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had occasion to give that meaning to the statutes. Admittedly, considered in the abstract, such filing is a form of public assumption; but such an interpretation of the statutes would violate their language which clearly indicates that they refer to an already existing and completed marriage. One advancing this contention must also ignore all the arguments already made in this comment: the language strongly negates such an interpretation, which would facilitate an easy method of evasion of Chapter 208, Laws of Montana 1947, and all the Montana cases to date indicate that the court assumed that they had stated the full scope of what will be deemed public assumption under the marriage code. This argument is not an acceptable basis for supporting the growing practice of marriage by contract.

Even if it be thought that the arguments advanced herein against the marriage by contract are not conclusive, the most that can be said for the validity of such a marriage is that it rests on such doubtful grounds that no responsible lawyer should advise a client to resort to it. It would be well indeed if arrangements could be made for clarification of the question possibly in the form of a declaratory judgment or by definitive legislative action.

Robert J. Webb.

THE PLACE OF TRIAL OF CONTRACT AND TORT ACTIONS UNDER THE MONTANA VENUE STATUTES

The case of Hardenburg v. Hardenburg decided by the Supreme Court of Montana has created some doubt as to the status of the law in Montana in regard to the "proper" place for the trial of actions upon contracts and actions for torts. Mr. Chief Justice Johnson in his dissenting opinion in the case stated:

"... the majority dispose of the present controversy without expressly reversing the law although they badly unsettle it. While three members concur in the disposal of the case the form of one member's concurrence ... does not fully indicate in what respects he agrees with the extended treatise signed by the other two members constituting the majority."

¹(1944) 115 Mont. 469, 146 P.(2d) 151.
²The word "proper" is used here in the same sense as the word is used in §§9097 and 9098 R.C.M. 1935. See note 12 infra.
³Supra note (1) P. 496.
Revised Codes of Montana 1935, Sections 9093 to 9095, inclusive, require that actions for the recovery or partition of or injury to real property, or of the determination of any right therein or for the foreclosure of a lien or mortgage on real property must be brought in the county in which the property or some part thereof is situated; that actions for the recovery of a penalty or forfeiture imposed by the statute and actions against public officers must be brought in the county where the cause of action arose; that actions against a county must be brought in that county. Section 9696 provides:

"In all other cases, the 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 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 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."

As Mr. Chief Justice Johnson and Mr. Justice Adair pointed out in their opinions in the Hardenburg case, the territorial legislature in 1871 altered the right of the defendant to be sued in the county of his residence by providing that actions brought under the provisions of Section 9096 might also be tried "where the plaintiff resides and the defendants or any of them may be found" and "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."

The leading case involving the interpretation of the latter provision is the case of the State ex rel. Interstate Lumber Co.

*R.C.M. 1935, §9093.
*R.C.M. 1935, §9094.
*R.C.M. 1935, §9095.
*Italicized provisions added by way of amendment, Laws of Montana 1871, §25, p. 31.
*Supra note (1).
*Supra note (7).
*Supra note (7).
The action was for the price of goods sold and delivered. Plaintiff, seller, commenced the action against the defendant, buyer, in Lewis and Clark County where the goods had been sold and delivered. The defendant moved for a change of place of trial to Silver Bow County, the county of his residence. The Supreme Court by writ of supervisory control annulled the order of the lower court directing a transfer of the cause of action to Silver Bow County and in a unanimous decision written by Mr. Chief Justice Brantly, after referring to the general provision in the first sentence of Section 9096, said:

"... the last sentence, however, excepts out of the application of this general provision actions upon contracts and actions for torts, and requires the place of trial in these cases to be determined by considerations wholly apart from the residence and whereabouts of defendant."

"... To determine, then, whether an action in either of these two classes has been commenced in the proper county, the only question the court may consider and determine is where, in the one case, the contract was to be performed, or, in the other where the tort was committed."

"... The term "contract" as used in the statute, not being limited in meaning, either by the context or by any qualifying word, must be accepted in its broadest signification and as including every kind of contract whether express or implied."

The court in reaching its decision reasoned that unless the permissive auxiliary "may" as used in the second sentence of Section 9096 were given the force of "must," expressive of obligation and necessity, the provision contained in that sentence would become meaningless when construed in conjunction with Section 9097. The court evidently assumed that if the provi-
sion of the second sentence of Section 9096 was permissive in character, the county where the contract was to be performed or where the tort was committed would not be a proper county for the place of trial under the provisions of Section 9097, and the cause of action would be subject to a motion by defendant for a change of place of trial to the proper county, which would place the action back under the operation of the general provision in the first sentence of Section 9096 which was mandatory in character. Interpreted in this manner, a party commencing an action possessed no greater right than that already possessed under Section 9097, for under that code provision the party had the right to commence a contract or tort action in any county in the state subject to defendant’s right to have the same removed to the proper county. Hence, in order to give the provision force and thereby carry out the legislative intent, the court held that the auxiliary “may” should have the force of “must.” The court having taken this first step faced two mandatory provisions in the same statute concerning the same two classes of cases and found it necessary to remove actions upon contracts and actions for torts entirely out of the operation of the provisions found in the first sentence in order to make the two sentences harmonious and import an intelligent meaning to the statute.

The court admitted that its decisions up to this time had not been harmonious and referred to two prior decisions as having impliedly adopted the same construction of the contract and tort provision of Section 9096 by refusing to recognize the residence of the defendant as a material consideration. The court specifically overruled three prior decisions insofar as they conflicted with its holding and stated that in deciding these cases the court had followed California decisions which were not applicable since the comparable California code section did not contain the contract and tort provision found in Section 9096.

The interpretation of the contract and tort provision of Section 9096 set forth in the Interstate Lumber Co. case was fol-

fidavit of merits, and demands in writing, that the trial be had in the proper county.”

"Oels v. Helena and Livingston S. and R. Co. (1891) 10 Mont. 524, 25 P. 1000; State ex rel. Coburn v. District Court (1910) 41 Mont. 84, 108 P. 144.

lowed by a long line of decisions both in the contract field and in the tort field up to the time of the Hardenburg case. Although Mr. Justice Adair, in his opinion in the Hardenburg case, cited the cases of McKinney v. Mires and Feldman v. Security State Bank as holding that the defendant's residence regulated the venue in actions upon contracts, the court in the McKinney case distinguished its holding and stated that if plaintiff's suit was upon the alleged contract the proper county for trial would be where the contract was to be performed. However, plaintiff's suit was to declare and enforce a trust as to partnership property, compel an accounting as to joint profits and expenditures and to have injunctive relief, and proof of the contract was but incidental to the establishment of the trust. Therefore, the place of trial was governed by the general provision contained in the first sentence of Section 9096. In the Feldman case the court stated that the proper county for trial was where the contract was to be performed and upheld defendant's right to a change of place of trial to that county, which county, by coincidence, was also the county of defendant's residence.

It should be noted that the right of defendant, set out in Section 9097 and subdivision (1) of Section 9098, to a change of place of trial to the proper county, is based on the contention §9098 as far as it is material to this discussion provides:

1. When the county designated in the complaint is not the proper county.
2. When there is reason to believe that an impartial trial cannot be had therein.
3. When the convenience of witnesses and the ends of justice would be promoted by the change.
that the plaintiff has chosen the wrong county for the commence-
ment of his action, contrary to the provisions of Sections 9093
to 9096, inclusive.25 The motion of defendant on this ground
must be made when he makes his general appearance26 or his
motion comes too late.27 The burden is upon the party moving
for a change of place of trial to disclose the facts that entitle
him to the change.28 Upon compliance with the statutes and a
proper showing that the action was commenced in the wrong
county defendant is entitled to a change to the proper county as
a matter of right.29 This right of the defendant cannot be de-
feated, at the time his motion is made, by a counter-motion,
made by the plaintiff, for the court to retain the action upon
the ground of convenience of witnesses, or that a fair and impartial
trial cannot be had in the county to which the defendant seeks
to have the cause changed.30 A motion upon the latter grounds,
set forth in subdivision (2) and (3) of Section 9098, can only be
made after the defendant has answered and the issues are
formed, the granting of the motion being within the discretion
of the trial court.31

The Hardenburg case32 was an action for the breach of a
written contract of sale. The plaintiffs and the defendant had
been engaged in an outdoor advertising business in and around
the city of Missoula, and all were residents of that city at the
time they entered into the contract. The plaintiffs agreed to
convey their interest in the business to the defendant and to
instruct a Missoula bank to deliver a bill of sale of plaintiffs’
share, together with other papers, to the defendant, the bank
having possession of the bill of sale under an escrow agreement.
The defendant promised to pay to the plaintiffs $100.00 per
month so long as they or either of them should live and a rea-
sone attorney’s fee in case of suit. The plaintiffs commenced

25McKinney v. Mires (1933) 95 Mont. 191, 26 P.(2d) 169.
26§9097 R.C.M. 1935, Supra note 12.
27Dawson v. Dawson (1932) 92 Mont. 46, 10 P.(2d) 381; McKinney v.
Mires (1933) 95 Mont. 191, 26 P.(2d) 169.
28Courtney v. Gordon (1925) 74 Mont. 408, 411 P. 233.
29Feldman v. Security State Bank (1922) 62 Mont. 330, 206 P. 425; Malo
v. Greene (1943) 114 Mont. 481, 137 P.(2d) 670.
30Wallace v. Owsley (1891) 11 Mont. 219, 27 P. 790; State ex rel Stephens
v. District Court (1911) 43 Mont. 571, 118 P. 208, Ann. Cas.
1912 C, 343; State ex rel. Interstate Lumber Co. v. District Court
(1918) 54 Mont. 602, 172 P. 1030; Malo v. Greene (1943) 114 Mont.
481, 137 P.(2d) 670.
31Dawson v. Dawson (1932) 92 Mont. 46, 10 P.(2d) 381; McKinney v.
Mires (1933) 95 Mont. 191, 26 P.(2d) 169; Archer v. Archer (1933)
106 Mont. 116, 75 P.(2d) 783; Malo v. Greene (1943) 114 Mont. 481,
137 P.(2d) 670.
32Supra note (1).
the action in Richland County and in the complaint alleged, "that at all times material to this cause of action, the plaintiffs have been and now are both residing at Sidney, Richland County, Montana," and that certain installments were delinquent. Process was served upon the defendant in Missoula County. At the time of filing a general demurrer, defendant moved for a change of place of trial to Missoula County upon the grounds that he was a resident of Missoula County at the time of commencement of the action and that Missoula County was the county in which the contract was to be performed. The plaintiffs contended the contract was to be performed in Richland County and this contention was the only point in dispute. The trial court denied the motion of the defendant for a change of place of trial. This order was reversed on appeal to the Supreme Court.

Although three members of the court considered Missoula County as the place for performance of the contract, this was not considered as controlling in the opinion written by Mr. Justice Adair, concurred in by Mr. Justice Anderson.

That opinion stated that the general rule governing venue in civil actions is that the action shall be tried in the county in which the defendant resides at the commencement of the action; that this general rule is set forth in the first sentence of Section 9096 and applies to all actions upon contracts and for torts, but such provisions are not exclusive, for a tort action may also be tried in the county in which the tort was committed and actions upon contracts may also be tried in the county in which the contract was to be performed, provided the contract sued upon indicates either in terms or by express implication 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; that this particular county in which the contract was to be performed must be fixed and certain at the time of contracting; that the defendant was within the general

[Note: Footnote reference is included but not transcribed.]

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rule since the contract did not indicate a particular county in which it was to be performed other than the county in which the defendant resided at the commencement of the action; that the last sentence of Section 9096 was an exception to the general rule set forth in the first sentence of that section and the burden was upon the plaintiff to show facts relied upon to bring himself within this exception.

The opinion disapproved of a line of decisions of the court holding that when a contract for the payment of a money obligation is silent as to the place of performance the presumption is that payment is to be made at the creditor's residence or place of business, and upon failure of the debtor to seek out his creditor for the purpose of making payment, the latter may sue in the county of his residence or place of business, that county being the place for performance of the contract. The reason for this disapproval was that the presumption was inconsistent with and the antithesis of the general rule set forth in Section 9096 in that the residence or place of business of the plaintiff creditor controlled the place of trial, whereas the general rule made the defendant's residence controlling. However, the opinion made an exception in the case of over-the-counter sale of goods, the seller's place of business being the place for payment and performance and the county of the seller's place of business was the county for place of trial in case of suit on the debt.

The opinion disapproved of the holding in the Interstate Lumber Co. case construing the auxiliary "may" to mean "must" and characterized that interpretation as judicial legislation prohibited by Article IV of the Montana Constitution.

Mr. Justice Morris in a separate opinion stated that it was evident that the parties at the time of contracting intended Missoula County as the place for performance of the contract; that he concurred in the result but he did not concur in all that was said in the opinion by Mr. Justice Adair.

Two justices wrote separate dissenting opinions. Mr. Justice Erickson was satisfied that the court's interpretation of Section 9096 in the Interstate Lumber Co. case was a correct
interpretation of that statute; that the place for defendant's performance of the contract was Richland County, for the contract was silent in regard to place of payment and in a situation of that kind the only place the defendant could make an effective tender was at the place provided by statute, the creditor's place of residence, and that county was the proper place for performance, and trial in case of non-performance.\(^2\)

Mr. Chief Justice Johnson stated that the bench and bar for some twenty-six years had regarded the holding in the *Interstate* case as settled law and dissented on the ground that the decision badly unsettled, without expressly reversing, the law and that the bench and bar were entitled to rely upon some consistency in the decisions of the court. The Chief Justice pointed out that there was only one "may" in the contract and tort provision of Section 9096 and whatever its meaning as applied to contract actions, that meaning must also be applied to tort actions; that the court, composed of the same justices, some eight months prior to their decision in the principal case, in the case of *Maio v. Greene*\(^3\) upheld the right of the defendant in a tort action to a change of place of trial from the county in which the plaintiff and defendant both resided to another county in which the tort had been committed.

While the opinion of Mr. Justice Adair in the *Hardenburg* case speaks in terms of the defendant's right to have the cause tried in the county of his residence, in substance it enlarges upon the plaintiff's right by making two other "proper counties" for the trial of contract and tort actions: (1) the county of defendant's residence, (2) the county where the plaintiff resides and the defendant may be found. However, the opinion limits plaintiff's right in contract actions by the limitations and qualifications previously set out in this comment.

Whether the court in future decisions would consider the opinion as a controlling precedent\(^4\) is doubtful in view of a later

\(^2\)The writer of this comment does not intend to set forth the contentions for and against the use of the tender rule to determine the place for performance of a contract for venue purposes. If the reader wishes to pursue this subject further in addition to the cases cited in note 31 supra, the following citations may be of value: BEALE, TREATISE ON THE CONFLICT OF LAWS §335.1, citing Courtney v. Gordon (1925) 74 Mont. 408, 241 P. 233; BURT v. WESTERN STATES L. INS. CO. (1931) 211 Cal. 568, 296 P. 273; WILLISTON ON CONTRACTS §1812; 26 Col. L. Rev. 904 (1926).

\(^3\)In Franz v. Listug (1937) 105 Mont. 499, 74 P.(2d) 1133, Mr. Justice Anderson speaking of Montana Securities Co. v. Boldwyn Distributing Corp. (1919) 56 Mont. 215, 182 P. 119, said: "That opinion was concurred in only as to the result by other members of the court, and ac-
decision of the court in the case of Johnson v. Ogle and the comments of the members of the court in that case concerning the holding in the Hardenburg case.

The case of Johnson v. Ogle was an action for services rendered by plaintiff, realtor, in the sale of realty situated in Lake County. Plaintiff commenced the action in Lake County and summons was served upon the defendant in Stillwater County. At the time of filing a general demurrer, defendant made demand for a change of venue and in support thereof made affidavit "that at the time of commencement of this action he was and now is a bona fide resident of the town of Columbus, Stillwater County, Montana." Before the motion for change of venue came on for hearing, plaintiff filed an affidavit stating that by agreement of the parties the contract was to be performed in Lake County; that the property sold was in that county and the contract between the parties was made there; that defendant had been a resident of Lake County and as yet had not established a residence in Stillwater County; that the witnesses reside in Lake County and the contract was breached there. The defendant moved to strike the affidavit of plaintiff from the files. The motion to strike was denied as well as the motion for change of venue.

Upon appeal, the Supreme Court found it unnecessary to consider the trial court's action with respect to the motion to strike, and held that in order for the defendant to show facts entitling him, as of right, to a change of venue to Stillwater County, it was incumbent upon him to show that the contract sued upon was not to be performed in Lake County where the action was commenced, and since the defendant failed to show sufficient facts the order denying the motion for change of venue was affirmed.

The decision is of value in this discussion because it refutes certain language in the opinion of Mr. Justice Adair in the Hardenburg case that the burden is upon the plaintiff to show facts relied upon to bring himself within what that opinion termed the performance exception to the general rule in Section 9096.

The decision is also of value because of the discussion of the holding in the Hardenburg case. Mr. Justice Morris stated accordingly, what is said therein is not a controlling precedent." Of three justices then on the bench, one wrote the decision, one concurred in the result and one was absent.

Supra note 35.

(1945) 117 Mont. 419, 159 P. (2d) 337.
that his special concurring opinion in that case went no further than to concur with the majority in holding that the venue of the action was properly determined to be in Missoula County, which was the only question presented by the controversy; that in his opinion the Interstate Lumber Co. case remained the leading case on the question of venue in Montana, and correctly construed Section 9096.

Mr. Justice Adair and Mr. Justice Angstman concurred specially in the result in the Johnson case, but in separate opinions characterized the discussion of the holding in the Hardenburg case by the majority as gratuitous and obiter dictum. Mr. Justice Adair stated that in his opinion, the views expressed in his opinion in the Hardenburg case were a correct interpretation of Section 9096. It is interesting to note that Mr. Justice Angstman, who in several prior decisions written or concurred in by the Justice, had upheld the interpretation of Section 9096 set forth in the Interstate Lumber Co. case, now was convinced that the decision in that case was wrong insofar as it declared that “may” as used in the contract and tort provision of Section 9096 means “must.”

In view of the confusion that exists as to the status of the Montana law on this subject, perhaps the writer of this comment could set forth his conclusions without adding to the confusion to a greater extent.

The limitations and qualifications placed upon the right to try a contract action in the county where the contract was to be performed are vulnerable to the same criticism that Mr. Justice Adair directed at the court’s construction of Section 9096 in the Interstate Lumber Co. case, that the limitations and qualifications are judicial legislation, for the legislature, in granting the right, did not so limit it.

It can hardly be disputed that every contract has a place for performance, and in determining the place for performance the courts should look to the intention of the parties in the light of the surrounding circumstances and the pertinent code provisions, and when the defendant moves for a change of place of trial on the grounds that the county where the action on the contract was commenced is not the proper county for performance

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*Kolberg v. Gliener (1932) 91 Mont. 509, 8 P. (2d) 799.

**Stewart v. First National Bank and Trust Co. (1933) 93 Mont. 390, 18 P. (2d) 801; Benjamin v. Crick (1933) 95 Mont. 390, 26 P. (2d) 369; Johnson v. Crick (1933) 96 Mont. 358, 26 P. (2d) 369; Colbert Drug Co. v. Electrical Products Consolidated (1937) 106 Mont. 11, 74 P. (2d) 437; Thomas v. Cloyd (1940) 120 Mont. 343, 100 P. (2d) 988.
and place of trial, it is for the court to decide, upon a proper showing by the defendant, whether the contract was to be performed in the county to which the defendant seeks to have the cause removed.

As an original problem of statutory construction it would seem that there is merit to the contention that all of the provisions of Section 9096 should apply to actions upon contracts and actions for torts. Where both mandatory and directory verbs are used in the same statute, or in the same section, it is a fair inference that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings. Especially is this true where "shall" and "may" are used in close juxtaposition in a statutory provision under circumstances that would indicate that a different treatment is intended for the predicates following them. The decision in the Interstate Lumber Co. case gave no satisfactory reason why a county in which a contract or tort action is commenced could not be a proper county for place of trial within the provisions of Sections 9097 and 9098, if the permissive auxiliary "may" carried with it its ordinary meaning. If construed as a proper county for trial, even though the provision is permissive in character, the sentence would not become meaningless when read in conjunction with Sections 9097 and 9098.

However, there is much to be said for Mr. Chief Justice Johnson's contention that the bench and bar are entitled to some degree of certainty in the court's interpretation of the statute. If the bench and bar have been satisfied for twenty-six years with the construction placed on the statute by the Interstate Lumber Co. case that there is but one proper place for trial of these classes of actions, the court, for the purpose of certainty in procedure, should adhere to that construction. If that construction is what the bench and bar and litigants want, the statute should be amended so that its language coincides with that construction and the contract and tort provision should be placed in the venue statutes ahead of the general provision set forth in the first sentence of Section 9096.

George W. Horkan.

*3 SUTHERLAND, STATUTORY CONSTRUCTION, (3rd ed. 1943) §5821.