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Restatement of the Law of Contracts of the American Law Institute, Sections 85-94, with Missouri Annotations

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No. 1

RESTATEMENT OF THE LAW OF CONTRACTS OF THE
AMERICAN LAW INSTITUTE, SECTIONS 85-94,*
WITH MISSOURI ANNOTATIONS†

BY TYRRELL WILLIAMS

TOPIC D. *Informal Contracts Without Assent or Consideration*

**Section 85. ASSENT OR CONSIDERATION UNNECESSARY IN
CASES ENUMERATED IN SECTIONS 86-90.**

Neither an expression of assent, unless the promise is in terms conditional upon such an expression, nor consideration is requisite for the formation of an informal contract in the cases enumerated in Sections 86 to 90.

Comment:

a. The cases referred to in this Section are exceptions to the general rule stated in Clauses (b) and (c) of Section 19. The requirements stated in Clauses (a) and (d) of that Section are not affected. The limiting effect of Section 93 should also be observed.

Annotation:

This Section is introductory. See separate annotations to Sections immediately following.

Section 19 presents the general rule as to the requirement of manifest assent and the requirement of consideration in informal contracts. Exceptions to this general rule are indicated in Section 19 by the phrase "except as otherwise stated in Sections 85 to 94." This portion of the Restatement, Sections 85

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to 94, treats of these exceptions. The American Law Institute boldly announces that the Common Law recognizes as binding a limited group of contracts in which there is neither seal nor consideration, *e. g.*, a debtor's promise to pay a debt in spite of a discharge in bankruptcy. These promises are binding and therefore they are contracts, but they do not need any consideration to make them binding. This is advance ground. It would be easy to collect dicta from Missouri Reports that would be at variance with this new doctrine of the Restatement. Nevertheless, there is no substantial conflict between the actual decisions in Missouri and this portion of the Restatement. The same practical results are reached in deciding human controversies by the Restatement's theory of no consideration, or by the several varying Missouri theories of constructive consideration, waiver or estoppel. The differences between Missouri theories and the new doctrine of the Restatement are verbal and speculative differences, not practical and realistic differences.

Section 86. PROMISE TO PAY A DEBT IS BINDING THOUGH THE DEBT IS BARRED BY THE STATUTE OF LIMITATIONS.

(1) Except as stated in Section 93, a promise to fulfill all or part of an antecedent contractual or quasi-contractual duty for the payment of money due from the promisor, other than a judgment, is binding if the antecedent duty was once enforceable by direct action, and is either still so enforceable or would be except for the effect of a statute of limitations.

(2) The following facts operate as such a promise as that stated in Subsection (1) unless other circumstances indicate a different intention:

- (a) A voluntary acknowledgment to the obligee, admitting the present existence of such an antecedent duty as is described in Subsection (1);
- (b) A voluntary transfer of money, a negotiable instrument, or other property to the obligee of such an antecedent duty as is described in Subsection (1), if made as interest thereon, or part payment thereof or collateral security therefor by the obligor, or by an agent of the obligor whose authority so to act was not given irrevocably before the antecedent duty was barred;
- (c) A promise to the obligee of such an antecedent duty as is described in Subsection (1) not to plead the Statute of Limitations as a defense to an action thereon.

(3) An executor, administrator, trustee or guardian who makes such a promise as that stated in Subsection (1) cannot by so doing impose a duty upon the estate which he represents. Nor will he be personally bound unless he was bound by the antecedent duty.

Comment:

a. The promises included under this Section, but not the part payments or giving of negotiable instruments or collateral security, are required by statutes enacted in most States to be evidenced by a signed writing in order to be operative. In a few States, however, no writing is required in any case. In a few other States part payment or giving of security imposes no duty on a debtor unless accompanied by and characterized by a writing.

b. The antecedent duty must be for the payment of money but it need not be for a liquidated sum and it may be under seal. An antecedent duty under a judgment is not, however, included.

Annotation:

By R. S. Mo. 1929, Sec. 883, the acknowledgment or promise to be evidence of the "new or continuing contract" must be in writing. This statute does not apply when the new promise is supported by a new consideration. *Bridges v. Stephens* (1896) 132 Mo. 524, 34 S. W. 555. Such a case is outside the scope of this Section 86 which applies only to gratuitous promises.

Shannon v. Austin (1878) 67 Mo. 485 and *Carr's Adm. v. Hurlbut* (1867) 41 Mo. 264 give support to the theory that in Missouri the action is upon the original contract and the new promise operates as a waiver of the statutory defense. *Davis v. Herring* (1839) 6 Mo. 21 and *Petty v. Tucker* (1912) 166 Mo. App. 98, 148 S. W. 142 give support to the theory that the new promise has a consideration, namely, the consideration of the original contract. However, as a matter of substantive law, the result would be the same if the new promise itself is a binding contract without consideration.

Subsection (1). This is in general accord with Missouri decisions.

The act of revivor may be made before the debt is barred. *Chidsey v. Powell* (1887) 91 Mo. 622, 4 S. W. 446. Or after the bar has attached. *Berryman v. Becker* (1913) 173 Mo. App. 346, 158 S. W. 899. In *Petty v. Tucker* (1912) 166 Mo. App. 98, 148 S. W. 142 the duty was quasi-contractual, and an express promise not in writing was ineffective merely because of R. S.

Mo. 1929, Sec. 883. The exception as to judgments is probably in accord with modern Missouri law. By virtue of an express statutory provision, repealed in 1895, the principle was formerly applied to judgments. *Chiles v. School District* (1903) 103 Mo. App. 240, 77 S. W. 82.

Subsection (2a). This is in general accord with Missouri decisions.

The promise may be implied from the acknowledgment. *Childsey v. Powell* (1887) 91 Mo. 622, 4 S. W. 446. Acknowledgment to a life insurance company may be sufficient when policy on life of debtor is to protect creditor. *Mastin v. Branham* (1885) 86 Mo. 643. See also *Thompson v. Richardson* (Mo. 1917) 195 S. W. 1039, direct acknowledgment to creditor's executor. Instructive cases where the alleged acknowledgments were insufficient are *Chambers v. Rubey* (1870) 47 Mo. 99, mere offer to compromise; *Cochrane v. Cott* (1911) 156 Mo. App. 663, 138 S. W. 46, debt admitted but no intention to promise; *Monroe v. Herrington* (1905) 110 Mo. App. 509, 85 S. W. 1002, language equivocal.

Subsection (2b). In general accord with Missouri decisions.

"When a creditor holds several claims against his debtor, the latter, on making a payment, has the right to direct upon which debt it shall be credited; if he gives no direction, then the creditor, on receiving the payment, can make the application; if neither the debtor directs, nor the creditor applies, the payment, then the law will apply it to the debt which first matures, unless justice and equity demand a different appropriation." *Beck v. Haas* (1892) 111 Mo. 264, 20 S. W. 19. "It is the fact of the partial payment of the note, and not the formal crediting of such payment on the back of it, which revives the debt." *Miller v. Miller* (1913) 169 Mo. App. 432, 155 S. W. 76. Evidence of payment does not have to be in writing. *Inhabitants of Bridgeton v. Jones* (1864) 34 Mo. 471. Ordinarily nothing but money will satisfy a debt but a creditor and debtor may agree on some other medium of payment. *State ex rel. v. Allen* (1908) 132 Mo. App. 98, 111 S. W. 622. In *Earls v. Earls* (Mo. App. 1916) 182 S. W. 1018, an alleged partial payment was insufficient as an acknowledgment for want of intention.

Subsection (2c). This is not inconsistent with Missouri decisions.

No direct authority has been found for the proposition that such a promise, without a new consideration, and not followed by estoppel, is binding. In *Bridges v. Stephens* (1896) 132 Mo. 524, 34 S. W. 555, forbearance to sue was consideration for an oral promise not to plead the Statute of Limitations. It was held that such a promise is binding and the statute requiring a writing does not apply when there is a new consideration or

estoppel. An alleged promise not to plead the Statute of Limitations was strictly construed in *Monroe v. Herrington* (1905) 110 Mo. App. 509, 85 S. W. 1002.

Subsection (3). When the new promise is without a new consideration, this is not inconsistent with Missouri substantive law.

Claims barred by the general Statute of Limitations cannot be revived by promise of the executor. *Bambrick v. Bambrick* (1900) 157 Mo. 423, 58 S. W. 8; *Cape Girardeau County v. Harbison* (1874) 58 Mo. 90. On the other hand, it is not incumbent upon an executor to plead the Statute of Limitations. *Overmeyer v. Rogers* (1928) 222 Mo. App. 89, 1 S. W. (2d) 844. But see *Harrison Machine Works v. Aufderheide* (1926) 222 Mo. App. 474, 280 S. W. 711. *North v. Walker's Adm.* (1877) 66 Mo. 453, was a case involving a new contract for a new consideration by an administrator to extend time for payment of a debt not barred. Executors and administrators may, with the consent of the probate court, enter into binding compromises. *Scott v. Crider* (1925) 217 Mo. App. 1, 272 S. W. 1010.

Section 87. PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY IS BINDING.

Except as stated in Section 93, a promise to pay all or part of a debt of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.

Comment:

a. In a few States only are the promises described in this Section required to be in writing in order to be enforceable.

Annotation:

This Section is in accord with results of Missouri decisions.

The Missouri cases proceed on the theory that the "moral force" of the barred obligation is consideration for the new promise. *Wislizenus v. O'Fallon* (1887) 91 Mo. 184, 3 S. W. 837; *Boone County Milling & Elevator Co. v. Lowery* (Mo. App. 1923) 248 S. W. 623; *Ferguson-McKinney D. G. Co. v. Beuckman* (1917) 198 Mo. App. 41, 198 S. W. 504. This theory has some support in *Zavelo v. Reeves* (1913) 227 U. S. 625, 57 L. Ed. 676. An allegation of valuable consideration for the new promise is sustained by proof of the old debt. *Farmers & Merchants Bank v. Richards* (1906) 119 Mo. App. 18, 95 S. W. 290. Promise is binding when made before or after final discharge. *Boone County Milling & Elevator Co. v. Lowery* (Mo. App. 1923) 248 S. W. 623. In *Traders' Nat. Bank v. Hermer* (Mo. App. 1920) 218 S. W. 937, the binding promise was made after adjudication

and before discharge. In *Fleming v. Lullman* (1881) 11 Mo. App. 104, it was held that the cause of action is upon the new promise, and the Statute of Limitations runs against the new promise. See also *Bank of Rothville v. Zaleuke* (1927) 221 Mo. App. 1051, 295 S. W. 520.

In Missouri there is no statute requiring the new promise to be in writing.

Section 88. PROMISE TO FULFILL A DUTY IN SPITE OF NON-PERFORMANCE OF A CONDITION IS BINDING WHEN.

(1) Except as stated in Subsection (2) and in Section 93, a promise to fulfill all or part of an antecedent conditional duty in spite of the non-fulfillment of the condition is binding, whether the promise is made before or after the time for fulfilling the condition, if performance of the condition is not a substantial part of what was to have been given in exchange for the performance of the antecedent duty, and if the uncertainty of the happening of the condition was not a substantial element in inducing the formation of the contract;

(2) If a promise such as stated in Subsection (1) is made before the time for fulfilling the condition has expired and the condition is some performance by the promisee or other beneficiary of the contract, the promisor can make his duty again subject to the condition by giving notice of his intention so to do before there has been any substantial change of position by the promisee or beneficiary and while there is still reasonable time to perform the condition.

Comment:

a. A promise may be conditional on receiving some performance regarded as the equivalent of the performance in the promise; as a promise to sell a horse if the promisee pays \$500 for him. A promise may also be conditional on the happening of some event, or the performance of some act which is little or no part of the agreed exchange for the performance of the promise, but fixes the time or manner in which the promise is to be performed. In this last class of cases a promise to disregard the condition is operative.

b. The new promise may be made either before the time for the performance of the condition or after that time has elapsed. If made before the time for the happening of the condition, the

new promise naturally induces failure to perform the condition, and if it does so the promisor cannot assert as an excuse a failure that he himself brought about (see Section 279). A new promise subsequent to the time of the happening of the condition cannot have this effect. The failure of the condition discharges the original duty, but the new promise subjects the promisor to a new duty; as where an insurer promises to carry out a policy in spite of default in some minor condition, or where a guarantor, indorser, or other surety promises to be bound as such in spite of lack of a requisite notice or of the creditor's failure to exercise diligence in presentment or in the prosecution of his claim against the principal debtor or against the promisor himself, or in spite of variation of the duty of the principal debtor to the creditor.

c. It is immaterial how the promisor manifests his intention to fulfill the prior duty without the performance of the condition thereof. Whether he speaks of waiver or uses other words in this connection is of no consequence, if the undertaking to perform is made plain.

Annotation:

This Section has to do with gratuitous promises to forego the benefit of a minor condition in a contract. In Missouri such promises, whether express or implied, are usually called waivers. Sometimes a so-called waiver of a condition is supported by a new consideration. See *Fairbanks, Morse & Co. v. Baskett* (1903) 98 Mo. App. 53, 71 S. W. 1113, and *Sanders' Press Brick Co. v. Barr* (1898) 76 Mo. App. 380. Promises supported by a new consideration are entirely outside the scope of this Section. A waiver under this Section is what was designated a "noncontract waiver" in *Patterson v. Amer. Ins. Co.* (1912) 164 Mo. App. 157, 148 S. W. 448.

Subsection (1). When the waiver is made *at or after the time* for fulfilling the condition, the law of Missouri is in perfect accord with the Restatement.

In *Schmidt v. Charter Oak Life Ins. Co.* (1876) 2 Mo. App. 339, a life insurance case, there was a non-fulfilment of a condition as to insured's place of residence. The Court said: "It remains to be inquired what acts, if any, appearing in the testimony, have amounted to such waiver of the condition in question as may entitle the plaintiff to recover, notwithstanding its breach. For this purpose any circumstances will be sufficient which prove that the defendant, while Schmidt continued to re-

side beyond the prescribed territorial boundaries, treats the contract as subsisting nevertheless, and not forfeited. If the policy had ceased to exist as a binding contract, the defendant had no right to collect any more premiums. Its receipt of the premiums, therefore, was a declaration to the other party that, so far as its option was concerned—and that was conclusive in the premises—the contract was still in force.” To the same effect: *Mackey v. Home Ins. Co.* (Mo. App. 1926) 284 S. W. 161, a fire insurance case with waiver of condition in iron safe clause; *St. Louis Police Relief Ass'n v. American Bonding Co.* (1917) 197 Mo. App. 430, 196 S. W. 1148, waiver of condition as to signature of bonded employee; *St. Clair v. Hellweg* (1913) 173 Mo. App. 660, 159 S. W. 17, waiver of condition as to time; *Reed v. Bankers' Union* (1907) 121 Mo. App. 419, 99 S. W. 55, retention of premiums paid after exact time of payment, held waiver of condition as to health certificate in fraternal order's contract of life insurance; *Polk v. Western Assur. Co.* (1905) 114 Mo. App. 514, 90 S. W. 397, waiver of condition as to additional insurance; *Fox v. Pullman Palace Car Co.* (1884) 16 Mo. App. 122, waiver by employer of condition in contract of employment.

In the following cases the principle of waiver of conditions in a contract was recognized, but in each case it was held that the facts did not constitute a waiver: *Ehrlich v. The Aetna Life Ins. Co.* (1885) 88 Mo. 249, life insurance agency contract; *Startzell v. Johnson* (Mo. App. 1923) 253 S. W. 54, subcontract after general building contract; *Rice v. Plattsburg-Vibbard Coal Mining Co.* (Mo. App. 1921) 229 S. W. 298, contract to dig a mine.

The principle of this subdivision is recognized in the Uniform Negotiable Instruments Law, and the work “waiver” is used. R. S. Mo. 1929, Sec. 2710, 2737, 2738, 2739. For typical cases see: *Orthwein v. Nolker* (1921) 290 Mo. 284, 234 S. W. 787; *Belch v. Roberts* (1915) 191 Mo. App. 243, 177 S. W. 1062; *Laumeier v. Hallock* (1903) 103 Mo. App. 116, 77 S. W. 347.

When the promise to waive is made *before the time* for fulfilling the minor condition, is it binding in the absence of a new consideration and in the absence of any change of position by the promisee? The Restatement answers this question in the affirmative. R. S. Mo. 1929 Sec. 2737 in the Negotiable Instruments Law expressly authorizes waiver of notice of dishonor “before the time of giving notice has arrived,” and is therefore in accord with the Restatement. In *Workingmen's Banking Co. v. Blell* (1894) 57 Mo. App. 410, a negotiable note case, there was certainly a promise to disregard a condition after time of performance and some evidence of an implied promise before time of performance. *Patterson v. Amer. Ins. Co.* (1912) 164 Mo. App. 157, 148 S. W. 448, a fire insurance case, contains this dictum, “there can be no waiver of forfeiture until the ground

of forfeiture has occurred." This suggests a conflict with the Restatement. However, the case is not in conflict if it be assumed that the condition (non-vacancy of insured premises unless vacancy is by specific consent) was a "substantial part" of the original consideration for the promisor's original duty.

For similarities and differences between estoppel and waiver see *Roberts v. American Nat. Assur. Co.* (Mo. App. 1920) 220 S. W. 996 and *Fairbanks, Morse & Co. v. Baskett* (1903) 98 Mo. App. 53, 71 S. W. 1113.

Subsection (2). The principle of this Subsection seems to be in accord with Missouri law. In *Wilt v. Hammond* (1914) 179 Mo. App. 406, 165 S. W. 362, the Court said: "There is no doubt that parties to a contract may waive for the time being a strict compliance with some of its terms without binding themselves to a continuance of such waiver, and while not allowed to take advantage of the non-compliance already waived, or, perhaps, to return to a strict enforcement without notice, yet, such parties may on reasonable notice at least, either with or without valid reasons therefor, demand a strict compliance with the terms of the contract in the future."

Section 89. PROMISE TO PERFORM A VOIDABLE DUTY IS BINDING.

Except as stated in Section 93, a promise to perform all or part of an antecedent contract of the promisor, theretofore voidable by him, but not avoided prior to the making of the promise, is binding.

Annotation:

This Section is in accord with Missouri law.

For definition of a voidable contract see Section 13. In so far as this Section relates to debts contracted during infancy it must be applied in connection with R. S. Mo. 1929, Sec. 2971, which proceeds on the theory of a power to ratify or avoid a voidable contract. The ratification is effective without a new consideration. For voidable contracts of infants, see *Baker v. Kennett* (1873) 54 Mo. 82, effective avoidance; *Lee v. Equitable Life Assur. Soc.* (1916) 195 Mo. App. 40, 189 S. W. 1195, binding ratification; *Koerner v. Wilkinson* (1902) 96 Mo. App. 510, 70 S. W. 509, alleged ratification held not binding.

Other cases illustrating this Section are: *Gwinn v. Simes* (1875) 61 Mo. 335, unilateral contract executed on Sunday in violation of statute supports new promise made afterwards on a secular day; *Brown v. Worthington* (1911) 152 Mo. App. 351, 133 S. W. 93, contract induced by duress is voidable; *Harms v. Wolf* (1905) 114 Mo. App. 387, 89 S. W. 1037, contract induced

by fraud is voidable. The common law contract of a married woman is void, not voidable, and therefore outside the scope of this Section. *Musick v. Dodson* (1882) 76 Mo. 624.

Section 90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION IS BINDING.

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.

Annotation:

This Section is broad enough to include as contracts certain promises even if those promises are made without specific contractual intent. The Section emphasizes the "objective test" of contracts. See Section 20 and Missouri cases there noted. This Section 90, when applied with Section 85, means that the promise described is a contract without any consideration. In Missouri the same practical result is reached without in theory abandoning the doctrine of consideration. In Missouri three theories have been advanced as ground for the decisions. (1) *Theory of act for promise.* The induced "action or forbearance" is the consideration for the promise. *Underwood Typewriter Co. v. Century Building Co.* (1909) 220 Mo. 522, 119 S. W. 400. See Section 76. (2) *Theory of promissory estoppel.* The induced "action or forbearance" works an estoppel against the promisor. In *School District v. Sheidley* (1897) 138 Mo. 672, 40 S. W. 656, a suit to collect on a promise to pay money to a charitable trust, it was held that the promisor's executors were "estopped to plead want of consideration" after the promisee changed its position in reliance on the promise. For other Missouri contract cases involving the substitution of estoppel for consideration, see annotation under Section 45. Additional estoppel cases are: *Dodd v. St. L. & H. Railway Co.* (1892) 108 Mo. 581, 18 S. W. 1117, a landowner who knowingly permits defendant to expend money in the construction of a railroad through his land without objection, sixteen years afterwards is estopped from maintaining an ejectment suit; *Dozier v. Matson* (1888) 94 Mo. 328, 7 S. W. 268, oral gift of land relied upon by donee who then makes valuable improvements puts latter in "attitude of a purchaser"; *Lawson v. Edwards* (Mo. App. 1927) 293 S. W. 794, a "suggestion" by one party to a contract that the other party act in a certain way followed by reliance thereon, held a new contract modifying the preexisting contract. Estoppel as used in the foregoing cases is a somewhat loose term.

For a case giving the strict limitations of estoppel see *Shields v. McClure* (1898) 75 Mo. App. 631. (3) *Theory of bilateral contract*. When the induced "action or forbearance" is begun, a promise to complete is implied, and we have an enforceable bilateral contract, the implied promise to complete being the consideration for the original promise. See Section 77. In *Nicholson v. Acme Cement Plaster Co.* (1909) 145 Mo. App. 523, 122 S. W. 773, there was a promise to pay cost of replastering a building in which defendant's cement had been used. This promise was relied upon and the work was done by plaintiff. In holding that there was a contract, the Court criticized those "highly strained technical rules in regard to the consideration of contracts, whereby agreements which parties understood to be complete and valid contracts are annulled." The Court added: "In this matter, more than others, it is important to keep the law in accord with the understanding of the people; and it is our opinion that hardly any man, except an astute lawyer, if placed as plaintiff was, would doubt he had a good contract." See also *American Pub. & Engr. Co. v. Walker* (1901) 87 Mo. App. 503.

This Section 90 is not at variance with the results of Missouri decisions. There is a variance between the doctrine underlying this Section and the theoretical justifications that have been advanced for the Missouri decisions.

Section 91. PROMISES ENUMERATED IN SECTIONS 86-90 IF CONDITIONAL ARE PERFORMABLE ONLY ON HAPPENING OF CONDITION.

If a promise within the terms of Sections 86, 87, 88, 89 and 90 is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the happening of the condition or upon the arrival of the specified time.

Annotation:

In so far as the conditional nature of the new promise is concerned, this Section is in accord with Missouri law.

In *Reith v. Lullman* (1881) 11 Mo. App. 254, a suit on a new promise to pay a debt discharged in bankruptcy, the Court said: "If there is a promise to pay depending upon a future contingency, or coupled with a condition, it must be shown that the contingency has happened, or that the condition has been performed." See also *Wislizenus v. O'Fallon* (1887) 91 Mo. 184, 3 S. W. 837, new and absolute promise in writing cannot be modified by parol evidence of condition. *Farmers & Merchants Bank v. Richards* (1906) 119 Mo. App. 18, 95 S. W. 290 contains a dictum that the new promise must be "unconditional" but the

context and authorities cited show a conditional promise is "unconditional" when the condition is fulfilled.

Section 92. TO WHOM PROMISES ENUMERATED IN SECTIONS 86-89 MUST BE MADE.

The new promise referred to in Sections 86, 87, 88 and 89 must be made to the person to whom the money is then due, or to the promisor's surety or co-principal or indemnitor.

Comment:

a. The word surety is used to include everyone who is bound on an obligation, which as between himself and another person, also bound to the obligee for the same performance, the latter obligor should discharge. Thus an indorser or a guarantor is a kind of surety.

b. The promisee may be the original obligee or an assignee; and after the new promise is made, as well as before, the right of the promisee will be negotiable or assignable, depending on the character of the original duty and of the renewal promise.

Annotation:

If it be understood that the word "person" includes creditor and the creditor's known agent, then this Section seems to be in accord with Missouri decisions.

In the following cases the new promise was held to be binding: *Thompson v. Richardson* (Mo. 1917) 195 S. W. 1039, acknowledgment to creditor's executor; *Mastin v. Branham* (1885) 86 Mo. 643, promise to insurer of debtor's life for protection of creditor; *Reith v. Lullman* (1881) 11 Mo. App. 254, creditor's collector held to be agent for purpose of communicating the promise.

In the following cases the new promise was held to be insufficient: *Allen v. Collier* (1879) 70 Mo. 138, undelivered written promise by debtor; *Williamson v. Williamson* (1892) 50 Mo. App. 194, alleged agent held to be a stranger and holding based upon *Fort Scott v. Hickman* (1884) 112 U. S. 150, 28 L. Ed. 636.

Comment b. is illustrated by *Wislizenus v. O'Fallon* (1887) 91 Mo. 184, 3 S. W. 837, plaintiff being assignee of promisee.

Section 93. PROMISES ENUMERATED IN SECTIONS 86-89 NOT BINDING IF MADE IN IGNORANCE OF FACTS.

A promise within the terms of Sections 86, 87, 88 or 89 is not binding unless the promisor knew or had reason to know the es-

stantial facts of the previous transaction to which the promise relates, but his knowledge of the legal effect of the facts is immaterial.

Annotation:

This Section is in accord with Missouri law.

The following cases relate to knowledge of facts: *Brown v. South Joplin Lead & Zinc Mining Co.* (1910) 231 Mo. 166, 132 S. W. 693, new binding promise after knowledge of fraud justifying rescission of prior contract; *Baker v. Kennett* (1873) 54 Mo. 82, infancy contract case—"promise must be made with a knowledge of the facts"; *Miller v. Miller* (1913) 169 Mo. App. 432, 155 S. W. 76, debt barred by Statute of Limitations effectively renewed because of full knowledge of facts. Pertinent to the last clause of Section 93 is *Ring v. Jamison* (1877) 66 Mo. 424, infancy contract case—ignorance of law held immaterial.

Section 94. STIPULATIONS.

Agreements with reference to a proceeding pending in court, made by attorneys representing adverse parties to the proceeding, are not deprived of legal operation because of lack of consideration, nor, if made in the presence of the Court, because made orally. If not made in the presence of the Court, a writing is generally required by statute or rule of court.

Comment:

Such agreements as are within the rule stated in this Section are called stipulations. In some States if a stipulation is not made in the presence of the Court, other formalities than a writing, such as filing in court, are requisite for its validity.

Annotation:

R. S. Mo. 1929 Sections 906, 935, 936 relate to stipulations as defined by this Section of the Restatement. In so far as R. S. Mo. 1929 Sec. 935 compels a court to recognize as stipulation for a continuance, some doubt has been expressed as to its constitutionality. 15 ST. LOUIS L. REV. 189. Many, if not all, circuit courts in Missouri have rules requiring all stipulations to be in writing unless made in open court.

A stipulation is a "contract," and when it relates to assessing non-statutory costs of litigation and is breached, the remedy is a motion to retax costs. *In re McManus' Estate* (Mo. App. 1917) 199 S. W. 422. Stipulations are construed like other contracts, so as to bring out the manifest intention of the parties. *Hanchett Bond Co. v. Gloré* (1921) 208 Mo. App. 169, 232 S. W. 159.

This Section 94 is not inconsistent with Missouri decisions, but no case has been found expressly holding that a stipulation is operative without a consideration. Many stipulations are in the nature of agreements to compromise pending litigation, and as such have been justified by the presence of consideration. See *Brandenburger v. Puller* (1916) 266 Mo. 534, 181 S. W. 1141; *North Missouri R. R. Co. v. Stephens* (1865) 36 Mo. 150; *Lewis v. Wilson* (1894) 151 U. S. 551, 38 L. Ed. 267.