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CHANGE OF VENUE IN ACTIONS INVOLVING PERFORMANCE OF CONTRACTS

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THE scene opens on a bright and cheery morning in November. We have dispatched a summons to one of the far corners of the state and have filed a carefully prepared complaint, unassailable in its perfectly stated cause of action. We glow with the warm satisfaction of work well done. Confidently we review our allegations and positive are we that no "weasel" motions or demurrers can upset it.

Time passes and in the mail we receive a neat and pithy warning that all is not well. It seems that the defendant, residing in the remote county does not wish to have his attorney travel to the far-off big city every time he wishes to argue a motion in the case. The defendant has embodied his objection in the form of a motion for a change of venue. We have gloomy visions of long, cold trips to the uttermost part of the state, and almost feverishly we reach for our Code. We find Section 29, ('35 C. S. A. Ch. 2, Sec. 29) which is straightforward English:

"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. . . . Actions upon contracts may be tried in the county in which the contract was to be performed. . . . "

Where the action involves a contract which is specifically and definitely to be performed in a certain county, the problem is simple: see for example, *Grimes Co., Inc.* vs. *Nelson,* 94 C. 487, 31 P. (2d) 488 (1934); *Lamar Alfalfa Milling Co.* vs. *Bishop,* 80 C. 369, 250 P. 689 (1927); *Coulter* vs. *The Bank of Clear Creek,* 18 C. A. 444, 72 P. 602 (1903).

Our case, however, involves a suit on a contract in which there is no place specified for the defendant to perform.

We feel that we ought to look at a few cases so we reach for *Progressive Mutual Insurance Co.* vs. *Mihoover,* 87 C. 64, 284 P. 1025 (1930), and find that the plaintiff may sue where he resides even though defendant resides and was served in another county. The court finds expressly that:

"Where the contract is silent as to the place of payment, the debtor is obliged to seek the creditor in the county of his

residence and at his usual place of business or abode, and make payment to him there."

The net result was that the plaintiff tried the case in his own county.

Well! We have solved that problem. But—our eye falls on *Kimberlin* vs. *Rutliff*, 93 C. 99, 23 P. (2d) 583 (1933). Here the court finds that:

"The contract is silent as to the place of performance. In that situation the code provision relative to the right of trial in the county where the contract is to be performed is not applicable. Such provision has reference to contracts which by their terms are to be performed at a particular place."

The result here is that the defendant is entitled to have the case tried where he resides and was served.

With visions of numberless trips to the remote county, we really settle down to careful search of all the cases. After several hours, we find the score to be seven to six in favor of the view announced in *Kimberlin* vs. *Rutliff*, 93 C. 99, 23 P. (2d) 583 (1933). Incredulous, we re-read our cases and finally desperately admit that there is a definitely and sharply divided split of authority in Colorado.

The cases of *People ex rel. Columbine Mercantile Co.* vs. *District Court*, 70 C. 540, 203 P. 268 (1922); *Chutkow* vs. *Wagman Realty and Insurance Company*, 80 C. 11, 248 P. 1014 (1926); *Progressive Mutual Insurance Co.* vs. *Mihoover*, 87 C. 64, 284 P. 1025 (1930); *Gould* vs. *Mathes*, 55 C. 384, 135 P. 780 (1913); *Board of Commissioners of Montezuma County* vs. *Board of Commissioners of San Miguel County*, 3 C. A. 137, 32 P. 346 (1893); and dictum in *Enyart* vs. *Orr*, 78 C. 6, 238 P. 29 (1925); (we omit *Bean* vs. *Gregg*, 7 C. 499, 4 P. 903 (1884) because the Code of 1883 differs from its present form), will sustain us in our now flagging hope of trying our case in our own county. These cases hold that where a contract does not specifically fix a place of performance, then the action may be tried where the plaintiff resides. The decisions are not based squarely on that ground in all the cases but the final result was that the plaintiff kept the place of trial in the county where he brought his action.

Opposed to these cases and nearly always ignoring them and their implications are the following: *Maxwell-Chamberlain Motor Co.* vs. *Piatt*, 65 C. 140, 173 P. 867 (1918); *People ex rel. Burton* vs. *District Court*, 74 C. 121, 218 P. 1047 (1923); *People ex rel.* vs. *District Court*, 66 C. 330, 182 P. 7 (1919); *Kimberlin* vs. *Rutliff*, 93 C. 99, 23 P. (2d) 583 (1933); *Brewer* vs. *Gordon*, 27 C. 111, 59 P. 404 (1899), and *People ex rel.* vs. *County Court*, 72 C. 395, 211 P. 102 (1922), which is weak on our point because it is a note and hence covered specifically in another subdivision of Section 29; and *Smith* vs. *Post Printing & Publishing Co.*, 17 C. A. 238, 68 P. 119 (1902), which is weak on our point. These cases all hold that as a general proposition the action must be tried where the defendant resides unless it clearly appears that the contract is to be performed in some other county. Again, these decisions are not all based squarely upon this ground. For our purposes, however, they indicate that the "city-shy" defendant was able to keep the place of trial in his own county.

Confronted with this inexplicable conflict, we naturally begin to go back to find some fundamental principle to be used as a standard.

We gradually become aware that "performance" is a word that embraces two distinct concepts. We realize that every contract—involving as it does, at least two parties—clearly contemplates two performances. The plaintiff is suing because the defendant has not performed. In our class of cases, the usual performance is the payment of money. Viewed in this light, we are forced to concede that some of the cases favoring us have ignored the distinction: viz. *Gould* vs. *Mathes*, 55 C. 384, 135 P. 780 (1913); *Board of Commissioners of Montezuma County* vs. *Board of Commissioners of San Miguel County*, 3 C. A. 137, 32 P. 346 (1893). We are convinced of the validity of this concept by *Lamar Alfalfa Milling Co.* vs. *Bishop*, 80 C. 369, 250 P. 689 (1927), which carefully distinguishes the two kinds of performance involved in contracts. This theory is also set forth in *People ex rel. Burton* vs. *District Court*, 74 C. 121, 218 P. 1047 (1923); *People ex rel.* vs. *District Court*, 66 C. 330, 182 P. 7 (1919); *Brewer* vs. *Gordon*, 27 C. 111, 59 P. 404 (1899), and *Smith* vs. *Post Printing & Publishing Co.*, 17

C. A. 238, 68 P. 119 (1902). We are thus forced to abandon the distinction between two kinds of "performance" as an aid to keeping our case in Denver.

We recall vaguely that only one case has made any definite attempt to reconcile the conflict implicit in the two lines of authority, or to distinguish the cases: *Kimberlin* vs. *Rutliff*, 93 C. 99, 23 P. (2d) 583 (1933). The case itself is contrary to our position because it held the venue must be laid in the county where defendant resides and was served. Avidly we seize on the reasoning requiring that the contract itself must specify the place of performance because the venue can be changed on that ground. We realize that in *Gould* vs. *Mathes*, 55 C. 384, 135 P. 780 (1913) the contract was not in writing and hence did not specify the place of performance and yet the court refused to change the venue to the place of defendant's residence. *Board of Commissioners of Montezuma County* vs. *Board of Commissioners of San Miguel County*, 3 C. A. 137, 32 P. 346 (1893) is to the same effect. Also in *People ex rel. Columbine Mercantile Co.* vs. *District Court*, 70 C. 540, 203 P. 268 (1922) the contract was set out in the complaint in haec verba and in a real sense did not definitely fix the place of performance; and yet the court did not require the venue to be changed to where the defendant resided and was served. We borrow the language of *People ex rel.* vs. *County Court*, 72 C. 395, 211 P. 102 (1922): "However, though the reason is wrong the decision was right." We derive some consolation out of the fact that the only case attempting to harmonize the conflict may be attacked as not decisive because even it ignores several contrary cases.

As a last resort we hopefully analyze the cases most strongly in our favor, viz. *People ex rel. Columbine Mercantile Co.* vs. *District Court*, 70 C. 540, 203 P. 268 (1922); *Chutkow* vs. *Wagman Realty and Insurance Company*, 80 C. 11, 248 P. 1014 (1926); *Progressive Mutual Insurance Co. vs. Mihoover*, 87 C. 64, 284 P. 1025 (1930) and the dictum in *Enyart* vs. *Orr*, 78 C. 6, 238 P. 29 (1925), in the hope that their original basis will help us reconcile the conflict. These cases say that the debtor must seek his creditor and make payment to him, and for that reason the creditor may sue where he resides. The real basis for those decisions stems

from statements in R. C. L. and C. J. to the effect that where no place is expressed for performance of a contract to pay money, the debtor must seek out the creditor and pay the creditor where he resided. The text statements are not discussed under a topic involving venue or change of venue. The Colorado decisions imply that if a debtor must seek his creditor, and pay him, then there is an implied agreement in the contract that it is to be performed where the creditor resides. This reasoning seems to stretch "performance" to cover a lot of ground in the light of the first sentence of Section 29 of the Code and of the decisions that the action *must* be tried where the defendant resides unless the *contract itself* clearly fixes a place of performance elsewhere, see e. g. *Lamar Alfalfa Milling Co.* vs. *Bishop,* 80 C. 369, 250 P. 689 (1927); *Maxwell-Chamberlain Motor Co.* vs. *Piatt,* 65 C. 140, 173 P. 867 (1918); *People ex rel. Burton* vs. *District Court,* 74 C. 121, 218 P. 1047 (1923); *People ex rel.* vs. *District Court,* 66 C. 330, 182 P. 7 (1919); *Kimberlin* vs. *Rutliff,* 93 C. 99, 23 P. (2d) 583 (1933).

We finally become woefully conscious that "our mistress" is capricious indeed. We still definitely wish to try our case here but we are hopelessly unable to rationalize our position as the better branch of two conflicting lines of authority. We prepare to face the court with the strongest cases we have and let the judge decide. As dusk falls we thoughtfully wonder how many days away from the office those trips will require.

A LAWYERS' ORCHESTRA

A unique institution in legal circles is the Lawyers' Club Orchestra of the Philadelphia Bar (The Shingle, Philadelphia Bar Association, December, 1938). It is composed entirely of members of the legal profession and started with eighteen men but now has a membership of thirty-eight and is the only orchestra of its kind in the nation.

MISSING

Volume 10 containing the 12 issues of Dicta for 1933 has been borrowed from the Editor and, as is usual in such cases, the latter has received a large number of calls for articles which the index shows are contained in that particular volume.

Please return it to the Editor's office.