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CONTRACTS IN IOWA REVISITED— OFFER AND ACCEPTANCE

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One of the requirements of a legally enforceable promise (except for the few enforced without mutual assent or consideration, on the basis of past acts or future reliance[1]) has been sometimes stated to be a *meeting of the minds.* This phrase is disapproved by those who dislike the suggestion in the phrase of a controlling subjective intent, particularly because in today's law the objective manifestation of intent is probably more often controlling[2]. In other places the requirement has been phrased simply as an agreement, or mutual assent.[3] The phrase "meeting of the minds" probably persists in part because it is a phrase that rolls easily off the tongue or the typewriter.[4] Nothing sensational

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[1] Promises enforceable without mutual assent or consideration were discussed in Hudson, *Doctrine of Consideration in Iowa Revisited—The Bargain Element,* 5 DRAKE L. REV. 67 (1956), including problems popularly referred to under the headings of "past consideration" and "promissory estoppel".

[2] See the statement in RESTATEMENT, CONTRACTS § 20 (1932):

> 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 §§ 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.

See also: Industrial Products Mfg. Co. v. Jewett Lumber Co., 185 F.2d 866 (8th Cir. 1951) (buyer bound by specific terms of order although changes had been made in it with jobber through whom order was originally placed; defendant argued no "meeting of minds" because no subjective meeting of minds; opinion points out that what is expressed by parties constitutes the contract, using objective test); CORBIN, CONTRACTS §§ 106-07 (1950); WILLISTON, CONTRACTS § 22 (3d ed. 1957); IOWA ANNOTATIONS TO THE RESTATEMENT OF CONTRACTS § 20-II (1934).

[3] For extensive discussion of mutual assent, see CORBIN, CONTRACTS §§ 1-108 (1950); WILLISTON, CONTRACTS §§ 1-98 (3d ed. 1957). RESTATEMENT, CONTRACTS §§ 1-74 are involved. These works will be referred to subsequently as CORBIN, WILLISTON, and RESTATEMENT. See also SIMPSON, CONTRACTS §§ 1-85 (1954).

[4] The phrase "meeting of the minds" was used in the following opinions: Fire Ass'n of Philadelphia v. Allis Chalmers Mfg. Co., 129 F. Supp. 335 (N.D. Iowa 1955); Harris v. Manning Independent School Dist., 245 Iowa 1295, 66 N.W.2d 438 (1954); Carmichael v. Stone, 243 Iowa 904, 54 N.W.2d 454 (1952); Maasdam v. Estate of Maasdam, 237 Iowa 877, 24 N.W.2d 316 (1946); Hueston v. Pointer Brewing Co., 222 Iowa 630, 269 N.W. 754 (1936); Bradley Lumber Co. v. R. D. Hunting Lumber Co., 218 Iowa 739, 255 N.W. 711 (1934); Nolan v. Wick, 218 Iowa 660, 254 N.W. 80 (1934); Heggen v. Clover Leaf Coal & Mining Co., 217 Iowa 820, 253 N.W. 140 (1934).

has occurred in Iowa cases dealing with this requirement since the publication of IOWA ANNOTATIONS TO THE RESTATEMENT OF CONTRACTS,[5] but in the interest of completeness of coverage, some attention should be paid to this area; therefore this collection and analysis of cases during that period is presented.

The manifestations of mutual assent almost always take the the form of an offer by one person, communicated by the offeror to the offeree,[6] followed by an acceptance by the offeree, although it is possible to find mutual assent in a series of documents.[7] Therefore, it is convenient to discuss the problem of reaching an agreement by first examining the circumstances which support a conclusion of a legally effective offer, then examining problems of a legally effective acceptance.

Finding a legally significant offer may involve trying to discover a promise when there is no promissory language, or, by contrast, may involve concluding that there is no offer even with language promissory in form. Promissory language is not absolutely necessary to support a finding of a promise as an offer—promises may be implied from conduct.[8] This is illustrated most frequently in connection with rendition of services to other persons. It has been commonly stated that where valuable services are rendered to another who accepts these services, an obligation to pay will be implied.[9] This would most often be preceded by a request from the recipient as the offer, but, apparently, this is not a necessary part of the rule. Of course the circumstances may suggest that the services were intended to be rendered gratuitously, or that the recipient could reasonably so understand, in which event no

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[5] That volume is subsequently referred to as IOWA ANNOTATIONS. Cases in 214 Iowa and volumes prior thereto may be found by consulting appropriate RESTATEMENT sections in IOWA ANNOTATIONS.

[6] An offer is not effective until it is communicated to the offeree. CORBIN §§ 59-60; WILLISTON §§ 33-34; RESTATEMENT §§ 23, 53. This point was raised in *In re* Estate of McKeon, 227 Iowa 1050, 289 N.W. 915 (1940), a case involving performance of services for decedent and an attempt to recover on an express promise. The Court affirmed a finding that performance was induced by the proposal; this was apparently referring to communication.

[7] CORBIN § 31. A provisions as to limitation of liability for defects in electrical equipment sold, contained in earlier communications, was held to be a part of the agreement because of references in subsequent writings to earlier ones. Fire Ass'n of Philadelphia v. Allis Chalmers Mfg. Co., 129 F. Supp. 335 (N.D. Iowa 1955).

[8] CORBIN § 13; WILLISTON §§ 22A, 36A; RESTATEMENT § 5. See Pascoe v. Franklin County State Bank, 217 Iowa 205, N.W. 63 (1933) (implied promise found in conduct by bank in honoring previous checks drawn by depositor); Orlich v. Rubio Savings Bank, 240 Iowa 1074, 38 N.W.2d 622 (1949) (Court found no promise by bank to honor checks).

[9] *In re* Estate of Holta, 246 Iowa 527, 68 N.W.2d 314 (1955); Finkle v. Finkle, 239 Iowa 783, 32 N.W.2d 807 (1948) (refers also to rule that one pleading an express contract may not recover on an implied contract); *In re* Estate of Beck, 239 Iowa 655, 32 N.W.2d 217 (1948) (observation was made that failure by claimant to keep books did not require inference that claimant did not expect to be paid); CORBIN § 566; WILLISTON §§ 36, 91.

promise to pay would be implied.[10] In this connection, although the matter probably should be treated solely as a matter of factual inferences primarily for the jury, there has been announced as a rule the proposition that when services are rendered by a member of the family they are presumed to have been performed gratuitously. No attempt is made here to discuss the possible meanings of "member of the family", or what is sufficient to overcome the presumption. However, it should be noted that the family relation concept was limited in *In re Estate of Klepper*,[11] to situa-

[10] Young v. Central Broadcasting Co., 229 Iowa 385, 294 N.W. 593 (1940) (Court concluded it was for jury to decide if doctor examining participants in boxing tournaments promised to donate services; jury found for doctor); Equitable Life Ins. Co. of Iowa v. Crosley, 221 Iowa 1129, 265 N.W. 137 (1936) (person who was in business of making loans and selling them to insurance company, and of taking applications for loans, did not recover for services rendered in servicing these loans where there was no special promise to pay for such service; the Court stated exceptions to usual rule applied where services were as much for benefit of party performing as for the other, and where there was failure to keep accounts; as to latter observation, see *In re* Estate of Beck, *supra*, note 9).

[11] 244 Iowa 521, 57 N.W.2d 565 (1933) (3 judges dissented, arguing that no prior decision had required reciprocal services, as matter of law, for the family services rule to apply). Other cases in which the concept of family relationship was involved are: Ferris v. Barrett, ... Iowa....., 95 N.W.2d 527 (1959) (claim of divorced wife of decedent for care of his aged, mute and partially deaf sister during four years of marriage; although there is presumption services rendered to members of family are gratuitous, this is special defense and must be pleaded; presumption may be overcome by agreement or mutual expectation as to payment for services and is overcome in this case by such factors as absence of blood relationship, lack of reciprocal character of duties performed, etc.); *In re* Estate of Andrews, 245 Iowa 819, 64 N.W.2d 261 (1954) (fact claimant was niece of decedent's wife did not require, as matter of law, finding of family relationship where services were rendered to decedent in his home after his wife's death); Dunlop v. Hemingway, 245 Iowa 696, 63 N.W.2d 901 (1954) (no family relationship between nephew and aunt who moved in with him because there was no real mutuality of services, so there was sufficient consideration for transfer by aunt to nephew to withstand attack by Board of Social Welfare); Maasdam v. Estate of Maasdam, 237 Iowa 877, 24 N.W.2d 316 (1946), 32 IOWA L. REV. 575 (1947) (discusses problem of application of "Dead-Man's" Statute [IOWA CODE § 622.4 (1958)] in claim by daughter against father's estate; may plead both express contract and implied contract in separate counts, but can't allege express contract and recover on implied); *In re* Estate of Larsen, 235 Iowa 57, 15 N.W.2d 919 (1944) (no conclusive evidence of family relationship when grandson worked for grandmother, stayed with her nights, but was otherwise not under her control; in any event don't need express promise to overcome presumption of gratuity if such presumption were present); *In re* Estate of Talty, 232 Iowa 280, 5 N.W.2d 584, 144 A.L.R. 859 (1942) (not gratuitous as matter of law when services rendered by sister-in-law of decedent in home of nephew of decedent; Court emphasized no blood relationship, disproportionate nature of services; not clear whether Court is relying on concept there was no family relationship or whether presumption of gratuity resulting therefrom was thought to be overcome); *In re* Estate of Kleinhesselink, 230 Iowa 1090, 300 N.W. 315 (1941) (claim for nursing services rendered to decedent by sister in her home not subject to directed verdict for estate on theory of family relationship where no mutuality of services); Shoberg v. Rock, 230 Iowa 632, 298 N.W. 834 (1941) (claim for services rendered as housekeeper by sister of decedent supported by evidence even considering presumption); Hatheway v. Hanson, 230 Iowa 386, 297

tions where reciprocal services are rendered; this was a case where the person to whom the services were rendered, by a son and daughter-in-law, was physically helpless.

Even though words are used, and more than conduct, the court may still conclude that there is no promise because there is no language to support a conclusion of a definite undertaking.[12] Words of promise do not assure a legally effective offer. For instance, the promise must be at least reasonably certain, and not too indefinite.[13] *Kelley v. Creston Buick Sales Company*,[14] in which the

N.W. 824 (1941) (presumption referred to in case of alleged fraudulent mortgage given by parent to child, allegedly for services rendered by son living at home); Clark v. Krogh, 225 Iowa 479, 280 N.W. 635 (1938) (claim for services rendered during illness by daughter who had previously left home and returned to care for parents; emphasizes "reciprocal services" in rule of presumption; don't need express promise to overcome presumption). See WILLISTON § 91AA; CORBIN § 566; IOWA ANNOTATIONS § 5, p. 5; Annot., 7 A.L.R.2d 8 (1949).

[12] The language may only be that of preliminary negotiations contemplating a further expression of fixed purpose. CORBIN §§ 22-23; WILLISTON § 27; RESTATEMENT § 25. Also, the language may be a mere expression of future intention. CORBIN § 15; WILLISTON §§ 1A, 26; RESTATEMENT § 2, comment *c*; E. I. DuPont de Nemours Co. v. Claiborne-Reno Co., 64 F.2d 224, 89 A.L.R. 238 (8th Cir. 1933) (in controversy involving distributorship, court thought language by DuPont of promise to remain bound until dissatisfied was more than mere expression of intention).

[13] CORBIN §§ 95-102; WILLISTON §§ 37-49; RESTATEMENT §§ 32-33.

[14] 239 Iowa 1236, 34 N.W.2d 598 (1948) (the opinion did not discuss the other basis for denying specific relief, given by the trial court, lack of special value in car). Other cases involving a contention of uncertainty and indefiniteness were: Fortgang Brothers, Inc. v. Cowles, ... Iowa ....., 85 N.W.2d 916 (1957) (opinion cites RESTATEMENT § 32); Drake v. Block, 247 Iowa 517, 74 N.W.2d 577 (1956) (bonus plan in employment discussed, but no definite amount ever agreed upon); Miller v. Lawlor, 245 Iowa 1144, 1154, 66 N.W.2d 267, 273 (1954) ("that is certain which can be made certain"); Carmichael v. Stone, 243 Iowa 904, 54 N.W.2d 454 (1952) (in an opinion concurred in by five judges, lack of evidence as to terms of sale of wool, down payment, and delivery were considered in the conclusion that there were only negotiations and no "meeting of minds"; six judges concurred in an opinion relying solely on evidentiary insufficiency under Statute of Frauds); Denny v. Jacobson, 243 Iowa 1383, 55 N.W.2d 568 (1952) (clause in lease for renewal with provision that rents were to be adjusted in accordance with proportionate general change in rentals in city, with arbitration by another person if parties unable to agree; Court held this clause not objectionable); Pazawich v. Johnson, 241 Iowa 10, 39 N.W.2d 590 (1949) (specific performance not decreed of land purchase contract, where doubt as to conditions of payment, kind of conveyance, whether wife's signature required); Down v. Coffie, 235 Iowa 152, 15 N.W.2d 216 (1944) (specific performance of alleged promise to convey denied because too uncertain; was allegedly promise to convey when party financially able, if had money, or if vendor wanted money); Johnstone v. Johnstone, 226 Iowa 503, 284 N.W. 379 (1939) (problem of specific performance of stipulations agreed to before divorce decree and incorporated therein that husband should pay expenses of schooling but should be informed of probable cost and proposed instruction; Court thought this left school and cost open to further agreement, so was too indefinite); Hueston v. Pointer Brewing Co., 222 Iowa 630, 269 N.W. 754 (1936) (claim, for additional compensation by salesman for use of automobile, not enforced when based on nothing more definite than substantially "we will do something

Court refused specific performance because of indefiniteness, is an interesting example of the problem involved here, even though the Court's reaction was colored by the stated proposition that in a suit for specific performance greater certainty would be required.[15] The agreement involved was entered into in 1945 for a Buick automobile, and had notable omissions: the space for price was left blank with printed provisions stating "price effective on day of delivery will be the governing price"; delivery was stated to be "as soon as possible" and "except insofar as products of factory and requirements of others permit". Three dissenting judges found no difficulty with these features of the case. The objection of indefiniteness of terms may be accentuated by not merely omitting certain terms but by expressly mentioning an "agreement to agree", as was done in another case;[16] the Court is then blocked from implying certain terms to fill the omission.

Promissory language is sometimes asserted to be legally ineffective as a contract because the parties contemplated the agreement should be reduced to a formal writing. This should not prevent the prior manifestations from constituting a binding contract unless the circumstances definitely indicate the parties intend no legal effect until the writing is adopted.[17] In *Cunningham v. Iowa-Illinois Gas & Electric Company*[18] the Court affirmed a finding that the parties had orally entered into an agreement for settlement of a condemnation proceeding appeal, and that formal releases which one party had insisted upon were only formalities, not affecting the validity of the prior agreement, when the landowner refused to sign the release. However, in a recent case, *Brandt v. Schucha*,[19] failure to adopt a written document was considered fatal to the existence of an alleged oral contract. A childless widow, living in Montana, apparently desirous of insuring that a piece of land in Iowa go, at the time of her death, to the tenant, made certain alternative proposals. The tenant subsequently visited her in Montana. The evidence indicated that there was an oral agreement reached at this meeting that the tenant would pay her $3,000 per year for her life, that the land would go to him when she died, and that the tenant would return home, have an attorney prepare a contract to embody their agreement, and send it to the widow-owner, who would go over it or have an attorney do so, and then

about it."); First Bank & Trust Co. v. Welch, 219 Iowa 318, 258 N.W. 96 (1934) (indefiniteness of provision as to security for future advances).

[15] CORBIN § 95; RESTATEMENT § 370, comment *b*.

[16] Fremon v. W. A. Sheaffer Pen Co., 209 F.2d 627 (8th Cir. 1954), *affirming* 111 F. Supp. 39 (S.D. Iowa 1953) (covered value of certain inventions). *Accord:* Storck v. Pascoe, 247 Iowa 54, 72 N.W.2d 467 (1955) (involving sale of business; Court affirmed a finding of a contract of sale, of more than an incomplete agreement looking toward the making of a complete agreement in the future). See WILLISTON § 45; CORBIN § 29.

[17] CORBIN § 30; WILLISTON §§ 28-28A; RESTATEMENT § 26.

[18] 243 Iowa 1377, 55 N.W.2d 552 (1952).

[19] ..... Iowa ....., ... N.W.2d ..... (no. 49624, opinion handed down April 8, 1959).

sign it. The attorney prepared the contract, wrote the owner a letter inclosing the contract, signed by the tenant and his wife, and authorizing a change in terms that did not meet with her approval. The widow died the day the letter was mailed from Iowa. The Court refused to enforce this alleged oral promise to devise the land to the tenant, asserting that what took place were plainly negotiations preliminary to the execution of a written contract; the opinion apparently placed great weight upon the apparent lack of oral agreement as to such questions as abstract of title, kind of conveyance, payment of taxes and insurance to be carried.[20] This writer believes the Court would not be compelled to adopt the conclusion that the parties did not intend to be bound until a written agreement was adopted. It is perfectly possible for parties to make tentative agreements subject to later modifications, and undue weight should not be given to the fact of drawing up a written document. The parties did not expressly state there was to be no obligation. Furthermore, the intention from the evidence was apparently very clear that she desired him to have the land at her death. However, in this case such argument does not help the tenant because, as the Court pointed out, the Statute of Frauds is an insuperable obstacle. The exceptions to the need for a writing were not complied with. There was no "purchase money" paid, nor did the tenant take and hold possession under the alleged oral contract, nor was there apparently any substantial reliance upon the promise, as statute and cases seem to require.[21] In addition, it should be noted that arguments for the tenant's claimed interest in the land on the basis of a deed and holographic wills were also unsuccessful.

Delivery of an informal written document has sometimes been stated to be essential to the validity of a contract.[22] Such a statement is made in *Dean v. Sargent.*[23] That opinion concluded that the requirement of delivery had been satisfied by handing over the land contract to an agent of the vendor, and that delivery did not require manual tradition or ceremony. Though with such loose interpretation of delivery there is little practical difficulty in the retention of a requirement of delivery of a contract, there does not seem to be any reason for its retention. Delivery should be a feature of informal contracts only to the extent a party has definitely indicated it to be a necessary part of an effective assent. Lack of proper delivery was asserted in *Furst-McNess Company v.*

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20 See cases referred to in IOWA ANNOTATIONS § 26-IV.

21 IOWA CODE §§ 622.32-622.33 (1958); IOWA ANNOTATIONS § 197; discussion of Statute of Frauds in land cases is found in Hudson, *Contracts in Iowa Revisited—Statute of Frauds,* 6 DRAKE L. REV. 63, 68 (1957).

22 See CORBIN § 32. The RESTATEMENT makes no mention of any such requirement. No attempt is made to collect the cases concerning delivery of negotiable instruments or insurance policies.

23 234 Iowa 176, 12 N.W.2d 249 (1943). *Cf.* Eastman v. DeFrees, 235 Iowa 488, 17 N.W.2d 104 (1945) (delivery of contract referred to here also and found to have been accomplished).

Kielly,[24] in which the guarantor asserted that he signed a guaranty agreement for the principal at his request only upon the oral condition it would not be delivered until two other people signed it. The Court considered that failure to admit testimony of the oral condition was error, that if such conditional delivery be found the creditor may recover against the guarantor if he proves he received the guaranty without notice of the condition. Note that the guarantor is here bound to his manifestation of assent by a theory of apparent authority or estoppel.[25]

Offers are ordinarily revocable before an act of acceptance, even though a stated time for duration of the offer has not elapsed, unless there is some consideration, or its substitute, for the offer.[26] Revocation before the offeree has completed the performance dictated by the offer as acceptance, but after he has completed part of the performance requested, or after he has in other ways relied on the offer, presents difficulties because the offeree has not done the acts requested as a method of indicating consent. These problems might be solved by interpreting the offer to call for a promise as acceptance, and to find a promise in some of the actions of the offeree.[27] Also, the problem might be solved by the application of a theory such as is stated in section 45 of the RESTATEMENT OF CONTRACTS,[28] which is that the offeror is bound after part of the consideration requested is given or tendered, or by the theory of section 90 of the RESTATEMENT[29] that promises are binding by substantial reliance which the promisor should have expected. Three Iowa cases during this period illustrate this problem.

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[24] 233 Iowa 77, 8 N.W.2d 730 (1943). See further discussion of this case, note 75, *infra*, and accompanying text.

[25] See WILLISTON, CONTRACTS § 1244 (Rev. ed. 1937).

[26] McCutchan v. Iowa State Bank, 232 Iowa 550, 5 N.W.2d 813 (1942); CORBIN §§ 38, 42-53; WILLISTON §§ 55, 61-61D; RESTATEMENT § 35.

[27] CORBIN § 52, WILLISTON § 60A.

[28] RESTATEMENT § 45:

> 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.

[29] RESTATEMENT § 90:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

RESTATEMENT § 46 provides:

> 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 provision in the offer binding irrespective of consideration [§ 90], 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.

In *Boyd v. Christiansen*[30] the creditor made an offer to take, in full satisfaction of an indebtedness, a certain amount of Federal Land Bank bonds. The debtor alleged efforts to get the loans, securing tentative approval, incurring expenses for an abstract, and difficulties in securing a right-of-way insisted upon by the Land Bank. The bonds apparently never were turned over or tendered before the creditor refused to go through with his promise. The Court refused to permit this as a defense in a foreclosure action, pointing out there was nothing more than a unilateral accord. In *Ferguson v. Bovee* [31] there was a real estate listing, stated to be exclusive and for a definite period of time, with a promise authorizing the broker to purchase for himself; the commission was to be paid on sale or purchase. The listing letter contained a statement, signed by the broker, "We accept this employment." The broker, before revocation, made many trips to secure purchasers and spent money for advertising. The trial court had dismissed the action. This was reversed, but the broker was permitted recovery only for amounts expended and time consumed. In *Vrba v. Mason City Production Credit Association*[32] the defendant, holder of a sheriff's deed, after foreclosure allegedly promised the debtor that defendant would accept for a reconceyance whatever "they had in it", if the money was brought by the next board meeting. The plaintiff alleged giving up an opportunity to redeem, and efforts to get the money. The Court affirmed a finding of insufficient evidence of any such promise, but also concluded that there was no compliance with the Statute of Frauds, that not redeeming was not purchase money within the Iowa statute, and in any event was not referrable exclusively to the contract.

The *Boyd* case probably does not come within the purview of section 45 of the RESTATEMENT because the acts performed were not part of the consideration, the turning over of the bonds, but were mere preparation. In literal terminology section 90 of the RESTATEMENT would probably apply, because the promisor should have realized these acts would have been performed, and they probably classify as substantial. There is some doubt in the law, though, that the doctrine of promissory estoppel, as section 90 is familiarly called, should apply to situations which start out as bargain situations but are not carried through.[33] The *Vrba* case, assuming the difficulties of insufficiency of evidence of the promise and lack of compliance with the Statute of Frauds could be overcome, would be classified with the *Boyd* case, as a bargain case with

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[30] 229 Iowa 1, 293 N.W. 826 (1940), 26 IOWA L. REV. 880 (1941).

[31] 239 Iowa 775, 32 N.W.2d 924 (1948).

[32] 248 Iowa 264, 80 N.W.2d 495 (1957). See discussion of Statute of Frauds aspects of this case, in Hudson, *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63 (1957).

[33] See Hudson, *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 80 (1957), and authorities cited therein; CORBIN § 51.

reliance elements. In neither of these cases was the possibility of such an idea of reliance producing irrevocability of the offer mentioned in the opinion.

The *Ferguson* case presents a variation. Real estate brokerage listing cases have apparently travelled along a route by themselves. For instance, in that area there is a doctrine that a listing may not be revoked if done in bad faith, a concept not elsewhere prevalent in contract law. Bad faith apparently is proved by showing the broker has been the effective cause of a sale, and that the owner withdrew when the broker was on the threshhold of success.[34] Such cases could probably be described as merely being concerned with what is complete acceptance by the broker. The *Ferguson* case is not such a situation. Further than that, however, apparently many of the brokerage cases, by one theory or another, or without a theory, have said that after the broker has expended effort and money the listing is irrevocable, particularly if the listing is exclusive or for a specified period of time.[35] The Ferguson case, by citing authority principally from legal encyclopedias, states in essence that if a listing is for a particular time, there may be damages for revocation.[36] What is its theory? The opinion refers

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[34] CORBIN § 50; RESTATEMENT, AGENCY 2d § 454 (1958); Wallace, *Promissory Liability under Real Estate Brokerage Contracts*, 37 IOWA L. REV. 350 (1952). The following cases were concerned with whether the broker was the effective cause of the sale and whether there was good faith withdrawal: Donahoe v. Casson's Market, Inc., 248 Iowa 1106, 84 N.W.2d 29 (1957) (broker not effective cause of sale); McCulloch Inv. Co. v. Spencer, 246 Iowa 433, 67 N.W.2d 924 (1955) (non-exclusive listing; found good faith rejection); Ducummon v. Johnson, 242 Iowa 488, 47 N.W.2d 231 (1951) (non-exclusive listing; found broker was efficient cause); Nickelsen v. Morehead, 238 Iowa 970, 29 N.W.2d 195 (1947) (agent entitled to commission even though seller and buyer agreed to cancel contract); Morton v. Drichel, 237 Iowa 1209, 24 N. W.2d 812 (1946) (non-exclusive listing; no good faith withdrawal; Court approved instruction that listing would continue for a reasonable time unless withdrawn and withdrawal must be in good faith); White v. Grovier, 237 Iowa 377, 21 N.W.2d 769, 164 A.L.R. 943 (1949) (broker effective cause as matter of law); Moore v. Griffith, 234 Iowa 1024, 14 N.W.2d 644 (1944); Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1943) (directed verdict against broker reversed on theory agency not terminated in good faith; emphasizes broker, not employed for definite time, may have employment terminated before entitled to compensation, if in good faith; on retrial jury found for defendants and Court affirmed in 234 Iowa 1360, 15 N.W.2d 257 [1944]); Kellogg v. Rhodes, 231 Iowa 1340, 4 N.W.2d 412 (1942) (broker not procuring cause); Santee v. Lutheran Mut. Aid Soc'y, 226 Iowa 1109, 285 N.W. 685 (1939); Maher v. Breen, 224 Iowa 8, 276 N.W. 52 (1938). See IOWA ANNOTATIONS § 52-II-B for cases on "commission contracts".

[35] See Wallace, *op. cit. supra*, note 34; WILLISTON § 60A, n. 16.

[36] The only Iowa case cited was Knudson & Richardson v. Laurent, 159 Iowa 189, 140 N.W. 392 (1913), but in that case, involving a listing for a specific period of time, the comment as to a suit for damages was used as a part of an argument that an action for commission could not be maintained, when the broker had not procured a purchaser ready, willing and able to buy on the terms proposed, before the owner allegedly revoked. The Court also observed there was no counter promise on broker's part, as in some cases, citing Metcalf v. Kent, 104 Iowa 487, 73 N.W. 1037 (1898). The latter case supported an action for commission even though the broker may have only made efforts

to the "listing contract" and "listing agreement". Does this mean the agreement was bilateral? Such a proposition seems doubtful in most listings; particularly in the *Ferguson* case the statement about accepting the employment does not seem to imply a promise to do anything. If it is conceded that the *Ferguson* listing is only a unilateral offer, a promise for an act, the next question might be as to what act or acts are requested as an acceptance. Conceivably the acceptance, or acts requested in exchange, could be the services of the broker in advertising, and otherwise attempting to sell, or the acceptance could be only the securing of the purchaser, in which event all else would be preparation. Because the compensation of brokers is not commonly geared to services rendered, it would seem that acceptance would be only the securing of the purchaser, and that the services of the broker would not be part performance but mere preparation within the theory of RESTATEMENT section 45, so that irrevocability would not be supported on that theory.[37] Furthermore, if the acts of solicitation were considered as part of the bargain for performance, and consideration and performance instead of mere preparation, it would seem that the broker should have been more clearly entitled to recover the commission promised instead of only his expenses, a reliance element, for this would put him in the position he would have been in if the promise had been carried out; it does not seem speculative to predict that the broker would have either secured a purchaser or would have bought the property himself. The true basis of the *Ferguson* case would then seem to be one of supporting irrevocability of the listing offer on an estoppel or reliance basis, akin to section 90 of the RESTATEMENT OF CONTRACTS. This is then a case where action in reliance makes a promise enforceable even if

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toward sale, at the time of revocation, under an agreement that gave the broker an exclusive right to sell for a specific time and which specifically promised a commission if property was sold during the stated period. The Court, in the opinion, stated that the consideration for the contract was that the plaintiff would endeavor to find a purchaser, and that the plaintiff performed his part of the contract by his efforts. The quoted agreement, in *Metcalf*, did not, however, specifically give any promise on the broker's part. In the *Metcalf* case an argument was also made for discharge of any right to commission by an oral statement of the broker that he would claim no commission. The Court did not support this argument, but stated consideration was needed for the release and none was present, because the cigars given at the time were not intended as consideration. This part of that case seems to be contrary to the decision in Pond v. Anderson, 241 Iowa 1038, 44 N.W.2d 372 (1950), which supported a contention of discharge of an obligation to pay a broker on a waiver without consideration. See discussion of the *Pond* case in Hudson, *Doctrine of Consideration in Iowa Revisited—Dicharge or Modification of Duties*, 5 DRAKE L. REV. 3, 13 (1955).

[37] See RESTATEMENT, AGENCY 2d § 445, comment c, 453 (1958). There is stated to be no entitlement to compensation for services rendered in unsuccessful effort to accomplish result before right to sell terminates; but there is a suggestion in comment c that if there is merely an offer to pay compensation without agreement to perform the services, the offer may be revoked at any time, with possible application of RESTATEMENT, CONTRACTS § 45 (1932).

there is not part performance of the exchange requested by the offeror. The result of *Ferguson* is then inconsistent with the result in *Boyd*, which refused to recognize reliance as sufficient for irrevocability where the requested exchange had not been performed.

Revocation is not ordinarily effective to terminate the offer unless there is a communication to the offeree that the offeror no longer intends to enter into the proposed contract.[38] However, there are several situations in which such a communication is not absolutely essential to an effective revocation. Revocation may be effected without direct communication, as was illustrated in *McCutchan v. Iowa State Bank*.[39] The Court, following the RESTATEMENT OF CONTRACTS, announced that in the case of an offer to sell a particular piece of land there was an effective revocation when the offeree learned the land had been sold to another person.[40] Communication of revocation is a problem in cases of offers made to the general public, where the offeror may not know who have read the original offer. The solution accepted by the RESTATEMENT OF CONTRACTS is to give publicity equal to that given the offer.[41] *Carr v. Mahaska County Bankers Association*[42] presents a fascinating example of this problem. A poster, printed over the name of the County Bankers Association, announcing an offer of a reward for information leading to arrest and conviction of robbers of another bank in that county, was posted in a particular bank, then a member of the association. The cashier of this particular bank testified that he had torn down the poster and put it in a waste basket. Apparently the plaintiff had no knowledge of its removal. In the suit against the association and its members, the Court affirmed a refusal to direct a verdict for this particular bank,[43] following the rule of equal publicity, concluding that interruption of posting was not giving publicity equal to that given the offer. This writer is curious as to whether scientific studies would support a conclusion, a proposition assumed so readily by the Court, that tearing down a sign would not attract as much attention as putting up a new sign.

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[38] CORBIN § 39; WILLISTON §§ 55-56; RESTATEMENT § 41.

[39] 232 Iowa 550, 5 N.W.2d 813 (1942).

[40] RESTATEMENT § 42. The opinion is not explicit that there was no direct communication of withdrawal. The citing of § 42 would seem, however, so to indicate. CORBIN § 40; WILLISTON § 57.

[41] RESTATEMENT § 43 states:

> An offer made by advertisement in a newspaper, or by a general notification, 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 before a contract has been created by acceptance of the offer.

See CORBIN § 41; WILLISTON §§ 59-59A.

[42] 222 Iowa 411, 269 N.W. 494, 107 A.L.R. 1080 (1936). No citation of the RESTATEMENT section was made.

[43] The individual bank was liable as a member of an unincorporated association, even though it later had dropped its membership.

Mutual assent, where required,[44] requires not only an effective offer but an acceptance.[45] In several cases the Court found there was not even a purported act of acceptance.[46] A purported acceptance, to be effective, must be in the terms of the offer.[47] This was illustrated in *McCutchan v. Iowa State Bank*[48] where the offer to sell real estate was not accepted by the called for payment of a specified sum of money; instead the offeree offered to put down a smaller amount and requested the use of a signed draft with deed attached. The principle was also illustrated in *Harris v. Manning Independent School District.*[49] A proposed teaching contract submitted to the teacher provided: "agrees to well and faithfully perform the duties of Instr. Music Instructor and instructor and such other duties connected with public school as may be assigned by Board." The offeree teacher crossed out the words "and instructor" and returned the form. The school board did not agree to the change. The trial court held for the teacher that there was an enforceable contract, that the words "and instructor" were surplusage, that the remaining words carried an obligation to teach other academic subjects such as were contemplated in the words "and instructor". The Supreme Court reversed, holding that, regardless of what interpretation would be placed on the document as altered, the alteration was not trivial, and accordingly there was no "meeting of the minds". This case supports the proposition that, in general, to be an effective acceptance there

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[44] See authorities cited *supra,* note 1, as to promises enforceable where mutual assent is not required. Bankers Trust Co. v. Economy Coal Co., 224 Iowa 36, 276 N.W. 16 (1937), is a case not subject of easy classification. The two owners of a corporation voted at a shareholders' meeting to postpone their salary claims against the corporation until the death of the survivor of them. In spite of the argument there was no evidence of acceptance by either, the heirs of one owner who had died were denied recovery for his salary; the Court stated there was no need to communicate the offer to the owners for their acceptance, that they are bound individually in acting for the corporation in matters concerning them personally.

[45] CORBIN § 55; WILLISTON § 64; RESTATEMENT §§ 19-22.

[46] Stevens v. Gear, 240 Iowa 1348, 39 N.W.2d 408 (1949) (embryonic tort settlement); *In re* Estate of Thornwall, 233 Iowa 626, 10 N.W.2d 35 (1943) (no acceptance of settlement offer by authorized person); Burmeister v. Council Bluffs Inv. Co., 222 Iowa 66, 268 N.W. 188 (1936) (no acceptance by particular date mentioned in "option" by making payment as provided; note that there was no need to comply with provisions for forfeiture of land contracts in what is now IOWA CODE ch. 656 [1958]); Heggen v. Clover Leaf Coal & Mining Co., 217 Iowa 820, 253 N.W. 140 (1934); *cf.* Dean v. Clapp, 221 Iowa 1270, 268 N.W. 56 (1956) (offeror of offer, not accepted, for asset of bank in receivership had no standing as interested party to object to compromise settlement at less price); Wescott & Winks Hatcheries v. F. M. Stamper Co., ... Iowa ....., 85 N.W.2d 603 (1957) (alleged sales contract for turkey poults; principal attention was paid to matter of no satisfactory memorandum under Statute of Frauds).

[47] Bradley Lumber Co. v. R. D. Hunting Lumber Co., 218 Iowa 739, 255 N.W. 711 (1934); CORBIN §§ 82-94; WILLISTON § 73; RESTATEMENT §§ 59-60.

[48] 232 Iowa 550, 5 N.W.2d 813 (1942).

[49] 245 Iowa 1295, 66 N.W.2d 438 (1954).

must be a consent to the form of the offer as well as to its legal effect,[50] and reaches a result different than in some cases where the offeree adds language which is considered not to be a conditional acceptance because it only corresponds to what the law would otherwise imply.[51] A related point is that the acceptance must be within the time specified.[52] In *Fire Association of Philadelphia v. Allis Chalmers Manufacturing Company*[53] there was an acceptance, of an offer to sell electrical equipment, which arguably was not in time. The Court, in discussing the case, pointed out that this would in this event then be a counter-offer which must be accepted by the original offeror to create a contract,[54] and would be accepted by the shipment of the merchandise.

Also for the acceptance to be effective the language must be unequivocal.[55] This proposition was illustrated in *Hunter Investment, Inc. v. Divine Engineering, Inc.*,[56] involving the acceptance of an option to buy contained in a lease. The evidence, in essence, as to acceptance was that representatives of optionee had said either: "we are going to exercise the option," or "we wanted to exercise the option." The Court thought that the language, in the context of other evidence, did not indicate an unequivocal acceptance.

If the offer requires the giving of a promise as an acceptance,[57] this may be found in conduct, as well as in words, a proposition discussed previously in connection with offers.[58] An extreme example

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[50] See CORBIN §§ 86-87.

[51] RESTATEMENT § 60; WILLISTON § 78.

[52] CORBIN § 35; WILLISTON § 53; RESTATEMENT §§ 35, 40.

[53] 129 F. Supp. 335 (N.D. Iowa 1955).

[54] CORBIN § 74; WILLISTON § 93; RESTATEMENT § 73.

[55] RESTATEMENT § 58; WILLISTON § 72.

[56] 248 Iowa 1109, 83 N.W.2d 921 (1957); cf. Johnston v. Federal Land Bank, 228 Iowa 838, 293 N.W. 480 (1940) (action for damages against defendant, because of losing equity in farm when defendant failed to consummate loan, not maintainable when original application for loan provided Bank could withdraw approval of loan before loan finally made).

[57] There is a reference in Kelly, Shuttleworth & McManus v. Central Nat. Bank & Trust Co., 217 Iowa 725, 248 N.W. 9, 250 N.W. 171 (1934), to the rule that requires communication of acceptance where a promise is involved. This was stated in connection with an argument of an alleged agreement as to settlement of attorney fees. The only competent testimony indicated the attorney, in response to the offer, only "pinched his lips". The Court found no such contract; the situation is more likely a problem of insufficient facts upon which to base an inference of consent, rather than a problem of no communication. See CORBIN § 67.

[58] See notes 8-11, *supra*, and accompanying text, particularly in connection with rendition of services; Snell v. S. S. Kresge Co., 223 Iowa 911, 274 N.W. 35 (1937) (promise to pay for steam delivered to building continued impliedly at previous rate even though radiators were discontinued, when no notice was given to plaintiff, supplier, of any other action contemplated then that provided in prior agreement); Gibson v. Miller, 215 Iowa 631, 246 N.W. 606 (1933) (order of monument accepted by acts in ordering materials); City of Pella v. Fowler, 215 Iowa 90, 244 N.W. 734 (1932) (no implied promise in fact in action by city for use of streets by telephone company because implied promise in fact is based on consent and defendant consistently refused to pay).

of this idea is contained in such a case as *Olson v. Wilson & Company,*[59] a 1954 case, where a debtor offered a check, marked "in full payment" of an asserted claim; the creditor protested but later cashed the check. The trial court's action in holding as a matter of law for the defendant debtor was affirmed, the Court applying the rule that, if a check (or other property or service) is offered on condition, it must be rejected, or if accepted the party will be considered to have accepted it upon the condition stated.[60] This is extreme because, although the party is saying "no", the Court is acting as if he said "yes". A contrasting case is *Kellogg v. Iowa State Traveling Men's Association,*[61] a 1947 case, involving an alleged settlement of a claim under an accidental death policy found in the cashing by the beneficiary of a check marked "settlement in full" on the front and "payment in full" on the back. A letter requested the beneficiary to sign a release which in turn requested a surrender of the certificate of membership. She did neither, but she did not affirmatively object to so doing. The Supreme Court concluded there was not a valid accord and satisfaction, concluding, inter alia, that: "It is our conclusion that the essential elements of the claimed accord and satisfaction, namely the meeting of the minds of the parties as to the making of the contract, and her intention to accept the accord . . . were questions of fact for the determination of the jury;" and stating that "it is improbable she had any clear understanding of them [her legal rights under the circumstances], or of what effect the acceptance and endorsement of the check would have upon them;" and "it

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[59] 244 Iowa 895, 58 N.W.2d 381 (1953). The question of consideration, as to whether there was an unliquidated claim was also involved in this case and was discussed in Hudson, *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties,* 5 DRAKE L. REV. 3, 9 (1955); a comparison of this case as to consideration was also made with Kellogg v. Iowa State Traveling Men's Ass'n, discussed *infra* at note 61 and text supporting.

[60] RESTATEMENT § 72 (2); WILLISTON § 91D; WILLISTON, CONTRACTS §§ 1854-56 (Rev. ed. 1938); CORBIN §§ 1277-79; Gold; *Accord and Satisfaction by Estoppel,* 27 IOWA L. REV. 31 (1941); Munn v. Town of Drakesville, 226 Iowa 1040, 285 N.W. 644 (1939); First Trust Joint Stock Land Bank v. Cuthbert, 215 Iowa 718, 246 N.W. 810 (1933) (assumed without much discussion that there was an implied acceptance of terms included in check for installment of debt, sent by grantee of premises not personally liable, with conditions that extension be granted, by cashing of check even though creditor later wrote imposing an additional condition; grantee was then able to recover payment when foreclosure was instituted). *Accord,* Fullerton Lumber Co. v. Gronlund, 230 Iowa 1054, 300 N.W. 273 (1941) (where deed to property, containing clause that deed is in full satisfaction, was prepared by mortgagor at request of mortgagee, abstract was supplied, both delivered to mortgagee and retained, even with some evidence mortgagee said he would not accept the deed in full satisfaction, action by mortgagee was dismissed); see Record & Tribune Co. v. Brandtjen & Kluge, Inc., 240 Iowa 1342, 39 N.W.2d 288 (1949) (where evidence indicated prior contract for printing press at set price, receipt of copy of contract before delivery of press with higher price and escalator clause inserted, not inequitable for buyer to rely upon prior contract).

[61] 239 Iowa 196, 29 N.W.2d 559 (1948).

[failure to return release] was significant and convincing evidence that she was not accepting the offer as made, and that it was not her intention to accept the $500 in full payment of the face of the policy."[62] It is submitted that these references to intention to accept, or to lack of knowledge of legal consequences, used in the *Kellogg* case as justification for the result there reached should not be considered to be authoritative after the *Wilson* decision, in 1954.[63] The particular rule referred to, about rejecting or being held to have accepted upon the conditions stated, is applied only if the offeree knows or should know of the conditions on the offer; more particularly in compromise or accord and satisfaction cases the offeree should know the offer was only on condition of full satisfaction. There is nothing in the *Kellogg* case to suggest that the offeree did not know of the terms of the offer, regardless of any intent not to accept or lack of knowledge of legal consequences, features referred to by the Court. There are several Iowa cases which resulted in decisions for creditors that may be supportable on this aspect of the problem. In one case of settlement of a life insurance policy the Court thought there was sufficient evidence to go to the jury because of the offeree's limited education and business experience and because the letter sent was not clearly understandable as making an offer in full satisfaction.[64] In *In re Estate of Gollobit*[65] a check was sent to a person who had rendered services to the decedent, marked "For Board and Room and care in full." The Court pointed out that recitals in a check do not necessarily control or amount to a settlement, and may be explained without showing fraud or mistake; the Court then said there was evidence to show the check was not in full satisfaction, without giving any indication of what that evidence might be. In *United Motors Service, Inc. v. Heinen*,[66] the Court found no justification by debtor in believing creditor was agreeing to full settlement of account by returning goods where creditor had said: "You can do one of three things—pay the bill, return the goods, or beat the bill". One important factor in the foregoing cases has been the opportunity to reject the property offered. This opportunity to reject was considered decisive in *Bruggeman v. Independent School District*,[67] an action to recover the reasonable value of transportation a parent furnished his daughter to the school house, after he had demanded transportation, under applicable statutes, and had been refused. The Court refused to find a promise implied

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[62] *Id.* at 213, 212, 29 N.W.2d 559, at 568 (1948).

[63] See CORBIN § 1279; RESTATEMENT § 20.

[64] Noble v. United Benefit Life Ins. Co., 230 Iowa 471, 297 N.W. 881 (1941). Also, in Koch Sand & Gravel Co. v. Koss Construction Co., 260 N.W. 54 (1935) (subsequent opinion in 221 Iowa 685, 266 N.W. 507 [1936]), the Court thought a check for a smaller amount was not clearly offered in full satisfaction.

[65] 231 Iowa 1074, 3 N.W.2d 191 (1942).

[66] 220 Iowa 859, 263 N.W. 343 (1935).

[67] 227 Iowa 661, 289 N.W. 5 (1939). RESTATEMENT § 72 (1) (A). The Court also rejected an argument of contract implied in law.

in fact to pay for these services because no promise by implication can be found where there is no opportunity to reject services. A similar idea must be behind such an opinion as *Nolan v. Wick*,[68] in which it was held that a mechanic's lien was not effective against the contract vendor of land for improvements made at the request of the contract vendee, even though the vendor may have known the improvements were being made.

Another illustration of a case where cashing a check resulted in a contractual relation is found in *Hotz v. Equitable Life Assurance Society*.[69] In that case the offeror gave a check for part payment on the purchase price of land, with the words on it: "to be cashed when contract is signed." A clerk of the offeree, contrary to specific instruction, cashed the check. The Court found a contract, citing RESTATEMENT OF CONTRACTS section 20 about there being no need for subjective intent to be bound, but without at all discussing the problem of authority of the clerk to bind a principal.[70]

Another way in which a person may be bound by conduct is found in those cases which hold that a person who indicates his consent to a document which he should know to be a contract will be bound by all the terms that appear therein whether he reads it or not, unless it is concluded he was not negligent in not reading. These cases were collected and discussed elsewhere,[71] so no further reference to them is made herein except to note the cases holding that the grantee who accepts a deed containing a clause as to assumption of the mortgage is personally liable for the debt,[72] and the case holding that the acceptance of a deed

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[68] 218 Iowa 660, 254 N.W. 80 (1934). See discussion in Darragh v. Knolk, 218 Iowa 686, 254 N.W. 22 (1934), that vendor may be subject to lien if contract obligates vendee to put in improvements. Court found no obligation to install entirely new bathroom equipment, so vendor's interest prevailed. See *Mechanics Liens—A Summary of Priority*, 6 DRAKE L. REV. 51, 53 (1956).

[69] 224 Iowa 552, 276 N.W. 413, 36 MICH. L. REV. 1008 (1938).

[70] RESTATEMENT § 20, Illustration 4, and Minnesota & Ontario Paper Co. v. Register & Tribune Co., 205 Iowa 1228, 219 N.W. 321 (1928), are cited in support. Neither is controlling. Illustration 4 does not refer to the agency problem. In the case cited, the only evidence against an alleged promise by a creditor to accept a check offered in full satisfaction was testimony by the treasurer of the creditor that the check had never come to his attention, which led the Court to observe that this was no evidence that the person cashing the check was not authorized to do so.

[71] Hudson, *Contracts in Iowa Revisited—Mistake*, 7(2) DRAKE L. REV. 3, 19 (1958); RESTATEMENT § 70.

[72] Federal Land Bank v. Ditto, 227 Iowa 475, 288 N.W. 618 (1940); First Trust Joint Stock Land Bank v. Thomas, 223 Iowa 1018, 274 N.W. 11, 275 N.W. 392 (1937). The grantee may show that insertion of such a clause was without his consent: Union Properties, Inc. v. Grant, 229 Iowa 303, 294 N.W. 312 (1940); Andrew v. Naglestad, 216 Iowa 248, 249 N.W. 131 (1933). Where deed contains only clause "subject to the mortgage," mere fact that mortgage is deducted from purchase price does not support implication of personal promise by grantee to pay: Des Moines Joint Stock Land Bank v. Allen, 220 Iowa 448, 261 N.W. 912 (1935). Assumption by grantee was not found in

carries an implied promise to perform the conditions imposed by the deed to make certain payments to third persons.[73]

Silence as a method of binding a person to a proposition has also been referred to in a case not involving the retention of property or services which are the usual cases where silence might be treated as an acceptance.[74] A failure to respond to what was essentially a counter-offer was involved in *Furst-McNess Company v. Kielly,*[75] an action by a creditor on a guaranty of an account. The guarantor alleged, as a defense, a delivery of the guaranty to the principal debtor on condition that an additional signature be secured. The creditor contended that any error of the trial court in not permitting evidence of the conditional delivery was avoided by the estoppel resulting from the silence in failing to respond to a letter from the creditor which read: "We are pleased to inform you that we have received and accepted the sales agreement of Mr. Sam Oler, dated July 25, 1939, which you, alone, have signed as surety." The Court reversed a directed verdict for the plaintiff stating, inter alia, that there was no estoppel as a matter of law, that the guarantor was under a duty to respond to a letter informing him of what was to him a wrongful delivery, but that an estoppel would not arise as to merchandise shipped before the letter reached the party in question and he had a chance to reply, and that there would be no estoppel unless the creditor was shown to be without notice of the conditional delivery of the guaranty. Even assuming the conditional delivery to be otherwise a defense,[76] that normally a conditional acceptance must be a counter-offer requiring acceptance by the original offeror, that failure to reply

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agreement by grantee to extend "as per original terms" where originally there was no personal liability: Woollums v. Anderson, 224 Iowa 264, 275 N.W. 472 (1937). See CORBIN § 568; WILLISTON § 90; IOWA ANNOTATIONS § 136-II-A-2. Similarly, taking assignment of contract for purchase of land, with clause as to assumption of obligation in assignment, led to personal liability of assignee: Coral Gables, Inc. v. Kleaveland, 220 Iowa 1280, 263 N.W. 339 (1935); see IOWA ANNOTATIONS § 136-II-A-1.

[73] Carlson v. Hamilton, 221 Iowa 529, 265 N. W. 906 (1936). This is a case of "equitable charge"; it was held that the rights of the beneficiaries became vested, free from subsequent change by agreement of grantor and grantee. See discussion in Hudson, *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments,* 6 DRAKE L. REV. 3, 17 n. 33 (1956).

[74] Ordinarily silence will not be treated as an acceptance except under certain limited conditions. RESTATEMENT §§ 72-73; CORBIN §§ 72-75; WILLISTON §§ 91-92. The Iowa position of a tort action based on negligent delay in acting on applications for insurance is illustrated in: Koonts v. Farmers Mut. Ins. Ass'n, 235 Iowa 87, 16 N.W.2d 20 (1944) (conceded policy in effect, so couldn't go to jury on tort claim); Mortimer v. Farmers Mut. Fire & Lightning Ass'n, 217 Iowa 1246, 249 N.W. 405 (1934) (fire insurance policy); Winn v. John Hancock Mut. Life Ins. Co., 216 Iowa 1249, 250 N.W. 459 (1933) (no negligence found); see VANCE, INSURANCE § 38 (3d ed. 1951); WILLISTON § 91C; CORBIN § 75.

[75] 233 Iowa 77, 8 N.W.2d 730 (1943).

[76] See discussion of delivery problem in notes 22-25, *supra,* and accompanying text.

would not itself be an acceptance,[77] and that the offeree had notice of the conditional delivery, if the Court's conclusion as to a duty to speak is accepted it is submitted that the resulting relationship might be treated more as a bargain situation in which the offeree, here the creditor, is replying in effect "I expect you to be liable," and in which the offeree might be justified becaused of the duty to speak in believing the failure to reply indicates an assent to going ahead without other signatures, either as to sales in the future or even as to sales already made. If a bargain situation, the liability could go beyond the scope of reliance.

Manifestations of mutual assent very frequently take place at a distance from each other both in time and place. It may be important to determine for various purposes where and when the contract was made. The rule commonly applied has been that a contract is made when and where the last act is performed which is essential to the formation of the contract.[78] In Iowa this has been applied to the interpretation of the words "made in Iowa" in the statute which denies a foreign corporation the right to sue in Iowa upon a contract made in Iowa if the corporation is engaged in business in the state without a license to do so.[79] See particularly the reference in *International Transportation Association v. Des Moines Morris Plan Company*[80] that a contract was made in Iowa because of the posting in Iowa of an acceptance to an offer mailed from outside Iowa.[81] In another case the problem was the applicability of the provisions of either Iowa or Illinois statutes on workmen's compensation with regard to who was the proper party to maintain a common-law cause of action after workmen's compensation had been paid on a deceased workman. The work was to be performed outside Iowa but the contract of employment was entered into by an offer spoken in Illinois over the telephone and accepted by speaking over the telephone in Iowa. The Eighth Circuit, in *Standard Oil Company v. Lyons*,[82] concluded that this was an Iowa contract, that the place of making the contract was where the words were spoken into the telephone. RESTATEMENT OF CONTRACTS section 65 indicates acceptance by telephone should be governed by the same rules as offers in person, which, although not explicitly so stated, would indicate the important item is the hearing rather than the speaking. The prevailing view, however, as to place of acceptance by telephone seems in accord with the Eighth Circuit opinion.[83] *Fire Association of Philadelphia v. Allis-Chalmers Manufacturing Company*[84] suggested the problem of

[77] See notes 53 and 54, *supra*, and accompanying text.
[78] RESTATEMENT § 74; WILLISTON §§ 96-97.
[79] IOWA CODE § 494.9 (1958). See cases cited in Hudson, *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3, 6 n. 17 (1958).
[80] 215 Iowa 268, 245 N.W. 244 (1932).
[81] RESTATEMENT §§ 64, 66; CORBIN § 78; WILLISTON § 81.
[82] 130 F.2d 965 (8th Cir. 1942).
[83] CORBIN § 79; WILLISTON § 82A.
[84] 129 F. Supp. 335 (N.D. Iowa 1955).

which state law would apply for purpose of determining illegality and interpretation of a clause in a sales contract relieving the seller from liability for defects in the merchandise.[85] In this case, arguably, there was first an offer to sell, mailed into Iowa, followed by a purported acceptance not sent in the time stated in the offer.[86] The opinion says that, in either event, acceptance by posting in Iowa, or shipment from outside Iowa into Iowa, Iowa was the last place necessary to a meeting of the minds, apparently because title to the goods was not to pass until the goods reached their destination. However, the contract as quoted does not in obvious language support this conclusion. If title was to pass on shipment, acceptance would seem to be at that point.[87]

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[85] The illegality aspect of the case is discussed in Hudson, *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3, 19 (1958).

[86] See notes 52-54, *supra*.

[87] See WILLISTON § 97.

EFFECT OF STATUTORY VIOLATIONS IN AUTOMOBILE NEGLIGENCE ACTIONS IN IOWA

The effect given a violation of a statute or ordinance in a civil action is frequently of vital importance especially in fields which are so highly codified as the motor vehicle law. This being true, it is equally important that the courts establish and practice a consistent and logical treatment of such violations. In Iowa the case of *Kisling v. Thierman*[1] establishes the rule to be applied in this area, a rule which in one stroke ostensibly reduces this problem to a well defined formula to be applied in a rigidly systematic way. Although on its face this rule would admit neither to exceptions nor arguments of interpretation, in actual practice it seems that there are some most interesting aspects to this canon which are latent in its usual recitation. The following discussion will endeavor to give a practical analysis of the present status of the rule of *Kisling v. Thierman* and point out some of these novel aspects.

There is no doubt that before the decision of *Kisling v. Thierman* there was a great deal of confusion and complete disagreement among cases in this area. As a single example, there had been two cases[2] holding that the violation of the statute requiring the sounding of a horn was negligence per se, and two cases[3] holding that it was merely prima facie evidence of negligence. To make matters worse, these cases were intermixed in point of time. A long list of earlier cases could be presented pointing out the complete failure of any accord in the various lines of decisions.[4]

The *Kisling* case brought an end to this. The case arose on uncontroversial facts. The car in which the plaintiff was riding came over the crest of a hill and ran into the back of the defendant's truck. The accident occured at night and the defendant did not have a tail light on his truck. The trial judge instructed the jury that if the defendant failed to have an operating tail light he had violated a statute and such was negligence per se and therefore any damage proximately resulting would be recoverable from the defendant. The jury found for the plaintiff and the defendant appealed alleging that the trial court erred in instructing that a violation of a statute was negligence per se. Both parties

[1] Kisling v. Thierman, 214 Iowa 911, 243 N.W. 552 (1932).

[2] Sexauer v. Dunlap, 207 Iowa 1018, 222 N.W. 420 (1929); Carlson v. Meusberger, 200 Iowa 65, 204 N.W. 432 (1925).

[3] Voiles v. Hunt, 213 Iowa 1234, 240 N.W. 703 (1932); McElhinney v. Knittle, 199 Iowa 278, 201 N.W. 586 (1925).

[4] For a complete discussion of the status of this law prior to the decision of Kisling v. Thierman see Note, *Automotive Tort Law in Iowa: An Examination and Proposals*, 35 IOWA L. REV. 468, 471 (1950).