail, saying: "I accept your offer." The horse belongs to B and B owes A \$250.

4. The facts being otherwise as stated in Illustration 2, B makes no reply and remains inactive with the intention of thereby expressing his acceptance. The horse belongs to B and B owes A \$250.

Illustration of Subsection (1c):

5. A, through salesmen, has frequently solicited orders for goods from B, the orders to be subject to A's personal approval. In every case A has shipped the goods ordered within a week and without notice to B. A's salesman solicits and receives another order from B. A receives the order and remains silent. B relies on the order and forbears to buy elsewhere for a week. A is bound to fill the order.

Illustrations of Subsection (2):

6. A sends B a one-volume edition of Shakespeare with a letter, saying, "If you wish to buy this book send me \$6.50 within one week after receipt hereof, otherwise notify me and I will forward postage for return." B examines the book and without replying makes a gift of it to his wife. B owes A \$6.50.

7. The facts being otherwise as stated in Illustration 6, B examines the book and without replying carefully lays it on a shelf to await A's messenger. There is no contract.

8. The facts being otherwise as stated in Illustration 6, B examines the book and uses it or gives it to his wife, writing A at the same time that he has taken the book, but that it is worth only \$5 and that he will pay no more. A may at his option treat B as a tort-feasor or as contracting to pay \$6.50.

Annotation:

This Section is in general accord with Missouri law.

Subsection (1a). In the following cases it was held that services might be contractual in the absence of a promise to pay for them except as implied from silence: *Lillard v. Wilson* (1903) 178 Mo. 145, 77 S. W. 74, services rendered by daughter-in-law of offeree, jury to decide question of contract or gratuity; *Hay v. Walker* (1877) 65 Mo. 17, in accord with Restatement as to objective test of circumstances indicating expectation of compensation; *Kerr v. Cusenbary* (1895) 60 Mo. App. 558, slightly at variance with preceding case and with Restatement in setting up the subjective test of actual intention of offeror to charge for services. In *Callahan v. Riggins* (1891) 43 Mo. App. 130, circumstances of domestic relation justified a verdict that the services rendered were not contractual.

Subsection (1b). In *Botkin v. McIntyre* (1884) 81 Mo. 557, defendant proposed to exchange stacks of hay and plaintiff remained silent; plaintiff recovered. See also *Bovard v. Mergenthaler Linotype Co.* (Mo. App. 1919) 209 S. W. 965, where the principle seems to be recognized but is held to be inapplicable because of facts.

Subsection (1c) is illustrated by *Bicking v. Stevens* (1897) 69 Mo. App. 168, where there was a retention for twenty days of a note offered in payment of goods, the parties having had dealings with one another before. The principle of this subsection is at the basis of many decisions as to the validity of an account offered as an account stated followed by a failure to object. "If the account be sent to the debtor in a letter, which is received but not replied to in a reasonable time, the acquiescence of the party is taken as an admission that the account is truly stated." *Powell v. Pacific Railroad* (1877) 65 Mo. 658. To the same effect: *Locke v. Woodman* (Mo. App. 1920) 216 S. W. 1006; *Alexander v. Scott* (1910) 150 Mo. App. 213, 129 S. W. 991; *Kenneth Inv. Co. v. National Bank of Republic* (1902) 96 Mo. App. 125, 70 S. W. 173. See also *Brown v. Kimmel* (1878) 67 Mo. 430.

The first sentence of *Subsection (2)* is illustrated by the widely cited case of *Austin v. Burge* (1911) 156 Mo. App. 286, 137 S. W. 618, where the defendant continued to take a newspaper from the post office after the expiration of his subscription, and was held to have contracted to pay for the newspaper, the court saying: "This was an acceptance and use of the property, and there being no pretense that a gratuity was intended, an obligation arose to pay for it." See also *Kendall Boot & Shoe Co. v. Bain* (1891) 46 Mo. App. 581.

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:

This Section is not inconsistent with Missouri law. No cases directly in point have been found. In *McLean v. Pastime Gymnasium Assn.* (1895) 64 Mo. App. 55, a controversy was settled by holding that a written offer was accepted orally in spite of subsequent and uncompleted negotiations for a substituted contract.

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:

This Section is in accord with Missouri law. "Where a contract is made between two parties not residing in the same jurisdiction, the situs of the making of the contract is the place where the final assent is given by one party to the terms proposed by the other." *Peak v. International Harvester Co.* (1916) 194 Mo. App. 128, 186 S. W. 574. To the same effect: *Illinois Fuel Co. v. Railway Co.* (1928) 319 Mo. 899, 8 S. W. (2d) 834, quoting from RESTATEMENT, CONFLICT OF LAWS (Tent.) as follows: "A contract is made in the state where the last act toward the completion of the contract is done by a party to the contract, or by an agent who makes a contract for a principal"; *Liebing v. Mutual Life Ins. Co.* (1918) 276 Mo. 118, 207 S. W. 230, loan contract on life insurance policy, application accepted in New York; *Town of Canton v. McDaniel* (1905) 188 Mo. 207, 86 S. W. 1092, sale of goods to be paid for on delivery is contract at place of delivery; *Cravens v. N. Y. Life Ins. Co.* (1899) 148 Mo. 583, 50 S. W. 519, place for delivery of life insurance policy held to be place of making contract; *Crohn v. Order of United Commercial Travelers* (1913) 170 Mo. App. 273, 156 S. W. 472, *semble*.

It should be remembered that the place of making a contract does not necessarily determine the venue of a cause of action for a breach of that contract. *Barnett, Haynes & Barnett v. Building Co.* (1909) 137 Mo. App. 636, 119 S. W. 471.