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# Contracts--Place Where Made When Acceptance is by Telephone

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# Recent Cases

CONTRACTS—PLACE WHERE MADE WHEN ACCEPTANCE IS BY TELEPHONE  
—Plaintiff insurance brokers in Pennsylvania offered by telephone to place with defendant insurance company in New York contracts for reinsurance of certain risks undertaken by another insurance company. Defendant accepted the oral offer by telephone. When plaintiff alleged a breach of the contract in an action to recover certain commissions, defendant contended that the statute of frauds of the State of New York, from where the acceptance was allegedly spoken, barred any action. From a judgment of nonsuit, plaintiff appeals. *Held*: reversed. Where one accepts an offer by telephone, the contract is formed at the place where the acceptor speaks. Record remanded to determine the state where the acceptor spoke. *Linn v. Employers Reinsurance Corporation*, 139 A.2d 638, 392 Pa. 58 (1958).

This relatively simple holding presents a most provoking problem in the law of contracts, for a logical consequence of the modern objective theory as to the formation of bilateral contracts would seem to require that the manifestation of acceptance be communicated to the offeror.<sup>1</sup> Authorities are willing to concede that the posting of a letter of acceptance and the delivery of a telegram of acceptance to the telegraph company are sufficient acts to form a contract despite the lack of communication, but there is some doubt in regard to speaking an acceptance over the telephone. Professor Williston and the Restatement of Contracts are the leading proponents of the rule that a telephone acceptance should be the same as where two parties speak face to face. In other words, the offeror must hear the acceptance before a contract is formed.<sup>2</sup>

In order to evaluate the rule of the *Linn* case, which treats the acceptance of effective when spoken, it is necessary to view the holding as involving a twofold problem of place and time. The accepted conflict of laws rule is that "the law of the place of contracting determines whether a promise is void, or voidable for fraud, duress, illegality or mistake or other legal or equitable defense."<sup>3</sup> The place of contracting is in turn dependent upon the place of acceptance since acceptance is the act which completes the formation of a contract.

<sup>1</sup> However Williston points out in § 70 that communication of the acceptance in a bilateral contract may be dispensed with by the offeror. Williston, *Contracts* § 70 (1929).

<sup>2</sup> Restatement, *Contracts* § 65 (1932). 1 Williston, *Contracts* § 82 (1929).

<sup>3</sup> Restatement, *Conflict of Laws* § 347 (1934). See also *Scudder v. Union National Bank*, 91 U.S. (1 Otto) 406 (1875); *Dacosta v. Hatch*, 4 Zab. 319 (N.J., 1854).

Since the place of acceptance determines the law which controls contract formation, it becomes important to consider the justification, if any, for treating the acceptance as occurring when the words of acceptance are spoken. The usual reasoning in support of this position is drawn from an analogy to the time of contracting applicable in the mailing of a letter.<sup>4</sup> To understand the significance of this analogy it is necessary to realize the conditions under which the historic *Adams v. Lindsell*<sup>5</sup> case was decided which established the principle that the posting of a letter of acceptance formed a contract. As Professor Grismore points out, the subjective theory of mutual assent was prevalent at the time of the decision, and it was doubtful at that time whether an offer could create a continuing power of acceptance in the offeree. The courts realized, however, that unless a compromise was made there could be no consummation of contracts by correspondence. Hence, the courts were willing to hold "that the proposal would be operative until the offeree had an opportunity to manifest his acceptance by an unequivocal overt act, but no longer."<sup>6</sup> The posting of a letter of acceptance was considered such an act, and furthermore, it was not deemed essential that the overt act be made to the other party.<sup>7</sup>

Despite the fact that the rule concerning posting is not necessary under the objective theory, and indeed conflicts with the requirements of communication under it, courts have followed the *Adams* case and show no substantial tendency to change the principle of that case. Furthermore, the reason given in modern cases for upholding the *Adams* case, which centers around the authority granted to the offeree to communicate his acceptance by mail,<sup>8</sup> affords an excellent basis for extending its application to means of communication other than mail. As formulated by the Restatement of Contracts:

An acceptance is authorized to be sent by the means used by the offeror or customary in similar transactions at the time when and the place where the offer is received, unless the terms of the offer or surrounding circumstances known to the offeree otherwise indicate.<sup>9</sup>

In light of this development, it is not difficult to see why the principle has spread to contracts made by the telegraph<sup>10</sup> and telephone,<sup>11</sup>

<sup>4</sup> *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855 (1903); *Trinity Universal Ins. Co. v. Mills*, 293 Ky. 463, 169 S.W.2d 311 (1943).

<sup>5</sup> 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

<sup>6</sup> Grismore, *Contracts* § 48 at 70 (1947).

<sup>7</sup> *Id.* § 48.

<sup>8</sup> 1 Williston, *Contracts* § 83 (1929).

<sup>9</sup> Restatement, *Contracts* § 66 (1932).

<sup>10</sup> *Cowan v. O'Connor*, [1888] 2 Q.B. 640; Restatement, *Contracts* § 64 (1932).

<sup>11</sup> *Bank of Yolo v. Sperry Flour Co.*, supra note 4; *Trinity Universal Ins. Co. v. Mills*, supra note 4.

as well as by mail. To find fault with these extensions of the principle is to find fault with the principle itself, and even Williston admits that the law is so well settled on the rule of the *Adams* case as to make discussion "academic."<sup>12</sup> It is to be admitted that the passing of a postal regulation<sup>13</sup> allowing the sender to reclaim a letter before it is delivered has caused a few courts to hold receipt of a letter of acceptance is necessary to bind a contract,<sup>14</sup> but this regulation has nothing to do with the holding in the *Adams* case which was based on the manifestation of an overt act of acceptance and not on the control of the letter. It is also to be admitted that England has held an acceptance on a telex machine is effective to create a contract when received on the basis of its being instantaneous.<sup>15</sup> While no court in the United States has had occasion to decide on this particular mode of communication, if the need should arise, the court would be disregarding all need for uniformity in commercial transactions by following the English rule. These relatively few decisions should not be the basis for overruling our progress toward a uniform system.

The court in the principle case has expressed the need for uniformity in all modes of communication. The importance of the need can easily be seen when one considers the confusion which could arise where two companies in the same state accept separate offers from out of state, one using the telephone and the other the telex as modes of communication. The former company would be governed by the laws of its own state, whereas the latter company would be subjected to the state laws of the offeror under the English rule. A situation such as this creates confusion in the application of the conflict of laws rule which provides that validity of a contract is a matter to be governed by the state where the contract is made. Obviously, both acceptances originated in the same place—just as if a letter of acceptance had been posted.

The doctrine of the *Linn* case does not prevent the parties from controlling the time of acceptance to suit their own needs. The offeror has the privilege of requiring the receipt of an acceptance for the contract to be binding.<sup>16</sup> Surely it is no great burden on the offeror to make this stipulation a part of the offer and thus remove all doubts.<sup>17</sup> One making an offer by telephone could easily state that it is his practice to make all contracts subject to his own state laws.

<sup>12</sup> 1 Williston, Contracts § 81 (1929).

<sup>13</sup> U.S. Post Office Regulation § 552-53 (1913).

<sup>14</sup> *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955); *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949).

<sup>15</sup> *Entores Ltd. v. Miles Far East Corp.* [1955] 2 All E.R. 493 (A.C.).

<sup>16</sup> *Household Fire Ins. Co. v. Grant*, [1879] 4 Ex. D. 216, 223.

<sup>17</sup> Restatement, Conflict of Laws § 326 (1934).

One should by all means realize that not all aspects of contracts made by telephone are governed by the law of the place where the acceptance is spoken. The courts have consistently held that if the question concerns the performance of the contract, then the laws of the place of performance are applicable,<sup>18</sup> which is in accord with the conflict of laws rule.

The writer believes the principle case stands for the correct rule to be applied as to contract formation. It is significant that only a month after the *Linn* case was decided, the same question arose in California, and the identical principle was once again affirmed.<sup>19</sup> Kentucky has also gone along with the majority in accepting this principle.<sup>20</sup> Since the *Adams* case is such an established authority, it is only reasonable for all other modes of communication to be treated consistently with this historic precedent if we are to achieve a uniform system.

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**AUTOMOBILES—FAMILY PURPOSE DOCTRINE—CONSENT OF OWNER—**A twenty-year old son asked his mother for permission to use the family-owned car which was registered in her name. She refused permission because she might need the car in order to visit her doctor. The son took the car anyway and a friend went with him. After eating dinner at the friend's house, they were "riding around" later in the afternoon when an accident occurred. There was testimony by persons living in the community that the son was frequently seen driving the car. The trial court ruled as a matter of law that defendant mother was liable under the Family Purpose Doctrine for the negligence of her son even though he was operating the family car without permission. She appealed, claiming that consent to the use of the car is an essential element of the Family Purpose Doctrine. *Held*: affirmed. The court reasoned that where a family automobile is customarily available for use by a child for his normal pursuits on reasonably frequent oc-

<sup>18</sup> *Cardon v. Hampton*, 21 Ala. App. 438, 109 So. 176 (1926); *Bank of Yolo v. Sperry Flour Co.*, supra note 4; see Restatement, Conflict of Laws § 358 (1934) which provides that:

The duty for the performance of which a party to contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:

- a. The manner of performance;
- b. The time and locality of performance;
- c. The person or persons by whom or to whom performance shall be rendered;
- d. The sufficiency of performance;
- e. Excuse for non-performance.

<sup>19</sup> *Wilson v. Scannavino*, 324 Pac.2d 350 (Cal. 1958).

<sup>20</sup> *Trinity Universal Ins. Co. v. Mills*, supra note 4.