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Collins, J.

Bridge Co. v. *Cull* (1); but in that case the word was "parochial" only, whereas here the words are "parochial, county, or other." Moreover, the clause at the end of s. 4, sub-s. 5, is a relieving clause, and it is no answer to the plaintiff's contention to say that it does not relieve from this tax, because this tax is not imposed by the Act; so that on either view of s. 4, sub-s. 5, the rent-charge is not liable to land tax, because that tax is not imposed upon it. It is immaterial to consider whether a newly-created rent-charge, not coming within this statute, would or would not be liable to land tax, because I am clearly of opinion that in this case the rent-charge is not liable.

Judgment for the plaintiff.

Solicitor for plaintiff: *E. W. I. Peterson.*

Solicitors for defendant: *Kingsford, Dorman & Co., for Philpott & Callaway, Cranbrook.*

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Dec. 6, 7.

[IN THE COURT OF APPEAL.]

CARLILL *v.* CARBOLIC SMOKE BALL COMPANY.

Contract—Offer by Advertisement—Performance of Condition in Advertisement—Notification of Acceptance of Offer—Wager—Insurance—8 & 9 *Vict.* c. 109—14 *Geo.* 3, c. 48, s. 2.

The defendants, the proprietors of a medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they offered to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover.

APPEAL from a decision of Hawkins, J. (2)

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the *Pall Mall Gazette* of November 13, 1891, and in other

(1) 1 E. & E. 213. (2) [1892] 2 Q. B. 484.

newspapers, the following advertisement: "100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000*l.* is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10*s.*, post free. The ball can be refilled at a cost of 5*s.* Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100*l.* The defendants appealed.

Finlay, Q.C., and *T. Terrell*, for the defendants. The facts shew that there was no binding contract between the parties. The case is not like *Williams* v. *Carwardine* (1), where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza—an event over which she had no control. The words express an intention, but do not amount to a promise: *Week* v. *Tibold.* (2) The present case is similar to *Harris* v. *Nickerson.* (3) The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Anyone who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be

(1) 4 B. & Ad. 621. (2) 1 Roll. Abr. 6 (M.).
(3) Law Rep. 8 Q. B. 286.

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impossible to disprove it. *Guthing* v. *Lynn* (1) supports the view that the terms are too vague to make a contract; there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: *Gerhard* v. *Bates* (2). The present case differs from *Denton* v. *Great Northern Ry. Co.* (3), for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (4) The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109. Or, if not, it is bad under 14 Geo. 3, c. 48, s. 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

Dickens, Q.C., and *W. B. Allen*, for the plaintiff. [THE COURT intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public—as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in *Brogden* v. *Metropolitan Ry. Co.* (4), shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended

(1) 2 B. & Ad. 232.
(2) 2 E. & B. 476.
(3) 5 E. & B. 860.
(4) 2 App. Cas. 666.

that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavouring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in *Spencer* v. *Harding*. (1) *Williams* v. *Carwardine* (2) shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (3) It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In *Gerhard* v. *Bates* (4), Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was

(1) Law Rep. 5 C. P. 561.
(2) 4 B. & Ad. 621.
(3) 2 App. Cas. 666.
(4) 2 E. & B. 476.

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no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

Finlay, Q.C., in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay 100*l.* to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (1). The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In *Denton* v. *Great Northern Ry. Co.* (2) the fact was ascertained by a public, not a secret act. The respondent relies on *Williams* v. *Carwardine* (3), and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honour, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: *Lampleigh* v. *Braithwait* (4); and here there was no request. Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some

(1) 2 App. Cas. 692.
(2) 5 E. & B. 86.
(3) 4 B. & Ad. 621.
(4) 1 Sm. L. C. 9th ed. pp. 153, 157, 159.

limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

LINDLEY, L.J. [The Lord Justice stated the facts, and proceeded:—] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay 100*l.* in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable—"100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "1000*l.* is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in

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aid by the advertiser as proof of his sincerity in the matter—that is, the sincerity of his promise to pay this 100*l.* in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay 100*l.* to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams* v. *Carwardine* (1), which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden* v. *Metropolitan Ry. Co.* (2)—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he

(1) 4 B. & Ad. 621. (2) 2 App. Cas. 666, 691.

does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise—that the vagueness of the language shews that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the 100*l.* is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to

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any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100*l.* will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention—that is, the consideration. It has been argued that this is nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing

to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of *Gerhard* v. *Bates* (1), which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L.J. I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public.

(1) 2 E. & B. 476.

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The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made—that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had pre-

viously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "100*l.* will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on for ever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5*s.* I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be

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sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the 100*l.* should, if the conditions were fulfilled, be paid? The advertisement says that 1000*l.* is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100*l.* would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise 100*l.* to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world—that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition.

That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in *Spencer* v. *Harding*. (1) "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating

(1) Law Rep. 5 C. P. 561, 563.

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acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in *Harris's Case* (1), and the very instructive judgment of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (2), in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a

(1) Law Rep. 7 Ch. 587. (2) 2 App. Cas. 666, 691.

nudum pactum—that there was no consideration for the promise —that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors* v. *Davies* (1) and Serjeant Manning's note to *Fisher* v. *Pyne* (2), which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's Nisi Prius, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp* v. *Bryant* (3), is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with *Gerhard* v. *Bates*. (4) In *Gerhard* v. *Bates* (4), which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the

(1) 12 M. & W. 758.
(2) 1 M. & G. 265.
(3) 3 Scott, 238, 250.
(4) 2 E. & B. 476.

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promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public—a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100*l.*, it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you 5*l.*," and he uses it, there is ample consideration for the promise.

A. L. SMITH, L.J. The first point in this case is, whether the defendants' advertisement which appeared in the *Pall Mall Gazette* was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or as I might put it in the words of Lord Campbell in *Denton* v. *Great Northern Ry. Co.* (1), whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "100*l.* reward will be paid

(1) 5 E. & B. 860.

by the Carbolic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold. The ball will last a family several months, and can be refilled at a cost of 5*s*." If I may paraphrase it, it means this: "If you"—that is one of the public as yet not ascertained, but who, as Lindley and Bowen, L.JJ., have pointed out, will be ascertained by the performing the condition—"will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you 100*l*. if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? It comes to this: "In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100*l*." It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000*l*. is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the 100*l*. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. The defendants have contended that it was a promise in honour or an agreement or a contract in honour—whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and nudum pactum; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honour is unless it is one on which an action cannot be brought because it is nudum pactum, and about nudum pactum I will say a word in a moment.

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In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of *Williams* v. *Carwardine* (1), and before that, down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a persona designata and able to sue, when he performs the conditions mentioned in the advertisement.

Lastly, it was said that there was no consideration, and that

(1) 4 B. & Ad. 621.

it was nudum pactum. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

Appeal dismissed.

Solicitors: *J. Banks Pittman; Field & Roscoe.*

H. C. J.

THE QUEEN *v.* JUSTICES OF MISKIN HIGHER.

1892
Nov. 19.

Licensing Acts — Licence — Renewal — Objection on ground of Disorderly Character of House — Evidence of Convictions of Previous Tenants — Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

A notice of intention to oppose the renewal of a licence for the sale of intoxicating liquors stated as the ground of objection that the house in respect of which the licence was sought was of a disorderly character. It was admitted that the applicant was himself a man of good character; but, in support of the objection, evidence was tendered and admitted of three convictions against previous tenants for offences against the Licensing Acts. The justices refused the application for the renewal on the sole ground of the convictions of the previous tenants:—

Held, that it was competent to shew that the house was of a disorderly character without making any charge against the character of the applicant or his management of the house, and that the evidence was properly admitted.

RULE NISI for a writ of mandamus to the justices of Miskin Higher, in the county of Glamorgan, to hear and determine the application of Thomas Pitman for the renewal of a licence.

It appeared from the affidavit of the applicant that at a special sessions held in April, 1892, the applicant obtained a transfer to himself of the licence of the Angel Inn, Aberdare. The general annual licensing meeting was appointed to be held on August 23, 1892; and, on August 13, the superintendent of police served on