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State ex rel. Perry v. District Court, 22 St. Rptr. 406, 400 P.2d 648 (Mont. 1965)

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RECENT DECISIONS

STATUTE PROVIDING FOR DISQUALIFICATION OF A JUDGE BY AFFIDAVIT WITHOUT PROOF OF BIAS OR PREJUDICE IS NOT A LEGISLATIVE INFRINGEMENT ON JUDICIAL POWER.—A district court judge in Montana, who was disqualified from hearing an action to quiet title, refused to remove himself from the case, contending that the Fair Trial Law[1] is unconstitutional. *Held*: The statute is constitutional. The procedure outlined by the statute does not infringe upon the judicial power. *State ex rel. Perry* v. *District Court*, 22 St. Rptr. 406, 400 P.2d 648 (Mont. 1965).[2]

Montana's original Fair Trial Law was passed in 1903[3] as an amendment to the existing disqualification statute.[4] The Fair Trial Law provided that in civil matters, any district judge could be disqualified upon timely filing of an affidavit alleging bias and prejudice. No proof was necessary to substantiate the allegations. Upon the filing of the affidavit, the judge would be immediately disqualified, and would be without further authority to act in the case. However, he could still perform administrative functions.[5] Any party could disqualify up to five judges by means of affidavit.[6] The Fair Trial Law was amended by the 1909 legislature. This amendment reduced from five to two the number of judges who could be disqualified by each party. It also provided that if there were more than one judge in a district, another judge from the same district must be called in to preside; and upon disqualification of all the judges in a district, either a judge from another district must be called, or the proceeding transferred to another judicial district.[7] Additional amendments to the Fair Trial Law have related to the timeliness of the affidavit[8] and

[1]REVISED CODES OF MONTANA, 1947, § 93-901(4). (REVISED CODES OF MONTANA are hereinafter referred to as R.C.M.)

[2]Although the basic question considered by the instant case was the constitutionality of the Fair Trial Law, there are certain procedural problems apparently inherent to a statute of this type. The problems are discussed in the latter portion of this article.

[3]Laws of Montana 1903, 2d Extra Session, ch. 3, § 1 at 10; the history behind this enactment is traced in HOWARD, MONTANA, HIGH, WIDE AND HANDSOME 50 (1943).

[4]Montana Code of Civil Procedure 1895, § 180.

[5]R.C.M. 1947, § 93-901(4) The judge may arrange the calendar, regulate the order of business, transfer the proceeding to some other court, or call in some other district judge to act in such action or proceeding.

[6]*Supra* note 4.

[7]Laws of Montana 1909, ch. 114, § 1 at 161, R.C.M. 1907, § 6315(4).

[8]a. Laws of Montana 1927, ch. 93, §1 at 327, R.C.M. 1921, § 8868(4). The legislature changed the earlier requirement that the filing be made at any time before the day fixed for the trial or hearing, to require filing of the affidavit at least 5 days prior to such trial or hearing (providing that the party filing had notice 5 days prior to the hearing; if he did not have notice, he was required to file his affidavit of disqualification immediately upon receipt of notice). The amendment also required a second disqualification to be made within 3 days after notice of the identity of the judge assuming jurisdiction over the action.

b. Laws of Montana, 1961, ch. 218, § 1 at 602, R.C.M. 1947, § 93-901(4). The legislature added the provision that, in single judge districts, the affidavit must be filed one day prior to the day fixed by the court for the setting of the trial calendar. The provision was not applicable unless notice of the setting date was given to all parties by the clerk of the court at least 15 days prior thereto.

deleted the words "bias and prejudice" from the affidavit.[9] Now the affidavit must state only that the party or his attorney believes he cannot have a fair trial before the judge against whom the affidavit is made.

Three general procedures exist for the disqualification of judges on the basis of bias and prejudice. Most states allow disqualification for actual bias and prejudice.[10] In these states, the party who seeks disqualification submits affidavits stating facts to support the allegations of bias and prejudice. If the facts upon which the alleged prejudice rests are not admitted by the judge, the affiant must prove them. The evidence produced need not be limited to the case at hand, but may show personal bias toward client or counsel, temperamental prejudice to the class of litigation involved, or other recognized ground for disqualification.[11] The sufficiency, and the truth or falsity of these proofs is determined at a hearing before the judge challenged,[12] another judge,[13] or some other designated authority.[14]

The second method of disqualification also requires an affidavit alleging bias and prejudice, and a statement of facts supporting the allegations. The reasons stated may not be frivolous or fanciful. If they are substantial and plausible, the truth of the statements may not be questioned. The only power remaining to the disqualified judge is to rule upon the legal sufficiency of the affidavit of disqualification.[15] The federal courts and the courts of several states use this procedure.[16]

The third method of disqualification—the one under discussion here—is the so-called "peremptory challenge" or affidavit statute. Generally, this procedure requires an affidavit that the affiant believes he cannot have a fair trial because of the bias and prejudice of the judge. The judge is automatically disqualified upon the filing of the affidavit. Neither reasons, facts, nor proof are required because the affidavit is sufficient on its face to disqualify the judge. The courts of most western

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c. Laws of Montana 1963, ch. 82, § 1 at 173, R.C.M. 1947, § 93-901(4). The legislature changed the time for filing to at least 15 days before the trial or hearing, and if notice of the trial or hearing was not received prior to this date, then immediately upon receipt of such notice.

[9]Laws of Montana 1965, ch. 234, § 1 at 754, R.C.M. 1947, § 93-901(4).

[10]Mose v. Julian, 45 N.H. 52, 84 Am. Dec. 114 (1863); State *ex rel.* McAllister v. Slate, 278 Mo. 570, 214 S.W. 85, 8 A.L.R. 1226 (1919); *In re* Crawford's Estate, 307 Pa. 102, 160 Atl. 585 (1931); Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948); State v. Doucet, 199 La. 276, 5 So.2d 894 (1942); Broad St. Corp. v. Valco Mortg. Co., 135 N.J. Eq. 581, 39 A.2d 700, *aff.* 136 N.J. Eq. 513, 42 A.2d 704, 705 (1945); Taylor v. Taylor, 185 Va. 126, 37 S.E.2d 886 (1946); *In re* Hupp, 178 Kan. 672, 291 P.2d 428 (1955).

[11]*In re Crawford's Estate, supra* note 10, at 587.

[12]*Haslam v. Morrison, supra* note 10, at 523.

[13]*State ex rel. McAllister v. Slate, supra* note 10, at 88.

[14]*State v. Doucet, supra* note 10, at 898. Louisiana uses a commissioner to rule on the facts presented.

[15]Dickenson v. Parks, 104 Fla. 477, 140 So. 459 (1932).

[16]Berger v. United States, 255 U.S. 22 (1921). The federal statute also requires the assertion that the alleged bias is personal. *In re* Union Leader Corp., 292 F.2d 381, *cert. denied* 368 U.S. 927 (1961); *Dickenson v. Parks, supra* note 15, at 461.

and several midwestern states have upheld statutes similar to that operative in Montana.[17] These courts have generally held that there is a presumption in favor of the constitutionality of a statute; and that there must be a plain and palpable abridgement of the judicial function before such a statute will be held unconstitutional.[18] Some of these courts have drawn an analogy between judicial disqualification and a change of venue.[19] Similarly, a court has said that the jurisdiction of the court is not removed, only that of the judge.[20] Other courts have stated that since actual bias and prejudice need not be shown, proof of the allegations in the affidavit is justifiably not required.[21] A further reason given for upholding such statutes is the need to maintain the confidence of the public in the absolute integrity of the courts.[22]

The constitutionality of Montana's original Fair Trial Law was upheld in *State ex rel. Anaconda Copper Mining Co.* v. *Clancy*.[23] The court held that removal of the judge had no effect on the jurisdiction of the court. It analogized the proceeding to disqualify a judge to a proceeding for a change of venue, saying it laid down a rule of procedure for the observance of the courts in the exercise of their jurisdiction. The law was held to be of the same character as the laws regulating continuances, appeals, and the entire subjects of remedies and of practice. The court noted that:

> The mere fact that a law requires the performance by a court of a particular act upon a given state of fact is not a sufficient test by which to determine its invalidity, and in many instances the legislature may deprive the court of discretion in the exercise of its jurisdiction. . . .It is true that the court, having a discretion as to a particular matter, cannot, so long as it retains that discretion, be controlled in the exercise of it. But the whole error is in forgetting that the court has the discretion only by virtue of the law giving

[17]State *ex rel.* Nissen v. Superior Court, 122 Wash. 407, 210 Pac. 674 (1922). Indiana requires disqualification by affidavit very similar to Montana's, but calls it an affidavit for a change of venue; Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925); Oregon uses language almost identical to Montana's and adds a requirement that the affidavit be made in good faith and not for the purpose of delay, U'Ren v. Bagely, 118 Or. 77, 245 Pac. 1074, 46 A.L.R. 1173 (1926); the Nevada courts hold that the affidavit must be filed before a hearing in any contested matter has commenced, State *ex rel.* Kline v. District Court, 70 Nev. 172, 264 P.2d 396 (1953); California allows only one disqualification for each side, Johnson v. Superior Court, 50 Cal. 2d 693, 329 P.2d 5 (1958); Arizona requires an affidavit by the party plus affidavits of three resident electors of the county to disqualify, Speakman v. Sullivan, 32 Ariz. 307, 257 Pac. 986, 56 A.L.R. 169 (1927); Minnesota requires filing within one day after it is ascertained which judge is to preside at the trial or hearing, Jones v. Jones, 242 Minn. 251, 64 N.W.2d 508 (1954). See also Price v. Featherstone, 64 Idaho 312, 130 P.2d 853, 143 A.L.R. 40 (1942).

[18]*U'Ren v. Bagely, supra* note 17, at 1075.

[19]*State v. Barber, supra* note 17, at 898.

[20]*Price v. Featherstone, supra* note 17, at 855.

[21]*State ex rel. Kline v. District Court, supra* note 18, at 398.

[22]State *ex rel.* Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 Pac. 312 (1904).

[23]*Ibid.* In this case two large Montana copper mining companies were in court; the Anaconda Company felt the judge who was to hear the case was prejudiced against them and filed an affidavit alleging prejudice. The judge announced his intention of proceeding with the trial, whereupon the Anaconda Company procured an alternative writ of prohibition from the Montana Supreme Court which then ruled on the constitutionality of the Fair Trial Law.

> it, and that the same law can take away that discretion. . . .and leave to the court a simple ministerial duty.[24]

The court further stated that the *imputation* of bias and prejudice required the removal of the judge. Since the question of *actual* bias and prejudice was not considered, there were no facts to be judicially determined. Therefore, there was no legislative interference with judicial discretion.[25]

However, in *State ex rel. Bennett v. Bonner*[26] the Montana Supreme Court declared unconstitutional a governor's actions based on a statute providing that:

> If for any cause a district court is not or cannot be held in any county by the judge or judges thereof, or by a district judge requested by such judge to hold court, or if the business of the court in any county is not or cannot be dispatched with reasonable promptness, the governor may, upon application of any interested person, by an order in writing, require some district judge to hold court in said county for such time as may be specified in the order.[27]

The court held that the governor could neither exclude or remove from office the duly elected, qualified, and acting judge of the district, nor otherwise suspend the powers conferred on the judge by the constitution. It stated that judicial power could not be taken away by legislative action. It is arguable that the Fair Trial Law grants to a litigant the same power that the statute above granted to the governor. Under the Fair Trial Law, the judge is barred from further discretionary action after the filing of the affidavit, and may then act only ministerially.[28] In effect, this procedure deprives a judge of his powers and gives them to another.

Another result of the Fair Trial Law is that in civil matters the litigant has the power to remove the presiding judge after verdict and before hearing on a motion for a new trial.[29] There are at least two objections to this right. The litigant may remove the judge who presided at the trial if he or his attorney did not like the rulings made by the judge. Since the law thus appears to give a party the power to control judicial discretion, it is arguably unconstitutional.[30] Moreover, when a judge is disqualified after verdict, and a new judge brought in to hear the motion for a new trial, the new judge must decide the motion solely on the record of the trial and its transcript. This seemingly vests in the substitute judge appellate power over the actions of the disqualified judge. Although in one case concern was expressed concerning the wisdom of allowing disqualification after verdict and before ruling

[24] *Id.* at 316.

[25] *Ibid.*, and instant case at 653.

[26] State *ex rel.* Bennett v. Bonner, 123 Mont. 414, 214 P.2d 747 (1950).

[27] R.C.M. 1947, § 93-312.

[28] *Supra* note 1.

[29] State *ex rel.* Carleton v. District Court, 33 Mont. 138, 82 Pac. 789 (1905). The criminal disqualification statute does not allow disqualification after verdict and before hearing on a motion for a new trial. See 26 MONT. L. REV. 128 (1964).

[30] *Bennett v. Bonner*, *supra* note 26, at 757.

on a motion for a new trial, the Montana Court has ruled that such disqualification is constitutional.[31]

The main objection to peremptory challenge statutes is abuse by attorneys. The courts sustaining these statutes have generally held that they are necessary, that abuse is not sufficient reason for abrogation, and that the need for such a statute must be weighed against the abuse.[32] The employment of the power to disqualify as a delaying tactic is the most prevalent abuse of the Fair Trial Law.[33] For example, an attorney who may not want to try a case on the date set and who cannot obtain a continuance, may wait until the last day allowed by the statute and then disqualify the scheduled judge. His maneuver generally results in delay of the trial, which may be held over until the next jury term. The disqualified judge must rule on the affidavit, then call in a new judge. The new judge must arrange his own calendar to accommodate the case and the case will probably be set at the end of that calendar. Since our statute allows two judges to be disqualified by each party,[34] with judicious timing it is a virtual certainty that the desired delay can be accomplished by two disqualifications. This is especially true in a one or two judge district.

Another undesirable practice in connection with the use of the Fair Trial Law is the disqualification of judges during the discovery and pre-trial procedures.[35] Often an attorney summarily disqualifies a judge after an adverse ruling at the pre-trial conference, or after an adverse ruling regarding depositions or interrogatories.[36] In the process of discovering, defining, and narrowing the issues, there are bound to be holdings adverse to one party. Because proper regulation of the discovery and pre-trial procedures may lead to disqualification, some judges may become hesitant about enforcing the rules.[37] Perhaps the powers given a district judge to control discovery procedures under the Montana Rules of Civil Procedure would be implemented more fully if disqualification were made more difficult.

It is submitted that statutory corrections should be made to prevent the principal abuses of the Fair Trial Law. One possible method of foreclosing the delay tactics would be to require that the disqualifying affidavit be filed within five days after the parties receive notice which judge is to preside.[38] Some minor delay may still occur, due simply to the mechanics involved in changing judges. The new judge, however, would have more time to rearrange his own calendar, and

[31] *State ex rel. Carleton v. District Court, supra* note 29.

[32] *Johnson v. Superior Court, supra* note 17, at 8.

[33] When asked for their comments on abuses of the Fair Trial Law, seven Montana attorneys stated delay tactics were the most common method of abuse.

[34] *Supra* note 1.

[35] The same attorneys questioned in note 32, *supra*, stated that this type of abuse was used quite frequently, although not to the extent of the delay tactic.

[36] *I.e.*, refusal to issue a protective order requested, denial of a motion to produce, etc.

[37] In discussions with three attorneys, this has been advanced as a possible theory for the failure of some judges to properly enforce the new Rules provisions.

[38] *Supra* note 8, comment c.

the action could be set at an earlier date. Such a rule would automatically cut off the practice of disqualification because of adverse rulings during discovery or pre-trial procedures. If the right to disqualify a judge by affidavit were limited to the recommended period, the objections based on alleged control of discretion and possible vesting of appellate powers in a district judge would no longer have any validity.

Montana's disqualification statute is, on balance, preferable to the more restricted methods of recusation. Statutes requiring proof of actual bias and prejudice are undesirable for several reasons: a litigant may be put to a great deal of expense gathering evidence to prove bias and prejudice; the hearing on the question of actual bias and prejudice is time consuming; and, if the question of prejudice is decided adversely to the litigant, he is required to have his cause heard by a judge whom he believes to be prejudiced against him. Even in those states following the federal rule, which allows the judge to consider only the legal sufficiency of the affidavit, a litigant is put to additional expense and effort. Temperamental prejudice to the class of litigation involved may not, by itself, sustain a charge of actual bias and prejudice against a judge; nor would a personality conflict, or animosity on the part of the judge toward the attorney or client.[39] Yet, a judge may be unconsciously influenced by any or all of these factors. Proof of actual bias and prejudice of a judge is extremely difficult.[40] Our advocacy system of practice demands that an attorney be allowed to disqualify a judge if he feels that his client will not have a fair trial. Therefore, any of the above reasons should be sufficient. Abuse of the disqualification statute exists in Montana, and presumably in other states with similar statutes. In view of the difficulty of proving actual bias and prejudice, it is submitted that Montana's statute, with provisions to restrict the present abuses, both provides the necessary protection to the litigant, and keeps the courts free from even the appearance of bias and prejudice.

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RIGHT TO COUNSEL DURING POLICE INTERROGATION: AN INTRINSIC RIGHT?—Dennis White, 16 years of age, was taken to the county attorney's office for questioning in connection with a murder. A confession was elicited after a three hour interrogation. White alleged that he was not given the benefit of his constitutional right to counsel. On appeal to the Supreme Court of Montana, *held*, since defendant was advised of his right to counsel and his right to remain silent shortly after interrogation began, and since he did not request such assistance, the failure

[39] Clyma v. Kennedy, 64 Conn. 310, 29 Atl. 539 (1894).
[40] People v. Emmett, 123 Cal. App. 678, 12 P.2d 92 (1932).