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Civil Procedure—Venue—Contract Fixing Venue in Advance of Litigation

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CIVIL PROCEDURE—VENUE—CONTRACT FIXING VENUE IN ADVANCE OF LITIGATION—Plaintiff contracted to rent an electrical sign to defendant's assignor for use in White Sulphur Springs, Meagher County. The contract provided that "if the owner shall institute any suit . . . venue of any such suit or action may at the option of the owner, be laid in the County of Cascade, State of Montana." Action was commenced in the district court for Cascade County to recover for the installation, maintenance and rental of the sign. Defendant's motion for a change of venue to Meagher County was denied. On appeal to the Supreme Court of Montana, *held,* affirmed. A contract provision expressly fixing the place of trial for possible litigation on the contract will be enforced. *Electrical Products Consolidated v. Bodell,* 316 P.2d 788 (Mont. 1957) (Mr. Justice Adair dissenting).

The court based its decision on two grounds: first, that section 93-2910, Revised Codes of Montana, 1947, allows parties to an action to agree to a change of venue "by stipulation or consent in open court," hence there is no reason to prohibit fixing venue beforehand by contract; second, that section 49-105 provides that "any person may waive the advantage of a law intended solely for his benefit," permitting defendant here to waive in advance objections to venue.[1]

Four other states have statutes, almost identical to Montana's, allowing a change of venue by stipulation of the parties in open court.[2] The instant case is in accord with decisions construing the Washington and Wisconsin statutes.[3] The Supreme Court of Arizona reached an opposite result in a case arising out of a controversy between a Mexican bank and its American agent.[4] However, that holding was primarily a consideration of jurisdiction rather than venue. Utah has not construed its statute on the subject.

California, Idaho and North Carolina statutes, like Montana's, contain the basic common law rule requiring venue to be set initially in the county of defendant's residence and allowing a change whenever a fair trial cannot be had. In addition, these three states allow a change of venue for the convenience of witnesses.[5] It is perhaps arguable that a specification of venue by contract could be justified under this latter provision, but none of these three states has construed its statute as allowing such an advance arrangement.[6] There is one basic variance between the statutes of these states and those of Montana; neither California, Idaho nor North Carolina allows a

[1]The much-litigated question of whether venue "may" or "must" be set at the place where the contract was to be performed was specifically excluded from the court's consideration in deciding the case, so this controversy will not be considered here.

[2]ARIZ. CODE ANN. § 21-103 (1939); UTAH CODE ANN. § 78-13-9 (1953); WASH. REM. REV. STAT. § 215 (1931); WIS. STAT. § 261.04 (3) (1953).

[3]State *ex rel.* Schwabacher Bros. & Co. v. Superior Court, 61 Wash. 681, 112 Pac. 927 (1911); State *ex rel.* Kuhn v. Luchsinger, 231 Wis. 533, 286 N.W. 72 (1939).

[4]Otero v. Banco De Sonora, 26 Ariz. 356, 225 Pac. 1112 (1924).

[5]CAL. CODE OF CIV. PROC. §§ 397, 398 (Deering 1937); IDAHO CODE §§ 5-406, 407 (1942); N.C. CODE ANN. § 470 (1939).

[6]General Motors Acceptance Corp. v. Codiga, 62 Cal. App. 117, 216 Pac. 383 (1923); McCarty v. Herrick, 41 Idaho 529, 240 Pac. 192 (1925); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921).

change of venue by stipulation of the parties—the critical factor in the principal case. For that reason, it appears that the dissenting Justice's reliance on cases from those jurisdictions was not well placed.

Notwithstanding the fact that the court's construction is in accordance with the few cases in point it would appear that it can be legitimately questioned. First of all, the decision seems contrary to the letter of the statute. Application of the familiar canon of statutory construction, *expressio unius est exclusio alterius,* or in other words, that the express mention of some things implies the exclusion of all others, would lead to a different result. Section 93-2904[7] enumerates two bases for determining venue in the usual contract action—the residence of the defendant and the place where the contract is to be performed. It can be argued that the specific affirmative provisions of this statute impliedly exclude the fixing of venue by any other means. The court, however, indicated in the instant case that this provision was not sufficiently explicit to support an argument that the bases mentioned are exclusive. In arriving at this conclusion, however, the above-mentioned canon was not expressly considered.

Section 93-2910[8] allows the parties to an action to stipulate to a change of venue. The language appears to contemplate an agreement *after* the action has been commenced. The court, however, interpreted this statute as allowing a specification of venue by contract in advance of any litigation. This construction also seems to violate the *expressio unius* canon, as the provision for changing venue by stipulation in court is express and specific. Consequently there seems to be no logical basis for implying an additional method for changing venue.

Despite the fact that the present decision appears to contravene the letter of the statute, it might still be a desirable result if it serves some important public policy. The court is very meager in its discussion of the policy question involved, seemingly content to say that what can be done after action is commenced should also be permitted to be done in advance by contract. There are at least two factors, neither of which was mentioned by the court, which may be of some importance in arriving at the policy decision.

The first of these is the probable inequality of knowledge of the contracting parties. There is an obvious opportunity for over-reaching by a litigation-wise large company, for instance, dealing with an individual who is often not really concerned with the possibility of a lawsuit

[7]REVISED CODES OF MONTANA, 1947, § 93-2904: "In all other cases this action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found, or, if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the state, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contract may be tried in the county in which the contract was to be performed, and actions for tort in the county where the tort was committed; subject, however, to the power of the court to change the place of trial as provided in this code."

[8]REVISED CODES OF MONTANA, 1947, § 93-2910: "All the parties to an action, by stipulation or by consent in open court, entered in the minutes, may agree that the place of trial be changed to any county in the state. Thereupon the court must order the change as agreed upon."

when he enters the contract. He probably is unaware of the importance of his venue rights and consequently can see no harm in such a condition. When litigation does arise he quite unexpectedly finds himself at a serious disadvantage as against an adversary who has chosen his forum well. For example, a buyer might have to travel hundreds of miles to defend himself in the court of the vendor's choosing. The court was aware of the problem of overreaching and pointed out that it was not shown to exist in this case, but it is rather the possibility of overreaching which concerns us, since it is that which lends weight to the proposition that it is not necessarily in the public interest to permit contracting away venue rights.

The second consideration is that of possible economic coercion. A buyer of small means is often in no position to haggle over details, and if sellers as a class should require waiver of venue rights as a standard contract provision, the freedom of contract which the majority position envisions would be illusory. It may be the better part of public policy to protect such persons against their own economic weakness. At least the contrary rule adopted here is not unassailable.

Thus there is a sharp contrast between agreeing to a particular place of trial *after* the litigation has commenced, when the effect of the agreement is apparent and the parties are on equal terms, and setting venue by contract in advance. The statute permitting changing of venue by stipulation in court may have been intended by the legislature to mean just that and no more.

JAMES SORTE

LANDLORD AND TENANT — WASTE — IMPLIED COVENANT RESTRICTING USE OF PREMISES—Plaintiff leased premises to Safeway Stores, the lease allowing the lessee to make alterations necessary for "its use" of the building, and also permitting assignment and subletting. A sublessee, the Roosevelt-Osborne Motor Co., was using the premises as a garage, and was about to cut a fourteen-foot doorway in the front of the building. Plaintiff sought a declaratory judgment to the effect that such use was contrary to the terms of the lease. The district court dismissed the complaint. On appeal to the Montana Supreme Court, *held,* affirmed. The alterations were permitted by the terms of the lease, and no implied covenant restricting the use of the leased premises will be raised. *Turman v. Safeway Stores, Inc.,* 317 P.2d 302 (Mont. 1957). (Justices Bottomly and Adair dissenting).

In the instant case the court decided two issues—whether the alteration would constitute waste and whether there was an implied covenant to use the premises only for food store purposes. Although somewhat interrelated in the present case, these issues are separable and will be so treated here.

Ordinarily, as the court itself concedes, an alteration such as that contemplated by the garage company (a fourteen-foot doorway cut in the front of the building) would constitute waste—a permanent, physical injury to the freehold. Therefore the question confronting the court was whether this alteration by the sublessee was authorized by the alteration clause.