MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON RULES

Call to Order: By Chairman Fred Van Valkenburg, on April 18, 1991, at 11:05 a.m.

ROLL CALL

Members Present:
Van Valkenburg, Chairman (D)
Joseph Mazurek, Vice Chairman (D)
Bruce Crippen (R)
Delwyn Gage (R)
Judy Jacobson (D)
Thomas Keating (R)
Paul Svrcek (D)

Members Excused: None.

Staff Present: None.

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: Senator Van Valkenburg opened the meeting to discuss SB 195 which had been referred to the Rules Committee at the request of Senator Bengtson, the bill's sponsor.

Senator Bengtson summarized her written statement (Attachment A.) which explains her position on House amendments to SB 195 for consideration by the Committee. She felt that the House amendments were not appropriate under the title and scope of the bill. She referred the Committee to Section 11, Article V of the MT Constitution and Joint Rule 40-90 which stipulates that a bill may not be altered or amended to change its original purpose.

Senator Van Valkenburg asked Senator Bengtson if she had consulted any attorneys about the situation. She had not. Sen. Van Valkenburg said that two lawyer lobbyists, Steve Browning and Mona Jamison, had discussed their opinions with him. Before having these attorneys present their opinions, Senator Van Valkenburg asked Greg Petesch, legal council for the Legislature, for his view on the matter. Greg Petesch felt that the original purpose of the bill was carried out even with the House amendments. He stated that the

amendments did not violate the Constitution or the rules of the session.

Steve Browning presented a memo (Attachment B.) summarizing case law which substantiates the constitutional objections to the House amendments on SB 195. Browning felt that the real issue was whether or not the bill had been altered beyond its original purpose. Browning questioned whether there was adequate notice to the House and to the public on the alteration of the bill's purpose. The bill dealt with water user entities from its introduction until April 6, when suddenly it became a subdivision bill. Browning asserted that the purpose of the constitutional provision and the joint rule is to assure adequate public notice.

Senator Svrcek asked Browning if the purpose of the bill dealing with water user entities is still preserved in the bill, even with the amendments. Browning agreed.

Senator Van Valkenburg asked Browning if his objection to lack of public notice and comment would be resolved if the bill was referred to Senate Natural Resources for hearing on the amendments. Browning replied that another hearing would address the policy concerns, but that as a matter of law it would not correct the violation which occurred when the Senate accepted the bill with these amendments.

Senator Gage asked if there was case law that addresses amendments to bills which jeopardize passage of a bill and therefore, defeats the original intent of the bill. Katherine Donnelly, assistant attorney to Steve Browning, responded that amendments cannot be so broad as to alter the general purpose of the bill, according to case law.

Senator Mazurek asked what role the sponsor's intent plays in this matter. Steve Browning replied that in his opinion the sponsor's intent is relevant only when the original purpose of a bill is in dispute. Katherine Donnelly mentioned that sponsor's intent was not addressed in her research for Browning's memo.

Mona Jamison, representing the Montana Association of Planners, submitted copies of two cases, The State of Montana ex Rel. Nagle, Attorney General v. The Leader Company et al and The State of Montana ex Rel. Griffin, Realtor v. Greene et al. She pointed out that the original title of the bill is not affected by the amendments and, as the case law supports, the purpose of the bill as proposed has not been altered. The original title still exists with an addition to accommodate the amendments. In many cases titles of bills are changed. As attorney for Governor Schwinden, Jamison spent much time evaluating the appropriateness of titles in relation to amendatory vetoes.

She cited the case of Olmholt v. Helena which says that amendments need to be reasonably and rationally related, and germane to the subject of the title. Jamison asserted that the amendments in SB 195 meet this criteria and referred to page 13, section 7 as an example. In addition, she pointed out that SB 195 is not a general revision of subdivision laws like HB 671 which was a forty page bill.

Senator Svrcek asked Jamison to interpret the subject of the title of SB 195. She said that even without amendments the subject of the title was multi-purpose defining water user entities, requiring subdivision plat review by affected water user entities, and requiring consideration of the effect of subdivision development on water user entities. The second and third purposes were criteria for subdivision review. The amendments also address the subdivision criteria, and therefore are reasonably and rationally germane to the title of the bill.

Senator Keating noted that the Olmholt decision also says that the title must not mislead the public or legislature as to the subject embraced in the legislation. In reading the amended title, he felt that the public and legislature is not fairly notified about changes in subdivision review. Jamison responded that Senator Keating might be reading a section of the Olmholt decision out of context. The amended title is not misleading because it deals with the effect on water user entities in the development of subdivisions.

Chris Kaufman, with the Environmental Information Center, addressed the Committee next. She argued that the original purpose of the bill was enhanced with the amendments. Under current subdivision law most land is not subject to review because of the 20 acre exemption and occasional sale provision. The original intent was to review more land divisions for effects on water user entities among other criteria. The amendments close loopholes in the subdivision laws assuring review of more land. More subdivisions will be reviewed for effect on water user entities with the amendments.

Senator Eck addressed the purpose of the bill as stated by the water users association, the group which requested introduction of the bill. The association's minutes states that "SB 195 is introduced in an effort to provide relief for water entities from the problems that occur with subdivisions when the purchasers are not aware that there might be problems in the future delivery system." The group understood that there would be another bill which would help stream line the process by addressing the problems of the 20 acre exemption.

Rep. Gilbert reminded the Committee of incidents when bills change purpose and are approved by the legislature and

signed by the governor. In 1987 Sen. Tveit sponsored SB 184 which originally would have exempted oil and gas drilling permits from MEPA, but was amended to put oil and gas drilling permits under MEPA and required programmatic study of the permits. This session Rep. Elliott introduced a bill to tax cigarette sales on reservations which has now become a two year study of the issue. The legislature changes the direction of many bills. Gilbert asserted that if legislators use the Rules Committee to challenge every disagreeable amendment, the Rules Committee would become the busiest committee in the legislature. If the Senate does not like the House amendments to SB 195 then the amendments should be rejected. HB 671 has not been amended into SB 195, he added.

Jo Brunner, representing the MT Water Users Association, commented that the association chose to have a bill introduced which would be separate from a subdivision bill. This strategy was chosen because in previous sessions the water users' concerns were included in larger subdivision bills which always met defeat. She believed that the intent of the bill has been changed beyond the water user's specific concerns. She objected to having been refused knowledge of the amendments until just minutes before they were offered.

Tom Hopgood, representing the MT Association of Realtors, noted that the constitutional provision prevents a bill from being perverted into a bill with another purpose and protects the integrity of the system. The original bill was a water user bill while the amended version is vague and ambiguous.

Rep. Mary Ellen Connelly mentioned that the House Rules Committee had rejected her same complaint about the amendments on the grounds that many bills are amended in similar ways. She asserted that the amendments robs people of property rights without allowing for public hearing which violates the constitution.

Senator Doherty felt the issue for the Rules Committee should not be related to the merits of the amendments, but should address the question of whether the original purpose has been altered. He believed the original purpose is still intact.

Senator Van Valkenburg asked Senator Bengtson that if the motion had not been made to refer the bill to the Rules Committee, or if the Rules Committee reports that the bill can be considered by the Senate, was her intention to ask the Senate to reject the House amendments. She replied yes, but that the issue is bigger. Sen. Van Valkenburg explained that the reason for his question was to consider a doctrine of law used by judges referred to as "ripeness" which allows

judges to defer consideration of issues until it is necessary. He was concerned that the issue was not ripe. If the Senate were to adopt the motion to reject the House Amendments then there would be no issue to decide. If the Senate accepts the amendments, then there would be a very substantive question for the Rule Committee to decide.

Sen. Bengtson felt that it was proper to have the Rules Committee consider the issue. She asked who is going to consider the sponsor's intent, and who will sponsor legislation if a desperate attempt like this is allowed? The drafting of legislation has gotten sloppy if anything can be done with it.

Sen. Crippen asked Greg Petesch if the constitutional provision cited and Joint Rule 40-90 was to protect the integrity of the legislative process. Petesch responded affirmatively. Sen. Crippen felt that the real issue was the integrity of the legislative process. He referred to Joint Rule 40-70 which does not allow for a house to accept a bill which has the same purpose as a bill already rejected by that house. This Committee should decide if HB 671 was injected into SB 195. In this situation Sen. Crippen believed there was a violation of rule 40-70.

Sen. Van Valkenburg asked Sen. Crippen if the Senate were to reject the House amendments, would the integrity of the process still be preserved or even enhanced? Sen. Crippen responded by saying that judging the integrity of the process is the role of the Rules Committee.

Sen. Mazurek agreed that Joint Rule 40-70 should be considered, but that the question of "ripeness" was more pertinent. Sen. Mazurek felt that if 40-70 was applied as Sen. Crippen suggested, then SB 195 would be killed by its amendments. This would significantly limit the legislature's ability to amend a bill and have it accepted into the other house.

Sen. Gage appreciated the comments about "ripeness" and agreed that applying the doctrine might take care of the situation. He asked if the bill had been properly received by the Senate because HB 671 failed in the Senate.

Sen. Jacobson asked if Sen. Crippen's bill called "Godzilla" was different than this bill. Sen. Crippen replied that "Godzilla" dealt with the general revision of income tax laws with one exception. The exception was considered by the Rules Committee. Sen. Van Valkenburg clarified that the Godzilla situation dealt with a prohibition that a bill can not contain more than more subject.

Senator Van Valkenburg asked Sen. Bengtson if it was her

desire for SB 195 to be tabled in the Rules Committee. She replied that she would "like never to see the bill again" and that the amendments were not properly before the committee. Tabling the bill would be an appropriate action.

MOTION: Based on Sen. Bengtson request, Sen. Gage made the motion to table the bill. Sen. Gage asked that the minutes reflect that the committee did not address the questions raised in this meeting, but merely accommodated Sen. Bengtson's desires with regard to the bill. Sen. Mazurek asked Greg Petesch for his interpretation of Rule 40-70 as it applies to this bill. Petesch felt the rule had no applicability because it was designed and always interpreted to prohibit the introduction of a bill or the reception of a House bill of the same nature. Legislative rules mandate that the Senate accept the bill for consideration of House amendments. Sen. Van Valkenburg called the question on the motion.

VOTE: Sen. Gage: Aye
Sen. Keating: Aye
Sen. Svrcek: Aye
Sen. Jacobson: Aye
Sen. Mazurek: No
Sen. Van Valkenburg: No
Sen. Crippen: Aye

The motion passes on a vote of 5 - 2.

ADJOURNMENT

Adjournment At: 12:40 p.m.

FRED VAN VALKENBURG, Chairman

CLAUDIA A. CLIFFORD, Secretary

FVV/cac

Attachment A 4-18-91
SB 195

The purpose of SB 195 as set out in the title and supported by the substance of the bill is that water user's facilities be included in the Local Government Master Plans and receive consideration in them during the subdivision process and platting.

It was amended in the House to lift the over-20-acre exemption from the subdivision laws. It is clear that such amendment constitutes a major change in the subdivision law, but it is not within the title.

Under Section 11, Article V of the MT Constitution, a bill may not be so altered or amended to change its original purpose. Similar language is in 40-90 of the joint rules.

SB 195 as introduced did not have as part of its scope a major revision of the subdivision law. About the only thing the bill now has in common with the bill as introduced is that it has something to do with subdivisions.

The constitution, when it said "amended or altered," did not necessarily envision that if the title and purpose just mention the subject that it would be within the title, no matter what the amendments. Granted, bills which discuss "generally revise" give wide latitude but such language is not found here in 195.

Again, looking at the title and the body of the bill, it deals with a very narrow subject involving water facilities in subdivisions, but does not deal with a major general revision of the subdivision law as is now amended into the bill. It was certainly not the original purpose of my SB 195 to revise or alter the subdivision law.

Senator Esther Bengtson

Attachment B.

M E M O R A N D U M

TO: Members of the Senate Rules Committee

FROM: Steve Browning and Katharine Donnelley

DATE: April 18, 1991

SUBJECT: Senate Bill 195--Constitutional Objections to Amendment

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The charge of the Senate Rules Committee today is to determine whether the amendment to SB 195 violates the legislative rule and corresponding constitutional provision that forbids alteration or amendment of a bill so as to change its original purpose. In addition, the Committee is asked to consider whether the title to SB 195, as amended, violates the Montana Constitution because it does not give notice of the general content of the amendment. This memorandum concludes that the amendment to SB 195 is repugnant to the Montana Constitution and in violation of Joint Rule 40-90. Furthermore, the title of the bill fails to give the public and members of the legislature fair notice of the contents of the amendment.

As introduced, Senate Bill 195 was a bill of modest scope containing a definition of and setting forth certain requirements for "water user entities." If asked by this Committee, the sponsor of SB 195 will testify that her purpose in introducing the bill was to change Montana's laws relating to water user entities. Thus, both the plain meaning of the bill's title and the sponsor's own testimony confirm that the purpose of SB 195, as originally introduced, was to regulate only water user entities. However, the House amendment to SB 195 sought to graft a second major purpose onto the bill, requiring subdivision review for occasional sales and sales of parcels of 20 acres or more.

Specifically, SB 195, as introduced, proposed the following changes to present law:

1. "water user entity" was defined as "an entity, as described in 7-12-115 [e.g., a water company or irrigation company], and irrigation districts, as provided in 85-7-101". (Section 1.)

2. A planning board's master plan was permitted to include "maps, plats, charts and material" pertaining to the facilities of water user entities. (Section 2.)

3. The definition of "water user entity" was included in the Montana Subdivision and Platting Act. (Section 3.)

4. The bill provided a water user entity must be given the opportunity to ensure that water user facilities are properly noted on the certificate of survey for a proposed subdivision exempt from review but subject to survey requirements. (Section 5.)

5. Local governing bodies were directed to issue a finding of fact concerning the effects of a proposed subdivision on water user entity facilities. (Section 7.)

6. The bill required that a water user entity must be given the opportunity to ensure that water user facilities are properly noted on the plat of a proposed subdivision. (Section 8.)

(Emphasis added.)

Article V, § 11(1) of the Montana Constitution provides:

> A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose.

This provision has been incorporated in the joint rules of the Montana Legislature. Joint Rule 40-80 provides:

> A law may not be passed except by bill. A bill may not be so altered or amended on its passage through either house as to change its original purpose.

Although relevant law exists in other jurisdictions, Montana case law is scarce construing the constitutional requirement that a bill may not be amended to change its original purpose. In one case, State ex rel. Griffin, 104 Mont. 460 (1937), the Montana Supreme Court rejected a claim that an amendment altered the original purpose of a bill imposing a license tax on movie theaters. According to the court:

> As originally introduced, the body of the bill was identical with the bill as finally enacted except, first, that, as originally introduced, the amount of the fee varied according to the population of the city in which the theater was operated and according to the number of theaters under the same general management, supervision, or ownership; second, as originally introduced, the bill provided that the fees "shall be paid annually"; as finally passed, the same provision that the fees "shall be paid annually" was still in the Act, but immediately followed by a provision that they shall be paid quarterly. The body of the bill, as originally introduced, as well as that of the Act as finally passed, dealt with movie theaters. It is plain that the original purpose of the bill as introduced was to impose a license tax on moving picture theaters. That purpose was preserved and carried out in the bill as finally enacted. The amount of the tax and the time when payable is all that was changed in the bill as originally introduced.

Griffin, 104 Mont. at 463 (emphasis added).

Proponents of the amending to SB 195 would no doubt argue that the amendment does not deviate the purpose of the bill because both the original bill and the amendment have a broad relationship to the same general subject of "land use regulation". Thus, proponents of the amendment would argue that any amendment dealing with land use or planning is a permissible amendment to SB 195. However, an example from the Griffin decision *supra*, indicates relating the original bill and the amendment to the same very broad subject matter does not imbue them with the same purpose. In Griffin, the court stated "It is plain that the original purpose of the bill as introduced was to impose a license tax on moving picture theaters." The court did not say the original purpose of the original bill was "taxation" - such an ostensible "purpose" would merely be the broadest possible characterization of the subject matter. Similarly, the purpose of SB 195 is to define and set forth certain requirements for "water user entities." The purpose of SB 195 is not "to amend land use regulation in Montana." As originally introduced, the bill does not contain a single provision inconsistent with its purpose of providing for water user entities. Although SB 195 as introduced requires, *inter alia*, a finding of fact or the effect of subdivision development on "water user entities", its relationship to eliminating the exemption for occasional sales and large parcels from subdivision review is tangential at best.

The courts of other jurisdictions have had the opportunity to explain constitutional provisions identical to that of Article V, § 11 of the Montana Constitution. The Michigan Constitution provides: "No bill shall be altered or amended on its passage through either house so as to change its original purpose." Mich.

Const. 1908, art. 5, § 22. The Michigan Supreme Court discussed this provision in Anderson v. Oakland County Clerk, 353 N.W.2d 448 (Mich. 1984). In Anderson, *supra*, a bill containing nine pages of minor changes to Michigan's election law was amended to deal with reapportionment. In holding that the reapportionment amendment violated the original purpose of the bill, the court stated:

> We are persuaded that the two-hour-and-five-minute metamorphosis of House Bill 4481 from a fairly pedestrian proposal to alleviate some of the burdens of local clerks and to remove some obsolete provisions concerning an election regarding the Detroit Income Tax into an entirely new means for reapportionment of the legislature constitute an introduction of 'entirely new and different subject matter; . . .

Id. 3535 N.W.2d at 455-56.

As a further example of the law in another jurisdiction, the Alabama Supreme Court has examined a similar constitutional provision. The court found that the purpose of a bill earmarking medicaid funds was alien to an amendment that actually appropriated the funds. Thus, the court held, the bill violated the constitutional requirements that the bill's purpose cannot be changed in its passage through the legislature. Opinion of the Justices, 381 S.2d 187 (Ala. 1985).

Both the 1889 and 1972 Montana Constitutions contain provisions prohibiting passage of legislation that has been altered beyond its original purpose. The Montana Supreme Court has identified the policy behind those prohibitions as follows: "[The] purposes are to restrict the Legislature to the enactment of laws the subjects of which are made known to lawmakers and to the public, to the end that any one interested may follow intelligently the course of pending bills to prevent the legislators and the people generally being misled by false or deceptive titles, and to guard against the fraud which might result from incorporating in the body of a bill provisions foreign to its general purpose and concerning which no information is given by the title." Helena v. Omholt, 155 Mont. 212, 220 (1970); State ex rel. Foot v. Burr, 73 Mont. 586, 238 P. 585; Hale v. Belgrade Co., Ltd., 74 Mont. 308, 240 P. 371; State ex rel. Holliday v. O'Leary, 43 Mont. 157, 115 P. 204; Russell v. Chicago, B & Q Ry. Co., 37 Mont. 1, 94 P. 488, 501; Yegen v. Board of County Commissioners, 34 Mont. 79, 85 P. 740; State v. Brown, 29 Mont. 179, 74 P.366.

Additionally, the Montana Supreme Court suggests that the test to be applied and the reason for the test are as follows: "The test under this provision of the Montana Constitution is simply this--Is the title of the legislation in question of such character as to mislead the public or members of the legislature as to the subjects embraced?" Helena v. Omholt, 155 Mont. 212, 220-221

(1970); State v. Driscoll, 101 Mont. 348, 54 P.2d 571; Arps v. State Highway Commission, 90 Mont. 152, 300 P. 549.

Applying the above test and policy to the House amendment to SB 195, which occurred on Saturday without public notice, which only passed by one vote (50 to 49), where the absent legislator would testify that if he had known about the amendment he would have opposed it, and where the public was effectively denied advance notice of the intent of the legislature to alter the purpose of SB 195 beyond its original purpose, the amendments must fail as being violations of the joint Rules and a contravention of the Montana Constitution.

A 1945 American Law Reports Annotation deals with the subject of changing the purpose of a bill. 158 ALR 421. This annotation summarizes permissible amendments or alterations to a bill.

> These [permissible] alterations are (a) immaterial alterations in the original bill such as stylistic changes or mere clarification of expression; (b) alterations which bring about only an extension or limitation of the scope of the bill or a change in time; (c) alterations by which the measures prescribed in the original bill are replaced by other measures if the latter have clearly the same purpose as the original measures; (d) amendments which do not alter the original bill but add new matters to it if the additions are germane to the original purpose of the bill.

158 ALR 421, 422.

The amendments to SB 195 are not immaterial or stylistic. Furthermore, they do not extend or limit the scope of water user entities or replace the measures prescribed for water user entities. Furthermore, the original purpose of SB 195 is to set forth requirements for water user entities; the amendments are not "germane" to this purpose.

Subjecting occasional sales to subdivision review and refining parcels greater than 20 acres as subdivision parcels is not germane to an act concerned solely with water user entities. According to the American Heritage Dictionary, Second College Edition, "germane" means "closely or naturally related; pertinent." SB 195 as introduced has no close or natural relation to occasional sales or lot size. Amending the bill to include these provisions contravenes the Montana Constitution.

The dual purpose of SB 195 as amended is underscored by a defect in the title of the bill as amended. As amended, the bill is called:

AN ACT DEFINING WATER USER ENTITIES; ALLOWING INCLUSION OF WATER USER ENTITY FACILITIES IN LOCAL GOVERNMENT MASTER PLAN; REQUIRING SUBDIVISION PLAT REVIEW BY AFFECTED WATER USER ENTITIES; REQUIRING CONSIDERATION OF THE EFFECT OF SUBDIVISION DEVELOPMENT ON WATER USER ENTITIES; REMOVING CERTAIN EXEMPTIONS AND CERTAIN CRITERIA FOR REVIEW . . .

To the uninitiated, the provision calling for "removing certain exemptions and certain criteria for review" "would appear to relate to exemptions and criteria for review of water user entities. Nowhere in the title is it indicated that the "exemptions" and "criteria for review" refer to exemptions and criteria for subdivision development. The title as amended contravenes the constitutional requirement that "each bill, except general appropriation bills and bills for the codification and general revision of the law, shall contain only one subject, clearly expressed in its title." Mont. Const., art. V, § 11(3). The title of SB 195 contains no indication that the "exemptions" and "criteria for review" referred to are the 20 acre parcel and occasional sale exemptions from subdivision review. This creates a separate constitutional problem. A legislator or member of the public reading this title would not be apprised of the general subject matter of the amendment; that is, the elimination of certain exemptions from subdivision review. However, if the title did clearly express the subject of the amendment, it would be equally clear from the title that such amendment has nothing to do with what the legitimate purpose SB 195.

Attachment C consisted of copies of 2 court decisions. State ex rel. Griffin v. Greene 104 Mont. 460, State ex rel. Nagle v. The Leader Co. 97 Mont. 586 The originals are stored at the Historical Society, 225 N. Roberts, Helena, MT. 406-444-4775.

STATE ex Rel. GRIFFIN, Relator, v. GREENE et al., Respondents.

(No. 7,689.)

(Submitted April 19, 1937. Decided May 1, 1937.)

[67 Pac. (2d) 995.]

Licenses—Moving Picture Theaters—Statutes—Constitutional Law—Uniformity Provisions of Constitution—Unreasonable Classification — Due Process of Law — Vaudeville — Chain Theaters—Who may not Question Validity of Act—Ambiguity in Statute—Surplusage—When Courts may Correct Manifest Error in Statute.

Licenses—Moving Picture Theaters—Statutes—Constitutional Law.

1. Chapter 91, Laws of 1937, providing for the licensing of moving picture theaters, *held* not open to the constitutional objection (sec. 19, Article IV, Constitution) that, as finally passed it was so altered or amended as to change its original purpose.

Same—Statutes—Uniformity Provisions of Constitution Inapplicable.

2. A license tax imposed for the privilege of doing business in the state is not subject to the uniformity provisions of the state Constitution (secs. 1 and 11, Art. XII).

Same—Statutory Classifications—When Arbitrary and Unreasonable.

3. While the legislature may impose a license tax on certain occupations and not on others, arbitrary and unreasonable classifications are not permissible; a classification, however, cannot be said to be arbitrary and unreasonable unless it precludes the assumption that it was made in the exercise of legislative judgment and discretion.

Same—Moving Picture Theaters—Statute Held not Open to Claim of Unlawful Discrimination.

4. Chapter 91, supra, operating alike upon all operators of moving picture theaters, and allowing all an exemption of $3,000 gross income from the license tax imposed, *held* not subject to the claim of unlawful discrimination.

Same—Moving Picture Theaters—Effect of Exclusion of Vaudeville from Statute.

5. The fact that vaudeville and other classes of entertainment are excluded from the operation of Chapter 91, supra, does not render the classification an arbitrary one, such theaters being taxable under section 2434, Revised Codes.

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1. Validity of license tax or fee on show or place of amusement, see note in 58 A. L. R. 1340. See, also, 24 Cal. Jur. 543; 26 R. C. L. 696 (8 Perm. Supp., p. 5795).

[104 Mont. 460.]

Same—When Courts Will not Interfere With Method of Arriving at Amount of License Tax.

6. Courts will not interfere with the legislative determination of the method of arriving at the amount of a license tax if it is not unreasonably discriminatory.

Same—Constitutional Law.

7. Chapter 91, supra, imposing a license tax of 1¼ per cent. of the gross proceeds from the sale of tickets of admission in excess of $3,000 per quarter on operators of moving picture theaters, *held* not violative of the equal protection and due process of law clauses of the Fourteenth Amendment to the federal Constitution.

Same—Chain Theaters—Statute—Unlawful Discrimination—Who not Entitled to Question Validity of Act on Constitutional Grounds.

8. Under the rule that only those who are adversely affected by an alleged discriminatory Act imposing a tax may be heard to question its validity, an operator of a moving picture theater seeking to enjoin the enforcement of the provisions of Chapter 91, supra, who did not claim to be operating a chain of such theaters, was in no position to complain of an alleged discrimination against the operator of a chain of theaters in allowing him but one deduction of $3,000 per quarter irrespective of the number in the chain, while plaintiff, as the owner of a single theater, in that regard had an advantage over the chain operator.

Same—When Statute Imposing License Void for Ambiguity—Due Process of Law.

9. Unless an Act imposing criminal penalties for a violation of its provisions, or one imposing civil burdens such as tax impositions, is sufficiently explicit so that one subject to the penalties or the burdens may know what to avoid or pay, it should be declared void for ambiguity as violating the first essential of due process of law.

Same—Moving Picture Theaters — Conflict as to Date on Which License Payable—What may be Disregarded as Surplusage—Construction of Statute.

10. Construing section 5 of Chapter 91, supra, in providing, first, that the license fees prescribed shall be payable annually, and, thereafter, that they are payable quarterly on the first days of April, July, October and January of each year, *held*, that the provision as to annual payment—a clear inadvertence—must be disregarded as surplusage, and that, the effective date of the Act being July 1, 1937, on application for a license on such date, it *must* (not *may*) be issued without payment of any fee, the Act not having been made retroactive.

Statutes—General and Specific Provisions Inconsistent—Latter Prevail.

11. Where a general and a specific provision in a statute are inconsistent, the latter prevails.

Same—When Courts may Correct Manifest Error in Statute.

12. In order to carry out the obvious intent of the legislature, courts may correct manifest error in a statute so long as no specific provision is abrogated.

Original application by the State, on the relation of John E. Griffin, against J. J. Greene and others, as members of and constituting the State Board of Equalization. Respondents' motion to quash the order to show cause granted, and proceeding dismissed.

Mr. Merle C. Groene, for Relator, submitted an original and a reply brief, and argued the cause orally.

Mr. Harrison J. Freebourn, Attorney General, *Mr. Carl N. Thompson,* Assistant Attorney General, and *Mr. John A. Matthews,* Attorney for the State Board of Equalization, submitted a brief for Respondents; *Mr. Matthews* argued the cause orally.

Mr. Harry Meyer, Amicus Curiae, submitted a brief and argued the cause orally.

MR. JUSTICE ANGSTMAN delivered the opinion of the court.

This is an original proceeding to enjoin the enforcement of Chapter 91, Laws of 1937.

By motion to quash the order to show cause issued by this court the sufficiency of the complaint is challenged by respondents. The attack upon the complaint does not question the sufficiency of the facts to raise the legal questions involved, but challenges the legal conclusions to be drawn from those facts.

The complaint questions the constitutionality of Chapter 91 **[1]** in several particulars. It is first contended that it is in contravention of section 19, Article V of the Constitution, which reads: "No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose."

It appears from the complaint that Chapter 91, as finally enacted, is the result of amendments or changes made in a bill introduced in the House, and designated House Bill No. 276. As originally introduced, the title to the bill was as follows: "An Act requiring licenses for the operation, maintenance, opening or establishment of movie theatres: Relating to exemptions from such license requirement: Relating to the collection and disposition of license fees and amending section 2434 of the Revised Codes of Montana of 1935, and repealing all Acts and

parts of Acts in conflict herewith. In its final form the title is as follows: "An Act requiring licenses for the operation, maintenance, opening or establishment of moving picture theatres: Relating to Exemptions from such License requirement: relating to the collection and disposition of license fees, and repealing all Acts and parts of Acts in conflict herewith."

As originally introduced, the body of the bill was identical with the bill as finally enacted, except, first, that, as originally introduced, the amount of the fee varied according to the population of the city in which the theater was operated and according to the number of theaters under the same general management, supervision, or ownership; second, as originally introduced, the bill provided that the fees "shall be paid annually"; as finally passed, the same provision that the fees "shall be paid annually" was still in the Act, but immediately followed by a provision that they shall be paid quarterly. The body of the bill, as originally introduced, as well as that of the Act as finally passed, deal with movie theaters. It is plain that the original purpose of the bill as introduced was to impose a license tax on moving picture theaters. That purpose was preserved and carried out in the bill as finally enacted. The amount of the tax and the time when payable is all that was changed in the bill as originally introduced. There was no departure from the prohibition contained in section 19, Article V of the Constitution.

The next contention is that Chapter 91 conflicts with the uni- **[2–4]** formity provisions of sections 1 and 11, Article XII of the Constitution. The Act imposes a license tax on operators of all moving picture theaters of 1¼ per cent. of the gross proceeds from the sale of tickets of admission in excess of $3,000 per quarter. The Act operates uniformly upon all operators of moving picture theaters. All operators have exempted to them the first $3,000 of gross income per quarter.

A license tax imposed for the privilege of doing business in Montana is not subject to the uniformity provisions of the state Constitution. (*State ex rel. Sam Toi* v. *French,* 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415; *State* v. *Hammond Packing Co.,*

45 Mont. 343, 123 Pac. 407; *Quong Wing* v. *Kirkendall*, 39 Mont. 64, 101 Pac. 250, affirmed 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; *State* v. *Hennessy Co.*, 71 Mont. 301, 230 Pac. 64; *Norum* v. *Ohio Oil Co.*, 83 Mont. 353, 272 Pac. 534.)

It is competent for the legislature to impose a license tax on certain occupations and not on others. (*Hale* v. *County Treasurer of Mineral County*, 82 Mont. 98, 265 Pac. 6.) Arbitrary and unreasonable classifications, however, are not permissible. (Id.) A classification cannot be said to be arbitrary and unreasonable unless it precludes the assumption that it was made in the exercise of legislative judgment and discretion. (*Stebbins* v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884, 44 A. L. R. 1454; *Bank of Miles City* v. *Custer County*, 93 Mont. 291, 19 Pac. (2d) 885, and cases there cited.)

The Act in question here operates alike upon all operators of moving picture theaters. It is not subject to the unlawful discrimination pointed out in *State* v. *Sunburst Refining Co.*, 73 Mont. 68, 235 Pac. 428. All are allowed a gross income of $3,000 per quarter exempt from the tax. Such a tax has been upheld. (*State* v. *Hennessy Co.*, supra.) Those who must pay a tax are all subject to the same rate.

It is contended that the classification is arbitrary because it
[5] excludes vaudeville and other forms of entertainment from the operation of the Act. This contention cannot be sustained. There is no showing made here that there are any exclusively vaudeville theaters in the state to which the Act could be made applicable if the legislature so desired. If there be any such they are separately taxed under an existing statute (sec. 2434, Rev. Codes). Moreover, we cannot say that there is not such a substantial difference between them and a moving picture theater to justify different treatment by the legislature. A strictly vaudeville theater, where it exists, offers employment and a means of livelihood to many more people than the moving picture theater. This difference alone would justify different treatment, or at least warrant us in assuming that the legislature in making the classification did so in the exercise of judgment and discretion, and not arbitrarily.

The next contention is that the Act violates the equal pro-
[6, 7] tection and due process of law clause of the Fourteenth Amendment to the federal Constitution. Relator relies upon the case of *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 55 Sup. Ct. 525, 527, 79 L. Ed. 1054. Chapter 91 here involved has essential features not present in the Kentucky statute (Acts Ky. 1930, Chap. 149) under consideration in the *Stewart Dry Goods Co. Case*, which distinguish it from the statute involved in that case. The Kentucky statute imposed a tax, as the court was careful to point out, "on gross sales, not on gross collections from vendees." Our statute imposes the tax on "gross proceeds from the sale of tickets of admission." Under the Kentucky statute the tax was measured by the gross sales whether the proceeds were actually received or not. Our statute simply measures the tax by the actual receipts from the sales. Also, the Kentucky statute was not confined to the sale of one particular commodity, but applied to the sale of commodities of every description. The court regarded that tax, not as a license tax for the privilege of doing business, but as a tax on the article itself. Our statute is a license tax expressly authorized as such by section 1, Article XII of the Montana Constitution. (Compare *State ex rel. Snidow* v. *State Board of Equalization*, 93 Mont. 19, 17 Pac. (2d) 68.) The Supreme Court of the United States has sustained license taxes similar to this. (*People ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 35 Sup. Ct. 162, 59 L. Ed. 355; *Equitable Life Assur. Soc.* v. *Commonwealth of Pennsylvania*, 238 U. S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239; *Northwestern Mutual Life Ins. Co.* v. *State of Wisconsin*, 247 U. S. 132, 38 Sup. Ct. 444, 62 L. Ed. 1025.)

The gross proceeds are simply the measuring stick by which the amount of the license tax is determined, and the courts will not interfere with the legislative determination of the method of arriving at the amount of the tax, it not being unreasonably discriminatory. (*Home Ins. Co.* v. *New York*, 134 U. S. 594, 10

Sup. Ct. 593, 33 L. Ed. 1025.) The Kentucky statute in the *Stewart Dry Goods Co. Case,* was one imposing a tax graduated in amount. Our statute was not patterned after that statute. It does not provide for a graduated tax. It is uniform on all operators of moving picture theaters. It simply creates an exemption of the first $3,000 quarterly proceeds, applicable to all operators, and imposes a uniform tax on the excess.

A theater tax, with classification more pronounced than that here, has been sustained by the United States Supreme Court in *Metropolis Theater Co.* v. *City of Chicago,* 228 U. S. 61, 33 Sup. Ct. 441, 57 L. Ed. 730. The *Metropolis Theater Company Case* was adhered to by all members of the court in the *Stewart Dry Goods Company Case.* Likewise, discrimination more apparent than that here was sustained in *Clark* v. *City of Titusville,* 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569. This case, too, was referred to with approbation in the *Stewart Dry Goods Company Case.*

True, under our statute, where several theaters are under the same management, supervision, or ownership, while a separate license shall be obtained for each theater, the tax and the exemption applies to the person, firm, corporation, association, or copartnership operating the theaters; in other words, each theater is not separately taxed; each operator or owner is separately taxed. In case of management or ownership of multiple theaters, there is but one exemption from the gross proceeds, and that is the exemption of $3,000. In this respect it is a chain tax; that is, it falls more heavily on those operating more than one theater; but classification in this respect has been sustained. (*State Board of Tax Comsnrs.* v. *Jackson,* 283 U. S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, 75 A. L. R. 1536; *Louis K. Liggett Co.* v. *Lee,* 288 U. S. 517, 53 Sup. Ct. 481, 77 L. Ed. 929, 85 A. L. R. 699; *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 55 Sup. Ct. 333, 79 L. Ed. 780; *Gulf Refining Co.* v. *Fox,* 297 U. S. 381, 56 Sup. Ct. 510, 80 L. Ed. 731.) In *Fox* v. *Standard Oil Co.,* supra, the court held that the tax on chains

may be imposed so heavily as to discourage multiplication of the units.

Chapter 91, supra, does not conflict with the Fourteenth Amendment to the United States Constitution.

The Supreme Court of the United States in the above-cited **[8]** cases had before it facts tending to show the advantages of chain operations, and particularly those resulting in economy of operation. Relator here, by challenging the statute on the ground that the classification is unreasonable and arbitrary, must assume the burden of so showing. He has made no showing as to the number of chain operators in the state or, in fact, whether there are any such. He makes it quite apparent from the complaint that he, himself, is not a chain operator. He alleges that he is the owner and operator of "a moving picture theatre at Chinook." If he, as the owner of a single theater, has advantages over a chain operator, he cannot complain of that. It is a well-established rule that only those adversely affected by an alleged discriminatory Act will be heard to question its validity. (*State ex rel. Intermountain Lloyds* v. *Porter,* 88 Mont. 347, 294 Pac. 363; *Pierson* v. *Hendricksen,* 98 Mont. 244, 38 Pac. (2d) 991; *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226, 56 Sup. Ct. 754, 80 L. Ed. 1155; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 52 Sup. Ct. 595, 76 L. Ed. 1155, 81 A. L. R. 1402.) Hence on this additional ground the statute here must be sustained as against the attack being considered.

The next contention is that the statute is so ambiguous that **[9, 10]** it should be declared void on that account. The Act imposes criminal penalties for its violation. This being so, unless it is sufficiently explicit so that all those subject to the penalties may know what to avoid, it violates the essentials of due process. (*H. Earl Clack Co.* v. *Public Service Com.,* 94 Mont. 488, 22 Pac. (2d) 1056.) This is likewise true of a statute imposing civil burdens (*State ex rel. State Board of Education* v. *Nagle,* 100 Mont. 86, 45 Pac. (2d) 1041), such as tax imposi-

tions. (*Vennekolt* v. *Lutey,* 96 Mont. 72, 28 Pac. (2d) 452.) Is the Act in question subject to this well-established rule?

Section 1 makes it unlawful for any person, firm, corporation, association, or copartnership to operate, maintain, open, or establish any movie theater without first procuring a license from the State Board of Equalization.

Section 2 requires the applicant to apply for a license giving the information therein stated.

Section 3 states that as soon as practicable after the receipt of the application, the state board may "if the application is found satisfactory and if the license fees herein prescribed shall have been paid," issue a license, and imposes the duty upon the licensee to display it in a conspicuous place in the theater.

Section 4 provides that all licenses shall be issued quarterly on the first days of April, July, October, and January; and that on or before the 1st day of each quarter the applicant is required to apply for a renewal of the license.

Section 5 requires that the applicant "shall pay the license fees hereafter prescribed." It then contains these provisions: "The license fees herein prescribed shall be paid annually. The license fees herein prescribed are payable quarterly on the first day of April, July, October and January of each year and shall be as follows: One and one quarter (1¼) per centum of the gross proceeds from the sale of tickets of admission in excess of the sum of three thousand dollars ($3,000.00) per quarter."

Section 6 prescribes the penalty for violating the Act. Other sections need not be noticed here, except the last, which makes the Act effective July 1, 1937.

The above-quoted portion of section 5 is relied upon here. The ambiguity arises from the contradictory language commanding, first, that the tax is payable annually, followed immediately by the provision for quarterly payments. The ambiguity, it is contended by relator, arises principally from the difficulty in making computation of the amount of the tax. Fair construction of the Act, we think, makes it compulsory for the State Board of Equalization to issue licenses to all applicants making

proper application, on July 1, 1937, and without the payment of any fees, for, since the Act is not made retroactive, there is at that time no tax prescribed by the Act.

It is true that section 3 provides that the board "may" issue the license. We have often held that "may" means "must." (*Montana Ore Purchasing Co.* v. *Lindsay,* 25 Mont. 24, 63 Pac. 715; *State ex rel. Malott* v. *Board of County Commrs.,* 86 Mont. 595, 285 Pac. 932; *State ex rel. Case* v. *Bolles,* 74 Mont. 54, 238 Pac. 586.) As used in section 3, it means "must," if the conditions have been complied with. The only discretion in the board is, first, to ascertain whether the application is satisfactory, that is: Does it contain all the information requested? and, second: Has the "license fee herein prescribed" been paid? None having been prescribed as payable on July 1, 1937, the license must issue when the first condition above is complied with. Thereafter the licenses must be renewed quarterly upon application therefor and upon payment of the fees, if any are then due, based upon the gross proceeds of the preceding quarter, above the exemption of $3,000. The license is not a receipt for taxes paid, but is an authorization to engage or continue in the business of operating a theater, and must issue even though there is at the time no fee paid because none is due. Payment of a fee is a condition precedent to the issuance of a license only when a fee is due and payable.

The statement that "the fees herein prescribed shall be paid annually" was in the bill as originally introduced and, under the scheme of taxation therein provided for, had a proper place in the bill. By amendments, the Act, as finally passed, made the tax payable quarterly and allowed quarterly exemptions of [11] $3,000. Since the provisions requiring payments quarterly are specific in character and the provision providing for annual payment is general, the specific provisions control. (Sec. 10520, Rev. Codes; *British-American Oil Co.* v. *State Board of Equalization,* 101 Mont. 293, 54 Pac. (2d) 129.) When thus construed, the Act gives effect to the apparent legislative intent, and this we are enjoined to carry out wherever

possible. (Sec. 10520, supra; *State ex rel. Carter* v. *Kall*, 53 Mont. 162, 162 Pac. 385, 5 A. L. R. 1309; *State ex rel. Murray* v. *Walker*, 64 Mont. 215, 210 Pac. 90; *State ex rel. Golden Valley County* v. *District Court*, 75 Mont. 122, 242 Pac. 421.)

This court, in order to carry out the obvious intent of the **[12]** legislature, may correct manifest error in a statute so long as no specific provision is abrogated. (*Hilburn* v. *St. Paul, M. & M. Ry. Co.*, 23 Mont. 229, 58 Pac. 551, 811.) The general provision for payment of the tax annually was, we believe, left in the statute as originally introduced through inadvertence and should be disregarded as surplusage. (*State ex rel. Lyman* v. *Stewart*, 58 Mont. 1, 190 Pac. 129; *Rose* v. *Sullivan*, 56 Mont. 480, 185 Pac. 562.)

The Act is not open to any of the objections urged against it. The motion to quash the order to show cause is granted and the proceeding dismissed.

MR. CHIEF JUSTICE SANDS and ASSOCIATE JUSTICES STEWART, ANDERSON and MORRIS concur.

Rehearing denied May 18, 1937.

HIER, ADMINISTRATOR, RESPONDENT, v. FARMERS MUTUAL FIRE INSURANCE CO., APPELLANT.

(No. 7,642.)

(Submitted April 3, 1937. Decided May 4, 1937.)

[67 Pac. (2d) 831.]

Fire Insurance—Burning of Property by Insured While Insane —Liability of Insurer—Reformation of Policy—Mutual Mistake — Insanity — Admissibility of Evidence—Physician and Patient — Privileged Communications—Waiver—Witnesses—Equity—Equitable Set-off—Circumstantial Evidence—When Sufficient—Contracts—Function of Courts.

Fire Insurance—Reformation of Application for Policy—Misdescription of Land—Mutual Mistake.

1. In the absence of an equitable bar, an application for a fire insurance policy, subsequently made a part of the policy issued, may be reformed, after loss by fire has occurred, where it is shown that owing to a mutual mistake of the applicant and the agent of the insurance company there was a misdescription of the land on which the buildings destroyed were situated.

Same—Equity—"Clean Hands" Doctrine—When Inapplicable—Insane Persons.

2. The maxim of equity that "he who comes into equity must come with clean hands" has no application where the facts do not show a case of unclean hands, as where one who, after securing a fire insurance policy, burned the insured buildings while insane and through his administrator comes into court asking for equitable relief, since such insane person was incapable of entertaining a wrongful design in doing what he did; the rule applying to one who represents the insane person's interest in a court action.

Actions—Circumstantial Evidence Rule—When Such Evidence Sufficient to Sustain Verdict or Decision.

3. The solution of any issue in a civil case may rest entirely upon circumstantial evidence, all required being that such evidence shall produce moral certainty in an unprejudiced mind; when it furnishes support for the theory of the party relying thereon and tends to exclude any other theory, it is sufficient to sustain a verdict or decision.

Fire Insurance—Burning of Property by Insured While Insane—Liability of Insurer.

4. Under section 8141, Revised Codes, where one, while sane, wilfully burns insured buildings, neither he nor his estate can recover under the contract of insurance; where, however, the burning is done by the insured while mentally incompetent, and thus unable to form the wrongful design to destroy his property, the insurer is liable in the

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4. See 14 R. C. L. 1223 (5 Perm. Supp., p. 3777).

Attachment C.

(Compare *Good Roads Machinery Co.* v. *Broadwater County*, 94 Mont. 68, 20 Pac. (2d) 834.)

There can be no doubt about the right of a defendant to compel a transfer to the proper county; but the defendant here is not asking that the transfer be made to the proper county, but rather to another improper county—assuming, as he does, that Silver Bow county is an improper county. (*State ex rel. Schatz* v. *District Court*, supra.)

Since defendant did not move to compel a transfer to the proper county, the trial court ruled correctly. The place of residence or service of process is not a controlling element in this case. (*State ex rel. Interstate Lumber Co.* v. *District Court*, supra.) The order is affirmed.

ASSOCIATE JUSTICES MATTHEWS and ANDERSON concur.

MR. CHIEF JUSTICE CALLAWAY and MR. JUSTICE ANGSTMAN not sitting.

Rehearing denied November 10, 1934.

STATE EX REL. NAGLE, ATTORNEY GENERAL, PLAINTIFF, *v.* THE LEADER COMPANY ET AL., DEFENDANTS.

(No. 7,362.)

(Submitted September 28, 1934. Decided October 19, 1934.)

[37 Pac. (2d) 561.]

Quo Warranto—Corporations—Extension and Revival of Corporate Existence—Statutes and Statutory Construction—Title of Act—Constitutional Law—Amendment of Statutes—Repeal by Implication—Rule.

Quo Warranto—Corporations—Statute Providing for Extension of Corporate Life—Constitutional Law—Title of Act—Sufficiency.
1. *Held*, on application for writ of *quo warranto*, that the title to Chapter 7, Laws of 1931, amending section 5916, Revised Codes 1921, and prescribing the method whereby corporations "whose terms of corporate existence have expired, or may hereafter expire," may,

in the one case, revive, and in the other extend, their existence, deals with but one subject—the life of corporations—and therefore does not offend against the mandate of section 23, Article V, of the Constitution, that no bill, other than those excepted, shall contain more than one subject, clearly expressed in its title.

Corporations—Extension or Revival of Corporate Existence—Power of Legislature.
2. The legislature has the power by statute to provide for the extension of the term of the existence of a corporation, or for the revival thereof where its term has expired.

Statutes—Title of Act—What Insufficient to Render Act Unconstitutional.
3. The fact that the title of an Act in setting forth its subject employs a phrase somewhat broader than that appearing in the Act does not affect its constitutionality with reference to the provisions of section 23, Article V, Constitution, relating to the contents of the title.

Same—Amendment of Statute "to Read as Follows"—Effect.
4. Where the legislature amends an existing statute "to read as follows," it evinces its intention that the new Act shall be a substitute for the amended one, exclusively; in such a case only those portions of the old law which are retained in the new are retained, and all portions omitted are repealed.

Same—Amendment "Germane" to Subject Matter of Statute Sought to be Amended—Definition.
5. *Held*, that Chapter 7, Laws of 1931, is relevant and pertinent to the subject matter of section 5916, Revised Codes 1921,—corporate existence—which it amends, and therefore germane to such matter, within the meaning of the rule that unless germane thereto, the amendment is of no effect whatever as an amendment.

Same—Repeal by Implication—Rule.
6. Repeals by implication, said to result where a statute so conflicts with a portion of an earlier one as to exhibit an inconsistency, in which event the inconsistent portion of the previous Act is impliedly deemed repealed, are not favored; where the two statutes are passed at the same session of the legislature, the presumption against repeal is strong, and before the doctrine of implied repeal is applied, courts should endeavor to reconcile the two Acts so as to render every provision of each effective.

Corporations—Corporate Existence—Statutes—Chapter 7, Laws of 1931, Held not Repealed Impliedly by Chapter 38 of Same Laws.
7. *Held*, under the last above rule, that Chapter 7, Laws of 1931, dealing with the life of corporations, was not impliedly repealed by Chapter 38 of the same laws, having to do with the amendment of the articles of incorporation, containing, however, *inter alia*, a provision referring to the extension of a corporation's existence, there being, under the interpretation adopted, no conflict between the Acts.

Original application for writ of *quo warranto*, by the State on the relation of Raymond T. Nagle, Attorney General, against The Leader Company and others. Proceeding dismissed.

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2. See 6a Cal. Jur. 211; 7 R. C. L. 101 (3 Perm. Supp., p. 1916).

Mr. Raymond T. Nagle, Attorney General, and *Mr. Oscar A. Provost,* Special Assistant Attorney General, for Plaintiff, submitted a brief; *Mr. Provost* argued the cause orally.

Messrs. Freeman, Thelen & Freeman and *Messrs. Cooper, Stephenson & Hoover,* for Defendants, submitted a brief; *Mr. James W. Freeman* and *Mr. W. H. Hoover* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Original application for writ of *quo warranto,* by the State of Montana on relation of Raymond T. Nagle, Attorney General, against The Leader Company, a corporation, and others.

On July 19, 1893, The Leader Company was duly incorporated and thereafter legally existed for a term of twenty years, at the end of which period its term of existence was duly and legally extended for a like term, expiring July 18, 1933.

The Twenty-second Legislative Assembly provided that section 5916, Revised Codes 1921, should be, and is, amended to read, in part, as follows: "When the term of years for which any corporation organized under the laws of the Territory or State of Montana was incorporated, or its extended term of a corporate existence, has expired, or is about to expire, * * * it may elect to have its term of incorporation extended and continued the same as if originally incorporated." The Act provides the steps to be taken in order to thus extend corporate existence. (Chapter 7, Laws of 1931.)

In July, 1933, The Leader Company duly complied with all the requirements of the above Chapter, and secured from the Secretary of State his certificate, under date of July 17, 1933, to that effect, which compliance, under the provisions of the law, extended the corporate existence of the company for a term of forty years.

On September 15, 1934, the consent of this court being first had, the Attorney General filed herein a complaint in a

statutory action in *quo warranto,* setting up the facts and challenging the legal existence of the corporation and the exercise of corporate powers and functions by its officers, on the ground that Chapter 7 of the Session Laws of 1931, "as an amendment of said section 5916, or otherwise, or at all, is unconstitutional and void, and of no force and effect." The defendants joined issue on the questions of law thus presented, by answer; briefs were filed and the matter fully presented for determination, on September 28, 1934.

The first question raised is "whether the title of Chapter 7, Laws of 1931, amending section 5916 of the Revised Codes of 1921, is misleading or otherwise violates the provisions of section 23, of Article V of the Constitution of the State of Montana." Hereunder it is argued that the framers of the Act misconstrued section 5916 to apply to corporations seeking to extend their corporate existence, and because thereof, under pretext of amending the section, "introduced a subject entirely foreign to the subject matter of that section."

Section 5916 was originally enacted as section 400 of the Civil Code of 1895, where it appears without a title; subsequent codifiers have given to it the title, "How corporations may continue their existence under this code." This section provides: "Any corporation formed under the laws of the territory or state of Montana, * * * and still existing, may, at any time within the period limited for its duration, elect to continue its existence under the provisions of this code applicable thereto." It then prescribes the procedure for extension much the same as that prescribed in Chapter 7, above.

The title to Chapter 7 is: "An Act Amending Section 5916 [1] of the Revised Codes of Montana, 1921, so as to Authorize Unliquidated Corporations whose Terms of Corporate Existence have Expired, or may Hereafter Expire, to Extend their Corporate Existence * * * ."

Section 23 of Article V of our Constitution declares that "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed

containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed."

The Act—Chapter 7, above—clearly contains but one subject: the life of corporations, to which the procedure outlined for accomplishing the purpose is incidental; all parts of the Act have a natural connection and reasonably relate to the legitimate subject of the legislation, and, consequently, the Act does not offend against the constitutional prohibition in this respect. (*Arps* v. *State Highway Commission*, 90 Mont. 152, 300 Pac. 549; *State ex rel. Boone* v. *Tullock*, 72 Mont. 482, 234 Pac. 277; *Evers* v. *Hudson*, 36 Mont. 135, 92 Pac. 462; *Merchants' Nat. Bank* v. *Dawson County*, 93 Mont. 310, 19 Pac. (2d) 892.)

While the Act deals with two classes of corporations—those whose term has expired and those whose term will shortly expire—the sole subject thereof is as above stated. The power **[2]** of the legislature to provide for the extension of the term of the one, or the revival of the other, is not, and cannot be, questioned. Such authority exists. (*Merges* v. *Altenbrand*, 45 Mont. 355, 123 Pac. 21; 1 Fletcher on Corporations, sec. 414.)

Comparing the provisions of the Act with the declarations of the title, it is apparent that the subject of the bill was **[3]** "clearly expressed in its title." The only discrepancy between the title and the Act is that the former refers to corporations whose terms have expired "or may hereafter expire," while in the Act the phrase employed is "about to expire." The phrase used in the title may be somewhat broader than that in the Act, but, if so, the constitutionality of the Act is not affected. (*State* v. *Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854.)

The principal shafts launched against this Act do not come within the letter of the constitutional inhibition invoked; they are that Chapter 7 in fact repeals the above-quoted provisions

of section 5916, which it assumes to amend, and merely retains the provisions respecting the method of procedure for extending the term of such a corporation as is mentioned in the section, and that, as section 5916 dealt only with bringing those corporations which were created before 1895 under the Code provisions, the subject of the amendment is not germane to the subject of the section it seeks to amend.

In construing an Act amendatory of a statutory provision **[4]** it is undoubtedly the rule that, when the legislature declares an existing statute to be amended "to read as follows," as was done here, that body evinces the intention to make the new Act a substitute for the amended statute, exclusively; only those portions of the old law repeated in the new are retained, and all portions omitted are repealed. (*State ex rel. Paige* v. *District Court*, 54 Mont. 332, 169 Pac. 1180; *State ex rel. Foot* v. *Burr*, 73 Mont. 586, 238 Pac. 585; *Hale* v. *Belgrade Co.*, 74 Mont. 308, 240 Pac. 371.)

Here, the legislature merely deleted that portion of the **[5]** law which had become a dead letter by reason of the fact that all corporations organized before the adoption of the Codes of 1895, which had not brought themselves within the Code provisions, had long since passed out of existence, and made the law applicable to all corporations existing under the state law. Chapter 7 still contains the substance of the provisions of section 5916 and enlarges the scope of the section, and the amended section, read in connection with its companion, section 5917, leaves no doubt in the mind but that its purposes include continuing corporate existence under the provisions of Part IV, Division I, of the Civil Code of 1895. The amended Act must be held valid, unless it violates the elementary rule that "if the amendatory Act is not germane to the subject matter of the Act to be amended, then it is not of any effect whatever as an amendment." (*Dolenty* v. *Broadwater County*, 45 Mont. 261, 122 Pac. 919.)

"Germane" means "in close relationship; appropriate; relevant; pertinent." The question as to what is germane to a subject is one of fact, rather than law, and there can be no

clear line of demarcation between those matters which fall within, and those which fall without, the inhibition of the constitutional provision. (*Hale* v. *Belgrade Co.*, above.)

The general subject of section 5916 is corporate existence under the laws of Montana; specifically it was enacted to bring corporations organized before the new law was passed, within its provisions.

An amendment is "a legislative act designed to change some prior and existing law by adding to or taking from it some particular provision." (*Ex parte Haines*, 68 Cal. App. 522, 229 Pac. 984.)

Chapter 7, Laws of 1931, relates to the subject of section 5916, and adds thereto the provisions for extending the term of existing corporations, whether organized before or after the codification of 1895. This added matter is in close relationship to the subject matter of the existing law; it is relevant and pertinent to the subject matter of that law, and would have been an appropriate addition to section 5916 at the time it was enacted. The amendatory Act is, therefore, "germane" to the subject matter of the amended section.

Chapter 7, Laws of 1931, is not vulnerable to the attacks **[6, 7]** made upon it on constitutional grounds, but was it repealed by Chapter 38, Laws of 1931, which prescribes the procedure for amending articles of incorporation, and repeals all Acts and parts of Acts in conflict therewith?

It will be noted that Chapter 38 specifically amends section 5918, as amended by Chapter 28, Laws of 1925, and amends sections 5920, 5922 and 5923, but does not mention sections 5916 and 5917, considered above. If, then, section 5916, as amended by Chapter 7, above, was repealed by this later Act of the same legislative assembly, the repeal was by implication.

It would seem that, had the Twenty-second Legislative Assembly intended to amend or repeal section 5916 as amended, while it had before it Chapter I of Part III of the Civil Code of 1921, and had in mind the fact that it had already amended that section, and while it was giving special attention to the immediately succeeding sections of the Chapter, it would

have declared its purpose to undo that which it had already done, and would have specifically mentioned section 5916 and its recent action thereon.

The governing rules here are as follows: "If one statute conflicts with a portion of another so as to exhibit an inconsistency, then the inconsistent portion of the previous statute cannot stand, and it is said to be repealed by implication. (*State ex rel. Esgar* v. *District Court*, 56 Mont. 464, 185 Pac. 157; *Wilkinson* v. *La Combe*, 59 Mont. 518, 197 Pac. 836.) But repeals by implication are not favored, and where the two statutes are passed at the same session of the legislature, the presumption against repeal is strong. (*State ex rel. Aachen etc. Ins. Co.* v. *Rotwitt*, 17 Mont. 41, 41 Pac. 1004; *State ex rel. Wynne* v. *Quinn*, 40 Mont. 472, 107 Pac. 506.) The intention of the legislature must be given effect, if possible (sec. 10520, Rev. Codes 1921; *Bennett* v. *Meeker*, 61 Mont. 307, 202 Pac. 203; *Wibaux Improvement Co.* v. *Breitenfeldt*, 67 Mont. 206, 215 Pac. 222), and before the doctrine of implied repeal is applied, the court should make every effort to reconcile the statutes and render every provision of each effective. (*State ex rel. Metcalf* v. *Wileman*, 49 Mont. 436, 143 Pac. 565.)

The alleged conflict between Chapters 7 and 38 of the Laws of 1931 consists in this: Chapter 7, dealing solely with the extension of the term of a corporation whose term "has expired or is about to expire," provides that this action may be taken at any annual meeting of the stockholders, or other meeting called for the purpose, and becomes effective on the vote in favor thereof "by stockholders representing a majority of the capital stock." Chapter 38 provides for the "amendment" of the articles of incorporation of any corporation by a *favorable* vote of the stockholders representing *two-thirds* of the capital stock. In the amendment to section 5918 in this Chapter, among the divers amendments authorized to be made in the articles, appears the provision "by extending its term of existence within the limits provided by law."

Now, if the term of existence of a corporation "has expired or is about to expire," and it is thereupon extended for another and like period of existence, there is no "amendment"

made to the articles of incorporation; it is merely continued in force—imbued with new life. The title to Chapter 38 deals only with "amendment" of articles of incorporation of a corporation whose term "has expired or is about to expire," and if the provision in the Act for "extending the term" has reference to such extension, the Act in this particular would probably be in violation of, and void under, the inhibition found in section 23 of Article V of the Constitution, above discussed.

However, a careful comparison of the two Acts, passed at the same session of the legislature, reveals that this finding may be avoided and the two enactments reconciled by the logical conclusion that the legislature did not intend that Chapter 38 should apply to such an extension of the term of a corporation.

"About" means "almost or approximately; near the time" (Bouvier's Law Dictionary); so when a term is "about to expire," it has nearly expired; has but a short time to go. Having satisfactorily dealt with the subject of a renewal of the life of corporations whose term "has expired or is about to expire," the legislature evidently considered that matter closed and passed to the consideration of other matters affecting corporations other than those mentioned in Chapter 7. We may reasonably conclude that there were brought to the attention of the legislature cases in which corporations might desire to extend the term of their existence, not because that term was about to expire, or for another term of like duration to that specified in the articles of incorporation, but rather for an additional term "within the limit provided by law." For example, while the articles of incorporation must set forth the term for which the corporation "is to exist, not exceeding forty years" (sec. 5905, Rev. Codes 1921), a set of original incorporators might declare the term in their articles to be ten years, and after the expiration of three or four years it might be found advantageous to enlarge the scope of the corporation's activities, change the place of business, the number of directors, or the amount of capital stock, and, with expansion, extend its term of existence "within the limit provided by law," to forty years instead of ten. Such changes, or even the extension alone,

would require an amendment of the articles of incorporation, which could not be made under the provisions of Chapter 7, for the term of the corporation would not be "about to expire." Other situations calling for an extension of the term of existence of a corporation may be readily conceived.

That the legislative intent was that these two Acts should apply to two classes of corporations is further indicated by the very provisions which it is urged conflict. If the term of a going concern has expired, or is about to expire, there is need of haste to remedy the situation in which it is found, and there should be little dissension among the stockholders as to the advisability of taking the step. The legislature, therefore, declared that, as to such action, the vote of a bare majority of the stockholders should control. On the other hand, a change in the articles theretofore agreed upon—an extension of the period of association and liability at a time when abundant opportunity exists for contact with all of the stockholders and for them to give consideration to a step which may materially alter their situation, should be taken only with the consent practically of all concerned; consequently the provision here is that the step may be taken—the articles amended, on the vote of stockholders representing at least two-thirds of the capital stock. Again, a distinction is indicated by the wording of the two Acts. A corporation "may * * * amend" its articles—an active step changing the solemn agreement which creates a legal union of the stockholders—by compliance with the provisions of Chapter 38; the corporation "may elect" to continue that legal union under the provisions of Chapter 7 only when its term of existence "has expired or is about to expire."

This, we think, is the true interpretation of the two Acts, and thereunder there is no conflict between them. It follows that Chapter 7 is not repealed by Chapter 38.

Proceeding dismissed.

ASSOCIATE JUSTICES STEWART and ANDERSON concur.

MR. CHIEF JUSTICE CALLAWAY and MR. JUSTICE ANGSTMAN absent.