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# Contracts--Acceptance by Telephone--Place of Contract

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recover \$300 of this amount from the true owner of the property under the ad valorem tax, for an adjusted total of \$900. It would seem that, because Murray is unfortunate enough to be using government property, he must pay \$300 more tax than if he had been using the property of some private individual. Could the state also impose on Murray a tax like that in *City of Detroit* or *Township of Muskegon*, that is, a tax "for the privilege of using exempt property"? Or would it be limited to either the tax collected under the ad valorem statute or the tax collected under the privilege of using exempt property statute?

It is believed that the holding of the principal case will have more far reaching implications than was contemplated. Is it not now possible for any state in the union to simply impose the traditional ad valorem tax on private parties using government property and indirectly collect the same amount as though the tax were levied "on" the government property, even though the same private parties are not subjected to any form of a privilege tax? It is submitted, if the result in this case is the desirable one, that such result should be formulated into policy by Congress so that the positions, in this area, of the federal government, the states, and the private party doing business with the federal government will have some degree of certainty.

J. L. R.

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CONTRACTS—ACCEPTANCE BY TELEPHONE—PLACE OF CONTRACT.—

An action of account was brought by the offeror in a contract for the reinsurance of certain risks. The outcome is dependent on the enforceability of the contract, and due to differences in the statute of frauds in Pennsylvania and New York (the New York statute contains the provision making contracts not to be performed within one year unenforceable unless in writing; the Pennsylvania statute omits this provision), the enforceability is in turn dependent on the place of the contract. *P*, with offices in Philadelphia, traveled to New York to communicate an offer to *D*. *P* returned to Philadelphia, where he was contacted by telephone by *D* accepting the offer. *Held*, reversing the lower court, that acceptance by telephone of an offer takes place where the words are spoken. *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Pa. 1958).

That a controversy does exist among legal writers with regard to the place of contract when acceptance is by telephone is readily discernible from the following sources:

RESTATEMENT (SECOND), CONFLICT OF LAWS § 326 (1958), states "if the acceptance is sent by any other means, (other than by an agent) the place of contracting is the state from which the acceptance is sent." Comment *c* of the same Restatement is headed acceptance by telephone, and pinpoints the above quotation to the fact situation in question: "When an acceptance is to be given by telephone, the place of contracting is where the acceptor speaks his acceptance."

RESTATEMENT, CONTRACTS § 65 (1932) states that "acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other." There are no comments or examples under this section. When this Restatement is read in the light of WILLISTON, CONTRACTS § 82 (rev. ed. 1938), it becomes clear that the Restatement favors the view that the contract would take place where heard. Professor Williston takes the position that a "contract by telephone presents quite as great an analogy to a contract made where the parties are in each other's presence." He applies this theory by continuing: "It has not been suggested in the latter case that the offeror takes the risk of hearing an acceptance addressed to him. If then it is essential that the offeror shall hear what is said to him. . . the time and place of the formation is not when and where the offeree speaks, but when and where the offeror hears. . . ."

The *Restatement of the Conflict of Laws* view is followed in 1 CORBIN, CONTRACTS § 79 (1950), Professor Corbin being unable to find a single case in support of the *Restatement of Contracts*.

The view of the *Restatement of Contracts* and Professor Williston is unsupported by case law as of this writing, and the list of jurisdictions deciding the question is rapidly growing in length. Inevitably the decisions have favored the view that the contract is made at the speaker's location. *United States v. Bushwick Mills*, 165 F.2d 198 (2d Cir. 1947); *Joseph v. Krull Wholesale Drug Co.*, 147 F. Supp. 250 (E.D. Pa. 1956); *Cousins v. Harrison*, 249 Ala. 153, 39 So. 2d 396 (1947); *Ward Mfg. Co. v. Miley*, 131 Cal. App. 2d 603, 281 P.2d 343 (1955); *Pearson v. Electric Service Co.*, 116 Kan. 300, 201

P.2d 643 (1949); *Traders Oil Mill Co. v. Arnold Bros. Gin Co.*, 225 S.W.2d 1011 (Tex. Civ. App. 1949).

Many of these decisions have admitted the view of Professor Williston to be sound theoretically. It would seem that a telephoned acceptance is a closer relative of the oral addressing acceptance than it is of the letter or telegram. However the courts have seemed to feel that uniformity for acceptances by telephone, telegraph, and mail is highly desirable, and outweighs the theoretical argument.

Although there is no case directly in point in West Virginia, opinions of the court in telegram and mail cases contain dicta that indicate strongly that West Virginia would follow the majority view, and this presumption is strengthened by the cases involving acceptance by telephone.

In *Deegans Coal Co. v. Hedrick*, 91 W. Va. 377, 113 S.E. 262 (1922), the court, with reference to a contract accepted by telephone, stated that "it could have been and doubtless was accepted over the telephone and became binding on Deegan the moment of acceptance." It may be stretching the opinion to areas not anticipated by the court, but it seems of some importance that the court said "moment of acceptance", not moment when acceptance was heard, thus indicating that the place of the contract would be the acceptor's end of the telephone line.

The above opinion stretching may seem more justified when *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S.E. 969 (1898), is read. This case concerned an acceptance by mail, and the court held (without seeming to limit its words to mail cases), that "the place of acceptance, not delivery, decides where the contract is made, as a general rule." And in *Three States Coal Co. v. Superior Elkhorn By-Products Coal Co.*, 110 W. Va. 455, 158 S.E. 661 (1931), the court seemed to give support to the majority: "Generally a contract is considered as formed at the place where the offer is accepted, or where the last act necessary to complete it is formed."

Additional grounds for the belief that West Virginia would follow the majority view are contained in *State v. Davis*, 62 W. Va. 500, 60 S.E. 584 (1907). *D*, who was engaged in selling alcoholic beverages, received a telephone call from *A* placing an order, *A* stating that she would pay when delivery was made. In this case the court was attempting to pinpoint the place of the actual sale, not only the executory contract of sale. *A* made the offer, acceptance was by *D*,

and the court held the place of the executed sales contract was where the acceptance was spoken.

Aside from these indications there is the persuasive argument of the desirability of uniformity in contract law. The great majority of states have adopted the view that telephone acceptances should be governed by the same rules as telegrams and letters, and it is submitted that the West Virginia courts would feel as did the court in the principal case, which stated:

"We believe that in this day of multistate commercial transactions it is particularly desirable that the determination of the place of contracting be the same regardless of the state in which suit takes place. The absence of uniformity makes the rights and liabilities of parties to a contract dependent upon the choice of the state in which suit is instituted and thus encourages forum-shopping."

T. J. W.

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CRIMINAL LAW—DECEPTIVE ADVERTISING—PRINTER'S INK MODEL STATUTE.—The New York Penal Law § 421 prohibits untrue, deceptive or misleading advertising. Defendant placed several signs in his store windows advertising the he was selling toys at a twenty per cent to forty per cent discount. It was established from the evidence that his prices were the same as or in excess of the prevailing prices in the community. *Held*, affirming defendant's conviction, a retailer cannot establish his own prices at levels higher than the prices customarily charged in the community and then mark his prices down to a point equal to or in excess of the standard prices, thereby creating the impression through advertising that the merchandise could be purchased at his store for less than it could be purchased elsewhere. *People v. Minijac Corp.*, 175 N.Y.S.2d 16, 151 N.E.2d 180 (1958).

In recent years advertising has become the dominant influence in guiding the choices of the American public. The reliance of the public on the truth thereof has given advertisers an instrumentality for abuse, of which they have taken undue advantage. Established remedies of deceit, breach of warranty, rescission, and unfair competition cannot be extended to cope with offenses which they were never intended to cover. See Handler, *False and Misleading Advertising*, 39 YALE L.J. 22 (1929).