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Civil Procedure—Venue—Actions on Contract

G. Richard Dzivi

CIVIL PROCEDURE — VENUE — ACTIONS ON CONTRACT — Defendant entered into a written lease agreement with the plaintiff, whereby the plaintiff agreed to drill an oil well for the defendant. All of the acts required of plaintiff were to be performed in Fallon County. The contract did not provide where payment was to be made. The defendant is a Montana corporation with its principal office in Billings, Yellowstone County. Action for breach of contract was commenced in the District Court for Fallon County. Defendant's motion for change of place of trial to Yellowstone County was denied. On appeal to the Supreme Court of Montana, *held,* affirmed. Either the county of defendant's residence or the county where the contract was to be performed is the proper county for the trial of the action; if the plaintiff chooses either of these counties, defendant may not have it removed. *Love v. Mon-O-Co. Oil Corp.,* 319 P.2d 1056 (Mont. 1958) (Justice Adair specially concurring).

After enumerating the proper county in which certain actions should be tried, the *Revised Codes of Montana,* 1947, section 93-2904 provides:

> In all other cases the action shall be tried in the county in which defendants, or any of them, may reside at the commencement of the action, * * * Actions upon contracts *may* be tried in the county in which the contract was to be performed, and actions for torts 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. (Emphasis added.)

In *State ex rel. Interstate Lumber Co. v. District Court*[1] the contract in question was made in Lewis and Clark County and was to be performed there. The defendant was a resident of Silver Bow County and had obtained an order directing transfer of the cause from Lewis and Clark County to Silver Bow County. In annulling the order, the court said the permissive auxiliary verb *may* should be interpreted to mean "must" so that the sentence becomes harmonious and consistent with the rest of the section and thus expressive of a definite intention of the legislature in enacting it. No valid reason was given for declaring that the sentence would be inconsistent with the rest of the section if *may* meant what is said.

The case of *Hardenburgh v. Hardenburgh*[2] involved a written contract for the sale of a certain outdoor advertising agency located in Missoula County. Action was brought in Richland County and the defendant moved to transfer the cause to Missoula County upon the grounds: (1) that the defendant resided in that county at the time of commencement of the action, and (2) that the contract was to be performed in Missoula County. A divided court granted the motion for change of venue. Mr. Justice Adair in his opinion expressly disapproved the holding in the *Interstate* case and said, "[A]ctions on contract may also be tried in the county in which the contract was to be performed provided that the contract sued upon indicates, either in terms or by express implication

[1]54 Mont. 602, 172 Pac. 1030 (1918).
[2]115 Mont. 469, 146 P.2d 151 (1944).

therefrom, a particular county in which it was to be performed other than the county in which the defendant may reside at the commencement of the action.'"[3] This opinion was concurred in by Mr. Justice Anderson, and Mr. Justice Morris concurred in the result without specifying his reasons. Mr. Chief Justice Johnson and Mr. Justice Erickson dissented. In separate opinions they expressed the belief that the *Interstate* case correctly interpreted the statute.

The county in which that action was commenced was neither the county of the defendant's residence nor the county in which the contract was to be performed. The defendant was therefore entitled upon demand to have the cause removed to a proper county. Since Missoula County was both the county in which the contract was to be performed and the county of the defendant's residence, it was the proper county in which to try the action under either interpretation of the performance exception. So any position on the *Interstate* case was unnecessary to the decision of the *Hardenburgh* case.

This area of the law was further confused by the case of *Johnson v. Ogle*.[4] In that case, action was commenced in Lake County where the plaintiff alleged the contract was to be performed. The defendant moved for a change of venue to Stillwater County on the grounds that he was a resident of that county. The court affirmed an order denying the change of venue. In the majority opinion Mr. Justice Morris stated that his special concurring opinion in the *Hardenburgh* case was not to be construed as overruling the *Interstate* case in any particular whatever. In separate specially concurring opinions, Mr. Justice Adiar and Mr. Justice Angstman referred to this attempt to clarify the holding in the *Hardenburgh* case as gratuitous and *obiter dictum*.[5]

In the case of *Frazer v. Clark*,[6] the majority discusses the question of whether the contract performance exception embraced only express contracts which on their face indicate the place of performance. The opinion then states, "We expressly disapprove of the above construction attempted to be given in *State ex rel. Interstate Lumber Co. v. District Court, supra,* to the provisions of the second or concluding sentence of . . R.C.M. 1947, § 93-2904.'"[7] Exactly what construction the court is disapproving it not clear. The court in the *Interstate* case did not attempt to construe the exception as applicable only to express contracts. This phase of the problem was not considered in *Interstate*. The court in the *Frazer* case may have intended to overrule the *Interstate* holding that *may* in the statute means "must". But the *may-must* controversy was not discussed in the *Fraser* decision, and it seems unlikely that the court would dismiss such a controversy so summarily.

[3] *Id.* at 488, 146 P.2d at 158.
[4] 117 Mont. 419, 159 P.2d 337 (1945).
[5] Mr. Justice Adair's attack on the majority opinion in the Johnson case is based on his belief that any position on the may-must issue was unnecessary to the result. It is interesting to note that this is apparently the same reason why Mr. Justice Morris did not concur with the reasoning of the majority in the Hardenburgh case.
[6] 128 Mont. 160, 273 P.2d 105 (1954).
[7] *Id.* at 187, 273 P.2d at 119.

Although much confusion has resulted from the inconsistent decisions,[8] it appears that prior to the instant decision, the *Interstate* case remained the leading case in construction of section 93-2904. In the principal case the majority in reaching its decision said that the word *may* in the statute should not be interpreted to mean "must," as was done in the *Interstate* case. However, it should be noted that the statement that *may* should mean "may" in the performance exception was perhaps not necessary to the instant decision. The action was brought in Fallon County, which the court determined was the place of performance of the contract. So Fallon County would have been the only proper county for trial of the action under the earlier *Interstate* holding that *may* in the statute means "must". If *may* were given only permissive force Fallon County would still be one of the proper counties, and denial of the motion for a change of venue would be proper.[9]

The defendant's principal contention in moving for a change of venue in the instant case was that the contracts alleged in plaintiff's complaint failed to provide any place of performance of the defendant's part of the contract. The burden of establishing the right to change of venue is upon the movant.[10] The plaintiff, is his affidavit filed in opposition to the motion for change of place of trial, stated that it was agreed that payments to be made by the defendant to him were to be made in Fallon County. This affidavit was uncontroverted. When such an affidavit remains wholly uncontroverted, the statement of facts set forth therein must be taken as true.[11] The place of performance by both parties to the contract must then be taken as Fallon County.[12]

The principal question before the court was whether the place of performance must appear in the express terms of the contract. The majority opinion stated that the performance exception applies only to such actions as are based upon contracts which plainly show, either (a) by their express terms, or (b) by necessary implication therefrom, that the contracting parties mutually agreed at the time of contracting upon a particular county other than that of defendant's residence, wherein they intended that their contract was to be performed. It might be argued that this was the only holding necessary to the decision of the instant case.

However, even if the statement in the principal case that *may* in the statute means "may" is considered mere *dictum*, it is still clear that the court intended to settle the controversy. Further, the reaffirmation of this position in the case of *Seifert v. Gehle*,[13] which was decided after the principal case, should make this principal controling; *i.e.*, that *may* in the statute is permissive. The *Seifert* case involved a venue dispute in a tort action. The alleged tort was committed in Lincoln County

[8]For a more complete discussion of this confused area of Montana law see Notes in 10 MONT. L. REV. 83 (1949), and 16 MONT. L. REV. 68 (1955).
[9]Under Shields v. Shields, 115 Mont. 146, 139 P.2d 528 (1943), it is error to grant a change of venue from one proper county to another.
[10]Courtney v. Gordon, 74 Mont. 408, 241 Pac. 233 (1925).
[11]Fraser v. Clark, 128 Mont. 160, 273 P.2d 105 (1954).
[12]Therefore it was not necessary for the court to decide whether the place of performance of the defendant's part of the contract is controlling in resolving this venue question.
[13]323 P.2d 269 (Mont. 1958).

and the defendant was a resident of Flathead County. Action was commenced in Lake County. The Montana Supreme Court reversed an order denying a change of venue to Flathead County. In so holding the court said that the word *may* as used in section 93-2904 applies to tort actions as well as to contract actions, and the statute means that either the county of defendant's residence or the county where the tort was committed is a proper county for trial of the action.

The instant decision, in light of the *Seifert* case, has settled two issues regarding the proper venue in actions on contract or tort. First, *may* in the contract performance exception in R.C.M. 1947, § 93-2904, means exactly what it says. *Either* the county of defendant's residence or the county where the contract was to be performed is the proper county for trial of the action. Second, in contract actions the place of performance need not appear in the express terms of the contract, but it may be shown by necessary implication therefrom and the performance exception may be invoked. The certainty so long desired in this area has at last been established.

G. RICHARD DZIVI

EQUITY — APPEALS FROM EQUITY DECREES — SCOPE OF APPELLATE REVIEW — Plaintiff wife sought a decree of separate maintenance on grounds of mental and physical cruelty inflicted by her husband. The evidence was in sharp conflict on most points. The plaintiff's case was based almost entirely on her own testimony, practically all of which was uncorroborated. The district court decree allowed separate maintenance. On appeal to the Montana Supreme Court, *held,* affirmed. Where the evidence in an equity case is in conflict the Supreme Court inclines toward sustaining the trial judge's findings because his personal observation of the witnesses allows him to better evaluate their credibility. And where there is substantial credible evidence in favor of the trial court's finding for the plaintiff, that finding will be sustained even though some of plaintiff's evidence be discarded as incredible. *Reynolds v. Reynolds,* 123 Mont. 303, 317 P.2d 856 (1957) (Justices Adair and Bottomly dissenting).[1]

Section 93-216, *Revised Codes of Montana,* 1947, provides that in equity appeals and in matters and proceedings of an equitable nature "the supreme court *shall* review all questions of fact arising upon the evidence presented in the record. . . and determine the same, as well as questions of law." (Emphasis supplied.)[2] This is not unlike the English equity procedure which had developed by the middle of the nineteenth century. In England such a complete review of facts and law in equity was entirely appropriate since the court of first resort neither saw nor questioned witnesses but made its decision on the basis of written evidence.

[1]Plaintiff's case, since believed, satisfied the requirements for separate maintenance, consequently this question will not be considered here. However, the facts are interesting and highly controversial.
[2]Laws of Montana 1903, Second Extraordinary Session, ch. 1.