1965

How and by Whom May an Offer Be Accepted?

Wencelas J. Wagner

*Indiana University School of Law*

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Contracts Commons

**Recommended Citation**

Wagner, Wencelas J., "How and by Whom May an Offer Be Accepted?" (1965). *Articles by Maurer Faculty*. 2374.

https://www.repository.law.indiana.edu/facpub/2374

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact RVAUGHAN@INDIANA.EDU.
HOW AND BY WHOM MAY AN OFFER
BE ACCEPTED?*

By W. J. Wagner†

I.
WHO MAY ACCEPT AN OFFER?

A. In General

THE UNIFORM RULE in the United States is that the offeree is the only person who has the power of acceptance of an offer. This power may not be assigned by the offeree to any other person.¹ The rule is thus expressed in § 54 of the Restatement: "A revocable offer can be accepted only by or for the benefit of the person to whom it is made," the words "for the benefit" covering contracts in which the offeror is asking for a consideration from a person other than the offeree. The act or promise of that person is an acceptance.² "It is . . . elementary that an offer to contract is not assignable; it being purely personal to the offeree."³ And if a third person learns of the offer and attempts to substitute himself for the offeree, his endeavors will be ineffectual.⁴ Behind this rule there is the idea that offerors have "the right to determine with whom they would contract, and no other person [can] accept the offer and bind them without their consent. . . . The minds of the negotiating parties must meet on the identity of those to be bound before there is an enforceable contract."⁵

Of course, in "impersonal" contracts the offeror may be indifferent as to the person with whom he deals; but even in this case, the purported acceptance of a third person should be understood as a counter-offer to which the original offeror must give his assent; and, in the absence of such an acceptance, the contract will not be consummated, unless the original offer was made to the public rather

* This article is based on reports, prepared by the author for the Cornell Law School Project on General Principles of Law Recognized by Civilized Nations, and published here with the permission of that Project. Concerning the nature of the comparative research undertaken by the General Principles Project, which is supported by a Ford Foundation grant, see SCHLESINGER, The Common Core of Legal Systems — An emerging Subject of Comparative Study, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW — LEGAL ESSAYS IN HONOR OF H. E. YNTEMA (1961) 65 ff.
† LL.M., 1939, Univ. of Warsaw, J.D., LL.M., 1953, S.J.D., 1957, Northwestern University, Professor of Law, Indiana University.
2. Id., Comment a.
4. Ibid.
than to a named offeree. This approach is connected with the rule
that in order to be valid, the acceptance must not deviate from the
offer in any way; and to have a third person accept the offer amounts
to varying its terms.\(^6\)

In former times, when every contract was said to be based on
strictly personal relations and the mutual duties and obligations could
not be assigned in any way, this result was obvious. But once the
ideas of assignability of contracts and of substituted performance have
been adopted, it might seem that similar ideas could be made applicable
to offers as well. However, the courts were unwilling to accept
this approach. And they are very strict. A guaranty given to a
partnership cannot be accepted by a corporation even though the
members of the corporation are identical with the partners of the
partnership,\(^7\) and a corporation cannot be substituted for its president
as the acceptor.\(^8\)

Nor can the offeree be forced to enter into a contract with a
person he did not contemplate as the offeror. Thus, if a corporation
making an offer has reason to know that the offeree believes it to be a
different corporation with a similar name, it cannot treat the offeree
as bound if he accepts because of his mistake.\(^9\) This situation borders
on the problem of the "reality of consent."

If the offeror proposes to an offeree to enter into a unilateral
contract, and the performance is impersonal, the offeree can accept
the proposal by causing a third party to perform and assigning to him
the consideration. However, even in this case, the mere assignment
of the power to accept the offer is not permitted, although Corbin
thinks that this may be the law of the future.\(^10\)

Of course, offers may be accepted by agents of the offerees; "and
even if one who accepts, purporting to be such an agent, is not
authorized by the offeree so to do, his act may be ratified."\(^11\)

B. Can the Acceptor be Ignorant of the Offer?

In direct dealings between two parties it is hardly possible to
accept an offer without knowing about it. But in the case of offers
to the public, and sometimes of other offers calling for unilateral
contracts, it may happen that a party who does not know about the
offer performs according to its terms. Is a valid contract made?
The Restatement answers this question in the negative: "§ 53, Neces-

---

\(^6\) Id. at 337. Routzahn v. Cromer, 220 Md. 65, 150 A.2d 912, 915 (1959).
\(^10\) CORBIN, op. cit. supra note 1.
\(^11\) RESTATEMENT, CONTRACTS § 54, Comment b (1932).
sity for Knowledge of Offer. The whole consideration requested by an offer must be given after the offeree knows of the offer." And in the Comment to this section, it is stated that "[i]t is impossible that there should be an acceptance unless the offeree knows of the existence of the offer." Again, § 23 of the Restatement requires "that the offeree should know that a proposal has been made to him." This rule represents the prevailing view.

C. Assignability of Options and other Irrevocable Offers

The rule of non-assignability is inapplicable to offers which were given for a consideration and constitute contracts called options, and those which are a part of some other contract. Today, valid contracts may be assigned, and assignability applies also to options, as it is not "forbidden by statute or public policy."\(^\text{12}\) Of course, in no contract can the assignor free himself from obligations arising under it, unless the other party to the contract gives his assent. Similarly, the optionee cannot, by assigning his power of acceptance, get rid of any obligations which the option contracts may impose on him.\(^\text{13}\) The assignment itself, however, may be effected without consent of the optionor.

Until recently, irrevocable offers not amounting to option contracts were very rare in the United States; the device of the seal was not frequently resorted to. According to some authority, such irrevocable offers should be treated the same way as revocable ones, and thus made non-assignable. However, by virtue of the prevailing rule, "[a] right which is conditional or arises from an irrevocable offer is not for that reason incapable of effective assignment,"\(^\text{14}\) and firm irrevocable offers are assignable just as options. However, there seem to be no reported cases on this point. The requirement of the seal to make a written offer irrevocable was eliminated in Pennsylvania, by the adoption of the Uniform Written Obligations Act,\(^\text{15}\) and New York.\(^\text{16}\) On a more limited scale (only if made in writing by merchants

---

\(^\text{12}\) Cochran v. Taylor, 273 N.Y. 172, 7 N.E.2d 89, 92 (1937). There is, however, some authority to the contrary. For details and citations of cases, see 1 Williston, Contracts § 76 (6th ed. 1963).

\(^\text{13}\) Williston, op. cit. supra note 12, § 418. However, in most jurisdictions, the creditor obtains a direct right against the assuming party. Even in other jurisdictions "it seems probable that in equity the obligation undertaken by the assignee . . . may be enforced by the non-assigning party to the original contract." The assignor then becomes a surety and "the assignee the principal debtor." Ibid.

\(^\text{14}\) Restatement, Contracts § 155 (1932). And an illustration to this section reads as follows: "A gives B an option under seal by which A promises to convey Blackacre for $10,000 on receipt of that amount within thirty days. B can make an effective assignment of his conditional right."


\(^\text{16}\) § 33(5) of New York Personal Property Law, enacted in 1941 and amended in 1944, provides as follows:

When . . . an offer to enter into a contract is made in a writing signed by the offeror . . . which states that the offer is irrevocable during a period set forth
in sales transactions) offers were permitted to be declared irrevocable by the Uniform Commercial Code\textsuperscript{17} which already has been adopted by the majority of the states. The assignability of such offers is subject to doubt. Until now, there is no authority on this point.

D. Offers to the Public

It clearly appears from the discussion above that the offeror has an unconditional right to select the person or persons with whom he wants to deal. Of course, he may be willing to enter into a contract with anyone who can furnish to him the consideration requested, or anyone from a class of persons to whom a proposal is directed. This is the situation in the case of offers made to the public. But if the purported acceptance is made by a person not falling within the class contemplated by the offeror, there is no contract. Thus, an abettor of a crime is not within the class to whom the offer of reward was addressed, and cannot recover.\textsuperscript{18} The same is true as to sheriffs and other ministerial officers, acting within the scope of their duties. Again, if a promise is made to workmen, by the words: "Go back to your work, and I will see that you are paid," it cannot be understood as an offer which can be accepted by subcontractors for whom the laborers worked.\textsuperscript{19} Generally speaking, a valid contract is made by the acceptance "by any one coming within the description of the class."\textsuperscript{20}

II.

What is a Valid Acceptance?

A. In General

In order that a contract be created, an offer must be validly accepted. There is no contract if plaintiff's evidence shows an offer with all its terms, but there is no proof of acceptance whatsoever.\textsuperscript{21}

\begin{footnotes}
\item or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period of time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.
\item § 279(4) of New York Real Property Law is analogous.
\item 17. § 2-205. Firm Offers. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
\item 18. Clinton County Com'rs v. Davis, 162 Ind. 60, 69 N.E. 680 (1904).
\item 19. Indianapolis & St. L. R.R. v. Luther Miller, 71 Ill. 463 (1874).
\item 20. Martin v. Fretwell, 202 Okla. 204, 211 P.2d 529, 533 (1949).
\end{footnotes}
A qualified acceptance is equivalent to a rejection of the offer and works as a counter-offer. "The party making an offer may require the offer be accepted by the offeree without variance." A purported acceptance which includes a condition not specified in the offer is not an acceptance at all. Thus, acceptance must be unconditional. Conditional acceptances are nothing but new offers. In some states, the rule is embodied in statutory provisions. Thus, in *Foster v. West Pub. Co.*, the court cited § 916, Rev. Laws 1910 of Oklahoma:

"An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal."

And Article 1806 of the Civil Code of Louisiana provides as follows:

"The modification or change of the proposition is, in all respects, considered as a new offer, and the party making it, is bound by the acceptance in the same manner as if the original proposition had been made by him."

It follows that "an acceptance burdened with some condition that was not included in the original offer constitutes a new offer that might be accepted or rejected by the original offeror as he sees fit." Under this Code it has been held that even a small variation from the offer in the purported acceptance prevents the formation of a contract. Thus, an offer to sell and deliver five bales of cotton during the month of September, and ten bales in October has not been validly accepted by the offeree who agreed to the proposal, asking that five bales be delivered on September 4th, and ten bales on October 2nd. The Field Civil Code has a provision to the same effect.

It follows that a contract cannot be validly entered into before an unconditional acceptance of the offer which is a condition precedent to the existence of the contract.

23. *Corbin*, *op. cit. supra* note 1, § 82.
24. 77 Okla. 114, 186 Pac. 1083 (1920).
25. *Id.* at 115, 186 Pac. at 1084.
In § 52 of the Restatement, the very definition of acceptance is "expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror," while § 60 reads as follows:

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

And § 58 provides that "[a]cceptance must be unequivocal in order to create a contract," while § 59 adds that it "must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested." Acceptance must comply with the offer in all details. The offeror may "dictate" not only the terms of the bargain, but also the manner in which the offeree should accept, the time of acceptance, its place, and so forth. A purported acceptance changing one of these details will not be treated as unqualified. But often the real problem will be whether a part of the offer should not be understood as a mere suggestion, that is, as to the manner of acceptance, rather than a condition.

The person of the offeree is a material term of the offer; there is no valid acceptance if a lease was requested to be executed in another name. "Certainly the identity of the parties to a contract is as important to a meeting of the minds as any other term upon which the parties must agree."

However, there may be an unconditional acceptance of an offer pursuant to the terms of which the offeree's promise is conditioned on the happening of some event. Thus, there is a valid contract if the offeror proposes to defray the offeree's prospecting expenses in Alaska in consideration of the latter's promise to repay $10,000 if he finds ore worth that much, and the offeree accepts the proposal.

An unconditional acceptance does not lose its validity by the mere fact that the acceptor indicates that he is not quite satisfied with the bargain, that the contract is hard upon him, and that he expected a better deal. In Mall Tool Co. v. Far West Equipment Co., the court said: "We can agree that Far West was never happy about the modification, but it never refused to accept it, and it is our view

---

32. Restatement, Contracts § 52 (1932).
33. Id., § 60.
34. Id., § 58.
35. Id., § 59.
37. Aurora Gasoline Co. v. Coyle, supra note 5, at 337.
that there was a reluctant acquiescence.” And Pollack on Contracts, cited in Johnson v. Federal Union Surety Co. stated:

An acceptance may be complete, though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of dissent, so that the whole thing be described as a ‘grumbling assent’.

B. Statements without any Effect

Very often, the important question will be the interpretation of some communication of the offeree rather than what the applicable rules of law are. Many statements of both negotiating parties are ambiguous. Answers of the offeree may amount to acceptance, acceptance plus additional statements, mere rejection or rejection and a counter-offer. In the two latter situations, the original offer lapses. But some other statements may have no legal effect whatsoever. Thus, in the early case of Mactier's Adri'rs v. Frith, the offeree's reply: “I shall delay coming to any determination till I again hear from you. . . .”, supplemented by some reasons for taking this attitude, was held not to prevent the offeree from making a valid acceptance later.

Again, once an unqualified acceptance is given, the contract will be valid in spite of the fact that the offeree added “immaterial words” to his assent. If acceptance is mixed with other statements, the problem may be whether words expressing acceptance can be separated “from the rest” and amount to an unqualified assent, as indicated in the Field Code and Oklahoma statute.

In general, a counter-offer has the effect of a rejection of the original offer. However, if “the offeree in his counter-offer states that in spite of the counter-offer the original offer shall not be terminated,” his subsequent acceptance will be valid.

C. Immaterial Variances Between Offer and Acceptance

The requirement of unconditional acceptance was mitigated, in some cases, by the idea that “[i]mmaterial variances between the offer and its acceptance may be disregarded.” This approach is a
reflexion of the old principle: *de minimis non curat lex*. However, the courts are very prudent in applying it, and cases where it was expressly adopted are few. In *Bushmeyer v. McGarry*, an offer to sell land asked that the abstract of title be left in a bank, and the letter of acceptance provided that the abstract should be sent to the purchaser. The seller sent it according to the vendor's wishes, and then endeavored to avoid the contract on the ground of the variance between the offer and the acceptance, so that the latter constituted a counter-offer to which assent was necessary. The court held that a valid contract was entered into, saying:

> It is true the letter of acceptance introduces a change in details. . . . Now, that was not a substantial change in the terms, but merely a detail which the defendant promptly acceded to by forwarding the abstract as requested. It was not such a change as amounted to a qualification of the original offer.

While it is possible to say that the terms of the offeree were accepted by performing the contract according to his wishes, the court expressly applied the idea that trivial variances between the offers and acceptances will not vitiate the validity of the contracts.

In *Small Co. v. American Sugar Refining Co.*, the orders contained no designation of the place from which the sugar was to be shipped, while the acceptances named New Orleans as the place. The defendant's assertion that this was a material variance was said by the Supreme Court to closely approach "a mere quibble." Another assertion was recognized as stronger (the orders gave the refiner a conditional right to supply such grades of sugar as it might have available at the time of shipment, while the acceptances omitted the words of condition and made the right absolute), but the Court held that a valid contract was entered into, relying on the fact that "[t]he orders and acceptances were both prepared by the refiner — a circumstance strongly suggesting they were intended to be in accord." A similar result was reached in another case, in which the holding seems to be the following: the addition, in the confirmation of the offer, of the words "option of routing reserved to seller," is immaterial since "[t]he seller had a right to send by the usual route." Thus, this "immaterial" addition should be understood not as a real variance with the offer, but as a term which was implied in the contract.

49. 112 Ark. 373, 166 S.W. 168 (1914).
50. *Id.* at 374, 166 S.W. at 169.
51. 267 U.S. 233 (1925).
52. *Id.* at 236.
54. *Id.* at 813.
The Uniform Commercial Code, which professes abhorrence of technicalities and aims to render the conclusion of contracts easier, did not overlook the point. Its 1962 version, slightly different from the earlier versions but having the same purpose in mind, has the following provision, entitled: Additional Terms in Acceptance or Confirmation:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.\(^5\)

Clearly, the Code departs from the traditional approach. Trivial variations between offer and acceptance could be disregarded even under the traditional view, but any other discrepancies ruled out the formation of a contract. The Code speaks about any "differences" without qualifying the term in any way. Since conflicting terms do not become a part of the deal, while the others ripen into a contract, it was observed that cases will arise in which without agreement on material terms the parties may still be told that a valid contract was entered into between them — a result perhaps not wanted or anticipated by either of them at the end of the negotiations. Some other criticism of the above provision of the Code was also expressed.\(^6\)

In New York the courts were traditionally very strict in their requirement that the acceptance be exactly conforming to the offer.\(^7\) The leading case was *Poel v. Brunswick-Balke-Collender Co.*,\(^8\) in which the acceptance of an offer, agreeing to all its terms but containing an additional request for acknowledgment of its receipt, was held ineffective. Although lower courts continued to use this strict approach down to the present time, the New York Court of Appeals relaxed the rule in *Valashinas v. Koniuto.*\(^9\) A few years later, influenced by the liberal view of the Uniform Commercial Code, the New York Law Revision Commission took up the problem. It found that there was need for legislation as it "would tend to remove uncertainties,"\(^10\) and recommended a provision which was adopted by the legislature and enacted in 1960, under the title: Immaterial Variance Between Offer and Acceptance. It reads as follows:

---

55. *Uniform Commercial Code* § 2-207.
56. However, it should be read together with the next paragraph; see *infra* Sec. F.
58. 216 N.Y. 310, 110 N.E. 619 (1915).
60. See *supra* note 57.
An expression of acceptance of an offer to make a contract to sell or a sale of goods, including an offer to buy goods, shall not be insufficient as an acceptance of the offer merely because it states additional or different terms which do not materially vary the terms of the offer unless the acceptance is expressly made conditional on assent to the additional or different terms. Where the expression of acceptance is not insufficient as an acceptance of the offer, the additional or different terms which it states shall be deemed an offer for addition to or modification of the contract.61

From the wording of this provision as well as from Legislative Document 65 C, it appears that the primary objective of the drafters was to save the contracts in which the acceptor should be understood as agreeing to the proposal and making additional requests, but its caption and text indicate that it will also have the effect of disregarding trivial variations between the expression of intention of both parties. Submitting its recommendation to the legislature, the New York Law Revision Commission explained:

Where the additional or different terms do not materially vary the terms of the offer, and the offeree has not expressly made his acceptance conditional, recognition of the acceptance as sufficient notwithstanding the immaterial variance accords with common practice and business expectation.62

The strict approach was condemned on the ground that “it left many agreements, which both parties had assumed to be binding, subject to avoidance when one of the parties found that subsequent events made performance against his own interests.”63

The new enactment applies only to contracts for the sale of personal property, where the problem is “especially acute”; but clearly, the problem exists in every contract, and the possible effect of the legislative enactment is that it may influence the New York courts to take a more liberal approach also in other situations, even though the Law Revision Commission anticipates, at the end of its report, that a “discrepancy between New York rules of offer and acceptance for contracts of sale and those for other contracts” may have been established.64

Much more clearly than with respect to acceptances of offers, the maxim de minimis non curat lex appears in connection with the

62. See supra note 57.
63. Ibid.
64. Ibid.
performance of contracts. In some types of contracts, such as building contracts, the courts are willing to permit a rather wide discrepancy between the terms of the contracts and their satisfaction, under the doctrine of substantial performance. In other cases, and particularly in sales contracts, they are stricter, but still the maxim *de minimis* is applicable. In questions of conformity of the acceptance with the offer the approach is still much stricter.

Some immaterial terms of the offer, however, may be understood as mere suggestions on the part of the offeree. Section 61 of the Restatement states that "[i]f an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded."

The comment to this section explains that "frequently in regard to the details of methods of acceptance, the offeror’s language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed." The offeree’s acceptance will be valid whether he followed the offeror’s suggestions or not.

D. Terms Implied in Fact

The Restatement provides as follows:

\[\text{... [A]n acceptance ... is not inoperative as such merely because it is expressly conditional, if the requirement of the condition would be implied from the offer, though not expressed therein.}\]

Thus, a court held that there was a valid contract where acceptance, requiring prompt cash payment and a reasonable time for removal of the lumber, "added nothing to the contract." The offer itself implicitly contemplated prompt payment; and "the law would allow a reasonable time for removal of the lumber."

The same view is taken in the states in which legal rules have been codified. Reaffirming the principle that in order to ripen into a contract, an offer for the sale of real property must be unequivocally accepted, a California court held that if the acceptance simply made it clear what the offer impliedly included, a valid contract was concluded. Thus, where the offeree accepted an offer for the sale of real property, adding that the sale included oil and mineral rights, the acceptance

---

66. *Id.*, comment A.
67. *Williston*, *op. cit. supra* note 12, § 76.
68. *Restatement, Contracts* § 60, comment (1932).
was valid, the offer being silent on that point and not indicating that those rights were to be excluded from the sale, and a contract was created. No change of its terms was made. In other words, the acceptance must in every respect comply with the offer to be effective, but it does not have to be phrased in identical language.

E. Terms Implied by Law

Illustration 2 to § 60 of the Restatement reads as follows:

*A makes a written offer to B to sell him Blackacre.*

*B replies, 'I accept your offer if you can convey me a good title.' There is a contract.*

This is a classical example of a condition which is implied in fact as well as by law in every sales contract, be it in transactions involving real or personal property. Non-compliance with the condition renders the defendant liable both at common law and under statutes.

Therefore, by spelling out, in the acceptance, a term which as a matter of law is understood to be a part of the offer, the offeree does not qualify the terms in any way. In *Richardson v. Greensboro Warehouse & Storage Co.*, the court said (as a dictum) that "it is implied in a contract to convey land, unless differently agreed, that the seller must give a good title;" and in *Townsend v. Stick*, it was stated "that it is implied in a contract to convey land . . . that the vendor will give a marketable title." The rule is thus expressed:

> It is generally implied, in the absence of an express provision in the contract to a different effect, that the vendor in a contract for the sale of real estate will convey a good title, which is generally defined as a marketable title. . . .

This seems fair enough. However, in some older decisions, a contrary approach was taken. The words: "[P]rovided the title is perfect" were held to have added a condition vitiating the acceptance in *Corcoran v. White*, and in *Warner Elevator Co. v. Guthrie*,

73. 223 N.C. 344, 26 S.E.2d 897 (1943).
74. *Id.* at 346, 26 S.E.2d at 899.
75. 158 F.2d 142 (4th Cir. 1946).
76. *Id.* at 144.
78. 117 Ill. 118, 7 N.E. 525 (1886).
79. 12 Ohio CC. 182 (1896).
the same effect was given to the simple words: "[A]ccepted, title to be good."

If there is a small addition in the acceptance, the offeree risks to have his assent qualified as conditional. How can the offeror prove that his title to the real estate is good? Either by exhibiting to the offeree a policy of title to the land, or by handing him over an abstract of title to be examined. The courts are not unanimous as to the treatment of an acceptance in which the offeree is asking for such documents. The problem may hinge either on a small difference in the wording of the acceptance, or on the approach of the particular court.

Such an addition may be understood either as being implied in the offer, or as being a supplementary request, or else as amounting to a rejection of the offer and constituting a counter-proposal.

The first view was expressed in Townsend v. Stick. The court stated that "all that was suggested was an examination of title to determine its merchantability," which was anyhow "implied". Again, acceptance is valid if it adds that the occupants of the premises which are being sold should be given a reasonable time to vacate. The occupants are entitled to a reasonable time to move out whether the contract is specific on this point or not.

The second approach was taken in Kreutzer v. Lynch. The question was how to understand the following words: "Your option is hereby accepted. Please forward deed and abstract of title to the Bank, with instructions to the bank to let us inspect the papers, and if the title is found perfect, to deliver to us on payment of $6,000.00." The court found that the acceptance was unconditional, followed by "a suggestion and request." On substantially similar facts, in Brearley v. Schoening, the holding was that there was no valid acceptance. The qualification "if" appeared in both cases, but in the Lynch case the offeree stated: "Option accepted," while in the other he said: "I will close with you." Some courts state that the general rule is "that the seller is not required to furnish an abstract of title unless he specifically contracts so to do." In the Richardson case, the court explained:

[1]t is not implied in law, or, as far as we know, required by any controlling custom, that attorneys of plaintiff's selection

80. See supra note 74.
82. 122 Wis. 474, 100 N.W. 887 (1904).
83. Id. 100 N.W. at 887. See also Holt v. Stoflet, 334 Mich. 272, 54 N.W.2d 593 (1952).
84. 168 Minn. 447, 210 N.W. 588 (1926).
86. See supra note 72.
should be designated to pass upon the title, and that their adjudication thereon should be final, and possibly have the effect of annulling the contract.

And the court treated the prospective purchaser’s request as an “introduction of a material condition affecting the transfer and acceptance of the title, not contemplated by the offer.” Therefore, it “amounted to a counter-proposal.”

No valid acceptance was held to have been expressed in *Phoenix Iron & Steel Co. v. Wilkoff Co.* The accepting telegram read as follows: “We accept option, and hereby purchase . . . 15,000 tons . . ., it being understood that we have the right to have our inspector at loading point as material is shipped. Acknowledge receipt of this message.” The court pointed out that the right to inspect the goods is recognized by the law even without any agreement on this point, but that the right of the buyer to inspect at any place other than at the destination of the goods is not well settled, and it “may be injurious to the seller in delaying him in shipping the goods, if not otherwise.”

Had the court stopped here, its decision would not seem to be controversial. The court, however, proceeded to compare the case at bar with the more usual situation, saying that if the offeree had assented to the offer, adding the observation that he will be entitled to an inspection, the acceptance would be valid, the right to inspect being given him by the law. But when he “expressly qualifies his acceptance by making it a condition thereof that it is to be agreed that he is to have a right to which he would have by law been entitled,” his assent will be treated as qualified and the contract will not be formed. It does not seem that this distinction is sound.

There are quite a few other cases, however, sustaining the proposition that if the offeree requires from the offeror an acknowledgement of his acceptance, the latter will be vitiated and treated as a counter-proposal.

F. Additional Requests

If acceptance is clear and unconditional, the contract is made even if the acceptor simultaneously makes some new propositions, requests, or other offers. The addition to the acceptance may not have the effect of making it conditional. Thus, a sales transaction is complete if the offeree expresses his assent to purchase some real property in

---

87. 253 Fed. 165 (6th Cir. 1918).
88. *Id.* at 175.
89. *Id.* at 170.
accordance with an option, and also proposes to buy some personalty. And an offer by a deceased's heir to pay a debt owed by the deceased when succession is settled is validly accepted even if the offeree makes a request to pay right away in the words: "I appreciate your attitude . . . and of course we would not mind waiting . . . for the settlement of the estate. However, if it is possible for you to secure the funds necessary to liquidate the note at this time, we would both appreciate it. . . ." The acceptor's reply to the offer "may go beyond the terms of the proposal without qualifying the acceptance." Then the court will have to consider what the offeree intended and what the offeror "ought to have understood," examining "the situation and purpose of the parties, and the subject matter and course of the negotiations." An additional request to "ship tomorrow if possible" clearly will not vitiate the validity of the acceptance. The idea is thus expressed in § 62 of the Restatement:

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

When prospective purchasers of real estate accept an offer and ask for an abstract of title, the acceptance may be understood as unconditional, the alleged variance with the offer being only "a mere request, which defendants [are] free to grant or refuse." And an offer to sell some land for cash is validly accepted although the offeree adds to his assent: "... attach draft to deed and send to the . . . Bank . . ., and I will take care of same," the addition being not an "unagreed-upon condition," but "a mere suggestion to expedite the consummation" of the contract.

*Podany v. Erickson* takes a similar approach. The court stated that it was . . . well settled that requested or suggested modifications of the offer will not preclude the formation of a contract where it clearly appears that the offer is positively accepted, regardless of whether the requests are granted.

In the instant case, said the court, the defendant had no legal duty to furnish an abstract; however, its furnishing was not made a condi-

---

97. 233 Minn. 36, 49 N.W.2d 193, 194 (1951).
tion of the deal by the plaintiff. It was just a "request or suggestion," and "not a qualification of the acceptance of the offer." Therefore, plaintiff's letter of intention to purchase was held to amount to "an unconditional acceptance" as a matter of law.  

Additional terms in the acceptance ordinarily do not have the effect of preventing the creation of a contract under the provision of the Uniform Commercial Code. Section 2-207(2) of the 1962 version of the Code provides as follows:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

The effect of this provision is to make the area of acceptances by silence much wider than under traditional rules.

Before New York adopted the Code, it was influenced by some of its provisions, and particularly the ones quoted above. As a result, § 84a of the Personal Property Law was enacted in 1960. One of the effects of this provision is that additional terms in the acceptance will not necessarily prevent the formation of a contract. If an agreement as to the bulk of the bargain is reached, the deal amounts to a valid contract, provided the additional terms of the acceptor do not materially vary the offer. His answer thus does not amount to a rejection of the offer, but to an acceptance supplemented by an offer to agree on still another point or points, or a request to modify some terms of the contract which may be accepted or rejected by the original offeror.

If the acceptor clearly does not condition his acceptance on the new terms proposed by him, similar results can be reached in the absence of a statute, even in situations in which the agreement of the offeror to the offeree's request would substitute a new contract for the previous one. Thus, in Johnson v. Federal Union Surety Co., the acceptance was held to be valid in spite of the fact that the acceptor expressed the hope that the other party would be more liberal, writing:

98. Ibid.
99. Uniform Commercial Code § 2–207(1); see supra.
100. See supra note 61.
"We are still expecting that you will agree to pay us $3,333.33 . . . I would appreciate very much receiving your check for this amount, or if your company is not willing to go along on this, we would thank you to send us the amount pledged by you of $2,500."102

Sometimes, acceptance and requests of the offeree for a better bargain are so much connected with each other, that the decision whether acceptance was unconditional may be difficult. In Bleeker v. Miller,103 the acceptor objected to some provisions of the offer and expressed the opinion that the offeror should not ask for such conditions. However, the court found that the acceptance was valid and only supplemented by a request for a favor which the seller was free to grant or refuse.

G. Method of Performance

Where the offer has stated some specific time and place of performance, an acceptance stipulating a change of the method of performance will not be recognized as unqualified. And if time and place of payment are not specified in the offer, the seller is entitled to be paid in cash. "It [is his] legal right to have the money paid to [himself], and at [his] place of abode."104 The buyer "has not the right to change the place of payment where he attempts to accept an offer, and . . . an acceptance of this kind is not an unqualified one such as is necessary to make a binding contract."105

The usual approach was well explained in Rahm v. Cummings:106

The telegram and letter . . . purporting to accept her offer, directed her to 'send deed in blank to Merchants' National Bank for collection.' We cannot regard this as a mere suggestion. It was a direction, and it imposed new conditions not found in the terms of the offer. It required the transaction to be closed at Detroit, Minn. . . . Unless otherwise agreed, defendant was entitled to have the transaction closed where she lived . . . She did not live in Detroit . . . The answer to defendant's offer was not unqualified, but conditional. It was not, therefore, an acceptance of the offer, but was in effect a rejection of it.107

The addition of the terms of payment to the acceptance was held by the court to amount to a "direction," invalidating the assent. Why was it not understood as a mere request with which the other party

102. Id., 153 N.W. at 790.
103. 40 Okla. 374, 138 Pac. 809 (1914).
105. Ibid.
106. 131 Minn. 141, 155 N.W. 201 (1915).
could comply or not, but which did not render the acceptance ineffectual? A similar acceptance was held valid in *Skinner v. Stone.* It is largely a question of construing the answer to the offer. It seems that "some courts may be too ready to interpret words of 'request' as making the acceptance conditional."

Any terms as to the method of performance, other than those concerning time and place, are dealt with in a similar manner.

H. *Orders Subject to Approval*

Customers who sign orders solicited from them by salesmen do not accept but just make offers if the orders are subject to approval by the salesmen's principals. Therefore, even if the word used by the customer is "Accepted," he may revoke his assent to the transaction before it is accepted by the seller.

108. See *supra* note 94.
109. *Corbin, op. cit. supra* note 1, § 84.
110. *Id.*, § 82.