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## Contracts--Offer and Acceptance--Advertsiement Announcing Free Exchange of 1955 Car If 1954 Model Was Purchased Held an Offer (Johnson v. Capital City Ford Co., 85 So. 2d 75 (La. Ct. App. 1955))

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## RECENT DECISIONS

CONTRACTS — OFFER AND ACCEPTANCE — ADVERTISEMENT ANNOUNCING FREE EXCHANGE OF 1955 CAR IF 1954 MODEL WAS PURCHASED HELD AN OFFER.—Plaintiff brought an action for specific performance against defendant car-dealer who advertised by newspaper that anyone who bought a new 1954 Ford from him would be entitled to exchange it, without extra charge, for a new 1955 model when these appeared on the market.<sup>1</sup> In response to the advertisement plaintiff bought a new 1954 Ford but defendant contended that plaintiff was not entitled to the 1955 model since the advertisement was merely an invitation to bargain and the 1955 deal was not included in his purchase-sale contract. The Court held that the advertisement constituted an offer which ripened into a contract when plaintiff purchased the 1954 Ford. *Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. Ct. App. 1955).

The principle that an advertisement may constitute a general offer, acceptance of which will result in a contract, has generally been applied in instances where the advertiser offered a reward for the furnishing of certain information.<sup>2</sup> The characteristics of such announcements require that they be addressed to the general public and it is well settled that they can be withdrawn only in the same manner.<sup>3</sup> Advertisements relating to the sale of merchandise, however, have been more frequently construed as invitations to make offers.<sup>4</sup> The only general test which can be applied, as a guide in determining the status of an advertisement, is an inquiry whether the facts show that some performance was promised in positive terms in return for something requested.<sup>5</sup>

It is often difficult to distinguish between offers and negotiations preliminary thereto.<sup>6</sup> Since it is common business psychology to in-

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<sup>1</sup> In Louisiana, there is a statutory right to bring an action for specific performance of a contract to sell personal property. LA. CIV. CODE ANN. art. 2462 (West 1952); see also Jackson, *Specific Performance of Contracts in Louisiana*, 24 TUL. L. REV. 401, 418 (1950). “. . . [T]he tendency of the civil law is to hold the defendant responsible for the very act contracted for and to give the plaintiff exactly what he would have received had not the defendant defaulted. . .” *Ibid.*

<sup>2</sup> *Salisbury v. Credit Service, Inc.*, 39 Del. (39 W.W. Harr.) 377, 199 Atl. 674, 681-82 (Sup. Ct. 1937) (dictum). See, *e.g.*, *Shuey v. United States*, 92 U.S. 73 (1875) (for apprehension of criminal); *Pierson v. Morch*, 82 N.Y. 503 (1880) (return of lost property).

<sup>3</sup> See *Shuey v. United States*, 92 U.S. 73 (1875); *Sullivan v. Phillips*, 178 Ind. 164, 98 N.E. 868 (1912); RESTATEMENT, CONTRACTS § 43 (1932).

<sup>4</sup> *Salisbury v. Credit Service, Inc.*, *supra* note 2, at 682.

<sup>5</sup> 1 WILLISTON, CONTRACTS § 27 (rev. ed. 1936).

<sup>6</sup> RESTATEMENT, CONTRACTS § 25, comment *a* (1932).

duce the other party to make the definite offer<sup>7</sup> courts have been reluctant to treat any step in the negotiations as an offer.<sup>8</sup> Accordingly, if the advertising material is in the form of a letter or circular giving a price list for certain articles it may be treated as an announcement that the advertiser is interested in receiving proposals for sales on the terms and conditions stated.<sup>9</sup> It is a device for calling to the attention of those in the trade what bargains are available.<sup>10</sup> Similarly, if goods are listed for sale at a certain price it is not an offer and no contract is formed upon the purchaser's declaration that he will take a specified quantity of goods at that price.<sup>11</sup> If such an announcement were treated as an offer, it might subject the advertiser to a crushing burden of liability.<sup>12</sup> The rare cases which have held an advertisement for the sale of merchandise to be offers are those where the wording of the offer was clear, definite and left nothing open for negotiation.<sup>13</sup>

In the final analysis, the determination of whether an advertisement will be deemed an offer is a matter of the intention of the offeror as manifested by the facts and circumstances of each particular case.<sup>14</sup> Factors which will be considered in determining this intention are: (1) the definiteness of the terms of the offer,<sup>15</sup> (2) the customs and usages of the business,<sup>16</sup> (3) and all the surrounding circumstances.<sup>17</sup>

In two New York cases involving the question of advertisements for the sale of merchandise at a stated price the advertisements were held to be invitations to enter into negotiation.<sup>18</sup> In *Lovett v. Frederick Loeser & Co.*,<sup>19</sup> the court in deciding this point relied heavily on *Georgian Co. v. Bloom*<sup>20</sup> indicating that it felt such an

<sup>7</sup> *Ibid.*

<sup>8</sup> See, e.g., *Loneragan v. Scolnick*, 129 Cal. App. 2d 179, 276 P.2d 8 (1954); *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, 152 N.W. 310 (1915).

<sup>9</sup> See *Montgomery Ward & Co. v. Johnson*, 209 Mass. 89, 95 N.E. 290 (1911); *Posposia Coal Co. v. Nye-Schneider-Fowler Co.*, 106 Neb. 4, 182 N.W. 586 (1921); *Moulton v. Kershaw*, 59 Wis. 316, 18 N.W. 172 (1884).

<sup>10</sup> *Moulton v. Kershaw*, *supra* note 9, at 174-75.

<sup>11</sup> See *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 207 N.Y. Supp. 753 (N.Y. Munic. Ct. 1924); *Georgian Co. v. Bloom*, 27 Ga. App. 468, 108 S.E. 813 (1921); *Craft v. Elder & Johnston Co.*, 34 Ohio L. Abs. 603, 38 N.E.2d 416 (Ct. App. 1941).

<sup>12</sup> WHITNEY, CONTRACTS § 17 (5th ed. 1953).

<sup>13</sup> See *Seymour v. Armstrong*, 62 Kan. 720, 64 Pac. 612 (1901); *Oliver v. Henley*, 21 S.W.2d 576 (Tex. Civ. App. 1929).

<sup>14</sup> *R. E. Crummer & Co. v. Nuveen*, 147 F.2d 3, 5 (7th Cir. 1945) (dictum); *J. E. Pinkham Lumber Co. v. C. W. Griffin & Co.*, 212 Ala. 341, 102 So. 689, 690 (1925) (dictum).

<sup>15</sup> See *Georgian Co. v. Bloom*, *supra* note 11.

<sup>16</sup> See *Hall v. Kimbark*, 11 Fed. Cas. 234, No. 5938 (E.D. Mo. 1874).

<sup>17</sup> RESTATEMENT, CONTRACTS § 25, comment a (1932).

<sup>18</sup> *People v. Gimbel Bros. Inc.*, 202 Misc. 229, 115 N.Y.S.2d 857 (N.Y. City Ct. Spec. Sess. 1952); *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 207 N.Y. Supp. 753 (N.Y. Munic. Ct. 1924).

<sup>19</sup> 124 Misc. 81, 207 N.Y. Supp. 753 (N.Y. Munic. Ct. 1924).

<sup>20</sup> 27 Ga. App. 468, 108 S.E. 813 (1921).

nouncements do not meet the test of definiteness. *People v. Gimbel Bros. Inc.*<sup>21</sup> involved a prosecution under New York Penal Law Section 2147 which prohibits selling or offering for sale any property on Sunday. The defendant department store maintained a telephone answering service on Sunday to take orders from customers who were responding to its Sunday newspaper advertisements. In holding that the defendant had not violated the statute the court said that an advertisement does not constitute an offer of sale but is solely an invitation to customers to make an offer to purchase. In instances, however, where the advertiser has some control over his possible liability the advertisement will be treated as an offer.<sup>22</sup>

The instant case is unusual in that, as the dissenting opinion points out, it relies for authority upon cases dealing with contests for prizes and auction sales which are governed by their own particular rules.<sup>23</sup> An advertisement for the sale of merchandise should be scrutinized closely to determine whether the advertiser intended to assume legal liability thereby. The advertisement in the instant case reads in part as follows:

TWO	FOR	ONE
.....For two weeks		
BUY A NEW	'54 FORD	NOW
TRADE EVEN FOR A '55 FORD		

Don't Wait—Buy a 1954 Ford now, when the 1955 models come out we'll trade even for your '54. You pay only sales tax and license fee. Your '55 Ford will be the same model, same body style, accessory group, etc. A sure thing for you—a gamble for us, but we'll take it. Hurry, though, this offer good only for the remainder of September.<sup>24</sup>

When plaintiff appeared at defendant's premises he offered no indication that he was responding to this advertisement. The announcement was not mentioned by either party during the negotiations and the purchase-sale contract contained a merger clause. In holding that the parol evidence rule did not apply the court said that "... the terms of this proviso limit it as the 'entire agreement pertaining to *this purchase*,' which indeed was a complete contract within itself; but this purchase-sale contract, complete within itself, was nevertheless also the acceptance of an offer, creating *another* and a

<sup>21</sup> 202 Misc. 229, 115 N.Y.S.2d 857 (N.Y. City Ct. Spec. Sess. 1952).

<sup>22</sup> See *Ford v. Ford Motor Co.*, 181 App. Div. 28, 168 N.Y. Supp. 176 (3d Dep't 1917) (per curiam) (defendant advertised that if it sold 300,000 cars during a certain year all retail buyers of Fords for that year would be entitled to a stated share of its profits); *Payne v. Lautz Bros. & Co.*, 166 N.Y. Supp. 844 (Buffalo City Ct. 1916), *aff'd*, 168 N.Y. Supp. 369 (Sup. Ct.), *aff'd mem.*, 185 App. Div. 904, 171 N.Y. Supp. 1094 (4th Dep't 1918).

<sup>23</sup> See *Johnson v. Capital City Ford Co.*, 85 So. 2d 75, 87 (La. Ct. App. 1955) (dissenting opinion).

<sup>24</sup> *Johnson v. Capital City Ford Co.*, 85 So. 2d 75, 77 (La. Ct. App. 1955).

separate obligation.”<sup>25</sup> Such an interpretation is placing an obvious strain upon the exception to the parol evidence rule permitting the admission of evidence to prove the existence of a collateral agreement.

The holding of the Court that this advertisement was an offer is open to serious question. Defendant testified he would have offered a much lower trade-in value for plaintiff's car had he known a 1954-55 deal was contemplated. Such accompanying circumstances as this uncertainty as to price and the unusual nature of the announcement, indicate the advertisement was merely an invitation to enter into negotiation for an agreement.

The tenor of the majority opinion indicates an effort to discourage extravagant and misleading advertising. The Court says: “There is entirely too much disregard of law and truth in the business, social, and political world of to-day. . . . It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing.”<sup>26</sup>



CONTRACTS—PHYSICIANS AND SURGEONS.—COMPLAINT ALLEGING BREACH OF CONTRACT TO CURE HELD SUFFICIENT.—Plaintiff-patient sought damages for breach of contract to cure. The complaint alleged defendant-physician agreed to perform a minor operation on plaintiff and to cure him in one or two days, but that defendant breached this agreement by puncturing an abdominal organ which necessitated further medical treatment and a consequent period of convalescence. The trial court dismissed the action as being barred by the malpractice statute of limitation. On appeal the Court of Appeals held that a cause of action in contract was sufficiently stated. *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955).

Although the legal liability of physicians to their patients has generally been restricted to the area of torts,<sup>1</sup> the number and variety of claims against physicians involving a breach of contract are by no means insignificant.<sup>2</sup> The majority of jurisdictions in this country hold that a physician and his patient are free to contract for a particular result and if that result be not attained, the patient may bring

<sup>25</sup> *Id.* at 81.

<sup>26</sup> *Id.* at 82, where the court quotes *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118, 121 (1922).

<sup>1</sup> See, e.g., *Pike v. Honsinger*, 155 N.Y. 201, 49 N.E. 760 (1898); *Patten v. Wiggin*, 51 Me. 594 (1862); *Craig v. Chambers*, 17 Ohio St. 253 (1867); *Graham v. Gautier*, 21 Tex. 111 (1858).

<sup>2</sup> See Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 413, 416. See, e.g., *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62 (1910); *Staley v. Jameson*, 46 Ind. 159 (1874); *Kolb v. Bergelin*, 209 Wis. 547, 245 N.W. 583 (1932).