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Contracts - Offer and Acceptance - Newspaper Advertisement as Offer to Sell

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CONTRACTS—OFFER AND ACCEPTANCE—NEWSPAPER ADVERTISEMENT AS OFFER TO SELL—Defendant store published two newspaper advertisements offering for sale on successive Saturdays limited numbers of fur pieces for one dollar, “first come, first served.” The initial advertisement offered three new fur coats “worth to \$100”; the second, *inter alia*, one black lapin stole “worth \$139.50.” Plaintiff was the first person to appear at the appropriate counter on both days, but defendant each time refused to sell him the

advertised furs, asserting a "house rule" that such offers could be accepted only by women. Plaintiff sued for contract damages. As to the offer of the coats "worth to \$100," the trial court held that the value of the coats was uncertain and disallowed plaintiff's claim. No such defect existed, however, as to the offer of the \$139.50 stole, and judgment was entered against defendant for \$138.50. On defendant's appeal, *held*, affirmed. Since the advertisement was the only evidence of the coat's value in the first offer, the trial court properly disallowed plaintiff's "speculative" claim. With respect to the stole, however, the advertisement contained an offer that was clear, definite and explicit, and left nothing open for negotiation. By being the first person to appear as requested and by tendering the price, plaintiff accepted the second offer and was entitled to performance. Assertion of a restrictive "house rule" after acceptance was ineffective. *Lefkowitz v. Great Minneapolis Surplus Store*, (Minn. 1957) 86 N.W. (2d) 689.

Imposition of contractual liability based upon published advertisements is appearing with increasing frequency, although there is said to be a presumption that such communications are not offers but mere requests that the reader or listener examine the advertised product and submit an offer himself.¹ In order for a newspaper advertisement to escape this presumption, the facts must show that some performance was promised in positive, specific terms for something requested.² Thus where the advertisement contains a promise to pay a reward for information, for apprehension of criminals, or for the return of lost articles, it has often been sustained as a valid offer of a unilateral contract.³ Some advertisements making representations as to conditions other than price have been enforced against the advertiser,⁴ and in a number of cases where the advertiser offered to buy certain described merchandise there was held

¹ *Salisbury v. Credit Service*, 39 Del. 377, 199 A. 674 (1937); 1 CORBIN, CONTRACTS §25 (1950); 1 WILLISTON, CONTRACTS, rev. ed., §27 (1936). There would seem to be more justification for calling a proposal in a circular an offer, since the seller retains some control over determination of the persons to whom the circular is sent, but the authorities are divided. That a circular is an offer, see *J. E. Pinkham Lumber Co. v. C. W. Griffin & Co.*, 212 Ala. 341, 102 S. 689 (1925); *Payne v. Lautz Bros.*, 166 N.Y.S. 844, affd. 168 N.Y.S. 369, affd. 185 App. Div. 904, 171 N.Y.S. 1094 (1916). But see *contra*, *Montgomery Ward & Co. v. Johnson*, 209 Mass. 89, 95 N.E. 290 (1911); *Schenectady Stove Co. v. Holbrook*, 101 N.Y. 45, 4 N.E. 4 (1885). Cf. *Hall v. Kimbark*, (C.C. Mo. 1874) 11 Fed. Cas. 234, No. 5,938.

² 1 WILLISTON, CONTRACTS, rev. ed., §27 (1936).

³ *Williams v. Carwardine*, 4 B. & Ad. 621, 110 Eng. Rep. 590 (1833); 1 CORBIN, CONTRACTS §§25, 64 (1950). Prizes in contests have been treated similarly. 1 WILLISTON, CONTRACTS, rev. ed., §32 (1936).

⁴ *Vigo Agricultural Society v. Brumfiel*, 102 Ind. 146, 1 N.E. 382 (1885) (promise to furnish police protection); *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118 (1922) (warranties as to serviceability of used trucks); *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256 (guarantee to pay £100 to anyone contracting influenza after using smoke ball).

to be a valid offer.⁵ Although recovery was allowed as to the stole in the principal case on the theory that plaintiff had accepted a valid offer of a unilateral contract, the weight of authority is against a finding of valid offers in newspaper advertisements.⁶ In two cases such an advertisement has been upheld as an offer on the ground that the stated terms were sufficiently definite and certain to be binding.⁷ Subjectively, the advertiser in these two cases and the principal case may not have intended to be bound by a contract.⁸ But if the advertisement is sufficiently definite as to description of the merchandise, limitation of quantity,⁹ price, terms, and other conditions, and if it is so framed as to lead the reader reasonably to believe that an offer has been made and no further negotiation is anticipated, there should be a binding obligation. The offers in the principal case were explicit: to sell the described article for \$1.00 to the first person accepting on a given day. Refusal by the court to uphold plaintiff's claim on the fur coats "worth to \$100" cannot properly be read as equivalent to a holding that no valid contract existed. The more speculative evidence of value in the first advertisement may have been sufficient to defeat plaintiff on the damage issue, but the terms of both advertisements were equally specific on the points essential to formation

⁵ These cases have been decided on a theory that a unilateral contract is formed with everyone who sends the requested merchandise. See *R. E. Crummer & Co. v. Nuveen*, (7th Cir. 1945) 147 F. (2d) 3; *Seymour v. Armstrong & Kassebaum*, 62 Kan. 720, 64 P. 612 (1901); *Schmidt v. Marine Milk Condensing Co.*, 197 Ill. App. 279 (1915). See also 1 *CONTRACTS RESTATEMENT* §25, comment *a*, illus. 3 (1932).

⁶ In the following cases advertisements were held not to be offers: *Georgian Co. v. Bloom*, 27 Ga. App. 468, 108 S.E. 813 (1921); *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 207 N.Y.S. 753 (1924); *Craft v. Elder & Johnston Co.*, (Ohio App. 1941) 38 N.E. (2d) 416. Cf. also *People v. Gimbel Bros.*, 202 Misc. 229, 115 N.Y.S. (2d) 857 (1952); *Ehrlich v. Willis Music Co.*, (Ohio App. 1952) 113 N.E. (2d) 252.

⁷ In *Oliver v. Henley*, (Tex. Civ. App. 1929) 21 S.W. (2d) 576, the seller advertised certain cottonseed for sale c.o.d. anywhere in Texas at a price of \$4.00 per sack, and the court held that this offer was complete as to essential terms and was intended to make quick sales without the necessity of any further communication between the parties. In *Johnson v. Capital City Ford Co.*, (La. App. 1955) 85 S. (2d) 75, noted in 8 *ALA. L. REV.* 366 (1956), 31 *TULANE L. REV.* 652 (1957), the advertiser offered to trade a 1955 Ford when the new models came out to anyone purchasing a 1954 Ford within a specified time. This was held sufficiently certain and definite to be a binding offer.

⁸ Often persons who advertise merchandise at low prices have no intention of selling the merchandise to anyone at that price, but intend rather to lure customers into their store and switch the customers' attention to higher-priced merchandise. This practice of "bait-advertising" has been condemned by the Better Business Bureau, and the Federal Trade Commission has issued cease-and-desist orders in several cases involving interstate commerce. Local authorities have little power to stop such practices in the absence of an "anti-bait-advertising" statute. *SIMON, THE LAW FOR ADVERTISING AND MARKETING* 404, 405 (1956). Holding advertisers to the terms of their newspaper offers will combat bait-advertising to some extent.

⁹ The quantity limitation is important because a seller does not have an unlimited capacity to perform. If no limitation is stated, but other conditions are definite, one solution might be to imply a quantity limitation of one and require the advertiser to sell one article at the advertised price before he can escape further contractual liability.

of a valid contract. In cases where the advertisement was held not to be an offer,¹⁰ the facts showed that the proposals were illusory, or were too uncertain and indefinite as to necessary terms to create an enforceable obligation. Absent this element of uncertainty, it would appear that the better view would allow recovery. That courts will do so whenever reasonably possible is indicated by the recognizable judicial attitude deploring this type of advertising.¹¹ Indeed, this distaste is reflected in the principal case by the court's willingness to hold that plaintiff's second attempted acceptance was valid, despite the fact that plaintiff knew from his experience the previous week that he was not within the intended class of offerees. While defendant may have asserted his "house rule" too late to prevent plaintiff's valid acceptance of the first week's offer, it is surprising that the court would ignore plaintiff's actual knowledge of an essential qualification for acceptance of the second offer.¹² It can only be speculated that either this issue was not raised on appeal or, perhaps more probably, the court's determination to bind this type of offeror led it to an adjudication of the case based upon equities rather than strict contract doctrine.

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¹⁰ Note 6 supra.

¹¹ In *Meyer v. Packard Cleveland Motor Co.*, note 4 supra at 338-339, the court said: "There is entirely too much disregard of law and truth in the business, social and political world of today. . . . It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair-dealing."

¹² If the offeree has subjective knowledge that an offer is not intended to apply to him or has been revoked as to him, he should be powerless to accept such offer. See *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876); 1 *CONTRACTS RESTATEMENT* §71(c) (1932). Since the existence of the "house rule" would tend to show that no contract was ever made, its admission would not violate the parol evidence rule. 3 *CORBIN, CONTRACTS* §577 (1950).