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## Restatement of the Law of Contracts of the American Law Institute, Sections 454-469, with Missouri Annotations

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# ST. LOUIS LAW REVIEW

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RESTATEMENT OF THE LAW OF CONTRACTS OF THE  
AMERICAN LAW INSTITUTE, SECTIONS 454-469,\*  
WITH MISSOURI ANNOTATIONS†

BY TYRRELL WILLIAMS

## IMPOSSIBILITY

### Section 454. DEFINITION OF IMPOSSIBILITY.

In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.

#### *Annotation:*

This description is rather broad. However it is not inconsistent with Missouri law. In *Trammell v. Vaughan* (1900) 158 Mo. 214, 59 S. W. 79, the impracticability of marriage at a particular time between a venereally infected man and a healthy woman was treated by the court as if it were an impossibility. In *Jackson County Light Co. v. Independence* (1915) 188 Mo. App. 157, 175 S. W. 86, a certain contract contained as an essential term the words "reasonably possible", and the court gave these words an interpretation in accord with this Section.

In Missouri (as in other American jurisdictions) the law of impossibility is still in the stage of development, and exhibits both the old unsympathetic attitude and the new sympathetic attitude. The old attitude is illustrated by the reasoning in *Harrison v. Mo. Pac. Ry. Co.* (1881) 74 Mo. 364, emphasizing the binding nature of express unconditional contracts and citing the English case of *Paradine v. Jane*. The new attitude is illustrated by *Hall v. School District* (1887) 24 Mo. App. 213, emphasizing the presence

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† Copyright, 1933, by Washington University. Previous sections of the Restatement, similarly annotated, will be found in the ST. LOUIS LAW REVIEW for December, 1930, February, 1931, June, 1931, December, 1931, December, 1932, and February, 1933.

in some contracts of implied conditions of excuse and citing the English case of *Taylor v. Caldwell*. Both attitudes are discussed in *Clough v. Stillwell Meat Co.* (1905) 112 Mo. App. 177, 86 S. W. 580, emphasizing the importance of the old attitude in actions on special contracts and the importance of the new attitude in actions on quantum meruit.

**Section 455. SUBJECTIVE IMPOSSIBILITY DISTINGUISHED FROM OBJECTIVE IMPOSSIBILITY.**

**Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract.**

*Annotation:*

The distinction between *subjective impossibility* and *objective impossibility*, while not definitely pointed out, has been recognized in Missouri law. "Mere inability of a party to a contract to perform its conditions affords no excuse in law for his failure to perform them." *Cluley-Miller Coal Co. v. Freund Baking Co.* (1909) 138 Mo. App. 274, 120 S. W. 658, agreement to ship coal over a certain railroad is not discharged by inability to get cars of that railroad. See also: *Harrison v. Mo. Pac. Ry. Co.* (1881) 74 Mo. 364, unconditioned promise by railroad to furnish freight cars to shipper not excused by alleged accident; *Lewis v. Atlas Mutual Ins. Co.* (1876) 61 Mo. 534, insolvency of promisor no defense to suit based on promise; *Cornett v. Best* (1910) 151 Mo. App. 546, 132 S. W. 35, mere insolvency of vendee does not excuse tender of performance by vendor; *Wright v. Fullerton* (1895) 60 Mo. App. 451, a promise which cannot be performed without consent of a third person, not excused by inability to get such consent. In *St. Joseph Hay & Feed Co. v. Brewster* (Mo. App. 1917) 195 S. W. 71, the principle of this Section as applied to *subjective impossibility* is stated as a "general rule" and "an exception to this old and well-established rule" is recognized "where the contract is with reference to particular property or to something derived, or to be derived, from a particular source, and the same is destroyed by what is commonly called an act of God." This "exception" corresponds with the Restatement's *objective impossibility*.

Sometimes the distinction between subjective and objective impossibility will seem to be rather arbitrary. See *Roseberry v. Am. Benevolent Ass'n* (1909) 142 Mo. App. 552, 121 S. W. 785, where a duty prescribed in an accident insurance policy for giving notice of accident, under the facts of the case, was excused because of impossibility which should therefore be classified as an objective im-

possibility. The opinion shows that in some other states the excuse would not have been allowed, and therefore in those states the impossibility would be classified as a subjective impossibility.

#### Section 456. EXISTING IMPOSSIBILITY.

Except as stated in Section 455, or where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know.

##### *Annotation:*

This Section is in accord with Missouri law. See *Buchanan v. Layne* (1902) 95 Mo. App. 148, 68 S. W. 952, promise to market ore from a particular mine is not breached when it appears that there is no ore in the mine, both parties being ignorant of facts at time of promise. The general principle of the Section is also recognized in *Gratton & Knight Mfg. Co. v. Troll* (1898) 77 Mo. App. 339, where replevin was allowed for goods bought by corporation so hopelessly insolvent as to indicate fraud. For a case "where a contrary intention is manifested" see *Chappell v. Boram* (1911) 159 Mo. App. 442, 141 S. W. 19, contract for sale of hogs warranted sound by seller but having cholera, and seller was held bound.

#### Section 457. SUPERVENING IMPOSSIBILITY.

Except as stated in Section 455, where, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation; but where such facts occur after the time when performance of a promise is due, they do not discharge a duty to make compensation for a breach of contract.

##### *Annotation:*

This Section is in practical accord with modern Missouri law. In *St. Joseph Hay & Feed Co. v. Brewster* (Mo. App. 1917) 195 S. W. 71, there was a contract to sell 3,000 bushels of wheat of a specified grade, impliedly to be grown on seller's farm, but bad weather caused the crop to be smaller and of poorer quality than expected. The buyer sued the seller and the trial court applied

the theory of Section 455. The reviewing court reversed the lower court and held that the seller had a good defense, saying: "If the particular subject of such a contract goes out of existence through no fault of the contracting party, the contract is incapable of being performed on either side. In such case, the parties can be said to have contracted on the condition that the subject thereof should be in existence at the time of performance." (Authorities omitted.) See also *Mosby v. Smith* (1916) 194 Mo. App. 20, 186 S. W. 49, promise to sell 900 head of cattle, more or less, is performed by delivery of 687 head, when it is apparent that the cattle were to be delivered from a particular ranch and all cattle as described on the ranch were delivered.

"A contrary intention was manifested" in: *Cochran v. People's Ry. Co.* (1895) 131 Mo. 607, 33 S. W. 177, evidence of bad weather as excuse for delay in performing building contract inadmissible in suit for damages for delay; *Koester v. Lowenhardt* (1913) 177 Mo. App. 699, 160 S. W. 566, another case involving bad weather.

**Section 458. SUPERVENING PROHIBITION OR PREVENTION BY LAW.**

**A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited**

- (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or**
- (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States.**

*Annotation:*

As qualified by *Clause (a)* this Section is in accord with Missouri law. "If doing the thing contracted for becomes unlawful, performance becomes impossible by force of law, and non-performance is excusable." (Authorities omitted.) *Sawner v. Phoenix Ins. Co.* (1890) 41 Mo. App. 480. Illustrative cases: *Finck v. Schneider Granite Co.* (1905) 187 Mo. 244, 86 S. W. 213, contract in restraint of trade formed in March, 1891, was clearly illegal when afterwards judged by a legislative act approved in April,

1891, and held that "no one can have any vested right which he can claim to be exempt from the lawful exercise by the State of its police powers"; *Pabst Brewing Co. v. Howard* (Mo. App. 1919) 211 S. W. 720, local option prohibiting sale of beer subsequent to contract to buy beer for ten years discharged the contract and seller cannot recover for breach.

As qualified by *Clause (b)* this Section would seem to be at variance with Missouri law. In *Olive v. Alter* (1851) 14 Mo. 185, a trial court had the power to order a new forthcoming bond and to cause a steamboat to be delivered upon such bond but this did not affect the prior rights of the holder of a mortgage on the steamboat; the reviewing court held that the action of the trial court was not "one of those acts of the law which, it is agreed by all the authorities, will discharge a contract". A breach of contract to construct sewers within a specified time is not excused by an injunction against the contractor. *Whittemore v. Sills* (1898) 76 Mo. App. 248. To the same effect: *McQuiddy v. Brannock* (1897) 70 Mo. App. 535, injunction against contractor for street improvement does not excuse contract liability to complete work within specified time. The theory of these Missouri cases is similar to the principle of Section 455.

#### Section 459. DEATH OR ILLNESS.

A duty that requires for its performance action that can be rendered only by the promisor or some other particular person is discharged by his death or by such illness as makes the necessary action by him impossible or seriously injurious to his health, unless the contract indicates a contrary intention or there is contributing fault on the part of the person subject to the duty.

#### Annotation:

This Section is in accord with Missouri law. "In contracts for service, sickness and death have been held to excuse the non-performance of an entire contract." *Haynes v. Second Baptist Church* (1882) 12 Mo. App. 536. See: *Trammell v. Vaughan* (1900) 158 Mo. 214, 59 S. W. 79, party innocently contracting disease between date of engagement and date set for marriage is not liable for failure to marry on date set; *Jarrell v. Farris* (1839) 6 Mo. 159, promisor having agreed to haul logs was killed and there was no liability against his estate; *Gauss v. Hussmann* (1886) 22 Mo. App. 115, a particular building contract terminated by death of contractor.

"A contrary intention" was indicated in *Coil v. Continental Ins. Co.* (1913) 169 Mo. App. 634, 155 S. W. 872, liability of property owner to pay premiums on tornado insurance survives death;

*Sauner v. Phoenix Ins. Co.* (1890) 41 Mo. App. 480, death of maker of premium note for fire insurance did not destroy liability of decedent's estate; *Reicke v. Saunders* (1877) 3 Mo. App. 566, death of one for whom a certain house was contracted to be built did not terminate the contract.

In *Ott v. Moore* (Mo. App. 1929) 20 S. W. (2d) 166, a building contractor who became ill, was discharged but was allowed to recover on quantum meruit.

**Section 460. NON-EXISTENCE OR INJURY OF SPECIFIC THING OR PERSON NECESSARY FOR PERFORMANCE.**

(1) Where the existence of a specific thing or person is, either by the terms of a bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise

- (a) never arises if at the time the bargain is made the existence of the thing or person within the time for seasonable performance is impossible, and
- (b) is discharged if the thing or person subsequently is not in existence in time for seasonable performance,

unless a contrary intention is manifested, or the contributing fault of the promisor causes the non-existence.

(2) Material deterioration of such a specific thing or physical incapacity of such a specific person as is within the rule stated in Subsection (1) has the same effect as non-existence in preventing a promisor's duty from arising or in discharging it, except that if the other party remains ready and willing to render in full the agreed exchange for whatever performance remains possible, the promisor is under a duty to render such partial performance unless the deterioration or injury would make performance by him materially more burdensome.

*Annotation:*

*Subsection (1-a)* is in accord with Missouri law. Illustrative cases: *Woodworth v. McLean* (1889) 97 Mo. 325, 11 S. W. 43, promise to sink mining shaft 500 feet on a particular vein of ore was not breached when the shaft was sunk for 330 feet only and the vein went no further; *Jackson County Light Co. v. Independence* (1915) 188 Mo. App. 157, 175 S. W. 86, gas company allowed to recover \$5,000 paid to city to insure company's bringing natural gas to city if reasonably possible and later it appeared that a sufficient supply could not be maintained; *Buchanan v.*

*Layne* (1902) 95 Mo. App. 148, 68 S. W. 952, promise to extract and market ore from a particular mine was not breached when it appeared that there was no ore in the mine.

*Subsection (1-b)* is in accord with Missouri law. Illustrative cases: *Jarrell v. Farris* (1839) 6 Mo. 159, death of promisor; *St. Joseph Hay & Feed Co. v. Brewster* (Mo. App. 1917) 195 S. W. 71, contract to sell 3,000 bushels of certain quality of wheat, impliedly to be grown on seller's farm, discharged by bad weather conditions; *Shine's Executrix v. Heimbürger* (1895) 60 Mo. App. 174, owner of land need not pay for brick work practically completed when blown down by wind unless the contract specifically so provides.

For cases involving "a contrary intention" see *Heffernan v. Neumond* (1918) 198 Mo. App. 667, 201 S. W. 645, destruction of mill; *Ryley-Wilson Gro. Co. v. Seymour Canning Co.* (1908) 129 Mo. App. 325, 108 S. W. 628, alleged failure of tomato crop; *Martin v. Ashland Mill Co.* (1892) 49 Mo. App. 23, burning of flour mill; *Haynes v. Second Baptist Church* (1882) 12 Mo. App. 536 (1885) 88 Mo. 285, burning of church.

*Subsection (2)* is not inconsistent with Missouri law. In *Trammell v. Vaughn* (1900) 158 Mo. 214, 59 S. W. 79, it was stated in effect that if a man apparently in good health becomes engaged to a woman and a wedding day is set and then the man innocently becomes infected with a disease, he is no longer under a contractual duty to marry the woman on the day set even if the woman is willing.

#### **Section 461. NON-EXISTENCE OF ESSENTIAL FACTS OTHER THAN SPECIFIC THINGS OR PERSONS.**

**When the existence of particular facts other than specific things or persons within the rule stated in Section 460 is, either by the terms of a bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise**

- (a) never arises, if at the time when the bargain is made the existence of such facts within the time for seasonable performance is impossible, and**
- (b) is discharged if such facts subsequently do not exist within the time for seasonable performance,**

**unless a contrary intention is manifested or the contributing fault of the promisor causes the non-existence, or unless performance is possible with unsubstantial variation under the rule stated in Section 463.**

*Annotation:*

Few pertinent cases have been found. This Section is in accord with the Missouri law when the existence of the particular facts is made a condition by the "terms of the bargain". Illustrative cases: *Weber v. Collins* (1897) 139 Mo. 501, 41 S. W. 249, contractors allowed to recover contract price for house although completion was delayed for 202 days due to strike and inclement weather, when the contract provided for unavoidable delay due to strikes or inclement weather; *Consolidated Coal Co. v. Mexico Brick Co.* (1896) 66 Mo. App. 296, contract to deliver two carloads of coal a day but performance excused by inability to get cars when contract provided that causes beyond control should excuse.

If existence of the facts is "in the contemplation of both parties" an implied condition of the contract, the same rule of law logically would apply, although proof might be more difficult. In *Laclede Const. Co. v. Moss Tie Co.* (1904) 185 Mo. 25, 84 S. W. 76, a contractual duty to furnish ties for the proposed extension of a railroad was discharged when it was determined that the extension should not be built, although vendee tried to enforce the contract because the price of ties had gone up.

If there is no evidence of any mutual understanding as to a condition of excuse, the promisor is liable. *Harrison v. Mo. Pac. Ry. Co.* (1881) 74 Mo. 364, carrier's inability to supply railroad cars; *Peirson-Lathrop Grain Co. v. Barker* (Mo. App. 1920) 223 S. W. 941, shipper's inability to obtain railroad cars; *Wright v. Fullerton* (1894) 60 Mo. App. 451, inability to get permit to use public alley for construction of private sewer.

**Section 462. TEMPORARY IMPOSSIBILITY.**

Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists.

*Annotation:*

This Section is not inconsistent with Missouri law. No cases have been found to illustrate the first clause of the Section. The second clause of the Section is in harmony with judicial reasoning in the following cases: *Roseberry v. Am. Benevolent Ass'n* (1909) 142 Mo. App. 552, 121 S. W. 785, condition in accident in-

insurance policy as to giving notice of accident is temporarily excused when policy holder is unconscious due to opiates administered by physician immediately after the accident; *Alexander v. Scott* (1910) 150 Mo. App. 213, 129 S. W. 991, refusal by subcontractor in levee construction to continue excavations until water could drain out of a borrow pit was not an abandonment of the contract and did not entitle other party to finish the work. See also *Sturtevant Co. v. Ford Mfg. Co.* (Mo. App. 1923) 253 S. W. 76, proper to instruct jury to consider that plaintiff was making war materials in time of war, in coming to a conclusion as to whether plaintiff delivered a promised chattel within "a reasonable time".

**Section 463. PARTIAL IMPOSSIBILITY.**

Where impossibility of performing part of the performance promised by a party to a bargain is of such character that if it related to the entire performance it would prevent the imposition of a duty or would discharge a duty that had arisen, and the remainder of the performance is not made materially more difficult or disadvantageous than it would have been if there had been no impossibility, the existence of duty is affected only as to that part; and if performance of the whole contract is possible with only an unsubstantial variation, the promisor is under a duty to render performance with that variation.

*Annotation:*

This Section is not inconsistent with Missouri law. A teacher employed to teach in a particular school house which burns down can collect salary only for the period before the fire and not for the subsequent period. *Hall v. School Dist.* (1887) 24 Mo. App. 213.

**Section 464. IMPOSSIBILITY OF PERFORMING SOME BUT NOT ALL BARGAINS.**

(1) Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged, except as stated in Subsection (2).

(2) The right to damages of a promisee in a bargain who has been given ground by the promisor at the time of its formation to believe that the promisor has neither already made other bargains nor will make later bargains limiting his possibility of performing all his promises, is not diminished by such other bargains.

*Annotation:*

*Subsection (1)* is not inconsistent with Missouri law. In *Consolidated Coal Co. v. Mex. Brick Co.* (1896) 66 Mo. App. 296, the trial court adopted a theory of evidence in exact accord with this Subsection. The case was reversed on a point of pleading but there was no disapproval of the principle of this Subsection.

*Subsection (2)* is not inconsistent with Missouri law. No cases directly in point have been found. In *White Oak Coal Co. v. Squier Co.* (Mo. App. 1920) 219 S. W. 693, there was an alleged contract for sale of coal with an express stipulation for a ratable apportionment among various buyers in case of strikes, et cetera, but the principle of this Subsection was not involved.

**Section 465. WHEN APPREHENSION OF IMPOSSIBILITY EXCUSES BEGINNING OR CONTINUING PERFORMANCE.**

(1) Where a promisor apprehends before or during the time for performance of a promise in a bargain that there will be such impossibility of performance as would discharge or suspend a duty under the promise or that performance will seriously jeopardize his own life or health or that of others, he is not liable, unless a contrary intention is manifested or he is guilty of contributing fault, for failing to begin or to continue performance, while such apprehension exists, if the failure to begin or to continue performance is reasonable.

(2) In determining whether a promisor's failure to begin or to continue performance is reasonable under the rule stated in Subsection (1), consideration is given to

- (a) the degree of probability, apparent from what he knows or has reason to know, not only of such impossibility but of physical or pecuniary harm or loss to himself or to others if he begins or continues performance, and
- (b) the extent of physical or pecuniary harm or loss to himself or to others likely to be incurred by attempting performance as compared with the amount of harmful conse-

**quences likely to be caused to the promisee by non-performance.**

*Annotation:*

This Section is in accord with *federal law*. *The Kronprinzessin Cecilie* (1917) 244 U. S. 12, German ship owner at sea on July 31, 1914, anticipated war and possible capture and turned back to neutral port with no liability for failure to deliver cargo under the circumstances.

As to the *general rule* of this Section, no Missouri cases have been found that are directly in point. That danger to public welfare may be equivalent to impossibility would seem to follow from the reasoning in *Trammell v. Vaughan* (1900) 158 Mo. 214, 59 S. W. 79, disease of defendant considered as affecting liability in breach of promise suit.

For cases *outside the general rule* of this Section, because manifesting "a contrary intention", see *Coonan v. City of Cape Girardeau* (1910) 149 Mo. App. 609, 129 S. W. 745, even reasonable fear by a sewer contractor that other party will not obtain right of way needed for part of sewer did not excuse failure to begin performance; *Southern Lumber Co. v. Lumber & Supply Co.* (1901) 89 Mo. App. 141, in sale of lumber doubt of buyer's solvency will not excuse seller.

**Section 466. WHEN APPREHENSION OF IMPOSSIBILITY EFFECTS A DISCHARGE.**

**A promisor who fails to begin or to continue performance because of such ground for apprehension as justifies him in so doing under the rule stated in Section 465 is entirely free from any duty to perform where the ground for apprehension continues until performance of the promise or of any remainder of it would impose upon him a seriously greater burden than he would have been subjected to had there been no ground for apprehension, either because he has materially changed his position in reasonable reliance on the apprehension or because the situation is altered in other ways.**

*Annotation:*

No pertinent Missouri cases have been found.

**Section 467. UNANTICIPATED DIFFICULTY.**

**Except to the extent required by the rules stated in Sections 455 to 456, facts existing when a bargain is made or occurring there-**

**after making performance of a promise more difficult or expensive than the parties anticipate, do not prevent a duty from arising or discharge a duty that has arisen.**

*Annotation:*

This Section is in accord with Missouri law. "If a party, by his contract, charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by an act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him." *Ward v. Haren* (1909) 139 Mo. App. 8, 119 S. W. 446. See also *Fruin v. Crystal Ry. Co.* (1886) 89 Mo. 397, 14 S. W. 557, a contract to excavate solid rock required excavation of flint rock; *Harrison v. Mo. Pac. Ry. Co.* (1881) 74 Mo. 364, a railroad's promise to furnish railroad cars was not excused by alleged accident; *Davis' Adm'r v. Smith* (1852) 15 Mo. 467, lessee of saw-mill held for rent after abandonment due to structural defects of mill; *Gathwright v. Callaway County* (1847) 10 Mo. 663, destruction of bridge by flood does not discharge contractual duty to build and keep in repair for four years.

Many cases have held that *adverse weather*, unless expressly made an excuse, has no effect upon a contractual duty. *Cochran v. People's Ry. Co.* (1895) 131 Mo. 607, 33 S. W. 177; *Koester v. Lowenhardt* (1913) 177 Mo. App. 699, 160 S. W. 566; *McQuiddy v. Brannock* (1897) 70 Mo. App. 535.

**Section 468. RIGHTS OF RESTITUTION.**

(1) Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time.

(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time.

(3) The value of performance within the meaning of Subsections (1) and (2) is the benefit derived from the performance in

**advancing the object of the contract, not exceeding, however, a ratable portion of the contract price.**

*Annotation:*

*Subsection (1).* The principle of this Subsection is in accord with Missouri law. In *Clough v. Stillwell Meat Co.* (1905) 112 Mo. 177, 86 S. W. 580, there was a contract to receive apples, store them, insure, repack and ship when ordered, for a stated price. The apples were destroyed by fire and the storage company was entitled to retain from the insurance money not the contract price for the total service promised, but only reasonable value of service rendered up to the time of the fire, not exceeding contract price. See also: *Haynes v. Second Baptist Church* (1885) 88 Mo. 285, recovery on quantum meruit for partial installation of pews in church which burned; *Lemp v. Streiblein* (1849) 12 Mo. 456, recovery allowed for unsuccessful effort to bring defendant's minor son back from Germany, performance having been prevented by defendant's wife; *Ott v. Moore* (Mo. App. 1929) 20 S. W. (2d) 166, contractor who became ill and was discharged recovered on quantum meruit.

A contract of *sale* of a chattel, title not to pass until delivery is completed, would be a contract which "clearly provides otherwise". See *Pike Electric Co. v. Richardson Drug Co.* (1890) 42 Mo. App. 272, chattel destroyed while in process of being delivered to vendee and latter held not liable on either special contract or quantum meruit.

*Subsection (2)* is not inconsistent with Missouri law. No cases directly in point have been found. In *Gratton & Knight Mfg. Co. v. Troll* (1898) 77 Mo. App. 339, replevin was allowed for goods bought by buyer so hopelessly insolvent as to indicate fraud on his part. See also *Clough v. Stillwell Meat Co.* (1905) 112 Mo. App. 177, 86 S. W. 580, bailee for hire having an express contract with bailor, after accidental destruction of property by fire, was entitled to reasonable compensation for service up to time of fire.

*Subsection (3)* is not inconsistent with Missouri law. No cases directly in point have been found. See *Downey v. Burke* (1856) 23 Mo. 228, action by contractor on quantum meruit, not on the special contract, and damages were allowed according to the rule of this Subsection.

**Section 469. IMPOSSIBILITY IN ALTERNATIVE CONTRACTS.**

**Impossibility of performing one or more but less than all of a number of performances promised in the alternative in a contract discharges neither the duty of the promisor if by the terms of the contract he had the privilege of choice, nor the duty of the prom-**

isee if he had that privilege, but merely destroys or limits the possibility of choice; except where a contrary intention is manifested or the impossibility exists at the time of the formation of the contract and there is such a mistaken assumption of the existence of a fact as renders the contract voidable under the rule stated in Section 502.

*Annotation:*

This Section is not inconsistent with Missouri law. No cases directly in point have been found. In *Clough v. Stillwell Meat Co.* (1905) 112 Mo. App. 177, 86 S. W. 580, the trial court construed a certain contract as an alternative contract, depending upon the happening or non-happening of a fire, and applied the principle of the first half of this Section. The reviewing court reversed the case on the ground that the contract had been misconstrued, but there was no disapproval of the principle of the first half of this Section.