Montana Law Review

Volume 23
Issue 2 *Spring 1962*

Article 5

1962

# State of Montana ex rel. Great Northern Railway Company v. District Court, 365 P.2d 512 (Mont. 1961)

Robert G. Anderson

# RECENT DECISIONS

SUPREME COURT OF MONTANA REFUSES TO DECIDE AVAILABILITY OF FORUM NON CONVENIENS IN MONTANA.—Plaintiff, a resident and citizen of Washington, instituted a suit under the Federal Employers' Liability Act[1] in a Montana District court in Silver Bow County. He claimed damages for injuries sustained in Spokane, Washington, while employed by the defendant railroad as a switchman in interstate commerce. Defendant moved to dismiss on the grounds of *forum non conveniens,* alleging undue expenses and inconvenience if the trial were to be held at such a distance from the scene of the accident. The motion was denied and defendant petitioned the Montana Supreme Court for an appropriate writ. An alternative writ of supervisory control was issued. After a hearing on the return of the writ, *held,* writ dissolved and proceedings dismissed. Since only a few suits of this type have been filed in this jurisdiction by nonresidents, the adoption of the doctrine of *forum non conveniens* at this time is not justified. A substantial increase, however, in this type of litigation would lead the court to re-examine the doctrine's availability in Montana. *State of Montana ex rel. Great Northern Railway Company v. District Court,* 365 P.2d 512 (Mont. 1961) (Justice Adair concurred in result only, Justice Doyle concurred specially, and Justice Castles dissented).

The California Supreme Court has described the doctrine of *forum non conveniens* in these words:[2]

> The rule of *forum non conveniens* is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere.

It is now settled that the doctrine is available in federal courts in Federal Employers' Liability Act (hereinafter FELA) cases.[3] It is also well settled that a state is free to decide the applicability of the principle in the state courts according to its own local law.[4] The Montana court was aware of these principles.[5]

Justice Adair, concurring in result only,[6] contended that *forum non conveniens* is not available in Montana FELA cases. Justice Adair proposed several reasons for his position, only two of which will be noted here. First, he argued that a dismissal under the doctrine would be a deprivation of plaintiff's right to sue in any forum in which the defendant does business, a right conferred upon him by the federal statute.[7] The United States Supreme Court seems to have conclusively answered this proposition by saying:[8]

[1]45 U.S.C. §§ 51-60 (1958).
[2]Leet v. Union Pac. R.R. Co., 25 Cal. 2d 605, 609, 155 P.2d 42, 44 (1944).
[3]*Ex parte* Collett, 337 U.S. 55 (1949).
[4]Missouri *ex rel.* Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950).
[5]Instant case at 514.
[6]Instant case at 514.
[7]Instant case at 521.
[8]Douglas v. New York, New Haven & Hartford R.R. Co., 279 U.S. 377, 387 (1929).

> As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned.

Second, Justice Adair contended that the doctrine of *forum non conveniens* was not a part of the common law at the time that law was adopted by Montana.[9] Inasmuch as no Montana statutes expressly authorize the use of the doctrine, he contended that there is no basis for the existence of the doctrine in Montana.[10]

The principle, however, is not new. The New York courts, as long ago as 1868.[11] recognized that though a court might have jurisdiction, yet it could, in a proper instance, refuse to entertain that jurisdiction.[12]

The principle of *forum non conveniens* has been held to be within the inherent power of a court.[13] In *Universal Adjustment Corporation v. Midland Bank*,[14] the Massachusetts court noted that:[15]

> [C]ourts of general jurisdiction have "inherent power to do whatever may be done under the general principles of jurisprudence to insure" to parties to litigation a fair trial. . . . This statement comprehends within its broad scope the power to determine the question whether the doctrine of forum non conveniens ought to be applied in any particular case.

One California court, recognizing that courts possess inherent powers and that those powers are not dependent upon constitutional grants, has stated that such powers may be used by the courts "to properly and effectively functions as a separate department in the scheme of our state government."[16] A recent California case, *Price v. Atchison*,[17] seemed to view the doctrine as being within the inherent powers of the court, saying:[18]

> [W]e are of the view that the injustices and burdens . . . require that our courts, acting upon equitable principles and within the Constitutional limits . . . exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere.

[9]Instant case at 516.
[10]Instant case at 519.
[11]Dewit v. Buchanan, 54 Barb. 31 (N.Y. 1868).
[12]It is not the purpose of this article to attempt a historical analysis of the doctrine of *forum non conveniens*. Such an undertaking would require much more space than is here allotted. Suffice it to say that this writer believes Justice Adair's contention to be, at the most, highly arguable. The following citations are included as some indication of the historical development of the doctrine: Logan v. Bank of Scotland, 1 K.B. 141 (1906); Collard v. Beach, 81 App. Div. 582, 81 N.Y. Supp. 619 (1st. Dept. 1903); Great Western Ry. Co. v. Miller, 19 Mich. 305 (1869); see also the annotation and cases cited in 32 A.L.R. beginning at page 6.
[13]Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N.E. 152 (1933); St. Louis-San Francisco Ry. Co. v. Superior Court, 276 P.2d 773, 778 (Okla. 1954).
[14]281 Mass. 303, 184 N.E. 152 (1933).
[15]*Id.*, 184 N.E. at 159.
[16]Corum v. Hartford Acc. & Indem. Co., 67 Cal. App. 2d 891, 155 P.2d 710, 713 (1945).
[17]42 Cal. 2d 577, 268 P.2d 457 (1954).
[18]*Id.*, 268 P.2d at 461.

*Price v. Atchison* expressly overruled a prior California decision which had denied the doctrine's existence in FELA suits.[19] In the *Price* case, an FELA suit involving nonresidents and a tort committed in New Mexico, the California court explained that since the United States Supreme Court's decision in *Missouri ex rel. Southern Railway Company v. Mayfield*,[20] a state court was no longer required to deny the existence of the doctrine in FELA cases.[21]

The Utah Supreme Court advanced a unique argument for the adoption of the doctrine in that state.[22] The court noted a state venue statute which provided, in part, for the change of place of trial within the state "when the convenience of witnesses and the ends of justice would be promoted by the change."[23] In referring to this statute, the Utah court stated:[24]

> It would appear from this enactment that the legislature intended the courts of this state to have the right to refuse jurisdiction in those instances where a more convenient forum was available within the state. If the principle can be applied against all persons within the state, there is no good reason why the doctrine should not be extended to causes of action arising outside the state if it is applied equally as to all litigants.

The portion of the Utah statute quoted is almost identical to a provision of one of the Montana venue statutes, section 93-2906 of the Revised Codes of Montana, 1947.[25] In the light of this clear legislative recognition and support of the principle upon which the doctrine is based, *i.e.*, a change of forum to promote the ends of justice, the Montana court could, without difficulty, determine that the use of the doctrine of *forum non conveniens* is within the inherent power of the courts of this state.

Another consideration, noted by the California court in the *Price* case, is that an anomaly is presented where a federal district court may transfer an FELA suit to a more appropriate forum, while, in comparable actions, regardless of the equities involved, a state court may not decline jurisdiction. The court said:[26]

> We are persuaded that such a result would be promotive of neither fairness, justice, nor Congressional intent when removal power was bestowed upon the federal district courts.

As noted by one law review writer, "the growth of forum non conveniens in this country was long hindered by decisions indicating that

[19]Leet v. Union Pac. R.R. Co., 25 Cal. 2d 605, 155 P.2d 42 (1944).
[20]240 U.S. 1 (1950).
[21]*Supra* note 17, 268 P.2d at 460.
[22]Mooney v. Denver & Rio Grande W. R.R. Co., 118 Utah 307, 221 P.2d 628 (1950).
[23]UTAH CODES ANN., 1943, § 104-4-9.
[24]Mooney v. Denver & Rio Grande W. R.R. Co., 118 Utah 307, 221 P.2d 628, 647 (1950).
[25]This section provides, in part, as follows:
> The court or judge must, on motion, change the place of trial in the following cases:
>
> . . .
>
> (3) When the convenience of witnesses and the ends of justice would be promoted by the change.
>
> . . .

[26]Price v. Atchison, 42 Cal. 2d 577, 268 P.2d 457, 461 (1954).

state courts were *required* by the federal Constitution to hear actions between residents of other states.''[27] (Emphasis added.) The United States Supreme Court, however, has dismissed the possibility of any violation of the privileges and immunities clause of the Constitution as concerns state application of *forum non conveniens* in FELA cases. In the *Mayfield* case, the Supreme Court explained its position in these words:[28]

> By reason of the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, § 2. Therefore Missouri cannot allow suits by nonresident Missourians for liability arising out of conduct outside that State and discriminatorily deny access to its courts to a nonresident who is a citizen of another State. But if a State chooses to ''[prefer] residents in access to often overcrowded Courts'' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control.

Following the decision in the *Mayfield* case, two states have adopted the doctrine, expressly overruling prior decisions.[29] Two other states have accepted the doctrine, evidently as a matter of first impression, relying upon the *Mayfield* decision.[30]

In Montana the status of the doctrine is unclear. In a previous case, *Bracy v. Great Northern Railway Company*,[31] the court refused to decide whether *forum non conveniens* was available. The court held merely that even if the doctrine was available, the trial court did not abuse its discretion by denying the motion to dismiss.[32]

Whether the trial court in the instant case held that the doctrine is not available in Montana, or whether it said that the facts did not warrant its application is not clear from the supreme court's opinion. There is some language pointing to each conclusion.[33] Nor is it clear upon what basis the supreme court reached its decision. The defendant's motion to dismiss on the ground of *forum non conveniens* was denied by the trial court and that denial was affirmed by the supreme court. The bases upon which the supreme court could have reached this disposition of the case can be enumerated as follows:

[27]Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1235 (1946-47).

[28]Missouri *ex rel.* Southern Ry. Co. v. Mayfield, 340 U.S. 1, 3, 4 (1950).

[29]Price v. Atchison, 42 Cal. 2d 577, 268 P.2d 457 (1954); Johnson v. Chicago, Burlington & Quincy R.R. Co., 243 Minn. 58, 66 N.W.2d 763 (1954).

[30]Mooney v. Denver & Rio Grande W. R.R. Co., 118 Utah 307, 221 P.2d 628 (1950); St. Louis-San Francisco Ry. Co. v. Superior Court, 276 P.2d 773 (Okla. 1954). For discussion by other courts that have adopted the doctrine on various other grounds, see Running v. Southwest Freight Lines, Inc., 227 Ark. 839, 303 S.W.2d 578 (1957); Whitney v. Madden, 400 Ill. 185, 79 N.E.2d 593 (1948); Stewart v. Litchenberg, 148 La. 195, 86 So. 734 (1920); Foss v. Richards, 126 Me. 419, 139 Atl. 313 (1929); Jackson & Sons v. Lumbermen's Mut. Cas. Co., 86 N.H. 341, 168 Atl. 895 (1933); Gore v. United States Steel Corp., 15 N.J. 301, 104 A.2d 670 (1954); Murnan v. Wabash Ry. Co., 246 N.Y. 244, 158 N.E. 508 (1927).

[31]136 Mont. 65, 343 P.2d 848 (1959).

[32]*Id.* at 68, 343 P.2d at 850.

[33]Instant case at 513. It is alleged that ". . . respondent [*i.e.*, the trial court] considered the showing made by relator insufficient to warrant a dismisal of the action." But it is also alleged "that respondent further believes that it has been the public policy of this state to keep its courts open to residents and nonresidents alike. . . ."

I. Assume the trial court held *forum non conveniens* **is available** in Montana, but that, in the trial court's discretion, the relative inconveniences did not warrant granting defendant's motion to dismiss. Then the possible bases of the supreme court's decision are as follows:

(1) The supreme court affirmed the decision on the same grounds, *i.e.*, that the doctrine is available but discretionary with the the trial court, and here the trial court did not abuse its discretion;

(2) The supreme court affirmed the decision on another ground, *i.e.*, that the doctrine is not available and the motion was properly denied;

(3) The supreme court affirmed the decision on still another ground, *i.e.*, that whether the doctrine is available in Montana need not now be decided because even though it might be available in an appropriate case, the facts in this case did not so obviously require the application of *forum non conveniens* that the trial court's denial would amount to an abuse of discretion.

II. Assume the trial court held *forum non conveniens* **is not available** in Montana, then the possible bases of the supreme court's decision are as follows:

(1) The supreme court affirmed the decision on the same grounds, *i.e.*, that the doctrine is not available in Montana;

(2) The supreme court affirmed the decision on another ground, *i.e.*, that the doctrine is available but discretionary, and viewing all the facts in the instant case the trial court would have abused its discretion, as a matter of law, had the motion to dismiss been granted;[34]

(3) The supreme court affirmed the decision on still another ground, *i.e.*, that whether the doctrine is available in Montana need not now be decided, for, if it is available in an appropriate case, upon the facts here presented a dismissal by the trial court would have been an abuse of discretion as a matter of law;[35]

III. Assume the trial court **did not decide** whether *forum non conveniens* is available in Montana, but held merely that even if it is available, the relative inconveniences would not warrant granting defendant's motion in this case, then the possible bases for the supreme court's decision are as follows:

(1) The supreme court affirmed the decision on the same grounds, *i.e.*, that the supreme court need not now decide whether it is available because, as the trial court found, the relative inconvenience in this case would not warrant the application of the doctrine even though it might be available in appropriate cases;

[34]Assume the trial court held that the doctrine *is not* available in Montana. If the supreme court intended to affirm the trial court on the ground of no abuse of discretion, then the supreme court, may have been in error for the trial court had, in fact, exercised no discretion. In such an instance, the case should have been sent back for an exercise of discretion by the trial court.

[35]See note 34 *supra*.

(2) The supreme court affirmed the decision on another ground, *i.e.*, that the doctrine is not available and the motion was, for that reason alone, properly denied;

(3) The supreme court affirmed the decision on still another ground, *i.e.*, that the doctrine is available but the trial court did not abuse its discretion by denying the motion.

Just which approach the supreme court took in the instant case is not clear; but there are nine logical possibilities—each of which has some support in the language of the court.[36] The court in the instant case cited *Bracy v. Great Northern Railway Company,* indicating that "whether the doctrine should be applied in a given case was a question resting in the discretion of trial court."[37] The import of this language, standing alone, is that the doctrine *is* available. However, the court concluded by saying: "... we do not feel justified in this instance to establish the rule."[38] Thus, the court seems to have ruled that the doctrine *is not* available in Montana.

Whichever position the court took, it did discuss the purposes of the doctrine and the conditions under which it might apply.[39] Apparently, however, the court misunderstood these purposes, for in discussing them, the court seems to have unduly limited the doctrine. As noted by the court:[40]

> The purpose of the rule is to require litigants to avail themselves of the trial forum of their residence and not burden the taxpayers and courts of foreign jurisdictions with such causes.

In contrast to this statement which limits the purposes of the doctrine, the United States Supreme Court, in *Gulf Oil Corporation v. Gilbert,* noted:[41]

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of the willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.

Not only has the Montana court again avoided the issue of *forum non conveniens,* but it has compounded the confusion. The court has not made clear whether or not the doctrine is available in Montana. Further, the court has not made clear upon which of many possible grounds it based its decision in the instant case.

[36]Actually there are eleven possibilities, but two of them would assume that the supreme court was in error. See notes 34 and 35 *supra.*
[37]Instant case at 514.
[38]Instant case at 514.
[39]Instant case at 514. The court seemed to feel that reciprocity was one condition to be noted in determining whether or not to apply the doctrine. The court noted: "Since our sister state has not seen fit to adopt the rule, ... we do not feel justified in this instance to establish the rule." It is submitted that such a condition is of little or no significance to such a determination.
[40]Instant case at 514.
[41]330 U.S. 501, 508 (1947); See Price v. Atchison, 42 Cal. 2d 577, 268 P.2d 457, 462 1954).

It is submitted that the instant case leaves the law completely unsettled and furnishes no guide for district judges, litigants, and attorneys. A definitive, authoritative ruling must some day be made. When an appropriate case again arises, the court should have no trouble in determining that the application of the doctrine is within the inherent power of the court.

ROBERT G. ANDERSON

---

DISCRETIONARY DECISION OF A STATE ADMINISTRATIVE AGENCY WILL BE SUSTAINED IF BASED ON SUBSTANTIAL EVIDENCE.

Baker Sales Barn, Inc. applied to the Montana Livestock Commission for a "certificate of public convenience and necessity" authorizing the licensing of a livestock market at Baker, Montana, under the appropriate Montana statutes. After a hearing the commission denied the application, concluding that the applicant failed to show the requisite public convenience and necessity. On appeal the district court set aside the commission's denial and ordered the certificate to issue. The court reviewed the evidence presented to the commission and found that the commission had acted capriciously and arbitrarily and had abused its discretion. On appeal to the Montana Supreme Court, *held,* reversed. Under the Montana statute permitting an appeal from a decision of the Montana Livestock Commission, the courts will not interfere with the commission's factual determination, if based on substantial evidence.[1] *Baker Sales Barn, Inc. v. Montana Livestock Commission,* 367 P.2d 775 (Mont. 1962) (Justice Doyle specially concurring, and Justices John C. Harrison and Adair writing separate dissenting opinions).

The instant decision recognizes what is commonly referred to as the "substantial evidence" rule for determining the evidentiary validity of an administrative decision.[2] The rule first appeared in a 1912 decision by

[1]The Montana statute permitting an appeal from a decision of the Montana Livestock Commission is § 46-917 of the REVISED CODES OF MONTANA, 1947. This section provides in part: ". . . The trial shall be held summarily before the district court upon the record of the evidence presented to the commission of which a complete record must be kept of the hearings of the commission as shown by said transcript and the exhibits, if any, presented to the commission and . . . upon which its decision was rendered and there shall not be any additional evidence introduced or anything in the nature of a trial de novo. The court shall not substitute its discretion for that of the commission but shall determine whether the commission and whether it acted according to law."

The district court held this statute unconstitutional because it did not provide for a trial *de novo.* The supreme court declared, "[The district court] did not need to go into any constitutional question [because it could have decided the case on other grounds] and under the familiar rule announced many times we shall not go into constitutional matters unless it is considered necessary to a decision on the merits." Instant case at 779. The supreme court, however, after reversing the district court's decision on the merits failed to answer the respondent's original contention that the appeal statute is unconstitutional. It can be assumed that, by finding against the respondent, the supreme court impliedly answered the question in the negative, *i.e.,* the statute is not unconstitutional.

[2]In interpreting the appeal statute, the court said, "The statutes confer, whether wisely or unwisely, the original discretion in the Commission. Such Commission is made up, presumptively at least, of men of experience in the field regulated, and when their discretion is exercised based upon substantial evidence, as it was here, that discretion should not be interfered with by the courts." Instant case at 782.