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Contracts -- Distinction Between Offer and Preliminary Negotiation

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NOTES AND COMMENTS

Contracts—Distinction Between Offer and Preliminary Negotiation

For a proposal to be turned into a binding contract by an acceptance, it must, as a general rule, be made in contemplation of legal consequences. When made with these intentions, it is a good offer; otherwise it becomes what is commonly called a preliminary negotiation. The difficulty of drawing an exact line between these two is recognized by the authorities everywhere.[1] In deciding if legal consequences were contemplated, the courts seek to determine whether the party making the proposal intended to create a contract upon acceptance of the proposal or intended merely to negotiate for one.[2] Fact situations, from which offer-preliminary negotiations difficulties may arise, include those based on (1) invitations to deal, (2) advertising circulars, (3) estimates, (4) oral agreement on terms to be reduced to writing, and (5) agreements with one or more terms left open. In a recent federal case,[3] the court was confronted with this type of problem.

There, the plaintiff expressed an interest in purchasing coal from the defendant for the 1947-48 burning season. The defendant quoted his coal prices, but refused to sign his name on a memorandum on which plaintiff had written these prices, until the word "quotation" was written across the top. Defendant increased price on second shipment. On plaintiff's refusal to pay the increase the defendant stopped shipments and this suit for breach of contract ensued. In holding the defendant's quotations were not an offer, but rather an invitation to make an offer, the court took note of several factors. Among these was the fact that plaintiff had knowledge of the custom and practice of the industry as to contracts of this nature[4] and the pendency of the wage agreement and

[1] "Frequently negotiations for a contract are begun between parties by general expression of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers or suggesting the terms of a possible future bargain, than making positive offers. . . . Language that at first sight may seem an offer may be found merely preliminary in its character." 1 WILLISTON, CONTRACTS §27 (Rev. ed. 1936).

[2] El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. 494, 127 N. W. 642 (1920); *In re* Kaufmann's Estate, 137 Pa. Super. 88, 8 A. 2d 472 (1939); Windsor Mfg. Co. v. Makransky & Sons, 322 Pa. 466, 186 Atl. 84 (1936).

[3] Cohen v. Johnson, 91 F. Supp. 231 (M. D. Pa. 1950).

[4] The court found ". . . that the general custom in the anthracite industry was not to enter into contracts for the sale of coal, wholesale, over any long period of time. . . . When price quotations are made it is not considered in the industry as an offer or sale, but as an invitation to the trade to submit orders—offers to buy—which may or may not be accepted." Cohen v. Johnson, 91 F. Supp. 231, 233 (M. D. Pa. 1950).

consequent price increase.[5]

As a general rule, a price quotation, whether in the form of an advertising circular or an invitation to deal, is not an offer. The famous case of *Nebraska Seed Company v. Harsh*[6] clearly sustains this point. However, under some circumstances it may be an offer, particularly is this true where, in answer to a definite request for an offer, a price quotation is sent that accurately describes the property and states definite contractual terms.[7] North Carolina agrees with the above rules,[8] with the possible exception of one case,[9] which is explainable on its facts. In that case, the defendant sent the following telegram: "Can offer you extra force at $65 per month. Will want you at once to ditch D. & N. road and R. & G. Answer quick. Job will last all the year." Plaintiff was discharged eleven days after starting to work. When sued for breach of contract, the defendant contended that the telegram did not constitute an offer, but was a preliminary negotiation and that if a contract existed it should be construed subject to the rules of the company.[10] The jury found for the plaintiff and on appeal, while affirming, the court explained the terminology of the telegram by saying—"The argument . . . that by using the potential 'can offer,' Elmore (defendant's agent) did not make a positive offer of employment, but only intended to open negotiations, is entirely destroyed by the undisputed evidence that the plaintiff accepted the offer by wire, reported for duty and was placed in charge of the work and prosecuted it for eleven days until discharged." While the result in this case is sound, the court's interpretation of the telegram seems wrong. It would appear that the telegram from the defendant's agent was not an offer. The telegram merely informed plaintiff that a certain job for a definite length of time and at

[5] "For sometime prior and subsequent to July 1, 1947, the anthracite coal operators and miners were negotiating a wage contract. It was generally known in the industry that the adjustment would be upward and the wage increase would be immediately absorbed and reflected in the price per ton of anthracite coal." Cohen v. Johnson, 91 F. Supp. 231, 233 (M. D. Pa. 1950).

[6] 98 Neb. 89, 152 N. W. 310 (1915) (quotation of seed price not an offer).

[7] Maedler Steel Products Co. v. Zanello, 109 Ore. 562, 220 Pac. 155 (1923); 1 WILLISTON, CONTRACTS §27 (Rev. ed. 1936).

[8] Clark Manufacturing Co. v. Western Union Telegraph Co., 152 N. C. 157, 67 S. E. 329 (1910) ("Will you accept receivership. . . ?" Held: inquiry as to whether he would take job or not); Cherokee Tanning Co. v. Western Union Telegraph Co., 143 N. C. 376, 55 S. E. 777 (1906) (A to B: "Kindly advise . . . by wire . . . if you can use about 1500 creosote barrels . . . at 95 cents each. . . ." Held: no contract as there was no offer, stating an . . . offer must be distinct as such and not merely an invitation to enter into negotiations upon certain basis . . .); Walser v. Western Union Telegraph Co., 114 N. C. 440, 19 S. E. 366 (1894) ("Will you accept eight one-half all two-fifty drills if we can get offer. . . ?" Held: trade inquiry).

[9] King v. Seaboard Air Line R. R., 140 N. C. 433, 53 S. E. 37 (1906).

[10] The company offered proof that it was their policy not to hire any person for a long period of time, but rather to hire on a month-to-month basis. Plaintiff knew of this policy, but contended and the jury agreed, that this was a special contract not subject to the general rules.

a stated pay was open with the defendant, but on the surface seemed to lack that expression of willingness on defendant's part necessary to make an offer. Plaintiff by appearing for work made the offer, and defendant by putting him to work, accepted the offer creating a contract containing the terms set forth in the telegram, they being the only ones mentioned. By its holding in this case the court sustained its previous rulings that it is the manifested intent that controls, rather than the language used.

Similarly, when a party receives an estimate, he, by the majority rule, cannot by "accepting" the estimate make a binding contract. The word "estimate" is usually construed to mean "more or less"[11] and unless the party makes his estimate in the form of a bid for the work, he has not made an offer which can be accepted. No North Carolina authority on this point has been discovered. However it would seem that our court, in view of its position when confronted with analogous situations,[12] would follow the majority view.

The problem of distinguishing between an offer and a preliminary negotiation presents itself in a somewhat different manner when the person making the proposal *suggests*, before a binding transaction is entered into, that the parol agreement be reduced to writing later. The courts are then called upon to determine if this suggestion makes an otherwise good offer a contract upon acceptance, or makes the complete transaction a preliminary negotiation. When faced with this question, most courts have held that where the material terms[13] of the proposal have been definitely understood and accepted, the subsequent failure to embody such terms in a written contract does not prevent the agreement from being binding on the parties.[14] This is particularly true where a draft is viewed by the parties as merely a convenient memorial or record of their previous contract. However, if a draft be viewed as the final act of their negotiations, there is no contract until its execution. The courts in endeavoring to find which attitude is present in any particular case, should consider numerous factors among which are (1) whether the contract is of that class which is usually found in writing, (2) whether it is of such nature as to need a formal writing for its full expression, (3) whether it has few or many details, (4) whether the amount is large or small, (5) whether it is a common or unusual contract and (6) whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.

[11] Robbins v. Hill, 259 S. W. 1112 (Tex. Civ. App. 1924).
[12] See note 8 *supra*.
[13] It is beyond the scope of this note to discuss what terms are or are not material to constitute a good offer.
[14] Atlantic Terra Cotta Co. v. Chesapeake Terra Cotta Co., 96 Conn. 88, 113 Atl. 156 (1921); Priest v. Oehler, 328 Mo. 590, 41 S. W. 2d 783 (1931).

The North Carolina court has taken these factors into consideration in several cases.[15]

On the other hand, if a party in the course of his negotiations has omitted or has failed to get an agreement on all the material terms of his proposal, then a contractual relationship cannot come into being.[16] As a general rule, where some material term is left open to be decided upon later, there is no contract.[17] Yet, the existence of an election, to be exercised within prescribed limits by one of the parties, in regard to a term of the offer does not vitiate it for uncertainty.[18] The North Carolina court in agreeing with this rule in *Elks v. North State Insurance Co.*[19] said, "The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not."

From these cases and those of other jurisdictions, it appears that in order for the courts to distinguish between an offer and a preliminary negotiation they must be able to answer these questions: first, has the party making the proposal sufficiently named all the material terms needed in the contract; second, has he put his proposal in a form showing no mental hesitation or reservation on his part. In seeking to answer these questions and thereby ultimately arrive at the true intentions of the parties, it is fundamental that the court put itself, as nearly as possible, in the same position the parties were in at the time of their negotiations. To do this will require a complete and thorough understanding of (1) the subject matter of the contract, (2) the contemplated acts of the parties, (3) the relationship between the parties, (4) the general custom and practice of the trade and (5) the circumstances under which the parties were then acting.

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[15] Wilkin v. Vass Cotton Mills, 176 N. C. 72, 97 S. E. 151 (1918) (contract to buy cotton goods held good, the court finding that the negotiations of the parties indicated they expected to be bound before reducing terms to writing); Billings v. Wilby, 175 N. C. 571, 96 S. E. 50 (1918) (contract to put in sewer line held good without being put in formal draft, this being the usual contract made for this type work); Gooding v. Moore, 150 N. C. 195, 63 S. E. 895 (1909) (negotiations showed that parties intended contract should arise immediately, the court stating, "When the parties to an oral contract contemplate a subsequent reduction of it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding upon them, though the intent to formally express the agreement in writing was never effectuated."); Teal v. Templeton, 149 N. C. 32, 62 S. E. 737 (1908) (oral rental contract held good without writing, it being the accepted rule that a lease for three years or less need not be in writing).

[16] United States v. P. J. Carlin Const. Co., 224 Fed. 859 (2d Cir. 1915); Rushing v. Manhattan Life Ins. Co. of N. Y., 224 Fed. 74 (10th Cir. 1915).

[17] Boatright v. Steinite Radio Corp., 46 F. 2d 385 (10th Cir. 1931); A. O. Anderson and Co. v. Texas Co., 279 Fed. 76 (2d Cir. 1922).

[18] McNeely v. Carter, 23 N. C. 141 (1840) (contract to sell cotton under which seller was to set the price by selection of a date and one of three towns, the price at that place to be the selling price).

[19] 159 N. C. 619, 75 S. E. 808 (1912).