MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 29, 1987

The seventeenth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 29, 1987 by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 121: Senator Bob Brown of Whitefish introduced SB 121 by saying the bill's explanation was on the lines 16 through 23 on page 1 of the bill in the white copy. He said the need for this legislation came from cases outside of the state, which resulted on the findings of liability on the part of manufacturers or importers of firearms because crimes were committed with the firearms. He told the committee the logic of the bill is no liability should result from a firearm or ammunition doing what they were manufactured to do. He stated if only the products are defective and cause an injury because of their defect, should there be any liability.

PROPONENT: Brian Judy, National Rifle Association, (see witness sheet) spoke in favor of SB 121 because no area is threaten more than the private use and ownership of firearms by law obeying citizens. He explained that because gun control prohibitionists have been unsuccessful in getting legislation through for more gun control, their latest tactic is to get gun bans through the courts. He said in a number of states anti-gun lawyers have filed law suits against hand gun manufacturers alleging that the hand guns are unreasonably dangerous and by consquence, the manufacturers of these guns should be held responsible if their product has been used in a crime. He said there has been approximately 25 to 30 of these cases filed to date. He stated the bases for these defectless product liability cases is an assumption that traditional product liability can be extended to include the notion that a hand gun is defective in design because it could potentially be used to cause injury or death. He told the committee that in an attempt to prove that the design of a hand gun is the approximate cause of injury or death, a plaintiff's counsel will rely upon the testimony from criminologists and sociologists, who will present data on the numbers of injuries and deaths resulting from the use of hand guns and this is the same data that gun control advocates will use in their attempts to get legislatures to act in gun control legislation. He stated that the motive of the gun control advocates' counsel is to acheive in the courts what they have failed in the legislatures and this over attempt to judicially in act gun control legislation has caused courts to dispose of these cases; however, in October of 1985, the case of Kelly vs R.G. Industries, 497-A

to G 1143 (MD 1985), the Maryland Court of Appeals ruled that law suits by crime victims could be brought against the manufacturer of a gun called "Saturday Night Special". He said their decision was based on a theory that hand guns are defective since they are primarily used to commit crimes. He said the Kelly case has been applauded by anti-gun organizations; the spokeman for an anti-firearm group is the National Coalition to Ban Hand Guns. He said this group can now fight a two front battle for hand gun control. He said they are predicting numerous cases to be coming up, and these courts will be looking at the Maryland decision for direction. The decision of the Kelly case has bankrupted the R.G. Industries, he said. He stated the National Rifle Association would like to nip this "twisted tort line" in the "bud" and protect the shooting sports by seeing defectless product liability passed in every state legislature in the country. He said Idaho, California, Nevada are three western states that have inacted this law, in fact California and Idaho have the same language that your are considering today. He pointed out that SB 121 provides that it is not the potential of firearms to cause injury, damage or death when discharged, and SB 121 would also assure that neither firearm or ammunition is to be deemed "defective in design" on the arbitrary bases that the benefits of the product do not out weigh the risk. He said SB 121 will not effect product liability action based on design flaws, manufacturing defects, or negligence on the part of the producer. He state one gun manufacturer is out of business and many more are on their way if something is not done about this liability problem.

Bill Bigelow from Big Timber, representing the Montana Rifle and Pistol Association and is the field representative for Montana with the National Rifle Association, spoke in favor of SB 121 because the Rifle and Pistol Association's main duty is to train young shooters, so they can go on to the Olympic shooting sports, so if firearms are no longer availible to sporting clubs, then efforts to continue Olympic shooting events would be hindered.

Ralph A. Knauss of Clancy, representing himself handed the committee written testimony on his support for SB 121 (see Exhibit 1, written testimony).

Alfred M. (Bud) Elwell, Weapons Collectors Society of Montana, stated that in the last 20 years the Weapons Collectors Society has brought many collections to communities, and he felt a firearm is nothing more than an inanimated object capable of nothing more than the will of the individual that is using it and it is his responsibility for a defect such as what we are talking about here. Mr. Elwell felt it was a waste of the court's time in these cases.

OPPONENTS: Karl Englund, Montana Trial Lawyers Association, opposed SB 161. He first explained the concept of product liability by stating it

is based upon the premise that a manufacture is liable when he sells products in a defective condition reasonably dangerous to the public; it is called strict liability because the focus is on the product because it is the product that causes the injury and the focus is not upon the conduct of the manufacturer. He said in order to prove a product liability case, a person must show a product that is defect, defective and unreasonably dangerous. He pointed out there are three ways to find a defect in a product: 1) the manufacturing process, 2) the designing, 3) the failure of warning or adequately instructing: now a manufacturing defect means that the product doesn't perform as designed, so an auto can be designed safe proof with quality screws, but the manufacture did not use quality screws but cheap ones, and it caused an accident. In a gun case it is the same type of deal, he said. He explained a "failure to warn case" means one has good design, the product is not unreasonably dangerous, and it is manufactured properly, but the manufacturer has failed to provide a necessary warning, such as a lawn mower sign saying "Do not stick your hand under the machine while it is running." He explained in a design case the problem is in the design of the product. He said a product that is designed reasonably dangerous and its risks far out way its benefits is a design case that is not used very much. He felt SB 121's purpose is to present this last kind of mechanism to show design defects in gun cases. He asked the committee what gun could he convince a Montana jury with that was so dangerous that its risks far out way its benefits. You could not use collectable guns or guns used in the line of duty by a police officer, or a sport gun, he stated. He commented that "Saturday Night Specials could be the one gun you could use because they are cheap, concealable, dangerous, and can't be imported in the U.S. under federal law. Mr. Englund said there are not guns like this manufactured in Montana or by representable gun manufactures and they have never been the subject of a product liability action in this state. He felt the bill says the Montana citizen who is the victim of a mugging or shooting by someone using a gun that has no social value and its risks out weigh any benefits has no chance to convince a Montana jury that the manufacture of this type of gun has some responsiblity for his injury. He stated the kind of cases tried in Montana are "design defect cases", which this bill does not touch, and the only benefit this bill has is to protect manufacturers of these dangerous products like the "Saturday Night Special".

DISCUSSION ON SB 121: Senator Pinsoneault asked about the Kelly case. Mr. Judy responded that Kelly Industries is the importer of firearms and the gun in question was a foreign made firearm approved by the Bureau of Alcohol, Tobacco and Firearms. He said the Kelly case concluded that cases could be brought against hand gun manufacturers or importers of guns for an injury of a person involved with one of their guns. He said the "Saturday Night Special"(SNS) are defined as a low cost, easily concealable, short barrel and light weight, but he thought this is a defintion of any hand gun and the "SNS" is a hypothetical term that was

made up. He said the firearm in the Kelly case was a high quality and expensive gun. He asked what the difference is between a low cost gun and a high cost gun when they both are designed for the same reason and they can inflict the same injury and it should not be the firearm that is liable but the individual's actions. He pointed out again many manufacturers will go out of business because of the present statute.

Senator Yellowtail asked Mr. Englund to give an example of a "Saturday Night Special". Mr. Englund suggested a cheap, light weight, easily concealable weapon that has no value to society in areas of hunting, sporting, collecting or police work. Senator Yellowtail inquired again to describe a hand gun that fits a "SNS" mold. Mr. Englund echoed his same statement as before, but did not know of a model or kind of gun. Senator Yellowtail asked if they made any plastic guns that were called "SNS". Mr. Englund said a gun made of plastic must be used to get through metal detectors, but did not know of a model. Senator Yellowtail inquried if there is a federal law that prohibits the importation of these kinds of weapons. Mr. Englund replied that the Gun Control Act of 1968 prohibited the importation "SNS", but the act contained big loop holes which allowed the parts to be imported into the U.S.. Senator Yellowtail asked Mr. Judy to respond to this. Mr. Judy told the committee that for a firearm to enter the U.S.; it must be approved by the Bureau of Alcohol, Tobacco, and Firearms. He said there is no such thing as a plastic firearm and we are looking at expensive guns being named "Saturday Night Specials" because of the definition of a "Satruday Night Special". He pointed out a price of a gun is a ridiculous arbitrary factor to be defining as a "Saturday Night Special" because there many good quality firearms that are sold for only $100 or less. Any gun that is less than $200 is going to be dubbed a "SNS", he said, and what you are doing is taking away the ability for many people to purchase a quality, but cheaper firearm to use for self defense. He said you better look at the quality, because the size, weight, and price are meaningless. He stated he agreed that if an injury has been caused by design flaws, manufacturing defects, or has been produce with any negligence, then the injured person has the right to recover; but if the gun is a good one then the manufacturer can't be liable. He felt it is just a way, now, to get manufacturers out of business and bring in strict gun control. Senator Yellowtail asked what standards the Bureau of Alcohol, Tabacco and Firearms uses when allowing guns in to the country. Mr. Judy was not sure, except the guns probably have to fit into the standards of this country's products.

Senator Crippen asked Karl Englund to give a defintion of a gun that falls outside the definition of a "Saturday Night Special". He state that under this one theory of product liability if a product, because of its design, has no social value and carries high, high risks, then there is some product liability attached to that. He said when he use the

words "Saturday Night Special", he uses a gun within that defintion. Senator Crippen stated Mr. Englund was not answering the question. Mr. Englund said he was trying. Senator Crippen asked again what gun falls outside the defintion of a "SNS". Mr. Englund replied a gun that has some soical value, like hunting, protecting, collecting or used for police work. Senator Crippen asked who's protection is it used for. Mr. Englund replied the gun owner. Senator Crippen inquired how you can, using the term protection, go further and define within that term one gun that this and gun that isn't. Mr. Englund responded the bill doesn't set any standards; it just says if a person can make that argument and convince a jury in Motnana that they should be allowed to do that. He said there are no examples because there has not been any cases in Montana. Senator Crippen commented isn't that the point that it is very difficult to make a standard as the way you define it. Mr. Englund replied the standard is set by the product liability action and by the conscious of the community and the jury and if the jury can be convinced that there is no social benefit; that the risks far out way the values that there is; then why should a hand gun be any different than any other kind of product.

Senator Pinsoneault felt Mr. Englund has substituted some social theory that has nothing to do with the others. Mr. Englund said he is relaying to the committee in terms of showing a "design defect" where there are two ways that it can be done; one way is to show that there is an improper design and the other way is to show that the entire product, because of its design, is unreasonable dangerous and then that is where you get into the benefits/risks analysis. He said that is an excepted way to show a design defect in a product liability case.

Senator Mazurek asked about subparagraph (3) of the bill and what happens to the negligence or a defect in the manufactured process itself. Mr. Judy stated the bill doesn't address these things because it goes under product liability. Senator Mazurek asked if he would object to an amendment which mentions the other types of defects a manufature could be accountable for. Mr. Judy said that would be fine, but if these other defects are involved, then the gun is like any other product; I am concerned about the design, because the 30 cases involve the social value idea and; thus, the gun is dangerous, and design is defective because of that. Mr. Englund pointed out that the provision of this section does not effect product liability cause of action based upon design flaws, negligence or defects in manufacturing, because improper selection of design alternatives is only one of the mechanisms which you can prove improper design, even assuming you don't have this cause of action, which this bill is addressed to.

Senator Bishop asked Mr. Bigelow about his opinion on this lack of social value on a "Saturday Night Special". Mr. Bigelow replied it is very difficult to find social value in self defense. He said according

to Mr. Englund if you saved yourself or womeone else with a $25 gun, it means the incident had no social value. He commented he did not agree with that because that $25 gun saved a life.

Senator Brown closed by stating if they did not cost very much money or if they were easily concealed or light weight, those things make them, by definition, a dangerous gun and the risks out weigh the benefits, that seems pretty obvious to be a "back door approach" to banning hand guns. He said if that is not public policy we want to let stand then I think this is necessary and all it does is say if guns are manufactured to the law, they should not be deemed defective for doing what they were manufactured to do.

CONSIDERATION OF SB 181: Senator Van Valkenburg of Missoula introduced SB 181, which was requested by the Magistrate's Association. He said the bill requires suspension of a driver's license for failure to appear to pay a fine, costs, or restitution after conviction of certain offenses, which are listed in the bill. He said the reason for the bill is many law enforcement people allow violators to pay fines in installment periods and the people don't pay at these times. He felt this bill will give them an incentive to pay the fine.

PROPONENTS: Jim Haynes of the Montana Magistrate's Association spoke in favor of SB 181. He handed out amendments he and the Magistrate's Association worked on for SB 181 (see Exhibit 2). He explained the amendment in subsection (2) of the bill, which posts the set bond amount, address an issue raised by Representative John Mercer, which clarifies one could not give the bond amount to the policeman when stopped, and still be subject to this bill. He said subsection (3) will make a person pay $50 reinstatement fee to get their license back. He stated many people don't have the money to pay the fines, so you can't throw them in jail, but maybe this act will make these people more aware of what consquence that could happen to them.

Judge Neil Travis of Park County stated that he introduced this bill to the Magistrate's Association. He said certain people will not pay the installments. He said a person can leave for Wolf Point without paying; a warrant is issued for him and the sheriff has to get him, which is expensive for the city and county. He said the person will probably not pay after all this work anyway.

Judge Gary Dupuis of East Helena spoke in favor of SB 181 because many are repeated offenders who can't pay and know they can get away with it. He wishes to see juveniles included in this bill.

DISCUSSION ON SB 181: Senator Mazurek asked Senator Van Valkenburg if he had looked at the amendments. Senator Van Valkenburg did look at them and he said he had no objections to the amendments, and he said there is

a fiscal note coming for this bill. Senator Mazurek asked what he thought about the $50 reinstatement fee. Senator Van Valkenburg felt it was a little steep.

Senator Blaylock felt these people who get their license suspended will still keep driving anyway. Senator Van Valkenburg responded he did not know what to do with those people, especially when the jails are full, but somehow there will be room for them.

Senator Halligan inquired about a provisionary license before the suspension, because maybe someone is really working hard to pay a fine but needs their car to work. Senator Van Valkenburg said most judges know who is making a good faith try to pay and this bill is for those who don't try at all.

Senator Beck asked if someone does leave town, who is going to pick up the license and does the fiscal note have something to do with that. Senator Van Valkenburg responded that under the current law the highway patrol picks up suspended licenses, and they assign, on a rotation bases, officers to this duty, and that is where the fiscal note does come into this bill.

Senator Van Valkenburg closed on SB 181.

CONSIDERATION OF SB 160: Senator Joe Mazurek of Helena presented SB 160 to the committee on behalf of the Montana Supreme Court and the Commission on the Rules of Evidence. The bill will revise and clarify the laws relating to statutes of limitation for the commencement of civil actions. He gave copies of the changes and an explanation to each change to the committee (see Exhibit 3).

PROPONENTS: Sam S. Hadden, Commissioner on the Rules of Evidence, said the bill is an out growth of a bill that was passed in the 1983 Legislature that asked the court to supervise the Commission in review of the statute of limitations and venue statutes. He stated it was not the Commission's intent to change the law or develop it beyond the point the Supreme Court had set. He said the entire code has 33 sections and the Commission only change six of the sections. He said the Commission worked under the Supreme Court.

Karl Englund, Montana Trial Lawyers Association, testified in favor of the bill, but had a problem with page 2, section 3, line 4, which deals with the "time clock" on the statute of limitations, which doesn't begin to run until a person knows that they were harmed; if the injury is by its nature concealed or self-concealing. He said that in both subsection (3) and (3a) it is the discovery of the injury that starts the statute of limitation and he felt the reading of the case law cited in the explanation of the bill says it is not just the discovery of the injury

but the discovery of the facts constituting the claim. Mr. Englund relayed a story of a man killed in a car accident and there was no explanation. He said the wife and patrolman ran an investigation and an engineer even checked the car. He said five year later the U.S. department of Transportation "called back" the kind of car the husband was driving, because it had bad breaks; and the wife knew the date of her husband's death, so she took steps to find out what happen, but it wasn't until five years later that she was able to discover what would allow her to bring a claim. He pointed out to look at the cases cited in the explanation of the bill on page 3, (see Exhibit 3) Interstate Manuafacturing Company vs. Interstate Products is one case. He said the plaintiff is not just ignorant of his injury, but his whole cause of action. He stated on page 4 there are three cases sited: Thompson vs Nebraska which the plaintiff didn't discover the injury defect in the mobile home and so the court said the "time clock" began when the person discovered the defect, which is the injury. He explained the Bennett vs. Dow case where the plaintiff tried to make a claim, which the statute did not begin to run until he had talked to a lawyer who felt he had a law suit. He said the Supreme Court rejected that because it would prevent the running of the statute of limitations for someone who has never talked to a lawyer. He handed out an amendment (see Exhibit 4). He felt in doing so he had used the court's language and made clear the plaintiff must discover the facts to give rise to a claim; not to extend the statute of limitations.

Pat Melby, State Bar of Montana, supported SB 160 and appreciated the Commission trying not to extend the law.

OPPONENTS: None

DISCUSSION ON SB 160: Senator Pinsoneault asked why "injury" couldn't be left in the bill and just insert "or facts constituting the claim". Mr. Englund felt it would be fine to do it that way. Senator Yellowtail asked Mr. Hadden to respond to that. Mr. Hadden said the Commission did not focus on that specifically, but said the historical approach the court has taken has been to refer this subject matter to the word "injury"; that is the discovery of the injury with the exceptions spelled out in the latter part of the section. He said this will trigger the running of the period. He said there are exceptions, like the surgeon leaving a spunge in a patient and the patient is not aware until it becomes a problem in healing.

Senator Mazurek closed by saying he hoped the Commission, Karl Englund, and Pat Melby can work together for this bill so the committee can pass it out.

The committee adjourned at 11:40 a.m.

Joseph P. Mazurek
Chairman

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Jan. 29

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

DATE Jan. 29th

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Oppose
Gary Deputs	City Judge East Helena	SB181	✓	
Neil Travis	City Judge Livingston	SB181	—	
Jyni Haynes	Mt. Mag Assn	SB 181	✓	
Sam F Hamilton	Commission on Courts of Just.	SB 181	✓	

(Please leave prepared statement with Secretary)

RALPH A.KNAUSS
P. O. BOX 66
CLANCY, MT. 59634
PH. (406) 933 5602
January 29,1987

Honorable Chairman and Members of the Senate Judiciary Committee
Montana State Legislature
Helena,Montana

Gentlemen:

I am in favor of Senate Bill 121, as introduced by Senator Brown and many co-sponsors.

It is unfortunate that the people and organizations that believe in the ownership of firearms for legitimate purposes have to keep coming back to the legislature asking for new legislation, but the ingenuity of the anti-gun zealots is not waning.

As I understand the situation, since the zealots have not been able promote their views by legislation or voter initiative they are bringing civil actions against firearms manufacturers who have produced firearms that have been used in the commission of crimes. They are in effect trying to create, through the courts, a climate that would make it economically unfeasible to manufacture firearms.

In my opinion, the anti-gun people are attempting to have the courts create law that will enforce their point of view without legislative or administrative review. We all know that this not the way our democratic process is supposed to work.

I believe that this legislation will preclude such an occurence from happening in Montana. However, it would not stop anyone from recovering damages in the event of faulty design or manufacture.

SINCERELY YOURS,

Ralph A. Knauss

RALPH A. KNAUSS

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Jan. 29, 1987
BILL NO. SB 121

TELEPHONE: (406) 363-6431

JAMES A. HAYNES
Attorney at Law
P. O. BOX 544
HAMILTON, MT 59840

TO: Sen. Fred Van Valkenburg DATE: January 26, 1987

FROM: Jim Haynes, Mt. Magis. Assn.

RE: Amendments to Senate Bill 181

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING SUSPENSION OF A DRIVER'S LICENSE FOR FAILURE TO APPEAR IN COURT OR FAILURE TO PAY A FINE, COSTS, OR RESTITUTION AFTER CONVICTION OF CERTAIN OFFENSES."

For the purpose of clarifying S.B.181 and ensuring that positive revenue is generated, the following amendments (underlined) are proposed.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Mandatory suspension for failure to appear or pay fine. The department shall suspend the license or driving privilege of an operator or chauffeur immediately upon receipt of a certified copy of a docket page or other sufficient evidence from the court that the operator or chauffeur:

(1) is guilty of a violation of 61-5-302 through 61-5-306, 61-5-309, or chapters 3, 7, 8, 9, or 10 of this title or is guilty of a criminal offense and was driving or was in actual physical control of a motor vehicle when the offense occurred; and

(2) (a) failed to post the set bond amount or appear as ordered by the court or appear upon issued summons; or

(b) failed to forfeit the posted bond amount or to pay a fine, costs, or restitution amount of $100.00 or more; and

(3) received notice, evidenced by a signed receipt for a certified letter or by a statement signed before the court of the provisions of this section, including the $50.00 reinstatement fee.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE Jan. 29, 1987
BILL NO. SB 181

Section 2.

(1) No provisional, restricted, or probationary license may be issued upon a suspension under this section.

(2) A $50.00 license reinstatement fee is imposed and payable to the court.

Section 3. Upon receipt of notification from the court that the operator or chauffeur has appeared, posted the bond, or paid the fine, costs, or restitution amounts and the $50.00 reinstatement fee, the department shall immediately reinstate the license.

Section 4. Extension of authority. Any existing authority of the department of justice to make rules on the subject of the provisions of this act is extended to the provisions of this act.

Section 5. Codification instruction. Section 1 is intended to be codified as an integral part of Title 61, chapter 5, part 2, and the provisions of Title 61, chapter 5, part 2, apply to Section 1.

- End -

EXHIBIT NO. 2
DATE 1-29-87
BILL NO. S.B. 181

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:

SENATE JUDICIARY
EXHIBIT NO. 3
DATE Jan. 29, 1987
BILL NO. SB 160

(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.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE Jan. 29, 1987
BILL NO. SB 160

PROPOSED AMENDMENTS FOR SB160-- AN ACT TO GENERALLY REVISE AND CLARIFY THE LAWS RELATING TO STATUTES OF LIMITATION ON COMMENCEMENT OF A CIVIL ACTION

1) Page 2, line 6, after the word "until"
   STRIKE: "the injury"
   INSERT: "the facts constituting the claim"

2) Page 2, line 6,
   STRIKE: "has"
   INSERT: "have"

3) Page 2, line 9,
   STRIKE: "injury is by its"
   INSERT: "facts constituting the claim are by their"

NAME: BRIAN JUDY DATE: 1/29

ADDRESS: 555 CAPITOL MALL #455 SACRAMENTO, CA 958

PHONE: 916/446-2455

REPRESENTING WHOM? NATL. RIFLE ASSN.

APPEARING ON WHICH PROPOSAL: SB 121

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Bill Bigelow DATE: 1/29/87

ADDRESS: Box 1208, Big Timber, MT 59011

PHONE: 932-4480

REPRESENTING WHOM? NRA / MT. Rifle & Pistol Assoc.

APPEARING ON WHICH PROPOSAL: SB 121

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: Support this bill as submitted by Sen. Brown

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Ralph A. Kruger DATE: 1/29/87

ADDRESS: P.O. Box 66, Clancy, Mt

PHONE: 406 933 5602

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: S.B. 121

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Alfred M (Bud) Elwell DATE: 1-29-87

ADDRESS: Box 77 B. Sith Clancy

PHONE: 933-8540

REPRESENTING WHOM? Weapons Collectors Socity of Montana

APPEARING ON WHICH PROPOSAL: SB 121

DO YOU: SUPPORT? 2 AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Jim DuRant DATE: 1/29/87

ADDRESS: 300 S. Main Kalispell

PHONE: 752-6161

REPRESENTING WHOM? Flathead Co. Sheriff's Assn.

APPEARING ON WHICH PROPOSAL: HB 121

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: TONY HARBAUGH DATE: 1-29-87

ADDRESS: 1010 MAIN

PHONE: 232-2237

REPRESENTING WHOM? ~~Self~~ CUSTER CO. SHERIFF

APPEARING ON WHICH PROPOSAL: HB 121

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.