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Venue of Contracts Actions in Montana

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which the judgment is based are false; or upon the grounds that
the court erred in determining the law or facts of the original
action. Why, then, should the courts allow a collateral attack on
the ground that there was a lack of jurisdiction over the subject
matter in the original action? In both instances the attacking
party has had his day in court and has presumably had ample op-
portunity to raise all of his defenses. Established principles de-
designed to protect the rights of parties and govern the orderly
judicial process indicate that the rule that a judgment rendered
by a court without jurisdiction of the subject matter is wholly
void and subject to collateral attack should be struck down once
and for all.

A. F. Slaight

Of course, if the court rendering the original judgment was barred by
the Constitution or by the supreme law of the land from assuming jurisdic-
tion of the action, then a collateral attack may be permissible and
necessary, depending upon the circumstances, e. g., Pennoyer v. Neff
(1877), 95 U. S. 714, 24 L. Ed. 565; supra, note 32.

To bring about this desired result it would require, in addition to an
overruling of the earlier decisions, legislative action. In this connection,

VENUE OF CONTRACTS ACTIONS IN MONTANA

In 1944 the Hardenburgh1 case overturned settled law in
Montana on the fundamental procedural question of the place of
trial of actions on contracts. That the question is one which is
still very much alive is evidenced by the recent decision of Fraser
v. Clark,2 wherein one of the dissenting justices said:

"Nothing said in the majority opinion tends to re-
duce the confusion that exists on the subject. It merely
disposes of the present controversy and in my judgment
lends no help to the lawyer who may find himself con-
fronted with questions of venue in the future."

Part I of this comment is a survey of the salient Montana
cases on this subject of venue of contract actions, including the
Hardenburgh and Fraser cases. Part II is an appraisal of the
present state of Montana law on the matter. Part III is a critique
of what would seem to be the present rule. Suggestions for
change of the present rule are made in part IV.

1Hardenburgh v. Hardenburgh (1944) 115 Mont. 469, 146 P.(2d) 151.
NOTES AND COMMENT

I.

Chapter 29 of Title 93 of the Montana Code 1 regulates the place of trial of civil actions, subject to the pertinent sections of the Montana Constitution. 2 Sections 93-2901 to 93-2903 enumerate certain types of actions and provide specifically the county of trial thereof. Section 93-2904 provides for "all other cases," as follows:

"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 so reside be unknown to the plaintiff, the same 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."

In examining the Montana cases concerning venue of contract actions, it is helpful to observe three important questions which present themselves throughout: Is there but one proper county for the trial of such actions, or more than one? Which contracts are within the purview of the second sentence of Section 93-2904? And upon whom is the burden of proof in regard to maintaining or changing the venue?

The first landmark case in Montana on this question was State ex rel. Interstate Lumber Company v. District Court. 3 Plaintiff Interstate Lumber Company sued in Lewis and Clark County for lumber sold and delivered. The defendant demurred, and also moved for a change of venue to Silver Bow County on the ground he was a resident there and had been served there. The plaintiff resisted the motion on the grounds that the contract was made in Lewis and Clark County and was to be performed there, and that the lumber was sold and delivered in Lewis County and was used in the erection of a building there.

In a unanimous decision, the Court held for the plaintiff, saying that the second sentence of Section 93-2904 excepts actions.

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1 R.C.M. 1947.
3 (1918) 54 Mont. 602, 172 P. 1030.
on tort and contract from the application of the general provisions of the first sentence and requires venue for those actions to be determined "... by considerations wholly apart from the residence or whereabouts of the defendant." The Court then held that the auxiliary "may" in the second sentence has no significance used as a permisive auxiliary; that, however, if given the effect of "must", it becomes harmonious with the rest of the section, and expresses legislative intent to except those two classes of cases from the general statement in the first sentence.

The decision overruled Wallace v. Owsley, McDonnell v. Collins, and Bond v. Hurd, as based upon California decisions which were founded on a California statute not then having a provision similar to the second sentence of Montana's Section 93-2904. It was further said that Bond v. Hurd was clearly erroneous in limiting the application of the second sentence to express contracts, since the word "contract" was not qualified in the code provision.

The decision seems to have tacitly assumed there could be but one proper county for trial, when setting out to render the second sentence "meaningful." And it perhaps impliedly approved of the use of the ordinary rules of contract interpretation when it held that "may" means "must", since it now became more imperative to find a place of performance.

The question of burden of proof, whether upon the plaintiff to maintain the venue when challenged or upon the defendant when moving for a change, was not expressly decided until the later case of Courtney v. Gordon, wherein it was held that the burden was upon the defendant.

The Interstate Lumber Company case was followed by a long line of decisions. These decisions applied the ordinary rules for the interpretation of contracts in determining where the contract was to be performed, including the "tender rule,"

*(1891) 11 Mont. 219, 27 P. 790.
*(1897) 19 Mont. 372, 48 P. 549.
*(1904) 31 Mont. 314, 78 P. 579, 3 Am. Cas. 566.
See note 27, infra. Also, by citing with approval Oels v. Helena and Livingston Smelting and Reduction Co., (1891) 10 Mont. 524, 26 P. 1000, wherein the place of performance of the contract was found by implication, the Court perhaps gave its blessing to the use of such interpretive rules.
*(1925) 74 Mont. 408, 241 P. 233.
See notes 17 and 18, Horkan, The Place of Trial of Contract and Tort Actions Under the Montana Venue Statutes, 10 Mont. L. Rev. 83 (1949).
See, for example, State ex rel. Coburn v. District Court (1910) 41 Mont. 84, 108 P. 144, a pre-Interstate case applying the tender rule, which is often cited in the later cases. Also, see R.C.M. 1947, Title 58, Ch. 4.
when the intent of the parties could not be clearly ascertained from the contract itself.

The *Hardenburgh v. Hardenburgh* decision apparently attempted to overrule the *Interstate Lumber Company* case. Hardenburgh was an action in Richland County, by the plaintiffs residing, for the breach of a written contract for the sale of the plaintiffs' business. The defendant moved for a change of venue to Missoula County, alleging that as his residence, and that Missoula was the place of contracting and the place of performance. The plaintiffs contended that Richland County was the place of performance.

The majority opinion, written by Mr. Justice Adair, held for the defendant, stating that: the general rule is that all actions other than specifically provided for in Sections 93-2901 to 93,2903 shall be tried in the county wherein the defendant resided at the commencement of the action; that the provisions of the first sentence of Section 93-2904 apply to all actions on contracts and torts, but that such provisions are not exclusive, for tort actions may also be tried in the county where the tort was committed, and contract actions in the county where the contract was to be performed, provided that the contract sued upon indicates, either in terms or by necessary implication therefrom a particular county in which it was to be performed; that the "may" of the second sentence means just that, the contract clause not having been placed ahead of the general provision; that the tender rule is not applicable, requiring too many assumptions; and that the plaintiff must clearly show the facts necessary to bring the case within the exception to the general rule. Concluding that Missoula was the county in which the contract was to be performed, the opinion said that, however, since Missoula was also the county of the defendant's residence, venue was controlled by the rule rather than the exception.

Mr. Justice Anderson concurred. Mr. Justice Morris said, "I do not concur in all that is said in the opinion by Mr. Justice Adair, but I concur in the result." Mr. Chief Justice Johnson and Mr. Justice Erickson dissented.

The decision seemed to establish more than one proper county for the trial of a contract action; to set up the rule that the contract clause of the venue statute applies only to express contracts which, in terms or by necessary implication therefrom, indicate the place of performance; and to put the burden on the

*Supra,* note 1.
plaintiff to avail himself of this "exception" to the general provisions of the first sentence.

The first case to test the effect of the Hardenburgh decision was Johnson v. Ogle," which case developed another split in the court. That was an action in Lake County for services rendered by the plaintiff in the sale of real property situated in Lake County, venue being laid on the allegation the contract was to be performed in that county. The defendant moved for change of venue to Stillwater County, his alleged residence.

The Court held the burden to be upon the party moving for the change of venue to disclose facts entitling him to the change, and that the defendant had not so carried the burden. Mr. Justice Morris wrote the majority opinion, which was concurred in by Mr. Chief Justice Johnson and Mr. Justice Cheadle, and he made use of the opportunity to state that in the Hardenburgh case he had concurred in the result only, and that in his opinion the Interstate Lumber Co. case remained the leading case on the subject, and correctly construed Section 93,2904 as to the question of venue of contract actions.

Mr. Justice Adair, concurring specially, said that the plaintiff, in the case sub judice, had made a proper showing; that the reference by the majority to the Hardenburgh decision was gratuitous; and that "may" still meant "may."

It thus appears that the burden of proof was shifted back to the party movant, that the majority intended to carry forward the law of the Interstate case, and that there was no discussion, in either the majority or the concurring opinions, of the rule of "express terms or necessary implication."

The most recent case on this subject was Fraser v. Clark, which again was a 3 to 2 decision. That was a suit in Yellowstone County for the down payment and the interest on the purchase price under a contract for the sale of ranch land situated in Fergus County. The plaintiffs were residents of Yellowstone County, and the defendants were residents of Fergus County, and were served there.

The defendants, in their affidavit in support of motion for change of venue, contended that the contract did not include all the lands originally agreed to be conveyed, that the contract was surrendered by the defendants' attorney without the plaintiffs having showed good title to the lands, and that the plaintiffs' conversion of certain earnest money was unlawful.

\(^{14}(1945) 117\) Mont. 419, 159 P. (2d) 337.

\(^{22}\) Supra, note 2.
The plaintiffs' affidavit stated that the contract sued upon did not designate the place of payment, and that the defendants had not sought out the plaintiffs for the purpose of making payment.

The Court held for the defendants, the majority opinion again being written by Mr. Chief Justice Adair. It stated that the Montana statutes provide for the application either of the general rule of trial at the defendant's residence or of certain exceptions, those exceptions being there enumerated. It was said that if the instant case did not come within one of the exceptions then the general rule applied; and therefore Fergus County, the residence of the defendants would be the proper county for the trial of the action. The Court quite summarily ruled out the application of the second sentence of Section 93-2904, saying that the plaintiffs' affidavit stated the place of payment was not designated in the contract.

Quoted with approval was the California case of Brown v. Happy Valley Fruit Growers, wherein it was said:

"The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions."

The Fraser opinion went on to state that the early Montana decisions uniformly held that the exception provided for in the second sentence of Section 93-2904 applies only to a) actions on express contracts b) wherein the contract discloses upon its face that it was to be performed in a particular county other than that of the defendant's residence, and that in all other cases the proper place of trial is regulated by the provisions of the first sentence. The Court then expressly disapproved of the construction given by the Interstate Lumber Co. case to the second sentence of Section 93-2904, and of its overruling of prior decisions.

Justices Angstman and Anderson dissented.

There seem to have been two grounds for the decision: the first, that the general rule of trial at the defendant's residence applied, since the contract did not in terms designate the place

It is the writer's view that the discussion of obligations to be met by the plaintiff, p. 119 (273 P. 2d), headnote 16, is in reference to the second ground for the decision, discussed infra, note 19.

Justice Anderson cited the earlier comment, Horkan, The Place of Trial of Contract and Tort Actions Under the Montana Venue Statutes, 10 Mont. L. Rev. 83.
for performance; the second, that the "subject of the action" was in Fergus County."

And so, the Fraser case is the latest pronouncement of the Montana Supreme Court on a procedural question which has gone up to that court three times in the last ten years. Does it settle the question?

Let us look at the Fraser case in terms of the three main facets of the problem which have shown themselves in this line of decisions; first, as to the question of whether there is but one, or more than one, proper county for the trial of a contract action. Neither the majority nor the dissent discussed the issue expressly. The majority did not consider Johnson v. Ogle, and the dissent cited it only on the question of burden of proof. Yet in Johnson the Court ostensibly invalidated the extensive Hardenburgh opinion on this point. What does the Court now think about the matter?

Next, what about burden of proof? The decision is ambiguous as to whether the defendant carried a burden to make a showing entitling him to a change of venue, or whether the plaintiff failed to sustain a burden in maintaining the venue as laid.

The alternate ground for the decision was that it was an action involving the title or right to possession of real property. This proposition was supported in two ways; the first, that the "subject of the action" was in Fergus County. After quoting Section 93-2901 (R.C.M. 1947), the opinion concluded that in the case at bar the "subject of the action" was the plaintiffs' right to the sums in the possession of the defendants' agent in Lewistown, when the plaintiff conveyed title to the land situated in Fergus County. But, would it not seem clear that the Legislature, in drafting Section 93-2901, intended the phrase, "subject of the action," to refer to the land itself, and sub-section (1) to refer to actions involving the recovery of the property itself, rather than the payment therefor? And, as pointed out by the dissent, the cited case of Heineke v. Scott would not seem comparable, being an action to remove a cloud on title. In 3 BANCROFT'S CODE PLEADINGS, PRACTICE AND REMEDIES, Ten Year Supplement, § 981, p. 1805, it is stated that statutes prescribing venue of actions for the recovery of real property apply only when the interest in the land is the exclusive subject of the action.

The second basis for this ground of the decision was, since the plaintiffs were to perform certain title obligations, and since all transactions affecting the title to real property are required, by statute, to be recorded in that county, therefore the action was brought into one of the exceptions in the venue code pertaining to real property, although it was not specified which. (See op. cit. at P. 119, headnote 16.) It is difficult for the writer to understand this line of reasoning, unless convenience of trial or witnesses was the concern, in which event the defendants could have moved the trial court's discretion after their general appearance (R.C.M. 1947, § 93-2906).

So, it would seem to the writer that the second ground of the decision in Fraser v. Clark is involved in some obscurity, and it does not appear that Mr. Chief Justice Adair himself placed much weight thereon.
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Finally, have the Montana bench and bar now in their possession a clear and unambiguous statement of a rule concerning which contracts are in the contemplation of the second sentence of Section 93-2904? The *Hardenburgh* opinion cast its rule as to which contracts are embraced by that sentence both in the form of requiring the contract to state "in terms" the place of performance and in the form of requiring the contract to state "either in terms or by express implication therefrom" the particular county. Further, the Court seemingly authorized recourse to statutes, to the nature of the contract itself, and to the facts and circumstances under which it was made.

But in the *Fraser* case the Court looked no further after seeing that the plaintiffs' affidavit admitted the contract did not designate a place of performance. And the rule was seemingly limited to contracts which by their express terms indicate the place of performance. Does the Court really intend to so limit the rule?

The importance of having these questions settled need hardly be stated. Not only is there the matter of delay and expense to the litigants concerned in establishing the place of trial of their actions, but also there is the interest of the courts and of the people of the state in the expeditious, efficient administration of justice. Further, the fact that this procedural question is assignable error in a case tried on the merits militates for the establishment of a rule that is certain.

II.

Since the *Hardenburgh* opinion was concurred in only by Mr. Justice Anderson, Mr. Justice Morris concurring only in the result, it would seem clear that it does not constitute a controlling precedent, particularly in view of Mr. Justice Morris' clarification in *Johnson v. Ogle*, of his position in the *Hardenburgh* case.

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*Hardenburgh v. Hardenburgh (1944)* 115 Mont. 469, 482, 146 P. (2d) 151, 156, in discussing the Coburn case.

*Hardenburgh v. Hardenburgh (1944)* 115 Mont. 469, 488, 146 P. (2d) 151, 158.

*Hardenburgh v. Hardenburgh (1944)* 115 Mont. 469, 480, 146 P. (2d) 151, 155.


The Johnson case reasserted that Interstate Lumber Co. remained the leading case on the subject, specifically stating that venue in contract cases is to be determined by considerations wholly apart from the residence or whereabouts of the defendant.

But it is arguable that now Fraser v. Clark has effectively overruled the Interstate Lumber Co. case as to that interpretation, despite a certain ambiguity as to exactly which construction of the . . . "second or concluding sentence of Section 93-2904 . . ." was being overruled;—the holding that "may" means "must," or the holding that Wallace v. Owsley, etc., was erroneous in requiring the contract to state in express terms the place of performance. However, as to that, the main consideration in the Interstate case was whether the second sentence was mandatory, rather than whether the second sentence embraced only express contracts which on their face indicate the place of performance. (Indeed, the Court in Interstate seemed not to consider that element of the problem.) And so, the Court in Fraser very possibly intended to overrule Interstate on "may" meaning "must." This interpretation is somewhat reinforced by the fact that the Court cited R.C.M. 1947, Section 19-102, pertaining to the interpretation of words and phrases in Montana Statutes; by the fact that the Court's enunciation of a primary right in the defendant to have an action against him tried at his residence militates against the Interstate rule, which regards the defendant's residence as irrelevant; and by the fact that the rule of "express terms" as laid down in the Fraser decision would seem to be opposed to a rule making it also mandatory to find the place of performance.

Therefore, it is possible to conclude that under the rule of Fraser v. Clark there is more than one proper county for the place of trial of an action upon a contract.\footnote{This argument is, of course, based upon the assumption that any rule limiting the type of contracts embraced by the contract clause is opposed to the interpretation of that clause given by the Interstate Lumber Co. case. This is not a logical necessity, but it appears to the writer an actual necessity under the Interstate line of cases, wherein it is asked, not "Is this a contract within the contract exception of Section 98-2904?", but simply, "Is there a contract involved?" That is, although it is possible to limit the contracts which are embraced by that clause and still provide for but one proper county of trial thereon, yet from the above discussed cases it would seem that the "may-must" rule under Interstate contemplates no limitation on the type of contract eligible, and that the Court in imposing such limitation is therefore impliedly throwing out the "may-must" rule. However, there is certainly some room for argument that the Court in Fraser did not consider the question of "may" and "must" seriously in question.}

As to burden of proof: Since the Court again adopts the \footnote{And, under Shields v. Shields (1943) 115 Mont. 148, 139 P. (2d) 528, it is error to grant a change of venue from one proper county to another.}
position taken in *Hardenburgh* that the defendant has an "ancient and valuable right" to have an action brought against him tried in the county of his residence, it would seem it would also prefer the corollary to that right, stated in *Hardenburgh*, that the burden is upon the plaintiff to bring himself within the terms of the "exception."

Yet the Court does not expressly overrule the holding of *Johnson v. Ogle* as to this matter; nor are the two decisions, beyond reasonable question, inconsistent as to this point. So it must be concluded that *Johnson v. Ogle* is still the law as to burden of proof, the burden being upon the party moving for a change of venue to disclose the facts which entitle him to the change.

Having ventured that "may" means "may," and that the burden of proof is on the defendant to effect a change of venue in a contract action, we now come to the third major aspect of this venue problem: whether the ordinary rules for contract interpretation may be used in finding where the contract sued upon was to be performed; or must the contract be specific as to that place of performance, and, if so, how specific?

A preliminary question to be looked at is whether—since the philosophy underlying the *Fraser* decision and some of the language therein closely parallel the same in *Hardenburgh*, and since both decisions were written by the same justice—the *Hardenburgh* and *Fraser* cases should be read together to arrive at the rule under consideration. If so, then we could assume that the law as expressed by the majority in the *Fraser* case is a little more liberal than the language would suggest, that the rule would at least include "necessary implication." And it would be possible to go further and state that the rule would also include looking to the circumstances and the pertinent code provisions, since there is much language to that effect in the *Hardenburgh* case.

However, it would seem more probable that a trial court would rule that the law today is as it was actually expressed in *Fraser v. Clark*. The language of the opinion bearing upon this question of contract interpretation was uniform and unbending in stating that the contract be specific in indicating the place of performance. Further, even should a trial court find the *Hardenburgh* opinion to be more than the private views of two members of that Court, still it is doubtful whether much weight would be laid upon that decision in view of the conflicting language therein.

And so it is concluded that the existing law governing which

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*See notes 20 through 23, *supra*. 

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contracts are embraced by the second sentence of Section 93-2904 should be determined from the Fraser case itself. But the question remains, does the rule of the Fraser case really mean what it says?

The rule of Fraser can be taken to be that statement quoted from American Jurisprudence which the majority declares it subscribes to: "... Where such a provision is in the nature of an exception... it is construed to be applicable only when the contract is by its express terms to be performed in a particular county." There are at least four possible interpretations of, or implications from such a rule: (1) that the place for performance must be stated in so many words; (2) that it must be possible to imply the place of the performance from the context of the contract ("factual" implication, but not legal implication); (3) that neither of the above are exclusive, but that the nature of the transaction and the circumstances surrounding its making may be looked to; or (4) that none of the above are exclusive, but that legal implication can be made, from statutory and common law rules for interpretation of contracts generally. (Of course, the decision makes it clear that only express contracts are contemplated by the statute.)

Let us examine those cases to which we are referred in the decision itself to see if they throw any light upon the matter.

The Montana cases expressly revived in Fraser v. Clark were Wallace v. Owlsley, McDonnell v. Collins, and Bond v. Hurd. Wallace was an action in L. County for goods sold and delivered at the plaintiff's place of business in that county. The Court held that there were no allegations in the complaint directed to provision for place of performance in the oral contract sued upon, and that, therefore, the contract clause of Section 93-2904 could not be applied. Surely a necessary implication from that contract was, not that the seller would seek out the buyer for payment, but that the buyer would, at the store, or in remittance thereto, pay the price. Yet the Court found the contract clause inapplicable.

McDonnell was a suit to recover the amount of an account claimed to be due and owing from the defendants. The Court summarily held that the action was of a character requiring it to

\[\text{Supra, notes 6, 7, and 8, respectively.}\]

\[\text{Such an implication is not necessarily an application of the tender rule. Cf. Mr. Justice Adair's discussion of the Coburn case, and his illustration of the over-the-counter sale of goods, in Hardenburgh v. Hardenburgh (1944) 115 Mont. 469, 488 et seq. 146 P.(2d) 151, 158 et seq.}\]
be brought where the defendant resided, citing Wallace v. Owsley, and Yore v. Murphy.\textsuperscript{18}

In Bond the Court held that two of the causes of action were actions upon open account, and not actions upon express contracts, as contemplated by the contract clause of the venue statute.

The Fraser case also cited Yore v. Murphy,\textsuperscript{19} dignifying the dictum in that case that the face of the contract must disclose that it was to be performed in the county in which the action was commenced.

Reading those Montana cases together, it would seem that the Court in Fraser v. Clark did indeed mean that the contract should in express terms indicate the place of performance.\textsuperscript{20}

The Colorado case to which reference was given in Fraser v. Clark was Lamar Alfalfa Milling Co. v. Bishop.\textsuperscript{21} That case was one of a line of Colorado cases, several of which were therein cited. It will be helpful to examine two of those cited cases, viz: Brewer v. Gordon,\textsuperscript{22} and People v. District Court of 12th District.\textsuperscript{23}

Brewer is the leading case in Colorado on the subject of venue of contract actions, and is the basis for the statement in American Jurisprudence which the majority in the Fraser case adopted. That was a suit on a sheriff's indemnity bond which contained no provision making the indemnity payable in any particular county. The Court held that since such was the case, it was the privilege of the defendant to have the action tried in the county of his residence. The decision was based upon an interpretation of the Colorado statute, similar on this point to that of Montana;\textsuperscript{24} and upon Texas and Iowa cases, in which states, however, the codes expressly required the naming of a particular place of performance. Those cited cases required that the instru-

\textsuperscript{18}The court also cited three California cases which, of course, ignored place of performance because the contract clause of the corresponding California venue statute (Cal. Code Civ. Proc., § 395) was not added thereto until 1933 (Ch. 744, § 6), STATUTES OF CALIFORNIA, 1933). This would indicate the Court was not quite aware of the problem involved.

\textsuperscript{19}(1891) 10 Mont. 304, 25 P. 1039.

\textsuperscript{20}Although the Court in Bond v. Hurd declared its holding was not contrary to Oels v. Helena and Livingston Smelting and Reduction Co. (1891) 10 Mont. 524, 26 P. 1000, wherein the place of performance was found by "necessary implication," yet Oels itself was not cited in Fraser, although it was the first Montana case on the subject.

\textsuperscript{21}(1926) 80 Colo. 369, 250 P. 689.

\textsuperscript{22}(1899) 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45.

\textsuperscript{23}(1923) 74 Colo. 121, 218 P. 1047.

\textsuperscript{24}... Actions upon contracts may be tried in the county in which the contract was to be performed . . . .", Colo. Stat. Ann. 1935, Rules of Civ. Proc., C.11, Rule 98 (c).
ment in writing "plainly provide" or "the terms of the contract
sued upon" indicate the place of performance.

_People v. District Court of 12th District_ was an action for
the price of two carloads of potatoes. The Court held that
"... No place of performance by defendant seems to have been
specified expressly, and, therefore, discussion of place of per-
formance is irrelevant. ...

Finally, _Lamar_ itself was an action for the alleged failure
to deliver under a contract for the sale and delivery of an electric
motor. It was held that the contract clause of the Colorado
Statute refers to contracts which by their terms are to be per-
formed at a particular place, citing the above discussed cases.

So, it would seem from those Colorado decisions that the
_Lamar_ Court thought the law to be as was paraphrased there-
from in the _Fraser_ case, that "... The language 'the county in
which the contract is to be performed,' refers only to contracts
which, by their terms, indicate they were to be performed in a
particular county.'"

Both, then, the early Montana cases cited in _Fraser v. Clark_,
and the line of Colorado cases based upon a similar code provi-
sion, would make tenable a conclusion that the rule of the _Fraser_
case eliminates "necessary implication" as an interpretive rule.

If necessary implication is out, _a fortiori_ would a considera-
tion of circumstances surrounding the execution of the contract
be excluded. But what about legal implication?

The Montana code provisions for the interpretation of con-
tracts run the course from necessary implication to investigat-
ing the state of mind of the promisor. It seems quite clear that re-
course to such statutes would be repugnant to the rule of _Fraser_.
Many of those statutes were cited in the _Hardenburgh_ case, but
no mention was made of them in the _Fraser_ case, nor did those

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"An explanation of this limitation could lie in a recognition of merit in
Justice Erickson's dissent in _Hardenburgh v. Hardenburgh_, in which he
said:

"It seems to me that if the majority view is to be adopted it would
have to be limited under the terms of the statute to contracts where
there was an express provision for the place for performance and to go
further and suggest that the place for performance can be determined by
necessary implication is not warranted and clearly when you apply the
latter test of necessary implication might it not be said that this court
has already applied that test when it was held as it has that it must
necessarily be implied that where the contract is silent as to the place
for performance the parties necessarily contracted with the statutes in
mind and the place for performance was, in effect, placed in the con-
tract for this reason?"

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early Montana cases make use of them. As for the tender rule, there was clear opportunity to apply it in the Wallace and McDonnell cases, as well as in several of the Colorado cases discussed supra, yet it was ignored.

So, in conclusion, it would seem that Fraser v. Clark would confine the application of the contract clause to express contracts which by express terms provide for a place of performance other than the defendant's residence, and that necessary implication, surrounding circumstances, and legal implication are ruled out. Before the value and effect of such a rule are appraised, an examination of the word "performance" would be in order.

There are at least two situations to consider in regard to performance: where the contract is bilateral, and where there is more than one place of performance by one of the parties to the contract.

Where the contract is bilateral, which performance is looked to, the plaintiff's or the defendant's? Fraser v. Clark itself answered that question when it declared that since the contract "... does not designate the place of payment" (emphasis ours), it did not come within the provisions of the second sentence of Section 93-2904. Also, an earlier Montana case decided the question directly. In Colbert Drug Co. v. Electrical Products Consolidated it was held that the place of performance of the obligation imposed upon the defendant, the breach of which was the ground for the plaintiff's complaint, was the place of performance in question. Most of the Montana cases have either assumed this to be the rule, or else the contracts sued upon were of a unilateral character.

There remains the question which is raised when there is more than one place of performance on the part of the defendant; as, for example, where he contracts to deliver goods to more than one county. Considering the narrowness of the rule of the Fraser case, and its underlying principle that the plaintiff must clearly bring himself within an exception to a strong primary right of the

Although confusion might result from a comparison of Mr. Chief Justice Adair's discussion of "payment" in Hardenburgh v. Hardenburgh.

(1937) 106 Mont. 11, 74 P. (2d) 437, citing State ex rel. Western Accident & Indemnity Co. v. District Court (1918) 55 Mont. 330, 176 P. 613. See also Lamar Alfalfa Milling Co. v. Bishop (1926) 80 Colo. 369, 250 P. 689, 690. The Todd case therein cited was one of many Texas cases touching the point in question.

See, e.g., Hough v. Rocky Mountain Fire Insurance Co. (1924) 70 Mont. 244, 224 P. 858; Stienke v. Jankovich (1925) 72 Mont. 363, 233 P. 904; Silver v. Morin (1925) 74 Mont. 398, 240 P. 825. However, the position of the Court in the Hardenburgh case on this point is not entirely clear, and the Oels case seemed to look to the place of the plaintiff's performance.
defendant, it would seem the Court would not allow the plaintiff the liberty of bringing suit in any one of several counties other than the defendant's residence, nor would it embark upon the often impossible task of determining in which county was the major part of the total performance to be executed. It is more probable that the Court would conclude that in such a situation the "exception" does not apply, and would place emphasis upon the fact that the statute reads, "... Actions upon contracts may be tried in the county in which the contract was to be performed..." The precise point has not been before the Supreme Court of Montana.

III.

Insofar as Fraser v. Clark may well have decided that there is more than one proper county for the trial of a contract action, and left the burden on the defendant to support a change of venue, it would seem a fairly clear and workable decision, although, as noted supra, there is that modicum of doubt on both points with which to contend.

But the rule laid down as to which contracts are within the purview of the second sentence of Section 93-2904 poses the difficulty, treated at some length above, as to whether that rule can be taken at its face value. Further, even if the rule be clearly that only contracts which in express terms indicate the place of performance are affected by that second sentence, still, it seems to be difficult to keep the rule so limited.

Witness first the Hardenburgh case. Although the Court there several times implied that the rule was limited to contracts with express terms in regard to performance, yet it also stated the rule as including necessary implication. And the opinion seemed them to find it necessary to go further and bring in legal implication, with the notable exception of the tender rule, and even there it invoked a tender rule of a sort in its illustration of an over-the-counter sale of goods. The opinion also talked of looking to the nature of the transaction, and to the circumstances surrounding its making.

Further, states whose statutes were narrower on their face than that of Montana have included at least "necessary implication" in the rule. Atlas Acceptance Corporation v. Pratt was a Utah case decided under a statute which provided, in part: "When the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract . . . may be . . . tried in

"(1935) 85 Utah 352, P.(2d) 710.
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the county where such obligation is to be performed or in which the defendant resides. . . .” 45 The entire decision was devoted to the question of whether this provision included “necessary implication” from the contract, the Court after examining many cases deciding that it did.

Until 1935, the corresponding Texas statute read, “If a person has contracted in writing to perform an obligation in a particular county, suit may be brought either in such county or where the defendant has his domicile.”

The now amended statute reads, “If a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile.” (Italics supplied).

The preamble to the amending Act showed the intended change: “An act amending subdivision 5 . . . by distinctly specifying that the county for the performance of the obligation which is involved in the suit, must be named by the writing expressly.” The emergency clause added as a reason for the amendment, “. . . the unsettled state of the law as to the contract clause of the venue statute.”

Prior to this amendment, the Texas courts had found it convenient and desirable to have recourse, not only to “necessary implication,” but also to parol proof, legal implication, and extraneous evidence, 50 the while rooting their decisions in the ground that the defendant has” . . . the inestimable right . . . to be sued in the place of his residence. . . .” 51 And so the Texas Legislature thought it necessary to make the statute even more explicit than it had been.

Likewise, it is most probable that before the law in Montana on this subject becomes settled there will be required a more definitive decision, or a legislative amendment. If this be true, then it is in order for the writer to set forth his views as to what would be a salutary turn of the law for Montana.

45 R.S. Utah 1933, § 104-4-4.
48 Tex. Laws 1935, Ch. 213, § 1.
50 Todd v. W. E. Jamar Seed Co. (1923) 252 S.W. 256, 257.
IV.

It appears to the writer that there are three practical choices for the Montana Court as to the future direction of the law of venue for contract actions. The first is to particularize the rule of *Fraser v. Clark* in substantially the same way the Texas Legislature has particularized its venue statute.

The second choice would be a compromise solution. That is that the plaintiff has the option to sue either where the contract was to be performed, or at the defendant’s residence, but that the ordinary rules for the interpretation of contracts could be applied where the intended place for performance by the defendant is not clear.

The third alternative would be a return to the rule of the *Interstate Lumber Co.* case and the line of cases following that decision.

With these alternatives in mind, let us look at this concept, “venue,” to see if it embraces any fundamental principles which will be of help in the choice. Professor Foster well summarizes the common law on the subject:

> “Numerous standard works (citing treatises) trace the relation between the rules of venue and the development of jury trial, and show how the fact-reporting function of the jury originally made it inevitable that the jurors come from the place where the facts at issue arose, thus making all actions local;... how the requirement of a local venue gradually relaxed with the change of the jury to a fact-trying body;... how the distinction between local and transitory actions came to turn on whether the court would permit the allegation that a particular event happened in one place, to wit in a totally different place, and how this left the plaintiff with the *prima facie* power of designating any county in England as the place for trial of a transitory action.”

And so it would seem, rather than there being a primary right in the defendant, that at the common law there is a primary right in the plaintiff to exercise a free election as to place of trial when the action is of transitory nature.

Professor Sunderland has stated:

> “Obviously there is no essential jurisdictional matter involved in the question of venue, and the only consideration that ought ever to control is convenience...”

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the points of incidence of the principle of convenience would be: (1) the convenience of the plaintiff; (2) the convenience of the defendant; and, (3) the convenience of the witnesses. Each of these has exerted an influence in the framing of rules of venue, and since they are often mutually antagonistic, the results have been confusing. 104 (Emphasis ours)

Professor George Neff Stevens, in an exhaustive study of venue statutes in the United States today, speaking of the right of the plaintiff to elect the place of trial says:

"... the broad choice of venue under the transitory action concept of the English common law has been substantially reduced by positive legislation. ... The most common provision today, and the basic one, appears to be venue based upon the residence of the defendant." 105

But, although Professor Stevens finds venue based upon the residence of the defendant to be the most common provision, his rationale therefor is not a fundamental right inhering in the defendant, but rather convenience to the defendant. And predicated upon the same basis, convenience, does he find venue provisions allowing the action to be brought in the county where the cause of action arose, or where the plaintiff resides. Like Professor Sunderland, Professor Stevens rationalizes the venue statutes in terms of convenience of the parties, and of convenience of witnesses.

The writer would presume to add—"and certainty of procedure."

Returning, then, to the three alternatives for the Montana venue problem, how does the rule of Fraser v. Clark appear in the light of the above-considered principles? It is submitted that it would be unnecessary and unreasonable to subject the clause of the venue statute to further judicial limitation, with all the danger and uncertainty concomitant thereto. That such a course bears little chance for success can be prophesied from a look at Colorado, where the law on venue of contract actions stays broken to lead, but no more, 106 and at Texas, where a legislative amendment finally became necessary. That such a course is unnecessary would seem a proper conclusion from the examination, supra, of the common law; and from the examination of modern

venue statutes, wherein rules of thumb attempting to make an initial balance of the relative conveniences of the parties and the witnesses are the prime considerations. If, in Montana, there be an “ancient and valuable” right in the defendant to have suit against him tried in his home county, the consideration of venue, supra, would yield the conclusion that it must needs have developed during the four year interim between the enactment of the Civil Practice Act of 1867 and the enactment of the Codified Statutes of 1871.

It is pertinent at this point to observe the Montana code section on place of trial of actions in justices’ courts R.C.M. 1947. Section 93-16601. Although this section gives the plaintiff an option in laying the venue it is mandatory in providing for finding the place of performance by operation of law in the absence of a special contract to the contrary, and it is expressly applicable to implied contracts. Should we conclude that only defendants who are being sued for an amount exceeding $300.00 possess the fundamental right to be sued at home with the corollary of stringent construction of any exceptions to that right?

It is further pertinent to observe that although the law of California continues to assert the “ancient and valuable right” doctrine, the California Legislature in 1933 added to the general venue section of their code, which prior thereto had no contract exception, a contract clause substantially the same as that quoted, supra, from the Montana justice court venue provision. Indeed, the note of the California Code Commissioners states:

“The provision specifying the county in which a contract is to be performed as a proper county, is taken from the former section 832—which is applicable only to justices’ courts. Its inclusion in the amended section would make it applicable to all courts. It seems a proper provision, which should be made generally applicable, liberalizing the rules, somewhat, in plaintiff’s favor.”

(Emphasis ours).

So California, while still choosing to favor the convenience of the defendant generally, recognizes in fact, if not in words, an equality in the convenience of witnesses and trial. Is there a sound basis for saying the Montana Legislature has done less?

And if the law will have recourse to the nature of the agreement, the circumstances surrounding its making, and legal implication in considering the place of performance and the alleged

\(^{34}\)See Goossen v. Clifton (1946) 75 Cal. App. (2d) 44, 170 P.(2) 104.

\(^{35}\)Ch. 744, § 6, STATUTES OF CALIFORNIA, 1933.

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breach thereof in the trial on the merits, why should it not be allowed such aids in attempting to approximate convenience of trial at the outset?

The writer, then, would submit that further judicial limitation along the lines of Fraser v. Clark would not have a sound basis, and that it would bear little hope for a successful stabilization of the Montana law on the venue of contract actions.

The second of the three practical choices suggested, supra, is a compromise solution whereby the plaintiff would be allowed an election between the county of the defendant's residence and the county in which the contract was to be performed; but implied contracts would be included, and ordinary rules of contract interpretation might be applied to determine the place of performance, as under the Interstate Lumber Co. case. The burden of proof would remain on the defendant, following the Courtney and Johnson cases.

This would seem to affect the intent of the Legislature as to which contracts are embraced by the second sentence, as discussed supra. As to the holding in the Interstate case, that "may" means "must," the statute does, after all, say "may." And an election on the part of the plaintiff is provided for in the venue statutes of several of the states.

Such a compromise solution would seem to be a straightforward and reasonable interpretation of the language of Section 93-2904 of the Montana Code. It would be harmonious with the general principles which should underly the regulation of venue, and with the Model Venue Code developed by Professor Stevens after extensive study of the problem.

However, though it would seem most proper, both in reason and tradition, to take our venue statute on its face and so construe it, still there is another factor to be considered—certainty of settled law. That brings us to the third alternative, namely, a return to the rule of the Interstate Lumber Co. case.

The only difference between the law under the Interstate case and the solution posed above is that with the former there is but one place of trial for a contract action—the county in which the defendant was to have performed. Although at the common law the plaintiff had plenary discretion in regard to place of trial when the action was transitory, under the modern rationale of

―e.g., Illinois, Colorado, California, and Texas. See also, Model Venue Code, infra, note 61.
convenience there is no necessity of ordaining such a power of election with a quality of sacredness. The Interstate rule certainly subserves the convenience of trial and witnesses, which would seem to be the reason for the contract and tort clause. And it goes without saying that it follows along with what would appear to be the policy behind the first sentence of 93-2904—to restrict the possible oppressive behavior of the plaintiff, who controls the institution of the suit.

But the real argument for a return to the Interstate rule is that it has been a workable rule, and a rule well-understood for many years by the bench and bar of Montana. After all, certainty is of prime importance in the law of procedure. And the Interstate rule had the certainty of twenty-six years of case law behind it before it was overturned.

True, this alternative is vulnerable to the same objection as is the alternative first discussed—judicial legislation. But the Interstate decision enjoyed the curative effect of time and the acquiescence of thirteen regular sessions of the Legislature.

For these reasons, the writer submits that a return to the rule under the Interstate Lumber Co. line of cases would be a salutary turn of the Montana decisional law concerning venue of contract actions.

That rule, again, is that the "may" of the second sentence of Section 93-2904 is to be taken as "must," resulting in but one place of trial of actions on tort and contract; that the contract clause applies to all contracts, express or implied; that the ordinary rules for the interpretation of contracts will be applied if the contract itself does not evidence the place of performance intended by the parties, including the tender rule; that the burden of proof is upon the defendant to disclose facts entitling him to a change of venue; and that it is the performance of the defendant, or part of that performance, which is in the contemplation of the contract clause, the alleged breach of which gives rise to the suit.

The choices before the Legislature, of course, are many. It could reinforce the Court in any of the above-offered alternatives, or it could enact an entire new venue code, or it could do nothing. The books are full of suggestions for reforms, sweeping reforms, of venue statutes, to bring them up to date, if that should be desired.

Should the Legislature consider the Hardenburgh-Fraser

*See e.g., Langley, A Suggested Revision of the Texas Venue Statute, 30 Tex. L. Rev. 547 (1952); Stevens, Venue Statutes: Diagnosis and Proposed Cure, 49 Mich. L. Rev. 307 (1951).*
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cases as moves in the right direction, then it is suggested that the contract clause, as amended, of the corresponding Texas venue statute be looked to. Since that amendment, the Texas law on the point seems to have become fairly well established.

Should the Legislature wish to adopt something similar to what has been called, supra, the compromise solution, it would seem in order to word the two sentences of Section 93-2904 in the alternative; to specifically include all contracts, whether express or implied; to provide that it is the defendant’s performance, or part of that performance, to which reference is made; and to provide for either the application of ordinary rules of contract interpretation, or for a special rule of legal implication. The contract clause of the justices’ courts venue statute could serve as a model.

But should the Legislature, in the interests of procedural stability, consider a return to the rule of the Interstate line of cases desirable, then it is suggested that the contract-tort clause be placed ahead of the general venue section with the other exceptions; that the clause specifically include all contracts, express or implied; that it provide that it is the defendant’s performance, or part of that performance, to which reference is made; and that it provide for either the application of the ordinary rules of contract interpretation, or for a special rule of legal implication, as in the venue statute for justices’ courts.

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6Supra, note 48.
8R.C.M. 1947, § 93-6601.

CREDITEERS’ CLAIMS IN PROBATE; WHAT CLAIMS MUST BE FILED WITHIN THE PERIOD OF THE NON-CLAIMS STATUTE

The Montana non-claim statute applying to the filing of creditors’ claims in probate reads as follows:

All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had

3R.C.M. 1947 §91-2704.