MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

March 13, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 13, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Grady and Hannah who were absent.

EXECUTIVE SESSION:

ACTION ON SENATE BILL NO. 249:

Rep. Mercer moved SB 249 BE CONCURRED IN. He stated he spoke to many people in regard to this bill especially to lowering the limits because property damages can be treated differently from personal injury damages. He recommended the bill be concurred in as it now stands. Question was called and a voice vote was taken. The motion CARRIED 11-3, with Reps. Cobb, Miles and Brown dissenting. SB 249 BE CONCURRED IN.

ACTION ON SENATE BILL NO. 20:

Rep. Mercer moved that SB 20 BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB 20 BE CONCURRED IN.

ACTION ON SENATE BILL NO. 104:

Rep. Gould moved that SB 104 BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED 11-3, with Reps. Miles, Strizich and Bulger dissenting. SB 104 BE CONCURRED IN.

ACTION ON SENATE BILL NO. 40:

Rep. Bulger moved SB 40 BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB 40 BE CONCURRED IN.

ACTION ON SENATE BILL NO 214:

Rep. Daily moved that SB 214 BE NOT CONCURRED IN. Rep. Mercer stated this bill needs some clarification. Rep. Gould pointed out that SRS does not want to have to take every child given to them. Rep. Daily stated if a child is

born seriously ill the SRS does not want to take that child and the Developmentally Disabled Association was opposed to this bill for that reason. Rep. Miles acknowledged she really does not know if this is a good bill or not. Rep. Darko stated she recalls from the testimony that there are some parents who do not want to deal with teenage problems and in some cases parents may want SRS to take a teenager off their hands. Rep. Bulger stated this bill does not talk about medical care because they get all the medical care they need. The question has to do with other services that SRS can offer, he said. Rep. Gould requested that Mr. MacMaster explain the legal degree of the bill. Mr. MacMaster explained that if the Department is correct and simply by signing this relinquishment the Department or an adoption agency has to take the child and then the parents parental rights are terminated, then they may be subverting the waiting list. He stated his understanding is that the waiting list is a list of children desperately in need of Department services. It would be up to the Department to take care of that child. Rep. Gould made a substitive motion that SB 214 BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED 8-7. SB 214 BE CONCURRED IN.

SENATE BILL NO. 164: Senator Gage, sponsor, District No. 5, stated this bill allows the Department of Justice to bill a party that subpoenas a Department employee so that the Department will be reimbursed for the employee's time spent on the subpoena, and repealing section 44-1-502, MCA. The money will go to the Department of Justice and not to the employee.

PROPONENTS: KIMBERLY KRADOLFER, Department of Justice, stated that statistics show that the employees of the lab have spent 69 hours and 55 minutes testifying and they spent 317 hours waiting to testify in 1986. She pointed out that they simply want to provide an incentive for the counties not to misuse their employees time.

There were no further proponents and no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 164: Rep. Meyers asked Senator Gage if the employee would get double pay. He stated the employee will not get any money.

Rep. Eudaily asked Senator Gage if this is only used in civil cases and Senator Gage stated he assumes it can be used in civil and criminal cases. Rep. Eudaily asked him what is being repealed. He explained the highway patrolman's section is being repealed, where the Department of Justice can bill for highway patrolmen to be subpoenaed and

that section only covered highway patrolmen. It will now cover the Department of Justice's employees.

Rep. Lory asked Ms. Kradolfer if the Department of Justice would charge the regular amount for an expert witness. She stated they would charge what it costs exactly to have that witness there so, it would be just reimbursement. Rep. Mercer asked Ms. Kradolfer what the costs will be for the county. She stated there have not been any figures worked up yet but the fiscal note attached states that for civil costs it comes to $15,000.00.

Rep. Mercer asked Ms. Kradolfer if the county prosecutors could work to get people moved through quicker and she stated it just does not work that way.

Senator Gage pointed out that in criminal cases the costs to the courts are born by the state at the present time and the intent of the bill is to get people to quit abusing the lab people and he closed the hearing on SB 164.

SENATE BILL NO. 160: Senator Mazurek, District No. 23, stated this bill was introduced by the request of the Montana Supreme Court and the Supreme Court Commission on the rules of evidence. It generally revises and clarifies the laws relating to the statutes of limitation on the commencement of a civil action. This bill makes the current statutes conform with court cases and it is not the intent of the bill to make any substitive change in the law of the statute of limitations. Section 27-2-102 is amended and provides as a general rule, that the statute of limitations or the period that determines when the time starts to run, when all of the elements of a claim or cause exist or have occurred and the right to maintain the action is complete. The lack of knowledge of the claim does not postpone the beginning of the period of limitation. Subsection (1) is new and incorporates the rule accepted throughout the United States, that a statute of limitation can begin to run against a potential plaintiff only when the claim or cause is complete to the point that a suit can be instituted on it. The statute of limitations does not stop running on an out of the state person if you can not get service on the person. He stated that where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends. He submitted a written explanation of the bill. (Exhibit A).

PROPONENTS: KARL ENGLAND, Montana Trial Lawyers Association, stated this is a good bill and the Association

supports it. He pointed out that missing the statute of limitations rules is the biggest single cause of lawyer malpractice.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 160: Rep. Gould asked Mr. England if this bill is enacted, will insurance rates go down for attorneys. He answered, "no".

Rep. Bulger asked Mr. England if section 27-2-401 conflicted with the Asay bill and he stated it does not because the specific statute on medical malpractice will govern medical malpractice actions.

Rep. Mercer stated he is concerned with the new section 4 regarding service of out-of-state people. Mr. England was asked to explain why this section was not tied down tighter because anyone can be served by process. Mr. England referred him to page 8 of the explanation (see Exhibit A) and the Commission says that there are two cases McGhee vs. District Court and Beedie vs. Shelley where the court has held that the period of limitations could only be postponed or interrupted where the defendant was not only absent but not capable of being served. The old law on statute of limitations was written before the expansion of an ability to serve someone under rule 4 of the rules of civil procedure.

Senator Mazurek closed the hearing on SB 160.

SENATE BILL NO. 181: Senator Van Valkenburg, District No. 30, stated that SB 181 was introduced at the request of the Montana Magistrates Association and it is designed to aid in the enforcement of fines that are imposed in the court system. He explained if a person is given a fine and fails to pay the fine this bill requires suspension of a driver's license to appear in court or failure to pay a fine, costs or restitution after conviction of certain offenses. This bill further requires payment of a reinstatement fee of $25.00. The purpose of this bill is to give judges a mechanism to work with in collecting these fines. The bill will generate a total of $117,000.00 to $160,000.00 a year and $60,000.00 to $80,000.00 will go into the state general fund.

PROPONENTS: BERNIE MCCARTHY, Montana Magistrates Association, stated they support this piece of legislation for the simple reason they need more teeth as an aid in collecting fines and costs. SB 181 gives us additional powers to give the incentives to pay fines. He proposed an amendment to section 2, paragraph 2, to read, "$25.00 to the motor vehicle division". Written testimony was submitted. (Exhibit A).

WALLACE A. JEWELL, Montana Magistrates Association, stated currently juveniles are paying a higher price for not being responsible than adults are. He supported this bill.

LARRY MAJARIS, Department of Justice, Motor Vehicle Division, statedthe Department does not have a position on this bill but offer an amendment starting on page 2, line 16, which clarifies. The amendment will help in avoiding confusion. (Exhibit B).

There were no further proponents and no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 181: Rep. Eudaily asked Mr. Majaris why the Department needs new equipment to handle the change over. He stated that special terminals are needed to suspend drivers licenses.

Rep. Brown asked Senator Van Valkenburg why all the chapters deal with juvenile driver licenses and why is it limited to traffic violations. He stated it relates to all driving related offenses and the reason it is limited to driving offenses is because the sanction is the drivers license revocation. Rep. Addy stated what Senator Van Valkenburg is attempting to make this apply to is when a drivers license can be suspended but is there anything that is being left out of the suspension procedure. Senator Van Valkenburg said that the intent is to have it relate to any driving related offenses.

Rep. Addy asked Senator Van Valkenburg if he wanted it amended as to who the fine should be paid to. He stated the general fund is getting the net amount already. The $25.00 got into place because the original fiscal note was done improperly and showed there would be a net loss to the general fund. Now, there is a net gain to the general fund through a substitive fiscal note.

Senator Van Valkenburg closed the hearing on SB 181.

SENATE BILL NO. 173: Senator Brown, District No. 2, stated the bill changes spousal privilege as a limitation on use of evidence in criminal and civil matters by requiring the consent of the testifying spouse rather than requiring the consent of the other spouse, and repealing limitations on the competency of a spouse to testify in criminal matters. He pointed out that in this day and age it seems nonsensical and illogical to continue with the present practice. Most states have eliminated the spousal privilege entirely. He stated it is time we bring the State of Montana into conformity of the Federal law.

PROPONENTS: MIKE MCGRATH, Lewis and Clark County Attorney, stated he feels this is a real good bill and it brings the Montana law into conformity to the law of the United States. Whether a witness is married or not should not be considered.

PATRICK PAUL, Cascade County Attorney, explained this bill is not designed to protect the wrongdoer and it is a beneficial change for the State of Montana.

DEBRA JONES, Lobbyist for the Woman's Fund, stated this law is based on outdated social rules and it will be a good change for Montana to adopt this bill.

KARL ENGLAND, Montana Trial Lawyers Association, stated this bill does two things. It deals with the spousal privilege and with the issue of spousal tort immunity. He pointed out this bill makes a big change in the spousal privilege law in criminal cases and he said he is not sure if this can be carried over into the civil field.

There were no opponents to SB 173.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 173: Rep. Addy stated that if this bill passes and your lawyer decides to testify against you, he cannot; and if your doctor decides to testify against you, he cannot; and if your social worker wants to testify against you, he cannot, but your wife can. He asked Mr. McGrath to please explain the different policy reasons. Mr. McGrath stated that the best answer to that is the reason all of the privileges have come into the law is to assure a person who goes to see a lawyer that a person will communicate fully because the lawyer cannot testify against his client. When we talk about a marriage we are talking about a different situation. People do not get married because of concerns about confidentiality. The state really has no business in telling a spouse they cannot testify if in fact, they wish to do that, he said. Mr. McGrath further pointed out that the repealer says that neither spouse is competent to testify against another spouse in a criminal case. Rep. Addy stated there is every reason to encourage confidential and even intimate communication between spouses during a marriage and what this bill says is you better not confide in your spouse and you better build the marriage on sand. Mr. McGrath pointed out that the question is, does the state have business dealing with that.

Rep. Keller asked Mr. McGrath if under current law, does a common law marriage have espousal immunity. He said there are different rulings on this subject and as far as he

knows, there has not been a case under the Montana Supreme Court.

Senator Brown closed the hearing on SB 173.

SENATE BILL NO. 152: Senator Walker, District No. 20, stated this is a bill that extends the time for filing a complaint with the Commission for Human Rights, be increased if the complainant has attempted to resolve the dispute through a grievance procedure. This bill adds 120 days to negotiate so there is neutral ground before a filing of a complaint.

There were no proponents and no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 152: Rep. Rapp-Svrcek asked Senator Walker if this bill includes provisions for determining if people are bargaining in good faith and Senator Walker stated there is not anything in the bill for bargaining in good faith, they just have the opportunity to bargain for 120 days. Rep. Rapp-Svrcek asked Senator Walker if people are required to wait for 120 days before filing a complaint. He said, "no".

Senator Walker closed the hearing on SB 152 by stating this is a matter of working things out on a common ground and he urged support.

ADJOURNMENT: There being no further business to come before this committee, the hearing was adjourned at 11:00 a.m.

Earl Lory

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 13, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)		✓	
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)		✓	
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

STANDING COMMITTEE REPORT

MARCH 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 104

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

THIRD reading copy (BLUE color)

REP. DARKO WILL CARRY THE BILL!

STANDING COMMITTEE REPORT

MARCH 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 214

- ☐ do pass
- ☐ do not pass
- ☒ be concurred in
- ☐ be not concurred in
- ☐ as amended
- ☐ statement of intent attached

Chairman

THIRD reading copy (BLUE color)

REP. GOULD TO CARRY BILL!

STANDING COMMITTEE REPORT

MARCH 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 20

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

THIRD BLUE REP. MERCER TO CARRY BILL!

reading copy (color)

STANDING COMMITTEE REPORT

MARCH 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 249

☐ do pass
☐ do not pass

XX ☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

THIRD reading copy (BLUE color)

REP. ADDY TO CARRY BILL.

STANDING COMMITTEE REPORT

MARCH 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 94

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

THIRD reading copy (BLUE color)

REP. JAN BROWN TO CARRY BILL!

STANDING COMMITTEE REPORT

MARCH 13, 1987

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 40

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

THIRD reading copy (BLUE color)

REP. BULGER TO CARRY BILL

ex— A
date-3-13 87
SB #160

Statutes of Limitation

Section 1. Section 27-2-102, MCA, is amended to read:

27-2-102. For the purposes of statutes relating to the time within which an action must be commenced: ~~an--action--is--commenced--when--the--complaint--is filed;~~

(1) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;

(2) an action is commenced when the complaint is filed.

(3) Unless provided otherwise by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued, does not postpone the beginning of the period of limitation.

(4) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the injury has been discovered, or, in the exercise of due diligence, should have been discovered by the injured party, if:

(1) The injury is, by its nature, concealed or self-concealing, or

(2) Before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

(3) Nothing in this sub-section shall affect the provisions of section 27-2-205, MCA.

Explanation of amendments to section 27-2-102

These amendments of section 27-2-102 MCA will put the provisions governing the beginning and ending of periods of limitations into a single statute, which seems to be the most understandable arrangement.

Subsection (1)

Subdivision (1) is new and incorporates the rule accepted throughout the United States, that a statute of limitation can begin to run against a potential plaintiff only when the claim or cause is complete to the point that a suit can be instituted on it. It prevents the anomalous and unjust situation in which a period of limitation may begin running against a person and possibly run out while he has no legal power to file the complaint that would toll the statute. The principle has been accepted and uniformly applied in Montana cases; *Northern Pacific Ry. Co. vs. Smith*, 62 Mont. 108, 203 Pac. 503 (1921), (action in ejectment); *Viers vs. Webb*, 76 Mont. 38, 245 Pac. 257 (1926) (action for possession of personal property); *Heckaman vs. Northern Pacific Ry. Co.*, 93 Mont. 363, 20 P.2d 258 (1933) (negligent injury to real property); *State ex rel DeKalb vs. Ferrell*, 105 Mont. 218, 70 P.2d 290 (1937) (action for payment of public obligation), and many others.

Subsection (2)

This is the present language of section 25-2-102 without change.

Subsection (3)

The rule that knowledge of the existence of a claim or cause of action by the person to whom it has accrued is not required to begin the running of the period of limitation has been part of our law since the beginning. Although not

mentioned in the Code, it was referred to as an existing principle in *Yore vs. Murphy*, 18 Mont. 342, 45 Pac. 217 (1896). *Kerrigan vs. O'Meara*, 71 Mont. 1, 227 Pac. 819 (1924) reaffirmed the rule and is the case usually cited as authority for it. Since *Kerrigan* it has been unquestioned. *Bennett vs. Dow Chemical*, _____ Mont. _____, 713 P.2d 992 (1986) is the latest of a long series of cases citing and applying it.

Originally, there was only one exception to the rule, Section 27-2-203, MCA, stating that the period of limitation on actions for fraud or mistake does not begin "until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The definition of "fraud" was expanded to include breaches of fiduciary duties by *Skierka vs. Skierka Bros., Inc.*, _____ Mont. _____, 629 P.2d 214 (1981), but the text of the statute itself has not been changed.

Of recent years, additional statutes have been passed, some included in the general statute of limitation laws (like sections 27-2-205 and 27-2-206, MCA, on medical and legal malpractice) and some not (like section 30-2-725(2), MCA, covering warranties of performance of goods).

The exception clause in this amendment seeks to avoid conflict with these and any other statutes, existing or future. It also attempts to incorporate without interference the substantial development of the "discovery" doctrine by the Supreme Court during the past twenty years.

Subsection (4)

The primary purpose of this subsection is to incorporate the comparatively recent case extensions of the discovery principle which are obviously of major importance.

The earliest of these exceptions seems to be *Interstate Manufacturing Co. vs. Interstate Products*, 146 Mont. 449, 408 P.2d 478 (1965). It was a conversion action where defendants claimed that the applicable statute of limitations had run before the action was filed. The Supreme Court rejected the contention, saying:

> However, the statute of limitations does not commence to run on the date of the transfer where the plaintiff is ignorant of his cause of action and such ignorance is neither willful nor the result of negligence . . . . (Many cases hold that the statute runs regardless of the plaintiff's lack of knowledge. However, the reason for these rulings seems to be that in such cases ignorance is the result of want of diligence and the party cannot thus take advantage of his own fault . . . .).

In the *Interstate* case the Court found that the conversion was a deliberate act, concealed from the plaintiff-owners, which could not have been discovered by the exercise of due diligence.

The kind of deliberate injury dealt with by the case is comparatively rare and has not figured in subsequent litigation, but the following year, the question arose

again in the more active field of negligent injuries and set in motion a current of change not yet finished.

A major expansion by judicial decision, now partially codified, began in *Johnson vs. St. Patrick's Hospital*, 148 Mont. 125, 417 P.2d 469, in 1966. That case recognized a national trend which permits postponement of the period of limitation in surgical malpractice cases. *Johnson* authorized such deferment only when foreign objects were left in a surgical incision, but was quickly followed by other cases extending the new doctrine, which the Court called "fraudulent concealment", to all medical malpractice (see *Grey vs. Silver Bow County*, 149 Mont. 213, 425 P.2d 819, and *Monroe vs. Harper*, 164 Mont. 23, 518 P.2d 788) and, inferentially at least, to many other kinds of actions (see *Carlson vs. Ray Geophysical*, 156 Mont. 450, 481 P.2d 327). This series of opinions held, in brief, that statutes of limitation should not begin to run on negligent injuries until the injuries were or should have been discovered, if they were of such a nature that they concealed themselves or if, after the negligent act was committed, the defendant concealed the facts from the injured party.

In 1971 this line of cases was codified for medical malpractice suits (Sec. 27-2-205, MCA) and in 1977 similar treatment was given to legal malpractice (Sec. 27-2-206, MCA). Some more recent cases have invoked the "discovery" doctrine without connecting it to "fraudulent concealment" or the *Johnson-Monroe-Carlson* line of decisions. *Thompson vs. Nebraska Mobile Homes*, 198 Mont. 461, 647 P.2d 334 (1982); *Masse vs. State Highway Department*, _____ M _____, 664 P.2d 890 (1983); and *Bennett vs. Dow Chemical*, _____ M _____, 713 P.2d 992 (1986) all discuss the application of the discovery doctrine, although the Court applied it only in the *Thompson* case. *Thompson* invoked the discovery principle in a product liability situation, and *Masse* and *Bennett* held that it might have been applicable if the facts had been more thoroughly documented or somewhat different from those presented.

Sub-section (4) seeks to codify the principles established in these cases without (1) restricting the power of the Court to define further the scope of the discovery doctrine, or (2) creating a conflict with those existing statutes which have already incorporated the Court's decisions in the medical malpractice area.

Section 2. Section 27-2-301, MCA, is amended to read:

27-2-301. When demand necessary to perfect right to action. Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when ~~the right to make~~ the demand is ~~complete~~, made, except ~~in one of the following cases:~~

(1) W where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

~~(2) Where there was a deposit of money not to be paid at a fixed time but only upon a special demand or a delivery of personal property not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.~~

Explanation of Section 2

This change is intended merely to clear up the difficulties in a statute the courts have never been able to make sense of, and to reflect what the decided cases have indicated should be done with it. This code section, as originally enacted, laid down the basic rule that wherever a demand was necessary to entitle the demanding party to bring an action the period of limitations ran, not from the demand or its refusal, *but from the time that the right to make the demand was complete.* Thus, the statute could be running against a potential plaintiff while he had no right to bring an action (obviously violating the basic principle expressed in the other limitation statutes and in leading cases like *Heckaman vs. N.P. Ry.*, supra). Exceptions were made for possession by fiduciaries or agents and for demand deposits of money or property, which dated the limitation period from the *demand* or from the *knowledge of facts giving rise to a right to make a demand.* These provisions were clearer but did not help in determining when and to what situation the basic rule of the section applied.

In the leading case of *Gates vs. Powell*, 77 Mont. 554, 252 Pac. 377 (1926) the Supreme Court complained that:

> It must be admitted that the statute is not free from ambiguity, and that its language is not easy of application. The legislative intent of this statute is not clear.

The court's solution to the problem has been to find, in each case, that the "basic rule" did not apply, and to date the beginning of the period of limitation from the making of the demand.

This recommended change would simply conform the statute to ~~the actual~~ practice adopted in these cases.

Section 3. Section 27-2-401, MCA, is amended to read:

27-2-401. When person entitled to bring action is under a disability. (1) If a person entitled to bring an action mentioned in part 2, except 27-2-211(3), is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not a part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by any such disability except minority ~~or, in any case, more than 1 year after the disability ceases~~.

(2) If an action is barred by 27-2-304, any of the heirs, devisees, or creditors who at the time of the transaction upon which the action might have been founded was under one of the disabilities mentioned in subsection (1) may, within 5 years after the cessation of such disability, maintain an action to recover damages. In such action he may recover such sum or the value of such property as he would have received upon the final distribution of the estate if an action had been seasonably commenced by the ~~executor or administrator~~ personal representative.

(3) No person may avail himself of a disability unless it existed when his right of action or entry accrued.

(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until ~~they~~ all are ~~both~~ removed.

Explanation of Section 3

This disability section is, if the number of decided cases concerned with it is a reliable guide, very seldom used. No part of it has caused real difficulty except the "1 year after the disability ceases" clause, which the Supreme Court has found opaque to the point of unintelligibility.

In the instance of disability for minority, the court has ruled that the minor has the full statutory period after reaching majority within which to sue and that the one-year clause has no application (*Smith vs. Sturm, Ruger and Co. Inc.*, ____ M. ____, 643 P.2d 576). The leading case on mental illness rejected defendant's claim that the one-year provision could shorten, as well as lengthen, the time allowed for bringing suit and the court tried to find a construction which would give it some effect without destroying plaintiffs' rights in the process. The court's rather tentative conclusion was that, whatever the full meaning of the clause, there was no reason to apply it in the case (*Hi-Ball Contractors, Inc. vs. District Court*, 154 M. 99, 460 P.2d 751). After citing *Hi-Ball Contractors*, in *Smith vs. Sturm, Ruger*, the court pointed out that it had managed to reach the result in spite of the fact that the statutory section "is hardly a model of good draftsmanship."

This amendment would simply abolish the troublesome "one-year" portion of the statute and treat all disabilities alike. Minors would continue to have the full period of limitations in which to file actions after the disability ceases, and so would those disabled by mental illness or imprisonment. In the latter two instances, however, the statute would also begin to run even during the continuance of the disability after it had continued for five years.

In subsection (2) the term "personal representative" has been substituted for "executor or administrator" to make this statute conform to the language of the Probate Code and the Rules of Civil Procedure.

A minor change has been made in subsection (4) to correct the grammar.

Section 4. Section 27-2-402, MCA, is amended to read:

27-2-402. When defendant is out of state. If when the cause of action accrues against a person he is out of the state and cannot be served with

process, the action may be commenced within the ~~term herein limited~~ after his return to the state; and if after the cause of action accrues he departs from the state and cannot be served with process, the time of his absence is not part of the time limited for the commencement of the action.

Explanation of Section 4

The added language incorporates exceptions to this section created in the cases of *State ex rel. McGhee vs. District Court*, 162 Mont. 31, 508 P.2d 130 (1973) and *Beedie vs. Shelley*, 187 Mont. 556, 610 P.2d 713 (1980). The cases held that the original intention of section 27-2-401, MCA, was to protect a plaintiff's right to sue if the prospective defendant left the jurisdiction and thus made himself immune to service of process for all or part of the period of limitation. At the time the statute was adopted, rulings of the U.S. Supreme Court prohibited service of process in state actions outside the state's boundaries. When the federal rule was changed and Montana adopted a valid method of serving process beyond its borders [Rule 4, Montana Rules of Civil Procedure] the need for the statute, in most cases, was gone.

McGhee and *Beedie* ruled that the running of the period of limitation could be postponed or interrupted *only* where the defendant was not only absent but "not capable of being served." The amendments reflect the change and conform the statute to the existing state of the law.

Section 5. Section 27-2-408 reads:

27-2-408. Counterclaims. A defendant is entitled to assert against a plaintiff, by pleading or amendment, any counterclaim, arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against him, which existed at the time of the commencement of the plaintiff's action against him. The time between the commencement and termination of the action is not part of the time limited for the commencement of an action by the defendant to recover for the

counterclaim or to interpose it in that action or another action by that plaintiff or a successor arising out of the same transaction or occurrence.

Explanation of Section 5

This new section is a replacement for the present section bearing the same number which was designed to fit the types of counterclaims and pleadings used under the old Code of Civil Procedure. The changes made will continue the basic policies formerly in force but adapt them to the current Rules of Civil Procedure.

Both the old and new sections provide that the filing of a plaintiff's complaint tolls the applicable statute of limitations on existing counterclaims by the defendant as well as on the plaintiff's own claim. The new statute, however, makes it clear that its provision applies only to counterclaims arising from the same transaction, that is, compulsory counterclaims under Rule 13(a), M.R.Civ.P., and not Rule 13(b) permissive counterclaims. It incorporates the interpretation given to the old statute in *Francisco vs. Francisco*, 120 Mont. 468, 191 P.2d 317 (under a different method of classifying counterclaims) and the majority rule in the federal courts under the Rules of Civil Procedure (Wright and Miller, Federal Practice and Procedure, Vol. 6, 1419, p. 109).

The new section also carries forward the former guarantee that the period of limitation on the counterclaim would not run during the continuance of the action. This is intended to preserve the status quo between the parties and remove any possibility that the period of limitation could be tolled as to one party's claim, but continue running, or begin running again, on the other's.

The provision that the counterclaim may be asserted "by pleading or amendment" is intended to conform to Rule 13(f), M.R.Civ.P., permitting, by leave of court, the addition of omitted counterclaims. Although the question has not yet been before the Montana Supreme Court, the federal courts have held under the identical rule that "amendment" includes either the formal procedure authorized by Rule 15(a) or amending by introduction of non-conforming evidence at the trial under Rule 15(b).

Section 6. Section 27-2-409 reads as follows:

27-2-409. **Acknowledgment of debt or part payment.** Acknowledgment or part payment of a debt is evidence of a new or continuing contract sufficient to cause the relevant statute of limitation to begin running anew. An acknowledgment must be contained in some writing signed by the party to be charged thereby. Part payment is any payment of principal or interest.

Explanation of Section 6

This new section is a substitute for the older statute bearing the same number. It is re-phrased for clarity but does not change the law. The alterations in language and arrangement are extensive enough to prevent a simple amendment of the old statute but have no object other than to make explicit what the Supreme Court has said the old law really means.

The old code section details what must be contained in a proper acknowledgment, but never sets out the basic principle (with which the new statute begins) that an acknowledgment or part payment starts the limitation period over from the beginning. The new draft repairs this defect but preserves as much as possible of the original language to leave no doubt that all the legal rules stated in cases construing the old act (like *Galvin vs. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *Mercer vs. Mercer*, 120 Mont. 132, 180 P.2d 248; and *Betor vs. Chevalier*, 121 Mont. 337, 193 P.2d 374) remain unchanged.

WITNESS STATEMENT

NAME _____ BILL NO. _____

ADDRESS _____ DATE _____

WHOM DO YOU REPRESENT? _____

SUPPORT _____ OPPOSE _____ AMEND _____

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Comments:

Se inscribe:

B
3-13-87
SB #181

Suggested Amendment to Senate Bill 181
Senate Third Reading Copy

On Page 2, line 16, following: "IMMEDIATELY REINSTATE THE LICENSE"

ADD: "UNLESS THE PERSON OTHERWISE IS NOT ENTITLED TO A MONTANA LICENSE"

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE
BILL NO. 181 DATE March 13, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Bern. McCarthy	MT Magistrates Assn	X	
Wallace A. Jewell	MT Magistrates Assoc	X	

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SENATE BILL NO. 173 DATE March 13, 1987

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Mike McGrath	County Attys	X	
Debra Taylor	Women's Lobbyist Fund	X	
Patricia Paul	Cas Co Atty	X	

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SENATE BILL NO. 160 DATE March 13, 1987

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NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
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JUDICIARY COMMITTEE

SENATE BILL NO. 164 DATE March 13, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Kimberly Kneebone	Dept of Justice	✓	

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