

ST. LOUIS LAW REVIEW

Vol. XVI

FEBRUARY, 1931

No. 2

RESTATEMENT OF THE LAW OF CONTRACTS OF THE
AMERICAN LAW INSTITUTE, SECTIONS 19-51,*
WITH MISSOURI ANNOTATIONS†

BY TYRRELL WILLIAMS

Chapter 3

FORMATION OF INFORMAL CONTRACTS

TOPIC A. *General Requirements*

**Section 19. REQUIREMENTS OF THE LAW FOR FORMATION OF
AN INFORMAL CONTRACT.**

The requirements of the law for the formation of an informal contract are:

(a) A promisor and a promisee each of whom has legal capacity to act as such in the proposed contract;

(b) A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise, except as otherwise stated in Sections 85 to 94;

(c) A sufficient consideration except as otherwise stated in Sections 85 to 94;

(d) The transaction, though satisfying the foregoing require-

* Copyright, 1928, The American Law Institute.

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

ments, must be one that is not void by statute or by special rules of the common law.

Comment:

a. The explanation of the requirements of Clause (a) belongs in the Restatement of the law of Persons; the explanation of the requirements of Clause (d) is given in a later Chapter of the Restatement of Contracts; the explanation of the requirements of Clauses (b) and (c) is given in the following Sections of this Chapter.

Annotation:

This Section is not inconsistent with Missouri law. As stated under Section 11, an *informal* contract is a *simple* contract. "A contract is an agreement between two or more persons, competent to contract, upon a sufficient consideration, to do or not to do some particular thing, the essential elements of which 'are the existence of two or more contracting parties, a meeting of their minds, by which each gives his voluntary assent to the thing agreed upon, and an obligation, either created or dissolved, which constitutes the subject-matter of the undertaking.'" *Cockrell v. McIntyre* (1901) 161 Mo. 59, 61 S. W. 648.

R. S. Mo. 1919, Sec. 2164 contains important limitations on the legal capacity of municipal corporations to contract.

Atwater v. Edwards Brokerage Company (1910) 147 Mo. App. 436, 126 S. W. 823 discusses illegality of contract by common law and also by statute.

Questions of assent and consideration will be treated in later Sections of this Chapter.

TOPIC B. *Manifestation of Assent*

Section 20. MANIFESTATION OF MUTUAL ASSENT NECESSARY.

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by Sections 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

Comment:

a. Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested. Moreover, if

the manifestation is at variance with the mental intent, subject to the slight exception stated in Section 71, it is the expression which is controlling. Not mutual assent but a manifestation indicating such assent is what the law requires. Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not.

Illustrations:

1. *A* offers to sell *B* his library at a stated price, forgetting that his favorite Shakespeare, which he did not intend to sell, is in the library. *B* accepts the offer. *B* is entitled to have the Shakespeare.

2. *A* orally promises to sell *B* a book in return for *B*'s promise to pay \$5. *A* and *B* both think such promises are not binding unless in writing. Nevertheless there is a contract.

3. *A* offers a reward to any one who will deliver to him a certain book or who will promise to do so. *B*, who owns the book requested, learns of the offer, but is not induced thereby to part with the book. *C*, learning the facts, threatens *B* with such personal violence unless he delivers or promises to deliver the book to *A* that, rather than fail to comply with *C*'s demand, *B* would have given *A* the book for nothing; but knowing of the offer he determines to accept it, and he either gives *A* the book or promises *A* to do so. On the first supposition there is a unilateral contract; on the second a bilateral contract.

4. *A* writes an offer to *B*, which he encloses in an envelope and stamps. Shortly afterwards, he decides not to send the offer and determines to throw the letter into his wastebasket. Absent-mindedly, he takes it up with other letters and deposits it in a mail chute. It is delivered to *B*, who accepts the offer. There is a contract.

Annotation:

This Section is in accord with modern Missouri law. Missouri seems committed to the *objective* and not the *subjective* test. The important element is not the secret thought but the external manifestation. "Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and

both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract." *Embry v. Hargadine, McKittrick Dry Goods Co.* (1907) 127 Mo. App. 383, 105 S. W. 777. To the same effect: *Seavy & Flarsheim Brokerage Co. v. Monarch Peanut Co.* (Mo. App. 1922) 241 S. W. 643. *Girard v. St. Louis Car-Wheel Co.* (1894) 123 Mo. 358, 27 S. W. 648 shows that the objective theory does not prevent the application of legal principles for avoiding a contract on the ground of fraud. See also *Ely v. Sutton* (1914) 177 Mo. App. 546, 162 S. W. 755. As to the important and unsettled relationship between a negligent promisor and a fraudulent promisee in an express contract, see *Tait v. Locke* (1908) 130 Mo. App. 273, 109 S. W. 105.

Section 21. ACTS AS MANIFESTATION OF ASSENT.

The manifestation of mutual assent may consist wholly or partly of acts, other than written or spoken words.

Comment:

a. Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise, and where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of a promise whether it is expressed (1) in writing, (2) orally, (3) in acts, or (4) partly in one of these ways and partly in others. (See Illustrations under Section 5.)

Annotation:

This Section is in accord with Missouri law. "There can be no contract without the assent of the parties thereto. But this assent may be indicated in various ways. The courts cannot say what facts, or words, or actions indicate the agreement between parties. Each case must be governed by the facts and circumstances developed, and by which the triers of the fact must be led to the truth." *Botkin v. McIntyre* (1884) 81 Mo. 557. To the same effect: *Allen v. Chouteau* (1890) 102 Mo. 309, 14 S. W. 869, paying taxes for another; *National Surety Co. v. Equitable Surety Co.* (Mo. App. 1922) 242 S. W. 109, collecting insurance premiums; *Austin v. Burge* (1911) 156 Mo. App. 286, 137 S. W. 618, taking newspaper regularly from post

office. See also *Williams v. Emerson-Brantingham Implement Co.* (Mo. App. 1917) 198 S. W. 425, principle considered but not applicable to facts.

Section 22. OFFER AND ACCEPTANCE.

The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties.

Comment:

a. This rule is rather one of necessity than of law. In the nature of the case one party must ordinarily first announce what he will do before there can be any manifestation of mutual assent. It is theoretically possible for a third person to state a suggested contract to the parties and for them to say simultaneously that they assent to the suggested bargain, but such a case is so rare, and the decision of it so clear that it is practically negligible.

Annotation:

This is in accord with Missouri law. "A binding contract can only occur when the offer made is met by an acceptance which corresponds with the offer made in every particular." *Robinson v. Railway Company* (1882) 75 Mo. 494. To the same effect: *Schepers v. Union Depot R. Co.* (1895) 126 Mo. 665, 29 S. W. 712.

Section 23. NECESSITY OF COMMUNICATION OF AN OFFER.

Except as qualified by Section 70, it is essential to the existence of an offer that it be a proposal by the offeror to the offeree, and that it become known to the offeree. It is not essential that the manifestation shall accurately convey the thought in the offeror's mind.

Comment:

a. Two manifestations of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other. An offeree, therefore, cannot accept an offer unless it has been communicated to him by the offeror. This may be done through the medium of an agent; but mere in-

formation indirectly received by one party that another is willing to enter into a certain bargain is not an offer by the latter.

Illustrations:

1. *A* advertises that he will give a specified reward for certain information; or writes to *B* a similar proposal. *B* gives the information in ignorance of the advertisement, or without having received the letter. There is no communication of the offer and there is no contract.

2. *A* sends *B* an offer through the mail to sell *A*'s horse for \$500. While this offer is in the mail, *B*, in ignorance thereof, mails to *A* an offer to pay \$500 for the horse. There is no communication of *A*'s offer, and there is no contract.

Annotation:

This Section is in accord with Missouri law. "No case has been cited where it has been held that the offeree can accept the term of an offer before it is communicated to him so as to bind the offerer." *James & Sons v. Fruit Jar & Bottle Co.* (1897) 69 Mo. App. 207. The principle is applied to reward cases. "The offer of a reward is the same as any other contractual offer and must be known and accepted by being acted upon." *Smith v. Vernon County* (1905) 87 S. W. 949, 188 Mo. 501. For justification of the second sentence, see cases cited in annotation under Section 20.

Section 24. OFFER DEFINED.

An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance. An offer is also a contract, commonly called an option, if the requisites of a formal or an informal contract exist, or if the rule stated in Section 47 is applicable.

Comment:

a. In an offer for a unilateral contract the offeror's promise is conditional upon an act other than a promise being given except in cases covered by Section 57. In an offer for a bilateral contract the offeror's promise is always conditional upon a return promise being given. The return promise may be in the form of assent to the proposal in the offer. (See Illustration 1 under Section 29.) In order that a promise shall amount to an offer, performance of the condition in the promise must appear by

its terms to be the price or exchange for the promise or its performance. The promise must not be merely performable on a certain contingency.

b. All offers are promises of the kind stated in this Section and all promises of this kind are offers if there has been no prior offer of the same tenor to the promisor. But if there has already been such an offer to enter into a bilateral contract, an acceptance thereof, like the offer itself, will be a promise of the kind stated in the Section.

Special Note: The word "option" is often used for a continuing offer although it is revocable for lack of consideration; but more commonly the word is used to denote an offer which is irrevocable and therefore a contract.

Illustrations:

1. A says to B, "This book is yours if you promise to pay me \$5 for it." A's offer is a promise in terms conditional on receiving a promise of \$5 from B.

2. A offers, in a sealed writing, Blackacre to B at a stated price. Subsequently, before the lapse of a reasonable time for acceptance, A informs B that the offer is revoked. The offer is a contract and the attempted revocation is ineffectual.

3. A promises B \$100 if B goes to college. If the promise, under the surrounding circumstances, is reasonably to be understood, not as requesting B to go to college and undertaking to pay him for so doing, but as promising a gratuity on a certain contingency, there is no offer.

Special Note: An offer necessarily looks to the future. It is an expression by the offeror of his agreement that something over which he at least assumes to have control shall be done or happen or shall not be done or happen if the conditions stated in the offer are complied with. Even in cases which seem at first sight to involve no promise by the offeror, analysis will disclose that such a promise exists, if the word is given the definition in Section 2. In such a case as that in Illustration 1, it may be urged that the offeror is expected to do nothing in fulfillment of his offer; that he has simply given a power to the offeree by virtue of which the latter on promising to pay the price will immediately become owner of the chattel. But though the owner need do nothing in fulfillment of his offer, and though it is self-operative if accepted, it nevertheless involves a promise on the part of the offeror that the offeree shall become owner

of the chattel if he accepts during the continuance of the offer. This is shown by the fact that the offeror would be liable to the acceptor if he had no title to the chattel and therefore the offeree acquired none by his acceptance; yet the question whether the words of the offeror amount to a promise can hardly depend on the extrinsic facts determining his ownership or lack of it. Though the offeror is to do nothing, he does undertake or promise that something shall come to pass on the performance of the condition stated in the offer.

Moreover, an offer which does not in terms state that it is revocable includes a promise, though not a binding promise, that the power given by the offer shall continue for the period named in the offer; or, if no period is named, for a reasonable time; and even if in terms revocable at any moment, it is still a promise, operative until revoked.

Confusion sometimes is caused by regarding an offer and a contract as antithetical. But since an offer is a promise, and as a promise becomes a contract if consideration is given for it or if it is under seal (where the common-law effect of seals is unchanged) an offer may also be a contract.

Annotation:

The first sentence of this Section is in accord with Missouri law. In *Brown v. Rice* (1860) 29 Mo. 322, the court described a gratuitous conditional unaccepted offer and said it was a "mere promise, not a contract." See also *Lapsley v. Howard* (1894) 119 Mo. 489, 24 S. W. 1020, promise to release mortgage on payment of money; *Groomer v. McCully* (1902) 93 Mo. App. 544, promise to pay money if title to land is perfected; *Sarran v. Richards* (1910) 151 Mo. App. 656, 132 S. W. 285, promise to pay money conditional on return promise to convey land. The promissory offer is sometimes contained in a paper called an order. *Outcault Advertising Co. v. Wilson* (1915) 186 Mo. App. 492, 172 S. W. 394; *Bronson v. Weber Implement Co.* (1909) 135 Mo. App. 483, 116 S. W. 20. Promise to render a gratuity if accepted by offeree is not an offer to contract; in doubtful cases "no absolute rule of law can be laid down." *Whaley v. Peak* (1871) 49 Mo. 80. See also *Lillard v. Wilson* (1903) 178 Mo. 145, 77 S. W. 74.

Options. In Missouri for practical purposes the distinction between formal and informal contracts is abolished. See Section 7. Otherwise the second sentence of Section 24 is in accord with Missouri law. *Aiple-Hemmelman Real Estate Co. v. Spelbrink* (1908) 211 Mo. 671, 111 S. W. 480, \$50 paid for written option to buy land at \$20,000, and specific performance appropriate remedy for breach; *Yontz v. McVean* (1920) 202 Mo. App. 377,

217 S. W. 1000, \$80 paid for valid option to buy 8000 bushels of corn at \$1.40 per bushel, and option defined as "right of election to exercise a privilege"; *Loud v. St. Louis Union Trust Co.* (1926) 313 Mo. 552, 281 S. W. 744, consideration not money paid but services rendered; *Warren v. Castello* (1892) 109 Mo. 338, 19 S. W. 29, alleged option not binding in absence of consideration; *Hooker Steam Pump Co. v. Buss* (1912) 240 Mo. 465, 144 S. W. 419, a valid option incidental to a principal contract.

Section 25. WHEN A MANIFESTATION OF INTENTION IS NOT AN OFFER.

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

Comment:

a. It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered, as well as the customs of business, and indeed all surrounding circumstances.

Illustrations:

1. A, a clothing merchant, advertises overcoats of a certain kind for sale at \$50. This is not an offer, but an invitation to the public to come and purchase.

2. A writes to B, "I can quote you flour at \$5 a barrel in carload lots." This is not an offer. The word "quote" and the incompleteness of the terms indicate that the writer is simply naming a current price which he is demanding.

3. A advertises that he will pay \$5 for every copy of a certain book that may be sent to him. This is an offer and A is bound to pay \$5 for every copy sent while the offer is unrevoked.

4. A writes to B, "I am eager to sell my house. I wish to get \$20,000 for it." B promptly answers saying, "I will

buy your house at the price you name in your letter." There is no contract. A's letter is a mere request or suggestion that an offer be made to him.

5. A corporation or municipality advertises for a bid, or tender, for certain work. This is not an offer but a request for offers.

Annotation:

This Section is in accord with Missouri law. A preliminary negotiation must be distinguished from a contractual offer. "When the intent expressed in the advertised proposal is reduced to certainty by interpretation, our system of administration of law is fully capable of giving effect to that intent." *Anderson v. Public Schools* (1894) 122 Mo. 61, 27 S. W. 610. The printed advertisement of a trust company containing the clause "allows interest on deposits," is not a contractual offer. *Stone v. St. Louis Union Trust Company* (1910) 150 Mo. App. 331, 130 S. W. 825. Other illustrative cases are: *Gray v. Toledo, St. L. & W. R. Co.* (1910) 143 Mo. App. 251, 128 S. W. 227; *James & Sons v. Fruit Jar & Bottle Co.* (1897) 69 Mo. App. 207.

Where parties manifestly intend not to be bound until a subsequent writing is prepared and signed, no contract exists. *Eads v. City of Carondelet* (1867) 42 Mo. 113.

As to auction, see Section 27.

Section 26. CONTRACT MAY EXIST THOUGH WRITTEN MEMORIAL IS CONTEMPLATED.

Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in Section 25.

Comment:

a. Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it, and often before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these pro-

visions and no others, they have then fulfilled all the requisites for the formation of a contract. On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.

b. The matter may be put in this way: If the parties indicate that the expected document is to be a mere "memorial" of operative facts already existing, its non-existence does not prevent those facts from having their normal legal operation. What that operation is must be determined largely by oral testimony, or by preliminary or only partially complete writings. If the parties indicate that the expected document is to be the exclusive operative consummation of the negotiation, their preceding communications will not be operative as offer or acceptance. This also must be shown largely by oral testimony.

c. If the written document is prepared and executed, the legal relations of the parties are then largely determined by that document, because of the so-called "Parol Evidence Rule," even though there was a binding informal contract previously made (see Section 233).

Annotation:

This Section is in accord with Missouri law. "Where the parties have assented to all the terms of a contract, the mere reference to a future contract in writing does not negative the existence of a present contract." *Green v. Cole* (1891) 103 Mo. 70, 15 S. W. 317. See also *Allen v. Chouteau* (1890) 102 Mo. 309, 14 S. W. 869; *Wilson v. Board of Education* (1876) 63 Mo. 137; *Young v. Lanyon* (Mo. App. 1922) 242 S. W. 685; *Gale v. Kennard Carpet Co.* (1914) 182 Mo. App. 498, 165 S. W. 842. *Bottom Produce Co. v. Olsen* (1915) 188 Mo. App. 181, 175 S. W. 126 applies the rule of this Section to an involved set of facts. The case also states that if a preliminary agreement constitutes a contract, the erroneous supposition of the parties as to the legal necessity of a subsequent writing is immaterial.

For illustration of last clause of Section 26, see *Eads v. City of Carondelet* (1867) 42 Mo. 113.

Comment c is in accord with Missouri law. *Tuggles v. Callison* (1898) 143 Mo. 527, 45 S. W. 291; *Plumb v. Cooper* (1894)

121 Mo. 668, 26 S. W. 678; *Railway Co. v. Cleary* (1883) 77 Mo. 634; *Chrisman v. Hodges* (1882) 75 Mo. 413, decided on parol evidence rule; *Leonard v. Railway Co.* (1893) 54 Mo. App. 293, decided on theory that cancellation of oral contract is consideration for subsequent written contract.

If cause of action has accrued on oral contract, the subsequent written contract does not operate as a discharge of liability unless there is a clear provision to that effect supported by adequate consideration. *Harrison v. Missouri Pacific Ry. Co.* (1881) 74 Mo. 364; *Fountain v. Wabash R. Co.* (1905) 114 Mo. App. 676, 90 S. W. 393; *Hoover v. St. Louis & S. F. R. Co.* (1905) 113 Mo. App. 688, 88 S. W. 769; *Gann v. Railway Co.* (1897) 72 Mo. App. 34.

Section 27. AUCTIONS; SALES WITHOUT RESERVE.

At an auction, the auctioneer merely invites offers from successive bidders unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder.

Comment:

a. An auction as ordinarily conducted furnishes an illustration of the principle stated in Section 25. The auctioneer, by beginning to auction property, does not impliedly say: "I offer to sell this property to whichever one of you makes the highest bid," but rather requests that the bidders make offers to him, as indeed he frequently states in his remarks to those before him.

b. It is a corollary of the principle stated in this Section taken in connection with Section 41 that, where the auctioneer merely invites offers, a bidder may withdraw his bid at any time before the fall of the hammer. A bid in such a case is a revocable offer. If the auctioneer has made an offer inviting acceptances, a bid is an acceptance and completes a contract, binding both auctioneer and bidder; but the contract is conditional on no higher bid being made before the fall of the hammer.

Illustrations:

1. A publishes a notice saying that he will sell his household goods at public auction at a specific time and place. This in no way affects his legal relations.

2. A's auctioneer, in Illustration 1, at the specified time and place holds up a chattel and says, "How much am I bid for this?" After each bid is made he urges others to bid

higher. Each bidder makes an offer to the auctioneer, but he makes no offer to them.

3. A advertises, "I offer my farm Blackacre for sale to the highest bidder and undertake to make conveyance to such person as submits the highest bid within the next thirty days." This is an offer, and each bid operates as an acceptance creating rights and duties conditional on no higher bid being received within thirty days.

4. A advertises a sale of his household furniture without reserve. An article is put up for sale at the auction and B is the highest *bona fide* bidder; but A, dissatisfied with the bidding, either accepts a higher fictitious bid from an agent employed for the purpose, or openly withdraws the article from sale. He also withdraws all the rest of the furniture from the sale. In either case A is bound by contract to B to sell to him the article on which he was the highest *bona fide* bidder, but neither B nor the others at the auction have legal ground for complaint that the remainder of the furniture not yet actually put up for sale is withdrawn from sale.

Annotation:

This Section is in accord with Missouri law. The principle in the first part of the Section often has been illustrated in judicial auction sales. "An officer selling property under execution is the agent of both the plaintiff and defendant, and he is bound to protect the interests of all parties concerned, and is not bound to accept a bid without reserve." *Shaw v. Potter* (1872) 50 Mo. 281. Other judicial auction cases are: *Davis v. McCann* (1898) 143 Mo. 172, 44 S. W. 795; *Rogers & Baldwin Hardware Co. v. Cleveland Bldg. Co.* (1896) 132 Mo. 442, 34 S. W. 57; *State ex rel. v. Moore* (1880) 72 Mo. 285. For a case announcing the same rule at a private auction, see *Richardson v. Landreth* (Mo. App. 1924) 260 S. W. 128. In *Springer v. Kleinsorge* (1884) 83 Mo. 152, the facts justified the indication of an auction without reserve, but the rule in the latter part of the Section was avoided to protect the highest bidder because of fraudulent by-bidding induced by the vendor. By reason of the Statute of Frauds, the highest bidder may in some cases have opportunity after the fall of the hammer to avoid liability by withdrawing his bid at any time up to the entry of his name in the auctioneer's memorandum book. *Dunham v. Hartman* (1900) 153 Mo. 625, 55 S. W. 233.

Section 28. TO WHOM AN OFFER MAY BE MADE.

An offer may be made to a specified person or persons or class of persons, or it may be made to anyone or to everyone to whom it becomes known. The person or persons in whom is created a

power of acceptance are to be determined by the reasonable interpretation of the offer.

Comment:

a. An offer may give many persons a power of acceptance. In some such cases the exercise of the power by one person will extinguish the power of every other person; in other cases this will not be true. The decision depends on interpretation of the offer.

Illustrations:

1. A publishes an offer of reward to whoever will give him certain information. This creates a power of acceptance in every person learning of the offer. B is the first of such persons to give the information. He thereby accepts the offer. Since the reasonable interpretation of the offer is that the information is to be paid for only once, the giving of the information by B terminates the power of every other person.

2. A, a bank, issues a traveler's letter of credit promising to repay anyone who makes advances to the holder of the letter, up to a certain amount. This creates a power of acceptance in B, C and D, and all others to whom the letter is successively presented by the holder with a request for an advance, as long as the maximum specified has not yet been advanced.

3. A offers \$100 to anyone who contracts a certain disease after using specified medicine as directed. B, C, and D severally use the medicine as directed and contract the disease. A has contracted with each of them to pay him \$100. In this case, the exercise of the power by B has no effect upon the powers of C and D, because they reasonably understand this to accord with the intention of A.

Annotation:

This Section is not inconsistent with Missouri law, and is illustrated by *reward* cases. "The offer of the reward, when acted upon, becomes a contract." *Cornwell v. St. Louis Transit Co.* (1903) 100 Mo. App. 258, 73 S. W. 305. To the same general effect: *Smith v. Vernon County* (1905) 188 Mo. 501, 87 S. W. 949; *Walsh v. St. Louis Exposition & Music Hall Assn.* (1887) 90 Mo. 459, 2 S. W. 842, affirming 16 Mo. App. 502. As to the reasonable interpretation of an offer of reward, see *Hoggard v. Dickerson* (1914) 180 Mo. App. 70, 165 S. W. 1135.

Passages in a university catalog were held to be an offer to contract with a prospective student in *Niedermeyer v. Curators of State University* (1895) 61 Mo. App. 654. The offer to con-

tract in a letter of credit is discussed in *Bank of Seneca v. First National Bank* (1904) 105 Mo. App. 722, 78 S. W. 1092. A certain letter of commendation was held not to be a letter of credit in *Liggett v. Levy* (1911) 233 Mo. 590, 136 S. W. 299. Contracts may originate in advertisements addressed to the general public; the manifested intent should govern the interpretation. *Anderson v. Public Schools* (1894) 122 Mo. 61, 27 S. W. 610, alleged contract for public work.

Section 29. HOW AN OFFER MAY BE ACCEPTED.

An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance.

Illustrations:

1. A offers B one hundred tons of coal at \$15 a ton payable in thirty days. B's mere manifestation of assent creates a contract.

2. A offers B any amount of coal, up to one hundred tons, for which B will promise to pay \$15 a ton. In order to accept this offer B must specify the amount of coal he desires.

3. A makes a bid at an auction sale. The auctioneer can accept by letting the hammer fall, by saying "sold," or by saying any words manifesting acceptance.

4. A offers B to sell him in monthly instalments the coal which B may require in his business during the next six months, not exceeding one hundred tons in any one month. It is a question of interpretation under all circumstances of the case whether this offer is for a series of contracts to be formed from time to time during the next six months, or is for a single contract to be made immediately by which B undertakes to buy all he requires during six months, up to one hundred tons monthly. On the bare facts given, the latter is the true interpretation.

Annotation:

This Section is in accord with Missouri law. In *Lancaster v. Elliott* (1887) 28 Mo. App. 86, the Court said: "A proposal being made, the most direct form of acceptance which will develop, at the same time, a meeting of the minds and the formation of a lawful contract, is the simple declaration in words to that effect, whether orally or in writing. If no such declaration is made, the law, nevertheless, sometimes finds in the acts of the person to whom the proposal was offered an acceptance no less

binding and conclusive." See *Murphy v. Murphy* (1886) 22 Mo. App. 18, oral assent to proposal to build house; *Allen v. Chouteau* (1890) 102 Mo. 309, 14 S. W. 869, acceptance of offer by paying taxes on land in which offeror had an interest; *Lungstrass v. German Insurance Co.* (1871) 48 Mo. 201, a contract between principal and agent where acceptance of principal's offer was a book entry by agent. In *Martin v. Ray County Coal Co.* (1921) 288 Mo. 241, 232 S. W. 149, there was a binding acceptance of an offer containing a choice of terms as to the amount of coal to be purchased from a mining company—100 to 300 tons per day. See also *Fuller v. Presnell* (Mo. App. 1921) 233 S. W. 502, "from one hundred to one hundred fifty thousand" feet of lumber.

Section 30. OFFER MAY PROPOSE A SINGLE CONTRACT OR A NUMBER OF CONTRACTS.

An offer may propose the formation of a single contract by a single acceptance or the formation of a number of contracts by successive acceptances from time to time.

Comment:

a. An offer may request several acts or promises as the indivisible exchange for the promise or promises in the offer, or it may request a series of contracts to be made from time to time. Such a series may be a series of unilateral contracts or a series of bilateral contracts, depending upon the terms of the offer. Whether several promises create several contracts or are all part of one contract is determined by principles of interpretation stated in Chapter 9.

Illustrations:

1. A offers B, a railway company, such quantities of certain goods as B's storekeeper may order from time to time during the next twelve months. Each order of B's storekeeper during that period creates a contract for the quantity ordered.

2. A offers B to sell and deliver to him during the following year any quantity of goods between 4000 and 6000 pounds in amount which B may specify. B must within a reasonable time specify a particular amount of not less than 4000 pounds and not more than 6000 pounds in order to create a contract; and there can be but one acceptance and one contract.

Annotation:

This Section is in accord with Missouri law. But in reading

some of the pertinent Missouri cases, one should pay attention to the principles involved rather than the terminology used. See annotation under Section 12 for Missouri usage of the term *unilateral* as indicating an unaccepted offer. In *Schlitz Brewing Co. v. Mo. Poultry & Game Co.* (1921) 287 Mo. 400, 229 S. W. 813, a continuing offer to sell beer was referred to as a unilateral promise. It was clearly intended as a proposal for a number of contracts to spring into existence from successive acceptances. In *Malloy v. Egyptian Tie & Timber Co.* (1923) 212 Mo. App. 429, 247 S. W. 469, a continuing offer to buy railroad ties was referred to as a unilateral contract. It was interpreted as in the preceding case and contracts were held to exist with reference to acceptances by performance before the offer was revoked. In the following cases, likewise, the offer, sometimes called a contract, was held to propose a series of contracts. *Roberts v. Harmount Tie & Lumber Co.* (Mo. App. 1924) 264 S. W. 448; *Saginaw Medicine Co. v. Dykes* (1922) 210 Mo. App. 399, 238 S. W. 556; *Campbell v. American Handle Co.* (1906) 117 Mo. App. 19, 94 S. W. 815.

In *Hudson v. Browning* (1915) 264 Mo. 58, 174 S. W. 393, the offer, referred to as a void contract, contained a definite promise on one side to buy railroad ties, and on the other side a nominal promise, held by the court to be vague, indefinite, uncertain and therefore meaningless. If both promises had been definite there would have been a binding single contract. In *American Pub. & Engr. Co. v. Walker* (1901) 87 Mo. App. 503, a written offer to prepare advertising matter for one year, as originally formulated, was referred to as a unilateral contract. It was interpreted as proposing one single contract which was held to be accepted by one single acceptance. In *Smith v. Coal Company* (Mo. App. 1924) 260 S. W. 545, an offer to sell coal to meet the "requirements" of an established business during a particular year was held to contemplate one single contract. To same effect is *Royal Brewing Co. v. Uncle Sam Oil Co.* (1920) 205 Mo. App. 616, 226 S. W. 656.

Section 31. PRESUMPTION THAT OFFER INVITES A BILATERAL CONTRACT.

In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree.

Comment:

- a. It is not always easy to determine whether an offeror re-

quests an act or a promise to do the act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed.

Illustrations:

1. A says to B: "If you will work in my garden next week I will give you \$5 a day." B says, "I'll do it." There is a bilateral contract.

2. A says to B: "If you will let me have that table that you are making, when it is finished, I will give you \$100 for it." B replies, "All right." There is a bilateral contract.

Annotation:

This Section is not inconsistent with Missouri law, although no express authority has been found for the existence of a presumption. In *Lewis v. Atlas Mutual Life Ins. Co.* (1876) 61 Mo. 534, the court said: "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied." *Warren v. Ray County Coal Co.* (1919) 200 Mo. App. 442, 207 S. W. 883 is an apposite case, involving the construction of a disputed contract which was held to be bilateral and binding. *Harrington v. K. C. Cable Ry. Co.* (1895) 60 Mo. App. 223 is similar to Illustration 1 of the text.

Section 32. OFFER MUST BE REASONABLY CERTAIN IN ITS TERMS.

An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain.

Comment:

a. Inasmuch as the law of contracts deals only with duties defined by the expressions of the parties, the rule of this Section is one of necessity as well as of law. The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. A promise by A to give B employment is not wholly illusory, but if neither the character of the employment nor the compensation therefor is stated, the promise is so in-

definite that the law cannot enforce it, even if consideration is given for it.

b. Promises may be indefinite in time or in place, or in the work or the property to be given in exchange for the promise. In dealing with such cases the law endeavors to give a sufficiently clear meaning to offers and promises where the parties intended to enter into a bargain, but in some cases this is impossible.

c. Offers which are originally too indefinite may later acquire precision and become valid offers, by the subsequent words or acts of the offeror or his assent to words or acts of the offeree.

Illustrations:

1. *A* promises *B* to serve him as a chauffeur and *B* promises *A* to pay him at the rate of \$5 a day. For any services actually rendered under such an offer *B* is bound to pay at the agreed rate, but beyond each day on which service begins no executory obligation is created, in the absence of usage fixing the length of service customary in employment of the sort agreed upon. In dealing with personal service the presumption that the performance shall continue a reasonable time is not adopted.

2. *A* promises *B* to serve him as a chauffeur, and *B* promises to pay him \$100 a month. The full period for which the service is expected to continue is not stated. There is at once a bilateral contract for a month's service. It is often a difficult question of interpretation to determine whether an agreement specifies merely a rate of compensation, or indicates, at least impliedly, an understanding that the employment shall continue for not less than one of the periods for which the rate is stated, in which case there is a contract for one period, and at its expiration an offer for another in the absence of revocation.

3. *A* promises *B* to employ him for a stated compensation and *B* promises *A* to serve therefor as long as *B* is able to do the work, or as long as a specified business is carried on. These promises create contracts, as a method is provided for determining the length of the engagement.

4. *A* promises *B* to sell and deliver goods to him, and *B* promises *A* to pay a specified price therefor. Though no time for performance is fixed, there is a contract, the presumption being that the parties intended performance to be made within a reasonable time. What is a reasonable time is a question of fact, in each case depending on the character of the goods and all surrounding circumstances.

5. *A* and *B* promise that certain performances shall be

mutually rendered by them "immediately" or "at once," or "promptly," or "as soon as possible," or "in about one month." All these promises are sufficiently definite to form contracts.

6. *A* promises *B* to sell to him and *B* promises *A* to buy of him goods "at cost plus a nice profit." The promise is too indefinite to form a contract.

7. *A* promises *B* to execute a conveyance, or a year's lease, of specified property and *B* promises *A* to pay therefor. Although the terms of leases and conveyances vary, the promises are interpreted as providing for documents in the form in common local use, and are sufficiently definite to form contracts.

8. *A* promises *B* to give him any one of a number of specified things which *A* shall choose, and *B* promises *A* to pay a specified price. There is a contract. A method is provided for determining what *A* is to give, and though what he gives is subject to his choice, he must give some one of the things specified. If he fails to do so the law will assess damages against him on the basis of the least valuable of the subjects of choice.

9. *A* promises *B* to do specified work or to transfer certain property and *B* promises *A* to pay therefor if it is satisfactory to him. These promises form contracts since a method is provided for determining *B*'s duty which is not dependent on his mere whim but requires the exercise of honest judgment.

10. *A* promises *B* to do a specified piece of work and *B* promises *A* to pay a price to be thereafter mutually agreed. As the only method of settling the price is dependent on future agreement of the parties, and as either party may refuse to agree, there is no contract. (It should be noticed that retention of a benefit under these circumstances may give rise to a quasi contractual duty.)

11. *A* promises *B* to construct a building according to stated plans and specifications, and *B* promises *A* to pay \$30,000 therefor. It is also provided that the character of the window fastenings shall be subject to further agreement of the parties. The indefiniteness of the agreement with reference to this minor matter will not prevent the formation of a contract.

12. *A* promises *B* to sell to him and *B* promises *A* to buy of him all goods of a certain character which *B* shall need in his business during the ensuing year. There is a contract.

Annotation:

This Section is in accord with Missouri law. The Illustrations

seem to be in harmony with Missouri decisions except Illustration 2. According to the decision in *Evans v. Railway Co.* (1887) 24 Mo. App. 114, the facts in Illustration 2 constitute a contract terminable at will with compensation fixed on the basis of \$100 a month. To the same effect: *Brookfield v. Drury College* (1909) 139 Mo. App. 339, 123 S. W. 86; *Davis v. Pioneer Life Ins. Co.* (1914) 181 Mo. App. 353, 172 S. W. 67. For a comparison of conflicting views, see Annotation, 11 A. L. R. 469.

General Rule. The rule of this Section has been stated negatively as follows: "When a contract is so uncertain or indefinite in its provisions that the court is unable to ascertain therefrom the meaning or the agreement of the parties thereto, then the courts will not hesitate to declare it null and void. This is a sound principle of law, and is predicated upon the idea that the parties themselves, and not the court, must make their own contracts and agreements;" held, that a particular promise, although "very singular and unusual," was "definite and certain in its terms" and therefore binding. *Voorhees v. Louisiana Purchase Exposition Co.* (1912) 243 Mo. 418, 147 S. W. 783. When an alleged contract for sale of a drug store as a going concern does not state time for delivery of possession, the law will imply a reasonable time and will permit changes in the stock not outside the usual course of business. *Vantrees v. Trimble* (1923) 214 Mo. App. 30, 251 S. W. 396. For other cases in which challenged terms were held to be definite enough, see *Browning v. North Missouri Cent. Ry. Co.* (Mo. 1916) 188 S. W. 143, "more or less"; *Brewer v. Lepman* (1908) 127 Mo. App. 693, 106 S. W. 1107, "prompt"; *Harrington v. Kansas City Cable Ry. Co.* (1895) 60 Mo. App. 223, "constant employment."

On the other hand, an alleged promise to give plaintiff "some learning" is too indefinite to form the basis of an express contract to furnish an education. *Ryan v. Lynch* (1880) 9 Mo. App. 18. If before delivery, goods are alleged to have been sold "as cheaply as they could be bought for elsewhere," the stipulation as to price is too indefinite. *Stout v. Carruthersville Hardware Co.* (1908) 131 Mo. App. 520, 110 S. W. 619. For other cases in which promissory language was held too vague for effecting bilateral contracts, see *Anderson v. Hall* (1918) 273 Mo. 307, 202 S. W. 539, promise to contemplate a contract; *Hudson v. Browning* (1915) 264 Mo. 58, 174 S. W. 393, qualified promise to cut railroad ties; *Bay v. Bedwell* (Mo. App. 1929) 21 S. W. (2d) 203, promise to use influence; *Jennings v. Hirsch Rolling Mill Co.* (Mo. App. 1922) 242 S. W. 1003, promise to supply uncertain quantity of iron; *Burks v. Stam* (1896) 65 Mo. App. 455, conditional promise to pay bonus.

Offer of Satisfactory Performance. The term *satisfactory* is definite enough for contractual purposes. The distinction be-

tween what is satisfactory to a reasonable man in ordinary standardized transactions and what is satisfactory to a particular person in isolated matters involving taste, fancy or judgment, is recognized in Missouri. The leading case is *Mullally v. Greenwood* (1895) 127 Mo. 138, 29 S. W. 1001, satisfactory lease. See also *Berthold v. St. Louis Electric Const. Co.* (1901) 165 Mo. 280, 65 S. W. 784, satisfactory rate of progress in construction work; *Bowen v. Buckner* (Mo. App. 1916) 183 S. W. 704, satisfactory picture of a dead son; *Cann v. Church of Redeemer* (1905) 111 Mo. App. 164, 85 S. W. 994, satisfactory plans for a church.

Offers to Supply Needs or Wishes. "A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer." The foregoing passage from a well-known Federal case was quoted, approved and applied in the following Missouri cases: *Moran Bolt & Nut Mfg. Co. v. St. Louis Car Company* (1908) 210 Mo. 715, 109 S. W. 47, binding; *Royal Brewing Company v. Uncle Sam Oil Company* (1920) 205 Mo. App. 616, 226 S. W. 656, binding. To the same effect: *Hudson v. Browning* (1915) 264 Mo. 58, 174 S. W. 393, not binding; *Smith v. Donk Bros. Coal & Coke Co.* (Mo. App. 1924) 260 S. W. 545, binding; *Saginaw Medicine Co. v. Dykes* (1922) 210 Mo. App. 399, 238 S. W. 556, not binding; *Rozier v. St. Louis S. F. R. Co.* (1910) 147 Mo. App. 290, 126 S. W. 532, binding; *Campbell v. American Handle Co.* (1906) 117 Mo. App. 19, 94 S. W. 815, not binding.

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

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

Illustration:

1. A says to B: "I will employ you for some time at \$10 a day." An acceptance by B either orally or in writing will not create a contract; but if B serves one or more days a

unilateral contract arises binding A to pay \$10 for each day's service.

Annotation:

This Section is in accord with Missouri law. In *Roberts v. Harmount Tie & Lumber Co.* (Mo. App. 1924) 264 S. W. 448, an agreement, invalid as a bilateral contract because of uncertainty, was held valid after execution. To same effect: *Stout v. Caruthersville Hardware Company* (1908) 131 Mo. App. 520, 110 S. W. 619.

Section 34. OFFER UNTIL TERMINATED MAY BE ACCEPTED.

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

Annotation:

This Section is in accord with Missouri law. "An offer is continuing until its withdrawal and the withdrawal communicated, and, if the offer is accepted and notification received by the offerer before a withdrawal of the offer, the agreement thereupon becomes complete and binding." *Cook v. Kerr* (Mo. App. 1917) 192 S. W. 466. For authority to the same effect, see *Krohn-Fechheimer Co. v. Palmer* (1920) 282 Mo. 82, 221 S. W. 353.

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

- (1) An offer may be terminated by
 - (a) rejection by the offeree, or
 - (b) lapse of time, or the happening of a condition stated in the offer as causing termination, or
 - (c) death or destruction of a person or thing essential for the performance of the proposed contract, or
 - (d) supervening legal prohibition of the proposed contract;
 or, except as stated in Sections 45, 46 and 47, by
 - (e) revocation by the offeror, or
 - (f) the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract.
- (2) Where an offer is terminated in one of these ways a contract cannot be created by subsequent acceptance.

Illustration:

1. A makes an offer to B and adds: "This offer will remain open for a week." B rejects the offer the following

day, but within a week from the making of the offer accepts it. There is no contract.

Annotation:

Subdivision (1) is in effect an outline of Sections 36 to 50 inclusive. For Missouri annotations see those Sections.

Subdivision (2) is in accord with Missouri law. In *Egger v. Nesbitt* (1894) 122 Mo. 667, 27 S. W. 385, there was an offer followed by a counter-offer (rejection, see Section 38) followed by a challenged acceptance of the original offer; held no contract.

Section 36. WHAT IS A REJECTION OF AN OFFER.

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

Comment:

a. This Section states a general definition of what amounts to a rejection. The more particular rules in the two following Sections state the common methods of rejection.

Annotation:

This Section is in accord with Missouri law. *Paramore v. Campbell* (1912) 245 Mo. 287, 149 S. W. 6, rejection by refusal to sign written proposal; *Eads v. City of Carondelet* (1867) 42 Mo. 113, rejection by passage of city ordinance; *Goodrich Rubber Co. v. Newman* (Mo. App. 1925) 271 S. W. 1029, rejection of offer to compromise by filing suit within one week; *Union Service Co. v. Drug Company* (1910) 148 Mo. App. 327, 128 S. W. 7, offer and rejection in course of correspondence.

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

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

Annotation:

This Section is in accord with Missouri law. In *Cangas v. Rumsey Mfg. Co.* (1889) 37 Mo. App. 297, an alleged contract was based upon correspondence; the court held that "plaintiff's letter of January 29 was not an acceptance, but a rejection of the defendant's offer contained in his letter of January 21."

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

A counter-offer by the offeree, relating to the same matter as

the original offer, is a rejection of the original offer, unless the offeree at the same time states in express terms that he is still keeping the original offer under advisement.

Comment:

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

Illustrations:

1. A offers B to sell him Blackacre for \$5000, stating that the offer will remain open for thirty days. B replies, "I will pay \$4800 for Blackacre," and on A's declining that, B writes, "I accept your offer to sell for \$5000." There is no contract, although B's acceptance of these terms was made within the time limit originally fixed by A in his offer.

2. A makes the same offer to B as that stated in Illustration 1, and B replies, "Won't you take less?" To which A answers, "No." An acceptance thereafter by B, if within the time allowed under A's offer, creates a contract.

3. A makes the same offer to B as that stated in Illustration 1. B replies, "I am keeping your offer under advisement, but if you wish to close the matter at once I will give you \$4800." A does not reply, and within the thirty days limited in the original offer B accepts it. There is a contract.

Annotation:

The first part of this Section is in accord with Missouri law. *Bruner v. Wheaton* (1870) 46 Mo. 363, principle recognized but held not to apply to facts in the case. In the following cases the principle was not only recognized but applied as a rule of decision: *Railroad Company v. Joseph & Bros. Co.* (1912) 169 Mo. App. 174, 152 S. W. 394; *Duke v. Compton* (1892) 49 Mo. App. 304; *Robertson v. Tapley* (1892) 48 Mo. App. 239; *Lan-caster v. Elliot* (1890) 42 Mo. App. 503.

The second part of this Section is not inconsistent with Missouri law. No direct authority has been found. But see *Sarran v. Richards* (1910) 151 Mo. App. 656, 132 S. W. 285, where a counter-offer was followed by an inquiry which apparently did not have the effect of a rejection of the counter-offer.

Section 39. TIME WHEN REJECTION IS EFFECTIVE.

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

Illustrations:

1. *A* makes *B* an offer by mail. *B* immediately after receiving the offer mails a letter of rejection. Within the time permitted by the offer *B* accepts. This acceptance creates a contract only if received before the rejection.

Annotation:

No pertinent Missouri cases have been found.

Section 40. WHAT LAPSE OF TIME TERMINATES AN OFFER.

(1) The power to create a contract by acceptance of an offer terminates at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know.

(3) In the absence of usage or a provision in the offer to the contrary, and subject to the rule stated in Section 51, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time during the day on which the offer is received.

Comment:

a. An offeror may fix any time that he wishes as that within which acceptance must be made. He need not make the time a reasonable one. If, however, no time is fixed the offeree is justified in assuming that a reasonable time is intended, and the law adopts this assumption.

b. Where a bilateral contract is contemplated a reasonable

time for making the return promise requested is generally brief. Especially is this true in regard to commercial contracts.

c. Where a unilateral contract is contemplated, assent to the proposition is manifested by performing or refraining from performing an act, and a reasonable time for so doing is necessarily a reasonable time for acceptance. If, therefore, in the nature of the case what is requested cannot be done without considerable delay, the time within which acceptance may be made is equally long.

Illustrations:

1. *A* publishes an offer of reward for information leading to the arrest and conviction of a murderer. *B*, intending to obtain the reward, gives the requested information a year after the publication of the offer. There is a contract.

2. While *A* and *B* are engaged in conversation, *A* makes *B* an offer to which *B* then makes no reply, but a few hours later meeting *A* again, *B* states that he accepts the offer. There is no contract unless the offer or the surrounding circumstances indicate that the offer is intended to continue beyond the immediate conversation.

3. *A* sends *B* an offer by mail to sell a piece of land. *B* does not reply for three days and then sends an acceptance. It is a question of fact under the circumstances of the particular case whether the delay is unreasonable.

4. *A* makes *B* an offer by mail to sell goods. *B* receives the offer at the close of business hours and accepts it by letter promptly the next morning. There is a contract.

5. *A* sends *B* a telegraphic offer to sell oil which at the time is subject to rapid fluctuations in price. Though the offer is not received until near the close of business hours, a telegraphic reply sent the next day is too late. There is no contract.

Annotation:

Subdivision (1) of this Section is in accord with Missouri law. The leading case is *James & Sons v. Fruit Jar & Bottle Co.* (1897) 69 Mo. App. 207. To the same effect: *Eagle Mill Co. v. Caven* (1898) 76 Mo. App. 458.

Subdivision (2) is in accord with Missouri law. *Williams v. Implement Company* (Mo. App. 1917) 198 S. W. 425. The word "prompt" modifies the general rule as to a reasonable time. *Brewer v. Lepman* (1908) 127 Mo. App. 693, 106 S. W. 1107.

Subdivision (3) is not inconsistent with Missouri law. No Missouri cases directly in point have been found. See *Minne-*

sota Linseed Oil Co. v. Collier White Lead Co. (1876) 4 Dill. 431, Fed. Cas. No. 9,635, a leading Federal case based on a Missouri transaction.

Section 41. REVOCATION BY COMMUNICATION FROM OFFEROR RECEIVED BY OFFEREE.

Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer.

Comment:

a. Revocation, as stated in Section 35, does not terminate an offer in cases within the rules stated in Sections 45, 46 and 47.

b. What amounts to receipt of revocation within the meaning of the rule is considered in Section 69.

Illustration:

1. *A* makes by mail an offer to *B* and subsequently by mail revokes the offer. Before receiving the revocation, however, *B* has mailed an acceptance. The revocation is ineffectual; and although on receiving the revocation *B* assumes that there is no contract and changes his position in reliance on that assumption, *A* is not precluded from asserting the existence of a contract, for when *B* changed his position *B* knew all of the facts and simply made a mistake of law.

Annotation:

This Section is in accord with Missouri law. In *Price v. Atkinson* (1906) 117 Mo. App. 52, 94 S. W. 816, the court said: "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. But a revocation of an order does not take effect until the letter or telegram revoking the order is actually received, hence defendant's letter and telegram were too late to revoke the order. The contract, if the order itself was sufficient, was completed by plaintiff's acceptance, before the arrival of either defendant's letter or telegram of revocation; therefore, if the subject-matter of the order is sufficiently definite and certain in its terms to constitute a contract, defendant cannot escape

liability for the agreed price or value of the goods by his refusal to receive them." To the same effect: *Outcault Ad. Co. v. Wilson* (1915) 186 Mo. App. 492, 172 S. W. 394, revocation of offer for advertising service; *Sarran v. Richards* (1910) 151 Mo. App. 656, 132 S. W. 285, revocation of counter-offer to sell land; *Chapman v. Adams* (1920) 204 Mo. App. 659, 219 S. W. 132, revocation of proposal to compromise.

Section 42. ACQUISITION BY OFFEREE OF INFORMATION THAT OFFEROR HAS SOLD OR CONTRACTED TO SELL OFFERED INTEREST.

Where an offer is for the sale of a property interest of any kind, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, the offer is revoked.

Comment:

a. Since revocation does not terminate offers falling within the rules stated in Sections 45, 46 and 47, the present Section has no application to such offers.

Illustrations:

1. *A* offers Blackacre to *B* at a stated price, and gives *B* a week within which to consider the proposal. Within a week *B* learns that *A* has contracted to sell Blackacre to *C*, but, nevertheless, sends a formal acceptance, which is received by *A* within the week. There is no contract between *A* and *B*.

2. *A* offers to sell *B* a hundred shares of stock at a stated price, and gives *B* a week within which to consider the proposal. Within the week the market price of the stock advances rapidly to a point much above the price named in the offer. *B*, knowing of this, sends an acceptance which is received by *A* within the week. There is a contract. Knowledge that an offeror may no longer desire to fulfil his offer does not itself affect a revocation.

Annotation:

This Section is not inconsistent with Missouri law. No express authority has been found. The following dictum by Lamm, J. may be helpful: "A power to sell may be revoked by a sale of the subject-matter by the donor of the power or a sale by another agent, by death, by express revocation, or by the performance of some act resulting in its revocation by necessary implication. Under given circumstances notice of revocation to third parties dealing with the agent is necessary." *Kilpatrick v. Wiley* (1906) 197 Mo. 123, 95 S. W. 213.

Section 43. HOW AN OFFER MADE BY ADVERTISEMENT OR GENERAL NOTICE MAY BE REVOKED.

An offer made by advertisement in a newspaper, or by a general notice, to the public or to a number of persons whose identity is unknown to the offeror, is revoked by an advertisement or general notice given publicity equal to that given to the offer.

Comment:

a. In the case of such an offer as is stated in this Section, revocation is not likely to be inoperative within the rules stated in Sections 45 and 46; but the rule stated in Section 47 may prevent a revocation within the rule of the present Section from being operative.

Illustration:

1. A posts a notice in a post office, offering a reward for the apprehension of B, a criminal. Before an acceptance of the offer A posts another notice in the same place, stating that he withdraws the offer. The offer is revoked.

Annotation:

This Section is in accord with Missouri law. "It is correctly held in *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697, a reward case growing out of the assassination of President Lincoln, that an offer of reward may be withdrawn in the same way it was made at any time before it was acted upon." *Hoggard v. Dickerson* (1914) 180 Mo. App. 70, 165 S. W. 1135, facts outside the rule.

Section 44. REVOCATION OF OFFER CONTEMPLATING A SERIES OF CONTRACTS.

A revocable offer contemplating a series of independent contracts by separate acceptances may be effectively revoked so as to terminate the power to create future contracts, though one or more of the proposed contracts have already been formed by the offeree's acceptance.

Comment:

a. An offer may propose several contracts, to arise at separate times (see Section 30). Such an offer is divisible, and the power to make an effective revocation continues *pari passu* with the continuing power of the offeree to accept.

b. Where an offer contemplates a series of unilateral con-

tracts, beginning performance of the consideration for any one of the series makes the offer for that one irrevocable (see Sections 45 and 52).

Illustrations:

1. *A* offers *B* to sell him five tons of steel daily, and tenders five tons at once. *B* accepts the tender. The same amount is furnished daily for a number of days. *A* then states to *B* that he revokes the offer. A contract is formed each day that steel is furnished; but the revocation prevents the formation of any contracts thereafter. If *A*'s proposal had been to buy five tons daily during the ensuing month, the presumption of Section 31 would be applicable. The offer would require prompt acceptance by *B* after it was first received, and if such an acceptance was given, there could be no revocation during the ensuing month.

2. *A* offers to guarantee the payment of all bills of exchange drawn by *B* and discounted by *C*. *C* discounts one such bill. *A* is bound to pay it. *A* then notifies *C* that the guaranty is withdrawn. *A* is not bound to pay bills subsequently discounted.

Annotation:

This Section is in accord with Missouri law. The principle is clearly illustrated by two cases, each involving a continuing offer by defendant to buy railroad ties. In each case there was a series of acceptances by performance and then a revocation of the offer. There was no liability of defendant before the first act of performance and no liability after revocation. But each case held defendant to liability for all acts of performance before revocation, and the measure of damages was as in an express contract and not as in *quantum valebant*. *Roberts v. Harmount Tie & Lumber Co.* (Mo. App. 1924) 264 S. W. 448; *Malloy v. Egyptian Tie & Timber Co.* (1923) 212 Mo. App. 429, 247 S. W. 469. To same effect: *Jones v. Durgin* (1885) 16 Mo. App. 370, consideration "supplied by performance." See also *Wellington v. Con P. Curran Printing Co.* (1925) 216 Mo. App. 358, 268 S. W. 396, offer of bonus at end of each year under profit-sharing plan.

Section 45. REVOCATION OF OFFER FOR UNILATERAL CONTRACT; EFFECT OF PART PERFORMANCE OR TENDER.

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the

full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

Comment:

a. What is rendered must be part of the actual performance requested in order to preclude revocation under this Section. Beginning preparations though they may be essential to carrying out the contract or to accepting the offer, is not enough.

b. Tender, however, is sufficient. Though not the equivalent of performance, nevertheless it is obviously unjust to allow so late withdrawal. There can be no actionable duty on the part of the offeror until he has received all that he demanded, or until the condition is excused by his own prevention of performance by refusing a tender; but he may become bound at an earlier day. It may be fairly contended that the main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promises. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see Section 90).

Illustrations:

1. A says to B, "I will not ask you to promise to install an intra-mural telephone system which will work perfectly in my building, but if you care to try to do it, I will pay you \$1000 if you succeed." B begins the work. When it is nearly finished, A revokes his offer. If B can prove that he would have complied with the terms of the offer, he has a right to damages—the contract price less the cost of completing the installation. If B cannot prove that he would have fulfilled the conditions of the offer he cannot recover.

2. A promises B to sell him a specified chattel for \$5. B tenders \$5 within a reasonable time. A refuses to accept the tender. There is a breach of contract.

Annotation:

No clear and direct Missouri authority for this Section has been found. In *Lindell v. Rokes* (1875) 60 Mo. 249, there was an offer for a unilateral contract (i. e., a promise in exchange for an act to be fully performed by the offeree) whereby the of-

feror was to pay the offeree \$50 if the latter would refrain from using intoxicants for eight months. In reliance on the offer, the offeree refrained for the entire period, sued and recovered. Let it now be supposed that at the end of seven months the offeror had tried to revoke the offer, and the offeree continued to refrain for an additional month and then brought suit. Would he have recovered? Yes. Such a decision could be justified on the theory of this Section. Or it could be justified on the theory of estoppel. *School District v. Stocking* (1897) 138 Mo. 672, 40 S. W. 656. Or it could be justified on the theory that partial performance by the offeree implied a promise of complete performance and thus made the contract mutual and bilateral. *American Pub. & Engr. Co. v. Walker* (1901) 87 Mo. App. 503.

Charitable Subscriptions. In *School District v. Stocking* (1897) 138 Mo. 672, 40 S. W. 656, there was an offer to pay \$25,000 to the plaintiff, apparently in contemplation of specific action, namely, the purchase by the plaintiff of a site for a library. In reliance on the offer, plaintiff took preliminary steps toward the purchase of a library site. Then the offeror was declared insane. Afterwards plaintiff completed the purchase of the library site. In a suit on the promise contained in the offer, it was held that the offer had become a binding contract and that the representatives of the promisor were "estopped to plead want of consideration." A more recent case is *Hardin College v. Johnson* (1928) 226 Mo. App. 285, 3 S. W. (2d) 264, decided in the same way and announcing established Missouri law as follows: "Where subscriptions to charitable objects are made, and on the faith of these subscriptions, and before their withdrawal, the promisee performs some act—expends money, incurs enforceable liabilities, in furtherance of the enterprise—consideration for the subscription is supplied, and it is valid and binding." This Missouri doctrine goes further than the Restatement because there is no condition of "full consideration." In *Koch v. Lay* (1866) 38 Mo. 147 (leading case) there could never be "full consideration" and yet the promisor was liable.

Interpretation. When it is doubtful whether the offer is for a *bilateral* contract (to be supported by offeree's promise) or for a *unilateral* contract (to be supported by offeree's act), the Missouri courts incline toward the bilateral interpretation. See *American Pub. & Engr. Co. v. Walker* (1901) 87 Mo. App. 503, where an offer, after partial performance by offeree, became binding as a bilateral contract with respect to the future, the court saying: "The agreement in question, after the performance of it had been begun, was manifestly obligatory on the plaintiff for the full term of one year." In *Martin v. Ray County Coal Co.* (1921) 288 Mo. 241, 232 S. W. 149, an offer to sell and deliver coal through a period of twenty-six months, followed by

delivery and acceptance during six months, could not be revoked by the offeror, because there had come into existence a bilateral contract.

The facts and conclusion in Illustration 2 are similar to the facts and holding in *Underwood Typewriter Co. v. Century Realty Co.* (1909) 220 Mo. 522, 119 S. W. 400. This case is frequently cited in Missouri and elsewhere as authority for the proposition that a promissory offer contemplating an act by the offeree is accepted when the offeree fully performs or tenders complete performance of the act.

Section 46. OFFERS WHICH ARE THEMSELVES CONTRACTS CANNOT BE TERMINATED.

An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself, or, if no time is fixed, within a reasonable time, either by revocation or by the offeror's death or insanity.

Annotation:

This Section is in accord with Missouri law, although it should be remembered that sealed contracts are not binding in Missouri in the absence of consideration. *Tebeau v. Ridge* (1914) 261 Mo. 547, 170 S. W. 871, option in lease to purchase land supported by promise to pay rent; *Aiple-Hemmelmann R. E. Company v. Spelbrink* (1908) 211 Mo. 671, 111 S. W. 480, money consideration for option paid in advance; *Young v. Lanyon* (Mo. App. 1922) 242 S. W. 685, question of damages when a contract on a produce exchange to enter into a future contract is broken. Although time is of essence in option contracts, yet the vendor may waive conditions as to time. *Bammert v. Kenefick* (Mo. 1924) 261 S. W. 78. For a case where an option was successfully challenged for want of consideration, see *Davis v. Petty* (1898) 147 Mo. 374, 48 S. W. 944.

Section 47. OFFERS WHICH OFFEROR HAS COLLATERALLY CONTRACTED TO KEEP OPEN CANNOT BE TERMINATED.

An offer cannot be terminated during the term therein stated, or if no term is therein stated for a reasonable time, either by revocation or by the offeror's death or insanity, if by a collateral contract the offeror has undertaken not to revoke the offer.

Comment:

- a. The promise of the offer itself may be a contract (see Sec-

tions 24, 46). For practical purposes the situation is the same where the offer is accompanied by a collateral contract to keep the offer open. This collateral contract is in effect specifically enforced without suit by denying the offeror the power to terminate his offer.

b. Whether a contract based on such an offer as is within the rule stated either in this Section or in Section 46 can itself be specifically enforced, or, if not, what damages are recoverable if the offeror repudiates or refuses to perform the contract, is determined by the law governing the performance of contracts.

Illustrations:

1. A offers to sell B Blackacre for \$5000 at any time within thirty days, and receives \$100 for a promise to hold the offer open for that period. Nevertheless he notifies B a few days later that the offer is withdrawn. Subsequently, but within the thirty days, B accepts the offer and tenders \$5000, which A refuses. There is a contract.

Annotation:

This Section seems to be in accord with Missouri law. See *Sooy v. Winter* (1915) 188 Mo. App. 150, 175 S. W. 132 and (Mo. App. 1917) 193 S. W. 845, where the facts did not justify an application of the principle.

Section 48. TERMINATION OF OFFER BY OFFEROR'S DEATH OR INSANITY.

A revocable offer is terminated by the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract.

Annotation:

This Section is not inconsistent with Missouri law. The principle was apparently recognized in *School District v. Stocking* (1897) 138 Mo. 672, 40 S. W. 656. It was claimed that an adjudication of insanity revoked certain offers; the court held the offers were accepted by partial performance before the insanity, saying "this occurred before Sheidley was adjudged insane and his insanity or death thereafter could not revoke them."

Section 49. TERMINATION OF OFFER BY DEATH OF ESSENTIAL PERSON OR DESTRUCTION OF ESSENTIAL THING.

Where a proposed contract requires for its performance the

existence of a specific person or thing, and before acceptance the person dies or the thing is destroyed, the offer is terminated unless the offeror assumes the risk of such mischance.

Comment:

a. If the essential person is not dead, but ill or otherwise apparently disabled or the essential thing is injured, it cannot be said that the offer is automatically terminated, though such facts may justify the offeror in refusing to fulfil any contract formed by acceptance.

Annotation:

This Section is not inconsistent with Missouri law. No case has been found applying the principle to an offer. But *Hall v. School District* (1887) 24 Mo. App. 213 recognized and applied the similar principle that a condition will be implied in a *contract* (not merely an *offer*) as to the continued existence of a particular person or thing when the "evident intention of the parties" requires it. See dictum quoted in annotation to Section 42.

Section 50. TERMINATION OF OFFER BY ILLEGALITY.

Where after the making of an offer and before acceptance the proposed contract becomes illegal the offer is terminated.

Illustration:

1. A offers B to lend him \$1000 for a year at 10 per cent interest. After the making of the offer but before its acceptance a usury law is enacted, prohibiting future loans bearing interest at more than 8 per cent. The offer is thereby terminated.

Annotation:

No pertinent cases have been found.

Section 51. EFFECT OF DELAY IN COMMUNICATION OF OFFER.

If communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the delay, though it is due to the fault of the offeror; but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows nor has reason to know that there has been delay, a contract can be

created by acceptance within the period which would have been permissible if the offer had been despatched at the time that its arrival seems to indicate.

Illustrations:

1. *A* sends *B* a misdirected offer which is delayed in delivery, as is apparent from the date of the letter or the postmark on the envelope, so that the offeree does not receive the offer until some time later than he would have received it had the direction been correct. The offeree cannot accept the offer unless he can do so within the time which would have been permissible had the offer arrived seasonably.

Annotation:

No pertinent cases have been found.