

MINUTES OF THE MEETING
BUSINESS AND LABOR COMMITTEE
50TH LEGISLATIVE SESSION

March 3, 1987

The meeting of the Business and Labor Committee was called to order by Chairman Les Kitselman on March 3, 1987 at 8:00 a.m. in Room 312-F of the State Capitol.

ROLL CALL: All members were present.

SENATE BILL NO. 59 - Allow Banks to Hold Agricultural Land for 10 Years Following Foreclosure, sponsored by Senator Jack Galt, Senate District 16, Martinsdale. Senator Galt explained that he represented the interim committee that studied agricultural problems. He said one of their recommendations is this bill which would allow state chartered banks to retain for ten years agricultural land that they have acquired instead of the existing law that allows them to retain it for five years. He said the main purpose of the bill would help retain the value of agricultural land. He pointed out that the value of agricultural land had fallen by 40-50 percent in the last few years. He said this bill would assist the agriculture community.

PROPOSERS

John Cadby, representing the Montana Bankers Association. Mr. Cadby distributed information supporting Senate Bill 59. He said the information tries to outline a typical scenario and applies to commercial as well as agricultural real estate. He submitted amendments to have a two year trial period. Exhibit Nos. 1 and 2.

Sharon Cleary, representing the Montana Association of Realtors. Ms. Cleary stated, for reasons outlined in previous testimony, they support this bill.

Mons Teigen, representing the Montana Stockgrowers and Cattlemen's Organizations. Mr. Teigen submitted written testimony. Exhibit No. 3.

OPPOSERS

Terry Carmody, representing Montana Farmers Union. Mr. Carmody stated the original law was placed on the books to keep banks out of speculation. He said this law would allow them to get into speculation. He said state banks that can't move the property can ask for an extension. He pointed out that agricultural land is priced at production value and that land will not appreciate like it has in the

past. He commented the only money available for agricultural loans came from insurance companies, and insurance companies require production appraisal and will only loan at 30 percent. He said if this bill passes, he suggested an amendment that if banks are allowed to hold agricultural land longer than five years and allow them to speculate, any money they receive above the loan balance remaining against the property would revert back to the person that they foreclosed on.

Jo Brunner, representing the Water Development Association. Ms. Brunner stated she is neither opposing or supporting this bill, but is testifying with a point of information. She informed the committee that the Reclamation Act allows anybody that forecloses on land on federal irrigation projects to hold that land only five years. She said if they have more land than allowed under the reclamation act they must either pay full costs of water or not have water delivered to them.

Shirley Ball, representing Montana WIFE, spoke in opposition to the bill. She said that ten years was too long and allowed for banks to speculate. She urged the committee to oppose the bill, and said they agree with the Farmers Union amendment if the bill is passed.

Meg Nelson, representing Northern Plains Resource Council. Ms. Nelson stated this bill would allow banks to hold land values at an artificially high level. She said this would make it difficult for family farmers and ranchers to enter agriculture. She added the opportunity for extension of the five year period is available.

QUESTIONS

Rep. Simon questioned Sen. Galt on the termination date of 2001. Sen. Galt replied that it was in effect for ten years after December 31, 1991. He pointed out that this was not just foreclosed property but property given to the bank and the bill would give them ten years to dispose of it.

Rep. Wallin commented that this was permissive legislation for the banks.

Rep. Simon asked John Cadby about the proposed amendments that addressed commercial property. He asked if a subdivision would be eligible under a definition of commercial property. Mr. Cadby replied that he would have to refer to the property tax classification in the amendment that was used to define commercial land. He said it was a commercial development and a commercial loan to a developer which the bank was forced to take back.

Rep. Bachini asked Sen. Galt whether the banks already had that option. Sen. Galt replied that it would do away with the red tape. He pointed out that a lot of institutions did not like to ask for variance. He said this would supply the option for banks to keep it for ten years.

Rep. Glaser asked Fred Flanders, Commissioner of Financial Institutions, about permitting banks to hold land after five years. He asked how many times this had been requested. Fred Flanders replied that records were not kept on the number of requests. He said that if the bill was not passed they intend to establish a formal procedure for requesting extensions.

Rep. Bachini asked about the red tape in order to get an extension. Mr. Flanders said that no formal procedure had been established. He said the main objection to extension was that the financial division wants the bank to convert the asset to cash. He said it was a nonperforming asset that should be eliminated, and the intent of the bill was to preclude the dumping of a lot of real estate on the market at the same time.

Rep. Brandewie pointed out that more requests would be coming up because banks were coming up against the five year limit. Fred Flanders said they do anticipate a number of requests.

Rep. Wallin asked whether the bank examiners objected since they wanted the assets converted to cash. Fred Flanders replied that the likelihood of the bank holding property for speculation was remote.

Rep. Simon questioned the problem of depression in land values. He asked if an extension would lengthen the problem. Fred Flanders replied that it was a legitimate concern. He said the intent of the bill would allow for a more orderly disposal of real estate.

Rep. Hansen asked John Cadby about other reasons to apply for an extension. John Cadby said they were hopeful that the current commissioner of financial institutions was more receptive to the requests of banks than the previous commissioner.

CLOSING

Senator Galt made no further comments.

Chairman Kitselman referred this bill to a subcommittee to work out some of the questions raised. He appointed Reps. Glaser, Grinde, Bachini with Rep. Glaser as chairman.

SENATE BILL NO. 78 - Transfer Regulation of Passenger Tramways to Department of Commerce, sponsored by Sen. Jack Haffey, Senate District 33, Anaconda. Sen. Haffey stated the bill transfers the responsibility for regulation of tramways from the Architecture and Engineering Division of the Department of Administration to the Business Regulation Division in the Department of Commerce. He said that tramways had to be certified and inspected each year.

PROPONENTS

None.

OPPONENTS

None.

QUESTIONS

Rep. Simon asked about the qualifications of the people in the Department of Commerce. Jim Kembel, with the Department of Commerce, Business Regulation Division, pointed out that the Division currently handled all enforcement of codes on elevators, electrical, plumbing, mechanical, and building codes. He said the inspection was handled under a contract with an engineer out of Missoula. He pointed out the advantage is that of an enforcement agency dealing with regulation.

Rep. Bachini asked Jim Kembel regarding the tax assessment. Mr. Kembel noted that SB 307 changes some of the finances and addresses the issue.

SENATE BILL NO. 16 - Require Presale Notice to Owner of Sale to Enforce Agister, Service Lien, sponsored by Senator Mike Halligan, Senate District 29, Missoula. Senator Halligan stated this bill was brought to the interim committee on lien laws by Chief Justice Turnage. He said that it provides a standard notice provision that would allow a 30 day notice to a person that does not pay their bill of sale. He submitted the letter from Chief Justice Turnage. Exhibit No. 4.

PROPONENTS

None.

OPPONENTS

None.

QUESTIONS

None.

CLOSING

Senator Halligan made no further comments.

SENATE BILL NO. 84 - Discretion of Law Enforcement Agency in Reserve Officers' Insurance Plan, sponsored by Senator Gene Thayer, Senate District 19, Great Falls. Senator Thayer stated this bill was at the request of the Department of Labor. He commented that in 1979 the law was amended to allow public corporations other than state agencies to ensure plan 1 and 2 rather than exclusively plan 3 of worker's compensation. He said a section of the law left out reserve officers, and this bill adds the reserve officers to that law.

PROPOSERS

None.

OPPOSERS

None.

QUESTIONS

None.

CLOSING

Senator Thayer made no further comments.

SENATE BILL NO. 2 - Providing Lien Rights for Physical Therapists and Occupational Therapists, sponsored by Sen. Tom Hager, Senate District 48, Billings. Senator Hager stated that as the interim committee studied the lien laws, they found that the persons who are allowed to file liens in case of nonpayment of a bill were not equitable, in that certain people were not included. He said the interim committee recommended extension of the privilege of filing liens to include physical and occupational therapists and chiropractors. He pointed out this was a matter of omission in the law, and this bill would correct that.

PROPOSERS

Gary Lusin, physical therapist from Bozeman and president of the Montana Chapter of the American Physical Therapy Association. He said as a small business man, a legal means to recover costs is needed. He submitted written testimony. Exhibit No. 5.

Doris Luckman, co-owner and business manager for the Joe O. Luckman Physical Therapy Clinic in Great Falls. Ms. Luckman stated that people who had been seriously injured to require physical therapy services and who chose to have therapy should expect to pay for the services they receive. She said a small business has operational expenses and it is not fair to be expected to provide the service with no protection. Ms. Luckman submitted written testimony. Exhibit No. 6.

Mary Mistal, representing private practice physical therapists. Ms. Mistal stated that this bill would allow physical therapists to be added to the lien laws to help ensure payment of their services.

Kurt Hanson, physical therapist in Helena. Mr. Hanson stated that part of their clientele were ones involved in lawsuits and have experienced not being reimbursed for services as a part of a settlement of a lawsuit. He feels that the protection offered by a lien would enable reimbursement for services already rendered.

Roger Tippy, representing the Montana Dental Association. Mr. Tippy stated that a generic description of all licensed health care providers could be included in the bill to shorten the list of people allowed to file liens, and to include the dentists.

Bonnie Tippy, representing the Montana Chiropractors Association. Ms. Tippy stated the chiropractor group had similar problems that the physical therapists have with nonpayment for their services.

Mike Pardis, chiropractor in Helena. Mr. Pardis stated they support this bill as amended to include chiropractors.

Mona Jamison, representing the Montana Chapter of the American Physical Therapy Association. Ms. Jamison stated that in behalf of the Association she urges support of the bill as amended. She said this was an economic issue since all expect to be paid for their work. She said filing a lien is equitable and fair to ensure that they receive payment from insurance settlements.

OPPONENTS

None.

QUESTIONS

Rep. Driscoll asked if a person does not have insurance to file a lien against, could a lien be filed against their house. Mona Jamison replied that a lien could be filed only against the insurance proceeds. She said the focus of the lien bill is on the insurance benefits should the injured party have a recovery. She said it did not extend to their homes.

Rep. Swysgood asked if this lien was filed against the insurance settlement, was the intent that it would be assumed that everybody is not going to pay their bills. Mona Jamison replied that the lien would have to be filed after the lawsuit and before judgement was rendered in the lawsuit.

Sen. Hager said the purpose of the bill would enable the chiropractor, physical therapists, and dentists to file a lien in the same manner as physicians and nurses.

Rep. Thomas asked if a lien filed could apply to some future benefits. Mr. Tippy replied that a lien had to be dollar specific and not open ended for unknown services. Ms. Jamison responded that in the code section in the notice of the lien, it is specifically tailored as to what has to be included and described in the nature of services, when rendered, the value, and that a lien is claimed. She said it was incident specific or claim specific, and the lien has to be filed with those benefits covering a particular incident.

CLOSING

Sen. Hager made no further comments.

EXECUTIVE ACTION - March 3, 1987 - 10:10 a.m.

ACTION ON SENATE BILL NO. 2

Rep. Brandewie moved that Senate Bill No. 2 BE CONCURRED IN. The motion carried unanimously.

Rep. Bachini will carry the bill in the House.

ACTION ON SENATE BILL NO. 84

Rep. Wallin moved that Senate Bill No. 84 BE CONCURRED IN. The motion carried unanimously.

Rep. Bachini will carry the bill in the House.

ACTION ON SENATE BILL NO. 16

Rep. Hansen moved that Senate Bill 16 BE CONCURRED IN. The motion carried unanimously.

Rep. Hansen will carry this bill in the House.

ACTION ON SENATE BILL NO. 78

Rep. Pavlovich moved that Senate Bill No. 78 BE CONCURRED IN. The motion carried unanimously.

Rep. Pavlovich will carry this bill in the House.

ADJOURNMENT

The meeting was adjourned at 10:15 a.m.



REP. LES KITSELMAN, Chairman

DAILY ROLL CALL

BUSINESS & LABOR

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date MARCH 3, 1987

NAME	PRESENT	ABSENT	EXCUSED
REP. LES KITSELMAN, CHAIRMAN	✓		
REP. FRED THOMAS, VICE-CHAIRMAN	✓		
REP. BOB BACHINI	✓		
REP. RAY BRANDEWIE	✓		
REP. JAN BROWN	✓		
REP. BEN COHEN	✓		
REP. JERRY DRISCOLL	✓		
REP. WILLIAM GLASER	✓		
REP. LARRY GRINDE	✓		
REP. STELLA JEAN HANSEN	✓		
REP. TOM JONES	✓		
REP. LLOYD MCCORMICK	✓		
REP. GERALD NISBET	✓		
REP. BOB PAVLOVICH	✓		
REP. BRUCE SIMON	✓		
REP. CLYDE SMITH	✓		
REP. CHARLES SWYSGOOD	✓		
REP. NORM WALLIN	✓		

STANDING COMMITTEE REPORT

MARCH 3

19 **87**

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 84

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSelman

Chairman


THIRD

reading copy (**BLUE**)
color

STANDING COMMITTEE REPORT

MARCH 3

19 37

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 78

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN

Chairman

MS

THIRD

BLUE

reading copy ()
color

STANDING COMMITTEE REPORT

March 3

19 87

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 16

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES RITSELIAN

Chairman

THIRD

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STANDING COMMITTEE REPORT

March 3

19 37

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 2

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN

Chairman


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Mr. Chairman and Members of the Committee:

The following scenario is typical:

a) bank takes property in satisfaction of debt or purchases property at mortgage sale;

b) bank writes off and deducts from taxes difference between amount loaned and appraised value of property if appraised value below amount loaned, (e.g. bank loans \$200,000 property appraised at \$100,000 bank writes off and deducts \$100,000);

c) bank holds property until leased or sold;

d) state law requires property written off and sold within 5 years, unless approved for extension by Commissioner of Financial Institutions, or Comptroller;

e) bank cannot deduct loss for taxes until property is sold.

For example, a bank in Hamilton has property next to a golf course in Idaho valued at \$200,000. Bank is holding the property expecting the value to appreciate when golf course is developed. Bank must sell at loss due to 5 year limit.

Bank in Glendive has taken back 50 lots in subdivision left over from the oil boom. Bank will probably take a loss as there are few buyers.

Forcing a bank to sell repossessed property will depress land values further. Private individuals trying to sell homes, lots or farms in the same area will be adversely effected. Neighbor farmers will have less collateral value for operating loans. Farmers with a higher debt to asset ratio are subject to higher interest rates.

A 5 year maximum holding period restricts the bank to one or two year leases. The longer the holding period, the longer the lender is able to provide a long term lease. Farmers who have deeded their property in lieu of foreclosure may be able to lease back on a long term lease with an option to buy at the end of the lease period.

Colorado allows a 15 year holding period for banks. The Farm Credit System allows a 20 year amortization period.

Montana is in the bottom 5 states in ranking of bank profitability in the nation. In the first 9 months of 1986, earnings for all Montana banks totaled only \$6.5 million (less than a 1% return on total assets) which is an 80% drop compared to the first 9 months of 1985. Of the 170 commercial banks in Montana, 51 lost money in 1986. Montana ranks 4th in the United States in non-performing loans. Further, loan activity dropped 3.5% in 1986.

A number of Montana banks are strained for capital at the present time. Forcing banks to dispose of property at today's value will aggravate the problem and may very well contribute to the closure of one or more banks.

Amendments to Senate Bill 59 (Third Reading) to make the bill applicable to both agricultural and commercial real estate; to allow state chartered banks to hold agricultural and commercial real estate for seven years following acquisition, and providing that the act terminates January 1, 1990.

Amend Senate Bill 59, third reading copy, page 1 in the title, line 8, following the term "AGRICULTURAL" add the following:

"AND COMMERCIAL"

Continuing page 1, line 8, strike the numerals "10" and insert "7".

Continuing page 1, following the material on line 21, insert the following new paragraph:

"WHEREAS, foreclosure of agricultural land affects the value of commercial land because agriculture is Montana's basic industry."

And, further amend page 3, line 7, strike the figure "10" and insert "7".

Further amend page 3, line 12, following the citation of "80-12-102" and before the period insert the following material:

"or commercial land as defined in 15-1-101(1)(d)(i)"

Further amend page 3, line 21, following the word "agricultural" add the following:

"and commercial"

Further amend page 3, line 25, strike "1991" and insert "1989."

Further amend page 4, line 4, strike "2001" and insert "1990."

WITNESS STATEMENT

EXHIBIT 3
DATE 3/3/87
SB SB 59

NAME Alvin Terger *Guest*
ADDRESS Box 1679 Helena BILL NO. 59
WHOM DO YOU REPRESENT? Mont Stockgrowers & Cattlewomen DATE 3/3/87
SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

The Mont Stockgrowers ag credit committee has reviewed this bill and believe that - far from "speculating" this bill would make possible long term leases with sale options thus expediting the return of owner operators on the foreclosed property.

We support the measure.

EXHIBIT _____
DATE 3/3/87
SB SB 78

WITNESS STATEMENT

NAME Tom O'Connell BILL NO. SB 78
ADDRESS 1500 Flaxmead Helena DATE 3/3/87
WHOM DO YOU REPRESENT? State of Montana DofA
SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

12/86

EXHIBIT

DATE

3/3/87

SB

SB 78

BILL NO.

TESTIMONY

TITLE:

"AN ACT TO TRANSFER REGULATION OF PASSENGER TRAMWAYS FROM THE DEPARTMENT OF ADMINISTRATION TO THE DEPARTMENT OF COMMERCE; AMENDING SECTIONS 23-2-702, 23-2-715, AND 23-2-734 MCA AND PROVIDING AN EFFECTIVE DATE".

PURPOSE:

This bill is proposed to you for the purpose of amending the law relating to the regulation of passenger tramways in the State. It would transfer the responsibility for this regulation from the Department of Administration to the Department of Commerce. The Department of Commerce has numerous regulatory functions and could more appropriately administer the program.

DESCRIPTION OF THE BILL:

Section 23-2-702, Subsection (2), is amended to define "department" as the Department of Commerce instead of the Department of Administration.

Section 23-2-715, Subsection (1), is amended to delete reference to the Department of Administration.

Section 23-2-734 is amended to delete reference to the Department of Administration.

A new section provides a July 1, 1987 effective date.

EFFECT OF THE BILL:

This bill will not change, or in any other way effect the policies and functions of the passenger tramway program. Only the administration of the program will be changed. The bill allows the tramway program to be consolidated with similar regulatory functions currently existing within the Department of Commerce.

SUMMARY:

This bill recognizes that the passenger tramway program, and the citizens of Montana that it serves, have a right to expect efficient management from government. Grouping the tramway program with similar functions such as building codes and professional and occupational licensing, provides the organization necessary for proper administration. In turn, this will insure that the public receives the best safeguards possible through the program.

EXHIBIT _____
DATE 3/3/17
BB 78

WITNESS STATEMENT

NAME W. JAMES KEMBEL BILL NO. 73

ADDRESS _____ DATE 3/03/17

WHOM DO YOU REPRESENT? BUSINESS REGULATION DIVISION DOX

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

THE SUPREME COURT OF MONTANA

J. A. TURNAGE
CHIEF JUSTICE



SE 16
11/12/86
EXHIBIT 4
DATE 3/3/87
GB SB 16
JUSTICE BUILDING
215 NORTH SANDERS
HELENA, MONTANA 59620
TELEPHONE (406) 444-2621

August 22, 1986

Mr. Paul Verdon
Legislative Researcher
Lien Law Interim Committee
Legislative Council
Room 138 State Capitol
Helena, MT 59620

RECEIVED
JUG 25 1986
LEGISLATIVE COUNCIL

Dear Paul:

Enclosed please find a copy of an opinion in *Rose v. Myers* handed down by the Court on August 21, 1986.

Since the interim committee is studying lien law matters, I believe it may be of interest to them to consider this opinion and possible amendments to the code sections relating to agister's liens to address the constitutional concerns mentioned in the concurring opinion and the opinion relative to section 71-3-1203, MCA.

Since the Court was able to render a decision in this case without reaching the constitutional issue, the Court did not reach the the constitutionality of the statute in the majority opinion. However, most certainly, an issue will be raised in the future that directly requires addressing the constitutionality issue.

The agister's lien law of this state is an important part of the citizens' daily concerns.

If a lien claimant is required to hire legal counsel and resort to the courts for judicial foreclosure of such a lien, the time and cost involved would certainly be an undue burden for many small lien matters.

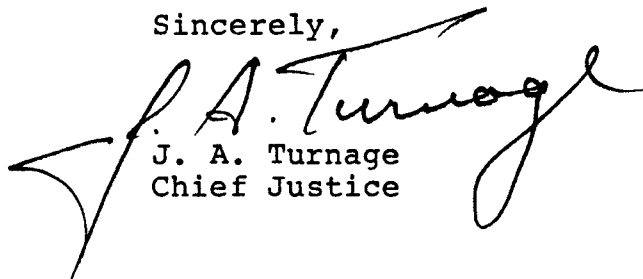
For example, if someone brought a television set to a repairman and the set would be worth \$100 and the repairs would be \$50, it is not reasonable to require several hundreds of dollars worth of attorney fees and court costs to accomplish a foreclosure when the owner didn't pay for the repairs.

Mr. Paul Verdon
Page 2
August 22, 1986

One result which would be a great detriment to many low income people of the state would be that if they wanted repairs made to their televisions, automobiles and other personal property, the repair people would start demanding exorbitant, cash-in-advance deposits before services were rendered.

It would be most appreciated if you would bring this to the attention of the committee for whatever consideration they may deem appropriate in the matter.

Sincerely,

A handwritten signature in cursive script, reading "J. A. Turnage". The signature is written in dark ink and is positioned above the printed name and title.

J. A. Turnage
Chief Justice

JAT:rap
Enclosure

c: Rep. John Mercer

No. 85-405

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

H. WALTER ROSE and RICHARD H.
ROSE,
Plaintiffs and Appellants,

-vs-

LARRY E. MYERS and MICHAEL A.
SCHAFFER, Sheriff of Yellowstone
County, Montana
Defendants and Respondents.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and for the County of Yellowstone,
The Honorable Diane G. Barz, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Robert E. La Fountain argued, Billings, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
Harold Hanser, County Attorney, Billings, Montana
Charles A. Bradley argued, Deputy County Atty.
Larry Myers, pro se, Billings, Montana

Submitted: July 24, 1986

Decided: August 21, 1986

Filed:

107 ALR 1072

Ethel M. Harrison
Clerk

due process safeguards: affidavit of register

Mr. Chief Justice J. A. Turnage delivered the Opinion of the Court.

Appellants, H. Rose and R. Rose, brought an action in the Yellowstone County District Court seeking to declare a sheriff's sale of appellants' horses invalid as held under the agisters' lien statutes, and attempting to nullify the certificate of sale. The District Court found that the sale was valid, that the appellants were not denied their due process by the manner of the notice and sale, and that the remaining horses be returned to appellants upon their posting a \$30,000 bond pending resolution of the underlying contract dispute. From this order the Roses appeal.

We affirm the District Court in this case because the appellant had actual notice of the sale.

Appellants raise the following issues on appeal:

1. Whether the sale should have been declared invalid as unconstitutional for failure to provide for notice and an opportunity to be heard prior to deprivation of property?
2. Whether the District Court erred in holding that the notice provisions were complied with in this case?
3. Whether the court erred in failing to declare that the sale was void or voidable?
4. Whether the court erred in using faulty figures in taking judicial notice that the parties' contract price was too low to include feeding, and in applying that decision to justify the court's order?

This dispute arose from an oral contract entered into in April 1984. Myers agreed to care for the Roses' horses at a cost of \$12 per head per month. The parties dispute whether Myers was responsible for feeding the horses or merely pasturing them. On November 30, 1984, Myers sent notice to the Roses that an agister's lien sale would take place in

December. Money was paid to Myers and the sale was not held. Over the course of the winter, Myers found it necessary to feed the horses at his own expense as the pasture would not support the horses in the winter. Myers contends the agreement was for pasturing only, while the Roses contend it was for the care and feeding of the horses.

On March 1, 1985, Myers again caused to be issued from the Yellowstone County sheriff's office, a notice of an agister's lien sale scheduled for March 11, 1985. The notice was postmarked March 1, 1985, and notices were posted in Yellowstone County. The sale was held March 11, 1985. The Roses contend they did not receive the notice until March 12, 1985. Myers stated he informed the Roses of the sale by telephone on March 2, and 3, 1985.

At the sale, 55 of 129 horses were sold for \$6,830 which was then applied by the sheriff to the outstanding bill. The Roses claim the horses' value was far in excess of \$6,830, but that none of the horses were sold as registered and most were sold by lots or in gross.

On March 20, 1985, the Roses filed their petition for declaratory relief, and to set aside the sale. Following a hearing before Judge Barz, the District Court held that the sale was valid and the Roses were not denied their due process. The Roses appeal that order.

Appellants' horses were sold pursuant to the agisters' lien statutes, § 71-3-1201, MCA, et seq. Section 71-3-1201, MCA, states:

(1) If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a ranchman, farmer, agister, herder, hotelkeeper, livery, or stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon such stock for the amount due for keeping, feeding, herding, pasturing, or

ranching the stock and may retain possession thereof until the sum due is paid.

Enforcement of the lien is found at § 71-3-1203, MCA.

That statute says:

If payment for such work, labor, feed, or services or material furnished is not made within 30 days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this section may enforce said lien in the following manner:

(1) He shall deliver to the sheriff or a constable of the county in which the property is located a statement of the amount of his claim against said property, a description of the property, and the name of the owner thereof or of the person at whose request the work, labor, or services were performed or the materials furnished.

(2) Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same.

(3) Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.

(4) The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the cost of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property.

(5) However, before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in [sic] not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff.

Our decision in this case is arrived at on other than constitutional grounds. We find it unnecessary to decide whether § 71-3-1203, MCA, is constitutional and therefore do not consider appellants' first issue.

The attention of the Montana Legislature is respectfully directed to the due process provisions of Article II, Section 17, of the Montana Constitution, the Fourteenth Amendment of the Constitution of the United States and their application to the notice provisions of § 71-3-1203, MCA.

The agisters' lien statute was first enacted in 1895 and is an important part of our commercial law, serving as a practical matter both the interest of debtors and creditors. If in a future case this statute was found to be unconstitutional, it would invite chaos and confusion in this area of law.

Appellants' second issue is whether the District Court erred in holding that the notice requirements were met in this case. Appellants argue that the notices of the sale were untimely and deficient, and that the District Court incorrectly interpreted the statutes in regard to notice.

The Roses claim the notice was untimely as they did not receive notice until one day after the sale. The District Court found that two notices were mailed to the Roses on March 1, 1985, 10 days before the sale. In addition, the Roses received notice in the form of two telephone calls from Myers on March 2, and 3, 1985. The District Court correctly concluded that the Roses received timely notice.

Appellants also claim the notices were deficient in that the notice failed to adequately describe the location of the sale or the property to be sold. The notice stated that the sale was to be held at "10:00 o'clock a.m. 3½ miles SW of Laurel." The notice described the property for sale as "10

mix horse colts, 25 mix mares, 17 mix colts, 1 gray stud, 1 sorrel stud, 1 chestnut stud."

The description of the horses is satisfactory. The notice described the horses by number, sex, and color. Appellants' contention that the notice should have described what mix the horses were as well as any special breeding or other special characteristics of the horses is not correct. The notice description was sufficient to alert the public to the nature of the sale and the property to be sold. There is no need for the kind of detailed description advocated by the appellants.

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Appellants' third issue is whether the District Court erred in failing to declare the sale void or voidable. Both sides agree that for a sale to be valid, the seller, acting in good faith, must substantially comply with the notice requirements of the power of sale, and the resultant sale

must be a fair one. As discussed above, the notice requirements were substantially complied with in this case. Further, we hold that the resultant sale was fair.

The District Court applied the standard of commercial reasonableness to judge the sale. Appellants argue that the sale was not commercially reasonable because the horses were sold in lots for far less than their value. The District Court answered that:

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Although this sale is not governed by the Uniform Commercial Code, that Code's discussion of commercial reasonableness is helpful. Section 30-9-507(2), MCA, states:

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The above authority supports the District Court's decision. Although the appellants claim the horses were worth far more than the selling price, that alone is insufficient to render the sale unreasonable. Likewise, the fact that the horses were sold by a method different from that suggested by appellants (in lots as opposed to individually)

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In its memorandum in support of its order, the District Court stated:

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The Court takes note of this, not to rule on the merits of the contract dispute, but rather as a factor in the notice Plaintiffs had regarding the sale.

Appellants argue that the District Court erroneously substituted its judgment for that of the parties who agreed on a contract price knowing the horses were to remain with Myers for an indefinite period of time. The court calculated 114 head x \$12 per head x 8 months equals \$1,824. Since the Roses paid Myers \$7,000 between December, 1984, and February, 1985, the court inferred that the Roses recognized that they owed more than \$12 per head per month, and that the excess would be applied to pay for feed over and above the original contract amount. This is wrong.

The correct calculations are: 114 head x \$12 per head x 8 months equals \$10,944, not \$1,824. Thus, appellants argue, the \$7,000 payment was a partial payment on the

\$10,944, the balance to be paid when the horses were retrieved. The court drew inferences from incorrect figures and erred in applying those inferences to justify its decision.

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Appellants are correct when they say the court incorrectly calculated the bill and took judicial notice of a fact not appropriate for judicial notice. Rule 201, M.R.Evid. states:

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However, the error is harmless as there is ample evidence to support the District Court's conclusion. On cross-examination, the appellant Richard Rose, testified as follows:

Q. Mr. Rose, I believe you stated that the agreement you had with Mr. Myers was that you were to pay him \$12.00 per month per horse unit; is that correct? A. That is correct.

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Q. And if he had to feed them, that would be an additional charge; wouldn't it? A. Yes.

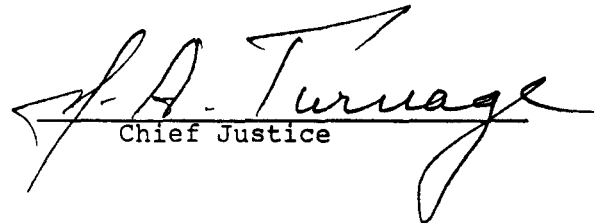
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Thus, even without the court's calculations there is ample evidence that the appellants owed Myers more than \$10,944 and only paid \$7,000. The court took judicial notice that appellants knew they owed Myers for feed and labor costs because they paid Myers in excess of \$12 per head per month. The

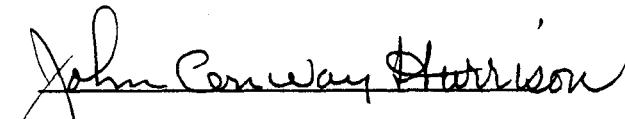
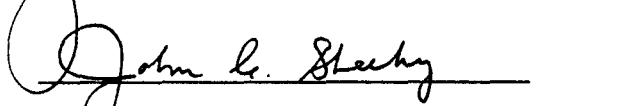

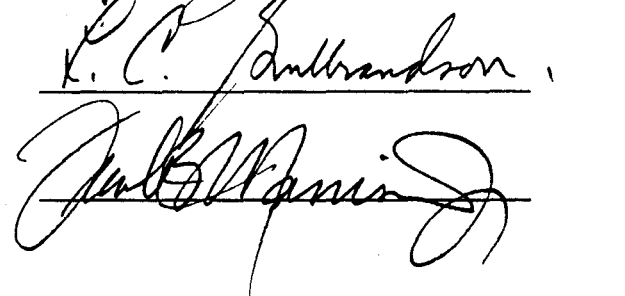
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court's calculations were wrong, but the result is the same. Appellants' own testimony revealed that the Roses knew they owed Myers for feed and labor costs in excess of the contract price, so although the court improperly took judicial notice of the fact, the result is supported by the evidence. Therefore, it is not necessary to reverse the District Court on this issue.

The order of the District Court is affirmed in all respects.


Chief Justice

We concur:

Justices

Mr. Justice William E. Hunt, Sr., concurring:

I concur in the result reached by the majority, but cannot agree with its analysis of the constitutional challenge raised by appellants.

The majority reaches its decision without addressing appellant's claim that § 71-3-1203, MCA, is unconstitutional as violative of due process. Appellants first raised the issue in their initial complaint before the District Court. They gave notice to this Court of the constitutional challenge in compliance with Rule 38 M.R.App.Civ.P.. Appellants have standing to challenge the statute. I cannot agree with the majority opinion that it is unnecessary to decide whether § 71-3-1203, MCA, is constitutional. The issue is squarely before us and cannot be ignored.

I would hold that § 71-3-1203, MCA, is clearly unconstitutional. The statute violates the due process clauses of the state and federal constitutions. However, I concur in the affirmance of the District Court's decision because the appellants have already had their hearing. Following the sale, the appellants brought an action in the District Court which they litigated to a final judgment, and from which they now appeal. They received the full benefits of a trial in which they had an opportunity to fully present their case. The District Court found in favor of the respondents. Therefore, it is unnecessary to reverse the District Court and remand this case for a hearing.

The agister's lien statute is clearly unconstitutional, however, because there is significant state action involved, and because the statute provides neither notice nor an opportunity to be heard prior to deprivation of property.

First, it is clear there is significant state action involved. The Third Circuit Court of Appeals found state action from the mere enactment of a statute authorizing a garageman to sell a customer's vehicle for nonpayment of a bill. *Parks v. Mr. Ford* (3d Cir. 1977), 566 F.2d 132. The state action under § 71-3-1203, MCA, is far more significant. The sheriff is given a copy of the bill, a description of the property, and the name of the owner. The sheriff then must advertise and conduct the sale, he applies the proceeds of the sale to the debt, and provides the buyer with a bill of sale. Clearly this constitutes significant state action.

Second, the statute does not satisfy the minimum due process requirements elaborated by either the Montana or the United States Supreme Court. As this Court stated in *Nygard v. Hillstead and Coyle* (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645:

It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, § 17. "It is well settled that notice and opportunity to be heard are essential elements of Due Process." *Halldorson v. Halldorson* (1977), 175 Mont. 170, 573 P.2d 169, 171.

The United States Supreme Court has addressed the due process requirement in the area of garnishment, replevin, and sequestration. That line of cases includes *Sniadach v. Family Finance Corp.* (1983), 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; *Fuentes v. Shevin* (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *Mitchell v. W.T. Grant Co.* (1974), 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, and *North Georgia Finishing Co. v. Ditech, Inc.* (1975), 413 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751.

In *Sniadach*, it was held that the Wisconsin prejudgment garnishment procedure whereby the defendant's wages were

frozen in the interim between the garnishment and the culmination of the main suit, without the opportunity for a hearing, violated the Fourteenth Amendment. The Court noted that wages were a specialized type of property and prejudgment garnishment might impose tremendous hardship on wage earners. The Sniadach holding was expanded by Fuentes. In Fuentes, Florida and Pennsylvania statutes were held unconstitutional. Those statutes authorized the issuance of writs ordering state agents to seize a person's possessions upon the ex parte application of any other person who claimed a right to them and posted a security bond, without providing the possessor with notice or an opportunity to be heard. The Court held that a person whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner, and that the replevin statutes in question were constitutionally defective in failing to provide for notice and hearing. The Court noted that "extraordinary situations" may justify the lack of notice and hearing, but such a situation did not exist in that case.

Fuentes was distinguished by Mitchell wherein it was held that a Louisiana statute which permitted the seller of goods under an installment contract to obtain a writ of sequestration to recover the goods, upon buyer's default, and without notice or hearing, did not violate due process. There were other adequate safeguards of due process because the writ would issue only upon a verified affidavit, and upon a judge's authority after the creditor had filed a sufficient bond. The statute entitled the debtor to immediately seek dissolution of the writ unless the creditor proved the grounds upon which the writ issued, and the debtor could regain possession by posting a bond to protect the seller.

The final case is North Georgia Finishing, Inc.. That case relied upon Fuentes to determine that Georgia statutes authorizing garnishment of property other than wages in pending suits, but not providing for notice, hearing, or participation by a judicial officer, violated due process.

The above cases dealt with something less than a sale of the property, i.e., sequestration, replevin, and garnishment. Clearly a permanent deprivation of property, such as occurs in a sale, warrants just as stringent a due process analysis as lesser forms of deprivation. As those cases indicate, due process requires at a minimum both notice and an opportunity to be heard prior to deprivation of property absent extraordinary circumstances, or other sufficient safeguards of due process.

Section 71-3-1203, MCA, does not provide the kind of safeguards which salvaged the Louisiana statute in Mitchell. There is no requirement for a verified affidavit, no participation by a judge, no mandatory bond, and no procedure to seek an immediate halt of the sale. Further, there are no other legal remedies available to sufficiently guarantee due process. The legal procedures available to the owner, such as the institution of an action for conversion or for declaratory relief, are insufficient substitutes for a pre-sale hearing. There is little probability that trial of a contested lien claim can be held within the minimum period preceeding transfer to the buyer, and injunctions or other extraordinary remedies are discretionary with the trial court and thus lack the certainty necessary to insure a hearing prior to permanent deprivation.

The question then becomes whether there exists any extraordinary circumstances which would justify the lack of a

hearing prior to the sale. The respondent, Schafer, argues that because the personalty involved was live animals, this constitutes an extraordinary circumstance. This argument is not persuasive. The United States Supreme Court in Fuentes discussed what is meant by "extraordinary situations." As that Court said:

These situations, however, must be truly unusual First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 90-91.

Thus, the Court has allowed summary seizure to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, or to protect the public from misbranded drugs and contaminated food. The present situation does not qualify as an important governmental interest. It is a private dispute between two parties. State intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health, and is of insufficient importance to override the due process requirements of notice and hearing. Therefore, I would hold that § 71-3-1203, MCA, is violative of due process as there is no provision for notice and hearing prior to deprivation of property.


The question remains what kind of notice and hearing satisfy due process requirements? The Supreme Court in Fuentes stated that notice must be granted at a meaningful time and in a meaningful manner. Fuentes, 407 U.S. at 80.

Further, the Court noted that leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the seizure has little probability of succeeding on the merits. Sniadach, 395 U.S. at 343.

The hearing should establish the validity, or at least the probable validity, of the underlying claim before an alleged debtor can be deprived of his property. Consideration should be given to the interests of the parties including the basis of the underlying claim, the nature of the property involved, i.e., its value, uniqueness, etc., and the need for prompt action. The hearing need not be a full blown trial-type hearing, but must protect a property owner's use and possession of property from arbitrary encroachment. This is an especially relevant danger where the State seizes and sells goods merely upon the application of a private party.

Because the appellants have properly challenged the constitutionality of § 71-3-1203, MCA, the issue must be addressed. However, I concur in the result reached by the majority and would affirm the District Court in all respects.

I concur.


Justice

No. 85-405

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

H. WALTER ROSE and RICHARD H.
ROSE,

Plaintiffs and Appellants,

-vs-

LARRY E. MYERS and MICHAEL A.
SCHAFFER, Sheriff of Yellowstone
County, Montana

Defendants and Respondents.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and for the County of Yellowstone,
The Honorable Diane G. Barz, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Robert E. La Fountain argued, Billings, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
Harold Hanser, County Attorney, Billings, Montana
Charles A. Bradley argued, Deputy County Atty.
Larry Myers, pro se, Billings, Montana

Submitted: July 24, 1986

Decided: August 21, 1986

Filed:

107 ALR 1072

Ethel M. Harrison
Clerk

due process safeguards: affidavit of sister

Mr. Chief Justice J. A. Turnage delivered the Opinion of the Court.

Appellants, H. Rose and R. Rose, brought an action in the Yellowstone County District Court seeking to declare a sheriff's sale of appellants' horses invalid as held under the agisters' lien statutes, and attempting to nullify the certificate of sale. The District Court found that the sale was valid, that the appellants were not denied their due process by the manner of the notice and sale, and that the remaining horses be returned to appellants upon their posting a \$30,000 bond pending resolution of the underlying contract dispute. From this order the Roses appeal.

We affirm the District Court in this case because the appellant had actual notice of the sale.

Appellants raise the following issues on appeal:

1. Whether the sale should have been declared invalid as unconstitutional for failure to provide for notice and an opportunity to be heard prior to deprivation of property?
2. Whether the District Court erred in holding that the notice provisions were complied with in this case?
3. Whether the court erred in failing to declare that the sale was void or voidable?
4. Whether the court erred in using faulty figures in taking judicial notice that the parties' contract price was too low to include feeding, and in applying that decision to justify the court's order?

This dispute arose from an oral contract entered into in April 1984. Myers agreed to care for the Roses' horses at a cost of \$12 per head per month. The parties dispute whether Myers was responsible for feeding the horses or merely pasturing them. On November 30, 1984, Myers sent notice to the Roses that an agister's lien sale would take place in

December. Money was paid to Myers and the sale was not held. Over the course of the winter, Myers found it necessary to feed the horses at his own expense as the pasture would not support the horses in the winter. Myers contends the agreement was for pasturing only, while the Roses contend it was for the care and feeding of the horses.

On March 1, 1985, Myers again caused to be issued from the Yellowstone County sheriff's office, a notice of an agister's lien sale scheduled for March 11, 1985. The notice was postmarked March 1, 1985, and notices were posted in Yellowstone County. The sale was held March 11, 1985. The Roses contend they did not receive the notice until March 12, 1985. Myers stated he informed the Roses of the sale by telephone on March 2, and 3, 1985.

At the sale, 55 of 129 horses were sold for \$6,830 which was then applied by the sheriff to the outstanding bill. The Roses claim the horses' value was far in excess of \$6,830, but that none of the horses were sold as registered and most were sold by lots or in gross.

On March 20, 1985, the Roses filed their petition for declaratory relief, and to set aside the sale. Following a hearing before Judge Barz, the District Court held that the sale was valid and the Roses were not denied their due process. The Roses appeal that order.

Appellants' horses were sold pursuant to the agisters' lien statutes, § 71-3-1201, MCA, et seq. Section 71-3-1201, MCA, states:

(1) If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a ranchman, farmer, agister, herder, hotelkeeper, livery, or stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon such stock for the amount due for keeping, feeding, herding, pasturing, or

ranching the stock and may retain possession thereof until the sum due is paid.

Enforcement of the lien is found at § 71-3-1203, MCA.

That statute says:

If payment for such work, labor, feed, or services or material furnished is not made within 30 days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this section may enforce said lien in the following manner:

(1) He shall deliver to the sheriff or a constable of the county in which the property is located a statement of the amount of his claim against said property, a description of the property, and the name of the owner thereof or of the person at whose request the work, labor, or services were performed or the materials furnished.

(2) Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same.

(3) Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.

(4) The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the cost of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property.

(5) However, before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in [sic] not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff.

Our decision in this case is arrived at on other than constitutional grounds. We find it unnecessary to decide whether § 71-3-1203, MCA, is constitutional and therefore do not consider appellants' first issue.

The attention of the Montana Legislature is respectfully directed to the due process provisions of Article II, Section 17, of the Montana Constitution, the Fourteenth Amendment of the Constitution of the United States and their application to the notice provisions of § 71-3-1203, MCA.

The agisters' lien statute was first enacted in 1895 and is an important part of our commercial law, serving as a practical matter both the interest of debtors and creditors. If in a future case this statute was found to be unconstitutional, it would invite chaos and confusion in this area of law.

Appellants' second issue is whether the District Court erred in holding that the notice requirements were met in this case. Appellants argue that the notices of the sale were untimely and deficient, and that the District Court incorrectly interpreted the statutes in regard to notice.

The Roses claim the notice was untimely as they did not receive notice until one day after the sale. The District Court found that two notices were mailed to the Roses on March 1, 1985, 10 days before the sale. In addition, the Roses received notice in the form of two telephone calls from Myers on March 2, and 3, 1985. The District Court correctly concluded that the Roses received timely notice.

Appellants also claim the notices were deficient in that the notice failed to adequately describe the location of the sale or the property to be sold. The notice stated that the sale was to be held at "10:00 o'clock a.m. 3½ miles SW of Laurel." The notice described the property for sale as "10

mix horse colts, 25 mix mares, 17 mix colts, 1 gray stud, 1 sorrel stud, 1 chestnut stud."

The description of the horses is satisfactory. The notice described the horses by number, sex, and color. Appellants' contention that the notice should have described what mix the horses were as well as any special breeding or other special characteristics of the horses is not correct. The notice description was sufficient to alert the public to the nature of the sale and the property to be sold. There is no need for the kind of detailed description advocated by the appellants.

Further, appellants failed to raise the issue of the adequacy of the sale location description during the trial below. Since appellants failed to raise the issue below, we will not address the question on appeal.

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must be a fair one. As discussed above, the notice requirements were substantially complied with in this case. Further, we hold that the resultant sale was fair.

The District Court applied the standard of commercial reasonableness to judge the sale. Appellants argue that the sale was not commercially reasonable because the horses were sold in lots for far less than their value. The District Court answered that:

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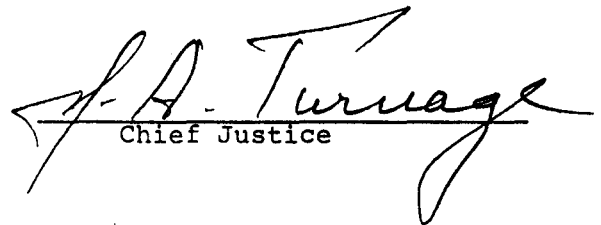
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Q. And it doesn't include any labor on his part, either; does it? A. No.

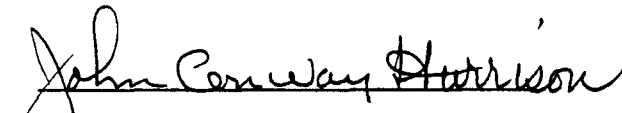
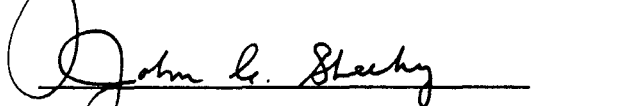


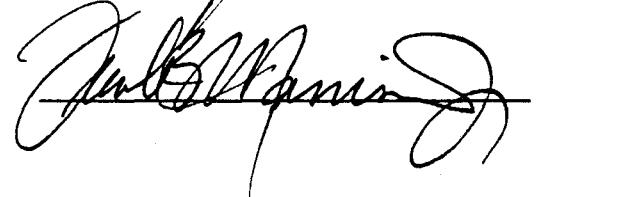
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court's calculations were wrong, but the result is the same. Appellants' own testimony revealed that the Roses knew they owed Myers for feed and labor costs in excess of the contract price, so although the court improperly took judicial notice of the fact, the result is supported by the evidence. Therefore, it is not necessary to reverse the District Court on this issue.

The order of the District Court is affirmed in all respects.


Chief Justice

We concur:

Justices

Mr. Justice William E. Hunt, Sr., concurring:

I concur in the result reached by the majority, but cannot agree with its analysis of the constitutional challenge raised by appellants.

The majority reaches its decision without addressing appellant's claim that § 71-3-1203, MCA, is unconstitutional as violative of due process. Appellants first raised the issue in their initial complaint before the District Court. They gave notice to this Court of the constitutional challenge in compliance with Rule 38 M.R.App.Civ.P.. Appellants have standing to challenge the statute. I cannot agree with the majority opinion that it is unnecessary to decide whether § 71-3-1203, MCA, is constitutional. The issue is squarely before us and cannot be ignored.

I would hold that § 71-3-1203, MCA, is clearly unconstitutional. The statute violates the due process clauses of the state and federal constitutions. However, I concur in the affirmance of the District Court's decision because the appellants have already had their hearing. Following the sale, the appellants brought an action in the District Court which they litigated to a final judgment, and from which they now appeal. They received the full benefits of a trial in which they had an opportunity to fully present their case. The District Court found in favor of the respondents. Therefore, it is unnecessary to reverse the District Court and remand this case for a hearing.

The agister's lien statute is clearly unconstitutional, however, because there is significant state action involved, and because the statute provides neither notice nor an opportunity to be heard prior to deprivation of property.

First, it is clear there is significant state action involved. The Third Circuit Court of Appeals found state action from the mere enactment of a statute authorizing a garageman to sell a customer's vehicle for nonpayment of a bill. *Parks v. Mr. Ford* (3d Cir. 1977), 566 F.2d 132. The state action under § 71-3-1203, MCA, is far more significant. The sheriff is given a copy of the bill, a description of the property, and the name of the owner. The sheriff then must advertise and conduct the sale, he applies the proceeds of the sale to the debt, and provides the buyer with a bill of sale. Clearly this constitutes significant state action.

Second, the statute does not satisfy the minimum due process requirements elaborated by either the Montana or the United States Supreme Court. As this Court stated in *Nygard v. Hillstead and Coyle* (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645:

It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, § 17. "It is well settled that notice and opportunity to be heard are essential elements of Due Process." *Halldorson v. Halldorson* (1977), 175 Mont. 170, 573 P.2d 169, 171.

The United States Supreme Court has addressed the due process requirement in the area of garnishment, replevin, and sequestration. That line of cases includes *Sniadach v. Family Finance Corp.* (1983), 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; *Fuentes v. Shevin* (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *Mitchell v. W.T. Grant Co.* (1974), 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, and *North Georgia Finishing Co. v. Dichen, Inc.* (1975), 413 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751.

In Sniadach, it was held that the Wisconsin prejudgment garnishment procedure whereby the defendant's wages were

frozen in the interim between the garnishment and the culmination of the main suit, without the opportunity for a hearing, violated the Fourteenth Amendment. The Court noted that wages were a specialized type of property and prejudgment garnishment might impose tremendous hardship on wage earners. The Sniadach holding was expanded by Fuentes. In Fuentes, Florida and Pennsylvania statutes were held unconstitutional. Those statutes authorized the issuance of writs ordering state agents to seize a person's possessions upon the ex parte application of any other person who claimed a right to them and posted a security bond, without providing the possessor with notice or an opportunity to be heard. The Court held that a person whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner, and that the replevin statutes in question were constitutionally defective in failing to provide for notice and hearing. The Court noted that "extraordinary situations" may justify the lack of notice and hearing, but such a situation did not exist in that case.

Fuentes was distinguished by Mitchell wherein it was held that a Louisiana statute which permitted the seller of goods under an installment contract to obtain a writ of sequestration to recover the goods, upon buyer's default, and without notice or hearing, did not violate due process. There were other adequate safeguards of due process because the writ would issue only upon a verified affidavit, and upon a judge's authority after the creditor had filed a sufficient bond. The statute entitled the debtor to immediately seek dissolution of the writ unless the creditor proved the grounds upon which the writ issued, and the debtor could regain possession by posting a bond to protect the seller.

The final case is North Georgia Finishing, Inc.. That case relied upon Fuentes to determine that Georgia statutes authorizing garnishment of property other than wages in pending suits, but not providing for notice, hearing, or participation by a judicial officer, violated due process.

The above cases dealt with something less than a sale of the property, i.e., sequestration, replevin, and garnishment. Clearly a permanent deprivation of property, such as occurs in a sale, warrants just as stringent a due process analysis as lesser forms of deprivation. As those cases indicate, due process requires at a minimum both notice and an opportunity to be heard prior to deprivation of property absent extraordinary circumstances, or other sufficient safeguards of due process.

Section 71-3-1203, MCA, does not provide the kind of safeguards which salvaged the Louisiana statute in Mitchell. There is no requirement for a verified affidavit, no participation by a judge, no mandatory bond, and no procedure to seek an immediate halt of the sale. Further, there are no other legal remedies available to sufficiently guarantee due process. The legal procedures available to the owner, such as the institution of an action for conversion or for declaratory relief, are insufficient substitutes for a pre-sale hearing. There is little probability that trial of a contested lien claim can be held within the minimum period preceeding transfer to the buyer, and injunctions or other extraordinary remedies are discretionary with the trial court and thus lack the certainty necessary to insure a hearing prior to permanent deprivation.

The question then becomes whether there exists any extraordinary circumstances which would justify the lack of a

hearing prior to the sale. The respondent, Schafer, argues that because the personalty involved was live animals, this constitutes an extraordinary circumstance. This argument is not persuasive. The United States Supreme Court in Fuentes discussed what is meant by "extraordinary situations." As that Court said:

These situations, however, must be truly unusual First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 90-91.

Thus, the Court has allowed summary seizure to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, or to protect the public from misbranded drugs and contaminated food. The present situation does not qualify as an important governmental interest. It is a private dispute between two parties. State intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health, and is of insufficient importance to override the due process requirements of notice and hearing. Therefore, I would hold that § 71-3-1203, MCA, is violative of due process as there is no provision for notice and hearing prior to deprivation of property.

The question remains what kind of notice and hearing satisfy due process requirements? The Supreme Court in Fuentes stated that notice must be granted at a meaningful time and in a meaningful manner. Fuentes, 407 U.S. at 80.

Further, the Court noted that leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the seizure has little probability of succeeding on the merits. Sniadach, 395 U.S. at 343.

The hearing should establish the validity, or at least the probable validity, of the underlying claim before an alleged debtor can be deprived of his property. Consideration should be given to the interests of the parties including the basis of the underlying claim, the nature of the property involved, i.e., its value, uniqueness, etc., and the need for prompt action. The hearing need not be a full blown trial-type hearing, but must protect a property owner's use and possession of property from arbitrary encroachment. This is an especially relevant danger where the State seizes and sells goods merely upon the application of a private party.

Because the appellants have properly challenged the constitutionality of § 71-3-1203, MCA, the issue must be addressed. However, I concur in the result reached by the majority and would affirm the District Court in all respects.

I concur.

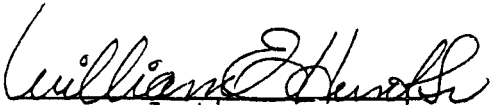

Justice

EXHIBIT 5
DATE 3/3/87
SB SB 2

**BOZEMAN
PHYSICAL THERAPY CENTER**

Suite 703G • Medical Arts Center
300 North Willson
Bozeman, Montana 59715
(406) 587-4501

March 3, 1987

To: House Business and Labor Committee

Re: SB 2, An Act Establishing Lein Rights for Physical Therapists and
Occupational Therapists.

I am a Physical Therapist from Bozeman, Montana, and have been in practice for over five years. Confronted with the demands of a small business, one of which is the endless job of collecting reimbursement for our services, requires as many legal options as possible to assure cash flow and meet our obligations. Often our reimbursement comes long after service has been provided and terminated.

Typically we see many patients involved in accidents that may or may not result in litigation on the part of the patient to recover some reward for them. This process can take three years or more and during this time we are not reimbursed. In the past five years we have accumulated over \$5,000 of service provided that is in the 2-4 year wait. There is also a substantial amount in the same situation that is less than two years old. Also, in the last five years we have had 2 accounts that had been settled without us receiving our money. There has also been several situations where patients have been provided service, submitted their bills to their insurance, received reimbursement, and not bothered to pay us.

The ability to apply a legal lein in these cases would at least assure us ~~that~~ we will be able to recover our service cost with a much greater degree of certainty. It would certainly place us in the same situation as hospitals and physicians for reimbursement as we are already in the mainstream of health care and should be allowed the same avenues of collection as the other providers.

I urge your support for this bill.

Sincerely,

Gary Lusin, PT
Gary Lusin, PT

Gary Lusin, P.T.
Mary Jo Lusin, P.T.

JOE O. LUCKMAN, P.T.
PHYSICAL THERAPY CONSULTANT
Great Falls Medical Building
1220 Central Avenue
GREAT FALLS, MONTANA 59401

EXHIBIT 6
DATE 3/3/87
SB SB 2

March 2, 1987

TO THE CHAIRMAN AND MEMBERS OF THE HOUSE BUSINESS AND LABOR COMMITTEE:

I am Doris Luckman, co-owner and Business Manager of Joe O. Luckman, P.T., a private practice Physical Therapy office in Great Falls, Montana.

I am here today to ask for your support of Senate Bill 2, entitled "An Act Establishing Lien Rights for Physical Therapists and Occupational Therapists".

We feel that people who have been injured seriously enough to need our services and who choose to come to us should expect to pay for the services they ask for and receive.

We are a small business that has operational expenses and it is not fair to be expected to provide service with no protection. We believe that when someone does get a settlement it is only fair for us to be assured of payment for the service they received from us.

At the present time we have approximately twelve patients whose cases have been under litigation for up to three years, during which time we have received no remuneration for treatments given.

We have also had patients who have received settlements which included our balances and have chosen not to pay our bill or to only partially pay it.

Therefore, we feel the need for a legal structure to enable us to file a lien in order to collect outstanding bills when settlements are awarded.

Thank you for your time, attention and consideration of this matter.



Doris Luckman

EXHIBIT _____
DATE 3/3/87
SB SB 2

WITNESS STATEMENT

NAME _____ BILL NO. _____
ADDRESS _____ DATE _____
WHOM DO YOU REPRESENT? _____
SUPPORT _____ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

WITNESS STATEMENT

EXHIBIT _____
DATE _____
HB _____

NAME KIRK HANSON BILL NO. 2
ADDRESS 1027 HAUSER BLVD HELONA DATE 3/3/82
WHOM DO YOU REPRESENT? SELF
SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I PRACTICE HERE IN HELONA.
WE ARE SUPPORT OF SB2

VISITORS' REGISTER

BUSINESS AND LABOR

COMMITTEE

BILL NO. SENATE BILL NO. 78

DATE MARCH 3, 1987

SPONSOR SENATOR JACK HAFHEY

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

BUSINESS AND LABORCOMMITTEEBILL NO. SENATE BILL NO. 59DATE MARCH 3, 1987SPONSOR SENATOR JACK E. GALT

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
<i>Mr. [illegible]</i>	<i>[illegible]</i>	<i>X</i>	
<i>Shirley Ball</i>	<i>U. I. F. E.</i>		<i>✓</i>
<i>Tom Tully</i>	<i>NPRC member</i>		<i>✓</i>
<i>[illegible]</i>	<i>[illegible]</i>	<i>X</i>	
<i>[illegible]</i>	<i>[illegible]</i>		<i>✓</i>
<i>[illegible]</i>	<i>[illegible]</i>		
<i>[illegible]</i>	<i>[illegible]</i>		<i>X</i>
<i>[illegible]</i>	<i>[illegible]</i>	<i>X</i>	
<i>Ang Nelson</i>	<i>NPRC</i>		<i>✓</i>
<i>[illegible]</i>	<i>[illegible]</i>		<i>✓</i>

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

BUSINESS AND LABOR

COMMITTEE

BILL NO. Senate Bill No. 2.

DATE March 3, 1987

SPONSOR Senator Tom Hager

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.