

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
March 4, 1981

The meeting of the House Judiciary Committee was called to order at 8:00 a.m. by Chairman Kerry Keyser in Room 437 of the Capitol. All members were present. Jim Lear, Legislative Council, was present.

SENATE BILL 38 SENATOR TURNAGE, chief sponsor, stated the purpose of the bill is to revise the Montana Probate Code. This bill will improve the function and operation of the code as it simplifies probate.

Pages 1-5 make it clear how an heir to an estate can disclaim the inheritance. If a person died and his spouse did not want the inheritance, the children could take it without going through the living spouse's estate. Page 5, section 2 deals with succession. It intends to shorten the number of people who would succeed to an estate if the deceased did not leave a will.

Section 3, page 7 deals with establishing parent-child relationship. It brings the Parentage Act and Uniform Probate Code together. Page 8 of the bill lists a new section that states the person who is related through two lines of relationship is entitled to only the larger share. This is possible because of mixed marriages where a person could claim two shares. Also, only one affidavit is needed instead of the present two. This will shorten paperwork.

Section 6 of the bill allows a spouse to disclaim what was left to him in a will. On page 17 the sole heir will not have to go through a long accountability.

J. C. WEINGARTNER, State Bar Association, supported the bill.

ADA HARLEN, State Bar of Montana, stated the bill puts some revenue into the state code and brings it into line with the national code.

TOM STOLL, Department of Revenue, stated the present law has not worked well. This would be of some value.

There were no further proponents.

There were no opponents.

SENATOR TURNAGE closed the bill.

REP. HANNAH asked who actually wanted the changes in the bill. ADA replied there are some problems in the state law that need to be revised. Housekeeping changes will allow the ability to use the code as it was intended.

REP. YARDLEY asked if the national codes were not federal law. It was answered correct, the UPC is the work product of the ABA and is a uniform law adopted in many states - not a federal law.

SENATE BILL 43 SENATOR BROWN, chief sponsor, stated this bill's purpose is to shift the burden of proof for suppression of confessions or admissions in criminal cases. EXHIBIT 1 was given to the committee.

The main purpose of the bill is to bring it into agreement with the courts decisions.

C. TWEETEN, Attorney General's Office, stated it is important the statutes are in compliance. He supports the bill.

There were no further proponents.

There were no opponents.

No questions were asked by the committee.

SENATE BILL 75 SENATOR BROWN, chief sponsor, stated this bill is to amend 2-9-303 authorizing district courts to approve compromise settlements against the state. The state has the authority to settle a claim only after is it proven in court. This would amend the court to provide that a hearing could be heard rather than having to come back to another county. It does not involve just a judge writing an order; a hearing has to be held. It makes it fair for the litigants.

MIKE YOUNG, Department of Administration, supports the bill. Currently the case has to be started all over with two judges. Hopefully, this will help the department and the claimants.

There were no further proponents.

There were no opponents.

No questions were asked by the committee.

SENATE BILL 63 SENATOR MAZUREK, chief sponsor of the bill, stated the bill's purpose is to conform the statutes regarding amendment of charges in criminal cases to case law. EXHIBIT 2.

C. TWEETEN, Attorney General's Office, supports the bill.

TOM HONZEL, County Attorneys, supports the bill. This bill would

codify the procedure that the legislature and the supreme court work together.

There were no further proponents.

There were no opponents.

REP. YARDLEY asked if this case was a 1968 case as shown in the exhibit. If it is, why was there such a time lag? The sponsor replied that was a typographical error and it was actually a 1979 case.

That ended the discussion on Senate Bill 63.

SENATE BILL 83 SENATOR MAZUREK, sponsor, stated this bill establishes the crime of failure to return rented personal property. Individuals who operate rental centers rent out all types of equipment from ladders to large expensive equipment. There are experiencing escalating loss with the equipment when it is not returned. The county attorneys have difficulty prosecuting the borrower when merchandise is not returned. It is not possible to charge them under the theft statute because it was not actually theft since an agreement was signed. Because of that difficulty, the only statute available to the county attorney is theft of service, which is a misdemeanor. Someone may rent a \$1,000 piece of equipment and be charged with a misdemeanor if it is not returned.

On the contract a notice of return must be indicated in bold print on the agreement. If the person fails to return the equipment, a certified letter is sent indicating he has 48 hours to return the equipment. It is similar to the bad check language.

The offense must be committed purposely and knowingly.

J. C. WEINGARTNER, Montana Rental Association, supports the bill. It is a big problem and this is a way to protect the small businessman. This bill is also protecting the person who forgets to bring the merchandise back by sending them a certified letter.

TOM HONZEL, County Attorneys, supports the bill. The problem the attorneys have is proving the intent of the person to keep the merchandise. This would clarify the situation.

KEN PETERSON stated 10 years ago there were only eight rental agencies in the state. Today there are about 30. It is not the intent of the agencies to sue over a fifty-cent screwdriver,

however, large items have been lost. Recently, a \$500 piece of engine removing equipment was rented and never returned. The borrower was traced to be in New York. The company is out of the equipment and has suffered the loss.

There were no further proponents.

There were no opponents.

REP. KEEDY questioned about theft. SENATOR MAZUREK replied it is difficult to prove that theft was the intent.

REP. KEEDY stated written notice containing the date and time is an element of defense, why? SENATOR MAZUREK replied the purpose is to insure that the defendant has knowledge of the time the equipment is to be returned. If it is not in bold print it is not right.

REP. EUDAILY asked if the penalties are in line with the bad check penalties. It was replied no, there are in line with the theft statute.

REP. KEEDY asked about page 1, line 12 purposely and knowingly. SENATOR MAZUREK replied that was at the request of Senator Towe. The concern expressed was if someone could knowingly not return the property. He may not have intended to return it or it may have been stolen from him, or he may have been hospitalized. If he were unable to return it knowingly alone could result in prosecution and conviction; knowingly and purposely would not.

EXECUTIVE SESSION

The House Judiciary Committee went into executive session at 9:25 a.m.

SENATE BILL 38 REP. SEIFERT moved do pass.

REP. YARDLEY agreed with the motion as it makes it a much more simplified probate law.

The motion carried unanimously.

SENATE BILL 43 REP. CONN moved do pass.

REP. CURTISS thought this was a radical change for one court case. There is a possibility it could be overturned. It was replied that type of case has appeared before the Supreme Court.

The motion of do pass carried with REP. HANNAH voting no.

Judiciary Committee
March 4, 1981
Page 5

SENATE BILL 63 REP. SEIFERT moved do pass.

The motion carried unanimously.

SENATE BILL 75 REP. BROWN moved do pass.

The motion carried unanimously.

SENATE BILL 83 REP. SEIFERT moved do pass.

REP. SEIFERT moved to amend line 12, page 1 following "purposely" strike "and" and insert "or". The motion failed.

REP. HANNAH moved the bill have an immediate effective date on passage and approval. The motion carried unanimously.

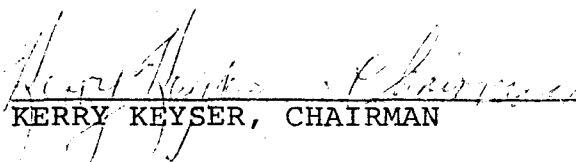
REP. SEIFERT moved do pass as amended. The motion carried with REP. EUDAILY against the motion.

SENATE BILL 36 REP. SEIFERT moved do pass.

REP. SEIFERT moved the amendments be incorporated with the bill. EXHIBIT 3. The motion carried.

REP. SEIFERT moved do pass as amended. The motion carried unanimously.

The meeting adjourned at 10:20 a.m.


KERRY KEYSER, CHAIRMAN
mr

TO: SENATOR STEVE BROWN
FROM: CHRIS TWEETEN
RE: SENATE BILL 43

This bill arose from the Montana Supreme Court's decision in State v. Blakney, Mont. _____, 605 P.2d 1093 (1980) (copy attached), in which the Court invalidated the portion of section 46-13-301, MCA, which placed on the defendant the burden of proving his confession involuntary. The Court had held that due process required the State to prove the voluntariness of a confession as early as 1974, See State v. Smith, 104 Mont. 334, 338, 523 P.2d 1395 (1974), but had never explicitly ruled on the constitutionality of section 46-13-301. Blakney was the first case to rule the statute unconstitutional.

In light of Smith, Blakney, and the United States Supreme Court's decision in Lego v. Twomey, 404 U.S. 477 (1972), there is no doubt that the constitution requires the State to shoulder the burden of proof as to the voluntariness of a confession. We proposed this legislation to avoid the situation which occurred in Blakney, where the district court, apparently unaware of the holding in Smith, followed the statute and placed the burden on the defendant. 605 P.2d at 1099. If the statute is amended to conform to Blakney, judges and attorneys will be able to refer to and rely on the statute to find the proper rule.

The amendment also adds a standard of proof, in addition to specifying which party bears the burden. The old statute left the reader in the dark as to whether the confession must be proved voluntary by a preponderance of the evidence or beyond a reasonable doubt. Blakney and Twomey hold that a preponderance of the evidence is the proper standard. The amendment codifies those holdings.

Legislation
CT/bjw

MEMORANDUM

8 January 1981

TO: Senator Joe Mazurek
FROM: Chris Tweeten
RE: SB 63

In State v. Cardwell, ____ Mont. ____, 609 P.2d 1230 (1968), the Montana Supreme Court held that the provision of section 46-11-403(1), MCA, allowing substantive amendments to informations without leave of court, violated Article II, Section 20 of the 1972 Montana Constitution. The Court found that leave of court was a constitutional condition to a substantive amendment of an information and established procedures for complying with the constitutional mandate. 609 P.2d at 1233. SB 63 codifies these procedures.

The major function of leave of court is to assure that the amended charge is supported by probable cause. SB 63 meets this need by requiring the prosecutor to support his amended information with an affidavit stating facts showing the existence of probable cause, and requiring the judge to find probable cause before granting leave to amend. The second procedure established by the Court involves notice. The Court held that a defendant must have sufficient time to prepare for trial and that he must be arraigned on the amended information. New subsections (d) and (e) of section 46-11-403 satisfy this requirement.

The bill provides two other departures from present law. The statute currently allows one substantive amendment without leave of court. It is unclear whether subsequent amendments are permissible with leave of court, since the statute is silent on the matter. The amendment in SB 63 strikes the word "once" from the statute, allowing multiple substantive amendments if the procedures set forth in the statute are followed. This seems reasonable, since the notice procedures and the requirement that the defendant be given a reasonable time to prepare eliminate the possibility of prejudice.

Senator Joe Mazurke
Page 2
8 January 1981

SB 63 also creates explicit authority to amend complaints in justice and city court proceedings. Current section 46-11-403 applies to amending a "charge", whether brought by information, complaint, or, presumably, indictment. Cardwell establishes that special constitutional constraints apply to informations and not complaints. It therefore is proper to limit the Cardwell procedures to informations and provide a separate authorization for amending complaints. Bill Section 2 amends the statute dealing with complaints to allow a complaint to be amended on motion with leave of court at any time before the jury returns its verdict. The defendant's rights are safeguarded in such a case through the leave of court requirement and the availability of a trial de novo on appeal in district court. This approach also conforms with the actual practice followed by most prosecutors in justice and city court proceedings.

The primary purpose of this bill is to give prosecutors and judges some guidance in applying Cardwell. We feel that the existence of an unconstitutional statute on the book only invites confusion. Since the legislature has adopted a criminal procedure code, it should reflect the procedures actually followed.

Amend Senate Bill 36

1. Page 2, line 11.

Following: "If"

Insert: "there are"

Following: "no"

Insert: "valid"

2. Page 2, lines 12 and 13.

Following: "townsite"

Strike: "have been filed"

3. Page 2, line 21.

Following: "for"

Strike: "any land in the townsite where"

4. Page 2, lines 22 and 23.

Following: "lot"

Strike: "is located other than for streets, alleys, parks, or
school sites"

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 63

Date 3/4/81

SPONSOR Mazurek

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 75

Date 3/4/81

SPONSOR S. Brown

[illegible]

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VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE
BILL 38 Date 3/4/81

SPONSOR Turnage

[illegible]

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VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 83

Date 3/4/81

SPONSOR Mazurek

[illegible]

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