



Volume 38 | Issue 1

Article 13

December 1931

Contracts--Offers and Acceptance--Counter Offers

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Recommended Citation

Kingsley R. Smith, *Contracts--Offers and Acceptance--Counter Offers*, 38 W. Va. L. Rev. (1931).

Available at: <https://researchrepository.wvu.edu/wvlr/vol38/iss1/13>

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CONTRACTS — OFFER AND ACCEPTANCE — COUNTER OFFERS. — Plaintiff was a West Virginia corporation engaged in buying and selling coal, with its place of business in Mercer County, West Virginia. Defendant, also a West Virginia corporation, was a coal operator having its mines in Kentucky. Plaintiff by letter to defendant in Kentucky inquired whether defendant would be interested in an order for 40,000 tons of coal (or, in the alternative, 15,000 to 20,000 tons (“or a similar tonnage . . . considered in the nature of a back log”) at \$1.30 net ton mines to be delivered “in approximately equal monthly instalments” from date of the letter until November 15th, about a five-months’ period. Plaintiff requested reply by wire. Defendant construed the letter as an offer and telegraphed at once that it would “accept order one car daily” over the stated period. The total amount of coal to have been shipped under this arrangement would have been 6,540 tons. Plaintiff thereupon replied, also by telegram, “Accept your offer one car daily mailing order.” The coal was not delivered in accordance with the contract and plaintiff sued in Mercer County, West Virginia, for breach of contract, recovering \$1,420.83 on a jury verdict. On writ of error, the Supreme Court of Appeals reversed the judgment, dismissing the case on the theory that the defendant’s plea in abatement attacking the jurisdiction of the court should have been sustained. *Three States Coal Co. v. Superior Elkhorn By-Products Coal Co.*¹

At common law the action for breach of contract was transitory and the defendant could be sued wherever he could be found.² However, by statute, West Virginia has so limited the transitory nature of this action that under such facts as these it could be maintained in this state only if instituted in the county “wherein the cause of action or any part thereof arose.”³ Consequently, the initial problem facing the court in this case was that of determining whether the cause of action “or any part thereof” arose in Mercer County.

The cases are not in accord as to where the cause of action accruing from the breach of a contract arises. Some hold that it arises exclusively at the place where the contract was made,⁴ others

¹ 158 S. E. 661 (1931).

² 2 ANDREWS, AMERICAN LAW (1908) p. 1439.

³ W. VA. REV. CODE (1931) c. 56, art. 1, § 2. “An action . . . may be brought in any county wherein the cause of action or any part thereof, arose, although none of the defendants reside therein, in the following instances; (a) When the defendant . . . is a corporation.”

⁴ *Morgan v. Eaton*, 59 Fla. 562, 52 So. 305 (1910); *Peters v. E. O. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749 (1917) (cause of action held to

maintain that the place of the *breach* is where such cause of action accrues.⁵ Still other decisions adopt the theory that the "cause of action" is divisible, consisting of (1) the contract and (2) the breach thereof.⁶ West Virginia has long followed the latter rule,⁷ under which a material part of the cause of action arises both where the contract was made and where it was breached. Since both parties admit that this contract was breached in Kentucky, the only way in which plaintiff could invoke the jurisdiction of the Mercer County court was to show that the contract was made in that county..

A contract is made where the offer is accepted.⁸ An offer contemplating telegraphic acceptance is turned into a contract when and *where* the offeree's telegram is delivered to a telegraph office for transmission,⁹ but an acceptance which varies the terms of the original offer rejects that proposal and sets up a counter

accrue in county in which letter was written accepting offer to sell); *State v. Reid*, 177 Wis. 612, 188 N. W. 67 (1922).

⁵ *Penn. L. M. Fire Ins. Co. v. Meyer*, 197 U. S. 407, 25 S. Ct. 483 (1905) (policy issued in Pa. on N. Y. property; property burned and upon refusal to pay insurance it was held the cause of action arose in N. Y., where contract was breached, even though made in Pa.); *N. P. Sloan Co. v. Barham*, 138 Ark. 350, 211 S. W. 381 (1919); *Moherstadt v. Harry Newman, Inc., Motor Cars*, 204 Mo. App. 619, 217 S. W. 591 (1920); *Lentz v. Evans & Howard Fire Brick Co.*, 11 S. W. (2d) 1070 (Tex. Civ. App. 1929) (suit for breach of contract for sale of clay; *held*, the cause of action arose at destination where buyer rejected shipment there, precluding circuit court of county where shipment was made from asserting jurisdiction).

⁶ *Graves v. McCollum & Lewis*, 193 S. W. 217 (Tex. Civ. App. 1917); *Houston Packing Cotton Co. v. Cuero Cotton Oil & Mfg. Co.*, 220 S. W. 394 (Tex. Civ. App. 1920) (suit for breach of contract for sale of oil held properly brought in county where offer was accepted, under statute permitting suit in any county in which the cause of action or part thereof arose); *Silvers Box Corporation v. Stone & Co.*, 248 S. W. 1104 (Tex. Civ. App. 1923); *State Bank of Beckville v. Mailander*, 277 S. W. 232 (Tex. Civ. App. 1926); *Arizona Superior Mining Co. v. Anderson*, 262 Pac. 489 (1928).

⁷ *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 281, 16 S. E. 580 (1892); *Clarke v. Ohio River R. Co.*, 39 W. Va. 737 (1894); *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969 (1898) (application for insurance from Va. accepted in W. Va. and policy issued thereon in this state; *held*, W. Va. contract); *Hudson v. Iguano Land & Mining Co.*, 71 W. Va. 409 (1912); *Danser v. Dorr*, 72 W. Va. 433 (1913); *Findley v. Coal & Coke Ry. Co.*, 76 W. Va. 751 (1915). In *Jones v. Main Island Creek Coal Co.*, 84 W. Va. 248, 99 S. E. 462 (1919), Judge Ritz used the following language: "A cause of action may . . . be said to consist of an obligation and the breach . . . of that obligation . . . the statute uses this language in order to confer the jurisdiction in any county in which *either* of these elements arises."

⁸ *Hogue-Kellogg Co. v. Webster Canning Co.*, 22 Fed. (2d) 384 (C. C. A. 4th 1927); *Galloway v. Standard Fire Ins. Co.*, *supra*, n. 7; *Nettles v. Gulf Fertilizer Co.*, 78 Fla. 490, 83 So. 298 (1919); *Bundy v. Commercial Credit Co.*, 200 N. C. 511, 157 E. S. 860 (1931) (order given in Michigan for acceptance in Alabama became Alabama contract upon acceptance there); 2 WHARTON, CONFLICT OF LAWS (3d ed. 1905) § 422(a); 1 WILLISTON, CONTRACTS (1920) § 97.

⁹ *Burton v. U. S.*, 202 U. S. 344, 26 S. Ct. 688 (1906); *Watson v. Coast*, 35 W. Va. 463, 470, 14 S. E. 249 (1891) (option to be accepted "by wire or

offer which in turn requires acceptance by the original offeror before contractual relations arise.¹⁰ In the principal case the Supreme Court of Appeals held that the defendant had made a sufficient acceptance. This conclusion was reached on the theory that plaintiff had set no minimum tonnage and by construing the words "or a similar tonnage" to include a total which was 8,550 tons less than the smallest amount mentioned in the letter. Under this view the contract was held to have been made in Kentucky and consequently no part of the cause of action arose in West Virginia.

It is submitted that plaintiff's letter quite clearly set both a maximum and a minimum tonnage. This letter offered to purchase 40,000 tons, then stated that if defendant was not inclined to handle that order, "perhaps you would consider the acceptance of 15,000 to 20,000 tons . . . or a similar tonnage." The minimum is expressly set and defendant's proposal to send less than half that minimum (a total of 6,450 tons) can hardly be construed as an unconditional acceptance.

The Supreme Court of the United States has held in a leading case that an "acceptance" of 1,200 tons of iron rails (the offer having been for from 2,000 to 5,000 tons) was such a variation from the terms of the offer as to constitute a rejection of that proposal and the substitution of a counter offer.¹¹ If an "acceptance" specifying 800 tons less than the minimum stated in an offer to sell iron rails converts the offeree's reply into a rejection and new offer, it would quite naturally seem to follow that an "acceptance" of 8,500 tons less than the minimum named in an offer to buy coal would have similar legal effect. By this interpretation the contract was made in Mercer County upon plaintiff's acceptance of defendant's counter offer there, a material part of the cause of action arose at that *situs*, and the West Virginia court quite properly assumed jurisdiction of the suit.

It is therefore submitted that the reasoning of the trial court was sound and that the plea of abatement to the jurisdiction of the court should have been denied.

—KINGSLEY R. SMITH.

otherwise" held turned into a contract upon acceptance by telegram); *Barnum Iron Works v. Construction Co.*, 86 W. Va. 173, 102 S. E. 860 (1920); *C. W. Craig & Co. v. Jones & Co.*, 200 Ky. 113, 252 S. W. 574 (1923).

¹⁰ *Weaver v. Burr*, 31 W. Va. 744, 8 S. E. 743 (1888); *Barnum Iron Works v. Construction Co.*, *supra* n. 9; *Crews v. Sullivan*, 133 Va. 478, 113 S. E. 865, 867 (1922); *Bowers Co. v. Kanawha Valley Products Co.*, 100 W. Va. 284, 130 S. E. 284 (1925); *J. Neils Lumber Co. v. Farmers Lumber Co.*, 293 Pac. 288 (1920); *Carrollton Acceptance Co. v. Ruggles Motor Truck Co.*, 253 Mich. 1, 234 N. W. 134 (1931); *Morris F. Fox v. Lisman*, 237 N. W. 267 (1931); 1 WILLISTON, CONTRACTS (1920) §§ 72, 73, 77.

¹¹ *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 7 S. Ct. 168 (1886).